CASES

Argued and Adjudged in the

High Court of Chancery.

Publiſhed from the MANUSCRIPTS of

THOMAS VERNON,

Late of the *Middle Temple*, Eſq;

By ORDER of the

HIGH COURT OF CHANCERY.

VOL. II.

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M DCC XXVIII.

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PAGE 146. *Line* 12, 21. *in the Margin read* Mortgagor. *p.* 159. *l.* 31. *for* Purchaſers *r.* Purchaſes. *Idem*, *Margin l.* 37. *after* Equity *add* Cautions. *p.* 166. *l.* 22. *after* the *add* Plaintiff. *p.* 185. *l. ult. in the Margin*, *for* it goes *r.* they go. *p.* 195. *l. ult. in the Margin* for *Diſcriptio* r. *Deſcriptio*. *p.* 226. *l.* 10. *for* Premiſſes *r.* *Præcipe*. *p.* 227. *l.* 8. for *Frances* r. *Francis*. *p.* 233. *l.* 3. *in the Margin for* Tenant *r.* Tenants. *p.* 255. *l.* 38. *in the Margin after* Daughters *add* which by another Deed was. *p.* 264. *l.* 8. *for* by *r.* of. *p.* 270. *l.* 14. *after* has *r.* made. *p.* 377. *l.* 19. *in the Margin r.* Mortgagor. *p.* 403. *l.* 8. *for* Years *r.* Pounds. *p.* 421. *l.* 12. *for* Direction *r.* Diſcretion. *p.* 538. *l.* 20. *in the Margin after* making *add* the. *p.* 545. *l.* 19. *after* Wills *add* at of Settlements. *p.* 595. *l.* 17. *in the Margin after* paid *add* thereout. *p.* 612. *l.* 40. *in the Margin* for B. r. A. *p.* 293. *l.* 13. *in the Margin for* his *r.* the Partnerſhip. *p.* 760. *l.* 15. *in the Margin after* Mortgage *add* for Daughters Portions.

ADVERTISEMENT.

WHEREAS in the firſt Volume of theſe Reports, at the End of the Caſe *Merreit* verſus *Eaſtwick*, *pag.* 264. a Note is added, that upon ſearching the Record, it did not appear thereby, that this Cauſe, (which was heard by the Lord Keeper *Nov.* 8, 1684,) did come on before Mr. Baron *Atkins* (as by the Caſe it is ſaid to have done) the Day before: Upon further Search it appears by the Regiſter's Minute-Book of *Nov.* 7, 1684, that the ſaid Cauſe came on before Mr. Baron *Atkins* on the ſaid 7 *Nov.* and was then ordered to ſtand for the *Lord Keeper*'s Judgment.

DE
Term. S. Trinitatis,
1686.

In CURIA CANCELLARIÆ.

Lord Chancellor Jefferies. 18 *June* 1686.

George Meynel Junior, and *Mary ux'*, and *George Meynell* Senior, } Plaintiffs.

Richard Maſſey, Blunden & ux', & al', } Defendants.

Caſe 1.

THE 29*th* of *Auguſt* 1662, after the Marriage of *Hamlet Maſſey* with the Plaintiff *Mary*'s Mother, (with whom he had received 2000 *l.* Portion) he and his Father by Deed, Fine and Recovery, ſettled their Lands, Part of them for three reſpective Jointures, and the Remainder of them to *Hamlet* for Life; the Remainder to his firſt and other Sons by his Wife in Tail, the Remainder in Tail to the Defendant *Maſſey*; under a Condition and Agreement, that if *Hamlet* at his Death ſhould leave one only Daughter by his Wife, and no Son, then if the Perſons in Remainder of the Premiſſes (except the Jointure-Lands) ſhould not pay unto ſuch Daughter 2000 *l.* at one Payment, at

Lands are ſettled on Marriage upon Condition, if there ſhould be a Daughter, the Perſons in Remainder ſhould pay her 2000 *l.* at 16, with Power for the Daughter, in Caſe of Non-payment, to diſtrain for the 2000 *l.* and Damages. Though no Power to ſell, yet a Sale decreed for raiſing the Portion.

Midſummer after ſhe ſhould be ſixteen Years of Age, the Recovery of all other, than the Jointure-Lands, ſhould be during the Jointures, and the Recoverors ſhould ſtand ſeiſed to the Intent that it might be lawful for ſuch Daughter or her Aſſigns, after Default of Payment, ſo long, and until ſhe ſhould receive the 2000 *l.* to enter and diſtrain for the ſame 2000 *l.* and Damages for the Forbearance thereof, and the Diſtreſs to impound and keep 'till the 2000 *l.* with Damages were ſatisfied.

The Plaintiff *Mary* was the only Daughter of that Marriage, whoſe Father died without Iſſue Male, and at *Midſummer* 1679, ſhe became intitled to the 2000 *l.* ſhe being ſixteen in 1678, and in 1682. ſhe and the Plaintiff *George* the younger married.

The Defendant by his Guardian had received the Rents of the Eſtate for about 14 Years, and the Plaintiffs had demanded the Portion of him and the Guardian, which they had refuſed to pay, or ſell the Lands to raiſe it; and inſiſted ſhe ought to take her Portion out of the Rents and Profits, as it would raiſe it, and that the Lands ſubject to the Portion beyond the Jointures, were but 120 *l. per Ann.* and though in this Caſe there was no Power given to the Truſtees to ſell by the Settlement, nor to the Daughter to enter and hold till ſhe was ſatisfied; but barely a Power of Diſtreſs: Yet inaſmuch as it was to be paid with Damages, and the Portion was to be paid at ſixteen, and was no more than her Mother's Portion, and the Plaintiff was twenty Years old when ſhe married, and was now Twenty-four; the Lord *Chancellor* declared, though there was no Manner of Proof to that Purpoſe, that he would take it, that it was intended that, in Caſe the Remainder-Man failed to pay it at the Day, the Truſtees were to ſell to raiſe it; and decreed the Truſtees accordingly to ſell, and raiſe the Portion.

Caſe 2.

Angelica Magdalena Wharton, Widow of *Philip Wharton*, } Plaintiff.

Maſter of the Rolls, 1686.

Mary Wharton, Daughter and Heir of *Philip Wharton* by a former Wife, by her Guardian & *al'*, } Defendants.

IN 1684, in Conſideration of 6000 *l.* Portion paid by the Plaintiff and her Friends, to *Philip Wharton* and his Father, and of the Marriage intended betwixt her and *Philip*, they by Leaſe and Releaſe convey the Manor of *Hutton Pannell*, &c. the Manor of *Edlington*, and Part of *Ravenſworth*, to the Truſtees of the Plaintiffs Nomination; in Truſt that after *Philip*'s Death they ſhould, during the Plaintiff's Life, receive and take out of the Profits 600 *l.* yearly, to be paid half yearly, as the Plaintiff ſhould appoint; with Power to the Truſtees to diſtrein, and to enter and receive the Profits, until the ſame, and the Arrears thereof and Damages for Non-payment were paid; and after other Remainders ſpent, to the right Heirs of *Philip* and his Father, which the Defendant is; and *Philip* and his Father did covenant to make further Aſſurance, and to levy a Fine of *Edlington* to thoſe Uſes, and that they or one of them were ſeiſed in Fee of all the Premiſſes, and that the ſame ſhould continue to thoſe Uſes free of all Incumbrances.

Whether Equity will ſupply the Defect of a Fine, where the *Conuſor* dies after the *Caption*, and before the Fine is perfected.

The Marriage was had, and the Portion paid. Sir *Tho.* the Father of *Philip* died, and *Philip* ſurviving his Father, 20 *Feb.* 1684, made his Will, and did confirm the Plaintiff's Jointure, and deviſed all his Lands to the Defendant *Mary* in Tail, ſubject to the Plaintiff's Jointure, and appointed

pointed that all Perſons, any Way concerned, ſhould make further Aſſurance, and that all his and his Father's and Father in Law's Debts and Legacies ſhould be paid out of his real Eſtate, and died without leaving any Iſſue but the Defendant: And the Bill complained, that the Defendant ſet up Intails againſt her Jointure, and the Lands were liable to pay the Debts and Legacies, and ſet forth, that *Philip* had acknowledged a Fine for perfecting the Jointure; and though he died before the ſame was perfected, yet it ought to be made good in Equity, and the Plaintiff's Jointure decreed to her, and the Debts and Legacies paid out of the real Eſtate.

The Defendant ſet up ſeveral Intails in Settlements, whereby ſhe was intitled to all the Lands, but *Ravenſworth*, (notwithſtanding the Marriage-Settlement) being about 300 *l. per Ann.* and that her Title was not barred in Regard the Fine was not perfected, and that in the Plaintiff's Marriage-Deed Sir *Tho.* covenanted, that her 6000 *l.* Portion ſhould be laid out in a Purchaſe for better ſecuring her 600 *l. per Ann.* and then *Adlington* to be diſcharged of it; and that the 6000 *l.* being paid to Sir *Tho.* and *Philip*, they depoſited it in the *Eaſt-India* Company, and inſiſted that none of the Lands were liable to the Plaintiff's Rent-charge, but thoſe in *Ravenſworth*; and ſet forth ſeveral Settlements for that Purpoſe, and inſiſted, that the Plaintiff ought not to be aided in Equity by the Fine, it having proceeded no further than barely a *Caption* from *Philip*; and that ſhe ought not to have both the 6000 *l.* and her Jointure, but that the 6000 *l.* ought firſt to be applied to make up her Jointure 600 *l. per Ann.* and the Surplus of it to the Payment of Debts and Legacies in Eaſe of the real Eſtate.

For the Plaintiff it was inſiſted, that ſhe being a Purchaſer, the Defect of the Fine not being perfected ought to be ſupplied in Equity, as much as a Defect in Livery.

But

But as to that it was inſiſted that the Defendant's Title was *per formam Doni*, and ſo not to be decreed againſt in Equity: And in that Point the *Maſter of the Rolls* did not think fit to relieve the Plaintiff: But as to the 6000 *l.* though Sir *Thomas* had covenanted to lay it out in a Purchaſe for the better ſecuring the Jointure, which if he had done, the Remainder would have deſcended upon *Philip*, and *Philip* was his Heir and Executor; it was conceived by the *Maſter of the Rolls*, that therefore and inaſmuch as by the Marriage-Settlement, *Ravenſworth*, (being 300 *l. per Ann.*) was ſettled towards the Jointure, and which the Plaintiff's Counſel inſiſted the Truſtees might hold over after her Death, to anſwer all Arrears of her 600 *l. per Ann.* in her Life-time, with Damages; and the Plaintiffs Counſel ſeeming willing to take the 6000 *l.* and 300 *l. per Ann.* for her Life, out of *Ravenſworth*; the *Maſter of the Rolls* did ſo decree it, and that the Plaintiff ſhould have the 6000 *l.* diſcharged of Debts and Legacies, and the 300 *l. per Ann.* for her Life.

Sir *John Cotterel*, and *John Holt*, Eſq; } Plaintiffs. Caſe 3.

Serjeant *Hampſon*, *Charles Bill*, & *al'*. } Defendants. *Lord Chancellor. June* 1686.

MAJOR *Bill*, the Defendant *Bill*'s Father, and his Truſtees *Chump* and *Johnſon* in *May* 1677, mortgaged a Tenement called *Dovers* in *Surrey*, to the Earl of *Leiceſter* in Fee. In 1680, Major *Bill* made his Will, and *Garret* his Executor in Truſt for the Defendant *Charles*, during his Minority, who having married the Defendant *Hampſon*'s Daughter, he and his Mother, and *Garrett*, by Articles transferred the Executorſhip to *Hampſon* in *July* 1682; and Major *Bill*'s Truſtees by Appoint-

Where Lands are veſted in Truſtees by Act of Parliament, to be mortgaged for a particular Purpoſe, it is incumbent on the Mortgagee to ſee the Money applied accordingly.

ment of *Garrett*, transferred the Equity of Redemption of the Mortgage to *Hampſon* and *Hodges*, and they and the Earl of *Leiceſter* for 1800 *l.* paid by the Plaintiff. *Cotterel*, aſſigned the Mortgage to him. In *Dec.* 1682, the Plaintiff, Serjeant *Holt*, lent *Hampſon* 260 *l.* which *Hampſon* agreed ſhould be ſecured by the ſaid Mortgage; and *Cotterel*, by Writing under Hand and Seal by *Hampſon's* Directions, acknowledged himſelf a Truſtee for *Holt* in the Mortgage, as to the Securing the 260 *l.* after his own 1800 *l.* and Intereſt was paid; and *Hampſon* and *Hodges* aſſigned the Equity of Redemption to *Holt* for that Purpoſe; and that the Defendants might redeem or be foreclоſed was the Bill.

The Defendant *Bill* inſiſted by Anſwer upon a Settlement in 1658. upon his Father and Mother's Marriage, of the Tenement called *Dovers*, and the Printing-Houſe, on the Defendant's Father for Life, and his Mother for Life, and afterwards on the Defendant in Tail; and that in the Fire in 1666, the *Printing-Houſe* being burnt, and the Defendant's Father but Tenant for Life, could not raiſe Money to rebuild: Whereupon 22 *Car.* 2. an Act of Parliament paſſed (reciting that Marriage-Settlement, and the Father's Incapacity to rebuild) which did enable the Defendant's Father to ſell his Lands in *Kent* and *Surrey* to rebuild, and ſtock the *Printing-Houſe* for the Benefit of the Defendant's Mother and Children; and the Tenement called *Dovers*, and Land in *Kent* were veſted in *Crump* and *Johnſon*, to ſell to raiſe Money for the Building and Stocking the *Printing-Houſe*, and the Surplus to purchaſe Lands, to be ſettled to the Uſes of the ſaid Marriage-Settlement of the Defendant's ſaid Father and Mother; and inſiſted, that he was abuſed in his Minority by *Hampſon* in transferring the Executorſhip, and that no more Money ought to be charged on the Mortgage, than what was taken up and employed according to the Truſt of the Act of Parliament; and the Lord *Chancellor* did ſo decree it, and that an Account ſhould be taken of what Monies had been

imployed in building or ſtocking the *Printing-Houſe*, according to the Truſt of the Act of Parliament, and that the Defendant *Bill* paying ſo much with Intereſt and Coſts, diſcounting the Profits received by the Mortgagees, ſhould be let in to redeem; tho' for the Plaintiffs it was inſiſted, that it could not reaſonably be intended, that they could be privy to, and could prove the Laying out of the Money according to the Act of Parliament; and that no Man would lend Money upon the Truſts of an Act of Parliament, if it was incumbent upon him to ſee the Money laid out, and imployed according to the Act; and ſuch a Conſtruction of the Act could not conſiſt with the Intention of the Act, but utterly prevent the ſame.

Daniel Warwick, Plaintiff.

Caſe 4.

Charles Gerrard, Defendant.

Lord Chancellor. 30 *June* 1686.

THE Defendant's Wife being ſeiſed in Fee, before her Marriage covenanted to ſtand ſeiſed to the Uſe of her ſelf for Life, and after to the Heirs of her own Body to be begotten, Remainder to ſuch Uſes as ſhe by Will, or Writing under Hand and Seal, ſhould appoint, and for want of ſuch Appointment, to the Uſe of the Plaintiff and his Heirs: Then ſhe married the Defendant, and had Iſſue one Daughter; the Mother died, and afterwards the Daughter died without Iſſue; the Plaintiff was of the Blood and Kindred of the Mother: The Mother after the Execution of the Deed of Covenant made her Will, and thereby reciting that Deed, ſhe gave to the Child ſhe then went with, and its Heirs, all her Lands, and for lack of ſuch Iſſue, to the Defendant and his Heirs, charged with the Payment of ſeveral Legacies, of which one was 100 *l.* to the Plaintiff; Part of which Legacies the Defendant hath paid, and offered to pay

Feme covenants to ſtand ſeiſed to the Uſe of her ſelf in Tail, Remainder to ſuch Uſes as ſhe by Writing under her Hand ſhould appoint; for want of ſuch Appointment, to the Uſe of the Plaintiff her Kinſman in Fee. Whether this Remainder to ſuch Uſes as ſhe ſhould appoint is not a void Remainder, being on a Covenant to ſtand ſeiſed.

pay the Reſt. The Plaintiff's Bill was for the Writings.

1 Co. 175, 176. Mildmay.

And for the Plaintiff it was inſiſted, that the Power in the Covenant to ſtand ſeiſed being general was void, and and that by Conſequence the Deviſe was void: But for the Defendant it was inſiſted, that though the Power was general; yet it ought to be ſupported ſo far, as to make good any Diſpoſition which ſhe might have made by a Covenant to ſtand ſeiſed; for that this Covenant was made before her Marriage, and at the ſame Time the Defendant made a Settlement upon her, in Conſideration of the intended Marriage; and if ſhe had covenanted for that Conſideration, to ſtand ſeiſed to the Uſe of her Husband, it would have been good, and ſo by Conſequence her Diſpoſition to the Husband by Virtue of that Power, though the ſame was general, being ſuch as the Law would bear upon a Covenant to ſtand ſeiſed, ought to be taken to be good.

Upon the Hearing, the Court left the Parties to try it at Law; and at Law a Verdict was given for the Plaintiff, though the Defendant ſtood upon a ſpecial Verdict, that ſo the ſame might have been argued. And afterwards the Cauſe being heard, it was decreed according to the Verdict; *Quære tamen.*

Caſe 5. *Edward Archer,* Plaintiff.

Lord Chancellor. About *June* 1686. *Tho. Moſſe & al',* Defendants.

Fraud in obtaining a Will relating only to a perſonal Eſtate, is not examinable in Chancery, after the Will is proved in the Spiritual Court, ſo long as that Probate is in Force. *Poſt.* Caſe 70.

John Archer the Plaintiff's Uncle, who died in *January* 1682, had before (when in perfect Health) made his Will, and thereby given the Plaintiff the greateſt Part of his perſonal Eſtate to the Value of 5000 *l.* as was proved in the Caſe:

Caſe: But one *Bridget Sandyman*, his Maid-Servant, had in his Sickneſs prevailed upon him (as was alledged) to make another Will, and to marry her a Week before his Death, when he lay in his Sick-bed, at ſix of the Clock at Night, though it was really proved by two Miniſters, that ſhe was a Year before actually married to the Defendant *Moſſe*, and was then his Wife, and that *Moſſe* procured the Licenſe for the Marriage of *Archer* to *Bridget*; and that, though they had ſet up a Will dated a Week before *Archer*'s Death, whereby *Bridget* was made Executor, and all given to her; and that ſhe had ſuppreſſed the former Will, by which the Plaintiff claimed; yet that Will ſo by her ſet up being proved in the *Prerogative* Court, and ſhe having made her Will, and *Moſſe* her Executor, (tho' in this Caſe there was as groſs a Practice proved, as could poſſibly be, in gaining that Will by *Bridget* from *Archer*, and that he was not *Compos*, neither when he made it, nor when his pretended Marriage was to *Bridget*, and that he knew in his Health, that ſhe was married to *Moſſe*,) and the Matter in Queſtion being purely relating to the perſonal Eſtate; the Lord *Chancellor* was of Opinion, that whilſt that Probate ſtood, this Matter was not examinable in Chancery; and though the Fraud was fully proved as aforeſaid, and was opened to him, he would not hear any Proofs read, but diſmiſſed the Bill.

DE

Term. S. Michaelis,

1686.

In CURIA CANCELLARIÆ.

Caſe 6. *Knightly, Robinſon & al'*, Plaintiffs.

Lord Chancellor Jefferies. And *Burdet, Hutchinſon & al'*, } Defendants.

THE *King* having granted a Duty upon *Sea-Coal*, for the *King*'s Life, to the Lord *Townſend*, the Defendants were Farmers of that Duty; and the Plaintiffs inſured the Defendants, that the Duty ſhould not determine before *Michaelmas* 1685, and that if it did, they would pay the Defendants the ſeveral Sums of Money ſubſcribed on the Policy without Abatement, and without queſtioning what the Defendants might loſe thereby, and without any farther Diſpute, Plea or Pretence whatſoever.

The Duty determined by the *King*'s Death in *Feb.* 1684, and the Premium paid to the Plaintiffs was three Guineas *per Cent.* for Inſurance. The Defendant *Burdett* had recovered at Law of the Plaintiff *Knightly* the Sum of 50 *l.* being the Sum ſubſcribed by him: The Bill ſug-

geſted, that tho' the Duty did expire by the Demiſe of the *King*, yet there was no Interruption or Stop of Payment of the Duty: But his preſent Majeſty did declare by Proclamation, that *Tonnage* and *Poundage* ſhould be collected as in his Brother's Time; and that thereby the Patentee, and the Defendants under him did enjoy the Duty 'till *Michaelmas* 1685, or made ſome Compoſition touching the ſame; and ſo were not dampnified, and therefore pray'd to be relieved againſt the Policy and Verdict, which the Defendants inſiſted upon by Plea: And though it was ſo expreſs, that in Caſe the Duty expired before *Michaelmas* 1685, the Plaintiffs would pay the Subſcription without Abatement, *&c.* as aforeſaid, yet the Lord *Chancellor* over-ruled the Plea, and ordered the Defendants to anſwer.

John Seabourne and *Thomas Seabourne*, } Plaintiffs. Caſe 7.

George Powel, *Thomas Seabourne* Senior, *Alice Auſtin* the Wife of *Joſeph Auſtin*, *William Mackley* and *Judith* his Wife, } Defendants. *Maſter of the Rolls.* *Nov.* 8, 1686.

Thomas Cowls demiſes Houſes and Grounds in *Chicklane* in 1674, for a long Term to build upon; which Term came by Aſſignment to the Defendant *Auſtin* and her Husband, which they believed to be a good Title, and borrowed 100 *l.* of the Defendant *Mackley*'s Wife, upon a Mortgage of it, for which the Plaintiffs became bound. That the Defendant *Auſtin*'s Husband nine Years ſince run away for Debt, and they thinking their Title good, had borrowed, and built upon the Ground with it, and but 15 *l.* of *Kerrington*'s Money was that Way imploy'd. Seven Years after her Husband's going away, the Defendant *Auſtin*

A. and his Wife being Aſſignees of a Leaſe, mortgage to *B.* *A.* becomes inſolvent, and the Title not being good, *C.* who had the real Title, in Compaſſion to *A*'s Wife makes a Leaſe in Truſt for her. Decreed the Truſtees to make a new Mortgage to *B.*

Auſtin found her Title not good, the real Title being in one *Haynes*; and he compaſſionating her Caſe, for ten Guineas Fine, leaſed the Premiſſes for a long Term, at four Pounds yearly Rent, in Truſt for her to the Defendant *Powell & al'*, and ſhe had inſtigated *Mackley* to ſue the Plaintiff upon the Bond for the Mortgage-Money.

The Plaintiff's Bill was, that though the Mortgage might not in Strictneſs of Law be good, yet the Eſtate granted by *Haynes* was, in regard of the Monies laid out in building upon the other Title, and that the Eſtate mortgaged was of better Value than the Mortgage, beſides what was reſerved to be paid to *Haynes*; and that the Mortgagee had therefore a plain Equity, to have the Benefit of that Title, which was but a Graft into that Stock from which he derived; and that the Defendant *Alice* had ſince the Taking of that Eſtate (and ſo it appeared on Proof) paid the Intereſt to the Mortgagee; and that therefore the Plaintiffs being but Sureties in the Bond had an Equity to have the Benefit of the Mortgage, and of that new acquired Title, to ſave them harmleſs againſt the Bond; or elſe the Truſtees ought to be decreed to make a new Mortgage to the Mortgagee; and he to forbear ſuing upon the Bond.

The Maſter of the *Rolls* in this Caſe did look upon the Eſtate made by *Haynes* to be as a Graft into the old Stock, and the Benefit of it above 4 *l. per Ann.* reſerved to *Haynes* did ariſe in Conſideration of the former Title; and therefore did decree the Truſtees to make a new Mortgage to the Mortgagee.

Thomas Griffith, William Buckle & ux', } Plaintiffs. Caſe 8.

William Buckle Senior, Defendant.

Maſter of the Rolls. Nov. 1686.

Marriage-Articles for ſettling Lands varied, by decreeing an Eſtate for Life inſtead of an Eſtate-tail.

THE Bill was to have a Marriage-Agreement in 1683, betwixt the Plaintiffs and Defendant, executed, whereby the Defendant in Conſideration of a Marriage to be, and afterwards had, between the Plaintiff *Buckle* and his Wife, the Plaintiff *Griffith*'s Daughter, and in Conſideration of 1500 *l.* that was her Portion, 1200 *l.* of which was paid to the Defendant, and the other 300 *l.* ſecured, did article to convey the Lands in Queſtion to the Uſe of himſelf 'till the Marriage had, with Remainder to the Heirs of the Plaintiff *Buckle*, upon the Body of *Elizabeth*, Remainder to the Plaintiff *William Buckle* in Fee.

The Defendant inſiſted, that he was ſurprized in the Wording of the Articles, and that he intended only an Eſtate for Life to the Plaintiff, with Remainder to his Sons in Tail; and that in Caſe of his Sons dying without Iſſue, it ſhould come to the Defendant's own Children; and that it was plain, (however the Articles were worded, that it was ſo meant, for that there was a Clauſe in the Articles, as indeed there was, that his Son ſhould do no Waſte, which would have been repugnant in Caſe he had been to have had the Eſtate of Inheritance: And though there was no Surprize proved in the Gaining of the Articles, the Maſter of the *Rolls* decreed the Father to execute a Conveyance, whereby the Plaintiff was to be but Tenant for Life, with Remainder in Tail to his Iſſue ſucceſſively, and that thereupon the Articles ſhould be delivered up.

DE
Term. S. Hillarii,
1686.

In CURIA CANCELLARIÆ.

Lord Chancellor.
Jan. 1686.

Caſe 9.

Berny ver. *Pitt*, Eſq;

An unconſcionable Bargain, got from an Heir in the Life of his Father, ſet aſide. *Poſt.* Caſe 18.

THE Plaintiff being a young Man, as he alledged, and his Father Tenant for Life only of a great Eſtate, which by his Death was to come to the Plaintiff in Tail; and during his Life allowing the Plaintiff but a narrow Allowance, he became indebted, and borrowed 2000 *l.* of the Defendant in 1675, and entred into two Judgments of 5000 *l.* a-piece, defeaſanced each of them, that if the Plaintiff out-lived his Father, and within a Month after his Father's Death paid the Defendant 5000 *l.* and if the Plaintiff ſhould marry in the Life-time of his Father, then if he ſhould from ſuch Marriage during his Father's Life pay the Defendant Intereſt for his 5000 *l.* the Defendant ſhould vacate the Judgment; with this farther Clauſe in the Defeaſance, that it was the Intent of the Parties, if the Plaintiff did not out-live his Father, that the Money ſhould not be repaid. *January* 1679, the Plaintiff's Father died, and to be relieved againſt the ſaid Judgments upon Payment of the 2000 *l.* lent with Intereſt, was the Bill; which complained of a Fraud,

and a working upon the Plaintiff's Neceſſity, when in Streights.

This Cauſe came firſt to be heard in *Hillary-Term*, 27 *Car.* 2. before the Lord *Nottingham*, who in Regard the Judgments were for Money lent, and not for Wares taken up to ſell again at Under-value, as improvident Heirs uſed to do; and in Regard of the expreſs Clauſe in the Defeaſance of the Defendant's looſing all, if the Plaintiff died before the Father, did not think fit to relieve the Plaintiff againſt the Bargain it ſelf, without paying the 5000 *l.* with Intereſt from a Month after the Plaintiff's Father's Death; and did decree upon the Payment of the 5000 *l.* with Intereſt, the Defendant ſhould acknowledge Satisfaction upon the Judgments; and the Money was paid, being 5390 *l.* and the Judgments vacated accordingly.

And now the Cauſe coming to be re-heard at the Plaintiff's Inſtance, before the Lord Chancellor *Jefferies*, it was inſiſted, that there was no true Difference in the Caſe of an unconſcionable Bargain, whether it be for Money or for Wares; and that the Inſerting the Clauſe in the Defeaſance, that the Defendant ſhould loſe his Money, if the Plaintiff died before his Father, did not difference the Caſe in Reaſon at all, from any other Bargain made by the Plaintiff, or other Tenant in Tail, to be paid for at their Father's Death; for that in theſe Caſes, if the Tenant in Tail died leaving the Father, the Debt would be loſt of Courſe, and therefore the expreſſing of it particularly in the Defeaſance, made the Bargain the worſe, as being done to colour a Bargain, that appeared to the Defendant himſelf unconſcionable; and though there was not in this Caſe any Proof of any Practiſe uſed by the Defendant, or any on his Behalf, to draw the Plaintiff into this Security; yet in reſpect merely to the Unconſcionableneſs of the Bargain, the Lord *Chancellor* diſcharged the Lord *Nottingham*'s Decree; and did decree the Defendant *Pitt* to refund to the Plaintiff,

tiff, all the Money he had received of him, except the 2000 *l.* originally lent, and the Intereſt for the ſame.

Caſe 10.

Nathaniel Spindlar, Plaintiff.

Lord Chancellor. *Feb.* 1686.

Edward Wilford, and *Priſcilla*, Executrix of *George Adams*, } Defendants.

A Rent out of a Copyhold aliened by Surrender and Admittance, for a valuable Conſideration, good in Equity.

Mercy Thorn, in 1614, ſurrendered a Copyhold Tenement to the Uſe of *Adam Johnſon* and his Heirs, on Condition that *Johnſon* and his Heirs ſhould pay *Abel Peterſon* and his Heirs 5 *l. per Ann.* for ever, and in Default of Payment, the Uſe to *Johnſon* and his Heirs to be void, and to be to the Uſe of *Peterſon* and his Heirs. *Johnſon* was admitted, and there were ſeveral Alienations of the Copyhold Tenement by Surrender and Admittance; and there were alſo Alienations of the 5 *l. per Ann.* Rent, which had always been done too by Surrender and Admittance, on aſſigning the Rent. The Plaintiff was the laſt Surrendree of the Rent, and the Defendants *Willford* and his Wife were Tenants in Poſſeſſion of the Copyhold, and denied to pay the Rent; and the Bill was to force them to pay it.

The Defendants demurred, and inſiſted that the Plaintiff's Title being by ſeveral meſne Surrenders of the 5 *l. per Ann.* and the Admittance thereupon was not good; ſo that the 5 *l. per Ann.* being a Rent created *de novo*, and no Copyhold or cuſtomary Intereſt, could not paſs in that Manner, the and Plaintiff had no Title in Equity.

But for the Plaintiff it was inſiſted, that though in Strictneſs the Rent would not paſs in Law by Way of Surrender, yet the Surrender and Admittances were Evidences of the Agreement for the Sale; and the Plaintiff was a Purchaſer, and ought therefore to be helped in

Equity: And the Lord *Chancellor* was of that Opinion, and over-ruled the Demurrer.

And, 27 *Octob.* 1687, it was decreed for the Plaintiff, that the Defendant ſhould pay the 5 *l. per Annum*, and Arrears.

Robert Carleton, Eſq; and the Lady *Dayrill* his Wife, } Plaintiffs.

The Earl of *Dorſet*, *Millington & al.* } Defendants.

Caſe 11.

Lord Chancellor. *Feb.* 1686.

THE Lady *Dayrill* before her Marriage, without Mr. *Carleton*'s Privity, had conveyed her Eſtate, of good Value, to the Defendants and their Heirs, in Truſt that they ſhould permit ſuch Perſon and Perſons, to receive the Rents and Profits, and diſpoſe thereof, as ſhe, whether covert or Sole, ſhould appoint.

Settlement made by a Woman before her Marriage for her ſeparate Uſe, without the Husband's Privity, will not bind the Husband.

The Bill was to avoid that Conveyance, being in Derogation of Right of Marriage, and without the Husband's Privity; and the Lady being crazed in her Underſtanding, endeavoured to run away from her Husband, and ſtirred up her Creditors to ſue him.

For the Husband it was inſiſted, that the Deed being made without his Privity, was in Derogation of the Rights of Marriage, and therefore ought to be ſet aſide, and cited the Caſe of Sir *William Howard* for that Purpoſe, and the Caſe of *Edmonds* againſt *Dennington* about four Years ſince: Where a Woman on Agreement before Marriage with her Husband, being to have Power to act as a Feme Sole, notwithſtanding that Marriage, and the Husband dying, and ſhe marrying again, the ſecond

Husband not being privy to the Settlement on the firſt Marriage; it was decreed, that the ſecond Husband ſhould not be bound by that Settlement on the former Marriage.

The Lord *Chancellor* in this Caſe did decree the Plaintiff *Carleton* ſhould have the Poſſeſſion of the Eſtate againſt the Defendants, and that the Defendants ſhould make a Conveyance of the Lands to the *ſix Clerks*, that it might be ſubject to the Order of the Court.

Vide Ca. 382. Vol. 1.

DE

Termino Paſchæ,

1687.

In Curia Cancellariæ.

Lord Chancellor.
April 1687.

Mumma the Widow, and others the younger Children of *Jacob Mumma*, } Plaintiffs.

Caſe 12.

Jacob Mumma the eldeſt Son and Heir, } Defendant.

A Purchaſe by the Father in the Name of his Infant Son, decreed to be an Advancement, and not a Truſt.

Jacob Mumma the Father purchaſed a Copyhold Tenement in the Name of the Defendant his eldeſt Son, an Infant of about 11 Years old. The Father afterwards laid out 400 *l.* in Improvements, paid the Purchaſe-Money, and all the Fines, and enjoyed during his Life; and having ſurrendred to the Uſe of his Will, deviſed the ſame to his Wife for Life, and afterwards to the other Plaintiffs his younger Children; and made other Proviſions for the Defendant; who having recovered in Ejectment, the Bill was to be relieved againſt it; for that the Defendant was but a Truſtee for his Father in the Purchaſe.

But the Lord *Chancellor* conceived, that he being but an Infant at the Time of the Purchaſe; though the Father

ther did enjoy during his Life, that the Purchaſe was an Advancement for the Son, and not a Truſt for the Father.

Caſe 13.

Richard Knights, Plaintiff.

Sir *Jonathan Atkyns*, *John Peers*, and *Frances* his Wife, & *al.* } Defendants.

Lord Chancellor. *April* 1687.

The Wife's Portion, and the like Sum of the Husband's Money, is agreed to be laid out in Lands, to be ſettled on them and the Heirs of their Bodies, without mentioning how the Remainder over ſhould be limited. They both died without Iſſue, and before any Purchaſe made; the Money ſhall be paid to the Heir of the Husband, and not to the Adminiſtrator of the Wife, who ſurvived her Husband.

IT was agreed upon the Marriage of *Benjamin Knights*, and the Defendant *Frances*, Daughter of Sir *Jonathan Atkyns*, that Sir *Jonathan* ſhould give her a Portion of 1500 *l.* and that *Benjamin* ſhould put 1500 *l.* more to it, and this 3000 *l.* to be laid out in the Purchaſe of Lands, to be ſettled on *Benjamin*, and *Frances* for her Jointure, and on the Heirs of their two Bodies.

Benjamin dying without Iſſue, *Frances* intermarried the Defendant *Peers*: The Plaintiff being Heir of *Benjamin*, brought his Bill to have the Money owing by Sir *Jonathan Atkyns*, together with 1500 *l.* more, which he offered to lay down, laid out in a Purchaſe, according to the Marriage-Agreement. *Frances*, *Peers*'s Wife, died before Anſwer.

For the Defendant *Peers* it was inſiſted at the Hearing, (though no Mention of it in his Anſwer) that he as Adminiſtrator to his Wife, who ſurvived *Benjamin*, was intitled to the Money, and not the Heir of *Benjamin*; all the Uſes for which the Purchaſe was agreed to be made, being ſpent by the Death of *Benjamin* and *Frances* without Iſſue; and that there was no Mention in the Marriage-Agreement, how the Remainder in Fee ſhould go; and that the Wife's Portion being equal to the Money laid down by the Husband, it would have been reaſonable, if a Queſtion had been made in this Court, how the Remainder ſhould have been limited in the Life of the Parties,

ties, to have decreed it for the right Heirs of the Survivor; and that therefore the Purchaſe being never made, and the Wife ſurviving, ſhe was intitled in Equity to the whole Money; and the Defendant her Husband, as her Adminiſtrator had the ſame Right, if not to the Whole, at leaſt to a Moiety, which was her own proper Portion.

But for the Plaintiff it was inſiſted, that if a Bill had been brought in the Life-time of the Husband and Wife to have had the Purchaſe made, it would have been decreed to have been to the Uſe of the Husband and Wife, and the Heirs of their two Bodies, with Remainder to the right Heirs of the Husband.

The Lord *Chancellor* decreed it for the Heir, upon Preſumption that it was ſo intended; and that Sir *Jonathan Atkyns* ſhould pay what remained in his Hands of the 1500 *l.* to the Plaintiff the Heir.

Elizabeth Fotherby Widow, Executrix of *Eliz. Brome*, who was the Executrix of Mr. Serjeant *Brome*, } Plaintiff. Caſe 14.

William Hartridge, *William Pyſeing*, and *Alice ux' ejus*, *Bernard Kendal* and *Anne* his Wife. } Defendants. *Lord Chancellor. May* 4, 1687.

Legacy preſumed to be paid after a great Length of Time.

LEWIS LEES, Father of the Defendants *Alice* and *Anne*, in the Year 1641, made his Will, and by it (*int' al'*) gave to the Defendant *Alice*, and to *Abraham Lees*, one of his Sons, 100*l.* a-piece; and made his Wife *Anne*, his Executrix, and ſhortly after died.

Anne the Executrix afterwards intermarried with the Defendant *Hartridge*; and above thirty Years ſince ſhe died, and the Defendant *Hartridge* took Adminiſtration of her Goods, and *de bonis non, &c.* of *Lewis Lees* the Teſtator. In the Year 1654, becauſe the Defendant *Alice*, and her Brother *Abraham* were then under Age, the Defendant *Hartridge* depoſited their Legacies of 100 *l.* a-piece, or Securities for the ſame in the Hands of the Defendant *Anne* who was then unmarried, to the End ſhe might pay them over; whereupon the Defendant *Kendal*, together with Mr. Serjeant *Brome*, entred into Bond, to the Defendant *Hartridge*, of 400 *l.* Penalty, with Condition to ſave him harmleſs againſt the ſaid Legacies ſo depoſited. The Defendant *Anne* married the Defendant *Bernard Kendal*; and thereupon *Bernard Kendal* the better to ſecure the Defendant *Alice*, gave Bond to her elder Brother in Truſt for her Legacy. Afterwards the Defendants *Alice* and *William Pyſeing* intermarried; and then *Lewis Lees* their Brother aſſigned the Defendant *Kendal*'s Bond, to the Defendant *Pyſeing*, who thereupon altered the Security, and took Bonds from *Kendal* in his own Name, and obtained Judgment upon the Bonds. About the Year 1679, *Abraham Lees* dying Inteſtate, the Defendant *Alice Pyſeing* took Adminiſtration of his Goods; of which (all Debts and Charges paid) there remained a great Overplus; one third Part whereof was ordered by the Spiritual Court to be paid to the Defendant *Anne*; but it was never paid, the Defendant *Alice* detaining it ſtill for Satisfaction of the Legacies given, and depoſited as aforeſaid; ſo that by detaining the Defendant *Anne*'s Part of her Brother's Eſtate, and by the Bonds and Judgment which the Defendant *Kendal* gave as aforeſaid, *Pyſeing* and his Wife are ſatisfied the two Legacies. That nevertheleſs in *Michaelmas-Term* 1685, when *Lewis Lees* the Teſtator had been dead about Forty-four Years, the now Defendant *Pyſeing* and his Wife by Combination, exhibited their Bill againſt the Defendant *Hartridge*, for both the ſaid Legacies; and the Defendant *Hartridge* hath brought

brought an Action againſt the Plaintiff upon the ſaid Bond given by the ſaid Serjeant *Brome* and the Defendant *Kendal, dum ſola,* to ſave him harmleſs; all which is done by Contrivance, after the Plaintiff hath paid in Debts and Legacies more than the Teſtatrix's Eſtate amounted to.

The Lord *Chancellor* declared, that in this Length of Time he would preſume the Legacy paid; and decreed a perpetual Injunction againſt the Bond, and diſcharged the former Decree againſt *Hartridge,* (though inrolled) on this Bill; and though no Relief was particularly prayed againſt that Decree.

Ward verſus *Bradley.*

Caſe 15. *Maſter of the Rolls.* *May* 1687.

A long Term of Years is aſſigned upon Truſt for *A.* for 99 Years, if he lived ſo long, then to his Wife for her Life, Remainder to the Heirs of *A.* begotten on his Wife. The whole Term does not veſt in *A.* but after the Death of him and his Wife, ſhall go to all their Children equally.

COLE being poſſeſſed for 2000 Years of a Tenement, in Conſideration of a Marriage to be and after had, and of 350 *l.* Portion, and for Proviſion and Stay of living of the Husband and Wife and their Children, demiſes to Truſtees for 1700 Years, if he and his Wife, or any of their Iſſue, live ſo long; Remainder to the Heirs of the Body of *Cole* on that Wife. They had Iſſue the Plaintiff and the two Defendants, who had gotten an Aſſignment of the whole Term, and had Adminiſtration to the Father.

And the Queſtion was, whether the Plaintiff ſhould have a Third with the other two Siſters the Defendants; for though it was inſiſted for the Defendants, that the Truſt of the whole Term veſted in the Father, and was executed in him; and that Daughters, though the Heirs of his Body, could not take by Purchaſe in this Caſe; yet the *Maſter* of the *Rolls* conceived, that inaſmuch as there was a particular Term of Ninety-nine Years taken out

out of the 1700; and that the Father had a particular Eſtate limited unto him during Ninety-nine Years, that the Truſt of the whole Term, as to the 1700 Years, was not executed to the Father; and ſaid, that *Conſtructions of Truſts muſt be governed by Intention:* And this being in Caſe of a Marriage-Settlement, and the Intention plain, it ought to be ſupported; and cited the Caſe of *Oakes* and *Chaford*, and *Traherne* and *Crompton*, 24 *Car.* 2. and the Caſe of *Warman* and *Seymour*; where by the Advice of Judges, where Alienation of a Term was to one for Life, and then to her Iſſue, that the Iſſue took by Purchaſe; and *Iſſue* was not taken to be a Word of Limitation, ſo as to veſt the whole Term in the Mother: And yet Iſſue, in legal Underſtanding, is a Word of Limitation, and not of Purchaſe: And therefore did conceive in this Caſe, that though the Word *Heirs* be not properly a Word of Purchaſe; yet there being a particular Eſtate for Life, during a particular Term, limited to the Father, that the Limitation to the Heirs of his Body, afterwards on that Marriage, would carry it to all the Children equally: And he was the more of that Opinion, for that it was declared in the Deed, that after the Death of the Father, the Truſtees ſhould execute Eſtates to the Perſon and Perſons reſpectively, that ſhould be intereſted according to their reſpective Shares therein; which ſhewed that the Children ſhould all take their ſeveral Shares.

Conſtructions of Truſts muſt be governed by Intention.

Caſe 16.

Lord Chancellor.

May 1687.

Norton verſus *Maſcall.*

THE Plaintiff and Defendant had ſubmitted to an Arbitrament by Bond, and an Award was made, not binding by Form of Law, by which the Plaintiff was to pay the Defendant 900 *l.* and to ſeal a Releaſe to the Defendant; and the Defendant was to aſſign ſeveral Securities he had from the Plaintiff. The Plaintiff ſold ſome Lands to raiſe the 900 *l.* expecting the Defendant would

receive it, as he gave him Intimation he would, and tendered him the 900 *l.* and a Releaſe executed by the Plaintiff; and though there was no other Execution on the Plaintiff's Part of the Award, and though the Award was *extrajudicial*, and not good in Strictneſs of Law, yet the Lord *Chancellor* decreed it ſhould be performed in *Specie*.

DE
Term. S. Trinitatis,
1687.
In CURIA CANCELLARIÆ.

Caſe 17. *Berry* verſus *Askham* Widow and Executrix, and *Askham* the Heir.

Maſter of the Rolls.
June 1687.

Where Debts are directed by Will to be paid out of Rents and Profits, the Court, if 'tis neceſſary, will decree a Sale.

Askham the Father, being indebted to the Plaintiff by Bond, deviſes that his Executors ſhall receive the Rents, Iſſues and Profits of his real and perſonal Eſtate, in the firſt Place to pay 60 *l. per Ann.* to one for Life, and after that Perſon's Death, out of the Remainder of his Eſtate, his Debts being paid, to raiſe Portions for ſeveral Children payable at Twenty-one, and Maintenance in the mean Time; and deviſes all his Lands in ſeveral Parcels to ſeveral Perſons at future Times; and thoſe Deviſees were not Parties to the Suit.

And whether the Lands were to be ſold for Payment of Debts, was the Queſtion.

The *Maſter* of the *Rolls* conceived, they ſhould: But firſt directed an Account of the perſonal Eſtate, and the Rents and Profits of the Lands; and if thoſe not ſufficient to pay the Debts in a reaſonable Time, declared he would decree a Sale: And directed the Deviſees to be made Defendants,

fendants, if they would not come in before the Maſter, declaring that the Sales ſhould be out of all the Deviſees Lands.

Thomas Knott, Son and Heir of Sir *Thomas Knott*, } Plaintiff. Caſe 18.

Johnſon, and *Graham* Executors of *George Hill*, } Defendants.

Lord Chancellor. *June* 1687.

THE Plaintiff being intitled to an Eſtate-Tail after the Death of his Father in Lands, which if in Poſſeſſion, were worth to be ſold about 800 *l.* and being caſt off by his Father, and deſtitute of all Means of Livelyhood, did in 1671, for 30 *l.* paid, and 20 *l. per Ann.* ſecured to be paid to him during the joint Lives of him and his Father, abſolutely convey his Remainder in Tail to the Defendant *Hill*'s Father, and his Heirs. The Plaintiff's Father lived ten Years after this Conveyance; and then the Plaintiff brought his Bill to be relieved againſt this Conveyance, charging that it was intended only as a Security; and though there was no Proof to that Purpoſe, and the Deed abſolute; and though *Hill* would have loſt all, if the Plaintiff had died in his Father's Life-time, yet upon the firſt Hearing of this Cauſe, 24 *June*, 34 *Car.* 2. the Lord *Nottingham* decreed a Redemption. The 18 *May*, 35 *Car.* 2. the Lord *Guildford* upon a Re-hearing diſmiſſed the Bill; and that Diſmiſſion not being ſigned and inrolled, the 27 *May* 1687 the Lord *Chancellor* ordered a Re-hearing; and now upon the Re-hearing declared, he took it to be an unrighteous Bargain in the Beginning; and that nothing happening afterwards would help it; and ſo diſcharged the Lord *Guildford*'s Order, and confirmed the Lord *Chancellor Nottingham*'s Decree.

1 Vol. Caſe 161. A Purchaſe from an Heir at an Under-Value in the Life of his Father ſet aſide. Ant. Caſe 9.

William

Caſe 19. *William Baylis* Adminiſtrator of *Fortune* his Wife, } Plaintiff.

Lord Chancellor. June 1687. *Jonathan Newton*, Son, Heir and Executor of *Matthew Newton*, } Defendant.

A. jointly ſeiſed with two others, conveys his third Part to the Uſe of himſelf for Life, Remainder to his Wife for Life, Remainder to his Son in Fee, and at the ſame Time makes his Will, and gives the ſame Lands to his Son in Tail charg'd with his Debts. The Son not a Truſtee for the Father in the Settlement; otherwiſe it would have been, if the intire Fee had been conveyed to the Son.

Matthew Newton being ſeiſed in Joint-tenancy of a third Part of a Village called *Caldicot*, by Leaſe and Releaſe the 21, and 23 *Nov.* 1668, convey'd his third Part for natural Love and Affection to the Uſe of himſelf for Life, Remainder to his Wife for Life, Remainder to the Defendant in Fee. The 25*th* of the ſame *Nov.* he made his Will, and thereby deviſed to the Defendant, and the Heirs of his Body, his Lands in *Caldicot*, and, amongſt other Things, to the Plaintiff *Fortune* his Daughter, out of a Debt *Fenwick* owed him, 250*l.* his Debts being firſt paid; and if *Fenwick*'s Debt was not ſufficient to pay them, over and beſides the 250*l.* to his Daughter, then he appointed his Debts to be paid out of his whole Eſtate.

Fenwick's Debt and the perſonal Eſtate were not ſufficient to pay the Teſtator's Debts, and the Bill was to have the Lands in *Caldicot* ſubjected to the Debts, that ſo the Plaintiff might have the 250*l.* out of *Fenwick*'s Debt: And for the Plaintiff it was inſiſted, that the Eſtate the Defendant had in *Caldicot* by the Leaſe and Releaſe was a Truſt for his Father, and that he ought to take it ſubject to the Will; and that the Leaſe and Releaſe were made to prevent Survivorſhip; and which was proved by

two Witneſſes expreſly: And ſo it alſo appeared by the Dates of the Leaſe and Releaſe and Will, they being all at the ſame Time; and had not the Leaſe and Releaſe been made, the Father as a Jointenant could not have deviſed.

This Cauſe was heard 19 *Feb.* by the *Maſter* of the *Rolls*, who directed an Account of the perſonal Eſtate; and if that was not ſufficient to pay the 250 *l.* the Maſter to report ſpecially as to *Coldicots*; which Matter coming now to be heard before the Lord *Chancellor*, he declared, that if the intire Fee had been paſſed to the Son by the Leaſe and Releaſe, he would not have taken it to be a Truſt in the Son: But inaſmuch as it was limited to the Father for Life, and then to the Mother for Life, with Remainder to the Son in Fee, he could not take it to be a Truſt in the Son.

Hawkins, Plaintiff.

Caſe 20.

Taylor & ux', and *Leigh & al.* } Defendants.

Lord Chancellor. June 1687.

After a Bill brought by a ſecond Mortgagee againſt the firſt and third Mortgagees to diſcover Incumbrances, the laſt Mortgagee may get in the firſt Incumbrance, and protect himſelf againſt the ſecond.

THE Defendant *Leigh* having an Incumbrance on the Lands in Queſtion ſubſequent to the Plaintiffs, and the Bill being againſt him and other Incumbrancers to diſcover their Incumbrances, *Wilſon*, who was a Defendant, and had the firſt Incumbrance, aſſigned to *Leigh*, *pendente lite*: And the Queſtion at the Hearing was, whether the Defendant *Leigh*, who had a Mortgage ſubſequent to the Plaintiff's, ſhould help himſelf againſt the Plaintiff, by buying in *Wilſon*'s Incumbrance, that was prior to both.

The Lord *Chancellor* conceived, he might lawfully do ſo; and diſmiſſed the Plaintiff's Bill without Coſts.

DE

Term. S. Michaelis,

1687.

In CURIA CANCELLARIÆ.

Caſe 21.

Anne Stanton, Plaintiff.

Maſter of the Rolls.

Sadler and *Buſh*, Defendants.

A ſubſequent Purchaſer protected by getting in an old ſatisfied Statute.

THE Plaintiff was a Jointreſs, and the Defendant was a Mortgagee ſubſequent to the Jointure; and got an Aſſignment of a Statute, that was precedent to the Jointure, but was ſatisfied; and extended it on the Lands mortgaged.

The Bill was to ſet aſide the Extent, for that the Statute was ſatisfied: And whether the Statute being ſatisfied ſhould protect the Mortgage, or be ſet aſide without Payment of the Mortgage-Money was the Queſtion.

And the Maſter of the Rolls decreed, that upon the Plaintiff's paying the Mortgage-Money with Intereſt and Coſts, the Defendants ſhould aſſign all their Securities to the Plaintiff: But would not ſet aſide the Extent without Payment of the Mortgage-Money.

Luke verſus *Alderne.*

Caſe 22. *Lord Chancellor.* *Dec.* 1687.

A Legacy is given to *A.* when he ſhould be 24. At 21 he receives Part, and the Executor gives Bond to pay the Remainder at a Day certain, being the Time when he would attain Twenty-four. He dies before that Time. Whether the Money received ſhall be repaid, and the Bond delivered up.

A Legacy of 500 *l.* was given to the Defendant's Teſtator, when he ſhould be Twenty-four Years old: The Plaintiff being his Siſter, and Executrix to the Teſtator, that gave the Legacy, paid the Legatee 250 *l.* of it at Twenty-one, to put him out into the World; and gave him a Bond to pay him the other 250 *l.* at a Day certain; which was the very Day he would attain his Age of Twenty-four Years. He died before that Age, and the Defendant was his Executor.

The Bill was to have the Bond up, and the 250 *l.* repaid, for that he died before Twenty-four, and ſo no Legacy was ever due; and charged an Agreement by the Legatee to repay in that Caſe, and deliver up the Bond. *That* Agreement was denied by Anſwer, and as to the Repayment of the 250 *l.* and Delivery up of the Bond, the Defendant pleaded the Payment, and the Bond which was for Payment at a certain Day, and became a Duty thereby, and not as a Legacy; and did waive the Penalty.

Upon Debate the Plea was to ſtand for an Anſwer, the Lord *Chancellor* declaring it was fit to be heard on the Merits.

DE

Term. S. Hillarii,

1688.

In Curiâ, Veneris 10 *die Feb.* 1688.

In CURIA CANCELLARIÆ.

Caſe 23.

Sharpe verſus *Gamon.*

If a Bill is brought for Diſcovery of a Bankrupt's Eſtate, the Bankrupt muſt be a Party.

BILL for a Diſcovery of a Bankrupt's Eſtate; the Defendant demurred, becauſe the Bankrupt was not made a Party, and the Demurrer was allowed.

Caſe 24. *Eodem die* in Court.

Counteſs of *Plymouth* verſus *Bladon.*

A Diſmiſſion upon an Election to proceed at Law is not peremptory, but the Plaintiff may, after ſhe has failed at Law, bring a new Bill.

THE Bill was to call the Defendant, who was the Plaintiff's Steward, to an Account. The Defendant by Way of Plea inſiſted, that the Plaintiff ought not to be relieved in this Court, nor be compelled to account.. *Firſt*, for that the Plaintiff had before exhibited a Bill in this Court to the ſame Purpoſe, and likewiſe ſued at Law for the ſame Matter; and afterwards being put to her Election, choſe to have her Bill diſmiſſed; and not having met with ſuch Succeſs at Law, as ſhe expected, would now reſort back again to this Court. *Secondly*, That the Plaintiff had diſabled the Defendant from giving any Account, by reaſon that ſhe had, in a violent and undue Manner, ſeiſed his Writings and Evidences, and even impriſoned

impriſoned his Perſon; and ſo in Effect hath made her ſelf both Judge and Executioner: And *Detinue* of *Charters* is a good Plea at Law in Bar of an Account; and ought to be ſo here: And although they may now alledge that the Trunk, in which the Writings were, has been ſince, with the Writings that were in it, reſtored, *that* ought not to excuſe the Plaintiff in this Caſe; for ſuch violent Seizure is an Evidence of the Plaintiff's Deſign to take from the Defendant ſome material Papers, and when ſhe had got them into her Power, it is to be preſumed, ſhe did take them: And it is not to be expected from the Defendant, that he ſhould prove, what Papers the Plaintiff took out of the Trunk.

Per Cur. As to the firſt Objection, A Diſmiſſion upon an Election is not peremptory, no more than a Nonſuit at Law. And as to the ſecond Objection, Although ſuch Proceedings are not to be approved of, or countenanced, yet they cannot amount to a Forfeiture of the Right, which the Plaintiff hath to call her Steward to an Account; and although *Detinue of Charters* is a good Plea at Law in Bar of an Account; yet it is not a good Plea, to ſay the Plaintiff did once ſeize his Writings; but it is the Detainer of them, that makes the Plea good. And as touching the Plaintiff's Impriſoning the Defendant, he may take his Remedy by an Action of *Falſe Impriſonment*, but a Man may ſurely juſtify the Detaining of his Servant, that was taking away his Goods.

Detinue of Charters is a good Plea at Law in bar of an Account, and ſo it is in Equity.

The Court therefore ordered, that whereas there was a conſiderable Sum of Money in the Trunk, that the Money, as well as the Writings, ſhould be reſtored. For although the Defendant might be greatly in the Plaintiff's Debt, yet ſhe muſt not levy her own Debt after that Manner; and ordered the Defendant to anſwer.

Caſe 25. *Sabbati* 11 *Feb.*

Cokes verſus *Maſcal.*

Whether a Letter wrote during a Treaty of Marriage, and there are ſubſequent Treaties and Propoſals, is an Agreement within the Statute of Frauds, &c.

THE Bill was to compel the Defendant, whoſe Daughter the Plaintiff had married, to perform an Agreement alledged to have been made on the Marriage. The Defendant by Anſwer inſiſted, there was a Treaty, but never any fixt Agreement in Writing, nor any ſigned by him, and relied on the Benefit of the Act made for Prevention of *Frauds and Perjuries.*

Upon the Proof the Caſe appeared to be, that there were ſeveral Diſcourſes and Treaties had before the Marriage, and Sir *Thomas Cokes* was to have made a Settlement on the Plaintiff's Side, but afterwards flew back from it; and the Defendant wrote a Letter importing what he intended to ſettle on his Daughter, and after this an Agreement is drawn and reduced into Writing, but not ſigned by either Party; but a Witneſs examined in the Cauſe depoſed, that both Parties heard the Agreement in Writing read over, and agreed to it; and it was proved that the Marriage was ſhortly afterwards had, and the Wedding Dinner kept at the Defendant's Houſe.

The Plaintiff's Counſel chiefly relied on the Letter, and would have that to be a good Agreement in Writing, and valid according to the Act of Parliament, and that the ſubſequent Agreement was the ſame in Effect, but drawn in a more formal Manner; and that a Marriage having been had upon it, and the Agreement thereby in Part executed, ought to be performed.

But for the Defendant it was inſiſted, that here was no Ground for a Decree of this Court: That there was a manifeſt Difference, as to the Settlement intended to have been made, between the Letter and the ſubſequent Agreement in Writing: And it was likewiſe proved on the De-

fendant's Behalf, that after the Letter and Agreement in Writing, there were ſeveral Treaties and Propoſals made, and the Parties differing, the Agreement broke off; and beſides, an Agreement ought to be mutual, and there was nothing done in this Caſe, that any Way obliged the Husband: So the Court inclined to diſmiſs the Bill; but at the Inſtance of the Plaintiff's Counſel gave him a Twelve-Month's Time to try it at Law, whether there was an Agreement ſo fixt, as they could maintain an Action at Law upon it, and that afterwards either Side might reſort back to this Court.

Kelley verſus *Berry.*

Caſe 26.
Lord Chancellor.
Lunæ 20 *Feb.*

THE Plaintiff was a Remainder-Man in Tail in a voluntary Settlement, and the Bill was for Diſcovery of the Deed: But it appearing to the Court that the Entail was diſcontinued, the Court would not relieve the Plaintiff.

A Remainder-Man in Tail in a voluntary Settlement brings a Bill for the Diſcovery of the Deed, and it appearing the Entail was diſcontinued the Court; would not relieve him. *Poſt.* Caſe 48.

Goſley verſus *Gilford & al'.*

Caſe 27.
Lord Chancellor.
Lunæ 27 *Feb.*

A Man poſſeſſed of a Term for Years determinable on Lives deviſes 20 *l. per Ann.* to *J. S.* to be paid half yearly out of this Eſtate, if the *ceſtuy que vies* ſhould ſo long live. *J. S.* dying in the Life-time of the *Ceſtuy que vies*, the Queſtion was, whether this Rent ſhould determine by his Death, or go to the Plaintiff who was his Executor, and be paid him during the Term.

A. deviſes to *B.* a Rent out of a Leaſe for Years determinable on Lives, to be paid half yearly, if the *ceſtuy que vies* lived ſo long. *B.* dies during their Life-time. Decreed the Rent was not determined, but ſhould be paid to the Executors of *B.* during the Term.

The Court decreed it for the Plaintiff, the Executor of *J. S.* and ſaid, if the Rent would have continued as long as the Term laſted, if *J. S.* had ſo long lived, why will it

it not laſt ſo long, though *J. S.* happened to die ſooner; there is nothing ſaid in the Will to determine it. And the Caſe in *Roll's* Abridgment, *firſt Part*, *Title* Eſtate, *fol.* 831. where it is ſaid, that if a Man poſſeſſed of a Term for Years grants a Rent generally without limiting any Eſtate, the Rent ſhall continue during the whole Term, was looked upon to be an Authority in point.

Caſe 29. *Lord Chancellor.* 1 *Martii.*

Sprignell verſus *Delawne.*

THE Plaintiff's Bill was to have Satisfaction of a Debt owing him by *J. S.* to whom the Defendant was Executor; the Caſe was, that the Defendant was bound to a third Perſon as Surety for *J. S.* and to indempnify him on that Behalf; *J. S.* aſſigned to him a Term for Years, and dies, and makes the Defendant his Executor, who pays that Debt out of the perſonal Aſſets; and the Plaintiff being a Creditor by ſimple Contract, and there being no perſonal Aſſets left, would have had the Benefit of that Security for Payment of his Debt; and it was urged to be reaſonable he ſhould have that Benefit, in regard that the perſonal Aſſets, which would have ſatisfied his Debt, were employed in Diſcharge of the Debt which was chargeable on this Security. *Sed non allocatur*, for that it was in the Power of the Executor to apply the perſonal Aſſets, the one Way or the other.

Caſe 30. *Eodem die. Lord Chancellor.*

Cooke verſus *Cooke.*

Upon a Bill for a ſpecifick Performance of a Covenant with *A.* for the Benefit of *B. A.* muſt be a Party. *Rolls* and *Yate*, fol. 177.

UPON a Bill for a ſpecifick Performance of a Covenant under Hand and Seal with *A.* for the Benefit of *B. A.* muſt be a Party to the Suit. But if it had been only a Promiſe, either *A.* or *B.* might have brought the Action according to the Caſe in *Yelverton's* Reports.

Searle verſus *Hale.*

Caſe 31. *Lord Chancellor. Lunæ 5 Martii.*

An Adminiſtrator pays away all the Aſſets in ſatisfying Debts on Specialty. Decreed to pay a Debt due by a Decree, though he had no Notice of the Decree, before he had paid thoſe Debts.

AN Adminiſtrator pays Money on Specialties without Notice of Money decreed, and had fully adminiſtred the Aſſets: And the Court nevertheleſs decreed, that the Adminiſtrator ſhould pay the Money decreed.

Buccle verſus *Atleo.*

Caſe 32. *Lord Chancellor. Martis 6 die Martii.*

An Executor being deſirous to apply the Aſſets, as far, as they would go, in ſatisfying the Debts, brings a Bill againſt all the Creditors, that they might, if they pleaſed, conteſt each others Debts, and that their Preference might be ſettled. Adjudged on a Demurrer, to be a proper Bill.

THE Plaintiff being Executor, and his Teſtator greatly indebted, and being deſirous to be rid of the Aſſets as far as they would go, and that his Payments might not be afterwards queſtioned, brought a Bill againſt all the Creditors, to the Intent they might, if they would, conteſt each others Debts, and diſpute, who ought to be preferred in Payment.

The Defendant being a Creditor demurred, for that the Bill contained Multiplicity of Matter, wherein he was not concerned. But the Court over-ruled the Demurrer; and held it a proper Bill, and a ſafe Way for an Executor to take.

Parrot verſus *Bowden.*

Caſe 33. *Eodem die.*

Plea of Outlawry to be on Oath.

A Plea of Outlawry over-ruled, becauſe it was not put in upon Oath.

Caſe 34.

Eodem die.

Hungerford verſus *Goreing.*

A. having Lands contiguous to *B.* brings his Bill, that *B.* may diſcover the Boundaries of his Eſtate, as they appear by his Deeds.

THE Plaintiff and Defendant's Lands lying contiguous, the Bill was to diſcover the Boundaries of the Defendant's Eſtate, alledging the ſame fully appeared by the Deeds and Writings in his Hands; the Defendant demurred.

B. is not obliged to make this Diſcovery.

Per Cur. there is no Reaſon to compel the Defendant to diſcover the Boundaries in his Deeds, for that would be to help a Man to Evidence to evict my Poſſeſſion.

Caſe 35.

Smith & ux', Plaintiffs.

At the Rolls.

William Clever & ux', and *William Farmer & ux'*, Defendants.

Intereſt of Money is deviſed to *A.* for Life, and and if he died without Iſſue, then the Principal to go over to another. The Remainder over is good.

THE Caſe was that one *Suſan Beale* being poſſeſſed of a conſiderable perſonal Eſtate made her Will, and thereby appointed *Robert Franklyn* and *Joſeph Fiſher*, Executors in Truſt, to receive and pay, act and do all Things according to the Intent and Meaning of her Will; and having thereby deviſed ſeveral particular Legacies, deviſed further in the Words following, *viz. And the Reſt and Reſidue of my Eſtate unbequeathed ſhall be put forth to Intereſt by my Executors, and one half of the Intereſt ſhall be paid to my Siſter* Anne Cole *during her Life, and the other half of the Intereſt unto her Daughter* Anne Smith, *and ſhe to have one half of my Houſhold Goods, and after her Mother's Deceaſe to have all the Intereſt during her Life: And my Will is, that if the ſaid* Anne Smith *die without Iſſue of her Body, the Principal of the Reſidue ſhall be divided equally between*

Mary Clever *and* Eliz. Farmer, *and ſuch Children as are or ſhall be born of their Bodies then living.*

The Bill was brought by the Plaintiff *Smith* and his Wife, ſetting forth that the Remainder over to *Clever* and *Farmer*, expectant on the Plaintiff *Anne*'s dying without Iſſue was void in Law, being of a Perſonalty, and that the whole Intereſt of this perſonal Eſtate was well veſted in the Plaintiff *Anne*, and therefore pray'd, that the Truſtees might be directed to deliver the Securities, and to pay the Money unto the Plaintiffs.

The Defendants by Anſwer confeſs the Will, and inſiſted on their Title by Virtue of the Limitation over.

The Caſe was ſeveral Times argued before his Honour the *Maſter* of the *Rolls*, who took Time to conſider of it. See the Determination of the Court, *Poſt.* Caſe 51.

Legriel and *Moreſcoe*, Plaintiffs. Caſe 36.

William Barker, Eſq; Sir *William Barker*, Serjeant *Kellingworth*, Defendants. *Maſter of the Rolls.*

THERE was 200 *l.* of the Plaintiff *Legriel*'s Money lent in the Plaintiff *Moreſcoe*'s Name, upon Bond from the Defendant *William Barker* the Father, and Sir *William Barker* his Son, wherein they were jointly bound; and the Defendant Sir *William* being jointly bound in other Bonds (as well as that) for his Father, 9 *Feb.* 30 *Car.* 2. the Defendant *Barker* the Father entered into a Statute of 2000 *l.* to the Defendant Serjeant *Kellingworth*, defeaſanced, that if *Barker* the Father ſhould within ten Years, or before his Death, pay the ſaid ſeveral Debts for which the Defendant Sir *William* was bound, and Intereſt, and indempnify the Defendant Sir *William* from the ſaid Bonds, and

A. is bound with his Father for the Debts of the Father, who enters into a Statute to the Son to pay the Debts and indempnify the Son. One of the Creditors delivers up his Bond and takes a Mortgage from the Father. The Son ſhall not ſet up his Statute to defeat the Mortgage.

and all Charges touching the ſame, the Statute to be void.

The Defendant *Barker* the Father paid ſome of the ſaid Debts, but not the Plaintiff's; but deſired to have the Bond delivered up, and to ſecure the ſame by Mortgage of ſome of his Lands; and thereupon for the ſame 200 *l.* he made a Mortgage to the Plaintiff *Legriel* of Lands in *Suffolk* for 500 Years without Impeachment of Waſte; with a Proviſo, that if he paid her 212 *l.* at a Year's End, the Leaſe to be void; with Covenants that the Premiſſes were free from Incumbrances, and for further Aſſurance.

The 200 *l.* and Intereſt was not paid; whereupon the Plaintiff *Legriel* endeavoured to enter upon the Lands: But the Plaintiff found that the Premiſſes were extended on the Statute, and that the Defendant Sir *William* inſiſted upon ſuch Extent; and that 11 *Octob.* 1681, there were Articles between him and his Father, for his Father's doing ſeveral Things to him, and alſo that his Father ſhould pay all the Debts unpaid, upon the Statute, according to the Defeaſance before mentioned by *Chriſtmas* then next; and 'till then that the Statute ſhould not be put in Suit; and that the Statute and any other Security the ſaid *William* the Father could give, ſhould ſtand as a Security for Performance of the Articles of 11 *Octob.* and that the Defendant the Son inſiſted upon great Breaches of the laſt mentioned Articles, and that therefore he had extended the mortgaged Premiſſes with the Statute.

Note, the Plaintiff is a Purchaſer of the Land by the Mortgage made to her; and that the Incumbrance the Defendant would ſet up, ought not to diſturb her, or Charge the Land to prevent Satisfaction of her Debts; for the Statute was originally given to take place only if the Father did not pay the Debt; and he did pay it by the Mortgage he gave, and not otherwiſe; and if the Plaintiff enjoy the Mortgage, as ſhe ought, the Statute

ought not to do her any Prejudice: And by the Father's giving the Statute to his Son to pay the Debts, and indempnify the Son, the Statute was a farther Security for the Debts, and ought not to be ſet up to hinder the Satisfaction of the Debts: Beſides the Son has no Wrong; for he was bound with his Father in the original Bond to *Moreſcoe*, and ſo was liable to pay it; and by the laſt Defeaſance of the Statute the Debts are to be paid alſo; and in Truth many of the Debts were the Sons own, as he has confeſſed in his Anſwer to a Bill of his Father's.

The *Maſter* of the *Rolls* took Time to conſider of this Caſe; and afterwards decreed, that the Defendants ſhould redeem, or be fore-cloſed, and a perpetual Injunction againſt the Statute.

DE

Termino Paſchæ,

1688.

In Court, Lord Chancellor. Jovis, 3 die Maii.

In CURIA CANCELLARIÆ.

Caſe 37.

Walker verſus *Penry.*

Statute reducing Intereſt, whether it affects precedent Securities. *Poſt.* Caſe 73.

THE Bill was to redeem an ancient Mortgage; and foraſmuch as the Mortgagor had paid Intereſt after the Rate of 8 *l. per Cent.* until 1675, whereas Intereſt by the Act of Parliament in 1660, was reduced to 6 *l. per Cent.* The Queſtion was, whether the 2 *l. per Cent.* from 1660, ſhould not be allowed to go in Diſcharge of ſo much of the Principal.

Per Cur. The Contract being made prior to the Statute for reducing Intereſt to 6 *l. per Cent.* and the Contract having not been changed or varied, and 8 *l. per Cent.* having been voluntarily paid, they ſaw no Reaſon to relieve the Complainant: For the Statute for reducing Intereſt reſpects only ſubſequent Contracts; and as in this Caſe no *Indebitatus aſſumpſit* will lye at Law to recover back the 2 *l. per Cent.* ſo there is not any juſt Ground to decree it in Equity; and the 8 *l. per Cent.* would have been Aſſets at Law in the Hands of an Executor, that had received Intereſt after that Rate.

The Court decreed, that from the Time of the Defendant's Entry, which was in 1675, he ſhould be allowed Intereſt but after the Rate of 6 *l. per Cent.* But thought not fit to give the Plaintiff any Relief, as touching the 8 *l. per Cent.* that had been paid from 1660, until 1675.

Peacock verſus *Spooner.*

Caſe 38. *Lord Chancellor. Martis* 8 *die Maii.*

Term aſſigned in Truſt for Baron and Feme for their Lives, Remainder to the Heirs of the Heir of

A Term for Years was aſſigned in Truſt, that *Baron* and *Feme* might receive the Profits during their Lives, and the Life of the longer Liver of them, and after their Death to the Heirs of the Body of the Wife to be begotten by the Husband.

the Body of the Feme by the Baron. If the whole Term veſts in the Feme, or ſhall go her Body. *Poſt.* Caſe 178.

The Counſel for the Plaintiff to ſupport the Remainder, would have the Words (*Heirs of the Body*) to be taken to be Words of Purchaſe or Deſcription, and not of Limitation: But *per Cur.* the whole Intereſt of the Term veſted in the Wife, and muſt go to her Executors or Adminiſtrators.

White verſus *White.*

Caſe 39. *Eodem die. In Court, Lord Chancellor.*

Perſonal Eſtate applied in eaſe of the Real againſt a reſiduary Legatee.

THIS Cauſe was heard the 25*th* of *January* laſt, and came now to be re-heard. The Caſe was, a Man by his Will deviſed ſeveral particular Legacies ſubject to particular Charges thereon, and gave the Surplus of his perſonal Eſtate to his Wife: The Bill was brought by the Heir to have the perſonal Eſtate applied in Eaſe of the real Eſtate: And the Court decreed the perſonal Eſtate to be ſo applied.

Per

Per Cur. It is not yet ſettled, whether the Heir ſhall not have the perſonal Eſtate ſo applied, even againſt a Legatee of a Sum of Money.

Caſe 40. *Lord Chancellor. Mecur' 9 die Maii.*

Sagitary verſus *Hide.*

The Heir claiming under a voluntary Settlement ſells the Land. If the Money in the Hands of the Purchaſer ſhall be Aſſets to pay the Anceſtor's Bond.

THE Plaintiff is a Creditor by Bond to *J. S.* who ſettled his real Eſtate on his Wife for Life, Remainder to one *Middleton* in Tail, (who happened afterwards to be Heir at Law) with Power of Revocation; and *Middleton* ſold to the Defendant *Hide*, who had Part of his Purchaſe-Money in his Hands, out of which the Plaintiff ſought to be ſatisfied his Debt.

For the Plaintiff it was inſiſted, that the Settlement was fraudulent, and that the Eſtate ought to be Aſſets, and made liable to the Plaintiff's Debt; and cited *Lenthal*'s Caſe in *B. R.* in Debt upon a Recogniſance forfeited by Reaſon of an Eſcape: A voluntary Settlement made thirty Years before the Eſcape was adjudged to be fraudulent.

Per Cur. Every voluntary Conveyance is not therefore fraudulent; but a voluntary Conveyance, if there was a reaſonable Cauſe for the making of it, may be good and valid, even againſt a Creditor: And here the Defendant *Hide* before his Purchaſe had Notice, that there was a Bond; but there was no Original filed, and before the Commencement of the Suit, he had covenanted to pay the Reſidue of his Purchaſe-Money, and the Court thereupon inclined to diſmiſs the Plaintiff's Bill.

Muſgrave verſus *Daſhwood.*

Caſe 41.
In Court, Veneris 11 *Maii.*

THE Caſe was, that a Copyholder for Life, where by the Cuſtom of the Manor there is a Widow's Eſtate, agrees that *J. S.* ſhould hold and enjoy during his Life, and the Widowhood of ſuch Woman, as he ſhould leave at his Death, and enters into Bond for that Purpoſe, and to ſurrender on Requeſt.

A Copyholder for Life, where by the Cuſtom there is a Widow's Eſtate, agrees to ſell, and dies. His Widow not bound by this Agreement.

The Bill was brought againſt the Widow, to have this Agreement performed.

Poſt. Caſe 56.

In the Arguing of this Caſe was cited the Caſe of *Twiford* and *Warcup*, where a Man covenanted, that his Eſtate was free from Incumbrances, except an Eſtate for Life that was thereon; by the Cuſtom of the Manor, of which the Eſtate was held, the Widow of the Tenant for Life, was to hold during her Widowhood; and it ſo fell out that the Tenant for Life left a Widow, yet this was adjudged to be no Breach of the Covenant. And the Caſe of *Newberry* and *Wigorn* was cited, where a Man was admitted to a Copyhold Eſtate in Truſt for *J. S.* and the Queſtion that aroſe thereupon was, Whether the Widow of the Truſtee did not come in paramount the Truſt, and ſhould enjoy her Widow's Eſtate, and the Court at Law was divided upon it: But in the principal Caſe, the Plaintiff was defective in his Title, being he had not taken out Letters of Adminiſtration to *J. S.* and ſo the Court delivered not any Opinion in the Caſe.

Caſe 42. *Eodem die, in Court.*

Niccol verſus *Wiſeman.*

Where there is a Plea and Anſwer, and the Plaintiff replies; the Replication muſt be to the Anſwer, as well as the Plea.

THE Cauſe came on to be heard the laſt Term, and then the Plaintiff had replied to the Plea only, and not to the Anſwer; and the Court thereupon made an Order that the Plaintiff ſhould file a Replication to the Anſwer, *nunc pro tunc*, and that the Cauſe ſhould be heard this Term: And the Plaintiff now ſet down the Cauſe for hearing again, without having given Rules for Publication, and had alſo amended his Bill, and had not new ſerved the Defendants to anſwer, ſo the Cauſe was again put off as coming on irregularly.

Caſe 43. *In Court, Lord Chancellor. Sabbati* 12 *die Maii.*

Buxton verſus *Hutchinſon.*

Tithe-Oar not due, but by particular Cuſtom.

THE Plaintiff's Bill was to be relieved for Tithe-Oar in *Braſſington*, a Townſhip within the Rectory of *Blackborne* in the County of *Derby.*

Per Cur. Tithe-Oar is not due of Common Right, but by particular Cuſtom only: And the Court therefore directed a Trial to be had at Law, whether there was any, and what Cuſtom within the ſaid Townſhip for the Payment of Tithe-Oar, with Direction to the Judge to endorſe the *Poſtea*, how the Cuſtom was found upon the Trial.

Caſe 44. *In Court, Lord Chancellor. Mecurii* 16 *die Maii.*

Saunders verſus *Browne.*

Money deviſed to be laid out in Land, and ſettled on the Children of *J. S.* Land ſhould

THE Caſe was, that *J. S.* by his Will directed two Hundred and forty Pounds to be laid out in the Purchaſe of Lands, to be ſettled on *Mary* and the Heirs of her Land is purchaſed and ſettled on them and their Heirs, and one dies. Decreed the not ſurvive.

her Body; and if ſhe died without Iſſue, then on the Children of *Elizabeth*, which ſhe ſhould leave behind her: *Mary* died without Iſſue before any Purchaſe had; afterwards the Truſtees lay out the Money in a Purchaſe, and convey the Lands to the two Children of *Elizabeth*, and their Heirs, who ſo held for ſeveral Years, and then one of them dies, the ſingle Queſtion was, whether the Moiety of the dead Child ſhould ſurvive.

Per Cur. decreed that it ſhould not ſurvive.

Caſe 45. *In Court, Lord Chancellor. Lunæ* 14 *Maii.*

Biſſell & ux' verſus *Axtell & al'.*

An Account decreed of an Inteſtate's perſonal Eſtate, notwithſtanding an Account before taken, and a Diſtribution decreed in the Spiritual Court.

THE Widow in the Spiritual Court ſet up a *Procurator* for her Children the Infants, and gets her Account paſſed there, and each Child's Proportion aſcertained, and Diſtribution decreed, and on giving new Security, got the old Security diſcharged.

The Court, without Regard had to the Proceedings of the Spiritual Court, decreed an Account of the whole Eſtate.

Caſe 46. *In Court, Lord Chancellor. Veneris* 18 *die Maii.*

Chomley verſus *Chomley.*

Poſt. Caſe 78.

BY Articles made on the Marriage of Mr. *Nath. Chomley*, with the Daughter and only Child of Sir *Hugh Chomley*; Mr. *Chomley* covenants to lay out *forty Thouſand Pounds* in Land, and to ſettle *one Thouſand Pounds per Ann.* thereof in Jointure, which was to be in Lieu of Dower, and all Demands out of his perſonal Eſtate; with a Covenant that ſhe would not claim any Part thereof, and to ſettle the Whole on the firſt and other Sons of that Marriage in Tail Male: Sir *Hugh* on his Part covenants to give in Marriage with his Daughter *five Thouſand Pounds* down,

down, and 5000 *l.* at his Death, and to ſettle his whole Eſtate on the Iſſue Male of this Marriage, if there ſhould be any; provided, that Sir *Hugh* with the Conſent of *Nathaniel*, might alter, change and make void the Uſes, *&c.* in the Articles.

Sir *Hugh* was greatly indebted to the full Value of his Eſtate, and unable to perform the Articles on his Part: But *Nathaniel* in his Life-time purchaſed Land of the Value of *one Thouſand and fifty Pounds per Ann.* and ſettled a Jointure according to the Articles, and afterwards died within the Province of *York*, being alſo a Freeman of the City of *London*, and poſſeſſed of a perſonal Eſtate of the Value of about *twenty Thouſand Pounds*, and left Iſſue two Sons and a Daughter.

The Plaintiff his Brother being his Executor, brought his Bill for the Direction of the Court, how, and in what Manner, the perſonal Eſtate ſhould be diſpoſed of.

The *firſt Queſtion* was touching the Proviſo for changing and altering the Articles; whether that ſhould be intended only as to the Eſtate that Sir *Hugh* was to ſettle: For if the Proviſo did not extend to both Eſtates, but ſhould be taken to relate to Sir *Hugh*'s only, then the Covenant of Mr. *Nathaniel Cholmley* for laying out *forty Thouſand* Pounds in Land, would ſwallow up his whole Eſtate, and there would be nothing left for the younger Children.

Secondly, admitting that the Articles were not binding, but were avoided purſuant to the Proviſo, then if the Cuſtom of the Province of *York* was to take Place, there being about *fifty Pounds per Ann.* in Poſſeſſion deſcended on the Heir, he was thereby excluded from having any Part or Share of the perſonal Eſtate.

As to this Point, the Court was clear of Opinion, that *Nathaniel Chomley* being a Freeman of the City of *London*, the Cuſtom of the City for the Diſtribution of his perſonal Eſtate ſhould prevail and controul the Cuſtom of the Province of *York*.

A Freeman of *London* dies within the Province of *York*. The Cuſtom of *London* in the Diſtribution of his perſonal Eſtate, ſhall controul the Cuſtom of the Province of *York*

The *third Queſtion* was, whether the Widow, who by the Articles was to have no Part of her Husband's perſonal Eſtate, more than what he ſhould leave her by his Will (and he had thereby given her 1000 *l.*) ſhould have the Jewels, which her Husband had preſented her with in his Life-time; and it was urged there was the leſs Reaſon to allow her them, in Regard her Portion was never paid.

The Court referred it to a Maſter to ſtate the whole Matter ſpecially to the Court.

Dullwich College verſus *Johnſon.*

Caſe 47. *In Court, Lord Chancellor. Jovis, 17 die Maii.*

THE Plaintiff's Bill was for a Diſcovery of a perſonal Eſtate, that was deviſed to Charities relating to the College. The Defendant pleaded that the Will was not yet proved, but was controverted in the Spiritual Court.

A Bill may be brought againſt an Executor for Diſcovery of the perſonal Eſtate, before the Will is proved, or during the Litigation thereof in the Spiritual Court.

The Court over-ruled the Plea, a Diſcovery of the Eſtate being for the Benefit of all Perſons intereſted therein, and neceſſary for the Preſervation thereof: And Diſcoveries have often been ordered to be made *pendente lite* in the Spiritual Court.

Bunce verſus *Phillips.*

Caſe 48.
Eodem die.

One claiming under a voluntary Conveyance from Tenant in Tail, not compellable by the Iſſue in Tail to diſcover the Deed of Entail.

THE Bill was to diſcover an antient Deed of Entail alledged to be in the Defendant's Hands; the Defendant pleaded Conveyances made to himſelf of the Eſtate in Queſtion; ſo that, if any ſuch Entail there was, the ſame was diſcontinued.

Vid. ante, Ca. 26, 28.

The Court allowed the Plea; and ſaid they would not aid the Iſſue in Tail againſt a Diſcontinuance, tho' by a voluntary Conveyance.

Crook verſus *Brooking.*

Caſe 49.
Lord Chancellor, Sabbati, 18 *Maii.*

Money bequeathed to *A.* for Life, and if ſhe died in the Life of her Husband, to go to the Children of her Siſter *B.* in ſuch Shares as *A.* ſhould adviſe. Some of the Children of *B.* Decreed the Money to be diſtributed amongſt the Children of *B.* and their Repreſentatives *per Stirpes*, and not *per Capita.*

THE Caſe was, that one *Mallock* had deviſed *one Thouſand five Hundred* Pounds by his Will to *Simon* and *Joſeph Snow*, to be by them diſpoſed of on ſuch ſecret Truſt as he had privately revealed to *Simon*; and directed, that the Execution of the Truſt ſhould be left wholly to them, ſo that in Caſe they ſhould break their Truſt, yet they ſhould not be queſtioned for the ſame either in Law, or Equity.

Simon in a Letter wrote by him to *Joſeph*, reciting, that the Teſtator had by his Will deviſed ſuch Legacy as aforeſaid, declares, that the Intent of the Teſtator was, that they ſhould out of the Profits of the *one Thouſand five Hundred Pounds*, maintain the Teſtator's Daughter, who was married to one *Crew*; and in Caſe ſhe ſhould ſurvive her Husband, ſhe to have the whole Money at her own free and abſolute Diſpoſal; but in Caſe ſhe died in the Life-

time of her Husband, then the *one Thouſand five Hundred* Pounds to go to the Children of his Daughter *Leach*, in ſuch Shares and Proportions, as *Anne Crew* ſhould adviſe.

Anne Crew died in the Life-time of her Husband, and made no Appointment.

At the Death of *Anne Crew*, many of *Leach*'s Children were dead; ſome with Iſſue, and ſome without Iſſue.

It was agreed, that the Truſt was well and ſufficiently declared by the Letter, which *Simon Snow* wrote to *Joſeph*, but the Doubt was, in what Shares and Proportions the Money ſhould be diſtributed, and who ſhould be let into a Share thereof.

Per Cur. The Money ſhall be diſtributed amongſt all the Children of *Leach* and their Repreſentatives *per Stirpes*, and not *per Capita*; and that without Regard had to the Adminiſtrator of any dead Child.

It was objected by the Counſel, that if *Anne Crew* her ſelf had been living to have made an Appointment, ſhe muſt have diſtributed it amongſt the Children then living, and could not have given any Part thereof to the Child of one that was dead. *Sed non allocat' per Cur'.*

Caſe 50. *Baden & al.* Creditors of *Philip* late Earl of *Pembroke*, } Plaintiffs.

Lunæ 21 Maii, In Court, Lord Chancellor, Maſter of the Rolls, Juſtice *Lutwich*, and Juſtice *Powel.*

The Earl of *Pembroke*, Counteſs Dowager of *Pembroke*, Domina *Charletta Herbert*, ſole Daughter and Heir of *Philip* late Earl of *Pembroke* & *al'*, } Defendants.

Poſt. Caſe 196. *A.* on his Marriage demiſes Lands to B. who redemiſes them to *A.* for a leſſer Term, paying a Pepper-Corn Rent during the Life of *A.* and after his Death an annual Sum for the Life of his Wife for her Jointure, and a Pepper-Corn for the Remainder of the Term. *A.* dies indebted, the redemiſed Term ſhall not be Aſſets to pay any Debts, but what affect the Inheritance, the Term redemiſed being raiſed for a particular Purpoſe.

THIS Cauſe coming now before the Court upon a Caſe ſtated by Dr. *Edisbury* for the Judgment of the Court, how far the ſeveral Terms for Years after mentioned ſhould be Aſſets, and liable to Debts by ſimple Contract: The Maſter certified, that *Philip* late Earl of *Pembroke* being ſeiſed in Fee of the Manors and Lands after mentioned in Conſideration of the Marriage then intended to be had betwixt him and the now Counteſs Dowager of *Pembroke*, and of *ten Thouſand* Pounds, which he then received as a Portion with her, and in Purſuance and Performance of certain Articles of Agreement made before the Marriage, whereby the ſaid Earl covenanted and agreed to charge his Eſtate in *Glamorganſhire* with the Payment of a Rent or Annuity of *one Thouſand and three Hundred Pounds per Ann.* to the ſaid Counteſs for her Life, and for Performance of thoſe Articles, became bound to the Earl of *Sunderland*, in a Statute-Staple of the Penalty of *twenty Thouſands* Pounds; and the ſaid late Earl having agreed to make up the *one Thouſand three Hundred Pounds, one Thouſand five Hundred Pounds per Ann.* did, by Indenture dated 1 *Octob.* (75.) made between the ſaid late Earl and

the ſaid Counteſs of the one Part, and the ſaid Earl of *Sunderland* and Lord *Godolphin* of the other Part, grant Bargain, ſell and demiſe to the ſaid Earl of *Sunderland* and Lord *Godolphin* their Executors and Adminiſtrators, all his Honours, Manors, *&c.* in *Glamorganſhire* for *Ninety-nine* Years under the Rent of a Pepper-corn: But upon Truſt that they ſhould redemiſe the Premiſſes in Manner after mentioned; and accordingly the ſaid Earl of *Sunderland* and Lord *Godolphin*, by their Indenture of Redemiſe bearing Date the ſecond Day of the ſaid *October*, made between them of the one Part, and the ſaid Earl of *Pembroke* of the other Part, did in Purſuance and Performance of their ſaid Truſt, and for five Shillings in Money, regrant the ſaid Premiſſes ſo demiſed, to the ſaid Earl *Philip*: To hold to him, his Executors, Adminiſtrators and Aſſigns for *Ninety-eight* Years and *eleven* Months, reſerving the Rent of a Pepper-corn only, during the Life of the ſaid Earl, and after his Deceaſe a Rent of *one Thouſand five Hundred* Pounds *per Ann.* by half yearly Payments, during the Life of the Counteſs, as a Jointure for her; and after her Death a Pepper-corn during the Reſidue of the Term, with a Covenant for Payment of the Rent, and a Clauſe of Re-entry in Caſe of any Default in Payment. And the Maſter in like Manner ſtated ſeveral other Securities that had been made by Way of Demiſe and Redemiſe; and certified, that the Bond-Debts of the late Earl amounted unto *nine Thouſand* Pounds, and that the Book-Debts, and Debts by ſimple Contract amounted unto *eighteen Thouſand two Hundred* Pounds; and that the perſonal Eſtate was not above *ſix Thouſand Pounds*; and therefore ſubmitted it to the Court, whether the Terms redemiſed to the ſaid late Earl ſhould be liable to thoſe Debts; which was the ſingle Point that came now before the Court in Judgment.

Mr. *Pollexfen* and others of Counſel with the Plaintiffs, the Creditors, argued that the Eſtate and Intereſt, which Earl *Philip* had by the Redemiſe, was purely a Chattel

Intereſt; it would in Law have paſſed by Grant; been forfeited as any other Chattel-term would have been, and might have been taken in Execution upon a *Fi. fac.* And as to the Objection that is made that a Term abſtracted out of the Inheritance for a particular Purpoſe is not to be Aſſets, as other Terms for Years would be, he ſaid there was no ſuch Rule in Law; nor that a Term ſhould be attendant on the Inheritance, or ſhould ceaſe, when a particular Purpoſe was anſwered: And if a Term be raiſed for a particular Purpoſe, and then to ceaſe, it muſt be ſo expreſſed in the Deed it ſelf; and no foreign Implication will ſerve for that Purpoſe; and to that Effect cited the Caſe of *Co.* 1 *Rep. fol.* 87. and to make ſuch Conſtruction in this Caſe muſt be not only by an Averment foreign to the Deed, but likewiſe contrary to the expreſs Statutes, as the Statute of *Weſtm.* 2. and the Statute of *Acton Burnel*, by which Terms for Years are liable to be taken in Execution upon a *Fi. fac.* and he ſaw no Reaſon why the Term after the Death of the Earl was not as ſubject to a *Fi. fac.* as it was in his Life-time: And there is no Queſtion, but that in his Life-time the Term might have been ſold by the Sheriff by a *Fi. fac.* ſubject to the Payment of *one Thouſand five Hundred* Pounds *per Ann.* was the Caſe here between the Heir and the Executor, there might be ſome Colour for Equity to interpoſe; but Equity ought to favour Creditors, and the Payment of their Debts, and has therefore in many Caſes enlarged Aſſets, and made that Aſſets that would not have been ſo at Law; but never abridged the Aſſets in Prejudice of Creditors; and cited *Tooke*'s Caſe in the Lord *Nottingham*'s Time; where a Man had a Leaſe for three Lives, to him and his Heirs from the Church, and mortgaged this Leaſe for *Ninety-nine* Years, if the three Lives ſhould ſo long live, and died, the Mortgage being forfeited: And there the Court decreed this mortgaged Term, which would not have been Aſſets at Law, to be ſold for the Payment of Debts. If a Man purchaſes an Eſtate and takes an Aſſignment of a Term

A. having a Leaſe for three Lives mortgages it for 99 Years, if the three Lives lived ſo long, and died after the Mortgage was forfeited. The mortgaged Term, tho' not Aſſets at Law, decreed to be ſold for Payment of Debts.

Term thereon to himſelf, and takes the Conveyance of the Inheritance in the Name of Truſtees, it was never pretended, but that the Term ſhould be Aſſets: And ſo if a Man ſeized in Fee makes a Mortgage for Ninety-nine Years, the Equity of Redemption has always in this Court been adjudged Aſſets, and he ſaw no Reaſon why the altering the Security, and making it by Way of Demiſe and Redemiſe, ſhould vary the Caſe; and as to the Caſe of *Lawrence* and *Beverly* upon a ſpecial Verdict by the Direction of the Lord Chief Juſtice *Hale*, *Paſch.* 23 *Car.* 2. where upon the Marriage of *Jane Chaire*, the Wife of *Albion Chaire*, with *Oliver Beverly*, by Articles made on the Marriage it was recited, that *Albion* ſtood bound to his Siſter *Jane* for Payment of *one Thouſand* Pounds at her Marriage or 21, and reciting a Marriage was then intended, by which the Money would become payable to the Husband; *Oliver Beverly* therefore covenants with *Albion Chaire*, that he ſhould have a Twelve-Month's Time for Payment of the Money, paying Intereſt in the mean Time: And *Albion Chaire* covenants to pay Intereſt in the mean Time, and at the Year's End to pay the Principal; to the Intent it might be laid out in a Purchaſe, to be ſettled upon *Oliver* and *Jane*, and the Heirs of their two Bodies, Remainder to the right Heirs of *Oliver*: And *Oliver* covenanted that the Money within one Month after Payment of it, ſhould be laid out accordingly. The Marriage was had; *Oliver Beverly* dies, and *Jane* ſurvives; they had Iſſue *Mary* their Daughter, who was alſo dead without Iſſue. After the Death of *Oliver*, *Jane* received *three Hundred Pounds* for Intereſt, and the *Thouſand* Pounds remained in the Hands of *Albion* unpaid. In an Action brought by *Samuel Laurence*, who was Creditor by Bond to *Oliver Beverly*, againſt the ſaid *Jane Beverly* as Executrix to her Husband; all this Matter was found ſpecially by the Jury, by the Direction of the Lord Chief Juſtice *Hale*: And whether the *three Hundred* Pounds received by *Jane* for Intereſt were Aſſets or no, the Jury doubted, and *pet' adviſament' Cur'*, *&c.* and after ſeveral Arguments,

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2 Keb. 841.

ments, Judgment was given *Quod quer' nil' capiat per billam.* It was obſerved that the original Security for the *Thouſand* Pounds Portion was a Bond to the Wife, and ſo was a *Choſe in Action*, and ſurvived to her; and there was only a mutual Covenant between the Husband and *Albion Chaire*, that the Money ſhould be paid, and laid out in Land to be ſettled to thoſe Uſes: And inſiſted that here was no Equity againſt the Creditors, and that the Court had never in any Caſe taken the Benefit from the Creditors of that, which was Aſſets at Law; and concluded with the Rule taken by *Littleton* upon the Statute of *Merton*, viz. *That which never was, never ought to be.*

Mr. *Keck* argued for the Defendant the Lady *Charletta Herbert*, the ſole Daughter and Heireſs at Law to Earl *Philip*, that the Articles in this Caſe ſhewed the Intent of the Parties was only for ſecuring the *one Thouſand five Hundred* Pounds *per Ann.* and ſuppoſe the Matter had reſted upon the Articles, and a Bill had been brought to compel a Performance of thoſe Articles, and the Court had decreed a Security by Way of Demiſe and Redemiſe, which had been made accordingly, and then Earl *Philip* had died indebted, as in this Caſe; I take it the Court would never have ſuffered the Redemiſed Term to have been made Aſſets, or any Advantage to be taken thereof, ſave only for ſecuring the *one Thouſand five Pounds per Ann.* and ſo it was reſolved in the Caſe of *Goodrick* and *Browne*, where a Fine was levied purſuant to a Decree of this Court for a particular Purpoſe, and the Court would not permit any Advantage to be taken of that Fine, for letting in of other Debts or Incumbrances. Now in the principal Caſe the Parties had only done that voluntarily, which they might by Decree have been compelled to have done; and their Intent by theſe Articles as fully appeared to be only for ſecuring the *one Thouſand five Hundred* Pounds *per Ann.* as it could have done, had there been a Decree to have governed it. And this Court has in ſome Caſes abridged even Creditors of the Advantages they had at Law, and made

Where a Fine is levied for a particular Purpoſe, purſuant to a Decree, the Court will not permit any other Uſe to be made of that Fine.

that, not to be Aſſets, which was Aſſets at Law: As in the Caſe of *Holt* and *Holt*, where an Executor had entered into a Recogniſance for the Payment of Debts and Legacies, and the Teſtator's Eſtate, that conſiſted in Houſes in *London*, was afterwards deſtroyed by the Fire, the Court in that Caſe, by Reaſon of that caſual Loſs, would not ſuffer that Recogniſance to run upon the Executors, nor any Advantage to be taken thereof, further than the Executors had Aſſets in their Hands; and the Caſe of *Jones* and *Bradſhaw*, *Paſch.* 1661, where an Executor had paid Money purſuant to a Decree of this Court, and upon a *Plene adm'* they would not permit him to give that Payment in Evidence at Law, the Court decreed that it ſhould be allowed, and referred the Matter to an Account in this Court: And the Caſe of *Douſe* and *Perſivall*, Vol. 1. Caſe 92. firſt heard by the Lord *Nottingham*, and reheard by Lord *Guildford*, where a Man purchaſed an Eſtate of Inheritance, on which there was a Term for Years in Being, and took the Aſſignment thereof in his own Name, in that Caſe the Court decreed, that this Term, though in himſelf, ſhould not be looked upon as Part of his perſonal Eſtate, ſo as to be ſubject or liable to the Cuſtom of the City of *London*. Which Caſes ſhew, that the Court has in all Times exerciſed a Juriſdiction, and interpoſed in Caſes of this Nature; and the Intent of the Parties in the principal Caſe by the Demiſe and Redemiſe, which is now become a common Conveyance, was only to ſecure the *one Thouſand five Hundred* Pounds *per Ann.* which being done, it was reaſonable, that the Eſtate ſhould fall again into the Inheritance: And the Inconvenience would be very great, ſhould this Term by the Redemiſe be made perſonal Aſſets.

The Judges, Mr. Juſtice *Powell*, and Mr. Juſtice *Lutwich*, only declared their Opinions, (to wit) that the Demiſe and Redemiſe being made purely for the particular Purpoſe of ſecuring the *one Thouſand five Hundred* Pounds *per Ann.* and that End being anſwered, they thought no

further Advantage ought to be taken of that Conveyance; and that the Redemiſed Term ought not to be liable to Debts, ſave only to Debts by Bond; as the Inheritance would have been, in Caſe there had been no Term for Years.

The Maſter of the *Rolls* agreed with the Judges in Opinion, and ſaid, he thought the Caſe of *Lawrence* and *Beverly* fully governed this Caſe; and the like Judgment has been ſince given in this Court in the Caſe of *Whitwick* and *Jermin*, where Money by a Marriage-Agreement was to be laid out in Land, the Court would not let that Money, as perſonal Aſſets, be liable to other Debts: And ſaid, that all Deeds were but in the Nature of Contracts, and the Intention of the Parties reduced into Writing, and the Intention was to be chiefly regarded. In an Act of Parliament, the Intention appearing in the Preamble, ſhall controul the Letter of the Law; and the Articles in this Caſe as much ſhew the Intention of the Parties, as a Preamble can that of an Act of Parliament; And from the Regard that the Law it ſelf gives to the Intention of the Party, it is, that where there is a Fine by Way of Render, there ſhall be no Dower: And ſo a Rent or Recogniſance ſhall not be extinguiſhed by levying a Fine to the Party. That the Court did, and often might, controul legal Titles; and inſtanced in the Caſe of Sir *John Fagg* in the *Exchequer*, who making a Title by an old dormant Security, the Court there directed that if the Jury ſhould find the Money thereby ſecured was ſatisfied, they ſhould find againſt his Title; though it was a Title ſtill in Law; he thought therefore the Intention of the Parties ought to govern this Caſe, and that there would enſue a great and general Inconvenience, ſhould Terms by Redemiſe be made perſonal Aſſets.

The Lord *Chancellor* was clear in it, that this Term redemiſed ought not to be made perſonal Aſſets, nor be otherwiſe liable to any of the Debts of Earl *Philip*,

than the Inheritance was (to wit) to Bond-Debts, or Debts of a ſuperior Nature: And therefore he agreed intirely with the *Judges* and the *Maſter* of the *Rolls*, and was glad to find them concur ſo unanimouſly with him in Opinion, and he declared, that Mr. Juſtice *Thomas Powell*, who had been likewiſe attended with a Caſe, and was to have delivered his opinion in this Matter, (but was removed from being a Judge) had been with his Lordſhip, and had declared his Opinion was, that the redemiſed Term ought not to be any further Aſſets, or liable to Debts, than the Inheritance would have been.

Smith verſus *Clever & al'.*

Caſe 51. *Maſter of the Rolls.*

THE *Maſter* of the *Rolls* having heard ſeveral Arguments in this Caſe, took Time to conſider thereof, and this Day delivered his Opinion therein: That he took the Queſtion to be, not ſo much how far a perſonal Chattel might be deviſed over, as how far the Uſe of Money may be limited and deviſed over. The firſt Authority I meet with in this Caſe, is in *H. Eighth*'s Time in *Brook*'s Caſes 388. where the Occupation of Goods is deviſed to one, the Remainder over; the Remainder is accounted good. And the Caſe of the Lord *Haſtings* verſus *Douglaſs*, *Cro. Car.* and in the Caſe 37 *H.* 6. there cited, by which it appears the Law is clear, that the Deviſe of the Uſe and Occupation of Goods veſts not an abſolute Property thereof in the firſt Deviſee, but that a Limitation of them over is good. Now by the Deviſe in Queſtion, I take it, that the Money it ſelf is not deviſed, but only the Intereſt of it: As to the Objection, that the Deviſe of a perſonal Eſtate in Tail, Remainder over is a Perpetuity, and void; and ſo was adjudged in the Caſe of *Boucher* and *Antram*, 14 *Nov.* 23 *Car.* 2. *that* is not any Thing like the principal Caſe: For here Money is not deviſed, but only the Uſe of it. But the Caſe I moſt princi-

21 *Maii* 1688. *Ant.* Caſe 35.

Fol. 343.

principally depend on, is *Rachel*'s Caſe, where Chattels were deviſed to the Wife for Life, *&c.* and if ſhe were with Child, then to that Child; if that Child died without Iſſue, the Remainder over to the Grandſon. The Wife had no Child: And it was in that Caſe reſolved, that the Remainder over was good; as likewiſe it would, if there had been a Child, and *that* Child had died without Iſſue; and cited the Caſe of *Wood* and *Saunders*, 21 *Car.* 2. And as to the Objection that had been made by the Plaintiff's Counſel, that the Intereſt being given to *Anne Smith* for Life, and if ſhe died without Iſſue, then the Remainder over, *&c.* implies an Eſtate-Tail both in Principal and Intereſt, he ſaid an Implication cannot be againſt the plain Intent of the Party expreſſed in his Will: And in this Caſe the Teſtatrix had carefully diſtinguiſhed between Principal and Intereſt; and nothing paſſed, but barely the Uſe, until ſhe comes to the Remainder over, and then ſhe deviſes the Principal. And he mentioned the Rule taken in *Matthew Manning*'s Caſe, that the Intention of the Party in his Will ought to be obſerved, as far as may conſiſt with the Rules of Law; and cited the Caſe of *Oakes* and *Chaffon*, as an Authority in Point; and declared, as this Will was penned, the Remainder was good; and therefore decreed the Money ſhould go according to the Will; but with this, that in Caſe there ſhould be Iſſue of *Anne Smith*, the Iſſue ſhould have the abſolute and intire Intereſt in the Money.

An Eſtate by Implication cannot be againſt the plain Intent of the Party expreſſed in his Will.

Note, It was objected that the Deviſe of the Uſe or Intereſt of Money paſſes the Money it ſelf, as a Deviſe of the Profits of a Term carries the Term: And as to the main Point, the Caſe of *Love* and *Windham* was cited as an Authority with the Plaintiffs.

1 Sid. 450.

2

Baker

Baker verſus *Child.*

Caſe 52.
In Court, Martis, 22 die Maii.

Where a Feme Covert agrees to join with her Husband in making a Surrender, or levying a Fine, and he dies before it is done, Equity will compel her to perform the Agreement.

PER *Cur.* Where a Feme Covert, by Agreement made with her Husband, is to ſurrender, or levy a Fine; though the Husband die before it be done, the Court will by Decree compel the Woman to perform the Agreement.

Bachelor verſus *Bean.*

Caſe 53.
Eodem die.
Lord Chancellor.

A Man marries an Executrix. He ſhall anſwer for ſo much of the perſonal Eſtate, as ſhe poſſeſſed, though he took it as a Portion with her.

THE Bill was brought by the Heir for an Account of his Father's perſonal Eſtate, and to have it applied in Eaſe and Exoneration of the real Eſtate, and was brought againſt the ſecond Husband, who married the Plaintiff's Father's Widow and Executrix.

Upon Exceptions to a Maſter's Report the Court declared, that the Husband, who had married the Widow and Executrix of her former Husband, ſhould be anſwerable for ſo much of the former Husband's perſonal Eſtate as ſhe had poſſeſſed; and that, although he took it as a Portion with the Widow: And this in Favour of the Heir, though there were no Creditors concerned in this Caſe.

Sawley verſus *Gower.*

Caſe 54.
Lord Chancellor.
Veneris, 25 die Maii.

An Equity of Redemption of a Mortgage in Fee is not Aſſets at Law, but is ſo in Equity; and if aliened or releaſed by the Heir, he ſhall be anſwerable for the Value.

PER *Cur.* The Equity of Redemption of an Inheritance is not Aſſets at Law, becauſe the Eſtate is forfeited; but the Heir having a Right in Equity, that

ought in Equity to be liable to ſatisfy a Bond-Debt; and if the Heir hath aliened or releaſed his Equity of Redemption to prevent the Creditors of the Satisfaction of their Debts, this Court will follow the Money in the Hands of the Heir or his Executor.

Legal Aſſets ſhall be applied in a Courſe of Adminiſtration; but equitable Aſſets amongſt all the Creditors proportionably. After a Bill brought by Creditors againſt the Executor, and the reſt of the Creditors, the Executor cannot by confeſſing a Judgment, or ſuffering Judgment to go by Default, prefer one Creditor before another.

Where Creditors are Plaintiffs, the uſual Decree is that the Debts ſhall be paid in Courſe of Adminiſtration; but that is to be intended of legal Aſſets, and not of Aſſets in Equity, that are not Aſſets at Law: And in the Caſe of *Parker* and *Dee*, where Creditors come with a Bill and make the Executor, and all the Reſt of the Creditors Parties, the Executor ſhall not have Power by the confeſſing of a Judgment, or by ſuffering Judgment to paſs by Default, after the Bill exhibited to prefer one Creditor before another; but there all the Creditors in equal Degree ſhall be paid in Proportion.

Whether an Heir being a Creditor by Bond or Judgment may retain, as well as the Executor may.

Where an Heir by Bond or Judgment is a Creditor, *Quære*, if he ſhall not retain: The Reaſon being the ſame in the Caſe of an Heir, as it is of an Executor, for neither can ſue himſelf.

Caſe 55. *Eodem die, in Court.*

Saunders verſus *Beale.*

AN Inheritrix carves out a Term for *one Thouſand* Years to Truſtees, the Truſt whereof was declared by the Woman and her intended Husband to be for the Husband for Life, and after his Death, to the Wife and her Heirs: Afterwards the Husband and Wife by *Fine ſur conceſſ.* grant a Term of *Twenty-one* Years, reſerving the Rent to the Husband and Wife, and the Heirs of the Wife; and the Bill was now brought by the Adminiſtra-

tor of the Wife to have the Benefit of the Rent preſerved; but the Court diſmiſſed the Bill.

Note, my Lord *Cook* is expreſs, that the Diſpoſition of Part of the Term by the Husband, which he hath in Right of his Wife, is not a Diſpoſition of the Whole. *Vide Co. Lit. fol.* 46. *B.* if the Husband poſſeſſed of a Term for forty Years in Right of his Wife, make a Leaſe for twenty Years reſerving Rent, the Wife ſhall have the Reſidue of the Term; but the Executors of the Husband the Rent.

Muſgrave verſus *Daſhwood.*

Caſe 56. *Eodem die, in Court.*

THE Caſe was, that a Copyholder for Life, where there was a Widow's Eſtate by Cuſtom, agrees to ſell his Eſtate, and enters into Bond, that the Purchaſer ſhould enjoy. *Ant.* Caſe 41.

The Bill was brought by the Purchaſer againſt the Widow to bind her by this Agreement. But the Court diſmiſſed the Bill with Coſts, for if ſuch Contracts for Copyholds ſhould be decreed, all Lords would be defrauded of their Fines, *&c.* and put the Caſe, if a Joint-tenant agrees to alien and does it not, but dies, it would be a ſtrange Decree to compel the Survivor to perform the Agreement.

Agreement by one Joint-tenant to ſell does not bind the Survivor.

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Term. S. Trinitatis,

1688.

In Court, Veneris, 22 die Junii.

In CURIA CANCELLARIÆ.

Caſe 57.

Therman verſus *Abell.*

A Tradeſman turns away his Apprentice for Negligence and Miſdemeanors. Decreed to refund Part of the Money he had with him.

THE Defendant being an Apothecary, the Plaintiff put his Son to him as an Apprentice, and gave with him a Sum of Money, and allowed the Youth ten Pounds *per Ann.* for his Cloaths: The Defendant having put away his Apprentice after he had lived ſome Time with him, by Reaſon of Negligence and Miſdemeanors laid to his Charge, the Court decreed the Maſter to refund 30 *l.* of the Money; and the rather, becauſe the Indentures were not inrolled, ſo as the Matter was not properly cogniſable before the *Chamberlain* of *London.*

Vide Vol. 1. Caſe 437.

Caſe 58.
In Court, Lord Chancellor.

Rutland verſus *Molineux.*

A Feme Covert agrees to ſell her Inheritance, ſo as ſhe might have Part of the Money. The Land is ſold, and her Part of the Money put into Truſtees Hands. This Money not liable to the Husband's Debts, though ſhe afterwards agreed it ſhould be ſo.

THE Caſe was, a *Feme Covert* agrees to ſell her Inheritance, ſo as ſhe might have two Hundred Pounds of the Money ſecured to her: The Land is ſold, and the Money put out in a Truſtee's Name accordingly. The Bill was brought by a Creditor of the Husband's, to ſubject

ſubject this Money to the Payment of his Debt; and charges that the Wife promiſed and agreed it ſhould be liable thereunto.

Per Cur. This Money ſhall not be liable to the Payment of any of the Husband's Debts, nor ſhall any Promiſe made by the Wife for that Purpoſe, ſubſequent to the firſt original Agreement, be obliging on that Behalf.

Coates verſus *Needham & al'.*

Caſe 59. *Eodem die, Lord Chancellor.*

J. S. being ſeiſed in Fee, deviſes all his Lands in *Sutton* . to Truſtees and their Heirs, in Truſt that they ſhould apply the Profits thereof until his Son (who was then but *two* Years old) ſhould attain *Twenty-one*, in Manner therein after directed, *viz.* as to one Third Part thereof to his Wife in Lieu and Satisfaction of Dower; the other two Thirds for Payment of his Debts, and afterwards to and for other Uſes, Intents and Purpoſes in his Will mentioned. The Truſtees from Time to Time receive the Profits and pay the Widow her Thirds; but the Proof was various, whether ſhe took it as for her Dower, or as deviſed unto her by the Will. The Widow dies, and then the Son dies. The Plaintiff who had married the Widow, and was her Adminiſtrator, preferred this Bill to have the Benefit of this Deviſe of a Third of the Profits, until the Son might have attained Twenty-one Years. The Defendants inſiſted the Widow had never declared her Acceptance of the Deviſe, nor done any Thing that would bar her of her Dower; but on the contrary often declared ſhe would bring her *Writ* of *Dower*, ſo that in Caſe ſhe had lived longer than ſuch Time, as the Son would have attained *Twenty-one*, ſhe might have waived the Deviſe, and inſiſted on her Dower.

A. deviſes Lands in Truſt to pay one 3d of the Rents to his Wife in Satisfaction of Dower, until his Son, then 2 Years old, attains 21. the Wife receives a 3d of the Rent from the Truſtees, and dies, and afterwards the Son dies during his Infancy. The Adminiſtrator of the Wife ſhall have her 3d of the Rents till ſuch Time as the Son might have attained 21.

Per Cur. There is no Doubt, but it is a good Deviſe of the Profits, until ſuch Time as the Son might have attained his Age of *Twenty-one* Years, according to the Reſolution in *Boraſton*'s Caſe; and her Acceptance of the Money from the Truſtees was a ſufficient Declaration of her Agreement to the Will, for it cannot be ſaid ſhe took it as Dower; for Dower muſt be of the Land it ſelf, into which it is not pretended ſhe ever entered, but accepted of a Third of the Rents and Profits from the Truſtees: And therefore decreed the Plaintiff ſhould have a Third Part of the Profits until ſuch Time, as the Son would have attained his Age of Twenty-one Years.

3 Co. 19. a.

Caſe 60. *Eodem die, In Court, Lord Chancellor.*

Aſcough verſus *Johnſon & ux', & al'.*

A Purchaſer or Mortgagee buying in Incumbrances for leſs than is due, ſhall have the Benefit of the whole Money due thereon. Vol. 1. Caſe 48, 330.

PER Cur. Where a Purchaſer, or Mortgagee buys in Incumbrances to protect his Eſtate at Law, on Compoſitions, (to wit) Incumbrances on his purchaſed Lands and other Lands, he ſhall be allowed the full Money due on ſuch Incumbrances, and the ſame ſhall not by the Heir or Mortgagor, be redeemed without full Payment of all the Money due on ſuch Incumbrances, without Regard to the beneficial Bargains and Compoſitions made by ſuch Purchaſer.

Caſe 61. *Lord Chancellor, Lunæ, 2 die Julii.*

Clerkſon verſus *Bowyer & econ'.*

THERE being a Mortgage made of a Copyhold in Fee for ſecuring an Annuity, the Heir of the Mortgagor is foreclоſed, and a Releaſe given to the Truſtee of the Mortgagee. The Bill after all was to be admitted to the Redemption: And it was inſiſted, that the Benefit of the Mortgage belonged to the Executor or Adminiſtrator of the Mortgagee, and not to his Heir; and therefore

therefore this Foreclosure could not be binding, the Administrator being no Party to it: And the Case of *Gobe and his Wife* against the Earl of *Carlisle*, was cited, where the Heir of the Mortgagee had foreclosed the Mortgagor, the Executor of the Mortgagee being no Party; and afterwards upon a Bill by the Executor against the Heir of the Mortgagee, and against the Mortgagor, the Land was decreed to the Executor.

The Heir of the Mortgagee forecloses the Mortgagor, the Executor being no Party. Upon a Bill by the Executor against the Heir of the Mortgagee and the Mortgagor: The Land was decreed to the Executor.

But it was said *per Cur.* if the Executor or Administrator of the Mortgagee, should after this Foreclosure come against the Heir of the Mortgagee to have the Benefit of the Mortgage, the Heir might well say, I will pay you the Money, and take the Benefit of Foreclosure to my self, in Case the Land be worth more than the Money.

But if the Executor of the Mortgagee, after a Foreclosure by the Heir, brings a Bill to have the Benefit of the Mortgage, the Heir, if he thinks fit, may take the Benefit of the Foreclosure to himself, paying the Executor the Mortgage-Money and Interest.

Kingdome versus *Bridges.*

Case 62. *Eodem die, in Court.*

THE Case was, that the Plaintiff's late Husband purchased a *Walk* in a *Chase*, and took the Patent thus; *to wit*, to himself and his Wife, and one *Bridges* for their Lives, and the Life of the longest Liver of them. *Kingdome* died, and made the Defendant his Executor; the Plaintiff's Bill was to have the Benefit of this Purchase, and to have the Patent delivered to her. The Defendant by Answer set forth, that *Kingdom* died greatly indebted, and had not left sufficient Assets for Payment thereof, and submitted it to the Court, whether this Purchase ought not to be liable to the Payment of his Debts.

A. purchases a Walk in a Chase and takes the Patent to himself and to his Wife, and *J. S.* during their Lives, and the Life of the Survivor; the Husband dies indebted. The Wife decreed the Benefit of the Patent during her Life, though *A.* had not left Assets to pay his Debts, but after her Death, *J. S.* to be a Trustee for the Executor.

Per

Per Cur. It ſhall be preſumed to be intended as an Advancement and Proviſion for the Wife: The Wife cannot be a Truſtee for the Husband: And therefore decreed, that the Plaintiff ſhould enjoy the Benefit of the Patent during her Life, and after her Deceaſe, in Caſe *Bridges* ſhould ſurvive her, to be a Truſt for the Executor of the Husband, and applied towards the Payment of his Debts.

Caſe 63. *Lord Chancellor, Martis, 3 die Julii.*

Liſter verſus *Liſter & al'.*

Whether the Wife's Portion conſiſting of Choſes in Action, ſhall upon the Husband's Death be liable to his Debts, the Husband before his Marriage having made an adequate Jointure on his Wife.

THE Bill was brought by the Creditors of the Husband againſt his Widow, and againſt his Siſter, who was his Executrix, and a Friend to the Creditors, ſetting forth that upon the Marriage-Treaty the Defendant's Portion was repreſented to be of the Value of five Hundred Pounds, and thereupon the Husband expecting to receive ſuch Portion as aforeſaid with his Wife, agreed to ſettle on her a Jointure of *Forty-five* Pounds *per Ann.* and made a Settlement thereof accordingly. That the Defendant's Fortune being Part in Monies owing to her ſelf on Bond, and the other Part in Lands of Inheritance, the Husband died before the Bonds were altered, or Money received, or before any Fine levied of the Wife's Inheritance, and died greatly indebted, and had little or no perſonal Eſtate beſides the Monies to which he was intitled in the Right of his Wife as aforeſaid, and notwithſtanding the Defendant the Widow had a Jointure ſettled adequate to her Portion, yet ſhe and the Executrix deſigning to defraud the Creditors, inſiſted that the Securities not being altered, and no Fine levied of the Land, the Right remained and ſurvived in her, whereas the ſame ought in Equity to be made liable to the Husband's Debts.

The Defendant, the Widow, by Anſwer ſet forth, that the Jointure ſettled on her fell ſhort in Value of what by the Marriage-Agreement it ought to have been, and inſiſted

ed on her Right to the Monies due on the Bonds, and to the Lands that were her own Inheritance.

Per Cur. The Defendant, the Widow, has the Title in Law to the Lands: Thoſe were her own Inheritance; and the Securities remained unaltered, and being *Choſes in Action*, the Benefit thereof was ſurvived to her; ſo the Law has caſt the Right upon her, and Equity cannot take it from her: And therefore diſmiſſed the Bill. *Vide* le *Caſe* de *Twiſden* & *Wyld.*

Arundell verſus *Phillpot.*

Caſe 64.

One makes a voluntary Settlement with Power of Revocation on Tender of a Guinea, and afterwards ſettles the ſame Lands to different Uſes, but does not tender the Guinea. Whether this is a Revocation.

THE Caſe was that Mrs. *Phillpot* in 1676, conveys and ſettles Part of her Eſtate on the Defendant, with a Power of Revocation on Payment or Tender of a Guinea, the Defendant having afterwards much diſobliged her, ſhe changes her Intentions, and by Deed and Will ſettles her Eſtate on the Plaintiff, (being the eldeſt Son of the Lord *Arundel,*) for Payment of ſome particular Charges and Appointments. In ſome of the ſubſequent Deeds there was ſome Proviſion made for the Defendant, which he accepted and ſealed a Counter-part thereof, and the Bill was to diſcover whether the firſt Deed was not well and ſufficiently revoked, or in Caſe the Revocation was not preciſe according to the Power, or was defective, yet to have it ſupplied in Equity, the Plaintiff taking the Eſtate charged with ſeveral Payments, *&c.* and ſo was in the Nature of a Purchaſer, and therefore they ought to have the firſt Deed delivered up, and to have the Teſtimony of the Witneſſes preſerved, *&c.*

Per Cur. This Court may ſupply an informal or defective Revocation, but cannot make a Revocation where there is none. And therefore either prove a Tender of the Guinea, or that Mrs. *Phillpot* declared ſhe intended to revoke the former Settlement, one or other of them ſhall

be ſufficient, though it hath not all the Formalities and Circumſtances mentioned in the Power of Revocation, ſo it appear to be a ſober ſolid Act, and done *animo Revocandi*, but that could not be made out. It was then inſiſted, that the ſubſequent Deed ſhould be taken as a ſufficient Revocation being of the ſame Land, and made to different Uſes and Purpoſes. *Sed non allocatur.*

Caſe 65. *In Court*, 28 *Julii.*

Sir *Brazill Firebraſs* verſus *Brett.*

Court of Equity diſcourages exceſſive Gaming.

THE Bill was to be relieved touching *one Thouſand four Hundred and fifty Guineas*, which the Defendant had wone of the Plaintiff at *Hazard* at his own Houſe, and likewiſe againſt an Action of Treſpaſs brought by the Defendant at Law, for that the Plaintiff and his Servants had forcibly taken from him about *two Thouſand* Guineas more, which the Defendant had won from the Plaintiff the ſame Time at Play, and had once in his Poſſeſſion. The Bill charged many Circumſtances of Fraud, as that the Defendant *Brett* had laid his Deſign to draw in the Plaintiff, and had for a conſiderable Time uſed ſeveral Arts and Contrivances for that Purpoſe, to get into his Company, *&c.* that the Defendant had his Wine mixt with Water, and plied the Plaintiff ſo with Wine, that he knew not what he did, and that the Defendant cheated the Plaintiff in Play, *&c.* and that the Defendant *Brett* when he began to play, had not above *ten Guineas* in his Pocket, ſo there was little Hazard of his Side, *&c.*

Court of Law diſcouraged an Action on an exorbitant Wager, by granting an Imparlance from Time to Time.

The *Chancellor* declared he thought it a very exorbitant Sum to be loſt at Play at one Sitting, between Perſons of their Rank, and that he would diſcourage, as much as in him lay, ſuch extravagant Gaming; and cited the Caſe of Sir *Cecil Biſhop* and Sir *Thomas Staples*, that came before the Lord Chief Juſtice *Hale* in the *King's Bench*, upon a Wager wone at a Horſe-Race, where his Lordſhip declared he would give the Defendant Leave to imparl from

Time to Time; and if ſuch Diſcouragement was given to Gaming at Common Law, it ought much more to be done in a Court of Equity.

The Defendant finding that the Court inclined ſo ſtrongly againſt him, ſubmitted to a Propoſition made by the Counſel, which was afterwards decreed as by Conſent.

Child verſus *Danbridge.*

Caſe 66. *Eodem die, Lord Chancellor.*

Tradeſman failing compounds, but makes an under-hand Agreement with ſome of his Creditors to pay them the whole.

THE Plaintiff failing in his Trade, compounded with his Creditors at ſo much in the Pound, to be paid at the Time therein mentioned, and he having failed in Payment at the preciſe Time, ſome of the Creditors refuſed to ſtand to the Agreement, which being under Hand and Seal, the Bill was to compel a Performance thereof.

This is a Fraud on the other Creditors, and on a Bill to compel them to perform the Agreement. Bill diſmiſſed

But it appearing in the Cauſe that the Plaintiff to draw in the Reſt of the Creditors, had made an under-hand Agreement with ſome of them, who were ſeemingly to accept of the Compoſition, to pay them their whole Debts; which being a Fraud and Deceit upon the Reſt of the Creditors, the *Court* would not decree the Agreement, nor relieve the Plaintiff, but diſmiſſed the Bill.

Thomas

Caſe 67. *Thomas* Earl of *Rivers*, Plaintiff.

Eodem die, In Court, Lord Chancellor. *William George* Earl of *Derby & al'.* } Defendants.

On a Marriage Lands are limited to the Husband for Life, Remainder to the Wife for Life, Remainder to the firſt, &c. Son of the Marrriage in Tail Male, Remainder to *J. S.* in Fee. Provided, if there be no Iſſue Male of the Marriage, and there be one or more Daughters, living at the Husband's Death, then the Truſtees to ſtand ſeiſed ſubject to the Jointure, to the Intent ſuch Daughter or Daughrers ſhould receive out of the Rents 10000 *l.* and 100 *l.* *per Ann.* for Maintenance; but no Time limited for Payment of the Portions. The Husband dies leaving only one Daughter, who lives to 17, and by her Will diſpoſes of the 10000 *l.* Decreed this is a veſted Intereſt in the Daughter, and well diſpoſed of by her Will. *Poſt.* Caſe 88, 193.

THE Caſe was, that by Indenture *tripartite*, dated 22 *Maii*, 1678, and by Fine and Recovery thereupon had, ſeveral Manors and Lands were (on the Marriage of the late Lord *Colcheſter* with *Charlott Kath. Stanley*, Siſter of the Earl of *Derby*) ſettled to the Uſe of the Lord *Cholcheſter* for Life, Remainder as to Part, to the ſaid *Charlot* his intended Wife for her Jointure, Remainder to her firſt and other Sons in Tail Male, Remainder to the Heirs of the Body of the Lord *Cholcheſter*, Remainder to the Plaintiff in Tail, Remainder to *John* and *Richard Savage* the Plaintiff's Brothers in Fee; provided that, if the ſaid Lord *Colcheſter*, and all the Iſſue Male, he ſhould get on the Lady *Charlot* his Wife, ſhould die, and for want of ſuch Iſſue Male the Premiſſes ſhould after the Death of the ſaid Lord *Colcheſter*, or his ſaid Lady, deſcend and come to the Uſe of any other Heir Male of the ſaid Lord *Colcheſter* by any other Wife, or to any other Perſon or Perſons by Virtue of any other the Uſes or Appointments therein mentioned, and if there ſhould be any Daughter or Daughters of the ſaid Lord *Colcheſter* on the Body of the ſaid Lady *Charlot*, living at his Death, that then the Truſtees and their Heirs, ſhould ſtand ſeiſed of the Premiſſes, except the Lands limited to the Lady *Charlot* in Jointure during her Life, and after her Death, then of them alſo, to the Intent that ſuch Daughter and Daughters of the Body of the ſaid Lady, by the ſaid Lord *Colcheſter* begotten, ſhould receive the Sum of ten Thouſand Pounds out of the Rents, Revenues and Profits thereof, to the Uſe of ſuch Daugh-

ter if but one, if more than one, to be equally diſtributed among them, together with 100*l. per Ann.* apiece for their Maintenance from the Death of their Father, 'till the Payment of the *ten Thouſand Pounds*, which is therein mentioned to be intended for their Portion or Portions reſpectively.

The Lord *Colcheſter* died about 1679, leaving Iſſue by the Lady *Charlot* his Wife, one Daughter only, (to wit) *Charlotta Katharina*, who lived to the Age of ſeventeen Years, and then made a Will, and thereof the Earl of *Derby* Executor, and thereby taking Notice that ſhe was intitled to this *ten Thouſand Pounds*, deviſed ſeveral Legacies, in the whole, amounting to about *fifteen Thouſand Pounds.*

The Plaintiff's Bill was, that this *ten Thouſand Pounds* being intended for a Marriage-Portion, and to be raiſed out of the Rents and Profits of the Lands, and the Daughter dying unmarried, and under Age, the Portion ought to extinguiſh in the Land, for the Benefit of the Plaintiff, who was the Heir at Law, and next Remainder-Man by Virtue of the Settlement; and that the ſaid *Charlotta Katharina* had no Power to diſpoſe thereof by Will; and the Will that was ſet up was unduly gained, and when ſhe was not *Compos mentis*; and that the Plaintiff therefore was intitled to an Account of the Profits of the Truſt-Eſtate.

The Defendant inſiſted that the Will was duly made and publiſhed, and fairly obtained, and that ſhe was of a ſufficient Age to make a Will; the Will was ſince proved in the Spiritual Court, ſo that Matter was not now to be drawn under Conteſt in this Court. And as to the *ten Thouſand Pounds*; although it was intended as a Portion, yet no Time being limited for the Payment thereof, it veſted in the ſaid Daughter, and is become due and payable to her Executor, and that the Profits of the

Truſt-Eſtate from the Time of the Death of the Lord *Colcheſter*, ought to be applied for that Purpoſe.

The ſingle Queſtion was, whether this *ten thouſand Pounds* being declared to be for a Portion, and to be raiſed out of the Rents and Profits of Land, ſhould go over to the Executor of the Daughter, who died under Age and unmarried, or extinguiſh in the Land for the Benefit of the Heir. And that it ſhould extinguiſh for the Benefit of the Heir, and not to go over to the Executor; the Caſe of *Pawlet* and *Pawlet*, firſt decreed by the Lord Keeper *North*, and afterwards confirmed upon an Appeal to the *Lords*, where the Difference was taken between a Legacy out of a perſonal Eſtate, and a Portion to be raiſed out of the Rents and Profits of Land, was ſtrongly inſiſted upon, as a Caſe in point, ſaving that in that Caſe the Portion was made payable at Marriage, or *Twenty-one* Years of Age, and in this Caſe no Time is appointed, but the ſame to be raiſed by Rents and Profits.

1 Part, Caſe 201, 320. *Poſt.* Caſe 88.

Lord *Chancellor* ſaid, he knew not what Reaſons the Lords might go upon in the Caſe of *Pawlet* and *Pawlet*, but he was to make Decrees according to his Conſcience, and every Caſe was to ſtand upon its own Bottom. That he thought the Caſe before him was very plain and without Difficulty; it was clearly an Intereſt veſted in the Daughter, and ought therefore to go over to her Executor, and the rather, becauſe here was no Time appointed for Payment; and obſerved that the Plaintiff's Counſel in ſpeaking to the Caſe, admitted that if ſhe had lived to *Twenty-one* Years of Age, that ſhe might have diſpoſed of this Portion, or it ſhould have gone to her Executor; but that dying before *Twenty-one*, it ſhould determine and extinguiſh, was a Fancy, for which there was no Ground nor Foundation. If they had been to have drawn the Deed, they might have worded it ſo; but the Deed being ſilent in that Matter, it may as well go over to the Executor, upon the Daughter's dying at *Seventeen* or *Eighteen*, *&c.* as if ſhe had been *Twenty-one*, at the Time of her

Death: And therefore decreed that the Truſtees ſhould apply the Profits received, and to be received towards diſcharge of the Portion, until the ſame was raiſed, and pay the ſame to the Defendant, the Earl of *Derby*, as being executor to the ſaid Daughter, to be adminiſtred according to Law.

Edwin verſus *Thomas.*

Caſe 68. *In Court, Lord Chancellor. Veneris, 20 die Julii.*

A new Trial granted on an Iſſue directed; the Matter in Queſtion being of Value, and concerning all the Copyholds in the Manor.

THE Iſſue directed to be tried touching the Cuſtom of the Manor of------- *quod vid.* 1 *Part, Caſe* 475. was found againſt the Plaintiff *Edwin*, and the Cauſe being now ſet down upon the Equity reſerved, it being alledged to be a Cauſe of Value, and concerning all the Copyholds in the Manor, a new Trial was directed upon Payment of Coſts.

Stiddolph verſus *Leigh.*

Caſe 69. *Lord Chancellor. Eodem die.*

An Executor makes a voluntary Aſſignment of Part of the Aſſets. Whether the Creditor can follow the Aſſets thus aſſigned.

Thomas Boſtock, Executor of one *Thomas Boſtock*, having voluntarily aſſigned to the Defendant *Leigh*, as a Reward for Service done, the Stock in the *Eaſt-India Company* which was the Teſtator's, pending a Bill in this Court by *Stiddolph*, who was a Creditor to *Thomas Boſtock* the Teſtator.

The Queſtion was, whether this Aſſignment ſhould ſtand good as againſt the Creditor *Stiddolph*, there not being (without this Stock ſhould be brought into the Account,) ſufficient Aſſets of the firſt Teſtator.

The Court looked upon this Suit as a Contrivance to defraud the Defendant *Leigh*, and the *Chancellor* declared, he, of his own perſonal Knowledge, was ſatisfied that *Leigh* well deſerved this Reward, and that he had that Power

Power and Influence on *Thomas Boſtock*, that he would have given him his whole Eſtate, if *Leigh* had deſired it: And foraſmuch therefore as *Tho. Boſtock*, the Executor, had ſubjected his own real Eſtate, to the Payment of his Debts, the Court directed an Account thereof to be taken, and declared that if there were ſufficient Aſſets of his Eſtate, without bringing this Stock into the Account, the Aſſignment to the Defendant *Leigh* ſhould ſtand good; though for the Plaintiff it was ſtrongly inſiſted on, that he being a Creditor to the firſt Teſtator might follow the Eſtate in whoſe Hands ſoever it came, and ought not to be put to the Charge and Trouble of controverting the Account directed *mes ō alloc'*.

Caſe 70. *Lord Chancellor, Lunæ, 23 Julii.*

Will of perſonal Eſtate only, and prov'd in the Spiritual Court, tho' gained by Fraud, yet not to be controverted in Equity. But if a Party claiming under ſuch Will comes for any Aid in Equity, he ſhall not have it.

Nelſon verſus *Oldfield.*

THE Caſe was, that Mrs. *Bettinſon* travelling into *France* for her Health, and there falling into Company with the Plaintiff, who having the young Lady under Power, prevailed ſo far upon her, as to make Mrs. *Bettinſon* ſolemnly ſwear to make her Will, and thereof to make the Plaintiff her Executor, and to give her all her Eſtate; and when ſhe had made a Will accordingly, the Plaintiff made her again ſwear, that ſhe would not revoke or alter that, or make any other Will.

It appeared by the Depoſition of Mr. *Wade*, (for whom ſhe had ſent to adviſe withal) and by others examined in the Cauſe, that ſhe in her Sickneſs often complained, how ſhe had been circumvented by the Plaintiff, and of the Injury ſhe had done to her Mother and Siſters by giving her Eſtate from them, that ſhe heartily repented that ſhe was thus fettered, but durſt not, for Fear of Damnation, revoke or alter her Will, and ſhortly afterwards died much troubled and afflicted that ſhe could not alter her Will.

The Will was proved in the Spiritual Court, and the ſame concerning only a perſonal Eſtate; the Validity thereof could not be controverted in this Court, and the Bill was brought by the Plaintiff as Executrix to Mrs. *Bettinſon*, to have the Performance and Execution of the Truſt of a Term for Years, for the raiſing of Monies appointed to be paid unto Mrs. *Bettinſon* and her Siſters. *Ant.* Caſe 5.

Per Cur. The Caſe where a Man, to ſave his Life, is made by a Thief to ſwear that he will give the Thief a Sum of Money, though by the Caſuiſts ſuch Oath is held to be binding, yet it ſhall never be carried on in a Court of Equity; and did not ſee, how this could be allowed and eſteemed as a Will, when it was not ambulatory, as a Will ought to be, nor made freely and voluntarily, but gained by Reſtraint and Force on the Party; but being proved in the Spiritual Court, that Matter was not to be controverted here, the Plaintiff might make the beſt ſhe could of her Probate there, but ſhould have no Aid from this Court, and therefore diſmiſſed the Bill.

Caſe 71.
Lord Chancellor.
Martis, 24 die Julii.
Vol. 1. Caſe 449.

An Heir, together with other young Heirs, is drawn in to buy Goods at extravagant Prices, and to accept of Aſſignments of bad Securities, joined in giving Securities for the Monies agreed on. He ſhall be relieved on paying the Value of the Goods which came to his Hand, and ſhall not be anſwerable for his Companions.

Lamplugh verſus *Smith.*

THE Plaintiff, with other young Heirs, being drawn in by *Sticeſtead*, with the Concurrence of Sir *William Smith*, to buy Stockings and ſuch like Goods, at an extravagant Price, and to accept of Aſſignments of bad Securities, and jointly to enter into Securities for the Payment of the Monies agreed on. The Bill was to be relieved againſt thoſe Securities.

The Counſel for the Defendant pretended not to maintain the Bargain, but would have it, that the Plaintiff

who had entered into a joint Security with others, ſhould be liable to anſwer the true and real Value of all the Goods that were ſold, and Securities that were aſſigned to him and his Companions.

But the Court declared, that the Plaintiff ſhould be liable to ſo much only, as came to his own Hands, and ſhould not be anſwerable for his Companions, and therefore referred it to a Maſter, to examine and certify, what of the Goods came to the Plaintiff's own Hands, and what was the real Value thereof, and on Payment thereof, and on re-aſſigning ſuch of the Securities as the Plaintiff had, his Security was decreed to be delivered up.

Caſe 72.
Lord Chancellor.
Eodem die.
1 Vol. Caſe 449.

Whitley verſus *Price.*

THE Plaintiff was likewiſe a young Heir, and had been drawn in to buy Ribbons and braided Wares, *&c.* at an extravagant Price, *&c.* and the Caſe being the ſame in Effect with the Caſe immediately preceding, had the like Rule.

Caſe 73.
Lord Chancellor.
Mercurii, 25 *Julii*, (88)
Ant. Caſe 37.

Walker verſus *Penrie.*

THIS Cauſe came again this Day to be re-heard, and the ſingle Queſtion inſiſted on was, whether a Mortgagee having received Intereſt upon an old Mortgage after the Rate of 8 *l. per Cent.* after ſuch Time as the Intereſt was reduced to 6 *l. per Cent.* by the Statute, ſhould allow or diſcount the 2 *l. per Cent.* toward Satisfaction of the Principal.

The Court confirmed the former Decree, to wit, that the 8 *l. per Cent.* paid to the Mortgagee for Intereſt ſhould be by him retained as ſuch, and that the 2 *l. per Cent.*

ſhould not be diſcounted, nor applied towards Satisfaction of the Principal.

Cole verſus *Gray & ux'.*

Caſe 74. *Lord Chancellor. Eodem die.*

A Wife not to be examined as a Witneſs againſt her Husband.

THE Plaintiffs were Infants, and the Children of the Defendant's Wife by a former Husband; their Bill was to have an Account of the Eſtate left them by their Father, and of the Produce and Proceed thereof. Upon the Hearing it was refer'd to an Account, and the Defendant and his Wife were to be examined on Interrogaries for Diſcovery of the Eſtate; the Wife being at Variance with her Husband, and living apart from him, upon her Examination, made the Eſtate of the Plaintiffs (who were her Children,) as great as ſhe could, and thereupon to fix the Charge upon the Husband. The Plaintiffs upon a Petition to the *Maſter* of the *Rolls*, obtained an Order to examine the Wife as a Witneſs againſt the Husband *de bene Eſſe*, and the Maſter upon her Evidence had charged the Husband with ſeveral Sums of Money, as Intereſt, and Produce of the Infants Eſtate: But now upon Exceptions to the Report, the Lord *Chancellor* diſallowed her Evidence, and declared the Wife could not be a Witneſs againſt her Husband.

Creſſey verſus *Carrington.*

Caſe 75. *Lord Chancellor. Eodem die.*

When the Court on hearing refers the Matter in Controverſy to Gentlemen in the Country, no Exceptions lie to their Certificate.

UPON the Hearing of this Cauſe, it was referred by Order of Court to Gentlemen in the Country to certify the Matters controverted, who made a Certificate accordingly; the Defendant conceiving himſelf agreived by the Certificate, put in Exceptions thereunto. But the Court rejected the Exceptions, and would not enter into the Debate thereof, but ordered the Certificate to be binding,

binding, though it was inſiſted that the Certificate was not, in the Form of the Court, more binding or peremptory than a Maſter's Report, to which the Parties have a Right to except, if they find themſelves agrieved. *Mes non allocat', tamen Quære.*

Caſe 76. *Lord Chancellor, Sabbati, 20 die Julii.*

Thwaytes verſus *Dye*

A. ſettles Lands to the Uſe of himſelf for Life, Remainder to ſuch of his 4 Children, and in ſuch Shares and Proportions, as *A.* by any Writing ſhall appoint. *A.* may not only limit the Land to any of his Children, but may charge the Land with any Rent-charge or Sums of Money for any of his Children.

J. S. having four Children, (to wit) two Sons and two Daughters, ſettles his Eſtate on Truſtees to the Uſe of himſelf for Life, Remainder to his Wife for Life, and after their Deceaſe, to the Uſe and Uſes of ſuch Child and Children, and in ſuch Shares and Proportions, as he ſhould appoint by any Writing to be by him ſigned in the Preſence of two Witneſſes, and in Default of ſuch Appointment, to his eldeſt Son in Tail. He by his Will by him ſigned, and atteſted by ſeveral Witneſſes, deviſes a Rent-charge out of thoſe Lands to his youngeſt Son for Life, and to the firſt and other Sons of his Body ſucceſſively in Tail, and further Wills that in Caſe his ſaid Son die without Iſſue Male, ſo as the Eſtate ſhould come to his eldeſt Son, then he to pay *five Hundred Pounds* apiece to his Daughters: The Son dies without Iſſue, the Bill was brought by the Daughters to have their *five Hundred Pounds* apiece according to the Will.

The Defendant who was the eldeſt Son by Way of Plea, ſet forth the Deed of Settlement and Power, *prout*, and inſiſted that the Power was not well purſued nor executed by the Will, (to wit) that the Teſtator might have diſtributed the Land amongſt his younger Children, in what Proportions he thought fit, but had not Power to grant or deviſe a Rent-charge, or Sums of Money, as he had taken upon him by his Will to do.

But the Court diſallowed the Plea, and ordered the Defendant to anſwer the Bill.

Turner verſus *Richmond.*

Caſe 77. *Lord Chancellor.*

A ſubſequent Incumbrancer, though *pendente lite*, may buy in a prior Mortgage, which tho' ſatisfied, ſhall not be taken from him, until all the Money due to him on the ſubſequent Incumbrance be paid him.

THERE was a firſt Mortgage which was paid off, but no Reconveyance, and next a Judgment-Creditor, then the Plaintiff a ſecond Mortgagee, whoſe Bill was againſt the firſt Mortgagee, the Mortgagor, and Judgment-Creditor to have a Reconveyance from the firſt Mortgagee, he being ſatisfied; which he acknowledged by Anſwer, and (pending the Suit,) did afterwards aſſign the Mortgage to the Judgment-Creditor, which the Lord *Chancellor* did declare to be juſtifiable, both in him and the Judgment-Creditor, and unleſs the Plaintiff would redeem and pay off the Debt by Judgment, diſmiſt the Bill, and the like Caſe was between *Lee* and *Warner*, about a Year ſince, and ſo adjudged.

DE
Term. S. Michaelis,
1688.
In Curia Cancellariæ.

Caſe 78. *Lord Chancellor, Veneris, 12 Octob'. Ant.* Caſe 46.

Cholmely verſus *Cholmely.*

THIS Cauſe came before the Court again upon a Caſe ſtated by the Maſter, by which it appeared, that Mr. *Cholmely*'s whole Eſtate was ſcarce ſufficient to perform the Marriage-Articles.

The Court again declared, that if there was any perſonal Eſtate for the Cuſtom to work upon, there was no doubt, but that the Cuſtom of the City of *London* ſhould be prefer'd to that of the *Province of York*, and that notwithſtanding the Cuſtom of the Province of *York*, the Heir ſhould come in for a Share of the perſonal Eſtate; for the Cuſtom of the Province of *York* is only local, and circumſcribed to a certain Place; but that of *London* follows the Perſon, though never ſo remote from the City; and cited the Caſe of *Harwood*, who married *Offley*'s Heir.

The Cuſtom of the Province of *York* is only local; but that of *London* follows the Perſon, though never ſo remote from the City.

And

And as to the Jewels and *Paraphernalia*, the Court declared, that the Widow was by the Articles to have nothing of the perſonal Eſtate, but what her Husband ſhould deviſe to her by his Will; and that this not only bars her of any cuſtomary Part, but even of any *Paraphernalia*, and from Jewels given to her by her Husband in his Life-time: But as to the Clauſe in the Articles, that Sir *Hugh*, by conſent of *Nathaniel*, may alter, change, or make void, *&c.* the Court took further Time to conſider, whether that ſhould extend to the Settlement on Sir *Hugh*'s Part only, or unto *Nathaniel*'s alſo.

A Feme by her Marriage-Articles agrees to have no Part of the Husband's perſonal Eſtate, but what he ſhould give her by Will. This bars her of her Paraphernalia.

Hunt verſus *Hunt.*

Caſe 79. *Lord Chancellor, Martii, 16 Octob'.*

THE Queſtion was between the Heir and Executor of a Freeman of *London*, which of them had the Right to a *Caroome*, (to wit) the Benefit of a Licenſe from the *Lord Mayor and Aldermen* for the keeping of a Cart; the Defendant pleaded that the Licenſe was a Term for Years and Perſonalty, and therefore belonged to him as Executor.

Per Cur. Over-rule the Plea, and Anſwer the Bill.

Gibſon verſus *Whitacre.*

Caſe 80. *Lord Chancellor. Eodem die.*

THE Defendant being the *foreign Oppoſer* in the *Exchequer*, pleaded the Privilege of that Court, and that he ought not to be ſued or impleaded elſewhere, but the Court over-ruled the Plea, becauſe it was not put in upon Oath.

Plea of Privilege ought to be upon Oath.

Caſe 81.
In Court, Maſter of the Rolls, Lunæ, 29 Octob'.

Manlove verſus *Ball* and *Bruton.*

A. for 550 *l.* makes an abſolute Aſſignment of a Leaſe for 3 Lives to *B.* and B. by a Writing under his Hand agrees that if *A.* pays *B.* 600 *l.* at the End of the Year, *B.* will reconvey; *B.* dies leaving *C.* his Son and Heir, 2 of the Lives die, and the Leaſe is twice renewed; yet Redemption decreed on Payment of the 550 *l.* and the 2 Fines with Intereſt, and during the Life of *B.* the Profits to be ſet againſt the Intereſt of the 550 *l.*

ONE *Bruton* having a Church-Leaſe for three Lives in 1664, convey'd and aſſigned it to the Defendant *Ball*'s Father, in Conſideration of 550 *l.* the Conveyance was abſolute. But Mr. *Ball* the Purchaſer by writing under his Hand and Seal agreed, that if Mr. *Bruton* the Vendor ſhould, at the End of one Year then next enſuiug, pay him *ſix Hundred* Pounds, that he would reconvey: The *ſix Hundred* Pounds was not paid, and two of the Lives died, and the Leaſe was twice renewed by the Defendant *Ball* and his Father; and now it was near twenty Years after the firſt Conveyance. *Bruton* being a Priſoner in the *Fleet*, and indebted to the *Warden* for Chamber-Rent, aſſigns to him all his Right, Title, Intereſt, Equity and Power of Redemption; and thereupon the Plaintiff *Manlove*, the *Warden* of the *Fleet*, brought his Bill to redeem and to have an Account of the Rents and Profits of the Premiſſes.

The Defendant inſiſted on his Title, and that the Eſtate was not now redeemable, nor ought he to account for the Profits.

But notwithſtanding the *Maſter* of the *Rolls* decreed a Redemption, on Payment of the 550 *l.* which was the firſt Conſideration-Money, as alſo the Fines paid upon the Renewal of the Leaſes, which Monies were to be paid with Intereſt, and the Account of Profits was to commence but from the Death of *Peter Ball*, who was the Purchaſer, and Father of the Defendant, and until that Time the Profits were to be ſet againſt the Intereſt of the 550 *l.* Conſideration-Money.

Harriſon verſus *Cage.*

Caſe 82. *Eodem die, in Court, Maſter of the Rolls.*

Truſtee appointed for raiſing and paying a Portion of 500 *l.* to *A.* Truſtee enters and gives Judgment to *A.* for paying the 500 *l.* to *A.* when raiſed; the is diſcharged.

THE Caſe was, that Land was charged by Deed for the raiſing of 500 *l.* for the Portion of the Siſter, the Truſtee entered and raiſed the whole 500 *l.* and more, out of the Rents and Profits of the Lands, and afterwards proves inſolvent; but before he became inſolvent, the Siſter had taken a Judgment from the Truſtee, that he ſhould pay the 500 *l.* when raiſed.

Truſtee raiſes the 500 *l.* and more, and becomes inſolvent; whether the Land

It was inſiſted that the Land was diſcharged, and for that Purpoſe cited the Caſe of *Goddard* and *Bowman*, where the Portion being once raiſed, the Land was held to be diſcharged.

But on the other Side it was ſaid, that in the Caſe of *Goddard* and *Bowman*, and in the other Caſes cited, by the expreſs Proviſion of the Deed the Term was to ceaſe, when the Money was raiſed: But in the principal Caſe, the Term is ſtill continuing, and the Profits are ſtill to be received and taken by the ſame Truſtees, for the Benefit of the Heir; and as to the Judgment, *that* was only in effect, that the Truſtee ſhould perform the Truſt, being to pay the 500 *l.* when raiſed unto the Siſter, and to account for and pay the Reſidue of the Profits to the Heir.

But the Words in the Deed of Truſt being that the Truſtee ſhould raiſe, and pay, 500 *l.* to the Siſter, and though it was raiſed, it was not paid, therefore the *Maſter* of the *Rolls* doubted and took Time to conſider thereof, and in the mean Time would look into the Deed of Truſt and Defeazance of the Judgment.

Caſe 83. *Mercurii*, 31 *Octob'*, *in Court, Maſter of the Rolls.*

Deviſe of 1300 *l.* to Teſtator's Grandaughter, provided if ſhe died before 21, and without Iſſue, then the Legacy ſhould go over to *A.* Decreed the Deviſe over in caſe of the Grandaughter's Dying without Iſſue, under 21, is good, the Contingency being to happen before the Legatee attains 21.

Pawlet & ux' verſus *Dogget.*

J. S. by his Will deviſes 1300 *l.* to the Plaintiff's now Wife, (his Grandchild) provided that if ſhe died before Twenty-one without Iſſue, then he will'd that the ſaid Legacy of 1300 *l.* ſhould go over to *A.* and provided if ſhe married before Twenty-one without the Conſent of her Grandmother, that the ſaid Legacy of 1300 *l.* ſhould go over to the now Plaintiff *Pawlet*. The now Plaintiff married the Legatee his now Wife before ſhe was Twenty-one Years of Age, and that not only without the Conſent, but to the expreſs Diſlike of the Grandmother, who endeavoured all ſhe could to prevent their Intermarriage; and the now Plaintiffs apprehending that the Forfeiture, if any, was to the Plaintiff. The Husband and Wife exhibited their Bill (the Wife not being yet Twenty-one Years of Age, and not having any Iſſue) againſt the Executor, and againſt *A.* to whom the Legacy was limited over, in caſe the Wife died before Twenty-one without Iſſue, to have the ſaid Legacy of 1300 *l.* paid unto them.

The Defendants by Anſwer confeſſed the Will, and pray'd the Judgment of the Court, whether the Plaintiff, his Wife not being as yet Twenty-one Years of Age, and not having Iſſue, was intitled to the Legacy, the ſame, in caſe the Plaintiff's Wife died before Twenty-one without Iſſue, being by the Will limited to the Defendant *A.*

For the Plaintiff it was inſiſted that the Limitation over to *A.* in caſe the Plaintiff's Wife died without Iſſue before her Age of Twenty-one Years, was an implicite Eſtate-tail in her, which gave her the intire Property in this

this pecuniary Legacy, and that therefore the Limitation over was void; and alſo that the Proviſo of Forfeiture upon her marrying without the Conſent of her Grandmother, though plac'd in the Will after the other Proviſo, yet was firſt in Point of Conſtauction; for *that* Forfeiture in Point of Time might, (as in this Caſe it did,) happen before her Age of Twenty-one Years, and until ſhe attained that Age, the other Contingency could not happen, and therefore if there was any Forfeiture, it was to the Plaintiff.

For the Defendants it was inſiſted that both the Proviſo's were conſiſtent, and therefore both were to have their Force, ſo that if ſhe died without Iſſue before Twenty-one, *A.* was to have the Benefit of the firſt Proviſo, and yet that would not wholly enervate the ſecond Proviſo; for although ſhe ſhould ſurvive the Age of Twenty-one, and have Iſſue, yet if ſhe married without the Conſent of her Grandmother, the Legacy was forfeited by the ſecond Proviſo to the now Plaintiff's Husband; and therefore the Plaintiffs came too ſoon for a Decree, the Plaintiff's Wife not having Iſſue, nor being Twenty-one Years of Age, and that a Contrivance of this Nature to defeat the Will ought not to be countenanced.

Per Cur. Both Proviſo's are conſiſtent, and ought to be ſo conſtrued; and as to the firſt Limitation over, that if ſhe die without Iſſue before Twenty-one Years of Age, that *A.* ſhould have the 1300 *l.* it was a good Limitation over, for though it was upon dying without Iſſue, yet the Time for the happening of that Contingency was circumſcribed and limited to fall before her Age of Twenty-one Years; and therefore decreed that if the Legatee, the now Wife of the Plaintiff, ſhould die before Twenty-one Years of Age without Iſſue, that *A.* ſhould have the Benefit of the firſt Proviſo; and declared that the Proviſo of Forfeiture by Marriage without Conſent of the Grandmother, could not take Place, nor have any Force,

Force, 'until the Plaintiff's Wife had attained her Age of Twenty-one Years.

Caſe 84. *In Court, Lord Chancellor, Sabbati* 24 *Novemb'.*

Searle verſus *Lane.*

An Adminiſtrator pays a Debt by Bond before a Debt due by a Decree, having no Notice of the Decree; this is a Miſ-payment, and the Adminiſtrator muſt pay the Debt by the Decree.

ON a Rehearing the Caſe was, that the Defendant being Adminiſtrator to one *Hayman*, as being Principal Creditor, had paid Debts by Bond and ſimple Contract, without Notice of a Decree, which the Plaintiff had obtained againſt the Inteſtate for a Sum of Money.

Upon the former Hearing, the Court had decreed the Defendant, though he had fully adminiſtred the Aſſets, to pay the Plaintiff the Debt decreed to him againſt the Inteſtate.

Now upon the Rehearing it was by Mr. *Pollexfen*, and Mr. *Keck* of Counſel with the Plaintiff, inſiſted, amongſt other Things, that it was the Rigour of the Law, and *ſummum jus*, that charged an Adminiſtrator for Payment of Debts of an inferior Nature, when he had not Notice of any Debts of a higher Degree, and *that* Rigour of the Law, ought not to be carried on againſt Conſcience, in a Court of Equity; and what Ground was there for a Court of Conſcience to charge a Defendant, that had been in no Default? He had no Notice of this Decree, and could not divine, that there was any Debt owing of a ſuperior Nature, and if he ſhould have refuſed to pay a Debt of an inferior Nature, expecting to hear of what he knew nothing of, he muſt have paid Coſts for ſuch Delay, and Neglect of Payment of the Monies, out of his own Purſe; and beſides the Defendant here was Adminiſtrator only, as being principal Creditor, and ſo ſtands not in the ſame Degree of Privity as an Executor, or other Relation might have been, and therefore not

having Notice of the Plaintiff's Demand, it would be againſt Conſcience to charge him with it, and contrary to regular Equity, and the Meaſures which the Court takes in other Caſes; as in the Caſe of a Truſt, though the Court will ſupport it, and compel an Execution of it, as far as may be done with Equity, yet the Court would never charge a Purchaſer, that had no Notice of the Truſt; and it was conſiderable alſo in this Caſe, that the Decree, which the Plaintiff obtained againſt *Hayman* the Inteſtate was by Default, when *Hayman* abſconded, and was gone, ſo that the Plaintiff's Debt was never conteſted, and was Matter of Account, and there was little, if any Thing, really due.

Per Cur. There is nothing more frequent in Practice or better known, than that a Decree of this Court is equal to a Judgment at Law; and the Filing of a Bill in this Court, equal to the Filing of an Original at Law, to prevent the Alienation of Aſſets. And therefore the Defendant has done as much Wrong in this Caſe by Payment of a Bond-Debt, when there was a Decree, as if he had done it, where there had been a Judgment at Law: And the having Notice or not Notice, is not material in either Caſe; and were Notice to be an Ingredient in the Caſe, it were leſs requiſite in the Caſe of a Decree, than in the Caſe of a Judgment; for that there are but few Courts of Equity, but very many Courts of Law; and yet a Judgment even in a Court of *Pie-powders*, will be binding in ſuch Caſe, ſo that it is much eaſier to diſcover whether there be a Decree againſt a Man, than whether there be a Judgment againſt him, or not. But if the Decree in this Caſe paſſed by Default, there may be ſome Colour to have the Reality of the Plaintiff's Debt examined, as at Law in an Eſcape againſt the Marſhal, the Gaoler ſhall have the Priſoner's Equity, and may give in Evidence the Poverty of the Priſoner, *&c.* and therefore the Court inclined to let the Adminiſtrator in this Caſe conteſt the Reality of the Plaintiff's Debt; but it appearing that the

A Debt by Decree in Equity, is equal to a Judgment.

original Suit between the Defendant and the Inteſtate had long depended, and had been conteſted, and did not paſs by Default; the Court therefore confirmed the former Decree.

Caſe 85.
In Court, Lord Chancellor, Eodem die.

Comer verſus *Hollingſhead & al'.*

The Maſter allows a Security, which proves defective. Maſter is not liable; otherwiſe, if the Maſter had by Bribery or Corruption allowed the Security.

BY a Decree of this Court, Money was to be put out at Intereſt, on a Security to be allowed by Sir *Samuel Clerke*, one of the Maſters of this Court, for the Benefit of Husband and Wife and their Iſſue; the Maſter allowed of a Security, that afterwards proved defective, and the Plaintiff by his Bill amongſt other Things, endeavoured to charge the Executor of Sir *Samuel Clerke*, to make good the Defect of this Security.

Per Cur. The Maſters would have uneaſy Places of it, if they were to anſwer for all defective Securities, nor is that ſo much their Buſineſs; but it concerns each Side to have Counſel to peruſe the Title, (as it appeared there were in this Caſe,) the Maſter principally is to take care that the Limitations and Uſes are drawn according to the Direction of the Court, and unleſs there had been either Bribery or Corruption, it was not reaſonable to charge a *Maſter* for allowing a defective Security, and therefore diſmiſſed the Bill as againſt him.

Caſe 86.
Maſter of the Rolls, in Court, 20 Novemb'.

Powell verſus *Morgan.*

By a Marriage-Settlement, Lands are limited to the Husband and Wife, with Remainder

BY a Marriage-Settlement, Lands were ſettled on the Husband and Wife, and their firſt and other Sons in Tail Male, and for want of ſuch Iſſue a Term for

to their firſt, &c. Son, and then a Term for Years to ſecure Portions for Daughters. The Husband dies leaving only a Daughter, upon whom the Inheritance deſcends. The Daughter dies an Infant and indebted, and diſpoſes of her Portion by her Will. Equity relieves againſt the Merger of the Portion. *Poſt.* Caſe 193.

for Years was limited to the Daughters for raiſing Portions, Remainder to the Iſſue Male of the Father, Remainder to his right Heirs. The Husband dies leaving Iſſue one Daughter only, who is alſo Heir at Law to the Father; ſhe dies an Infant, and indebted, but made a Will, and deviſed away the Portion charged on the Eſtate, and gave the Plaintiff, who was her Heir at Law, a Legacy, upon Condition that he did not diſturb or interrupt her Will. The Plaintiff afterwards conteſted the Validity of the Will, and inſiſted that the Term was merged in the Daughter, as being alſo Heir at Law.

The Court upon the Hearing relieved againſt the Merger, and decreed the Portion to go according to the Will of the Daughter. The Point now before the Court, was whether the Plaintiff had forfeited the Legacy, by conteſting the Validity of the Will.

Legacy given on Condition the Legatee ſhall not diſpute the Will.

Legatee commences a Suit, whereby he conteſts the Validity of the Will, yet no Forfeiture of the Legacy, if there was *Probabilis cauſa litigandi.*

Per Cur. There was *Probabilis cauſa litigandi*, and it was not a Forfeiture of the Legacy.

Roper verſus *Roper.*

Caſe 87. *Eodem die, Maſter of the Rolls.*

THE Court had decreed, that either the Defendant ſhould pay a Sum of Money by a Time therein, for that Purpoſe, limited, or in Default thereof, that the Plaintiff ſhould hold and enjoy the Lands charged therewith; a Writ of Execution of the Decree had iſſued, and an Attachment for Non-performance thereof, and now upon the Return of the Attachment, the Defendant moved he might appear and be examined; And it was inſiſted he ought to be admitted thereto, for that he might ſhew that the Proceſs iſſued not regularly, or that he had paid the Money, or had a Releaſe, and that it was againſt common Senſe that a Man ſhould be attached for a ſup-

Upon a Decree for Payment of Money after a Writ of Execution and an Attachment returned; Court refuſes to give Leave to Defendant to be examined, unleſs he gives Security to abide the Decree.

a ſuppoſed Contempt, and yet ſhould not be heard to make his Defence. And the Caſe of the Duke of *Norfolk* was cited, where there was a Writ of Execution, then an Attachment, and then an Injunction for Poſſeſſion; and afterwards, when a Writ of Aſſiſtance was moved for, upon Debate he was admitted to appear and be examined.

But in this Caſe the *Maſter* of the *Rolls* ordered the Proceſs to go on, and would not admit the Defendant to appear and be examined, unleſs he would give Security to perform the Decree.

Caſe 88. *Sarah Smith*, Widow, Plaintiff.

At the Rolls. Maſter of the Rolls, Dec. 1. *John Smith*, Defendant. Et econtra.

One deviſes 1000*l.* to his Daughter for her Portion, charg'd upon a real Eſtate, and payable at 21. Daughter dies before 21. The Portion ſhall ſink in the Land; otherwiſe, if no Time had been limited for the Payment of the Portion, for in that Caſe it goes to the Executors of the Daughter. No Difference where the Portion is ſecured by a Settlement or a Will, if ſecured out of a real Eſtate, and the Party dies befo re it is payable. In either Caſe it ſinks in the Lands.

THE Caſe was, that one *Thomas Smith* being ſeiſed in Fee of ſeveral Lands in the County of *Suffolk*, and having Iſſue one Son and one Daughter, the 10*th* of *July* 1683, made his Will in Writing, and thereby amongſt other Things deviſed Part to his Wife, the now Plaintiff, for her Jointure, and deviſed the Rents and Profits of all other his Lands, until his Son attained his Age of Twenty-one Years, unto his Executors therein named, to be applied in ſuch Manner as he had directed, and gave the Whole to his Son, when he ſhould attain his Age of Twenty-one Years, charged with ſo much of his Daughter's Portion, as ſhould not before that Time be raiſed by his Executors and Truſtees, and gave unto his Daughter the Sum of *one Thouſand* Pounds to be paid by his Executor at her Age of *Twenty-one* or Marriage, which ſhould firſt happen, willing the ſame to be raiſed out of the Rents and Profits of the ſaid Lands; and

and further willed, that in caſe his Son ſhould die before he accompliſhed his Age of *Twenty-one* Years, or without Heirs of his Body lawfully begotten, then from and after the Death of his ſaid Son, he gave all and every the ſaid Meſſuages, Lands, Tenements and Hereditaments to *John Smith* his Uncle, the now Defendant, and his Heirs, he making up his Daughter's Portion *two Thouſand* Pounds; and of his ſaid Will made the Defendant *Smith*, and one *Dey*, who renounced, Executors, and ſhortly afterwards died, leaving his ſaid Son and Daughter both Infants, and the eldeſt not *three* Years old. The Daughter died ſoon after the Death of the ſaid Teſtator an Infant unmarried, and ſhortly afterwards the Son alſo died without Iſſue; the Plaintiff the Widow took Letters of Adminiſtration to her Daughter, and the principal Queſtion inſiſted on was whether the Plaintiff as being Adminiſtratrix to her Daughter, was intitled to all, or any Part of the ſaid Portion.

For the Defendant it was inſiſted, that the Plaintiff was not intitled to all or any Part of this Portion; but that the Daughter dying before *Twenty-one* and unmarried, it extinguiſhed in the Land for the Benefit of the Heir, and that it was ſo reſolved in the Caſe of my Lord *Pawlet* and the Lady *Pawlet*, which was afterwards confirmed upon an Appeal to the Houſe of *Lords*; and likewiſe in the Caſe of *Brown* and *Bond*, and the Difference there taken was between a perſonal Legacy, (which was admitted ſhould in ſuch Caſe, being *debitum in præſenti*, and payable *in futuro*, go to the Executor or Adminiſtrator,) and a Sum of Money appointed to be raiſed out of the Rents and Profits of Lands, and deſigned for a particular Purpoſe, (to wit) a Portion for a Daughter, for which there was no Occaſion, ſhe dying unmarried, and under Age. That if any Part of the *two Thouſand* Pounds was payable, it could be only the firſt *Thouſand* Pounds, for the Portion was not to be made up *two Thouſand* Pounds, but upon the Son's dying without Iſſue,

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which never happened in the Life-time of the Daughter, ſhe dying before her Brother; and ſo that laſt *Thouſand* Pounds never veſted in her, and conſequently could not go to her Adminiſtratrix; and if the Plaintiff was intitled as Adminiſtrator, yet ſhe could not have it until ſuch Time as the Daughter would have attained her Age of *Twenty-one* Years, as was reſolved in the Caſe of *Earl* and *Earl*, even in a perſonal Legacy: But though theſe other Matters were mentioned for Argument's Sake, the Defendant's Counſel relied upon it, that the Plaintiff was not intitled to any Part of the *two Thouſand* Pounds.

For the Plaintiff it was inſiſted, that the Legacy was an Intereſt veſted, and attached in the Daughter, and ought to go to the Plaintiff her Adminiſtrator; and that it had been ſo lately reſolved by the Lord *Chancellor*, in the Caſe of the Earl of *Rivers* and Earl of *Derby*, which was long ſince the Caſe of *Pawlet* and *Pawlet*, and that the principal Caſe was not exactly the ſame with the Caſe laſt mentioned; for there was a Settlement as well as a Will, but here the Caſe depended purely upon a Will: But ſeemed to admit that the Plaintiff could not have the Portion, until ſuch Time as the Daughter would have attained her Age of *Twenty-one* Years.

Ant. Caſe 67.

Per Cur. I take it that the Plaintiff is not intitled to any Part of the *two Thouſand* Pounds, and that the Judgment in my Lord *Pawlet*'s Caſe governs this Caſe. It appears that the Intention of the Teſtator was that it ſhould be for a Portion, and it is expreſly called a Portion in the Will; and then it is no perſonal Legacy, but Money to be raiſed out of the Rents and Profits of Land, and the Caſe of the Earl of *Rivers* and the Earl of *Derby*, differs from this; in that Caſe there was no Time limited for the Payment of the Money: But here the Payment is expreſly to be at 21 Years or Marriage, and therefore diſmiſſed the

the Bill, as to ſo much as concerned the *two Thouſand* Pounds Portion.

Memorandum, That on *Thurſday* Morning being the 28*th* Day of *Feb.* 1688-9, Mr. Serjeant *Maynard*, Mr. *Keck*, and Mr. Serjeant *Rawlinſon*, were ſent for to *Whitehall*, and Mr. *Keck*, and Mr. Serjeant *Rawlinſon* attending accordingly, Mr. Serjeant *Maynard* not being able to attend, by reaſon of his Indiſpoſition by the Gout, Mr. *Keck*, and Mr. Serjeant *Rawlinſon* kiſſed the King's Hand, and the *Great Seal of England* was delivered to Mr. *Keck*, in the Preſence of the Marquiſs of *Hallifax*, the Earl of *Shrewsbury*, Lord *Mordant*, and ſeveral other Noblemen then preſent.

DE

Termino Paſchæ,

1689.

In CURIA CANCELLARIÆ.

Caſe 89. *In Court*, Sir *John Maynard*, Sir *Anthony Keck*, Sir *Will. Rawlinſon*, *die Jovis*, 18 *Aprilis*.

Vandenanker verſus *Desbrough*.

Deviſe of 800 *l.* to be inveſted in Land for the Benefit of the Wife of *J. S.* for her Life, and afterwards to her Children, and the Intereſt of the Money to go as the Profits of the Lands, if bought. *J. S.* becomes a Bankrupt; the Intereſt of the 800 *l.* ſhall not be liable to the Bankruptcy. This not being a Truſt created by the Bankrupt, and being intended for the Maintenance of the Wife, and given by her Relation. *Poſt.* Ca. 176.

THE Defendant's Teſtator by his Will deviſed 800 *l.* to be paid within *ſix* Months after his Death to one Mr. *Deſine*, in Truſt that he ſhould lay it out and inveſt it in a Purchaſe for the Benefit of the Wife of *J. S.* and to ſettle it ſo, as after the Death of the Wife, it might come to her Children, and the Intereſt in the mean Time to be paid to ſuch Perſon as ought to receive the Profits. *J. S.* becomes a Bankrupt, and the Plaintiff as Aſſignee under the Statute of Bankrupts, would have the Intereſt of this Money decreed to him, during the joint Lives of Baron and Feme.

Per Cur. This not being any Truſt created by the Husband, nor any Thing carved out of his Eſtate, but given by a Relation of the Wife's, and intended for her Support and Maintenance; it is not liable to the Creditors of the Husband; and the Plaintiff hath no Title thereunto

unto as Aſſignees of the Commiſſion of Bankrupt, and therefore decreed it ſhould be paid to *Deſine* the Truſtee, to be laid out in Land and ſettled according to the Will. The Caſe of *Drake* and the *Mayor* of *Exeter* was cited, where there was a Leaſe for *Twenty-one* Years, with a Covenant for Renewal of the Leaſe at the End of the Term, the Leſſee became a Bankrupt. Adjudged the Aſſignee under the Statute ſhould have no Benefit of that Covenant, and it was for ſome Time doubted whether the Aſſignee under a Statute of Bankruptcy, ſhould have the Benefit of an Equity of Redemption, the Clauſe in the Statute being that the Aſſignee may perform Conditions not broken, and Conditions performable.

A Leaſe for 21 Years to *A.* with a Covenant for Renewal at the End of the Term. The Leſſee becomes Bankrupt, the Aſſignee under the Commiſſion is not intitled to the Benefit of Renewal.

Tooke verſus *Haſtings.*

Caſe 90.
Eodem die.

NOTE, *Per Cur.* If a Man covenants, or enters into Bond to ſettle Land of ſuch a Value or an Annuity out of Land of ſuch a Value, and has no Land at the Time of the Settlement; but afterwards purchaſes Land, *that* Land ſhall be liable, and that againſt a voluntary Deviſee, as the Defendant *Haſtings* in this Caſe was, and accordingly decreed, that *Backwell* as well as *Churchill* ſhould be liable to the Plaintiff's Annuity, notwithſtanding that *Backwell* was deviſed to *Haſtings*, the Teſtator having entered into Bond to charge Lands of the Value of *one Hundred* Pounds *per Ann.* with the Payment of this Annuity, and not having any other Lands of that Value: But withal declared, that *Haſtings* the Deviſee of *Backwell*, ſhould be reimburſed out of *Churchill*, *that* not being deviſed, but left to deſcend on the Daughters.

One covenants to ſettle Land of ſuch a Value, or an Annuity out of Land, and he afterwards purchaſes Land (having no Land before) and deviſes it, and dies, this Land ſhall be liable to the Covenant.

Caſe 91.
Sabbati, 20 *Aprilis*, Sir *John Maynard*, Sir *Will. Rawlinſon.*

Clerke verſus *Leatherland.*

Freeman of *London* poſſeſſed of a Term for Years, aſſigns it in Truſt for himſelf for Life, then for his Wife for Life, and afterwards for his Son by a firſt Venter: Whether this ſhall ſtand againſt the Cuſtom of *London*.

A Citizen of *London* being poſſeſſed of a Term for Years, aſſigns the ſame in Truſt for himſelf for Life, then to his Wife for Life, paying *twenty Pounds per Ann.* to his Son by his firſt Wife, Remainder to his ſaid Son during the Reſidue of the Term. And it was now made a Doubt, whether this Aſſignment was good, within the Cuſtom of the City of *London*, ſo as to bind the other Children, and it was refer'd to the *Recorder* of the City of *London* to certify.

2 Lev. 130.

Caſe 92.
Lunæ, 22 *die Aprilis.*

Towers verſus *Moor.*

Deviſe of Land not to be explained by Parol Proof touching the Declaration of the Teſtator, or the Inſtructions given by Teſtator for the making his Will.

THE Plaintiff endeavouring to have the Will explained by Depoſitions of Witneſſes touching what the Teſtator declared, and the Inſtructions he gave for the drawing of his Will.

Parol Proof ſhall be admitted to explain a Surrender of Copyhold Land, to ſhew a Miſtake either in the Land or Uſes.

Per. Cur. Deviſes concerning Land muſt be in Writing, and we cannot go againſt the Act of Parliament. But in Caſe of a Surrender made by a Steward of a Copyhold, if there be any Miſtake there, that is only Matter of Fact, and the Courts at Law will in that Caſe admit an Averment, that there was a Miſtake, *&c.* either as to the Lands or Uſes.

Leaſe by Deed of Land rendring Rent, The Leaſe is loſt, Leſſor may declare on a Demiſe in general, without ſaying it was by Deed; otherwiſe of a Thing that lies in grant.

Where a Demiſe is made of Lands rendring Rent, though the Leaſe be loſt or miſlaid, the Landlord may ſue

ſue for the Rent, and declare on a Demiſe in general, without ſaying it was a Leaſe in Writing; and ſo you may in all Caſes, where it is not a Thing that lies in Grant, *&c.*

Where two are jointly bound, and one dies, you muſt ſue the Survivor, and cannot maintain an Action againſt the Executor or Adminiſtrator of him that is dead; but if bound jointly and ſeverally, it is otherwiſe. Where two imploy Workmen to build and one dies, *Quære*, whether this be ſuch a joint Contract, that you cannot ſue the Executor or Adminiſtrator of him that is dead.

Where two are bound jointly, and one dies, the Survivor only is liable: but otherwiſe if bound jointly and ſeverally.

Roll verſus *Roll.*

Caſe 93. *Mercuri*, 24 *Aprilis.*

LANDS ſettled on Truſtees for raiſing of Maintenances and Portions for Daughters, the Bill was to have a Sale, and that the Heir might join.

Land ſettled on Truſtees for raiſing Portions for Daughters, on Bill for a Sale, Court will decree the Heir to join in the Sale, though he has no legal Intereſt.

It was objected, that the Eſtate in Fee being in the Truſtees, and the Heir having no Eſtate in him, he ought not to be compelled to join in a Sale.

Decreed that the Heir ſhould join, and the Caſe of *Pit* and *Pelham* in *Parliament* cited, *cum multis aliis.* Ch. Ca. 176.

Pring verſus *Pring.*

Caſe 94. *Die Mercurii*, 24 *Aprilis.*

THE Caſe was, a Man makes his Will, and *A. B.* and *C.* Executors thereof in Truſt, and for a Remembrance and over and above their Coſts and Charges, he gives them *twenty* Shillings apiece.

One by Will makes *A. B.* and *C.* Executors in Truſt, and gives them a Legacy of 20 *s.* apiece for a Remembrance above their Charges. Parol Proof admitted, that this was in Truſt for the Wife only. *Poſt.* Caſe 144.

The Bill was brought by the Wife, alledging that her Husband deſigned, and often declared, that ſhe ſhould have the Benefit of his perſonal Eſtate, but ſhe being aged and infirm, he made the Defendants Executors in Truſt for her; one of the Defendants denied the Truſt, the other two confeſſed it, and it was inſiſted by the Defendant who was Adverſary, that though the Will did call them Executors in Truſt, and though it might be collected from the Will that the Executors were not to have more than *twenty* Shillings apiece, yet it is not ſaid for whom the Truſt is, and therefore it ſhall be taken to be a Truſt for all, who might come in and have Benefit by the Statute for Diſtribution of Inteſtate's Eſtates, and not for the Wife alone.

Per Cur. The Will declaring, that the Executors are only in Truſt, and not declaring for whom, the Perſon may be averred, and two of the Executors having by their Anſwer confeſſed the Truſt, and it being likewiſe fully proved, that it was the Intent of the Teſtator, and that he declared it a Truſt for his Wife, decreed the Truſt for the Plaintiff, with Coſts againſt the Adverſary Defendant.

Caſe 95.
Sabbati, 27 *Aprilis.*

Submiſſion to an Award, ſo as the Arbitrators make their Award at or upon the 27*th* of *March* then next, and if the Arbitrators make no Award, then if the Umpire make his Umpirage on the ſame Day. Umpire cannot make his Umpirage on 27 *March*, the Arbitrators having all that Day to make their Award.

THE Submiſſion to an Award being that the Arbitrators ſhould at or upon the 27*th* Day of *March* then next make their Award, and in Default of their making their Award, that the Umpire, ſhould at or upon the ſaid 27*th* Day of *March* make his Umpirage. The Arbitrators diſagreeing, the Umpire made his Award on the ſaid Day.

Per

Per Cur. This Award is void in Law, for the Arbitrators had all the 27*th* Day allowed them to make their Award, ſo that there was no Time for the Umpire to make an Award; and in this Caſe the Servant of the Umpire having, before the Award made, given out, that he was ſure his Maſter would award *one Hundred* and *fifty* Pounds; and the Arbitrators differing; one yielding to give *Thirty-five* Pounds, and the other inſiſting for *Ninety-five* Pounds; and the Umpire coming and giving *one Hundred* and *fifty* Pounds, the Court looked upon this as an Evidence of Fraud and Corruption, and therefore decreed the Arbitration-Bond to be delivered up.

Lancy verſus *Fairechild.*

Caſe 96. *Mer'*, 8 *die Maii* 1689.

MOney by Marriage-Articles being to be laid out in Land, and ſettled on the Husband and Wife, and their Iſſue, Remainder to the Heirs of the Wife, the Wife dying in the Life-time of the Husband.

By Marriage-Articles Money is to be laid out in Land, and ſettled on Husband and Wife, and their Iſſue, Remainder to the Heirs of the Wife; Husband and Wife die. The Heir, and not the Executor, or Adminiſtrator of the Wife, ſhall have the Money.

Decreed for the Heir of the Wife againſt the Adminiſtrator, the Money being bound by the Articles according to the Reſolution in the Caſe of *Kettleby* and *Atwood.* Vol. 1. Caſe 293.

Note, It was reſolved in the Caſe of *Eeles* and *Lambert,* that a contingent Security ſhould not ſtand in the Way of a Debt by ſimple Contract, as to the Adminiſtration of Aſſets by the Executors. *Vide Corbet's* Caſe as touching a Truſt upon Land for raiſing of Portions, and when the Land ſhall be diſcharged having born its own Burthen, and as to Conſtruction when raiſed and paid.

A contingent Security ſhall not ſtand in the Way of Debt by ſimple Contract.

DE
Term. S. Trinitatis,
1689.
In CURIA CANCELLARIÆ.

Caſe 97. *Lords Commiſſioners, Martis,* 30 *Aprilis.*

Bond in common Form for Payment of Money; but proved that the Agreement was that the Obligor ſhould marry ſuch a Man, or ſhould pay the Money due on the Bond: Court relieved againſt the Bond; Marriage ought to be free and without Compulſion. *Poſt.* Caſe 197.

Key verſus *Bradſhaw.*

THE Bill was to be relieved againſt a Bond drawn in common Form, for Payment of Money; but proved to be made on an Agreement, that the Plaintiff ſhould either marry her Servant, or ſhould by Way of Forfeiture pay him the Sum of Money mentioned in the Condition of the Bond.

The *Court decreed* this Bond on Debate to be delivered up to be cancelled, it being contrary to the Nature and Deſign of Marriage, which ought to proceed from a free Choice, and not from any Compulſion.

Delabeere

Delabeere verſus *Beddingfield.*

Caſe 98.
Eodem die.

An Agreement betwixt Lord and Tenants to ſtint a Common, more favoured than an Agreement to incloſe a Common; and one or two humourſome Tenants oppoſing, ſhall not hinder the Agreement for ſtinting a Common, from being decreed to be performed.

THERE having in 1670 an Agreement been made between the Lord and Tenants, touching the Stint of the Common, the Bill was to have that Agreement decreed.

There is a great Difference between an Agreement for an Encloſure, and an Agreement only for a Stint of Common. It is a proper and natural Equity to have a Stint decreed; and though one or two humourſome Tenants ſtand out and will not agree, yet the Court will decree it; but it is otherwiſe as to an Encloſure. And in the principal Caſe the Court decreed the Agreement to be performed.

Webber verſus *Smith.*

Caſe 99.
Lords Commiſſioners, Merc', 15 Maii, 1689.

One makes a Leaſe, and the Leſſee covenants to pay the Rent and to repair. The Leſſee makes too under Leſſees. The Rent is behind, and the Premiſſes out of Repair; the original Leaſe is avoided for Non-payment of Rent. Some of the under Leſſees bring a Bill to be relieved againſt the Forfeiture. Equity will not apportion the Rent; but the Plaintiffs muſt pay the whole Rent in Arrear; and repair all the Houſes, and may compel the other under Leſſees to contribute.

A Leſſee for Years by Leaſe from my Lord *Salisbury* under a certain Rent, and covenants to repair, makes a *Hundred* under Leaſes: The Premiſſes not being repaired, nor the Rent paid, a Re-entry is made, and the original Leaſe avoided. *Six* of the under Leſſees were Plaintiffs againſt the head Landlord and firſt Leſſee *& al'.*

Per Cur. Cannot make any Decree to apportion the head Landlord's Rents, nor relieve the Plaintiffs, but on their Payment of the whole Rent in Arrear, and repairing

ing all the Premiſſes. But having ſo done, they might compel the Reſt of the Under-tenants to contribute.

Caſe 100. *Lords Commiſſioners, Sabbati, 1 Junii.*

Hills verſus *Brewer.*

One by Will gives ſeveral Legacies and makes Executors, who are not related to him, Teſtator afterwards has ſeveral Children and increaſes his Eſtate, and dies; Equity will not make the Executors Truſtees for the Children, as to the Surplus of the Eſtate.

A Man poſſeſſed of a conſiderable perſonal Eſtate, deviſed ſome particular Legacies, and made two Perſons no Way related to him Executors, he happened to live many Years afterwards, and encreaſed his Eſtate, and had many Children, and died without new publiſhing, revoking or altering his Will, whereby the Executors became in Law intitled to the Surplus of his Eſtate, which was of conſiderable Value.

One appoints his Truſtees to convey his Lands to his Daughter after his Death. He afterwards has a Son; the Conveyance ſhall be made to the Son.

The Bill was to make the Executors Truſtees for the Children as to the Surplus of the Eſtate, and the Plaintiff's Counſel cited the Caſe in *Fitzherbet*, Tit. *Subpœna*, where a Man appoints his Truſtees after his Death to convey to his Daughter, and afterwards happened to have a Son, the Opinion there is, that the Conveyance ſhould be made to the Son; *ſed non allocat'*, and the Court diſmiſſed the Bill.

Caſe 101. *Lords Commiſſioners, Sabbati, 1 Junii.*

Counteſs of *Portland* verſus *Prodgers.*

A Wife (whoſe Husband is by Act of Parliament baniſhed for his Life,) may make a Will and in every Thing act as a Feme Sole, and as if the Husband was dead.

THE Queſtion was touching the Validity of the Will of the Lady *Sandys*, her Husband being by Act of Parliament baniſhed during Life, ſhe made a Will and bequeathed ſeveral Legacies, and whether ſhe might ſo do or not was the Queſtion.

2

In

In arguing of the Caſe were cited the Caſe of the *King* and the Lady *Matraverſe*, *Ed.* 3. *fol.* *Weyland*'s Caſe, Lady *Belknap*'s Caſe, and the Lady *Shannon*'s Caſe. 1 Inſt. 132. b. 133. a.

The Court were of Opinion that the Husband being by Act of Parliament baniſhed for Life, the Wife might in all Things act as a Feme Sole, and as if her Husband was dead, and that the Neceſſity of the Caſe required ſhe ſhould have ſuch Power, and therefore decreed for the Plaintiff.

Attorney General verſus *Hughes.*

Caſe 102. *Die Sabbati*, 8 *Junii.*

THIS Cauſe concerning the Deviſe to Mr. *Baxter* of Monies to be by him diſtributed amongſt poor ejected Non-conformiſt Miniſters, coming to be reheard, the former Decree was diſcharged, and the Information diſmiſſed, and the Money then remaining in Court ordered to be paid out to Mr. *Baxter*, to be by him diſtributed according to the Will. 1 Vol. Caſe 243.

Garbland verſus *Mayot.*

Caſe 103. *Eodem die.*

ONE *Mayot* having by his Will deviſed *twenty* Pounds apiece, to all the Children of her Siſter *B.* the Queſtion was, whether a Child born after the making of the Will, and before the Death of the Teſtator, ſhould take by Virtue of that Deviſe.

A. deviſes 20 *l.* apiece to all the Children of his Siſter *B.* a Child born after the making the Will, and before the Death of the Teſtator, ſhall take.

The Court decreed it to extend to the after-born Child, the Word (*Children*) comprehending all; and cited the Caſe in *Dyer*, where if a Man has made three Feoffees, Dyer 177. a. 1 Inſt. 112. b.

and deviſes that his Feoffees ſhall ſell his Lands, there though one dies the Survivors may ſell; but if the Deviſe had been to *three* Perſons by Name, and one had died, the Survivors could not ſell.

Caſe 104. *Martis*, 18 *die Junii.*

Hawker verſus *Buckland.*

6 Co. 16 a. 3 Cr. 378. Deviſe of Land to *A.* paying out of the Rents or out of the Land a certain Sum, is no Fee-ſimple, otherwiſe if the Deviſe was paying a certain Sum generally, without ſaying out of the Land. Deviſe of Lands to Executors for Payment of Debts, no Aſſets at Law 'till Sale; but when ſold the Money is legal Aſſets.

THE Queſtion was, whether a Fee-ſimple paſſed by the Words of the Will, and the Caſe of *Collier* was cited, where it was adjudged, that a Deviſe paying out of Profits, or out of Lands in general, is no Fee-ſimple; but a Deviſe paying a certain Sum at the End of *two* Years, or at any other certain Time, and the Profits not being ſufficient, will paſs a Fee-ſimple, and ſo a Deviſe of Lands paying a certain Sum without more, is a Fee-ſimple; and in this Caſe the Deviſe being to the Executor for Payment of Debts, the Value of the Land cannot be given in Evidence, as Aſſets at Law, in the Executors Hands; but when the Land is ſold, the Money in the Executor's Hands will be Aſſets at Law.

Caſe 105. *Lords Commiſſioners.*

Unton Crooke and *Gratious* his Wife, } Plaintiffs.

Thomas Brookeing & al', Defendants.

Deviſe of 1500 *l.* to *A.* and *B.* for ſuch Uſes as Teſtator had declared to them, and by them not to be diſcloſed. *A.* in the Life of *B.* writes a Letter diſcloſing the Truſt, this is a good Declaration of the Truſt.

Roger Mallock, the Plaintiff *Grace*'s Grandfather, the 15*th* of *Feb.* 1651, made his Will, and thereby gave to his Brothers *Simon* and *Joſeph Snow*, *one Thouſand five Hundred* Pounds, for ſuch Uſes as he had declared to them, and by them not to be diſcloſed, charging them that

that they would perform the ſame, as they would anſwer it at God's Tribunal. The ſaid *Snowes* accordingly received the ſaid *one Thouſand five Hundred* Pounds, and afterwards *Joſeph Snow* died, *Simon* ſurvived and received the *one Thouſand five Hundred* Pounds. *Simon*, in the Life-time of his Brother *Joſeph*, wrote a Letter to him dated 17 *Nov.* (52.) therein mentioning the Truſt to be, that they out of the Profits ſhould allow *Anne Crew* a Maintenance for her Livelyhood during her Husband's Life-time, and if he died before her, ſhe to have the Money at her own Diſpoſe; but if the Husband ſurvived, the Money to go amongſt her Siſter's Children as ſhe ſhould adviſe.

Anne died in 1684, in the Life-time of her Husband, having only one Siſter *Grace*, the Mother of the Plaintiff *Gratious*, without giving any Advice or Directions touching the Diſpoſing of the *one Thouſand and five Hundred* Pounds; *Grace* had only one Child living at the Death of *Anne Crew*, but had five other Children living at the Death of the Teſtator *Mallock*, who all died inteſtate, and their Adminiſtrators were before the Court, as alſo ſuch of the Children of the dead Children as were living. The Queſtions that were made were,

Deviſe of 1500 *l.* in Truſt for the Children of *A. A.* has only one Child and ſeveral Grandchildren, the Child only ſhall take,

and not the Grandchildren; but if there had been no Child of *A.* living, the Grandchildren might have taken.

1. Whether the Plaintiff *Gratious*, being the only Child living of *Grace Leach* at *Anne Crew*'s Death, ſhould have the whole *one Thouſand five Hundred* Pounds.

2. If not, whether the Adminiſtrators of the dead Children ſhould come in for an equal Share with the Plaintiff.

3. Or whether the Grandchildren, to wit, the Children of the dead Children ſhould come in for an equal Share with the Plaintiff.

The

The Cauſe was firſt heard before the Lord *Chancellor Jefferies* in *May* 88, who declared the Truſt was well declared by *Simon Snow*'s Letter, and decreed that the *one Thouſand five Hundred* Pounds ſhould be divided between the Plaintiff *Gratious*, the only Child living at the Death of *Anne Crew*, and the Childrens Children as were living at the Death of *Anne Crew*, from which Decree the Plaintiffs appealed.

And now upon a Rehearing decreed by the *Lords Commiſſioners*, that the Plaintiff *Gratious*, being the only Child living at the Death of *Anne Crew*, ſhould have the whole *one Thouſand five Hundred* Pounds; and ſaid, the only Difficulty in this Caſe was the Word (Children) and here was but one Child, and yet notwithſtanding decreed it for the Plaintiff, and were clear of Opinion where the Deviſe is to Children, the Grandchildren cannot come in to take with the Children; and turn it into *Latin*, and Children and Grandchildren are expreſt by diſtinct and different Words: But all admitted that if there had been no Child, the Grandchildren might have taken by the Deviſe to his Children.

5

DE

Term. S. Michaelis,

1689.

In Curia Cancellariæ.

Caſe 106.
Die Jovis, 17 *Octob'*, *in Court*, *Lord* Maynard, *Lord* Keck, *Lord* Rawlinſon.

Hide verſus *Cooth.*

Submiſſion to a Reference, and the Award to be confirmed by Decree of Court without Appeal or Exception; yet Exceptions to the Award admitted.

SUbmiſſion by Order of Court to a Reference, and the Award to be made to be confirmed by the Decree of the Court, without Appeal or Exception; yet upon Debate, Exceptions to the Award admitted.

If a Submiſſion to an Award be made conditional, *ita quod* the Award be made *de præmiſſis*, if the Award be not made of the Whole it is void. But if the Submiſſion be not conditional, then the Award, though made but of Part of the Premiſſes, ſubmitted is good *pro tanto*.

Note, *Per* Lord *Maynard*, if the Submiſſion to an Award be conditional, *ita quod* an Award be made *de & ſuper Præmiſſis*, *&c.* there if the Award be not *of* the Whole it is void: But if the Submiſſion be not conditional as aforeſaid, then, though the Award be but of Part of the Matters referred, it is good for ſo much as it ſettles, tho' it leaves other Things at large.

Eliz. Webb Widow, Plaintiff.

Caſe 107. *In Court, 25 die Octob'.*

John Webb & al', econtra, Defendants.

Though a Freeman of *London* leaves *London*, and reſides in the Country, yet on his Death, his perſonal Eſtate ſhall be ſubject to the Cuſtom.

John Webb the Plaintiff's late Husband being a Freeman of *London*, but having left the Town and living many Years at *Wincheſter*, in *June* 1684, made his Will, and thereby deviſed a Chattle-Leaſe to the Defendant *Nicholas Webb*, and all his Books to the Defendant *John Webb*, and as to all the Reſt of his Eſtate, conſiſting in Money, Goods, Mortgages, and Credits, he gave the yearly Profits and Benefit thereof to the Plaintiff his Wife for Life, by quarterly Payments; and directed his Executors out of his Eſtate to pay the Plaintiff's funeral Charges after her Death, and deviſed to her the Uſe of his Plate, *&c.* during her Life, and directed that his Stock and Eſtate in the Hands of the Defendant *Cranmer*, ſhould remain there during his Wife's Life, and the Product paid to her for her Maintenance, and deviſed ſeveral particular Legacies, and after the Death of his Wife deviſed over the Reſidue and Surplus of his Eſtate to the Children of his Brother *Nicholas Webb*, *&c.* and made *John Webb*, *William Cranmer & al'*, Executors.

Freeman of *London* having a Wife and no Child, deviſes a Leaſe for Years to *A.* and his Books to *B.* and the Uſe of the reſt of his perſonal Eſtate to his Wife for Life, Decreed the Wife ſhall have the Moiety of the Leaſe, and of the Books, though ſpecifically deviſed to other Perſons. Alſo the Wife ſhall have a Moiety of the whole perſonal Eſtate by the Cuſtom, and the Uſe of the other Moiety by the Will.

This Cauſe was firſt heard at the *Rolls* on the 8*th* of *Feb.* 1681. and decreed that the Plaintiff by the Cuſtom of the City of *London*, ſhould have her Widow's Chamber, and one entire Moiety of the perſonal Eſtate, after Debts paid, as well of the Leaſe, and Books, which were ſpecifically deviſed away, as of all the Reſt and Reſidue of his Eſtate by the Cuſtom of the City of *London*, and ſhould have the Benefit of the other Moiety for Life by the Will, and decreed an account

 accord-

accordingly; which Decree was confirmed upon an Appeal to the *Lords Commiſſioners.* And the Caſe of *North* and *North* was cited, where an Inhabitant in the Province of *York* made a Will, and deviſed a Moiety of his Eſtate to his Wife; adjudged that the Widow ſhould have *three Fourths:* And *Ryder*'s Caſe, where the Widow had a Moiety by the Cuſtom, and a Legacy of *one Thouſand five Hundred* Pounds out of the other Moiety.

But on the contrary were cited the Caſes of *Bloyes* and *Bloyes*, where *four Thouſand* Pounds was provided as Portions for Daughters by Marriage-Settlement, and there being two Daughters, the Father by his Will gives them *two Thouſand* Pounds apiece for their Portions, without taking Notice of the Settlement; and decreed that the *two Thouſand* Pounds by the Will, ſhould be in Satisfaction of the Portion by the Settlement; and *Chadwick* and *Love*'s Caſe.

A Man by Marriage-Settlement provides 4000 *l.* for Daughters, and having 2 Daughters, by Will gives them 2000 *l.* apiece for their Portions, without taking Notice of the Settlement;

the 2000 *l.* apiece by the Will, ſhall be in Satisfaction of the Portion by the Settlement.

In the principal Caſe a Queſtion was made, whether the ſpecifick Legatees of the Leaſe, and of the Books, being as to a Moiety evicted by the Widow by the Cuſtom of the City of *London*, ſhould have Satisfaction made for what was ſo evicted as againſt the Legatees at large, or againſt the Legatee of the Surplus.

A Freeman of *London* deviſes a Leaſe for Years to *J. S.* who is evicted of a Moiety thereof by the Widow claiming it by the Cuſtom.

The ſpecifick Legatee ſhall have no Satisfaction for this Eviction out of the Surplus: The Teſtator having Power to diſpoſe only of a Moiety.

Adjudged they ſhould not; for though a ſpecifick Legatee has a Preference, and is not to abate in Proportion with other Legatees, where the Eſtate falls ſhort, as to the Payment of Debts; yet in any Caſe he cannot have more than what the Teſtator deviſed to him. Now the Teſtator's Widow, by the Cuſtom of the City of *London*, there being no Child, was intitled to a Moiety, ſo the Teſtator could deviſe but one Moiety, nothing more paſſed by his Will, and therefore the ſpecifick Legatees muſt be contented with a Moiety.

Specifick Legatee is not to abate in Proportion with other Legatees, where there is a Deficiency to pay the Debts.

Johnſon

Caſe 108. *Die Sabbati, 26 Octob', In Court, Lords Commiſſioners.*

Johnſon verſus *Milkſopp.*

One mortgages his Lands, and by Will appoints them to be ſold for Payment of the Mortgage-Money, and afterwards in another Part of his Will deviſes a Moiety of the mortgaged Premiſſes to *A. B.* The perſonal Eſtate ſhall be applied to pay off the Mortgage in Favour of the Deviſee.

THE Defendant's Teſtator having made a Mortgage of his Lands for a conſiderable Sum of Money, by his Will appoints them to be ſold for Payment of the Mortgage-Money, and afterwards in another Part of his Will, deviſes the Lands ſo in Mortgage, as to one Moiety thereof to the Plaintiff, *&c.* and makes the Defendant Executor, and deviſes his perſonal Eſtate to his Executor for Payment of his Debts.

The ſingle Queſtion was, whether the perſonal Eſtate ſhould be applied to diſcharge the Mortgage, for the Benefit of the Legatee.

The Cauſe was firſt heard at the *Rolls*, and decreed there, that the perſonal Eſtate, ſhould be ſo applied for the Advantage of the Legatee; and the Decree upon an Appeal was confirmed by the Lords Commiſſioners.

Caſe 109. *Lunæ, 28 Octob', in Court, Lords Commiſſioners,*

Natchbolt verſus *Porter.*

Leſſee for Years having agreed with the Leſſor to ſurrender his Leaſe, delivers up the Key, which the Leſſor accepts, but afterwards refuſes to take the Surrender of the Leaſe. Decreed the Leſſee ſhould be diſcharged of the Rent.

SIR *George Moore* being Leſſee of a Houſe in *Hatton Garden*, under 60 *l. per Ann.* Rent, aſſigns his Term to *Porter*, who covenants in the Aſſignment, to indempnify him againſt the Covenants in the original Leaſe. Sir *Charles Rich* buys the reverſionary Intereſt of the Leſſor, and treated with *Porter* to ſurrender the Term, and an Aſſignment was made betwixt them, for that Purpoſe, and the Key delivered and accepted: But afterwards Sir *Charles Rich* altering his Purpoſe of living

in the Houſe, it ſtood empty for ſome Years, and then he brings a Bill againſt Sir *George Moore*, who was the original Leſſee, to compel him to admit an Attornment, in order to his bringing his Action at Law for the Rent: But *Porter* was made no Party to that Suit; however Sir *George Moore* in his Defence did inſiſt upon the Agreement made between Sir *Charles Rich* and *Porter* for the Surrendring of the Leaſe, and that the Key was delivered purſuant thereunto, *&c.* But he was over-ruled in that Matter at the Hearing, and decreed he ſhould go to a Trial at Law, and admit an Attornment. But Sir *George Moore*'s Attorney pleading that Sir *George* never attorned, upon the Plaintiff's coming back into this Court, it was decreed Sir *George* ſhould pay the Rent Arrear, amounting to about *four Hundred* Pounds.

Leſſee for Years decreed to admit an Attornment.

Now *Knatchbolt*, the Executor of Sir *George Moore*, brought his Bill to be reimburſed againſt *Porter*, according to his Covenant on the Aſſignment, upon which he could not recover at Law, by reaſon that Sir *Charles Rich* could not at Law have recovered of Sir *George Moore* for want of an Attornment.

Mr. *Porter* by Anſwer, ſet forth the Agreement made with Sir *Charles Rich* for Surrendring his Term, and Delivery of the Key, and his Acceptance of it, *&c.* and therefore inſiſted he ought not to be charged, and the Court now upon the Hearing of the Cauſe was of Opinion that the Agreement was well proved, and a good Diſcharge, and *Porter* not liable to anſwer any Rent after that Time: And though the Court had decreed otherwiſe againſt Sir *George Moore*, yet *Porter* being no Party to that Suit, was not bound thereby, and therefore without any Regard to that Decree, they were to judge upon the Caſe then before them, and ſaw no Reaſon to relieve the Plaintiff.

None but Parties to the Suit are bound by it

The Court upon this Caſe obſerved the Inconveniency of going on with a Cauſe without proper Parties, and it was Sir *George Moore*'s Fault that he did not plead, he had aſſigned to *Porter*, and inſiſt that he ought to have been made a Party to the Suit.

Caſe 110. *Die Martis, 29 Octobris, in Court, Lords Commiſſioners.*

Fiſh verſus *Geſſon.*

Whether a Releaſe by Will of all Debts, Accounts and Demands, will transfer the Property of Goods, which Defendant then had in his Hands, belonging to Plaintiff's Teſtator.

THE Defendant *Geſſon*, being Servant to one Mr. *Mayo*, he by his Will deviſes to the Defendant a Legacy of 50 *l.* and 20 *l. per Ann.* for his Life, and by his Will mentions to acquit, exonerate, and diſcharge the Defendant of all Debts, Accounts, Reckonings and Demands whatſoever.

Now the Defendant at the Time of the Will and Death of the Teſtator, having in his Hands a Trunk of the Teſtator's, in which were Medals, Jewels, *&c.* alledged to be of great Value; the Queſtion was, whether the Releaſe or Diſcharge ſhould be taken to go as to that Trunk, *&c.*

For the Plaintiff it was inſiſted that the Property, as to that Trunk, *&c.* continued always in the Teſtator, and a Releaſe even of all Demands, would not tranſlate the Property; and cited *Southcott*'s Caſe. *Co.* 4. *Rep.* If the Bailor keep the Key and the Goods are loſt, the Bailee is not anſwerable: And beſides the Word (*Demand*) being in this Caſe, in Company with the Words, *Debts, Accounts, and Reckonings*, it ought to be reſtrained and taken in that Senſe, and to Matters only of that Sort and Kind, and not to be taken ſo as to paſs the Property of Goods, that were not in Controverſy nor queſtioned.

But

But for the Defendant it was inſiſted, the Plaintiff's Bill contained no Equity; that the Plaintiff was a Stranger to the Teſtator, no way related in Blood, and yet had by the Deviſe *three Hundred* Pounds *per Ann.* of Lands of Inheritance, and was Executor; and if he had any Right to the Trunk and Goods in Demand, it was a Matter purely triable at Law.

Pur Cur. Foraſmuch as the Defendant has not by Anſwer, diſcovered any of the Particulars in the Trunk, but pray'd the Judgment of the Court, whether he ſhould be obliged ſo to do. The Court therefore ordered that the Defendant ſhould admit Part of the Goods come to his Hands, in order to enable the Plaintiff to bring his Action at Law, and if the Plaintiff recovered there, he might reſort back, and the Court would order the Defendant to be examined on Interrogatories for Diſcovery of Particulars, *&c.*

Caſe 111. *Die Lunæ, 11 Novembris, in Court, Lords Commiſſioners.*

Jenkins verſus *Powell.*

THE Teſtator deviſed to his Daughter *two Hundred* Pounds; *Item, I alſo give her my Houſhold-Goods, if ſhe ſhall not be married in my Life-time*; and afterwards in his Life-time, he gives with his Daughter in Marriage above *two Hundred* Pounds and dies, having not revoked nor altered his Will.

A. by Will gives his Daughter 200 *l.* and afterwards gives with his Daughter in Marriage above 200 *l.* The Teſtator paying his Daughter her Portion in his Life-time, is a Satisfaction of the Legacy.

Per Cur. The Legacy is extinguiſhed by the Portion after given: And *Elken Head*'s Caſe was cited, where Payment in the Teſtator's Life-time was adjudged a Satisfaction of the like Sum deviſed.

Birkhead

Caſe 112.
Die Jovis, 2 Novembris, in Court, Lords Commiſſioners.

Birkhead verſus *Coward.*

One deviſes to his Siſter 350 *l.* on Condition that at or before her Death, ſhe gives 200 *l.* thereof to her Children. The Siſter dies in the Life of the Teſtator. The whole Legacy is lapſed. *Poſt.* Caſe 192.

THE Teſtator deviſed to his Siſter *Dixon three Hundred and fifty* Pounds, upon Condition, that ſhe at or before her Death, ſhall give to her Children *two Hundred* Pounds thereof; his Siſter *Dixon* dies in the Life-time of the Teſtator. Now upon a Demurrer to the Plaintiff's Bill, the Queſtion was whether the whole *three Hundred* and *fifty* Pounds were lapſed, or that *two Hundred* Pounds thereof ſhould remain to the Daughters.

For the Plaintiff it was inſiſted, that if the Deviſe had been only of the Intereſt of the *two Hundred* Pounds to the Teſtator's Siſter for Life, and the Principal to the Children, *that* had been a good Deviſe to the Children, as to the *two Hundred* Pounds, and it would not have been loſt by the Mother's Dying in the Teſtator's Life-time, and the Intention of the Teſtator in this Caſe amounted to as much; *ſed non allocatur per Cur.* but allowed the Demurrer, for it being a Deviſe of Money, the abſolute Property veſted in the firſt Legatee.

Caſe 113.
Die Lunæ, 25 Novembris, in Court, Lords Commiſſioners.

Fines verſus *Cobb.*

One grants to *A.* Common in Dale for 100 Sheep. Bill brought for that the Defendant had over-ſtock'd the Common. Bill diſmiſſed.

A Man having granted to *J. S.* Common in his Down for *one Hundred* Sheep and *five* Rams. The Bill complained the Grantor over-ſtock'd the Common, ſo that the Plaintiff the Grantee could have no Benefit of the Grant, and pray'd the Grantor might be injoined not to over-ſtock, *&c.* upon Debate the Court diſmiſſed the Bill.

Chapman verſus *Derby.*

Caſe 114. *Eodem die, in Court, Lords Commiſſioners.*

THE Plaintiff being a Factor in *Blackwel Hall*, advanced Money to his Principal, relying, as ſurmiſed, in the Bill on the Credit of the Cloaths reſting in his Hands, to reimburſe himſelf. The Clothier died, the Adminiſtrator ſues at Law for the Cloth, the Factor comes in Equity, and prays he may on Account be allowed the Monies he advanced.

Adminiſtrator of a Clothier brings an Action againſt the Factor for Cloths ſent by the Clothier to the Factor. The Factor cannot in Equity deduct out of the Value of the Cloath, the Money owing to him from the Clothier.

Per Cur. non allocat', for if there be Debts of a higher Nature, it will be a *Devaſtavit* in the Adminiſtrator, to pay or diſcount the Plaintiff's Debt.

But in the Caſe of a Bankrupt, adjudged by the Lord Chief Juſtice *Hale*, that where there were Dealings on Account, that a Man ſhould not be charged with the Account on the Credit Side, and be put to come in as a Creditor for the Debt owing to himſelf, but ſhould only anſwer to the Bankrupt's Eſtate the Balance of the Account.

Where there are mutual Dealings between a Bankrupt and *J. S.* only the Balance is to be paid to the Bankrupt's Eſtate.

Thynn verſus *Duvall.*

Caſe 115. *Die Martis, 26 Novembris, in Court, Lords Commiſſioners.*

THE Bill was to redeem or foreclоſe. It was objected, that the Defendant was only Tenant for Life of the Equity of Redemption, and the Remainder-Men over were not made Parties.

Court directed a Bill to be brought by the Defendant *Duvall*, to have a Sale made, the Mortgage-Debt paid,

and the Surplus diſtributed amongſt the Tenants for Life, and Remainder-Men in Proportion, according to their reſpective Intereſts.

Caſe 116. *Die Jovis, 5 Decembris, in Court, Lords Commiſſioners.*

Saul verſus *Wilſon.*

No Appeal lies to the Houſe of Lords, from a Sentence by the Delegates, nor from a Decree upon the Statute of Charitable Uſes.

DEcree made by the *Chancellor* on Exceptions to a Decree of charitable Uſes came on the Exceptant's Petition, to be reheard.

Whether a Decree on Exceptions to a Decree of Commiſſioners for charitable Uſes, be final, and whether the Court can grant a Rehearing.

It was objected that the Decree on hearing Exceptions being once confirmed by the *Chancellor*, *that* was final by the Act of Parliament, and there could be no Rehearing; and the Court ſeemed to be of that Opinion, and mentioned, that there lies no Appeal to the Houſe of Lords from a Sentence in the *Delegates*, nor from a Decree on the Statute of Charitable Uſes, for they cannot have any original Juriſdiction, becauſe theſe Matters are grounded upon Acts of Parliament, and the Acts give them none.

Caſe 117.

Sanderſon verſus *Crouch.*

Feme Adminiſtratrix waſtes the Aſſets, then marries and dies, Husband liable to no more than the Value of what came to his or his Wife's Hands after the Intermarriage.

ON Exceptions to a Maſter's Report, a Man marries an Adminiſtratrix (who before their Intermarriage had waſted great Part of the Eſtate,) after their Inter-marriage a Suit is commenced againſt them, for Diſtribution according to the Act of Parliament, and a Decree is had for that Purpoſe; then the Wife dies.

Per Cur. The Husband is not to be charged further than with what was poſſeſſed, or came to his, or his Wife's Hands after their Inter-marriage.

DE

Term. S. Hillarii,

1690.

In Curia Cancellariæ.

Caſe 118.
Die Sabbati, 11 *Jan'*, *Lords Commiſſioners* Maynard, Keck, *and* Rawlinſon.

Woodward verſus *Gyles.*

In a Leaſe for Years of Land, Leſſee covenants not to plow paſture Land, and if he does, then to pay after the Rate of 20 *s. per Ann.* for every Acre plow'd. The Court will not grant Injunction againſt the Tenant's plowing; for the Parties themſelves have agreed the Damage, and ſet a Price for plowing.

MR. *Hellier* moved for an Injunction to ſtay Waſte in plowing. The Caſe was, that the Plaintiff let a Farm to the Defendant at an annual Rent, and Part of it being Paſture Land, the Defendant covenants amongſt other Things, not to break up or plow any Part of it, and if he did plow any Part of it, that he would pay after the Rate of *twenty* Shillings *per* Acre *per Ann.*

Nor will the Court relieve the Leſſee againſt the Penalty, if he plows.

Per Cur. The Parties themſelves have here agreed the Damage, and have ſet a Price for plowing, and therefore will not grant any Injunction, and declared if the Defendant was Plaintiff againſt paying 20 *s. per* Acre for plowing, they would not relieve him.

Woots

Caſe 119.
Die Veneris, 17 Januarii, Lords Commiſſioners.

Where a Demurrer to a Bill of Review is allowed, it may be inrolled, otherwiſe if the Demurrer is diſallowed.

Woots verſus *Tucker.*

PER Cur. Where a Demurrer to a Bill of Review is allowed, it may be inrolled; but if over-ruled, that cannot be inrolled, ſo as to prevent the Demurrer's being re-argued.

Caſe 120.
24 Januarii, in Court, Lords Commiſſioners,

A. Purchaſes a Copyhold Eſtate and takes the Surrender to himſelf and his Wife and Daughter, and their Heirs. The Husband and Wife (as one Perſon) take a Moiety by Intireties, and the Daughter the other Moiety. The Husband mortgages it, and dies; void for the whole, and no Relief in Equity.

Back verſus *Andrews.*

PUrchaſe made of a Copyhold Eſtate by *John Andrew* the Husband, and the Surrender taken to *John Andrew* and his Wife, and *Elizabeth* his Daughter, and their Heirs. The ſaid *John Andrew*, as being viſible Owner of the Eſtate, takes upon him to make a conditional Surrender by Way of Mortgage to the Plaintiff, and afterwards dies; the Plaintiff's Bill was againſt the Mother and Daughter to diſcover their Title, and to ſet aſide their Eſtates as fraudulent againſt the Plaintiff, who was a Purchaſer; *ſed non allocat'*. Bill diſmiſſed but without Coſts; for *per Cur.* the Husband and Wife take one Moiety by *Intireties*, ſo that the Husband cannot alien, nor diſpoſe of it, ſo as to bind the Wife, and the other Moiety is well veſted in the Daughter.

Caſe 121.
Sabbati, 1 Feb', in Court, Lords Commiſſioners.

A. by Will gives 20 *l.* to *B.* and makes him Executor, and gives his real Eſtate to *C.* paying his Debts and Legacies, and in Default of Payment within ſuch a Time, the Legatees and Creditors to enter and to hold 'till paid, and makes no expreſs Diſpoſition of the Surplus of the perſonal Eſtate. The perſonal Eſtate ſhall be applied in Eaſe of the real.

Mead verſus *Hide.*

ONE *Davis* by Will deviſes ſeveral Legacies *& inter al'*, *twenty* Pounds to *John Hide* (the Defendant) and makes him Executor, and deviſes his real Eſtate to

the Plaintiff, paying his Debts and Legacies, and if he did not pay the Legacies in *three* Months, and the Debts in *two* Months, the Legatees and Creditors might enter and hold 'till ſatisfied.

The Queſtion was, whether the perſonal Eſtate ſhould be applied in Eaſe of the real Eſtate. The Court decreed the perſonal Eſtate ſhould go in Eaſe of the real Eſtate, and obſerved that the Deviſe amounts but to a Charge upon the real Eſtate, and extends not to avoid the Eſtate, in Caſe of Non-payment; and obſerved that in this Caſe the Defendant has a particular Legacy, and there is no Deviſe to him of the *reſiduum bonorum.* And in caſe there had been no Executor, can any one doubt, but that the perſonal Eſtate in the Hands of the Adminiſtrator, ſhould be applied in Eaſe of the real Eſtate, though the real Eſtate were made likewiſe liable *ut ſupra:* And beſides, here the Creditors have a Bill, and no one can queſtion but they have a Right to be ſatisfied out of the perſonal Eſtate, if they think fit to purſue it.

The Lord *Maynard* obſerving upon the Evidence, that *Hide* had drawn the Will, ſaid it was a Rule in the *Civil* Law, that *Qui ſibi conſtituit nihil capit.*

Caſe 122.
Die Ven', *7 Februarii, in Court, Lords Commiſſioners.*

Wiſeman verſus *Beake.*

THE Plaintiff had entered into ſeveral Statutes of great Penalties to the Defendant's Teſtator, defeaſanced for Payment of *ten* for *one*, upon the Death of his Uncle, who was only Tenant for Life, of a conſiderable real Eſtate, Remainder to his firſt and other Sons in Tail, Remainder to the Plaintiff, in caſe the Uncle died without Iſſue Male, and the Plaintiff ſurvived him: And the

A. Tenant for Life, Remainder to his firſt, &c. Son, in Tail, Remainder to his Nephew *B. B.* enters into ſeveral Statutes to *C.* for Payment of ten for one upon the Death of *A.* in caſe he died without Iſſue Male in the Life of *B. C.* in the Life of *A.* brings a Bill to compel *B.* either to pay Principal and Intereſt, or to be foreclоſed of any Relief againſt the Bargain. *B.* by Anſwer declares the Bargain fairly made, and intends to abide by it, and that he would ſeek no Relief againſt it. *A.* dies, and *B.* brings a Bill againſt the Executor of *C.* and notwithſtanding *B.*'s former Anſwer, he is relieved againſt the Bargain, on Payment of Principal and Intereſt, without Coſts.

the Plaintiff's Uncle dying ſome Years ſince without Iſſue, the Bill was to be relieved againſt this Bargain, and to have up the Securities on Payment of what was really due with Intereſt.

For the Defendant it was inſiſted, that this was not the ordinary Caſe of ſurpriſing a young Heir into a hard Bargain, but Mr. *Wiſeman* was above *thirty*, near *forty* Years old, when this Bargain was made, had long been a Man in Employment, (to wit) a *Proctor* at *Doctors Commons*, and of Experience in the World: And beſides, the Defendant's Teſtator, ſeveral Years after this Bargain made, underſtanding that the *Chancery* began to relieve againſt ſuch Bargains, came to adviſe with Mr. Serjeant *Philips*, what was fit to be done in the Caſe, and thereupon a Bill was exhibited by the Teſtator againſt the Defendant, to compel him either to repay the Money with Intereſt, or to be foreclоſed of any Relief againſt this Bargain; and that in Anſwer thereunto in the Life-time of his Uncle, he elected to ſtand to the Bargain, and that it was fairly and duly made, and that he would not ſeek any Relief againſt the ſame, and therefore ought not now to be relieved againſt his own Election and Oath.

Per Cur. When he had ſpent the Money, then a ſpecious Offer was made to relinquiſh the Bargain on Payment of the Money lent with Intereſt, which at that Time was impoſſible for him to do: And though ſuch Bill was exhibited, it was not proſecuted, but was a Contrivance only to double hatch the Cheat; and therefore thought fit to relieve the Plaintiff on Payment of Principal and Intereſt only without Coſts, and decreed it accordingly.

Dyer verſus *Tymewell.*

Caſe 123. *Eodem die, in Court, Lords Commiſſioners.*

Relief againſt a Bill of Exchange ſaid to be for Value received, but gained by Fraud, and for a fictitious Conſideration.

THE Bill was to be relieved againſt a Bill of Exchange for *fifty* Pounds, mentioned to be for Value received, which was in Truth extorted from the Plaintiff by the Defendant in the Time of *Monmouth*'s Rebellion, the Defendant being then a Juſtice of the Peace, and taking upon him to ſend for whom he pleaſed, *&c.*

The Court could not well relieve againſt this Bill of Exchange, upon Pretence that it was gained by Threats or Menaces, for that was proper at Law, and *Dureſſe* a good Plea there; but inaſmuch as the Defendant by his Anſwer having admitted, that although the Bill was drawn for Value received, that there was not any Money paid; but inſiſted that he had intruſted one *Andrews* many Years ago to ſell ſome Clothes for him, and that the Plaintiff attached thoſe Clothes in the Hands of *Andrews*, and for the Debt of *Andrews*; whereas they were the Defendant's proper Goods; and that the Plaintiff had often promiſed to make him Satisfaction, and at laſt gave him the Bill of Exchange in Queſtion in Satisfaction thereof: And the Plaintiff having proved in the Cauſe that *Andrews* was no Factor, nor was indebted to the Defendant, and falſified his Anſwer as to that Pretence.

In Caſe of a groſs Fraud, the Court will give Coſts to be aſcertained by the Party's own Oath.

The Court declared the Bill of Exchange to be gained by Fraud and Practice, upon the Pretence of a Demand that was fictitious, and had nothing of Reality in it, and therefore decreed the Plaintiff to repay the *fifty* Pounds with Intereſt, and Coſts to be aſcertained by the Plaintiff's own Oath.

Peter

Caſe 124. 11 *Die Feb', in Court, Lords Commiſſioners.*

Peter Crooke and *Elizabeth* his Wife, Siſter of the half Blood to *Geo. Watt deceaſed*, } Plaintiffs.

John Watt Adminiſtrator of *George Watt*, *Francis Camfield* and *Elizabeth* his Wife, the ſaid *John* and *Elizabeth* being Brother and Siſter of the whole Blood to the Inteſtate *George Watt*, } Defendants.

The Siſter of the half Blood ſhall come in for an equal Share, upon the Statute of Diſtribution, with the Brother or Siſter of the whole Blood. 1 Vol. page 437.

THE ſingle Point was, whether the Siſter of the half Blood, ſhould come in with the Brother and Siſter of the whole Blood, for an equal Share of the Inteſtate's Eſtate, or whether the half Blood ſhould have only half a Share, or ſhould be wholly excluded.

For the Plaintiffs it was inſiſted, that there were very many Precedents in this Court, where the half Blood had been admitted to an equal Share; that it was almoſt endleſs to cite them, and cited the Caſe of *Hill* and *Birds*, where a Prohibition had been moved for and denied, and Adminiſtration thereupon granted to the Siſter of the whole Blood: And a Caſe in the *Modern Reports* to the ſame Effect.

1 Mod. Rep. 209.

For the Defendants it was inſiſted by Mr. *Attorney General*, and Mr. Serjeant *Levinz*, that in Caſe of Deſcent, and

and in all Caſes where the Common Law takes Notice of Blood, the whole Blood is preferred, and inſtanced in many Caſes; as where a Remainder is limited *proximo de ſanguine*, it will go to the whole Blood, and the Act for Diſtribution of Inteſtates Eſtates muſt be expounded according to the Common Law; in ſome Caſes it directs Diſtribution to be made according to former Laws, which muſt be intended Common Law. That the Courts of Common Law had always controlled the Spiritual Courts in theſe Matters, and cited the Lady *Butler*'s Caſe, in the Lord Chief Juſtice *Hale*'s Time, where by the Statute of *H.* 8. the Ordinary is to grant Adminiſtration to the Wife or next of Kin, if there be a Wife, the Spiritual Court ſhall not be ſuffered to grant the Adminiſtration from her to the next of Kin; that it was not meant by the Statute, the Ordinary ſhould have that Latitude, but that where there was a Wife, ſhe ſhould have it; if no Wife, the next of Kin.

If there be Grandfather, Father, and Son, and the Father dies Inteſtate, the Son ſhall have the Adminiſtration, and not the Grandfather, tho' they be both in equal Degree as to Nearneſs of Kindred, and ſo is the Opinion in *Godolphin*, that the Child or Children ſhall in that Caſe be preferred as to Adminiſtration. And cited *Palmer*'s Reports 416. *Latch*'s Reports 67. and *Brown*'s Caſe 8 *Car.* that the whole Blood is to be preferred.

If there be Grandfather, Father and Son, and the Father dies inteſtate, the Son ſhall have the Adminiſtration, and not the Grandfather.

As to the Caſe of *Smith* and *Tracy* in *B. R.* there was a Prohibition moved for, becauſe the Spiritual Court took upon them to diſtribute to the half Blood, and the Court ordered a Demurrer to be put in, that all might come before the Court; but before any Judgment in that Caſe, the Lord Chief Juſtice *Hale* went off the Bench, and he and *Twiſden* ſeemed all along to incline in Opinion againſt the half Blood, and afterwards the Lord Chief Juſtice *Rainsford* informing the Court, that in the Spiritual Court they diſtributed but half a Share to the

1 Mod. Rep. 209.

half Blood, there was no further Proceedings had in the ſaid Cauſe: But then ſoon afterwards came Doctor *Story*'s Caſe before Doctor *Rayne*'s, then Judge of the Prerogative Court, and he let in the half Blood to a whole Share.

Per Lord *Maynard*, there is no Doubt, but the half Blood is capable of having the Adminiſtration; even an Alien of the half Blood is capable, and cited *Hinks*'s Caſe, who, he ſaid, died a Martyr for the Common Law, becauſe in the Court of Wards, he would not ſwear a Leaſe for *one Thouſand* Years to be a Fee-ſimple, and cited the Caſe in *Dyer*, where Adminiſtration was granted to the reſiduary Legatees, for that Adminiſtration is in reſpect of Intereſt; and ſaid, that the Words in the Statute for Diſtribution *pro ſuo cuique jure*, according to Law, cannot be interpreted as to former Laws; for then there were no former Laws in Being, and ſo muſt be intended according to the Common Law. And it was obſerved that in *Scotland*, they give but half a Share to the half Blood; and they hold there, that Diſtribution ought to be, not ſo much according to the Order of Nature, but according to the Will of the Owner. And it could not be preſumed, that a Man had as great a Kindneſs for thoſe of the half Blood, as he had for thoſe of the whole Blood.

The Court after long Debate ſaid, this Caſe had been ſo often adjudged and ſettled here, that the half Blood ſhould have an equal Share with the whole Blood, that to give a new Rule in it now, would make great Confuſion, and Diſturbance in very many Families, *&c.* and therefore thought fit to decree it, as it had been, to wit, a whole Share to the half Blood, and an Account to be taken accordingly.

Caſes in Parliament 108.

Note, Upon an Appeal to the Houſe of Lords, this Decree, after Civilians, and Common Lawyers had been heard

heard on both Sides at the Bar of the Houſe of *Lords*, was confirmed about the Beginning of *Eaſter* Term laſt, in laſt Seſſions of *Parliament*.

Scolefield verſus *Whitehead*.

Caſe 125. *Die Jovis*, 20 *Feb'*, *Lords Commiſſioners*.

THE Bill was to have a Covenant decreed in Specie, whereby the Plaintiff was to have a Pit in the Defendant's Ground for digging of black Stone, and that when the old one failed, he might ſink a new Pit, and with a further Covenant that there ſhould be no other Pit there for the digging of black Stone.

Bill for a ſpecifick Performance of a Covenant, whereby the Plaintiff was to have a Pit in the Defendant's Ground, for digging black Stones. Proved that the Defendant had for above ſixty Years been in quiet Poſſeſſion of this Pit, for digging black Stones. Bill diſmiſſed.

But it appearing in the Cauſe that the Defendant, and thoſe under whom he claims, had been in the Poſſeſſion of a Pit there, and had uſed the ſame for above *ſixty* Years paſt; the Court inſtead of decreeing the Covenant in Specie, diſmiſſed the Plaintiff's Bill.

Richard Parrot, Plaintiff.

John Wells and *Elizabeth ux' ejus nuper Elizabeth Wilſon* and *Henry Clerke*, Defendants.

Caſe 126. *Eodem die*, *Lords Commiſſioners*.

THE Plaintiff's Father applied himſelf to the Defendant *Henry Clerke* a Scrivener, to borrow Money, and in (81) took up *two Hundred* Pounds, and the Plaintiff and one *How* became bound as Sureties with the Plaintiff's Father in two Bonds to the Defendant *Elizabeth*,

Where an Agreement made by a Scrivener on Behalf of his Client, to compound his Clients Debt, ſhall bind the Scrivener, though not the Client.

Elizabeth, (then *Elizabeth Wilſon*) and one Mrs. *Abdy*. The Defendant *Clerke* the Scrivener, had the Ordering and Diſpoſing of the Monies, and from Time to Time received the Intereſt due upon the Bonds. In 1687, the Plaintiff's Father fail'd, and the Plaintiff likewiſe, by reaſon of the Debts for which he ſtood engaged for his Father, failed, and the other Surety was dead inſolvent, ſo that the Plaintiff's Father compounded his Debts with his Creditors at ſeven Shillings in the Pound, and he applied to the Defendant *Clerke*, to know where his Clients (to wit) the ſaid Mrs. *Wilſon* and Mrs. *Abdy* lived; but the Defendant told the Plaintiff and his Father, they need not trouble themſelves to go to them, for they would be governed by him, and would make no Agreement without him, but what Agreement he made, they would ſtand by; hereupon they treat with *Clerke*, the Scrivener, and agree for *ſeventy* Pounds to be paid down, and *thirty* Pounds to be ſecured to be paid in a ſhort Time, that the Bonds ſhould be delivered up to be cancelled; ſo he had *ten* Shillings in the Pound Compoſition, where other Creditors had but *ſeven* Shillings. The *ſeventy* Pounds were paid purſuant to the Agreement, and the 30*l.* tendred. The Defendant *Clerke* refuſed to deliver up the Bonds according to his Agreement, and pretended his Clients had the Bonds, and that they would not part with them without Payment of the whole Debt, and threatned to put the Bonds in Suit; the Bill was therefore to compel the Defendant *Clerke* either to perform the Agreement, and deliver up the Bonds to be cancelled, or otherwiſe be decreed to ſave harmleſs and indempnify the Plaintiff againſt the ſame.

The Defendant *Clerke*, by Anſwer confeſſed the making of the Agreement, and ſaid he did it in Expectation that his Clients would have been governed by him, as they had in other Matters; but they refuſed to ſtand to the Agreement, and hoped that as he acted only as their Agent, and was not to get or looſe by the Matter, he ſhould not be compelled to make good the Agreement.

After long Debate the Court decreed the Plaintiff to pay what was due to the Defendant *Wells* and his Wife, for Principal, Intereſt and Coſts, on the Bond in Queſtion, and the Defendant *Clerke* to repay, what the Plaintiff ſhould ſo pay to *Wells*, and to indempnify the Plaintiff according to the Agreement.

Ayneſley verſus *Vaughan.*

Caſe 127. *Eodem die, in Court, Lords Commiſſioners.*

THE Plaintiff's Bill was to have the Benefit of an Agreement, by which ſhe ſurmiſed that one *Dalton Shaftoe* agreed, in caſe of Failure of Iſſue of his own Body, the Lands ſhould remain to the Plaintiff, and that he and his Heirs ſhould ſtand ſeiſed of the Premiſſes, upon ſuch Truſt as aforeſaid.

The Court ſuppoſed the Deeds produced by the Plaintiff purporting ſuch Agreement to be forged: But in caſe there was any ſuch real Agreement, yet it was well barred by the ſubſequent Agreement.

Richard Fowkes, Brian Saterthwaite and *Thomas Fowler*, } Plaintiffs.

Thomas Joyce, John Mills and *George Lawrence* & *al'*, } Defendants.

Caſe 128. *9 die Feb', Lords Commiſſioners.*

THE Defendant *Joyce* being Owner of the *George* Inn in *Chipping Barnet*, in which Inn ſeveral Cloſes of Paſture lay near adjoining, and had been always uſed and occupied

A Grazier driving a Flock of Sheep to *London*, is encouraged by an Inn-keeper to put his Sheep into Paſture Grounds belonging to the Inn. The Landlord ſeeing the Sheep, conſents they ſhall ſtay there one Night, and then diſtreins them for Rent. Grazier relieved againſt this Diſtreſs.

occupied with the Inn. The Defendant *Wills* was his Tenant at a great annual Rent, and was run *one Hundred* and *Thirty-two* Pounds in Arrear of Rent. The Plaintiffs being Graziers, their Servant was driving *one Hundred Twenty-three* fat Sheep to ſell at *Smithfield*, and at *Barnet* were met by one *Matthews* a Servant of *Wills* the Inn-keeper, who tells them, that they had good Graſs in the Grounds belonging to the Inn, and that they ſhould be there at the uſual Rate of *eight* Pence *per* Score *per* Night: Before they were *levant* and *couchant*, the Defendant *Joyce* comes to the Ground, demands whoſe Sheep they were, and ſeeming to be in a Paſſion, the Drovers offered to take out their Sheep, but at laſt *Joyce* ſaid, being they were in they might ſtay in; yet afterwards when the Men were gone to the Inn, *Joyce* cauſed the Sheep to be drove into the Pound, where they were kept *four* or *five* Days, and the Plaintiffs were forced to replevy them, and *Joyce* avowed for Rent-Arrear, and obtained Judgment at Law on a Demurrer: The Bill was to be relieved againſt this Judgment.

Upon the Hearing of the Cauſe, it being fully proved that *Joyce* was privy to the putting in the Sheep there, and that when the Plaintiffs Servants were, upon *Joyce*'s ſeeming to be in a Paſſion, about to take them out, *Joyce* told them they might ſtay there for that Night; the Court looked upon this as a Fraud and Contrivance in *Joyce*, to ſubject the Plaintiff's Sheep to his Diſtreſs; and they ſeemed to think that the Grounds lying to the Inn, and uſed therewith, ought to have the ſame Privilege as the Inn hath, and Paſſengers Cattle not to be diſtrainable there. But however ſaid, there was ſufficient Cauſe to decree againſt *Joyce* for a Fraud; and decreed *Joyce* to anſwer to the Plaintiffs the Value of their Sheep with Coſts, both at Law, and in this Court.

The

If Cattle eſcape into the next Ground, and are diſtrained there for Rent, Equity will relieve againſt ſuch Diſtreſs.

The Caſe of *Brodon* and *Peirce* was cited, where there being *twenty* Years Arrear of a Rent-charge, and Cattle came by Eſcape out of the next Ground, and were diſtrained, *&c.* the Lord *Nottingham* relieved againſt it in this Court.

Caſe 129. *22 die Feb'*, *Lords Commiſſioners.*

Beverley verſus *Beverley & al'.*

Deviſe of Land to *A.* for 60 Years if he ſo long live, and from and after the Death of *A.* to his eldeſt Son *B.* in Tail, whether this be a veſted or contingent Remainder.

ONE Point in this Caſe was, that old Sir *James Beverley* having by his Will deviſed the Lands in Queſtion to his then eldeſt Son *Thomas Beverley*, for the Term of *ſixty* Years, if he ſhould ſo long live. And from and after his Deceaſe to his Grandſon *James*, eldeſt Son of the ſaid *Thomas* in Tail Male, Remainder in Tail Male to the Defendant *Thomas Beverley* his next Brother, *James* the Grandſon intermarried with the Plaintiff; and upon the Marriage a Settlement was made, and a Common Recovery ſuffered by *Thomas* the Father, and *James* the Son.

The Objection was, that the Deviſe to *James* being only of a Term of *ſixty* Years, if he ſhould ſo long live, and then from and after his Deceaſe to *Thomas*: That the Freehold during the Life of *James* was in *Abeyance*, and no good Tenant could be to the *Præcipe*, and by Conſequence *James* the Grandſon being dead without Iſſue Male, the Lands belonged to the Defendant *Thomas*, as next Brother of the ſaid *James*, by Virtue of the Entail which was not well docked.

Mr. *Finch* argued for the Plaintiff, that the Recovery was well ſuffered, and that the Limitation of the Entail was good expectant on the Term for *ſixty* Years: And that it was ſo reſolved in the Lord *Derby*'s Caſe in *Hutton*'s *Reports*, and *that* Judgment was confirmed again upon

Hutt. 119. Pollexf. c. 67.

upon a *Sci. fac.* That ours is a much ſtronger Caſe being a Limitation in a Will, where the Intent of the Party ought to be regarded, and no Advantage to be taken for want of the preciſe and nice penning of it, by reaſon that Teſtators are preſumed to be *inopes concilii*; and therefore in a Will a Deviſe unto a Man and his Heirs, with a Remainder, is good; ſo here the Deviſe to *Thomas* for *ſixty* Years, if he ſhall ſo long live, and from and immediately after his Deceaſe, *that* ought to be intended of his dying within the Term, which was highly preſumable, *Thomas* being then above *forty* Years of Age; the Poſſibility that *Thomas* might over-live, was a very remote and foreign Conjecture; ſo that there is not any Gap or *Hiatus* in the Settlement as they would pretend; but by this Conſtruction the Freehold veſted immediately in *James*, and *Thomas* had only a Term for ſixty Years if he ſhould ſo long live. But beſides the Teſtator at the Time of the Deviſe had only an equitable Eſtate in him, the Eſtate in Law at the Time of his Purchaſe remaining in one *Biggs* an Infant, who had not to this Day made any Conveyance, ſo that the Common Recovery, though it was defective, as to a Tenant to the *Præcipe*, yet it was ſufficient and formal enough to bar an Equity.

A defective Common Recovery as to a Tenant to the *Præcipe* will bar an Eſtate Tail in a Truſt only.

Per Cur. It would be hard to make ſuch Conſtruction on the Words of the Will, as to ſay where a Term is limited to a Man for *ſixty* Years if he ſhall ſo long live, and from and after his Deceaſe, to *A. B.* that it muſt be meant, from and after his Deceaſe within the Term; for ſuppoſe he ſhould out-live the Term, ſhould the Remainder-Man take in the Life-time of *Thomas*, that were a Conſtruction contrary to the Words, and Intention of the Teſtator. And as in this Caſe, it is of a Term for *ſixty* Years; ſuppoſe it had been of *ſix*, *ſeven*, or *eight* Years, could there be any Room then for ſuch Conſtruction; and at what Number of Years is ſuch Conſtruction to begin; but in Regard the Teſtator had

only an equitable Title in himſelf, and the Eſtate in Law ſtood out in an Infant, the Court held the Recovery ſufficient, and that even a Bargain and Sale would have done it; and decreed it accordingly.

Bargain and Sale only will baran Eſtate-Tail of a Truſt. *Poſt.* Ca. 501.

In this Caſe the Widow of the Teſtator having given a Releaſe of her Dower upon a Pretence that *three Thouſand five Hundred* Pounds was given to her by her Husband's Will in lieu thereof; and this Releaſe being on the Plaintiff's Marriage, produced and ſhewed to the Plaintiff and her Relations, and in Confidence thereof the Marriage having taken Effect, and a Settlement made and Portion paid; whether now the Widow who had recovered her Dower at Common Law, ſhould be concluded by this Releaſe, and obliged to part with her Dower to make good the Plaintiff's Settlement.

A Mother having a Right of Dower, to incourage a Marriage of her Son to *A. B.* releaſes her Dower, and ſhews the Releaſe to the Wife and her Relations. It ſhall bind the Mother, though the Releaſe was obtained by a fraudulent Suggeſtion.

The *Court* decreed it for the Plaintiff, though it was ſtrongly inſiſted that this Releaſe was gained by an ill Practice ſoon after the Death of her Husband, and upon a Pretence that ſhe had *three Thouſand five Hundred* Pounds given her in the Will in lieu of Dower, whereas ſuch Sum was given her by the Will, but not meant or intended to be in lieu of Dower; and that her Son who ſurpriſed her into that Releaſe, had alſo defrauded her of that *three Thouſand five Hundred* Pounds.

Anonymus.

Caſe 130. *Die Jovis, 27 Feb', in Court, Lords Commiſſioners.*

THE Caſe was, that one *John Saunders* by his Will dated the 14*th* of *Octob.* (86.) deviſed *inter alia*, as follows, *viz.* my Nephew *William Beng* I make my ſole Executor, and to him and his Heirs, I give and deviſe

One makes his Nephew Executor, and deviſes to him and his Heirs all his Lands in Truſt, to ſell and to pay all his Debts,

and his Childrens Portions, and gave to his Children 100 *l.* apiece. The Money ariſing by this Sale is not legal Aſſets, and the Debts and Childrens Portions, are to be paid in equal Proportions.

viſe all my Meſſuages, Lands, Tenements and Hereditaments, upon Truſt to ſell the ſame, and with the Monies to be raiſed by Sale, and perſonal Eſtate, to pay my Debts, and Portions to my Children; and gave to each of his *nine* Children *one Hundred* Pounds apiece.

The Queſtion was, whether the Money raiſed by Sale ſhould be legal Aſſets.

Per Cur. The Deviſe being to him and his Heirs, the Lands muſt go in a Courſe of Deſcent, and he muſt take as a Truſtee, and not as an Executor; and therefore decreed Debts and Portions to be paid in Proportion.

Caſe 131. *Eodem die.*

Marquiſs of *Hallifax* verſus *Higgens.*

Mortgage at 5 *l. per Cent.* with covenant to pay 6, on Default of paying the Intereſt within 60 Days after due.

MOney lent on a Mortgage at *five* Pounds *per Cent.* the Mortgagor covenants to pay *ſix* Pounds *per Cent.* if he made Default for the Space of *ſixty* Days after the Time of Payment.

If the Intereſt is behind 60 Days, the Mortgage ſhall carry Intereſt at 6*l. per Cent.* and the Court will not relieve againſt it.

The Court decreed that from Default made he ſhould pay *ſix* Pounds *per Cent.* and that this Covenant was the Agreement of the Parties, and not to be relieved againſt as a Penalty.

Caſe 132.

Fortrey verſus *Fortrey.*

In caſe of Judgment recovered againſt an Heir, who has a Reverſion in Fee, which is only Aſſets *cum acciderit*; Court will not decree a Sale of the Reverſion, but the Creditor muſt wait 'till it falls.

WHERE a Man obtains Judgment againſt an Heir, who has a Reverſion in Fee deſcended to him, the Judgment is only of Aſſets *quando acciderint*; and the Creditor cannot by a Bill in Equity compel the Heir to ſell the Reverſion, but muſt expect until it falls.

Gladman verſus *Henchman.*

Caſe 133. *Die Lunæ*, 3 *Mar'*, *Lords Commiſſioners.*

A Mortgage made for 450 *l.* payable at the End of 5 Years with Intereſt at 5 *per Cent.* in the mean Time. About 2 Months before the End of the 5 Years, the Mortgagee aſſigned over the Mortgage for 560 *l.* being the Principal and Intereſt then due. The 560 *l.* ſhall carry Intereſt, though the five Years were not elapſed; the Mortgage being forfeited by the Non-payment of the Intereſt.

THE Mortgage was made in *June* 1678, for 450 *l.* principal Money, payable at the End of *five* Years, and Intereſt in the mean Time half yearly; no Intereſt being paid, about *two* Months before the *five* Years were expired, the Mortgagee aſſigned to the Defendant in Conſideration of 560 *l.* being ſo much due for Principal and Intereſt.

The Queſtion was, whether the Intereſt then due ſhould carry Intereſt. It was objected, that he ought not to have aſſigned untill the *five* Years were quite expired; *ſed non allocatur*; for the Mortgage was forfeited long before by Non-payment of the Intereſt; and the Court decreed the 560 *l.* to be paid with Intereſt from the Time of the Aſſignment.

DE
Termino Paſchæ,
1690.

In Curia Cancellariæ.

Caſe 134. Maynard, Keck, *and* Rawlinſon, *Lords Commiſſioners, die Martis,* 13 *Maii.* *Poſt.* Ca. 188.

Bentham verſus *Alſton.*

THE Plaintiff was Succeſſor to a Parſon, who had made a Leaſe to the Defendant of his Tithe and Glebe for *three* Years; *two* Years and an half expired in the Life-time of the Leſſor, and the Leſſee had taken the Profits of the whole Year in the Parſon's Life-time, who died before the laſt Rent-Day, the Plaintiff's Bill was to have that half year's Rent. *Vide* Statute 28 *H.* 8. *cap.* 11. The Plaintiff had not made the Executor of his Predeceſſor a Party. *Per Cur. diſmiſs the Bill.*

Caſe 135. *Eodem die.*

Roberts verſus *Bennet, & econtra.*

A. deviſes 100 *l.* to *B.* and by Will releaſes to *B.* all Debts and Demands, and afterwards *A.* lends *B.* 100 *l.* whether this 100 *l.* is releaſed by the Will

BEnnet deviſed to the Plaintiff a Legacy of *one Hundred* Pounds, and by his Will releaſes her of all Debts and Demands, and after the Date of the Will lends her *one*

one Hundred Pounds. The Plaintiff's Bill was for her Legacy. The Defendant had a croſs Bill to be ſatisfied this *Hundred* Pounds.

The Queſtion was, whether the Will ſhould diſcharge this laſt *Hundred* Pounds without any new Publication: And the Caſe of *Northcot* and *Northcot* was cited for that Purpoſe; if a Man *deviſes all* his perſonal Eſtate; *that* is a *fluctuating* Thing; and though the Eſtate after the Publiſhing the Will *encreaſes*, all paſſes; and ſo is *Bret* and *Rigden*'s Caſe. Plowd. 342.

Per Cur. If the Executor, can recover it at Law, he may; we will not take away his Remedy, if any he hath; nor will give him any Aid in Equity; and therefore decreed Payment of the Legacy, and diſmiſſed the croſs Bill.

Franklin verſus *Green.*

Caſe 136. *Mercurii*, 14 *Maii.*

LEgacies of *one Hundred* Pounds apiece deviſed to four Children, payable at Twenty-one or Marriage, and a Maintenance not exceeding the Intereſt in the mean Time, and the Plaintiff is appointed to receive the Profits of the Truſt-Eſtate during their Infancy; the Plaintiff paid *twenty* Pounds for the placing out one of the Children an Apprentice, who died an Infant; and the *Hundred* Pounds being limited over in Caſe of Death before *Twenty-one* or Marriage; it was objected, the Plaintiff could not have an Allowance of that *twenty* Pounds, out of the dead Child's *Hundred* Pounds.

100 *l.* deviſed to an Infant payable at 21, and if he dies before, then it is deviſed over, and the Intereſt of the 100 *l.* is for the Child's Maintenance. The Truſtee lays out 20 *l.* of the 100 *l.* for placing out the Child an Apprentice, and the Child died under 21. this 20 *l.* ſhall be allowed.

Per Cur. It being paid to place the Child out an Apprentice, it was well beſtowed, and might have been of better Advantage to him, than all the reſt of his Por-

tion, and therefore decreed it to be allowed upon the Account.

Levet verſus *Needham.*

Caſe 137.

One deviſes Lands to Truſtees and their Heirs in Truſt to receive the Rents, until his Son ſhall come to 21, and to pay one Third thereof to the Teſtator's Wife in lieu of Dower, and out of the other two Thirds to raiſe Portions for his Daughters; and deviſes all to his Son *William*, when 21, in Tail, Remainder to *B.* and *C.* The Wife dies. The Son dies before 21, and without Iſſue. Reſolved, the Wife's Intereſt determines by her Death, and her Third ſhall not go to her Executors, until her Son would have attained 21. Reſolved, the Remainder over to *A. B.* and *C.* are good, tho' the Son died before 21. Reſolved, The Daughters Portions being raiſed, the Reſidue of the Term ſhall go to the Heir, as an Intereſt undiſpoſed of by the Will. But it will veſt in the Heir as a Chattle, and on his Death go to his Executor, until Teſtator's Son ſhould have come to 21.

William Clerke, by Will in writing, deviſes to *Sherwin* and *Turpin* and their Heirs, his Lands in *Sutton*, upon Truſt that they ſhall receive the Rents and Profits until his Son *William* attain his Age of *Twenty-one* Years, and pay a *third* Part thereof to his Wife *Anne*, in lieu of Dower, and out of the other *two* Thirds raiſe Portions for his Daughters, and deviſes all to his Son *William*, when *Twenty-one*, in Tail, and for want of ſuch Iſſue, diſtributes the Eſtate in ſeveral Shares amongſt his Relations, to wit, *Blowe*'s Farm to his Siſter *Mary*, other Part to his Brother *Peter*, and the Tithes in *Sutton* to his Siſters *Anne*, *Martha* and *Deborah Needham*. *Anne* the Widow married Mr. *Coates*, and died before ſuch Time as her Son *William*, who died before her, would have been *Twenty-one*.

Upon the former Hearing, the Queſtion being, whether the Executors, or Adminiſtrators of *Anne* the Widow, ſhould have a third Part of the Profits, until ſuch Time as the Son would have been *Twenty-one*, or whether by her Death the Deviſe to her ceaſed; and it being adjudged, that the Bequeſt as to her was determined, the Queſtion now was, who ſhould have that *third* Part of the Profits until the Son would have been *Twenty-one*, for that the Inheritance is not diſpoſed of by the Will until ſuch Time as the Son would have been *Twenty-one*.

It

It was inſiſted that the Heir ought to have theſe Profits, the ſame not being deviſed away from him; and the Caſes of *Counden* and *Clerk*, *Fawkner* and *Fawkner*, *Tryan* and *Thornbury* were cited by Mr. *Bowes*, as Caſes where the Heir ſhould have the Benefit of any Thing not diſpoſed of, and Lord *Maynard* ſaid, here is a *Chaſm*, *Hiatus*, a Gap in the Limitation of the Eſtate, no Proviſion or Diſpoſition being made in Caſe of the Widow's Death before the Heir came of Age: But I take it that the Inheritance is nevertheleſs well diſpoſed of, and that this is not ſuch a contingent Remainder, as though the particular Eſtate fail, the Remainder ſhould be void. In caſe of a Deviſe to a Monk, the Remainder over is good; and in this Caſe, the Fee is deviſed unto and lodged in Truſtees, and no abſolute Term carved out, but only a Declaration of Truſt, and direction to them how to apply the Profits until his Son came to *Twenty-one*; and Lord *Keck* cited the Caſe of *Gore* and *Black*, where a Term for Years being created for Payment of *five Hundred* Pounds, when *that* was raiſed, the Heir had the Term. Hob. 29.

Term raiſed for a particular Purpoſe when that Purpoſe is anſwered, the Term ſhall be in Truſt for the Heir.

Per Cur. As to *Needham*'s Pretence that this third Part of the Profits ſhould follow the Inheritance, and ſo accrue to the Deviſees according to their reſpective Intereſt in the Inheritance, the Caſe would not bear ſuch Conſtruction; becauſe there is nothing deviſed to them, until after the Heir attain *Twenty-one*, and die without Iſſue: Nor had the Executor of the Teſtator, as Executor, a Right to this Term, for that it is not a Term abſolutely raiſed, and taken out of the Inheritance, but rather a Direction to the Truſtees, who have the whole Fee in them, how they ſhould diſpoſe of the Profits, until his Son attain *Twenty-one*: But in caſe it had been a Term abſolutely raiſed out of the Inheritance, yet being raiſed for a particular Purpoſe, which is ſatisfied, the Heir ſhould have the Benefit of the Surplus of the Term. But now though the Heir is favoured

ed thus to have the Surplus of a Term, that is carved out of the Inheritance, for a particular Purpoſe; yet he muſt have it as a Term which muſt go in a Courſe of Adminiſtration, and not in a Courſe of Deſcent: And decreed accordingly for the Adminiſtrator of the Heir, and not to his Heir.

Memorandum, That a new Commiſſion paſſed for the Cuſtody of the Great Seal, on---- and Sir *John Trevor* and Serjeant *Hutchins* put in the Places of Sir *John Maynard* and Sir *Anthony Keck*.

DE
Term. S. Trinitatis,
1690.

In Curia Cancellariæ.

Caſe 138. Trevor, Rawlinſon, Hutchins, *Lords Commiſſioners, die, Sabbati* 21 *Junii.*

Goſton verſus *Mill.*

THE Lord *Sandys* by his Will deviſed *four Hundred* Pounds in full Satisfaction of all the Monies he owed *J. S.* and ſubjected his real Eſtate to the Payment of his Debts, the Debt owed *J. S.* was *eight Hundred* Pounds, but the Remedy was barred by the Statute of *Limitations.* The Bill was for the whole *eight Hundred* Pounds.

A. by Will deviſes to *B.* 400 *l.* in full Satisfaction of all the Monies which he owed *B.* and ſubjects his real Eſtate to the Payment of his Debts.

The Debt which *A.* owed *B.* was in all 800 *l.* but was barred by the Statute of Limitations. Court will ſuppoſe the Teſtator miſtaken in his Computation, and the whole Debt of 800 *l.* ſhall be paid.

For the Defendant it was inſiſted, that the Teſtator by his Will had declared how far he intended to give the Plaintiff a Remedy, *viz.* for *four Hundred* Pounds and no more.

Sed per Cur. We will rather ſuppoſe him miſtaken in his Computation; and there being a Proviſion here for Payment of Debts, a Debt upon which the Statute of *Limitations* has run, is nevertheleſs within the Proviſion equally

A Deviſe for Payment of Debts, ſhall include Debts, the Remedy whereof is barred by the Statute of Limitations. The Duty remaining, though the Remedy be gone.

equally with any other Debt, and decreed the whole Debt to be ſatisfied out of the Truſt, and the *four Hundred* Pounds to go only in Part.

Caſe 139.

Chapman verſus *Duncombe.*

The Mortgagee on her Marriage ſettled the mortgaged Eſtate on her ſelf for Life, Remainder to the Iſſue of that Marriage. The Mortgagee brings a Bill to redeem; Defendant omits ſetting forth the Settlement in her Anſwer; the Mortgagee has a Decree to redeem, and pays the Mortgage-Money. Afterwards the Iſſue of the Mortgagee brings an Ejectment on the Settlement, and recovers the mortgaged Premiſſes. The Mortgagor relieved, having paid his Money purſuant to the Decree, and having been in no Fault.

THE Caſe was that a Mortgagee, to wit, (*Ralph Stint*'s Daughter) to her third Marriage, with one *Duncombe*, ſettles the mortgaged Premiſſes on her ſelf for Life, Remainder on the Heirs of her Body; and after having Iſſue levied a Fine, and made her ſelf barely Tenant for Life, Remainder to the Iſſue of that Marriage. The Mortgagor afterwards brings a Bill to redeem againſt the Mortgagee, who anſwered, and mentioned nothing of this Settlement, and thereupon the Cauſe was heard, and a Redemption decreed, and the Money paid to the Lady *Duncombe*, Daughter of *Ralph Stint*, the Mortgagee, and Mother of the now Defendant. And now after all, the ſaid Defendant, Sir *William Duncombe*, being the Iſſue of the ſaid Marriage, had by Virtue of the Settlement recovered at Law. The Bill was to be relieved againſt that Recovery at Law, and to have the Eſtate in Law reconveyed, and to be quieted in Poſſeſſion.

For the Defendant it was inſiſted, he was in the Nature of a Purchaſer, and claimed by the Marriage-Settlement, and though the Eſtate were ſubject to a Redemption, yet then he ought to have had his Proportion of the Money in lieu of the Land, and that he ought not to loſe both.

For the Plaintiff it was ſaid, that he having paid the Money for which he pawned his Land, he ought to

enjoy it; that he brought his Bill, and had a Decree for Redemption, and the Defendant's Mother was a Party; and if the Defendant was cheated, it was by his own Mother, who made the Settlement, and afterwards concealed it.

Per Cur. Decree the Defendant to convey, and the Plaintiff in the mean Time to enjoy againſt him, and all claiming from, by or under him, and a perpetual Injunction againſt the Judgment.

John Elliot, Plaintiff.

Caſe 140. 25 *Die Junii, in Court, Lords Commiſſioners,*

Thomas Hancock and *Jane* his Wife, *James Elliot* and *Tho. Cripps*, Defendants.

Real Eſtate decreed to be charged with an Annuity given by the Will, though no expreſs Words to charge the Land, the Executor being Deviſee of the Land.

John Elliot the Plaintiff's late Father, being ſeiſed of a little Meſſuage in *Marlborough*, of *eight* Pounds *per Ann.* and poſſeſſed of a perſonal Eſtate to the Value of *two Hundred* and *fifty* Pounds or thereabouts, 14 *Octob.* 1663, made his Will in Writing, and thereby deviſed ſeveral Legacies, and gave to the Plaintiff his eldeſt Son, *five* Pounds yearly for *forty* Years, if the Plaintiff ſhould ſo long live, and made *James* his ſecond Son Executor, and reſiduary Legatee; and alſo deviſed unto him the ſaid Meſſuage in Tail, with ſeveral other Remainders over. *James* proved the Will, poſſeſſed the perſonal Eſtate, and entered on the real Eſtate, and paid the Plaintiff's Annuity to the Time of his Death, and in *Nov.* 1681, died, and left an Infant Heir, and other Children, and made his Wife Executrix, who proved the Will, and after married the Defendant *Hancock*; and they pretend that *James Elliot* in his Life-time, had fully adminiſtred the Eſtate of the firſt Teſtator; or however, if he had waſted

waſted any Part of it, yet he left no Aſſets to anſwer it, and therefore refuſed to pay the Plaintiff's Annuity, and inſiſted the real Eſtate was not liable to the Payment thereof, being never ſubjected thereunto by the Will; and *James* having by Fine docked the Entail, he borrowed *fifty* Pounds of the Plaintiff, and for ſecuring the ſame, as alſo the *five* Pounds *per Ann.* for *three* Years, *James* conveyed the Meſſuage, *&c.* in Fee to one *Playſted* in Truſt for the Plaintiff, redeemable at three Years end on Payment of the *fifty* Pounds and Intereſt, and the *three Five* Pounds, and that Money was repaid, and the Plaintiff reconveyed, and ſo had extinguiſhed what Right, if any, he had upon the real Eſtate.

Per Cur. The Court took it that the Deviſee of the Land, being alſo Executor, the Land ſhould be liable to the *five* Pounds *per Ann.* according to the Judg-
1 Vol. Caſe 306. ment in the Caſe of *Clowdeſley* and *Pelham*, and the rather, becauſe it was all the Proviſion that was made for the Heir, who was diſinherited, and the Executor and Deviſee had, during all his Life-time, which was above *twenty* Years, duly paid the ſame. And as to the Pretence of extinguiſhing his Right by the accepting of a Mortgage, that was not a good Defence, nor to be regarded in Equity, and therefore decreed to the Plaintiff his Arrears, and growing Annuity for the Time to come, and an Account of Profits of the real Eſtate for that Purpoſe, *&c.*

Walter

Walter & al', Plaintiffs.
Penry & al', Defendants.

Caſe 141. *Die Martis, 1 Julii, in Court Lords Commiſſioners.*

UPON a Demurrer to a Bill of Review, the original Bill was for the Redemption of a Mortgage made ſo long ſince as in 1650, when Money was at *eight* Pounds *per Cent.* in *Sept.* 1660, Intereſt by the Statute is reduced to *ſix* Pounds *per Cent.* but the Money is ſtill continued on this Security, and Intereſt paid after the Rate of *eight* Pounds *per Cent.* and now the Queſtion was, whether *eight per Cent.* ſhould be allowed as paid for Intereſt ſince 1660, or whether the *two per Cent.* over the Statutable Intereſt ſhould not go to ſink the Principal.

In 1650, *A.* makes a Mortgage to *B.* at 8 *l. per Cent.* Intereſt. In 1660, Intereſt is reduced to 6 *l. per Cent.* by Act of Parliament. *A.* for ſeveral Years after continues to pay 8 *l. per Cent.* whether the Intereſt paid after 1660, above 6 *l. per Cent.* ſhall go to ſink the Principal.

The Cauſe was firſt brought to hearing before the Lord Chancellor *Nottingham*, on the Mortgagee's Bill to foreclоſe, and he being of Opinion that the *two per Cent.* ſhould go towards ſinking the Principal, the then Plaintiff diſmiſſed his Bill, and afterwards the Mortgagor brought a Bill to redeem, and that coming to hearing before the Lord Chancellor *Jefferies*, he was of Opinion that the *eight per Cent.* being paid, and received as Intereſt, no Part of it ought to be applied to ſink the Principal, and that the Statute had no Retroſpect beyond 1660, but looked forwards to Contracts and Agreements then after to be made, and not to any Contracts and Agreements before that Time, and decreed the Account to be taken accordingly.

Now upon the Bill of Review, Lord *Trevor*, being there was a Decree already made in it, would not reverſe it. Lord *Rawlinſon* and *Hutchins*, on reading the Act of Parliament, held the Act had a Retroſpect, and

makes it unlawful to take more than *ſix per Cent.* upon any Contract, whether made before or after the Act of Parliament. But that Part of the Statute, which adds Penalties, relates only to Contracts and Agreements then after to be made.

Caſe 142.
Eodem die.

Graham verſus *Stamper.*

Indebitatus Aſſumpſit for Goods ſold and delivered and Verdict for Plaintiff. Defendant brought a Bill, ſuggeſting that he was Maſter of the Buck-Hounds and acted only in Relation to his Office, and that the King ought to pay for theſe Goods. Defendant pleaded the Verdict and demurred, for that the Matter was conuſable at Law. Plea Over-ruled.

THE Defendant had recovered againſt the Plaintiff at Law in an *Indebitatus aſſumpſit* for Goods ſold and delivered; the Bill was to be relieved againſt that Recovery, ſurmiſing it was for Goods ſold to the Plaintiff, as he was Maſter of the Buck-Hounds, and that the Lace and Lining was for the King's Servants, and that 'twas the King's Debts and not the Defendant's, and what he acted was in Relation to his Office, and not as a private Perſon, and that the Defendant was to expect his Money from the King, and not from the Plaintiff, and that the Plaintiff was only to pay it, if he received the Money from the King. The Defendant pleaded the Verdict and Judgment, and that the Plaintiff had inſiſted on the ſame Matter at Law, where it was ruled againſt him; and that a Writ of Error being near ſpent, he now brought this Bill for Delay and demurred; for that the Matter was conuſable at Law, and the Bill contained no Equity; yet the Court, notwithſtanding, over-ruled the Plea and ordered the Defendant to anſwer the Bill.

Caſe 143.
Sabbati, 4 *Julii, in Court, Lords Commiſſioners.*

Robinſon verſus *Bell.*

Executor relieved after a Verdict at Law had againſt him upon a *plene Adminiſtravit*, and the Verdict was had on producing the Executor's own Letter confeſſing a Mortgage made to the Teſtator for 300*l.* The Executor proving in Equity, that this Mortgage appeared afterwards to be worth nothing, and that there were two prior Mortgages upon the ſame Eſtate.

BILL to be relieved againſt a Judgment in an Action of Debt upon a Bond, upon *plenement adminiſtr.* pleaded, the Bill ſurmized that there were ſeveral Debts ſtill

ſtill unſatisfied of a higher Nature than the Defendant's, and that the Plaintiff had given Directions to his Attorney to plead ſpecially, and he had not Aſſets *ultra* what would ſatisfy thoſe Debts, but he by Miſtake had pleaded generally, *plenement adminiſtr.* and farther charged that the now Defendant, by her Friends, applied to the Plaintiff, to know the Value of the Teſtator's Eſtate, and of the Debts that were owing by him; and he informed them thereof accordingly, and at their Deſire he was prevailed upon, for the now Defendant's Satisfaction, to write a Letter to the Defendant, and therein to mention the Particulars of the ſaid Teſtator's Eſtate; and in the Letter ſo by him wrote, he mentioned *three Hundred* Pounds as due on a Mortgage to the ſaid Teſtator; and upon the producing that Letter at the Trial, the Judge took it as ſufficient Evidence to prove, that the *three Hundred* Pounds came to the Defendant's Hands, and directed the Jury accordingly; whereas in Truth, after ſuch Time as the Plaintiff wrote that Letter, he diſcovered that it was a bad Security, there being three precedent Mortgages on the ſame Lands, ſo that the *three Hundred* Pounds is not received, but is all ſtanding out at this Day: The Defendant confeſſing the Letter, and that it was given in Evidence at the Trial at Law; and it appearing that there were ſuch precedent Mortgages, and that the *three Hundred* Pounds was ſtill ſtanding out upon that Security; the Court thought fit to relieve the Plaintiff, and granted an Injunction to ſtay Proceedings at Law, and directed an Account of Aſſets, and on Payment of what ſhould appear due to the Defendant, to acknowledge Satisfaction of the Judgment; and the Lord Commiſſioner *Hutchins* ſaid he thought the Plaintiff was proper in this Court for Relief upon both Points, and cited a Caſe in the Lord *Bacon*'s Time, where upon an Action of Debt upon a Bond of *ſeven Hundred* Pounds brought againſt one as Executor, he pleaded *ne unques Execut'*,

In Debt againſt an Executor for 700 *l.* Executor pleads *ne unques Executor*; and on proving at the Trial, that a Chimney-back, or ſome other ſlight Thing, came to the Defendant's Hand, Plaintiff had a Verdict, but Equity relieved againſt the Verdict. So in another Caſe upon the like Plea of *ne unques Executor*, Plaintiff proved the Defendant took Money for a Pot of Ale ſold by the Teſtator in his Life-time, and Equity relieved.

Execut', and upon the Evidence it appeared, that a Chimney-back, or other Matter of very ſmall Value, had come to his Hands; and thereupon a Verdict paſſed againſt him, and the Judges came into Court and informed the Lord *Keeper* this was the Fact; and the Party was relieved in Equity. And he alſo cited the Caſe of *Cryer* and *Goodhand* in my Lord *Nottingham*'s Time, where in an Action of Debt brought againſt the Widow of an Ale-Houſe Keeper, who died inteſtate, ſhe pleaded *ne unques Executor*, and all the Proof that was againſt her, was that ſhe had taken Money for ſome few Pots of Ale ſold in the Houſe after her Husband's Death, and upon hearing ſhe was relieved.

Caſe 144. *Die Martis, 8 Julii, Lords Commiſſioners.*

Cordell verſus *Noden & al'.*

A. by Will gives ſeveral Legacies to his Relations, amounting to near the Value of his Eſtate; and makes *B.* and *C.* his Executors, and gives them 20 *l.* and intreats them to take the Trouble of getting in his Eſtate. Teſtator lives 10 Years after, and acquires an additional Eſtate. Decreed the ſurviving Executor but an Executor in Truſt, and that the new acquired Eſtate ſhould go to the Legatees in Proportion to their Legacies.

ONE Mr. *Cordell* in 1674, made his Will to the Effect following: *I diſpoſe of my Eſtate after mentioned, and what elſe I have in the World, in Manner and Form following*, and then diſtributes his Eſtate amongſt his Relations, (the particular Legacies amounting unto near the Value of his whole perſonal Eſtate, as appeared by a Calculation of his own Hand-writing by him about that Time made) and then made his Mother and Mr. *Noden* Executors, and gave them *twenty* Pounds, and intreats them to take the Trouble of getting in his Eſtate. The Teſtator lives *ten* Years after this, and acquires an additional Eſtate, and dies, not having altered nor new publiſhed his Will.

The Bill was by the Legatees to call Mr. *Noden*, who was the ſurviving Executor, to an Account for the perſonal Eſtate, alledging he was intruſted therein for their Benefit. The Defendant by Anſwer confeſſed the Will; that the Teſtator lived *ten* Years afterwards, and acquired

quired a conſiderable additional perſonal Eſtate, and conceived he was intitled to it, as being the ſurviving Executor, but ſubmitted to the Judgment of the Court.

Upon long Debate of this Caſe, the Court agreed in Opinion, that the Defendant ſhould be but in the Nature of a Truſtee for the Benefit of the Legatees. Lord *Trevor* conceived *Cordell* could not be ſaid to die Inteſtate, (as was urged by the Plaintiff's Counſel) as to the new acquired Eſtate; for having left a Will, and an Executor, he could not be ſaid to die Inteſtate: But he took it, that upon the Face of the Will, the Defendant *Noden* was only an Executor in Truſt for the Plaintiffs, and that the new acquired Eſtate ſhould be diſtributed to the Legatees in the Will, in Proportion to the Legacies thereby deviſed; and as if the Eſtate had fell ſhort, they muſt have abated in Proportion, ſo now it is increaſed, it ſhall be advanced in Proportion.

Lord *Rawlinſon* of the ſame Opinion, and reſted much on the Words *I diſpoſe of my Eſtate after mentioned, and what elſe I have in the World, as follows*, &c.

Lord *Hutchins:* That *Noden* was a Truſtee, and the Eſtate ſhould go to augment the Legacies in Proportion, and ſaid there might a Truſt appear upon the Face of a Will in an Executor, as well as upon the Face of a Deed or Aſſignment; and cited the Caſe of *Pring* and *Pring*, where in the Will it was ſaid, he made *J. S.* Executor in Truſt, and not ſaid for whom, and decreed a Truſt for the Widow. And ſaid he was told of a Caſe adjudged in the Court, when he was abſent through Sickneſs, where a Man had made his Wife and *J. S.* Executors, his Wife being aged and unable to collect and get in the Eſtate, and made his Wife reſiduary Legatee: It happened that the Wife died in the Life-time of the Teſtator, who left four Children, who brought a Bill againſt the ſurviving Executor, and their Bill was diſmiſſed: Tho' upon the Will, *Ant.* Caſe 94.

the Wife was made reſiduary Legatee, and the Intention of the Teſtator, no Queſtion, was that ſhe ſhould diſpoſe of the Eſtate for the Benefit of the Children, and confided in her for that Purpoſe.

Caſe 145. *Jovis* 17 *Julii*, *Lords Commiſſioners.*

Hunſden verſus *Cheyney.*

The Mother who was the abſolute Owner of a Term, is preſent at a Treaty for her Son's Marriage, and hears her Son declare, that the Term was to come to him at his Mother's Death, and is a Witneſs to the Deed, whereby the Reverſion of the Term is ſettled on the Iſſue of this Marriage after the Mother's Death. The Mother is compellable in Equity to make good this Settlement, and to ſettle the Reverſion of the Term accordingly after her Death.

THE Mother to whom a Term was limited in Tail, ſtands by at a Treaty of a Marriage, intended to be had betwixt her Son and the Plaintiff's Mother, and hears her Son upon that Marriage declare, that the Term was to come to him after the Death of his Mother, and is a Witneſs to the Deed, whereby the Son took upon him to ſettle the Reverſion of the Term expectant on his Mother's Deceaſe, on the Iſſue of that Marriage, and did not mention or inſiſt ſhe had more than an Eſtate for Life therein: The Bill was brought by the Son of that Marriage, complaining that his Grandmother, notwithſtanding the Premiſſes, gave out ſhe *was Tenant in Tail of the Term*, and could diſpoſe of the Term at her Pleaſure, and threatned to alien it, and prayed the Benefit of the Marriage-Settlement, and that the Defendant might be compelled to make it good, as to the Reverſion of the Term after her Diſeaſe.

And though it was inſiſted on for the Defendant, that ſhe was not guilty of any Fraud or ill Practice, but was ignorant of her Title, and knew not that ſhe, as being Tenant in Tail of a Term, might diſpoſe of it, and was no Party to the Marriage-Agreement, or concerned in it, and that it might rather be preſumed, that ſhe was impoſed upon by her Son, and made to believe that ſhe had but an Eſtate for Life, when ſhe had in Truth the Ownerſhip of the whole Term in her,

yet the Court decreed it for the Plaintiff; and as a like Caſe cited the Caſe of Dr. *Amyas*, who ſtood by and ſuffered a Purchaſer to go on without diſcloſing of his Title, and the Caſe between *Charles Clare* and the Earl of *Bedford*, who only witneſſed a Deed, and told the Money lent at his Maſter's Chamber, being his Clerk, and for that alone had his own Security poſtponed.

A Prior Incumbrancer being a Witneſs to a ſubſequent Mortgage, does not diſcloſe his own Incumbrance. He ſhall be poſtponed.

Dale verſus *Smithwick.*

Caſe 146. *Eadem die.*

THE Plaintiff lent *ſeventy* Pounds to the Defendant's Uncle, and for his Security took only a Warrant of Attorney to confeſs a Judgment in Ejectment of three Cloſes upon a feigned Demiſe for *twenty* Years.

One borrows 70 *l.* of *A.* and as a Security gives him a Warrant of Attorney for a Judgment in Ejectment of 3 Cloſes of Land, upon a feigned Demiſe for 20 Years. This is a defective Security, but a good Agreement in Equity to charge the Land.

Per Cur. It is a defective Security, and amounts to a good Agreement in Equity to charge the Land, and decreed it accordingly againſt the Heir.

Martin verſus *Long.*

Caſe 147. *Die Veneris, 18 Julii, Lords Commiſſioners.*

J. S. Deviſes to his Son *Martin* a Leaſe-hold Eſtate to him, his Executors, Adminiſtrators and Aſſigns for ever; but if he died before *Twenty-one* without Iſſue, in that Caſe deviſes it over to his Brother. The Queſtion was, whether the Remainder over was good: It was objected, that it was a Perpetuity, for that the Remainder depends on *Martin*'s Dying without Iſſue; for if he die before *Twenty-one*, though he leaves a Child, and that Child afterwards dies without Iſſue, *Martin* may be ſaid to

Deviſe of a Term to *J. S.* and his Aſſigns for ever, but if he dies without Iſſue before 21, then to go over to his Brother. This is a good Deviſe over.

to be dead before *Twenty-one* without Iſſue. *Sed non allocat' per Cur.* Decreed the Remainder over good, and the like Caſe between *Smith* and *Smith* in the Exchequer, was cited to be ſo adjudged.

Claxton verſus *Claxton.*

Caſe 148. *Eodem die, Lords Commiſſioners.*

Deviſe of Land upon which Timber is growing, to *A.* for Life, Remainder to *B.* in Fee, paying ſeveral Legacies within a limited Time. And in Default of Payment, the Remainder in Fee is deviſed over to *C.* he paying the Legacies. Upon a Bill brought by *B.* the Court gave Leave to *B.* to cut down Timber for the Payment of the Legacies, tho it was oppoſed by the Tenant for Life, and the Deviſee over. *Poſt.* Caſe 199.

ONE *Morris Claxton* deviſes his Lands to the Defendant *Dorothy* his Widow for Life, Remainder to the Plaintiff and his Heirs, paying ſeveral Legacies at the Times appointed in his Will for that Purpoſe; and if he do not pay accordingly, Remainder over to one *Bacon*, he paying the Legacies; and if he failed, the like Remainder over to the Defendant *Felton*, he paying the Legacies: Now the Plaintiff's Bill was, in regard there was a great Quantity of Timber growing upon the Eſtate, which belonged to him in Right of his Reverſion, that he was willing it ſhould be ſold, and the Legacies paid, but that the Widow, who had barely an Eſtate for Life, and could make no Profit thereof her ſelf, yet ſhe in Combination with the other Remainder-Men, deſigning to make the Plaintiff forfeit his Eſtate by Non-payment of the Legacies, and refuſed to permit him to fell the Timber, though he offered Satisfaction for any Damage ſhe ſhould ſuſtain thereby, and therefore prayed he might have Liberty to cut and carry off the Timber, and ſell it for Payment of the Legacies, making the Widow Satisfaction.

The Widow by Anſwer inſiſted, that the Plaintiff had no Right to take off the Timber in her Life-time, and the Defendant *Felton* hoped he ſhould not be compelled to conſent to the doing thereof.

It was objected, that the Plaintiff had made the Widow and Mr. *Felton* Parties, and had not *Bacon*, who was next in Remainder after the Plaintiff, before the Court, but Mr. *Felton* a more remote Remainder-Man; the Anſwer that was given, was that *Bacon* was willing and conſenting to it, and therefore they had no Occaſion to make him a Defendant.

The Court thought it reaſonable that the Plaintiff ſhould have Liberty to take off the Timber, making Satisfaction to the Widow for breaking the Ground by Carriage, Waſte, *&c.* and referred it to a Maſter to ſee what Quantity of Timber was neceſſary to be felled for Payment of the Legacies, and what might be conveniently ſpared. Lord *Hutchins* cited a Caſe of *Nelſon* and *Nelſon*, where he ſaid was a like Decree for Sale of Timber, in the Life-time of the Tenant for Life, for Payment of Legacies.

Edward Wareham, and other Creditors and Legatees of Sir *Anthony Brown*, } Plaintiffs.

Sir *George Brown*, Nephew and Heir of Sir *Anthony*, *Will. Brown* the Executor, *&* *al'*, } Defendants.

Caſe 149. *Eodem die.*

SIR *Anthony Brown* being ſeiſed in Fee of ſeveral Manors and Lands in the County of *Wilts* and *Bucks*, 19 *Octob.* 1688, made his Will, and thereof made the Defendant

One deviſes to 2 of his Siſters 400 *l.* apiece, and to his 3d Siſter what his Executors ſhould think fit. The Court decreed the 3d Siſter ſhould have 400 *l.* alſo, and be made equal to her two other Siſters, if the Eſtate would hold out.

Defendant *William Brown* Executor, and by his Will deviſed unto *two* of his Siſters 400 *l.* apiece, and unto the *Third*, what his Executors ſhould think fit, and then (*inter alia*) deviſed as followeth, *viz.* I give and bequeath all that Manor of *Ludgiſhall*, and the Manor of *Biddwell* in the County of *Wilts*, and all that Lordſhip of *D.* in the County of *Berks*, unto my Brother *John Brown*, and to the Heirs of his Body; and for want of ſuch Iſſue, I give the ſame to my Brother *George Brown*, and the Heirs of his Body; and for want of ſuch Iſſue, I give the ſame to my Uncle *Anthony Brown* and his Heirs. *Item*, I give and bequeath unto my Executor, full Power and Authority to raiſe out of my Eſtate, the Sum of *five Hundred* Pounds, for the Uſe of the next Heir of my Eſtate, if my ſaid Executor ſhall think it neceſſary: And alſo I deſire my Executor, to ſee all my juſt Debts which he ſhall find due, and my funeral Charges, paid and ſatisfied. *Item*, I give and bequeath unto my ſaid Executors, all the Reſt and Reſidue of my whole Eſtate unbequeathed, to pay and diſtribute according as my ſaid Executor ſhall think it moſt fit and requiſite.

A. deviſes Lands to *B.* in Tail, Remainder to *C.* and gives his Executor Power to raiſe out of his Eſtate 500 *l.* for his next Heir, and deſires him to ſee his Debts paid. This gives the Executor a Power to ſell the Lands to pay the Debts.

Upon the Reading of this Will, the Court held that *William Brown* the Executor, had ſufficient Power to ſell the Lands, and that the real Eſtate by the Will was ſubjected to the Payment, both of Debts and Legacies, and decreed it accordingly. And as to the eldeſt Siſter, who was to have only what the Executors ſhould think fit, they thought it reaſonable ſhe ſhould have *four Hundred* Pounds, and be equal with her other Siſters; but reſerved the Conſideration thereof, until after the Account taken, and they ſhould ſee how the Eſtate would hold out.

I

Tyrrel

Tyrrel verſus *Beake.*

Caſe 150. *Die Lunæ*, 21 *Julii*, *Lords Commiſſioners.*

The Plaintiff Captain of a Man of War ſeiſes the Defendant's Ship, (being an Interloper,) out of the Limits of the *Eaſt-India* Company's Charter, and ſhe and her Goods condemned in the Admiralty, and delivered over to the King's Uſe. The Defendant, the Owner and Freighter of the Ship, brings *Trover*, and recovers 1300 *l.* Damages. The Plaintiff brings Bill to be relieved againſt this Judgment; Defendant pleads the Judgment and Proceedings at Law. Plea overruled.

THE Defendant was Owner and Freighter of an interloping Ship that went to the *Eaſt-Indies*, the Plaintiff was Captain of a Man of War, and took the Defendant's Ship at Sea, even out of the Limits of the *Eaſt-India* Company's Charter, and ſhe was condemned in the *Admiralty*, and the Ship and Goods delivered to the *King*'s Uſe. Upon the Plaintiff's Return to *England*, the Defendant brought an Action of *Trover* againſt him the Plaintiff; the Defendant at Law firſt put in a Plea in *Abatement*, which was over-ruled, then pleaded the ſame Matter in *chief*, and thereupon Judgment was obtained againſt him, and a Writ of Inquiry of Damages executed, and Damages aſſeſſed to 1300 *l.* To be relieved againſt which the Plaintiff brought his Bill, alledging, that what he did, was by Virtue of his Majeſty's Commiſſion, and as he was Captain of a Man of War; that the Ship and Goods were condemned in the Admiralty, and ſeiſed to the King's Uſe; that he received not one Shilling to his own Uſe; that the Damages were exceſſive, as would appear by the Bills of Lading, if produced, and that the Writ of Inquiry was by Contrivance executed, when he was at Sea; ſo that no Defence could be made, and done the laſt Day of the Term, about Noon of the ſame Day; ſo that he could not move the Court at Law for a new Trial that Term; and Judgment was entered up before the next Term; ſo that then he came too late. The Defendant pleaded the Proceedings at Law *prout*, *&c.* that Defence was made at the executing the Writ of Inquiry, that his Ship and Goods were really worth *one Thouſand three Hundred* Pounds, *&c.*

The Court diſallowed the Plea, and ordered the Defendant to anſwer, and continued the Injunction to Hearing.

Hitchcox

Caſe 151. 23 *Julii*, *Lords Commiſſioners.* *Poſt.* Caſe 187.

Hitchcox & al' verſus *Sedgwick & al', & econtra.*

THE Caſe was, that one *Slaney* was joint Factor with one *Cudmore* at *Lisbon* in *Portugal*, in 1682, and they being conſiderably indebted, procured a Letter of Licence from their Creditors, 18 *Nov.* 1684. *Slaney* being ſeiſed of the Manor of *Lulſey*, in the County of *Worceſter*, demiſes the ſame to one *Minſhal* for *five Hundred* Years, by way of Mortgage to ſecure a Debt of *eight Hundred* Pounds. Some Time after *Slaney* comes over into *England*, and in *March* following borrows *two Thouſand two Hundred* Pounds of *Sedgwick*, and by Leaſe and Releaſe the *6th* and *7th* of *March*, 1684, makes a Mortgage in Fee to him of the ſaid Manor of *Lulſey*, and on the *7th* of *March*, *Minſhal* being paid off with this Money, aſſigns his Mortgage to one *Harris* in Truſt for *Sedgwick*. It ſeems that on the *21ſt* of *Feb.* 1684, but unknown to *Sedgwick*, a Commiſſion of Bankruptcy was taken out againſt *Slaney* and *Cudmore*, and on the *2d* of *March* before *Sedgwick*'s Mortgage, the Commiſſioners had made an Aſſignment to *Yote* and *Birds* in Truſt for the Creditors: *Sedgwick* hearing of it, and underſtanding that the Eſtate was ſufficient to pay all the Creditors, who were then come in, as alſo to pay him his *two Thouſand two Hundred* Pounds, is adviſed to come in as a Creditor, and paid his Contribution; and *Auguſt* 14, 1685, there was a Deed of Diſtribution made of the ſaid Manor, that is to ſay, the ſame was valued at *three Thouſand* Pounds, and that Money diſtributed amongſt the Creditors. *Sedgwick*'s Share was *two Thouſand two Hundred Thirty-five* Pounds *ſix* Shillings and *five* Pence. On the *Decemb.* 2. 1685, more Creditors came in, and a *ſecond* Diſtribution is made: In *Jan.* 1685, the Aſſignees ſold the Manor, and conveyed it to *Noden* in Truſt

Truſt for *Sedgwick* for *three Thouſand* Pounds. *Sedgwick* had in Money and Bills the whole Conſideration-Money there, and had an Allowance of his own Debt, and paid the reſt of the Monies to the Aſſignees for the Creditors. After this ſeveral Orders on Petitions were made by the late Lord Chancellor *Jefferies*, for ſetting aſide this Purchaſe, and Proceedings upon the Statute of Bankrupt, and for letting in other Creditors, and the Aſſignees were ordered to repay the Money, and *Noden* to reconvey to the Aſſignees.

The Plaintiff's Bill was by the Creditors of *Slaney*, to be let in under the Commiſſion of Bankrupt, and to have the Lands ſold for their Satisfaction, and to redeem the firſt Mortgage, if precedent to the Bankruptcy: *Sedgwick*'s Bill was to have a Reconveyance from the Aſſignees, and he reſtored to what he had loſt by arbitrary Orders on the Petitions. The principal Queſtions in the Caſe were,

Whether a Man who lends Money to a Bankrupt after a Commiſſion of Bankruptcy ſued out againſt him, and actual Notice of it, can come in under the Statute as a Creditor.

Whether one who lends Money to a Bankrupt after a Commiſſion ſued out againſt him, but before actual Notice of it, can come in under the Statute as a Creditor. By two Lords Commiſſioners againſt one, who doubted, he cannot.

Secondly, Whether *Sedgwick* having really and *bona fide*, lent his Money without any actual Notice of the Bankruptcy, and having an Aſſignment of *Minſhal*'s Mortgage, by which he might protect himſelf at Law, a Court of Equity ſhall take that Plank from an Innocent Purchaſer.

A. makes a Mortgage, and afterwards a Commiſſion of Bankruptcy is taken out againſt him, and Commiſſioners make an Aſſignment of his Eſtate, and then *B.* lends 2000 *l.* to the Bankrupt on a ſecond Mortgage having no Notice of the Bankruptcy, and afterwards he gets in the firſt Mortgage. This prior Mortgage ſhall not protect the Mortgage ſubſequent to the Bankruptcy.

Whether a Diſtribution by Commiſſioners of Bankrupt among the Creditors upon a ſuppoſed Value of the Bankrupt's real Eſtate, when the Commiſſioners had no Money to diſtribute, is fraudulent, and to be ſet aſide.

A third Queſtion was made, whether any Diſtribution or Dividend in this Caſe had been well made, in regard that though a Deed for that Purpoſe was made in *Aug.* 1685, and the *three Thouſand* Pounds mentioned to be diſtributed amongſt the Creditors, yet in Truth the Manor was not then ſold, nor had the Aſſignees any Money to diſtribute, but this was a colourable Diſtribution contrived to defraud and ſhut out the reſt of the Creditors.

As to this laſt Matter it was anſwered, that the Diſtribution was well and regular, and ſo held to be by the Court, and that nothing is more uſual than to make a Diſtribution before the Eſtate be actually ſold, and the Words of the Act of Parliament are that the Commiſſioners ſhall have the ordering of the Bankrupt's Eſtate, ſo there is no Neceſſity for them to ſell and diſtribute the Money amongſt the Creditors; if they allot a Proportion of the Land to each Creditor, it is well enough.

As to the *firſt* Queſtion, whether *Sedgwick* could come in as a Creditor for Money lent after the Commiſſion ſued out; Lord *Trevor* and *Hutchins* held that he could not, but was excluded; *Rawlinſon* doubted, and took it to be a new Point not yet ſettled, and that there were no Words in the Act to exclude him.

As to the ſecond Point, Lord *Rawlinſon* was of Opinion that *Sedgwick* as an innocent Purchaſer ought to have the Advantage of all his Securities to defend himſelf at Law, and that this Court ought not to take any Advantage from him; and ſaid he would conſider the ſeveral Steps, that this Court had gone in Favour of Purchaſers, in allowing them to defend themſelves by any Advantage they could get at Law: That where a Pur-

chaſer buys in an old Statute or Mortgage, though nothing be due upon it, he ſhall be admitted to defend himſelf by it, as was the Caſe of *Higden* and *Calamy*, 21 *Car.* 2. and the Caſe of *Wymonſel* and *Hawland*, *May* 1674, and many Caſes of that Kind. The next Step has been that Purchaſers, who have got an Advantage at Law, though by undue Means, have been permitted to profit by *it*. And for that Purpoſe cited the Caſes of *Burnel* and *Ellis*, where *Ellis* had got the Deed of Rent-charge into his Hands: And 22 *Car.* 2. Sir *John Fagg*'s Caſe, who got the Deed of Entail into his Hands by a Trick: And the Caſe of *Harcourt* and *Knowel*, where a Releaſe was obtained from a Grantee of a Rent-charge, without any Conſideration and by Fraud, and yet a Purchaſer admitted to *take the Advantage* of it: And the Caſe of Lord *Huntington* and *Greenvile* firſt decreed to protect a Purchaſer, and after that a Releaſe gained from an Adminiſtrator *de bonis non:* And the Caſe of *Seybourne* and *Clifton*, where Plaintiff and Defendant had each of them purchaſed a Reverſion, expectant on the Death of Tenant for Life, the Plaintiff's Bill was, that he might examine his Witneſſes to preſerve their Teſtimony, and be admitted to try his Title in the Life-time of the Tenant for Life; but foraſmuch as the Purchaſer was a Defendant, the Court would do nothing in it, but diſmiſſed the Plaintiffs Bill, and he loſt his Land for want of examining his Witneſſes; and as to what has been objected, that the Suing out the Commiſſion, was preſumptive Notice of the Bankruptcy to all Perſons, and that *Sedgwick* was bound to take Notice of it: He ſaid this Court had been always very careful not to impeach Purchaſes by preſumptive Notice, and for this cited the Caſe of *Brampton* and *Barker*, 2 *die Junii*, 1671. Tenant for Life, Remainder to his firſt Son mortgaged for *one Thouſand five Hundred* Pounds: The Deed of Settlement was then produced,

When a Purchaſer buys in an old Statute or Mortgage, tho' nothing is due upon it; yet in Equity he ſhall defend himſelf by it. So he ſhall, though he got in this prior Incumbrance by undue Means.

Court wont give Leave to Plaintiff to examine Witneſſes to perpetuate Teſtimony, tho' in caſe of a Purchaſe of a Reverſion, where there can be no Trial at Law during the Eſtate for Life.

Court of Equity in impeaching a Purchaſer's Title upon preſumptive Notice.

Tenant for Life, Remainder to his firſt Son, aſſures the Mortgagee that he had no Son, whereas he had a Son born five Days before, and delivers the Settlement to the Mortgagee. The Mortgagee being adviſed that before the Birth of a Son the Tenant for Life might deſtroy the contingent Remainder, lends his Money, having no Notice a Son was born. The Son of the Mortgagor ſhall not be relieved againſt this Mortgage.

duced, and ſeen by the Purchaſer, who notwithſtanding lent the Money, being adviſed that the Tenant for Life, not having then any Son born, could deſtroy the contingent Remainders; whereas in truth there was a Son born *five* Days before the Lending of the Money; but the Mortgagees having no Notice thereof and having got the Deed of Settlement, the Court would not relieve againſt the Purchaſer; but diſmiſſed the Bill. And the Caſe of *Philips* and *Redhil*, 17 *Nov.* 1679, Where Tenant for Life ſold as Tenant in Fee, and the very Deed of Settlement at the Time of the Purchaſe was produced and delivered to the Purchaſer himſelf; yet the Court would not affect the Purchaſer with the preſumptive Notice; but diſmiſſed the Bill.

As to the Objection, that a Bankrupt had nothing in him to ſell or diſpoſe of, but the Eſtate was deveſted by Act of Parliament, and the Inheritance and Equity of Redemption veſted in the *Commiſſioners*, who by the Act have Power to perform Conditions, and at the Time of the Commiſſion ſued out, the Mortgage was not forfeited. He ſaid there had been Caſes in this Court, where a Man purchaſed from a Bankrupt who in Truth had no Eſtate at all in him, and yet ſuch Purchaſer by buying in an Incumbrance has been permitted to protect himſelf; as where a Man firſt made a Mortgage, and after for a further Conſideration abſolutely releaſed the Equity of Redemption, and after all this makes a ſecond Mortgage for *one Thouſand* Pounds, ſuch ſecond Mortgagee ſhall protect himſelf by an old Statute; and cited the Caſe of *Taylor* and *Tabor* where the Defendant in the late Times having purchaſed under the Parliament Title, after the Reſtoration of King *Charles* 2. purchaſed in an old Statute, and this Court would not relieve againſt the Purchaſer; and he put this Caſe; A Man articles to ſell unto *J. S.* afterwards *J. D.* gets a ſecond

A Man makes a firſt Mortgage and afterwards for a further Conſideration, abſolutely releaſes the Equity of Redemption, and then makes a ſecond Mortgage. The ſecond Mortgagee ſhall protect himſelf under an old Statute. One in the Time of the Rebellion purchaſed under the Parliament's Title, and after the Reſtoration gets in an old Statute; Equity would not relieve againſt him. One articles to ſell Lands to *A.* and afterwards articles to ſell the ſame Lands to *B.* *B.* pays the Money and gets a Conveyance, and *A.* aſſigns his Articles to *C.* who gets in an old Statute; he ſhall defend himſelf by it.

cond Article, and actually pays his Money, and has a Conveyance. *J. S.* afterwards aſſigns the Benefit of his Articles to a Man, who gets in a Statute, and he was permitted to defend himſelf by it. And he ſaid foraſmuch as *Sedgwick* had in this Caſe got the Law on his Side, he could not conſent to do any Thing to take a Plank from an innocent Purchaſer, as *Sedgwick* appeared to be, no Manner of actual Notice being proved; nor could it be preſumed he would have been ſo mad as to lend *two Thouſand two Hundred* Pounds, if he had known *Slaney* was a Bankrupt. And altho' the Commiſſion was ſued out before the Money lent, he did not think that ought to bind him, or to be ſuch Notice as ſhould affect a Purchaſer.

A Plank not to be taken from an innocent Purchaſer.

Lord *Trevor* and *Hutchins* were of a contrary Opinion, and held firſt that he was not a Creditor within the Act of Parliament. And *ſecondly*, That he was not in the Caſe of an innocent Purchaſer: When the Commiſſion was ſued out, he was bound to take Notice: Lord *Hutchins* ſaid, the Caſe turned upon this, that *Slaney* at the Time of *Sedgwick*'s Mortgage, had no Eſtate or Intereſt in him, either in Law or Equity: all was deveſted and gone by the Act of Parliament, to which all Perſons are preſumed to be Parties, and are bound by it. And the Act gives the *Commiſſioners* Power to perform Conditions, and in this Caſe the Mortgage was not forfeited; but in Caſe it had, he held the *Commiſſioners* ſhould have had the Equity of Redemption; and ſaid the Caſes that had been put, would not come up to this Caſe, for that there was a Difference where a Man had deveſted himſelf of his Eſtate by his own Act, and where it was taken out of him by Act of Parliament, whereunto all Perſons are ſuppoſed to be Parties, and are concluded by it; and ſaid that ſeemed a very ſtrong Caſe to him that had been put of a Purchaſer's, in the late Times, Buying in a Statute to protect his Title; if that had been allowed, moſt *Cavaliers* would have loſt their Eſtates. And ſaid he

Every one bound to take Notice of a Commiſſion of Bankruptcy when taken out.

looked upon the Diſtribution that was in this Caſe to be a fraudulent Contrivance, to divide when they had nothing to diſtribute; and ſaid, though *Thomas Sedgwick* had an honeſt Debt, he had loſt that Honeſty by playing a Trick to come at it; and cited Sir *William Beverſham*'s Siſter's Caſe, who by adding a Seal to a Note, which was ſufficient without a Seal, loſt her Security. And ſaid he thought the Lord *Chancellor* had done well to ſet aſide the colourable Diſtribution and Sale, and that he might well do it, even upon a Petition. And ſaid it had been ſo done in the Lord *Clarendon*'s Time; and that it appeared in the Caſe that *Slaney* was a Factor in *Portugal*, and ſo long ago as in (82.) did that in *Portugal*, which if done in *England*, would have made him a Bankrupt; but that Queſtion was not yet ſettled, whether the committing Acts of Bankruptcy beyond Sea, or whether trading only beyond Sea, be within the Reach of the Statutes. He ſaid in the Caſe of one *Anderſon*, who traded in *Ireland*, he was adjudged a Bankrupt within the Statute; but there it was proved, he came ſome Times over to *Cheſter* to buy Goods, and therefore he did not ſee any Bankruptcy that would reach *Minſhall*'s Mortgage.

An honeſt Debt may be loſt by playing a Trick to come at it, as by adding a Seal to a Note, which is good without it.

Fraudulent Diſtributions by Commiſſioners of Bankrupt, may be ſet aſide by the Lord *Chancellor* on a Petition.

Whether Trading beyond Sea, or Committing an Act of Bankruptcy beyond Sea, be within the Statutes of Bankrupt.

And thereupon it was decreed that the Land ſhould be ſold, *Sedgwick* to be paid the *eight Hundred* Pounds, and Intereſt due on *Minſhall*'s Mortgage, then the Coſts of this Suit to be born out of the Eſtate, and the Reſidue to be paid amongſt all the Creditors in Proportion; but *Sedgwick* not to come in for his *two Thouſand three Hundred* Pounds.

2

Thomas

Thomas Bradley, one of the younger Sons of *Thomas Bradley* Deceaſed, } Plaintiff.

Richard Bradley, Son, Heir and Executor of the ſaid *Thomas Bradley & al'*, } Defendants.

Caſe 152. *Eodem die, Lords Commiſſioners.*

THomas Bradley Deceaſed, the Father of the Plaintiff and Defendant, *Sept.* 7, 1688, made his Will, and deviſes to each of his younger Children pecuniary Legacies, and particularly to the Plaintiff *one Hundred* Pounds at *Twenty-one* or Marriage, and thereby deviſeth unto the Defendant his *three* Copyhold Meſſuages at *Mile-End* in Fee, and likewiſe his Leaſe-hold Eſtate of ſeveral Tenements at *Ratcliff* and *Redriff* to the Defendant his Executors, Adminiſtrators and Aſſigns, *ſubject nevertheleſs, and my Will and Pleaſure is, that the Copyhold Meſſuages or Tenements, and alſo the Leaſe-hold Premiſſes herein before bequeathed to my Son* Richard Bradley, *and alſo what ſhall be herein given to my Son* Richard Bradley, *ſhall be liable and chargeable for the Payment of the Legacies before given to my younger Children.* It happened that there was no Surrender of the Copyhold Eſtate to the Uſe of the Will, and *that* being of the Tenure of *Gavelkind*, the Plaintiff got himſelf preſented and admitted to a *third* Part of the Copyhold, as deſcended on him in *Gavelkind*, and having lately attained his Age of *Twenty-one*, exhibited this Bill for Satisfaction of his *one Hundred* Pounds Legacy, and prayed an Account and Diſcovery of the perſonal Eſtate in order thereunto.

Equity will ſupply the Want of a Surrender of a Copyhold, as well for an elder Son as a younger, in Caſe of *Gavelkind* Copyhold; if it appears to be the Intent of the Will, that the eldeſt Son ſhall have the Copyhold, paying a Legacy thereout to the younger Son.

The

The Defendant confeſſed the Will, ſet forth the Value of the Eſtate, that he was willing to pay the Legacy, in caſe he might enjoy the Land according to the Will; but ſet forth how his Brother taking the Advantage of the Want of a Surrender, had got himſelf admitted; and unleſs he might have the Copyhold, hoped he ſhould not be compelled to pay the Legacies; for if ſo, he who was the eldeſt Son and Heir, and unto whom the Teſtator intended much the greater Part of his Eſtate, would have the leaſt Share of it.

When this Cauſe came firſt to be heard, the Court took Time to conſider of it, and would be attended with Precedents; and the Cauſe coming on again to be heard, the Precedents, that were inſiſted on, were the Caſe of *Hardham* and *Roberts*, *Jan.* 22, 1682-3, where by the Cuſtom of the Manor, a Surrender ought to be into the Hands of *two* Tenants, and the Surrender was into the Hands of one only; yet being for a Proviſion for a younger Child, the Court ſupplied that Defect, and the Caſe of *Croft* and *Lyſter Feb.* 22, 1675, where Husband and Wife were Jointenants for Life, Remainder in Fee to the Wife; the Husband purchaſes the Freehold, and takes the Conveyance to the Uſe of himſelf and his Wife, and their Heirs; the Husband dies, the Wife ſurrenders to the Uſe of a Daughter by a former Husband, and decreed accordingly againſt the Heir: And the Caſe of *Smith* and *Aſhton*, where the Defective Execution of a Power was ſupplied in Equity, being a Proviſion for younger Children. And ſeveral other Caſes were cited, where Surrenders and Liveries had been ſupplied in Equity; but thoſe Caſes were grounded upon a long Poſſeſſion and Enjoyment.

Equity will ſupply the Want of a Surrender of a Copyhold, when it is deviſed for a Proviſion for younger Children, or in favour of Creditors, or a Purchaſer.

A Defective Execution of a Power to provide for younger Children ſupplied in Equity.

It was objected firſt, that there was ſufficient perſonal Eſtate without the Copyhold for Payment of the Legacy; and if the Copyhold was charged, it was but in Aid

and Supplement of the perſonal Eſtate; and here being no Deficiency, there was no Need to ſupply the Want of a Surrender, upon Pretence that it is for making Proviſion for younger Children. And *ſecondly*, that the Plaintiff's Bill was barely for his Legacy, and he ask'd it only out of the perſonal Eſtate, and the Defendant had no Bill to have the Defect of a Surrender ſupplied.

The *Commiſſioners* all concurred in Opinion, that the Want of the Surrender ought to be ſupplied, and therefore decreed the Plaintiff to re-ſurrender the Copyhold, and the Defendant in the mean Time to hold and enjoy, and upon ſurrendring he to be paid the *one Hundred* Pounds Legacy.

Lord *Hutchins:* I take it the Objection that the Heir has no Bill to have the Want of a Surrender ſupplied, turns upon them; for a Man in many Caſes may defend himſelf with that, which would not give him Title to ſue. There is no Doubt but in the Caſe of a Purchaſer the Want of a Surrender ſhall be ſupplied, and ſo in the Caſe of a Creditor, or Proviſion for Payment of Debts; and there having been Precedents already of Relief, where it is a Proviſion for Children, he thought the beſt Service they could do was to make the Rule uniform, and to ſtick to a Rule. As to the Objection that the perſonal Eſtate is ſufficient to pay the Legacies, the eldeſt Son has no Legacy, and the Proviſion intended him will be gone, if the Surrender be not ſupplied. Suppoſe the Houſes were burnt down, ſo that the perſonal Eſtate fell ſhort, no Doubt but the younger Children would have an Equity to charge the Copyhold, and to ſupply the Defect of a Surrender, and there ought not to be one Sort of Equity for an eldeſt, and another for a yonger Son.

Caſe 153. 24 *Die Julii*, *Lords Commiſſioners.*

Woodman verſus *Blake*, & *econtra.*

One ſeiſed in Fee of Lands of 10000 *l.* Value, ſettles it ſo, that in Caſe his eldeſt Daughter within 6 Months after his Death, ſhould pay 6000 *l.* to the Uſe of his other four Daughters, then the eldeſt to have the Land. But if ſhe failed in Payment, then the 2d to have the like Privilege. The 6 Months paſt without Payment. Whether the eldeſt Daughter can aſſign over this Privilege. *Poſt.* Ca. 202.

SIR *Thomas Bade* having *five* Daughters by Deed ſettles his *Hampſhire* Eſtate ſo, that in caſe his eldeſt Daughter ſhould pay 6000 *l.* within *three* Months after his and his Wife's Deceaſe, to be equally diſtributed amongſt his other Daughters, that then ſhe ſhould have the Eſtate, being worth *ten Thouſand* Pounds to be ſold; if ſhe failed, then the like Power to another Daughter, with Power in the Deed to change, alter or revoke the ſame. By Will reciting his Power to alter or revoke the Deed, he deviſes that his eldeſt Daughter ſhall have the Preemption, and gives *ſix* Months Time for Payment of the Money. The eldeſt Daughter within the *ſix* Months made Application to the Truſtees, that they would join in Mortgage or Sale for raiſing of the Money; and ſome Difficulties ariſing about it, ſhe, upon the Expiration of the *ſix* Months Time for Payment of the Money, exhibited her Bill in this Court, and being indebted to the now Plaintiff *Woodman*, aſſigned her Intereſt and Right of Preemption to him.

The Queſtion was, whether the *ſix* Months being elapſed, the Plaintiff ſhould have any Benefit of the Aſſignment. It was inſiſted for the Defendants, that the Intention of the Teſtator was to keep the Eſtate in his Family, and therefore in caſe one Daughter was not able, or ſhould neglect, to pay, he limits that Privilege over to another. Now here comes *Woodman*, the Aſſignee of a Daughter, to take the Eſtate out of the Family, contrary to the Intention of the Donor; and that the Deed was not revoked by the Will, but only altered as to the Time of Payment, ſo that if the firſt Daughter failed, that Privilege is to go over to another by the Deed, which ought to be

taken ſtrictly, in Favour of thoſe who were to come after. The Court took Time to conſider of it.

Earl of *Plymouth* verſus *Hickman.*

Caſe 154. *Eodem die, Lords Commiſſioners.*

THE Caſe appeared to be, that in 1681, a Settlement was made of *Tovey*'s Eſtate, whoſe Daughter the Lord *Windſor* married, and out of that Settlement Lands called *Breedon* and *Redmarley* were omitted, to the Intent that if a Purchaſe ſhould offer it ſelf of Lands more convenient, and lying better to the Lord *Windſor*'s Eſtate, theſe might be ſold and other Lands purchaſed; much about the ſame Time in 1681, there was a Treaty for the Purchaſe of the Manor of *Bromeſgrove*, (being the Lands in Queſtion) carried on by *Emes*, on Behalf of the Lord *Windſor*, and *Emes* and Lord *Windſor* were obliged by the Articles to pay the Purchaſe-Money, and in the ſame Year, to wit, in 1681, is the Purchaſe made, and the Conveyance taken in the Name of the Earl of *Plymouth* and *Emes*, and to the Heirs of the Earl of *Plymouth*. The *three Thouſand three Hundred* Pounds Conſideration-Money is mentioned in the Deed of Purchaſe to have been paid by the Earl of *Plymouth*, and was in Truth by him borrowed of the Earl of *Conway* on a Mortgage of his own Eſtate. The Lord *Plymouth* at the Courts he held there, declared it was his Son's Eſtate. In 1683, Sir *William Hickman* lends *three Thouſand three Hundred* Pounds to pay off the Lord *Conway*, and he accepts of a Security of the Lord *Windſor*'s Lands, to wit, of *Breedon* and *Redmarley*; and thereupon the Earl of *Plymouth*'s Security was diſcharged: To this Security the Earl of *Plymouth* was a Party, and, as was ſaid, gave a Receipt on the back of it, for the *three Thouſand three Hundred* Pounds. The Earl of *Plymouth* afterwards by his Will deviſes this Manor of *Bromeſgrove* (*inter alia*) for the Payment of his Debts: And now the Queſtion

Though in the Purchaſe-Deed, the Conſideration-Money, is mentioned to be paid by the Purchaſer, and there is no expreſs Declaration of a Truſt; yet upon the Circumſtances of the Caſe, decreed a Truſt, though to the Diſappointment of the Purchaſer's Will and of his Creditors.

Queſtion was, whether here was a Truſt for the Plaintiff, the Infant Heir, ſufficiently declared in Writing, according to the Statute of *Frauds* and *Perjuries*.

It was inſiſted on for the Defendants, that here was no ſufficient Declaration of the Truſt; that as to the Articles, nothing was more uſual than for one Man to article for another; that when the Matter is proceeded in, as in this Caſe, and Conveyances come to be executed, the Articles are out of Doors, and the Deed of Purchaſe declares the Money was paid by the Earl of *Plymouth*, as in Truth they cannot controvert, but that it was; then, when ſhould the Truſt begin? for it was no Truſt at the Time of the Purchaſe; and there is no expreſs Declaration of the Truſt in Writing to this Day; the moſt they can make of it, is but an Inference, that becauſe the Father had the like Sum of Money afterwards out of the ſame Eſtate, that therefore that Money muſt be applied to the Purchaſe, and come in Lieu of the Conſideration-Money which was paid by the Earl; and this to diſappoint a Man's Will, and to diſcredit it, who is not preſumed to do an ill Thing *in articulo Mortis*, and to prevent his Creditors of their Satisfaction.

Per Cur. We think it a Truſt, upon the Face of the Deeds; though Creditors are Favourites, we muſt not pay them out of other Mens Eſtates, nor as Juſtice *Twiſden* was wont to ſay, *ſteal Leather to make poor Men Shoes*, and decreed it for the Plaintiff.

Caſe 155. 28 *die Julii, in Court, Lords Commiſſioners.*

Beeton verſus *Darkin & econtra.*

One dies Inteſtate leaving an Uncle and a deceaſed Uncle's Son, whether the deceaſed Uncle's Son ſhall come in for a Share on the Statute of Diſtribution. *Poſt.* Caſe 213.

THE Queſtion aroſe upon the Statute for *Diſtribution of Inteſtate's* Eſtates; in this Caſe there were *four*

four Brothers and a Siſter, being Uncles and Aunt to the Inteſtate, one of them was dead leaving Children; the Queſtion was, whether theſe Children ſhould come in for a Share.

Mr. *Finch* argued that before the Making of this Statute, if there were a Brother living and a Nephew, the Brother ſhould have had the Adminiſtration, and the Nephew ſhould have had nothing. But now by this Act of Parliament the Nephew comes in for a Share, but the Act goes only to Brothers and Siſters Children and their Repreſentatives, which will not reach this Caſe, for the Words of the Act are, there ſhall be no Diſtribution further than Brothers and Siſters Children and their Repreſentatives, and that muſt be intended of Collaterals to the Inteſtate.

Objected *per* Lord *Hutchins:* If there be two Uncles both dead leaving Iſſue, the Child of one of them gets Adminiſtration; by Mr. *Finch*'s Rule, the Adminiſtrator is not bound to diſtribute.

Mr. *Finch*: That is not my Argument, I do not ſay that even in that Caſe there ſhall not be Diſtribution amongſt thoſe who are in equal Degree; but what I ſay is, that there ſhall not be any Repreſentation amongſt Collaterals to the Inteſtate, beyond Brothers and Siſters Children.

Mr. *Solicitor General*, and Mr. Serjeant *Levinz*, argued *econtra*, that the Proviſo in the Act of Parliament, that there ſhall be no Repreſentation beyond Brothers and Siſters Children, muſt be taken with Relation, not to the Inteſtate, but to the Perſons amongſt whom the Diſtribution is to be made: There are no ſuch Words in the Act of Parliament, as that there ſhall be no Repreſentation amongſt the Collaterals to the Inteſtate beyond Brothers and Siſters Children to the Inteſtate; there

wants the Word (Inteſtate) in that Place to ſupport Mr. *Finch*'s Argument.

Per Lord *Hutchins*, the Eccleſiaſtical Court very anciently made Diſtribution of Inteſtates Eſtates, long before the Act of Parliament; many Precedents whereof were lately produced at the Bar of the Houſe of Lords in the Caſe of *Crook* and *Watts* between the half Blood and the whole Blood, that the Spiritual Court was not prohibited from making Diſtribution until the Reign of King *James* the Firſt, and the Prohibition was then grounded on the Statute of *Henry* 8. which directs the Ordinary to grant Adminiſtration to the next of Kin, and when that was done, they had executed their Authority; and he took it that the Words in the Act of Parliament, to diſtribute according to the Laws for that Purpoſe, and Rules in the Act afore-mentioned, the Word (Laws) muſt relate and be intended of Eccleſiaſtical Laws, and the Uſage in the Spiritual Court before that Time practiſed.

Ant. Ca. 124.

1 Salk. 250. *Pett* v. *Pett*, *contra* adjudged. *Poſt.* Ca. 213. *contr'.*

The *Court* inclined that the Nephew was well intitled to a Share with the Uncles and Aunt, but took Time further to conſider of the Caſe.

Caſe 156. *Die Mer'*, 30 *Julii*, *in Court, Lords Commiſſioners.*

Taylor & ux', & al' verſus *Bell, Bagnal & al'.*

A Woman reſorts to Places of Gaming at Court, and borrows Money to ſupply Perſons of Quality in their Gaming, and gives the Lenders great Rewards, and afterwards borrows more, and is arreſted for the laſt Money lent, and gives Bond and Judgment for it, and brings a Bill to have an Allowance for the former exceſſive Premiums which ſhe allowed. The Court would not relieve otherwiſe than on Payment of Principal, Intereſt and Coſts.

THE Plaintiff's Wife reſorted to Places of Gaming at Court, and by ſupplying Perſons of Quality there, with Sums of Money and otherwiſe, made conſiderable Profit, and for the better carrying on this Sort of Trade, ſhe borrowed great Sums of Money of ſeveral Perſons, and amongſt others of the Defendants and their Wives,

Wives, boaſting to them the great Advantage ſhe made by this Sort of Dealing, and that they ſhould have the Benefit of it; and for gaining the better Credit with them ſhe would bring them five Guineas for the Loan of ten for a Week, and ſo from Time to Time, alledging their Money had gained ſo much Profit; and they finding this great Profit were incouraged to lend greater Sums, at leaſt *one Hundred*, or *two Hundred* Guineas at a Time, and then put them of, that there had been Diſappointments, and but little Play, but that there would ſhortly be great Gluts of Play, and great Profits made, and they ſhould be ſure to have at leaſt five for one. The Defendants at laſt ſuſpecting her fair Promiſes, arreſted the Plaintiff her Husband, who had then lately married her, and the Plaintiff the Wife alſo, by her Maiden Name, and held them in Cuſtody until they agreed to an Account of what they alledged was due, and gave Bonds with Sureties, who had been ſome of her like Cuſtomers, for Payment of the Monies, with a Warrant of Attorney to confeſs Judgments againſt the Plaintiff *Taylor* and his Wife.

The Bill was to be relieved againſt thoſe Securities thus obtained, and to bring the Defendants to a fair Account, ſetting forth the Plaintiffs had no Dealings with them, but by Way of Monies borrowed and repaid, and annexed a Schedule of Receipts and Payments. The Defendants by Anſwer confeſſed the Fact to be as above, and that they had often received *five* or *ten* Guineas for the Loan of *ten* Guineas for a Week or *ten* Days, as Profit that had been made of the ſame, and ſo of other Sums, and they lent and gave the Plaintiff new Credit for the Sums ſo paid as Profit; ſo that it appeared by their Anſwers, that though they had got Securities from the Plaintiff for great Sums of Money, that yet the Defendant *Bell* had in Truth received more than ſhe really lent to the Plaintiff, and that there was but little due to *Bagnal*; but inſiſted that the Sums ſo received were paid as Profit, and not towards Satisfaction of the Monies lent.

For

For the Plaintiff it was inſiſted there ought to be an Account; by their own Anſwers it appears there is no ſuch Sums due, as thoſe for which they have got Securities. As to the Pretence that the Monies repaid were ſo paid as Profit made at Play, and not to ſatisfy the Monies due, it was ſaid, they might make what Agreements they thought fit amongſt themſelves, but if they came into *Weſtminſter-Hall*, there would be but little Regard given to them; they muſt there be governed by the Rules at Law. Now here they had no Right to any Profit ariſing by Play, for they run no Hazard; they of their own Shewing were to have their Principal again in all Events; then it comes to this, that it is a Debt for Money lent, and the Meaſure there is what is due for Principal and Intereſt; and as to what they object, that the Plaintiffs made great Profit with their Money, and they run a great Hazard in truſting us, they run the ſame in Hazard that other People do who lend Money on a Promiſe or perſonal Security, and that Hazard will not juſtify the Taking of unlawful Intereſt; and where a Merchant borrows Money, and makes great Advantage by it, by ingroſſing a particular Commodity or the like, that will not intitle the Lender to come in a Sharer with him for the Profit, nor for him to take more than ſtatutable Intereſt. In this Caſe it appears by the Defendants own Anſwers, that the Bonds they have gained from the Plaintiffs, are within the Proviſion of the Statute againſt exceſſive Uſury, but they got a Warrant of Attorney from us, and have entered up Judgment, ſo we have loſt our Opportunity of defending our ſelves at Law, but ought to be relieved in this Court, and cited the Caſe of *Powell* and *Hall* in the *Exchequer*, where *Hall* had got Judgment in a Truſtee's Name, upon a Bond given for a Play-Debt; there the Court, though the Plaintiff had ſlipt his Opportunity at Law, directed an Iſſue and relieved the Plaintiff.

Though a Security be hazardous, yet this will not juſtify exceſſive Intereſt.

The

The Court thought not fit to relieve the Plaintiffs, but ordered them to pay Principal, Intereſt and Coſts at Law and here, or the Bill to be diſmiſſed with Coſts, for that the Court would not interpoſe or meddle with Play-Debts and Things of this Kind.

Per Lord *Hutchins*, If the Sureties had not been Plaintiffs as well as *Taylor* and his Wife, he would not have relieved even againſt the Penalty.

Colonel *Leighton*'s Caſe.

Caſe 157.

Memorandum, That upon a Caveat put in againſt the Paſſing of a Patent to Colonel *Leighton* of the Office of *Warden* of the *Fleet*, upon hearing Counſel on both Sides, it was admitted that the Inquiſition having found two Eſcapes, though but for ſmall Debts, *that* amounted to a Forfeiture of the Office; nay, that one voluntary Eſcape made a Forfeiture.

Inquiſition finding two negligent Eſcapes *per* Warden of the *Fleet*, is Forfeiture of the Office, though but for ſmall Sums.

So is one voluntary Eſcape a Forfeiture.

But it was objected againſt Paſſing the Patent, that Colonel *Leighton* had been too haſty in this Matter, and proceeded illegally in having applied and obtained a Promiſe and Order for a Grant before any Inquiſition taken, or Forfeiture found, which they alledged was againſt the Bill of Rights, and mentioned the Caſe in *Co.* 7 *Rep. fol.* 36. as the granting Forfeitures on penal Laws.

Grant by the Crown of an Eſtate, &c. forfeited before any Inquiſition finding the Forfeiture, is illegal.

Secondly, That the Inquiſition in this Caſe had not found what Eſtate the *Warden* had in the *Fleet*; for in Caſe he had but an Eſtate for Life only, as in Truth he had not, then the Forfeiture, if any, would not be to the *King*, but to him that had the Inheritance, which was the

Warden of the *Fleet*, if but Tenant for Life, his Forfeiture of the Office belongs to the Reverſioner and not to the Crown.

the Point adjudged in the Duke of *Norfolk* and *Brandon*'s
4 Co. 32. b. Caſe, 39 *H.* 6. and that Point was agreed in *Whichcott*'s Caſe, and in *Mitton*'s Caſe, *Co.* 4 *Rep.* and *Crabley* the Exigenter's Caſe in *Dyer*, and in the Lady *Broughton*'s Caſe of the *Gate-Houſe* at *Weſtminſter*, ſhe having but an Eſtate for Life in it, the *King* could not have the Forfeiture, but the *Dean* and *Chapter* had it.

As to the firſt Objection, it was anſwered that Colonel *Leighton* had not proceeded unduly or illegally in order to the Obtaining of this Patent, for that in Truth the Inquiſition bears Date, and was taken before the Warrant for paſſing of the Patent, and though it was not filed till afterwards, that is not material; for this is none of thoſe Caſes where the Statute requires the filing of an Inquiſition, and only in Caſes of Grants of Lands and Tenements,

In Caſe of an Inquiſition finding a Forfeiture by the Warden of the *Fleet*, whether it ought to find, what Eſtate the Warden had in the Office.

And as to the ſecond Objection, that the Inquiſition has not found what Eſtate the Warden had therein, it is a ſtrange Objection; for that firſt the Inquiſition does not direct that any ſuch Thing ſhall be inquired into, and *Mounſon*'s Caſe in *Moor* 216, 217, is that the Inquiſitors muſt not exceed the Commiſſion, though to find a Matter neceſſary to be found; nor was it done in Sir *George*
9 Co. 95. a. *Reynell*'s Caſe, or in any Caſe, nor is it poſſible to be done: Who can tell what private or ſecret Conveyances the Warden may have made? So to ſay the *Warden* had but an Eſtate for Life, and that therefore the Forfeiture was not to the *King*, but to him that had the Inheritance, was a foreign Objection, and a Matter that could not at this Time come judicially before the Court; ſo they relied on it that a Forfeiture being found, that *prima facie* was to the *King*, which was ſufficient Ground for him to ſeiſe and grant. If there be a Reverſioner who has the Inheritance, he may come in, and ſet forth his Title; and in the Lady *Broughton*'s Caſe, there the *Dean* and *Chapter* upon the Inquiſition and before Judgment, were by the Court

Court admitted to come in, and ſurmiſe on the Roll that they had the Inheritance.

Per Cur. It is a Matter of great Conſequence to the *King*, and to the Subject, ſhould the Seal be put to this Patent, it might occaſion a general Eſcape of all the Priſoners in the *Fleet*, and therefore would know his *Majeſty*'s Pleaſure before they would paſs the Grant.

Court cautious how they paſs a Patent for Grant of Warden of the *Fleet*, becauſe it may occaſion a general Eſcape of the Priſoners.

DE

Term. S. Michaelis,

1690.

In CURIA CANCELLARIÆ.

Caſe 158. **Note, *per* Lord Commiſſioner *Hutchins*.**

Policy of Enſurance, how far it extends.

WHERE a Policy of Enſurance is againſt Reſtraint of Princes, *that* extends not where the Enſured ſhall navigate againſt the Law of Countries, or where there ſhall be a Seiſure for not paying of Cuſtom, or the like, *die Martis*, 14° *Octobris*.

Caſe 159. ***Marſhfield* verſus *Weſton*.**

In what Caſes, as to Matters under 40 *s*. Party's own Oath is allowed to be a Proof.

IN an Account between the Plaintiff a Gardiner, and the Defendant a Seedſman, though the Defendant be allowed Sums under forty Shillings upon his Oath as to his Seeds ſold, and delivered, *&c.* yet the Plaintiff ſhall not be allowed any Thing upon his Oath, as to Trees that he ſold and delivered to the Defendant or the like.

Per

Anonymus.

Caſe 160.

PER Cur. A Man having a Mortgage of a Leaſe for Years, afterwards lends more Money to the Mortgagor on Bond, if the Executor comes to redeem, he ſhall not be admitted to a Redemption, unleſs he pays both Debts, though no ſpecial Agreement that the Bond-Debt ſhould ſtand ſecured by the Mortgage.

Leſſee for Years mortgages his Term, and afterwards borrows more Money of the Mortgagee on Bond, and dies, his Executor ſhall not redeem without paying the Bond as well as the Mortgage.

Smith verſus *Duffield.*

Caſe 161.
Die Lunæ, 27 *Octobris* 1690. *in Court, Lords* Rawlinſon *and* Hutchins.

THE Plaintiffs Bill claimed a Proviſion of *three Thouſand* Pounds made for Daughters, upon Failer of Iſſue Male, by a Settlement in *one Thouſand ſix Hundred Thirty-one.*

Bill is to have 3000 *l.* provided for Daughters Portions, on Failer of Iſſue Male by an old Settlement in 1631. The Brother of the Plaintiffs who might have barred them by a Recovery, giving them by Will above the Value of the 3000 *l.* it ſhall be intended a Satisfaction. *Poſt.* Caſe 244.

For the Defendant it was inſiſted, that this dormant Settlement had not been taken Notice of in the Family, and having been made *Sixty-two* Years ſince, was in Truth forgotten, and not regarded, for otherwiſe the Plaintiff's Brother, who by Virtue of this Settlement was Tenant in Tail, precedent to the Proviſion for Daughters, might have deſtroyed and barred that Proviſion. And the Brother, who had it then in his Power, and might have deſtroyed that Proviſion without making any Compenſation to his Siſters, has by his Will given them his whole perſonal Eſtate, being of greater Value than the Proviſion made them by the Settlement, and therefore in Conſcience they ought not to make this Demand, and cited the Caſe of *Brook* and *Yeomans.*

The Court was of Opinion that the Deviſe of the perſonal Eſtate ought to be taken as a ſufficient Compenſation of the Plaintiff's Demands, and therefore diſmiſſed the Bill, which was to redeem or foreclose, with Coſts.

Caſe 162. *Die Mercurii, 29 Octobris, in Court, Lords Commiſſioners,* Rawlinſon *and* Hutchins.

Sir *Thomas Smith* Bar. *Peter Wilbraham* and *Anne* his Wife & *al'*, } Plaintiffs.

Dame *Abigal Smith* Widow, *Richard Liſter* and *Frances Pate* his Wife, Sir *Charles Holt* Bar. & *al'*, } Defendants.

THIS Cauſe came now to be reheard upon the Defendant's Petition, who conceived themſelves agrieved, by the Decree made upon the Hearing of the Cauſe by the late *Lords Commiſſioners.*

Grandfather being Tenant for Life, Remainder to his firſt Son in Tail, Remainder over, with Power to charge the Eſtate with 250 *l. per Ann.* Annuity, does by Deed charge the Premiſſes

The Caſe was that upon the Marriage of Sir *Thomas Smith* with Dame *Mary* his Wife, being the Grandfather of the Defendant *Frances Pate Smith*, now Wife of the Defendant *Liſter*, by Settlement on his Marriage aſſured the Manors and Lordſhip of *Hough Weſton* cum *Charleton Graſh* and *Great Shavington* in *Com. Ceſtr.* to the Uſe of himſelf for Life, Remainder to Dame *Mary* his Wife for her Jointure, Remainder to the firſt Son in Tail with other Remainders over.

with 250 *l. per Ann.* for four Years, to commence from his Death, in Truſt to raiſe 1000 *l.* Part to be paid to *A.* and the other Part to the Plaintiff *B.* and dies. The Son pays *A.* what was due to him, and he delivers up the Deeds and they are ſuppreſſed. The Son takes the Profits for four Years and more, and leaves a Daughter his Heir at Law, and leaves no perſonal Aſſets. The Daughter enters on the Eſtate. The Lands ſhall be liable in her Hands to pay the Money due to the Plaintiff with Intereſt, though the Term for Years that was to ſecure the Money is expired; and though the Perſon be dead that received thoſe Profits, and ſhould have paid the Money in Queſtion.

Provided that the ſaid Sir *Thomas* ſhould have Power by any Deed or Writing atteſted by *two* Witneſſes to grant an Annuity or Rent-charge not exceeding *two Hundred* and *fifty* Pounds out of all the ſaid Manors and Premiſſes, or any Part thereof, to any Perſon for any Term not exceeding *four* Years, to commence after the Death of Sir *Thomas* and Dame *Mary*.

Sir *Thomas* purſuant to the Power by Indenture *July* 23, 1666, grants an Annuity of *two Hundred* and *fifty* Pounds *per Ann.* to Sir *Robert Holt* for *four* Years, to commence after his Death, upon Truſt to diſpoſe thereof, as he by Deed or Will ſhould direct or appoint.

Sir *Thomas* afterwards by Deed-Poll appoints *one Hundred* and *fifty* Pounds of the ſaid Monies to be expended in his Funeral, and *one Hundred* and *fifty* Pounds in a Monument to be erected for him in *Covent-Garden* Church, and gave ſeveral Sums to Sir *Robert* and his *Lady*, (who was his Daughter) and their Children, and diſtributed the reſt amongſt the Plaintiffs and thoſe they repreſent.

In *April* 1668, Sir *Thomas* died, and upon his Deceaſe the Premiſſes came to Sir *Thomas* the Son, who prevailed with Sir *Robert Holt* to deliver up the Indenture of Rent-charge, and to join in a Fine and Deed to lead the Uſes thereof, whereby Sir *Thomas* the Son became ſeiſed in Fee of the Premiſſes; and in Lieu of the ſaid Indenture of Rent-charge delivered up as aforeſaid, Sir *Thomas* and his Truſtees make a Mortgage to Sir *John Bridgman*, and *Humphrey Jennings* Eſq; being Perſons nominated by Sir *Robert Holt*, for a Term of *ſeven* Years, defeaſable on Payment of the ſaid *one Thouſand* Pounds by ſeveral annual Payments therein mentioned; after this Sir *Robert Holt* has Satisfaction made to him for the Sums payable to himſelf, his Wife and Children, and thereupon the Indenture of Rent-charge, the Deed-Poll for Diſtribution

bution, and the ſubſequent Mortgage for *ſeven* Years are ſuppreſs'd and huſh'd up.

Sir *Thomas Smith* the Son enjoyed the Profits during his Life, and upon his Deceaſe the Premiſſes deſcended and came to his only Daughter and Heireſs, the Defendant *Frances Pate Smith*, now the Wife of *Liſter*, who had ever ſince taken the Profits; and the Defendant Dame *Abigal* was Executrix of Sir *Thomas* the Son, her late Husband, but had not Aſſets.

The Plaintiffs Bill was for that as much as the Deed had been thus concealed from them, and Sir *Thomas* the Son and Heir having received the Profits, which ought to have been applied to have ſatisfied their Demands, that therefore the Defendant Dame *Abigal* might either pay them out of the Aſſets, if any ſhe had, or that the Land might ſtand charged.

The Defendant, Dame *Abigal*, inſiſted ſhe had not Aſſets; and the Defendant, the Heir, inſiſted, that if there were ſuch Deeds *ut ſupra*, which ſhe did not admit, that yet the Profits which ought to have ſatisfied the Plaintiffs Demands, were taken by her Father, and not by her, and the *four* Years for the Rent-charge, as alſo the ſubſequent Term for *ſeven* Years, were both expired before the Lands came to her Poſſeſſion, therefore inſiſted that the Lands ought not to ſtand charged in her Hands.

Upon hearing the Cauſe, it being fully proved, that there were ſuch ſeveral Deeds, (*ut ſupra*) and that the ſame had been ſuppreſſed or concealed by Agreement between Sir *Robert Holt* and Sir *Thomas Smith*; the Court thereupon declared, that although the *four* Years Term for Payment of the Rent-charge, and the *ſeven* Years Mortgage-Term was expired, yet the Plaintiffs Share of the *one Thouſand* Pounds which remained unpaid, ought

ought to remain a Charge on the ſaid Lands; and decreed the ſame accordingly, with Intereſt at 4 *l. per Cent.* from *April* 5, 1672, being the Time when the Mortgage-Term for *ſeven* Years expired, and cited Sir *Andrew Corbet*'s Caſe; where even at Law, if the Heir has taken the Profits which ſhould be applied for Payment of Debts, the Lands ſhall ſtill remain charged therewith. 4 Co. 81. b. 82.

And now upon the Rehearing, the *Lords Commiſſioners* confirmed the former Decree *in omnibus.*

Caſe 163. *Die Veneris*, 31 *Octobris*, *in Court*, *Lord* Hutchins, *Maſter of the Rolls.*

Robinſon verſus *Duſgale.*

A. by Will deviſes his Land to *B.* in Fee, paying 400 *l.* whereof 200 *l.* to be at the Diſpoſal of his Wife, by her Will, to whom ſhe ſhould think fit. The Wife dies Inteſtate, her Adminiſtrator ſhall have this 200 *l.* the Property thereof being abſolutely veſted in the Wife.

THE Caſe was, that *J. S.* by his Will deviſed his Lands to *A.* for Life, Remainder to *B.* in Fee, he paying *four Hundred* Pounds; whereof *two Hundred* Pounds to be at the Diſpoſal of his Wife, in and by her laſt Will and Teſtament to whom ſhe ſhall think fit to give the ſame. The Wife dies inteſtate, the Plaintiff takes out Adminiſtration, and brings his Bill to have this *two Hundred* Pounds.

For the Defendant it was inſiſted that the Property was not abſolutely veſted in the Wife, but that ſhe had only a Power to diſpoſe by Will, if ſhe thought fit; and not having made any Diſpoſition, it becomes a lapſed Legacy, and the Defendant not chargeable with the Payment of it, and cited for that Purpoſe the Caſe of *Peaſe* and *Stileman* ver. *Mead* in *Hob. fol.* 9. where the Condition of a Bond was, that the Defendant *Mead* ſhould pay *twenty* Pounds to ſuch Perſon or Perſons as *Eliz. Hanchett* ſhould by her Will and Teſtament in Writing name and appoint the ſame to be paid to, and ſhe died having made her Will, and *Peaſe* and *Stileman* Execu-

tors, but no expreſs Appointment; and it was there adjudged, that an expreſs Appointment was neceſſary, and that the Plaintiffs the Executors, as Aſſignees in Law, were not entitled thereunto.

But the Court took it, that the whole Intereſt and Property of the *two Hundred* Pounds veſted in the Wife, and that ſhe had Power to diſpoſe of it as ſhe thought fit, and therefore decreed it for the Plaintiff as Adminiſtrator of the Wife.

Caſe 164. *In Court, die Lunæ,* 10 *Novembris.*

Porey verſus *Marſh & al'.*

One dies leaving a Debt by Judgment, and another by Bond; the Judgment-Creditor levies his Debt out of the perſonal Eſtate; whether the Bond-Creditor ſhall in Equity ſtand in the Place of the Judgment-Creditor, and charge the Land with his Debt.

THE Plaintiffs being Bond-Creditors, brought their Bill againſt the Heir and Executor, and againſt Sir *John Thomſon* who had a Judgment, which bound the Land; but he being at a good Underſtanding with the Heir, refuſed to go upon the Land, but levied his Debt upon the perſonal Eſtate, ſo that there was nothing left to ſatisfy the Plaintiffs. They prayed that Sir *John Tompſon* might either refund, or they might have the Benefit of his Security to follow the Land.

It was inſiſted for the Defendant the Heir, that here being no Truſt nor equitable Aſſets, they were to be adminiſtred in a Courſe of Law, and that there was no Precedent, where this Court had interpoſed, where there were only legal Aſſets, but left the Creditors to take their Satisfaction in a Courſe of Law, unleſs where the Court has interpoſed that Bond-Creditors ſubſequent to a Decree, ſhall not ſweep away the Aſſets. As to the Caſe of *Knight* and *Gay*, that was cited on the other Side, it was not like to this, where a Man having a Mortgage and Statute as a further Security, and he by Virtue of the Statute ſwept away the perſonal Eſtate,

Eſtate, and the Plaintiff a Legatee in that Caſe had a Decree to go upon the Land; for there the Land was the principal Security; but in the Matter in Queſtion, the Judgment affected the perſonal Eſtate as well as the real; and as to *Sibly*'s Caſe in the Lord *Jefferies*'s Time, this Point was ſtirred, but no Decree made in it.

Lord Commiſſioner Hutchins inclined to relieve the Plaintiff, and ſaid the Heir in many Caſes has the Aſſiſtance and Favour of the Court, as to make the perſonal Eſtate firſt liable to Debts, and to be applied in Eaſe and Exoneration of the real Eſtate, and even an *hæres factus* has had that Relief here, and he therefore thought it reaſonable *e converſo*, that as the Heir was to have Equity, he ought to do Equity. *Vide* the Order.

Lovel verſus *Lancaſter.*

Caſe 165. *Eodem die.*

J. S. deviſes Land to *A. B.* for Payment of Debts and *J.* deviſes to *J. D.* certain Lands which the Teſtator in his Life-time had mortgaged, and likewiſe gives him his perſonal Eſtate: The Queſtion was, whether *J. D.* ſhould have the Benefit of the Truſt for Payment of Debts, ſo as to have the Money owing on the Mortgage paid off by Monies raiſed out of the Truſt, that the Lands might come to him clear of the Debt owing to the Mortgagee.

One deviſes *B.* Acre to *A.* for Payment of his Debts; deviſes *W.* Acre to *B.* which the Teſtator had mortgaged, and likewiſe deviſes to *B.* all his perſonal Eſtate. *B.* ſhall take the mortgaged Premiſſes *cum onere*, and though the perſonal Eſtate is deviſed to *B.* and the Land is deviſed for the Payment of the Debts; yet the perſonal Eſtate ſhall be ſubject to the Debts.

Per Cur. He muſt take the mortgaged Lands *cum onere*; and the perſonal Eſtate alſo, though deviſed to him, yet muſt be ſubject to the Debts, notwithſtanding Lands were deviſed for Payment of the Debts.

Caſe 166. *In Court, Mercurii,* 12 *die Novemb'.*

Decree 5 *Car.* 1. that all the Miners within the Pariſh of *D.* as well for the Time being as to come, ſhall pay to the Vicar for Tithe, the tenth Diſh of Lead-oar cleaned. All Miners within the Pariſh held to be within the Decree, though not Parties to the Decree, nor claiming in Privity under any that were.

Browne verſus *Booth.*

THE Plaintiff being Vicar of the Pariſh of *Wirkſworth* in *Derbyſhire*, brought a *Subpœna* in the Nature of a *Scire fac.* againſt the Defendants to enforce the Performance of a Decree made 5 *Car.* 1. by which (amongſt other Things) It was *decreed* that all the *Miners* within the ſaid Pariſh, as well for the Time being, as to come, ſhould pay the *tenth Diſh* of Lead-Oar cleanſed, *&c.* to the Vicar of the ſaid Pariſh for the Time being for Tithes, *&c.* The Defendants appeared to the *Scire facias*, and ſet forth they claimed not in Privity under any of the Parties to that *Decree*, and that ſome of them were ſeiſed of Mines not then found out or opened, and that there had not been any Performance or Execution of the *Decree* and other Matters in Avoidance.

Per Cur. The Decree extends to all Miners within the Pariſh for the Time being or to come, ſo the Defendants are within the Letter, and expreſly bound by the *Decree*, and as long as the *Decree* ſtands in Force muſt obey.

Caſe 167. *In Court, die Jovis,* 13 *Novembris.*

Eſtate *pur auter vie* may be limited to a Man and his Heirs, and may be entailed, and may deſcend, tho' a Term for Years cannot be ſo entailed.

Finch verſus *Tucker.*

THE Queſtion ariſes on Exceptions taken to a Maſter's Report, who had reported the Defendant's Anſwer to be inſufficient, the Plaintiff by his Bill ſeeking a Diſcovery of a Settlement made by one who was Tenant *pur auter vie*, and the Plaintiff claiming as Iſſue in

Poſt, Caſe 205.

in Tail. The Defendant inſiſted ſuch Limitation, if any there were, was void, and that he ought not to be put to diſcover ſuch Settlement, if any ſuch there were.

Per Cur. We remember not any expreſs Precedent in the Point, but take it that a Term *pur auter vie* may be limited to a Man and his Heirs, and may be entailed, and ſhall deſcend, and is not like the ſettling of a Term for Years in Tail, where, as has been often adjudged, the Tenant in Tail is looked upon to have the whole Eſtate in him, and may diſpoſe of it at his Pleaſure.

Lomax verſus *Hide.*

Caſe 168. *Eodem die, in Court.*

THE Plaintiff being a ſecond Mortgagee, and coming to redeem the Defendant, who had been at great Expences in Law-Suits to forecloſe the Mortgagor, and otherwiſe in Relation to the Eſtate. The Court ordered that his Coſts ſhould not be taxed as in an adverſary Suit, but that he ſhould be allowed all his Coſts and Expences, as is done in the Caſe of a Solicitor, who lays out and disburſes Money for his Client and the like, and the Court further ordered that the Profits of the Eſtate in Queſtion, ſhould in the firſt Place be applied to pay and ſatisfy what was due for ſuch Coſts, Charges and Diſburſements, before it is applied to ſink the Principal, for that it was not reaſonable he ſhould expect for it, and be allowed it only at the Foot of the Account, (as had been uſually done) whereby to make him looſe the Intereſt of what he had ſo laid out, for ten or more Years together.

The ſecond Mortgagee brings a Bill to redeem the firſt Mortgagee, who had been put to great Charge, in foreclоſing the Mortgagor. *Cur'*, The Coſts which the firſt Mortgagee has been put to, ſhall not be taxed, as in Caſe of an adverſary Suit, but he ſhall be allowed all his Coſts and Charges, as is done in Caſe of a Solicitor who lays out Money for his Client; and the Profits of the mortgaged Premiſſes ſhall be firſt applied to pay off thoſe Coſts, before they goe to ſink the Principal.

Note, The Parties being in Court, the Matter was compromiſed, and the Sum remaining due to the Defendant, agreed on in Court.

Caſe 169. *In Court 9 die Novembris.*

Broom Whorwood verſus *Simpſon, & econtra.*

A. articles to ſell Lands to *B.* for 15000*l.* the whole to be paid in Money, or ſo much Land returned, as would make up what he paid ſhort of the 15000*l.* *A.* conveys Part of the Lands to *B.* and by his Perſwaſion values that Part at an Under-value; and then *B.* ſells this Part to *C.* and would then have returned ſo much of the Reſt as would make up the 15000*l.* Articles ſet aſide as unreaſonable, but the Sale by *B.* to ſtand.

THE Plaintiff in Right of his Wife, who was one of the Daughters of Sir *John Forteſcue* Bar. was ſeiſed of the Manors of *Over Shenley* and *Neither Shenley* in the County of *Bucks*. The Defendant *Simpſon* had been for many Years employ'd in the Management of the Eſtate, and at laſt articles with Mr. *Burdett*, whom the Plaintiff had impowered on that Behalf, to become the Purchaſer thereof, at *fifteen Thouſand* Pounds; and by the Articles *Simpſon* was either to pay the whole in Money, or might return Lands to make up what he paid ſhort in Money of the *fifteen Thouſand* Pounds; purſuant to the Articles, the Defendant had obtained a Conveyance of Part to himſelf, at an Under-Value, alledging it was not material, what Sum was mentioned to be the Conſideration of the Conveyance, in Regard he was to make up the whole *fifteen Thouſand* Pounds, and had ſold other Parcels, and paid the Money, as the Plaintiff *Broom Whorwood* appointed, amounting in the whole to about *four Thouſand five Hundred* Pounds, and would now return ſo much Land as ſhould make up the *fifteen Thouſand* Pounds.

The original Bill brought by *Broome Whorwood* was to ſet aſide the Articles, and the croſs Bill to have them performed, and Time for the Performance of them enlarged.

Upon

Upon the Hearing, though there was no Surpriſe, Fraud or Circumvention proved, and though Conveyances had been made purſuant to the Articles, ſeveral Sales made, Part of the Purchaſe-Money paid, and the Articles in great Part performed; yet the Court ſet aſide the Articles, and the Conveyance made to *Simpſon*; but as to Strangers to whom *Simpſon* had *bona fide* ſold, thoſe Purchaſes were to ſtand, the Court declaring they looked on *Simpſon*, but as an Agent for the Plaintiff, and being one in whom the Plaintiff repoſed great Truſt and Confidence, which he had deceitfully abuſed, and the Articles themſelves ſeem to manifeſt a Surpriſe, the Plaintiff having Occaſion to ſell to raiſe Money, and yet by the Articles, *Simpſon* might pay as ſmall a Sum of Money as he pleaſed, and return what of the Lands he thought fit to make up the Value; and the Court took it they had the greater Latitude in this Caſe, becauſe *Simpſon* had elapſed the Time prefixt by the Articles, in which he was to make good the *fifteen Thouſand* Pounds by Money, and Return of Lands. And this Decree was afterwards confirmed on an Appeal.

Matthew verſus *Hanbury & ux', & al'.*

Caſe 170. *In Court*, 10 *die Novemb'.*

THE Plaintiff as Executor to *Euſebius Matthew* his Father, brought a Bill to be relieved againſt ſeveral Bonds obtained from the Teſtator by one *Frances Moore*, whilſt Sole, now the Wife of the Defendant *Hanbury*, ſome of them being taken in her own Name, and others in the Name of other the Defendants, her Truſtees; the Bill charging that thoſe Bonds were extorted from him by Threats, and Menaces, and by undue Means, and were not for any real Debt, or other good Conſi-

Bill by Executor to avoid Bonds given by Teſtator, on Suggeſtion that they were gained by Threats and undue Means. Defendant by Anſwer ſays they were entred into for Money lent, and Debts

due. It appeared by Proof, Defendant was a common Harlot, and Plaintiff's Father had unlawful Converſation with her. *Cur'*, Though this not ſet forth in the Bill, yet the Defendants anſwer, ſaying, The Bonds were given for Money lent, this ſufficiently puts it in Iſſue, though not laid in the Bill. Where the Party himſelf that is culpable comes for Relief, againſt the ſaid Bonds, Court may refuſe; otherwiſe where his Executor comes.

Poſt. Ca. 226. Conſideration: But upon the Proofs it appeared that the Defendant *Frances* was a common Harlot, and that the Plaintiff's Father, an old weak Man, having an unlawful Converſation with her, was prevailed upon to enter into the Bonds in Queſtion.

It was objected by the Defendant's Counſel, that the Plaintiff could not be relieved upon this Bill, having charged only that the Bonds were obtained by Force and other undue Means, and charged not any Thing in particular of any *turpis contractus*, and ſo had not made a proper Caſe upon his Bill, which was the Reaſon of the Diſmiſſion in the Caſe of *Peyto* and *Wanklin*.

Per Cur. Though where the Party himſelf, who was the Perſon culpable, comes to be relieved, the Court may juſtly refuſe to interpoſe; yet where the Plaintiff is an Executor only, as in the principal Caſe, *that* varies the Matter: And in this Caſe the Defendant by Anſwer having ſworn the Bonds were entred into for Monies lent, or other Debts owing to her, *that* ſufficiently put the Matter in Iſſue, and gives the Plaintiff an Opportunity, to prove that the Bonds were entred into upon the Account of an unlawful Converſation between the Teſtator and Defendant, and not for Monies lent or real Debts; and whereas the Truſtees had declared a ſpecial Truſt for a particular Purpoſe, as to one of the Debts, *per Cur. That* will not avail, there being no Proof that the Teſtator was privy thereunto, or directed ſuch Truſt, and therefore decreed an Account of what ſhould appear to be juſtly due for Monies lent, and other real Debts, and on Payment the Bonds to be delivered up.

2

Mich. Portington Arm' verſus *Alexander* Com' *Eglington & al'.*

Caſe 171. *In Court*, 14 *Novembris.*

THE Plaintiff being ſeiſed of the Manor of *Portington*, and other Lands in the County of *York*, and being of mean Parts and eaſy to be impoſed upon, and having two younger Brothers; the Counteſs of *Eglington*, who was his Relation, and Mr. *Green*, who was his Coſin, and had been his Tutor at *Cambridge*, deſigning to preſerve the Eſtate in the Family, prevail upon him to enter into Bond to the Counteſs of *Eglington* of *ſix Thouſand* Pounds Penalty, (and as Mr. *Green* had penned the Condition of the Bond) it was to ſettle his Eſtate on himſelf and Heirs Male of his Body; and for want of ſuch Iſſue, then to his next Brother in Tail Male; and for want of ſuch Iſſue, to his third Brother in Tail Male; the Eſtate to be ſettled ſo as to make the Eſtate-Tail as durable as may be.

Plaintiff being a weak Man, was prevailed on by two of his Relations to give Bond to one of them to ſettle his Eſtate to the Uſe of himſelf in Tail Male, Remainder to his two Brothers ſucceſſively in Tail Male. Plaintiff marries and makes a Settlement on his Marriage, and brings a Bill for Delivery up of the Bond, and it would have been decreed, had not the Plaintiff by Bill offered to ſettle Part.

The Plaintiff afterwards married Mr. *Nevil*'s Daughter, and made a Settlement of the Eſtate upon the Marriage, and now preferred a Bill to have the Bond delivered up to be cancelled; and had been decreed accordingly, but that he offered by his Bill to ſettle Part of his Eſtate in Tail on his Brother.

Lingard verſus *Griffin.*

Caſe 172. *Die Veneris*, 14 *Novemb'*, *in Court. Lords Commiſſioners.*

IN this Caſe amongſt other Things, a Fine and Non-claim was allowed to be a good Bar to an Equity of Redemption.

A Fine and Non-claim a good Bar to an Equity of Redemption; ſo 'tis a Bar to a Bill of Review.

Per Lord Commiſſioner Hutchins, a Fine and Non-claim allowed a good Bar to a Bill of *Review*, and cited Sir *Nicholas Stourton*'s Caſe, where a Fine and Non-claim was allowed by Lord Chief Juſtice *Hale*, to be a good Bar to an Equity of Redemption: And it was inſiſted in this Caſe, that the Fine was levied in (*Eighty*) and the Plaintiff's Father died not until *Eighty-four*, and that therefore the Fine being levied with Proclamations in the Life-time of the Father, and he living *four* Years after, that ſhould run upon the Heir though an Infant, and be a good Bar. But as to the Fine in this Caſe it was inſiſted, it could be no Bar, for that the Fine was levied upon the making of the Mortgage to *Lingard*, and to ſtrengthen his Security, and therefore could be no Bar to the Equity of Redemption; for that the very Eſtate which then paſſed by the Fine, was a redeemable Eſtate.

Howman verſus *Corie*; and *Corie* verſus *Howman* and *Chettleburgh*.

Caſe 173. *In Court, Lords Commiſſioners, 15 die Nov'.*

A. by Will gives his Daughter 400 *l.* and deviſes Lands to her until his Son *B.* ſhould pay her this 400 *l.* She marries *C.* whoſe Father covenants to ſettle Lands of 100 *l. per Ann.* and *B.* her Brother covenants to pay the 400 *l.* to the Husband; and upon Payment, the Lands deviſed to the Daughter were to be diſcharged of this 400 *l.* the Husband dies. Decreed the 400 *l.* belongs to the Wife, and not to the Executor of the Husband.

THE Caſe was, that *William Copping* by Will (*inter alia*) deviſed *four Hundred* Pounds to his Daughter *Judith*, charged on certain Lands called *Reading* and *Brickilne*, and deviſed theſe Lands unto his ſaid Daughter, until his eldeſt Son ſhould pay or make good unto her the *four Hundred* Pounds. *Judith* marries *William Corie*, whoſe Father *George* covenanted to ſettle on *Will.* and *Judith* Lands of *one Hundred* Pounds *per Ann.* preſent Maintenance and Jointure, *&c.* and *George Copping* the Brother of *Judith*, who was in Poſſeſſion of the Lands

Lands charged with the Portion, covenants to pay the *four Hundred* Pounds to *William Corie* his Siſter's intended Husband; and it is thereby further covenanted between all the Parties on Payment of the *four Hundred* Pounds, the Lands ſhould be diſcharged.

The Settlement was not made, nor *George Corie* able to perform his Covenant on that Behalf, nor was the Portion paid.

But Matters ſtanding thus, *George Copping*, who was to pay the *four Hundred* Pounds Portion, dies, and deviſes all his Lands for Payment of his Debts and Legacies to *William Corie* and one *Chettleburgh: William Corie* accepts the Truſt and dies. *Howman* having agreed and articled to purchaſe the Lands charged with the *four Hundred* Pounds, brings his Bill, that he may pay his Money ſafely; and *Judith Corie* having ſurvived her Husband, brings her Bill to have the *four Hundred* Pounds, which was her Portion, paid to her: And the Queſtion in this Caſe was, whether the Portion ſhould ſurvive to the Wife, or whether by the Marriage-Articles it was not ſo veſted in *William Corie*, the Husband, as that it ſhould go to his Adminiſtrator.

For the Plaintiff it was inſiſted, that the Covenant from *George Corie* was but an additional Security, and did not change the Nature of the Debt, but it ſtill continued a Charge upon the Land, and as a *Choſe in Action* it ſurvived to the Wife, although it was agreed that the Husband during the Coverture might have releaſed or diſcharged it; and that it ſtill continued a Charge upon the Land, was the more plain from the Covenant, that when the Portion was paid, the Land ſhould be diſcharged: And of that Opinion was the *Court*, and decreed it for the Wife.

Gorray

Caſe 174. *In Court, die Lunæ,* 17 *Novembris.*

Gorray verſus *Uſtwick.*

Bill againſt an Executor for a Debt due from the Teſtator, and though the Debt was proved, yet Plaintiff ſent to Law: But Bill retained till after the Trial, in order to take the Account of Aſſets, if Verdict for the Plaintiff.

THE Plaintiff's Bill was to have a Debt due to him from the Defendant's Teſtator, and ſecured by a Bill of Sale of Goods. The Defendant the Executor denied, he knew or believed there was any ſuch Debt; and although the Debt was proved in this Court, the Plaintiff was ſent to Law to recover his Debt; but the Bill retained until after the Trial had, and if the Plaintiff recovered at Law, then he might reſort back for an Account of Aſſets.

Caſe 175. *In Court,* 19 *die Novemb'.*

Awdley verſus *Awdley.*

Committees of a Lunatick inveſt Part of his perſonal Eſtate in the Purchaſe of Lands in Fee. This ſhall ſtill be taken as perſonal Eſtate, and in Caſe of his Death ſhall go to the next of Kin, and not to his Heir.

THE Committees of one *Awdley* a Lunatick, having inveſted Part of the Lunatick's perſonal Eſtate in a Purchaſe of Lands, made in the Lunatick's Name, to him and his Heirs, the great Queſtion in the Cauſe was, whether the Committees had not exceeded their Power, by changing the perſonal Eſtate into a real Eſtate, and thereby defeating the next of Kin, in Favour of the Heirs at Law.

For the Defendants it was inſiſted, that the Committees had acted fairly in this Matter, having made the Purchaſe, and taken the Conveyances in the Name of the Lunatick, ſo that in caſe he had recovered and become of *ſane* Memory, he might have inſiſted, that the Lands were purchaſed with his Money, and have had the Benefit of the Purchaſe, whether the Truſtees would or not, and cited the Caſe of *Zoach* and *Lloyd,* where the

Mother, as Guardian to her Infant-Son, had out of his perſonal Eſtate paid off a Mortgage; the Infant afterwards died, and the Eſtate deſcended to a remote Heir, and then the Mother would have had back the Money, but the Court denied any Relief in that Caſe; and likewiſe the Caſe of *Dennis* and *Badd.*

Mother as Guardian of an Infant, out of his perſonal Eſtate pays off a Mortgage upon his Land; the Infant dies, and the Land deſcends to a remote Heir. The Mother ſhall not have the Money back.

But it was anſwered, that the Truſtee had bound himſelf, by making the Purchaſe in the Lunatick's Name, ſo had no Election, but the Lunatick might have accepted or refuſed the Purchaſe; and as to the Caſe of *Zoach* and *Lloyd*, there the Guardian had done no more than what by the Juſtice of this Court ſhe might have been enforced to do, *viz.* to apply the perſonal Eſtate in Eaſe of the real, by taking off the Incumbrances that lay upon it; and ſuppoſe in this Caſe the Lunatick had been indebted by ſimple Contract, and had left no perſonal Eſtate, ſhould not this Court have made theſe purchaſed Lands liable to that Debt? And where a Mortgagor releaſes to the Heir of the Mortgagee in Fee, the Mortgage being forfeited; the Adminiſtrator ſhall have the Benefit of that Eſtate, even though there be no Debts. And in the Caſe of *Wood* and *Thornebourgh* verſus *Noſworthy*, where there was a Mortgage in Fee forfeited, and the Mortgagor would not redeem, yet the Adminiſtrator ſhould have the Eſtate, though there were no Debts; and ſo in caſe a Mortgagor be foreclоſed, or that the Mortgagee be of ſo antient a Date, as in the ordinary Courſe of the Court, it is not redeemable; yet in caſe the Mortgagee be not actually in Poſſeſſion, it ſhall be looked upon to be perſonal Eſtate.

Mortgagor releaſes to the Heir of the Mortgagee in Fee, yet the Executor or Adminiſtrator of the Mortgagee, ſhall have the Benefit of the Mortgage, tho' there are no Debts. So if a Mortgagee in Fee dies, and the Morgagor will not redeem; yet the Executor or Adminiſtrator of the Mortgagee ſhall have the Benefit of the Mortgage. So he ſhall, though the Mortgage be foreclоſed, or be of ſo antient a Date as not to be redeemable, unleſs the Mortgagee be in the actual Poſſeſſion.

After great Debate, and upon reading the Statute made touching the Granting of the Cuſtody of Lunaticks, whereby it is provided, that the Surplus ſhall be ſafely kept, and delivered to him, if he recover; if not, upon his Death to be imployed for the Benefit of his Soul, *&c.* The Court decreed an Account of the perſonal Eſtate, and the Lands purchaſed to be ſold, and the Money to go, and be divided as perſonal Eſtate, amongſt the next of Kin.

Where a Man charges himſelf by his Anſwer, whether his Anſwer ſhall be allowed as a good Diſcharge. *Poſt.* Ca. 277.

Note, Per Cur. The Caſe of *Howard* and *Brown* was the firſt Caſe in this Court, where becauſe a Man had charged himſelf by Anſwer, that his Anſwer ſhould be allowed as a good Diſcharge, and that it ought to be the laſt.

Caſe 176. *Mercurii*, 19 *die Novemb'.*

Moyſes verſus *Little.*

Father on his Son's Marriage covenants, during his Life to pay his Son 15 *l. per Ann.* the Son becomes a Bankrupt. His Creditors ſhall not have the Benefit of this Agreement.

THE Defendant on Marriage of his Son ſettles Lands on himſelf for Life, Remainder to his Son for Life, *&c.* and covenants during his own Life, to pay his Son *fifteen* Pounds *per Ann.* the Son becomes a Bankrupt, the Plaintiff as an Aſſignee brings the Bill againſt the Defendant the Father, to have the Benefit of this Agreement, and to compel Payment of the *fifteen* Pounds *per Ann.*

Ant. Caſe 89.

Per Cur. An Aſſignee under a Statute of Bankrupt, is not intitled to have the Performance of an Agreement made with the Bankrupt, and that it was ſo adjudged in the Caſe of *Drake* and the *Mayor of Exeter*, and therefore diſmiſſed the Bill. Vide *Jones*'s *Rep.* 437. the Caſe of *Criſpe* and *Pratt*, that Copyhold Lands are within the Statute of the 13*th* of *Eliz.* and *Parker* and *Bleake*,

Cr. Car. 548. March 24. 1 Rol. Abr. 523

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Bleake, that the Widow of a Copyholder, who was a Bankrupt, and where the Commiſſioners had made an Aſſignment of the Copyhold, ſhall not have her *Free-Bench.* Jo. Rep. 451.

Jackſon verſus *Rawlins.*

Caſe 177.
20 *Die Nov'*,

A Man having married an Adminiſtratrix, the Plaintiff obtains a Decree againſt the Husband and Wife for *one Thouſand five Hundred* Pounds, out of the Eſtate of the Inteſtate; then the Wife dies. The Queſtion was, whether he could proceed againſt the Husband without reviving and bringing an Adminiſtrator of the Wife before the Court.

A Man marries an Adminiſtratrix. Plaintiff obtains a Decree againſt him and his Wife for 1500*l.* ſhe dies. Whether the Plaintiff can proceed againſt the Husband, without reviving againſt the Adminiſtrator of the Wife.

It was inſiſted, that although the Decree is to pay only out of Aſſets, and though the Waſting might be before the Coverture, yet now the Husband and Wife are bound to anſwer it, as far as any Aſſets came to the Wife's Hands, and being once charged, the Death of the Wife ſhall not diſcharge him. *Tamen Semble* the Husband is not bound to anſwer it farther than the Value of the Eſtate, which he had with his Wife; and the Rule in Equity is, where two or more are liable to a Demand, you ſhall not proceed againſt one alone, but muſt bring all the Perſons liable before the Court.

Where 2 are liable to a Demand, you cannot proceed againſt one alone.

Caſe 178.
Veneris, 21 *Novembris*, *in Court, Lords Commiſſioners.*

Peacock verſus *Spooner.*

A Term of *nine Hundred* Years was aſſigned to Truſtees in Truſt to permit and ſuffer the Husband and

Ant. Caſe 38. *Poſt.* Ca. 326. Term aſſigned in Truſt for Baron and Feme

for their Lives, Remainder in Truſt for the Heirs of the Body of the Feme by the Baron; Baron and Feme die. The Term ſhall go to the Heir of the Body of the Feme by the Baron, and not to her Executor or Adminiſtrator. The Words *Heirs of the Body* being a good *deſcriptio Perſonæ.*

and Wife, and the Survivor of them, to receive the Profits, for ſo many Years of the Term, as they or the Survivor of them ſhould happen to live, and after their Deaths to the Uſe of the Heirs of the Body of the Wife, by the Husband to be begotten: Queſtion whether the Words, (*Heirs of the Body*) are Words of Limitation, or only a Deſcription of the Perſon, ſo as the Heir of the Body ſhall take by Purchaſe.

Per Cur. Held that the Heir of the Body took by Way of Purchaſe, and as a Perſon well diſcribed, and the Limitation of the Term to them good, and therefore diſmiſſed the Bill that was brought by the Executor of the Wife, as ſuppoſing the Term belonged to him.

Note, The Lord Chancellor *Jefferies* in *Eighty-eight* had decreed it for the Plaintiff.

Note, In this Caſe they cited the Caſe of *Wareman* and *Seaman*, and relied upon it, as alſo *Bowman* and *Yates*, where the Words (*Heirs of the Body*) were looked upon to be a good Deſcription of the Perſon, intended to take in a Settlement made on a ſecond Marriage, although there was Iſſue by a former Wife, and ſo he was not
6 Co. 16. b. in Strictneſs Heir. *Wyld*'s Caſe in *Cook*'s Reports, is not allowed to be Law.

Note, This Decree and Diſmiſſion was affirmed upon an Appeal to the Houſe of *Lords*.

Vide *Webb* verſus *Webb*, *Feb.* 20, 1710, A Decree at the Rolls grounded upon the Caſe of *Peacock* and *Spooner* reverſed. And decreed the Limitation to the Heir Male void, and that the Whole veſted in the Father, by the Limitation to him for Life, Remainder to the Heirs of his Body.

Anonymus.

Anonymus.

Caſe 179.
25 Die Nov.

PER *Cur.* Where a Commiſſion is returnable *ſine dilatione*, if it be within the Kingdom it muſt be returned by the *ſecond* Return of next Term; if executed afterwards, it is void, and the Depoſitions ought to be ſuppreſſed.

A Commiſſion returnable *ſine Dilatione* muſt be executed before the ſecond Return of next Term.

Anonymus.

Caſe 180.

WHERE the *Baron* and *Feme* exhibit a Bill for a Demand in Right of the Wife, the Defendants anſwer, and the Cauſe being at Iſſue, ſeveral Witneſſes are examined, and Publication paſt, but before it proceeds to a Hearing, the Husband dies; the Wife marries a ſecond Husband, and they bring a new Bill for the ſame Matter. It was moved they might be reſtrained from examining the Witneſſes examined in the former Cauſe; but not allowed by the *Court*: The Wife was not bound by the Proceedings in the former Cauſe, and therefore examine, as if no Examination had been in the former Cauſe.

Baron and Feme exhibit a Bill for a Demand in Right of the Wife, Defendants anſwer, Witneſſes are examined, and Publication paſſes; Baron dies, Feme marries a ſecond Husband. On a new Bill, they may examine again the ſame Witneſſes as were examined in the former Cauſe. *Poſt.* Caſe 234.

Pritchard verſus *Langher.*

Caſe 181.
26 Die Nov.
in Court, Lords Commiſſioners.

MRS. *Katharine Williams* lent her Brother in Law, the Defendant *Langher*, *one Hundred* Pounds, and took a Bond for it in the Name of one *Morgan Jenkins*; Mrs. *Williams* and the Defendant differing about ſome

Payment of Money to a Truſtee, with Notice of the Truſt, is a Miſ-payment, tho' the Truſtee had Judgment and Execution againſt the Perſon that paid the Money.

Reckonings that were between them, the Bond is put in Suit by Mrs. *Williams*, in the Name of *Morgan Jenkins* her Truſtee; and to avoid Charges, the Defendant confeſſed a Judgment in the *Grand Seſſions* in *Wales*. The Defendant to prevent being taken in Execution, pays the Money to *Morgan Jenkins* the Truſtee, who gave a Warrant of Attorney to one *John Deere*, to acknowledge Satisfaction on the Judgment, which was done accordingly.

The Bill was to compel the Defendant to pay the Money again to the Plaintiffs, the Adminiſtrators of *Katharine Williams*, and decreed accordingly, with full Coſts, the Court declaring it to be a Fraud in the Defendant, who knew the Money was Mrs. *Williams*'s, to pay it to her Truſtee; and the principal Evidence of the Fraud was, that there was a new Attorney made, or named to acknowledge Satisfaction on the Judgment, and not the Attorney on Record, who was imploy'd by Mrs. *Williams*. And although in this Caſe it was inſiſted, that it was hard to decree a double Payment in Equity, where the Money was really paid to the Perſon that Mrs. *Williams* intruſted, and by Law was intitled to receive it; and the rather, for that in this Caſe Mrs. *Williams* lived in *London*, ſo that the Plaintiff who lived in *Wales* could not have Recourſe to her, and had no other Way to avoid being taken in Eecution. *Sed non allocatur.*

Caſe 182.
10 *Die Dec'.*
in Court.

Took verſus *Took.*

Plea of an Outlawry with the Common Averment of the Identity of the Perſon need not be upon Oath.

REference to the *Six Clerks*, whether by the Courſe of the Court a Plea of an Outlawry with the Averment of the ſame Perſon ought to be upon Oath. In the Lord *North*'s Time it was ruled, it might be without Oath, becauſe it might come in on the other Side to aver, that he was not the ſame Perſon.

Per Cur. Being only the common Averment of Identity of Perſon, allowed the Plea to be good without Oath, but gave the Plaintiff Leave to amend paying *twenty Shillings* Coſts. *Per* Lord *Hutchins*, to avoid Pleas of Outlawry, may make all that have Outlawries againſt him Defendants.

A good Method to avoid the Plea of an Outlawry, is to make all thoſe, that have Outlawries againſt the Party, Defendants.

Anonymus.

Caſe 183. 11 *Decembris, in Court.*

THE Caſe of *Cloberry* and *Lampen* cited, where a Legacy was deviſed to a Child, payable when *Twenty-one*, and he dies before, his Adminiſtrator ſhall have it, but he ſhall wait and expect for it, until ſuch Time as the Son would have been *Twenty-one*, and this confirmed upon an Appeal to the Houſe of Lords, tho' the Lord *Nottingham* for ſome Time doubted whether it ſhould not be paid preſently; but it was ſaid, *that* was but an Invention to encourage Adminiſtrations.

2 Vent. 342. Legacy given to a Child payable when 21, the Child dies before, his Adminiſtrator ſhall have the Legacy, but ſhall ſtay for it, till ſuch Time as the Child, if he had lived, would have come to 21.

Vide Saunders's Caſe, Legacy payable at *Twenty-one*, the Child dies in Minority. If by the Will it was to be paid with Intereſt, it ſhall be paid to the Adminiſtrator preſently; but if it does not carry Intereſt, the Adminiſtrator muſt expect, until the Child would have attained the Age of *Twenty-one*.

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Term. S. Hillarii,

1690.

In CURIA CANCELLARIÆ.

Caſe 184. *Jan.* 19.

Cookes verſus *Maſcall & econtra.*

Marriage Agreement reduced into Writing, tho' not ſigned by either Party, yet decreed to be performed.

IN *Eighty-two* a Marriage was treated to be had between the Plaintiff *Cookes* and the Defendant *Maſcall*'s Daughter, it being pretended Sir *Thomas Cookes* would make a conſiderable Settlement on the Plaintiff his Kinſman, and Propoſals being made in order to mutual Settlements, *Maſcall* to ſettle *forty* Pounds *per Ann.* in preſent, and *Edward Cookes* the Father, to ſettle the Reverſion of his Eſtate at *Wick*, after the Death of him and his Wife, and to allow his Son *twenty* Pounds *per Ann.* for Maintainance in the mean Time, and *Maſcall* to ſettle Reverſions of Copyholds, Part after the Death of himſelf and Wife, of the Value of *eighty* Pounds *per Ann.*

In 1684, a Meeting was appointed and held at *Worceſter* in order to a full Agreement; there the Propoſals were diſcourſed on, and all Parties ſeemed to allow and approve thereof. In *October* 1684, *Cookes* the Father, with one *Baker* an Attorney, came over to *Maſcall*'s Houſe at *Fordebigg*, in Order to make a full Agreement

touching the Settlement to be made on the intended Marriage: Mr. *Baker* having diſcourſed both Parties, proceeded to draw the Agreement into Articles in Writing, to be mutually ſigned by the Parties; but before the ſame were ready for Execution, upon Diſcourſe between *Maſcall* and *Cookes* they diſagree. And *Maſcall* by his Anſwer ſwore poſitively, that he then reflecting that Sir *Thomas Cookes* had refuſed to make any Settlement on his Kinſman, as it was pretended he would, and *Cookes* the Father alſo refuſing to ſettle a further Eſtate upon the Plaintiff to anſwer the Reverſion, that *Maſcall* ſettled expectant on the Death of his Mother *Wallis*, he therefore refuſed to proceed any further in Order to perfect the Agreement, and never ſigned it: But *Cookes* put up what *Baker* had wrote into his Pocket, and ſo they parted, and had no further Meeting nor Treaty: But old *Cookes* ſwore that after the Articles were drawn, they were read over and agreed to, and that *Maſcall* promiſed to meet at another Time to execute: That young *Cookes* was afterwards permitted to come to *Maſcall*'s Houſe, and in *December* 1684, married his Daughter, *Maſcall* being privy to it, helping to ſet them forwards in the Morning, and entertaining them, and ſeemed well pleaſed with the Marriage, upon their Return to his Houſe at Night.

Upon this Caſe *Cookes* the Father, having by his Anſwer offered to perform the Agreement on his Part; the Court thought fit to Decree *Maſcall* alſo to perform the Agreement, according to what was contained in the Writing drawn by *Baker*, though that was not ſigned by *Maſcall*, as was intended it ſhould have been, nor any other Agreement reduced into Writing.

Caſe 185.
Jan. 24.

Douglas verſus *Vincent.*

One by Letter under his Hand promiſed 1000*l.* with his Niece, but in the ſame Letter diſſuaded her from marrying the Plaintiff, but afterwards was preſent at, and gave her in Marriage. *Cur.* would not decree the Payment of the 1000*l.* but leave the Plaintiff to his Action at Law.

THE Bill being for *one Thouſand* Pounds, as promiſed by Sir *Matthias Vincent* with his Niece by a Letter under his Hand, but in the ſame Letter he diſſuaded her from marrying the Plaintiff, yet was afterwards preſent at the Marriage, and gave her in Marriage.

In this Caſe the Court would not decree the Payment of the *Thouſand* Pounds, but left the Plaintiff to bring his Action to recover it as he could at Law.

Caſe 186.
Jan. 27.

Fairebeard verſus *Bowers.*

A voluntary Judgment given by a Freeman of *London*, payable three Months after his Death, is to be poſt-poned to Debts by ſimple Contract, and to the Widow's cuſtomary Part, but will bind the Freeman's legatary Part.

George Bowers, a Freeman of *London*, having three Baſtards by *Joan Fairebeard*, confeſſes a Judgment to her in *one Thouſand* Pounds, defeaſanced for Payment of *five Hundred* Pounds in three Months after his Death.

Decreed that this Judgment being voluntary, it ſhall not prevail againſt Debts by ſimple Contract, nor againſt the Widow of the Freeman, but that ſhe muſt have her Share according to the Cuſtom of the City, without any Regard had to this Judgment; but his Debts being paid, the Judgment would bind the legatary Part.

Wiſeman verſus *Vandeputt.*

Caſe 187. *Jan.*—— *and on* 21 *Martii.*

THE Plaintiffs being Aſſignees under a Statute of Bankruptcy taken out againſt the *Bonnells*, brought their Bill for a Diſcovery and Relief touching two Caſes of Silk at firſt conſigned by *Altenory* and *Altoery* to the *Bonnells*, then conſiderable Merchants in *London*; but before the Ship ſet ſail from *Leghorne*, News came that the *Bonnells* were failed, and thereupon *Altenory* and *Altoery* alter the Conſignment of the Silks, and conſign them to the Defendant.

A. being beyond Sea, conſigns Goods to *B.* then in good Circumſtances in *London*, but before the Goods arrive becomes a Bankrupt. If *A.* can by any Means, prevent the Goods coming into the Hands of *B.* or the Aſſignees, 'tis allowable in Equity, and *B.* or the Aſſignees, ſhall have no Relief in Equity.

Upon the firſt Hearing, the Court ordered all Letters, Papers, *&c.* to be produced, and that the Parties proceed to a Trial in *Trover*, to ſee whether the firſt Conſignment, notwithſtanding the Altering thereof, and new Conſignment made, before the Ship ſailed, veſted the Property of thoſe Silks in the *Bonnells*; and upon the Trial, and Verdict being given for the Plaintiffs, the Cauſe now came on upon the Equity reſerved.

The Court declared the Plaintiffs ought not to have had ſo much as a Diſcovery, much leſs any Relief in this Court, in Regard that the Silks were the proper Goods of the two *Florentines*, and not of the *Bonnells*, nor the Produce of their Effects; and therefore they having paid no Money for the Goods, if the *Italians* could by any Means get their Goods again into their Hands, or prevent their coming into the Hands of the Bankrupts, it was but lawful for them ſo to do, and very allowable in Equity.

And

And it was ſo ruled in the like Caſe between *Wigfall* and *Motteux*, &c. and lately between *Hitchcox* and *Sedgwick* in Caſe of a Purchaſe, without Notice of Bankruptcy. Therefore decreed an Account, if any Thing due from the *Italians* to the *Bonnells*, *that* ſhould be paid the Plaintiffs, but they ſhould not have the Value of the Silks by Virtue of the Conſignment or Verdict, and put the *Italians* to come in as Creditors under the Statute of Bankrupts.

Ant. Ca. 151.

Caſe 188.
Jan. 28.

Bentham verſus *Alſton.*

Ant. Ca. 134. Incumbent of a Parſonage being old, he together with the Grantee of the next Avoidance join in a Leaſe of the Tithes rendring the Rent half yearly, *viz.* *Midſummer* and *Chriſtmas*. Incumbent dies before *Midſummer* Day.

DOctor *Tudor* the Incumbent, having leaſed the Rectory and Tithes to *three* of his Pariſh at *three Hundred* and *Twenty* Pounds *per Ann.* for *three Years*, rendring Rent half yearly at *Midſummer* and *Chriſtmas*, the *Doctor* being old, the Leſſees upon taking a new Leaſe, deſired the Plaintiff, who had a Grant of the next Avoidance, to join therein, that they might be ſure to enjoy their Bargain, who agreed accordingly. Doctor *Tudor* died before *Midſummer* the laſt half Year's Day, the Leſſees having firſt collected and got all, or greateſt Part of the Tithes, *&c.*

The Leſſee gathered in the Tithes, except a ſmall Part which he got in afterwards. Who ſhall have the *Midſummer* Rent?

The Plaintiff in Equity would have had a Decree for the half Year's Rent; *firſt*, becauſe he was bound by the Agreement; for if the *Doctor* had died before any Tithes collected, yet he was bound and muſt have permitted the Leſſees to have enjoyed. And *ſecondly*, becauſe the Leſſees had received ſome Tithes after the Death of Doctor *Tudor*, which was an Evidence, that they looked upon their Leaſe as continuing, and acted under the Agreement made by the Plaintiff.

But

But it was objected, if the Rent was payable to any one, the Executors of Doctor *Tudor* had a better Right than the Plaintiff, and they no Parties.

Per Cur. Of Opinion in the old Books that the Fee is in the Patron during the Vacancy, and a Releaſe to him alone is good. Recommended it to the Parties to end the Matter by Compromiſe.

Newman verſus *Barton.*

Caſe 189.
Jan. 31.

THE Queſtion being whether an Executor ſhould compel a Legatee to refund. And the Caſe of *Grave* and *Bainſon* cited, where one Legatee being paid in full his whole Legacy, and there wanting Aſſets to pay the other Legacies, it was decreed for the Benefit of the unſatisfied Legatees, that the Legatee who had received his full Legacy, ſhould refund, and be paid only in Proportion; and the Caſe of *Hodges* and *Waddington* where a Creditor compelled a Legatee to refund.

Vol. 1. Page 94, and Caſe 153. Where Aſſets fall ſhort, Legatees ſhall refund to unſatisfied Creditors. But where an Executor has made a voluntary Payment to a Legatee, he ſhall not make him refund. Otherwiſe if the Executor pays a Legatee by Compulſion.

Per Cur. A Creditor ſhall follow the Aſſets in Equity, into whoſoever hands they come. But where the Executor had voluntarily paid the full Legacy, and afterwards Aſſets proved deficient to pay the other Legacies, they conceived neither the Executor, nor any of the other Legatees ſhould compel him to refund; but if the Payment had not been voluntary, but he had recovered his Legacy by Decree, there he ſhould have refunded.

Caſe 190. *Feb.* 4. ## *Whittingham* verſus *Thornburgh & al'.*

Policy of Inſurance for inſuring a Life gained by Fraud ſet aſide, with Coſts both at Law and in Equity, and the Premium received on the Policy to go in Part of Coſts.

THE Defendant *Thornburgh* in *March*, 1689, cauſed a Policy of Inſurance to be drawn for the Enſuring the Life of one *Edward Harwell* for a Year, and left it at one *Samuel Luplon*'s Office, to get Subſcriptions at *five* Pounds *per Cent. Premium*; and to draw in the Plaintiffs and others to under-write the Policy, procured one *Marwood*, a near Neighbour of *Harwell*'s to under-write *one Hundred* Pounds; and he giving out he knew *Harwell* healthy and like to live, and the Plaintiffs relying on ſuch Information, under-wrote the Policy. *Whittingham* for a *Hundred* Pounds, the other *four* for *fifty* Pounds apiece. *Harwell* ſoon after died.

It appearing that *Thornburgh* had no Eſtate or Intereſt that depended on *Harwell*'s Life; that *Marwood*'s Subſcription was only colourable to draw in others, and that *Harwell* was in a languiſhing Condition; though *Marwood* affirmed and pretended he was his Neighbour and a healthful Man, and the Plaintiff having upon the firſt Diſcovery of the Contrivance offered to return the *Premium*, and publiſhed the Fraud to prevent others from being drawn in; and the Defendants intending to get a very large Subſcription, having by a like Contrivance, got between *one* and *two Thouſand* Pounds on making the like Inſurance, on the Life of *William Sweeting*, the Court therefore decreed the Policy of Inſurance to be delivered up to be cancelled, and a perpetual Injunction againſt the Verdict thereon obtained at Law, and the Plaintiffs their full Coſts both at Law and in this Court, and the Money received for the Premium to go in Part of their Coſts.

I

Mergrave

Mergrave verſus *Le Hooke.*

Caſe 191. *Feb.* 11.

THE Plaintiff's Bill was to redeem a Mortgage made by his Father to the Defendant, who by Anſwer inſiſted, that the Plaintiff's Father had made him two ſeveral Mortgages of ſeveral Lands, that the Plaintiff endeavoured to defeat him of one of thoſe Mortgages, by Reaſon of an Entail, and hoped that in Equity he ſhould redeem both or neither.

1 Vol. Caſe 236. If *A.* makes two ſeveral Mortgages, and dies, and one of the Mortgages is of an entailed Eſtate, or is deficient in Value. The Heir of the Mortgagee ſhall not be admitted to redeem one, without redeeming the other.

Per Cur. He ſhall redeem both or neither; and ſo if one Mortgage had been deficient in Value, and the other Mortgage had been more worth than the Money lent upon it, the Heir ſhould not have been admitted to redeem the one without the other.

Miller verſus *Warren.*

Caſe 192. *Feb.* 19.

SIR *John Borlace* by his Will deviſes to the *four* Children of Sir *Henry Miller one Thouſand five Hundred* Pounds apiece in this Manner, *viz.* to *Nicholas Miller one Thouſand five Hundred* Pounds to be paid him, when he ſhall attain the Age of *Twenty-one*; to *Benjamin Miller one Thouſand five Hundred* Pounds, when he ſhall attain the like Age; to *Elizabeth Miller one Thouſand five Hundred* Pounds, to be paid at *eighteen*, or Marriage; the like to *Mary Miller*; and in Caſe one, or more of the aforeſaid Children ſhall happen to die, before his, her, or their reſpective Legacy or Legacies ſhall become due to them as aforeſaid, then my Will and Meaning is, that his, her, or their Legacy or Legacies ſhall be equally divided amongſt the Survivors of them; and in Caſe *three* of them ſhall happen

Deviſe of a Legacy of 1500*l.* to *A.* payable at his Age of 21, and if *A.* die before, then to *B. A.* dies in the Life of the Teſtator, yet *B.* ſhall have the Legacy.

happen to die before their reſpective Ages or Days of Marriage, then my Will and Meaning is, that the aforeſaid Legacies to them bequeathed ſhall be and remain to the Survivor of them. *Mary* one of the *four* Children of *Miller* died in the Life-time of the Teſtator: The Queſtion was, whether that *one Thouſand five Hundred* Pounds ſhould go to the ſurviving Children.

Decreed that it ſhould ſurvive. If a Legacy is deviſed to *A.* at *Twenty-one*, and if he die before, to *B.* tho' *A.* die in the Life of the Teſtator, the Legacy ſhall go to *B.* But where a Man deviſed *three Hundred* Pounds to his Siſter, willing her to give thereof *two Hundred* Pounds to her Child, ſhe died in the Teſtator's Life-Time: Bill by the Child for the *two Hundred* Pounds diſmiſſed.

Ant. Ca. 112.

Caſe 193. *Feb.* 20.

Norfolk verſus *Gifford.*

One Charges his Lands with 6000 *l.* for the Child with which his Wife was *privement enſient*, if it prov'd a Daughter, with a Clauſe of Entry for Non-payment. A Daughter is born, who died, the Mother as her Adminiſtratrix would have had the *ſix Thouſand* Pounds raiſed: But the Bill was diſmiſſed.

ONE by Will charged his Lands with *ſix Thouſand* Pounds for the Child his Wife was *privement enſient* of, if it proved a Daughter, with Clauſe of Entry for Non-payment. A Daughter is born, who died, the Mother as her Adminiſtratrix would have had the *ſix Thouſand* Pounds raiſed: But the Bill was diſmiſſed.

Non-payment. A Daughter is born and dies. The 6000 *l.* ſhall not go to her Adminiſtrator. *Ant.* Caſe 67, 88.

Ant. Caſe 86.

The Caſe of *Powell* and *Morgan* was cited, where a Term raiſed for the Portion of a Daughter was extinguiſhed, by the Inheritance deſcending on the Daughter, yet revived and ſet up in Equity for the Benefit of Creditors.

3

Aſford

Alford verſus *Earle.*

Caſe 194. *Feb.* 21.

Joſeph Jackſon ſenior, poſſeſſed for *Ninety-nine* Years of Lands in *Barton Regis*, if his Brother *John Jackſon* ſo long live, by Will *July* 17, 1658, deviſes all his Intereſt in *Barton Regis*, which he held for the Life of his Brother *John Jackſon*, with Liberty in *nine* Months Time to change the Life, to his Daughter *Sarah*, and deſires her Life may be put in, in Lieu of his Brothers. On *Octob.* 20, 1659, he ſurrrenders the Term, and takes a new Leaſe for the like Term of *Ninety-nine* Years, if his Son *Joſeph Jackſon* ſo long live; and afterwards adds ſeveral Codicils to the Will, taking no Notice of this Leaſehold Eſtate.

One deviſes a Leaſe to his Daughter, and afterwards renews the Leaſe, and afterwards adds a Codicil to his Will.

Whether the Renewal of the Leaſe is a Revocation: And whether the adding a Codicil to his Will is a Republication.

Firſt, Whether Renewing of the Leaſe be a Revocation of the Deviſe to his Daughter *Sarah.* And

Secondly, If a Revocation, whether the Codicils amount not to a Republication: The Caſe of *Bret* and *Rigden* cited, where a Deviſe was to *J. S.* and his Heirs; *J. S.* died, a new Publication after his Death will not carry it to his Heir.

Plowd. 342.

The Caſe of *Cotton* and *Cotton* cited, tried in the *Common Pleas* before Lord Chief Juſtice *North*, where the Teſtator's Saying his Will was in a Box in his Study, amounted to a new Publication.

Teſtator ſaying his Will was in a Box in his Study, amounted to a Republication.

Caſe 195. *Jan.* 15.

Edwin Mil', and *Stafford* & *al'*, Owners of the Ship *Falcon*, } Plaintiffs.

Eaſt-India Company, Defendants.

Though a Charter-party is ſo penned, that no Freight can be recovered upon it at Law, yet if the Owners of the Ship have a juſt Demand, Equity will relieve.

SIR *Humphrey Edwin* and *Stafford* the Part-owners, and *Preſtwith* Maſter of the Ship *Falcon*, let her to Freight to the *Eaſt-India Company*, by *Charter-party* dated *Feb.* 20, 1683, by which the Plaintiffs agreed to fit up the Ship with all Neceſſaries, ſo as ſhe might be ready to ſail by the 10*th* of *March* then next following, and ſhe was to go from Port to Port, and to any Port or Place within the Limits of the *Eaſt-India Company*'s Charter, as they ſhould direct; but was to be diſpatched back for *England* on or before the 24*th* of *Jan.* 1684, or ſo ſoon after as to ſave her *Moorſoon* for *England* that Year; or in Default of her being diſpatched within the Time aforeſaid, the Owners were to pay *four* Months Demurrage, at *ſeven Pounds ten Shillings per diem* for her Moorſoon ſo loſt, and her Stay in *India*, after the 20*th* of *Jan.* 1684, with this further Clauſe, that the Company might detain the Ship in their Imployment in Trade or Warfare for any longer Time, not exceeding *twelve* Months, after the 20*th* of *Jan.* 1684, after the Rate of *ſeven Pounds ten Shillings and ſix Pence per diem* Demurrage, until the Ship be diſpatched from the laſt lading Port, or Expiration of the *twelve* Months, which ſhall firſt happen; but after the *twelve* Months expired, the Ship is to return to *England*, and the Company not to be liable for any further Demurrage, or any Damage that may accrue by her Detention after that Time. The Company covenant, on the Ship's Arrival in *England*, to pay Freight for *three Hundred and one* Tun, and Demurrage

murrage from the 20*th* of *Jan.* 1684, until the Ship ſhould be diſpatched for the Space of *twelve* Months after the ſaid 20*th* of *Jan.* 1684; and it was thereby provided, that until *ſix* Days after the Ship ſhall have returned to the Port of *London*, and made a Right and full Diſcharge of all her Lading, the Company are not to pay, nor to be liable to pay any of the Sums of Money agreed on for Freight or Demurrage, or for detaining the Ship in *India*, it being the Intent of the Parties, that if the Ship ſhould be loſt either in her outward or homeward bound Voyage, nothing ſhould be paid by the Company for Freight or Demurrage.

The Ship ſet ſail according to the Charter-party, arrived in *India*, and was imploy'd by the Company in trading from Port to Port for *one* Year and upwards: The Ship arrived in *India Nov.* 23. 1684, and was to enter into Demurrage in four Months afterwards, which was the 23*d* of *March*, 1684, and the *twelve* Months after (during which Time the Company by their Charter-party might detain her) ended *March* 23, 1685. but the Ship was imployed in the Company's Service, ſo that ſhe arrived not at *Surat* until 1686, and from thence was ordered to *Bombay*, where the Ship having been ſo long detained in thoſe Seas, was ſurveyed, and found not ſufficient for a Voyage to *England*; and on *Sept.* 24, 1686, the Seamen were diſcharged, and the Ship left there.

The Company refuſed to pay any Thing for Freight or Demurrage, becauſe by the expreſs Proviſion of the Charter-party, they were not to pay until *ſix* Days after the Ship's Arrival in *England*, and diſcharged of her Lading; and if they were to pay any Thing, yet they were to be charged with Demurrage until *March* 23, 1685, only, and for no longer, and ſo it is provided by the Charter-party, and refuſed likewiſe to account for the Value

Value of the Ship, or ſhew how they had diſpoſed of her.

Per Cur. Though the Charter-party is ſo penned that nothing can be recovered at Law, yet the Plaintiffs had a juſt Demand, and ought to be relieved in Equity; and cited the Caſe of *Weſtland* and *Robinſon* (where as in moſt Caſes there was to be no Freight paid for the outward bound Cargo, but only a certain Rate *per* Tun for the homeward bound Cargo,) when the Ship arrived beyond Sea, the Factor had no Goods at all to load the Ship with, ſo ſhe was forced to come home with her Ballaſt: But in that Caſe the Court decreed the Payment of Freight; and ſo was it done in a like Caſe of a Ship that was hired at *New Caſtle* for a Voyage to the Duke of *Courland*'s Country, there being Freight to be paid only for the homeward bound Cargo; and when the Ship came thither, the Goods were ſeiſed and attached, ſo as the Ship was forced to come home empty, and yet their Freight was decreed.

In the principal Caſe the Court decreed the Company ſhould account for what they had made of the Ship, that they ſhould pay Demurrage according to the Rate mentioned in the Charter-party, and that they ſhould alſo be charged in Reſpect of Freight; but as to the *Quantum* of the Freight, the Court would further conſider of it, in regard that by the Charter-party there are ſeveral Rates agreed on to be paid, as Freight for the homeward bound Cargo, *viz.* for Callicoes, *&c. Twenty-one* Pounds *per* Tun, for Salt-petre, *&c. eighteen* Pounds *per* Tun, for Iron, Copper, *&c. ſix* Pounds *per* Tun; and therefore, before final Judgment, would be informed what Quantities of theſe reſpective Commodities were uſually brought home on ſuch a Voyage, and how much in Proportion to each other.

Baden & al' Creditores Philippi nuper Com' Pembroke, } Plaintiffs.

Caſe 196. *Feb.* 7. *Trevor, Raſt-linſon, Hutch-ins.*

Comitiſſ. *Pembroke*, Dom' *Jefferies*, & Domina *Charlot ux' ejus' fil' & hæres dicti Philippi Com'* Pembroke, } Defendants.

PHilip late *Earl* of *Pembroke*, upon the Marriage of the now Counteſs of *Pembroke*, in Conſideration of *ten Thouſand* Pounds Portion, and purſuant to Articles by which he had covenanted to charge his Eſtate in *Glamorganſhire*, with a Rent or Annuity of *one Thouſand three Hundred* Pounds *per Ann.* to her for her Life, and afterwards agreed to make it up *one Thouſand five Hundred* Pounds *per Ann.* did by Indenture *Octob.* 1, 1675, demiſe to the Earl of *Sunderland* and Lord *Godolphin* his Manors and Lands in *Glamorganſhire* for *Ninety-nine* Years at a Pepper-Corn Rent, and by Indenture *Octob.* 2. 1675, the Earl of *Sunderland* and Lord *Godolphin* redemiſe the Premiſſes to Earl *Philip* for *Ninety-eight* Years and *eleven* Months at a Pepper-Corn Rent during his Life, and after his Death *one Thouſand five Hundred* Pounds *per Ann.* by half yearly Payments, during the Life of the Counteſs, for her Jointure, and after her Death a Pepper-Corn Rent during the Reſidue of the Term, with a Covenant for Payment of the Rent, and a Clauſe of Re-entry for Non-payment. *Ant.* Caſe 56.

The ſaid late *Earl* by Way of Demiſe and Redemiſe, had ſecured the Payment of ſeveral Annuities for Life,

viz. for ſecuring an Annuity of *ſeventy* Pounds *per Ann.* to one *Uphill* for Life, the ſaid late *Earl* and his Truſtees had demiſed a Meadow called *Burdensball* Meadow to *Richard Uphill* for *Ninety-nine* Years, and *Uphill* by Indenture bearing Date the next Day after redemiſed the Premiſſes to the late *Earl* for *Ninety-eight* Years and *ſix* Months, reſerving the Rent of *ſeventy* Pounds *per Ann.* during *Uphill*'s Life, and a Pepper-Corn during the Reſidue of the Term, a Clauſe of Re-entry, and a Covenant from *Uphill*, if the Rent was paid, to ſurrender the Term; and in like Manner ſecured other Annuities to *Negus* and others.

The ſaid *Earl* alſo with his Truſtees, to ſecure *four Thouſand* Pounds to his *three* Siſters, and *four Hundred* Pounds *per Ann.* to the preſent *Earl*, demiſed ſeveral Manors and Lands in *Monmouthſhire* to *Villers*, *Salladine* and *Chomley* for *five Hundred* Years, in Truſt out of Rents and Profits to raiſe the Intereſt of the *four Thouſand* Pounds, and the *four Hundred* Pounds *per Ann.* to the preſent Earl for his Life, clear of all Taxes and Deductions, under a Proviſo that on Payment of the *four Thouſand* Pounds and Intereſt, and ſecuring the *four Hundred* Pounds *per Ann.* to the now *Earl*'s Content, they ſhould at the Requeſt of the late *Earl* ſurrender the Term.

The ſaid *Earl* in *November* 1682, demiſed the Manor of *Patney* in *Wilts* for *one Thouſand* Years to one *Clerke*, as a collateral Security for his Enjoyment of the Manor of *Eaſt Overton*, which he had bought of the late *Earl.*

And *June* 18. 1683, by Articles under Hand and Seal, did covenant for him and his Heirs for *five Thouſand two Hundred* Pounds to convey to *Pinſeint* and his Heirs the Manor of *Patney*, and *Pinſeint* covenanted in a Week after the Conveyance made, to pay the *five Thouſand two Hundred* Pounds. *Pinſeint* pays Part of the Purchaſe-

Purchaſe-Money to pay off an old Statute and other Incumbrances, and before any Conveyance made, the *Earl* dies greatly indebted by Bond and otherwiſe.

Upon the firſt Hearing of this Cauſe by the Lord Chancellor *Jefferies* on *July* 11, 1688, aſſiſted by the *Maſter* of the *Rolls*, Mr. Juſtice *Lutwich* and Baron *Powell*, it was decreed that the Term for *Ninety-nine* Years raiſed for ſecuring the *one Thouſand five Hundred* Pounds *per Ann.* to the Counteſs for Life, was raiſed only for a particular Purpoſe, and that being done, then to attend the Inheritance, and go to the Heir, and not to be taken as a Term in Groſs, to be Aſſets to anſwer Debts by ſimple Contract; and that *Pinſeint* being willing to go off, he ſhould be repaid, and his Purchaſe diſcharged, and reſerved the Conſideration of the other Points for further Debate.

Now upon Debate before the *Lords Commiſſioners*, they were of Opinion that the mortgaged Terms derived out of the Earl's Inheritance, were Aſſets, and liable to Bond-Debts only, and not to Debts by ſimple Contract; and decreed *Pinſeint*'s Purchaſe ſhould go on, and the Heir convey, and the Purchaſe-Money be paid to the Executors.

A. articles to ſell Lands, and dies before a Conveyance made. The Heir decreed to convey, and the Purchaſe-Money to be paid to the Executors.

Roger Baker and *Eliz. ux'*, Plaintiffs.

Francis White & al', Defendants.

Caſe 197. *Feb.* 24.

THE Plaintiff *Elizabeth* whilſt a Widow, was by the Contrivance of her Siſter *Anne*, now the Wife of *Alwin*, and of the Defendant *White*, at a Meeting for that Purpoſe appointed at the *Devil Tavern*, prevailed

Ant. Caſe 97. *A.* being a Widow gives a Bond to pay *B.* 100 *l.* if ſhe marry again, and *B.* gives a Bond to the Widow, to pay her Executors the like Sum, if ſhe ſhould not marry again. The Widow ſoon after marries. Her Bond decreed to be delivered up.

vailed upon, to give a Bond of *two Hundred* Pounds Penalty to the Defendant *White*, dated *Octob.* 8, 1683, conditioned that if the Plaintiff *Elizabeth*, then a Widow, ſhould afterwards marry again, then ſhe, her Executors, Adminiſtrators or Aſſigns, ſhould pay the Defendant *White*, his Executors, *&c.* *one Hundred* Pounds in *eight* Days after ſuch Marriage; and the Defendant *White* at the ſame Time gave her a Bond, of the like Penalty, conditioned to pay the Executors, *&c.* of the ſaid *Elizabeth one Hundred* Pounds, if ſhe the ſaid *Elizabeth* ſhould not marry again before ſhe departed this Life. The Plaintiff *Elizabeth* having married the Plaintiff *Baker*, they brought their Bill to have her Bond delivered up; and although it was inſiſted that the Plaintiff was well apprized of what ſhe did, being then a Widow, and near *thirty* Years of Age, and the Matter had been often diſcourſed of, and conſidered by her at other Meetings between them before that Time, at which the Bond was executed, and after the Giving of the Bonds, declared her ſelf well ſatisfied therewith; and though the Money the Defendant was to pay, was not payable in the Life-time of *Elizabeth*; yet it would help to increaſe her Daughter's Portion; and that if ſhe the ſaid *Elizabeth* had died unmarried, the Defendant *White* could not have been relieved againſt his Bond.

Non allocatur; But the Bond was decreed to be delivered up to be cancelled.

Caſe 198. *Feb.* 26.

Finch verſus *Newnham.*

A Deviſee obtains a Decree to hold and enjoy againſt the Heir, who it was ſuppoſed had ſuppreſſed the Will.

John Finch of *Godſtone* in *Surry*, having Iſſue only one Daughter, and being minded to keep Part of his Eſtate in his Name, by his Will in *Octob.* 1684, deviſed to

Pending this Suit, a third Perſon gets an Aſſignment of a Mortgage made by the Teſtator, and then purchaſes the Equity of Redemption of the Heir, with Notice of the Will. The Court would not admit the Purchaſer to diſpute the Juſtice of the Decree, nor to try at Law, whether the Will was not cancelled by the Teſtator.

to the Plaintiff, his near Kinſman, in Tail Male, a Meſſuage in *Godſtone* called *Hammerlands*, with Remainder over, and gave to his Daughter his Lands in *Suſſex*, and about *ſix* Months after died; *Elizabeth* the Daughter within *three* Days after the Death of her Father married one *Ditcher*, and they with one *Cooper* were ſuppoſed to deſtroy this Will, after the Death of the Teſtator.

The now Plaintiff brought his Bill againſt *Ditcher* and his Wife, and in *June* 1687, obtained a Decree at the *Rolls*, to hold and enjoy the Lands according to the Will againſt *Ditcher* and his Wife and all claiming under them. The Eſtate ſo deviſed to the Plaintiff, being by the Teſtator, prior to his Will mortgaged to one *Budgin* for *one Hundred* Pounds; the Defendant pending the Suit, buys in the Mortgage from *Budgin*, and alſo the Equity of Redemption from *Ditcher* and his Wife. The now Defendant was ſerved with the former Decree, and appeared and was examined, and ſet out his Title under the Aſſignment of this Mortgage; thereupon the Plaintiffs were put to bring their Bill to redeem the Mortgage; the Defendant by Anſwer inſiſted, that although he had been informed before his Purchaſe, that it was pretended, that there had been ſuch Will made, yet upon Enquiry was aſſured and ſatisfied, that ſuch Will was deſtroyed by the Teſtator in his Life-time, and therefore proceeded in his Purchaſe; and inſiſted the former Decree, to which he was no Party, was unjuſt, in decreeing the Lands to be enjoyed according to ſuch pretended Will. But in Regard he purchaſed *pendente lite*, and with Notice that there was a Will, the Court would not admit him to examine the Juſtice of the former Decree, nor to try at Law, whether ſuch Will was cancelled or deſtroyed by the Teſtator; but declared he ſhould be bound by the former Decree, and accordingly decreed the Redemption of the Mortgage to the Plaintiff.

Caſe 199. *Martii* 4.

Aſpinwall & al' verſus *Leigh & al'.*

A Term for Years is limited for Payment of Debts, Remainder to *A.* for his Life *ſans* Waſte, Remainder to his firſt, *&c.* Son in Tail. *A.* being in Want, the Court gave him Leave to cut Timber for his Support, not exceeding the Value of 500 *l.* *Ant.* Caſe 148.

SIR *Gilbert Ireland* by Deed of the 23*d* of *April* 1675, grants a Term for *five Hundred* Years to the Defendant *Leigh*, and others, of his Manors and Lands in *Lancaſhire*, to commence after the Deceaſe of him and his Wife, for Payment of Debts and Annuities; and by Will of the ſame Date, deviſes the Reverſion and Inheritance thereof to the Plaintiff for Life, without Impeachment for Waſte, Remainder to his firſt, and other Sons in Tail-male, with divers Remainders over. Sir *Gilbert* and his Wife both being dead, and the Truſtees in Poſſeſſion under the Truſt for Payment of Debts and Annuities, which was like to have a long Continuance, the Plaintiff brought his Bill, ſetting forth that he was reduced to great Want, and that there was much decaying Timber upon the Eſtate, and that he had an Eſtate for Life limited to him *without Impeachment of Waſte*, expectant on the Determination of the Truſt, and that the Truſtees had no Power to cut the Timber, and prayed he might be permitted to take off the Timber, allowing for what Damage he did the Eſtate.

And although it was objected, that the Plaintiff might die before the Truſt performed, and until then, could not be let into Poſſeſſion, and to decree that he in the mean Time might take off the Timber, would be a Prejudice to his Sons or other Remainder-Men; yet the *Court* decreed a Commiſſion to go to take off Timber for the Plaintiff's Relief and Support, not exceeding *five Hundred* Pounds.

Lord *Stowell* verſus *Cole.*

Caſe 200.
5 *Martii.*

PER Cur. Where a mutual Account is decreed, and there happens an Abatement, the Defendant in ſuch Caſe may revive.

After a Decree of a mutual Account, the Defendant may revive.

DE

DE

Termino Paſchæ,

1691.

In CURIA CANCELLARIÆ.

Caſe 201. *April* 30.

Martha Cottle Widow, Plaintiff.

Jane Fripp Widow, and *James Fvy*, } Defendants.

The Husband in Conſideration of his Wife's joining with him in a Fine, and parting with her Jointure of 40 *l. per Ann.* gives her Truſtee a Bond to ſettle other Lands of 40 *l. per Ann.* on the Wife for Life, Remainder to the Heirs of his Body by her. The Husband being indebted in other Bonds, dies Inteſtate, and the Wife takes Adminiſtration, and confeſſes Judgment to her Truſtee: On a Bill by another Bond-Creditor decreed the Wife's Bond as to her ſelf only, to be performed before the Plaintiff is paid; but the Children to have no Benefit of this Bond, preferable to the other Bond-Creditors.

THE Defendant *Jane Fripp* having a Portion of *four Hundred* Pounds, *Edward Fripp* her late Husband's Father, purſuant to an Agreement made before Marriage, ſettled a Jointure of *forty* Pounds *per Ann.* on the Defendant for Life, iſſuing out of an impropriate Parſonage of *Tilſhead* in *Wiltſhire*. *Richard Fripp* the Defendant's late Husband, prevailed on the Defendant to levy a Fine, and to join in the Sale of the Impropriation to one *Hollyday*, and in Conſideration thereof, and in Lieu of her Jointure, the ſaid *Richard Fripp*, *Jan.* 24, 1677, gave Bond, to the Defendant *Fvy*, of *one Thouſand two Hundred* Pounds Penalty, conditioned that if he ſhould at any

any Time during her Life, ſettle Lands and Tenements of the yearly Value of *forty* Pounds *per Ann.* beyond Repriſes, to the Uſe of the Defendant *Jane* for Life, in lieu of her Jointure, Remainder to the Heirs of the ſaid *Richard Frip*, on the ſaid Defendant begotten, or in Default of ſuch Settlement, if the ſaid *Richard Frip* ſhould pay to the Defendant *Jvy ſeven Hundred* Pounds, to the Uſe of the ſaid *Jane* for Life, Remainder to the Uſe of the Children of the ſaid *Richard Frip*, begotten on the Body of the Defendant, the Bond to be void.

Richard Frip, *May* 18, 1683, borrowed *fifty* Pounds of the Plaintiff *Cottle*, on his and his Brother *Benjamin Frip*'s Bond, and before Payment died Inteſtate. The Defendant, his Widow, having taken Adminiſtration, the Bill was to have an Account and Diſcovery of his Eſtate, in order to ſatisfy the Complainant's Debt, and complained of fraudulent Demands ſet up by the Defendants. The Defendant by Anſwer inſiſted on the Bond to *Jvy* to be ſatisfied in the firſt Place, ſhe having confeſſed Judgment thereon to *Jvy*, and being left without any other Proviſion for her ſelf or Children.

Upon Debate, the Court decreed that the Bond and Judgment to *Jvy* ſhould be allowed, and ſtand good ſo far as to ſecure *forty* Pounds *per Ann.* to the Wife for Life; but as to the Remainder to the Children, or any Settlement to be made for them, the Court took it, that upon the Wording of the Condition of the Bond, the Husband was to have been Tenant in Tail, and might have barred ſuch Settlement, if made, as to the Children, and therefore as againſt the Plaintiff, the Defendant muſt have a Satisfaction prior to him, but as to the Children he muſt be preferred, and decreed it accordingly.

Caſe 202.
21 *Martii.*

Woodman verſus *Blake.*

Ante Caſe 153.

One having three Daughters, deviſes Land to his eldeſt upon Condition that ſhe within ſix Months after his Death, pay certain Sums to her two other Siſters, and if ſhe failed, then he deviſed the Land to his ſecond Daughter on the like Condition, &c.

THE Lands in Queſtion were ſettled by the Father of the Plaintiff's Wife on Truſtees, (of which Colonel *Sackvile* was the Survivor) to ſuch Uſes, Intents and Purpoſes, as he by Deed or Will ſhould appoint, and by his Will made *ſix* Months afterwards, having Iſſue only *three* Daughters, and being willing his Eſtate ſhould not be divided, but go intirely to one of his Daughters, deviſed and appointed his Eſtate to the Plaintiff's Wife, being one of his Daughters, ſhe within *ſix* Months paying certain Sums to the other of his Daughter's; if ſhe failed, then he gave and appointed the Lands to another Daughter, ſhe paying the like Sums of Money to her Siſters, and upon her failing, to his *third* Daughter in like Manner.

The Court may inlarge the Time for Payment, though the Premiſſes are deviſed over, and in all Caſes that lie in Compenſation, the Court may diſpenſe with the Time, tho' even in Caſe of a Condition precedent.

The Queſtion was, whether the Plaintiff not having paid the Money within the ſix Months, ſhould have the Benefit of the Bequeſt, being in the Nature of a Preemption.

Per Cur. The Court may enlarge the Time of Payment beyond the *ſix* Months, and hath uſually done it, even in the Caſe of a Condition precedent, and in all Caſes that lie in Compenſation, as in the Caſe of *Popham* and *Bamfield*, and this Caſe is much the ſtronger with the Plaintiff, in Regard there is no Deviſe of the Land it ſelf; but the Will is in the Nature of a Declaration of Truſt, and the Bill is preferred within the *ſix* Months, (that is to ſay) within *ſix* Kalendar Months, and the Plaintiff claimed not a naked Power, but a Power coupled with an Intereſt, and is relievable within the Reaſon of the Caſe of *Pitcarne* and *Wheeler.*

1 Vol. Caſe 33, 159.

Com' *Salisbury & ux'*, Plaintiffs.

Bennet & ux', Defendants.

Caſe 203. 1 *Maii.* Rawlinſon, Hutchinſon, *Lords Commiſſioners.*

MR. *Simon Bennet* deviſed to his *two* Daughters *twenty Thouſand* Pounds apiece, to be paid them at their reſpective Age of *Twenty-five* Years, or Marriage, which ſhould firſt happen, ſo as ſuch Marriage was with the Conſent of the Mother and other Truſtees, and after ſuch Time as they reſpectively had attained the Age of *ſixteen* Years. If either of them married before *ſixteen*, or without Conſent, then ſuch Daughter to have only *ten Thouſand* Pounds Portion; and directed that the Surplus of his perſonal Eſtate, ſhould be inveſted in Lands, and ſettled on his Daughters and their Iſſue, with croſs Remainders, *&c.*

One by Will, having two Daughters, gives 20000*l.* to each, payable at 25, or Marriage, ſo as ſuch Marriage be with the Conſent of the Mother and the Truſtees, and after the Age of 16. If either of the Daughters marry before 16, or without Conſent, ſuch Daughter to have only 10000*l.* Portion. Teſtator afterwards treats with the Plaintiff for a Marriage with his eldeſt Daughter, and he dying before the Marriage had, ſhe afterwards marries the Plaintiff; with Conſent of her Mother and the Truſtees, but before her Age of 16. yet ſhe ſhall have the whole 20000*l.*

In the Life-time of Mr. *Bennet*, a Marriage was treated of to be had between the Plaintiff and his Lady; but before any Agreement made, old Mr. *Bennet* died, and the Plaintiff, the *Earl*, married his now Wife, before ſhe attained her Age of *Sixteen*, but with the Conſent of her Mother and Truſtees.

Whether he ſhould have only *ten Thouſand* Pounds, or *twenty Thouſand* Pounds Portion, was the Queſtion.

For the Plaintiff it was inſiſted, that here was no expreſs Deviſe over, and that it was a Clauſe inſerted, and intended only *in terrorem*; and old *Bennet* himſelf after the Making of this Will, though his Daughter was under *Sixteen*, treated to have married her to the Plaintiff,

Plaintiff, ſo (as it ſtood on the Will) if there had been any Condition precedent, or Forfeiture, he had afterwards diſpenſed with it. Here the whole Portion comes out of the perſonal Eſtate, and is a Legacy, and therefore Regard ought to be had to the Law and Uſage in the Spiritual Court, where Conditions of this Nature are odious. And the Caſe of the Duke of *Southampton* cited, where Relief was given in the like Caſe.

The Court decreed the *twenty Thouſand* Pounds to the Plaintiff.

Caſe 206. Trevor, Rawlinſon, Hutchins, *Lords Commiſſioners.* 5 *Maii.*

Cecil & al', Plaintiffs.

Comes *Salisbury*, Defendant.

THE Plaintiffs the younger Children of the late Earl of *Salisbury*, brought their Bill for the Execution of a Truſt, under the Will of their Father, for raiſing their Portions and Maintenances, and prayed the Truſtees might be decreed to ſell, *&c.* the Defendant the *Earl*, whilſt a Minor, deſired the Truſt-Eſtate might not be ſold, and offered to ſubject other Lands not within the Truſt, for the better raiſing of the Portions, ſo that then a Sale would not be neceſſary: Upon the Hearing of the Cauſe, the Queſtion was, whether he ſhould be bound by this Offer in his Anſwer, he being then a Minor.

An Infant bound by the Offer made by him in his Anſwer, if the other Side are thereby delayed; and if the Infant does not immediately after his coming of Age apply to the Court, in order to retract his Offer, and amend his Anſwer.

Per Cur. Shall hold him to his Offer, for by that Means, he hath delayed a Sale, *&c.* and if he would have departed from what he had offered, he ought immediately when he came of Age to have applied to the Court, to have retracted his Offer, and amended his Anſwer.

Anſwer: But though he came of Age in 1687, yet no Complaint was made, either that he had been deceived, or defrauded, or an improper Defence made for him; but acquieſced in the Anſwer to this Time. This Court hath often decreed building Leaſes for *ſixty* Years of Infants Eſtates, where for their Benefit. A Common Recovery ſuffered by an Infant is good; and if the Court is ſatisfied, it is for the good of the Infant, will take it. Where an Exchange is made, if the Infant continues in Poſſeſſion after he comes at Age, he ſhall be bound by it. So where a Jointure is made after Marriage, if after the Death of her Husband, the Wife enters, ſhe ſhall be bound by it. In Sir *Edward Moſeley*'s Caſe, where a Proviſion was made for his Lady in lieu of her Jointure, by Articles during Coverture, ſhe after the Death of her Husband, entred on *Forty-ſix* Pounds *per Ann.* Part thereof only, and ſhe thereby was held obliged to perform the whole Articles. And the Lady *Widrington*'s Caſe was cited, where ſhe and her Husband agreed to an Incloſure, and ſhe was bound by it, even as to her Jointure.

Court of Equity often decrees building Leaſes for 60 Years, of Infant's Eſtates, where 'tis for their Benefit.

Infant exchanges Land, and continues in Poſſeſſion of the Lands given him in Exchange, after his coming of Age, he ſhall be bound.

Proviſion made for a Wife in lieu of her Jointure, by Articles during Coverture; if the Wife after her Husband's Death enters but upon Part of theſe Lands, ſhe is obliged to perform the whole Articles.

Baker verſus *Bayley.*

Caſe 205.
1 *Maii.*

THE Defendant that had an Eſtate for three Lives, ſettled it to the Uſe of himſelf in Tail, Remainder to the Plaintiff; the Defendant ſurrenders the old Leaſe, and takes a new Leaſe to himſelf: The Plaintiff's Bill was to have the Benefit of the Remainder preſerved to him.

A. having an Eſtate for 3 Lives, ſettles it to the Uſe of himſelf in Tail, Remainder to *B.* The Remainder is void, or if good, it might be barred by Deed, Surrender, or other Conveyance.

Leaſe *pur auter vie*, is not within the Statute *de donis*. *Ant.* Ca. 167.

Cur. Take the Remainder to be void, and diſmiſs the Bill. *Firſt*, a Leaſe *pur auter vie*, is not within the Statute *de donis*, and therefore if a Limitation over had been good, it might have been barred by a Deed, or Surrender, or other Conveyance, without a Common Recovery, as in the Caſe between *North* and *Champernoone* where bare Articles ſhall be a Bar to an Intail of an Equity, and though there was a Recovery in that Caſe, yet that was not material, in Regard there was no Tenant to the *Præcipe* [illegible]; and in this Caſe, if it had been an Intail within the Statute *de donis*; yet the Plaintiff's Remainder not to be regarded, by Reaſon the Defendant has a prior Eſtate in Tail, and might at any Time bar the Remainder. The Caſe of *Dowdeſwell* and *Dowdeſwell* cited; adjudged *per* Lord Chief Juſtice *Hale*, that an Eſtate *pur auter vie* of Lands in *Burrough Engliſh*, ſhould deſcend and go to the Heir in *Burrough Engliſh*.

Bare Articles a Bar to an Intail of an Equity. 1 Vol. Ca. 8. 2 Ch. Caſes 78.

3 Keb. 475, 486, 498. An Eſtate *pur auter vie* of Lands in Burrough Engliſh ſhall deſcend to the cuſtomary Heir.

Caſe 206.
Eodem die.

Baker verſus *Child.*

Bill will not lie to quiet one in the Poſſeſſion of a Pew in a Church, tho' Plaintiff before had a Decree before the Ordinary, for this Pew.

THE Plaintiff had obtained a Decree before the *Ordinary*, for an Iſle in a Church, in the Year 1676, and brought his Bill for the Decree of this Court to quiet him in Poſſeſſion; and it was inſiſted upon by Mr. *Finch*, that the Biſhop had the Diſpoſition of the Seats in the Church, and when he hath diſpoſed thereof, that gives a Right to the Party, and he may maintain an Action, and that was the Caſe of *Boothby* and *Bayly*, and hoped the Court would not put them to bring their Action, but would quiet the Poſſeſſion by Decree.

Hob. 69.

Per Cur. Diſmiſs the Bill with Coſts, for this Court executes not their own Decrees by a Bill, without exa-

mining the Juſtice thereof; but we cannot examine whether the Biſhop hath done Right, nor will ſuch a Decree bind the Succeſſors.

Symons verſus *Rutter.*

Caſe 207. 4 *Maii.*

ON the Marriage of *Elizabeth Symonds* with *John Rutter*, it was agreed by Articles in Writing, that *five Hundred* Pounds, Part of the Portion of *Elizabeth*, ſhould be placed in the Hands of Sir *Francis Child* and *William Pain*, to be placed out at Intereſt, until it could be inveſted in a Purchaſe, with the Conſent of *Elizabeth* and *John Rutter* her intended Husband, in Houſes or Lands of Inheritance, to be ſettled to the Uſe of *John Rutter* and *Elizabeth* his intended Wife for their Lives, and the Life of the longeſt Liver, Remainder to the Heirs of their two Bodies; Remainder to the Heirs of the Body of *Elizabeth*; Remainder to the Plaintiff the Brother of *Elizabeth*, and his Heirs. The Marriage being afterwards had, and the *five Hundred* Pounds depoſited with the Truſtees; before any Purchaſe had, *Elizabeth* died without Iſſue; *John Rutter* ſurvived, and received the Intereſt of the *five Hundred* Pounds, during his Life; he being dead, the Plaintiff now claimed the *five Hundred* Pounds, by Virtue of the Remainder to him and his Heirs, and as Brother and Heir of the ſaid *Elizabeth*, and alſo as having Adminiſtration to her *de bonis non* adminiſtred by *John Rutter* the Husband, who ſurvived *Elizabeth* his Wife.

By Marriage-Articles agreed that 500 *l.* the Wife's Portion, ſhould be inveſted in a Purchaſe of Lands to be ſettled on Husband and Wife for their Lives; Remainder to the Heirs of their two Bodies; Remainder to the Heirs of the Body of the Wife; Remainder to the Plaintiff, the Wife's Brother in Fee. The Wife dies without Iſſue, and then the Husband dies, the 500 *l.* not being laid out. Whether this Money is to be taken as Land, and go to the Plaintiff, to whom the Fee is limited; or as Money, and go to the Executor of the Husband.

Per Trevor and *Rawlinſon*, The *five Hundred* Pounds in this Caſe is to be looked on as Money, and not as Land, and go to the Defendant as Adminiſtrator to *John Rutter* the Husband, who ſurvived: *Firſt*, becauſe no poſitive Covenant

Covenant that it ſhould be laid out in Land. *Secondly*, not to be laid out in Land, but by the Conſent of *John Rutter* and *Elizabeth* his Wife, and no Purchaſe made or conſented unto; and it remaining therefore as Money, the Intereſt by the Articles was only appointed to the Survivor, and no Diſpoſition as to the Principal, and muſt go to the Adminiſtrator of the Husband, who ſurvived and the Bill diſmiſſed; for if ſettled, the Husband had been Tenant in Tail, and might have barred the Iſſue.

Per Hutchins, The Intention plain, it ſhould be inveſted in a Purchaſe, and plain that a Purchaſe might have been had after the Death of one of them, becauſe the Survivor by the Articles, is to have only the Intereſt for his Life; and though if ſettled, the Husband might have been Tenant in Tail; yet having no Iſſue, was only Tenant in Tail after Poſſibility of Iſſue extinct, and conceived this Caſe governed by the Rule that had been taken in the ſeveral Caſes of *Whitwick* and *Jermin*, or *Lawrence* and *Beverley*, being the ſame Caſe; and by the Caſes of *Annon* and *Honywood*, *Kettleby* and *Atwood*; and muſt not upon the ſame Circumſtances be taken as perſonal Eſtate, which in other Caſes had been looked on as Land, and gone as real Eſtate.

Vol. 1. Caſe 293, 458.

Caſe 208.

Alcock verſus *Sparhawk.*

Ant. Ca. 140. *J. S.* by Will deviſes his Lands to his Brother who was his Heir at Law, in Fee, gives Legacies and makes his Brother Executor, deſiring him to to ſee his Will performed. The real Eſtate is charged with the Legacies.

James Sparhawk, the Defendant's Brother, ſeiſed of Freehold and Copyhold, and deſigning to have intermarried with the Plaintiff, in caſe he had lived; by Will *April* 15, 1679, drawn by the Defendant his Brother by his Direction, deviſed as followeth. As touching my worldly Goods, I diſpoſe thereof as followeth. I give

I give and bequeath to *John Sparhawk* (being the Defendant) my loving Brother, all my Houſes and Lands lying and being in *Feeſingfield* and *Stradbrook*, and all my Houſes in *Theberton* to him and his Heirs: And after other Legacies deviſes thus. *Item*, I give to Mrs. *Suſanna Alcock*, (the Plaintiff) the Sum of *two Hundred* Pounds to be paid by my Executor within *five* Years after my Deceaſe. *Item*, I give my Stone-Ring unto Mrs *Suſanna Alcock*, and I do nominate and appoint my loving Brother *John Sparhawk* to be my ſole Executor of this my laſt Will and Teſtament; deſiring him to ſee the ſame performed, according to the Truſt and Confidence that I repoſe in him. And the Teſtator propoſing the Legacies ſhould be paid in *three* Years; the Defendant deſired *five* Years Time for the doing of it. The perſonal Eſtate proving deficient. The Queſtion was, whether the real Eſtate was liable.

Per Cur. The Lands are ſubject and liable even on the Face of the Will. Teſtator needed not have deviſed the Lands to his Brother, for he was his Heir at Law, unleſs he intended his Brother ſhould take them ſubject to his Legacies: But he is Deviſee and Executor, and is deſired to ſee the Will performed; and therefore a much ſtronger Caſe than that of *Cloudeſly & al'*, Creditors of *Dean* againſt *Pelham*, which was confirmed upon an Appeal to the Lords. Vol. 1. Caſe 586.

Note, This Decree was alſo confirmed upon a Bill of Review, and afterwards upon an Appeal to the *Lords* in *Parliament*.

Whitacre verſus *Pawlin*.

Caſe 209. 18 *Maii*.

Pawlin and *Loggin* become Partners in ſome Forges and Iron Mills, and *Pawlin* alledging that *Loggin* had not

An Award is made in an adverſary Suit between *A.* and *B.* and confirmed by the Court, *A.* being then a Bankrupt, but not known to be ſo. A Commiſſion is afterwards taken out. This Award ſhall bind the Aſſignee under the Commiſſion.

not brought his Proportion of Stock into Trade, and had waſted and imbeziled the Joint Stock, brought a Bill againſt him to be relieved touching the ſame. The Matter by Conſent was referred to Mr. *John Trinder*, who in Regard *Loggin* had not brought in his firſt Stock, and had waſted and imbeziled the Joint-Stock, *Jan.* 30, 1685, awarded *Loggin* to deliver to *Pawlin* what remained of the Joint-Stock, and the Leaſe of the Iron Mills, *&c.* to be by him enjoyed to his own Uſe, and thereupon general Releaſes to be given; which Award, after Exceptions taken to it, was afterwards confirmed, and decreed by the Court. *Loggin* was afterwards found a Bankrupt, and the Plaintiff *Whitacre* as being a Creditor to him by Bond, had an Aſſignment made to him by the Commiſſioners, and brought a Bill to have an Account of *Loggin*'s Eſtate, that came to the Hands of *Pawlin*, and alledged, if any ſuch Award was made, it was after ſuch Time as *Loggin* became a Bankrupt.

Per Cur. There appearing no Fraud or Colluſion in the obtaining of the Award, but the ſame being in an adverſary Cauſe, and the Award after excepted to, *&c.* although *Loggin* might be then a Bankrupt, yet not being known ſo to be at the Time of the Award, ſuch Award ought to ſtand. *Quære*, If the Decree upon a Rehearing was not reverſed?

DE
Term. S. Trinitatis,
1691.

In Curia Cancellariæ.

Burrel verſus *Harriſon.*

Caſe 210.
10 *Junii.*

BILL to have an Execution of Articles for a Leaſe of Lands in *Norfolk*, at the Rent of *thirty* Pounds *per Ann.* and the Cuſtom throughout *Norfolk* being, that the Landlord ſhould do and be at the Charge of all Repairs during the Term. The Queſtion was, who in this Caſe ſhould be obliged to repair.

Bill for a ſpecifick Performance of Articles for a Leaſe of Lands in *Norfolk*, where by Cuſtom the Landlords repair: But the Rent reſerved on this Leaſe appearing to be under the Value, decreed the Tenant ſhould covenant to repair.

Per Cur. The Tenant being Plaintiff to have the Leaſe made, and it being in Proof that *thirty* Pounds *per Ann.* is not the full Value, decreed a Leaſe to be made; but that the Plaintiff the Tenant ſhould covenant to repair, and the Rent of *thirty* Pounds *per Ann.* to be ſubject to no Deductions, ſave only Parliamentary Taxes.

Bliman

Caſe 211.
16 *Junii.*

Bliman verſus *Brown.*

Bill for Writings and a Partition; Defendant inſiſts, the Plaintiff has no Title, and that there is an Intail ſubſiſting: The Court gave the Plaintiff a Year's Time to try his Title.

THE Plaintiff being a Purchaſer, came here for Writings and a Partition. The Defendant inſiſted there was an Intail, and Plaintiff's Purchaſe not good. The Court upon the firſt Hearing gave the Plaintiff a Year's Time to try his Title. Ejectment was brought, and a Copy of the Deed of Intail produced, but the Original loſt and not proved to be executed; Verdict againſt the Intail.

And upon a Trial in Ejectment, Verdict for the Plaintiff; upon coming on upon the Equity reſerved, it was inſiſted, this being a Matter of Right of Inheritance, Defendant ought not to be bound by one Trial; *ſed non allocat'*, it being a Decree only for a Partition. *Tamen quære.*

The Cauſe was now ſet down on the Equity reſerved: The Defendant inſiſted, he ought not to be bound by one Trial in a Matter of Right of Inheritance; *ſed non allocatur*, being a Decree only for a Partition. *Tamen quære.*

Caſe 212.
23 *Junii.*

Thomas verſus *Gyles.*

One gives her Son other Lands in Lieu of Lands intailed, and by her Will gives the intailed Lands to her Daughter, and takes a Bond from her Son, to permit her Daughter to enjoy the intailed Lands. The Son dies, leaving an infant Son, who being in Poſſeſſion of the Lands that came in Recompence, brings an Ejectment for the intailed Lands. By Reaſon of the Infancy of the Grandſon, the Bond could not be ſued. The Daughter brings a Bill, and is decreed to be quieted in Poſſeſſion of the intailed Lands, until ſix Months after the Infant comes of Age, and then the Infant may ſhew Cauſe.

Sarah Gyles, the Mother, agrees to give her Son other Lands in Lieu of Lands intailed, and by Will diſpoſes of the intailed Lands to her Daughter *Rebecca*, and takes Bond from her Son to permit and ſuffer the intailed Lands to be enjoyed as ſhe by Will had deviſed them. The Son dies, leaving the Defendant his Son an Infant, who brought an Ejectment for the intailed Lands. The Plaintiff could not ſue the Bond againſt the Defendant, being an Infant.

Per

Per Cur. The Infant being in Poſſeſſion of the Lands that came in Recompence, we will at preſent only quiet the Plaintiff's Poſſeſſion in the intailed Lands, until *ſix* Months after the Infant comes of Age, and then he may ſhew Cauſe if he thinks fit. The Caſe of *Burton* and *Jeux* cited, where Partition between Tenants in Tail, though but by Parol decreed to bind the Iſſue; and the like in the Caſe between *Roſe* and *Roſe*. And a Caſe cited where *J. S.* ſeiſed of *Blackacre* in Tail, and of *Whitacre* in Fee, by Miſtake deviſed the intailed Acre, and leaves the Fee-ſimple to deſcend. The Deviſee came here and had a Decree to enjoy.

Partition between Tenants in Tail, though only by Parol ſhall bind the Iſſue.

A. ſeiſed of *Blackacre* in Tail, and of *Whiteacre* in Fee, by Miſtake deviſes the intailed Acre, and leaves the Fee-ſimple Acre to deſcend; the Deviſee upon his Bill, had a Decree to enjoy.

Maw verſus *Harding.*

Caſe 213. 20 *Julii.* *Ant.* Ca. 155.

ON the Statute for the better ſettling of Inteſtates Eſtates, the Queſtion was on that Clauſe of the Statute; that there ſhould be no Repreſentation among Collaterals, beyond Brothers and Siſters Children. Whether to be intended of Brothers and Siſters to the Inteſtate; or whether, when Diſtribution falls out amongſt Brothers and Siſters, though remote Relations to the Inteſtate, Repreſentation ſhall be admitted.

The Clauſe in the Statute of Diſtribution, which ſays there ſhall be no Repreſentation among Collaterals beyond Brothers and Siſters Children, muſt be intended that none ſhall take by Repreſentation, but the Children of Brothers and Siſters to the Inteſtate.

Per Cur. No Repreſentation but between Brothers and Siſters to the Inteſtate.

Freeman verſus *Freeman.*

Caſe 214. 21 *Julii.*

THE Father ſettles Lands upon his Son in Tail, and takes Bond from him, that he ſhould not dock the Intail. Bill to be relieved againſt the Bond.

The Father ſettles Lands upon his Son in Tail, and takes a Bond from him that he ſhall not dock the Intail. On Bill to be relieved againſt the Bond, Bond decreed to be good. If the Son would not have given the Bond, the Father might have made him only Tenant for Life. *Poſt.* Caſe 237.

Per Cur. The Bond good; had not the Son agreed to give the Bond, the Father might have made the Son only Tenant for Life; and though the Alienation is not made by the Son, but by his Iſſue; Bill diſmiſſed with Coſts.

Caſe 215.
16 *Julii.*

Fane verſus *Bence.*

An only Child of a Freeman of *London*, advanced in Part, is not to bring ſuch Part into Hotch-Pot.

SIR *Vere Fane* having married Alderman *Bence*'s Daughter, with whom he received a Portion in Marriage. The Queſtion was, whether ſhe was thereby excluded from her orphanage Share; the Teſtator not having by his Will, or otherwiſe, declared her not fully advanced: And in Caſe ſhe ought to be let into an orphanage Share; it was agreed her Portion was not to be brought into Hotch-Pot, there being none in equal Degree with her, ſhe being the only Child.

Caſe 216.
23 *Julii.*

Fothergill verſus *Kendrick.*

A Recogniſance being inrolled by the ſpecial Order of the Court, after the Time for inrolling it was elapſed, the Conuſor betwixt the Date of the Recogniſance, and the Enrolling of it, borrowed Money of *J. S.* upon a Judgment, which was now over-reached by the Recogniſance, and the Eſtate of the Conuſor was in Mortgage, prior to the Recogniſance, ſo that neither the Recogniſance, nor the Judgment could reach the Eſtate without the Aid of Equity. The Court inclined to give the Preference to the Judgment-Creditor.

A Recogniſance was enrolled by ſpecial Order of Court, after the Time for the Enrolling of it was elapſed, but being now enrolled, that makes the Recogniſance effectual from the Time of the Date. It ſo happened that the Plaintiff between the Date and the Enrollment of the Recogniſance, lent Money to the Cogniſor, and took a Judgment for his Security, which now was over-reached by this Recogniſance, made good by the ſubſequent Enrollment: And in Regard the Eſtate was in Mortgage, and neither the Judgment or Recogniſance could reach it without the Aſſiſtance of a Court of

of Equity; the Cogniſor having only an Equity of Redemption in him; the Court inclined to give the Preference to the Judgment-Creditor, that he might not complain of Wrong done him by the Order for enrolling the Recogniſance.

Cook verſus *Sadler.*

Caſe 217. 24 *Julii.*

THERE being a firſt and ſecond Mortgage made of the ſame Eſtate, the firſt Mortgagee brought a Bill againſt the ſecond, to compel him to redeem or to be foreclоſed, and foreclоſed him accordingly. It ſo happened that the firſt Mortgagee by his Will deviſed the Premiſſes to the Mortgagor, and thereupon the ſecond Mortgagee brought a new Bill to ſet aſide the firſt Mortgage, and to be let into a Satisfaction of his Money. The Defendant pleaded the former Suit, and Decree of Foreclоſure.

A. mortgages Land to *B.* and after mortgages the ſame Land to *C.* *B.* the firſt Mortgagee foreclоſes *C.* and afterwards deviſes the Premiſſes to the Mortgagor. Whether *C.* may now in Equity ſet aſide the firſt Mortgage. Vol. I. Caſe 58, 74, 139.

Per Cur. Anſwer the Bill. Something like the Caſe of *Bovey* and *Smith*, where a Purchaſer that had Notice, ſold to one that had no Notice of the Truſt, and afterwards repurchaſes, the Truſt ſhall revive in his Hands.

Collins verſus *Goodall.*

Caſe 218. *Eodem die.*

BILL to be relieved touching a Rent charged upon Lands by a Will; the Defendant pleaded the Statute of Limitations, and that there had been no Demand or Payment in forty Years.

Statute of Limitations as to Rents, extends only to cuſtomary Rents between Lord and Tenant, and not to Rent ariſing by Grant, or a Will, whereof the Commencement may be ſhewn.

Per Cur. The Caſe in *Cook*'s *Reports*, on the Statute of *H.* 8. concerns only cuſtomary Rents between Lord and Tenant,

Tenant, and not to any Rent that commences by Grant or whereof the Commencement may be ſhewn.

Caſe 219.

Engleſield verſus *Engleſield.*

THERE having been a Decree made for a very liberal Allowance for the Maintenance of the Infant out of a Truſt-Eſtate, and not according to the Truſt; upon a Rehearing it was endeavoured to ſet aſide the Decree.

Where an Infant recovers by a Decree of the Court, the Court may with the Approbation of the Infant's Relations, allot the Infant a Maintenance, tho' no Proviſion in the Truſt for that Purpoſe; and this is founded on natural Equity.

Per Cur. Where an Infant recovers by Decree of the Court, the Court may with the Approbation of the Infant's Relations, allot him a Maintenance, though no Proviſion in the Truſt for that Purpoſe; and this founded on natural Equity: And though in this Caſe the Decree went beyond the Rules of regular Equity, yet a Decree being made in it, we will not reverſe it, though poſſibly we would not have made the Decree.

DE
Term. S. Michaelis,
1691.

In Curia Cancellariæ.

Owen verſus *Curzon.*

Caſe 220. *Dec.* 16.

Adminiſtrator obtains a Decree, and dies, the Adminiſtrator *de bonis non* may revive this Decree, within the Equity of Statute 30 *Car.* 2. *cap.* 6.

AN Adminiſtrator as ſuch, obtains a Decree, but before Enrollment, or any further Proceedings dies. The Adminiſtrator *de bonis non* brings a Bill of Revivor, to have the Benefit of that Decree, whereto the Defendant demurred, becauſe the *Adminiſtrator de bonis non* came not in Privity to the Adminiſtrator, that obtained the Decree, but claimed paramount, and therefore could not revive.

Stat. 30 *Car.* 2. *cap.* 6.

Per Cur. By the *Oxford* Act, after a Judgment obtained by an Adminiſtrator, the Adminiſtrator *de bonis non* may revive; and ſo in this Court where a Decree is obtained, as there was in this Caſe.

Caſe 221. *Dec.* 7.

Underwood verſus *Mordant.*

By Marriage Articles, the Houſhold Goods and Plate of the Wife were aſſigned to Truſtees, the Husband to have the Uſe of them for his Life only, afterwards to the Wife, her Executors and Adminiſtrators. But if the Husband ſurvived, then the abſolute Property to be to him.

UPON the Marriage of *Suckley* and *Grace Hill*, Articles were made whereby the Eſtate of *Grace* was aſſigned over to Truſtees therein named; thereout in the firſt Place to raiſe *one Thouſand* Pounds and pay it to the Husband, and the Reſidue of the perſonal Eſtate to him, ſave the Houſhold Goods and Plate, of which the Husband was to have only the Uſe for his Life, then to his Wife, her Executors and Adminiſtrators; but if the Husband ſurvived her, he to have the abſolute Property therein.

A. having got Judgment againſt the Husband, takes the Goods in Execution. The Wife's Friends give Security to the Sheriff, who returns *nulla bona*, whereupon *A.* brings an Action againſt the Sheriff and recovers. Afterwards the ſame Goods are taken in Execution by *B.* another Creditor of the Husband, and the Sheriff on the like Security given him by the Wife's Friends, returns *nulla bona*, whereupon *B.* alſo brings Action and recovers. The Wife's Truſtees bring Bill, but could have no Relief, it being all at Law, in whom the Property of the Goods are.

The Defendant *Mordant* having recovered a Debt againſt *Suckley* the Husband, takes the Houſhold Goods and Plate, *&c.* in Execution, the Friends of the Wife give Security to the Sheriff, and he thereupon returns *nulla bona.* And *Mordant* brings his Action againſt the Sheriff for a falſe Return, and recovers againſt him. And afterwards the ſame Goods were taken in Execution by one *Pyle* for a Debt, alſo due from *Suckley* the Husband; and upon the like Return of *nulla bona*, the like Recovery was had againſt the Sheriff, and after a Writ of Error ſpent, the Plaintiff brought his Bill for Relief.

Per Cur. There being an Aſſignment made of the Goods in Queſtion to Truſtees, the Matter is purely at Law, whether ſuch Aſſignment well veſts the Property in the Truſtees, and whether fraudulent as againſt a Creditor or not. *That* having been already tried, no Room for Equity

Equity to interpoſe; if we ſhould relieve the Plaintiff, we muſt declare *that* not to be fraudulent in Equity which is found to be ſo in Law. And as to that Part of the Caſe where two ſeveral Creditors have recovered the Value of the ſelf-ſame Goods, it was the Folly of the Party not to provide better for himſelf. For altho' when a Man recovers againſt another in *Trover*, there the Property of the Goods veſts in the Defendant againſt whom the Damages were recovered; yet where the Sheriff returns *nulla bona*, and there is a Recovery againſt him for his falſe Return, *that* veſts no Property of the Goods in him; but they remain in the Party, and are liable to any ſubſequent Execution for his Debt.

In *Trover* the Plaintiff recovers; the Property of the Goods veſts in the Defendant, againſt whom the Damages for them are recovered. But where upon a *Fi. fa.* the Sheriff returns *nulla bona*, and an Action is brought againſt him for a falſe Return, and a Recovery is had againſt him, the Property of the Goods is not veſted in him, but they are liable to any other Execution.

Raw and *Elizabeth ux'* verſus *Pole.*

Caſe 222. 13 *Jan.*

Leonard Pole, the Defendant's elder Brother, upon his Marriage with the Defendant *Elizabeth*, ſettled the Lands in Queſtion upon her for her Jointure. The Defendant was privy to the Treaty of Marriage, and ingroſſed the Jointure-Deed, and concealed the Intail, *Leonard Pole* the Defendant's elder Brother being Dead without Iſſue, and having deviſed the Inheritance of theſe Lands to the Plaintiff *Raw*; the Defendant *Pole* having the Deed of Intail in his Cuſtody made by his Grandfather, brought his Ejectment and recovered; the Plaintiffs brought their Bill for Relief, and the Defendant by Anſwer confeſſed he was Privy to the Marriage-Treaty, and ingroſſed the Plaintiff *Elizabeth*'s Jointure-Deed, and that he had then the Deed of Entail in his Hands; but did not mention his Title, nor diſcover the antient Deed

A. on his Marriage with *B.* ſettles Lands for her Jointure, which were ſubject to an Intail; *C.* Brother of *A.* was privy to the Intail, ingroſſed the Jointure-Deed, had the Deed of Intail in his Cuſtody and concealed it. *A.* the Husband deviſes the Inheritance of the Premiſſes to *J. S.* and afterwards dies without Iſſue, and *J. S.* marries the Widow; *C.* the Brother ſets up the Intail, and brings an Ejectment. *J. S.* and his Wife bring a Bill to be relieved againſt this Deed of Intail. Decreed the Wife to hold her Jointure; but Bill diſmiſt as to the Husband's Claim under the Will, it being a voluntary Conveyance.

Deed of Entail, becauſe he apprehended his Brother would dock the Intail.

The Court decreed the Plaintiff *Elizabeth* to hold and enjoy her Jointure againſt the Defendant, and all claiming by or under him, and a perpetual Injunction againſt the Judgment in Ejectment. But as to the Plaintiff *Raw*, who claimed the Reverſion and Inheritance by a voluntary Deviſe; the Bill as to him was diſmiſſed, Dr. *Amye*'s Caſe, and *Charles Clare*'s Caſe cited.

Ant. Ca. 145.

Note, This Decree was afterwards affirmed upon an Appeal to the Houſe of *Lords*.

Caſe 223.
11 *Nov.*

Coddrington verſus *Webb*.

Bill for a new Trial, Plaintiff ſuggeſting that her Mark to the Bond was forged by one *Webb*, and all the pretended Witneſſes to the Bond being dead.

BILL for a new Trial, ſuggeſting the Plaintiff's Mark to the Bond was forged by one *Webb*, and by Surpriſe Defendant had recovered againſt him at Law, all the pretended Witneſſes to the Bond being dead. New Trial ordered, *Tewke*'s Caſe, *Swinfield*'s Caſe cited.

pretended Witneſſes to the Bond were dead, and that the Verdict was recovered by Surpriſe. A new Trial ordered.

Caſe 224.
Eodem die.

Deakins verſus *Buckley*.

A Freeman of *London* deviſes 700 *l.* for Mourning. It ſhall be paid only out of the legatory Part, and not out of orphanage or cuſtomary Part.

WHERE a Citizen of *London* by Will had deviſed *ſeven Hundred* Pounds for Mourning, the Queſtion was, whether this *ſeven Hundred* Pounds ſhould come out of the whole Eſtate, or only out of the legatory Part; for it was inſiſted, if there had been no Direction by the Will, or if the Will had only directed that the Expences of the Funeral ſhould not exceed ſuch a Sum, there the Deduction muſt have been out of the whole Eſtate.

Per Cur. Mourning deviſed by the Will muſt come out of the legatory Part, and not to leſſen the orphanage and cuſtomary Share.

Dame *Mary Vernon*, Relict of Sir *Thomas Vernon* of *Hodnet*, } Plaintiff.

Jones, Squibb, Tilſon & al', Defendants.

Caſe 225. 10 *Nov.*

SIR *Thomas Vernon* in 1680, by Will deviſes ſeveral Manors and Lands to *Jones & al'*, to pay his Debts, then to pay *two Hundred* Pounds *per Ann.* to the Plaintiff for her Life, and to make Proviſion for younger Children, Sir *Thomas Vernon* living many Years afterwards, his Debts increaſed from *two Thouſand five Hundred* Pounds, to *ten Thouſand* Pounds or thereabouts; and *Jones* and *Squibb* being bound with him for Payment of about *eight Thouſand* Pounds, Sir *Thomas Vernon* conveyed all the Premiſſes to the Defendants and their Heirs to ſell to pay his Debts, and the Surplus to him and his Heirs, in which Conveyance the now Plaintiff joined, and levied a Fine to bar her Dower, and to corroborate the Security.

A. deviſes Lands to Truſtees to pay his Debts, and then to pay his Wife 200 *l. per Ann.* for her Life: Teſtator lives ſeveral Years, and his Debts are increaſed from 2000 to 10000 *l.* for 8000 *l.* whereof his ſaid Truſtees were bound. *A.* the Teſtator by Deed and Fine conveys his Lands to his ſaid Truſtees to ſell to pay his Debts, and the Surplus to him and his Heirs, and his Wife joins in the Fine and Conveyance. Whether this is a Revocation of the Wife's 200 *l. per Ann.* or whether ſhe ſhall have her 200 *l.* a Year out of the Surplus of the Money after the Debts paid. Decreed for the Wife. *Quære.*

The Queſtion was, whether this Conveyance ſhould amount unto a Revocation of the Will as to the *two Hundred* Pounds *per Ann.* thereby deviſed to the Plaintiff for Life; or whether the Surplus after the Debts paid, ſhall not be liable to the *two Hundred* Pounds *per Ann.* Decreed *pro Quer'*. Q.

Caſe 226.
24 *Octob.*

Bainham verſus *Manning.*

Bond to a Houſe-keeper for ſecret Service. Equity will not relieve: Otherwiſe if the Bond was given to a common Strumpet. *Ant.* Ca. 170.

BOND to a Houſe-keeper for ſecret Service, Bill to be relieved againſt it diſmiſſed. The Caſe of *Uphill* and *Bowman* cited, where the Bill was likewiſe diſmiſſed. But in the Caſe of *Hanbury* and *Matthews* there relieved againſt ſuch a Bond, becauſe the Woman appeared to have been a common Strumpet, and by her Inſinuation prevailed upon the old Man. Lord Commiſſioner *Hutchins* cited the Caſe of Mr. *Forteſcue*, who had preſented a Parſon to a Living, and took a Bond from him to reſign on Requeſt at any Time within *ſeven* Years; Mr. *Forteſcue*'s Houſe-keeper, being the Parſon's Siſter, got the Bond and delivered it over to her Brother. Bill to diſcover this Matter and to be relieved. The Defendants demurred, and the Demurrer allowed.

Caſe 227.
Eodem die.

Draddy verſus *Deacon.*

Subſequent Agreement with *A.* by a Factor of a Merchant for Freight at 6*l.* 10*s.* *per* Tun, good, tho' *A.* took no Notice, he had made a former Agreement with the Merchant for Freight at 3*l.* 10*s.* *per* Tun, *that* Agreement having been obſtructed by an Imbargo.

THE Plaintiff, a Merchant in Town, hired the Defendant's Ship to Freight for a Voyage to *Bourdeux*, at *three* Pounds *ten* Shillings *per* Tun, it happened that an Imbargo was laid upon all Merchants Ships for *ſix* Weeks. The Ship afterwards proceeds on her Voyage to *Bourdeux*, and the Defendant not diſcovering what Agreement he had made with the Plaintiff in *England*, the Plaintiff's Factors and Correſpondents there, agree to allow the Defendant *ſix* Pounds *ten* Shillings *per* Tun, upon which latter Agreement the Defendant had recovered at Law. Bill to be relieved againſt the Verdict found upon the ſecond Agreement, which was obtained by Fraud in concealing the former Agreemeent.

Per Cur. Bill diſmiſſed, looking upon the Defendant to be at Liberty to make a new Agreement, by Reaſon that the Performance of the firſt was obſtructed by the Imbargo, after laid upon all Merchant Ships.

Mildmay verſus *Hungerford.*

Caſe 228.
Eodem die.

A Copyhold at *Newington* being deviſed by to the Plaintiff for Life, Remainder to his firſt and other Sons in Tail, Remainder to the Defendant Sir *Giles Hungerford* in Fee; the Plaintiff being minded to make himſelf abſolute Owner of the Eſtate, his Wife being then privement *enſient* of a Son, was adviſed that if he bought in the Reverſion in Fee from Sir *Giles Hungerford*, and took a Surrender thereof to his own Uſe, *that* would merge his Eſtate for Life, and by Conſequence deſtroy the contingent Remainder to his Son, there being then no Iſſue born; and therefore he agreed to give Sir *Giles Hungerford five Hundred* and *fifty* Pounds for the Reverſion; and now brought his Bill to be relieved againſt the Security given to the Defendant, for that he was deceived therein, in Regard he now underſtood ſuch Surrender of the Reverſion would not bar the Son ſince born, in regard the Freehold and Inheritance was in the Lord, ſo not the like Inconvenience as of Freehold Eſtates at Common Law, in reſpect of contingent Remainders, where there is none againſt whom to bring the *Præcipe.* *Per Cur.* Pay Principal, Intereſt and Coſts, or be diſmiſſed with Coſts.

Tenant for Life of a Copyhold, with a contingent Remainder to his firſt Son in Tail, takes a Conveyance of the Reverſion in Fee of the Copyhold, before the Birth of the Son. The contingent Remainder is not deſtroyed, the Freehold being in the Lord.

African

Caſe 229. 10 *Novemb.*

African Company verſus *Pariſh & al'.*

African Company hires the Defendant's Ship to freight, Defendant covenants not to trade in any of the Goods in which the Company deal, and in

THE *African Company* hired the Defendant's Ship to freight; the Defendant by Charter-party covenants as is uſual in like Caſes, that if the Defendant traded in the Goods the Company dealt in, he would pay ſuch and ſuch particular Sums to the Company in reſpect thereof, and deduct ſuch Sums out of the Freight, that ſhould be coming to him.

ſuch Caſe covenants to pay double the Value for all ſuch Goods, with Liberty to the Company to deduct the ſame out of the Freight. The Company bring a Bill to diſcover whether the Defendant did trade in any of the ſaid Goods. Tho' this be a Penalty, yet it being the Defendant's own Agreement, the Defendant is bound to diſcover.

Bill by the Company to diſcover, whether the Defendant had not traded in any ſuch, and what Goods in particular, *&c.* The Defendant pleads the Charter-party, by which it appears that the Sums therein mentioned were of double the Value of the Goods themſelves, and ſo was in the Nature of a Penalty, and that he ought not to be compelled to make a Diſcovery by Anſwer touching the ſame, ſo as to ſubject himſelf to ſuch Penalties.

Per Cur. The Defendant muſt be bound by his own Agreement, having agreed it ſhall be deducted out of the Freight, he ought to diſcover; and it hath been adjudged ſo ſeveral Times in the Caſe of the *Eaſt-India* Company. *Quære*, if ordered to anſwer over?

5

Clergis

Clergis Mil' verſus *Albermarle* Duciſſam.

Caſe 230. *Eodem die.*

Chriſtopher Duke of *Albermarle*, deviſed ſeveral Jewels of great Value to the old *Dutcheſs* for Life, and after her Deceaſe, gave the ſame to his Son the *late Duke*. The Plaintiff Sir *Thomas Clergis* brought his Bill againſt the *Dutcheſs* the Widow, and the other Executors of the ſaid late *Duke*, for a Diſcovery and Satisfaction for the Jewels, claiming the ſame as Adminiſtrator to the old *Dutcheſs*, and that ſhe was intitled thereunto, as well for that the ſame were deviſed to her as aforeſaid; as alſo that ſhe was intitled thereunto as her *Paraphernalia*.

Deviſe of a perſonal Thing to one for Life, Remainder to another, the Remainder is good, it being the ſame as if the Uſe of a Thing was deviſed to one for Life, the Remainder over.

Poſt. Ca. 316.

To which Bill the Defendant pleaded the Will of the old *Duke*, by which the ſame were deviſed to the Dutcheſs only for Life, Remainder to the late *Duke*.

For the Plaintiff it was inſiſted by Mr. *Attorney General*, that it was a well known and allowed Difference in Law, that as to Chattles real they may be diſpoſed of for ſeveral Eſtates and Durations, *viz.* for Life, with Remainder over; but as to Chattles perſonal, they cannot be ſo diſpoſed of, but where the Property firſt veſteth, that carrieth the abſolute Ownerſhip, and cannot be granted to one for Life, Remainder over to another, but the Remainder will be void. And to ſay, as has been inſiſted on by the Defendant's Counſel, that where a Chattle perſonal is given or deviſed to one for Life, Remainder over to another, ſuch Gift and Deviſe muſt be conſtrued and taken to be only the Uſe of it to the firſt Deviſee for Life, and not a Deviſe of the Thing it ſelf, is to confound Things, and to render inſignificant the Diſtinction that has been taken, and al-

lowed, that where only the Uſe of a perſonal Chattle hath been deviſed to one for Life, with a Remainder over, the Remainder is good; but if the Thing it ſelf were granted or deviſed for Life, or for any other Time, with a Remainder over, there the Remainder is void; and yet according to this Notion now taken at the Bar, be the Deviſe one Way, or other, it ſhall amount but to one and the ſame Thing; and cited the Caſe in *Marſh*'s *Reports*, *fol.* 106. *Brooke*'s *Abr.* Tit. *Deviſe* 13.

For the Defendant it was inſiſted, that this being in the Caſe of a Will, made by a Man ſuppoſed to be *inops concilii*, ſuch Expoſition ought to be made thereof, as the whole Will may ſtand and take Effect; and therefore in this Caſe the Deviſe of the Jewels to the *Dutcheſs* for Life, with a Remainder over, muſt be conſtrued and taken to be a Deviſe of the Uſe of them to her for her Life only, and has been ſo ſettled in ſeveral Caſes, and the Law at this Day is not ſo ſtrait as formerly taken to be, as to the Diſpoſition of Chattles perſonal; and cited the Caſe of the Lord *Ferrars*, where Goods in *Tamworth Caſtle* were by Sir *Robert Sherly* deviſed to his *Lady* for Life, and after her Death to his *Son*, and held good by Juſtice *Ellis*, and confirmed afterwards by Lord *Nottingham*, that the Deviſe of the Goods for Life muſt be intended only the Uſe of them; and the Caſe of *Spencer* and *Abell*, and the Caſe of *Catesby* and *Nicholls*, where Goods were deviſed to one for Life, Remainder over, decreed good, *&c.* and as to the Pretence of the Plaintiff's claiming them as *Paraphernalia*, there was no Reaſon for that Demand; for although where *A.* dies Inteſtate, or by Will does not diſpoſe of the Jewels, his Wife may claim (in caſe there be no Debts) the Jewels ſuitable for her Quality, to be worn as the Ornaments of her Body, as her *Paraphernalia*; yet held in *Crooke*'s *Reports*, that if the Husband by Will deviſes away the Jewels, ſuch Deviſe ſhall ſtand good againſt the Wife's Claim of *Paraphernalia*: But in this Caſe the old *Dutcheſs*

Cro.Car. 343, 4, 5, 6. 1 Rol. Abr. 911, (9)

Dutcheſs in her Life-time made no Election or Claim to have them as her *Paraphernalia*, and her Adminiſtrator could not ſet on Foot ſuch Pretence after her Death, to which ſhe had made no Claim in her Life-time. The Plea after ſeveral Arguments before the *Lords Commiſſioners*, and after before the *Lord Keeper* was allowed.

The Husband deviſes the Wife's Jewels to the Wife for Life, the Remainder to his Son. The Wife makes no Election or Claim to have the Jewels as her *Paraphernalia*, her Adminiſtrator cannot make this Claim.

Callingham verſus *Melliſh.*

Caſe 231. *6 Novemb.*

THE Teſtator deviſed ſeveral Lands to the Defendant his Nephew to pay his Debts, and makes his Nephew Executor, and makes no Diſpoſition as to the Surplus.

One deviſes his Lands to his Nephew to pay his Debts, and makes his Nephew Executor; but makes no Diſpoſition of the Surplus, whether the Deviſee ſhall have the Surplus, or whether it ſhall go to the Heir. If an expreſs Legacy is given to the Heir; in ſuch Caſe the Deviſee ſhall have the Surplus.

The Queſtion was, whether here ſhould be a reſulting Truſt as to the Surplus for the Heir, or whether the Nephew ſhould take the Surplus as Deviſee and Executor.

For the Plaintiff it was inſiſted, that by the Deviſe to ſell to pay Debts, the Intention of the Teſtator was to make Proviſion for the Payment of his Debts, and not of any Benefit to the Deviſee, and the rather becauſe the Deviſee was alſo made Executor, whoſe Office it is to ſee the Debts paid.

For the Defendant it was inſiſted, that in a like Deviſe in the Caſe of *Crompton* and *North*, the Surplus was adjudged to the Deviſee againſt the Heir. And by Mr. *Finch*, though in a Conveyance, where no Uſe is declared as to the Surplus, it may reſult to the Heir; yet in the Caſe of a Will, there the Deviſee is to take to his own Uſe, if no Truſt is declared, and it can be no reſulting Truſt for the Heir.

Note,

Note, In the Caſe of *Crompton* and *North*, a particular Legacy was deviſed to the Heir. *Quære* the Order.

Caſe 232.

King verſus *Ballett.*

By the Statute of Frauds the Truſt of a Fee is Aſſets at Law; but the Truſt of a Term is not.

NOTE, By the Statute of *Frauds* and *Perjuries*, the Truſt of an Inheritance is made Aſſets at Law, but the Truſt of a Term is not: And by a Clauſe, where Judgment is obtained againſt the Teſtator, the Sheriff may take the Truſt-Eſtate in Execution.

Caſe 233.
31 *Nov.*

Greaves verſus *Powell.*

A Deviſe to Truſtees for Payment of Debts and Legacies, and the Truſtees are made Executors. The Eſtate falls ſhort.

A Deviſe is to Truſtees for Payment of Debts and Legacies, and the Truſtees are made Executors: The Eſtate falling ſhort, the Queſtion was, whether the Debts are to be paid in the firſt Place, or only in Average with the Legatees.

The Debts muſt be paid firſt, becauſe the Truſtees being made Executors, the Money is legal Aſſets.

Per Cur. No Doubt in this Caſe, Truſtees being alſo made Executors, the Money, when the Eſtate is ſold, becomes legal Aſſets; and Debts therefore muſt be preferred. Lord Commiſſioner *Hutchins* cited Sir *John Bowle*'s Caſe, firſt heard before Lord Keeper *Bridgman*, where upon a Truſt for Payment of Debts and Legacies, it was decreed they ſhould be paid *pari paſſu*, and bear the Loſs in Average: But *that* Cauſe was afterwards heard by the Lord *Nottingham*, who ordered the Debts ſhould be firſt paid, and ſaid he would not make a Man ſin in his Grave, and mentioned the Complaint of the Prophet, where the Creditor had taken away the Children for Satisfaction of the Father's Debt; and that his Opinion

was, that in the Caſe of a Truſt for Payment of Debts and Legacies, the Debts ought to be preferred, and ſatisfied in the firſt Place, before the Legatees ſhould have any Benefit of the Truſt.

Shelberry verſus *Briggs & ux'.*

Caſe 234. 30 *Octob.*

THE Plaintiff's Bill was to have the Payment of a Legacy deviſed to him by a Will, of which the Defendant's Wife was made Executrix. The Defendants anſwered, divers Witneſſes were examined, and Publication paſſed. The Husband dies.

Bill for a Legacy againſt Baron and Feme, who was Executrix of the Teſtator. Defendants anſwer, and Witneſſes are examined, and Publication paſt; Husband dies. No Abatement, and the Wife ſhall be bound by the Anſwer and Depoſitions; but it might be otherwiſe, if the Wife's Inheritance was in Queſtion.

It was inſiſted, that the Wife was not bound by the Anſwer, nor by the Depoſitions taken, whilſt ſhe was under Coverture. *Ant.* Ca. 180

Sed non allocatur per Cur. Here is no Abatement, and the Wife ſhall be bound by the Anſwer and Depoſitions: But in Caſe of the Wife's Inheritance it might be otherwiſe.

Rous verſus *Noble.*

Caſe 235.

THE Teſtator deviſed a Legacy to his Child an Infant, payable at the Age of *Twenty-three*, and made his Wife Executrix; ſhe marries a ſecond Husband, and dies, and he takes Adminiſtration *de bonis non*, with the Will annexed, his Wife being reſiduary Legatee: Bill ſuggeſts his Inſolvency, and prays that he might give Security to pay the Legacy when payable, and decreed accordingly.

Teſtator gives a Legacy to his Child, payable at his Age of 23, and made his Wife Executrix and reſiduary Legatee. She marries again and dies. Her ſecond Husband takes Adminiſtration *de bonis non*, &c. Upon a Suggeſtion of Inſolvency the ſecond Husband ordered to give Security to pay the Legacy when due.

DE
Term. S. Hillarii,
1691.
In Curia Cancellariæ.

Caſe 236.
26 *Jan.*

Styant verſus *Staker.*

The Lord enfranchiſes a Copyhold with all Common thereto belonging. Though the Common be extinct at Law, yet it ſubſiſts in Equity.
2 Cr. 253.
Yelv. 189.
Moor 667.
1 Brownl. 173, 230.

THE Lord of the Manor enfranchiſes a Copyhold, with all Commons thereto belonging or appertaining, and afterwards buys in all the other Copyholds, and then diſputes the Right of Common with the Copyholders he had enfranchiſed, and at Law recovers againſt the Plaintiff, becauſe the Preſcription of Common to the Copyhold was deſtroyed by the Enfranchiſement; and the Grant of the Copyhold, with all Common thereunto belonging and appertaining gives no Right of Common, becauſe when enfranchiſed no Common in Point of Law belonged or appertained thereunto.

Per Cur. Decreed the Plaintiff ſhould hold and enjoy againſt the Defendant, the ſame Right of Common as belonged to the Copyhold, and Coſts againſt the Defendant.

Jervis verſus *Bruton.*

Caſe 237.
9 *Feb.*

John Morris ſettles Lands on his Daughter and the Heirs of her Body, Remainder to his own right Heirs, and takes a Bond from the Daughter not to commit Waſte; the Daughter having levied a Fine, and afterwards committing Waſte, the Bond was put in Suit.

One ſettles Land upon his Daughter in Tail, and takes a Bond from her not to commit Waſte. Bond not binding in Equity.

Per Cur. An idle Bond, and decreed to be delivered up to be cancelled; and like *Poole*'s Caſe cited in the Caſe of *Tatton* and *Molleneux* in *Moor*'s *Reports*, where a Recogniſance conditioned that Tenant in Tail ſhould not ſuffer a Recovery, is decreed to be delivered up, as creating a Perpetuity.

Ant. Ca. 214.

Moor 809, 810.

Earle verſus *Stocker.*

Caſe 238.
5 *Feb.*

AN Award ſet aſide, the Arbitrator appearing to have an Intereſt in the Cargo touching which the Award was made, and therefore put too great a Value thereon; and in *five* Days after the Award made, the Money awarded was attached by the Arbitrators for Debts owing to them by *Stocker.* In the Butcher of *Croydon*'s Caſe, Lord *Bridgman* did not ſet aſide the Award, barely becauſe the Damages were exceſſive, but gave another Reaſon, *viz.* It was agreed it ſhould be referred to indifferent Perſons, and it appeared one of the Referrees was the Butcher's Cozen. In *Pitt* verſus *Dawkra*, the Arbitrators promiſed to hear Witneſſes, but making the Award before they had ſo done, the Award was ſet aſide. In the Caſe of *Smith* and *Coryton*, the Arbitrator promiſed not to make his Award until *Smith* (who was not well) ſhould come abroad. Lord *Nottingham* inclined

An Award ſet aſide, the Arbitrators being intereſted in the Cargo, touching which the Award was made, and therefore put too great a Value thereon. Vol. 1. Caſe 147.

Arbitrators promiſed to hear Witneſſes, but made the Award before. The Award ſet aſide.

clined for that Reaſon to ſet it aſide: But the Matter ended by Compromiſe.

Caſe 239. 22 *Feb.*

Rundle verſus *Rundle.*

Poſt. Ca. 249. *Alexander Rundle* purchaſes a Copyhold Eſtate in a weſtern Manor for his own Life, and the Lives of *John* his Son, and of *Alice*, who was his Niece. *Alexander* and *John* his Son being both dead, the Plaintiff, who was the Widow and Adminiſtratrix of *Alexander*, brought her Bill again *Alice* ſetting forth the Cuſtom of the Manor *prout*, and that the Name of *Alice*, was made Uſe of by *Alexander* in Truſt for him, who paid the whole Fine, *&c.* and prayed the ſame might be decreed a Truſt, and made liable to the Debts of *Alexander*. *Vid. Order.*

Caſe 240. 27 *Feb.*

Gainsborough Comitiſſ. verſus *Gainsborough* Com'.

One by Will ſubjects his real Eſtate to pay his Debts, and makes his Wife Executrix. Parol Proof admitted, to prove Teſtator's Declarations, that his Executrix ſhould have his perſonal Eſtate, exempt from his Debts.

THE late Earl of *Gainsborough* having by his Will ſubjected his Lands and real Eſtate for Payment of his Debts, made the now Plaintiff, the Counteſs, his Executrix, intending thereby, as was alledged by the Plaintiff, that ſhe ſhould have all his perſonal Eſtate to her own Uſe, freed and diſcharged from the Payment of his Debts; but that Mr. *Milbourne* who drew the Will, either through ſome ill Deſign, or Ignorance, omitted to inſert a Deviſe in the Will of the perſonal Eſtate to the Plaintiff, pretending the making her Executrix amounted to as much, and was the ſame Thing in Effect. And complained that the Creditors threatned to follow the perſonal Eſtate, whereas a ſufficient Proviſion was made for them out of the real Eſtate; and if the perſonal Eſtate was exhauſted, or applied in the

Payment of Debts, ſhe ought to be reimburſed as much, out of the real Eſtate. And prayed ſhe might examin her Witneſſes as to the Declarations of the Teſtator, that the Plaintiff his Relict and Executrix ſhould have his perſonal Eſtate to her own Uſe.

As to ſo much of the Bill as ſought to examin Witneſſes touching the Teſtator's Intention or Declaration, that the Complainant, his Executrix, ſhould have his perſonal Eſtate to her own Uſe, or to examin Matters *de hors*, and foreign to the Will in Writing, *&c.* The Defendant demurred, for that it appeared by the Bill, that there was a Will in Writing, and *that* Will proved by the Plaintiff, the Counteſs, and that it was of dangerous Conſequence to admit Proof by Parol, to control, vary, or alter a Will in Writing; and the rather, in this Caſe, for that the *Counteſs* had not ſo much as attempted to prove ſuch parol Declaration, as a Codicil in the Spiritual Court.

On the arguing of this Demurrer, it was ſaid by *Serjeant Hutchins*, then one of the *Lords Commiſſioners*, that he thought the Bill ought to be anſwered, and the Plaintiff admitted to the Proof of her Allegations. As to the Objection that the Plaintiff had not proved the Declaration of the Teſtator, that ſhe ſhould have the perſonal Eſtate to her own Uſe, as a Codicil in the Spiritual Court, he thought it not neceſſary as this Caſe was, in Regard the Averment was not to make a Title to the Plaintiff, but to rebut the Defendant's Equity, who would have the perſonal Eſtate applied to Debts in Exoneration of the real Eſtate. And inſiſted much on the Caſe of *Crompton* and *North*, where the Teſtatrix deviſed her Lands to Mr. *North* to ſell and diſpoſe of for Payment of her Debts, the Heir brought his Bill, inſiſting, that as to the Surplus after Debts paid, it belonged to him by a reſulting Truſt, being not diſpoſed of by the Will; the Defendant inſiſted there was no reſulting

Truſt, and that the Teſtatrix had declared, ſhe intended the Surplus for the Defendant. Upon the Hearing there were two Queſtions: *Firſt*, Whether a Fee paſſed by the Will or not? and adjudged there did. *Secondly*, Whether any reſulting Truſt when Debts paid? and adjudged there was not, without reading the Depoſitions by which it was proved, ſhe declared her Truſtee ſhould have all: But the Court there declared, that the Eſtate in Law being veſted in the Deviſee, that he ſhould have been admitted to his Proof of the Teſtratrix's parol Declaration, if it had been wanting and neceſſary. And this was in the Caſe of Land; and much rather may parol Proof be admitted as to a perſonal Eſtate, and cited the Caſe of *Foſter* and *Munt*, and of *Pring* verſus *Pring*, where the Executor who confeſſed the Truſt, was examined, and read againſt the other Executor who denied it. And *Serjeant Rawlinſon* cited a Caſe of *Kingsmill* and *Ogle*, where the Surplus by Will was deviſed to the Wife; Averment taken that ſhe was intended only as a Truſtee for her Son, and that the Teſtator ſo declared at the making of the Will. And a Decree grounded on the Proof made thereof. *Per Cur.* Anſwer the Bill.

Vol. 1. Caſe 462.

Caſe 241.
23 *Feb.*

Woodford verſus *Swayne.*

Ant. Ca. 114.

THE Plaintiff being a Factor for a Weſt-Country Clothier, who became a Bankrupt; the Queſtion was, whether the Plaintiff having Cloaths of the Bankrupt's in his Hands, might thereout retain his full Debt, or muſt come in as a Creditor under the Statute of Bankrupt, and accept of a Satisfaction in Proportion with other Creditors, and account for the Cloaths he had in his Hands.

Biſhop of *Worceſter* verſus *Parker.*

Caſe 242. *Feb.* 7.

BILL to diſcover whether a Leaſe made in Queen *Elizabeth*'s Time for *Ninety* Years, in Truſt for Doctor *Lopus*, to commence after the Eſtates then in Being were determined, were not efflux'd in Point of Time, and charges it would ſo appear by Deeds and Writings in the Hands of the Defendant the Aſſignee of the Leaſe, and that he knew the Leaſe was expired, but refuſed to diſcover.

The Biſhop brings a Bill againſt one that was an Aſſignee of a Leaſe, charging the Defendant knew that the Leaſe was expired, and that the ſame did appear by Writings in his Cuſtody. Defendant pleads that he was a Purchaſer of the Leaſe, and was then informed, that there were *Fifty ſeven* Years to come in the Leaſe, and therefore gave *nineteen* Years Purchaſe for it. Allowed a good Plea.

The Defendant pleads the Leaſe, and that he was informed, that in *Seventy-ſeven* when he purchaſed, there was *Fifty-ſeven* Years to come in the Leaſe, and therefore gave after the Rate of *nineteen* Years Purchaſe for it, and therefore ought not to make any Diſcovery to impeach or weaken his Title. Plea allowed, and a Demurrer alſo.

Jeſſon verſus *Jeſſon.*

Caſe 243. *Feb.* 5.

SIR *Will. Jeſſon* by Settlement in 1669, on his Marriage with *Penelope Villars*, and in Conſideration of 1500 *l.* Portion ſecured to be paid by Sir *George Villars*, limited ſeveral Manors and Lands to himſelf for Life, Remainder to *Penelope* his intended Wife for Life, Remainder to firſt and other Sons of the Marriage, Remainder to Truſtees for the Term of *one Thouſand* Years, Remainder to the Heirs

Poſt. Caſe 244, 288, 320. By a Marrige-Settlement a Term for Years expectant on failer of Iſſue Male, is raiſed for ſecuring 3000 *l.* Portions for Daughters not preferred in the Life of the Father, payable at eighteen or Marriage. There are a Son and two Daughters. The Father in his Life-time, by a Sale of Part of his Eſtate, raiſes 1800 *l.* for his Daughters, payable at Twenty one or Marriage, and dies, leaving alſo a Son by a former Marriage, who dies an Infant without Iſſue. This 1800 *l.* though payable at a different Time, and tho' not intended to go as Part of the Portion, (there being a Son then living) ſhall be taken as Part of the 3000 *l.* Portion.

Heirs of the Body of Sir *William*, Remainder to his own right Heirs. And as to the Term for *one Thouſand* Years, the Truſt thereof was declared to be that in Caſe there ſhould be no Iſſue Male of that Marriage, or if ſuch Iſſue Male ſhould die without Iſſue before *Twenty-one*, and there ſhould be one or more Daughters between them, not preferred in the Life-time of the ſaid Sir *William Jeſſon* and *Penelope*, then if one Daughter 1500 *l.* if two or more 3000 *l.* to be equally divided between them at *eighteen* or Marriage; if not paid, Truſtees after the Death of Sir *William* and *Dame Penelope* without Iſſue Male, might raiſe it by Leaſing or Sale, and what Maintenance they thought fit in the mean Time, and then the Term to attend the Inheritance. Provided if the next in Remainder ſhall pay, *&c.* the Term to ceaſe.

March 10, 1680, Sir *William Jeſſon* demiſes ſeveral Meſſuages, *&c.* unto Sir *William Villers* and *Woollaſton* for *Ninety-nine* Years, if Sir *William* ſhould ſo long live, upon Truſt by Rents, Iſſues and Profits, to raiſe (*inter alia*) 2000 *l.* for the Portions of *Penelope* and *Anne*, *Margaret* and *Thomas*, the *four* younger Children, Infants and unmarried. Thereupon Sir *William Villers* and Sir *William Jeſſon*, agree to ſell the Truſt-Eſtate, being a Term for *Ninety-nine* Years, determinable on the Death of Sir *William Jeſſon* for 2000 *l.* of which, *two Hundred* Pounds was to be paid to Sir *William Jeſſon*, and the 1800 *l.* to Sir *William Villers*, which he agreed to accept in Lieu of the 2000 *l.* by this Truſt provided for the two ſurviving Daughters.

May 1688, Sir *William Jeſſon* died, leaving Iſſue the Plaintiff his eldeſt Son by a former Venter; and *Villers Jeſſon*, and two Daughters by his laſt Wife; *Villers Jeſſon* died without Iſſue an Infant.

The Queſtion was, whether the 1800 *l.* raiſed by Sir *William Jeſſon* out of his own Eſtate for Life, ſhall be taken in Part of the 3000 *l.* now become due, and payable unto the two Daughters by the Marriage-Settlement, on Failer of Iſſue Male of that Marriage.

It was inſiſted by the Defendant's Counſel, that the 1800 *l.* ought not to go in Part of the 3000 *l.* *Firſt*, It was not declared by Sir *William Jeſſon* that it ſhould go or be taken in Part; and Sir *William Villers* the Truſtee, examined in the Cauſe, ſwears it was not diſcourſed of nor intended to go in Part. *Secondly*, By the Marriage-Settlement, the Portion is to be paid at *eighteen* or Marriage. By the later Deed at *Twenty-one* or Marriage, and if die before, to ſurvive.

Per Cur. Decree the 1800 *l.* to go and be taken in Part of the 3000 *l.* Portion. It might have been a Queſtion, whether the Daughters ſhould have more than the 1800 *l.* but no Queſtion whether *that* ſhould go in Part; and cited the Caſe of *Blois* and *Blois*, where even a Legacy ſhall go in Part. And all the Precedents are, that there ſhall not be a double Proviſion or double Satisfaction, and cited *Elkenhead*'s Caſe, who having made his Will, and thereby deviſed 1000 *l.* apiece to each of his *five* Daughters, and after Legacies paid, gave the Surplus of his Lands equally amongſt his *five* Daughters, and gave 1000 *l.* Portion with one of them in Marriage, ſhe was excluded from the 1000 *l.* intended by the Will.

DE
Termino Paſchæ,
1692.
In CURIA CANCELLARIÆ.

Caſe 244. 6 *Apr.*

Duffield verſus *Smith*

By a Marriage-Settlement, in caſe of Failer of Iſſue Male, a Remainder is limited, to the Daughters until they ſhould raiſe 3000 *l.* for Portions. There is Iſſue a Son and two Daughters. The Father by Will gives the Daughters 700 *l.* apiece, and dies. The Son gives by his Will to the Daughters, to the Amount of 7000 *l.* and deviſes the Land to his Male Heirs, and dies without Iſſue. The Father or Son's Legacies to the Daughters ſhall not be a Bar, and Satisfaction of the 3000 *l.* ſecured by the Marriage-Settlement. *Ant.* Caſe 161, 243. *Poſt.* Caſe 288, 324.

THE now Defendants having formerly brought a Bill, claiming a Charge of 3000 *l.* upon the Eſtate, as a Proviſion for Daughters, on Failer of Iſſue Male, ſecured by a Settlement made on the Marriage of *Knightly Duffield* their Father; and their Brother having deviſed the Land to the now Plaintiff *Duffield*, they pray'd he might either pay the 3000 *l.* or be forecloſed, and the now Plaintiff, then Defendant, inſiſting that his Teſtator had by his Will left an ample Recompence to his Siſters, by large Legacies, and making them Executors, by which they profited above 3000 *l.* that Bill upon hearing on the 27*th* of *October* 1690, was diſmiſſed with Coſts. And the now Plaintiff brought on his Bill to Hearing, to have a Decree to hold and enjoy the Land againſt the Claim of the 3000 *l.* the Plaintiff's Teſtator having by his Will given, and left an ample Recompence

Recompence to the Defendants his Siſters, exceeding the Value of 3000 *l.*

And the Caſe appeared to be, that *Knightly Duffield* the Defendants Father, upon his Marriage in 1631, conveyed the Lands to the Uſe of himſelf for Life, Remainder to his Wife for Life, Remainder to the firſt and other Sons in Tail Male, Remainder to the Daughters of that Marriage until 1500 *l.* if but one, and 3000 *l.* if more than one, were raiſed and paid, Remainder to his right Heirs. There was Iſſue of the Marriage *Andrew* a Son, and *two* Daughters. *Knightly Duffield*, the Defendants Father, by Will deviſes 600 *l.* to one of the Daughters, and 700 *l.* to the other, and dies. After his Deceaſe, *Andrew Duffield* the Son deviſes 700 *l.* apiece to his *two* Siſters, and alſo makes them Executors and reſiduary Legatees, by which they had all the Reſidue of his perſonal Eſtate, amounting to near 7000 *l.* and by the ſame Will devi'es the Lands compriſed in the ſaid Marriage-Settlement of 200 *l. per Ann.* to the now Plaintiff (being his Coſin German and Heir Male of the Family,) for his Life, Remainder to his firſt and other Sons in Tail. The Daughters had brought an Ejectment to recover the Lands, the 3000 *l.* not being paid, and *that* depended on a ſpecial Verdict.

The Queſtion was, whether what was given to the Defendants, either by the Will of their Father, or by the Will of their Brother, or what they took as being made Executors thereof, ſhould in Equity be conſtrued, or taken as a Satisfaction of the 3000 *l.* in Part, or for the Whole.

For the Defendants it was inſiſted, that although there was a ſpecial Verdict now depending at Law, yet it muſt at the Hearing of this Cauſe be taken, that the Defendants have a good Eſtate in Law, until the 1500 *l.* apiece be paid them, otherwiſe the Plaintiff has

no

no Pretence to come for Relief in Equity. *Secondly*, That although the former Bill brought by the now Defendants, to forecloſe the Plaintiff, was diſmiſſed, yet *that* is not now to be made Uſe of; but if the now Plaintiff will have a Decree in this Cauſe where he is Plaintiff, it muſt be upon the Circumſtances and Merits of the Cauſe.

As to the Merits of the Cauſe, *firſt*, there could be no Pretence that the Legacy given by the Father to his Daughters, ſhould be reckoned as any Satisfaction of the 3000 *l.* in Queſtion, as not being adequate in Value; but beſides the Father had then a Son living, and it was altogether contingent and uncertain, whether the 3000 *l.* would ever ariſe, and become payable or not, and it was but reaſonable the Father ſhould make ſome certain Proviſion for his Daughters. And as to the Will of *Andrew Duffield* their Brother, though the Benefit they take thereby is of greater Value than the 3000 *l.* yet there is nothing in the Will that declares it to be in Lieu or Satisfaction of the 3000 *l.* nor that neceſſarily implies, that it was ſo intended; and if they will pretend this was a dormant Settlement, and he knew not of it; *that* deſtroys their Pretence, that what they took by the Will was intended in Lieu, or Satisfaction of the 3000 *l.* by the Settlement; and this 3000 *l.* coming to the Daughters in Lieu of the Land, of which they who are the Heirs at Law, are diſinherited, there was no Ground for the Court to make a ſtrained Conſtruction, in Favour of a voluntary Deviſee, againſt the Heirs at Law; and *that* diſtinguiſhes this Caſe from all the Precedents cited on the other Side. And although it is objected, that the Brother might have barred his Siſters by a Common Recovery, without making any Compenſation; and might have declared, that what they took by his Will, was in Lieu and Satisfaction of the 3000 *l.* by the Settlement, yet he hath not ſo done; and the Queſtion is not, what he might have done, or what might have been

fitting or prudent for him to have done; but the Caſe depends on what he hath in Fact done.

Per Lords Commiſſioners Trevor and *Hutchins* (*Rawlinſon* diſſenting) decreed, the Proviſion made by the Brother's Will to be conſtrued and taken in Lieu and Compenſation of the 3000 *l.* by the Marriage-Settlement; for he having by the ſame Will deviſed away the Lands to his Coſin, and Heir Male of his Family, it implied, that what he had given by the ſame Will to his Siſters, was to be in Lieu of their Intereſts in the Lands, and as to the Point of Satisfaction, the Siſters are not to be conſidered as Heirs, but as in the Nature of Mortgagees. And cited the Caſes of *Blois* and *Blois*, *Yeoman* and *Brooks*, *Dekins* and *Powell*, *Jeſſon* and *Jeſſon*, *Osbaſton* and *Strickland*, &c. *Ant.* Ca. 243.

Note, This Decree was afterwards reverſed upon an *Appeal* to the *Houſe of Lords*.

Hungerford verſus *Earle*.

Caſe 245. 14 *Apr.*

THE Father makes a voluntary Settlement on Truſtees to raiſe Money to pay his Debts therein mentioned, and Portions for his younger Children, reſerving 50 *l. per Ann.* to himſelf for Life, Remainder of the whole to his Son for Life, and to his firſt and other Sons in Tail, *&c.* The Plaintiffs are Bond-Creditors to the Father, for Money lent *twelve* Years after the Making of this Settlement.

The Father makes a Settlement on Truſtees in Truſt to pay his Debts therein mentioned, reſerving 50 *l.* a Year to himſelf for Life, Remainder to his Son, *&c.* Father continues in Poſſeſſion, and *twelve* Years after contracts Debts by Bond, whether the Settlement is fraudulent as to the Bond-Creditors.

Queſtion whether the Settlement fraudulent againſt them. *Per Lord Commiſſioner Hutchins:* The Settlement fraudulent, and the Plaintiffs ought to have a Decree;

for it is proper to be determined here, for this Court determined touching Charities, and Frauds, long before the Making of any Statute concerning the ſame: This Settlement not purſued, for the Truſtees did not enter and take Poſſeſſion according to the Deed, but permitted the Father to live in the Houſe, *&c.* And a Deed not at firſt fraudulent, may afterwards become ſo by being concealed, or not purſued, by which Means Creditors are drawn in to lend their Money; but the other two *Commiſſioners* doubting it was ſent to be tried at Law.

A Deed not fraudulent at firſt, may afterwards become ſo, by being concealed or not purſued.

Caſe 246. 30 *Apr.*

Battily verſus *Cooke & al'*, late Churchwardens, and alſo the preſent Churchwardens of-----

Bill againſt Churchwardens, becauſe they refuſed to ſign a Rate for reimburſing the Plaintiff according to a Vote and Order of Veſtry and their Succeſſors.

BILL againſt the Defendants, lately *Churchwardens*, becauſe they refuſed to make a Rate to reimburſe the Plaintiff according to a Vote and Order of Veſtry. And cited *Jefferies* Caſe in *Co.* 5 *Rep.* that the Majority may bind as to Pariſh Duties.

They being out of their Office, the Decree was prayed againſt them *Q.*

Objections ſhould have come whilſt Defendants were Churhwardens, that if they had been decreed to pay, they might have reimburſed themſelves by a Rate. *Per* Serjeant *Philips* Decree againſt Dr. *Crowther* and Succeſſor: So here would have it againſt the Churchwardens and Succeſſors. *Q.*

4

Ligo

Ligo verſus *Smith* and *Leigh.*

Caſe 247. 22 *Apr.*

THE Plaintiff, Tenant under a Jointreſs at *forty* Pounds *per Ann.* for *ſixty* Years, if the Jointreſs ſhould ſo long live, had committed Waſte *ſparſim*, ſo as at Law the Eſtate was forfeited; but inſiſted he had improved the Eſtate from 40 *l.* to 60 *l. per Ann.* and offered to take a Leaſe of it at that Rent for *fifty* Years abſolute, and to anſwer the Value of the Timber upon a *Quantum damnificatus.* Sir *Percival Hart*'s Caſe cited, where he had voluntarily made a Settlement to himſelf for Life, then to his Nephew; afterwards he committed Waſte *ſparſim*, and the Nephew recovered, ſo as Sir *Percival* could not go out of his Houſe. *Q.*

The Under-Tenant of a Jointreſs commits Waſte *ſparſim*, but had improved the yearly Value; and offers to take a Leaſe at the improv'd Rent, and to pay for the Timber cut. *Quære*, whether the Court will relieve as to the Waſte.

Benſon verſus *Benſon.*

Caſe 248. 25 *Apr.*

UPON the Marriage, the Husband being an Inhabitant within the *Province* of *York*, Proviſion was made by Settlement for the Wife in caſe ſhe ſurvived. It was thereby alſo agreed that ſhe ſhould not claim any Part of her Husband's perſonal Eſtate by the Cuſtom of the *Province* of *York*, or otherwiſe. The Husband afterwards dies inteſtate, leaving his Wife, and *two* Children.

An Inhabitant within the *Province* of *York*, makes a Settlement on his Wife, in Bar of what ſhe might claim by Cuſtom of *York*, or otherwiſe out of the perſonal Eſtate. Husband dies inteſtate, leaving the ſaid Wife and Children. How the Wife's cuſtomary Part ſhall go.

Queſtion whether the whole perſonal Eſtate ſhall be now divided between the two Children, as if there had been no Wife? Or, how the Third (belonging to the Wife according to the Statute for ſettling Inteſtate's Eſtates, but of which ſhe is excluded by the Marriage-Agreement) ſhall be diſpoſed of.

Per

Per Mr. *Finch:* The Husband is in the Nature of a Purchaſer of his Wife's Share, and without Doubt might have diſpoſed of it by Will, and what he might have diſpoſed of by Will, the Statute has diſpoſed of for him, and is in the Nature of a Will for all Inteſtates. As was reſolved in the Caſe of *Travell* and *Pecock*, and in *Ryder*'s Caſe. But it was obſerved by *Lord Commiſſioner Hutchins*, that the Agreement being in 1669, and the Act of Parliament in 1670, ſhe could not by the Agreement be excluded of the Right that accrued to her by the Statute, made ſubſequent to the Agreement. *Quære.*

Caſe 249. 25 *Apr.* and 1 *Junii.*

Rundle verſus *Rundle.*

Ant. Ca. 239. A Copyhold is granted to 3, ſucceſſively, but no Cuſtom proved that the firſt Taker had the Power of diſpoſing the whole, nor that the firſt Taker paid the Purchaſe Money. This ſhall not go to the Executor of the firſt Taker, but ſhall go in Succeſſion.

THERE being no Cuſtom within the Manor where the Copy is to Three for their Lives *ſucceſſive*, that the firſt Taker may ſurrender the Copy, and diſpoſe of the Eſtate, the Court would not decree the remaining Life to be a Truſt for the firſt Taker, and to go to his Executor or Adminiſtrator, as had been done in other Caſes where there was ſuch Cuſtom. And alſo for that upon looking into the Copy, it appeared there was a former Copy to *Richard Rundle* the Father, and *Alexander* the Son, and the Surrender is by them both *Sub Conditione*, that the Lord make a new Grant for three Lives *prout.* And it is *dant Domino de fine, &c.* So in Truth the Eſtate moved rather from *Richard* the Father, than from *Alexander* the Son; nor does it appear the Fine was paid by *Alexander.* And alſo for that it was proved in the Cauſe, that it was intended that the Son of *Alexander* ſhould have married the now Defendant; and that *Alexander* declared the now Defendant ſhould have the Eſtate, whether ſhe married his Son or not, and therefore diſmiſſed the Bill: But it was agreed

per Cur. That if it had been a Truſt, the Adminiſtrator ſhould have had the Benefit thereof, though an Eſtate for Lives, and whether Freehold or Copyhold, or an Office; and it had been ſo adjudged, as to a *Prothonatary*'s Office. The Caſes of *Thyn* and *Brompfield*, *Clark* and *Davis*, *How* and *How* cited.

An Eſtate in a Copyhold *pur auter vie*, ſhall go to Executors or Adminiſtrators, as well as a Freehold *pur auter vie*.

Stafford verſus *Southwick.*

Caſe 250. 2 *Maii.*

THE Defendant intruſted *Tyms* a Scrivener to lend out 100 *l.* at Intereſt, he lends it to the Plaintiff, from whom he takes Bond, and alſo a Warrant of Attorney to confeſs a Judgment in Debt for 100 *l.* both in the Name of the Defendant, to whom he delivers a Copy of the Judgment, but keeps back the Bond. The Plaintiff afterwards pays *Tyms* the Money, and takes up the Bond, unknown to the Defendant; the Defendant ſuing the Judgment at Law, the Plaintiff's Bill was to be relieved againſt it. *Q.*

A Scrivener lends 100 *l.* his Client's Money to *B.* and takes a Bond and Warrant of Attorney for a Judgment, in the Client's Name, and keeps the Bond, and gives the Client the Copy of the Judgment, and afterwards receives the Money and delivers up the Bond. Whether *B.* liable to pay the Money over again.

Cooper verſus *Cooper.*

Caſe 251. 3 *Maii.*

THE Father having deviſed a Copyhold of the Tenure of *Burrough Engliſh*, to his eldeſt Son, and deviſed Houſes in *London* to his youngeſt Son; but had made no Surrender to the Uſe of his Will: The Queſtion was, whether the Defect of a Surrender ſhould be ſupplied in Equity, to make good a Proviſion for a Child, and the Caſe of *Bradley* and *Bradley* was cited, as a Caſe in Point, and that this was rather a ſtronger Caſe, becauſe that it appears that the Father before his Death intended,

One deviſes his Copyhold being *Burrough Engliſh*, to his eldeſt Son, and deviſes Houſes to his youngeſt Son. The Houſes are ſoon afterwards burnt, and were never entred upon by the younger Son. The Court as this Caſe was circumſtanced, would not ſupply the Want of a Surrender.

tended, and would have gone down into the Country, to have made a Surrender to the Uſe of his Will; but it being in the Time of the great Plague, was prevented from ſo doing. But in Regard the Proviſion intended for the youngeſt Son, was a Deviſe of ſome Houſes in *Milk-Street*, which within about *twelve* Months after were burnt down in the great Fire of *London*, and the younger Son then an Infant, and never entred thereon, nor received any of the Profits. The Court therefore, as this Caſe was circumſtanced, would not ſupply the Defect of a Surrender.

Caſe 252. 13 *Maii.*

The Attorney General verſus *Guiſe.*

Charity, tho' given to an illegal or ſuperſtitious Uſe ſhall not be void, for the Benefit of the Executor or Heir; but be applied *cy pres*, &c.

John Snell by his Will charged his real and perſonal Eſtate with an annual Sum or Exhibition for the Maintenance of *Scotchmen*, in the Univerſity of *Oxon*, to be ſent into *Scotland*, to propagate the Doctrine and Diſcipline of the *Church* of *England* there. Now by the late Act of Parliament, *Presbyters* are ſettled in *Scotland*; and it was inſiſted, that although the Charity cannot now take Place according to the Letter and expreſs Direction of the Will, yet it ought to be performed *cy pres*; and the Subſtance of it may be purſued; that is to propagate the Doctrine and Diſcipline of the *Church* of *England*, though not in the Form and Method intended by the Teſtator, and ſhall not be void, ſo as to fall into the Eſtate, and go to the Heir; and cited *Syderfin*'s Caſe, where 1500 *l.* was deviſed to be diſpoſed to ſuch Charities, as he by Writing had appointed; the Writing being loſt, the Application of the Charity left to the King; and *Gates* and *Jones*'s Caſe in the *Exchequer*, affirmed upon an Appeal to the Houſe of *Lords*; where a Charity was given to maintain popiſh Prieſts, applied to other Uſes by the *King*, and not to turn to the Benefit of the Heir.

Vol. 1. Caſe 223.

5

The

The Caſe of Mr. *Combes* decreed in 1679, where *he* deviſed a Salary for Maintenance of Independent Lectures in *three* Market-Towns, and deviſed the Eſtate thus charged, to his Nephew, who afterwards deviſed it for Payment of his Debts. Bill was brought to have the Lands ſold for Payment of the Debts; afterwards upon an Information for the Charity, the growing Payments and Arrears were decreed, and the *Independent* Lectures changed into *Catechiſtical* Lectures, in the ſame *three* Maket-Towns; and this, though there were not ſufficient to pay the Debts.

Elizabeth James, *Dorothy Humphrys*, and Dame *Anne Stephens*, Siſters and Coheirs of *Richard Collins* deceaſed, } Plaintiffs.

Caſe 253. 2 *Mall.*

John Hales Arm' & *al'*, Defendants.

Richard Collins being ſeiſed in Fee of ſeveral Lands, by his Will of *Jan.* 17, 1683, deviſes the ſame to his dear Friend *John Hales* the Defendant for Life, and deviſes one third Part of the Reverſion to each of his *three* Siſters reſpectively, and her Heirs.

A. deviſes Lands incumbred with Debts, to *B.* for Life; Remainder to *C.* in Fee. *B.* cuts down Timber from the Eſtate.

B. decreed to pay *two* Fifths of the Debts, and *C.* the remaining *three* Fifths, and *B.* to account for the Timber which he had cut; and this to be taken as Part of the *three* Fifths, which the Remainder-Man was to pay. *Poſt.* Caſe 289.

The Bill was to diſcover the Incumbrances upon the Eſtate, and compel the Defendant to bear his Share and Proportion thereof, complaining the Defendant increaſed the Debts by Non-payment of Intereſt, ſo that their Reverſion might in a little Time become charged with

with as much as it is worth, and the Defendant go away with all the Profits during his Life, without paying ſo much as Intereſt upon the Mortgages, and charged he had cut down Timber, for which he ought to be accountable.

Per Cur. Decree the Defendant Mr. *Hales* the Deviſee for Life, to pay *two* Parts in *five* of the Debts, and the Plaintiffs the Reverſioners, the other remaining *three Fifths*, and the Defendant to account for the Timber, being but barely Tenant for Life, and not with Power to do or commit Waſte; and what he hath raiſed by Timber to be taken as ſo much in Part of what the Reverſioners are to pay, by the Direction before given towards the Diſcharging of the Incumbrances.

DE

Term. S. Trinitatis,

1692.

In CURIA CANCELLARIÆ.

Goddart verſus *Garrett.*

Caſe 254.
1 *Junii.*

THE Defendant had lent Money on a *Bottom-Rhea Bond*, but had no Intereſt in the Ship or Cargo, the Money lent was 300 *l.* and he inſured 450 *l.* on the Ship; the Plaintiff's Bill was to have the Policy delivered up, by Reaſon the Defendant was not concerned in Point of Intereſt, as to the Ship or Cargo.

One having no Intereſt in the Ship, lends 300 *l.* on a Bottomry Bond, and inſures 450 *l.* on the Ship. Policy decreed to be delivered up.

Cur. Take it that the Law is ſettled, that if a Man has no Intereſt, and inſures, the Inſurance is void, although it be expreſſed in the Policy *intereſted or not intereſted*, and the Reaſon the Law goes upon, is that theſe Inſurances are made for the Incouragement of Trade, and not that Perſons unconcerned in Trade, nor intereſted in the Ship, ſhould profit by it; and where one would have Benefit of the Inſurance, he muſt renounce

One having no Intereſt in a Ship inſures it, the Inſurance is void, though the Policy runs, *Intereſt or no Intereſt.* But if he is intereſted in the Ship, he may inſure more than the Value of his Intereſt. Where one inſures a Ship, if he would have any Benefit of the Inſurance, he muſt renounce his Intereſt in the Ship.

nounce all Intereſt in the Ship. And the Reaſon why the Law allows that a Man having ſome Intereſt in the Ship or Cargo, may inſure more, or *five* Times as much, is that a Merchant cannot tell how much, or how little, his Factor may have in Readineſs to lade on Board his Ship. And it was ſaid, that the uſual Intereſt allowed on *Bottom Rhea*, was 3 *l. per Cent. per Menſem*, and you may inſure at 6 or 7 *per Cent.* for the Voyage: So if this Practice might be allowed, a Man might be ſure to gain 30 *l.* or more *per Cent.* *Per Cur.* Decree the Policy of Inſurance to be delivered up to be cancelled.

Note, That in this Caſe, Notice was taken in the Policy, that it was made to inſure Money on Bottom Rhea.

Note alſo, That in this Caſe, the Ship ſurvived the Time limited in the *Bottom-Rhea* Bond, and was loſt within the Time limited in the Policy. So if Inſurance good, Defendant might be intitled to the Money on the Bond, and alſo on the Policy.

Caſe 255.
1 *Junii.*

Tudor verſus *Samyne.*

The firſt Husband aſſigns a Term for the ſeparate Uſe of the Wife. The ſecond Husband may ſell or diſpoſe of it, tho' he has no Proviſion for his Wife.

DOctor *Sermon*, the Defendant's firſt Husband, being poſſeſſed for the Reſidue of a Term of *Thirty-one* Years, granted by Doctor *Lamplugh*, in the Year 1676, conveyed it over to Truſtees for the ſeparate Uſe and Benefit of the Defendant his Wife. She marries *Samyne* a ſecond Husband, who firſt mortgages this Term to *Venner*, and he and *Venner* aſſign to the Plaintiff.

Husband may diſpoſe of the Truſt of a Term which he has in Right of his Wife, as well as of the legal Eſtate of a Term which he has in her Right.

The Bill was againſt the Wife and her Truſtees to compel them to aſſign over the legal Eſtate to the Plaintiff. And decreed accordingly; for as the Husband may

diſpoſe of a Term for Years, where the legal Eſtate was in his Wife; ſo he may of the Truſt of a Term, without either the Wife or the Truſtees joining; and Sir *Edward Turner*'s Caſe cited, that a Term aſſigned by the Vol. 1. 1. firſt Husband for the ſeparate Uſe of the Wife, may be ſold or diſpoſed of by the ſecond Husband.

It was objected that the Husband in this Caſe had made no Settlement or Proviſion for the Wife; and if he was Plaintiff, the Court would not decree the Truſtees to aſſign to him, without making ſome Settlement on the Wife; and the Plaintiff who derives under the Husband, ought not to be in any better Condition. *Sed non allocatur.*

Saunders verſus *Dehew.*

Caſe 256. 3 *Junii.*

ANne Bayly being poſſeſſed of a Term for Years makes a voluntary Settlement thereof in Truſt for her ſelf for Life, Remainder to her Daughter *Iſabella Barnes* for Life, Remainder to the Children of *Iſabella*, by Mr. *Barnes*, her then Husband. *Iſabella* for 200 *l.* mortgages the Lands in Queſtion to the Plaintiff, who pretends he had no Notice of the Settlement; *Iſabella* in the Mortgage-Deed being called the Daughter and Heir of *John Bayly*. The Plaintiff hearing of it, gets an Aſſignment of the Term from the Truſtees.

A Purchaſer or Mortgagee ſhall not protect himſelf by taking a Conveyance from a Truſteeafter Notice of the Truſt, for by taking ſuch Conveyance he becomes the Truſtee himſelf.

Per Cur. Though a Purchaſer may buy in an Incumbrance, or lay hold on any Plank to protect himſelf, yet he ſhall not protect himſelf by the Taking a Conveyance from a Truſtee after he had Notice of the Truſt, for by taking a Conveyance with Notice of the Truſt, he himſelf becomes the Truſtee, and muſt not, to get a Plank to ſave himſelf, be guilty of a Breach of Truſt. And the Plaintiff's Bill being brought againſt the Children of *Iſabella* to foreclose them, the Court refuſed ſo to do, ſaying,

ſaying, if he might be ſuffered to protect himſelf, by thus getting in the legal Eſtate, they would not carry it on by a Decree in Equity to foreclose.

Note; In this Caſe it was objected, that the Plaintiff could not be an innocent Purchaſer without Notice, becauſe *Iſabella*, who made the Mortgage, had no Title but under the Settlement; and as to her being called Daughter and Heir of *John Bayly*, it was known that the Eſtate was only a Chattle; if it had been pretended to be an Inheritance, ſome Deed or Settlement muſt have been produced to make it ſo.

Note; In this Caſe, the Plaintiff had alſo bought in a Mortgage made by *Anne Bayly* her ſelf, which though ſubſequent to the Settlement, *that* being voluntary, was a good Mortgage.

Caſe 257. 27 *Junii.*

Whitchurch & al' ver' D'nam *Baynton.*

Debt on Bonds for Payment of Sums certain, to be preferred in Payment to Demands on Articles ſounding in Damages.

ON the Marriage of Mr. *Henry Baynton* with the Defendant, then the Lady *Anne Willmott*, by Articles of *July* 14, 1685, Mr. *Baynton* agrees to ſettle 1900 *l. per Ann.* Jointure, and 1500 *l. per Ann.* more on the Iſſue Male, *&c.* And Lady *Anne* agreed, when of Age, to levy a Fine and ſettle her Lands on Mr. *Baynton*, and the Iſſue of the Marriage, her Lands being valued at 21000 *l.* Mr. *Baynton* when of Age, confirms the Article by an Indorſement, and afterwards a Settlement was made by Mr. *Baynton*, which was approved of by the Counteſs of *Rocheſter*, the Defendant's Mother, but in Fact, though the Jointure was near 1900 *l. per Ann.* the Lands upon the Iſſue Male did not hold out to be 1500 *l. per Ann.* and great Part of that too in Reverſion. Mr. *Baynton*, by purchaſing Sir *Edward Hungerford*'s Eſtate of *Farley Caſtle*, became greatly indebted, and in

June 1691, deviſed all his Lands unſettled to be ſold for Payment of his Debts.

The Bill was brought by the Creditors of Mr. *Baynton*, againſt the Widow, his Infant Son and Truſtees, to have the Lands ſold for Payment of Debts, complaining it was obſtructed by the Defendant's Setting up ſo many pretended Claims by the Marriage-Agreement, *&c.* The Defendant diſcloſed the Articles, and the Settlement after made, and the Deficiency thereof in Point of Value.

Per Cur. There is no Covenant that the Eſtate ſhall continue of the Value in the Articles, nor that it ſhould be of that Value in preſent Poſſeſſion, and therefore the Settlement ought to ſtand, the Articles being ſufficiently performed. And if the Settlement is deficient; yet in Regard there is no Covenant in the Articles, nor Mention of any particular Lands, the Widow and Infant muſt come in for a Satisfaction after the Bond-Creditors, whoſe Debts are aſcertained and fixed, and their Demands on the Articles only found in Damages.

Fletcher & al' verſus *Stone.*

Caſe 258.
13 *Julii.*

Theophilus Tilden mortgaged his Lands to *Weldeſh* for 550 *l.* and gave Bond for Performance of Covenants, and became alſo indebted to the Plaintiffs by Bond, and by Will deviſes his Lands to the Defendant and his Heirs, (the Defendant having married his Daughter) and alſo makes him Executor, who would exhauſt the perſonal Eſtate to pay off the Mortgage, ſo as to leave no Aſſets, liable to the Plaintiffs Bond.

One dies indebted by Mortgage, with a Bond to perform Covenants and owes other Debts on Bond. The perſonal Eſtate ſhall be applied to pay off the Bond-Debts in the firſt Place.

Account decreed of the perſonal Aſſets, and no Allowance to be thereout made in Reſpect of the Bond for Performance of Covenants in the Mortgage-Deed.

Caſe 259.
29 *Junii.*

Gudgeon verſus *Ramſden.*

An Inteſtate being an Inhabitant in the *Province* of *York*, has a Son and Daughter, and no Wife, and in his Life-time gives his Daughter 1000 *l.* Portion, in Bar of what ſhe might claim by the Cuſtom of *York*. This being ſaid to be in Bar of her cuſtomary Part, ſhall be no Bar of her diſtributory Part on Statute of Diſtribution, nor ſhall ſhe bring the ſaid 1000 *l.* into Hotch-pot.

THE Inteſtate being an Inhabitant in the *Province* of *York*, left Iſſue a Son and Daughter only, and no Widow, the Daughter had a Portion given her in Marriage, in Lieu and full Satisfaction of what ſhe might Claim by the Cuſtom of the *Province* of *York*; the Son was alſo advanced by a Settlement of Lands.

The Queſtion was, how this Eſtate ſhould be diſtributed. For the Heir it was inſiſted, that now the Cuſtom of the *Province* of *York* is to be quite laid out of the Caſe, and the ſame Diſtribution made of the Eſtate, as of any other Inteſtate's Eſtate, and by Conſequence the Daughter to bring her Portion into *Hotch-pot*; but the Heir to have a full Share, without Regard to what Lands had been ſettled upon him.

Per Cur. The Daughter muſt not bring back her Portion into Hotch-pot, for that came in Lieu of the cuſtomary Part, and was as the Price the Father thought fit to give her for the ſame.

Vol. 1. Caſe 339. *Vide Beckford*'s Caſe, where a Child is advanced, what is to be brought into Hotch-pot ſhall not go into the whole Eſtate, but only into the Share belonging to the Children, and not to augment either the Widow's or legatory Part.

3 Mod. Rep. 58. *Vide Palmer* and *Allicot*'s Caſe in *K. B.* adjudged, tho' the Child die before Diſtribution, the Eſtate veſted immediately, and ſhall go to the Adminiſtrator of the Child; for it is an Act not only for the Diſtribution, but for the better ſettling of Inteſtate's Eſtates.

D E

DE
Term. S. Michaelis,
1692.

In Curia Cancellariæ.

Sparkes verſus *Smith & al'.*

Caſe 260. *Nov.* 4. *Lords Commiſſioners.*

Leſſee for Years of a Brewhouſe, with Covenants to repair, aſſigns it by Way of Mortgage to *B.* *B.* was never in Poſſeſſion; Brewhouſe much out of Repair, the Mortgagee, though it was his Folly to take an Aſſignment, and not an Under-leaſe; yet Equity will not compel him to repair. *Poſt.* Caſe 336.

John Sparkes the Plaintiff's Father ſeiſed in Fee of a Brewhouſe, and two other Houſes in *Southwark*, in 1688, demiſed them to *Richard Gwin* for *ſeven* Years at 30*l.* *per Ann.* with Covenants that the Leſſee ſhould repair, *&c.* *Gwin* the Leſſee died; *Berisford* married his Widow and Executrix, and having borrowed Money of the Defendant *Smith*, for ſecuring the Repayment thereof did aſſign the Leaſe of the ſaid Houſes to *Smith*, defeaſable on the Payment of the Money with Intereſt.

The Houſes being greatly out of Repair, the Plaintiff's Bill was to compel the Defendant to diſcover whether the Leaſe was not aſſigned to him, and to compel him to perform the Covenants on the Leſſee's Part.

The Defendant by Anſwer inſiſted he never was in Poſſeſſion, nor received any of the Rents; that in 1690,

Berisford gave him an Order on one of the Tenants for 20 *l.* which was paid him in Part of what was due on the Mortgage, and not as Rent.

Per Cur. It was the Mortgagee's Folly to take an Aſſignment of the whole Term, whereby to ſubject himſelf to the Covenants in the original Leaſe, and not to take a derivative Leaſe of all the Term, but a Month, or Week, or a Day, as he might have done; yet in as much as he is only a Mortgagee, who never was in Poſſeſſion, we will not aſſiſt the Plaintiff to charge him, or decree him to perform the Covenants in *Specie*, but leave the Plantiff to recover at Law as well as he can, and therefore diſmiſſed the Bill.

Caſe 261.
9 *Nov.*

Sherman verſus *Sherman.*

Tho' length of Time no Bar betwixt Merchant and Merchant; yet if Dealings betwixt them have ceaſed for ſeveral Years, and one of them dies, and the ſurviving Merchant brings a Bill for an Account, the Court will not decree an Account, but leave the Plaintiff to his Remedy at Law.

THE Plaintiff's late Husband and Defendant had Dealings together as Merchants, the Bill was for an Account; and although it was agreed that the Length of Time was no Bar, yet the Plaintiff's Husband living many Years after the Trade and Dealings between them ceaſed, and after ſome Differences and Diſputes had ariſen between them, and acquieſced to the Time of his Death; the Court therefore diſmiſſed the Bill, and left the Plaintiff to recover at Law, if ſhe could.

Among Merchants, if an Account current be ſent from one to the other, who receives it and makes no Objections for two or three Poſts, this is looked upon as an Allowance of the Account.

Per Lord *Hutchins*; Amongſt Merchants it is looked upon as an Allowance of an Account current, if the Merchant that receives it does not object againſt it, in a ſecond or a third Poſt.

Hall

Hall verſus *Hall.*

Caſe 262.
Nov. 11.

THE Plaintiff was the Widow of a Freeman of the City of *London*, and brought her Bill againſt the Defendants the Children, to diſcover the Eſtate, and to have her cuſtomary Part paid her. The Defendants pleaded, that their Father by Deed executed in his Life-time, had given his Goods to them.

If a Freeman of *London* abſolutely gives away his Goods in his Life time to any of his Children, this is good. But if he keeps the Deed of Gift in his own Power, or continues in Poſſeſſion of the Goods, then it is a Fraud upon the Cuſtom.

For the Plaintiff it was inſiſted, that ſuch pretended Deed was a Fraud on the Cuſtom, and in Truth was but in the Nature of a Will, the Words of it being, I give and deviſe, and ſo cannot prevent the Cuſtoms taking Place; as was reſolved in the Lady *Dethick*'s Caſe, and in the Caſe of *Green* and *Lambert.*

For the Defendant it was inſiſted, it was not a Will, but a Deed under Hand and Seal, and delivered as his Act and Deed, and therefore the Words give and deviſe will not make it a Will.

Per Cur. If Goods are abſolutely given away by a Freeman in his Life-time, this will ſtand good againſt the Cuſtom. But if he has it in his Power, as by the keeping of the Deed, *&c.* or if he retains the Poſſeſſion of the Goods, or any Part of them, this will be a Fraud upon the Cuſtom.

Lane verſus *Williams & al'.*

Caſe 263.
Nov. 15.
Rawlinſon, Hutchins, *Lords Commiſſioners.*

J. S. and Defendant *Williams* Teſtator were Partners as Woollen-Drapers, *J. S.* gives a Note to the Plaintiff for

A. and *B.* Partners as Woollen-Drapers. *A.* borrows Money of *C.* and gives a Note for the ſame for himſelf and Partner. Tho' this Money was not brought into Partnerſhip, nor the Note given with the Privity of the other Partner; yet held *per Cur.* that this would bind the other Partner. *Poſt.* Caſe 282.

for 150 *l.* received and borrowed of him, which he promiſes to repay, and ſubſcribed it for himſelf and Partner. The Bill was for a Diſcovery and Satisfaction out of the Aſſets againſt *Williams* the Executor of the ſurviving Partner, to oblige him to pay, it being inſiſted for the Defendant at the *Rolls*, that this Money was never brought into Trade, nor was contracted upon the Account of the Partnerſhip; and therefore, although one Partner ſigned it, as for himſelf and Partner, *that* could not bind the Partner that was not privy nor conſenting thereunto; and the Maſter of the *Rolls* diſmiſſed the Bill.

Now upon an Appeal, the Court declared they took it that both Partners were bound; but the Note being of pretty long ſtanding, therefore ordered the Defendant to admit Aſſets in an Action at Law to be brought, and not plead the Statute of Limitations, otherwiſe would decree for the Plaintiff.

Caſe 264.
22 *Nov.*

Chaffen verſus *Gawden.*

Bill brought to be relieved *pro certo Letæ.*

THE Bill was to be relieved *pro certo letæ*; for the Plaintiff it was ſaid, that the Tenants owing Suit and Service to the Sheriff's Turn, the Lord for Eaſe of the Tenants purchaſed a Leet, and for that Eaſe the Tenants of each Tithing agreed to pay the Lord a Sum certain; and the Surmiſe was, that the Tithing-Man being to collect and pay over to the Lord, the Lord in this Caſe had no Remedy but in Equity. *Cur. Advis' vult.*

2

Walton

Walton verſus Com' *Stanford & econtra.*

Caſe 265. 25 *Nov.*

Walton's Bill was to be quieted in the Enjoyment of a Meſſuage and Lands during the Continuance of a Leaſe for *two* Lives, ſuppoſed to have been made thereof; and it appearing that upon a Partition of a conſiderable Eſtate between the Lord *Stamford* and Sir *Boucher Wray*, the Lands in Queſtion were allotted to the Lord *Stamford*, as a Reverſion expectant on the Determination of *two* Lives then in Being, and if the Leaſe was loſt, or was defective and not good in Law; yet it ought to be made good as againſt the Defendant, who had an Allowance upon the Partition, as if a good Eſtate for Lives were then in Being; and ſo it was adjudged in the Caſe of one *Prettyman*, who purchaſed a Reverſion expectant on the Determination of an Eſtate granted to *J. S.* by a Copy of Court-Roll for his Life; and altho' in Truth there was no Copy nor Grant of an Eſtate for Life, yet decreed *J. S.* ſhould enjoy *pur vie.* But in this Caſe the Parties were ſent to Law, to try whether any ſuch Leaſe in Being at the Time of the Partition.

One buys a Reverſion expectant on an Eſtate for Life to *A.* *A.* ſhall enjoy it in Equity againſt the Purchaſer, tho' *A.* had no Title to the Eſtate for Life.

Lord Chief Juſtice *Holt* verſus *Mill* & *al'.*

Caſe 266. 6 *Decemb.*

THE Plaintiff having lent *J. S.* 600 *l.* on Mortgage, and afterwards diſcovering that the Eſtate was premortgaged to the Defendant, got in an old ſatisfied Incumbrance, and now brought his Bill to compel the Defendant to redeem or foreclоſe.

Third Mortgagee buys in the firſt, and brings Bill to foreclоſe the ſecond, if he don't pay both. He need not prove the Money actually lent on the third Mortgage, the Producing an Acquittance being ſufficient.

It

It was objected, that the Plaintiff in this Caſe (as between him and the Defendant who was a Purchaſer) ought to have proved the actual Lending and Payment of the Conſideration-Money, and the Producing the Deed or an Acquittance was not ſufficient. *Sed non allocatur.*

Caſe 267.

Caſs verſus *Rudele & al'.*

A. articles on Behalf of *B.* to purchaſe four Houſes in *Jamaica*, and to pay 800 *l.* for the ſame. The Houſes are ſoon afterwards ſwallowed up by an Earthquake; and *A.* had no Affets of *B.* yet decreed to pay the Purchaſe-Money.

THE Defendant, on the Behalf of *Jeremiah Tilly*, articles to purchaſe of the Plaintiff *four* Houſes at *Port Royal* in *Jamaica*, by which Articles the Plaintiff covenants to convey, and the Defendant on behalf of *Tilly* covenants to pay 800 *l.* for the Purchaſe thereof by Articles dated *Aug.* 6. 1690, afterwards 100 *l.* is paid in Part. The Bill was for a ſpecifick Performance of the Articles. The Defendant inſiſted he had not ſufficient Effects of *Tilly*'s in his Hands, and that the Plaintiff had not made out a good Title to the Houſes, by which Means the Agreement had not been performed, and pending this Suit, the great Earthquake happened at *Jamaica*, in which the *four* Houſes in Queſtion (*inter alia*) were intirely deſtroyed and ſwallowed up; and therefore ſuch Agreement ought not now to be decreed in *Specie*, but the Plaintiff rather left to recover what Damages he can at Law.

But the Court notwithſtanding the Eſtate *pendente lite* was deſtroyed and gone, and notwithſtanding Defendant had not ſufficient Effects of *Tilly*'s in his Hands, decreed a ſpecifick Execution of the Articles. And the ſame was afterwards affirmed upon an Appeal to the *Houſe* of *Lords*.

2

Bond

Bond verſus *Kent.*

Caſe 268
19 *Dec.*

A. purchaſes Lands of *B.* and mortgages back thoſe Lands for Part of the Purchaſe-Money, and gives a Note to *B.* for 200 *l.* the other Part thereof. *A.* deviſes thoſe Lands to be ſold for Payment of his Debts. This 200 *l.* Note, tho' for Part of the Purchaſe-Money, ſhall not be preferred to other Debts, nor be a Charge on the Land in Equity.

Kent purchaſed of *Bond* the Lands in Queſtion, and remortgaged them for ſecuring Part of the Purchaſe-Money, and for other Part thereof gave a Note payable on Demand, on which 200 *l.* remained unſatisfied. *Kent* deviſes his Lands to be ſold for Payment of his Debts, and dies not leaving ſufficient Aſſets.

The Queſtion was, whether this 200 *l.* remaining due on the Note, being for Part of the Conſideration-Money, ſhall have a Preference to other Debts, and be looked on in Equity as a Charge upon the Land; and the rather, for that the Plaintiff as Mortgagee hath the real Eſtate in him.

Per Cur. Can have no Preference, but muſt accept Satisfaction in Proportion only with the other Creditors.

Beckford verſus *Beckford.*

Caſe 269.
7 *Dec.* 1 Jac. 2.
Lord Jeffries.

Vol. 1. Caſe 339. Money brought into Hotch-pot by an Orphan, is to be brought into the Orphanage-Part only, and not to increaſe the Widow's cuſtomary Part, or the teſtamentary Part.

WHERE a Freeman of *London* dies, leaving a Wife and Children, ſome whereof were only in Part advanced, and others fully advanced. The Children who were in Part advanced, muſt bring in what they have reſpectively received into Hotch-pot; but it ſhall be brought into the Childrens Third only, and not to

to increaſe the Widow's or Executors Third, (*viz.*) the Eſtate left by the Teſtator at his Death ſhall be firſt divided into three Parts, *viz.* the Widow's third Part, the Orphanage-Part, and the legatory or teſtamentary Part, and then what the Children in Part advanced had received, ſhall be brought into the Orphanage-Part only, and not to increaſe the whole Eſtate.

DE
Term. S. Hillarii,
1692.
In CURIA CANCELLARIÆ.

Chriſt-College in *Cambridge* verſus *Widdrington.*

Caſe 270. 25 *Feb.* Rawlinſon, Hutchins, *LordsCommiſſioners.*

THE Cauſe heard and referred to an Account; as to one Article of the Account, there was a ſingle Witneſs againſt the Defendant's Oath.

Where there is a ſingle Witneſs againſt the Defendant's Oath, this is not ſufficient Evidence for a Decree, nor will the Court direct a Trial at Law.

Per Cur. Not ſufficient Evidence to decree againſt the Defendant, and the Plaintiff having had the Benefit of a Diſcovery on the Defendant's Oath, we will not ſend it to be tried at Law, where one Witneſs is ſufficient; although it was inſiſted by the Defendant's Counſel, that it might be tried at Law.

Papworth verſus *Moore.*

Caſe 271. *Eodem die, Maſter of the Rolls.*

A Legacy of 300 *l.* deviſed to *J. S.* to be paid at *Twenty-three* Years of Age, if he die before, to go over to *A.* and *B. J. S.* died an Infant.

Ant. Caſe 183, 241. Legacy of 300 *l.* to be paid to *A.* at his Age of 23, if he die before, to go over to *B. A.* dies before 23, *B.* ſhall have it preſently.

Queſtion,

Queſtion, whether it ſhould be paid to *A. B.* preſently, or not until ſuch Time as *J. S.* would have been 23. *Per Cur.* Decreed to be paid preſently.

Caſe 272. ## *Abbot* verſus *Lee* and *Cuthbert & al'.*

Deviſe. *George Cuthbert* having Iſſue *William*, *Edward*, *Jane* and *Mary*, *May* 17, 1681, by his Will deviſed to his ſaid two Daughters 550 *l.* apiece, and ordered the ſame ſhould be laid out in the Purchaſe of Lands by his Executors within one Year after his Deceaſe, to the Uſe of his ſaid two Daughters, and the Heirs of their two Bodies, and in Caſe either of them ſhould die before Marriage, that the Sum of 150 *l.* Part of the Portion of her ſo dying, or if the 1100 *l.* ſhould be laid out in Land, that ſo much Land that ſhould be of the Value of 150 *l.* ſhould go to the ſurviving Siſter, and the other 400 *l* being the Reſidue of the Legacy of her ſo dying, or Land to that Value, if ſuch Purchaſe ſhould be then made, ſhould go to his two Sons equally to be divided betwixt them and their Heirs, and made *Jane* his Relict, and *Henry Lee* his Executors; *William* and *Edward* the two Sons died without Iſſue, *Jane* alſo died unmarried, *Mary* ſurvived, and married *Thomas Abbot*, the Plaintiff, and died without Iſſue. The Plaintiff took Adminiſtration to his Wife, and in *Trin.* 1685, exhibited a Bill againſt the Executors, and *William Cuthbert* the Heir at Law, to have the 550 *l.* and 150 *l.* paid to him as Adminiſtrator to his Wife.

The Defendant *Cuthbert* inſiſted, that the Money by the Direction of the Will being to be inveſted in Lands, within a Year after the Teſtator's Deceaſe, the Money ought now to be looked upon as Land; and if a Purchaſe had been made according to the Direction of the Will,

it would have deſcended to him, he being Heir at Law to the Teſtator, and to his four Children the Legatees. But the Court decreed the 550 *l.* and 150 *l.* the whole 700 *l.* to *Abbot* as Adminiſtrator to his Wife.

Garſh verſus *Egerton.*

Caſe 273. 4 *Mar.*

After 2 Non-ſuits and a Verdict for Defendant, on an Iſſue of *deins age*, on Debt on Bond, Bill was brought ſuggeſting the Regiſter on which the Verdict was given, was razed and altered. Defendant pleaded the Non-ſuits and Verdict. Ordered to anſwer the Bill.

ON Debt on a Bond and *deins age* pleaded, there were two Non-ſuits, and at laſt a Verdict for the Defendant. Bill ſurmiſed that the Evidence at the Trial was a Church-Book, which the Plaintiff had ſince diſcovered, was raſed and altered, and *Egerton*'s Name put in the Place of another Perſon; and likewiſe that there was a Picture in the Houſe of Major General *Egerton* that would help to make out his Age.

Defendant pleaded the Nonſuits and Verdict on full Evidence, and by Anſwer ſet out that the Church-Book was given in Evidence on the Trial, and the pretended Razure then obſerved and inſiſted on; and that the Witneſs, who made the Affidavit annexed to the Bill, and ſwears to have made this Alteration in the Church-Book by the Direction of the Lady *Egerton*, was a Witneſs at thoſe Trials, and that the firſt Nonſuit was in 1655, the Verdict *twelve* Years ago, and that after ſuch Trials, and Length of Time, he ought not to be farther troubled in Equity.

But the Court ordered him to anſwer the Bill, and mentioned the Caſe of *Harder* and *Syſe*, where after *five* Trials, Leaſe or no Leaſe, it was at laſt diſcovered that in an Office *Poſt mortem*, the Leaſe was found and ſet out *in hæc verba.*

Caſe 274.
20 *Mar.*
At the Rolls.

Pope verſus *Onſlow.*

One makes 2 Mortgages of ſeveral Eſtates, for ſeveral Sums, and one of the Mortgages is deficient in Value. If the Mortgagor brings his Bill to redeem one, he muſt redeem both.

THE Plaintiff as Aſſignee of a Statute of Bankrupt, brought his Bill to redeem a Mortgage of the Manor of *Newington* in *Kent*, made by the Bankrupt to the Defendant.

The Defendant by Anſwer inſiſted, that he firſt lent the Bankrupt 200 *l.* on a Mortgage of a particular Tenement, and afterwards lent him 300 *l*, on a Mortgage of the Manor of *Newington*, which was of better Value than the Money due, but the firſt Mortgage was deficient in Point of Value. *Per Cur.* If the Plaintiff will redeem one, he ſhall redeem both.

DE
Termino Paſchæ,
1693.

In Curia Cancellariæ.

Aſhfield verſus *Aſhfield* Dominam.

Caſe 275.
27 *Apr.*

Husband aſſigns a perſonal Eſtate belonging to his Wife as Executrix, in Truſt for ſuch Uſes as he by Deed or Will ſhould appoint; and in Default of ſuch Appointment in Truſt for himſelf, his Executors, &c. He afterwards deviſes this Eſtate to his Wife and Children.

THE Plaintiff having obtained a Decree for his Portion, out of the Aſſets of Sir *John Aſhfield*, the Defendant's late Husband; on the Maſter's Report it appeared, that Sir *John Aſhfield* by Deed had aſſigned the perſonal Eſtate, to which the Defendant was intitled, as Executrix to her former Husband, to Truſtees, upon Truſt for ſuch Uſes, Intents and Purpoſes, and for ſuch Perſon and Perſons, as he by Deed or Will ſhould direct or appoint, and in Default of ſuch Appointment in Truſt for himſelf, his Executors, Adminiſtrators and Aſſigns; and afterwards by his Will deviſes this Eſtate to his Wife and Children.

Wife and Children. This is Aſſets, and the Deviſe to the Wife and Children is only a Legacy, and it muſt be liable to the Debts of the Husband in the firſt Place.

Per Cur. This Aſſignment alters the Property of the Eſtate, and the Truſt being general, as he ſhould direct or appoint, he was Owner in Equity, and had the Power and Diſpoſal of this Eſtate during his Life; and the

Diſpoſition and Appointment he hath made by his Will to his Wife and Children, is but in the Nature of a Legacy, and the rather in this Caſe, becauſe no Notice is taken in the Will of the Power of appointing, and therefore decreed it to be Aſſets, and liable to the Plaintiff's Demands.

Caſe 276. *May* 5, *in Court.*

Fawcet verſus *Bowers.*

One for 300*l.* grants a Rent of 60*l. per Ann.* for ſeven Years. Whether redeemable.

THE Plaintiff for 300*l.* had granted to the Defendant 60*l. per Ann.* for *ſeven* Years payable half yearly, and ſecured by Demiſe and Redemiſe.

The Maſter of the Rolls decreed a Redemption on Payment of what was Arrear of the annual Payment without Intereſt or Coſts. On an Appeal the Court took Time to conſider of it.

Caſe 277. *May* 8, *in Court.*

Hampton verſus *Spencer & econtra.*

Plaintiff for 80*l.* conveys an Eſtate abſolutely to the Defendant, and brings a Bill to redeem. Defendant inſiſts the Conveyance was abſolute; but confeſſes that after the 80*l.* paid with Intereſt, it was to be in Truſt for the Plaintiff's Wife and Children.

Hampton in Conſideration of 80*l.* paid by the Defendant *Spencer*, conveys an Houſe, and ſurrenders a Copyhold Eſtate to the Defendant and his Heirs; the Bill was for a Reconveyance on Payment of the Remainder due of the 80*l.* and Intereſt. The Defendant by Anſwer inſiſted, that the Conveyance was abſolute to him and his Heirs, without any Proviſo, Clauſe, or Agreement, that the Plaintiff might redeem, *&c.* But confeſſed it was in Truſt, that after the 80*l.* with Intereſt was paid, Defendant ſhould ſtand ſeiſed for the Benefit of the Plaintiff's Wife and Children, although no ſuch Truſt was declared by Writing.

Plaintiff replies to the Anſwer, and no Proof of the Truſt; yet decreed the Truſt for the Benefit of the Wife and Children.

For the Plaintiff it was inſiſted, that he having replied to the Defendant's Anſwer, who had not made any Proof

Proof of ſuch pretended Truſt; he was bound by his Confeſſion, that he was not to have the Eſtate abſolutely to himſelf, and no Regard ought to be had to the Matter ſet forth in Avoidance of the Plaintiff's Demand, becauſe the Defendant had not proved it; yet the Court decreed the Truſt for the Benefit of the Wife and Children. *Ant.* Ca. 175.

Plowman Widow verſus *Plowman* & *econtra.*

Caſe 278. *Eodem die, in Court.*

ON the Son's Marriage, the Father ſettles a Leaſe for Years, held of the *Queen Dowager*, on the Son for Life, to the Wife for Life, and then to the Iſſue of that Marriage; the Son covenants from Time to Time to renew the Leaſe, and to aſſign it to Truſtees to keep the Leaſe on foot, as long as the Wife, or any Child of the Marriage ſhould live. The Son renews the Leaſe in his own Name, and makes no Aſſignment thereof to Truſtees, and dies greatly indebted, without Aſſets.

A. on the Marriage of *B.* his Son, ſettles a Leaſe on *B.* for Life, to his Wife for Life, and then to the Iſſue of the Marriage. *B.* covenants from Time to Time to renew the Leaſe, and to aſſign it on the ſame Truſt. He renews the Leaſe, but does not aſſign it to the Truſtees, and dies greatly indebted. This Leaſe is bound by the Marriage-Agreement, and is not Aſſets for Payment of *B.*'s Debts.

Per Cur. The Leaſe is bound by the Marriage-Agreement, and ſhall not be Aſſets, nor liable to Debts.

Domina *Holles* verſus *Wyſe.*

Caſe 279.

THE Plaintiff lent the Defendant Money on a Mortgage at 5 *l. per Cent.* Intereſt, but if not punctually paid, then to anſwer Intereſt at 6 *l. per Cent. per Ann.* There being a great Arrear of Intereſt, the Queſtion was, whether it ſhould be computed after the Rate of 5 *l.* or 6 *l. per Cent.*

Intereſt reſerved at 5 *l. per Cent.* but if not duly paid, then to anſwer Intereſt at 6 *l. per Ann.* Great Arrear of Intereſt. Mortgagor decreed to pay but 5 *l. per Cent.* the Reſervation at 6 *l. per Cent.* being only as a *Nomine pœnæ.*

Decreed the Defendant ſhould pay but 5 *l. per Cent.* and the Court looked upon the Reſervation of 6 *l. per Cent.* but as a *Nomine pœnæ*, to oblige the Defendant to the more punctual Payment. But the Caſe of Lord *Halliſax* was cited, where Intereſt reſerved at 6 *l. per Cent.* but if duly paid, agreed to accept 5 *l. per Cent.* and becauſe not punctually paid, Intereſt allowed at 6 *l. per Cent. per Ann.*

But where Intereſt was reſerved at 6 *l. per Cent*, *Ant.* Ca. 131. and if duly paid, then agreed to take 5 *l.* Intereſt not duly paid, and Court allowed 6 *l. per Cent.* *Poſt.* Caſe 303.

Caſe 280.

Cotton verſus *Cotton.*

Plaintiff being an Executor and reſiduary Legatee of her former Husband, lends 100 *l.* to *A.* and *B.* and took a Note for it in her own Name, and a Bond in a Truſtee's Name, and after marries *B.* one of the Obligors; the Bond is not extinct.

THE Plaintiff being Executor and reſiduary Legatee to her former Husband, lends 100 *l.* to *A.* and *B.* for which ſhe took a Note in her own Name, and as a farther Security took alſo a Bond from *A.* and *B.* in the Name of *J. S.* in Truſt for her ſelf, and afterwards marries *B.* one of the Obligors, who died. The Bill was to compel Payment of 100 *l.*

It was inſiſted by the Defendant's Counſel, that the Bond being a Truſt for the Wife, and ſhe marrying one of the Obligors, the Marriage was a Releaſe of the Debt, and it was extinguiſhed, as it would have done in Caſe the Bond had been in her own Name. *Sed non allocatur.*

D E

DE
Term. S. Trinitatis,
1693.

In Curia Cancellariæ.

Woodroffe verſus *Farnham.*

Caſe 281.
17 *Junii.*

THE Bill was to be relieved againſt a Bond of *one Hundred* Pounds Penalty for Payment of *fifty* Pounds and Intereſt. The Caſe appeared to be that the Plaintiff and Defendant being both of them Apprentices, the Defendant at *two* ſittings at *Whisk*, had won of the Plaintiff about *one Hundred* Pounds in the whole, for the ſecuring *fifty* Pounds, Part thereof, the Bond in Queſtion was given. The Defendant by Anſwer acknowledged the Money won at Play, and though he was unwilling and declined playing for ſo much; yet the Plaintiff, would not ſuffer im to give over.

One Apprentice gives a Bond to another Apprentice for 50 *l.* won at Play. Bond decreed to be delivered up. Gaming among Apprentices being of the worſt Conſequence.

h

Per Cur. Gaming ought to be diſcouraged in all Caſes, and much more in this, where it is between Apprentices; by the Cuſtom of *London*, it is a ſufficient Cauſe for a Maſter to turn away his Apprentice, becauſe he frequents Gaming, and may juſtify it before the Chamberlain;

By the Cuſtom of *London*, a Maſter may juſtify turningaway his Apprentice, if he frequents Gaming.

berlain; and the Cuſtom ſeems to be grounded on good Reaſon, the Maſter being in Danger to have his Caſh waſted, and his Shop and Houſe robbed, to ſupply the Extravagances of an Apprentice, who frequents Gaming. Decreed the Bond to be delivered up and cancelled.

Caſe 282.
30 *Junii.*

Lane verſus *Williams.*

Ant. Ca. 263. *A.* and *B.* Partners as Woollen-Drapers, *A.* receives Money in the Shop, and gives his Note for it. Though no Proof that this Money was brought into Stock, or uſed in Trade; yet this Note being given in the Shop by one of the Partners, it ſhall bind both; and though this Note at Law binds only the Executor of the ſurviving Partner, yet in Equity the Creditor may follow the Eſtate of the other.

ONE *Newberry* and *Williams* the Defendant's late Husband, being Woollen-Drapers and Partners, *Newberry* ſurvived, and ſome Years after *Newberry* alſo died, and the Plaintiff ſought to recover the Debt againſt the Executors of *Newberry*, who ſigned the Note; but there being a Deficiency of Aſſets, he now brought this Bill to have Satisfaction out of the Eſtate of *Williams*.

For the Defendant it was inſiſted, that it does not appear that *Williams* was privy or conſenting to the borrowing of this Money, or that it was brought into Stock, or uſed in the Trade: And had the Plaintiff demanded it in the Life-time of *Newberry*, or before his Eſtate was waſted and Aſſets exhauſted, the Defendant might have had Recourſe to the Bond of Copartnerſhip, to repair the Loſs ſuſtained by *Newberry*'s taking up this Money, and giving ſuch Note, without the Conſent or Privity of her Husband; but ſhe had now loſt that Remedy, by the Plaintiff's Laches in not demanding the Debt ſooner; and therefore the Plaintiff ought not to have the Aſſiſtance of a Court of Equity to charge her. The Maſter of the Rolls, before whom the Cauſe was firſt heard, diſmiſſed the Bill.

Per

Per Cur. The Money being paid at the Shop, the Note of one Partner binds both; and tho' at Law the Note ſtands good only againſt the Executor of the ſurviving Partner, who was *Newberry*, who received the Money, and ſigned the Note, yet proper in Equity to follow the Eſtate of *Williams* for Satisfaction; and decreed it accordingly.

Richardſon verſus *Goodwin & al'.*

Caſe 283. 14 *Julii, in Court.*

Richardſon ſenior, and *Richardſon* junior, and one *Gonſon* were Partners together in the Trade of a *Dry-Salter*; *Gonſon* imbezils and waſtes the Joint-ſtock, contracts private Debts, and becomes a Bankrupt. The Commiſſioners aſſign the Goods in Partnerſhip. Bill by the Plaintiff for an Account and to have the Goods ſold to the beſt Advantage; and inſiſted that out of the Produce of the Goods, the Debts owing by the Joint-trade ought to be paid in the firſt Place, and that out of *Gonſon*'s Share, Satisfaction muſt be made for what *Gonſon* had waſted or imbeziled; and that the Aſſignees could be in no better a Caſe than the Bankrupt himſelf, and were intitled only to what his third Part would amount unto clear, after Debts paid, and Deductions for his Imbezilment; and the Court ſeemed to be of that Opinion. But ſent it to a Maſter to take the Account, and ſtate the Caſe.

A. and *B.* Partners in Trade; *A.* imbezils the Joint-ſtock, and contracts private Debts and becomes Bankrupt, and his Eſtate is aſſigned by the Commiſſioners: Firſt out of the Joint-ſtock all the Partnerſhip Debts are to be paid; then whether out of *A.*'s Share, Satisfaction is not to be made for what he has imbeziled of the Stock,

before his own private Creditors can come in. *Poſt.* Caſe 628.

Garret & ux' verſus *Pritty & al'.*

Caſe 284. 14 *Julii, in Court.*

MR. *Pritty* by his Will deviſed *three Thouſand* Pounds to his Daughter the Plaintiff *Garrett*'s Wife, at *Twenty-*

One deviſes 3000*l.* to his Daughter at 21, or Marriage, provided ſhe

marry with the Conſent of *A. B.* and if ſhe married without ſuch Conſent, then ſhe was to have but 500 *l.* and the 3000 *l.* Legacy to ceaſe. The Daughter marries without Conſent, yet ſhe ſhall have her whole 3000 *l.* becauſe it is not deviſed over, but only to fall into the Surplus. *Poſt.* 323.

Twenty-one, or Marriage, and recommended her to the Care of one Mr. *Scriven* his Friend. Provided if ſhe married without the Conſent of *Scriven*, her Legacy of *three Thouſand* Pounds to ceaſe, and ſhe to have but *five Hundred* Pounds, and made the Defendant his Son Executor, and reſiduary Legatee. The Plaintiff intermarried without the Conſent of *Scriven*; yet the Court decreed her the whole *three Thouſand* Pounds with Intereſt from the Marriage, and principally becauſe it was not expreſly deviſed over, but to fall into the Surplus.

Caſe 285. *Eodem die.*

Bellaſis Domina verſus *Compton* and *Frankland & al'.*

* Mortgagee aſſigns over his Mortgage to *J. S.* and declares a Truſt by Parol for other Perſons. *J. S.* acknowledges the Truſt. There being an expreſs Truſt declared, tho' by Parol only, ſhall prevent a reſulting Truſt to the Aſſignor.

THE Defendant *Compton* made a Mortgage for a Term for Years to the Lord *Bellaſis*, for ſecuring *one Thouſand eight Hundred* Pounds and Intereſt; the Lord *Bellaſis* aſſigns it over to the Defendant *Frankland*, and ſome Time afterwards gave Inſtructions for the Drawing of a Declaration of Truſt, that *A.* and *B.* ſhould have *Twenty* Pounds *per Ann.* apiece for Life out of the Intereſt-Money, then to his Grand-Daughter, the Daughter of the Lord *Dunham*, if ſhe attained *Twenty-one*; but if died before, then to the Lady *Abergavenny* and *three* other of his Daughters: But before this Deed was executed, the Lord *Bellaſis* dies, having made his Will, and the Lady *Bellaſis* Executrix. She brought her Bill, alledging the Aſſignment was made in Truſt for the Teſtator. The Defendant *Frankland* confeſſed the Aſſignment, and that he was to take no Benefit to himſelf, and ſet forth the Truſt to be *ut ſupra.*

The Statute of Frauds and Perjuries which ſaves reſulting Truſts extends only to ſuch as were reſulting Truſts before the Statute.

The Counſel for the Plaintiff would have this to be a reſulting Truſt; but for the Defendant it was anſwered, that there being an expreſs Truſt declared, though but

but by Parol, there could be no reſulting Truſt, for reſulting Truſts are ſaved indeed by the *Statute* of *Frauds* and *Perjuries*; but are only ſaved and left as they were before the Act: Now a bare Declaration by Parol, before the Act, would prevent any reſulting Truſt.

The Court ſeemed to be of that Opinion, that there could not in this Caſe be any reſulting Truſt, and inclined to decree for the Defendant. But it being inſiſted on by the Plaintiff's Counſel, that the Lord *Bellaſis* was not *compos Mentis*, when he gave Inſtructions for the Deed of Truſt, and there being ſome Proof to that Purpoſe, the Court directed that Matter to be tried at Law.

Chicheſter Bar. verſus *Bickerſtaff* Mil' & al'.

Caſe 286. 14 *Julii.*

THE Plaintiff was Brother and Heir to Sir *John Chicheſter* deceaſed, who married Sir *Charles Bickerſtaff*'s Daughter, and by Articles on the Marriage, Sir *Charles* was to pay *one Thouſand five Hundred* Pounds in Part of the Portion, which together with *one Thouſand five Hundred* Pounds more, to be advanced by Sir *John*, within *three* Years after the Marriage, was to be inveſted in Lands, and ſettled on Sir *John* for Life, his intended Wife for Life, to firſt and other Sons in Tail, Remainder to Daughters, Remainder to Sir *John*'s right Heirs. Sir *John* and his *Lady* within a Year after the Marriage, fall ſick of the Small Pox, the Wife dies firſt, and Sir *John* in *three* Days after, without Iſſue; Sir *John* having made a Will, and the Defendant Sir *Charles* Executor; and deviſed the Reſidue of his perſonal Eſtate after Debts, *&c.* paid, to the Defendant *Frances Chicheſter* his Siſter.

Vol. 1. Caſe 293, 458. Money by Marriage-Articles is agreed to be laid out in Land, and ſettled on the Husband and Wife, and their Iſſue, Remainder to the right Heirs of the Husband. Tho' the Money at firſt is bound by the Articles; yet when Husband and Wife are dead without Iſſue, the Money is in the Diſpoſal of the Husband, and will be Aſſets, and go to his Executor or Adminiſtrator; and a *fortiori* to his reſiduary Legatee.

The

The Plaintiff's Bill was to compel the Defendant Sir *Charles*, to pay him the *one Thouſand five Hundred* Pounds, inſiſting that by Virtue of the Marriage-Articles, the Money ought to be looked on and conſidered in Equity as Land, and therefore belonged to him as Heir to his Brother.

Per Cur. This Money, though once bound by the Articles, yet when the Wife died without Iſſue, became free again, and was under the Power and Diſpoſe of Sir *John*, as the Land would likewiſe have been, in Caſe a Purchaſe had been made purſuant to the Articles, and therefore would have been Aſſets to a Creditor, and muſt have gone to the Executor or Adminiſtrator of Sir *John*; and this Caſe is much ſtronger where there is a reſiduary Legatee, and therefore diſmiſſed the Bill.

Money ſhall in many Caſes be conſidered as Land, when bound by Articles in order to a Purchaſe, but whilſt it remains ſtill Money, and no Purchaſe made, the ſame ſhall be deemed as Part of the perſonal Eſtate of ſuch Perſon, who might have aliened the Land in Caſe a Purchaſe had been made.

Caſe 287.
23 *Julii.*

Domina *Stowell* verſus *Cole.*

Mortgagor brings a Bill to redeem. An Account is decreed, a Report made, divers Proceedings are had in the Cauſe, and the Plaintiff is ordered to pay Coſts, and deliver Poſſeſſion.

THE now Defendant *Cole* brought a Bill againſt the Lord *Stowell*, the Father of the late Lord *Stowell*, to redeem a Mortgage. The Cauſe was heard, and an Account decreed, a Report made, and diverſe Proceedings thereon, and Orders made for *Cole* to pay Coſts, and to deliver Poſſeſſion. The Lord *Stowell* died, and

The Defendant, the Mortgagee dies. Whether his Executor can revive this Suit.

and made the late Lord *Stowell* his Son Executor, who brought a Bill to revive the former Suit, and ſeveral Proceedings were thereupon had, and (*inter alia*) an Appeal to the *Houſe of Peers*, from ſome Order made touching the Account in Queſtion; but before the Matter was finally determined, the Lord *Stowell* the Son alſo dies. The now Plaintiff as Executor to her late Husband, brought a Bill to foreclose, as likewiſe to revive the Decree and Proceedings in the Cauſe wherein *Cole* was Plaintiff, and to have the Benefit of Orders for Coſts, and for Delivery of Poſſeſſion.

Where there is a Decree for a mutual Account, Plaintiff on his own Bill may be decreed to pay the Balance of the Account, and Defendant may revive as well as the Plaintiff in Caſe of an Abatement.

It was inſiſted by the Defendant *Cole*'s Council, that as this Caſe was, the now Plaintiff who ſtood in the Place of the Defendant in the former Cauſe, could not revive, the Bill being only to redeem, and in ſuch Caſe if upon the Event of the Account it ſhould be found too heavy, and the Eſtate not worth redeeming, all that could be done was to diſmiſs the Bill with Coſts, and the Court could not decree the Plaintiff to pay what ſhould appear to be due upon the Account. But where a mutual Account is decreed upon a Dealing in Trade, or the like, there poſſibly the Plaintiff ſhall not be admitted to diſmiſs his Bill after an Account decreed; but ſhall upon his own Bill be decreed to pay what ſhall be found due upon the Account; ſo in that Caſe there may be Reaſon that a Defendant may revive.

Per Cur. If this Queſtion was *res integra* and came in the firſt Inſtance before the Court, poſſibly a Defendant, as this Caſe is, could not revive, but in as much as in this Caſe upon the Death of the Lord *Stowell* the Father, there was a Bill of Revivor brought by the Lord *Stowell* his Son and Executor, and upon an Appeal from an Order of this Court to the Houſe of *Peers*, the Lords confirmed the Proceedings in that Cauſe; cer-

tainly the Lady *Stowell* in this Caſe has the ſame Right to revive upon the Death of her Husband, as he had upon the Death of his Father.

Caſe 288.
25 *Julii.*

Goodfellow verſus *Burchett.*

One on the Marriage of his Daughter, gives a Bond to the Husband for the Daughter's Portion, and afterwards by Will deviſes Land of much greater Value, to the Husband and the Wife and their Heirs. The Deviſe, no Satisfaction of the Bond, though there be a Defect of Aſſets to pay the Teſtator's Debts.

THE Cauſe having been heard, and an Account decreed; upon the Maſter's ſpecial Report the Caſe appeared to be, that one *Hill* on the Marriage of his Daughter to the Defendant *Burchett*, gave a Bond to him for Part of the Portion. And afterwards deviſed ſeveral Lands to his Son in Law *Burchett* and his Wife and their Heirs, being of much greater Value than the Debt, and makes his Son in Law *Burchett* alſo Executor. The Plaintiff was a Creditor of *Hill* the Teſtator, and comes to diſcover Aſſets real or perſonal, to ſatisfy his Debt due by Bond; and the Maſter ſtated ſeveral other Matters ſpecially for the Judgment of the Court, and thereupon *three* Queſtions did ariſe.

Firſt, Whether the Land thus deviſed ſhall in Equity be conſtrued or taken as a Satisfaction of the Bond-Debt; and for the Plaintiff the Caſes of *Blois* and *Blois*, *Jeſſon* and *Jeſſon*, *Brooke* and *Yeomans*, and ſeveral other Caſes, where a Legacy of a greater Value had been conſtrued to be intended in Satisfaction of a Debt; and on the other Hand the Caſe of *Smith* and *Duffield* was cited, where the Court had ſo decreed it, and that Decree reverſed upon an Appeal to the Houſe of Lords.

Ant. Ca. 245.

Ant. Ca. 161, 244.

Per Cur. Caſes of this Nature depend upon Circumſtances, and where a Legacy has been decreed to go in Satisfaction of a Debt, it muſt be grounded upon ſome Evidence, or at leaſt a ſtrong Preſumption that the Teſtator did ſo intend it. But there is no Room for that in

in this Caſe. It plainly appearing the Teſtator intended to give all he could to his Son in Law and Daughter, and to defraud his Creditors; ſo cannot preſume the Deviſe of the Lands was intended in Satisfaction of the Bond-Debt.

An Executor loſes a Bond due to the Teſtator; whether he is chargeable with the Debt to the Creditors of the Teſtator.

Secondly, Another Point in this Caſe was, that the Defendant the Executor had loſt a Bond for a Debt, that was owing to his Teſtator; and it was inſiſted on for the Plaintiff, that the Defendant ought to ſtand charged therewith, and make good the Debt to his Teſtator's Eſtate. For the Defendant it was inſiſted, that a Bond is not Aſſets at Law, but a Creditor muſt expect until the Money due upon it be recovered; nor is the Loſs of a Bond a *Devaſtavit* at Law, and it would be hard to make the Executor anſwer it out of his own Eſtate, in Caſe the Obligor was inſolvent, as in this Caſe he was, eſpecially in Equity; and the rather for that the Looſing of the Bond, did not loſe the Debt, but might be recovered in Equity, and the Defendant had already brought a Bill againſt the Obligor for that Purpoſe.

The Court inclined to charge the Defendant with the Debt; but for the preſent directed only that the Defendant ſhould proſecute the Suit brought by him againſt the Obligor with Effect, in order to recover the Money due on the Bond that was loſt, and reſpited Judgment in the mean Time.

Bond-Creditor brings a Bill againſt an Executor for Recovery of his Debt, and pending this Suit, the Executor confeſſes a Judgment to another Bond-Creditor; the Executor may pay this Judgment before the Bond-Debt,

Thirdly, A third Point in this Caſe was, whether a Judgment confeſſed by the Executor to a Bond-Creditor, after the Bill brought in this Court by the Plaintiff, who was alſo a Bond-Creditor, ſhould be allowed upon the Account. It was inſiſted for the Defendant, that it ought to be allowed; for that the Bringing of a Bill in Equity is not ſtronger, nor can bind the Aſſets more than the Bringing of an Original at Law, and even in that

that Caſe after an Original filed by a Bond-Creditor, if another Bond-Creditor brings his Action, the Executor may confeſs Judgment on the later Action, and *that* ſhall take Place. The Executor may retard one Action, and confeſs Judgment to another ſubſequent Action; and in ſome Caſes is obliged to confeſs Judgment for his own Defence, and plead ſuch Judgment to other Actions then depending; otherwiſe if ſeveral Actions ſhould come to be tried at the ſame Time, he might be doubly charged, and obliged to anſwer the Value of the Aſſets twice over: But a voluntary Payment indeed made after an Original filed, or Bill exhibited, ſhall not be allowed. But even in the Caſe of a voluntary Payment, if the Suit at Law be not by Original, but for the Purpoſe upon a *Latitat* out of the *King's Bench*, there a voluntary Payment ſhall ſtand good, tho' after the Action brought.

Per Cur. Allow the Payment on the Judgment confeſſed after the Bill brought.

DE

Term. S. Michaelis,

1693.

In Curia Cancellariæ.

Ballet verſus *Spranger.*

Caſe 289.
12 *Nov.*

VIDE the Caſe and Decree as to what Proportion the Deviſee for Life ought to bear of Mortgages, and other Incumbrances on the Eſtate. *Ant.* Ca. 253.

Weekes verſus *Slake.*

Caſe 290.

THERE having been an Incloſure made out of the Common, and young Wood and Timber thereon growing, and the Plaintiff inſiſting it was an Improvement within the Proviſion of the Statute of *Merton*, and *W.* 2. The Court thought fit to continue the Injunction, and directed a Trial to be had the next *Aſſiſes*, whether ſufficient Common left for the Tenants.

Lord of a Manor incloſes part of a Common, inſiſting it was an Improvement within the Statute of *Merton.* Court continue the Injunction, and direct a Trial, whether ſufficient Common was left for the Tenants. *Poſt.* Caſe 322.

Caſe 291.

Cutler verſus *Coxeter.*

A. deviſes his perſonal Eſtate to his Wife, whom he makes Executrix, ſhe takes as Executrix, and it ſhall be applied to exenorate the real Eſtate. *Poſt.* Caſe 299.

SIR *Edward Bathurſt* by Will deviſed his perſonal Eſtate to his Wife, whom he made Executrix. *Per Cur.* ſhe takes it as Executrix, and the perſonal Eſtate is to be applied in Exoneration of the real Eſtate; *Wilkinſon* the Six Clerks Caſe cited.

Caſe 292.
25 *Nov.*

Greaves verſus *Powell.*

Ant. Ca. 233.

WHERE an Eſtate was ſubjected by Will, for Payment of Debts and Legacies, Queſtion was, whether the Debts ſhould have a Preference. *Vid.* Decree.

Caſe 293.

Cary verſus *Taylor.*

One dies Inteſtate leaving a Daughter, the Wife of *J. S.* The Daughter dies Inteſtate, and after her Husband dies Inteſtate. Whether the Share of the Daughter ſhall go to her own Adminiſtrator, or to the Adminiſtrator of her Husband.

A. married *B.* the Daughter of *J. S.* who died Inteſtate; *B.* dies before any Diſtribution made of her Father's Eſtate; *A.* alſo dies before any Diſtribution made or Adminiſtration taken to his Wife: The Plaintiff is Adminiſtrator to *A.* the Husband; the Defendant is Adminiſtrator to *B.* the Wife. The Queſtion was, whether the Plaintiff or Defendant had the Right to the Share of the perſonal Eſtate of *J. S.* remaining undiſtributed.

It was admitted on all Hands, that the Share which *B.* was intitled to of her Father's perſonal Eſtate was an Intereſt veſted, and that before any Diſtribution made, or the Time by the Statute limited for the making Di-

ſtribution was expired. But the Doubt was, whether it was ſo veſted, as a Legacy aſſented unto, that it ſhould veſt in the Husband without taking Adminiſtration to his Wife or not. And for the Plaintiff it was inſiſted, that ſince the Statute for ſettling Inteſtates Eſtates, the Adminiſtrator is but in the Nature of a Truſtee, and therefore the taking of the Adminiſtration is as the Acceptance of a Truſt, and implies an Aſſent, that the Eſtate ſhall be diſtributed according to the Statute; and therefore the Shares of the Perſons intitled to Diſtribution muſt be conſidered, not only as a Legacy, but as a Legacy aſſented unto, and conſequently go to the Plaintiff, the Adminiſtrator of the Husband. *Tamen Vid.* the Decree.

Platt verſus *Sprigg & al'.*

Caſe 294. 11 *Nov. at the Rolls.*

Truſtees in a Marriage-Settlement for preſerving contingent Remainders, (there being no Iſſue) are Decreed to join in a Sale, the Settlement being only of an Equity of Redemption, and the Wife conſenting to the Sale.

THE Defendant *Richard Sprigg* in 1681, made a Mortgage of the Lands in Queſtion for the Term of *one Thouſand* Years to one *Morcall*, to ſecure *one Thouſand* Pounds and Intereſt, and alſo confeſſed a Judgment to one *Adams* for *one Hundred* and *fifty* Pounds; and afterwards upon his Marriage ſettles theſe Lands, thus in Mortgage, and incumbred with the Judgment to the Uſe of himſelf for Life, Remainder to the Uſe of Truſtees during the Life of the Husband, to ſupport contingent Remainders; Remainder to his Wife for Life, Remainder to his firſt and other Sons in Tail, Remainder to his own right Heirs; and having no Iſſue, articles to ſell theſe Lands to the Plaintiff, who brings his Bill and ſets out theſe Matters, and that the Truſtees refuſed to join, and the Mortgagee threatned to enter, and pray'd a ſpecifick Execution of the Agreement, and that the Truſtees might join in Conveyances.

Sprigg and his Wife by Anſwer ſet out the Settlement; that they had been married *ſix* Years and had no Iſſue; confeſſed

confeſſed the Contract with the Plaintiff, and were willing to perform it. The Truſtees ſet out the Marriage-Settlement, and were willing to do as the Court ſhould direct, being indempnified.

Where a Settlement on Marriage is made of an Eſtate ſubject to a Mortgage, if the Mortgagee foreclo-ſes the Husband and Wife, it will bind, though Iſſue is afterwards born.

For the Plaintiff it was inſiſted, that the Settlement being only of an Equity of Redemption, the Mortgagee was not bound thereby, but might not only enter but foreclose, which would bind, though there ſhould be Iſſue afterwards born. And the Husband and Wife not being able to redeem, a Sale was abſolutely neceſſary, otherwiſe the Benefit of Redemption would be loſt, as well to the Husband and Wife, as alſo to the Iſſue in Caſe there ſhould be any.

The *Maſter* of the *Rolls* decreed the Truſtees to join in a Sale and to be indemnified, the Settlement being only of an Equity of Redemption, the Wife being in Court and examined, whether ſhe freely conſented thereunto or not.

Caſe 295.

Fox verſus *Crane* and *Wight*.

A. mortgages Lands to *B.* afterwards upon Marriage ſettles the ſame on himſelf for Life, to his Wife for Life, Remainder to the Heirs of his Body by his Wife. Afterwards *A.* mortgages the ſame Lands to *C.* and makes Affidavit they were free from Incumbrances.

John Wight the Defendant's Father was ſeiſed in Fee of the Lands in Queſtion, and in 1676, mortgages them to one *Barnes* for *one Thouſand* Years to ſecure *three Hundred* Pounds and Intereſt; and in 1688, without taking Notice of this Mortgage, in Conſideration of the Marriage then intended, ſettles thoſe Lands to the Uſe of himſelf for Life, to his intended Wife for Life, for her Jointure, Remainder to his Heirs on the Body of *Marry* his intended Wife to be begotten. The Marriage was accordingly had, and Portion paid, and the Defendant *Wight* was the eldeſt Son of the Marriage.

A. dies Inteſtate, leaving a Son. *D.* adminiſters to *A.* during the Minority of the Son, and out of *A.*'s perſonal Eſtate pays off the firſt Mortgage, and takes an Aſſignment in Truſt for the Son. Decreed the Adminiſtrator ſhall not be allowed, as againſt the ſecond Mortgagee, what he paid in Diſcharge of the firſt Mortgage.

After this *Wight* the Father mortgages theſe Lands again to the Plaintiff, and makes *Affidavit* they were free from Incumbrances, and ſhortly afterwards in 1691, dies Inteſtate. The Defendant *Crane* being the Uncle of the Defendant *Wight* takes Adminiſtration during his Minority; and hearing of the Mortgage to *Barnes*, which was prior, and might impeach the Marriage-Settlement, pays what was due on it out of the perſonal Eſtate, and takes an Aſſignment of the Mortgage, and alſo of a Bond given for Performance of Covenants to himſelf in Truſt for his Nephew the Infant.

The Plaintiff being Creditor by Mortgage with a Covenant for Payment of the Money, and Bond for Performance of Covenants, brought his Bill that he might either redeem the firſt Mortgage and hold the Eſtate, until he recieved what was due on both the Mortgages, or that the perſonal Eſtate of *Wight* the Father might be applied to ſatisfy his Debt, and that what *Crane* the Adminiſtrator had paid in Diſcharge of the firſt Mortgage, might not be allowed out of the perſonal Aſſets, but remain a Charge upon the Lands.

For the Defendant it was inſiſted, that the Defendant *Wight*, the Iſſue in Tail coming in under the Marriage-Settlement, was a Purchaſer as well as the Plaintiff, and prior in Time, and if they were both Plaintiffs before the Court to redeem the firſt Mortgage, it would be decreed to the Defendant *Wight*; for in this Caſe *qui prior eſt tempore potior eſt jure*, and much leſs would the Court take that Advantage from him, when, without the Aſſiſtance of the Court, he had got that Mortgage aſſigned in Truſt for himſelf. And as to the perſonal Eſtate, it was as reaſonable to apply it to pay off the firſt Mortgage, as to pay off the latter; and where there were Creditors in equal Degree, the Adminiſtrator might prefer which of them he thought fit; and that this was

not within the Reaſon of the Caſe between *Knight* and *Keyme*: There the perſonal Eſtate was applied, in Prejudice of a Bond-Creditor, to ſatisfy a Statute which bound the Lands, and the Bond could not affect them, and the Court uſually marſhals the Aſſets, ſo as all Creditors may have a Satisfaction; but never to prevent any Creditor from obtaining Satisfaction of his Debt, nor a Purchaſer from protecting his Purchaſe; and in this Caſe the Iſſue in Tail is certainly in the Nature of a Purchaſer; and though the Father had a Power to bar the Intail, yet not having done it, the Iſſue was in *per formam doni*, and now the Settlement was become as effectual, as if it had been limited to the firſt Son, and was ſo intended by the Statute, until that Fiction in Law of a Common Recovery was invented; and the Caſe of *Weale* and *Lower* was cited, where Tenant in Tail had ſold at a full Value, and received the Conſideration-Money, and had covenanted to levy a Fine and was decreed to do it; yet dying (though in Priſon in Contempt for not performing the Decree,) the Iſſue in Tail could not be bound by it.

Tenant in Tail ſells for a full Value, receives the Money, and covenants to levy a Fine, and was afterwards decreed to do it; yet dying, (tho' in Priſon for not performing the Decree) his Iſſue could not be bound.

The *Maſter* of the *Rolls* decreed the Plaintiff's Debt to be ſatisfied as far as Aſſets of *Wight* the Father, and directed that in taking of ſuch Account, *Crane* the Adminiſtrator ſhould not, as againſt the Plaintiff, be allowed the 150 *l.* by him paid to *Barnes* on his Aſſigning of the Mortgage.

Caſe 296.
5 *Dec.*

Lynes verſus *Brown.*

A Copyhold Eſtate is ſurrendered to *J. S.* who reſurrendred the ſame, provided if *A.* paid not 20 *l. per Ann.* to *J. S.* without any Charges or Deductions *J. S.* to re-enter, and the Surrender to be void. Queſtion, whether a Deduction to be out of the 20 *l. per Ann.* for Par-

liament Taxes. This being neither properly a Rent-Annuity, nor Intereſt-Money.

Wilkinſon verſus *Brayfield.*

Woodhouſe verſus *Brayfield.*

Caſe 297.
6 Decemb.

A Conveyance by Deed and Fine gained without Conſideration and indirectly. Court relieved againſt it.

THE Defendant *Brayfield* having by the Means of *Fogg* an Attorney, prevailed on *Elizabeth Corie* to levy a Fine of ſome Houſes in *Norwich*, and to execute a Deed leading the Uſes thereof to *Brayfield* and his Heirs; and it being proved, that ſhe at the Time of levying the Fine declared, ſhe muſt make uſe of ſome Friend's Name in Truſt, and afterwards by Will declaring ſhe had levied ſuch Fine only in Truſt, and the better to enable her to diſpoſe of the Eſtate, and thereby deviſed it to *Wilkinſon* and his Heirs, ſubject to the Payment of her Debts. And altho' *Brayfield* proved a great Familiarity and Friendſhip between them, and that ſhe had declared he ſhould have her Eſtate; yet decreed, not only that the Eſtate ſhould be liable to the Creditors Debts; but that *Brayfield* ſhould convey the Eſtate to the Deviſee *Wilkinſon* and his Heirs.

DE
Term. S. Hillarii,
1693.
In CURIA CANCELLARIÆ.

Caſe 298. *Jan.* 29.

Symonds verſus *Gibſon.*

Bond given by *A.* to *B.* for *B.*'s quitting his Pretence, and procuring *A.* to be admitted Purſer to one of the King's Ships.

BILL to be relieved againſt *four* Bonds entred into by the Plaintiff's Teſtator to the Defendant for quitting his Pretence, and procuring the Plaintiff to be admitted *Purſer* of one of the *King*'s Men of War.

Court relieve on Payment of Principal, without Intereſt or Coſts.

Per Cur. We cannot ſet aſide the Bonds, but will relieve on Payment of the *four Hundred* Pounds Principal, without Intereſt or Coſts.

Caſe 299. *Jan.* 25.

Barton al' Stone verſus *Barton.*

One deviſes, after Debts and Legacies paid, the Surplus of his Eſtate to his Wife and Son *John*, equally, whom he makes his Executors, but if ſhe ſhould marry, that then ſhe ſhould render the Right of being an Executrix, to the Teſtator's Son *Roger*, he to be Partner with his Brother *John* in the Executorſhip. The Wife marries again, ſhe thereby loſes her Right to the Surplus, and to the Executorſhip.

Barton by Will deviſed the Surplus of his Eſtate (his Debts and Legacies being paid) to the Plaintiff his Wife, and *John* his eldeſt Son, equally to be divided betwixt

twixt them; and then adds, *whom I make my Executors:* And further wills, that ſhe ſhould continue his true Widow, but if ſhe marry again, *my Will is, ſhe ſhall render the Right of being my Executrix to my Son* Roger, *to be Partner with his Brother* John *in the Executorſhip.*

The Plaintiff, the Widow of the Teſtator, married one Colonel *Stone*, but ſurmiſed by the Bill ſhe was never actually married to him; but upon a Libel in the Spiritual Court, it was ſentenced ſhe was married, and *that* confirmed upon an Appeal; and *Stone* being alſo dead,

The Queſtion was, taking it that ſhe had been married to *Stone*, whether by that Marriage ſhe had forfeited her Share of the Surplus.

The Caſe of *Wilkinſon*, and of *Cutler* and *Coxeter* cited, where upon like Deviſes, it was decreed the Wife ſhould take as Executor, and not as Legatee. The Maſter of the Rolls was of Opinion that ſhe had, as well loſt her Share of the Surplus, as her Right to the Executorſhip, and diſmiſſed the Bill. *Ant.* Ca. 291.

Mill verſus *Darrel & al'.*

Caſe 300.
7 *Mar.*

THE Caſe was, that the Father died Inteſtate, leaving younger Children unprovided for, being indebted by mortgage, with a Covenant for Payment of the Money, and having entred into a Recogniſance as a farther Security. The Mortgagee by Virtue of the Recogniſance came upon the perſonal Eſtate for Satisfaction of his Debt, ſo that there was nothing left for the younger Children.

One dies Inteſtate leaving younger Children, and indebted by Mortgage with a Covenant for Payment of the Mortgage-Money. Whether the Mortgagee ſhall be permitted to exhauſt all the perſonal Eſtate by the Covenant, and leave the younger Children deſtitute.

The Queſtion was, whether the younger Children, who were Plaintiffs againſt the Heir and the Mortgagee, ſhould have a Recompence for their Shares of the Father's perſonal Eſtate, exhauſted in Payment of the Debt ſecured by Mortgage, out of the mortgaged Lands.

For the Plaintiff it was inſiſted, that the Statute for ſetling Inteſtates Eſtates has made a Will for thoſe that die Inteſtate; and they have the ſame Right to their reſpective Shares, as if ſuch Shares had been reſpectively deviſed to them: Now when the perſonal Eſtate is deviſed away, it ſhall not be applied in Exoneration of the real Eſtate, and though the Heir and Mortgagee ſhould agree to charge the Debt on the perſonal Eſtate, yet the Legatees ſhall be repriſed out of the real Eſtate. *Cur' adviſare vult.*

Caſe 301. 10 *Mar.* *Lord Keeper* Somers.

Sheldon & ux' verſus *Dormer.*

Where there is a Truſt for raiſing Portions out of Rents and Profits, the Lands may be ſold.

BY Settlement on Sir *John Dormer*'s Marriage, the Lands in Queſtion were limited to Sir *John* for Life, Remainder to his firſt and other Sons in Tail, with other Remainders over to the Heirs Male of the Family. Proviſo that Sir *John Dormer* might charge the Premiſſes with *five Thouſand* Pounds for Daughters Portions. Sir *John Dormer* having Iſſue a Son and a Daughter, by Deed, reciting his Power in his Marriage-Settlement, charged the Premiſſes with *five Thouſand* Pounds for his Daughter's Portion, payable at *eighteen* or Marriage; and for the more effectual raiſing thereof, doth appoint that certain Truſtees ſhall have the Poſſeſſion immediately from and after his Deceaſe, until they ſhall by Rents and Profits raiſe and receive the *five Thouſand* Pounds; Part of the Eſtate ſuppoſed to be liable to this Charge was evicted, as being Copyhold; other Part,

as being by a prior Settlement intailed, and what remained was not worth above 4000 *l.* to be ſold.

And the Queſtion in this Caſe was, in regard the Lands were by the Settlement intailed on the Son, who was a *Lunatick*, with Remainders over to the Heirs Male of the Family, and the Charge upon the Eſtate being only by Virtue of a Power reſerved in that Settlement, and Sir *John* having in a particular Manner directed the Way of raiſing it, *viz.* that the Truſtees ſhould receive and take the Profits until the 5000 *l.* were raiſed; whether the Court, as this Caſe was, ought to decree a Sale.

Lord Keeper, We are here upon a Conſtruction of a Truſt, where the Intent of the Party is to govern; and Courts of Equity have always in Caſes of Truſts, taken the ſame Rule of expounding Truſts, and of purſuing the Intention of the Parties therein, as in Caſes of Wills; and that even in Point of Limitations of Eſtates, where the Letter is to be as ſtrictly purſued, as in any Caſe. Now in the Caſe of a Will, where an Eſtate is charged with the raiſing of a Sum of Money, though it be by Rents and Profits, there the Court has frequently decreed Sales; and this Caſe is ſtronger than many of thoſe Caſes, becauſe here is a Time prefixt for the raiſing of the Portion, which cannot be done by annual Rents and Profits by the Time limited: Nay, in this Caſe it can never be done, becauſe the Eſtate charged is defective in Value, and the annual Profits will not pay the Intereſt. That this Caſe was not at all like the Caſe of an *Elegit*, where the Party is to hold until paid by Profits; there he has ſuch an Intereſt as the Law gives him, and a Court of Equity has nothing to do to intermeddle: Nor like the Caſe, where a Term for Years is allotted for the raiſing of the Portion, and it effluxes in Point of Time, before the Portion is raiſed, there a Court of Equity cannot enlarge the Eſtate, nor charge the Inheritance.

In

In this Caſe it is agreed, if Sir *John Dormer* had only ſaid, that purſuant to his Power he charged the Premiſſes with 5000 *l.* without going further, that the Court might have decreed a Sale. Now in the firſt Part of his Deed, he does execute his Power, and expreſly declares the Eſtate ſhall ſtand charged: Then he proceeds and ſays, that for the more effectual Raiſing of the 5000 *l.* the Truſtees ſhall enter and hold until the Money be raiſed by Rents and Profits. It would be an unnatural Conſtruction, to ſay that he meant by this to reſtrain what he had before done: What he ſays for the more effectual Raiſing, you would conſtrue to hinder and reſtrain the Raiſing of it; but the truer Conſtruction of that Clauſe is, that no Part of the Profits ſhould be diverted, or otherwiſe applied, until the 5000 *l.* were raiſed; and the Remainder-Men in Truſt contend for nothing, ſince the Eſtate can never anſwer the Charge laid thereon, and therefore decreed a Sale and all Parties to join.

Caſe 302. 10 *Mar. in Court, Lord Keeper.*

A. poſſeſſed of a Leaſe for Years is outlawed for Treaſon, the King grants away the Term, the Outlawry is reverſed, the Term ought to be reſtored.

Peyton verſus *Ayliffe.*

THE Caſe was, Sir *Robert Peyton* the Plaintiff's Father, being poſſeſſed of ſeveral Houſes in the *Old Bayly* for long Terms for Years, granted to him by the City of *London*, made a Mortgage of the Premiſſes, and being intitled to the Equity of Redemption, was in the Reign of King *James* the Second outlawed for High Treaſon. An Inquiſition was afterwards ſued out, and found *Peyton*'s Title to the Houſes in Queſtion, and the ſame were thereupon ſeiſed into the *King*'s Hands: The *King* being thus intitled, by *Letters Patent* in Conſideration of *one Hundred* Pounds, grants the Premiſſes to the Defendant *Ayliffe*, who had alſo got an Aſſignment of the Mortgage. The Outlawry was afterwards reverſed for Error.

The Plaintiff as Executor to his Father, to whom he was alſo Heir, brought this Bill to redeem the Mortgage.

The Queſtion was, whether by the Reverſal of the Outlawry, he ought to be reſtored to his Equity of Redemption notwithſtanding the Seiſure into the *King*'s Hands, and Grant made by Letters Patent as aforeſaid.

It was inſiſted by the Plaintiff's Counſel, that only the Profits during the Time the Outlawry ſtood in Force were forfeited, and not the Leaſe it ſelf, and conſequently the Equity of Redemption was not forfeited. The Leaſe being the Principal, is to be reſtored upon the Reverſal, although the Profits be forfeited and loſt; and for that Purpoſe cited the Caſe of *Eyre* and *Woodfine* in *Cr. Eliz.* 278. upon Reverſal of an Outlawry for Recuſancy, the Party was reſtored to a Chattle Leaſe, and *Beverly* and *Cornwall*'s Caſe in *Moor*, the Party upon Reverſal reſtored to the Right of preſenting to a Living; and the Caſe of *Pinfold* and *Northey* in the *Exchequer*, the Party reſtored to *Eaſt-India* Stock, though granted away by *Privy Seal*, and transfered purſuant thereunto in the Company's Books. And the Caſe of *Garret* and the Earl of *Holland* in the Court of------ about the Year 1668, where a Man that had a Debt due to him by Judgment and was outlawed, *Progers* the Grantee from the Crown acknowleges Satisfaction upon the Record of the Judgment; and yet upon Reverſal, that Acknowledgment of Satisfaction ſet aſide, and Reſtitution made; and alſo the Caſe in 2 *E.* 4. put in *Hoe*'s Caſe in the *Fifth Report*; they admitted that as to the Profits received there could be no Reſtitution. The Judgment upon the Reverſal being to be reſtored to what was not anſwered to the *King*; but the Party was always reſtored to the principal Thing forfeited, which in this Caſe was the Leaſe; and ſeemed to doubt whether an Equity of Redemption of a Term for Years was forfeited by the Outlawry or not.

Moor 269.

5 Co. 90. b. 1 Roll. Abr. 778.

For the Defendant it was anſwered, that as to the Caſe of *Eyre* and *Woodfine*, that would not be much to the preſent Queſtion; for there was a great Difference between an Outlawry for Treaſon, and an Outlawry for Recuſancy, where although the Outlawry be regular, and no Error to be found in it; yet if the Party at any Time conforms, the Outlawry is to fall; and yet in that Caſe the Lord Chief Baron *Periam* differed in Opinion from the other *Barons*. And as to the Caſe of *Pinfold* and *Northey*, there the Grant was made to the Perſon, at whoſe Suit the Party was outlawed; and do take it that the Perſon who ſues and outlaws the Defendant has a Right to be ſatisfied in the firſt Place; and if whilſt the Eſtate remains in his Hands the Outlawry be reverſed, there may be reaſon the Party ſhall be reſtored: As where a Term is taken in Execution, if delivered over to the Party, on Reverſal of the Judgment, the Defendant ſhall be reſtored to the Term; but if the Term was ſold to a Stranger, there, though the Judgment ſhould be afterwards reverſed, the Party ſhall not be reſtored to the Term. And here in this Caſe, the Defendant has not purchaſed from the Sheriff, but from the *King* himſelf; and inſiſted, there is no Caſe in the Books where a Term for Years after an Outlawry being actually ſold, was ever reſtored to the Party upon the Reverſal of the Outlawry. Lands of Inheritance, or a Freehold ſhall be reſtored, but not the meſne Profits. And as the Profits are forfeited and loſt, ſo is a Term for Years, when taken into the *King*'s Hands and diſpoſed of, being but a perſonal Thing; and cited the Caſe of *Wilkinſon* and
2 Keb. 871. *Rockley* in *Keble*'s Reports, where after Seiſure into the *King*'s Hands, upon Reverſal of the Outlawry, the Party was not immediately reſtored, but put to plead it off in the Exchequer, and ought ſo to do, at leaſt in this Caſe, the Seiſure being not only of the Equity of Redemption,
2 Cr. 246 but of the Term it ſelf; and cited the Caſe of *Goodier* and
1 Roll. 778, 3, 4 *Ince* in 2 *Crook*, where upon a Reverſal after an *Elegit*, there

ſhall be Reſtitution from the Party, but not from the *King*.

The *Lord Keeper* decreed the Plaintiff ſhould be admitted to redeem. The Judgment upon the Reverſal is, that the Party ſhall be reſtored to all that has not been anſwered to the *King*, which in all Caſes has been underſtood of the meſne Profits anſwered to the *King*, and not as to the principal Thing it ſelf, though ſeiſed into the *King*'s Hands, and that is undoubtedly ſo as to a Freehold or Inheritance; and he ſaw no ſubſtantial Difference in the Caſe of a Leaſhold, and took Notice that the Caſe of *Northey* and *Pinfold* was ended by Compromiſe; but the Lord Chief Baron *Hale* was of Opinion, that there ought to have been Reſtitution in that Caſe.

DE
Termino Paſchæ,
1694.
In CURIA CANCELLARIÆ.

Caſe 303. 27 *Apr. in Court Lord Keeper.*

Shode verſus *Parker.*

A Mortgage is made with Intereſt at 5 *l. per Cent.* provided that if the Intereſt be not paid within two Months after due, then to pay 5 *l.* 10 *s.* this is in Nature of a Penalty, and the Court will relieve againſt it; otherwiſe if 5 *l.* 10 *s. per Cent.* be reſerved originally, and to be leſſened to 5 *l. per Cent.* if duly paid within two Months after due.

THE Bill being to foreclose a Mortgage, the Intereſt by the Deed was to be 5 *l. per Cent. per Ann.* and made payable half-yearly, and if not paid by the Space of *two* Months after the Time of Payment, then to pay after the Rate of 5 *l.* 10 *s. per Cent. per Ann.* for Increaſe of Intereſt, the Intereſt being run greatly in Arrear; the Queſtion was, after what Rate the Intereſt ſhould be computed upon the Redemption of the Mortgage.

The Court decreed Intereſt to be computed at the Rate of 5 *l. per Cent. per Ann.* only, and took a Difference where the Intereſt was reſerved at 6 *l. per Cent.* but to be reduced to 5 *l. per Cent.* if paid half-yearly; there if the Party will have the Benefit of lowering or reducing the Intereſt, he muſt comply with the Times of Payment; and ſo decreed in the Lord *Hallifax*'s Caſe; but

Ant. Ca. 279.

where the Intereſt is to be increaſed, if not paid at the D y, *that* is but in the Nature of a Penalty, and relievable in Equity.

Quære tamen, for the Agreement of the Parties ſeems to be the ſame in either Caſe, and whether Intereſt is to be reduced upon Compliance with the Times of Payment, or to be advanced in Default thereof, ſeems only to be a Difference in the expreſſing one and the ſame Thing.

Pilkington Mil' verſus *Stanhope.*

Caſe 304. 3 *Maii, in Court.*

THE Plaintiff having brought a Bill to redeem an old Mortgage, againſt the Defendant, who was then an *Ambaſſador*, at the Court of *Spain*; the Defendant obtained an Order, that all Proceedings ſhould ceaſe, until his Return from his *Embaſſy*: The Plaintiff moved to diſcharge the Order; and upon Debate it was agreed a *Protection* lies for an *Ambaſſador*, *quia profecturus*, or *quia moraturus*, and may at Law caſt an *Eſſoin* for a Year and a Day, and may afterwards renew it, if the Occaſion continues.

Bill againſt an Ambaſſador to redeem; Court ordered all Proceedings to ſtay for a Year and a Day, unleſs the Defendant ſhould return ſooner. An Ambaſſador, when Defendant, has a Right to an *Eſſoin* for a Year and a Day, and afterwards to renew it, if the Occaſion continues.

The Court ordered a Stay of Proceedings for a Year and a Day from this Time, unleſs the Defendant ſhould ſooner return into *England.*

Dodſwell verſus *Nott.*

Caſe 305. 18 *May.*

THE Suit being touching the Loſs and Miſapplication of a Sum of Money given for the Benefit of the Pariſhioners: The Queſtion was, whether any Inhabitant of the Pariſh ought to be admitted as a Witneſs.

Where there is a Diſpute being touching Money given to Pariſhioners, none of the Inhabitants of the Pariſh ought to be Witneſſes.

For the Plaintiff it was inſiſted, that the Intereſt was ſo minute and inconſiderable, that it could not be preſumed to influence the Witneſs, or biaſs him in his Evi-
1 Sid. 192. dence, and cited the Caſe in *firſt Siderfin.*

Per Cur. The Caſes, where the Party was concerned in Intereſt, though never ſo ſmall, have always prevailed, and it was ſo reſolved upon great Debate in the Caſe of the City of *London* concerning the *Water Bailiff.*

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DE
Term. S. Trinitatis,
1694.
In Curia Cancellariæ.

Thompſon verſus *Towne.*

Caſe 306. 9 *Julii.*

J. S. on Sale of Lands, takes a Bond from the Purchaſer to pay any Sum or Sums of Money not exceeding 500 *l.* as he ſhould by Will appoint, and *J. S.* by Will diſtributes it, and appoints Payment of it to ſeveral of his Relations. The Bill was brought by Creditors of *J. S.* for Satisfaction out of Aſſets, and (*inter alia*) to have the 500 *l.* applied towards Payment of their Debts.

Where a Man has a Power to diſpoſe of Money by his Will, this is Aſſets, and liable to his Debts. *Poſt.* Ca. 425.

Per Cur. J. S. having Power to diſpoſe, the 500 *l.* muſt be looked upon as Part of his Eſtate, and decreed it to be Aſſets liable to the Plaintiffs Debts.

DE

DE
Term. S. Michaelis,
1694.
In CURIA CANCELLARIÆ.

Caſe 307. *St. John's College* verſus *Fleming* Mil' & *al'*.

Dean and Chapter make a Leaſe to a Man, his Executors and Adminiſtrators for three Lives. This was held to be a deſcendible Eſtate, and to belong to the Heir, and not the Executor.

THE *Dean and Chapter* of *Carliſle* made a Leaſe to *J. S.* for *three* Lives, *Habend'* to him, his Executors, Adminiſtrators and Aſſigns for *three* Lives; the Leſſee dying, the Queſtion was, whether this ſhould be looked upon as a deſcendible Eſtate and go to the Heir, or whether the Executor ſhould have it.

The Court decreed it to be in its Nature an inheritable Eſtate, and that it ſhould go to the Heir; and the Cauſe afterwards ended by Compromiſe.

2

Shouldham

Shouldham verſus *Shouldham.*

Caſe 308. *6 Nov. in Court.*

By a Marriage-Settlement, a Frehold Eſtate, was ſettled on Husband and Wife for their Lives, Remainder to the firſt, &c. Son in Tail, Remainder to Truſtees for 500 Years to raiſe Portions for Daughters, Remainder over. Covenant from the Husband to ſettle his Copyhold Eſtate to the ſame Uſes. A Surrender is made, but no Term is limited. The Frehold Eſtate not being ſufficient to raiſe the Daughters Portions, Decreed the Copyhold Eſtate ſhould be charged, and liable to raiſe the Portions.

BY a Marriage-Settlement, the Frehold Eſtate was ſettled to the Husband and Wife for Life, and to the firſt and other Sons in Tail; and in Default of Iſſue Male, a Term of *five Hundred* Years was limited to Truſtees to raiſe Portions for Daughters, with Remainder over to the Defendant, the Heir Male of the Family; and this was Part of the Husband's Eſtate who made the Settlement. There was a Covenant in the Deed, that for the better Stay of Livelihood for the Wife, and more ample Proviſion for the Iſſue of the Marriage, he would ſettle the Copyhold Eſtate to the ſame or the like Uſes, and ſubject to the ſame Truſts or Proviſoes, *&c.* as far as the Cuſtom of the Manor would allow of it. There was afterwards a Surrender made to the Uſe of the Husband and Wife for Life, and firſt and other Sons in Tail with Remainder over. There being no Iſſue Male of the Marriage, and the Frehold Eſtate not ſufficient to raiſe the Daughters Portions, they brought a Bill to have the Copyhold ſubjected and made liable thereunto. And for the Defendant it was inſiſted, it was not the Intention of the Parties to the Settlement that the Copyhold ſhould be liable thereunto; nor would the Cuſtom of the Manor allow of the raiſing ſuch Term in Failer of Iſſue Male, for raiſing of Daughters Portions.

The Cauſe was firſt heard at the Rolls, where the Bill was diſmiſſed, but upon an *Appeal* to the Lord *Keeper*, he decreed the Copyhold Eſtate to ſtand charged and liable to the raiſing of the Portions.

Caſe 309. *7 Nov. in Court.*

Wankford verſus *Fottherly.*

One by Letter ſays he will give 1500*l.* Portion with his Daughter. The Daughter marries, and the Father is privy to it, and ſeems to approve of it; Daughter dies, and Husband adminiſters. Father decreed to pay the 1500*l.* Portion.

THE Defendant was decreed to pay 1500*l.* as his Daughter's Portion in Marriage with the Plaintiff *Wankford*, who after his Wife's Deceaſe took Adminiſtration to her. The chief Evidence for the Supporting of which Decree was a Letter, proved to have been Writ by his Direction, wherein it was ſaid he would give 1500*l.* Portion with his Daughter; and that he was afterwards privy to the Marriage, and ſeemed to approve thereof. And this Decree was afterwards affirmed upon an Appeal to the Houſe of Lords.

Caſe 310. *Nov.* 19.

Holt verſus *Holt.*

Plaintiff's Father ſeiſed in Fee of Land, articles to pay *J. S.* 1000*l.* to build an Houſe on the Premiſſes, and dies before the Houſe is built. The Plaintiff the Heir may compel the Builder to build it, and his Father's Executor to pay for it.

James Holt the Defendant's late Husband, and Father to the Plaintiff, articles with *J. S.* touching the Building of an Houſe, and covenants to pay *J. S.* 1000*l.* for the Building of it, and before the Houſe was built dies Inteſtate. The Plaintiff the Son and Heir, on whoſe Inheritance the Houſe was to be built, brought his Bill againſt the Widow and Adminiſtratrix, to compel her ſpecifically to perform this Agreement, and decreed accordingly.

Caſe 311.

Rowney's Caſe.

Baron and Feme Jointenants for their Lives. Baron ſows the Land and dies before Severance. Who ſhall have the Corn?

John Rowney on his Marriage, ſettles the Lands in Queſtion to the Uſe of himſelf and his Wife for their Lives, and of the Survivor of them, Remainder to the Heirs of their two Bodies, *&c.* The Husband dies, leaving the Ground ſowed with Corn. The Queſtion was, whether the Emblements on the Land ſettled as aforeſaid, ſhould go to the Wife, or to the Executors of the

Husband. It was admitted, that where Strangers are Jointenants, it would ſurvive; but being between Husband and Wife, they would have it to be within the Reaſon of the Caſe, where the Husband is ſeiſed in Right of the Wife; and there by the Opinion of my Lord *Rolle*, the Emblements ſhall go to the Executor of the Husband. The Court propoſed to each to take a Moiety, which was agreed to.

Where Strangers are Jointenants, the Emblements will go to the Survivor.

Clerk verſus *Clerk & Dominam Turner.*

Caſe 312. *Nov.* 29.

SIR *Philip Warwick* conveys his Houſe of *Frognall* and *four* Farms to Truſtees upon Truſt, that his Siſters, the Lady *Turner*, and *Arabella Clerk*, might cohabit in the capital Houſe, and equally divide the Rents and Profits of the *four* Farms betwixt them, and the Whole to the Survivor of them. *Arabella Clerke* in her Life-time makes a Leaſe of her Moiety to her Daughter for *eighty* Years to commence upon her Deceaſe, if the Lady *Turner* ſhould ſo long live, and ſoon after dies.

Deviſe to 2 equally to be divided, and to the Survivor of them, they are Jointenants.

Firſt, it was reſolved, that this was a Joint-Eſtate, and not a Tenancy in Common; for although the Words (*equally to be divided betwixt them*) ſometimes in a Will may make a Tenancy in Common only by Way of Conſtruction, and that it was the Intent of the Teſtator that there ſhould be a Diviſion or Partition; yet if afterwards in the Will it is declared, as in this Caſe, it ſhould go to the Survivor, *that* would ouſt ſuch Conſtruction, and it would be a Joint-Eſtate, even in the Caſe of a Deviſe by Will.

Secondly, Taking it to be a Joint-Eſtate, the Leaſe made by *Arabella*, tho' to commence after her Deceaſe, is a Severance of the Jointenancy; and the Leaſe of her Moiety will be good againſt the Survivor.

A. and *B.* are Jointenants. *A.* makes a Leaſe for Years of his Moiety to commence upon his Death, if *B.* ſhall ſo long live. This is a Severance of the Jointenancy, and the Leaſe will bind *B.* if he ſurvives.

DE
Term. S. Michaelis,
1695.
In CURIA CANCELLARIÆ.

Caſe 313.
30 *Octob.*

Snell verſus *Clay.*

Tenant by Curteſy ſhall have the Aid of Equity againſt a Truſt Term aſſigned in Truſt to attend the Inheritance.

THE Plaintiff as *Tenant by the Curteſy*, brought his Bill to be relieved againſt a Term for Years that was aſſigned in Truſt to attend the Inheritance, and had been ſet up by the Heirs at Law in Bar to his Title, and decreed accordingly, that the Term ſhould not be made Uſe of againſt him by the Heirs at Law.

Caſe 314.
Nov. 15.

Richards verſus Dominam *Bergavenny.*

An Houſe, together with the Furniture thereof, is limited to a Feme, and ſuch Heir of her Body as ſhould be living at her Death; and in Default of ſuch, Remainder over.

AN Eſtate, together with the Furniture of the Houſe, being limited to the Lady *Bergavenny*, and ſuch Heir of her Body as ſhould be living at her Death, and in Default of ſuch, the Remainder over. The Queſtion was, whether the Goods go over to the Remainder-Man, or whether the abſolute Property thereof veſted in the Lady *Bergavenny*.

The Feme has an Eſtate-Tail in the Houſe, and the abſolute Property in the Furniture.

Per

Per Cur. The Limitation of the Eſtate to the Lady *Bergavenny*, and ſuch Heir of her Body as ſhould be living at her Death, with a Remainder over for want of ſuch, is an Eſtate-Tail: A Deviſe to a Man for Life, Remainder to the Heir of his Body, tho' in the ſingular Number, or to the Iſſue of his Body is an Eſtate-Tail: But if the Limitation is as in *Archer*'s Caſe, to *J. S.* for Life, Remainder to the Heir of the Body of *J. S.* in the ſingular Number, and to the Heirs of the Body of ſuch Heir, there *J. S.* is but Tenant for Life. But in the principal Caſe, the Limitation making an Eſtate-Tail in the Land, the Goods diſpoſed in the ſame Clauſe, muſt go in the ſame Manner, and conſequently the abſolute Property is in the firſt Deviſee, and no Remainder of Goods after an Eſtate-Tail is good; for the Words (*Heir of her Body*) muſt not as to the Land, be conſtrued to be Words of *Limitation*, and make an Eſtate-Tail, and as to the Goods, to be only Words of *Deſignation* of the Perſon intended to take the Goods; and beſides his Intention appears, that the Goods ſhould go along with the Houſe, and the Deviſee to have like Intereſt in both.

Deviſe to *A.* for Life, Remainder to the Heir of his Body, (tho' in the ſingular Number) is an Eſtate-Tail. 1 Co. 66. b.

The Words (Heirs of the Body) can't in the ſame Clauſe, be conſtrued Words of Limitation, as to Lands, and as to Goods Words of Deſignation of the Perſon.

Stephenſon verſus *Wilſon.*

Caſe 314. 15 *Nov.*

BILL by the Plaintiff, an Adminiſtrator, to be relieved, after a ſpecial *plene Adminiſtravit* pleaded, and Verdict and Judgment thereon, upon Pretence that the Attorney at Law without Direction, pleaded that the Defendant had not Notice of the Original until the 12*th* of *March*, and had then fully adminiſtred. Iſſue taken, that the Defendant had Notice before the 12*th viz.* on the 6*th* of *March*, whereas in Truth he had fully adminiſtred before the 6*th* of *March*, and in Truth before the Original purchaſed, ſo that the Right was never tried at Law.

An Action at Law by a Creditor againſt an Adminiſtrator; Defendant by Miſtake of his Attorney pleads a falſe Plea, and Verdict for the Plaintiff, tho' Merits never tried; yet Equity will not relieve.

Bill diſmiſſed at the *Rolls*, and the Diſmiſſion affirmed upon an Appeal to the *Lord Keeper*.

Caſe 315. 26 *Nov.*

Shaw & al' verſus Lady *Standiſh* Wid', and Sir *Richard Standiſh* her Son.

A. enters into Partnerſhip in Fifths with 3 others for 21 Years, in digging for Mines in *A.*'s Lands, *A.* to have 2 Fifths, and in Conſideration of his Ownerſhip of the Land, to have a Tenth out of the Share of the other Partners. *A.* dies, and his Widow ſets up a voluntary Settlement made after Marriage. Court inclined, that the Partners were as Purchaſers, and that the voluntary Settlement ſhould not ſtand againſt them.

BY Articles made between Sir *Richard Standiſh* Deceaſed, the late Husband of the Lady *Standiſh*, and Father of the Defendant Sir *Richard*, whereby Sir *Richard* reciting he was ſeiſed in Fee of the Manor and Waſtes of *Hoapy* and *Anglezack* in *Lancaſhire*, wherein were ſuppoſed to be ſeveral Rakes, Veins, Pipes and Flats of Lead-Ore; and that Sir *Richard* being minded to take the Plaintiffs *Shaw* and *Smith*, and one *Fowle* to be Partners with him, in managing all Mines diſcovered, or to be diſcovered in any of the Soils of Sir *Richard*: They agree to become Partners together for *Twenty-one* Years in *Fifths*, *viz.* Sir *Richard two Fifths* and *one Tenth*, *Shaw* and *Smith* each a *Fifth*, and *Fowle one Tenth*, and covenant to bear Profits and Loſs in Proportion; provided if any one of the Partners ſhould be minded to deſiſt, and ſignify ſuch his Intention, and pay his Share of the Charges and Expences to that Time, the Agreement as to him, on his Releaſing his Intereſt to the reſt, to be void. And thereby it was further covenanted, that Sir *Richard* and his Heirs, in Recompence of his Title to the Soil and Royalty, ſhould alſo have a *Tenth* of the Ore of the Shares of the ſaid *Shaw* and *Smith*, and *Fowle*. Purſuant to the Articles they ſearched for Mines, and after *two* Years Time, and the Expence of about 120 *l.* they diſcovered a valuable Mine, and worked for about the Space of *three* Months, and then Sir *Richard* dies. The Bill was to have the Benefit of the Agreement.

The

The Defendants the Lady *Standiſh* and her Son inſiſted, that *twelve* Years before the making of the Agreement, Sir *Richard* after Marriage ſettled his Eſtate to himſelf for Life, to his Lady for Jointure, Remainder to their firſt, and other Sons, with Power only to charge it with *three Thouſand* Pounds for younger Childrens Portions.

The principal Queſtion at the Hearing was, whether the Plaintiffs under theſe Articles were to be conſidered as Purchaſers, ſo as they might avoid this voluntary Settlement, and become intitled to have their Agreement decreed in Equity.

For the Plaintiffs it was inſiſted, that they were in the Nature of Purchaſers, and that by the Statute of 27 *Eliz.* all voluntary Conveyances are void as againſt Purchaſers; and there was a Difference between Purchaſers and Creditors, for the Statute of 13 *Eliz.* makes not every voluntary Conveyance, but only fraudulent Conveyances, void as againſt Creditors; ſo that as to Creditors, it is not ſufficient to ſay the Conveyance is voluntary, but muſt ſhew they were Creditors at the Time of the Conveyance made, or by ſome other Circumſtances make it appear that the Conveyance was made with an Intent to deceive or defraud a Creditor: But in the Caſe of a Purchaſer, all voluntary Conveyances are void without more, by the expreſs Proviſion of the Statute. And it has been adjudged at Law, that a Leſſee at a Rack-Rent and who paid no Fine, is a Purchaſer within the Statute, and ſhall avoid a voluntary Convevance: And inſiſted, they had at leaſt as ſtrong a Caſe under the Articles, as the Caſe of a Leſſee at a Rack-Rent, and were as much Purchaſers as ſuch Leſſees can be reckoned to be; and in Truth their Caſe was more like that, where a Leſſee paid not only an annual Rent, but had alſo paid a Fine, they having run the Hazard of loſing the Money expended in Search for a Mine, and had actually

A Leſſee at a Rack-Rent, and who paid no Fine, is a Purchaſer, and ſhall avoid a voluntary Conveyance.

actually expended 120 *l.* before any Mine diſcovered; and the Defendants would now reap the Benefit of what they had gained with ſuch Hazard and Expence as aforeſaid.

For the Defendants it was anſwered, that a Leſſee at a Rack-Rent is bound to pay his Rent during the Term, and that whether the Land was worth his Money or not; but under theſe Articles the Plaintiffs were at Liberty to go off and deſiſt, when they pleaſed, and it was at their Election whether they ſhould go on, and expend any Thing or not, either in the Search for, or in the Working of the Mine, when found, and what they were to pay in this Caſe, was not any certain Sum, but only a *Tenth* Part of the Ore that ſhould be got.

The Court took Time to conſider of it, but inclined to decree for the Plaintiffs, for Execution of the Agreement againſt the voluntary Settlement.

Caſe 315. *Eodem die.*

Sawyer verſus *Bletſoe.*

Husband conveys Lands to a Truſtee in Fee, in Truſt out of the Rents, to pay 6 *l. per Ann.* for the ſeparate Uſe of the Wife, and to be at her Diſpoſal, then to the Uſe of the Husband for Life, after his Deceaſe, to the Uſe of the Heirs of the Wife, until the Heirs or Aſſignees of the Husband ſhould pay to the Executors, Adminiſtrators or Aſſigns of the Wife, 100 *l.* with Intereſt from the Death of the Husband, then to the Wife for her Life for her Jointure, Remainder over. The Wife dies firſt, having by her Will diſpoſed of this 100 *l.* Held the Wife had no Power to diſpoſe of this Money.

Richard Bayly, by Deed and Fine, conveys to *Sawyer* and his Heirs ſeveral Lands therein mentioned, to the Intent he might receive and take out of the Rents and Profits 6 *l. per Ann.* during the joint Lives of him the ſaid *Richard Bayly* and his Wife, as a ſeparate Proviſion for the Wife, ſo as the Husband might not intermeddle, but to be at her ſole and ſeparate Diſpoſe, then to the Uſe of *Richard Bayly* for Life, and after his Deceaſe to the Heirs of the Wife, until the Heirs or Aſſigns of the Husband ſhould pay unto the Executors, Adminiſtrators or Aſſigns of the Wife, 100 *l.* with In-

tereſt from the Death of *Richard Bayly*, then to the Wife for her Life for her Jointure, with other Remainders over. The Wife dies in the Life-time of her Husband, but takes upon her to make a Will, and diſpoſes of the 100 *l.* amongſt her Relations, and made *Sawyer* Executor. *Richard Bayly* afterwards by Will deviſed the Lands to *Bletſoe*, who had married his Daughter. *Sawyer* had formerly brought an Ejectment in the Name of the Heirs of the Wife and recovered at Law. *Bletſoe* the Deviſee of the Lands by the Will of *Richard Bayly* brought his Bill to be relieved; and on the Hearing of the Cauſe, was decreed to pay the 100 *l.* with Intereſt from the Death of *Richard Bayly*; or in Default of Payment, his Bill was to ſtand diſmiſſed with Coſts, and for Non-payment the Bill was diſmiſſed accordingly, and the Coſts taxed and paid. And the Ejectment Leaſe being expired, *Bletſoe* got a Conveyance from the Heirs of the Wife, by which he had gained the Title at Law; ſo that *Sawyer* was now become Plaintiff in Equity, to have the 100 *l.* with Intereſt paid; and by his Bill ſet forth the Proceedings in the former Cauſe, and complained of the Conveyance obtained by *Bletſoe* from the Heirs of the Wife, who were but in the Nature of Truſtees for the Benefit of the Executor and Legatees of the Wife.

Firſt it was agreed, that notwithſtanding the Diſmiſſion of *Bletſoe*'s Bill, *Sawyer* being now Plaintiff by an original Bill, the Cauſe was open, and the Merits of the Caſe properly before the Court, ſo that the Queſtion was, whether upon the Deed the Wife dying in the Life-time of the Husband, had Power to appoint or diſpoſe by Will or otherwiſe this 100 *l.*

Tho' Plaintiff's Bill is diſmiſt on the Merits; yet if by the Plaintiff's gaining the legal Eſtate, Defendant is forced to be Plaintiff; the Cauſe is open, and the Merits of the Cauſe are before the Court.

Secondly, it was agreed that where the Wife has Power to diſpoſe in the Life-time of the Husband, though it

If a Wife has a Power to diſpoſe of Money in the Life of her Husband, ſhe may diſpoſe of it by a Writing in Nature of a Will, though not ſo provided.

it be not particularly provided that ſhe may diſpoſe by Will; yet a Diſpoſition by a Writing in the Nature of a Will would be a good Diſpoſition or Appointment.

So that the Queſtion was reduced to this, *viz.* whether as the Deed is penned, it was the Intention of the Parties, that although ſhe died in the Life-time of her Husband, ſhe might diſpoſe of this 100 *l.*

And the Court was of Opinion that ſhe could not, for that it appears that if the Husband ſurvived, the 6 *l. per Ann.* was to ceaſe; for he was in ſuch Caſe to hold the Eſtate for his Life exempt from any Charge, and the 100 *l.* was to be paid with Intereſt only from the Deceaſe of the Husband, and if the Husband ſurvives her, he is in Law her Aſſignee. And it is obſervable that Care is taken, that ſhe, notwithſtanding the Coverture, might diſpoſe of the 6 *l. per Ann.* but no ſuch Proviſion as to the 100 *l.* And beſides it is reaſonable to ſuppoſe, that if it had been intended that the 100 *l.* ſhould remain a Charge upon the Eſtate, although the Husband ſhould ſurvive, it would not only have carried Intereſt during the Life of the Husband, but Proviſion would have been made that the Husband in his Life-time might have redeemed and freed his Eſtate: But the Deed provides only that the Heir of the Husband might pay the 100 *l.* and therefore diſmiſſed the Plaintiff's Bill.

5

DE
Term. S. Michaelis,
1696.

In Curia Cancellariæ.

Hide verſus *Parrot.*

Caſe 316. 14 *Oct.*

THE Plaintiff *Hide*'s Father deviſed the Goods in his Houſe at *Hounſditch* in theſe Words, *I give and bequeath unto my Wife, all my Houſhold Goods that are in my Dwelling-Houſe at* Hoddeſden *in the Pariſh of* Much-Amwell, *during her natural Life: And after her Deceaſe I give and bequeath my ſaid Houſhold Goods unto my Son* Joſeph *for ever.* The Queſtion was, whether the Deviſe over of theſe perſonal Chattles (as the Will was worded) was good or not.

A. deviſes Houſhold Goods to his Wife for Life, and afterwards to his Son. This is a good Deviſe over and the ſame, as if the Deviſe had been only of the Uſe of the Goods, to the Wife for Life. *Ant.* Caſe 230.

It was inſiſted by the Defendant's Counſel, that the Deviſe over was void, and relied on the Difference taken in the Books, where the Thing it ſelf was deviſed, as in this Caſe the Goods were deviſed, the Deviſe over was void; but where only the Uſe of them is deviſed to one for Life, it is otherwiſe; and for that Purpoſe cited the Caſe 37 *H.* 6. 30. *Brook*'s *Abridgment*, Tit. *Deviſe*, *Plowden*'s *Commentaries* 521. *b. Owen*'s *Reports* 33. and *Marſh*'s *Reports*

Reports 106. where a Prohibition was granted out of the Court of Common Pleas, to the Court of the Marches of *Wales*, for proceeding for the Deviſe over of a perſonal Chattle.

For the Plaintiff it was anſwered, that all theſe Authorities cited were built upon the Caſe of 37 *H.* 6. but of latter Times it had been otherwiſe reſolved upon great Debate, and inſtanced in the Caſe of the Lord *Ferrars*, *Hart* and *Say*, and *Vachell* and *Vachell*, &c. and that in the preſent Caſe, the ſame ariſing upon a Will, a Conſtruction (as far as the Law will admit) is to be made, that the Intention of the Teſtator may take Place. And therefore if a Man poſſeſſed of a Term for Years, grants the Term to one for Life, the Remainder over; the Remainder over is void: But in the Caſe of a Will, or of an Aſſignment by Way of Truſt, there the Remainder over is good.

Where a perſonal Chattle is deviſed for a limited Time, this is to be intended of the Uſe of it, and not of the Thing it ſelf.

The *Lord Keeper* held that the Deviſe over was good, for as to the perſonal Chattles, the Civil and Common Law is to be conſidered, and there the Rule is, where perſonal Chattles are deviſed for a limited Time, it ſhall be intended the Uſe of them only, and not the Deviſe of the Thing it ſelf, and therefore allowed the Remainder over to be good.

DE

Term. S. Hillarii,

1697.

In Curia Cancellariæ.

Lucius Henry Cary Lord Viſcount *Falkland*, Son and Heir of *Edw. Cary*, an Infant, by his Guardian, } Plaintiff.

James Bertie and *Elizabeth* his Wife, Sir *William Whitlock*, *John Grout* and others, } Defendants.

Caſe 317. *Jan.* 25.

John Cary of *Stanwell* Eſq, having neither Wife nor Child, and the Defendant *Elizabeth*, now the Wife of Mr. *Bertie*, being his Niece and Heir at Law, on *Sept.* 10, One deviſes Lands to Truſtees and their Heirs, in Truſt to pay ſuch of his Debts and Legacies as his perſonal Eſtate ſhould fall ſhort to pay; then in Truſt for his Niece *Elizabeth* (his Heir at Law) for her Life, in caſe ſhe within three Years after his Death ſhould be married to the Lord *Guilford*, Remainder to her firſt, &c. Son by the Lord *Guilford* in Tail Male. In Default of ſuch Iſſue, or in caſe the ſaid Marriage ſhould not take Effect within the three Years, then in Truſt for the Lord *Falkland* for Life, Remainder to his firſt, &c. Son in Tail Male, Remainder to his own right Heirs. The Niece's Marriage with the Lord *Guilford* does not take Effect, and after the three Years ſhe marries Mr. *Bertie* with the Truſtees Conſent. This is a Condition precedent, and Equity cannot relieve againſt the Non-performance.

10, 1685, he made his Will, and thereby deviſed his Manor of *Stanwell*, and divers other Manors and Lands, being his own real Eſtate (except his Manor of *Caldicot*, which he thereby gave to his Kinſman *Edward Cary*) to *Grout*, *Hall* and *Whitlock* and their Heirs, upon Truſt, (*inter al'*) to pay what Debts and Legacies his perſonal Eſtate ſhould not extend to ſatisfy, and then in Truſt for the Honourable *Elizabeth Willoughby*, the Defendant, his Coſin and Heir, in Caſe ſhe ſhould within *three* Years after his Death be married to *Francis* Lord *Guilford*, for her Life; and after her Death, in caſe ſuch Marriage was had, to the eldeſt Son of the Lord *Guilford* on her Body to be begotten, and to the Heirs Males of the Body of ſuch Son; and for Default of ſuch Iſſue, to all other the Sons of the ſaid *Elizabeth* by the Lord *Guilford* in Tail Male; and in Default of ſuch Iſſue, or in caſe ſuch Marriage ſhould not take Effect within the ſaid *three* Years, then in Truſt for *Anthony* Lord *Falkland* for Life, and to his firſt and other Sons in Tail Male; in Default of ſuch Iſſue, in Truſt for *Edward Cary*, the Plaintiff's Father, for Life, and to his firſt and other Sons in Tail Male; and in Default of ſuch Iſſue, in Truſt for the right Heirs of the ſaid *John Cary* the Teſtator: And deviſed to his Truſtees the Leaſehold ſubject to the ſame Truſts, as are declared concerning the Freehold; and deviſed to them his Houſhold Goods at *Stanwell*, that the ſame might go and be for the Benefit of ſuch Perſon, who by Virtue of his Will ſhould be intitled to his Houſe.

Sept. 18, 1685, he made a Codicil, only directing ſome other Legacies.

The 20*th* of the ſame Month he makes another Codicil, reciting that by his Will he had appointed the Truſt of his real Eſtate, to be for the Benefit of the Honourable *Elizabeth Willoughby*, in Caſe ſhe ſhould within *three* Years after his Deceaſe be lawfully married to the Lord

Guilford: Now his Will is, that if the ſaid Marriage ſhould take Effect before Years of Conſent, and if not afterwards, when of a competent Age, ratified, the ſaid *Elizabeth Willoughby* ſhould have no Benefit of the ſaid Truſt, other than ſhe ſhould have had, if the Marriage had been never ſolemniſed; and deviſes the Tuition of his Niece to the Lady *Wiſeman*, the Lord *Guilford*'s Siſter, and ſoon after died.

The Marriage between the Lord *Guilford* and *Elizabeth Willoughby* did not take Effect within the *three* Years, and after they were elapſed, ſhe intermarried with the Defendant Mr. *Bertie*, having firſt by her Truſtees come to an Agreement with *Anthony* Lord *Falkland*, and *Edward Cary* (the Plaintiff's Father) that they, on the Terms agreed on, ſhould permit her to enjoy the Eſtate; but they being both but Tenants for Life and ſince dead, the Plaintiff, the Son and Heir of *Edward Cary*, brought his Bill claiming the Benefit of the Truſt, demanding an Account of Profits, and a Conveyance of the legal Eſtate from the Truſtees.

Mr. *Bertie* and his Wife had alſo brought their Bill to the like Effect. This Cauſe was heard by the *Lord Chancellor Somers*, aſſiſted with the two *Chief Juſtices*, and this Day was appointed for the Delivery of their Opinions.

Lord Chief Juſtice Treby. I take this Will to be deſigned by the Teſtator for a final and fixed Settlement of the Eſtate, and although *Elizabeth Willoughby* was his Niece and Heir at Law; yet the Lord *Falkland* was of his Name and Blood, though not altogether ſo nearly related to him, as the Defendant, his Niece and Heir at Law: And it appears likewiſe in the Caſe, that the Teſtator was related alſo to the Lord *Guilford* by Marriage, but not in Blood.

Firſt,

Firſt, He was of Opinion that the Defendant *Elizabeth*'s being willing and conſenting, or endeavouring to bring about the Marriage, would not be of any Avail or Moment in this Caſe; for that the Will was formed not upon the Endeavour or Agreement of the Parties to marry, but upon the Event. If a Marriage ſhould be had according to the Will, then his Niece was to have an Eſtate for Life, and ſo to firſt and other Sons of Lord *Guilford* on her Body begotten; but was to take nothing by the Will, unleſs the Marriage was actually had. And this appears more plainly by the Codicil, whereby it is provided, that although a Marriage ſhould be ſo far proceeded in, as to be ſolemniſed between his Niece and the Lord *Guilford infra annos nubiles*, yet unleſs afterwards confirmed, when both of Age capable to contract Marriage, (for by Law until both are of competent Age, that is the Man *Fourteen*, and the Woman *Twelve*, either of them are at Liberty to go off from ſuch Marriage) ſuch Marriage was not to be reckoned a Marriage within the Intention of the Will, nor would his Niece take any Eſtate thereby.

He obſerved Mr. *Bertie*'s Counſel ſeemed to be a little at a Loſs, what Relief, what Conveyance to ask from the Truſtees, whether a Fee, or an Eſtate in Tail Male to *Elizabeth*, and her firſt and other Sons by Mr. *Bertie*, or whether to content themſelves only with an Eſtate for Life.

In the determining and judging upon this Caſe he was of Opinion,

Firſt, That no Regard was to be had to the Greatneſs or Quality of the Perſons. The Rule the Divine Lawgiver laid down was, that there ſhould not be any Reſpect, even to the Poor, in Judgment, much leſs to the Rich.

Secondly, That all the parol Proof on both Sides is to be rejected, and thrown out of the Caſe, (that is to ſay) the Declarations of the Kindneſs the Teſtator had for his Niece the Defendant, and that ſhe was his Heir, and he would not diſinherit her, and the like, *&c.* And the great Incertainty there is of Proof in this Caſe ſhews how neceſſary it was to make the Statute againſt *Frauds and Perjuries.* The Caſe therefore muſt be determined as it ſtands upon the Will, and conſequently to enter into an Inquiry what Regard he had to his Niece; how far he conſidered the Lord *Guilford* either in Point of Affection, or in Gratitude for good Offices received, or by Reaſon of Affinity by Marriage, or the like, is not material, nor neceſſary to know; and it may be it is not poſſible now to know what induced him to limit his Eſtate in the Manner as by his Will is expreſſed; but he having done it, we muſt agree with the Lord *Dyer*, that Mens Deeds and Wills, by which they ſettle their Eſtates, are the Laws that private Men are allowed to make, and they are not to be altered even by the *King* in his Courts of Law, or Conſcience; we muſt take it as we find it.

In Caſe of a Deviſe of Lands no Regard to be had to parol Declaration

And that being ſo, thus far his Intention plainly appears, that his Heir ſhould not have his Eſtate, unleſs ſhe married with the Lord *Guilford*, and likewiſe that neither the Lord *Guilford*, nor his Iſſue were to have any Benefit by it, unleſs he married his Niece. And the Condition, which is a Condition precedent, not having been performed, the Marriage not having taken Effect, it is plain that the Eſtate by the Letter of the Will is gone over to the Lord *Falkland*, and the Truſt of the Eſtate veſted in him.

All that remains is, whether a Court of Equity can relieve in this Caſe, and in what Manner.

Firſt, The Defendant *Elizabeth* cannot have the Inheritance, for if ſhe had performed the Condition in the Will, ſhe was to have had but an Eſtate for Life, with a Remainder to her firſt and other Sons by the Lord *Guilford*; and ſhe muſt not have a greater and better Eſtate by not performing, than ſhe could have had in Caſe ſhe had performed the Condition.

Secondly, If ſhe cannot be intitled to the Inheritance, yet it hath been inſiſted on by her Counſel, that ſhe ought to have an Eſtate for her Life, and to her firſt and other Sons in Tail Male by Mr. *Bertie*; for that it was not through her Default, that the Marriage with the Lord *Guilford* was not accompliſhed, and that ſhe has equitably performed the Will, by marrying a Perſon equal in Quality and Eſtate to the Lord *Guilford*; and this they call a Performance of the Condition *cypres*, that ſhe hath gone as far as was in her own Power, and cited the Caſe of *Popham* and *Bamfield*, where the Court relieved upon an Equivalent as a Precedent to ſuit this Caſe.

Vol. 1. Caſe 73, 159.

But that Caſe is not like this; and they run upon a plain Miſtake, in ſaying that they come to be relieved againſt a Forfeiture; and that the Teſtator by his Will principally intended the Advancement of his Niece; whereas the Will is made in Derogation of her Right as Heir at Law. And although the Teſtator might be willing, and it would be agreeable enough to him if ſuch Marriage took Effect, yet he handles that Matter with ſome Indifferency; for he does neither enjoin his Niece to marry the Lord *Guilford*, nor ſo much as recommends to either Party, but leaves them at their Liberty. But if the Marriage took Effect, the Eſtate was to go accordingly; if not, the Eſtate was to go to thoſe of his Name and Blood. If they ſhould marry, they were to take the Eſtate; it is given to them in the Conjunctive, to neither of them ſeverally; there is no Lati-

tude left for her to chooſe another Man: It is not a Caſe in Compenſation; it is not capable of an Equivalent to anſwer the Will of the Teſtator: Nor can, as I apprehend, a Court of Equity relieve, or decree even an Eſtate for Life to the Defendant, unleſs they can decree Mr. *Bertie* and the Lord *Falkland* to be the ſame Perſon.

Lord Chief Juſtice Holt was of the ſame Opinion, that the Bill ought to be diſmiſſed; and firſt was clear of Opinion that all the parol Proof, as to what the Teſtator either declared, or intended, was to be diſallowed, and the Caſe muſt ſtand confined to the Will, and is to be conſidered as it ſtands upon the Will alone, and muſt have been ſo even before the Making of the Statute of *Frauds and Perjuries*; for by the Statute of *Wills*, by which Men are enabled to make Wills, and deviſe their Lands, it muſt be a Will in Writing; and ſhould parol Proof be admitted, it would introduce a mighty Incertainty, and an infinite Inconvenience. The laſt Will of a Man is looked upon as the laſt ſerious Act of his Life, as to the Diſpoſition of his Eſtate, and muſt be admitted ſufficient to repeal all former Wills, and much more to control all parol Declarations.

Equity cannot relieve againſt the Breach of a Condition precedent.

It is plainly a Condition precedent. In Caſes of Conditions ſubſequent, that are to defeat an Eſtate, thoſe are not favoured in Law; and if the Condition becomes impoſſible by the Act of God, the Eſtate ſhall not be defeated or forfeited; and a Court of Equity may relieve to prevent the Deveſting of an Eſtate, but cannot relieve to give an Eſtate that never veſted. The Caſe of *Fry* and *Porter* is much a ſtronger Caſe, and more proper for Relief, the Condition there being to be performed by an Infant, and an Infant too that had no Notice of the Condition in the Will. In the Caſe of the Earl of *Mountague* and Earl of *Bath*, there the Duke of *Albermarle* who made the Settlement, and had reſerved a Power to revoke, yet having tied himſelf to ſtrict Terms, as to the Man-

1 Mod. 300.

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ner and Circumſtances of doing it, although by his laſt Will made in a very ſolemn and deliberate Manner, he ſufficiently expreſſed his Intention and Reſolution to revoke it; yet the Court would not relieve in that Caſe; and if the Party himſelf, who was Maſter of the Eſtate, and might have diſpoſed of it as he pleaſed, is to be tied down to the Terms and Circumſtances he had impoſed upon himſelf; thoſe that claim or derive under him; thoſe to whom he gives an Eſtate upon Terms and Conditions, muſt ſtand much more obliged to the Performance of the Conditions and Circumſtances upon which it is given. And if the Condition becomes impoſſible even by the Act of God, as in caſe the Lord *Guilford* had died within the *three* Years, or ſoon after the Death of the Teſtator, he was of Opinion the Eſtate would never ariſe; there would be no Relief even in that Caſe, much leſs is there any Room for Relief in the Caſe in Queſtion.

On the Will, the Teſtator's Intention is plain and expreſs, that his Niece ſhould not have the Eſtate unleſs the Marriage took Effect; an actual Marriage was plainly by him intended upon the Face of the Will; and by his further Declaration in the Codicil put beyond Doubt. The Proſpect that ſuch Marriage might take Effect, ſeems to be the only Conſideration that induced him to give the Eſtate in ſuch a Manner as he has done. It appears by the Proof in the Cauſe, that he had a real Kindneſs and Affection for the Lord *Guilford*; and as he had a Kindneſs and Affection for his Niece, ſo it likewiſe appears he was deſirous to preſerve the Eſtate in his Name and Family. And whereas it is objected, that the Heir at Law is to be favoured, *that* may hold, where the Words are ambiguous or doubtful, there ſhall be no ſtrained Conſtruction to work a Diſheriſon. But where there is no Doubt, no Ambiguity, the Plea of Heirſhip muſt not control a plain and expreſs Will. And it is very vain, what has been pretended, that he did

In caſe of doubtful Words of a Will, an Heir is to be favoured: Not where the Will is plain.

not intend to diſinherit his Heir, when the whole Frame and Intent of the Will is to prevent the Deſcent, and that ſhe ſhould not take as Heir. And it is likewiſe as vain to talk of an Equivalent; although the Lady may be as well preferr'd, or advanced in Marriage to Mr. *Bertie*, *that* is no Equivalent to the Teſtator, who had an Affection for the Lord *Guilford*, and was for ought appears an utter Stranger to Mr. *Bertie*, and was minded his Niece ſhould marry the Lord *Guilford:* It is in Truth no more an Equivalent, than it may be pretended to be a Performance of the Condition; and it would be hard to maintain, that where an Eſtate is given upon Condition that the Niece marries one Man, to ſay that ſhe has performed that Condition; not in marrying him, but in marrying another Man; and concluded, that if it was a Rule in Equity, that Eſtates ought to go according to the Will of the Dead, he muſt adviſe the Lord *Chancellor* to diſmiſs the Bill; but if this Court can alter Wills, it might be proper to relieve the Plaintiff in the croſs Cauſe.

Lord Chancellor concurred in Opinion with the two *Chief Juſtices*, and obſerved that it was plainly a Condition precedent, for that by the Will the *three* Years Profits after the Deceaſe of the Teſtator were to be applied to pay the Debts, ſo nothing deſcended in the mean Time, nor veſted; and there was no Ground to maintain what was offered from the Bar, that this ſhould be deemed a Condition ſubſequent, or to deveſt an Eſtate, and obſerved there could not be ſtricter Words to make a Condition precedent, than what were inſerted in the Will.

And his Intention is manifeſt that his Niece ſhould take nothing as Heir, unleſs there ſhould happen to be a Failer of Iſſue Male of the *Carys*; but in Caſe his Niece married the Lord *Guilford*, then he preferred her, and ſhe was to take before the Lord *Falkland*, and the reſt of his Name

and Blood; but if ſuch Marriage was not had, then the Lord *Falkland*, and thoſe of his Name and Blood are preferr'd to her. If Lord *Guilford* had intermarried with her, and had died without Iſſue Male, it is plain that neither her Daughters by him, nor any Iſſue Male of hers by any after taken Husband, could have become intitled to the Eſtate by the Deviſe in the Will.

As to what has been ſaid of its being an hard Limitation, and that being in the Caſe of a Truſt, there is a great Latitude of expounding in a Court of Equity, to correct the Rigour of a Deviſe. Limitations of Eſtates, whether it were by Way of Truſt, or by Eſtates executed at the Common Law, were to be governed by the ſame Rule; and it is much better, that an Eſtate ſhould be carried from the Heir by a hard or imprudent Diſpoſition, than that the Courts in *Weſtminſter-Hall* ſhould take upon them to vary from the Intention of the Teſtator expreſſed in his Will.

King as *Pater patriæ* has the Direction of Charities, Infants, Ideots, Lunaticks.

And as to the Plea of Infancy, it is true Infants are always favoured. In this Court there were ſeveral Things that belonged to the *King* as *Pater patriæ*, and fell under the Care and Direction of this Court, as Charities, Infants, Ideots, Lunaticks, *&c.* afterwards ſuch of them as were of Profit and Advantage to the King were removed to the *Court of Wards* by the Statute; but upon the Diſſolution of that Court, came back again to the Chancery, where the Intereſts of Infants is ſo far regarded and taken Care of, that no Decree ſhall be made againſt an Infant, without having a Day given him to ſhew Cauſe after he comes of Age. An Infant may by his *Prochein Amy* call his Guardian to an Account, even during his Minority: If a Stranger enters and receives the Profits of an Infant's Eſtate, he ſhall in the Conſideration of this Court, be looked upon as a Truſtee for the Infant, and the like. But the Court never pretended to change the Nature of Infants Eſtate, or to make

Divers Privileges of Infants.

that abſolute, which was defeaſible. Where an Eſtate is given to an Infant upon a Condition, ſuch Act as an Infant can perform, muſt be done by him; and Infancy in ſuch Caſe is no Excuſe; and ſo it was held in that Caſe of *Fry* and *Porter*, which has been cited. But Infants are bound by Conditions.

The Caſe of *Popham* and *Bamfield* has no Reſemblance to this Caſe, for here can be no Equivalent; the Nature of this Condition is not in Point of Value, but on a collateral Act to be done: And as to the Caſe of the Earl of *Salisbury* which was cited, there was a Performance of the Condition in Subſtance, and there was no expreſs Deviſe over of the 10000 *l.* in caſe the Counteſs, then Mrs. *Bennet*, did not obſerve the Circumſtances preſcribed by the Will as to her Marriage. And ſo likewiſe the Caſe of *Ventris* and *Glide* on Sir *Nich. Staughton*'s Will. The Conſent of the Aunt was asked, and ſhe did not abſolutely refuſe, but pretended ſhe was coming to Town, and being a ſuitable Match, and all other Relations conſenting, the Conſent of the Aunt was, what ſhe ought, according to the Truſt repoſed in her, to have given, Application being made to her on that Behalf: and beſides the Aunt's Conſent, there were Truſtees as to the Portions, until the Daughters attained *Twenty-one*, and the Condition of Conſent was taken to have Relation to the Term only, to their Marrying in their Infancy, and there the Daughter had attained *Twenty-one* before her Marriage.

And therefore, upon the whole Matter, he was of Opinion,

Firſt, That Mrs. *Bertie* had no Pretence to claim the abſolute Fee and Inheritance of the Lands in Queſtion: It would be very abſurd to ſay ſhe ſhould profit by diſobeying, and that ſhe ſhould take a greater and better Eſtate by non-performing, than ſhe could have had by the Performance of the Condition.

Secondly,

Secondly, Nor can her Claim of having a like Eſtate, or a Conveyance *cypres*, *viz.* to her and her Iſſue by *William Bertie*, as it would have been to her and her Iſſue by the Lord *Guilford*, (if the Marriage had taken Effect) be any Way maintained or ſupported, either by Precedent, or Reaſon, unleſs Mr. *Bertie* could really become the Lord *Guilford*.

When the next in Remainder by Practice or Contrivance, prevents the Performance of a Condition, Equity will relieve.

Thirdly, As the Condition was the Performance of a collateral Act, and did not lie in Compenſation, he did not ſee any Thing that could be a juſt Ground for Relief in a Court of Equity, or to give Mrs. *Bertie* even an Eſtate for Life, unleſs the Remainder-Men (who were to take the Eſtate on Non-performance of the Condition) had uſed any indirect Practice, or Contrivance to prevent the Marriage from taking Effect.

And diſmiſſed the Bill of Mr. *Bertie* and his *Lady*, and in the other Cauſe decreed the Truſtees to execute Conveyances, according to the Truſt, to the Lord *Falkland*, &c.

Note; This Cauſe was afterwards, upon an Appeal to the *Houſe of Lords* in Parliament, ended by Compromiſe.

Caſe 318. *Feb.* 1.

Bowater & ux' verſus *Elly*.

Truſtees joining with the *Ceſtuy que Truſt* in Tail in a Feoffment, will bar an Eſtate-Tail in a Truſt.

Elly the Defendant's Grandfather being ſeiſed of the Lands in Queſtion, by his Will deviſed the ſame to Sir *Simon Archer*, and others and their Heirs, in Truſt for *John Elly* the Father for Life, Remainder to *Elizabeth* the Wife of *John* the Father for Life, Remainder to the Heirs of the Body of *John* the Father by *Elizabeth* his Wife; they had Iſſue *John* a Son, and *Mary* a Daughter,

ter, now the Wife of the Plaintiff *Bowater*; *John Elly* the Father died, *Elizabeth* his Wife ſurvived him; *Elizabeth* the Mother, and *John* the Son, together with Sir *Simon Archer* the ſurviving Truſtee, join in a Feoffment to the Uſe of *Elizabeth* the Mother for Life, Remainder to *John* her Son and his Heirs. *John* the Son by his Will deviſes the Lands to *John Elly* his Kinſman and Heir Male of the Family in Fee, ſubject to the Payment of ſeveral Debts and Legacies. The Plaintiff's Bill was to have the Truſt and Conveyance executed. The Queſtion was whether this Feoffment was a Bar in Equity to the Plaintiff's Demand who derived her Title under an Entail of the Truſt of the Lands in Queſtion.

For the Defendant it was inſiſted, that *John Elly* the Teſtator's Grandſon being Tenant in Tail, with the Reverſion in Fee to himſelf, had it been of a legal Eſtate or Uſe executed at Common Law, might by Fine or Common Recovery have barred the Plaintiff; a Feoffment would have made a Diſcontinuance; and this Court ſo far favours the Owner of the Inheritance, that had a Power to diſpoſe, that if Tenant in Tail make a Feoffment, or a Deed of Vouchers as is commonly practiſed in *Wales*, the Iſſue in Tail or Remainder-Man ſhall not have the Aſſiſtance of a Court of Equity, to defeat the Conveyance, but muſt defeat it at Law if he can. And ſo it was adjudged in the Caſe of *Sharrard* and *Stapleton*, where the Intail being diſcontinued by Feoffment, the Court would not oblige the Defendant to diſcover where the Freehold was, to enable the Plaintiff to find out a Tenant to the *Præcipe*, againſt whom he might bring his *Formedon*. Vol. 1. Caſe 210.

But here the Intail is only of a Truſt, and is not within the Statute *de donis*, and ſo a Fine or Recovery not neceſſary, but is alienable by any other Conveyance, made by him who hath an Eſtate of Inheritance in the Truſt. *Ant.* Ca. 205.

In this Caſe, if the Mother and Son had brought a Bill againſt the Truſtee, the Court would have decreed the Truſtee to convey to them, or to whom they ſhould appoint, and poſſibly he might have paid Coſts for refuſing to convey, and putting his *Ceſtuy que Truſt*, to the Charge of an unneceſſary Suit. And in this Caſe the Truſtee having done that voluntarily, without a Suit, which if he had refuſed to have done, the Court would have compelled him to do, is as ſtrong and as valid when done, without a Suit, as if it had been done purſuant to a Decree; and no Truſtee was ever yet blamed for doing that without a Suit, which this Court would have compelled him to have done; and yet if the Plaintiff has any Relief in this Caſe, it muſt be upon a ſuppoſed Breach of Truſt in the Truſtee; for the legal Eſtate is well paſſed and ſettled; and if not done in Breach of Truſt, there is no Ground for this Court to relieve the Plaintiff.

No Truſtee ever blamed for doing that without a Suit, which Equity would compel him to do.

The *Lord Chancellor* held, that the Complainants equitable Title under the Intail, was well barred by the Feoffment, and diſmiſſed the Bill.

Caſe 319. *Feb.* 7.

Smith verſus *Burroughs, Loader & al'.*

One juſt come of Age, intitled to an Eſtate of 3000 *l. per Ann.* being drawn into a Statute for 1000 *l.* upon which he received only 300 *l.* is relieved upon the Circumſtances of Fraud.

THE Plaintiff being juſt come of Age, and intitled to a real Eſtate of 3000 *l. per Ann.* and upwards, but then in Poſſeſſion of Truſtees, for the raiſing of Portions for younger Children, and wanting 1000 *l.* propoſed to take it up upon a Mortgage of ſome Part of his real Eſtate; but *Loader* the Scrivener perſuaded him, that it might be better done, and with leſs Trouble, by giving only a Recogniſance for Repayment of it: And it likewiſe appeared by Proof in the Cauſe, that the

the Plaintiff *Smith* all along declared he would have the Money of a Gentleman, and not of a *Mechanick*, as his Expreſſion was, becauſe then he might expect Gentleman-like Uſage; however *Loader* the Scrivener concerted the Matter between him and the other Defendant *Burroughs* a *Vintner*, that *Burroughs* did not appear as the Lender, but pretended to act as on the Behalf of a Friend and Acquaintance of his, a Gentleman that lived in the Country; *Smith* the Plaintiff, together with *Loader* the Scrivener (who readily offered to be bound for his Cuſtomer) both enter into the Statute, 300 *l.* is paid to *Smith* in Goldſmiths Bills, more offerred to be paid in *Guineas*; but being then of uncertain Value, Mr. *Smith* would not take them at the Rate they then went, and was by Agreement to have come the next Day for the Reſidue of the Money; but the Meeting was put off, and ſeveral Diſappointments happened from Time to Time: At length the 300 *l.* before lent is made up 1000 *l.* by paying about 100 *l.* in Money to *Loader*, and diſcounting an old Debt he owed *Burroughs*; and by a Parcel of Wines which *Burroughs* put off to *Loader* at the Price of 400 *l.* though after ſold for 150 *l.* and according to the Proof in the Cauſe were not worth above 200 *l.*

The Plaintiff's Bill being to be relieved againſt the Fraud, the Queſtion was, whether the Plaintiff ſhould be bound by the Payment made to *Loader* of 400 *l.* in Wines, and 300 *l.* in Money and by Diſcount of an old Debt, or whether he ſhould only repay the 300 *l.* and Intereſt received by himſelf.

It was inſiſted for the Defendant *Burroughs*, that *Loader* was the Plaintiff's Scrivener and Agent in this Matter, and truſted by him, and therefore in that Reſpect the Plaintiff ought to be bound by what *Loader* did, and pretended he would have paid the whole in *Specie*, and provided Money for that Purpoſe; but that *Loader* choſe to have Wines, and offered to diſcount his own Debt; and there

there was ſome Proof in the Cauſe to that Effect. And it was further inſiſted, that if *Loader* was not to be conſidered as Agent for the Plaintiff, and as a Perſon truſted by him; yet in Regard *Loader* was as well bound in the Statute as the Plaintiff, as he was joint Cogniſor with the Plaintiff; a Payment made to either of the Cogniſors of the Satute ought, as to the Defendant *Burroughs*, to be allowed as a good Payment.

But it was anſwered that *Burroughs* knew the Plaintiff *Smith* was the Borrower, that he intended to have had it on a Mortgage, and of a Country Gentleman, and that he was a Party to the Contrivance, in altering the Security propoſed from a Mortgage to a Statute.

And if *Loader* had been impowered and intruſted by the Plaintiff *Smith*, to receive the Money, it was never intended that his own Debt ſhould have been diſcounted, nor had he any Authority to take Wines in Lieu of Money.

Per Cur. Decree that the Plaintiff ſhall be relieved on Payment of the 300 *l.* and Intereſt, and a perpetual Injunction againſt the Statute, as to any further Demand thereon againſt the Plaintiff.

Caſe 320. 9 *Maii.*

Thomas Bar. & *ux'* verſus *Kemiſh* Bar. & *ux'*.

On Marriage Lands are ſettled on *A.* for Life, Remainder to the firſt, &c. Son of the Marriage in Tail Male, Remainder to Truſtees for 500 Years, to raiſe 5000 *l.* Portions for Daughters, payable at 18, or Marriage, Remainder to *A.* in Fee. After the Marriage *A.* ſettles other Lands, and a Term is created for raiſing the like Sum of 5000 *l.* for Daughters on Failer of Iſſue Male, payable at 16, or Marriage. *A.* dies leaving a Daughter his Heir at Law, who attains 18, and dies unmarried. The Truſt of the Term is not merged in the Fee, but the Portion ſhall go to the Daughters Executors, and is diſpoſable by her Will; but there ſhall be but one 5000 *l.* raiſed.

ON Marriage of Sir *Thomas* with the Lord *Wharton*'s Daughter, there was by the Marriage-Settlement a Term lodged in Truſtees for the raiſing of 5000 *l.*

5000 *l.* for Daughters on Failer of Iſſue Male, and a Maintenance until the Portions were payable, which was to be at *Eighteen*, or Marriage; and ſubject to that Term, the Eſtate was intailed on the Iſſue Male, with a Remainder to the right Heirs of Sir *Thomas*.

After the Marriage had, Sir *Thomas* made a Settlement of other Lands, and thereby likewiſe lodged a Term in Truſtees for raiſing the like Sum of 5000 *l.* for Daughters on Failer of Iſſue Male, payable at *Sixteen*, or Marriage, and a Maintenance in the mean Time with Remainders over *prout*.

There being Iſſue a Son and Daughter of that Marriage, the Son died in his Minority unmarried, and the Eſtate deſcended upon his Siſter and Heir, who having attained the Age of *Nineteen* and upwards, in her laſt Sickneſs made a Will nuncupative, and thereby mentioned to deviſe all that was in her Power to deviſe to her Mother, then the Wife of Sir *Charles Kemiſh*, (by whom he had ſeveral Children) and died. Her Mother proved the Will in the Prerogative Court, and the real Eſtate deſcended to the Plaintiff's Wife, her Heir at Law.

The Plaintiff's Bill was, as being Heir at Law, to be relieved againſt a Judgment in Ejectment, obtained by the Truſtees on the Terms for Years lodged in them, for raiſing Portions for Daughters as aforeſaid.

The Queſtion was, What paſſed to the Lady *Kemiſh* by the Will of her Daughter, whether both or either of the Sums of 5000 *l.* charged on the Lands in Manner aforeſaid, as Portions for Daughters in Failer of Iſſue Male; and whether in the Conſideration of a Court of Equity, the Sums intended for the Portion of Mrs. *Thomas* were not merged or extinguiſhed, and the Truſt determined, either by her dying unmarried, before the Portion was raiſed, or by the Inheritance of the whole Eſtate deſcending upon her,

as being the Heir at Law to her Brother, Father, and Grandfather.

For the Plaintiff it was inſiſted, that the Truſt was determined, and the Proceedings in the Truſtees Names ought to be ſtay'd by the Injunction of this Court.

Firſt, Becauſe the ſeveral Sums of 5000 *l.* and 5000 *l.* were intended as a Portion for Mrs. *Thomas*, and ſhe dying in her Minority and unmarried, the Intention of the Truſt was anſwered, and there was no Occaſion for the raiſing of a Portion; and therefore the Proceedings upon the Ejectment in the Truſtees Names ought to be ſtay'd by the Injunction of this Court, and the Terms ought to be aſſigned to the Plaintiff the Heir at Law: And inſiſted this was the Reaſon of the Decree in the Caſe of *Pawlet* and *Pawlet*, where it was held, that the Daughter dying an Infant and unmarried, the Portion ſhould not be raiſed for the Benefit of her Adminiſtrator; but ſhould ſink into the Inheritance, for the Benefit of the Heir, although there was no Proviſion or Clauſe in the Settlement, that the Portion ſhould in ſuch Caſe ceaſe.

Vol. 1. Caſe 201.

Secondly, That the Inheritance deſcending upon her, the whole Eſtate was conſolidated, and the Term was no longer a Truſt for the Raiſing of a Portion for her, but the whole intire Term became a Truſt for her, and ſhe might have compelled the Truſtees to have aſſigned the Term to her, or to whom ſhe ſhould appoint; and to make her Portion to be a ſubſiſting Charge on the Eſtate, is in Effect to ſay ſhe was Debtor to her ſelf.

Thirdly, That where Matters come to be controverted, between the Heir, and Adminiſtrator, the Heir is generally favoured, and ought to be ſo in this Caſe; the rather becauſe here were no Debts to pay, and the Nuncupative Will was made when ſhe was almoſt *in extremis*,

and doth not contain any particular Deviſe of the Portion; but is in general, of all ſhe had Power to diſpoſe of, and cited the Caſe of *Narbone* and *Narbone*, where by Articles of Marriage, 12000 *l.* was to be laid out in Land, and ſettled to the Husband for Life, Remainder, as to Part, to the Wife for her Jointure, Remainder to the firſt and other Sons in Tail; and in Failer of Iſſue Male, a Term to Truſtees for raiſing Portions for Daughters, Remainder to the right Heirs of the Husband. The Husband dying leaving Iſſue only a Daughter; on a Bill brought to have the Money inveſted in Land and ſettled according to the Articles; the Court in that Caſe decreed a Performance of the Articles, but with this, that there ſhould not be any Term in Truſtees for the Raiſing of a Portion for the Daughter; but that the Eſtate ſubject to the Mother's Jointure, ſhould go to the Daughter and her Heirs; and the Reaſon given by the Court was, that it was in vain to direct any ſuch Term, ſince the Daughter was the Heir at Law, unleſs it were for the Benefit of an Adminiſtrator, to the Prejudice of the Heir, as that Caſe might happen, which the Court thought not reaſonable.

Fourthly, It was inſiſted, if the Portion provided by the Marriage-Settlement was ſtill a ſubſiſting Charge upon the Eſtate; yet there ought to be but one Sum of 5000 *l.* raiſed, and the later Proviſion ſhould be taken to be in Lieu and Satisfaction of the Former, as had been adjudged in the Caſe of *Blois* and *Blois*, *Jeſſon* and *Jeſſon*, and in many other like Caſes. *Ant.* Ca. 243, 244.

For the Defendant it was anſwered,

Firſt, That this Caſe was not within the Reaſon of the Judgment given in the Caſe of *Pawlet* and *Pawlet*, for there the Portion which was to be out of Lands, was made payable at *Eighteen* or Marriage, and the young Lady happened to die unmarried, and before the Age of *Eighteen*

Eighteen, of which Age ſhe wanted a Year at her Death; but in the principal Caſe, the Portion was not only *debitum*, but was alſo become payable in her Life-time, and therefore may be more properly reſembled to the Caſe of the Earl of *Rivers* and Earl of *Derby*; but is in Truth a much ſtronger Caſe, for there being no Time appointed for the Payment of the Daughter's Portion; but the Term for raiſing of it being to commence upon the Deceaſe of her Father, whom ſhe ſurvived, there although ſhe died in her Infancy and unmarried, it was looked upon as an Intereſt veſted, and went to her Adminiſtrator, and was ſo decreed in this Court, and affirmed upon an Appeal to the Lords in *Parliament*; and much more might the Portion in this Caſe be deemed an Intereſt veſted, ſince it was made payable at a certain Time, and ſhe ſurvived the Time appointed for Payment thereof.

Ant. Ca. 67.

Secondly, Although the Inheritance deſcended and veſted in her as Heir at Law, yet there could be no *Merger* of the Term, for that was lodged in Truſtees; and where an Infant hath two Rights in her, this Court which is to take Care of Infants, will always preſerve that Right, which is moſt beneficial to the Infant; and in this Caſe, it was for the Intereſt and Advantage of the Infant, that the Portion ſhould be looked upon as a continuing and ſubſiſting Charge, and not ſink into the Inheritance; becauſe it might have been a Means to have preferred her in Marriage during her Infancy, and before ſhe was capable of making a Settlement of her real Eſtate; and likewiſe when of the Age of *Seventeen*, ſhe was capable of diſpoſing by Will her perſonal Eſtate, either for Payment of Debts, or in Legacies amongſt her Relations; and in the Caſe of *Narbone* and *Narbone* that was cited, if the Infant had deſired her Portion might have been raiſed, in order to prefer her in Marriage, or the like, no Doubt but the Court would have decreed it to be raiſed out of the Land. And in caſe there had been a Bill brought as on the Behalf of Mrs. *Thomas*, to have the

the Term aſſigned, ſo as it might have merged in the Inheritance; the Court would not have ſo decreed, becauſe it would have been to the Prejudice of the Infant; and for that Reaſon in the Caſe of *Audley* and *Audley*, where the Committee of a *Lunatick* had inveſted Part of the Lunatick's perſonal Eſtate in a Purchaſe of Lands, when that Matter came to be controverted between the Heir at Law and the next of Kin, the Court there decreed that it ſhould ſtill be accounted as perſonal Eſtate; and the next of Kin conſenting to accept the Lands at the Value they were purchaſed at; the Land was decreed to be ſold accordingly; or otherwiſe the Committee muſt have been charged with the Money, and have diſpoſed of the Land as he could. And ſo it was likewiſe adjudged in the Caſe of one *Dennis*, where the Guardian of an Infant took upon him to inveſt Part of an Infant's perſonal Eſtate in the Purchaſe of Lands. *Ant.* Ca. 175.

Thirdly, It was inſiſted by the Defendant's Counſel, that both the 5000 *l.* ought to be raiſed; for that the later Proviſion is not ſaid to be in Lieu or Satisfaction of the former, and they are made payable at different Times; the 5000 *l.* by the Marriage-Settlement at *Eighteen*, or Marriage; that of the Proviſion of the Father at *Sixteen*, or Marriage; if the Father had married a ſecond Wife, and had Iſſue Male, yet the 5000 *l.* by the Marriage-Settlement muſt have been raiſed; but the later 5000 *l.* was not to ariſe but in Failer of Iſſue Male of the Body of the Father, as well of the firſt, as of any other after taken Wife: And as the Daughter by the firſt Wife was to have 5000 *l.* although the Father ſhould have had one or more Sons by a ſecond Wife; ſo in Caſe he ſhould have no Son at all, but only Daughters by a ſecond Wife, or ſhould think fit to give the Eſtate to any collateral Heir, it might be reaſonable to augment and double the Daughters Portion; and that might be a ſufficient Reaſon to induce the Father to make this fur-

ther Proviſion for his Daughter: And as it is not declared that the later Proviſion was intended to be in Lieu and Satisfaction of the Former, there was nothing in the Deed that lead to ſuch Conſtruction, nor that neceſſarily implied any ſuch Matter, but rather the Contrary; being not only made payable at ſeveral Times as aforeſaid; but alſo different Sums appointed for Maintenance, until the Portions were payable. And the Caſe of *Duffield* and *Smith* was cited, where the Daughters had Portions charged upon Lands, and their Brother afterwards by Will gave them his perſonal Eſtate, and deviſed the Lands to a Kinſman of his Name; although the perſonal Eſtate ſo deviſed was of better Value than their Portions; yet upon an *Appeal* to the Lords in *Parliament*, it was adjudged they ſhould have both the one and the other.

Ant. Ca. 244.

The Lord Chancellor was of Opinion, that as the Term in Law was not merged, ſo neither was the Truſt determined or extinguiſhed in Equity, but remained ſtill a ſubſiſting Charge upon the Eſtate, and ought to be raiſed and paid to the Lady *Kemiſh*, who had Adminiſtration with the Will annexed.

Poſt. Ca. 418.

And likewiſe held, that only one 5000 *l.* with the Maintenance ought to be raiſed, and the Defendant to take by which of the two Settlements ſhe thought moſt to her Advantage; but to diſcount what Profits were received from the Death of Mr. *Thomas* the Brother: The 5000 *l.* to carry Intereſt from the Time it was payable.

Note; This Decree was afterwards affirmed upon an Appeal to the *Lords* in *Parliament*.

Henningham verſus *Henningham.*

Caſe 321.

By a Settlement, two Eſtates, one in *Norfolk*, and the other in *Suffolk*, are ſubjected to the Raiſing of a Portion of 2000 *l.* to a Daughter, by a Term of 500 Years, commencing after the reſpective Deceaſe of two ſeveral Lives; one Life upon the *Suffolk* Eſtate, and the other upon the *Norfolk* Eſtate. The Life on the *Suffolk* Eſtate fell, and the Daughter bringing her Bill for the 2000 *l.* *J. S.* to whom that Eſtate was come, paid the 2000 *l.* Afterwards the Life on the *Norfolk* Eſtate fell, and the Fee-ſimple thereof deſcended to the Daughter. *J. S.* that paid the 2000 *l.* ſhall have Contribution out of the *Norfolk* Eſtate, in Proportion to its Value, only the *Suffolk* Eſtate ſhall be valued as an Eſtate in Poſſeſſion, and the *Norfolk* Eſtate as an Eſtate in Reverſion.

BY a Settlement in 1675, both the Eſtates, (to wit) the *Norfolk* and *Suffolk* Eſtates were made ſubject and liable for the raiſing of 2000 *l.* for the Portion of the Defendant *Abigal Henningham*, by a Term for Years that was to commence upon the Determination of the Eſtates then in Being; both the Eſtates reſpectively being then ſubject to Jointures, and other Eſtates for Lives. The *Suffolk* Eſtate by the Limitations of the Settlement being come to the now Plaintiff Mr. *Henningham*; it ſo happened that the Lives on the *Suffolk* Eſtate happened firſt to die, and *that* Eſtate falling firſt into Poſſeſſion, and the Term firſt taking Place upon that Eſtate, the now Defendant had brought a Bill and obtained a Decree that the Term ſhould be ſold for raiſing of her Portion. Mr. *Henningham* to prevent the Sale of the Term, paid the 2000 *l.* and Intereſt; and now brought his Bill to be reimburſed a Proportion of the 2000 *l.* and Intereſt out of the *Norfolk* Eſtate, which was lately ſince that Decree deſcended upon the Defendant; ſo that now ſhe, who before was intitled only to a Sum of 2000 *l.* charg'd upon both the Eſtates, was intitled to the Inheritance of the *Norfolk* Eſtate.

The Lord *Chancellor*, aſſiſted with the Maſter of the *Rolls*, held, that what was now asked by the Plaintiff was conſiſtent with the former Decree, by which the Term that covered both the *Norfolk* and *Suffolk* Eſtates was to be ſold to raiſe the Portion, and the Plaintiff having paid the whole, was intitled to demand Contribution from the *Norfolk* Eſtate, the Inheritance where-

of

of was now veſted in the Defendant her ſelf, and decreed each Eſtate to bear its Proportion. But with this, the Term being to commence and take Place as the former Eſtates fell in, and the Lives upon the *Suffolk* Eſtate firſt dying; in the adjuſting what Proportion each Eſtate was to pay, *that* is to be valued as an Eſtate in Poſſeſſion, and the other an Eſtate in Reverſion; and ſo to value what the Term upon each Eſtate reſpectively was worth to be ſold.

Caſe 322.

Arthington verſus *Fawkes & al'.*

Lord incloſes Part of the Common, inſiſting it was an Improvement within the Statute of *Merton*, and that he had left ſufficient Common for the Tenants. The Tenants throw open the Incloſure by Force. Court grant an Injunction, and at hearing direct Iſſues, whether the Defendant had a Right of Common; and whether ſufficient Common left.

THE Lord of a Manor having incloſed Part of a Common, and the Tenants by Force throwing open the Incloſures, brought his Bill to quiet him in Poſſeſſion, ſurmiſing he had only improved according to the Statute of *Merton*, and had left a Sufficiency of Common; but that ſome of the Defendants (although they pretended to have a Right) were not intitled to Inter-Common upon the Waſte in Queſtion.

Ant. Ca. 290.

Upon the Hearing, two Iſſues were directed to be tried at Law.

Firſt, As to ſome of the Defendants, whether they had Right of Common there.

Secondly, Whether there was ſufficient Common left beyond what was incloſed.

And the Injunction was continued in the mean Time, although a new Incloſure, and made not above *two* Years before the Bill exhibited.

DE

Term. S. Trinitatis,

1698.

In Curia Cancellariæ.

Stratton verſus *Grymes.* Caſe 323.

MR. *Stratton*, a Citizen and Freeman of *London*, having Iſſue a Son and a Daughter, deviſes two Thirds of his legatory Part to his Daughter; but if ſhe married without the Conſent of her Mother, then her Brother to have 500 *l.* of what he had ſo deviſed to his Daughter.

Deviſe of a Legacy to a Daughter; but if ſhe marry without her Mother's Conſent, then 500 *l.* of the Daughter's Legacy to go to the Son.

The Daughter marries without the Mother's Conſent, the Son ſhall have the 500 *l.* *Ant.* Caſe 284. *Poſt.* Caſe 415.

The Daughter marries without the Conſent of her Mother.

Per Cur. This is not to be taken as a Clauſe *in Terrorem* only, but the *five Hundred* Pounds upon her marrying without the Conſent of her Mother, is well de-

viſed over, and an Intereſt veſted in her Brother, who in this Caſe muſt be looked upon as a Perſon the Teſtator conſidered, and had in his Thoughts, as to what Proviſion he was to have, and what Benefit to take by his Will, as well as the Daughter; and this is according to the Difference taken by the Lord Chief Juſtice *Hale*, in the Caſe of Sir *Henry Bellaſis*, and in the Caſe of *Davis* and *Hatton*.

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DE

Term. S. Michaelis,

1698.

In CURIA CANCELLARIÆ.

Hooley verſus *Booth & al'.*

Caſe 324.
Novemb. 9.

ANthony Booth having Iſſue a Son by the firſt *Venter*, and *two* Sons and *ſix* Daughters by a *ſecond* Wife, ſettles his Eſtate in Queſtion on his eldeſt Son by his ſecond Wife in Tail Male, Remainder to his ſecond Son by his ſecond Wife, and the Heirs Males of his Body; and in Default of ſuch Iſſue, to the Son by his firſt Wife. Provided, if both his Sons by the *ſecond* Wife died without Iſſue Male, ſo that the Eſtate came to his eldeſt Son, that then his eldeſt Son, or his Heirs, ſhould, within *four* Months after the Eſtate came to him or them, pay 1000 *l.* to his Daughters; or in Default, the Truſtees therein named to enter and raiſe it.

One deviſes Lands to his Son by his ſecond Wife in Tail Male, Remainder to his eldeſt Son by his firſt Wife. Provided, that if the Land ſhould come to his eldeſt Son, that then he or his Heirs, ſhould pay 1000 *l.* to the Teſtator's Daughters within four

Months after the Eſtate ſhould come to them, and in Default of Payment, the Truſtees to enter and raiſe the Money. The Son by the firſt Wife dies, leaving a Son. The Son by the ſecond Wife ſuffers a Recovery of a Moiety of the Lands, and dies without Iſſue; ſo that the Moiety only of the Premiſſes, comes to the Son of the Son by the firſt Wife. Though no Part of the Premiſſes ever came to the eldeſt Son; yet the Moiety of the Lands ſhall be liable to the Payment of the whole 1000 *l.* without any Apportionment.

George, one of the Sons by the *ſecond Venter*, enters and levies a Fine and ſuffers a Common Recovery; but his Mother being then living, who had a Jointure in a Moiety of the Eſtate; the Recovery as to that Moiety was void, there being no Surrender made of her Eſtate for Life; and ſhe being ſince dead, and both her Sons dying alſo without Iſſue, one Moiety of the Eſtate by Virtue of the ſaid Settlement, came to the Grandſon of *Anthony Booth* being the Son of his Son by his firſt Wife.

The Bill was by the Daughters to have the *one Thouſand* Pounds raiſed.

The Defendants Counſel made two Objections to the Plaintiffs Demand.

Firſt, That the Eſtate never came to *Anthony* the eldeſt Son by the firſt Wife, for he died in the Life-time of his Brothers of the half Blood; but they afterwards dying without Iſſue, one Moiety of the Eſtate came to the Son of *Anthony*; but not coming to *Anthony* himſelf, the Charge of 1000 *l.* according to the Words of the Proviſo did not ariſe, or attach upon the Eſtate.

But that Objection was over-ruled by the Court, the very Proviſo being, that if the two Sons by the ſecond Wife died without Iſſue Male, that his eldeſt Son, or his Heirs, ſhould within *four* Months after the Eſtate came to them, pay, *&c.*

Secondly, It was objected, that in Regard the whole Eſtate did not come to *Anthony* or his Heirs, but a Moiety only, there did not accrue to the Defendant ſo great a Benefit, as was intended him, and in Reſpect whereof he was to pay the 1000 *l.* and therefore the Charge ought not to ariſe at all; the Moiety that was conveyed away under the Common Recovery, being better worth than

than 1000 *l.* or if the Defendants Moiety ought to be charged with any Thing; yet at moſt it ought to be but with a Moiety of the 1000 *l.*

But this *Objection* was alſo over-ruled by the Court, for that the 1000 *l.* was a legal ſubſiſting Charge, and the Daughters did not claim under, but paramount, *George*, who ſuffered the Common Recovery, and therefore there was no Apportionment, but the Daughters were intitled to the Whole.

Bayley verſus *Powell.*

Caſe 325. *Decemb.* 6.

Elizabeth Burgeſs by Will gave ſeveral Legacies therein ſpecified, to all her next of Kin by Name; and likewiſe gave particular Legacies to *Mead* and *Powell* two Diſſenting Miniſters, and made them her Executors; but did not make any expreſs Diſpoſition of the Surplus of her perſonal Eſtate.

Deviſe of expreſs Legacies to the Executors, and alſo to the next of Kin; and no Diſpoſition of the Surplus. How the Surplus ſhall go.

The Queſtion was, whether the Executors muſt retain it to their own Uſe, or ſhould be obliged to diſtribute it to the next of Kin.

The Caſe of Sir *William Baſſet* cited as a much ſtronger Caſe, where he had deviſed his Lands to his Executors, to be ſold for Payment of Debts; and further Wills, that if there ſhould be any Surplus after his Debts were paid, it ſhould be deemed Part of his perſonal Eſtate, and go to his Executors; yet even in this Caſe, they were decreed to account and pay over the Surplus to the next of Kin.

DE
Term. S. Trinitatis,
1699.
In CURIA CANCELLARIÆ.

Caſe 326. *July* 27. ***John Dafforne*** and ***Thomas Dafforne*** verſus ***Goodman*** and ***Bolt & al'.***

One poſſeſſed of a Term for Years, on his Marriage aſſigns it to Truſtees, in Truſt for himſelf for Life, Remainder to his Wife for Life, Remainder to the Heirs of the Body of the Wife by the Husband.

John Bolt poſſeſſed of a Term for *Ninety-nine* Years of *Peachy* Farm, in *Hallow* in *Worceſterſhire*, held by a *Lopus* Leaſe of the Biſhop of *Worceſter*, *Feb.* 23, 1680, on his Marriage with *Apoline* his Wife, aſſigns the Term to Truſtees in Truſt for himſelf for Life, Remainder as to a Moiety to *Apoline* his intended Wife for Life for her Jointure, Remainder to the Heirs of the Body of *Apoline* by him to be begotten, Remainder as to the other Moiety to the Children of the Body of *Apoline.*

They have a Son. This is a good Limitation to the Heirs of the Body of the Wife, and they are Words of Purchaſe, and not of Limitation.

John Bolt died, leaving Iſſue by *Apoline*, the Defendant *Bolt*; *Apoline* married a *ſecond* Husband, by whom ſhe had Iſſue a Son *Thomas*, and died. *John Dafforne* her Husband took Adminiſtration to *Apoline* his Wife, who together with *Thomas Dafforne* his Son, brought their Bill againſt

againſt *Goodman* the Truſtee, to compel him to aſſign over the Term to them, and account for the Profits.

For the Plaintiff it was inſiſted, that the Truſt as to a Moiety being that the Truſtees ſhould permit *John Bolt* to receive the Profits for Life, Remainder to *Apoline* for Life, and then in Truſt to permit the Heirs of the Body of *Apoline*, by *John Bolt* to be begotten, to receive the Profits during the Reſidue of the Term; that thereby *Apoline* became Tenant in Tail, and the whole Term veſted in her, and conſequently belonged to the Plaintiff *John Dafforne*, as her Adminiſtrator.

But the Lord *Chancellor* held, that the Caſe of *Peacock* and *Spooner*, ſettled on an Appeal to the Houſe of *Peers* in *Nov.* 1689, by which the Decree of this Court made in 1688, was reverſed, muſt govern this Caſe: There the like Limitation to the Heirs of the Body of the Wife by the Husband to be begotten, adjudged to be taken as Words of Purchaſe, and not as Words of Limitation, and that on View of that Precedent, his Lordſhip had lately decreed accordingly in a like Caſe; and ſaid it would be in vain to make a Decree, to be reverſed on an Appeal, and therefore diſmiſſed the Bill as to that Moiety. *Ant.* Ca. 178

As to the other Moiety limited to the Children of the Body of *Apoline*, it was inſiſted, that the Plaintiff *Thomas Dafforne*, as being a Child of her Body, though by a *ſecond* Husband, was by the Words of the Truſt intitled to a Share of that Moiety; and that it ought to be equally divided between him and the Defendant *Bolt*, the Son of *Apoline* by her firſt Husband, they *two* being the only Children of *Apoline*.

One poſſeſſed of a Term for Years, in Conſideration of Marriage, aſſigns it to Truſtees in Truſt for himſelf for Life, Remainder in Truſt for the Wife by this

Children of the Body of the Wife. This ſhall be intended for the Children of the Marriage, and not to let in her Children by another Husband.

But

But the Lord *Chancellor* diſmiſſed the Bill as to that Demand alſo; for that it being the Eſtate of *John Bolt*, and the Settlement to the Purpoſes before mentioned being made on his Marriage; the Declaration of Truſt for the Benefit of the Children of *Apoline*, muſt be intended the Children of that Marriage, and not as a Proviſion for any Child of her by any other Husband.

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DE
Term. S. Michaelis,
1699.

In CURIA CANCELLARIÆ.

Lawrence verſus *Lawrence* Widow.

Caſe 327. *Novemb.* 21.

MR. *Lawrence* by his Will deviſed ſome Legacies out of his perſonal Eſtate to his Wife, and deviſed to her Part of his real Eſtate during her Widowhood, and deviſed the Reſidue of his Eſtate to Truſtees for *Twenty-one* Years, for Payment of Debts and Legacies; the Remainder of the whole Eſtate he deviſed to the Plaintiff, (who was his Godſon, and of his Name, but a remote Relation) for Life, and to his firſt and other Sons in Tail, *&c.*

One by will gives a Legacy to his Wife, and deviſes to her Part of his real Eſtate, during her Widowhood, and deviſes the Reſidue of his whole Eſtate to *J. S.* for Life, Remainder to his firſt Son, *&c.* Whether, if the Wife accepts of this Deviſe, it does not bar her of her Dower.

In this Caſe the Lord Chancellor *Sommers* was of Opinion, that although what was given to the Wife, was not declared to be in Lieu and Satisfaction of Dower, and although no Eſtate for Life was deviſed to her, but only during Widowhood; yet that in Equity it ought to be taken, that what was ſo deviſed was intended to be in

Lieu and Satisfaction of Dower, and that it might be plainly collected and intended from the Will, that it was ſo intended, becauſe he has thereby deviſed all other his real Eſtate to other Uſes; and a collateral Satisfaction may be a good Bar to Dower in Equity, though not pleadable at Law, and decreed that ſhe muſt either take her Dower, and wave the Deviſe, or accept the Deviſe, and wave her Dower. This Decree was afterwards reverſed by *Lord Keeper Wright.*

Caſe 328.

Barnardiſton verſus *Fane & al'.*

One deviſes his Land to *J. S.* paying 1000*l.* to his Daughter. *J. S.* makes Default in Payment. The Daughter recovers in Ejectment. The Heir of *J. S.* brings a Bill, and is relieved on Payment of Principal, Intereſt, and Coſts; though to the Diſinheriſon of an Heir, and in favour of a voluntary Deviſee.

Edward Rothwell having two Daughters and Heirs, deviſed his real Eſtate to his Kinſman Sir *Richard Rothwell*, paying 1000*l.* apiece to his *two* Daughters, within *ſix* Months after the Deceaſe of his Wife. The Money not being paid, the Daughters who were the Heirs at Law brought an Ejectment, and recovered; the Plaintiffs claiming under Sir *Richard Rothwell* the Deviſee, brought their Bill to be relieved, and obtained a Decree for that Purpoſe, paying what remained unpaid of the 2000*l.* with Intereſt and Coſts.

Although it was objected that Sir *Richard Rothwell* claiming only as a voluntary Deviſee, ought not to be relieved in Equity againſt the Breach of the Condition, whereby to eſtabliſh a Diſinheriſon againſt the Defendants; but that he ought at his Peril to have taken Care to have performed the ſame; and that there being neither Purchaſer nor Creditor in the Caſe, Equity ought not to aſſiſt a Deviſee againſt the Heir, but the Law ought to take place; *ſed non allocatur.*

Tabor verſus *Grover.*

Caſe 329. *Nov.* 13.

A Mortgage in Fee, tho' two Deſcents caſt, and tho' more due upon it than the Value, and tho' the Mortgagee by Anſwer ſays he'll not redeem; yet it ſhall go to the Executor, and not to the Heir, the Equity of Redemption not being foreclоſed or releaſed.

UPON an Appeal from the *Rolls*, the Caſe was, that a Mortgage was made of a Copyhold Eſtate by a Surrender thereof to one *Mabel Porter*, who was admitted Tenant, and died in 1690, *Thomas Porter* her Son and Heir, and Executor entred, and was alſo admitted. And by his Will, but without any Surrender to the Uſe of his Will, deviſed to the Plaintiff, who was alſo Adminiſtrator *de bonis non* to *Mabel Porter.*

The Defendant was Heir at Law both to *Mabel* and *Thomas Porter*, and would have this to be taken as a real Eſtate, being ſo long ſince forfeited, and two Deſcents caſt, and more due than the Value of the Eſtate, and the Mortgagors by Anſwer refuſing to redeem, and ſubmitting to be foreclоſed; and the Deviſe of *Thomas Porter* to the Plaintiff void at Law, for want of a Surrender to the Uſe of the Will.

But decreed at the Rolls to the Plaintiff as *Adminiſtrator de bonis non* to *Mabell Porter*; and the Decree was affirmed upon the Appeal, there being no Foreclоſure, nor Releaſe of the Equity of Redemption.

Tredway verſus *Fotherley.*

Caſe 330. *Novemb.* 27.

Copyholder in Fee makes a conditional Surrender for ſecuring a Sum of Money at the End of *ſix* Months. Money not being paid, and Mortgagee willing to continue his Money, they deſire the Lord that the old Surrender might be taken up, and a new one made for *ſix* Months longer. But the Lord inſiſted the Mortgagee ſhould come in and be admitted, and pay a Fine of *two* Years Value. Equity will not relieve againſt the Lord

THE Plaintiff was a Copyhold Tenant of Inheritance, in the Manor of *Rickmondſworth* in *Hertfordſhire*, of which the Defendant was *Lord*, and to ſecure 700 *l.* borrowed

borrowed of *Grove*, ſurrendred to him his Copyhold, to be void if repaid in *ſix* Months. At the End of the *ſix* Months the Mortgagee being willing to continue his Money on that Security, deſired the old Surrender might be taken up, and a new one made for *ſix* Months longer, but the Lord refuſed to accept the new Surrender; but inſiſted the Time for Payment upon the firſt Surrender being elapſed, *Grove* the Mortgagee ought to come in and be admitted, and take up the Eſtate, and pay an arbitrary Fine of *two* Years Value, and for that Purpoſe called Courts, and cauſed Proclamations to be made, *&c.* but before the third Court the Bill was exhibited, complaining of this as an unjuſt Proceeding in the Lord, to gain to himſelf an arbitrary Fine, and to oppreſs his Tenant, and to inforce *Grove* to take the Advantage of the Forfeiture of the Mortgage, though he did not deſire it; but was willing to accept of a new conditional Surrender.

The Court refuſed to make any Decree in Favour of the Plaintiff, ſave only to try it at Law, (if he thought fit,) whether the Lord was by the Cuſtom of the Manor bound to renew the Surrender, or to accept the *ſecond* Surrender; if not, although a hard Caſe, yet was not to be relieved in Equity. This being the Opinion of the Court, the Matter was afterwards ended by Compromiſe, and a Fine of 40 *l.* paid to the Lord, the Eſtate being 100 *l.* *per Ann.*

Caſe 331.
Eodem die.

Allen verſus *Sayer.*

A. deviſes Lands to Truſtees until Debts paid, and then to an Infant and his Heirs.

F. S. ſeiſed of the Lands in Queſtion, deviſed them to Truſtees *until* Debts paid, then to the Plaintiff *Allen* and his Heirs; *Allen* being then an Infant, the Defendant entred

Defendant enters and levies a Fine, and *five* Years paſs. Infant when of Age brought an Ejectment, but was barred becauſe the Truſtees ſhould have entred. Equity will relieve, and not ſuffer an Infant to be barred by Laches of the Truſtees; nor to be barred of a Truſt Eſtate during his Infancy. The Infant in this Caſe ſhall recover the mean Profits.

entred on the Eſtate, and levied a Fine in 1678, and *Non-claim* paſſed; the Plaintiff when of Age brought an Ejectment, and was Nonſuit by the Fine and *Non-claim*, and now brought his Bill to be relieved for Poſſeſſion, and an Account of Profits.

And altho' the Fine and *Non-claim* was a good Bar at Law, the legal Eſtate being in the Truſtees, who were of full Age, and ought to have entred; yet the Plaintiff ought not to ſuffer for their Laches, being an Infant; and as ſoon as of Age made his Entry, and brought his Ejectment, and likewiſe his Bill in this Court, before *five* Years incurred after he attained his Age. And the Court decreed the Poſſeſſion, and an Account of Profits, declaring the Fine and *Non-claim* ſhould not run upon the Truſt in the Infant's Minority, nor he ſuffer for the Laches of his Truſtees.

Note; It did not appear whether the Debts were all paid, nor whether the Plaintiff became intitled to the Poſſeſſion.

Parker verſus *Blackbourne.*

Caſe 332.

ONE of the Defendants, a neceſſary Party, having been a Lodger in *London*, and not now to be found; the Plaintiff obtained an Order that Service of Proceſs to appear and anſwer at his laſt Place of Abode, ſhould be deemed good Service, and left the ſame at the Houſe where he ſo lodged, and carried on the Proceſs to a *Sequeſtration*, and then brought on the Cauſe againſt the other Defendant *Blackbourne*, who inſiſted that if the Plaintiff ought to be relieved againſt him, he ought to have a Decree over againſt the other Defendant; and therefore he was concerned to ſee the Proceeding was regular, and inſiſted that it being above *twelve* Months ſince

Leaving a *Subpœna* to appear and anſwer at the Lodgings of a Defendant, who was not to be found, not good Service, tho' an Order was obtained for that Purpoſe, it appearing afterwards that the Defendant had left his Lodgings above a Year before the *Subpœna* ſerved.

ſince the other Defendant had left that Lodging; the Service was not good, and the Court was of that Opinion.

Caſe 333. *Draper & al'* verſus *Borlace, Ive* and *Hill.*

A Counſel having a Statute from *A.* adviſes *B.* to lend *A.* 1000 *l.* on a Mortgage, and draws the Mortgage with a Covenant againſt all Incumbrances, and conceals his own Statute. The Statute ſhall be poſtponed to the Mortgage.

DRaper, Naylor and *Hill* having lent *Borlace* 8000 *l.* *Naylor* 3000 *l* *Draper* 3000 *l.* and *Hill* 2000 *l.* on a Mortgage in Fee of his Manor of *Treludro,* and on a Statute of 16000 *l.* Penalty, as a farther Security; the ſaid *Hill* being a Counſellor of *Lincolns-Inn,* was afterwards adviſed with by Mr. *Ive* in lending of 2000 *l.* to *Borlace* on a Mortgage of the Manor of *Gargoll,* being a Leaſe for *three* Lives held of the Biſhop of *Exeter,* Mr. *Hill* encouraged *Ive*'s Lending of the Money, drew the Mortgage, and therein was a Covenant that the Eſtate was free from Incumbrances, making no Mention of the Statute, *Treludro* being ſuppoſed to be deficient. The Queſtion was, whether *Hill* ſhould be admitted to take Advantage of the Statute to leſſen *Ive*'s Security upon *Gargoll.*

Per Cur. If he who only conceals his Incumbrance ſhall be poſtponed, much more ought Mr. *Hill,* who was intruſted as Counſel by the Mortgagee, and incouraged the Lending of the Money, and drew the Deed with Covenant that the Eſtate was free from Incumbrances; and decreed that *Ive* ſhould be ſatisfied his 2000 *l.* out of *Gargoll* before *Hill* ſhould charge the ſame with his Statute.

Caſe 334. *Decemb.* 8. *Penhay* verſus *Hurrell.*

A. ſeiſed in Fee, by Deed and Fine conveys the Lands to the Uſe of Truſtees for 70 Years if *A.* ſo long live, Remainder to Truſtees for 3000 Years, and after the Death of *A.* then to his Son *B.* Whether the Remainder to *B.* is good.

ROger Hurrell ſeiſed in Fee, had Iſſue *Sampſon Hurrell* his eldeſt Son, and by Deed and Fine conveys to Truſtees for *ſeventy* Years, if *Roger Hurrell* ſhould ſo long live,

live, Remainder to Truſtees for 3000 Years, and from and after the Death of *Roger* the Father, to *Sampſon* the Son for Life, and to his firſt and other Sons in Tail Male, Remainder to *Henry ſecond* Son of *Roger* for Life, and to his *firſt* and other Sons in Tail Male, with other Remainders over. *Roger* the Father, and *Sampſon* his Son, by Deed and Fine, convey to the Plaintiff.

Queſtion whether the Remainder to *Sampſon* for Life, and to his *firſt* and other Sons in Tail Male, Remainder to *Henry* for Life, and his *firſt* and other Sons in Tail, were good or void Remainders. If void, Plaintiff well intitled as a Purchaſer: The Objection was, that an Eſtate of Freehold was to commence *in futuro*, for the *firſt* Freehold Eſtate is limited to *Sampſon*, which is not to ariſe until the Expiration of the Terms, and after the Death of *Roger*; and no Eſtate for Life limited to *Roger*, unleſs an Eſtate for Life ſhall be ſuppoſed to reſult back to *Roger*.

For the Plaintiff it was inſiſted, that the Conveyance here working by way of Tranſmutation of Poſſeſſion, no Eſtate for Life can reſult, nor ariſe by Implication of Law; as there may in a Covenant to ſtand ſeiſed, or in a Will; but where a Conveyance works by Tranſmutation of Poſſeſſion, no Eſtate reſults, or ariſes but by expreſs Limitation.

For the Defendant it was inſiſted, that every Man is ſuppoſed to be ſeiſed of the Eſtate and of the Uſe, and where he conveys by Deed and Fine, or Feoffment, if no Uſe is declared, the Whole reſults back; and Uſes at Law are the ſame as Truſts now; and in the Caſe of *Webb* and *Cranmer* reſolved upon an Appeal to the Houſe of *Lords*, that no Truſt being declared during the Life of the Duke of *Southampton* (but only from and after the Deceaſe of him and his Wife without Iſſue, and ſhe being dead without Iſſue, and the *Duke* yet living) that during

during his Life the Truſt reſulted, and deſcended to the Heirs at Law of Sir *Henry Wood.*

Whereunto it was replied by the Plaintiff's Counſel, that if what the Defendants Counſel contend for ſhould be admitted; *viz.* that whatever Uſe is not declared or diſpoſed of, either remains in the Party, or reſults back; *that* would put an End to all Queſtions on contingent Remainders; and all Vacancies in Settlements, ſhall be ſupplied by that Notion of a reſulting Uſe; and even in the Caſe of a Will, where there is an expreſs Eſtate limited to the Party; as in this Caſe a Term for *ſeventy* Years to the Truſtees, if *Roger* ſo long lives, he cannot have any other, or greater Eſtate by Implication.

Moor 284. 3 Cr. 321. Raym. 228. 1 Rol. 238, 317, 438.

The Caſes of *Fenwick* and *Mitford*, and *Pibus* and *Mitford*, before Chief Juſtice *Hale*, *Lane* and *Pannell*, *Roll's firſt Rep.* and the Caſe of *Speed* and *Davis* cited.

The Court took Time to conſider of it.

DE

Term. S. Hillarii,

1699.

In CURIA CANCELLARIÆ.

Halſpenny verſus *Ballet.*

Caſe 335. *Feb.* 9.

ON Marriage treated to be had between the Plaintiff and the Defendant's Daughter, an Agreement was reduced into Writing and ſigned by the Plaintiff, and delivered to *Ballet* to be ſigned by him, but he by Anſwer denied he ever ſigned it, but tore it being diſſatisfied with it, in ſome Particulars; but his Objections not being to any material Parts of the Agreement, and he having permitted the Plaintiff to Court his Daughter, and the Marriage being afterwards had, and he not declaring his Diſlike until asked for Payment of the Portion, and permitting the young Couple to live with him; the *Maſter* of the *Rolls* decreed the Agreement and Payment of the Portion.

A Marriage treated betwixt Plaintiff and Defendant's Daughter, and the Articles ſigned by the Plaintiff, but not by the Defendant; but the Defendant permitting the Plaintiff to Court his Daughter; and not declaring his Diſlike to the Marriage, and permitting the young Couple to live with him, Court decreed the Defendant to pay the Portion according to the Articles.

DE

Term. S. Trinitatis,

1700.

In CURIA CANCELLARIÆ.

Caſe 336. *June* 3. ***Pilkington*** verſus ***Shaller*** and ***Jefferies*** & al'.

Leaſe for Years ſubject to a Ground-Rent, is aſſigned over by way of Mortgage to *J. S.* for 100 *l.* The Mortgagee never entred and loſt the 100 *l.* Mortgage-Money, and is ſued by the Leſſor for the Ground-Rent. No Relief, it being his own Fault, to take the Mortgage by way of Aſſignment, and not by way of Under-leaſe.

THE Plaintiff lent to one *Richardſon* 100 *l.* by way of Mortgage on an Aſſignment of a building Leaſe; and although ſhe never entred nor took Poſſeſſion, and loſt the 100 *l.* lent; yet the Defendant had recovered againſt her, as Aſſignee, the Rent reſerved on the Leaſe.

The Plaintiff's Bill was to be relieved againſt the Recovery at Law, and although a hard Caſe, could not be relieved; but the Bill was diſmiſſed, ſhe being ill adviſed to take an Aſſignment of the whole Term; whereas if ſhe had taken only a derivative Leaſe, ſhe could not have been liable to the Rent reſerved on the *firſt* Leaſe.

Ant. Ca. 260.

Conſtable

Conſtable verſus *Conſtable & al'.*

Caſe 337.

By a Marriage Settlement *A.* is Tenant for Life, Remainder as to Part to his Wife, for Life, Remainder as to the whole to the firſt Son, *&c.* in Tail. By Cuſtom of *York* the eldeſt Son by Means of this Settlement is excluded from a Share of his Father's perſonal Eſtate.

UPON the Hearing of this Cauſe on *June* 25, 1695, a Queſtion ariſing upon the Cuſtom of the *Province* of *York*, touching the Diſtribution of the perſonal Eſtate of the Father; an Iſſue was directed to be tried at Law, whether the Father having by Settlement on his Marriage ſettled his real Eſtate to himſelf for Life, Part to his Wife for her Jointure, the Remainder of the whole to his *firſt*, and other Sons in Tail, Remainder to his own right Heirs; the eldeſt Son was thereby excluded by the Cuſtom of the *Province* of *York*, from having any Share of his Father's perſonal Eſtate; and it being found that he was thereby debarred and excluded, and the Cauſe coming now to be heard on the Equity reſerved, it was decreed accordingly.

Lord *Culpepper* verſus *Fairfax & ux'* & *al'.*

Caſe 338. *June* 8.

A. and *B.* claiming, each of them, a Rent-charge out of Land, by the ſame Deed, *B.* can be no Witneſs for *A.*'s Title to his Rent-charge, being a Party intereſted, until he has releaſed his own Rent-charge.

THE Plaintiff's Bill being to be relieved touching an Annuity charged on the Eſtate of the Defendant's Wife; Mr. *Cheney Culpepper*, the Plaintiff's Brother, was examined as a Witneſs for the Plaintiff. It was objected againſt his Evidence, that he was concerned in Intereſt, having the like Annuity by the ſame Deed charged upon the Eſtate, which was in Fact true; but the late Lord *Culpepper* had made him another Satisfaction in Lieu of it, and he had releaſed his Annuity; but *that* not appearing by any Proof in the Cauſe, the Court put off the Hearing, and gave the Plaintiff Liberty to examine Witneſſes to prove that *Cheney Culpepper* had releaſed his Annuity, before he was examined as a Witneſs in the Cauſe.

Spearing

Caſe 339. *June* 12.

Spearing & ux' verſus *Lynn.*

A Miſtake in the Title of an Order amended, though to charge a Surety that gave a Recogniſance to abide the Order of hearing.

A Recogniſance to abide ſuch Order as ſhould be made upon the Hearing of the Cauſe, being put in Suit againſt *Field* of *Hatton-Garden* Vintner, who was one of the Securities. It fell out, that in the Title of the Order for confirming of the Report, the Words *& ux'*, were omitted, the Defendant at Law took Advantage thereof, and pleaded there was no ſuch Order made in the Cauſe; the Plaintiff perceiving the Miſtake, obtained an Order from the *Maſter* of the *Rolls* to amend the Title of the Order, by adding the Words, *& ux'*, and the ſame was afterward confirmed by the Lord Keeper.

Caſe 340. *June* 17.

Biſhop of *Oxon* verſus *Leighton & al'.*

A. on his Marriage conveys his Land to a truſtee to the Uſe of himſelf for Life, Remainder to his Wife for Life, Remainder to the Heirs of their two Bodies, Remainder to *A.* in Fee. Proviſo, that in Default of Iſſue of the Marriage the Truſtee ſhall convey to ſuch Uſes as the Survivor ſhould appoint.

Thomas Powell on the Marriage of his Wife, by Leaſe and Releaſe conveyed to *Holland* and his Heirs, to the Uſe of himſelf for Life, to his Wife for her Jointure, Remainder to the Heirs of *Powell* on the Body of his Wife to be begotten, Remainder to the right Heirs of *Thomas Powell*. *Proviſo*, that in Default of Iſſue of their Bodies, *Holland* ſhould convey to ſuch Uſes as the Survivor ſhould appoint. *Thomas Powell* deviſed to the Defendant *Leighton* and his Heirs. The Wife ſurvived, and appointed *Holland* to convey to Sir *Francis Winnington* and his Heirs, to the Uſe of her ſelf and her Heirs; and ſhe by Will deviſed to the Plaintiff and his Heirs. The Plaintiff could not recover at Law, by Reaſon that *Holland* had not made ſuch Conveyance as Mrs. *Powell* directed.

Altho' the Husband deviſes the Land and dies firſt without Iſſue, yet the Wife has a good Power of diſpoſing of the Eſtate by her Appointment.

Lord

Lord Keeper: The Lord *Dyer*'s *Scintilla juris* remains in *Holland*, and although the Proviſo be unskilfully penned, it amounts unto a Power of revoking, and limiting new Uſes; and decreed the Defendant to admit that *Holland* had conveyed according to the Wife's Appointment, prior to the Will of the Wife, by which ſhe deviſed to the Plaintiff.

The Caſe of *Jenning* and *Hellier* cited, where the Deviſe was, if the Son die before *Twenty-one*, or without Iſſue, I give and deviſe the Premiſſes to *J. S.* Adjudged on a ſpecial Verdict, that if the Son die before *Twenty-one*, although he leave Iſſue, the Iſſue ſhall not take, but the Remainder-Man; and the Caſe of *Saul* and *Gerrard* in *Cro.* and *Price* and *Hunt* in the Exchequer, and *French*'s Caſe in *Dyer*, inſiſted upon by Juſtice *Powel.*

One deviſes if his Son dye before 21, or without Iſſue, that the Lands ſhall go to *J. S.* The Son dies before 21, but leaves Iſſue, *J. S.* ſhall have the Land. *Poſt.* Ca. 356. 3 Cr. 525.

Procter & al' verſus *Cowper.*

Caſe 341. *June* 22, 1700.

THE Bill was to redeem a Mortgage made in 1642, the Mortgagee entred in 1650, *three* Deſcents on the Defendant's Part, and *four* on the Part of the Plaintiff; yet the Length of Time being anſwered for the greateſt Part by Infancy or Coverture; and foraſmuch as in 1686, a Bill was brought by the Mortgagee to foreclоſe, and an Account then made up by the Mortgagee, the Court decreed a Redemption, and an Account from the Foot of the Account in 1686.

Mortgagor admitted to redeem a Mortgage made in 1642, after 3 Deſcents on the Defendant's Part, and 4 of the Plaintiffs Part. Length of Time anſwered by Infancy and Coverture, and an Account made up by the Mortgagee in 1686.

Caſe 342. *June* 26, 1700.

Wray Bar. & *al'* verſus Lady *Williams.*

SIR *Griffith Williams* grants a Term for *Ninety-nine* Years to Mr. *Buckley*, as a collateral Security for other Lands he had ſold him. Sir *William Williams* the Son of Sir *Griffith* entred, and dying, the Defendant his Widow recovered a *Third* of thoſe Lands for her Dower. The Bill was to be relieved againſt that Recovery in Dower.

Caſe 343. *June* 29.

Darrel verſus *Moleſworth.*

Divers Legacies given by a Will, and the Will is, that if any Legatee died before his Legacy was payable, it ſhould go to his Brothers and Siſters; a Legatee died in the Teſtator's Life-time; no lapſed Legacy, but ſhall go to his Siſter.

A Legacy of 50 *l.* is given to *Darrel Trelawny* at 21, or Marriage, 50 *l.* to *Elizabeth Trelawny* at *Twenty-one* or Marriage; and in the Cloſe of his Will the Teſtator adds, if any Legatee died before his Legacy was payable, the ſame ſhould go to the Brothers and Siſters of ſuch Legatee; *Darrel Trelawney* died in the Life-time of the Teſtator; adjudged it was no lapſed Legacy, but ſhould go to his Siſter.

Caſe 344. *June* 28.

Tilly Mil' verſus *Wharton & econtra.*

New Trial granted by the Houſe of Lords. *Poſt.* Ca. 382.

Wharton on a Plea of *non eſt factum*, had obtained a Verdict on a Bond of 3000 *l.* Penalty for Payment of 1500 *l.* and there not being ſufficient perſonal Aſſets, *Wharton* brought a Bill to have a Truſt of Lands executed in Aid of the perſonal Eſtate. The Defendant inſiſted the Bond was forged, and had made a ſtrong Proof of it; but *that* being the Point tried at Law, the Court would not enter into the Proof thereof, or permit the

the Depoſitions to be read: But admitted if the Witneſſes had been convicted of Perjury, or the Party of Forgery, that might have been a juſt Ground for Relief in Equity, eſpecially ſince the Proſecuting of Attaints was become in a Manner impracticable; but upon an Appeal to the *Houſe of Peers*, a new Trial was directed, and the Bond found to be forged.

If a Witneſs be convicted of Perjury, or the Party of Forgery, good Cauſe for a new, Trial.

Arethuſa Lady Dowager *Clifford* verſus Earl of *Burlington* Lord *Clifford* & *al'*.

Caſe 345. *Eodem die.*

THE Lord *Clifford* by Marriage-Settlement was made Tenant for Life, of ſeveral Manors and Lands in *Ireland*, with Power to make a Jointure not exceeding 1000 *l. per Ann.* upon his Marriage with the Lord *Berkley*'s Daughter, he covenanted to ſettle a Jointure on her of 1000 *l. per Ann.* and purſuant thereunto a Settlement was made, and a Particular of Lands mentioned, and ſet out for the Jointure, and which in the Particular given him, were computed at 1000 *l. per Ann.* but in Truth fell ſhort, and were not above 600 *l. per Ann.* the Bill was to have the Jointure made up 1000 *l. per. Ann.*

Tenant for Life with Power to make a Jointure of 1000 *l. per Ann.* upon Marriage, covenants to make a Jointure on his Wife of 1000 *l. per Ann.* Afterwards gives a Particular of Lands mentioned to be 1000 *l. per Ann.* which are ſettled for the Jointure, but prove to be but 600 *l. per Ann.* Decreed the Jointure to be made up 1000 *l. per Ann.* by the Iſſue in Tail.

It was inſiſted for the Defendant, that he claimed under the Marriage-Settlement as a Purchaſer, and the late Lord *Clifford* had only a Power to have charged the Eſtate with 1000 *l. per Ann.* if he had not done it at all, and had died without executing of his Power, a Court of Equity could not have done it for him, and have raiſed a Jointure of 1000 *l. per Ann.* upon the Eſtate, tho' it had been reaſonable and juſt for him to have done it in his Life-time. So if he had executed his Power but in Part, that cannot be extended or carried further in

Tenant in Tail covenants to ſettle a Jointure and dies, Iſſue in Tail not bound by the Covenant.

in Equity. If Tenant in Tail covenants to make a Jointure although he might have done it by a Fine or *Common Recovery*, a Court of Equity cannot relieve, or decree a Jointure.

But the Court in this Caſe decreed the Jointure to be made up 1000 *l. per Ann.* againſt the Iſſue in Tail, who was not privy to the Marriage-Treaty, nor guilty of any Fraud.

Eyton verſus *Eyton.*

Caſe 346. *July* 6.

Defendant ſuppreſſes a Marriage-Settlement, whereby a Remainder in Tail is limited to Plaintiff's Father, all prior Eſtates being ſpent. Decreed Plaintiff to hold and enjoy the Eſtate.

THE Defendant having ſuppreſſed a Marriage-Settlement by which a Remainder in Tail Male was limited to the Plaintiff's Father, and all the prior Eſtates ſpent: Upon Proof made that the Settlement came to the Defendant's Hand, and that he had confeſſed it in an Anſwer to a former Bill, though he now denied it; the Maſter of the *Rolls* decreed the Plaintiff ſhould hold and enjoy the Eſtate; and this Decree was confirmed upon an Appeal to the *Lord Keeper.*

Dr. *Steward* verſus *Eaſt-India Company.*

Caſe 347. *July* 10.

Bill to be relieved againſt an Award made by ſome of the Members of the *Eaſt-India Company*; and thoſe Members, and the Arbitratots are made Defendants. They may demur to the whole Bill, without anſwering to the Fraud; for the Plaintiff can have no Decree againſt them, nor can their Anſwer be read againſt the Company; but they ought to be examined as Witneſſes.

BILL to be relieved againſt an Award made by ſome of the Members of the *Company*, touching the *Quantum* of Freight due to the Plaintiff, from the Company. The Arbitrators and ſome of the particular Members being made Defendants, they demurred to the whole Bill, becauſe the Plaintiff could have no Decree againſt them, and their Anſwers would be no Evidence againſt the Company, and the Plaintiff might examine them as Witneſſes. Demurrer allowed, without putting them to anſwer as to Matters of Fraud and Contrivance.

Jones

Jones verſus *Beale & al'.*

Caſe 348.
Octob. 20.

William Williams in 1681, deviſes 15 *l.* apiece to each of his Relations of his Father's and Mother's Side; and deviſes the Surplus of his Eſtate, after Debts and Legacies paid, to the Plaintiff, and made the Defendants Executors; he left ſeveral Coſin Germans on the Father's and Mother's Side, who were his neareſt Relations. The Defendants the Executors paid *fifteen* Pounds to one *Dorothy Smith*, who was one of the Teſtator's Couſin Germans, and likewiſe *fifteen* Pounds apiece to *four* of her Children.

One deviſes 15 *l.* apiece to each of his Relations of his Father and Mother's Side, and gave the Surplus of his perſonal Eſtate to *A.* and makes *B.* Executor. *B.* the Executor, paid 15 *l.* to the Teſtator's Couſin German, and 15 *l.* apiece to her 4 Children. The Court allowed the Payment to the Children, and would not reſtrain the Deviſe to the Relations within the Statute of Diſtributions.

The Plaintiff inſiſted this was a *Male* Adminiſtration, as to what was paid to the Children; for that in Caſes of ſuch general and uncertain Deviſes, the Court had always reſtrained it to ſuch Kindred, as would be intitled by the Statute for ſettling Inteſtates Eſtates; ſo that the Payment ought to have been only to the next of Kindred, which were the Couſin Germans, and not to their Children.

The Lord Keeper being attended with Precedents, allowed the 15 *l.* apiece to the *four* Children of *Dorothy Smith* to be well paid, as againſt the Plaintiff the reſiduary Legatee; and took Notice of the Caſe of *Arnold* and *Bedford*, where although it is mentioned in the Order that the Deviſe to the Kindred ſhould be governed by the Statute for Diſtribution of Inteſtates Eſtates; yet there the Children of Brothers and Siſters were let in to receive a Share in the Life-time of their Parents, which is not allowable on a Diſtribution under the Statute.

DE
Term. S. Michaelis,
1700.
In CURIA CANCELLARIÆ.

Caſe 349. *Octob.* 24.

Champernoon verſus *Gubbs & al'.*

Plaintiff had 120 *l. per Ann.* Rent-charge ſettled for her Jointure; and there being a great Arrear, and not ſufficient Diſtreſs on the Land; Plaintiff brought her Bill that the Defendant, the Deviſee of the Inheritance, might ſet out ſufficient Diſtreſs; or that the Plaintiff might hold and enjoy till paid the Arrears. *Cur.* when the Party has provided one Remedy, *viz.* by Diſtreſs, we will not give her another, unleſs ſome Fraud be proved in letting the Land lie freſh, or depaſturing the Land in the Night-time only. *Poſt.* Caſe 354.

THE Plaintiff on her Marriage had a Rent-charge of *one Hundred and twenty* Pounds *per Ann.* ſettled on her in lieu of a Jointure, with Power of Diſtreſs; and there being no leſs than *five Hundred* Pounds Arrear, and no ſufficient Diſtreſs to be found on the Land; the Bill was againſt the Deviſee of the Inheritance, that a ſufficient Diſtreſs might be ſet out, or that the Plaintiff might hold and enjoy the Land until ſatisfied the Arrears, and the growing Payments.

The Lord Keeper thought not fit to relieve the Plaintiff, declaring the Law never gives any other Remedy, than what the Party has provided for himſelf, and the Remedy here being only by Diſtreſs, and not to enter upon and hold the Lands, declared he could not relieve the

the Plaintiff, unleſs ſome particular Fraud had been proved; as letting the Land lie freſh, or depaſturing it in the Night-time, on purpoſe to prevent a Diſtreſs; and if that were the Caſe, ſuch Fraud by Tenant for Life ought not to turn to the Prejudice of the Remainder-Man, to charge the Land with Arrears, which incurred in the Time of the Tenant for Life, and declared he muſt diſmiſs the Bill.

The Defendant propoſing that if the Plaintiff would quit the Arrears, he would pay all the growing Annuity and be decreed to pay it; her Counſel took Time to return an Anſwer to the Propoſition.

Colcheſter verſus *Arnett.*

Caſe 350. *Octob.* 30.

BILL by the Landlord to compel the Defendant his Tenant at a Rack-rent to ſurrender his Leaſe, whereby to enable the Plaintiff to renew with the Church, the Plaintiff offering by his Bill, (as he had before done) as ſoon as the grand Leaſe was renewed, to make a new Leaſe to the Defendant for the Term then to come, and under the ſame Rent, *&c.*

Leſſee of a Church-Leaſe, makes an Under-leaſe, and would have the Under-Leſſee to ſurrender in order to enable him to renew with the Church.

There being no Covenant in the Tenant's Leaſe to ſurrender, the Court cannot compel him to do it.

Per Cur. There being no Covenant in the Under-leaſe to compel the Tenant to ſurrender to enable the Plaintiff to renew, Court cannot compel him thereunto, and diſmiſſed the Bill.

Ferrars

Caſe 351.
Octob. 26.

Ferrars verſus *Cherry & al'.*

One Purchaſes having Notice of a Settlement, whereby the Vendor was but Tenant for Life, Remainder to his firſt, &c. Son in Tail, and afterwards ſells to one who had no Notice. Tenant for Life dies leaving a Son. Decreed the laſt Purchaſer ſhall hold the Land; but the firſt ſhall account for the Purchaſe Money which he received, with Intereſt from the Death of the Tenant for Life.

THE Defendant purchaſed from the Plaintiff's Father and Mother the Lands in Queſtion by Deed and Fine, whereby they conveyed to him and his Heirs; whereas purſuant to an Agreement made on their Marriage, the Eſtate was ſettled to the Plaintiff's Father for Life, Part to the Mother for her Jointure, Remainder of the Whole to the firſt and other Sons in Tail Male, *&c.* and it appeared by the Proofs in the Cauſe, that the Defendant *Cherry* had Notice of the Settlement, and that the ſame amongſt the other Writings was delivered to him. Upon his Purchaſe the Defendant took in a Mortgage-Term, which was prior to the Settlement, and enters, and afterwards ſold the Eſtate, Part to *Howland*, and other Part to *Harwood*, who were made Defendants to the Bill, and pleaded they were Purchaſers without Notice; and the Plaintiff not being able to prove any Notice upon them, the Bill as againſt them was diſmiſſed; but as againſt the Defendant *Cherrey*, the Court decreed him to account for the Conſideration-Money for which he ſold the Eſtate, with Intereſt, from the Deceaſe of the Plaintiff's Father and Mother, thereout diſcounting what was due on the Mortgage, made prior to the Settlement.

The Settlement was made after Marriage, but in purſuance of Articles before the Marriage; but the Articles are not taken Notice of in the Settlement. However the Purchaſer having Notice of the Settlement, it was incumbent on him to inquire whether it was voluntary, or made in purſuance of an Agreement before Marriage.

It was objected, that although it now appears by the Proof, that the Settlement which was made after Marriage, was made purſuant to Articles made before the Marriage; yet it was not ſo recited in the Settlement, nor any Notice taken therein of the Agreement or Articles before Marriage; and for ought appeared to the Defendant *Cherrey*, the Deed was fraudulent, as againſt a Purchaſer.

Per Cur. He ought to have enquired of the Wife's Relations, who were Parties to the Deed, whether it was voluntary, or made purſuant to an Agreement before Marriage, and having Notice of the Deed, muſt at his Peril purchaſe, and be bound by the Effect and Conſequence of the Deed.

Moyſe verſus *Gyles.*

Caſe 352.
Octob. 30.

THE Plaintiff's late Husband and his Anceſtors had, together with the Defendant and his Anceſtors, long enjoyed a Church-Leaſe in Moieties, and had ſeveral Times renewed it under an Agreement, that no Advantage ſhould be taken of Survivorſhip; but on the laſt Renewal of the Leaſe by the Plaintiff's Teſtator and the Defendant, there was no expreſs Agreement made to bar Survivorſhip. The Plaintiff's late Husband falling ill of the Small Pox, ſent for a School-Maſter, and intending to ſever the Jointenancy; made a Grant or an Aſſignment of his Intereſt to his Wife the Plaintiff, and likewiſe by Will deviſed it to her.

The Plaintiff and Defendant had enjoyed a Church-Leaſe in Moieties, under an Agreement that there ſhould be no Benefit of Survivorſhip. Upon the laſt Renewal, the Leaſe was taken in both their Names, and no expreſs Agreement againſt Survivorſhip. The Plaintiff's Husband being ſick, by Deed aſſigned his Moiety of the Leaſe to his Wife; and by his Will deviſed it to her. The Grant to the Wife is void, and the Deviſe will not ſever the Jointenancy.

The Plaintiff's Bill was to be relieved againſt Survivorſhip, and it was inſiſted by the Plaintiff's Counſel, that the new Leaſe ſhould be preſumed to be taken under the ſame Agreement as the former Leaſes were, *viz.* that no Advantage ſhould be taken of Survivorſhip, or that the Court upon the Circumſtances of the Caſe ſhould ſupply the defective Grant or Aſſignment to the Wife.

Per Cur. The Grant to the Wife is abſolutely void in Law, and the Will cannot take Effect to prevent Sur-

vivorſhip, and no Agreement appearing to exclude it, the Court diſmiſſed the Bill.

Caſe 353. *Nov.* 12. *Maſter of the Rolls.*

An Agreement for the Husband and Wife's parting, and for the Husband's returning his Wife's Portion to her Father, and for the Father's indempnifying the Husband from the Maintenance and Debts of his Wife, eſtabliſhed by a Decree, tho' the Husband offered to receive and maintain his Wife.

Seeling verſus *Crawley.*

THE Defendant having married the Plaintiff's Daughter, on a Quarrel between him and his Wife, they agreed to part, and the Defendant gave a Note to the Plaintiff to pay him 160 *l.* (being the Portion the Plaintiff had given with his Daughter) on Demand, the Plaintiff ſaving him harmleſs from any Debts his Wife may contract, and againſt all Demands for her Maintenance, *&c.* The Wife with her Child went thereupon and lived with the Plaintiff her Father, and were maintained by him; the Bill was to compel Payment of the 160 *l.* the Plaintiff offering to perform the Agreement on his Part. And altho' the Husband now offered to take his Wife home and maintain her and her Child, and allow the Plaintiff for the Time paſt; yet the Court decreed the Defendant to pay the 160 *l.* to the Plaintiff, upon his giving Security to indempnify the Defendant againſt the Debts and Maintenance of the Wife and Child.

Foſter verſus *Foſter.*

Caſe 354. *Nov.* 11.

Deviſee of a Rent-charge out of Lands with Power of Diſtreſs dies. His Executrix brings a Bill for the Arrears. Decreed that ſhe may enter and hold and enjoy till paid the Arrears and Coſts.

Ant. Ca. 349.

Foſter the Son ſeiſed of an Eſtate at *Bromley* in *Kent*, deviſed the ſame to the Defendant, and deviſed thereout 100 *l. per Ann.* to his Father, payable half yearly, and in Default of Payment to enter and diſtrain, and the Diſtreſs to detain until the Arrears paid; the Plaintiff the Widow and Executrix of the Father, brought her Bill for Satisfaction of the Arrears, and the *Maſter* of the *Rolls* decreed the Arrears with Coſts and Charges, and ſhe to enter and enjoy until ſatisfied; though the *Lord Keeper* this Term diſmiſſed the Bill in the like Caſe between *Champernoon* and *Gubbs.*

Attorney

Attorney General at the Relation of the Inhabitants of *Clapham* verſus *Hewer & al'.*

Caſe 355. *Nov.* 13.

A School-Houſe being erected on the Waſte, by the voluntary Contribution of the Inhabitants, Mr. *Atkins* the *Lord* of the *Manor* enfeoffs about *Eighteen* of the principal Inhabitants and their Heirs, in Truſt, and to the Intent that the Inhabitants of *Clapham* may for ever have a School, *&c.* as of the Gift of *Richard Atkins.* Upon a Diſpute between the Inhabitants and the ſurviving Truſtees, the Queſtion was whether the Truſtees, or the Inhabitants ſhould nominate the School-Maſter; and for the Plaintiff the Caſe of *Hinley Chapel* in the Pariſh of *Wigan* in *Lancaſhire* was cited, where Ground was granted to Truſtees, whereon to erect a Chapel for the Celebration of Divine Service, for the Uſe of the Inhabitants: Decreed in the *Dutchy*, that the Nomination of the Miniſter was in the Inhabitants.

A School-Houſe being erected by voluntary contributions of the Inhabitants of *A.* on the Waſte, the Lord of the Manor enfeoffs Truſtees in Truſt that the Inhabitants of *A.* may for ever have a School, *&c.* as of the Gift of the Lord. Whether the Truſtees or the Inhabitants are to nominate the School-Maſter.

Lord Keeper: This not being a Free-School, is not a Charity within the Proviſion of the Statute of Queen *Elizabeth*, and conſequently the Inhabitants have not a Right to ſue in the Name of Mr. *Attorney General.* If the Lord of a Manor ſhould erect a Mill, and convey it to Truſtees, to the Intent the Inhabitants might have the Convenience of grinding there; the Inhabitants ſhould not be admitted to ſue here in Mr. *Attorney General*'s Name; and declared unleſs the Plaintiff could produce Precedents where the Court had relieved in like Caſes, he would diſmiſs the Bill.

If not a Free-School, the Inhabitants have no Right to ſue in the Attorney General's Name.

Woodward

Caſe 356. *Nov.* 18.

Woodward verſus *Glasbrook.*

One deviſes ſeveral Parcels of Land to his ſeveral Children in Tail, and if any of them die before 21, or unmarried, ſuch Child's Part to go to the ſurviving Children. If any of the Children die unmarried, though above the Age of 21, his Share ſhall go to the ſurviving Child; but ſuch Survivor ſhall have ſuch Share for Life only.

THE Teſtator *Edward Glasbrook* by his Will (*inter alia*) deviſed a Houſe in *Lime-Street* to his Son *James* and *Thomas*, and the Heirs of their Bodies in equal Moieties, and deviſed other Houſes to his other Children in like Manner, and then adds, *but my Will and Mind is, that if any of my ſaid Children ſhall die before* 21, *or unmarried, the Part or Share of him or her ſo dying ſhall go over to the Survivors.*

In Ejectment before the *Lord Chief Juſtice Holt*, he was of Opinion that *Thomas* dying unmarried, though he attained his Age of *Twenty-one*, his Moiety went over to the Survivors; and that *John* another Son likewiſe dying unmarried, though after *Twenty-one*, that his half went over to the Survivors.

What goes over on one Child's Death, ſhall not go over again a ſecond Time.

Secondly, That what went over to *John* on the Death of his Brother *Thomas* would not go over again a *ſecond* Time.

Thirdly, That by the Deviſe over, only an Eſtate paſſed to the Survivors for their Lives; and the Court decreed an Account to be taken, and a Partition to be made accordingly.

Caſe 357. *Nov.* 20.

Nichols verſus *Tolley & al'.*

Deviſe.

John Giles having his own Life in a Copyhold held of the Biſhop of *Worceſter*, procured a Copy in Reverſion to be granted to *Grace* his Wife, *Pritchet*, and *Andrews*,

drews, for their Lives *ſucceſſive*; but this was in Truſt for *John Giles* and his Heirs; *John Giles* by his Will deviſes the Copyhold after the Deceaſe of him and his Wife, to the Heirs of his Body on his Wife *Grace* to be begotten, if ſuch Iſſue ſhall be living at the Deceaſe of him, his Wife or Survivor, Remainder over to the Plaintiff; he left Iſſue living at the Time of his Deceaſe, but ſuch Iſſue died in the Life-time of his Wife.

Per Lord Keeper, The Word (*Survivor*) muſt not be rejected, and the Word (*or*) muſt be expounded (*and* living at the Deceaſe of the Survivor) ſo that he held the Remainder over good; and if that Point had been otherwiſe, yet the Plaintiff had been well intitled as Heir at Law to the Teſtator *John Giles*, and decreed it accordingly.

Nicholls verſus *How* and *Porter & al'*, *& econtra.*

Caſe 358. *Nov.* 21.

From what Time the Lands of a Receiver of the Crown are bound by the Statute of 13 *El.* Ca. 4.

Bevis Loyd having firſt purchaſed a long Term for Years in the *Lamb-Inn*, and of other Houſes in St. *Clement's Pariſh*, and afterwards purchaſed the Inheritance, he afterwards became Receiver of *North Wales*, and having Occaſion for 500 *l.* aſſigned over the Term by way of Mortgage to *J. S.* Afterwards on the Marriage of *Evan Loyd* his Son, he ſettled the Houſes in St. *Clements* (*inter alia*) on himſelf for Life, Remainder to *Evan Loyd* and the Heirs of his Body. There was Iſſue of the Marriage a Daughter, now the Wife of *Porter*. After this *Bevis Loyd* mortgages theſe Houſes to Mr. *John Nichols* for 1800 *l.* The *King* extends theſe Houſes for the Debt of *Bevis Loyd*; and *Nicholls* gets an Aſſignment of the Extent, and a *Privy Seal* for the Debt.

Firſt, Reſolved that by the Statute of Queen *Elizabeth*, the Land and real Eſtate of *Bevis Loyd* was bound and ſtood liable to anſwer the *King*'s Debt, although he was not actually a Debtor to the *King*, nor any Extent againſt him in ſeveral Years after.

When the King's Receiver is ſeiſed of the Inheritance, and there is a Term for Years attending the Inheritance, the Term is bound as well as the Inheritance. But if the King's Receiver is poſſeſſed of a Term in groſs, and it is aſſigned before an actual Extent, the Aſſignment is good againſt the Crown.

Secondly, That where a Term is attendant on the Inheritance, if the *King* extends the Inheritance, he ſhall have a Right to the Term; but if it be a Term in groſs, and aſſigned before any actual Extent, the Aſſignment will ſtand good, and the Term not liable to the King's Debt.

Caſe 359.
Nov. 24.

Finch verſus *Resbridger.*

After a long Enjoyment of a Water-Courſe running to a Houſe and Garden, through the Ground of another, it ſhall be preſumed the Owner of the Houſe has a Right to the Water-Courſe; unleſs the other Party can ſhew a ſpecial Licenſe, or an Agreement to reſtrain it in point of Time.

THE Bill was to quiet the Plaintiff in the Enjoyment of a Water-Courſe to his Houſe and Garden, through the Ground of the Defendant. It appeared upon the Proof, that there had been a long Enjoyment of this Water-courſe, particularly by the Earl of *Arundel*, and after him by the Duke of *Norfolk*, and that the Plaintiff had ſcoured and repaired it, when there was Occaſion, and that the *Duke* was in the quiet Enjoyment of it, when he ſold to the Plaintiff.

For the Defendant it was inſiſted, that the Earl of *Arundel* in 1662, took a long Leaſe of the Lands, now the Defendant's, and that whilſt he held thoſe Lands as Leſſee, he made the Water-Courſe in Queſtion; and that after the Expiration of the Leaſe, he was many Times denied Liberty to ſcour or amend the Water-Courſe, and ſeveral Witneſſes depoſed to that Effect;

and the Defendant inſiſted it was only upon Sufferance, and not founded upon any Agreement or Conſideration.

This Cauſe being firſt heard before the *Lord Chancellor Sommers*, he directed an Iſſue to be tried at Law, whether there was any Agreement made between any of the Owners of the Plaintiff's and Defendant's Eſtates reſpectively, for the making or continuing of the Water-Courſe in Queſtion.

Upon a Rehearing before the *Lord Keeper Wright*, he decreed for the Plaintiffs, declaring a quiet Enjoyment was the beſt Evidence of Right, and would preſume an Agreement, and the Proof ought to come on the other Side to ſhew the ſpecial Licenſe, or that it was to be reſtrained or limited in point of Time.

A long quiet Enjoyment is the beſt Evidence of a Right.

Mitchell verſus *Edes.*

Caſe 360. *Maſter of the Rolls.*

THE Plaintiff being an Aſſignee of the Wages due to a Seaman, the Defendant was his Adminiſtrator, and inſiſted the Agreement was but in the Nature of a Letter of Attorney, and conſequently revoked by the Death of the Inteſtate; and there being Bond-Debts the Inteſtate's Eſtate ought to be applied in a Courſe of Adminiſtration; and the Debt owing by the Plaintiff, for ſecuring or Satisfaction whereof the Aſſignment was made, was only a ſimple Contract Debt.

A Seaman aſſigns his Wages to *J. S.* as a Security for a Debt he owed to *J. S.* and died inteſtate. It was inſiſted that this was only an Agreement in Nature of a Letter of Attorney,

and determined by the Seaman's Death, and that there were Bond-Debts. Decreed *J. S.* ſhall be paid in Courſe of Adminiſtration.

The Court decreed an Account of Aſſets, and the Plaintiff to be paid in a Courſe of Adminiſtration.

Hanſon

Caſe 361. ## *Hanſon* verſus *Derby.*

On a Bill to redeem an Account decreed, and 240*l.* reported due, and Exceptions to the Report. Pending which the Defendant the Mortgagee commits Waſte. Court orders the Mortgagee to deliver up the Poſſeſſion, on the Plaintiff's giving Security to abide the Event of the Account.

THE Bill being to redeem a Mortgage, on the Hearing an Account was decreed, and 240*l.* reported due; to which Report, the Plaintiff had taken Exceptions. The Cauſe thus ſtanding in Court, the *Lord Keeper* on a Motion and reading Affidavits, that the Defendant had burnt ſome of the Wainſcot, and committed Waſte, ordered the Defendant to deliver up Poſſeſſion to the Plaintiff, who was a *Pauper*, giving Security to abide the Event of the Account.

Caſe 362. *Novemb.* 30. ## *Bennet* verſus *Edwards* and *Selby & al'.*

Bill to foreclose an Infant. By Decree it is ſent to a Maſter to ſee what due. Maſter reports what is due for Principal, Intereſt and Coſts. Whether upon a ſubſequent Order to carry on Intereſt, the former Intereſt during the Infancy ſhall carry Intereſt.

A Bill being brought that an Infant might redeem a mortgage, or be foreclоſed, upon the Hearing it was decreed to an Account, and the Infant to pay what ſhould be reported due, unleſs Cauſe within *ſix* Months after he became of Age. A Report made and confirmed of 2600*l.* due, and a ſubſequent Order being made to compute Intereſt from the Report, the *Lord Keeper* doubted whether Intereſt ought to be allowed for the Intereſt.

Caſe 363. *Maſter of the Rolls. Decemb.* 2. ## *Smith* verſus *Bruning.*

A Marriage Brocage Bond decreed to be delivered up, and a Gratuity of 50 Guineas actually paid to be refunded.

THE Court not only decreed a Marriage *Brocage* Bond to be delivered up, but a Gratuity of *fifty* Guineas actually paid to be refunded.

Sheffield

Sheffield verſus Lord *Caſtleton & ux'.*

Caſe 364. *Decemb.* 4.

THE Lord *Fanſhaw* the Father, together with his Son, on the Marriage of his Daughter to Sir *Thomas Chappel*, become bound in a Recogniſance of the 5*th* of *May* 1660, for Payment of 1500 *l.* to Sir *Thomas Chappel*, as his Daughter's Marriage-Portion. It ſo fell out, that this Recogniſance was not confirmed by the Act of the *Convention* for Confirmation of judicial Proceedings, *that* Act having Relation to the *firſt* Day of the *Seſſions*, which was *April* 25, 1660, and confirmed only Recogniſances then taken.

A. is bound as a Surety in a Recogniſance dated *May* 5, 1660, for Payment of Money, which happened not to be made good by the Convention Act, for confirming judicial Proceedings, the Act not extending to that Day. *A.* being a Surety only, and having no Conſideration for entring into this Recogniſance, the Court would not make it good, nor allow it to be ſo much as a Debt.

The Queſtion now was, Whether this ſhould in a Court of Equity be looked upon as a Debt which the Lord *Fanſhaw* the Son, (whoſe Widow and Executrix the Lord *Caſtleton* had married) was in Conſcience obliged to pay, and ſhould be decreed to be ſatisfied out of his Aſſets.

For the Defendant it was inſiſted, that *Thomas* Lord *Fanſhaw* the Son, did not concern himſelf in the Treaty of Marriage, made no Promiſe to pay, nor had any Allowance or Conſideration from his Father. All that appears is, that he intended and ſubmitted to be bound as Surety for his Father; but it falls out he is not effectually bound: Now where a Man intended to become bound as a Surety, and had promiſed and declared he would ſo do, and died before he did it; or if he afterwards thought better of it, and altered his Mind, no Bill would lie in Equity to inforce him to become bound, or to compel his Executors to pay the Debt.

The *Lord Keeper* diſmiſſed the Bill.

Caſe 365.
Decemb. 6.

Gardner verſus *Pullen.*

One is bound by Bond to transfer 300*l.* *Eaſt-India* Stock before *Sept.* 30, then next. Tho' the Stock was much riſen, Defendant decreed to transfer the 300*l.* Stock in Specie, and to account for all Dividends, from the Time that it ought to have been transferred.

THE Plaintiff became bound to the Defendant in a Bond of 500*l.* Penalty, that he or one *Phillips* would on or before *Sept.* 30, 1698, transfer 300*l.* Stock in the *old Eaſt-India Company*, and Stock being now much riſen, the Queſtion was, on what Terms the Plaintiff ſhould be relieved againſt the Penalty of the Bond, whether to anſwer the Value of the 300*l.* Stock, according to what it was worth on the Day on which he ought to have transferred it with Intereſt from that Time, or whether he ſhould be obliged to transfer 300*l.* Stock in *Specie.*

Per Cur. Decree the Plaintiff to transfer 300*l.* Stock in a Fortnight, and account for all *Dividends* ſince he ought to have transferred, and Coſts at Law and here, or diſmiſs the Bill with Coſts.

Caſe 366.
Eodem die.

Sprigg verſus *Sprigg.*

Deviſe of Lands to his Executors to be ſold, and thereout to pay 500*l.* to *A.* if he return from beyond Sea, and the Reſidue to B. *A.* died before Teſtator. This 500*l.* Legacy being given on a Contingency that never happened, is as no Legacy, and falls into the Deviſe of the Reſiduum: Otherwiſe if it had been an abſolute Legacy of 500*l.*

Sprigg deviſed his Lands in *Brigſtock*, after the Deceaſe of his Wife, to his Executors to be ſold, and thereout to retain their Coſts and Charges, and to pay 500*l.* to his Nephew *Thomas Sprigg*, if he came from beyond the Sea, and gave a Releaſe, and Diſcharge for it. The reſt and Reſidue of the Money to be raiſed by Sale, he deviſed to *ſeven* Perſons therein named, being Nephews and Nieces. *Thomas Sprigg* never returned, and is ſuppoſed to be dead at the Time of the Will.

The

The Plaintiff as Heir to the Teſtator, brought his Bill againſt the Executors and reſiduary Legatees, demanding to have either the 500 *l.* or to that Value of the Land, as undiſpoſed of, and reſulting to him as Heir at Law.

It was admitted, that in the Deviſe of the Reſidue of a perſonal Eſtate, if a Legatee was dead at the Time of making the Will, the reſiduary Legatees ſhall not have the Benefit of that Legacy, and that it ſhall not fall into the Reſidue; nothing being intended to paſs by that Deviſe, but the Reſidue after that and other Legacies paid.

But in this Caſe the *Lord Keeper* was of Opinion that the Deviſe of 500 *l.* to *Thomas Sprigg* if living and ſhall return from beyond Sea, is a contingent Deviſe, and on a Condition Precedent, which not happening, is as if never given. But if it had been an abſolute Deviſe, it would not have paſſed to the reſiduary Legatee by the Deviſe of the reſt and Reſidue, and diſmiſſed the Bill.

Lord *Ranelaugh* verſus Sir *John Champante.*

Caſe 367. *Decemb.* 11.

THE Court upon the Account allowed the Defendant but 6 *l. per Cent. per Ann.* for a Debt contracted in *Ireland*, becauſe the Bond for ſecuring of it was executed here in *England.*

Bond executed in *England* for a Debt in *Ireland*, ſhall carry but 6 *l. per Cent.* Intereſt.

Harvey verſus *Eaſt-India Company.*

Caſe 368.

THE Plaintiff having a Decree againſt the *Eaſt-India Company* for 3700 *l.* a *Diſtringas* iſſued againſt them and

After a Decree againſt a Corporation for a Sum of Money, and a *Diſtringas* iſſued out againſt them, Court refuſed to give them any Time, or to let them be examined on Interrogatories: Otherwiſe if it was a *Diſtringas* on mean Proceſs.

and they came in, and entred their Appearance with the *Regiſter*, and prayed they might be examined, and all Proceedings on the *Diſtringas* might be in the mean Time ſtay'd. And it was inſiſted by the *Attorney General*, that the *Diſtringas* was to compel the Defendants to appear to anſwer, which is to anſwer upon *Interrogatories*, and that there is the ſame Reaſon that a Corporation ſhould be admitted to ſhew Matters in Avoidance to ſave their Goods, as there is for a common Perſon to ſave his Liberty, and to prevent a Commitment.

But the *Lord Keeper* was of Opinion that there being a Decree againſt the Corporation for 3700 *l.* Execution was to go without their being farther heard, as in the Caſe of a Judgment at Law; but where a Decree *agit in perſonam*, there the Defendant ſhall be admitted in Favour of Liberty to ſhew Cauſe, why he ſhould not be committed. The *Diſtringas in Proceſs* againſt a Corporation is to anſwer as well the Contempt as the Bill or Complaint; but when upon a Decree, it is *ad comparendum & ſolvendum*, and in the Caſe of Dr. *Huſſey* againſt the *Grocers Company* 24 *Car.* 2. a Sequeſtration iſſued on the Return of the firſt *Diſtringas*; and ſo in *Cholmley* and the *Grocers Company*; and the Court refuſed in this Caſe to grant any Stay of Proceſs, or for the Defendants to be examined.

Private Members of a Company made liable to the Company's Debts, where the Company had no Goods.

Note; In the Caſe between Dr. *Salmon* and the *Hamborough Company*, the Members in their private Perſons were made liable, the *Company* having no Goods.

Attorney

Attorney General verſus *Mayor*, &c. *de Coventry.*

Caſe 369. *Lord Keeper*, *Lord Chief Juſtice* Holt, *Juſtice* Powel, *Juſtice* Blencoe.

IN the 34*th* Year of *Hen* 8. upon the Diſſolution of Monaſteries the Lands in Queſtion, then under ſeveral Leaſes for Lives at a Rent of *ſeventy* Pounds *per Ann.* but of much greater Value when the Lands ſhould come in Poſſeſſion, (now about *three Hundred* Pounds *per Ann.*) were purchaſed from the Crown, at the Price of *one Thouſand four Hundred Pounds.* The *Corporation* of *Coventry* was then very low and poor, and by their common Box-Money, Sale of their Goods, and of a Gold Ring, *&c.* raiſed about *four Hundred* Pounds; the Reſidue of the Purchaſe-Money was paid by Sir *Thomas White*, and in Articles between the Town and Sir *Thomas White*, in which Notice is taken of the low and decayed Condition of the Corporation, it was agreed that *ſeventy Pounds per Ann.* ſhould be applied to ſeveral Charities therein mentioned, *viz.* about *Forty-five* Pounds *per Ann.* to place out Apprentices, and to be lent to decayed Tradeſmen, *five* Pounds *per Ann.* to the *Mayor* and *Aldermen* of *Coventry*, and *twenty* Pounds *per Ann.* to *Merchant-Taylors Company*, and after the Expiration of *thirty* Years, the Charity of *Forty-five* Pounds was to circulate, and be applied one Year for the Benefit of the Town of *Leiceſter*, the ſecond for the Town of *Northampton*, the third for *Warwick*, and the fourth for *Coventry*, and ſo for ever by ſuch Rotation. In the Articles the Town of *Coventry* are mentioned to be the Purchaſers, tho' *one Thouſand* Pounds of the Money was paid by Sir *Thomas White.*

The Reverſion in Fee of divers Lands let on Leaſes, on which in all 70 *l. per Ann.* was reſerved, was granted by K. *Hen.* 8. to the Corporation of *Coventry.* 400 *l.* of the Purchaſe-Money was paid by the Corporation, and 1000*l.* by Sir *Thomas White*; but in the Grant the Corporation was ſaid to be the Purchaſers, and it was by the Deed that declared the whole 70 *l. per Ann.* ſhould be applied to ſeveral Charities therein mentioned. The Leaſes expiring, the Value of the Lands were greatly increaſed. But the Surplus had been all along received by the Corporation of *Coventry.* The Lands themſelves not being given to the Charities but particular Rents out of the Lands, decreed the Corporation ſhould have the Surplus of the Profits. But this Decree reverſed by the Houſe of Lords.

The Town of *Coventry* had always the Poſſeſſion, and Sir *Thomas White* becoming poor, he wrote to the Cor-

poration, in Regard many of the Leaſes were fallen into Poſſeſſion, and the Revenue greatly increaſed, that they would ſettle 40 *l. per Ann.* on his Wife for Life, which they refuſed to comply with; but had all along paid the Charities, and diſpoſed of the Surplus as they thought fit.

The Information was brought by the *Attorney General*, on Behalf of the Towns of *Leiceſter*, *Northampton* and *Warwick*, to compel the Corporation to account for the improved Value of the Lands, and to have the ſame applied to the Charities mentioned in the Articles.

For the Plaintiffs it was inſiſted, that *ſeventy* Pounds *per Ann.* was the whole Rent reſerved on the Leaſes at the Time of the Articles, and the *ſeventy* Pounds *per Ann.* being appointed to Charities, the whole was appointed to Charities, and as the Value of the Lands increaſed, ſo ought the Charities to be increaſed in Proportion, according to the Reſolution in the Caſe of *Thetford School*, and that the Length of Time was no Bar; that there was no Statute of Limitations againſt God and Religion; what was once given to Charity ought to be ſo applied, and what had been imbeziled ought to be reſtored.

8 Co. 130.

But for the Defendants it was inſiſted, and the *Lord Keeper*, and the *three Judges* were all of that Opinion, that this Caſe was not within the Reaſon of the Caſe of *Thetford School*, but a plain and ſubſtantial Difference appears, for in that Caſe the Lands were given to the Charity; and although in directing the Application of it a Sum certain is given to maintain a School-Maſter, and Sums uncertain to other Charities, amounting to what was the then Value of the Eſtate, as the Eſtate increaſed, it was reaſonable the Charity ſhould increaſe, for no one elſe was to take any Benefit thereof. But in the preſent Caſe, not the Lands themſelves, but *ſeventy* Pounds *per Ann.* iſſuing out of the Lands is allotted to Charities,

Charities, and the Town of *Coventry* is expreſly mentioned to be the Purchaſers; and it appears that they raiſed *four Hundred* Pounds, Part of the Conſideration-Money, and that with ſome Difficulty, by Sale of their Goods, their Gold Ring, Box-Money, *&c.* and when they were in that low and decayed Condition, as is mentioned in the Articles, the Plaintiffs would have it preſumed they were ſuch good Chriſtians as to ſell all they had to give it to the Poor.

A Charity is not barred by Length of Time or the Statute of Limitations.

And although a Charity is not barred by Length of Time, or any Statute of *Limitations*; yet it is an Evidence that the Surplus belonged to *Coventry*, becauſe they have enjoyed it ever ſince the Purchaſe: And in the Life-time of Sir *Thomas White*, he in his Letters takes Notice they enjoyed it, and that Leaſes were fallen in, and the Surplus conſiderable; yet claims not that Surplus, or that it ought to go to Charities; but in a precarious Manner deſires them to make a Proviſion for his Wife for Life.

It was ſtrongly inſiſted by the Lord Chief Juſtice *Holt*, that the Articles mentioning the Corporation to be the Purchaſers, there could be no Averment received to the Contrary. This Purchaſe was after the Statute of 7 *H.* 8. by which all Uſes were deſtroyed, and no ſuch Thing as a Truſt then thought of; nor could a Corporation *aggregate* be ſeiſed to an Uſe, it being held no *Subpœna* lay againſt them; and the Recital that Sir *Thomas White* advanced the Money doth not imply that he was to be the Purchaſer, but the Contrary is expreſſed in the Articles, that the Corporation were the Purchaſers. The Deed ought to be expounded by it ſelf, and by what appears in it, there being no Reference in the Deed to any Thing foreign to it, and it would be a Matter of moſt dangerous Conſequence to conſtrue Deeds by foreign Matters or Conjectures; it would put all Things into Confuſion, and render all Things incertain. It is the peculiar

peculiar Advantage of Mankind from all the reſt of the Creation, that they can commit Things to Writing, and tranſmit them to Poſterity; and cited *Bedell*'s Caſe, 7 *Co.* 39. *b.* where a particular Conſideration being mentioned in the Deed; the Court would not allow the Averment of any other Conſideration, as for natural Love, Affection, *&c.*

And concluded that the Surplus was always intended for the Corporation, the Leaſe it ſelf not being given to the Charity, but only *ſeventy* Pounds *per Ann.* out of the Lands. In the Caſe of *Adams* and *Lambert*, where Lands were *twenty* Pounds *per Ann.* and but *ten* Pounds *per Ann.* appointed to the Prieſt, there the whole adjudged to the Queen, becauſe the Lands were given, and not a Rent out of them; and in the Caſe of *Cherry* and *Dethick*, there the Deviſe of a Rent was adjudged a Deviſe of the Land it ſelf; but in this Caſe but *ſeventy* Pounds *per Ann.* allotted to the Charities, and the Payment of *ſeventy* Pounds *per Ann.* to the Charities is a good Performance of the Articles, and I am of Opinion, if I have Lands of *forty* Pounds *per Ann.* and grant out of thoſe Lands *forty* Pounds *per Ann.* to a Charity; that if the Lands increaſe to *one Hundred* Pounds *per Ann.* the Charity ſhall have only *forty* Pounds *per Ann.*

The Information was unanimouſly diſmiſſed. Upon an Appeal to the *Houſe of Lords*, the Diſmiſſion was reverſed, and the Defendants ordered to account for the improved Value of the Land, and the Charities to be augmented in Proportion.

Amhurſt

Amhurſt verſus *Dawling.*

Caſe 370. *Lord Keeper. Decemb.* 14.

THE Defendant having mortgaged the Manor of *Thunderſley*, to which an Advowſon was appendant, to the Plaintiff, who brought the Bill to foreclose, the Church became void; the Defendant moved the Court for an Injunction to ſtay the Proceedings in a *Quare impedit* brought by the Plaintiff.

A Manor with an Advowſon appendant, being mortgaged, the Church becomes void. The Mortgagor ſhall preſent, unleſs forecloſed; and if pending a Suit by the Mortgagee to foreclose, the Church becomes vacant, though the Defendant has no Bill, the Court will grant an Injunction to ſtay Proceedings in a *Quare impedit* brought by the Plaintiff. *Poſt.* Caſe 500.

Per Cur. Although the Defendant *Dawling* hath no Bill, yet being ready and offering to pay the Principal, Intereſt and Coſts, if the Plaintiff will not accept his Money, Intereſt ſhall ceaſe, and an Injunction to ſtay Proceedings in the *Quare impedit*; for the Mortgagee can make no Profit by preſenting to the Church, nor can account for any Value in reſpect thereof, to ſink or leſſen his Debt, and the Mortgagee therefore in that Caſe, until a Foreclosure, is but in the Nature of a Truſtee for the Mortgagor.

Mortgagee, till a Foreclosure, is but in Nature of a Truſtee for the Mortgagor.

And the like Order was made between *Jory* and *Cox*, where the Defendant had an Injunction againſt the Plaintiff to ſtay his Preſenting to a Church, that became vacant pending the Suit.

Burnett Arm' verſus *Kinnaſton.*

Caſe 371. *Lord Keeper. Decemb.* 16.

THE Plaintiff's Teſtator having married the Siſter of the Defendant *Kinnaſton*, her Portion was ſecured

A Man marries a Woman intitled to a Mortgage in Fee, and after Marriage aſſigns his Intereſt in the Mortgage to Truſtees, to call in the Money, and lay it out in Land to be ſettled upon the Husband and Wife, and their Iſſue, Remainder to the Heirs of the Husband. Husband dies without Iſſue, and after the Wife dies. This Mortgage is as a Choſe in Action, and the Wife ſurviving, it ſhall go to her Executor, and not to the Executor of the Husband.

red to her by a Mortgage in Fee of Part of the Defendant's Eſtate. The Plaintiff's Teſtator after Marriage made an Aſſignment of his Intereſt in the Mortgage, and by Articles between him and ſeveral Truſtees therein named, the Money was to be called in, and inveſted in Land to be ſettled to the Uſe of the Husband and Wife, and their Iſſue, Remainder to the right Heirs of the Husband.

The Husband and Wife being both dead without Iſſue, the Plaintiff claimed the Benefit of the Mortgage by Virtue of the Articles, as claiming under the Husband.

But the Court diſmiſſed the Bill, becauſe the Husband had not an abſolute Power over the Mortgage; but being in the Nature of a *Choſe in Action*, he had only a Right to reduce it into Poſſeſſion, and not having ſo done in his Life-time, his Aſſignee ſtood but in the Place of the Husband, and could have no greater Right, or Power than the Husband himſelf had, which was only to reduce it into Poſſeſſion in his Life-time, and not having ſo done, it ſurvived to the Wife, notwithſtanding the Articles, and muſt go to her Adminiſtrator.

Caſe 372. *Maſter of the Rolls. Eodem die.*

A. borrows 200 *l.* of *B.* and gives *B.* a Mortgage defeaſanced to be void on *B.*'s paying *A.* 40 *l. per Ann.* for 8 Years by quarterly Payments. Court relieved on Payment of the 200 *l.* and ſimple Intereſt.

James verſus *Oades.*

THE Plaintiff being poſſeſſed of a reverſionary Term for *Thirty-ſix* Years to commence with the Year 1700, of the Value of about *two Hundred* Pounds *per Ann.* when the Eſtate ſhould fall into Poſſeſſion; in the Year 1683, applied to the Defendant *Oades* a Scrivener, to lend him the Sum of *two Hundred* Pounds; they came to an Agreement for that Purpoſe, *viz.* that the Plaintiff ſhould aſſign his Term to the Defendant, defeaſanced to be void on the Payment of *forty* Pounds *per Ann.* for *eight* Years by quarterly Payments.

Plaintiff's Bill was to redeem, paying Principal, Intereſt and Coſts; the Defendant inſiſted to have the Benefit of his Bargain, and Intereſt from the Time of each quarterly Payment, and the rather, becauſe he lent his Money in 1683, on ſuch a remote Reverſion.

Per Cur. What is uſually called a *Briſtol Bargain* is *twenty* Pounds *per Ann.* for *ſeven* Years for *one Hundred* Pounds for Years; but this goes beyond it, and is extended to *eight* Years, *viz. one Hundred* and *ſixty* Pounds for every *Hundred*, by *twenty* Pounds *per Ann.* and ſhould it be allowed of, it may be carried to *nine* Years, and ſo on without any Stint or Bounds; and declared it to be an Agreement againſt Conſcience, and decreed a Redemption on Payment of the *two Hundred* Pounds with ſimple Intereſt at *ſix* Pounds *per Cent.*

Hilchins Wid' verſus *Hilchins.*

Caſe 373.
Lord Keeper.
Decemb. 17.

Samuel Hilchins in 1679, deviſeth, that if his Stock and Credits Abroad ſhould not be ſufficient for Payment of his Debts and Legacies, that his Executors ſhould pay the ſame out of the Rents and Profits of his real Eſtate; and when Debts and Legacies were paid, deviſed his real Eſtate to his Son *Giles Hilchins* in Tail, with Remainder over, and ſhortly afterwards died; the Executors enter on the real Eſtate. *Giles Hilchins* the Son married the Plaintiff *Silvetha*, and died in 1681, before the Debts were paid, and before he had any Poſſeſſion. In 1694, the Plaintiff *Silvetha* recovered her Dower in the *Mayor's Court*, and *two Hundred* and *Twenty-ſeven* Pounds for Damages, and had her Dower ſet out by Meets and Bounds by the Sheriff, but had not recovered the actual Poſſeſſion, an old ſatisfied Mortgage to Sir *John Tippetts* ſtanding in her Way; and therefore ſhe brought

brought her Bill againſt the Executors, alledging the Debts and Legacies were long ſince paid, and againſt the Remainder-Man, and alſo againſt the Defendant *Sarah Hilchins* the Teſtator's Widow, to ſet aſide her Pretence of Dower, alledging the Teſtator had made no other Proviſion for her, which was intended in lieu and Recompence of Dower, though not ſo expreſſed in the Will, yet was implied, becauſe he had deviſed all the reſt of his Eſtate, to other Purpoſes, and as to that Matter it was inſiſted by the Plaintiff's Counſel that in the Caſe of *Lawrence* and *Lawrence*, it was decreed by the late Lord Chancellor *Sommers*, that where the Teſtator had deviſed Part of his real Eſtate to his Widow for Life, and other Part to her during her Widowhood; and deviſed the reſt of his Eſtate to other Purpoſes, that what was ſo deviſed to his Widow, ſhould be deemed and taken to be in Lieu and Satisfaction of Dower; and ſet aſide her Recovery in Dower. And a Croſs-Bill was brought by the Deviſee of the Lands and Executors, to ſet aſide *Silvetha*'s Recovery of *two Hundred* and *Twenty-ſeven* Pounds for Damages, for detaining her Dower, and upon the firſt hearing it being referred to a *Maſter* to take an Account of the perſonal Eſtate, and Rents and Profits of the real Eſtate received by the Executors, and how much the Debts and Legacies amounted to; the *Maſter* had made his Report therein, and thereby certified that ſufficient was raiſed for Payment of all the Debts and Legacies in the Year 1693, and that the Recovery in Dower was not until 1694.

Ant. Ca. 327.

Deviſe of Lands to Executors till Debts paid, Remainder to his Son in Tail. The Son marries and dies, before the Debts paid. The Eſtate of the Executors is only a Chattel Intereſt, and will not hinder the Son's Wife of Dower. But the Wife's Dower cannot commence in Poſſeſſion, nor Damages be recovered for detaining it, but from the Time of the Debts being paid.

Per Cur. It muſt be admitted that the Eſtate in the Executors was but a Chattel Intereſt, and as ſuch could not hinder Dower; they were only to receive the Rents and Profits until Debts and Legacies paid, and *that* Intereſt determines at Law, when the Truſt is ſatisfied, and therefore her Recovery in *Dower* was juſt; but as to the

Damages that is carried too far back, ſhe having recovered the Value from the Death of her Husband; whereas ſhe ought to have had Damages but from the Time of Debts paid, and Truſts performed. As for the Teſtator's Widow ſhe not having recovered her Dower, *that* is to be laid out of the Caſe, and the Plaintiff's Dower is not therefore to be looked upon as *dos de dote*, and decree the Mortgage made to Sir *John Tippetts* for *one Thouſand* Years, and ſince aſſigned to the Defendant, to be ſet aſide, and the Plaintiff to be let into her Dower; but ſet aſide the Verdict as to the *two Hundred* and *Twenty-five Pounds* Damages, and ſhe to have only an Account of the *Third* of the Profits from the Time the Debts were paid, and Truſt performed.

Anonymus.

Caſe 374.
Lord Keeper.

A Reverſion in Fee expectant on an Eſtate for Life, is deviſed to *A.* and *B.* for Payment of Debts and Legacies,

THE Teſtator ſeiſed of a Reverſion in Fee expectant on the Determination of an Eſtate for Life, deviſed the ſame to *A.* and *B.* to be ſold for the Payment of his Debts and Legacies, and made the ſaid *A.* and *B.* his Executors.

and *A.* and *B.* are made Executors. The Deviſees being Executors, the Money raiſed by Sale is legal Aſſets, and the Debts muſt be firſt paid; otherwiſe if the Truſtees had not been made Executors.

The Queſtion was, Whether the Money raiſed by the Sale ſhould be deemed legal Aſſets, and conſequently the Debts to be thereout paid in the firſt Place, or only as equitable Aſſets, and conſequently the Debts and Legacies to be paid in Proportion *& pari paſſu.*

Decreed that the Debts ſhould be firſt paid. The Deviſe being to the ſame Perſons as are named Execu-

tors, the Money becomes legal Aſſets: But if to Truſtees not made Executors, it had been otherwiſe; and cited the Caſe of *Hixon* and *Witham* in *Chancery Reports*, and *Rolle's Abr.* Tit. *Executor.* Land deviſed to be ſold by Executors for Payment of Debts, the Money raiſed by Sale is legal Aſſets, and the Caſe of *Edwards* and *Graves* in *Hobart.*

1 Chan. Ca. 248.

1 Rol. Abr. 920. G. 6.

Hob. 265.

DE
Term. S. Hillarii,
1700.
In CURIA CANCELLARIÆ.

Johnſon Mil' *& ux'*, Plaintiffs.

Sir *Edward Northey & al'*, Defendants.

Caſe 375.
Lord Keeper.
Jan. 28, 29.

THE Earl of *Cleveland* having in 1638, ſettled the Manor of *Toddington*, and ſeveral Lands in *Bedfordſhire*, to the Uſe of himſelf for Life, Remainder to the Lord *Wentworth* for Life, and to his firſt and other Sons in Tail; in Default of ſuch Iſſue to the Heirs Females of the *Earl*, with a Power to revoke by Deed or Will.

The Earl of *Cleveland*, and Lord *Wentworth* his Son, make a Letter of Attorney to *Thomas Byers* to ſell the Premiſſes to pay Debts, and to pay the Surplus as they ſhould appoint.

And an Act of Parliament was alſo made impowering Truſtees to ſell to pay Debts, and the Surplus to the Earl of *Cleveland*.

The

The Lord *Wentworth* died without Iſſue Male, leaving Iſſue a Daughter, the Lady *Philadelphia Wentworth*, who in 1684, by Deed conveyed to her Mother the Lady *Philadelphia* and her Heirs, but kept the Deed in her own Cuſtody, and afterwards by Will deviſed the Lands to her Mother for Life, and then to be ſold to pay Debts, and died without Iſſue.

Bill brought by the old Lady *Lovelace*, as only Daughter and Heir Female of the Earl of *Cleveland*, and Heir at Law to the Lady *Philadelphia Wentworth*, to have the Deeds and Writings, and to ſet aſide the Deed of 1684, as gained by Fraud, or as a Truſt for the Daughter.

And a Bill was brought by the Lady *Philadelphia Wentworth* to have up the Settlement of 1638, as being revoked, and to have all other Deeds and Writings which concerned the Premiſſes, ſetting out her Title by the Conveyance from her Daughter by the Deed in 1684. To which Bill the Lady *Lovelace* anſwered to the Effect of her Bill, and the Cauſe proceeded, and divers Witneſſes examined, and a Decree was made againſt the old Lady *Lovelace ex parte.*

The Lady *Lovelace* died, pending the Suit, and *John* Lord *Lovelace* her Son, being alſo dead, and the old Lady *Wentworth* being alſo dead, and having deviſed the Lands to Sir *Edward Northey & al'*, to be ſold for the Payment of Debts,

Sir *Henry Johnſon* and the Lady *Wentworth*, Baroneſs of *Nettleſtead*, his Wife, being the only ſurviving Child of the Lord *Lovelace*, brought their Bill againſt the Truſtees and Executors of the Lady *Philadelphia Wentworth*, to ſet aſide the Deed of 1684.

And a Bill was brought by the Creditors to have the Benefit of the former Decree made *ex parte*, and to have the Lands ſold for Payment of Debts.

Per Cur. Firſt, the Limitation to the Heirs Females of the Earl of *Cleveland* was determined, and the Lady *Wentworth* the Wife of Sir *Henry Johnſon* could not make Title under that Limitation, becauſe ſhe muſt in ſuch Caſe derive all by Females; whereas the old Lady *Lovelace* the Daughter of the Earl of *Cleveland*, left a Son the late Lord *Lovelace*, who left Iſſue two Daughters, of which the Plaintiff, Sir *Henry Johnſon*'s Lady, was the Survivor.

A Son's Daughter cannot take by a Limitation to the Heirs Female of the Body of the Father, for ſuch Heirs Female muſt derive all by Females.

But then it was inſiſted that the old Lady *Lovelace* had ſuffered a Common Recovery.

Secondly, Per Cur. Whereas Sir *Henry Johnſon* had examined Witneſſes in this Cauſe, wherein he was Plaintiff, to the ſame Matters put in Iſſue in the former Cauſes, and in Truth examined the ſame Witneſſes as had been examined in the former Cauſes; thoſe Depoſitions were irregular, and therefore ordered to ſtand ſuppreſſed; for although the Creditor's Bill was to have the Benefit of the former Decree, ſo that the Court might examine the Juſtice of that Decree; yet that muſt be done upon the Proofs in that Cauſe, wherein the Decree was made, and not upon any new Proofs.

In a Bill brought to have the Benefit of a former Decree, Plaintiff cannot examine Witneſſes, much leſs the ſame Witneſſes to the Matters in Iſſue in the former Cauſe. But on ſuch a Bill, the Court may examine the Juſtice of the former Decree; but then it muſt be upon the Proofs taken in the Cauſe, wherein that Decree is made.

Thirdly, A Doubt ariſing whether the Settlement of 1683, was revoked, two Iſſues were directed to be tried at Law, *viz.*

Firſt, Whether the Settlement of 1684, was revoked.

Secondly, Whether the old Lady *Lovelace* ſuffered a good Common Recovery.

But Sir *Henry Johnſon* afterwards ſubmitted to become a Purchaſer of the Eſtate under the Truſtees.

Lydiatt & al', on the Behalf of the Hoſpital of *Felſtead* in *Eſſex*, } Plaintiffs.

Sir *John Foach*, Defendant.

Caſe 376.
Lord Keeper.
Feb. 3.

THE Lord *Rich*, who founded the *Hoſpital* amongſt other Rules, directs that no Leaſe ſhould be made for any longer Term than *Twenty-one* Years, and that thereon ſhould be reſerved the old Rent, and no more, and that the Fine to be taken on ſuch Leaſe ſhould not exceed *two* Years Value.

The Farm at *Bromley*, Part of the *Hoſpital* Lands, had been leaſed accordingly at *eighteen Pounds per Ann.* and ſome Corn-Rent; but the Price of Proviſions increaſing, the Hoſpital in 1640, made a Leaſe reſerving the old Rent, but took a Deed of Covenants from the Leſſee to pay an additionl Rent of *Thirty-two Pounds per Ann.* over and above the Rent reſerved.

In 1659, the *Hoſpital*, at the Recommendation of the Lord *Warwick*, made a Leaſe to *John Atwood* ſenior, for *Twenty-one* Years, reſerving the old Rent of *eighteen Pounds per Ann.* and by Deed of Covenants the Leſſee covenants to pay *Thirty-two Pounds per Ann.* additional Rent, and the *Hoſpital* covenants from Time to Time to renew until the Term ſhould be made up *ſixty* Years; and in 1679, made a new Leaſe accordingly; and in 1682, the Leaſe was renewed again at the old Rent, and at the ſame Time an Indorſement was made on the Deed

of Covenants of 1659, that during the Term in the laſt Leaſe, the Leſſee would pay the additional Rent of *Thirty-two Pounds per Ann.*

Rules on the Foundation of an Hoſpital, that no Leaſe ſhould be made for above 21 Years. The Hoſpital make a Leaſe for 21 Years, with a Covenant by Renewal to make it up 60 Years. This Covenant is not binding in Equity, as being equally prejudicial to the Hoſpital as a Leaſe for 60 Years.

Sir *John Foach*, who had purchaſed of *Atwood*, brought a Bill to have the Leaſe renewed, purſuant to the Covenant in 1659; and upon hearing his Bill was diſmiſſed, the Covenant to renew until the Term of *Twenty-one* Years was made up *ſixty* Years, being the ſame, and as much to the Prejudice of the *Hoſpital*, as to grant a Term for *ſixty* Years at firſt, which was contrary to the Rules of the Founder.

And thereupon Sir *John Foach*, ſince he could not have the Leaſe renewed, refuſed to pay the additional Rent of *Thirty-two Pounds per Ann.* and the *Hoſpital* could not recover it at Law, *that* Agreement not being indorſed on the Leaſe of 1682, but on the Deed of Covenants of 1659, and the Indorſement was that the Corporation performing their Covenants for renewing, he would pay the increaſed Rent of *Thirty-two Pounds per Ann.* during the Term of *Twenty-one* Years granted by the Leaſe of 1682.

And it was now inſiſted on by the Defendant, that as the Plaintiffs would not perform their Agreement, by making up the Term *ſixty* Years, ſo he ought not to be compelled to pay the additional Rent; the Agreement being mutual, it ought to be mutually performed. And altho' Sir *John Foach* purchaſed with Notice of the Agreement for the Increaſe of Rent; yet at the ſame Time he took Notice that the Corporation had agreed to renew, and to make up the Term of *Twenty-one* Years in the Leaſe of 1659, to the Term of *ſixty* Years.

Lord

A Corporation for a Charity, are but Truſtees for the Charity, and may improve, but cannot do any Thing to the Prejudice of the Charity, or in Breach of the Rules of the Founder.

Lord Keeper. The Corporation are but Truſtees for the Charity, and might improve for the Benefit of the Charity, but could not do any Thing to the Prejudice of the Charity, in Breach of the Founder's Rules, and agreed Sir *John Foach*'s Bill was well diſmiſſed; for the Court could not have decreed a Renewal purſuant to the Covenant, without decreeing them to be guilty of a Breach of Truſt, and ſaid, although it was an Indenture of mutual Covenants on the Leſſor's Part to renew, and on the Leſſee's to pay the additional Rent of *Thirty-two Pounds per Ann.* yet thoſe Covenants appeared in the Deed to have been made on diſtinct Conſiderations, *viz.* the Covenant for Increaſe of Rent, becauſe the Price of Proviſions was raiſed; and the Covenant for Renewal, becauſe the Leſſee undertook to lay out *one Hundred Pounds* in Building, and ſo not dependant on each other; and he looked upon it as a Fraud and Impoſition on the *Hoſpital*, that the Agreement for the additional Rent was indorſed on the Deed of Covenants of 1659, and not on the Counterpart of the Leaſe of 1682, and therefore decreed the additional Rent and Arrears to be paid during the Term of *Twenty-one* Years in the Leaſe of 1682, and that Sir *John* and his Aſſigns paying the additional Rent of *Thirty-two Pounds per Ann.* and the reſerved Rent of *eighteen Pounds per Ann.* might hold and enjoy during the Reſidue of the Term of *Twenty-one* Years.

Caſe 377. *Lord Keeper.* *Feb.* 7.

John Clerk by Committee verſus *Rich. Clerk & al'.*

John Clerk the *Lunatick* being ſeiſed of the Manors of *Ardington* and *Isbury*, and being a very weak Man, if not a *Lunatick*, in 1665, made a Settlement by Deed, Fine and Common Recovery, by which *five Hundred Pounds* apiece was to be raiſed for his Brothers and Siſters,

who were left deſtitute of any Proviſion, the Father dying inteſtate, and ſubject thereunto the Eſtate was limited to him for Life, Remainder to the Heirs of his Body, Remainder to the Heirs of *John Clerk* the Father; his Mother joined in the Settlement, and it was openly tranſacted, with the Concurrence of Friends and Relations.

John Clerk afterwards married the Siſter of one *Gerrard*, who got the *Lunatick* home to him, and engaged him in many Debts by Bond, and otherwiſe; and in 1685, the *Lunaticks* Son and only Child being about *nineteen* Years old died, and thereupon a Commiſſion was ſued out and *John Clerk* found to be a Lunatick, and had ſo been from 1658, and that without any lucid Intervals. But this Inquiſition by the Direction of Sir *Robert Sawyer* then *Attorney General*, was taken off the File, and an Agreement was made, that *Isbury* ſhould be ſold to pay Debts in a Schedule amounting to 6000 *l.* and that *Ardington* ſhould be ſettled to the Uſe of the *Lunatick* for Life, and to his firſt and other Sons by his then Wife, Remainder to the Defendant *Richard Clerk*, &c. In 1698, another Commiſſion iſſued, and then he was found to be a *Lunatick* on the Day the Commiſſion was executed, without ſaying from what Day he became a *Lunatick*.

The Bill was brought to ſet aſide both the Settlements, as well that in 1655, as that in 1685.

For the Defendant *Rich. Clerk* it was inſiſted, that the firſt Settlement in 1655, was by Deed, Fine and Common Recovery, and fairly and openly tranſacted, and with the Privity and Concurrence of the Friends and Relations of *John Clerk*, who might be a weak Man, but not a *Lunatick*, or if a *Lunatick*, might have lucid Intervals; and therefore if the Conveyance was good at Law, it ought not, after this Length of Time, to be impeached or queſtioned in a Court of Equity; and the rather ſince it had been in good Meaſure executed, by

the raiſing and paying the younger Childrens Portions; and that *Richard Clerk* the Brother did not profit by the ſecond Settlement; but for Payment of the *Lunatick's* Debts joined in a Sale of *Isbury*, and ſo barred himſelf of the Inheritance of *Isbury*, and ſo ought in Equity to be looked upon as coming in upon a good Conſideration, and not having been guilty of any Fraud or ill Practice, his Title ought not to be impeached in Equity.

A Settlement if made by a Lunatick, though reaſonable, and for the Convenience of the Family, ought to be ſet aſide in Equity.

Per Cur. If *John Clerk* was in Fact a *Lunatick*, altho' the Settlement in other Reſpects is reaſonable, and for the Convenience of the Family, yet it ought to be ſet aſide in Equity.

But there not being any ſufficient Proof of his being a *Lunatick* in 1655, and *that* Settlement by Deed and Fine having been acquieſced in, the Court directed an Iſſue to try if he was a *Lunatick* in 1685, and if with lucid Intervals, whether the Settlement was executed in ſuch Interval.

Caſe 378. *Lord Keeper. March* 7.

Sir *William Reresby*, Exceptant.

Farrer School-Maſter, *Dun* Uſher of *Pocklinton* School, } Reſpond'ts.

Charity-Lands being let at a great Under-value, Leaſe ſet aſide, and the Leſſee decreed to pay the Arrears of Rent according to the full Value of the Land, and to deliver up the Poſſeſſion.

DR. *Downham* having given ſeveral Lands for the Maintenance of a *Maſter* and *Uſher* of the Free-School of *Pocklinton*, and they being incorporated by Act of Parliament in 1661, in Conſideration of a Fine of 20 *l.* and the Surrender of a former Leaſe granted a Term of *Eighty-one* Years of the Lands in Queſtion to the *Exceptant*'s Father at 24 *l. per Ann.*

Upon a Commiſſion of charitable Uſes, it was found by *Inquiſition*, that the Lands contained 164 Acres, and were of the Value of 133 *l.* 16 *s.* 8 *d. per Ann.* and the Commiſſioners thereupon decreed the *Exceptant* to deliver Poſſeſſion to the Truſtees therein named, and to pay the Arrears of Rent after the Rate of 133 *l.* 16 *s.* 8 *d. per Ann.*

To which Decree Sir *William Reresby* having taken Exceptions, the Court confirmed the Decree, as to the Making of the Leaſe void, and delivering Poſſeſſion; and directed a Commiſſion to ſet out and aſcertain the Charity Lands, from the other Lands of Sir *William Reresby*'s, the ſame lying intermixed.

Bromley verſus *Jefferies & al'.*

Caſe 379. *March* 14.

SIR *Rowland Berkley* ſettled his Manor of *Cotheridge* on Truſtees to be by them ſold after his Death, and the Money thereby ariſing to be diſpoſed of as in the Settlement is mentioned, and as he by his laſt Will and Teſtament ſhould appoint, with a Power of Revocation, and afterwards on the Marriage of the Plaintiff, with one of his Daughters, covenanted that if the Plaintiff ſurvived Sir *Rowland*, and had Iſſue by his Daughter, that the Plaintiff ſhould have *Cotheridge* 1500 *l.* leſs than any other Purchaſer would give for the ſame.

A. on the Marriage of his Daughter to *B.* covenants that *B.* ſhould have his Land called *C.* for 1500 *l.* leſs than any other would give for it, and afterwards deviſes this Eſtate to his Grandſon for Life, with Remainders over and dies. The Court refuſed to decree a ſpecifick Execution of this Agreement, by Reaſon of the Uncertainty of it, and it not being mutual.

Sir *Rowland* lived *twenty* Years after this, and by his Will revokes his Settlement, and deviſes *Cotheridge* and the Manor of *Acton Beacham* unto the Plaintiff, and to the Defendant, and other Truſtees for the Term of *ten* Years upon Truſt, to apply the Profits as therein mentioned

mentioned, Remainder to his Grandſon *Green* for Life, with Remainder to his firſt and other Sons in Tail, he and they taking upon them the Name of *Berkley*, and thereby (*inter alia*) gave a Legacy of 1000 *l.* to the Plaintiff, and 500 *l.* to his Daughter the Plaintiff's Wife, *&c.*

The Court upon the Hearing refuſed to Decree a ſpecifick Execution of this Agreement from the Uncertainty of it, becauſe if the Eſtate was not to be ſold, but the Plaintiff was to have it, it was not practicable to know what a Purchaſer would give for it. *Secondly*, that the Agreement was not mutual, the Plaintiff was not bound to take it at any Price; and it was obſerved, that as the Covenant was worded, if the Plaintiff had died in the Life-time of Sir *Rowland*, the Covenant was of no Effect; and it was ſaid if Sir *Rowland* after this had a Son, *that* ſhould have diſcharged the Covenant, like as in the Caſe of *Fitzherbert*, *fol.* 23. cited in *Shelley*'s Caſe, where the Father lying ſick, directs his Truſtees to convey to his only Daughter, and afterwards he recovered and had a Son, who was relievable even by the Opinion of the *Judges*.

1 Co. 100. b.

Caſe 380.
Lord Keeper.
Eodem die.

Yates verſus *Phettiplace.*

A. having entailed his Land on his Son ſubject to a Mortgage, by Will deviſes his Leaſehold and perſonal Eſtate to pay his Debts and Legacies, and directs if his perſonal Eſtate is applied to pay the Mortgage, it ſhould be kept on Foot to make good his Daughter's Portion, and gives her 3000 *l.* to be paid at 21, or Marriage, if married with Conſent, if not, but 1000 *l.* ſhe died at ſix Years of Age. The Portion ſhall not be raiſed for the Benefit of her Adminiſtrator.

THE Defendant's Father had mortgaged his Manors of *Pudlicoat*, and afterwards intailed the Equity of Redemption on the Defendant his Son; and by Will deviſed ſome Leaſehold and perſonal Eſtate to be applied for the Payment of his Debts and Legacies; directing that if his perſonal Eſtate was applied to pay off his Mortgage, the ſame ſhould be kept on Foot to make

make good his Daughter's Portion, and thereby deviſed to his Daughter 3000 *l.* to be paid her at *Twenty-one*, or Marriage, if married with Conſent, if not, then but 1000 *l.* and died, leaving Iſſue the Defendant his only Son, and a Daughter; the Daughter died when but *ſix* Years old, to whom the Mother, late the Wife of the Plaintiff *Yate*, took Adminiſtration; and Mr. *Yate* was her Executor, as alſo Adminiſtrator *de bonis non* to the Daughter, and was now Plaintiff to have the 3000 *l.* Portion.

And for the Plaintiff it was inſiſted, this was not within the Reaſon of the Caſe of *Pawlet* and *Pawlet*, that the Portion ſhould extinguiſh in the Land for the Benefit of the Heir. Vol. 1. Ca. 201.

Firſt, There the Settlement was by Deed, here the Portion is provided by Will.

Secondly, There it was to be raiſed only out of the Land; 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 the Court diſmiſſed the Bill, and declared it to be within the Reaſon of the Lord *Pawlet*'s Caſe; and beſides the Deviſe being of 3000 *l.* at *Twenty-one* or Marriage, which Marriage was to be with Conſent, it did not veſt in the Daughter, but was contingent; and the *Lord Keeper* was of Opinion that a Deviſe to *J. S.* of 1000 *l.* to be paid at *Twenty-one*, and a Deviſe to him at *Twenty-one* was all the ſame, and the Teſtator's Intention the ſame in both Caſes; and ſaid the Diſtinction taken by *Swinbourne* and *Godolphin* between the Age being mentioned in the Body of the Deviſe, and where in the Time of Payment, he looked upon it as a *Diſtinction without a Difference*, and that the Authorities they cited did not come up to what they laid down. *Poſt.* Ca. 385, 403.

A Deviſe of a Legacy to one at 21, or to be paid at 21, is all one.

Caſe 381. *Lord Keeper. March* 20.

St. John verſus *Turner.*

A. mortgages in 1639, and in 1663, his Heir brings a Bill to redeem; he dying the Suit is revived by his Co-heirs, who obtain a Decree in 1672, but do not proſecute it, and *B.* having purchaſed the Equity of Redemption of them, he now brings a Bill to have the Benefit of the former Decrees.

John St. John in 1639, demiſed the Lands in Queſtion in *Cold Overton* in *Com. Leiceſter* to Sir *Richard Holford* to counter-ſecure him againſt Debts, for which he ſtood bound as Security, amounting to about 4000 *l.* In 1649, Sir *Richard Holford* having been arreſted and impriſoned for the Debts of *St. John*, entred on his Security, and by his Will deviſed 1000 *l.* apiece to his *two* Grand-daughters, 500 *l.* to his Son *Richard* out of this Eſtate, and the Surplus to his Sons *Thomas* and *Richard*, whom he made Executors. In 1662, the Executors allot to each Grand-daughter Part of the Lands for their 1000 *l.* apiece, and *Richard* takes Part for his 500 *l.* and the Reſidue was divided between *Richard* and *Thomas.*

Bill diſmiſſed by Reaſon of the Difficulty of the Account and Length of Time.

In 1663, a Bill was brought by *Benjamin St. John* the Heir, to redeem, and decreed to an Account; and afterwards he dying, the Suit was revived by his *three* Daughters and Co-heirs, and thereupon again in 1672, decreed to an Account; and particular Directions given as to Part of the Lands purchaſed by Dr. *Amy*, Sir *Richard Holford* having encouraged him to purchaſe, without diſcovering that thoſe Lands were compriſed in his Security; and the Plaintiff being of the ſame Name had purchaſed from the Co-heirs of *St. John* ſeveral Lands, and amongſt the reſt their Equity of Redemption of the Lands in Queſtion, and brought his Bill to redeem, and to have the Benefit of the former Decrees.

Lord Keeper diſmiſſed the Bill, and would not allow the Plaintiff to redeem by Reaſon of the Difficulty of the Account after ſuch great Length of Time; for that the

the Mortgagor himſelf acquieſced from 1639 to 1663, and neither paid the Debt, nor ſought a Redemption; and although there were Infants, yet the Time having begun upon the Anceſtor, it ſhall run even upon Infants, as it is at Law in the Caſe of a *Fine*; and although they afterwards obtained a Decree, yet not having proſecuted it, and the Cauſe being now within one Year of the *Grand Climacterick*, it is fit it ſhould reſt in Peace.

Though Infancy may be an Anſwer to the Objection of Length of Time in not coming to redeem a Mortgage; yet where the Time begins upon the Anceſtor, it ſhall run on againſt his Infant Heir, as in the Caſe of a Fine at Common Law.

Wharton & ux' verſus *Tilly* Mil' *& ux'*, *& al'*.

Caſe 382. *Lord Keeper. March* 22.

Ennice Brown, now the Wife of the Plaintiff *Wharton*, being a Niece of Sir *John Roberts*, whoſe Widow and Executrix and Deviſee the Defendant had married, they ſet on Foot a Demand of 1500 *l.* by Bond from Sir *John Roberts*, and there being great Reaſon to ſuſpect it was forged, upon the Action at Law the Plaintiffs firſt ſuffered a Nonſuit upon full Evidence; upon a *ſecond* Trial there was a Verdict againſt the Bond; but before Judgment was entred up, the Plaintiffs moved and obtained a new Trial, and therein prevailed and had a Verdict, and now brought a Bill to have Satisfaction out of a Truſt-Eſtate for the Bond-Debt, there being not perſonal Aſſets; but Sir *John* had ſubjected his real Eſtate to the Payment of his Debts. *Ant.* Ca. 344.

And the ſingle Queſtion was, Whether the Court upon the Circumſtances of this Caſe would decree a Satisfaction out of the Truſt-Eſtate, upon the Credit of the Verdict, without directing an Iſſue, or giving the Defendant an Opportunity to try it again; and the Court decreed for the Plaintiffs. But upon *Appeal* to the *Lords* in *Parliament*, a new Trial was directed, and the Bond found to be forged. *Vide Poſt.* Ca. 401.

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DE

Termino Paſchæ,

1701.

In CURIA CANCELLARIÆ.

Caſe 383. *Lord Keeper. May* 13.

Warburton verſus *Warburton.*

Where a Term is limited to raiſe Portions for younger Children by Rents and Profits, the Heir may have the Portions raiſed by a Sale, though the younger Children oppoſe it, as well as they may inſiſt on a Sale, if they think fit.

UPON rehearing of this Cauſe, the *firſt* Queſtion was, Whether the younger Childrens Portions ſhould be raiſed by Sale, or only out of Rents and Profits, as the ſame ſhould ariſe. By the Settlement a Term of *Ninety-nine* Years was lodged in Truſtees for raiſing the Portions of the younger Children by Rents, Iſſues and Profits; and ſubject to the Term, the Eſtate was limited to the Plaintiff the eldeſt Son for Life, and to his firſt and other Sons in Tail, with other Remainders over; and in the mean Time only 40 *l. per Ann.* limited to the Plaintiff for his Maintenance. The Defendants the younger Children inſiſted that their Portions might be raiſed by annual Rents and Profits, and the Plaintiff the Heir confined in the mean Time to his Allowance of 40 *l. per Ann.* The Heir inſiſted, that the Portions ſhould be raiſed by a Sale, that he might thereby be let into the immediate Poſſeſſion of the Reſidue of the Eſtate.

The *Lord Keeper* confirmed the former Decree; for as the younger Children might have compelled a Sale; ſo in this Caſe it being for the Benefit of the Heir to have a Sale made, he might juſtly inſiſt thereon, altho' the younger Children oppoſed it; they oppoſing the ſame not for their own Benefit, but in Prejudice to the Heir. *Poſt.* Ca. 385.

The *ſecond* Point was, that the perſonal Eſtate, and 400 *l.* to be raiſed out of the Truſt-Eſtate ſhould be diſtributed by the *two* Daughters his Executrixes amongſt themſelves and their Brothers and Siſters according to their Need and Neceſſity, as in their Discretion they ſhould think fit, and inſiſted on their Power to diſpoſe thereof, as they thought fit; and that the Defendants were not intitled to any Part thereof.

A. gives 400*l.* to his 2 Daughters his Executrixes, to be diſtributed amongſt themſelves, and their Brothers and Siſters according to their Neceſſity, as in their Diſcretion they thought fit.

The Court ſettled the Diſtribution, and decreed a double Share to one of the Children.

The *Lord Keeper* decreed a double Share thereof to the Plaintiff the Heir, as looking upon him to ſtand moſt in Need thereof, and confirmed his former Decree, which was alſo upon an *Appeal in Parliament* affirmed.

City of London verſus *Richmond & al'.*

Caſe 384. *Lord Keeper. May* 16.

THE City of *London* articled with *Alderſea* to lay a new leaden Pipe of *five* Inches Diameter for the carrying of Water to *Cheapſide* and *Stocks-Market*, which it was affirmed would carry *twenty* Tun of Water each Hour; and whilſt this was doing, the City by a Committee treat with *Houghton* to grant him a Leaſe of the Water, reſerving ſufficient to ſerve the Conduits and

Equity will decree an Aſſignee of a Leaſe to pay the Rent become due ſince his Aſſignment, and which ſhall become due, whilſt he continues in the Poſſeſſion, but not during the Continuance of the Leaſe; for he may, if he can, get rid of the Leaſe by aſſigning it to another.

Priſons with Water, and he agreed to pay a Fine of 2750 *l.* and a Rent of 750 *l. per Ann.* for *fifteen* Years; and a Leaſe was made accordingly. *Houghton* the Leſſee aſſigns over the Leaſe to the Defendants *Richmond*, *Delanoy*, *Glover*, and *Bowater*; but it did not appear that *Glover* and *Bowater* accepted the Aſſignment. The Aſſignment was in Truſt for ſuch Perſons as ſhould buy Shares, the whole being divided into 900 Shares, valued at 10 *l.* each Share. It ſo fell out that the Pipe would not diſcharge above *ſix* Tun *per* Hour, and ſo inſtead of being a beneficial it would not produce, after the Conduits, Priſons, and Tankard-bearers were ſerved, above the 300 *l. per Ann.* *Houghton* became inſolvent, and the Rent in Arrear.

The Bill was brought againſt *Richmond* and others the Aſſignees of the Leaſe, as alſo againſt ſeveral who had bought Shares, to have the Arrear of Rent paid, and the growing Rent, and the Performance of the Covenants in the Leaſe.

Upon a Bill brought againſt an Aſſignee of a Leaſe to pay the Rent, and perform the Covenants in the Leaſe, the original Leſſee ought to be a Party. But if the Aſſignee has divided his Intereſt in the Leaſe into a great Number of Shares, it is not neceſſary to make all the Sharers Parties.

It was objected that the Plaintiffs had not proper Parties, for *Houghton* the Leſſee, who had aſſigned over, was liable, and no Party; and the Plaintiffs had not all the Owners of Shares, that ought to contribute to the Rent, before the Court. The *firſt* Part of the Objection was allowed that *Houghton* ought to be a Party; but as to the later Part, that all the Sharers were not Parties, was diſallowed; the Aſſignees, by dividing of it into ſo many Shares, had made it impracticable to have them all before the Court.

Secondly, That the Defendants as Aſſignees, if liable, were liable at Law, and the Plaintiffs ought to take their Remedy there; and no good Ground to decree them to be farther liable in Equity than they were at Law; and

an Aſſignee may by Law aſſign over, and then remains no longer liable.

To which it was anſwered, that poſſibly the Aſſignees might not be liable at Law, if it was an incorporeal Inheritance, for they had no Privity of Eſtate; yet they 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 Aſſignment, and what ſhould incur and become due whilſt they ſhould continue the Poſſeſſion; but if they could 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 continued the Poſſeſſion; and how far an Aſſignee named or not named is bound to perform Covenants in the Leaſe, cited *Spencer*'s Caſe. 5 Co. 16. a.

Thirdly, 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, to decree *in Specie* ſuch a hard and unreaſonble Bargain.

Lord Keeper. As a beneficial Bargain will be decreed in Equity; ſo if it happens to be a looſing Bargain, for the ſame Reaſon it ought to be decreed.

As a beneficial Bargain will be decreed in Equity; ſo if it proves a looſing one, it ought by the ſame Reaſon to be decreed.

Fourthly, 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.*

Jackſon

Caſe 385.
Lord Keeper.
May 17.

Jackſon verſus *Farrand.*

A. by Will gives 500 *l.* to his Daughter, to be paid by his Executors at her Age of 21, out of his perſonal Eſtate, and Rents of his real; and if not raiſed by that Time, the Executors to ſtand ſeiſed and take the Rents, till the 500 *l.* was raiſed, and after Payment

Thomas Farrand having only a Son and Daughter in 1682, made his Will, and deviſed 500 *l.* Portion to his Daughter, to be paid by his Executor at her Age of *Twenty-one*, out of his perſonal Eſtate, and Rents, and Profits of his Lands; and if not raiſed by that Time, his Executor ſhould ſtand ſeiſed, and receive and take the Rents, Iſſues and Profits of his Lands until the 500 *l.* ſhould be raiſed and paid, and after Payment deviſed the Lands to his Son. The Plaintiff married the Daughter at her Age of *Eighteen*, and ſhe died before ſhe attained the Age of *Twenty-one*, leaving Iſſue a Daughter. The Plaintiff as Adminiſtrator to his Wife, brought his Bill to have the 500 *l.* raiſed out of the Land.

gives the Land to his Son. The Daughter marries at 18, and dies under 21; the Husband takes Adminiſtration. Decreed the Portion to be raiſed, and that by a Sale, though the Land by Reaſon of the Incumbrances would produce little more than the 500 *l.*

Ant. Ca. 380.
Poſt. Ca. 403.

For the Defendant the Heir it was inſiſted, *firſt*, that the Portion ought not to be raiſed, becauſe the Daughter died before the Age of *Twenty-one*, *Secondly*, if to be raiſed, yet by the Profits only, and not by a Sale.

Ant. Ca. 383.

The Court decreed the Portion to be raiſed with Intereſt and Coſts, and *that* by a Sale; wherein the Defendant the Heir was forthwith to join; and this, altho' the Incumbrances were ſo great, that the whole Inheritance would produce little more than the 500 *l.*

5

Randall

Randall verſus *Bookey.*

Caſe 386.
May 22.

Robert Randall having a Wife, but no Child, and two Brothers and two Siſters, by Will gave a Moiety of a Banker's Debt to his Nephew and Nieces, and the other Moiety to his Wife, and made his Wife his ſole Executrix; and deviſed ſeveral Lands unto *two* Truſtees and their Heirs, in Truſt to permit his Wife to receive the Profits for Life, and then to ſell, and out of the Money to be raiſed by Sale to pay 100 *l.* to his Brother *George* (who was his Heir at Law) 120 *l.* to his Brother *Thomas*, and 100 *l.* to his Siſters. Defendant *Bookey* married the Widow, and was her Adminiſtrator.

Land is deviſed to Truſtees to ſell, and out of the Money ariſing by the Sale, amongſt other Sums to pay 100 *l.* to his Heir at Law; and no Diſpoſition is made by the Teſtator of the Surplus of his Eſtate. The Land ſhall not be turned into perſonal Eſtate, nor more ſold than is neceſſary to pay the Legacies, and the Heir ſhall have the Surplus.

Per Cur. Firſt, the Wife, by the Deviſe of a Moiety of the ſaid Banker's Debt, was excluded from the Surplus of the perſonal Eſtate, as Executrix, altho' there was no Child, and that Legacies were given to the Brothers and Siſters out of the Land; which had not been neceſſary, unleſs the Teſtator intended the Surplus of his perſonal Eſtate for his Wife, that otherwiſe had been ſufficient to pay thoſe Legacies.

Secondly, Although the Land is deviſed to Truſtees and their Heirs in Truſt to ſell, and thereout to pay the ſeveral Legacies therein mentioned, and amongſt the reſt a Legacy of 100 *l.* to his Brother *George* his Heir at Law; yet the Land ſhall not be turned into perſonal Eſtate, nor more ſold, than what is neceſſary for the Payment of the Legacies, and the Heir ſhall have the Surplus.

Caſe 387. *May* 31.

Brown and *Sandys* verſus *Trant* and *Bridges & al'.*

Aſſignees under a Commiſſion of Bankruptcy, bring a Bill for an Account againſt ſome Perſons who had ſeiſed the Bankrupt's Eſtate by Virtue of 3 Extents, one for the King, and the other two were Extents in Aid. Bill diſmiſſed, the Matter being properly cogniſable in the Court of Exchequer, which is the King's Court of Revenue.

PLaintiffs as Aſſignees under a Statute of Bankruptcy pray an Account of the Eſtate of *Hind* the Banker, ſeiſed by the Defendants, on Pretence of Debts owing to the *King* by Virtue of ſeveral Extents ſued out for that Purpoſe, *viz.* one original Extent for the *King*, and two other Extents *in Aid* by the Defendants, who were Farmers of the Exciſe.

Court of Chancery will not examine the *Quantum* of the King's Debt, nor how far Extents ſued out are neceſſary.

It being objected that this Matter was properly cogniſable in the Court of *Exchequer*, which was the *King*'s Court of *Revenue*, and that this Court would not examine what was the *Quantum* of the Debt due to the *King*, or how far the Extents were neceſſary, the *Lord Keeper* allowed the Objection, and diſmiſſed the Bill.

And as to the Precedents, which had been produced, where this Court had held Plea in like Caſes, he ſaid they did not come up to this Caſe.

Vol. 1. Caſe 454. But otherwiſe it is, where the Defendant, who has ſued out an Extent in Aid, confeſſes by Anſwer, he has ſufficient Eſtate of his own to pay the King's Debt.

In the Caſe of *Capel* and *Brewer*, the Defendant, who ſued the Extent *in Aid*, confeſſed by Anſwer he had ſufficient of his own Eſtate to pay the *King*'s Debt.

Or where it appears to be a fraudulent Contrivance by an Extent *in Aid*, to gain a Preference to a Debt of an inferior Nature.

And in the Caſe of *Cholmley* and *Sturt*, it appeared to be a fraudulent Contrivance by an Extent *in Aid*, to gain a Preference to a Debt of an inferior Nature.

DE

Term. S. Hillarii,

1701.

In CURIA CANCELLARIÆ.

Sir *Copleſton Warwick Bamfield* verſus *Popham & al'.* Caſe 388. *Lord Keeper. Jan.* 24.

HEnry Rogers by Will deviſed his Eſtate to Truſtees and their Heirs, in Truſt for the Defendant *Popham* for Life, and to his firſt and other Sons in Tail; *But in Caſe the Defendant* Popham *died without an Heir Male of his Body begotten*, the Truſt to be void; and in ſuch Caſe he gave the Eſtate to Defendants: The Bill was brought to ſtay Waſte, and for an Account of Timber already ſold, Mr. *Popham* having no Son.

A Deviſe to Truſtees and their Heirs in Truſt for *A.* for Life and to his firſt, &c. Sons in Tail; *but if* A. *dies without an Heir Male of his Body begotten*, then to go over. *A.* is only Tenant for Life; and the Words, *if he dies without an Heir Male*, &c. does not give him an Eſtate-Tail by Implication. *Poſt.* Caſe 414.

The Queſtion was, Whether the Words, *if he die without an Heir Male of his Body begotten*, gave him an Eſtate-Tail by *Implication*; and it was held it could not enlarge an expreſs Eſtate deviſed to him for Life.

Saunders

Caſe 389.
Jan. 24.
Maſter of the Rolls.

Saunders verſus *Nevil.*

Where a Truſt is limited to a Man and the Heirs of his Body with Remainders over, the Court will not decree the Truſtees to convey to him an Eſtate in Fee, but an Eſtate-Tail only.

A Truſt being limited to the Plaintiff, and the Heirs of his Body with Remainders over; the Bill was to have the Truſtees convey to him in Fee.

The *Maſter of the Rolls* decreed them to convey an Eſtate-Tail only, and refuſed to decree a Conveyance in Fee; and the Caſe of Mr. *Cooke* and *Woodward* was cited, where the Lord *Jefferies* did refuſe to decree a Conveyance in Fee, the Remainder after an Eſtate-Tail being limited to a *Charity.*

Caſe 390.
Jan. 27.
Lord Keeper.

Peters & al' verſus *Soame & al'.*

A. being bound in a Bond to *B.* the Bond is aſſigned by *B.* to *C.* in Satisfaction of a Debt due from *B.* to *C.* *B.* becomes a Bankrupt, and *C.* not being able to ſue at Law in *B.*'s Name, brings a Bill againſt *A.* to be paid the Money due on the Bond. Whether *A.* out of the Money due on the Bond ſhall retain a Debt due to himſelf from *B.*

Darwin the Receiver of the *New-River* Rent, aſſigned to the Plaintiff *Peters* a Bond, wherein the Defendants *Soame* and *Green* were bound to him in 700 *l.* for Payment of 350 *l.* and this Aſſignment was to indemnify him againſt two Debts, for which he ſtood bound as Surety for *Darwin*, and in Satisfaction of 30 *l.* he owed the Plaintiff. *Darwin* became a Bankrupt, ſo *Peters* could not ſue in the Name of *Darwin* at Law, and brought his Bill to have the Money decreed to him in Equity. Defendant *Soame* inſiſted *Darwin* is indebted to him for Rent received for *four New-River* Shares, and inſiſted to retain it out of the Bond; and the Aſſignees inſiſted to have the Bond; they being juſt Creditors, as well as the Plaintiff, and had the Law, as well as Equity, on their Side.

Per

Per Cur. The Aſſignees can have no better Right than the Bankrupt himſelf; and as the Bankrupt is bound by the Aſſignment, the Aſſignees under the Statute muſt be bound likewiſe, and ſtand in his Place; but they inſiſting *Darwin* was a Bankrupt before he aſſigned the Bond; he directed *that* to be tried at Law.

But ſaid, he was in Doubt whether *Soame* might not retain for his Debt, and that *Stoppage* ſeemed to be a good Equity in ſuch Caſe.

Cooke verſus *Parſons.*

Caſe 391.
Feb. 1.

ON a Bill of Review an Error aſſigned was, that Lands were decreed to be ſold purſuant to the Will for Payment of Debts, without giving the Heir a Day to ſhew Cauſe, after he came of Age.

Lands are deviſed to be ſold for Payment of Debts. The Lands may be decreed to be ſold without giving the Heir, who is an Infant, a Day to ſhew Cauſe, when he comes of Age. Otherwiſe if he is decreed to join in the Sale.

Lord Keeper confirmed the Decree, for the Lands being deviſed to be ſold for Payment of Debts, there is nothing deſcends to the Heir, and an immediate Sale may be decreed without giving him a Day to ſhew Cauſe, though an Infant; but if he had been decreed to have joined in the Conveyance, there he muſt have had a Day after he came of Age.

Caſe 392.
Feb. 16.

Phillips verſus *Phillips.*

A. by Will deviſes Lands to Truſtees and their Heirs, in Truſt, that the Profits ſhould be equally divided between his Wife and Daughter, during the Wife's Life; and after her Death he deviſed the ſame to the Uſe of his Daughter in Tail, with Remainders over; the Daughter died during the Mother's Life.

William Phillips by Will deviſed his Lands to *Powell* and *Jennings* and their Heirs, in Truſt that the Profits ſhould be equally divided between *Elizabeth* his Wife and his Daughter *Martha*, during the Life of *Elizabeth*; and after her Deceaſe he gave and deviſed the ſame to his Truſtees and their Heirs, to the Uſe of his Daughter *Martha* and the Heirs of her Body, with Remainders over. *Martha* the Daughter died without Iſſue, *Elizabeth* the Wife yet living. *David Phillips* the Heir at Law was Plaintiff againſt the Defendant *Elizabeth* the Widow, and the Truſtees, for an Account of a Moiety of the Profits, tho' the Defendant the Widow inſiſted, that ſhe by Implication or Survivorſhip, was intitled to the whole for her Life.

Decreed this to be a Tenancy in Common between the Mother and Daughter, and that during the Mother's Life, the Daughter's Moiety did not deſcend or reſult to the Heir, but was an Intereſt undiſpoſed of, and in nature of a Tenancy *pur auter vie*, and ſhould go to the Adminiſtrator of the Daughter.

This Matter being referred to the *Judges* of the *Common Pleas* for their Opinion, they unanimouſly certified, that it was a *Tenancy in Common* between the Wife and Daughter; ſo that the Mother had no Title to the Daughter's Moiety, either by Survivorſhip or by Implication; nor did that Moiety during the Life of *Elizabeth*, either deſcend or reſult to the Heir; but as to that Moiety during the Life of *Elizabeth*, it was an Intereſt undiſpoſed of, and in the Nature of a Tenancy *pur auter vie*, and conſequently belonged to the Adminiſtrator of *Martha* the Daughter, and decreed accordingly.

Nevill verſus *Nevill.*

Caſe 393. *Lord Keeper. Feb.* 25.

A Legacy of 500 *l.* is given to the eldeſt Son of *A.* to be begotten, to place him out Apprentice. *A.* has a Son born after the Teſtator's Death, who brings a Bill for the Legacy, and it is decreed to be paid him, though not born in the Teſtator's Life-time; and though the 500 *l.* was given for a particular Purpoſe.

SIR *Chriſtopher Nevill* deviſed (*inter alia*) 500 *l.* to the eldeſt Son of *John Nevill* to be begotten, *to Place him out Apprentice*, and died; after his Death *John Nevill* had a Son born, the Plaintiff, who brought a Bill for this Legacy. It was objected he was not capable to take, becauſe not born at the Teſtator's Death; or if he might take, yet being given for a particular Purpoſe, *viz. to place him out Apprentice*, he was not intitled, until fit to be placed out.

Not allowed, but the Legacy decreed to be paid.

New-River Company verſus *Graves.*

Caſe 394. *March* 2.

The Act of Parliament relating to the *New-River-Water Company* ought to have a liberal Conſtruction, ſo as the Town in general may be ſerved with Water.

BILL to be quieted in their Enjoyment of Pipes laid through a Field, called *Long Field*, firſt laid there by Conſent of the Tenant, who had a long Term for Years, upon Satisfaction made to him for the Damage; and the Leaſe being now expired, and the Field lately purchaſed by the Defendant *Graves*, he plucked up the Pipes.

For the Defendant it was inſiſted, *firſt*, that by the Act of *Parliament*, the Company had only a Power to bring the Water in a Trench *ten* Foot wide of Brick or Stone, and not to lay Pipes.

Secondly,

Secondly, They had Liberty given by the Act, only to ſerve the City with Water, and not any Parts adjacent; and thoſe Pipes were uſed to ſerve *Hackney*, *Shoreditch*, and *White Chapel*.

Per Cur. The Act is to be taken in a liberal Senſe, that the Town in general might be ſerved with Water, without Regard to its being within or without the Liberties of the City; and although a Trunk or Trench of *ten* Foot wide is mentioned in the Act of Parliament; yet the Intent of the Act was to give Power in *alieno ſolo* not exceeding *ten* Foot wide; and agreeable thereunto was the Decree made by the Lord *Sommers*, between the *New-River Company* and *Henly*, where although the Act of Parliament mentions the Serving the *North* Part of the Town with Water there, it went *Southward* and *South-weſt*, to ſerve *Weſtminſter* and *Chelſea*, &c. and yet held to be within the Benefit of the Act: And therefore decreed a Commiſſion to iſſue to aſcertain the Damages the Defendants ſuſtained, and the Plaintiffs to be quieted in the Poſſeſſion of their Pipes.

Caſe 395. *March* 4.

Toulſon verſus *Grout*.

A Legacy given to a Bankrupt before his Bankruptcy, may be aſſigned by the Commiſſioners.

William Dawſon having deviſed a Legacy of 600 *l.* to his Son, payable at *Twenty-one*, for which he had obtained a Decree, and 637 *l.* reported due; before he received the Money he became a Bankrupt, and the Commiſſioners aſſigned the Legacy, and Benefit of the Decree.

The Bill was by the Aſſignees to have the Benefit of the Decree, to which the Defendants the Executors demurred

red, inſiſting that a Legacy was not within the Compaſs or Proviſion of any of the Acts made againſt Bankrupts to be aſſigned to the Creditors.

But the Demurrer was over-ruled, and ſaid, that the Act of Parliament ought to be taken in the moſt beneficial Senſe, for the Advantage of the Creditors.

DE
Termino Paſchæ,
1702.
In CURIA CANCELLARIÆ.

Caſe 396. *Lord Keeper.* *May* 20.

Harcourt verſus *Sherrard* and Dame *Anderſon ux'*.

Defendant having by Anſwer conſented that an Award made by her Father might be confirm'd, prayed ſhe might amend her Anſwer, ſhe having made Oath, that ſhe never read the Award, and that her Anſwer was prepared by her Father, who had wronged her in the Award. Motion denied *per Cur'*.

THE Defendant the Lady *Anderſon* having by her Anſwer conſented, that an Award made by her Father might be confirmed, deſired Leave to amend her Anſwer in that Particular, having made Oath, that ſhe never read the Award; and that ſuch Anſwer was prepared for her by her Father, who had wronged her in the Award; but the Court refuſed to give her Leave to amend her Anſwer.

Caſe 397. *May* 2.

Fretwell verſus *Stacy*.

A Legacy given to Executors for Care and Pains, if a Deficiency of Aſſets, they muſt abate in Proportion with the other Legatees.

White verſus *Taylor.*

Caſe 398.

THE Bill was brought for an Account of the perſonal Eſtate of one *Thomas Ely*; the Defendant having anſwered, and Witneſſes being examined, it happened that in the Title of the Interrogatories the Plaintiff was called *Tho. White*, inſtead of *John*. *Per Cur.* cannot read the Depoſitions, nor can the Title be amended, and this, although moſt of the Witneſſes were ſince their Examination gone to Sea.

The Plaintiff's Chriſtian Name being miſtaken in the Title of the Interrogatories, the Depoſitions could not be read, nor would the Court permit the Title to be amended, though moſt of the Witneſſes ſince their Examination were gone to Sea.

Sheppard verſus *Kent.*

Caſe 399.

MR. *Kent* having by Will deviſed his Lands to his Executors, to be ſold in Aid of his perſonal Eſtate, and the Creditors having joined in a Bill, and obtained a Decree for the Payment of their Debts out of Aſſets, and the Truſt-Eſtate; ſome of the Creditors that were Plaintiffs in that Cauſe, to gain a Preference of the reſt, had obtained Judgments againſt the Executors.

After Creditors have joined in a Bill, and obtained a Decree for Payment of their Debts out of legal and equitable Aſſets, none of them ſhall be permitted to obtain a Preference of the others by obtaining Judgments againſt the Executors.

Upon a Bill now brought by the other Creditors to be relieved againſt thoſe Judgments; the *Lord Keeper* was of Opinion, *firſt*, ſince all the Creditors had joined in a Bill, and had obtained a Decree for Payment of all their Debts without any Preference; and the Decree being ſince proſecuted, and Monies paid under it, that ſuch of the Creditors as were Plaintiffs in the Cauſe, wherein ſuch Decree was obtained, ſhould not now gain a Preference by Judgments obtained by Confeſſion.

And

Where there are legal and alſo equitable Aſſets, the Creditors, who will take their Satisfaction out of the legal Aſſets, ſhall have no Benefit of the equitable Aſſets, until the other Creditors, who had only a Remedy out of the equitable Aſſets, had thereout received an equal Proportion to their reſpective Debts.

And declared his Opinion to be, that where there were legal and alſo equitable Aſſets, the Creditors who would take their Satisfaction out of the legal Aſſets, ſhould have no Benefit of the equitable Aſſets, until the other Creditors, who had only a Remedy out of the equitable Aſſets, had thereout received an equal Proportion to their reſpective Debts.

Caſe 400. *Lord Keeper. May* 7.

Bateman verſus *Bateman.*

A. purchaſes Lands in his eldeſt Son's Name, and puts him into Poſſeſſion, and the Son falling ſick, takes a Declaration of Truſt from him, and after the Son's Recovery he is permitted to continue in Poſſeſſion. The Son marries and dies, and the Father gets a Conveyance from his younger Son. The eldeſt Son's Wife ſhall have Dower in theſe Lands.

Joas Bateman the Father in 1691, purchaſed an Eſtate at *Erith* in *Kent*, in the Name of *William Bateman* his eldeſt Son, and he was put into Poſſeſſion, and about a Year afterwards falling ſick, his Father *Joas* got him to execute a Deed, declaring his Name was uſed only in Truſt for his Father; but he recovering of his Sickneſs continued the Poſſeſſion as formerly; and in 1695, married the Defendant, the Widow of *Vanackre*, ſhe having a Jointure of 600 *l. per Ann.* and an Inheritance of 400 *l. per Ann.* more. Upon the Marriage an Agreement was made, that, in caſe ſhe ſurvived *William Bateman*, he would leave her 4000 *l.* and gave a Bond to perform Covenants. As to Dower nothing was mentioned one Way or other. *William Bateman* dying without Iſſue, Sir *James Bateman* his Brother and Heir conveyed to *Joas Bateman* the Father.

The Defendant the Widow of *William*, brought her Writ of Dower. *Joas Bateman* the Father brought his Bill to be relieved againſt it, and obtained a Decree at the *Rolls*. Now upon an *Appeal* to the *Lord Keeper*, he diſmiſſed the Plaintiff's Bill, declaring it to be a ſecret and fraudulent Deed of Truſt, to deceive Creditors and Purchaſers.

Tovey & al' verſus *Young & al'.*

Caſe 401.
May 11.

THE Plaintiffs being *London* Cheeſemongers, and having formerly bought Cheeſe in *Suffolk* by Factors, found, that although they paid their Factors; yet the Dairy-Men not being paid by the Factors, many Times ſued the Merchant and made him pay for the Cheeſe again. They gave Notice publickly that they would not buy by Factors, nor be anſwerable for them; yet after ſuch Notice given were ſued by ſuch as acted as Factors, and Verdicts were obtained againſt them in *Suffolk*. The Bill was for a new Trial in an indifferent County, and cited for Precedents the Caſes of *Humphrys* and *Peyton* 11 *Nov.* 15 *Car* 2. A new Trial after a Trial at Bar. *Henvill* and *Graham* verſus *Holland*, 28 *Car.* 2. after a Verdict on a *plene Adminiſtravit*, a material Witneſs being abſent at the Trial, and a Voucher ſince diſcovered to make out the Payment of the Sum of 50 *l.* *Ives* and *Hankey*, 8 *Dec.* 3 *Jac.* 2. in the Caſe between the *Cheſhire* Dairy-Men and the *London* Cheeſemongers. *Tilly* and *Wharton*, new Trial upon a Bond ſuppoſed to be forged. *Scott* and *Hilton* the like, there being *five* Trials in all.

Verdicts being recovered in *Suffolk* by the Factors there, againſt the *London* Cheeſemongers, brought their Bill for a new Trial in an indifferent County. Bill diſmiſſed.

Ant. Ca. 382.

But the Court would not relieve in this Caſe, but diſmiſſed the Bill.

Com' *Huntington* verſus Counteſs of *Huntington.*

Caſe 402.
Lord Keeper.
May 12.

THeophilus Earl of *Huntington* and the Counteſs *Elizabeth* his *firſt* Wife, the Mother of the preſent Earl, join in a Mortgage

A. joins with *B.* her Husband in making a Mortgage for Years of her

5 T

Inheritance, to raiſe Money to buy a Place. *B.* covenants in the Mortgage to pay the Money, and on Payment thereof by the Proviſo the Term is to ceaſe. The Mortgage is afterwards aſſigned, and the Proviſo is that on Payment by them, or either of them, the Term is to be aſſigned as they or either of them ſhall direct. *B.* by Letter ſoon after the Mortgage, promiſes his Wife to apply the Profits to pay it off. He pays off the Mortgage and takes an Aſſignment in Truſt for himſelf, and by Will gives it to a ſecond Wife; the Son and Heir brings a Bill to have the Mortgage aſſigned to him. The Court would not relieve him, but on Payment of Principal, Intereſt and Coſts; but this Decree was reverſed upon an Appeal to the Houſe of Lords.

Mortgage of her Inheritance for 4500 *l.* to ſupply the Lord's Occaſions, to pay for the Place of Captain of the *Band* of *Penſioners*; and ſubject to the Mortgage, which was for a Term of Years, the Eſtate was ſettled to Counteſs *Elizabeth* for Life, Remainder to the now Plaintiff her Son in Tail; and the late Earl in the Mortgage-Deed covenants to pay the Money, and the Proviſo was, That on Payment of the Mortgage-Money the Term was to ceaſe. The Mortgage was ſeveral Times aſſigned, and particularly in 1683, and the Counteſs joined in it; and there the Proviſo was, that on Payment of the Money by them or either of them, the Mortgage-Term was to be aſſigned, as they, or either of them ſhould direct or appoint.

The Mortgage bore Date *Aug.* 1, 1682. On the 5*th* of the ſame *Aug.* the late Earl by Letter thank'd the Counteſs for having ſealed the Mortgage; and added, that the Profits of the Office ſhould be religiouſly applied to pay off the Incumbrance: But yet afterwards, when Money came in, he paid off the Mortgage; but took an Aſſignment thereof in Truſt for himſelf, and by Will deviſed his perſonal Eſtate to the Defendant, the Counteſs his *ſecond* Wife, and the Benefit of this Mortgage.

The Plaintiff's Bill was to have the Mortgage aſſigned to him. But the *Lord Keeper* declared he could not decree for the Plaintiff, but upon the uſual Terms of a Redemption on Payment of Principal, Intereſt and Coſts, diſcounting Profits.

But upon *Appeal* to the *Lords* in *Parliament*, the Plaintiff obtained a Decree to have the Mortgage aſſigned to him.

5

Bruen

Bruen verſus *Bruen.*

Caſe 403.
May 15.

BY the Marriage-Settlement, a Term was lodged in Truſtees, to commence after the Deceaſe of the Father and Mother, in Truſt to raiſe 3000 *l.* in *twelve* Months after the Death of the Survivor, for Portions for Daughters; there being Iſſue only one Daughter of the Marriage, the Father by Will deviſed the Truſt-Lands to make good his Wife's Jointure of 200 *l. per Ann.* and for raiſing 3000 *l.* for his Daughter's Portion; and died, leaving Iſſue a Daughter, who died when *five* Years old. The Mother took out Adminiſtration to her, and claimed the 3000 *l.* againſt the Uncle and Heir.

A Term is created by Marriage-Settlement to raiſe 3000 *l.* for Daughters Portions within 12 Months after the Death of the Survivor of Huſband and Wife. There being one Daughter, the Father by Will deviſes the Truſt-Lands to make good his Wife's Jointure, and to raiſe 3000 *l.* for his Daughter's Portion. The Daughter ſhall not have two Portions of 3000 *l.* and ſhe dying at the Age of five Years, and the Portion being to be raiſed out of Land, it ſhall not be raiſed for her Adminiſtrator.

Per Cur. Firſt that the Will ſhall be taken as relative to the Settlement, and conſtrued as for the better ſecuring the 3000 *l.* by the Settlement, and not as a Deviſe of another 3000 *l.*

Secondly, It being for a Portion to be raiſed out of the Land, and the Daughter dying when but *five* Years old, before ſhe had Occaſion for a Portion; although no Time was appointed for the Payment of it, it ſhall merge in the Land for the Benefit of the Heir, and not go to the Adminiſtrator. *Ant.* Ca. 380.

DE
Term. S. Michaelis,
1702.
In CURIA CANCELLARIÆ.

Caſe 404. *Decemb.* 5.

Kendar verſus *Milward.*

A. dies inteſtate leaving a Wife and 2 Daughters; after his Death 200*l.* is found hid in a Wall, and 200*l.* in a Box. The Widow lays out this Money in Land, and ſettles it to the Uſe of her ſelf for Life, Remainder to her Daughters in Tail, Remainder to her own right Heirs.

THomas *Chalkley* a Meal-Man of *Uxbridge* died Inteſtate, leaving a Widow and *two* Daughters. It was proved that 200 Guineas were found hid in a Hole in the Wall, and 200*l.* in Silver in a Box, beſides his Stock in Trade. The Widow inveſts the 400*l.* in a Purchaſe of Lands of Inheritance, and ſettles the ſame to her ſelf for Life, Remainder to her two Daughters in Tail, Remainder to her own Right Heirs; both the Daughters died without Iſſue inteſtate; the Defendant as Heir to the Mother entered on the Lands.

After the Death of the Mother and two Daughters, Plaintiff as Adminiſtrator to the Daughters, brings a Bill againſt the Heir at Law, to have *two Thirds* of the 400*l.* out of the Land as perſonal Eſtate, and the *Maſter of the Rolls* decreed for him; but the Decree was reverſed by the *Lord Keeper*, Money having no Ear-Mark.

The Plaintiff, as next of Kin, and as Adminiſtrator to the Daughter, brought his Bill to ſubject the Land to the 400*l.* that is, to refund *two Thirds* thereof, as being

being perſonal Eſtate belonging to the Daughters; and ſeveral Witneſſes were examined, proving that the 200 *l.* ſo found in the Wall, and the 200 *l.* in the Box was inveſted in this Purchaſe.

The *Maſter* of the *Rolls* decreed for the Plaintiff; but upon an Appeal to the *Lord Keeper*, the Decree was reverſed, being within the Reaſon of the Caſe of *Kirk* and *Webb*, lately affirmed upon an Appeal in *Parliament*, that Money had no Ear-Mark, and could not be followed when inveſted in a Purchaſe. *Poſt.* Ca. 435.

Haines verſus *Haines.* Caſe 405.

THE Uncle having deviſed his real Eſtate, Part to the Plaintiff, and other Part to other Relations, and diſinherited his Nephew and Heir at Law; at the Funeral of the Uncle, a younger Brother of the Heir at Law ſnatched the Will out of the Hands of the Executor, and tore it in many ſmall Pieces; and moſt of them, and particularly ſuch Part, wherein was the Deviſe of the Land, were picked up and ſtitched together again.

A. deviſes Lands to ſeveral Perſons, and after his Death, one, who was a Friend to the Heir at Law, ſnatches the Will out of the Executor's Hands, and tears it in pieces. The Pieces being gathered up, and ſtitched together, a Bill is brought to eſtabliſh the Will, and decreed the Deviſees to hold and enjoy, and the Heir to convey to them.

The Bill was to have the Will eſtabliſhed; and decreed that the Deviſees ſhould hold and enjoy againſt the Heir, and he to convey to the Deviſees, although no direct Proof made that the Heir directed the Tearing of the Will.

Caſe 406. Sir *John Heathcoate* ver. Sir *John Fleete.*

Bill to diſcover who was Owner of a Wharf and Lighter, to enable the Plaintiff to bring Action for Damages his Goods had ſuſtained by the Negligence of the Lighter-Man. Defendant demurred. Demurrer overruled. See the next Caſe.

BILL to diſcover, who was Owner of a Wharf and Lighter, to enable the Plaintiff to bring an Action for the Damages his Goods ſuſtained by the Lighter's being over ſet, by Negligence of the Lighter-Man. The Defendant demurred.

4

DE
Term. S. Michaelis,
1703.
In Curia Cancellariæ.

Morſe verſus *Buckworth.*

Caſe 407. *Octob.* 18.

THE Ship called the *Turkey Merchant*, taking Fire by the Neglect of the Maſter, or Ship's Crew, the Plaintiff who was one of the Freighters, and had his Goods burnt, brought his Bill to diſcover, who were Part-owners of the Ship, to enable him to bring his Action. The Defendant demurred.

See the preceding Caſe.

In both theſe Caſes it was inſiſted on for the Defendant, that it was a hard Demand in its Nature. The Plaintiff might recover at Law, as he could, but was not to be aſſiſted in Equity; and compared it to the Caſe, where a Fire happens in a Man's Houſe, and burns his Neighbours alſo; altho' he is liable to Damages at Law, yet the Plaintiff in ſuch Caſe ſhall not be aſſiſted in Equity.

Per Cur. The Caſes are not alike. In the Caſe put, it is true, the Law gives an Action; but it doth not ariſe out of any Contract or Undertaking of the Party; but

but in the Caſes before the Court, the Lighter-Man receives a Premium, or Wages for Undertaking to conduct the Goods to the Wharf; and ſo the Maſters or Owners are by Agreement to have Freight for carrying and tranſporting of the Goods; and it is within the Reaſon of the Caſe of any common Carrier; and therefore overruled the Demurrers, and ordered the Defendants to anſwer.

Caſe 408.
Octob. 23.

Webſter verſus *Biſhop.*

An Award is made a Rule of Court according to a Submiſſion for that Purpoſe, and an Attachment is taken out for not obeying the Award, and then the Party dies, againſt whom the Attachment iſſues. By the Act of Parliament the Attachment is gone, and the Remedy loſt.

Webſter having ſubmitted to an Award, and that the ſame ſhould be made a Rule of Court, the ſame was accordingly made a Rule of this Court; and an Attachment iſſued out againſt him for not performing the Award. *Webſter* was afterwards found a *Lunatick*. *Biſhop* took out a *Subpœna ſcire fac'* againſt the Executrix and Heir, to carry on the Rule of Court to an Execution.

Per Cur. The Act of Parliament directing it to be carried on by an Attachment, as is done in other Courts for diſobeying a Rule of Court; by the Death of the Party the Attachment is gone, and the Remedy loſt.

Caſe 409.
Octob. 29.

Humble verſus *Bill & al'.*

A. having a Term in the Printing-Office for 21 Years, by Will directs that 2000 *l.* ſhall be raiſed out of the Profits for his Daughter, and her Children, and made *B.* Executor; *B.* mortgages the Term. Decreed the Daughter and her Children ſhould redeem, or be foreclоſed; but this Decree was reverſed by the Houſe of Lords.

Bill having a Term for *Twenty-one* Years in the *Printing-Office*, deviſed (amongſt other Things) that 2000 *l.* ſhould be raiſed out of the Profits of the *Printing-Office* for his Daughter, the Wife of *Darcy Savage*, and

and their Children, and made one *Garret* Executor; who firſt mortgaged the Term in the *Printing-Office* to Dr. *Brown*, and the ſame was afterwards aſſigned to Sir *William Humble* for 1800 *l.*

It was inſiſted, here was no Occaſion to ſell to pay Debts, and Sir *William* having Notice of the Will, was to take the Eſtate ſubject unto the 2000 *l.*

But the Court was of Opinion, that the Executor of a teſtamentary Eſtate, had the Power over it ſo as to alien or ſell, as he ſhould judge neceſſary; and that if he ſold in Prejudice of a reſiduary or ſpecifick Legatee, they might have their Remedy againſt the Executor, but not follow the Eſtate into the Hands of a Purchaſer; for ſhould that be allowed, no one would venture to buy of an Executor; for it would be unreaſonable that a Purchaſer ſhould take upon him to make out the Account, as to the *Quantum* of the Debts or Aſſets; nor is he intitled to have the Vouchers to make out ſuch an Account; and if ſuch Difficulties be put upon Purchaſers of Chattles, *&c.* from Executors, it will follow, that Executors will be under an Incapacity, and diſabled to ſell, though there be never ſo much Occaſion for it, for Payment of Debts; and therefore the Court decreed an Account to the Plaintiff of the Rents and Profits, and to hold and enjoy the *Printing-Office*, and Defendants to redeem, or be foreclоſed.

Note; This Decree was afterwards reverſed upon an *Appeal* to the *Houſe* of *Lords.*

Stribblehill verſus *Brett.*

Caſe 410. *Nov.* 13.

DEfendant had a Leaſe made by *Thomas Thynn* Eſq; of the Impropriation of *Thame* for *two* Lives, in Reverſion after another Leaſe for Life of Mr. *Thynn* of *Egham.* Decree grounded on 2 Verdicts at Law, reverſed by the *Houſe of Lords.*

Egham. On the Death of Mr. *Thynn* without Iſſue, the Eſtate came to the Lord *Weymouth*, who had made a Leaſe, under which the Plaintiff claimed.

The Plaintiff's Bill was to ſet aſide the Defendant's Leaſe upon Surmiſe, that the Conſideration of the Leaſe was Colonel *Brett*'s Undertaking to procure a Marriage to be had between Mr. *Thynn* and the Lady *Ogle*.

It was objected by the Defendant's Counſel, that the Lord *Weymouth* being a Remainder-Man, claimed by Settlement paramount, and came not in Privity of Eſtate; and therefore neither he nor his Leſſee intitled to controvert, whether the Leaſe was made on good Conſideration or not; but not allowed.

Leaſe granted by Tenant in Tail in Conſideration of procuring a Match, ſet aſide at the Suit of the Remainder-Man.

Per Cur. If the Leaſe was gained by Fraud, or an unjuſt Conſideration, it is to be deemed void, and the Eſtate diſcharged of it, as if no ſuch Leaſe had been made.

The Court directed an Iſſue to be tried at the Bar of the Court of *Common Pleas*, whether the Leaſe was made in Conſideration of Colonel *Brett*'s Aſſiſting to effect or procure the ſaid Marriage. *Two* Verdicts for the Defendant, and thereupon the Bill was diſmiſſed.

Upon an Appeal to the *Lords* in *Parliament*, the Decree was reverſed, and without Regard to the Verdicts, the Leaſe was ſet aſide.

Richardſon

Richardſon verſus *Sydenham.*

Caſe 411. *Nov.* 16.

ONE *Allay* demiſes *ſix* Acres of Paſture Land at *Lambeth*, being Copyhold, for *three* Years at 13 *l.* *per Ann.* The Tenant, who was by Trade a Gardiner, covenants to lay out 100 *l.* in Improvements, and in Conſideration thereof, the Leſſor covenanted at the End of the Term to grant a new Leaſe under the ſame Rents and Covenants. The Defendant having purchaſed the Eſtate, refuſed to grant the new Leaſe. Decreed *pro Quer'*.

A. makes a Leaſe for 3 Years, and in Conſideration of the Leſſees laying out 100 *l.* in Improvements, covenants at the End of the Term to grant a new Leaſe at the ſame Rent and Covenants. Purchaſer of the Inheritance decreed to make good this Covenant.

Nevil & al' verſus *Johnſon & al'.*

Caſe 412. *Nov.* 19.

THE Lord *Lovelace* by Will deviſed his real Eſtate for Payment of Debts, the Surplus to the Plaintiffs. The Creditors brought a Bill for the Payment of their Debts, and to ſet aſide ſeveral Conveyances fraudulently obtained, and made Sir *Henry Johnſon* and his Wife, and alſo the Legatees, Defendants; and obtained a Decree for Payment of their Debts, and to ſet aſide the Conveyances, as unduly obtained by Sir *Henry Johnſon.*

The Creditors of Lord *Lovelace* obtain a Decree for payment of their Debts, and to ſet aſide ſome Conveyances gained by Fraud, and Sir *Henry Johnſon* and the Legatees are made Defendants. The Legatees having brought their Bill againſt Sir *Henry Johnſon*; the Queſtion was, if the Depoſitions in the former Cauſe touching the Fraud could be read in this. *Per Cur.* The Queſtion being the ſame in both Cauſes, and Sir *Henry Johnſon*'s Defence the ſame, the Depoſitions ought to be read.

Now the Legatees brought their Bill againſt Sir *Hen. Johnſon* and his Wife, praying to ſet aſide Conveyances, and to have an Account of the Surplus of the Eſtate.

The Queſtion was, Whether the Depoſitions taken in the former Cauſe, as to the Fraud and undue Obtaining of the Deeds, could be read in this Cauſe for the Legatees

gatees againſt Sir *Henry Johnſon & ux'*, who were *Co-Defendants* in the former Cauſe.

Per Lord Keeper and *Maſter* of the *Rolls*, there being the ſame Queſtion in both Cauſes; and Sir *Henry Johnſon*'s Defence being the ſame in both Cauſes, the Depoſitions ought to be read.

Caſe 413. *Decemb.* 16. ## *Baskervile* verſus *Baskervile* and Lady *Gore & al'.*

A. on the Marriage of his Son with *B.* a Widow, articles to make a Settlement in Conſideration of a Portion of 2600*l.* to be paid to him. 1000 *l.* of the Portion being tied up by Articles on *B.*'s firſt Marriage, it could not be paid. On Bill brought by the Father, the Articles were decreed at the *Rolls* to be performed in *ſix* Months, or delivered up. Upon an Appeal to the *Lord Keeper*, he decreed the Son to make good the 1000 *l.* he being a Party to the Articles, and alſo bound by his Wife's Covenant, who had thereby, whilſt Sole, covenanted for Payment of the Portion.

Baskervile the Father, upon the Treaty for the Marriage of the Defendant his eldeſt Son, with Mrs. *Reyner* Widow, the Daughter of the Lady *Gore*, by Articles of *April* 1, 1699, between *Baskervile* Father and Son on the one Part, and Mrs. *Reyner* and *John Gereher* Uncle on the other Part; *Baskervile* the Father covenants, in Conſideration of the intended Marriage had, and of Payment of the Portion of 2600 *l.* he would ſettle on his Son for Life, Part for Jointure, Remainder of the Whole upon the firſt Son, *&c.* It fell out that 1000 *l.* Part of the intended Portion upon her firſt Marriage with Mr. *Reyner*, was lodged in the Hands of Truſtees to be inveſted in Lands, and ſettled on *Reyner & ux'* for Life, Remainder to their Iſſue, Remainder to her Children by any other Husband, Remainder to the right Heirs of *Reyner*; ſo that this 1000 *l.* could not be paid to compleat the Portion as was intended; and until the whole Portion was paid, *Baskervile* refuſed to ſettle.

The Marriage was had, and there were ſeveral Children, and *Baskervile* the Father wanting the Portion to provide for his younger Children, brought his Bill againſt his Son and Daughter, and *William Gore* the Uncle, to have the Portion

Portion paid, or Articles delivered up; and a croſs Bill was brought to have the Articles performed, and a Settlement made in Proportion to ſo much of the Portion as could be raiſed and paid.

The Cauſe was firſt heard at the *Rolls*, and there decreed the Articles to be perfomed in *ſix* Months, or delivered up to be cancelled.

Upon an Appeal to the *Lord Keeper*, he held the Decree ſo far to be good, that *Baskervile* the Father could not be compelled to ſettle without having the Portion paid; but in as much as the Marriage was had, it would be very hard to diſcharge the Marriage-Articles; and the Son being a Party to the Articles, he was of Opinion, that the Son was bound to pay the Portion; and if he had not been a Party to the Articles; yet his Wife, whilſt *Sole*, having covenanted for Payment of the Portion, the Husband after Marriage would be bound to perform that Covenant; and therefore decreed the Husband to make good the 1000 *l.* of the Portion.

Bampfield verſus *Popham.*

Caſe 414.

THIS Caſe came on to be argued before the *Lord Keeper*, aſſiſted with the Lord Chief Juſtices *Holt* and *Trevor*, and Juſtice *Powell*, who all unanimouſly agreed, that Mr. *Popham* had only an Eſtate for Life; and that it was a fixed Rule in Law, that an *expreſs Eſtate for Life, cannot be inlarged by an Implication*; by expreſs Words it may; as in the common Caſe, if an Eſtate be given to *J. S.* for Life, and after his Deceaſe to the Heirs of his Body; *that* by expreſs Words enlargeth his Eſtate, and makes him Tenant in Tail. But it is otherwiſe in this Caſe, where an expreſs Eſtate for Life is limited to him, and his firſt and other Sons in Tail, provided if he die without an Heir Male, or if he

Ant. Ca. 388.

An expreſs Eſtate for Life cannot be enlarged by an Implication; but may by expreſs Words.

dies without Iſſue Male, or for want of Iſſue Male, altho' ſuch Words are ſufficient to create an Eſtate-Tail, yet it is only by Implication, and when an expreſs Eſtate for Life is not before limited. Even in a Will, an Implication ſhall not alter an expreſs Eſtate; but where there is a ſubſequent Deviſe in expreſs Words to the ſame Perſon, to whom an Eſtate for Life was before deviſed, *that* will enlarge the Eſtate; as in the Caſe of *Plunckett* and *Holmes*, or *Wedgewood*'s Caſe in *Siderfin*; the Caſe of *King* and *Melling* cited; *Milliner* and *Robinſon*'s Caſe, *Moor* 682. *Frencham*'s Caſe, 43 *Eliz.* *Burleigh*'s Caſe cited by *Hale*. *Clerk* and *Davy*, *Rolle* 839. Deviſe to *Roſe* for Life, and if ſhe have Heir of her Body, the Heir to have it; adjudged that *Roſe* had only an Eſtate for Life, *Cr. Eliz.* 313. *Owen* 148. *Bullington* and *Barnadiſton*, Deviſe to *Evers Armin* for Life, if he died without Iſſue Male, Remainder over: Agreed it would not make an Eſtate-Tail.

1 Sid. 47.

1 Vent. 214. Pol. 101.

And it was ſaid, that the Reaſon of the Thing, and Intent of the Teſtator, as well as the Rules of Law, were againſt him. *Firſt*, for that it is plain the Teſtator intended that the firſt and other Sons ſhould take by Purchaſe, and not by *Deſcent*; and the Occaſion of the Proviſo, that if he left no Heir Male, *&c.* was not intended to enlarge the Eſtate, but to govern and direct what was to become of the Truſt, in Caſe there was no Son to carry it over to the Plaintiff. And as to the Objection, that a *Poſthumous* Son was not expreſly provided for, but might be by this implied Eſtate-Tail: It was anſwered, *that* was a remote Contingency, and it may be, not thought of by the Teſtator; and he might not think it neceſſary to provide for a *Poſthumous* Son; but manifeſtly thought it neceſſary to provide, that it ſhould not be in the Power of the Father to bar his Son; and therefore made him but Tenant for Life; and beſides, it being of a Truſt, *that* might ſupport the Remainder to a *Poſthumous* Son.

Secondly, It was objected, that by the Codicil the Teſtator recites, he had deviſed an Eſtate-Tail to the Defendant. It was anſwered, that in common *Parlance*, and in ordinary Acceptation, where an Eſtate is given to the Father for Life, and to his firſt and other Sons in Tail, it is looked upon as an Entail; and is the ſtricteſt way of entailing an Eſtate. But *ſecondly*, a Recital in a Will or Codicil, cannot amount unto a Deviſe. 2 *Vent.* 56.

Thirdly, As to *Sunday*'s Caſe in the *6th Report*, if he have Iſſue Male, his Son to have it, and if he die without Iſſue Male, the Eſtate to go over; there adjudged the Son ſhould have an Eſtate-Tail, but *that* no Way affects this Caſe, becauſe no expreſs Eſtate for Life.

It was admitted that no Eſtate-Tail, even in a Deed, may be raiſed by Implication, as is adjudged in the Caſe of *Gardner* and *Sheldon* in *Vaughan*'s *Reports*; and where there is not any expreſs Eſtate before limited, as a Deviſe to a Man and the Heirs of his Body, and then comes the Clauſe, if he die without Heir; *that* ſhall not enlarge the Eſtate by Implication; but by expreſs Words it may be done; as in *Lewis Bowles*'s Caſe 11 *Rep.* Covenant to ſtand ſeiſed to the Uſe of a Man and his Wife for their Lives, Remainder to the firſt and other Sons, Remainder to the Heirs of their two Bodies; there the Remainder is expreſs and good.

No Eſtate-Tail in a Deed can be raiſed by Implication. *Vaugh.* 259.

79. b.

Decreed an Injunction to ſtay Waſte, and an Account of what Timber was felled.

Aſton

Caſe 415.

Aſton verſus *Aſton.*

A. by Will gives Portions to his Daughters, but mentions no Time, when to be paid, but adds a Proviſo, that his Daughters ſhould marry with Conſent of his Wife; and if any married without ſuch Conſent, her Portion to go over. On a Bill brought by the Daughters for their Portions, the Court decreed the Portions to be paid; but on Security to refund, if the Condition ſhould be broken.

SIR *Willoughby Aſton* by Will directed, that the Portions of his then unmarried Daughters (being *ſix*, Plaintiffs) of 6000 *l.* provided by his Marriage-Settlement, ſhould be made up 4000 *l.* apiece out of his perſonal Eſtate, and Lands deviſed to be ſold for that Purpoſe; provided that each of his ſaid Daughters be married with the Conſent of his Wife, if living; and if dead, then with the Conſent of his eldeſt Son, in Writing, ſigned in the Preſence of *three* or more Witneſſes before Marriage; and if any of my Daughters ſhall marry without ſuch Conſent, her Portion ſhall go, firſt to make up the other Daughters Portions 4000 *l.* apiece, if the Fund prove deficient; and if any Surplus, *that* to go to his younger Sons.

Where Portions are provided for Daughters by a Settlement, the Father cannot by his Will annex any Condition to the Payment of them, or deviſe them over, in caſe of the Death of any of the Daughters, before their Portions become payable.

The *Lord Keeper* decreed *firſt*, as to the 6000 *l.* provided by the Settlement, the Father had only a Power of appointing Portions; that in Caſe either of them died before her Portion was payable, and unmarried, that the Portion would extinguiſh in the Land for the Benefit of the Heir, and he could not annex any Condition to it or deviſe it over.

Secondly, That although the Deviſe be to them, if married with Conſent; yet it is but a Condition ſubſequent, and not precedent, and the Portions are veſted Portions.

Thirdly, That in Caſe of Marriage without Conſent, although but a Condition ſubſequent, the Court cannot

relieve againſt the Forfeiture, by Reaſon of the Deviſe over; altho' it be a hard Condition, no Time being limited, but goes to a Marriage at any Time, even after the Age of *Twenty-one.*

Decreed the Portions to be paid; but on Security to refund, in caſe the Condition ſhould be broken.

The Caſes of *Bellaſis* and *Earl*, 1 *Chan. Rep.* 22. *Stratton* and *Grimes.* *Ant.* Ca. 323.

Attorney General at the Relation of *Pettifer* verſus *Rye* and *Warwick & al'.*

Caſe 416. *Decemb.* 17.

Michael Foxley, Tenant in Tail, by Will deviſed the Premiſſes in Queſtion for the Maintenance of a *School-Maſter* and other *charitable* Uſes. The Queſtion was, Whether a Deviſe by Tenant in Tail, who levied no Fine, nor ſuffered any Recovery, be a good Appointment within the Statute of *charitable Uſes* againſt the Defendants, who claimed under the Intail. The Commiſſioners below had decreed it to the Charity; and upon Exceptions now taken to the Decree, it was confirmed by the *Lord Keeper*, who ſaid, he was of Opinion, that the Intent of the Act of the *Queen* for *charitable Uſes*, was to make the Diſpoſition of the Party as free and eaſy as his Mind; and not to oblige him to the Obſervance of any Form or Ceremony either of *Leaſe* or *Releaſe*, or *Common Recovery* or *Fine*, &c. and cited the Caſe of *Coliſon* in *Hobart*; where before the Statute of *Wills*, a Will of Land made 15 *H.* 8. deviſing the ſame for Repair of Highways, was adjudged to be good within the Statute of the *Queen*, though made long after, *Moor* 888. the ſame Caſe, but there called *Rolle*'s Caſe.

Tenant in Tail deviſes Lands for Maintenance of a School-Maſter, and other charitable Purpoſes. Decreed to be a good Appointment within the Statute of charitable Uſes, tho' no Fine was levied, or Recovery ſuffered.

Hob. 136. *Griffith Flood*'s Caſe in *Hobart*, a Deviſe to *Jeſus College* being in *Mortmain*, and void at Law; yet allowed good within the Statute of the *Queen*.

Damus's Caſe *Moor* 822, a Feme Covert Adminiſtratrix deviſes to Charity, and held good.

Rivett's Caſe *Moor* 890. Deviſe of a Copyhold without a Surrender to the Uſe of the Will held good; and ſo in *Reppington* verſus *Reppington*, and the Town of *Chaid* and *Opie*.

Higgens ver. *Town of Southampton*, on the Will of one *Mill*, *June* 26, 1671, a Deviſe out of a Manor held in *Capite*, decreed good, being to a Charity; altho' otherwiſe the Will void, as to a third Part; *Wild* and *Windham*, who aſſiſted in that Caſe, ſaying, that the Statute of the *Queen* was an enabling Act, giving Power in any Manner to diſpoſe to charitable Uſes.

In the Caſe of Sir *John Platt* and St. *John*'s *College*, in 27 *Car.* 2. a *Miſnomer* ſupplied. 1 *Chanc. Rep.* 267.

DE

Term. S. Hillarii,

1703.

In CURIA CANCELLARIÆ.

Pyke verſus *Williams*, & *econtra*.

Caſe 417.
Feb. 4.

THE Defendant *Williams* having mortgaged the Lands in Queſtion to one *Marſh* for 760 *l.* died, leaving an Infant; and it being for the Advantage of the Infant that the Eſtate ſhould be ſold, an Act of Parliament was procured for that Purpoſe; and the Widow and Truſtees held a publick Survey for the Sale of it; at which *Pyke* appeared, and offered 1250 *l.* for it; but one *Goulſon* bid 1350 *l.* and ſigned the Contract, but ſhortly afterwards died; and then the Plaintiff *Pyke* offered again 1250 *l.* which was accepted, and agreed unto; Conveyances directed to be made, and Poſſeſſion actually delivered in *June* 1692; but Diſputes ariſing about ſettling the Conveyances; *Pyke* in *Sept.* 1692, got an Aſſignment from *Marſh* of the Mortgage, and gets it antedated as in *July* 1692.

A publick Survey is held for Sale of an Eſtate, and *A.* offering 1250 *l.* for it, it is accepted and agreed to, and Conveyances are ordered to be got ready, and *A.* is put into Poſſeſſion; but Diſputes ariſing about ſettling the Conveyances, *A.* gets an Aſſignment of a Mortgage to which the Eſtate is ſubject, and antedates it, and refuſes to go on with the Purchaſe: Tho' the Agreement was only parol; yet on the Circumſtances of this Caſe, *A* was decreed to proceed in the Purchaſe.

The Plaintiff *Pyke*'s Bill was, that the Defendant might redeem or be foreclosed; the croſs Bill was to compel *Pyke* to go on with his Purchaſe. *Pyke* by Anſwer confeſſed he agreed to purchaſe for 1200 *l.* that Directions were given for drawing the Conveyances, touching which Diſputes afterwards aroſe between them; denied he entred purſuant to his Contract for the Purchaſe, but under the Aſſignment of the Mortgage; and denied the Mortgage was antedated; in all which Particulars his Anſwer was fully diſproved; and the ſingle Queſtion was, Whether upon the Circumſtances of this Caſe, although the Agreement was only *Parol*, it ſhould be decreed, and *Pyke* held to his Purchaſe.

And as Inſtances where *parol* Agreements, in Part executed by delivering of Poſſeſſion, *&c.* had been decreed ſince the Statute againſt *Frauds and Perjuries*, were cited the Caſes of *Foxcraft* and *Liſter*, where the Plaintiff, purſuant to a *parol* Agreement for a building Leaſe of *Wild* Houſe, proceeded to pull down Part, and build Part; and before any Leaſe executed, the Owner of the Soil died; the Defendants his Repreſentatives knew nothing of the Matter, and inſiſted on the Statute made for the *Prevention of Frauds and Perjuries*, and the *Lord Keeper* diſmiſſed the Bill; but upon an Appeal to the *Lords* in *Parliament*, *that* Diſmiſſion was reverſed, and a building Leaſe decreed; and the Caſe of *Butcher* and *Butcher*.

The *Lord Keeper* decreed *Pyke* to proceed in the Purchaſe, in caſe he could have a good Title; and for that Purpoſe referred it to a Maſter.

5

Laurence

Laurence verſus *Blatchford & al'.*

Caſe 418.
Feb. 26.

Euſtace Man upon his Marriage, ſettled to the Uſe of himſelf for Life, to his Wife for Life, to his firſt and other Sons in Tail Male; in Default of ſuch Iſſue to Truſtees for 500 Years in Truſt, if but one Daughter, to raiſe 2000 *l.* for the Portion of ſuch Daughter, payable at *twenty-one* or Marriage. He left Iſſue only one Daughter, and by Will deviſed all his Lands to Truſtees for the Term of *ſixty* Years, to pay Debts and Legacies, Remainder to his Daughter in Tail; in Default of Iſſue to the Defendants, the *Blatchfords*, his Siſter's Children, and deviſed ſome Fee-Farm Rents to his Daughter and her Heirs.

A Daughter's Portion ſecured by a Truſt-Term not extinguiſhed by a Deviſe of the Lands to the Daughter in Tail.

The Plaintiff, with the Conſent of the Friends and Relations, married the Daughter, when *ſixteen* Years of Age; and Articles were entred into, whereby the Plaintiff covenanted to pay the Legacies charged upon the Eſtate, amounting to 1500 *l.* within *ſix* Months after the Marriage; and on the Behalf of the Wife it was covenanted by her Friends, that ſhe, when of Age, ſhould ſettle her Eſtate on the Plaintiff for Life, *&c.*

The Plaintiff gave a Statute, and likewiſe a Mortgage of his own Eſtate to ſecure Payment of the Legacies, and by an Indorſement on the Mortgage the ſame was to be void, unleſs the Wife's Eſtate was ſettled on the Plaintiff for Life. The Wife died an Infant, the Plaintiff not having paid the 1500 *l.* Legacies, nor received the 2000 *l.* Portion.

The Bill was to have the 2000 *l.* Portion paid to him as Adminiſtrator to his Wife; and to have up the Statute and Mortgage, and Articles, without paying the

1500 *l.* Legacies, being he could not enjoy his Wife's Eſtate for Life.

The Queſtions were firſt, Whether the Portion was extinguiſhed by the Deviſe of an Eſtate-Tail to the Daughter, expectant on the Truſt-Term for *ſixty* Years for Payment of Debts and Legacies; and it was inſiſted it could not be extinguiſhed; becauſe nothing deſcended or came to her in Poſſeſſion, only a Reverſion expectant on the *ſixty* Years Term, and *that* alſo but of an Eſtate-Tail. Whereas in the Caſe of *Kemiſh* and *Thomas*, the Fee-ſimple in preſent Poſſeſſion deſcended on the Daughter; yet *that* was no Extinguiſhment of the Portion, but held to be ſubſiſting, and to go to her Adminiſtrator.

Ant. Ca. 320.

Secondly, If not extinguiſhed, whether what was given by the Will ſhould be deemed a Satisfaction.

Thirdly, If the Indorſement on the Mortgage only was ſufficient to diſcharge the Statute and Articles alſo; and held it was ſufficient for that Purpoſe; all being executed at one and the ſame Time; the ſame Witneſſes, and Part of the ſame Agreement, and all to be looked upon as but one Conveyance.

Caſe 419. *Lord Keeper.* *Feb.* 29.

Elizabeth Gerrard Spinſter verſus Sir *Francis Gerrard.*

By Marriage-Settlement a Term is limited to raiſe 5000 *l.* if but one Daughter, to be paid at 21 or Marriage, which

BY Settlement of *Jan.* 20, 1675, on the Marriage of *Honoria Seymour*, Siſter to the Duke of *Somerſet*, with Sir *Charles Gerrard*, the Lands in Queſtion were limited to Sir *Charles* for Life, to Dame *Honoria* for her Jointure;

ſhould firſt happen after the Death of the Father and Mother, or within *ſix* Months after either of thoſe Days or Times. There being one Daughter only, and ſhe having attained 21, and her Father being dead, her Portion was decreed to be raiſed in the Life-time of her Mother.

Jointure; Remainder to the firſt and other Sons in Tail; but if Sir *Charles* ſhould die without Iſſue Male, having one or more Daughters, then to Truſtees for the Term of 500 Years, in Truſt to raiſe 5000 *l.* if one Daughter, to be paid at *Twenty-one* or Marriage, which ſhould firſt happen next after the Deceaſe of Sir *Charles* and *Honoria*, or within *ſix* Months after either of thoſe Days or Times; ſo as ſuch Daughter do not marry before *Eighteen*, without the Conſent of Parent or Grand-Parent, if then living. Sir *Charles* died without Iſſue Male, left only the Plaintiff a Daughter, who in 1698, attained *Twenty-one*, the Mother ſtill living.

The Queſtion was, Whether the Portion ſhould be raiſed in the Life-time of the Mother; for, if not, the Daughter, as ſhe was already *Twenty-one*, if ſhe is to expect after the Deceaſe of her Mother, a Portion may come too late to prefer her in Marriage; and beſides, according to the ſtrict Letter of the Deed, if ſhe ſhould marry in the Life-time of her Mother, ſhe is not to have any Portion even after the Deceaſe of her Mother, the Portion being made payable at *Twenty-one* or Marriage, which ſhould firſt happen after the Deceaſe of Sir *Charles* and *Honoria*; and therefore it was inſiſted that the Words, *or within ſix Months after either of the Days or Times aforeſaid*, were intended to provide for the Caſe, which hath happened; *viz.* that if the Daughter attained *Twenty-one* or married in the Life-time of the Mother, there ſhould be *ſix* Months Time afterwards allowed for raiſing of it: If ſhe married, or attained *Twenty-one* after her Mother's Deceaſe, then to be raiſed immediately, or in any of the Caſes, within *ſix* Months after *Twenty-one* or Marriage; and the Portion was decreed to be raiſed accordingly.

Vide the next Caſe.

Staniforth

Caſe 420. *Staniforth* and *Clerkſon* verſus *Staniforth.*

Feb. 29. *In Court, Maſter of the Rolls.*

By Marriage-Settlement, Lands are limited to Husband and Wife for their Lives, Remainder to the Heirs Male of their Bodies; and if there ſhould be no Iſſue Male of their Bodies, and one or more Daughters, then to Truſtees for 5 Hundred Years from the Deceaſe of the Survivor, in Truſt by Sale or Mortgage, to raiſe 1000*l.* for Daughters Portions; but there is no Time appointed for the Payment of them. The Father dies leaving a Daughter only. The Portion veſting in the Daughter in the Life-time of the Mother, it was decreed to be raiſed by a Sale with reaſonable Maintenance in the mean Time, though no Maintenance is provided by the Settlement.

IN 1679, by Settlement on the Marriage of the Plaintiff's Father and Mother, the Eſtate was ſettled on the Father for Life, and to the Mother for her Jointure, and to the Heirs Males of their two Bodies to be begotten; and if it ſhould happen there ſhould be no Iſſue Male of the Marriage, and one or more Daughter or Daughters, then to Truſtees for the Term of 500 Years from the Deceaſe of the Survivor, in Truſt by Sale or Mortgage to raiſe 1000*l.* for the Daughters Portions, and no Time appointed for Payment; the Father dies without Iſſue Male of that Marriage, leaving Iſſue the Plaintiff a Daughter by that Marriage, and the Defendant a Son by a former Wife.

March 13. The Cauſe being now further heard, upon View of Precedents, *viz. Hilliar* verſus *Jones*, and the Caſe of *Ant.* Ca. 308. *Shouldham* verſus *Shouldham*, where future Terms have been decreed to be ſold to raiſe Portions, although not to commence in Poſſeſſion, until after the Death of the Fa- *Ant.* Ca. 419. ther and Mother, and the Caſe of *Gerrard* and *Gerrard*, lately decreed by the *Lord Keeper.*

The *Maſter* of the *Rolls* declared, *firſt*, that by the Contingency of the Father's Death without Iſſue Male of that Marriage, leaving a Daughter, the Term did ariſe, though not to take Effect in Point of Profits, until after the Death of the Mother.

Secondly, That the Portion doth veſt in the Daughter, in the Life-time of the Mother.

Thirdly, No Time being appointed for the Payment of the Portion, nor any Maintenance in the mean Time, that ſhe was intitled to a reaſonable Maintenance, not exceeding the Intereſt of the Portion, from the Death of the Father; or at leaſt-wiſe from ſuch Time, as the Portion might have been raiſed by a Sale.

And decreed the Portion to be raiſed by Sale with a reaſonable Maintenance in the mean Time.

Rooke verſus *Rooke.*

Caſe 421. *March* 1.

A. ſeiſed in Fee deviſes *Blackacre* to B. for Life, and deviſed to *C. all his Lands not before deviſed*, to be ſold. By this Deviſe of *all his Lands*, &c. the Reverſion of *Blackacre* was well deviſed to *C.*

F. S. ſeiſed in Fee deviſed *Blackacre* to *A.* for Life, and deviſed to *B. all his Lands, not before deviſed*, to be ſold, and the Money to be divided between his younger Children.

The Queſtion was, Whether the Reverſion of *Blackacre* paſt by the Deviſe of all his Lands not before deviſed; and it having been referred to the *Judges* of the *Common Pleas*, they unanimouſly agreed and certified, that the Reverſion was well deviſed; and it was decreed accordingly.

DE
Term. S. Michaelis,
1704.
In Curia Cancellariæ.

Caſe 422. *Novemb.* 8.

Brandling verſus *Owen, & econtra.*

THE Plaintiff having firſt made a Leaſe to the Defendant *Owen* of a Colliery, and after mortgaged to him the Manor of *Felling* and the Colliery: The Bill was to redeem. The Plaintiff inſiſted the Defendant had broken the Covenants in his Leaſe, by not having left ſufficient *Baulks* and *Pillars* to ſupport the Work: And *ſecondly*, being by his Leaſe to pay 10 *s.* for every Tun of Coals; he had made his Waggons of a larger Size than ordinary, to defraud him in that Particular.

The Court left him to recover Damages at Law, as he could, on the collateral Covenants for not working of the Colliery; and ſuch Damages were not to be brought into the Account of Redemption.

But as to the over Size of the Waggons, directed an Iſſue at Law.

Hall verſus *Adkinſon* and *Daniel.*

Caſe 423.

THE Plaintiff by his Bill charged that in the Mortgage made by one *Wyſhinburgh* to *Adkinſon*, there was a Truſt declared for the Benefit of the Plaintiff; but the ſaid *Adkinſon* having ſince conveyed to *Daniel*, he refuſed to diſcover the Truſt. The Defendant *Daniel* by Anſwer ſaid, that in the ſaid Mortgage there was no Truſt declared for the Benefit of the Plaintiff; whereto the Plaintiff replied, and the Queſtion now at the Hearing was, Whether the Defendant *Daniel* ſhould be obliged to produce the Deed or not.

Bill for a Diſcovery whether in a Mortgage made by *A.* to *B.* which had been aſſigned to the Defendant, there was not ſome Truſt declared for the Benefit of the Plaintiff. Defendant by Anſwer denied there was any Truſt declared for the Plaintiff. The Anſwer being replied to, the Queſtion at the Hearing was, Whether the Defendant ſhould be obliged to produce the Deed; the Court would not compel him to do it. *Q.*

Lord Keeper. I will not oblige him to produce it; by this Method all Purchaſers may be blown up. *Q. tamen.*

Needham verſus *Smith.*

Caſe 424.
Nov. 17.

UPON an Appeal from the *Rolls*, it was objected to the Evidence of one *Norris*, a Witneſs examined in the Cauſe, and read at the Hearing at the *Rolls*, that ſince that Hearing, in Anſwer to a Bill exhibited againſt him, he had confeſſed, that on the Day on which he was examined as a Witneſs, he took a Bond of the Plaintiff, that if the Plaintiff recovered the Eſtate in Queſtion, he would convey Part of it to the ſaid *Norris*.

Upon an Appeal from the *Rolls*, it was objected to the Evidence of a Witneſs examined in the Cauſe, and read at the former Hearing, that he had ſince, by Anſwer to a Bill exhibited againſt him, confeſſed that on the Day he was examined, the Plaintiff gave him a Bond, that if he recovered the Land in Queſtion, he would convey Part of it to the Witneſs. By the Opinion of the *Lord Keeper*, aſſiſted by two Judges, this Anſwer was ordered to be read.

The

The Queſtion now was, Whether that Anſwer ſhould be now read to take off his Evidence; and the *Lord Keeper*, aſſiſted with the Lord Chief Juſtice *Holt*, and Juſtice *Powel*, were all of Opinion, that the Anſwer ought to be read.

Upon an Appeal from the *Rolls* the Cauſe is intirely open.

Juſtice *Powel.* The Cauſe upon an Appeal from the *Rolls* is intirely open; and if the Anſwer had been in then, it might have been read there, and you may now read it here upon the Appeal: And as to the Objection that was made, that after Publication you may examine as to the Credibility, but not as to the Competency of a Witneſs, it was a Difference without *Colour* of Reaſon; if you may examine to the Credibility, which goes to Part, you may certainly examine to the Competency, which goes to the whole, and totally deſtroys his Evidence. And as to the Objection, that by taking the Advantage of an Anſwer to take off the Evidence of a Witneſs, the adverſe Party looſeth the Opportunity of croſs examining of him: It was anſwered, that it being proved, the Witneſs was a Party intereſted; no Proof is to be admitted to ſhew him not to be intereſted.

After Publication you may examine to the Competency, as well as a Credibility of a Witneſs.

If after hearing, a Witneſs is convicted of Perjury, the Party may take Advantage of it upon a Rehearing.

Lord Chief Juſtice. If after the Hearing, a Witneſs is convicted of Perjury, you may take Advantage of it upon a Rehearing.

Lord Keeper. Though a Witneſs is examined an Hour together at Law, if in any Part of his Evidence it appears that he was a Party intereſted, the Court will direct the Jury, that he is no Witneſs, nor any Regard to be had to his Evidence.

The Anſwer thereupon was read.

Laſſells & al' verſus Dominum *Cornwallis.*

Caſe 425.

A. by Marriage-Settlement having a Power to charge the Eſtate with any Sum not exceeding 3000 *l.* for ſuch Purpoſes as he thought fit, by Deed appoints the 3000 *l.* as a collateral Security for quiet Enjoyment of an Eſtate he had ſold; and if no Incumbrance did appear, the Appointment was to be void; and by Will deviſes the 3000 *l.* to his Daughter. Upon a Bill by the Creditors of *A.* the 3000 *l.* was decreed to be applied to the Payment of his Debts.

THE late Lord *Cornwallis*, on his Marriage with the Daughter of Sir *Stephen Fox*, reſerved to himſelf in the Marriage-Settlement, a Power to charge the Eſtate with 6000 *l.* 3000 *l.* Part thereof for younger Childrens Portions, and any Sum not exceeding 3000 *l.* for ſuch Purpoſes, as he ſhould think fit. The Lord *Cornwallis* by Deed appointed 3000 *l.* for his Daughter of that Marriage; and having ſold ſome Lands to Sir *Stephen Fox*, appointed the other 3000 *l.* to him as a collateral Security for the Enjoyment of his Purchaſe; and if no Incumbrance did ariſe, the Appointment as to him was to be void; and by his Will he deviſed the laſt 3000 *l.* to his Daughter.

The Plaintiffs as Creditors to the Lord *Cornwallis*, brought their Bill to have the laſt 3000 *l.* raiſed, and applied for Payment of Debts.

Lord Keeper. The Court has not gone ſo far, as where a Man has a Power to raiſe Money, if he neglect to execute that Power, to do it for him; although he thought that might be reaſonable enough, and agreeable to Equity in Favour of Creditors; and the Caſe of the Lady *Beaufoy* came ſomething near that; there was a Power to charge Portions for younger Children not executed; but Dr. *Walker*, the Truſtee, had covenanted that he would execute his Power; but in the principal Caſe, the Power was executed by appointing the 3000 *l.* as a collateral Security to Sir *Stephen Fox*; and no Incumbrance ariſing upon his Purchaſe, reſulted back to the Lord *Cornwallis*;

and he accordingly took upon him to deviſe it to his Daughter; which brings it within the Reaſon of the Caſe of *Thompſon* and *Town*, where the Vendor left 500 *l.* Part of the Conſideration-Money in the Purchaſer's Hands, and took a Bond in the Name of *J. S.* that he ſhould pay it as he ſhould direct by Will, and deviſed it to *J. S.* and made him Executor. This 500 *l.* was decreed to be Aſſets, and the Decree was confirmed upon an Appeal to the *Lords* in Parliament.

Ant. Ca. 306. *A.* ſells an Eſtate to *B.* and leaves 500 *l.* Part of the Purchaſe-Money in his Hands, and takes a Bond in the Name of *C.* to pay the 500 *l.* as *A.* by Will ſhould direct. *A.* deviſes the 500 *l.* to *C.* and makes him Executor. This 500 *l.* was decreed to be Aſſets.

Decreed the *three Thouſand Pounds* to be raiſed and applied to the Payment of Debts.

Caſe 426. *Decemb.* 1.

Lamlee verſus *Haman & ux'.*

A Widow on the Marriage of her Son, agrees to releaſe her Jointure, that he might make a Settlement, and the Son privately agrees to aſſign a Leaſhold Eſtate to his Mother. This Agreement of the Son's was ſet aſide as fraudulent.

THE Mother, a Widow, on the Marriage of her Son, agreed in Conſideration of a Marriage-Portion, to make a Settlement of ſeveral Lands, in which ſhe had a Jointure, which by Agreement ſhe was to releaſe to her Son. The Son being poſſeſſed of a Leaſehold Eſtate agrees to aſſign the Leaſe to his Mother; but no Notice was taken thereof in the Marriage-Agreement, and therefore ſet aſide, as an underhand and fraudulent Agreement; and the Caſes of *Kyte* and *Coventry*, Sir *Richard Butler* and Sir *Henry Chancey*, &c. were cited.

Poſt. Caſe 450, 664. Vol. 1. Caſe 233, 344, 464.

Caſe 427. *Decemb.* 4.

Eacles & ux' verſus *England & ux'.*

A. by Will gives 300 *l.* to *B.* and declares her Will and Deſire, that he give the 300 *l.* to his Daughter at his Death, or ſooner, if there be Occaſion for her Advancement. *B.* dies three Days before *A.* and the Daughter dies at ſixteen unmarried. The 300 *l.* decreed to the Adminiſtrator of the Daughter.

ON an Appeal from the *Rolls*, the Caſe was, that *Elizabeth Heydon* by Will *April* 20, 1689, deviſed in

theſe Words: *Item*; *I give unto my loving Kinſman* Richard Hammerton *the Sum of* three Hundred Pounds, one Hundred Pounds *Part whereof he doth owe me, which I do intend to give to my Couſin* Suſan Hammerton, *his youngeſt Daughter*; *but my Will and Deſire is, that he will give the ſaid* three Hundred Pounds *unto his Daughter* Suſan *at the Time of his Death, or ſooner, if there be Occaſion for her better Advancement and Preferment.* The Teſtatrix at the Making of her Will was in *England*, and it ſo fell out, that *Richard Hammerton* died in *Ireland* eight Days before the Death of the Teſtatrix.

The Cauſe was heard at the *Rolls*, *July* 1, 1702, when it was decreed, that the *one Hundred Pounds* Bond to the Teſtatrix ſhould be aſſigned to the Plaintiffs, and the *two Hundred Pounds* paid with Intereſt from the exhibiting the Bill.

Note; The Plaintiff's Wife was Adminiſtratrix to *Suſan* the Daughter, who died unmarried, when but *ſixteen* Years of Age.

Now upon the Appeal it was admitted, that the Words, *I Deſire*, or *I Will*, amount unto an expreſs Deviſe; and that if a Deviſe be to one for Life, directing him at his Deceaſe to give it to *J. S.* that amounts only to a Deviſe of the Uſe of it to the Deviſee for Life, Remainder over to *J. S.*

The Words, *I Deſire*, or *I Will*, in a Will amount to an expreſs Deviſe.

If a Deviſe is to *A.* for Life, directing him at his Death to give it to *B. that* amounts to a Deviſe of the Uſe of it only to *A.* for Life, Remainder to *B.*

But it was inſiſted on by the Defendants Counſel, that a Benefit was deſigned to *Richard Hammerton*, and that he was not a bare Truſtee; for he was to have the Intereſt of the *three Hundreed Pounds* for his Life, at leaſt until there was Occaſion for it, for the better Preferment,

ferment, or Advancement of his Daughter *Suſan*; and he had but a contingent Intereſt, *viz.* if there was Occaſion for it to advance or prefer her; but ſhe dying unmarried, and but *ſixteen* Years of Age, could not have called for it, nor would her Executor or Adminiſtrator have been intitled to it, if her Father had ſurvived her.

But it was anſwered, that if *Richard Hammerton* had ſurvived the Teſtatrix, he had at moſt been intitled to retain it during his Life, and when ever he had died, had the Daughter been but *two* Years old, it muſt have gone to her; but if there was Occaſion, it might have been called for by her, even in his Life-time: And according to the Rules of Law in *Brett* and *Rigdens* Caſe, if a Deviſe be of Lands to *J. S.* and his Heirs, and *J. S.* die before the Teſtator, the Heir cannot take; but the Deviſe is void: But if a Deviſe be to *A.* for Life, Remainder to *B.* although *A.* die in the Life-time of the Teſtator; yet the Deviſe to *B.* is good, and he ſhall take it immediately.

Plowd. 345. a.

It was alſo inſiſted, that if a Legacy is given to *A.* in Truſt for *B.* although *A.* died in the Life-time of the Teſtator, the Deviſe ſhall ſtand good for the Benefit of *B.*

The *Lord Keeper* ſeemed to doubt of that Point; but confirmed the Decree at the *Rolls*, and diſmiſſed the Appeal.

Biſhop

Biſhop verſus *Sharp.*

Caſe 428.
Decemb. 9.

A. by Will after ſome Legacies gives the Reſidue of his perſonal Eſtate to his Daughter, and gives his real Eſtate to her and her Heirs; and if ſhe died under 21, gives his real Eſtate to his Brother. The Daughter dies at 16, and by Will gives all her perſonal Eſtate to *B.* The Eſtate being ſubject to a Mortgage, the Brother, who is both Heir to the Teſtator and his Daughter, brings his Bill to have the Mortgage paid off, out of the perſonal Eſtate. Whether the perſonal Eſtate in the Hands of *B.* ſhall be applied to exonerate the real.

THankfull *Biſhop* having Iſſue only a Daughter an Infant, deviſed ſome particular Legacies, and gave the Reſidue of his perſonal Eſtate to his Daughter, and deviſed his real Eſtate to her and her Heirs; but if ſhe died unmarried, and before the Age of *Twenty-one*, to the Plaintiff, who was his Brother, and now become Heir at Law both to the Teſtator and his Daughter; and made the Defendant's late Husband Executor in Truſt for his Daughter: The Daughter attained the Age of *ſixteen* Years, and then died without Iſſue and unmarried, having made her Will, and deviſed her perſonal Eſtate to the Defendant. The Teſtator had mortgaged the real Eſtate for *four Hundred Pounds*, and the Plaintiff's Bill was, that being not only *Hæres factus*, but alſo Heir at Law, both to the Teſtator and his Daughter, the Teſtator's perſonal Eſtate ought to be applied to pay off the Mortgage, and exonerate the real Eſtate.

But for the Defendant it was inſiſted, that the firſt Teſtator deviſed ſome particular Legacies, and deviſed the Reſt and Reſidue of his perſonal Eſtate to his Daughter; and ſhe having, though an Infant, made a good Will, as to her perſonal Eſtate, (for it was agreed a Female may make a Will at *twelve* Years, Male at *ſeventeen*; at *fifteen*, if proved to be a Perſon of Diſcretion) and deviſed it to the Defendant, that the Plaintiff by Reaſon of ſuch Deviſe was outed of his Equity, and was not intitled to have the perſonal Eſtate of the Teſtator applied to exonerate his real Eſtate.

A Female may make a Will at 12, a Male at 15, if proved to be a Perſon of Diſcretion.

Whereto it was replied, that there was no particular Deviſe of any Thing in certain to the Daughter, but only a general Deviſe of his perſonal Eſtate, which can paſs no more than what ſhall be left after Debts and Legacies paid; and as the perſonal Eſtate is liable to Debts, it muſt ſo remain, notwithſtanding ſuch Deviſe; and there is nothing in the Deviſe, that imports either that the Debt in Queſtion, which is a Debt on the perſonal Eſtate, by Reaſon of the Covenant in the Mortgage-Deed, or any other Debt of the Teſtator's, ſhould not be paid out of his perſonal Eſtate; and manifeſtly his other Debts muſt be thereout paid; there being no other Fund for the Payment thereof: Nor is there any Thing in the Will, that the perſonal Eſtate ſhould be freed or exempt from the Payment of any Debts; or that the Debt in Queſtion ſhould remain a Charge on the real Eſtate only.

Ant. Ca. 240. In the Caſe of the Counteſs of *Gainsborough*, the Proof was, that having deviſed his Lands in *Rutlandſhire* for the Payment of his Debts, he declared the ſame ſhould be raiſed and paid out of that Eſtate, and that his Wife ſhould have his perſonal Eſtate freed and exempt from the Payment of Debts and Legacies: And in the Caſe of Mr. *Moore* and the Counteſs of *Meath* his Wife, and the Earl of *Meath*, the Reſidue of the perſonal Eſtate, after Debts and Legacies paid, was deviſed to the Counteſs; yet there the perſonal Eſtate was decreed to pay off a Mortgage, and the Decree was affirmed upon an Appeal to the *Lords* in *Parliament*.

And altho' the Deviſe here be not in the ſame Words, *The Reſt and Reſidue after Debts paid*; yet *that* is implied in every reſiduary Deviſe: Where there is an univerſal Legatee, ſuch Legatees can take only what is left after Debts paid, and the Will performed.

Quære, If the Bill was diſmiſſed, as to this Point.

In this Caſe, the Defendant as Guardian to the Infant, took an Aſſignment of the Mortgage; and although the Mortgagee had never entred; yet the *Lord Keeper* was of an Opinion, that as to the Profits received out of the mortgaged Lands, the Defendant ſhould be taken to be in Poſſeſſion as Mortgagee, and not as Guardian. *Q.*

Combes verſus *Spencer.*

Caſe 429. *Decemb.* 8.

A Copy of a Deed to lead the Uſes of a Fine, and enrolled for ſafe Cuſtody only, allowed to be read as Evidence at a Trial at Law.

William Spencer having married one of the Daughters and Coheirs of Sir *John Baker*, he and his Wife levied a Fine, and joined in a Deed leading the Uſes of that Fine, and thereby gave Power to *William Spencer* to charge his Wife's Inheritance with *five Thouſand Pounds*; the Plaintiff claimed Part of that *five Thouſand Pounds* by the Appointment of Mr. *Spencer*, and brought his Bill to have the ſame raiſed out of the Eſtate.

The Plaintiff, to make out his Title, produced a Copy of the Fine, and likewiſe a Copy of the Deed of Uſes, the ſame being inrolled: But it was objected, that the Copy from the Inrollment of the Deed of Uſes ought not to be read as Evidence, eſpecially againſt the Defendant the Wife; firſt, becauſe it was a Deed that did not take Effect by Inrollment, but was only inrolled for ſafe Cuſtody, and is not Evidence; nor is the Inrollment it ſelf without particular Circumſtances to ſupport it, as proving the original Deed was in the Defendant's Cuſtody or Power, or accidentally loſt, *&c.* ſo as to intitle a Plaintiff to read a Copy, or Counter-part of a Deed: And of that Opinion was the *Maſter* of the *Rolls*, who ſaid, that in Caſe of an Inrollment for ſafe Cuſtody, the Deed may be ſaid to be recorded; but where a Bargain and Sale is inrolled purſuant to the Statute, the Inrollment is a Record, ſo that a Copy of it may be

be read in Evidence: And it was alſo objected, that though the Husband and Wife were both Parties to the Deed, it was acknowledged by the Husband only.

Note; Afterwards upon a Rehearing, an Iſſue at Law was directed, whether ſuch Deed of Uſes was executed; and upon the Trial, a Copy of the Deed was allowed to be read, and a Verdict for the Deed.

Caſe 430.

Callow verſus *Mime.*

A Witneſs was examined, before the Hearing, whilſt ſhe was intereſted, and decreed to an Account; ſhe was re-examined after the Hearing before the *Maſter*, on the Account, having firſt releaſed her Intereſt.

A Witneſs was examined before the Hearing, whilſt ſhe was intereſted, but after the Hearing ſhe releaſed her Intereſt, and was examined again before the Maſter. Her Depoſitions before the Maſter allowed to be read.

It was objected, that ſhe ought not to be read, for having been examined whilſt intereſted, and her Depoſitions publiſhed, ſhe was thereby engaged, and almoſt under a Neceſſity of ſtanding to what ſhe had before ſworn, and could not be free to retract or contradict it; and if, becauſe an Interrogatory is leading, *that* is ſufficient to ſuppreſs the Depoſition, this is a much worſe Practice; and the Witneſs not only lead, but obliged to ſwear, as ſhe had ſworn before. The Tendring to a Witneſs a Depoſition ready drawn, or if brought by the Witneſs in Writing, and delivered ſo in to the Examiner or Commiſſioner, is a ſufficient Cauſe to ſuppreſs a Depoſition; by the like Parity of Reaſon, the Depoſition in this Caſe ought not to be received.

But the *Lord Keeper* over-ruled the Objection, and ordered the Witneſs to be read.

DE

Term. S. Hillarii,

1704.

In CURIA CANCELLARIÆ.

Henry Clavering, Plaintiff. Caſe 431.

Sir *James Clavering & al'*, Defendants.

OLD Sir *James Clavering* having *three* Sons, *John*, *James*, and the Plaintiff *Henry*, in 1663, ſettled *ſix Hundred Pounds per Ann.* on *John* his eldeſt Son; and having increaſed his Eſtate, ſettled about *five Hundred Pounds per Ann.* on *James* his *ſecond* Son; and in 1684, ſettled the Manor of *Lamedon* on Truſtees, in Truſt from and after his Deceaſe, to pay to the Plaintiff his *third* Son for Life (he having been extravagant, and in Diſgrace with his Father) and likewiſe to pay his Daughter *Katharine one Hundred Pounds per Ann.* for her Life; and to pay the ſurplus Profits to Sir *James* his Grandſon, and after the Death of the Annuitants to convey the

A. in 1683, makes a voluntary Settlement of an Eſtate, ſubject to ſome Annuities, in Truſt for his Grandſon and his Heirs, and afterwards in 1690, he makes another voluntary Settlement of the ſame Eſtate, to the Uſe of his eldeſt Son for Life, and to his firſt, &c. Sons in Tail, with Remainders over; and by Will gives a conſiderable Eſtate to his Grandſon. Altho' it was proved that *A.* always kept the Settlement of 1683, in his Cuſtody, and never publiſhed it; and it was after his Death found amongſt waſte Papers; and the Deed of 1690, was often mentioned by him; and he told the Tenants, the Plaintiff was to be their Landlord after his Death; yet the Son could not be relieved againſt the firſt Settlement.

the ſaid Manor to his ſaid Grandſon Sir *James* and his Heirs. After this old Sir *James* having greatly increaſed his Eſtate in the Year 1690, without Regard to the Settlement of 1684, conveyed the Manor of *Lamedon* to the Plaintiff for Life, and to his firſt and other Sons in Tail, Remainder to *Henry* and his firſt and other Sons in Tail, Remainder to his Grandſon Sir *James*, and his firſt and other Sons in Tail; and about the ſame Time made another Proviſion for his Daughter *Katharine*, by aſſigning to her a Mortgage of *eighteen Hundred Pounds*; and in 1697, by Will deviſed his perſonal Eſtate to be inveſted in Lands, and ſettled on Sir *James* for Life, and his firſt and other Sons in Tail; which perſonal Eſtate was of the Value of *fifteen Thouſand Pounds*, or thereabouts. After the Death of old Sir *James*, the Plaintiff entred and took Poſſeſſion of *Lamedon*, and received the Arrears of Rent, which were deviſed to him by the Will of his Father, who intended the Arrears to go along with the Eſtate; but Sir *James* having found the Settlement of 1684, got the Tenants to attorn to him.

The Plaintiff's Bill was to be relieved againſt the Settlement of 1684, and to have the Benefit of the Conveyance of 1690. And for the Plaintiff it was inſiſted, he was proper to be relieved in Equity; becauſe it appeared on the Proofs, that old Sir *James* had never delivered out or publiſhed the Settlement of 1684, but had it in his own Power, and it was after his Death found amongſt his waſte Papers; and it is to be preſumed, he apprehended he had a Power either to change or alter it, as he thought fit; he having always had it in his own Poſſeſſion or Power, or poſſibly might have forgotten it; the Deed of 1690, being often mentioned by Sir *James*, as the Settlement of *Lamedon*, and ſo indorſed with his own Hand; and in his Life-time he told the Tenants, that the Plaintiff was to be their Landlord after his Deceaſe; and the Defendant had no Reaſon to complain, his Grandfather having by Lands, and the Deviſe of his perſonal Eſtate, left him an Eſtate of *three Thouſand Pounds*

per Ann. great Part of which he was not obliged to leave him by Settlement or otherwiſe, but out of his Bounty to his Grandſon; ſo that if in the Settlement of 1690, he had done him any Wrong, he had given him an ample Recompence, by leaving to him Eſtates, that were indiſputably in his Power to have given to the Plaintiff, inſtead of *Lamedon*, had he been informed or appriſed, that it was not in his Power to have given *Lamedon* to the Plaintiff; but that the voluntary dormant Settlement of 1684, would take Place: And it would be very hard upon the Plaintiff, who had no other Proviſion; whereas *Henry* the *ſecond* Son had at leaſt *five Hundred Pounds per Ann.* ſettled on him by old Sir *James.*

Lord Keeper declared, he was ſufficiently ſatisfied that the Manor of *Lamedon* was intended as a Proviſion for the Plaintiff, and that it was but a reaſonable Proviſion; yet the Caſe was too hard to be relieved in Equity.

Firſt, Admitting it to be the Intention of old Sir *James*, that the Plaintiff ſhould have *Lamedon*; yet *that* was not a ſufficient Foundation to decree upon. If a Will be prepared and every Thing done, but it is not publiſhed; or if publiſhed, and but one Witneſs to it: If a Deed is ſigned and ſealed, and by Accident not delivered; in all theſe Caſes the Intention is plain; yet not relievable in Equity: So if a Will is made by a *Feme Covert* of Lands of Inheritance to *J. S.* and the Husband dies, and then the Wife; although her Intention is plain; and although after the Death of her Husband, when ſhe became *ſui juris*, ſhe might have deviſed the Lands to *J. S.* or by a Republication have made the former Will good; yet *that* Caſe is not relievable in Equity.

In the Lord *Lincoln*'s Caſe, it was intended the Eſtate ſhould have gone along with the Honour, and was ſo deviſed by *five* or *ſix* Wills ſucceſſively; but no Relief could be had againſt a ſubſequent voluntary Conveyance, though

A Rule in Law, that the firſt Deed, and the laſt Will, ſhall take Place. *Poſt.* Ca. 476.

though made for a particular Purpoſe only, which never took Effect. It is a common Rule in the Law, that the firſt Deed, and the laſt Will are to take Place. And if a prior Deed, without more, might be diſcharged by a ſubſequent Deed, there would never be Occaſion to inſert Powers of Revocation; and *that* had been an idle and unneceſſary Proviſion in Deeds, and would not have been ſo long uſed and practiſed by learned Men; and although the Settlement in 1684, was always in the Cuſtody or Power of Sir *James*; yet *that* did not give him a Power to reſume the Eſtate: And although voluntary Conveyances, if defective, ſhall not in many Caſes be ſupplied in Equity; yet where there hath been a Covenant to ſtand ſeiſed to the Uſe of a Relation, although it is a voluntary Settlement; yet this Court in the ancient of Times always executed ſuch Uſes. In the Lady *Hudſon*'s Caſe, where the Father, having taken Diſpleaſure at his Son, made an additional Jointure on his Wife, but kept it in his Power; and being afterwards reconciled to his Son, cancelled the additional Jointure, and died; the Wife after his Deceaſe found the cancelled Deed, and recovered by Virtue of it.

A. being diſpleaſed with his Son, makes an additional Settlement for his Wife's Jointure, but keeps the Deed in his own Cuſtody, and being reconciled to his Son, cancels it. The Wife after her Husband's Death, finds the cancelled Settlement, and recovers by Virtue thereof.

And as to the Equivalent, or Recompence given to Sir *James* in lieu of *Lamedon*, the voluntary Settlement of 1690 being void by Reaſon of the prior Settlement of 1684, cannot give the Plaintiff an Equivalent out of the perſonal Eſtate. A Recompence equivalent to a void Settlement is nothing at all.

Diſmiſſed the Bill as to any Relief againſt the Deed of 1684, but decreed the Payment of the Annuity and Arrears.

Note; Afterwards this Decree was affirmed upon an Appeal to the *Lords* in *Parliament*.

Hawes

Hawes verſus *Warner.*

Caſe 432.

THE Teſtator *Hawes* by his Will mentions, that he computed, that the Surplus of his perſonal Eſtate, his Debts and Funerals being thereout firſt paid, would amount unto 5800 *l.* and ſo diſtributes the 5800 *l.* in ſeveral pecuniary Legacies to his Grandchildren; and Wills if his perſonal Eſtate fell ſhort, they ſhould abate in Proportion; if the ſaid Surplus amounted to more, ſuch Surplus to go to his ſaid Grandchildren in the ſame Proportions, as he had deviſed the 5800 *l.* and by the ſame Will deviſes to *Nathaniel* and *Thomas Hawes*, two other of his Grandchildren, ſeveral Houſes and Warehouſes then mortgaged for 1400 *l.*

A. by Will computing the Surplus of his perſonal Eſtate, after Debts and Legacies paid, would amount to 5800 *l.* gives the 5800 *l.* to ſome of his Grandchildren in ſeveral Proportions; and Wills if the Surplus fell ſhort, they ſhould abate in Proportion; if it amounted to more, it ſhould be divided between them in the ſame Proportions. Decreed that a Mortgage on an Eſtate deviſed to two other Grandchildren ſhould be paid out of the perſonal Eſtate, although by this Means the perſonal Eſtate would fall ſhort of the 5800 *l.*

The Queſtion was, Whether this Mortgage ſhould be paid out of the perſonal Eſtate; for if ſo, the Surplus would not amount to 5800 *l.* as the Teſtator had computed it; and the Caſe of Captain *Bright* was cited, that a Deviſee of Land ſhall not have Aid of the perſonal Eſtate, to pay off a Mortgage, in Prejudice of a pecuniary Legatee.

Lord Keeper. An expreſs Deviſe ſhall not be defeated by applying the perſonal Eſtate to pay off a Mortgage, even for the Sake of an Heir, much leſs of a Deviſee of the Land, who is but *Hæres factus*; but here the Deviſe is not of 5800 *l.* certain, but of the Surplus after his Debts and Funerals paid, which he computed at 5800 *l.* and if he was miſtaken in the Computation, *that* would not ouſt the Deviſee of his Equity; it being mentioned that he computed the Surplus would be 5800 *l.* after Debts and Funerals paid, implies

An expreſs Deviſe ſhall not be defeated by applying the perſonal Eſtate, to pay off a Mortgage, in Favour of an Heir at Law.

plies he intended his Debts, of which the Debt by Mortgage is one, ſhould be paid out of the perſonal Eſtate: And decreed it accordingly.

Legacies are given by a Will to four Grandchildren, upon Condition that as they came of Age, they ſhould releaſe all Claims to the Teſtator's Eſtate. This Condition muſt be taken *diſtributively*; and ſuch only as refuſed to releaſe ſhall forfeit their Legacies.

And whereas the Teſtator was indebted to the Eſtate of his eldeſt Son *Thomas Hawes*, who left a Widow and ſeveral Children, to whom the Teſtator by his Will had ſeverally and reſpectively given Legacies, upon expreſs Condition, that the Widow of his Son *Thomas* within *three* Months after his Deceaſe, and her *four* Children reſpectively, as they came of Age, ſhould releaſe all Claims and Demands out of his Eſtate, which they might claim in Right of his Son *Thomas*, or by the Cuſtom of the City of *London* or otherwiſe; the Legacies ſo given to them to be void, and to go over to the Children of his Daughter *Warner*.

The *Lord Keeper* was of Opinion, that the Condition or Proviſo was to be taken *diſtributively*; that ſuch only ſhould forfeit their reſpective Legacies, who did not releaſe; and thoſe who did releaſe ſhould not be prejudiced by thoſe, who ſhould refuſe; their Refuſal ſhould only forfeit their own Legacies.

Caſe 433.

Atkinſon verſus *Webb.*

A. gives Bond to B. her Servant, to pay her 20 *l. per Ann.* quarterly for her Life, free from Taxes, and by Will, without taking Notice of the Bond, gives B. 20 *l. per Ann.* for her Life, payable half yearly; but not ſaid free of Taxes. Decreed the Annuity, by the Will, not to be a Satisfaction of the Bond, and that *B.* ſhould have both the Annuities. *Poſt.* Caſe 448.

THE Lady *Pratt* had by Bond ſecured 20 *l. per Ann.* to Mrs. *Atkinſon* who had been her Woman, payable quarterly, free of Taxes, during her Life: By Will, taking no Notice of the Bond, deviſed to her 20 *l. per Ann.* for her Life, payable half yearly; but not ſaid to be free from Taxes.

Lord Keeper. The Annuity deviſed not ſo beneficial, as that ſecured by Bond; that which is leſs, not to be preſumed in Satisfaction of that which is greater; And decreed the Annuity additional, and not as given in Lieu or Satisfaction of the Bond.

Gundry verſus *Baynard.*

Caſe 434.

AN Eſtate is given to Mrs. *Baynard* and the Heirs of her Body; if ſhe left no Sons, and only *two* Daughters, the eldeſt to pay the younger 300 *l.* and to have the whole Eſtate. She leaving only *two* Daughters, and the eldeſt neglecting to pay the 300 *l.* the younger brought a Bill for an Account of Profits, and for Poſſeſſion of half of the Eſtate; and at the *Rolls* obtained a Decree, that the Defendant ſhould pay the 300 *l.* with Intereſt from the Mother's Death in *ſix* Months, or in Default thereof, to account for Profits of a Moiety; and the Moiety to be ſet out by Commiſſioners, and the Plaintiff to hold and enjoy it accordingly.

Lands are given by Will to a Woman and the Heirs of her Body; and it is declared, if ſhe left no Sons, and only 2 Daughters, the eldeſt ſhould pay the younger 300 *l.* and have the Eſtate. There being only 2 Daughters, and the 300 *l.* not being paid, the younger brought her Bill for an Account of Profits, and for Poſſeſſion of half the Eſtate. The Court may decree the Defendant, though an Infant, to pay the 300 *l.* in *ſix* Months, with Intereſt from the Mother's Death, or in Default, to account for Profits of a Moiety, and the Moiety to be ſet out by Commiſſioners; but the Defendant being an Infant, muſt have a Day to ſhew Cauſe, when ſhe comes of Age.

Upon an Appeal to the *Lord Keeper*, the Decree to ſtand as to the Account of Profits and Partition: But the Defendant being an Infant, the Words, *hold and enjoy*, which amounts unto a Foreclоſure, to be ſtruck out, or Defendant to have a Day after ſhe comes of Age, to ſhew Cauſe.

Hooper

Caſe 435. ## *Hooper* verſus *Eyles* and *Rideout.*

A Guardian borrows Money of *A.* to pay off an Incumbrance on the Infant's Eſtate, and promiſes to give *A.* a Security for his Money, but dies before it was done.

Rideout, the Infant, having an Eſtate charged with 150 *l.* and the Money being called for, *Anne Rideout* his Aunt and Guardian borrowed it of the Plaintiff, and paid off the Incumbrance, and promiſed to give the Plaintiff a Security for it; but before ſhe had ſo done, died; the Defendant *Eyles* her Adminiſtrator.

Though *A.*'s Money was applied to pay off the Incumbrance; yet the Court would not decree him a Satisfaction of his Debt out of the Infant's Eſtate.

The Plaintiff by his Bill ſought, *firſt*, to have a Satisfaction out of the Infant's Eſtate, his Money having paid off the Incumbrance that was upon it: But the *Lord Keeper* refuſed ſo to decree. Without ſome Contract or Agreement, you cannot charge the Land or follow the Money, though inveſted in Land, or applied to pay off the Incumbrance: And for that Purpoſe cited the Caſe of *Kirk* and *Webb*, and *Cuthbert* and *Lee.*

Ant. Ca. 404.

But the Aunt having diſburſed more than ſhe had received out of the Infant's Eſtate; decreed *that* Account to be taken, and what was due to the Aunt, to be raiſed out of the Infant's Eſtate, and applied as Aſſets to ſatisfy the Plaintiff's Debt.

Caſe 436. ## *Acton* Widow verſus *Peirce* and *Saxby & al'.*

Bond given to the Wife before Marriage to leave her 1000 *l.* though extinguiſhed at Law by the Marriage, yet good in Equity, and ſhall bind the real Aſſets; and decreed the Wife after her Husband's Death to redeem a Mortgage, and to hold over; tho' Copyhold, as well as Freehold included in the Security.

John Acton on his Marriage agreed to leave his Wife the Plaintiff 1000 *l.* if ſhe ſurvived him: The drawing of the

the Marriage-Agreement was left to one *Nowel*, the Parſon of the Pariſh, who made a Bond from *Acton* to the Plaintiff his intended Wife in 2000 *l.* conditioned to leave her 1000 *l.* if ſhe ſurvived him. The Marriage being had, *John Acton* mortgaged his Eſtate, and died.

The Plaintiff's Bill was to have the Benefit of the Bond, although releaſed at Law by the Intermarriage; and that ſhe, as a Bond-Creditor, might be admitted to redeem the Mortgage, and hold over, until ſatisfied what ſhe ſhould pay for the Redemption, and alſo the Bond-Debt.

It was objected, *firſt*, although it might ſubſiſt as an Agreement in Equity, and intitle the Plaintiff to a Satisfaction out of the perſonal Eſtate; yet the Bond being void, it could not be looked upon as a Specialty, or bind the real Aſſets. Hob. 216.

Lord Keeper. The Bond, if ſet up, muſt be wholly and intirely ſet up, and not in Part only, to bind the perſonal Aſſets, and not the real.

Secondly, It was objected, if a good Bond, yet it could only affect the Freehold, and could not give her any Right to redeem the Copyhold Eſtate: But it was anſwered, that although a Bond will not bind a Copyhold Eſtate, yet the Free and Copyhold being both in one Mortgage, the Plaintiff is intitled to redeem the Whole.

Decreed for the Plaintiff, to redeem, and hold over.

Caſe 437. *Feb.* 22.

Roundell & ux' verſus *Breary.*

A. on the Marriage of his Son, covenants for himſelf, his Executors, without naming his Heirs, to ſettle Lands of 150*l.* a Year on the Son, and the Iſſue of the Marriage, but dies before any Settlement made. The Son enters on the real Eſtate, as Heir to his Father, and ſettles it for the Jointure of a ſecond Wife, who has no Notice of the Articles. Decreed the Articles to be a Lien on the Lands, whereof the Father was then ſeiſed, tho' no particular Lands are mentioned in the Articles.

HEnry Breary, on the Marriage of his Son to the Daughter of Dr. *Hitch,* covenants for himſelf, his Executors and Adminiſtrators, in one Month after the Marriage, to ſettle Lands of the Value of 150*l. per Ann.* but no Lands in particular are mentioned in the Articles, to the Uſe of the Husband, and *firſt* and other Sons, and for raiſing Portions for Daughters. The Marriage took Effect.

Henry Breary died, having never made any Settlement; his Son thereupon entred upon the Lands, whereof his Father died ſeiſed, as Heir, and as deſcended to him, and married the Defendant a *ſecond* Wife, and ſettled Part of the Lands upon her for a Jointure, and *firſt* Son *&c.* and deviſed the Reſidue to his Son by the *ſecond* Wife, charged with Portions for younger Children.

The Plaintiff's Bill was to have 150*l. per Ann.* of the Lands whereof *Henry Breary* died ſeiſed, ſettled to the Uſes in the Marriage-Articles.

For the Defendant it was inſiſted, *firſt,* that no Lands in particular being mentioned in the Articles, but to ſettle Lands of the annual Value of 150*l. Henry* after ſuch Covenant might ſell or deviſe at his Pleaſure the Lands, whereof he was then ſeiſed, notwithſtanding the Articles; there being no Lien upon thoſe Lands; but only a Covenant to ſettle Lands of that Value.

3

Secondly,

Secondly, That no Lands in particular are bound, or mentioned in the Articles; and *Henry Breary* having not performed his Covenant, the Plaintiff's Remedy muſt be a Satisfaction out of his Aſſets; and that only his perſonal Aſſets were liable, and not his real Aſſets, or what deſcended from him to his Son; becauſe the Covenant was only for him, his Executors and Adminiſtrators, and not for him and his Heirs.

Thirdly, The Defendant, the Widow, a Purchaſer without Notice, and could not be affected by the Articles.

The *Lord Keeper* was of Opinion, that although no Lands were mentioned in the Articles; yet the Covenant ſhould be a *Lien* upon the Land, whereof *Henry Breary* was then ſeiſed, unleſs he had purchaſed and ſettled other Lands within the Time limited by the Articles, and which were not ſettled on the *ſecond* Wife, who came in as a Purchaſer without Notice.

Trelawny verſus *Williams*.

Caſe 438.

THE Defendant having a *Tin-ſet* in the Plaintiff's Land, the Plaintiff was to have an *eighth* Part ſet out upon the Graſs, *viz.* the Whole to be divided into *eight* Heaps; a Barrow-full to each Heap, and ſo round again, and then to caſt Lots. The Bill complained that the Defendant had not divided into *eight* Heaps, as he ought to have done; but laid the Adventurers *ſeven* Shares or Parts on *one* Heap, and the Plaintiff's on another; and that the Barrows which went to his Heap were not ſo full, as thoſe carried to the other Heap; and the Plaintiff prayed an Account.

Stannary Court a Court of Law, but not of Equity.

The

The Defendant inſiſted that the Plaintiff gave Leave, and conſented to divide into *two* Heaps only; and that if he had wrong done him, he ought to have ſued in the *Stannary* Court.

If the Party inſiſts the Court of Chancery has not Juriſdiction of the Matter in Queſtion, he muſt plead to the Juriſdiction of the Court, and not object it at the Hearing.

The *Lord Keeper* decreed an Account, the Defendant not proving that the Plaintiff agreed to divide into *two* Parts only: And as to the Objection that the Plaintiff ought to have ſued in the *Stannary* Court, it was anſwered, that the *Stannary* Court was a Court of Law, and not like the Counties *Palatine*, and Principality of *Wales*, who have Courts of Equity, as well as Law; and yet even there to ouſt this Court, the Defendant muſt plead to the Juriſdiction; all the Queen's *Denizens* have a Right to reſort to her Courts of Equity.

The Agreement for the *Tin-ſet* in this Caſe was in Writing, and no Time was mentioned therein; but it was agreed on both Sides, that the ſame by Cuſtom of the *Stannaries* is good for *Tin*, as long as the Adventurers will work it.

But the Plaintiff inſiſted, that as to *Mundick* or to any other Metals, as *Copper*, *&c.* if found in the ſame Mine, it was but in the Nature of a Leaſe at Will.

Caſe 439. *Mackdowell & ux'* verſus *Halfpenny.*

A. deviſes his Eſtate to *B.* his Son charged with 500 *l.* to his Grandaughter, the Daughter of *B.* payable at 21 or Marriage. *B.* marries his Daughter and gives her 1500 *l.* Portion, but no Notice is taken of the 500 *l.* Legacy, nor any Releaſe given. *Twenty-one* Years afterwards the Daughter and her *ſecond* Husband bring a Bill againſt the Father for the 500 *l.* Bill diſmiſſed. The 1500 *l.* ſhall be preſumed a Satisfaction of the 500 *l.* eſpecially after ſuch a Length of Time.

THOMAS *Halfpenny*, the Grandfather, deviſed his real and perſonal Eſtate to his eldeſt Son, the Defendant, charged with ſeveral Legacies to his Grandchildren, and (*inter alia*) with 500 *l.* to the Plaintiff, payable at *Twenty-one*

one or Marriage, in 1684 the Grandfather died. In 1685, within a Year after the Death of the Grandfather, the Defendant married his Daughter to Mr. *Palmer*, her firſt Husband, and gave her 1500 *l.* as her Marriage-Portion; but no Mention was made of the 500 *l.* Legacy, or any Releaſe or Diſcharge taken for it; and now after *Twenty-one* Years, the *ſecond* Husband with his Wife brought their Bill againſt the Defendant her Father for the 500 *l.* Legacy.

And for the Plaintiff was cited the Caſe of *Chudleigh* and *Lee*, where a greater Portion given, yet afterwards decreed to pay a Legacy, not taken Notice of in the Marriage-Agreement.

But the Bill was diſmiſſed; it being to be preſumed that the 1500 *l.* Portion was intended in Satisfaction of the 500 *l.* Legacy, eſpecially after this Length of Time.

Harris verſus *Mitchell.*

Caſe 440.
Feb. 28.

IN the Submiſſion it was provided, if the Arbitrators did not make their Award within the Time limited, they ſhould chooſe a *third* Perſon *Umpire*, whoſe Umpirage ſhould be final. The *two* Arbitrators did not make their Award within the Time limited; and not agreeing who ſhould be Umpire, the one propoſing *Chaplin*, and the other naming *Ramſey*, they agreed to throw *Croſs* and *Pyle*, who ſhould have the Naming of the Umpire, or whoſe Man ſhould ſtand.

Arbitrators, if they could not agree, were to chooſe an Umpire; they make no Award; and not agreeing about the Perſon to be Umpire, they throw *Croſs and Pyle*, who ſhould name him. The Umpire thus choſen by Lot makes his Award. The Court ſet aſide the Award for that Reaſon.

And by Lot *Ramſey* was to be the Umpire; and the Arbitrators accordingly indorſed on the Back of the Bond, that they had appointed *Ramſey* to be Umpire, who

ſummoned both Parties, and they attended him, and he afterwards made his Umpirage.

The Bill was to ſet aſide the Award, and amongſt other Things aſſigned for Cauſe, that the Umpire was not duly choſen, according to the Intent of the Submiſſion, but by Lot as aforeſaid; and the *Maſter* of the *Rolls*, before whom the Cauſe was heard, thought *that* a ſufficient Cauſe to ſet aſide the Award. An Election or Choice is an Act, that depends on the Will and Underſtanding; but the Arbitrators followed neither in this Caſe, and it is a Diſtruſting of *God's Providence* to leave Matters to Chance.

Caſe 441.

Clifton verſus *Jackſon.*

A. on the Marriage of his Son *B.* ſettles Lands to the Uſe of *B.* for Life, Remainder to the Wife for Life, Remainder to the Heirs of their 2 Bodies, Remainder to *B.* in Fee.

SIR *Gervas Clifton* purchaſed the Manor of *Allwoodly* in the County of *York*, and on the Marriage of his Son *Robert* with *Sarah Parkhurſt*, the Plaintiff's Father and Mother, the ſame was ſettled to *Robert* for Life, to *Sarah* his intended Wife for Life, Remainder to the Heirs of the Body of *Robert* and *Sarah* to be begotten, Remainder to *Robert* in Fee.

B. and his Wife by Deed and Fine, mortgage in Fee, and ſubject to the Mortgage the Lands are ſettled to the Uſe of *B.* for Life; and after his and his Wife's Death, to the Heirs of her Body by him begotten, Remainder to his right Heirs. The Wife after her Husband's Death ſuffers a common Recovery. Whether the Eſtate of the Wife for Life by the firſt Settlement, and the Limitation to the Heirs of her Body by the ſecond, did conſolidate; and if it did, whether the Eſtate of the Wife was alienable within the Statute of 11 *Hen.* 7.

Afterwards *Robert* and *Sarah* by Deed and Fine convey to the Earl of *Cheſterfield* in Fee, by way of Mortgage for the ſecuring 1000 *l.* and after the 1000 *l.* and Intereſt paid, the Eſtate was ſettled to the Uſe of *Robert* for Life, and after his and his Wife's Deceaſe, to the Heirs of the Body of *Sarah* by him to be begotten, Remainder to his own right Heirs. *Robert* the Plaintiff's Father died, *Sarah* the Plaintiff's Mother, with the Earl of *Cheſterfield*,

field, the Mortgagee, join in a *Fine* and *common Recovery*, and articles with *Robert Jackſon* to ſell to him for 3500 *l.*

Jackſon brings his Bill againſt the Mother and the Plaintiff, then an Infant of *two* Years old, to have a ſpecifick Performance of thoſe Articles; and in 1678, a Decree was made by the Lord *Nottingham* for that Purpoſe, and the Money paid to the Plaintiff's Mother, and *Jackſon* put into Poſſeſſion.

The Plaintiff brought his Bill of Review to reverſe the former Decree; and the chief Point inſiſted on was, Whether the Eſtate in the Wife was alienable, or within the Statute of 11 *Hen.* 7. as a Proviſion made by the Husband for the Wife.

For the Plaintiff it was inſiſted, that the Wife being only Tenant for Life by the *firſt* Deed, and the *ſecond* Settlement having limited the Eſtate to the Heirs of her Body; *that* Limitation is but a contingent Remainder, and will not conſolidate with the Eſtate for Life, it not being by the ſame, but by a diſtinct Conveyance: But where one takes an Eſtate of Freehold, and by the ſame Conveyance there is a Limitation to the Heirs of his Body, there the Heirs of the Body ſhall not take as Purchaſers; but thoſe Words, the Heirs of his Body, will be taken to be Words of Limitation, and operate to enlarge the firſt Eſtate: But where the Eſtate for Life is by one Conveyance, and the Grant to the Heirs of his Body by another, the Eſtates do not conſolidate; but the Limitation to the Heirs of the Body will remain, as a contingent Remainder, and cited *Litt. Sect.* 352. *Chudleigh*'s Caſe, 1 *Roll.* 317. *Lane* and *Pannell*'s Caſe.

Secondly, If the Eſtates would conſolidate, yet ſtill it would be an Eſtate-tail not alienable, as being the Proviſion of the Husband, and within the Proviſion of the Statute of 11 *Hen.* 7. and for that Purpoſe cited *Crook*

Eliz.

Eliz. fol. 24. The Plaintiff *third* Husband and Wife ſeiſed of a Copyhold in Fee; the Husband purchaſeth the Freehold to him and his Wife, and the Heirs of their Bodies, held to be within the Statute of *H.* 7. the Caſe of *Snow* and *Cutler*, 1 *Lev.* 136. Copyhold to Husband and Wife, and the Heirs of the Husband, and the Husband ſurrenders to the Uſe of his Will, and deviſeth to the Wife and the Heirs of her Body. The Eſtate ſhall not conſolidate; and cited the Caſe of *Crocker* and *Kelſey* in *Jones*'s *Reports* 60. *Baggott* and *Palmer*, *Moor* 250. and it was obſerved that the Statute of *H.* 7. by expreſs Words extends to Uſes.

For the Defendant it was inſiſted, that the Statute of *H.* 7. is a penal Statute, not to be extended, or aſſiſted by any Conſtruction in a Court of Equity; no more than the Statute of *Glouceſter*, which gives *locum vaſtatum*, and treble Damages; and in many Caſes there are different Rules in legal Eſtates, and in Eſtates in Equity; at Law the Wife is to have Dower, and the Husband to be Tenant by the Courteſy, but not ſo of a Truſt.

Secondly, The Wife by joining in the Mortgage, and ſubjecting her Eſtate for Life to the Payment of the Mortgage-Money, became in the Nature of a Purchaſer of an Eſtate-tail in the *ſecond* Settlement; and the Limitation to the Heirs of her Body ought not to be looked upon as the Proviſion of the Husband, but as her own Purchaſe.

Whereto it was replied, that as to the Objection that the Statute of *H.* 7. was in the Nature of a penal Law; the Plaintiff comes not for any Penalty, or to make the Wife forfeit any Thing, but to diſcover whether ſhe was a perſon diſabled from aliening. And as to *Dower* and *Tenancy* by the *Courteſy*, thoſe are Creatures of the Common Law, and depend intirely on the Nature of the *Seiſin:* But where there is an Act of Parliament,

that binds as well in Equity as at Law, and the Rules of Deſcents are to be ſacred, and beſt preſerved in our Law, and the Rules in Law and Equity are the ſame: But *Dower* and *Tenancy by the Courteſy* are collateral to the Eſtate; and although the Eſtate for Life to the Wife by the *firſt* Settlement, is to be allowed as valuable, yet not adequate to an Eſtate of Inheritance; and where the Eſtate moves from the Husband, be it in Value more or leſs, yet it is of the Proviſion of the Husband, and within the Statute; and it is not a penal Statute, but a remedial Law, and therefore extended and conſtrued favourably for the Benefit of the Heir, in all the Caſes in our Books. A Copyhold is not indeed within the Statute, becauſe the Lord ſhall not have a Tenant put upon him that cannot alien; and as to the Objection that the Wife is to be conſidered as a Purchaſer; every Jointreſs is ſo, either for a Portion paid, Land given in Lieu, or in Conſideration of Marriage; yet it is ſtill of the Proviſion of the Husband, and within the Statute of 11 *H.* 7. It is ſufficient that the Eſtate moves from the Husband, though upon never ſo valuable a Conſideration paid by the Wife.

Lord Keeper was of Opinion, that a Truſt, or an Equity of Redemption was within the Proviſion of the Statute of 11 *Hen.* 7. which expreſly extends to Uſes: But if it be a penal Statute, as the Statute of *Glouceſter*, the Heir ſhall not be aided or aſſiſted in Equity.

And he was in Doubt whether the Eſtates did not conſolidate, though by ſeveral Deeds. The Authorities are only in the Affirmative, that if by the ſame Deed, it ſhall conſolidate, not negatively, that if by different Deeds, they ſhould not; and in the Caſe of *Pibus* and *Mitford*, there no expreſs Eſtate for Life limited but ariſeth by Implication, and there held that the Eſtate was conſolidated.

Cur adviſare vult.

Caſe 442. *March.* 6. ## *Fletcher & al'* verſus Dominam *Sidley & al'.*

A. makes a Bill of Sale of his Goods to a Truſtee, for one who lived with him as his Wife, and was ſo reputed. Bill of Sale ſet aſide as fraudulent againſt Creditors.

THE Cauſe having been heard, and coming on upon the Maſter's Report; the Caſe appeared to be, that Sir *Charles Sidley* had by Bill of Sale made over his Goods to a Truſtee for the Defendant, who lived with him as his Wife, and was ſo reputed; and having alſo purchaſed a Leaſe of a Houſe in *Bloomsbury*, where he dwelt, in the Name of Sir *Francis Winnington*, takes a Declaration of Truſt to permit Sir *Charles* to enjoy for Life; then in Truſt for the Defendant, during the Reſidue of the Term.

The Court upon the *firſt* Hearing ſet aſide the Bill of Sale of the Goods and perſonal Eſtate, as fraudulent againſt the Plaintiffs the Creditors; and decreed an Account thereof.

A. purchaſes a Leaſe of a Houſe in the Name of *B.* and takes a Declaration of Truſt to permit *A.* to enjoy for Life, and then in Truſt for one who lived with him as his Wife, and was ſo reputed. This Leaſe is not Aſſets of *A.* nor liable to his Creditors after his Death; for when a Man purchaſes, he may ſettle the Eſtate as he pleaſes.

The Queſtion now before the Court was, Whether the Leaſe of the Houſe at *Bloomsbury* ſo purchaſed in Truſt, in the Name of Sir *Francis Winnington*, ſhould be liable to the Creditors, and brought into the Account of the perſonal Eſtate.

For the Defendant it was inſiſted, *firſt*, that it did not appear that Sir *Charles Sidley* was indebted, or that the Plaintiffs were Creditors at the Time of the purchaſing the Leaſe.

Secondly, And principally, that it cannot be Aſſets of Sir *Charles*, becauſe he never had the Term in him; was

only to enjoy for Life, Remainder to the Defendant, during the Reſidue of the Term; and it being ſo ſettled upon the Purchaſe, it could not be liable to his Creditors; for as in his Life-time he might have given the Money to the Defendant to have purchaſed the Leaſe her ſelf; ſo he might by the ſame Reaſon direct a Conveyance to be made to her, or a Declaration of Truſt for her Benefit.

So if a Man purchaſes a Freehold Eſtate to himſelf for Life, Remainder over to another; ſuch Remainder ſhall not be void or fraudulent, even as to Creditors by Bond or Judgment; and ſaid it is a new Pretence to ſay, a Man made a Purchaſe fraudulently. A Man may alien on Purpoſe to defraud his Creditors; and there the Statutes againſt fraudulent Conveyances will reach it: But as to Purchaſing, a Man may do it, or let it alone at his Pleaſure; may purchaſe for Years or for Life, or in Tail or in Fee, as he pleaſes, and may take in what Remainder-Men he pleaſes; and inſiſted *that* could never be Aſſets, that a Man never had in him.

The *Lord Keeper* inclined to that Opinion, that fraudulent Conveyances are made ſo only by the ſeveral Statutes made for that Purpoſe; as the Statute of *Merton*, where the Father enfeoffs his Son and Heir apparent, to defeat the Lord of his Wardſhip, *&c.*

Stephenſon verſus *Houlditch & al'.*

Caſe 443. *Feb.* 5, 1703-4.

THE Plaintiff an Apprentice had ſued in the *Mayor*'s Court to have 150*l.* repaid, which his Mother had given to the Defendant to take him as his Apprentice

If upon a *Certiorari* Bill the Cauſe is brought on to Hearing, the Court, if they think fit, may make a Decree, or ſend it back to the Mayor's Court to be determined there; and ſometimes the Court ſends it back after Publication paſſed, and a *Subpœna* ſerved to hear Judgment, and before the Hearing.

Apprentice in the Trade of a Linen Draper. The Defendant brought his *Certiorari* Bill; and upon bringing his Bill, he entred into Bond to prove his Suggeſtions within the Time limited, as uſual; and upon a Reference to a *Maſter*, he certified the Plaintiff had proved his Suggeſtions; and thereupon, although a *Procedendo* was ſeveral Times moved for, it was denied: So the Defendant was neceſſitated to reply, and both Sides examined their Witneſſes; and Publication being paſſed, the Plaintiff ſerved the Defendant to hear Judgment: And upon opening the Nature of the Caſe, the *Lord Keeper* and *Maſter* of the *Rolls* were both of an Opinion, that it ſhould be ſent back to be determined in the Mayor's Court; and the *Regiſter* ſaid, it had been often done both Ways, ſometimes retained and decreed here, but oftner ſent back: Sometimes after Publication, and ſometimes after a *Subpœna* ſerved to hear Judgment.

In this Caſe the Apprentice firſt obtained that his Indentures ſhould be delivered up, and ſo decreed in the *Mayor*'s Court, becauſe not inrolled; although it was at the Inſtance of his Mother they were not inrolled; yet *that* would not excuſe the Maſter, who had covenanted to inrol the Indentures; and although the Apprentice was bound for *ſeven* Years; yet covenanted to make him free at the End of *five* Years.

If an Apprentice in *London* marries without his Maſter's Conſent, the Maſter cannot turn him away for that Reaſon, but muſt ſue his Covenant.

Secondly, Whereas the Apprentice had married without the Privity of his Maſter; yet *that* would not juſtify his Turning him off, but muſt ſue his Covenant.

DE

Termino Paſchæ,

1705.

In Curia Cancellariæ.

Domina *Oxenden per prochein amie* verſus Sir *James Oxenden & al', & e-contra.* Caſe 444.

UPON the Marriage of the Defendant Sir *James* with the Plaintiff, the Siſter of the Lord *Rockingham*, 6000 *l.* Part of the Portion was paid to Sir *James*, and a Settlement made of 1000 *l. per Ann.* for Jointure, *&c.* The other 6000 *l.* was by the Articles to be inveſted in Lands, and ſettled on Sir *James* for Life; then to the Plaintiff for Increaſe of her Jointure, Remainder as a Proviſion for younger Children, Remainder to Sir *James*, and his Heirs and Aſſigns; and until a Purchaſe made to be placed at Intereſt, with the Conſent of the Plaintiff and Defendant, and her Truſtees. The Marriage being had, and there being no Iſſue, and the Money lying dead, and ſome Leaſhold Eſtates, which by the Marriage-Articles were to be kept up, not being renewed

By Articles before Marriage 6000 *l.* Part of the Portion, is agreed to be inveſted in Land, and ſettled to the Husband for Life, then to his Wife for Life, Remainder as a Proviſion for younger Children, Remainder to the Husband in Fee, The Husband having by his Cruelty forced his Wife to ſeparate from him; the Court decreed the Intereſt of the 6000 *l.* to be paid her for her ſeparate Maintenance 'till Cohabitation. *Poſt.* Caſe 598, 657.

newed, as they ought to have been; and Sir *James* by his cruel Uſage having forced the Plaintiff, his Wife, to ſeparate from him,

The Lady *Oxenden*'s Bill was to have the Marriage-Agreement performed, the Leaſes filled up and renewed; and in Regard of ill Uſage, to have an Allowance for Maintenance.

Sir *James*'s croſs Bill was to have the 6000 *l.* which, by the Default or Obſtinacy of the Truſtees, lay dead, inveſted in a Purchaſe, and until a Purchaſe found, to be placed at Intereſt, on Security, or on ſome of the publick Funds.

The ill Treatment of the Lady being fully proved, the Court decreed, that the 6000 *l.* ſhould be placed out at Intereſt, and the Plaintiff to receive it for her ſeparate Maintenance, until there ſhould be a Cohabitation; and it was ſaid by the *Lord Keeper*, that as the Court of Equity will oblige a Husband, who comes into Equity for his Wife's Portion, to make a Settlement upon the Wife by way of Jointure, or to ſecure a Maintenance to her, in Caſe ſhe out-lives the Husband; the Court ought much rather to do it, where the Wife is at preſent reduced to a ſtarving Condition; and eſpecially, when, as in this Caſe, the Execution of a Truſt is to be directed by the Court.

When a Husband comes into a Court of Equity for his Wife's Portion, the Court will oblige him to make a Settlement upon her, or ſecure her a Maintenance in Caſe ſhe ſurvives him.

Caſe 445. *May* 14.

Toller verſus *Carteret.*

Bill that Defendant might redeem a Mortgage of the Iſland of *Sarke*, or be foreclоſed.

SIR *Philip Carteret*, Owner of the Iſland of *Sarke*, made a Mortgage thereof to one *Willowe*, the Plaintiff's Inteſtate, for *five Hundred* Years for 500 *l.*

Defendant pleaded to the Juriſdiction of the Court, that the Iſland was Part of the Dutchy of *Normandy*, and had Laws of their own, and were under the Juriſdiction of the Courts of *Guernſey*. Plea over-ruled, becauſe the Mortgage was of the whole Iſland, and for that the Defendant was ſerved here, for *Equitas agit in perſonam.*

The Bill was, that the Defendant might redeem, or be foreclosed.

The Defendant pleaded to the Juriſdiction of the Court, that the Iſland of *Sarke* was Part of the *Dutchy* of *Normandy*, and had Laws of their own, and were under the Juriſdiction of the Courts of *Guernſey*, and not within the Juriſdiction of the Court of Chancery; and cited 4 *Inſt.* 284. *Anderſon's* 2 *Rep.* 115. *Kelloway* 202.

Lord Keeper over-ruled the Plea, becauſe the Grant was of the whole Iſland; and *ſecondly*, that the Court of Chancery had alſo a Juriſdiction, the Defendant being ſerved with the Proceſs here, *& Æquitas agit in perſonam*, which is another Anſwer to the Objection.

Lamb Wid' verſus *Parker.*

Caſe 446.

Edward Parker by his Will deviſed to his younger Son, *Wyke Parker*, a Meſſuage with Appurtenances in *Zeale monachorum* for *Ninety-nine* Years, if *three* Lives lived ſo long; yielding and paying unto the Plaintiff, his Siſter, 20 *l. per Ann.* until *twelve* Years old, and thence 40 *l. per Ann.* for Life. The ſaid *Edward Parker* afterwards in *Nov.* 1682, for 300 *l.* Fine, demiſed the ſaid Meſſuage to one *Levett* for *Ninety-nine* Years, if *three* Lives lived ſo long; yielding and paying 50 *l. per Ann.* to the Teſtator, his Heirs and Aſſigns.

A. by Will deviſes to his Son a Meſſuage for 99 Years, if 3 Lives lived ſo long, paying his Siſter 40 *l. per Ann.* for her Life, and afterwards makes a Leaſe to *B.* of the ſame Meſſuage for 99 Years, if 3 Lives lived ſo long, paying 50 *l. per Ann.* to the Leſſor and his Heirs. Decreed at the Rolls, that the Leaſe was a Revocation of the Deviſe; but upon an Appeal to the *Lord Keeper*, decreed to be no Revocation, and that the Daughter ſhould be paid her Annuity.

The Queſtion was, Whether this Demiſe to *Levett* was a Revocation of the *Deviſe* to *Wyke Parker*, and conſequently of the Annuity payable to the Plaintiff.

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The Cauſe was heard at the *Rolls*, and there held to be a Revocation. Now upon an Appeal to the *Lord Keeper*, adjudged to be no Revocation; for that by the Leaſe to *Levett*, the Term for *Ninety-nine* Years commenced immediately in the Life-time of the Teſtator: The Term to *Wyke Parker* was for *Ninety-nine* Years from the Teſtator's Death, and altho' both determinable on *three* Lives, and poſſibly *Levett*'s *three* Lives might live longeſt; yet a reverſionary Intereſt paſſes, and will carry the Rent reſerved on *Levett*'s Leaſe; and the Rule where a ſubſequent Act ſhall amount to a Revocation by Implication, is, that ſuch Implication muſt be neceſſary, and wholly inconſiſtent; and for that Purpoſe cited *Cr. Jac. Cook* and *Bullock* 49. 1 *Roll. Abr.* 616. A Deviſe for *forty* Years, afterwards the Teſtator grants a Leaſe for *twenty* Years of the ſame Premiſſes; *that* is no Revocation, only *pro tanto*. *Cro. Car.* 23 & 24. A Deviſe in Fee; a Leaſe ſubſequent revokes not the Deviſe. *Gardner* and *Sheldon*'s Caſe in *Vaughan*'s *Reports* 259. A Revocation by Implication muſt be a neceſſary Implication. *Hall* and *Dunch*, a Mortgage ſubſequent to a Deviſe no Revocation, but *pro tanto* only.

Vol. 1. Caſe 325.

Decreed for the Plaintiff.

3

Attorney

Attorney General, ad relationem *Coſſart* and *Dutrie* verſus *Sothon & ux', & e-contra.*

Caſe 447. *May* 18.

A. having made ſeveral Wills, and thereby given 600 *l.* to a *Dut.h* Church, and the like Sum to a *Fren.h* Church; but no Will being to be found after his Death, the Brother endeavours to get Adminiſtration in the prerogative Court, but was oppoſed; and after the Cauſe there had depended eighteen Months, the Brother was told he ſhould have Adminiſtration; but it was expected he ſhould give Bond to pay each of the Churches 300 *l.* Bond is given and read in Court, and then Sentence is pronounced, and afterwards confirmed by the Delegates. Upon an Information by the Attorney General, that the Churches might have the Benefit of the Bond, and a croſs Bill to ſet it aſide, as being unduly obtained; Court declared, if the Bond was not given freely, but by Compulſion, it ought to be ſet aſide, or at leaſt not carried into Execution. At length both Bills diſmiſſed.

ONE *Coſtell* having made ſeveral Wills, and therein deviſed 600 *l.* to a *French*, and the like Sum to a *Dutch* Church; but after his Deceaſe there being no Will to be found, Defendant *Sothon*, his Nephew and next of Kin, applied to the *Prerogative* for Adminiſtration; but being oppoſed there by the Relations, who were named Executors, in one or more Wills made by *Coſtell*, the Cauſe, whether the Defendant ſhould have Adminiſtration or not, depended *eighteen* Months in the *Prerogative*: At laſt the Defendant was told, he ſhould have Adminiſtration; but that it was expected, he ſhould give Bond to pay 300 *l.* to each of the ſaid Churches. The Bond is read in open Court, and then Sentence is pronounced. After this the Relators appealed to the *Delegates*, and there the Sentence was confirmed.

The original Bill was to have the Benefit of the Bond, or Note given for the Payment of the 300 *l.* to each Church; and the croſs Bill was to have the Bond or Note delivered up to be cancelled, as being unduly gained.

Lord Keeper. The Queſtion is, Whether the Bond was given freely and voluntarily, or by Compulſion; if by Force or Terror, though not ſo as to make it *per duress*, it ought to be ſet aſide, or at leaſt not carried into an Execution. A Judge may fairly mediate an Accommo-

dation; but not put Terms upon pronouncing Sentence, or giving Judgment. *Nulli vendemus, nulli differemus, juſtitiam,* ſays *Magna Charta.*

There being Proofs in the Cauſe, that there were ſuch Wills once made; and likewiſe it appearing by the Proofs, that the Teſtator had afterwards changed his Mind, thereupon the *Lord Keeper* declared, he was not ſatisfied to decree a Performance or Execution of the Bond, nor to ſet it aſide; and diſmiſſed both Bills.

Caſe 448. *May* 23.

Brown verſus *Dawſon, & econtra.*

A. on his Wife's Joining in Sale of Part of her Jointure gives her a Note to pay her 7 *l.* 10 *s. per Ann.* for her Life, and afterwards on Sale of a farther Part, gives her a Bond to pay her 6 *l.* 10 *s. per Ann.* for her Life; and afterwards by Will, without taking Notice either of Bond or Note, deviſed unto her 14 *l. per Ann.* for her Life.

MR. *Dawſon* on his Wife's Joining in Sale of Part of her Jointure, gave her a Note to pay her 7 *l.* 10 *s. per Ann.* for her Life; and upon a *ſecond* Sale of a farther Part of her Jointure, gave her a Bond to pay her 6 *l.* 10 *s. per Ann.* for her Life; and afterwards by Will, without taking Notice either of Bond or Note, deviſed unto her 14 *l. per Ann.* for her Life.

Per Cur. The Deviſe ſhall be taken to be in Lieu and Satisfaction of the Bond and Note.

Caſe 449. *May* 24.

Burkitt Wid' verſus *Burkitt.*

A. by Will duly executed deviſes a Copyhold Eſtate to his Wife, and on the Day of his Death, orders his Nephew to obliterate ſome Deviſes, but nothing as to the Copyhold, and then cauſed a Memorandum to be wrote, that he approved of the Will as obliterated, but does not republiſh it; and ordered his Nephew to carry it to one to write it fair, and before it is done, he becomes delirious. Held to be a good Will, and that the Copyhold paſſed.

William Burkitt, Rector of *Dedham* in *Eſſex*, by Will in Writing atteſted by *three* Witneſſes, deviſed to his Wife a Copyhold Eſtate in *Ealing*; afterwards the Teſtator on the Day of his Death, directed his Nephew to obliterate ſome Deviſes, but nothing as to the Copyhold

Copyhold deviſed to his Wife, and then cauſed a Memorandum to be wrote that he had examined, peruſed and approved of the Will as ſo obliterated and altered by his Nephew in his Preſence, but did not republiſh it in the Preſence of *three* Witneſſes; but directed his Nephew to carry it to Mr. *Eldred*, to have it wrote out fair, but before it was brought back became delirious.

Held to be a good Will, and the Truſtees decreed to ſurrender accordingly.

Lamlee verſus *Hanman & ux'.*

Caſe 450. *Rolls, May* 24.

Lamlee the Mother having a Jointure in Part, and 10 *l. per Ann.* deviſed to her by her Husband, and charg'd on the other Part of the Premiſſes in Queſtion, on the Marriage of *Lamlee* the Son, the Mother joined in the Settlement, and accepted 15 *l. per Ann.* in Lieu; and the Day before the Settlement, had taken a Security from her Son for 10 *l. per Ann.* out of the Leaſhold Eſtate, which was not compriſed in the Marriage-Settlement; and the Son covenants to pay it. The Son died; the Plaintiff his Widow took Adminiſtration. The Defendant brought an Action of Covenant againſt her for Non-payment of the 10 *l. per Ann.*

Under-hand Agreements on Marriage, ſet aſide as fraudulent. *Ant.* Ca. 426.

The Bill was to be relieved againſt that Action, inſiſting that the Defendant was guilty of a Fraud in making this private Agreement with her Son to have 10 *l. per Ann.* over and above the 15 *l. per Ann.* mentioned in the Marriage-Settlement.

And decreed for the Plaintiff, 1 *Roll. Abr.* Tit. *Marriage*, the Daughter promiſed to repay 10 *l.* Part of the Marriage-Portion of 90 *l.* adjudged at Law to be a fraudulent and void Promiſe; and in the Caſe of *Peyton* and

Vol. 1. Caſe 233. *Blaidwell, Paſch.* 9. *May* 1684, where Sir *John Blaidwell* having a Kindneſs for *Yelverton Peyton*, treated a Marriage for him with *John Roberts* for his Niece, and a Settlement agreed for 2500 *l.* Portion; he obtained a Redemiſe of Part of the Eſtate ſettled for preſent Maintenance, and a Releaſe of what *Blaidwell* had covenanted to ſettle after his Death, and both ſet aſide in Equity.

Vol. 1. Caſe 344. And alſo cited the Caſe of *Redman* verſus *Redman*, 9 *Dec.* 1685, the Widow of *Redman* relieved, although privy and conſenting to the Fraud, and giving of the Bond.

Vol. 1. Caſe 464. *Gale* and *Lendo* 1687, where the Brother gave a Bond to make up his Siſter's Portion the Sum, that was inſiſted on, but took a Bond from her before Marriage to repay. The Husband died, the Wife ſurvived, and was relieved againſt the Bond; from which Precedents it may be collected, that that which is the open and publick Treaty and Agreement upon Marriage, ſhall not be leſſened, or any Ways infringed by any private Treaty or Agreement.

That which is the open and publick Treaty and Agreement on Marriage ſhall not be leſſened or infringed by any private Agreement.

And decreed a perpetual Injunction of the Action.

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Term. S. Trinitatis,
1705.
In Curia Cancellariæ.

Blois and *Martin* Executors of the Lord Viſcount *Hereford* verſus Dominam Viſcounteſs *Hereford & al'.*

Caſe 451. *June* 13.

ON the Marriage of the late Lord Viſcount *Hereford* with the Defendant, one of the Daughters and Coheirs of Mr. *Narbone*, on the Treaty of Marriage, they being both Infants, there was an Act of Parliament procured for ſettling a Jointure in Bar of Dower; provided if ſhe, when of Age, did not ſettle her Lands, Part of the Jointure to ceaſe; but nothing ſaid, as to the perſonal Eſtate: But upon the Treaty of Marriage Inquiry was made, what was the Portion or Fortune of Mrs. *Narbone*; and a Particular given in of what her perſonal Eſtate amounted unto, and (*inter alia*) Mention made of the Mortgage for 1300 *l.* taken in the Lady *Bacon*'s Name. The Lady *Bacon* being dead, and having made her *three* Daughters Executrixes, their Husbands gave

A. marries *B.* who has an Eſtate in Land, and a Fortune in Money. They being both Infants, an Act of Parliament is obtained for ſettling a Jointure on the Wife in Bar of Dower; provided that the Jointure ſhall ceaſe, if the Wife when of Age did not ſettle her Land; but nothing ſaid as to the perſonal Eſtate. Part of the Fortune is a Mortgage for 1300 *l.* taken in a Truſtee's Name. The Wife when ſhe came of Age ſettled her own Land; and afterwards the Husband dies. Decreed the Mortgage to the Executors of *A.* and that it ſhould not ſurvive to his Wife as a Choſe in Action.

gave a Declaration of Truſt, that half belonged to the Lady *Hare*, and the other half to the Lord Viſcount *Hereford*. The Marriage being had, and a Settlement made by the Defendant, after ſhe came of Age, of her Lands, purſuant to the Marriage-Agreement; the Lord Viſcount *Hereford* died, having made the Plaintiffs his Executors.

The Queſtion was, Whether this Money ſhould go to the Plaintiffs, Executors of the Lord Viſcount *Hereford*, or as a *Choſe in Action*, ſhould ſurvive to the Wife.

When a Man makes a Settlement equivalent to his Wife's Portion, it ſhall be intended, that he was to have the Portion, tho' there is no particular Agreement for that Purpoſe.

Lord Keeper. I lay no Streſs upon the Declaration of Truſt; lay that out of the Caſe; the Law of this Court will preſume a Promiſe; and in all Caſes, where a Settlement equivalent, it ſhall be intended the Husband was to have the Portion. The Wife ſhall not have her Jointure and Fortune both; and the rather in this Caſe, becauſe a Truſt; and the Husband could not come at it, ſo as to alter the Property without the Aſſiſtance of this Court; and the Defendant was condemned in Coſts.

Now the Counſel cited the Precedents of *Cleeland* and *Cleeland*, where a Jointure ſettled in Conſideration of 100 *l.* Portion; whereas the Wife had 150 *l.* more in her Brother's Hands. The Husband died, the Wife ſurvived. Decreed at the *Rolls*, and confirmed upon an Appeal, that the 150 *l.* ſhould ſurvive to the Wife.

Burnett and *Kinaſton*. A Mortgage in Fee to the Wife. The Husband by Articles agrees to ſettle it on his Wife for Life; and the Wife died; the Huband afterwards died. Mr. *Kinaſton* the Brother got Adminiſtration *de bonis non* to his Siſter, and decreed for him; although the Husband had done what lay in his Power to alter the Property of it.

Ruddiard

Ruddiard verſus *Nearn* 1702, A Jointure made in Conſideration of 500 *l.* paid down, and of 500 *l.* which the Wife had in the Chamber of *London.* The Husband died, and the Wife ſurvived; decreed to the Wife.

Gilbert verſus *Emerton.*

Caſe 452.

THE Plaintiff by his Bill ſurmiſed, that he and the Defendant having been Partners in buying and ſelling of Cattle, and in returning Money; they paid 1460 *l.* into the Exchequer, upon the Account of Mr. *Woodcock*, the Receiver of *Leiceſterſhire*; and that 600 *l.* Part thereof was the proper Monies of the Plaintiff; but the Defendant had been paid by *Woodcock* the whole 1460 *l.* and refuſed to pay the Plaintiff the 600 *l.* The Defendant by Anſwer denied that 600 *l.* of the 1460 *l.* was the Plaintiff's Money; but ſwore it was all his own Money.

An Iſſue at Law was directed in a Matter, where the Plaintiff had a proper Action at Law, and was under no Impediment in reſpect of bringing ſuch Action.

The Plaintiff had *three* Witneſſes, who ſwore the Defendant confeſſed that 600 *l.* of the 1460 *l.* was the Plaintiff's Money.

And although it was inſiſted, that little Regard ought to be given to Witneſſes, who only ſwore a Confeſſion, when the Defendant had denied it upon his Oath; but beſides, if there was any Doubt in it, the Plaintiff might bring his Action at Law; there being no Impediment, nor Reaſon for a Court of Equity to meddle in it.

Yet the *Lord Keeper* directed, that the Plaintiff ſhould bring his Action, and the Defendant not to inſiſt on the Statute of *Limitations:* And the Plaintiff's Counſel inſiſting rather to have an Iſſue directed; he did accordingly direct it to be tried, whether 600 *l.* Part of the 1460 *l.* was the proper Money of *Gilbert*, or not.

Note

Note in the Caſe of *Peeres* and *Bellamy*, although the Aſſignees under the Statute of Bankruptcy, were diſabled from recovering the Effects belonging to the Bankrupt's Eſtate by a Fraud in the Defendant's, *viz.* their having altered the Bills of Lading and Invoices; and even the Ship's Name, that the Aſſignees might not know or diſcover the Goods, that were aſſigned to *Bellamy* the Bankrupt; yet there the *Lord Keeper* refuſed to direct an Iſſue, ſaying it was a Matter triable at Law, and refuſed to direct that the Statute of *Limitations* ſhould not be given in Evidence.

Caſe 453.

Fellowes verſus *Owen.*

Two Truſtees for Sale of an Eſtate, join in a Conveyance of it to a Purchaſer, and in a Receipt for the Conſideration-Money; but each of them received only a Moiety thereof. One of them afterwards becomes inſolvent; the other ſhall not be anſwerable for what the inſolvent Truſtee received. *Poſt.* Caſe 464, 516.

TWO Truſtees, each received 1000 *l.* upon the Sale of the Truſt-Eſtate, and both joined in the Sale, and executed Conveyances; one of them afterwards became inſolvent.

The Queſtion was, Whether the ſolvent Truſtee ſhould be charged with what his Co-Truſtee received, or ſhould only be anſwerable for what he received himſelf. In the Caſe of *Heaton* and *Marryott*, Truſtees for Sale of Lands, each anſwerable for his own Receipts only; but in the Caſe of Executors, where they join in Sales, it is otherwiſe; and the *Lord Keeper* doubted in this Caſe, and would conſider of it.

Otherwiſe it is where Executors join in Sales.

I

Perry

Perry verſus *Perry.*

Caſe 454.

ON the Plaintiff's Marriage, *Edward Perry* her Husband covenanted to purchaſe and ſettle upon her for her Jointure 20 *l. per Ann.* and if he died before ſuch Purchaſe or Settlement made, ſhe ſhould have 300 *l.* out of his Eſtate for her own Uſe. The Marriage was had, and before any Purchaſe or Settlement, *Edward Perry* the Husband died without Iſſue, having made his Will and the Defendant Executor; and thereby deviſed to the Plaintiff his Wife 330 *l.* for her Life, with Power to diſpoſe of 30 *l.* Part thereof at her Death, and the Reſidue of the 330 *l.* upon her Death, he deviſed over to other Relations.

A. on his Marriage covenants to purchaſe and ſettle 20 *l.* a Year on his Wife for her Life, and if he died before it was done, to leave her 300 *l.* out of his perſonal Eſtate for her better Livelyhood and Maintenance. He died without making any Settlement, and by Will gives his Wife the Intereſt of 330 *l.* for her Life, with a Power to diſpoſe of 30 *l.* at her Death. Decreed firſt, that ſhe was intitled to the 300 *l.* by the Articles, and that the Executors were not at Liberty to ſettle 20 *l.* a Year on her for her Life. *Secondly*, That the Legacy was not a Satisfaction of the Articles; but ſhe ſhould have the 300 *l.* by the Articles, and the Legacy too.

The Bill was to have 300 *l.* abſolutely by the Articles, and alſo the Uſe of 330 *l.* for her Life by the Will, with Power to diſpoſe of 30 *l.* Part thereof.

And the Queſtions were, *firſt*, Whether the Plaintiff was intitled to have the 300 *l.* and Intereſt by the Articles, or only 20 *l. per Ann.* for her Life; and it was decreed at the *Rolls*, that ſhe had a Right to the 300 *l.* and Intereſt, and that the Executor could not now be at Liberty to ſettle 20 *l. per Ann.* for Life, as the Teſtator might have done.

The *ſecond* Queſtion was, Whether the 330 *l.* deviſed as aforeſaid, ſhould be in Lieu of the Articles, or be looked upon as an additional Bounty and Proviſion for the Wife: The Words of the Articles being, that if the Husband did not purchaſe and ſettle 20 *l. per Ann.* on her

Ant. Ca. 448.

her for Life, he would leave her out of his perſonal Eſtate 300 *l.* for her better Livelyhood and Maintenance: And decreed ſhe ſhould have as well the 300 *l.* by the Articles, as alſo the Legacy by the Will.

And this Decree now affirmed upon an *Appeal.*

Caſe 455.

Oldham verſus *Litchford.*

A. deviſes Land to his Brother, and makes him Executor; and wills that out of his perſonal Eſtate, and Half a Year's Rent of his real Eſtate, he ſhould pay his Legacies; and gives an Annuity to his Nephew. It being proved that the Brother promiſed the Teſtator to pay the Annuity, otherwiſe he would have charged his real Eſtate therewith; Decreed the real Eſtate to be charged with the Annuity.

John Litchford made his Will, and the Defendant *Abell Litchford* his Brother Executor, and deviſed to him his real Eſtate; and thereby willed, that his Executor out of his Rents in Arrear and other his perſonal Eſtate, and out of Half a Year's Rents and Profits of his real Eſtate, after his Death, ſhould pay his Debts and Legacies therein after mentioned; and by his Will, amongſt other Legacies, deviſed 40 *l. per Ann.* to the Plaintiff his Wife's Nephew, to maintain him at *Cambridge*, to be paid by his Brother and Executor. The Teſtator dying, the Defendant his Executor alledged, he had fully adminiſtred the perſonal Eſtate; as alſo the Half Year's Profits of the real Eſtate, which incurred after the Teſtator's Death; and therefore refuſed to pay the *forty Pounds per Ann.* to the Plaintiff.

The Queſtion was, Whether the real Eſtate was chargeable therewith or not; it being charged by the Bill, and proved by Mr. *Bagſhaw*, that the Defendant promiſed the Teſtator, he would pay the Annuity to the Plaintiff; otherwiſe the Teſtator would have charged his real Eſtate with the Payment of it.

It was admitted, that the Will had made only the Half Year's Rents and Profits of the real Eſtate liable; but upon the Evidence of Mr. *Bagſhaw*, it was decreed

at the *Rolls* for the Plaintiff, and affirmed upon an Appeal by the *Lord Keeper.*

Corpus Chriſti College in *Oxon* verſus *Paroch' de Naunton in Com' Glouceſt'.* Caſe 456.

Iſſue at Law directed upon a Rehearing of Exceptions taken to a Decree made by Commiſſioners of charitable Uſes, after that Decree had been twice confirmed.

IN 1660, a Decree was made by Commiſſioners of charitable Uſes againſt Mrs. *Oldys* for *four* Acres of Land in her Poſſeſſion, belonging to the Pariſh of *Naunton* for Repairs of the Church, whereby ſhe was decreed to deliver Poſſeſſion, and account for Arrears.

Mrs. *Oldys* in 1681, took Exceptions to the Decree, and upon arguing thereof the ſame were over-ruled, and the Decree confirmed.

Afterwards in 1690, the *College* came, and alledged that Mrs. *Oldys* was only their Tenant, and prayed that they might be admitted to take Exceptions to the Decree; and they were admitted ſo to do; and their Exceptions were over-ruled, and the Decree confirmed again.

Upon a Rehearing before the *Lord Chancellor Sommers*, he directed a Trial at Law, Whether *four* Acres in the Poſſeſſion of Mrs. *Oldys* belonged to the Pariſh of *Naunton* for Repairs of their Church.

Upon a Rehearing, the Lord Keeper *Wright* confirmed the laſt Order.

Cave

Caſe 457. *June* 26.

Cave Domina verſus *Cave* Bart.

A. devi'es 4000*l* to his Son, to be paid at his Age of 25, and Intereſt in the mean Time, and he to have a Maintenance thereout; and directs the 4000*l.* to be raiſed out of a Truſt-Eſtate. The Son dies under *Twenty five.* This is a veſted Legacy, and ſhall go to his Executors. Vol. 1. Caſe 201.

SIR *Roger Cave* by his Will deviſed *four Thouſand Pounds* to his Son *Charles*, to be paid him at his Age of *Twenty-five*, and Intereſt in the mean Time, and he thereout to have a Maintenance. *Charles* died under Age, and the *four Thouſand Paunds* being to be raiſed out of a Truſt-Eſtate the Queſtion was, Whether the *four Thouſand Pounds* ſhould be raiſed and paid to his Repreſentative, or merge in the Land for the Benefit of the Defendant, the Heir.

Decreed it ſhould be raiſed, it being an Intereſt veſted in *Charles*; for although it was not payable until his Age of *Twenty-five*, yet it was to carry Intereſt immediately.

Pictures and Glaſſes put up inſtead of Wainſcot, or where Wainſcot would otherwiſe have been put, ſhall go to the Heir, and not the Executor. 4 Co. 64. a.

And a Queſtion ariſing, Whether ſome Pictures and Glaſſes belonged to the Heir or to the Executor: The *Lord Keeper* was of Opinion, that although Pictures and Glaſſes generally ſpeaking are Part of the perſonal Eſtate; yet if put up inſtead of Wainſcot, or where otherwiſe Wainſcot would have been put, they ſhall go to the Heir. The Houſe ought not to come to the Heir maimed and disfigured. *Herlackenden*'s Caſe, Wainſcot put up with Screws, ſhall remain with the Freehold.

2

Steward

Steward verſus *Rumball.*

Caſe 45.
July 12.

A Man has Judgment for the Penalty of a Bond. Though the Principal and Intereſt exceed the Penalty; yet he ſhall recover no more than the Penalty. *Quære.*

BRigadier *Villars* borrowed *five Hundred Pounds* of Sir *Walter Plunkett* on Bond and Judgment, in which the Defendant was bound as Surety, and forced to pay the Debt. The Brigadier died, and the Lady *Grandiſon* his Wife took Adminiſtration, and afterwards married Lieutenant General *Steward.* The Defendant had received ſeveral Sums in Part, and had got Judgment againſt the Plaintiff by Default, and *Devaſtavit* returned for *ſix Hundred* and *ſeventy Pounds*, and the Money levied in the Sheriff's Hands.

The Bill was to be relieved, paying what was due, diſcounting what had been paid by Aſſignment of the Brigadier's Pay or otherwiſe; and the Bond being of *one Thouſand Pounds* Penalty, and the Debt and Intereſt much exceeding that Sum; a Queſtion aroſe, Whether the Payments formerly made ſhould be applied in the *firſt* Place to pay the Intereſt then in Arrear, and afterwards to ſink the Principal; and ſo the Plaintiff to have now the Benefit of the Penalty, to recover what remained due.

The *Lord Keeper* was of Opinion, that including what had been paid, though at ſeveral Payments, and many Years ſince, that the Defendant ſhould have in the Whole no more than the Penalty of the Bond, ſaying a Man can have no more than his Debt; and the Penalty is the utmoſt of the Debt. *Tamen Quære.*

Caſe 459. *Tarback & al'* verſus *Marbury & al'.*

A. conveys Lands to the Uſe of himſelf for Life, with Power to mortgage ſuch Part as he ſhall think fit, Remainder to Truſtees to ſell to pay all his Debts, and afterwards becomes indebted by Judgments, Bonds and ſimple Contract. This is fraudulent, as againſt the Judgment Creditors, and they ſhall not be compelled to take a Satisfaction in Average with the other Creditors, having no Notice of the Settlement.

William Marbury in 1672, made a Conveyance to *Brook* and others of his Eſtate, to the Uſe of himſelf for Life, with Power to mortgage ſuch Part of the Eſtate as he ſhould think fit, Remainder to the Truſtees and their Heirs in Truſt, to ſell and pay all his Debts. After this he becomes indebted by ſeveral Judgments and Statutes, as likewiſe on Bond and ſimple Contract. The Eſtate was all covered with Mortgages, and the Inheritance in *Brook & al'*, the Truſtees, when the Judgments were obtained, and Statutes acknowledged; ſo that the Creditors by Judgment and Statute, could not recover their Debts by Law.

The Queſtion was, Whether the Creditors by Judgment and Statute ſhould be preferred in Point of Payment, to Creditors by Bond and ſimple Contract, or muſt ſubmit to come in under the Deed of Truſt, and content themſelves to be paid in an Average with the other Creditors.

The Deed of Truſt is fraudulent as againſt Creditors by Statute and Judgment.

Firſt, Becauſe *William Marbury* continued in Poſſeſſion, and kept the Deed in his Cuſtody, and might produce it or not, as he pleaſed; and the Creditors had no Notice of it.

3

Secondly,

Secondly, Having reſerved to himſelf a Power to mortgage, and charge the Eſtate with what Sums he thought fit, he might have charged it to the full Value, which amounts in Effect to a Power of Revocation; and therefore fraudulent, as againſt Creditors by Statute and Judgment.

A. makes a voluntary Settlement, reſerving to himſelf a Power to mortgage what Part he pleaſed. This amounts in Effect to a Power of Revocation, and therefore fraudulent as againſt Creditors by Judgment.

DE
Term. S. Michaelis,
1705.
In CURIA CANCELLARIÆ.

Caſe 460. *Octob.* 31.

Franklyn & al' verſus Counteſs of *Burlington.*

A. deviſes that the Furniture and Pictures of his *three* Houſes in *B. C.* and *D.* ſhould go along with the *three* Houſes.

Richard Earl of *Burlington* by Will deviſed, that the Furniture and Pictures of his *three* Houſes at *Lanesborough*, *Burlington* and *Chiſwick*, ſhould go along with the *three* Houſes; and wills, that his gilt Plate belonging to his *Chapel*, ſhould be ſolely appropriated to that Uſe.

Adjudged the Plate then at the *three* Houſes, paſſed by this Deviſe.

Queſtion, Whether the Plate then at the *three* Houſes ſhould paſs by the Deviſe of his Furniture and Pictures; and adjudged that it ſhould paſs.

Thomas

Thomas verſus *Thomas.*

Caſe 461.
Nov. 6.

Alexander Thomas by Will in 1691, deviſed *one Thouſand Pounds* a-piece to his *ſix* younger Children, payable at *Twenty-one* or Marriage, to be raiſed by Truſtees, by Sale of Lands appointed for that Purpoſe; and his Mind and Will was, that if any of his Children died before *Twenty-one* or Marriage, the *one Thouſand Pounds* of the Child ſo dying, ſhould be diſpoſed of to one or more of his Children then living, in ſuch Manner as his Executrix ſhould think fit; and made his Wife Executrix. *Martha* one of the younger Children dying unmarried and under Age, the Mother the Executrix appointed *one Thouſand Pounds* to be paid to her Daughter *Mary.*

A Man gives Legacies to his Children to be paid at 21 or Marriage, and if any of them died before 21 or Marriage, the Legacy of ſuch Child to be diſpoſed of to one or more of the Children then living, in ſuch Manner, as his Wife, whom he made Executrix, ſhould think fit. One of the Children died under Age and unmarried; the Mother appoints the whole Legacy of ſuch Child to one of the other Children. A good Appointment.

Queſtion, Whether ſuch Appointment ſhould ſtand, and *Mary* have the whole *one Thouſand Pounds*; or the other younger Children come in for any Share or Proportion thereof.

Lord Keeper. The Power ſpecial and particular, that the Wife might diſpoſe to one or more; and not like the Caſes of a general Truſt in the Executrix to diſtribute amongſt the younger Children at Diſcretion; there an unreaſonable and indiſcreet Diſpoſition may be controlled by a Court of Equity: But this is *Caſus proviſus*, it is expreſly provided, that ſhe might give all to one.

Where an Executrix has a general Power to diſtribute a Sum of Money amongſt Children at Diſcretion; an unreaſonable or indiſcreet Diſpoſition may be controlled by a Court of Equity.

Decreed the Appointment to ſtand.

Caſe 462.
Nov. 6.

Adams verſus *Buckland.*

Adminiſtration granted to *two*, *one* dies, it ſurvives to the other. But if a Letter of Attorney is made to *two*, and *one* dies, the Authority ceaſes.

AN Adminiſtration granted unto *two*; the *one* dying, the Queſtion was, Whether the Adminiſtration ceaſes; like a Letter of Attorney unto *two*, *one* dies, the Authority ceaſes.

Lord Keeper. It is not a bare Authority; but rather an Office. Adminiſtrators are enabled to bring Actions in their own Names, come in the Place of Executors, and the Office ſurvives.

Caſe 463.

Burton verſus *Knight.*

Nov. 8. Award ſet aſide for Partiality in the Arbitrators.

THE Submiſſion was to *three* Arbitrators, or any *two* of them. They all *three* had ſeveral Meetings, and heard the Parties and Witneſſes. *Hudſon*, one of the Arbitrators, not agreeing with the other *two*, they have Meetings by themſelves, at ſome of which *Knight* was admitted to be preſent; and whilſt *Burton* was held in Hand, that the Time ſhould be inlarged, or at leaſt ſhould have been farther heard, the *two* Arbitrators privately and without Notice, either to *Burton*, or to *Hudſon* the other Arbitrator, draw up and publiſh their Award, and imployed *Knight*'s Attorney to draw it up.

Decreed at the *Rolls* to be ſet aſide, and the Decree confirmed by the *Lord Keeper*, becauſe the Proceedings of the Arbitrators were partial and unfair.

Firſt, Where a Submiſſion is unto *three* or any *two* of them, if *two* by Fraud or Force will exclude the other; *that* alone is ſufficient to vitiate the Award.

If a Submiſſion is to 3, or any 2 of them; and 2 by Fraud or Force exclude the other; *that* alone is ſufficient to vitiate the Award.

Secondly, Nothing could be more partial than to let *Knight* be preſent at their private Meetings, and admit him to be heard to induce Alterations in their intended Award, and at the ſame Time induſtriouſly to conceal their Meeting from *Burton*; and although they met him, and had Debates with him *three* Days after they had determined to make their Award; yet mentioned nothing of it, and at laſt left it to *Knight*'s Attorney to draw up the Award.

Private Meetings of the Arbitrators with one of the Parties, and admitting him to be heard to induce an Alteration in the Award, is Partiality.

Fellowes verſus *Mitchell* and *Owen*. Caſe 464.

THE Plaintiff *Fellowes*, and the Defendant *Owen* were made Truſtees on the Marriage of *Charles Mitchell* and his Wife, and had a Term for Years lodged in them of the Manor of *Long Braddy*, in Truſt to raiſe *two Thouſand Pounds* to be placed out at Intereſt, or inveſted in Lands with the Approbation of *Charles Mitchell*, and Intereſt and Profits to *Charles Mitchell* for Life, and to the Wife for Life, and then to the Children, as the Wife ſhould appoint; and in Default of an Appointment, to them equally. Mr. *Pollixfen* advanced the *two Thouſand Pounds*, with other Monies, upon a Mortgage of the Eſtate; the Truſtees both joined in an Aſſignment of the Eſtate, and in a Receipt or an Acquittance for the *two Thouſand Pounds*: But it was paid, *one Thouſand Pounds* thereof to the Plaintiff, and the other *one Thouſand Pounds* to his Co-Truſtee, the Defendant *Owen*, who is ſince become inſolvent; *Charles Mitchell* preſent and conſenting to the Payment.

Ant. Ca. 453.

The

The Queſtion was, Whether the Plaintiff *Mitchell* ſhould be liable to the *one Thouſand Pounds* received by *Owen*; and decreed he ſhould not, and upon Payment of the *one Thouſand Pounds* received by him into Court, to be indempnified.

It was admitted, that the Precedents, that had been produced, as *Foſter* and *Townley*, *Cro. Car.* 312. *Murrell* and *Pitt*, and *Widmore* and *Bond*, *&c.* were for making joint Truſtees, if they had joined in Receipts and Acquittances, to be anſwerable for each other: But *that* ſeemed to be againſt natural Juſtice, unleſs they had ſo joined in Receipt, as not to be diſtinguiſhed, what had been received by one, and what by the other; there indeed of Neceſſity they muſt both be charged with the Whole; and that is from their own Neglect or Default: As if another Man ſhould blend his Money with mine, by rendring my Property uncertain, he looſes his own. And there was a Difference between Joint-Truſtees and Executors: Executors may act ſeparately, if they think fit; but if a Truſt-Eſtate is to be ſold, the Truſtees muſt both join in conveying, and alſo in Receipts; otherwiſe no one will purchaſe: And ſince one Truſtee has equal Power, Authority and Intereſt with the other, the one cannot in Reaſon inſiſt or deſire to receive more of the Conſideration-Money, than the other, or to be more Truſtee than his Partner or Co-Truſtee.

Caſe 465.
Nov. 9.

Steward verſus *Bridger.*

Lord of the Manor of *A.* brings a Bill for a Rent of 8 *s.* payable out of a Copyhold held of the Manor of *B.* and though it appeared by the Rolls of the Manor of *B.* from *H.* 8. to *Car.* 1. that the Copyhold was held of the Manor of *B.* at the Rent of 8 *s.* and though it was admitted by the Plaintiff that the Copyhold was held of the Manor of *B.* and he had no other Evidence of his Title to the Rent, but that it had been paid him near *twenty* Years; yet the Court decreed him the Arrears and growing Rent, and denied the Defendant a Trial at Law.

THE Defendant held a Copyhold of the Manor of *Ipeing*, at the Rent of 8 *s. per Ann.* and it ſo appeared

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peared by the Court-Rolls of *Hen.* 8. of *Phil. & Mary*, and down to *Car.* 1. and in the 12 *Car.* 1. Mrs. *Heather*, the Defendant's Mother, was admitted, as of the Manor of *Ipeing*. The Plaintiff Owner of the Manor of *Dean*, which he purchaſed from Sir *Peter Betteſworth*, who formerly was Owner of both Manors, now brought his Bill to compel Payment of the 8 *s. per Ann.* and altho' he admitted, that the Copyhold was held of the Manor of *Ipeing*, and not of the Manor of *Dean*; yet the Rent having been paid to him for near *twenty* Years, which was the only Evidence he had to ſhew for it, the Arrears and growing Rent were decreed to him; and a Trial at Law denied, though prayed by the Defendant. The *Lord Keeper* ſaying, it was agreeable to the Rules of Law; where in Caſe of *Incroachment* of Rent; if the Tenant makes but one Payment of more than was due, he ſhall never go back from it: And after a Payment of *twenty* Years, a Grant of the Frehold of the Copyhold from the Lord of the Manor of *Ipeing* ſhall be preſumed.

By the Rules of Law, in Caſes of Incroachment of Rent, if the Tenant makes but one Payment of more than is due, he ſhall never go back from it.

Pendleton verſus *Grant.* Caſe 466.

IN a Will the Bequeſt was, *I give my Houſhold Stuff, as Braſs, Pewter, Linen and Woollen whatſoever, except a Trunk under the Chamber Window.* The Perſon, who made the Will, was examined as a Witneſs; and ſwore the Teſtator directed him to inſert all his Goods, except the Trunk.

There being a Deviſe in a Will of all the Teſtator's Houſhold Stuff, as Braſs, Pewter, Linen and Woollen, except a Trunk; the Perſon who drew the Will was examined, to prove that the Teſtator directed him to inſert all his Goods except the Trunk, and was allowed to be read.

Queſtion, Whether he ſhould be admitted to be read. Ordered to be read, as in Caſe of a Deviſe to Son *John*, when he had *two* of the ſame Name; or if the Deviſe had been of his Trunk, when the Teſtator had *three* Trunks.

Caſe 467. ## *Draper & al'* verſus *Jennings & al'.*

A. has a firſt Mortgage, and *B.* a *ſecond*, and ſubject to theſe Mortgages the Eſtate is ſettled on *C.* for Life, Remainder on *D.* an Infant. *A.* brings a Bill to foreclose, though *B.* has not the like Remedy over againſt *D.* who becauſe of his Infancy cannot be foreclosed; yet *B.* muſt redeem *A.* in *ſix* Months, or be foreclosed.

THE Plaintiff had a Mortgage on the Manor of *Swallowfield* for a Term of *five Hundred* Years; the Defendant a ſubſequent Mortgage. The Eſtate ſubject to theſe Mortgages was ſettled on the Earl of *Clarendon* for Life, Remainder to the Lord *Cornbury*, now an Infant of *fourteen* Years of Age.

Per Cur. Although the Defendant cannot have the like Remedy over againſt the Lord *Cornbury*, who, becauſe an Infant, cannot be foreclosed; yet the Defendant muſt redeem within *ſix* Months or be foreclosed.

Objected, Some intervening Incumbrancers not made Parties. It was anſwered, the Plaintiff might notwithſtanding foreclose ſuch Defendants as he had brought before the Court.

Objected, The Infant had a Right to redeem all, and therefore he to have the *firſt* Election, and to be *firſt* foreclosed. Not allowed.

Caſe 468. ## *Mountague & al'* Executors of *Ewer* verſus *Tidcombe* and *Haskins.*

A. puts his Son Apprentice to *B.* and gives Bond for his Fidelity, and takes a Covenant from *B.* that he would, at leaſt once a Month, ſee his Apprentice make up his Caſh. The Apprentice imbezils the Caſh; and *B.* brings Action on the Bond. On a Bill by *A.* to be relieved, decreed, that *A.* ſhould be anſwerable for no more than *B.* could prove his Servant had imbezilled in the firſt Month after the Imbezilment began.

MR. *Ewer* gave the Defendant, a *Spaniſh* Merchant, *ſix Hundred Pounds* to take his Son Apprentice, and entred into a Bond of *one Thouſand Pounds* for his Fidelity;

Fidelity; and at the ſame Time took a Covenant from his Maſter, that he ſhould, at leaſt once a Month, ſee his Apprentice make up his Caſh. The Defendant brought an Action on the Bond, alledging the Apprentice had run out *eight Hundred* and *fifty Pounds*. Bill to be relieved againſt it.

Lord Keeper. The Meaning of the Covenant is, that the Defendant ſhould not only ſee to the Caſting up of his Caſh, that it was right in Figures, but to ſee the Caſh effectually made up; and therefore the Defendant's Pretence, that his Apprentice had inſerted in his Accounts Goldſmiths or Bankers Notes, as remaining, when he had diſpoſed of them, is no Excuſe; that the Bond and the Covenant ought to be taken as one Agreement; that the Plaintiff would be anſwerable, provided Accounts were taken Monthly; would be liable but for one Month's imbezilment: And decreed the Plaintiff ſhould be anſwerable for no more than the Maſter could prove the Apprentice imbeziled in the firſt Month, when the Imbezilment began.

Tilley & ux' verſus *Bridger & al'.*

Caſe 469. *Nov.* 26.

ON an Appeal from the Rolls the Queſtion was, Whether the Plaintiff was intitled to Relief for meſne Profits received by the Defendant, whilſt a Cauſe was pending in this Court; and the Defendants had an Injunction.

A Perſon is intitled to meſne Profits, but from the Time of his Entry.

Lord Keeper. Not intitled to Profits, but from the Time of Entry. If the Plaintiff entred, he may recover at Law, the Injunction did not prevent an Entry; and diſmiſſed the Bill.

An Injunction does not prevent an Entry.

Beſt

Caſe 470.

Beſt verſus *Stampford.*

A Woman, who is *Ceſtuy que Truſt* of a Term, having the Inheritance in her, marries and dies. The Term ſhall attend on the Inheritance, and not go to the Husband as Adminiſtrator of his Wife.

Jane Harris having an Eſtate of Inheritance given to her by her *firſt* Husband, on the Marriage of *Brown*, her *ſecond* Husband, demiſed the Premiſſes to *Binks* for *one Thouſand* Years; in Truſt to permit *Brown & ux'*, to receive the Profits during their Lives, and the Life of the Survivor, then in Truſt for their Children; but if *Brown* died in her Life-time without Iſſue, then in Truſt for her, and her Executors, Adminiſtrators and Aſſigns. *Brown* died, *Elizabeth* married the Defendant her *third* Husband, and died. The Plaintiff claimed the Term as Heir; the Defendant, as Husband and Adminiſtrator to his Wife.

The Queſtion ſingly, Whether a Woman, who is *Ceſtuy que Truſt* of a Term, and having the Inheritance in her, and marrying a *third* Husband, who ſurvived her, the Term ſhould attend the Inheritance, or go to the Husband as Adminiſtrator. Decreed for the Plaintiff the Heir.

Holt verſus *Holt*, *Percivall* and *Dowſe*, *Pawlett* verſus *Pawlett.*

Caſe 471.
Decemb. 3.
Maſter of the Rolls.

Jennings & al' verſus *Ward & al'.*

A. lends Money to B. on a Mortgage, and takes a Covenant from B. by another Deed, that if *A.* ſhould think fit, B. ſhould convey to *A* ſo much of the mortgaged Eſtate, as ſhould be of the Value of the Money lent at *Twenty* Years Purchaſe. Covenant decreed to be ſet aſide as unconſcionable.

THE Defendant *Ward* lends Money to *Neale*, the *Groom Porter*, to carry on his Buildings in *Cock* and *Pye* Fields, and took a Mortgage from him to ſecure *ſixteen Thouſand Pounds* with Intereſt at 6 *l. per Cent.* and in another

another Deed executed at the ſame Time, took a Covenant from *Neale*, that he ſhould convey to the Defendant, if he thought fit, Ground-Rents to the Value of *ſixteen Thouſand Pounds*, at the Rate of *Twenty* Years Purchaſe. The Bill being to redeem, the Defendant inſiſted on that Agreement; but the *Maſter* of the *Rolls* decreed a Redemption, on Payment of Principal, Intereſt and Coſts, without Regard to that Agreement; but ſet aſide the ſame as unconſcionable. A Man ſhall not have Intereſt for his Money, and a collateral Advantage beſides for the Loan of it, or clog the Redemption with any By-Agreement.

A Man ſhall not have Intereſt for his Money on a Mortgage, and a collateral Advantage beſides for Loan of it; or clog the Redemption with any By-Agreement.

Elliott verſus *Davenport.*

Caſe 472. *Decemb.* 5. *Maſter of the Rolls.*

THE Teſtatrix by Will reciting, that Sir *William Elliott* owed her *four Hundred Pounds*, gave and bequeathed that *four Hundred Pounds* to him, provided he out of the *four Hundred Pounds* paid ſeveral Sums therein mentioned, to his Wife and Children; and the Reſt and Reſidue ſhe freely and abſolutely gave to Sir *William Elliott*; and willed and required the Executor to deliver up the Security immediately upon her Death, and not to claim or meddle with the Debt or any Part thereof; but to give ſuch Releaſe or Diſcharge, as Sir *William* his Executors or Adminiſtrators ſhould require or think fit. Sir *William* died in the Life-time of Mrs. *Davenport* the Teſtatrix.

A. deviſes to *B.* 400*l.* which he owed her, provided that thereout he paid ſeveral Sums to his Wife and Children; and the Reſt ſhe freely gave to him, and directs her Executor to deliver up the Security, and not to claim any Part of the Debt, but to give ſuch Releaſe, as *B.* his Executors, *&c.* ſhould require. *B.* dies in the Life-time of the Teſtatrix. Decreed the Legacies given out of the 400*l.* to be paid, and the Reſidue of the Debt to be paid to the Executor.

Whether the *four Hundred Pounds* was releaſed, or was a lapſed Legacy was the Queſtion.

If a Perſon ſays in his Will, *I forgive ſuch a Debt, or my Executor ſhall not demand it, or ſhall releaſe it*, this is a Diſcharge of the Debt, though the Debtor dies in the Life-time of the Teſtator.

It was admitted, if ſhe had only ſaid, *I forgive ſuch a Debt, or that my Executor ſhall not demand it, or ſhall releaſe it, that* would have been a good Diſcharge of the Debt, altho' Sir *William* died in the Life-time of the Teſtatrix.

And it was alſo admitted, that the Money directed to be paid by Sir *William* to his Wife and Children, out of the Debt of *four Hundred Pounds*, will ſtand good, as well deviſed, although Sir *William* died before the Teſtatrix.

But if a Debt is deviſed by Will to the Debtor, without Words of Releaſe or Diſcharge of the Debt, and the Debtor dies in the Life of the Teſtator; the Legacy is lapſed, and the Debt ſubſiſts.

And it was likewiſe admitted, that if a Debt is mentioned to be deviſed to the Debtor, without Words of Releaſe or Diſcharge of the Debt; if the Debtor died before the Teſtator, *that* will be a lapſed Legacy, and the Debt will ſubſiſt.

Now in this Caſe, the *firſt* Clauſe in the Will imports a Deviſe only; and the later Clauſe amounts to a Releaſe and Diſcharge of the Debt; and the Executor is injoined from receiving it. The only Queſtion is, Whether the latter Clauſe is not to be ſo coupled to the former, as to be *ancillary* and dependant upon it; *viz.* if the Legacy took Effect, then the Executor to releaſe, and not to claim the Debt as a Conſequence of it; and the Court was the rather induced to be of that Opinion, becauſe it appears by the Deviſe over of Part of the Debt to the Wife and Children, it was not the Intent of the Teſtatrix, that the Will ſhould work by Way of Releaſe or Extinguiſhment of the Debt.

Decreed the Plaintiff to be allowed what was deviſed over, and to pay the Reſidue of the Debt to the Executors.

Blagrave

Blagrave verſus *Clunn & ux', & al'.*

Caſe 473. *Decemb.* 11. *Maſter of the Rolls.*

Lands are limited by Marriage-Settlement, upon Failer of Iſſue Male, to the Daughters of the Marriage and their Heirs, until the next Remainder-Man ſhould pay them 3000 *l.* there being *four* Daughters only, they entred. Decreed at the Rolls they ſhould account for the Profits; and that the Rents ſhould be applied firſt to pay the Intereſt, and then to ſink the Principal; as in

Edward Loyd on his Marriage ſettled ſeveral Lands to the Uſe of himſelf for Life, as to Part to his Wife for Jointure, Remainder to firſt and other Sons of that Marriage; and in Default of Iſſue Male, to the Daughter and Daughters of that Marriage, and their Heirs; until the Remainder-Man, to whom the Eſtate was to go, according to the Limitations of that Settlement, ſhould pay and ſatisfy unto the Daughter *three Thouſand Pounds*, Remainder to the Heirs of his Body, *&c.* He had Iſſue a Son by that Marriage, and *four* Daughters. The Son died in the Life-time of *Edward Loyd*, leaving a Daughter: He afterwards ſuffered a Common Recovery, and made a Settlement upon that Marriage, and thereby charged the Premiſſes with other Lands with the raiſing *three Thouſand Pounds* more. The Plaintiffs were Creditors by Judgment, and their Bill was to be let into a Satisfaction, ſubject to thoſe Charges of *three Thouſand Pounds*, and *three Thouſand Pounds*; and in Exoneration thereof, to have an Account of the Rents and Profits.

Caſe of a common Mortgage. Decree affirmed by the *Lord Chancellor*, with this Variation, that the Principal ſhould not be ſunk, till a *third* Part was raiſed above the Intereſt; and ſo again, when another *third* Part was raiſed.

For the Defendants, the Daughters, it was to be conſidered, that they were as Purchaſers under the Marriage-Settlement; and as ſuch were intitled to retain the Poſſeſſion, and to receive the Rents and Profits to their own Uſe without Account, until the Remainder-Man, or thoſe, who had the next Eſtate or Intereſt, ſhould think fit to determine their Eſtate by the Payment of the *three Thouſand Pounds* at one intire Payment.

But the *Maſter* of the *Rolls* decreed the Defendants to account for the Rents and Profits, to be applied in the

the firſt Place to pay the Intereſt of the *three Thouſand Pounds*, and then to ſink the Principal, as in the Caſe of a common Mortgage.

Poſt. Ca. 521. Upon an Appeal to the *Lord Chancellor*, the Decree was affirmed with this Alteration, that the Principal ſhould not be ſunk by ſmall Payments; but when a *third* Part was raiſed beyond all Intereſt then due, it ſhould go to ſink the Principal; and ſo again, when any other *third* Part was raiſed, *&c.*

Caſe 474. *Dec.* 17. *Lord Keeper.*

Comes *Briſtol & al'* Creditors of Sir *William Baſſett* verſus *Hungerford & al'.*

A. in 1687. lends 1000 *l.* to *B.* on a Judgment, at which Time there was a Term of Years attendant on the Inheritance, which had been aſſigned to 3 Truſtees. In 1688, *B.* and one of the Truſtees aſſign the Term to *C.* for ſecuring Money then borrowed of him. *A.* having Notice of this Aſſignment, gets an Aſſignment of the Term from the *two* other Truſtees to *D.* in Truſt for the better ſecuring his 1000 *l.* *A.* ſhall have the Benefit of this Aſſignment, and be paid before *C.*

SIR *William Baſſett* in 1687, borrowed *one Thouſand Pounds* of the Lady *Biddulph* on a Judgment; at that Time there was a Term of *five Hundred* Years kept on Foot, and aſſigned to *Neville*, Lady *Biddulph*, and *Simon Biddulph* to attend the Inheritance. Afterwards in 1688, Sir *William Baſſett*, and *Neville*, one of the *three* Truſtees, aſſigned the Term to *Windham* and *Millington*, for ſecuring *one Thouſand five Hundred Pounds* borrowed of them by way of Mortgage; and afterwards Sir *William Baſſett*, together with the *two* other Truſtees, *viz.* the Lady *Biddulph*, and *Simon Biddulph* aſſign the Term to *Garrett*, in Truſt for the better ſecuring the *one Thouſand Pounds* due to the Lady *Biddulph*.

It was now made a Queſtion, Whether *Windham* and *Millington* ſhould have the Benefit of the whole Term, or only of a *third* Part, there being but *one* of the *three* Truſtees that joined in the Aſſignment; and it was inſiſted,

ſiſted, that although but *one third* Part paſſed, as to the legal Eſtate; yet the *Ceſtuy que Truſt* could make a good Aſſignment in Equity; and the Lady *Biddulph* ought to be bound thereby, becauſe ſhe lent her Money on the Credit of the Judgment, and before the Aſſignment to *Garrett* had Notice of the Aſſignment to *Windham* and *Millington.*

Lord Keeper. Although there is a Term attendant on the Inheritance; yet a Judgment is an equitable Lien on the Inheritance, and conſequently affects the Term; and therefore the Lady *Biddulph* having got the legal Eſtate, as to *two Thirds* of the Term in *Garret*, in Truſt for her ſelf, ſhall have the Benefit thereof, although ſhe had Notice of the Mortgage and Aſſignment made by the *Ceſtuy que Truſt* with one of the Truſtees. And the Mortgage-Term being created in 1679, all meſne Incumbrances were poſt-poned to the Debt of the Lady *Biddulph*, and of *Windham* and *Millington.*

In this Caſe *firſt* decreed at the *Rolls*, Mortgages were to be paid in the firſt Place, and then Judgments, and then Recogniſances, *&c.* but upon an Appeal to the *Lords*, it was adjudged, that Mortgages were not to be preferred to other real Incumbrances: But Mortgages, Judgments, Statutes and Recogniſances, ſhould take Place according to Priority, and as they ſtood in Order of Time.

Mortgages are not to be preferred to other real Incumbrances; but Mortgages, Judgments, Statutes and Recogniſances, ſhall be paid according to Priority.

In this Caſe *Simonds* a *Puiſne* Incumbrancer after the Bill brought, and after the firſt Decree made, and in Truth after the Report, gets an Aſſignment of an old Judgment and Mortgage, hoping thereby to gain a Preference to his Debt.

Per Cur. The Aſſignment obtained by him being after the Decree made, he ſhall not profit by it, or change the Order of Payment; but muſt come in according to the

Time of his own Incumbrance, without Regard to the old Judgment and Mortgage, which he got in after the Decree and Report.

Caſe 475.

Leonard verſus Com' *Suſſex.*

A. deviſes Lands to Truſtees to pay Debts and Legacies, and then to ſettle the Remainder on her Son *B.* and the Heirs of his Body, with Remainders over; and directs, that ſpecial Care ſhould be taken in the Settlement, that it ſhould never be in the Power of her Son to dock the Intail.

THE Counteſs of *Sheppey* (*inter alia*) deviſed her real and perſonal Eſtate to Sir *Charles Cotterell* & *al'*, and their Heirs, for Payment of Debts and Legacies, and afterwards to ſettle the Remainder; and what ſhould remain unſold, a Moiety to her Son *Henry*, and the Heirs of his Body by a *ſecond* Wife; and in Default of ſuch Iſſue, to her Son *Francis*, and the Heirs of his Body; the other Moiety to *Francis* and the Heirs of his Body, with Remainders over; taking ſpecial Care in ſuch Settlement, that it never be in the Power of either of my ſaid Sons, *Francis* or *Henry*, to dock the Intail of either of the ſaid Moieties, given them as aforeſaid, during their, or either of their Life or Lives.

Decreed the Son ſhould be only Tenant for Life, without Impeachment of Waſte, and ſhould not have an Eſtate-Tail conveyed to him.

And whether *Francis* and *Henry* were intitled to have an Eſtate-Tail conveyed to them, or only an Eſtate for Life, was the Queſtion. The Defendant the Lord *Suſſex*, having purchaſed from *Henry*, and his younger Brother, who was the Plaintiff's Father,

The Sons muſt be made only Tenants for Life, and ſhall not have an Eſtate-Tail conveyed to them; but their Eſtate for Life ſhall be without *Impeachment of Waſte:* And *firſt*, becauſe here an Eſtate is not executed, but only executory; and therefore the Intent and Meaning of the Teſtatrix is to be purſued. She has declared her Mind to be, that her Sons ſhould not have it in their Power to bar their Children; which they would have

if an Eſtate-Tail was to be conveyed to them: And took it to be as ſtrong in the Caſe of an executory Deviſe for the Benefit of the Iſſue, as if the like Proviſion had been contained in Marriage-Articles; but had ſhe by her Will deviſed to her Sons an Eſtate-Tail, the Law muſt have taken Place, and they have barred their Iſſue, notwithſtanding any ſubſequent Clauſe or Declaration in the Will, that they ſhould not have Power to dock the Intail.

As to the Account that had been formerly taken in the Cauſe, where *Henry* the Father was Plaintiff againſt the Truſtees; although he was but Tenant for Life, and the now Plaintiff claims not under him, but *paramount* him by the Will; yet the Plaintiff or any Iſſue of *Henry* not being in *Eſſe* at that Time, all Perſons were Parties, that could then be made Parties; and therefore decreed *that* Account to ſtand, and not to be ravelled into.

A. is Tenant for Life of a Truſt, Remainder to his Sons. *A.* before a Son born, brings a Bill againſt the Truſtees, and an Account is decreed, and afterwards taken. This Account ſhall bind the Sons; for all Perſons, that could be made Parties, were Parties in the Suit.

D E

DE
Term. S. Hillarii,
1705.
In CURIA CANCELLARIÆ.

Caſe 476. *Jan.* 25. *Lord Keeper.*

Chadwick & ux' verſus *Doleman* Mil'.

A. by Marriage-Settlement is Tenant for Life, Remainder to Truſtees, to raiſe 4000 *l.* for younger Childrens Portions, as *A.* ſhould appoint; Remainder to his firſt, &c. Sons in Tail. *A.* appoints the 4000 *l.* amongſt his younger Children, and particularly 2600 *l.* thereof to *B.* his *ſecond* Son. The eldeſt Son dies *ſix* Years afterwards, whereby *B.* became eldeſt Son, and intitled to the whole Eſtate after his Father's Death; and thereupon *A.* makes a new Appointment of the 2600 *l.* to one of his Daughters. Decreed the laſt Appointment to take place; the firſt being made to *B.* upon a tacit or implied Condition, that he ſhould not become the eldeſt Son.

SIR *Thomas Doleman*, the Father, on his Marriage ſettled divers Manors and Lands to the Uſe of himſelf for Life; and then, as to Part thereof, to his Wife for her Jointure, Remainder to Truſtees in Truſt, that if there ſhould be both Sons and Daughters of the Marriage, then the Truſtees were within *ſix* Months after his Deceaſe to enter on all, not ſettled in Jointure; and by Profits to raiſe any Sum, not exceeding 2000 *l.* for Payment of Debts, as Sir *Thomas* ſhould appoint; and ſhould alſo raiſe 4000 *l.* for younger Childrens Portions, in ſuch Proportions, as Sir *Thomas* ſhould appoint; and in Default of an Appointment, to be equally divided amongſt them; Remainder to *firſt* and other Sons in Tail.

It

It happened that there being ſeveral younger Children grown up, and of full Age, Sir *Thomas Doleman* in 1686, by Deed appoints the 4000 *l.* in ſeveral Proportions amongſt his younger Children, and particularly the Sum of 2600 *l.* to the Defendant *Thomas*, now Sir *Thomas*, his *ſecond* Son, who was at full Age, and under a Treaty of Marriage at that Time. After this the eldeſt Son, the Defendant's Brother, died without Iſſue, and the Defendant by the Settlement, as *firſt* Son, became intitled to the Whole Eſtate; and thereupon Sir *Thomas*, the Father, made a new Appointment of the 2600 *l.* amongſt his other younger Children; particularly 1600 *l.* Part thereof to his Daughter, the Plaintiff. The Bill therefore was brought by *Chadwick* and his Wife againſt the Defendant Sir *Thomas Doleman*, and the Heir of the ſurviving Truſtee, to have 1600 *l.* raiſed: And the ſingle Queſtion was, Whether the firſt or laſt Appointment ſhould take Place.

For the Defendant it was inſiſted, that Sir *Thomas* by the firſt Appointment had well executed his Power by Deed, without Power of Revocation, and at a proper Time for the doing of it: His younger Children grown up, of full Age, in want to be advanced, and put into the World; and particularly the Defendant at that Time under a Treaty of Marriage, and was capable of taking; and by the Appointment had an Intereſt actually veſted in him, which although payable *in futuro*, and not to be raiſed till after the Death of Sir *Thomas*; yet he might for Support of himſelf and Family mortgage, ſell, or diſpoſe of it, and was in Truth his Subſiſtence for ſeveral Years; there being about the Space of *ſix* Years between the Making the firſt Deed of Appointment, and the Death of the elder Brother; and an Intereſt once veſted, is not eaſily to be deveſted; and there is nothing in the Settlement, which imports, that after an Appointment made it ſhould deveſt, if a younger Son happened

to be the eldeſt and Heir before the Money became payable; but it was ſufficient that he was a younger Son at the Time of the Appointment made, when the Father thought fit to execute his Power, who was the proper Judge, as well of the Time, as of the Manner and Proportions; and having made an abſolute Appointment, without reſerving any Power of Revocation, whereby an Intereſt veſted, it was not to be deveſted without an expreſs Condition or Proviſo for that Purpoſe; and as the Defendant was a younger Brother for near *ſeven* Years after the Appointment made, it might have happened that he might have been ſo for *thirty* or *forty* Years, and might have ſpent his Fortune; and it would have been hard to make him, as Heir, refund what he had ſpent, whilſt a younger Son, and whilſt he had no Benefit of the Eſtate; and therefore that the *firſt* Appointment ought to ſtand: As where there are ſeveral voluntary Conveyances, the *firſt* is to take Place; and ſo it is, where there are ſeveral Appointments made by Deed; and ſo decreed in the Caſe of *Anderſon* and *Halcher*; and ſo held in the Lord *Ormond*'s Caſe, and very lately in the Caſe of *Clavering* and *Clavering*, adjudged upon Appeal to the *Lords* in Parliament, where the Father had made a voluntary Conveyance to the eldeſt Son, and kept the Deed in his own Cuſtody; and *ten* Years afterwards (having as was ſuppoſed) forgot the firſt Deed, made a Conveyance of the ſame Lands to a younger Son; and although he left his eldeſt Son by his Will, another Eſtate of greater Value, which he might have diſpoſed of, as he pleaſed, and gave him great Part of his perſonal Eſtate, ſo that he had much more than an Equivalent; yet the Bill of the younger Son to have the latter Deed eſtabliſhed, was diſmiſſed by the Lord Keeper *Wright*, and the Diſmiſſion affirmed upon an Appeal to the Houſe of *Peers*.

Ant. Ca. 431.

In voluntary Deeds, and voluntary Appointments, the Firſt is to take Place.

The *Lord Keeper* ſaid, he admitted the Authority of the Caſes cited, and agreed the Rule, that of voluntary Deeds, and voluntary Appointments the Firſt is to take Place

Place, as well at Law as in Equity; and likewiſe admitted, that the Defendant, at the Time of the Appointment, was a Perſon capable to take, and was a younger Child within the Power of appointing; but was of Opinion, that this was a defeazable Appointment; (as he was pleaſed to term it) not from any Power of revoking, or upon the Words of the Appointment, but from the Capacity of the Perſon. He was a Perſon capable to take at the Time of the Appointment made, but that was *ſub modo*, and upon a tacit or implied Condition, that he ſhould not afterwards happen to become the eldeſt Son and Heir; ſo that he had as it were only a defeazable Capacity in him, and decreed it for the Plaintiff; and added, that although the Appointment had been made in Conſideration of Marriage, it would have been the ſame Thing.

Lady *Charlotte Orby & al'* verſus Lady *Mohun.*

Caſe 477.

THE late Earl of *Macclesfield* ſettled his *Cheſhire* Eſtate on the Lord *Brandon* his eldeſt Son for Life, and to his firſt and other Sons in Tail, Remainder to his ſecond Son *Fitton Gerrard*, and his firſt and other Sons in Tail, with a Power to the Tenant for Life in Poſſeſſion, to grant Leaſes of all Lands anciently demiſed, reſerving the antient and accuſtomed Rents; and of the other Lands, reſerving the beſt and improved Rents, that could be gotten for the ſame, Remainder to his own right Heirs. Earl *Brandon* the elder Brother being dead without Iſſue, and having deviſed the Reverſion in Fee to the Defendant the Lord *Mohun*: And Earl *Fitton* having

In a Settlement a Power is reſerved to Tenant for Life to make Leaſes of all Lands antiently demiſed, reſerving the antient Rents, and of the other Lands, reſerving the beſt improved Rents. Tenant for Life being ill, and not having the Counter-Parts of the old Leaſes, makes a general Leaſe to his Siſter of all the Lands, *reddend'*, for the Lands that had been let, the antient and accuſtomed Rents, and for the Lands not uſually let, the full and improved Rents and Value thereof. Leaſe adjudged void by the *Lord Keeper* and Lord Chief Juſtice *Trevor*, *contra* the Opinion of Lord Chief Juſtice *Holt*.

ving no Iſſue, and being indiſpoſed in Health, thought fit to execute his Power in Favour of the Plaintiff, the Lady *Charlotte Orby*, and the Dutcheſs of *Hamilton*, the Heirs at Law; but not having the Counter-parts of Leaſes, nor Time to make particular Contracts, by the Advice of Counſel, made one general Leaſe of all his Lands to the Plaintiffs, yielding and paying for the Lands, that had been let, the antient and accuſtomed Rents, and for the Demeſnes and Lands not uſually let, the full and improved Rents and Value thereof, and ſoon after died without Iſſue; and whether this was a good Leaſe within the Power or not, was the principal Queſtion in the Caſe.

And the Settlement being by Way of a Covenant for ſuffering a Common Recovery to the Uſes therein mentioned, which Common Recovery was never ſuffered, but the legal Eſtate reſting in the Truſtees, the Bill was to have the Benefit of the Truſt, ſo far as to make good the Leaſes in the ſame Manner as they would have been at Law, in caſe Earl *Fitton* had had the legal Eſtate in him, inſiſting that the Leaſes ought to be allowed as good in Equity.

And for the Plaintiffs it was inſiſted, It was a Rule in the Execution of Powers, that if a Man exceeds his Power, yet it ſhall ſtand good for what was within his Power; but indeed if he doth not do what was neceſſary in the Execution of his Power, *that* Defect is not to be ſupplied. And this Caſe is not to be compared to the Caſe of a Biſhop's Leaſe, or Caſes on the *diſabling* Statutes; but rather to Caſes on the *enabling* Statutes; and as Leaſes are held ſtrictly to the Letter in the one Caſe, ſo the Expoſition is always liberal and favourable in the other Caſe; and as Authorities, cited the Caſe in *Dyer*, A Demiſe of *three* ſeveral Things, with *three* ſeveral *red-*
Moor 199. *dendums*, and held good. *Knight*'s Caſe, and *Ayre*'s Caſe in *Moor* 51. *Tanfield* and *Rogers*, *Cr. Eliz.* 340. Demiſe by Tenant

Tenant in Tail of Lands uſually demiſed, and of Lands not uſually demiſed, *reddend'* for the Lands uſually demiſed, the antient and accuſtomed Rent, and for the Lands not uſually demiſed the beſt improved Rent: Held to be a good Leaſe. *Cook Litt. fol.* 45. A Leaſe for ſuch Number of Years as *J. S.* ſhall name, is a good Leaſe.

Lewſon and *Piggott*'s Caſe in *B. R.* Power to Leaſe for *Twenty-one* Years, or *three* Lives, ſo as 12 *s. per Ann.* Rent be reſerved. Leaſe of all within his Power to let, paying the Rent intended to be reſerved by the Power, and held to be a good Leaſe; though neither the Lands, nor the Rent ſpecified or mentioned in certain. *Venables*'s Caſe, held that the Leaſe good for Lands for which Rent was reſerved, and void only for thoſe, for which no Rent was reſerved; and there an Averment neceſſary, and allowed, how many *Cheſhire* Acres reſerved in the Leaſe, *Audley* verſus *Audley*, A Leaſe rendring *two* Thirds of the full improved Value, held good. 11 *Rep.* Dr. *Grant*'s Caſe, A *Modus* of 2 *s.* in the Pound of the full improved Value held to be good. Fol. 15. b.

3 *Lev.* 255. Cuſtom for a Fine of Copyhold at a Year's improved Value held good; and cited *Plowd. Com.* where many relative Clauſes are allowed to be good upon the *Maxim*, that *certum eſt quod certum reddi poteſt*; and in Letters Patent the uſual Clauſe *tot tanta & talia* allowed good, though not appearing in the Grant what thoſe Franchiſes and Royalties were: And it was not difficult to know what the antient Rent is; for it is but looking into the laſt Leaſe, according to the Reſolution in the Caſe of *Morries* and *Antrobus*, in *Hardres*'s Reports, the Rent reſerved in the laſt Leaſe ſhall be preſumed to be the antient Rent. Fol. 325.

And as to the Caſe of *Owen* and *Thomas ap Rees*, in *Crook Ch.* *that* Report is of no Authority, becauſe it puts not the Caſe, but abruptly relates the Opinion of the Judges: And the Caſe of *Thredneedle* and *Lynham*, Fol. 94. 1 Mod. 203.

Lynham, Lord Chief Juſtice *Vaughan* takes Notice of that Caſe in *Crook*, and that it went off upon another Point, *viz.* for want of Excepting out of general Words Lands, that had been excepted in former Leaſes; ſo more Lands then uſually demiſed, for the ſame Rent, as when leſs was demiſed, and ſo fell within the Rules of Lord
5 Co. 3. b. *Mountjoy*'s Caſe.

On the other Hand, for the Defendant it was inſiſted, that in this Leaſe the Leſſor had not well purſued the Power, nor was the Leaſe within the Purview or Intent of it; which was to give a Power of Leaſing in a reaſonable Manner, as Leaſes fell in; and for keeping of the Eſtate tenanted, in like Manner as an Owner of an Eſtate would be ſuppoſed to do: But here is no Contract or Agreement with any Tenant, but a general Leaſe made of all, as well what was uſually demiſed, as not, to the Plaintiff, to the Intent he might have the Benefit of granting Leaſes, and of putting the Power more particularly in Execution; ſo that in Truth, it was rather a delegating the Power of Leaſing to the Plaintiffs, than an Execution of the Power, and *delegatus non poteſt delegare.* And ſhould ſuch general Leaſing be allowed, it would put the Remainder-Man, or Reverſioner under great Difficulties, as well to find out what Lands had been uſually demiſed, and what had not; as alſo to know what Rent he was to demand, how to diſtrain or avow; and beſides, had the Rent been particularly reſerved in the Leaſe, the Tenant ſhould have been obliged to have paid, whether it had been the antient Rent or not; and there might have been an Action of Debt or Covenant brought againſt him: And the Intent of the Settlement was, that as the Tenant in Poſſeſſion ſhould have a Power of Leaſing, ſo on the other Hand, that the Revenue ſhould not be leſſened; but that the Remainder-Man or Reverſioner ſhould be ſure of his Rent, and have it effectually reſerved, and ſecured to him in the moſt eaſy and beneficial Manner; and relied on the Caſe of *Owen*

and *App Rees* in *Crook*, and that in *Thredneedle* and *Lynham*'s Caſe, the Lord *Vaughan* allowed of *that* Authority as reported by *Crook*, and the Matter of the Omiſſion of the Exception not material.

Vide infra Leaſe held not to be good. *Poſt.* Ca. 485.

Gore verſus *Knight.*

Caſe 478.
Lord Keeper.

THE Lady *Gore*, the Plaintiff's Mother, upon her Marriage with Sir *John Knight* having reſerved to her ſelf a Power by Deed or Will to diſpoſe of her perſonal Eſtate, and Rents and Profits of her real Eſtate, made her Will, and deviſed to the Plaintiff ſeveral Securities for Money and her perſonal Eſtate. Sir *John Knight* objected, ſhe had diſpoſed of ſeveral Mortgages, *&c.* that did not appear to be any Part of the Eſtate, ſhe had ſo reſerved a Power over.

Where a Woman on her Marriage reſerves a Power to diſpoſe of her perſonal Eſtate, all that ſhe dies poſſeſſed of is to be taken to be her ſeparate Eſtate, or the Produce of it; unleſs the Contrary can be made appear; and as ſhe has Power over the Principal, ſhe may diſpoſe of the Intereſt.

Lord Keeper. It appears not, that any other Eſtate came afterwards to the Lady; and therefore what ſhe died poſſeſſed of is to be taken to be the ſeparate Eſtate, or the Produce of it, unleſs the contrary had been made appear; and as ſhe had a Power over the Principal, ſhe conſequently had it over the Produce of it; for the *Sprout* is to favour of the *Root*, and to go the ſame Way.

Ramſden

Caſe 479. *Feb.* 5. *Lord Keeper.*

Ramſden verſus *Langley, & econtra.*

Mortgagee having been at great Charges to defend a Suit at Law, brought by the Heir of the Mortgagor, who endeavoured to defeat the Mortgage by an Intail, but could not prevail; upon a Bill afterwards brought by the Heir to redeem, the Mortgagee allowed his full Coſts expended in that Suit, and not tied down to the Coſts taxed.

THE Plaintiff by his Guardian having endeavoured to overthrow the Mortgage by a ſuppoſed Intail; and after a ſpecial Verdict, and great Agitation at Law, the Mortgagee having prevailed, the Plaintiff now brought his Bill to redeem.

Allowed alſo his Coſts in taking out Adminiſtration to the Mortgagor, as principal Creditor.

And the Mortgagee having ſworn he paid and expended above 120 *l.* in defending his Mortgage at Law, although he had but 60 *l.* Coſts allowed him there, *per Cur.* ſhall not be held down to the Taxation at Law, but ſhall upon the Account be allowed all he laid out, or expended. And the Mortgagee fearing his Mortgage would have been defeated at Law, got Adminiſtration as principal Creditor in the Spiritual Court, *per Cur.* ſhall be allowed the Coſts expended there alſo.

Caſe 480. *Feb.* 9. *Lord Keeper.*

Sweetapple verſus *Bindon.*

A. deviſed 300 *l.* to be laid out in Land, and ſettled to the Uſe of his Daughter and her Children, and if ſhe died without Iſſue, to go over. She married B. and had a Child by him, and ſhe and the Child being dead, and the Money not laid out; on a Bill brought by B. decreed the Money to be conſidered as Land, and the Plaintiff to be Tenant by the *Courteſy*.

W. B. deviſed 300 *l.* to her Daughter *Mary*, to be laid out by her Executrix in Lands, and ſettled to the only Uſe of her Daughter *Mary* and her Children; and if ſhe died without Iſſue, the Lands to be equally divided between her Brothers and Siſters then living. The Plaintiff married *Mary* the Legatee, and had Iſſue by her; but ſhe and her Child being both dead, and the Money not laid out in Land, the Bill was, that the Plaintiff might either have the Money laid out in Lands, and

and ſettled on him for Life, as being Tenant by the *Courteſy*, or in Lieu of the Profits of the Lands might have the Intereſt of the Money during his Life.

Per Cur. If it had been an immediate Deviſe of Land, *Mary* the Daughter would have been, by the Words in the Will, Tenant in Tail, and conſequently the Husband would have been Tenant by the *Courteſy*; and in the Caſe of a voluntary Deviſe, the Court muſt take it as they found it, and not leſſen the Eſtate or Benefit of the Legatee; although upon the like Words in Marriage-Articles it might be otherwiſe, where it appeared the Eſtate was intended to be preſerved for the Benefit of the Iſſue; and therefore decreed the Money to be conſidered as Lands, and the Plaintiff to have the Intereſt, or Proceed thereof, for his Life, as Tenant by the *Courteſy*.

Naſh verſus Com' *Derby*, & *econtra*. Caſe 481.

THE Defendant, the Earl of *Derby*, married one of the Daughters and Coheirs of Sir *William Morley*, and in her Right became intitled to the Manor of *Borgrave* in *Suſſex*. The Plaintiff held *two* Copyholds within the Manor, and had cut down Timber on the one, to repair the Tenements on the other; and pretended there was a Cuſtom within the Manor, that he might ſo do, the Timber being aſſigned and ſet out by *two* of the cuſtomary Tenants of the Manor. An Ejectment was brought, as ſuppoſing this to be voluntary Waſte and a Forfeiture; upon the *firſt* Trial a Verdict againſt the Lord; but upon a new Trial a Verdict againſt the pretended Cuſtom. The Bill was to be relieved againſt the Forfeiture.

A. having 2 Copyholds held of the Manor of *B.* cuts Timber on the one, and employs it in repairing the other. After a Verdict on an Ejectment by the Lord for the Forfeiture, *A.* brings a Bill and is relieved; but ordered to pay Coſts at Law and in Equity.

It was admitted that by the Cuſtom of the Manor, that when Timber was wanting on one Copyhold Te-

nement, the Lord by his Woodward or Bailiff might aſſign Timber for Repairs on any of the other Copyhold Eſtates; but here they were ſetting up a Cuſtom for *two* of the Tenants to aſſign to a *Third*, which might be prejudicial to the Lord; and more Timber might, by that Means, be cut than was neceſſary, and thriving Timber, when there might be found enough of that which was decaying, fit for Repairs. It was alſo admitted that the Timber was but of ſmall Value, and all of it imployed in Repairs upon the Copyhold.

The *Lord Keeper* relieved the Plaintiff againſt the Forfeiture; but decreed him to pay the Coſts of both the Trials at Law, and the Coſts of this Suit.

Caſe 482. *Feb.* 26. *Lord Keeper.*

Gayre verſus *Gayre* and *North & al'.*

A. deviſes to *B.* all his Goods and Furniture in his Houſe, except his Pictures, which he gives to *C.* Pictures in Boxes, as well as what were hung up in the Houſe, will paſs to *C.* and ſo will Pictures bought after the Making of Will.

SIR *Robert Gayre* deviſed his Houſe in St. *Jermin* Street, and all his Goods and Furniture therein, to his Lady for Life, and after her Deceaſe, to his Son *Robert* and his Heirs, except the Pictures, which he thereby gave to his Sons *James* and *Edward*, the Teſtator having Pictures hung up in the Houſe, and likewiſe Pictures in Boxes; and it appeared by Proofs in the Cauſe, that he had Skill in Pictures, and frequently bought Pictures and ſold them again.

Lord Keeper. The Pictures paſs not by the Deviſe to the Lady *Gayre*, but the Exception of the Pictures ſhall extend as well to the Pictures hung up as Furniture, as to thoſe in Boxes; and as well to thoſe in the Houſe at the Time of the Will, as to thoſe brought in after the Will made.

Altho'

Although the Caſe in *Swinbourne* 418. was cited, where the Deviſe of Goods in a Houſe ſhall paſs only what the Teſtator then had in the Houſe.

Baldwin verſus *Billingſley.*

Caſe 485. *Feb.* 26. *Lord Keeper.*

MRS. *Sharpe* by her Will deviſed 200 *l.* to Sir *Ambroſe Phillips* and *Thomas Parker*, in Truſt for the ſeparate Uſe of her Daughter *Billingſley* and her Children. In 1691, the 200 *l.* was lent to *Charles Baldwin*, who became Bound for the ſame to Sir *Ambroſe Phillips* and *Thomas Parker*. In 1695, *Charles Baldwin* truſts *Parker* to receive 100 *l.* for him from *Singleton*, and afterwards ſtates an Account with him, and takes a Receipt from *Thomas Parker*, as for ſo much received by him upon the Account of Mrs. *Billingſley*; but gave no Notice thereof to Mrs. *Billingſley* until 1699, when *Thomas Parker* became inſolvent and abſconded.

A. and *B.* being Truſtees of Money for the ſeparate Uſe of a Feme Covert, lend it to *C.* who gives Bond to the Truſtees, and the Truſt is declared in the Condition. The Bond is kept by the Feme, and *B.* having received Money for *C.* they ſettle an Account, and *B.* gives *C.* a Receipt for 100 *l.* as received for the Uſe of the Feme. *B.* becomes inſolvent. Whether *C.* is well diſcharged of this 100 *l.*

The Queſtion was, Whether the Plaintiff ſhould be allowed *that* 100 *l.* as well paid to *Parker* for the Uſe of Mrs. *Billingſley*, who always kept and had the Bond in her Hands.

Mr. *Baldwin* by Letters owned that he had intruſted *Parker* to receive and pay Monies for him, and complained that he had been drawn in by *Parker*; and ſeemed to admit that he ſhould be obliged to make Mrs. *Billingſley* Satisfaction.

Lord Keeper. This is a Caſe of unuſual Circumſtances, as here is a Power in *Parker* a Truſtee to receive and pay, to call in, and to put out; but the Truſt being particularly

ticularly taken Notice of in the Condition of the Bond, Mr. *Baldwin* ought to have been cautious how he paid the Money; it being in Equity the Money of *Billingſley*, as much as if the Bond had been aſſigned to her; and Payment to the Obligee after Notice of an Aſſignment is not good: In the Caſe of an Aſſignment of a Bond the Aſſignee alone becomes intitled to receive the Money: But here in this Caſe *Parker* remains a Truſtee ſtill, and might have received, in Caſe he had had the Bond; but having delivered over the Bond to Mrs. *Billingſley*, *Parker* had diſmiſſed himſelf of the Truſt, and put it altogether in her Power to receive, *&c.* and therefore the Payment afterwards to *Parker*, without ſeeing the Bond, was not a good Payment; and it is plain Mr. *Baldwin* was conſcious to himſelf, that the Payment would not be allowed him; and therefore never mentioned nor took Notice of it until 1699, when *Parker* was failed.

Payment to the Obligee, after Notice of an Aſſignment of the Bond, is not good.

Caſe 484.

Duplein verſus *De Roven.*

If a Man recovers a Judgment or Sentence in *France*, for Money due to him, the Debt muſt be conſidered here only as a Debt on ſimple Contract, and the Statute of Limitations will run upon it.

PLaintiff and Defendants Inteſtate were Merchants at *Lyons* in *France*. The Plaintiff recovered a Judgment, or Sentence there, againſt the Inteſtate; and afterwards the Inteſtate failing, compounded for a leſſer Sum, for which in 1676, he gave a Note, as for ſo much due upon an Account ſtated; but before any Payment or Satisfaction, the Inteſtate fled out of *France*, and at the *Indies* acquired a conſiderable Eſtate; and about *four* Years before the Bill exhibited died Inteſtate. The Defendant took Adminiſtration to him, and lately had conſiderable Effects come to his Hands. The Bill was for a Diſcovery of Aſſets, and Satisfaction of the Plaintiff's Debt.

The Defendant pleaded the Statute of Limitations.

Per Lord Keeper. Although the Plaintiff obtained a Judgment or Sentence in *France*, yet here the Debt muſt be conſidered as a Debt by ſimple Contract. The Plaintiff can maintain no Action here, but an *indebitatus Aſſumpſit*, or an *inſimul computaſſet*, &c. ſo that the Statute of Limitations is pleadable in this Caſe; and although both Parties were Foreigners, and reſided beyond Sea, *that* will not help the Plaintiff. The Statute provides, where the Party Plaintiff, he who carries the Action about him, goes beyond Sea; his Right ſhall be ſaved; but when the Debtor or Party Defendant goes beyond Sea, there is no Saving in that Caſe. It is plauſible and reaſonable, that the Statute of Limitations ſhould not take Place, nor the *ſix* Years be running, until the Parties come within the Cogniſance of the Laws of *England*; but that muſt be left to the Legiſlature.

The Statute of Limitations provides, where the Party to whom a Debt is owing, goes beyond Sea, but not where the Debtor is beyond the Seas.

DE
Termino Paſchæ.

1706.

In CURIA CANCELLARIÆ.

Caſe 485. *April* 15. *Lord Keeper, Lord Chief Juſtice* Holt, *Lord Ch. Juſtice* Trevor. *Ant.* Ca. 477.

Orby verſus Lord *Mohun, & econtra.*

LORD Chief Juſtice *Holt* differed in Opinion from the Lord Chief Juſtice *Trevor*, and from the *Lord Keeper*, and held that the Leaſe was good, and the Rent certain enough. It muſt be admitted that a Power to leaſe, reſerving the ancient Rent, is a certain Power, and well enough to be underſtood, what it is, and what it means; and why ſhall the ſame Words, that create and reduce the Power to a ſufficient Certainty, when turned into a Leaſe, render it uncertain? The ſame Certainty, that is in the Power, is carried over into the Leaſe, which is the Execution of it; but neither in the one or the other, is it mentioned what the old Rent is; but
8 Co. 69. b. that lies in an Averment, as 'tis held in *Whitlock*'s Caſe. And that is certain, which may be made Cer-
9 Co. 30. a. tain. In the Caſe of the *Abbot of Strata Marcella*, Reference to a former Grant the ſame, as if former Letters Patent had been recited. A Leaſe reſerving the Rents and Services *inde prius debita & de Jure conſueta*, is a good
Fol. 6. a. Reſervation. Sir *John Mollyns*'s Caſe, 6 *Rep. That* ſhall

be deemed the ancient Rent, which was the Rent at the Time the Power was reſerved, or when the laſt Leaſe before was made, if the Eſtate was not then under Leaſe, *Hardreſs*'s Reports, *Morris* and *Antrobus*. The Word Ancient is not uſed in reſpect to the Time paſt, but in Reſpect of the Leaſes to be after made. Fol. 325

If a Dean and Chapter have once increaſed their Rent they can never go back, becauſe the Statute reſtrains it. But Tenant in Fee has an abſolute Power to diminiſh, ſo that the laſt Rent, before the Creation of the Power, is to be deemed the ancient Rent; and altho' all is compriſed in one Leaſe, it is the ſame, as if it had been in ſeveral. *Knight*'s Caſe, and *Winter*'s Caſe, there may be ſeveral Reſervations in one Leaſe. If the Demiſe be joint; yet if ſeveral Reſervations, they ſhall be taken to be ſeveral, 5 *Rep*, *fol.* 7. Juſtice *Windham*'s Caſe. A Leaſe for *forty* Years, to commence after the Expiration of *two* former Leaſes, which end at different Times. When the *firſt* Leaſe expires, it ſhall commence as to that Part; but here in the granting Part, it is ſaid ſeverally and diſtinctly, and not jointly, 6 *Rep.* Sir *Edward Clere*'s Caſe, and the Caſe of *Kibbet* and *Lee*, *Hob.* 312. what is void, as a Deed or Will, may be a good Appointment, or Execution of a Power; and therefore in his Opinion the Leaſe, as to the Lands anciently demiſed, was a good Leaſe; although not as to the Demeſnes, and Lands not uſually demiſed; nothing being more uncertain than what is the beſt improved Rent. 5 Co. 55. b. Dyer 308. b. 6 Co. 17. b.

But the *Lord Keeper*, and Lord Chief Juſtice *Trevor* were of Opinion, that the Leaſe was void. As to the Lands not uſually demiſed, *that* was given up; the Remainder-Man could not tell what Rent to demand; and it is in great Meaſure in the ſame Uncertainty as to the Lands uſually demiſed, and of the Rent payable for them. As the Intent of the Settlement was, that the Tenant for Life in Poſſeſſion might leaſe; ſo it was on the other Hand,

Hand, that the Revenue ſhould not be diminiſhed; but the ancient Rent at leaſt reſerved, and in ſuch beneficial Manner, as might with Certainty, and without any Difficulty be recovered; and for that Reaſon it is provided, that there ſhould be a Counter-part of the Leaſe, that it might the better be known what the Rent was, and how to recover it. If the Rent had been mentioned in the Leaſe, there if the Tenant had refuſed to pay it, the Proof would have been turned upon the Tenant, to ſhew the Rent in his Leaſe was not the ancient Rent, and if he ſhould do ſo, it would make his Leaſe void. But as this Leaſe is contrived, the Remainder-Man might be baffled and nonſuited *twenty* Times, before he could declare or avow in Certain, for the Rent payable in the Leaſe; and yet the Tenant ſtill holds the Land, and doth not prove his own Leaſe void, as muſt have been done in the other Caſe. All beneficial Clauſes and Reſervations ought to be obſerved. In the Lord *Mountjoy*'s Caſe, if the Rent was anciently reſerved Quarterly, and now is reſerved Half-yearly, the Leaſe is void; if Silver inſtead of Gold; if two Farms, formerly let at 10 *l.* each, are both demiſed at 20 *l. per Ann.* not good.

The Queſtion here is not, Whether the Leaſe is void for Incertainty, as between the Leſſor and Leſſee; but whether all Requiſites are obſerved, and ſuch beneficial Clauſes and Reſervations, as ought to have been for the Benefit of a third Perſon, the Remainder-Man. Where there is a Power of Leaſing in general Words, as reſerving the antient Rent; in the Execution of the Power which is to be explained and made certain, the Rule, *certum eſt quod certum reddi poteſt*, is to be underſtood of a Reffe-rence to that which is abſolutely certain, as to former Letters Patent or the like; but this is rather a Delegating the Power of Leaſing to the Plaintiff, than an Execution of the Power, and is the firſt Attempt of the Kind; and it is a good Rule, that what never has been ought never to be; and therefore adjudged the Leaſe to be void.

Cook verſus *Cook.*

Caſe 494.
April 17.
Lord Keeper.

A Deviſe to the Iſſue of *J. S.* who then had a Daughter living, and afterwards had a Son born. The Queſtion was, who ſhall take, and what Eſtate.

A Deviſe to the Iſſue of *J. S.* who had a Daughter living, and afterwards a Son born.

All the Children ſhall take, and even Grandchildren, if there were any. But they ſhall only take an Eſtate for their Lives.

Lord Keeper. All the Children ſhall take, and even Grandchildren, if there had been any; but they ſhall take only an Eſtate for Life: And although the Deviſe is to the Iſſue begotten, *that* makes no Difference: The Words, *begotten and to be begotten*, are the ſame, as well upon Conſtruction of Wills, as Settlements, and take in all the Iſſue after begotten. And although upon the Death of the Teſtator, there was then only a Daughter born; yet upon the Birth of another Child, the Eſtate ſhall open, and take in the after-born Son. A Deviſe to *J. S.* and his Children: If he hath Children, they take with their Father; but if he hath no Child, it is an Eſtate-Tail. A Deviſe to a Man and his Children of a perſonal Eſtate. A Child born after the Death of the Teſtator, ſhall not take; for it veſted upon the Death of the Teſtator, and ſhall not be deveſted. A Deviſe to the Teſtator's *two* Daughters, and the Heirs of their Bodies: The Rule of Law is, it is a Joint-Eſtate for Life, and ſeveral Inheritances; but the Teſtator never meant that the ſurviving Daughter ſhould turn out the Iſſue of her deceaſed Siſter, and that was the Point upon the Appeal in *Wilkinſon* and *Spearman*, where the Lords inclined for the Appellant; yet the Judges all agreeing that the Law was ſo ſettled, the Lords would not alter it. A Deviſe to the Teſtator's *two* Daughters and their Iſſue,

The Words, begotten and to be begotten, are the ſame, as well upon Conſtruction of Wills.

A Deviſe to *J. S.* and his Children: If he has Children, they take with their Father; but if he has none, it is an Eſtate-Tail.

A Deviſe to a Man and his Children of his perſonal Eſtate. A Child born after the Death of the Teſtator ſhall not take.

A Deviſe to *two*, and the Heirs of their Bodies. It is a Joint-Eſtate for Life, and ſeveral Inheritances; and ſo it is, if there is a Deviſe over: But if there is a Deviſe over, and one of them dies without Iſſue, a Moiety ſhall go over to the Remainder-Man.

Iſſue, and in Default of ſuch Iſſue to *J. S.* they have a Joint-Eſtate for Life, and ſeveral Inheritances; if one of the Daughters dies without Iſſue, there ſhall not be croſs Remainders; but her Moiety ſhall go over to the Remainder-Man upon the Death of the Daughter, for want of ſuch Iſſue, *i. e.* ſuch reſpective Iſſue. A Deviſe to the Iſſue of *B.* and for want of ſuch Iſſue to *C.* *B.* having a Son and a Daughter, they ſhall take only as Perſons deſcribed, and have only an Eſtate for Life; although the ſubſequent Words, for want of ſuch Iſſue, ſeem to imply an Eſtate-Tail: But then there muſt be a double Uſe made of the Word Iſſue, *viz. Firſt*, it is a Word of Implication, who were the Perſons to take. *Secondly*, As Words of Limitation to make an Intail, which is not to be admitted.

A Deviſe to the Iſſue of *A.* and for want of ſuch Iſſue to *B.* *A.* has a Son and a Daughter. They ſhall take as Perſons deſcribed; but ſhall take only an Eſtate for their Lives.

In the Caſe of *Chute* and *Parker*, or *Tilt* and *Parker*. A Deviſe to the Son for Life, and to his firſt and other Sons in Tail; and, for want of ſuch Iſſue, to his Daughter *Parker*. It was made a Queſtion whether thoſe laſt Words, *for want of ſuch Iſſue*, gave the Son an Eſtate-Tail by Implication. The Matter ended by Compromiſe; but the ſame Queſtion came afterwards in Judgment, in the Caſe of *Popham* and *Bampfield*; and adjudged that the Deviſee having an expreſs Eſtate for Life, it could not be inlarged, nor he take an Eſtate-Tail by Implication.

1 Salk. 236.

Caſe 495. ## *Townſhend & al* verſus *Windham* and *Robinſon.*

A. deviſes a Year's Wages to ſuch of his Servants, as ſhall be living with him at his Death. Stewards of Courts, or ſuch as are not obliged to ſpend their whole Time with their Maſter, are not within the Words of this Deviſe.

THE Duke of *Bolton* by his Will deviſed in theſe Words, *viz. Item, I give and bequeath unto ſuch of my Servants, as ſhall be living with me at the Time of my Death, one Year's Wages.*

Lord Keeper. Steward of Courts, and ſuch who are not obliged to ſpend their whole Time with their Maſter, but may alſo ſerve any other Maſter, are not Servants within the Intention of the Will: But I will not narrow it to ſuch Servants only, that lived in the Teſtator's Houſe, or had Diet from him.

But it ſhall not be reſtrained to ſuch Servants only, as lived in the Teſtator's Houſe, or had Diet from him.

Hill & ux' verſus *Wiggett.*

Caſe 496. *Apr.* 20. *Lord Keeper.*

AN Entry in the Steward's Book, and a parol Proof by the Foreman of the Jury, admitted as good Evidence, that a Feme Covert ſurrendred her whole Eſtate; although the Surrender upon the Roll, and the Admiſſion thereon, was but of a Moiety.

An Entry in the Book of the Steward of a Manor, and a parol Proof by the Foreman of the Jury, allowed as good Evidence againſt an Entry on the Roll, and an Admiſſion thereon.

Colwall verſus *Bonython Longeville & al'.*

Caſe 497. *Eodem die, Lord Keeper.*

Colwall the Teſtator on his Marriage with *Lucy Ramſey*, was intitled to her Portion of 8000 *l.* in the Chamber of *London*; but a Stop being put to Payment there, and the Credit of the Chamber failed; he by Will declared, that when his Executors ſhould have received his Wife's Portion, He gave 2000 *l.* to the *three* Hoſpitals, *viz. Chriſt*'s Hoſpital, St. *Bartholomew*'s, and St. *Thomas*'s; it fell out that 8000 *l.* in the Chamber of *London*, was worth but 6300 *l.* to be ſold.

A. is intitled to 8000 *l.* in the Chamber of *London*, and whilſt a Stop was put to Payment there, he makes his Will, and declares that when his Executors ſhould receive the 8000 *l.* he gives 2000 *l.* to *three* Hoſpitals.

Afterwards an Act paſſed for ſettling a Fund for paying a perpetual Intereſt for the Orphans Debt, and the 8000 *l.* is then worth to be ſold but 6300 *l.* yet decreed the whole 2000 *l.* to be paid.

The Queſtion was, Whether the 2000 *l.* ſhould be all paid, or there ſhould be an Abatement in Proportion. It

was

was inſiſted upon for the Hoſpitals, that from the paſſing of the Act of Parliament in 1693, which ſettles the Orphans Fund and gives a perpetual Intereſt, the Portion ought to be looked upon as recovered, and the 2000 *l.* ought to be paid.

Lord Keeper. This is not called a Compoſition by the Act of Parliament, but intended a Satisfaction; and the Deviſe is not of 2000 *l.* Part of the Debt of 8000 *l.* but a Charge upon the Whole; and if the Debt had increaſed, and been 10000 *l.* yet the Legacy was not to increaſe; neither now when it is of leſs Value is the Legacy to be reduced; and decreed the Payment of the 2000 *l.*

Caſe 498.
Apr. 22.
Lord Keeper.

Lee verſus *Lee.*

Although a Truſtee is not directed to put Money out at Intereſt; yet if he makes Intereſt, he ſhall account for it.

Lord Keeper. Although a Truſtee, or Executor, is not impowered or directed to place out Intereſt; yet where he makes Intereſt, he ſhall be accountable for it; and decreed it accordingly.

Caſe 499.
Apr. 24.
Lord Keeper.

Clare verſus *Wordell.*

A Deviſee may bring an original Bill in Nature of a Bill of Revivor, and ſhall have the ſame Advantage of a Decree, as an Heir or Executor, and the Defendant is not at Liberty to make a new Defence. *Poſt.* Caſe 599.

A Deviſee brings an original Bill in the Nature of a Bill of Revivor. The Queſtion was, Whether the Defendant ſhould be at Liberty to make a new Defence.

Lord Keeper. Where the Bill, altho' original, is only to ſupply the Want of Privity, and in all other Matters but as a Bill of Revivor, I think the Decree ought to be carried on in the ſame Manner, as it would have been upon

upon a Bill of Revivor, if the Plaintiff had claimed in Privity. There is no Reaſon why the Deviſee ſhould not have the ſame Advantage of the Decree, as an Heir or Executor, without entring again into the Merits of the Cauſe; and the Decree ought to be neither longer or ſhorter than the firſt Decree.

Attorney General verſus *Hesketh Scarisbrick* and *Sadel.*

Caſe 500. *Apr.* 26.

Hesketh had mortgaged the Manor and Advowſon of *Aughton* in *Cheſhire*, firſt to the Lord *Rivers*, and by Aſſignment to *Scarisbrick*, who for Non-payment of the Intereſt had brought an Ejectment, recovered Judgment, and by Conſent of *Hesketh* had Poſſeſſion. After this the Church became void, and *Hesketh* preſented one *Butterworth* upon a Simoniacal Contract; the Biſhop having Notice of it rejected it. Then the Defendant *Sudell* applies, and has a Preſentation from *Hesketh*, and is inſtituted and inducted; and afterwards being informed that ſome Objection might be made to his Title, by Reaſon that *Butterworth* was Simoniacally preſented: He ſurrendered the Church to the Biſhop, and took a new Preſentation both from *Hesketh* and *Scarisbrick*, *&c.* *Hinley* gets the *Queen*'s Title, and brings the Information in the Attorney General's Name, to remove the Title of the Mortgagee, that he might not be prevented and obſtructed in his Suit at Law by the Preſentation from him, or his Title being given in Evidence.

Mortgagee of a Manor and Advowſon being in Poſſeſſion, the Church becomes vacant. The Mortgagor makes a ſimoniacal Preſentation of *A.* which is rejected by the Biſhop. Then the Mortgagor and Mortgagee join in preſenting *B C.* gets the Title of the Crown; and brings an Information in the Name of the Attorney General, to remove the Mortgagee's Title, and that it might not be ſet up at Law; and it was ſo decreed. *Ant.* Caſe 370.

Lord Keeper. This is the firſt Caſe of the Kind in all its Circumſtances; the firſt Preſentation was Simoniacal, and waived by *Butterworth*, who durſt not ſtand the Teſt of it. The criminal Patron preſents *Sudell*, who hearing of the *Queen*'s Title, to eſtabliſh himſelf and his Poſſeſſion, ſurrenders and gets both the Mortga-

gor and Mortgagee to join in a new Preſentation; and if this Contrivance ſhould prevail, it would totally fruſtrate the Act of Parliament, that excellent Law; for then every Patron might convey to a Truſtee, and then make ſimoniacal Contracts; and if diſcovered and found out, then to prevent the *Queen*'s Title, might ſet up the Title of his Truſtee.

It is objected that *Sudell* is innocent, had no Notice when he was firſt preſented, has a legal Title, and therefore not to be impeached or prejudiced, or any Defence at Law taken from him in Equity. Although *Sudell* be acquitted of the Simony, yet he is Partaker of the Fraud to ſet up the Mortgagee's Title in Oppoſition to the Queen's, and is not only *Particeps*, but the Principal in it, and the Contriver of it; and the late Act of Parliament hath ſet the Bounds, that an innocent Incumbent ſhall not ſuffer, where the Simoniack died in Poſſeſſion; but it is not to be carried further; and this Caſe therefore not within the Proviſion of the Act of Parliament.

The Mortgagee is but a Truſtee for the Mortgagor, until the Equity of Redemption is releaſed or forecloſed; and accordingly he inſiſts not upon his Preſentation, as having preſented in his own Right, but at the Nomination of the Mortgagor; and there is no Reaſon therefore, that it ſhould be ſet up againſt the *Queen*'s Title; and the rather alſo, becauſe it doth not appear the *Queen* had any Notice of the Mortgage, ſo as ſhe might bring a Bill to prevent the Mortgagee's Preſenting; and beſides no Laches incur to prejudice the Title of the *Crown*. And a Court of Equity ought the rather to remove the Impediment, becauſe the Obſtruction ariſes from a Creature of Equity. The Court, that ſupports Truſts, will prevent Truſts from doing Miſchief, and that they ſhall not be made uſe of to protect Simony; and therefore decree the Mortgagee's Right of preſenting to be ſet aſide, and not given in Evidence at Law.

Legatt verſus *Sewell & ux'* and *Weller.*

Caſe 501. *Apr.* 21. *Lord Keeper,*

A Deviſe to *A.* for Life, he paying 200 *l.* a-piece to his 2 Siſters, and after his Deceaſe to the Heirs Male of the Body of *A.* and the Heirs Male of the Body of every ſuch Heir Male, ſeverally and ſucceſſively, as they ſhall be in Priority of Birth, and Seniority of Age, Remainder over. Whether *A.* is Tenant in Tail, or for Life only.

George Legatt by his Will in 1685, after Payment of his Debts, Legacies and Funerals, directed the Defendant *Weller* to lay out and inveſt the Reſidue and Surplus of his perſonal Eſtate in Lands, and to ſettle and intail the ſame on *William Legatt* for Life, he paying 200 *l.* a-piece to his *two* Siſters, *and after his Deceaſe to the Heirs Male of the Body of his ſaid Nephew* William Legatt, *and the Heirs Male of the Body of every ſuch Heir Male, ſeverally and ſucceſſively, as they ſhould be in Priority of Birth and Seniority of Age*; and for Want of ſuch Iſſue to his Brother *Henry Legatt* for Life, *&c. William Legatt* brought a Bill in his Infancy againſt *Weller* the Executor, and obtained a Decree that the Money ſhould be laid out in Land, and ſettled according to the Will; but having afterwards attained his full Age in the Year 1690, he obtained a Decree on a Rehearing, that in Regard he was to be Tenant in Tail of the Land, when purchaſed and ſettled, whereby he might bar the Remainders; that the Money ſhould be paid to him, that he might have the laying of it out, or otherwiſe diſpoſe of it as he ſhould think fit; and afterwards in 1703, died without Iſſue, and deviſed to the Defendant Mrs. *Sewell* all his Eſtate, both real and perſonal, paying his Debts, *&c.*

Henry the Remainder-Man now brought his Bill againſt *Weller* the Executor, and *Sewell* and his Wife, complaining that in Breach of Truſt the Money was paid to *William*, and not laid out in Land and ſettled, as it ought to have been, and he no Party to the Decree.

Lord Keeper. The now Plaintiff being no Party to the former Decree, he is not bound thereby, and the Matter

as

as to him lies open: *Firſt*, Queſtion whether *William* the Nephew was Tenant in Tail, or Tenant for Life only; and

Where Money is deviſed to be laid out in Land, and ſettled to the Uſe of *J. S.* in Tail, with a Remainder over; the Court ought not to decree the Money to be paid to *J. S.* though he will have Power over the Land, when purchaſed and ſettled by ſuffering a Recovery; but ought to decree the Money to be laid out, and the Land ſettled according to the Will.

Secondly, If Tenant in Tail, whether the Money was well decreed to him; and was of Opinion, that if he was Tenant in Tail, yet the Money ought not to have been decreed to him; but in a Court of Equity the Truſt ought to have been ſtrictly purſued, and the Money inveſted in Lands, and ſettled according to the Will. It is admitted it ought to be ſo, where he, that is to be Tenant in Tail, is an Infant; becauſe he has not a Capacity to bar the Intail until of Age, and may poſſibly dye before; and therefore it was ſo decreed in this Caſe, whilſt *William Legatt* was an Infant: And I take it that his Coming of Age did not alter the Caſe, ſo as to intitle him to the Money; for if he was Tenant in Tail, altho' of full Age, he might die before he could ſuffer a common Recovery: So the Remainder-Man had a Contingency, though not ſo conſiderable, as when Tenant in Tail was an Infant. But it is an undeniable Rule both in Law and Equity, that *De majori & minori non variant Jura.* A Right to an *Unite* is as much a Right, as a Right to a *Million.* And was of Opinion, that a Deviſe, or Bargain and Sale by Tenant in Tail of a Truſt, was not alone ſufficient to bar an Intail; but as at Law there is a common Recovery of a legal Eſtate to bar an Intail; in Equity it ought to be barred by a Decree: But foraſmuch as *William Legatt* the Nephew lived above *ten* Years after the firſt Decree, and Payment of the Money to him; and probably had it been ſettled in Land, would in his Life-time have barred the Intail, it was too late now to fetch the Money back from him, in Caſe he was Tenant in Tail. *Quod fieri non debet factum valet.*

A Deviſe or Bargain and Sale by Tenant in Tail of a Truſt, not ſufficient alone to bar an Intail; but it ought to be barred by a Decree. *Ant.* Ca. 129.

As to the principal Point, whether *William Legatt* by the Will was to be Tenant in Tail, or only Tenant for Life. He claims by a voluntary Deviſe; and altho' *executory*, it is to be taken in the very Words of the Will

as a Deviſe, and is not to be ſupported or carried further in a Court of Equity, than what the ſame Words would operate at Law in a voluntary Conveyance. And *Archer*'s Caſe was cited, where a Deviſe to a Man for Life, and after his Deceaſe, to his Heir Male, and the Heirs Males of ſuch Heir Male, held to be but an Eſtate for Life; and the like Caſe in *Shellie*'s Caſe, to a Man for Life, and his Heirs Males, and the Heirs Males of ſuch Heirs Males, well argued there, that the Words Heirs Males muſt be Words of Purchaſe, becauſe they are followed with Words of Limitation. 1 Co. 66. b. 1 Co. 104. a.

It was ordered that the Judges of the *Common Pleas* ſhould be attended with a Caſe for their Opinion, and then the Parties to reſort to the Court for further Directions.

Symes verſus *Vernon.*

Caſe 502.

John Vernon of *Antegoa* deviſed to the Children of one *Symes*, of whom he had bought a Plantation, 50000 *l.* Weight of Sugar, to be paid by his Executors in *ten* Years after his Deceaſe, which fell out to be in the Year 1699. The Plaintiff being one of the *five* Children brought her Bill for a Satisfaction of her Part.

A. living in *Antegoa*, and having a Plantation there, deviſes 50000 *l.* Weight of Sugar to the Children of *B.* to be paid by his Executors in *ten* Years after his Death. The Executors not delivering the Sugars within the Time, on a Bill brought by one of the Children; Decreed the Value of the Plaintiff's Legacy to be computed according to the medium Rate of Sugars in *Antegoa*, at the End of the *ten* Years, and paid with Intereſt from the Time it became due.

Per Cur. Although the Defendant might have paid the Plaintiff in Sugar at the Time it became payable by the Will; yet not having ſo done, it became a perſonal Duty, and to be paid in Money here.

Decreed that the Value of the Plaintiff's Share of the Legacy ſhould be computed, according to what was the

medium Rate of Sugars in *Antegoa* in 1699, and paid with Intereſt from the Time it became payable.

Caſe 503.
May 3.
Lord Keeper.

Ibbottſon verſus *Rhodes.*

A. lends Money to *B.* on mortgage, but before he does ſo, ſends *C.* to inquire of *D.* who had a prior Mortgage, whether he had any Incumbrance on *B.*'s Eſtate, who denied he had any. This was proved by *C. D.* by Anſwer confeſt *C.* enquired of him what Money *B.* owed him; but denied *C.* told him, that *A.* was about to lend *B.* any Money. Decreed at the Rolls the Eſtate ſhould ſtand charged in the firſt place with *A.*'s Debt. But upon an Appeal, Iſſue directed to try, whether *C.* told *D.* that *A.* was about to lend Money on *B.*'s Eſtate.

ON an Appeal from the *Rolls*, the Caſe was, that the Defendant *Rhodes* having lent Money to *Shipley* upon a Mortgage of his Eſtate, and *Ibbottſon* being likewiſe about to lend *Shipley* Money, one *Gargrave* examined as a Witneſs in the Cauſe depoſed, that the Plaintiff being about to lend Money to *Shipley*, he by the Plaintiff's Direction enquired of the Defendant, whether he had any Incumbrance or Mortgage on the Eſtate, and denied he had any; and that he enquired a *ſecond* Time, and had the ſame Anſwer.

The Defendant by Anſwer confeſt that *Gargrave* met him in a publick Market, and enquired of him what Money *Shipley* owed him; but denied that *Gargrave* told him, the Plaintiff was about to lend *Shipley* Money; nor did *Gargrave* upon his croſs Examination take upon him to ſwear it; but ſlides it in, that the Plaintiff being about to lend Money to *Shipley*, he enquired of the Defendant, if he had any Mortgage, *&c.* And although it was inſiſted upon for the Defendant, that to take away the Defendant's Mortgage, or to make him loſe or forfeit his Money, it ought to be a very plain and poſitive Proof, that the Defendant induſtriouſly concealed his Mortgage, as deſigning or contriving to induce the Plaintiff to lend his Money upon a bad Security; yet upon the Evidence, the Maſter of the *Rolls* decreed, that the Eſtate ſhould in the firſt place ſtand charged with the Plaintiff's Debt, and that the Defendant, although the

firſt Mortgagee, ſhould be poſt-poned for having concealed his Incumbrance.

Lord Keeper directed it to be tried at Law, whether *Gargrave* told the Defendant, that the Plaintiff was about to lend Money on *Shipley*'s Eſtate, when he enquired, what the Defendant's Debt was; and alſo directed that upon ſuch Trial, the Anſwer ſhould be admitted to be read as Evidence.

Defendant's Anſwer directed to be read as Evidence at a Trial.

Herne Domina & *al'* verſus *Frederick Herne.*

Caſe 504. *May* 3. *Lord Keeper.*

SIR *Joſeph Herne* on the Marriage of the Plaintiff agreed by Articles, that his Wife, over and above one third Part of his perſonal Eſtate, ſhould, if ſhe ſurvived him, have 800 *l.* in Money and the Furniture of a Chamber and her Jewels, *&c.* and it was thereby further declared, that notwithſtanding any Thing in the Articles, ſhe ſhould not be debarred of any Thing Sir *Joſeph* ſhould give her by Will or Writing, or other lawful Declaration of his Mind or Intention: And Sir *Joſeph* having by his Will deviſed to the Plaintiff the Sum of 1000 *l.* the Plaintiff therefore claimed the 800 *l. &c.* by the Articles, and alſo the 1000 *l.* deviſed by the Will, and reheard the Cauſe as to that Matter.

A. by Marriage Articles agrees to leave his Wife 800 *l.* and her Jewels, *&c.* but it is declared that notwithſtanding the Articles ſhe ſhould not be debarred of any Thing he ſhould give her by Will. *A.* by Will makes a Diſpoſition of his whole Eſtate, and gives his Wife 1000 *l.*

The Wife muſt either waive the Articles or the Will; ſhe cannot claim the Benefit of both.

Lord Chancellor. It is true the Articles do provide, that the Plaintiff ſhall have what her Husband ſhall think fit to give her more than the Proviſion there made, and give her a Capacity to take of her Husband; yet I am of Opinion, that ſhe muſt either abide by the Will and renounce the Articles, or abide by the Articles and renounce the Will; and ſhe cannot take by them both; for although the 1000 *l.* deviſed by the Will is not mentioned

tioned to be in Lieu of what is given by the Articles; yet the Will imports a Diſpoſition of his whole Eſtate, and allows what was intended for the Wife, and what for the Children; and therefore implies a Condition, that ſhe muſt accept what is there given her, in Satisfaction of her Demands: If ſhe will take the Benefit of the Will, ſhe muſt ſuffer the Will to be performed throughout.

A Child intitled by his Father's Marriage-Articles to a Share of his Father's perſonal Eſtate, has a Legacy given him by the Will of his Father. If he will have the Legacy, he muſt waive the Benefit of the Articles.

And as to the Defendant *Frederick Herne* the eldeſt Son, who by the Articles was intitled to an equal Share of one Third of the perſonal Eſtate, he having 7000 *l.* deviſed to him by the Will; and one Third of the Eſtate is deviſed to the younger Children: If he will have the Benefit of the Will, he muſt renounce the Articles, and accept of what is given by the Will, in Lieu and Satisfaction of what he might claim by the Articles.

Caſe 505. *May* 4.

Aſton & al' verſus *Smallman & al'.*

A. and *B.* are Joint-tenants of the Truſt of a Term. *A.* dies, *B.* ſhall have the whole by Survivorſhip.

John Smith being poſſeſſed of a Leaſe for Years, which he held of the Lord *Killmurry*, died Inteſtate, leaving *two* Daughters *Eleanor* and *Mary*: *Tonna* their Grandfather, and *Dod* the Adminiſtrator of *John Smith*, ſurrender the old Leaſe, and take a new one from the Lady *Killmurry* to *Tonna* the Grandfather, and *Dodd* the Adminiſtrator for *Ninety-nine* Years, if the *two* Daughters, and one *John Leach*, any or either of them ſhould ſo long live; but in Truſt, nevertheleſs for the *two* Daughters. *Eleanor* married *Bradburne* and died, and left *three* Children. The Defendant *Smallman* claimed under *Eleanor* in a Courſe of Adminiſtration, and had alſo got an Aſſignment of the Leaſe from the Executor of *Tonna* the ſurviving Truſtee. The Plaintiffs claimed under *Mary* as Adminiſtrators *de bonis non* to her, who ſurvived her Siſter *Eleanor*, and brought their Bill to compel the Defen-

Defendant *Smallman* to account for Profits, and to aſſign the Term to them.

The Queſtion was, Whether *Mary* as Jointenant with her Siſter *Eleanor*, and ſurviving her, became intitled to the whole Term by Survivorſhip.

For the Defendant it was inſiſted, that in this Caſe, there ought not to be any Survivorſhip allowed in Equity; and as Authorities cited the Caſes of *Cox* and *Quaintock*, and of *Billingſley* and *Shore*, and *Draper*'s Caſe, 2 *Par. Chanc. Rep.* 64.

Lord Keeper. A Truſt of a Term muſt go as the Term at Law would have done by the like Limitations; and as Survivorſhip would have taken Place at Law, it muſt do ſo in Equity; and decreed the Defendant to account for Profits from the Death of *Eleanor*, and to aſſign the Term to the Plaintiffs, or as they ſhould appoint.

DE
Term. S. Trinitatis,
1706.
In Curia Cancellariæ.

Caſe 506.

Wilcocks verſus *Wilcocks.*

A. covenants on his Marriage to purchaſe Lands of 200 *l.* a Year, and ſettle them for the Jointure of his Wife, and to the firſt, &c. Sons of the Marriage: He purchaſes Lands of that Value, but makes no Settlement; and on his Death the Lands deſcend on the eldeſt Son.

THE Plaintiff's Father upon his Marriage covenanted to purchaſe Lands of 200 *l. per Ann.* and to ſettle the ſame upon himſelf for Life, and on his Wife for her Jointure, and to the firſt and other Sons in Tail, Remainder to the Daughters. The Father, who was a Freeman of the City of *London*, died Inteſtate, having purchaſed Lands of the Value of 200 *l. per Ann.* but made no Settlement thereof, but permitted them to deſcend upon the Plaintiff his eldeſt Son; who now brought a Bill founded on his Father's Marriage-Articles, to have 200 *l. per Ann.* purchaſed out of the perſonal Eſtate, and ſettled to the Uſes in the Marriage-Articles.

On a Bill by the Son for a ſpecifick Performance, decreed the Lands deſcended to be a Satisfaction of the Covenant.

Poſt. Ca. 631.

Lord Keeper. The Lands deſcended, being of 200 *l. per Ann.* and upwards, ought to be deemed a Satisfaction of the Covenant, and decreed it accordingly; and that the perſonal

perſonal Eſtate ſhould be divided and diſtributed amongſt the *three* Children, according to the Cuſtom of the City of *London*, and the Statute for ſettling Inteſtates Eſtates.

One of the Daughters having attained the Age of *ſeventeen* Years, made her Will, and deviſed her perſonal Eſtate.

A Child intitled to an orphanage Share of his Father's perſonal Eſtate, dying under *Twenty-one*, and unmarried, cannot deviſe it by his Will; for by the Cuſtom it ſurvives to the other Children; but he may deviſe his Share under the Statute of Diſtributions.

Per Cur. The Will is good as to the Share that belonged to her by the Statute; but as to her orphanage Share, ſhe dying unmarried before *Twenty-one*, it ſurvives to the other Orphans by the Cuſtom, and her Will could not take place upon her orphanage Part.

Kingſman verſus *Kingſman.*

Caſe 507.

THE Plaintiff having diſpleaſed his Father, who was alſo jealous that he was not really his Son, made his Will, and deviſed both his real and perſonal Eſtate to the Defendant *Jaſper Kingſman*, a *Bargeman*, the real Eſtate being upwards of 2000 *l. per Ann.* The Plaintiff's Bill was to have a Diſcovery of the Deeds and Writings, and the Circumſtances of obtaining the Will; and whether it was not upon a ſecret or private Truſt for the Benefit of the Plaintiff.

A. diſinherits his Son, and by Will gives the greateſt Part of his Eſtate to *B.* and tells *B.* if his Son behaved well, he might pay him 20*l.* a Quarter, and if he uſed that well, he might make it up 40*l.* a Quarter. Decreed the 40*l.* a Quarter to the Son.

It appeared by Proof in the Cauſe, and in ſome Meaſure confeſſed by the Defendant's Anſwer, that the Defendant had confeſſed to ſeveral Perſons, that when the Teſtator delivered his Will to the Defendant, he ſaid to him, if his Son gave him no Diſturbance, he might do *ſo or ſo*; and being afterwards preſſed to diſcover, what the Teſtator meant by that Expreſſion, *ſo and ſo*; he

he owned before ſeveral Witneſſes, that the Teſtator directed him, that if his Son behaved himſelf well, he might allow him 20 *l.* *per* Quarter; and if he uſed that well, he might make it 40 *l.* *per* Quarter.

Upon this Caſe the Court decreed the Payment of 40 *l.* *per* Quarter to the Plaintiff during his Life.

A. deviſed a Farm to *B.* for Life, and after ſome Legacies, deviſes all other his perſonal Eſtate, Lands, Tenements and Hereditaments not before deviſed to *C.* The Reverſion of the Farm paſſed by the general Deviſe to *C.*

The Teſtator having by his Will deviſed a Farm to the Plaintiff for Life; and after other Legacies, deviſed all other his perſonal Eſtate, Lands, Tenements and Hereditaments not before deviſed, to the Defendant; it was made a Queſtion, Whether the Reverſion of that Farm paſſed to the Defendant by that general Deviſe.

Per Cur. The Reverſion well paſſed.

Caſe 508. *Scot & ux'* verſus *Haughton* and Dr. *Fuller.*

A. gives Lottery Tickets amongſt her Servants, on Condition if any of them came up a Prize of 20*s.* or more, they ſhould give one Half to her Daughter. The Ticket given to the Foot-Boy came up a Prize of 1000*l.* On a Bill by the Daughter, a Moiety of the 1000*l.* decreed to her.

ONE Mr. *Cornewallis* having ſet up a Lottery called the *Wheel of Fortune*, or a *Thouſand Pounds* for a *Penny*; Mrs. *Fuller* the Wife of Dr. *Fuller*, ſent for *Twenty-four* of thoſe Tickets, and gave them amongſt the Servants, upon Condition if 20*s.* or more ſhould come up, her Daughter ſhould have a Moiety of the Lot; and one of them thus given to the Defendant *Haughton*, her Foot-Boy, happened to produce the 1000*l.* Lot.

The 1000*l.* being paid to Dr. *Fuller*, *Scot* and his Wife, Daughter of Mrs. *Fuller*, brought their Bill for a Moiety of the 1000*l.* Lot. And it being undeniably proved by the reſt of the Servants and others, that the Ticket,

Ticket, which coſt but one Penny, was given the Foot-Boy on that Condition.

Per Cur. Cujus eſt dare, ejus eſt diſponere, and an Infant is to be bound by it as well as one of full Age, and may be a Truſtee; and decreed it for the Plaintiff accordingly.

A Gift to an Infant on Condition. The Infant is bound by the Condition.

Sanſon & ux' verſus *Rumſey.*

Caſe 509.

THE Defendant confeſſed, that he in a Paſſion had burnt the Articles made upon his Marriage with the Daughter of Mr. *Gamage*; but it being made appear, that he produced and exhibited them at the Execution of a Commiſſion ſubſequent in Time to the Day, on which he pretended to have burnt them, he was committed a Priſoner to the Fleet, until he ſhould produce them; and although he afterwards made Oath, he had them not, and could not produce them, and that it was inſiſted for him, that altho' the Burning of the Articles was a great Miſdemeanor; yet a Man was not to ſuffer perpetual Impriſonment, becauſe he could not do what was impoſſible for him to do; yet he could not be diſcharged until he had conſented to admit the Articles were to the Effect in the Bill.

A. by Anſwer confeſſed he had in a Paſſion burnt his Marriage-Articles; but it being proved that he had produced them after the Time he ſaid they were burnt, he was committed; and tho' he made Oath he had them not, and could not produce them; yet the Court would not diſcharge him, till he conſented to admit the Articles to be as in the Bill.

Hook verſus *Taylor, & econtra.*

Caſe 510. *June* 11. *Lord Keeper.*

HUgh *Phillips* being ſeiſed in Fee of *two* ſeveral Farms, deviſed them to *Richard Carill*, the Father, and *Richard Carill*, the Son, and their Heirs, in Truſt to permit

A Deviſe of *two* Farms to the Father and Mother for their Lives, Remainder to Truſtees till

A. and *B.* reſpectively come of Age, and then to convey one Farm to *A.* and the other to *B.* *A.* died before the Time came for the Conveyance. *A.* being to have had an Eſtate in Fee, the Conveyance ſhall be made to his Heir.

mit his Father and Mother to receive the Profits for their Lives; and after their Deceaſe to permit his *two* Nephews to receive the Profits until placed out Apprentices, and when his Nephews reſpectively attained their full Ages of *Twenty-one*, then to convey one Farm to one of the Nephews, and the other to the other Nephew. *Will. Hook*, one of the Nephews, died in the Life-time of the Teſtator's Father, and before he attained the Age of *Twenty-one*. The now Plaintiff's Bill was, as Brother and Heir of *Will. Hook*, to have the Farm, intended for *Will. Hook*, conveyed to him.

Per Cur. The Caſe is no more than a Deviſe to the Father and Mother for their Lives, Remainder to Truſtees till *A.* and *B.* came of Age, and then to convey to them reſpectively; although one of the Deviſees died before the Time came for the Conveyance; yet as he was to have had an Eſtate in Fee, he being dead, the Conveyance ſhall be to his Heir: And decreed for the Plaintiff accordingly. *Vide Boraſton*'s Caſe.

3 Co. 19. a.

DE
Term. S. Michaelis,
1706.
In Curia Cancellariæ.

Thomas verſus *Freeman.* Caſe 511

A Poſſibility cannot be aſſigned, but it may be releaſed.

J. S. the *Ceſtuy que Truſt* of a Term, upon his Wife's Joining in a Sale of Part of her Jointure, by Deed directs and appoints, that his Truſtees after his and his Wife's Deceaſe, ſhould aſſign the Reſidue of the Term to his Wife's Daughter (under whom the Plaintiff claimed) when ſhe ſhall attain the Age of *Twenty-one*, or be married, after the Deceaſe of her Father and Mother.

The Daughter being married, ſhe and her Husband in the Life-time of her Father and Mother, aſſign the Term to the Plaintiff.

Queſtion if ſuch a Poſſibility could be aſſigned, and Plaintiff well intitled in Equity.

Lord Keeper. Equitas ſequitur legem, and that which is the Rule of Law, muſt be the Rule here. It is a Notion that has obtained at Law, that a Poſſibility is not aſſignable; but no Reaſon for it, if *res integra*; but the Law

Law is not ſo unreaſonable, but to allow, that it may be releaſed. The Law holds it to be unreaſonable that there ſhould be an Incumbrance on a Man's Eſtate, that can no way be diſcharged; and therefore doth allow that a Poſſibility may be releaſed; and diſmiſſed the Plaintiff's Bill, but without Coſts.

Caſe 512.

Murry verſus *Wyſe & ux'.*

A. deviſes all the Reſt and Reſidue of his real and perſonal Eſtate whatſoever. This will paſs a Fee.

Robert Nott deviſed unto his Daughter *Mary Wyſe* 50 *l.* to be paid in *three* Months; *all the Reſt and Reſidue of his real and perſonal Eſtate whatſoever, he gives to his dearly beloved Wife* Anne Nott, whom he makes the ſole Executrix of his Will.

Queſtion was, Whether the Inheritance of the real Eſtate, or only an Eſtate for Life paſſed to the Wife, who had made her Will, and deviſed all her Eſtate to the Plaintiff *Murry*.

Lord Keeper Decreed the Inheritance of the real Eſtate to the Plaintiff. *Vide* the Caſe of *Carter* and *Horner*, 4 *Modern Report* 89. *Hanchet* and *Thelwall*, in 3 *Mod. Report* 104. and *Hyley* and *Hyley* 228.

Caſe 513.
Nov. 11.
Lord Keeper.

Taylor verſus *Wheeler.*

A. mortgages Copyhold Land to *B.* but the Surrender not being preſented within the Time limited by the Cuſtom, became void.

Richard Wheeler being ſeiſed of a Copyhold Eſtate, borrowed 400 *l.* of the Plaintiff in 1698, and ſurrendered into the Hands of *two* cuſtomary Tenants the Copyhold Eſtate in Queſtion, to be preſented at any Court after *Sept.* 1699, defeaſible on paying the 400 *l.* and

Afterwards *A.* becomes Bankrupt. On a Bill by *B.* againſt the Aſſignees, this defective Surrender was made good. *Poſt.* Caſe 547.

and Intereſt. The Mortgagor paid the Intereſt for *four* Years together; but no Care was taken to get the Surrender preſented; and in the mean Time the Mortgagor *Wheeler* became a Bankrupt, and died inteſtate and inſolvent. After his Death the Surrender was tendered, but the Homage refuſed to preſent it; becauſe by the Cuſtom of the Manor confirmed by Act of Parliament, all Surrenders were to be void if not preſented in *twelve* Months after they were made.

The Bill was brought againſt the Aſſignees and the Heir to be relieved, and to ſupply the Defect of the Surrenders not being preſented in Time.

The *Lord Keeper* upon the firſt Hearing of the Cauſe, inclined to diſmiſs the Plaintiff's Bill; and thought it more reaſonable that he ſhould ſuffer for his own Default, than the other Creditors.

But the Cauſe ſtanding in the Paper to be farther heard upon the 20*th* of *Feb.* and the *Lord Keeper* having been attended with the Precedent of *Burgh* and *Francis*, where the Court had ſupplied the Defect of Livery againſt Judgment-Creditors, he was pleaſed to declare, that although upon the Hearing of the Cauſe, he inclined not to relieve the Plaintiff, becauſe thro' his Neglect of getting the Surrender preſented, the Creditors might be poſſibly drawn in to give the greater Credit to the Bankrupt; and the Statute of Bankrupts provides, if Goods remain in the Hands of the Bankrupt, that they ſhall be liable to the Creditors, and may be ſold as Part of the Bankrupt's Eſtate, notwithſtanding any Bill of Sale, *&c.* yet it was too hard to extend a penal Law in a Court of Equity to the Prejudice of the Plaintiff, who was in the Nature of a Purchaſer by a defective Conveyance, and had contracted and agreed for a Security on thoſe Lands, which the other Creditors had not; but lent to the Bankrupt upon a general Credit; and

could therefore be intitled to no more than what properly was the Bankrupt's: And againſt the Bankrupt himſelf, the Plaintiff had a plain Equity, and he muſt have been decreed to have ſupplied his defective Conveyance: Therefore decreed the Defendants to pay the Plaintiff his Principal, Intereſt and Coſts, or to be foreclоſed, and the Plaintiff to be admitted to hold and enjoy againſt the Defendants.

Caſe 514.
Nov. 25.

Brompton verſus *Alkis.*

A Feme ſeiſed in Fee of Lands, charged with ſpecifick Debts, marries. The Husband receives the Rents, but does not pay the Intereſt of the Debts. The Wife dies without Iſſue. On a Bill by her Heir, decreed the Husband ought to have kept down the Intereſt. Q.

Richard Brompton ſeiſed of a Reverſion expectant on the Determination of an Eſtate for Life, conveyed the ſame to Truſtees, to be ſold for Payment of Debts in a Schedule; and if any Surplus, to go to his Heirs, Executors and Adminiſtrators.

The Defendant *Alkis* married the ſole Daughter and Heir of *Richard Brompton*, and in 1681, obtained a Conveyance from the Truſtees to him and his Heirs, and paid ſome of the Debts: His Wife died without Iſſue, and the Plaintiff, being her Couſin and Heir, brought his Bill to have a Reconveyance, there having been, as was ſurmiſed, ſufficient raiſed by Rents and Profits for the Payment of the Debts.

The Defendant inſiſted, that what Rents and Profits were received by him, were received in Right of his Wife, and that he was intitled to retain them; and if the Plaintiff will redeem, he ought to pay what the Defendant paid for Debts, with Intereſt and Coſts; and that this was not like the Caſe of a Tenant for Life, and a Remainder-Man in Fee; there the Tenant for Life ſhall be obliged to pay one Third of the Debt, or to pay the Intereſt out of the Profits: But where there is a Debt charged

charged upon the Eſtate of Tenant in Fee-ſimple, he may do what he thinks fit with the Land, and much more with the Profits; and his Heir cannot call him to an Account, or complain that he did not pay either Principal or Intereſt; and where a Man marries an Inheritrix, what the Husband doth as to the Management of the Eſtate is the ſame, as if done by the Wife; nor ſhall he be ſo much as reſtrained or enjoined from committing of Waſte; and there can be no one to queſtion, or call him to Account. Tenant in Fee-ſimple, as he has the whole Eſtate, ſo alſo he has his Heirs in him. *Non eſt hæres viventis.*

Per Cur. The Husband, who received the Profits in Right of his Wife, ought thereout to have paid the Intereſt, and ſhall not ſuffer the Debt to increaſe; and decreed the Defendant to account accordingly. *Q. tamen.*

DE
Term. S. Hillarii,
1706.
In CURIA CANCELLARIÆ.

Caſe 515.

French & ux' verſus *Chicheſter.*

A. by Will charges his real Eſtate with the Payment of his Debts, Legacies and Funerals; and deviſed to his Wife, whom he made his Executrix, all his perſonal Eſtate, not otherwiſe diſpoſed of. Decreed the perſonal Eſtate to be applied in Eaſe of the real; there being no Words in the Will to exempt the perſonal Eſtate from the Debts, and the Wife taking the perſonal Eſtate as Executrix.

UPON a Bill of Review, the Error aſſigned and relied on was, that *John Chicheſter*, as Heir and Executor to his Father, having raiſed ſufficient out of the real and perſonal Eſtate for Payment of his Siſters Portions, deviſed to them by his Father's Will; and having paid all, but his Siſter *Katharine*, who was under Age, did by Deed convey ſeveral Lands to Truſtees for Payment of his Debts, and afterwards made his Will; and thereby alſo directed that his Truſtees ſhould out of his Truſt-Eſtate pay his Debts, Legacies and Funerals; and thereby deviſed to his Wife, now the Wife of the Plaintiff *French*, whom he made his Executrix, all his perſonal Eſtate not otherwiſe diſpoſed of, intending thereby a Proviſion for her, ſhe having been prevailed upon to ſell away Part of her own Inheritance.

And the Queſtion now was between the Heir and the Executor, Whether the Wife and Executrix ſhould have the perſonal Eſtate as deviſed to her, and leave the Debts charged upon the Land; or whether the perſonal Eſtate ſhould be applied in Eaſe and Exoneration of the real Eſtate.

The Defendant Mr. *Chicheſter*, having paid *Katharine*'s Portion, brought his Bill to be reimburſed out of the perſonal Eſtate, and obtained a Decree for that Purpoſe.

For *French* and his Wife, the Executrix of *John Chicheſter*, it was inſiſted, that *John Chicheſter* having charged his Debts upon his Land; and afterwards by his Will having charged even his Legacies and Funerals upon his Land, and deviſed his perſonal Eſtate to his Wife, doth ſufficiently manifeſt his Intention, that his Wife ſhould have his perſonal Eſtate as a Proviſion for her, and to her own Uſe; and the ſame was but a ſmall Recompence for the Inheritance ſhe parted with; but if made liable to Debts, the Whole will be exhauſted, and the Proviſion intended for the Wife defeated: And the known Rule is, that where the perſonal Eſtate is deviſed away, the Heir ſhall not have it applied in Exoneration of the real.

But the Lord Keeper *Wright*, upon the former Hearing, and the preſent *Lord Keeper*, on the Bill of Review, were both of Opinion, that the Deviſe being in the ſame Clauſe, in which ſhe was named Executrix, and not ſaid free and exempt from Payment of Debts; ſhe muſt therefore take it as Executrix, and the ſame muſt be applied to the Payment of Debts; and therefore allowed the Demurrer, and diſmiſſed the Bill of Review.

Caſe 516.
Jan. 24.
Lord Keeper

Murrell verſus *Cox* and *Pitt.*

If Executors join in receiving Money, both are anſwerable. Otherwiſe where Truſtees join.

THE Plaintiffs, as reſiduary Legatees, brought their Bill againſt the Defendants the Executors for an Account and Payment of the Surplus; they appeared and put in a joint Anſwer, and in a Schedule thereunto annexed, ſet forth all their Receipts and Payments, and make themſelves jointly Debtors for the Balance; and *inter al'* therein mentioned, for 200 *l.* Stock in the *Eaſt-India Company*, as remaining in their Hands undiſpoſed of.

After the Anſwer put in, the Defendants ſell the Stock in the *Eaſt-India Company*, both join in the Transfer, and divide the Money; the one receiving 106 *l.* and the other the like Sum. *Cox* after this became inſolvent, and the Defendant *Pitt* inſiſted, that he ought to be charged only with 106 *l.* which was all that he received.

The Cauſe was firſt heard at the *Rolls*, and the Decree joint againſt them both, and conſequently the Defendant *Pitt* liable to pay the Whole; and now upon an Appeal, the *Lord Keeper* affirmed the Decree.

Ant. Ca. 453, 464.

For the Defendant *Pitt*, the Caſes of *Fellowes* and *Owen*, and of *Heaton* and *Marriott*, were cited; where although Truſtees had joined in ſelling and conveying a Truſt-Eſtate, yet each was charged but with his own Receipts: But it was anſwered that thoſe Caſes, where a Truſtee joins only for Conformity, and in Order to paſs over the Eſtate to a Purchaſer, which cannot be done without his Joining or Releaſing to his Co-Truſtee, differ from the Caſe of Executors, who need not join, but may act ſeverally, if they think fit; each may ſell, aſſign, or releaſe the Whole without joining with the other; and in the Caſe

Caſe cited of *Fellowes* and *Owen*, what was done, was with the Privity and Approbation of the *Ceſtuy que Truſt.*

City of *London* verſus *Garway & al'.* Caſe 517.

THomas Garway deviſed ſeveral Lands to his Wife for Life, ſhe paying 20 *l. per Ann.* to *A.* and *B.* for their Lives, and the Life of the longer Liver of them; and if ſhe died before them, his Truſtees to pay the 20 *l. per Ann.* out of the Lands deviſed to them; and therein deviſes ſeveral Lands therein mentioned to *three* Truſtees and their Heirs upon Truſt to ſell, and to diſpoſe of the Monies to be raiſed by ſuch Sale to ſuch Perſons, as he ſhould by a Paper, to be ſigned by him, direct and appoint: Provided if he left no ſuch Paper of Appointment, then the Truſtees to ſtand ſeiſed, in Truſt for the Benefit of his *four* Nephews, and if any of the Appointees died before Sale and Payment of the Money, ſuch Share to reſort to his Nephews.

A. by Will deviſes his Land to Truſtees to ſell, and to diſpoſe of the Money as he by Writing ſhould appoint, and for want of Appointment, to his *four* Nephews.

A. by Writing appoints his Truſtees to pay ſeveral Sums to ſeveral Perſons; but not near the Value of the Land.

Decreed the Surplus to the Heir, and not to the Nephews, as an Intereſt reſulting, and not diſpoſed of.

Thomas Garway, by a Paper ſigned by him, appointed his Truſtees to pay ſeveral Sums of Money to ſeveral Perſons therein named; but not near to the Value of the Land.

The Queſtion was, Whether the Surplus ſhould paſs by the Will to the Nephews, or reſult as undiſpoſed of to the Heir at Law; and decreed it to the Heir at Law: The *Lord Keeper* ſaying, this was not ſo ſtrong a Caſe, as that of Sir *Cæſar Cranmer* and the Duke of *Southampton*; and that to diſinherit an Heir at Law, there muſt either be expreſs Words, or a neceſſary Implication, according to the Caſe in the Year-book of *H.* 7. A Deviſe of

There muſt either be expreſs Words in a Will, or a neceſſary Implication, to diſinherit an Heir at Law.

A Deviſe of Lands to the Heir after the Death of the Wife by a neceſſary Implication gives an Eſtate for Life to the Wife. Otherwiſe where the Deviſe is to a Stranger.

of Lands to the Heir after the Death of the Wife, by a neceſſary Implication, gives an Eſtate for Life to the Wife, becauſe the Heir was not to take till after her Death; but if the Deviſe be to a Stranger after the Death of the Wife, *that* gives no Eſtate for Life to the Wife by Implication; but the Eſtate during her Life ſhall deſcend, and go to the Heir at Law.

Caſe 518. *Jan.* 25. *Lord Keeper.*

Creagh & ux verſus *Wilſon & al'.*

A. by Will gives his Grandaughter 200 *l.* on Condition ſhe continued with his Executors till ſhe was *Twenty-one*; but if ſhe was taken from them by her Father who was a Papiſt, before *Twenty-one*, or married againſt the Conſent of his Executors, then he gave her but 10 *l.* The Daughter was placed by the Executors with a Clergyman, who, before ſhe was *Twenty-one*, with Conſent of one of the Executors, permitted her to make a Viſit to her Father; and he took that Opportunity to marry her to a Papiſt. Decreed ſhe ſhould only have the 10 *l.*

John Wilſon, a Miniſter of *Northamptonſhire*, deviſed by his Will to his Grandaughter, the Plaintiff *Elizabeth*, 200 *l.* provided ſhe continued with his Executors, until ſhe attained the Age of *Twenty-one*; but if ſhe ſhould be taken from them by her Father, who was a *Roman Catholick*, before ſhe attained her Age of *Twenty-one*, or in Caſe ſhe ſhould marry againſt the Conſent of his Executors, then he gave her but 10 *l.* and made *John* and *Jane Wilſon* his Executors.

The Plaintiff *Elizabeth* did not reſide with the Executrix *Jane Wilſon*, one of the Executors, ſhe being a Boarder her ſelf; and although *John Wilſon* the other Executor was a Houſekeeper, yet he was not willing to receive her: And thereupon with the Conſent of the Executors, ſhe was placed with Mr. *Joſeph Wilſon*, a Clergyman; and after ſhe had been there ſome Time had his Leave, as alſo the Conſent of one of the Executors, to make her Father a Viſit, not being *Twenty-one* Years of Age, who took that Opportunity to marry her to a Papiſt, and gave her a Portion of 800 *l.* And the Executors refuſing to pay the 200 *l.* Legacy, the Bill was brought by the Plaintiffs for Recovery thereof, and ob-

tained a Decree at the *Rolls* for the Payment of the Legacy, with Intereſt and Coſts.

But now upon an Appeal to the *Lord Keeper*, he declared the 200 *l.* Legacy was given upon a Condition precedent: The Condition deſcribing the Qualification of the Perſon, who is to take, is in its Nature a Condition precedent: That ſhe ſhould continue with the Executors, is to be underſtood with them, or with ſuch Perſon as they ſhould appoint or approve of, as under their Direction; and they accordingly placed her very properly with Mr. *Joſeph Wilſon*, a Clergyman, which was agreeable to the Intent of the Teſtator, that ſhe might be bred a *Proteſtant*. And although ſhe had the Conſent of the Executors that ſhe might go and viſit her Father; yet they did not conſent that the Father ſhould marry her; *that* was the very Thing the Teſtator intended to provide againſt; and although there may be a Difference between a Condition, that ſhe ſhall not marry without Conſent, and where it is (as in this Caſe) that ſhe ſhall not marry againſt their Conſent; according to the Caſe of *Flemming* and *Walgrave*, in 1 *Chanc. Rep.* yet it is the ſame Thing Fol. 58. where the Marriage is without Conſent of the Executors. When they have not an Opportunity before the Marriage to declare their Diſlike, it is a Marriage againſt their Conſent, if upon Notice of it they diſſent, and declare their Diſlike of it; and therefore reverſed the Decree made at the *Rolls*, and diſmiſſed the Bill with Coſts as to the 200 *l.* and decreed Payment of the 10 *l.* only.

Caſe 519
Jan. 28.
Lord Keeper,

Brotherton Widow verſus *Hatt* Widow, *Martha Coy*, Sir *Edward Hungerford & al', & econtra.*

A. makes 3 ſeveral Mortgages to *B. C.* and *D.* and in the laſt Mortgage *B.* is a Party, and agrees that after he is paid, he will ſtand a Truſtee for *D.* Decreed that *C.* ſhall be paid before *D.* For all the Securities being tranſacted by the ſame Scrivener, Notice to him was Notice to *D.* *Poſt.* Ca. 547.

SIR *Edw. Hungerford* mortgaged his Manor of *Blackwater* to *Marſh* and his Heirs, for ſecuring 3000 *l.* and Intereſt; and afterwards Mr. *Gunter*, the Father of the Plaintiff *Brotherton*, lent Sir *Edw. Hungerford* 2800 *l.* and by Deed, reciting the Mortgage to *Marſh* for 3000 *l.* Sir *Edward* declares, that after the 3000 *l.* and Intereſt paid, the Eſtate ſhall ſtand charged, and be a Security to *Gunter* for the 2800 *l.* and Intereſt; but *Marſh* was no Party to that Deed. Afterwards the Defendant Mrs. *Hatt* lent Sir *Edward* 400 *l.* and obtains a Deed, as well from Sir *Edward*, as from *Marſh*; that after *Marſh* was paid, the Eſtate ſhould in the next Place ſtand charged with her 400 *l.* and in like Manner for *Coy*, and ſeveral other Perſons.

And the Queſtion now was, Whether Mrs. *Brotherton* ſhould be paid, next after *Marſh*'s 3000 *l.* her Security being the next in Point of Time; or whether *Hatt* or *Coy*, &c. ſhould be preferred, becauſe they had got a Declaration, not only from Sir *Edward Hungerford*; but alſo from *Marſh*, who by that Means became a Truſtee for them after his own Money paid.

It was firſt decreed at the *Rolls*, and now affirmed upon an Appeal to the *Lord Keeper*, that Mrs. *Brotherton* ſhould be paid next after *Marſh*, and then Mrs. *Hatt*, and ſo the Reſt, as they ſtood in Order of Time; becauſe all the Securities being tranſacted at the Shop of *Williams* and *Ellecker* the Scriveners, who were Witneſſes, and engroſſed all the Securities, and were in Nature of Agents to all the ſeveral Lenders; and Notice to the *Agent*

Notice to the Agent is Notice to the Party.

Agent is good Notice to the Party, and conſequently they that lend laſt muſt come laſt, having Notice of what was before lent; and the Circumſtance of Mrs. *Hatt*, and thoſe, who came after Mrs. *Brotherton*, having made *Marſh* a Party to their Securities ſeems not very material, ſince a Mortgagee, when his Money is paid, is but a Truſtee for the Mortgagor; and he cannot by any Act of his alone bring a farther Charge upon the Eſtate; but however the Mortgagor alone, without the Mortgagee, may well charge the Equity of Redemption; and if any one after Notice thereof lend more Money, altho' they ſhould obtain the legal Eſtate; yet would in Equity ſtand affected with the Notice, and be bound thereby.

Where there are ſeveral Mortgages, they that lend laſt muſt come laſt, having Notice of what was before lent.

Bruges & al' verſus *Curwin & al'.*

Caſe 520. *Jan.* 29. *Lord Keeper.*

THE Plaintiffs being the greateſt Part of the Land-holders of the *Hamlets* of *Cleeve* and *Woodmacott*, in the Pariſh of *Biſhops Cleeve* in *Com' Glouceſter*, in which Hamlets there were about 5000 Acres of Land, which when not ſown with Corn, were uſed in Common, and were of little Benefit, when over-ſtockt; and the Land-holders had agreed therefore to a Stint, *viz.* that every Land-owner ſhould put in but *two* Sheep for each Acre he had in the Land, or *one* Cow for *two* Acres, or one *Horſe* for *four* Acres; but the Defendant the Rector, and about *nine* others would not agree thereto.

The greateſt Part of the Landholders intitled to Right of Common agree to a Stint. This will not bind the reſt.

For the Plaintiff it was inſiſted, that the Bill was not to take away any juſt Right the Defendants had, but that they might ſo uſe their Property, as not to injure their Neighbours; and that upon a Bill of the like Nature, a Decree was obtained 1 *Will.* 3. for the like Stint in the Hamlet of *Southam* in the ſame Pariſh. But the Bill was diſmiſſed firſt at the *Rolls*, and now affirmed upon an Appeal.

Blagrave

Caſe 521. *Jan.* 31. *Lord Keeper.*

Blagrave & al' verſus *Clunn & al'.*

Ant. Ca. 473. *Edward Lloyd* on his Marriage in 1656, ſettled the Eſtate in queſtion to himſelf for Life; Part to his Wife for Jointure, Remainder to *firſt* and other Sons of that Marriage in Tail Male, Remainder to the Daughters of that Marriage, *viz.* to the Daughter and Daughters of that Marriage and their Heirs, until the next Remainder-Man ſhall pay and ſatisfy, if *two* Daughters or more, 3000 *l.* amongſt them, Remainder to *Edward Lloyd* in Tail Mail, with other Remainders over.

Edward Lloyd had Iſſue by his *firſt* Wife, *Edward* a Son and *four* Daughters. *Edward* the Son married, and left Iſſue a Daughter, the Defendant *Katharine*; then *Edward Lloyd* the Father, (there being no Iſſue Male of the firſt Marriage) levied a Fine and ſuffered a Common Recovery, and became indebted to the Plaintiffs by Judgment, who brought their Bill againſt *Katharine* the Grandaughter and Heir of *Edward Lloyd* the Father, and againſt the *four* Daughters of the *firſt* Marriage, to redeem them on Payment of what remained unpaid of the 3000 *l.* and to be let into a Satisfaction of their Judgment.

The Defendants, the Daughters, inſiſted to retain the Profits without Account, until the 3000 *l.* were paid in a groſs Sum. *Secondly*, That the Plaintiffs were not intitled to determine their Eſtate by Payment of the 3000 *l.* but ſuch Privilege was reſerved and given only to the Perſon intitled by the Settlement to take next in Remainder; and the Clauſe in the Settlement being by way of Limitation to the Daughter and Daughters and their Heirs, until the next Remainder-Man ſhall pay and ſatisfy 3000 *l.* ſo that they take an Eſtate in Fee-ſimple determinable

terminable on the Payment of 3000 *l.* by the Remainder-Man; it was in the Election of the Remainder-Man, whether he would pay it or no, and might take his own Time for Payment; there being no Time appointed for that Purpoſe; but at any Time on Payment of 3000 *l.* their Eſtate was to ceaſe. And therefore as in this Caſe the Remainder-Man could not be forecloſed; ſo on the other Hand here ought not to be any Account of Profits, or a Redemption; but the Remedy was only at Law where the Eſtate might be at any Time determined upon Payment of the *three Thouſand Pounds.*

For the Plaintiffs it was inſiſted, that they as Judgment-Creditors had the ſame Right to redeem, as the Remainder-Man; where a Man conveys over the Equity of Redemption, or becomes indebted by Judgment, the Aſſignees or Conuſees are intitled to redeem.

Secondly, the Clauſe in the Settlement is by Way of Limitation to the Daughters and their Heirs, until *three Thouſand Pounds* paid; yet not to be underſtood, until paid at one intire Payment in a groſs Sum. The common Proviſo in all Mortgages is, that the Deed ſhall be void, if the Mortgagor paid; yet if the Money was received by broken Payments, or out of Rents or Profits, it is the ſame, as if paid by the Party; as Payment by the Eſtate by Perception of Profits is as effectual a Payment, as if paid by the Mortgagor, or by the Remainder-Man. A Payment by a Man's Eſtate is a Payment by him.

Thirdly, If it ſhould be thought reaſonable, or the Intention of the Parties, that the Profits ſhould go againſt the Intereſt; yet in this Caſe *three* of the *four* Siſters have been paid their Portions by Mr. *Lloyd*; and as the Judgment-Creditors ſtand in his Place, they muſt at leaſt be intitled to an Account of *three* Parts in *four* of the Rents and Profits, as ſtanding in the Place of the Siſters,

who have received their Portions or Shares of the *three Thouſand Pounds*; as if one Siſter had received all the Profits, the other *three* might have had an Account againſt her.

The Cauſe was firſt heard at the *Rolls*, and a Decree there made, that the Plaintiffs ſhould redeem on Payment of what remained due for Principal, Intereſt and Coſts, diſcounting what had been received by Rents and Profits.

The Defendants conceiving themſelves agrieved by being directed to account for Rents and Profits, appealed to the *Lord Keeper*, who declared it was not the ſame with an ordinary Caſe of Redemption; becauſe here the Remainder-Man could not be compelled to pay, nor could be forecloſed; being he might at any Time defeat and determine the Eſtate at Law by Payment of the *three Thouſand Pounds*; and therefore varied the Decree, *viz.* that the Defendants ſhould account for Rents and Profits, firſt to pay the Intereſt; but the Surplus ſhould not annually go to ſink the Principal; nor until an entire Sum of *one Thouſand Pounds* was raiſed; and ſo again, not to ſink the Principal, until another *Thouſand Pounds* was raiſed.

Palmer verſus *Cracroft & al.*

Caſe 522. *Feb.* 1. *Lord Keeper.*

Lands by Marriage-Settlement are limited to the Sons in Tail Male, Remainder to *A.* the Husband in Fee. Provided if *A* and his Wife, or either of them, die without Iſſue Male living at the Time of his or her Death, leaving only one Daughter unmarried, the Truſtees to ſtand ſeiſed till they have raiſed 1500*l.* for ſuch Daughter; and if more Daughters unmarried at the Death of *A.* and his Wife, or either of them, and no Iſſue Male living begotten between them, then 3000 *l.* for ſuch Daughters. *A.* dies leaving Daughters, and his Wife *enſeint* of a Son, which is afterwards born. Whether the Daughters are intitled to the 3000*l.*

Robert Cracroft the Father, the 18*th* of *October* 15 *Car.* 2. upon his Marriage ſettled his Eſtate at *Wisby* in *Lincolnſhire* to himſelf for Life, to his Wife for her Jointure, and to their firſt and other Sons in Tail Male, Remainder to the Right Heirs of the Grandfather. Provided,

vided, if *Robert* and *Anne* his Wife, or either of them die without Iſſue Male living at the Time of his or her Death, leaving only one Daughter unmarried, the Conuſee of the Fine to ſtand ſeiſed until he had raiſed 1500 *l.* for ſuch Daughter's Portion; and if more Daughters than one unmarried at the Time of the Death of the ſaid *Robert* and *Anne*, or either of them, begotten of their *two* Bodies, and no Iſſue Male living begotten by *Robert* on *Anne*, 3000 *l.* for ſuch Daughters.

Robert died leaving *five* Daughters at the Time of his Death, and his Wife *enſeint* of a Son, the Defendant, who was born in about *ſix* Weeks after his Father's Death; the Plaintiff, who married one of the Daughters, as Adminiſtrator to his Wife, brought his Bill to have his Wife's Share of the *three Thouſand Pounds* raiſed, her Siſters having had their Portions paid them.

Queſtion was, Whether upon the Wording of this Proviſo, the *poſthumous* Son ſhould defeat the Daughters of their Portions.

It was agreed, that there being no Proviſion for a *poſthumous* Son; and the Father dying before the Son born, the Son could not take by the Settlement; for the Remainder muſt immediately veſt, when the particular Eſtate determined. And it was inſiſted, that as the Proviſo was worded, a Conſtruction could not be made, that the Daughters were to have Portions upon Failer of Iſſue Male; and whilſt Iſſue Male no Portions to ariſe; for that the Proviſo is ſpecial, and operates both Ways, *viz.* If a Son living at the Deceaſe of *Anne* or *Robert* firſt dying; though there ſhould afterwards be a Failer of Iſſue Male, no Portions could ariſe to the Daughters: So *e converſo*, if no Son living at the Deceaſe of *Robert* or *Anne*, the Portions ſhould ariſe, although a Son ſhould be after born.

Lord

Lord Keeper. Generally and moſt commonly it is the Intent of the Parties, that the Daughters are not to have Portions provided by the Settlement, if there be a Son: So when no Proviſion is made for a *poſthumous* Son, altho' it is the Intent of the Parties, that the Son ſhould have it; yet until the late Statute ſuch *poſthumous* Son could not take; ſo that what might be the Intent of the Parties, cannot be the Rule. And if in this Caſe the Daughters (upon the Wording of the Settlement, and as it were by Accident not being directly intended by the Parties) become intitled to a reaſonable Proviſion and Portion, he thought Equity would not take it away; but would be further informed as to the Value of the Eſtate; and whether the other Daughters had received their Portions.

10 & 11 Will. 3. c. 16.

Caſe 523. *Feb.* 3. *Lord Keeper.*

Mesgrett & ux' verſus *Mesgrett & al'.*

A. deviſed 300 *l.* to *B.* her Daughter, and that if ſhe married under 21, without Conſent of the Executors, or major Part of them, the Legacy to go to the Children of her Siſter the Wife of *C.* and made *C.* and *two* others

Heſter Tanden deviſed to the Plaintiff *Maria*, her only Child, the Sum of *three Hundred Pounds*, a Pearl Necklace, and her Jewels; but if ſhe married before the Age of *Twenty-one*, without the Conſent of the Executors, or the major Part of them, in ſuch Caſe what ſhe had deviſed to her Daughter the Plaintiff, ſhould go to the Children of her Siſter, the Wife of the Defendant *David Mesgrett*; and made the Defendant *David Mesgrett*, one *Tanden* and *Chawell* Executors.

Executors. *B.* being at the Houſe of *C.* there marries his Son by a former Wife, with his Privity, being under *Twenty-one*: *B.* and her Husband bring a Bill for the Legacy. *C.* in Favour of his other Children, inſiſts the Legacy forfeited. The other Executors confeſt, they had Notice of the Courtſhip, and did not contradict or diſapprove of it. Decreed the 300 *l.* to the Plaintiffs, there being at leaſt a tacit Conſent.

The Plaintiff *Maria* being *eleven* Years old at the Death of her Mother, lived for ſome Time afterwards with *Chawell*, one of the Executors, and was there courted by the Plaintiff her now Husband, the Son of *David Mesgrett*

grett by a former Wife; and afterwards the Plaintiff *Maria* removed to the Houſe of the ſaid *David Mesgrett*, where the Marriage was had with the Privity of the ſaid *David Mesgrett*; altho' he now ſets up a Pretence that the Legacy was forfeited, and deviſed over to his Children by his *ſecond* Wife, the Siſter of the Teſtatrix; and the other Executors by Anſwer confeſſing that they had Notice ſuch Match was carrying on, did not contradict or diſapprove of it; nor remove the young Woman, as they might have done.

Lord Keeper Decreed for the Plaintiffs; it plainly appearing there was at leaſt a tacit Conſent; and the Will not preſcribing the Manner of the Conſent to be in Writing or otherwiſe: And looked upon it as a Fraud in *David Mesgrett* in promoting the Marriage; and afterwards to pretend a Forfeiture for Want of a Conſent to gain the Legacy to his Children by his laſt Wife.

Noys & ux' verſus *Mordaunt & al'.*

Caſe 524. *Feb.* 4. *Lord Keeper.*

John Everard having *two* Daughters in 1686 makes his Will, and deviſes to *Margaret*, his eldeſt Daughter, his Lands in *Beeſton*, and *eight Hundred Pounds* in Money: To *Mary* his *ſecond* Daughter, his Lands in *Stanborn* and *Broom*, and *one Thouſand three Hundred Pounds* in Money; provided and on Condition ſhe releaſed, conveyed and aſſured *Beeſton* Lands to her Siſter *Margaret*; and deviſed to his ſaid *ſecond* Daughter *one Thouſand three Hundred Pounds* in Money. Provided if he ſhould have a Son, what was deviſed to his Daughters to be void; and in ſuch Caſe gave to *Margaret one Thouſand two Hundred Pounds*, and to *Mary one Thouſand Pounds*. Provided if he ſhould have another Daughter, then he gave the *eight Hundred Pounds* deviſed to *Margaret*, to ſuch after-born Daughter, and the Lands at *Stanborn* and *Broom* and the

A. having 2 Daughters *B.* and *C.* deviſes Fee-ſimple Lands to *B.* and Lands which were ſettled upon him in Tail, to *C.* If *B.* will claim a Share of the intailed Lands under the Settlement, ſhe muſt quit the Fee-ſimple Lands, for the Teſtator having diſpoſed of his whole Eſtate amongſt his Children, what he gave them was upon an implied Condition they ſhould releaſe to each other.

one Thouſand three Hundred Pounds deviſed to *Mary* the *ſecond* Daughter to the ſaid *Mary*, and ſuch after-born Daughter equally between them. He ſhortly afterwards died, and left his Wife *enſeint* of a Daughter *Elizabeth*; *Mary* married *Higgs*, and died without Iſſue, not having given any Releaſe to *Margaret* her Siſter according to the Will.

Elizabeth claimed not only the Lands deviſed to her by the Will, and a Moiety of what was deviſed to her Siſter *Mary*; but alſo a Moiety of the *Beeſton* Lands deviſed to *Margaret*; the ſame on the Teſtator's Marriage, being ſettled on himſelf for Life, and his Wife for her Jointure, and to the firſt and other Sons, and in Default of Iſſue Male, to the Heirs of his Body.

Queſtion was, Whether ſhe ſhould be at Liberty ſo to do, or ought not to acquieſce in the Will; or renounce any Benefit thereby.

Lord Keeper. In all Caſes of this Kind, where a Man is diſpoſing of his Eſtate amongſt his Children, and gives to one Fee-ſimple Lands, and to another Lands intailed, or under Settlement; it is upon an implied Condition, that each Party acquit and releaſe the other; eſpecially as in this Caſe, where plainly he had the Diſtribution of his whole Eſtate under his Conſideration, and has given much more to *Elizabeth*, than what belonged to her by the Settlement; and had it in his Power to cut off the Intail.

A Man having Mortgages, one of which was a Mortgage in Fee of Lands in *D.* on which he had entered, deviſes thoſe Lands to his *two* Daughters and their Heirs, and the other Mortgages to them, their Executors, &c. one of the Daughters dies. Her Share of the Lands in *D.* ſhall go to her Heir, and not to her Adminiſtrator; for the Teſtator might intend thoſe Lands to paſs as real Eſtate to his Daughters, though as between him and the Mortgagor, they were but a Mortgage.

In this Caſe the Teſtator having ſeveral Mortgages, and, amongſt the reſt, a Mortgage in Fee of Lands in *Fenlake*, he deviſes his Mortgages to his two Daughters, and

and their Executors and Adminiſtrators; and deviſes his Lands in *Fenlake* (upon which he had entred upon Forfeiture of the Mortgage) to his *two* Daughters and their Heirs. *Mary* one of the Daughters dying without Iſſue, *Higgs* the Husband and Adminiſtrator, claims a Moiety of the Lands in *Fenlake*, as Part of his Wife's perſonal Eſtate; it being a Mortgage not forecloſed, nor the Equity of Redemption releaſed.

Per Cur. Although it is a Mortgage, as between the Mortgagor and Mortgagee; yet the Teſtator's Intent was, it ſhould paſs to his Daughters as a real Eſtate, to them and their Heirs, and not as Part of his perſonal Eſtate; and *Mary* the Wife of *Higgs* being dead without Iſſue, it deſcends and goes to her Siſters, as her Heirs at Law; and *Higgs* as Adminiſtrator to his Wife, ought not to have any Part thereof as perſonal Eſtate.

Barbara Otway Widow and Executrix of *Roger Otway* verſus *Henry Hudſon*, *John Mills*, *Thomas Fenwick*, *Anne Dove*, *Mary Warner & al'*.

Caſe 525. *Lord Keeper.* Feb. 27.

THomas Otway being ſeiſed of *three* Copyhold Meſſuages, held of the Manor of *Tyneman* in the County of *Northumberland*, ſurrendred to Truſtees to the Uſe of himſelf for Life, Remainder to *Suſanna* his Wife for Life, Remainder to the Heirs of their Bodies; and in Default of ſuch Iſſue, the ſaid Truſtees were to ſurrender to ſuch other Truſtees, as he ſhould by Will appoint to ſuch Uſes as ſhould be therein mentioned; *May* 22, 1696, he made his Will, and thereby directed his Truſtees to ſurrender to *Hudſon* and *Mills*, in Truſt to permit

A. being Tenant in Tail of the Truſt of a Copyhold Eſtate, with Remainder over, and Truſtees refuſing to ſurrender the legal Eſtate to him, he brought his Bill for that Purpoſe, and pending that Suit, went to the Lords Court, and offered to ſurrender; but was refuſed, not having the legal Eſtate, and thereupon he made his Will and gave the Eſtate to his Wife and Children. Decreed the Eſtate to go according to the Will, the Court conceiving the Will ſufficient to bar the Intail of a Truſt.

permit *John Otway* and the Heirs of his Body to take the Profits, Remainder to *Roger Otway*, the Plaintiff's late Husband, in Tail Mail, Remainder to *John Dove* in Tail Mail, Remainder to his own Right Heirs; and ſhortly after died; *John Otway* alſo died without Iſſue; and *Suſanna* the Wife of the Teſtator being alſo dead, *Roger Otway*, the Plaintiff's late Husband, requeſted the Truſtees to ſurrender to him in Tail Male; which they refuſing, *Roger Otway* brought a Bill to compel them to ſurrender to him, and they put in their Anſwers thereto; but before any further Proceedings *Roger Otway* died; but pending that Suit, he went to the Lord's Court, and deſired to be admitted to ſurrender; which was refuſed, becauſe the legal Eſtate was in the Truſtees. Matters ſtanding thus, *Roger Otway* made his Will, and deviſed the Premiſſes to his Wife for Life, Remainder to her Children by a former Husband and their Heirs, ſubject to the Payment of his Debts.

The Plaintiff's Bill therefore was, that whereas by the Cuſtom, every Widow of a Copyholder is intitled to her *Free Bench*, or Widow's Eſtate; and although the Husband had not the legal Eſtate, yet was Tenant in Tail of the Truſt, and endeavoured to have had the Eſtate at Law ſurrendered to him; and although the Truſtees refuſed ſo to do in Favour of the Remainder-man; yet *that* ought not to turn to her Prejudice: And the Bill likewiſe prayed Relief upon the Will of her Husband, by which as far as in him lay, he had deviſed the Premiſſes in Manner above-mentioned.

The Defendants *Dove* and *Warner*, as Coheirs to the Teſtator, inſiſted the Intail was never well barred, and that they were well intitled.

Per Cur. Decree the Eſtate to go according to the Will of *Roger Otway*, he having endeavoured to get in the legal Eſtate, to the Intent he might have made a regular

and proper Surrender; but the Truſtees refuſing to comply, he brought a Bill to enforce them, and repaired to the Lord's Court, and made or tendred to make ſuch Surrender as he could; and having deviſed the Eſtate to the Uſes and Purpoſes in his Will, the *Lord Keeper* conceived *that* ſufficient to bar the Intail of a Truſt. Where there is no particular Method in the Lord's Court for barring of Intails, a general or common Surrender is ſufficient, even where the Intail is of the legal Eſtate.

Where there is no particular Method in the Lord's Court to bar Intails, a common Surrender is ſufficient, tho' the Intail is of a legal Eſtate.

The Widow of the *Ceſtuy que Truſt* of a Copyhold Eſtate, ought to have her *Free Bench* or Widow's Eſtate, as well as if the Husband had had the legal Eſtate in him: There it may be ſaid, that *Equitas ſequitur legem*; and the Caſe of *Sweetapple* and *Bindon*, was for that Purpoſe cited: Where Money was to be inveſted in Land, and ſettled on the Wife and the Heirs of her Body; ſhe married and had Iſſue, but died before the Money was laid out and inveſted in Land, the Husband her ſurviving. The *Lord Keeper* decreed, he ſhould have the Intereſt of the Money for his Life, as he muſt have had the Profits of the Land, if it had in his Wife's Lifetime been laid out and inveſted in Land according to the Truſt; and that he ought to be Tenant by the Courteſy of a Truſt, as well as of a legal Eſtate.

The Widow of the *Ceſtuy que Truſt* of a Copyhold Eſtate ſhall have her *free Bench*, as well as if her Husband had had the legal Eſtate. Money is to be inveſted in Land and ſettled on a Woman in Tail. She marries, has a Child and dies, before the Money is laid out. The Husband ſhall have the Intereſt of the Money for his Life.

A Man ſhall be Tenant by the Courteſy of a Truſt, as well as of a legal Eſtate.

DE

Termino Paſchæ,

1707.

In CURIA CANCELLARIÆ.

Caſe 526.
Lord Keeper.
May 14.

Smith verſus *Goodman, & econtra.*

Edward Warnett in 1702 made his Will, and thereby deviſed Lands to be ſold for the Payment of his Debts and Legacies; and the Surplus after Debts and Legacies paid, he deviſed to *five* of his Relations, to each a *fifth* Part, of whom *John Smith* jun. one of his Coheirs, (*to wit*) a Siſter's Son, was one, and made *Edward Goodman* his other Coheir, his ſole Executor, without any Deviſe to him of his perſonal Eſtate; but deviſed ſeveral Lands to him and his Heirs. After the Will the Teſtator mortgages Part of the Lands deviſed for a Term of *five Hundred* Years to *John Smith* ſen. and levied a Fine *ſur Conuzance de droit* for Confirmation of it.

It fell out, that the Perſon, whom he had directed to draw his Will, had inſerted in the Draught thereof a Clauſe ſubjecting as well his perſonal Eſtate, as the Lands directed to be ſold, for Payment of his Debts and Legacies; which the Teſtator obſerving, he ſtruck that Clauſe out,

out, and told the Drawer of his Will, that he intended his perſonal Eſtate for his Executor, and bad him inſert a Clauſe in his Will to that Purpoſe; who replied, that was not neceſſary; the Clauſe being ſtruck out that made it liable to Debts and Legacies, the Executor would of Courſe, or without more, have the perſonal Eſtate.

The Will was afterwards ingroſſed, leaving out the Clauſe ſtruck out by the Teſtator; by which the perſonal Eſtate was expreſly mentioned to be ſubject and liable to the Payment of Debts and Legacies, and without any expreſs Deviſe inſerted of the perſonal Eſtate to the Executor; and for the Plaintiff *Smith* it was inſiſted, that the Caſe of the Counteſs of *Gainsborough* was a Caſe in Point.

DE

Term. S. Michaelis,

1707.

In Curia Cancellariæ.

Caſe 527.
Lord Keeper.
Octob. 28.

Keat verſus *Allen.*

Bond given to the Wife's Father, in order to obtain his Conſent to the Marriage of his Daughter, to repay Part of the Portion if the Daughter died without Iſſue, where the Daughter was intitled to her Portion by a collateral Anceſtor. Bond ſet aſide as a Marriage Brocage-Bond.

THE Plaintiff *Keat* on his Marriage with the Defendant's Daughter, with whom he received *one Thouſand two Hundred Pounds* as a Marriage-Portion, was obliged by the Defendant, in order to obtain his Conſent to his Daughter's Marriage, to give Bond to pay the Defendant *two Hundred Pounds*; if the Plaintiff's Wife died without Iſſue, or the Iſſue died before *eighteen* or Marriage; and the Wife being dead without Iſſue, the Bill was to be relieved againſt that Bond, as unduly obtained; the 1200 *l.* Portion being given to the Plaintiff's Wife by an Aunt; and as the Father gave her no Portion, there was no Reaſon for him to require or exact ſuch Bond upon the Contingencies before-mentioned.

Per Cur. It is in Nature of a *Brocage*-Bond; and decreed it to be delivered up to be cancelled, and the Defendant to refund what had been paid for Intereſt, but without Coſts.

Stafford & al' verſus *Selby.*

Caſe 528.

THE Bill was brought by the Plaintiff, as being a Creditor of *Charles Stafford*, who had made a Deed of Truſt for Payment of Debts, and for ſecuring Portions to his Brothers and Siſters, (of which the Plaintiff was one) and had afterwards ſold and conveyed to the Defendant, who had alſo taken in a Mortgage from the Lady *Nevil.*

A Perſon who will take Advantage of the Statute againſt clandeſtine Mortgages, muſt be an honeſt Mortgagee: And therefore if a Man has uſed any Fraud, or ill Practiſe in obtaining a ſecond Mortgage, he ſhall not have the Benefit of the Statute.

The Defendant pleaded in Bar to the Bill, that he was a Purchaſer without Notice; and alſo pleaded the Statute againſt *clandeſtine Mortgages*; and that the ſaid *Stafford* before the making the ſaid Deed of Truſt, had mortgaged the Premiſſes to the Lady *Nevil*, and did not, as the Statute requires, give a Writing under his Hand of all the prior Incumbrances; but made an Affidavit; wherein he ſet forth ſeveral of the Incumbrances, but omitted others of them, particularly mentioned in his Plea.

4 & 5 W. & M. Ca. 16.

The Plea having been replied to, and the Cauſe now brought on to Hearing, the Defendant chiefly inſiſted on his Plea of the Statute made againſt clandeſtine Mortgages; that Notice in Writing under *Stafford*'s Hand of all Prior Incumbrances was abſolutely neceſſary, as much as *three* ſubſcribing Witneſſes are neceſſary to a Will concerning Lands; and as the Statute concerns the Redemption of Mortgages, it was intended as a Rule and Law to Courts of Equity, where Perſons come to redeem Mortgages; and therefore to be obſerved according to the Letter. But the Plea was over-ruled, and a Redemption decreed, and *that* without Coſts.

In ſpeaking to the Caſe, the *Lord Keeper* admitted, that *Charles Stafford* had not obſerved the Directions of the Act of Parliament; and for ought appeared in the Caſe of the Lady *Nevill*, ſhe might have taken Advantage of the Act of Parliament, Notice not being given of all the prior Incumbrances.

If a Mortgage by the Statute becomes irredeemable, it will remain ſo in the Hands of the Aſſignee, though aſſigned in Conſideration of the Principal, Intereſt and Coſts due thereon.

Secondly, That a Mortgage, which thus by the Statute became irredeemable, a foreclоſing Mortgage, as he called it, although aſſigned over to another in Conſideration of what was really due thereon for Principal, Intereſt and Coſts; yet in the Hands of ſuch Aſſignee it would remain irredeemable, and ſuch Aſſignee might take Advantage of the Statute againſt clandeſtine Mortgages.

If a ſubſequent Mortgagee redeems ſuch Mortgage, he ſhall hold the Eſtate irredeemable.

Thirdly, If a ſubſequent Mortgagee had redeemed ſuch foreclоſing Mortgage, he ſhould alſo have held the Eſtate irredeemable.

If there are more Lands in the *ſecond* Mortgage, than in the *firſt*; *that* ſeems to be a Caſe omitted out of the Statute; but the Adding an Acre or *two* ſhall not exempt it, for *that* may be a Contrivance to evade the Statute.

But Part of the Lands being only in the prior Mortgages, and new and other Lands added in the Mortgage to the Lady *Nevill*, this ſeems to be in that reſpect a Caſe omitted out of the Statute; and this penal Law is to be taken with ſome Strictneſs: But the Adding of an Acre or two, or the like, ſhould not exempt it out of the Statute, but ſhould be looked upon as a Contrivance to have evaded the Statute; but chiefly and principally relied upon it, that the Defendant had acted unfairly in this Matter, contriving with *Stewkley* and others, to ſink Part of the Conſideration-Money, by giving Goldſmiths Notes for no leſs than 1000 *l.* Part of it, and paying them into *Stewkley*'s Hands, who was inſolvent, and upon a private Agreement to ſhare with him Part of that Money; and inſiſting on a Premium of 50 *l.* for advancing of it, ſo that that Part of the Money ſtuck

ſtuck by the Way; whereas the Statute intended to recompence honeſt Mortgagees for the Trouble, Hazard and Charge they might be put unto; and not to cover a Fraud, or ill Practice, in obtaining an Aſſignment of a Mortgage, or in becoming a Purchaſer; and the Statute therefore does not concern this Equity, where a Man was impoſed upon in the Mortgage it ſelf; the Defendant *Selby* acting as Counſel for *Stafford*, when he redeemed the Mortgage from *Bacon*, and procured the Money from the Lady *Nevill*, and had a Premium of 50 *l.* for doing it; and to bring *Stafford* to thoſe Terms had exhibited a Bill in *Bacon*'s Name to foreclоſe him, without *Bacon*'s Privity; and when he had ſo diſtreſſed him, at laſt pretended to purchaſe. And as to the other Part of his Plea, of being a Purchaſer without Notice, he had plainly Notice of the Deed of Truſt, and therefore decreed as above.

Combs verſus *Dowell*, and *Squire* verſus *Dowell*.

Caſe 529. *Lord Keeper. Nov.* 4.

A Deed made by *Robert Spencer* and *Elizabeth* his Wife, to declare the Uſes of a Fine levied by them of the Wife's Inheritance, being loſt, but having been inrolled for ſafe Cuſtody; upon the firſt Hearing of theſe Cauſes, it being objected, that the Conveyance was not a Bargain and Sale, and ſo did not operate by the Inrollment; and that therefore the Copy of the Inrollment not to be allowed as Evidence; and the Court ſeemed to be of that Opinion. But an Iſſue at Law being directed to try, whether the Deed to lead the Uſes of the Fine was duly executed by Mr. *Spencer* and his Wife: The *Lord Chief Juſtice* allowed the Copy of the Inrollment to be given in Evidence; and a *Scrivener* alſo, who drew the Deed, being examined, a Verdict paſſed for the Plaintiffs, that the Deed was duly executed.

Upon an Iſſue at Law, whether a Deed to lead the Uſes of a Fine levied by a Man and his Wife was duly executed by them, the Deed having been enrolled for ſafe Cuſtody, and afterwards loſt; a Copy of the Inrollment was allowed at the Trial to be given in Evidence.

Walton

Caſe 530. *Nov.* 7.

Walton verſus *Hanbury & al'.*

IN 1695, the Defendant and others, Part-owners of the *Danby* Galley, fitted her out as a Privateer, and made the Plaintiff *Walton* Captain, and obtained a Commiſſion by Letter of *Marque* from the Duke of *Savoy*, and ſent her to cruiſe in the *Mediterranean*; where in the Year 1695, the Captain took a *French* Ship, on board whereof were ſeveral *Turks* and *Tripolins*. The Captain ſet the *Turks* on Shore; but detained ſome of their Effects.

In 1700, Complaint was made by the Conſul of *Tripoly* to King *William*; and upon Proceſs iſſued out of the *Admiralty*, Sentence was given againſt the Plaintiff, *viz.*

Firſt, That the Ship and Goods were not well taken by an *Engliſhman*, and *Engliſh* Veſſels, without any Commiſſion from the *King*; but by Commiſſion from the Duke of *Savoy* only; and therefore if the *Caption* was lawful, yet it was a Perquiſite belonging to the *Lord High Admiral*. And *ſecondly* not good, becauſe the *Tripolins* being in Peace with *England*, their Goods and Effects were not to be ſeiſed by *Engliſh* Ships or Men.

The Plaintiff having now agreed the Matter with the Conſul of *Tripoly* for 500 *l.* and having obtained a Grant from King *William* of the Ship and Goods, obtained a Decree for *two Thirds* of the Value of the Ship and Goods, each Part-owner to pay according to the *Quantum* of his Intereſt; if any inſolvent, the Loſs to be born by the Reſt, who were ſolvent, with Intereſt and Coſts.

Hodgſon and *Caldicot* verſus *Hodgſon* and *Fitch & al'.*

Caſe 531. *Lord Chancellor.* *Nov.* 7.

Collateral Proof may be allowed to make certain a Perſon or Thing, deſcribed in a Will. *Poſt.* Ca. 557. See the next Caſe.

Robert Hodgſon ſeiſed of a good real Eſtate, and poſſeſſed of a perſonal Eſtate, *Sept.* 28, 1701, deviſed to the Defendant *Hodgſon* ſeveral Cloſes of the Value of 60 *l. per Ann.* paying 100 *l.* he owed to *J. S.* and 100 *l.* he owed by Bond to one *Shaw*; and deviſed ſome ſmall Legacies, and gives all the Reſt of his perſonal Eſtate to the Plaintiffs his Nieces. It fell out that the 100 *l.* due on Bond was not due to *Shaw*, but was the Money of *Alice Beck*, then the Wife of one *Fitch*. By Reaſon of this Miſtake, the Deviſee of the Land refuſed to pay the 100 *l.* The Plaintiff examined *Harvey* who drew the Will, and depoſed that the Teſtator declared he meant the 100 *l.* due to the Perſon, who married Mrs. *Beck* of *Lincoln*; and another Witneſs depoſed, that he meant the Debt for which *Caldicot* was bound as his Surety.

Decreed for the Plaintiff, *firſt* at the *Rolls*, and now brought on by a Bill of *Review* before the *Lord Chancellor*, and heard on the Merits, and again decreed for the Plaintiff: *Lord Chancellor* declaring he ſaw no Hurt in admitting of collateral Proof to make certain the Perſon, or the Thing deſcribed.

Cuthbert verſus *Peacock.*

Caſe 532. *Lord Chancellor.* *Nov.* 10.

Parol Proof allowed as to a Man's Intention in a Will, where the Queſtion was, whether a Legacy ſhould go in Satisfaction of a Debt due from the Teſtator to the Legatee. *Poſt.* Ca. 578.

Teſtator indebted to his Niece *Frances* 100 *l.* by Bond, by Will gave her 300 *l.* and 200 *l.* apiece to her Siſters; and afterwards by a Codicil reduced the Legacies

Legacies of 200 *l.* to 100 *l.* apiece to his other Nieces; but ſaid nothing as to his Niece *Frances*; and afterwards borrowed of his Niece *Frances* 100 *l.* more.

Queſtion was, Whether the 300 *l.* Legacy ſhould go in Satisfaction of the Bond.

Lord Chancellor. The Conſtruction of making a Gift a Satisfaction, had in many Caſes been carried too far; that it was reaſonable in ſuch Caſes to admit of parol Proof, as to the Teſtator's Intention; and upon reading the Proofs, decreed the 300 *l.* Legacy over and above the Debt; for otherwiſe the Favourite Niece (as *Frances* was proved to be) deducting the 200 *l.* and Intereſt due to her out of the 300 *l.* there would not remain above 80 *l.* and ſhe reduced to a leſs Legacy, than what was given to her Siſters, contrary to the Teſtator's Intention.

Caſe 533. *Lord Keeper.* *Nov.* 11.

Grimſton verſus Dominum *Bruce & ux'.*

A. by Will gives his Grandaughter 30000 *l.* to be paid by 1000 *l.* a Year, and deviſes his Lands to *B.* and his Heirs, on Condition that he pays his Debts and Legacies. The 1000 *l.* a Year not being paid, the Grandaughter enters. If *B.* is relieved againſt the Breach of the Condition, it muſt be upon Payment of Intereſt for each 1000 *l.* from the Time it became due, together with Coſts.

SIR *Samuel Grimſton* deviſed, *inter alia*, 30000 *l.* to his Grandaughter and Heir, now the Wife of the Lord *Bruce*, to be paid by 1000 *l.* *per Ann.* for *ſixteen* Years, then 2000 *l.* *per Ann.* until the 16000 *l.* was made up 30000 *l.* but if his Grandaughter dies before it be raiſed, then Payment to ceaſe: And deviſes to the Plaintiff, *ſecond* Son of Sir *William Lucking*, all his Lands in *Hertfordſhire* for his Life, Remainder to his *firſt* and other Sons in Tail, *&c.* and all the Reſt and Reſidue of his Eſtate, real and perſonal, he deviſes to him and the Heirs of his Body, upon Condition in both Bequeſts, that he pays his Debts and Legacies.

Per Cur. The Plaintiff muſt pay Intereſt for each 1000 *l.* as it became due, and that without any Deduction for Taxes, and with Coſts, he being relieved againſt the Forfeiture by Breach of the Condition, upon which Defendants had entred; and held that the Condition extended to both Deviſes, *viz.* as well to the *Hertfordſhire* Eſtate, as to what paſſed by the general Deviſe of the Reſt and Reſidue of real and perſonal.

Crouch verſus *Martin* and *Harris & al'.* Caſe 534.

THE Plaintiff lent *Arthur Harris*, late Husband of the Defendant 100 *l.* on *Bottom-Rhea*; and as a farther Security aſſigned to the Plaintiff the Wages, that would become due to him in the Voyage to the *Indies*, as Chirurgeon of the Ship at 4 *l.* 10 *s.* *per* Month; the Ship returned ſafe to *London*, and 145 *l.* became due on the *Bottom-Rhea* Bond. *Arthur Harris* died in the Voyage; the Defendant his Widow took out Adminiſtration; and there being a Bond given by her Husband on her Marriage to leave her 400 *l.* if ſhe ſurvived him, ſhe confeſſed Judgment thereon, and inſiſted *that* Judgment ought to be firſt paid, and the Wages due to the Husband applied to that Purpoſe.

A Seaman aſſigns his Wages, as a Security for Money, and dies indebted to other Perſons. This Aſſignment ſpecifically binds the Wages, and the Money ſecured thereby ſhall be paid thereout preferable to all other Debts.

Per Cur. Seamens Wages are aſſignable; and the Aſſignment ſpecifically binds the Wages; and in Truth the Advancing the 100 *l.* on the Credit of the Wages is, as it were, paying the Wages before hand; and the Seaman or his Widow muſt not have his Wages twice.

It is a *Choſe in Action*, being due by Contract, although the Service not then done, and a *Choſe in Action* is aſſignable in Equity upon a Conſideration paid.

A *Choſe en* Action is aſſignable in Equity, upon a Conſideration paid.

Watſon

Caſe 535. *Nov.* 13.

Watſon verſus *Hinſworth Hoſpital.*

In the Conſtitutions for founding an Hoſpital it was ordained, that no Leaſe ſhould be made for above 21 Years, and the Rent not to be raiſed, nor above 3 Years Rent taken for a Fine. Tho' the Tenant of the Hoſpital Lands is intitled to a beneficial Leaſe upon Renewal; yet this Conſtitution is not to be followed according to the Letter, but as Times alter, and the Price of Proviſions increaſes, ſo the Rent ought to be raiſed in Proportion.

THE Hoſpital conſiſting of a *Maſter* and *twenty* poor Men and Women of the Gift of Dr. *Holyale*, Archbiſhop of *York*, who deviſed his Lands to his Executors, and all his perſonal Eſtate to be laid out in founding of the Hoſpital; the Executors procured Letters Patent for that Purpoſe, with Power for them to make Ordinances and Conſtitutions for the governing the Hoſpital; and they, amongſt other Things, did ordain that no Leaſe ſhould be made for above *Twenty-one* Years, the Rent not to be raiſed, nor above *three* Years Rent taken for a Fine, or *Greſſom.*

The Executors ſold Part, and leaſed out the Reſidue, reſerving only 120 *l. per Ann.*

On a Bill by the Maſter and Hoſpital, Sir *Edward Phillips* decreed the Leſſees to enjoy, paying 120 *l. per Ann.* and afterwards the Cauſe was heard again by the Lord *Elſmere*, and by the Lord *Clarendon*; and although the Leaſe was long before expired; yet decreed by Lord *Elſmere*, the Leſſee to Account at 120 *l. per Ann.* only, and to have a new Leaſe for 21 Years at 120 *l. per Ann.* altho' it appeared by the Decree the Lands were 250 *l. per Ann.* ſo 120 *l.* only to the Hoſpital, and 130 *l.* allowed to the Tenant in reſpect of Improvements made by him, and of the Rule or Ordinance, that the Rent ſhould not be raiſed. In 1663, decreed again by Lord *Clarendon*, aſſiſted with Chief Juſtice *Hide*, and Chief Baron *Hale*, that the Leaſe of *Twenty-one* Years, having been ſome Time ſince expired, the Tenant ſhould account from the Expiration of the Leaſe at 120 *l. per Ann.* and that the Tenant ſhould have a new Leaſe on reaſonable Terms,

Terms, and recommended it to the Archbiſhop of *York*, to call the Parties before him, and to certify what Terms were thought reaſonable for a new Leaſe, who certified the Hoſpital had agreed to accept *one Hundred Pounds* Fine and 120 *l. per Ann.*

Watſon the preſent Tenant having purchaſed the Leaſe in Being, now near expiring, and laid out *two Thouſand Pounds* in Improvements, brought his Bill to have a new Leaſe, the Maſter refuſing to renew.

Lord Chancellor. The Conſtitution juſt and charitable, that the Rent ſhould not be raiſed for the Encouragement of the Tenant to improve the Eſtate; and he ought to find a Benefit by it; and the Hoſpital alſo will find an Advantage in having the Rent well ſecured by an Eſtate of greater Value, and conſtantly paid; but the Rule or Conſtitution is not to be followed according to the Letter, that no more Rent ſhould be taken, than what was at firſt reſerved; but as Times alter, and the Price of Proviſions, *&c.* increaſes, ſo the Rent ought to be raiſed in Proportion; and declared the Tenant was intitled to a beneficial Leaſe, but not at any certain Rent. That he regarded the Conſtitution, not in the Letter, but in the Reaſon of it; and referred it to a Maſter to certify the Value of what had been laid out in Improvements, and when that was aſcertained, referred it to the Archbiſhop of *York*, to certify what Fine and what Rent he thought reaſonable.

Attorney General verſus *Barnes & ux'.* Caſe 536.

THE Attorney General at the Relation of *Sidney Suſſex College* in *Cambridge* ſet out, that one Dr. *Johnſon*, a Member of that College, by Will in Writing mention-

A. deviſes Frehold Lands for a Charity, but the Will was not executed in the Preſence of

three Witneſſes. Adjudged the Will being void as a Will, it could not operate as an Appointment within the Statute of 43 *Eliz.*

mentioned to deviſe his Land to the College, to maintain *two* Scholars, to augment Vicarages, and to buy Preſentations, and to maintain Widows; and by a Codicil gave other Charities.

To the Will there were no Witneſſes at all, but to the Codicil there were *three* Witneſſes, who ſubſcribed in the Teſtator's Preſence.

But ſuch a Will may operate as an Appointment, as to Copyhold Lands, where there is a Surrender to the Uſe of the Will, they paſſing by the Surrender, and not by the Will.

First, As to ſuch of the Lands, as were Copyhold, it was agreed they were well appointed, they paſſing by Surrender, and not by the Will.

A. deviſes Lands by Will to which there are no Witneſſes, and afterwards makes a Codicil executed in the Preſence of *three* Witneſſes. The Will is void, as to the Land, and the Codicil will not ſupport it. 3 Mod. 262.

Secondly, It was alſo agreed, as to the Frehold, the Will, as a Will, was void; for although there were *three* ſubſcribing Witneſſes to the Codicil, yet that would not ſupport the Will; and it was ſo adjudged in *C. B.* in the Caſe of *Lea* and *Libb.*

But the great Queſtion was, admitting it void, as a Will, if good as an Appointment; *Griffith Flood*'s Caſe, and *Colliſon*'s Caſe, *Hob.* 136. and *Moor* 888.

It was inſiſted, that the Statute of *Frauds* and *Perjuries* makes Wills abſolutely void, if there are not *three* ſubſcribing Witneſſes thereto; and the Statute is to be ſtrictly taken to prevent Frauds in the Time, when People are eaſieſt to be impoſed on.

Lord Keeper took Time to conſider of it, and afterwards adjudged, that the Teſtator intended to diſpoſe by Will; that the Writing imported a Will, and being void as a Will, could not operate as an Appointment.

Wilker verſus *Bodington.* Caſe 537.

A. purchaſes of a Man, who had committed an Act of Bankruptcy, but without Notice thereof; afterwards a Commiſſion is taken out, and there being a Term ſtanding out in Truſtees, the Aſſignee brings a Bill againſt them and the Purchaſer, to have the Term aſſigned to him. Bill diſmiſſed.

James Bodington on *May* 1, 1701, was arreſted at the Suit of one *Staines* for a juſt Debt of 700 *l.* ſecured by Bond; he for Delay pleaded it was for Money won at play, and held out the Plaintiff above *ſix* Months, which by the Statute *Jac.* 1. was adjudged to be an Act of Bankruptcy, altho' he afterwards paid the Debt, and many *thouſand Pounds* to others, and appeared publickly on the *Exchange*, and afterwards (*to wit*) *Dec.* 1, 1707, made a Settlement on the Defendant his Son's Marriage.

The Settlement was thus: *Henry Bodington* had on his own Marriage, ſettled Houſes in *Lothbury* on *Joſeph* and *Peter Grey*, in Truſt to ſecure 2000 *l.* to his Wife, if ſhe ſurvived; and now reciting *that* Settlement, with the Privity of the *Greys*, who were Parties to it, he aſſigns all his Eſtate, Right, Title, and Intereſt to the *Ruſſells*, the Wife's Relations, for the Benefit of *Henry* for Life, and of his Wife for Life, *&c.*

The Plaintiff being the Aſſignee under a Statute of Bankrupt taken out againſt *Bodington*, the Queſtion was, Whether a Court of Equity would decree the *Greys* to aſſign the Term to the Plaintiff, or ſuffer it to reſt in them to protect the Settlement.

For the Defendants it was inſiſted, that they being Purchaſers without Notice of the Bankruptcy; Equity ought not to impeach their Title, if they can defend themſelves at Law; and although they have not the legal Eſtate in them; yet the *Greys*, in whom the legal Eſtate is, being Parties to the Settlement, are become their Truſtees: And in the Caſe of *Blake* and *Hungerford*, where Truſtees

Truſtees declared a Truſt for *Blake, that* gave him and thoſe claiming under him a Preference againſt a Statute acknowledged to *Arnold*, to whom Sir *Jeremy Sambrook* was Executor; although the Statute was acknowledged by Sir *Edward Hungerford*, before he ſold his Eſtate for Life, to his Son *Anthony Hungerford*, under whom *Blake*, *&c.* claimed; and in the Caſe of *Hitchcox* and *Sedgwick*, it was allowed that a Purchaſer without Notice of the Bankruptcy may be protected, if he gets in a prior Incumbrance. But it was objected here, that it was not ſaid by and with the Conſent of the *Greys*, but only with their Privity.

A Purchaſer without Notice ſhall not be hurt in Equity, not only where he has got in a prior legal Title; but where he has a better Right to call for the legal Eſtate, than another who has got an Incumbrance prior to his Title.

Lord Chancellor. I take it to be the Rule in Equity, that where a Man is a Purchaſer without Notice, he ſhall not be annoyed in Equity, not only where he has a prior legal Eſtate, but where he has a better Title or Right to call for the legal Eſtate than the other; and therefore diſmiſſed the Bill.

Caſe 538.

Higgens verſus *Dowler.*

A. demiſes Lands for a long Term in Truſt for *B.* for Life, then to his firſt Son for the Remainder of the Term, and in Default of Iſſue of ſuch Son, to the *ſecond* and other Sons of *B.* and for Want of Iſſue Male to the Daughters of *B.* for the Remainder of the Term. There having never been a Son, the Limitation to the Daughters was held good.

Alice Higgens poſſeſſed of a Term for 999 Years, demiſed to *J. S.* for 860 Years, in Truſt for her ſelf for Life; then to *Henry Higgens* her Son for Life, Remainder to *Mary* his Wife for Life, then to the *firſt* Son during the Reſidue of the Term; and in Default of Iſſue of ſuch firſt Son, to the *ſecond* and other Sons of *Henry* and *Mary*; and in Default of Iſſue Male, to the Daughter and Daughters of *Henry* and *Mary*, equally to be divided between them, during the Reſidue of the Term; and in Default of Iſſue of *Henry* and *Mary*, to *Henry* during the Reſidue of the Term.

Upon

Upon a Demurrer the *Lord Chancellor* was of Opinion, that in Regard there never was any Son, but only a Daughter, the Limitation to the Daughter was good. In Caſe of an expreſs Deviſe to the *firſt* Son during the Reſidue of the Term, Remainder to the Daughter; if no Son, the Remainder to the Daughter will take place; and where deviſed to the firſt Son in Tail, *that* gives him the whole Term only by Conſtruction in Law: And an Eſtate by Conſtruction of Law cannot be greater, or of more Force to make void the Remainder, than an expreſs Limitation of the Reſidue of the Term.

Godfrey verſus *Chadwell.*

Caſe 539. *Lord Chancellor.* *Dec.* 18.

After a Decree by firſt Mortgagee to foreclose the Mortgagor, a ſecond Mortgagee may redeem the firſt, though the firſt Mortgagee had no Notice of the ſecond Mortgage before the Decree.

BILL by a ſecond Mortgagee to redeem. The firſt Mortgagee pleaded his Mortgage, and Decree to Foreclose the Mortgagor, without Notice of the ſecond Mortgage. Plea over-ruled.

DE

Term. S. Hillarii,

1707.

In CURIA CANCELLARIÆ.

Caſe 540.
Jan. 31.

Small verſus *Brackley.*

A. intruſted by *B.* to receive Intereſt on Tallies, receives the Principal, and fails, and afterwards compounds with his Creditors; but *B.* would not come in without having a greater Compoſition, which *A.* agrees to give. *A.* brings a Bill to be relieved againſt this underhand Agreement; but by having been guilty of a great Fraud and Breach of Truſt, and having agreed to make ſome Satisfaction, was intitled to no Relief in Equity. Bill diſmiſſed.

THE Plaintiff was intruſted by the Defendant to receive the Intereſt due upon Tallies, which the Plaintiff had pledged or mortgaged to her, and *two* or *three* Times he received the Intereſt, and paid it to her, and brought back the Tallies and Orders; but at laſt wanting Money, he received not only the Intereſt, but alſo the Principal, and ſhortly afterwards failed.

The Creditors ſigned a Deed to accept a Compoſition of *nine Shillings per* Pound, ſo as all the Creditors ſigned the Deed within the Time limited; otherwiſe to be void. Mrs. *Brackley* refuſed to ſign and accept the Compoſition, unleſs the Plaintiff would pay her *one Hundred Pounds* down, and *three Shillings* in the Pound over and above the *nine Shillings per* Pound.

The 100 *l.* was paid, and Security given for the 75 *l.* the Reſidue of the Compoſition Money.

Plaintiff brought a Bill to be relieved, the Defendant having been guilty of a Fraud in ſigning the Compoſition for 9 *s. per* Pound to blind the other Creditors, and yet underhand to gain a greater Benefit to her ſelf.

The Cauſe was heard at the *Rolls*, and Baron *Price* decreed for the Plaintiff; but upon an Appeal to the *Lord Chancellor*, he diſmiſſed the Bill; the Plaintiff having been guilty of as great a Fraud and Breach of Truſt, as could be, and not be criminal; and having agreed to make ſome Satisfaction, he ought not to be relieved in Equity.

Winne verſus *Lloyd.*

Caſe 541.

THE Defendant having obtained a Bill of Sale of Goods, and likewiſe a Note from his Brother a little before his Death, for Payment of 300 *l.* the Plaintiff inſiſted thoſe were voluntarily given, and for a Colour only, and that underneath the Note, the Defendant had ſubſcribed an Acknowledgment, that no Debt was due to him.

Copy of a Note taken by one, who had been intruſted with the Note, and was ſince dead, under which was wrote an Acknowledgment that nothing was due, allowed to be read as Evidence, though not proved to be a true Copy, and though the Defendant had ſworn there was no ſuch Acknowledgment under the Note, it appearing when the Note was produced, that the Bottom of it was torn off.

The Defendant by Anſwer ſwore his Debt, and denied there was any ſuch Defeaſance or Acknowledgment.

It appeared upon the Proof, that the Defendant depoſited the *two* Inſtruments he had ſo obtained, in the Hands of *Sidney Lloyd* his Siſter, and afterwards wrote to her to ſend him the *two* Inſtruments by a ſpecial Meſſenger

ger ſent for that Purpoſe, and that ſhe ſhould not let any one ſee them.

His Siſter ſent them, but ſat up all Night to take Copies of them, as ſhe declared in her Life-time, being dead before the Commencement of this Suit; and upon producing the Copies ſo taken by the ſaid *Sidney Lloyd*, there appeared to be ſuch Acknowledgment under wrote, that there was no real Debt; and upon inſpecting the Inſtruments produced by the Plaintiff upon ſtampt Paper, it appeared that the Bottom was torn off.

Per Lord Chancellor: You ſhall read the Copies, being the Hand-writing of *Sidney Lloyd*, although not proved to be true Copies.

Caſe 542.

Pocock verſus *Lee.*

A. and his Wife mortgage the Wife's Eſtate, and *A.* covenants to pay the Money, but the Equity of Redemption is reſerved to them and their Heirs.

MR. *Alexander* and his Wife, who was the Daughter and Heir of one *Dayly*, made a Mortgage of the Wife's Eſtate; the Husband covenanted to pay the Money, but the Equity of Redemption was reſerved to them and their Heirs. Mr. *Alexander* the Husband died, and made the Defendant his Executor. The Wife ſurviving after a Decree to account.

A. dies and his Wife ſurvives. The Mortgage ſhall be diſcharged out of the Husband's Eſtate.

The Queſtion was upon Exceptions to the Maſter's Report, whether the Mortgage-Money ſhould ſtand charged upon the Land, or the Land be exonerated out of the Husband's perſonal Eſtate.

Per Cur. The Husband having had the Money, is in Equity the Debtor, and the Land is to be conſidered but as an additional Security; and ſo decreed it according to the Judgment in the Houſe of Peers, in the Caſe of Lord and Lady *Huntington.*

Hancock verſus *Hancock.*

Caſe 543.

Leonard Hancock on the Marriage of the Defendant his Wife, in Conſideration of 2000 *l.* Portion covenanted to purchaſe 400 *l. per Ann.* and ſettle it on himſelf and his Wife for their Lives, and the Life of the Survivor, Remainder to the Heirs of their *two* Bodies begotten; and if he ſhould happen to die before ſuch Purchaſe and Settlement ſhould be made, that then the Wife might elect either to have the 400 *l. per Ann.* purchaſed and ſettled, or to have 3000 *l.* paid her in Lieu of Dower and Thirds.

A Man on his Marriage, covenants to purchaſe and ſettle Lands of 400 *l.* a Year to the Uſe of himſelf for Life, then to his Wife for Life, Remainder to the Heirs of their *two* Bodies; and if he died before a Settlement made, the Wife might elect either to have the 400 *l.* a Year, or 3000 *l.* in Money in Lieu of Dower and Thirds. The Husband dies before a Settlement made. On a Bill by the Creditors, the Wife by Anſwer elects the 3000 *l.* and the Children inſiſt on having a Settlement made according to the Articles expectant on their Mother's Death, by which Means all the Aſſets would be exhauſted. Decreed a Settlement to be made on the Wife and Children, notwithſtanding the Election.

There being ſeveral Children of the Marriage, and the Husband dying before any Purchaſe and Settlement made, a Bill was brought by the Creditors againſt the Defendant, the Wife and Adminiſtratrix of her Husband, for a Diſcovery and Account of Aſſets.

The Wife by Anſwer ſet forth the Articles, and that no Purchaſe or Settlement having been made, ſhe claimed and elected to have 3000 *l.* paid to her according to the Articles: And the Children by their Anſwer inſiſted to have 400 *l. per Ann.* purchaſed, and ſettled according to the Articles expectant on the Mother's Deceaſe; and by that Means the Mother and Children would have exhauſted all the Aſſets.

Per Cur. Notwithſtanding the Election, decree a Settlement of 400 *l. per Ann.* on the Wife for Life, Remainder to the Children *nunc pro tunc.*

Caſe 544.
April 22.

Waters verſus *Ebrall.*

Guardian not compellable to apply the Profits of the Lands, deſcended on the Infant Heir, to pay off the Bond-Debts of the Anceſtor.

PLaintiff, the Widow of *Ebrall* her *firſt* Husband, and as Guardian to her Son, received the Rents and Profits of his Eſtate, and paid off Debts by Specialty, but took Aſſignments of the Bonds; the Son dying in his Minority without Iſſue, ſhe brought her Bill againſt the Defendant, the Heir, for a Diſcovery of Aſſets by Diſcent to ſatisfy the Money due by Bond, ſhe claiming the Profits, as Adminiſtratrix to her Son.

Per Cur. The Guardian not compellable to apply the Profits of the Eſtate of the Infant Heir, to pay off the Bond-Debts.

Caſe 545.
April 23.

Manning verſus *Weſterne.*

A. indebted by Specialty, and alſo on ſimple Contract, pays ſeveral Sums, and enters them in his Book as paid on Account of what was due by Specialty.
This Entry not ſufficient to make the Application.

DEfendant being indebted to the Plaintiff on Specialty, *viz.* on Articles under Hand and Seal, and alſo on ſimple Contract, on a running Account made ſeveral Payments of Sums in Groſs, and entered them in his own Book, as paid upon Account of what was due upon Articles.

Queſtion was, Whether theſe Sums ſhould be applied towards Satisfaction of what was due on the Articles, which carried Intereſt, or in Satisfaction of the Debts by ſimple Contract.

4

Per

Per Lord Chancellor; Although the Rule of Law is, that *quicquid ſolvitur, ſolvitur ſecundum modum ſolventis*; yet that is to be underſtood, when at the Time of Payment he that pays the Money declares upon what Account he pays it; but if the Payment is general, the Application is in the Party, who receives the Money, and the Entries in the Defendant's Books, are not ſufficient to make the Application.

Quicquid ſolvitur, ſolvitur ſecundum modum ſolventis. But this Rule is to be underſtood, when the Perſon paying at the Time of Payment declares on what Account he pays the Money; but if the Payment is general, the Application is in the Perſon receiving.

DE
Termino Paſchæ.
1708.
In CURIA CANCELLARIÆ.

Caſe 546. *April* 28.

Parſons and *Cole* verſus Dr. *Briddock* & al'.

The Principal in a Bond being arreſted gave Bail, and Judgment is had againſt the Bail. On a Bill by the Sureties, who had been ſued on the original Bond, and paid the Money, decreed the Judgment againſt the Bail to be aſſigned to them, in order to reimburſe them what they had paid with Intereſt and Coſts.

PLaintiffs in 1694 were bound as Sureties for Mr. *Briddock*, and had Counter-bonds. *Briddock* the Principal was afterwards arreſted, and the Defendant his Brother became his Bail, and Judgment was obtained againſt the Bail. The Plaintiffs being ſued on the original Bond were forced to pay the Money, and now brought their Bill to have the Judgment obtained againſt the Bail aſſigned unto them, in order to be reimburſed what they had paid.

Per Lord Chancellor; The Bail ſtand in the Place of the Principal, and cannot be relieved on other Terms than on Payment of Principal, Intereſt and Coſts, and the Sureties in the original Bond are not to be contributory; and therefore decreed the Judgment againſt the Bail

Bail to be aſſigned to the Plaintiffs, in order to reimburſe them what they had paid, with Intereſt and Coſts.

And although the Plaintiffs by their Bill had unadviſedly charged that they had agreed to pay an equal Proportion of the Debt; yet the Defendants having by Anſwer denied they made any ſuch Agreement, *that* ſet the Plaintiffs at large, and left them at Liberty to demand the Whole againſt the Defendants; and decreed it accordingly.

Jennings Executor of *Carew Guidott* verſus *Adrian Moore, Blincorne, & al'.*

Caſe 547. *May* 7. *Lord Chancellor.*

A defective Surrender of Copyhold Land for ſecuring a Sum of Money, which was become void for Want of being preſented in due Time, made good againſt a ſubſequent Purchaſer with Notice.

Carew Guidott, the Plaintiff's Teſtator, in 1699, lent to *Carleton Whitlock* 200 *l.* on a Surrender of ſome Copyhold Lands in *Walton* in the County of *Surrey*; but neglected to get the Surrender preſented at the next Court, as he ought to have done; and for Want thereof the Surrender was void according to the Cuſtom of the Manor. In 1703, *Blincorne* agrees with *Whitlock* to purchaſe for 400 *l.* and took a Surrender in the Name of the Defendant *Moore*, who agreed to become the Purchaſer, and paid the Conſideration-Money; and pleaded himſelf to be a Purchaſer, without Notice of the Plaintiff's Demand, and that his Surrender was preſented, and he admitted Tenant without Notice of *Guidott*'s Surrender, which was kept in his Pocket, and not preſented till long after his Purchaſe, Surrender, Admittance and Payment of his Conſideration-Money.

A. having Notice of an Incumbrance purchaſes in the Name of *B.* and then agrees that *B.* ſhall be the Purchaſer, and he accordingly pays the Purchaſe-Money without Notice of the Incumbrance. Tho' *B.* did not employ *A.* nor knew any Thing of the Purchaſe till after it was made; yet *B.* approving of it afterwards, made *A.* his Agent *ab initio*, and therefore ſhall be affected with the Notice to *A.* *Ante* Caſe 519.

But it being proved, that *Blincorne*, whilſt he was treating with *Whitlock*, had Notice, and therefore declined to purchaſe in his own Name, and took the Surrender in *Moore*'s Name, and procured him to become the

chaſer, that he might be paid a Debt, which *Whitlock* owed him, out of the Conſideration-Money; *that* Notice was adjudged ſufficient to affect *Moore*; and he was decreed to pay the 400 *l.* and Intereſt, or to ſurrender to the Plaintiff; and altho' he did not employ *Blincorne* to purchaſe for him, or knew any Thing of it, until after *Blincorne* had agreed, and taken the Surrender in his Name; yet he approving of it afterwards, made *Blincorne* his Agent *ab initio.*

This Decree was firſt made at the *Rolls*, and was afterwards affirmed on an Appeal to the *Lord Chancellor.*

Ant. Ca. 513. In this Cauſe was cited the Caſe of *Taylor* and *Wheeler*, where the Plaintiff lent 400 *l.* on the Surrender of a Copyhold Eſtate, and took no Care to have it preſented at the next Court, nor in *four* Years Time, by which it became void by the Cuſtom of the Manor; and before it was preſented, the Surrenderor became a Bankrupt.

Queſtion was, Whether he ſhould be relieved againſt the Creditors of the Bankrupt; and altho' the *Lord Chancellor* at firſt doubted, yet afterwards decreed for the Plaintiff.

DE
Term. S. Trinitatis,
1708.
In CURIA CANCELLARIÆ.

Ledſome verſus *Hickman.*

Caſe 548.
June 5.

DEfendant's Teſtator deviſed 300 *l.* apiece to his *three* Daughters *A. B.* and *C.* at *Twenty-one* or Marriage; if any died before, to go to the Survivor. *B.* one of the Daughters died in the Life-time of the Teſtator.

J. S. deviſed 300 *l.* apiece to his *three* Daughters *A. B.* and *C.* at *Twenty-one* or Marriage.

If any died before, to go to the Survivors. *B.* died in the Life of the Teſtator, her Legacy ſhall go to the ſurviving Daughters. *Poſt.* Caſe 581.

Queſtion was, Whether the 300 *l.* a lapſed Legacy, or ſhould accrue to the *two* ſurviving Siſters. Decreed for the Plaintiff.

Lord Chancellor. Deviſe over as an executory Deviſe. *Sed quære tamen.*

Turner

Caſe 549. *June* 16.

Turner verſus *Jennings.*

A Freeman of *London* aſſigns the greateſt Part of his perſonal Eſtate in Truſt for himſelf for Life, and then for his Grandchildren: This Deed not good againſt the Cuſtom of *London*, as to the Moiety belonging to the Children, but binding as to the other Moiety, which he had Power to diſpoſe of, he having no Wife. *Ant.* Ca. 91.

A Freeman of the City of *London* by Deed executed in his Life-time, grants and aſſigns over the greateſt Part of his perſonal Eſtate, in Truſt for himſelf for Life, and then for the Benefit of his Grandchildren; his Son dying in his Life-time; the Plaintiff who married the Freeman's Daughter, brought his Bill to ſet aſide the Deed, and to have his Wife's orphanage Part in her Right, according to the Cuſtom of the City of *London*. And although it was admitted that if the Father had made an actual Gift of any Part of his perſonal Eſtate to his Grandchildren in his Life-time, or had actually given all to one Child in his Life-time, *that* would have held good againſt the Cuſtom; or if he had turned all his perſonal Eſtate into a Purchaſe of Lands, he might have diſpoſed of it as he thought fit; yet it was decreed for the Plaintiff, and the Deed ſet aſide; for that the Freeman had not intirely diſmiſt himſelf of the Eſtate in his Life-time; and the Deed being made when he was languiſhing, and but a little before his Death, it ought to be looked upon as a *Donatio cauſa mortis*. *Lord Chancellor* declaring that either the Cuſtom muſt be intirely given up, or this Deed muſt be looked upon, as made in Fraud of the Cuſtom; but will ſtand good as to a Moiety, which he, having no Wife, might diſpoſe of.

Caſe 550. *July* *Lord Chancellor.*

Lord *Fairfax* verſus Lord *Derby.*

A. is Tenant in Tail ſubject to a Rent-charge to B. for Life; A. dies, the Rent-charge being in Arrear. The Iſſue in Tail not liable by the Statute of 32 *H.* 8. *ap.* 37. to the Arrears incurred in the Life of his Anceſtor. 5 Co. 118. a.

A Queſtion ariſing on the Statute of 32 *H.* 8. how far the Iſſue in Tail ſhould be liable for the Arrears

rears of a Rent-charge granted to the late Counteſs of *Derby* for her Life, and which incurred and became due in the Life-time of his Anceſtor; the Plaintiff, the Lord *Fairfax* being the Executor of the late Counteſs of *Derby*.

The *Lord Chancellor* was of Opinion, that the Statute only provided what was juſt and equitable; that he who ſhould have paid, ſhould ſtill be liable to Action of Debt or Diſtreſs of the Executor or Adminiſtrator of the Grantee of the Rent-charge; and ſo againſt any claiming under him by Purchaſe, Gift or Deſcent; but extends not to the Iſſue in Tail, who claim not under, but *Paramount*.

The Tenant ought to have paid the Rent-charge. It is true, whilſt the Rent-charge was continuing, the Iſſue in Tail was liable to be diſtrained for the whole Arrear which was incurred in the Life-time of his Anceſtor; but *that* was *ſummum jus*, and the new Remedy given by the Statute doth not carry it ſo far.

Had this Caſe been within the Statute, yet the Plaintiff's Remedy was at Law, and not to be aided in Equity, or the Remedy altered or changed from a Diſtreſs to a Receiver or Poſſeſſion.

Dubois verſus *Hole & ux'*.

Caſe 551. *July* 14.

DUbois, the Defendant's firſt Husband, in Caſe of the Death of his Son without Iſſue, deviſed his real Eſtate, and great Part of his perſonal, to the Plaintiffs his Nephews, who were then, and yet, Infants; and dies in *Barbadoes*. The Defendant his Widow poſſeſſed the Eſtate, and afterwards married Mr. *Hole*, her ſecond Husband; but before Marriage, aſſigned and conveyed

If a Bill is brought againſt Baron and Feme for a Demand out of the ſeparate Eſtate of the Feme; and the Husband is beyond Sea, and not amenable by the Proceſs of the Court; yet, if the Wife is ſerved with a *Subpœna*, ſhe muſt appear, and anſwer the Plaintiff's Bill

over her firſt Husband's Eſtate to Truſtees, ſo as the *ſecond* Husband might not intermeddle therewith. She comes over to *England*, and was ſerved with a *Subpœna* to anſwer the Plaintiff's Bill, and afterwards arreſted upon an *Attachment*; but her Husband Mr. *Hole* was beyond Sea, and not to be reached by the Proceſs of the Court. The Bill was brought againſt *Hole* and his Wife, and Mrs. *Hole* appeared to the Bill, and had moved for and obtained an Order for Leave to put in a ſeparate Anſwer without her Husband; but was afterwards adviſed by her Counſel, that ſhe being a *Feme Covert* could not be compelled to appear or anſwer, her Husband being never ſerved with any Proceſs, and obtained an Order to refer the Proceedings againſt her as irregular.

But *per Lord Chancellor*, If the Caſe is as laid by the Bill, the Wife has a ſeparate Capacity, and the Husband has nothing to do with the Eſtate; and rather than there ſhould be a Failer of Juſtice, he held the Proceſs regular againſt her alone, her Husband being beyond Sea, and not amenable by the Proceſs of the Court.

DE
Term. S. Michaelis,
1708.

In CURIA CANCELLARIÆ.

Hodges verſus *Hodges.*

Caſe 552.
Nov. 26.

CAnnot paſs as a Deviſe, becauſe not in the Will; nor can be a *Donatio cauſa mortis*, becauſe he gave it in his Life-time, in Contradiſtinction to a Deviſe.

But it is a Gift *bona fide*, not in Fraud of the Cuſtom, and in Lieu of what he had given out of his legatory Part, which he had Power to do.

An Advancement at a Certainty, if the Party will have the Benefit of the Orphanage, muſt be brought into Hotch-pot.

Where a deliberate Act is done, although it attains not the End deſigned, and ſhould in Conſequence prove quite contrary, not relievable in Equity.

Crane

Caſe 553.
Nov. 3.

Crane verſus *Drake & al'.*

A. purchaſes a Leaſhold Eſtate of an Executor, having Notice a Debt of the Teſtator's was unpaid, and out of the Purchaſe-Money has an Allowance of a Debt of 200 *l.* due to him from the Teſtator, and a Debt of 550 *l.* due to him from the Executor; the Remainder being 150 *l.* was paid in Money. This Sale not good againſt an unſatisfied Creditor.

Francis Hooper being indebted to the Plaintiff 100 *l.* on Bond, died poſſeſſed of a great perſonal Eſtate, and made his Brother *William* Executor and Deviſee, who waſted the Eſtate: The Defendant *Drake*, having Notice of the Plaintiff's Debt, buys of *William* the Executor a Leaſhold Eſtate by diſcounting 200 *l.* due from the Teſtetor, 550 *l.* due from the Executor, and by Payment of 150 *l.* in Money.

Plaintiff's Bill was to have Satisfaction for his Debt out of the Leaſhold Eſtate, being Part of the Teſtator's Aſſets.

Queſtion was, Whether this was a good Sale to bind a Creditor.

For the Defendant it was inſiſted, that an Executor may ſell, and with the Money, when he has it, may pay his own Debts; and for the ſame Reaſon he may upon Sale diſcount and allow the Purchaſer the Debt he owes him; and the rather in this Caſe, becauſe he paid 150 *l.* in Money with which the Executor might have paid the Plaintiff's Debt; yet decreed for the Plaintiff at the *Rolls*, and affirmed on an Appeal to the *Lord Chancellor*, he ſaying the Defendant was a Party, and conſenting to and contriving a *Devaſtavit*.

Carter verſus *Bletſoe.*

Caſe 554. *Nov.* 26.

Math. Bletſoe ſeiſed in Fee, in 1692 made his Will, and thereby deviſed to his eldeſt Son, *Saterthwaite Bletſoe*, and his Heirs, all his Meſſuages, *&c.* But it is my Will nevertheleſs, that my ſaid Son ſhall pay out of the ſaid Lands ſo deviſed to him, the Sum of *ſix Hundred Pounds* to my Daughter *Mary*, *two Hundred Pounds* at her Age of *Twenty-one*; to Son *John two Hundred Pounds* at his Age of *Twenty-one*; to Son *Math. two Hundred Pounds* at his Age of *Twenty-one*; and *four Pounds per Ann.* for Maintenance, until they come to *Twenty-one* and their Portions paid.

A. deviſes Lands to *B.* his Son and his Heirs, and declares that out of the Lands he ſhall pay 200*l.* to his Daughter at her Age of 21. She marries and dies under Age. Legacy not veſted.

Mary the Daughter married, and died before *Twenty-one*; her Husband came as Adminiſtrator to his Wife for the *two Hundred Pounds*, and alſo for *two Hundred* more, which was to accrue to her upon the Death of her Brother.

Per Cur. There is no veſting Clauſe in the Will; the Direction that the Son pays to *Mary* at her Age of *Twenty-one*, veſts nothing until ſhe attains *Twenty-one*, and ſhe dying before, it never ariſes.

Hales verſus *Vanderchem & ux'*, and *Cole, & econtra.*

Caſe 555. *Nov.* 13.

Vanderchem upon the Marriage of his Wife in 1704, by Articles in Writing, in Conſideration of *ſix Thouſand Pounds*, mentioned to have been by him received as a Por-

Agreements ſince the Statute of Frauds, *&c.* are not to be part Parol, and part in Writing;

yet a Depoſit for Performance of a written Agreement, though there is no Writing declaring ſuch Depoſit to be a Security, is not within the Purview of the Statute.

a Portion with his Wife, covenanted that if he and his Wife lived *ſeven* Years, in *three* Months afterwards to lay out *ten Thouſand Pounds* in a Purchaſe, and ſettle it on himſelf for Life, and his Wife for her Jointure, *&c.* and if he died before a Settlement was made, to leave her *ten Thouſand Pounds*, and confeſſed a Judgment to *Brown* and *Cole* for Performance of Covenants. *One Thouſand five Hundred Pounds* of the Wife's Portion was laid out in the Purchaſe of an Annuity of *one Hundred Pounds per Ann.* in the Exchequer, in the Name of *Cole*; and he gave a Declaration of Truſt to *Vanderchem*, that his Name was uſed in Truſt for him, his Executors and Adminiſtrators.

The Plaintiff *Hales* was prevailed upon to lend *Vanderchem one Thouſand Pounds* on his Aſſignment of the Annuity, and depoſiting the Tallies and Order with him; and the Wife attempting to take out Execution againſt the Husband in the Name of the Truſtees, before the Time was lapſed for making the Purchaſe; *Brown* one of the Truſtees was prevailed upon to acknowledge Satisfaction on the Judgment.

Hales's Bill was to compel *Cole* to aſſign the Truſt for ſecuring his *one Thouſand Pounds*; and the Croſs Bill was, that the Wife might have the Benefit of the *one Hundred Pounds per Ann.* and that *Brown* might be charged with a Breach of Truſt, and compelled to ſtand in the Place of *Vanderchem*, and make good the Marriage Agreement; ſhe inſiſting that the Annuity purchaſed in *Cole*'s Name in Truſt, was to remain as a Pledge until the Marriage-Agreement was performed; and that the Tallies and Order were depoſited in *Cole*'s Hands for that Purpoſe; but that her Husband perſuaded her to take them out of his Hands, on Pretence they were not ſafe there; and ſhe having ſo done, he afterwards took them out of her Cabinet, and delivered them to *Hales*.

For

For Mr. *Hales* it was inſiſted, that whatever private Agreement might be between *Vanderchem* and his Wife, as he had not heard of it, ſo it could not bind him, being only by Parol, and void by the Statute of *Frauds and Perjuries*, and was no Part of the Agreement in Writing, but inconſiſtent with it; the whole *ſix Thouſand Pounds* being thereby recited to have been paid to *Vanderchem*; and alſo inconſiſtent with the Declaration of Truſt given by *Cole*; and even before the Statute of *Frauds and Perjuries* it was never allowed, that any Thing of a parol Agreement ſhould be added or tacked to an Agreement in Writing, for that would render Writings of little Effect, and reduce all Things to Uncertainty.

Yet the *Lord Chancellor* diſmiſſed Mr. *Hales*'s Bill; and decreed the *one Hundred Pounds per Ann.* to the Wife, *Vanderchem* the Husband being broke, ſaying, altho' parol Agreements are bound by the *Statute*, and Agreements are not to be part Parol and part in Writing; yet a Depoſit or collateral Security for the Performance of the written Agreement is not within the Purview of the Statute. And the Defendant, who was married in her Infancy, and her Truſtees, who had made an improvident Agreement in Writing, did well afterwards upon Recollection to get that Depoſit for the Performance of the Agreement.

And as to *Brown*, who had unadviſedly been perſuaded to acknowledge Satisfaction on the Judgment, he having ſome Colour for ſo doing, becauſe a *Scire facias* had been brought in his Name without his Privity, and Execution taken out before the Agreement was broken, or the Time lapſed for making the Purchaſe; and it alſo appearing by the Time the *Scire facias* was ſued out, that Execution could not have been had before ſuch Time as *Vanderchem* failed, and became a Bankrupt; and he had no Lands that could be affected with the Judgment; therefore

therefore only condemned him in Coſts, and to anſwer Damages in Caſe the Wife ſhould think it worth her while to bring a *Quantum damnificatus* by the acknowledging Satisfaction on the Judgment; but with all declared, that if he had done it deſignedly and corruptly, as for a Reward, *&c.* he ſhould have been decreed to ſtand in the Place of *Vanderchem*, and to have made good the Marriage-Agreement.

Caſe 556.
Nov. 26.

Moore verſus *Godfrey.*

Legacies are given to *A.* *B.* and *C.* to be paid at their reſpective Marriages, and if any of them die, her Legacy to go to the Survivors. One of them dies unmarried, the Survivors ſhall not receive her Legacy before their reſpective Marriages.

SIR *William Coventry* deviſed 1500 *l.* to his *three* Co-Heireſſes to be paid at their reſpective Marriages, as well Principal as Intereſt; and if any of them died unmarried, her Legacy to go to the Survivor or Survivors.

One of the *three*, who was the Plaintiff, married and received her Share; the *ſecond* Niece died unmarried.

Queſtion was, Whether the 500 *l.* that accrued to the Plaintiff and Defendant, by the Death of the unmarried Siſter, was ſubject to the Condition of marrying, the Condition not being again repeated.

Per Lord Chancellor: The Condition ſhall go to the Whole, as well to what accrued by Survivorſhip, as to the original Deviſe.

5

Sir

Sir *Litton Strode* verſus Dominam *Ruſſel*, Dominam *Falkland*, &c.

Caſe 557.

SIR *William Litton* being ſeiſed of ſeveral Manors and Lands in *Hertfordſhire*, &c. the antient Eſtate of the Family, of about 3000 *l. per Ann.* and alſo of Lands of his own Purchaſe, Freehold and Copyhold, of about 600 *l. per Ann.* and poſſeſſed of a great perſonal Eſtate, and having no Iſſue, but *two* Siſters of the whole Blood, *viz.* the Lady *Ruſſel*, who by Sir *Francis* her Husband, had Iſſue ſeveral Daughters, and the Lady *Strode*, who died in his Life-time, and left Iſſue by Sir *George Strode* her Husband, the Plaintiff Sir *Litton Strode*, and the Lady *Falkland*, a Siſter of the half Blood; made his Will, and after a Deviſe of Part to his Wife for Life, and other Legacies, deviſed to the Plaintiff his Nephew, all other his Lands, Tenements and Hereditaments *out of Settlement*; provided he took upon him the Surname of *Litton*, and ſubject to raiſe 4000 *l.* in caſe the Teſtator left a Daughter.

A. by Virtue of ſeveral Settlements, being Tenant in Tail after Poſſibility of Iſſue extinct, of ſome Lands, Remainder in Fee to Truſtees, in Truſt for him and his Heirs; and as to ſome other Lands being Tenant for Life, Remainder to his *firſt*, &c. Sons, Remainder to Truſtees in Fee, in Truſt for the right Heirs of *B.* whoſe Heir he was;

and as to other Lands being Tenant in Tail, Remainder to the right Heirs of his Father; and having no Iſſue, by Will deviſed to his Nephew all his Lands, Tenements and Hereditaments *out of Settlement*. Decreed all the Lands ſo ſettled to paſs by this Deviſe.

The Chief Point in the Caſe was, what ſhould paſs by the Deviſe of Lands, Tenements and Hereditaments *out of Settlement*.

Upon the ſeveral Settlements that had been made in the Family,

As to the Manors of *Half-hide* and *Homerly*, Sir *William* was Tenant in Tail after Poſſibility of Iſſue extinct by *Mary* his firſt Wife, with a Remainder in Fee in Truſtees in Truſt for him and his Heirs.

As to the Manor of *Knebworth*, he was Tenant for Life, with contingent Remainders to his *firſt* and other Sons, Remainder to Truſtees in Fee, in Truſt for the right Heirs of Sir *William Rowland Litton.*

As to the Manors of *Auſty* and *Stolford*, and ſeveral Houſes in *London*, Sir *William* was Tenant in Tail, Remainder in Fee to the right Heirs of Sir *Rowland Litton*, which Sir *William* then was.

And it fell out, that Sir *William* after making of his Will, and before the Codicils, purchaſed ſome Lands, and forecloſed, and had Releaſes of the Equity of Redemption of ſome Mortgages in Fee.

As to the *firſt* Point it was inſiſted by the Defendants, that the Words *out of Settlement* muſt not be rejected, but muſt be of ſome Force and Operation, being plainly reſtrictive Words; and the rather, becauſe they come not accidentally, as the Phraſe or Expreſſion of the Penner or Drawer of the Will; but induſtriouſly, and more than once repeated in the Will: And therefore it was inſiſted, that either all the Family-Eſtate compriſed in any of the Settlements ſhould be excluded, and only the new purchaſed Lands to paſs; or at leaſt-wiſe ſuch Lands whereof the Settlements were in Force, and the Uſes of the Settlements not ſo ſpent, but that the Lands, if not deviſed, would go according to the Limitations in the Settlements, and not to Sir *William*'s Heir; as the Manor of *Knebworth*, *&c.* where the laſt Limitation was to the right Heirs of Sir *Rowland*; there thoſe Lands would by Virtue of the Settlement deſcend to all the *three* Siſters, *viz.* to the Lady *Falkland* the Siſter of the half Blood, as well as to the Siſters of the whole Blood. So plainly the Settlement did influence thoſe Lands, and they might be ſaid properly enough, to be under Settlement.

ment. And it was proved by Witneſſes in the Cauſe, that Sir *William* expreſſed great Kindneſs for the Lady *Falkland*, and ſaid his Anceſtors were wiſer than he, and he would not diſturb what Settlements they had made, or to that Effect.

But the *Lord Chancellor* aſſiſted with the *Maſter* of the *Rolls*, Lord Chief Juſtice *Trevor*, and Juſtice *Tracy*, concurred in Opinion.

That the whole Family-Eſtate was well deviſed, and that the Words *out of Settlement*, as the Caſe fell out, would have no Effect.

Firſt, Becauſe beyond all Queſtion, he had a Power to deviſe the Whole, as being intitled either in Poſſeſſion, or as right Heir to Sir *Rowland* to the laſt Remainder in Fee; and as he had Power to deviſe, ſo the Words were ſufficient to paſs the Whole; for the Remainder, or Reverſion in Fee, is an Hereditament.

And as Authorities, cited the Caſes of *Cook* and *Gerrard*, 1 *Lev.* 212. where a Man having deviſed to his Wife a Houſe for one Year after his Death; and having before ſettled *Spain*'s Hall on his Daughter for Life; then deviſes all his Lands not ſettled, or deviſed, to *Thomas Kemp* and his Heirs; and adjudged the Reverſion of both well deviſed. And 2 *Vent.* 285. the Caſe of *Willowes* and *Lidcott*, and a Reverſion is an Hereditament out of Settlement.

Although the Words *out of Settlement* ſeemed to be uſed in Contradiſtinction to Lands in or under Settlement, and properly Lands under Settlement, is where the whole Inheritance is ſettled, and diſpoſed of; as if the Teſtator had been Tenant in Tail, Remainder in Fee to another; there the Whole had been under Settlement, though he might have barred the Remainder by a Common

Lands ſettled with a Power of Revocation, will not paſs by a Deviſe of Lands out of Settlement.

mon Recovery. If the whole Inheritance had been ſettled, but there had been a Power of Revocation; altho' the Teſtator might have revoked it, it ſhould not have paſſed by this Deviſe, becauſe the Whole is properly under Settlement, though liable to be revoked.

Had the Teſtator only intended the new purchaſed Lands ſhould have paſſed, he would have ſaid ſo; but his chief Deſign ſeems to be to keep up his Name, and preſerve the antient Eſtate in his Name and Family; and therefore he obligeth his Nephew *Strode* to change his Name.

Secondly, If the Teſtator had intended only the new purchaſed Lands ſhould paſs, and all the antient Eſtate to have gone to his Daughter, he would not have charged thoſe Lands with 4000 *l.* for a Daughter.

Thirdly, The Teſtator has deviſed to his Wife Part of his Lands in Settlement, and then ſubjoins, and all other my Lands out of Settlement, I give to my Nephew *Strode*, *&c.* which ſhews that he intended to paſs Lands compriſed, or within that Settlement.

Fourthly, Although by ſome of the Settlements the half Blood might be entitled to come in for the Reverſion, as right Heir of Sir *Rowland*; yet there is no Reaſon to think, the Teſtator intended to exempt Lands for the Sake of a Siſter of the half Blood, and deviſe away that which would have gone intirely to his Siſters of the whole Blood; and cited the Caſe in *Hob.* 51. Some looſe Words ſhall not control the main Deſign of a Will.

No parol Proof ought to ſupply the Words of a will. *Ant.* Ca. 531.

And Mr. Juſtice *Tracy* was clear of Opinion, that no parol Proof ought to have been received, according to the Rule given in *Cheyney*'s Caſe, 5 *Rep.* No Proof ought to ſupply the Words of a Will. If a Deviſe be to one of the Sons of *J. S.* who hath ſeveral Sons, the Deviſe is void

void, and ſhall not be ſupplied by any parol Proof; nor is any Regard to be had as to Expreſſions, before or after making of the Will, which poſſibly might be uſed by the Teſtator on Purpoſe to control or diſguiſe what he was doing, or to keep the Family quiet, or for other ſecret Motives and Inducements: But the Will, that muſt paſs the Land, muſt be in Writing, and muſt be determined only by what is contained in the written Will.

As to the other Points it was alſo unanimouſly agreed,

Firſt, That Mortgages in Fee, although forfeited when the Will was made, did not paſs by the general Words.

Mortgages in Fee, though forfeited, will not paſs by a general Deviſe of all my Lands, Tenements and Hereditaments.

Secondly, Altho' he afterwards foreclоſed thoſe Mortgages, or obtained a Releaſe of the Equity of Redemption, they ſhould not paſs by the Will, but go to the Heir at Law.

Nor will they paſs by ſuch a general Deviſe, though the Equity of Redemption is afterwards foreclоſed, or releaſed.

Thirdly, No Pretence that Copyhold Lands ſhould paſs, which were not ſurrendered to the Uſe of the Will: In *Kettle* and *Townſhend*'s Caſe, by the Judgment in the Houſe of Lords, Want of a Surrender not to be ſupplied for the Sake of a Grandſon; much leſs for a Nephew.

Fourthly, As to Lands purchaſed after the Making of the Will, but before the Codicils, thoſe Lands could not paſs: The Codicils concerning only ſome perſonal Legacies, could not amount to a Republication of the Will, as in the Caſe of *Beckford* and *Parnecot*, 3 *Crook*.

A Codicil, which concerns only perſonal Legacies, will not amount to a Republication of the Will, ſo as to paſs Lands purchaſed after the Making of the Will.

Caſe 558. *Nov.* 22.

Lupton & ux' verſus *Tempeſt & al'.*

Where Husband and Wife demand the Execution of a Truſt of a real Eſtate, deviſed by Will for the Benefit of the Wife, it muſt be decreed according to the Will: But where the Husband comes for a perſonal Demand in Right of his Wife, the Court may impoſe Terms on him.

'*Prothonotary Tempeſt* having by his Will deviſed ſome Fee-Farm Rents to Truſtees, to be conveyed to his Daughters at their reſpective Ages of *Twenty-one*, or Marriage, the Plaintiff married one of the Daughters without the Conſent or Privity of her Relations, and without having made any Settlement upon her; and now they brought their Bill to have a Conveyance purſuant to the Truſt.

The Defendants confeſſed the Will, and admitted the Truſt, but hoped the Husband, having made no Settlement on his Wife, ſhould be obliged ſo to do; or that otherwiſe the Fee-Farm Rents ſhould be ſettled, as a Proviſion for the Wife and Children.

Per Lord Chancellor: Where Husband and Wife join, and demand an Execution of the Truſt of a real Eſtate, it muſt be decreed according to the Will, becauſe the Wife demands it; and it cannot be denied, but ſhe may require an Execution of a Truſt.

But where a Husband comes for a perſonal Demand in the Right of his Wife, or for raiſing a Sum of Money, there the Court may impoſe Terms on the Husband, as being in Diminution of the Husband's Right. But here the Wife is the *Ceſtuy que Truſt*, and demands an Execution of it; and when ſhe has it, may chooſe whether ſhe will convey it to her Husband or not.

4

Lamas

Lamas verſus *Bayly.*

Caſe 559.

A. and *B.* being ſeverally in Treaty to purchaſe a Houſe and Toft of Land of *J. S.* they agree by parol, that *A.* ſhall deſiſt, and that *B.* ſhall purchaſe, and let *A.* have Part of the Ground, which he wanted, at a proportionable Price. *B.* purchaſes, and refuſes to perform the Agreement. This Agreement is within the Proviſion of the Statute of Frauds.

PLaintiff being about to purchaſe from the Coheirs of Mr. *Guifford* an old Houſe and Toft of Ground in *Hoxton*, adjoining to his own Houſe, deſigning thereby principally to ſecure his Lights, and to add a ſmall Part of it to his own Houſe; and the Defendant being alſo in Treaty to purchaſe. The Plaintiff and Defendant met together; and it was propoſed and agreed unto, that the Plaintiff *Lamas* ſhould deſiſt, and permit the Defendant to purchaſe; and thereupon the Defendant ſhould permit the Plaintiff to have at a proportionable Price the Slip of Ground he deſired for a Convenience to his Houſe, and to prevent the Stopping up of his Lights. The Plaintiff deſiſted accordingly, and the Defendant purchaſed; but afterwards refuſed to perform the Agreement.

The Plaintiff brought his Bill, and obtained a Decree at the *Rolls*; it being inſiſted, that altho' it was an Agreement *parol*; yet it was in Part executed by the Plaintiff's deſiſting from proſecuting his Purchaſe, who otherwiſe might have purchaſed for himſelf; or at leaſt have enhanſed the Price, the Defendant was to pay, ſo that the Defendant had a Benefit by it; and beſides it was a Fraud, and like the Caſe where a Man agreed to purchaſe as Agent for another; and would afterwards retain the Purchaſe to himſelf.

But upon an Appeal to the *Lord Chancellor*, the Decree was reverſed, as being a parol Agreement, within the Proviſion of the Statute againſt *Frauds.*

DE
Term. S. Hillarii,
1708.
In CURIA CANCELLARIÆ.

Caſe 560. *Lord Chancellor.*

Dean & ux verſus Lord *Delaware.*

An only Child of a Freeman of *London* not fully advanced, is to have a full *Third* of the perſonal Eſtate, without Regard to what has been paid for her Portion.

THE Lord *Delaware* having married the ſole Daughter and Heireſs of Mr. *Freeman*, a Merchant and Freeman of *London*, he in his Life-time had entred in his Book ſeveral Sums of Money, as paid to the Lord *Delaware* in Part of his Wife's Portion, and in Part of a greater Sum due for her Portion, yet unpaid; and afterwards in his own Books retracted what had been before done, and made the Lord *Delaware* Debtor for all the Monies ſo paid: And having ſo done made his Will, and thereby mentioned to deviſe one *third* Part of his Eſtate to his Wife; another *third* Part to his Daughter, according to the Cuſtom of the City of *London*, and gave great Legacies out of, and to the Amount of, the other *Third* of his perſonal Eſtate, and dies. After his Death, the Plaintiff *Dean* having married Mr. *Freeman*'s Widow; they brought their Bill for an Account, and a Diſcovery of the Eſtate, (the Lord *Delaware* being made Executor of the Will, and having poſſeſſed the Eſtate) and to have a *Third* paid them according to the Cuſtom of the City of *London*.

Defendant by Anſwer did not mention any Thing, as to what Portion he had or expected, nor was it inſiſted on at the Hearing; but the Court decreed the Eſtate to be divided into *Thirds*, and one *Third* Part thereof to be paid to the Plaintiffs.

Upon the Account before the Maſter, the Plaintiffs inſiſted the Lord *Delaware* ought to be made Debtor for the Sums mentioned to have been paid him in the Teſtator's Books. On the other Hand the Defendant inſiſted, that what he had received in Part of his Wife's Portion, he ought to retain, and to have it made up 10000 *l.* which he pretended was the Sum agreed upon; and to have a *Third* by the Cuſtom, or by the Will over and beſides.

And this Matter coming now before the Court on the Maſter's ſpecial Report,

The *Lord Chancellor* was of Opinion, *firſt*, that there was no ſufficient Proof that the Portion was to be 10000 *l.* but what had been once entered down by the Teſtator as paid upon the Account of the Portion, he could not afterwards retract; nor make the Lord *Delaware* Debtor for it; and therefore what had been ſo paid, ought not to be brought into the perſonal Eſtate.

And it being further inſiſted, that the Defendant, as being the only Child, was intitled to the *third* Part by the Cuſtom of the City of *London*, without Regard had to what had been ſo paid; and for that Purpoſe cited the Caſe of *Wood* and *Fettiplace*, 17 *Jac.* 1. where an Orphan, who was advanced with a Sum of 200 *l.* ſhe being the only Child, was not to bring it into Hotchpot. And in all Caſes where a Child is to bring into Hotchpot, it is only into the Children's Part, and not into the general

In all Caſes where a Child is to bring into Hotchpot, it is only into the Childrens Part, and not into the Eſtate in general. Vol. 1. Caſe 339.

general Eſtate; and the Entries in the Books ſhew, that but Part of the Portion was paid, and *that* amounts unto a Declaration that the Child was not fully advanced; and alſo is a Writing under the Teſtator's Hand, which ſtates the *Quantum* of the Advancement; and if they were not intitled by the Cuſtom, yet they were by the Will intitled to a *third* Part of the Eſtate.

Vol. 1. Caſe 213.

To which it was anſwered, that by the Cuſtom, if a Child is advanced in Marriage, *that* bars any Claim by the Cuſtom, unleſs it does appear by Writing under the Father's Hand, what that Advancement was. That the Father's Declaring, that the Child was fully advanced or not advanced, was of no Avail, unleſs it appeared what the Advancement was in Certainty; to the Intent it might be known, whether ſuch Advancement did amount unto as much as would have belonged to the Child by the Cuſtom: And therefore in the Caſe of *Turner* and *Longland*, decreed lately by the *Lord Chancellor*, where the Father by his Will, on Purpoſe, and to the Intent to exclude his Daughter, declared ſhe was fully advanced; but happened to over-do it, and mentioned that he had fully advanced her with the Sum of 500 *l.* *that* not being as much as her cuſtomary Part amounted to, and the Certainty thus appearing, let her into her Share by the Cuſtom.

Where a Child is advanced in the Father's Life-time, and it appears by Writing under his Hand, what that Advancement was, this will let her into her Share by the Cuſtom.

But in this Caſe, the Certainty of the Advancement, doth not appear. In the Book ſeveral Sums are entered as paid in Part of the Portion; but it is not declared under the Teſtator's Hand, that *that* was or was not the Sum, wherewith he had advanced his Daughter; ſo that the Certainty of the Advancement did not ſufficiently appear.

Secondly, If it was to be taken, that the Sums entered in the Book to be paid in Part of the Portion, was the whole Advancement; yet if *that* did amount to as much

as her Orphanage Share, that would exclude her from claiming any Thing by the Cuſtom; for a Child is to be let into the Share by the Cuſtom only, where the Child has not Right done her, and has not received as much as her Share by the Cuſtom: And in this Caſe it was inſiſted, that even what appeared by the Books to have been paid in Part of the Portion, amounted to a *Third* of the perſonal Eſtate and more; and therefore ſhe was excluded, although the Certainty of the Advancement had ſufficiently appeared.

And as to claiming a *Third* by the Will, it is plain the Teſtator once intended to have given a Portion, and expected a Settlement, and had paid ſeveral Sums in Part of the Portion; but finding no Settlement could be made, wrote off what before he had paid in Part of the Portion, and made the Lord *Delaware* Debtor for it; and having ſo done made his Will, and deviſed a *Third* to his Daughter according to the Cuſtom; but then ſhe muſt take it as intended by the Will, and not have a *Third*, and what was paid in his Life-time over and beſides; but muſt either account for what the Lord *Delaware* is made Debtor in the Teſtator's Books, or renounce the Will, and only have what he has received already, made up a full third of the Eſtate.

Lord Chancellor. What is paid in Part of the Portion, and ſo entered by the Teſtator in his Books, he could not recall or write off again, or make the Lord *Delaware* Debtor for it.

If a Freeman of *London* enters in his Books ſeveral Sums of Money as paid on Account of his Daughter's Portion, he cannot afterwards write off thoſe Sums, and make the Husband Debtor for them.

And the Matter as to the Cuſtom, whether the Defendant is excluded or not, is not before the Court; the Decree being only that the Plaintiff ſhall have a *third* Part: Whereas if the Daughter is barred, the Widow would claim a Moiety, and that Matter not being proper upon the Report,

Where an only Child is fully advanced, the Wife will be intitled by the Cuſtom to a Moiety of the perſonal Eſtate.

At

At the preſent only declared, that what had been paid the Lord *Delaware* in Part of the Portion, was not to be brought into the Eſtate; and left it to the Maſter, with this Direction, to take the Account, and certify whether what the Defendant had received in Part of the Portion, did amount unto a *Third* of the whole Eſtate.

Caſe 561. *Green* verſus *Wood & ux', & econtra.*

An Agreement for a Purchaſe obtained from a Woman of *ninety* Years of Age, and ſeveral ſuſpicious Circumſtances appearing, the Court would neither decree it to be carried into Execution againſt the Heir at Law, nor to be delivered up.

IN 1694, *Leonard Robinſon*, an Attorney, obtained a Writing from *Elizabeth Read*, then *ninety* Years of Age, purporting that ſhe being intitled to an Eſtate in *Eſſex*, as Siſter and Heireſs of *John Green*, in Caſe one *Jermin Green* died without Iſſue, in Conſideration of 400 *l.* mentioned to be paid and ſecured to her, ſhe bargains, ſells and conveys all her Right and Title, Remainder and Expectancy to the ſame, to the ſaid *Leonard Robinſon*. No Part of the Money was paid, and *Robinſon* pretended he made the Contract in Truſt for *Jermin Green*; but made no Declaration of Truſt, or Aſſignment to *Green*: But *Green* in 1695, paid 100 *l.* to *Robinſon* to be paid over to Mrs. *Read* on executing Conveyances, and gave him 20 *l.* for his Pains; but afterwards took Bond for Repayment, with Intereſt from *Robinſon*.

In 1696, a Bill was brought by *Green* to compel an Execution, but no Proceedings therein. Then in 1704, Mrs. *Read* being dead, a Bill was brought againſt the now Defendant, as the Daughter and Heireſs of Mrs. *Read*. Then *Jermin Green* dying, the now Plaintiff brought his Bill of Revivor againſt the Defendant.

It was objected, the Agreement was obtained by an Attorney from an old Woman of *ninety* Years of Age,

weak in Body and Mind; could not diſtinguiſh a *Six-pence* from a *Shilling*, no Counſel, no Friend to aſſiſt her.

Secondly, The Agreement not fairly drawn; ſhe bound; and it was not only as an Agreement to convey, but imported to be a Conveyance; and yet the 400 *l.* neither paid nor ſecured.

Thirdly, Surreptitious and a Surpriſe; it mentions Lands in *York* as well as *Eſſex*, when none ſuch.

Fourthly, Not purſued or proſecuted recently, as it ought to have been; Nothing more than an Attachment; from 1699 to 1704 no Proceedings.

Fifthly, Plaintiff had ſued *Robinſon*, and recovered back the 120 *l.* as diſpairing that the Agreement would be performed.

Sixthly, The Eſtate is now fallen in Poſſeſſion, and worth 5000 *l.* to be ſold, and now the Plaintiff would have it for 400 *l.*

Lord Chancellor. Upon theſe Circumſtances, too hard to be decreed in Equity, and diſmiſſed the Bill without Coſts; but would not decree the Writing to be delivered up on the croſs Bill.

Ball verſus *Smith.*

Caſe 562

THomas *Smith* on his *firſt* Marriage, ſettled a Term of *five Hundred* Years, in Truſt to raiſe 2000 *l.* for the Daughters of that Marriage, payable by Rents, Profits, Leaſing or otherwiſe, at *eighteen* or Marriage; and married a *ſecond* Wife, the Defendant *Smith*; and on that Marriage made the like Settlement, and Proviſion for

Daughters in like Manner. He having only the Plaintiff Mrs. *Ball* by the *firſt Venter*, and leaving his Wife *enſeint*, by his Will in 1684, deviſed Part of the Premiſſes to the Defendant Mrs. *Smith* for Life; and in caſe the Child ſhe went with proved a Daughter, (as it did) he deviſed the Eſtate to Truſtees, and directed them to convey forthwith to his Daughters, and pay them the Profits equally in the mean Time.

Mr. *Smith* the Teſtator died in 1684, and the Plaintiff having in 1693 attained her Age of *eighteen*, brought her Bill (*inter alia*) to have the 2000*l.* raiſed and paid. And the Decree by the Lord *Somers*, as drawn up, directed an Account, and decreed the Profits from the Death of the Father.

In the Defendant's Petition for a Rehearing ſhe complained, that by this Means the Profits were taken from her, though deviſed to her for her Life, and the Profits intended for the Maintenance of his *poſthumous* Daughter *Fowler Smith*.

Lord Chancellor. The Wife ought not to quit what was deviſed to her for Life; but as to the Daughter, the Will is not plain and expreſs; and therefore the Wife ſhall not hold over for the Whole, but ſhall deduct a reaſonable Allowance for Maintenance.

A. makes a Will and his Son Executor, but makes no Diſpoſition of the Surplus. The Son dies without proving the Will. The Surplus ſhall be diſtributed amongſt the next of Kin, at the Death of the Teſtator. *Poſt.* Ca. 602.

Smith the Father made his Son Executor, but made no Diſpoſition of the Surplus; the Son dies without proving the Will.

Queſtion was, When and to whom Diſtribution ſhall be made; Whether to the Widow and Son of old *Smith*; or whether the Son dying without Probate, the Diſtribution ſhall be amongſt the next of Kin at that Time.

Lord Chancellor. Smith is dead inteſtate *ab initio.*

Collins verſus *Plummer.*

Caſe 563.
Feb. 4.

A Settlement to Husband for Life, to his intended Wife for Life, Remainder to the Heirs of the Body of the Husband, on the Body of the Wife, Remainder to his own right Heirs.

A. on his Marriage ſettles Lands to the Uſe of himſelf for Life, then to the Wife for Life, Remainder to the Heirs of his Body begotten on the Wife, Remainder to his own right Heirs; and covenants in the Settlement not to bar the Intail, nor ſuffer a Recovery; and having one Daughter, to whom on her Marriage he had given a good Portion; he ſuffers a Recovery, and by Will deviſes the Eſtate to his Daughter for Life, and to her firſt, *&c.* Sons in Tail, with Remainders over. On a Bill for a ſpecifick Performance of the Covenant, the Court would not decree it, but leave the Party to recover Damages at Law, for Breach of the Covenant.

With a Covenant that he would not dock the Intail, nor ſuffer a Common Recovery.

There being only a Daughter of that Marriage, her Father married her to the Plaintiff *Collins*, and gave her a good Portion.

And afterwards ſuffered a Common Recovery and deviſed the Eſtate to his Daughter for Life, and to her *firſt* and other Sons in Tail, Remainder to the Defendants his Nephews; provided if ſhe ſurvived her Husband, that ſhe ſhould have it in Fee to her and her Heirs.

Bill for a ſpecifick Execution of the Covenant. For the Plaintiff: The Agreement is executory, and like a Covenant that a Man would not execute a Power; as in the Lord *Peterborough*'s Caſe, the *fifteen* Leaſes ſet aſide.

Lord Chancellor. This Caſe differs; for there was an Agreement, ſubſequent to the raiſing of the Power, to extinguiſh it; but here all is in the ſame Deed: So you knew he had Power to bar, and therefore agree to accept of a Covenant, by which to have Damages, and not

not the Thing in *Specie*; *that* would be to make it beyond the Agreement.

Caſe 564. *Feb.* 5. *Lord Chancellor.*

Oxwith verſus *Plummer.*

PLaintiff was a Mortgagee, and afterwards had an abſolute Conveyance of all that Meſſuage called *Biſhops*, with all the Lands therewith uſed and enjoyed, or reputed Part or Parcel thereof, or whereof any in Truſt for the Mortgagor were ſeiſed.

Elizabeth Wiſeman, the Mortgagor, had a Right to *eight* Acres of Copyhold; but the legal Eſtate was in Sir *Richard* her Father; and although the *eight* Acres were Copyhold, yet there being no Surrender made of the Copyhold, Sir *Walter Plummer*, who had lent the Money to *Richard* and *Elizabeth Wiſeman*, got a Surrender of the *eight* Acres, and brought an Ejectment.

Bill to be relieved.

Lord Chancellor. Here is no ſpecifick Agreement for the Copyhold.

Secondly, A Debt before due the ſame, if longer Credit is given for it, as if the Money was then lent.

Thirdly, Poſſeſſion of the Under-Tenant not ſufficient to affect him with Notice.

Fourthly, I take it Nothing intended to paſs but the Frehold, and affirmed the Decree. 3

Phillips

Phillips & al' verſus *Willcox & al'.*

Caſe 565.
Feb. 8.

Bankrupt having releaſed and aſſigned all his Eſtate to the Aſſignees may be examined as a Witneſs for them.

PLaintiffs were Aſſignees of a Statute of Bankrupt againſt *Blunt*. The Queſtion was, Whether *Blunt* ſhould be allowed a Witneſs: They produced a Releaſe from the Bankrupt of all Goods, Chattles, Debts and Credits in a Schedule to the Aſſignment mentioned, and a Bargain and Sale of all the Eſtate he was intitled unto.

Secondly, As a Bankrupt is intitled to the Surplus, and intitled to a Share by the late Act of Parliament, he is not to be received as a Witneſs to diſprove the Sale of Goods, and Receipts under his Hand. *Sed non allocatur.*

Thirdly, They may produce a Releaſe and Bill of Sale in Court, but cannot examine him to the Time of the Execution of it. *Sed non allocatur.*

Lord Chancellor. Creditors are to have reaſonable Aſſiſtance. Bankrupts agree and conſent to make fraudulent Aſſignments and Sales, that ſap the Foundation of the Statutes of Bankrupt. Sworn by *Blunt*, that it was a fraudulent Sale; but 70 *l.* paid, the other 100 *l.* to be paid to the Bankrupt with Intereſt, and ſince paid to him, and yet prime Coſt 390 *l.*

Iſſue, what was the Value of the Goods at that Time.

Caſe 566. *Feb.* 21. *Lord Chancellor.*

Burdett verſus *Willet & al'.*

A. employs *B.* as his Factor to ſell Cloth. *B.* ſells the Cloth on Credit, and before the Money is paid, dies indebted by Specialty more than his Aſſets will pay. This Money ſhall be paid to *A.* and not to the Adminiſtrator of *B.* as Part of his Aſſets; but thereout muſt be deducted what was due to *B.* for Commiſſion.

THE Plaintiff having made Mr. *Willett* his Factor to ſell ſome coarſe Linen called *Croins*; he took them up at the Cuſtom-Houſe, *&c.* and ſold them to the Defendants *Wingfield* and *Bowater* for 115 *l.* and before Payment died indebted by *Specialty*, more than his Aſſets will pay; and (*inter alia*) on his Marriage by Articles covenanted, if his Wife ſurvived him, to leave her 3000 *l.* His Widow had now taken Adminiſtration, and inſiſted that the 115 *l.* in the Hands of *Wingfield* and *Bowater* ſhould be liable, not only to reimburſe what was due to *Willett*, as Factor; but ſhould come into the Aſſets, and be liable to her Articles and Debts by Specialty.

Decree the Money to be paid to the Plaintiff, diſcounting thereout what was due to *Willett* as Factor, and that with Coſts, as having made an ill Defence, to ſatisfy her Articles out of the Plaintiff's Eſtate. The Factor is in Nature of a Truſtee only; and although he has the Right at Law, yet he is in Equity but a Truſtee.

A Factor is in Nature of a Truſtee only for his Principal.

Caſe 567.

Lillcott verſus *Compton.*

PLate ſhall paſs by a Deviſe of Houſhold Goods.

Caſe 568.

Phiney verſus *Phiney.*

The Son and Heir intitled to 500 *l.* under a Marriage Agreement, decreed to bring it into Hotchpot upon the Statute of Diſtributions, tho' in Nature of a Purchaſer.

PLaintiff's Father, on the Marriage of the Daughter of *Buck*, covenanted in Caſe of a *ſecond* Marriage

riage to pay the *firſt* Son by the *firſt* Wife 500 *l.* there was a Son and ſeveral other Children of the *firſt* Marriage; the Father died inteſtate.

Per Cur. The Heir muſt bring the 500 *l.* into a Hotchpot, although in Nature of a Purchaſer under Marriage-Settlement.

DE

Term. S. Michaelis,

1709.

In CURIA CANCELLARIÆ.

Caſe 569.
Dec. 6.

Corbett & ux' verſus *Maydwell.*

A Term is limited in Remainder after the Father's Death, in Truſt, if he died without Iſſue Male, and there ſhould be one or more Daughters unmarried, or unprovided for at his Death, the Truſtees were to raiſe 2000 *l.* for their Portions, to be paid at *eighteen* or Marriage. The Mother being dead, and there being one Daughter who was married, and no Iſſue Male; the Court would not decree the Portion to be raiſed in the Life of the Father, it not veſting till his Death. *Poſt.* Ca. 583. 1 Salk. 159.

AN Eſtate limited to the Father for Life, to the Wife for Life, Remainder to Truſtees for *five Hundred* Years, in Truſt, if *Maydwell* died without Iſſue Male by *Margaret*, or if his Iſſue Male died without Iſſue Male before *Twenty-one*; and if there ſhould be one or more Daughters unmarried, or not provided for, at the Time of his Deceaſe, as therein after is mentioned; the Truſtees were to raiſe 2000 *l.* to be paid at *eighteen* or Marriage, or as ſoon after as could be conveniently raiſed, by Leaſe, Mortgage or Sale.

The Wife died; the Father ſurvived; the Daughter attained *eighteen* in 1700, and in 1708 married.

Queſtion

Queſtion was, Whether ſhe could have any Portion or Maintenance in the Life-time of the Father.

The Caſes of *Staniforth* and *Staniforth*, and *Gerrard* and *Gerrard*, 29 *Feb.* 1703, cited for the Plaintiff. *Ant.* Ca. 420. *Ant.* Ca. 419.

For the Defendant it was inſiſted, *firſt*, that the Words were, if the Father die without Iſſue Male by *Margaret* his Wife: So there muſt be, not only a Failer of Iſſue Male, but he muſt be alſo dead; as was reſolved in the Caſe of the Duke of *Southampton.*

Secondly, It is only for ſuch Daughter, as at the Death of the Father ſhould be left unprovided for.

Lord Keeper. I muſt adjudge by what appears on the Settlement, no foreign Proof to be admitted; as yet it appears to me harder to raiſe the Portion in this Caſe, than in any that have yet been adjudged. This Caſe differs from *Staniforth*'s, becauſe there the Queſtion was, Whether the Term was veſted; and it was taken *pro conceſſo* the Portion was veſted.

Upon the Wording of the Truſt; if in Caſe it ſhall happen the Father ſhall die without Iſſue Male, and ſhall leave a Daughter unmarried, or not provided for at his Death.

In Caſe of a Son, the Daughter was not to have a Portion until Failer of Iſſue Male, although ſhe might be then *forty* or *fifty*; when there happened to be a Failer of Iſſue Male.

Nothing irrational, that a Father ſhould inſiſt, that a Portion ſhould not be raiſed in his Life-time.

If in Caſes *ſimilar* the Court has gone ſo far.

Caſe 570.
Dec. 12.

Brice verſus *Whiteing.*

A Man dies Inteſtate before the Statute of Diſtributions takes Place, but Adminiſtration is granted after. His perſonal Eſtate ſhall be diſtributed according to the Statute.

ALthough the Inteſtate died before the Year 1670, yet Adminiſtration being granted after the Making of the Statute, his perſonal Eſtate is liable to a Diſtribution. The Words of the Act being, that it ſhall be lawful for the *Ordinary* upon granting Adminiſtration of Perſons dying inteſtate after *June* 1670, to take a Bond for Diſtribution.

DE

DE

Term. S. Hillarii,

1709.

In Curia Cancellariæ.

Speering & al' verſus *Degrave, Gallway & al'.*

Caſe 571.

Gallway, as Maſter of the Ship of which other Defendants were Part-owners, bought ſeveral Goods of the Plaintiffs; as Beef, Bisket, Sails, Cordage; *Gallway* the Maſter failed. The Bill was to compel the Defendants, the Part-owners, to pay; who inſiſted, that *Gallway* only was liable; and beſides that he had Money from the Owners to pay the Plaintiffs.

Maſter of a Ship buys Proviſions for the Ship, and has Money from the Owners to pay for the Proviſions, but fails without paying the Money. The Owners are liable to pay in Proportion to their reſpective Shares in the Ship.

Per Cur. *Gallway* the Maſter was but a Servant to the Owners; and where a Servant buys, the Maſter is liable. If the Owners paid their Servant, yet if he paid not the Creditors, they muſt ſtand liable: And decreed the Owners to pay the Plaintiffs their Debts in Proportion to their reſpective Shares and Intereſts in the Ship.

Maſter of a Ship is but a Servant to the Owners.

Caſe 572. ***Hobart*** Bar. verſus ***Comitiſſ. Suffolk, Maynard, Colcheſter, & al'.***

Lands are deviſed to 3 Perſons and their Heirs to the Uſe of them and their Heirs, upon the Truſts after mentioned, and then the Teſtator directs them to convey Part to *A.* for Life, and other Part to B. in Tail; but gives no Direction as to the Remainder in Fee. Though *two* of the Truſtees were related to the Teſtator; yet the Remainder in Fee will not belong to them, but be a reſulting Truſt for the Teſtator's Heir.

SErjeant *Maynard* by Will deviſed to the Counteſs of *Suffolk*, the Lord *Gorge*, and the Defendant *Colcheſter* and their Heirs, to the Uſe of them and their Heirs, all his ſeveral Manors and Lands upon the Truſts aftermentioned; and then directs that after the Death of the Counteſs his Wife, they ſhould convey Part of the Eſtate to *Hobart* for *Ninety-nine* Years, if he ſo long lived; Remainder to his Wife as to Part for Life, Remainder to the *firſt* Son for Life; and other Part of his Eſtate in like Manner to his Grandaughter the Counteſs of *Suffolk*, and her Iſſue Male for Life, with a croſs Remainder, on Failer of Iſſue Male of either of them; the Will ſaying nothing more as to the Remainder in Fee.

A Queſtion was now made by Mr. *Colcheſter*, and inſiſted upon, that on Failer of Iſſue Male, both of *Hobart* and *Stamford*, the Remainder of the Eſtate was to go to the Truſtees, and could not be a reſulting Truſt for the Heir; the Deviſe being to them and their Heirs upon the Truſts after mentioned, which imports only that they ſhould be Truſtees for the Purpoſes after mentioned, and when thoſe Eſtates were ſpent, it was to remain with them and their Heirs, to the Uſe of them and their Heirs, which excludes any Truſt for the Heir at Law.

Lord Chancellor. This is not fully within the Reaſon of the Caſe; where a Deviſe or Grant is in Truſt for Payment of Debts, there the whole Eſtate is affected with the Truſt; but here the Remainder is not affected

with any Truſt declared; but conſidering the Deviſe to *three* Perſons, and the Lord *Gorge* no Relation to the Teſtator, it could not be intended a Proviſion or Bounty, as it might have been, if the Deviſe had been to *Colcheſter* alone; and decreed the Remainder in Fee to the Teſtator's right Heir.

Counteſs of *Briſtol* verſus *Hungerford.* Caſe 573.

DEviſe of real Eſtate to Executors to be ſold for Payment of Debts, the Surplus, if any be, to be deemed perſonal Eſtate, and go to his Executors, to whom he gave 20 *l.* apiece.

A. deviſes his real Eſtate to his Executors to be ſold for Payment of Debts; the Surplus, if any, to be deemed perſonal Eſtate, and go to his Executors, to whom he gives 20 *l.* apiece. Surplus decreed to the Heir at Law.

Decreed the Surplus a Truſt for the Heirs at Law, and affirmed in Parliament.

Cook and *Guavas.* A Term for *five Hundred* Years in Truſt to pay Debts, and *four* Years afterwards to attend the Inheritance. As ſoon as Debts paid, a Truſt for the Heir.

A Term for 500 Years limited in Truſt to pay Debts, and 4 Years after to attend the Inheritance. As ſoon as Debts paid, a Truſt for the Heir.

Sir *Cyril Wich* and *Packington.* 200 *l. per Ann.* for *ſixteen* Years to pay Debts and Legacies; yet Surplus adjudged a Truſt for the Heir.

200 *l.* a Year for *ſixteen* Years to pay Debts and Legacies. Surplus a Truſt for the Heir.

North verſus *Crompton,* 1 *Chanc. Reports.* Fol. 196.

Caſe 574. ## *Cherrington* verſus *Abney* Mil'.

Where an old Houſe is pulled down, wherein were antient Lights, and a new one is built; the Lights in the new Houſe muſt be in the ſame Place, and of the ſame Dimenſions, and not more in Number than the Lights in the old Houſe.

BILL for an Injunction to prevent ſtopping of Lights: There being *ſix* Lights in an old Houſe; it was inſiſted, that in the New they ſhould have but the ſame Number of Lights, and of the ſame Dimenſions, and in the ſame Place, or elſe may ſtop up and blind them.

So muſt not make more Stories, more Lights, nor in other Places.

It is certain they cannot alter the ſame to the Prejudice of the Owner of the Soil; as if before ſo high, as they could not look out of them into the Yard, ſhall not make them lower and the like; for Privacy is valuable.

One Trial had, another directed.

Caſe 575. *Jan.* 27. *in Court.* ## *Chapman* verſus *Salt.*

MRS. *Salt* deviſed 50 *l.* to Mary the Wife of *Leonard Chapman.* This Will was made in 1700; afterwards the Teſtator gave a Note to *Leonard Chapman,* for 50 *l.* payable at Demand.

By Proofs it appeared, it was intended the Note ſhould be in Lieu and Satisfaction of the Legacy.

Objected the Note was to one, and the Legacy to another: The Legacy to the Wife; the Note to the Husband.

If

If the Wife had ſurvived, ſhe would have had the Legacy, and the Executors of the Husband the Note.

Maſter of the *Rolls*. A teſtamentary Queſtion. Evidence may be received.

Diſmiſſed the Bill.

Gibſon verſus *Cromwell, & econtra.*

Caſe 576. *Jan.* 27.

Oliver Cromwell deviſed a Term for *Ninety-nine* Years, to Truſtees for Debts and Legacies, and ſubject thereunto deviſed to *Richard Cromwell* his Father for Life, Remainder to the Plaintiffs his Siſters. The Debts and Legacies were paid by Sale of Timber and Wood; yet a Leaſe decreed to be made by the Truſtee to a Tenant of Part of the Capital Meſſuage and Demeſnes at 170 *l. per Ann.* for *nine* Years certain, although oppoſed by the Reverſioners.

Striſh verſus *Pelham.*

Caſe 577. *Feb.* 10. *Lord Chancellor.*

John Striſh in 1686, ſent for one *Holland* to make his Will, who took it in Characters from his Mouth, and read it to him, and he approved thereof; the next Day *Holland* brought the Will drawn up in *four* Sheets of Paper; but the Teſtator was not then ſenſible, and died.

After the Teſtator's Death, *Holland* who drew the Will, examined as a Witneſs.

Lady

Caſe 578. *Feb.* 24. Lady *Granvill & al'* verſus Dutcheſs of *Beaufort.*

Poſt. Ca. 601. THE Duke by Will deviſed the Uſe of his Table-Plate to the Defendant, the Dutcheſs, for Life, and after her Death to the preſent Duke his Grandſon; and his *George*, and *Jewell* which he wore in his Hat, *&c.* to be delivered to him, and made the Dutcheſs Executrix, and left it to her as to the Funeral; and made no Diſpoſition by his Will of the Surplus of his Eſtate.

The Bill was for a Diſtribution of the Surplus.

Surplus not being diſpoſed of by the Will, Proofs were allowed to be read, that the Teſtator intended to give the Surplus to his Executor, it being to ouſt an Implication, or Rule in Equity. *Ant.* Caſe 532. *Poſt.* Ca. 602.

Firſt, Queſtion aroſe, Whether it ſhould be admitted to prove the Duke intended to give the Surplus to the Executrix; and that he gave ſuch Inſtructions to Mr. *Price*, who drew the Will, and was ſince dead.

Ordered on Debate, that the Proofs ſhould be read to ouſt an Implication or Rule in Equity, that the Surplus of the perſonal Eſtate ſhould be taken from the Executors and be diſtributed.

Mr. *Price* the Drawer of the Will was dead, having lived about *ſix* Years after the Duke.

Proofs came ſhort of what they were in the Lady *Gainsborough*'s Caſe; there at the very Time of the Execution of the Will, the Teſtator objected, that the Deviſe of the perſonal Eſtate was not inſerted in the Will; Mr. *Millner* who drew the Will inſiſted, and affirmed it was not neceſſary, and perſiſted in it. Here only what was ſaid, not at the Time of Execution of the Will; but

but what was ſaid before or after the Making of it.

Firſt, Not a Deviſe, but in Nature of an Exception.

Secondly, Objected, not an abſolute Deviſe of the general Property, but a ſpecial Property.

Thirdly, By a Deviſe to the Duke of the Table-Plate, after the Death of the Dutcheſs, the Teſtator would have the ſpecial Property left in the Dutcheſs for her Life; but would not exclude her from the Surplus.

Lord Chancellor. I take it for granted my Determination will not be final. The Caſe in ſome Meaſure is determined by the Rule in the two Caſes, of Lady *Gainsborough*, and *Foſter* and *Mount*; both which were ſettled in the Houſe of *Peers*, which muſt bind inferior Juriſdictions, although an Innovation of the Law. Vol. 1. Caſe 462.

The Proof of what *Price* ſaid in his Life-time is Evidence; but the ſlendereſt Sort of Evidence.

An other Witneſs ſpeaks leſs and incertainly, that ſhe ſhould have it as Executrix, or to that Effect.

Third Witneſs, that the Duke gave Directions the Dutcheſs ſhould have the Eſtate to diſpoſe of as Executrix.

So that the Proof is to be laid out of the Caſe.

Next Point, how it ſtands on the Face of the Will; and that is to be directed by the Caſe of *Foſter* and *Mount*. Executors were Strangers. Anſwer. It has been ſo adjudged where a Relation is made Executor.

Secondly, The Deviſe of the Uſe of any Part is as ſtrong an Implication that the Deviſee ſhould not have the Whole; and rather ſtronger, becauſe more reſtrictive and more minute.

Thirdly, That it is only in Nature of an Exception, which is the ſtrongeſt Objection, and like the Caſe of giving Books to *J. S.* except *ſix* to my Wife, which was rightly adjudged; but the Will is not ſo worded. If the Words of the Will had been, I give Plate to the Duke, except the Uſe of it to the Dutcheſs, it would have been within the Reaſon of that Caſe.

But all Wills depend upon the Nicety of the Wording of them, as a Deviſe at *Twenty-one*, or when *Twenty-one*; and a Deviſe of 100 *l.* payable at *Twenty-one.*

Objection, That the Duke did not make his Will with Intent to die inteſtate, goes to all Caſes of like Nature.

As to the Smallneſs of the Legacy, the *Major* and *Minor* not material.

Hoskins and *Hoskins.* After the Deceaſe of my Wife, my Son to be Executor of all my perſonal Eſtate.

Decreed a Diſtribution, and the Dutcheſs to have her *Paraphernalia* over and above a *Third.*

DE

DE
Termino Paſchæ.

1710.

In Curia Cancellariæ.

Holt verſus *Burley.*

Caſe 579.

A Settlement made on the Marriage of *Will. Bullock* with *Sarah Gill*, of an Eſtate of the Wife's, called *Haylehurſt*, limited to the Husband and Wife for Life, Remainder to their Iſſue, Remainder to the right Heirs of *William Bullock* the Husband. A Proviſo that in Caſe the ſaid *Sarah* ſurvive the ſaid *William Bullock*, *they not having Iſſue between them lawfully begotten*, that then the ſaid *Sarah* might revoke the former, and limit new Uſes. *William Bullock* died, *Sarah* ſurvived him, and they had Iſſue *John*, who died in the Life of his Mother.

A Proviſo in a Settlement, if the Wife ſurvive her Husband, *they not having Iſſue between them*, then ſhe may revoke the Settlement. Husband dies leaving a Son, who dies in the Life of his Mother. She may revoke the Settlement.

The Queſtion was, Whether in Regard there was Iſſue living at the Death of the Husband, the Power of Revocation did ariſe.

The Plaintiffs, being Heirs at Law to *William Bullock*, inſiſted, *Sarah* had no Right to revoke; and cited the Caſe

Caſe of *Brett* and *Partridge*, to refund 500 *l.* of the Portion, if the Wife died without Iſſue in *two* Years after the Marriage. There was Iſſue of the Marriage, who died within *two* Years: Yet adjudged, there being once Iſſue, no Refunding. *Econtra*, *Vincent* and *Lee* in 1 *Leonard* 285. if my Son departs this World not having Iſſue. 3 *Leonard* 106. 1 *Lev.* 35. *Goodwin* and *Clarke.*

Lord Chancellor. No Room for any Doubt in the Expoſition of the Words and Meaning. If the Wife ſurvives her Husband, they having no Iſſue; *that* is not to be confined to the Moment of his dying, but takes in the whole Time of her Life, that ſhe ſurvives.

Caſe 580. **D. *Hamilton & ux'* verſus Dominum *Mohun & al'.***

A. B. on the Marriage of her Daughter inſiſts on a Bond from the Husband to give her a Releaſe within *two* Years after the Marriage. Bond ſet aſide. No Difference between ſuch Bond and a Brokage-Bond.

ON the Marriage of the Plaintiff the Dutcheſs; the Lady *Gerrard* her Mother inſiſted to have a Covenant from the Duke, in the Penalty of 10000 *l.* to give a Releaſe within *two* Years after Marriage.

This Caſe comes under the Head of Extortion or Compulſion; but in Truth is in the Nature and Reaſon of Marriage Brokage-Bonds. No Difference between giving a Bond for procuring a Marriage, and a Bond to releaſe Part of what became due. Decreed for the Plaintiff.

Bretton & ux' & al' verſus *Lethulier.* Caſe 581.

Samuel Lethulier deviſed the Surplus of his Eſtate to his Brothers Sir *John*, *William* and *Abraham Lethulier*, and the Children of his Brother Sir *Chriſtopher*, and of his Siſter *Birkin*, equally to be divided; *and if any of my Brothers die before the Eſtate is got in and divided, his or their Share to go to his or their Children.*

Surplus deviſed to the Teſtator's 4 Brothers, and if any of them died before the Eſtate was got in and divided, his Share to go to his Children. One of them died in the Life of the Teſtator, leaving Children. Whether they ſhall take their Father's Share.

Abraham, one of his Brothers, died in the Teſtator's Life-time, leaving ſeveral Children. Sir *Chriſtopher* his Brother left *five* Children. Mrs. *Birkin* had *four* living at the Teſtator's Death.

The *firſt* Queſtion was, Whether *Abraham* dying in the Teſtator's Life-time, *that* lapſed Legacy ſhould go to his Children.

Secondly, Whether the Children of Sir *Chriſtopher* ſhould be conſidered as one Perſon, and take a *Fifth* amongſt them; or whether an equal Share with the Brothers; and ſo as to *Birkin*'s Children.

Lord Chancellor. *Abraham* died before the Eſtate was got in and divided, but he died before the Teſtator; yet ſtill he died before the Eſtate was gotten in and divided: But then it is objected, that his Share is to go to his Children, when he had no Share ever veſted in him. But that is to be underſtood the Share intended him.

A Will ſpeaks not until the Death of the Party; but the Conſtruction is to be made as Matters ſtood at the

Ant. Ca. 548. Time of making the Will. The Caſe of *Ledſome* and *Hickman*, 300 *l.* to *three* at *Twenty-one*, if any die, to go to Survivors; one died in the Life of the Teſtator. *Davis* and Lord *Bindon*. Deviſe of a Debt to *two*, if either died, to the Survivor; one died before the Debt got in. *Lord Chancellor* was of Opinion, that *Davis* having ſurvived the Teſtator, though he died before the Debt was got in, was intitled to his Share of the Debt. But the Lords reverſed it.

A Debt is deviſed to 2. and if either died, to the Survivor. One died before the Debt was got in. The Survivor ſhall have the whole Debt.

DE
Term. S. Trinitatis,
1710.
In CURIA CANCELLARIÆ.

Hickman verſus *Anderſon.*

Caſe 582.
June 10.

ON the Marriage of *Anderſon* with *Mary Glynn*, a Term is limited after the Death of Father and Mother to raiſe Portions, if no Sons, for Daughters, payable at *eighteen* or Marriage. Proviſo ſuch Daughters ſurvive the Father. The Daughter married the Plaintiff Sir *Willoughby Hickman*, and died in the Life-time of the Father. Bill diſmiſſed. A Strain even to ſell the Term in the Life-time of the Father.

A Term is limited to raiſe Portions for Daughters, if no Sons; provided ſuch Daughters ſurvive their Father. A Daughter dies in the Life of her Father. Her Portion ſhall not be raiſed.

Corbett verſus *Maydwell.*

Caſe 583.
June 13.
Lord Chancellor.

CASE ariſes on the Settlement of Mr. *Maydwell*, an ill penned Settlement, where the Difficulty ariſes from a too great Multiplicity of Words. The Queſtion is, whether the Portion is to be raiſed in the Life-time of the Father. From the blundering Expreſſions which it

Ant. Ca. 569.

it is hard to conſtrue conſonant to Reaſon, and agreeable to former Precedents. The Opinion I ſhall give, is from throwing out all the impertinent Words, and taking in the material Words only.

The Uſes are firſt to *Thomas Maydwell* for Life, Remainder to Truſtees, during the Life of *Tho. Maydwell*, to ſupport contingent Remainders; Remainder to Truſtees for *five Hundred* Years; Remainder to *Tho. Maydwell* in Tail-Male ſpecial: Then comes the Declaration of the Truſt of the Term, which does not affect the Veſting of the Term, for that is abſolute: But the Truſt of the Term is declared, that in Caſe *Thomas Maydwell* ſhall die without Iſſue Male, and there ſhall be one or more Daughters, that ſhall be unmarried or unpreferred at his Death; ſuch Daughter, if but one, to have 2000 *l.* for her Portion, and for her Maintenance 30 *l. per Ann.* out of the Profits, till her Portion becomes due; the Portion to be paid at *eighteen* or Marriage. Proviſo, that the Term ſhall be void, if the ſaid *Thomas Maydwell* pay or ſecure to the Daughter, that ſhall be unmarried at his Death, the ſaid Portion of 2000 *l. Thomas Maydwell* ſurvives his Wife, and by her had one Daughter, who attained her Age of *Twenty-one*, and married the Plaintiff *Corbett*; and they bring this Bill for her Portion of 2000 *l.*

Lord Chancellor. None of the Precedents come up to the Caſe. Queſtion is not concerning the Term, but concerning the Truſt.

If a Portion is directed to be paid at *eighteen*, or Day of Marriage, and the Term is abſolutely veſted; there the Daughter ſhall not expect during the Life of the Father, but it may be ſold in the Father's Life, although a Term in Remainder and not in Poſſeſſion.

Secondly, If the Truſt of the Term had been on a Condition precedent, as to commence if the Father die

without Iſſue Male by his Wife, in Truſt to raiſe Portions for Daughters; there if the Wife be dead without Iſſue Male, leaving a Daughter; tho' the Father is living, the Term has been decreed to be ſold; (but if *res integra* I ſhould not decree it). But in Equity the Father is taken as dead without Iſſue, when the Wife is dead, by whom he was to have Iſſue. All that is contingent there has happened, by the Death of the Wife without Iſſue Male; and the Husband muſt alſo one Time or other die, as all Men muſt; and whenever he dies, he muſt die without Iſſue Male by that Marriage, his Wife being dead before. This is in Truth a Remainder, and depends no longer upon a Contingency.

This Court, as in ſome Caſes they do prolong Time, ſo here have ſhortened it.

But if the Agreement is, that the Portion ſhould be paid after his Death, it is hard to make it payable in his Life-time.

But in the preſent Caſe the Condition is precedent, in Caſe *Thomas Maydwell* die without Iſſue Male on the Body of *Margaret:* So far the Court has gone; but which ſhall be unmarried, or unpreferred, as therein is mentioned, at the Death of the Father: It muſt be for ſuch Daughter as ſhall be unprovided for at the Death of the Father. So here I muſt ſay, he's dead without Iſſue Male in his Life-time; and alſo, that the Plaintiff is a Daughter unpreferred at her Father's Death.

Maintenance to be raiſed in the mean Time only out of the Profits. If *Maydwell* pay or ſecure the Portion to the Daughter, which ſhall be unmarried at the Time of his Death, or unprovided for, the Term is to be void and determined.

So the Caſe ſtronger than any of the Caſes adjudged, or any of the Precedents.

The Preſidents, *Hellier* and *Jones*: There the Queſtion only was, when Intereſt ſhould commence of a Portion payable at *eighteen* or Marriage, and no Contingency; and there no Doubt, Intereſt payable in the Life-time of the Father.

Elizabeth Gerrard's Caſe; which if conſidered, the Condition precedent to the Term is only in Failer of Iſſue Male of the Wife; the Death of the Father no Part of the Condition.

The Truſt to pay at *eighteen* or Marriage, next after the Death of the Father and Mother, which firſt happened.

Ant. Ca. 420. *Staniforth*'s Caſe. There a Condition precedent to the Veſting of the Term, if they two ſhall dye without Iſſue Male, and there ſhould be Daughters; there the Term veſted, although the Mother living. *Greaves* and *Mattiſon*, 2 *Jones*'s Report 201.

Queſtion, If Portions veſted. There were *two* Daughters. *Three* of the Judges were of Opinion the Portions were veſted, although the Father was then li-
Poſt. Ca. 662. ving; and that the Term might be ſold.

Caſe 584.
June 13.
Lord Chancellor.

Honour verſus *Honour.*

Articles and Settlement mentioned to be made in Purſuance thereof, were both made before the Marriage; but the Settlement varied from the Uſes in the Articles. Decreed to go according to the Articles.

ARticles to ſettle on the Father for Life, the Mother for Life, Remainder to the Heirs of the Body of the Mother by the Father.

Settlement was to the Father for Life, to the Mother for Life, Remainder to the Heirs of their *two* Bodies; and the Settlement is mentioned to be according to and in Performance of the Marriage-Articles.

Lord Chancellor. It appears not that the Parties intended to vary the Uſes from the Articles, but ſeems to be only an Accident; and by Proof it appears a ſtrict Settlement was intended. Neither Party underſtood the Limitations of the Settlement or Articles; but the Articles happen to agree with the Intention of the Parties, and the Settlement doth not.

Therefore decreed to go according to the Articles, although the Settlement was made before the Marriage.

Harvey verſus *Harvey.*

Caſe 585.
June 16.

MR. *Poklington* had a Mortgage from *Quince*, and Bonds from the Defendant Mr. *Harvey*, and other perſonal Eſtate; and by a Codicil did deviſe to his Daughter, the Wife of *Harvey*, the Reſidue and Surplus of his perſonal Eſtate for her ſole and ſeparate Uſe, and made her Executrix: She proved the Will, and Mr. *Harvey* her Husband gave her a Note under his Hand, that ſhe ſhould have the Benefit of the Mortgage, *Quince* having by Will deviſed the mortgaged Premiſſes, and other his real Eſtate to Mr. *Harvey*, and Mr. *Cowper* for the Payment of his Debts.

A. deviſes the Surplus of his perſonal Eſtate to his Daughter, the Wife of *B.* for her ſeparate Uſe, and makes her Executrix. Surplus being deviſed to the Wife, and not to Truſtees, when it comes to the Wife, by Law it belongs to the Husband: But whether Equity will not interpoſe.

In this Caſe it was admitted, that the Wife by the Note had a good Right to the Mortgage: But as to the Surplus of the Eſtate, the *Lord Chancellor* was of Opinion, *that* being deviſed to the Wife, and not to Truſtees, when it

it comes to the Wife, by Law it belongs to the Husband.

What the Husband has poſſeſſed by the Conſent of the Wife, there is to be no Account for that.

As to the Mortgage, the Wife is intitled as well to the Intereſt, as the Principal due on the Mortgage; becauſe he gave a Note for that: And altho' voluntary, yet it was grounded on natural Juſtice, and in Performance of the Will; by which it is plain the Teſtator intended it for the ſeparate Uſe of the Wife, as far as by Law it might.

Reſerve the Conſideration as to the Surplus of the Eſtate, whether it belongs to the Husband, or to the Wife for her own ſeparate Uſe and Benefit.

Caſe 586. *Trafford & ux'* verſus Sir *Ralph Aſhton & al'.*

A. deviſes to Truſtees in Truſt for his Daughter for Life, Remainder to the *ſecond* Son of her Body, in Tail Male, and ſo to every younger Son, with Remainders over. There were *two* Sons, B. and C. B. died, and after his Death C. was born. C. tho' an only Son, ſhall take, he being the *ſecond* Son in Order of Birth, and as the Will is worded, not to be excluded.

MR. *Vavaſor* having an only Daughter, articles to pay 3000 *l.* Portion, and Sir *Ralph* was to make a Settlement. After this Mr. *Vavaſor* makes his Will, and deviſes all his Eſtate to Truſtees, in Truſt, that his Daughter might receive the Profits for her Life; Remainder to the *ſecond* Son of her Body to be begotten, in Tail Male; and ſo to every younger Son. In Default of ſuch Iſſue Male to her eldeſt Daughter, and to the *firſt* Son of her Body, taking on him the Name and Arms of *Vavaſor*. And adds, that he did not by his Will deviſe the Eſtate to the eldeſt Son, becauſe he expected his Daughter would marry ſo prudently, as that the eldeſt Son would be provided for. Sir *Ralph Aſhton*, after having Notice of Mr. *Vavaſor*'s Will, marries the ſaid Daughter

ter of Mr. *Vavaſor*, and makes a Settlement on her, purſuant to the ſaid Articles, by which he was to have a Portion of 3000 *l.*

It fell out *Edmund* the *firſt* Son of the Lady *Aſhton*, died in *twelve* Months after his Birth; *Richard* the *ſecond* Son lived 'till *eighteen*, and died without Iſſue, and was not born until after the Death of *Edmund*.

Queſtion *firſt*, Whether *Richard* not being born 'till after the Death of *Edmund*, was a *ſecond* Son within the Intent of the Will.

Secondly, Whether he was not to take on him the Name of *Vavaſor*.

Thirdly, Whether the Articles ought to be performed?

Lord Chancellor. *Firſt*, *Richard* was a *ſecond* Son, and muſt take, although not according to the Teſtator's Deſign; but as the Will is worded, not to be excluded; the *ſecond* Son is the *ſecond* in Order of Birth.

Secondly, *Richard* the *ſecond* Son dying in Minority not hindred from claiming, it was a Condition ſubſequent to defeat the Eſtate, and not precedent.

Thirdly, As to the Articles, Sir *Ralph Aſhton* is intitled to the 3000 *l.* although he had Notice of the Will of *Vavaſor*.

The negative Words in *Vavaſor*'s Will, that he had not provided for the eldeſt Son, *&c.* not ſufficient to exclude *Richard* who was the *ſecond* Son by Birth, though afterwards he became the eldeſt. *Chadwick* and *Doleman*. *Ant.* Ca. 4-6.

Caſe 587. *July* 10.

Holland verſus *Calliford.*

A. on his Marriage gives Bond to leave his Wife, 500 *l.* or a *Third of his perſonal Eſtate at her Election.* *A.* becomes Bankrupt.

ONE *Blanchard*, a Cabinet-maker, married the Siſter of *Calliford*, who had 500 *l.* Portion ſecured by Land. *Blanchard* on his Marriage, gives a Bond to leave his intended Wife, if ſhe ſurvived him, 500 *l.* or a *Third* of his Eſtate at her Election.

Decreed the Wife to come in as a Creditor on her Bond, and what ſhall be paid in reſpect thereof, to be put out at Intereſt, which is to be received by the Creditors during the Bankrupt's Life, and the Principal to be paid to the Wife, if ſhe ſurvives him.

Blanchard became a Bankrupt. Bill by the Aſſignees to have the 500 *l.* raiſed by a Sale, and decreed accordingly; but with this, that the Wife ſhould come in as a Creditor upon the 500 *l.* Bond, and what ſhould be paid in reſpect thereof, to be put out at Intereſt, and received by the Creditors during the Life of the Husband; and if the Wife ſurvived, then the Money to be paid to her.

Caſe 588.

Drapers Company verſus *Yardly & al'.*

A. deviſes Lands to B. in Tail, Remainder to *C.* in Tail, ſubject to the Payment of Legacies. *C.* levies a Fine and *five* Years Non-claim paſs, and mortgages the Lands. Fine and Non-claim no Bar of the Legacies. *C.* having no Title but under the Will, the Mortgagee muſt be ſuppoſed to have Notice of the Legacies.

SIR *William Boreman* deviſed to *John Boreman* in Tail Male, and if he died without Iſſue Male, to *Yardley* in Tail Male, but to pay to the Plaintiffs 500 *l.* and 1000 *l.*

Yardley afterwards levied a Fine, (on which was *five* Years Non-claim) to the Uſe of him and his Heirs; and grants a Rent-charge of 100 *l. per Ann.* to the Defendant *Smith*, and mortgages to *Norcliffe.*

Lord Chancellor. The Fine and Non-claim no Bar to the Plaintiffs, the Legatees under the Will; *Yardley* having no Title, but under the Will, is implicite Notice: And all other Purchaſers, if any, to be brought in and contribute.

Morret & al' verſus *Weſterne.*

Caſe 589.
July 15.

THE Defendant *Weſterne* after *ten* Years Suit, *four* ſeveral Reports, and *two* Trials at Law, obtained a Decree to foreclose Mrs. *Bennet* upon a Mortgage.

Subſequent Incumbrancers may redeem the firſt Mortgagee, though the Mortgagor is foreclosed by a Decree; and the Account taken in the Suit where ſuch Decree was obtained will not bind the ſubſequent Incumbrancers.

Plaintiffs had Judgments and other Incumbrances on *Bennet*'s Eſtate, ſubſequent to the Defendant's Mortgage, and now brought a Bill againſt the Defendant *Weſterne* for an Account of Profits, and to redeem.

Defendant pleaded all the former Proceedings, the Taking the Account in an adverſary Way, Reports and References, and Trials at Law, and Decree ſigned and inrolled, in Bar of any new Account to be taken; and denied he had any Notice of the Plaintiffs Incumbrances.

The Plea over-ruled.

DE
Term. S. Michaelis,
1710.
In CURIA CANCELLARIÆ.

Caſe 590.
Obſ. 27.

Cox verſus *Higford.*

A Copyhold is forfeited for not repairing; whether Equity will relieve.

PLaintiff, a *Quaker*, amerced for not coming to the Lord's Court, and taking the Oath of Fealty; and after the Copyhold Eſtate is preſented for being out of Repair, and then a Forfeiture for not Repairing. In 1679 the Lord entered, and prevailed on the Tenant to attorn. An Ejectment is brought by the Plaintiff the Copyholder, and then a Rule of Court, that upon paying Coſts, and repairing, the Copyholder ſhould have an Account of Profits and Repairs.

The Want of Repairing was only of an Ox-houſe, ſet up by the Tenant for 40*s.* and a Wain-houſe.

Porter and *Thomas* cited. Iſſue, whether Waſte with Intent to commit a Forfeiture.

Cudmore and *Raven*, the Court relieved the Defendant, a *Quaker*, againſt a Forfeiture for not doing Suit and Service.

3

Morley

Morley verſus Earl of *Derby*, The Plaintiff relieved againſt a Forfeiture in felling of Timber.

Bill diſmiſſed, becauſe the Plaintiff's Neglect was not once or twice, but for *twenty* Years together he refuſed or neglected to do Suit and Service, and repair.

The Lord might lawfully enter, and having ſo done, the Tenant attorned.

A Bill afterwards brought, and he elected to go to Law; then a Rule of Court to pay Coſts and to repair, but failed in Repairing.

Bill diſmiſſed.

Davy verſus *Hooper & al'.*

Caſe 591. *Nov.* 17.

TWO Thouſand five Hundred Pounds to be for the Iſſue of the Marriage, in ſuch Proportion, as *William Davy* ſhall appoint: He died leaving only one Daughter, and made no Appointment; yet the Daughter well intitled.

2500 *l.* is provided by Settlement for the Iſſue of the Marriage, in ſuch Proportion as the Huſband ſhall appoint: He dies, leaving a Daughter only, and makes no Appointment. She ſhall have the 2500 *l.*

Decreed the 2500 *l.* to be raiſed.

Hancock verſus *Hancock.*

Caſe 592. *Nov.* 18. *Lord Keeper.*

WHERE the Wife of a Freeman of *London* is compounded with before Marriage, by ſettling a Jointure, although of Land, the Wife is taken as advanced, and the Children by the Cuſtom of *London* ſhall have

Settlement by a Freeman before Marriage, though of Land, bars the Wife of her cuſtomary Part; and the Children in ſuch Caſe, ſhall have a Moiety of the perſonal Eſtate.

have a Moiety, as if the Wife was dead; and ſo certified in the Caſe of *Hall & ux'* and *Lumley*, 17 *Car.* 1.

So if all the Children are advanced, the Wife ſhall have a Moiety.

The Caſe of *Clare* and *Acmooty* cited: That when all the Children were advanced, there the Wife had a Moiety.

Dee, City Serjeant. Any Jointure binds, and bars the Wife. *That* is called a Compoſition.

Caſe 593. *Nov.* 20.

Comitiſſa *Derby* verſus Earl of *Derby.*

PLaintiff a Jointreſs; the Defendant claimed under an Intail, and had recovered Part of the Jointure in *Cheſhire* and *Lancaſhire.*

Bill to have Recompence on the Eviction on the Statute of 27 *H.* 8. *c.* 10.

Firſt, Queſtion whether ſhall take it out of County *Palatine*, and direct any Trial at Law, and until that ſettled, will remove the Impediment of the Leaſes, for cannot try it in the proper County againſt the Earl of *Derby.*

Caſe 594. *Lord Keeper.*

Lock verſus *Lock.*

A. deviſes a College-Leaſe for 21 Years to his Wife for Life, Remainder to his Son, ſhe paying 10 *l. per Ann.* to his Son during her Life; the Son dies in the Life of his Mother; the Rent continues during the Life of the Wife, and ſhall go to the Executor of the Son, and the Wife is compellable to pay her Proportion for a Renewal of the Leaſe. See the next Caſe.

James Lock deviſed a Term of *Twenty-one* Years, held of a College in *Oxon*, to his Wife for Life, and after her Deceaſe to his Son *James*; ſhe paying 10 *l. per Ann.* to *James* during her Life, and not to alien without the Son's Conſent.

James the Son died, and deviſed all his Intereſt in the Land to the Plaintiffs, and made one of them Executrix.

Bill for the Remainder of the Rent, and to compel the Defendant to renew the Leaſe.

Per Cur. The Rent is to have Continuance during the Life of the Defendant, and will go to the Executor of the Son.

Secondly, The Deviſe being to the Wife for Life, paying 10 *l. per Ann.* to *James* her Son during her Life, with Remainder to *James*, is an Implication, that the Widow ſhould renew and keep the Term on Foot; and there being but *ſeven* Years of *Twenty-one* to come, ſhe was decreed to renew, and the *Maſter* to ſettle the Proportion.

Rawlinſon verſus Dutcheſs of *Mountague*.

Caſe 595. *Decemb.* 4.

Chriſtopher, late Duke of *Albemarle*, deviſed to his Executors and their Heirs 50 *l. per Ann.* during his Wife the Dutcheſs's Life, to be for the ſeparate Uſe of Mrs. *Rawlinſon*, to be paid to her own Hands, and ſo as her Husband ſhould not intermeddle. Mrs. *Rawlinſon* dies.

Deviſe of 50 *l. per Ann.* to the Wife of *A.* during the Life of *B.* for her ſeparate Uſe. The Wife of *A.* dies, the 50 *l. per Ann.* ſhall be paid to the Executor of the Wife of *A.* during the Life of *B.* See the preceding Caſe.

Decreed the 50 *l. per Ann.* to be paid to the Executors of Mrs. *Rawlinſon*, during the Life of the Dutcheſs.

D E

DE
Term. S. Hillarii,
1710.
In CURIA CANCELLARIÆ.

Caſe 596.

Webb verſus *Webb.*

A. on his Marriage aſſigns a Term for 1000 Years, in Truſt for himſelf for Life, Remainder to his Wife for Life, Remainder to the Heirs of the Bodies of the Husband and Wife.

Edward Webb, the Defendant's Grandfather, poſſeſſed of a Term of *one Thouſand* Years, 31 *Octob.* 1651, on Marriage of his Son, and 250 *l.* Portion, aſſigned the Term to Truſtees, in Truſt to permit *Thomas Webb*, the Defendant's Father, to receive the Profits for his Life; and after his Death, to permit *Anne* his Wife to receive the Profits for her Life; Remainder to the Heirs of the Bodies of *Thomas* and *Anne*, during the Reſidue of the Term. The Wife dies leaving Iſſue.

The Wife dies leaving Iſſue. The whole Term veſts in the Husband, and he may aſſign it.

Plaintiff claimed by an Aſſignment made by *Thomas* the Father.

Cauſe firſt heard at the *Rolls*, and the Bill diſmiſſed upon the Reaſon of the Caſe of *Peacock* and *Spooner*, that the Heirs of the Body ſhould take as Purchaſers; and that the whole Term did not veſt in the Father.

Ante Ca. 38, 178

Upon an Appeal to the *Lord Keeper*, and after Search of Precedents, decreed for the Plaintiff; that the whole Term veſted in *Thomas Webb* the Father, and that the Heirs of the Bodies of *Thomas* and *Anne* could not take as Purchaſers.

If the legal Eſtate had been ſo limited, the Father muſt at Law have taken the Whole, and the Truſt of a Term muſt be governed by the ſame Rule.

DE
Termino Paſchæ,
1711.
In CURIA CANCELLARIÆ.

Caſe 597.
April 28.

Baile verſus *Coleman*.

The Truſt of Lands is deviſed to *A.* for Life, with Power of leaſing, Remainder to the Heirs Male of the Body of *A.* Decreed the Truſtees to convey an Eſtate-Tail to *A.* and not an Eſtate for Life only, with Remainder to his firſt, &c. Son in Tail Male. *Poſt.* Caſe 625.

William Stowell by Will deviſed Lands to Truſtees and their Heirs, for Payment of Debts and Legacies; and after Debts and Legacies paid, willed that one fourth Part ſhould be and remain in Truſt for *Elizabeth Baile*, for and during the Term of her natural Life, with Power of leaſing for *Ninety-nine* Years, determinable on *one*, *two*, or *three* Lives; and from and after her Deceaſe, in Truſt for her Son *Chriſtopher Baile*, for and during the Term of his natural Life, with like Power of leaſing; and after his Deceaſe, in Truſt for the Heirs Males of the Body of the ſaid *Chriſtopher*, lawfully to be begotton.

Lord Chancellor *Cowper* decreed the Truſtees to convey only an Eſtate for Life to *Chriſtopher Baile*, and to his firſt and other Sons in Tail Male.

But

But upon a Rehearing, the *Lord Keeper* reverſed *that* Decree, and decreed an Eſtate-Tail to be conveyed to *Chriſtopher*; *viz.* to him and the Heirs Male of his Body.

Although he admitted, that upon Articles of Marriage founded on the Agreement of the Parties, the Husband in ſuch Caſe might be made only Tenant for Life; but in a Will you muſt take Words as you find them.

But otherwiſe it would be, if Lands were agreed to be ſo ſettled by Marriage-Articles.

Sir *Edward Nicholls*, and *Suſan Danvers* his Siſter verſus *John Danvers & al'*, *& econtra.*

Caſe 598.

THE Defendant *Danvers* on the Marriage of the Plaintiff *Suſan*, Siſter of Sir *Edward Nicholls*, received a Portion of 2000 *l.* and made a ſuitable Settlement on her. After the Marriage, the Plaintiff *Suſan*'s Mother died inteſtate, by which one *Third* of her perſonal Eſtate, of the Value of 3000 *l.* came to her, as her Share of the Inteſtate's Eſtate. Defendant *Danvers* having acted with Severity and Cruelty towards his Wife, ſhe parted from him.

A Wife having been uſed with Cruelty by her Husband, becomes intitled to 3000 *l.* as her Share of her Mother's perſonal Eſtate, who died inteſtate. Decreed the Intereſt of this to the Wife for her ſeparate Uſe; and then to her Husband if he ſurvived; and afterwards the Principal to be paid to the Iſſue; and if no Iſſue, then to the Survivor of the Husband and Wife. *Poſt.* Ca. 657.

Sir *Edward Nicholls* and his Siſter's Bill, was to have the 3000 *l.* for her own Uſe for her Maintenance.

The croſs Bill by *Danvers* the Husband was, that the Adminiſtrator might pay it to him.

Lord Keeper decreed the Principal to be brought before a Maſter, and placed out at Intereſt, and the Intereſt to be paid to the Plaintiff *Suſan* for Life for her Maintenance; then to the Defendant the Husband for Life; if any Iſſue, the

the Principal to the Iſſue; if none, to the Survivor of *Danvers* and his Wife.

Ant. Ca. 444. The Precedent of Sir *James Oxenden* and *Watſon* cited.

Memorandum, Defendant had given a Note to his Wife, that if he ſhould again uſe her Ill, ſhe ſhould have her Share of her Mother's Eſtate to her own Uſe.

Caſe 599.

Minſhull verſus Lord *Mohun.*

Upon a Bill in Nature of a Bill of Revivor againſt a Deviſee; the Deviſee cannot diſpute the Juſtice or Validity of the Decree; for then a Deviſee would be in a better Caſe than an Heir.

THE Defendant, the Lord *Mohun*, claiming the Eſtate of Sir *Edward Fitton*, as Deviſee of the Lord *Macclesfield*, againſt whom Sir *Edward* had obtained a Decree for an Account of Profits, and a Partition of a *ſeventh* Part of a *third* Part, as being *one* of the *ſeven* Co-heirs, (the Will being void as to a *third* Part of the Land, which was held *in Capite*) the Bill was an original Bill, in the Nature of a Bill of Revivor.

The Queſtion was, Whether the Defendant ſhould be at Liberty to enter into the Merits of the Cauſe, and queſtion the Juſtice of the Decree; and held that he ſhould not; for had it been a Bill of *Revivor*, the Heir could not have been heard; and no Reaſon that a Deviſee ſhould be in a better Condition than the Heir. *Hæres natus* is rather to be favoured than *Hæres factus:* And ſo it was held by the Lord Chancellor *Cowper*, in the Caſe of *Clare* and *Wordell*, 26 *April*, 1706.

Ant. Ca. 499.

DE
Term. S. Michaelis,
1711.
In Curia Cancellariæ.

Stapleton verſus *Cheele.*

Caſe 600. *Nov.* 11.

A Legacy of 50 *l.* deviſed to *J. S.* when of the Age of *ſixteen*, and Intereſt in the mean Time, to be paid quarterly. *J. S.* died before *ſixteen*; yet adjudged, it was a Legacy veſted, becauſe it carried Intereſt; and ſo it was adjudged in the Caſe of *Clobury* and *Lampen*, reported in 2 *Vent.*

A Legacy deviſed to *J. S.* when of the Age of *ſixteen*, and Intereſt in the mean Time. *J. S.* dies before *ſixteen.* The Legacy veſted, and ſhall go to the Executors of *J. S.*

Wingfield verſus *Alkinſon.*

Caſe 601. *Nov.* 30.

IN 1710, *John Rudder* gave to the Plaintiff, his Siſter's Son, and to his Nephews, Sons of his Brother, 100 *l.* apiece, being in Truth his next of Kin, and makes the Defendant *Alkinſon* and *Myres* Executors, and gave them 100 *l.* apiece, they being not of Kindred to the Teſtator.

One by his Will gives his next of Kin, being his Nephews, an expreſs Legacy, and gives 100 *l.* apiece to his 2 Executors, and makes no Diſpoſition of the Surplus.

The Queſtion was, Whether the Executors, or next of Kin ſhould have the Surplus.

Poſt. Ca. 645.

Ant. Ca. 578. *Poſt.* Ca. 602.

The Caſes cited were the Dutcheſs of *Beaufort*, *Smith* and *Ball*, *Wicket* and *Jones*, and *Littlebury* and *Buckley*, which was firſt heard in the *Mayor's Court*, and the Surplus there decreed to the next of Kin: And upon an Appeal to the *Houſe* of *Peers*, the Executors were admitted to read Witneſſes, to prove the Teſtator intended them the Surplus; and upon that Foot the Lords reverſed the Decree.

DE

Term. S. Hillarii,

1711.

In Curia Cancellariæ.

Ball verſus *Smith.*

Caſe 602.

THE Defendant Mrs. *Smith* was Executrix of Mr. *Atkins* her former Husband, and after married Mr. *Smith*, who by his Will in 1686, deviſed to his Wife, the Defendant, the Plate and Goods ſhe brought him in Marriage, and two Silver Salvers in Lieu of the Plate that had been changed away; and made the Defendant his Wife Executrix, and died, leaving a Daughter by a former Wife (who married Mr. *Ball* the Plaintiff) and the Defendant his Wife *enſeint* of a Daughter; and there being no Deviſe of the Surplus of the perſonal Eſtate to the Wife; the Queſtion was, Whether ſhe ſhould take it as Executrix to her own Uſe, or liable to a Diſtribution.

Ant. Ca. 562. The Wife of the Teſtator is made Executor, and no Deviſe of the Surplus, nor any expreſs Legacy to the Wife, except what ſhe had as Executor of her former Husband, and ſome Things ſhe had before her Marriage. Decreed the Surplus to the Wife, and that it ſhould not be diſtributed among the next of Kin.

For the Plaintiff it was inſiſted, that the Surplus ought to be diſtributed according to the Rule given in the Caſe of *Foſter* and *Mount*, and many other ſubſequent Caſes.

Vol. 1. Caſe 462.

The *Lord Keeper* inclined to decree the Surplus to the Wife, as well for that this Will was made before the

Caſe of *Foſter* and *Mount*, as alſo for that in this Caſe nothing is deviſed to the Wife, but what was her own before; and as ſhe was Executrix to Mr. *Atkins* her former Husband; but principally becauſe where a Wife is made Executrix, it is to be preſumed ſhe was not made ſo to have barely an Office of Trouble, but of Benefit to take the Surplus.

His Lordſhip directed to be attended with Precedents; and being accordingly attended with Precedents; as to the Caſe of *Foſter* and *Mount*, he having peruſed the Will, Pleadings and Decree, obſerved, that although there was a Charge in the Bill, that the Will was unduly obtained; yet the Proof failed; no ſuch Thing was made out by Proof; but the Executors having 10 *l.* apiece for their Care and Trouble; and being Strangers, and the Surplus of the Eſtate being conſiderable, the Lord Chancellor *Jefferies* ſent it to a Maſter to certify the Value; and it appearing to be 5000 *l.* when it came back upon the Report, he decreed it to be diſtributed.

Firſt, Becauſe the Deviſe of 10 *l.* apiece to the Executors for Care and Pains, ſeemed to imply a Truſt as to the Reſidue.

And *ſecondly*, The Executors being Strangers to the Teſtator, he could not intend them a Surplus of 5000 *l.* when he had given them Legacies of 10 *l.* apiece; but withal obſerved, that the next of Kin were his *two* Daughters, both before that Time married, and to which he gave Legacies of 200 *l.* apiece; and therefore the Precedent comes not up to this Caſe where the Wife, and not Strangers, is Executrix.

Other Precedents produced were *Cook* and *Walker*, where *Penelope Lane* by Will 29 *May*, 1691, made the Defendant *Walker* her Executor, to whom ſhe gave 20 *l.* for Mourning, he not of Kin, but a Stranger. 7 *Annæ* Diſtribution decreed.

Darwell and *Bennet.* Mr. *Darwell* by Will 3 *Dec.* 1692, gave 100 *l.* Legacy, and the Intereſt of 300 *l.* to his Wife for her Life, and made her and the Defendants *Bennet* and *Burroughs* Executors; to *William* he gave 20 *l.* for Mourning. 19 *July*, 7 *Annæ Reginæ*, Surplus decreed to be diſtributed.

Ward and *Lane.* Where *Andrew Lane* had made his Wife Executor, he living *twenty* Years after the Will, and acquiring an Eſtate. 10 *Jan.* 13 *Will.* 3. Surplus decreed to be diſtributed.

Hungerford and *Reppington.* Lands deviſed to be ſold; Surplus, if any, to be deemed Part of his perſonal Eſtate; and the Teſtator having deviſed 100 *l.* apiece to his Executors, Surplus decreed a Truſt. *Q.* Whether for the next of Kin, or for the Heirs at Law.

On the other Hand were cited the Caſes of the Lady *Granville* and Dutcheſs of *Beaufort.* The Uſe of the Table Plate to the Dutcheſs for Life, and after to his Grandſon: The Dutcheſs made Executrix. Lord Chancellor *Cowper* decreed a Diſtribution; the Diſtribution reverſed in the *Houſe of Peers*, and the Surplus decreed to the *Dutcheſs* as Executrix. *Ant.* Ca. 578.

Littlebury and *Buckley.* Where one not of Kin, but a Stranger, made Executor, and had conſiderable Legacies given to him: His *two* Brothers Plaintiffs in the *Mayor*'s Court. Decreed by Sir *Peter King* the *Recorder*, that the Surplus ſhould be diſtributed. But upon an Appeal to the *Houſe of Peers*, *that* Decree was reverſed, not barely as it ſtood upon the Will, but that parol Proof ought to be received in Favour of the Executor's Title, conſiſtent with the Will: And the Proof being full as to the Teſtator's frequent Declarations, that his Executor, tho' a Stranger,

ſhould have the Surplus, and that his Brothers ſhould not have it: It was decreed accordingly for the Executor.

Lord Keeper. There being but *that* one ſingle Inſtance of *Ward* and *Lane*, where the Wife was Executrix, that ſhe hath been excluded from taking the Surplus. The Caſe of *Darwell* and *Bennet*, where *two* Strangers were made Executors with the Wife, not coming up to the Caſe; decreed the Surplus to the Wife, with this Declaration, that he hoped the Caſe would not reſt here; but for ſettling of this Point, receive the Judgment of the *Houſe of Peers:* And withal he was content it ſhould be admitted in this Caſe, that the Defendant Mrs. *Smith* was not intitled to the Goods and Plate, as Executrix to Mr. *Atkins* her former Husband; but as a Legacy given to her by Mr. *Smyth* the Teſtator.

Caſe 603. *Jan.* 24. *Lord Chancellor.*

Addiſon per *Committee* verſus *Dawſon, Maſcall & al'.*

Sales at great Under-value from one that was afterwards a Lunatick, ſet aſide; but the Conveyances to ſtand a Security for what was really paid.

Addiſon by a *firſt* and *ſecond* Inquiſition was found a Lunatick in 1706, from the Year 1689, when he had a Fall, without any Intervals. The Defendant had got a Mortgage, and at laſt an abſolute Purchaſe at great Under-value, by Deeds, Fines and Recoveries; and a conſiderable Sum was paid into *Maſcall*'s Hands, who pretended to have ſtated an Account, but had not made any Proof. The Defendants inſiſted on a Trial at Law; but the Court ſet aſide the Purchaſes and ſtated Account, and the Defendant decreed to be allowed, what he ſhould prove he had paid for the Uſe and Benefit of the Lunatick.

Greenhill

Greenhill verſus *Greenhill.*

Caſe 604.

MR. *Greenhill* the Teſtator employ'd one *Young* to article for the Purchaſe of Lands, Part whereof lay in *Cornwall*, and are called cuſtomary Lands, and although they paſs by Leaſe and Releaſe; yet by the Cuſtom of the County *Palatine of Cornwall*, they cannot be deviſed without a Surrender.

A. articles to purchaſe Lands in Truſt for *B.* and before any Conveyance made, *B.* by Will directed all his Frehold Eſtate to be ſettled on *C.* and his firſt Son, *&c.* The Lands articled for will paſs by the Will.

The Articles were made in *April*, the Conſideration-Money paid, and Conveyance to be executed at *Michaelmas* then next following. In *June* the Teſtator made his Will, and deviſed the Reſidue of his perſonal Eſtate, after Debts and Legacies paid, to be laid out in Land; and the Lands ſo to be purchaſed, together with his Frehold Eſtate, to be ſettled on the Plaintiff and his firſt Son, *&c.*

The Teſtator afterwards at *Michaelmas* entered, and paid the Conſideration-Money, and in *Michaelmas* 1707, Conveyances were perfected, an Act of *Parliament* being found neceſſary, and died, leaving the Defendant, and the Plaintiff's Mother, his Daughters and Coheirs.

The Queſtion was, Whether the Land thus contracted for, eſpecially the cuſtomary Lands, paſſed by this Will.

Decreed for the Plaintiffs, and confirmed upon a Rehearing.

Firſt, That the Articles being made in *April* 1706, and the Will in *June* following, although Poſſeſſion was not to be given till *Michaelmas* following, it was ſuch an Intereſt as was deviſable, and well paſſed by the Will.

That the Words were ſufficient; all the Reſidue of his perſonal Eſtate to be inveſted in Land, and together with his Frehold Eſtate to be ſettled. The Frehold Eſtate was mentioned only in Contra-diſtinction to his perſonal Eſtate. Whether real or perſonal, the Whole intended for the Plaintiff.

Objection. Firſt, The Articles were in *Young*'s Name; and *Young* made no Declaration of Truſt in Writing.

Secondly, The Eſtate of Feme Covert.

Thirdly, No Surrender of the cuſtomary Eſtate.

Lands within the County Palatine of *Cornwall*, by the Cuſtom cannot be deviſed without a Surrender; yet one, who has an equitable Intereſt only in ſuch Lands, may deviſe them without making a Surrender.

Per Cur. An equitable Intereſt is as well deviſable, as a legal Eſtate. A future Intereſt is deviſable. No Surrender wanting; becauſe he had an equitable, and not the legal Eſtate; and *Young* having owned the Truſt, and the Feme Covert not oppoſing; but having ſubmitted to, and convey'd according to the Articles, theſe Objections were not material.

A. articles to purchaſe Lands, and deviſes thoſe Lands, and afterwards they are conveyed to the Teſtator and his Heirs; Whether this is a Revocation.

The Teſtator after the Date of his Will, having taken a Conveyance to himſelf and his Heirs.

Q. If it did not amount to a Revocation.

Caſe 605. Dame *Ellen Williams* verſus Sir *Bowcher Wray*.

Whether a Dowreſs ſhall be relieved in Equity againſt a Term for Years.

SIR *Griffith Williams* by Settlement was Tenant for Life, Remainder to his Son Sir *William Williams* in Tail, with Power to grant a Term of *Ninety-nine* Years, of Lands within *five* Pariſhes.

In a Bill by Sir *Bowcher Wray* to ſet aſide the *Ninety-nine* Years Term, made of the Lands in *five* Pariſhes: It was decreed by the Lord Keeper *Wright*, that Ejectments ſhould be brought upon the Term of *Ninety-nine* Years, and conſequently the Widow would be evicted of Dower.

Now upon a Bill of Review, the Caſes cited for the Plaintiff were *Ball*'s Caſe, where the Inheritance was in Truſtees for Payment of Debts; yet decreed the Huſband ſhould be *Tenant per Courteſy*.

Worthington and *Fletcher*. Tenant by Courteſy decreed of a Truſt.

Lady *Dudley*'s Caſe at the *Rolls*.

Sweetapple's Caſe. The Money to be laid out in Land.

Orm verſus *Smith*.

Caſe 606. *Feb.* 22.

I Give my Uncle *Orm* 500 *l. viz.* the Bond and Judgment about 400 *l.* due to me from *A.* and 100 *l.* in Money. The Teſtator lived to receive 370 *l.* and took a new Bond for 80 *l.* other Part, and died.

One deviſes 500 *l. viz.* 400 *l.* due on Bond, and 100 *l.* in Money; afterwards the Teſtator receives Part of the 400 *l.* and takes a Bond for the other Part. This is no Ademption of the Legacy.

Swinburne 7 *Part*, *Ch.* 20. *Fol.* 447.

Pawlet's Caſe, *Raymond*'s *Reports* 335.

A Deviſe of 500 *l. J. S.* owed him, the Teſtator lived to receive the 500 *l.*

Elliot and *Davenport*. *Ant.* Ca. 472.

Decree for the 500 *l.* Legacy.

Caſe 607. *Feb.* 25. *Lord Keeper.*

Bellaſis & ux' verſus *Churchill* and *Caſtle.*

An Adminiſtrator of a Captain of a Company of Marines is intitled to an Account, as well of the Pay of the Company, as of the perſonal Pay of the Captain, and of his Servants.

BILL by the Plaintiff as Adminiſtratrix to her Brother, Captain of a Company in Colonel *Churchill*'s Regiment of Marines, for an Account of his perſonal Pay, and the Pay of his Servants, and the Pay of the Company.

The Defendant Colonel *Churchill*, and his Agent, the Defendant *Caſtle* inſiſted, that the Plaintiff was only intitled to an Account of the Captain's perſonal Pay, and Pay of his Men, and not for the Pay of the Company; although they ſeemed to admit, that a Captain for Land-Service was to recruit his Company, but would have it, there was a Difference, where he was a Captain of Marines; or if the Captain may be intitled, yet his Adminiſtrator was not. *Sed non allocatur.*

Decreed the Defendants to account, as well for Pay of the Company, as for the Captain's perſonal Pay, and Pay of his Servants.

D E

DE

Term. S. Trinitatis,

1712.

In CURIA CANCELLARIÆ.

Chriſt's Hoſpital verſus *Budgin & ux'.*

Caſe 608. *May* 30.

THomas Garraway's perſonal Eſtate being decreed to be applied to the Payment of Debts and Legacies in Eaſe of his real Eſtate, which by his Will was made liable thereto; upon the Account before the Maſter, his Widow and Executrix, now the Wife of the Defendant *Budgin*, inſiſted, that ſeveral Mortgages and Bonds for Money lent by her Husband, being taken in the Name of the Husband and Wife, ſhe was intitled thereto as Survivor, and the ſame ought not to be brought into the Account, as Part of the perſonal Eſtate; and the Maſter having ſtated *that* Matter ſpecially,

Husband lends out Money in the Names of himſelf and his Wife, upon Mortgages and Bonds, and dies. The Wife is intitled to this by Survivorſhip, if there are Aſſets ſufficient without this Money to pay Debts.

For the Heirs it was inſiſted, that the Wife was but in the Nature of a Truſtee, the Money being the Husband's; and if paid in the Life of the Husband, it would have fallen into his perſonal Eſtate again, and he not accountable to the Wife; and if this ſhould not be liable to Debts,

Debts, the Husband by joining his Wife in the Security, might defraud all his Creditors; and cited the Caſe of *Gatley* and *Quarrel*, where Lord *Cowper* adjudged it againſt the Wife, to be Aſſets of the Husband, and liable even to Legacies.

But the *Lord Keeper* looked upon the Wife to be in the Nature of a Joint-purchaſer, and decreed it for the Defendant againſt the Heirs at Law; but admitted in Caſe of Creditors it might be fraudulent; but there being ſufficient Aſſets, beſides the 4000 *l.* in Queſtion, to pay all the Debts and Legacies, decreed the 4000 *l.* to the Defendant *Budgin*, as Adminiſtrator to his Wife.

Caſe 609. *May* 31.

Kirſley & al' verſus *Duck & ux'*.

One poſſeſſed of a Term for 2000 Years in Land, grants the Land to *A.* without mentioning any Term. It is void for Uncertainty.

A Man poſſeſſed of Land for a Term of *two Thouſand* Years, in 1671, grants the Land to *Duck* and his Wife, (without mentioning any Term) to the Uſe of *Kirſley* for Life, and to the Heirs of his Body; and in Default of Iſſue, to the Uſe and Behoof of *Duck* for *one Thouſand eight Hundred* Years.

The Queſtion was, Whether the Limitation to *Duck* was good.

It was agreed the *firſt* Limitation void for Uncertainty, it mentioning to grant to *Duck & ux'*, and not ſaying for what Eſtate or Term.

One ſeiſed in Fee, may create a Term for Years to commence after his Death without Iſſue; but one poſſeſſed of a Term for 2000 Years, cannot out of that Term carve a future Term to commence after the Determination of an Eſtate in Tail.

But for the Defendant it was inſiſted that the Limitation to *Duck* and his Wife, in Default of Iſſue to *Kirſley* for *one Thouſand eight Hundred* Years, was a good Limitation, as an *intereſſe Termini*. A Man may grant a Term

to commence upon Failer of Iſſue, or expectant on an Eſtate-tail.

To which it was anſwered, that a Man may carve ſuch Term out of his Inheritance; but one, that is poſſeſſed only of a Term for Years, cannot carve any future Term out of his Term for Years, to commence after the Determination of an Eſtate-Tail.

Firſt, Becauſe ſuch an Eſtate-Tail, is deemed a greater and more durable Eſtate.

Secondly, It would create a Perpetuity, not to be barred by any common Recovery.

Turner & ux' verſus *Jennings* and *Longland.*

Caſe 610. *June* 16, 1708.

JOHN *Longland*, a *Maſter Carpenter* at *Pauls*, being a Freeman of *London*, had Iſſue a Son and a Daughter; his Son dying and leaving *three* Children, he in *July* 1706, by Deed aſſigned over ſeveral Leaſhold Eſtates to the Defendant *Jennings*, on Truſt to ſell and to pay any Sum not exceeding 1000 *l.* as he ſhould appoint; and by Deed and Will appointed 500 *l.* to his Daughter, and the Reſidue to his Grandchildren.

A Freeman of *London* having one Daughter and three Grandchildren by a deceaſed Son, by Deed aſſigns over ſeveral Leaſes, in Truſt to pay any Sum not exceeding 1000 *l.* as he ſhould appoint; he appoints 500 *l.* to his Daughter, and the Reſidue to the Grandchildren. This is in Fraud of the Cuſtom, and void as to the Moiety, which the Daughter is intitled to.

Decreed to be ſet aſide, as to a Moiety, which the Daughter by the Cuſtom, as only ſurviving Child, was intitled to, as being in Fraud of the Cuſtom.

Caſe 611.
Lord Keeper.
June 16, 1708.

A. Deviſes Lands to his Son and his Heirs; and if his Son dies without Iſſue, then 200 *l.* to his Daughter. Son leaves Iſſue, which dies without Iſſue. The 200*l.* not due.

Nichols verſus *Hooper.*

JOHN *Jackſon*, 14 *Mar.* 1693, deviſed his Eſtate at *A.* to *Mary* his Wife for Life, and after her Deceaſe to his Son *Thomas*, his Heirs and Aſſigns for ever. Provided if *Thomas* died without Iſſue of his Body; then he bequeathed unto his Daughters *Mary Nicholls*, and *Elizabeth Newman* 200 *l.* to be divided equally between them, and to be paid out of his Eſtate within *ſix* Months after the Deceaſe of the Survivor of the Wife and Son.

Mary the Widow died; *Thomas* the Son alſo died leaving Iſſue, who died within *three* Months after the Father.

The Bill was to have the 200 *l.*

Per Cur. Although in ſome Caſes a Man is ſaid to die without Iſſue, whenever there is a Failer of Iſſue, as to the Limitation over of Lands of Inheritance. Yet in this Caſe the 200 *l.* as a perſonal Legacy, was not intended to ariſe upon any remoter Contingency, than that of *Thomas* dying without Iſſue living at his Death, and therefore diſmiſſed the Bill.

DE
Term. S. Hillarii,
1713.
In Curia Cancellariæ.

Ackland verſus *Ackland.*

Caſe 612.

ARthur Ackland by Will deviſed to his Brother *Richard*, all his Lands, Tenements and Hereditaments, and all his perſonal Eſtate, and whatever elſe he had in the World, and made him Executor, deſiring him to pay his Debts and Legacies.

A. deviſes to his Brother *B.* all his Lands and Hereditaments, and all his perſonal Eſtate, deſiring him to pay his Debts and Legacies. A Fee paſſes.

On a *ſpecial Verdict* in *Communi Banco*, adjudged the Inheritance paſſed by this Deviſe: *Richard Ackland* the Deviſee was the Teſtator's younger Brother; and *John* his eldeſt Brother left a Daughter.

DE

DE
Term. S. Michaelis,
1714.
In CURIA CANCELLARIÆ.

Caſe 613.

Sayer verſus *Sayer.*

One deviſes to his Wife all his perſonal Eſtate at *W.* this is a ſpecifick Legacy and to be preferred to pecuniary Legacies, in Caſe of Deficiency of Aſſets.

J. S. by Will deviſes to his Wife, the Defendant, all his perſonal Eſtate at a Place called *Wouſton*, and deviſed to the Plaintiff a Legacy of 500 *l.* and ſeveral other Legacies; and Aſſets proved deficient.

All the Teſtator's perſonal Eſtate that was at *W.* at his Death ſhall paſs, though not there at the Making the Will.

Per Cur. The Defendant's Legacy is a ſpecifick Legacy, and therefore to take Place, although there be a Defect of Aſſets for Payment of Money Legacies.

And as to what paſſes by the Deviſe, the *Chancellor* declared the general Words of all his perſonal Eſtate at *Wouſton* will paſs, whatever perſonal Eſtate he had there at the Time of his Death; the perſonal Eſtate being fluctuating and varying until the Time of the Teſtator's Death; and therefore what he died poſſeſſed of, paſſes, and not what he had at the Time of the Making the Will. The Legacy is to reſpect the Time of his Death.

Coaches,

Coaches, Horſes, and whatever he had at *Wouſton* will paſs.

Tate verſus *Auſtin.*

Caſe 614.

THE Wife joined with her Husband in a Fine to raiſe 400 *l.* out of her own Eſtate for the Uſe of her Husband, to equip him as an Officer in the Army.

The Wife joins with her Husband in a Fine to raiſe 400 *l.* by mortgage of her own Eſtate, to buy a Place for her Husband. Husband dies. The Mortgage ſhall be paid out of the Husband's perſonal Eſtate, if there be enough to pay all his other Debts.

The Queſtion was, Whether the Husband's perſonal Eſtate ſhall be applied to exonerate the Mortgage.

Per Cur. The Wife ſubjects her Eſtate to ſupply the Wants of her Husband; it muſt be taken to be a Debt due from the Husband, and to be paid out of his perſonal Eſtate, if he be able: But all other Debts ſhall be firſt paid.

DE
Term. S. Trinitatis,
1715.
In CURIA CANCELLARIÆ.

Caſe 615.
Lord Chancellor.

Beachcroft verſus *Beachcroft.*

A. begins his Will with diſpoſing of all his worldly Eſtate; and then wills that all his Debts be firſt paid and gives his Wife a Moiety of what is left after his Debts paid. The real Eſtate is charged with the Debts, and a Fee in a Moiety of the Surplus of the real Eſtate paſſes to the Wife.

NAth. *Beachcroft* by his Will deviſed, *viz. I do by this my Will diſpoſe of ſuch wordly Eſtate as it hath pleaſed God to beſtow upon me; firſt, I will that all my Debts be paid and diſcharged, and out of the Remainder of my Eſtate, I give and bequath unto my Wife* 300 l. *My Mind and Will is, that my Wife have one Moiety of what is left after my Debts paid.* Item, *I give to my dear Brother Sir* Robert Beachcroft, *a Cloſe lying in the Pariſh of St.* Peter *in* Derby; *and for the remaining Part of my Eſtate, as well real as perſonal, I give and bequeath unto my Brother* Joſeph Beachcroft, *whom I make Executor.*

The Queſtion was, Whether a Moiety of the real Eſtate after Debts paid, paſſed to the Wife, or only half of the perſonal Eſtate; and the Caſe of *Bowman* and *Milbank* was cited, where the Words were, *I give all to my Mother*, and adjudged, that only the perſonal Eſtate paſſed.

1 Sid. 191 Raym. 97.

Lord Chancellor. My worldly Eſtate compriſes as well real, as perſonal: His worldly Eſtate compriſes all he had in the World. Without Doubt thoſe Words ſubjected his real Eſtate to the Payment of his Debts, and conſequently a Deviſe of a Moiety of what is left, after Debts paid, muſt compriſe all that was liable to the Debts; and therefore decreed a Moiety of the Surplus, of the real and perſonal Eſtate to the Wife.

A Deviſe of all a Man's worldly Eſtate compriſes all he has in the World.

Demainbray verſus *Metcalfe & al'.*

Caſe 616. *June* 27. *Lord Chancellor.*

PLaintiff pawned ſome Jewels and Plate to the Defendant *Knight*, a Goldſmith, for 110 *l.* redeemable in *twelve* Months. *Knight* in *two* Days after pawns them to the Defendant *Metcalfe* for 200 *l.* and after borrowed the further Sums of 36 *l.* and 50 *l.* of *Metcalfe* on promiſſory Notes, to be repaid on Demand. *Knight* became a Bankrupt and inſolvent.

One pawns Jewels to *A.* and after borrows 50 *l.* more of *A.* on a promiſſory Note. He ſhall not redeem the Jewels without paying alſo the Money on the Note. *Poſt.* Caſe 621.

Bill by the Plaintiff to redeem from *Metcalfe*, who by Anſwer inſiſted, that although he took promiſſory Notes for Repayment of the Sums of 36 *l.* and 50 *l.* upon Demand; yet it was agreed at the ſame Time that the Pawn ſhould alſo remain as a Security for thoſe Sums, as well as for the Money before lent; but no Perſon was then preſent, therefore he could not prove the Agreement.

Lord Chancellor ſaid, It was natural to ſuppoſe, that although *Metcalfe* took promiſſory Notes; yet his having a Pawn in his Hands of greater Value might be the Inducement to him to lend, and took Time to conſider of it; and at laſt decreed that the Plaintiff muſt pay, as well the 36 *l.* and 50 *l.* as other Monies due. *Q. tamen.*

Coles

Caſe 617.
Lord Chancellor.
July 3.

An Aſſignee of a Bond muſt take it ſubject to the ſame Equity, as it was in the Obligee's Hands.

Poſt. Ca. 664.

Coles verſus *Jones* and *Coles.*

JONES gave Bond to the Defendant *Coles* in 250 *l.* for Payment of 120 *l.* the Defendant aſſigns that Bond to the Plaintiff, in Satisfaction of a Debt of 56 *l.* and to indempnify him againſt a Bond, he was bound in, as Surety for the Defendant *Coles*; and at the ſame Time the Plaintiff *Coles* gave a Note to the Defendant to indempnify him againſt a Debt of 50 *l.* to *Jewel*, in which the Defendant *Coles* was bound as Surety for the Plaintiff.

Lord Chancellor decreed the Plaintiff to have the Benefit of the Bond, and thereout to diſcount the Debt to *Jewel*, the Note being (as he ſaid) in the Nature of a Defeaſance to the Bond; and although the Aſſignee comes in upon a full and valuable Conſideration; yet he muſt take the Bond ſubject to the ſame Equity, as it was in the Obligee's Hands.

Caſe 618.
Lord Chancellor.
July 5.

A. poſſeſſed of an Exchequer Annuity for 96 Years, by Marriage-Articles covenants to pay it to the Wife for her ſeparate Uſe, and then to the Survivor of Husband and Wife for Life, and after to the Children of the Marriage, and if no Child, then to be for the Benefit of *A.* Husband and Wife die leaving a Child, who ſoon after dies. *A.* ſhall keep the Annuity, and it ſhall not go to the Adminiſtrator of the Child.

Baſſe verſus *Grey* Bar'.

THE Denfendant Sir *James Grey* on the Marriage of *Elizabeth Jennings* (ſuppoſed to be his natural Daughter,) gave her 700 *l.* Portion, and having purchaſed an Annuity in the *Exchequer* of 14 *l. per Ann.* for a Term of *Ninety-ſix* Years, he by the Marriage-Articles covenanted to pay the 14 *l. per Ann.* to the intended Wife during the Coverture, for her ſeparate Maintenance, and that the Survivor of them ſhould have the 14 *l. per Ann.* for Life, if the Term ſhould not ſooner determine; and

and if the Survivor died before the Determination thereof, then the Reſidue thereof to the Child or Children begotten between them; and in Caſe there ſhould be no ſuch Child or Children, then the 14 *l. per Ann.* to be for the Benefit of Sir *James Gray.*

The Marriage took Effect; *Baſſe* and his Wife died leaving a Son, who ſurvived them for the Space of *four* Years, and then died, and the Plaintiff took Adminiſtration to him.

The Queſtion was, To whom the Reſidue of the Term belonged; whether to the Plaintiff as Adminiſtrator to *Baſſe* the Son, or to Sir *James Gray.*

For the Plaintiff it was inſiſted, that the Limitation to the Wife during the Coverture, and then to the Survivor of Husband and Wife for Life, and if a Child, to ſuch Child or Children begotten between them, was a Diſpoſition of the whole Term, and would not admit of any further Remainder over; being limited unto *two* Perſons for their Lives, and the Life of the Survivor, and then to the Child or Children afterwards to be begotten; and eſpecially ſince there was a Child, who ſurvived Father and Mother; and the Words ſeem to import, that if there was a Child or Children, they were to have the Reſidue of the Term; but if no Child to take, that is, a Child living at the Deceaſe of the Survivor of Father or Mother, then the Defendant Sir *James Gray* to have the Reſidue of the Term; and if not ſo underſtood and limited, the Remainder is void.

Per Cur. The Defendant has not aſſigned the Order, nor transferred the Property, only covenanted to pay; and a Court of Equity muſt not carry the Covenant, (being a free Gift) beyond the Letter.

Difference between an actual Aſſignment, and only a Covenant to aſſign. The latter not to be carried in Equity beyond the Letter.

Quære tamen, If that Diſtinction be allowed, Settlements of Terms hereafter will be done by Way of Covenant, with ſuch Remainders over, as cannot be done by Way of Limitation of an Eſtate or of a Truſt.

Caſe 619. *Aug.* 6. *Lord Chancellor.*

Sir *William Joliffe* verſus *Pitt* and *Whiſtler.*

THE Plaintiff Sir *William Jolliffe* lent *Whiſtler* 4500 *Dollars*, on a Note dated *Auguſt* 10, 1689, to be repaid with Intereſt at 1 *l. per Cent. per Menſem* until repaid; *Whiſtler*, then reſiding at *Tripoly* in *Turkey*, paid *two* Years Intereſt, but then failed, and went to *Fort St. George* in the *Indies*, and there acquired a conſiderable Eſtate, and in *Feb.* 1706, died in the *Eaſt-Indies*, and made the Defendant *Pitt* his Executor. Sir *William Jolliffe* continued in *Turkey* till 1702, and on *April* 30, 1702, takes out a *Latitat* againſt *Whiſtler*, and the ſame was continued on the Roll 'till 1706, at which Time *Whiſtler* died in the *Indies*, and made Mr. *Pitt* his Executor, who alſo then reſided in the *Indies*. *Octob.* 1710, the Defendant Mr. *Pitt*, *Whiſtler*'s Executor, came over to *England*, and proved the Will, and upon Application made to him by the Plaintiff he declared he was willing to apply the Aſſets to the Payment of his Teſtator's Debts. On *May* 8, 1714, the Plaintiff filed his Bill; *Pitt* the Executor ſubmitted to do as the Court ſhould direct; but the other Creditors who were made Defendants, inſiſted the Plaintiff was bound by the *Statute* of *Limitations*.

If the Creditor is beyond Sea, the Statute of Limitation will not take Place. So it is by the late Statute of 4 & 5 Q. *Ann.* if the Debtor is beyond Sea.

Firſt, It was agreed that the Plaintiff being abroad, and not returning into *England* till 1702, and then bringing his *Latitat*, and the ſame being continued on the Roll to the Time of the Death of *Whiſtler*, all that Time

was well excuſed; and alſo until *Whiſtler*'s Will was proved, and there was an Executor. The Statute could not run upon a Man whilſt beyond Sea. It is expreſly excepted out of the Statute, when the Party, who has a Right of Action is beyond Sea; nor can *Laches* be attributed to him for not ſuing, while there was no Executor againſt whom he could bring his Action. But it was objected that the Action which was ſo long depending, was the Action which ought to have been revived, and he ought not to let the Action fall, and bring a Bill in Equity; but *that* Action ought to have been carried on, and the Recovery ought to have been in that Action.

Neither will the Statute take Place, if there be no Executor, until Adminiſtration be taken out.

And as to the Defendants, the Creditors, who thought fit to inſiſt on the *Statute* of *Limitations*, their Demands were entirely barred; for although they were Merchants, and the Debts contracted in the Way of Trade; yet it appeared of their own Shewing, their Accounts were long ſince ſtated, and only open Accounts were ſaved by the *Statute*.

Merchants Accounts not within the Statute. Otherwiſe if ſtated.

The *Lord Chancellor* inclined to be of Opinion, that the *Statute* of *Limitations* was not to take Place; and a Diſpute ariſing, Whether the Plaintiff ſhould be intitled to *Turkiſh* Intereſt at 12 *l. per Cent.* and for how long, Whether until ſuch Time as the Parties arrived in *England*, referred it to a Maſter to ſtate the Facts, and the *Quantum* of the Debts and Aſſets; and reſerved the further Conſideration of the Caſe, until the Account ſhould be taken.

If a Creditor ſues out a *Latitat* againſt *J. S.* and continues it, and *J. S.* dies, the Creditor may bring a Bill in Equity againſt the Executor of *J. S.* and need not go on in the old Action, and Statute of Limitations no Bar.

The Time till *Whiſtler*'s Death being anſwered, and the Executor being beyond Sea, the *Statute* of the 4 & 5 of the late *Queen* took Place, which ſaves the Right of Action, as well where the Debtor is beyond Sea, as where the Creditor is beyond Sea.

Ex

Caſe 620.
Lord Chancellor.
Aug. 11.

A Bankrupt having his Certificate allowed, and having ſlipped his Time of pleading it at Law, to a Debt precedent to the Bankruptcy, is not to be relieved in Equity.

Ex parte *Goodwin.*

THE Petitioner *Goodwin* complained, that although he had in every Thing conformed to the Statutes made againſt Bankrupts, and had his *Certificate* allowed; yet Mr. *Arthur Turner* had taken him in Execution, and detained him in Priſon for a Debt due before his Bankruptcy.

And the Caſe appeared to be that Mr. *Turner* had lent Mr. *Dibble* 1500 *l.* on Bond, and the Petitioner *Nicholas Goodwin*, the Scrivener, was bound as his Surety; and *Goodwin* having a Judgment againſt *Dibble* for 15000 *l.* promiſed Mr. *Turner*, when he levied his own Debt, he would pay Mr. *Turner*; but failing ſo to do, and *Dibble* being alſo failed, Mr. *Turner* brings his Action againſt *Goodwin* on his Bond. Then a Commiſſion of Bankrupt iſſued againſt *Goodwin*. *June* 7, 1714, being the laſt Day of *Trinity-Term*, a Rule was given for entring up Judgment; and on *June* 26, *Goodwin*'s *Certificate* was allowed. Mr. *Turner* by the Rules of the Court of *King's Bench*, being at Liberty to enter his Judgment either of *Trinity* or *Michaelmas Term*, ſigned Judgment as of *Michaelmas-Term*; and conſequently this being a Judgment ſubſequent to the *Certificate*, was not within the Act of Parliament.

The Matter had been ſeveral Times argued at Law, and *Goodwin* could have no Relief there; and therefore now ſought to be relieved by Petition to the *Lord Chancellor.*

It being manifeſtly the Intention of the Law, that all Debts due before the Bankruptcy ſhould be diſcharged, it was ſaid this was an Art, and Contrivance, to evade the

the *Statute* by entring Judgment as of *Michaelmas-Term*, when Judgment was pronounced in *Trinity-Term.*

Per Cur. A Court of Equity is not to alter the Law. The Statute is binding in Equity, as well as at Law; and if the Judgment be good at Law, it cannot be ſet aſide in Equity. But it was agreed that *Goodwin* might have pleaded his *Certificate* upon the Roll, and have prevented the Judgment from being entered up; and having neglected ſo to do, it was his own Default; and a Court of Equity is not to relieve either Miſpleading, or where there is a Neglect and Want of Plea, or no proper Plea put in Time; and it was alſo agreed that *Goodwin* could not be relieved at Law upon an *Audita querela*, becauſe he had an Opportunity, and might have pleaded his Certificate before the Judgment was entered up; and upon producing of ſome Precedents, where Bankrupts had been relieved againſt Judgments obtained againſt them, they did not come up to the Caſe in Queſtion, and the Petition was diſmiſſed.

Statutes relating to Bankrupts, bind the Courts of Equity, as well as of Law.

Court of Equity will not relieve againſt Miſpleading, or Neglect of Pleading a proper Plea at Law.

For Mr. *Turner*, *two* Caſes at Law were cited, *Bailey* verſus *Robinſon*, *Trin. 6 Ann. in Banco Regis*, Judgment was entered againſt a Bankrupt upon a Warrant of Attorney, and he taken in Execution during the Time that his *Certificate* was referred to the Judges; and although it appeared that the Debt was diſcharged by the Statute of Bankrupts; yet the Court would not diſcharge him, but put him to his *Audita querela.*

Bankrupt is taken in Execution, pending the Reference of his Certificate to the Judges. The Court will not diſcharge him; but put him to his *Audita querela.*

And the Caſe of *Grumby* verſus *Smith*, *H. 8. Annæ Banco Regis*, a Man puts in ſpecial Bail to an Action, and the Plaintiff had Judgment againſt the Defendant by Default: The Bail ſurrendered the Defendant; it was moved to diſcharge the Defendant, becauſe he had liſted himſelf a Soldier after the Bail put in, and before the Judgment; but refuſed *per Cur'.*

DE
Term. S. Michaelis,
1715.
In Curia Cancellariæ.

Caſe 621. *Lord Chancellor.* *Nov.* 16.

Ant. Ca. 616.

Demainbray verſus *Metcalfe & al'.*

PLaintiff pawned ſome Jewels to *Knight*, who ſigned a Writing that they were to be redeemed in *twelve* Months, otherwiſe for the 110 *l.* they were to be as bought and ſold. *Knight* within a ſhort Time after delivers over the Jewels, together with ſome Plate of his own to *Metcalfe*, as a Pledge for 200 *l.* and *Knight* afterwards borrowed 38 *l.* and 50 *l.* of *Metcalfe* on promiſſory Notes, to be repaid on Demand; and *Metcalfe* by Anſwer inſiſted, it was agreed that the Pledge ſhould be a Security, as well for the Money upon the Notes, as for the Money firſt lent; but could make no Proof of any ſuch Promiſe or Agreement.

Lord Chancellor. Altho' *Metcalfe* a Bookſeller, and did not deal in Plate or Jewels, and ſo had not gained any Property, as having bought in a Market-overt; yet it is natural to think, although he took Notes for the 30 *l.* and 50 *l.* that the Pawn was not to be parted with, until *that* Money, as well as what was before lent, was paid; and ſaid, he looked upon it as an Account current between

between *Knight* and *Metcalfe*, and therefore he might retain what he had in his Hands, until Balance paid: And therefore decreed a Redemption to the Plaintiff of his Jewels, upon Payment of all that was due to *Metcalfe*, as well upon the Notes, as on the Pawns; but the Goods of *Knight*, which were pawned, were to be firſt applied, as far as the Value thereof would extend.

Goſſe & al' verſus *Tracy, & econtra.*

Caſe 622. *Lord Chancellor.* *Nov.* 17.

One examined as a Witneſs, when diſintereſted, afterwards becomes intitled to the Eſtate in Queſtion.

His Depoſition ſhall be read.

ONE *Tilſley* had made his Will, and deviſed all his real Eſtate to his Mother and her Heirs, to which the Defendant *Tracy* was privy; and being an Acquaintance and related to Mr. *Tilſley* was intruſted to draw the Will.

He afterwards came to Mrs. *Tilſley* and ſurmiſed to her, that the Will was not ſufficient, and that it wanted to be garded, as he called it; and thereupon drew another Will, as he pretended, for that Purpoſe only; but in Truth had inſerted therein a Deviſe of the real Eſtate to the Mother only for Life, with a Remainder to himſelf, and his Heirs.

This laſt Will was not only gained by ſuch a Contrivance, but the Teſtator was then languiſhing of a Palſy, and was ſuppoſed to be *non compos Mentis:* And the Queſtion upon the Bill, and croſs Bill was, which Will ought to take Place: But before the Cauſe was brought to Hearing Mrs. *Tilſley* died, and deviſed the Eſtate to the Plaintiff *Goſſe*, who in the Life-time of Mrs. *Tilſley* had been examined as a Witneſs; but was now become Plaintiff in a Bill of Revivor.

It was therefore objected, that ſhe being now the Plaintiff in the Bill by her brought, as Deviſee to Mrs. *Tilſley*, in the Nature of a Bill of Revivor; her Depoſition taken in the Life-time of Mrs. *Tilſley*, ought not to be admitted to be read; and a Caſe at Law was cited, where the Depoſition of a Witneſs taken, whilſt unconcerned in Intereſt, could not be read.

But it was anſwered, that *that* Opinion at Law was not, becauſe the Witneſs after Examination became a Party; but upon another Rule at Law, *viz.* that where the Witneſs is living, and might be produced at the Trial, the Depoſition of ſuch Witneſs ſhould not be read. Where the Obligee makes the only living Witneſs to the Bond Executor, it has been ruled at Law, that the Executor ſhall be allowed to prove the Hands of the Witneſſes. And the *Lord Chancellor* upon Debate ordered the Depoſition to be read.

The Obligee makes the only living Witneſs to the Bond Executor. The Executor ſhall be allowed at Law to prove the Hands of the other Witneſſes, that are dead.

It was alſo objected, that a Will concerning Land is only triable at Common Law; and the Party may there take Advantage of any Fraud or Impoſition on the Teſtator, and therefore not proper to be examined into, or ſet aſide in Equity upon Pretence of Fraud or Surpriſe.

Lord Chancellor. There may be a Fraud in obtaining a Will, that may be relievable in Equity, and of which no Advantage can be taken at Law; as if a Man agrees to give the Teſtator 2000 *l.* in Bank-Bills, if he will deviſe his Eſtate to him, and on the Delivery of ſuch Bills makes his Will, and deviſes his Eſtate to him, and the Bills prove to be forged or counterfeit.

Fraud in obtaining a Will of Land may be relieved againſt in Equity; as if *A.* agrees to give *B.* 1000 *l.* in Bank-Bills, if *B.* will deviſe his Land to *A.* and *A.* gives Bills to *B.* that are forged. On Proof hereof, this Will ſhall be ſet aſide in Equity.

Stephens verſus *Gaule.*

Caſe 623. *Nov.* 16.

THE Bill was to redeem a Mortgage, and charged that the Defendant pretended to be a Jointreſs, and in Nature of a Purchaſer from her Husband; whereas her Husband was only an Aſſignee of a Mortgage, and had no other Title.

A Jointreſs is not bound to anſwer, whether her Husband had no other Title than as Aſſignee of a Mortgage, her, he was

She denying ſhe had any Notice of this Mortgage, and that her Husband told in by Deſcent.

The Defendant pleaded her Title, and denied Notice of the Mortgage, but had not anſwered, whether her Husband had any other Title than as Aſſignee of a Mortgage; and the Plea was over-ruled by the Lord *Harcourt.*

Exceptions being taken to the Defendant's Anſwer, ſhe inſiſted on the ſame Matter, that ſhe was a Purchaſer without Notice, and that her Husband alledged, that he was in by Deſcent from his Mother; but did not anſwer, whether her Husband had any other Title, than as Aſſignee of the Mortgage.

The *Lord Chancellor* allowed the Anſwer to be good and ſufficient, and would not oblige her to anſwer, whether her Husband had any other Title than as an Aſſignee of the Mortgage.

Howell verſus *Price & ux', & econtra.*

Caſe 624. *Lord Chancellor.* *Nov.* 18.

A Mortgage in Fee for 300 *l.* was made redeemable at *Michaelmas* 1710, or at any other *Michaelmas* on *ſix* Months Notice, and no Covenant to pay the Money.

A Mortgage in Fee is made redeemable on Payment of 300 *l.* and Intereſt upon

any *Michaelmas* Day, on *ſix* Months Notice. Mortgagor dies, having deviſed his perſonal Eſtate to his Wife. Perſonal Eſtate not liable to pay the Mortgage, there being no Covenant expreſſed or implied.

The Mortgagor continued in Poſſeſſion, paid the Intereſt, and by Will deviſed his perſonal Eſtate to his Wife and Daughter.

The Queſtion was, Whether the perſonal Eſtate ſhould be applied in Eaſe of the real Eſtate, to pay off this 300 *l.*

Lord Chancellor. The perſonal Eſtate is not liable. Here is no Covenant, either expreſſed or implied.

Caſe 625. *Lord Chancellor.*

White & ux' & al' verſus *Thornburgh & al'.*

One upon his Marriage covenants to levy a Fine of his Frehold, and to ſurrender his Copyhold, to the Uſe of himſelf and his Wife for their Lives, Remainder to the Heirs Male of their Bodies, Remainder to the Heirs of their Bodies; and dies leaving Iſſue a Son and a Daughter, before any Fine levied, or Surrender made. The Son for ſecuring of Money, covenants to levy a Fine of the Frehold Lands, and ſurrenders the Copyhold, and dies without Iſſue. Decreed by the Lord *Harcourt*, that it being in Caſe of Articles for valuable Conſideration, the Settlement ſhould be to the firſt, &c. Son of the Marriage, with the Remainder to the Daughters; and that the Daughter was intitled to both Frehold and Copyhold. And on Rehearing, Lord *Cowper* confirmed the Decree as to the Frehold, but for other Reaſons; and reverſed it as to the Copyhold. *Ant.* Caſe 597.

J. S. ſeiſed of Frehold and Copyhold Lands, on his Marriage covenanted to levy a Fine of the Frehold, and to ſurrender the Copyhold to the Uſe of himſelf for Life, and to his Wife for Life, Remainder to the Heirs Males of his Body by his Wife, Remainder to the Heirs of their *two* Bodies, Remainder to his own right Heirs.

The Marriage took Effect, and there was Iſſue a Son and a Daughter; but *J. S.* died before any Fine was levied, or Surrender made.

The Son attained *Twenty-one*, and borrowed Money of the Defendants, and alſo of others on Bond, in which the Defendants were Bound as his Sureties, and which they afterwards were obliged to pay.

The Son to reimburſe the Defendants, and to counter-ſecure them, covenanted to levy a Fine of the Frehold, and to ſurrender the Copyhold to them and their Heirs, redeemable on Payment of the Money by them lent, and of what they ſhould be obliged to pay as his Sureties; and by his Will deviſed his Lands to the Defendants, in Truſt to raiſe Money for the Payment of his Debts, and made them Executors, and afterwards died without Iſſue, having ſurrendered his Copyhold Lands to the Defendants; but without having levied a Fine of the Frehold.

The Plaintiff *White* having married the Siſter, they brought their Bill againſt the Defendants, to have the Frehold conveyed, and the Copyhold ſurrendered to them, according to the Intent of the Marriage-Settlement; and to have an Account of the Rents and Profits.

The Defendants inſiſted they were honeſt Creditors for great Sums of Money, and having a Security made to them by the Plaintiff's Brother, who had the whole legal Eſtate deſcended to him, there having been no Fine levied, or Surrender made, purſuant to the Marriage-Settlement; and if the Settlement had been perfected by a Fine and Surrender, yet the Plaintiff's Brother would have been Tenant in Tail, and might by a Fine have barred, not only his own Iſſue, but alſo the Plaintiff his Siſter; and he having the Fee-ſimple of the legal Eſtate, and being Tenant in Tail of the equitable Eſtate, the Deed of Covenant to lead the Uſes of the intended Fine, (although no Fine actually levied) was ſufficient in Equity to Bar it.

That it had been held that Tenant in Tail of an equitable Eſtate might alien by a Bargain and Sale, or Feoffment, or even by Articles; and in the Caſe of *Aley* verſus *Aley*, the Feoffment made by the *Ceſtuy que Truſt* in Tail,

Tail and the Truſtees, was adjudged a good Bar of the Intail; and as to the Copyhold, he having actually ſurrendered it to the Defendants, and there being no particular Cuſtom within the Manor for ſuffering of Common Recoveries, a general Surrender thereof would have been a good Bar of the Intail, in Caſe it had (as it was not) been ſettled in Tail; and although the Plaintiff's Brother had not levied a Fine of the Frehold to the Defendants, according to his Covenant; yet the Defendants had the legal Eſtate in them by the Will, and having both Law and Equity on their Side, ought to prevail againſt the Plaintiffs, who had only a Demand in Equity, by Virtue of the Father's Marriage-Agreement.

The Cauſe was firſt heard before the Lord Chancellor *Harcourt*, who looked upon the Deed of the Father's in the Nature of Articles, and when to be carried into an Execution by a Court of Equity, might be ſettled in a ſtricter Manner, than barely in the Words of the Deed; and that a Remainder might be expreſly limited to the Daughters of the Marriage, ſo as the Son's Fine could not bar it; and decreed both Frehold and Copyhold to the Plaintiffs.

Upon a Rehearing before the Lord Chancellor *Cowper*, He declared, that the Settlement by Deed to lead the Uſes of a Fine was to be conſidered, not as Articles; but as a defective Settlement, and the Uſes not to be altered or varied; but being a weak and feeble Settlement, a Court of Equity would aſſiſt it ſo far, as to conſider it, as if a Fine had been levied, and then the Plaintiff could not have been barred without a Fine; and the Plaintiff is to be conſidered as Heir of the Body of the Father, and the Limitation in the Deed to the Heirs of their Bodies, could be inſerted for no other End or Purpoſe but to carry the Eſtate to the Daughters of the Marriage, it being before limited to the Heirs Males; and

and therefore confirmed the Decree as to the Frehold Eſtate.

But as to the Copyhold, there appearing no particular Cuſtom within the Manor for the ſuffering a Recovery; he held the Surrender would bar the Intail, in Caſe the Copyhold had been well ſettled; and therefore varied the Decree, and diſmiſſed the Bill as to the Copyhold.

Where there is no Cuſtom within a Manor for ſuffering a Recovery, a Surrender will bar an Intail.

Corneforth verſus *Geer.*

Caſe 626. *Lord Chancellor.* *Nov.* 22.

BILL to ſet aſide an Award.

Per Lord Chancellor, If it appears that the Arbitrators went upon a plain Miſtake, either as to the Law, or in a Matter of Fact; the ſame is an Error appearing in the Body of the Award, and ſufficient to ſet it aſide; but the Plaintiff failing to make out his Caſe by Proof, Bill diſmiſſed.

If Arbitrators go upon a plain Miſtake either as to Law or Fact, Equity will relieve againſt the Award.

Weld verſus *Bradbury & al'.*

Caſe 627. *Lord Chancellor.* *Dec.* 9.

Wickſtead Weld, the Plaintiff's Father, deviſed his Stock without Doors to be ſold by his Executors, and after Debts and Legacies paid, the Surplus ariſing by Sale to be put out at Intereſt; and one Moiety to be paid to the younger Children of the Plaintiff, living at his Death, and the other Moiety to the Children of *J. S.* and *J. N.*

One deviſes the Surplus of his perſonal Eſtate to the Children of *A.* and *B.* neither of them has a Child at the Making of the Will, or the Death of the Teſtator. The Deviſe is executory, and ſhall extend to any Children that *A.* and *B.* ſhall afterwards have; and the Children of each ſhall take *per Capita*, and not *per Stirpes.*

Neither *J. S.* nor *J. N.* had any Child living at the Making of the Will, or at the Death of the Teſtator.

Per Cur. It muſt be intended an executory Deviſe, and to be to ſuch Children, as they, or either of them ſhould at any Time after have; and the Children to take *per Capita*, and not *per Stirpes*, they claiming in their own Right, and not as repreſenting their Parents.

Caſe 628.
Dec. 19.

Ex parte *Crowder.*

Separate Creditors allowed to come in under a Joint-Commiſſion againſt *two* Partners; but the Joint-Effects are to be applied, firſt to pay the Partnerſhip Debts, and then the ſeparate Debts; and as to the ſeparate Effects, firſt the ſeparate Creditors, and afterwards the Partnerſhip Creditors are to be paid out of the ſame. *Ant.* Caſe 283.

A. and *B.* being Joint-Traders, a Commiſſion of Bankruptcy iſſued againſt them; their ſeparate Creditors now applied by Petition, that they might be let in for their Debts upon the reſpective ſeparate Eſtates of the Bankrupts, under that Joint-Commiſſion; the ſeparate Eſtates being of ſmall Value, and would not bear the Charge of taking out two new Commiſſions againſt them ſeparately.

The *Lord Chancellor* ordered them to be let in to prove their reſpective ſeparate Debts upon the Joint-Commiſſion, they paying Contribution to the Charge of it, and directed that as the Joint or Partnerſhip Eſtate was in the firſt Place to be applied to pay the Joint or Partnerſhip Debts; ſo in like Manner the ſeparate Eſtate ſhould be in the firſt Place to pay all the ſeparate Debts: And as ſeparate Creditors are not to be let in upon the Joint-Eſtate, until all the Joint-Debts are firſt paid; ſo likewiſe the Creditors to the Partnerſhip ſhall not come in for any Deficiency of the Joint-Eſtate, upon the ſeparate Eſtate, until the ſeparate Debts are firſt paid.

I

Anonymus.

Anonymus.

Caſe 629.
Dec. 19.

A. being indebted to a Feme Covert, becomes a Bankrupt; the Husband pays the Contribution-Money, and dies before Diſtribution, and then the Wife died. The Executors of the Wife are intitled to the Dividend; for the Husband paying the Contribution-Money does not alter the Property of the Bond.

J. S. indebted by Bond to the Wife of *A.* became a Bankrupt; the Husband comes in and claims the Debt, pays the Contribution-Money, but dies before any Dividend was made; the Wife ſurvives, and dies alſo before any Diſtribution.

Lord Chancellor directed the Diſtribution to be made to the Executors of the Wife, and not to the Executors of the Husband, repaying to the Husband's Executors, what was paid for Contribution.

The Husband paying the Contribution-Money did not alter the Property of the Debt; but it remained *a Choſe in Action*, and ſurvived to the Wife.

DE

Term. S. Hillarii,

1715.

In CURIA CANCELLARIÆ.

Caſe 630.

Trott & al' verſus *Vernon.*

One by Will deviſes that his Debts and Legacies ſhould be paid in the firſt Place; and then deviſes his Lands to his Siſter for Life, Remainder to her Iſſue, Remainder over; and made the Siſter Executrix. Decreed the Lands to be charged with the Debts.

SIR *Henry Boothby* made his Will, and thereby willed and deviſed, that his Debts, Legacies and Funerals ſhould be paid in the firſt Place: *Item*, He gave to his Siſter ſeveral Manors and Lands for Life, Remainder to her Iſſue if any, Remainder over to others; and after ſome Legacies given, made his Siſter Executrix, who married the Defendant *Math. Vernon*, and died leaving Iſſue the other Defendant the Infant.

The Plaintiffs were Creditors of Sir *Henry Boothby* by ſimple Contract. The Queſtion was, Whether the real Eſtate, (there being not ſufficient perſonal Aſſets) was made ſubject and liable to the Debts by ſimple Contract.

For the Defendant it was inſiſted, that there was no direct Charge upon the Land, and the Clauſe, willing his Debts and Legacies to be paid in the firſt Place, does not neceſſarily imply, that his Lands ſhall be charged there-

with; and the rather, becauſe it includes even Legacies and Funerals; and the Deviſe to his only Siſter, who was his Heir at Law, was not the better to enable her to perform the Will, or to give any Thing to her for that Purpoſe; but to prevent her from taking as Heir at Law, and to ſecure the Eſtate to her Iſſue, and Remainder Men; and gave her barely an Eſtate for Life, which was not a proper Fund for Payment of Debts, Legacies and Funerals.

Sed non allocatur.

Lord Chancellor. It is but natural to ſuppoſe, that all Perſons would provide for the Payment of their juſt Debts; and directing them to be paid in the firſt Place imports, that before any Deviſe by his Will ſhould take Place, his Debts, *&c.* ſhould be paid; and he ſeemed to lay ſome Streſs upon the Word *Deviſe*, and *decreed* the real Eſtate to be liable to the Payment of the Debts.

Blandy verſus *Widmore.*

Caſe 631. *Maſter of the Rolls.* *Feb.* 15.

One covenants to leave his Wife 650 *l.* he dies inteſtate, and the Wife's Share on the Statute of Diſtribution, comes to more than the 650 *l.* this is a Satisfaction. *Poſt.* Caſe 641.

Benjamin Blandy on his Marriage with the Defendant (now the Wife of *Widmore*) covenanted, if ſhe ſurvived, to leave her 620 *l.* He died inteſtate without Iſſue, but left four Brothers or their Repreſentatives. The Defendant having taken Adminiſtration to her Husband, the Bill was by a Son of one of the Brothers for an Account and Diſtribution of the Inteſtate's Eſtate.

And it being admitted that the Widow's Moiety of the Eſtate upon the Diſtribution, amounted to above 1000 *l.* The Queſtion was, Whether the Widow ſhould firſt come in as a Creditor for the 620 *l.* and after for a

Moiety of the Surplus of the Eſtate by the *Statute* of *Diſtributions.*

For the Plaintiff it was inſiſted, that by the Husband's dying inteſtate, poſſeſſed of a perſonal Eſtate upwards of 2000 *l.* a Moiety whereof comes to his Widow; *that* was a good Performance, even literally of the Covenant, for he had left her 620 *l.* and upwards, and falls under the ſame Reaſon, as if he had made a Will, and left her *that* Sum; for where a Man dies Inteſtate, the Statute of Diſtributions has made a Will for him. The Caſe of *Wilcocks* and *Wilcocks*, *Trin.* 1706 was cited, where the Father covenanted to ſettle 100 *l. per Ann.* on his Son, but did not; yet having ſuffered 100 *l. per Ann.* to deſcend upon him, *that* was decreed to be a good Performance of the Covenant; and the Caſe of *Phinny* and *Phinny*, where the Husband covenanted, if he married a ſecond Wife, to give his Son by the firſt Wife 500 *l.* He dying inteſtate, decreed to have it brought into *Hotchpot.*

Ant. Ca. 506.

Ant. Ca. 568.

In the principal Caſe, the Maſter of the *Rolls* decreed for the Plaintiff, that the Widow's 620 *l.* was well ſatisfied, by her having a Moiety of the perſonal Eſtate of greater Value by the Statute of Diſtributions, and that ſhe ſhould not come in firſt as a Creditor for the 620 *l.* and alſo for a Moiety of the Surplus.

Caſe 632. *Lord Chancellor.* *Feb.* 25.

Muſgrave & al' verſus *Parry & al'.*

One deviſes the Surplus of his Eſtate to his Grandchildren living at his Death; Grandchildren born after his Deceaſe ſhall not take.

SIR *John Chardine* deviſed the Surplus of his Eſtate to his Grandchildren, living at the Time of his Deceaſe, to be paid to them at *Twenty-one*, or Marriage. There were two Grandchildren born, the one within four Months, the other within ſix Months after his Deceaſe.

For

For the Plaintiffs, the Grandchildren born after his Deceaſe, it was inſiſted, that a Child in *ventre ſa mere* is capable of taking, may be vouched, a Bill may be brought on it's Behalf, and an Injunction to ſtay Waſte. The Mother may juſtify Detaining of Writings on the Behalf of a Child *in ventre ſa mere*, a Limitation *Hæredibus de corpore procreatis* ſhall include Iſſue after born, and ſo *e converſo proceandis* includes Iſſue already born. And the Caſe of *Palmer* and *Creaghcroft* cited.

A Child *in ventre ſa mere* may be vouched, is capable of taking; the Mother may detain Charters on Behalf of ſuch Child; a Suit may be brought on Behalf of ſuch Child, and the Court will grant an Injunction to ſtay Waſte; and *Hæredibus de corpore procreatis* and *procreandis* are the ſame. *Ant.* Ca. 522.

Lord Chancellor. The Words, living at the Time of his Deceaſe, muſt be reſtrictive Words, and can be of no other Uſe, elſe the Deviſe had been to his Grandchildren. A Will muſt be expounded according to what is contained in it; and we muſt not make or vary the Will, to provide for Children or Grandchildren not provided for by the Will; and decreed it for the Grandchildren living at the Teſtator's Death, and excluded the *two* born after his Deceaſe.

Ward & al' verſus *Cecil & al'.*

Caſe 633. *Lord Chancellor.* *Mar.* 12.

A private Act of Parliament was obtained for the Sale of the Lord *Stawell*'s Eſtate, by which it was Enacted, that the Eſtate ſhould be veſted in Truſtees to be ſold; and that the Money ariſing by Sale, ſhould in the firſt Place be applied to pay the Money due to the Mortgagees, and after Payment thereof, then to pay the Creditors by Statutes, Judgments, and Recogniſances; and in the Cloſe of the Act, there was a general Saving of the Rights of all Perſons, Bodies Politick and Corporate, other

Act of Parliament for Sale of Lord *Stawell*'s Eſtate, and that the Monies ariſing by Sale ſhould be firſt applied to pay off the Mortgages, and afterwards for Payment of Statutes, Judgment and Recogniſances, with a Saving to all but the Right of the Heirs of the Lord *Stawell*. Decreed that ſubſequent Mortgages ſhall be paid before precedent Statutes.

other than except the Heir at Law, and ſeveral others of the Lord *Stawell*'s Family.

Several of the Statutes and Judgments were prior to ſome of the Mortgages; and there being a Decree for Sale and Execution of the Truſt in the Act of Parliament; the Queſtion now before the Court, upon a ſpecial Report was, Whether Mortgages ſhould be paid in the firſt Place; or whether the Creditors by Statutes, Judgments, and Recogniſances, ſhould be let in to receive a Satisfaction according to their Priority, or be poſt-poned to the Mortgages.

For the Creditors by Statutes, Judgments and Recogniſances, it was inſiſted, that as their Securities bound the Land as well as the Mortgages, they were, both in Law and Equity, to be conſidered as having a prior Right to the ſubſequent Mortgages; and although in the Beginning of the Act it is provided, that the Mortgages ſhall be paid in the firſt Place; yet there is a general Saving of the Rights of all Perſons, except the Heir at Law, and thoſe of the Lord *Stawell*'s Family; and *that* Saving ſet the Matter at large again, and reſtored them to their Priority.

Lord Chancellor. The Act expreſly provides that the Mortgages ſhall be paid in the firſt Place, and the general Saving muſt not control the expreſs Proviſion of the Act; but muſt be ſo expounded, as to conſiſt with the expreſs Preference given to the Mortgagees; and he muſt decree the Execution of the Truſt accordingly; but ſeemed to admit that by Virtue of the general Saving in the Act, they might make Uſe of their Incumbrances as they could at Law.

And it was further obſerved, that the Act of Parliament had not done them ſuch manifeſt Injury as was ſuppoſed, in Regard at the Time of paſſing the Act, the

Heir of the Lord *Stawell* was an Infant of but *four* Years old, and the Statutes, Judgments and Recogniſances could not reach the Eſtate, till the Heir came of Age; but the Mortgagees might enter preſently; and therefore to induce them to conſent to a Sale, there might be ſome Reaſon for giving them the Preference, it being apprehended at that Time, that the Eſtate, if preſently ſold, would have raiſed ſufficient to have paid the Whole; and upon that Suppoſition it was provided that 200 *l. per Ann.* ſhould be allowed for the Heir's Maintenance during his Minority.

Attorney General verſus Mayor, *&c.* of *Coventry.*

Caſe 634. *Lord Chancellor.*

One claims a Fee-farm Rent under the Stat. of *Car.* 2. and the Land is ſequeſtred, out of which the Rent iſſues. Court ordered the Grantee of the Fee-farm Rent might take his Remedy at Law for the Rent, notwithſtanding the Sequeſtration

THE Plaintiffs having obtained a Decree againſt the Corporation of *Coventry* for 2000 *l.* and upwards, belonging to Sir *Thomas White*'s Charity; and for Non-payment thereof having obtained a Sequeſtration, and taken Poſſeſſion of all the Corporation Lands; the Earl of *Aylesford* having a Fee-farm Rent of 50 *l. per Ann.* payable by the Corporation moved the Court, that the Sequeſtrators might be ordered to pay it out of the Money in their Hands; and upon that Motion it was referred to a Maſter to examine, and ſtate the Nature of the Demand.

Upon the Report it appeared, that Queen *Iſabel* having a Grant for Life of the Tolls, Fines and Amerciments, *&c.* of the Town, and the Reverſion in Fee granted to Prince *Edward*; they granted the ſame to the Corporation, reſerving a Fee-farm Rent of 50 *l. per Ann.* and the Eſtate afterwards coming to the *Crown*, the Franchiſes, Tolls, Fines and Amerciaments, were by ſeveral Charters confirmed to the Corporation, reſerving the 50 *l. per Ann.* which had been conſtantly paid to the

Crown, until the Fee-farm Rents were ſold; and this Fee-farm Rent was purchaſed from the Truſtees appointed by the Act 22 *Car.* 2. *cap.* 6. by the Lord Chancellor *Nottingham*, and by him deviſed to the Lord *Aylesford* his younger Son, to whom it was paid, until about *two* Years ſince; and the Act of Parliament to encourage Purchaſers gave them the like Liberty the *Crown* had to diſtrain, not only upon the Eſtate granted, but upon any of the Lands of the Tenant, who ought to pay the Fee-farm Rent.

For the Incouragement of Purchaſers of Fee-farm Rents, Stat. *Car.* 2. gives the Purchaſers the ſame Power of Diſtreſs, not only on the Land out of which the Fee-farm iſſues; but on any other of the Land of the Tenant, as the King had.

For the Plaintiff it was inſiſted, *firſt*, that this was a Rent originally reſerved to a ſubject, and conſequently void; for although the Crown may, yet a ſubject cannot, reſerve a Rent out of an incorporeal Inheritance. But to that it was anſwered, that the ſubſequent Charters having confirmed the Grant, reſerving the ſame Rent, it made the Rent good; and beſides at this Diſtance of Time having been ſo long paid, it would be preſumed to be well reſerved.

Secondly, It was objected, that the Fee-farm Rent iſſuing only out of Tolls, Fines, Amerciaments, *&c.* the Grantee could not diſtrain upon the Lands of the Tenants, the Act of Parliament providing that a Purchaſer of a Fee-farm Rent might diſtrain on all or any of the Lands of the Tenant, for the Time being, that ſhould hold any Lands charged with the ſaid Rent: But here the Tenant holds no Lands charged; for nothing is charged with the Rent, but the Tolls, Fines and Franciſes.

Sed non allocatur.

Thirdly, It was inſiſted, that although the *King* may diſtrain in any of the Lands of the Tenant; yet it muſt be

Though the King may diſtrain on any other of the Lands of his Tenant, as well as on thoſe out of which the Rent iſſues; yet if the Tenant alien, deviſe, or leaſe at Will only his other Lands, the Crown cannot diſtrain on thoſe Lands.

be admitted, that if the Tenant alien any Part of his Lands, or if he deviſes; nay if he leaſes to a Tenant at a Rent, although but at Will, the *King* cannot diſtrain upon thoſe Lands, being no Part of the Lands originally charged with the Rent; and ſo it is upon a Recovery by *Elegit*; and therefore even the *Crown* is precarious in the Matter; the Tenant may at any Time determine *that* Right of diſtraining by aliening, by deviſing or ſetting his Land. It is only liable, whilſt it is in his own Hands; and therefore no great Regard was to be given to ſuch Privilege; and if the Tenant might do it even by a voluntary Act; if a Tenant at Will was to be exempt from that Power of Diſtreſs, *a fortiori* the Sequeſtrators, who come in by Proceſs, and by a judicial Proceeding for a juſt Debt, ought in Equity to be equally regarded, and put upon an equal Foot with thoſe who come in by *Elegit*.

Lord Chancellor declared, that all he could do upon the Motion, was to declare that notwithſtanding the Sequeſtration the Earl of *Aylesford* might take his Remedy at Law as he ſhould be adviſed.

DE
Term. S. Michaelis,
1716.
In CURIA CANCELLARIÆ.

Caſe 635.
Lord Chancellor.
Nov. 7.

Goods inſured by Agreement valued at 600 *l.* and the Inſured not to be obliged to prove any Intereſt.

Le Pypre verſus *Farr.*

ON a Policy of Inſurance on Goods by Agreement valued at 600 *l.* and the Inſured not to be obliged to prove any Intereſt.

Goods inſured by Agreement valued at 600 *l.* and the Inſured not to be obliged to prove any Intereſt; yet the Inſured is ordered to diſcover what Goods he put on Board, that the Value of his Goods ſaved, may be deducted out of the 600 *l.*

Lord Chancellor Ordered the Defendant to diſcover what Goods he put on Board; for although the Defendant offered to renounce all Intereſt to the Inſurers; yet referred it to a Maſter to examine the Value of the Goods ſaved, and to deduct it out of the Value or Sum of 600 *l.* at which the Goods were valued by the Agreement.

Harman verſus *Vanhatton.*

Caſe 636. *Lord Chancellor.* *Nov.* 7.

DEfendant lent the Plaintiff 250 *l.* on a *Bottomry Bond*, and afterwards inſured on the ſame Ship; but the Inſurance was larger as to the Voyage, there being Liberty to go to other Ports and Places, than what were contained in the Condition of the *Bottomry Bond.* The Ship being loſt, the Defendant recovered the Money on the Policy of Inſurance, and alſo put the *Bottomry* Bond in Suit: The Ship, though loſt, had deviated from the Voyage mentioned in the Bond, in going to *Virgin gardo* to buy Salt.

One lends 250 *l.* on a Bottomry Bond, and afterwards inſures on the ſame Ship. The Ship is loſt. He ſhall have both the Benefit of the Inſurance, and the Money due on the Bond too.

The Plaintiff brought his Bill, pretending the Defendant ought not to have a double Satisfaction to recover both on the Inſurance, and alſo on the Bond, he having Inſured only in reſpect of the Money he had lent on *Bottomry*, and had no other Intereſt in the Ship or Cargo; and therefore the Plaintiff would have had the Benefit of the Inſurance, paying the *Premium.*

Sed non allocatur.

The Defendant having paid the *Premium*, was intitled to the Benefit of the Policy, and run the Riſque, whether the Ship was loſt or not; and the Inſurers might as well pretend to have Aid of the *Bottomry Bond*, and to diſcount the Money recovered thereon, as the Plaintiff to have the Money recovered on the Policy to eaſe the Bottomry Bond.

Paying the Premium intitles the Party to the Benefit of the Inſurance.

The Plaintiff alſo charged that the Defendant had promiſed and agreed to deliver up the Bond, on the Plain-

An Offer to deliver up a Bond upon Terms not complied with is not binding, and if made without Conſideration is *nudum pactum.*

tiff's making up the Money recovered on the Policy, as much as he lent on the Bond, with Intereſt and Coſts, and proved ſuch Offer and Promiſe. *Sed non allocatur.* It was but *nudum pactum*, a voluntary Offer, and on Condition that the Money was then paid, and it was not complied with.

Caſe 637. *Lord Chancellor.* *Dec.* 26.

Wainwright verſus *Bendlowes.*

A. deviſes his Fee-farm Rents to be ſold for the Payment of his Debts, and the Surplus to go betwixt his Heir at Law, and his younger Brother; deviſes his Houſhold Goods to go with his Houſe, and the Reſidue of his perſonal Eſtate to his Siſter. The perſonal Eſtate ſhall not be applied to pay Debts in Eaſe of the real Eſtate.

Thomas Bendlowes deviſed his Fee-farm Rent to be ſold for the Payment of his Debts, and the Surplus ariſing by Sale after Debts paid, he deviſed to his Brother *John*, his Heir at Law, and to his Brother *Philip*, and to his Brother in Law *Wainwright*; and willed his Houſhould Goods ſhould go along with his Houſe, and deviſed the Reſt and Reſidue of his perſonal Eſtate to his Siſter *Wainwright*, and made her Executrix.

The Queſtion was, Whether the perſonal Eſtate ſhould be applied to the Payment of Debts, in Eaſe of the Fee-farm Rent.

Difference where an Eſtate is only charged with Payment of Debts, and where it is deviſed to be ſold out and out to pay Debts.

Lord Chancellor. A Difference is to be taken, where an Eſtate is to be ſold out and out for Payment of Debts; and where only the Debts are charged on it, and the Eſtate made liable to the Debts, and cited *Feltham*'s Caſe, 1 *Lev.* 203. and the preſent Caſe is the ſtronger, becauſe the Surplus ariſing by Sale after Debts paid, is not to go to the Heir, but is deviſed away; and beſides here the Debts being great, the Deviſe of the perſonal Eſtate would come to nothing, which is at Law deemed the worſt Conſtruction that can be made of a Will; and therefore decreed the Debts to be paid in the firſt Place, out of the Money ariſing by Sale of the Fee-farm Rents, and the perſonal Eſtate only to come in Aid of the Fund, if deficient,

deficient, and the Surplus of the perſonal Eſtate to the Siſter the Executrix. The Deviſe of the Reſt and Reſidue of the perſonal Eſtate to her is to be underſtood, what he had not otherwiſe deviſed by his Will, *viz.* the Houſhold Goods to go with the Houſe, and not the Reſidue after Debts paid.

Dux *Devon'* verſus *Kinton* Wid'.

Caſe 638. *Lord Chancellor.* *Dec.* 5.

A. ſeiſed of a Leaſhold Eſtate to him and his Heirs for 3 Lives, ſettles it on his Daughter and her Husband for their Lives, Remainder to the Uſe of his own Executors and Adminiſtrators. The Daughter and her Husband die. *A.* dies indebted by ſimple Contract, and deviſes this Eſtate to his Wife. Decreed that the Uſe of this Eſtate being limited to the Executors and Adminiſtrators of *A.* this makes it perſonal Eſtate in *A.* and being perſonal Eſtate, *A.* cannot deviſe it exempt from his Debts, though due but by ſimple Contract.

Kinton having an Eſtate granted by the Biſhop of *London*, to him and his Heirs for the Lives of *A. B.* and *C.* upon his Daughter's Marriage conveyed it over for the Uſe of his Son and Daughter for their Lives, Remainder to his own Executors, Adminiſtrators and Aſſigns; his Daughter being dead, and *Kinton* dying indebted to the Plaintiff (whoſe Steward he was) by ſimple Contract, and having deviſed this Eſtate to his Wife the Defendant,

The Queſtion was, Whether the Reſidue of this Term expectant on his Son in Law's Deceaſe, ſhould be Aſſets to pay a Creditor by ſimple Contract.

By the *Statute* againſt *Frauds* and *Perjuries*, an Eſtate *pur auter vie* is made deviſable, and is Aſſets to pay Bonds and Specialties, if it comes to the Heir, and Aſſets general, if it comes to the Adminiſtrator; but if it be deviſed (as in this Caſe Mr. *Kinton* has deviſed it to his Wife) the Deviſee takes it as deviſed to him; and it is no more Aſſets now, than it was before the Statute of *Frauds* and *Perjuries*.

Lord Chancellor. As to the *Statute* againſt *fraudulent Deviſes*, although the general Words in it may extend to a Deviſe

Deviſe of an Eſtate *pur auter vie*, yet *that* is only for Creditors by Specialty; and the Plaintiff here was only a Creditor by ſimple Contract. But in this Caſe the Reſidue of the Term being to Mr. *Kinton*, and to his Executors and Adminiſtrators, he had made it perſonal Eſtate, and his Lordſhip took it that before the Statute of *Frauds* and *Perjuries*, if an Eſtate *pur auter vie* came to an Executor or Adminiſtrator it would be Aſſets, and decreed it accordingly.

Eſtate *pur auter vie*, if limited to Executors, was Aſſets before the Statute of Frauds and Perjuries.

Caſe 639. *Lord Chancellor.*

Clarke & ux' verſus *Berkeley & ux' & al', & econtra.*

A. deviſes Lands in Truſt to permit his Daughter *Suſan* to receive the Rents until her Marriage or Death, and in Caſe ſhe marry with the Conſent of Truſtees, then to convey the Premiſſes to her and her Heirs. But if ſhe died before Marriage, or married without ſuch Conſent, then to convey to other Perſons. *Suſan* afterwards marries with the Conſent of her Father, who ſettles Part of the Lands on his Daughter and her Husband, and dies. This Settlement is no Revocation of the Will as to the Deviſe of the other Lands to *Suſan*.

George Bohun having Iſſue *four* Daughters, and no Male Iſſue, 17 *July* 1705, deviſes his Meſſuage called *Newhouſe*, and the Park and other Lands adjoining, to *four* Truſtees, upon Truſt to permit his Daughter *Suſan*, now the Wife of Mr. *Clarke*, to receive the Rents and Profits until her Death or Marriage, and in Caſe ſhe married with the Conſent of *two* of the Truſtees and of her Mother, then to convey unto her and her Heirs, or to ſuch Perſon as ſhe ſhould appoint; but if ſhe died before Marriage, or married without ſuch Conſent; then the Truſtees to convey thoſe Lands to the ſame Uſes, as he had deviſed his other Lands by his Will.

Suſan afterwards in the Life-time of her Father, and with his Conſent, married with the Plaintiff Mr. *Clarke*; and the Teſtator upon her Marriage conveyed to Mr. *Clarke*, *Newhouſe* and Park, and other Lands Part of the Truſt-Eſtate, and died, having made ſuch Will as aforeſaid.

The

The Bill was brought by Mr. *Clark* and his Wife, againſt the Truſtees and the other *three* Daughters, to have the Reſidue of the Truſt-Eſtate conveyed to the Plaintiff *Suſan*, according to the Will.

It was inſiſted by the Defendants, that the Teſtator having in his Life-time preferred his Daughter *Suſan* in Marriage, and given her a Portion by conveying Part of the Truſt-Eſtate to her Husband, and that in preſent Poſſeſſion, *that* amounted to a Revocation of the Deviſe; the Lands deviſed to her, being intended as a Portion to advance her in Marriage, and the Conveyance to her of the greateſt Part, although not of the Whole, in preſent Poſſeſſion upon the Marriage, was an Equivalent and as good a Portion, as the whole would have been after the Teſtator's Deceaſe.

And it was alſo inſiſted by the Defendants, that ſhe could not take by the Will, the Deviſe being on a Condition precedent, that ſhe married with the Conſent of the Truſtees and her Mother, in her Widowhood, and no ſuch Conſent was had; ſhe marrying in her Father's Life-time, when the Truſtees had no Eſtate or Truſt, and the Conveyance was to have been made on her Marriage; and the Deviſe was grounded only upon a Suppoſition of a Marriage to be had after the Teſtator's Deceaſe, which did not happen.

Lord Chancellor decreed a Conveyance according to the Will, declaring that the Marriage did not work a Revocation; and as to the Condition in the Will of her having the Conſent of the Truſtees, and of her Mother, *that* was diſpenſed with by having the Teſtator's own Conſent; which was more to be regarded than any Conſent of Truſtees, to whom he had delegated a Power to conſent, in Caſe of a Marriage after his Deceaſe.

By the Daughter's marrying with Conſent of her Father in his Life-time, the Condition is diſpenſed with.

Caſe 640. *Lord Chancellor.* *Nov.* 9.

Hutton verſus *Simpſon & ux', & econtra.*

Deviſe of Lands to *A* and the Heirs Male of his Body, *A.* dies in the Life of the Teſtator leaving Iſſue. The Deviſe is void, and the Iſſue cannot take.

Thomas Addiſon having Iſſue *two* Daughters, *Jane* the Wife of *Simpſon*, and *Bridget* the Wife of *Hutton*, 14 *Aug.* 1702, made his Will, and thereby declares that his Daughter had married *Simpſon* againſt his Will; yet deviſed to her ſome Tithes, and a Sum of Money, and gives Legacies to her Children, and declared what he had ſo given to his Daughter *Jane*, was in full of her Portion, and in Bar of any further Part of his real Eſtate; and after the Deceaſe of his Wife, he deviſes his Lands in *Turpentro* and in *Whitehaven*, and all other his real Eſtate, to his Daughter *Bridget*, and the Heirs of her Body begotten; and for Want of ſuch Iſſue, unto his Daughter *Jane Simpſon* for Life, and to her *firſt* and other Sons in Tail, Remainder to her Daughters in Tail.

Bridget afterwards married *Hutton* with the Teſtator's Conſent, and died in his Life-Time, leaving Iſſue the Plaintiff *Hutton*. After the Death of *Bridget*, the Teſtator annexed a Codicil to his Will, and thereby diſpoſed of ſome Part of his perſonal Eſtate.

Firſt, Reſolved that *Bridget* dying in the Life-time of the Teſtator, the Deviſe became void, and that her Son could not take as Heir of her Body, but the Eſtate was to have veſted in the Mother; and the Words Heirs of her Body were Words of *Limitation*, and do denote the Nature and Duration of the Eſtate the Mother was to take.

Making a Codicil and annexing it to the Will, is no Republication of the Will.

Secondly, That although a Codicil was annexed to the Will, *that* could not amount to a Republication of the Will, nor give any Title to the Son.

Thirdly, Whereas the Lands in *Turpentroe* and in *Whitehaven*, were deviſed to *Jane Simpſon* after the Death of her Siſter without Iſſue, who had Iſſue now living, the Plaintiff; yet the Deviſe to *Bridget* and the Heirs of her Body becoming void by the Death of *Bridget*, in the Life-time of the Teſtator, *Jane* ſhould take immediately by Virtue of the Deviſe. The Authorities in the Books being ſo, although the *Lord Chancellor* at the ſame Time declared, it was not only againſt the Intention of the Teſtator, but alſo againſt the expreſs Words of the Will, and alſo againſt a Maxim in Law, That an Heir is not to be diſinherited without expreſs Words.

Deviſe of Land to *A.* in Tail, and after *A.*'s Death without Iſſue, to *B. A.* dies in the Life of the Teſtator, leaving Iſſue; the Deviſe to *A.* is void, and *B.* ſhall take the Remainder preſently, tho' againſt the Words and Intent.

Fourthly, That a Deviſe to *Bridget* after the Death of his Wife, although *Bridget* was but one of the two Coheirs, would give an Eſtate for Life to the Wife by Implication: But *that* would not concern this Caſe; for the Words in the Will after the Death of the Wife, related only to her Jointure Lands deviſed to *Bridget*.

One having a Wife and 4 Daughters, deviſes Lands to one of his Daughters after the Death of his Wife; this is a Deviſe to the Wife for Life by Implication, though the Daughter was only one of the Coheirs.

The Caſes cited were *Fuller* verſus *Fuller*, *Cro. Eliz.* 422. when the firſt Deviſe is void, the Remainder ſhall take Place, as if no ſuch Deviſe had been made; and *Hartop*'s Caſe 1 *Levinz*, and *Cro. Eliz.* 243. Deviſe to *A.* and Heirs of his Body, Remainder to *B. A.* dies in the Life-time of the Teſtator, *B.* ſhall take preſently, altho' *A.* left Iſſue.

Fifthly, The Teſtator having given the Reſidue of his Eſtate to his Wife, with Power to diſpoſe thereof with the Approbation of his Truſtees, although ſhe made a Will and deviſed to the Plaintiff *Hutton*; *Lord Chancellor* declared *that* Deviſe void, ſhe not having the Concurrence of the Truſtees, and that the Teſtator died Inteſtate as to the Reſidue of his Eſtate.

A. having a Power of diſpoſing of Land with Conſent of Truſtees, deviſes the Lands by her Will, this being without the Conſent of the Truſtees, is void.

Sixthly,

Equity will not relieve for mean Profits, unleſs in Caſe of Truſt or an Infant, where no Entry is made by the Perſon intitled to the mean Profits.

Sixthly, Although the Wife did not take an Eſtate for Life by Implication, (the Words after the Death of the Wife, having Reſpect to the Jointure Lands only, and not to the other Lands mentioned to be deviſed to his Daughter *Bridget*) yet ſhe had taken the Rents and Profits of the Whole; however there being no Truſt, nor Infant in the Caſe, nor any Entry made by *Jane Simpſon* in the Life-time of the Wife; the *Lord Chancellor* would not decree any Account of the Rents and Profits taken by the Wife.

Caſe 641.
Lord Chancellor.
Nov. 7.

Davila verſus *Davila.*

A. by Marriage-Articles is bound to pay his Wife, if ſhe ſurvives him, 1500 *l.* in full of Dower, Thirds, Cuſtom of *London*, or otherwiſe, out of his real and perſonal Eſtate. *A.* dies inteſtate; this bars the Wife of her Share by the Statute of Diſtributions. *Ant.* Caſe 631.

MR. *Davila*, on the Marriage of his Wife in 1703, in Conſideration of the intended Marriage, and of 1000 *l.* Portion, covenanted, if his Wife ſurvived him, to pay her 1500 *l.* in a Month after his Deceaſe, in full of Dower, Thirds, Cuſtom of *London*, or otherwiſe out of his real or perſonal Eſtate.

Mr. *Davila* died Inteſtate, and without Iſſue, his Widow brought her Bill againſt the Adminiſtrator of her Husband, to have a Moiety of the perſonal Eſtate by the *Statute* for Diſtribution of Inteſtate's Eſtates.

The Defendant the Adminiſtrator pleaded in Bar thereunto the ſaid Marriage-Agreement, and that thereby the Plaintiff was to have but 1500 *l.* out of her Husband's real and perſonal Eſtate, which he was ready to pay.

For the Plaintiff it was inſiſted, that the Marriage-Agreement did not extend to debar her from a Moiety of the perſonal Eſtate, which the Law gave her, not by her Marriage, but by her Husband's dying Inteſtate; and the Marriage-Agreement was intended to bar her only of all ſuch Right as ſhe might claim or become intitled unto by Virtue of her Intermarriage; and as the Husband might have given her by Will any Part of his real or perſonal Eſtate, and as the Marriage-Agreement would not hinder her from taking a Moiety of his Eſtate, if he had thought fit to deviſe it to her by Will; the Statute for ſettling Inteſtate's Eſtates was in the Nature of a Will, for all ſuch as die Inteſtate.

Or if ſhe might not have the 1500 *l.* by the Marriage-Agreement, and alſo the Moiety of the Eſtate by the Statute; yet ſhe might elect *that* of the *two* Proviſions, which was moſt beneficial.

Lord Chancellor. By the Words of the Agreement ſhe is tied down to accept the 1500 *l.* in full for what ſhe might claim for Dower or Thirds, or by the Cuſtom of the City of *London*, or otherwiſe, out of the real or perſonal Eſtate; Words are never to be confined or reſtrained from their natural Signification, and therefore allowed the Plea.

It is objected her Husband might have given her a Legacy: It is true he might have ſo done, and ſo he might have made a Will, and have given her nothing, and poſſibly he might think it not neceſſary to make a Will, and deviſe the Eſtate to his next of Kin; becauſe he knew his Wife was barred by the Agreement from claiming more than the 1500 *l.* and that all the Reſt of his Eſtate would go to his next of Kin.

Caſe 642. *Lord Chancellor.*

Peter verſus *Ruſſell.*

A. having a Mortgage of a Leaſhold Eſtate, the Mortgagor borrows the original Leaſe of *A.* with an Intention to borrow more Money on the Premiſſes. If *A.* was privy to the Mortgagor's Intention of taking up more Money on the Premiſſes, *A.*'s Mortgage ſhall be poſtponed to the ſubſequent Mortgage, as being acceſſary to the Fraud. Otherwiſe if *A.* was not privy to the ſubſequent Loan, but innocently lent the Leaſe to the Mortgagor.

Goffe having a Leaſe from Mr. *Poultney* for *ſixty* Years of the thatched Tavern in St. *James*'s, and of a void Piece of Ground adjoining to it, with Power to build thereon, had mortgaged it to Dr. *Lancaſter* and to Mr. *Haberfield*, which by meſne Aſſignment came down to the Defendant *Ruſſell*, on which there was due on the 5*th* of *March* 170⁵, 1700 *l.* In *May* 1706, *Goffe* pretending he had contracted to let out Part of the Ground to be built upon, under a Ground-rent that would be an Improvement to the Eſtate, deſired the Defendant *Ruſſel*, who had the original Leaſe in his Cuſtody, to lend it to him, to ſatisfy the Perſons he was contracting with, as to the Duration of his Term, and that he had Power to grant a building Leaſe; the Defendant *Ruſſell* accordingly let him have it, being then at *Goffe*'s Houſe, and in a few Hours after, *Goffe* delivered back the Leaſe to the Defendant *Ruſſell.*

The Plaintiff brought his Bill and alledged that on the 27*th* of *May* 1706, he lent *Goffe* 250 *l.* on Mortgage of Part of the Premiſſes, and that he was induced ſo to do upon *Goffe*'s Shewing and Producing to him the original Leaſe, and was drawn in to lend the Money by the Defendant's Parting with and Truſting *Goffe* with the original Leaſe; and although *Ruſſell* ſwore by Anſwer he did not know the Plaintiff was about to lend, or *Goffe* to borrow any Money, and only produced it to ſatisfy ſuch Perſons, as *Goffe* alledged were treating with him to make an Improvement upon the Eſtate; yet at the *Rolls* the Plaintiff obtained a Decree to be paid the Money by him lent in the firſt Place, and to poſt-pone *Ruſſell*'s

Mortgage; and the Eſtate not being ſufficient to pay both, *Ruſſell* appealed from the Decree.

Lord Chancellor reverſed the Decree, it being denied by Anſwer, and there being no Proof, that *Ruſſell* knew, or was informed that the Plaintiff was about to lend *Goffe* Money; but produced his Leaſe upon another Occaſion, to ſatisfy the Perſons who were ſuppoſed to be treating for Leaſes to build on; and did not any Thing againſt good Conſcience, whereby to forfeit his Mortgage, he having neither actually incouraged the Plaintiff to lend the Money, nor paſſively, as ſtanding by and concealing the Mortgage, knowing that the Plaintiff was about to lend Money on the Premiſſes.

John Edwards and *Elizabeth* his Wife, Widow and Executrix of Captain *Jenefer*, verſus Sir *Richard Child*, *Shepherd* and others, Owners of the Ship *Succeſs*, and the *Eaſt-India Company*.

Caſe 643.

Eaſt-India Company take Bonds from the Mariners and Officers of the Ships, not to demand their Wages, unleſs the Ship returned to the Port of *London*. The Ship arrives at a delivering Port, and is afterwards taken by the *French*. The Seamen and Officers ſhall have their Wages to the Time of the Arrival of the Ship at the delivering Port.

IN 1693, *Jenefer* was appointed Captain of the Ship *Succeſs*, on a Voyage to *India*, at 10 *l. per* Month Wages, and to have two Servants, the one at 30 *s.* *per* Month, and the other at 20 *s.* *per* Month Wages. *Jenefer* the Maſter, and the Defendants the Part-owners enter into a Charter-party with the *Eaſt-India Company*, in which Recital was made, that the *Company* had paid to the Maſter and Mariners in Part of Freight 1200 *l.* by Way of Impreſt Money; and further agreed, that the Seamen at the End of every *ſix* Months during the Voyage, ſhould receive one Month's Wages; and that until *ſix* Days after the Return of the Ship to the Port of *London*, the *Eaſt-India Company* were not to pay any Freight, ſave the ſaid Impreſt Money, which was not to be returned, although the Ship ſhould be loſt in the Voyage: And there-

fore

fore by the Direction of the *Company*, *Jenefer* the Commander, when he hired the Seamen, took Bonds from them not to demand any Wages till the Return of the Ship to the Port of *London*, and that they ſhould not demand any Wages, if the Ship was loſt before her Return to *London*.

The Ship ſailed to *Bengall*, and there delivered her outward bound Cargo. In her Return home the Ship was taken by the *French* on the Coaſt of *Ireland*, and the Captain and Mariners made Priſoners.

The Captain was ſued by the Mariners for their Wages, being *four* Months, that became due at *Bengall*, the firſt delivering Port; and although the Bonds were given in Evidence, yet the Mariners recovered their Wages in an Action tried before the Lord Chief Juſtice *Holt*.

The Bill by the Plaintiffs, the Wife being the Executrix of Captain *Jenefer*, was to recover about 800 *l.* he had been forced to pay to the Mariners, and likewiſe to have the Captains own Wages, and the Wages of his Servants for *four* Months, that became due at *Bengall* the firſt delivering Port.

Upon producing of Precedents, where Relief had been given in like Caſes, *viz.* the Caſe of Sir *Humphry Edwin* and Captain *Stafford* againſt the *Eaſt-India Company* in 1695, and the Caſe of *Buck* and Sir *Thomas Rawlinſon*, affirmed upon an Appeal in the *Houſe of Peers*; notwithſtanding the *Eaſt-India Company* had taken Bonds from the Mariners not to demand their Wages, unleſs the Ship returned to the Port of *London*, the *Lord Chancellor* decreed the Plaintiffs to be paid the Wages due to Captain *Jenefer* for himſelf and Servants, and likewiſe what *Jenefer* had paid to the Seamen, with Intereſt and Coſts.

Ant. Ca. 195.

DE

Term. S. Hillarii,

1716.

In CURIA CANCELLARIÆ.

Samuel Newcomen, and *Mary* his Wife, verſus *Edward Barkham*, and Sir *William Maſſenburgh & al'*. Caſe 644. *Lord Chancellor.* *Feb.* 9.

Edward Barkham verſus *Newcomen & ux'*, Sir *William Maſſenburgh*, *Dimock Walpool* and *John Walpool*.

SIR *Edward Barkham* having no Iſſue, 19 *Jan.* 1709, made his Will, and deviſed his real Eſtate to Sir *William Maſſenburgh* and *Walpool*, and their Heirs, in Truſt by Rents and Profits, and Sale of ſuch Part, or of ſo much as ſhould be neceſſary, to raiſe Money for Payment of his Debts and Legacies, and to convey the Reſt and Reſidue of all his Lands, Tenements and Hereditaments, which ſhould remain unſold, to his Couſin *Robert Barkham*, and the Heirs Male of his Body; and for

A. deviſes Lands in Truſt, after Debts paid, to convey the Premiſes to the Heirs Male of the Body of *B.* the Teſtator's Great Grandfather. *C.* is the Heir Male of the Body of *B.* but not Heir general, there convey to *C.* deſcribed to

being a Daughter of an elder Brother, who is Heir general. Decreed Truſtees to As *C.* would be well intitled to take as Heir Male by Deſcent, ſo he is ſufficiently take by Purchaſe.

Want of ſuch Heirs Male, then to the Heirs Male of the Body of Sir *Robert Barkham* his Great Grandfather; and for Want of ſuch Heirs Male, to his own right Heirs for ever. And directed, that the Overplus of the Money ſhould be paid to his Couſin *Robert Barkham*, or to ſuch Heirs Male as ſhould be intitled to the Reſidue of his Manors and Hereditaments by his Will; and thereby gave to his Siſter *Newcomen* 2000 *l.* to be put out at Intereſt during her Life, ſhe to receive the Intereſt, and after her Death to her Children.

Sir *Edward Barkham* died in about a Year after, and *Robert Barkham* died ſoon after in *Spain*, without Iſſue. The Plaintiff *Edward Barkham*, who was the Brother of the ſaid *Robert Barkham*, being then in the *Eaſt-Indies*, now brought his Bill, as being the Heir Male of the Body of Sir *Robert Barkham*, the Teſtator's Great Grandfather, againſt the Truſtees, and Mrs. *Newcomen*, to have a Conveyance of the Truſt-Eſtate; and Mrs. *Newcomen*'s Bill was that the Truſtees might account, and convey to her, as being the only Siſter and Heireſs of the Teſtator.

The Queſtion was, to whom the Truſtees ſhould convey, whether to the Plaintiff *Edward Barkham*, as the Perſon deſcribed, and intended to take by the Will, being the Heir Male of the Body of Sir *Robert Barkham*, the Teſtator's Great Grandfather, or to Mrs. *Newcomen*, the Teſtator's Siſter and Heireſs at Law, who inſiſted, that altho' the Plaintiff *Edward Barkham* was Heir Male of the Body of Sir *Robert Barkham*, and might have taken as ſuch by Deſcent, or by Way of Limitation; yet being to take by way of Purchaſe, he ought to be as well Heir general, as Heir Male of the Body, and ought to be compleat Heir at Law to Sir *Robert Barkham*.

Lord Chancellor. The Meaning and Intention of the Teſtator is ſo very plain and obvious, that it becomes a Queſtion only by the artificial Reaſoning of the Law, but

but not a Doubt to any Man of Senſe and right Reaſon, if that is to be the Rule. And it is fit therefore to conſider, how far this Court is hindred from decreeing according to the Intent and Meaning of the Teſtator agreeable to common Senſe and right Reaſon. What has been objected is, that it has been adjudged and ſettled, that he that would take under the Deſcription of Heir by Way of Purchaſe, muſt be a compleat Heir, or in other Words, Heir general, as well as Heir ſpecial: And that it is a Maxim and Rule in Law, *Quod non eſt hæres viventis*; but neither that Maxim, nor any of the Authorities built upon it, will affect this Caſe.

For here, *firſt* the Anceſtor is dead, which frees us from the Authority of *Archer*'s Caſe in *Co. Rep.* That Caſe goes no further, than that a Man ſhall not take as Heir in the Life-time of the Anceſtor, *non eſt hæres viventis*; but in this Caſe the Anceſtor is dead, and *Edward Barkham* is the Heir Male of his Body. All the Words of the Definition of the Perſon intended to take, exactly concur, and are verified in him, even in a legal Senſe; and no Arguments are to be drawn from Caſes, where the Words do not ſuit the Deviſee; and therefore the Caſes cited of *Challener* and *Bowyer*, 2 *Leo.* 70. as an Authority by *Newcomen*'s Counſel may be laid aſide, the Deviſe there being to the Heir of the Body of the Son, who was then living, and he could not have an Heir in his Life-time; and ſo likewiſe the Caſe in *Dyer* 99. there the Anceſtor was living; but it is there implied that the Son might have taken, if the Anceſtor had been dead; and in that Caſe it would be hard to ſay that the Son of the ſecond Marriage, might not take as Heir of the Bodies of the Husband and his Second Wife, becauſe he was not Heir general to them both, which he could not be, if either the Husband by a former Wife, or the Wife by a former Husband had happened to have had Iſſue a Son. In the Caſe of *Etterick* and *Sterling*, he was not there Heir Male in any legal Senſe whatſoever, and could

could only ſay he was a Male; and it is to be obſerved, *that* was upon a Deed: And it may be admitted, that the Words (Heir Male) without more, will not carry it in a Deſcent, or by Way of Limitation, if he be not alſo Heir; but do hold that he may take as Heir Male of the Body of a Perſon deceaſed, although he be not Heir general.

A Perſon may take as well by a Deſcription, as by a Chriſtian or Surname.

And as the Intent and Meaning of the Teſtator is evident, as to the Perſon he deſigned to ſucceed to his Eſtate, ſo I think it ought to obtain. For *firſt*, it is a known Principle in Law, that a Perſon is allowed to take, as well by a Deſcription, as by a Chriſtian or Surname; nay it has been carried further, even to paſs by Miſtakes or Untruths in the Deſcription, as where the Chriſtian Name is miſtaken, or the like.

In the Caſe of a Deſcent, the Heir Male of the Body takes only as a Perſon deſcribed, and if a Perſon may take by a Deſcription of the Perſon, then it certainly follows he muſt take, when the Deſcription is true, and is perfect and compleat.

In the preſent Caſe the Deſcription is not only true, but is certain, is perfect and compleat; and *that* alſo in a legal Senſe, and in Terms of Art. It muſt be admitted he is truly and certainly deſcribed, otherwiſe the ſame Deſcription of the ſame Perſon would not intitle him to take by way of Deſcent, or Limitation; and yet the Reaſon, which the Authorities cited ſeem to have gone upon, is, that theſe Words are not true of him; that they are not entirely verified; becauſe, although he is Heir Male of the Body, yet he is not Heir general, or compleat Heir.

I may ſay this is an unfair and diſingenuous Expoſition. If a Man deviſes to his Heirs in *Borough Engliſh*,

or to his Heirs in *Gavelkind*, ſhould not ſuch ſpecial Heir take, although he was not Heir general at Common Law: So that the Objection comes to this, that here are Words proper to limit and reſtrain the Senſe, and to diſtinguiſh the Perſon from the Heir general, and yet the Perſon ſo deſcribed or diſtinguiſhed, ſhall not take as Heir ſpecial, becauſe he is not the Heir general; whereas the Heir general is neither the Perſon intended nor deſcribed.

A Man may deviſe Land to his Heirs in *Borough Engliſh*, or to his Heirs in *Gavelkind*; and ſuch a ſpecial Heir will take, tho' not Heir general.

As to the Certainty of the Deſcription, he is the only Perſon living, that can be called Heir Male of the Body of Sir *Edward Barkham*, and is deſcribed by proper and artful Words, and not a Word redundant, and is not only true and certain, but artful and correct, and admits not or leaves Room for ſo much as a Cavil: And there is the ſame Reaſon, that the Heir Male of the Body may take by Purchaſe, as it is admitted he may by Way of Deſcent, ſince in both Caſes he takes by Deſcription of the Perſon intended to take. But a Diſtinction has been made, that the ſpecial Heir of the Body, who takes by Deſcent, is within the Statute *de donis*; but *that* Statute extends not to ſuch as take by Purchaſe, and that is true in Fact. But it does not follow, but the ſame Deſcription may as well aſcertain the Perſon, that is to take by Purchaſe, as it will, when he is to take by Way of Deſcent, or Limitation; and beſides, the Statute *de donis* creates no new Eſtates, or Limitations, but only ſecures and preſerves ſuch Eſtates to the Heir ſpecial, as were before at Common Law, from being liable to Alienation in ſuch Manner as they were at Law: And no true Reaſon can be given why the ſame Deſcription may not aſcertain the Perſon intended to take by Purchaſe, as well as to intitle him to take by Deſcent. If ſuch Diſtinctions are to be admitted, and to become Rules in Law, the Knowledge of the Common Law, will become rather a Matter of Memory, than of Judgment and Reaſon.

Hob. 31. I do admit that the Lord *Hobart*, in the Caſe cited in his Argument to maintain the Point there adjudged, ſays *obiter*, that where the Heir Male or Female of the Body is to take by Way of Purchaſe, he muſt be Heir general, and gives as a Reaſon for it, that he is not within the Statute *de donis:* But that is no good Reaſon; and the rather, becauſe ſuch ſpecial Heirs were well known at Common Law. In *Shelly*'s Caſe, the Queſtion there was upon Words of Limitation, and whether they were good Words of Purchaſe could not come in Queſtion; but what is there ſaid, that they would not be good Words of Purchaſe, was delivered only as the Lord *Coke*'s Opinion in arguing for his Client, and not ſo much as taken Notice of by the Court, nor was it the Point in Queſtion; yet he tranſcribes it into the Book of *Coke* on *Littleton fol.* 24. *b.* The Authorities there cited in the Margin, do none of them come up to this Caſe, as 9 *H.* 6. 24. *Farrington*'s Caſe; there the Limitation is to the Heir Male, and not to the Heir Male of the Body, thoſe Words (of the Body) wanting; and beſides it appears by the Book, that the Perſon was not *in eſſe* when he ought to have taken. And ſo likewiſe the Caſe of 37 *H.* 8. *Bro. Abridgment.* There a Caſe put of a Limitation by a Deed to a Man and the Heirs Female of his Body, and although he had a Son, yet the Daughter took, and that of *Dyer* 374. *a.* appears to be an imperfect Sketch of *Shelley*'s Caſe. It is generally found that in Caſes *obiter*, the Points adjudged are not to be much relied on; and when ſifted, the Law will be found conſiſtent with it ſelf, and the adjudged Caſes reconciled.

1 Co. Rep. 103. b.

The Caſe of *James* and *Richardſon* in *Pollexfen* 457. and the ſame Caſe in ſecond *Ventris* 311. in other Names; the Deviſe to the Heir Male of *R. S.* now living, adjudged a good Deviſe. That is a much ſtronger Caſe than the preſent, for there the Deviſee was neither Heir general, nor Heir ſpecial, the Anceſtor being

ing living, and a Maxim of the Law diſpenſed with, (*non eſt heres viventis*) and *Pollexfen* in that Caſe lays it down as a Principle, that if well deſcribed, he ought to take.

And the Caſe of *Long* and *Beaumont* in the Houſe of Lords. A Deviſe to the Heir Male of *Elizabeth Long* lawfully begotten; and for Want of ſuch Heir, to his own right Heirs; there held good, although not to the Heirs of the Body; thoſe Words of her Body wanting; yet the Deſcription ſupplied, and made good by other Words *tantamount*.

In the Caſe of *Pibus* and *Mitford*, 1 *Vent.* 372. where, in the Limitation in a Deed, *Mitford* covenanted to ſtand ſeiſed to the Uſe of his Heirs Male, begotten or to be begotten on the Body of his ſecond Wife; altho' a Son by the firſt Wife; there held good, even in a Deed; and it is ſtronger in the Caſe of a Will. And although the other Judges gave it a nice Turn, that the Heirs took by Deſcent, and not by Purchaſe, by ſaying *Mitford* took an Eſtate for Life by Implication; yet the Lord *Hale* ſaid he took by Purchaſe, and by Deſcription, and held, he was well deſcribed; and ſays, it was abſurd to ſay he could not take becauſe he was not Heir general, when he is deſcribed as an Heir ſpecial, to diſtinguiſh him from the Heir general: And the Lord *Hale* there ſays, he finds not any Caſe adjudged contrary to that Opinion: And *Wyld* as convinced by his Argument, declares he was of the ſame Opinion: So that the Opinion of *Hale* and *Wyld* may out-weigh (by Way of Authority) the Opinion of *Cook obiter* in *Shelley*'s Caſe, and *that* of *Hobart* in *Counden* and *Clarke*, their Opinions not being upon the Point adjudged; and beſides right Reaſon and common Senſe ſpeak againſt thoſe *obiter* Opinions; and the Caſe cited by the Lord *Hale* in the Caſe of *Pibus* and *Mitford* comes very near the preſent Caſe. A Man having two Daughters and a Nephew, gave his Daughters Fol. 29.

Daughters 2000 *l.* and gave the Land to his Nephew, by the Name of his Heir Male; provided, if his Daughters troubled the Heir, the Deviſe of the 2000 *l.* to be void, and adjudged good. In our Caſe the Teſtator takes Notice of the Siſter who was his Heir, and gives her 2000 *l.* and then deviſes to the Heirs Male of his great Grandfather. And the Caſe *Trin.* 8 *Annæ Reginæ, Communi Banco, Rot.* 1884. Where a Deviſe to his Heir Male, although neither Heir of the Body, nor Heir at Law, held good; becauſe by other Words in the Will it appeared, the Teſtator did not intend he ſhould be hindered from taking by his Heir Female.

And therefore upon the whole Matter, decreed the Deviſe to Mr. *Barkham* was good, and a Conveyance to be made to him, he having not only the Intention of the Teſtator, and the Strength of Reaſon on his Side, but alſo the ſtronger Authorities; and directed the Conveyance to be made to *Edward Barkham*, and to his Heirs Male of the Body of Sir *Edward* the Great Grandfather.

When a Queſtion ariſes how a Truſt ought to be executed by a Conveyance, there is no better Rule than to obſerve and follow what has been done at Law in the executing of Conditions, that are Matters executory, and to be performed, ſo far as the Caſe will admit of.

Caſe 645. *Lord Chancellor. Jan.* 24.

Batchellor & ux' verſus *Searl.*

One by Will gives his Executor an expreſs Legacy, and makes no Diſpoſition of the Surplus. The Court will admit of parol Evidence to ſhew the Intention of the Teſtator, and if proved that the Teſtator intended the Surplus to the Executor, he ſhall have it notwithſtanding his expreſs Legacy. *Ant.* Ca. 601.

William Allen, to whom the Plaintiff was Siſter of the half Blood, being a ſingle Man when he came to Town, was often at old *Searl*'s Houſe, who had a Daughter and four Sons, and falling ſick, ſent for *Parſons*

ſons a Scrivener to draw his Will, and gave Legacies of 10 *l.* apiece to the Plaintiffs for Mourning, and alſo his Horſe to *John Searl*, and his wearing Apparel to his Executors, and made *John* and *George Searle* his Executors; and made no Diſpoſition of the Reſidue or Surplus.

Plaintiffs Bill was to have the Surplus, as being his Siſter of the half Blood, and next of Kin. *Parſons* who drew the Will ſwore, that the Teſtator gave no particular Directions as to the Surplus; but ſaid, the Plaintiffs *ſhould have no more, would give no more away.*

Lord Chancellor. The Evidence of *Parſons* falls in with the Tenor of the Will, and his Evidence takes away the Preſumption, that he did not intend the Surplus for his Executors. And this is a much ſtronger Caſe, than that *Littlebury* and *Buckley* in the Houſe of Lords, and therefore diſmiſſed the Bill; ſaying, theſe Reſolutions do not thwart the Authority of thoſe Caſes, where a Money Legacy given to an Executor, ſhall exclude him from the Surplus; the Preſumption being, that the Teſtator did not intend him all and ſome: But ſuch Preſumption may be ouſted or taken away by a Proof of the Teſtator's Intention, that his Executor ſhould have the Surplus, or that his next of Kin ſhould not have it: And here the Witneſs proves, that the Teſtator declared his Siſter ſhould have no more, ſhould not have the Surplus.

Humberſton verſus *Humberſton.*

Caſe 646.

MR. *Humberſton* deviſed his Manors, Meſſuages, *&c.* to the *Drapers Company* and their Succeſſors, *&c.* upon Truſt to convey to *Matthew Humberſton* for Life, and

A. deviſes Lands to the Drapers Company in Truſt to convey to *B.* for Life, Remainder to

his firſt, *&c.* Sons for their Lives ſucceſſively, and ſo to their Iſſue Male for their Lives only, Remainder over. Though this be a vain Attempt of a Perpetuity, yet the Truſtees ſhall make as ſtrict a Settlement as may be, making all the Perſons in Being but Tenants for Life; but the Limitation to the Son unborn muſt be in Tail.

and to his firſt Son, and all other his Sons for Life, and to their Iſſue Male for Life; and for Want of ſuch Iſſue to *John Humberſton* for Life, and to his Iſſue Male for Life, *&c.* and ſo to a great Number of them for Life, and their Iſſue Male for Life, and ſo to convey *toties quoties.*

Per Cur. An Attempt to make a perpetual Succeſſion of Eſtates for Life, is vain and not practicable; however there ought to be a ſtrict Settlement made, and the Intent of the Teſtator followed as far as the Rules of Law will admit of; and therefore directed the Settlement to be made, ſo that ſuch who were in Being, ſhould be only Tenants for Life; but where the Limitation was to be to a Son not in Being, there he muſt be made Tenant in Tail Male.

Vane verſus Lord *Barnard.*

Caſe 647. *Lord Chancellor. Jan.* 24.

A. on Marriage of his Son, ſettles a Meſſuage on himſelf for Life *ſans* Waſte, Remainder to his Son. The Father, tho' his Eſtate for Life be *ſans* Waſte, cannot pull down the Houſe, nor commit any voluntary Waſte therein; if he does the Court will grant an Injunction to ſtay Waſte, and compel the Father to put the Meſſuage in as good Repair as before the Waſte committed.

THE Defendant on the Marriage of the Plaintiff his eldeſt Son with the Daughter of *Morgan Randyll,* and 10000 *l.* Portion, ſettled (*inter alia*) *Raby Caſtle* on himſelf for Life, without Impeachment of Waſte, Remainder to his Son for Life, and to his firſt and other Sons in Tail Male.

The Defendant the Lord *Barnard* having taken ſome Diſpleaſure againſt his Son, got *two Hundred* Workmen together, and of a ſudden, in a few Days, ſtript the Caſtle of the Lead, Iron, Glaſs Doors, and Boards, *&c.* to the Value of 3000 *l.*

The Court upon filing the Bill, granted an Injunction to ſtay Committing of Waſte, in pulling down the Caſtle; and

and now, upon the Hearing of the Cauſe, decreed, not only the Injunction to continue, but that the Caſtle ſhould be repaired, and put into the ſame Condition it was in, in *Auguſt* 1714, and for that Purpoſe a Commiſſion was to iſſue to aſcertain what ought to be repaired, and a Maſter to ſee it done at the Expence and Charge of the Defendant the Lord *Barnard*; and decreed the Plaintiff his Coſts.

Dux *Beaufort* & *al'* verſus Dom' *Dundonald* & Duciſs' *Beaufort ux' ejus.*

Caſe 648. *Jan.* 26.

THE Duke of *Beaufort* by his Will made in 1712, deviſed to his Son the Plaintiff, the Furniture of his Houſes in the Counties of *Glouceſter* and *Monmouth*, and all his Plate, and leaving ſeveral other Legacies, made the Defendant his Wife ſole Executrix and reſiduary Legatee.

Poſt. Ca. 654. One deviſes to his Son the Furniture of his Houſe at *D.* and orders Goods to be carried from *London* to his Houſe at *D.* and agrees with Carriers for that Purpoſe, but dies before the Goods are removed to *D.* Theſe Goods ſhall not paſs by the Will, as Part of the Furniture of the Houſe at *D.*

The Fact fell out to be, that the *Duke* lived about *two* Years after the Making of the Will, and had before his Death cauſed ſeveral Rooms at *Badmington* in *Glouceſterſhire* to be meaſured, and bought Hangings, Pictures, and other Funiture deſigned to be put up there; and had cauſed the ſame, with other Goods he had here in Town, to be packed up, and put into Caſes, in order to be ſent down to *Badmington*, and had agreed with a Bargeman for the Carriage of them to *Letchlade*; and with Carriers and Farmers to carry them from *Letchlade* to *Badmington*, by Land-Carriage; but before they were removed from *London*, the Duke in 1714, died at *Badmington*.

The

The Plaintiffs Bill was (amongſt other Things) to have the Goods ſo packed up, and intended to furniſh *Badmington*; and the Queſtion was, Whether they paſſed by the Deviſe of the Furniture of his Houſes in *Glouceſterſhire* and *Monmouthſhire*, or belonged to the Dutcheſs as Executrix and reſiduary Legatee.

The Cauſe was heard at the *Rolls*, and the *Duke*'s Bill diſmiſſed as to *that* Demand; and coming on now before the *Lord Chancellor*, on an Appeal he affirmed the Decree: That the Teſtator's Intention to remove the Goods to *Badmington*, and to place them there, was not ſufficient to make them paſs by the Deviſe of the Furniture of his Houſe at *Badmington*.

Doleman verſus *Smith*.

Caſe 649. *Lord Chancellor. Feb.* 5.

A. directed his Debts and Legacies to be paid out of the Rents of his real Eſtate; and that his Executors ſhould receive the Rents until his Nephew comes to the Age of 25, and to pay the Surplus of the Rents to his Nephew at 25, and deviſes the Reſidue of his perſonal Eſtate to his Nephew.

SIR *Thomas Doleman* by his Will directed that his Debts, Legacies, and Funerals ſhould be paid out of the Rents and Profits of his real Eſtate, and that his Executors ſhould receive the Rents and Profits of his real Eſtate until his Nephew *Thomas Humphry Doleman* attained his Age of *Twenty-five*; and after Debts, Legacies and Funerals paid, they to pay the Reſidue of the Rents and Profits to his ſaid Nephew, at his Age of *Twenty-five*. As to his perſonal Eſtate, he deviſed Part to Mrs. *Smith*, and other Part to other Perſons, and other Part to go as *Heir-looms*, and then deviſes the Reſt and Reſidue of his Goods, Chattles and perſonal Eſtate unbequeathed to his Nephew *Thomas Humphry Doleman*.

The Nephew dies an Infant. *Cur.* If this Bequeſt of the Surplus of the perſonal Eſtate had been to a Stranger, or a third Perſon, he ſhould have had the perſonal Eſtate diſcharged of the Debts; but the Surplus of the perſonal Eſtate, and the Land being given to the ſame Perſon, the Surplus of the perſonal Eſtate was not intended to be exempt from the Debts.

Thomas Humphry Doleman died an Infant.

The Queſtion was, Whether the Reſidue of the perſonal Eſtate not particularly deviſed, ſhould go to the Adminiſtrators and Repreſentatives of the ſaid *Thomas Humphry Doleman*, as exempt from Payment of Debts and Legacies; or whether the perſonal Eſtate not particularly deviſed ſhould be applied to pay Debts and Legacies in Exoneration of the real Eſtate; and if ſo, the ſame would be totally exhauſted in Payment of Debts and Legacies, and the Deviſe of the Reſidue of his perſonal Eſtate idle and vain.

Lord Chancellor. The Debts, Legacies and Funerals being charged on the real Eſtate, and to be paid out of Rents and Profits, if the Reſidue of the perſonal Eſtate unbequeathed had been deviſed to a Stranger, or to a third Perſon, he ſhould have had it free and exempt from Payment of Debts; but the Deviſee of the Surplus of the perſonal Eſtate, and the Deviſee of the Land being one and the ſame Perſon; upon Conſideration of the whole Will, he thought the Surplus of the perſonal Eſtate was not intended to be deviſed to him free and exempt from Payment of Debts.

Onions verſus *Tyrer.*

Caſe 650. *Lord Chancellor. Feb.* 6.

One deviſes his Land by Will atteſted by 3 Witneſſes, and afterwards makes another Will of his Land, which revokes all former Wills; but this Will is not duly executed. The laſt Will being no Will, and void, will not amount to a Revocation of the former.

MR. *Tyrer* in 1707 made a Will, duly atteſted by *three* ſubſcribing Witneſſes, and thereby had diſpoſed of his real Eſtate, and being afterwards minded to make ſome Alteration in his Will, in the Year 1711, he made a ſecond Will touching his real Eſtate, and with a

Clauſe in it of revoking all former Wills; but there being no Table in the Room where the Teſtator lay ſick and ſubſcribed his Will, the *three* ſubſcribing Witneſſes did not atteſt it in his Preſence, but went into a lower Room out of the Teſtator's Sight, and there wrote their Names as Witneſſes to the Publiſhing this latter Will; and it was alſo in Proof in the Cauſe that there being two Parts of his former Will, one whereof was in his Cuſtody, he called for that which was in his own Cuſtody, and directed his Wife to cancel it, and the Witneſs ſwore ſhe heard her tear it; and the Queſtion now was, Whether the former Will was well revoked, or not.

Firſt, It was reſolved, that although there was an expreſs Clauſe in the latter Will of revoking all former Wills; yet *that* latter Will being void, the Witneſſes not atteſting the ſame in the Teſtator's Preſence, *that* would not amount to a Revocation, it being intended to operate as a Will, and not otherwiſe as an Inſtrument of Revocation: And ſo it was adjudged in the Caſe of *Eggleſton* and *Speak*, 3 *Mod.* 258. Sir *Bart. Shore*'s Reports 89. and in the Caſe of *Hilton* and *King*, 3 *Lev.* 86.

Where there are Duplicates of a Will, and the Teſtator cancels one of them only, and the other Part is left intire; yet that is an effectual Cancelling of the Will.

Secondly, Where there were Duplicates, and two Parts of the former Will, in Caſe the Teſtator duly cancelled and tore *that* Part, which was in his own Cuſtody or Keeping, that would be an effectual Cancelling of the Will, altho' the other Part or Duplicate remained whole and uncancelled; and it was ſo reſolved in Sir *Edward Seymour*'s Caſe.

Thirdly, *Lord Chancellor* was of Opinion, that the former Will ſtood good; for the latter Will being void, and not operating as a Will, would not amount to a Revocation; and as to the actual Cancelling of the former Will, the Evidence was not full and poſitive, that it was done; the Witneſs thought ſhe heard the Wife tear it. It is plain he did it only upon a Suppoſition that he had made a latter

a latter Will at the ſame Time, and both Wills as to the Main, were much to the ſame Effect, and with little Variation as to the Diſpoſition of the real Eſtate; and he did not cancel it with a Deſign to revoke the Deviſes as to the real Eſtate, but intended to do the ſame Thing by a latter Will; and in Caſe it had been a good Cancelling of the Will at Law, it ought to be relieved againſt, and the Will ſet up again in Equity, under the Head of Accident, and decreed it accordingly.

A former Will of Land is cancelled, the Teſtator ſuppoſing a latter Will by him made of the ſame Land to the ſame Effect was good. If that proves not to be duly executed, Equity will ſet up the former Will.

Chir verſus *Philpott.*

Caſe 651. *Lord Chancellor.*

THE Plaintiff a voluntary Deviſee of Land brought a Bill againſt the Defendant, who was not Heir at Law, but pretended to claim by ſome antient Settlement; and the Bill was to eſtabliſh the Will, and to be quieted in Poſſeſſion againſt the Defendant's Claim and pretended Title.

A voluntary Deviſee brings a Bill to eſtabliſh the Will againſt one who is not Heir at Law. Defendant by Anſwer claimed under ſome antient Settlement, which he could not find, and hoped when he could, he ſhould have the Benefit of it. It was inſiſted for the Plaintiff, that the Defendant might try his Title by a certain Time, or in Default that the Plaintiff might hold and enjoy againſt the Defendant. Bill diſmiſſed with Coſts.

The Defendant by Anſwer ſaid he was informed that there was a Settlement made by his Grandfather, and the Eſtate thereby intailed upon him, but he could not as yet find or diſcover in whoſe Hands it was, but hoped when he could diſcover it, he ſhould have the Benefit of it, and to make ſuch Uſe of it as he ſhould be adviſed.

For the Plaintiff it was inſiſted, that the Defendant might be limited to a Time to try his Right, and make out his Title; and in Default thereof, the Plaintiff might be decreed to hold and enjoy againſt the Defendant, *Sed non allocat'*. The *Lord Chancellor* diſmiſſed the Bill with Coſts.

Bird

Caſe 652. *Lord Chancellor.* *Feb.* 11.

Bird & ux' verſus *Lockey.*

One deviſes 1200 *l.* to *A. B. C. D.* the 4 Children of *J. S.* to be divided amongſt them according to the Diſcretion of *J. S.* whom he makes Executor, and wills that he ſhall not be compelled to pay any of the Legacies within a Year after the Teſtator's Death. *A.* dies before the Teſtator. *B.* dies within ſix Months after the Teſtator, and before any Allotment or Diſtribution. *J. S.* pays to *C.* 900 *l.* and takes a Receipt from *C.* in full of his Share of the 1200 *l.* and by Will gives 400 *l.* to *D.* in full of his Share.

MRS. *Standiſh* by Will gave 1200 *l.* to the *four* Children of *John Lockey* by his firſt Wife, to be divided amongſt them according to his Diſcretion and Pleaſure, and made the ſaid *John Lockey* and *Guilsthorpe* Executors; and in 1697 the Teſtatrix died.

One of the *four* Children died in her Life-time, another of them within *ſix* Months after her Death, and before any Allotment or Diſtribution made by *John Lockey* amongſt his Children; but in 1708, *John Lockey* did pay to his Son *Edward* 900 *l.* and took a Receipt from him, in full of his Share of the 1200 *l.* *Abigal*, now the Wife of the Plaintiff *Bird*, being the other ſurviving Child, *John Lockey*, her Father, by Will gives her 400 *l.* in full of her Share of the 1200 *l.* She brought her Bill ſtating the Caſe as above, with this, that there was a Clauſe in the Will, that the Executors ſhould not be compelled to pay any of the Legacies within *twelve* Months after the Deceaſe of the Teſtatrix; ſhe intending to allow *that* Time to get in and improve her Eſtate; and the Plaintiff by her Bill demanded the Reſidue of the 1200 *l.* with Intereſt from the End of a Year after the Teſtatrix's Death.

Adjudged firſt, that *A.* dying in the Life of the Teſtatrix, a fourth Part, of the 1200 *l.* did not become a lapſed Legacy; for nothing veſted in any of the Children before an Allotment by the Executor.

The firſt Queſtion was, Whether by the Death of *one* of the *four* Children in the Life-time of the Teſtatrix, a fourth Part of the 1200 *l.* became a lapſed Legacy.

Adjudged the whole 1200 *l.* was a ſubſiſting Legacy, the Deviſe being to the *four* Children, and a Power only to the Father to diſtribute, divide and apportion; and until a Diviſion and Apportionment made no particular Intereſt veſts in any one Child.

The ſecond Queſtion was, Whether the Father, as Adminiſtrator to the Child who ſurvived the Teſtatrix, was intitled in her Right to any Part or Share of the 1200 *l.* and adjudged he was not for the Reaſons *ſupra*; no Allotment or Apportionment being made; and alſo for that ſhe died within the Year allowed the Executors for Payment of the Legacies.

Secondly, For the ſame Reaſon the Adminiſtrator of *B.* was not intitled to any Part of the 1200 *l.*

Thirdly, John Lockey the Father having in 1708, (*ten* Years after the Death of the Teſtatrix) paid 900 *l.* to his Son, and taken his Receipt in full for his Share, his Repreſentative was barred from claiming any further Share, or Part of the 1200 *l.* and conſequently the Remainder of the 1200 *l.* belonged to the Plaintiff the other ſurviving Child.

Thirdly, *C.* having received 900 *l.* and given a Receipt in full of his Share, his Repreſentative could claim no further Part of the 1200 *l.*

Fourthly, That the Father ought to anſwer Intereſt for the 1200 *l.* from the End of a Year after the Teſtatrix's Death. Securities were never wanting in the publick Funds, and it was his Default that he did not make an Appointment at the End of the Year after the Death of the Teſtatrix; and therefore decreed Intereſt to be anſwered after the Rate of 5 *l. per Cent. per Ann.* but the Maſter in computing of the Intereſt was to take out of the Principal ſo much, as with the Intereſt of it, would make up 900 *l.* when it was paid to the Son in 1708, and then to carry Intereſt for the remaining Principal, from the End of the Year after the Teſtatrix's Death; and decreed ſuch Principal with ſingle Intereſt to be paid the Plaintiff.

Fourthly, The Father ought to pay Intereſt for the 1200 *l.* from a Year after the Teſtator's Death; Securities having been never wanting in the publick Funds.

Caſe 653. *Lord Chancellor.*

Attorney General, at the Relation of the Schoolmaſter of *Wootton Underhedge,* verſus *Smith.*

A Decree having been made in Lord *Coventry's* Time for granting a Leaſe of Charity Lands to *J. S.* (who had been at great Expence in recovering thoſe Lands) for 99 Years if 3 Lives lived ſo long, at the Rent of one Third of the then improved Value, and to be perpetually renewable without Fine; it was now decreed the Leaſe ſhould be renewed, *toties quoties,* without Fine, but the Rent not to be computed according to the Value of the Land at the Time of the Decree, but as it ſhould be, when the Leaſe ſhould from Time to Time be renewed.

THE School of *Wootton Underhedge* in *Com' Glouceſter,* being founded and endowed by the Lady *Berkley*; Mr. *Smith* the now Defendant's Great Grandfather, having been at great Expence, on the Behalf of the School to recover the Lands belonging to the School, which were got into the Hands of Patentees as concealed Land; in the Lord *Coventry's* Time a Decree was obtained for ſetting aſide all the Leaſes then in Being, but decreed to the then Tenants, Leaſes for *Ninety-nine* Years determinable on *three* Lives under the Rent of one third Part of the then improved Value; and as to Mr. *Smith* the Defendant's Great Grandfather, that he ſhould alſo have a Leaſe for *Ninety-nine* Years, determinable on *three* Lives, at one third Part of the improved Value; and to be renewed from Time to Time for ever, without any Fine to be paid for the ſame, according to the Value of the ſaid reſpective Eſtates ſettled by a *Commiſſion of Survey* directed by the Court for that Purpoſe.

Upon the Hearing of the Cauſe, the *Lord Chancellor* decreed, that the Defendant *Smith* according to the Decree made by the Lord *Coventry,* ſhould be admitted to renew his Leaſe, *toties quoties,* for *Ninety-nine* Years, determinable on *three* Lives without any Fine, at and under the yearly Rent of one Third Part of the improved Value; but the Value was not to be taken, what it was in the Lord *Coventry's* Time, or in the Survey then taken, but to be a third Part of the real improved Value, as the Eſtate ſhall be worth to be let at the Time when the

Leaſe ſhall be renewed from Time to Time; and directed a Commiſſion to enquire, whether the Defendant *Smith* had Poſſeſſion of any Lands belonging to the School, that were not according to the ſaid Decree to be compriſed in his Leaſe, and for ſuch he was to account according to the full Value; and as to what were within his Leaſe, to account for them at a third Part of the real improved annual Value.

Comes *Shaftsbury* verſus Comitiſſam *Shaftsbury*.

Caſe 654. *Lord Chancellor.* *Feb.* 25.

THE late Earl of *Shaftsbury*, before he went to *Naples* for his Health, made his Will, and thereby (*inter alia*) deviſed to the Defendant his Wife all the Plate, Pictures, Houſhold Goods and Furniture, that ſhould be in his Houſe at *Rygate* at the Time of his Death.

Ant. Ca. 648. *J. S* deviſes all his Houſhold Goods and Furniture which ſhould be in his Houſe at *R.* at his Death to his Wife, and

afterwards going beyond Sea, his Steward gets the Landlord of the Houſe to accept of a Surrender of the Leaſe of the Houſe, and removes the Goods to another Houſe; and writes an Account of this to *J. S.* who approves of it. The Goods will not paſs by the Will to the Wife, otherwiſe if they had been removed by Fraud to defeat the Legacy; or by any tortious Act without the Privity of the Teſtator.

Whilſt he was beyond the Seas, his Steward got the Landlord to accept a Surrender of the Leaſe of the Houſe at *Rygate*, and thereupon he removed the Goods to another Houſe of the Teſtator's, and wrote to the *Earl* an Account of what he had done, who approved thereof; yet the Defendant inſiſted to be intitled to the Goods, that had been at the Houſe at *Rygate*, the ſame being removed from thence, not by the Direction of the Teſtator, but by Accident, upon the Steward's prevailing on the Landlord to accept a Surrender of the Leaſe.

The *Court* decreed the Defendant to account and anſwer the Value of the Goods to the Plaintiff; but withal declared, that if the Goods had been removed by Fraud

or

or Practice, on Purpoſe to diſappoint the Legacy, or by a tortious Act, unknown to the Teſtator, *that* might have intitled her to Relief.

And whereas the Counteſs before Marriage had ſaved out of her Maintenance-Money 350 *l.* which was in the Hands of her Brother *Henry Ewre* Eſq; who after his Siſter's Marriage gave a Bond for it to the *Earl*; but Mr. *Wheelock*, the *Earl*'s Steward, proving that the *Earl* ſaid his Wife ſhould have that Money, and that it ſhould be placed out in ſome publick Fund for her Benefit; and having alſo a little before his Death ſaid, he gave it to his Wife; and *three* Perſons then preſent put down in Writing what he ſo ſaid, and atteſted it as Witneſſes, though the *Earl* did not direct them ſo to do, nor knew that what he ſo ſaid was put down in Writing; and although the *Earl* afterwards made *two* Codicils to his Will, and in one of them deviſed ſeveral Things to the *Counteſs*; but took no Notice of this Money, or of the Bond given for it; yet the *Lord Chancellor* decreed it to the Defendant the *Counteſs*, not as a Gift from her Husband, but as declared and intended originally for her ſeparate Uſe.

Caſe 655. *Lord Chancellor.*

Attorney General, ad relationem *Tracy* and *Lapthorn & al'*, verſus Dominam *Floyer, Campion, Cowper & al'*.

A. ſeiſed of the Manor and Patronage of *Waltham*, by Will gives 100 *l. per Ann.* Rent-charge, and the Right of Nominating to the Church to ſix Truſtees, and thoſe Truſtees when reduced to three, to chooſe others. *B.* the only ſurviving Truſtee aſſigns his Truſt to others, who nominate to the Church, being a Donative. Decreed the Aſſignees of the Truſt, though the Aſſignment was made by one only who ſurvived, had the Right to nominate to the Church, and not the Owner of the Manor.

Edward Denny Earl of *Norwich*, being ſeiſed by Grant from *Edward the Sixth*, of the Scite and Demeſnes of the diſſolved *Monaſtry* of *Waltham Holy Croſs*, and of the Manor of *Waltham*, and of the Patronage of the *Church* of *Waltham*, and of the Right of Nominating a Miniſter to

to officiate there, it being a *Donative*, the *Abbey* being of *Royal Foundation*; by his Will in 1636, amongſt other Things, the ſaid *Earl* deviſed a Houſe in *Waltham*, and a Rent-Charge of 100 *l. per Ann.* and *ten* Load of Wood to be annually taken out of the Foreſt of *Waltham*, and his Right of Nominating a Miniſter to officiate in the ſaid Church, to *fix* Truſtees and their Heirs, of which Sir *Robert Atkins* was one, in Truſt for the perpetual Maintenance of the Miniſter, to be from Time to Time nominated by the Truſtees, and directed that when the Truſtees were reduced to the Number of *three*, they ſhould chuſe others.

It ſo fell out, that all the Truſtees, except Sir *Robert Atkins*, were dead, and he alone took upon him to enfeoff others to fill up the Number, and *Tracy* and the other Relators were now the ſurviving Truſtees, and they nominated *Lapthorne* to officiate; and the Lady *Floyer* and *Campion*, who were Owners of the diſſolved Monaſtry, and of the Manor, claimed the Right of Nomination to the Donative, and had nominated *Cowper* to officiate there, and he was got into Poſſeſſion.

The Bill was that *Lapthorne* might be admitted to officiate there, and to be quieted in the Poſſeſſion, and to have an Account of the Profits.

By the Defendants it was, amongſt other Things, inſiſted, That the Truſtees having neglected to convey over to others, when they were reduced to the Number of *three*, and the legal Eſtate coming only to one ſingle Truſtee, he had not Power to elect others; but by that Means the Right of Nomination reſulted back to the Grantor, and belonged to the Defendants who had the Eſtate, and ſtood in his Place; or at leaſt the Court ought to appoint ſuch Truſtees as ſhould be thought proper.

Lord Chancellor. It is only directory to the Truſtees, that when reduced to *three*, they ſhould fill up the Number of Truſtees; and therefore although they neglected ſo to do, *that* would not extinguiſh or determine their Right; and Sir *Robert Atkins*, the only ſurviving Truſtee, had a better Right than any one elſe could pretend to, and might well convey over to other Truſtees: It was but what he ought to have done; and *decreed* for the Plaintiffs with Coſts, and an Account of Profits; but the Maſter to allow a reaſonable Salary to *Cowper*, whilſt he officiated there.

Caſe 656. *Lord Chancellor.* *Mar.* 11.

Bothomley & al' verſus Dom'um *Fairfax.*

A Recogniſance not inrolled to be taken as an Obligation, and to be paid as a Debt by Specialty.

THE Eſtate of the late Lord *Fairfax* being by him deviſed for Payment of Debts, and decreed to be ſold, and the Money ariſing by Sale to be applied for that Purpoſe; and firſt to pay Mortgages, Judgments and Recogniſances that affected the Land, and then other Debts; and all Creditors were at Liberty to come before the Maſter and prove their Debts.

J. S. had a Recogniſance from the late Lord *Fairfax* for 500 *l.* but the Recogniſance was not inrolled, and the Queſtion was, Whether *J. S.* was to be conſidered as a Creditor by Recogniſance, or only as a Bond-Creditor.

It was inſiſted, that a Recogniſance at Common Law, need not to be inrolled; but it takes it's Focce from being acknowledged, and being taken by the proper Officer, and for that Purpoſe cited the Caſe of *Wingfield* and *Hall*, Fol. 195, 222. in Lord *Hobart:* And if Inrollment was neceſſary, it might yet be inrolled. A Statute Staple by the Statute of *Acton Burnell*, is to be inrolled within a limited Time, but not ſo of a Recogniſance at Common Law; and altho' in the Caſe of *Cro. Eliz.* 355. *Hollingworth* ver. *Aſcue*,

and 2 *Roll. Abr.* 149. A Recogniſance not inrolled is adjudged to be a Bond, *that* ſeems to be a Strain; becauſe altho' under Hand and Seal, it is not delivered, and Delivery is eſſential to a Bond.

Lord Chancellor. The Recogniſance not being inrolled is imperfect; and although the Court may permit the Inrollment of it after the Time elapſed; yet it is always done with Caution, that it ſhall not Prejudice any intervening Purchaſer; and the Statute of Frauds and Perjuries provides, that Judgments ſhall not by having Relation to the firſt Day of the Term bind Purchaſers nor affect the Land, but from the Time of Signing of them in the Margin; but it is ſilent as to Recogniſances and Pocket Securities, which are more dangerous to Purchaſers, and therefore more reaſonable that this Recogniſance ſhould not bind, but from the Time of the Inrollment; and it may fairly be preſumed, that the Debt was otherwiſe ſatisfied or ſecured, when the Recogniſance was not inrolled: And decreed *J. S.* ſhould be conſidered as a Bond-Creditor only.

A Recogniſance may be enrolled after the Time is elapſed; but it is done with Caution, ſo as not to prejudice any intervening Purchaſer.

DE
Term. S. Michaelis,
1717.
In Curia Cancellariæ.

Caſe 657. *Williams* verſus *Callow, & econtra.*

A Husband uſes his Wife with Cruelty, and is an extravagant Perſon, waſting all his Subſtance. Court decreed the Intereſt of a Truſt-Bond given for the Wife's Portion, to be paid to the Wife for her ſeparate Maintenance. *Ant.* Caſe 598.

Williams a Glover agreed to give his Son 1500 *l.* and turn over his Trade and Houſe to the Son, and Mrs. *Callow* was to give 600 *l.* Portion with her Daughter; but Mrs. *Callow* inſiſted ſhe could give but 500 *l.* until the Son prevailed that if ſhe would give Bond for 600 *l.* he would return 100 *l.*

The Marriage took Effect, Husband proved drunken, rude, and abuſive to his Wife, and waſting his Stock; his Father got him to re-aſſign back his Houſe for an Annuity of 60 *l. per Ann.* for his Life; and afterwards he came to an Agreement with Mrs. *Callow* to take a Bond for 500 *l.* the Intereſt whereof was to be paid him during the Joint-Lives of himſelf and Wife, and if he ſurvived, the Principal to be paid to him; and gave a Releaſe of the Portion to Mrs. *Callow.*

Williams

Williams the Husband brought a Bill to ſet aſide the Releaſe he had given to Mrs. *Callow*, and to have a Legacy of 150 *l.* given to his Wife by her Grandmother, and to have the Portion made up 600 *l.* although he had delivered up the laſt Bond for 100 *l.*

The Wife having given a Releaſe to the Mother before Marriage, and the Treaty being for 600 *l.* Portion, and no Mention made of the Legacy, the Bill was diſmiſſed as to that Demand, and alſo as to the 100 *l.* which the Son promiſed to remit to his Mother, and accordingly after Marriage gave up the Bond.

Mrs. *Williams* the Wife brought her croſs Bill to have the Intereſt of her Portion for her ſeparate Maintenance; and the *Chancellor* decreed it accordingly, declaring that this was a ſtronger Caſe than that of Sir *James Oxenden*; there only relieved from the ill Behaviour and Beaſtlineſs of Sir *James*, here Cruelty mixed with it. Sir *James Oxenden* of Subſtance to have maintained his Wife, and lived ſuitable to his Eſtate; here the Husband has waſted all, and has no fixed Habitation, but goes from Alehouſe to Alehouſe; and both Caſes alike in that the Wife's Fortune was in Truſtees, the Bond for the 500 *l.* being taken in Mr. *Callow*, the Wife's Brother's Name. *Ant.* Ca. 444.

Stanton verſus *Platt.*

Caſe 658.

MR. *Platt*, a Freeman of *London*, having an only Daughter, advanced her in Marriage by the ſettling of a real Eſtate, and the Husband and Wife ſeparated, and the Husband went beyond Sea.

Advancement by a Freeman of *London* of a Child by a real Eſtate, no Bar of the orphanage Part.

Mr. *Platt* died, having by his Will deviſed ſome Houſes to a Truſtee for the ſeparate Uſe of his Daughter.

Firſt, Advancement by Land no Bar to the Cuſtom, any more than if deviſed or deſcended.

If there is a Wife and but one Child of a Freeman, which is advanced but in Part, the Child ſhall not bring that Part into Hotchpot. *Ante* 560.

Secondly, If it might go in Part, yet it would be the ſame Thing, becauſe there was but one Child; and the Advancement in Part, falls in again to the Child's Part.

A Leaſhold Eſtate deviſed by a Freeman to a Truſtee for the ſeparate Uſe of his Daughter, not to be taken as Part of her orphanage Part, but to go out of the legatory Part. *Ant.* Ca. 107.

Thirdly, That what was deviſed to the Truſtee for the Daughter, cannot go in Part of *Orphanage*, nor any Bar to it; but if legatory Part not ſufficient, the Legatees muſt abate in Proportion.

Caſe 659. *Lord Chancellor.* *Nov.* 15.

Elie verſus *Osborne.*

Marriage-Settlement on the Husband for 99 Years, if he ſo long lived, Remainder to Truſtees, to preſerve contingent Remainders, Remainder to the Heirs of the Body of the Husband by the Wife, Remainder to the Heirs of the Husband. There is Iſſue two Sons and a Daughter. Husband and Truſtees with the eldeſt Son, join in a Fine; it is a good Bar, and no Breach of Truſt, the eldeſt Son joining.

James Steer, on his Marriage ſettled the Lands in Queſtion on himſelf for *Ninety-nine* Years, if he ſo long lived, Remainder to Truſtees and their Heirs, to preſerve contingent Remainders, during his Life, Remainder to his Wife for her Jointure, Remainder to the Heirs of his Body on the Body of *Mary* his intended Wife, Remainder to his own right Heirs.

Iſſue *John*, *James*, and *Mary*: *James* the Father, and *John* his eldeſt Son, with the Heir of the ſurviving Truſtee, join in a Feoffment and Fine to *Doughty* and his Heirs. *John* and *James* the Sons died without Iſſue, *James* the Father yet living.

The

The Queſtion was, Whether the Purchaſer had a good Title, or that the Truſtees joining ſhould be a Breach of the Truſt.

Plea allowed. *Lord Chancellor.* It is abſurd to ſay, that the Truſtees may not join with the Tenant in Tail; for although the Father was living, he was but barely Tenant for *Ninety-nine* Years if he lived ſo long, and the Eſtate-Tail veſted in the Son in Equity, but the legal Eſtate in the Truſtees and their Heirs, during the Life of the Father, and they are Truſtees purely for the Tenant in Tail, and to preſerve his Eſtate, and not to ſtand in Oppoſition to him for the Sake of thoſe who are to come after him.

Tenant in Tail joining with the Truſtees for preſerving contingent Remainders, prevents any Breach of Truſt.

Attorney General verſus *Burdet* and *Smith & al'.*

Caſe 660. *Rolls.* *Feb.* 15.

AN Appointment by Tenant in Tail to a Charity, ſhall bind the Reverſioner in Fee, and as an Authority in Point, the Caſe of *Chriſt's Hoſpital* and *Hawes* was cited, *Duke's Charitable Uſes* 84. the Statute of Charitable Uſes, ſupplying all Defects of Aſſurance, where the Donor is of Capacity to diſpoſe, and hath ſuch an Eſtate, as is any Way diſpoſable by him, whether by Fine or Common Recovery; and the Caſe alſo of the *Attorney General* and *Hawley* was cited, that the Appointment by Tenant in Tail, barred the Remainder-Man.

An Appointment by a Tenant in Tail to a Charity, ſhall bind the Reverſioner. Statute of Charitable Uſes ſupplys all Defects of Aſſurance, which the Donor was capable of making.

DE

Term. S. Hillarii,

1717.

In CURIA CANCELLARIÆ.

Short verſus *Long.*

Caſe 661. *Lord Chancellor. Feb.* 24.

A. deviſes his real Eſtate to his Son for Life, Remainder to his firſt, *&c.* Son in Tail, with Remainders over, and deviſes a Leaſe to his Daughter, and dies not leaving Aſſets to pay Debts. The Son and Daughter ſhall contribute in Proportion, each Eſtate being liable at Law, and the Teſtator's Intention equal between both.

THE Teſtator deviſed his real Eſtate to his Son for Life, and to his firſt and other Sons in Tail, with Remainders over; and by the ſame Will deviſes ſpecifically a Leaſhold Eſtate to his Daughter, and made his Son Executor; the Aſſets falling ſhort to pay Debts.

The Queſtion was, Whether the Deficiency was to be charged upon the real, or upon the Leaſhold Eſtate.

Lord

Lord Chancellor decreed the Deficiency to be born equally in Proportion to the Value of each Eſtate; the Fee-ſimple Eſtate deviſed to the Son, being liable to Debts by Specialty, by the Statute againſt fraudulent Deviſes; and the Leaſhold, although ſpecifically deviſed, is liable to Debts, and both being deviſed, the Intention of the Teſtator ſtands equally between the Deviſees; and both Eſtates being liable, each ought to contribute its Proportion.

DE

Term. S. Trinitatis,

1718.

In CURIA CANCELLARIÆ.

Caſe 662. *Lord Chancellor.* *July* 12.

One by Will gives all his Lands, Money, *&c.* to his Wife; provided if Wife dies without Iſſue, then 80 *l.* ſhall remain to his Brother after his Wife's Death.

Pinbury verſus *Elkin & al'.*

Giles Davis a Clothier in *Com' Glouc' July* 18, 1712, having no Iſſue, deviſed to *Heſter* his Wife, all his Lands and Tenements, Money, Cloaths and Yarn, to be freely by her poſſeſſed and enjoyed: Provided if the ſaid *Heſter* died without Iſſue by the Teſtator *Giles Davis*, that then 80 *l.* ſhould remain to his Brother *John Davis* after her Deceaſe, and made *Heſter* his Wife Executrix.

The Brother dies in the Life of the Wife. *Vide poſt.* Ca. 665. where it was decreed the Legacy good.

The Teſtator died without Iſſue, and had no Lands or Tenements, either Frehold or Leaſhold, but poſſeſſed only of a perſonal Eſtate, conſiſting chiefly in Money, Cloaths and Yarn. *Heſter* married the Defendant *Elkin*; *John Davies* died in the Life-time of *Heſter*, and made a Will, and one *Wright* Executor, who aſſigned the 80 *l.* to the Plaintiff.

The Plaintiff's Bill was to be paid the 80 *l.* Defendant *Elkin* admitted ſufficient Aſſets of his Wife; but inſiſted, the Plaintiff was not well intitled to the 80 *l.*

Firſt, Becauſe *John Davies* died in the Life-time of *Heſter.*

Secondly, Becauſe the Deviſe of the 80 *l.* was to ariſe, upon too remote a Contingency, *viz.* upon *Heſter*'s dying without Iſſue by the Teſtator.

As to the firſt Objection, it was inſiſted by the Plaintiff's Counſel, that altho' *John Davis* had but a Poſſibility or contingent Intereſt, and ſuch, as they admitted, he could not transfer or aſſign over; yet ſuch Poſſibility would go to his Executors or Adminiſtrators, and for that Purpoſe cited the Caſe in 2 *Ventris*, an *Anonymous* Caſe 347. 100 *l.* deviſed to *J. S.* at the Age of *Twenty-one*, and if he died before that Age to *A.* and *B.* and the Survivor of them; *A.* and *B.* both died in the Life-time of *J. S.* then *J. S.* dies under the Age of *Twenty-one*; the Adminiſtrator of *B.* who ſurvived *A.* obtained a Decree for the 100 *l.* Although *B.* died before the Contingency happened, yet it ſhould go to his Adminiſtrator.

As to the *ſecond* Objection, it was inſiſted that the Will is to be conſtrued according to the vulgar Underſtanding of the Teſtator, who is ſuppoſed to be *inops Conſilii*, and not according to a legal Acceptation of the Words, and in common *Parlance*, or according to the vulgar Acceptation a Man is ſaid to be dead without Iſſue, when he has no Iſſue living at the Time of his Death; and it is not to be underſtood of a future Time, when the Iſſue he left at his Death might afterwards happen, it may be *one Hundred* Years after, to die without Iſſue; and therefore the Defendant's Counſel would have it to be the ſame, as if it had been, provided ſhe ſhould die

die without Iſſue living at the Time of her Deceaſe; and a Remainder or Deviſe over upon a Contingency, that was to happen within the Compaſs of Life, was a good Deviſe or Limitation over, even of a Perſonalty, or of a Sum of Money, or Chattel perſonal.

Lord Chancellor as to the firſt Point ſeemed doubtful, Whether the Deviſe of the 80 *l.* was not perſonal to the Brother, if he ſurvived the Widow.

As to the ſecond Point, not to be maintained, that the Deviſe over was good, after the Wife's Dying without Iſſue by the Teſtator; nor can the Court ſupply the Words, *living at the Time of her Deceaſe:* But the Queſtion is, Whether there are not Words ſufficient in the Will to ſhew, when he intended the Contingency to ariſe; the 80 *l.* is made payable after her Deceaſe; the Word (after) to be taken the ſame as at her Deceaſe, or immediately after her Deceaſe.

As to the *firſt* Point, By the Civil Law it is a Rule laid down in *Swinburne*, that when a Legacy is payable at a Time uncertain, as at the Death of the Teſtator's Wife or the like, if the Legatee be then dead, it is not to be tranſmitted to the Executor, but is a lapſed Legacy.

Caſe 662.
Lord Chancellor.
July 22.

Butler verſus *Duncomb.*

Settlement on Husband for Life, Remainder to Wife for Life, Remainder to the firſt, &c. Son, Remainder to Truſtees for *five Hundred* Years, in Truſt after the Commencement of the Term, to raiſe 4000 *l.* by Rents and Profits, Sale or Mortgage, payable at *Twenty-one* or Marriage. Husband dies leaving one Daughter, who marries. The Portion not to be raiſed in the Life of the Mother, nor any Intereſt to accrue during the Mother's Life, becauſe the Truſt is to raiſe the Portion after the Commencement of the Term, which muſt be intended when it comes into Poſſeſſion.

SEttlement to the Husband for Life, to the Wife for Life, and to *firſt* and other Sons in Tail; in Default of ſuch Iſſue, to Truſtees for *five Hundred* Years, Remainder to the Defendant *Duncomb* the Grandfather, who made the Settlement, and his Heirs.

The Truſt of the Term is declared to be in Truſt, that after the Commencement of the Term, the Truſtees ſhall by and out of the Lands, Tenements and Hereditaments, raiſe for the Portions of ſuch younger Children, as *George* the Son ſhould have by *Anne* his Wife, the Sum of 4000 *l.* to be raiſed and paid out of the Rents and Profits, or by demiſing, ſelling or mortgaging the Premiſſes, to be paid to the Child or Children at *Twenty-one* or Marriage, which ſhall firſt happen.

The Husband died, and left only a Daughter, who when of the Age of *fifteen*, married the Plaintiff in the Life-time of the Mother.

The Queſtion was, Whether the Portion ſhould become payable in the Life-time of the Mother.

The Objection relied on was, that it was not to be raiſed until after Commencement of the Term, and the Term does not properly Commence until it comes in Poſſeſſion, but was a veſted Remainder on the Making of the Settlement, and was no contingent Remainder; and cited the Caſe of *Cotton* and *Cotton*, where a Maintenance was to ariſe, and be paid at the firſt Feaſt that ſhould happen after the Commencement of the Term, heard at the Rolls, and decreed it did not commence until after the Death of the Wife.

For the Plaintiff were cited the Caſes of *Hellier* and *Jones*, where a Term was ſold in the Life-time of the Father, to raiſe Portions at *Twenty-one* or Marriage, *Greaves* and *Mattiſon*, 2 *Jones* 201. If he die without Iſſue Male of his then Wife. *Ant.* Ca. 569, 583.

Cur' adviſare vult.

A Woman being intitled to a Portion of 4000 *l.* after the Death of her Mother, and no Intereſt payable for it in the mean Time, and ſhe having married a conſiderable Tradeſman, decreed by Conſent of the Wife, that he might ſell or diſpoſe of a Moiety of the Portion as he thought fit.

The Cauſe coming on afterwards to be further heard, the Court declared the Portion was not payable until after the Deceaſe of the Jointreſs, nor would carry Intereſt in the mean Time. But Mr. *Butler* being a conſiderable Tradeſman in *Guildford*, the Court thought it not reaſonable, that the whole Money, when payable ſhould be ſecured or laid out for the Benefit of the Wife and Children; but *decreed* the Wife being preſent in Court and conſenting, that Mr. *Butler* might ſell or diſpoſe of a Moiety of it, as he thought fit.

DE

Term. S. Michaelis,

1718.

In CURIA CANCELLARIÆ.

Willſon verſus *Fielding*. *Hillerſden* verſus *Fielding*.

Caſe 663. *Lord Chancellor.*

THE Executrix applies Part of the perſonal Aſſets in paying of a Mortgage. The Plaintiff *Wilſon*, who was a Creditor by ſimple Contract, brings his Action againſt the Executrix, who pleaded *plene Adminiſtravit*, and he takes Judgment againſt the Executrix, to be ſatisfied out of Aſſets *quando acciderint*, and now brought his Bill againſt the Heir to compel him to refund ſo much of the perſonal Aſſets, as had been applied to pay off the Mortgage.

One dies indebted by Mortgage and ſimple Contract: One of the ſimple Contract Creditors gets Judgment of Aſſets *cum acciderint*. The Executor applies the Aſſets to pay off the Mortgage.

The ſimple Contract Creditors ſhall ſtand in the Place of the Mortgagee, as to what he has exhauſted out of the perſonal Aſſets; and this being only by the Aid of Equity, all the ſimple Contract Creditors ſhall come in equally with the Creditor that got Judgment.

And *Hillerſden*, and others, the Plaintiffs in the other Cauſe, being likewiſe Creditors by ſimple Contract brought their Bill to compel the Heir to refund and to be paid their Debts.

And

And the Queſtion was, Whether *Wilſon* by Virtue of his Judgment, was to be preferred to the other Creditors in Point of Payment.

A Leaſe for Years or Bond taken in a Truſtee's Name, being perſonal Aſſets, ſhall be applied in a Courſe of Adminiſtration, and not to the Payment of all Debts equally.

Adjudged that the Plaintiff *Wilſon* being only relievable in Equity, all the Creditors ſhould be paid in Proportion, for the Judgment could not avail him at Law, no Aſſets coming afterwards to the Hands of the Executors: But if there had been perſonal Aſſets, as a Leaſe for Years, a Bond, or the Grant of an Annuity in a Truſtee's Name, then although a Creditor could not come at it without the Aid of a Court of Equity, yet the Aſſets ſhould be applied in a due Courſe of Adminiſtration: But in this Caſe the Compelling the Heir to refund is a Matter purely in Equity, and a Raiſing of Aſſets, where there were none at Law.

Caſe 664. *At the Rolls.*

Turton verſus *Benſon.* *Richardſon & al'* verſus *Benſon.*

On a Treaty of Marriage between *A.* and the Daughter of *B.* The Mother of *A.* ſurrendered Part of her Jointure to enable her Son to make a Settlement; and *B.* agrees to give his Daughter 3000 *l.* Portion. *A.* without the Privity of his Mother gives a Bond to *B.* to pay back 1000 *l.* at the End of ſeven Years. Decreed the Bond to be delivered up, as obtained in Fraud of the Marriage-Agreement. And though *A.* after *B.*'s Death had promiſed to pay the 1000 *l.* to *B.*'s Creditors, yet that was *nudum pactum*, and not binding. *Ant.* Ca. 426, 450.

THE Plaintiff *Turton* on the Marriage of *Benſon*'s Daughter, was to have 3000 *l.* Portion, and in Conſideration thereof, his Mother agreed to ſurrender Part of her Jointure, to enable her Son to make the Settlement.

There were no Articles in Writing, but in the Settlement made by Mr. *Turton*; it is mentioned to be in Conſideration of 3000 *l.* Portion; but Mr. *Benſon* who was *Secondary* of one of the *Counters* in *London*, prevailed on *Turton* to agree between themſelves, unknown to his Mother, and thoſe who treated for the Marriage on his

Behalf, to give a Bond to repay 1000 *l.* Part of the 3000 *l.* at the End of *ſeven* Years, but without Intereſt. *Benſon* being dead, the Bill was brought againſt his Widow and Adminiſtratrix to have the Bond delivered up, as unduly gained, and impoſed upon him by *Benſon* a little before the Marriage without the Conſent or Privity of his Mother or Friends, that treated on his Behalf.

Richardſon and others as Creditors of *Benſon*, brought their Bill to have the Benefit of the Bond, charging a Colluſion between *Turton* and Mrs. *Benſon*, and that ſhe made but a faint Defence to their Prejudice, and charging that *Turton*, ſince the Death of *Benſon*, had promiſed to pay the Money, and in Confidence that it would be paid, it was aſſigned over to the Creditors.

The Bond *decreed* to be delivered up, as obtained in Fraud of the Marriage-Agreement. The Aſſignment to the Creditors did not alter the Caſe; a Bond, which is aſſignable only in Equity, is ſtill liable to and attended with the ſame Equity, as if remaining with the Obligee.

A Bond is only aſſignable in Equity, and when aſſigned is liable to the ſame Equity, as if remaining with the Obligee. *Ant.* Ca. 617.

And as to any Promiſe made by *Turton* that he would pay it, *that* was but *nudum pactum*, and not binding.

The *Decree* in *Michaelmas* 1719, affirmed upon an Appeal to the *Lord Chancellor*.

DE
Term. S. Trinitatis,
1719.
In CURIA CANCELLARIÆ.

Caſe 665. *July* 22.

Pinbury verſus *Elkin.*

Ant. Ca. 662. *Object.* 1. LEgacy is to take Effect after the Death of *Heſter* the Wife without Iſſue, and therefore void, as on too remote a Contingency.

If he die before Iſſue.

If depart not leaving Iſſue.

If died not having a Son; all theſe Limitations create an Eſtate-Tail.

1 Sid. 102. 2. In the Caſe of *Goodyear* verſus *Clarke*, a Caſe cited, as determined in Chancery and referred to the Judges. A Father on the Marriage of his Daughter, provides his Son in Law ſhould refund 500 *l.* if his Wife died without Iſſue in *two* Years: She had a Son, and ſhe and the Son died within the *two* Years. Adjudged the Son in Law ſhould not refund.

3. In the vulgar Senſe, a Man is ſaid to be dead without Iſſue, if he has no Iſſue living at the Time of his Death. If a Queſtion is asked, did *J. S.* die without Iſſue? No, he left a Son, and that Son is dead without Iſſue.

The Words are, *If ſhe die without Iſſue, after her Death* (that is immediately after her Death) the 80 *l.* is to go over; and therefore the *Lord Chancellor* was of Opinion, the Deviſe over was good. It cannot be thought that he intended the Brother ſhould have it, if Iſſue failed *eight Hundred* Years after.

As to ſuch Remainders over, is not a Covenant good to pay a Man 500 *l.* on the Failer of Iſſue of *J. S.*?

Point 2. *John* was dead before his Wife, *Swinburne* 462, 463. Caſe in *Ventris* 347. *econtra*, that altho' the Contingency happen not in the Life of the Party, yet good.

Adjudged the Legacy good, and decreed with Intereſt and Coſts.

THE

A

TABLE

OF THE

Principal Matters

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If an Account current is ſent by one Merchant to another, who receives it, and makes no Objections for two or three Poſts, it is looked upon amongſt Merchants to be an Allowance of the Account. *Page* 276

Where there is a Decree for a mutual Account, the Plaintiff on his own Bill may be decreed to pay the Balance of the Account. 297

A. is Tenant for Life of a Truſt-Eſtate, Remainder to his Sons. *A.* before a Son born, brings a Bill againſt the Truſtees; and an Account is decreed, and afterwards taken. This Account ſhall bind the Sons; for all Perſons, that could be made Parties, were Parties in the Suit. 527

An Adminiſtrator of a Captain of a Company of Marines is intitled to an Account, as well of the Pay of the Company, as of the perſonal Pay of the Captain and his Servants. 682

Equity will not decree an Account of mean Profits, unleſs in Caſe of a Truſt, or an Infant, where no Entry has been made by the Perſon intitled to the Profits. 724

Adminiſtrator. Vide **Executor.**

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Affidavit.

In what Caſes, as to Matters under 40 *s.* The Party's own Oath is allowed to be a good Proof. 176

Age. Vide **Infant.**

Agreement.

A Copyholder for Life, where by the Cuſtom there is a Widow's Eſtate, agrees to ſell for his own Life, and the Life of ſuch Widow as

as he ſhould leave at his Death. His Widow not bound by this Agreement. *Page* 45

If a Perſon covenants to ſettle Land or an Annuity out of Land, and has no Land at that Time, but afterwards purchaſes Land; *that* Land ſhall be liable to the Covenant, and that againſt a voluntary Deviſee. 97

An Agreement for ſtinting a Common between Lord and Tenants ſhall be performed, though oppoſed by one or two humourſome Tenants; ſuch an Agreement being more favoured than an Agreement to incloſe a Common. 103

Where an Agreement made by a Scrivener on Behalf of his Client to compound a Debt, ſhall bind the Scrivener, though not the Client. 127

Subſequent Agreement with *A.* by a Factor of a Merchant for Freight at 6*l.* 10*s.* *per* Tun, good, tho' *A.* took no Notice, he had made a former Agreement with the Merchant at 3*l.* 10*s.* *per* Tun, *that* Agreement having been obſtructed by an Imbargo. 242

A. on the Marriage of his Daughter to *B.* covenants that *B.* ſhould have his Land called *C.* for 1500*l.* leſs than any other would give for it, and afterwards deviſes the Premiſſes to his Grandſon for Life, with Remainders over, and dies: Court refuſed to decree a ſpecifick Execution of this Agreement, by Reaſon of the Uncertainty of it, and it not being mutual. 415

Equity will not carry a voluntary Covenant beyond the Letter. 693

Parol Agreement.

Statute of Frauds and Perjuries.

Whether a Letter wrote during a Treaty of Marriage, and there are ſubſequent Treaties and Propoſals, is an Agreement within the Statute of Frauds, *&c.* *Page* 34

Leſſee for Years having agreed to Surrender his Leaſe to the Leſſor, delivers up the Key, which the Leſſor accepts, but afterwards refuſes to take the Surrender. Leſſee decreed to be diſcharged of the Rent. 112

Marriage Agreement is reduced into Writing, but not ſigned by either Party; yet decreed to be performed. 200

One, by Letter under his Hand, promiſed 1000*l.* with his Niece, but in his Letter diſſuaded her from marrying the Plaintiff; and tho' he was afterwards preſent at the Marriage, and gave her in Marriage; yet the Court would not decree the Payment of the 1000*l.* but left the Plaintiff to his Action at Law. 202

One by Letter ſays, he will give 1500*l.* with his Daughter; the Daughter marries, and the Father is privy to it, and ſeems to approve of it. The Daughter dies, and the Husband takes Adminiſtration. The Father decreed to pay the 1500*l.* Portion. 322

A Marriage is treated between the Plaintiff and Defendant's Daughter, and the Articles are ſigned by the Plaintiff, but not by the Defendant, who tears the Articles on Pretence of being diſſatisfied, tho' not on material Objections. Defendant permitting the Plaintiff to court his Daughter, and not declaring his Diſlike to the Marriage, and

and permitting the young Couple to live with him, decreed the Defendant to pay the Portion according to the Articles. *Page* 373

A publick Survey is held for Sale of an Eſtate, and *A.* offering 1250 *l.* for it, it is accepted and agreed to, and Conveyances are ordered to be got ready, and *A.* is put into Poſſeſſion; but Diſputes ariſing about ſettling the Conveyance, *A.* gets an Aſſignment of a Mortgage, to which the Eſtate is ſubject, and antedates it, and refuſes to go on with the Purchaſe: Though the Agreement was only by Parol, yet on the Circumſtances of the Caſe, *A.* is decreed to proceed in the Purchaſe. 455

Agreements ſince the Statute of *Frauds*, &c. are not to be Part parol, and Part in Writing; yet a Depoſit for Performance of a written Agreement, though there is no Writing declaring the Depoſit to be a Security, is not within the Purview of the Statute. 617

A. and *B.* being ſeverally in Treaty to purchaſe a Houſe and Toft of Land, they agree by Parol, that *A.* ſhall deſiſt, and that *B.* ſhall purchaſe, and let *A.* have Part of the Ground, which he wanted, at a proportionable Price. *B.* purchaſes and refuſes to perform the Agreement. This being a parol Agreement, is within the Proviſion of the Statute of Frauds. 627

Underhand Agreement.

Tradeſman failing compounds, but makes an underhand Agreement with ſome of his Creditors to pay them the Whole. This is a Fraud, and on a Bill brought by him againſt ſome of the Creditors, who refuſed to take the Compoſition, after the Time of Payment was paſſed, the Court would not relieve the Plaintiff. *Page* 71

A. intruſted by *B.* to receive Intereſt on Tallies, receives the Principal, and fails, and afterwards compounds with his Creditors; but *B.* would not come in without having a greater Compoſition than the Reſt, which *A.* agrees to give. *A.* brings a Bill to be relieved againſt this underhand Agreement; but he having been guilty of a great Fraud and Breach of Truſt, and having agreed to make ſome Satisfaction, the Court would not relieve him; but diſmiſſed the Bill. 602

Agreement, when to be performed in Specie, and when not.

A. having taken a Leaſe of a Brewhouſe, and covenanted to repair, aſſigns it by Way of Mortgage to *B.* The Premiſſes being out of Repair, the Leſſor brings his Bill againſt *B.* to compel him to perform the Covenant. *B.* having never been in Poſſeſſion, the Court would not decree him to perform the Covenant *in Specie*, but left the Plaintiff to recover at Law as he could. 272

A. articles on Behalf of *B.* to purchaſe ſome Houſes in *Jamaica*, and covenants to pay 800 *l.* for the ſame, and the Houſes are afterwards deſtroyed by an Earthquake. Though *A.* had no Effects of *B.*'s in his Hands; yet decreed him to pay the 800 *l.* 280

One is bound to transfer 300 *l.* *Eaſt-India* Stock before the 30*th* of *Sept.* then next: Tho' the Stock was much riſen, yet the Defendant decreed to transfer the 300 *l.* Stock in Specie, and to account for

for all Dividends from the Time it ought to have been transferred. *Page* 394

A. on his Marriage with his Daughter to *B.* covenants that *B.* ſhall have his Land called *C.* for 1500 *l.* leſs than any other Perſon would give for it, and dies. The Court refuſed to decree a ſpecifick Performance of this Agreement, by Reaſon of the Uncertainty of it, and it not being mutual. 415

As a beneficial Bargain ought to be decreed in Equity, ſo by the ſame Reaſon a loſing one ought. 423

A. makes a Leaſe for three Years, and in Conſideration of the Leſſee's laying out 100 *l.* in Improvements, covenants at the End of the Term to grant a new Leaſe, at the ſame Rent. Purchaſer of the Inheritance decreed to make good the Covenant. 447

A Man on his Marriage makes a Settlement, whereby the Lands were limited in Remainder after his and his Wife's Death, to the Heirs of his Body begotten on the Wife, and covenants not to bar the Intail, nor ſuffer a Recovery; and having one Daughter, to whom on her Marriage he had given a good Portion, he ſuffers a Recovery, and by Will deviſes the Eſtate to his Daughter for Life, and to her firſt, *&c.* Sons in Tail, with Remainders over. On a Bill for a ſpecifick Performance of the Covenant, the Court would not decree it, but left the Party to recover Damages at Law for Breach of the Covenant. 635

Unreaſonable Agreement.

A. articles to ſell Lands to *B.* for 15000 *l.* the Whole to be paid in Money, or ſo much Land returned, as would make up what he paid ſhort of 15000 *l.* *A.* conveys Part of the Lands to *B.* and by his Perſwaſion values that Part at an Undervalue; and then *B.* ſells this Part to *C.* and afterwards would have returned ſo much of the Lands, as would make up the 15000 *l.* Articles ſet aſide as unreaſonable; but the Sale to *C.* to ſtand. *Page* 186

Agreement on Marriage

Marriage Articles for ſettling Lands varied, by decreeing an Eſtate to one for Life, with Remainder in Tail to his Iſſue, inſtead of an Eſtate-tail to him. 13

A Woman on her Marriage agrees to have no Part of her Husband's perſonal Eſtate, but what he ſhould give her by Will. This bars her of her *Paraphanalia.* 83

An Inhabitant within the Province of *York*, makes a Settlement on his Wife, in Bar of what ſhe might claim out of his perſonal Eſtate, by the Cuſtom of the Province of *York*, or otherwiſe, and dies Inteſtate, leaving his Wife and two Children. Whether the whole perſonal Eſtate ſhall be divided between the two Children, as if there was no Wife? 263

A. on the Marriage of *B.* his Son, ſettles a Leaſe on *B.* for Life, to the Wife for Life, and then to the Iſſue of the Marriage; and *B.* covenants from Time to Time to renew the Leaſe, and aſſign it on the ſame Truſts. *B.* renews the Leaſe, but does not aſſign it, and dies indebted. This Leaſe is bound by the Marriage Agreement, and is not Aſſets for Payment of Debts. 289

Money by Marriage Articles is agreed to be laid out in Land, and ſettled on the Husband and Wife,

and their Iſſue, Remainder to the right Heirs of the Husband: Tho' the Money at firſt is bound by the Articles, yet when the Husband and Wife are dead without Iſſue, the Money is in the Diſpoſal of the Husband, and will be Aſſets, and go to his Executor or Adminiſtrator, and *a fortiori* to his reſiduary Legatee. *Page* 295

A. on the Marriage of his Son with *B.* a Widow, articles to make a Settlement in Conſideration of the Marriage, and 2600 *l.* Portion to be paid to him; 1000 *l.* of the Portion being tied up by Articles on *B.*'s firſt Marriage, it could not be paid. On a Bill brought by the Father, Decreed at the *Rolls*, that the Articles ſhould be performed in ſix Months, or be delivered up. On an Appeal to the Lord Keeper, decreed the Son to make good the 1000 *l.* he being Party to the Articles, and bound by his Wife's Covenant, who while Sole, had covenanted by the Articles for Payment of the Portion. 448

A Widow on the Marriage of her Son, agrees to releaſe her Jointure, that he might make a Settlement, and the Son privately agrees to aſſign a Leaſhold Eſtate to his Mother. This Agreement of the Son ſet aſide as fraudulent. 466

Bond given to the Wife before Marriage to leave her Son 1000 *l.* though extinguiſhed at Law, yet good in Equity, and ſhall bind the real Aſſets; and decreed the Wife after her Husband's Death to redeem a Mortgage, and to hold over; though Copyhold as well as Freehold included in the Security. 480

One on the Marriage of his Son, covenants for himſelf, and his Executors, without naming his Heirs, to ſettle Lands of 150 *l.* a Year on the Son, and the Iſſue of the Marriage, but dies before any Settlement made. The Son enters on the real Eſtate, as Heir to his Father, and ſettles it for the Jointure of a ſecond Wife, who has no Notice of the Articles. Decreed the Articles to be a Lien on the Lands, whereof the Father was then ſeiſed, though no particular Lands are mentioned in the Articles. *Page* 482

A. having Jointure in Part, and 10 *l. per Ann.* charged on other Part of her Son's Eſtate, upon the Marriage of the Son, joined in the Settlement, and accepted 15 *l. per Ann.* in Lieu; but privately the Day before takes a Security from her Son for 10 *l. per Ann.* more out of a Leaſhold Eſtate, which was not compriſed in the Son's Marriage-Settlement, and the Son covenants to pay it. *A.* after the Death of her Son brings Action of Covenant againſt his Widow and Adminiſtratrix for Non-payment of the 10 *l. per Ann.* On a Bill to be relieved againſt the Action, decreed for the Plaintiff. 499

That which is the open and publick Treaty and Agreement on Marriage, ſhall not be leſſened or infringed by any private Agreement. 500

Articles and a Settlement mentioned to be made in Purſuance thereof, were both made before the Marriage; but the Settlement varied from the Uſes in the Articles. Decreed to go according to the Articles. 658

If by the Marriage Articles Lands are agreed to be ſo ſettled, as that the

the Husband would be Tenant in Tail, the Court will direct them to be ſettled on the Husband for Life, and to his firſt, *&c.* Sons in Tail in ſtrict Settlement. *Page* 671

One upon his Marriage, covenants to levy a Fine of his Freehold Lands, and to ſurrender his Copyhold to the Uſe of himſelf and his Wife for their Lives, Remainder to the Heirs Male of their Bodies, and dies, leaving Iſſue a Son and Daughter, before any Fine levied, or Surrender made. The Son for ſecuring Money, covenants to levy a Fine of the Frehold, and to ſurrender the Copyhold, and by Will deviſes his Lands for Payment of his Debts, and dies without Iſſue, having ſurrendered his Copyhold, but levied no Fine of the Frehold. On a Bill by the Daughter to have the Lands ſettled according to the Marriage Agreement, the Lord *Harcourt* was of Opinion, that the Deed of the Father was in Nature of Articles, and when to be carried into Execution in a Court of Equity, the Lands might be ſettled in a ſtricter Manner than in the Words of the Deed, and ſo as the Son's Fine ſhould not bar the Daughter's; and decreed both Frehold and Copyhold to the Daughter. 702

Upon a Rehearing before the Lord Chancellor *Cowper*, he confirmed the Decree as to the Frehold, but for different Reaſons; and as to the Copyhold, there appearing no particular Cuſtom within the Manor for ſuffering a Recovery, was of Opinion the Surrender would bar the Intail, in Caſe the Copyhold had been well ſettled; and diſmiſſed the Bill as to the Copyhold. 704

A Man by Marriage Articles covenants to pay his Wife, if ſhe ſurvives him, 1500 *l.* in full of Dower, Thirds, Cuſtom of *London*, or otherwiſe, out of his real and perſonal Eſtate. *A.* dies inteſtate. The Wife is barred of her Share by the Statute of Diſtributions. *Page* 724

On a Treaty of Marriage between *A.* and the Daughter of *B.* the Mother of *A.* ſurrendered Part of her Jointure to enable her Son to make a Settlement; and *B.* agrees to give his Daughter 3000 *l.* Portion. *A.* without the Privity of his Mother, gives a Bond to *B.* to pay back 1000 *l.* at the End of ſeven Years. Decreed the Bond to be delivered up, being obtained in Fraud of the Marriage Agreement. 764

Alimony. Vide **Baron and Feme.**

Ambaſſador. Vide **Privilege.**

Amendment.

A Miſtake in the Title of an Order amended, though to charge a Surety, that gave a Recogniſance to abide the Order of Hearing. 376

Defendant by Anſwer conſenting that an Award made by her Father ſhould be confirmed, pray'd ſhe might amend her Anſwer, having made an Affidavit that ſhe never read the Award, and that her Anſwer was prepared by her Father, who had wronged her in the Award. Motion denied. 344

The Plaintiff's Chriſtian Name being miſtaken in the Title of the Interrogatories, the Depoſitions could not be read, nor would the

the Court permit the Title to be amended, though moſt of the Witneſſes ſince their Examination were gone to Sea. *Page* 435

Anſwer.

If a Man charges himſelf by Anſwer; Whether his Anſwer ſhall be allowed as a good Diſcharge? 194

Defendant by Anſwer conſented that an Award made by her Father might be confirmed, pray'd ſhe might amend her Anſwer, ſhe having made Oath, that ſhe never read the Award, and that her Anſwer was prepared by her Father, who had wrong'd her in the Award. Motion denied *per Cur'*. 344

A Defendant's Anſwer directed to be read as Evidence at a Trial at Law. 555

Appeals.

No Appeal lies to the Houſe of Lords from a Sentence in the *Delegates*, nor from a Decree on the Statute of Charitable Uſes. 118

Upon an Appeal from the *Rolls* to the *Lord Chancellor* or Lord *Keeper*, the Cauſe is entirely open. 464

If upon a *Certiorari* Bill the Cauſe is brought on to Hearing, the Court, if they think fit, may make a Decree, or ſend it back to the Mayor's Court to be determined there; and ſometimes the Court ſends it back after Publication paſſed, and a *Subpœna* to hear Judgment, and before the Cauſe comes to Hearing. 491

Apportionment. Vide **Average.**

Apprentice. Vide **Maſter and Servant.**

Arbitrators. Vide **Award.**

Aſſent and Conſent. Vide **Legacy.**

Aſſets.

Vide **Heir, Executor.**

A. on his Marriage demiſes Lands to *B.* who redemiſes them to *A.* for a leſſer Term, paying a Pepper-Corn Rent during his Life, and after his Death an annual Sum to his Wife for her Jointure, and a Pepper-Corn for the Remainder of the Term. The redemiſed Term ſhall not be Aſſets to pay any Debts of *A.* but what affect the Inheritance, that Term being raiſed for a particular Purpoſe. *Page* 52

A. having a Leaſe for three Lives, mortgaged it for Ninety-nine Years, if the three Lives lived ſo long, and died after the Mortgage was forfeited. The mortgaged Term, though not Aſſets at Law, decreed to be ſold for Payment of *A.*'s Debts. 54

Legal Aſſets ſhall be applied in a Courſe of Adminiſtration; but equitable Aſſets amongſt all the Creditors proportionably. 62

A. purchaſes a Walk in a Chaſe, and takes the Patent to himſelf and his Wife, and *J. S.* during their Lives, and the Life of the Survivor, and dies indebted. This Patent ſhall not be Aſſets during the Life of the Wife. 67

Land is deviſed to Executors for Payment of Debts, the Value of the

the Land cannot be given in Evidence, as Aſſets at Law in the Hands of the Executors; but when the Land is ſold, the Money will be legal Aſſets. *Page* 106

One makes *A.* his Nephew Executor, and deviſes all his Lands to *A.* and his Heirs in Truſt to ſell, and pay all his Debts and Childrens Portions, and gives his Children 100 *l.* apiece. The Money ariſing by Sale of the Lands is not legal Aſſets; and the Debts and Portions ſhall be paid in equal Proportions. 133

In Caſe Judgment is recovered againſt an Heir, who has a Reverſion in Fee deſcended upon him, which is only Aſſets *cum acciderit*, the Court will not decree a Sale of the Reverſion, but the Creditor muſt wait till it falls. 134

By the Statute of *Frauds and Perjuries*, the Truſt of a Fee is Aſſets at Law; but the Truſt of a Term is not. 248

A Deviſe to Truſtees to pay Debts and Legacies, and the Truſtees are made Executors. The Debts muſt be firſt paid; becauſe the Truſtees being made Executors, the Money is legal Aſſets. *Ibid.*

A Man aſſigns a perſonal Eſtate, which his Wife was intitled to as Executrix of her former Husband, to Truſtees for ſuch Uſes, as he by Deed or Will ſhould appoint, and for want of Appointment, in Truſt for himſelf, his Executors, *&c.* and afterwards deviſes this Eſtate to his Wife and Children. This ſhall be Aſſets, and liable to his Debts, and the Deviſe to the Wife and Children is only a Legacy. 287

A. on the Marriage of *B.* his Son ſettles a Leaſe on the Son for Life, to the Wife for Life, and then to the Iſſue of the Marriage, and *B.* covenants from Time to Time to renew the Leaſe, and aſſign it on the ſame Truſts. *B.* renews the Leaſe, but does not aſſign it, and dies greatly indebted. This Leaſe is bound by the Marriage Agreement, and is not Aſſets for Payment of Debts. *Page* 289

Where a Man has a Power to diſpoſe of Money by his Will, and accordingly gives it by Will; this is Aſſets, and liable to his Debts. 319, 465

A. by Marriage Settlement having a Power to charge the Eſtate with any Sum not exceeding 3000 *l.* for ſuch Purpoſe as he thought fit; by Deed appoints the 3000 *l.* as a collateral Security for the quiet Enjoyment of an Eſtate which he had ſold, and if no Incumbrance did appear, then the Appointment to be void; and by Will appoints the 3000 *l.* to his Daughter. Upon a Bill by the Creditors of *A.* the 3000 *l.* is decreed to be applied to pay his Debts. 465

A. purchaſes a Leaſe in the Name of *B.* who declares it to be in Truſt to permit *A.* to receive the Rents during his Life, and then for one, who was his reputed Wife. This Leaſe is not Aſſets of *A.* nor liable to his Creditors after his Death; for when a Man purchaſes, he may ſettle the Eſtate as he pleaſes. 490

A Seaman aſſigns his Wages, as a Security for Money, and dies. The Aſſignment ſpecifically binds the Wages, and the Money ſecured thereby ſhall be paid thereout preferable to all other Debts. 595

A. ſeiſed of a Leaſhold Eſtate to him and his Heirs for three Lives, ſettles

ſettles it on his Daughter and her Husband for their Lives, Remainder to the Uſe of his own Executors and Adminiſtrators. The Daughter and her Husband die; and *A.* deviſes this Eſtate to his Wife. The Uſe of this being limited to the Executors and Adminiſtrators of *A.* this makes it perſonal Eſtate; and being perſonal Eſtate, *A.* could not deviſe it exempt from his Debts, though due but by ſimple Contract. *Page* 719

Eſtate *pur auter vie*, if limited to Executors, was Aſſets before the Statute of Frauds and Perjuries. 720

A Leaſe for Years, or a Bond taken in a Truſtee's Name, being perſonal Aſſets, ſhall be applied in a Courſe of Adminiſtration, tho' the Creditors cannot come at it without the Aid of Equity. 764

Marſhalling of Aſſets, and in what Order Debts are to be paid.

An Adminiſtrator pays away all the Aſſets in ſatisfying Debts on Specialty. Decreed to pay a Debt due by Decree, though he had no Notice of the Decree before he paid away the Aſſets. 37, 88

A Debt by Decree in Equity is equal to a Judgment. 89

A contingent Security ſhall not ſtand in the Way of a Debt by ſimple Contract, as to the Adminiſtration of Aſſets. 101

One dies indebted both by Bond and Judgment. The Judgment-Creditor levies his Debt out of the perſonal Eſtate. Whether the Bond-Creditor ſhall ſtand in the Place of the Judgment-Creditor, and charge the Land with his Debt. 182

Debts on ſimple Contract ſhall be paid before a voluntary Judgment. *Page* 202

A Man in Conſideration of his Wife's parting with her Jointure of 40 *l.* a Year, gives her Truſtee a Bond to ſettle other Lands of like Value on the Wife for Life, Remainder to the Heirs of his Body by her. He dies Inteſtate, and the Wife takes Adminiſtration, and confeſſes a Judgment to her Truſtee. On a Bill by another Bond-Creditor, decreed the Wife's Bond as to her ſelf only, to be performed before the Plaintiff is paid; but the Children to be poſt-poned to the other Bond-Creditors. 220

Lands are deviſed to Truſtees for Payment of Debts and Legacies, and the Truſtees are made Executors. The Debts muſt be firſt paid; for the Truſtees being made Executors, the Money is legal Aſſets. 248;

Otherwiſe if the Truſtees were not made Executors. 405

Debts on Bonds for Payment of Sums certain, ſhall be preferred in Payment to Demands on Articles ſounding in Damages. 272

A Seaman aſſigns his Wages to *J. S.* as a Security for a Debt he owed to *J. S.* and died inteſtate: It was inſiſted this was only an Agreement in Nature of a Letter of Attorney, and determined by the Seaman's Death, and that there were Bond-Debts. Decreed *J. S.* ſhall be paid in Courſe of Adminiſtration. 391

After Creditors have joined in a Bill and obtained a Decree for Payment of their Debts out of legal and equitable Aſſets; none of them ſhall be admitted to obtain a Preference of the other by obtaining

taining Judgment againſt the Executors. *Page* 435

Where there are legal and equitable Aſſets, the Creditors who will take their Satisfaction out of the legal Aſſets, ſhall have no Benefit of the equitable Aſſets, until the other Creditors, who can only be paid out of thoſe Aſſets, have thereout received an equal Proportion of their reſpective Debts. 436

One dies indebted by Mortgage and ſimple Contract. The Executor applies the Aſſets in Diſcharge of the Mortgage; and one of the ſimple Contract Creditors brings an Action, and takes Judgment to be paid, *Quando Aſſets acciderint.* The ſimple Contract Creditors ſhall ſtand in the Place of the Mortgagee, ſo far as the perſonal Aſſets were exhauſted in paying the Mortgage, and this being by the Aid of Equity, the Creditor who had taken Judgment, *Quando, &c.* ſhall not have a Preference, but all the ſimple Contract Creditors ſhall be paid in Proportion. 763

Aſſets by Deſcent, and in the Hands of the Heir.

The Heir claiming under a voluntary Settlement, ſells the Land. If the Money in the Hands of the Heir ſhall be Aſſets to pay the Anceſtor's Bond. 44

An Equity of Redemption of a Mortgage in Fee is not Aſſets at Law, but is ſo in Equity; and if aliened or releaſed by the Heir, he ſhall be anſwerable for the Value. 61

Whether an Heir, being a Creditor by Bond or Judgment, may retain, as well as the Executor may. 62

One dies indebted both by Bond and Judgment. The Judgment-Creditor levies his Debt out of the perſonal Eſtate. Whether the Bond-Creditor ſhall, in Equity, ſtand in the Place of the Judgment-Creditor, and charge the Land with his Debts. *Page* 182

Aſſets by Deviſe for Payment of Debts. Vide *Truſt for Payment of Portions and Debts, under Title* **Truſt.**

As touching the Applying the perſonal Aſſets to exenorate the real Eſtate, vide *Title* **Real Eſtate.**

Aſſignment and Aſſignee.

Vide **Leaſe.**

One ſettles Lands ſo, that in Caſe his eldeſt Daughter paid 6000*l.* within ſix Months after his Death to the Uſe of his other Daughters, ſhe ſhould have the Lands; but if ſhe failed, the ſecond Daughter to have the like Privilege. The ſix Months being paſt without Payment, Whether the eldeſt Daughter can aſſign over this Privilege. 166

Aſſignee of a Leaſe, by Way of Mortgage, not having entered, ſhall not be compelled in Equity to repair, or perform the Covenants in the Leaſe. 275

Leſſor having recovered at Law the Rent reſerved on the Leaſe againſt an Aſſignee by Way of Mortgage, though he had never entered; he brought his Bill to be relieved; but the Court would not relieve him, it being his Fault to take an Aſſignment of the whole Term; whereas he ſhould have taken a derivative Leaſe, and

and then he would not have been liable to the Rent. *Page* 374

A Seaman aſſigns his Wages to *J. S.* as a Security for a Debt he owed to *J. S.* and died inteſtate. 'Twas inſiſted, this was only in Nature of a Letter of Attorney, and died with the Perſon, and that there were Bond-Debts. Decreed *J. S.* ſhall be paid in Courſe of Adminiſtration. 391

Husband aſſigns a Mortgage in Fee, or a *Choſe in Action*, which he has in Right of his Wife, this will not bind the Wife, if ſhe ſurvives. 401

A Poſſibility cannot be aſſigned; but it may be releaſed. 563

A Choſe en Action is aſſignable in Equity, upon a Conſideration paid. 595

An Aſſignee of a Bond muſt take it ſubject to the ſame Equity, as it was in the Obligee's Hands. 692, 765

Aſſurance. Vide **Deeds.**

Attachment. Vide *under Title* **Proceſs.**

Attorney, Solicitor, Scrivener.

A Scrivener lends his Client's Money to *J. S.* and takes a Bond and Warrant of Attorney to confeſs Judgment in the Client's Name, to whom he delivers a Copy of the Judgment, but keeps the Bond, and afterwards receives the Money, and delivers up the Bond. Whether *J. S.* is liable to pay the Money over again. 265

Average and Contribution.

Vide **Aſſets.**

Vide **Proportion.**

A Leſſee for Years makes ſeveral Under-Leaſes; the Eſtate is out of Repair, and the original Leaſe avoided for Non-payment of the Rent, and ſome of the Under-Leſſees bring a Bill to be relieved againſt the Forfeiture. Equity will not apportion the Rent, nor relieve the Plaintiffs, but on Payment of the whole Rent in Arrear, and repairing the Premiſſes; but having ſo done, they may compel the Reſt of the Under-Tenants to contribute. 103

One deviſes Lands to his Son by his ſecond Wife, in Tail Male, Remainder to his eldeſt Son, by his firſt Wife, provided if the Land ſhould come to his eldeſt Son, that then, he or his Heirs ſhould pay 1000 *l.* to the Teſtator's Daughter within four Months after the Eſtate ſhould come to him or them, and in Default of Payment, Truſtee to enter and raiſe the Money. The Son by the firſt Wife dies leaving a Son: The Son by the ſecond Wife ſuffers a Recovery of a Moiety of the Lands, and dies without Iſſue, ſo that only a Moiety of the Premiſſes came to the Son of the Son by the firſt Wife; yet the Moiety of the Lands ſhall pay the whole 1000 *l.* without any Apportionment, in Regard the 1000 *l.* was a legal ſubſiſting Charge, and the Daughter does not claim under the Son by the ſecond Wife, who ſuffered the Recovery. 359

One conveys Lands to the Uſe of himſelf

himſelf for Life, with Power to mortgage what Part he pleaſed, Remainder to Truſtees to ſell to pay all his Debts, and dies indebted by Judgments, Bonds, and ſimple Contract. This Deed is fraudulent as to the Judgment-Creditors, and they ſhall not be compelled to take a Satisfaction in Average with the other Creditors. *Page* 510

One deviſes his real Eſtate to his Son for Life, and to his firſt, *&c.* Sons in Tail, with Remainders over, and deviſes a Leaſe to his Daughter, and dies not leaving Aſſets to pay Debts. The Son and Daughter ſhall contribute in Proportion, each Eſtate being liable at Law, and the Teſtator's Intention equal between the Deviſees. 756

Award and Arbitrators.

Submiſſion to an Award, ſo as the Arbitrators make their Award at or upon the 27*th* of *March* then next; and if they make no Award, then if the Umpire make his Umpirage on the ſame Day. The Umpire cannot make his Umpirage on the 27*th* of *March*, the Arbitrators having all that Day to make their Award. 100

Submiſſion to a Reference, and the Award to be confirmed by Decree of the Court, without Appeal or Exception; yet Exceptions to the Award allowed. 109

If a Submiſſion to an Award is conditional, *ita quod* the Award is made *de præmiſſis*, and the Award is not made of the Whole, it is void. But if the Submiſſion is not conditional, then the Award, tho' made but of Part of the Premiſſes ſubmitted, is good *pro tanto*. *Ibid.*

An Award ſet aſide, it appearing the Arbitrators were intereſted in the Cargo, touching which the Award was made. *Page* 251

Arbitrators promiſe to hear Witneſſes, but make their Award without doing ſo. Award ſet aſide. *Ib.*

A Bill is brought to be relieved againſt an Award, and the Arbitrators being made Defendants, they demurred to the whole Bill, becauſe the Plaintiff could have no Decree againſt them, and the Plaintiff might examine them as Witneſſes. Demurrer allowed without putting them to anſwer to Matters of Fraud. 380

An Award is made a Rule of Court according to a Submiſſion for that Purpoſe, and an Attachment is taken out for not obeying the Award, and then the Party dies, againſt whom the Attachment iſſues. The Act of Parliament directing Awards to be carried on by Attachment, as in other Caſes of Contempt, the Attachment is gone, and the Remedy loſt. 444

Arbitrators, if they could not agree, were to chooſe an Umpire. They make no Award, and not agreeing about the Perſon to be Umpire, they throw *Croſs and Pyle* who ſhould chooſe him. The Umpire made his Award, and it was ſet aſide by Reaſon of his being choſen in that Manner. 485

The Submiſſion is to three, or any two of them. After all the Arbitrators had had ſeveral Meetings, and heard the Parties, two of them make an Award privately, without Notice to the other Arbitrator. Award ſet aſide. 514

If a Submiſſion is to three, or any two of them, and two by Fraud or Force exclude the other; *that* alone is ſufficient to vitiate the Award. 515

Private Meetings of the Arbitrators with one of the Parties, and admitting him to be heard to induce an Alteration in the intended Award, is Partiality. *Page* 515

If Arbitrators go upon a plain Miſtake, either as to Law or Fact, Equity will relieve againſt the Award. 705

Bankrupt.

DEviſe of 800 *l.* to be inveſted in Land for the Benefit of the Wife of *J. S.* for her Life, and afterwards for her Children, and the Intereſt of the Money to go as the Profits of the Lands, if bought. *J. S.* becomes a Bankrupt. The Intereſt of the 800 *l.* ſhall not be liable to ſatisfy the Creditors. This not being a Truſt created by the Bankrupt, but by the Wife's Relation, and intended for her Benefit. 96

Leſſee for Years becomes a Bankrupt. The Aſſignee under the Commiſſion is not intitled to the Benefit of a Covenant in the Leaſe for Renewal at the End of the Term. 97

One lends Money to a Bankrupt after a Commiſſion ſued out, but without Notice of the Commiſſion. By two Lords Commiſſioners againſt one, who doubted, he cannot come in as a Creditor under the Statute. 157

A. makes a Mortgage, and afterwards a Commiſſion of Bankruptcy is taken out againſt him, and the Commiſſioners make an Aſſignment of his Eſtate, and then he makes a ſecond Mortgage to *B.* who has no Notice of the Bankruptcy. *B.* ſhall not protect his Mortgage by getting an Aſſignment of the prior Mortgage. *Page* 157

Whether a Diſtribution made by the Commiſſioners of Bankrupt upon a ſuppoſed Value of the Bankrupt's Eſtate, when they had no Money to diſtribute, is fraudulent, and to be ſet aſide. 158

Every one is bound to take Notice of a Commiſſion of Bankruptcy. 161

Fraudulent Diſtributions by Commiſſioners of Bankrupt, may be ſet aſide by the Lord Chancellor on a Petition. 162

Whether trading or committing Acts of Bankruptcy beyond Sea, is within the Statute againſt Bankrupts. *Ibid.*

One *Anderſon*, who traded in *Ireland*, adjudged a Bankrupt within the Statutes; but there it was proved, he ſometimes came over to *Cheſter* to buy Goods. *Ibid.*

A Man on his Son's Marriage covenants during his own Life to pay his Son an Annuity. The Son becomes a Bankrupt. The Aſſignee under the Statute ſhall not have the Benefit of this Covenant. 194

A. being beyond Sea conſigns Goods to *B.* then in good Circumſtances, who afterwards becomes a Bankrupt. If *A.* can prevent the Goods coming into the Hands of *B.* or the Aſſignees, it is allowable, and the Aſſignees ſhall have no Relief in Equity. 203

An Award is made in an Adverſary Suit between *A.* and *B.* and confirmed by the Court, *A.* being then a Bankrupt, but not known to be ſo. A Commiſſion is afterwards ſued out. This Award ſhall bind the

the Aſſignee under the Commiſſion. *Page* 229

A. and *B.* are Partners in Trade. *A.* imbezils the joint Stock, and contracts private Debts, and becomes Bankrupt; and the Partnerſhip Goods are aſſigned by the Commiſſioners. Whether the Aſſignees are intitled to any more than what *A.*'s Share of the Partnerſhip Effects amounts to clear after Debts paid, and a Deduction for his Imbezilment. 293

A. is bound in a Bond to *B.* for Payment of Money, *B.* aſſigns it to *C.* in Satisfaction of a Debt. *B.* becomes Bankrupt, and a Commiſſion is taken out againſt him. *C.* in Equity is well intitled to the Bond, for as the Bankrupt himſelf was bound by his Aſſignment; ſo thoſe claiming under the Commiſſion, cannot be in a better Caſe than the Bankrupt himſelf was. 428

A. owes Money to *B.* by Bond, *B.* owes Money to *A.* for Rent, *B.* aſſigns the Bond for a valuable Conſideration to *C.* *B.* becomes Bankrupt. Whether *A.* ſhall retain the Rent due to him from the Bankrupt, out of the Bond. *Ibid.*

A Legacy given to a Bankrupt before his Bankruptcy, may be aſſigned by the Commiſſioners for the Benefit of the Creditors. 432

A. on his Marriage gives Bond to leave his Wife 500 *l.* or a Third of his perſonal Eſtate at her Election. *A.* becomes Bankrupt. Decreed the Wife to come in as a Creditor on her Bond, and what ſhall be paid in Reſpect thereof, to be put out at Intereſt, and the Intereſt to be paid to the Creditors during the Bankrupt's Life, and the Principal to the Wife, if ſhe ſurvived her Husband. *Page* 662

If a Bankrupt having his Certificate allowed, has ſlipped his Time of pleading it at Law to an Action brought for a Debt precedent to the Bankruptcy, Equity will not relieve him. 696

Statutes relating to Bankrupts bind the Courts of Equity, as well as at Law. 697

If a Bankrupt is taken in Execution, pending a Reference of his Certificate to the Judges, the Court will not diſcharge him; but put him to his *Audita querela*. *Ibid.*

Separate Creditors allowed to come in under a Joint-Commiſſion againſt two Partners; but the Joint-Effects are to be applied, firſt to pay the Partnerſhip Debts, and then the ſeparate Debts: And as to the ſeparate Effects; firſt the ſeparate Creditors are to be paid thereout, and then the Partnerſhip Creditors. 706

Catching Bargains. Vide *under Title* **Heir.**

Baron and Feme.

A Wife is not to be examined as a Witneſs againſt her Husband. 79

A Wife, whoſe Husband is by Act of Parliament baniſhed for Life, may make a Will, and in every Thing act as *Feme Sole*, and as if her Husband was dead. 104

A. purchaſes a Copyhold Eſtate, and takes the Surrender to the Uſe of himſelf and his Wife, and Daughter and their Heirs. The Husband and Wife, as one Perſon take a Moiety by *Intireties*, and the Daughter the other Moiety. 120

Baron and Feme bring a Bill for a Demand in Right of the Wife; the Defendant anſwers, Witneſſes are examined, and after Publication paſſed the Husband dies. The Wife may bring a new Bill, and examine Witneſſes, as if no Examination had been in the former Cauſe, for ſhe is not bound by the Proceedings in that Cauſe. *Page* 197

A Term is aſſigned by the Husband, for the ſeparate Uſe of the Wife, who after his Death marries a ſecond Husband, who ſells the Truſt of this Term. The Truſtees decreed to aſſign the legal Eſtate to the Purchaſer, though the ſecond Husband had made no Proviſion for his Wife. 270

One dies inteſtate leaving a Daughter, the Wife of *J. S.* The Daughter dies inteſtate, and after the Husband dies inteſtate: Whether the Share of the Daughter ſhall go to her own Adminiſtrator, or to the Adminiſtrator of her Husband. 302

A Bill is brought againſt Baron and Feme for a Demand out of the ſeparate Eſtate of the Wife, and the Husband is beyond Sea, and not amenable by the Proceſs of the Court: If the Wife is ſerved with a *Subpœna*, ſhe muſt appear, and anſwer the Bill. 613

Eſtates and Intereſts of the Wife.

Settlement made by a Woman before her Marriage for her ſeparate Uſe, without the Husband's Privity, will not bind the Husband. 17

Where a Feme Covert agrees to join with her Husband in making a Surrender, or levying a Fine, and he dies before it is done, Equity will compel her to perform the Agreement. *Page* 61

A Man marries an Executrix. He ſhall anſwer for ſo much of the perſonal Eſtate, as ſhe poſſeſſed, though he took it as a Portion. *Ibid.*

A Feme Covert agrees to ſell her Inheritance, ſo as ſhe may have Part of the Money. The Land is ſold, and her Part of the Money put into Truſtees Hands. This Money not liable to the Husband's Debts, though the Wife afterwards agreed it ſhould be ſo. 64

Whether the Wife's Portion conſiſting of *Choſes in Action*, ſhall upon the Husband's Death be liable to his Debts, the Husband before his Marriage having made an adequate Settlement on his Wife. 68

A. purchaſes a Walk in a Chaſe, and takes the Patent to himſelf and his Wife, and *J. S.* during their Lives, and the Life of the Survivor. The Husband dies indebted. The Wife decreed the Benefit of the Patent during her Life, though *A.* had not left Aſſets to pay his Debts; but after her Death *J. S.* to be a Truſtee for the Executor. 67

Copyhold Land is ſurrendered to the Uſe of the Husband and Wife and their Daughter, and their Heirs. The Husband mortgages it and dies. Mortgage void for the Whole. 120

A. by Will gives his Daughter 400 *l.* and deviſes Lands to her, until *B.* his Son ſhould pay her this 400 *l.* She marries *C.* whoſe Father covenants to ſettle Lands of 100 *l. per Ann.* and *B.* covenants to pay the 400 *l.* to the Husband; and upon Payment, the Lands deviſed

deviſed to the Daughter were to be diſcharged. The Husband dies. Decreed the 400 *l.* to the Wife, and not to the Executor of the Husband. *Page* 190

One conveys Lands in Truſt out of the Rents to pay 6 *l. per Ann.* for the ſeparate Uſe of his Wife, and to be at her Diſpoſal, then to the Uſe of himſelf for Life, Remainder to the Heirs of the Wife, until the Heirs or Aſſigns of the Husband ſhall pay to the Executors, Adminiſtrators or Aſſigns of the Wife 100 *l.* with Intereſt from the Death of the Husband, then to the Wife for her Life for her Jointure, Remainder over. The Wife dies firſt, having by her Will diſpoſed of this 100 *l.* Held, the Wife dying in the Life-time of her Husband, had no Power to diſpoſe of this Money. 328

If a Wife has a Power to diſpoſe of Money in the Life of her Husband, ſhe may diſpoſe of it, by a Writing, in Nature of a Will, though not ſo provided. 329

An Agreement for the Husband and Wife's Parting, and the Terms thereof eſtabliſhed by a Decree. 386

A. on the Marriage of his Son *B.* ſettles Lands to the Uſe of *B.* for Life, Remainder to the Wife for Life, Remainder to the Heirs of their two Bodies, Remainder to *B.* in Fee. *B.* and his Wife by Deed and Fine mortgage in Fee, and ſubject to the Mortgage, the Lands are ſettled to the Uſe of *B.* for Life, and after his and his Wife's Death, to the Heirs of her Body by him begotten, Remainder to his right Heirs. The Wife after her Husband's Death ſuffers a Common Recovery. Whether the Eſtate of the Wife for her Life by the firſt Settlement, and the Limitation to the Heirs of her Body by the ſecond, did conſolidate; and if it did, whether the Eſtate of the Wife was alienable within the Statute of the 11 *H.* 7. *Page* 486.

When a Man comes into a Court of Equity for his Wife's Portion, the Court will oblige him to make a Settlement upon her, or ſecure her a Maintenance, in Caſe ſhe ſurvives him. 494

On the Marriage of two Infants, an Act of Parliament is obtained for ſettling a Jointure in Bar of Dower; provided that the Jointure ſhall ceaſe, if the Wife, when of Age, did not ſettle her Land; but nothing is ſaid as to that Part of her Fortune, which was in Money, Part of which was a Mortgage for 1300 *l.* taken in a Truſtee's Name. The Wife, when ſhe came of Age, ſettled her own Land; and then the Husband dies. Decreed the Mortgage to the Executors of the Husband, and that it ſhould not ſurvive to the Wife as a *Choſe en Action.* 501

In all Caſes, where the Husband makes a Settlement equivalent to the Wife's Portion, it ſhall be intended, that he was to have the Portion. 502

Where a Woman on her Marriage reſerves a Power to diſpoſe of her perſonal Eſtate, all that ſhe dies poſſeſſed of is to be taken to be her ſeparate Eſtate, or the Produce of it, unleſs the contrary can be made appear: And as ſhe has Power over the Principal, ſhe may diſpoſe of the Intereſt. 535

A Woman ſeiſed in Fee of Lands charg'd with ſpecifick Debts, marries. The Husband receives the

Rents, but does not pay the Intereſt of the Debts. The Wife dies without Iſſue. On a Bill by her Heir, decreed the Husband ought to have kept down the Intereſt. *Quære.* *Page* 566

A. and his Wife mortgage the Wife's Eſtate, and *A.* covenants to pay the Money, but the Equity of Redemption is reſerved to them and their Heirs. *A.* dies, and his Wife ſurvives. The Mortgage ſhall be diſcharged out of the Husband's Eſtate. 604

Where the Husband and Wife bring a Bill for the Execution of a Truſt of a real Eſtate deviſed by Will for the Benefit of the Wife, it muſt be decreed according to the Will: But where the Husband comes for a perſonal Demand in Right of his Wife, the Court may impoſe Terms upon him. 626

A. deviſes the Surplus of his perſonal Eſtate to his Daughter, the Wife of *B.* for her ſeparate Uſe, and makes her Executrix. Surplus being deviſed to the Wife, and not to Truſtees, when it comes to the Wife, it belongs to the Husband: But whether Equity will not interpoſe? 659

The Wife joins with her Husband in a Fine to raiſe 400 *l.* by Mortgage of her own Eſtate, to buy him a Place. Husband dies: The Mortgage ſhall be paid out of his perſonal Eſtate, if there are Aſſets to pay his other Debts. 689

A Man pays Contribution Money upon a Commiſſion of Bankruptcy for a Debt due to his Wife, and dies before a Dividend made, and then the Wife dies. The Executors of the Wife are intitled to the Dividend; for the Husband's paying Contribution Money does not alter the Property of the Debt. *Page* 707

A Woman being intitled to a Portion of 4000 *l.* after the Death of her Mother, and no Intereſt being payable for it in the mean Time, and ſhe having married a conſiderable Tradeſman, it was decreed by the Wife's Conſent, that the Husband might ſell or diſpoſe of a Moiety of the Portion, as he thought fit. 762

In what Caſes the Act of the Husband ſhall bind the Wife, and not.

A Copyholder for Life, where by the Cuſtom there is a Widow's Eſtate, agrees to ſell for his own Life, and the Life of ſuch Widow, as he ſhould leave, and dies. His Widow is not bound by this Agreement. 45

Bill is brought for a Legacy againſt Baron and Feme, who was Executrix of the Teſtator. The Defendants anſwer, Witneſſes are examined, and after Publication paſt the Husband dies. The Wife ſhall be bound by the Anſwer and Depoſitions: But it might be otherwiſe if the Wife's Inheritance was in Queſtion. 249

A Man marries a Woman intitled to a Mortgage in Fee, and after Marriage aſſigns his Intereſt in the Mortgage to Truſtees to call in the Money, and lay it out in Land, to be ſettled upon the Husband and Wife, and their Iſſue, Remainder to the Heirs of the Husband. The Husband dies without Iſſue, and after the Wife dies. This Mortgage is a *Choſe en Action*, and the Husband has only a Power to reduce it into Poſſeſſion, and the Wife ſurviving, it ſhall go to her Executor, and not to

the Executor of the Husband. *Page* 401

How far the Husband is anſwerable for the Acts of the Wife.

Feme Adminiſtratrix waſts the Aſſets, then marries and dies. The Husband is liable to no more than the Value of the Aſſets, which came to his or his Wife's Hands after the Intermarriage. 118

Alimony and ſeparate Maintenance.

An Agreement for the Husband and Wife's Parting, and for the Husband's returning his Wife's Portion to the Father, and for the Father's Indempnifying the Husband from the Maintenance and Debts of the Wife, eſtabliſhed by a Decree, though the Husband offered to receive and maintain his Wife. 386

By Articles before Marriage 6000 *l.* Part of the Portion is agreed to be inveſted in Land, and ſettled to the Husband for Life, then to the Wife for Life, Remainder as a Proviſion for younger Children, Remainder to the Husband in Fee. The Husband having by his Cruelty and ill Treatment forced his Wife to ſeparate from him, the Court decreed the Intereſt of the 6000 *l.* to be paid the Wife for her ſeparate Maintenance 'till Cohabitation. 493

A Woman having been uſed with Cruelty by her Husband, becomes intitled to 3000 *l.* as her Share of her Mother's perſonal Eſtate, who died inteſtate. Decreed the Money to be put out, and the Intereſt to be paid to the Wife for her ſeparate Uſe, and then to the Husband for Life if he ſurvived her, and the Principal to be paid to the Iſſue, and if no Iſſue, to the Survivor of Husband and Wife. *Page* 671

A Husband having uſed his Wife with Cruelty, and being an extravagant Perſon, and waſting all his Subſtance, the Court decreed the Intereſt of a Truſt-Bond given for the Wife's Portion, to be paid to the Wife for her ſeparate Maintenance. 752

Bill.

Who muſt be Parties. Vide *Title* **Parties.**

An Executor being deſirous to apply the Aſſets, as far as they would go, in ſatisfying the Debts, brings a Bill againſt all the Creditors, that they might, if they pleaſed, conteſt each others Debts, and that their Preference might be ſettled. Adjudged on a Demurrer to be a proper Bill. 37

Bill by Executor to avoid Bonds given by the Teſtator, ſuggeſting they were gained by Threats and undue Means. The Defendant by Anſwer ſays, they were given for Money lent and Debts due. It appeared by the Proofs, that the Defendant was a common Harlot, and that the Teſtator had unlawful Converſation with her. Though this was not laid in the Bill, yet it was ſufficiently put in Iſſue by the Defendant's Anſwer, which ſaid the Bonds were given for Money lent. 187

A Bill will not lie for quieting one in the Poſſeſſion of a Pew in a Church, though the Plaintiff has a Decree before the Ordinary for this Pew. 226

Whether

Whether a Bill will lie againſt Churchwardens after they are out of their Office, for refuſing to make a Rate to reimburſe the Plaintiff according to an Order of Veſtry. *Page* 262

Bill is brought to have the Benefit of a former Decree. Plaintiff can't examine Witneſſes, much leſs the ſame Witneſſes, to the Matters in Iſſue in the former Cauſe; but on ſuch Bill, the Court may examine the Juſtice of the former Decree; but then it muſt be on the Proofs taken in the Cauſe, wherein that Decree is made. 409

A Bill may be brought on Behalf of a Child in *ventre ſa mere* for an Injunction to ſtay Waſte. 711

Bill of Diſcovery.

For diſcovery of Deeds. Vide *under Title* **Deeds loſt or concealed.**

A. having Lands contiguous to *B.* brings his Bill, that *B.* may diſcover the Boundaries of his Eſtate, as they appear by his Deeds. *B.* is not obliged to make this Diſcovery. 38

A Bill may be brought againſt an Executor for the Diſcovery of the perſonal Eſtate, before the Will is proved, or during the Litigation thereof in the ſpiritual Court. 49

African Company hire the Defendant's Ship to freight, and the Defendant covenants not to trade in any of the Goods, in which the Company dealt, and if he did, to pay double the Value for ſuch Goods, with Liberty to the Company to deduct the ſame out of the Freight. The Company bring a Bill to diſcover, whether the Defendant traded in any of the ſaid Goods. Though this be a Penalty, yet the Defendant ſhall diſcover, it being his own Agreement. *Page* 244

A Bill lies to diſcover who was the Owner of a Wharf or Lighter, to enable the Plaintiff to bring an Action for the Damage his Goods had ſuſtained by the Neglect of the Lighterman. 442, 443

So Bill of Diſcovery lies to diſcover the Part-owners of a Ship, to enable one of the Freighters, that ſuffered by Neglect of the Maſter, to bring his Action. 443

Bill for Diſcovery, whether in a Mortgage, which had been aſſigned to the Defendant, there was not ſome Truſt declared for the Benefit of the Plaintiff. Defendant by Anſwer denied there was any ſuch Truſt. The Anſwer being replied to, the Queſtion at the Hearing was, whether the Defendant ſhould be obliged to produce the Deed? The Court would not compel him ſo to do, for by this Method Purchaſers may be blown up. *Q.* 463

Appeals and Certiorari Bills.

Vide *Title* **Appeals.**

Bill of Revivor. Vide **Abatement.**

Bill to examine Witneſſes in perpetuam rei Memoriam. Vide *Title* **Witneſs.**

Bill of Review.

Where a Demurrer to a Bill of Review is allowed, it may be inrolled; but if over-ruled, that cannot be inrolled, to prevent the Demurrer's being reargued. 120

Lis Pendens.

After a Bill brought by a ſecond Mortgagee againſt the Firſt and Third Mortgagees to diſcover Incumbrances, the laſt Mortgagee may get in the firſt Incumbrance, and protect himſelf againſt the Second. *Page* 29

A Deviſee obtains a Decree to hold and enjoy againſt the Heir, who it was ſuppoſed had ſuppreſſed the Will. Pending this Suit, a third Perſon gets an Aſſignment of a Mortgage made by the Teſtator, and then purchaſes the Equity of Redemption of the Heir, with Notice of the Will. The Court would not admit the Purchaſer to diſpute the Juſtice of the Decree, nor to try at Law, whether the Will was not cancelled by the Teſtator. 216

Bond.

A Bond is given in common Form for Payment of Money; but proved, the Agreement was, that the Obligor ſhould marry ſuch a Man, or pay the Money in the Bond. Obligor relieved againſt the Bond. Marriage ought to be free. 102

Bond is given to a common Harlot by one who had unlawful Converſation with her. If the Obligor himſelf comes to be relieved againſt this Bond, the Court may refuſe to interpoſe; yet if his Executor comes for Relief, it may vary the Caſe. 187

A. being a Widow, gives a Bond to pay *B.* 100 *l.* if ſhe married again, and *B.* gives *A.* a Bond to pay her Executors the like Sum, if ſhe did not marry again. *A.* marries ſoon after. Her Bond decreed to be delivered up. *Page* 215

A Man ſettles Land on his Son in Tail, and takes a Bond from him, that he ſhall not dock the Intail. Bond decreed to be good. If the Son would not have given the Bond, the Father might have made him only Tenant for Life. 233

Bond to a Houſe-keeper for ſecret Service. Equity will not relieve: Otherwiſe if the Bond was given to a common Strumpet. 242

One ſettles Land on his Daughter in Tail, and takes a Bond from her not to commit Waſte. An idle Bond, and decreed to be delivered up. 251

Bond for 400 *l.* given by *A.* to *B.* for *B.*'s quitting his Pretence, and procuring *A.* to be admitted Purſer, to one of the King's Ships. Court relieved on Payment of Principal without Intereſt or Coſts. 308

Bond extinguiſhed at Law decreed good in Equity, and to bind the real Aſſets. 480

One has Judgment for the Penalty of a Bond. Though the Principal and Intereſt exceed the Penalty, yet he ſhall recover no more than the Penalty. *Quære.* 509

Bonds for Marriage Brocage.
Vide Marriage.

Bottomry-Bonds.

One lends 300 *l.* on a Bottomry-Bond, and inſures 450 *l.* on the Ship, but had no Intereſt in the Ship or Cargo. Policy decreed to be delivered up. 269, *contra* 717

Burrough English.

An Eſtate *pur auter Vie* of Lands in *Burrough Engliſh* ſhall deſcend to the cuſtomary Heir. *Page* 226

Charity, and charitable Uſes.

NO Appeal lies to the Houſe of Lords, from a Decree upon the Statute of charitable Uſes. 118

Whether a Decree made upon Exceptions taken to a Decree of Commiſſioners for charitable Uſes be final; and whether the Court can grant a Rehearing? *Ibid.*

If a Charity is given to a ſuperſtitious or illegal Uſe; tho' it cannot take place, yet it ſhall be performed *cy pres*, *&c.* 266

A School-houſe being erected by voluntary Contributions of the Inhabitants of *A.* on the Waſte of the Lord of the Manor, the Lord enfeoffs Truſtees in Truſt, that the Inhabitants of *A.* may for ever have a School, *&c.* as of the Gift of the Lord. Whether the Truſtees or the Inhabitants are to nominate the School-maſter? 387

Ground was granted to Truſtees, whereon to erect a Chapel for the Celebration of divine Service, for the Uſe of the Inhabitants. Decreed in the *Dutchy*, that the Nomination of the Miniſter was in the Inhabitants. *Ibid.*

If the School be not a Free-School, the Inhabitants have no Right to ſue in the Attorney General's Name. *Ibid.*

The Reverſion in Fee of divers Lands let on Leaſes, on which in all 70 *l. per Ann.* Rent was reſerved, was granted by King *H.* 8. to the Corporation of *Coventry*, 400 *l.* of the Purchaſe-Money was paid by the Corporation, and 1000 *l.* by Sir *Tho. White*, but in the Grant the Corporation was ſaid to be the Purchaſer; and it was by the Deed declared, that the whole 70 *l. per Ann.* ſhould be applied to the ſeveral Charities therein mentioned. The Leaſe expiring, the Value of the Lands were greatly improved, but the Surplus had been all along received by the Corporation of *Coventry*. The Lands themſelves not being given to the Charities, but particular Rents out of the Lands, decreed the Corporation ſhould have the Surplus of the Profits. But this Decree was reverſed by the Houſe of Lords. 397

A Corporation for a Charity are but Truſtees for the Charity, and may improve; but cannot do any Thing to the Prejudice of the Charity, or in Breach of the Rules of the Founder. 412

By the Rules made on the Foundation of an Hoſpital, no Leaſe was to be made for above Twenty-one Years. The Hoſpital makes a Leaſe for Twenty-one Years, with a Covenant by Renewal to make it up ſixty Years. This Covenant not binding in Equity, as being equally prejudicial to the Hoſpital, as a Leaſe for ſixty Years. 411

Charity Lands being let at a great Under-value, the Leaſe ſet aſide, and the Leſſee decreed to pay the Arrears of Rent according to the full Value of the Land, and to deliver up the Poſſeſſion. 414

Iſſue at Law directed upon a Rehearing of Exceptions taken to a Decree made by Commiſſioners of

of charitable Uſes, after that Decree had been twice confirmed. *Page* 507

Deviſe and Appointment to a charitable Uſe.

Tenant in Tail deviſes Lands for Maintenance of a School-Maſter, and other charitable Purpoſes. Decreed to be a good Appointment, within the Statute of charitable Uſes, though no Fine was levied or Recovery ſuffered. 453

Deviſe to a College, though *Mortmain* and void at Law, yet allowed good within the Statute of *Eliz.* 454

Feme Covert Adminiſtratrix deviſes to a Charity, held good. *Ibid.*

Deviſe of a Copyhold to a Charity, without ſurrendring to the Uſe of the Will, good. *Ibid.*

Deviſe of a Manor held *in Capite* to a Charity, though it had been void for a third Part, if not for a Charity; yet good for the Whole. *Ibid.*

Miſnoſmer ſupplied in Caſe of a Gift to a Charity. *Ibid.*

Frehold Lands were deviſed to a Charity, but the Will was not executed in the Preſence of three Witneſſes. Adjudged the Will being void as a Will, it could not operate as an Appointment within the Statute of 43 *Eliz.* 597

But ſuch a Will may operate as an Appointment of Copyhold Lands, where there is a Surrender to the Uſe of the Will, they paſſing by the Surrender, and not by the Will. 598

An Appointment by a Tenant in Tail to a Charity, ſhall bind the Reverſioner in Fee. 755

The Statute of charitable Uſes ſupplies all Defects of Aſſurance, which the Donor was capable of making. *Page* 755

Charter-Party.

Though a Charter-party is ſo penn'd, that no Freight can be recovered upon it at Law; yet if the Owners of the Ship have a juſt Demand, Equity will relieve. 210

Commiſſion.

A Commiſſion to examine Witneſſes returnable *ſine Dilatione* muſt be executed before the ſecond Return of the next Term, and if executed afterwards it is void, and the Depoſitions ought to be ſuppreſſed. 197

Common Recovery. Vide **Recovery.**

Common.

An Agreement between Lord and Tenants to ſtint a Common, more favoured than an Agreement to incloſe a Common; and one or two humourſome Tenants oppoſing ſhall not hinder the Performance of an Agreement for ſtinting a Common. 103

A Man grants to *J. S.* common in his Down for one Hundred Sheep. The Grantee brings a Bill againſt the Grantor, for that he had over ſtock'd the Common, and praying he might be injoined from ſo doing. Bill diſmiſſed. 116

The Lord enfranchiſes a Copyhold with all Common thereunto belonging. Though the Common is extinct at Law, yet it ſubſiſts in Equity. 250

Lord of a Manor incloſes Part of the

the Common, inſiſting it was an Improvement within the Statute of *Merton*. The Court continues the Injunction, and directs a Trial, whether ſufficient Common was left for the Tenants. *Page* 301, 356

The greateſt Part of the Landholders intitled to Right of Common agree to a Stint of the Common. This will not bind the reſt. 575

Tenants in Common. Vide **Jointenants.**

Concealment.

A. lends Money to *B.* on Mortgage, but before he does ſo ſends *C.* to inquire of *D.* who had a prior Mortgage, whether he had any Incumbrance on *B.*'s Eſtate, who denied he had any. This was proved by *C. D.* by Anſwer confeſſed *C.* enquired of him what Money *B.* owed him; but denied *C.* told him, that *A.* was about to lend *B.* any Money. Decreed at the *Rolls*, the Eſtate ſhould ſtand charged in the firſt Place with *A.*'s Debt: But upon an Appeal, Iſſue directed to try, whether *C.* told *D.* that *A.* was about to lend Money on *B.*'s Eſtate. 554

Condition.

One deviſes Lands to his eldeſt Daughter upon Condition, that within ſix Months after his Death ſhe pays certain Sums to his two other Daughters, and if ſhe failed, he deviſed the Land to the ſecond Daughter on the like Condition. The Court may enlarge the Time of Payment, though the Lands are deviſed over. 222

In all Caſes, that lie in Compenſation, the Court may diſpenſe with the Time of Payment; even in Caſe of a Condition precedent. *Page* 222

One deviſes Lands to his Son by his ſecond Wife in Tail Male, Remainder to his eldeſt Son by his firſt Wife. Provided, that if the Land ſhould come to his eldeſt Son, then he or his Heirs ſhould pay 1000 *l.* to the Teſtator's Daughter within four Months after the Eſtate ſhould come to him or them; and in Default of Payment, the Truſtees to enter and raiſe the Money. The Son by the firſt Wife dies leaving a Son: The Son by the ſecond Wife dies without Iſſue. Though the Eſtate never came to the eldeſt Son by the firſt Wife, he dying in the Life of his half Brother, yet the Proviſo being that the eldeſt Son or his Heirs ſhould within four Months after the Eſtate came to him or them, pay, *&c.* The Land is liable to pay the 1000 *l.* 359

Legacies are given by a Will to *A. B. C.* and *D.* on Condition, that as they came of Age, they ſhall releaſe all Claims to the Teſtator's Eſtate. This Condition muſt be taken *diſtributively*; and ſuch only, as refuſe to releaſe, ſhall forfeit their Legacies. 478

A. gives ſome Lottery Tickets amongſt her Servants, on Condition if any of them came up a Prize of 20 *s.* or more, they ſhould give one Half to her Daughter. The Ticket given to the Foot-Boy came up a Prize of 1000 *l.* On a Bill by the Daughter, a Moiety of the 1000 *l.* was decreed her. 560

A Gift to an Infant on Condition.

tion. The Infant is bound by the Condition. *Page* 561

One deviſes Lands to Truſtees, in Truſt for his Daughter till Marriage, and then to convey to her and her Heirs, if ſhe married with Conſent of the Truſtees; but if ſhe married without ſuch Conſent, then to convey to others. She marries with the Conſent of her Father in his Life-time. The Condition is diſpenced with. 721

Condition precedent.

One deviſes Lands to Truſtees and their Heirs, in Truſt to pay ſuch of his Debts and Legacies as his perſonal Eſtate ſhould fall ſhort to pay; then in Truſt for his Niece *Elizabeth* (his Heir at Law) for her Life, in Caſe ſhe within three Years after his Death ſhould be married to the Lord *Guildford*, Remainder to her firſt, *&c.* Son, by the Lord *Guildford*, in Tail Male; in Default of ſuch Iſſue, or in Caſe the Marriage ſhould not take Effect within the three Years, then in Truſt for the Lord *Falkland* for Life, Remainder to his firſt, *&c.* Son in Tail Male, Remainder to the Teſtator's own right Heirs. The Niece's Marriage with the Lord *Guildford* does not take Effect, and after the three Years ſhe marries Mr. *Bertie*, with the Truſtee's Conſent. This is a Condition precedent, and Equity cannot relieve againſt the Non-performance. 333

Equity cannot relieve againſt the Breach of a Condition precedent, nor can give an Eſtate that never veſted, by Reaſon of the Non-performance of a Condition precedent. 339

Condition or Covenant broken, and how far relievable.

If the Remainder Man by Practice or Contrivance prevents the Performance of a Condition, Equity will relieve. *Page* 344

One having Iſſue a Daughter, deviſes his Land to his Kinſman, paying 1000 *l.* to his Daughter. The Kinſman makes Default in Payment; the Daughter who is Heir brings Ejectment and recovers. Deviſee relieved on Payment of Principal, Intereſt and Coſts, though to the Diſinheriſon of an Heir, and in Favour of a voluntary Deviſee. 366

A. by Will gives his Grand-daughter 30000 *l.* to be paid by 1000 *l.* a Year, and deviſes his Lands to *B.* on Condition, that he pays his Debts and Legacies. The 1000 *l.* a Year not being paid, the Grand-daughter enters. If *B.* will be relieved againſt the Breach of the Condition, it muſt be upon Payment of Intereſt for each 1000 *l.* from the Time it became due, together with Coſts. 595

Contribution. Vide **Average.**

Conveyance. Vide **Deeds.**

Copyhold.

A Rent out of a Copyhold aliened by Surrender and Admittance for a valuable Conſideration, good in Equity. 16

A Copyhold Eſtate of the Nature of *Gavelkind*, is deviſed to the eldeſt Son, paying a Legacy thereout to his younger Brother, but no Surrender to the Uſe of the Will. Equity will ſupply the

Want of a Surrender, as well in Favour of an elder, as a younger Son. 163

Equity will ſupply the Want of a Surrender to the Uſe of a Will, when it is deviſed as a Proviſion for younger Children, or in Favour of Creditors, or a Purchaſer. 164

The Lord enfranchiſes a Copyhold with all Common thereunto belonging. Though the Common is extinct at Law, yet it ſubſiſts in Equity. 250

A Copyhold is granted to three for their Lives *ſucceſſive*: If there is no Cuſtom within the Manor, that the firſt Taker may diſpoſe of the Whole, this ſhall go in Succeſſion, and not to the Executor of the firſt Taker. 264

An Eſtate in a Copyhold *pur auter vie* ſhall go to Executors or Adminiſtrators, as well as a Frehold *pur auter vie*. 265

One deviſes a Copyhold of the Tenure of *Burrough Engliſh* to his eldeſt Son, but had made no Surrender to the Uſe of his Will, and deviſed ſome Houſes to his youngeſt Son. The Houſes being ſoon after burnt down, and the youngeſt Son, who was an Infant, having never entered thereon, the Court, as this Caſe was circumſtanced, would not ſupply the Want of a Surrender. *Ibid.*

By a Marriage-Settlement, a Frehold Eſtate is ſettled on Husband and Wife for their Lives, Remainder to their firſt, *&c.* Son in Tail, Remainder to Truſtees for five Hundred Years, to raiſe Portions for Daughters, Remainder over; and the Husband Covenants to ſettle his Copyhold Eſtate to the ſame Uſes. A Surrender is made, but no Proviſion is made for Daughters: The Frehold Eſtate not being ſufficient for raiſing the Daughters Portions, decreed the Copyhold Eſtate ſhould be liable thereto. 321

Copyholder in Fee makes a conditional Surrender, for ſecuring a Sum of Money, at the End of ſix Months. The Money is not paid, and the Mortgagee being willing to continue his Money, they deſire the Lord, that the old Surrender may be taken up, and a new one made for ſix Months longer; but the Lord inſiſts the Mortgagee ſhould come in to be admitted, and pay a Fine of 2 Years Value. Equity will not relieve againſt the Lord. 367

A Man Tenant in Tail of the Truſt of a Copyhold Eſtate deviſes it by Will. The Eſtate will paſs to the Deviſee, the Will being ſufficient to bar the Intail of a Truſt. 585

Where there is no particular Method in the Lord's Court to bar Intails, a common Surrender is ſufficient, though the Intail is of a legal Eſtate. 585, 705

The Widow of a *Ceſtuy que Truſt* of a Copyhold Eſtate ſhall have her *Free-Bench*, as well as if her Husband had had the legal Eſtate. 585

One, who is *Ceſtuy que Truſt* of a Copyhold Eſtate may deviſe it, without making a Surrender to the Uſe of his Will. 680

Corporation.

Bill to be relieved againſt an Award made by ſome of the Members of the *Eaſt-India* Company, and the Arbitrators, and ſome of the particular Members are made Defendants. They may demur to the whole Bill without anſwering to the

the Fraud charged; for the Plaintiff can have no Decree againſt them, nor can the Anſwer be read againſt the Company; but they ought to be examined as Witneſſes. *Page* 380

After a Decree againſt a Corporation for a Sum of Money, and a *Diſtringas* had iſſued out againſt them for the Duty decreed, the Court refuſed to give them any Time, or to let them be examined on Interrogatories. 395

Private Members of a Company made liable to the Company's Debts, where the Company had no Goods. 396

Coſts.

The ſecond Mortgagee brings a Bill to redeem the firſt Mortgagee, who had been put to great Charge in foreclоſing the Mortgagor. *Cur.* The Coſts, which the firſt Mortgagee has been put to, ſhall not be taxed, as in Caſe of an Adverſary Suit, but he ſhall be allowed all his Coſts and Charges; as is done, where a Solicitor lays out Money for his Client; and the Profits of the mortgaged Premiſſes ſhall be applied to pay off thoſe Coſts, before they go to ſink the Principal. 185

Covenant. Vide **Agreement.**

Covenant broken, and how far relievable. Vide *under Title* **Condition.**

Courts. Vide **Juriſdiction.**

Court of Chancery.

Fraud in obtaining a Will relating to perſonal Eſtate only, is not examinable in Chancery, after the Will is proved in the Spiritual Court, ſo long as that Probate is in Force. *Page* 8

An Account decreed of an Inteſtate's perſonal Eſtate, notwithſtanding an Account had been before taken, and a Diſtribution decreed in the Spiritual Court. 47

In the Court of Chancery there were ſeveral Things that belonged to the King as *Pater Patriæ*, and fell under the Care and Direction of this Court, as Charities, Infants, Ideots, Lunaticks; and afterwards ſuch of them, as were of Profit and Advantage to the King, were removed to the Court of *Wards* by the Statute; but upon the Diſſolution of that Court, they came back again to the Chancery. 342

Court of Chancery will not examine the *Quantum* of the King's Debt, nor how far Extents that are ſued out are neceſſary, the Court of Exchequer being the King's Court of Revenue, and the proper Court for that Purpoſe. 426

Otherwiſe, if the Defendant who has ſued out the Extent in Aid, confeſſes by Anſwer that he has ſufficient Eſtate of his own to pay the King's Debt. *Ibid.*

Or where it appears to be a fraudulent Contrivance by an Extent in Aid to gain a Preference to a Debt of an inferior Nature. *Ibid.*

Court of Exchequer.

The Court of Exchequer is the King's Court of Revenue, and Bill for an Account will not lie in Chancery at the Suit of *A.* whoſe Eſtate is extended by virtue of Extents, one at the Suit of the King, and the other an Extent in Aid, this Matter being properly cogniſa-

cogniſable in the Court of Exchequer. *Page* 426

Stannary Court.

Stannary Court, a Court of Law, but not of Equity. 483

Spiritual Court. Vide *Title* **Spiritual Court.**

Tenant by Curteſie.

Tenant by Curteſie ſhall have the Aid of Equity, againſt a Truſt-Term aſſigned in Truſt to attend the Inheritance. 324

A. deviſed 300 *l.* to be laid out in Land, and ſettled to the Uſe of his Daughter and her Children, and if ſhe died without Iſſue, to go over. She married *B.* and had a Child by him, and ſhe and the Child being dead, and the Money not laid out; on a Bill brought by *B.* decreed the Money to be conſidered as Land, and *B.* to be Tenant by the *Curteſie.* 536, 585, 681

A Man ſhall be Tenant by the Curteſie of a Truſt, as well as of a legal Eſtate. 585, 681

Cuſtoms of London. Vide *Title* **London.**

Debts. Creditor and Debtor.

Vide *Truſt for Payment of Debts, under Title* **Truſt.**

A Judgment or Sentence recovered in *France* for Money due, muſt be conſidered here only as a Debt on ſimple Contract, and the Statute of Limitations will run upon it. *Page* 540

In what Caſes one Debt ſhall be ſet off in Equity againſt another.

A Clothier ſends Cloth to the Factor to ſell for him, and dies. The Adminiſtrator brings an Action againſt the Factor for the Cloth. The Factor cannot in Equity deduct out of the Value of the Cloth, a Debt owing to him from the Clothier. 117

Where there are mutual Dealings between two Perſons, and one becomes Bankrupt, the Balance of the Account only ſhall be anſwered to the Bankrupt's Eſtate. *Ibid.*

The Order and Priority in which Debts are to be paid. Vide *under Title* **Aſſets.**

Debt to the Crown. Vide **Prerogative.** Vide **Extent.**

Decree.

A Debt by a Decree ſhall be paid before Bonds. 37, 88

It is equal to a Judgment. 89

After a Writ of Execution, and an Attachment returned for not performing a Decree, the Court will not give the Defendant Leave to be examined, unleſs he gives Security to perform the Decree. 91

Money paid in Purſuance of a Decree, though it happened to be paid to a wrong Hand, allowed to be a good Payment. 142

Decree. Parties bound by it.

A Decree was made 5 *Car.* 1. That all the Miners within the Pariſh of *D.* as well for the Time being as to come, ſhould pay to the Vicar for Tithe, the tenth Diſh of Lead Oar cleaned. All Miners within the Pariſh held to be within the Decree, though not Parties to it, nor claiming in Privity under any that were. *Page* 184

A. is Tenant for Life of a Truſt-Eſtate, Remainder to his Sons. *A.* before a Son born, brings a Bill againſt the Truſtees, and an Account is decreed, and afterwards taken. This Account ſhall bind the Sons; for all Perſons, that could be made Parties, were Parties in the Suit. 527

Subſequent Incumbrancers may redeem the firſt Mortgagee, though he has foreclоſed the Mortgagor by a Decree: And the Account taken under that Decree will not bind the ſubſequent Incumbrancers. 663

Deeds, Conveyances and Aſſurances.

Conſtruction and Operation of them.

A Woman covenants to ſtand ſeiſed to the Uſe of her ſelf in Tail, Remainder to ſuch Uſes as ſhe by Writing ſhould appoint; for Want of Appointment to the Uſe of her Kinſman in Fee. Whether this Remainder to the Kinſman is good, being on a Covenant to ſtand ſeiſed. 7

Bill for a Diſcovery, whether in a Mortgage made by *A.* to *B.* which had been aſſigned to the Defendant, there was not ſome Truſt for the Benefit of the Plaintiff; Defendant by Anſwer denied there was any Truſt declared for the Plaintiff. The Anſwer being replied to, the Queſtion at the Hearing was, Whether the Defendant was obliged to produce the Deed? Court would not compel the Defendant to produce the Deed, ſaying that by this Method all Purchaſers may be blown up. *Page* 463

Deeds loſt or concealed.

A Remainder-Man in Tail in a voluntary Settlement, brings a Bill for Diſcovery of the Deed; and it appearing that the Entail was diſcontinued, the Court would not relieve him. 35

One claiming under a voluntary Conveyance from Tenant in Tail, not compellable by the Iſſue in Tail to diſcover the Settlement. 50

Equity will not aid the Iſſue in Tail againſt a Diſcontinuance, though by a voluntary Conveyance. *Ibid.*

If a Leaſe of Lands by Deed is loſt, the Leſſor may declare on a Demiſe in general, without ſaying it was by Deed: Otherwiſe of a Thing which lies in Grant. 98

Defendant ſuppreſſes a Marriage-Settlement, whereby a Remainder in Tail is limited to the Plaintiff's Father, all prior Eſtates being ſpent. Decreed the Plaintiff to hold and enjoy the Eſtate. 380

A. by Anſwer confeſſed he had in a Paſſion burnt his Marriage-Articles; but it being proved, that he had produced them after the

Time he ſaid they were burnt, he was committed; and though he made Oath he had them not, and could not produce them, yet the Court would not diſcharge him, 'till he conſented to admit the Articles to be as ſet forth in the Bill. *Page* 561

Upon an Iſſue at Law, whether a Deed to lead the Uſes of a Fine levied by a Man and his Wife was duly executed; the Deed having been enrolled for ſafe Cuſtody, and afterwards loſt, a Copy of the Inrollment was allowed at the Trial, to be given in Evidence. 471, 591

Deeds cancelled.

A. being diſpleaſed with his Son, makes an additional Settlement for his Wife's Jointure, but keeps the Deed in his own Cuſtody; and being afterwards reconciled to his Son, cancels it. The Wife after her Husband's Death finds the cancelled Settlement, and recovers by Virtue thereof. 476

Deeds obtained by Dures, *Compulſion*, &c.

If a Bond is obtained by Force or Terror, tho' not ſo as to make it *per dures*, it ought to be ſet aſide, or at leaſt not carried into Execution in a Court of Equity. 497

Deeds fraudulent. Vide **Fraud.**

Defective Conveyances, Securities, &c. *made good in Equity.*

Vide **Voluntary.** Vide **Copyhold.**

Whether Equity will ſupply the Defect of a Fine, where the Conuſor dies after the Caption, and before the Fine is perfected. *Page* 3

A. and his Wife being Aſſignees of a Leaſe Mortgage to *B.* *A.* becomes inſolvent, and the Title not being good, *C.* who had the real Title, in Compaſſion to *A.*'s Wife, makes a Leaſe in Truſt for her. Decreed the Truſtees to make a new Mortgage to *B.* 11

Equity may ſupply an informal or defective Revocation, though it has not all the Formalities and Circumſtances mentioned in the Power of Revocation. 69

A defective Common Recovery, as to a Tenant to the *Præcipe*, will bar an Eſtate-tail in a Truſt only. 132

One borrows 70 *l.* and as a Security gives a Warrant of Attorney to confeſs Judgment in Ejectment, on a feigned Demiſe for twenty Years. This is a defective Security, but a good Agreement in Equity to charge the Land. 151

Equity will ſupply a defective Execution of a Power, in Favour of younger Children. 164

One buys a Reverſion of an Eſtate expectant on the Life of *J. S.* Tho' *J. S.* had no Title to the Eſtate for his Life, yet he ſhall hold it in Equity againſt the Purchaſer. 279

A. mortgages Copyhold Lands to *B.* but the Surrender not being preſented within the Time limited

ed by the Cuſtom, became void. Afterwards *A.* becomes Bankrupt. On a Bill by *A.* againſt the Aſſignees, this defective Surrender was made good. *Page* 564

A defective Surrender of Copyhold Land for ſecuring a Sum of Money, which was become void, for not being preſented in due Time, made good againſt a ſubſequent Purchaſer with Notice. 609

Demurrer.

One is made a Party to a Bill, againſt whom there can be no Decree, but may be examined as a Witneſs. He may demur to the Bill. 380

Depoſitions.

The Creditors of the Lord *Lovelace* obtained a Decree for Payment of their Debts, and to ſet aſide ſome Conveyances gained by Fraud, and Sir *Henry Johnſon* and the Legatees are made Defendants. The Legatees having brought their Bill againſt Sir *Henry Johnſon*, the Queſtion was, if the Depoſitions in the former Cauſe, touching the Fraud, could be read in this. *Per Cur.* The Queſtion being the ſame in both Cauſes, and Sir *Henry Johnſon*'s Defence the ſame, the Depoſitions ought to be read. 447

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. Her Depoſitions before the Maſter allowed to be read. 472

Devaſtavit. Vide **Executor.**

Deviſe. Vide **Will.**

Deviſe for Payment of Debts. Vide *Truſt for raiſing Portions, and Payment of Debts under Title* **Truſt.**

Diſcretion.

A. gives 400 *l.* to his two Daughters his Executrixes, to be diſtributed amongſt themſelves, and their Brothers and Siſters, according to their Neceſſity, as in their Diſcretion they thought fit. The Court ſettled the Diſtribution, and decreed a double Share to one of the Children. *Page* 421

A Man gives Legacies to his Children to be paid at Twenty-one or Marriage, and if any of them died before Twenty-one or Marriage, the Legacy of ſuch Child to be diſpoſed of to one or more of the ſurviving Children, as his Wife, whom he made Executrix, ſhould think fit. One of the Children died under Age and unmarried. The Mother appoints the whole Legacy of ſuch Child to one of the other Children. A good Appointment. 513

Where an Executor has a general Power to diſtribute a Sum of Money amongſt Children at Diſcretion; an unreaſonable or indiſcreet Diſpoſition may be controlled by a Court of Equity. *Ibid.*

A. diſinherits his Son, and by Will gives the greateſt Part of his Eſtate to *B.* and tells *B.* if his Son behaved well, he might give him 20 *l.* a Quarter, and if he uſed that well he might make it up 40 *l.*

40 *l.* a Quarter. Decreed the 40 *l.* a Quarter to the Son. *Page* 559

Diſmiſſion.

A Diſmiſſion upon an Election to proceed at Law is not peremptory, but the Plaintiff, after he has failed at Law, may bring a new Bill. 32

Diſtreſs.

A Grazier driving a Flock to *London*, is encouraged by an Innkeeper's Servant to put his Sheep into Grounds belonging to the Inn. The Landlord of the Inn ſeeing the Sheep, conſents they ſhall ſtay there one Night, and then diſtrains them for Rent. Grazier relieved againſt this Diſtreſs. 129

If Cattle eſcape into the next Ground, and are there diſtrained for Rent, Equity will relieve againſt ſuch Diſtreſs. 131

Diſtribution.

Money is bequeathed to *A.* for Life, and then to go to the Children of *B.* in ſuch Shares as *A.* ſhall adviſe. *A.* dies without making any Appointment. Decreed the Money to be diſtributed amongſt the Children of *B.* and their Repreſentatives *per ſtirpes*, and not *per Capita*. 50

But this Decree was afterwards reverſed, and the Money decreed to the Teſtator's only Child, and that the Grand-children ſhould not take. 106

The Siſter of the half Blood ſhall ſhare equally with thoſe of the whole Blood, in the Diſtribution of an Inteſtate's Eſtate upon the Statute. *Page* 124

One dies Inteſtate leaving an Uncle, and an Uncle's Son, whether the Uncle's Son ſhall come in for a Share upon the Statute of Diſtributions. 168

The Clauſe in the Statute, which ſays, there ſhall be no Repreſentatives among Collaterals beyond Brothers and Siſters Children, muſt be intended, that none ſhall take by Repreſentation, but the Children of Brothers and Siſters to the Inteſtate. 233

One dies inteſtate, being an Inhabitant of the Province of *York*, leaving a Son and Daughter, and no Wife, and having given his Daughter on Marriage 1000 *l.* in Satisfaction of what ſhe might claim by the Cuſtom of the Province. This ſhall not bar her of her diſtributory Share under the Statute, nor ſhall ſhe bring the 1000 *l.* into Hotchpot. 274

A Legacy of 15 *l.* apiece given to each of the Relations on the Teſtator's Father and Mother's Side. Whether reſtrained to Relations within the Statute of Diſtribution. 381

One makes a Will, and his Son Executor, but makes no Diſpoſition of the Surplus. The Son dies without proving the Will. The Teſtator is dead inteſtate as to the Surplus, and the ſame ſhall be diſtributed amongſt the next of Kin of the Teſtator. 634

The Son and Heir intitled to 500 *l.* under a Marriage Agreement, decreed to bring it into Hotchpot upon the Statute of Diſtributions, though in Nature of a Purchaſer. 638

A Man dies inteſtate before the Statute of Diſtributions takes place; but Adminiſtration is granted after. His perſonal Eſtate ſhall be diſtributed according to the Statute. *Page* 642

Dower.

Where there is a Fine by Way of Render, there ſhall be no Dower. 58

One by Will deviſes to his Wife Part of his real Eſtate during her Widowhood, and deviſes the Reſidue of his whole real Eſtate to *J. S.* for Life, Remainder to his firſt Son. Whether the Wife's Acceptance of this Deviſe ſhall in Equity bar her Claim of Dower of what is deviſed to *J. S.* 365

A collateral Satisfaction may be a good Bar to Dower in Equity, though not pleadable at Law. 366

Deviſe of Lands to Executors till Debts paid, Remainder to his Son in Tail. The Son marries and dies before Debts are paid. This is but a Chattel Intereſt in the Executors, and cannot hinder the Son's Widow of Dower. But the Dower cannot commence in Poſſeſſion, till the Debts are paid. 404

A. purchaſes Lands in his eldeſt Son's Name, and puts him in Poſſeſſion, and the Son falling ſick, the Father takes a Declaration of Truſt from the Son; and after the Son's Recovery he is permitted to continue in Poſſeſſion. The Son marries and dies. The Father gets a Conveyance from his younger Son. The elder Son's Wife ſhall be endowed. 436

The Widow of the *Ceſtuy que Truſt* of a Copyhold Eſtate ſhall have her *Free-Bench*, as well as if her Husband had had the legal Eſtate. *Page* 585

Whether a Dowreſs ſhall be relieved in Equity againſt a Term for Years. 680

Election.

A Diſmiſſion upon an Election to proceed at Law is not peremptory; but the Plaintiff after he has failed at Law, may bring a new Bill. 32

A. on his Marriage covenants to purchaſe, and ſettle 20*l.* a Year on his Wife for her Life, and if he died before it was done, to leave her 300*l.* out of his perſonal Eſtate for her better Livelihood. He died without making any Settlement. Decreed the Wife was intitled to the 300*l.* by the Articles, and that the Executors were not at Liberty to ſettle 20*l.* a Year on her for her Life. 505

A Man on his Marriage covenants to purchaſe and ſettle Lands of 400*l.* a Year to the Uſe of himſelf for Life, then to his Wife for Life, Remainder to the Heirs of their two Bodies; and if he died before a Settlement was made, the Wife might elect either to have the 400*l.* a Year, or 3000*l.* in Money in Lieu of Dower. The Husband dies without making a Settlement. On a Bill by the Creditors, the Wife elects the 3000*l.* and the Children inſiſt on having a Settlement made accord-

ing to the Articles expectant on their Mother's Death, by which Means all the Aſſets would be exhauſted. Decreed a Settlement to be made on the Wife for Life, Remainder to the Children *nunc pro tunc*, notwithſtanding her Election. *Page* 605

Emblements.

Baron and Feme are Jointenants for their Lives. Baron ſows the Land, and dies before Severance. Who ſhall have the Corn. 322

A. and *B.* Jointenants of Land, and the Land is ſown with Corn, and one of the Jointenants dies. The Survivor ſhall have the Corn. 323

Husband ſeiſed in Fee in Right of his Wife, ſows the Land, and dies. His Executors ſhall have the Corn. *Ibid.*

Enrolment. Vide Inrolment.

Entry.

A Perſon is intitled to mean Profits, but from the Time of his Entry. 519

An Injunction does not prevent an Entry. *Ibid.*

Equity.

If a Man having a good Plea to an Action at Law, ſlips his Opportunity of Pleading, Equity will not relieve him. 696, 697

Eſtate.

In Fee-ſimple.

A Deviſe of Land to *A.* paying out of the Rents, or out of the Land in general, is not a Deviſe in Fee; but a Deviſe paying a certain Sum at the End of two Years, or any certain Time, and the Profits are not ſufficient, will paſs a Fee-ſimple. *Page* 106

In Fee-tail.

Eſtate-tail by Deviſe. Vide *under Title* Will.

A. is Tenant in Tail, ſubject to the Payment of 250 *l.* a Year to *B.* for four Years. *A.* receives the Profits during the four Years, but does not pay all the Annuity, and dies, leaving a Daughter, and no perſonal Aſſets. The Lands ſhall be liable in the Hands of the Daughter to pay the Arrears of the Annuity, though the Term was expired. 178

An Eſtate *pur auter vie* may be entailed. 184

Leaſe *pur auter vie* is not within the Statute *de donis.* 226

Bare Articles a Bar to an Intail of an Equity. *Ibid.* & 344

A Partition between Tenants in Tail, though but by Parol, ſhall bind the Iſſue. 233

One ſettles Land upon his Daughter in Tail, and takes a Bond from her not to commit Waſte. Bond not binding in Equity. 251

Tenant in Tail enters into a Recogniſance not to ſuffer a Recovery. Recogniſance decreed to be delivered up, as creating a Perpetuity. *Ibid.*

Tenant in Tail having ſold for full Value, and received the Money, and covenanted to levy a Fine, was afterwards decreed to levy this Fine, and died in Priſon for not performing the Decree. His Iſſue is not bound. 306

Deviſe of Land to a Man for Life, Remainder to the Heir of his Body in the ſingular Number, is an Eſtate-tail. *Page* 325

Deviſe to *A.* for Life, Remainder to the Heir of his Body, (in the ſingular Number) and to the Heirs of the Body of ſuch Heir, is but an Eſtate for Life to *A.* *Ibid.*

An Houſe with the Furniture thereof, is limited to a Woman, and ſuch Heir of her Body as ſhall be living at her Death, and in Default of ſuch, Remainder over. She has an Eſtate-tail in the Houſe, and an abſolute Property in the Furniture. 324

Truſtees joining with the *ceſtuy que Truſt* in Tail in a Feoffment, will bar the Eſtate-tail in the Truſt. 344

Tenant in Tail covenants to ſettle a Jointure, and dies. Iſſue in Tail not bound by the Covenant. 379

Defective Execution of a Power, made good in Equity againſt the Iſſue in Tail, if for a valuable Conſideration. *Ibid.*

Deviſe of Lands to *A.* for Life, Remainder to his firſt, *&c.* Son in Tail, provided if *A.* dies without Iſſue Male, then to *B.* Theſe latter Words raiſe no Eſtate-tail by Implication to *A.* he having before an expreſs Eſtate for Life. 449, 546

For Life.

Eſtate pur auter vie. Vide **Occupant.**

A. by Deed grants a Term for Years for Payment of Debts, and by Will deviſes the Reverſion to *B.* for Life *ſans* Waſte, Remainder to his firſt, *&c.* Son in Tail. *B.* being in Want, the Court gave him Leave to cut Timber for his Support not exceeding the Value of five Hundred Pounds. *Page* 218

A. Tenant for Life of Lands charged with Debts, decreed to pay two Fifths of the Debts, and *B.* the Remainder-Man in Fee three Fifths, and *A.* to account for the Timber he had cut down, which was to go in Part of *B.*'s three Fifths. 267

A. by Will deviſed Land to Truſtees and their Heirs, in Truſt that the Profits ſhould be equally divided between his Wife and Daughter during the Wife's Life, and after her Death he deviſed the ſame, to the Uſe of the Daughter in Tail, with Remainders over. The Daughter dies before the Mother. Decreed this to be a Tenancy in Common between the Mother and Daughter during the Mother's Life, and that on the Daughter's Death, her Moiety did not deſcend or reſult to the Heir during the Mother's Life, but was an Intereſt undiſpoſed of, and in Nature of a Tenancy *pur auter vie*, and belongs to the Executor of the Daughter. 430

For Years.

Deviſe of Lands to Executors till Debts paid, Remainder to his Son in Fee. This is but a Chattel Intereſt in the Executors, and when Debts are paid, the Son's Wife ſhall have her Dower. 404

One ſeiſed in Fee may create a Term for Years to commence after his Death without Iſſue: But one poſſeſſed of a Term for Years, cannot

cannot out of that Term carve a future Term to commence after the Determination of an Eſtate-tail. *Page* 684

Term attendant on the Inheritance.

Tenant *per Curteſie* ſhall have the Aid of Equity againſt a Truſt-Term attendant on the Inheritance. 324

Where a Term is attendant on the Inheritance, if the King extends the Inheritance, he ſhall have the Term. 390

A Woman, who is *ceſtuy que Truſt* of a Term, having the Inheritance in her, marries and dies. The Term ſhall attend on the Inheritance, and not go to the Husband as Adminiſtrator of his Wife. 520

Limitations of Terms for Years, Money, &c.

A. on his Marriage aſſigns a long Term of Years in Truſt for himſelf for Ninety-nine Years, if he lived ſo long, then in Truſt for his Wife for her Life, Remainder to the Heirs of the Body of *A.* begotten on his Wife. The whole Term does not veſt in *A.* but after the Death of him and his Wife, ſhall go to all their Children equally. 23

A Term is aſſigned to a Woman for Life, and then to her Iſſue: Adjudged the Iſſue took by Purchaſe. 24

Intereſt of Money is deviſed to *A.* for Life, and if he died without Iſſue, then the Principal to go over to another. The Remainder over is good. 38

A Term is aſſigned in Truſt for Baron and Feme for their Lives, Remainder to the Heirs of the Body of the Wife by the Baron. If the whole Term veſts in the Wife, or ſhall go to the Heir of her Body. *Page* 43

Deviſe of 1300 *l.* to the Teſtator's Grandaughter; provided if ſhe died before Twenty-one and without Iſſue, then the Legacy to go over. The Deviſe over is good, the Contingency being to happen before the Legatee attains 21. 86

Deviſe of a Term to *J. S.* and his Aſſigns for ever; but if he dies without Iſſue before Twenty-one, then to go over. The Deviſe over is good. 151

A Term is aſſigned in Truſt for Baron and Feme for their Lives, Remainder in Truſt for the Heirs of the Body of the Feme by the Baron. The Baron and Feme die. Adjudged the Heir of the Body took by Way of Purchaſe, and as a Perſon well deſcribed. 195

Deviſe of a perſonal Thing to one for Life, Remainder to another. The Remainder is good, it being the ſame, as the Deviſe of the Uſe of a Thing for Life, with Remainder over. 245, 332

An Houſe with the Furniture, thereof is limited to a Woman and ſuch Heir of her Body, as ſhall be living at her Death, and in Default of ſuch, Remainders over. She has an Eſtate-tail in the Houſe, and an abſolute Property in the Furniture. 324

Where a perſonal Chattle is deviſed for a limited Time; this is to be intended only of the Uſe of it, and not of the Thing it ſelf, and therefore ſuch deviſe over is good. 331, 332

One poſſeſſed of a Term for Years, on his Marriage aſſigns it to Truſtees, in Truſt for himſelf for Life, Remainder to his Wife for Life, Remainder to the Heirs of the Body of the Wife by the Husband. This is a good Limitation to the Heirs of the Body of the Wife, and they are Words of Purchaſe, and not of Limitation. 362

One poſſeſſed of a Term, in Conſideration of Marriage aſſigns it to Truſtees, in Truſt for himſelf for Life, then to his Wife for Life, Remainder in Truſt for the Children of the Body of the Wife. This ſhall be intended, for the Children of the Wife by this Marriage, and not to let in her Children by another Husband. 363

A. demiſes Lands for a long Term of Years in Truſt for *B.* for Life, then to his firſt Son for the Remainder of the Term, and in Default of Iſſue of ſuch Son, to the ſecond and other Sons of *B.* and for Want of Iſſue Male to the Daughters of *B.* for the Remainder of the Term. There having never been a Son, the Limitation to the Daughters was held good. 600

A. on his Marriage aſſigns a Term for one Thouſand Years, in Truſt for himſelf for Life, Remainder to the Heirs of the Body of the Husband and Wife during the Reſidue of the Term. The Wife dies leaving Iſſue. The whole Term veſts in the Husband, and he may diſpoſe of it, and the Heirs of the Body of the Husband and Wife cannot take as Purchaſers. 668

A. poſſeſſed of an Exchequer Annuity for Ninety-ſix Years, on Marriage of his natural Daughter covenants to pay it to the Wife for her ſeparate Uſe, and then to the Survivor of the Husband and Wife for Life, and after to their Children, and if no Child, then to be for the Benefit of *A.* Husband and Wife die leaving a Child, who ſoon after dies. *A.* ſhall keep the Annuity, and it ſhall not go to the Adminiſtrator of the Child. *Page* 692

There is a Difference between an actual Aſſignment and only a Covenant to pay. The Latter (when voluntary) not to be carried in Equity beyond the Letter. *Quære.* 693

One by Will gives all his Lands, Money, *&c.* to his Wife; provided if ſhe died without Iſſue, then 80*l.* ſhould remain to his Brother after her Death, and made the Wife Executrix. The Brother died in the Life of the Wife, who died without Iſſue. Decreed the Executor of the Brother intitled to the Legacy. *If ſhe died without Iſſue* muſt be underſtood in the vulgar Senſe, *viz.* leaving no Iſſue at her Death. 758, 766

Tenants in Common and Jointenants. Vide *Title* Jointenants.

Evidence.

A Legacy is preſumed to be paid after a great Length of Time. 21

Parol Proof not to be admitted to explain a Will. 98

But ſuch Proof may be admitted to explain a Surrender of Copyhold Land, to ſhew a Miſtake either in the Land or Uſes. *Ibid.*

One makes his Will, and *A. B.* and *C.* Executors in Truſt, and gives them 20*s.* apiece for a Remembrance above their Charges. Parol Proof admitted to prove, that this was a Truſt for the Wife only. *Page* 99

One by Will ſubjects his real Eſtate to pay his Debts, and makes his Wife Executrix. Parol Proof admitted to prove Teſtator's Declarations, that his Wife ſhould have his perſonal Eſtate exempt from his Debts. 252

A third Mortgagee gets in the firſt, and brings a Bill to foreclose the ſecond Mortgagee, if he don't pay both. He need not prove the actual Payment of the Money lent on the third Mortgage, the Producing an Acquittance being ſufficient. 279

No Regard is to be had to parol Declarations in Caſe of a Deviſe of Lands. 337, 339

One deviſes his Lands to his Brother, and makes him Executor, and wills that his Brother out of the perſonal Eſtate, and Half a Year's Rent of the real Eſtate ſhall pay his Legacies, and gives an Annuity to his Nephew. Upon parol Evidence that the Brother promiſed the Teſtator to pay the Annuity, or otherwiſe he would have charged his real Eſtate therewith; the real Eſtate was decreed to be charged with the Annuity. 506

A Copy of a Deed, to lead the Uſes of a Fine, and inrolled only for ſafe Cuſtody, allowed to be read as Evidence at a Trial at Law, and againſt the Wife, tho' the Husband only acknowledged the Deed. 471, 591

There being a Deviſe in a Will of all the Teſtator's Houſhold-Stuff, as Braſs, Pewter, Linen and Woollen, except a Trunk; the Perſon, who drew the Will was examined, to prove the Teſtator directed him to inſert all the Teſtator's Goods, except the Trunk, and his Depoſition was allowed to be read. *Page* 517

An Entry in the Steward's Book, and a parol Proof of the Foreman of the Jury, admitted as good Evidence, that a Feme Covert ſurrendered her whole Eſtate; although the Surrender on the Roll, and the Admiſſion thereupon was but of a Moiety. 547

A Defendant's Anſwer directed to be read as Evidence at a Trial at Law. 555

Collateral Proof may be allowed to make certain a Perſon or Thing deſcribed in a Will. 593

Parol Proof allowed as to a Man's Intention in a Will, where the Queſtion was, Whether a Legacy ſhould go in Satisfaction of a Debt due from the Teſtator to the Legatee. *Ibid.*

Copy of a Note taken by one, who had been entruſted with the Note, and was ſince dead, under which Note was wrote an Acknowledgment that nothing was due, allowed to be read as Evidence, though not proved to be a true Copy, and though the Defendant had ſworn there was no ſuch Acknowledgment under the Note. 603

No Parol Proof ought to be received to ſupply the Words of a Will. 624

If a Deviſe is to one of the Sons of *J. S.* who hath ſeveral Sons, the Deviſe is void, and ſhall not be

be ſupplied by any parol Proof. *Page* 624

Surplus not being diſpoſed of by the Will, parol Proofs were allowed to be read, that the Teſtator intended to give the Surplus to his Executor, it being to ouſt an Implication or Rule in Equity. 648, 736

Examination.

Baron and Feme exhibit a Bill for a Demand in Right of the Wife. Witneſſes are examined, and after Publication paſſed the Baron dies, and the Wife and her ſecond Husband bring a new Bill. They may examine the ſame Witneſſes again, as were examined in the former Cauſe. 197

In perpetuam rei memoriam.

The Court will not give Leave to examine Witneſſes to perpetuate Teſtimony, in Caſe of a Purchaſe of a Reverſion, where there can be no Trial at Law during the Eſtate for Life. 159

After Publication.

In a Bill brought to have the Benefit of a former Decree, Plaintiff cannot examine Witneſſes, much leſs the ſame Witneſſes to the Matters in Iſſue in the former Cauſe; but on ſuch a Bill the Court may examine the Juſtice of the former Decree, but then it muſt be upon the Proofs taken in the Cauſe wherein that Decree is made. 409

Exceptions.

When the Court on Hearing a Cauſe refers the Matter in Controverſy to Gentlemen in the Country, no Exceptions lie to their Certificate. *Page* 79

Submiſſion to a Reference, and the Award to be confirmed by the Decree of the Court without Appeal or Exception; yet Exceptions to the Award admitted. 109

Execution.

Where the Sheriff returns *nulla Bona* upon a *Fi. fa.* and there is a Recovery againſt him for a falſe Return, *that* veſts no Property of the Goods in him; but they remain in the Party, and are liable to any ſubſequent Execution. 239

Executor and Adminiſtrator.

In what Priority Debts are to be paid. Vide *under Title* **Aſſets.**

An Executor being deſirous to apply the Aſſets as far as they would go, in ſatisfying the Debts, brings a Bill againſt all the Creditors, that they might, if they pleaſed, conteſt each other's Debts, and that their Preference might be ſettled. Adjudged on a Demurrer to be a proper Bill. 37

After a Bill brought by Creditors againſt an Executor, and the Reſt of the Creditors, the Executor cannot, by confeſſing a Judgment or ſuffering Judgment to go by Default, prefer one Creditor before another. 62

An Executor makes a voluntary Aſſignment of Part of the Aſſets. Whe-

Whether a Creditor can follow the Aſſets in the Hands of the Aſſignee. 75

If there be a Grand-father, Father and Son, and the Father dies inteſtate, the Son ſhall have the Adminiſtration, and not the Grand-father. 125

Bill againſt an Executor for a Debt due from the Teſtator, and though the Debt was proved, yet the Plaintiff was ſent to Law: But the Bill was retained till after the Trial, in order to take the Account of Aſſets, if there ſhould be a Verdict for the Plaintiff. 192

An Adminiſtrator *de bonis non cum Teſt' annex'* upon a Suggeſtion of Inſolvency, ordered to give Security for a Legacy payable at a future Day. 249

Bond-Creditor brings a Bill againſt an Executor for the Recovery of his Debt, and pending the Suit, the Executor confeſſes a Judgment to another Bond-Creditor. The Executor may pay this Judgment before the Bond-Debt. *Page* 299

But a voluntary Payment after an Original filed, or Bill exhibited, ſhall not be allowed: But in the Caſe of a voluntary Payment, if the Suit at Law be not by Original but upon a *Latitat* in the *King's Bench*, the Payment ſhall ſtand good, though after an Action brought. 300

In an Action at Law againſt an Executor or Adminiſtrator by a Creditor, Defendant by Miſtake of his Attorney, pleads a falſe Plea, and a Verdict paſſes for the Plaintiff. Tho' the Merits were never tried, yet Equity will not relieve. 325

A. having a Term in the Printing-Office for Twenty-one Years, by his Will directs that 2000 *l.* ſhould be raiſed out of the Profits for his Daughter, and made *B.* Executor. *B.* mortgages the Term. Decreed the Mortgagee not liable to the Legacy charged by the Will on the Term: But this Decree was reverſed by the Houſe of Lords. *Page* 444

Adminiſtration is granted to two, and one dies, it will ſurvive to the other. 514

If Executors join in receiving Money, both are anſwerable, for they may act ſeverally, if they think fit. 504, 515, 570

A. purchaſes a Leaſhold Eſtate of an Executor, having Notice a Debt of the Teſtator's was unpaid; and out of the Purchaſe-Money, he has an Allowance of 200 *l.* due to himſelf from the Teſtator, and of 550 *l.* due to himſelf from the Executor, and pays the Remainder in Money. This Sale not good againſt an unſatisfied Creditor, *A.* being a Party, and conſenting to and contriving a *Devaſtavit*. 616

In what Caſes the Executor ſhall be only a Truſtee.

One by Will gives ſeveral Legacies, and makes two Perſons, not related to him, Executors, and afterwards increaſes his Eſtate, and has Children, and dies without new publiſhing or altering his Will. Equity will not make the Executors Truſtees for the Children, as to the Surplus. 104

A. by Will gives Legacies to his Relations amounting to near the Value of his Eſtate, and makes *B.* and *C.* Executors, and gives them 20 *l.*

20 *l.* and intreats them to take the Trouble of getting in his Eſtate. He lives ten Years after and increaſes his Eſtate, and dies without new publiſhing his Will. Decreed the ſurviving Executor but an Executor in Truſt, and that the new acquired Eſtate ſhould go to the Legatees in Proportion to their Legacies. *Pag.* 148

Vide *Surplus, and reſiduary Legatee under Title* **Legacies.**

How to account, and how to be charged.

One deviſes 1200 *l.* to *A. B. C.* and *D.* Children of *J. S.* to be divided amongſt them according to the Diſcretion of *J. S.* whom he makes Executor. *A.* dies before the Teſtator, and *B.* ſix Months after the Teſtator's Death. *J. S.* pays *C.* 900 *l.* for his Share, and by will gives *D.* 400 *l.* in full of his Share. Decreed the Eſtate of *J. S.* to anſwer Intereſt for the 1200 *l.* from a Year after the Teſtator's Death, Securities having never been wanting in the publick Funds; but the Maſter in computing the Intereſt was to take out of the Principal ſo much, as with the Intereſt of it would make up 900 *l.* when it was paid to *C.* and then compute Intereſt for the remaining Principal. 745

Devaſtavit.

A Clothier truſts the Factor with Cloaths to ſell for him, and dies. In an Account for theſe Cloaths, if the Adminiſtrator of the Clothier pays or diſcounts a Debt due from the Clothier to the Factor, and there are Debts of a higher Nature, it will be a *Devaſtavit.* *Page* 117

If an Executor loſes a Bond due to the Teſtator, Whether he is chargeable with the Debt to the Creditors of the Teſtator. 299

Expoſition of Words.

Vide *under Title* **Will.**

Where a Deviſe is to Children, the Grand-children cannot come in to take with the Children: But if there is no Child, the Grand-children ſhall take. 106

Word (Or) taken for (And). 388, 389

A. by Virtue of ſeveral Settlements, being Tenant in Tail after Poſſibility of Iſſue extinct, of ſome Lands, with Remainder in Fee to Truſtees, in Truſt for him and his Heirs; and as to ſome other Lands being Tenant for Life, Remainder to his firſt, *&c.* Sons in Tail, Remainder to Truſtees and their Heirs, in Truſt for the right Heirs of *B.* whoſe Heir he was; and as to other Lands being Tenant in Tail, Remainder to the right

Heirs of his Father; and having no Iſſue, by Will deviſed to his Nephew all his Lands, Tenements and Hereditaments *out of Settlement*. Decreed all the Lands to which the Teſtator was ſo intitled, did paſs by this Deviſe. *Page* 621

But Lands ſettled with Power of Revocation, will not paſs by this Deviſe. 624

Hæredibus de corpore procreatis & Procreandis are the ſame. 711

Extent.

If the King's Receiver is ſeiſed of the Inheritance, and there is a Term for Years attending thereon; If the King extends the Inheritance, he ſhall have the Term. 390

But if the King's Receiver is poſſeſſed of a Term in groſs, and it is aſſigned before an actual Extent, the Aſſignment is good againſt the Crown. *Ibid.*

Aſſignees under a Commiſſion of Bankruptcy, bring a Bill for an Account againſt ſome Perſons who had ſeiſed the Bankrupt's Eſtate by Virtue of three Extents, the one for the King, and the other two were Extents in Aid. Bill diſmiſſed, the Matter being properly cogniſable in the Court of *Exchequer*, which is the King's Court of Revenue. 426

But it is otherwiſe, where the Defendant who has ſued out an Extent in Aid, confeſſes by Anſwer, that he has ſufficient Eſtate of his own to pay the King's Debt. *Ibid.*

Or where it appears to be a fraudulent Contrivance by an Extent in Aid to gain a Preference to a Debt of an inferior Nature. *Page* 426

Extinguiſhment.

A Rent or Recogniſance ſhall not be extinguiſhed by levying a Fine to the Party. 58

A. by Will gives his Daughter 200 *l.* and afterwards gives her a Portion in Marriage more than the Legacy. The Legacy is extinguiſhed by the Portion after given. 115

A Woman takes Bond in the Name of a Truſtee, and afterwards marries one of the Obligors. The Marriage is no Releaſe or Extinguiſhment of the Debt. 290

Bond extinguiſhed at Law, decreed good in Equity, and to bind the real Aſſets. 480

Factor.

A. employs *B.* as his Factor to ſell Cloth; *B.* ſells it on Credit, and before the Money is paid, dies indebted by Specialty more than his Aſſets will pay. This Money ſhall be paid to *A.* and not to the Adminiſtrator of *B.* as Part of his Aſſets; but thereout muſt be deducted *B.*'s Commiſſion 638

A Factor is in Nature of a Truſtee, only for his Principal. *Ibid.*

Fee-Farm Rents. Vide Rent.

Fine.

Whether Equity will ſupply the Defect of a Fine, where the Conuſor dies after the Caption, and before the Fine is perfected. *Pag.* 3

Where a Fine is levied for a particular Purpoſe purſuant to a Decree, the Court will not permit any other Uſe to be made of that Fine, 56

A Rent or Recogniſance ſhall not be extinguiſhed by levying a Fine to the Party. 58

Where there is a Fine by Way of Render, there ſhall be no Dower. *Ibid.*

Fine and Non-claim.

A Fine and Non-claim a good Bar to an Equity of Redemption: So it is to a Bill of Review. 189

A. deviſes Lands to Truſtees in Truſt to pay Debts, and then in Truſt for an Infant. A third Perſon enters and levies a Fine, and five Years paſs: Though the Fine bars the Truſtees, yet Equity will not ſuffer the Infant to be barred by the Laches of the Truſtees, nor to be barred of the Truſt-Eſtate during her Infancy, but ſhe ſhall be relieved againſt the Fine, and recover all the mean Profits. 368

A. deviſes Lands to *B.* in Tail, Remainder to *C.* in Tail, ſubject to the Payment of Legacies. *C.* levies a Fine and five Years *Non-claim* paſs, and then *C.* mortgages the Lands. Fine and *Non-claim* no Bar of the Legacies. *Page* 662

Forfeiture.

A Legacy is given on Condition, not to diſpute the Will. The Legatee commences a Suit, whereby he diſputes the Validity of the Will. This is no Forfeiture of the Legacy, if there was *probabilis Cauſa litigandi.* 91

A Leſſee for Years makes ſeveral Under-leaſes. The Premiſſes are out of Repair, and the Leaſe is avoided for Non-payment of the Rent. Some of the Under-Leſſees bring a Bill to be relieved againſt the Forfeiture. They ſhall not be relieved but on Payment of the whole Rent in Arrear, and repairing the Premiſſes: But having ſo done, they may compel the other Under-Leſſees to contribute. 103

A Leſſee under a Jointreſs at 40 *l. per Ann.* had committed waſte *ſparſim*, ſo that at Law the Eſtate was forfeited, but inſiſted he had improved the Eſtate to 60 *l.* a Year, and offered to take a Leaſe at that Rent for fifty Years, and to pay for the Timber cut. Whether Equity will relieve againſt this Forfeiture. 263

Legacies are given by a Will to *A. B. C.* and *D.* on Condition, that as they come of Age they ſhall releaſe all Claims to the Teſtator's Eſtate. This Condition muſt be taken *diſtributively*, and ſuch only as refuſe to releaſe ſhall forfeit their Legacies. 478

A. having two Copyholds held of the Manor of *B.* cuts Timber on the one, and employs it in repairing the other. After a Verdict

dict on an Ejectment by the Lord for the Forfeiture, *A.* brings a Bill, and is relieved; but ordered to pay Coſts at Law, and in Equity. *Page* 537

A. by Will gives his Grand-daughter 200 *l.* on Condition ſhe continued with his Executors, 'till ſhe was Twenty-one; but if ſhe was taken from them by her Father, who was a Papiſt, before Twenty-one, or married againſt the Conſent of his Executors, then he gave her but 10 *l.* The Daughter was placed by the Executors with a Clergyman, who, before ſhe was Twenty-one, with Conſent of one of the Executors, permitted her to make a Viſit to her Father; and he took that Opportunity to marry her to a Papiſt. Decreed ſhe ſhould only have the 10 *l.* 572

A Copyhold is forfeited for not repairing. Whether Equity will relieve. 664

Fraud, Colluſion, Covin, Concealment, Impoſition.

Vide **Deeds.**

Vide *Underhand Agreements, under Title* **Agreements.**

Vide *Catching Bargains, under Title* **Heir.**

Fraud in obtaining a Will relating only to a perſonal Eſtate, is not examinable in Chancery, after the Will is proved in the Spiritual Court, ſo long as that Probate is in Force. 8

Relief againſt a Bill of Exchange mentioned to be for Value received, but gained by Fraud, and for a fictitious Conſideration. 123

In Caſe of a groſs Fraud, the Court will give Coſts to be aſcertained by the Parties own Oath. *Page* 123

A Mother to incourage a Marriage of her Son, releaſes her Dower, and ſhews the Releaſe to the Wife and her Relations. This Releaſe ſhall bind the Mother, though the Son got it from her by a fraudulent Suggeſtion. 133

A Mother, being abſolute Owner of a Term, is preſent at a Treaty for her Son's Marriage, and hears him declare the Term was to come to him at her Death, and is a Witneſs to the Deed, whereby the Reverſion of the Term is ſettled on the Iſſue of the Marriage after her Death. The Mother is decreed to make good the Settlement, and to ſettle the Reverſion of the Term accordingly after her Death. 150

One ſtands by and ſuffers a Purchaſer to go on, without diſcloſing his Title. Purchaſer relieved. 151

A prior Incumbrancer is a Witneſs to a ſubſequent Mortgage, and does not diſcloſe his own Incumbrance. Decreed he ſhould be poſt-poned. *Ibid.*

An honeſt Debt may be loſt by playing a Trick to come at it, as one by adding a Seal to a Note, which was good without it, loſt his Security. 162

A. being a weak Man, was prevailed on by two of his Relations to give Bond to one of them, to ſettle his Eſtate to the Uſe of himſelf in Tail Male, with Remainder to his two Brothers ſucceſſively in Tail Male. *A.* marries and makes a Settlement on his Marriage, and brings a Bill for Delivery up of his Bond; and it would have been decreed, but

but that he offered to ſettle Part of his Eſtate in Tail on one of his Brothers. *Page* 189

Policy of Inſurance for inſuring a Life gained by Fraud ſet aſide, with Coſts both at Law and in Equity, and the Money received for the Premium to go in Part of the Coſts. 206

A Man makes a Settlement on Truſtees to pay his Debts therein mentioned, and Portions for his younger Children, reſerving to himſelf 50*l.* a Year for his Life, Remainder as to the Whole to his Son, *&c.* He continues in Poſſeſſion, and twelve Years after contracts other Debts by Bond. Whether this Settlement is fraudulent as to the Bond-Creditors. 261

A Deed not fraudulent at firſt, may afterwards become ſo, by being concealed or not purſued. 262

A Conveyance by Deed and Fine is gained without Conſideration and indirectly. Court relieved againſt it. 307

Conuſee of a Statute from *A.* adviſes *B.* to lend *A.* 1000*l.* on Mortgage, and draws the Mortgage, with a Covenant againſt all Incumbrances, and conceals his own Statute. The Statute ſhall be poſt-poned to the Mortgage. 370

A. makes a Bill of Sale of his Goods to a Truſtee for one, who lived with him as his Wife, and was ſo reputed. Bill of Sale ſet aſide as fraudulent againſt Creditors. 490

But if he purchaſes a Leaſe in the Name of a Truſtee; who declares the Leaſe was made in Truſt to permit *A.* to receive the Rents during his Life, and then for his reputed Wife; this will not be Aſſets of *A.* nor liable to his Creditors after his Death; for when a Man purchaſes, he may ſettle the Eſtate as he pleaſes. *Page* 490

A. conveys Lands to the Uſe of himſelf for Life, with Power to mortgage ſuch Part as he ſhall think fit, Remainder to Truſtees, to ſell to pay all his Debts, and then dies indebted by Judgments, Bonds and ſimple Contract. This Deed is fraudulent as againſt the Judgment-Creditors, and they ſhall not be compelled to take a Satisfaction in Average with the other Creditors. 510

A. intruſted by *B.* to receive Intereſt on Tallies, receives the Principal, and fails, and afterwards compounds with his Creditors; but *B.* would not come in without having a better Compoſition than the Reſt, which *A.* agrees to give. *A.* brings a Bill to be relieved againſt this Underhand Agreement; but he having been guilty of a great Fraud and Breach of Truſt, and having agreed to make ſome Satisfaction, the Court would not relieve him; but diſmiſſed the Bill. 602

An Agreement for a Purchaſe being obtained from a Woman of Ninety Years of Age, and ſeveral ſuſpicious Circumſtances appearing, the Court would not decree it to be carried into Execution againſt the Heir at Law, nor to be delivered up. 632

Sales at a great Undervalue from one, that was afterwards a Lunatick, ſet aſide: But the Conveyances to ſtand as a Security for what was really paid. 678

A Will concerning Land may be ſet aſide in Equity for Fraud in obtaining it. 700

A. having a Mortgage of a Leaſhold Eſtate, the Morgagor borrows the original Leaſe of *A.* and by that Means borrowed more Money on the Premiſſes, but pretended he wanted it for another Purpoſe. If *A.* was privy to the Mortgagor's Intention of borrowing more Money on the Premiſſes, *A.*'s Mortgage ſhall be poſt-poned to the ſubſequent Mortgage, he being Acceſſary to the Fraud: But otherwiſe it will be, if he innocently lent the Leaſe to the Mortgagor. *Page* 726

Gaming.

EXceſſive Gaming diſcouraged by the Courts, both at Law and in Equity. 70

One Apprentice gives a Bond to another Apprentice for 50 *l.* won at Play. Bond decreed to be delivered up: Gaming among Apprentices being of the worſt Conſequence. 291

By the Cuſtom of *London* a Maſter may juſtify Turning aw ayhis Apprentice for Gaming. *Ibid.*

Grant.

One poſſeſſed of a Term for two Thouſand Years, grants the Land to *J. S.* without mentioning any Term. It is void for Uncertainty. 684

Guardian.

An Infant being ſeiſed in Fee of Lands ſubject to a Mortgage, the Guardian takes an Aſſignment of the Mortgage. Altho' the Mortgagee had never entered, yet the Lord Keeper was of an Opinion, that as to the Profits received out of the mortgaged Lands, the Defendant ſhould be taken to be in Poſſeſſion as a Mortgagee, and not as Guardian. *Page* 471. *Q.*

A Guardian is not compellable to apply the Profits of Lands deſcended on the Infant Heir, to pay off the Bond-Debts of the Anceſtor. 606

Heir and Anceſtor.

Vide **Aſſets.**

WHether an Heir, being a Creditor by Bond or Judgment, can retain, as well as the Executor may. 62

Land is ſettled for raiſing Portions for Daughters. On a Bill for a Sale, the Heir ſhall be compelled to join, though he has no legal Intereſt. 99

Where Judgment is obtained againſt an Heir, who has a Reverſion in Fee deſcended upon him, the Judgment is only of Aſſets, *quando acciderint*; and Equity will not decree a Sale of the Reverſion, but the Creditor muſt wait till it falls. 134

When a Term is raiſed for a particular Purpoſe out of the Inheritance, and *that* Purpoſe is ſatisfied, the Heir ſhall have the Benefit of the Surplus of the Term. 138

A. is Tenant in Tail, ſubject to the Payment of 250 *l.* a Year to *B.* for four Years. *A.* receives the Profits during the four Years, and dies leaving a Daughter, and no

no perſonal Aſſets, and having not paid all the Annuity. The Lands ſhall be liable to anſwer the Arrears of the Annuity in the Hands of the Daughter, though the Term was expired. *Page* 178

In Caſe of doubtful Words in a Will, an Heir is to be favoured, and there ſhall be no ſtrained Conſtruction to work a Diſheriſon: But where there is no Doubt, the Plea of Heirſhip muſt not control a plain Will. 340

A Son's Daughter, cannot take by a Limitation to the Heirs Female of the Body of the Father, for ſuch Heirs Female muſt derive by Females only. 409

There muſt either be expreſs Words in a Will, or a neceſſary Implication, to diſinherit an Heir at Law. 571

A Guardian is not compellable to apply the Profits of Lands deſcended on the Infant Heir, to pay off the Bond-Debts of the Anceſtor. 606

Heir.

Matters controverted between the Heir and Executor.

The Wife's Portion and the like Sum of the Husband's Money is agreed to be laid out in Lands to be ſettled to the Uſe of them and the Heirs of their Bodies, without mentioning how the Remainder over ſhould be limited. they both died without Iſſue, and before any Purchaſe made. The Wife ſurvived. The Money ſhall be paid to the Heir of the Husband, and not to the Adminiſtrator of the Wife. 20

The Heir of the Mortgagee foreclоſes the Mortgagor, the Executor being no Party. Upon a Bill by the Executor againſt the Heir of the Mortgagee and the Mortgagor, the Land was decreed to the Executor. *Page* 67

But if the Executor of the Mortgagee after a Foreclоſure by the Heir, brings a Bill to have the Benefit of the Mortgage, the Heir, if he think fit, may take the Benefit of the Foreclоſure to himſelf, paying the Executor the Mortgage-Money and Intereſt. *Ib.*

By Marriage-Articles Money is agreed to be laid out in Land, and ſettled on the Husband and Wife and their Iſſue, Remainder to the Heirs of the Wife. The Husband and Wife die without Iſſue, and the Money is not laid out. The Heir, and not the Adminiſtrator of the Wife, ſhall have the Money. 101

Committee of a Lunatick inveſts Part of the Lunatick's perſonal Eſtate in a Purchaſe of Lands in Fee. This ſhall be taken as perſonal Eſtate, and in Caſe of the Lunatick's Death, go to his next of Kin, and not to his Heir. 192

A Woman as Guardian of her Infant Son, out of his perſonal Eſtate pays off a Mortgage upon his Land. The Infant dies, and the Land deſcends to a remote Heir. The Money ſhall not be brought back into the perſonal Eſtate. 193

Mortgagor releaſes to the Heir of the Mortgagee in Fee. The Executor or Adminiſtrator of the Mortgagee, ſhall have the Benefit of the Mortgage, though there are no Debts. *Ibid.*

If a Mortgagee in Fee dies, and the Mortgagor will not redeem; yet the Executor or Adminiſtrator of the Mortgagee ſhall have the Benefit of the Mortgage. *Pag.* 193

So he ſhall, though the Mortgagor is foreclоſed, or is of ſo antient a Date, as not to be redeemable, unleſs the Mortgagee is actually in Poſſeſſion. *Ibid.*

A Man articles to ſell Lands, and dies before a Conveyance is made. The Heir decreed to convey, and the Purchaſe-Money to be paid to the Executors. 215

By Marriage-Articles the Wife's Portion is agreed to be laid out in Land, to be ſettled on Husband and Wife for their Lives, Remainder to the Heirs of their two Bodies, Remainder to the Heirs of the Body of the Wife, Remainder to her Brother in Fee. The Wife dies without Iſſue, and then the Husband dies, the Money not being laid out. Whether this Money ſhall be conſidered as Land, and go to the Wife's Brother; or as Money, and go to the Adminiſtrator of the Husband. 227

Dean and Chapter make a Leaſe to a Man, his Executors and Adminiſtrators for three Lives. This was held to be a deſcendable Freehold, and to belong to the Heir and not to the Executor; as 'tis in its Nature an inheritable Eſtate. 320

One ſeiſed in Fee of Lands, articles to pay 1000*l.* to *J. S.* to build an Houſe on the Premiſſes, and dies before the Houſe is built. The Heir may compel *J. S.* to build the Houſe, and his Father's Executor to pay for it. 322

An old Mortgage, though two Deſcents caſt, and though more upon it than the Value, and though the Mortgagee by Anſwer ſays he will not redeem, yet ſhall go to the Executor and not the Heir; the Equity of Redemption not being foreclоſed, or releaſed. *Page* 367

One deviſes Lands to his Executor to be ſold, and thereout to pay 500*l.* to his Nephew *A.* if he return from beyond Sea, and the Reſidue to *B.* *A.* died before the Teſtator. This 500*l.* Legacy being given on a Contingency, that never happened, is as no Legacy, and falls into the Deviſe of the *Reſiduum*; and the 500*l.* or Land to that Value ſhall not go to the Heir as reſulting to him. Otherwiſe it would have been, if it had been an abſolute Legacy of 500*l.* 394

Portion charged by Will on a real Eſtate, payable to a Daughter at Twenty-one or Marriage. Daughter dies at the Age of ſix Years. Her Portion ſhall ſink in the Land for the Benefit of the Heir, and not be raiſed for the Benefit of her Adminiſtrator. 416

Lands are deviſed to Truſtees to ſell, and out of the Money ariſing by the Sale, among other Sums to pay 100*l.* to the Teſtator's Heir at Law, and no Diſpoſition is made by the Teſtator of the Surplus of his Eſtate. The Land ſhall not be turned into perſonal Eſtate, nor more ſold than is neceſſary to pay the Legacies. 425

Pictures and Glaſſes put up inſtead of Wainſcot, or where Wainſcot would otherwiſe have been put, ſhall go to the Heir, and not to the Executor. 508

A Woman, who is *Ceſtuy que Truſt* of a Term, having the Inheritance in her, marries and dies. The Term ſhall attend on the Inheritance, and not go to the Husband as Adminiſtrator of his Wife. *Page* 520

A Man having ſeveral Mortgages, one of which was a Mortgage in Fee of Lands in *D.* on which he had entred, deviſes thoſe Lands to his two Daughters and their Heirs, and the other Mortgages to them, their Executors, *&c.* One of the Daughters dies. Her Share of the Lands in *D.* ſhall go to her Heir, and not to her Adminiſtrator; it being the Intent of the Teſtator, that thoſe Lands ſhould paſs as real Eſtate to his Daughters; though as between him and the Mortgagor, they were but a Mortgage. 582

Catching Bargains.

An unconſcionable Bargain got from an Heir in the Life of his Father ſet aſide. 14

A Purchaſe from an Heir at an Under-value in the Life of his Father ſet aſide. 27

An Heir is drawn in with other young Heirs to buy Goods at extravagant Prices, and to join with them in giving Securities for the Monies agreed on. He ſhall be relieved on paying the Value of the Goods, which came to his own Hands, and ſhall not be anſwerable for his Companions. 77

A. Tenant for Life, Remainder to his firſt, *&c.* Son in Tail, Remainder to his Nephew *B.* *B.* enters into ſeveral Statutes to *C.* for Payment of ten for one, in Caſe *A.* died without Iſſue Male in the Life of *B.* *C.* in the Life of *A.* brings a Bill to compel *B.* either to pay Principal and Intereſt, or be foreclоſed of any Relief againſt the Bargain. *B.* by Anſwer declares the Bargain fairly made, and ſays he intends to abide by it, and would ſeek no Relief againſt it. *A.* dies, and *B.* brings a Bill againſt the Executors of *C.* and notwithſtanding *B.*'s former Anſwer, he is relieved on Payment of Principal and Intereſt, without Coſts. *Page* 121

One juſt come of Age intitled to an Eſtate of 3000 *l. per Ann.* being drawn into a Statute for 1000 *l.* on which he received only 500 *l.* is relieved on the Circumſtance of Fraud. 346

Incumbrances bought in by the Heir or a Purchaſer. Vide *under Title* **Securities.**

Hotchpot. Vide **London.** Vide **Diſtribution.**

Implication.

Eſtate by Implication.

An Eſtate by Implication cannot be againſt the plain Intent of the Party expreſſed in his Will. 60

No Eſtate-tail in a Deed can be raiſed by Implication. 451

An expreſs Eſtate for Life, cannot be inlarged by Implication, but may by expreſs Words. 449, 546

A Deviſe of Lands to the Heir after the Death of the Wife, by a neceſſary Implication gives an Eſtate for Life to the Wife: Otherwiſe where the Deviſe is to a Stranger. 572

One having a Wife, and four Daughters, deviſes Lands to one of his Daughters, after the Death of his Wife. This is a Deviſe to the Wife for Life by Implication, though the Deviſee was only one of the four Coheirs. *Page* 723

Incloſure. Vide **Common.**

Incumbrances. Vide **Securities.**

Infant.

One gives her Son other Lands in Lieu of Lands, which were intailed on him, and then makes her Will, and gives the intailed Lands to her Daughter, and takes a Bond from her Son to permit his Siſter to enjoy the intailed Lands. The Son dies leaving an Infant Son, who being in Poſſeſſion of the Lands, which came in Recompence, brings an Ejectment for the intailed Lands, and by Reaſon of his Infancy the Bond could not be put in Suit againſt him. On a Bill brought by the Daughter, ſhe is decreed to be quieted in Poſſeſſion until ſix Months after the Infant comes of Age, and then he may ſhew Cauſe, if he will. 232

Court of Equity often decrees building Leaſes of Infants Eſtates, where it is for their Benefit. 225

Where an Infant recovers by Decree of the Court, the Court may with the Approbation of the Infant's Relations, allot him a Maintenance, though there is no Proviſion in the Truſt; for this is founded on natural Equity. 236

How the Care and Direction of Infants came into the Court of Chancery. *Page* 342

No Decree ſhall be made againſt an Infant, without having a Day to ſhew Cauſe after he comes of Age. *Ibid.*

An Infant being *Ceſtuy que Truſt*, a Stranger enters and levies a Fine and five Years paſs: The Infant is barred at Law; but Equity will relieve, and not ſuffer him to be barred by the Laches of his Truſtee, nor to be barred of a Truſt-Eſtate during his Infancy. And the Infant in this Caſe ſhall have all the mean Profits. 368

A Guardian borrows Money of *A.* to pay off an Incumbrance on the Infant's Eſtate, and promiſes to give *A.* a Security for his Money, but dies before it is done. Tho' *A.*'s Money was applied to pay off the Incumbrance, yet the Court would not decree him a Satisfaction out of the Infant's Eſtate. 480

A Gift to an Infant on Condition. The Infant is bound by the Condition. 561

A Child in *ventre ſa Mere* is capable of taking, may be vouched, a Bill may be brought on it's Behalf, and an Injunction may be had to ſtay Waſte; and the Mother may juſtify detaining Charters on Behalf of ſuch a Child. 711

What Acts by an Infant ſhall be good and binding.

An Infant is bound by the Offer made by him in his Anſwer, if he does not immediately after his coming of Age apply to the Court, in Order to retract his Offer, and amend his Anſwer. 224

An Infant exchanges Lands, and continues in Poſſeſſion of the Lands given him in Exchange, after he comes of Age. He ſhall be bound by the Exchange. *Page* 225

In what Caſes an Infant is favoured or privileged.

No Decree ſhall be made againſt an Infant, without giving him a Day to ſhew Cauſe after his coming of Age. 342

An Infant may by his *prochein Amy* call his Guardian to an Account, even during his Minority. *Ibid.*

If a Stranger enters and receives the Profits of an Infant's Eſtate, he ſhall in Equity be looked upon as Truſtee for the Infant. *Ibid.*

If an Eſtate is given to an Infant upon Condition, the Condition will bind the Infant, and Infancy is in ſuch Caſe no Excuſe. 343

Bill to foreclоſe an Infant. By Decree it is ſent to a Maſter, to ſee what is due, who Reports what is due for Principal, Intereſt and Coſts. Whether upon a ſubſequent Order to carry on Intereſt, the former Intereſt during the Infancy ſhall carry Intereſt. 392

Lands are deviſed to be ſold for Payment of Debts. They may be decreed to be ſold for that Purpoſe, without giving an Infant Heir a Day to ſhew Cauſe when he comes of Age; for by the Deviſe of the Land there is nothing deſcends to the Heir, therefore an immediate Sale may be decreed: But if the Heir be decreed to join in the Sale; there he muſt have a Day, after he comes of Age, to ſhew Cauſe. 429

Lands are given by Will to a Woman and the Heirs of her Body; and it is declared, if ſhe left no Sons, and only two Daughters, the Eldeſt ſhould pay the Younger 300*l.* and have the Eſtate. There being only two Daughters, and the 300*l.* not being paid, the Younger brought her Bill for an Account of Profits, and Poſſeſſion of Half the Eſtate. The Court may decree the Defendant, though an Infant, to pay the 300*l.* in ſix Months, with Intereſt from the Mother's Death; or in Default, to account for a Moiety of the Profits, and that a Moiety of the Eſtate be ſet out by Commiſſioners: But the Defendant muſt have a Day to ſhew Cauſe, when ſhe comes of Age. *Page* 479

Infranchiſement. Vide **Copyhold.**

Injunction.

A. grants to *B.* Common in his Down. *B.* brings a Bill againſt *A.* complaining he had over-ſtock'd the Common, and praying he might be injoined not to over-ſtock, *&c.* Bill diſmiſſed. 116

Leſſee for Years covenants not to plow paſture Land, and if he does, then to pay after the Rate of 20*s.* *per Ann.* for every Acre plowed. The Court will not grant an Injunction againſt the Tenant's plowing, the Parties themſelves having agreed the Damage for plowing. 119

An Injunction does not prevent an Entry. 519

Inquiſition.

Inquiſition.

Grant by the Crown of an Eſtate, *&c.* forfeited, before any Inquiſition finding the Forfeiture, is illegal. *Page* 173

In Caſe of an Inquiſition finding a Forfeiture by the Warden of the Fleet, whether it ought to find what Eſtate the Warden had in the Office. 174

Inrolment.

Where a Demurrer to a Bill of Review is allowed, it may be inrolled; but if over-ruled, *that* cannot be inrolled, to prevent the Demurrer's being re-argued. 120

A Copy of a Deed inrolled for ſafe Cuſtody only, leading the Uſes of a Fine, allowed to be read as Evidence at a Trial at Law, and read againſt the Wife, though the Husband only acknowledged it. 471, 591

Inſurance.

Policy of Inſurance, how far it extends. 176

One lends 300 *l.* on a Bottomry-Bond, and inſures 450 *l.* on the Ship, but has no Intereſt in the Ship or Cargo. Policy decreed to be delivered up. 269

If a Man inſures on a Ship, and has no Intereſt therein, the Inſurance is void, although it is expreſſed in the Policy, *intereſted or not intereſted.* *Ibid.*

But if he is intereſted in the Ship, he may inſure beyond the Value of his Intereſt. *Ibid.*

If one inſures a Ship, which is loſt, he muſt renounce his Intereſt in the Ship, if he would have any Benefit of the Inſurance. *Page* 269

Goods inſured are by Agreement valued at 600 *l.* and the Inſured not to be obliged to prove any Intereſt. Ship being loſt, it was ordered that the Inſured ſhould diſcover what Goods he had put on board, and that a Deduction ſhould be made for the Value thereof out of the 600 *l.* though he offered to renounce all Intereſt to the Inſurers. 716

One lends Money on a *Bottomry*-Bond, and then inſures on the ſame Ship. He ſhall have both the Money on the Bond, and alſo the Benefit of the Inſurance. 717

Paying the Premium, intitles the Party to the Benefit of the Inſurance. *Ibid.*

Intereſt of Money.

Statute reducing Intereſt of Money, Whether it affects precedent Securities. 42

A Mortgage is made at 5 *l. per Cent.* with a Covenant to pay 6 *l.* if the Intereſt is unpaid for ſixty Days after it is due: This being the Agreement of the Parties, Equity will not relieve againſt it as a Penalty. 134

A. in 1650, makes a Mortgage at 8 *l. per Cent.* In 1660, Intereſt is reduced to 6 *l. per Cent.* *A.* for ſeveral Years after pays Intereſt at 8 *l. per Cent.* Whether the Intereſt paid after 1660, above 6 *l. per Cent.* ſhall go to ſink the Principal. 145

Intereſt is reſerved at 5 *l. per Cent.* but if not duly paid, then to pay Intereſt at 6 *l. per Cent.* Tho' there was a great Arrear of Intereſt, yet Mortgagor decreed to pay but 5 *l. per Cent.* the Reſervation at 6 *l. per Cent.* being only as *Nomine pœnæ.* *Page* 289

But where Intereſt was reſerved at 6 *l. per Cent.* and if duly paid, then agreed to take 5. Intereſt not being duly paid, the Court allowed 6 *l. per Cent.* 290

For if the Party will take the Benefit of lowering the Intereſt, he muſt comply with the Times of Payment. 316

Bill to foreclooſe an Infant, and by Decree referr'd to a Maſter to ſee what is due, who reports what is due for Principal, Intereſt and Coſts. Whether upon a ſubſequent Order to carry on Intereſt, the former Intereſt during the Infancy ſhall carry Intereſt. 392

Bond executed in *England* for a Debt in *Ireland*, ſhall carry but 6 *l. per Cent* Intereſt. 395

Interrogatories.

The Plaintiff's Chriſtian Name being miſtaken in the Title of the Interrogatories, the Depoſitions could not be read, nor would the Court permit the Title to be amended, tho' moſt of the Witneſſes, ſince their Examination, were gone beyond Sea. 435

Jointenants and Tenants in Common.

Vide **Survivor.**

Agreement by one Jointenant to ſell, does not bind the Survivor. 63

Deviſe to two equally to be divided, and to the Survivor of them; they are Jointenants by Reaſon of the expreſs Gift to the Survivor. *Page* 323

A. and *B.* Jointenants for their Lives, *A.* makes a Leaſe for Years of his Moiety, to commence from his Death, if *B.* ſo long live. This Leaſe ſhall bind the Survivor. *Ibid.*

The Plaintiff's Husband and Defendant had enjoyed a Church-Leaſe in Moieties, under an Agreement there ſhould be no Benefit of Survivorſhip: Upon the laſt Renewal the Leaſe was taken in both their Names, and no expreſs Agreement againſt Survivorſhip. The Plaintiff's Husband being ſick, by Deed aſſigns his Moiety to his Wife, and by Will deviſes it to her. The Grant to the Wife is void, and the Deviſe will not ſever the Jointenancy. 385

A. by Will deviſes Lands, in Truſt that the Profits ſhould be equally divided between his Wife and Daughter, during the Wife's Life, with Remainders over. The Daughter died in the Life of her Mother. Decreed this to be a Tenancy in Common between the Mother and Daughter, and that during the Mother's Life, the Daughter's Moiety ſhould go to her Adminiſtrator. 430

A Deviſe to *two* and the Heirs of their Bodies. It is a Joint-Eſtate for Life, and ſeveral Inheritances; and ſo it is, if there is a Deviſe over; but if there is a Deviſe over, and one of them dies without Iſſue, a Moiety ſhall go over to the Remainder-Man. 545

A Man lends Money in the Names of himſelf and his Wife, upon Mort-

gages and Bonds, and dies. The Wife is intitled to the Money by the Survivorſhip, if there are other Aſſets ſufficient to pay Debts. *Page* 683

Jointure.

A Jointreſs is not bound to anſwer, whether her Husband had any other Title than as Aſſignee of a Mortgage, ſhe denying, that ſhe had any Notice of the Mortgage, and inſiſting ſhe was a Purchaſer without Notice, and that her Husband alledged he was in by Deſcent. 701

Ireland.

Bond executed in *England* for a Debt in *Ireland*, ſhall carry but *6 l. per Cent.* Intereſt. 395

Judgment. Vide *under Title* **Securities.**

Jurisdiction.

Vide **Courts.**

An Account decreed of an Inteſtate's perſonal Eſtate, notwithſtanding an Account had been before taken, and a Diſtribution decreed in the Spiritual Court. 47

If the Party inſiſts the Court of Chancery has not Juriſdiction of the Matter in Queſtion, he muſt plead to the Juriſdiction of the Court, and not object it at the Hearing. 484

Bill that the Defendant might redeem a Mortgage of the Iſland of *Sarke*, or be foreclоſed. Defendant pleaded to the Juriſdiction of the Court, that the Iſland was Part of the Dutchy of *Normandy*, and had Laws of their own, and were under the Juriſdiction of the Courts of *Guernſey*. Plea overruled, becauſe the Mortgage was of the Iſland, and for that the Defendant was ſerved here; for *Equitas agit in Perſonam.* *Page* 494

Laches. Vide **Infant.**

Leaſes and Covenants therein.

Leſſee for Years covenants not to plow paſture Land, and if he does, then to pay 20 *s. per Ann.* for every Acre plowed. The Court will not grant an Injunction to ſtay the Tenant's Plowing, the Parties themſelves having agreed the Damage for plowing. 119

Nor will the Court relieve the Leſſee againſt the Penalty if he plows. *Ibid.*

Bill for a ſpecifick Performance of Articles for a Leaſe of Lands in *Norfolk*, where by Cuſtom the Landlords repair: But the Rent reſerved on the Leaſe appearing to be under the Value, decreed the Tenant ſhould covenant to repair. 231

Leſſee of a Church-Leaſe, makes an Under-Leaſe, and would have the Under-Leſſee to ſurrender in Order to enable the original Leſſee to renew with the Church. There being no Covenant in the Tenant's Leaſe to ſurrender. Equity cannot compel him to do it. 383

Rules are made at the Foundation of an Hoſpital, that no Leaſe ſhould be made for above Twenty-one

one Years. The Hoſpital make a Leaſe for Twenty-one Years with a Covenant by Renewal to make it up ſixty Years. This Covenant is not binding in Equity, as being equally prejudicial to the Hoſpital, as a Leaſe for ſixty Years. *Page* 411

Equity will decree the Aſſignee of a Leaſe to pay the Rent which becomes due ſince the Aſſignment, and which ſhall become due while he continues in Poſſeſſion; but not during the Continuance of the Leaſe; for he may if he can, get rid of the Leaſe, by aſſigning it to another. 421

Upon a Bill brought againſt an Aſſignee of a Leaſe, to pay the Rent, and perform the Covenants in the Leaſe; the original Leſſee ought to be a Party, becauſe he is ſtill liable; but if the Aſſignee has divided his Intereſt in the Leaſe, into a great Number of Shares, it is not neceſſary to make all the Sharers Parties. 422

In the Conſtitutions for founding an Hoſpital it was ordained, that no Leaſe ſhould be made for above Twenty-one Years, and the Rent not to be raiſed, nor above three Years Rent taken for a Fine. Though the Tenant of the Hoſpital Lands is intitled to a beneficial Leaſe upon Renewal; yet this Conſtitution is not to be followed according to the Letter; but as Times alter, and the Price of Proviſions increaſes, ſo the Rents ought to be raiſed in Proportion. 596

A Decree having been made in the Lord *Coventry*'s Time for granting a Leaſe of Charity-Lands for Ninety-nine Years, if three Lives lived ſo long, at the Rent of one Third of the then improved Value, and to be perpetually renewable without Fine; it was now decreed the Leaſe ſhould be renewed *toties quoties*, without Fine, but at the Rent of one Third of the improved Value; not as it was in the Lord *Coventry*'s Time, but according as the Eſtate ſhall be Worth, when the Leaſe ſhall from Time to Time be renewed. *Page* 746

Legacies and Legatees.

Legacies to be applied at Diſcretion. Vide *Title* **Diſcretion.**

Legacies given on Condition to marry with Conſent, &c. Vide *Reſtraints on Marriage, under Title* **Marriage.**

A Legacy preſumed to be paid after a great Length of Time. 21

A Legacy is given on Condition not to diſpute the Will. The Legatee commences a Suit, whereby he diſputes the Validity of the Will. This is no Forfeiture of the Legacy, if there was *probabilis Cauſa litigandi*. 91

A. by Will gives his Daughter 200 *l.* and afterwards gives with her in Marriage a Portion greater than the Legacy. The Portion is an Extinguiſhment of the Legacy. 115

One gives Legacies of 15 *l.* apiece to each of his Relations of his Father and Mother's Side, and gave the Surplus of his perſonal Eſtate to *A.* and makes *B.* his Executor. *B.* the Executor paid 15 *l.* to the Teſtator's Couſin German, and 15 *l.*

15 *l.* apiece to her four Children. The Court allowed the Payment to the Children, and would not reſtrain the Deviſe to the Relations within the Statute of Diſtribution. *Page* 381

Lands are deviſed to *A.* to be ſold to pay Debts and Legacies, and *A.* is made Executor. The Money raiſed by Sale is legal Aſſets, and Debts muſt be firſt paid: Otherwiſe if the Deviſee were not made Executor. 405

Where Lands are ſubjected by Will to pay Debts and Legacies, whether Debts are to have a Preference, or both to be paid equally. 248, 302, 405

Legacy of 500 *l.* given to the eldeſt Son of *A.* to be begotten, to place him out Apprentice. *A.* has a Son born after the Teſtator's Death, who brings a Bill for the 500 *l.* and 'tis decreed to him, though born after the Teſtator's Death, and though the Legacy is given him for a particular Purpoſe. 431

Legacies are given to *A. B.* and *C.* to be paid at their reſpective Marriages, and if any of them died unmarried, her Legacy to go to the Survivors. One of them dies unmarried, the Survivors ſhall not receive her Legacy, before their reſpective Marriages. 620

One deviſes Lands to his Son and his Heirs; and if his Son died without Iſſue, then he gives 200 *l.* to his Daughter. The Son left Iſſue, which died without Iſſue. The 200 *l.* did not become due; the Legacy not being intended to ariſe upon any remoter Contingency, than the Son's dying without Iſſue living at his Death. 686

A Legacy is given upon a Contingency, and the Legatee dies before the Contingency happens. It ſhall go to his Executors. *Page* 758, 766

Specifick Legacies.

A. living in *Antegoa*, and having a Plantation there, deviſes 50000 Weight of Sugar to the Children of *B.* to be paid by his Executors in ten Years after his Death. The Executors not delivering the Sugars within the Time; on a Bill brought by one of the Children, decreed the Value of the Plaintiff's Legacy to be computed according to the medium Rate of Sugars in *Antegoa*, at the End of the ten Years, and paid with Intereſt from the Time it became due. 553

One deviſes to his Wife all his perſonal Eſtate at *W.* This is a ſpecifick Legacy, and to be preferr'd to pecuniary Legacies, in Caſe of Deficiency of Aſſets. 688

Legacies or Portions veſted, lapſed, or extinguiſhed.

A Legacy is given to *A.* when he ſhould be Twenty-four; at Twenty-one the Executors pay him Part, and give Bond to pay the Remainder at a future Day, being the Time, when he would be Twenty-four. *A.* dies under Twenty-four. Whether the Money received ſhall be repaid, and the Bond delivered up. 31

By Marriage-Settlement it is provided, that if there be no Iſſue Male of the Marriage, and one or more Daughters living at the Death of the Father, the Truſtees ſhould

ſhould ſtand ſeiſed to the Intent ſuch Daughter or Daughters ſhould receive out of the Rents 10000 *l.* and 100 *l. per Ann.* for Maintenance, but no Time is limited for Payment of the Portions. The Father dies leaving a Daughter only, who lives to Seventeen, and by Will diſpoſes of her Portion. Decreed the Portion to be veſted, and well diſpoſed of by the Will, and the rather, becauſe no Time was appointed for the Payment. *Page* 72

A Portion for a Daughter by Will is charged upon Land, payable at Twenty-one. The Daughter dies under Age, the Portion ſhall ſink in the Land. Otherwiſe if no Time had been limited for Payment of the Portion. 92

No Difference where the Portion is ſecured by a Settlement or a Will, if charged on a real Eſtate, and the Party dies before it is payable. In either Caſe it ſinks in the Land. *Ibid.*

One deviſes to his Siſter 350 *l.* on Condition that at or before her Death ſhe gives 200 *l.* thereof to her Children. The Siſter dies in the Life of the Teſtator. The whole Legacy is lapſed. 116

A. by Will deviſes his Land to *B.* in Fee, paying 400 *l.* whereof 200 *l.* to be at the Diſpoſal of his Wife by her Will, to whom ſhe ſhould think fit. The Wife dies inteſtate. Her Adminiſtrator ſhall have this 200 *l.* the Property thereof being abſolutely veſted in the Wife. 181

A Legacy is given to a Child payable when Twenty-one. The Child dies under Age. The Legacy ſhall go to the Adminiſtrator; but he ſhall not have it, till ſuch Time as the Child, if he had lived, would have come to the Age of Twenty-one. 199

If the Legacy is payable with Intereſt, the Adminiſtrator ſhall have it preſently, and he ſhall not wait, till ſuch Time as the Child would have attained Twenty-one. *Ibid.*

A Legacy is given to *A.* to be paid when he ſhall attain Twenty-one, and Legacies are given to *B.* and *C.* in the ſame Manner; and if one or more of them ſhould die, before his, her, or their reſpective Legacy or Legacies became due, then his, her, or their Legacy or Legacies ſhould be equally divided among the Survivors. *A.* dies in the Life of the Teſtator. His Legacy ſhall go to the Survivors. 207

One charges his Lands with 6000 *l.* for the Child, of which his Wife was *privement enſient*, if it proved a Daughter. A Daughter is born and dies. The 6000 *l.* ſhall not go to her Adminiſtrator. 208

A Legacy is given to *A.* to be paid at his Age of Twenty-three, and if he dies before, to go over to *B.* *A.* dies before Twenty-three, *B.* ſhall have the Legacy preſently. 283

By Marriage-Settlement on Failer of Iſſue Male, a Term is limited for raiſing 5000 *l.* for Daughters Portions, payable at Eighteen. There is one Daughter only, upon whom the Inheritance of the Lands deſcends. She dies, and by a *nuncupative* Will gives all ſhe could deviſe to her Mother, who took Adminiſtration with the Will annexed. The Truſt of the Term is not extinguiſhed in Equity, but is a ſubſiſting Charge on the Eſtate, and

ought to be raiſed, and paid to the Adminiſtratrix. *Page* 348

Divers Legacies are given by a Will, and if any Legatee died before his Legacy was payable, it ſhould go to his Brothers and Siſters. A Legatee dies in the Teſtator's Life-time. This is no lapſed Legacy, but ſhall go over to his Siſter. 378

One deviſes Lands to his Executor to be ſold, and thereout to pay 500 *l.* to *A.* if he returns from beyond Sea, and the Reſidue to *B.* *A.* dies before the Teſtator. The Heir ſhall not have this 500 *l.* or ſo much of the Land as is of that Value, as a reſulting Truſt, as undiſpoſed of: But this 500 *l.* ſhall fall into the *Reſiduum*, as a Legacy given upon a Contingency that never happened; and conſequently as no Legacy. Otherwiſe if it had been an abſolute Legacy of 500 *l.* 394

A Deviſe of a Legacy to one at Twenty-one, or to be paid at Twenty-one, is all one. 417

A Daughter's Portion ſecured by a Truſt-Term, not extinguiſhed by a Deviſe of Lands to the Daughter in Tail, in Remainder after a Term for ſixty Years deviſed for Payment of Debts and Legacies. 457

A. by Will gives 300 *l.* to *B.* and declares her Will and Deſire, that he give the 300 *l.* to his Daughter at his Death, or ſooner, if there be Occaſion for her Advancement. *B.* dies three Days before *A.* and the Daughter dies at Sixteen unmarried. The 300 *l.* decreed to the Adminiſtrator of the Daughter. 466

If a Deviſe is of any Thing to *A.* for Life, directing him at his Death to give it to *B.* this amounts to a Deviſe of the Uſe of the Thing to *A.* for Life, Remainder to *B.* *Page* 467

A. deviſed 4000 *l.* to his Son, to be paid at his Age of Twenty-five, and Intereſt in the mean Time, out of which the Son was to have Maintenance; and directs the 4000 *l.* to be raiſed out of a Truſt-Eſtate. The Son dies under Twenty-five. This is a veſted Legacy, and ſhall go to his Executors. 508

A. deviſes to *B.* 400 *l.* which he owed *A.* provided he paid thereout ſeveral particular Sums to his Wife and Children, and the Reſt he freely gave to him, and directs his Executor to deliver up the Security, and not to claim any Part of the Debt, but to give ſuch Releaſe, as *B.* his Executors, *&c.* ſhould require. *B.* dies in the Life of the Teſtator. Decreed the Legacies given out of the 400 *l.* to be paid, and the Reſidue of the Debt to be paid to the Executor of *A.* 521

If one ſays in his Will, *I forgive ſuch a Debt*, or *my Executors ſhall not Demand it*, or *ſhall Releaſe it*, this is a Diſcharge of the Debt, though the Debtor dies in the Life of the Teſtator. 522

But if a Debt is deviſed by Will to the Debtor, without Words of Releaſe or Diſcharge, and the Debtor dies in the Life of the Teſtator, the Legacy is lapſed, and the Debt ſubſiſts. *Ibid.*

J. S. deviſed 300 *l.* apiece to his three Daughters at Twenty-one or Marriage, and if any died before, to go to the Survivors. One of them died in the Life of the Teſtator. Her Legacy ſhall go to

to the ſurviving Daughters. *Qu.* *Page* 611

A. deviſes Lands to his Son and his Heirs, and declares that out of the Lands he ſhall pay 200*l.* to his Siſter at her Age of Twenty-one. She marries, and dies under Age. Legacy not veſted. 617

Surplus deviſed to four Perſons, and if any of them died before the Eſtate was got in and divided, his Share to go to his Children. One of them died in the Life of Teſtator, leaving Children. Whether they ſhall take their Father's Share. 653

A Term is limited to raiſe Portions for Daughters, if no Sons, payable at Eighteen or Marriage; provided ſuch Daughters ſurvive their Father. A Daughter marries and dies in the Life of her Father. Her Portion ſhall not be raiſed. 655

A Legacy is deviſed to *J. S.* when of the Age of Sixteen, and Intereſt in the mean Time. *J. S.* dies before he attained the Age of Sixteen. The Legacy veſted, and ſhall go to his Executor. 673

One deviſes 1200*l.* to the four Children of *J. S.* to be divided amongſt them according to the Diſcretion of *J. S.* whom he makes Executor. One of the Children died in the Life of the Teſtator. Decreed a fourth Part of the 1200*l.* did not become a lapſed Legacy; for nothing veſted in any of the Children before an Allotment by the Executor; and for the ſame Reaſon the Adminiſtrator of the deceaſed Child could not be intitled to any Part of the 1200*l.* 744, 745

A Legacy is given upon a Contingency, and the Legatee dies before the Contingency happens; the Legacy is not lapſed, but ſhall go to the Executor of the Legatee. *Page* 758, 766

Abatement and refunding.

A Freeman of *London* having deviſed a Leaſhold Eſtate to *J. S.* he is evicted of a Moiety by the Teſtator's Widow, who claimed by the Cuſtom. *J. S.* ſhall not have Satisfaction made him for what was ſo evicted, either againſt the Legatees in general, or the reſiduary Legatee; for the Teſtator had Power only to diſpoſe of a Moiety. 111

A ſpecifick Legatee is not to abate in Proportion with other Legatees, where there is a Deficiency to pay Debts. *Ibid.*

Legatees ſhall refund to unſatisfied Creditors. But where an Executor voluntarily pays a Legacy; and Aſſets prove deficient, neither he nor the other Legatees ſhall compel him to refund. Otherwiſe if the Executor pays a Legacy by Compulſion. 205

A Legacy is give to Executors for Care and Pains. If there is a Deficiency of Aſſets, they ſhall abate in Proportion. 334

In what Caſes a Legacy ſhall be a Satisfaction of a Debt, or other Demand on the Teſtator's Eſtate.

Vide *Title* **Satisfaction.**

A Man by his Marriage-Settlement provides 4000*l.* for Daughters Portions, and having two Daughters, by Will gives them 2000*l.* apiece

apiece for their Portions, without taking Notice of the Settlement. The Legacies ſhall be in Satisfaction of the Portions by the Settlement. *Page* 111

By an old Settlement in 1631, 3000 *l.* is provided for Daughters Portions on Failer of Iſſue Male. The Brother of the Daughters, who might have barred his Siſters by a Recovery, having given them above the Value of 3000 *l.* by his Will, it ſhall be intended a Satisfaction. 177

By a Marriage-Settlement, in Caſe of Failer of Iſſue Male, the Remainder is limited to the Daughters, until they ſhould raiſe 3000 *l.* for their Portions. There is Iſſue a Son and two Daughters. The Father by Will gives his Daughters 700 *l.* apiece, and dies, and the Son afterwards by his Will gives them to the Amount of 7000 *l.* The Father or Son's Legacy ſhall not be a Satisfaction of the 3000 *l.* ſecured by the Settlement. 258

One on the Marriage of his Daughter, gave a Bond to the Husband for the Daughter's Portion, and afterwards by Will deviſes Lands of much greater Value to the Husband and Wife, and their Heirs. The Deviſe is no Satisfaction of the Land, though there are not Aſſets to pay the Teſtator's Debts. 298

A. gives Bond to *B.* her Servant, to pay her 20 *l. per Ann.* Quarterly, for her Life free from Taxes, and by Will, without taking Notice of the Bond, gives *B.* 20 *l. per Ann.* for her Life, payable Half-yearly; but not ſaid free of Taxes. Decreed the Annuity by the Will not to be a Satisfaction of the Bond, and that *B.* ſhould have both the Annuities. *Page* 478

A. on his Wife's joining in Sale of Part of her Jointure, gives her a Note to pay her 7 *l.* 10 *s. per Ann.* for her Life, and afterwards on Sale of a farther Part gives her a Bond to pay her 6 *l.* 10 *s. per Ann.* for her Life; and by Will, without taking Notice of the Note or Bond, gives her 14 *l.* a Year for Life. The Deviſe ſhall be a Satisfaction of the Bond and Note. 498

A. on his Marriage covenants to purchaſe and ſettle 20 *l.* a Year on his Wife for her Life, and if he died before it was done, to leave her 300 *l.* for her better Livelyhood and Maintenance. He died without making any Settlement, and by Will gives his Wife the Intereſt of 330 *l.* for her Life, with Power to diſpoſe of 30 *l.* at her Death. Decreed the Legacy was not a Satisfaction of the Articles, and that the Wife ſhould have the 300 *l.* by the Articles, and the Legacy too. 505

A. by Marriage-Articles agrees to leave his Wife 800 *l.* and her Jewels, *&c.* but it is declared, that notwithſtanding the Articles, ſhe ſhould not be debarred of any Thing he ſhould give her by Will. *A.* by Will makes a Diſpoſition of his whole Eſtate, and gives his Wife 1000 *l.* The Wife muſt either waive the Articles or the Will: She cannot claim the Benefit of both. 555

A Child entitled by his Father's Marriage-Articles to a Share of his perſonal Eſtate, has a Legacy given him by the Will of his Father. If he will have the Legacy, he muſt waive the Benefit of the Articles. 556

Surplus and reſiduary Legatee.

One deviſes Lands to his Nephew to pay his Debts, and makes the Nephew Executor, but makes no Diſpoſition of the Surplus. Whether the Deviſee or the Heir at Law ſhall have the Surplus. *Page* 247

If an expreſs Legacy is given to the Heir, the Deviſee ſhall have the Surplus. *Ibid.*

One deviſes, after Debts and Legacies paid, the Surplus of his Eſtate to his Wife and Son *John* equally, and makes them Executors, but if his Wife ſhould marry, then ſhe ſhould render the Right of being an Executrix to his Son *Roger*, he to be Partner with his Brother *John* in the Executorſhip. The Wife marries. She thereby loſes her Right to the Surplus, and to the Executorſhip. 308

Deviſe of an expreſs Legacy to the Executors, and alſo to the next of Kin, and no Diſpoſition of the Surplus; how the Surplus ſhall go. 361

One has a Wife, and no Child, and two Brothers and two Siſters, and by Will gives a Moiety of a Banker's Debt to his Wife, whom he makes Executrix, and makes no Diſpoſition of the Surplus of his perſonal Eſtate, and gives Legacies to his Brothers and Siſters out of his real Eſtate. *Per Cur'*, The Wife by a Deviſe of a Moiety of the Banker's Debt, is excluded from the Surplus, as Executrix, though there was no Child, and that Legacies were given to the Brothers and Siſters out of the Land; which had been unneceſſary, unleſs the Teſtator had intended the Surplus for his Wife, which otherwiſe would have been ſufficient to pay the Legacies. *Page* 425

One makes a Will, and his Son Executor, but makes no Diſpoſition of the Surplus. The Son dies without proving the Will. The Surplus ſhall be divided amongſt the next of Kin of the Teſtator. 634

One by Will gives his next of Kin, being his Nephews, an expreſs Legacy, and gives 100*l.* apiece to his two Executors, and makes no Diſpoſition of the Surplus. Whether the Executors or the Nephews ſhall have the Surplus. 673

The Wife of the Teſtator is made Executrix, and there is no Deviſe of the Surplus, nor any expreſs Legacy given to the Wife, except what ſhe had as Executrix of her former Husband, and ſome Things ſhe had before Marriage. Decreed the Surplus to the Wife. 675

The Executor had 20*l.* given him for Mourning. Diſtribution decreed. 676

A. by Will gives 100*l.* Legacy to his Wife; and alſo the Intereſt of 300*l.* for her Life, and makes his Wife and two Strangers Executors, to one of whom he gives 20*l.* for Mourning. Surplus decreed to be diſtributed. 677

In what Caſes the Executor ſhall be only a Truſtee. Vide *under Title* **Executors.**

Ademption of a Legacy.

One deviſes 500 *l. viz.* 400 *l.* due on Bond from *J. S.* and 100 *l.* in Money. Afterwards the Teſtator receives Part of the 400 *l.* and takes a new Bond for the Remainder. This is no Ademption of the Legacy. *Page* 681

Limitation of Actions, &c.

Where there is a Deviſe for Payment of Debts, a Debt, upon which the Statute of Limitations has run, is within the Proviſion, equally with other Debts. 141

Statute of Limitations, as to Rents, extends only to cuſtomary Rents between Lord and Tenant, and not to Rent ariſing by Grant or Will, whereof the Commencement may be ſhewn. 235

Statute of Limitations not to take Place againſt Religion, or Charity. 398, 399

If a Man recovers a Judgment or Sentence in *France* for Money due to him, the Debt muſt be conſidered here only as a Debt on ſimple Contract, and the Statute of Limitations will run upon it. 540

The Statute of Limitations provides, where the Party to whom a Debt is owing, goes beyond Sea; but not where the Debtor is beyond the Seas. 541, 694

But the Statute of 4 & 5 of Queen *Anne*, ſaves the Right of Action, as well where the Debtor, as where the Creditor is beyond Sea. *Page* 695

The Statute of Limitations will not take Place, if there be no Executor, until Adminiſtration be taken out. *Ibid.*

Merchants Accounts not within the Statute; otherwiſe if ſtated. *Ibid.*

If a Creditor ſues out a *Latitat* againſt *J. S.* and continues it, and *J. S.* dies, the Creditor may bring a Bill in Equity againſt the Executor of *J. S.* and need not to go on in the old Action: And the Statute of Limitations is no Bar. *Ibid.*

Lis Pendens. Vide *under Title* **Bill.**

London.

A Freeman of *London* dies within the Province of *York*. The Cuſtom of *London* in the Diſtribution of his perſonal Eſtate, ſhall control the Cuſtom of the Province of *York*. 49

The Cuſtom of *London* follows the Perſon, though never ſo remote from the City. 82, 110

A Freeman of *London* aſſigns a Leaſe for Years in Truſt for himſelf for Life, then for his Wife for Life, and afterwards for his Son by a firſt *Venter*. Whether this Aſſignment ſhall ſtand againſt the Cuſtom, ſo as to bind the other Children. 98

A Freeman of *London* deviſes a Leaſe for Years to *A.* and his Books to *B.* and the Uſe of the Surplus to his Wife for Life. Decreed the Wife, there being no Child, ſhould have a Moiety of the whole perſonal Eſtate, as well of

of the Leaſe and the Books, as of all the Reſt, by the Cuſtom, and the Uſe of the other Moiety of the Surplus for Life by the Will. *Page* 110

A voluntary Judgment given by a Freeman will not be good againſt the Widow; but will bind the legatory Part. 202

An only Child of a Freeman advanced in Part, is not to bring that Part into Hotchpot. 234,754

A Freeman of *London* by Will gives 700 *l.* for Mourning. It ſhall be paid out of the legatory Part, and not out of the orphanage or cuſtomary Part. 240

If Goods are abſolutely given away by a Freeman in his Life-time, ſuch Gift will ſtand good againſt the Cuſtom: But if he makes a Deed of Gift of his Goods, and retains the Poſſeſſion of any Part thereof, this will be a Fraud upon the Cuſtom. 277

Money brought into Hotchpot by an Orphan, muſt be brought into the orphanage Part only, and not to increaſe the Widow's cuſtomary Part, or the teſtamentary Part. 281, 629

By the Cuſtom of *London* a Maſter may juſtify turning away his Apprentice for Gaming. 291

If the Child of a Freeman of *London* dies under Twenty-one, his orphanage Part by the Cuſtom will ſurvive to the other Children, and he cannot deviſe it. 559

A Freeman of *London* aſſigns the greateſt Part of his perſonal Eſtate, in Truſt for himſelf for Life, and then for his Grandchildren. This Deed is not good againſt the Cuſtom of *London*, as to the Moiety belonging to the Children; but binding as to the other Moiety, which he had Power to diſpoſe of, he having no Wife. *Page* 612, 685

An only Child of a Freeman of *London*, not fully advanced, is to have a full Third of the perſonal Eſtate, without Regard to what has been paid for her Portion. 628

Where a Daughter is advanced in the Father's Life-time, and it appears by Writing under the Father's Hand, what that Advancement was, this will let her into her Share by the Cuſtom. 630

If a Freeman of *London* enters in his Books ſeveral Sums of Money, as paid on Account of his Daughter's Portion, he cannot afterwards write off thoſe Sums, and make the Husband Debtor for them. 631

Where an only Child is fully advanced, the Wife will be intitled by the Cuſtom to a Moiety of the perſonal Eſtate. *Ibid.* 666

Settlement by a Freeman of *London* before Marriage, though of Land, bars the Wife of her cuſtomary Part: And the Children in ſuch Caſe will have a Moiety of his perſonal Eſtate. 665

A Freeman of *London* by Deed aſſigns over ſeveral Leaſes in Truſt to pay any Sum not exceeding 1000 *l.* as he ſhould appoint. He appoints 500 *l.* to his Daughter, and the Reſidue to his Grandchildren. This is in Fraud of the Cuſtom, and void, as to the Moiety, which the Daughter is intitled to. 685

Advancement by a Freeman of *London* of a Child by ſetling a real Eſtate, no Bar of the orphanage Part. 753

A Leaſhold Eſtate deviſed by a Freeman to a Truſtee for the ſeparate Uſe of his Daughter, is not to be taken as Part of her orphanage Part, but to go out of the legatory Part. *Page* 754

Lunatick.

Committee of a Lunatick inveſts Part of the Lunatick's perſonal Eſtate, in a Purchaſe of Lands in Fee. This ſhall ſtill be taken as perſonal Eſtate, and in Caſe of the Lunatick's Death, go to his next of Kin, and not to his Heir. 192

A Settlement made by a Lunatick, though reaſonable, and for the good of the Family ought to be ſet aſide in Equity. 414

Mariners.

THE *Eaſt-India* Company take Bonds from the Mariners and Officers of the Ship, not to demand their Wages, unleſs the Ship returned to the Port of *London*. The Ship arrives at a delivering Port, and is afterwards taken by the *French*. The Seamen and Officers ſhall have their Wages to the Time of the Arrival of the Ship at the delivering Port. 727

Marriage.

Agreement on Marriage and underhand Agreement in Fraud of a Marriage-Agreement. Vide *under Title* Agreement.

A Woman takes a Bond in the Name of a Truſtee, and afterwards married one of the Obligors. The Marriage is no Releaſe or Extinguiſhment of the Debt. *Page* 290

Marriage Brocage-Bonds.

A Marriage Brocage-Bond decreed to be delivered up, and a Gratuity of fifty Guineas actually paid to be refunded. 392

Leaſe granted by Tenant in Tail in Conſideration of procuring a Marriage, ſet aſide at the Suit of the Remainder-Man. 446

A Bond was given to the Father, in Order to obtain his Conſent to the Marriage of his Daughter, (who was intitled to a Portion by the Gift of an Aunt) to repay Part of the Portion, if ſhe died without Iſſue. Bond ſet aſide as a Marriage *Brocage*-Bond. 588

A. on the Marriage of her Daughter inſiſts on a Bond from the Husband, to give her a Releaſe within two Years after the Marriage. Bond ſet aſide. No Difference between ſuch Bond and a Marriage Brocage-Bond. 652

Reſtraints on Marriage.

One by Will gives 20000 *l.* apiece to his two Daughters, payable at Twenty-five or Marriage, ſo as ſuch Marriage be with Conſent of his

his Wife and Truſtees, and after the Age of ſixteen. If either married under ſixteen or without Conſent, ſuch Daughter to have only 10000*l.* Teſtator afterwards treats with *J. S.* for a Marriage with his eldeſt Daughter, and he dying before the Marriage had, ſhe marries *J. S.* with Conſent of her Mother and the Truſtees, but before her Age of ſixteen. Decreed her the whole 20000*l.* *Page* 223

One deviſes 3000*l.* to his Daughter at Twenty-one or Marriage, provided ſhe marry with the Conſent of *A. B.* and if ſhe married without Conſent, then ſhe was to have but 500*l.* and the 3000*l.* Legacy to ceaſe. The Daughter marries without Conſent; yet decreed ſhe ſhould have the whole 3000*l.* it not being deviſed over, but only to fall into the Surplus. 293

One has a Son and a Daughter, and deviſes a Legacy to his Daughter, but if ſhe marry without the Conſent of her Mother, then 500*l.* of the Daughter's Legacy to go to the Son. The Daughter marries without the Mother's Conſent. The Son ſhall have the 500*l.* as deviſed over, and an intended Increaſe of the Son's Proviſion. 357

A. By Will gives Portions to his Daughters, but mentions no Time when to be paid; but adds a Proviſo that his Daughters ſhould marry with the Conſent of his Wife; and if any married without ſuch Conſent, her Portion to go over. Though this is an hard Condition, it extending to a Marriage at any Time, though after Twenty-one; yet the Portions being limited over in Caſe of a Marriage without ſuch Conſent Equity will not relieve. *Pag.* 452, 453

But on a Bill brought in this Caſe by the Daughters for their Portions, the Court decreed the Portions to be paid on Security to refund, if the Condition ſhould be broke. 452

A. by Will gives his Grand-daughter 200*l.* on Condition ſhe continued with his Executors, till ſhe was Twenty-one; but if ſhe was taken from them by her Father, who was a Papiſt, before Twenty-one, or married againſt the Conſent of his Executors, then he gave her but 10*l.* The Daughter was placed by the Executors with a Clergyman, who, before ſhe was Twenty-one, with Conſent of one of the Executors, permitted her to make a Viſit to her Father; and he took that Opportunity to marry her to a Papiſt. Decreed ſhe ſhould only have the 10*l.* 572

When the Condition is, that a Daughter, ſhall not marry *againſt* the Conſent of Executors, it is the ſame Thing, as if it had been, that ſhe ſhould not marry *without* their Conſent, where the Marriage is without the Conſent of the Executors. 573

When the Executors have not an Opportunity before the Marriage to declare their Diſlike, it is a Marriage againſt their Conſent, if upon Notice of it they diſſent, and delare their Diſlike of it. *Ib.*

A. deviſed 300*l.* to *B.* her Daughter, and if ſhe married without Conſent of the Executors, or the major Part of them, the Legacy to go to the Children of her Siſter, the Wife of *C.* and made *C.*

and two others Executors. *B.* being at the Houſe of *C.* there marries his Son by a former Wife, with his Privity, being under Twenty-one. *B.* and her Husband bring a Bill for the Legacy. *C.* in Favour of his other Children inſiſts the Legacy is forfeited. The other Executors confeſs, they had Notice of the Courtſhip, and did not contradict or diſapprove of it. Decreed the 300 *l.* to the Plaintiffs, there being at leaſt a tacit Conſent. *Page* 580

Maſter and Servant.

A Tradeſman turns away his Apprentice for Negligence and Miſdemeanors. Decreed to refund Part of the Money he had with him. 64

If an Apprentice in *London* marries without his Maſter's Conſent, the Maſter cannot turn him away for that Reaſon, but muſt ſue his Covenant. 492

A. puts his Son Apprentice to *B.* and gives Bond for his Fidelity, and takes a Covenant from *B.* that he would, at leaſt once a Month, ſee his Apprentice make up his Caſh. The Apprentice imbezils the Caſh, and *B.* brings Action on the Bond. On a Bill by *A.* to be relieved, decreed that *A.* ſhould be anſwerable for no more than *B.* could prove his Servant had imbeziled in the firſt Month after the Imbezilment began. 518

Maſter of a Ship is but a Servant to the Owners, and if he buys Proviſions for the Ship, and does not pay for them, the Owners are liable in Proportion to their reſpective Shares in the Ship. 643

Merger.

A Term is limited for raiſing Daughters Portions. The Father dies leaving one Daughter only, upon whom the Inheritance deſcends. She dies an Infant and indebted, and diſpoſes of her Portion by Will. Equity will relieve againſt the Merger of the Portion. *Page* 90

A Term of five Hundred Years is limited to Truſtees to raiſe 5000 *l.* Portions for Daughters, if no Son, payable at Eighteen. The Father dies, leaving Iſſue only one Daughter and no Son; and the Inheritance deſcends to the Daughter, who attains her Age of Nineteen, and dies. As the Term for raiſing the Portion is not merged in Law, ſo neither ſhall the Truſt be extinguiſhed in Equity; it being more beneficial to the Infant, that it ſhould not be merged, in Regard to her Advancement in Marriage, and Payment of her Debts, and her Power of diſpoſing her Portion by Will: And decreed the Portion to be raiſed for the Benefit of the Mother, to whom the Daughter had given all that was in her Power to deviſe. 348

A Daughter's Portion ſecured by a Truſt-Term not extinguiſhed, by a Deviſe of the Lands to the Daughter in Tail, in Remainder after a Term for ſixty Years deviſed for Payment of Debts and Legacies. 457

Mortgage.

Mortgage.

As to Buying in of Incumbrances and what Uſe may be made thereof. Vide *under Title* **Securities.**

As to Concealment of Mortgages. Vide **Concealment.**

A. having a Leaſe for Years of a Brewhouſe, wherein are Covenants to repair, aſſigns it by Way of Mortgage to *B.* The Premiſſes being out of Repair, the Leſſor brings a Bill againſt *B.* to compel him to perform the Covenant. *B.* having never been in Poſſeſſion; the Court would not decree him to perform the Covenant in Specie, but leave the Plaintiff to recover at Law as he could. *Page* 275

Leaſe for Years ſubject to a Ground-Rent, is aſſigned over by Way of Mortgage to *J. G.* for 100*l.* the Mortgagee never entered, but loſt the 100*l.* Mortgage-Money, and is ſued by the Leſſor for the Ground-Rent. No Relief, it being his own Default, to take the Mortgage by Way of Aſſignment, and not by Way of Under-Leaſe. 374

Mortgagor ſhall preſent to the Church, until the Mortgage is foreclоſed. 401

One borrows 200*l.* and makes a Mortgage, which is defeazanced to be void on Payment of 40*l. per Ann.* quarterly for eight Years. The Court relieved on Payment of the 200*l.* and ſimple Intereſt. 402

Mortgages are not to be preferred to other real Incumbrances; but Mortgages, Judgments, Statutes and Recogniſances ſhall be paid according to their Priority. *Page* 525

Expoſition of the Statute of 4 & 5 W. & M. cap. 16. *for preventing Frauds by clandeſtine Mortgages.*

A Perſon, who will take Advantage of this Statute, muſt be an honeſt Mortgagee: And therefore if a Man has uſed any Fraud or ill Practiſe in obtaining a ſecond Mortgage, he ſhall not have the Benefit of the Statute. 589

If a Mortgage by the Statute becomes irredeemable, it will remain ſo in the Hands of the Aſſignee, though aſſigned in Conſideration of the Principal, Intereſt and Coſts due thereon. 590

If a ſubſequent Mortgagee redeems ſuch Mortgage, he ſhall hold the Eſtate irredeemable. *Ibid.*

If there are more Lands in the ſecond Mortgage than in the firſt; *that* ſeems to be a Caſe omitted out of the Statute; but the adding an Acre or two ſhall not exempt it, for that may be a Contrivance to evade the Statute. *Ibid.*

Special Agreements about Mortgages and Redemptions ſpecial.

A. lends Money to *B.* on a Mortgage, and takes a Covenant from *B.* by another Deed, that if *A.* ſhould think fit, *B.* ſhould convey to *A.* ſo much of the mortgaged Eſtate, as ſhould be of the Value of the Money lent at Twenty Years Purchaſe. Covenant decreed to be ſet aſide as unconſcionable. 520

A Man ſhall not have Intereſt for his Money on a Mortgage, and a collateral

collateral Advantage beſides for the Loan of it; or clog the Redemption with any By-Agreement. *Page* 521

Redemption, Foreclosure.

A. makes an abſolute Aſſignment of a Leaſe for three Lives for 550 *l.* to *B.* and *B.* by Writing under Hand agrees on Payment of 600 *l.* at the End of the Year to reconvey. *B.* dies, two of the Lives die, and the Leaſe is twice renewed; yet Redemption decreed on Payment of the 550 *l.* and the two Fines with Intereſt, and during the Life of *B.* the Profits to be ſet againſt the Intereſt. 84

A Feme Mortgagee on her Marriage ſettles the mortgaged Eſtate on her ſelf for Life, Remainder to the Iſſue of the Marriage. The Mortgagor brings a Bill to redeem againſt the Mortgagee, who takes no Notice of the Settlement in her Anſwer, and the Mortgagor having a Decree to redeem, pays the Mortgage-Money. Afterwards the eldeſt Son of the Mortgagee brings Ejectment on the Settlement, and recovers at Law. The Mortgagor relieved, having paid his Money purſuant to the Decree, and having been in no Fault. 142

Leſſee for Years mortgages his Term, and afterwards borrows more Money of the Mortgagee on Bond, and dies; his Executors ſhall not redeem without paying the Bond, as well as the Mortgage. 177

Where a Man has two Mortgages, and one is deficient in Title or Value, the Heir of the Mortgagor ſhall not redeem one without redeeming both. *Page* 207

The firſt Mortgagee forecloſes the Mortgagor, and afterwards deviſes the Eſtate to the Mortgagor. Whether the ſecond Mortgagee ſhall now be let in to a Satisfaction of his Money. 235

A third Mortgagee gets in the firſt, and brings a Bill to foreclose the ſecond Mortgagee, if he do not pay what is due on both. He need not prove the actual Payment of the Money lent on the third Mortgage, the Producing an Acquittance being ſufficient. 279

One makes two Mortgages of two ſeveral Eſtates for ſeveral Sums of Money, and one of them proves deficient. He ſhall not be admitted to redeem one, without paying off the other. 286

One for 300 *l.* grants a Rent of 60 *l.* *per Ann.* for ſeven Years. Whether redeemable. 288

Mortgagor admitted to redeem a Mortgage made in 1642, after three Diſcents on the Defendant's Part, and four of the Plaintiff's Part. Length of Time anſwered by Infancy, and Coverture, and an Account made up by the Mortgagee in 1686. 377

On a Bill to redeem an Account is decreed, 240 *l.* reported due, and Exceptions to the Report; pending which the Defendant the Mortgagee commits Waſte. The Court orders the Mortgagee to deliver up the Poſſeſſion, on the Plaintiff's giving Security to abide the Event of the Account. 392

A. mortgages in 1639, and in 1663, his Heir brings a Bill to redeem, he dying the Suit is revived by his

his Coheirs, who obtain a Decree in 1672, but do not proſecute it. *B.* having purchaſed the Equity of Redemption of the Coheirs, brings his Bill to have the Benefit of the former Decree. Bill diſmiſſed by Reaſon of the Difficulty of the Account and Length of Time. *Page* 418

A. has a firſt Mortgage, and *B.* a ſecond, and ſubject to theſe Mortgages the Eſtate is ſettled on *C.* for Life, Remainder on *D.* an Infant. *A.* brings a Bill to forecloſe. Though *B.* has not the like Remedy over againſt *D.* who, becauſe of his Infancy, cannot be forecloſed; yet *B.* muſt redeem *A.* in ſix Months, or be forecloſed. 518

After a Decree by the firſt Mortgagee to forecloſe the Mortgagor, a ſecond Mortgagee may redeem the firſt, though the firſt Mortgagee had no Notice of the ſecond Mortgage before the Decree. 601, 665

And the Account taken under the Decree will not bind the ſecond Mortgagee. *Ibid.*

A. pawns Jewels to *B.* and after borrows 50*l.* more of him on a promiſſory Note. *A.* ſhall not redeem the Jewels, without paying the Money on the Note. *Quære.* 691

When the Money ſhall be paid to the Heir, and when to the Executor, or to whom.

An old Mortgage in Fee, though two Deſcents caſt, and though more due upon it than the Value, and though the Mortgagee ſays by Anſwer that he will not redeem, but ſubmits to be foreclоſed, ſhall go to the Executor, and not to the Heir; the Equity of Redemption not being forecloſed or releaſed. *Page* 367

A. having ſeveral Mortgages, one of which was a Mortgage of Lands in *D.* on which he had entred, deviſes thoſe Lands to his two Daughters and their Heirs, and the other Mortgages to them their Executors, *&c.* One of the Daughters dies. Her Share of the Lands in *D.* ſhall go to her Heir, and not to her Adminiſtrator; it being the Intent of the Teſtator, that thoſe Lands ſhould paſs as real Eſtate, though as between him and the Mortgagor, they were but a Mortgage. 582

Mortgage aſſigned over.

A Mortgage is made for 450*l.* payable at the End of five Years with Intereſt in the mean Time. About two Months before the five Years expire, the Mortgagee aſſigns the Mortgage for 560*l.* being the Principal and Intereſt then due. Decreed the Intereſt to carry Intereſt from the Time of the Aſſignment. 135

How and in what Manner, one, who has a Mortgage or other Incumbrance on an Eſtate, ſhall account, and what Allowances he ſhall have.

Lands are limited by Marriage-Settlement upon Failer of Iſſue Male, to Daughters and their Heirs, until the next Remainder-Man ſhould pay them 3000*l.* There being four Daughters only, they entred. Decreed at the Rolls,

they ſhould account for the Profits; and that the Rents ſhould be applied firſt to pay the Intereſt, and then to ſink the Principal; as in the Caſe of a common Mortgage. Decree affirmed by the Lord *Chancellor*, with this Variation, that the Principal ſhould not be ſunk, till a third Part was raiſed above the Intereſt; and ſo again, when another third Part was raiſed. *Page* 523, 576

Mortgagee having been at great Charges to defend a Suit at Law brought by the Heir of the Mortgagor, who endeavoured to defeat the Mortgage by an Intail, but could not prevail; upon a Bill afterwards brought by the Heir to redeem, the Mortgagee was allowed his full Coſts expended in that Suit, and not tied down to the Coſts taxed; and he was alſo allowed his Coſts in taking out Adminiſtration to the Mortgagor, as principal Creditor. 536

Notice.

AN Adminiſtrator pays away all the Aſſets in ſatisfying Debts by Specialty. Decreed to pay a Debt by a Decree, though he had no Notice of the Decree before he paid away the Aſſets. 37, 88

One lends Money to a Bankrupt after a Commiſſion ſued out without Notice of the Bankruptcy. By two Lords Commiſſioners againſt one, who doubted, he cannot come in as a Creditor under the Statute. 157

A. makes a Mortgage, and after a Commiſſion ſued out againſt him, and an Aſſignment made by the Commiſſioners, he makes a ſecond Mortgage to *B.* who has no Notice of the Bankruptcy. *B.* ſhall not protect his Mortgage by getting an Aſſignment of the prior Incumbrance. *Page* 157

Court of Equity very careful not to impeach Purchaſers by preſumptive Notice. 159

A. lends Money on Mortgage to *B.* who was Tenant for Life, with Remainder to his firſt Son, *A.* being adviſed that *B.* might deſtroy the contingent Remainder, and being aſſured by *B.* he had no Son, whereas he had a Son born five Days before: But *A.* having no Notice of it, and having the Settlement in his Cuſtody, the Court would not relieve againſt this Mortgage. *Ibid.*

Payment of Money to a Truſtee, having Notice of the Truſt is a Miſ-payment, tho' the Truſtee had Judgment and Execution againſt the Perſon, who paid the Money. 197

A Deviſee obtains a Decree to hold and enjoy againſt the Heir, who it was ſuppoſed had ſuppreſſed the Will. Pending this Suit a third Perſon gets an Aſſignment of a Mortgage made by the Teſtator, and then purchaſes the Equity of Redemption of the Heir with Notice of the Will. The Court would not admit the Purchaſer to diſpute the Juſtice of the Decree, nor to try at Law, whether the Will was not cancelled by the Teſtator. 216

A Purchaſer or Mortgagee ſhall not protect himſelf by taking a Conveyance from a Truſtee after Notice of the Truſt; for by taking ſuch

ſuch Conveyance he becomes the Truſtee himſelf. *Page* 271

One purchaſes, having Notice of a Settlement, whereby the Vendor was but Tenant for Life Remainder to his firſt, *&c.* Son in Tail, and afterwards the Purchaſer with Notice ſold the Premiſſes to one that had no Notice. The Tenant for Life dies leaving a Son. Decreed the laſt Purchaſer without Notice ſhall hold the Land; but the firſt Purchaſer who had Notice, ſhall account for the Purchaſe-Money which he received, with Intereſt from the Death of the Tenant for Life. 384

The aforeſaid Settlement was made after Marriage, in Purſuance of Articles before Marriage, but the Articles are not taken Notice of in the Settlement; however the firſt Purchaſer having Notice of the Settlement, it was incumbent upon him to inquire whether this Settlement was voluntary, or made in Purſuance of Articles, and he ought to have inquired of the Wife's Relations who were Parties to the Deed. *Ibid.*

A. makes three ſeveral Mortgages to *B. C.* and *D.* and in the laſt Mortgage *B.* is a Party, and agrees, that after he is paid, he will ſtand a Truſtee for *D.* Decreed that *C.* ſhall be paid before *D.* For all the Securities being tranſacted by the ſame Scrivener, Notice to him was Notice to *D.* 574

Notice to the Agent is Notice to the Lender. *Ibid.*

Where there are ſeveral Mortgages they that lend laſt, muſt come laſt, if they have Notice of what was before lent. 575

A. purchaſes of a Man, who had committed an Act of Bankruptcy, but without Notice thereof: Afterwards a Commiſſion is taken out, and there being a Term ſtanding out in Truſtees, the Aſſignee brings a Bill againſt them and the Purchaſer, to have the Term aſſigned to him. Bill diſmiſſed. *Page* 599

A Purchaſer without Notice ſhall not be hurt in Equity, not only where he has got in a prior legal Title; but where he has a better Right to call for the legal Title, than another, who has got an Incumbrance prior to his Title. 600

A defective Surrender of Copyhold Land, for ſecuring a Sum of Money, which was become void by not being preſented in due Time, made good againſt a ſubſequent Purchaſer with Notice. 609

A. having Notice of an Incumbrance, purchaſes in the Name of *B.* and then agrees that *B.* ſhall be the Purchaſer, who accordingly pays the Purchaſe-Money without Notice of the Incumbrance. Tho' *B.* did not employ *A.* nor knew any Thing of the Purchaſe, 'till after it was made; yet *B.* approving of it afterwards, made *A.* his Agent *ab initio*, and therefore ſhall be affected with the Notice which *A.* had. *Ibid.*

A. purchaſes a Leaſhold Eſtate of an Executor, having Notice a Debt of the Teſtator's was unpaid; and out of the Purchaſe-Money has an Allowance of 200 *l.* due to himſelf from the Teſtator, and of 550 *l.* due to himſelf from the Executor, and pays the Remainder in Money. This Sale not good againſt an unſatisfied Creditor,

tor, *A.* being a Party, and conſenting to and contriving a *Devaſtavit.* *Page* 616

Lands are deviſed to *J. S.* ſubject to the Payment of Legacies. *J. S.* mortgages the Lands. *J. S.* having no Title, but under the Will, the Mortgagee muſt be ſuppoſed to have Notice of the Legacies being a Charge on the Eſtate. 662

A Jointreſs is not bound to anſwer, whether her Husband had any other Title than as Aſſignee of a Mortgage, ſhe denying, that ſhe had any Notice of the Mortgage, and inſiſting ſhe was a Purchaſer without Notice, and that her Husband alledged he was in by Deſcent. 701

Oath. Vide **Affidavit.**

Occupant.

ESTate *pur auter vie* may be limited to a Man and his Heirs, and may be entailed, and may deſcend, tho' a Term for Years cannot be ſo entailed. 184

A. having an Eſtate for three Lives, ſettles it to the Uſe of himſelf in Tail, Remainder to *B.* The Remainder is void, or if good, it might be barred by Deed, Surrender or other Conveyance. 225

Leaſe *pur auter vie* is not within the Statute *de donis.* 226

An Eſtate *pur auter vie* of Lands in Burrough *Engliſh* ſhall deſcend to the cuſtomary Heir. *Ibid.*

An Eſtate *pur auter vie* in a Copyhold, ſhall go to Executors or Adminiſtrators, as well as a Freehold *pur auter vie.* 265

Dean and Chapter make a Leaſe to a Man, his Executors and Adminiſtrators for three Lives. This was held to be a deſcendible Eſtate, and to belong to the Heirs and not to the Executor. *Page* 320

A. by Will deviſes Lands, in Truſt that the Profits ſhould be equally divided between his Wife and Daughter, during the Wife's Life, and after her Death deviſed the ſame to his Daughter in Tail, with Remainder over. The Daughter died during the Mother's Life. Decreed this to be a Tenancy in common between the Mother and Daughter, and that during the Mother's Life, the Daughter's Moiety did not deſcend or reſult to the Heir; but was an Intereſt undiſpoſed of, and in Nature of a Tenancy *pur auter vie*, and ſhould go to the Adminiſtrator of the Daughter. 430

A. deviſes a College Leaſe to his Wife for Life, Remainder to his Son, ſhe paying 10 *l. per Ann.* to the Son during her Life. The Son dies in the Life of his Mother. The Rent continues during the Life of the Mother, and ſhall be paid to the Executor of the Son. 666

Deviſe of 50 *l. per Ann.* to the Wife of *A.* during the Life of *B.* for her ſeparate Uſe. The Wife dies. The 50 *l. per Ann.* ſhall be paid to her Executor during the Life of *B.* 667

Eſtate *pur auter vie*, if limited to Executors, was Aſſets before the Statute of Frauds and Perjuries. 720

Offer.

Offer.

An Offer to deliver up a Bond upon Terms not complied with, is not binding, and if made without Conſideration is *nudum Pactum*. *Page* 717

Office and Officers.

An Inquiſition finding two negligent Eſcapes againſt the Warden of the Fleet, though but for ſmall Sums, amounts to a Forfeiture of his Office. So is one voluntary Eſcape a Forfeiture. 173

If the Warden of the Fleet is but Tenant for Life, and forfeits his Office, it belongs to the Reverſioner, and not to the Crown. *Ibid.*

In Caſe of an Inquiſition finding a Forfeiture by the Warden of the Fleet, whether it ought to find, what Eſtate the Warden had in the Office. 174

The Court is cautious, how they paſs a Grant for the Office of Warden of the Fleet, becauſe it may occaſion a general Eſcape of the Priſoners. 175

Orphan. Vide London.

Outlawry.

Plea of Outlawry muſt be upon Oath. 37, 198 *contra.*

If an Outlawry for Treaſon is reverſed, the Judgment is that the Party ſhall be reſtored to all that has not been anſwered to the King; ſo that as to the Profits of Lands received by the Crown during the Outlawry, there is to be no Reſtitution. 313

A. poſſeſſed of a Leaſe for Years, is outlawed for Treaſon, and the King during the Outlawry grants away the Leaſe. The Outlawry is reverſed. *A.* or in Caſe of his Death, his Executors or Adminiſtrators ſhall be reſtored to the Term; or in caſe the Term was mortgaged before the Outlawry, ſhall be reſtored to the Equity of Redemption of the Term. *Pag.* 312

Paraphanalia.

A Feme by her Marriage-Articles agrees to have no Part of her Husband's perſonal Eſtate, but what he ſhould give her by Will. This bars her of her *Paraphanalia.* 83

A Man deviſes his Wife's Jewels to her for Life, and afterwards to his Son. The Wife makes no Election or Claim to have the Jewels as her *Paraphanalia.* Her Adminiſtrator ſhall not have them. 247

Parol. Vide Agreement Parol.

Parol Evidence. Vide Evidence.

Parties.

Upon a Bill for a ſpecifick Performance of a Covenant with *A.* for the Benefit of *B.* *A.* muſt be a Party. 36

None but Parties to a Suit are bound by it. 113

A Man obtains a Decree againſt Husband and Wife as Adminiſtrator of *J. S.* for 1500 *l.* The

Wife dies. Whether the Plaintiff can proceed againſt the Husband, without reviving againſt the Adminiſtrator of the Wife. *Pag.* 195

Where two are liable to a Demand, you cannot proceed againſt one alone. *Ibid.*

One is made a Party to a Bill, againſt whom the Plaintiff can have no Decree, but may examine him as a Witneſs. He may demur. 380

Upon a Bill brought againſt an Aſſignee of a Leaſe, to pay the Rent and perform the Covenants in the Leaſe, the original Leſſee ought to be a Party: But if the Aſſignee has divided his Intereſt in the Leaſe into a great Number of Shares, it is not neceſſary to make all the Sharers Parties. 422

A. is Tenant for Life of a Truſt-Eſtate, Remainder to his Sons. *A.* before a Son born brings a Bill againſt the Truſtees, and an Account is decreed, and afterwards taken. This Account ſhall bind the Sons; for all Perſons, that could be made Parties, were Parties in the Suit. 527

Partners and Partnerſhip.

If one Partner borrows Money, and gives a Note for it for himſelf and Partner, this will bind the other Partner. 277

One Partner receives Money in the Shop, and gives his Note for it, and having ſurvived the other Partner, dies. This Note binds both; and though at Law the Note ſtands good only againſt the Executor of the ſurviving Partner, who gave the Note, yet in Equity the Creditor may follow the Eſtate of the other Partner. 293

A. and *B.* are Partners in Trade *A.* imbezils the Joint-Stock, and contracts private Debts and becomes Bankrupt, and his Eſtate is aſſigned by the Commiſſioners. Court inclined that firſt out of the Joint-Stock, all the Partnerſhip-Debts are to be paid, and then out of *A.*'s Share Satisfaction is to be made for what he has imbeziled of the Stock, before his own private Creditors ſhall be paid. *Page* 293

Part-Owners in Ships.

Maſter of a Ship buys Proviſions for the Ship, and has Money from the Owners to pay for the ſame, but fails without paying the Money. The Owners are liable to pay in Proportion to their reſpective Shares in the Ship. 643

Maſter of a Ship is but a Servant to the Owners. *Ibid.*

Partition.

Bill for Writings and a Partition; Defendant inſiſts the Plaintiff has no Title, and that there is an Intail ſubſiſting: The Court gives the Plaintiff a Year's Time to try his Title. Trial is had, and Verdict for the Plaintiff. Upon hearing the Cauſe on the Equity reſerved, it was inſiſted, this being a Matter of Right of Inheritance, Defendant ought not to be bound by one Trial; *ſed non allocat*', it being a Decree for a Partition. *Quære.* 232

Partition between Tenants in Tail, though by Parol only, ſhall bind the Iſſue. 233

Payment.

General Payment, how it ſhall be applied.

A. indebted by Articles, and alſo on ſimple Contract, pays ſeveral Sums, and enters them in his Book as paid on Account of what was due on the Articles. This Entry not ſufficient to make the Application. *Page* 606

Quicquid ſolvitur, ſolvitur ſecundum modum ſolventis. 607

But this Rule is to be underſtood, when the Perſon paying, at the Time of Payment declares, on what Account he pays the Money. *Ibid.*

If the Payment is general, the Application is in the Perſon receiving. *Ibid.*

To whom to be made, and when good.

Where Lands by Act of Parliament are to be mortgaged for a particular Purpoſe, it is incumbent on the Mortgagee to ſee the Money applied accordingly. 5

Payment of Money to a Truſtee with Notice of the Truſt is a Miſ-payment, tho' the Truſtee had Judgment and Execution againſt the Perſon who paid the Money. 197

A Scrivener lends his Client's Money to *J. S.* and takes a Bond and Warrant of Attorney to confeſs Judgment in the Client's Name, to whom he gives a Copy of the Judgment, but keeps the Bond, and afterwards receives the Money, and delivers up the Bond. Whether *J. S.* is liable to pay this Money over again. 265

A. and *B.* being Truſtees of Money for the ſeparate Uſe of a Feme Covert, lend it to *C.* who gives Bond to the Truſtees, and the Truſt is declared in the Condition. The Bond is kept by the Feme, and *B.* having received Money for *C.* they ſettle an Account, and *B.* gives *C.* a Receipt for 100 *l.* as received for the Uſe of the Feme. *B.* becomes inſolvent. Whether *C.* is well diſcharged of this 100 *l.* *Page* 539

Penalty.

Vide **Bond.**

Leſſee for Years covenants not to plow Paſture Land, and if he does, then to pay 20 *s.* *per Ann.* for every Acre ploughed. The Court will not relieve the Leſſee againſt the Penalty, if he plows. 119

A Mortgage is made at 5 *l.* *per Cent.* with a Covenant to pay ſix, if the Intereſt is in Arrear for ſixty Days after it is due. This being the Agreement of the Parties, Equity will not relieve againſt it, as a Penalty. 134

African Company hire the Defendant's Ship to freight, and the Defendant covenants not to trade in any of the Goods, in which the Company dealt, and if he did, to pay double the Value for ſuch Goods, with Liberty to the Company to deduct the ſame out of the Freight. The Company bring a Bill to diſcover whether the Defendant traded in any of the ſaid Goods. Though this be a Penalty, yet the Defendant ſhall diſcover, it being his own Agreement. 244

A Table of the principal Matters.

Perpetuity. Vide *Limitations of Terms for Years under Title* **Eſtates.**

Perſonal Eſtate.

Where the perſonal Eſtate ſhall be applied to exonerate the Real. Vide *Title* **Real.**

A. dies inteſtate leaving a Wife and two Daughters: 200 *l.* is found hid in a Wall, and 200 *l.* in a Box. The Widow lays out this Money in a Purchaſe, and ſettles the Land on her ſelf for Life, Remainder to her two Daughters in Tail, Remainder to her ſelf in Fee. She and her two Daughters die, and the Plaintiff as Adminiſtrator to the two Daughters, brings a Bill againſt the Heir at Law, for two Thirds of the 400 *l.* out of the Land, as perſonal Eſtate; and it was decreed to him by the Maſter of the *Rolls*; but reverſed by the Lord Keeper, Money having no Ear-Mark. *Page* 440

Plea.

Plea of Outlawry muſt be upon Oath. 37, 198 *contra.*

So muſt a Plea of Privilege. 83

Portions or Proviſions for Children.

Vide *Legacies or Portions veſted*, &c. *under Title* **Legacy.**

Vide *Truſt for raiſing Portions and Payment of Debts, under Title* **Truſt.**

By a Marriage-Setlement a Term for Years, expectant on Failer of Iſſue Male, is limited for raiſing 3000 *l.* for Daughters not prefer'd in the Life of the Father, payable at Eighteen or Marriage. There are Iſſue a Son and two Daughters. The Father in his Life-time raiſes 1800 *l.* for his Daughters by Sale of Lands, which by another Deed he had charged with raiſing 2000 *l.* for them, payable at Twenty-one or Marriage. This 1800 *l.* though payable at a different Time, and though not intended to go as Part of the 3000 *l.* (there being a Son then living) ſhall be taken as Part thereof. *Page* 255

By a Marriage-Settlement, in Caſe of Failer of Iſſue Male, the Remainder is limited to the Daughters, until they ſhould raiſe 3000 *l.* for their Portions. There is Iſſue a Son and two Daughters. The Father by Will gives his Daughters 700 *l.* apiece, and dies. The Son by his Will gives his Siſters to the Amount of 7000 *l.* The Father or Son's Legacies ſhall not be a Satisfaction of the 3000 *l.* ſecured by the Settlement. 258

One dies inteſtate leaving younger Children, and indebted by Mortgage, with a Covenant for Payment of the Mortgage-Money. Whether the Mortgagee ſhall be permitted to exhauſt all the perſonal Eſtate by the Covenant, and leave the younger Children deſtitute. *Page* 309

A Term for five Hundred Years is limited to Truſtees for raiſing 5000*l.* for Daughters Portions in Caſe of Failer of Iſſue Male, payable at the Age of Eighteen; There is Iſſue only one Daughter, and the Father dying, the Inheritance deſcends upon the Daughter. The Daughter attains the Age of Eighteen and, dies unmarried; the Term being in Truſtees is not merged, and the 5000*l.* Portion of the Daughter ſhall go to her Executor or Adminiſtrator and not ſink in the Land. 348, 349

On Marriage Lands are ſettled on *A.* for Life, Remainder to the firſt, *&c.* Son of the Marriage in Tail Male, Remainder to Truſtees for five Hundred Years to raiſe 5000*l.* Portion for Daughters, payable at Eighteen or Marriage, Remainder to *A.* in Fee. After the Marriage *A.* ſettles other Lands, and a Term is created for the raiſing a like Sum of 5000*l.* for Daughters on Failer of Iſſue of *A.* by any Wife, and it is payable at a different Time, *viz.* Sixteen or Marriage. There is Iſſue only one Daughter, who attains Eighteen, and dies unmarried. The Portion ſhall go to her Executor or Adminiſtrator. But there ſhall be but one 5000*l.* raiſed, and the Executor or Adminiſtrator ſhall have the Election, by which of the Settlements he will take. *Page* 348, 354, 439

A Portion is charged by Will on a real Eſtate, payable to a Daughter at Twenty-one or Marriage. The Daughter dies at ſix Years old. Her Portion ſhall ſink in the Land for the Benefit of the Heir, and not go to her Adminiſtrator. 416

Where Portions are provided for Daughters by a Settlement, the Father cannot by his Will annex any Condition to the Payment of the Portions, nor deviſe them over, in Caſe of the Death of any of the Daughters before their Portions become payable. 452

By Marriage-Settlement a Term for five Hundred Years is limited to raiſe 5000*l.* if but one Daughter, to be paid her at Twenty-one or Marriage, which ſhould firſt happen, after the Death of the Father and Mother, or within ſix Months after either of thoſe Days or Times. There being one Daughter only, and ſhe having attained Twenty-one, and her Father being dead, her Portion was decreed to be raiſed in the Life-time of the Mother. 458

By a Marriage-Settlement Lands are limited to Husband and Wife for their Lives, Remainder to the Heirs Male of their Bodies; and if there ſhould be no Iſſue Male, and one or more Daughters, then to Truſtees for five Hundred Years from the Deceaſe of the Survivor, in Truſt by Sale or Mortgage to raiſe 1000*l.* for Daughters Portions; but there is no Time appointed for the Payment of them. The Father dies leaving a Daughter only. The Portion veſting in the Daughter, it was decreed to

be raiſed by a Sale in the Life-time of the Mother, with reaſonable Maintenance in the mean Time, tho' no Maintenance is provided by the Settlement. *Page* 460

A. deviſes his Eſtate to *B.* his Son, charged with 500 *l.* to the Daughter of *B.* payable at Twenty-one or Marriage. *B.* marries his Daughter and gives her 1500 *l.* Portion, but no Notice is taken of the 500 *l.* Legacy, nor any Releaſe given. Twenty-one Years afterwards the Daughter and her ſecond Husband bring a Bill againſt the Father for the 500 *l.* Bill diſmiſſed. The 1500 *l.* ſhall be preſumed a Satisfaction of the 500 *l.* eſpecially after ſuch Length of Time. 484

A. by Marriage-Settlement is Tenant for Life, Remainder to Truſtees to raiſe 4000 *l.* for younger Childrens Portions, as *A.* ſhould appoint; Remainder to his firſt, *&c.* Son in Tail. *A.* appoints the 4000 *l.* amongſt his younger Children, and particularly 2600 *l.* to his ſecond Son. The eldeſt Son afterwards dies, and *B.* becoming eldeſt Son, and intitled to the whole Eſtate after his Father's Death, *A.* makes a new Appointment of the 2600 *l.* to one of his Daughters. Decreed the laſt Appointment to take place; the firſt being made to *B.* upon a tacit or implied Condition, that he ſhould not become eldeſt Son. 528

Lands by Marriage-Settlement are limited to the Sons in Tail Male, Remainder to *A.* the Husband in Fee. Provided if *A.* and his Wife, or either of them, die without Iſſue Male living at the Time of his or her Death, leaving only one Daughter unmarried, the Truſtees to ſtand ſeiſed, till they have raiſed 1500 *l.* for ſuch Daughter; and if more Daughters unmarried at the Death of *A.* and his Wife, or either of them, and no Iſſue Male living begotten between them, then 3000 *l.* for ſuch Daughters. *A.* dies leaving Daughters, and his Wife *enſeint* of a Son, which is afterwards born. Whether the Daughters are intitled to the 3000 *l.* *Page* 578

A Term is limited in Remainder after the Father's Death by Marriage-Settlement, upon Truſt if he died without Iſſue Male, and there ſhould be one or more Daughters unmarried or unprovided for at his Death, the Truſtees ſhould raiſe 2000 *l.* for their Portions, to be paid at Eighteen or Marriage. The Mother being dead, and there being one Daughter, who was married, and no Son, the Court would not decree the 2000 *l.* to be raiſed in the Life of the Father, it not veſting till his Death. 640, 655

If a Portion is directed to be paid at Eighteen or Marriage, and the Term is abſolutely veſted; the Daughter ſhall not expect during the Life of the Father, but the Term may be ſold in the Father's Life, although a Term in Remainder, and not in Poſſeſſion. 656

If the Truſt of a Term is limited on a Condition precedent; as to commence, if the Father dies without Iſſue Male by his Wife, in Truſt to raiſe Portions for Daughters; there if the Wife be dead without Iſſue Male, leaving a Daughter; the Term has been decreed

decreed to be ſold, though the Father was living. *Page* 656

But by the Lord Chancellor *Cowper*, if it was *res integra*, he ſhould not decree it. 657

By Marriage-Settlement 2500 *l.* is provided for the Iſſue of the Marriage in ſuch Proportions, as the Husband ſhall appoint. He dies leaving a Daughter only, and makes no Appointment. She ſhall have the 2500 *l.* 665

By a Marriage-Settlement a Term is limited to Truſtees on Failer of Iſſue Male of the Marriage, in Truſt after the Commencement of the Term, to raiſe 4000 *l.* by Rents and Profits, Sale or Mortgage, for Daughters Portions payable at Twenty-one or Marriage. The Husband died, leaving only a Daughter, who married in the Life-time of the Mother. The 4000 *l.* ſhall not be raiſed during the Life of the Mother, nor will it carry Intereſt in the mean Time. 760

Poſſeſſion, how far favoured.

Bill for a ſpecifick Performance of a Covenant, whereby the Plaintiff was to have a Pit in the Defendant's Ground for digging black Stones. Proved that the Defendant, and thoſe under whom he claimed, had been in Poſſeſſion of a Pit there above ſixty Years. Bill diſmiſſed. 127

After a long Enjoyment of a Water-courſe running to a Houſe and Garden, through the Ground of another, it ſhall be preſumed that the Owner of the Houſe has a Right to the Water-courſe, unleſs the other Party can ſhew a ſpecial Licenſe, or an Agreement to reſtrain it in Point of Time. *Page* 390

A long quiet Enjoyment is the beſt Evidence of a Right. 391

Rent decreed to a Lord of a Manor iſſuing out of a Copyhold Eſtate, though the Eſtate was held of another Manor, and the Plaintiff had no other Evidence of his Title to the Rent, but that it had been paid him for near Twenty Years. 516

Poſſibility.

A Poſſibility cannot be aſſigned; but may be releaſed. 563

Power.

Diſcretionary Power. Vide **Diſcretion.**

Defective Execution of a Power. Vide *Defective Conveyance made good in Equity, under Title* **Deeds.**

If a Man by Settlement has a Power to limit the Lands to ſuch of his Children, and in ſuch Proportions, as he by any Writing ſhall appoint, he may not only limit the Lands to any of his Children, but may charge it with Rent Charges, or Sums of Money for any of them. 80

A. on Marriage conveys his Land to a Truſtee, to the Uſe of himſelf for Life, Remainder to his Wife for Life, Remainder to the Heirs of their two Bodies, Remainder to *A.* in Fee: Proviſo that in Default of Iſſue of the Marriage, the Truſtee ſhall convey to ſuch Uſes as the Survivor ſhall appoint. Though the Husband deviſes

viſes the Land, and dies without Iſſue, yet the Wife ſurviving has a good Power of diſpoſing of the Eſtate by her Appointment. *Page* 376

Tenant for Life with Power to make a Jointure of 1000 *l. per Ann.* covenants upon Marriage to make a Jointure on his Wife of 1000 *l. per Ann.* and afterwards gives a Particular of Lands mentioned to be 1000 *l. per Ann.* which are ſetled for the Jointure, but prove to be but 600 *l. per Ann.* Decreed the Jointure to be made up 1000 *l. per Ann.* by the Iſſue in Tail. 379

A. by Marriage-Settlement is Tenant for Life, Remainder to Truſtees to raiſe 4000 *l.* for younger Childrens Portions, as *A.* ſhould appoint, Remainder to his firſt, *&c.* Sons in Tail, *A.* appoints the 4000 *l.* amongſt his younger Children, and particularly 2600 *l.* thereof to *B.* his ſecond Son. The eldeſt Son afterwards dies, and *B.* becoming eldeſt Son, and intitled to the whole Eſtate after his Father's Death, *A.* makes a new Appointment of the 2600 *l.* to one of his Daughters. Decreed the laſt Appointment to take Place; the firſt to *B.* being made upon a tacit or implied Condition, that he ſhould not become the eldeſt Son. 528

In a Settlement a Power is reſerved to Tenant for Life to make Leaſes of all Lands anciently demiſed, reſerving the ancient Rents, and of the other Lands, reſerving the beſt improved Rents. Tenant for Life being ill, and not having the Counter-parts of the old Leaſes, makes a general Leaſe to his Siſter of all the Lands; *reddend'* for the Lands that had been let the antient and accuſtomed Rents, and for the Lands not uſually let, the full and improved Rents and Value thereof. Leaſe adjudged void by the Lord Keeper, and the Lord Chief Juſtice *Trevor*, *contra* the Opinion of the Lord Chief Juſtice *Holt*. *Page* 531, 542

Where a Woman on her Marriage reſerves a Power to diſpoſe of her perſonal Eſtate, all that ſhe dies poſſeſſed of ſhall be taken to be her ſeparate Eſtate, or the Produce of it, unleſs the contrary can be made appear; and as ſhe has Power over the Principal, ſhe may diſpoſe of the Intereſt. 535

By Marriage-Settlement 2500 *l.* is provided for the Iſſue of the Marriage, in ſuch Proportions as the Husband ſhall appoint. He dies leaving a Daughter only, and makes no Appointment. She ſhall have the 2500 *l.* 665

Prerogative.

Debt to the Crown.

By the Statute of Queen *Elizabeth* where one is a Receiver of the Revenues of the Crown, his real Eſtate is bound, and ſtands liable to anſwer the King's Debt, though he is not actually a Debtor to the King, nor any Extent againſt him in ſeveral Years after. 389, 390

Where a Term is attendant on the Inheritance, if the King extends the Inheritance, he ſhall have a Right to the Term. But if the King's Receiver is poſſeſſed of a Term in groſs, and it is aſſigned before an actual Extent, the Aſſignment is good againſt the Crown. 390

Preſentation to a Church or Chapel.

Ground is granted to Truſtees whereon to erect a Chapel for the Uſe of the Inhabitants. Decreed in the Dutchy, that the Nomination of the Miniſter was in the Inhabitants. *Page* 387

A Manor with an Advowſon appendant, being mortgaged, the Church becomes void. The Mortgagor ſhall preſent; and if pending a Suit by the Mortgagee to forecloſe, the Church becomes vacant, though the Defendant has no Bill, the Court will grant an Injunction to ſtay Proceedings in a *Quare impedit* brought by the Plaintiff. 401

One ſeiſed of the Manor and Patronage of *W.* by Will gives 100*l.* *per Ann.* Rent-charge, and the Right of nominating to the Church to ſix Truſtees, who, when reduced to three, were to chooſe others. The only ſurviving Truſtee aſſigns the Truſt to new Truſtees, who nominate to the Church, being a Donative. Decreed the Aſſignees of the Truſt, though the Aſſignment was made by one only who ſurvived, had the Right to nominate to the Church, and not the Owner of the Manor. 748

Privilege.

Bill is brought to redeem a Mortgage againſt one, who was then an Ambaſſador in *Spain*. The Court ordered all Proceedings to ſtay for a Year and a Day, unleſs the Ambaſſador ſhould return ſooner. 317

An Ambaſſador, if he is a Defendant, has a Right to an *Eſſoin* for a Year and a Day, and after to renew it, if the Occaſion continues. And a *Protection* lies for an Ambaſſador, *quia profecturus*, or *quia Moraturus*. *Page* 317

Proceſs.

Subpœna.

Leaving of a *Subpœna* to appear and anſwer at the Lodgings of a Defendant who was not to be found, not good Service, though an Order was obtained for that Purpoſe; it appearing afterwards, that the Defendant had left his Lodging above a Year before the *Subpœna* ſerved. 369

Attachment.

After a Writ of Execution, and an Attachment returned for not performing a Decree, the Court will not give the Defendant Leave to be examined, unleſs he gives Security to perform the Decree. 91

Proportion.

Vide Average.

What Proportion a Deviſee for Life ought to bear of Mortgages and other Incumbrances on the Eſtate. 301

A. is intitled to 8000*l.* in the Chamber of *London*, and whilſt a Stop was put to Payment there, he makes his Will, and declares, that when his Executors ſhould receive the 8000*l.* he gives 2000*l.* to three Hoſpitals. Afterwards an Act paſſed for ſettling a Fund for

paying a perpetual Intereſt for the Orphan's Debt, and the 8000 *l.* is then worth to be ſold but 6300; yet decreed the whole 2000 *l.* to be paid, and that there ſhould not be an Abatement in Proportion. *Page* 547

A. deviſes a College Leaſe for Years to his Wife for Life, Remainder to his Son, ſhe paying 10 *l. per Ann.* to the Son during her Life. The Son dies in the Life of his Mother. The Rent continues during the Mother's Life, and ſhall go to the Executor of the Son: And the Mother is compellable to pay her Proportion of the Fine for a Renewal of the Leaſe. *666*

Purchaſe and Purchaſe-Money.

Where Lands are by Act of Parliament to be mortgaged for a particular Purpoſe, it is incumbent on the Mortgagee to ſee the Money applied accordingly. 5

A Leſſee at a Rack-Rent, and who paid no Fine, is a Purchaſer, and ſhall avoid a voluntary Conveyance. 327

A. enters into Partnerſhip in Fifths, with three others for Twenty-one Years, in digging for Mines in *A.*'s Lands; *A.* to have two Fifths, and in Conſideration of his Ownerſhip of the Land, to have a Tenth of the Share of the other Partners. *A.* dies, and his Widow ſets up a voluntary Settlement made after Marriage. The Court inclined the Partners were as Purchaſers, and that the voluntary Settlement ſhould not ſtand good againſt them. 326

Purchaſer.

How far favoured. Vide **Notice.**

As to a Purchaſor's Buying in of Incumbrances. Vide *under Title* **Securities.**

Bill is brought by a Biſhop againſt an Aſſignee of a Leaſe, which was made to commence after the Eſtates then in Being were determined, charging that the Defendant knew the Leaſe was expired, and that the ſame did appear by Writings in his Cuſtody. Defendant pleads he was a Purchaſer of the Leaſe, and that he was then informed, there were Fifty-ſeven Years to come in the Leaſe, and therefore gave nineteen Years Purchaſe for it. Plea allowed. *Page* 255

If a Purchaſer gives a Note for Payment of Part of the Purchaſe-Money, and dies: This Note will be no Charge in Equity upon the Land. 281

A Jointreſs is not bound to anſwer, whether her Husband had any other Title than as Aſſignee of a Mortgage, ſhe denying, that ſhe had any Notice of the Mortgage, and inſiſting ſhe was a Purchaſer without Notice, and that her Husband alledged he was in by Deſcent. 701

A Table of the principal Matters.

Real Eſtate.

Where the perſonal Eſtate ſhall be applied to exonerate the Real.

PErſonal Eſtate applied in Eaſe of the Real againſt a reſiduary Legatee. *Page* 43

A. having mortgaged his Lands, by Will appointed them to be ſold for Payment of the Mortgage-Money; and in another Part of his Will deviſed a Moiety of the mortgaged Premiſſes to *B.* and deviſed his perſonal Eſtate to his Executor for Payment of his Debts. The perſonal Eſtate ſhall be applied to pay off the Mortgage in Favour of the Deviſee. 112

A. by Will gives 20*l.* to *B.* and makes him Executor, and gives his real Eſtate to *C.* paying his Debts and Legacies, and in Default of Payment within a limited Time, the Legatees and Creditors to enter, and hold till paid, and makes no expreſs Diſpoſition of the Surplus of his perſonal Eſtate. The Surplus ſhall be applied in Eaſe of the real Eſtate. 120

One deviſes Lands to *A.* for Payment of his Debts, and deviſes other Land, which he had mortgaged to *B.* and alſo gives *B.* his perſonal Eſtate. *B.* muſt take the mortgaged Lands *cum onere*, and though the perſonal Eſtate is deviſed to *B.* and Land is deviſed for Payment of Debts; yet the perſonal Eſtate will be ſubject to the Debts. 183

One dies indebted by Mortgage, with a Bond to perform Covenants, and owes other Bond-Debts. The perſonal Eſtate ſhall be applied to pay off the Bond-Debts in the firſt Place. *Page* 273

A. deviſes his perſonal Eſtate to his Wife, whom he makes Executrix. She takes as Executrix, and the perſonal Eſtate ſhall be applied to exonerate the Real. 302

One dies Inteſtate, being indebted by Mortgage, and leaving ſeveral younger Children: In the Mortgage there is a Covenant for Payment of the Mortgage-Money. Whether the Mortgagee ſhall be permitted to exhauſt all the perſonal Eſtate by the Covenant, and leave the younger Children deſtitute. 309

A. joins with *B.* her Husband, in making a Mortgage for Years of her Inheritance, to raiſe Money to buy him a Place: *B.* covenants in the Mortgage to pay the Money, and on Payment thereof at the Day, the Term by the Proviſo is to ceaſe. The Mortgage is afterwards aſſigned, and the Proviſo is, that on Payment by the Husband and Wife, or either of them, the Term is to be aſſigned, as they, or either of them ſhould direct. *B.* by Letter promiſes to apply the Profits to pay off the Mortgage. He pays off the Mortgage, and takes an Aſſignment in Truſt for himſelf, and by Will gives it to his ſecond Wife. The Son and Heir by the firſt Wife, bring a Bill to have the Mortgage aſſigned to him. The Court would not relieve him but on Payment of Principal, Intereſt and Coſts: But this Decree was reverſed by the Houſe of Lords. 437

A. by

A. by Will, after ſome Legacies, gives the Reſidue of his perſonal Eſtate to his Daughter, and gives his real Eſtate to her and her Heirs; and if ſhe died under Twenty-one, gives his real Eſtate to his Brother. The Daughter dies at ſixteen, and by Will gives all her perſonal Eſtate to *B.* The Eſtate being ſubject to a Mortgage, whether the perſonal Eſtate in the Hands of *B.* ſhall be applied to exonerate the Real. *Pag.* 469

A. by Will, computing the Surplus of his perſonal Eſtate after Debts and Legacies paid, would amount to 5800*l.* gives the 5800*l.* to ſome of his Grand-children in ſeveral Proportions; and wills, if the Surplus fell ſhort, they ſhould abate in Proportion; if it amounted to more, it ſhould be divided between them in the ſame Proportions. Decreed that a Mortgage on an Eſtate deviſed to two other Grand-children ſhould be paid out of the perſonal Eſtate, although by this Means the perſonal Eſtate would fall ſhort of the 5800*l.* 477

An expreſs Deviſe ſhall not be defeated by applying the perſonal Eſtate to pay off a Mortgage in Favour of an Heir at Law. *Ibid.*

A. by Will charges his real Eſtate with the Payment of his Debts, Legacies and Funeral Expences; and deviſed to his Wife, whom he made Executrix, all his perſonal Eſtate, not otherwiſe diſpoſed of. Decreed the perſonal Eſtate to be applied in Eaſe of the Real; there being no Words in the Will to exempt the perſonal Eſtate from the Debts, and the Wife taking the perſonal Eſtate as Executrix. 568

A Man having Mortgages, one of which was a Mortgage in Fee of Lands in *D.* on which he had entred, deviſes thoſe Lands to his two Daughters and their Heirs, and the other mortgages to them, their Executors, *&c.* One of the Daughters dies. Her Share of the Lands in *D.* ſhall go to her Heir, and not to her Adminiſtrator, it being the Teſtator's Intent that thoſe Lands ſhould paſs as real Eſtate to his Daughters; tho' as between him and the Mortgagor, they were but a Mortgage. *Page* 582

A Mortgage in Fee is made redeemable on Payment of 300*l.* and Intereſt upon any *Michaelmas-Day*, on ſix Months Notice. Mortgagor dies, having deviſed his perſonal Eſtate to his Wife. Perſonal Eſtate not liable to pay off the Mortgage in Eaſe of the real Eſtate, there being no Covenant expreſs or implied. 701

One deviſes his Fee-farm Rents to be ſold for Payment of his Debts, and gives the Surplus to his Heir at Law and younger Brother; deviſes his Houſhold Goods to go with his Houſe, and the Reſidue of his perſonal Eſtate to his Siſter. The perſonal Eſtate ſhall not be applied to pay Debts in Eaſe of the real Eſtate. 718

There is a Difference between charging an Eſtate with Payment of Debts, and deviſing an Eſtate to be ſold out and out to pay Debts. *Ibid.*

One directs his Debts and Legacies to be paid out of the Rents of his real Eſtate, and that his Executors ſhall receive the Rents, till his Nephew was Twenty-five, and then pay the Surplus of the Rents

to him, and gives his Nephew the Surplus of his perſonal Eſtate. The Nephew dies an Infant. *Per Cur'*, If the Surplus had been given to a third Perſon, he ſhould have had the perſonal Eſtate diſcharged of the Debts; but being given to the ſame Perſon, to whom the Land is deviſed, the Surplus of the perſonal Eſtate was not intended to be exempt from the Debts. *Page* 740

Recogniſance. Vide *Judgment*, &c. *under Title* **Securities.**

Recovery Common.

A defective Common Recovery, as to a Tenant to the *Præcipe*, will bar an Eſtate-Tail in a Truſt. 132

Bare Articles will bar an Entail of an Equity. 226

A Child in *ventre ſa mere* may be vouched. 711

Releaſe.

Whether a Releaſe by Will to *J. S.* of all Debts, Accounts and Demands will transfer the Property of Goods, which he has in his Hands, belonging to the Teſtator. 114

A. deviſes to *B.* 100*l.* and by his Will releaſes him of all Debts and Demands, and afterwards *A.* lends *B.* 100*l.* Whether this 100*l.* is releaſed by the Will. 136

If one ſays in his Will, *I forgive ſuch a Debt*, or *my Executor ſhall not demand it*, or *ſhall releaſe it*; this is a Diſcharge of the Debt, though the Debtor dies in the Life of the Teſtator. 522

But if a Debt is deviſed by Will to the Debtor, without Words of Releaſe or Diſcharge, and the Debtor dies in the Life-time of the Teſtator, the Debt ſubſiſts. *Page* 522

A Poſſibility cannot be aſſigned; but it may be releaſed. 563

Remainder.

Deviſe or Limitations of Remainders over of Leaſes, Money, &c. Vide *Limitations of Terms for Years, Money*, &c. *under Title* **Eſtates.**

A Woman covenants to ſtand ſeiſed to the Uſe of her ſelf in Tail, Remainder to ſuch Uſes as ſhe by Writing ſhould appoint; for want of Appointment, to the Uſe of her Kinſman in Fee. Whether this Remainder to the Kinſman is good being on a Covenant to ſtand ſeiſed. 7

Land is deviſed to *A.* for ſixty Years, if he lives ſo long, and from and after his Death to *B.* his eldeſt Son in Tail. Whether the Limitation of the Entail to *B.* is good, being expectant on a Term of ſixty Years. 131

Lands are deviſed to Truſtees and their Heirs, in Truſt to receive the Rents, till the Teſtator's Son came to Twenty-one, and to pay one Third to his Wife, and out of the other two Thirds to raiſe Portions for his Daughters, and then deviſes the Lands to his Son, when Twenty-one, in Tail, with Remainder over. The Son died before Twenty-one without Iſſue, and the Mother who ſurvived him, died before ſuch Time as

the Son would have attained Twenty-one. The Remainder over is good, though the Son died before Twenty-one. *Pag.* 138

A. having an Eſtate for three Lives, ſettles it to the Uſe of himſelf in Tail, with Remainder over. The Remainder is void, or if good, it may be barred by Deed, Surrender or other Conveyance. *Pag.* 225

Tenant for Life of a Copyhold with Remainder to his firſt, *&c.* Son in Tail, takes a Surrender to his own Uſe of the Reverſion in Fee before the Birth of a Son. The contingent Remainder is not deſtroyed, the Frehold being in the Lord. 243

A. ſeiſed in Fee, by Deed and Fine conveys the Lands to the Uſe of Truſtees for ſeventy Years, Remainder to Truſtees for three Thouſand Years, and after the Death of *A.* then to his Son *B.* Whether the Remainder to *B.* be good. 370

Rent.

The Incumbent of a Parſonage, and the Grantee of the next Avoidance join in a Leaſe of the Tithes, rendring Rent at *Midſummer* and *Chriſtmas*. The Incumbent dies before *Midſummer*-Day, the Leſſee having firſt got in the greateſt Part of the Tithes. Who ſhall have the *Midſummer* Rent? 204

One takes a Mortgage of a Leaſe for 100*l.* ſubject to a Ground-Rent. He loſes his 100*l.* Mortgage-Money, never enters on the Premiſſes, and yet is ſued for the Ground-Rent. No Relief in Equity, it being his own Folly to take his Security by Way of Aſſignment, and not by Way of Under-leaſe. *Page* 374

A Woman having 100*l. per Ann.* Rent-charge for her Jointure, and there being a great Arrear, and not a ſufficient Diſtreſs on the Land, ſhe brought her Bill againſt the Deviſee of the Inheritance, that he might ſet out ſufficient Diſtreſs, or that ſhe might hold and enjoy till paid the Arrears. *Cur'*, When the Party has provided one Remedy, we won't give another, unleſs ſome Fraud be proved in letting the Land lie freſh, or depaſturing the Land in the Night-time only; and declared they could give no Relief. 382

Deviſee of a Rent-charge out of Lands, with Power of Diſtreſs, dies; his Executor brings a Bill for the Arrears. Decreed that he may enter, and hold and enjoy till paid the Arrears and Coſts. 386

Lord of the Manor of *A.* brings a Bill for a Rent of 8*s.* payable out of the Manor of *B.* and tho' it appeared by the Rolls of the Manor of *B.* from *Hen.* 8. to *Ch.* 1. that the Copyhold was held of the Manor of *B.* and was ſo admitted by the Plaintiff, and he had no other Evidence of his Title to the Rent, but that it had been paid him near twenty Years; yet the Court decreed him the Arrears and growing Rent, and denied the Defendant a Trial at Law. 516

By the Rules of Law in Caſe of *Incroachment* of Rent, if the Tenant makes but one Payment of more than was due, he ſhall never go back from it. 517

A. is Tenant in Tail ſubject to a Rent-charge to *B.* for Life. *A.* dies, the Rent-charge being in Arrear. The Iſſue in Tail not liable by the Statute of 32 *H.* 8. *ca.* 37. to the Arrears incurred in the Life of his Anceſtor. *Pag.* 612

One claims a Fee-farm Rent under the Statute of *Car.* 2. and the Land out of which the Rent was iſſuing, being under a Sequeſtration, the Court would not order the Sequeſtrators to pay the Rent out of the Money in their Hands; but left the Party to take his Remedy at Law for the Rent, notwithſtanding the Sequeſtration. 713

For the Incouragement of Purchaſers of Fee-farm Rents, the Statute of *Car.* 2. gives the Purchaſers the ſame Power of Diſtreſs, as the King had, not only on the Land out of which the Rent iſſues, but on any other Land of the Tenant. 714

Though the King may diſtrain on any other of the Lands of his Tenant, as well as on thoſe, out of which the Rent iſſues; yet if the Tenant alien, deviſe or leaſe at Will only his other Lands, the King cannot diſtrain on thoſe Lands. *Ibid.*

Replication.

Where there is a Plea and Anſwer, and the Plaintiff replies; the Replication muſt be to the Anſwer as well as the Plea. 46

Return of Writs.

A Commiſſion returnable *ſine Dilatione* muſt be executed before the ſecond Return of next Term, and if executed afterwards, it is void. *Page* 197

Where the Sheriff returns *nulla bona* upon a *Fi. fa.* and there is a Recovery againſt him for a falſe Return, *that* veſts no Property of the Goods in him; but they remain in the Party, and are liable to any ſubſequent Execution. 239

Revivor. Vide **Abatement.**

Revocation.

Revocation of a Will. Vide *under Title* **Will.**

One makes a voluntary Settlement, with Power of Revocation on Tender of a Guinea, and afterwards ſettles the Lands to other Uſes, but does not tender the Guinea. The firſt Settlement is not revoked. 69

If the Perſon had declared he intended to revoke the former Settlement, it had been ſufficient, though the Guinea had not been tendred. *Ibid.*

Equity may ſupply an informal or defective Revocation, though it has not all the Formalities and Circumſtances mentioned in the Power of Revocation. *Ibid.*

A Proviſo in a Settlement, if the Wife ſurvive her Husband, *they not having Iſſue between them*, then ſhe may revoke the Settlement. The Husband dies leaving a Son, who dies in the Life of his Mother. She may revoke the Settlement. 651

Satisfaction.

Vide *under Title* **Legacy.**

A. deviſes his Eſtate to *B.* his Son, charged with 500*l.* to the Daughter of *B.* payable at Twenty-one or Marriage. *B.* marries his Daughter, and gives her 1500*l.* Portion, but no Notice is taken of the 500*l.* Twenty-one Years afterwards the Daughter and her ſecond Husband bring a Bill againſt the Father for the 500*l.* Bill diſmiſſed. The 1500*l.* ſhall be preſumed a Satisfaction of the 500*l.* eſpecially after ſuch a Length of Time. *Page* 484

A. covenants on his Marriage to purchaſe Lands of 200*l.* a Year, and ſettle them for the Jointure of the Wife, and to the firſt, *&c.* Sons of the Marriage. He purchaſes Lands of that Value, but makes no Settlement; and on his Death they deſcend on the eldeſt Son. On a Bill by the Son for a ſpecifick Performance, decreed the Lands deſcended to be a Satisfaction of the Covenant. 558

One covenants to leave his Wife 650*l.* He dies inteſtate, and the Wife's diſtributive Share amounts to more than that Sum. This is a Satisfaction, and the Wife ſhall not come in, firſt as a Creditor for the 650*l.* and then for a Moiety of the Surplus. 709

Scribener. Vide Attorney.

Securities and Incumbrances.

Judgment, Statute and Recogniſance.

A. is bound with his Father for the Debts of the Father, who enters into a Statute to the Son to pay the Debts and indempnify the Son. One of the Creditors delivers up his Bond, and takes a Mortgage from the Father. The Son ſhall not ſet up his Statute to defeat the Mortgage. *Page* 39

A Recogniſance, after the Time for enrolling it was elapſed, was enrolled by ſpecial Order of the Court. The Conuſor, between the Date of the Recogniſance and the Time of enrolling it, borrows Money on Judgment, which was over-reached by the Recogniſance: But the Eſtate of the Conuſor was in Mortgage prior to both, ſo that neither the Recogniſance, nor Judgment could reach the Eſtate without the Aſſiſtance of Equity. The Court inclined to give the Judgment a Preference to the Recogniſance. 235

A Counſel having a Statute from *A.* adviſes *B.* to lend *A.* 1000*l.* on a Mortgage, and draws the Mortgage with a Covenant againſt all Incumbrances, and conceals his own Statute. The Statute ſhall be poſt-poned to the Mortgage. 370

Mort-

Mortgages are not to be preferred to other real Incumbrances; but Mortgages, Judgments, Statutes and Recogniſances ſhall be paid according to their Priority. *Page* 525

A Judgment or Sentence recovered in *France* for Money due, muſt be conſidered here only as a Debt on ſimple Contract; and the Statute of Limitations will run upon it. 540

By Act of Parliament an Eſtate is veſted in Truſtees to be ſold, and the Money to be applied, firſt to pay Mortgages, and then to pay Statutes, Judgments and Recogniſances. Decreed that ſubſequent Mortgages ſhall be paid before precedent Statutes. 711

A Recogniſance not inrolled is to be taken as an Obligation, and to be paid as a Debt by Specialty. 750

A Recogniſance may be enrolled after the Time is elapſed; but it is always done with Caution, ſo as not to prejudice any intervening Purchaſer. 751

Defective Securities made good in Equity. Vide *under Title* Deeds.

Securities and Incumbrances taken in by an Heir, or Purchaſer, or ſubſequent Incumbrancer.

After a Bill brought by a ſecond Mortgagee, againſt the firſt and third Mortgagees, to diſcover Incumbrances, the laſt Mortgagee may get in the firſt Incumbrance, and protect himſelf againſt the ſecond. 29

A ſubſequent Purchaſer protected by getting in an old ſatisfied Statute. 30, 160

A Purchaſer or Mortgagee buying in Incumbrances for leſs than is due, ſhall have the Benefit of the whole Money due thereon. *Page* 66, 81

A. makes a Mortgage, and after a Commiſſion of Bankruptcy taken out againſt him, and an Aſſignment made by the Commiſſioners, he makes a ſecond Mortgage to *B.* who has no Notice of the Bankruptcy. *B.* ſhall not protect his Mortgage by getting an Aſſignment of the firſt Mortgage. 157

If a Purchaſer buys in an old Statute or Mortgage, tho' nothing is due thereon, he ſhall defend himſelf by it. 159

So he ſhall, tho' he got in the prior Incumbrance by undue Means. *Ibid.*

One in the Time of the Rebellion purchaſed under the Parliament's Title, and after the Reſtoration got in an old Statute. The Court would not relieve againſt him. 160

One articles to ſell Lands to *A.* and afterwards articles to ſell the ſame Lands to *B.* who gets a Conveyance, and pays his Money, and *A.* aſſigns his Articles to *C.* who gets in an old Statute, and he was permitted to defend himſelf by it. *Ibid.*

A Purchaſer or Mortgagee ſhall not protect himſelf by taking a Conveyance from a Truſtee after Notice of the Truſt, for by taking ſuch Conveyance he becomes the Truſtee himſelf. 271

A. mortgages Lands to *B.* and afterwards on Marriage ſettles the ſame on himſelf for Life, Remainder to his Wife for Life, Remainder to the Heirs of his Body

by his Wife; and afterwards *A.* mortgages the ſame Lands to *C.* *A.* dies leaving a Son. *D.* adminiſters to *A.* during the Son's Minority, and pays off the firſt Mortgage out of the perſonal Eſtate of *A.* and takes an Aſſignment of it in Truſt for the Son. Decreed the Adminiſtrator ſhall not be allowed as againſt the ſecond Mortgage, what he paid in Diſcharge of the firſt Mortgage. *Page* 304

A. in 1687, lends 1000*l.* to *B.* on Judgment, at which Time there was a Term of Years attendant on the Inheritance of *B.*'s Eſtate, which had been aſſigned to three Truſtees. In 1688, *B.* and one of the Truſtees aſſign the Term to *C.* for ſecuring Money then borrowed of him. *A.* having Notice of this Aſſignment, gets an Aſſignment of the Term from the two other Truſtees to *D.* in Truſt for better ſecuring his 1000*l.* *A.* ſhall have the Benefit of this Aſſignment, and be paid before *C.* 524

Ship. Part-owners of a Ship. Vide *under Title* **Partners.**

Simony.

Mortgagee of a Manor and Advowſon being in Poſſeſſion, and the Church becoming vacant, makes a ſimoniacal Preſentation of *A.* which is rejected by the Biſhop. Then the Mortgagor and Mortgagee join in preſenting *B.* *C.* gets the Title of the Crown, and brings an Information in the Name of the Attorney General, to remove the Mortgagee's Title, and that it might not be ſet up at Law; and it was ſo decreed. *Page* 549

Specifick Performance, when to be decreed, and when not. Vide *under Title* **Agreement.**

Spiritual Court.

An Account decreed of an Inteſtate's perſonal Eſtate, notwithſtanding an Account had been before taken, and a Diſtribution decreed in the Spiritual Court. 47

Statutes.

In an Act of Parliament, the Intention appearing in the Preamble, ſhall control the Letter of the Law. 58

The Act of Parliament relating to the *New-River Company* ought to have a liberal Conſtruction, ſo as the Town in general may be ſerved with Water. 431

By Act of Parliament an Eſtate is veſted in Truſtees to be ſold, and the Money to be applied firſt to pay off Mortgages, and then to pay Statutes, Judgments, and Recogniſances. Decreed that ſubſequent Mortgages ſhall be paid before precedent Statutes. 711

A general Saving in an Act of Parliament, muſt not control the expreſs Proviſion in the Act. 712

Statute of Limitations. Vide *Title* **Limitation.**

Statute of Frauds and Perjuries. Vide *under Title* **Agreement.**

Statutes for Security. Vide *under Title* **Securities.**

Subpena. Vide *under Title* Proceſs.

Surety.

A Miſtake in the Title of an Order amended, though to charge a Surety, who gave a Recogniſance to abide the Order of Hearing. *Page* 376

A. is bound as a Surety in a Recogniſance dated *May* 5, 1660, for Payment of Money, which happened not to be made good, by the Convention Act, for confirming judicial Proceedings, the Act not extending to that Day. *A.* being a Surety only, and having no Conſideration for entring into this Recogniſance, the Court would not make it good, nor allow it to be ſo much as a Debt. 393

The Principal in a Bond being arreſted gave Bail, and Judgment is had againſt the Bail. On a Bill by the Sureties, who had been ſued on the original Bond, and paid the Money, decreed the Judgment againſt the Bail to be aſſigned to them, in order to reimburſe them, what they had paid, with Intereſt and Coſts. 608

Survivor.

Vide **Jointenants.**

Money is deviſed to be laid out in Land, and ſettled on the Children of *J. S.* Land is purchaſed, and ſettled on them and their Heirs, and one of them dies. Decreed the Land ſhould not ſurvive. 46

Agreement by one Jointenant to ſell does not bind the Survivor. 63

Where two are bound jointly, and one dies, the Survivor only is liable: Otherwiſe if bound jointly and ſeverally. *Page* 99

Deviſe to two equally to be divided and the Survivor of them; they are Jointenants. 323

A. and *B.* are Jointenants for their Lives. *A.* makes a Leaſe of his Moiety for Years to commence from his Death, if *B.* ſo long live. This Leaſe ſhall bind the Survivor. *Ibid.*

Two Men Jointenants in Fee, one of them being ſick, aſſigns his Moiety by Deed to his Wife, and afterwards deviſes it to her. The Aſſignment void, and the Deviſe will make no Severance. 385

Adminiſtration is granted to two, and one of them dies. The Adminiſtration does not ceaſe, but ſurvives to the other. 514

But if a Letter of Attorney is made to two, and one dies, the Authority ceaſes. *Ibid.*

A. and *B.* are Jointenants of the Truſt of a Term. *A.* dies. *B.* ſhall have the Whole by Survivorſhip. 556

If a Child of a Freeman of *London* dies under Twenty-one, his orphanage Part by the Cuſtom will ſurvive to the other Children, and he cannot deviſe it. 559

A Debt is deviſed to two, and if either died, to the Survivor. One died before the Debt was got in. The Survivor ſhall have the whole Debt. 654

Term for Years. Vide Eſtate for Years.

Tithe.

TIthe Oar is not due, but by particular Cuſtom. *Page* 46

Trial.

New Trial granted after one Trial on an Iſſue directed; the Matter in Queſtion being of Value, and concerning all the Copyholds in the Manor. 75

Bill for Writings and a Partition; Defendant inſiſts the Plaintiff has no Title, and that there is an Intail ſubſiſting: The Court gave the Plaintiff a Year's Time to try his Title. A Trial is had, and Verdict for the Plaintiff. Upon coming on upon the Equity reſerved, it was inſiſted, this being a Matter of Right of Inheritance, Defendant ought not to be bound by one Trial; *ſed non allocat'*, it being a Decree only for a Partition. *Quære.* 232

Bill for a new Trial, Plaintiff ſuggeſting, that her Mark to the Bond in Queſtion was forged by one *Web*, and that all the Witneſſes to the pretended Bond were dead, and that the Verdict was obtained by Surpriſe. A new Trial was ordered. 240

Upon an Appeal, the Houſe of Lords granted a new Trial, to try whether a Bond was forged or not, though a Verdict for the Bond had been before obtained at Law, on *non eſt factum* pleaded, and tho' new Trial denied in Equity. 378, 419

If after the Trial a Witneſs be convicted of Perjury, or the Party of Forgery, it is a good Cauſe for granting a new Trial. *Page* 379

Precedents where new Trials, and in an indifferent County, have been granted, and alſo ſome denied. 437

An Iſſue at Law was directed in a Matter, where the Plaintiff had a proper Action at Law, and was under no Impediment of bringing ſuch Action. 503

Truſt.

Deviſe of 1500 *l.* to *A.* and *B.* for ſuch Uſes as the Teſtator had declared to them, and by them not to be diſcloſed. *A.* in the Life of *B.* writes a Letter diſcloſing the Truſt. This is a good Declaration of the Truſt. 50, 106

A. in Conſideration of 80 *l.* conveys an Eſtate abſolutely to *B.* and brings a Bill to redeem. *B.* by Anſwer inſiſts the Conveyance was abſolute, but confeſſes, that after Payment of the 80 *l.* and Intereſt, he was to ſtand ſeiſed for the Benefit of the Plaintiff's Wife and Children. Plaintiff replies to the Anſwer, and the Truſt is not proved; yet decreed the Truſt for the Benefit of the Wife and Children. 288

Truſtees joining with the *Ceſtuy que Truſt* in Tail in a Feoffment, will bar the Eſtate-tail in the Truſt. 344

How conveyed, barred or transfer'd, and how to be executed.

One appoints his Truſtees to convey his Lands to his Daughter after his Death, and afterwards has a Son.

Son. The Conveyance ſhall be made to the Son. *Page* 104

A defective Common Recovery as to a Tenant to the *Præcipe*, will bar an Eſtate-tail in a Truſt. 132

Bargain and Sale only will bar an Eſtate-tail in a Truſt. 133, but 552 *contra.*

Where a Truſt is limited to a Man and the Heirs of his Body, with Remainder over, the Court will not decree the Truſtees to convey to him an Eſtate in Fee, but an Eſtate-tail only. 428

Where Money is deviſed to be laid out in Land, and ſettled to the Uſe of *J. S.* in Tail, with a Remainder over; the Court ought not to decree the Money to be paid to *J. S.* although he will have Power over the Land, when purchaſed, by ſuffering a Recovery; but ought to decree the Money to be laid out, and the Land ſettled according to the Will. 552

A. being Tenant in Tail of the Truſt of a Copyhold Eſtate, with Remainder over, and the Truſtees refuſing to ſurrender the legal Eſtate to him, he brought his Bill for that Purpoſe, and pending the Suit went to the Lords Court, and offered to ſurrender, but was refuſed, not having the legal Eſtate; and thereupon he made his Will, and gave the Eſtate to his Wife and Children. Decreed the Eſtate to go according to the Will, the Court conceiving the Will ſufficient to bar the Intail of a Truſt. 583

The Truſt of Lands is deviſed to *A.* for Life, with Power of leaſing, Remainder to the Heirs Male of his Body. Decreed the Truſtees to convey an Eſtate to *A.* and the Heirs Male of his Body, and not an Eſtate for Life only, with Remainder to his firſt, *&c.* Sons in Tail Male. *Page* 670

But otherwiſe it would be, if Lands were agreed to be ſo ſettled by Marriage-Articles. 671

When a Queſtion ariſes, how a Truſt ought to be executed by a Conveyance, there is no better Rule than to obſerve and follow, what has been done at Law in the executing of Conditions, that are executory, and to be performed, ſo far as the Caſe will admit. 736

A. deviſes Lands to the *Drapers* Company in Truſt to convey the ſame to *B.* for Life, and to his firſt, *&c.* Sons for their Lives ſucceſſively, and ſo to their Iſſue Male for their Lives only, Remainder over. Though this is a vain Attempt to create a Perpetuity, yet the Truſtees ſhall make as ſtrict a Settlement, as may be, making all the Perſons in Being but Tenants for Life; but the Limitation to the Sons unborn muſt be in Tail. 737

Reſulting Truſt, and Truſt by Implication and Conſtruction.

A Purchaſe by the Father in the Name of his Infant Son, decreed to be an Advancement for the Son, and not a Truſt for the Father. 19

A. conveys Lands to the Uſe of himſelf for Life, Remainder to his Wife for Life, Remainder to his Son in Fee, and at the ſame Time makes his Will, and gives the ſame Lands to his Son in Tail charged with his Debts. The Son not a Truſtee for the Father in

the Settlement: Otherwiſe it would have been, if the intire Fee had been conveyed to the Son. *Page* 28

In the Purchaſe Deed the Conſideration-Money is mentioned to be paid by the Grantee, and there was no expreſs Declaration of Truſt in Writing; yet upon the Circumſtances of the Caſe decreed a Truſt, though the Grantee had deviſed the Eſtate for Payment of his Debts. 167

A Mortgagee aſſigns over his Mortgage to *J. S.* and declares a Truſt by Parol for other Perſons; *J. S.* acknowledges the Truſt. There being an expreſs Truſt declared by Parol only, ſhall prevent a reſulting Truſt to the Aſſignor. 294

The Statute of *Frauds and Perjuries*, which ſaves reſulting Truſts, extends only to ſuch as were reſulting Truſts before the Statute. *Ibid.*

Land is deviſed to Truſtees to ſell, and out of the Money ariſing by the Sale, among other Sums, to pay 100 *l.* to the Heir at Law; and no Diſpoſition is made of the Surplus. The Land ſhall not be turned into perſonal Eſtate, nor more ſold than is neceſſary to pay the Legacies. 425

A. by Will deviſes his Land to Truſtees to ſell, and to diſpoſe of the Money as he by Writing ſhould appoint, and for Want of Appointment to his four Nephews. *A.* by Writing appoints his Truſtees to pay ſeveral Sums to ſeveral Perſons; but not near the Value of the Land. Decreed the Surplus to the Heir, and not to the Nephews, as an Intereſt reſulting, and not diſpoſed of. 571

Lands are deviſed to three Perſons and their Heirs, to the Uſe of them and their Heirs, upon Truſt to convey Part to *A.* for Life, and other Part to *B.* in Tail; but gives no Direction as to the Remainder in Fee. Tho' two of the Truſtees were related to the Teſtator; yet the Remainder in Fee, will not belong to them, but be a reſulting Truſt for his Heir at Law. *Page* 644

Lands are deviſed to Executors to be ſold for Payment of Debts; the Surplus, if any, to be deemed perſonal Eſtate, and go to the Executors, to whom the Teſtator gave 20 *l.* apiece. Surplus decreed to the Heir at Law. 645

A Term for five Hundred Years is limited in Truſt to pay Debts, and four Years after to attend the Inheritance. As ſoon as Debts paid, a Truſt for the Heir. *Ibid.*

Two Hundred Pounds a Year deviſed for ſixteen Years to pay Debts and Legacies. Surplus a Truſt for the Heir. *Ibid.*

For raiſing Portions and Payment of Debts.

Vide *Deviſe of Lands to be ſold for Payment of Debts*, &c. *under Title* **Will.**

Vide **Portions or Proviſions for Children.**

Lands are ſettled on Marriage upon Condition, if there ſhould be a Daughter, the Perſons in Remainder ſhould pay her 2000 *l.* at Sixteen, with a Power for the Daughter in Caſe of Non-payment to diſtrain for the Portion. Though no Power to ſell; yet a Sale decreed for raiſing the Portion. 1

Where Debts are directed by Will to be paid out of Rents and Profits, the Court, if it is neceſſary, will decree a Sale. *Page* 26

A Truſtee for raiſing and paying a Portion of 500 *l.* to *A.* enters and gives Judgment to *A.* to pay the 500 *l.* when raiſed. He raiſes the 500 *l.* and more, and then becomes inſolvent. Whether the Land is diſcharged. 85

Tenant for Life with Power to charge the Lands with 5000 *l.* for Daughters Portions, by Will charges the Lands with 5000 *l.* for Daughters Portions, and directs that the Truſtees ſhall enter and hold until the Money be raiſed by Rents and Profits. The Court decreed a Sale for raiſing the Money. 310, 420

Reverſion in Fee expectant on an Eſtate for Life, is deviſed to *A.* and *B.* for Payment of Debts and Legacies, and *A.* and *B.* are made Executors. The Deviſees being made Executors, the Money raiſed by Sale is legal Aſſets, and the Debts muſt be firſt paid. Otherwiſe if the Truſtees had not been made Executors. 248, 405

Where a Term is limited to raiſe Portions for younger Children, by Rents and Profits, the Heir may have the Portions raiſed by a Sale, though the younger Children oppoſe it, as well as the younger Children may inſiſt upon a Sale, if they think fit. 420

A. by Will gives 500 *l.* to his Daughter to be paid by his Executor at her Age of Twenty-one, out of his perſonal Eſtate, and Rents of his real; and if not raiſed by that Time, the Executors to ſtand ſeiſed and take the Rents, till the 500 *l.* was raiſed; and after Payment gives the Land to his Son. The Daughter marries at eighteen, and dies under Twenty-one, and the Husband adminiſters. Decreed the Portion to be raiſed and that by a Sale, though the Land by Reaſon of the Incumbrances, would produce little more than the 500 *l.* *Page* 424

By Act of Parliament an Eſtate is veſted in Truſtees to be ſold, and the Money to be applied firſt to pay of Mortgages, and then to pay Statutes, Judgments and Recogniſances. Decreed that ſubſequent Mortgages ſhall be paid before precedent Statutes. 711

Truſt for preſerving contingent Remainders.

Truſtees for preſerving contingent Remainders, are decreed to join in a Sale, the Eſtate ſettled being only an Equity of Redemption ſubject to a Mortgage, and there being no Iſſue born, and the Wife conſenting to the Sale. 303

If Tenant in Tail joins with the Truſtees for preſerving contingent Remainders, in barring the Limitations in the Settlement, it is no Breach of Truſt in the Truſtees. 754

Truſtee. How and when to be charged and diſcharged, and what Allowances to have.

A Legacy of 100 *l.* is deviſed to an Infant payable at Twenty-one, and if he dies before, then to go over, and the Intereſt is for his Maintenance in the mean Time. The Truſtee pays 20 *l.* to place the Child out an Apprentice, who died under Twenty-one. The Truſtee allowed the 20 *l.* out of the Legacy. 137

Two Truſtees for Sale of an Eſtate join in a Conveyance of it to a Puchaſer, and in a Receipt for the Conſideration-Money; but each of them receives only a Moiety thereof. One of them afterwards became inſolvent. The other ſhall not be anſwerable for what the inſolvent Truſtee received. *Page* 504, 515, 570

Otherwiſe it is, where Executors join in Sales. *Ibid.*

Although a Truſtee is not directed to put Money out at Intereſt; yet if he makes Intereſt, he ſhall account for it. 548

Verdict.

Relief denied after a Verdict, & econtra.

A Verdict having been obtained againſt an Executor, (who pleaded *plene adminiſtravit*) upon producing a Letter of his, confeſſing a Mortgage for 300*l.* made to the Teſtator; the Executor brought his Bill and was relieved, he proving the Mortgage appeared to be worth nothing, and that there were two prior Mortgages on the ſame Eſtate. 146

In Debt againſt an Executor, he pleads *ne unques* Executor, and on Proof at the Trial, that a Chimney Back, or ſome other ſlight Thing came to his Hands, Plaintiff had a Verdict: But Equity relieved againſt it. 147

So in another Caſe upon the like Plea, it was proved the Defendant took Money for ſome Pots of Ale ſold in the Teſtator's Houſe after his Death: Equity relieved. *Page* 147

Voluntary.

Vide **Fraud**, &c.

A Remainder-Man in Tail in a voluntary Settlement, brings a Bill for Diſcovery of the Deed; and it appearing the Entail was diſcontinued, the Court would not relieve him. 35

A. on his Marriage with *B.* ſettles Lands for her Jointure, which were ſubject to an Intail. *C.* Brother of *A.* was privy to the Intail, ingroſſed the Jointure Deed, and had the Deed of Intail in his Cuſtody, and concealed it. *A.* deviſes the Inheritance of the Lands to *J. S.* and dies without Iſſue, and *J. S.* marries the Widow, and they bring a Bill to be relieved againſt the Deed of Intail, which was ſet up by *C.* Decreed the Wife to hold her Jointure; but Bill diſmiſſed as to the Husband's Claim under the Will, it being a voluntary Conveyance. 239

A. in 1683, makes a voluntary Settlement of an Eſtate on his Grandſon and his Heirs, and afterwards in 1690, he makes another voluntary Settlement of the ſame Eſtate on his eldeſt Son for Life, Remainder to his firſt, *&c.* Son in Tail, and by his Will gives a conſiderable Eſtate to his Grandſon. Although it was proved that *A.* always kept the Settlement of 1683, in his Cuſtody, and never publiſhed it, and after his Death it was found among waſte Papers, and the Deed of 1690, was often men-

mentioned by him, and he told the Tenants that the Plaintiff was to be their Landlord after his Death; yet the Son could not be relieved againſt this firſt Settlement. *Page* 473

A Man makes a voluntary Settlement, reſerving to himſelf a Power to mortgage what Part he pleaſed. This amounts in Effect to a Power of Revocation, and therefore fraudulent as againſt Creditors by Judgment. 511

A voluntary Covenant is not to be carried in Equity beyond the Letter. 693

Uſury.

A Woman reſorts to Places of Gaming, and borrows Money to ſupply Perſons in their Gaming, and gives the Lenders great Premiums, and afterwards borrows more Money, and being arreſted for it gives Bond and Judgment, and then brings a Bill to be relieved againſt theſe Securities, and to have an Allowance for the former exceſſive Premiums, which ſhe had paid: But the Court would not relieve againſt the Judgment, but upon Payment of Principal, Intereſt and Coſts. 170

Though a Security is hazardous, yet that will not juſtify the Taking of exceſſive Intereſt. 172

One in 1683, borrows 200 *l.* of *A.* and gives a Mortgage of a reverſionary Term for Thirty-ſix Years commencing from 1700, of the Value of 200 *l. per Ann.* and the Mortgage is defeaſanced on Payment of 40 *l. per Ann.* for eight Years by quarterly Payments. The Court relieved on Payment of the 200 *l.* with ſimple Intereſt. *Page* 402

Waſte.

Injunction to ſtay Waſte. Vide *Title* **Injunction.**

A Term for Years is limited by Deed for Payment of Debts, and by Will the Reverſion is deviſed to *A.* for Life *ſans* Waſte, Remainder to his firſt, *&c.* Sons in Tail. *A.* being in Want, the Court gave him Leave to cut Timber for his Support, not exceeding the Value of 500 *l.* *Page* 218

The Tenant of a Jointreſs at 40 *l. per Ann.* had committed Waſte *ſparſim*, but inſiſted he had improved the Eſtate to 60 *l.* a Year, and offered to take a Leaſe at that Rent for fifty Years, and to pay for the Timber cut. Whether Equity will relieve againſt the Forfeiture for the Waſte. 263

On a Bill to redeem an Account is decreed, and 240 *l.* reported due, and pending Exceptions to the Report the Mortgagee commits Waſte. Ordered he ſhould deliver up Poſſeſſion, on the Plaintiff's giving Security to abide the Event of the Account. 392

A Bill may be brought in Behalf of a Child in *ventre ſa mere* for an Injunction to ſtay Waſte. 711

A. on the Marriage of his Son, ſettles a Meſſuage to the Uſe of himſelf for Life *ſans* Waſte, Remainder to his Son. Though the Eſtate for Life of the Father be *ſans* Waſte, yet he cannot pull

down the Houſe, nor commit any voluntary Waſte; and if he does the Court will grant an Injunction, and oblige him to put the Houſe in as good Repair, as it was before the Waſte committed. *Page* 738

Watercourſe.

After a long Enjoyment of a Watercourſe running to an Houſe and Garden, through the Ground of another, it ſhall be preſumed that the Owner of the Houſe has a Right to the Water-courſe, unleſs the other Party can ſhew a ſpecial Licence, or an Agreement to reſtrain it in Point of Time. 390

Will and Teſtament.

How far parol Proof may be admitted to explain a Will. Vide *Title* **Evidence.**

A Wife, whoſe Husband is baniſhed by Act of Parliament for his Life, may make a Will. 104

Whether a Releaſe by Will to *J. S.* of all Debts, Accounts and Demands, will transfer the Property of Goods, which he has in his Hands, belonging to the Teſtator. 114

An Heir at Law is to be favoured, where the Words of a Will are doubtful, and there ſhall be no ſtrained Conſtruction to work a Diſinheriſon; but where a Will is plain, no Favour then to the Heir. 340

Word (or) not taken for Word (and) in a Will. 377, 388

A. deviſes Land to ſeveral Perſons, and after his Death, one who was a Friend to the Heir at Law, ſnatches the Will out of the Executor's Hands, and tears it in Pieces. The Pieces being gathered up and ſtitched together, a Bill is brought to eſtabliſh the Will; and decreed the Deviſees to hold and enjoy, and the Heir to convey to them. *Page* 441

The Words in a Will, *I deſire*, or *I will*, will amount to an expreſs Deviſe. If I deviſe any Thing to *A.* for Life, directing him at his Death to give it to *B.* this amounts to a Deviſe of the Uſe of it only to *A.* for his Life, Remainder to *B.* 467

A Female may make a Will at Twelve, a Male at Fifteen, if proved to be of Diſcretion. 469

There muſt either be expreſs Words in a Will, or a neceſſary Implication, to diſinherit an Heir at Law. 571

A. deviſes Lands by Will, to which there are no Witneſſes, and afterwards makes a Codicil executed in the Preſence of three Witneſſes. The Will is void, as to the Land, and the Codicil will not ſupport it. 598

A Will ſpeaks not until the Death of the Teſtator: But the Conſtruction is to be made, as Matters ſtood at the Time of making it. 653

Fraud in obtaining a Will of Land may be relieved againſt in Equity; as if *A.* agrees to give *B.* 1000 *l.* in Bank-Bills, if *B.* will deviſe his Land to *A.* and *A.* gives *B.* forged Bills. On Proof thereof this Will ſhall be ſet aſide in Equity. 700

One deviſes his Land by Will atteſted by three Witneſſes, and afterwards makes another Will of

of his Land, which revokes all former Wills; but this Will is not duly executed. The laſt Will being no Will, and void, will not amount to a Revocation, it being intended to operate as a Will, and not as an Inſtrument of Revocation. *Page* 741

Where there are Duplicates of a Will, and the Teſtator cancels one of them only, and the other Part is left intire; *that* is an effectual Cancelling of the Will. 742

A former Will of Land is cancelled, the Teſtator ſuppoſing a latter Will by him made of the ſame Land to the ſame Effect was good. If the laſt Will proves not to be duly executed, Equity will ſet up the former Will. 743

Probate.

Fraud in obtaining a Will relating to perſonal Eſtate only, is not examinable in Chancery, after the Will is proved in the Spiritual Court, ſo long as that Probate is in Force. 8, 76

A Bill may be brought againſt an Executor for Diſcovery of the perſonal Eſtate, before the Will is proved, or during the Litigation thereof in the Spiritual Court. 49

Although a Will of perſonal Eſtate only, gained by Fraud, if proved in the Spiritual Court, cannot be controverted in a Court of Equity, yet if a Perſon claiming under ſuch a Will comes for any Aid in Equity, he ſhall not have it. 76

One makes a Will, and his Son Executor, but makes no Diſpoſition of the Surplus. The Son dies without proving the Will. The Teſtator is dead inteſtate, as to the Surplus, and the ſame ſhall be diſtributed amongſt his next of Kin. *Page* 634

Deviſe and Deviſee.

Deviſe of Remainders over of Leaſes, Money, &c. Vide *Limitations of Terms for Years, Money*, &c. *under Title* **Eſtates.**

Deviſe for a Charity. Vide *under Title* **Charity.**

The real Eſtate being deviſed to the Executor, was decreed to be charged with an Annuity given by the Will, though there were no expreſs Words in the Will to charge the Lands with this Annuity. 143

Land is deviſed to *A.* for Life, Remainder to *B.* in Fee, paying ſeveral Legacies within a limited Time, and if he failed, with like Remainder over to *C.* he paying the Legacies. Upon a Bill by *B.* the Court gave Leave to cut down Timber to pay the Legacies, though oppoſed by the Tenant for Life, and *C.* the laſt Deviſee in Remainder, *B.* making Satisfaction to *A.* for breaking the Ground, Carriage, *&c.* 152

One deviſes to two of his Siſters 400 *l.* apiece, and to his third Siſter what his Executors ſhould think fit. Decreed the third Siſter ſhould have 400 *l.* alſo, if the Eſtate would hold out. 153

A. deviſes Lands to *B.* in Tail, Remainder over, and gives his Executor Power to raiſe 500 *l.* out of his Eſtate for his next Heir, and deſires him to ſee his Debts paid. The Lands are charged with the Debts, and the Executor

tor has a Power to ſell for Payment thereof. *Page* 154

Land is deviſed to *A.* for Payment of Debts, and other Lands, which the Teſtator had mortgaged, are deviſed to *B. B.* muſt take the mortgaged Lands *cum onere.* 183

One ſeiſed of *Blackacre* in Tail, and *Whiteacre* in Fee, by Miſtake deviſes the intailed Acre, and leaves the Fee-ſimple Acre to deſcend. The Deviſee upon a Bill had a Decree to enjoy. 233

One deviſes, after his Debts and Legacies paid, the Surplus of his Eſtate to his Wife and his Son *John* equally, and makes them Executors; but if his Wife ſhould marry, then ſhe ſhould render the Right of being an Executrix, to the Teſtator's Son *Roger*; he to be Partner with his Brother *John* in the Executorſhip. The Wife marries again. She thereby loſes her Right to the Surplus, and to the Executorſhip. 308

An Houſe, together with the Furniture, is deviſed to a Woman and ſuch Heir of her Body, as ſhould be living at her Death, and in Default of ſuch, Remainder over. The Woman has an Eſtate-tail in the Houſe, and an abſolute Property in the Furniture. The Words (Heirs of the Body) cannot in the ſame Clauſe be conſtrued Words of Limitation as to the Land, and as to the Goods, Words of Deſignation of the Perſon. 325

One deviſes Lands to his Son by his ſecond Wife in Tail Male, Remainder to his eldeſt Son by his firſt Wife, provided that if the Land ſhould come to his eldeſt Son, that then he or his Heirs ſhould pay 1000*l.* to the Teſtator's Daughters, within four Months after the Eſtate ſhould come to him or them, and in Default of Payment, the Truſtees to enter and raiſe the Money. The Son by the firſt Wife dies leaving a Son, and the Son by the ſecond Wife dies without Iſſue. Though the Eſtate never came to the eldeſt Son by the firſt Wife, he dying in the Life of his Half Brother; yet the Proviſo being that the eldeſt Son, or his Heirs, ſhould within four Months after the Eſtate came to him or them, pay, *&c.* The Land is liable to pay the 1000*l.* *Page* 359

One deviſes ſeveral Parcels of Land to his ſeveral Children in Tail, and if any of them die before Twenty-one, or unmarried, ſuch Child's Part to go to the Survivor. One of them dies unmarried, but above Twenty-one. His Share ſhall go to the Survivors for their Lives only, and if any of the other Children afterwards die under Age, or unmarried. The Share that went over before, ſhall not go over a ſecond Time. 388

Deviſe of Lands to Truſtees and their Heirs, in Truſt equally to be divided betwixt the Teſtator's Wife and Daughter, during the Life of the Wife; and after the Death of the Wife, then to the Uſe of the Heirs of the Body of the Daughter, Remainder over. The Daughter dies in the Life of the Mother. Her Moiety during the Life of the Mother, ſhall go to the Executor or Adminiſtrator of the Daughter. 430

One deviſes a Year's Wages to ſuch of his Servants, as ſhall be living with him at his Death. Stewards

of Courts, or ſuch as are not obliged to ſpend their whole Time with their Maſter, are not within the Words of this Deviſe. *Page* 546

But it ſhall not be reſtrained to ſuch Servants only, as lived in the Teſtator's Houſe, or had Diet from him. 547

A Deviſe of two Farms to a Man and his Wife for their Lives, Remainder to Truſtees and their Heirs, till *A.* and *B.* reſpectively come of Age, and then to convey one Farm to *A.* and the other to *B.* *A.* died under Twenty-one. He being to have had an Eſtate in Fee conveyed to him, the Conveyance ſhall be made to his Heir. 561

A. having two Daughters *B.* and *C.* deviſes Fee-ſimple Lands to *B.* and other Lands, of which he was Tenant in Tail, to *C.* If *B.* will claim a Share of the intailed Lands under the Settlement, ſhe muſt quit the Fee-ſimple Lands; for the Teſtator having diſpoſed of his whole Eſtate amongſt his Children, what he gave them was upon an implied Condition, that they ſhould releaſe to each other. 581

If a Deviſe is to one of the Sons of *J. S.* who hath ſeveral Sons, the Deviſe is void, and ſhall not be ſupplied by any parol Proof. 624

A. deviſes to Truſtees in Truſt for his Daughter for Life, Remainder to the ſecond Son of her Body in Tail Male, and ſo to every younger Son, with Remainders over. There were two Sons, *B.* and *C.* *B.* died, and after his Death *C.* is born. *C.* though an only Son, ſhall take, he being the ſecond Son in order of Birth, and as the Will is worded, not to be excluded. *Page* 660

One, who is *Ceſtuy que Truſt* of a Copyhold Eſtate, may deviſe it, without making a Surrender to the Uſe of his Will. 680

Surplus of perſonal Eſtate is deviſed to the Children of *A.* and *B.* The Children ſhall take *per Capita*, and not *per Stirpes*; they claiming in their own Right, and not as repreſenting their Father. 705

Lands are deviſed to *A.* and the Heirs Male of his Body. *A.* dies in the Life of the Teſtator, leaving Iſſue a Son. The Deviſe is void, and the Son cannot take. 722

Lands are deviſed to *A.* in Tail, and after *A.*'s Death without Iſſue, to *B.* *A.* dies in the Life of the Teſtator leaving Iſſue. The Deviſe to *A.* is void, and *B.* ſhall take preſently, though againſt the Words and Intent of the Will. 723

A. having by the Will of her Husband a Power of diſpoſing of Lands with Conſent of Truſtees, deviſes the Lands by her Will. This being without the Conſent of the Truſtees, the Deviſe is void. *Ibid.*

A. deviſes Lands in Truſt, after Debts paid, to convey the ſame to the Heirs Male of the Body of *B.* the Teſtator's Great Grandfather. *C.* is the Heir Male of the Body of *B.* but not Heir general, there being a Daughter of an elder Brother, who is Heir general. Decreed the Truſtees to convey to *C.* for as *C.* would be well intitled to take as Heir Male by Deſcent, ſo he is ſufficiently deſcribed to take by Purchaſe. 729

A Perſon may take, as well by a Deſcription, as by a Chriſtian or Surname. *Page* 732

A Man may deviſe Land to his Heirs in *Borough Engliſh*, or to his Heirs in *Gavelkind*; and ſuch a ſpecial Heir will take, tho' not Heir general. 733

A Deviſee brings a Bill to eſtabliſh the Will againſt one, who is not Heir at Law. Defendant by Anſwer claimed under a Settlement, which he could not find, but hoped, when he did, he ſhould have the Benefit of it. It was inſiſted for the Plaintiff, that the Defendant might try his Title by a certain Time, or in Default thereof that the Plaintiff might hold and enjoy againſt the Defendant. Bill diſmiſſed with Coſts. 743

Deviſe of Lands for Payment of Debts, &c. Vide *Truſts for raiſing Portions, and Payment of Debts under Title* **Truſt.**

Land is deviſed to Executors for Payment of Debts. When the Land is ſold, the Money will be legal Aſſets. 106

One makes his Nephew Executor, and deviſes to him and his Heirs all his Lands, in Truſt to ſell, and pay his Debts and Childrens Portions, and gave his Children 100 *l.* apiece. The Money ariſing by the Sale is not legal Aſſets, and the Debts and Childrens Portions ſhall be paid in equal Proportion. 133

Where there is a Deviſe for Payment of Debts, a Debt, upon which the Statute of Limitations has run, is within the Proviſion equally with other Debts. 141

Lands are deviſed to *A.* for Life, Remainder to *B.* in Fee, paying ſeveral Legacies within a limited Time; and in Default of Payment, the Remainder over to *C.* he paying the Legacies. Upon a Bill by *B.* the Court gave Leave to *B.* to cut Timber for Payment of the Legacies, though it was oppoſed by Tenant for Life, and the Deviſee over. *Page* 152

One deviſes Lands to his Nephew to pay his Debts, and makes his Nephew Executor; but makes no Diſpoſition of the Surplus. Whether the Deviſee, or the Heir ſhall have the Surplus? 247

If an expreſs Legacy is given to the Heir, the Deviſee ſhall have the Surplus. *Ibid.*

Lands are ſubjected by Will to the Payment of Debts and Legacies. Whether Debts ſhall have a Preference. 248, 302

A. purchaſes Lands of *B.* and mortgages back thoſe Lands for Part of the Purchaſe-Money, and gives a Note to *B.* for the Remainder, and then deviſes the Lands to be ſold for Payment of his Debts. This Note can have no Preference, but muſt be paid in Proportion with the other Debts. 281

What Words in a Will will amount to charge the real Eſtate with Debts or Legacies.

Real Eſtate decreed to be charged with an Annuity given by the Will, though no expreſs Words to charge the Land, the Executor being Deviſee of the Land. 143

A. deviſes Lands to his Brother and Heir at Law, gives Legacies, and makes his Brother Executor, deſiring

ſiring him to ſee his Will performed. The real Eſtate is charged with the Legacies. *Page* 228

One begins his Will with diſpoſing of all his worldly Eſtate, and then wills that all his Debts be firſt paid; gives his Wife a Moiety of what is left after his Debts paid, deviſes ſome Lands to *A.* and gives the remaining Part of his real and perſonal Eſtate to *B.* The real Eſtate is charged with the Debts. 690

One by Will deviſes, that his Debts and Legacies ſhall be paid in the firſt Place; and then deviſes his Lands to his Siſter for Life, Remainder to her Iſſue, Remainder over; and made the Siſter Executrix. Decreed the Lands to be charged with the Debts. 708

Who may make a Will.

A Female may make a Will at Twelve, a Male at Fifteen, if proved to be a Perſon of Diſcretion. 469

What Eſtate or Intereſt paſſes, and to whom.

A. deviſes to *B.* a Rent out of a Leaſe for Years determinable on Lives, to be paid Half-yearly, if the *Ceſtuy que vies* lived ſo long. *B.* dies during their Life-time. The Rent is not determined by the Death of *B.* but ſhall be paid to his Executor during the Leaſe. 35

A. deviſed Lands in Truſt to pay one Third of the Rents to his Wife in Satisfaction of Dower, till his Son attained Twenty-one. The Wife dies, and then the Son dies under Twenty-one. The Adminiſtrator of the Wife ſhall have her Third of the Rents, till ſuch Time as the Son might have attained Twenty-one. *Page* 65

Where a Deviſe is to Children, the Grandchildren cannot come in to take with the Children: But if there is no Child, the Grandchildren ſhall take. 106

A Deviſe to *J. S.* and his Children, and if he dies without Iſſue to go over. This is an Eſtate-tail. 536, 7

A Deviſe to the Iſſue of *J. S.* who had a Daughter living, and afterwards a Son born. All the Children ſhall take, and even Grandchildren, if there were any: But they ſhall only take an Eſtate for their Lives. 545

A Deviſe to *J. S.* and his Children. If he has Children, they take with their Father; but if he has none, it is an Eſtate-tail in *J. S. Ibid.*

A Deviſe to a Man and his Children of perſonal Eſtate. A Child born after the Death of the Teſtator ſhall not take. 105, 545

A Deviſe to *two*, and the Heirs of their Bodies. It is a Joint-Eſtate for their Lives, and ſeveral Inheritances: And ſo it is, if there is a Deviſe over. 545

But if there is a Deviſe over, and one of them dies without Iſſue, a Moiety ſhall go over to the Remainder-Man. *Ibid.*

A Deviſe to the Iſſue of *A.* and for want of ſuch Iſſue to *B.* *A.* has a Son and a Daughter. They ſhall take as Perſons deſcribed; but they ſhall take only an Eſtate for their Lives. 546

A. deviſes all the Reſt and Reſidue of his real and perſonal Eſtate whatſoever. This will paſs a Fee. 564

A De-

A Deviſe of Lands to the Heir after the Death of the Wife, by a neceſſary Implication gives an Eſtate for Life to the Wife: Otherwiſe where the Deviſe is to a Stranger. *Page* 572

A. Deviſes to his Brother *B.* all his Lands and Hereditaments, and all his perſonal Eſtate, deſiring him to pay his Debts and Legacies. A Fee paſſes. 687

One begins his Will with diſpoſing of all his worldly Eſtate, and then wills, that all his Debts be firſt paid; gives his Wife a Moiety of what is left after his Debts paid, deviſes ſome Lands to *A.* and gives the Remainder of his real and perſonal Eſtate to *B.* A Fee in a Moiety of the Surplus of the real Eſtate paſſes to the Wife. 690

What Things paſs by the Words, and to whom.

One deviſes 1500*l.* in Truſt for the Children of *A.* who has one Child and ſeveral Grandchildren. Decreed the Grandchildren to ſhare with the Child. 50

But this Decree was afterwards reverſed, and the Legacy decreed to the only Child. 106

Admitted, if there had been no Child, the Grandchildren might have taken. 108

A. deviſes 20*l.* apiece to all the Children of his Siſter *B.* a Child born after the Making the Will, and before the Death of the Teſtator, ſhall take. 105, 545

A. ſeiſed in Fee, deviſes *Blackacre* to *B.* for Life, and deviſes to *C.* all his Lands not before deviſed, to be ſold. By this Deviſe of all his Lands, *&c.* the Reverſion in Fee of *Blackacre* is well deviſed to *C.* *Page* 461

A. deviſes that the Furniture and Pictures of his three Houſes in *B. C.* and *D.* ſhould go along with his three Houſes. Adjudged the Plate then at the three Houſes paſſed by this Deviſe. 512

A. deviſes Lands to Truſtees to pay Debts and Legacies, and then to ſettle the Remainder on his Son *B.* and the Heirs of his Body, with Remainders over; and directs that ſpecial Care be taken in the Settlement, that it ſhould never be in the Power of his Son to dock the Intail. Decreed the Son ſhould be only Tenant for Life, without Impeachment of Waſte, and ſhould not have an Eſtate-tail conveyed to him. 526

A. deviſes to *B.* all his Goods and Furniture in his Houſe, except his Pictures, which he gives to *C.* Pictures in Boxes, as well as what were hung up in the Houſe will paſs to *C.* and ſo will Pictures bought after the Making the Will. 538

A Deviſe to *A.* for Life, he paying 200*l.* apiece to his two Siſters, and after his Deceaſe to the Heirs Male of his Body, and the Heirs Male of the Body of every ſuch Heir Male, ſeverally and ſucceſſively, as they ſhall be in Priority of Birth, and Seniority of Age, Remainder over. Whether *A.* is Tenant in Tail, or for Life only? 551

A. deviſed a Farm to *B.* for Life, and after ſome Legacies deviſes all other his perſonal Eſtate, Lands, Tenements and Hereditaments not before deviſed to *C.* The Reverſion of the Farm paſſes by the general Deviſe to *C.* 560

Mortgages in Fee, though forfeited, will not paſs by a general Deviſe of all the Teſtator's Lands, Tenements and Hereditaments. *Page* 625

Nor will they paſs by ſuch general Words, though the Equity of Redemption was foreclоſed, or releaſed after the Making of the Will. *Ibid.*

Plate will paſs by a Deviſe of Houſhold Goods. 638

A. Articles to purchaſe Lands in Truſt for *B.* who before any Conveyance made, by Will directed all his Frehold Eſtate to be ſettled on *C.* and his firſt Son, *&c.* The Lands articled for will paſs by the Will. 679

One deviſes to his Wife all his perſonal Eſtate at *W.* By this Deviſe all the perſonal Eſtate, which the Teſtator had at *W.* at his Death, will paſs, though not there at the Making the Will. 688

A Deviſe of all a Man's worldly Eſtate, compriſes all a Man has in the World. 691

One deviſes the Surplus of his perſonal Eſtate to the Children of *A.* and *B.* neither of whom has a Child, either at the Making of the Will, or the Death of the Teſtator. The Deviſe is executory, and ſhall extend to ſuch Children as *A.* and *B.* ſhall have at any Time; and the Children ſhall take *per Capita*, and not *per Stirpes*, they claiming in their own Right, and not as repreſenting their Father. 705

One deviſes the Surplus of his perſonal Eſtate to his Grandchildren living at his Death. Grandchildren born after his Deceaſe ſhall not take. 710

One deviſes to his Son the Furniture of his Houſe at *D.* and orders Goods to be carried from *London* to his ſaid Houſe, and agrees with Carriers for that Purpoſe, but dies before the Goods are removed to *D.* Theſe Goods will not paſs by the Will, as Part of the Furniture of the Houſe at *D.* *Page* 739

One deviſes all his Houſhold Goods and Furniture, which ſhould be in his Houſe at *R.* at his Death, to his Wife, and afterwards going beyond Sea, his Steward gets the Landlord of the Houſe to take a Surrender of the Leaſe thereof, and removes the Goods to another Houſe, and ſends an Account of what he had done to the Teſtator, who approves of it, and dies before his Return to *England.* The Wife is not intitled to the Goods. 747

But otherwiſe it would be, if the Goods had been removed by Fraud to defeat the Legacy; or by any tortious Act without the Privity of the Teſtator. *Ibid.*

Revocation.

One deviſes a Leaſe to his Daughter, and afterwards renews the Leaſe, and after that makes ſeveral Codicils; but takes no Notice of the Leaſe. Whether the Renewal of the Leaſe is a Revocation of the Deviſe. 209

One deviſes Lands to Truſtees to pay his Debts, and then to pay his Wife 200*l.* a Year for her Life. The Teſtator's Debts being afterwards increaſed, for great Part of which his Truſtees were bound, he by Deed and Fine, in which his Wife joined, conveys his Lands to the ſaid Truſtees to ſell to pay his Debts, and the Surplus to be paid to him and his Heirs. Whether this is a Revocation of the

Wife's 200 *l.* a Year, or whether ſhe ſhall have her Annuity out of the Surplus of the Money after the Debts paid. Decreed for the Wife. *Quære.* *Page* 241

A. by Will deviſes to his Son a Meſſuage for Ninety-nine Years, if 3 Lives lived to long, paying 40 *l.* *per Ann.* to his Siſter for her Life, and afterwards makes a Leaſe to *B.* of the ſame Meſſuage for Ninety-nine Years, if three Lives lived ſo long, paying 50 *l.* *per Ann.* to the Leſſor and his Heirs. Decreed at the Rolls, that the Leaſe was a Revocation of the Deviſe; but upon an Appeal to the *Lord Keeper*, decreed to be no Revocation, and that the Daughter ſhould be paid her Annuity. 495

Where a ſubſequent Act ſhall amount to a Revocation of a Deviſe by Implication, ſuch Implication muſt be neceſſary, and wholly inconſiſtent with the Will. 496

A Man articles to purchaſe Lands, and before a Conveyance makes his Will, and deviſes thoſe Lands, and afterwards they are conveyed to him and his Heirs. Whether this amounts to a Revocation. 680

One deviſes Lands in Truſt to permit his Daughter *Suſan* to receive the Rents until her Marriage or Death, and in caſe ſhe marries with the Conſent of the Truſtees, then to convey to her and her Heirs: But if ſhe died before Marriage, or married without ſuch Conſent, then to convey to other Perſons. *Suſan* afterwards marries with the Conſent of her Father, who ſettles Part of the Lands on her and her Husband, and dies. This Settlement is no Revocation of the Will as to the reſt of the Lands. 720

One deviſes his Land by Will atteſted by three Witneſſes, and afterwards makes another Will of his Land, which revokes all former Wills; but this Will is not duly executed. The laſt Will being no Will, and void, will not amount to a Revocation of the former, it being intended to operate as a Will, and not as an Inſtrument of Revocation. *Pag.* 742

Republication.

One deviſes a Leaſe to his Daughter, and afterwards renews the Leaſe, and after that makes ſeveral Codicils; but takes no Notice of the Leaſe. Whether the Renewal of the Leaſe is a Revocation of the Deviſe, and if a Revocation, whether the Codicils will amount to a Republication? 209

A Man ſaying his Will was in a Box in his Study, amounted to a Republication. *Ibid.*

A. by Will duly executed, deviſes a Copyhold Eſtate to his Wife, and on the Day of his Death, orders his Nephew to obliterate ſome Deviſes, but ſays nothing as to the Copyhold, and then cauſed a Memorandum to be wrote, that he approved of the Will as obliterated, but does not republiſh it; and ordered his Nephew to carry it to one to write it fair, and before it was done, he becomes delirious. Held to be a good Will, and that the Copyhold paſſed. 498

One deviſes Lands by Will, to which there are no Witneſſes, and afterwards makes a Codicil executed in the Preſence of three Witneſſes. The Will is void, as to the

Land, and the Codicils will not ſupport it. *Page* 598
A Codicil, which concerns only perſonal Legacies, will not amount to a Republication of the Will, ſo as to paſs Lands purchaſed after the Making of the Will. 625
Making a Codicil, and annexing it to the Will, is no Republication of the Will. 722

Witneſs.

A Wife is not to be examined as a Witneſs againſt her Husband. 79
Where there is a Diſpute touching Money given to Pariſhioners, none of the Inhabitants of the Pariſh can be Witneſſes. 317
A. and *B.* claiming each of them a Rent-charge out of Land, by the ſame Deed, *B.* can be no Witneſs to *A.*'s Title to his Rent-charge, being a Party intereſted, until he has releaſed his Rent-charge. 375
Upon an Appeal from the Rolls, it was objected to the Evidence of a Witneſs examined in the Cauſe, and read at the former Hearing, that he had ſince by Anſwer to a Bill exhibited againſt him, confeſſed, that on the Day he was examined, the Plaintiff gave him a Bond, that if the Plaintiff recovered the Land in Queſtion, he would convey Part of it to the Witneſs. In order to prevent his being a Witneſs, this Anſwer was read, by the Opinion of the *Lord Keeper*, Chief Juſtice *Holt*, and Judge *Powel*. 463
If after a Hearing a Witneſs is convicted of Perjury, the Party may take Advantage of it on a Rehearing. *Page* 464
After Publication, the Party may examine to the Competency, as well as Credibility of a Witneſs. *Ibid.*
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; her Depoſitions before the Maſter were allowed to be read. 472
If a Bankrupt has releaſed and aſſigned all his Eſtate to the Aſſignees, he may be examined as a Witneſs. 637
One examined as a Witneſs, when diſintereſted, afterwards becomes intitled to the Eſtate in Queſtion; his Depoſitions ſhall be read. 699
The Obligee makes the only living Witneſs to the Bond his Executor. The Executor ſhall be allowed at Law to prove the Hands of the other Witneſſes, that are dead. 700

Bill to examine Witneſſes in perpetuam rei Memoriam.

The Court will not give a Plaintiff Leave to examine Witneſſes to perpetuate Teſtimony, though in Caſe of a Purchaſe of a Reverſion, where there can be no Trial at Law during the Eſtate for Life. 159

A Table of the principal Matters.

York.

Vide **London.**

A Freeman of *London* dies within the Province of *York*. The Cuſtom of *London* in the Diſtribution of his perſonal Eſtate, ſhall control the Cuſtom of the Province of *York*. *Page* 49

The Cuſtom of the Province of *York* is only local; but that of *London* follows the Perſon, tho' never ſo remote from the City. 82

An Inhabitant within the Province of *York* makes a Settlement on his Wife, in Bar of what ſhe might claim out of his perſonal Eſtate by the Cuſtom of the Province of *York*, or otherwiſe, and dies Inteſtate, leaving his Wife and two Children. Whether the whole perſonal Eſtate ſhall be divided between the two Children, as if there had been no Wife. *Page* 263

By a Marriage-Settlement *A.* is Tenant for Life, Remainder as to Part to his Wife for Life, Remainder as to the Whole to his firſt, *&c.* Son in Tail. By the Cuſtom of *York*, the eldeſt Son by Means of this Settlement, is excluded from a Share of his Father's perſonal Eſtate. 375

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F I N I S.