CASES

IN

EQUITY

During the TIME of the late

Lord Chancellor TALBOT:

WITH

TABLES

OF THE

Names of the Cafes and Principal Matters.

The SECOND EDITION, with many References, and large Notes.

In the SAVOY:

Printed by HENRY LINTOT, Law-Printer to the King's moſt Excellent Majeſty; for T. Waller, oppoſite *Fetter-Lane*, *Fleet-Street*.

MDCCLIII.

THE

PREFACE.

THE Proprietor of the following Sheets is very ſenſible that they will, at firſt, appear in Publick under ſome Diſadvantage without the Author's Name; but having (before he put them to the Preſs) prevailed on ſome Gentlemen of known Judgment to read them in Manuſcript, who (without conſulting together) were unanimous in the Approbation of them, he no longer heſitated to riſque the Expence upon the Merits of the Collection; to which he was alſo induced by ſeveral other Reaſons.

Firſt, *There are but a Few Books of* Reports of Caſes in Chancery; *inſomuch that, before the Publication of Mr.* Vernon's, *a Gentleman muſt have attended that Bar many Years before he could, with Juſtice to his Clients, venture to give Advice in Equity-Matters of Difficulty.*

Secondly, *Thoſe* Reports in Equity *which have been publiſhed, are moſtly ſhort Notes of the State of the Caſe, and the Decree, (often without any Reaſon given) and one or both of theſe frequently imperfect; ſo that the Reader muſt be a Perſon of good Experience in his Profeſſion, and muſt afford more than ordinary Attention and Conſideration to many of them, to enable him rightly to underſtand their Tendency, and ſo to make the proper Uſe of them; But in this our Collection it is hoped the Caſes are fully and truly ſtated, and the Arguments of Council, and the Reaſons given*

by the Court for making the Decree are reported pretty much at large; as was the Method of Mr. Plowden, *Lord* Vaughan *and ſome others, in the Common Law, and is done in ſome few in* Chancery; *particularly in the three ſelect Caſes,* viz. *The Duke of* Norfolk's *and two more. And here it may be proper to obſerve, That before the Determination of that great Caſe of the Perpetuities,* * *almoſt all the great Lawyers in* England *were of Opinion againſt the Point, as it was determined: But* † *ſince that Time the whole Profeſſion ſeems to concur with that Determination. To what can this be attributed ſo naturally as to the Printing that Caſe, and the Arguments at large, whereby Men had Leiſure to diſcern which were the Arguments of Art, and which of Common Senſe?*

Thirdly, *The Caſes here collected are of a very late Date; therefore, if they be well taken, we have the Authority of Lord* Coke, *concurring with Reaſons too plain to mention, that they muſt be the moſt uſeful.*

Fourthly, *They have been (except three or four) decreed by Lord* Talbot, *whoſe eminent Virtues and Abilities were ſo ſerviceable to his Prince and uſeful to his Country, that the Loſs of him would have been reckon'd a publick Calamity at leaſt for one Generation, if he had not (by a Felicity peculiar to the Reign in which he flouriſh'd) happened to have left his Equal behind him. But we leave that Topick to ſome abler Pen; Panegyrick, how juſt ſoever, being neither our Talent, nor preſent Purpoſe; which is only to make ſome Apology for publiſhing an anonymous Work: And after what we have offered, we hope the* Caſes *themſelves, upon the peruſal of them, will more effectually anſwer this End.*

* See the Opinions of the Counſel, and the Arguments of the three Chief Judges in that Caſe.

† See the Caſe of *Lamb* and *Archer* in *Skinner* and *Salkeld*, 5 *W.* & *M.* and many other Caſes ſince, of the like Nature.

A TABLE

A TABLE OF THE NAMES of the CASES.

Alphabetically diſpoſed in ſuch a *Double Order*, as that the Caſes may be found knowing the Names either of the Plaintiffs or Defendants.

N. B. *Where* verſus *follows the firſt Name it is that of the Plaintiff; where* and *it is the Name of the Defendant.*

A.

Adams *v.* Cole. *Page* 168
Arnham *and* Coke. 35
Aſhton *v.* Aſhton. 152
Aſhton *and* Harvey. 212
Attorney General *v.* Scott. 135

B.

Baker *and* Galley. 199
Bank of England *and* Morrice. 217
Barbuit's *Caſe.* 281
Barker *and* Rudge. 124
Beckwith *and* Ibbetſon. 157
Bellamy *v.* Burrow. 97
Black & al' *and* Moor. 126
Bliſſett *and* Chapman. 145
Boſanquett *v.* Daſhwood. 38
Boſville *and* Lord Glenorchy. 3
Bradley *v.* Powell. 193
Bromhall *v.* Wilbraham. 274
Brown *v.* Selwin & contra. 240

C.

Calverley *and* Micklethwaite. 3
Carleton *and* Lowther. 187
Carter *v.* Carter. *Page* 271
Cartwright *and* Hebblethwaite. 31
Chapman *v.* Bliſſett. 145
Clare *v.* Clare. 21
Cole *and* Adams. 168
Collet *v.* De Gols and Ward. 65
Colvile *and* Stapleton. 202
Comyns *and* Sir John Robinſon. 164
Cook *v.* Arnham. 35
Cotterel *v.* Purchaſe. 61
Cotton *and* Scarth. 198
Cray *v.* Rooke. 153

D.

Daſhwood *and* Boſanquett. 38
De Gols *v.* Ward. 243
De Gols and Ward *and* Collet. 65
Deſboverie and others *and* Harvey. 130

F.

Fellows *and* Jermyn. 93

Ferrers (Counteſs of) *v.* Earl Ferrers. *Page* 2
Fort *v.* Fort and Blomfield. 171
Fox *and* Lady Laneſborough. 262

G.

Galley *v.* Baker. 199
Glenorchy (Lord of) *v.* Boſville. 3
Gifford *v.* Manley. 109

H.

Hatton *v.* Nichol. 110
Harvey *v.* Sir Edward Deſboverie and others. 130
Heard *v.* Stanford or Stamford. 172
Hebblethwaite *v.* Cartwright. 31
Hervey *v.* Aſhton. 212
Hide *and* Stephens. 27
Hines *and* Proof. 111
Hole *and* Thomas. 251
Hopkins *v.* Hopkins. 44
Hunter *v.* Maccray. 196
Hudſon *v.* Hudſon. 127

I.

Ibbetſon *v.* Beckwith. 157
Jermyn *v.* Fellows. 93
Jones *v.* Marſh. 64

K.

Kenſey *v.* Langman. 143
King *v.* Withers. 117

L.

Landſborough (Lady) *v.* Fox. 262
Langman *and* Kenſey. 143
Law *v.* Law. 140
Lechmere *v.* Lady Lechmere. 80
Lowther *v.* Carleton. 187
Lutkins *v.* Leigh. 53
Lutwyche *v.* Lutwyche. 276
Lyne, (*ex parte*) a Lunatick. 143

M.

Maccray *and* Hunter. 196
Mallabar *v.* Mallabar. 78
Manley *and* Gifford. 109
Manſell *v.* Manſell. 252
Marſh *and* Jones. 64
Menzey *v.* Walker. 72
Micklethwaite *v.* Calverly and Barber. 3
Moor *v.* Black & al'. *Page* 126
Morrice *v.* the Bank of England and others. 217
Morſe *and* Tanner. 284

N.

Nichol *and* Hatton. 110
Norton *and* Warrington. 184

P.

Partridge *v.* Partridge. 226
Penne *v.* Peacock & Ux'. 41
Powell *and* Bradley. 193
Prince *and* Upton. 71
Proof *v.* Hines. 111
Purchaſe *and* Cotterell. 61

R.

Raymond's (*Lord*) *Caſe*. 58
Robinſon (Sir John) *v.* Comyns. 164
Rolt *v.* Rolt. 189
Rogers v. Rogers. 268
Rooke *and* Cray. 153
Rudge *v.* Baker. 124

S.

Sabbarton *v.* Sabbarton. 55, 245
Savage *v.* Taylor. 234
Scarth *v.* Cotton. 198
Scott *and* Attorney General. 138
Selwin *and* Brown. 240
Stanford *and* Heard. 173
Stapleton *v.* Colvile. 202
Stephens *v.* Hide. 27
Stephens *v.* Stephens. 228
Streatfield *v.* Streatfield. 176

T.

Tanner *v.* Morſe, 284
Taylor *and* Savage. 234
Thomas *v.* Hole. 251
Tite *v.* Willis. 1

U.

Upton *v.* Prince. 71

W.

Walker *and* Menzey. 72
Warrington *v.* Norton. 184
Wilbraham *and* Bromhall. 274
Willis *and* Tyte. 1
Withers *and* King. 117

DE
Term. S. Michaelis
7 Geo. II. 1733.
In CURIA CANCELLARIÆ.

Tyte verſus *Willis.*

5 *Dec.*

GEORGE *Tyte* deviſed his Lands, *&c.* to his Wife *Jane* for Life, Remainder to his Son *Henry* for Life, Remainder to his Son *George* and his Heirs for ever; and if he died without Heirs, then to his two Daughters *Katherine* and *Jane.*

A. deviſes Lands to *I.* his Wife for Life, then to his Son *H.* for Life, then to his Son *G.* and his Heirs for ever; if he died without Heirs, then to his two Daughters *K.* and *L.* This is an Eſtate-tail in *G.*

The Queſtion was, Whether *George* took a Fee-ſimple, or only an Eſtate-tail? And the Caſe of *Webb* and *Herring*, *Cro. Ja.* 415. was cited, to prove that where a Deviſe is to one and his Heirs, and if he die without Heirs, Remainder over to another, who is or may be the Deviſee's Heir at Law, ſuch Limitation ſhall be good; and the firſt Limitation conſtrued an Intail, and not a Fee, in order to let in the Remainder-man: But where the ſecond Limitation is to a Stranger, it is meerly void, and the firſt Limitation is a Fee-ſimple.

Lord Chancellor. In this Caſe *George* took only an Eſtate-tail. The Difference which has been taken is right; and the Reaſon of it is, That in the latter Caſe there is no Intent appearing to make the Words carry any other Senſe than what they import at Law; but in the former, itis impoſſible that the Deviſee ſhould die without an Heir while the Remainder-man or his Iſſue continue: And therefore the Generality of the Word *Heirs* ſhall be reſtrained to *Heirs of the Body*; ſince the Teſtator could not but know, that the Deviſee could not die without an Heir, while the Remainder-man, or any of his Iſſue, continued. 3 *Mod.* 123.

The Counteſs of Ferrers verſus *Earl Ferrers.*

ONE of the Points in this Caſe was to this Effect:

Intereſt for the Rents and Profits of an Eſtate, is never decreed: In what Caſes of an Annuity or Rent-charge Intereſt may be decreed or not; and for what Reaſon.

The Counteſs Dowager of *Ferrers* was, by Settlement and Will of her late Huſband Earl *Robert*, intitled to a Jointure Eſtate of 1000 *l. per Ann.* but was kept out of Poſſeſſion by Earl *Waſhington*, the Son of Earl *Robert* by a former Venter, and now inſiſted upon the Arrears and Intereſt from the Time of her Huſband's Death; comparing it to the Caſe of Arrears of an Annuity, or a Rent-charge, which are decreed to be paid with Intereſt.

Lord Chancellor. The Arrears of an Annuity or Rent-charge are never decreed to be paid with Intereſt, but where the Sum is certain and fixed; and alſo where there is either a Clauſe of Entry, or *Nomine pœnæ*, or ſome Penalty upon the Grantor, which he muſt undergo, if the Grantee ſued at Law; and which would oblige him to come into this Court for Relief, which the Court will not grant but upon equal Terms, and thoſe can be no other but decreeing the Grantor to pay the Arrears, with Intereſt for

for the Time, during which the Payment was with-held: But Intereſt for the Rents and Profits of an Eſtate was never decreed yet, the Sum being intirely uncertain. And though it may be ſaid, that the Lady is intitled to an Eſtate of 1000 *l. per Ann.* yet that is not ſufficiently certain, being only the Perception of the Profits of an Eſtate, which are not to be paid at any one certain Time, but only as the Tenants of the Land bring them in; ſome at one Time, ſome at another.

Micklethwaite ver. *Calverly and Baker.* 14 *Dec.* 1735.

THE Plaintiff filed his Bill in this Cauſe, to which the Defendant *Baker* pleaded; and before the Plea came on to be argued, the Defendant died; the Plaintiff revived, and now the ſaid Plea came to be argued: But the *Lord Chancellor* was of Opinion that it could not be argued; but that the Defendant's Repreſentative muſt plead *de novo.*

Where the Teſtator had pleaded to a Bill, and died before the Plea was argued, the Executor may plead *de novo*: For the firſt cannot be argued now.

N. B. The Reaſon ſeems to be, Becauſe the Repreſentative may have a Plea to defend him without denying the Merits; for if an Executor or Adminiſtrator can truly plead *Plene Adminiſtravit* upon a *Scire Facias* at Law (which muſt always iſſue in ſuch Caſe) the Execution can only be *de bonis Teſtatoris quando acciderint. But the Anſwer of the Teſtator, in a Court of Equity, will bind the Executor who has Aſſets.*

Lord Glenorchy verſus *Boſville.*

SIR *Thomas Perſhall* deviſes all his real Eſtate to his Siſter *Anne Perſhall* and *Robert Boſville*, and their Heirs and Aſſigns, upon Truſt, that till his Grandaughter *Arabella*

A. deviſes Lands to his Siſter *B.* and *C.* and their Heirs and Aſſigns, upon Truſt, that until his

Grandaughter *D.* ſhould marry or die, to receive the Profits, and thereout to pay her 100 *l.* a Year for her Maintenance; the Reſidue to pay Debts and Legacies. After Payment thereof, in Truſt for the ſaid *D.* and upon further Truſt, that if ſhe lived to marry a Proteſtant of the Church of *England*, and at the Time of

of ſuch Marriage be of the Age of Twenty-one or upwards, or if under that Age, ſuch Marriage be with the Conſent of the ſaid *B.* then to convey, with all convenient Speed, after ſuch Marriage, to the Uſe of the ſaid *D.* for Life, *ſans* Waſte, voluntary Waſte in Houſes excepted; Remainder to her Husband for Life; Remainder to the Iſſue of her Body, with Remainders over; and upon further Truſt, that if the ſaid *D.* die unmarried, then to the Uſe of *B.* for Life; Remainder to the Son of his other Grand-daughter *E.* in Tail; Remainder to the Defendant *C.* Remainder to his firſt and other Sons; Remainder to *A.*'s right Heirs; and upon further Truſt, that if *D.* marry not according to the Will, then upon ſuch Marriage to convey to Truſtees, as to one Moiety to the Uſe of *D.* for Life, then to Truſtees to preſerve contingent Remainders; Remainder to her firſt and every other Son, being a Proteſtant, with Remainders over; and as to the other Moiety, to the Son of his Daughter *E.* in like Manner. *A.* dies, *D.* attains her full Age; and upon a Treaty of Marriage with *F.* applies to *B.* and *C.* for a Conveyance to herſelf for Life; Remainder to her intended Huſband for Life; Remainder to the Iſſue of her Body: *B.* executes ſuch Conveyance, but *C.* refuſes; *D.* ſuffers a Recovery of the Whole to the Uſe of herſelf in Fee, and then marries *F.* who made a conſiderable Settlement upon her; ſhe covenants to ſettle her Eſtate upon Huſband and Wife; Remainder to firſt, *&c.* Sons in Tail; Remainder to Survivor of Huſband and Wife in Fee. They bring a Bill to compel *C.* to convey, *&c.* Decreed (not an Eſtate tail to *D.*) but an Eſtate for Life *ſans* Waſte, *ut ſupra*, as being the Intent of *A.* upon the Will; with Remainders over in ſtrict Settlement.

Arabella Perſhall marry or die, to receive the Rents and Profits thereof, and out of it to pay her 100 *l.* a Year for her Maintenance; and as to the Reſidue, to pay his Debts and Legacies; and after the Payment thereof, then in Truſt for his ſaid Grandaughter; and upon further Truſt, that if ſhe lived to marry a Proteſtant of the Church of *England*, and at the Time of ſuch Marriage be of the Age of Twenty-one, or upwards; or if under the Age of Twenty-one, and ſuch Marriage be with the Conſent of her Aunt, the ſaid *Anne Perſhall*, then to convey the ſaid Eſtate, with all convenient Speed, after ſuch Marriage, to the Uſe of the ſaid *Arabella* for her Life, *without Impeachment of Waſte, voluntary Waſte in Houſes excepted*; Remainder, after her Death, to her Husband for Life; Remainder to the Iſſue of her Body, with ſeveral Remainders over; and upon further Truſt, that if the ſaid *Arabella Perſhall* died unmarried, then to the Uſe of the ſaid *Anne Perſhall* for Life; Remainder to the Son of his other Grand-daughter *Frances Ireland* in Tail; Remainder to Mr. *Boſville*, the Defendant, for Life; Remainder to his firſt and other Sons; Remainder to the Teſtator's right Heirs; and upon further Truſt, that if his Grandaughter marry not according to the Directions of his Will, then, upon ſuch Marriage, to convey the ſaid Eſtate to Truſtees; as to one Moiety thereof, to the Uſe of the ſaid *Arabella* for Life; Remainder to Truſtees to preſerve contingent Remainders; Remainder to her firſt and every other Son, being a Proteſtant, with ſeveral Remainders over; and as to the other Moiety, to his Daughter *Ireland*'s Son, in like Manner.

Sir

Sir *Thomas Perſhall* died in the Year 1722, and Mrs. *Arabella Perſhall* in 1723 attained her full Age: And upon a Treaty of Marriage in 1729, ſhe applies to the Truſtees for a Conveyance of the Eſtate to herſelf for Life; Remainder to her intended Huſband for Life; Remainder to the Iſſue of her Body; and ſuch Conveyance was executed by one of the Truſtees: But Mr. *Boſville*, the other Truſtee, who was alſo a Remainder-man, refuſed to convey. However, ſhe having by this Conveyance a legal Eſtate-tail in one Moiety, and an equitable Eſtate-tail in the other Moiety, ſuffered a Recovery to the Uſe of herſelf in Fee, and in 1730 married the Plaintiff, the Lord *Glenorchy*, who made a conſiderable Settlement upon her; and as to her own Eſtate, ſhe covenanted to ſettle it upon the Lord *Glenorchy* and herſelf for Life; Remainder to the firſt and every other Son of the Marriage in Tail Male; and upon Failure of ſuch Iſſue, to the Survivor of the ſaid Huſband and Wife in Fee.

The Bill was to have a Conveyance of the Moiety of the ſaid Truſt Eſtate from Mr. *Boſville*, to ſuch Uſes as are limited in the ſaid Covenant: And the principal Queſtion was, Whether under the ſaid Will the Lady *Glenorchy* was Tenant for Life or in Tail? Upon which two other Queſtions aroſe, *viz.* Firſt, Whether the Words in the Will, in an immediate Demiſe of a legal Eſtate, would have carried an Eſtate-tail? Secondly, If ſo, Whether the Court will make any Difference between a legal Title, and a Truſt Eſtate Executory?

Lord Chancellor. I ſhould upon the firſt Queſtion make no Difficulty of determining it an Eſtate-tail, had this been an immediate Deviſe; but when you apply to this Court for the carrying a Truſt Eſtate into Execution, the Doubt is, Whether we ſhall not vary from the Rules of Law to follow the Teſtator's Intent? which will alſo bring on another Queſtion, What is the Teſtator's Intent in the preſent Caſe?

Upon the ſecond Queſtion, it was argued for the Plaintiffs, That the Lady *Glenorchy* was, under this Will, intitled to an Eſtate-tail in Equity: For, this Court puts the ſame Conſtruction upon Limitations of Truſts in Equity, as the Law does upon legal Eſtates, and that to prevent Confuſion. This Doctrine is laid down with the ſtrongeſt Reaſons by the Earl of *Nottingham* in the Duke of *Norfolk*'s Caſe; and the Authority of *Baile* verſus *Coleman*, 2 *Vern.* 670. where a Truſt to one for Life, Remainder to the Heirs Male of his Body, is held an Eſtate-tail, has never yet been queſtioned. So it is held in *Legat* and *Sewell*'s Caſe, 2 *Vern.* 551. (but more fully reported in *Abr. Ca. Eq.* 394. *pl.* 7.) where Money was given to be laid out in Land to one for Life, and after his Deceaſe, to his Heirs Male, and the Heirs Male of the Body of every ſuch Heir Male, ſeverally and ſucceſſively one after another; and a Caſe being made for the Opinion of the Judges, as of a legal Eſtate, they certified it to be an Eſtate-tail. So in the Caſe of *Bagſhaw* verſus *Downes*, or *Bagſhaw* verſus *Spencer*, at the Rolls, *Hil.* 6 *G.* 2. an Executory Truſt was directed to the Judges for their Opinion as a legal Eſtate. Upon the ſame Reaſon do *Ceſtui que Truſts* levy Fines and ſuffer Recoveries, which are held good in this Court. Indeed, in Marriage Articles, if they covenant to ſettle to the Huſband for Life, Remainder to the Heirs of their two Bodies, this Court will decree a Conveyance in ſtrict Settlement, if any of the Parties apply here, becauſe the Children are looked upon as Purchaſers: But in a Will it is otherwiſe; they take through the Bounty of the Teſtator, and in ſuch Words as he gives it.

1 *Will. Rep.* 87. S. C.

It was farther inſiſted for the Plaintiffs, that the Words *Iſſue of her Body*, would make a Difference from all other Caſes; for, in the Statute *de Donis*, which created Intails, it is ſaid to be a proper Word for that Purpoſe, and is uſed no leſs than ten Times in that Statute; for this the Authority of *King* and *Melling*, 1 *Vent.* 214, 225. and the Reaſon there given, cannot be conteſted; which is alſo an Authority

2 *Lev.* 58. S. C.

Authority in the principal Caſe: For, there it is held, that to one for Life, with a Power to make a Jointure, is much ſtronger to ſhew the Intent of the Teſtator, than the Words *without Impeachment of Waſte.* To *A.* for Life, Remainder to the Iſſue of her Body, and for want of ſuch Iſſue, Remainder over, was held an Eſtate-tail in the Court of Exchequer, in the Caſe of *Williams* verſus *Tompſon,* about three or four Years ago. *Anderſ.* 86. To one for Life, Remainder to the Children of his Body, is an Intail. So in *Wyld*'s Caſe, 6 *Co.* 16. and *Sweetapple* verſus *Bindon,* 2 *Vern.* 536.

It was farther argued, That if the Remainder in this Caſe to the Iſſue be conſtrued to be Words of Purchaſe, they muſt be attended with the greateſt Abſurdity: For, in what Manner can the Iſſue take? All the Sons, Daughters, and Grand-children are Iſſue; and if they take as Purchaſers, they muſt be Jointenants, or Tenants in Common, and that for Life only. 2 *Vern.* 545. Which Conſtruction can never be agreeable to the Teſtator's Intent; and whatever Eſtate was given in the firſt Part of the Will, yet the Words, *And for want of ſuch Iſſue, then,* &c. will give the Plaintiff an Eſtate-tail, according to the Caſes of *Langley* verſus *Baldwyn,* and *Shaw* and *Weigh, Abr. Ca. Eq.* 184, 185. It was alſo farther urged, That from the Face of the whole Will, and by comparing this Clauſe with the other, it appears, that the Teſtator intended the Plaintiff, the Lady *Glenorchy,* ſhould take an Eſtate-tail; and that the ſeveral Clauſes in a Will are to be taken together, and make but one Conveyance; and that it was a proper Argument to prove the Intention of the Party from the different penning of the ſeveral Clauſes. The Perſon who drew the Will knew how to convey, either by Words of Limitation or Purchaſe, where there was Occaſion for it; for, where he limits the Eſtate to Mrs. *Ireland,* it is in ſtrict Settlement by proper Words of Purchaſe; and ſo where he limits it to the Lady *Glenorchy,* in Caſe ſhe had married a Papiſt. But farther, to ſhew he well underſtood the Doctrine of Conveyances, when he limits by Words

of Purchaſe to Sons not *in eſſe*, he has put in Truſtees, to preſerve contingent Remainders; which he would certainly have done in this Caſe, had he intended the Lady *Glenorchy* an Eſtate for Life only.

For the Defendant it was argued, That though, in the Conſtruction of Wills in this Court, Uſes and Truſts are to be governed by the ſame Rules as legal Eſtates, and that there is but little Difference between Uſes and Truſts executed and legal Eſtates; yet Truſts Executory are by no Means under the ſame Conſideration. In the Caſes of *Legat* verſus *Sewell*, and *Baile* verſus *Coleman*, the Judges were divided in their Opinions; and ſince that Time there is an expreſs Authority for the Defendant. In the Caſe of *Papillon* verſus *Voyce*, *Hil.* 5 *G.* 2. So likewiſe in the Caſe of the *Attorney General* verſus *Young*, in the Court of Exchequer: And the Caſe of *Leonard* verſus Earl of *Suſſex*, 2 *Vern.* 526. as alſo in the Caſe of *Brampſton* verſus *Kinaſton*, heard at the Rolls in *June* 1728. where an Eſtate was given to be ſettled upon his Grandchild for her Life; Remainder to the Iſſue of her Body; and when ſhe applied to have an Eſtate-tail conveyed to her, ſhe was decreed an Eſtate for Life only. And to ſhew that this Court is not tied up to the Rules of Law in Caſes of executory Truſts, the Caſe of the Earl of *Stamford* verſus Sir *John Hobart*, concerning Serjeant *Maynard*'s Will, was cited, where an Eſtate was given to Truſtees, to convey one Moiety to Sir *John Hobart* for 99 Years, in caſe he ſhould ſo long live, with ſeveral Remainders over; and this Court decreed the Maſter ſhould ſettle the Conveyance according to the Letter of the Will; but upon Exceptions to the Maſter's Report, *November* 19, 1709. it was ordered, that proper Eſtates ſhould be made to ſupport the Remainders, that the Teſtator's Intent might not be fruſtrated; and this Reſolution was affirmed in the Houſe of Lords. So in all Matters Executory, this Court endeavours to find the Intent of the Parties, and lets it prevail againſt the Rules of Law. In Marriage Settlements it was never doubted but that this Court would carry any Words into ſtrict Settlement, if the

Intent

Intent of the Parties was ſuch; and ſo held in the Caſe of *Weſt* verſus *Eaſy*, in the Houſe of Lords; and in that of *Trevor* verſus *Trevor*, *Abr. Eq. Ca.* 387. and the ſame Rules will prevail in all Caſes Executory, whether Wills or Articles. Beſides, the preſent Caſe is very much like that of Marriage Articles: The Teſtator had all along the Marriage of his Grandaughter in View, and intended this Will as no more than Heads or Directions for the Truſtees in what Manner he would have it ſettled; and ſo it remains to be carried into Execution by the Aid of this Court.

Then as to the Word *Iſſue*, it is ſometimes a Word of Limitation, ſometimes of Purchaſe. There is a Caſe mentioned in *Wylde*'s Caſe, *6 Co.* 16. where *to one and his Children*, is held to be an Eſtate-tail; yet, had it been *to one for Life, Remainder to his Children*, there can be no Doubt but that it had been a bare Eſtate for Life. And as to the Objection, that the Iſſue, if Purchaſers, are to take jointly and for Life only, Why ſhall it not be as in Caſes where the Limitation is to the firſt and every other Son? And where-ever *Heirs of the Body* are held to be Words of Purchaſe, they are conſtrued to the firſt and every other Son.

To make an Eſtate-tail ariſe by Implication upon the Words, *and for want of ſuch Iſſue*, has been cited the Caſe of *Langley* and *Baldwyn*, *Abr. Eq. Ca.* 185. *pl.* 29. But there is the Caſe of *Bampfield* verſus *Popham*, *2 Vern.* 427, 449. for the Defendant: So the Caſe of *Loddington* and *Kyme*, *3 Lev.* 431. and that of *Backhouſe* and *Wells*, *Abr. Eq. Ca.* 184. *pl.* 27. Beſides, it is a general Rule, That where an Eſtate is to be raiſed by Implication, it muſt be a neceſſary and inevitable Implication, and ſuch as that the Words can have no other Conſtruction whatſoever; and in the preſent Caſe, there is the Word *Iſſue* mentioned before; ſo that theſe laſt Words muſt relate to the Iſſue before mentioned: Whereas in the Caſe of *Langley* and *Baldwyn*, the Limitation is to ſix Sons only; then come the Words, *and*

for want of Iſſue; which Words could not have Relation to any Thing before mentioned.

The *Lord Chancellor* had taken Time to adviſe, and to have the Opinion of the Judges upon this Caſe: And the ſame coming now again to be argued upon the ſame Points that had been before the late *Lord Chancellor*,

It was inſiſted by the Plaintiff's Counſel, That the Lady *Glenorchy*'s marrying a Proteſtant of the Church of *England* at or after the Age of Twenty-one, or if under that Age, marrying ſuch an one with her Aunt's, or in caſe ſhe was dead, with the other Truſtees Conſent, was a Condition precedent; which, when performed, would give her an Eſtate-tail. That this Intent appeared from the different Penning of the ſeveral Clauſes in this Will; for, it provides, in caſe ſhe ſhould not marry ſuch a Perſon as is before deſcribed, that ſhe ſhould have but a Moiety for Life, and Truſtees are appointed to preſerve contingent Remainders; none of which are injoined in caſe ſhe ſhould marry a Proteſtant of the Church of *England*; which ſhews a Difference was intended in caſe of Performance and Non-performance of the Condition. Then conſidering it as a legal Deviſe, no doubt but that a Deviſe to one and the Iſſue of his Body will make an Eſtate-tail; and ſo it was held in the Caſe of *King* verſus *Melling*, 1 *Vent.* 214, 225. notwithſtanding the Proviſo there, impowering the Deviſee to make a Jointure: So if in this Caſe the Land itſelf had been deviſed to the Lady *Glenorchy*, it would have made an Intail at Law; and there is no Difference between an Intail of a legal Eſtate and of an equitable one. *Wyld*'s Caſe, 6 *Co.* 16. Deviſe to a Man and his Children, who had then two Children alive, the Deviſee took but for Life; but in *King* verſus *Melling*, 1 *Vent.* 214, 225. Lord *Hale* ſaid, That had there been no Children living, in that Caſe of *Wyld*, it would have been an Eſtate-tail; though *Children* be not ſo ſtrong a Word as *Iſſue*; which in many Statutes, particularly the Statute *de Donis*, takes in all the Children.

Children. In *Shelley*'s Caſe, 1 *Co.* it is ſaid, That if there be a Gift to one for Life, be it by Deed or Will, and afterwards comes a Gift to the Heirs of his Body, it is an Intail; otherwiſe indeed, if the Limitation be to *the Heirs Male of ſuch Heir Male*, as in *Archer*'s Caſe, 1 *Co.* there it would make but an Eſtate for Life; becauſe the Limitation there is grafted upon the Word *Heirs*. So in the Caſe of *Backhouſe* and *Wells*, in *B. R.* 1712. *Abr. Eq. Ca.* 184. the Deviſee but took for Life, the Limitation being there grafted upon the Word *Iſſue*; which for that Reaſon was taken to be only a Deſcription of the Perſon in that Caſe; but in *Cozen*'s Caſe, *Owen* 29. and in *Langley* verſus *Baldwyn*, *Abr. Eq. Ca.* 185. the Eſtate-tail was raiſed by Implication; which ſhews that an Eſtate-tail may paſs not only by expreſs Words, but by Implication alſo. In *King* and *Melling* the Lord *Hale* ſaid upon *Wyld*'s Caſe, that had it been to the Children of the Body, it would have paſſed an Intail; and yet none of thoſe Caſes ſeem ſo ſtrong as the preſent. So in the Caſe of *Cook* verſus *Cook*, 2 *Vern.* 545. it is ſaid, That a Deviſe *to one and his Children*, if there be no Children living, will be an Eſtate-tail.

The Exception of Waſte is next to be conſidered; and had it not been for that, this would clearly have paſſed an Intail; but this Exception varies not the Caſe: For here the Eſtates muſt disjoin (according to *Bowles*'s Caſe, 11 *Co.*) to let in the Huſband's Eſtate, which muſt intervene between her Eſtate and that of her Iſſue; and the Power of committing Waſte (voluntary Waſte in Houſes excepted) was given only to make her diſpuniſhable of Waſte during the Time ſhe ſhould be Tenant for Life only; which ſhe muſt be until her Huſband's Death, by reaſon of the Remainder to him; but not at all to reſtrain the Eſtate, which the Words of the Will give her, which is plainly an Eſtate-tail. The adding the Words, *without Impeachment of Waſte*, can alter nothing; for if ſhe was Tenant in Tail, ſhe had already in her that Power which theſe Words would give her; and the expreſſing the Power which was already in her, could no more abridge her Eſtate (according

to

to the Maxim of *Expreſſio eorum, &c.*) than the Power of making the Jointure did in *King* and *Melling*'s Caſe. In *Langley* and *Baldwyn*'s Caſe there were the ſame Words as here; and in that of *Shaw* and *Weigh*, or *Sparrow* verſus *Shaw*, *Abr. Eq. Ca.* 184. *pl.* 28. which went up to the Houſe of Lords, the Prohibition went not only to voluntary but to all Manner of Waſte, and yet there it was decreed to be an Eſtate-tail, which was a much ſtronger Implication, to make the Siſter to be but Tenant for Life, than any in the preſent Caſe. And in *Baile* and *Coleman*'s Caſe, 2 *Vern.* 670. an Eſtate-tail was decreed by the Lord *Harcourt*, notwithſtanding the Power of leaſing given to *Chriſtopher Baile*: Nor can the other Words, *voluntary Waſte in Houſes excepted*, carry the Implication farther than the former; ſince this Court will often reſtrain a Tenant for Life without Impeachment of Waſte from committing Waſte, notwithſtanding his Power; as was declared by the Earl of *Nottingham* in *Williams* and *Daye*'s Caſe, 2 *Ch. Ca.* 32. who there ſaid, That he would ſtop the pulling down of Houſes, or defacing a Seat, by Tenant in Tail, after Poſſibility of Iſſue extinct, or by Tenant for Life, though diſpuniſhable of Waſte by expreſs Grant or by Truſt; and the like has been ſince done in the Caſe of *Vane* verſus *Lord Barnard*, 2 *Vern.* 733. By comparing this with the other Clauſes of this Will, it appears plainly that the Teſtator did not intend the Lady *Glenorchy* a leſs Eſtate than to the other Deviſees; but that his Deſign was to prefer her and her Iſſue to that of Mrs. *Frances Ireland*, though *Frances* was dead at the Time of the Will; and that her Son, who could expect no more Favour than his Mother could, had ſhe been living, ſhall have an immediate Eſtate-tail, and ſo a greater Eſtate than ſhe who was intended to be moſt preferred. It is plain the Teſtator well knew the Difference between giving an Eſtate for Life and an Eſtate-tail, by the different Wording of the Clauſes of this Will: In that, whereby he deviſes the Remainder to Mr. *Boſville*, theſe Words are purpoſely omitted; and in others he gives the Lady *Glenorchy* ſeveral Eſtates, according to her marrying ſuch or ſuch Perſons, Proteſtants or Papiſts;

Papiſts; and conſequently he muſt be thought to have intended her a greater Eſtate upon her performing than upon her not performing the Condition. If therefore theſe Words would create an Eſtate-tail at Law, the Conſtruction will be the ſame here, ſince a Court of Equity ought not to go farther than the Courts of Law; as was held by Lord *Cowper* in the Caſe of *Legat* and *Sewell*, 2 *Vern.* 551. *Abr. Eq. Ca.* 394. *pl.* 7. and was alſo held by Lord *Harcourt* in the Caſe of *Baile* and *Coleman*, 2 *Vern.* 670. where he takes a Difference between Caſes ariſing upon Wills, and Caſes ariſing upon Marriage Articles, where the Perſons being all Purchaſers, the Agreement is to be carried into ſtricter Execution than in the Caſe of a Will, where the Parties being but Voluntiers, the Words muſt be taken as you find them. The ſame is held *totidem verbis* in the Caſe of *Sweetapple* verſus *Bindon*, 2 *Vern.* 536. where it is ſaid, That in a Deviſe, all being Voluntiers, the Deviſee's Eſtate is not to be reſtrained; nor is there any Argument to be drawn from this being an executory Truſt, ſince the Caſe of *Baile* verſus *Coleman* was ſuch, and looked upon as ſuch by the Lords *Cowper* and *Harcourt*. And the Caſe of *Leonard* verſus *Earl of Suſſex*, 2 *Vern.* 526. is widely different from ours; for, there was an expreſs Injunction that it ſhould be ſettled in ſuch Manner as that the Sons ſhould never have it in their Power to bar the Iſſue.

Note; this Caſe is more fully reported in *Abr. Eq. Ca.* than in 2 *Vern.* 551. —1 *Will. Rep.* 87. S. C.

It was argued for the Defendant by Mr. *Attorney General*, Mr. *Verney*, and Mr. *Fazakerly*, That the Lady *Glenorchy* could take but an Eſtate for Life; and they took a Difference between the preſent Caſe, being of an executory Truſt, and thoſe of *Cozens*, and of *Cook* verſus *Cook*; which were legal Eſtates, and executed. The Reſolution in *Sonday*'s Caſe, 9 *Co.* 127. *b.* (which was likewiſe of a legal Eſtate) was chiefly founded upon the *Proviſo*, reſtraining the Son or his Iſſue from aliening; which made the Argument that he was intended by the Teſtator to be Tenant in Tail; ſince if he had been but Tenant for Life, the Reſtraint had been vain and needleſs. In the Caſe of *Langley* verſus *Baldwyn*, an Eſtate-tail was raiſed by Implication upon

the Words, *if he die without Iſſue Male*; becauſe the Deviſe extending no farther than the ſixth Son, no Son born after could have taken; but the Heir at Law muſt have been preferred: Whereas his Intent was to provide equally for all his Sons; and therefore the raiſing an Eſtate-tail by Implication (beſides that it was in the Caſe of a legal Eſtate) was carrying the Teſtator's Intent into Execution. The Caſe of *King* verſus *Melling* has indeed gone very far; but has always been look'd upon as the *Ne plus ultra*, beyond which no Court would ever go. This appears from the Reſolution in the Caſe of *Backhouſe* verſus *Wells*, where the Party's Intent prevailed againſt the Doctrine now inſiſted on: But it is ſaid, the Word *Iſſue* is always a Word of Limitation. In that of *Sweetapple* verſus *Bindon*, the Words did of themſelves carry an Eſtate-tail, and there was no Intent appearing to the contrary. And in *Legat* verſus *Sewel*, one Judge was of Opinion it was but an Eſtate for Life; and that Caſe was afterwards agreed.

The Difference which was inſiſted on in the former Argument, and is ſtill ſtrongly relied on for the Defendant, between legal Eſtates and Truſts executed, and Truſts Executory, is evident, and appears plainly from the Caſe of *Leonard* verſus *Earl of Suſſex*, where the Words were much ſtronger to create an Eſtate-tail than they are here; but yet in that Caſe the Court declared, that it being a Truſt Executory, the Proviſion ſhould be looked upon as ſtrong for the Benefit of the Iſſue, as if it had been in Marriage Articles; and that the Teſtator's Intent (appearing by the ſubſequent Words, *that none ſhould have Power to dock the Intail*) ſhould be obſerved, therefore decreed but an Eſtate for Life. This Difference appears likewiſe from the Caſes of *White* verſus *Thornborough*, 2 *Vern.* 702. and *Trevor* verſus *Trevor*, *Eq. Ca. Abr.* 387. and from that of *Papillon* verſus *Voyce*, *Hil.* 5 G. 2. which is not diſtinguiſhable from our Caſe, except that there were Truſtees appointed in that Caſe to preſerve contingent Remainders, which are not in this: But notwithſtanding that Proviſion, the late *Lord Chancellor* declared in that Caſe, That the Limi-

Limitation, had it been by Act executed, would have created an Eſtate-tail; but that the Truſt being Executory, and to be carried into Execution by the Aſſiſtance of this Court, he would keep the Parties to the Obſervance of the Teſtator's Intent; which plainly governs the preſent Caſe; and by all thoſe it appears, that the Teſtator's Intent is as much to be obſerved in caſe of executory Deviſes, as of Marriage Articles. If therefore the Teſtator's Intent is to be obſerved, and that no Words that may have any Operation are to be rejected, it plainly appears from this and the other Clauſes of this Will, that Sir *Thomas Perſhall* intended this Lady only an Eſtate for Life. It is true indeed, that the Word *Iſſue* in a Will is generally a Word of Limitation, and creates an Eſtate-tail; but that is only where no Intent appears to controul it: And in every Clauſe of this Will, where he intends only an Eſtate for Life, he mentions the Words *for Life*; and where he intends an Eſtate-tail, there is not a Word mentioned of *Impeachment of Waſte*; which ſhews he knew what he was doing when he inſerted this Exception, and was not ignorant of the Operation theſe Words would have on the ſeveral Eſtates. And theſe Words were, in the Caſe of *Loddington* verſus *Kyme*, 3 *Lev.* 431. taken to be a ſtrong Implication of the Teſtator's Meaning to give but an Eſtate for Life, notwithſtanding the other Words, which ſeemed to carry an Intail. Nor is there any Colour for what has been inſiſted on for the Plaintiff, That the Power of committing Waſte, with the Reſtraint of voluntary Waſte in Houſes, was deſigned only to attend on her Eſtate for Life, till by her Huſband's Death ſhe ſhould come to be Tenant in Tail; ſince no more could be meant by it than to reſtrain her from defacing or pulling down Houſes while ſhe was in her Huſband's Power, the Teſtator not knowing who her Huſband might be. This Power of committing Waſte has been compared to the Power of Leaſing in the Caſe of *Baile* verſus *Coleman*, though they are widely different; nor can it be compared to that of making a Jointure in *King* and *Melling*'s Caſe: For, ſince Tenant in Tail cannot make a Jointure without a Recovery, the Power was as proper to be

be annexed to an Eſtate-tail as to an Eſtate for Life, which was one of the Reaſons of Lord *Hale*'s Opinion in that Caſe. In our Caſe, to ſerve the Intent of Reſtraint of Waſte in Houſes, ſhe muſt be decreed but an Eſtate for Life; if it be an Eſtate-tail, ſhe will be enabled to commit Waſte in Houſes as well as in all the other Parts of the Eſtate, notwithſtanding any Reſtraint to the contrary: Nor will the Anſwer that has been given to this, that ſhe might be reſtrained in this Court, avail; ſince no Inſtance can be ſhewn where a Tenant in Tail has been reſtrained from committing Waſte by Injunction of this Court.

Lord Chancellor. That was refuſed in Mr. *Saville*'s Caſe of *Yorkſhire*; who being an Infant, and Tenant in Tail in Poſſeſſion, in a very bad State of Health, and not likely to live to full Age, cut down by his Guardian a great Quantity of Timber juſt before his Death, to a very great Value; the Remainder-man applied here for an Injunction to reſtrain him, but could not prevail.

The other Objection, That Sir *Thomas Perſhall* could never intend the Lady *Glenorchy* a leſs Eſtate than the Children of his other Grandaughter *Frances Ireland*, turns rather againſt the Plaintiff; for the Teſtator's Intent was to provide for the Lady *Glenorchy*'s Children, preferably to thoſe of *Frances Ireland*; and therefore he makes the Lady herſelf but Tenant for Life, and her Children Tenants in Tail. Nor is any thing more common than to limit an Eſtate for Life only to the firſt Taker, by which the Intent of providing for Children is better anſwered than if the firſt Taker was made Tenant in Tail: Nor will there in this Caſe follow the Inconvenience that has been mentioned, by making the Iſſue to be Purchaſers, *viz.* That the Iſſue muſt take jointly, and take Eſtates for Life only; for if Iſſue be *Nomen Collectivum*, as has been inſiſted for the Plaintiff; Why may it not be ſo as well where they take by Purchaſe, as where they take by Limitation? eſpecially where the Teſtator's Intent, that they ſhould take ſucceſſively, and by Seniority of Birth, is as well ſerved by their taking

taking one way as the other? And if the Word *Iſſue* be tantamount to the Word *Heirs*, as it hath been agreed to be, they have anſwered themſelves. In the Caſe of *Burchet* verſus *Durdant*, 2 *Vent.* 311. and in 2 *Lev.* 232. by the Name of *James* verſus *Richardſon*, the Words *Heirs of the Body* were held to be Words of Purchaſe, by reaſon of the Words *now living*, which came juſt after, and yet were at the ſame Time determined to carry an Eſtate-tail, the Word *Heirs* being *Nomen Collectivum*: And if ſo in caſe of a legal Eſtate executed, much more ought this Conſtruction to hold here; this Will being meant by the Teſtator only as Heads of a Settlement to be made; and ſo may well be thought not to have been ſo accurate in the wording as if the Conveyance were then to have been drawn up with Advice of Counſel, and all other Aſſiſtances to make it formal.

Lord Chancellor Talbot. Several Obſervations have been made on the different Penning of the ſeveral Clauſes of this Will, from which I think no Inference can be drawn; the Teſtator having expreſſed himſelf variouſly in many if not in all of them. It is plain, that by the firſt Part of this Will he intended her but an Eſtate for Life till Marriage; then comes the Clauſe upon which the Queſtion depends. But before I give any Opinion of that I muſt obſerve, that the Truſtee has not done right; for nothing was to veſt till after her marrying a Proteſtant: The Truſtee therefore, by conveying, and enabling her to ſuffer a Recovery before Marriage, which has been done accordingly, has done wrong.

But the great Queſtion is, What Eſtate he ſhall take? And firſt, conſidering it as a legal Deviſe executed, it is plain that the firſt Limitation, with the Power and Reſtriction, carries an Eſtate for Life only; ſo likewiſe of the Remainder to the Huſband: But then come the Words, *Remainder to the Iſſue of her Body*, upon which the Queſtion ariſes: The Word *Iſſue* does, *ex vi termini*, comprehend all the Iſſue; but ſometimes a Teſtator may not intend it

in ſo large a Senſe, as where there are Children alive, *&c.* That it may be a Word of Purchaſe is clear from the Caſe of *Backhouſe* verſus *Wells*, and of Limitation, by that of *King* verſus *Melling*; but that it may be both in the ſame Will has not nor can be proved. The Word *Heirs* is naturally a Word of Limitation; and when ſome other Words expreſſing the Teſtator's Intent are added, it may be looked on as a Word both of Limitation and Purchaſe in the ſame Will; but ſhould the Word *Iſſue* be looked upon as both in the ſame Will, what a Confuſion would it breed! for the Moment any Iſſue was born, or any Iſſue of that Iſſue, they would all take. The Queſtion then will be, Whether Sir *Thomas Perſhall* intended the Lady *Glenorchy*'s Iſſue to take by Deſcent or by Purchaſe? If by Purchaſe, they can take but for Life, and ſo every Iſſue of that Iſſue will take for Life; which will make a Succeſſion *ad Infinitum*, a Perpetuity of Eſtate for Life. This Inconvenience was the Reaſon of Lord *Hale*'s Opinion in *King* and *Melling*'s Caſe, that the Limitation there created an Eſtate-tail. It may be, the Teſtator's Intent is by this Conſtruction render'd a little precarious; but that is from the Power of the Law over Mens Eſtates, and to prevent Confuſion. Reſtraint from Waſte has been annexed to Eſtates for Life, which have been afterwards conſtrued to be Eſtates-tail. I do not ſay that where an expreſs Eſtate-tail is deviſed, that the Annexing a Power inconſiſtent with it, will defeat the Eſtate: No, the Power ſhall be void. But there the Power is annexed to the Eſtate for Life, which ſhe took firſt; and therefore I am rather inclined to think it ſtronger than *King* and *Melling*'s Caſe, where there was no mediate Eſtate, as there is here to the Huſband; there, there was an immediate Deviſe, here a mediate one: So the applying this Power to the Eſtate for Life carries no Incongruity with it. As the Caſe of *King* and *Melling* has never been ſhaken, and that of *Shaw* and *Weigh*, or *Sparrow* and *Shaw*, which went up to the Houſe of Lords, was ſtronger, I do not think that Courts of Equity ought to go otherwiſe than the Courts of Law; and therefore am inclinable to think it an Eſtate-tail, as it would be at Law.

But

But there is another Queſtion, *viz.* How far in Caſes of Truſts Executory, as this is, the Teſtator's Intent is to prevail over the Strength and legal Signification of the Words? I repeat it, I think, in Caſes of Truſts executed or immediate Deviſes, the Conſtruction of the Courts of Law and Equity ought to be the ſame; for, there the Teſtator does not ſuppoſe any other Conveyance will be made: But in executory Truſts he leaves ſomewhat to be done; the Truſts to be executed in a more careful and more accurate Manner. The Caſe of *Leonard* and *The Earl of Suſſex*, had it been by Act executed, would have been an Eſtate-tail, and the Reſtraint had been void; but being an executory Truſt, the Court decreed according to the Intent as it was found expreſſed in the Will, which muſt now govern our Conſtruction. And though all Parties claiming under this Will are Voluntiers, yet they are intitled to the Aid of this Court to direct their Truſtees. I have already ſaid what I ſhould incline to, if this was an immediate Deviſe; but as it is Executory, and that ſuch Conſtruction may be made as that the Iſſue may take without any of the Inconveniencies which were the Foundation of the Reſolution in *King* and *Melling*'s Caſe; and that the Teſtator's Intent is plain that the Iſſue ſhould take. The Conveyance, by being in common Form, *viz.* to the Lady *Glenorchy* for Life, Remainder to her Huſband the Lord *Glenorchy* for Life, Remainder to their firſt and every other Son, with a Remainder to the Daughters, will beſt ſerve the Teſtator's Intent. In the Caſe of *Earl of Stamford* and *Sir John Hobart*, *Dec.* 19, 1709. it appeared, That for want of Truſtees to preſerve the contingent Remainders, all the Uſes intended in the Will and in the Act of Parliament to take Effect, might have been avoided; and therefore the Lord *Cowper* did, notwithſtanding the Words of the Act, upon great Deliberation, inſert Truſtees. In the Caſe of *Legat* and *Sewell*, the Words, if in a Settlement, would have made an Eſtate-tail; and in that of *Baile* and *Coleman* the Execution was to be of the ſame Eſtate he had in the Truſt, which in Conſtruction of Law

was

was an Eſtate-tail. Nor is the Rule generally true, that in Articles and executory Truſts different Conſtructions are to be admitted; the late Caſe of *Papillon* and *Voyce* is directly againſt this; and it ſeems to me a very ſtrong Authority for executing the Intent in the one Caſe as well as the other.

And ſo decreed the Lady *Glenorchy* but an Eſtate for Life, with Remainder, *&c.*

N. B. By *Lord Chancellor, Legg* and *Goldwire, Nov.* 10, 1736. where Articles are entered into before Marriage, and Settlement made after Marriage different from thoſe Articles, (as if by Articles the Eſtate was to be in ſtrict Settlement, and by the Settlement the Huſband is made Tenant in Tail, whereby he hath it in his Power to bar the Iſſue) this Court will ſet up the Articles againſt the Settlement: But where both Articles and Settlement are previous to the Marriage, at a Time when all Parties are at Liberty, the Settlement differing from the Articles will be taken as a new Agreement between them, and ſhall controul the Articles. And although in the Caſe of *Weſt* and *Eriſey, Mich.* 1726. in the Court of *Exchequer*, and afterwards in the *Houſe of Lords* in 1727. the Articles were made to controul the Settlement made before Marriage; yet that Reſolution no way contradicts the general Rule; for in that Caſe the Settlement was expreſly mentioned to be made *in Purſuance and Performance of the ſaid Marriage Articles*, whereby the Intent appeared to be ſtill the ſame as it was at the making the Articles.

DE

Termino Paſchæ

7 Geo. II.

In CURIA CANCELLARIÆ.

Clare verſus *Clare.*

May 8.

WILLIAM Clare, poſſeſſed of a Term of one thouſand Years, by Will dated *April* 13, 1706. deviſes it to Truſtees, in Truſt for his Son *Thomas Clare* for ſo many Years of the Term as he ſhould live, and after his Death, in Truſt for the Iſſue Male of his Son *Thomas* lawfully begotten, for ſo many Years of the ſaid unexpired Term as ſuch Iſſue Male ſhould live; and when the Iſſue Male of his ſaid Son *Thomas* ſhould happen to be extinct, then in Truſt for his ſecond Son *William* for Life; Remainder in Truſt for the Iſſue Male of his ſaid Son *William*, for ſo many Years as they ſhould happen to live; the eldeſt of ſuch Iſſue Male to be preferred before the youngeſt;

W. Clark deviſes his Term of One thouſand Years, in Truſt for his Son *T. C.* for ſo many Years of the Term as he ſhould live; and after his Death in Truſt for the Iſſue Male of *T. C.* lawfully begotten, for ſo many Years, *&c.* as ſuch Iſſue Male ſhould live; and when the Iſſue Male of *T. C.* ſhould

happen to be extinct, then in Truſt for his ſecond Son *W.* for Life, Remainder in Truſt for the Iſſue Male of *W.* for ſo many Years as they ſhould happen to live; the eldeſt to be preferred before the youngeſt; and after the Death of *W.* and from the Time his Iſſue Male ſhould happen to be extinct, then the Premiſſes to deſcend and continue in the Iſſue Male of the Name and Family of the *Clares*, which ſhould be next of Kin, for all the Reſidue of the Term; and made his Son *T. C.* ſole Executor and reſiduary Legatee. The Teſtator died, and *T. C.* died without Iſſue Male. The Reſidue of the Term ſhall go to the Repreſentative of *T. C.* contrary to the Will, in which there is a plain Affectation of a Perpetuity.

youngeſt; and after the Death of the ſaid *William Clare*, and from the Time his Iſſue Male ſhould happen to be extinct, then that the Premiſſes ſhould come, deſcend and continue in the Iſſue Male of the Name and Family of the *Clares* which ſhould be next of Kin, for all the Reſidue of the Term; and made his Son *Thomas* ſole Executor and reſiduary Legatee. The Teſtator died, and in the Year 1718 *Thomas* died without having had any Iſſue Male. The Queſtion was, Whether the whole Term did not veſt abſolutely in *Thomas?* and whether the Limitation over to *William* the ſecond Son, after Failure of Iſſue Male of *Thomas*, was not void?

Mr. *Attorney General* and Mr. *Fazakerley* argued, That the Limitation was good; for, that the Whole being veſted in the Truſtees, *Thomas* the firſt Son had but a contingent Intereſt in ſo many Years only as ſhould happen to be expired at his Death, and no abſolute Eſtate-tail in the Whole; as it muſt have been to prevent the Limitation over to *William* taking Place; then it muſt be the Remainder in the Truſt for the Iſſue Male of *Thomas*, which muſt avoid the Limitation over. Indeed the Word *Iſſue* is in a Will ſometimes taken to be a Word of Limitation (though in a Deed it can carry but an Eſtate for Life) in order to fulfil the Teſtator's Intent; but that Intent muſt be plain and manifeſt, and the Words not controlled by any other. This appears from *Wyld*'s Caſe, 6 *Co.* 16. where the Words, *after their Deceaſe*, made the other Words to be Words not of Limitation, but of Purchaſe; and from the Caſes of *Papillon* verſus *Voyce*, and *Lord Glenorchy* and *Boſville*: And the Reaſon why, in many Caſes, theſe Words are determined to carry an Eſtate-tail is, becauſe otherwiſe the Teſtator's Intent could never take Place; which was the Reaſon of the Reſolution in *King* and *Melling*'s Caſe, 1 *Vent.* 214, 225. but no Inference can be drawn from the Caſe of Freehold to that of Leaſehold Eſtates, which have been often differenced in this Court. In the Caſe of *Peacock* and *Spooner*, 2 *Vent.* 195. the Words were ſtronger than they are here; and yet the Gene-

Generality of them was reſtrained, and they were conſtrued to be Words of Purchaſe. If then *Thomas* took but an Eſtate for Life, the Remainder to his Iſſue never taking Place, muſt be looked upon as out of the Queſtion; which will let in the Limitation to *William*: And this is an eligible Conſtruction in order to let in a Proviſion for his Family, and to follow his Intent, which was, that his Son *William* ſhould take: Nor is this Intent controlled by any Rule of Law, the Contingency happening within the Compaſs of a Life, *viz.* That of *Thomas* the elder Son. And that ſuch Conſtruction may well be made, appears from the Caſe of *Higgins* verſus *Dowler*, 2 *Vern.* 600. and from that of *Brook* and *Taylor*, *Trin.* 2 *Geo.* 2. in *B. R.* where there was a Bequeſt of a Perſonal Eſtate to his Wife, upon Condition to give his three Siſters 5 *l.* yearly for their Lives; and after his Wife's Death, he gave the ſame to his Daughter *Mary Taylor*, upon the ſame Obligation to his Siſters; and after his Daughter's Death, to the Fruit of her Body; and for want of ſuch Fruit, to his Brothers and Siſters and their Children then living: The Opinion of the Court was, That the Limitation to the Brothers and Siſters was good; and yet had there been any Fruit of the Body, they muſt have taken an Eſtate-tail; but they never coming *in eſſe*, the ſecond Limitation was allowed to take place. So in the Caſe of *Stanley* and *Lee*, or *Mead* at the Rolls, about three Terms ago, where there was a Bequeſt to one for Life, and to his firſt and every other Son, and there never was any Son; upon the Words *if he died without Iſſue* it was inſiſted, that the Limitation over ſhould take place; and that theſe Words ſhould be underſtood to be *Iſſue at the Time of his Death*; and ſo allow'd by the Court: For, that the Limitations to the Sons, and the Heirs of their Bodies, never taking Place, the ſecond Limitation was good, there being no Danger of a Perpetuity. So in our Caſe, had *Thomas* had any Iſſue they would have taken an Eſtate-tail; but there being no Iſſue of him, the Limitation over to *William* the ſecond Son is good.

Mr.

Mr. *Solicitor General* and Mr. *Lutwych* argued for the Plaintiff (who was Executor to *Thomas* the reſiduary Legatee) that the Limitation to *William* was void; for, that it was plainly the Teſtator's Meaning, that the Iſſue Male, and the Iſſue of that Iſſue, ſhould take *in infinitum*; and then he ſays, That when the Iſſue ſhall be extinct, it ſhall go to *William*. The Extinguiſhment here meant is not of any one Iſſue, but of the Whole. The Words *lawfully begotten* are likewiſe conſiderable, being held by the Lord *Hale* in *King* and *Melling*'s Caſe to be Words naturally belonging to the Creation of an Eſtate-tail. Only ſuppoſe he had made as many Limitations for Lives as there had been Poſſibility of Peoples taking: Would not this, in a Court of Equity, be looked upon to be the ſame as if he had limited it to him and the Iſſue of his Body? and has he not done it here? He has limited it to as many as ſhould be of the Name and Family of the *Clares*, according to Judge *Richell*'s Invention in 1 *Inſt.* 377. *b.* But ſuch Practices have always been diſcountenanced, nothing being ſo contrary to our Laws as the Admiſſion of a Perpetuity. Nor will the other Method, which has been attempted to ſupport this Limitation, do better; which is that of conſtruing *Thomas* to take an Eſtate for Life, and then ſtriking out the Remainder to his Iſſue Male as if it had never been; becauſe there never was any Iſſue Male of him: For it is admitted, that if *Thomas* had had any Iſſue Male, this Limitaion over had been void; and the making it good by Failure of Iſſue Male would be making the Validity of the Limitation to depend upon a ſubſequent Accident; whereas it muſt ſtand upon its own Bottom, and cannot be decreed to be good or bad upon any unforeſeen Accident. The *Maſter of the Rolls* his Opinion in the Caſe of *Stanley* verſus *Lee*, was founded upon the Caſe of *Higgins* verſus *Dowler*; and there are now Thoughts of appealing from that Decree at the *Rolls*. If the Caſe of *Brooks* verſus *Taylor* had depended ſingly on the Words *to her, and after her Deceaſe to the Fruit of her Body*, it had clearly been an Eſtate-tail; but the Reaſon was, that there were thoſe other

other Words, *to my Brothers and Siſters then living*, which brought it within the Compaſs of a Life; and theſe Words *then living* making the Caſe to be the ſame as the Duke of *Norfolk*'s, 3 *Chan. Caſes.* In the Caſe of the Lady *Laneſborough* verſus *Fox*, the Seſſions before laſt, in the Houſe of Peers, the Judgment was (by the Advice of all the Judges preſent) that there was no implied Eſtate; and conſequently the Recovery void; which ſhows that the Court has never laid any Streſs on the Accident of the Death happening or not happening. And in the Caſe of *Scattergood* verſus *Hedge*, the Lord *Treby* and the other Judges held that the Accident of no Son being born was not to influence the Caſe one way or other; which is another ſtrong Authority that ſubſequent Accidents are not to be regarded.

Lord Chancellor. Two Queſtions have been made in this Caſe; the firſt is, What Eſtate *Thomas* the eldeſt Son took by this Will? whether an Eſtate-tail, or an Eſtate for Life only? And ſecondly, whether if he took but an Eſtate for Life, the ſubſequent Accident of his dying without Iſſue Male, or rather never having had any Iſſue Male, will let in the Limitation to *William* the ſecond Son? As to the firſt, I am of Opinion, that *Thomas* took but an Eſtate for Life: Nor will the ſubſequent Words, *That from and immediately after his Death the Truſtees ſhould ſuffer*, &c. inlarge his Eſtate for Life. The Word *Iſſue* in a Deed can never be a Word of Limitation; but is made ſo in Wills to ſerve the Teſtator's Intent; which was the Reaſon of the Reſolution in the Caſe of *King* and *Melling*. And if the preſent Caſe was like that, I ſhould think myſelf bound to obſerve that Reſolution: But that was of a Freehold, which may and muſt deſcend to the Iſſue; and this is of a Leaſehold, which without a particular Proviſion, can never deſcend; but muſt go in Courſe of Adminiſtration: And therefore, as here is an expreſs Eſtate for Life limited to *Thomas*, it ſhall not be inlarged by any of the ſubſequent Words; eſpecially when in the Limitation to *William* the ſecond Son, he has explained what he meant by the Gift

to the Iſſue in the firſt Part; for, there he gives it to the firſt and every other Son, and the Heirs Male of their Bodies: So it is plain he intended every Iſſue that was born of *Thomas* ſhould take; and then the Limitation to *William*, being at ſo great a Diſtance, is too remote, and cannot take Effect.

The next Queſtion is, Whether the ſubſequent Accident of *Thomas* dying without Iſſue will better the Caſe for *William*? And as to that, I think, all Deeds and Wills are to ſtand as they did at the making them, and cannot be made good by any After-Act, eſpecially where ſuch Act is collateral; and is, upon its happening, ſuch a Contingency upon which no Eſtate can commence by Law. Was it ever ſaid in caſe of a Limitation to one, *And if he die without Iſſue living at the time of his Death*, that you muſt wait till his Death to determine whether the Limitation be good or not? If ſo, that Limitation would be no better than a general Limitation upon a general Failure of Iſſue.

The Caſe of *Higgins* verſus *Dowler* is very imperfectly reported; and was upon a Demurrer, where Things are not argued with that Nicety that they are upon arguing the Merits of a Cauſe. That of *Stanley* and *Lee* has not been particularly mentioned; ſo that what we have of it is only upon Memory: And I think it much better to ſtick to the known general Rules, than to follow any one particular Precedent which may be founded on Reaſons unknown to us: Such a Proceeding would confound all Property. That of *Brooks* and *Taylor* (whatever Reaſon the Judges might go upon) was certainly very different, by reaſon of the Words *then living*: But there is a plain Affectation of a Perpetuity as ſtrongly declared by the Teſtator himſelf as can be; and a Succeſſion of Eſtates for Life to Perſons not *in eſſe*, is as much a Perpetuity, and as little to be endured, as would be that of an Eſtate-tail, of which no Recovery could be ſuffered. The Caſe of Lady *Lanesborough* verſus *Fox* (*a*) is the ſtrongeſt Authority that can be; and even, had it not been in the Houſe of Lords,

(*a*) *Vide* Page 262. for the Report of this Caſe.

Lords, I ſhould have thought myſelf bound to go according to the general and known Rules of Law.

And ſo decreed the Term to *Thomas*, as being the reſiduary Legatee of his Father; and from him to the Plaintiff, who was the Executor of *Thomas*.

N. B. As to this laſt Point *Burges* and *Burges*, 1 *Mod.* 114. 1 *Chan. Ca.* 229. and *D.* of *Norfolk's Caſe*, 3 *Chan. Ca.* 19, 29.

Stephens verſus *Hide.*

UPON a Rehearing, the Caſe was thus: *Humphry Hide*, the Teſtator, did by his Will in the Year 1718. deviſe three Fourths of his perſonal Eſtate to his three Sons, equally to be divided between them; and as to the other Fourth he deviſed it to his three Sons, but in Truſt only for his two Daughters, and by their Approbation to be put out at Intereſt in the Name of his three Sons, and the Intereſt to be paid to his two Daughters reſpectively *during their natural Lives, and afterwards to their or either of their Child or Children*; and for Default of ſuch Iſſue, he deviſed it to his three Sons, equally to be divided between them; one of his Daughters leaves a Son (under whom the Plaintiff claimed) and the other dies without Iſſue. The Queſtion was, Whether the Son ſhould take the Moiety belonging to his Aunt, who died without Iſſue? or whether it ſhould go to the three Sons? The *Maſter of the Rolls* decreed the Son to take only the Moiety belonging to his Mother, and the other Moiety to go to the three Sons of *Humphry Hide.*

H. H. deviſes three Fourths of his perſonal Eſtate to his three Sons, equally to be divided between them; and the other Fourth to them, in Truſt for his two Daughters; the Intereſt to be paid them reſpectively during their natural Lives, and afterwards to their, or either of their Child or Children; and for Default of ſuch Iſſue, to his three Sons, equally to be divided between them; one of his Daughters leaves a Son, under whom the Plaintiff claims, and the other dies without Iſſue. The Moiety of the Siſter who died without Iſſue, ſhall not go to the three Brothers, but to the Repreſentative of the Nephew.

Mr. *Attorney General* and Mr. *Fazakerley* argued for the Plaintiff, That the Children of the Daughters muſt take by Purchaſe; and that the Deviſe being to the Child or Children

dren of either of them, any Iſſue of them, or either of them, was intitled to the Whole that was deviſed; that had the Eſtate, inſtead of being limited to his two Daughters, been limited to two Strangers, there could be no Doubt but that the ſurviving Child muſt take the Whole; and the two Daughters taking only an Eſtate for Life, their Child or Children do not claim through or under them; and conſequently it is the ſame as if the Deviſe had been to two Strangers, and then to the Child or Children of his two Daughters. The Teſtator does not ſay, that they ſhall take the Moieties reſpectively; but deviſes it to the Child or Children of either of them: So that, by the plain and neceſſary Conſtruction of the Words, nothing could go to the Sons, if there was a Child or Children of either of the Teſtator's Daughters.

Mr. *Solicitor General*, Mr. *Lutwych*, Mr. *Verney*, and Mr. *Floyer*, argued on the other hand for the Defendant, That the Moiety of the Daughter who died without Iſſue muſt go to the three Sons; for, that there was no Doubt but that, by the Word *reſpectively*, the Daughters were Tenants in Common; and the ſubſequent Limitation, being founded on the firſt Deviſe, muſt receive the ſame Conſtruction as to the Children taking by Purchaſe. This being a perſonal Eſtate, the Teſtator's Intent could not otherwiſe be fulfilled than by making them take by immediate Deviſe; but that Intent was only to provide for his two Daughters and their reſpective Iſſues in the natural Order; *viz.* The Child or Children of one to take what belonged to his or their Mother, and not what belonged to the other Siſter: So that this Caſe muſt be conſidered as if the Teſtator had deviſed one Moiety to one Daughter and her Iſſue, and the other to the other and her Iſſue; and for want of ſuch Iſſue to the Sons; where there can be no Doubt but that, upon Failure of Iſſue of one Daughter, her Share muſt have gone over to the Sons: But if the ſubſequent Words ſhould be explained according to the Conſtruction inſiſted on for the Plaintiff, and that one Daughter had died firſt, both having Iſſue, the Moiety of the

the Deceaſed (whoſe Child or Children were never to take during the other's Life) muſt go either to the ſurviving Daughter, which is contrary to the Nature of a Tenancy in Common; or elſe it muſt have expected, and been in Abeyance until the Death of the ſurviving Siſter; which is abſurd: But according to our Conſtruction it will go to the Iſſue of the Perſon firſt dying, and upon Failure of ſuch Iſſue go over to the Sons, in which there is no Inconvenience. And if it had happened that one Daughter had had but one Child, and the other ſeveral; then either the Iſſue of each Daughter muſt have taken their Mother's Share reſpectively according to our Conſtruction, or all the Children muſt have taken equally *per Capita*; which is contrary to the Teſtator's Intent.

Lord Chancellor. The Queſtion here is, To how much of the Teſtator's Eſtate the Plaintiff, claiming under the Son of one of the Daughters, is intitled? And in this Will, as well as in every other, the Teſtator's Intent is to be gathered from the Words of the Will, without either adding or rejecting any, which can poſſibly have any Meaning. The Teſtator has here deviſed his Eſtate to be divided into four Parts; three whereof he gives to his three Sons, and of thoſe three the Sons are plainly Tenants in Common: The Fourth he has given to his two Daughters; but with this Difference, That whereas the Sons have the Property of their reſpective Shares given them, the Daughters have not the abſolute Property in that Share which comes to them; but only the Intereſt, which is to be paid to them reſpectively during their Lives, and by this Word *reſpectively* they are Tenants in Common.

The next Limitation to the Children veſts the whole Property in them, and they take as Purchaſers according to *Wyld*'s Caſe, 6 *Co.* 16. *a.* but then it is contended that they muſt take reſpectively as well as their Mothers: This I ſee no Reaſon for, there being no Words of Diviſion in the Deviſe to them; but the Whole is to go over to either of their Child or Children. And when a Teſtator has uſed

ſuch plain Words to ſhew his Intent, that whether there was one or more Children, that in either Caſe the Child or Children ſhould take the Whole, I cannot add Words to make the Moiety only to go to his Child or Children againſt the Teſtator's plain Intent; which appears from this; That wherever he intended a Tenancy in Common he has expreſſed it, as by the Word *reſpectively* in caſe of the Daughters, and the Words *equally to be divided* in caſe of the Sons. Nor is there any Abſurdity in ſuppoſing that if there had been many Children of one Siſter, and none of the other, that the Children ſhould take the Share of her, who left no Iſſue in their Mother's Life-time; ſince his Intent was equal, and as rational, in caſe there had been many Children, as but one, as in the preſent Caſe. But if, on the other hand, after the Death of one without Iſſue, the Whole was not to go over to the Children of the other till their Mother's Death, the ſurviving Daughter would have an Eſtate for Life by Implication; and ſo the Abſurdity of an Abeyance or Expectancy be avoided. Nor does it ſeem contrary to the Teſtator's Intent, that his Grandchildren ſhould take *per Capita*, they all being equally related to him; but as theſe are only Caſes that might have happened, I think it not neceſſary for me to determine how the Eſtate would then have gone; that which has happen'd is only now in Judgment; and upon the Whole, I am of Opinion that the Teſtator's Intent was, that any Child of either of his Daughters ſhould (in all Events) take the Whole of this fourth Part, and no Part to go over to his Sons till Failure of ſuch Iſſue.

And ſo decreed for the Plaintiff.

Hebblethwaite

Hebblethwaite verſus *Cartwright.*

May 21.

A. upon his Marriage with *B.* ſettles his Eſtate to the Uſe of himſelf for Life, Remainder to his firſt and other Sons in Tail Male, Remainder to Truſtees for One thouſand Years, Remainder to his Brother *C.* for Life, Remainder to the Heirs Male of his Body hereafter to be begotten; and then declares the Truſt of the Term, that if there ſhould be no Iſſue Male of the Bodies of *A.* and *B.* begotten, that ſhould live to the Age of Twenty-one Years, or be married and have Iſſue, and that there ſhould be a Daughter or Daughters of the Bodies of *A.* and *B.* ſuch Daughter ſhould have 4000 *l.*

JAMES Hebblethwaite, upon his Marriage with *Bridget Cobb*, ſettled his Eſtate to the Uſe of himſelf for Life, Remainder to his firſt and other Sons in Tail Male, Remainder to Truſtees for One thouſand Years (the Truſt whereof is afterwards declared) Remainder to his Brother *Charles Hebblethwaite* for Life, and after his Deceaſe to the Heirs Male of his Body hereafter to be begotten; and then declares the Truſt of the Term to be, that in caſe there ſhould be no Iſſue Male of the Bodies of the ſaid *James* and *Bridget* begotten, that ſhould live to the Age of Twenty-one Years, or be married and have Iſſue, and that there ſhould be one or more Daughter or Daughters of the Bodies of the ſaid *James* and *Bridget*, that then the ſaid Daughter or Daughters ſhould have, if but one, the Sum of 4000 *l.* for her Portion; and if two or more, the Sum of 5000 *l.* equally to be divided between them at their Ages of Twenty-one, or Days of Marriage, which ſhould firſt happen; and that if there ſhould be but one Daughter, that then ſhe ſhould have the yearly Sum of 100 *l.* to be paid her Half-yearly by equal Portions for her Maintenance; and if there ſhould be two or more, then the Sum of 100 *l.* to be paid them Half-yearly in equal Shares, till their reſpective Portions ſhould be raiſed and paid; and in caſe the Portions were not paid, that then the Truſtees, their Executors, *&c.* ſhould, out of the Rents or Profits, or by Mortgage or Sale of the Premiſſes, or any Part

for her Portion; and if two or more, they to have 5000 *l.* equally to be divided at their Ages of Twenty-one, or Days of Marriage, which ſhould firſt happen; and if only one Daughter, ſhe to have the yearly Sum of 100 *l.* to be paid her Half-yearly for her Maintenance; if two or more, the like Sum to be paid them Half-yearly in equal Shares, until their reſpective Portions paid; if the Portions not paid, the Truſtees to raiſe them out of the Rents, or by Sale or Mortgage of the Premiſſes, or of Part. Provided that if the Father ſhould in his Life-time prefer them in Marriage with Portions equivalent, or the Remainder-man ſhould after the Father's Death, or that there ſhould be no Daughter who ſhould attain the Age of Twenty-one, or be married, then the Term to ceaſe. *B.* died in the Life of *A.* leaving no Son, but three Daughters, who are all unmarried. *C.* took an Eſtate-tail under this Settlement; and the Portions may be raiſed for the Daughters in the Life-time of *A.* their Father.

Part thereof, during the Term, raiſe and pay the ſeveral Portions before limited; Provided that if the Father ſhould in his Life-time prefer them in Marriage with Portions equivalent to thoſe herein limited, or that after his Death the Remainder-man ſhould upon their Marriage pay them Portions equivalent, or that there ſhould be no Daughter or Daughters who ſhould live to attain the Age of Twenty-one or be married, that then the Term ſhould ceaſe and be void. *Bridget* the Wife died in her Huſband's Life-time, leaving no Iſſue Male, but only three Daughters, who are all unmarried.

Two Queſtions were made: Firſt, What Eſtate *Charles Hebblethwaite* had? Secondly, Whether upon this Truſt the Daughters Portions were to be raiſed in their Father's Life-time.

As to the firſt Queſtion the *Lord Chancellor* was clearly of Opinion, that *Charles* took an Eſtate-tail: And that the Words *hereafter to be begotten*, do not confine it to the Iſſue born after, but will likewiſe take in that born before: The Words *procreatis & procreandis* being of the ſame Import, according to 1 *Inſt.* 20. and 24 *Ed.* 3. *pl.* 15. where the Limitation was *& Hæredibus quos ille de Corpore procreaverit*, held it ſhould take in the Iſſue born before. And this, he ſaid, was to prevent the great Confuſion which would otherwiſe be in Deſcents, by letting in the Younger before the Elder, *&c.*

The Precedents in raiſing Daughters Portions have gone both ways; ſometimes they have been decreed to be raiſed in the Parents Life-time, and at other Times not: Which ſhews that the raiſing or not raiſing muſt depend upon the particular Penning of the Truſt. In the Caſe of *Brome* verſus *Berkley*, *Abr. Eq. Ca.* 340. *pl.* 7. the raiſing the Portion in the Mother's Life-time was refuſed; becauſe the Proviſion of Maintenance was not to commence until the Death of the Jointreſs, and conſequently the Portion could not be raiſed till then; for, the Maintenance muſt precede the Portion:

Portion: And if that which was to precede the Portion muſt have waited the Jointreſs's Death, it follows clearly, that the Portion, which was to come after, muſt do ſo likewiſe. And in that of *Corbett* verſus *Maidwell*, 2 *Vern.* 640. and *Abr. Eq. Ca.* 337. *pl.* 5. it was requiſite that the Daughter ſhould be unmarried and unprovided for at his Deceaſe; but here not only the Term is not contingent, but abſolutely veſted in the Truſtees; and all the Contingencies in the Declaration of the Truſt of the Term precedent to the raiſing the Portions have happened; as that of not having Iſſue Male, the Daughters marrying or attaining the Age of Twenty-one, *&c.* Indeed, during the Life of the Father and Mother, it was contingent, by reaſon of the Uncertainty whether there would be any Iſſue Male between them: But immediately upon the Mother's Death it became no longer contingent, but abſolutely veſted, by reaſon of one of the Parties Death without Iſſue Male, which in this Court is deemed a total Failure of Iſſue Male between them. The Caſe of *Greaves* verſus *Maddiſon*, *Ch. Juſ. Jo.* 201. was a ſtronger Caſe than this, and was at Law; yet there the Portions were adjudged to be raiſed in the Father's Life-time; though by the expreſs Words of the Condition he was to be dead before the Portions were to be raiſed: But in our Caſe the Father's Death is not at all made Part of the Condition; it is only ſaid, That *if there be no Iſſue Male between them, then the Truſtees are to raiſe out of the Rents and Profits, or by Sale or Mortgage of the Premiſſes*, &c. without any Mention made of the Father's Death. Nor will the Option given to the Truſtees of raiſing either by Rents and Profits, or Sale or Mortgage of the Premiſſes, warrant the Concluſion that has been inferred, that *James Hebblethwaite*'s Death muſt neceſſarily precede; ſince it is impoſſible for the Truſtees to raiſe the Portions out of the Rents and Profits during his Life: For, in Deeds it is uſual to put in every Way which may be made uſe of; but it does not from thence follow, that the Daughters are to wait till the Truſtees can make their Choice which way they will raiſe their Portions: That might be making them wait till their Fortunes could be of

no Service to them. And though the Mortgage or Sale is to be during the Term which is not to commence in Poſſeſſion till the Father's Death, yet the Portions may well be raiſed in his Life-time; it being no where ſaid, that the Portions ſhall not be raiſed till after ſuch Time as the Term ſhall take Effect in Poſſeſſion. Indeed had there been no expreſs Authority given to the Truſtees to ſell or mortgage, there might be ſome Difficulty; but ſince they have the Power of both, they may uſe that which beſt ſuits the Intereſt of the Daughters.

The next Thing to be conſidered is the Proviſo, where the Term is made void, in caſe the Father ſhould in his Life-time prefer the Daughters in Marriage with Portions equivalent with thoſe provided for them by the Settlement. The Proviſo has been objected to prove that the Party's Deſign was, that the Portions might not be raiſed during the Father's Life, by reaſon of the Power reſerved to him of providing for them in his Life-time by Portions equivalent: And to prove this, has been cited the Caſe of *Corbett* verſus *Maidwell*; but that Caſe widely differs from the preſent one: For, there it was Part of the Deſcription of the Daughter that ſhe ſhould be unmarried and unprovided for at the Time of the Father's Death; which Deſcription gave the Father Time to perform it during his Life, for the Reaſons before mentioned: But we have no ſuch Deſcription here; nor can it be thought from the Nature of the Thing, that a ſecond Marriage might be intended; a Portion upon a ſecond Marriage being not a Portion equivalent to that provided by the Settlement, it could only be a firſt Marriage that was intended; and upon that and no other were the Portions to ariſe: Not upon the diſtant and remote Conſideration of the ſecond Marriage.

And ſo decreed the Portions to be raiſed with Intereſt from the Mother's Death, at which Time they firſt veſted.

DE
Term. S. Trinitatis
8 Geo. II.
In CURIA CANCELLARIÆ.

Cook verſus *Arnham.*

June 22.

UPON a Rehearing, the Caſe was thus: *Robert Cook* ſeiſed in Fee of Copyhold Lands in *Lakenham* in the County of *Norfolk*, and of ſeveral Freehold Lands, by Will, dated *April* 28, 1710. deviſed all his Meſſuages and Lands (whether Freehold or Copyhold) to his Grandſon *Cook* (who was his Heir at Law) for Life, Remainder to his firſt and other Sons in Tail, Remainder to his Daughters in Tail, Remainder to his younger Son the Plaintiff in Fee, and died without making any Surrender to the Uſe of his Will; *Richard* the Grandſon died without Iſſue, but before his Death ſurrender'd the Copyholds Lands in *Lakenham* to the Uſe of his Will; whereby he deviſed them to his Mother and her Heirs.

3 *Will. Rep.* 283. S. C. *accord*, on an Appeal from a Decree at the Rolls.

A. ſeiſed in Fee of Freehold and of Copyhold Lands, deviſes all his Meſſuages and Lands, whether Freehold or Copyhold, to *C.* who was his Grandſon and Heir at Law, for Life, Remainder to his firſt and other Sons in Tail, Remainder to his Daughters in Tail, Remainder to his younger Son the Plaintiff in Fee, and dies without ſurrendering to the Uſe of his Will. *C.* dies without Iſſue, having firſt ſurrendered to the Uſe of his Will, and thereby deviſed the Copyhold Lands to his Mother. The Court ſupplied the Defect of the Surrender in Favour of the Plaintiff, although his Father had made ſome other Proviſion for him, and although this was only a Remainder after an Eſtate-tail.

The

The Queſtions were, Firſt, Whether the Defect of the Surrender ſhould be ſupplied in Favour of the Plaintiff, not being a Child unprovided for, but already provided for another way? Secondly, Whether Equity would ſupply the Defect, it being in caſe of ſo remote a Deviſe as a Remainder upon an Eſtate-tail, which is of no (or at leaſt very little) Value in the Eye of the Law, and Defects being never ſupplied where the Heir is diſinherited? And here the Heir at Law has only an Eſtate for Life, with a Remainder in Tail.

It had been decreed at the *Rolls* againſt the Plaintiff, That this being no preſent Proviſion intended for him, the Defect ſhould not be ſupplied.

Lord Chancellor. There never having been any Surrender to the Uſe of the Will, the legal Eſtate deſcended to the Grandſon as Heir at Law; and therefore the ſingle Queſtion now is, Whether this Court will ſupply that Defect? The Rule is, That Creditors are intitled to have a Defect of a Surrender ſupplied; as are likewiſe younger Children unprovided for; and that from the Circumſtances of the Perſons who appear in a favourable Light before the Court. But the Objection here is, that the Plaintiff does not appear in that favourable Light, he being otherwiſe provided: As to that it has been often held here, that the Father is the ſole and only Judge of the *Quantum* of the Proviſion; and the Defect of Surrenders has been ſupplied even where the Copyhold Eſtate, intended to paſs, has made but Part of the Proviſion; and ſo not liable to the Objection of leaving the Child intirely unprovided for in caſe the Defect was not ſupplied: For, the Court has never yet enter'd into the Conſideration of the *Quantum* that was proper for each Child. And I do not find it inſiſted on by the Counſel, that had the Proviſion been in the ſame Will, and not by any other Act in the Teſtator's Life-time, that that would have taken away any Equity he might have to get the Defect ſupplied: And if it would not in that Caſe, Why ſhould it in this?

The

The Objection is, That this could not be intended as a preſent Proviſion, being a Remainder after ſeveral Eſtates-tail; which being ſo remote, is of little or no Value in the Eye of the Law. But this Objection is of no Weight: For, ſuppoſe the Father had but a Remainder upon an Eſtate for Life, might not he have made a Proviſion out of it for his Children? It is true, he could not make ſo good a Proviſion as where he is in actual Poſſeſſion; but it would be a Proviſion ſtill. And if after one Life, Why not after three or four? And what Difference is there between the Caſes where the Court will ſupply a Defect of a Surrender upon a Remainder depending on an Eſtate for Life, and where the Whole is deviſed away, or is only a Remainder after an Eſtate-tail? That is, Why ſhould it be ſupplied where the Whole is deviſed away from the Heir at Law, and not where but Part? Here is no intermediate Diſpoſal of the Eſtate but to ſuch Perſons as would have all been intitled to take as Heir at Law before the Plaintiff: So his Intent was, that for ſo long as his Heirs at Law continued, ſuch as would be ſo before the Plaintiff, that this ſhould be a Proviſion for him; and when they fail, there is no Heir at Law to be diſinherited, but he becomes Heir at Law himſelf. Nor can it be ſaid, That there is an Heir at Law unprovided for: For, though he is made but Tenant for Life, yet there are Limitations to all his Iſſue, who are all to take before the Plaintiff.

And ſo reverſed the Decree, and ordered the Defect of the Surrender to be ſupplied. (*a*)

(*a*) At the Plaintiff's Charge, 3 *Wil. Rep.* 288.

The Caſe of *Burton* verſus *Loyd* (*b*) in Lord *Harcourt*'s Time, ſaid to be in Point.

(*b*) It appears by the Regiſter's Book that in this Caſe the Bill was brought (*inter al'*) to ſupply the Deficiency of a Surrender left in the Hands of a cuſtomary Tenant, and not preſented at the next Court; the Uſes of the Surrender were to the Teſtator's eldeſt Son *Andrew Burton*, and the *Heirs Male of his Body*; *and for want of ſuch Iſſue, to the Plaintiff the ſecond Son and the Heirs Male of his Body, Remainder over.* The Cauſe was heard before his Honour, 3 *July* 1712. who decreed for the Plaintiff, and on 14 *November* 1713. that Decree was on an Appeal affirmed by Lord Chancellor. *Vide* 3 *Will. Rep.* 285.

DE

Term. S. Michaelis

8 Geo. II.

In CURIA CANCELLARIÆ.

11 *Novem.*

Boſanquett verſus *Daſhwood.*

This Court will decree Money overpaid in Purſuance of an uſurious Contract to be accounted for, notwithſtanding the Agreement of the oppreſſed Party to allow ſuch Payments.

THE Plaintiffs being Aſſignees under a Commiſſion of Bankruptcy againſt the two *Cottons*, brought their Bill againſt *Daſhwood* the Defendant, as Executor of Sir *Samuel Daſhwood*, who had in his Life-time lent ſeveral Sums to the *Cottons* the Bankrupts, upon Bonds bearing 6 *l. per Cent.* Intereſt; and had taken Advantage of their neceſſitous Circumſtances, and compelled them to pay at the Rate of 10 *l. per Cent.* to which they ſubmitted, and enter'd into other Agreements for that Purpoſe; and ſo continued paying 10 *l. per Cent.* from the Year 1710 to the Year 1724.

'Twas decreed at the *Rolls*, that the Defendant ſhould account; and that for what had been really lent, legal Intereſt ſhould be computed and allowed; and what had been paid over and above legal Intereſt ſhould be deducted out of the Principal at the Time paid; and the Plaintiffs to pay what ſhould be due on the Account: And if the Teſtator had received more than was due with legal Intereſt,

that

that was to be refunded by the Defendant, and the Bonds to be delivered up.

Mr. *Solicitor General* and Mr. *Fazakerley* inſiſted for the Defendant, That 'twas hard to inquire into a Tranſaction of ſo long ſtanding, the Parties having on all Sides ſubmitted to the Agreement; and that *Volenti non fit Injuria*; which was the Reaſon of the Lord *Holt*'s Opinion in the Caſe of *Tomkins* verſus *Barnet*, 1 *Salk.* 22. why an Action would not lie for Recovery of Money paid upon an uſurious Contract; and that the Bankrupts being *Participes Criminis*, ſhould have no more Advantage here than at Law. Nothing was more common than to admit the Party, after he had paid the Money, to be an Evidence in an Information upon the Statute of Uſury; which ſhews he is, in the Eye of the Law, after Payment, an indifferent Perſon: And compared it to the Caſe of Gaming; where, if the Loſer pays the Money, and does not ſue for the Recovery within the Time preſcribed by the Act, he is barred. And cited the Caſe of *Walker* verſus *Penry*, 2 *Vern.* 78, 145.

Lord Chancellor. There is no doubt of the Bonds and Contracts therein being good: But it is the ſubſequent Agreement upon which the Queſtion ariſes. It is clear that more has been paid than legal Intereſt. That appears from the ſeveral Letters which have been read, which prove an Agreement to pay 10 *l. per Cent.* and from Sir *Samuel Daſhwood*'s Receipts; but whether the Plaintiffs be intitled to any Relief in Equity, the Money being paid, and thoſe Payments agreed to be continued, by ſeveral Letters from the *Cottons* to Sir *Samuel Daſhwood*, wherein are Promiſes to pay off the Reſidue, is now the Queſtion?

'The only Caſe that has been cited, that ſeems to come up to this, is that of *Tomkins* verſus *Barnet*; which proves only, that where the Party has paid a Sum upon an illegal Contract, he ſhall not recover it on an Action brought by him. And though a Court of Equity will not differ from the

the Courts of Law in the Expoſition of Statutes; yet does it often vary in the Remedies given, and in the Manner of applying them.

The Penalties, for Inſtance, given by this Act, are not to be ſued for here; nor could this Court decree them. And though no *Indebitatus Aſſumpſit* will lie, in Strictneſs of Law, for receiving of Money paid upon an uſurious Contract; yet that is no Rule to this Court, which will never ſee a Creditor running away with an exorbitant Intereſt beyond what the Law allows, though the Money has been paid, without relieving the Party injured. The Caſe of Sir *Thomas Meers*, heard by the Lord *Harcourt*, is an Authority in Point, that this Court will relieve in Caſes which (though perhaps ſtrictly legal) bear hard upon one Party. The Caſe was this: Sir *Thomas Meers* had in ſome Mortgages inſerted a Covenant, That if the Intereſt was not paid punctually at the Day, it ſhould from that Time, and ſo from Time to Time, be turned into Principal, and bear Intereſt: Upon a Bill filed, the *Lord Chancellor* relieved the Mortgagors againſt this Covenant, as unjuſt and oppreſſive. So likewiſe is the Caſe of *Broadway*, which was firſt heard at the *Rolls*, and then affirm'd by the Lord *King*, an expreſs Authority, that in Matters within the Juriſdiction of this Court it will relieve, though nothing appears which, ſtrictly ſpeaking, may be called illegal. The Reaſon is, becauſe all thoſe Caſes carry ſomewhat of Fraud with them. I do not mean ſuch a Fraud as is properly Deceit; but ſuch Proceedings as lay a particular Burden or Hardſhip upon any Man: It being the Buſineſs of this Court to relieve againſt all Offences againſt the Law of Nature and Reaſon: And if it be ſo in Caſes which, ſtrictly ſpeaking, may be called legal, how much more ſhall it be ſo, where the Covenant or Agreement is againſt an expreſs Law (as in this Caſe) againſt the Statute of Uſury, though the Party may have ſubmitted for a Time to the Terms impoſed on him? The Payment of the Money will not alter the Caſe in a Court of Equity; for, it ought not to have been paid: And the Maxim of *Volenti non fit Injuria* will hold

as

as well in all Caſes of hard Bargains, againſt which the Court relieves, as in this. It is only the Corruption of the Perſon making ſuch Bargains that is to be conſidered: It is that only which the *Statute* has in View; and 'tis that only which intitles the Party oppreſſed to Relief. This anſwers the Objection that was made by the Defendant's Counſel, of the Bankrupts being *Participes Criminis*; for, they are oppreſſed, and their Neceſſities obliged them to ſubmit to thoſe Terms. Nor can it be ſaid in any Caſe of Oppreſſion, that the Party oppreſſed is *Particeps Criminis*; ſince it is that very Hardſhip which he labours under, and which is impoſed on him by another, that makes the Crime. The Caſe of Gameſters, to which this has been compared, is no way parallel; for, there both Parties are criminal: And if two Perſons will ſit down, and endeavour to ruin one another, and one pays the Money, if after Payment he cannot recover it at Law, I do not ſee that a Court of Equity has any thing to do but to ſtand *Neuter*; there being in that Caſe no Oppreſſion upon one Party, as there is in this. Another Difficulty was made as to the refunding: But is not that a common Direction in all Caſes where Securities are ſought to be redeemed, that if the Party has been over-paid, he ſhall refund? Muſt he keep Money that he has no Right to, meerly becauſe he got it into his Hands? I do not determine how it would be if all the Securities were delivered up; that is not now before me: I only determine what is now before the Court; and is the common Direction in all Caſes where Securities are ſought to be redeemed.

In the Caſe of Money loſt at Gaming and paid, poſſibly this Court will refuſe Relief; the Plaintiff in Equity being *Particeps Criminis.*

And ſo affirmed the Decree, *&c.*

Penne verſus *Peacock & ux'.*

12 *Novemb.*

THE Defendant *Jane Peacock*, before her Marriage, conveyed (with her now Huſband's Privity) the Premiſſes to Truſtees, in Truſt to pay the Rents and Profits

Huſband and Wife levy a Fine of her Truſt Eſtate; this ſhall bind the Wife, unleſs there be Proof of Force or Fraud: And this, although ſhe by Anſwer had ſworn that ſhe was compelled by *Dureſs* to join.

fits to her ſole and ſeparate Uſe for her Life; and after her Deceaſe, in Truſt for ſuch Uſes as ſhe, whether ſole or covert, ſhould by her laſt Will limit and appoint; and for want of ſuch Appointment, then to her own right Heirs for ever. She afterwards marries the Defendant, who mortgages Part of the Lands to the Plaintiff for 1000 *l.* for a Term of Five hundred Years; and then a Fine is levied by Huſband and Wife, who both declared the Uſes of the Fine, as to the mortgaged Premiſſes, to be to the Plaintiff for ſecuring the Principal and Intereſt. The Wife, by Order of the Court, anſwered ſeparately; and inſiſted in her Anſwer, That ſhe had been forced to join in the Fine by *Dureſs*, inſinuating the Mortgage to be fictitious, and in Truſt for her Huſband, in order to defraud her. She further inſiſted, That there was no Power reſerved to her in the Indenture of Bargain and Sale, to diſpoſe of her real Eſtate, or any Part thereof, but by her laſt Will; that ſhe had no Eſtate in the Premiſſes, but that the Fine and Mortgage were both void.

It was inſiſted for the Defendant, that the legal Eſtate being in the Truſtees, the Parties to the Fine had not ſuch an Eſtate in them whereof a Fine could be levied to bar the Wife's Right; and that this being a meer naked Power, without any Intereſt, could not be barred by the Fine; but remained ſtill in the Wife by Force of the firſt Conveyance.

Lord Chancellor. The Suggeſtions of Dureſs and Fraud in the Defendant's Anſwer do not appear upon the Proofs; although it muſt be confeſſed, that the reſerving the Equity of Redemption to the Huſband and his Heirs, without any Mention made of the Wife, looks a little ſuſpicious: But as the Fraud is not made out to the Satisfaction of the Court, it is needleſs to determine how far ſo ſolemn an Act as a Fine might be affected by it. The next Objection is, That the legal Eſtate being in the Truſtees, the Huſband and Wife had not ſuch an Eſtate in the Land whereof a Fine could be levied to bar the Wife's Right: But as to that,

that, 'tis very well known, that the Operations of Fines and Recoveries is the ſame upon Truſt Eſtates as upon legal Eſtates. And, if ſo, it muſt inevitably follow, that an Eſtate for Life limited to the Wife, and the Remainder limited to her own right Heirs in Default of any Appointment made by her laſt Will, are both diſpoſed of by the Fine. And if no ſuch Remainder had been limited by it, as the Eſtate was the Wife's own, and moved originally from her, whatever was not conveyed would have remained in her, and conſequently been barred. This anſwers the Objection of its being a naked Power, or Power in Groſs, and ſo not barred by the Fine: For, how can that be called a naked Power, which is to operate and take Effect on the Party's own Eſtate? It is certainly a Power coupled with an Intereſt, and annexed to her Inheritance, and ſo deſtroyed by the Fine; ſince that a Leaſe and Releaſe, or any other Conveyance, will carry with them all Powers that are joined to the Eſtate: So a Feoffment to the Uſe of her laſt Will, or the Surrender of a Copyhold to the Uſe of one's laſt Will, do ſtill leave a Power in the Feoffor or Surrenderor to diſpoſe of their Eſtate by a new Feoffment or Surrender.

And ſo decreed the Truſtees to convey to the Plaintiffs the Mortgagees, but without Prejudice to any future Bill that may be brought for Diſcovery of the Fraud or Force.

For the Defendant was cited the Caſe of *Blackwood* verſus *Norris*, heard ſometime ago at the *Rolls*, where the Lady *Shovell* had deviſed 4000 *l.* in Truſt for the ſeparate Uſe of a Feme Covert; and upon a Bill brought by Huſband and Wife againſt the Truſtees, though the Wife was herſelf in Court, and conſented that the Money ſhould be paid to her Huſband; yet the *Maſter of the Rolls* would not decree it, but diſmiſſed the Bill.

N. B. *This was the Caſe only of a Perſonalty.*

Hopkins

to *Novem.*

Hopkins verſus *Hopkins.*

A Conſtruction in Favour of executory Deviſes, to ſupport the Intent of the Teſtator, will be made either in the Courts of Law or Equity, if it may be done conſiſtently with the Rules of Law.

THE Teſtator Mr. *Hopkins*, by his Will, deviſes his real Eſtate to Truſtees and their Heirs, to the Uſe of them and their Heirs, in Truſt for *Samuel Hopkins* (the Plaintiff's only Son; which Plaintiff is Heir at Law to the Teſtator) for Life; and from and after his Deceaſe, in Truſt for the firſt and every other Son of the Body of the ſaid *Samuel*, lawfully to be begotten, and the Heirs Male of the Body of every ſuch Son; and for want of ſuch Iſſue, in caſe the ſaid *John Hopkins* the Plaintiff ſhould have any other Son or Sons of his Body lawfully begotten, then in Truſt for all and every ſuch Son and Sons reſpectively and ſucceſſively, for their reſpective Lives; with the like Remainders to their ſeveral Sons; with the like Remainders to the Heirs Male of the Body of every ſuch Son, as before limited to the Iſſue Male of the ſaid *Samuel Hopkins*; and for want of ſuch Iſſue, in Truſt for the firſt and every other Son of the Body of *Sarah*, the ſaid *John Hopkins*'s eldeſt Daughter, lawfully to be begotten; with like Remainders to the Sons of *John Hopkins*'s other Daughters; and for want of ſuch Iſſue, then in Truſt for the firſt and every other Son of his Couſin *Anne Dare* (Wife of *Francis Dare*) lawfully to be begotten; with like Remainders to the Heirs Male of the Body of every ſuch Son of the ſaid *Anne Dare*; and for Default of ſuch Iſſue, then in Truſt for his own right Heirs for ever: Then come two Proviſoes; the one, whereby every Perſon that ſhould come into Poſſeſſion of his Eſtate, was to take his Name, and bear his Arms: The other is in theſe Words; *Provided alſo, and it is my Will, that none of the Perſons, to whom the ſaid Eſtates are hereby limited for Life, ſhall be in the actual Poſſeſſion thereof, and in the Enjoyment of the Rents and Profits, or of any greater or other Part thereof, than as herein after is mentioned, until he or they ſhall have reſpectively attained his or their Ages*

Whatever Intereſt in, or Profits out of a real Eſtate, are undiſpoſed of by a Teſtator, deſcend to the Heir: And he takes them, not by the Will, or the Intent of the Teſtator; but they are thrown upon him by the Law, for want of ſome other Perſon to take. *Æquitas ſequitur Legem.*

Ages of Twenty-one Years; and, in the mean Time, and until his or their attaining to ſuch Age, my Truſtees and their Heirs and Executors ſhall make ſuch Allowances thereout, for the handſome and liberal Maintenance and Education of ſuch Perſon and Perſons reſpectively, as they ſhall think ſuitable and agreeable to his Eſtate and Fortune; and it is my Will, that the Overplus of the ſaid Rents and Profits, over and above the annual Allowances, or ſuch Part thereof as ſhall remain after all my Debts, Legacies, and Funeral Expences ſhall be firſt paid, (with the Payment whereof I have charged my real Eſtate, in caſe my perſonal Eſtate ſhall not be ſufficient for thoſe Purpoſes) do go to ſuch Perſon, as ſhall firſt be intitled unto, or come into the actual Poſſeſſion of my ſaid real Eſtate, according to this my Will.

Samuel Hopkins died in the Teſtator's Life-time, without Iſſue; and, ſome Time after, the Teſtator died without any Alteration made of his Will: Nor had *John Hopkins* any other Son; nor were any of the other Remainder-men *in eſſe* at the Teſtator's Death, except-------- *Dare*, Son of *Anne Dare.*

The firſt Queſtion was, Whether, by *Samuel*'s Death in the Teſtator's Life-time, the ſeveral Limitations between him and *Dare* were not become void; there being no particular Eſtate to ſupport them as Remainders, by reaſon of *Samuel*'s Death in the Teſtator's Life-time, who was to take the firſt Eſtate; nor no body capable of taking at the Teſtator's Death but the Son of *Anne Dare*, who thereby claimed the whole Intereſt preſently? or whether theſe intermediate Limitations ſhould not enure by way of executory Deviſe to any other Son he might hereafter have?

The ſecond Queſtion was, in caſe the Limitation to the other Sons of *John Hopkins* was to be looked upon as an executory Deviſe, What ſhould become of the Rents and Profits in the mean time?

The Cauſe was firſt heard at the *Rolls*, and there decreed to be an executory Deviſe.

Mr. *Serjeant Eyre*, and Mr. *Peere Williams* argued, That the Conſideration of Truſt and legal Eſtates being the ſame, this Limitation to the other Sons of *John Hopkins* was to be taken to be a Remainder, and could not enure; the Rule of Law being, never to conſtrue that an executory Deviſe, which may enure as a contingent Remainder. They agreed the Difference between Deeds and Wills; that in the former the firſt Eſtate muſt be good, otherwiſe all the Remainders depending thereon are void, and can never ariſe; but in the latter, the firſt Eſtate may be void, and yet the Remainders take Place, as in 2 *Ro. Ab.* 415. *pl.* 6. 7. *Plow.* 414. *a.* *Cro. El.* 423. 2 *Vern.* 722. But they inſiſted, that Deviſes of real Eſtates were to relate to the Time of the making the Will; as if one deviſes all the Land he has, or ſhall have at his Deceaſe, yet no after purchaſed Land ſhall paſs, but ſuch only as he had at the Time of the Will made: And that what was a Limitation by way of Remainder at the Time of the Will made, could not, by any ſubſequent Accident, become an executory Deviſe, 1 *Salk.* 237. 1 *Sid.* 3. 2 *Ro. Abr.* 418. 2 *Saund.* 380, 388. 1 *Salk.* 226. and that this, being to ariſe after an Eſtate-tail, was too remote; the Law not allowing of executory Deviſes to ariſe after an Eſtate-tail.

Mr. *Attorney General*, Mr. *Solicitor General*, Mr. *Verney*, Mr. *Fazakerley*, Mr. *Bootle*, and Mr. *Strange* argued, on the other hand, That *Samuel* being dead without Iſſue in the Teſtator's Life-time, this Limitation to the other Sons of *John Hopkins* ſhould enure by way of executory Deviſe. They obſerved, that executory Deviſes were not of a very long ſtanding; yet that they are of the ſame Nature with another Thing which is very antient; which is ſpringing Uſes, which are as old as Uſes themſelves. And that, if at Common Law ſuch Things were allowed, it was very well done of the Judges to admit of executory Deviſes to carry into Execution, as far as poſſible, the Intent of the Teſtator. That the Teſtator's Intent is clear in this Caſe, that the firſt and every other Son of *John Hopkins* ſhould

rake;

take; and that this Intent may be carried into Execution is likewiſe clear. Indeed as a contingent Remainder, it can never take Effect; becauſe Remainders muſt take Place *eo Inſtanti* the particular Eſtates determine; but in order to prevent that Inconveniency, other Ways have been found out to ſupport Wills; and the Lord *Hobart* commends the Judges for being *Aſtuti* to ſerve the Party's Intent. The Rule laid down, on the other Side, that a Limitation which may enure as a Remainder, ſhall never be conſtrued to be an executory Deviſe, is true: But that is only upon a Suppoſal that the Party's Intent was, that Things ſhould go according to the ordinary Forms; but where they cannot, there extraordinary Methods are uſed to ſerve the Intent; and it is impoſſible to find out any Set of Words more proper to make an executory Deviſe than thoſe uſed here: Nothing but the intervening Eſtate to *Samuel* can make any Difficulty; and that is anſwered by the Caſes put on the other Side, 2 *Ro. Abr.* 41. *b.* of a Deviſe to *A.* for Life, Remainder to *B.* and of a Deviſe to a Monk, Remainder over; *A.* dies in the Teſtator's Life-time; *B.* ſhall take by way of executory Deviſe; and in the latter Caſe immediately upon the Teſtator's Death, the Remainder-man ſhall take: And yet if either *A.* had outlived the Teſtator, or the Monk been deraigned in the Teſtator's Life-time, in both Caſes the ſecond Limitation muſt have been a Remainder. So, in this Caſe, the Eſtate to *Samuel* never having taken Effect, it muſt enure by way of executory Deviſe, to the firſt and every other Son of *John Hopkins*; whereas, had *Samuel* outlived the Teſtator, the Limitation had been a Remainder. The Caſe in 1 *Sid.* 3. widely differs from this; for, that was upon a Settlement, which is compleat upon the Execution of it; whereas a Will is Ambulatory until Death. Nor can any better Compariſon be drawn between this and the other Caſes that have been put, which are of contingent Remainders, and ſo quite foreign to executory Deviſes. And in that of *Purefoy* verſus *Rogers*, 2 *Saund.* 380, 388. the particular Eſtate was exiſting after the Teſtator's Death, which conſequently ſupported the Remainder; and ſo plainly differs from this Caſe, where there is no particular

Eſtate

Eſtate in Being. But *Cro. Eliz.* 878. is a ſtrong Authority for the Conſtruction now deſired; for, there the Deviſe was of Lands to *J. S.* from *Michaelmas* following, Remainder over in Fee; the Teſtator died before *Michaelmas*: It was held by the Court to be a good executory Deviſe: For, a Remainder it could not be; becauſe it could not begin until the particular Eſtate did, which was not to commence till *Michaelmas* after; and a Freehold cannot be in Expectancy: It was therefore held, that the Freehold ſhould, in the mean Time, deſcend to the Heir at Law, and veſt in him; but if, in that Caſe, the Teſtator had lived to *Michaelmas*, then it had been a good Remainder. And if an executory Deviſe may, by a ſubſequent Accident, become good as ſuch, eſpecially where the Teſtator's Intent is clear that it ſhould; (which was the Reaſon of the Reſolution in the Caſe of *Higgins* verſus *Dowler*, 2 *Vern.* 600. where the Limitation to the Daughter was allowed to be good, there being no Son to take: So a Deviſe to two and their Heirs, one dies in the Life of the Teſtator, the Survivor ſhall take the Whole, 1 *Salk.* 238.) and if Courts of Law do, much more will Courts of Equity mould the Words ſo as to let in thoſe whom the Teſtator intended to take. Nor will the Objection hold that has been made on the other Side, *viz.* That this being to take Effect after an Eſtate-tail, is too remote, and can never ariſe; for, here can never be any Eſtate-tail before this executory Deviſe is to ariſe, *Samuel* being dead without Iſſue: Nor is there any Danger of a Perpetuity; the longeſt Time that this can ſubſiſt as an executory Deviſe being only until the Birth of a Son to a Perſon *in eſſe*, which is but nine Months: Whereas in the Caſe of *Floyd* verſus *Carey*, in the Houſe of Lords, twelve Months were allowed to be a reaſonable Time; and in that of *Maſſenburgh* verſus *Aſh*, 1 *Vern.* 234, 257, 304. Twenty-one Years were held to be good; and where there is no Danger of a Perpetuity, it is juſt that executory Deviſes ſhould be carried as far as may be to ſerve the Intent of the Party. This Court went a great way in that Caſe of *Maſſenburgh* verſus *Aſh*. And though the Courts at Law would not at firſt

firſt allow any executory Deviſe to ariſe after the Compaſs of a Life or Lives wearing out together, as appears by the Caſe of *Scattergood* verſus *Edge*, 1 *Salk.* 229. Yet that of *Floyd* verſus *Carey*, being ſubſequent to that, and in the Houſe of Lords, has led the Courts of Law into carrying them as far as this Court does. The Caſe of the Lord *Glenorchy* verſus *Boſville* is another ſtrong Authority; where the Words were determined to carry an Eſtate-tail; but the Truſts being executory, and the Intent of the Parties clearly otherwiſe, they were reſtrained, and decreed to carry but an Eſtate for Life, with Remainder to the firſt and other Sons, *&c.*

Lord Chancellor. Two Queſtions have been made upon this Will: The firſt is, Whether this Limitation to the firſt and every other Son of *John Hopkins* can now take Effect as an executory Deviſe? or, whether it ſhall be taken as a contingent Remainder, and conſequently void for want of a particular Eſtate to ſupport it, by reaſon of *Samuel*'s Death in the Teſtator's Life-time, and that *John Hopkins* had no Son *in Eſſe* at the Teſtator's Death, in whom the Remainder might veſt? The next Queſtion is, in caſe the Limitation be taken as an executory Deviſe, what is to become of the Rents and Profits of this Eſtate until *John Hopkins* has a Son? As to the firſt, I think it impoſſible to cite any Authorities in Point. None have been cited. It ſeems to be allowed, that if Things had ſtood at the Teſtator's Death, as they did at the Time of the making of the Will, the Limitation in Queſtion would have been a Remainder, by reaſon of *Samuel*'s Eſtate, which would have ſupported it: So is the Caſe of *Purefoy* verſus *Rogers*, 2 *Saund.* 380, 388. and Limitations of this Kind are never conſtrued to be executory Deviſes but where they cannot take Effect as Remainders. So on the other hand, it is likewiſe clear, that had there been no ſuch Limitation to *Samuel* and his Sons, the Limitation muſt have been a good executory Deviſe, there being no antecedent Eſtate to ſupport it; and conſequently not able to enure as a Remainder: So that it muſt be the intervening Accident of *Samuel*'s

Death in the Teſtator's Life-time, upon which this Point muſt depend. And as to that, I am of Opinion, that the Time of making the Will is principally to be regarded in reſpect to the Teſtator's Intent. If an Infant or Feme Covert make a Will, and do not act either at full Age or after the Coverture determined, to revoke this Will, yet the Will is void; becauſe the Time of making is principally to be conſidered; and the Law judges them incapable of diſpoſing by Will at thoſe Times. The ſame Reaſon holds in the Caſe of a Deviſe of all the Lands which a Man has or ſhall have at the Time of his Death, no after-purchaſed Lands ſhall paſs without a Republication: Which was the Caſe of *Bunter* verſus *Cook*, 1 *Salk.* 237. becauſe the Time of the Will made is chiefly to be regarded. Indeed it is poſſible that ſubſequent Things may happen to alter the Teſtator's Intent; but unleſs that Alteration be declared, no Court can take Notice of his private Intent not manifeſted by any Revocation of the former; though theſe ſubſequent Accidents may and muſt, in many Caſes, have an Operation upon the Will; as in the Caſe of *Fuller* verſus *Fuller*, *Cro. Eliz.* 422. and *Hutton* and *Simpſon*, 2 *Vern.* 722. And in the Lord *Lanſdown*'s Caſe, the firſt Limitation did not expire by Effluxion of Time, but by the intervening Alteration of Things between the Time of the Will made and the Teſtator's Death; and the Words there, *for want of ſuch Iſſue*, were not conſtrued to create another Eſtate-tail to poſtpone the Limitation, but only to convert the ſecond Eſtate to the precedent Limitation. So we ſee, that in theſe Caſes the Method of the Courts is not to ſet aſide the Intent becauſe it cannot take Effect ſo fully as the Teſtator deſired; but to let it work as far as it can. And if, in this Caſe, we conſider it as an executory Deviſe, the Intent will be ſerved in caſe *John Hopkins* has a ſecond Son; but if it is taken as a Remainder, the Intent plainly appearing that a ſecond Son of *John Hopkins* ſhould take, is quite deſtroy'd; there being no precedent Eſtate to ſupport it as a Remainder. The very Being of executory Deviſes ſhews a ſtrong Inclination both in the Courts of Law and Equity to ſupport the Teſtator's Intent as far as poſſible:

And

And though they be not of antient Date, yet they are of the ſame Nature with ſpringing Uſes, which are as old as Uſes themſelves. I can ſee no Difference between this Caſe and the others of like Nature that have been adjudged. And if ſuch a Conſtruction may be made conſiſtently with the Rules of Law, and agreeable to the Teſtator's Intent, it would be very hard not to ſuffer it to prevail. In *Gay*'s Caſe, *Cro. Eliz.* 878. had the Teſtator lived to *Michaelmas*, the Limitation had been a Remainder; and if a Remainder in its firſt Creation does, by any ſubſequent Accident, become an executory Deviſe, why ſhould it not be good here, upon the Authority of that Caſe, where by the Teſtator's Death before *Michaelmas*, what would otherwiſe have been a Remainder, was held to be good by way of executory Deviſe? I think, that in this Caſe the Limitation would operate as an executory Deviſe, if it was of a legal Eſtate; and therefore ſhall do ſo as a Truſt, the Rules being the ſame.

The next Queſtion is, What is to become of the Rents and Profits, in caſe this be taken to be an executory Deviſe, until the Birth of a Son to *John Hopkins*? And this muſt depend upon the wording of the Proviſo. The Words are, *That none of the Perſons to whom the Eſtates are limited ſhall be in the actual Poſſeſſion and Enjoyment of the Rents and Profits until they ſhall reſpectively attain the Age of Twenty-one; and that, in the mean Time, the Truſtees ſhall make ſuch Allowance thereout as they ſhall think ſuitable; and then he wills, that the Overplus of ſuch Rents and Profits do go to ſuch Perſons as ſhall be intitled unto; and come to the actual Poſſeſſion of his Eſtate*, &c. By which Words none are affected but ſuch as are to come to the Eſtate under the Limitations. It reſtrains them from having any thing to do with the Eſtate till they attain the Age of Twenty-one, and provides the Surplus (beyond their Allowance) to be laid up for them; but here is no Proviſion made what ſhall become of thoſe Rents and Profits until a Son be born. The Words *in the mean Time* have been differently conſtrued: And it was ſaid, That there was no certain *Terminus à quo*, from whence they

they ſhould begin. Had *Samuel* lived, the *Terminus* muſt have been from the Time of the Limitation taking Place; and ſo it muſt be *toties quoties* any come to be intitled to this Eſtate under the ſeveral Limitations: But until Somebody is *in Eſſe* to take under this executory Deviſe, the Rents and Profits muſt be looked upon as a Reſidue undiſpoſed of, and conſequently muſt deſcend upon the Heir at Law; the Caſe being the ſame where the whole legal Eſtate is given to the Truſtees, and but Part of the Truſt diſpoſed of, as in this Caſe; and where but Part of the legal Eſtate is given away, and ſo the Reſidue undiſpoſed of, the legal Eſtate deſcends upon the Heir at Law. So it was held by the Lord *King* in the Caſe of Lord and Lady *Hertford* verſus *Lord Weymouth*; which ſhews that Equity follows the Law.

One Objection indeed has been made, which is, That the Teſtator having in this Caſe deviſed another Eſtate to *John Hopkins* his Heir at Law, can never be ſuppoſed to have intended him this Surplus. And to warrant that Objection, the Caſe of *North* and *Crompton*, 1 *Chan. Ca.* 196. has been cited. I anſwer, That in theſe Caſes the Heir does not take by reaſon of the Teſtator's Intent being one way or the other; but the Law throws it upon him: And whereever the Teſtator has not diſpoſed (be his Intent that the Heir ſhould take or not take) yet ſtill he ſhall take: For, Somebody muſt take; and none being appointed by the Teſtator, the Law throws it upon the Heir.

And ſo affirmed the Decree, and order'd the perſonal Eſtate, (which was of very great Value) to be laid out in Land, and ſettled to the ſame Uſes as the real Eſtate, according to the Direction of the Will.

4

Lutkins

Lutkins verſus *Leigh.*

20 *Novem.*

A. deviſes (as touching his worldly Eſtate, after Payment of his Debts, which he wills to be firſt paid) his Lands (in Mortgage) to *B.* his Wife for Life, and after her Death to *C.* and directs the Reſidue of his perſonal Eſtate to be placed out at Intereſt; *B.* to have the Intereſt during her Life, and after her Death to *C.* and gives *B.* 1500 *l.* provided ſhe accept the Deviſes and Bequeſts in Lieu of Dower; there is not ſufficient perſonal Eſtate to pay the Debts and Legacies; If the Mortgagee take Part of the perſonal Eſtate, the Legatee ſhall, for ſo much, ſtand in his Place.

Benjamin Knight having mortgaged his Freehold Lands to Mr. *Ainſcomb* for ſecuring the Sum of 2500 *l.* in 1729. made his Will in theſe Words; *As touching my worldly Eſtate, after Payment of my Debts and Funeral Charges, which I will to be firſt paid, I give my Freehold Eſtate in* Kent *to my Wife for Life, chargeable with an Annuity of* 30 l. *for Life to* Elizabeth Knight; and after his Wife's Death he deviſes his ſaid Freehold Eſtate, ſo charged, to the Children of his three Siſters, and directs the Reſidue of his perſonal Eſtate to be placed out at Intereſt; his Wife to have the Intereſt during her Life, and after her Death to be divided among the Children of his three Siſters; and gave his Wife 1500 *l.* with a Proviſo that the Deviſes and Bequeſts in the Will ſhould be accepted by the Wife in Lieu of her Dower, and in full Satisfaction of her Share of the perſonal Eſtate.

The Queſtion was, Whether the perſonal Eſtate ſhould be applied in Exoneration of the real, ſo as to defeat the pecuniary Legatees; there not being ſufficient to pay the 1500 *l.* in caſe the perſonal Eſtate ſhould be applied in Exoneration of the real.

Mr. *Attorney General* inſiſted for the Widow, That this Legacy was to be looked upon as a Charge upon the real Eſtate, according to the Lord *Warrington*'s Caſe; and ſaid, It was a great while before this Court would favour the Deviſee of Land (being but *Hæres factus*) ſo far as to intitle him to have the perſonal Eſtate applied in Exoneration of the real. 1 *Chan. Ca.* 271. and 2 *Vern.* 477. where it is ſaid, That an expreſs Deviſe ſhall not be defeated, even

for an Heir, much leſs for a Deviſee of Land, who is but *Hæres factus.*

Lord Chancellor. This Point has been ſo far determined, that it ſeems quite ſettled and clear; where a Man leaves his real Eſtate charged, the Legatees and ſimple Contract Creditors have a Right to ſtand in the Room of Bond Creditors, if theſe latter run away with the perſonal Eſtate; and this in order to do Juſtice both to the Teſtator's Intent, and likewiſe to the Creditors. Indeed where the Conteſt is between the Heir and Executor, and there is either a Mortgage or Bond wherein the Heir is bound, the Heir ſhall always prevail to have the perſonal Eſtate applied; but that is only where no Prejudice is done either to a ſimple Contract Creditor or Legatee: And had there been no Deviſe of the Land in this Caſe, the Widow and the other Legatees would have had a Right to apply to this Court, and to ſtand in the Room of the Mortgagee if he fell upon the perſonal Eſtate, that being the proper Fund for their Legacies, and to have ſo much of the real Eſtate, as he had out of the perſonal: But here the real Eſtate is deviſed away; which gives the Legatees rather a ſtronger Claim than when they have to do with an Heir at Law; ſince it was a long Time before a Deviſee could prevail with this Court to have the perſonal Eſtate applied in Exoneration of the real, as appears from many antient Caſes, which diſtinguiſh, in that Caſe, between a Deviſee and an Heir at Law; though at laſt he has prevailed where there is no Damage done to a third Perſon: But it has been endeavoured here to put him in a better Condition than the Heir; and to that End has been cited 1 *Salk.* 416. There is a great Difference between that Caſe and this; for, a Bond affects not the real Eſtate in the Teſtator's Hands; nor did it the Deviſee, until the Statute of fraudulent Deviſes; nor, before that Statute, did it affect the Heir, if he had aliened before the Writ brought: But in Caſe of a Mortgage, that is a Lien upon the Land both in the Hands of the Teſtator and the Deviſees, and in whoſe Hand ſoever the Land comes. Thus the Court has gone

Where the perſonal Eſtate ſhall be applied in Exoneration of the real.

The Caſe of *Hæres factus* not quite ſo favourable as that of an Heir at Law.

as

as far as is reaſonable, *viz.* to put the *Hæres factus* in as good a Plight as the *Hæres natus*; but not in a better. So the Legatees muſt have the Legacies out of the perſonal Eſtate in caſe the Mortgagee keeps to the real; and if he falls upon the perſonal, they have a Right to ſtand in his Room for ſo much out of the real Eſtate as he ſhall take out of the perſonal; that being a proper Fund for their Payment.

Sabbarton verſus *Sabbarton.*

22 *Novem.*

Joſeph Sabbarton being ſeized of a real Eſtate, and poſſeſſed of a perſonal Eſtate in Bank Stock and Orphans Stock, by Will dated *April* 21, 1710. deviſed his real Eſtate and Stock to Truſtees, and their Heirs, Executors, *&c.* in Truſt to pay the Rents and Profits to *Catherine Corr* for Life; and if ſhe married *Benjamin Sabbarton*, then in Truſt, after her Deceaſe, to pay the Rents and Profits to him for Life; and after both their Deaths, in Truſt to the firſt and every other Son of them two in Tail Male; and for want of ſuch Iſſue, to their Daughters, equally to be divided between them; and for want of ſuch Iſſue, then in Truſt for the Iſſue Male or Female of the Survivor of them, equally to be divided between them; and in Default of Iſſue of the ſaid Marriage, then in Truſt for the Iſſue of the Survivor of them; and if neither of them leave Iſſue, then in Truſt for his Siſter *Sarah Kidwell* for Life, and after her Deceaſe, to the Uſe of all and every the Child and Children of his Brother *John Sabbarton*, which ſhall be living at his Death, or his Wife ſhall be *enſient* of, and ſhall attain the Age of Twenty-one, and to the Heirs, Executors, Adminiſtrators and Aſſigns of ſuch Child or Children, Share and Share alike, as they ſhall reſpectively attain their Ages of Twenty-one; and in Default of ſuch Children, *&c.* then to his own right Heirs. *Benjamin* and *Catherine* intermarried, but had no Iſſue between them: *Catherine* ſurvived, but had no Iſſue, and deviſed to the Defendant. The Queſtion was between the Plaintiff, who

was

was Child to *John Sabbarton*, and the Defendant, who claimed under the Deviſe of *Catherine*, Whether the Limitation of the perſonal Eſtate to *Benjamin* and *Catherine*, and the Iſſue of the Survivor of them, did not create an Eſtate-tail in *Catherine*, who ſurvived, and conſequently the Limitation over, of a Perſonalty after an Eſtate-tail, void.

Mr. *Solicitor General* for the Plaintiff cited the Caſe of *Atkinſon* and *Hutchinſon*, heard the ſecond of *May* laſt, where the Deviſe was to Truſtees, in Truſt for his Wife, ſo long as ſhe ſhould remain unmarried; then in Truſt for ſuch Child and Children as he ſhould leave at his Death, equally to be divided between them; and if either of them die without Iſſue, then his Share to go to the Survivor; and if both die without Iſſue, then in Truſt for the Defendant *Hutchinſon*; he left two Daughters, who both died without Iſſue, under Age; and there the Words *dying without Iſſue* were held to be *Iſſue living at the Death*, and ſo the Limitation to *Hutchinſon* allowed to be good. So in the Caſe of *Donne* verſus *Merrefield*, heard at the *Rolls* the 22d of *October* 1730. where the Deviſe was, to his Brother *John* for Life; then to ſuch Perſon as he ſhould marry, for her Jointure; and after her Death, to the Heirs of the Body of his Brother *John*, and the Executors, Adminiſtrators and Aſſigns of ſuch Heirs during the Reſidue of the Term; and for Default of ſuch Iſſue of his Brother *John*, then to *Henry Donne*: This Limitation to *Henry* was held good; the Words being taken to be Heirs living at his Death. *Forth* verſus *Chapman*, heard by the Lord *Macclesfield*. *Higgins* verſus *Dowler*, 2 *Vern.* 600.

Lord Chancellor. I do not ſee how it is poſſible to maintain this Limitation to the Children of *John Sabbarton*. Executory Deviſes are favoured in order to ſupport the Parties Intent; but ſtill they muſt not exceed the Rules. The Compaſs of a Life is held to be a reaſonable Time for a Contingency to happen in: So in the Caſe of *Maſſenburgh* verſus *Aſh*, 1 *Vern.* 234, 257, 304. Twenty-one Years after a Life

a Life were held to be a reaſonable Time; but a Contingency to ariſe after the Determination of an Eſtate-tail, is too remote: So that the Queſtion muſt be here, Whether the Words mean a general Failure of Iſſue, or ſuch a Failure as is to happen within the Compaſs of a Life? The real and perſonal Eſtates are both deviſed to the ſame Truſtees; and the Limitations are the ſame. The Eſtates are firſt limited to *Benjamin* and *Catherine* for their Lives, Remainder to their firſt and other Sons, Remainder to the Daughters; and for want of ſuch Iſſue, then in Truſt for the Iſſue Male or Female of the Survivor; which latter Words do clearly make an Eſtate-tail, according to *King* and *Melling*'s Caſe, 1 *Vent.* 214, 225. they taking in both Sons and Daughters, and Grandchildren *in Infinitum.*

It has been endeavour'd to confine this Limitation to *the Iſſue living at the Death of the Survivor*; but it can never be imagined that theſe Limitations to *John Sabbarton*'s Children were intended to take Effect before the Determination of the former; and they plainly carry an Eſtate-tail; theſe latter muſt be void. It has been alſo objected, That the Words *leave Iſſue* muſt be conſtrued *Iſſue living at the Death*; but ſtill we muſt remember, that this is a complicated Deviſe both of the real and perſonal Eſtate; and in caſe of the real, this Limitation to the Iſſue of the Survivor makes *Benjamin* and *Catherine* Tenants in Tail; and the perſonal Eſtate being intended to go, and be limited, in the ſame Manner as the real, muſt likewiſe be an Eſtate-tail; and ſo the Limitations of it after that void; the Word *leave* being only to connect the Clauſes, and ſhew what is to become of the Eſtate after the Determination of the former Limitation. The Words in the Caſe of *Forth* and *Chapman* were different, and carried an Intent in the Teſtator different from the Intent in this Caſe. In that of *Atkinſon* verſus *Hutchinſon* there was no precedent Limitation in Tail, as there is here. And in the other of *Donne* verſus *Merrefield*, the Contingency of the Brother's having Iſſue was to ariſe within the Compaſs of a Life; and there were no Words carrying a general Failure of Iſſue,

by reaſon of the Words *Executors, Adminiſtrators and Aſſigns*, which reſtrained the Word *Heirs* to immediate Heirs: And that Contingency never happening, the Limitation over was allowed to be good.

And ſo diſmiſſed the Plaintiff's Bill, *&c.*

See this Caſe ſtated more at large, with the Opinion of the Judges of the King's Bench, &c. p. 245.

The Lord Raymond's Caſe.

This Court will aſſiſt the teſtamentary Guardian to prevent an improper Marriage of the Infant Heir.

UPON a Petition to the *Lord Chancellor*, the Defendants ſet forth, That the late Lord *Raymond* had by his Will appointed them Guardians to the preſent Lord, his only Child, and Truſtees of his Eſtate till he ſhould come to Age; that the Plaintiff was but Seventeen Years old, and was ſeduced by Mr. *Chetwynd* in order to marry his Daughter Mrs. *Mary Chetwynd*, who was much inferior to him in Family and Fortune; that it would be a great Diſadvantage to the Plaintiff to marry at this Time, by reaſon of his tender Age and want of Education; that the Plaintiff had contracted ſuch an Acquaintance with the Lady, that the Defendants had been forced to keep him cloſe in their Cuſtody for ſome Time to prevent their marrying: Wherefore they (in general Terms) prayed the Aſſiſtance of this Court; and that his Lordſhip would give ſuch Directions as to him ſhould ſeem proper.

The Petition was ſupported by an Affidavit, ſetting forth Mr. *Chetwynd*'s Proceedings. And there was alſo an Affidavit of Mr. *Chetwynd*, ſhewing that he did not give the Plaintiff any Encouragement; but that upon Solicitation, and after he had been twice with the Defendants about it, he had conſented to the intended Marriage.

Lord

Lord Chancellor. It appears that the Lord *Raymond* is but Seventeen Years old, and is about contracting Matrimony at an Age when he is not capable of judging for himſelf; and unfortunate for him it is that he is of Age to contract Matrimony; it being moſt reaſonable to have the Guardians Counſel in all ſuch Caſes, eſpecially where they are appointed by the Will of the Father, and have the ſame Power over the Infant as the Father would have had: But here has been an Application in Time, and I am glad it has before the Marriage was actually conſummated; ſince it is moſt proper for the Court to prevent it, if it be in its Power ſo to do. There are many Caſes where Application has been made to this Court after the Marriage had; and ſuch have always been attended with a Cenſure upon the Parties privy to, and promoting ſuch Marriage, without the Conſent of the Court. In the Earl of *Shaftsbury*'s Caſe, *Eq. Ca.* 172. there was an Order of Court before the Marriage had; and ſo the Infant Lord was more immediately under the Care of the Court; and upon his Mother's conſenting to his marrying, and promoting it without the Conſent of the Court or the Guardian, a Sequeſtration went againſt her; altho' the Marriage was with the Lady *Suſanna Noel*, a Lady of equal Family, and every way proper for my Lord *Shaftsbury*. In the Caſe of Mrs. *Hand*, Daughter to Dr. *Hand*, all the Parties were committed; it being held a Contempt of the Court to marry a Ward of the Court without its Direction. Indeed this is not the preſent Caſe: But I infer from hence, that we are to take all the Care we can to prevent this Marriage. As to the Inequality of Fortune, it is not ſhewn what Eſtate the Plaintiff, the Lord *Raymond*, has: So that I cannot tell whether this be a *Smithfield* Bargain or not. And as to the Family, it is admitted that Mr. *Chetwynd* is of a very good Family. But the Age of the Lord *Raymond* is improper; and that is the Conſideration which weighs moſt with me, and upon which I think myſelf bound in Duty to prevent the Marriage if I can. In order therefore to ſtrengthen the Guardians Hands, I order that the Lord

Raymond

Raymond ſhall continue in their Care and Cuſtody; and that they do not permit him to marry without the Conſent of the Court. As to Mr. *Chetwynd*, the Match not having taken Effect, there is no Neceſſity of looking ſo minutely into the Affair in order to cenſure him. He would have done well not to have conſented to this Marriage, unleſs the Guardians had done ſo too. But it has been ſaid, That it would be cruel and unnatural in a Father not to ſuffer his Daughter to marry to her Advantage; and ſhe would have Reaſon to blame him for it ever after. Now to prevent that Charge upon Mr. *Chetwynd*, I order him not to ſuffer his Daughter to marry the Lord *Raymond* without the Conſent of the Court; which prevents any Imputation or Charge upon Mr. *Chetwynd* from the Lady or any Body elſe; ſince, if there be any Fault in it, it will fall upon the Court; and I ſhall be very willing to bear it.

N. B. In this Caſe there was no Cauſe in Court at the Time the Facts ſet forth in the Petition were tranſacted. The Bill was filed but the Day before the Petition was preſented: And in the Caſes cited, there were Cauſes in Court at the Time of the Marriages.

DE

Term. S. Hillarii

8 Geo. II.

In CURIA CANCELLARIÆ.

Cotterell verſus *Purchaſe.*

THE Plaintiff and her Siſter being ſeiſed of an Eſtate in *Yorkſhire* as Jointenants, the Plaintiff by Leaſe and Releaſe, in Conſideration of 104 *l.* conveys the Moiety to the Defendant and his Heirs: But it was admitted, that the Conveyance (though abſolute in Law) was intended by the Parties as a Mortgage, to be redeemable on Payment of the Money with Intereſt. Sometime after, in the Year 1708, thoſe Deeds were cancelled; and in Conſideration of a farther Sum, which made up the Whole 184 *l.* ſhe conveys the Eſtate in manner as before, but with this farther Covenant, That ſhe would not agree to any Diviſion or Partition of the Eſtate, or make, or cauſe to be made, any Diviſion or Partition thereof, without the Licence, Conſent, Advice and Appointment of him the ſaid *Benjamin Purchaſe.* At the Time of this Conveyance the Plaintiff's Siſter was in Poſſeſſion of the whole Eſtate, and ſo continued till the Year 1710. when the Defendant turned her out of Poſſeſſion of the Moiety by Ejectment; and from that Time he enjoy'd

A Mortgage will not eaſily be preſumed againſt an abſoluteConveyance; eſpecially where Poſſeſſion has gone along with the Conveyance, and an Acquieſcence for many Years: Altho' there be an incongruous Covenant in the Deed. A Defeazance contained in a ſuſpicious, ſeparate Deed, is and ought to be diſcouraged.

it quietly till 1726. at which Time the Plaintiff filed her Bill to be let into Redemption; to which the Defendant pleaded himſelf an abſolute Purchaſer for a valuable Conſideration; and in 1732. the Cauſe coming to be heard upon the Merits, the *Maſter of the Rolls* was of Opinion, that the Deeds of 1708. amounted to an abſolute Conveyance; and diſmiſſed the Bill.

For the Defendant were given in Evidence ſeveral Particulars, to ſhew, that by the Deeds of 1708. the Parties intended an abſolute Conveyance of this Eſtate. And it was inſiſted, that as the Deeds were an abſolute Conveyance in Law; by the Statute of Frauds, no Truſt or Mortgage could be implied without an Agreement in writing. And they inſiſted likewiſe, that as the Defendant had been in Poſſeſſion ever ſince the Year 1710. the Plaintiff was barred of the Redemption by the Statute of Limitations.

It was ſaid on the other hand for the Plaintiff, That the Defendant's Plea admitted the firſt Conveyance made in Conſideration of the 104 *l.* to be intended but as a Mortgage; and that the ſecond Conveyance was in the ſame Form, excepting the Covenant; and that it was therefore probably intended in the ſame Manner. That as to the Covenant, it made ſtrongly for the Plaintiff; ſince to ſuppoſe a Perſon would abſolutely ſell away his Eſtate, and then covenant not to make a Diviſion of it, is abſurd. That the Statute of Frauds makes nothing againſt the Plaintiff; this being in Nature of a reſulting Truſt, and ſo within the Proviſo in that Statute. Nor can the Statute of Limitations affect the Plaintiff; ſince, in Caſes of Redemption, the Court always gives what it thinks a reaſonable Time. And though the general Rule be not to exceed twenty Years, unleſs it be upon extraordinary Circumſtances; yet that Rule cannot affect the Plaintiff, who did not loſe Poſſeſſion until 1710. and brought her Bill in 1726.

Lord

Lord Chancellor. The Caſe is ſomething dark. The firſt Deed is admitted to be a Mortgage; and the ſecond is made in the ſame Manner, excepting an odd Sort of a Covenant, which is the darkeſt Part of the Caſe: For, to ſuppoſe that it is an abſolute Conveyance, and to take a Covenant from one who had nothing to do with the Eſtate, makes both the Parties and Covenants vain and ridiculous. But then it will be equally vain and ridiculous if you ſuppoſe the Deed not an abſolute Conveyance; ſo that it is of no great Weight, and muſt be laid out of the Queſtion. Then, as to the Circumſtances, on one Side has been ſhewed an Account ſtated of Money received; and it is there ſaid *ſo much received on Account of Purchaſe Money*; and in another general Account the Sum of 184 *l.* is called *Purchaſe Money.* Then, as to the Agreement in 1710. that if the Plaintiff had a Deſire for it, ſhe ſhould have her Eſtate again upon Payment of the Money with Intereſt, and the Coſts he had been at: This ſhews it was not redeemable at firſt. There have been ſtrong Proofs on both Sides as to the Value: One has ſhewn the Rent to be but 27 *l. per Ann.* and then, deducting one Third out of it for the Dower of the Plaintiff's Mother, a Moiety of what remains is near the Value of the Money paid. The other Side has ſhewn the Rent to be 40 *l. per Ann.* But I rather give Credit to the firſt; becauſe it is certain the Dower was but 9 *l. per Ann.* So that, upon the Whole, I am inclined to think this was at firſt an abſolute Conveyance. Had the Plaintiff continued in Poſſeſſion any Time after the Execution of the Deeds, I ſhould have been clear that it was a Mortgage; but ſhe was not. And her long Acquieſcence under the Defendant's Poſſeſſion is, to me, a ſtrong Evidence that it was to be an abſolute Conveyance; otherwiſe, the Length of Time would not have ſignified: For, they who take a Conveyance of an Eſtate as a Mortgage, without any Defeazance, are guilty of a Fraud; and no Length of Time will bar a Fraud. Beſides, here the Bill was filed in 1726. And though the Cauſe has lain dormant; yet it is not like making an Entry and then lying ſtill: For, in the

the preſent Caſe, the Defendant might have diſmiſſed the Bill for want of Proſecution, or they themſelves might have ſet down the Plea to be argued.

In the Northern Parts it is the Cuſtom, in drawing Mortgages, to make an abſolute Deed, with a Defeazance ſeparate from it; but I think it a wrong way; and, to me, it will always appear with a Face of Fraud: For the Defeazance may be loſt; and then an abſolute Conveyance is ſet up. I would diſcourage the Practice as much as poſſible.

Upon the Circumſtances of the Caſe, affirmed the Decree, *&c.*

Jones verſus *Marſh.*

A Settlement made after Marriage, for valuable Conſideration, for Advancement of the Iſſue, may be conſider'd as a Purchaſe, and defeat a ſubſequent Purchaſer; and the Value paid is not to be too ſtrictly examined; there being room for Bounty.

THE Defendant's Father, ſometime after Marriage, in Conſideration of an additional Portion of 100 *l.* paid by his Wife's Mother, (a Receipt whereof was indorſed on the Deed) ſettles an Eſtate of 100 *l. per Ann.* upon himſelf for Life, Remainder to his firſt and other Sons, *&c.* and the Mother of the Defendant's Father, having an Intereſt in this Eſtate, joins with him in the Conveyance; the Father, thirteen Years after, mortgages this Eſtate, with the uſual Covenants to the Plaintiff, and dies; the Plaintiff brings his Bill to foreclоſe. The Queſtion was, Whether the Settlement ſhould be looked upon as a Voluntier and fraudulent againſt a Creditor, who lent his Money ſo many Years after.

The Caſe of *Parſlowe* verſus *Weedon*, *Abr. Eq. Ca.* 149. *pl.* 7. was cited; but the *Lord Chancellor* ſaid that Mr. *Vernon* had always grumbled at the Determination of that Caſe, and never forgave it the Lord *Macclesfield*; ſaying it was contrary to the conſtant Practice of the Court. There was alſo cited the Caſes of *Osbourne* verſus *Strode*, and *Teranda* verſus *Crooke*, in the late *Lord Chancellor*'s Time.

Lord

Lord Chancellor. The Queſtion is, Whether this be a voluntary Conveyance or not? Here is plain Proof that 100 *l.* was paid, the Receipt being indorſed upon the Back of the Deed, for a Conſideration for 100 *l. per Ann.* yet, in Marriage Settlements, Things are not to be conſidered ſo ſtrictly, there being Room for Bounty: And every Man ought to provide for his Wife and Family. Beſides, in this Caſe, there was an Eſtate that moved from the Defendant's Father's Mother; and ſhe may, in ſome Reſpect, be conſider'd as a Purchaſer of the Limitations made to her Grandchildren: So that it would be very hard to call this a fraudulent Settlement; ſince it is in Conſideration of a Marriage had, and of an additional Proviſion of 100 *l.* paid by the Wife's Relations; which cannot be called voluntary againſt a Creditor who lent his Money thirteen Years after.

How far this Court will ſet aſide a Family Settlement without any Conſideration, as fraudulent againſt a Creditor who lends his Money thirteen Years after the Settlement, I do not ſay? I need not at preſent determine that Point.

Collet verſus *De Gols and Ward.*

14 *February.*

THE Plaintiff, as Aſſignee under a Commiſſion of Bankruptcy againſt *Tyſſen*, filed his Bill againſt *Ward* and others, to ſet aſide ſeveral Conveyances, which *Ward* and the other Defendants in Truſt for him, had obtained of *Tyſſen* after his Bankruptcy, and alſo without any Conſideration. The Defendant *Ward* pleaded himſelf a Purchaſer for a valuable Conſideration of all the Eſtates in Queſtion; and alſo that he had no Notice of *Tyſſen*'s being a Trader, or of his having committed any Act of Bankruptcy. Whereupon an Iſſue was directed; and the Jury found *Tyſſen* a Bankrupt, and fixed the Day of the Bankruptcy to the 25th

A Bankrupt whoſe Eſtate is in Mortgage, conveys the Equity of Redemption to a third Perſon after an Act of Bankruptcy, but before the Commiſſion and Aſſignment; this ſhall not defeat the Aſſignees. But where a *bona fide* Purchaſer for a valuable Conſideration,

and without Notice, has a Conteſt with the Aſſignees, this Court will not take any Advantage from him, therefore not compel a Diſcovery. A Commiſſion iſſued is Notice of the Bankruptcy.

25th of *December* 1732. *Tyſſen* being ſeiſed of a conſiderable real and perſonal Eſtate, ſome Part of which real Eſtate was in Mortgage to *Bradley* for 1000 *l.* and another Part to *Harkſhaw* for 500 *l.* which latter Mortgage, and ſome others, were by Aſſignments veſted in the Defendant *Ward*; and great Part of *Tyſſen*'s perſonal Eſtate being convey'd in Truſt for *Ward*, ſubſequent to *Tyſſen*'s Bankruptcy, *Ward* got ſeveral Mortgages, and alſo Releaſes of Equity of Redemption of all the aforeſaid Eſtates; which he now inſiſted upon againſt the Plaintiffs, and the Creditors under the Commiſſion.

It was argued for the Plaintiff, That all Things done by *Tyſſen* ſubſequent to his Bankruptcy, were as ſo many void Acts; and that *Ward* could have no Advantage from them. The Act of Bankruptcy was in itſelf of ſuch Force, as to put *Tyſſen*, from that very Time, under an Incapacity of diſpoſing of, or affecting any of his real or perſonal Eſtate to the Prejudice of his Creditors under the Commiſſion; that the legal Effect of the Aſſignment avoided all intermediate Acts between the Bankruptcy and the Aſſignment; ſo as to give the Whole to the Aſſignees, according to the Caſe of *Kidwell* verſus *Player*, 1 *Salk.* 111. and the Caſe of *Phillips* verſus *Thomſon*, 3 *Lev.* 191. where an Act of Bankruptcy was committed after a *Fi. Fa.* delivered to the Sheriff, and before Seizure of the Goods by him; and held that the Execution was of no Effect againſt the Aſſignees: And the Law is the ſame with regard to the Bankrupt's Diſability over his real Eſtate, by the *Statute* 13 *Eliz. cap.* 7. and 21 *James* 1. *cap.* 19. the Plaintiff there would be intitled to avoid an Execution by *Elegit*, if the Act of Bankruptcy was committed before the *Liberate*, and the Plaintiff would in ſuch Caſe be accountable for the Profits intermediate to the Bankruptcy and the Aſſignment. It was farther argued, That by the *Stat.* 13 *Eliz.* a Purchaſer would be defeated although there ſhould be forty Years after an Act of Bankruptcy and before a Commiſſion; and altho' the Purchaſer had no Notice; for the Words of the Statute are general *after Bankruptcy*; and the *Proviſo* in the

End

End of the Statute makes it ſtill plainer, *viz. That Aſſurances made by a Bankrupt before Bankruptcy, and* bona fide, *ſhall not be defeated.* This was hard Doctrine againſt fair Purchaſers without Notice; but ſo the Law was. And there is therefore a Proviſo in the End of 21 *Ja.* 1. *That no Purchaſer, for a good and valuable Conſideration, ſhall be impeached, unleſs the Commiſſion be ſued out within five Years after the Bankruptcy:* And here the Commiſſion was ſued out within three Years. Wherefore they inſiſted, that the Incumbrances ſhould be redeemed; and that the Plaintiff ſhould have the Reſidue of the real and perſonal Eſtate; and that *Ward* ſhould not come in as a Creditor for any Money lent after the Bankruptcy.

It was alſo further urged, That the Equity of the Redemption of the mortgaged Premiſſes was an Intereſt tranſferred by the Statute to the Plaintiff; and that the Defendant's having no Notice of the Bankruptcy when he lent his Money, would therefore make no Alteration. Beſides, all the Conveyances after the 25th of *December* 1722. are fraudulent for want of a Conſideration; and therefore *Ward* had not the uſual Equity of a Purchaſer for a valuable Conſideration without Notice; and then, as he had not paid a Conſideration, his not knowing of the Bankruptcy will not avail him. It appears likewiſe that he had Notice of *Tyſſen*'s abſconding, and being often denied to his Creditors: And though *Ward* might be ignorant of the legal Conſequence; yet *Ignorantia Juris non excuſat*, according to the Caſe of *Hitchcock* verſus *Sedgwick*, 2 *Vern.* 156.

On the other hand, it was inſiſted for the Defendant, That as he had the Law on his ſide, and equal Equity at leaſt with the Plaintiff, if not a ſuperior one, in regard he paid a valuable Conſideration for all the Deeds after *Tyſſen*'s Bankruptcy, and beſides had no Notice of it, that the Court would not interpoſe to his Prejudice: And the Caſe of *Hitchcock* and *Sedgwick*, 2 *Vern.* 156. was cited, to ſhew how far Purchaſers without Notice were favoured in Courts of

of Equity: As alſo 2 *Chan. Ca.* 72, 135, 136, 156. 1 *Vern.* 27. 2 *Vern.* 599.

N. B. There was no Proof of a valuable Conſideration; but only ſome few ſcattering Sums which *Ward* let *Tyſſen* have at different Times.

Lord Chancellor. The firſt Conſideration will be as to that Part of the Eſtate which is in Mortgage to *Bradley*: And the Queſtion is as to that, Whether the Plaintiffs, the Aſſignees of *Tyſſen*, are to redeem it, or the Defendant *Ward*.

The Releaſe of the Equity of Redemption, which *Ward* has obtained, appears to be a groſs Impoſition: For, the Conſideration is mentioned to be 2000 *l.* yet not a Farthing appears to be paid. The Statutes that have been mentioned concerning Bankruptcy, bind equitable as well as legal Rights, and Courts of Equity as well as Law. Theſe Statutes were founded on ſuppoſed Frauds of the Bankrupts; and therefore intended to put them under Diſabilities to prejudice and defraud their Creditors. In the preſent Caſe, the Equity of Redemption of this Eſtate was made over by *Tyſſen* after his Bankruptcy (though before the Aſſignment.) Nothing therefore paſſed by this Conveyance: And if *Bradley*'s Mortgage had been out of the Caſe, and the Plaintiff would then have purchaſed of him, after an Act of Bankruptcy, and then a Commiſſion had iſſued within five Years, the Aſſignees under that Commiſſion muſt have prevailed. Creditors after Bankruptcy are in the Nature of Purchaſers, and have a prior Equity to any other Perſons: And here *Ward*'s is a prior Conveyance, but from a Perſon who had nothing to convey. *Ward* could not come in at Law as a Creditor for this Sum of 2000 *l.* Beſides, it is an Impoſition, the Money never having been advanced; yet if it had been actually paid, as the legal Eſtate was in *Bradley*, it would not have been any Benefit to *Ward*; but he muſt have loſt the Money.

Decreed

Decreed therefore, as to this Eſtate, That *Bradley* ſhould reconvey to the Plaintiff upon Payment of Principal and Intereſt.

The next Queſtion is as to thoſe Eſtates which being incumbred by *Tyſſen* before his Bankruptcy, thoſe Incumbrances are ſince, by meſne Aſſignments, veſted in *Ward*. And here it appears that *Ward* has, after the Bankruptcy, and before the Plaintiff's Aſſignment, got a Releaſe of the Equity of Redemption of thoſe Eſtates from *Tyſſen* for 3600 *l.*

Here the legal Eſtate is in *Ward:* And the Queſtion is, Whether in a Court of Equity it ſhall be taken away without *Ward*'s being paid all the Money he advanced? Tho' the Rule be the ſame here as at Law upon Conſtruction of Statutes; yet where an Act is to be carried into Execution here, there are certain Rules to be obſerved which will bind equally in caſe of an Act of Parliament, as of the Common Law. One of thoſe Rules is, That a Purchaſer for a valuable Conſideration, without Notice, having as good Title to Equity as any other Perſon, this Court will never take any Advantage from him; and conſequently will not grant a Diſcovery againſt him of the only Equity he has to defend himſelf by; which, if he ſhould be obliged to diſcover, the other Party would immediately take Advantage of. And there certainly may be Caſes where a Purchaſer for a valuable Conſideration, without Notice of an Act of Bankruptcy, ſhall not be obliged in this Court to diſcover any Thing (whether Incumbrances that he has got in, or any other Thing) but all Advantages ſhall be left him to defend himſelf. Suppoſe two Purchaſers without Notice, and the ſecond by chance gets hold of an old Term; he ſhall defend himſelf thereby againſt the firſt, who ſtill is as much a Purchaſer for a valuable Conſideration, as himſelf. I do not therefore think a Purchaſer for a valuable Conſideration, without Notice of the Bankruptcy, to be

relieved againſt in this Court within 21 *Jac.* 1. The Caſe of *Hitchcock* verſus *Sedgwick*, 2 *Vern.* 156. is very different from this: For a Commiſſion is a public Act, of which all are bound to take Notice; but an Act of Bankruptcy may be ſo ſecret as to be impoſſible to be known: And therefore I think that *Ward* having the legal Eſtate in him, ſhall by that be protected for ſo much as he really and *bona fide* paid *Tyſſen* before Notice of *Tyſſen*'s Bankruptcy.

Difference as to Notice between an Act of Bankruptcy committed, and a Commiſſion iſſued.

And therefore directed an Iſſue upon the Point of Notice; to try whether *Ward* had Notice of *Tyſſen*'s Bankruptcy, and when? And as to the other Part of the Eſtate, which (though not in *Ward* himſelf) was in others who were Truſtees for *Ward*, that muſt be conſidered as one and the ſame Thing.

DE

Termino Paſchæ

8 Geo. II.

In CURIA CANCELLARIÆ.

Upton verſus *Prince.*

25 and 26 *April* 1735.

THE Teſtator *William Prince*, a Freeman of *London*, had Iſſue two Sons, *William* and *Peter*, and four Daughters; and in his Life-time gave his two Sons, in order to ſettle them in the World, 1500 *l.* a-piece; for which he took two ſeveral Receipts, each in the following Words: *Received of my Father* William Prince *the Sum of* 1500 l. *which I do hereby acknowledge to be on Account and in Part of what he has given, or ſhall in or by his laſt Will give unto me his Son.* Sometime after the Teſtator makes his Will in the following Words: *And whereas I have heretofore paid to, given or advanced with my Children* William, Elizabeth, *and* Sarah, *the Sum of* 1500 l. *a-piece: Now I do hereby, in like Manner, give and bequeath unto my three other Children,* Peter, Mary, *and* Anne, *the ſeveral Sums of* 1500 l. *a-piece*; and then gives the Reſidue equally amongſt all his Children.

A Father advances ſome of his Children with Portions in his Life-time, and then makes his Will; and thereby recites he had advanced *B.* and *C.* but omits reciting *D.* (whom he had alſo advanced) and leaves to him a Sum certain, and deviſes the Reſidue equally among them: The Money which *D.* had received ſhall go in Satisfaction of the Legacy left to him.

The

The Cuſtom of *London* being waived on all Sides, the Queſtion was, Whether *Peter* ſhould have a new Sum of 1500 *l.* upon the latter Words of the Will? or whether he ſhould not be in the ſame Caſe with *William*; they both being equally advanced by the Father, and this ſeeming only a Miſtake in the Teſtator?

Mr. *Fazakerley* inſiſted, That the Receipt given to his Father could not controul the expreſs Gift of the Father ſubſequent; and the Father's omitting *Peter* in the Mention of the Advancement, ſhould be plainly intended a Difference between them; the Receipt given by both, and the Caſe of both being the ſame.

But the *Lord Chancellor* decreed the 1500 *l.* received by *Peter* in his Father's Life-time, to be a Satisfaction for what the Father gave him by his Will; and that he ſhould not have another 1500 *l.* upon the latter Words.

26 *April.*

Menzey verſus *Walker.*

The Father by Marriage Settlement has a Power to make an Appointment of a Sum not exceeding a Sum certain, for Portions and Maintenance of younger Children, in ſuch Manner and under ſuch Limitations as he ſhall appoint. He has ſeveral younger Children, and by his Will (taking Notice that the Reſt were provided for by their Grandfather) he appoints the whole Sum to one. This is not a good Purſuance of his Power.

MR. *Walker*, upon his Marriage, ſettled his Eſtate upon himſelf for Life, Remainder to his Wife, Remainder to Truſtees for a Term of Three hundred Years, Remainder to his firſt and other Sons; and the Truſt of the Term was declared to be for the raiſing ſuch Sum and Sums of Money for the Portion and Portions and Maintenance of all and every Child and Children of that Marriage (other than an eldeſt Son) *in ſuch Manner and at ſuch Time, and under ſuch Limitations as he the ſaid Mr.* Walker *ſhould appoint by his laſt Will, or by Deed, under Hand and Seal, atteſted by three credible Witneſſes, ſo as ſuch Sum or Sums do not in the Whole amount to above* 2000 l. *if but one younger Child, or* 3000 l. *if more than one; and ſo as all the Sums for ſuch Maintenance do not in the Whole amount to above* 120 l. per Ann. and

and for want of ſuch Appointment, then in Truſt to raiſe ſuch Portion or Portions equally to be divided amongſt all his younger Children, Share and Share a-like, to be paid to them reſpectively at the Age of Twenty-one, or Day of Marriage.

The Teſtator had three younger Children; and by his Will duly executed, reciting that his two Daughters were amply provided for by their Grandfather, he appoints the whole Sum of 2000 *l.* to his ſecond Son *Thomas Walker*. And the Queſtion was, Whether this Appointment of the Whole to one was a good Appointment, and made purſuant to his Power?

This Cauſe was heard at the *Rolls*, where it was decreed to be not a good Appointment; and now coming on to be heard before the *Lord Chancellor*,

Mr. *Attorney General*, &c. argued this Appointment to be good; and ſaid, That a Difference was to be made where ſuch Powers are to be executed by a Stranger, and where by the Father himſelf, who is a proper Judge of the Merit of each Child; and conſequently that the Court will not interpoſe to ſet aſide this Diſtribution, conſidering the particular Circumſtances of this Caſe; where, by the Words of the Power, he was not bound to raiſe the whole Sum of 2000 *l.* but might (if he had pleaſed) not have raiſed the tenth Part of that Sum.

The Father in this Caſe had a Latitude; or elſe the providing how this Sum ſhould be divided, in caſe no Appointment was made by him, would have been vain and idle: And if it was not neceſſary for him by the Words, *to divide it equally*, this Appointment made by him muſt be good. It is in Proof here that the other Children were provided for by their Grandfather, and took good Eſtates from him. Indeed where certain Directions are given, that ſuch and ſuch Sums ſhall be given to each Child, there nothing is left either to the Diſcretion of the Party or of

the Court: But where this Court has relieved againſt the Execution of Powers meerly diſcretionary in their Creation, it has not been for Inequality only, but for ſome other Piece of Injuſtice or Hardſhip. In the Caſe of *Wall* verſus *Thorborn*, 1 *Vern.* 355, 414. Relief was given, becauſe there was no Reaſon that one Daughter ſhould be looked upon in a different Light from the others, ſhe having no particular Proviſion: But even in that Caſe the Court ſaid, that the Circumſtances muſt be very ſtrong to take away the Power which the Wife had by the expreſs Words. And in that Caſe another is cited of *Sweetman* verſus *Wolaſton*, where Relief was denied. In that of *Thomas* and *Thomas*, 2 *Vern.* 513. it is ſaid, That this Court will relieve againſt an unreaſonable, but not an unequal Diſtribution upon a ſpecial or particular Power; which was the Caſe of *Liſter* verſus *Robinſon*, *Mich.* 1732. where a Man gave a Power to his Wife, to deviſe ſuch a Sum to and amongſt his Child and Children, and in ſuch Manner and Proportion to each Child as ſhe ſhould think fit; there were two Children, and the Elder being provided for, the Mother appointed the Whole to the Younger: Upon which Appointment a Bill was brought here for an unequal Diſtribution; but was diſmiſſed. So in that of *Auſtin* verſus *Auſtin* (heard by the preſent *Lord Chancellor*) *March* 2, 1733. where the Words of the Truſt were, That if *Robert Auſtin* the Father dies without leaving by *Jane* his Wife a Son, and other Iſſue then living, then and in ſuch Caſe to raiſe a Sum not exceeding 1500 *l.* as ſoon as may be, to and for the ſole Benefit and Advantage of ſuch Child or Children (other than the eldeſt Son of that Marriage) in ſuch Proportion, Manner and Form, in all Reſpects, as the ſaid *Robert* ſhould, for ſuch Purpoſe, by his laſt Will in Writing, direct and appoint; and in Default of ſuch Appointment, then to and for the ſole Benefit of ſuch Child, if but one; but if more (other than the Eldeſt) equally and in equal Parts and Manner, to all Intents and Purpoſes. *Robert*, by his Will, directs the 1500 *l.* to be raiſed; and gives 450 *l.* to his Son *Robert*, 1050 *l.* to *Jane*, and nothing to *Edward*, who had an Eſtate of 4

or

or 500 *l. per Ann.* given him by another; and he coming into this Court for a Share of the 1500 *l.* his Bill was diſmiſſed: The Power being diſcretionary, and nothing hard in the Execution of it. The Caſes before mentioned will govern this; for, here the Manner, the Time, the Limitation, are all reſerved to him by the Power, whereby he might have given it to one ſooner, to the other later; to the one abſolutely, to the other under a Limitation; in which Caſe there would have been an Inequality as well as in the preſent one. Indeed in *Auſtin*'s Caſe, there are not the Words *in ſuch Proportion*; but there are Words tantamount: And theſe Powers being reſerved to Parents, in order to keep their Children in due Obedience, are highly reaſonable, that Parents may have a Power of Diſtribution according to the Merit or Circumſtance of each particular Child.

Mr. *Solicitor General*, Mr. *Pauncefort*, and Mr. *Fazakerley* argued on the other Side againſt the Validity of this Appointment; and though they admitted, that perhaps where Powers were General or Diſcretionary, this Court would not intermeddle; yet they inſiſted, that here the Power was particular, and conſequently muſt be ſtrictly purſued: The Argument of this Power being executed by the Father himſelf will not alter the Caſe; for, by the Words it is clear that a Proviſion was intended for every Child, and all the Children are become Purchaſers of ſome Proviſion under this Power; the Words being *for all and every of them*; and conſequently, though the Father be a better Judge than a Stranger, yet being diſabled by the Words from excluding any of them, this Court will take Care that he, as well as any other, ſhall follow the Rules of Reaſon and Juſtice.

The diſcretionary Power lodg'd in the Father by this Power, is firſt to be conſidered with Relation to the eldeſt Son, whoſe Circumſtances perhaps might not to be able to bear ſo great a Charge as 2000 *l.* or 3000 *l.* and therefore the Father has a Power to charge the Eſtate with ſuch a Sum as he ſhould think his Son's Eſtate could bear, provided

vided it did not exceed 2000 *l.* if but one younger Child, or 3000 *l.* if more. It muſt next be conſider'd with Relation to the younger Children; and there three Things are left to his Diſcretion, *viz.* 1. The Time, Manner, and the Limitation; the Time, whether it ſhould be payable at the Day of Marriage, or at any other Time? 2. The Manner, which muſt be underſtood the Manner of raiſing, and not of diſtributing the Sum; this Conſtruction agreeing with the Wording of the Power in every Clauſe, and the ſubſequent Proviſions making it clear; eſpecially that which relates to Advancement by the Father in his Life-time. 3. The Limitations which he had Power of making, but ſtill for the Childrens Benefit; for, one might marry imprudently, or be guilty of ſome other Piece of Folly, which might make it neceſſary for the Father to limit the Share of ſuch Child in ſuch a Manner as might be effectual and advantageous to that Child. And his having a Diſcretion in theſe Caſes, cannot give it him in the other reſpect of giving the Whole to one, and nothing to the two others; ſuch Diſcretion being neither given nor intended to be given to him by the Words of this Power: Nor will the two Childrens being provided for by the Grandfather alter the Caſe; the Intent of the Parties being to raiſe a Portion for each by the Truſt. And it would be very unreaſonable that a Child becoming by Accident, able to do for himſelf by the Bounty of ſome of his Friends, ſhould thereby loſe the Right he has of being provided for by his Father. The Caſe of *Wall* verſus *Thurborn*, 1 *Vern.* 355, 414. is an expreſs Authority. And in the Caſes of *Thomas* verſus *Thomas*, 2 *Vern.* 513. and *Liſter* and *Robinſon*, there was an expreſs Power of giving it to one of the Children; and ſo not like this. So in that of *Auſtin* and *Auſtin*, the Power was much more general, and intirely diſcretionary: But here is an unreaſonable Excluſion of two of the Children, who have but a ſmall Proviſion, no way adequate to what their Brother takes under this Will.

Lord Chancellor. There are two Queſtions: The firſt, Whether the Power be purſued? The ſecond, Whether it be executed in a reaſonable Manner? As to the firſt, I think

think the Words are as plain as they can be, that the Execution of this Power ſhould be for the Benefit of all the Children. Indeed it was diſcretionary in the Father how much ſhould be raiſed; but he had no ſuch Diſcretion as to exclude one or the other. The Words *in ſuch Manner* do clearly extend only to the Manner of raiſing; there being ſeveral Methods mentioned in the Power; which was to make it as convenient as might be for the eldeſt Son. The Time alſo was under his Diſcretion, whether it ſhould be paid at Marriage, or any other Time; and ſo was the Limitation: But ſtill that is to be underſtood of the Manner in which the Portions ſhould be ſettled upon them; whether it ſhould be upon their reſpective Marriage, or in what other Manner he thought proper; and if he makes no Appointment, then he fixes it upon the expreſs Words, *to be equally divided between the Children*; and the Time that it ſhall be paid. Now, after all this, How can this partial Appointment be called an Execution of his Power? And is not that the preſent Caſe? If then it be clear that he has not purſued his Power, it is needleſs to inquire whether the Proviſion made by him be reaſonable or not? a void Appointment being as no Appointment, and conſequently a Failure of the Appointment he was enabled to make by his Power. Where there is a defective Execution of a Power, Creditors or younger Children are intitled to have that Defect ſupplied: But where the Execution is meerly void, as in the preſent Caſe, and when the Court has interpoſed in ſuch Caſes as this before us, it has always been where the Execution (though perhaps within the Words) was attended with ſome Hardſhip or Unreaſonableneſs: So that if this depended upon the Reaſonableneſs or Unreaſonableneſs of the Execution, I ſhould not determine the Point without ſome farther Inquiry into the Circumſtances of theſe two Daughters: But as a Power *to all and every* can never be reſtrained to one only, I think the Execution void, and ſo the ſecond Point is quite out of the Queſtion. In the Caſes of *Liſter* and *Robinſon*, and *Thomas* and *Thomas*, 2 *Vern.* 513. the Words gave a general Power; which being ſo, the Court had nothing to do

to reſtrain them. So in that of *Auſtin* and *Auſtin*, the Father had a Power with regard to the Nomination of the Child or Children who ſhould take; and there the Execution was highly reaſonable, the Perſon excluded being provided for five Times as greatly as the other Children: And ſo it would have been unreaſonable in the Court to reſcind what he had done upon ſo juſt a Ground.

So affirmed the Decree.

Note Midmay's Caſe, 1 *Co.* 175. *a.* 177. *a.*

May 6.

Mallabar verſus *Mallabar.*

Where a Man deviſes his real Eſtate to be ſold to pay Debts and certain pecuniary Legacies; and ſubject to his Debts and Legacies deviſes his perſonal Eſtate to his Siſter; this Court will not ſupply the Defect of a Surrender of the Copyhold to the Uſe of the Will, if the other Eſtates ſuffice to pay the Debts.

THE Teſtator, *Thomas Mallabar*, by his laſt Will deviſed as follows: *Imprimis*, "I deviſe, give and bequeath all and ſingular my Meſſuages, Lands and Hereditaments whatſoever, and whereſoever, in the Counties of *Norfolk*, *Suffolk* and *Cambridge*, unto my Siſter *Eſter Mallabar*, and to her Heirs and Aſſigns for ever, upon Truſt, that the ſame ſhall be ſold by her or them, for the beſt Price that can be gotten for the ſame, as ſoon as conveniently can be after my Deceaſe; and that out of the Monies ariſing therefrom, all my juſt Debts, of what kind ſoever, be paid; and after Payment of my Debts, I deviſe, out of the Remainder of the Money, the Sum of 500 *l.* to my Siſter *Mary Bainbrigg*, and alſo 500 *l.* to my Siſter *Girt*'s Children, that ſhall be living at the Time of my Deceaſe, to be divided equally between them; and alſo 500 *l.* to my Nephew *Nicholas Mallabar*; and alſo 500 *l.* to be divided amongſt the Children of my late Brother *James Mallabar*, which ſhall be living at the Time of my Deceaſe. *Item*, after my Debts and Legacies paid as aforeſaid, and ſubject to the ſame, I give and bequeath all the Reſt and Reſidue of my perſonal Eſtate unto my ſaid Siſter *Eſter Mallabar*; whom I do hereby conſtitute and appoint ſole Executrix of this my laſt Will and Teſtament."

The

The Executrix brought her Bill againſt *Nicholas Mallabar*, the Heir at Law of the Teſtator, to prove the Will, and to have the Eſtate ſold, and the Debts and Legacies paid according to the Will; and charged that the Teſtator had not ſurrendered all his Copyhold Eſtate to the Uſe of the Will, but ſome Part of it only. And ſuggeſted, that the Teſtator's whole Eſtate, real and perſonal, included ſuch Parts of the Copyhold as were not ſurrendred; and therefore inſiſted, that the Defect of the Surrender ſhould be ſupplied. The Defendant, in his Croſs-Bill, inſiſted, that there was more than ſufficient (excluding the Copyhold, which was not ſurrendred) to pay all the Debts; and therefore inſiſted, that the Surrender ſhould not be ſupplied.

Both Cauſes came to a Hearing together: And the Plaintiff in the original Bill, having, in her ſecond Anſwer to the Croſs-Bill, confeſſed that the Teſtator's Eſtate (excluſive of the Copyhold not ſurrendred) was more than ſufficient; the *Lord Chancellor* refuſed to ſupply that Defect againſt the Heir; and diſmiſſed the original Bill with Coſts as to that Point. The Reaſon whereof was; becauſe ſhe confeſſed the Matter in her ſecond Anſwer to the Croſs-Bill, though ſhe had charged the contrary in her original Bill, and not diſcloſed the Truth in her firſt Anſwer to the Croſs-Bill, and therefore ſhould be puniſhed with Coſts.

Another Point aroſe at the Hearing, though not inſiſted on in the Pleading; which was, Whether upon the Will there was not a reſulting Truſt for the Heir? The Plaintiff's Counſel inſiſted, that here could be no reſulting Truſt for the Heir; firſt, becauſe the Teſtator had given a Legacy of 500 *l.* to the Heir. Secondly, becauſe the Teſtator had directed his real Eſtate to be ſold for Payment of his Debts and Legacies, and had therefore conſider'd it as a perſonal Eſtate; and after Payment of his Debts and Legacies, and ſubject to the ſame, had given all the Reſt and Reſidue of his perſonal Eſtate to his Executrix the Plaintiff: But if it ſhould be conſtrued to be a reſulting Truſt

for

for the Heir, the Teſtator's Intent would be utterly defeated: For, then the perſonal Eſtate muſt be firſt applied in Eaſe of the real; and ſo the Executrix would have but a troubleſome Affair, without any Benefit or Conſideration, which could never be the Teſtator's Intent: And in order to ſhew clearly that was the Teſtator's Intent, they inſiſted upon giving parol Evidence.

Lord Chancellor. If this was *Res Integra*, and I was at Liberty to follow my own Opinion, I ſhould be very unwilling to admit ſuch Evidence: But as it has been done, and particularly in the Caſes of *Doxey* verſus *Doxey*, and *Littlebury* verſus *Buckley*, 2 *Vern.* 677. I now admit it to be done. Then was read the Depoſition of a Witneſs, who gave full Evidence of the Teſtator's Declarations, that the Plaintiff, after Payment of his Debts and Legacies, ſhould have all the reſt of his Eſtate.

But the *Lord Chancellor* decreed upon the Will itſelf, independently of the parol Evidence, that here was no reſulting Truſt for the Heir; and that the Executrix ſhould have the whole Reſidue, after the Sale of the Eſtate, both of the Money ariſing by ſuch Sale, and of the perſonal Eſtate.

May 13. *Tubbs v Broadwood. 2 Ruſſ. Rep. 492.*

Lechmere verſus *Lady Lechmere.*

3 *Will. Rep.* 211. Money upon a Marriage is agreed to be laid out in Land in Fee, and ſettled on Huſband and Wife, Remainder to their Sons in Tail Male, Remainder to the Huſband, his Heirs and Aſſigns for ever: A Covenant, that until the Money be laid out in Land, the Intereſt to be paid to the Perſons who were to have the Rents of the Lands when purchaſed. The Huſband purchaſed ſeveral Eſtates, but never ſettled any, and died inteſtate *ſans* Iſſue, leaving a conſiderable real Eſtate to deſcend to his Heir at Law. The Heir may compel the Adminiſtratrix, the Widow, to inveſt this Money in the Purchaſe of Lands; and the Lands deſcended upon him will not go in Satisfaction of the Covenant, except as to ſuch as were purchaſed after the Covenant.

THE late Lord *Lechmere*, upon his Marriage with the Lady *Elizabeth Howard*, Daughter to the Earl of *Carliſle*, and in Conſideration of 6000 *l.* Portion, covenanted with the Earl of *Carliſle* and the Lord *Morpeth* his Son, to lay out, within one Year after the Marriage, the ſaid Sum of

of 6000 *l.* and likewiſe the farther Sum of 24000 *l.* amounting in the Whole to 30000 *l.* in the Purchaſe of Freehold Lands in Poſſeſſion; which were to be ſettled upon the Lord *Lechmere* himſelf for Life, without Impeachment of Waſte, Remainder to Truſtees and their Heirs during the Life of the Lord *Lechmere*, to preſerve contingent Remainders, Remainder for ſo much as would amount to 800 *l. per Ann.* to the Lady *Lechmere*, for her Jointure, Remainder of the Whole to the firſt and other Sons of the Marriage in Tail Male, Remainder to the Truſtees for Five hundred Years, for the raiſing a Portion or Portions for the Daughter or Daughters of the Marriage, Remainder to the Lord *Lechmere*, his Heirs and Aſſigns for ever: But if there ſhould be no Daughters, that the ſaid Term was to ceaſe for the Benefit of the Lord *Lechmere*, his Heirs and Aſſigns for ever. And the ſaid Lord *Lechmere* farther covenanted, that until the ſaid 30000 *l.* ſhould be laid out in Lands as aforeſaid, there ſhould be paid Intereſt for the ſame after the Rate of 5 *l. per Cent.* unto the Perſons intitled to the Rents and Profits of the Lands when purchaſed.

The Lord *Lechmere*, after his Marriage, purchaſed ſeveral Eſtates in Fee-ſimple in Poſſeſſion, but which were never ſettled according to the Covenant; as alſo ſeveral Terms and Reverſions, *&c.* and in the Year 1727. died inteſtate and without Iſſue, leaving a conſiderable real Eſtate (to the Value of about 1800 *l. per Ann.*) to deſcend upon the Plaintiff, his Nephew and Heir at Law. The Lady *Lechmere* took out Adminiſtration; and the Plaintiff brought his Bill againſt her for an Account of the Lord *Lechmere*'s perſonal Eſtate, and to have this Covenant carried into Execution (his Remainder by the Death of the Lord *Lechmere* without Iſſue now taking Effect); as alſo to have ſome Purchaſes compleated which were left incompleat by the Lord *Lechmere*'s Death.

The Lady *Lechmere* inſiſted by her Anſwer, That the Plaintiff, being no way privy to any of the Conſiderations within this Covenant, could not compel her to lay out

the 30000 *l.* in the Purchaſe of Lands for his Benefit: But that if he could, the Lands which Lord *Lechmere* had permitted to deſcend on him, being to the Value of 1800 *l. per Ann.* ought to be taken in full Satisfaction for all the Benefit the Plaintiff could be intitled to as Heir at Law to the Lord *Lechmere*, who deſigned theſe ſeveral Purchaſes to be ſettled according to the Uſes ſpecified in the Covenant.

The Cauſe was firſt heard at the *Rolls*, and there decreed for the Heir at Law, Mr. *Lechmere*, upon both Points; *viz.* That he was intitled to have a ſpecific Performance of this Covenant; and ſecondly, That the ſeveral Eſtates which deſcended upon him were not a Satisfaction for this Covenant, or any Part of it; and now coming on to be heard before the *Lord Chancellor*,

Mr. *Pauncefort*, Mr. *Strange*, Mr. *Browne*, and others, argued for the Plaintiff, That he could not in this Caſe be conſidered as a meer Voluntier, but was in ſome Sort a Purchaſer; according to *Jenkins* and *Kemiſh*'s Caſe, *Hardr.* 395. *Lev.* 150, 237. But that though he ſhould be taken for a Voluntier, yet he muſt prevail againſt an Adminiſtratrix: And this to ſerve the Intent of the Lord *Lechmere*, who by his Covenant has ſaid, That his Heirs at Law ſhould have an Intereſt in the Land, and in the Money, until the Land be purchaſed. That the Heir was in Contemplation at the Time of the Lord *Lechmere*'s entering into this Covenant, appears from the Proviſion, that in caſe there ſhould be no Daughters, the Term of Five hundred Years ſhould ceaſe for the Benefit of him and his Heirs. That wherever a Man enters into a lawful Engagement, and is prevented by Death, or any other Accident, from carrying his Agreement into Execution, the Court will look upon it as performed. That the Strength of this Rule appear'd from the Caſe of *Sweetapple* verſus *Bindon*, 2 *Vern.* 536. where the Huſband was decreed to ſtand in the ſame Condition as if the Money had been actually laid out in Land; although no Rule of Law be clearer, than that the Huſband ſhall never be Tenant by the Curteſy

teſy but where he has reduc'd his Wife's Eſtate into Poſſeſſion during her Life. That though every Tenant in Fee has his Heir in his Power, yet, if the Anceſtor does nothing to deveſt the natural Right which his Heir hath to ſucceed him, and to have a ſpecific Execution of his Covenant, he ſhall always prevail againſt the Executor or Adminiſtrator, even when the Covenant was meerly voluntary; as appears by the Caſe of *Holt* verſus *Holt*, 2 *Vern.* 322. the Truſtees neglecting to compel the Lord *Lechmere* in his Life-time, to perform his Covenant, cannot prejudice either Party who is intitled to have it carried into Execution: For, if ſo, the Doctrine of this Court would be intirely overturned; and Truſtees would become Judges whether and how far Men ſhould be bound by their Covenants: But, by the known Rules of this Court, Truſtees are bound to execute the Truſt in the Manner the Perſons that made the Conveyance have directed; and have no Latitude of Judgment left them, to diſtinguiſh whether the Conveyance be made upon a valuable Conſideration or not? or whether the Perſons claiming under the Truſt be Voluntiers or Purchaſers? If then the Neglect of the Truſtees will not affect the Caſe one way or the other, the Whole muſt depend upon the Equity of the Heir and Adminiſtratrix. And taking the Heir even but as a Voluntier, yet is he ſuch a Voluntier as is greatly favoured both at Law and in this Court; and will always appear in a more favourable Light than an Executor or Adminiſtrator; as appears from the ſeveral Caſes of *Kettleby* verſus *Atwood*, 1 *Vern.* 298, 471. *Knight* verſus *Atkins*, 2 *Vern.* 20. *Baden* verſus *Com. Pembroke*, 2 *Vern.* 52. *Lancey* and *Fairchild*, 2 *Vern.* 101. *Lingen* and *Sowray*, * *Abr. Eq. Ca.* 175. *pl.* 5. and *Vernon* verſus *Vernon*, in the Houſe of Lords in 1732. and *Kentiſh* verſus *Newman*, *July* 1713. where a Feme being poſſeſſed of 200 *l.* the Huſband before Marriage covenanted to join ſo much to her 200 *l.* as would purchaſe 30 *l. per Ann.* to be ſettled on them two, and the Heirs of their Bodies, Remainder to the Huſband in Fee; and until the Settlement made, the 200 *l.* to be taken as Part of her ſeparate Eſtate; and if no Settlement made during the Huſ-

* 1 *Will. Rep.* 172. S. C. *Prec. in Chan.* 400. S. C.

Huſband's Life, and ſhe ſurvived, then to remain to her; but if ſhe ſurvived, then to go to her Brothers and Siſters: The Marriage took Effect in 1688. and they had Iſſue a Daughter; the Wife died in 1711. before the Huſband, no Purchaſe having been made: Upon a Bill brought by the Daughter, ſhe had a Decree againſt the Brother and Siſter of her Mother, tho' the Money had not been laid out within the Time provided by the Articles; the Court looking upon the Purchaſe as compleated. This Caſe not only fully proves the Right of the Heir, but likewiſe that he ſhall not loſe that Right through any Accidents preventing the Execution of Agreements within the Time prefixed. Here are no Creditors, no want of Aſſets, and conſequently no Equity, to prevail againſt the Heir. They farther inſiſted, That if this Covenant was to be carried into Execution, it could not be done partially; but being equally binding as to all Parties, all are equally intitled to the Benefit of the Execution: That therefore it could not be confined ſingly to the Purchaſe of Lands of 800 *l. per Ann.* for the Lady *Lechmere*'s Jointure; but the Whole muſt be carried through, and limited to the Heir in the Manner it would have been limited to the Lord *Lechmere* himſelf, had he been alive. The Lady *Lechmere* cannot vary the Execution of the Articles; and the Covenant being to lay out the whole Sum of 30000 *l.* which is an intire Covenant, cannot be reſtrained to a Covenant for Purchaſe of Lands of 800 *l. per Ann.* only for the Lady *Lechmere*'s Jointure. This Method would be admitting the Repreſentative to contradict what the Lord *Lechmere* himſelf has ſaid ſhould be Land, and Land for the Benefit of his Heir; which appears from the Proviſion, that until the Lands purchaſed, Intereſt at 5 *l. per Cent.* ſhould be paid to ſuch Perſons as ſhould be intitled to the Rents of theſe Eſtates. Many of the Caſes cited were not ſo ſtrong as the preſent one, being founded upon voluntary Agreements; which nevertheleſs have been carried into Execution for the Benefit of the Heir againſt the Executor: And inſiſted upon that of *Vernon* verſus *Vernon*, as a Caſe in Point, and no way diſtinguiſhable from the preſent; the Matter reſting upon

upon the Covenant in that Caſe as well as in this; and the Execution of that Covenant decreed in Favour of the Heir againſt the Wife, both in this Court and in the Houſe of Lords; notwithſtanding all the ſame Objections made there in her Behalf that can be made here for the Defendant.

To the ſecond Point they argued, that the Lord *Lechmere* having not done any Thing in his Life-time to ſhew his Intent that theſe late Purchaſes ſhould go in Satisfaction of his Covenant, in Part or in the Whole, no ſuppoſed Intent could prevail againſt the Heir for the Adminiſtratrix, ſhe not having ſo good an Equity as he; eſpecially ſeeing that Suppoſitions may as well be one way as the other. That the Caſes of Satisfaction depend upon the particular Circumſtances of each Caſe, appears from the Caſes of *Duffield* verſus *Smith*, and *Goodfellow* verſus *Burkett*, 2 *Vern.* 258, 298. and alſo from the Intent of the Parties; as is moſt manifeſt from that of *Saville* verſus *Saville*, where the only Difference was between a Deſcent of Lands in Fee, which by the Settlement were to be a Satisfaction; and that which happened, of a Deſcent of Lands in Tail of equal Value, of which the Daughters might, by levying a Fine, have made themſelves Tenants in Fee; and yet held there not to be a Satisfaction; becauſe the Intent was, that the Fee-ſimple Lands ſhould deſcend. In the preſent Caſe it does not appear that the Intent was, that thoſe Fee-ſimple Lands ſhould go in Satisfaction: For, if he had ſo intended, he would have acquainted the Truſtees with his Deſign of performing ſo much of his Contract by theſe Purchaſes: And as no Intent appears, it is no more than if the Lord *Lechmere* had given a Bond to his Heir, and had then permitted theſe Lands to deſcend upon him; in which Caſe it cannot be pretended, that the Deſcent would have been a Satisfaction for the Bond, or that the Adminiſtratrix could have defended herſelf againſt this Demand by ſuch an Argument. So if he had owed 1000 *l.* to his next of Kin, the diſtributive Share would never have been taken as a Satisfaction for the Debt. A leſs Thing cannot go in

Satisfaction for a greater; as in *Atkinſon*'s and *Webb*'s Caſe, 2 *Vern.* 478. But an Equivalent muſt be given, which muſt appear to have been intended as a Satisfaction. And in that of *Eaſtwood* verſus *Vink*, *Apr.* 1732. it was held, that a Deviſe, which was to go in Satisfaction, muſt be of the ſame Nature as the Thing for which it was to be an Equivalent; and therefore held there that Money could not go in Satisfaction for Land, nor Copyhold for Freehold, *&c.* How then, according to theſe Rules, can ſeveral of theſe Purchaſes be called a Satisfaction? There are Terms, Reverſions, *&c.* which are not only leſs in Value, but from their Nature cannot be limited according to the Uſes intended by the Covenant, which was to purchaſe Freehold Lands, and Lands in Poſſeſſion; and it is therefore very ſtrange to think that the Lord *Lechmere* ſhould make Purchaſes, and intend them to go in Satisfaction of his Covenant, which (he very well knew) could not from their Nature or their Value anſwer any Deſcription of thoſe he had agreed to purchaſe: Such a Conſtruction (beſides its Abſurdity) would go in direct Contradiction to the well known Maxim, that an Heir is not to be diſinherited by a conſtructive, but a neceſſary Implication only.

Mr. *Attorney General*, Mr. *Solicitor General*, Mr. *Verney*, and Mr. *Fazakerley* argued for the Defendant, That the Conſideration, upon which this Covenant was made, extended no farther than to the Lady *Lechmere* and the Children of the Marriage, but not at all to the Heir; who therefore could be looked upon but as a meer Voluntier, and, as ſuch, had no Claim to any Equity. That the naming *the Heirs* in the Covenant, was only to ſhew what ſhould become of the Land when the other Limitations ſhould be ſpent: And the Proviſion, that the Intereſt ſhould be paid to ſuch as ſhould be intitled to the Rents and Profits of the Eſtate, was no more than what muſt have been if it had not been inſerted; and ſo fall within the Rules of *Expreſſio eorum*, *&c.* That it was neceſſary to explain for what Purpoſe the Five hundred Years Term was raiſed; and to provide that in caſe of Failure of Daughters,

ters, it ſhould ſink in the Inheritance, in order to prevent its becoming legal Aſſets; which it muſt otherwiſe have done. That there was a great Difference between a Limitation to the Heirs of the Body, and a general Remainder to one and his Heirs; the Heir being, in the former Caſe, under the immediate Contemplation of the Parties, but not ſo in the latter. And that this Court conſiders even a Covenant but as *Nudum pactum* in the Caſe of Voluntiers: For, though it be a Court of Conſcience, yet that is only to aid ſuch as are in Conſcience intitled to a Performance of the Covenant; which cannot be ſaid of a Voluntier, unleſs he, by ſome particular Circumſtances, takes himſelf out of the general Rule. Then, as to the Nature of the Obligation, here are no Truſtees appointed, but the Whole reſts ſingly upon the Lord *Lechmere*'s Covenant; which is but a perſonal Lien, and muſt fail whenever he himſelf becomes intitled to the Benefit of what was to be performed by that Obligation. *The Rule that what is covenanted to be done is looked upon as done*, holds only in Caſes where ſomewhat is veſted either in Truſtees, or ſome other Manner, whereupon the Covenant may be a Lien; but not where it is a meer perſonal Obligation, as in this Caſe, the Whole remaining in the Perſons own Hands. This Difference appears from the Caſe of *Lingen* verſus *Sowray*, *Abr. Eq. Ca.* 175. where there was (as appears by the decretal Order) an Aſſignment of Securities to Truſtees to be laid out in Land, and to be ſettled; the Truſtees did not actually receive the Securities: But ſometime after the Marriage the Huſband called in Part of the Money himſelf, and ſettled it upon the ſame Perſons as it was to have been ſettled upon by the Marriage Settlement: He afterwards made his Will, and deviſed his perſonal Eſtate to his Wife, againſt whom a Bill was brought by the Nephew as Heir at Law; and it appearing that 700 *l.* remained upon the ſame Securities at his Death as at the Time of the Settlement, it was decreed, That the 700 *l.* ſhould be looked upon as Land; but that the other Part that was actually taken out by him ſhould not be bound. And the Court would not, in that Caſe, admit the Repreſentative of the

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Covenantor to ſay that his Anceſtor had broke his Covenant. The like Diſtinction in the Caſe of *Chaplin* verſus *Horner*, 18 *March* 1718. at the *Rolls*; and in that of *Chicheſter* verſus *Bickerſtaff*, 2 *Vern.* 295. it is held, that the Money ſhall in many Caſes be conſidered as Land, when bound by Articles in order to a Purchaſe made; yet whilſt it remains ſtill Money, it ſhall be deemed Part of the perſonal Eſtate of ſuch Perſon who might have aliened the Land in caſe a Purchaſe had been made. And in the Caſes of the Counteſs of *Warwick* and *Edwards*, *Knight* verſus *Atkins*, *Lancey* verſus *Fairchild*, and *Sweetapple* verſus *Bindon*, 2 *Vern.* 20, 101, 536. the Sums were appropriated, and ſtanding out in Truſtees Hands; and ſo not like this Caſe. And in that of *Knight* verſus *Atkins*, the Plaintiff was both Heir and Executor; as appears in 2 *Chan. Rep.* 400. Indeed the Caſe of *Vernon* and *Vernon*, in the Houſe of Lords, 1732. reſted upon a bare Covenant; but there was an expreſs Proviſion that the Brother ſhould have the Benefit of the Covenant, there being an expreſs Eſtate limited to him, upon which he might have had a Remedy againſt Mr. *Vernon* himſelf in his Life-time: But it cannot be pretended that the Plaintiff could in this Caſe have had any Remedy againſt the Lord *Lechmere* in his Life-time; Lord *Lechmere* could have limited the Remainder to any other of his Relations, in Bar of his Heir at Law. In the Caſe of *Cann* and *Cann*, 1 *Vern.* 480. the Court refuſed compelling the Executrix to lay out the Money in a Purchaſe of Lands whereof the Huſband would, by the Articles, have been Tenant in Tail. The Objection, that the Covenant was intire, and conſequently could not be partially executed, was endeavoured to be anſwered, by ſaying, that the Lady *Lechmere* did not come here to have the Covenant carried into Execution; but was ready to waive all the Pretenſions ſhe had under this Covenant, unleſs the Court ſhould think the Heir intitled to have it carried into Execution: And concluded this Point by ſaying, The Heir was as much a Stranger to this Covenant as the natural Daughter was held to be to the Covenant for farther Aſſurance in *Foreſaker*'s and *Robinſon*'s Caſe, *Abr. Eq. Ca.* 123. and that the

the Lord *Lechmere* having lived ſeveral Years after his entring into this Covenant, and having never carried it into Execution; this long Surceaſing was to be taken as a Change in his Intention; and conſequently the Heir not intitled to a Performance.

As to the ſecond Point they argued, That if the Heir was intitled to have a ſpecific Performance of this Covenant, the Deſcent of Lands to the Value of above 30000 *l.* which he took from the Lord *Lechmere*, muſt be looked upon as a Satisfaction. That where-ever a Thing is to be done either upon a Condition, or within a Time certain, yet, if a Recompence can be made which agrees in Subſtance, though perhaps not in every formal Circumſtance, ſuch a Recompence ſhall be good, and ſhall go in Satisfaction of the Thing covenanted to be done. In the Caſe of *Wilcox* and *Wilcox*, 2 *Vern.* 558. the Deſcent of Lands of the ſame Value was held a Satisfaction; though in that Caſe the Son was a Purchaſer; which the Heir is not in the preſent Caſe; and in that of *Blandy* verſus *Widmore*, 2 *Vern.* 709. the Huſband having covenanted to leave his Wife 620 *l.* at his Death, and dying inteſtate, whereupon her diſtributive Share came to 1000 *l.* this was held to be a Satisfaction; and in Caſes of Portions, they are held to be ſatisfied either by a Deviſe, or where given by Will, are likewiſe held to be ſatisfied by a Gift in the Party's Life-time, though the Will does not take Effect till his Death.

Lord Chancellor. The firſt Queſtion is, Whether the Plaintiff, the Heir at Law to the Lord *Lechmere*, be intitled to a ſpecific Performance of this Covenant? It has been conſidered by the Plaintiff's Counſel as an Agreement of the Lord *Lechmere*, and an Intent in him to lay out this whole Sum of 30000 *l.* in Lands at all Events; on the other hand, the Defendant's Counſel have inſiſted, that the Deſign went no farther than the providing for the Lady *Lechmere*, and the Iſſue of the Marriage. The Intent ſeems to me to be, that the 30000 *l.* ſhould, at all Events, be laid out in Land; the Produce whereof was to

be ſecured to the Iſſue of the Marriage, who in this Caſe muſt have taken as Purchaſers: But as to the Remainder in Fee, I do not think that the looking upon the Lord *Lechmere* either as a Purchaſer of it or not, will vary the Caſe; ſince, had the Covenant been ſilent, the Remainder muſt have returned to the Perſon from whom the Eſtate moved: And I think it quite the ſame whether he is conſidered as a Purchaſer or as a Voluntier; the Diſpute not being between the Heir and a third Perſon, but between the two Repreſentatives of the Lord *Lechmere*, the one of his real, the other of his perſonal Eſtate; the Heir's being but a Voluntier in regard to his Anceſtor, will not exclude him from the Aid of this Court. But, though the Queſtion is between two Voluntiers, the Court will determine which way the Right is, and decree accordingly. We muſt therefore ſee whether the 30000 *l.* is upon this Covenant, to be looked upon as real or perſonal Eſtate?

It ſeems to be allowed on both Sides, That had the Money been depoſited in Truſtees Hands, it muſt have been looked upon as a real Eſtate, and the Heir intitled to the Benefit of it. This I ſay, ſeems to be granted; and no Authority againſt it, but what has been collected from the Caſe of *Chicheſter* verſus *Bickerſtaff*, 2 *Vern.* 295. It is probable that in that Caſe the Court went upon ſome Reaſon which induced it to think that Sir *John Chicheſter* looked upon the Money as perſonal Eſtate; for, otherwiſe the Authority of that Caſe is not to be maintained; being contrary to all the former Reſolutions, and to a late one in the Houſe of Lords, by which I am bound, *viz.* That of the Counteſs of *Warwick* verſus *Edwards*, where the Money was decreed to go as Land, though to a collateral Heir, who was not within the Conſiderations of the Settlement: So that it is now a ſettled Point, that where the Securities are appropriated, the Money ſhall go as Land, not only to the Iſſue of the Marriage, but likewiſe to a collateral Heir or general Remainder-man; unleſs there appears ſome Variation in the Parties Intent. And indeed it is very reaſonable that it ſhould be ſo; for, otherwiſe the Neglect of Truſtees,

Truſtees, or any other Accident, might overthrow all Mens Agreements and Contracts enter'd into upon the beſt and moſt valuable Conſiderations. But it has been objected, that this Caſe differs from all thoſe; for, that the Money was never depoſited, but remained in the Lord *Lechmere*'s own Hands; and that he only was the Debtor. So now the Queſtion is, Whether this will make any Difference? An Heir can no more be looked upon as a Creditor againſt his Anceſtor, than he can be looked upon as a Purchaſer under him; he takes with the ſeveral Burdens that his Anceſtor lays upon him. And as, on the one hand, the Lord *Lechmere* bound himſelf, by his Covenant, to lay out this Sum of 30000 *l.* in Land; he, on the other, acquired a Right to an Eſtate for Life, and to a Remainder in Fee, which by his Death are now ſevered, and the Remainder only deſcends upon the Heir. If a Man articles for a Purchaſe, and binds himſelf, his Heirs, Executors and Adminiſtrators, he may as well be called, in that Caſe, both Covenantor and Covenantee, as in the preſent one; but yet the Heir is intitled to have the Purchaſe compleated, and may compel the Executor to do it; becauſe their Rights are different; as appears from the Caſe of *Holt* verſus *Holt*, 2 *Vern.* 322. And where-ever a Man's Deſign appears to turn his perſonal Eſtate into Land, this gives his Heir an Advantage which this Court will never take from him. None of the Caſes cited warrant this preſent Diſtinction that is endeavoured at; and in Reaſon, I am ſure, there is nothing to warrant it; the Intent and Agreement of the Parties being the ſame in both Caſes; which, if effectual in one Caſe, I cannot ſee why it ſhould not be ſo in the other. The only Caſe, from which any thing like this Diſtinction can be collected, is that of *Kingſton* and *Sowray*; but I am no ways ſatisfied that that Caſe was reſolved upon that Reaſon: For in that Caſe, the Huſband had alter'd the Truſt, and the Limitations of it. Beſides, in that Caſe no body had any Intereſt in it but he and his Wife; and the Court, as appears by the Decree, laid great Streſs upon the Change of his Intent, appearing by changing the Truſt: But here no Change appearing, the Intent remains as it

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was at the Time of the Covenant enter'd into; and conſequently a very wide Difference between the two Caſes. In the Caſe of *Chaplin* verſus *Horner*, the Huſband alone was to have the Benefit of the Articles; and therefore not at all like the preſent Caſe. I therefore think that this Caſe falls within the common known Rule, *That Money articled to be laid out in Land is to be looked upon as Land.* The Lord *Lechmere* was bound at the Time of his Death to lay out this Money in Land; by which he gained a Right to an Eſtate for Life, with a Remainder in Fee; and the Eſtate for Life being determined by the Death, the Right which he had to the Remainder deſcends upon his Heir; and as it comes by his Death, nothing that has been done by the Lady *Lechmere*, either as to the Waiver of her Jointure, or any Thing elſe, can alter or defeat that Right. Indeed to ſuppoſe it would be abſurd.

The Caſes upon Satisfaction are generally between Debtor and Creditor; and the Heir is no Creditor, but only ſtands in his Anceſtor's Place. One Rule of Satisfaction is, that it depends upon the Intent of the Party; and that which way ſoever the Intent is, that way it muſt be taken. But this is to be underſtood with ſome Reſtrictions; as, that the Thing intended for a Satisfaction be of the ſame Kind, or a greater Thing in Satisfaction of a leſſer: For, if otherwiſe, this Court will compel a Man to be juſt before he is generous; and ſo will decree both. But theſe Queſtions are no way material in this Caſe, which turns intirely upon my Lord *Lechmere*'s Intent at the Time of theſe Purchaſes made. Thoſe made before the Covenant can never have been deſigned to go in Performance of the ſubſequent Covenant, his Intent being clear, that the whole Sum of 30000 *l.* ſhould be laid out from the Time of the Covenant. Then there are Terms, with Covenants to purchaſe the Fee; but Terms are not deſcendible to the Heir, and ſo no Satisfaction. The like of Reverſions; eſpecially ſeeing the Lives did not fall in during the Lord *Lechmere*'s own Life. But as to the Purchaſes of Lands in Fee-ſimple in Poſſeſſion, it is to be conſidered, that there was no Obligation

tion upon the Lord *Lechmere* to lay out the whole Sum at one Time. Now here are Lands in Poſſeſſion, Lands of Inheritance, purchaſed; which though not purchaſed with the Privity of Truſtees, yet it was natural for the Lord *Lechmere* to ſuppoſe that the Truſtees would not diſſent from thoſe Purchaſes, being entirely reaſonable; the Deſign of inſerting Truſtees being not to prevent proper, but improper Purchaſes: And though they were not purchaſed within the Year, yet no body ſuffer'd by it; and ſo this Circumſtance cannot vary the Intent of the Party in a Court of Equity. The Intent was, that as ſoon as the Whole was laid out, it ſhould be ſettled together; and not to make half a Score Settlements. In the Caſe of *Wilcox* and *Wilcox*, 2 *Vern.* 558. the Covenant was not perfected; nothing done towards it ſtrictly, but ſome Steps taken by the Anceſtor which ſeemed to be intended that way: And it is as reaſonable to ſuppoſe theſe Purchaſes to have been intended to ſatisfy this Covenant in the preſent Caſe, as it was to ſuppoſe it ſo in that. And ſo varied the Decree as to this Point only, *viz.* as to the Fee-ſimple Lands in Poſſeſſion purchaſed ſince the Covenant.

Jermyn verſus *Fellows.*

16 and 17 *May.*

BY a private Act of Parliament, 13 *Will.* 3. intituled, *An Act for enabling* Stephen Jermyn *to make Proviſion for his younger Children, and for the Advancement of his eldeſt Son*, it was enacted, That the Sum of 3750 *l.* remaining in the Chamber of *London*, and the Intereſt thereof, ſhould be veſted in Truſtees named in the Act, upon Truſt that they ſhould, by and with the Conſent of the ſaid *Stephen Jermyn*, the Father, in his Life-time, by any Writing under his Hand, teſtified in the Preſence of two or more Witneſſes, diſpoſe of the ſaid Sum unto and amongſt *Stephen Jermyn* the Son, *Martha* and *Catharine Jermyn* (Daughters of *Stephen Jermyn* the Father) and the Survivors and Survivor of them, and ſuch other Child and Children as the

Where there is a Sum of Money provided for younger Children, and one of the Younger becomes Eldeſt, he ſhall have no part of this Money; but where the Money was, by a private Act of Parliament, to be appointed among *A. B.* and *C.* (naming them) and *A.* afterwards becomes Eldeſt, he is capable of an Appointment in his Favour.

the ſaid *Stephen Jermyn* the Father ſhould hereafter have, in ſuch Manner, Proportion and Proportions, and at ſuch Time and Times as the ſaid *Stephen Jermyn* the Father, by his laſt Will in Writing, or other Deed under his Hand and Seal, teſtified by two or more Witneſſes, ſhould limit and appoint; and in Default of ſuch Appointment, or for ſo much of the ſaid 3750 *l.* whereof no Appointment ſhould be made, then unto, and amongſt ſuch and ſo many of the ſaid *Stephen Jermyn* the Son, *Martha* and *Catherine*, and the Survivors and Survivor of them, and ſuch other Child and Children as the ſaid *Stephen Jermyn* the Father ſhould hereafter have, and ſhould not be provided for out of any Part of the 3750 *l.* Share and Share alike; and in caſe any of them died before Twenty-one, or Marriage, then his or their Share to go to the Survivor or Survivors.

At the Time of this Act made, *Stephen Jermyn* had five Children; *John* his eldeſt Son, *Stephen* his ſecond Son, *Mary*, *Martha*, and *Catherine*; *Mary* was provided for before the Act paſſed, upon her Marriage, and ſo recited in the Act; *John* died ſoon after the Act paſſed, under Age and without Iſſue, in his Father's Life-time; whereupon *Stephen* the ſecond Son became intitled to the Proviſion made for the eldeſt Son; *Martha*, upon her Marriage, had 1050 *l.* appointed to be paid her by the Father, in full of her Share of the ſaid 3750 *l.* and *Catherine* married the Defendant *Fellows*, and died after having attained her Age of Twenty-one, (no Part of the 3750 *l.* having been appointed to her) and left ſeveral Children; after her Death, upon the 23d of *June* 1720. *Stephen Jermyn* the Father, by Deed duly executed, directed the Truſtees to pay the remaining 2700 *l.* to his Son *Stephen Jermyn*, his Executors and Adminiſtrators, and died ſoon after; then died *Stephen* the Son, leaving Iſſue the Plaintiff, who claimed under this Appointment made to his Father: The Defendant inſiſted, that *Stephen* becoming eldeſt Son by his Brother *John*'s Death, became intitled to the Proviſion made for the eldeſt Son; and ceaſing to be a younger Child, became thereby incapable of taking by Force of the Appointment; and ſo

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he being diſabled, and *Martha* having been fully provided for out of the 3750 *l.* the remaining 2700 *l.* belonged to him as Adminiſtrator of his late Wife; it being a Part not appointed according to the Direction of the Act. The Queſtion was, Whether this Appointment to *Stephen Jermyn* the Son, being eldeſt Son at the Time of the Appointment made, was a good Appointment within the Meaning of this Act?

Lord Chancellor. It is clear from the Words of this Act, that the Legiſlature intended to provide for *Stephen*, *Martha* and *Catherine*, and for any other younger Children which *Stephen Jermyn* the Father ſhould have; and without doubt *Stephen* was at that Time conſider'd as a younger Child. The Father, purſuant to his Power, made an Appointment to *Martha* and her Huſband of 1050 *l.* which was accepted by them in full of *Martha*'s Share; ſo that ſhe is quite out of the Caſe. And the only Queſtion is, Whether the Appointment to *Stephen* the Son of the remaining 2700 *l.* be a good Appointment? And the Intent of the Act has been much relied on; and it has been compared to Marriage Settlements, when younger Children are ſo called in Oppoſition to him who takes the Eſtate; although that, in the ſtrictly grammatical Senſe, the ſecond born can never be called the Eldeſt. The Caſe of *Chadwick* verſus *Doleman*, 2 *Vern.* 328. was much ſtronger. For, there he was younger Son at the Time of the Appointment made, and yet it was brought back again ſeven Years after. That Caſe aroſe upon a Settlement; this ariſes upon an Act of Parliament, in which the Intent ſhall prevail againſt the very Words; but then that Intent muſt be plain and clear: Now *Stephen* is indeed called a younger Child in the Preamble; but when the Power of Appointment is given, it is not to appoint amongſt the younger Children generally, but to *Stephen*, *Martha*, and *Catherine*. And it is obſervable, that the Power might have been executed, Part at one Time, and Part at another, by one or more Deeds, or by his laſt Will: Nor was there any Thing veſted until an Appointment made, but all was uncertain

certain until he appointed. And the Legiſlature had in view that there might be a Death in the Father's Life-time, by reaſon of the Words *Survivor and Survivors.* *Martha* being out of the Queſtion, no body is to be conſider'd but *Catherine* and *Stephen*; *Catherine* died long before the Appointment, and conſequently none in Being at that Time but *Stephen:* And I think it would be very hard to take it from him in Favour of an Adminiſtrator, who has no other Right than ſhe had; and that is none at all, ſhe dying before the Execution of the Power, which was ambulatory until the Father's Death. So that this Caſe differs greatly from that of *Chadwick* verſus *Doleman,* where the Queſtion was between the eldeſt Son, become ſo by his Brother's Death, and the other younger Children; all which had as good a Right as Sir *Thomas Doleman* himſelf. Beſides, the Power in the preſent Caſe is to appoint it to the *Survivor or Survivors*; and if *Stephen* be incapable of taking, there is no body left to take; for, *Mary* was fully provided for before the Act; *Martha* had accepted of 1050 *l.* in full for her Share, and *Catherine* died before the Execution of the Power; ſo that unleſs *Stephen* can take, the Appointment muſt be meerly void. And then it will come to this, that *Stephen* is the only Perſon left who can take. Indeed he was a younger Child at the Time of the Act made; but Circumſtances are ſince altered, there being no body left but he: Whereas in *Chadwick* verſus *Doleman* there were younger Children capable of taking at the Time, as well as Sir *Thomas Doleman* himſelf.

And ſo decreed the Appointment to be good.

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Term. S. Trinitatis

9 Geo. II.

In CURIA CANCELLARIÆ.

Clarke v Richards. 1 Jo 06368.

Bellamy verſus *Burrow.*

June 14.

THE late Mr. *Bellamy* (the Plaintiff's Father) was, by Letters Patent 4 G. 1. intitled to the Office of *King's Coroner and Attorney in the King's Bench,* to hold by himſelf, or his ſufficient Deputy, during his Life, after the Death of *Simon Harcourt* and *William Bordrigge:* Mr. *Harcourt* died in the Year 1724. and the 9th of *May* in the ſame Year, *Bordrigge* ſurrendered to the Crown; whereupon Mr. *Bellamy* enter'd upon and enjoy'd the Office. About this Time Mr. *Bellamy,* being deſirous to have another Life in the Office, obtained new Letters Patent *May* 14, 1724. granting the Office to Mr. *Burrow* (who was his near Relation) to hold by himſelf or Deputy, during his Life, after Mr. *Bellamy*'s Death; Mr. *Bellamy* acquainting the Defendant, that he had inſerted his Name in a Warrant from the King for a Grant of the Office, wrote a Note in the following Words, *viz. May* 8, 1724. (which was the Day before the Surrender by *Bordrigge,* and ſome Days before the Date of the Letters Patent)

A. being in Poſſeſſion of the Office of Clerk of the Crown, &c. in the King's Bench, in which *B.* has alſo an Eſtate for Life, procures *B.* to ſurrender, and ſolicits a Patent for himſelf and *C.* and takes a Note from *C.* promiſing to declare a Truſt for *A.* The Patent afterwards is obtained; *A.* dies in Debt, and without calling for a Declaration of this Truſt; this Note was held to be a ſufficient Declaration of Truſt.

" Whereas Mr. *Bellamy* has cauſed my Name to be inſerted
" in a Warrant from the King for a Grant of his Majeſty's
" *Coroner and Attorney in B. R.* in order for the Paſſing of
" a Grant thereof, I do promiſe, at his Requeſt, to exe-
" cute in due Form any Declaration of Truſt, with proper
" and uſual Covenants, that ſhall be reaſonable; declaring
" my Name is uſed in Truſt for the ſaid Mr. *Bellamy*, his
" Executors and Aſſigns."

This Note was then ſigned by Mr. *Burrow* the Defendant, and delivered by him to Mr. *Bellamy*; no other Declaration of Truſt was ever executed by the Defendant: But in *February* 1732. Mr. *Strutt*, being employ'd in Mr. *Bellamy*'s Affairs, received Orders from him to draw his Will; and having received Inſtructions from him for that Purpoſe, (but none particularly concerning the Crown-Office) and apprehending from his general Inſtructions, that Mr. *Bellamy* intended to deviſe his Patent-Office, and the Profits thereof, in the ſame Manner as he had directed all his other Eſtate real and perſonal to be deviſed, inſerted in the Draught which he prepared the following Clauſe, *viz. And as to the Office commonly called the Crown-Office, whereof I am Patentee, determinable upon my Life, and the Life of* —— Burrow, *Eſq; I give the ſaid Patent, and all Benefit ariſing therefrom, to my Executors, their Executors and Adminiſtrators in Truſt, to apply and diſpoſe of the Profits ariſing therefrom in the Purchaſe of Lands, to be ſettled to the Uſes laſt above-mentioned; and it is my Will, that my Executors do not give up my Right to appoint Clerks generally to act in the ſaid Office, nor to the Benefit of filing and copying Affidavits; but to have Recourſe to all lawful Means in the confirming my Right in the ſaid Office, and to the Profits ariſing therefrom,* &c. *And it is my Will, that the ſaid* Burrow *do act in the ſaid Office as Maſter thereof, for the Benefit of my Son, or appoint a Deputy, as he ſhall think proper.* Mr. *Strutt* attending Mr. *Bellamy* ſoon after with the Draught of the Will, at the reading of this Clauſe, Mr. *Bellamy* was greatly ſurpriz'd, ſaying he had given no ſuch Inſtructions; and directed the Clauſe to be left out of the Ingroſſment of his Will, it being

being no Part of his Intention. Some Days after, Mr. *Bellamy* being deſirous to ſee the State of his Affairs as drawn up by Mr. *Strutt*, directed him to make an Alteration in relation to the Crown-Office in the following Words, *viz. That Mr.* Burrow *might inſure the Crown-Office for the firſt Year, or until he ſhould obtain a farther Grant; and act in the ſame Office himſelf, or appoint a Deputy, as he ſhould think proper*; and a Day or two after he order'd this Clauſe to be left out of his Will, which accordingly was done, and his Will duly executed by him; whereby he, after Payment of his Debts and Legacies, deviſed his perſonal Eſtate to his Executors, in Truſt to inveſt the ſame, together with other Monies ariſing from the Sale of ſome Lands, in the Purchaſe of Land, to the Uſe of the Plaintiff (his only Child) and the Heirs Male of his Body, Remainder to his two Siſters for Life, Remainder to the Defendant *Burrow* in Tail Male, and made the Defendant one of his Executors. The Teſtator ſoon after died, leaving a great Load of Debts, far exceeding his real and perſonal Eſtate. The Queſtion was, Whether Mr. *Burrow* was (upon this whole Caſe) to be looked upon but as a Truſtee, or whether he ſhould hold the Office in his own Right?

The Caſe was firſt heard at the *Rolls*, where the Plaintiff's Bill was diſmiſſed, and the Office decreed to Mr. *Burrow* in his own Right, upon the following Reaſons:

Maſter of the Rolls. The Ability of any Perſon, to whom a Patent is granted for the Execution of an Office relating to the Adminiſtration of Juſtice, is the Foundation upon which the Patent paſſes; as appears from *Winter*'s Caſe, *Dy.* 150. *b.* which was a Grant of this very Office; and from the Lord *Hobart*'s Opinion in the Caſe of *Glover* verſus *Biſhop of Litchfield*, *Hob.* 143. and if it afterwards appears, that the Perſon to whom ſuch Grant is made is unſkilful, and unable to execute it, ſuch Grant is void; as it was held by all the Judges in *Winter*'s Caſe: The Reaſon is, that an Office relating to the Adminiſtration of Juſtice highly

highly concerns the Public; and is not conſider'd as the private Property of the Perſon enjoying it, independently of his Skill and Integrity in the Diſcharge of his Duty; and therefore Grants of this Kind being made upon this Foundation, if there is any Truſt to be declared by the Perſon to whom ſuch Office is granted, the Crown ought to be privy to it; and the Ability and Integrity of the Perſon, for whoſe Benefit it is, ſhould be known, and approved. Nor do I think that a private Dealing between two Perſons concerning a public Office (eſpecially the Crown-Office, the due Execution of which ſo greatly concerns the Public) ought, for the Reaſons before-mention'd, to receive any Countenance in a Court of Equity: And there cannot, in this Caſe, be the leaſt Pretence to determine it as a Truſt between the Crown and the Nominee; ſince the Crown is no way privy to any Truſt declared or intended between the Parties. Perhaps indeed, it might be too hard to ſay, that all Truſts of Offices of this Kind, which are held by Patent, are void; and therefore the Nature of this Office, the Circumſtance under which the Truſt is declared, and the Ability of the Perſon for whoſe Benefit it is declared to execute it himſelf, or appoint a proper Deputy, are to be taken into Conſideration, and will in ſome Meaſure govern the Opinion of the Court. But ſtill, whatever may be the Circumſtances of any Caſe relating to an Office that concerns the Adminiſtration of Juſtice, I ſhall always be very careful how I ſever the Profits from the Duty of it; the Reaſon of which is founded in the Relation of Things: ſince, without the Obſervance of this, the Dignity cannot be ſupported, nor the Attendance recompenſed, which are neceſſary for the due Execution of it; by which Means the Public will ſuffer the more, in order to increaſe the Gain of a private Perſon.

The Objections to Mr. *Burrow*'s enjoying the Office in his own Right are, Firſt, That he has given a *Memorandum*, which in a Court of Equity will amount to a Declaration of Truſt. Secondly, That ſubſequent to this, and even

even ſhortly after the Teſtator's Death, he declared, that his Name was uſed in the Patent only in Truſt for Mr. *Bellamy*, or to that Effect. Thirdly, That the Teſtator died inſolvent; and therefore the Grant to Mr. *Burrow* ought to be declared a Truſt for the Benefit of his Creditors.

To ſupport the firſt Objection, it has been ſaid, That although the Declaration was but imperfect and executory, and imported in Strictneſs a farther Act, which was never demanded by Mr. *Bellamy*, and conſequently never done by Mr. *Burrow*; yet that Part of it, relating to the Execution of a farther Deed, makes it unneceſſary; ſince the Words are, *I do promiſe at his Requeſt, in due Form to execute any Declaration of Truſt, with proper and uſual Covenants, declaring my Name is uſed in Truſt for him*; from whence it was collected, that the Words *is uſed in Truſt* were an immediate Declaration, and in Strictneſs took Place when the Paper was ſigned: But I don't think that any Streſs can be laid on this Part of the *Memorandum*; ſince the Words *is uſed in Truſt* do manifeſtly refer to a future, and cannot be therefore conſtrued into a preſent Declaration; nor will any Court ſtrain or torture Words to make them import what is evidently contrary to their plain Meaning. Beſides, the Limitation in Mr. *Bellamy*'s Will in Favour of Mr. *Burrow* does, *prima facie*, prove that he intended to provide for him; and from Mr. *Strutt*'s Evidence it is plain that he declined, at two ſeveral Times, aſcertaining the Truſt, or explaining himſelf concerning the Crown-Office. From all which it ſeems plain to me, that the *Memorandum* ſigned by Mr. *Burrow* was only taken to make ſuch Uſe of it as, from the future Behaviour of Mr. *Burrow*, Mr. *Bellamy* might think proper with regard to this Office; and not as an actual Declaration of Truſt: And Mr. *Bellamy*'s Conduct at laſt does pretty clearly explain what his Meaning was at the firſt. As to the ſecond Objection, Mr. *Burrow* might poſſibly declare that he looked upon himſelf as a Truſtee for Mr. *Bellamy*, knowing that he had executed that *Memorandum*: But this only ſhews what Mr. *Burrow*'s Sen-

timents were, not Mr. *Bellamy*'s, by which the preſent Caſe muſt be govern'd.

As to the laſt Objection, *viz.* The Inſolvency of Mr. *Bellamy*, it cannot affect a Matter of this Conſequence relating to the Execution of an Office of ſo great a Truſt, in which the Confidence of the Crown, and the Good of the Publick, muſt be conſider'd before the Caſe of Creditors. And ſo diſmiſſed the Bill; expreſſing in a particular Manner his Approbation of Mr. *Burrow*, with regard to his Skill and Probity in the Diſcharge of his Duty; and declared, that he did not doubt that if the *Lord Chancellor* ſhould, upon an Appeal be of Opinion that Mr. *Burrow* was but a Truſtee for Mr. *Bellamy*'s Creditors; yet he would think (as his Honour ſhould have done, had he been of that Opinion) that Mr. *Burrow* was intitled to a very liberal Allowance. This Caſe was now reheard by the *Lord Chancellor* upon the ſole Point of the Truſt.

Mr. *Attorney General*, Mr. *Solicitor General*, Mr. *Chute*, and Mr. *Daval* argued for the Defendant, that there was a plain Intention of Kindneſs appearing by the Will, from Mr. *Bellamy* to the Defendant; and that ſuch Intentions have always, in Conſtruction of Truſts of this Kind, had a great Weight with the Court. That Mr. *Bellamy*'s Intent, at the Time of the Grant obtained, ſeems uncertain, and to be aſcertain'd afterwards by his future Choice. That the Wording of the Note given by the Defendant, ſhewed clearly that it was not intended as a preſent Declaration of Truſt: But only to ſecure a future Declaration upon Mr. *Bellamy*'s Requeſt, in caſe the Defendant, who was then very young, ſhould not behave to his Satisfaction. Here was no Demand ever made, nor the leaſt Pretence of Misbehaviour in the Defendant. And had Mr. *Bellamy* intended the Profits of this Office as an additional Eſtate, he would ſurely have ſaid ſomewhat of it in his Will, wherein he is very particular in the Diſpoſition of all his Eſtate both real and perſonal: Nor can he be ſaid to have forgot

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Mr. *Burrow*, having limited ſeveral Eſtates to him in Remainder, and made him Executor of his Will. That when the Perſon who drew his Will had officiouſly inſerted a Clauſe, whereby this was declared to be a Truſt, he blamed him, and ordered that, before the Will was engroſſed, this Clauſe ſhould be left out, and nothing of it to be mentioned, which was a ſtrong Preſumption that he intended it ſolely for the Defendant's Benefit: It being very ſtrange to ſuppoſe that, had he intended him to be but a bare Truſtee, he ſhould make no Proviſion for him, but make him execute the Office without any Conſideration at all. That tho' the Intent ſeemed ſo ſtrongly with the Defendant, it was alſo worthy the Conſideration of the Court, whether ſuch an Office, ſo highly concerning the Adminiſtration of Juſtice, could be granted in Truſt, the Publick being very much concerned in the Execution of it? and as it muſt, by Law, be granted to a Perſon who is fit and expert, otherwiſe the Grant is void, whether it was not proper and reaſonable that the Officer ſhould have the Profits to his own Uſe? That the Office of Marſhal was held in Sir *George Reynolds*'s Caſe, 9 *Co.* 95. not to be grantable for Years, for many Reaſons which will weigh as ſtrong againſt Dealings of this Nature; particularly that which ſays, that in Offices concerning the Adminiſtration of Juſtice the Truſt which the Law repoſes in the Officer is individual and perſonal; and that the Law will not repoſe Confidence in Matters relating to the Adminiſtration of Juſtice in Perſons unknown. And that this being the Caſe of Creditors who were likely to remain unſatisfied, could not vary the Nature of this Office, which was no more liable to become legal Aſſets than an Office in Fee, or a Stewardſhip of a Manor granted for Life, could be deemed ſo upon Judgment obtained againſt the Anceſtor, either in the Hands of the Heir in the firſt Caſe, or againſt the Grantee himſelf in the ſecond Caſe. *Dyer* 7. *b.* is an expreſs Authority that Offices of Truſt are not Aſſets; for, here the Queſtion was, Whether the Profits of the *Philazer*'s Office could be taken in Execution? and held they could not: For, Execution can only be of ſuch Things as

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are grantable or aſſignable; which an Office of *Philazer* is not, it being a perſonal Truſt that cannot be aſſigned. This Reſolution likewiſe ſhews how careful the Law is in not ſevering the Profits of an Office from the Duty of it. And in the great Caſe of the Earl of *Oxford*, Sir *William Jo.* 127. it is held by *J. Dodderidge*, that no Uſe can be of an Office at Common Law. There never was an Inſtance of a Truſt of ſuch an Office being carried into Execution in this Court. That of a Maſter of this Court was never yet attempted to be granted upon a Truſt; nor if it had, is it likely that ſuch a Truſt would be countenanced here; and yet the Office now in Queſtion is of as great Confidence in the Court of *King's Bench*, as that of a Maſter is in this Court. Nor can the Court of *King's Bench*, in caſe this ſhould be conſtrued to be a Truſt, get at the *Ceſtui que Truſt* to make him anſwerable in caſe of any Miſdemeanor; the Perſon executing the Office being the only one that they can take Notice of. In Sir *George Reynolds*'s Caſe, 9 *Co.* 97. *b.* it is ſaid, That this very Office of Clerk of the Crown, and other Offices of other Courts relating to the Adminiſtration of Juſtice, are to be granted in the ſame Manner as they always have been granted: For, that otherwiſe good Clerks will be deterred from applying themſelves to Knowledge, if ſuch Offices ſhould become ſaleable or transferrable from one to the other for Lucre: And upon that alſo would ariſe Corruption in the Office, and Extortion from the Subject. If therefore this Office is neither legal Aſſets, nor liable to be taken in Execution, becauſe not aſſignable, according to *Dyer* 7. *b.* nor ſaleable, nor grantable for Money, by *Stat.* 5, 6 *E.* 6. *cap.* 16. then the Profits of it cannot be accounted for upon a Truſt; the latter being as much within the *Statute* as the former: For, there is but little Difference whether I convey my Office for a preſent Sum of Money, or upon Condition that the Grantee ſhall pay the Profits of it to me; and all corrupt Bargains relating to the Sale of Offices being void by the *Statute*, if ſuch a Proceeding as this was to meet with any Countenance, that good and wholeſome Law might be intirely eluded: So that taking the *Memorandum* to be even a preſent Declaration of

Truſt,

Truſt, it is void by the *Statute* of 5 & 6 *E.* 6. and conſequently the Office muſt be decreed to the Defendant, to hold and enjoy it in his own Right, diſcharged from any Truſt.

Mr. *Verney*, Mr. *Fazakerley*, and Mr. *Strange* argued, on the other hand, That Mr. *Burrow* was a meer Truſtee; and that the *Memorandum* he had ſigned was a clear and plain Declaration of Truſt. And that a Truſt might well be annexed to a Thing which is neither grantable nor extendible. But if this ſhould be conſtrued to come within the *Statute* 5 & 6 *E.* 6. *cap.* 16. then not only the Declaration of Truſt would be void, but likewiſe the Grant itſelf to the Defendant. But this Office might well be granted in Truſt notwithſtanding the *Statute*; for, that only avoids corrupt Agreements between the Grantor and Grantee of an Office; and cannot be conſtrued to extend to ſuch as come in Nomination only to execute the Office without having any thing to do with the Profits of it, but only to ſuch as are themſelves the beneficial Officers. Here is no corrupt Agreement between the Grantor and Grantee; but a Grant of this Office obtained at the ſole Charge of Mr. *Bellamy*, and no Conſideration at all moving from the Defendant. That though an Office was not, ſtrictly ſpeaking, legal Aſſets; yet if an Officer conveys the Profits of an Office to Truſtees for Payment of his Debts, this Court will carry ſuch a Truſt into Execution; as appears from the Caſe of *Thynn* verſus *Jacob*, *June* 16, 1656. where the Lord *Goring* having a Grant of the Offices of Clerk of the Counſel, and Clerk of the Signet of the Court of the Preſident and Counſel of the Marches of *Wales*, convey'd the Profits to two Truſtees for the Payment of his Debts; Mr. *Thynn*, a ſubſequent Creditor, brought his Bill againſt the Truſtees for an Execution of the Truſt, and to have his Debt paid, and ſo decreed by the then Commiſſioners of the Great Seal; and upon a Rehearing in 1661. before the Lord *Clarendon*, the Decree was affirmed, the Validity of the Truſt being never queſtioned. The like Determination was in the Caſe of *Powell* verſus *Drake*, *May* 10, 1731. in this Court; where Mr. *Drake* having a Grant of the

Office of Chirographer of the Court of *Common Bench*, in the Names of *Bennet* and *Champion*, who had declared the Truſt to be for the Benefit of Mr. *Drake*, he deviſed it for Payment of his Debts and Legacies, and decreed, upon the Maſter's Report, That the Office ſhould be ſold for Satisfaction of his Creditors; and ſo it was afterwards for 3500 *l.* The Arguments, that the Profits of the Office are not to be ſevered from the Execution of it, are not warranted by any of the Caſes cited. Sir *George Reynolds*'s Caſe was adjudged upon the great Inconveniency that might enſue upon a Grant for Years; as if the Grantee ſhould die inteſtate, there would be none to execute it until Adminiſtration granted; which perhaps might not be for a long Time. And indeed if that Doctrine was to prevail, it would overthrow all the Benefit which the Law gives to the Grantee of an Office, whoſe Grant is to hold it by himſelf or ſufficient Deputy: Which Words are ſo beneficial and ſtrong, that in *Young* and *Fowler*'s Caſe, *Cro. Car.* 555. a Grant of the Office of Regiſter to an Infant of eleven Years of Age, to be executed by him or his Deputy, was held good; for that he might appoint a ſufficient Deputy; which if he did not, or if the Deputy miſbehaved, it is a Forfeiture of the Office: And there a Difference is taken between ſuch a Grant, and where the Grant is to the Infant alone. Nor can any thing be inferred from the Caſes cited in *Dyer* 7, 150. but that the Publick is concerned, that the Offices that relate to the Adminiſtration of Juſtice be executed by proper Perſons; which does not at all preclude the Grantee from making a Deputy: For, the Office being executed by a ſufficient Perſon, the Weal public is ſatisfied. In the Caſe of *Culliford* and *Cardonell*, *Salk.* 466. a Difference was taken between a Bond for the Payment of a Sum in Groſs for an Office, and a Bond for accounting for Part of the Profits as his Deputy; which comes pretty near our Caſe. And that the Law will, in ſome Caſes, allow the Profits of an Office to be ſevered from the Execution of it, appears from the common Caſe of Sequeſtration of the Profits of a Benefice for Payment of Debts

Debts, where the Benefice (*viz.* the Cure of Souls) is as much an Office as that now in Queſtion.

Lord Chancellor. The firſt Queſtion is, Whether Mr. *Burrow* is to be looked upon but as a Truſtee for Mr. *Bellamy*'s Creditors, or whether he is to hold this Office in his own Right, diſcharged from any Truſt? It muſt be conſider'd, that at the Time of this Grant Mr. *Bellamy* was himſelf in the Office for his own Life, and alſo for the Life of another who ſurrendred, in whoſe Stead a Grant was obtained to Mr. *Burrow* for his Life; upon which he gives ſuch a Paper as I think amounts to a Declaration of Truſt: It has been ſaid, that this related to a future Act, and was not intended as a preſent Declaration; but I cannot think ſo: It ſeems to be quite proper for a Declaration in preſent. There is an expreſs Promiſe, which would not perhaps have been ſo ſtrong, if at that Time the Grant had been actually paſſed and perfected; but it was not ſo at this Time: And therefore the Tranſaction was ſufficient as Things ſtood. Nor can I think it right to admit of Mr. *Strutt*'s Evidence to ouſt a Conſtruction which appears from the Nature of the Tranſaction itſelf. The Intent muſt be collected from the Words of the Note, and from the Circumſtances appearing at the Time of the Note given. The not mentioning any thing of it in his Will might be to leave the Defendant at Liberty to execute this Office either by himſelf or Deputy; or for many other Reaſons, as well as thoſe that are inſiſted on. And by the Inſtructions given to *Strutt*, he had order'd his Executors to inſure this Office for 2000 *l.* So that if theſe Inſtructions were admitted to weigh any thing, they would rather weigh againſt the Defendant than in his Favour.

The next Queſtion is, Whether by Law there can be a Truſt of this Office, if this Caſe be within the Statute of 5 *&* 6 *Ed.* 6? I ſhould do Mr. *Burrow* but little Service in decreeing for him, if it be within the *Statute*. In that Caſe the Whole is void, and the Office vacant; the *Statute* diſabling the Party buying, as well as ſelling: So that it would

would lead us farther perhaps than the Defendant deſires. The Deſign of the *Statute* was to reſtrain corrupt Agreements between the Grantor and Grantee; but here is no ſuch Thing; this being a gratuitous Grant from the Crown of this Office, without any Conſideration at all, either from Mr. *Bellamy* or Mr. *Burrow*; here is a bare Nomination of Mr. *Burrow* to act, but nothing at all to bring it within the *Statute*, for want of a corrupt Agreement between the Truſtee and the *Ceſtui que Truſt*. Indeed the Reaſon of the Thing ſpeaks itſelf; for, where the Officer is to have no Part of the Profits to his own Uſe, but barely his Name made Uſe of, What Inducement can he have to give a Sum of Money for an Office, the Profits of which he is to be no way benefited by? The Caſes that have been cited for the Defendant do not come up to the preſent Caſe; for, here can be no Want of an Office nor of a proper Officer; he being Officer ſtill, though not to his own Uſe: So that this differs widely from the Reaſons in Sir *George Reynolds*'s Caſe and the other Caſes. As I am therefore perſwaded that here was a Truſt intended, I think it ought to be carried into Execution. It has been objected by the Defendant's Counſel, that it was meerly executory; but I do not think it more ſo than any other Truſt; every Truſt is, in ſome Sort, executory; for, they all relate to ſome future Act to be done; and this does no more: And whatever may hereafter happen in caſe a Deputy be made, and that he miſbehave, the Loſs muſt be born by the Truſt Eſtate; and conſequently no Damage to Mr. *Burrow*, who is but a nominal Officer only.

And ſo reverſed the Decree; but order'd, that after the Account ſettled, the Maſter ſhould make a very liberal Allowance to Mr. *Burrow* for the Time he had actually executed the Office, and alſo for the Time to come.

Gifford

mar v Wardle 7 Jac 84. Trevor v Davenport 2 Lev. 226.

Gifford verſus *Manley.*

June 21.

BY Articles previous to the Marriage of *Anthony Gifford*, dated the 20th of *September* 1717. the Sum of 400 *l.* was veſted in two Truſtees, *Buckingham* and *Jones*, to be put out at Intereſt; the Intereſt to be paid to the Huſband and Wife during their Lives, and the Life of the Survivor of them; and after their Deaths, then to ſuch Children of the Marriage as ſhould be appointed by the Survivor, and in ſuch Share and Proportion as ſhould be appointed; and it was farther agreed, that neither of the Truſtees ſhould be anſwerable for the Act of the other. The 400 *l.* was paid to *Buckingham* only, who gave a Receipt for it, and, by Writing under his Hand and Seal, dated *October* 1, 1717. declared, That *Jones*, the other Truſtee, had received no Part of the 400 *l.* but that he had received the Whole. *Buckingham* dies inteſtate, having never placed out the 400 *l.* according to the Truſt, but having kept it in his Hands till his Death. The Queſtion was, Whether this was to be looked upon as a Simple Contract Debt only, or whether as a Specialty Debt, being under Hand and Seal?

A. and *B.* are Truſtees under a Deed, by which neither of them is to anſwer for the other. *A.* receives a Sum of Money under the Truſt, and gives a Writing under Hand and Seal, acknowledging it, and that *B.* had received no Part of it; *A.* never placed out the Money, and dies; this Writing is a Specialty, and good againſt the Executor, but not againſt the Heir of *A.* he not being mention'd in it.

The *Maſter of the Rolls* had decreed it a Specialty Debt, to affect the Executor only, but not the Heir, he not being bound, nor the Declaration under Hand and Seal extending to him; and that the Plaintiffs ſhould ſtand in the room of ſuch other Creditors as had been ſatisfied out of the perſonal Eſtate, in caſe of Deficiency.

It was now inſiſted on, that an Acknowledgment, tho' without the Words *Teneri & firmiter obligari*, if under Hand and Seal, will create a Specialty Debt, becauſe under Hand and Seal. And to prove it were cited *Dy.* 20. *a. Ro. Ab.* 597. *Bro. Dette* 187. *Cro. Eliz.* 644.

Lord Chancellor. This without Doubt is to be conſidered as a Specialty Debt; there being no other Definition of ſuch a Debt but that it is under Seal: The Caſes which have been cited prove it. There was one tried at *York*, before the Lord *Macclesfield*, where a Man had given a Note to a Woman upon a Condition not proper to be mentioned, in the following Manner, *viz. Borrowed and received from* —— 100 l. *which I promiſe never to pay*, and he directed the Jury to find for the Plaintiff.

Here is a Contract that the Truſtees ſhall lay out this 400 *l.* and that one ſhall not be anſwerable for the other; and as *Buckingham* has, by a Paper under Hand and Seal, acknowledged that he received that Eſtate, he is become anſwerable for the Whole: And not having laid it out as he was bound to do, he has broke his Covenant. I have no Doubt but that this is a Specialty Debt: For, though Breaches of Truſt are indeed in ſome Caſes conſidered but as Simple Contract Debts; yet here it muſt be otherwiſe, by Reaſon of the expreſs Acknowledgment under Hand and Seal, that he alone has received the whole Money, and had received it as Truſtee for the particular Purpoſes mentioned.

And ſo affirmed the Decree.

July 2.

Hatton verſus *Nichol.*

The Teſtator deviſes, *as to all his worldly Eſtate, that his Debts be paid within a Year after his Deceaſe*; and then deviſes his real Eſtate to Truſtees for a Term in Truſt for his Wife for Life,

MR. *Nichol* made his Will in the following Words: "And as to the worldly Eſtate, with which it hath "pleaſed God in his abundant Goodneſs to bleſs me, I "give, deviſe and diſpoſe thereof as followeth: *Imprimis*, "I will that the Charges of my Funeral, and all Debts "which ſhall be owing by me at the Time of my Death, "be juſtly paid and ſatisfied; eſpecially that due to my "poor

Remainder to his Sons ſucceſſively in Tail Male; and gives ſeveral Legacies. The real Eſtate is chargeable with the Debts in caſe the perſonal do not ſuffice.

" poor Carriers, which I will ſhall be diſcharged out of " the firſt Money of mine that ſhall be received, of which " I deſire particular Care may be taken; and I will that " all my Debts be diſcharged within one Year after my " Deceaſe, or ſo ſoon after as can poſſibly be performed." And then deviſes his real Eſtate to Truſtees, in Truſt for his Wife for the Term of 99 Years, if ſhe ſo long live, and after her Death in Truſt for his Mother for 99 Years, Remainder to his firſt and other Sons in Tail Male, and gives away ſeveral ſpecific and pecuniary Legacies. The Queſtion was, Whether his real Eſtate was, by theſe Words, chargeable with the Payment of his Debts in the Caſe of a Deficiency of the perſonal Eſtate.

Mr. *Solicitor General* argued it to be a plain Charge upon the real, as well as the perſonal Eſtate; which appeared from the Proviſion, that they ſhould be paid within one Year: And cited the Caſe of the Earl of *Warrington* verſus *Leigh*, where the real Eſtate was held to be chargeable, tho' the Words were not ſo ſtrong as in the preſent Caſe.

Lord Chancellor. The Debts are well charged upon the real Eſtate, in caſe of a Deficiency of the perſonal Eſtate: Let an Account be taken of the Teſtator's Debts, and alſo of his perſonal Eſtate, not ſpecifically deviſed, which is firſt to be applied as far as it will go.

Proof verſus *Hines.*

July 3.

THE Plaintiff being intitled, in Right of his Wife, to ſome Part of the late Sir *Thomas Coleby*'s Eſtate, and being a very mean illiterate Perſon, and in very poor Circumſtances, applied to the Defendant (a Brazier by Trade) and his Wife, to aſſiſt him in making out his Pedigree, and getting ſuch Proofs are were neceſſary to the making out

The Plaintiff, a poor Man, ſuing for a conſiderable Eſtate, gives a Bond for a great Sum of Money to the Defendant, a Perſon who aſſiſted him with ſmall Sums, and took ſome Pains in the Affair: The Defendant's Wife had alſo intermeddled with her Huſband's Knowledge and Approbation; and the Bond was obtained by preſſing the Plaintiff for Payment of what was expended, and taking Advantage of his Inſolvency. The Bond decreed to ſtand only as a Security for what was advanc'd, and Intereſt; and the Defendant left at Liberty to bring his *Quantum meruit* for Pains, &c.

out his Title to this Eſtate; the Defendant telling him, That ſuch Things could not be done without Money; and he anſwering, That he had none, nor did not know where to raiſe any without the Defendant's Aſſiſtance, deſired him to advance it, and he would repay him: The Defendant accordingly laid out ſeveral Sums; and the Defendant's Wife imploy'd Perſons to ſearch Regiſters, *&c.* for the Plaintiff; pending the Suit, the Defendant's Wife often declared, that ſhe thought herſelf and her Huſband intitled to a good Gratuity for their Trouble and Aſſiſtance of the Plaintiff; but was reſolved not to truſt to the Plaintiff's Generoſity, but to bind him as faſt as Pen and Ink could bind him. The Plaintiff coming ſome time after to the Defendant's Wife, deſired her to continue her and her Huſband's Care for his Affairs; ſhe thereupon preſſed him very much for the Payment of what Money had been laid out by them; whereupon he offer'd to give a Bond for 1000 *l.* payable to the Defendant in a Year, for what Services they had already done, and for ſuch Care as they would hereafter take of his Affairs; to which the Defendant's Wife replied, he might take what Time he pleaſed for Payment of the Bond, but preſſed him very hard for Repayment of what had been laid out by her Huſband and her: The Plaintiff gave her his Bond for 1000 *l.* for the Uſe of the Defendant her Huſband after the Recovery of ſome Part of the Eſtate by the Plaintiff; this Bond was put in Suit, and now the Plaintiff brought his Bill to have it ſet aſide as unduly and unconſcionably obtained, by taking Advantage of the Diſtreſs he was then under.

It was in Proof in the Cauſe, That at the Time he gave this Bond he was in the meaneſt Circumſtances, being reduced ſo low as to live upon what broken Scraps of Meat he could get from Taverns and ſuch Places.

Mr. *Verney*, Mr. *Fazakerley*, and Mr. *Mills* argued for the Plaintiff, That he appearing to be illiterate, and in ſuch mean indigent Circumſtances, muſt naturally be ſuppoſed in the Defendant's Power; and that the Neceſſity of his Circum-

Circumſtances was the Cauſe of giving the Defendant a Bond for ſuch an exorbitant Sum. It can never be imagin'd that being *Sui Juris* he would have enter'd into a Bond by which the Defendant had it in his Power to throw him into Gaol, and keep him there all his Life, whether he had the good Fortune to recover what he was then ſuing for or not. And it can as little be thought that this Bond was deſigned as a meer Gratuity to the Defendant, the Plaintiff being at that Time not worth 5 *l.* in the World, and it being very uncertain whether he ſhould ever be in better Circumſtances than he then was. Bonds taken from young Heirs, Marriage-Brocage Bonds, though given quite voluntarily, and often too chearfully, are ſet aſide in this Court upon the Reaſon that the Party is not a free Agent, and that the free Operation of the Mind, which is neceſſary to give Validity to every Act, is wanting. This appears from the Caſe of *Curwen* verſus *Millner*, *June* 19, 1731. and from 2 *Vern.* 14, 27, 121. and the Caſe of *Twiſleton* and *Griffith*, heard before the Lord *Cowper* 1716. Theſe Caſes indeed were upon Contracts; where it may be ſaid nothing was intended by way of Gratuity: But there are Caſes where Bonds meerly voluntary, and not founded upon Contracts, have been ſet aſide as being unconſcionable. 1 *Vern.* 413. 1 *Salk.* 158. 2 *Vern.* 652, 764. In moſt of theſe Caſes there was a Hazard run by the Defendant, the whole Money muſt have been loſt upon a Contingency; but here the Defendant runs no Hazard, nor can he have any other Loſs than that of his Advice. The Caſe of *Boſanquett* verſus *Daſhwood*, *Nov.* 11, 1734. is another very ſtrong Authority, that where Advantage is taken of either Party's Circumſtances and Neceſſities, this Court will relieve. Nor will the Conſideration's moving partly from the Wife, vary the Caſe; for, her declaring that ſhe would not truſt the Plaintiff's Generoſity, but would bind him as faſt as Pen and Ink could bind him, and the Huſband's afterwards accepting the Bond, makes it to be his own Act *ab initio.*

Ante 38.

Mr. *Attorney General* and Mr. *Solicitor General* argued for the Defendant, That there were many Caſes where the Court perhaps would not decree a Performance of the Condition of a Bond; but yet upon Application made by the Obligor would not ſet it aſide. That this Caſe was very different from the Caſes of Bonds given by young Heirs, or for Marriage-Brocage, where the Whole reſts upon Contracts, but nothing is intended by the way of Gratuity; as it is in the preſent Caſe. The Illegality of the Conſiderations, Fraud, Accident will intitle to Relief here; but it was never yet ſaid, that a Man's Poverty, barely and meerly without any other Ingredient, would be a ſufficient Cauſe for ſetting aſide any voluntary Contract he may have entered into through his own Careleſſneſs, and the other Party may (through want of Chriſtianity perhaps) inforce a Performance of.

Here the paſt Services done to the Plaintiff by the Defendant, and Expectation of future Services, were the Motives upon which the Plaintiff gave this Bond: And none of the Caſes cited will warrant the ſetting aſide a Bond meerly voluntary as this is. The Plaintiff cannot be ſaid to be other than a free Agent, only becauſe he had a great Mind to recover the Part of the Eſtate which he apprehended to be his Due; which was the only Influence he was under at the Time he enter'd into this Bond. The Caſe of *Boſanquet* verſus *Daſhwood* (though one of the Reaſons for the Decree was the unfair Advantage that one Party had taken of the other's Neceſſity) was very different from this; for, though the Statute does not go ſo far as to make the Party receiving the uſurious Intereſt liable to refund, yet having prohibited the taking beyond ſuch a Sum, and avoided the Contract, the taking it is a Breach of the Statute, and the actual Receipt of the Money will (in a Court of Equity) make him liable to refund; the Wrong being the ſame, whether the uſurious Intereſt has been actually paid or not. In the preſent Caſe it is obſervable, that the Bond was never put in Suit, nor Payment of it demanded

demanded until after the Plaintiff's Recovery of what he was ſuing for; which takes off the Objection, that he might have lain in Priſon all his Life, whether he had prevailed in his Suit or not.

Lord Chancellor. I have been a good deal doubtful in this Caſe: For, as on the one hand it is intirely reaſonable to leave People at Liberty to diſpoſe of their Property as they think fit; ſo on the other hand, it is as reaſonable to prevent any Impoſition in ſuch Diſpoſal: And if here has been no Impoſition on the Plaintiff, and that all his Defence be his Poverty, or the Inconveniency it may be to him to pay this Sum, that will not be a Ground for Relief. But as this Caſe is circumſtanced, the Plaintiff's Poverty is not to be omitted in the Conſideration of the Tranſaction. His Circumſtances were as mean as can be imagined, and no Certainty that he ſhould be ever able to diſcharge any Part of this Bond; and yet he gives an Obligation for 1000 *l.* to be paid, at all Events, within the Year. A poor illiterate Man, who applies to the Defendant and his Wife for Aid in purſuing his Claim; they anſwer, That Regiſters could not be ſearched, nor other Things done without Money: He thereupon replies, That he has none, but deſires the Defendant to lay it down for him. The Cauſe goes on, and pending this Suit, the Defendant's Wife preſſes for the Money laid out; whereupon the Plaintiff declares, That for the Services they have done, and he hoped they would continue, he would give a Bond; upon which the Wife replies, he might take what Time he pleaſed for the Payment of the Bond; but at the ſame Time again preſſes for Repayment of the Money laid out by her Huſband and her, and then the Bond is given. So that here is a plain Contract between them: And how can I conſider it as a Gratuity, or otherwiſe than as a Contract? Now though a meer voluntary Contract is not to be ſet aſide purely and ſimply becauſe it is voluntary; yet that differs widely from the preſent Caſe; which was not intended as a Bounty, but as an Execution of an original Contract for the Services already done. Had an Attorney, pending

pending the Suit, taken ſuch a Bond as this upon the ſame Tranſaction, Would not the Court ſet it aſide? or would it ſuffer it to ſtand any farther than as a Security for what was juſtly and legally due? The Rule, *That a Miſchief is rather to be ſuffered than a general Inconvenience*, does not at all affect this Caſe: For, it would be a much greater Inconvenience to leave Men under Difficulties and Diſtreſſes open to all the Oppreſſion that other People may pleaſe to make them undergo. This is the Reaſon upon which the Court relieves againſt Bonds given by young Heirs, and Marriage-Brocage Bonds; and will not ſuffer any Advantage to be taken of the Extravagance and want of Judgment in the one Caſe, and of the ſtrong Bias to obtain what is deſired in the other. The only Difficulty that aroſe with me was, Whether the Defendant had any Share himſelf in the Tranſaction? and that where Fraud is pretended it muſt be fully proved. Here indeed the Huſband was not preſent when the Bond was executed; but ſtill, I think, there is ſufficient Ground for Relief: For, here the Wife was Party to all the Tranſactions in ſearching Regiſters, *&c.* The Contract for the Bond was for their joint Service; and though ſhe did not preſs for the Bond, yet ſhe preſſed for what worked more ſtrongly, *viz.* the Repayment of the Money which ſhe and her Huſband had laid out at the Time that he was not worth a Shilling, and in the midſt of the Purſuit of his Cauſe: And when this comes to be coupled with that other Saying of her's, *That ſhe would not truſt to his Generoſity, but bind him as faſt as Pen, Ink and Paper, could bind him*, it makes it plain that it was obtained of the Plaintiff when under Force and Neceſſity; the preſſing for the Repayment being almoſt as ſtrong as if ſhe had actually required the Bond.

And ſo decreed the Bond to ſtand as a Security only for ſo much as had been actually laid out with Intereſt; and left the Defendant at Liberty to bring his *Quantum meruit* at Law for what he deſerved for his Pains and Trouble.

King

Brown v Wooler 2 Vern. 138.

King verſus *Withers.*

Charles Withers, the Teſtator, being poſſeſſed of a conſiderable real and perſonal Eſtate, diſpoſed of it in the following Words, *viz.* " I give and bequeath unto my " Daughter *Mary*, at her Age of Twenty-one, or Day of " Marriage, which ſhall firſt happen, the Sum of 2500 *l.* " And my Will and Meaning is, That if my Son *Charles* " ſhould die without Iſſue Male of his Body then living, " or which may afterwards be born, that then my ſaid " Daughter ſhould have and receive at her Age of Twenty-" one, or Day of Marriage, which ſhall firſt happen, the " farther Sum of 3500 *l.* over and above the ſaid Sum of " 2500 *l.* but in caſe the Contingency of my ſaid Son's " dying may not happen before the ſaid Age of my " Daughter, or her Day of Marriage, that then ſhe ſhall " receive and be paid the Sum of 3500 *l.* whenever it " might after happen." Then he deviſes his real Eſtate to his Son in Tail; and for want of ſuch Iſſue, Remainder to his Brother in Fee; then goes on thus: " And " my Will and Meaning is, that the Lands and Premiſſes " hereby deviſed ſhall be liable to, and chargeable with " the Payment of the ſaid Sum of 3500 *l.* whenever it " ſhall become due and payable;" and directs, that in caſe of Failure of Iſſue of his Son, his Daughter, her Heirs or Aſſigns, ſhould join in a Surrender of ſome Copyhold Lands to the Uſe of his Brother, otherwiſe the Legacy of 3500 *l.* to be void.

3 *Will. Rep.* 414. *A.* deviſes to his Daughter *M.* 2500 *l.* at the Age of Twenty-one, or Marriage; and if his Son *C.* die without Iſſue Male, then *M.* to have at Twenty-one, or Marriage, the farther Sum of 3500 *l.* and if the Son's ſo dying do not happen before the Age of Twenty-one, or Marriage of *M.* then ſhe is to receive it whenever it may after happen. Then deviſes his real Eſtate to *C.* his Son in Tail Male, Remainder to his Brother in Fee: And declares his Will to be, that his Lands deviſed be liable to that Payment whenever it becomes due; and directs, that in caſe of Failure of Iſſue of *C. M.* her Heirs and Aſſigns, ſhall join in a Surrender of ſome Copyholds to the Uſe of his Brother; otherwiſe the Legacy of 3500 *l.* to be void. The Father dies; the Daughter marries, having attained Twenty-one, and dies in *C.*'s Life-time; her Huſband adminiſters to her; *C.* dies *ſans* Iſſue Male. The 3500 *l.* ſhall not ſink in the Land, but ſhall be raiſed for the Benefit of the Adminiſtrator of *M.* if the perſonal Eſtate be deficient.

The Daughter marries, having attained her Age of Twenty-one, and dies in her Brother's Life-time, leaving

the Plaintiff, her Huſband, who took out Adminiſtration to her, and then her Brother dies without Iſſue Male.

The Queſtion was, whether the Legacy of 3500 *l.* ſhould be raiſed out of the Land, the perſonal Eſtate being deficient? and whether it was ſuch an Intereſt in her as ſhould go to the Plaintiff her Adminiſtrator?

Mr. *Solicitor General*, Mr. *Verney*, and Mr. *Fazakerley* argued for the Defendant, That the Caſe was become quite different by the Daughter's Death from what it would have been had ſhe lived; in which Caſe it might have been a Conſideration of Marriage, and an Advancement to her: That the Huſband was a meer Stranger; and the ſame Arguments that might be uſed for him, could, with as much Reaſon, be uſed for the moſt remote collateral Relation ſhe might have left behind her: That had this Sum of 3500 *l.* been intended to veſt abſolutely, there would have been no Neceſſity for providing for the Contingency of her Marriage, or attaining her Age of twenty-one before her Brother's Death; but if it did not veſt abſolutely, then this Proviſion ſhews, that the Teſtator thought it neceſſary to provide for that only; and when another Contingency happens, no way provided for by him, it muſt follow, that the Plaintiff is not intitled to have this Legacy raiſed; that this was not to be compared to Caſes where a preſent ſubſiſting Intereſt is given to one for Life, Remainder to another upon a Contingency; there the Intereſt is ſubſiſting in the Donor himſelf, but not ſo here: For, it was never a ſubſiſting Intereſt even in the Donor himſelf; and that there was a great Difference where, at the Time of the Legatee's Death, it is abſolutely uncertain whether the Contingency will ever happen, as in the preſent Caſe, and where the Thing is certain, but only the Manner or Time of Payment uncertain; that in the laſt Caſe the Legatee's Death will not alter the Caſe, but the Repreſentative ſhall be intitled to it; but otherwiſe in the former, according to *Domat*, *lib.* 4. *tit.* 2. *ſ.* 9. *p.* 10, 11. That this Caſe differed

differed from that of *Cave* verſus *Cave*, 2 *Vern.* 508. for, there the Son being, by his Father's Will, intitled to the Intereſt, was decreed the Principal. In the Caſe of *Com. Rivers* verſus *Com. Darby*, 2 *Vern.* 72. the Contingency had actually happened by the Lord *Colcheſter*'s having a Daughter at his Death, and conſequently the Portion was to be raiſed for the Benefit of her Repreſentative. That of *Pinbury* verſus *Elkein*, 2 *Vern.* 758, 766. was a Demand out of a perſonal Eſtate only; and ſo not to be compared to the preſent Caſe, where the real Eſtate is chargeable as well as the perſonal. Nor can it be reſembled to that of *Buckley* verſus *Stanlake*, *Paſch.* 1720. where a Man ſeiſed of a Rectory for Lives, deviſed it to his Wife for Life, and after her Deceaſe to his Daughter, her Heirs and Aſſigns; and if his Daughter ſhould happen to die unmarried, then to his Wife, and her Heirs and Aſſigns, ſubject to and chargeable with two Legacies of 100 *l.* each to two Strangers, who died before the Daughter; then the Daughter died an Infant and unmarried; the Wife deviſed it to Truſtees for Performance of her Huſband's Will; and upon a Bill brought, decreed the Legacies of 100 *l.* each to the Repreſentatives of the two Legatees, although they both died before the Daughter, upon whoſe Death, without Marriage, the Eſtate was deviſed to the Wife, chargeable with their Legacies.

Here was a ſecond Will, *viz.* That of the Wife to intitle the Legatees and their Repreſentatives to the ſeveral Legacies bequeathed by the Huſband's Will, and upon that Circumſtance it is moſt probable the Court went in decreeing the Legacies. In the Caſe of *Wilſon* verſus *Spenſer*, *January* 31, 1732. it was a preſent Bequeſt, and no Contingency, the Twelve Months being given to the Executor to get in the Teſtator's Eſtate, and to pay this Legacy; but not at all to create a Contingency to ariſe within the Year. There is nothing to warrant the Diſtinction, that where the Child marries and dies, the Legacy or Portion ſhall be raiſed for the Benefit of her Huſband; but not where ſhe dies an Infant, and before Marriage. The Caſe of *Carter* verſus *Bletſoe*,

ſoe, 2 *Vern.* 617. is directly againſt it: Nor is it warranted from that of *Jackſon* verſus *Ferrand*, 2 *Vern.* 424. for, there the 500 *l.* was to be raiſed out of the Rents and Profits as ſoon as might be; ſo that whatever was raiſed before the Daughter came to Twenty-one, was then to be ſeparated from the Land, and remain as Money in the Executors Hands; and conſequently could never merge for the Benefit of the Heir, when once ſeparated from the Land: And though, as it appears from the decretal Order, (which was produced in Court) Debts came in ſo faſt that the 500 *l.* could not be raiſed ſo ſoon as expected, yet the Intent was the ſame, that it ſhould be raiſed for her; and decreed probably upon that or ſome other Circumſtance not mentioned in the Book. But beſides the Authority of *Carter* verſus *Bletſoe*, 2 *Vern.* 617. the Caſes of *Smith* and *Smith*, 2 *Vern.* 92. and *Tournay* and *Tournay*, *Precedents in Chan.* 290. are expreſs that the Child muſt live until the Time the Legacy or Portion becomes payable; otherwiſe it ſhall ſink for the Benefit of the Heir. *Snell* verſus *Dee*, 2 *Salk.* 415. It was alſo ſaid, That the Words, *which may afterwards be born*, make this to be a Legacy to take Effect after a general Failure of Iſſue, and conſequently too remote.

Mr. *Attorney General* replied for the Plaintiff, That had this Legacy been given to her, her Executors and Adminiſtrators, it would not have made the Caſe any thing better for the Repreſentative; for, if by her Death the Contingency be defeated, then the Repreſentative can never have it: But a Contingency before it has happened, may well veſt in the Party, and conſequently be tranſmiſſible to the Repreſentative: As if there be a Deviſe of a Lottery Ticket to one in caſe it comes up a Prize; the Deviſee dies before the Ticket drawn, then the Ticket comes up a Prize; Shall not the Repreſentative have it? Many other Caſes which might be put prove it likewiſe. If this Intereſt be compared to a Grant of a Rent *de novo* to commence at a future Day, then it may be releaſed or extinguiſhed: And if ſo, it is immaterial whether it be aſſignable or not: And relied upon 2 *Vern.* 348.

Lord

Lord Chancellor. It has been made a Queſtion by the Defendant's Counſel, whether the Words, *which may afterwards be born*, do not make this a void Bequeſt, as being too remote? Had it been after a general Failure of Iſſue, it would not have been good, becauſe it would then have kept in Suſpence too long; but now the Nature of the Thing confines the Teſtator's Intent; for, though we ſhould take it in the moſt general Senſe, yet the Contingency muſt ariſe within nine Months after the Brother's Death: So that the Objection of its being too long in Suſpence, is, by this plain and natural Senſe, intirely removed.

The next and great Queſtion is, Whether this Sum of 3500 *l.* be now a ſubſiſting Charge upon the real Eſtate? for, the perſonal Eſtate being deficient, I ſhall conſider it principally as a Charge upon the Land. Three Things were, by the Will, neceſſary to happen to intitle the Plaintiff's Wife to this Legacy; Death of her Brother without Iſſue Male, Marriage, or attaining her Age of Twenty-one; all three have happened: And now the Queſtion is, Whether another implied Contingency be neceſſary to intitle her to this additional Portion. The Words, whereby the particular Contingency of her Marriage, or attaining her Age of Twenty-one is provided for, have been conſtrued both ways; but I do not think that any great Streſs can be laid upon them either one way or the other. The Teſtator might throw it in naturally enough to manifeſt his Intent, that his Daughter ſhould have this 3500 *l.* although ſhe married or attained her full Age before her Brother's Death: Nor will the Operation of the Words, whereby the real Eſtate is made chargeable, any way affect the preſent Queſtion. The other Clauſe, whereby ſhe or her Heirs are to join in a Surrender of the Copyhold Lands, has alſo been conſidered as influencing this Queſtion; but it does not follow from thence, that what has ſince happened was then in the Teſtator's View; for, ſhe might have died before ſhe had actually received the Money, al-

though the Son had died without Iſſue in her Life-time; and therefore it was reaſonable enough to ſecure the Remainder-man the better, by compelling her Heirs and Aſſigns to join, upon Pain of Forfeiture of this Sum: The only Thing therefore to be conſider'd is her Death, upon which the Whole muſt turn. It has been ſaid, That where Portions, in Caſes of this Nature, are chargeable upon Land, they ſhall ſink for the Benefit of the Heir. The leading Caſe is that of *Lady Paulet* verſus *Lord Paulet*, 1 *Vern.* 204, 321. This and the like Caſes have gone not upon any Proviſion of the Party, but on the Conſtruction of this Court; nor has the Difference between the Age being annexed to the Body of the Deviſe itſelf, or to the Time of Payment, ever held in theſe Caſes: The Reaſon is, That if Portions are given to be paid at Eighteen, or Marriage, and the Party dies before that Time, the Occaſion of raiſing it, *viz.* the Advancement, ceaſes; and therefore the Reaſon of giving it ſhall qualify the Grant itſelf: As an Annuity *pro Conſilio impenſo & impendendo*, the Counſel is the Foundation of the Grant: And ſo in theſe Caſes the Proviſion for Advancement being the Reaſon of the Portion, when that fails, the Portion ſhall ceaſe likewiſe. It may be compared to what is called in *Scotland*, *Cauſa data & non ſecuta*, when the Cauſe ceaſes: It ſhall never be raiſed for one Purpoſe when deſigned for another. Indeed in the Caſe of *Jackſon* verſus *Farrand*, 2 *Vern.* 424. the Court went ſomewhat farther: But the Marriage of the Child might be the Cauſe of that Decree, 500 *l.* being intended as a Portion, although no expreſs Proviſion made that it ſhould be paid upon the Daughter's Marriage. The Caſe of *Carter* verſus *Bletſoe* ſeems to be contrary; and in both theſe Caſes there was the ſame Circumſtance, *viz.* the Death of the Daughter after Marriage, but before the only Time which was limited for the Payment happened. In Caſes where the Portion is to be raiſed out of the reverſionary Term after the Tenant for Life's Death, and to be paid at Twenty-one or Marriage, the Child marries, and then dies, it would be very hard to decree it to merge. In *Butler* and *Duncomb*'s Caſe, 2 *Vern.* 760. a Sum was borrowed by the

Direction

Direction of the Court to aſſiſt the Huſband in his Trade, the Term being not yet come into Poſſeſſion. In the Caſe of *Broome* verſus *Berkley*, *Abr. Eq. Ca.* 340. *pl.* 7. the Lord *Trevor* deliver'd his Opinion in the *Houſe of Lords*, that in all ſuch Caſes as this, where the Portion is contingent, and the Child marries, and then dies, the Repreſentative ſhall have it. Indeed in Caſes where the Child dies ſo young that the Portion could never be wanted, the Court will not decree it to be raiſed, becauſe there is no Occaſion for it; as in *Bruen* and *Bruen*'s Caſe, 2 *Vern.* 439. and in that of *Tournay* verſus *Tournay*; but there is no Precedent where the Court has dealt ſo hardly with a Child who dies after Marriage, as to take that away which was intended for its Proviſion.

It has been ſaid, That this being future, could not be intended as a Proviſion for her. But is not a future Intereſt an Intereſt ſtill, though not ſo good as an Intereſt in Poſſeſſion? It is and may be a Conſideration of Marriage. It does not indeed abſolutely veſt, becauſe the Contingency may never ariſe: But it is carrying it too far to ſay, that it does not veſt at all. Why may it not veſt in ſuch Manner as to be tranſmiſſible? There is no Doubt but after Twenty-one ſhe might have releaſed it, though not have aſſigned it at Law; becauſe but a meer Poſſibility in the Eye of the Law. A Condition may deſcend upon the Heir, although no Eſtate does actually deſcend from the Anceſtor; and when the Condition is performed, he ſhall be in by Deſcent, becauſe of the Condition deſcending. And as this might have been releaſed, I do not ſee why it ſhould not be tranſmiſſible to the Repreſentative. But if I had any Doubt about that, the ſeveral Authorities that have been cited for the Plaintiff would bind me; and particularly 2 *Vent.* 347. (where the Intereſt was as contingent as it is here) is an expreſs Authority that a contingent Intereſt is tranſmiſſible to the Repreſentative. The Caſe of *Bulkley* verſus *Stanlake* is the ſame. It has been ſaid indeed, that in this Caſe the Contingency was annexed, not to the Legacy itſelf, but to the Fund only out of which

which it was to ariſe: But I apprehend that the Contingency went to the Whole. Nor can I help conſidering that Caſe as another Authority, that a contingent Intereſt is tranſmiſſible to the Repreſentative. That of *Pinbury* verſus *Elkin* was a Deviſe of 80 *l.* to his Brother, if his Wife ſhould die without Iſſue by the Teſtator then living; the Deviſee died in the Life-time of the Wife; then the Contingency happened, and the Legacy agreed to be paid to the Repreſentative. The Caſe of *Smell* verſus *Dee*, 2 *Salk.* 415. weighs but little with me; for, Firſt, I do not think it well reported. Secondly, The Reaſon ſeems idle; for, Why may not an Incertainty be tranſmiſſible as well as a Certainty, though perhaps not ſo beneficial? This, altho' to be raiſed out of Land, cannot receive a different Conſtruction from the other Caſes: For, though it is to be raiſed out of Land, it remains Money ſtill; and can any one ſay, that the Contingency upon which this was left to her, has not happen'd? Has not ſhe married? And altho' ſhe has not lived to receive it, yet the Contingency having happen'd, it muſt go to her Huſband, who is her Repreſentative, and who may well be thought to have married her in Contemplation of this additional Fortune of 3500 *l.* though depending upon a Contingency.

And ſo decreed it to the Plaintiff, the Huſband and Adminiſtrator of *Mary.*

N. B. Upon the 16th of *March* 1735. this Decree was affirmed in the Houſe of Peers. (*a*)

(*a*) With Coſts. 3 *Will. Rep.* 418.

July 18. Barker v Lea 1. Turn & R. 414. Crowder v Stone 3. Russ. 222. Bright v Rowe. 3 M & K. 322. Eyre v Marsden 2. K. 57. Sillick v Booth. 1 Y&C. N.C. 127.

Rudge verſus *Barker*.

A. bequeaths to his Grandchildren, *B. C.* and *D.* 1000 *l.* a-piece, and the Intereſt thereof to their Uſe; and if any dies, to the Survivors or Survivor, Share and Share alike; the Intereſt to be paid to their Father, to be improved to their Uſe; *B.* dies an Infant, then *C.* dies; the Share which *C.* took by the Death of *B.* ſhall not ſurvive to *D.* but go to *E.* the Father; who adminiſtred to *C.* the Intereſt and Principal are to receive the ſame Conſtruction.

THomas *Cole* made his Will as follows, *viz.* "I give "unto my Grandaughters *Elizabeth* and *Anne*, and to "my Grandſon *Thomas*, 1000 *l.* a-piece of my Capital Stock "in

" in the *Eaſt-India* Company, and the Intereſt thereof to " them for their Uſe. And if any dies, to the Survivors " or Survivor, Share and Share alike; and my Meaning " is, that the Intereſt ſhall be paid to their Father my Son " *Howard*, to be improved to their Uſe." The Grandſon died an Infant, by which his Share ſurvived amongſt his two Siſters; then one of the Siſters dies, and the Queſtion was, Whether the Share ſhe had taken by Survivorſhip upon her Brother's Death ſhould ſurvive to the other Siſter, as well as her original Legacy of 1000 *l.* or whether that Share taken by Survivorſhip ſhould go to the Father, who was her Adminiſtrator?

Maſter of the Rolls. The firſt Queſtion is, Whether the Intereſt ſhall receive a different Conſtruction from the Principal? But I think it will not; for, being both coupled together, they muſt receive the ſame Determination.

The next Queſtion is, Whether the Share ariſing by Survivorſhip, which the Deceaſed Siſter took upon her Brother's Death, will ſurvive to the next Siſter; or, Whether it will go to her Father, who is her Adminiſtrator? And I am of Opinion, that it does not ſurvive, but goes to her Adminiſtrator. Indeed, it may be, the Teſtator intended the Whole to go amongſt his Grandchildren, and no body elſe to have any Benefit: But whatever his Intent might be, I muſt judge upon the Words of the Will; and according to thoſe, the Limitation over relates to the Legacy only. Had they not been diſtinct Legatees, it might have been another Queſtion: But being intirely diſtinct, and not even ſo much as Tenants in Common, the Caſe is the ſame as that of *Bearnes* verſus *Ballard*, before the Lord *King*, *June* 1, 1727. where it was decreed for the Adminiſtrator. And agrees with the Lord *Holt*'s Opinion cited in *Woodward* and *Glaſsbrooks*'s Caſe, 2 *Vern.* 388. the Deviſe is ſeveral, and the Queſtion is not upon the original Share, but upon the Share that accrued by the Survivorſhip, which goes to the Adminiſtrator, by reaſon of the Words

Share and Share alike, which are tantamount to the Words *equally to be divided.*

And ſo decreed the Share accruing by Survivorſhip to the Father, who was the Adminiſtrator of the Deceaſed.

July 26. ## *Moor* verſus *Black & al'.*

A. dies ſeiſed of Lands, which deſcend upon *B.* and *C.* in Coparcenary: *B.* before Receipt of Rent, or Partition made, dies; his Widow brings a Bill to have Dower aſſigned, ſuggeſting, that *C.* had all the Title-Deeds: Upon Demurrer reſolved, That this Court will relieve in ſuch Caſe. The Demurrer over-ruled.

THE Plaintiff, by her Bill, charged, That Mr. *Rawlinſon* died upon the 8th of *July* 1732. ſeiſed of ſeveral Eſtates, which, upon his Death, deſcended, as to one Moiety, upon the Plaintiff's Huſband in Fee; who died the 11th of *March* next after, before any Partition made; and that the Defendants had got Poſſeſſion of all the Title-Deeds, whereby ſhe was diſabled from ſuing for Dower at Law, and therefore came into this Court to have her Dower aſſigned of what Lands deſcended to her Huſband.

The Defendants demurred, for that the Plaintiff's Right of Dower was a Right meerly at Law, and triable by a Jury; and that no Impediment was ſuggeſted why ſhe could not recover at Law.

Mr. *Attorney General* and Mr. *Forreſter* inſiſted for the Plaintiff, That ſhe was proper to come into this Court, both by reaſon of the Deeds being in the Defendants Hands, without which ſhe could not prove her Title at Law; and alſo for that the Eſtate being in Coparcenary, and no Partition made, the Sheriff could, upon Recovery in a Writ of Dower, put her into Poſſeſſion but of a Third of an undivided Moiety; and that ſtill Recourſe muſt be had to this Court for a Certainty, and to ſet out a Part to her. The Judgment in Dower not reducing it to more Certainty than it was before; according to 1 *Inſt.* 346. and that by bringing this Bill, the Plaintiff had only done at firſt what ſhe muſt have done at laſt.

Mr.

Mr. *Fazakerley* inſiſted, on the other hand, for the Defendant, That though the Plaintiff might be intitled to a Diſcovery, yet ſhe could not be ſo to have Dower aſſigned her; that being a Title meerly at Law, and for a Detainer of which, Damages were to be aſſeſſed by a Jury; and that ſhe was not intitled to the Poſſeſſion of the Deeds, but that they belonged to the Defendant.

The *Lord Chancellor* over-ruled the Demurrer upon both Points, ſaying, That there was no Poſſibility for the Plaintiff (as appeared to him) to recover without the Aſſiſtance of the Deeds: For, the Eſtate deſcending upon her Huſband in *July*, and he dying upon the 11th of *March* after, before any Receipt of Rent, or Partition made, ſhe could not prove a Seiſin at Law to intitle herſelf to Dower.

Secondly, That ſhe lay under another Difficulty, as her Huſband's Eſtate was complicated, and that ſhe muſt come here for a Partition; otherwiſe the Conſequence would be, that, after Judgment and Execution, ſhe muſt, at the End of every ſix Months, be driven to her Action againſt ſuch as held jointly with her, and who received the Profits, for her Share, and alſo for her Damages for the Detainer; which would be abſurd and unreaſonable.

Hudſon verſus *Hudſon.*

July 30.

THE Plaintiff brought his Bill, as Adminiſtrator, againſt the Defendant; who pleaded, That Adminiſtration had been granted to the Plaintiff, and to another who died before the Bill brought: And upon that Plea the Queſtion was, Whether, when an Adminiſtration is granted to two, and one dies, the Adminiſtration ſhall ceaſe and be void? or whether it ſhall ſurvive to the other who is ſtill living?

Adminiſtration is granted to two; one of them dies, the Adminiſtration ſurvives.

The

The Court doubted at firſt, and would hear Civilians: And accordingly it was now argued by Dr. *Strahan* for the Plaintiff, and by Dr. *Lee* for the Defendant; and he quoted the Caſe of *Bowden* verſus *Bowden*, the 30th or 31ſt of *April* 1734. where it was adjudged in the *Court of Arches*, that an Adminiſtration does in ſuch Caſe determine and ceaſe, and does not ſurvive; being but an Authority, and no Intereſt.

Lord Chancellor. There are Authorities both ways in the preſent Caſe, *viz.* That of *Adams* and *Buckland*, 2 *Vern.* 514. where it was held by the Lord *Cowper*, that an Adminiſtration would ſurvive; and that of *Bowden* verſus *Bowden*, where the contrary was determined in the Eccleſiaſtical Court. As therefore the Precedents are not uniform, we muſt conſider this *Caſe* according to the general Rules of Survivorſhip; which ſeem to be pretty much the ſame both by the Common and Civil Law. If an Eſtate for 99 Years be granted to two, if they ſhall ſo long live, when one dies the Eſtate is determined; but if a Grant be made to two for their Lives, when one dies, the Survivor ſhall take the Whole; according to *Brudenell*'s Caſe, 5 *Co.* 9. but in Auditor *Curle*'s Caſe, 11 *Co.* 1. it is held, That if an Office be granted to two, there ſhall be no Survivorſhip of it without ſpecial Words. We muſt now conſider which of theſe Caſes reſembles the preſent one moſt. It cannot properly be ſaid that there was any ſuch Thing as an Adminiſtrator before the *Statute* 31 *Ed.* 3. *cap.* 11. Before that *Statute*, where one died inteſtate, the King, as *Pater Patriæ*, was to take Care of his Eſtate; and this did, in Proceſs of Time, devolve from the King to the Ordinary. And the *Statute* of *Weſtm.* 2. *cap.* 19. which was made to compel the Ordinary to pay the Inteſtate's Debts, looks as if they had not been very forward in it before. But by the 31 *Ed.* 3. the Ordinary is to grant Adminiſtration; and therefore the Adminiſtrator is the Creature of that *Statute*, and is to be conſider'd accordingly. The expreſs Words of the *Statute* enable him to ſue and be ſued as an Executor: And ſince that Time

it

it has never been doubted but that the Property of the Goods was well veſted in him, ſince he now repreſents the Inteſtate in every Thing. By the Wording of the 21 *H.* 8. *cap.* 5. one would imagine, that ſomewhat beneficial is intended to the Adminiſtrator, by reaſon of the Perſons there mentioned, to whom Adminiſtration is to be granted, *viz. The moſt lawful Friend:* For, had no Benefit been intended to him, Why might not the Adminiſtration be granted to any other as well as to the neareſt of Kin? The Spiritual Courts did indeed take Bonds of the Adminiſtrators to oblige them to diſtribute the Eſtate; but as often as they did ſo, they were prohibited by the Temporal Courts. Nor does the *Statute* of Diſtributions alter the Nature of the Office; it makes him only to be as it were a Truſtee for the Perſons intitled to a Diſtribution, and uſually for himſelf as one of them; and then if a joint Eſtate at Law will ſurvive, why ſhould not an Adminiſtration, when they both have a joint Eſtate in it? A Truſt will ſurvive, though no way beneficial to the Truſtee; and the Adminiſtrators being appointed by the *Statute* to come in Lieu of Executors, the *Statute* has therefore made a Will for him who is dead inteſtate: And the Office of Adminiſtrator is every way to be compared to that of an Executor. It has been ſaid indeed, that one Executor may do many Acts which one Adminiſtrator cannot do without the other Adminiſtrator; but that is nothing to the Survivorſhip either for or againſt it. I have all due Regard for the Determinations in the Eccleſiaſtical Court; but have likewiſe a great deal for thoſe of a noble Perſon who ſat here with as much Honour as any Man ever did: And he having determined this Point in *Adams* and *Buckland*'s Caſe, I think it ſafer for me to follow that Authority than any other which may have paſſed in the Eccleſiaſtical Court *ſub ſilentio*, eſpecially when the Queſtion ariſes upon the Conſtruction of ſeveral Acts of Parliament, the Conſtruction of which belongs to the Temporal Courts.

And ſo over-ruled the Plea.

Auguſt 8. *Vide* 3 *Will. Rep.* 315.

Hervey verſus *Sir Edward Desbouvrie and others.*

By the Cuſtom of *London*, a Freeman cannot deviſe either the orphanage Part, or the Contingency of the Benefit of Survivorſhip, among Orphans. Neither can an Orphan deviſe his orphanage Part, or the Part which accrued by Survivorſhip. But ſuch Freeman may give, by Will, to his Children, Legacies inconſiſtent with the Diſtribution under the Cuſtom; and then ſuch Children muſt make their Election, whether they will abide by the Will, or by the Cuſtom. But they cannot abide by the Will in Part only, and take the Benefit of the Cuſtom alſo.

THIS Cauſe came on by Conſent, and was thus: Sir *Chriſtopher Desbouverie* (a Freeman of *London*) being ſeiſed of a very conſiderable real Eſtate, and poſſeſſed of a perſonal Eſtate of the Value of 60000 *l.* by his Will dated *January* 21, 1730. gave to *Anne* his eldeſt Daughter (now the Wife of Mr. *Hervey*, one of the Plaintiffs) the Sum of 12000 *l.* and to his Daughter *Elizabeth* (another of the Plaintiffs) the Sum of 7000 *l.* and to the Defendant *John Desbouverie*, his younger Son, 14000 *l.* and deviſed all the Reſt and Reſidue of his perſonal Eſtate to his Executors, in Truſt for his eldeſt Son *Freeman Desbouverie*, until he ſhould attain his Age of Twenty-one; and in caſe his eldeſt Son ſhould die before that Age, he gave all the Reſidue to the Defendant *John*.

By a Codicil dated *July* 17, 1732. he gave his Daughter *Elizabeth* 3000 *l.* more (which made her Fortune 10000 *l.*) and thereby taking Notice that his Daughter *Anne* had been ſometime married to Mr. *Hervey*, inſtead of 12000 *l.* he gave her but 10000 *l.* and deſired that Mr. *Hervey* ſhould immediately, upon his Deceaſe, give the reſt of his Executors (Mr. *Hervey* himſelf being one) a Bond, renouncing all farther Claims and Demands of and from his Eſtate. The Teſtator died ſoon after, leaving no Wife, and only the four Children above-named. About two Years after, Mr. *Freeman Desbouverie* died at the Age of Eighteen, having made his Will; whereby, after ſome pecuniary Legacies given, he made his Brother *John* reſiduary Legatee.

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The Plaintiffs Bill was, to be let into a Share of *Freeman*'s orphanage Part, as diſtributable amongſt the ſurviving Children by the Cuſtom, *Freeman* dying before Twenty-one, who could neither deviſe his orphanage Share before that Age; nor could his Father deviſe it, upon the Contingency of his dying before Twenty-one, to one Child in Bar of the reſt; the Cuſtom being paramount to the Will, and not to be controlled by it.

Mr. *Attorney General*, Mr. *Fazakerley*, Mr. *Moreton* and Mr. *Forreſter* argued for the Plaintiffs, That, according to the Cuſtom, nothing ſtood in the way of the Plaintiffs Claim; for, that the Orphan himſelf could not deviſe his Share, nor could the Father deviſe it over upon the Contingency of his Son's dying before Twenty-one; according to *Pate* and *Hatton*'s Caſe, 1 *Chan. Caſes* 199. and that of *Wilcox* verſus *Wilcox*, 2 *Vern.* 558. and according to the conſtant Courſe of the City; which appear'd from the following Precedents taken out of the City Books, *viz. Saturday*, ----*April* 1570. "This Day it was put in Queſtion, Whether *William Offley*, Merchant, who married *Anne* the Daughter of *William Beſwick* of *London*, Draper, *and was advanced in the Life of the ſaid* William *her Father*, ſhould, or juſtly ought to have any Part or Portion of the orphanage Share of *Arthur Beſwick*, one of the Orphans of the ſaid *William Beſwick*, which *Arthur* is deceaſed, amongſt other the Orphans of the ſaid *William*, after the Deceaſe of the ſaid *Arthur*, or not? Whereupon the antient and old Records were ſeen and conſidered; and for that it appeared, by the antient Cuſtom of this City, that the ſaid *William Offley*, in the Right of the ſaid *Anne* his Wife, ought to have, amongſt other the Orphans and Children of the ſaid *William Beſwick*, his Part of the Orphanage and Portion of the ſaid *Arthur* after his Deceaſe; it was ordered, That the Surety's Bond for the ſaid Orphan ſhall be ſent to for the Payment of the ſame to the ſaid *William Offley*."

Note;

Note; The Cuſtom was, That if the orphanage Shares were not brought into the Chamber of *London*, Securities were given for the Payment.

" Another to the ſame Purpoſe, *Friday*, *June* 20, 1572.

" *Cur. Specialis Tent. die* 24° *Mai* 1625.

" According to the Order of this Honourable Court of " the 10th of this Inſtant *May*, we have ſundry Times " met together, and conſidered of the Matters thereby re- " ferred to us; and upon Examination, Peruſal and Con- " ſideration had of antient and latter Books and Records " of this City, we find that the Cuſtom is, and ſo hath " been taken, declared and adjudged by the Court, that " the orphanage Part and Portion of an Orphan of this " City, dying in his or her Minority, within the Age of " Twenty-one Years, whether Son or Daughter (if ſuch " Orphan Daughter, ſo deceaſing, be unmarried at the " Time of his or her Deceaſe) by the Cuſtom of this City " ought to come and be to and amongſt his or her Brethren " or Siſters by the Father ſurviving, *as well advanced as* " *not advanced* in the Life of the Father; although the " Father of ſuch Orphan, by his laſt Will, ſhould other- " wiſe diſpoſe of the ſame, or ſhould die without a Will. " This 24th Day of *May* 1625. *Heneage Finch* Recorder, " *Thomas Middleton*, *Edward Barkham*, *&c.* And upon the " Certificate a Judgment given."

" Another Judgment of the ſame Nature, *February* 28, " 1672. 25 *Ch.* 2. and the ſame Certificate to the Court " of *Chancery*, *February* 18, 1702. 1 *Ann.* in *Jeſſon* and " *Eſſington*'s Caſe, *Precedents in Chancery* 207."

" *Martis* 8° *Octobris* 1639.

" Whereas in the Cauſe, at the Suit of *George Combe* " and *Anne* his Wife, one of the Daughters of *Walter Bur-*

" *ton*

" *ton* deceaſed, late Citizen and Freeman of *London*, Com-
" plainant againſt *John Burton* and others, depending in the
" Court of Requeſts, the ſaid Court finding the Queſtion
" to depend upon the Cuſtom of this City, whether there-
" by any Orphan of this City, under Age, may by Will
" deviſe his orphanage Part or not? or, whether the ſame
" ought not to be diſtributed amongſt the reſt of the Or-
" phans, notwithſtanding the Deviſe by Will? did think
" fit that the Plaintiff's Counſel make their Caſe concern-
" ing the ſaid Point, and that Mr. *Recorder* and Mr. *Com-*
" *mon Serjeant* ſhall be attended therewith; and that after
" Conſideration had, to certify the aforeſaid Court the
" Cuſtom of this City in the ſaid Point: Now this Day
" the Caſe was preſented unto this Court under the Hand
" of Counſel on both Sides; and upon Advice and Coun-
" ſel taken thereupon by this Court, it was agreed and
" ordered by this Court, that Mr. *Recorder* certify accord-
" ing to the Truth and Cuſtom of this City, that an Or-
" phan, before his full Age of Twenty-one Years, cannot
" by Will deviſe his orphanage Part; but that the ſame
" ought to be diſtributed amongſt the reſt of the ſurviving
" Orphans, according to the laudable Cuſtom always ap-
" proved of."

A Certificate of the ſame Purport to the Court of *Chancery*, *January* 17, 1655.

The Plaintiff's Counſel inſiſted, That by theſe Precedents it plainly appeared, that neither the Father nor the Orphan (during his Minority) could make any Diſpoſition of the orphanage Share in Bar of the Right of the ſurviving Orphans; and that being eſtabliſhed, nothing could bar the Plaintiffs in the preſent Caſe but the pretended Satisfaction given by the Father's Will for their ſeveral orphanage Shares; which although indeed not ſo conſiderable as the Legacies left by the Will, yet theſe Legacies could never be taken as a Satisfaction for this Contingency; but as to the 2500 *l.* deviſed to each above their orphanage Share, muſt

be taken as a meer Bounty from the Teſtator. That this Caſe differed from that of *Kitſon* verſus *Kitſon*, *Mich.* 1712. *Precedents in Chan.* 351. and *Eq. Caſes* 28. where the Wife was obliged to take either by the Will or the Cuſtom; for, that upon the Huſband's Death there was a preſent Right veſted immediately in the Wife, which the Will (if ſhe choſe ſtanding to that) ſhould be a Satisfaction for; but here was no Right in the Plaintiffs, upon the Father's Death, to any Thing but their own orphanage Shares. This was a meer Contingency to ariſe, not out of their Father's, but out of their Brother's Eſtate, and is to be conſider'd only in that Light; that the Caſes upon Satisfaction are generally be-
Ante 80. tween Debtor and Creditor; as is held in *Lechmere* and *Lady Lechmere*'s Caſe; but here was neither Debtor nor Creditor, but a meer Chance which the Cuſtom gives to every Child of a Freeman to take his Brother's or his Siſter's Share if dying under Age; and conſequently the Rules of Satisfaction did not reach this Caſe. That had Sir *Chriſtopher Desbouverie* advanced the Plaintiffs in his Life-time, it would never have barred them from this Right of Survivorſhip; as was clear from the above Precedents: And if ſo, it was hard to take it from them, becauſe the Advancement was by Will, and not by Act executed in the Father's Life-time.

Mr. *Solicitor General* inſiſted for the Defendants, That the Teſtator's Intent was manifeſt, that the Plaintiffs ſhould have no more than 10000 *l.* each; and that he had this very Contingency in View which has happened: So that the Queſtion is, Whether the Will ſhall be complied with, or whether the Plaintiffs ſhall be at Liberty to drop that which makes againſt them, and take up that which makes for them, relying upon the Operation of the Cuſtom? The Defendants do not pretend that the Father had Power to deviſe the orphanage Share, that is, the Share of any of the Children that ſhould die before Twenty-one, in Bar of the Cuſtom; but what they inſiſt upon is, That if the Plaintiffs will take Advantage of the additional Bequeſt beyond

beyond the orphanage Share, they muſt comply in the Whole with the Will, and not comply with one Part and waive the other. The Objection that this was a future contingent Right, and therefore not within the Will, cannot alter the Caſe; for, although it was but a Contingency at the Time of the Teſtator's Death, yet the Releaſe of that Contingency might as well be the Conſideration of this additional Bequeſt, as if it had been a preſent Right immediately upon Sir *Chriſtopher*'s Death.

Lord Chancellor. The Queſtion here ariſes upon the Will compared with the Cuſtom. It is clear that the Teſtator intended by his Will to make a Diſpoſition of his perſonal Eſtate: He has given his Daughter *Elizabeth* 3000 *l.* in caſe his Son *Freeman* ſhould die before Twenty-one; and by the Codicil gives ſome additional Legacies to his Children; but makes no Alteration, as to the Deviſe over to his Son *John*, the eldeſt Son dying before Twenty-one. Had this ſtood upon the Cuſtom alone, there muſt have been a Diſtribution of his orphanage Share: But now it is to be conſider'd, whether the Cuſtom ſhall prevail againſt the expreſs Limitations of the Will? The Cuſtom is clear that Children advanced, as well as thoſe who are not advanced, are intitled to a Diſtribution: And the Reaſon is, That when the Father advances his Child in his Life-time, it is ſuppoſed to be done with regard to his preſent Circumſtances; and if it do not appear how much he was advanced with it, it is a Bar; otherwiſe, if the *Quantum* appear; for, the Father ſhall not have it in his Power to advance one more than the other upon a Preſumption that the other may be more fully provided for by the Death of a Third; and therefore it is very reaſonable that a Child advanced, as well as one not advanced, ſhall be intitled to a Share upon the Death of a Brother or Siſter. It is clear therefore, that neither the Freeman nor the Orphan can deviſe againſt the Cuſtom; nor can they any more deviſe what accrued by Survivorſhip than the original Share: But ſtill the Father may make a Diſpoſition by his Will, and leave

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it to his Childrens Option, either to take by the Will or ſtand by the Cuſtom. If they chooſe the former, that will be a Waiver of the Cuſtom; for, it would be unreaſonable to admit a Latitude of taking by the Will, as far as that makes for the Party, and likewiſe by the Cuſtom, as far as that will go, and waive the other Part of the Will which makes againſt him. The Caſe of *Noys* verſus *Mordaunt*, 2 *Vern.* 581. goes upon that Reaſon: And the City Precedents prove only, that the Father cannot by Will diſpoſe of the orphanage Share in Bar of the Cuſtom; but do not prove, that where a Will is made, and Legacies given by that Will, which the Child accepts of, that he ſhall notwithſtanding have Recourſe to the Cuſtom for his Share; and ſo, by taking both under the Will and the Cuſtom, defeat that Proviſion intended by his Father for others. The Bond that the Plaintiff was to give, is to me a ſtrong Proof that the Teſtator had the Cuſtom in View, and intended notwithſtanding to make this Proviſion for his Children: For, it does not appear that either the Plaintiff, Mr. *Hervey*, or his Wife, had any other Claim or Right to any Part of the Teſtator's Eſtate but what the Cuſtom of *London* gave them: Nor can I ever think that this Contingency will give them a Right to take both by the Will and the Cuſtom: For, even ſuppoſing it to be the Orphan's Eſtate, it is clear that the Teſtator conſidered it as his own; and in that View, and upon that Conſideration, gave the Plaintiffs the additional Sum of 3500 *l.* beyond what was due to them by the Cuſtom. And indeed, in Propriety of Speech, the orphanage Shares are ſo many Demands upon his Eſtate; ſo that his Expreſſion is not ſo improper as may be thought. But however, his Intent is clear; and that muſt take Place, although his Expreſſions be not ſo correct as might be; and 10000 *l.* being better than 7500 *l.* (which was the Amount of the Shares of each of the Plaintiffs) with Contingencies of Increaſes by the Death of the other Children, this Bequeſt of 10000 *l.* muſt be taken as a Bar to what may happen by the Contingency. I am therefore of Opinion, that his Intent

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was to diſpoſe of his perſonal Eſtate in ſuch a Manner, as that if the Plaintiffs chooſe to take by the Will, they ſhould be barred of what was due by the Cuſtom. And ſo decreed an Election; and if they took by the Will, then to take nothing by the Cuſtom; reſerving to the Plaintiff *Elizabeth* her Election until Twenty-one or Marriage; and that Mr. *Hervey* and his Wife ſhould make theirs before the firſt Day of *Hilary* Term next.

DE
Term. S. Michaelis
9 Geo. II.
In Curia Cancellariæ.

12 *Novemb.*

Attorney General verſus *Scot.*

A. deviſes a Truſt-Eſtate to *B.* and his Heirs, and dies. *B.* dies. The Wife of *B.* cannot be endowed of it.

ANNE *Ratford* being ſeiſed in Fee of Lands in *London* and in *Eſſex*, ſhe and her Huſband levied a Fine, and by Leaſe and Releaſe, *February* 18, 1711. conveyed the Premiſſes in *London* to *Thomas Barker* and his Heirs, to the Uſe of him and his Heirs, in Truſt to permit the ſaid *Anne* and her Huſband to receive the Profits during their Lives, and the Life of the Survivor of them, with Power to *Anne* to charge the Premiſſes with 400 *l.* and ſubject to ſuch Power, *Barker* to ſtand ſeiſed to the Uſe of the Heirs of the Survivor of *John* and *Anne.* And by another Deed, *April* 2, 1712. the *Eſſex* Eſtate was conveyed in the ſame Manner; *Anne* died in 1713. *John* the Huſband died in 1723. having by his Will deviſed this Truſt-Eſtate to *Locklay* and his Heirs (who was married to his now Wife in 1713.) and afterwards, in 1724. and 1727. mortgaged ſeveral Parts of the Premiſſes to the Defendant *Scott.* The Eſtate being now to be ſold, the Queſtion was, whether *Locklay*'s Wife had any Title of Dower

to

to this Truſt-Eſtate, which might hereafter affect the Purchaſers, ſhe having inſiſted upon it in her Anſwer.

For the Wife were cited *Fletcher* verſus *Robinſon*, *Precedents in Chan.* and *Banks* verſus *Sutton*, at the *Rolls*, *March* 1733. where Dower was decreed of the Truſt-Eſtate; becauſe there was a Direction that the Truſtees ſhould convey, and therefore looked upon as an actual Conveyance.

Lord Chancellor. The Queſtion is very conſiderable, and very proper to be ſettled. Dower is properly a legal Demand; and here the Eſtate is limited to the Truſtees and their Heirs, to the Uſe of them and their Heirs: So that it is actually executed in the Truſtees; and whatever comes after can be looked upon only as an equitable Intereſt: For, there cannot be an Uſe upon an Uſe. The Queſtion therefore is, Whether the *Feme* of the Deviſee ſhall be intitled to Dower at Law? No Dower was of an Uſe before the Statute, it being intirely a legal Demand; as appears from *Vernon*'s Caſe, 4 *Co.* 1. And then how can ſhe be dowable of a Truſt after the Statute, ſince no Difference can be aſſigned between a Truſt now, and an Uſe before the Statute? And Courts of Equity muſt follow the ſame Rules now as to Truſts, as prevailed before the Statute as to Uſes. How the Difference now received, between Tenant by the Curteſy and Tenant in Dower, ever came to be eſtabliſhed, I cannot tell; but that it is eſtabliſhed is certain. Nor have I heard any Caſe cited to the contrary, but that of *Fletcher* verſus *Robinſon*, which was determined upon another Reaſon, that does not affect the preſent Caſe. That of *Bottomly* verſus *Lord Fairfax*, *Paſch.* 1712. *Precedents in Chan.* 336. is an exact Authority that a Woman ſhall not be endowed of a Truſt; and the received Practice of inſerting Truſtees to bar Dower would otherwiſe be of no Signification. For me therefore to do a Thing meerly upon the Authority of an obſcure Caſe, (*viz. Fletcher* verſus *Robinſon*) which does not ſeem to have been determined upon that Point neither, and that might perhaps ſhake the Settlements of five hundred Families, is what I cannot anſwer

ſwer to my Conſcience. I do not think it neceſſary to ſay any thing as to the Caſes where Terms are ſtanding out, as *Lady Dudley* verſus *Lord Dudley*, *Precedents in Chan.* 241. and that of Counteſs of *Radnor* verſus *Vandebendy*, 1 *Vern.* 356. and *Show. Parliament Caſes* 69. For they are different, and are to be conſider'd in another Light. Nor is there any greater Neceſſity, at this Time, of determining the Queſtion where the legal Eſtate is firſt in the Huſband, and conſequently the Wife intitled to the Dower, and then is convey'd to Truſtees by the Huſband; for, in the preſent Caſe, it was originally a Truſt-Eſtate, and could not be any Inducement to her in her Marriage; for, ſhe married in 1713. and the Truſt-Eſtate was not deviſed to her Huſband until 1723. ten Years after her Marriage.

And ſo decreed the Wife not dowable.

14 *Novem.* Duncan v Worrall ... 36. Colleyer v Fallon. 1. Turn ... 70. Clarke v Richards. 1 Yo & C 368. Simpson v Howden. 3 M & C. 107 & 1 M. & C. 344.

Law verſus *Law*.

3 *Will. Rep.* 391. S. C. A Bond given to pay Money for procuring the Office of Collector of Exciſe, is within the *Stat.* 5 & 6 *Ed.* 6. againſt Sale of Offices; and falls within the Reaſon of Marriage-Brocage-Bonds. Wherefore decreed it to be deliver'd up to be cancelled, and perpetual Injunction.

EDmund Law, the Plaintiff's late Huſband, gave his elder Brother a Bond, reciting, that whereas the ſaid *Edmund Law* had been for many Years an Officer and Superviſor of Exciſe, by the Procurement of his Brother *Richard Law* the Defendant, and that the ſaid *Richard Law* had promiſed to uſe his utmoſt Endeavour and Intereſt to procure him to be advanced to the Office of Collector of the Exciſe, upon Condition that the ſaid *Edmund Law* ſhall pay to the ſaid *Richard Law* 10 *l. per Ann.* ſo long as he ſhall continue Superviſor (his then Office) and 20 *l. per Ann.* as long as he ſhould be Collector: The Condition therefore was, That if *Edmund* ſhould pay the ſaid 10 *l.* and 20 *l. per Ann. &c. Edmund Law* paid one Sum of 10 *l.* and died inteſtate; and the Defendant *Richard Law* brought an Action upon the Bond againſt the Plaintiff, the Widow and Adminiſtratrix of *Edmund*; and ſhe thereupon brought her Bill to ſet aſide this Bond, and to have the 10 *l.* refunded.

Lord

Lord Chancellor. It is agreed on all Hands that this Bond is good at Law: Wherefore the Repreſentative of the Obligor is obliged to come hither for Relief. The general Head of Relief goes upon Fraud and Impoſition; of which there is nothing ſuggeſted in the preſent Caſe, but the whole Conſideration appears in the Condition. The Queſtion is, Whether this be ſuch a Bond as a Court of Equity ought to relieve againſt?

This is but one Agreement although reſpecting two Periods, *viz.* That of having obtained the Office of Superviſor, and that of procuring the Collectorſhip: And then the Condition is to pay two ſeveral Sums. It relates to an Office which is certainly within the *Statute* 5 *&* 6 *Ed.* 6. For, it concerns the King's Revenue, and cannot be executed by Deputy; and no body can ſay but that the Sale of Offices within that *Statute* is a public Miſchief; the Legiſlature has adjudged it to be ſo. And although this be not directly a Sale within the *Statute*, yet it is in Effect the ſame; there being little or no Difference between a Commiſſioner's taking a Sum of Money, and another Perſon's taking it to influence the Commiſſioner: The Inconveniencies are the ſame; ſince thereby the Perſons appointing are deceived, and ſo is the Public; and there is a very ſtrong Preſumption that the Perſon ſo giving is not duly qualified for the Execution of the Office: And in this very Caſe it appears that the Obligor was ſuſpended. The Objection, That this being a Penal Law is not to be extended in Equity, is eaſily anſwered; for though Penal Laws are not to be extended as to Penalties and Puniſhments; yet if there be a public Miſchief, and a Court of Equity ſees private Contracts made to elude Laws enacted for the public Good, it ought to interpoſe. Here is a Bond given for future Acts, as well as for ſuch as are paſſed; and which is the ſame as if given to a Commiſſioner for a direct Sale. And indeed had there been no Precedent of the ſame Nature, I ſhould have had Courage enough to have made one in the preſent Caſe: But I ſhall be abun-

dantly warranted by what the Court has done in Caſes within the ſame Reaſon. Bonds of Reſignation are not intirely parallel; for, the relieving or not relieving againſt them, depends upon the Uſe made of them *ex poſt facto*; and Bonds given in Fraud of Marriage are relieved againſt, by reaſon of the Extortion and Impoſition which attends them; as in the Duke of *Hamilton*'s Caſe, 2 *Vern.* 652. But Marriage-Brocage Bonds fall directly within the Reaſon of this Caſe, being intirely a voluntary Act; nor does the Court interpoſe therein for the particular Damage to the Party only, but likewiſe from a public Conſideration; Marriage greatly concerning the Public. And it is no Objection, that the Point of relieving againſt them has been ſettled but lately; for, it was ſettled upon very great Conſideration, and there are now many Precedents of it: If therefore in this and the like Caſes this Court does interpoſe and regulate Things of a public Nature, as in the Caſe of a young Heir's entering into unreaſonable Contracts during the Life of the Parent; why ſhall it not do the like in the Caſe before us, the Inconveniencies of winking at ſuch Practices being plain and obvious to every Man's Underſtanding? Some Caſes have been cited for the Defendant, none of which come up to our preſent Caſe; as *Lawrence* verſus *Brazier*, 1 *Chan. Ca.* 72. where it does not at all appear what the Office was, and the only Queſtion there is, Whether the Party ſhould pay for the Time he was diſpoſſeſs'd; that of *Beresford* verſus *Done*, 1 *Vern.* 98. related to a Commiſſion in the Army: And no Law prohibits the Sale of ſuch, no more than it does that of Purſer of a Ship; which was *Symmonds* verſus *Gibbons*, 2 *Vern.* 308. That of *Lockner* verſus *Strode*, 2 *Chan. Ca.* 48. had nothing illegal in it; for, the Payment was not to be abſolute, but only in caſe the Profits amounted to 400 *l.* or more, beſides the whole Profits belonging to the Sheriff himſelf, that was but a Reſervation of what was his Right, *viz.* the Profits of the Office. And in that of *Bellamy* verſus *Burrow*, the ſole Queſtion was, Whether that Office was capable of a Truſt? So that none of thoſe Caſes come near to the preſent one; which is clearly within the

Ante 97.

the Miſchief of 5 & 6 *Ed.* 6. and therefore not to be endured.

And therefore decreed the Bond to be cancelled, and a perpetual Injunction. *

* And tho' a new Caſe, yet Defendant ordered to pay Coſts. 3 *Will. Rep.* 394.

Ex parte Lyne, a Lunatick.

14 *Novemb.*

THE Cuſtody of the Lunatick's Eſtate was granted to Huſband and Wife, the Wife being next of Kin to the Lunatick: The Wife died, and the *Lord Chancellor* held, That the Huſband's Right to the Cuſtody of the Lunatick's Eſtate was determined, it being a joint Grant, and a meer Authority without any Intereſt; and ſaid, It had been ſo determined in the Lord *King*'s Time.

A Cuſtody of a Lunatick's Eſtate granted to Baron and Feme (the Feme being next of Kin) determines on her Death.

Kenſey verſus *Langham.*

Gilly v. The Biſhop of Exeter. 12. B. Mayn. 594.

18 *Novemb.*

SIR *Edward Nichols* being ſeiſed in Fee of ſeveral Lands in *Northamptonſhire* and elſewhere, *Auguſt* 12, 1708. made his Will; whereby he deviſed his Manor of *Faxton*, and Lands lying there, and other Lands in the Will mentioned, to Truſtees and their Heirs, in Truſt for the Plaintiff *Jane Kenſey*, and the Lady *Suſanna Danvers* her Siſter, and all other his Meſſuages, Cottages, Cloſes, Woodlands and Tenements whatſoever in *Faxton*, *Haſlebitch*, *Subby* and *Hardwicke*, in *Northamptonſhire*, and all other his Lands and Tenements not therein after deviſed, upon Truſt that his ſaid Truſtees, and the Survivor of them ſhould, out of the Rents, Iſſues and Profits, yearly for ever, pay the Sum of 30 *l.* a-piece, without any Deduction, to the ſeveral Vicars, for the Time being, of eight ſeveral Vicarages in his Will named, for the Augmentation of their Vicarages; and that whenever the Profits of thoſe Lands amounted to more than the yearly Payment, and his Truſtees Expences, that then the Surplus ſhould be diſpoſed of in ſuch charitable Uſes as his Truſtees ſhould think fit; the Teſtator died,

A. ſeiſed in Fee deviſes his Lands and Tenements in *B.* to Truſtees, to apply Part of Rents for charitable Uſes. The Teſtator dies; the Church of *B.* becomes void; the Heir at Law ſhall preſent.

died, leaving the Plaintiff and the Lady *Suſanna Danvers* his Heirs at Law; which latter died ſoon after, without Iſſue; and now the Church of *Hardwicke* becoming void (which was full at the Time of the Teſtator's Death) the Plaintiff brought her Bill to have the Preſentation: For, the Advowſon not paſſing by the Deviſe to the Truſtees, did belong to her as Heir at Law.

The Truſtees and Vicars inſiſted in their Anſwer, That by the general Deviſe the Advowſon paſſed; and that the Teſtator intended it to paſs to make up what Deficiency might be in the Eſtate.

Lord Chancellor. The Queſtion is, Whether the Advowſon paſſed to the Truſtees by the Will? And I rather incline to think, that by the firſt Words it does not paſs, there being Lands *lying and being at Hardwicke* to ſatisfy theſe Words; and an Advowſon being but a Right of Preſenting, cannot be ſaid to be *ſituate*. Nor am I clear that the Word *Tenements*, which has been ſaid to carry the Advowſon, does extend to incorporeal Inheritances: But I do not think it neceſſary to enter into that Queſtion at this Time. And I ſhall conſider it a Deviſe to the Truſtees, ſo far as it may be beneficial to the Charity, but not where it cannot be any way beneficial to it; as in the preſent Caſe, the Church being actually void, and conſequently cannot be beneficial; for, no Money muſt or can be taken for the filling it; and if ſo, the Rule, *That whatever is not diſpoſed of remains in himſelf*, muſt take Place, and the Heir at Law conſequently be intitled to this Preſentation, there being no Proviſion that either the Truſtees or the Charity ſhould have it. It has been ſaid indeed, that this might be a beneficial Deviſe, by the Truſtees ſelling the next Avoidance; but as he has made no ſuch Proviſion, I do not think it proper by ſuch a Conſtruction to advance a Thing which would be much better if intirely prohibited; eſpecially in the preſent Caſe, where it cannot be proved that he intended any ſuch Thing. In Caſes of Mortgages, the Mortgagor preſents to every Avoidance before Foreclo-

ſure:

ſure: For, the Lands being but a Pledge in the Mortgagee's Hands for the Payment of his Debt, he can receive nothing but what may be accounted for in its Nature; which a Preſentation cannot be; and therefore he ſhall not have it. So in *Atherton* verſus *Sir Walter Calverley*, the Truſtees having no Intereſt, only a bare Power of Nomination, the Right of Preſentation was decreed to be in the Infant. As therefore this particular Turn is not to be given away by the Will, and ſince nothing is intended for the Truſtees but a Reimburſement of their Charges, and this cannot be applicable to the Charity, I think this Turn belongs to the Heir at Law, and that her Preſentee muſt be admitted.

A Caſe was made for the Opinion of the Judges of *B. R.* Whether the Word *Tenements*, in the Will, would paſs the Inheritance of the Advowſon to the Truſtees?

Chapman verſus *Bliſſett*.

Baskin v Coates. 3. Beav 100

22 *Novem.*

Joſeph Bliſſett deviſed all his Freehold, Copyhold and Leaſehold, and all his real and perſonal Eſtate not therein before deviſed, to three Truſtees, their Heirs, Executors and Aſſigns, in Truſt to pay his Son *Iſaac Bliſſett* 27 *l.* Quarterly; and if he married with Conſent, then double the Sum; and if he ſhould have any Child or Children, he gives the Reſt and Reſidue of the yearly Rents and Profits of his ſaid Truſt-Eſtate, over and above the ſaid yearly Payment, to be applied, during the Life of the ſaid Son, for the Education and Benefit of ſuch Child or Children: And then he goes on in theſe Words, *viz.* " After " my Son's Deceaſe, I give one Moiety of the ſaid Truſt-

A. deviſes his Freehold, Copyhold and Leaſehold, and all his real and perſonal Eſtate not before deviſed, to three Truſtees, their Heirs, &c. in Truſt to pay his Son *B.* an Annuity; and if he ſhould have any Child or Children; the Reſidue of the Rents, during *B.*'s Life, for the Education and Benefit of ſuch

" Eſtate

Child or Children; and after *B.*'s Deceaſe, a Moiety of the Truſt-Eſtate to ſuch Child and Children as he ſhall leave, their Heirs, &c. the other Moiety to the Child and Children of his Grandſon *C.* and every other Child and Children of his Daughter *S.* their Heirs, &c. And if *B.* die without Iſſue, the firſt Moiety to *C.* and other Child and Children of *S.* and their Heirs, &c. and directs an annual Payment to ſuch Wife as *B.* ſhall marry. The Teſtator died; *B.* married, and had Iſſue a Son and Daughter, and died; afterwards *C.* married, and had Iſſue a Daughter, and died: The Limitation to the Daughter of *C.* is well ſupported by the Eſtate in the Truſtees; or, if not, is good as an executory Deviſe; and the Profits, &c. ſhall go to the Children of *B.*

" Eſtate to ſuch Child and Children of my ſaid Son as he " ſhall leave, their reſpective Heirs, Executors and Aſ- " ſigns, and to the Survivor; and the other Moiety I give " to the Child and Children of my Grandſon *Joſeph* " *Dickenſon*, and every other Child and Children of my " Daughter, their Heirs and Aſſigns, and the Survivor of " them. Then in caſe *Iſaac* die without Iſſue, the firſt " Moiety to *Joſeph Dickenſon* and other Child and Chil- " dren of *Sarah* and their Heirs, *&c.*" Then by another Clauſe he appoints 100 *l. per Annum* as a Jointure to any Wife his Son *Iſaac* ſhould marry, in caſe he married with Conſent; and gives to his ſaid Grandſon *Joſeph Dickenſon* 30 *l. per Annum* for his Maintenance, until his Age of Fifteen, and then 200 *l.* to put him out Apprentice: Soon after the Teſtator died. In the Year 1712. *Iſaac Bliſſett*, the Teſtator's Son, brought his Bill for a Diſcovery, and it was decreed (*inter alia*) by Lord *Harcourt*, That the Surplus of the Profits of the Teſtator's real Eſtate (over and above the ſeveral Payments directed by the Will) and the Produce of the perſonal Eſtate ſhould be improved for the Benefit of ſuch Child or Children as the ſaid *Iſaac* ſhould have; and that after *Iſaac*'s Death, and upon his having a Child, all Parties intereſted ſhould apply to the Court. Soon after, *Iſaac* married with Conſent; and having Iſſue a Son and Daughter, applied to the Court for farther Directions: Whereupon it was decreed by the Lord *Cowper*, that the Produce of the Surplus of the Teſtator's Eſtate to the Time that *Iſaac* had a Child, ſhould go in Augmentation of the ſaid Surplus; but that the Produce of ſuch Surplus, from the Birth of *Iſaac*'s firſt Child, ſhould be paid to him for the Maintenance of his Children during his Life; and that at his Death the Eſtate ſhould go according to the Limitations in the Teſtator's Will. *Iſaac Bliſſet* continued accordingly to receive the Surplus Profits until his Death, which was upon the 10th of *October* 1728. leaving a Son and two Daughters, the now Defendants. About two Years after *Iſaac*'s Death *Joſeph Dickenſon* married, and had Iſſue the Plaintiff his only Daughter, and died ſoon after.

This

This Cauſe was firſt heard at the *Rolls*, where it was decreed for the Plaintiff; and that the Produce of the Surplus of the Teſtator's real and perſonal Eſtate incurred after his Death, and before *Iſaac* had a Child born, ſhould not go to ſuch Child, but ſhould go in Augmentation of the *Reſiduum* of the Teſtator's Eſtate.

And now coming on to be reheard, two Queſtions were made; Firſt, Whether the Children of *Joſeph Dickenſon* took by way of executory Deviſe or contingent Remainder? for, if they took by the latter, then the Plaintiff could never take, ſhe being born three Years after *Iſaac*'s, the particular Tenant's Death. The ſecond Queſtion was, What ſhould become of the Surplus of the real and perſonal Eſtate of the Teſtator from his Death until the Birth of *Iſaac*'s firſt Child? Whether it ſhould go to the Children of *Iſaac*, or whether it ſhould go to the augmenting the *Reſiduum*?

Mr. *Attorney General*, Mr. *Verney*, and Mr. *Fazakerley* argued for the Defendants, That the Rules of Truſts veſted were the ſame as thoſe of Eſtates limited to Uſes at Law; and that no Rule was better known than that the Remainder muſt veſt *eo Inſtante* the particular Eſtate determines. That the Danger of Perpetuities was equal in Truſts and legal Eſtates; and that executory Deviſes were no more to be favoured here than at Law. That where nothing goes to the Heir at Law as undiſpoſed of until the Contingency happens, upon which the Deviſee's Intereſt is to ariſe, then it is a contingent Remainder. That here was no Deſcent to the Heir in the mean Time, the Whole being diſpoſed of during the Life of *Iſaac*. And though Part of the Profits were to be laid out, during his Life, for the Benefit and Education of his Children, and there were Children born before his Death, that did only veſt their Intereſt in them in their Father's Life-time; and there being a compleat Diſpoſition of the Profits during the Life of *Iſaac*, makes it a Freehold of the Truſt in Being, as to the whole Truſt,

viz.

viz. Part to himſelf, and Part to his Children. Beſides, no more is executed here in the Truſtees than is ſufficient to ſerve the Purpoſes ſpecified during the Life of *Iſaac*; and both the Truſt-Eſtate and Intereſt determine with his Life: For, the Truſtees cannot have a greater Eſtate by Implication than what the expreſs Words give them, unleſs the Purpoſes directed neceſſarily require it; the Court never extending the Conſtruction againſt the veſting of Uſes. Now, after *Iſaac*'s Death, the legal Eſtate is deviſed, Part to his Children, and Part to the Children of *Joſeph Dickenſon*; and is deviſed by *verba de præſenti*, which are only proper for a Remainder, and to make an Uſe executed: For, whenever the Deviſe is *in verbis de præſenti*, and the Teſtator intends a preſent Deviſe, no Fact can alter it: And if it cannot take Effect as ſuch, it ſhall rather be void than be conſtrued a future Deviſe; the Conſequences being no Ingredient in the Conſtruction. This appears from the Caſe of *Scattergood* verſus *Edge*, 1 *Salk.* 229. where it was agreed, That if the Words had been to a Child to be born, it would have been good by way of executory Deviſe; but being to Truſtees for eleven Years, and then to the firſt Son of *A.* in Tail, who had no Son at that Time, that it was void; there being no Perſon *in Eſſe* capable of taking at that Time. The ſame Determination was in *Goodright* and *Corniſhe*'s Caſe, 1 *Salk.* 226. in both which Caſes it was impoſſible to ſupport the Deviſe but as a future one; yet the Teſtator having deviſed by *verba de præſenti*, the Court would not make a Conſtruction in Favour of the Party not born. What has been ſaid for the Plaintiffs, that this was not too remote a Contingency becauſe confined to ariſe within the Compaſs of a Life, is agreed: But the Queſtion is, Whether it was the Teſtator's Intent to paſs it in that Manner? and if it was not, then it muſt be a contingent Remainder; and as ſuch, by its not taking Effect in due Time, upon the Determination of the Eſtate of Freehold in *Iſaac*, is void, and can never ariſe.

Mr. *Solicitor General* replied for the Plaintiff, that although the Deviſe was *in verbis de præſenti*, yet conſidering the

the whole Frame of the Will, it was evident that the Teſtator's Intent was to extend it to the Children born thereafter, the Words being uſed promiſcuouſly, and making no Difference between the Children already born and thoſe to be born. And in *Scattergood* and *Edge*'s Caſe there was nothing to ſhew the Intent to be to take in the Children unborn: Whereas the Clauſe in the Will, whereby, upon the Death of *Joſeph* and his Daughter without Children, he gives their Moiety to *Iſaac*'s Children, ſhews plainly that he muſt mean Children to be born, ſince he knew that *Joſeph* had no Children at that Time; and that he, by another Clauſe, provides a particular Maintenance for him until his Age of Fifteen: Nor was it more reaſonable to conſtrue this to be an Uſe executed in the Truſtees only during *Iſaac*'s Life, and then to determine; for, there are many other Purpoſes in the Will to be ſerved by them, which do not any way depend upon *Iſaac*'s Life, as the Annuity given to his Wife, the Direction about putting out Boys to Apprenticeſhip, and others which are quite diſtinct from, and have no Dependency upon *Iſaac*'s Life; but can ariſe no way but from the Truſt-Eſtate: And ſurely it could never be his Intent to make ſuch a Diſpoſition as would be liable ſo ſoon to be defeated by the Determination of the Truſtee's Eſtate, but rather to continue the Uſes for the Benefit of all that were named; which could only be done by the Continuance of the Truſtee's Intereſt: And the Words being well able to bear that Conſtruction, it is the moſt reaſonable way of taking his Intent.

Lord Chancellor. The firſt Queſtion is, Whether this Limitation to the Plaintiff be good or void? It has been ſaid, That the Truſt-Eſtate determining upon *Iſaac*'s Death, the Limitation to *Joſeph*'s Children was of a legal Eſtate, and being by *verba de præſenti*, could enure only as a contingent Remainder; and conſequently the Plaintiff could never take, becauſe not *in Eſſe* at the Determination of the particular Eſtate by the Death of *Iſaac*. The whole depends upon the Teſtator's Intent, as to the Continuance of the Eſtate deviſed to the Truſtees, whether he intended

the whole legal Eſtate to continue in them, or whether only for a particular Time or Purpoſe: If an Eſtate be limited to *A.* and his Heirs, in Truſt for *B.* and his Heirs, then it is executed in *B.* and his Heirs: But where particular Things are to be done by the Truſtees, as in this Caſe the ſeveral Payments that are to be made to the ſeveral Perſons, it is neceſſary that the Eſtate ſhould remain in them ſo long at leaſt as thoſe particular Purpoſes require it. No Authority has been cited to warrant the Doctrine, that in caſe of ſuch a general Limitation to Truſtees as the preſent Caſe is, that they ſhould have but a particular Intereſt, and then that Intereſt to determine; ſuch a Caſe might indeed be framed, but was never intended here; there being many Purpoſes to take Effect, which might endure longer than the Life of *Iſaac*; and the taking it in ſo confined a Senſe, would be making a forced Conſtruction to diſappoint the Teſtator's Intent, which was to make an intire Diſpoſition of the legal Eſtate to the Truſtees.

Conſidering it therefore as a Truſt-Eſtate, the Queſtion is, whether this Limitation to the Plaintiff ſhall enure by way of executory Deviſe or contingent Remainder? and I think no Objection againſt its taking Place as an executory Deviſe, that it is limited by *verba de præſenti*: For, it appears that *Joſeph* was very young at the Time of the Deviſe, and the Teſtator's providing a Maintenance for him until he ſhould attain to the Age of Fifteen, is a Proof of his knowing that *Joſeph* had no Children at that Time; it being intirely improbable that he ſhould have any in Being when he was himſelf of ſo tender an Age at the Time of the Deviſe: So that although the Words be *in præſenti*, they muſt be taken in a future Senſe, in order to ſerve his Intent; which appears manifeſtly to be, that the Children of *Joſeph* ſhould take in its Creation; therefore it was Executory. But then it has been ſaid, That when *Iſaac* had a Son born, the Remainder veſted in him, and conſequently the Limitations to the other became veſted Remainders likewiſe; and the Remainder-men not being *in rerum Natura* at the Time of *Iſaac*'s Death, this Remainder

can

can never ariſe. But in regard to Truſts, the Rules are not ſo ſtrict as at Law; for, the whole legal Eſtate being in the Truſtees, the Inconveniency of the Freehold's being in Abeyance, if the particular Eſtate determines before the Contingency (upon which the Remainder depends) does happen, is thereby prevented; there being always a ſufficient Tenant to the *Præcipe*; the Defect of which was the ſole Miſchief the Law provided againſt. And even the Reaſon is not now ſo ſtrong, as when real Actions, which can be brought againſt the Tenant of the Freehold only, were more in Uſe. The Whole therefore being in the Truſtees, ſupports the ſeveral Uſes that are to ariſe out of their Intereſt, which continuing in them until the Birth of the Plaintiff, whether it be taken as a future Limitation, or as a contingent Remainder of a Truſt, is good either way.

The next Queſtion is, What ſhall become of the intermediate Profits from the Time of the Teſtator's Death until the Birth of *Iſaac*'s Son? Upon this Head, and in this very Caſe, there have been two different Decrees: The firſt by the Lord *Harcourt*, who thought thoſe Profits ſhould belong to the Children of *Iſaac* when born; the other by the Lord *Cowper*, who was of Opinion, that the Children had no Right to them, but that they ſhould go in Augmentation of the Truſt-Eſtate. I am at a Loſs how to determine between two as great Men as ever ſat here: But the Whole being open before me, I muſt give my Judgment in the Manner which ſeems to me moſt reaſonable. He gives, in caſe *Iſaac* ſhould have any Children, the *Reſt and Reſidue* of the yearly Rents and Profits for the Education and Benefit of ſuch Children. Now the Words *Reſt and Reſidue* are Words of Relation, and Part of ſomewhat that went before; the preceding Diſpoſition being of yearly Rents and Profits, the Words *Reſt and Reſidue* muſt be applied to them, and not to the Capital, which was not given away before. Indeed had thoſe Children never been born, then they could never take; but when they are born, how can I determine that they ſhall not take what is expreſly given

to

to them without any Diſtinction between Profits before and after their Birth? The Words *Benefit and Education* make it plain that they are intitled to them all abſolutely and intirely.

And ſo varied the Decree at the *Rolls* as to this laſt only.

24 *Novemb.*

Aſhton verſus *Aſhton.*

Robinſon v Addiſon 2 Atk. 570. Hosking v Nicholls 1 Ves. 476. Pl. 479.

3 *Will. Rep.* 384. *A.* deviſes to his Nephew *B.* 6000 *l. South-Sea* Annuities, to be laid out in Land, and ſettled on the Plaintiff, *&c.* and by Codicil taking Notice of it, gives 1200 *l.* to the ſame Uſes; and made *B.* his Executor, and dies poſſeſſed of a large perſonal Eſtate, but had only 5360 *l.* in *South-Sea* Annuities: This is a ſpecific Legacy; and this Court will not decree the Deficiency to be made up out of the other perſonal Eſtate.

Joſeph Aſhton, by Will, gave to his Nephew *Henry Aſhton*, and two other Perſons, the Sum of 6000 *l. South-Sea* Annuities; upon Truſt, as ſoon as conveniently might be after his Death, to ſell and lay out the ſame in a Purchaſe of Lands, to be ſettled on the Plaintiff for Life, Remainder to his Iſſue; and afterwards by a Codicil, dated three Days after, taking Notice that he had given his Truſtees ſuch a Sum, gives 1200 *l.* to be laid out in Land to the ſame Uſes, and made his Nephew Executor: The Teſtator died, leaving a very conſiderable perſonal Eſtate; but had only 5360 *l.* in Annuities at the Time of the Will made. The Queſtion was, Whether it ſhould be made up 6000 *l.* or, whether only the Teſtator's ſpecific Fund paſſed by the Will? It had been decreed at the *Rolls* to paſs nothing but what the Teſtator had in *South-Sea* Annuities.

Lord Chancellor. This is a ſpecific Legacy: The Teſtator has given 6000 *l. South-Sea* Annuities Stock, having at that Time but 5360 *l.* And if a Man deviſe a Thing which he hath not, it is not ſuch an Eſtate as a Court of Equity can relieve againſt. If in this Caſe he had actually had as much as he deviſed, but before his Death had ſold a Part, it had been an Ademption for ſo much: But here is no Ademption; for, he having no more than 5360 *l.* no more can paſs. Specific Legacies are different in their Nature from all others; for, if there be a Deficiency of Aſſets, there ſhall be no Abatement of the ſpecific Legacy:

gacy: And on the other Hand, if the Teſtator alien any Part of it, or the Whole, the Legatee has no Claim on any other Part of the Eſtate; and in this Caſe, this being a ſpecific Legacy, and the Teſtator not having ſo much at that Time, no Relief can be given to the Legatee: It is a Miſtake in the Teſtator, but ſuch as cannot be helped here. If a Man, through a Miſtake, deviſes the Inheritance of an Eſtate which he really hath not, this Court cannot put the Deviſee in a better Condition than the Will has left him. Nor is this to be compared with the Caſe in 2 *Leon.* where it is held, That if one deviſes his Land in ſuch a Place, and has no Land, but only Tithe in that Place, the Tithe ſhall paſs; for, otherwiſe there would be nothing to ſatisfy the Deviſe: But if one deviſes his Lands, expreſſing them to be of the Value of 600 *l.* and they prove to be worth but 500 *l.* this Court can make no Addition; for, being a ſpecific Deviſe of the Eſtate, the Deviſee muſt take it as he finds it.

And ſo affirmed the Decree.

Edwards v Edwards Term. 614.

Cray verſus *Rooke.*

11 *Decemb.*

A Bond given to a kept Miſtreſs for the Maintenance of her, and Proviſion for a Child ſhe had by the deceaſed, ſhall not be ſet aſide in favour of his legitimate Children or Heir, if not obtained by Fraud; but ſhall not be paid out of the perſonal Eſtate until after Simple Contracts, but ſhall be paid out of the real Eſtate, if there be one, in caſe the perſonal Eſtate falls ſhort.

BILL brought by the Son and Heir and his two Siſters to have a Diſtribution of their Father *Jeremiah Cray*'s Eſtate, and to ſet aſide a Bond given by his ſaid Father to the Defendant *Katherine Rooke*, in the Penalty of 2000 *l.* to pay her (whom he had formerly kept as his Miſtreſs) the yearly Sum of 80 *l.* The Defendant inſiſted by her Anſwer, That the Bond was good; that ſhe being a Woman of Virtue, and intitled to ſome Fortune, was prevailed upon, by large Promiſes, to live with the ſaid *Jeremiah Cray*; whereby ſhe greatly diſobliged all her Friends; and that ſhe and *Jeremiah Cray* cohabited from *January* 1728. to *April* 1731. when the ſaid *Cray*, for making ſome Proviſion for her Child (then about two Years old) executed this Bond, without any Fraud or Impoſition, whereby he

bound himſelf and his Heirs in the Penalty of 2000 *l.* for the Payment of a yearly Annuity of 80 *l. per Ann.* for her Maintenance and that of her Child; the ſaid *Jeremiah Cray* being then about marrying (which he afterwards did) the Plaintiff's Mother.

The *Maſter of the Rolls* had decreed the Annuity, ſecured by the Bond, to be paid after all other Creditors, whether by Bond or Simple Contract, this being a voluntary Bond; and that in that Courſe of Payment a Fund ſhould be ſet a-part out of the perſonal Eſtate; but had given no Direction whether the real Eſtate ſhould be chargeable with this Annuity in caſe of a Defect of the perſonal Aſſets.

Wherefore the Defendant *Rooke* appealed, and it was inſiſted for her, Firſt, That this Bond was not to be conſider'd as a meer voluntary Bond: That the Defendant *Rooke* appear'd to be a virtuous young Gentlewoman before unhappily ſeduced by Mr. *Cray*; that this was *Præmium Pudoris*, *&c.* and Conſiderations may ariſe as well by ſuffering Loſs and Damage at the Inſtance of another, as by giving Money, *&c.* And that in *Harris* and *Marchioneſs of Annandale*, decreed *June* 25, 1727. and affirmed in the *Houſe of Lords*, *March* 19, 1728. a like Bond was to be paid in a Courſe of Adminiſtration, and not poſtponed, *&c.* And in *Ord* and *Blackett*, decreed by Lord *Macclesfield*, it appearing that Sir *William Blackett* had ſeduced the Plaintiff, a young Lady of 10000 *l.* Fortune, and ſettled upon her 300 *l. per Ann.* Annuity, by a Deed, which was not an effectual Conveyance, ſo that ſhe could not recover at Law. This Court interpoſed, and decreed againſt the Heirs at Law of Sir *William Blackett*. So in the Caſe in the *Exchequer*, cited in *Harris* and *Lady Annandale*, in *Eq. Abr.* 87. *pl.* 6. where a Man granted an Annuity to a Woman of 30 *l. per Ann.* out of Lands he had no Title to: The Court decreed him to make a good Grant, *&c.* And therefore the Court would not conſider the Grantees as meer Voluntiers.

It

It was alſo inſiſted, That if the Bond was to be conſidered as voluntary, and to be poſtponed to Creditors by Simple Contract; yet as it affected the real Eſtate, and no Pretence to ſet it aſide for Fraud, the Bill, ſo far as it ſought on Behalf of the Plaintiff the Heir at Law to ſet the Bond aſide, ought to have been diſmiſſed, and the Plaintiff left to her Remedy at Law againſt the real Eſtate, or ſome Proviſion made by the Decree for the Defendant *Rooke* to have Satisfaction out of the real Eſtate, *&c.*

Mr. *Attorney General* for the Plaintiffs. This at beſt is to be conſidered as a voluntary Bond. There is a Difference where ſuch Bonds, *&c.* are given before ſeducing, and where after, and this appears to be long after: And it would be ſtrange to put ſuch Bonds, *&c.* upon a better Foot than Bonds and Securities given after Marriage, which are always deemed voluntary, *&c.*

As to the Caſe of *Ord* and *Blackett*, and the other Caſe in the Court of *Exchequer*, they are founded upon this; That though a Bond or Conveyance be at firſt voluntary, yet if the Party who gives it does afterwards by Fraud deſtroy or endeavour to defeat it, Equity will relieve againſt the Act of the Party himſelf. And ſo was the Caſe of *Pitt* and *Pitt* at the *Rolls*; where it appearing that the late Governor *Pitt* had granted the younger Son (the Plaintiff) an Annuity of 300 *l. per Annum*, in order to qualify him for Member of Parliament, and afterwards got the Deed and burnt it; it was decreed againſt the eldeſt Son, the Heir at Law, to make it good.

Lord Chancellor. No Relief in Equity can be had upon this Bond. Here is no Pretence of Fraud, and therefore no Reaſon to relieve againſt it. It is indeed a voluntary Bond, being given after actual Cohabitation, and cannot be in a more favourable Condition than a Settlement made after Marriage, which is looked upon as voluntary; although the

the Obligation of Nature is as ſtrong upon a Man to provide for his Children after Marriage as before it.

If then it be once ſettled to be good, the next Queſtion is, In what Degree it ſhall be paid? And as to that, I think, that according to the Lord *Harcourt*'s Opinion, the Reſolution in *Jones* and *Powell*'s Caſe, *February* 23, 1712. (and *Abr. Eq. Ca.* 84. *pl.* 2.) all Creditors, whether by Bond or Simple Contract, ſhall be preferred; but that this Bond ſhall be paid before Legacies: For, the Bond, although it be voluntary, transfers a Right in the Life-time of the Obligor; but Legacies ariſe only from the Will, which takes Effect only from the Teſtator's Death; and therefore ought to be poſtpon'd to a Right created in the Teſtator's Life-time: The Caſe of *Fairbeard* and *Powers*, 2 *Vern.* 202. proves this expreſly; and that the Lord *Harcourt*'s Opinion in *Wood* and *Powell*'s Caſe, or in *Jones* and *Powell*'s Caſe, was grounded upon precedent Authorities.

The next Conſideration is, How far it ſhall affect the real Eſtate, in caſe of a Deficiency of the perſonal Aſſets? Now although it be a voluntary Bond, and poſtponed in Point of Payment even to Simple Contract Creditors; yet it muſt not be in a worſe Condition than they are, its being voluntary giving the Heir no Right to ſet it aſide: For, as the Anceſtor might have granted away the Eſtate intirely from his Heir, ſo, when he thinks proper to charge himſelf and his Heirs, the Heir ſhall be bound in reſpect of the Aſſets deſcended upon him from his Anceſtor: And as the Whole is now before me, I muſt give my Opinion upon it; ſince the leaving the Defendant to ſue the Bond at Law, where ſhe can recover but the Penalty, and where the Parol muſt demur until the Heir (who is now but Three Years old) comes to his full Age, would be delaying her much too long; and ſince even after Advantage taken of the Infancy at Law, and the Penalty recovered againſt the Heir, he might reſort again to this Court to have the whole Thing reconſidered; which is now as

proper

proper for the Judgment of the Court as it would be then.

And ſo decreed, That if the perſonal Eſtate fall ſhort, upon Payment of the Arrears, and growing Payments by the Plaintiff, and upon his ſecuring the Annuity out of a ſufficient Part when he comes of Age, the Defendant *Rooke* be reſtrained from proceeding upon this Bond at Law.

Ibbetſon verſus *Beckwith.*

Wilce v Wilce 7 Bing 667 Bradford v Belfield 2 Sim 267. vi Brown's Rep 437
& 5 Moore & P. 684 — 3 Silvey v Howard 6 A&E 257. Doe v Lawton 6 Sco 312.

THomas *Beckwith* made his Will in the Words following, *viz.* " As touching my worldly Eſtate, wherewith it hath pleaſed God to bleſs me, I give, deviſe and " diſpoſe of the ſame in the Manner following: *Imprimis*, " I give my Eſtate, which I lately purchaſed of *John Adamſon*, to pay and diſcharge all my Debts. *Item*, I give " and bequeath unto my loving Siſter *Mary Beckwith*, all " my Eſtate at *Helmehouſe* in *Hither Dale Leaſing* at *Crew*, " and all my Eſtate at *Cubeck*, paying and diſcharging all " Legacies before charged by my Father's Will. *Item*, I " give unto my loving Mother *all my Eſtate* at *Northwith* " *Cloſe*, *North Cloſes*, and my Farm held at *Roomer*, with " all my Goods and Chattels as they now ſtand, for her " natural Life, *and to my Nephew* Thomas Dodſon *after* " *her Death*, if he will but change his Name to *Beckwith*; " if he does not, I give him only 20 *l.* to be paid him for " his Life out of *Northwith Cloſe*, *North Cloſe*, and the Farm " held at *Roomer*; which I give her upon my Nephew's " refuſing to change his Name, to her and her Heirs for " ever."

A Teſtator's ſetting out in his Will to give and diſpoſe of his worldly Eſtate, is a ſtrong Proof that he intends to diſpoſe of the Inheritance of his Lands, when there are ſufficient Words in the following Parts of the Will for that Purpoſe; the Words *Eſtate at* ſuch a Place, or in ſuch a Place, may carry a Fee. The whole Complexion of a Will ought to be conſider'd.

Mr. *Solicitor General* and Mr. *Fazakerley* argued, That this was a Fee-ſimple in *Thomas Dodſon*, the Teſtator's Intent being to diſpoſe of his whole Eſtate; and there ſuch Conſtruction ſhould prevail as ſhould make the Whole to paſs. That as this was his Intent, ſo had he uſed Words ſufficient to carry the Whole; three Things only being neceſſary in

Wills to make the Deviſe good, *viz.* The Perſon deſcribed who is to take, the Thing which is to be taken, and the Intereſt which the Party is to have in it; all which concur here: The Words being ſufficient to deſcribe the Perſon, the Thing, and the Intereſt which the Party is to have in that Thing. In Wills the Word *Eſtate* carries the whole Intereſt the Party hath; as was held in *Wilſon* and *Robinſon*'s Caſe, 2 *Lev.* 91. where the Opinion of the whole Court was, That the Words *Tenant-Right Eſtate* were ſufficient to paſs the Fee; although, as that Caſe is reported 1 *Mod.* 100. it ſeems to be the Opinion but of two Judges. So in *Norton* and *Ladd*'s Caſe, 1 *Lutw.* 755. the Words *whole Remainder* were held to carry a Fee, although one would think they would carry but an Eſtate for Life: But becauſe the Intent was manifeſt that a Fee ſhould paſs by theſe Words, it was held ſo accordingly. That the Objection of a precedent Eſtate being given (*viz.* to the Mother) by the Word *Eſtate*, was idle: For, that as it was reſtrained to be but for Life; and had the Word *Inheritance* been uſed inſtead of the Word *Eſtate*, with ſuch a *Reſtriction*, it would have paſſed but an Eſtate for Life. That the other Parts of the Will made his Intent to paſs a Fee-ſimple quite plain; as the Proviſion that he ſhould take the Teſtator's Name, and the Limitation over to another, and her Heirs for ever, upon his Refuſal to take the Name, is a plain Proof that he intended him a Fee-ſimple, not to be deveſted out of him but upon his refuſing to take the Teſtator's Name. And might well be compared to *Beachcroft* and *Beachcroft*'s Caſe, 2 *Vern.* 690. where the Words *worldly Eſtate* were held to paſs a Fee. *Barry* verſus *Edgworth*, *Abr. Eq. Ca.* 178. *pl.* 18. and *Holden* and *Barker*, *June* 11, 1706. Deviſe of all his Eſtate in *Mount-Street*, adjudged to paſs an Eſtate in Fee.

Mr. *Attorney General* and Mr. *Verney* inſiſted on the other Side, That *Thomas Dodſon* took but an Eſtate for Life; it being a known Rule, That an Heir was never to be diſinherited but by expreſs Words, or by neceſſary Implication; and there could be no neceſſary Implication where the

the Words were capable of being taken in two Senſes; as they are in the preſent Caſe, where it is natural to take the Words in that Senſe which is uſed by People in common Parlance, rather than in the ſtrict legal Senſe. This Will was drawn by the Teſtator himſelf, who appears not to have been very knowing in the legal Signification of the Words. Now the Word *Eſtate* does, in common Speech, imply only the perſonal Poſſeſſion; as when it is ſaid, That a Man has an Eſtate, by that is meant Land, Houſes, *&c.*

The Clauſe of his changing his Name, is rather a Proof that he intended him but an Eſtate for Life; for it is uſual in all ſuch Clauſes to provide that not only the firſt Taker, but likewiſe every Heir ſhall take the Teſtator's Name; and that upon any of their Defaults the Eſtate ſhall go over: But here is no Proviſion for the Heir of *Thomas* taking the Teſtator's Name; which looks as if he intended *Thomas*'s Eſtate to determine with his Life. A Gift of one's *Inheritance* for Life will give to the Deviſee but an Eſtate for Life; becauſe the Word *Inheritance* being reſtrained to the Term of a Life, can mean only a Deſcription, and not the Continuance of the Thing given; and where after ſuch Limitation the Remainder is given over to another, the Remainder-man takes a Fee; becauſe the Word *Inheritance*, where not reſtrained by others, can mean only a Fee, which the Word *Eſtate* does not; and therefore very different from the preſent Caſe. His Intent appears farther from Difference of his Expreſſion in this Clauſe, and in that whereby, upon Failure of taking his Name, he limits it by expreſs Words, *to her and her Heirs*; which Diverſity of Expreſſion proves a Difference of Intention in him. Indeed in ſome Caſes the Deviſee may have a Fee-ſimple, not from the Words, but from the Purpoſes for which he takes, which require a Continuance of the Eſtate; as in this very Will, the Clauſe whereby he deviſes ſeveral Lands to his Siſter, paying his Legacies, gives her a Fee: But in the Deviſe to *Thomas* there is no particular Purpoſe to make that Conſtruction requiſite; nor is there any other Clauſe in all the Will which has a Deviſe over but this one.

Wilſon

Wilſon verſus *Robinſon*'s Caſe, 2 *Lev.* 91. is ſcarcely intelligible as the Caſe is there ſtated; the Misfortune of moſt of the modern Books being, that they run to the Argument and Reſolution before they have well ſtated the Caſe, leaving us often to judge of the Caſe by the Arguments: Beſides the Words *Tenant Right*, which were uſed in that Caſe, are of a particular Signification. *Burdet* verſus *Burdet*, in 1732. is within the Rule of paſſing a Fee, becauſe of the Deviſe for Payment of Debts. In *Norton*'s and *Ladd*'s Caſe, 1 *Lutw.* 755. the Words *whole Remainder*, which were there uſed, ouſted any Notion of an Eſtate for Life only. And in *Beachcroft* and *Beachcroft*'s Caſe, (2 *Vern.* 690.) there being a precedent Charge upon the Inheritance for Payment of his Debts, the Deviſe of the Moiety of what was left muſt neceſſarily carry the Inheritance. The Diſtinction taken in *Barry* and *Edgworth*'s Caſe, *Abr. Eq. Ca.* 178. between a Deviſe of all his Eſtate *in* ſuch a Place, and *at* ſuch a Place, which latter (ſays the Book) will carry but an Eſtate for Life, is an expreſs Authority for the Defendant, that but an Eſtate for Life paſſes by this Will; the Words here being the ſame as if he had put in the Word *at*. (*Sed per Lord Chancellor*, I remember that Caſe very well, and no ſuch Diſtinction was made in it as is pretended by the Book.) And another ſtrong Authority for the Defendant is *Wilkinſon* and *Merryland*'s Caſe, *Cro. Car.* 447, 449. and 1 *Ro. Abr.* 834. held but an Eſtate for Life.

Lord Chancellor. The Queſtion turns intirely upon the Conſtruction of the Words of the Will, what Intereſt was intended to *Thomas Dodſon*, whether an Eſtate for Life, or in Fee? In order to come at the Teſtator's Intent, the whole Complexion of the Will has been very properly taken into Conſideration on both Sides; and it has been ſaid, that the firſt Words, *Worldly Eſtate*, were uſed only to ſhew, that what he was then doing was *animo Teſtandi*; but not intended by him to reach to the Whole of his Eſtate. As to that, I am of Opinion, that theſe Words prove him to have had his whole Eſtate in his View at that Time. Indeed

deed he might have made but a partial Diſpoſition; but if the Will be general, and that taking his Words in one Senſe will make the Will to be a complete Diſpoſition of the Whole, whereas the taking them in another will create a Chaſm; they ſhall be taken in that Senſe which is moſt likely to be agreeable to his Intent of diſpoſing of his whole Eſtate. If therefore *Thomas* takes an Eſtate in Fee, the Will will be perfect, and take in the Whole: Whereas, if he takes but an Eſtate for Life, one Moiety will, after his Death, deſcend upon him as Heir at Law, and the other Moiety to the other Coheirs. The Clauſe whereby the Eſtates are deviſed over to his Mother and her Heirs, in caſe *Thomas* ſhould refuſe to take his Name, hath been argued as a Proof of his intending him but an Eſtate for Life; but that depends upon the Conſtruction of the Word *Eſtate*, which will be clear from the Senſe he hath taken it in through all the other Parts of this Will, where, whenſoever he hath uſed it, he has meant thereby to paſs the Inheritance.

It hath been ſaid indeed, That in thoſe Clauſes the Fee doth not paſs from the Force of the Words, but from the Nature of the Purpoſes, *viz.* That of paying Debts, *&c.* But ſtill the Words are an Argument that he intended to paſs the Inheritance, though not the whole Argument. It has been ſaid likewiſe, That the Word *paying* does not of itſelf import a Fee; but ſtill, In what Senſe hath he uſed the Words *my Eſtate?* to paſs the inheritance. As for Example; The Word is left out in the Clauſe now in Queſtion; which is a very material and a very operative Word: But yet none will pretend that this Clauſe ſhould be expunged by reaſon of the Omiſſion of that ſingle Word. Then the next Words are, *All my Eſtate, Northwith Cloſe, North Cloſe, &c.* without either *in* or *at*; which is likewiſe very imperfect: So that it muſt return to the Words, *All my Eſtate to my Mother for Life, and to my Nephew* Thomas Dodſon *after her Death.* Now although the Word *Eſtate* may, in common Speech, not mean an Inheritance; yet it is clear he has meant it ſo here: And then taking

it in that proper legal Senſe, it will be a complete Diſpoſition of the Whole: Whereas, taking it to carry but an Eſtate for Life, there will be a Chaſm, an incomplete Diſpoſition; ſince Half much deſcend to this very *Thomas*, and the other Half to the other Coheirs, as hath been before obſerved. In the Counteſs of *Bridgwater* and *Duke of Bolton*'s Caſe, 1 *Salk.* 236. *Abr. Eq. Ca.* 178. the Deviſe of all his real Eſtate *in* or *at* (I do not rightly remember which) *ſuch a Place*, was held to paſs a Fee. And I do not think there is any Difference between the Words *at* or *in*; they, in my Opinion, mean the ſame Thing: The Caſe of *Wilſon* verſus *Robinſon*, 2 *Lev.* 91. and of *Burdet* verſus *Burdet*, in 1732. are very ſtrong Authorities for the Plaintiff; in the firſt of which the Fee was held to paſs by the Words *Tenant-Right Eſtate*; and the latter was a Deviſe of his particular Eſtates at ſuch and ſuch a Place; which was held likewiſe to paſs the Inheritance. Nor did the Proviſion in the End of that Caſe, for Payment of his Debts, influence the Conſtruction; but it was decreed upon the Force of the firſt Words. The ſame Reſolution was in that of *Barry* and *Edgworth*, *Abr. Eq. Ca.* 178. All which are ſo many expreſs Authorities that the Word *Eſtate* carries a Fee: Nor hath any Caſe been cited to warrant the altering the known legal Signification of it. An Objection indeed hath been made from the Nature of the Limitation; and it hath been ſaid, That although the Word *Eſtate* might in other Caſes carry a Fee, yet it could not do ſo here, becauſe applied, in the firſt Inſtance, to an *Eſtate* for Life only; and therefore was intended but as a Deſcription of the Thing intended to paſs: But that Objection hath no Weight in it; for, although he gave it particularly to his Mother in the firſt Place, yet the Deviſe to his Nephew is in general Words; and I cannot ſee that the Limitation for Life, in the firſt Inſtance, where the ſecond Limitation is general, can make any Difference. Another Objection has been made, That had he intended him an Eſtate of Inheritance, he would have given it him in the ſame Words as he has limited it over upon his Default of his taking his Name: But this Wording is ſo incorrect, that

that I think no great Streſs can be laid upon it. What weighs with me, is the Intent plainly appearing to paſs the Inheritance; as is manifeſt from the other Clauſes of the Will. Indeed as to the other Lands, wherein the Teſtator had not a Fee, the Words *my Eſtate* paſs only ſuch an Intereſt as the Teſtator had; if a Fee, then a Fee; if but a Chattel, then that only; the Operation of the Words being according to the Eſtate the Teſtator hath in what he deviſes.

And ſo decreed an Eſtate in Fee to *Thomas* the Nephew.

DE

Term. S. Hillarii

9 Geo. II.

In CURIA CANCELLARIÆ.

Doe v Bird 5 Burr 709.

7 *February.*

Sir John Robinſon verſus *Comyns.*

A. deviſes Land to *B.* and his Heirs, to the Uſe of *B.* and his Heirs, in Truſt to pay Debts, and afterwards in Truſt for his Grand-daughter *C.* (late Wife of the Plaintiff) and the Heirs of her Body, Remainder to *B.* in Fee, upon Condition that he marry *C.* and gave him his perſonal Eſtate in Truſt for *C.* until ſhe attain full Age; and made *B.* Executor, and died. *C.* refuſed to marry *B.* and marries the Plaintiff; and at full Age ſhe and her Huſband ſuffer a Recovery of the Premiſſes. The Condition of the Deviſe in Fee to *B.* is diſpenſed with by the Lady's Refuſal; but then that Remainder is well barred by the Recovery, without a Fine; though the Bargain and Sale, whereby the Tenant to the *Præcipe* was made, were not inrolled till after the Recovery was compleated.

Robert Sheffield being ſeiſed of a real Eſtate, and poſſeſſed likewiſe of a conſiderable perſonal Eſtate, by Will deviſed all his Lands unto the Defendant and his Heirs, to the Uſe of the Defendant and his Heirs, in Truſt for Payment of his Debts, and afterwards in Truſt for his Grandaughter *Mary* (the Plaintiff's late Wife) and the Heirs of her Body, Remainder to the Defendant *Comyns* and his right Heirs, upon Condition that he ſhould marry the Teſtator's Grandaughter; and gave him likewiſe his perſonal Eſtate in Truſt for *Mary* until ſhe ſhould attain her Age of Twenty-one, and made the Defendant his Executor, and died ſoon after. The Defendant brought a Bill for perpetuating of Teſtimony of the Witneſſes to the Will; and in his Bill, reciting the Clauſe in *Robert Sheffield*'s Will, declared

declared himſelf ready and willing to marry the young Lady; but ſhe, by her Anſwer, ſet forth her abſolute Averſion to the Match, and utterly refuſed to have him; and ſoon after, marrying the Plaintiff, ſhe and her Huſband (after ſhe had attained her Age of Twenty-one) made a Bargain and Sale to *J. S.* in order to the ſuffering a common Recovery; wherein her Huſband and ſhe were vouched, and the Uſes thereof were to the Iſſue of the Marriage, Remainder to her own right Heirs; the Lady died, leaving Iſſue by the Plaintiff two Children; who ſet forth their Right under the Deed and Marriage Settlement, and inſiſted upon the Defendant's Remainder being barred by Recovery.

This Bill was brought againſt the Defendant to have a Conveyance according to the Uſes declared in the Recovery.

Lord Chancellor. The firſt Queſtion is, What Sort of Eſtate the Remainder in *John Comyns* is? Whether it be a Truſt, or a legal Eſtate? It is obſervable, that the whole Eſtate is given to the Defendant and his Heirs, to the Uſe of him and his Heirs; which is a compleat Diſpoſition of the whole legal Eſtate; and being in caſe of a Will, would be ſo of the equitable Intereſt likewiſe, unleſs the Teſtator's Intent appears to the contrary, as in this Caſe it manifeſtly does; for, it is given in Truſt for Payment of his Debts, *&c.* and ſo far is a Limitation of an equitable Eſtate, the Remainder of which (had the Teſtator gone no farther) would, after the Purpoſes ſerved, return to the Heir at Law; as was determined upon Serjeant *Maynard*'s Will. But then there comes a Remainder to the Defendant and his right Heirs, *&c.* It is true that the Word *Remainder* (properly ſpeaking) ſignifies only a Continuance of the ſame kind of Eſtate as is before limited, which here was only a Truſt-Eſtate: For, when the whole legal Eſtate is diſpoſed of, and Part of the equitable Intereſt likewiſe, there the Remainder muſt be an equitable Remainder. In this Caſe indeed it is not an abſolute one, but conditional; which,

when the Condition is performed, will veſt the Eſtate in him; and if the Condition be not performed, it will then deſcend to the Heir: The Teſtator therefore has conſidered it as an equitable Intereſt. And yet it is likewiſe true, that this equitable Intereſt, when veſted in the ſame Perſon with the legal one, muſt, as to ſome Purpoſes, be conſidered as a legal Intereſt.

Conditions precedent and ſubſequent, no technical Words to diſtinguiſh them.

The next Queſtion is, Whether the Condition annexed to the Defendant's Remainder be a Condition precedent or ſubſequent? And as to this, I am inclined to think it is a Condition ſubſequent. There are no technical Words to diſtinguiſh Conditions precedent and ſubſequent; but the ſame Words may indifferently make either, according to the Intent of the Perſon who creates it. In this Caſe the precedent Limitation was an Eſtate-tail in Poſſeſſion; and therefore why ſhall we not ſay, that as to this Remainder likewiſe, it was the Teſtator's Intent to have it veſt immediately in the Defendant? The Limitation is immediate, although the Condition upon which it depends is ſubſequent. Whether the Defendant hath broke the Condition or not hath not been proved: But from his Anſwer, and ſome other Things that have appeared in the Cauſe, I am inclined to think it now diſpenſed with; partly by the Lady *Robinſon*'s Death, and partly by her Declaration in her Anſwer to the former Bill, that ſhe would not marry him; and therefore the Defendant's Intereſt is now become abſolute.

Another Queſtion has been made, whether the Intereſt of the Lady *Robinſon* and her Huſband was barrable by a Recovery? and if it was, whether it was well barred by this Recovery without a Fine? It has been ſaid, That a legal and an equitable Intereſt cannot be incorporated together; but that Objection cannot affect this Caſe: For, though the legal and equitable Eſtates cannot be incorporated, yet the Teſtator hath not limited an equitable Eſtate, and then the legal Eſtate, but hath at firſt given the whole Fee. It happens indeed that the laſt Part of the equitable Intereſt

Intereſt may be conſidered as merged by coming to one and the ſame Perſon, who had the whole legal Eſtate in him; but it would be hard, that by coming to the Defendant, although not abſolutely (for the Heir might, upon the Condition broken, have taken the equitable Intereſt out of him) it would be hard I ſay, that this ſhould prevent their Incorporation: I therefore think it an equitable Eſtate in the Defendant, as well as that which was in the Lady *Robinſon*, and conſequently that ſhe and her Huſband had a Power to bar it. Whether it hath been done in this Caſe is next to be conſidered.

Equitable Eſtates barrable by Recoveries as well as legal. *vi Brown's R.*

It hath been ſaid, That a Feme Tenant in Tail and her Huſband cannot make a Tenant to the *Præcipe* without a Fine: But whatever may be the Caſe where a Huſband is merely ſeiſed in Right of his Wife is not neceſſary for me to determine; becauſe in this Caſe Sir *John Robinſon* did, by his Inter-marriage, become intitled to an Eſtate by Curteſy; and therefore he alone, without his Wife's joining, might have made a good Tenant to the *Præcipe*. It has been alſo objected, that the Bargain and Sale, whereby the Tenant to the *Præcipe* was made, was not inrolled until the Recovery compleated: As to that, if the Lord *Hobart's* Opinion, as cited from *Goldbolt's Reports*, had been Law, ſome judicial Authority would certainly have followed it. If there be no Inrolment, then the Bargain and Sale are void; but if there be an Inrolment within ſix Months, then it is good by Relation.

And ſo decreed for the Plaintiffs.

See as to this Point of Relation Hynde's *Caſe*, 4 Co. 70. b.

Adams

8 *March.*

Adams verſus *Cole.*

The Huſband upon Marriage (in Conſideration of his Wife's Fortune, computed at 500 *l.*) agrees to yearly Payments to her ſeparate Uſe, that ſhe may diſpoſe of 100 *l.* by Will in his Life-time; that if ſhe ſurvive, he is to leave her 200 *l.* Apparel, Plate, *&c.* Part of her Fortune was a Bond of 200 *l.* The Huſband dies, having made his Will, and the Plaintiff reſiduary Legatee, but had not recovered the 200 *l.* due on the Bond; then the Wife dies: This Bond ſhall go to the Repreſentative of the Huſband, he being a Purchaſer of it by the Settlement on her.

John Lockyer, upon his Marriage with *Elizabeth Hody*, gave a Bond to two Truſtees, reciting, That whereas by the ſaid Marriage he the ſaid *Lockyer* ſhould be greatly preferred in Riches and Subſtance to the Value of about 500 *l.* and had agreed to pay her the yearly Sum of 10 *l.* to her ſole and ſeparate Uſe, as well during the Coverture as being ſole, without any Controul from her intended Huſband; and likewiſe that if ſhe ſhould die in his Life-time, that it ſhould be lawful for her to diſpoſe, by Will, of the Sum of 100 *l.* and all her wearing Apparel, Watch, Rings and Jewels; and that in caſe ſhe ſurvived him, then he was to leave her the Sum of 200 *l.* and all her wearing Apparel, Plate, Jewels, Houſhold Goods, Furniture, Linen and Woollen of all Sorts, which ſhe ſhall at her Marriage be poſſeſſed of, to be at her ſole Diſpoſal: And for the better ſecuring the Premiſſes, the ſaid *John Lockyer* was upon Requeſt to ſettle Lands of the yearly Value of 12 *l.* Now the Condition of this Obligation is, That if the ſaid *John Lockyer* ſhould pay the ſaid Sum, and ſhould (in caſe of his ſurviving her) permit her to make ſuch Will; and if ſhe ſurvived him, would leave her the Sum of 200 *l.* and all her wearing Apparel, *&c.* that ſhe ſhould be poſſeſſed of at the Time of her Marriage, that then this Obligation to be void.

Part of the ſaid *Elizabeth*'s Fortune conſiſted in a Bond Debt of 200 *l.* given to her while Sole; then the Marriage takes Effect; and *John Lockyer* the Huſband makes his Will, and the Plaintiff reſiduary Legatee thereof, and dies, without ever recovering this Bond Debt of 200 *l.* then his Wife dies.

And

And now the Queſtion was, Whether this Bond Debt (being a Choſe in Action, and never reduced into Poſſeſſion by him) ſhould go to his Repreſentative, or to the Repreſentative of the Wife, who ſurvived her Huſband.

Mr. *Solicitor General* and Mr. *Clive* argued for the Plaintiff, That although the Huſband hath by Law no Right to a Choſe in Action belonging to the Wife, unleſs reduced into Poſſeſſion by him and his Wife during the Coverture, according to 1 *Inſt.* 351. *b.* yet that would not affect the preſent Caſe, the Huſband here being a Purchaſer for a valuable Conſideration of all his Wife's Fortune, whether in Action or Poſſeſſion, by Force of the Condition of his Bond; and cited the Caſe of *Medith* verſus *Wynne*, *Abr. Eq. Ca.* 70. *pl.* 15. although, as the Court obſerv'd, that Caſe is quite different from this; for there the Huſband ſurvived the Wife. And *Parker* and *Wyndham*'s Caſe, *Precedents in Chan.* 412.

Mr. *Fazakerley* inſiſted on the other hand for the Defendant, That the Huſband could not be conſidered as a Purchaſer, the Article reciting that he ſhould be greatly advanced to the Value of 500 *l.* and that if ſhe ſurvived, he ſhould leave her 200 *l.* beſides her wearing Apparel: And ſhould the Plaintiff's Conſtruction prevail, then ſhe ſhould not have even ſo much as was her own; and the Huſband would be a Purchaſer, not with his own, but with her Money: So that here is no Conſideration moving from the Huſband to the Wife. And where-ever the Court takes an Advantage from the Wife which the Law gives her, it muſt be upon ſome Advantage redounding to her from her Huſband's Eſtate, of which there was nothing here. Had there been any dowable Eſtate, ſhe muſt have been indowed notwithſtanding this Bond, and therefore no Reaſon to bar her of this legal Advantage; according to the Reſolution in *Liſter* and *Liſter*'s Caſe, 2 *Vern.* 68.

Lord Chancellor. Moſt of the Caſes where *Choſes* in Action have been decreed to the Huſband's Repreſentative (he dying in the Life-time of the Wife) have gone upon the Reaſon of Equality, there being a Settlement made by the Huſband on his Wife, whereby he became a Purchaſer of her Fortune; and therefore, on the one hand, as ſhe was to have the Proviſion made by the Settlement, ſo on the other he ſhould have her whole Portion. In this Caſe indeed there is no Settlement of any Eſtate by the Huſband upon his Wife, only a Proviſion, that in caſe ſhe ſhould ſurvive him, then he ſhould leave her 200 *l.* and her wearing Apparel, Jewels, *&c.* So that it hath been truly ſaid, That here is nothing moving from the Huſband; ſince the Whole that ſhe is to have will not amount to 500 *l.* But ſtill is not this the Agreement of the Parties? Had he reduced it into Poſſeſſion during the Coverture, it had been his abſolutely: Nay, he might have releaſed it during the Coverture. Indeed had there been no Agreement, the Law which gives her the Chance of Survivorſhip muſt have taken Place: But ſhe hath waived that Chance by her expreſs Agreement of having ſo much at all Events; and his Departure from that abſolute Right which the Law gave him over the Whole, either by reducing into Poſſeſſion this Debt, or by releaſing it, is of itſelf a ſufficient Conſideration; the Conſequence of his not having this 200 *l.* would be, that he ſhould be bound on the one ſide to leave her ſo much if ſhe ſurvived him, and ſhe not bound at all. I think therefore that the Huſband's Repreſentative is intitled to this 200 *l.*

And ſo decreed for the Plaintiffs.

Fort verſus *Fort and Blomfield.*

Frances Witherley being poſſeſſed of *South-Sea* Stock and other Stock to the Value of 2000 *l.* by Will dated the 14th of *December* 1732. deviſed ſome Annuities, and ſubject to thoſe Annuities deviſed all the Reſidue of her perſonal Eſtate to *Bridget Fort* (the Plaintiff) by the Name of *Bridget Witherley* (her Maiden Name) and made her Executrix of her Will, and died: The Plaintiff being ſometime before the Teſtatrix's Death (but unknown to her) married to Mr. *Fort*, who thereupon agreed with the Defendant *Blomfield* to ſettle this 2000 *l.* and put it into the Hands of two Truſtees; one whereof to be nominated by him, and the other by his Wife, in Truſt for Huſband and Wife and the Survivor: The Huſband and Wife make a Transfer of Stock to the two Defendants as Truſtees nominated by them both. *Blomfield*, the Wife's Truſtee, draws a Declaration of Truſt, and ſends it into *Scotland* to *Fort* and his Wife, to be executed by them; whereby this Stock was to be ſettled upon the Huſband and Wife for their Lives, and for the Life of the longeſt Liver of them, then for the Iſſue of the Marriage; and if no Iſſue, then for the Wife, her Executors and Adminiſtrators: The Huſband refuſed to execute this Declaration, apprehending that his Wife would thereby be impower'd to diſpoſe of the Stock during his Life, in caſe they had no Iſſue, and that ſhe died before him; but by Letter directed to the Defendant *Blomfield*, he deſired that the Truſt ſhould be declared jointly for himſelf and his Wife for their Lives; and after their Deceaſe, then to their Children, then to the Survivor to take the Whole: A Declaration was accordingly drawn; but before it could be tranſmitted to the Huſband he died inteſtate without Iſſue.

A. deviſes the *Reſiduum* of her perſonal Eſtate, about 2000 *l.* to *B.* by her Maiden Name (not knowing her to be married) moſt of it being *South-Sea* Stock; her Huſband agrees to ſettle it in two Truſtees, in Truſt for Huſband and Wife; and they tranſfer it to the Truſtees accordingly: There is a Deed prepared, but not executed, as being objected to by the Huſband as not in Purſuance of the Agreement; and by Letter he gives Directions to prepare another: Before that is done he dies; his Wife adminiſters; ſhe ſhall have this *South-Sea* Stock, &c. in her own Right, and not as Adminiſtratrix to her Huſband.

And now the Queſtion was, Whether the Defendants ſhould be looked upon as Truſtees for the Wife as Adminiſtratrix

niſtratrix to the Huſband? (in which Caſe the Defendant *Fort* would be intitled to a Moiety under the Statute of Diſtributions, he being Father to her Huſband) or, whether they ſhould be Truſtees for her in her own Right?

Lord Chancellor. The Teſtatrix has made the Plaintiff Executrix of her Will, and reſiduary Legatee thereof, by her Maiden Name, not knowing her to be married at that Time; and it would be hard therefore to ſay this 2000 *l.* did veſt abſolutely in the Huſband, notwithſtanding the Caſe, 3 *Lev.* 403. that hath been cited; eſpecially in the preſent Caſe, where ſhe is made Executrix, and conſequently chargeable with Debts. But without entring minutely into the kind of Right which the Huſband had to this Stock, whatever it was, he had it ſingly through his Wife, ſubject to the ſeveral Agreements made for ſettling this Stock; and it was very reaſonable that it ſhould be ſettled, the Huſband having made no Settlement upon her. The firſt Agreement between the Huſband and *Blomfield* was, That it ſhould be ſettled ſo, as if they had no Iſſue, the Survivor of the Huſband and Wife ſhould take the Whole, and that it ſhould be put into the Hands of two Truſtees, to be nominated by the Huſband and Wife; who accordingly make a Transfer of the Stock to the two Defendants as their Truſtees; then comes the Declaration of Truſt drawn by *Blomfield*, and therein a new Scheme of turning his Money into Land, which was never thought of before, and the Proviſo about the Survivorſhip not at all obſerved; but inſtead thereof it is expreſly ſaid, That in caſe there be no Iſſue of the Marriage, it ſhall be to ſuch Uſes as the Wife ſhall direct: This Declaration the Huſband poſitively refuſes to execute, but by a Letter to *Blomfield*, propoſes to have it ſettled according to the Agreement, that is, that neither he nor his Wife ſhall have Power to diſpoſe of it, but that it ſhould go to the Survivor; upon which another Declaration of Truſt is drawn, but the Huſband is prevented by Death from executing it, having before declared, that which of the two ſurvived ſhould have the Whole; which ſhews his Intention of continuing

tinuing in his former Reſolution; and nothing appears to ſhew any Alteration of it. Taking it therefore in that Light, I muſt conſider the Defendants as Truſtees, not only for the Huſband, but for him and his Wife; otherwiſe, What Neceſſity was there for their being nominated on both Sides? it being antecedently agreed upon what Terms this Stock ſhould be ſettled; the Agreement was complete on both Sides, and the ſubſequent Transfer of the Stock to the Truſtees muſt be taken in Purſuance of that Agreement; and not to convey away all the Wife's Right, which was ſettled by the precedent Agreement to which this Transfer relates, and is a Completion of. I am therefore of Opinion, that upon her ſurviving her Huſband, this Stock is become her ſole and abſolute Property.

And ſo decreed the Defendants to be Truſtees for the Wife in her own Right.

Heard verſus *Stanford.*

3 Will. Rep. 409. S. C. under the Name of *Heard* and *Stamford.*

The Huſband, as ſuch, is not chargeable in a Court of Equity any more than at Law, with the Debts of his Wife after her Deceaſe; not even tho' he had a large Fortune with her; as on the other hand he is, during the Coverture, liable to all her Debts, altho' he did not get a Shilling with her.

THE Defendant's Wife, before Marriage, gave a Promiſſory Note for 50 *l.* to the Plaintiff, in Conſideration of five Years Service, at the Rate of 10 *l. per Annum*, and afterwards married the Defendant, who had a Fortune with her to the Amount of 700 *l.* Part whereof conſiſted of Things in Action, ſome of which the Defendant received as Huſband, and the reſt he took as Adminiſtrator to his late Wife. The Bill was for the Payment of this Note, upon Suggeſtion of his having received a great Fortune with her, and never having made any Settlement upon her. The Defendant inſiſted, That that Part of his Wife's Fortune which was not reduced into Poſſeſſion by him during the Coverture, and which he received after her Death as Adminiſtrator, was not near ſufficient to pay her Debts; and that he had already paid more than that Part amounted to.

The Queſtion was, Whether the Huſband ſhould be liable in Equity to the Payment of his deceaſed Wife's Debts; and the Fortune he had received with her ſhould be looked upon as equitable Aſſets? it being clear, that at Law he is chargeable only during the Coverture, and no longer.

For the Plaintiff was cited the Caſe of *Freeman* verſus *Goodham*, 1 *Chan. Ca.* 295. where, upon a Bill brought againſt the Huſband for Diſcovery of Goods bought by the Wife before Marriage, which after her Death came to his Hands, the Lord *Nottingham* ſaid, he would change the Law in that Point. And alſo that of *Powell* verſus *Bell*, *Abr. Eq. Ca.* 60. *pl.* 7.

Lord Chancellor. The Queſtion is, Whether the Huſband as ſuch, be chargeable for a Debt of his Wife's after her Death in a Court of Equity? As on the one hand the Husband is by Law liable to all his Wife's Debts during the Coverture, although he did not get one Shilling Portion with her, and that her Debts ſhould amount to 2000 *l.* or any other Sum whatever; ſo on the other hand it is as certain, that if the Debt be not recovered during the Coverture, the Husband is no longer chargeable as ſuch, let the Fortune he received with his Wife be never ſo great. The Caſe perhaps may be hard, but the Law hath made it ſo, that it may be equal on both Sides, as well where the Husband is ſued during the Coverture, for a Debt of his Wife's, with whom he had no Fortune, as where he by her Death is diſcharged from all her Debts, notwithſtanding any Fortune he may have received in Marriage with her; ſo is the Law, and the Alteration of it is the proper Work of the Legiſlature only. There are Inſtances indeed in which a Court of Equity gives Remedy where the Law gives none; but where a particular Remedy is given by Law, and that Remedy bounded and circumſcribed by particular Rules, it would be very improper for this Court to take it up where the Law leaves it, and extend it farther than the Law allows. Beſides, if Relief was to be given in

Where the Law provides a particular Remedy, to extend it is the Province of the Legiſlature, but not of the Courts of Equity.

in this Caſe, it would be very unreaſonable not to extend it to the former Caſe, where the Hardſhip lies on the Huſband, which was never yet done. There is a Caſe which may, and probably does happen very often, that comes very near to this. Suppoſe Goods are ſold for a certain Price to a Perſon, who juſt after the Delivery, and before the Price paid, becomes a Bankrupt, and theſe very Goods are veſted in the Aſſignees; the Vendor can come in but as a Creditor for his Share; and can neither pretend to have the Price agreed, nor purſue the Goods in the Hands of the Aſſignees; and yet this is a Hardſhip upon him, but not ſuch as is relievable here. In the Caſe of *Freeman* verſus *Goodham*, the Goods never came to the Huſband's Hands until after the Wife's Death; which made it a very hard Caſe upon the Creditor, and probably occaſioned the Saying of my Lord *Nottingham:* But even there he only overruled a Demurrer, put into a Bill for a Diſcovery of the Goods; and it does *not appear* what became afterwards of the Cauſe. (*a*) And in that of *Powell* verſus *Bell* the Wife was Adminiſtratrix of her firſt Huſband, and it did not appear what ſhe had in her own Right, and what as Adminiſtratrix of her Huſband; in which Caſe the Marriage is no Gift in Law of the Goods which ſhe hath in *Auter Droit:* And upon this Reaſon only are founded all the Caſes where a ſurviving Huſband has been charged with his Wife's Debts after her Death.

(*a*) Upon ſearching the Reporter's Book it appears, that in the Caſe of *Freeman* ver. *Goodland & econt'* (not *Goodham*) the Defendant had married the Teſtator's Widow, who had bought Goods of the Teſtator's Executors; that after the Widow's Death, the Executors bring their Bill *(inter al')* to be ſatisfied of theſe Goods; the Defendant demurred, which Demurrer, 18 *December* 1676. was over-ruled by Lord Chan. That afterwards on the Hearing of the Cauſe, 2 *December* 1678. the Defendant inſiſted that his Wife had the Property in theſe Goods at the Marriage, which were Part of her Portion; but nevertheleſs to avoid further Trouble, and in Caſe an Aſſignment of ſome Leaſehold Eſtates mentioned in the Cauſe were made to him, (tho' he was not liable by Law ſo to do) yet by his Counſel he offered to pay for the Goods; whereupon the decretal Order runs thus: *That the Defendant* Goodland *do pay to the ſaid Executors the Sum of* 350 l. *reported due to them on Account of the ſaid Goods, according to his Offer aforeſaid;* ſo that this being a Decree in Conſequence of the Defendant's Offer, here appears to be no expreſs Determination in the Point; however, it is very probable that the Defendant perceiving which way the Opinion of the Court inclined, on arguing the Demurrer, was induced to make the above mentioned Offer. 3 *Will. Rep.* 411. *in a Note.*

And ſo decreed an Account of what the Huſband had received ſince his Wife's Death as her Adminiſtrator; and that he ſhould be liable for ſo much only: But, as to any further Demand againſt her, diſmiſſed the Bill.

Streatfield

Church v Kemble. 5 Vin 528.

Streatfield verſus *Streatfield.*

The Anceſtor, by Articles previous to his Marriage, agrees to ſettle certain Lands to the Uſe of himſelf and his intended Wife, Remainder to the Iſſue of the Marriage, in the uſual Manner. He makes a Deed, not purſuant to the Articles, and has a Son and two Daughters; and upon the Marriage of his Son, ſettles other Lands, in Conſideration of this laſt Marriage, in the uſual Manner; and levies a Fine of the former Lands to the Uſe of himſelf in Fee; and then makes his Will, and deviſes Part of the former Lands to his two Daughters, and the reſt of his real Eſtate to Truſtees, to the Uſe of his Grandſon for Life, with uſual Remainders; and with Direction, out of the Profits, to educate the Grandſon; and to place out the reſt of the Profits, to be paid to the Grandſon at Twenty-one Years of Age; and if he does not attain that Age, to be paid to his ſaid Daughters, their Executors, &c. The Grandſon is not to be bound by the Deed, which did not purſue the Articles; but then he ſhall make his Election when he comes of Age; and if he chooſes to take Lands, which ought to have been ſettled, the Daughters (his Aunts) ſhall be repriſed out of the Lands deviſed to him.

THomas *Streatfield*, the Plaintiff's Grandfather, by Articles previous to his Marriage, *May* 31, 1677. agreed to ſettle Lands in *Sevenoake* to the Uſe of himſelf and *Martha* his intended Wife, for their Lives and the Life of the Survivor; and after the Survivor's Deceaſe, to the Uſe of the Heirs of the Body of him the ſaid *Thomas* on his Wife begotten, with other Remainders over. The Marriage ſoon after took Effect, and by Deed, dated *April* 5, 1698. reciting the aforeſaid Articles, he ſettled his Lands at *Sevenoake* to the Uſe of himſelf and his Wife for their Lives, and the Life of the longeſt Liver of them, without Impeachment of Waſte during the Life of *Thomas*, and after their Deceaſe to the Uſe of the Heirs of the Body of the ſaid *Thomas*, on the ſaid *Martha* to be begotten, and for want of ſuch Iſſue, Remainder to the right Heirs of *Thomas*. They had Iſſue *Thomas* (their only Son) and two Daughters, *Margaret* and *Martha*, in the Year 1716. Upon the Marriage of *Thomas* the Son, the Father ſettled other Lands (of which he was ſeiſed in Fee) of the yearly Value of 355 *l.* to the Uſe of his Son for Life, Remainder to the Daughters of the Marriage, Remainder in Fee to the Son, with a Power to raiſe 2000 *l.* for younger Children. After the Son's Death, *Thomas* the Father, in the Year 1723. levied a Fine of the Lands compriſed in the Deed of 1698. to the Uſe of himſelf in Fee, and in the Year 1725. made his Will, and thereby deviſed Part of thoſe Lands to his two Daughters *Margaret* and *Martha*; "And alſo all other his "Manors, Meſſuages, Lands, Tenements and Hereditaments whatſoever, either in Poſſeſſion, Reverſion or Remainder

" mainder not therein before given or diſpoſed of, ſituate " in the Counties of *Kent*, *Surrey*, or elſewhere, to Tru- " ſtees, in Truſt for the Plaintiff *Thomas* his Grandſon for " Life, Remainder to his firſt and other Sons in Tail Male, " Remainder to his Daughters in Tail, Remainder to *Mar-* " *garet* and *Martha*, with ſeveral Remainders over: [then comes this Clauſe] " And my Will and Meaning farther " is, and I do hereby authoriſe and appoint the Truſtees, " and the Survivor of them, to receive the Rents and Pro- " fits of the ſaid Eſtates to them deviſed, and out of the " ſame to allow and expend, for the Education of my " Grandſon *Thomas* ſo much as they ſhall think fit during " his Minority; and that the Truſtees ſhall place out at " Intereſt ſuch Monies ariſing out of the Rents and Profits " of the ſaid Eſtates; which ſaid Monies, with Intereſt " ariſing therefrom, my Will is, be paid to my Grand- " ſon *Thomas*, at his Age of Twenty-one Years, if he " ſo long live; or in caſe he dies before that Age, then " that the ſame ſhall be paid to my two Daughters *Mar-* " *garet* and *Martha*, their Executors, *&c.*" The Teſtator died in the Year 1730.

The Queſtion was, Whether the Settlement in 1698. was a proper Execution of the Articles of 1677? and if not, whether the general Deviſe to the Plaintiff ſhould be taken as a Satisfaction for what he was intitled to under the Articles of 1677?

Mr. *Solicitor General*, Mr. *Brown*, Mr. *Fazakerley*, and Mr. *Noel* argued for the Plaintiff, That although in a Will or Articles executed *Thomas* the Grandfather would have been Tenant in Tail, yet the Articles of 1677. being but Executory, this Court would interpoſe, by carrying them into Execution in the ſtricteſt Manner, and not leaving it in his Power to deſtroy the Uſes as ſoon as raiſed. That according to that Rule the Deed of 1698. was certainly no Execution of the Articles in Equity; for, though it was in the very Words, yet it did not at all anſwer the Intent of

the Articles, and came therefore within the Rules of *Trevor* and *Trevor*'s Caſe, *Abr. Eq. Ca.* 387.

That the Settlement in 1716. upon *Thomas* the Son's Marriage (although it was of Lands of greater Value than thoſe contained in the Articles) could never be thought a Satisfaction for them, there being no Reference at all in it to the Articles, and it being made only in Conſideration of the Son's Marriage, and for ſettling a Jointure upon his Wife, and making a competent Proviſion for the Iſſue; all which are new Conſiderations no way relative to the Articles: And where there is an expreſs Conſideration mentioned in a Deed, there can be no Averment of another not contained therein.

That nothing could be taken for a Satisfaction but what was in its Nature agreeable to the Thing which was to be done, was held in *Lechmere* and *Lady Lechmere*'s Caſe. But in this Caſe *Thomas* the Son was by the Articles to have been Tenant in Tail; but by the Settlement 1716. he was to be but Tenant for Life; which was giving him a leſs Eſtate for a greater, and conſequently not to be deemed a Satisfaction without a ſpecial Acceptance of it as ſuch, according to the Rule in *Pinnel*'s Caſe, 5 *Co.* 117. where it is held that Payment of a leſſer Sum can never be a Satisfaction for a greater, unleſs upon a ſpecial Circumſtance ſhewing the Intent; as Payment at an earlier Day, *&c.* That the Will could no more be taken for a Satisfaction than the Settlement, and upon the ſame Reaſons; for, by it the Plaintiff is no more than Tenant for Life, and even that not abſolutely, the Profits being directed by the Teſtator to be accumulated until the Plaintiff attains his Age of Twenty-one, and then to be paid to him; but if he dies before that Age, they are given away to the Teſtator's Daughters; and when he does arrive to that Age, he is to be but barely Tenant for Life, and even not that without Impeachment of Waſte; beſides, if the Will be conſtrued a Satisfaction as againſt the Plaintiff, ſo it muſt likewiſe be as to all

Ante 80.

all the others claiming under the Articles; whereas the Plaintiff's Siſters, who were intitled under the Articles, can never take any thing under this Will, but are wholly excluded.

The general Deviſe of all his Manors, Lands, *&c. in Poſſeſſion, Reverſion or Remainder*, will not alter the Caſe; for, where the Teſtator hath Eſtate ſufficient to ſatisfy ſuch general Words, he ſhall never be conſtrued to have intended to paſs that which he had no Right to diſpoſe of, and the giving of which would work a Wrong. That he had no Right to diſpoſe of the Lands contained in the Articles is evident from what hath been already ſaid: And had not this been upon his own Marriage, but in any other Settlement, he had been a Truſtee for his Son, and then had made his Will in the ſame Words that he had done here, ſurely that Truſt-Eſtate would never have paſſed; and there is no Difference whether the Truſt be expreſſed, or whether it ariſes by Implication of Equity. It would be an Abſurdity to conſtrue theſe Words to paſs away a third Perſon's Eſtate. *A Grant of all one's Goods* will not paſs thoſe which he hath in *Auter Droit:* So if he had had a Mortgage in Fee, ſuch general Words would not have paſſed it from the Deviſee of the perſonal Eſtate to the Deviſee of the Land. In *Roſe* and *Bartlett*'s Caſe, *Cro. Car.* 292. a general Deviſe of *all his Lands and Tenements*, having both Freehold and Leaſehold, was held to paſs the Freehold Lands only. And in *Harwood* and *Child*'s Caſe, heard by the preſent *Lord Chancellor*, *March* 18, 1734. a Deviſe of all his Lands for Payment of Debts, having both Freehold and Copyhold, but no Surrender made of the Copyhold to the Uſe of his Will, was held not to paſs the Copyhold. Nor can the Caſes of *Duffield* verſus *Smith*, 2 *Vern.* 250. *Noys* verſus *Mordaunt* 581. be objected; for, in the former the Decree was reverſed, upon Account of the Siſter's being Heir at Law, and diſinherited; which is the preſent Caſe: For, here they could take a beneficial Intereſt from the Plaintiff, who was Heir at Law to his Grandfather, and gave him but a very ſmall one in its Room; and in the latter Caſe, the Father being Tenant in Tail of

Part,

Part, had Power to bar it by Fine; in which Reſpect he might well be looked upon as a Proprietor of the Whole: But if he be decreed to make his Election, it muſt be done preſently, for then it is that he is to take: Whereas he cannot by Law make his Election, being but an Infant; and if ſo, the Court muſt compel him to that which the Law diſables him from doing.

Mr. *Attorney General*, Mr. *Strange*, and Mr. *Peere Williams* argued for the Defendant, That this Court will not, in all Caſes whatever, decree a ſpecific Performance; but would, in ſome particular Caſes, leave the Party to his Remedy at Law upon the Covenant; that theſe Articles were made ſo long ago as in 1677. and *Thomas* the Son, who was the Perſon intitled to have them carried into Execution, lived until 1722. Forty-five Years after, without ever deſiring to have them executed; and that the Intent of thoſe Articles did not ſeem to go any farther than the ſettling the Jointure on the Wife, and the making *Thomas* the Grandfather Tenant in Tail, the Words being *to provide for the Wife*, but no Mention made of the Iſſue; but whoever comes into Equity muſt do Equity; and therefore if the Plaintiff would take Advantage of thoſe Articles, he muſt make a Compenſation for it out of the Will, which gives him an Eſtate upon a plain Suppoſal that he ſhall take nothing by the Articles; but ſhall never be at Liberty to take a great Benefit under the Will, and waive that Part which makes againſt him, to the Prejudice of a third Perſon: The whole Will muſt be acquieſced under, or no Part of it at all, according to the Reſolution in *Noy*'s and *Mordaunt*'s Caſe; which went upon the Reaſon of an intire Compliance with the Teſtator's Intent in taking intirely under the Will, and not upon the ſuppoſed Reaſon of his being Proprietor, by having it in his Power to levy a Fine. The like Reſolution was in the Caſe of *Hearne* verſus *Hearne*, 2 *Vern.* 555. in that of *Cowper* verſus *Cotton*, *February* 16, 1731. at the *Rolls*; where a Freeman of *London* deviſed his Eſtate to Truſtees for the raiſing 6000 *l.* for his four Daughters, and made a Diſpoſition of the Surplus, and held

held that they ſhould ſtand either by the Will or by the Cuſtom; and if by the former, that they ſhould not defeat the Deviſe over. That in Caſes where general Words in a Will had been reſtrained from paſſing all which the Teſtator had, it hath been upon the Teſtator's Intention manifeſtly appearing in the Will itſelf not to paſs ſo much as the Generality of his Words would comprehend; but in the preſent Caſe, his Intent plainly appears to paſs all: Nor will that Intent be ſatisfied by ſaying, that he had a Reverſion of the Lands compriſed in the Articles; ſince he would have been Tenant in Tail under the Articles, and only for Life under the Will.

Lord Chancellor. It cannot be doubted, but that upon Application to this Court for the carrying into Execution the Articles of 1677. the Court would have decreed it to be done in the ſtricteſt Manner, and would never leave it in the Huſband's Power to defeat and annul every Thing he had been doing: And the Nature of the Proviſion is ſtrong enough for this Purpoſe, without any expreſs Words; and I muſt therefore conſider what was the Operation of the Deed of 1698. which is declared to be in Performance of the true Intent and Meaning of the Articles. If it be ſo, all is well; but if it be not, it only ſhews that the Parties intended it ſo, but were miſtaken. So was the Caſe of *Weſtern* verſus *Harris*, where the Articles were by the *Houſe of Lords* decreed to be made good; and the ſame muſt be done in this Caſe, if nothing intervenes to prevent it. The Settlement in 1716. whereby the Grandfather ſettled other Lands upon his Son's Marriage, has been called a Satisfaction for thoſe Articles; but to me it appears neither an actual Satisfaction, nor to have been intended as ſuch. The Grandfather had done that in 1698. which he apprehended to be a Satisfaction for the Articles; but this Deed proceeds upon Conſiderations quite different from thoſe of the Articles, the Perſons claiming under this being Purchaſers for a Conſideration intirely new, the Limitations being intirely different; and therefore it would be abſurd to call this a Satisfaction for another Thing it hath nothing to do

with, and to which it is no way relative. The next Thing to be conſidered is, the Fine levied of the Lands in Queſtion in the Year 1723. by the Grandfather; the Intent whereof was, to have the abſolute Ownerſhip of thoſe Lands in him: And one Reaſon why no Application hath been made till now, to have thoſe Articles carried into Execution, might be, that during the Grandfather's Life no body was intitled to any thing in Poſſeſſion under them. Then comes the Will in 1725. whereby he gives Part of thoſe Lands ſettled in 1698. to his Daughter; thereby ſhewing his Apprehenſion to be, that by a Fine he had given himſelf a Power of diſpoſing of them: And it would be a very ſtrained Conſtruction to ſay that he intended this, not as a preſent Deviſe to his Daughters, but to take Effect out of the Reverſion of the Lands compriſed in the Articles. The next Thing is the Deviſe to the Truſtees for his Grandſon the Plaintiff, upon his attaining the Age of Twenty-one; and the Queſtion here is, Whether the general Words ſhall ever paſs Lands not capable of the Limitation in the Will? And to that have been cited *Roſe* and *Bartlett*'s Caſe, *Cro. Car.* 292. and other Caſes; but they cannot influence the preſent Caſe: For, the Teſtator had legally a Power to diſpoſe of thoſe Lands; and tho' they might be affected with a Truſt in Equity, yet that cannot be ſuppoſed to lie in his Conuzance, he having done an Act to enable himſelf to diſpoſe of theſe Lands. And it differs from the Caſe that was put of an expreſs Truſt, and the Truſtee deviſes *all his Lands*; for, there the Truſtee cannot be ignorant that the Lands which he holds in Truſt are not his own. But what makes his Intent clear is, that he hath deviſed Part of theſe Lands to his Daughters, and he muſt have looked upon himſelf as Maſter of the one Part as well as the other; I therefore think his Intent was clear to paſs theſe Lands by the Will; and if ſo, we muſt now conſider what will be the Effect of this Will. If the Plaintiff has a Lien upon the Lands of the Articles, then he may ſtand to them if he pleaſes; but when a Man takes upon him to deviſe what he had no Power over, upon a Suppoſition that his Will will be acquieſced under, this Court compels

compels the Deviſee, if he will take Advantage of the Will, to take intirely, but not partially under it; as was done in *Noy*'s and *Mordaunt*'s Caſe: There being a tacit Condition annexed to all Deviſes of this Nature, that the Deviſee do not diſturb the Diſpoſition which the Deviſor hath made. So are the ſeveral Caſes that have been decreed upon the Cuſtom of *London*. The only Difficulty in the preſent Caſe is, That what is given to the Plaintiff is precarious, nothing being given to him if he dies before Twenty-one, and if after, then but an Eſtate for Life; and that he appears before the Court in the favourable Light of being Heir at Law: But this will not alter the Caſe. The Eſtates which the Teſtator has given him were undoubtedly in his Power; he hath given them to Truſtees until his Grandſon attain Twenty-one, and has diſpoſed of them in ſuch a Manner as that there can never be any undiſpoſed Reſidue to go to the Plaintiff as Heir at Law; and ſurely it is as much in the Power of the Court to make this Bequeſt, thus limited, to be a Satisfaction, if the Party will ſtand to the Will, as in the other Caſes. Indeed if he takes by the Will, there is nothing to make Satisfaction to his Siſters for their general Chance under the Articles; but that is becauſe nothing is left them by Will; and they cannot be ſaid to be quite deſtitute of Proviſion, ſince it is juſt and reaſonable that they ſhould be maintained by their Mother, who is intitled to a large and ample Proviſion by her Marriage Settlement: Nor can what is deviſed to the Plaintiff be looked upon as intended by the Teſtator to go towards the Maintenance of younger Children; for, if the Plaintiff dies before Twenty-one, then all the Profits already received are to go to his Aunts; and ſo by that Conſtruction I muſt take the Maintenance out of their Eſtate, and oblige them to contribute to the Maintenance of diſtant Relations, *viz.* Nieces, at the ſame Time that the Mother (who hath an ample Proviſion) would be left at large, and under no Tie of maintaining her own Children.

And ſo decreed the Plaintiff to have ſix Months after he comes of Age to make his Election, whether he will ſtand

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to the Will or the Articles? And if he makes his Election to ſtand to the latter, then ſo much of the other Lands deviſed to him as will amount to the Value of the Lands compriſed in the Articles, and which were deviſed to *Margaret* and *Martha*, to be conveyed to them in Fee.

Warrington verſus *Norton.*

A Commiſſion of Bankruptcy iſſues againſt *H.* at eleven o'Clock in the Morning; at three in the Afternoon the Commiſſioners declare him a Bankrupt, and execute an Aſſignment at ſix, and then have Notice that he died at one o' Clock that Day: this a *Dealing* within the Act of Parliament, and the Proceedings ſhall ſtand.

A Commiſſion of Bankruptcy was taken out againſt one *Hughes*, and upon the 9th of *February* 1730. at eleven o'Clock in the Morning the Commiſſioners met, and proceeded to declare him a Bankrupt, and the Declaration was ſigned by them between three and four o'Clock in the Afternoon, and the Aſſignment of the Bankrupt's Goods executed at ſix; at which Inſtant the Commiſſioners had Notice that the Bankrupt died that Day at one in the Afternoon; which was the firſt Notice they had of his Death. The Bankrupt having before his Death deviſed all his real and perſonal Eſtate for the Payment of his Debts, the Plaintiff who was a Creditor, brought his Bill againſt the Defendant as Aſſignee under the Commiſſion, for an Account of ſuch Goods of the Bankrupt as had come to his Hands; to which the Defendant pleaded the Commiſſion and the Proceedings under it. The Queſtion was, Whether this was ſuch a *Dealing* under the Commiſſion as was within 1 *Jac.* 1. *cap.* 15. *ſect.* 17. the Words whereof are; "*That where after any Commiſſion of Bankruptcy is dealt* "*in by the Commiſſioners, the Offender happen to die before* "Diſtribution, that nevertheleſs they *may in that Caſe pro-* "*ceed* in the Execution of the Commiſſion in ſuch Sort as "they might have done if the Offender was living."

Mr. *Attorney General*, Mr. *Fazakerley*, and Mr. *Forreſter* argued for the Defendant, That the Meeting in order to declare him a Bankrupt, was a ſufficient *Dealing* within the Statute; and that the Aſſignment hath a Relation to the Bankruptcy; that when the Commiſſioners aſſign, it is from the Act of Parliament, and not from themſelves; for,

for, they have no Intereſt veſted in them; but it is the Operation of the Act which gives them Right in the Thing, but none at all in the Perſon of the Bankrupt; ſo that his Death cannot be material: And the Law giving no Right over the Perſon, but only a Power of calling him a Bankrupt, it muſt be in Purſuance of the Commiſſion, and therefore that Examination was a Dealing within the Statute; that by Law there can be no ſplitting a Day; as a Leaſe made to commence from *henceforth*, takes in the Day of the Date, although executed at the very laſt Moment: And in *Shelley*'s Caſe, 1 *Co.* 93. the Recovery was held good, although the Party died the ſame Day, becauſe it was a legal Proceeding. That the Laws againſt Bankrupts were not at all to be conſidered as penal, but as remedial Laws, and as ſuch were intitled to the moſt favourable Conſtruction, according to the Rule laid down in *Heydon*'s Caſe, 3 *Co.* 7. And therefore if any Conſtruction could be made more beneficial for the Creditors than another, that one was to be admitted as founded upon natural Juſtice, and upon that beſt of Rules, *Jus ſuum Cuique tribuere*; that in theſe Caſes the Law itſelf hath provided how it ſhall be conſtrued; for by 21 *Jac.* 1. *cap.* 19. *ſect.* 1. it is enacted, That all the Statutes which were theretofore made againſt Bankrupts, and for the Relief of Creditors, ſhall be in all Things beneficially conſtrued for the Relief of the Creditors of the Bankrupts; ſo that the Law itſelf directs a beneficial Conſtruction to be made for the Creditors; and when a Law does by expreſs Proviſion enact how Conſtructions ſhall be made, the Clauſe ſo directive of Conſtruction is of the ſame Force and Authority as any other Part of that Law.

Mr. *Solicitor General* and Mr. *Browne* argued on the other hand, That theſe Laws were rather penal than remedial, the Party being therein called an Offender, *&c.* which he does not appear to be until he is declared a Bankrupt, and that Declaration is the *Dealing* meant by the Statute; for, till then there can be no Proceeding upon the Commiſſion properly ſo called. *Shelley*'s Caſe is quite different; for, Recoveries being common Aſſurances, the Law favours

them, and does not enter into any Inquiries about the particular Minute of the Day the Party died upon. Had this Law not been made, the Commiſſioners could not have proceeded after the Bankrupt's Death; and the Words of the Statute ſeem to mean that he ſhould be declared a Bankrupt firſt.

Lord Chancellor. The Plaintiff, if contented to come in under the Commiſſion, will be intitled to the Benefit of it: But his Intent ſeems to be, to ſet aſide all the Words of this *Statute* of 1 *Jac.* 1. it looks as if ſome Doubt had been conceived, Whether the Party's Death determined the Commiſſion? The former Statutes being, That they ſhould ſeize his Body, which they could not do when the Party was dead; but it was always clear, that no Commiſſion could be taken out againſt a Man after his Death: Then (whatever might occaſion the Doubt) comes this Statute, which ſays, That when the Commiſſion had been *dealt* in, *&c.* What is a *Dealing* in it is the Queſtion?

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

The Plea was allowed.

Lowther

Lowther verſus *Carleton.*

7 April.

A Church Leaſe of Twenty-one Years, obtained by the Plaintiff's Grandmother, was, upon the Marriage of his Father and Mother, ſurrendred to the Dean and Chapter of *Carliſle*, and a new one for the ſame Term granted to the Plaintiff's Father and Mother, which by Articles was agreed to be ſettled on them for their Lives and the Life of the Survivor, and then upon the Iſſue of the Marriage; the Father and Mother afterwards ſurrendred this new Leaſe, and a new one was granted to a Stranger, to whom the Father had mortgaged the ſecond; the laſt Leaſe was afterwards purchaſed by the late Marquiſs of *Wharton*, who did not appear to have any Notice of the Marriage Articles. The Defendant purchaſed the Marquiſs of *Wharton*'s Title of his Executors; who upon the Purchaſe gave him a collateral Security for the better aſſuring his Title: But previous to this Purchaſe the Defendant had Notice of the Marriage Articles, which were ſhewn to him by his own Father; and now the Plaintiff brought his Bill to be let into Poſſeſſion of this Leaſehold Eſtate, and praying that the Defendant might be conſidered as a Truſtee for him.

A Man by Marriage Articles agrees to ſettle a Church Leaſe upon himſelf and Wife, and the Iſſue of the Marriage; he afterwards ſells it to a Stranger, who had no Notice of the Marriage Articles; the Executors of this Vendee ſell to *B.* who had full Notice of the Marriage Articles, and took a collateral Security of the Executors for the better aſſuring his Title. *B.*'s Purchaſe ſhall ſtand good againſt the Plaintiff, who claims under the Articles.

The Defendant pleaded his Purchaſe, and confeſſed the Notice; but principally inſiſted upon the Marquiſs of *Wharton*'s Purchaſe without Notice, whoſe Title was now in him.

Lord Chancellor. Had this Bill been brought againſt Lord *Wharton* himſelf, and he had pleaded that he was a Purchaſer without Notice of the Articles, the Plea would have been good; he having the Law on his ſide, and having both Law and Equity, the Court would not take it from him: And as the Court would not have given any Relief againſt him, ſo neither would it againſt his Executor; for, if the Plaintiff's Title had not been good againſt the

the Lord *Wharton* himſelf, it would not be ſo againſt his Executors; and therefore his Death is not material. Had the Defendant paid nothing at all for his Purchaſe, yet the Plaintiff could not prevail againſt him; becauſe, though he were but a Voluntier, yet he claims under a Purchaſer without Notice, who hath barred the Plaintiff's Right, and all the Purchaſer's Right is now devolved upon him.

Indeed it hath been objected, That the Defendant is a Purchaſer with Notice under the Lord *Wharton:* But becauſe he is ſo, ſhall he be in worſe Condition than a Voluntier or Executors claiming under Lord *Wharton* would have been? A Voluntier claiming under a Purchaſer for a good and valuable Conſideration without Notice, would have a clear and abſolute Right; and ſhall not the Defendant have it alſo, becauſe he is a Purchaſer with Notice of the Plaintiff's Title? As the Lord *Wharton* had a Right of enjoying it, ſo he had of aliening it: And when he had ſo done, his Alienee hath the ſame Right that he himſelf had. Nor can the Defendant's taking a collateral Security make his Caſe the worſe; for, though he might be relieved againſt the Lord *Wharton*'s Executors upon that Security, yet what Relief can they have where the Teſtator was a fair and honeſt Purchaſer.

The Executors, upon ſome Doubt ariſing in the Purchaſer as to the Title, gave him a collateral Security; but why ſhould they be liable to make Satisfaction out of this Security, when if they had kept the Term in their own Hands it would never have been taken from them by the Plaintiff? The Security being given only to ſatisfy the Purchaſer's Doubts, ſhall never turn to their Diſadvantage. If the Lord *Wharton* can be affected with Notice, then all will be overturn'd: But if he cannot, the Defendant's Plea will be good. I remember a Caſe where a Purchaſer, with Notice, aliened to one who had no Notice; and there, although the Court would not affect the Purchaſer without Notice, yet it being a Fraud, the Vendor (who was the

Purchaſer

Purchaſer with Notice) was decreed to make Satisfaction to the Plaintiff.

And ſo allow'd the Plea.

Rolt verſus *Rolt*.

Clayton v Bengall 2 Cont 2. 317. 1 Dr Rep 10.

10 *April*.

MR. *Baynton* being ſeiſed in Fee of a conſiderable Eſtate, and having no Children, by Indenture *January* 19, 1715. covenanted to ſuffer a Recovery of all his Lands, to the Uſe of himſelf for Life, then to his Wife for Life, then to the Iſſue of their Bodies; and for want of ſuch Iſſue, in Truſt for his Siſter *Anne Rolt* for her ſole and ſeparate Uſe during Life; and, after her Death, if *Edward Rolt* her Huſband ſhould ſurvive her, to permit him to receive the clear yearly Sum of 1000 *l.* during Life, and afterwards to *Edward Rolt* (eldeſt Son of *Edward* and *Anne*) for Life, with Remainder to his firſt and other Sons, with like Remainder to *Thomas*, and all the other Sons of *Edward* and *Anne*. Then comes this Proviſo: "Provided alſo "that it ſhall and may be lawful to and for the ſaid *Anne* "*Rolt*, with the Conſent of the ſaid *Edward Rolt* her Huſ- "band, and for the ſaid *Edward Rolt* her ſurviving, from "Time to Time, by Sale, Mortgage or otherwiſe, charging "the Premiſſes, to raiſe and ſecure ſuch Sums of Money "not exceeding in the Whole the Sum of 12000 *l.* as "the ſaid *Anne*, notwithſtanding her Coverture, ſhall, "with the Conſent in Writing of her Huſband, think fit, "and for the ſaid *Edward Rolt* her ſurviving, as he ſhall "think fit, for the Maintenance and Portion of any of the "Children of them the ſaid *Edward* and *Anne*, born or to "be born; and if the ſaid *Edward* and *Anne* his Wife, or "the Survivor of them, ſhall not appoint in what Proportion "ſuch their Children ſhall be provided for, then all the

A. ſettles his Eſtate to his Siſter *B.* for Life, Remainder to her ſecond and other Sons in Tail, &c. and gives her a Power with the Conſent of *C.* her Huſband, and for *C.* ſurviving *B.* to charge it with a Sum not exceeding 12000 *l.* for their Children; and if they or the Survivor of them do not appoint the Proviſion, then 2000 *l.* each to be raiſed for younger Sons, and 3000 *l.* each for Daughters, at their Ages of Twenty-one, with Intereſt at 5 *l. per Cent.* for Maintenance to commence from the Time of the Appointment; and if no Appointment, then from the Death of the Survivor of *B.*

and *C.* And if any of the younger Children die before their Shares become payable, the ſame to go to the Survivors. *A.* dies, *C.* dies, leaving four younger Sons and two Daughters; one of which died an Infant ſoon after her Father; then *B.* dies without making any Appointment; the whole 14000 *l.* ſhall be raiſed, and carry Intereſt only from the Death of *B.*

" Parties to theſe Preſents are agreed that 2000 *l.* a-piece " ſhall be raiſed and payable to each ſuch younger Sons, " and 3000 *l.* a-piece for the Daughters of the ſaid *Edward* " and *Anne*; and if there ſhall be but one Daughter, then " 6000 *l.* for ſuch only Daughter, at their Ages of Twen- " ty-one Years, with Intereſt for the ſaid ſeveral Sums " after the Rate of 5 *l. per Cent.* for their ſeveral and re- " ſpective Maintenances until their reſpective Portions " ſhall become payable; and ſuch Maintenance to begin " from the Time that ſhall be appointed by the ſaid *Ed-* " *ward* and *Anne* his Wife, or the Survivor of them; and " in caſe no ſuch Appointment, then from the Death of " the Survivor of them the ſaid *Edward* and *Anne* his Wife: " Then comes a Proviſion, that if any of the younger " Children die before their reſpective Shares become pay- " able, then the Share of ſuch Child ſo dying ſhall be " equally divided amongſt the ſurviving Children."

Mr. *Baynton* died ſoon after without Iſſue, and then, in the Year 1722. Mr. *Rolt* died, leaving Iſſue by his Wife four younger Sons and two Daughters, *Elizabeth* and *Anna Maria*, which laſt died an Infant ſoon after her Father's Death; and in the Year 1734. the Mother died, having never charged the Lands with the 12000 *l.* or any other Sum for the younger Childrens Proviſion, nor given any Direction in what Manner or Proportion they ſhould be provided for, ſome of the Children having attained their Age of Twenty-one in her Life-time.

The Queſtions were, firſt, Whether, there having been no Appointment made by the Father or Mother, the Sum of 12000 *l.* only ſhould be raiſed purſuant to the Power given to them? or, Whether the whole Sum of 14000 *l.* ſhould be raiſed purſuant to the Clauſe which, in Default of Appointment, gives 2000 *l.* to each younger Son, and 3000 *l.* to each and every Daughter, there being four younger Sons and two Daughters, one of whom died an Infant in her Mother's Life-time? The ſecond Queſtion was, Whether ſuch of the Children as attained their Ages of

of Twenty-one in their Mother's Life-time, ſhould have Intereſt for their Portions from that Time, or only from the Time of their Mother's Death?

Lord Chancellor. The firſt Queſtion is, How much ſhall be raiſed for the younger Children, whether the whole Sum of 14000 *l.* or only 12000?

By the firſt Clauſe it is clear, that no more than 12000 *l.* was to be raiſed; but the Doubt ariſes upon the ſecond Clauſe, whereby particular Sums are provided for each younger Child in caſe no Appointment be made by the Father or Mother, which hath not been done; and by the Number of younger Children the particular Sums provided by this Clauſe amount to 14000 *l.* This ſecond Clauſe indeed is not an independent Clauſe, but ſubſidiary to the firſt: In caſe the firſt does not take Effect, then this ſecond is to prevail, whereby he hath made a certain direct Charge of 3000 *l.* for each Daughter, and 2000 *l.* for each younger Son, without any Proviſion (as there is in the firſt Clauſe) that the Whole ſhall not amount to more than 12000 *l.*

In the firſt Clauſe, where he delegates the Power of charging, he thought it proper to confine that diſcretionary Power given; but where he was to charge the Eſtate himſelf, as by this ſecond Clauſe he does, there was no Reaſon for him to confine his own Diſcretion: And if ſo, can a Court of Equity (where there are ſix younger Children, and the Eſtate well able to bear the Charge) ſeek for a foreign Intention to take away their Bread? The Queſtion, Whether *Anna Maria*, who died in her Mother's Life-time, be ſuch a Daughter as can be ſaid to have any Intereſt in this Sum of 3000 *l.* depends upon the Conſtruction of the Deed, whether it was a certain Charge before, or not until the Mother's Death?

The Power of Appointment is not given to the Huſband and Wife jointly, but to her, to be executed with her Huſband's Conſent; which ſhews that he intended that ſhe

might execute it during her Coverture; and in caſe the Huſband ſhould ſurvive her, then there is an expreſs Proviſion that he might execute it; but in caſe ſhe ſurvived her Huſband, as ſhe did, it is not ſo clear by this Clauſe whether, by the firſt Gift of the Power to her, he intended to enable her to execute it during the Coverture only, but under the Control of her Huſband; or, whether ſhe might execute it after her Huſband's Death? This I ſay is not clear by this Clauſe; but the other Clauſe of Maintenance makes it ſo, and proves his Intent to be, that it might be done either way; for, it ſays appointed by the Survivor; and therefore the taking it in the firſt Senſe would be taking away the Effect of the Words: Whereas in all Caſes the Conſtruction muſt prevail which makes the Whole conſiſtent; and where there are plain and ambiguous Words, thoſe that are ambiguous and doubtful muſt give way to ſuch as are plain and obvious. By the firſt Clauſe ſuch Children only can be conſidered as intitled to any Share under the Power of Appointment, as were living at the Survivor's Death; but no Appointment having been made, it ſtands upon the ſecond Clauſe, which is a direct Charge upon the Land of 2000 *l.* and 3000 *l.* for each Daughter.

The next Queſtion is about the Intereſt, From what Time it ſhall be payable? And I am of Opinion, that although the Payments were to be at Twenty-one, yet no certain Intereſt veſted in any of the Children until the Survivor's Death: And although ſome of them attained their Ages of Twenty-one in their Mother's Life-time; yet all being contingent until the Survivor's Death, no Intereſt can be due but from the Time of the happening of the Contingency.

And ſo decreed the Whole 14000 *l.* to be raiſed, and Intereſt from the Mother's Death only.

DE

Termino Paſchæ

9 Geo. II.

In CURIA CANCELLARIÆ.

Bradley verſus *Powell.*

24 *May* 1736.

JOHN Powell being Tenant for Life, with Remainder to *Henry* his eldeſt Son in Tail, they two agreed to re-ſettle the Eſtate, and a Recovery was accordingly ſuffered to the Uſe of *John* the Father for Life as to Part, then to Truſtees for Two hundred Years, upon Truſt to raiſe 1100 *l.* to be paid to *Richard Powell* (the ſecond Son of *John Powell*) within ſix Years after the Death of *John*, or as ſoon after as the ſame could be raiſed, and in the mean Time Intereſt from the Death of *John* the Father, after the Rate of 5 *l. per Cent.* for and towards his Maintenance until the Portion be paid to him, Remainder to *Henry* the eldeſt Son for Life, and to his firſt and other Sons in Tail, *&c. Richard* the ſecond Son died conſiderably indebted, leaving no Aſſets, after having attained the Age of Forty-five Years; and two Years after *John* the Father died, by whoſe

A. the Father, and *B.* the eldeſt Son, re-ſettle an Eſtate, to the Uſe of *A.* for Life as to Part, then to Truſtees for Two hundred Years, to raiſe 1100 *l.* to be paid to the ſecond Son within ſix Years after *A.*'s Death, or as ſoon after as the ſame could be raiſed, and in the mean Time Intereſt from *A.*'s Death, for and towards his Maintenance, Remainder to

B. the Eldeſt, *&c. C.* died indebted, and two Years after him *A.* died; from whom a good Eſtate came to *B.* The Creditors cannot have this Portion raiſed, the Contingency upon which it was payable never happening.

whoſe Death an Eſtate of 700 *l. per Ann.* came to *Henry*, and from him to his Son the now Defendant.

The Bill was brought by the Creditors of *Richard* againſt the Defendant and the Truſtees, to have the 1100 *l.* raiſed and applied towards the Payment of his Debts: The Defendant *Powell* inſiſted, That *Richard* dying in his Father's Life-time, the Portion could not be raiſed, not being tranſmiſſible to his Repreſentative, but ſhall merge in the Land for the Benefit of the Defendant, who was Heir at Law.

Lord Chancellor. It has been doubted whether this Settlement was not to be conſider'd as voluntary? But I think it was made upon a good and valuable Conſideration, and that the Parties are Purchaſers under the Recovery ſuffered by the Father and Son, and therefore *Richard* is to be conſidered as a Purchaſer for the 1100 *l.* in Queſtion. But the main Point is, Whether this 1100 *l.* is to be looked upon as a Portion? And I think it muſt be conſidered in that Light, it moving from the Father, and being intended by him as a Proviſion for his Child. The Rule of Portions ſinking in the Land where the Party dies before the Term out of which they are to ariſe, comes into Poſſeſſion, hath not always held without Exception; as appears from *Butler* and *Duncomb*'s Caſe, 2 *Vern.* 760. where the Words were *from and after the Commencement of the Term*, and therefore the Portion not payable during the Life of the Father and Mother, the Term not being yet commenced: But yet the Court inabled the Huſband and Wife to raiſe Money upon the Intereſt by way of Mortgage; which was, to conſider it in ſome Sort as already veſted. So in that of *Broome* verſus *Berkley*, *Abr. Eq. Ca.* 340. notwithſtanding the Portions were decreed not to be raiſed immediately; yet they were conſidered as tranſmiſſible Intereſts. The ſame in *King* and *Wither*'s Caſe in the *Houſe of Peers*. In all theſe Caſes the Limitation was, That the Portions ſhould be paid them at ſuch a Time, as upon Marriage, or at ſuch an Age; and the Intent of the Parties was plain, That upon either of theſe Contingencies happening, the Child

Child ſhould be intitled to the Portion, although it was contingent; ſince a contingent Intereſt is tranſmiſſible, and a future Proviſion may well be looked upon as a Conſideration for Marriage. In the preſent Caſe the Term and the Truſt are not to ariſe until the Father's Death; but no particular Time is limited for the Payment of the 1100 *l.* but barely within ſix Years after his Father's Death, and not made payable to him, his Executors and Adminiſtrators, *&c.* but barely to him, with a Proviſion, *That from the Father's Death* 5 l. per Cent. *ſhall be raiſed for and towards his Maintenance*; which looks as if the Intent was to poſtpone the veſting until the Death of the Father; ſince *the* 5 l. per Cent. *for and towards his Maintenance* can never be raiſed by them to that Purpoſe, when he died in his Father's Life-time. This firſt Act which the Truſtees are to do, *viz.* That of providing for his Maintenance, neceſſarily ſuppoſes him living at his Father's Death; and where the Intereſt is contingent, as it is in the preſent Caſe, it is moſt conformable to Reaſon to conſider the Principal as contingent likewiſe.

But if the Conſtruction ſhould be otherwiſe, the Term, by the expreſs Words of the Truſt, can never ceaſe; it being to endure *for and towards his Maintenance until the Portion be paid unto him*; which it can never be, ſince he died in his Father's Life-time.

I therefore think the Whole was contingent, Principal as well as Intereſt; and that it differs from the Caſe of *Broome* verſus *Berkley*, and of *King* verſus *Withers*; for that in thoſe Caſes Marriage enſued, which was one of the Times appointed for Payment: But here the 1100 *l.* is limited to be paid to him within ſix Years after his Father's Death, without any other Limitation; and he dying in his Father's Life-time, the Contingency hath never happened; and the Portion muſt therefore ſink for the Benefit of the Owner of the real Eſtate. *Ante* 117.

And ſo diſmiſſed the Bill.

Hunter

27 *May.*

Hunter verſus *Maccray.*

Though *England* and *Scotland* be now one Kingdom, yet the Writ of *Ne Exeat Regno* has not been alter'd ſince the Union. It was originally a State Writ. Q. Whether in the common Form, and Security given thereupon, it can reſtrain the Party from going into *Scotland*? vid. 1 P. W. 263

A Motion was made before the *Lord Chancellor*, that a *Ne Exeat Regno* might be ſo framed as to prevent the Defendant from going into *Scotland*, upon Affidavit made that he was ſoon going to reſide there, and that he had confeſſed, That as Truſtee for the Plaintiffs under their Father's Will, he had received the Sum of 10000 *l.* The common Order had been made at the *Rolls* for a *Ne Exeat* to iſſue (upon a Petition there preferred) and marked for 10000 *l.* Bail; and this Motion was now made upon an Apprehenſion, that as the Writ was only to reſtrain him from going out of the Realm, it could not reſtrain him going into *Scotland*, which by the Union is now the ſame Kingdom, and yet as effectually out of the Reach of the Proceſs of the Court as any other foreign Part which is of the King's Allegiance.

His Lordſhip aſked how they would have it altered? and what Authority he had to alter an original Writ? eſpecially as this Writ was not originally intended to aid the Proceſs of the Court, but was a mandatory Writ, to prevent the King's Subjects from going into foreign Countries to practiſe Treaſon with the King's Enemies? And he ſeemed to think, that this Caſe muſt have happened ſince the Union; and yet he had never known, nor heard, that any Attempt had been made to alter the Writ: And he ſaid, That perhaps there was no Foundation for the Doubt, whether the common Writ would not prevent the Defendant from going into *Scotland*, as well as any of the King's other Dominions out of the Reach of the Proceſs of the Court.

Mr. *Hamilton* inform'd the Court that ſomething of this Kind had been moved, in one *Mitchel*'s Caſe, in the Lord *Cowper*'s Time; who ſeemed to think that the Writ extended to *Scotland*, notwithſtanding the Union, and did nothing

in it. The Regiſters likewiſe ſaid they never knew any other than the common Order made. His Lordſhip conſider'd whether he might not direct that the Sheriff ſhould take Security, that the Defendant ſhould not go out of that Part of *Great Britain* called *England*; but as ſuch an Order might be liable to Objections, as, Whether the Defendant might go into *Wales?* Whether it would be neceſſary to give the ſame Direction in every other Caſe as well as in the preſent? And whether it would not be countenancing an Objection, which otherwiſe, perhaps, would not be of any Force? He ſaid, That it was dangerous to alter old eſtabliſhed Forms, and therefore would make no Order in it; but left the Parties to proceed in the old beaten Path.

DE

Term. S. Trinitatis

9 Geo. II.

In CURIA CANCELLARIÆ.

Brookfield v Bradley. 1 Sac. 635.

5 July. 9 Vin 418

Scarth verſus *Cotton.*

An Eſtate conveyed in Truſt to be ſold to pay Incumbrances, the Reſidue in Truſt for the Grantor and his Heir; upon a Bill brought by another Creditor againſt the Truſtees and Heir, who was a Minor, and the Heir anſwering that the Parol ought to demur during the Minority, becauſe (as to the Reſidue) it was only Aſſets: It was order'd accordingly, although the Infant's Counſel would have waived it as prejudicial to the Infant.

A Bill was brought by the Plaintiff, as a Bond-Creditor, againſt the Defendant as Truſtee of the Eſtate of one *John White* (who had in his Life-time conveyed it to the Defendant, in Truſt to ſell all or ſo much of the ſame as would be ſufficient to pay his Debts, and the Incumbrances charged upon it, and then in Truſt for his own right Heirs) in order to have the Eſtate ſold, the prior Incumbrances paid off, and then to be paid his Debt out of the Reſidue. The Daughter and Heir, who was an Infant, was alſo a Defendant; and ſhe, by her Anſwer, inſiſted, That being an Infant, the Parol ought to demur; becauſe that although it was a Truſt for paying off Incumbrances which then affected the ſame, yet as to the Reſidue, it was only Aſſets.

The *Lord Chancellor* thought it was ſo, and that there was no Difference between legal and equitable Aſſets: And

And although in this Caſe it would be to the Infant's Prejudice to take Advantage of the Law, becauſe the Intereſt would out-run the Rents and Profits of the Eſtate; yet, it being mentioned in the Pleadings, he ſaid, he could not avoid ordering it, although the Counſel would have waived the Objection. And ſo an Order was made to take an Account of what was due to the Plaintiff; but all Proceedings to ſtay until the Defendant came to Age, and the Plaintiff to pay all Parties their Coſts, except the Infant, and to have them again out of the Eſtate.

Galley verſus *Baker.*

3 *July.*

A Building Leaſe is made of Church-Lands, by a Deceit put upon this Court by the Leſſor; who takes a large Fine from the Leſſee, tho' nothing of that was mentioned in the Propoſal laid before a Maſter: The Executor of the Leſſor was decreed to refund this Money to be laid out in a Purchaſe for the Benefit of the Succeſſors; but the Leaſe was allowed to ſtand good, becauſe it did not appear that the Tenant was privy to the Impoſition upon the Court.

THE Dutcheſs of *D*——being ſeiſed of a Houſe and Garden in *St. Giles's in the Fields*, called *Whitehouſe*, upon the 7th of *April* 1662. made a Leaſe of the Premiſſes to the then Archbiſhop of *Canterbury* and other Truſtees, for the Benefit of the Rector of the Pariſh and his Succeſſors, for the Term of Ninety-nine Years; and afterwards by her Will, dated *November* 2, 1668. reciting the Leaſe, directed her Heirs to convey, from Time to Time, as the Rector of *St. Giles's* and his Succeſſors ſhould direct, declaring her Intent to be, that the ſaid Houſe ſhould remain as a Dwelling-houſe for the ſaid Rector and his Succeſſors for ever, as a free Gift by her. There was at her Death a Leaſe for Lives ſubſiſting, which determined in 1681. when the late Archbiſhop *Sharp* was Rector; who finding that the Houſe was ſo old and ruinous that it could not conveniently be made an Habitation for the Rector; and thinking it would be more for the Advantage of him and his Succeſſors to let out the Ground on a Building-Leaſe at a reſerved Rent, came to an Agreement with one *Boſwell*, to let him a Leaſe for Forty-one Years, at 11 *l. per Ann.* to build Houſes on; and a Bill being brought by *Boſwell* to have this Agreement carried into Execution, it was decreed by the Earl of *Nottingham*, that a Leaſe ſhould be made, with Covenants to build; and a Leaſe was accordingly

cordingly made the 27th of *February* 1682. by Dr. *Sharp*, and the Heir of the Dutcheſs, and the ſurviving Truſtee of the Term.

Boſwell laid out a conſiderable Sum, and built ſixteen good Houſes; and his Leaſe expiring at *Michaelmas* 1720. when the late Biſhop *Barker* was commendatory Rector of *St. Giles*'s, the Biſhop, in the Year 1724. brought his Bill, ſetting forth all the former Proceedings, and ſuggeſting that the Houſes were ſo ruinous that it was neceſſary to rebuild them, which no body would undertake unleſs a building Leaſe could be obtained for a long Term, and prayed it might be inquired under what Rents and Covenants it was proper to have ſuch a Leaſe granted; the Court thereupon ſent it to a Maſter, who reported that the Parties propoſed to let a Leaſe for Sixty-one Years, and to improve the Rent from 16 *l.* to 20 *l.* and made it appear that the Houſes were ruinous, and that it would be for the Benefit of the Rector to have ſuch a Leaſe made with proper Covenants; which the Court accordingly ordered, and a Leaſe was made *June* 22, 1725. but in it there was no Covenant to rebuild, only in caſe where any was neceſſary to be pulled down: And it appeared by the Evidence that the Biſhop had taken 600 *l.* for a Fine of the Leſſee; but nothing of it appeared upon the Leaſe: In Fact, the Houſes wanted a great deal of Repair, but not to be rebuilt; nor was any one of them rebuilt, but about 700 *l.* laid out in Repairs, the Rents being now 167 *l. per Ann.*

This Bill therefore was brought by the Plaintiff the preſent Rector and immediate Succeſſor to the Biſhop, againſt the Biſhop's Executor and againſt the Leſſee, either to avoid the Leaſe, as obtained by Fraud upon the Court, and on a Contract injurious to the Succeſſor, or to have the 600 *l.* with Intereſt from the Biſhop's Death, for the Benefit of the Succeſſor, the preſent Rector.

Lord Chancellor. There was not the leaſt Suggeſtion to the Court that the Biſhop intended to take a Fine, or make any

any private Advantage; but only a Deſire of having it inquired how the End of the Truſt might be beſt anſwered.

In his Propoſal to the Maſter he ſays, That notwithſtanding the Inconvenience he hath been at for want of a Rectory Houſe, yet, provided he may have Leave to make a Leaſe, he is willing to do it; which is ſaid to be a Suggeſtion that he intended to take a Fine. It might be a dark Intention, and ſhews Skill in impoſing upon the Court, but cannot make the Caſe the better. Affidavits were laid before the Maſter, *That the Houſes would fall of themſelves if not ſpeedily taken down,* which was the Inducement to the Court to make a final Decree, and thereby give Leave to leaſe; and the preſent Bill is not to ſet aſide the former Decree, nor can it be done by original Bill, except in caſe of apparent Fraud; nor is the Decree wrong in it ſelf; but it hath not been rightly purſued, and a wrong Uſe hath been made of it in the carrying it into Execution.

According to the Decree there ſhould have been no Fine, and there ſhould have been proper Covenants. If there had been no Fine, the Biſhop would never have agreed to this Leaſe at the Rent of 20 *l. per Ann.* and if the Facts had been known to the Court, it would never have ratified the Leaſe: This therefore is what the preſent Bill is brought to rectify. The Queſtions are, Firſt as to the Leſſee, who does not appear until 1725. (being no Party to the former Cauſe) when he was told that the Biſhop had Power to make ſuch a Leaſe, he looked no farther back than the Decree; he ſaw the Power that the Biſhop had, and it does not appear that he had a great Bargain: So that it ſeems too hard to ſet aſide his Leaſe, and the rather becauſe Part is ſold, and the Repairs have been great. But ſecondly, as to the Biſhop, I have no Doubt but the 600 *l.* ought to be conſidered as a Part of the Truſt from which it flow'd, and ought to be repaid with Intereſt, at 4 *l.*

per Cent. to the preſent Rector, from the Death of the Biſhop.

And ſo decreed the 600 *l.* to be laid out in a Purchaſe for the Rector and his Succeſſors, and until ſuch Purchaſe made, to be laid out on Security in Truſtees Names, and the Biſhop's Executors to pay Coſts out of his Aſſets; but as againſt the Leſſee diſmiſſed the Bill without Coſts.

10 *July.* Prec. in Chan. 265. *Stapleton* verſus *Colvile.*

A. deviſes his Lands to *B.* his Wife for Life, chargeable with two Annuities for Life, and with a Legacy of 1000 *l.* and gives *B.* Power to raiſe, by Sale or Mortgage of any Part, ſuch a Sum as would be ſufficient to pay his Debts due at his Deceaſe; and then reciting the great Satisfaction he had of his Eſtate's having continued long in his Name and Family, and his Deſire to perpetuate

MR. *Colvile*, by Will, deviſed his Lands to his Wife for Life, chargeable with the Payment of two Annuities for the Lives of the Annuitants, and likewiſe with a Legacy of 1000 *l.* and gave her a Power to raiſe, by Mortgage or Sale of any Part of the Inheritance, ſuch a Sum as would be ſufficient to diſcharge the Debts he ſhould owe at the Time of his Death; and then reciting the great Satisfaction he had of his Eſtate's having continued ſo long in his Name and Family, and the great Deſire he had to perpetuate, as far as he could, his Name and Eſtate, he deviſes all his real Eſtate (after his Wife's Death) to his Nephew *Robert Lupkin* for Life, Remainder to his firſt and other Sons in Tail, *&c.* upon Condition of their taking and uſing the Name and Arms of *Colvile* for ever: And then, in the Cloſe of his Will, he gives all his Goods, Chattels, and perſonal Eſtate, to his Wife, and makes her ſole Executrix.

both, as far as might be, he deviſes all his real Eſtate, after his Wife's Death, to his Nephew *C.* for Life, Remainder to the Sons of *C.* ſucceſſively in Tail, *&c.* upon Condition of their taking his Name and Arms; and then gives all his perſonal Eſtate to his Wife, and makes her ſole Executrix: She ſhall take the perſonal Eſtate free from the Debts of the Teſtator; it ſhall not be applied in Exoneration of the real.

The Queſtion was, Whether the Wife ſhould take the perſonal Eſtate exempt and diſcharged from the Payment of Debts? or, whether the perſonal Eſtate ſhould not according to the general Rule be firſt applied. It had been decreed

decreed at the *Rolls*, that the Charge ſhould be intirely upon the real Eſtate, and the Wife to have the perſonal Eſtate to her own Uſe.

Mr. *Attorney General*, Mr. *Solicitor General*, Mr. *Verney*, and Mr. *Hamilton* argued, That, by the known and general Rule, the perſonal Eſtate was the proper Fund for Payment of Debts; and that it hath been always held, that where there are no Words in a Will to exempt it, either particularly or by neceſſary Implication, it ſhall be applied firſt; and whenever it hath been held otherwiſe, that hath only been to ſatisfy the Teſtator's Intent, who being Maſter of the Whole, may give and diſpoſe of it in what Manner he pleaſes; as in the Caſe of a Deviſe to Truſtees to ſell for Payment of Debts, *&c.* But where the Debts are only charged upon the Eſtate, the perſonal Eſtate muſt be firſt applied, according to the Diſtinction in *Wainwright* and *Bendlow*'s Caſe, 2 *Vern.* 718.

That in this Caſe the Clauſe whereby he hath diſpoſed of his real Eſtate, was to be conſidered but as auxiliary to that whereby he hath diſpoſed of his perſonal Eſtate; and whether the Deviſee of his perſonal Eſtate takes as Executor, or in any other Manner, both Law and Equity make him but as a Truſtee for the Creditors, who have the beſt Right to it: And although the Teſtator makes both real and perſonal Eſtate the Fund for Payment of his Debts, yet there ſhall be no Average; but the real Eſtate ſhall be chargeable only in caſe of Deficiency of the perſonal. So where the perſonal Eſtate is deviſed to one who is made Executor, unleſs there be particular Words to exempt the perſonal Eſtate, it ſhall paſs to the Deviſee but as Executor, and conſequently applicable in the firſt Place; according to *Cuttler* and *Coxeter*'s Caſe, 2 *Vern.* 302. and *French* and *Chicheſter*'s Caſe, 2 *Vern.* 568. the laſt of which is a very great Authority, being warranted by the Opinion of the Lord Keeper *Wright* and the Lord *Cowper*, who both decreed the perſonal Eſtate to be firſt applied, notwithſtanding that the Truſt-Eſtate was expreſly and directly charged with Payment

ment of Debts. So in *Harewood* and *Child*'s Caſe, heard by the preſent *Lord Chancellor*, *Auguſt* 13, 1734. where the Words were, " I deviſe all my Manors to *A.* and *B.* and " their Heirs, in Truſt that they and their Heirs, out of " the Rents and Profits, or by Leaſe, or Mortgage, or Sale " thereof, or any Part thereof, ſhall raiſe ſo much Money " as I ſhall owe at my Death; and after Payment of my " Debts, and re-imburſing themſelves, upon farther Truſt " that they and their Heirs ſhall ſtand ſeiſed of ſuch Part " of the Premiſſes as ſhall remain unſold to and for ſuch " Perſons and Uſes as the Manor of *C.* is already ſettled; " and if any Money remains after Payment of my Debts, " it ſhall be paid to my Daughter, and ſuch as are intitled " to the ſaid Manor by the Limitation aforeſaid." He had already given the Manor of *C.* to his Daughter in Tail, with Remainder to his Nephew; and then he gave all his perſonal Eſtate, of what Nature or Quality ſoever, to his Daughter, whom he made Executrix; and it was held, that notwithſtanding this expreſs Deviſe to the Truſtees, the perſonal Eſtate ſhould be firſt applied in Diſcharge of the real. The like was decreed in *Bromhale* and *Willbraham*'s Caſe at the *Rolls* about four or five Years ago, where the Teſtator deviſed in the following Words, *viz.* " All " my perſonal Eſtate, of what Nature, Kind or Quality " ſoever, I give to my Siſter *A.* whom I make my Execu- " trix, and all my real Eſtate, of what Kind, Nature or " Quality ſoever, I give unto my Sons *B.* and *C.* charge- " able with my Debts." It was held at the *Rolls*, and afterwards by Lord Chancellor *King*, That the perſonal Eſtate ſhould be firſt liable. And the ſame had been before decreed in the Caſe of *Lord Gray* verſus *Lady Gray*, 1 *Chan. Ca.* 297. and that of *Mead* verſus *Hide*, 2 *Vern.* 120. In the preſent Caſe there is no Deviſe to Truſtees for Payment of Debts; but a beneficial Intereſt is given to the Wife for Life, with a Power to raiſe, by Sale or Mortgage of the Inheritance, ſuch a Sum as will be ſufficient for the Payment of his Debts; which was intended only to enable her to diſpoſe of the Inheritance in caſe of Neceſſity, but not at all to take it out of the common Rule; being no more

more in Effect than charging the real Eſtate; which could be charged only by one of the two Means chalked out by the Teſtator. Indeed, without this particular Power, the Wife being but Tenant for Life, could neither ſell nor mortgage the Inheritance; but that can be no Objection, ſince in caſe of a Deficiency of the perſonal Eſtate the Inheritance would ſtill be liable, although ſhe had no Power of charging it. Beſides, the Deviſe to his Nephew after his Wife's Death, evinces the Teſtator's Intent to be, that the real Eſtate ſhould not be chargeable but upon Deficiency of the perſonal, it being upon Condition that his Nephew ſhall take his Arms; which always implies the Teſtator's Intent to give the Deviſee as large, beneficial and great Eſtate as poſſible, to perpetuate his Name and Family: And was one of the Reaſons for decreeing a Fee-ſimple to the Deviſee in *Ibbetſon* and *Beckwith*'s Caſe. *Ante* 157.

Mr. *Browne*, Mr. *Fazakerley* and Mr. *Idele* inſiſted on the other hand, That upon the whole Frame of this Will the Teſtator's Intent clearly appeared to give his perſonal Eſtate to his Wife, exempt from the Payment of his Debts; and that all the Caſes cited on the other Side did but evince the general Rule, without governing the preſent Caſe, which was quite different from every one of them all. The Directions given in reſpect of his Debts, are contained in the Clauſe whereby he diſpoſes of his real Eſtate, and with that Clauſe he hath cloſed every Thing in regard to his Debts; the Deviſe of the perſonal Eſtate ſtanding ſole and ſingle, without any Thing therein relating to the Payment of his Debts. And when an expreſs Deviſe is to be controlled by Implication, it muſt be ſuch an Implication as is abſolute and neceſſary; whereas in this Caſe the Teſtator's Intent plainly appears, to give his perſonal Eſtate to his Wife abſolutely, without any Charge; having uſed no Words which, either by themſelves, or by any Implication, can denote an Intent in him that the perſonal Eſtate given ſhould be charged with his Debts; and ſince he hath not, neither this nor any other Court can narrow his Expreſ-

ſions ſo as to make the Diſpoſition different from what he intended it to be. Had he intended the Charge to lie upon the perſonal Eſtate, he needed only to have charged the real Eſtate in Aid of it; but would never have been ſo exact in deſcribing the particular Manner in which the real Eſtate ſhould be made chargeable with his Debts, as he hath been in his creating this Power; which if it is not conſidered as a beneficial Power given to the Wife in order to eaſe her own Eſtate, can never have any Effect: And it is not at all to be compared with an Authority given to Truſtees to ſell; there being a very great Difference between ſuch bare general Powers to a third Perſon to ſell, or do ſome other Act, and ſuch a particular beneficial Power as the preſent one; which, when given to a Perſon to do a Thing that is and will be advantageous to him, is to be conſidered in the ſame Light as if the Giver himſelf had done that Thing; particularly in the Caſe of a Wife, as it is here. The Deviſe of the perſonal Eſtate is *all his Goods, Chattels, &c.* by which Words, unleſs a Part can be taken for *All*, ſhe muſt take the whole perſonal Eſtate diſcharged from any Out-goings; for the Word *All* implies it: Since though, as to the Creditors, the perſonal Eſtate cannot be looked upon as *his* after his Death, yet between Legatees and Deviſees, it is as much his, and to be looked upon as ſuch after his Death as during his Life. And in all the Caſes where the Intent has clearly appeared to diſcharge the perſonal Eſtate, it hath made no Difference whether the Deviſe was to charge the real Eſtate only, or to ſell it. According to *Bamfield* and *Wyndham*'s Caſe, *Precedents in Chan.* 101. where the Deviſe of the perſonal Eſtate was almoſt in the ſame Words as here, and which though decreed upon the Reaſon, That, if the perſonal Eſtate ſhould not be exempted, nothing would be left for the Wife, yet ſeems likewiſe to have gone upon the Words of the Deviſe themſelves. So in the Caſe of the *Attorney General* and *Barkham*, decreed in this Court about two Years ſince, where the Teſtator deviſed in the following Words, *viz.* "For the "juſt and true Performance of this my laſt Will, and for "the

" the Payment of all my Debts, I give and deviſe all my real " Eſtate; and as to the perſonal Eſtate, which at the Time " of my Death I ſhall be poſſeſſed of and intitled unto, I " give the ſame unto my Executor and Executrix herein " named, to defray my Funeral Charges and Expences; " and if my perſonal Eſtate ſhall fall ſhort to diſcharge the " ſame, then the Remainder to be paid to my Executors " out of the firſt Rents and Profits of my real Eſtate, as " they ſhall become due after my Deceaſe until Payment " be made of all my Legacies, Debts and Funeral Expences " as aforeſaid; and if there be any Surplus of my perſo- " nal Eſtate, that then my Executors pay the ſame to my " dear and loving Wife." And held in this Caſe, that the perſonal Eſtate ſhould go to the Wife diſcharged from the Payment of Debts. The Caſes of *Harewood* verſus *Child*, and of *Broomhall* verſus *Wilbraham* are very different from the preſent Caſe; for, in the firſt the Daughter was to take the Whole either way, whether as real or perſonal Eſtate; and therefore the Doubt there could only be with regard to the Repreſentatives. And in that of *Broomhall* verſus *Wilbraham*, had the real Eſtate which was deviſed to the Sons been charged with the Debts, the Sons would have had nothing at all; and the Teſtator's Siſters, who were the Deviſees of the perſonal Eſtate, would have run away with the Whole: So that the Queſtion being between the Teſtator's own Children and his Siſters, it was natural and juſt to conſtrue the Intent in Favour of his Children, and to lay the Load on the perſonal Eſtate. But what clearly evinces the Teſtator's Intent in the preſent Caſe is, that the Annuities, Legacies and Debts are all in one and the ſame Clauſe; and the perſonal Eſtate being as much the proper Fund for the Payment of Legacies as Debts, and the Legacies being particularly charged upon the Land, and coupled and joined with the Power given for Sale of Part of the Inheritance for Payment of his Debts, ſhews he intended no Difference between them. The Annuities likewiſe are given in the ſame Clauſe; and it can never be pretended that the Annuities were deſigned by him to

iſſue

iſſue out of the perſonal Eſtate. Then comes a ſeparate diſtinct Clauſe, whereby he diſpoſes of all his Goods, Chattels, *&c.* without any Reference to the former, or any thing that looks like an Intent of burdening the perſonal Eſtate with the Debts: But thoſe being particularly provided for by a former Clauſe with the Legacies and Annuities, muſt be conſider'd as deſigned by him to iſſue out of the ſame Fund, and his Intent as to all three to be one and the ſame.

Lord Chancellor. The ſingle Queſtion for the Judgment of the Court is, Whether the perſonal Eſtate ſhall or ſhall not be liable to the Payment of the Teſtator's Debts? What the *Quantum* of the Debts, or the Amount of the perſonal Eſtate was at the Teſtator's Death, does not appear; if it did, it would give a great Light into this Matter. Indeed it is not abſolutely in the Teſtator's Power to take the perſonal Eſtate from the Creditors: But he may ſubſtitute another Fund in the Room of it; and if ſo, this Court will take Care that Right be done to all Parties, as well the Deviſees of the perſonal as of the real Eſtate. The Teſtator's Intent muſt govern the Conſtruction of his Will, and that Intent muſt be collected from the Will itſelf. In Caſes where the real Eſtate is charged with Payment of Debts, and an Executor appointed, as in *Wainwright* and *Bendlow*'s Caſe, there is no room to doubt of the Teſtator's Intent; for, it is no more than charging his real Eſtate for the better Security of his Creditors in caſe of a Deficiency of the perſonal; but can never be intended an Exemption of the perſonal Eſtate for the Benefit of the Executor. A Difference hath been taken between the bare Charging of the real Eſtate, and a Deviſe to ſell: But I think, that in Equity a Charging of the real Eſtate is almoſt equal to a Deviſe to ſell; ſince the Court will, upon the Neceſſity of a Sale, order it ſo: And in *Wainwright* and *Bendlow*'s Caſe the Teſtator's Intent appeared to have the Whole converted into Money; and therefore that Caſe does not ſeem to me to weigh much either way. It hath alſo been ſaid, That where the Ex-

Hoel v Hoel. 12 Price 265.

ecutor

ecutor is named in the ſame Clauſe, the Nature of the perſonal Eſtate is not alter'd, but it ſtill remains liable to the Debts; and ſome Caſes have been ſo decreed: But although that Reaſon may have ſome Weight, yet do not I think it ſufficient for the Exoneration of the real Eſtate; and unleſs I was acquainted with the particular Circumſtances of *French* and *Chicheſter*'s Caſe, wherein the Book ſeems deficient, I can never form any Judgment from it; ſince if the Reaſon given in the Book for it be the only one, I cannot ſay that it gives me entire Satisfaction, nor can I lay any great Streſs upon it; and the rather becauſe there is a plain Difference at Law between the bare making an Executor, and the making him likewiſe Legatee of the perſonal Eſtate, as it is in the preſent Caſe; for, in the firſt Inſtance, if the Executor dies inteſtate before Probate, the Repreſentative of the Teſtator is intitled to the Adminiſtration; whereas in the latter, there being an expreſs Gift to him, he takes as Legatee, and conſequently upon his Death his Repreſentative would be intitled to it; an Intereſt being veſted in him, in his own Right, in the one Caſe, but nothing at all in the other, until he hath converted it. In the Caſe of *Harewood* verſus *Child*, the Opinion of the Court was founded upon the Completion of the Will, which, being taken together, manifeſted the Intent to be, that the Daughter ſhould take the perſonal Eſtate liable to the Payment of his Debts, ſhe herſelf being Deviſee of the Whole; and it would have been abſurd to imagine the Teſtator to have intended his perſonal Eſtate to be exempt from the Payment of his Debts, when he had expreſly provided that the Surplus of the Produce of what ſhould be raiſed out of the real Eſtate ſhould go to the very ſame Perſon, who was Deviſee in Tail of the real Eſtate. In that of *Broomhall* verſus *Wilbraham* the real and perſonal Eſtates were pretty much of the ſame Value, and the Debts muſt have exhauſted the one or the other Fund; ſo that had the Judgment of the Court been otherwiſe, the Man's Children would have been left without any Proviſion. And in that of *Mead* verſus *Hide*, there

was an Executor but without any expreſs Gift made to him. But in *Bamfield* and *Wyndham*'s Caſe the Determination was in Favour of the Wife, that ſhe ſhould take the perſonal Eſtate exempt from the Debts; and there ſhe was made Executrix in the ſame Clauſe: Although indeed there be another Reaſon given in the Book, of the Debts amounting to more than the perſonal Eſtate. In that of the *Attorney General* verſus *Barkham*, the Teſtator had laid the Charge upon the real Eſtate, and then taking up his perſonal Eſtate, mentions particular Things which he chargeth it with; ſo that the Surplus there meant muſt be the Surplus after the particular Charges which he had there ſpecified; and therefore this Caſe, being very particular, muſt ſtand upon its own Bottom and Reaſon, and cannot be compared to the preſent one. All thoſe Caſes depended upon the Intent plainly appearing, as this muſt do likewiſe. After the Gift of the Annuity and Legacies wherewith he hath charged his real Eſtate (wherein I do not think that the uſing the Words *Charging* or *Chargeable*, will make any Difference, ſince they are uſed indifferently) he gives his real Eſtate to his Wife for her Life; and although it does not neceſſarily follow that the Coupling both together, ſhews he intended both to be payable out of one and the ſame Fund, the perſonal Eſtate being the proper Fund for Debts, though no Proviſion had been made by the Teſtator; but the Annuities having none but what is particularly provided for them, yet that muſt have ſome Weight.

Then comes the Power given to the Wife, which ſeems to me very clearly to manifeſt this Intent, that ſhe ſhould take what he hath given to her by his Will to her own Uſe. For, his Intent being to carry down and perpetuate his Eſtate in his Name and Family, can it be ſuppoſed, that after having given his Wife the whole Power over his perſonal Eſtate, by making her Executrix, he would likewiſe give her a Power of diſpoſing of ſo much of the Inheritance, (and conſequently of defeating the Deviſe to his Nephew, not of ſo much as the perſonal Eſtate ſhould

prove

prove deficient, but of what ſhould be neceſſary for the Payment of his Debts) unleſs he had intended her the perſonal Eſtate abſolutely to her own Uſe, clear and diſcharged from the Payment of his Debts? His Intent ſeems clear to give her this Power of diſpoſing of ſo much of the Inheritance as would ſatisfy his Debts, in order to ſecure her the full Enjoyment of her Eſtate for Life, and of the perſonal Eſtate, free from all Charges whatſoever.

And ſo affirmed the Decree in Behalf of the Wife.

DE
Term. S. Michaelis
10 Geo. II.
In CURIA CANCELLARIÆ.

Hervey verſus *Aſhton.*

A. by Settlement after Marriage creates a Term, in Truſt, by Mortgage or Sale, to raiſe 2000*l.* for the Portion of each of his Daughters, provided they marry with their Mother's Conſent, and directs a yearly Payment out of the Rents until they marry; and if any of them die before Marriage with ſuch Conſent, her Portion to ceaſe, and the Premiſſes to be exonerated thereof; and if it be raiſed, to be paid to ſuch Perſon to whom the Premiſſes ſhould belong; and by Will he creates another Truſt-Term to raiſe by Sale or Mortgage 4500*l.* whereof 2000*l.* to be paid to each of his Daughters in Augmentation of their Fortunes, ſubject to ſuch Condition as in the Settlement; and by a Codicil creates another Term for the better raiſing their Portions. *A.* dies, the Daughters marry without Conſent; the Portions ſhall be raiſed, but the Huſbands ſhall make competent Settlements.

SIR *Thomas Aſhton*, by Settlement after Marriage, creates a Truſt-Term of One thouſand Years, the Truſt whereof he declares to be by Mortgage or Sale of the Premiſſes to raiſe the Sum of 2000*l.* for the Portion of each of his Daughters, provided they married with the Conſent of the Defendant their Mother; then directs a Yearly Sum to be paid them out of the Rents and Profits until they marry; and if any of his Daughters ſhould happen to die before Marriage with ſuch Conſent, that her Portion ſhould ceaſe, and the Premiſſes be exonerated thereof; and if ſuch Portion ſhould be raiſed in Whole or in Part, that the ſame ſhould be paid to ſuch Perſon to whom the Premiſſes ſhould belong. By his Will 1722. he creates another Truſt-Term, to raiſe by Sale or Mortgage the Sum of 4500*l.* whereout 2000*l.* to

to be paid to each of his Daughters in Augmentation of their Fortunes, but ſubject to ſuch Conditions as are declared in the Settlement: And by a Codicil, in purſuance of a Power of Revocation, he creates another Truſt-Term for the better raiſing of his Daughters Portions. Sir *Thomas* died in 1724. leaving two Daughters, the Petitioners, one of whom Mr. *Hervey* married after the Age of Twenty-one, but without the Conſent of her Mother; and the other married Mr. *Clutton* at her Age of Nineteen, and without Conſent likewiſe; and they and their Huſbands brought their Bill againſt their Mother and Brother to have their Portions and additional Fortunes, and to have the real Eſtate applied towards Payment of their reſpective Portions; alledging, That upon their reſpective Marriages their Portions became payable. Mr. *Clutton*, the Huſband of one of the Daughters, died; whereupon they brought a Bill of Revivor, and a Decree was made by Conſent, with Liberty to apply farther to the Court: And now Mr. *Hervey* and his Wife, and Mrs. *Clutton*, preferred their Petition for Payment of their Portions, Mr. *Hervey* offering therein to ſettle his Wife's Fortune, and they inſiſting, that the Lands were ſufficient to anſwer the Daughters additional Portions.

The *Maſter of the Rolls* having taken Time to conſider of this Caſe, now deliver'd his Opinion. The Queſtion is, Whether the Plaintiffs be intitled to thoſe original and additional Portions, both the Marriages being had without the Conſent of the Lady *Aſhton* the Mother? And Firſt it is to be obſerved, That theſe Portions are Proviſions for Children. Secondly, That the Loſs of theſe Proviſions is a Penalty. And, Thirdly, That this Court can impoſe Terms upon the Huſbands as to the ſettling the Fortunes. Nor are Proviſions for Children meerly voluntary; ſince Nature obliges Parents to take Care of their Children. *F. N. B.* 284. of the new Edition; and that the Court did very early impoſe Terms upon Huſbands applying for their Wives Fortunes, appears from the Caſe of *Shipton*, in a

Book called *Reports of Caſes in the Time of Sir* Heneage Finch 145.

Now, for the clearing up of this Queſtion it is to be conſider'd, that by the Common Law all Conditions againſt the Liberty of Marriage are unlawful. *Swinbourne* 150. And in the ſame Chapter it is ſaid, " That although " the Legacy be given over, yet it is void, as being in " Reſtraint of Marriage, and conſequently againſt the Good " of the Commonwealth." Thus it ſtood by the *Eccleſiaſtical* Law. And in *Moor* 857. *Pigot's* Caſe, cited by *J. Winch*, comes up to the preſent Caſe; it was a Condition annexed to a Legacy that the Daughter ſhould marry with the Conſent of the Mother, ſhe married without her Mother's Conſent, and yet Sentence was given, that ſhe ſhould have her Legacy: Which ſhews that the Common Law Courts had adopted the Notions of the Eccleſiaſtical Lawyers. This Court indeed hath not gone ſo far: Whereever there is a Deviſe over, that Deviſe over having always been held to be good: But where there is no Deviſe over, ſuch Conditions have been only conſidered as *in Terrorem*, 1 *Mod.* 308. *Abr. Eq. Ca.* 110. and there is a reaſonable Foundation for conſtruing ſuch Deviſes to be *in Terrorem* only: For though a Daughter marries without her Father's Conſent, yet it is not to be ſuppoſed that this Severity (was he living) would carry him ſo far as to leave her quite deſtitute. Beſides, whatever is injurious to the Commonwealth is unreaſonable; and therefore it was that Reſtraints of Marriages were diſcouraged by the *Roman* Laws: For theſe Reaſons this Court hath conſtrued ſuch Limitations to be only *in Terrorem*, unleſs there be a Deviſe over. Indeed it hath been inſiſted, That in the preſent Caſe there was a Deviſe over; for that, by that Clauſe of the Will whereby the Teſtator provides the additional Sum of 2000 *l.* to each of his Daughters, he gives the Reſidue (over and above the 2000 *l.* apiece) to his Wife: But the Legacy is not by that given over, only the Reſidue over and above the 2000 *l.* It hath been likewiſe inſiſted, That by the Clauſe in the Settlement declaring, that if any

any ſhould die before Marriage with ſuch Conſent, that her Portion ſhould ceaſe, there was a ſufficient Diſpoſition of it: But ſurely this is not a good Diſpoſition within the Meaning of thoſe Caſes that allow a Limitation over to be good; for, this is not to take Place upon marrying without Conſent, but upon dying before Marriage with ſuch Conſent, and is no more than providing for Daughters dying unmarried; he taking it all along that if they married they would do it with Conſent. Here does not appear to be any Perſon in the Teſtator's View to whom theſe Fortunes ſhould go over; as there does in all the Caſes where theſe Limitations over are allowed: The Intent being as clear in thoſe Caſes to give it over upon Breach of the Condition, as that upon Performance of it the firſt Taker ſhould retain it.

As to Authorities I ſhall cite firſt thoſe that relate to perſonal Eſtates; the Caſe of *Eſcot* verſus *Eſcot*, *February* 6, 1663. and mentioned 1 *Chan. Ca.* 144. was a Deviſe to his Nephews and Nieces; to his Nephews at Twenty-one, to his Nieces at Twenty-one or Marriage; but if they married without their Mother's Conſent, then he deviſed it over; and the Court went ſo far in this Caſe as to decree the Legacy notwithſtanding the Deviſe over. The next is that of Sir *Henry Bellaſys* verſus *Sir William Ermine*, 1 *Chan. Ca.* 22. and agrees with the Regiſter Book; the Condition was, that ſhe ſhould marry with the Conſent of *A.* and if not, that ſhe ſhould have but 100 *l. per Ann.* The Court held this Proviſo to be only *in Terrorem.* So *Garrett* and *Pretty*'s Caſe, 2 *Vern.* 293. where, for want of a Deviſe over, the Condition was held to be but *in Terrorem.*

The true Reaſon of this Diſtinction is given in *Stratton* and *Gryme*'s Caſe, 2 *Vern.* 357. that a Deviſee over being named, he muſt be looked upon as a Perſon whom the Teſtator conſidered and had in his Thoughts as to what Proviſion and Benefit he was to have by the Will. Indeed that of *Amos* verſus *Horner*, *Abr. Eq. Ca.* 112. is contrary to the

the former Determination; but no Reſolution was there taken, but it went off for want of Parties, and never came on again. And in that of *Creagh* verſus *Wilſon*, 2 *Vern.* 572. the Intent of the Condition was to provide againſt his Daughter's marrying a Papiſt; which, ſince the Proteſtant Religion hath been ſettled here, is a very good Condition; and if the Teſtator's Intent be defeated in that Reſpect, the Legacy ſhall not be paid. Nor will theſe Fortunes being chargeable upon Land, vary the Caſe; for, although they are to iſſue out of Land, and are ſecured by Deed, yet this being upon a Direction of Truſt-Money, though by Deed, the Court will adjudge this Limitation to be only *in Terrorem*; the Intent of the Parties being as much to govern in Conſtruction of Truſts, as in Conſtruction of Wills: As is ſaid by Lord *Somers* in *Sheldon* and *Dormer*'s Caſe, 2 *Vern.* 311. Nor is the Caſe of *Fry* verſus *Porter* applicable to the preſent Caſe; that being a Condition annexed to a legal Eſtate, and this being an equitable Intereſt only. In *Farmer* and *Compton*'s Caſe, 1 *Chan. Rep.* 121. although the Marriage was againſt Conſent, yet the Daughter was held to take, by the Opinion of two Judges to whom it was referred. And in that of *Fleming* verſus *Waldgrave*, 1 *Chan. Ca.* 58. the Benefit of the Leaſe was decreed to the Adminiſtrator notwithſtanding the Deviſe over. Indeed in that of *Aſton* verſus *Aſton*, 2 *Vern.* 452. the Court would not relieve, becauſe of the expreſs Words of Deviſe over. The Lord *Falkland*'s Caſe, 2 *Vern.* 333. is not at all applicable to this Caſe; nor will it be an Authority almoſt in any Caſe, from the Peculiarity of its Circumſtances. That of *King* verſus *Withers*, reported in a Book compoſed by the late Lord C. B. *Gilbert*, called *Reports in Equity* 26. (and *Preced. in Chan.* 348.) is an expreſs Authority for the Plaintiffs, although I cannot agree with what is there ſaid, That Truſt-Money to ariſe out of Land muſt have the ſame Conſtruction that the Lands themſelves would. So likewiſe is the Determination in *Semphill* verſus *Baily*, *Preced. in Chan.* 562. By all theſe various Judgments it appears, that ſuch Clauſes in Reſtraint of Marriage are never taken favourably, but generally

ly reſtrained, as intended only *in Terrorem.* In the preſent Caſe it is a Sum of Money charged upon Land; but there being no Diſtinction between Conditions annexed to Money charged upon Land and Conditions annexed to Portions ariſing out of the perſonal Eſtates; and Portions by Will being due by the Eccleſiaſtical Law, notwithſtanding ſuch Conditions as this annexed to them, Portions by Settlement (although under the like Conditions) are likewiſe due by the Law and Rules of this Court; and therefore I think the Plaintiffs well intitled to their ſeveral Portions.

And ſo ordered, that Mr. *Hervey* ſhould make his Propoſals before the Maſter as to the ſettling his Wife's Fortune; and that Mrs. *Clutton*'s Fortune ſhould be paid to her, her Huſband being dead.

Catherine Morrice, Widow and Executrix of Humphry Morrice, deceaſed, Plaintiff;

Governor and Company of the Bank of England, and other Creditors, Defendants.

THE State of the Caſe, as far as is material, was as follows:

3 *Will. Rep.* 402. S. C. in the Note; by which it appears that Lord *Talbot*'s Decree was affirmed in Parliament in *May* 1737.—*Reports of Select Caſes in Chan.* &c. 43. S. C. but ſpeaks only of a Motion to diſcharge an Injunction (obtained by Mrs. *Morrice*) for Irregularity.

Mr. *Brown*, in the Life-time of the Teſtator, the Huſband of the Plaintiff (*viz.*) in *October* 1720. made his Will, and thereby gave Mr. *Morrice* 16500 *l.* in Truſt for his

An Executrix of *A.* who was greatly indebted to divers Perſons, in Debts of different Natures, is ſued in this Court by ſome of them; appears and anſwers immediately, and confeſſes their Bill, ſome of the Plaintiffs here being her own Daughters: Other Creditors ſue the Executrix at Law (where ſhe cannot plead the Decree) and obtain Judgments. The Decree here being for juſt Debts, is not *per fraudem*, and the Creditors, Plaintiffs at Law, ſhall be injoined, and the Executrix protected in her Obedience to the Decree; the Plaintiffs at Law to come in afterwards in due Courſe of Adminiſtration, the whole being legal Aſſets. The Judgments of all Courts at Law, having proper Juriſdiction, whether by Grant or Preſcription, are equally binding. The Decrees in this Court are of equal Force with Judgments at Law; and the real Priority in Point of Time (and not by Relation to the firſt Day of a Term) muſt give the Preference in Point of Payment.

his Daughters, to be paid to them, and the Survivors of them, at Twenty-one or Marriage, which ſhould firſt happen, Share and Share alike, together with ſuch Intereſt as ſhould be made of the ſame. He gave ſeveral other Legacies to other Perſons; and, ſubject to his Debts and Funeral Expences, he gave all the Reſidue of his real and perſonal Eſtate to Mr. *Morrice*, his Heirs, Executors, *&c.* and made him ſole Executor. Mr. *Morrice* being a great Trader contracted many Debts, and died *November* 16, 1731. having made his Will, and the Plaintiff his Executrix; his Affairs being much embaraſſed, and he ſtanding indebted to ſeveral Perſons by Specialty and otherwiſe in large Sums of Money, and particularly to the Bank of *England* for 35000 *l.* by ſimple Contract. Soon after his Deceaſe, and before any Action commenced againſt the Plaintiff by any of the Creditors, the Defendants *Anne*, *Judith* and *Elizabeth*, the Daughters of Mr. *Morrice*, with ſome other few Creditors, *December* 15, 1731. exhibited their Bill againſt the Plaintiff as Executrix of her ſaid Huſband, ſetting forth the ſeveral Sums that Mr. *Morrice* was indebted to them reſpectively, and with which he was intruſted for their Benefit, which remained unpaid, together with a great Arrear of Intereſt, and thereby prayed a Decree for the Payment thereof; Mrs. *Morrice*, the now Plaintiff, immediately put in her Anſwer, confeſſing the Bill, and on the 25th of *January* 1731. the Cauſe was heard upon Bill and Anſwer only; and the now Defendants, Mrs. *Morrice*'s Daughters, obtained a Decree, That the Plaintiff ſhould, out of the Aſſets of her ſaid Huſband, pay the ſaid ſeveral Sums of Money ſo demanded in a Courſe of Adminiſtration. The Plaintiff, in Obedience to that Decree, on the 4th of *February* following, paid out of her Huſband's Aſſets to two of the Daughters 10111 *l.* in Satisfaction of Part of their Demands under the Decree. On the 16th of *December* 1731. ſome few other Creditors, for ſmaller Sums of Money, filed their Bills for the Payment of ſeveral Quantities of *South-Sea* Stock and Annuities, and *Eaſt-India* Stock, that were transferred to Mr. *Morrice* in Truſt for them, praying that the ſeveral Stocks, as remaining in Mrs.

Mrs. *Morrice*'s Name, might be transferred to proper Truſtees; and as to ſo much as Mr. *Morrice* had diſpoſed of to his own proper Uſe, the now Plaintiff might be decreed out of her Huſband's Aſſets to make good the ſame. Mrs. *Morrice* confeſſed this Bill, and on the 2d of *February* 1731. a like Decree with the former was made, That the Plaintiff ſhould pay what was certified by the Maſter to be due (after an Account was taken) out of the Aſſets in a Courſe of Adminiſtration. All the Defendants had Notice of theſe Decrees, from the Plaintiff or her Agent, ſo ſoon as they were made, and alſo Notice that the Aſſets of the ſaid Mr. *Morrice* come to the Defendants Hands were not ſufficient to diſcharge their reſpective Debts upon Specialties; and that the Sums of Money decreed as aforeſaid, except the ſaid 10111 *l.* before-mentioned to be paid, were yet unpaid, and other Parts of the Decree wholly performed: While all this was doing, ſeveral other Creditors brought their Actions for their reſpective Debts, againſt the Plaintiff as Executrix of her Huſband, and particularly the Bank of *England*, for 28990 *l.* to which the Defendant pleaded a ſpecial *Plene Adminiſtravit*, and would have pleaded ſeveral other Bonds had ſhe then been informed of the ſame; and alſo the two Decrees had ſhe been able by the Rules of Law ſo to have done, they being obtained before any Plea pleaded. After this the now Plaintiff filed her Bill, ſetting forth all the abovementioned Particulars; and that by the Rules of Law ſhe could not plead the ſaid Decrees to their ſeveral Actions, or retain Aſſets in her Hands ſufficient to ſatisfy them, or any way protect herſelf from the Executions on the ſeveral Judgments obtained againſt her; and therefore ſhe pray'd, That what ſhould appear to be due to any one of the Defendants might be reſpectively paid out of the Aſſets of the Deceaſed, ſo far as they would extend, in due Courſe of Adminiſtration, Regard being had to the Nature and Superiority of their Debts; and that the Plaintiff might be protected and indemnified in paying a due Obedience to the Decrees of this Court; and that the Defendants might be reſtrained from proceeding at Law.

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The *Bank* and other Judgment Creditors inſiſted, That the Decrees were fraudulent, and obtained by Colluſion between the now Plaintiff and the other Parties to thoſe Suits, to give an undue Preference to the Parties concerned therein: And they inſiſted farther, That as their Debts were due upon Judgments they were to be paid before the Decree Creditors.

Sir *Joſeph Jekyll, Maſter of the Rolls,* directed the Decree Creditors to be firſt paid, as being prior in Time; and after they were ſatisfied, then the Surplus of the Aſſets, if any, ſhould be applied to the Payment of the ſeveral Judgments according to their Priority, and the other Creditors to be paid in a Courſe of Adminiſtration.

Lord Chancellor. The Rule of this Court, with regard to equitable Aſſets, is to put all the Creditors on an equal Foot; ſo where the Aſſets are partly legal and partly equitable: And though Equity cannot take away the legal preference on legal Aſſets; yet if one Creditor has been partly paid out of ſuch legal Aſſets, when Satisfaction comes to be made out of equitable Aſſets, the Court will poſtpone him till there is an Equality in Satisfaction to all the other Creditors, out of the equitable Aſſets, proportionable to ſo much as the legal Creditor has been ſatisfied out of the legal Aſſets. This is a Matter that has been ſo often determin'd, that it will be unneceſſary to cite Authorities; and it is founded on this, That by natural Juſtice and Conſcience all Debts are equal, and the Debtor himſelf is equally bound to ſatisfy them all. Indeed this Court, in the Diſtribution of legal Aſſets, follows the Rule of Law, which allows of Preference to Creditors, who have made Uſe of legal Diligence in getting in their Debts. This Court and the Courts of Law, in that particular Inſtance, have a concurrent Juriſdiction; and Bills are at this Day brought againſt Executors, not merely for a Diſcovery of the Aſſets, but alſo for ſuch Diſcovery, and a Satisfaction of the Debt; though the more antient way might be to bring a Bill for a

Diſco-

Diſcovery only; and the Reaſon of ſuch Bills is, That the Creditor can have better Aid in this Court than he can at Law; for he may have the Oath of the Executor for the Diſcovery of Aſſets. But as this Court hath only a concurrent Juriſdiction upon legal Aſſets with Courts at Law, and as ſuch Preference is allow'd by Law, there would be great Confuſion in the Adminiſtration of legal Aſſets if this Court did not in general follow the ſame Rule here: And therefore it is upon that Reaſon that Courts of Equity have departed from that Rule which they had ſet to themſelves and borrowed from Principles of natural Juſtice. In the preſent Caſe the Aſſets are all legal; and the firſt Queſtion will be, Whether any of thoſe Creditors, who ſtood on an equal Foot at the Death of Mr. *Morrice*, have gained a Preference by what has happen'd ſince? Secondly, What will be the Conſequence of that with regard to the Executrix, and whether ſhe will be intitled to any, and what Relief in this Court? In this preſent Caſe ſome are ſimple Contract Creditors, others are Creditors by Judgment, others by Decree; and the general Queſtion at the Bar has been, Whether Decree Creditors are equal to Judgments or not? In the conſidering of this Point ſome Gentlemen have gone into the Antiquity of the Juriſdiction of the ſeveral Courts of Equity and Law: But Queſtions of that Kind, unleſs they neceſſarily tend to give a Determination to the Matter in Diſpute, are greatly to be avoided. And that the preſent Caſe does not depend on the Antiquity of this Court, or the Extent of its Juriſdiction, or whether it is a ſuperior or an inferior Juriſdiction, appears; for, that Judgments at Law againſt the Teſtator in Courts commencing by Grants, are equal to Judgments in Courts by Preſcription; and that the Judgments of Courts of general Juriſdictions, as in *Weſtminſter-hall*, and of Courts of Record of the narroweſt Juriſdiction, are all equal; which is a Demonſtration, that in Conſideration of Law, it is not the Antiquity of the Court, nor the Extent of its Juriſdiction, or its being a ſuperior or inferior Court, that makes any Difference with regard to the Rank or Order in which Judgment-Creditors are to ſtand; and conſequently it is

plainly immaterial to enter into thoſe Matters: But the Law ſeems to be founded in this, That the Judgments of all Courts, upon Matters or Perſons within their Juriſdictions, are concluſive ſo long as they are in Force; and the Parties are bound to yield Obedience to them; and that Obligation to perform them follows the Aſſets in the Hands of the Executor or Adminiſtrator. And if theſe Matters are applied to Courts of Equity, I ſee no Reaſon why a Decree of Equity ought not to be equal to a Judgment at Law: For, as Judgments at Law may be executed by a *Capias ad Satisfaciendum* to take the Perſon; ſo ſimilar to that are Attachments for not performing Decrees; and although before the *Statute* of Q. *Anne* an Action of Eſcape would not lie againſt the Gaoler for letting the Priſoners under ſuch Attachments eſcape; yet no Argument can be drawn from thence to ſhew the Imbecillity of Decrees: For, though the Act of Parliament gives a new Remedy, yet it affirms the Juriſdiction of the Court with regard to the Power of taking up Perſons for not performing Decrees. Judgments at Law may be executed upon the Goods by *Fieri Facias*; Decrees in this Court, by Sequeſtration. In this reſpect the Proceſs of this Court is more effectual than by *Fieri Facias* at Law; for, there may be a Sequeſtration againſt the Goods, although the Party is in Cuſtody upon the Attachment: Whereas at Law, if a *Capias ad Satisfaciendum* is executed, there can no *Fieri Facias* iſſue. Indeed Judgments at Law bind Lands, ſo that the Party by *Elegit* may have Execution of a Moiety by Virtue of the Statute, which ordinary Decrees do not: Yet there have been Caſes where even Decrees have been held to bind Lands, and where Decrees are to hold and enjoy over. And ſuch was the Caſe of Lord *Cartaret* and *Paſchal*, *Paſch.* 7 *Geo.* 2. before Lord *King*, Lord Chancellor, where the Intereſt under ſuch Decree was taken to be ſimilar to an Eſtate by *Elegit*; which ſhews this Court has conſidered Decrees and Judgments, and their ſeveral Executions, as ſimilar to each other. And as a *Scire Facias* may be brought at Law to revive a Judgment, ſo it may to revive a Decree of this Court; and in that Reſpect they agree, and in this alſo,

That the original Demand is gone both by a Decree and a Judgment, for *Tranſit in Rem Judicatam*; and therefore I can ſee no Reaſon why they ſhould not ſtand on the ſame Footing. Yet I am at the ſame Time well appriſed that the uniform Judgments of Courts of Law have been otherwiſe: For, it is clear that a Decree of this Court, if an Action is brought againſt an Executor on a Bond, is not pleadable, nor can be given in Evidence againſt it. Why, I do not ſay, but that it hath obtained is certain: And the Conſequence is, that really the Decrees of this Court are conſidered as nothing but the Opinion of this Court, which, with Regard to its own Decrees, hath been different from that of Courts of Law, 2 *Vern.* 88. *Searles* and *Lane*, 3 *Lev.* 355. And if in the Conſideration of this Court Decrees are equal to Judgments, a Way is pointed out in 1 *Vern.* 143. for the Party to defend himſelf againſt Actions at Law. If this Court hath any Juriſdiction, Decrees here muſt have the ſame Lien upon Aſſets as a Judgment at Law. And the Caſe of *Joſeph* and *Mott*, *Preced. in Chan.* 79. is in Point, that a Decree prior in Time muſt be prefer'd to a ſubſequent Judgment; and if it was otherwiſe the Conſequence would be, That this Court muſt give up its Juriſdiction. *Darſton* and *The Earl of Oxford*, *Addis* and *Winter*, *Jones* and *Bradſhaw*, 4 *May* 1661. where an Executor had paid Aſſets in Purſuance of a Decree of this Court; and on *Plene Adminiſtravit* at Law he was not permitted to give ſuch Payment in Evidence; but this Court decreed it ſhould be allowed him; which ſhews it hath always ſupported its Juriſdiction, though its Decrees would not be allowed at Law. Upon this Part of the Caſe then, I think, that Decrees and Judgments ſtand upon an equal Footing, and that ſuch as is firſt obtained againſt an Executor ought to be firſt paid out of the Aſſets. The next Thing that ariſes for the Conſideration of the Court is, as to the Priority of the Decree Creditors and the Judgment Creditors: And as to this Matter, there is no Doubt but the Decree is prior in Point of Time; yet if the Judgments are allowed to have Relation to the firſt Day of that Term in which they were enter'd, then they will be before the Decrees:

But

But this Court muſt certainly attend to the Truth of the Fact. And though the general Rule of the Law is, That Judgments relate to the firſt Day of the Term, yet that is not quite ſo abſolute and concluſive to Courts of Law themſelves but it may be examined into. 1 *Sid.* 432. *Co. Lit.* 150. Then why may not a Court of Equity have the ſame Privilege of examining into the exact Time when a Judgment was entred upon, or given, in order to prevent its Juriſdiction from being defeated? And if it ſhould be otherwiſe, the Conſequence would be that a Decree, which was good when it was pronounced, would, by Matter *ex poſt facto*, be overturn'd; and thoſe Aſſets would be taken away which were once bound by it. Another conſiderable Objection has been taken relating to the Nature of this Demand; which is, That the Decrees have been obtained *per fraudem*, according to the legal Language; and as ſuch Matter might have been replied in Caſe the Decree ſhould have been pleaded at Law, therefore the other Creditors ought in Juſtice to be let into the ſame Examination here: And it is certain, if they are fraudulent, no body ought to have the Benefit of them. As to what is ſaid, That theſe Decrees are *res inter alios acta*, and ſo ought not to hurt the other Creditors, that has no Weight with me; for, the ſame may be ſaid of all Judgments at Law. And though theſe Decrees were obtained in a Manner by Confeſſion, for I take them to be ſo, as Mrs. *Morrice* put in her Anſwer in a ſhort Time, and thereby confeſſed the Demand of the Plaintiffs, and alſo as ſhe appear'd *gratis* at the Hearing of the Cauſe, thereby forwarding the Plaintiffs more than they could otherwiſe be by the Rules of the Court; yet Courts of Law hold it to be no Objection if a Judgment is pleaded that was obtained by Confeſſion, though there is Favour ſhewn by the Executor; nor upon a Replication of *per fraudem* is it any Evidence of Fraud if there was a real and juſt Debt. As to Bills of Conformity, indeed the Caſe of *Buccle* and *Atleo*, 2 *Vern.* 37. is a Caſe where they have been allowed; but they have ſince been diſcountenanced; and the Reaſon is, becauſe this Court is ſatisfied that they have no Right to take

take away the Preference that one Creditor gains over another by his legal Diligence. Beſides, that ſuch Bills may be made Uſe of by Executors to keep People out of their Money longer than they would otherwiſe be: But in this Caſe the Executrix cannot be ſaid to give Preference, but wants to have it determined who hath gain'd a Preference according to the Rules of Law and Equity. Mrs. *Morrice* comes here for Protection; and if this Court doth not protect her, ſhe will be liable to a double Satisfaction; firſt, to pay the Aſſets to the Decree Creditors, and afterwards to the Judgment Creditors; and it is certainly proper for the Executrix to come for Protection to this Court, when ſhe finds herſelf troubled for yielding Obedience to the Decrees of it. But then it is ſaid on the other hand, That ſhe has brought herſelf into this Diſtreſs, and therefore ought not to be relieved: Yet, with regard to the Law, it muſt be owned that what ſhe hath done is ſtrictly right: For, an Executor may confeſs a Judgment to one Creditor, and plead it in Bar to the Demand of others. And the original Foundation of ſuch Liberty being given to an Executor, might be to prevent the trouble of two Demands when he had Aſſets only to ſatisfy one: And then, by Parity of Reaſon, an Executor may ſuffer Decrees to be againſt him as it were by Confeſſion: And as the Court hath never controlled an Executor in ſuch Liberty, or in retaining, if he inſiſts upon it; ſo what Mrs. *Morrice* has done is neither contrary to the Rules of Law or Equity. And though it would have been much clearer had theſe Decrees been obtained in a more adverſary Manner, yet as they are for juſt Debts, they muſt be paid according to their Priority. It has been ſaid at the Bar, that the Judgment Creditors have both Law and Equity, and the Decree Creditors Equity only; and therefore that the Court ought not to take away the Benefit of the Law from the Judgment Creditors: But that has always been where Equities were of the ſame Nature; for, where one Equity has been of a ſuperior Nature, that ſuperior Equity has been preferr'd: As in the Caſe of *Taylor* and *Wheeler*, *Salk.* 449. where the Queſtion was, Whether an Aſſignee of a Com-

miſſion of Bankruptcy, or a Mortgagee under a defective Conveyance, ſhould be preferred? And it was held that the Mortgagee ſhould, his Equity being ſpecifically a Lien upon the Lands. So, in the preſent Caſe, at the Time of Mr. *Morrice*'s Death, the Equity of all the Creditors was equal; but when the Decrees were obtained, they bound the Aſſets in the Hands of Mrs. *Morrice*, and being prior to the Judgments, ought to be firſt ſatisfied. As the Proceedings at Law now ſtand, there being Judgment *de bonis propriis* againſt the Executrix, unleſs this Court injoins their Proceedings, they will be paid out of her Pocket; therefore they muſt be injoined, as by the *Maſter of the Rolls* his Decree: But as they are ty'd up at Law, they muſt have a Direction to the Maſter to take an Account of the Effects which are firſt to be applied in Diſcharge of the Decree Creditors, and the Reſidue to the ſeveral Judgment Creditors according to their Priority, and ſo on in a Courſe of Adminiſtration.

Note; This Decree of Lord Chancellor's was afterwards affirmed in Parliament in *May* 1737. See 3 *Will. Rep.* 402.

Upon the Whole, the Decree of the *Maſter of the Rolls* was confirmed, with an Alteration only, by deducting for the Daughters Maintenance after their Attaining the Age of Twenty-one Years, and the additional Direction on Behalf of the Judgment Creditors.

Partridge verſus *Partridge.*

A. deviſes 1000 *l.* Capital *South-Sea* Stock to *B.* At the Time of making his Will he had 1800 *l.* ſuch Stock, and after, by Sale, reduced it to 200 *l.* which he after increaſed to 1600 *l.* and died. Between the making his Will and his Death the Act took Place, which changed three Fourths of the Capital *South-Sea* Stock into Annuities: This Legacy is not taken away nor impaired by the Sale, nor by the Act of Parliament.

THE Teſtator by his Will deviſed 1000 *l.* Capital *South-Sea* Stock to his Wife for Life, for her ſole Uſe and Benefit, with Power to diſpoſe of the ſame to ſuch of her Children as ſhe ſhould think fit. At the Time of making his Will he was poſſeſſed of 1800 *l.* *South-Sea* Stock: He afterwards reduced ſuch Stock to 200 *l.* but after that purchaſed as much as made up the 200 *l.* to be 1600 *l.* and afterwards died in *July* 1733. In *June* next before his Death

Death the Act took Place for changing three Fourths of the Capital *South-Sea* Stock into Annuities. The Queſtions made upon this Caſe were, Firſt, Whether the Teſtator ſelling 1000 *l.* Part of his 1800 *l.* *South-Sea* Stock, after the making his Will, ſhould not be conſider'd as an Ademption of the Legacy? If not, Secondly, If the Act for turning *South-Sea* Stock into Annuities ſhould not be ſo conſidered? In the argument of this Caſe, the Caſe of *Aſhton* and *Aſhton* was cited, where the Teſtator deviſed 6000 *l.* *South-Sea* Stock to *J. C.* and at the Time of his Death and Will was poſſeſſed of only 5500 *l.* *South-Sea* Stock; upon which a Bill was brought againſt the Executor to have it made up 6000 *l.* But the *Maſter of the Rolls*, and after him the *Lord Chancellor*, on Appeal, were of Opinion the Deficiency ſhould not be ſupplied, upon this Principle, That as general Legatees have no Lien on what is given to ſpecific Legatees, ſo a ſpecific Legatee ſhall have no Lien on the general Fund of the Teſtator; but if any Loſs happens to what is ſpecifically given to him, he muſt bear the Burden thereof himſelf. *Ante* 152.

Lord Chancellor. All Caſes of Ademption of Legacies ariſe from a ſuppoſed Alteration of the Intention of the Teſtator; and if the ſelling out the Stock is an Evidence to preſume an Alteration of ſuch Intention, ſurely his buying in again is as ſtrong an Evidence of his Intention that the Legatee ſhould have it again. It was not the particular Stock he was poſſeſſed of that he gave; but the Deviſe was only deſcribing the Nature of the Thing he gave, of which he had ſufficient to anſwer ſuch Legacy at the Time of his Death. If the Teſtator after ſuch a Legacy ſells out Part, and dies, ſuch Sale would afterwards be looked upon as an Ademption *pro tanto*. If he deviſes ſo much particular Stock, and at the Time of ſuch Deviſe has not any ſuch Stock, it is a Direction to the Executor to procure ſo much for the Legatee. It would be very hard in the Caſe at Bar, to conſider the Selling as an Ademption, becauſe he might ſell out for ſome particular Purpoſe, and as ſoon as that Purpoſe was anſwer'd he might buy in again. As to the

the ſecond Point, after ſuch Deviſe, the Legiſlature thought proper to make a Law to change three Fourths of the Stock into Annuities, and the Fourth to remain as it ſtood before; ſo that the Teſtator, when he died, was poſſeſſed of 1200 *l.* Annuities, and 400 *l.* Stock; and it would be extremely hard to ſay, that this Alteration of the Stock by Parliament ſhould work an Ademption, when it cannot be preſumed the Teſtator's Intent was particularly aſked, or that he concurred or agreed to ſuch Law in any other Manner than what every other Perſon is ſuppoſed to do.

If an Obligee was to deviſe a Legacy of 1000 *l.* ſecured by Bond from *A. B.* and he ſhould afterwards compel *A. B.* by due Courſe of Law to pay it him, this would be an Ademption of the Legacy; but it was never thought, if *A. B.* ſhould pay in the Money voluntarily, it would be an Ademption, becauſe the Obligee is bound to receive it.

Bengough v Eldridge

13 *Decemb.* 1. Sim: 173

Stephens verſus *Stephens*.

Doe v Howell 10 B & C. 195. Cattell v Palmer 10 Bing 143 & 1 C & F [illegible]

Ackers v Phipps. 3 C & F 676 Baskin v Watts. 3. Beav. 100. Wills v Wills. 1. Dr & War 448.

An Executory Deviſe of an Eſtate of Inheritance to a Perſon unborn when he ſhall attain the Age of Twenty-one Years, is good: And there is no Danger of a Perpetuity.

THERE were five Cauſes which were heard together by the late lord Chancellor *King*; and upon the Hearing he directed a *Caſe to be ſtated, and referred to the Judges of the* King's Bench *for their Opinion*; and it now came back for the Judgment of the Court, upon the Judges Certificate; upon reading of which, the preſent *Lord Chancellor* was pleaſed to decree according to it, and expreſſed his Satisfaction with it, as agreeing perfectly with his own Sentiments; and ſaid, he hoped it would be for the future a leading Caſe in the Determinations of all Queſtions of this Kind. The Caſe ſtated, and the Opinion of the Judges were as follow:

Sir *William Stephens* being ſeiſed of the ſeveral Meſſuages, Lands and Tenements herein aftermentioned, made his Will the 15th Day of *February* 1712. whereby (*inter alia*) he made the ſeveral Deviſes in the Words following: " *Item*, I give, deviſe and bequeath unto my Grandſon

" *William*

" *William Stephens*, after the Deceaſe of my ſaid Wife Dame " *Suſanna Stephens*, all thoſe my Meſſuages, Lands, Tene- " ments and Hereditaments, ſituate, lying and being in " *Deptford* in the County of *Kent*, and by Deed ſettled " by my ſaid Wife on me, my Heirs and Aſſigns, to hold " the ſame to my ſaid Grandſon *William Stephens*, his Heirs " and Aſſigns for ever. *Item*, I give, deviſe and bequeath " to my ſaid Grandſon *William Stephens* all my Freehold " Eſtates, Meſſuages, Lands, Tenements, Hereditaments " and Premiſſes, in the Pariſh of *St. Mary Magdalen Ber-* " *mondſea*, in the County of *Surry*, ſituate and being in " *Rotherith Wall*, *Eaſt Lane*, *St. Mary Magdalen Court-Yard*, " and elſewhere in the ſaid Pariſh of *St. Mary Magdalen* " *Bermondſea*; and alſo all thoſe my Freehold Meſſuages, " Lands, Tenements, Hereditaments and Premiſſes in the " Pariſh of *St. Olave* in *Southwark*, and elſewhere in the " County of *Surry*; and alſo all my Freehold Meſſuages, " Lands, Tenements and Hereditaments in the County " of *Eſſex*, to hold my ſaid Freehold Meſſuages, Lands, " Tenements, Hereditaments and Premiſſes, to my ſaid " Grandſon *William Stephens*, his Heirs and Aſſigns for " ever: But in caſe my ſaid Grandſon *William Stephens* " ſhall happen to die and depart this Life before he attains " his Age of Twenty-one Years, then I give and bequeath " to my Grandſon *Thomas Stephens* all and every my Meſ- " ſuages, Lands and Hereditaments beforementioned, as " well thoſe in the Pariſhes of *St. Mary Magdalen Bermond-* " *ſea* and *St. Olave* in *Southwark*, as thoſe in the Counties " of *Eſſex* and *Kent*, to hold the ſame to my ſaid Grand- " ſon *Thomas Stephens*, his Heirs and Aſſigns for ever: But " in caſe my ſaid Grandſon *Thomas Stephens* ſhall happen " to die and depart this Life before he attains his Age of " Twenty-one Years, then I give and bequeath all my " ſaid Freehold Meſſuages, Tenements, Hereditaments and " Premiſſes whatſoever beforementioned to ſuch other Son " of the Body of my Daughter *Mary Stephens*, by my Son- " in-law *Thomas Stephens*, as ſhall happen to attain his Age " of Twenty-one Years, his Heirs and Aſſigns for ever; " the Elder of ſuch Sons to take Place before the Younger,

" one after another in Order and Courſe as they and every " of them ſhall be in Seniority of Age and Priority of " Birth, and of the ſeveral and reſpective Heirs Male of " the ſeveral and reſpective Body and Bodies of all and " every ſuch Son and Sons, and the Heirs Male of his and " their Body and Bodies iſſuing; and for Default of ſuch " Iſſue, then I give and bequeath my aforeſaid Freehold " Eſtates, Meſſuages, Lands, Tenements and Hereditaments to all and every the Daughter and Daughters of " my ſaid Son *Thomas Stephens* on the Body of my ſaid " Daughter to be begotten, and to the Heirs of the Body " and Bodies of all and every the ſaid Daughter and " Daughters, as Tenants in Common, and not as Jointenants; and for want of ſuch Iſſue, then I give, deviſe " and bequeath my aforeſaid Freehold Eſtates, Meſſuages, " Lands, Tenements and Hereditaments to my Brother " Sir *Richard Stephens*, to hold the ſaid Freehold Meſſuages, " Lands, Tenements and Hereditaments to the ſaid Sir " *Richard Stephens*, his Heirs and Aſſigns for ever. *Item*, " All the Reſt and Reſidue of my Eſtate real and perſonal, Goods, Chattels, Rings, Jewels, Plate, Money and " Monies-worth whatſoever and whereſoever not hereby " before bequeathed, I give and bequeath the ſame to my " ſaid Son *Toomas Stephens*, his Heirs, Executors, Adminiſtrators and Aſſigns for ever." And the ſaid Teſtator by his ſaid Will, made his ſaid Son-in-law, Sir *Thomas Stephens*, ſole Executor thereof. And afterwards (to wit) on or about the 15th Day of *March* following died, leaving Dame *Mary*, the Wife of Sir *Thomas Stephens*, his Daughter and Heir, and leaving two Grandſons, *William* and *Thomas*, living at the Time of his Death, and one Grandaughter. On the 18th of *May* 1713. *Suſan*, the Daughter of Sir *Thomas Stephens* and *Mary* his Wife was born, and is ſtill living; the ſaid Sir *Thomas Stephens* the Grandſon died without Iſſue, and under the Age of Twenty-one Years, the 24th Day of *October* 1714. and the ſaid *William Stephens*, the other Grandſon, died the 14th Day of *September* 1718. without Iſſue, and under the Age of Twenty-one Years; *Mary Stephens*, another Daughter of the ſaid Sir *Thomas*

mas Stephens and *Mary* his Wife was born the 14th of *March* 1719. and died without Iſſue and under Age the 26th of *October* 1722. *Sarah Stephens*, another Daughter of the ſaid Sir *Thomas* and *Mary* his Wife, was born the 13th of *November* 1721. and is living; *Mary Stephens* another Daughter of the ſaid Sir *Thomas Stephens* and *Mary* his Wife was born the 15th of *February* 1722. and died without Iſſue and under Age the 26th of *April* 1723. *Thomas Stephens*, one of the Parties in this Suit, Son of the ſaid Sir *Thomas Stephens* and *Mary* his Wife, was born the 12th Day of *January* 1727. and is ſtill living; *Richard Stephens*, the ſaid Teſtator's Brother, mentioned in his Will, is ſtill living: The ſaid *Thomas Stephens* claims Title to the Premiſſes as Reſiduary Deviſee of the ſaid Teſtator; and the ſaid Dame *Mary* his Wife lays Claim thereto as Heir at Law to the ſaid *William Stephens* the Teſtator; and the ſaid other Parties likewiſe claim Title thereto under the ſaid Teſtator's Will; *Suſan Stephens*, the Plaintiff in the original Cauſe, ſince the Hearing the ſaid Cauſes (to wit) the 14th of *April* 1734. died without Iſſue and under Age; and on the 6th of *Auguſt* following an Order was obtained upon the Petition of all the ſurviving Parties, that the Caſe ſhould be made agreeable to the Fact, as it now ſtands ſince her Death, and that the Judges of the Court of *King's Bench* be then deſired to give their Opinion on this Queſtion, What Eſtate, Right or Intereſt, either in the Preſent or in Contingency any of the ſaid Parties have in or to the Lands in Queſtion, or any Part thereof?

The Judges of the *King's Bench* certified their Opinion as follows: We have heard Counſel for all the Parties, and maturely conſidered the Caſe upon which the Queſtion is raiſed and referred to us; and the principal Point appears to be, Whether the Deviſe made by the Will in theſe Words, *viz.* "And in caſe my ſaid Grandſon *Thomas Stephens* ſhall "die before he attains his Age of Twenty-one Years, then "I give all my ſaid Freehold Eſtates, *&c.* to ſuch other "Sons of the Body of my ſaid Daughter *Mary Stephens*, by "my Son-in-law *Thomas Stephens*, as ſhall happen to at-

" tain his Age of Twenty-one Years, his Heirs and Aſſigns " for ever," be good by way of executory Deviſe? As to which we do not find any Caſe wherein an executory Deviſe of a Freehold hath been held good, which hath ſuſpended the veſting of the Eſtate until a Son unborn ſhould attain his Age of Twenty-one Years, except the Caſe of *Taylor* and *Bydall* adjudged upon a ſpecial Verdict in the Court of *Common Pleas*, *Hil.* 29 & 30 *Car.* 2. and reported in 2 *Mod.* 289. That Reſolution appeared in every View of it to be ſo conſiderable in the preſent Caſe, that we cauſed the Record to be ſearched, and find it to agree in the material Parts thereof with the printed Report: And therefore, however unwilling we may be to extend executory Deviſes beyond the Rules generally laid down by our Predeceſſors; yet upon the Authority of that Judgment, and its Conformity to ſeveral late Determinations in Caſes of Terms for Years, and conſidering that the Power of Alienation will not be reſtrained longer than the Law would reſtrain it, *viz.* during the Infancy of the firſt Taker, which cannot reaſonably be ſaid to extend to a Perpetuity; and that this Conſtruction will make the Teſtator's whole Diſpoſition take Effect, which otherwiſe would be defeated; We are of Opinion, that the Deviſe beforementioned may be good by way of executory Deviſe.

The Conſequence whereof is, That all the ſubſequent Limitations will be good; the Eſtate will veſt in *Thomas* the Son now living, when he ſhall attain the Age of Twenty-one Years in Tail Male, according to the Clauſe directing the Order of Succeſſion between the Sons to be born; if *Thomas* the Son, now living, ſhould happen to die before his Age of Twenty-one Years, and the Teſtator's Daughter Dame *Mary Stephens* ſhould have any other Son by Sir *Thomas Stephens*, then the Eſtate will go over to him when he ſhall attain his Age of Twenty-one Years, in like Manner as it would have veſted in *Thomas*; if *Thomas* the Son ſhould die before the Age of Twenty-one Years, and Dame *Mary* ſhould have no other Son by Sir *Thomas Stephens* who ſhould attain his Age of Twenty-one Years, then

Cadell v Palmer 10 Bing 143.

his

his Eſtate will go over to *Sarah* the Daughter, and all other Daughters of the ſaid Dame *Mary* by Sir *Thomas*, as Tenants in Common in Tail, with Remainder over to *Richard Stephens* the Teſtator's Brother in Fee: But in Caſe *Thomas* the Son ſhould die before the Age of Twenty-one, and *Sarah* the Daughter ſhould then be dead without Iſſue, and there ſhould be no other Son of Dame *Mary* who ſhould attain the Age of Twenty-one Years, or any other Daughter hereafter born of their two Bodies, then the Eſtate will go over to the ſaid *Richard Stephens*, by Virtue of the laſt Remainder to him in Fee. As to the Profits of the Eſtate received ſince the Death of *William* the Grandſon, or to be received until it ſhall veſt in any one Perſon by Force of the ſaid executory Deviſe, or ſhall go over to the Remainder-man, we conceive that they belong to Sir *Thomas Stephens*, by Virtue of the Reſiduary Deviſe in the Will, as an Intereſt in the Teſtator's real Eſtate not before bequeathed or diſpoſed of by his Will.

Phipps v Ackers 3 Cl & F 704

Hardwicke, *E. Probyn*,
F. Page, *W. Lee.*

DE
Term. S. Hillarii
10 Geo. II.
In CURIA CANCELLARIÆ.

Harris v Kemble 5 Ble. 108. 554.

Savage verſus *Taylor.*

There may be a Degree of unfairneſs in obtaining Articles for the Purchaſe of an Eſtate, for which this Court will not ſet them aſide; but will refuſe its Aid to carry them into Execution. And if the Party who obtained ſuch Articles hath been in Poſſeſſion, and made laſting Improvements; he ſhall be allowed for them, on conſenting to deliver up the Articles and account for the Profits. Otherwiſe, if he goes to Law, and fails there.

William Taylor made his Will, bearing Date *May* 25, 1727. and thereby deviſed to Truſtees and their Heirs all his Meſſuages, Lands, *&c.* in *Cherrington* in *Com. Glouceſter*, to the Uſe of *Mary* his Wife for Life, Remainder to Truſtees for Five hundred Years, to raiſe 400 *l.* for her as ſhe ſhould appoint, or in Default thereof to her Executors, Remainder to the Uſe of the Teſtator's Nephew *John Taylor* in Tail, Remainder to *William Taylor*, Son of the Teſtator's Brother *Humphrey*, in Fee, and makes *Mary* his Wife ſole Executrix and reſiduary Legatee; and by a Codicil *October* 1727. gives two Cottages to two Servants in Fee, and 20 *s. per Annum* to the Poor of *Cherrington.* Before the making this Will, the Teſtator had a Fit of the Palſey, which impair'd his Health, but did not affect his Underſtanding: In *Auguſt* 1728. he had a ſecond Fit of the Palſey, which deprived him of his Speech, and greatly impair'd his Underſtanding. *January* 31, 1728. after a Treaty between one *Savage* and the Teſtator, which was

chiefly managed by the Teſtator's Wife and one *Nathaniel Thomas* her Relation, Articles were enter'd into by the Teſtator and his Wife of the one Part, and *Savage* of the other Part, for Sale of the Teſtator's Eſtate in *Cherrington* to *Savage* in Fee, for 2080 *l.* and a Guinea. In *July* 1729. the Teſtator died; and about *November* 1732. *Mary* the Teſtator's Widow died, having made her Will, and the Plaintiff *Savage* ſole Executor and reſiduary Legatee. *John* the Nephew, the firſt Deviſee of the Teſtator, died ſoon after the Teſtator's Wife, leaving one Son named *John Taylor.* The Plaintiff *Savage* brought his Bill in the Life-time of *Mary*, but not long before her Death, againſt her, and againſt *John Taylor* the Teſtator's eldeſt Brother and Heir at Law, againſt *John* the Nephew, and *William* the Nephew an Infant, the two Deviſees in the Will, and alſo againſt the Truſtees, and the Deviſees in the Codicil; for a ſpecific Performance of the Articles, and to have Conveyances accordingly. *John Taylor*, the Heir at Law, died in 1735. having put in his Anſwer, and leaving *John* his Grandſon and Heir at Law. A ſecond Bill was brought by *William Taylor* the Infant Deviſee, intitled in Fee under the Will, to eſtabliſh the Will, and to be relieved againſt the Articles. And a third Bill was brought by *John Taylor* an Infant, Grandſon and Heir at Law of *John*, againſt *Savage*, to diſcover a Settlement made 1683. and to have the ſame deliver'd up to him, under which he claimed a Moiety of the Eſtate compriſed in the Articles of Purchaſe; and againſt *William Taylor* the Infant, diſputing the Will, claiming the other Moiety as Heir at Law. *John Taylor*, Great Grandfather of the Infant *John*, had Iſſue four Sons, *John*, *William*, *Thomas* and *Humphry*. *John* the Grandfather had Iſſue *John* who married and died in the Life-time of his Father, leaving *John* the Great Grandſon, the Plaintiff in the third Bill. *May* 17, 1688. *John Taylor* the Great Grandfather, and *John* his Son, in Conſideration of a Marriage to be had between *John* the Son and *Hannah Whiting*, convey'd the Eſtate in Queſtion to Truſtees, to the Uſe of *John* the Son for Ninety-nine Years, if he ſhould ſo long live,

live, Remainder to Truſtees to preſerve contingent Remainders during his Life, Remainder to *Hannah* his Wife for Jointure, Remainder to the Heirs of his Body in ſpecial Tail, Remainder to the Heirs of his Body in Tail General, Remainder to the right Heirs of *John* the Great Grandfather. *March* 29, 1694. *John* the Grandfather and *Hannah* his Wife, in Conſideration of 1000 *l.* paid by *John* the Great Grandfather and the Teſtator *William*, covenant to levy a Fine *ſur Conuſance de Droit come ceo, &c.* to them with Warranty. *Eaſter Term*, 6 & 7 of *Will.* and *Mary*, a Fine was levied between *John Taylor*, ſen. and *William* the Teſtator, Complainants, and *John Taylor* and *Hannah* his Wife, Deforceants. *Eaſter Term*, 9 *Geo.* 1. *William Taylor*, the Teſtator, levied a Fine, but no Deed leading the Uſes thereof appear'd.

Lord Chancellor ſtated the three Bills, and the Deſign of them, and added to this Effect: The firſt Queſtion is with regard to the Articles under which the Plaintiff claims, Whether he is intitled to have the Benefit of them? which depends on two Conſiderations; 1. Whether the Articles are ſuch as a Court of Equity will ſet aſide? and if the Court will not, Whether the Plaintiff ſhall have its Aſſiſtance by decreeing a ſpecific Performance of them? It is certain this Court, in Caſes of Articles, has a diſcretionary Power to carry them into Execution or not; and if it appears they are unfairly obtained, though not to ſuch a Degree as to ſet them aſide, yet this Court will not order a Performance, but will leave the Plaintiff to his Remedy at Law. And upon the whole Matter, I am clearly of Opinion this Court ought not in this Caſe to aid the Plaintiff: But if, upon the Proſpect of having the Articles performed, the Plaintiff has improv'd the Eſtate, it is reaſonable he ſhould have an Allowance for laſting Improvements; provided he is content to deliver up the Articles, and to account for the Profits; otherwiſe, if he goes on at Law, he muſt not expect it.

The next Queſtion is, as to the Title upon the Settlement in 1683. Whether the Remainder, under which *John* claims, is barred in Point of Law by the firſt Fine; the Uſes of which are declared by the Deed of *March* 29, 1694. And in that Fine there was a Warranty, which was contended to be collateral, and to bar the Right of *John* by deſcending upon him. And undoubtedly the Warranty is collateral to the Title of *John*, who claims by Purchaſe, and not from the Perſon who made the Warranty; and as this was before the *Stat.* 4 & 5 Q. *Anne*, *cap.* 16. (how hard and unreaſonable ſoever it may be) there is no room for a Court of Equity, which cannot alter the Law, to interpoſe. But to this two Anſwers have been given, either of which ſeems ſufficient; (1ſt,) That this Warranty deſcended on an Infant, and therefore is no Bar to him: (2d,) That ſuppoſing it to work a Wrong, and to diſplace and deveſt the Eſtates, then it is a Warranty commencing by Diſſeiſin, and ſo commencing by a tortious Act, the Law did not allow ſuch Effect as if it was not attended with that Circumſtance; for collateral Warranties are grounded on this Preſumption, that no one would bind the Eſtate of his Heir without leaving him a Satisfaction, but when he who makes the Warranty does a tortious Act, it ſeems that Preſumption ceaſes. Then the next Queſtion to be conſider'd is, Whether the Fine and Non-claim, by the *Stat.* 4 *Hen.* 7. *cap.* 34. has barred this contingent Remainder? If it is conſider'd as a Fine levied by Tenant for Ninety-nine Years, determinable on his Death, 'tis not a Bar; but an Averment may be taken, That *Partes finis nil habuerunt*; and it is a Forfeiture of his Eſtate, if the Parties over will take Advantage of it; otherwiſe it is a Nullity, and will not take away the Entry of the Truſtees when their Right takes Place. It is ſaid this Caſe differs from the common Caſe of a Fine levied by Tenant for Years; for, here the Wife joined in the Fine, who had an Eſtate for Life; and if that had been a Freehold, properly ſo called, then it might have a greater Effect than a Fine levied by Tenant for Years: But in this Caſe that Freehold lies be-

This Court will not relieve againſt a collateral Warranty created before *Statute* 4 *Anne*, *cap.* 16.

hind the Limitation to Truſtees to preſerve contingent Remainders; and then it is hard to ſay the Fine ſhall ſo operate as to diſplace the precedent Eſtate for Life limited to the Truſtees. But ſuppoſing this Fine did diſplace the Eſtates, and ſhould be conſidered in the ſame way as a Fine levied by Tenant for Life in Poſſeſſion; the Conſequence would be, that the Truſtees might enter immediately, or within five Years after the Determination of the Eſtate for Life. But then it is ſaid, That though a Right of Entry in the Truſtees is ſufficient to preſerve contingent Remainders, yet the Right of Entry which the Truſtees had, is quite gone in this Caſe by the Death of *John*, who was Tenant for Ninety-nine Years, if he ſhould live ſo long; becauſe his Eſtate, and the Eſtate of the Truſtees determined *eodem Inſtante*: But that is not ſo certain; for, the Eſtate of the Truſtees might ſubſiſt after the Eſtate of *John* determined, if he out-liv'd the Ninety-nine Years; which the Law ſuppoſes may happen; for, then the Truſtees might enter, becauſe their Eſtate is for his Life: So they had a Poſſibility to enter after the Eſtate of *John* was determined, and during his Life. And though that did not take place, yet their Right was not clearly gone and extinguiſhed; and therefore it may be conſiderable, Whether that Poſſibility of Entry within five Years after the Determination of Ninety-nine Years is not ſufficient to ſupport the contingent Remainder? I ſhould think Courts of Law ſhould go a great way to ſupport ſuch Remainders, which could not be deſtroy'd without this Practice, I had almoſt ſaid Iniquity; but this is properly a legal Queſtion, and not determinable here. And the ſame Things may be ſaid with regard to the other Fine levied afterwards; and farther alſo, that it is not certain that it includes theſe Lands now in Queſtion. Thus far is clear, That the Plaintiff in the third Bill has a Right to have the Deed of 1683. and *valeat quantum valere poteſt*: There is another Point very conſiderable in this Caſe, upon a Suppoſition that the contingent Remainder is barred in Point of Law. If there is Tenant for Life, Remainder over to ſome other Perſon, ſo as to be in Contingency, if the Tenant for Life makes a

Feoffment, or levies a Fine without Truſtees to preſerve the contingent Remainders, in Point of Law they are barred: But it is a moſt barbarous Thing to rob Perſons unborn of their Inheritance, and to give it to one who has no Colour of Title; yet hard and unjuſt as it is, I do no remember this Court has ever interfered ſo far as to direct a Conveyance to him in Remainder. In the Caſe of *Manſell* and *Manſell*, there were Truſtees to preſerve contingent Remainders, who were drawn in to deſtroy them; and this Court conſidered the Matter as a Breach of Truſt, and followed the Lands in the Hands of a Purchaſer with Notice. This is a kind of middle Caſe; for, here is no actual Breach of Truſt by any Act done; but if the contingent Remainder is barred, it is by their Neglect to perform the Truſt, and that in the ſingle Inſtance for which they were appointed Truſtees; that is, to bring Actions, and make Entries: And it may deſerve Conſideration how far one who has Notice ſhall avail himſelf by this Neglect of the Truſtees; but I will not enter into a Caſe of this Conſequence unneceſſarily, but will reſerve a Liberty of conſidering it when it comes back to the Court for farther Directions after the Trial.

Poſt. & 2 Will. Rep. 678.

It was decreed, That upon *Savage*'s ſubmitting to give up the Articles to be cancelled, his Bill, ſo far as it pray'd a Performance of them, ſhould be diſmiſſed; and that he ſhould account for the Rents and Profits of the Eſtate by him received, and ſhould be allowed for his laſting Improvements. That an Ejectment ſhould be brought to try the Right of the whole Eſtate, both of that in Settlement and that out of Settlement, and no Term to be ſet up; and in this Ejectment *John* to be Leſſor of the Plaintiff, and *William* Defendant: That the Deed of 1683. ſhould be deliver'd up to *John*, and *William* to have a Copy of it at his own Charge; and that the other Deeds and Writings ſhall be brought before the Maſter; and that *William* ſhould admit himſelf in Poſſeſſion, and that after Trial the Parties ſhould reſort back for farther Direction.

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DE

Term. S. Michaelis

8 Geo. II.

In CURIA CANCELLARIÆ.

wrys v Mansfield 6 Vin 547. Hallo Hill. 1. Con Ch. 128. 1 Ch Ca 102.

1734. ***Brown*** verſus ***Selwin, & contra.***

A. deviſes the Reſidue of his real and perſonal Eſtate, not before deviſed, to his two Executors, *&c.* as Tenants in Common, *&c.* One of them is indebted by Bond to the Teſtator. This Bond-Debt is not releaſed, but ſhall be divided between them; and no parol Evidence ſhall be admitted, That the Teſtator intended to releaſe it to the Obligor, and had given Inſtructions for that Purpoſe to an Attorney who drew his Will, *&c.*

JOHN *Brown*, on the 23d of *June* 1732. made his Will, and thereby bequeathed to the Plaintiff a Legacy of 500 *l.* and all his Plate; to the Defendant he gave all his Leaſehold Meſſuages; and after ſeveral other Legacies and Bequeſts, as well as deviſing ſome Freehold and Copyhold Lands, he deviſed as follows: " And as for the Reſt, " Reſidue and Remainder of my Eſtate, whether real or " perſonal, whereof I am ſeiſed or poſſeſſed, or which I " am any ways intitled to, which I have not herein and " hereby deviſed, given, *&c.* I give and bequeath the " ſame, and every Part thereof, and all my Right, Title " and Intereſt herein and thereto, unto ſuch my Executor " or Executors herein after-named, as ſhall duly take on " him or them the Execution of this my Will, according " to the true Intent and Meaning thereof, his or their " Heirs, Executors, Adminiſtrators and Aſſigns, as Te- " nants in Common, and not as Jointenants;" and afterwards

wards appointed the Plaintiff and Defendant his Executors, and ſoon after died; and the Plaintiff and Defendant proved the Will. The Defendant was at the Time of the Teſtator's Death indebted to the Teſtator in 3000 *l.* Principal Money, beſides Intereſt, and for ſecuring thereof had given a Bond to the Teſtator, dated the 20th of *June* 1732. in 6000 *l.* Penalty: The Bill was brought that the Defendant might account with the Plaintiff for the Teſtator's reſiduary Eſtate, and pay him a Moiety of the ſaid 3000 *l.* and Intereſt; and the Croſs Bill was to have the Bond delivered to be cancelled.

It appeared by the Anſwer of the Defendant in the Croſs Cauſe, and by the Proofs in both Cauſes, that the Teſtator deſigned to give this Money to the Defendant; and gave one *Viner*, the Attorney concerned in drawing the Will, Inſtructions in Writing accordingly; but *Viner* refuſed to make mention of it in the Will, inſiſting that the Bond would be extinguiſhed and releaſed of Courſe by Mr. *Selwin*'s being appointed Executor; but the Teſtator appearing diſſatisfied with *Viner*'s Opinion, a Caſe was ſtated for Counſel's Opinion, who confirmed what *Viner* ſaid: In Confidence of which the Teſtator ſigned and publiſhed his Will, with full Perſuaſion that the Bond would be extinguiſhed; and this appeared clearly to be the Intention of the Teſtator.

Lord Chancellor. The Queſtion is, Whether 3000 *l.* which was due to the Teſtator from Mr. *Selwin*, ſhall paſs to Mr. *Selwin* by his being made Executor? or, Whether it paſt by the Deviſe of the Reſidue to the two Executors? The written Inſtructions for drawing the Will directs the 3000 *l.* all to Mr. *Selwin*. The Attorney who was to draw the Will ſays it was the Teſtator's Intention it ſhould go ſo: But that he, apprehending that making the Obligor Executor was an Extinguiſhment of the Debt, hindred it from being particularly mentioned. It was never doubted but a Debt due from an Executor to a Teſtator ſhall be Aſſets in the Executor's Hands to pay Debts; for, if the

Teſtator had expreſly given it away, even that could not have ſcreen'd it from Debts: So the Teſtator may give a Legacy out of a Debt due to him, as in the Caſe in *Yelv. Phillips* and *Phillips*, which Authority is right; the implied Gift, by making the Debtor Executor, may be controlled by an expreſs Gift, or by a Deviſe of all his Debts.

It hath been queſtion'd whether ſuch a Debt be Aſſets to pay Legacies in general; but that not being the preſent Caſe, it is not neceſſary to be determined: I am at preſent inclined to think it may; but ſhall not bind myſelf, by giving my Opinion, till the Caſe happens. If this be conſider'd upon the Will, without the parol Evidence, it will appear clearly from the general Words of deviſing the Reſidue, *(i. e.) All his real and perſonal Eſtate which he had not thereby before given to the reſiduary Legatees*; that this Debt, which at that Time was Part of the perſonal Eſtate, falls within the Deſcription: The Teſtator was intitled to this Debt when he made his Will, and at the Time of his Death; he had not before diſpoſed of it, nor had he appointed Mr. *Selwin* Executor. A Deviſe of the Reſidue after Payment of Debts and Legacies plainly comprehends this Debt; and the only Doubt is with regard to Mr. *Viner*'s Evidence, who wrote the Will. I privately think that it was intended the 3000 *l.* ſhould go to Mr. *Selwin*. Privately I think ſo: But I am not at Liberty, by private Opinion, to make a Conſtruction againſt the plain Words of a Will. None of the Caſes where parol Evidence has been admitted have gone ſo far as the preſent Caſe; the fartheſt they go is to rebut an Equity or reſulting Truſt; the parol Evidence in thoſe Caſes tended to ſupport the Intention of the Teſtator conſiſtent with the written Will, and did not contradict the expreſs Words of the Will, as in the preſent Caſe. It is better to ſuffer a particular Miſchief than a general Inconvenience, and ſo reverſed the Decree, and order'd Mr. *Selwin* to account with the Plaintiff *Brown* for the ſaid 3000 *l.* but no Coſts.

This was upon an Appeal from the *Rolls*.

This

This Cauſe, the 26th of *March* 1735. came before the *Houſe of Lords* upon an Appeal, and the *Lord Chancellor*'s Decree was affirmed: And the Lords would not allow the parol Evidence to be read, nor even the Reſpondent's Anſwer as to theſe Matters.

De Gols verſus *Ward.*

3 *Will. Rep.* 311. S. C. in a Note, but not S. P. Whether an Act of Bankruptcy may be purged by Length of Time? and Whether Creditors, after an Act of Bankruptcy, ſhall come in under the Commiſſion, or only have their Remedy againſt the Perſon of the Bankrupt? on whoſe Petition a Commiſſion ſhall iſſue?

THE Defendant *Ward* became indebted to the Plaintiff in 1730. and afterwards committed an Act of Bankruptcy; upon which the Plaintiff, being the petitioning Creditor, took out a Commiſſion of Bankruptcy againſt the Defendant; and in order to over-reach and make void as many of his Conveyances and Settlements, *&c.* as poſſible, the Creditors, on a Bill filed, endeavour'd to prove him a Bankrupt as far backward as they could; and did actually prove, to the Satisfaction of the Court, that he committed an Act of Bankruptcy in the Year 1726. Then it became a Queſtion, Whether the Commiſſion of Bankruptcy, and all that was done under it, was not wrong, in regard that the Debt of the petitioning Creditor, on which it was grounded, was contracted ſubſequent in Time to the firſt Act of Bankruptcy? After this Matter had been argued and Time taken to conſider of it,

Lord Chancellor declared, It was clear that no Body but a Creditor could take out a Commiſſion of Bankruptcy againſt another; for, that the Acts of Parliament were all made for the Relief of Creditors; and likewiſe that ſuch Commiſſion muſt iſſue on the Petition of ſome Creditor who could be relieved under it. Now, if the Debt is ſubſequent to the Act of Bankruptcy, the Creditor cannot come in under the Commiſſion againſt the Effects of the Bankrupt, though the Perſon of the Bankrupt himſelf will be liable. The general Rule is not to determine the Time of the Bankruptcy, but only that the Perſon was a Bankrupt antecedent to the Commiſſion; for then all the Creditors before

before that Time will have a Right to come in: But when that Matter is minutely enter'd into, it muſt be diſtinguiſhed which Creditors are precedent, and which are ſubſequent to the Act of Bankruptcy. If the Defendant became a Bankrupt in 1726. then the petitioning Creditor is out of the Caſe; but if not till 1730. when the Plaintiff's Debt was ſubſiſting, then all is right. What puzzles the Caſe is, that the Aſſignees have been over diligent, and in order to reſcind as many of the Defendant's Acts as they could, have endeavour'd to prove him a Bankrupt as far backwards as poſſible; by which they have cut up their own Foundation by proving an Act of Bankruptcy in 1726. Then the Difficulty is, whether the Act of Bankruptcy in 1726. cannot be conſider'd as purged, being near ten Years ſince, and no Commiſſion taken out upon it? I am moſt inclined to direct an Action of *Trover*, in which the Jury will conſider whether the Defendant was a Bankrupt in 1726. or not; and if they pay no Regard to it, I am ſure I will not.

Then Mr. *Fazakerley* objected, That the Court would never direct a Trial at Law, unleſs it appear'd doubtful whether he was a Bankrupt in 1726. which, he ſaid, was not the preſent Caſe. And, he ſaid, it was never determined that an Act of Bankruptcy could be waived or purged.

The *Lord Chancellor* diſmiſſed the Plaintiff's Bill without Prejudice.

Note; This Decree was reverſed in the *Houſe of Lords*, by the Opinion of all the Judges, *February* 17, 1737.

Jane

Cadell v Palmer 10 Geo 1448. 1 C & P. 418.

Jane Sabbarton, an Infant, by Thomas Parr, Eſq; her next Friend,
verſus
Benjamin Sabbarton, Dulcibella Sabbarton, Widow, Robert Kidwell, William Sabbarton, an Infant, by the ſaid Robert Kidwell, his Guardian, Joel Pocock, Giles Pocock, Sarah Pocock, and Thomas Diggles and Sarah his Wife.

Joſeph Sabbarton, late of *London*, Merchant, made his Will, dated *April* 20, 1710. and ſo much thereof as regards the preſent Queſtion is in the Words following (that is to ſay) " And whereas a Marriage is propoſed to be had and " ſolemnized by and between the ſaid *Catherine Corr* and " *Benjamin Sabbarton*, jun. eldeſt Son of my Couſin *Ben-* " *jamin Sabbarton*, ſen. of the City of *Norwich*, Weaver, " Now I do hereby deviſe and bequeath unto the ſaid " *Thomas Botterell* and *John Young*, and the Survivor of " them, and the Heirs, Executors and Adminiſtrators of " ſuch

J. S. by Will, reciting that a Marriage is propoſed between his Niece *A.* and his Couſin *B.* deviſes to Truſtees divers Freehold Houſes, *&c.* and the Rents due, or to become due, and Money in the Orphans Fund, and the Produce of the ſame, *Bank*

Stock, and Money due thereon, in Truſt to pay the Rents and Profits to *A.* if living at his Deceaſe, during Life, or to ſuch Perſon as ſhe by Writing ſhould appoint, with or without the Conſent of any Huſband; but if ſhe ſhould marry *B.* then, after the Deceaſe of *A.* in Truſt for *B.* during Life, and after his Deceaſe in Truſt for the firſt and other Sons ſucceſſively of *A.* and *B.* and their Heirs Male; and for want of ſuch Iſſue, in Truſt for the Daughters of *A.* and *B.* equally to be divided between them, and for want of Iſſue of that Marriage, in Truſt for the Iſſue of the Survivor of them; and if neither of them leave Iſſue, in Truſt for *C.* for Life, with Remainder for ſuch Child and Children as his Brother *D.* ſhould leave living at his Deceaſe, or that *D.*'s Wife ſhould be *enſient* of, that ſhould attain the Age of Twenty-one, and to the Heirs, Executors, *&c.* of ſuch Child, *&c.* as they ſhould reſpectively attain the Age of Twenty-one Years; and if none attain that Age, to his own right Heirs: But if *A.* ſhould not marry *B.* then in Truſt after her Deceaſe for *C.* for Life, Remainder for the Child and Children of *D. ut ſupra*, and if none attain the Age of Twenty one, to his own right Heirs; and deviſed the Reſidue of his Eſtates real and perſonal to *A.* and *C.* equally to be divided between them, their Heirs, Executors, *&c.* and made others Executors, and died. *A.* and *B.* intermarried; *B.* died without Iſſue; *C.* married, and died without Iſſue; *A.* died without Iſſue, having made her Will, and appointed an Executor; *D.* died before *A.* leaving Iſſue two Sons, *E.* and *F.* above Twenty-one Years of Age: *E.* died (before *A.*) inteſtate, leaving *G.* a Daughter, an Infant, now living; *F.* is alſo living; the Orphan's Fund and Bank Stock were not transferred but remain as at the Teſtator's Death: The Bequeſts of theſe (conſidered as a Bequeſt of a Term for Years in Lands) to the Child and Children of *D. ut ſupra*, is held to be good as this Caſe has happened.

" ſuch Survivor, all that my Freehold Houſe, Out-houſes,
" Barn, Coal-houſe, Stable, Gardens and Orchards at *En-*
" *field*, in the County of *Middleſex*, which I lately pur-
" chaſed of *Patience Aſhfield*; and alſo all and every my
" Freehold Houſes, Meſſuages, Lands, Tenements and
" Hereditaments ſituate in or near *Queen-ſtreet* and *Bow-*
" *lane*, *London*, or either of them, or any Court or Courts
" adjacent thereunto, which I lately purchaſed of *John*
" *Kalendar* and *Edward Kalendar*, or either of them, to-
" gether with ſuch Rents as ſhall be due and in Arrear for
" the ſame Premiſſes at the Time of my Deceaſe, and af-
" ter that ſhall become due; and alſo the Sum of 287 *l.*
" 1 *s.* 3 *d.* in the Orphans Fund of the Chamber of *Lon-*
" *don*, and the Intereſt, Increaſe and Produce of the ſame
" Fund that ſhall be due at the Time of my Deceaſe, and
" after that become due and payable; and alſo the Sum of
" 350 *l.* Capital Stock in the Corporation of the Bank of
" *England*, and all Monies due thereon at the Time of my
" Deceaſe, or that ſhall thereafter become due and payable
" for the ſame, to and for the ſeveral Uſes, Truſts, In-
" tents and Purpoſes hereafter mentioned, limited and de-
" clared (that is to ſay) in Truſt that they the ſaid *Thomas*
" *Botterell* and *John Young*, and the Survivor of them, and
" the Heirs, Executors and Adminiſtrators of ſuch Survi-
" vor ſhall pay, or cauſe to be paid, all and ſingular the
" ſaid Rents, Iſſues, Profits and Produce of all the ſaid
" Meſſuages, Lands, Tenements and Hereditaments at *En-*
" *field*, and in or near *Queen-ſtreet* or *Bow-lane*, *London*,
" and Orphans Fund in the Chamber of *London*, and Bank
" Stock, to the ſaid *Catherine Corr*, if living at the Time
" of my Deceaſe, and not otherwiſe, Quarterly, Half-
" yearly or otherwiſe, as the ſame are and ſhall become
" due, paid and payable, for and during the Term of her
" natural Life, or unto ſuch Perſon or Perſons as ſhe ſhall
" by any Writing under her Hand direct and appoint,
" with or without the Conſent of any Huſband ſhe may
" have; and whether the hereby propoſed Marriage, or
" any other Marriage of her to any other Perſon, may or
" ſhall happen, or notwithſtanding ſhe ſhall never marry;

" but in caſe ſhe the ſaid *Catherine Corr* do or ſhall marry " the ſaid *Benjamin Sabbarton*, jun. then that they the ſaid " *Thomas Botterel* and *John Young*, and the Survivor of " them, and the Heirs, Executors and Adminiſtrators of " ſuch Survivor, ſhall, from and after the Deceaſe of the " ſaid *Catherine Corr*, ſtand ſeiſed, intereſted and poſſeſſed " of the ſaid Premiſſes, in Truſt for the ſaid *Benjamin Sab-* " *barton*, jun. for and during the Term of his natural Life; " and from and after his Deceaſe, then in Truſt to and " for the firſt Son lawfully begotten of the ſaid *Catherine* " *Corr* and the ſaid *Benjamin Sabbarton*, jun. and the Heirs " Male of ſuch firſt Son, and ſo on ſucceſſively to the ſe- " cond, third, fourth and fifth, and all and every other " Son and Sons of the ſaid *Catherine Corr* and *Benjamin* " *Sabbarton*, jun. as they ſhall ſtand in Seniority of Age and " Priority of Birth, and their Heirs Male reſpectively; and " for want of ſuch Iſſue Male, then in Truſt to and for " the Uſe and Behoof of the Daughter and Daughters law- " fully begotten of the ſaid *Catherine Corr* and *Benjamin Sab-* " *barton*, jun. equally to be divided between them, Share " and Share alike; and for want and in default of any " lawful Iſſue of the hereby propoſed Marriage between " the ſaid *Catherine Corr* and the ſaid *Benjamin Sabbarton*, " jun. then in Truſt to and for all the Iſſue Male and " Female lawfully begotten of the Body of the Survivor " of them, equally to be divided between them Share and " Share alike; and in caſe neither of them ſhall leave any " lawful Iſſue, then in Truſt to and for my ſaid Siſter *Sa-* " *rah*, for and during the Term of her natural Life; and " from and after her Deceaſe, in Truſt to and for the only " proper Uſe and Behoof of all ſuch Child and Children " lawfully begotten, as my ſaid Brother *John* ſhall at the " Time of his Death leave living, or that his Wife ſhall be " then *enſient* or in Child with, that ſhall live and attain " to the Age of Twenty-one Years, and to the Heirs, " Executors, Adminiſtrators and Aſſigns of ſuch Child and " Children, equally to be divided between them, Share and " Share alike, as they ſhall reſpectively attain the ſaid Age " of Twenty-one Years; and in caſe no ſuch Child of my

" ſaid

" ſaid Brother *John* ſhall live to attain the ſaid Age of " Twenty-one Years, then I give, deviſe and bequeath the " ſaid Houſe, Out-houſes, Barn, Stable, Coal-houſe, Gar- " dens and Orchard at *Enfield*, Houſes, Lands, Tenements " and Hereditaments in or near *Queen-ſtreet* and *Bow-lane*, " *London*, and Orphans Fund in the Chamber of *London* and " *Bank*, to my own right Heirs for ever; but in caſe the ſaid " *Catherine Corr* ſhall not marry the ſaid *Benjamin Sabbarton*, " jun. then in Truſt that they the ſaid *Thomas Botterel* " and *John Young*, and the Survivor of them, and the " Heirs, Executors and Adminiſtrators of ſuch Survivor, " ſhall, from and immediately after the Deceaſe of the ſaid " *Catherine Corr*, ſtand ſeiſed, intereſted and poſſeſſed of " the ſaid laſt mentioned Premiſſes, in Truſt to and for " my ſaid Siſter *Sarah*, for and during the Term of her " natural Life; and from and after her Deceaſe, in Truſt " to and for the only proper Uſe and Behoof of all ſuch " Child and Children lawfully begotten as my ſaid Brother " *John* ſhall at the Time of his Death leave living, or that " his Wife ſhall be then *enſient* or in Child with, that ſhall " live and attain the Age of Twenty-one Years, and to " the Heirs, Executors, Adminiſtrators and Aſſigns of ſuch " Child and Children, equally to be divided between " them, Share and Share alike, as they ſhall reſpectively " attain the ſaid Age of Twenty-one Years; and in caſe " no ſuch Child of my ſaid Brother *John* ſhall live to at- " tain the ſaid Age of Twenty-one Years, then I give, de- " viſe and bequeath the ſaid laſt mentioned Premiſſes to " my own right Heirs for ever." And as to the Reſidue of the ſaid Teſtator's Eſtate, he by his ſaid Will diſpoſed thereof in the Words following, *viz.* " All the Reſt, Reſidue and " Remainder of my ready Money, Plate, Rings, Jewels, " Clocks, Watches, Notes, Bills, Bonds, Mortgages, Houſe- " hold Goods, and all other my Eſtate and Eſtates, as well " real as perſonal, whereſoever and whatſoever, either in " Poſſeſſion, Reverſion or Expectancy, after my Debts and " Funeral Charges ſhall be fully paid and ſatisfied, I give, " deviſe and bequeath unto my ſaid Siſter *Sarah* and the " ſaid *Catherine Corr*, equally to be divided between them,

" to

" to hold unto them my ſaid Siſter *Sarah* and the ſaid *Ca-*
" *therine Corr*, their Heirs, Executors, Adminiſtrators and
" Aſſigns for ever; and I do hereby make, conſtitute and
" appoint my ſaid Siſter *Sarah* and the ſaid *Catherine Corr*
" my joint reſiduary Legatees.

The ſaid Teſtator appointed *George Vergoe* and *Thomas Pilkington* Executors of his ſaid Will, and died ſometime in the Month of *January* 1710. without revoking or altering the ſame; and the ſaid Executors proved the ſaid Will, and the Truſt is now veſted in the Defendant *Diggles* and his Wife. The Marriage propoſed between *Benjamin Sabbarton* the Younger and *Catherine Corr* took Effect after the Death of the ſaid Teſtator; and *Sarah*, the Teſtator's Siſter, about the 28th of *March* 1713. intermarried with the Defendant *Robert Kidwell*, and died without Iſſue the 9th of *Auguſt* 1721. and he is her Adminiſtrator. The ſaid *Benjamin Sabbarton* the Younger died the 2d of *December* 1718. without ever having had any Iſſue, and the ſaid *Catherine* his Wife ſurvived him, and died on the 7th of *September* 1733. without having ever had any Iſſue, having made her Will, and thereof appointed the ſaid *Kidwell* Executor in Truſt, who proved the ſame. *John Sabbarton*, the ſaid Teſtator *Joſeph Sabbarton*'s Brother, died about the 19th of *November* 1729. leaving Iſſue two Sons, namely *Joſeph Sabbarton* and *Benjamin Sabbarton*, then both of the Age of Twenty-one Years and upwards. *Joſeph Sabbarton*, the eldeſt Son of the ſaid *John Sabbarton*, the ſaid Teſtator's ſaid Brother, died in *January* 1729. inteſtate, leaving Iſſue only one Child, *Jane* an Infant, now living; and the ſaid *Benjamin*, the other Son of the ſaid *John Sabbarton*, is alſo living; and neither the ſaid Sum of 287 *l.* 1 *s.* 3 *d.* in the Orphans Fund, or the ſaid 350 *l. Bank* Stock have been ever tranſferred; but the ſame remain in the ſame Condition as they did at the Time of the making of the ſaid Will by the ſaid Teſtator.

Upon the Hearing of two Cauſes before the late Lord Chancellor upon the ſaid 15th of *November* 1736. one

between the ſaid *Jane Sabbarton* the Infant, by her next Friend, Plaintiff, and the ſaid *Benjamin Sabbarton* (her Uncle) *Robert Kidwell*, and *Thomas Diggles* and his Wife, and others Defendants; and the other between the ſaid *Robert Kidwell*, Plaintiff, and the ſaid *Thomas Diggles* and his Wife, *Jane Sabbarton*, *Benjamin Sabbarton* and others, Defendants; it was order'd (among other Things) that a Caſe be made for the Opinion of his Majeſty's Court of *King's Bench*, on the following Queſtion:

If a Term for Years in Lands had been bequeathed in the ſame Manner as the Truſt of the Orphans and *Bank* Stock is limited by this Will, Whether the Limitation to all ſuch Child and Children lawfully begotten as the Teſtator's Brother *John* ſhould at the Time of his Death leave living, or that his Wife ſhould be then *enſient* or with Child with, that ſhould live to attain the Age of Twenty-one Years, and to the Heirs, Executors, Adminiſtrators and Aſſigns of ſuch Child or Children, equally to be divided between them Share and Share alike, as they ſhould reſpectively attain the Age of Twenty-one Years, whether that would have been good in the Caſe that hath happened?

On hearing Counſel on both Sides, and Conſideration of this Caſe, we are of Opinion, That if a Term for Years in Lands had been bequeathed in the ſame Manner as the Orphans and *Bank* Stock is limited by this Will, the Limitation to all ſuch Child and Children lawfully begotten as the Teſtator's Brother *John* ſhould at the Time of his Death leave living, or that his Wife ſhould be then *enſient* with that ſhould live to attain the Age of Twenty-one Years, and to the Heirs, Executors, Adminiſtrators and Aſſigns of ſuch Child and Children, equally to be divided between them Share and Share alike, as they ſhould reſpectively attain the Age of Twenty-one Years, would have been good in the Caſe that hath happened.

W. Lee, *E. Probyn*,
F. Page, *W. Chapple*.

Heneage v Andover. 10 Price 259. Elmsley v Young 2 Myl & K 785.
Mattison v Tanfield 2 Beav. 133. Withy v Mangles 4 Beav. 362.

Thomas verſus *Hole.*

11 *April* 1728.

A Deviſe to Relations is to be confined to ſuch as would take by the Statute of Diſtributions: But their Shares may not be the ſame as under that Statute.

ONE *Hole* by his Will gave 500 *l.* to the *Relations* of *Elizabeth Hole*, to be divided equally between them. *Elizabeth Hole* had at the Teſtator's Death two Brothers living, and ſeveral Nephews and Nieces by another Brother. The Cauſe came on to be heard before my Lord *King*, and two Queſtions were made; in the firſt Place, Who ſhould take by this Deſcription of the *Relations* of *Elizabeth Hole?* It was ſaid, that in the Caſe of *Brown* and *Brown* my Lord *Macclesfield* had determined that the Word *Relations* ſhould be confined to ſuch *Relations* as were within the Statute of Diſtributions, becauſe of the Uncertainty of the Word *Relations*; and upon this Authority my Lord *King* determined, That no *Relation* ſhould take by this Deſcription that could not take by the Statute of Diſtributions. The next Queſtion was, In what Proportions ſuch *Relations* ſhould take, whether as they would have taken by the Statute, or in a different Manner? and as to this he determin'd, That as the Teſtator had directed the 500 *l.* to be divided equally among them, he could not direct an unequal Diſtribution, and accordingly decreed them to take *per Capita.*

DE
Term. S. Trinitatis
6 Geo. II.
In CURIA CANCELLARIÆ.

1732.

Manſell verſus *Manſell.*

2 *Will. Rep.* 678. S. C.

THIS Cauſe came on upon an Appeal to my Lord Chancellor *King* from the Decree of the *Maſter of the Rolls.*

Truſtees to preſerve contingent Remainders for Children unborn, join to defeat them; this is a Breach of Truſt relievable in Equity; and where there is not a Purchaſer for a valuable Conſideration without Notice, the Eſtates ſhall be re-convey'd to the former Uſes.

Edward Vaughan ſeiſed in Fee in 1683. deviſed Lands to his Siſter *Dorothy*, afterwards the Plaintiff's Mother, for Life, Remainder to Truſtees to preſerve contingent Remainders, Remainder to the Uſe of her firſt and other Sons in Tail Male, Remainder to the Uſe of his Couſin *Edward Manſell* in Fee, and charges the Eſtate with a Debt of 1200 *l.* and dies.

The Plaintiff's Mother intermarried with Sir *Edward Manſell*, and in 1685. they, with the Remainder-man in Fee, join in a Feoffment with a Covenant to levy a Fine to Truſtees to the Uſe of the Plaintiff's Father in Fee; and this is expreſt to be the Intent that the Fee-ſimple might

be veſted in him for the raiſing of Money for the Payment of the Debts of *Edward Vaughan* the Teſtator (whoſe Inheritance it was) by demiſing, ſelling or mortgaging the Eſtate, or any Part thereof, and for other good Cauſes and Conſiderations a Fine is levied accordingly at the Grand Seſſions in *Carmarthenſhire*, where the Lands lay. About a Year after, the Truſtees, to preſerve contingent Remainders, reciting the Will, Feoffment and Fine, convey the whole Eſtate by Leaſe and Releaſe to the Plaintiff's Father in Fee, *Dorothy* being then with Child, and then the Plaintiff is born. Afterwards the Father by Will makes the Plaintiff Tenant for Life, *&c.* and dies.

The Plaintiff brought his Bill to have the Benefit of Mr. *Vaughan*'s Will, and inſiſted on the Breach of Truſt; and that the Parties who claim under the Fine and Feoffment, being Parties to the Breach of Truſt, ought not to take Advantage of it.

The Defendant in his Anſwer inſiſted on the Fine and Feoffment.

The *Maſter of the Rolls* decreed for the Plaintiff for ſo much as was not aliened *bona fide*.

It was argued for the Plaintiff by Mr. *Attorney General*, That the Eſtate ought to be preſerved by the Truſtees according to the Intent of the Deed of Truſt; that their joining with the Tenant for Life in the Alienation was a high Breach of Truſt; and that had they aliened to one who had no Notice of the Truſt, the Remedy ſhould be againſt them; but where with Notice, the Parties claiming under the Truſt ſhould make good the Eſtate; and ſo held by the Lord *Harcourt* in *Pye* and *George*'s Caſe, in *Salk. Reports*, which is ſtronger than our Caſe; for, thoſe we claim againſt are all Voluntiers under Sir *Edward Manſell*'s Will. Mr. *Vaughan*'s Eſtate being ſubject to a Charge of 1200 *l.* it cannot be ſuppoſed that Sir *Edward Manſell* and the Truſtees ſhould bar the Remainders to prevent them coming

to the firſt and other Sons of *Dorothy*, who was his Wife; but merely to diſcharge that Debt, which a Court of Equity would, upon a Bill brought, have decreed to be done by Sale. Where-ever a Conveyance has been made for a particular Purpoſe, and no particular Limitation of the Eſtate after that Purpoſe performed, it has been always looked on as a reſulting Truſt for the Heir, or for ſuch to whom the Inheritance belongs; there are many Caſes where it has been ſo held. 2 *Vern.* 52. *Baden* verſus *Earl of Pembroke.*

It was alſo inſiſted, That old Sir *Edward Manſell* had in an Anſwer (formerly put in to another Suit in this Court) allowed that the Plaintiff would be intitled in Equity to an Eſtate-Tail under Mr. *Vaughan*'s Will.

Mr. *Solicitor General*, Mr. *Verney* and Mr. *Ryder*, after the Proofs read, added, That their Claiming only againſt Deviſees under Sir *Edward Manſell*'s Will, and not againſt any Purchaſers either with or without Notice of the Truſt, obviated all Objections that could be made on that Head; and that where a Voluntier claims under a Breach of Truſt, without any Conſideration paid, and with Notice of the Truſt, it would be unconſcionable he ſhould take Advantage of it; but he ſhall hold the Eſtate liable to the Truſt. *Pye* and *George*'s Caſe, though not a Caſe directly adjudged, yet was a very ſtrong Declaration by the Court.

Truſtees to preſerve contingent Remainders were found out to help the Defect in the Law, of the firſt Son's not being able to take Advantage of the Forfeiture of the Tenant for Life by making a Feoffment, becauſe not *in rerum Natura* at the Time of the Forfeiture committed: And at Law, before the Statute of Uſes if a Feoffee to Uſes had enfeoffed another with Notice of the Uſes, the ſecond Feoffee would have held the Eſtate ſubject to and for the Uſe of the *Ceſtui que Truſt*; and Truſtees are appointed to preſerve and not to deſtroy contingent Remainders. Then taking it on the other Side, this does not ſeem

ſo much a Breach of Truſt as a juſt and legal Act, to take off that Charge which lay on the Eſtate, and to ſecure that very Intail which they were Truſtees for, and would have been deſtroy'd by a Sale; for, the Acts done by the Huſband and Wife are recited in the Deed to be done only in order that the Eſtate may be ſettled on the Huſband, to and for the raiſing ſuch Sums as the Eſtate is chargeable with; and it is the greateſt Equity they ſhould be taken to this particular Purpoſe only, it being a lawful one: For, where a Deed may be taken in a double Senſe, the juſt and equitable one ſhall be preferred.

Neither is it to be ſuppoſed the Wife would have joined in the Diſheriſon of her Children, but only to make Sir *Edward Manſell*, her Huſband, a Truſtee for this ſpecial Purpoſe of diſcharging the Eſtate. In all Caſes of raiſing of Terms for one Purpoſe, after that Purpoſe ſerved, the Term ſhall attend the Inheritance, though no Truſt appointed after the ſerving of the Purpoſe. *Lowther* verſus *Lowther*, heard at the *Rolls* the laſt Term. And ſo Whether it is conſidered as a rightful Act, or whether it is taken as a Breach of Truſt, and ſo a wrongful one, the Plaintiff ought to be relieved; and ſo *quacunque via data*, the Decree ought to be affirmed.

Mr. *Lutwych*, Mr. *Willes* and Mr. *Mead* argued on the other Side for the Defendant, and ſaid, That it was not pretended that the legal Eſtate was well veſted in Sir *Edward Manſell* by his Father's Will: But they object that there has been a Contrivance to defeat the Plaintiff not then born, of that Intail which he would otherwiſe have had. 'Twas not the Feoffment that deſtroy'd the contingent Remainder; for, therein the Truſtees were not concerned, but 'twas the Releaſe: And 'tis obſervable that here is no Purchaſer, but only Voluntiers claiming under a Settlement made by Mr. *Vaughan*'s Will; and there are many Inſtances where, in caſe of Voluntiers, contingent Remainders have been deſtroy'd, they being favoured neither in Law or Equity. *Pollexfen* 250. Where Tenant for Life, with

with Remainder to himſelf deſtroys the contingent Remainder, it has always been held good: And it is here admitted, that had there been a Purchaſer there would have been no Relief, which appears by this very Decree; for, it gives no Relief againſt ſuch who have purchaſed Part of this Eſtate *bona fide*. As this Caſe is circumſtanced there can be no Reaſon for a Court of Equity to interpoſe; for, they ſeek Relief as to one Part of the Father's Will, which they do not like; but would have the other Part, which makes for them, to ſtand. 2 *Vern.* 582. *Noy* verſus *Mordaunt*. Here is a very fair Settlement made by the Father, and it has gone farther towards ſerving Mr. *Vaughan*'s Intent, which was to have the Eſtate remain in the Family, than would have been otherwiſe if he had been Tenant in Tail: The defeating this will be diſappointing the Proviſion made by the Father for his younger Children, which, could the Father have apprehended, he would have provided otherwiſe for his Children. Their ſaying the Conveyance to Sir *Edward Manſell* was only a Truſt for Payment of Debts (for, that 'twas not *Dorothy*'s Intent to diſinherit the Child ſhe was then *enſient* of) is ſetting up an Intent to defeat the expreſs Act of the Parties, which was a Conveyance for and in Conſideration of natural Love only to Sir *Edward Manſell and to no other Uſe or Purpoſe whatſoever*; and the Word *Truſt* not ſo much as mentioned in any Part of the Deed; and there being in the End of the Deed an expreſs Proviſion that all Conveyances ſhall be to the Uſe of Sir *Edward Manſell* in Fee, and to no other Uſe whatſoever. In the Caſe of *Lowther* verſus *Lowther* there was an expreſs Conveyance to Strangers in Truſt; none of which is in this Caſe: But here the Conveyance is to his own Heirs, without mentioning a Word of any Truſt. Neither will their other Method of taking it as a Breach of Truſt do much better; ſince Remedy has often been denied againſt the Truſtees for preſerving contingent Remainders in caſe of a Tenant in Tail. *Pratt* verſus *Spring*, 2 *Vern.* 303. *Bowater* verſus *Ely*, 344. *Ely* verſus *Osborne*, 754. Neither do they pray their Remedy againſt the Truſtees, but againſt the Remainder-men under the Will. Tenant

for Life by Fine bars the contingent Remainders, there can be no Remedy againſt him: And yet that is a ſtronger Caſe than this; ſince there he had a kind of Truſt repoſed in him, but here he has none at all. Then were cited the Caſes of *Stapleton* verſus *Sherrard*, 1 *Vern.* 212. *Sherbourne* verſus *Clarke*, 273. *Smith* verſus *Dean and Chapter of St. Paul's and Rogle*, 367. and in *Show. Parl. Caſ.* 67. to prove that Equity would not aſſiſt to defeat thoſe Advantages a Man has at Law, by taking Fetters off another Man's Eſtate. Upon the Whole, as no Precedent had been ſhewn where in the like Caſe any Remedy had been given, and that the Caſe of *Pye* verſus *George* was but an extrajudicial Opinion of the Court, and ſo imperfectly reported that no Streſs can be laid on it, they ſaid it would be hard to begin in this Caſe; which muſt be by taking away a legal Title, and defeating the Proviſions made for younger Children, who are always favour'd in Equity. Beſides, we ſhould be left without any Proviſion for the Debts which had been paid by old Sir *Edward Manſell*, and to which this Eſtate was liable: And therefore prayed the Decree might be reverſed.

No Judgment was now given. But in *Michaelmas* Vacation, 6 *G.* 2. the Opinion of the Court was delivered at my *Lord Chancellor*'s Houſe.

Lord Chancellor *King*,
Lord Chief Juſtice *Raymond*,
Lord Chief Baron *Reynolds*.

Reynolds Chief Baron, after having ſtated the Caſe,

There are two Points;

Firſt, Thoſe Conveyances being made with an Intent to raiſe Money to pay the Debts of *Edward Vaughan*, Whether this Proviſion ought to extend to that Purpoſe only? for, then there will be a reſulting Truſt to the old Uſes under the Will of *Edward Vaughan*.

Secondly, Suppoſing the contingent Eſtate deſtroy'd, whether this is ſuch a Breach of Truſt as that the Eſtates defeated thereby ought to be ſet up again in this Court againſt thoſe who claim under a voluntary Conveyance with Notice?

1*ſt*, In the firſt Place it is evident that the Truſtees, not having executed the Deed of Feoffment, but being made Parties without their Conſent, their Eſtate could not be affected or deſtroy'd thereby; and the ſame may be ſaid of the Fine; and if nothing elſe had been done, the contingent Remainder had been good: But the Deeds of Leaſe and Releaſe executed by the Truſtees, were an abſolute Conveyance, and have no Reference to what was done before, but were made on purpoſe to deſtroy their own Eſtate, and conſequently the contingent Remainders. I admit all the Caſes of reſulting Truſts, 2 *Vern.* 645. *Harcourt* and *Weymouth*, *Loder* and *Loder*, and which are all founded upon this plain Principle, That when an Eſtate is conveyed for particular Purpoſes, ſo ſoon as they are ſatisfy'd there is a reſulting Intereſt to him who ought to have the Eſtate; but there is no Truſt expreſt in the Deeds of Leaſe and Releaſe; nor can it be pretended they ought to be coupled with the Deed of Feoffment before executed by different Parties, and for different Purpoſes; the one being to pay Debts, and the other to deſtroy contingent Remainders.

2*dly*, Whether Equity ought to interpoſe, ſo as to ſet up theſe Eſtates againſt the Truſtees, and thoſe claiming under them.

That this is a Breach of Truſt is ſo plain, that I know not how, by any Thing I have to ſay, to make it more ſo. Indeed had this conveyance been for a valuable Conſideration without Notice, the Purchaſer could not have been affected; but when any one claims by a voluntary Conveyance with Notice, he muſt take the Conveyance cloathed with all its Truſts. *The* Dictum *of a Counſel at the*

Bar in the Duke of Norfolk's *Caſe* is of very little Weight; beſides it does not appear there to be his own Opinion. And *Salk.* 680. is to the contrary. The Caſe of *Engleſield* and *Engleſield*, 1 *Vern.* 443. was ſolely decreed on the Point of Fraud; for, there were no Truſtees to preſerve contingent Remainders. As to the Caſe of *Ely* and *Osborne* 2 *Vern.* 754. that Determination can be of no greater Authority than the Reaſon on which it is founded will warrant; there the Lord Chancellor took it, that the Son had an Eſtate-tail, and therefore the Remainder ought to be conſider'd no longer as contingent, and that then the Truſtees became Truſtees for the Tenant in Tail, to which Eſtate the Quality of barring Remainders over is eſſential; but this is not the preſent Caſe: For, here the Truſt ſubſiſted in its full Force. *Winnington* verſus *Tipping and Piggot*, reported in *Abr. Eq. Caſes* 385. in all theſe Caſes the Remainder-man was *in Eſſe*; ſo that he had an Eſtate-tail veſted, and then the Truſtees became Truſtees for Tenant in Tail, and conſequently the Eſtates over might be barred. It is ſaid, that Courts of Equity have obliged Truſtees to join; but this has been juſt as the Circumſtances of the Caſes have appeared, 2 *Vern.* 303. And whatever they have done, or may do, yet they will never have it left to the Diſcretion of a Truſtee to do it. It is objected, that the Plaintiff has a Satisfaction by the Will, and therefore he ought not to have the Advantage of both. 2 *Vern.* 581. I anſwer, That what he has under the Will is not a proper Equivalent, ſince he is thereby only made Tenant for Life, without Power to provide for younger Children, or pay his Debts; beſides, the Eſtate is only limited to his firſt Son in Tail: And farther, there is no Condition annex'd to the Deviſe, either expreſt or implied; but the preſent Queſtion is only concerning the *Vaughan*'s Eſtate, the *Manſell*'s is ſufficient to pay the farther Debts and Legacies. As to the Inconveniencies, they are imaginary, and there is no Compariſon between them and thoſe which would attend the other ſide of the Queſtion; for, if this ſhould ſtand, the Truſtees might, without Reaſon,

and

and without the Direction of a Court of Equity, join to defeat moſt Settlements: Therefore the Plaintiff ought to be relieved, but in what Manner muſt be left to my *Lord Chancellor.*

Lord Chief Juſtice *Raymond* agreed with the Chief *Baron* in both Points, and ſpoke to this Effect: As to the contingent Remainders, ſince they are deſtroy'd, the Plaintiff is intitled to Relief, either againſt the Truſtees or the Purchaſers with Notice. That ſuch Remainders may be deſtroy'd is a poſitive Law, and when done, there is no Remedy at Law; and therefore Perſons were choſen in whom there was a Confidence placed to preſerve Men's Eſtates in their Families. It has been ſaid, that Remedy may be had at Law for a Breach of Truſt: But I think it is the proper Buſineſs of a Court of Equity to keep Truſtees within due Bounds, and to give Relief. If there is Tenant for Life, with contingent Remainders, and he defeats them, he is not anſwerable for it, ſince no Truſt or Confidence was repoſed in him: And in ſuch Caſe *Æquitas ſequitur Legem.* As to Caſes in Point, though there are none, yet the Reaſon of the Thing will govern it. If an Eſtate ſubject to a Truſt is purchaſed from the Truſtees for a valuable Conſideration, *without Notice, a Court of Equity cannot affect the Purchaſer*, but they can the Truſtees; but if ſuch Purchaſer had Notice, then the Truſt goes along with the Eſtate, and the Land ſtill continues ſubject to it. It may be, Truſtees have been excuſed where there have been favourable Circumſtances: But here is not the leaſt reaſonable Matter to induce the Truſtees to join; therefore what they have done is againſt natural Equity and Juſtice. In the Caſe of *Elie* and *Osborne*, 2 *Vern.* 754. the Inheritance was veſted; and what was done might be proper for the Circumſtances of the Family; but *non ſequitur* a Truſtee may do it in what Caſes he ſhall think proper. Upon the Whole, he was clear that the Plaintiff ſhould be relieved.

Lord Chancellor ſaid he would confine himſelf to one Point, Whether in this Caſe the Breach of Truſt ought to be relieved againſt? For, as to the reſulting Truſt, and the equivalent Satisfaction, he thought there was not much in them, and would give no Opinion about them. In Point of Law theſe Remainders are abſolutely deſtroy'd. Though the Truſtees had defeated their Eſtates, yet if the Wife had kept hers, that would have preſerv'd the contingent Eſtates over. The Queſtion now is, Whether Equity will relieve; Here is no Fraud but what appears on the Deeds. It would be a very odd Thing to ſay, it is not a Breach of Truſt for thoſe Perſons who are appointed to preſerve Eſtates, to defeat them contrary to the Intent of him who repoſes a Confidence in them. Then, if this is a Breach of Truſt, Equity may relieve; for, this is a Matter within its original Juriſdiction. He ſaid, he never knew that Law had any thing to do in the Caſe: If then it be the Buſineſs of Equity to keep Truſtees within Compaſs, and to ſee Truſts executed, can Equity ſit ſtill and ſee Truſtees break their Truſts? At Law, if there had been a Truſtee to a Uſe, and he had conveyed without Conſideration and without Notice of the Uſe; or though it had been for a valuable Conſideration, yet if there had been Notice, the Uſe would have followed the Land: And Truſts are to be govern'd by the ſame Rules that Uſes were before the Statute of Uſes. If there had been a bare Tenant for Life, who is no Truſtee, Equity would not have relieved; for, there can be no Breach of Truſt where there is no Truſtee: And ſuch Caſe is like a collateral Warranty by Tenant for Life, againſt which Equity would never relieve. Indeed Courts of Equity have gone great Lengths to judge whether a Man would have any Child or not; but I ſhall be very cautious how I do it. A Breach of Truſt will go ſo far as to affect the Truſtees, and all who purchaſe under them having Notice. However, here is no Occaſion to go againſt the Truſtees, ſince the Lands themſelves may be had; and this being the Caſe of a Purcha-

ſer with Notice my *Lord Chancellor* confirmed the Decree made by the *Maſter of the Rolls* in Favour of the Plaintiff.

25, 26 *April* 1733.

Morse v Lord Ormonde. 1. Ruſs. 382

Ruthven v Craven. 12 Price 618.
Dicken v Clarke. 2 Ves. 576.

Paſchæ 6 Geo. II.

Lady Lanesborough verſus *Fox.*

Cited in the Caſe of *Clare* v. *Clare*, *Eaſt.* 7 *Geo.* 2. p. 25. *per* Counſel *arguendo*; and p. 26. (in the ſame Caſe) cited by *Talbot* C. calling it a Caſe of the ſtrongeſt Authority that can be.

A. having the Reverſion in Fee of Lands ſettled upon the Marriage of *B.* his Son in the uſual Manner, deviſes all the Lands in that Settlement *on Failure of Iſſue of the Body of* B. *and for want of Heirs Male of his* own *Body, to his Daughter* F. *and the Heirs of her Body.* This Will does not give an Eſtate-tail by Implication to *B.* The Deviſe to *F.* is Executory; and is void, as being on too remote a Contingency.

Burgess v. Wheate 1. Ves. 230

MArk *Anthony Morgan*, Eſq; Leſſee of *George Fox*, Eſq; brought an Ejectment in the Court of *Exchequer* in *Ireland* againſt the Lady Dowager *Lanesborough*, for ſeveral Caſtles and Lands in the County of *Longford* in *Ireland*: To which the Lady *Lanesborough* pleaded Not guilty. The Cauſe came to be tried by a Special Jury at the Bar of the ſaid Court, who found a Special Verdict in *Michaelmas* Term 1727. *viz.* That Sir *George Lane*, Knt. and Bart. afterwards Lord Viſcount *Lanesborough*, was ſeiſed in Fee of the ſaid Caſtles and Lands, and being ſo ſeiſed did, in Conſideration of a Marriage then to be had between his Son *James* and *Mary Compton* now the ſaid Lady *Lanesborough*, and of 2000 *l.* Marriage Portion, by Indentures of Leaſe and Releaſe, dated the 3d and 4th of *May* 1676. convey the ſaid Caſtles and Lands to *Thomas* Earl of *Oſſory*, *Richard* Earl of *Arran*, *Henry* Lord Biſhop of *London*, and Sir *Hugh Cholmondeley*, Bart. and their Heirs, upon the Truſts and to the Uſes following, *viz.* That the ſaid *James Lane* ſhould have thereout, during the joint Lives of him and Sir *George Lane*, one Annuity of 300 *l.* and in caſe the ſaid intended Marriage ſhould take Effect, then after the Death of the ſaid *James Lane*, that the ſaid *Mary Compton* ſhould have and receive one Annuity or yearly Rent of 320 *l.* for her Jointure; and ſubject thereto to the Uſe of the ſaid Sir *George Lane*, for his Life, without Impeachment of Waſte, and then to the Uſe of the ſaid *James Lane* for Ninety-nine Years, to commence from the Deceaſe of his Father Sir *George Lane*, if the ſaid *James Lane* ſhould ſo long live, without Impeachment of Waſte; and then to the Uſe of the ſaid Earl of *Oſſory*, Earl of *Arran*, Biſhop of *London*

and Sir *Hugh Cholmondeley*, and their Heirs during the Life of the ſaid *James Lane*, upon Truſt to ſupport the contingent Remainders, and then to the firſt Son of the Body of the ſaid *James Lane* on the Body of the ſaid *Mary Compton* to be begotten, and the Heirs Male of the Body of ſuch firſt Son, with like Remainders to all other Sons of the ſaid Marriage ſucceſſively in Tail Male; and for Default of ſuch Iſſue, then to the Uſe of the Heirs Male of the Body of the ſaid *James Lane*, and then to the right Heirs of the ſaid Sir *George Lane*.

That the ſaid Marriage was had and ſolemnized *May* 5, 1676. and the ſaid 2000 *l.* paid to the ſaid Sir *Geo. Lane*.

That Sir *George Lane*, then Viſcount *Lanesborough*, being ſeiſed in Fee of the Reverſion of the ſaid Premiſſes, did, the 10th Day of *July* 1683. make his laſt Will and Teſtament in Writing, and did thereby, among other Things, deviſe in the Words following: *Item*, I will and deviſe "the Manor and Town of *Lanesborough*, and all other "Lands, Tenements and Hereditaments mentioned or "contained in the Settlement made by me on the Mar-"riage of my ſaid Son *James Lane* with the Daughter of "Sir *Charles Compton*, ſecond Brother to the late Earl of "*Northampton*, *on Failure of Iſſue of the Body of the ſaid* "James Lane, *and for want of the Heirs Male of my Body*, "to my ſaid Daughter *Frances Lane*, and the Heirs of her "Body lawfully to be begotten; and for want of ſuch "Iſſue, to my ſaid Daughters the Lady *Beaufoy* and *Mary* "*Bingham* ſeverally, and the Heirs of their Bodies law-"fully begotten or to be begotten, ſeverally and reſpective-"ly, and for want of ſuch Iſſue, that all and every of the "Premiſſes ſhall be and remain to his Grace *James* Duke "of *Ormond*, and the Heirs Male of his Body lawfully be-"gotten or to be begotten." And in a ſubſequent Part of his ſaid Will, he did will and deviſe, That if his ſaid Son *James Lane* ſhould die without Iſſue Male, his the ſaid Teſtator's Wife ſurviving him, his ſaid Wife ſhould hold and enjoy his Houſe and Park in *Rathline*, and all the Houſes,

Houſes, Lands, Tenements and Hereditaments in the County of *Longford*, wherein he had any Eſtate of Inheritance in Poſſeſſion, Reverſion or Remainder, for and during her natural Life; and after her Deceaſe, to the ſeveral Uſes to which the ſame are limited as aforeſaid; and made his ſaid Wife Executrix of his ſaid laſt Will and Teſtament.

That the ſaid *George* Lord Viſcount *Lanesborough* died the 1ſt of *December* 1683. ſo as aforeſaid ſeiſed of the ſame Reverſion of the Manors, Towns and Lands in the Declaration mentioned, and had Iſſue at the Time of his Death the ſaid *James*, his only Son and Heir, and two Daughters, to wit, *Mary* and *Charlotte* by his firſt Wife, and the ſaid *Frances* by his ſecond Wife, and no other Iſſue Male; and that *Thomas* Earl of *Oſſory* died the 2d of *June* 1681. and that *Frances* Viſcounteſs *Lanesborough*, the Widow of *George* Lord *Lanesborough*, died the 1ſt of *May* 1700, in the Life-time of the ſaid *James* Viſcount *Laneſborough*.

That *James* then Viſcount *Lanesborough*, *December* 1, 1683. after the Death of his Father, entred upon the Premiſſes, and was thereof poſſeſſed, and the ſaid ſurviving Truſtees became ſeiſed of the ſaid Manors, Towns and Lands in the Declaration mentioned, by Virtue of the ſaid Deeds of Leaſe and Releaſe, bearing Date reſpectively the 3d and 4th of *May* 1673. in ſuch Manner as the Law allows.

That the ſaid *James* Viſcount *Lanesborough*, and the ſaid Earl of *Arran*, Lord Biſhop of *London*, and Sir *Hugh Cholmondeley*, the then ſurviving Truſtees, by Indentures of Leaſe and Releaſe, the 16th and 17th of *October* 1684. for the barring all Eſtates-tail, Reverſions and Remainders, and to the End to ſettle and aſſure the ſame as therein aftermentioned, did convey to *Edward Brabazon*, Eſq; and *William Smith*, Gent. and their Heirs, among others, the Manors, Caſtles and Lands in Queſtion, to the Intent and

Purpoſe, that one or more common Recovery or Recoveries might be thereof had and ſuffered; which ſaid Recovery or Recoveries ſhould be and enure to the Uſe of the ſaid *James* Viſcount *Lanesborough* for his Life, without Impeachment of Waſte; and after his Deceaſe, then to the Uſe of the Lady *Mary* Viſcounteſs *Lanesborough*, Wife of the ſaid *James* Viſcount *Lanesborough*, for her Life, as, and for, an Increaſe of or Augmentation of her Jointure, and in Bar of her Dower and Thirds at Common Law; and after her Deceaſe, then to the Uſe of the ſaid *James* Viſcount *Lanesborough* and his Heirs.

That the ſaid Recovery was accordingly ſuffered, *Hil.* 36 *Car.* 2. 1686. of the ſaid Manors, Towns and Lands in Queſtion, in which *Fergus Farrell*, Eſq; and *Edward Nangle*, Gent. were Demandants, and the ſaid *Brabazon* and *Smyth* were Tenants, who vouched the ſaid *James* Viſcount *Lanesborough*, who vouched the common Vouchee.

That the ſaid *James* Viſcount *Lanesborough* being ſo poſſeſſed of the Manors, Towns and Lands in Queſtion, *October* 15, 1722. did make his laſt Will and Teſtament, and did thereby deviſe to *George Hooper*, Lord Biſhop of *Bath* and *Wells*, and *Hatton Compton*, Lieutenant-General, and *Robert Dormer*, Eſq; a Judge of the *Common Pleas*, and *James Middleton*, Eſq; and their Heirs, all his Manors, Lands, Tenements and Hereditaments whatſoever in the Kingdom of *Ireland*, in which he, or any Perſon in Truſt for him, had any Eſtate of Inheritance or other Intereſt in Poſſeſſion, Reverſion, Remainder or Expectancy, in Truſt nevertheleſs, and to and for the ſeveral Uſes therein after expreſſed: That is to ſay, That from and after his Deceaſe, his ſaid Truſtees ſhould ſtand and be ſeiſed of all the ſaid Premiſſes in the ſaid County of *Longford*, in Truſt for the Heirs of his Body: And for want of ſuch Iſſue he did will and deviſe that the ſaid Truſtees ſhould permit and ſuffer his Siſter *Charlotte* Lady *Beaufoy*, for and during her Life, to have and receive for her own Uſe and Behoof, the Rents, Iſſues and Profits of the Farm and Land of *Coolcroy Barony*

of *Rathline* in the ſaid County of *Longford*; and after her Deceaſe, his ſaid Truſtees ſhould permit and ſuffer his ſaid Wife to have and receive to her own Uſe the Rents, Iſſues and Profits of the ſaid Premiſſes laſt mentioned. And his Will was, That his ſaid Truſtees ſhould ſuffer his ſaid Wife, from and immediately after his Deceaſe, to have and receive to her own Uſe, all the Rents, Iſſues and Profits of all the Reſt and Reſidue of his ſaid Manors, Lands and real Eſtate in the Kingdom of *Ireland*, for her Life; and after her Deceaſe, directed his Truſtees ſhould convey the ſaid Premiſſes to the ſeveral Uſes in the ſaid Will mentioned, *viz.* To the Uſe of *John Bell Lane*, the eldeſt and only Grandſon of his Siſter *Mary Bingham*, afterwards called *Mary Middleton*, deceaſed, for his Life; and after his Deceaſe, to the Uſe of his firſt and other Sons in Tail Male, with ſeveral Remainders over: And he did appoint his ſaid Wife ſole Executrix of his ſaid Will.

That the ſaid *James* Viſcount *Lanesborough*, *Auguſt* 30, 1724. died poſſeſſed of the ſaid Manors, Towns and Lands in Queſtion, and without Iſſue.

That the ſaid *Frances Lane*, Daughter of the ſaid *George* Lord Viſcount *Lanesborough*, and Deviſee in his ſaid laſt Will, married *Henry Fox*, and by him had Iſſue *George Fox* the Leſſor of the Plaintiff, her eldeſt Son and Heir; and the ſaid *Henry* died the 13th Day of *October* 1718. and the ſaid *Frances* died the 12th Day of *December* 1712. leaving the ſaid *George*, the Leſſor of the Plaintiff, her eldeſt Son and Heir of her Body, who, on the 1ſt of *September* 1724. entred upon the ſaid Premiſſes, and was thereof ſeiſed as the Law directs, and made the Leaſe to the ſaid *Mark Anthony Morgan*, as in the Declaration abovementioned, who entred upon the Premiſſes, and was poſſeſſed thereof until the ſaid *Mary* Viſcounteſs *Lanesborough* entred upon the Premiſſes and ejected him.

But whether upon the whole Matter found by the ſaid Jury, the ſaid Lady Viſcounteſs *Lanesborough* be guilty of

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the ſaid Treſpaſs or not, the Jury are altogether ignorant: And if the Court judge her guilty, then they find her guilty, and aſſeſs Damages and Coſts; but if the Court do not think her guilty, then they ſay ſhe is not guilty.

The Jury find the ſeveral Settlements, Recovery and Wills herein beforementioned *in hæc verba.*

Hil. 1730. The Court of *Exchequer* in *Ireland* gave Judgment for Mr. *Morgan* the Leſſee of *George Fox*, Eſq; and 68 *l.* 18 *s.* for Damages and Coſts.

The ſame Term the ſaid Lady Viſcounteſs Dowager *Lanesborough* brought her Writ of Error in the *Exchequer* Chamber in *Ireland*, returnable in *Eaſter* Term 1731. Upon which Writ of Error the ſaid Judgment was affirm'd in *Eaſter* Term 1732. Upon which Affirmance of the ſaid Judgment the ſaid Lady Viſcounteſs Dowager *Laneſborough* brought a Writ of Error before the *Houſe of Lords* of *Great Britain*; which coming on to be heard on the 25th and 26th of *April* 1733. and Mr. *Talbot* Solicitor General, and Mr. *Ryder*, having argued for the Plaintiff in Error; and Sir *Philip Yorke* Attorney General, and Mr. *Lutwyche*, for the Defendant in Error; the Judges having been ordered to attend, were aſked their Opinion, Whether Lord *James* took any other or greater Eſtate by the Will than by the Settlement? And it being agreed they ſhould deliver their Opinions *ſeriatim*,

Mr. Juſtice *Reeve* deliver'd his Opinion with his Reaſons, That the Lord *James* could not take an Eſtate-tail, no Alteration being made by the Will, and that no Eſtate is raiſed to Lord *James* by Implication. Then

Mr. Juſtice *Lee*, Sir *William Thompſon*, Mr. Juſtice *Forteſcue*, Mr. Baron *Comyns*, Mr. Juſtice *Probyn*, Mr. Juſtice *Page*, and the *Lord Chief Baron*, ſeverally delivered their Reaſons, and all were of the ſame Opinion.

After

After which this Queſtion was put to the Judges, *viz.* Whether any or what Eſtate *Frances* took by the Will of Lord *George?* And thereupon Mr. Juſtice *Reeve* delivered his Opinion, with his Reaſons for it, That *Frances* took no Eſtate whatſoever; but that the Deviſe to her was abſolutely void in its Creation, as being in too remote a Contingency. Alſo all the other Judges declared themſelves of the ſame Opinion, and ſeverally delivered their Reaſons.

The Judgment of the *Exchequer Chamber* in *Ireland*, affirming the Judgment of the Court of *Exchequer* there, was reverſed.

Wood v Cox. 2 Ves 687.

Michaelis 4 Geo. II.

Rogers verſus *Rogers.*

3 *Will. Rep.* 193. and *Sel. Ca. in Chan.* 81. S. C.

A. among other Legacies, gives a Legacy of 5 *l.* to *B.* his Brother and Heir, and then makes his beloved Wife *C.* his ſole Heireſs and Executrix of all his Lands, Tenements, Goods and Chattels, the ſame to ſell and diſpoſe of as ſhe ſhould think proper, to pay his Debts and Legacies. This is a Gift to her of the Surplus in Fee; and there is no reſulting Truſt for the Heir.

William Rogers made his Will, and gave a Legacy of 5 *l.* to *H. Rogers* his Brother, and Heir at Law, among ſeveral other Legacies; and then he conſtituted his beloved Wife *Mary Rogers* his whole and ſole Heireſs and Executrix of all his Lands, Tenements, Goods and Chattels whatſoever, Real and Perſonal, the ſame to ſell or diſpoſe as ſhe ſhould think proper, to pay his Debts and Legacies of that his laſt Will and Teſtament.

The Queſtion was, Whether there be a reſulting Truſt, *&c.* for the Plaintiff the Heir at Law?

It was ſaid for the Plaintiff, that in Caſes parallel to this, the Determinations had been that there ſhould be a reſulting Truſt. The Rule of Law in Deviſes of legal Eſtates is, That the Heir at Law ſhall not be diſinherited

without expreſs Words; and Equity has followed the ſame Rule with reſpect to Truſts; in the preſent Caſe it is not ſaid what is to be done with the Eſtate after the particular Purpoſes are ſatisfied. 2 *Chan. Ca.* 115, 221. 2 *Vern.* 424, *Randall* verſus *Bookey*, there was a Legacy given to the Heir at Law, as in the preſent Caſe, from whence it might be collected that it was not intended he ſhould have any thing elſe; yet it was held, that no more of the Land ſhould be ſold than was neceſſary, and that the Reſidue ſhould go to the Heir. 2 *Vern.* 644. *Hobart* verſus *The Counteſs of Suffolk.* 2 *Vern.* 645. *Briſtoll* verſus *Hungerford.* Theſe Caſes go farther than any other in Favour of the Heir, and even than the preſent Caſe; for there the Surplus was given to the Executrix expreſly; yet it was decreed to the Heir at Law. *Loader* verſus *Loader*, there Land was deviſed to one for Life, with Remainders to his firſt and every other Son in Tail, and ſo on to a ſecond Perſon in like Manner; and for Default of ſuch Iſſue the Remainder in Fee was deviſed to the Teſtator's Kinſman *Robert* (for ſo it is expreſs'd) and his Heirs, paying 5000 *l.* to particular Perſons who were Heirs at Law of the Teſtator; yet it was held there ſhould be a reſulting Truſt for the Benefit of thoſe Heirs at Law. *Herod* verſus *Elford*, *Paſch.* 6 *Geo.* 2. 2 *Vern.* 571. 6 *Co.* 16. On the other hand it was argued for the Defendant, It cannot be controverted but that the legal Eſtate paſſes by this Will; for, the very making one his Heir is a Deviſe of the Fee to that Perſon, as being put in the Place of the Heir at Law: But though the legal Eſtate does paſs in Point of Law, yet when that has been done for a particular Purpoſe, and that Purpoſe is ſatisfied, it has been conſtrued to be a reſulting Truſt to the Heir. Therefore the preſent Point under Conſideration is what the Teſtator intended; for, making a Conſtruction contrary to that would be making a new Will, inſtead of expounding one. And a Difference was taken between a Will and a Deed, the former importing a Bounty, which the latter does not. 2 *Chan. Ca.* 115, 228. was of a Deed; and it appeared more ſtrongly to be a Truſt than in the preſent Caſe: Beſides, in that Caſe there was no Colour

for ſuppoſing a Bounty; but here the Teſtator has called the Deviſee his well-beloved Wife; which imports a Kindneſs for her. 6 *Co.* 16. is not applicable to this Matter; for, there a Difference was taken between a Sum in Groſs and one iſſuing out of the Rents and Profits, and this in order to determine what Quantity of the Eſtate the Deviſee was to have, and not whether a Truſtee or not. In this Caſe the Teſtator has given the Heir at Law a Legacy of 5 *l.* But ſuppoſe it had been only a Gift of a Shilling, every body knows that would have implied a ſtrong Intention that he ſhould have nothing elſe. If this be conſtrued to be a reſulting Truſt, there muſt be a different Meaning put upon the ſame Clauſe as to the perſonal Eſtate and the Land; for as to the Surplus of the former, it muſt be for her own Benefit, when as to the latter ſhe muſt be a Truſtee for the Benefit of the Heir at Law; and that too when the Teſtator has conſtituted his Wife by his Will to be his Heireſs. 2 *Vern.* 425. was a Deviſe upon Truſt; and as the Teſtator had called the Deviſee a Truſtee, the Court would not determine him to be otherwiſe. The ſame Anſwer may be given to 2 *Vern.* 644. But 2 *Vern.* 646. Mr. *Attorney General* ſaid, was a Caſe too ſtrong to prove any Thing; for, there Money was decreed againſt the Executor, when the Surplus was expreſly given him. In *Loader* verſus *Loader* there was an expreſs Truſt; and in *Heron* verſus *Elford*, Land was deviſed upon ſpecial Truſt and Confidence to ſell for Payment of Debts in caſe the perſonal Eſtate ſhould prove deficient, unleſs the Deviſees ſhould think proper to raiſe the ſame by any other Ways and Means. The Caſes cited in Favour of the Defendant were *Chancery Caſes* 196. *North* verſus *Compton*, 2 *Vern.* 247. *Abr. Eq. Ca.* 273.

See the preceding Page

Lord *King Lord Chancellor.* I think here is no reſulting Truſt for the Benefit of the Heir; though, perhaps, the Caſes on this Head are not reconcilable to one another. The Word *Heireſs*, on all ſides, is agreed to carry the Fee; then what is there in the Will to draw the Eſtate out of her? It is true a Limitation in a Conveyance to a Man

and his Heirs, without declaring the Uſe, will not paſs the Uſe for want of a Conſideration: But a Deviſe implying a Conſideration in itſelf, there is no Occaſion to declare the Uſe in order to convey the Intereſt of the Land; and if this were inſufficient, yet being to a Wife whom the Huſband mentions with Affection, it is impoſſible to imagine he intended to give the Land away from her, and make her a Truſtee for his Heir: And though it is ſaid that this is only a Power to *ſell or diſpoſe of the real and perſonal Eſtate*, yet it is *as ſhe thinks proper*, either the one or the other at her Election. Suppoſe the Deviſe had been to a Man and his Heirs, to pay Debts, the Land would be Aſſets at Law; and there is no more in this Caſe; only the Teſtator hath in this Caſe, by making her Heireſs, placed the Deviſee in the room of the Heir, and made her abſolute Owner of the Whole. Beſides, the perſonal and real Eſtate being mix'd together, if there could be a reſulting Truſt of the one, there muſt be the ſame of the other; which was never pretended where the Executor had no Legacy, or was not cut off by ſome expreſs Words. And (he ſaid) 2 *Vern.* 247. and 1 *Chan. Ca.* 196, 7. were full in Point, and decreed for the Defendant.

Paſchæ 6 Geo. II.

Carter verſus *Carter.*

Money deviſed to be laid out in Land to the Uſe of *B.* in Tail, Remainder to the Uſe of *C.* in Fee; *B.* (having no Iſſue) agrees with *C.* by Deed to divide the Money, and before this Agreement is executed *B.* dies: This Agreement ſhall bind, in Favour of his Executors.

A. Deviſed 8000 *l.* to be laid out in Land, and ſettled to the Uſe of *B.* in Tail, Remainder to *C.* in Fee; *B.* and *C.* agreed by Articles of Writing to divide the Money in the Manner therein mentioned; *B.* the Tenant in Tail, died without Iſſue ſoon after the making of the Articles, and before they were executed by a Diviſion of the Money. This came before the Court by way of Appeal from the *Rolls*, where a ſpecifick Performance of the Articles was decreed in Favour of the Executor or Adminiſtrator of *B.*

Note;

Note; Some Years before the Articles were made, there was a Decree obtained to have the Money laid out in Land, and ſettled according to the Will; but the Matter reſted there.

Lutwyche, in ſupport of the Decree, ſaid, That at the Time of the Agreement it was very beneficial to the Perſon who had the Remainder, becauſe the Tenant in Tail might have barred the Remainder, had the Money been laid out in Land, and ſettled as the Will directed. It is a Rule, if Money is to be laid out in Land, and ſettled to one in Tail, the Remainder to another in Fee, that he in Remainder ſhall not be barred of his Contingency by the Payment of the Money to Tenant in Tail; but in the preſent Caſe he in Remainder is conſenting to the Diviſion. *Legat* verſus *Sewell*, 2 *Vern.* 551. It has been held ſince in the Caſe of *Colwell* and *Shadwell*, that if Money is to be laid out in Land, and ſettled on one in Tail, with Remainder to the ſame Perſon in Fee, it ſhall be paid over to the Tenant in Tail; becauſe, immediately after the Money is laid out in Land and ſettled, he may bar his Iſſue.

A Fine may be taken and compleated ſo far, even in Vacation Time, as to bar the Iſſue in Tail; but a Recovery to bar an Eſtate-tail, or Remainder dependant on ſuch Eſtate, cannot be ſuffered but in Term Time; which, is given as a Reaſon why Money may be paid to Tenant in Tail, with Remainder in Fee to himſelf, but not when the Remainder is limited over to another.

Mr. *Attorney General contra.* There is no Reaſon to make a Diſtinction between the Iſſue in Tail and a Remainder; for the one is as much in the View and Contemplation of him who made the Settlement as the other; and the *Majus* and *Minus* of the Time neceſſary to compleat a Fine and Recovery will not alter the Caſe.

Mr. *Rider* on the ſame Side, inſiſted, Equity will not decree Money to Tenant in Tail, though he has a Remainder in Fee to himſelf. And afterwards cited *Weldon* verſus *Oxendon*, *July* 1731. at the *Rolls*. A Man by Will left 3000 *l.* to his Wife, to be paid within ſix Months after his Deceaſe, provided ſhe would releaſe all her Right to Dower of his real Eſtate: She died before the End of the ſix Months, and before any Releaſe had been offered to her; yet it was decreed, that ſhe not having perform'd the Condition, no one would be intitled to the Legacy, and therefore the Bill was diſmiſſed. If a Huſband before Marriage covenants to make his Wife a Jointure, and ſhe, in Conſideration thereof, covenants to convey her Land to the Uſe of her Huſband and his Heirs, and the Wife dies before the Jointure is made, a Court of Equity will not compel a ſpecifick Performance of thoſe Articles.

Mr. *Solicitor General* in his Reply admitted the Caſe of *Weldon* verſus *Oxendon*, becauſe the Widow had an Election: Which never being made ſhe could not be intitled to the Legacy: But diſtinguiſhed it from the preſent Caſe, becauſe here both Parties are bound by the mutual Agreement.

As to the Caſe of a Covenant by the Wife before Marriage, he ſaid a Court of Equity would compel a ſpecifick Performance, though ſhe died before a Jointure was made; and that it was ſo determined in the Caſe of *Cotter* verſus *Lear & al'*.

Lord Chancellor. This is a mutual Agreement between the Parties to have the Money divided between them; and there were no Children of Tenant in Tail *in Eſſe*. The Tenant in Tail died before any Thing was done in Purſuance of the Articles; yet every Thing may be done now as well as it might in his Life-time. The Decree was affirmed.

Note; He ſeemed to lay a good deal of Streſs on Tenant in Tail's dying without Iſſue.

Michaelis 7 Geo. II.

Bromhall verſus *Wilbraham.*

Cited *ante* 204, 209.

A. by Will gives all his perſonal Eſtate to his three Siſters, equally to be divided between them, and (being indebted by Simple Contract, Bond and Mortgage) gives his real Eſtate to his four Sons, chargeable with his juſt Debts; and makes his Siſters his Executrixes. The perſonal Eſtate ſhall be applied in Exoneration of the real; eſpecially as one of theſe Funds muſt be exhauſted.

Ralph Wilbraham, being ſeiſed and poſſeſſed of a real and perſonal Eſtate, diſpoſed of the ſame by Will in Manner following: "I give all my perſonal Eſtate whatſoever "to my three loving Siſters, equally to be divided among "them; and I give my real Eſtate to my four Sons, "chargeable with the Payment of my juſt Debts;" and after makes his three Siſters his Executrixes. The Teſtator died indebted by Simple Contract, Bond and Mortgages. The *Maſter of the Rolls* decreed, That the perſonal Eſtate ſhould be firſt applied towards Payments of all the Debts, and that the real Eſtate ought to come in only to ſupply the Deficiency, in Caſe there ſhould be any. From this Decree the Executrixes appealed.

Mr. *Solicitor General* for the Appellants ſaid, On the Face of the Will it appear'd the Teſtator intended his real Eſtate ſhould be firſt applied to the Payment of his Debts; and that though he could not with reſpect to Creditors prevent them from taking Advantage of the legal Fund, yet ſince he had originally a Power to direct out of which of his Eſtates his Debts ſhould be paid, and he has provided another Fund for that Purpoſe, this Court will ſo marſhal the Aſſets, that his Intent may take Effect. And though in this Caſe his Siſters are made Executrixes, yet they do not take as ſuch; for, the Direction in the Will is, That the perſonal Eſtate ſhall be equally divided amongſt them; which

which is in a Manner different from what they could have taken in as Executrixes; for that would have been jointly. It is the common Doctrine of this Court, that the *Hæres Factus* ſhall have the ſame Benefit of the perſonal Eſtate in Diſcharge of the real, as the *Hæres Natus*; yet when the Teſtator has ſubjected the Gift to the Payment of Debts, then it ought *tranſire cum onere.*

Mr. *Peere Williams* and Mr. *Fenwick* on the ſame Side, cited 2 *Vern.* 756, 718, 477. in the laſt of which Caſes the *Lord Keeper* ſays an expreſs Deviſe ſhall not be defeated by applying the perſonal Eſtate to pay off a Mortgage.

Mr. *Willes* for the Sons. The Teſtator was not obliged in Law, Equity or Conſcience, to make ſuch Proviſion for his Siſters, as he was for his Children; and it is the conſtant Practice to allow them the ſame Favour as Creditors. It is a Rule, that where a Perſon is made Executor, and comes to the perſonal Eſtate in that Right, it remains liable to be applied for the Payment of Debts in Exoneration of the real Eſtate, though the latter is charged by the Will. So it is where the perſonal Eſtate is deviſed to one by Name, who afterwards is made Executor in the Will. 2 *Vern.* 43, 302. Thoſe two Caſes do not go ſo far as the preſent Caſe, becauſe there was no Charge on the Land by the Will, but by the Mortgage only. But 2 *Vern.* 153, 568. are full as ſtrong. He obſerved, that the Word in the Will was *chargeable*, which he ſaid was not ſo ſtrong as if the Word *charged* had been made Uſe of; for the former may refer to the Failure of the perſonal Eſtate. 2 *Vern.* 112. 2 *Vent.* 349. were cited by Mr. *Stracy* on the ſame Side.

Lord Chancellor. Here is no Clauſe to charge the real Eſtate at all Events; the Word is *chargeable.* The natural Conſtruction of a Will, where the Teſtator gives all his perſonal Eſtate to one whom he makes his Executor, is, That the perſonal Eſtate muſt go to the Creditors, and the Gift muſt be intended after Debts paid. The Teſtator has

made his real Eſtate ſubject, in caſe the perſonal Eſtate fail.

The Decree was affirmed.

N. B. In this Caſe the real and perſonal Eſtates were much of the ſame Value, and the Debts muſt have exhauſted the one or the other Fund; ſo that had the Judgment of the Court been otherwiſe, the Man's Children would have been left without any Proviſion.

Dillon v Coppin. 4 Mr VC. 660.

Paſchæ 8 Geo. II.

25 *March* 1735.

Lutwyche verſus *Lutwyche.*

A Deſcent of Lands in *Borough Engliſh* to the youngeſt Son will not prevent his having a full diſtributive Share of his Father's perſonal Eſtate.

THomas *Lutwyche*, Eſq; died inteſtate, poſſeſſed of a perſonal Eſtate, and ſeiſed of a Copyhold in Fee at *Turnham Green*, which was in the Nature of *Borough Engliſh.*

This Cauſe came on by way of amicable Suit to determine this Queſtion, Whether the youngeſt Son ſhould have an equal Share with the other Children of the perſonal Eſtate, excluſive of the Copyhold, or only ſo much as with that Copyhold would make his Portion equal to that of the other Children?

Mr. *Solicitor General* for the Plaintiff. This Queſtion intirely depends upon the Statute 22 & 23 *Car.* 2. *cap.* 10. *ſect.* 5. *of diſtributing Inteſtates Eſtates.* The *Borough Engliſh* Eſtate by Law deſcends to the Plaintiff, and there are no expreſs Words in the Statute to take it from him, or to exclude him from his Share of the perſonal Eſtate.

Mr. *Green.* The Words of the Statute are to exclude ſuch Child, who ſhall have any Eſtate by the Settlement

of the Inteſtate, and the Plaintiff takes this *Borough Engliſh* Eſtate as his Heir at Law, and not by any Settlement.

Mr. *Attorney General* for the Defendant. The Statute of Diſtributions was penn'd by Civilians, without Aſſiſtance of the Common Lawyers. The primary and ultimate Intention of that Statute was to make all the Children of the Inteſtate equal; and if the Plaintiff prevails, there will be an Inequality.

A Perſon may take by Settlement and by Deſcent alſo; as, where an Eſtate by Settlement is limited to the Heir of the Body of a Tenant for Life, ſuch Heir comes in both by Deſcent and Settlement. The Exception in the Statute is, of the Heir at Law only; the Queſtion then is, Who is meant by Heir at Law? In common Parlance, Heir at Law means nothing but eldeſt Son. According to the Common Law the eldeſt Son is the Heir at Law, and diſtinguiſhed from the Heir by Cuſtom. The Statute means only the eldeſt Son. *Co. Lit.* 376. Title *Warranty.* Heir in *Borough Engliſh* is not Heir at Common Law. *Hob.* A Man may be Heir to the Land, and not Heir at Law to the Perſon. There is no Pre-eminence but to the eldeſt Son by any Law Divine or Human; the Act intended to put the Heir in that Senſe. In the Statute it is Heir at Law in the ſingular Number. If any other but the eldeſt Son had been intended to be excepted, it would have been Heir or Heirs at Law. *Pratt* verſus *Pratt*, *May* 11, 1732. Decreed at the *Rolls*, that the Heir in *Borough Engliſh* ſhould bring his Eſtate into *Hotchpot.*

Mr. *Brown.* Before the Statute of Diſtribution, all Lands, as well as Goods, were (by the Civil Law) diſtributable among the Children equally; and the Intent of that Statute is the ſame, except with reſpect to the Heir at Law. The Word *Settlement* is of various Significations. Money advanced to a Stranger to make a Settlement on a Child is not an Advancement within the Words of the Act; yet in Equity it has always been held to be an Advancement.

The Act is to be conſtrued in an equitable Senſe, and not according to the Letter of it; and Equality among younger Children is intended by it. Perſonal Advancement to the Heir at Law is not within the Statute; yet he muſt bring it into *Hotchpot*. *Phiney* verſus *Phiney*, 2 *Vern.* 638. The Son 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. 2 *Vern.* 558. *Willcox* verſus *Willcox*, the Father covenanted to ſettle 100 *l. per Annum* on his Son, but did not; yet having ſuffer'd 100 *l. per Annum* to deſcend upon him, that was decreed to be a good Performance of the Covenant, and the perſonal Eſtate was order'd to be diſtributed among the other Children according to the Cuſtom of the City of *London*. A Perſon buying *Borough Engliſh* Lands, knows the ſame will deſcend to his youngeſt Son; which is the ſame Thing as a Settlement or Proviſion for the youngeſt Son. The Act is only in Favour of Primogeniture. There are different *Species* of Heirs at Law; the Heir at Law ſpoken of in the Act by way of Eminence, is the moſt worthy. The Act comprehends only one Heir, and that muſt be Eldeſt, which is the moſt worthy. *Carter* verſus *Crowley*, *Raym.* 553. All the Repreſentatives have the Inteſtate for their Correlative throughout the whole Act. *Tayler* verſus *Webb*, *Styles* 207. where the Act ſpeaks of the Wife, it means the Wife of the Inteſtate; of a Child, the Child of the Inteſtate; of the Heir at Law, the Heir at Law of the Inteſtate, *&c.* Heir at Law in *Borough Engliſh* is not Heir at Law to the Inteſtate, but only to the Land; therefore ſuch an Heir at Law cannot be meant by the Act. Suppoſe the Inteſtate had left only Daughters; all the Eſtate, both Real and Perſonal, would be equally divided amongſt them. If the Heir in *Borough Engliſh* is meant by the Statute, he muſt be privileged throughout. The privilege is not annex'd to the Land, but to the Perſon: And ſuppoſe the Heir in *Borough Engliſh* had had a Freehold Eſtate of 1000 *l. per Annum* ſettled on him by the Inteſtate in his Life-time, it could not have been ſaid he ſhould bring the Freehold Eſtate into *Hotchpot*, and not

the *Borough Engliſh*; both or neither muſt be brought into *Hotchpot.*

Reply. The Intent of the Statute to make all the Children equal does not appear. The Queſtion is, If there are any Words in the Statute to exclude the Heir in *Borough Engliſh* from having his Share in the Inteſtate's perſonal Eſtate? There are none. Before the Statute the Heir in *Borough Engliſh* muſt by the Common Law have had the Eſtate: It follows then that he muſt have it ſtill; for, the Law is not alter'd.

Lord Chancellor. The Queſtion is, Whether the firſt Words in the Statute (*the Reſidue to be divided by equal Portions amongſt the Children of the Inteſtate*) are extenſive enough to bring the *Borough Engliſh* Eſtate into *Hotchpot?* The ſecond Queſtion is, Whether by the ſecond Words (*other than ſuch Child (not being Heir at Law) who ſhall have any Eſtate by the Settlement of Inteſtate, or ſhall be advanced by the Inteſtate in his Life-time, by Portion or Portions equal to the Share which ſhall by ſuch Diſtribution be allotted to the others to whom ſuch Diſtribution ſhall be made*) the Plaintiff can be excluded? It is proper to take into Conſideration what the Law was before the Statute. All the Children had a Right to Adminiſtration if there was no Wife; and if Adminiſtration was granted to one, a Prohibition went to compel the Ordinary to diſtribute. The firſt Clauſe ſpecifies to what Perſons Diſtribution ſhall be made, that is, among all the Children equally, except thoſe who had any Eſtate by Settlement, or ſhould be advanced; and thoſe which were advanced are totally excluded. The third Clauſe is, If any Child is advanced in Part, ſuch Child is to have ſo much more as will make his Share equal with the reſt unadvanced: They are material Words, *other than ſuch Child who ſhall have any Eſtate by Settlement from the Inteſtate.* The Queſtion is, What is meant by the Word *Settlement?* There was no Settlement made by the Inteſtate in this Caſe; it was only a common Purchaſe made by him. The Plaintiff took the Eſtate by Deſcent, and not

by

by any Settlement. The Act of Law throws the Eſtate upon the youngeſt Son; not the Act of the Father: He has permitted the Land to deſcend to the youngeſt Son, but he is not by the Words of the Act thereby excluded from his Share of the perſonal Eſtate. It is a *Caſus Omiſſus*. I cannot ſupply any Clauſe in an Act of Parliament, though I may explain doubtful Words. The Exception in the Statute was intended for one Perſon; I cannot ſay it was ſo intended throughout. The laſt Clauſe is Explanatory, and ſhews what was intended to be excepted, *only Land which the Heir at Law would have by Deſcent or otherwiſe*; not pecuniary Advancement. In common Parlance the Heir at Law is the eldeſt Son, in Relation to the Inteſtate, and is only one Perſon: And not the Heir in *Borough Engliſh:* The Exception extends only to the eldeſt Son. But there is no Law for the Plaintiff to bring the *Borough Engliſh* Eſtate into *Hotchpot*, only this Statute; and there are no Words here that oblige him to it.

Decreed an Account of the perſonal Eſtate of the Inteſtate, and that the Plaintiff have an equal Share, without Regard to the Value of the *Borough Engliſh* Eſtate.

N. B. The Caſe of *Pratt* and *Pratt* came after this Caſe before the Lord Chancellor *Talbot*; and he reverſed the Decree of the *Maſter of the Rolls*, and decreed agreeable to this Caſe. *Vide* Appendix to *Robinſon* of *Gavelkind.*

Hillarii 10 Geo. II.

Barbuit's Caſe.

Barbuit had a Commiſſion, as Agent of Commerce from the King of *Pruſſia* in *Great Britain*, in the Year 1717. which was accepted here by the *Lords Juſtices* when the King was abroad. After the late King's Demiſe his Commiſſion was not renewed until 1735. and then it was, and allow'd in a proper Manner; but with a Recital of the Powers given him in the Commiſſion, and allowing him as ſuch. Theſe Commiſſions were directed generally to all the Perſons whom the ſame ſhould concern, and not to the King: And his Buſineſs deſcribed in the Commiſſions was, to do and execute what his *Pruſſian Majeſty* ſhould think fit to order with regard to his Subjects trading in *Great Britain*; To preſent Letters, Memorials and Inſtruments concerning Trade, to ſuch Perſons, and at ſuch Places, as ſhould be convenient, and to receive Reſolutions thereon; and thereby his *Pruſſian Majeſty* required all Perſons to receive Writings from his Hands, and give him Aid and Aſſiſtance. *Barbuit* lived here near twenty Years, and exerciſed the Trade of a Tallow-Chandler, and claim'd the Privilege of an Ambaſſador or Foreign Miniſter, to be free from Arreſts. After hearing Counſel on this Point,

Of Foreign Miniſters, Conſuls, &c. Whether privileged by the Statute, which is declarative of the Law of Nations; there is no preſcript Form of appointing them. A foreign Miniſter who uſes Merchandizing does not thereby loſe his Privilege; tho' any of his Retinue in ſuch Caſe would. Matters of Commerce may be proper Objects for the Imployment of Embaſſadors. Yet, *quære* whether Conſuls have ſuch Privilege?

Lord Chancellor. A Bill was filed in this Court againſt the Defendant in 1725. upon which he exhibited his Croſs Bill, ſtiling himſelf Merchant. On the hearing of theſe Cauſes the Croſs Bill was diſmiſſed; and in the other, an Account decreed againſt the Defendant. The Account being paſſed before the Maſter, the Defendant took Exceptions to the Maſter's Report, which were over-ruled; and then the Defendant was taken upon an Attachment for Non-payment, &c. And now, ten Years after the Com-

mencement of the Suit, he inſiſts he is a public Miniſter, and therefore all the Proceedings againſt him null and void. Though this is a very unfavourable Caſe, yet, if the Defendant is truly a public Miniſter, I think he may now inſiſt upon it; for, the Privilege of a public Miniſter is to have his Perſon ſacred and free from Arreſts, not on his own Account, but on the Account of thoſe he repreſents; and this ariſes from the Neceſſity of the Thing, that Nations may have Intercourſe with one another in the ſame Manner as private Perſons, by Agents, when they cannot meet themſelves. And if the Foundation of this Privilege is for the ſake of the Prince by whom an Ambaſſador is ſent, and for ſake of the Buſineſs he is to do, it is impoſſible that he can renounce ſuch Privilege and Protection: For, by his being thrown into Priſon the Buſineſs muſt inevitably ſuffer. Then the Queſtion is, Whether the Defendant is ſuch a Perſon as 7 *Anne, cap.* 10. deſcribes; which is only declaratory of the antient univerſal *Jus Gentium:* The Words of the Statute are, (*Ambaſſadors or other public Miniſters*) and the Exception of Perſons *trading* relates only *to their Servants*; the Parliament never imagining that the Miniſters themſelves would Trade. I do not think the Words *Ambaſſadors* or *other public Miniſters*, are ſynonymous. I think that the Word *Ambaſſadors* in the Act of Parliament, was intended to ſignify Miniſters ſent upon extraordinary Occaſions, which are commonly called *Ambaſſadors Extraordinary*; and *public Miniſters* in the Act take in all others who conſtantly reſide here; and both are intitled to theſe Privileges. The Queſtion is, Whether the Defendant is within the latter Words? It has been objected that he is not a public Miniſter, becauſe he brings no Credentials to the King. Now, although it be true that this is the moſt common Form, yet it would be carrying it too far to ſay, that theſe Credentials are abſolutely neceſſary; becauſe all Nations have not the ſame Forms of Appointment. It has been ſaid, That to make him a public Miniſter he muſt be imploy'd about State Affairs. In which Caſe, if State Affairs are uſed in Oppoſition to Commerce, it is wrong: But if only to ſignify the Buſineſs

between Nation and Nation the Propoſition is right: For Trade is a Matter of State, and of a publick Nature, and conſequently a proper Subject for the Imployment of an Ambaſſador. In Treaties of Commerce thoſe imploy'd are as much public Miniſters as any others; and the Reaſon for their Protection holds as ſtrong: And it is of no Weight with me that the Defendant was not to concern himſelf about other Matters of State, if he was authorized as a public Miniſter to tranſact Matters of Trade. It is not neceſſary that a Miniſter's Commiſſion ſhould be general to intitle him to Protection; but it is enough that he is to tranſact any one particular Thing in that Capacity, as every Embaſſador Extraordinary is; or to remove ſome particular Difficulties, which might otherwiſe occaſion War. But what creates my Difficulty is, That I do not think he is intruſted to tranſact Affairs between the two Crowns: The Commiſſion is, to aſſiſt his *Pruſſian Majeſty*'s Subjects here in their Commerce; and ſo is the Allowance. Now this gives him no Authority to intermeddle with the Affairs of the King; which makes his Imployment to be in the Nature of a Conſul. And although he is called only an Agent of Commerce, I do not think the Name alters the Caſe. Indeed there are ſome Circumſtances that put him below a Conſul; for he wants the Power of Judicature, which is commonly given to Conſuls. Alſo their Commiſſion is uſually directed to the Prince of the Country; which is not the preſent Caſe: But at moſt he is only a Conſul.

It is the Opinion of *Barbeyrac*, *Wincquefort* and others, That a Conſul is not intitled to the *Jus Gentium* belonging to Ambaſſadors.

And as there is no Authority to conſider the Defendant in any other View than as a Conſul, unleſs I can be ſatisfied that thoſe acting in that Capacity are intitled to the *Jus Gentium*, I cannot diſcharge him.

Note; The Perſon was after diſcharged by the *Secretary's Office*, ſatisfying the Creditors.

Trinitatis

Trinitatis 7 Geo. II.

Bradford v Belfield 2. Sim. & Knocker v Bembury. 6 Vin. 313.

Tanner verſus *Morſe.*

1734. vi Browne's Rep 437

3 *Will. Rep.* 295. S. C. under the Name of *Tanner* and *Wife*, *Trin.* 1734. on a Rehearing (before Lord *Talbot*) from a Decree of the Lord Chancellor *King*'s. A Deviſe in the following Words: *As to my Temporal Eſtate, I bequeath to my Nephew* T. (the Teſtator's Heir at Law) 50 *l.* Then after ſeveral Legacies, *And all the Reſt and Reſidue of my Eſtate, Goods and Chattels whatſoever, I give and bequeath to my beloved Wife* M. C. *whom I make my full and ſole Executrix.* This is a Deviſe of the Fee-ſimple Eſtate of the Teſtator.

THomas *Carter*, *March* 10, 1725. made his Will, whereby he deviſed in the following Manner: "As to my "Temporal Eſtate, I bequeath to my Nephew *Tanner* "(the Teſtator's Heir at Law) the Sum of 50 *l.*" Then he gives ſeveral Legacies: "And all the Reſt and Reſidue of "my Eſtate, Goods and Chattels whatſoever, I give and "bequeath to my beloved Wife *Mary Carter*; whom I "make my full and ſole Executrix."

The Heir at Law brought this Bill againſt the Deviſee and Executrix, who married the Defendant *Morſe*, to have an Account of what Deeds, belonging to the Teſtator ſhe had got in her Cuſtody; and to ſet forth what Right ſhe claimed to the real Eſtate of *Thomas Carter*, and whether he made any Will; and if ſo, to ſet it forth. And the Plaintiff, to make himſelf proper in a Court of Equity, had charged in his Bill, that the Defendants refuſed to let him have a Sight of the Deeds; and that they threaten'd, if he brought an Ejectment, to ſet up ſome old Incumbrances to bar it. The Queſtion was, Whether any, and what Eſtate in the Teſtator's Lands paſſed to the Defendant by this Will?

For the Plaintiff it was ſaid, That there were no Words in the Will that could be conſtrued to extend to the Inheritance; or if any, it muſt be the Words, *as to my Temporal Eſtate*, which (in the ſtricteſt Senſe) relate only to the Eſtates of a certain Duration, that are to continue for a Time only, and have never been held to paſs an Eſtate of Inheritance. As to the Words, *All the Reſt and Reſidue of*

my Eſtate, they muſt have Relation to ſomewhat that went before; and there is nothing diſpos'd of in the Will before this Clauſe, but only ſome Legacies charged upon the perſonal Eſtate. So held in the Caſe of *Markant* and *Twiſden*, *Abr. Eq. Ca.* 212. where, notwithſtanding there was the Word *Deviſe*, yet it was decreed not to paſs the Inheritance: Whereas in the preſent Caſe there is no ſuch Word as *Deviſe*; nor even the Word *Heir*, *Land* or *Tenement*. It was farther urged, that the Words of the Will were not certain or poſitive enough to diſinherit the Heir; *Bowman* verſus *Milbank*, 1 *Lev.* 130. a Deviſe of *all to his Mother* was held to be incertain, and not ſufficient to diſinherit the Son.

It was ſaid, on the other hand, for the Defendant, That even if the Caſe would admit of any Doubt, yet the Plaintiff was not proper to come into this Court. That here were no Mortgages, Leaſes or Truſts, that could have been ſet up by the Defendant; which he has told the Plaintiff in his Anſwer: So that whatever the Plaintiff did at firſt, yet upon the coming in of the Anſwer, he might ſafely have proceeded by Ejectment.

Then, as to Merits, it was ſaid, That the Words *Temporal Eſtate* have been conſtrued, and very properly, to extend to all the Eſtates both Real and Perſonal; and that in Oppoſition to the Word *Eternal*. The Word *Temporal* is the ſame as *Worldly*; and as ſuch, it comes within the Reaſon of Lord *Warrington*'s Caſe, where the Words were, *As to my Worldly Eſtate, I will that all my Debts be paid*, &c. And by Virtue of theſe Words, *Worldly Eſtate*, it was held that his real Eſtate was liable to his Debts. But the latter Clauſe itſelf would be ſufficient to paſs a real Eſtate of Inheritance: And ſo are the Opinions of the Court in the old Reports. There is a Caſe in *Styles*, where the Words *all my Eſtate* were held to paſs an Inheritance. And another in *Skinner's Reports*, where *all my Eſtate* paſſed every Thing the Teſtator had. *Hyley* verſus *Hyley*, 3 *Mod.* 228. *All the remaining Part of my Eſtate*. So in 1 *Chan. Caſes*, *Tyrrel* verſus *Page*, 262. And in 4 *Mod.* 89.

Carter verſus *Horner*, *Salk.* 236. *Bridgwater* verſus *Bolton*, 2 *Vern.* 564. *Murry* verſus *Wiſe*, 687. *Ackland* verſus *Ackland*, 690. *Beacroft* verſus *Beacroft*. And likewiſe the Caſe of *Awdrey* verſus *Middleton*, in 1716. where the Words were, *As to all my Worldly Eſtate, I give* (ſome Legacies) *and all the reſt of my Goods, and Chattles, and Eſtate, I give to* Middleton; and the Queſtion was, Whether the real Eſtate paſſed by the Will? The Lord *Cowper* held, That from the Frame of the whole Will the Teſtator intended it; and accordingly decreed the real Eſtate ſhould paſs: And that Caſe does not vary in any Particular from the preſent, except the Word *Worldly* inſtead of *Temporal*. *All my Concerns* has been held to paſs a real Eſtate, and that upon a Point reſerved upon a Trial at an Aſſize. So, *and whatever elſe I have in the World* has paſſed an Eſtate of Inheritance.

Lord Chancellor King, (before whom this Cauſe was firſt heard). You have cited no Caſe where the Word *Temporal* has been uſed. But to me it ſeems clearly to relate to every Eſtate of this World: For there is nothing here but what is *Temporal*; every Thing muſt have an End; and the Teſtator certainly intended all the remaining Part of his Eſtate to go to his Wife, as well real as perſonal. But then, whether ſhe will take an Eſtate for Life, or in Fee, I do not determine; that Point is not before me. If they have a mind to try it, they muſt ſtay till ſhe is dead.

The Plaintiff (being Heir at Law) inſiſted upon trying the Validity of this Will at Law, and likewiſe what would paſs by it. And accordingly the *Lord Chancellor* retained the Bill till they had a Trial.

On the 29th of *June* 1734. *Trin.* 8 G. 2. This Cauſe was reheard by the Lord *Talbot*, who affirm'd the Lord *King*'s Decree; and decreed an Eſtate in Fee-ſimple to paſs by the Words of the Will.

See the Caſe of Neeves *verſus* Winnington, 3 Mod. 45. *where a Deviſe of* all his Eſtate *was held to paſs a Fee by the whole Court.*

FINIS.

A TABLE

OF THE

PRINCIPAL MATTERS contained in the foregoing CASES.

Abatement of Suit.

THE Teſtator pleaded, and died. This plea cannot be argued now; the Executor may plead *de novo*. *Page* 3

Account. See *Uſurious Contract.*

Ademption of Legacies. See *Deviſe*, ſec. 28. *Legacies*, ſec. 4.

Adminiſtrator.

1. Adminiſtration is granted to two; one of them dies; the Adminiſtration ſurvives to the other. 127 *to* 129
2. *A.* deviſes to his Grandchildren *B. C.* and *D.* 1000 *l.* apiece, the Intereſt to their Uſe; and if any dies, to the Survivors and Survivor; the Intereſt to be paid to their Father to their Uſe. *B.* dies an Infant; then *C.* dies. The Share which *C.* took by the Death of *B.* ſhall not ſurvive to *D.* but go to the Father, Adminiſtrator of *B.* *Page* 124 *to* 126
3. A Huſband ſhall be charged as Adminiſtrator to his Wife, by Reaſon of ſuch Part only of her Eſtate as he did not reduce into Poſſeſſion during the Coverture. 173 *to* 175
4. Difference between legal and equitable Aſſets, and the Application of them in this Court with Reſpect to Creditors. 220 *to* 226

Advancement. See *Deviſe*, *Diſtribution*, *Portions*, *Settlement.*

Advowſon.

Whether an Advowſon paſſes by the Word *Tenement*. 143 *to* 145

Age. See *Infant.*

Agree-

A TABLE of Principal Matters.

Agreements.

See *Bargains, Fraud, Marriage.*

An Agreement between Tenant in Tail and a Remainder-man to divide Money which was to be laid out in Land and ſettled, carried into Execution in this Court after the Death of Tenant in Tail without Iſſue, in Favour of his Executor. *Page* 271 *to* 274

Ambaſſadors.

Of Ambaſſadors and other foreign Miniſters their Privilege, which they cannot waive, it being the Privilege of their Maſters. Trade and Commerce are Matters of State. 281 *to* 283

Anſwer, Plea and Demurrer.

1. A Plea put in by the Teſtator cannot be argued after his Death. 3
2. Whether the Anſwer of a Wife, without Proof, ſhall avail her againſt her Fine. 42, 43
3. Where an Infant, in his Anſwer to a Creditor's Bill, inſiſted that the Parol ought to demur during the Minority; it was order'd accordingly, although his Counſel would have waived it as prejudicial to him. 198, 199

Appointment.

1. A Father has a Power to appoint a certain Sum for the Advancement of his younger Children: He has ſeveral Children and deviſes the whole Sum to one of them, reciting that the reſt were otherwiſe provided for by their Grandfather. This is not a good Appointment. *Page* 72 *to* 78
2. In what Caſe the younger Child, who becomes eldeſt, is capable of an Appointment in his Favour, out of Money which was provided for younger Children. 93 *to* 96

Articles. See *Agreements, Bargains.*

Aſſets.

See *Executor, Heir.*

1. Where a Bond given to a kept Miſtreſs ſhall affect the real Eſtate in Caſe of Deficiency of perſonal Aſſets; although as to theſe latter it was poſtponed, in Point of Payment, even to ſimple Contract Creditors. 153 *to* 157
2. A Huſband ſhall be charged as Adminiſtrator to his Wife, by Reaſon of ſuch Part only of her Eſtate as he did not reduce into Poſſeſſion during the Coverture. 173 *to* 175
3. Difference between legal and equitable Aſſets, and in the Application of them in this Court with reſpect to Creditors. 220 *to* 226
4. For *Specifick Legacies*, ſee *Deviſe*, ſec. 28.

Authority. See *Power.*

A TABLE of Principal Matters.

Bankrupt.

1. WHERE the Aſſignees under a Commiſſion were relieved as to Money paid by the Bankrupt upon an uſurious Contract. *Page* 38 *to* 41
2. Where a Bankrupt conveys the Equity of Redemption of his Eſtate which was in Mortgage, Whether that ſhall bind his Aſſignees? and how far this Court will interpoſe againſt the Purchaſer? 65 *to* 70
3. What Act of the Commiſſioners on the Day of the Bankrupt's Death, and before Notice of it, ſhall be held a *Dealing in the Commiſſion* within the Statute. 184 *to* 186
4. The Statutes of Bankrupts are to be conſtrued beneficially for the Creditors. 185, 186
5. Whether an Act of Bankruptcy can be purged by Length of Time? 243, 244
6. What Creditors may Petition, and have Relief under the Commiſſion. 243, 244

Bargains.

1. Hard and unconſcionable Agreements obtained by taking Advantage of a Man's Neceſſities, ſhall be relieved againſt in this Court. 38 *to* 41, 111 *to* 116
2. Bond to make Payments for obtaining an Office in the *Exciſe*, relieved againſt. 140 *to* 143
3. Where a Bond given to a kept Miſtreſs ſhall not be relieved againſt, unleſs obtained by Fraud. 153 *to* 157
4. There may be a Degree of Unfairneſs in an Agreement or Bargain, which will not be ſufficient to ſet it aſide; but for which this Court will refuſe its Aid to carry it into Execution. *Page* 234 *to* 239

Bargain and Sale. See *Recovery*, ſec. 2.

Baron and Feme.

See *Recovery*, ſec. 2, 3.

1. Where a Fine by Huſband and Wife of her Truſt-Eſtate ſhall bind the Wife, even tho' ſhe ſwears by her Anſwer that ſhe was compelled to join. 41, 42 43
2. The Wife, with the Huſband's Privity, obtains an unreaſonable Bond, ſome ſmall Sums being advanced by the Huſband, and Services pretended to be performed by the Wife; decreed to ſtand as a Security only for the Money advanced, and the Huſband to be at Liberty to bring a *Quantum Meruit* for the Services. 111 *to* 116
3. Whether a Feme Covert Tenant in Tail, and her Huſband, can (in order to ſuffer a Recovery) make a good Tenant to the *Præcipe*, without a Fine. 167
4. In what Caſe a Choſe in Action, which belonged to the Wife, and was not recovered during the Coverture, ſhall go to the Executor of the Huſband, and not to the Wife who ſurvived. 168 *to* 170
5. The Cuſtody of a Lunatick's Eſtate is granted to Baron and Feme, ſhe being the next of

Kin; ſhe dies; the Grant is determined. *Page* 143

6. Where the Huſband ſhall be deemed a Purchaſer of a Bond-Debt due to his Wife; and what may be a ſufficient Conſideration for it. 168 *to* 170
7. Where there is an Agreement to ſettle a perſonal Eſtate in Truſtees, in Truſt for Huſband and Wife, and the Survivor; and a Deed is prepared, but not executed, and the Huſband dies, the Wife ſhall have it in her own Right. 171 *to* 173
8. A Huſband is liable, during the Coverture, to pay the Debts which his Wife owed before Marriage; but after her Deceaſe can only be liable as Adminiſtrator, for ſuch Part of her Eſtate as he did not reduce into Poſſeſſion during the Coverture, and not for any Fortune which he had before received with her, or in her Right. 173 *to* 175

Bill. See *Debts*, ſec. 8.

Bond.

Bond given to a kept Miſtreſs how poſtponed to ſimple Contract Creditors. 153 *to* 157
See *Baron and Feme*, ſec. 6.

Borough-Engliſh. See *Diſtribution*, ſec. 2.

Commerce. See *Ambaſſadors.*

Common Recovery. See *Recovery.*

Conſideration. See *Baron and Feme*, ſec. 6. *Infant*, ſec. 2.

Conſul.

Whether a Conſul has the Privilege of a public Miniſter. *Page* 281 *to* 283

Contingency. See *Debts*, ſec. 5. *Remainders*, *Truſtees.*

Conveyances.

1. An abſolute Conveyance will not eaſily be preſumed to be but a Mortgage, eſpecially if attended with a long uninterrupted Poſſeſſion. 61 *to* 64
2. An abſolute Conveyance by one Deed, and a Defeazance by another, is an uſual Method of Mortgaging in the Northern Parts; but ought to be diſcouraged as an Inlet to Fraud. 63, 64

Copyholds.

1. The want of a Surrender to the Uſe of a Will, in what Caſes to be ſupplied in Equity. 35, 36, 37
2. *A.* deviſes his real Eſtate to be ſold to pay Debts and Legacies, and ſubject to Debts and Legacies his perſonal Eſtate to his Siſter; the Defect of a Surrender of Copyhold to the Uſe of his Will, ſhall not be ſupplied if the other Eſtates are ſufficient to pay the Debts. 78 *to* 80

Coſts.

Where in a Cauſe and Croſs Cauſe, *A.* in the firſt Cauſe charges a Matter, and does not confeſs the contrary thereof in the firſt Anſwer to the Croſs

Croſs Bill, but does in the ſecond; this is a good Reaſon to puniſh that Party with Coſts. *Page* 79

Creditors.

See *Debts*, *Debtor*, &c.

Creditors by Simple Contract, how preferred againſt a Bond given to a kept Miſtreſs. 153 *to* 157

Covenant. See *Heir*, ſec. 4. *Settlement*, ſec. 2.

Cuſtoms of London. See *London.*

Debts, Debtor and Creditor.

See *Bond.*

1. IN what Caſe ſubſequent Creditors may be defeated by a Settlement made after Marriage for a valuable Conſideration. 64, 65
2. A Deed by a Truſtee acknowledging that he has received the Truſt-Money, ſhall bind his Aſſets as a Specialty; but ſhall not bind his Heir who is not named. 109, 110
3. Words in a Will, by which a real Eſtate ſhall be chargeable with Debts, if the perſonal prove inſufficient. 110, 111
4. A Bond for a large Sum of Money obtained from a poor Man, by preſſing him for ſmall Sums lent him, and under Pretence of Service in ſoliciting a Suit for him, was decreed to ſtand as a Security for the Money really advanced only, with Intereſt; and the other Party left at Liberty to bring a *Quantum Meruit* for the Service. 111 *to* 116
5. Where a Portion given by Settlement upon a Contingency which never happens, cannot be raiſed in Favour of Creditors. *Page* 193 *to* 195
6. Where an Infant, to a Creditor's Bill, inſiſted that the Parol ought to demur during the Minority, it was order'd accordingly; although his Counſel would have waved it as prejudicial to him. 198, 199
7. Whether Creditors who recover in this Court againſt an Executor ſhall be preferred to thoſe who afterwards obtained Judgments at Law. 217 *to* 226
8. Difference between legal and equitable Aſſets, and the Application of them in this Court with Reſpect to Creditors. Creditors may have a Bill for Relief againſt Executors. 220 *to* 226
9. Where a Debtor is made one of the Executors of his Creditor, whether it ſhall, in all Caſes, be a Releaſe of his Debt. 240 *to* 243

Decree.

1. A Decree cannot be ſet aſide by an original Bill, unleſs in Caſe of apparent Fraud. 201
2. Decrees of this Court are equal to Judgments at Law, and their Execution as effectual, or more ſo. 217 *to* 226

Deeds. See *Conveyances.*

Deviſe.

See *Eſtates*, *Legacies.*

1. Deviſe of Lands to *A.* for Life, then to his Son *B.* for Life, then to his Son *C.* and his

his Heirs for ever; and if he die without Heirs, to his two Daughters *D.* and *E.* This is an Eſtate-Tail in *C. aliter* if the Remainder over had been to a Stranger. *Page* 1, 2

2. Where a Deviſe to Truſtees in Truſt for *A.* for Life, without Impeachment of Waſte, voluntary Waſte in Houſes excepted, Remainder *to the Iſſue of her Body, &c.* ſhall be conſtrued only an Eſtate for Life *ſans Waſte*; and ſtrict Settlement decreed. 3, 8

3. Where an Eſtate-Tail ſhall ariſe by Implication or not, and for what Reaſons. 9, 14

4. Differences between *Iſſue* and *Children* in a Will. 10, 11

5. Where a Power to commit Waſte, or a Reſtraint from Waſte, or a Power of Leaſing ſhall not prevent the Deviſee from taking an Eſtate-Tail. 12

6. A Truſtee, whether by Will or Deed, ought not to do any Act to defeat the Intention of his Conſtituent. 17, 252

7. The Word *Iſſue* is, in Wills, ſometimes a Word of Limitation, at other Times a Word of Purchaſe. 17, 18

8. The Intent of the Teſtator is one principal Rule for conſtruing Wills. 19, 20, 208

9. What Deviſe over of a Term ſhall be void, as aiming at a Perpetuity. 21 *to* 27

10. Whether ſubſequent Accidents ſhall be let in to aſſiſt the Conſtruction of a Will or not. 25, 26

11. In Conſtruction of Wills, Words are not to be rejected which can have any Meaning. 29

12. In what Caſes the want of a Surrender of a Copyhold to the Uſe of a Will ſhall be ſupplied in Equity. *Page* 55, 36, 37

13. Executory Deviſes favour'd in Law and Equity, to ſupport the Teſtator's Intent, if conſiſtent with the Rules of Law. 44 *to* 52, 145 *to* 152

14. Whatever Intereſt in, or Profits of a real Eſtate the Will, *&c.* of the Anceſtor has not diſpoſed of, are thrown upon the Heir by Act of Law. *ibid.*

15. That which was a contingent Remainder in its Creation, may, by a ſubſequent Accident, become and hold good as an executory Deviſe. 48, 51

16. Deviſe of all a Man's Lands will not paſs Lands purchaſed after the making of the Will. 50

17. Deviſee ſhall have the perſonal Eſtate applied in Exoneration of the real, as well as *Hæres natus.* 55

18. How far a Deviſe over of a perſonal Eſtate ſhall hold good. See *Eſtate for Years.* 55 *to* 58, 245 *to* 250

19. In what Caſe a Portion given by the Will of the Father may, or may not, be deemed ſatisfied by a Proviſion in his Life-time. 71, 72

20. Where a Perſon has a Power to appoint a Sum for the Advancement of his Children, and has ſeveral Children, he cannot deviſe the whole Sum to one of them. 72 *to* 78

21. A Man deviſes his real Eſtate to be ſold to pay his Debts and Legacies, and ſubject to his Debts and Legacies deviſes his perſonal Eſtate to his Siſter; the Defect of a Surrender

render of a Copyhold to the Uſe of his Will, ſhall not be ſupplied if the other Eſtates ſuffice to pay the Debts. *Page* 78 *to* 80

22. *A.* deviſes, *as to all his worldly Eſtate, that his Debts be paid within one Year after his Deceaſe*; and then deviſes his real Eſtate to Truſtees for a Term, in Truſt for his Wife for Life, Remainder to his Sons ſucceſſively in Tail Male, and gives ſeveral Legacies; the real Eſtate is chargeable towards the Debts, if the perſonal is inſufficient. 110, 111

23. In what Caſe an additional Portion, upon a Contingency, chargeable on a real Eſtate in Aid of the perſonal, ſhall be raiſed in Favour of the Adminiſtrator, and not ſink for the Benefit of the Heir. 117 *to* 124

24. *A.* deviſes to his Grandchildren *B. C.* and *D.* 1000 *l.* a-piece, and the Intereſt thereof to their Uſe; and if any dies, to the Survivors; the Intereſt to be paid to their Father to their Uſe; *B.* dies an Infant, then *C.* dies: The Share which *C.* took by the Death of *B.* ſhall not ſurvive to *D.* but go to the Adminiſtrator of *C.* 124 *to* 126

25. A Freeman of *London* cannot deviſe over the orphanage Part; but if he gives Legacies to ſome of his Children inconſiſtent with it, they muſt make their Election, and cannot have both. 130 *to* 137

26. *A.* deviſes Lands and Tenements in *B.* to Truſtees, to apply Part of the Rents to charitable Uſes, and dies; the Church of *B.* becomes void, the Heir of *A.* ſhall preſent. *Page* 143 *to* 145

27. Where a Deviſe is to Truſtees for particular Purpoſes, which require a conſiderable Time to execute them, their Eſtate will ſupport a contingent Remainder happening within that Time; or otherwiſe it may be good as an executory Deviſe. 145 *to* 152

28. *A.* deviſes to *B.* 6000 *l.* *South-Sea* Annuities, to be laid out in Lands, and ſettled; and by Codicil, taking Notice of it, deviſes 1200 *l.* to the ſame Uſes; and dies poſſeſſed of a great perſonal Eſtate, but had only 5300 *l.* in *South-Sea* Annuities: This is a Specific Legacy, and ſhall not be made good out of the reſt of the perſonal Eſtate. 152, 153

29. *A.* ſets out at the Beginning of his Will *to diſpoſe of his worldy Eſtate, or all his temporal Eſtate*; this will favour a Conſtruction to paſs the Inheritance in the following Parts of the Will. All my Eſtate *at* (or *in*) ſuch a Place, may carry a Fee. 157 *to* 163, 284 *to* 286

30. The whole Complexion of a Will is to be conſidered in the Conſtruction of it. 157 *to* 163

31. Where an Eſtate is deviſed to *B.* if he marry *C.* and ſhe refuſes, and marries another; Whether the Condition be diſpenſed with in Favour of *B.* 164 *to* 167

32. Where a Deviſe of Lands to the Iſſue, in other Manner than the ſame were by Marriage Articles agreed to be ſettled, ſhall not bind the Iſ-

ſue; but he ſhall have his Election when he attains his full Age. *Page* 176 *to* 184

33. Where a real Eſtate was deviſed to a Wife for Life, with Power by Sale or Mortgage to raiſe a ſufficient Sum to pay his Debts, and all the perſonal Eſtate is alſo deviſed to her, it ſhall not be applied in Exoneration of the real. 202 *to* 211

34. The Intent of the Teſtator is to be collected from the Will itſelf. 208

35. Where a Deviſe or Settlement to raiſe Portions for Daughters, provided they marry with their Mother's Conſent, ſhall be held *in Terrorem* only. 212 *to* 217

36. Where a Sale of Stock in the public Companies, or Change of it into Annuities by Act of Parliament, will not be an Ademption of a Legacy of it. 226 *to* 228

37. An executory Deviſe to a Perſon unborn, when he ſhall attain the Age of Twenty-one Years, is good, and no Danger of Perpetuity. 228 *to* 233

38. Where parol Proof ſhall not be admitted to alter the Conſtruction of a Will. 240 *to* 243

39. *A.* having a Reverſion in Fee of Lands ſettled in the uſual Manner, upon the Marriage of *B.* his Son, deviſes the Lands in that Settlement, *on Failure of Iſſue of the Body of* B. *and for want of Heirs Male of his own Body, to his Daughter* F. *and the Heirs of her Body.* This does not give an Eſtate-Tail by Implication to *B.* The Deviſe to *F.* is Executory, and void, as being on too remote a Contingency. 262 *to* 268

40. Where a Deviſe to a Wife making her ſole Heireſs and Executrix of all his Lands, Goods, *&c.* ſhall be a Deviſe to her in Fee; and no reſulting Truſt for the Heir at Law. *Page* 268 *to* 271

41. Where Sons were favoured againſt the Siſters of the Teſtator, to have the perſonal Eſtate applied in Exoneration of the real. 274 *to* 276

Diſtribution.

1. Where 500 *l.* was bequeathed equally among the Relations of *B.* they only ſhall take who are capable of Diſtribution under the Statute: But then they ſhall take *per Capita.* 251

2. A Deſcent of Lands in *Borough Engliſh* ſhall not hinder the youngeſt Son from having a full diſtributive Share of his Father's perſonal Eſtate. 276 *to* 280

Dower.

1. A Caſe in which a Bill in this Court may be proper to have Dower aſſigned. 126, 127

2. Whether the Widow can be endowed of a Truſt-Eſtate. 138 *to* 140

Embaſſador. See *Ambaſſador.*

Enrolment. See *Recovery*, ſec. 2.

Eſcape.

AN Action is given by Statute againſt a Gaoler who lets a Priſoner eſcape who is under an Attachment for not per-

performing a Decree. *Page* 222

Eſtate.

See *Copyhold*, *Deviſe*, *Tail.*

Where the Perſonal ſhall be applied in Exoneration of the Real, or not. 53, 54, 202 *to* 211, 274 *to* 276

Eſtate for Years.

What Limitations of a Term in a Will ſhall be deemed an Affectation of a Perpetuity, and ſhall be void, or not. 21 *to* 27, 245 *to* 250

Evidence.

Parol Proof not admitted to alter the Conſtruction of a Will. 240 *to* 253

Execution.

See *Eſcape.*

Decrees in Equity and Judgments at Law, and their ſeveral Executions, are ſimilar to each other. 222, 223

Executor and Adminiſtrator.

See *Adminiſtrator*, *Deviſe.*

1. Where the Teſtator had pleaded to a Bill, and died before the Plea argued; the Executor may plead *de novo.* 3
2. The Anceſtor upon his Marriage covenants to lay out Money in Lands to be ſettled in the uſual Manner, with a Remainder to his right Heirs, the collateral Heir ſhall prevail againſt his Adminiſtratrix (who was his Widow) although the Heir took a more valuable Eſtate by Deſcent; but Lands purchaſed after the Covenant are (for ſo much) to go in Satisfaction of it. *Page* 80 *to* 93
3. The Difference where a Perſon is barely made Executor, and where he is alſo Legatee of the perſonal Eſtate. 209
4. Where an Executor forwards the Plaintiff, who is Creditor for a juſt Debt, by confeſſing the Bill; this is not *per fraudem*, and he ſhall be protected againſt the ſubſequent Judgments at Law. 217 *to* 226
5. The Difference with reſpect to the Application of legal and equitable Aſſets, in this Court, to the Payment of Creditors. 220 *to* 226
6. Where the Creditor's appointing his Debtor to be one of his Executors, ſhall not be a Releaſe of the Debt. 240 *to* 243
7. Who ſhall come within the Deſcription of *the Relations of* B. upon a Bequeſt of a Sum of Money among them. 351

Executory Deviſe. See *Deviſe*, ſec. 13, 15, 27, 37, 39.

Expoſition of Words. See *Deviſe*, *Relations*, *Tenement.*

Fine.

WHAT Fine, and by whom levied, ſhall bar contingent Remainders. 234 *to* 239

Foreign Miniſters. See *Ambaſſadors.*

Fraud.

1. No Length of Time will bar a Fraud. *Page* 63
2. 'Tis a Fraud to take a Conveyance of an Eſtate as a Mortgage, without a Defeazance. 63
3. An abſolute Conveyance by one Deed, and a Defeazance in another, is an uſual way of Mortgaging in the Northern Parts; but ought to be diſcouraged as an Inlet to Fraud. 63, 64
4. In what Caſe a Settlement after Marriage, for valuable Conſideration, ſhall not be deemed fraudulent againſt a ſubſequent Purchaſer. 64, 65
5. An unconſcionable Security obtained by taking Advantage of a Man's Neceſſities, will be relieved againſt in Equity: The like where the Money was actually paid. 38 *to* 41, 111 *to* 116
6. Where an Incumbent of a Living put a Deceit upon the Court to make a Building-Leaſe, and privately took a Fine; his Executor was decreed to refund with Intereſt and Coſts, for the Benefit of the Succeſſor; but the Leaſe held good, becauſe the Tenant was not privy to the Fraud. 199 *to* 202
7. Whether in Caſe of apparent Fraud a Decree may be ſet aſide by original Bill. 201

Gaoler. See *Eſcape.*

Grant. See *Baron and Feme*, ſec. 5.

Guardian.

A Teſtamentary Guardian ſhall have the Aſſiſtance of this Court to prevent the improper Marriage of the Infant Heir. *Page* 58, 59, 60

Heir and Anceſtor.

See *Deviſe.*

1. WHatever Intereſt in, or Profits of a real Eſtate are undiſpoſed of by the Anceſtor, deſcend to the Heir at Law, by Act of Law. 44 *to* 52, 233, 268 *to* 271
2. The Heir is favour'd againſt the Executor to have the perſonal Eſtate applied in Exoneration of the real. 54
3. An abſolute Conveyance ſhall not be preſumed to be a Mortgage, although there be an incongruous Covenant in the Deed. 61 *to* 64
4. Where the Anceſtor, upon his Marriage, covenants to lay out Money in Lands, to be ſettled in the uſual Form, with Remainder to his right Heirs, his collateral Heir ſhall have the Benefit of it againſt the Adminiſtratrix, although an Eſtate of greater Value deſcended to him; but Lands purchaſed after the Covenant are, *pro tanto*, to go in Satisfaction of it. 80 *to* 93
5. The Heir is not bound by a Specialty of the Anceſtor, if not named in it. 109, 110
6. How far the youngeſt Son is conſidered as Heir with reſpect to Lands of the Nature of *Borough Engliſh*. 276 *to* 280

Hotchpot.

A TABLE of Principal Matters.

Hotchpot. See *Diſtribution.*

Implication. See *Deviſe.*

Infant.

1. THIS Court will aſſiſt the teſtamentary Guardian of an Infant to prevent an improper Marriage. *Page* 58, 59, 60
2. Where a Settlement upon an Infant, not purſuant to Marriage Articles, ſhall not bind him; but he ſhall have his Election when he attains his full Age. 176 *to* 184
3. Where an Infant, to a Creditor's Bill, inſiſted that the Parol ought to demur during the Minority, it was order'd accordingly; although his Counſel would have waved it as prejudicial to him. 198, 199

Inrolment. See *Recovery*, ſec. 2.

Intereſt for Money.

1. Intereſt is never decreed for the Rents or Profits of an Eſtate. 2
2. In what Caſes Intereſt may be decreed for the Arrears of a Rent-charge or Annuity, and in what Caſes not? and the Reaſon. 2, 3
3. Where Intereſt of Money and the Principal muſt receive the ſame Conſtruction. 124 *to* 126 195
4. See *Portions*, ſec. 6.

Joint and Jointenancy. See *Survivorſhip.*

Iſſue.

1. The Word *Iſſue*, in a Will, is ſometimes a Word of Limitation, and ſometimes a Word of Purchaſe. *Page* 17, 18
2. When the Word *Iſſue*, in a Will, is taken for a Word of Limitation, 'tis to ſerve the Teſtator's Intent; but never can be ſo in a Deed. 22, 25

Juriſdiction.

Concerning the Power of this Court to execute its Decrees by Attachment, Sequeſtration, *&c.* 217 *to* 226

Legacies.

1. A Fourth Part of a perſonal Eſtate is deviſed in Truſt for two Daughters, the Intereſt to be paid them reſpectively during their natural Lives, and afterwards to their or either of their Children; and for Default of ſuch Iſſue to three Sons, equally to be divided, *&c.* One Daughter leaves a Son, the other dies without Iſſue; the Son ſhall take the Moiety of his Aunt. 27, 30
2. In what Caſes a Legatee ſhall reſort to the real Eſtate, where a Mortgagee is paid out of the perſonal Eſtate. 53, 54, 55
3. A Freeman of *London* may give, to ſome of his Children, Legacies inconſiſtent with their orphanage Part, and then ſuch Children ſhall not have both, but be obliged to make their Election which they will abide by. 130 *to* 137

4. In what Caſe a Sale of Stock after a Deviſe of it by Will, or a Change thereof into Annuities by Act of Parliament, will not be an Ademption of a Legacy. *Page* 226 *to* 228
5. The Ademption of Legacies, in what founded, and what Change of the Specific Thing ſhall not be an Ademption. 227
6. For *the Nature of Specific Legacies*, ſee *Deviſe*, ſec. 28.
7. *A.* by Will gives 500 *l.* to the Relations of *B.* Who ſhall take by this Deſcription; and in what Proportions? 251
8. By what Conſtructions the Profits of a real Eſtate deviſed, are to be govern'd and diſpoſed of. 145 *to* 152
See *Executor*, ſec. 3.

Limitation of Suits.

No Length of Time will bar a Fraud. 63

London.

1. A Freeman of *London* cannot deviſe over the orphanage Part, but he may give to ſome of his Children Legacies inconſiſtent with it, and then they ſhall be put to make their Election. 130 *to* 137
2. An Orphan of *London*, being under Age, cannot deviſe away his orphanage Part. *ibid.*

Lunatic. See *Survivorſhip*, ſec. 3.

Marriage and Marriage Articles and Agreements.

1. MArriage Articles are to be carried into ſtrict Execution. 13, 20, 181
2. Where a Settlement which is not made purſuant to Articles made before Marriage, ſhall not bind the Iſſue; but he ſhall have his Election when he attains his full Age. *Page* 176 *to* 184
3. Reſtraint of Marriage is not favour'd by the Common Law. 214

Merchants.

See *Bankrupts.*

If an Ambaſſador be a Merchant, he does not thereby loſe his Privilege. Otherwiſe of his Servants. 281 *to* 283

Mortgage, Mortgagor or Mortgagee.

1. When a Mortgagee is paid out of the perſonal Eſtate, what Perſons (*viz.* Creditors, *&c.*) may be allowed to ſtand in his Place. 53, 54, 55
2. An abſolute Conveyance with a long Poſſeſſion, ſhall not eaſily be preſumed a Mortgage, although there be an incongruous Covenant in the Deed. 61 *to* 64
3. An abſolute Conveyance by one Deed, and a Defeazance by another, is an uſual Method of mortgaging in the North; but ought to be diſcouraged as an Inlet to Fraud. 63, 64

Ne exeat Regno.

WHether this Writ in the old Form will prohibit going to *Scotland.* 196, 197

A TABLE of Principal Matters.

Notice.

1. PUrchaſer without Notice, of an Eſtate from a Bankrupt after an Act of Bankruptcy, how far indulged in this Court. *Page* 65 *to* 70
2. What Act of the Commiſſioners of Bankrupt on the Day of the Bankrupt's Death, and before Notice of it, ſhall be held a *Dealing in the Commiſſion* within the Statute. 184 *to* 186
3. Where a Purchaſer, without Notice of Marriage Articles, ſells to one who had full Notice, and this Vendee takes a collateral Security for the better aſſuring his Title, Whether his Purchaſe ſhall prevail againſt thoſe who claim under the Articles. 187 *to* 189
4. Where a Purchaſer, for valuable Conſideration of a ſettled Eſtate, without Notice of the Settlement, ſhall not be affected: But he who purchaſes with Notice takes the Eſtate cloathed with all its Truſts. 258, 260

Office and Officer.

1. THE Office of *Clerk of the Crown* in the Court of *King's Bench* may be held in Truſt for another, by a Perſon capable of exerciſing it. 97 *to* 108
2. Bonds given to make Payments for obtaining for the Obligors Offices in the Revenue are illegal, and this Court will relieve againſt them. 140 *to* 143

Parol-Proof. See *Evidence.*

Performance. See *Agreements, Bargains, Settlement.*

Perpetuity. See *Deviſe*, ſec. 37.

Perſonal Eſtate.

See *Diſtribution.*

1. HOW Profits of Lands are to go while an executory Deviſe is in Suſpence. *Page* 145 *to* 152
2. The reſt of a perſonal Eſtate ſhall not make good the intended *Quantum* of a Specific Legacy. 152, 153
3. Where the perſonal Eſtate ſhall be applied in Exoneration of the real, or not. 53, 54, 202 *to* 211, 274 *to* 276

Portions.

1. An Eſtate is ſettled upon the Marriage of *A.* with *B.* to the Uſe of *A.* for Life, Remainder to his Sons ſucceſſively in Tail Male, Remainder to Truſtees for One thouſand Years, upon Truſt, by Rents, Sale or Mortgage, if no Iſſue Male of *A.* by *B.* to raiſe Portions for Daughters, with Remainders over. *B.* dies, leaving no Son, but three Daughters, Whether the Portions may be raiſed in the Life-time of *A.* the Father? 31 *to* 34
2. In what Caſe Money which a Child had received ſhall not go in Satisfaction of a Portion by the Will of the Father. 71, 72
3. Where a Father has a Power to appoint a Sum of Money for the Advancement of his Children,

Children, and has ſeveral of them, he cannot give the Whole to one Child. *Page* 72 *to* 78

4. In what Caſe a younger Son, who becomes eldeſt, may be capable of an Appointment of Part of the Money which was provided for the younger Children. 93 *to* 96
5. In what Caſe an additional Portion deviſed to a Daughter upon a Contingency which happens after her Death, and chargeable on Lands, ſhall be raiſed in Favour of her Huſband her Adminiſtrator, and not ſink in the Land for the Benefit of the Heir. 117 *to* 124
6. A Settlement gives *B.* Power to charge 12000 *l.* for Portions for younger Children; and if ſhe makes no Appointment, then 2000 *l.* for each younger Son, and 3000 *l.* each Daughter, at the Age of Twenty-one, with Intereſt for Maintenance, to commence from the Appointment; and if no Appointment, then from *B.*'s Death; if any of the younger Children die before their Shares are payable, to go to the Survivor. There were four younger Sons and two Daughters; but one died in the Life-time of *B.* then *B.* died without making any Appointment; the Whole 14000 *l.* ſhall be raiſed, and Intereſt from *B.*'s Death. 189 *to* 192
7. Where a Portion given upon a Contingency, which never happen'd, cannot be raiſed in Favour of Creditors. 193 *to* 195
8. Where the Clauſe of *marrying with Conſent* ſhall be conſtrued *in Terrorem* only; but Huſbands who marry ſuch Daughters without Conſent, muſt make Settlements. *Page* 212 *to* 217

Poſſeſſion.

Poſſeſſion, eſpecially for a great Length of Time, adds conſiderable Strength to Preſumption concerning the Title of the Poſſeſſor. 61 *to* 64

Power.

1. Where a Father has a Power to appoint a Sum of Money for the Advancement of his Children, and has ſeveral younger Children, he cannot give the whole Sum to one of them, although the reſt were otherwiſe provided for. 72 *to* 78
2. In ſome Caſes a younger Son who becomes eldeſt may be capable of an Appointment in his Favour, of the Money which was intended for the younger Children. 93 *to* 96

Preſentation. See *Advowſon.*

Preſumption.

Poſſeſſion for a great Length of Time has the Preſumption of Law in Favour of it. 61 *to* 64

Privilege. See *Ambaſſadors.*

Profits. See *Legacy*, ſec. 8.

Proof. See *Evidence.*

A TABLE of Principal Matters.

Purchaſe and Purchaſer.

1. An abſolute Conveyance ſhall not be preſum'd to be only a Mortgage, eſpecially where it has been attended with a long Poſſeſſion. *Page* 61 *to* 64
2. A Settlement made after Marriage for valuable Conſideration, for Advancement of the Iſſue, may be conſidered as a Purchaſe, and may defeat a ſubſequent Purchaſer. 64, 65
3. Whether a Bankrupt may ſell the Equity of Redemption of his Eſtate or Mortgage; and how far this Court will interpoſe againſt the Purchaſer? 65 *to* 70
4. Where a Purchaſer, without Notice of Marriage Articles, ſells to one who has full Notice, and this Vendee takes a collateral Security for the better Aſſuring his Title, Whether his Purchaſe ſhall ſtand good againſt thoſe who claim under the Articles. 187 *to* 189
5. Where a Purchaſer who hath taken ſome unfair Advantage in obtaining his Purchaſe, may be allowed for laſting Improvements, and where not. 234 *to* 239
6. Where a Purchaſer of a ſettled Eſtate for a valuable Conſideration without Notice ſhall not be affected by a Family Settlement. 258 *to* 260

See *Baron* and *Feme*, ſec. 6.

Recovery.

1. A Recovery ſuffered of a Truſt-Eſtate is good, and bars the Remainders. 164 *to* 167
2. A Recovery by Huſband and Wife of her Truſt-Eſtate held good, although the Bargain and Sale, whereby the Tenant to the *Præcipe* was made, were inrolled (within ſix Months, but) not until after the Recovery was compleated. *Page* 164 *to* 167
3. Whether a Feme Covert Tenant in Tail, and her Huſband, can (in order to ſuffer a Recovery) make a good Tenant to the *Præcipe* without a Fine? 167

Relations.

Deviſe of 500 *l.* to the Relations of *B.* Who ſhall take, and in what Proportions. 251

Remainder.

See *Deviſe*, ſec. 1, 2, 13, 15.

1. What Deviſe to Truſtees for particular Purpoſes will ſupport a contingent Remainder, and how long? See *Deviſe*, ſec. 27. 238
2. Of contingent Remainders barred by Truſtees who were made to preſerve them; and the Relief. 252 *to* 262

Reſulting Truſts. See *Heir*, ſec. 1.

Satisfaction.

1. Where Lands deſcended upon the Heir at Law ſhall, or ſhall not be deemed a Satisfaction of a Covenant which the Anceſtor entred into, to purchaſe Lands of ſuch a Value. 80 *to* 93

2. In what Caſe Money which a Child had received in the Father's Life-time ſhall not go in Satisfaction of a Portion given by the Father's Will. *Page* 71, 72

3. Where, by Articles before Marriage, Lands are agreed to be ſettled; a Settlement, and Deviſe of the ſame, and other Lands, not purſuant to the Articles, although in the Words of them, ſhall not be deemed a Satisfaction; but the Iſſue ſhall have his Election at full Age, and the other Deviſes to be repriſed. 176 *to* 184

Scotland.

Whether a Writ of *Ne exeat Regno* in the old Form will prohibit going thither. 196, 197

Sequeſtration.

A Sequeſtration is ſimilar to a *Fieri Facias*, but is more effectual. 22

Settlement.

See *Marriage, Portions.*

1. Where a Proviſo in a Settlement to marry with Conſent, ſhall be held *in Terrorem* only. 212 *to* 217

2. Where a Deſcent of Lands to a Son has been held Performance of a Covenant to ſettle ſo much on him. 278

Specifick Performance. See *Agreements, Bargains, Settlement.*

Survivorſhip.

1. *A.* deviſes to his Grandchildren *B. C.* and *D.* 1000 *l.* a-piece, and the Intereſt thereof to their Uſe; and if any dies, to the Survivors and Survivor, the Intereſt to be paid to their Father to their Uſe: *B.* dies an Infant, then *C.* dies; the Share which *C.* took by the Death of *B.* ſhall not ſurvive to *D.* but go to the Adminiſtrator of *B.* *Page* 124 *to* 126

2. Adminiſtration is granted to *A.* and *B.* *A.* dies, the Adminiſtration ſurvives to *B.* 127 *to* 129

3. The Cuſtody of Lunatick's Eſtate is granted to Baron and Feme, ſhe being the next of Kin: She dies, the Grant is determined. 143

4. In what Caſe a Choſe in Action, which belonged to the Wife, and was not recovered during the Coverture, ſhall go to the Executor of the Huſband, and not to the Wife who ſurvived. 168 *to* 170

5. Where a perſonal Eſtate of the Wife is agreed to be ſettled in Truſtees for Huſband and Wife, and the Survivor; a Deed is prepared, but not executed; the Huſband dies; whether the Wife ſhall have it in her own Right. 171 *to* 173

Tail.

See *Deviſe.*

1. TEnant in Tail cannot be reſtrained from committing any Kind of Waſte. 16

2. Tenant in Tail after Poſſibility, *&c.* will be reſtrained from

from committing Waſte in Houſes or defacing a Seat. *Page* 12

3. Where Eſtates-Tail are raiſed by Implication, or not? and for what Reaſons? 9, 14, 262 *to* 268
4. In a Settlement a Remainder to *C.* for Life, Remainder to *the Heirs of his Body hereafter to be begotten*, is an Eſtate-Tail; and the Iſſue born *before* ſhall take, notwithſtanding the Words *hereafter to be begotten*. 31, 32
5. Deviſe to *A.* and his Heirs for ever, and if he die without Heirs to the two Siſters of *A.* the Deviſee; this is an Eſtate-Tail in *A.* 1, 2
6. Whether a Feme Covert Tenant in Tail, and her Huſband can, in order to ſuffer a Recovery, make a good Tenant to the *Præcipe*, without a Fine. 167

Tenement.

Whether the Word *Tenement* will paſs an Advowſon in a Will. 143 *to* 145

Term for Years. See *Eſtate for Years.*

Trade. See *Embaſſadors.*

Truſt and Truſtee.

1. Equity conſtrues Limitations of Truſts as the Law does legal Eſtates. 6
2. Difference between executory Truſts and legal Eſtates, or Truſts executed. 13, 19
3. Truſts Executory to be carried into Execution in Equity according to the Teſtator's Intent. *Page* 15, 19, 216
4. A Truſtee under Will or Deed ought not to join in any Conveyance which tends to defeat the Intent of his Teſtator, *&c.* 17, 252 *to* 262
5. The Office of the *Clerk of the Crown* in the *King's Bench* held in Truſt; and a Note decreed to be a ſufficient Declaration of the Truſt. 97 *to* 108
6. A Truſtee declares under Hand and Seal that he has received Truſt-Money; this turns that Demand into a Specialty which had been otherwiſe a Debt by Simple Contract only. 109, 110
7. Whether a Woman ſhall be endowed of a Truſt-Eſtate. 138 *to* 140
8. A Recovery ſuffered of a Truſt-Eſtate is well enough, and bars the Remainders. 164 *to* 167
9. Where Truſtees to preſerve contingent Remainders for Children unborn join to defeat them, this is a Breach of Truſt relievable in Equity; and where there is not a Purchaſer for valuable Conſideration without Notice, the Eſtate ſhall be reconvey'd to the former Uſes.

See *Deviſe*, ſec. 27, 40. *Heir*, ſec. 1.

Uſurious Contract.

IN what Caſe this Court will decree Money paid upon an Uſurious Contract to be accounted for, notwithſtanding the former Agreement of the oppreſſed

oppreſſed Party to allow ſuch Payments. *Page* 38 *to* 41

Warranty.

THE *Court of Chancery* will not relieve againſt a collateral Warranty binding before the Act for the Amendment of the Law. 237

Waſte.

1. This Court will reſtrain Tenant in Tail after Poſſibility of Iſſue extinct, from pulling down Houſes, or defacing a Seat; the like of Tenant for Life diſpuniſhable of Waſte by expreſs Grant. *Page* 12
2. Tenant in Tail cannot be reſtrained by the *Court of Chancery* from committing any Manner of Waſte. 16

Will. See *Deviſe, Evidence, Legacies, Portions, Truſts.*

Writ.

Whether this Court will be induced to alter the Form of an original Writ, to avoid a Queſtion in Law concerning its being either ineffectual; or incongruous with an Act of Parliament. 196, 197

FINIS.