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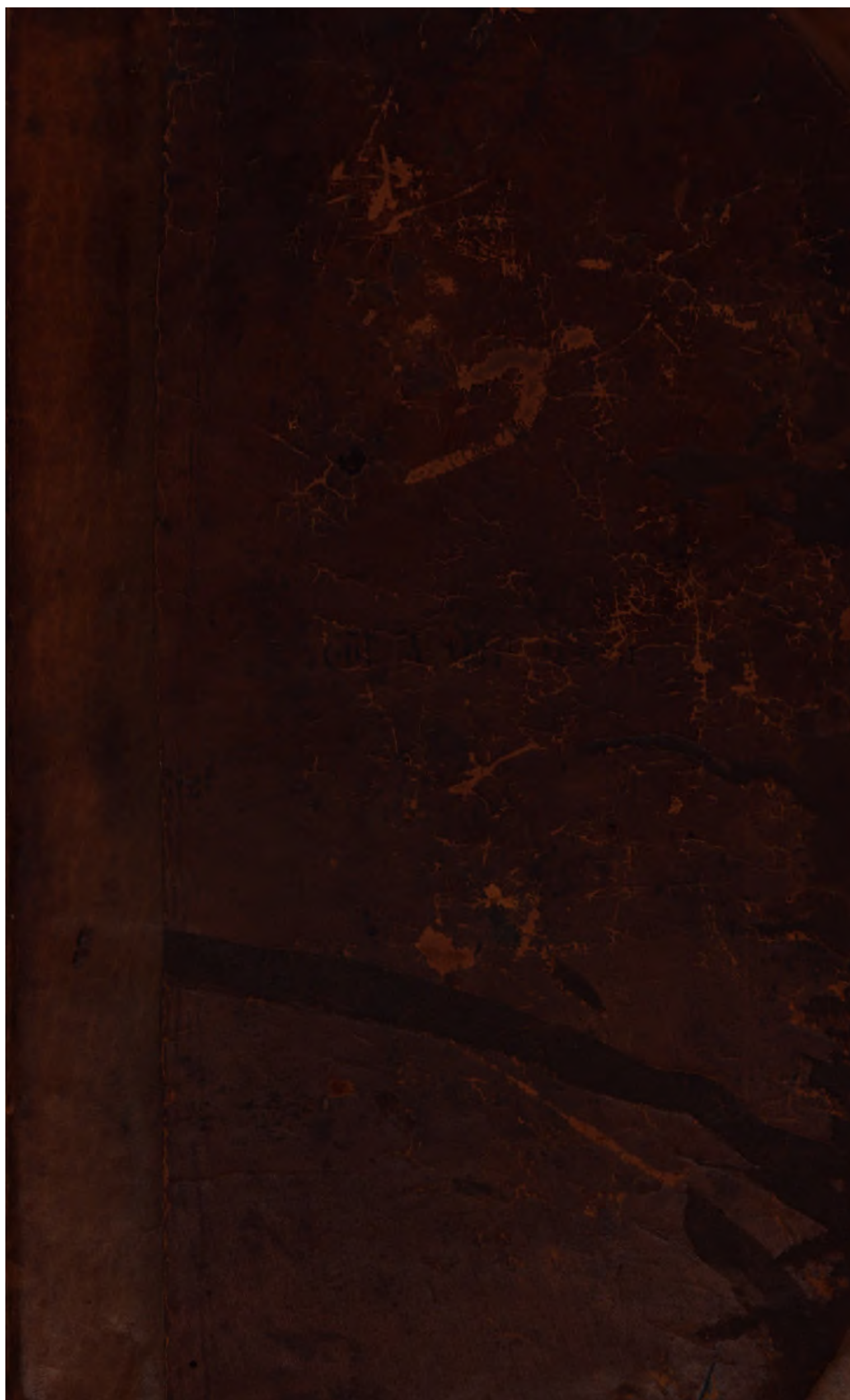
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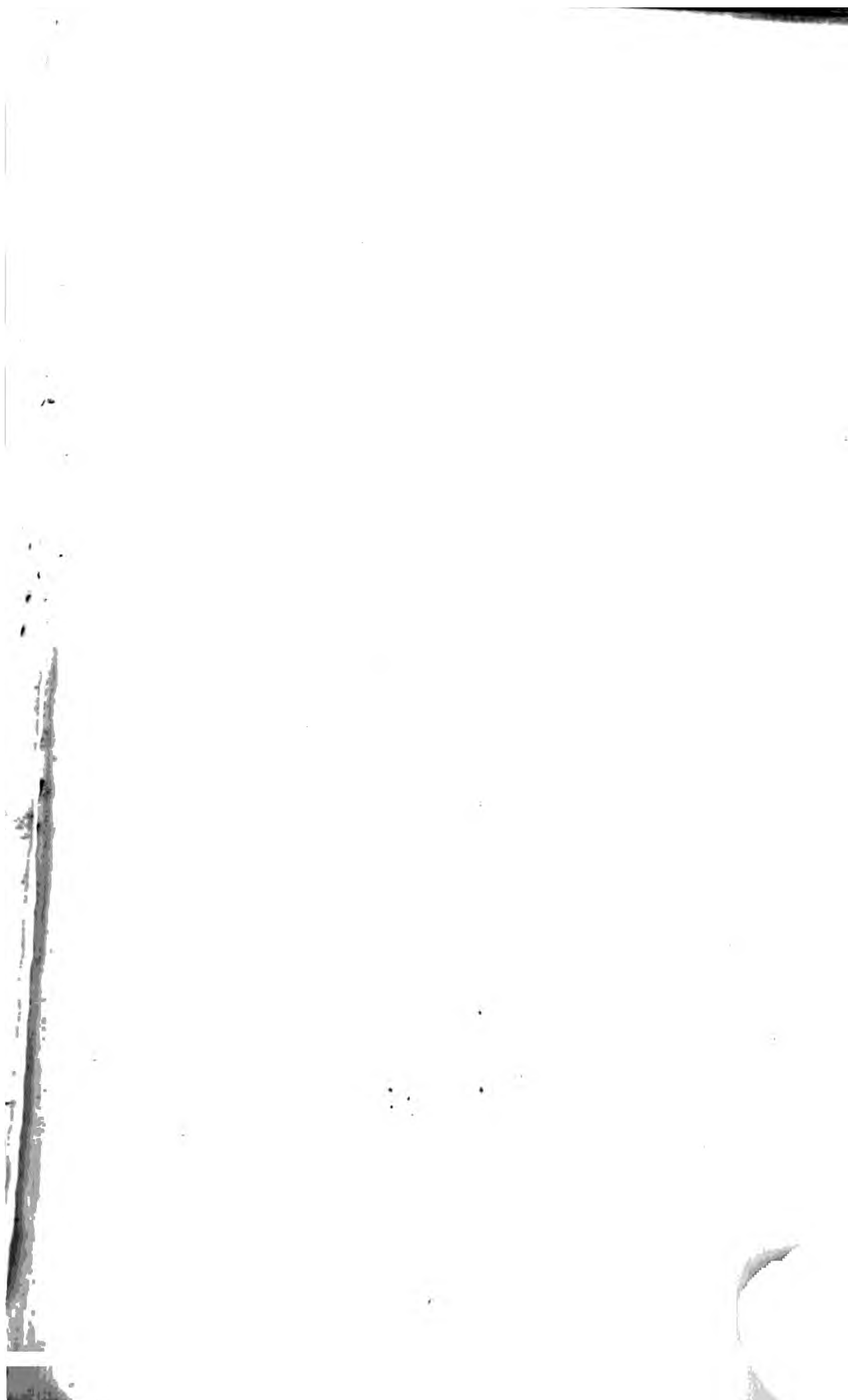
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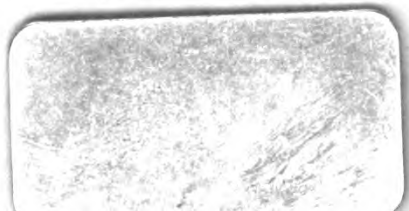


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R E P O R T S

OF

C A S E S

ARGUED AND DETERMINED

IN THE

High Court of Chancery.

2 T R O V A

2 E A A A

DEPT. OF THE INTERIOR

1881

THE COURT OF CHANCERY

R E P O R T S

OF

CASES

ARGUED AND DETERMINED

IN THE

HIGH COURT OF CHANCERY.

DURING THE TIME OF THE LATE

LORD CHANCELLOR KING.

COLLECTED BY

WILLIAM MOSELY, Esq.

LATE BARRISTER AT LAW.

*Published with Notes, and many thousand References,
and two Tables ; one of the Names of the Cases ;
the other of the Principal Matters.*

SECOND EDITION.

LONDON:

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1803.

A

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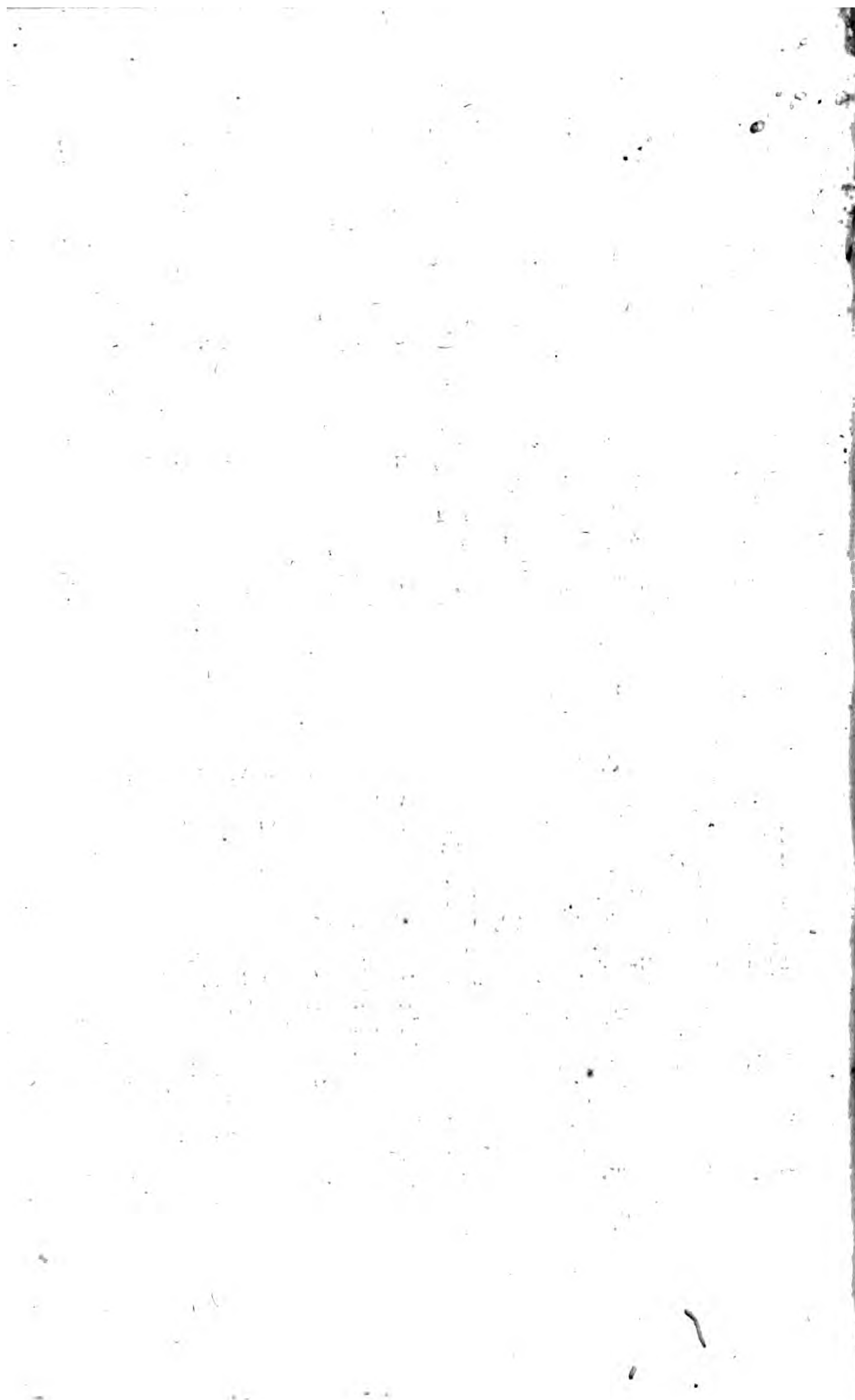
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D E

Term. S. Michael.

1726.

In Cur. Cancellariæ.

Peter (Lord) *King*, Lord High Chancellor.

Sir Joseph Jekyll, Kt. Master of the Rolls.

Sir Philip York, Kt. his Majesty's Attorney General.

Charles Talbot, Esq. his Majesty's Solicitor General.

BURROUGHS & al' Plaintiffs.

JAMINEAU & al' Defendants.

Cause 1.

In Court
Lord Chan-
cellor.

SKINNER, a merchant in *London*, on the 22d of *January* 1713, drew two bills of exchange on the plaintiffs at *Leghorn*, one for seven hundred pieces of eight, the other for eight hundred, amounting in the whole to 317*l.* *Sterling*, payable to the defendant and company, or order, three months after sight; the defendant inclosed them in a letter to his co-partners at *Leghorn*, who indorsed them over to *Nevil* and *Bouciere*, and they indorsed them over to *Langlois* and company, and the plaintiffs accept them the 19th of *February*; the 11th of *February* *Skinner* stops payment, of which the plaintiffs have advice, by letter bearing date the said 19th of *February*, which coming to their hands before the bills became due, they refuse payment, and it being the law of *Leghorn*, that the acceptor of a bill must either pay it or go to prison without bail or main-prise, or if he has any objection to the payment, he must bring the money into Court, and prosecute the suit at his own charges: The plaintiffs accordingly brought the money into Court, and cite *Langlois* and company to appear, and upon hearing the

Sel. Caf. in
Chan. 69.
S. C.

B

cause,

By the laws of *Leghorn*, if the drawer fails before the bill is accepted, and the acceptor has no notice of it, he is not obliged to pay the bill, unless he has effects of the drawer in his hands, and then he shall answer only for their value. cause, the acceptance was vacated against the defendants, and all the indorsees and negotiators of the bill; and the money deposited was returned to the plaintiffs; for by the laws of *Leghorn*, if the drawer has failed, before the acceptance of the bill, and the acceptor at that time has no notice thereof, he shall not be obliged to pay the bill, unless he has effects of the drawers in his hands, and then he shall be only answerable for their value; now it was impossible the plaintiffs, when they accepted the bills, should know *Skinner* had failed, because the letter which advised them of it, bore date the same day with the acceptance, and they had no effects of *Skinner*, but he was indebted to them 275*l*. Soon after the plaintiffs came into *England*, upon which the defendant brought his action against them in the Court of Common Pleas for the 31*th* 7*th*. and the plaintiffs file this bill for an injunction, which was granted till the hearing of the cause, upon the plaintiffs giving judgment with a release of errors. And the cause now coming on to be heard, the Lord Chancellor decreed a perpetual injunction against the defendants, and that they should acknowledge satisfaction upon the judgment, for his Lordship declared, as the cause had received a determination in a proper judicature, that should be binding there: And to prove that our Courts have always a regard to the sentence of foreign Courts, he quoted a case, where one being tried for murder committed beyond the seas, on the statute of *H. 8.* pleaded in bar, that he had been tried in *Spain* and acquitted, and the plea was allowed: And his Lordship further said, that our Courts of Admiralty, every day put in execution the sentence of a foreign Admiralty certified to them.

The sentence of a foreign court is binding in our courts, and a perpetual injunction was granted to an action brought on two bills of exchange, the acceptance having

been vacated in the court of *Leghorn*. 1 *Vern.* 21. 2 *Chan. Cas.* 74. *Cartbaw* 32. 1 *Chan. Cas.* 237. *Nelf. Fol. Rep.* in *Can.* 186. *Stwinb.* part 1. sect. 6. n. 8, 9. *Nelf. 8vo. Rep.* in *Can.* 103.

One tried for a murder beyond seas, pleads in bar a trial in *Spain*, and an acquittal. This is a good plea. *Shov.* 6.

Though *Langlois* and company, being the last indorsees, had the sole property of the bills, and were therefore made the only parties to the suit at *Leghorn*, yet the sentence made the acceptance void against the now defendants and all others.

A judgment of a foreign court, may be either pleaded, or given in evidence to an action. The Lord Chancellor allowed this would have been a proper defence at law, yet would not dismiss the bill, because the plaintiffs had given a judgment with release of errors, and a difficulty might arise at law, as the plaintiffs in the action, are not the persons against whom the sentence was given in *Leghorn*,

Legborn, and his Lordship said, that this foreign judgment might be either pleaded to the action, or given in evidence, as if a seaman brings an assumpsit for wages, the defendant may plead in bar, a sentence of the Admiralty, or give it in evidence upon non assumpsit, because it defeats the promise.

The defendants council insisted, that by the general custom of merchants, an acceptor is at all events liable, and that it would be very prejudicial to trade, if merchants in one place, should have greater advantages than in another, and be a great detriment to subsequent indorseees, that a sentence of divorce in *Italy* has been refused to be received in evidence here, because they proceed there by a different law: and that it was adjudged in *Bland's* case, that stopping payment is no act of bankruptcy.

A sentence of divorce in *Italy* cannot be given in evidence here.

Stopping payment is no act of bankruptcy.

BEECHER versus GUILBURN.

IF one co-partner borrows money of the other on his note, he shall pay interest for it, though he had more money in the stock than what he borrowed; for the stock is only to be employed in augmentation of the trade, for their mutual benefit, but neither of them can make use of it, for their own private advantage.

Case 2.
In Court
Lord Chancellor.

If one partner borrows from the other on note, he shall pay interest, tho' he had more money in the stock than he borrowed.

HARPER & al' Plaintiffs.

JOHN LEE, an infant, by his guardian LAMBETH, & al' Defendants.

THOMAS Lockwood made his will, *inter al'* in these words, 'I give and bequeath all my houses, leases, tenements, and goods whatsoever, to my dear wife *Margaret Lockwood*, for term of her life: and then to my nephew *Harper Lockwood*, all my books of geometry, architecture and surveying, and all my mathematical rules and instruments: and as to any person who may have any claim, or demand, as related to me, I give them twelve pence each; and I make *Margaret Lockwood* my executrix.' *Thomas Lockwood* died, and *Margaret* proved his will, and took upon herself the execution thereof, *Harper Lockwood* devised all

Case 3.
In Court
Lord Chancellor.

I give all my houses, leases, tenements, and goods whatsoever to my wife for life, and then to my nephew all my books and all my mathematical rules. By this devise

the nephew is intitled after the death of the wife to the books and mathematical rules and instruments only.

his interest under the will of *Thomas* to the plaintiffs, and died, *Margaret* assigned the lease now in question, part of the premises devised to her to the defendant *Lambeth*, and others, in trust, for herself for life, remainder to *John Lee*, the defendant, and soon after died. Two questions arose upon the will of *Thomas Lockwood*.

First, what passed to *Harper Lockwood*? And the Lord Chancellor was of opinion that *Thomas Lockwood* having devised in general all his houses, leases, tenements, and goods whatsoever to *Margaret* for life, and that *Harper Lockwood*, after her death, should have such a parcel of his said goods, viz. His books and mathematical instruments, and the words bearing that plain meaning, that he was intitled only to the said books and instruments. The council for the plaintiffs argued, that *Harper Lockwood* was executory devisee after the death of *Margaret*, of all the houses, leases, &c. And that a (,) comma, and an (and) were wanting after the words (then to my nephew *Harper Lockwood*) and that the will should be read thus, viz, I give all my houses, &c. to *Margaret* for life, and then to my nephew *Lockwood*, and all my books, &c. which latter clause they construed as an additional immediate devise; and that *Margaret* herself understood the words in this sense, because she delivered him the books and instruments immediately after the death of the testator.

If the testator leaves all his relations twelve pence a piece, or twelve pence and no more, his executors shall have the surplus not disposed of by his will. See post. case 12. case 26. case 32. case 157.

2 Vern. 247.

361, 425, 673, 736, 675, 648, 104, 148. 1 Vern. 473, 30. 3 Salk. 82. cas. 1. Chan. cas. 196. 5 Mod. 247.

Secondly, allowing the lease did not pass as an executory devise to *Harper Lockwood*, to whom the residue of the said term should go after the death of *Margaret*? And the Lord Chancellor declared, that *Margaret* as executrix was intitled to it by law, and that she having assigned over the whole term in her life-time, it belonged to the defendant *Lambeth*, as surviving assignee, and that his title could not be divested by the next of kin, for they were debarred from claiming the residue by the express words of the will, by which the testator gives them twelve pence a piece as was adjudged by the House of Lords, the 8th of *March*, 1706, in the case of *Vachell* versus *Bretton*, where his children brought a bill against his executors, for an account of the surplus of his personal estate not disposed of by his will, whereby he gave to his daughter *A* all his goods and plate, 1500*l.* to his son *B*,

and

and 10s. and no more to his son *W*, and 10s. and no more to his wife's daughter *P*, and made *C* and *D* executors, and gave them 100*l.* each, but made no disposition of the residue, and an account was decreed, because the leaving them particular legacies did not debar them of their title to the residue, but this decree was reversed in Parliament in favour of the executors title at law, because the testator by express words had barred *W*. and *P*. of any claim to the surplus by leaving them 10s. and no more.

ANONYMOUS.

THE Master of the Rolls said that a woman may make a will of her personal estate at twelve years of age, and a man at fourteen, *Went. office of executors 212*; and that when a legacy is given to an infant, the testator makes it necessary to come into this Court, for directions how to lay it out; and therefore this application ought to be considered as an incumbrance on his estate, and the costs must be paid out of his assets.

Case 4.
At the
Rolls.
Eodem die.
Sir Tb. Jen.
210.
1 *Sid.* 102.
1 *Vern.* 255,
326. A wo-
man may
make a will
at twelve, a
man at four-
teen. 2
Vern. 469.
Comb. 50.

Swinb. part 2. sect. 2. 34 *H.* 8. ch. 5. *Co. Lit.* 89, a. 5 *Co.* 29. If an infant sues for a legacy, costs must be paid out of assets, and not out of the legacy.

Case 5.

At the
Rolls.

GREENWOOD's Case.

PIDDINGTON versus MAIN.

Eodem die.

By the custom of *London* a freeman may devise over the orphanage part of his sole orphan, if a son, on his dying before twenty one, if a daughter, on her dying before marriage or twenty one, tho' the orphan should make a will.

THE Attorney-General produced from the city-books, the note of a case, of the orphan of *Nicholas Clerk*, which was referred to Sir *George Treby* the Recorder in 1679, by the Lord Mayor and Aldermen, to certify the custom: who certified, that it appeared to him by several precedents, that by the custom of *London*, a freeman of the said city might devise over the orphanage part of his sole orphan, if a son, on his dying before twenty-one, if a daughter, on her dying before twenty-one years of age, or marriage, and that a will made by the orphan, in case the freeman had so devised it over was void. And Mr. *Lingard* the Common Serjeant read three other precedents, one in the 4th of *H. 5.* another in the 18th of *H. 8.* and a third in the 1st of *Ph. and M.* and said, that Sir *Heneage Finch*, Recorder of *London* in the reign of King *Charles I.* was of the same opinion, and that this was a reasonable custom, and very consistent with the custom of the orphanage part; whereby a sure provision was secured for the children of freemen, which this custom did not deprive them of, but only upon the contingencies before mentioned, gave the preference to the father's appointment, in prejudice of the representative, or legatee of the orphan. And the Master of the Rolls decreed accordingly. It was adjudged by Lord Chancellor *Macclesfield* in the case of *Blundel and Barker*, and by the last Lords Commissioners of the Great Seal, in the case of *Lewin and Labin* that tho' the custom was not proved in the cause by the proper certificate, it might be made out by precedents, as was done in this case. 2 Chan. Caf. 117.

1 Chan. Caf.
199. contra

2 Ventr.

341.

Custom of
London,

though cer-

tified, may

be made

out by pre-

cedents.

But see the next following case.

ANONYMOUS.

ANONYMOUS.

AN order being made in the city of *London* to certify a custom, they returned, that it did not appear whether there was such a custom or not, and the Lord Chancellor was of opinion, that this was an insufficient return, and made an order on them to make a new return in a fortnight's time, and declared if they did not, he would fine the city. The council argued, that this amounted to a certificate that there was no such custom, that in the case of *Atkins and Waterston*, the city certified, that they could find no instance of the custom referred to them, but submitted it to the determination of the Court, and Lord Chancellor *Cowper* declared that this amounted to a certificate that there was no such custom. In this case the city sent their books for the inspection of the Court, but the Lord Chancellor said he would not determine the custom from precedents, and cases, since the law had directed in what manner the said customs were to be tried.

Cafe 6.
At the
Chancel-
lor's house.

A certifi-
cate, that it
did not ap-
pear, whe-
ther there
was such a
custom or
not, if not
good.

Lord Chan-
cellor would
not deter-
mine the
custom of
London from
the city
books, be-
cause the
law had ap-
pointed a proper trial. See the next preceding case.

GIBSON, and UX, & al' Plaintiffs,

MARY SCUDAMORE an infant, by her guardian DIGBY,
and COTES, Defendants.

Cafe 7.

In Court
Lord Chan-
cellor.

JANE Scudamore devised the residue of her personal estate, after payment of her debts and legacies, to her daughter *Mary Price*, in trust, to invest the money in a purchase of lands to be settled on the said *Mary Price* for life, remainder to Lord Scudamore and his heirs. *Jane Scudamore* died, and the surplus of her personal estate amounted to eight thousand pounds. Some time after Mrs. *Price* laid out three thousand pounds on a purchase of lands in *Norton*, Lord Scudamore died before any estate was purchased with the trust money, leaving *Mary Scudamore* the defendant, his only daughter and heir. Mrs. *Price* by her will bequeathed several legacies to the plaintiffs, and made *Mary Scudamore* (who was also her heir) executrix, and devised the lands in *Norton* to her in fee, and also the residue of her personal estate after payment of debts and legacies, and appointed the defendant *Cotes*, executor during the minority of *Mary*. The plaintiffs, who

Sel. Caf. in
Can. a 63,
S. C.

who were the legatees, filed their bill against *Mary Scudamore*, and *Cotes*, for a payment of their legacies, and that the estate devised by Mrs. *Price* to *Mary* might be considered in equity for the value, as a satisfaction of the eight thousand pounds, that by this construction, all the parts of the will would be satisfied, and there would be assets sufficient to pay all her debts and legacies, with a residue to Miss *Scudamore*, that Mrs. *Price* being intitled to the estate to be purchased for her own life, and *Mary Scudamore* to the remainder in fee, as heir of Lord *Scudamore*, this devise of the Norton lands to the said *Mary* in fee, is an equitable execution of the trust

If one covenants to stand seized to the use of his son in tail, with remainders over, and he permits the lands to descend to him, this is a performance of the covenant in equity; because the son may settle the lands according to the limitations, that by making *Mary Scudamore* residuary legatee, it is plain Mrs. *Price* thought there would be a surplus, whereas if the said devise is not taken as part of the trust money, the assets will not be sufficient to pay the legatees five shillings in the pound.

performance of the covenant. 1 Chan. Caf. 301. Nels. fol. rep. in Canc. 290, 294. 2 Vern. 439, 558, 709, 638.

There was no mention in Mrs. *Price*'s will, that she devised those lands to *Mary*, in part satisfaction, or that they were purchased with part of the trust money; nay it appeared from Mrs. *Price*'s books, that the trust money stood out on mortgages, and other securities, after the making the said purchase, yet the Lord Chancellor finding this the only way to satisfy all the clauses of the will, decreed that the real estate so devised should be taken as a satisfaction *pro tanto*, and that the 3000*l.* and interest from the death of Mrs. *Price* should be deducted out of the 8000*l.*

A, trustee of 8000*l.* to be invested in lands to the use of herself for life, remainder to *B* in fee, devises lands of 3000*l.* value, (which she purchased after the trust, but not with any part of the trust money) to *B* in fee and several pecuniary legacies to others, and makes *B* residuary legatee, the devise of the real estate was decreed to go to *B*, in part satisfaction, the assets being otherwise deficient to satisfy the legacies. 2 Vern. 177, 255, 258, 298, 478, 498, 348, 115, 110, 555, 448, 484.

Nels. 8vo. His Lordship declared that it was now settled in equity, rep. in can. 38. A legacy equal to a debt, is considered as a payment. that if the debtor leaves his creditor a legacy equal to his debt, that shall be taken as a payment. And that specific legatees shall not abate in proportion with pecuniary, on a deficiency of assets.

If

ment. 1 *Salk.* 155, cas. 5, 508, cas. 4. Vide post. case 68, case 159. Specific legatees shall not abate in proportion with pecuniary. 2 chan. cas. 171. 2 chan. rep. 155. 1 *Vern.* 31. 2 *Vern.* 688. 1 chan. rep. 133. 3 chan. rep. 54. *Nels.* fol. rep. in can. 303.

If the petitioner sets forth in his bill, that he resides in another kingdom, or upon affidavit of his living abroad, the Court will make an order, on a motion, for the plaintiff to give security to a Six-Clerk to pay the costs, before the defendant be obliged to answer his bill.

If the plaintiff resides in another kingdom, he must give security to pay costs.

JOHN CARRICK, son and heir of *Anne Errington* deceased, *Thomas Lorrain*, and *Jane* his wife, *John Robson* and *Margaret* his wife, (which said *Anne*, *Jane*, *Margaret*, and *Frances Errington* one of the defendants, were the four sisters and coheirs of *Edward Errington* deceased) Plaintiffs. Case 8.
In Court
Lord Chancellor.

THOMAS ERRINGTON, *William Errington*, *Frances Errington* spinster, *Richard Ridley* and *Nicholas Fenwick*, Esqrs. and *Christopher Soulby*, son and heir of *Ralph Soulby*, (which said Mr. *Ridley*, Mr. *Fenwick*, and Mr. *Soulby*, were only trustees of the estate in question) Defendants.

EDWARD Errington, being cousin, and heir at law to *William Errington* an infant, before he came into possession of the estate in question did in the life-time of the said infant, by indenture dated the 15th of *October* 1714, covenant to levy a fine of the said estate to Mr. *Ridley* and Mr. *Fenwick* and their heirs, and by another indenture, bearing date the 19th of the said *October*, it was declared, and agreed, that the said fine should enure, to the use of the said *Edward Errington* for life, without impeachment of waste, remainder to *Ralph Soulby* (the defendant *Soulby*'s late father) and his heirs, to preserve contingent uses, remainder to the first, and other sons of *Edward Errington* in tail male; remainder to *Thomas Errington* for his life, without impeachment of waste, and from, and after the determination of that estate, then to the use of the said *Ralph Soulby* and his heirs, for the life of the said *Thomas Errington*, in trust, to preserve contingent uses, and estates, remainder to the first, and other sons of *Thomas Errington*, in tail male; remainder to *William Errington* for life, without impeachment of waste, remainder to trustees to preserve contingent uses, remainder to the first, and other sons of the said *William Errington* in tail male,

male, with remainder to the said *Edward Errington* in fee. The said fine was accordingly levied, and the said infant died in the year 1716, without issue. Whereupon the estate descended on the said *Edward Errington* as his heir at law, who entered, and became seized thereof; and being desirous to supply any defect which might be in the said settlement, he by indentures of lease and release, bearing date the 21st and 22d of *April* 1718, and by fine thereupon levied, in consideration of 200*l.* therein mentioned to be paid him by *Ridley* and *Fenwick*, (but which was really the money of *Thomas Errington*, which *Edward* was indebted to him by bonds) and for other considerations therein mentioned, did grant, and convey, the estate in question, to *Ridley* and *Fenwick* and their heirs, to the use of him the said *Edward Errington* for his life, with remainders to his first, and other sons in tail male; remainder over to *Ridley* and *Fenwick*, and their heirs; who by indenture executed the same day, but dated the day after, declared that the 200*l.* was the proper monies of *Thomas Errington*, and that their names were made use of, in trust only, for *Thomas Errington* and his assigns for his life, without impeachment of waste, and from and after the determination of that estate, then to the use of the said *Ralph Soulby* and his heirs during the life of the said *Thomas*, in trust to preserve the contingent uses and estates, remainder to the first, and other sons of *Thomas* in tail male, remainder to *William Errington* for life, without impeachment of waste, remainder to trustees to preserve contingent uses, remainder to his first, and every other son in tail male, remainder to *Edward Errington* in fee. The first of *September* 1719, the said *Edward Errington* died without issue, and thereupon *Thomas Errington* entered upon the estate in question, and in or about *Michaelmas* term 1719, the plaintiffs exhibited their bill against the defendants, thereby *inter al'* charging, that *Thomas* and *William Errington* were papists, and therefore by the statute of 11 and 12 of *Wil.* 3. ch. 4. sect. 4. were disabled to take by purchase, any interest in lands, and that the said *Edward Errington* was infirm, and weak in body and mind, and not sensible when he executed the said several conveyances; and that the 200*l.* consideration money was not paid, but inserted only in the said indenture of release to colour the same, or if paid, that it was not a valuable consideration, and that the said deeds seemed to be gained by fraud and imposition, and prayed that they might be put into possession of the premises, or at least might be
at

at liberty to try their title at law without being prejudiced by the said deeds of 1718. *William Errington* by his answer insisted, that he was a protestant; and upon two former hearings, the Court declared that there was a gross imposition on the said *Edward Errington*, in obtaining the said deed of settlement, and therefore decreed that it should be delivered up to the plaintiffs to be cancelled, and that the receiver should deliver possession of the said estate to the coheirs of *Edward Errington*, but the said cause being re-heard on the 12th of November 1726, the Lord Chancellor did think fit, and so order, that the former orders should be reversed, and his Lordship declared, that he saw no cause to set aside the settlement. But then the question was, to whom the estate should go during the life of *Thomas Errington*? he being a papist, and having no issue-male. Whether to the right heirs of *Edward Errington*, or to *William Errington* the remainder-man? And the counsel for the defendant *William Errington* argued, That *Edward Errington* having by the said settlements conveyed away the whole estate, subject to the uses and trusts expressly declared, his heirs at law were thereby excluded from having any benefit of the estate, till after all the particular intermediate uses were spent, and therefore to raise a trust by implication, in favour of the heirs at law, during the life of *Thomas Errington*, out of the supposed estate of *Soulby* the trustee to preserve the contingent uses, was to give them a preference to the particular uses, to which they are expressly postponed by *Edward Errington* the grantor, who had an absolute power over the estate. Secondly, Where an estate is limited to a person incapable of taking, the next remainder ought according to the rules of law to take place immediately; and consequently *Thomas Errington* being incapable to take by the said act, and having no issue, *William Errington* is entitled to be let into the perception of the profits, immediately upon the death of *Edward Errington* without issue, there being no intervening equitable estate to prevent him, for though the legal estate should be taken to be in *Soulby* to preserve the contingent uses, (which possibly may never arise) yet since the trusts annexed to that estate are void to all other purposes, it ought not to be any impediment to hinder *William Errington* from enjoying the benefit of the estate, nor to have any further effect, than to preserve the legal interest in the trustee, for that contingent purpose, for which alone it can be good, viz. to let in the sons of *Thomas Errington*, in case he shall have any. As in *Lewis Bowles's*

Bowles's case 11 Co. 79 b. *Thomas Bowles* covenanted to stand seized to the use of himself and of *Anne* his intended wife for term of their lives, and after their decease to the use of their first issue-male, and the heirs male of such issue lawfully begotten, and so over to the second, third, and fourth issue-male, &c. and for default of such issue, to the use of the heirs male of the body of the said *Thomas* and *Anne* lawfully begotten, with remainders over. It was resolved that till issue-male, *Thomas* and *Anne* were seized of an estate in tail, and that then the estates should open, and they become tenants for life, to let in the son's remainder; nor ought the said legal estate to obstruct the limitations of the settlement in any other respect, much less to prefer the heirs at law of the grantor, to *William Errington*, contrary to the grantor's intent declared in the deed.

Thirdly, supposing there was a resulting trust during the life of *Thomas Errington*, yet that trust did arise upon the settlement in 1714, (which was good by estoppel) and *Edward Errington* had a power to dispose of that trust, which might very well, and did clearly pass by the subsequent settlement of 1718, and consequently, that trust estate being no ways necessary to preserve the contingent remainders under the settlement of 1718, will now vest in *William*, there being no body in esse capable of taking it before him.

But the Lord Chancellor decreed in favour of the right heirs of *Edward Errington*, and declared, that the act having made the trust for the benefit of *Thomas Errington* void, did for so much defeat the intention of *Edward Errington*; but that equity would see the rest of the settlement performed, as far as the rules of law would permit, that the limitation of the premises to *William Errington*, is by the express words of that settlement not to commence, or take place, until after the death of the said *Thomas Errington*, and on failure of issue-male of his body; neither of which have yet happened, and possibly may not happen, during the life-time of *William Errington*, and therefore in the mean time, *William* has no manner of right or title to the possession of the premises, or the rents and profits thereof, to be preserved to the trustees to preserve contingent uses, remainder to his first, and every other son in tail male, remainder to *B* for life, remainder to the right heirs of the grantor, *A* is a papist, and has no son, the trust during his life, shall go to the right heirs of the grantor, and not to *B* the next remainder man.

thereof,

thereof, and if the construction which *William Errington* contends for, should prevail, the limitation to the sons of *Thomas Errington*, (if he should hereafter have any) would be thereby defeated, contrary to the express design of the grantor, for if a person is to take by purchase, and the estate is once gone over to the next in remainder before that person comes in esse, there is no instance of the estates being ever brought back again, tho' 'tis otherwise in case of a descent; as where lands are given to *A* and the heirs of his body, remainder to *B* in fee, *A* dies without issue, *B* enters, and *A*'s wife is afterwards delivered of a son, the son shall take: He also allowed that if an estate is devised to *C* for life, remainder to *D*, and *C* happens to be a monk, that *D* shall take immediately, but that this case is very different, for between the remainder to *Thomas Errington*, and the remainder to *William Errington*, there are several intermediate remainders that would be destroyed, and is easily distinguished from *Lewis Bowles*'s case, for there the contingent remainder took effect whilst the particular estate subsisted. He allowed that it was the intention of *Edward Errington* that his heirs should not take but as last in remainder, but that they took by a new title given them by the law, the profits of the premises during the life of *Thomas Errington* being undisposed of: Whereas *William Errington* had no title but by the settlement, whereby the grantor intended that he should not take the estate, while *Thomas* or his issue-male were alive.

If one that claims by purchase is not in esse at the time the next in remainder takes, the estate on his birth is never brought back again, but it is otherwise if he claims by descent, *Carter* 190.

Estate to *A* for life, remainder to *B*. if *A* is a monk, *B* shall take immediately.

Shorro.
Parlm.
Cas. 87

2 Vern. 722. Cro. El. 422. Case 20.

This decree was affirmed in parliament on Wednesday, May the 15th 1728.

The word purchase in the act of the 11 and 12 W. 3. ch. 4. is to be understood as it stands in opposition to descent in a legal sense, and a devise of lands is within the meaning of the act, the words of which ought to be explained according to their sense in law, nay a real estate devised only by construction of a court of equity is a purchase within the act, as where lands are devised in trust, to sell for payment of debts and legacies, and to pay the surplus money to a papist, because such a cestuy que trust may by a bill in chancery

The word purchase, is to be understood in a legal sense as opposed to descent, in the act of 11 and 12 W. 3.

A devise of lands is

within the act, or even a devise only by construction of a court of equity, as where lands are devised to be sold for payment of debts and legacies, and to pay the surplus to a papist. Post. C2. 194.

compel

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Term. S. Hill.

1726.

In Cur. Cancellaria.

Case 11. WILLIAM GARDINER, Clerk, Plaintiff.

In Court Lord Chan-
cellor. JAMES COOK, Clerk, EDWARD GRIFFITH, Clerk,
and JOHN GRIFFITH, Clerk, Defendants.

THE 27th of July 1722, the plaintiff filed his bill against the said defendants, setting forth, That King *Charles II.* by letters patent under the great seal, bearing date the 20th of *November 1672*, amongst other things, granted to *John Lord Freshville*, the advowson, and right of presentation to the rectory of *Ecklington cum Kilwalmarsh* in the county of *Derby*, worth about 400*l. per ann.* for thirty one years, from *Michaelmas 1670*. That Lord *Freshville* by indenture bearing date the 29th of *December 1672*, assigned over the said advowson to trustees, who, by indenture bearing date the 14th of *February 1672*, declared the trust for *Samuel Gardiner* doctor in divinity. That the 27th of *February 1675*, King *Charles II.* granted the said advowson of the said rectory to the said Lord *Freshville* for ninety nine years, in trust, for Dr. *Samuel Gardiner* the plaintiff's grandfather, his executors, administrators, and assigns, who enjoyed the same as rector thereof for his life, and the plaintiff's father *Samuel Gardiner* succeeded the said Dr. *Gardiner*, and was incumbent thereof during his life, and brought up the plaintiff a clergyman to succeed him in the said rectory.

That the 23d of *July 1711*, the plaintiff's father mortgaged the term in the said rectory (being about sixty three years to come) to the defendant *Cook*, a neighbouring clergyman,

gyman, a security for 300*l.* which his father had before borrowed of him on his bond, and to indemnify him against a bond for 200*l.* more, for which the defendant *Cook* was surety for the plaintiff's father. That about *July* 1721, the defendant *Cook* pressing to have his money paid, the plaintiff's father procured the same, and acquainted *Cook* therewith, but he then declined receiving it, and desired it might not be paid in till the *Lady day* then next following, for fear he should be robbed, his house being old and ruinous; and the plaintiff's father being at that time ill of the sickness whereof he died, the defendant *Cook* promised, that whenever he should die, or immediately, if he would resign, that he would present the plaintiff, and renewed the same assurances to the plaintiff at his father's funeral. That the plaintiff's father on the 8th of *September* 1721, died intestate, and the plaintiff took administration to him, and thereby became intitled to the equity of redemption of the premises; and the plaintiff desiring to be presented, the defendant *Cook* insisted to have further security for the aforesaid 300*l.* and for his indemnity against the aforesaid bond of 200*l.* and interest; which the plaintiff was advised he could not safely do, without incurring the danger of simony, the church being then vacant: Upon which the defendant *Cook* privately, and without the previous knowledge of the plaintiff, executed an instrument for presenting the other defendant *John Griffith*, and *Cook* pretending that the right of presentation was in him, and that the plaintiff's consent was not necessary, but only matter of form, and the other defendants promising him their interest for the living of *Hitchinstoke* in *Hampshire*, which the defendant *John Griffith* then enjoyed, and which would become vacant by his acceptance of the other; and having first warmed him with liquor, they prevailed upon him to consent, before the Bishop of *Coventry* and *Litchfield*, to the presentation of the defendant *John Griffith*; tho' at first he positively refused, and was at last prevailed upon with great reluctance, by the threats of the defendant *Edward Griffith*, and for fear of being thrown into goal for his father's debts, for which he stood bound; and which the defendants the *Griffiths* promised to pay off, if the plaintiff would consent to their proposals. That the defendant *John Griffith* has been since instituted and inducted into the said rectory; and afterwards the defendants continued their assurances for procuring preferment for the plaintiff till they apprehended his time for bringing a quare impedit, was expired, and then there

[+16]

If an advowson is mortgaged, and the church becomes void, the right of presentation is in the mortgagor.

2 Vern.
401, 549.

Post. 542.

was an end of all promises of that kind, the plaintiff therefore offered to pay the said debts of 300*l.* and 200*l.* and interest, and prayed that upon payment thereof, the defendant *Cook* might assign over the said rectory with the appurtenances to the plaintiff, for the residue of the said term of ninety nine years; and that the defendant *John Griffith* might resign the said rectory, that the plaintiff might be presented thereto, and enjoy the same. To which bill the said defendants put in their several answers, and the cause coming on to be heard the 28th of *January*, the council for the plaintiff argued, that the † defendant *Cook* had no right to the said rectory any further than as a security for his principal and interest, and until there be a foreclosure, the right of presentation upon a vacancy (since such presentation cannot be applied towards satisfaction of the principal and interest secured by the mortgage) ought in equity to be enjoyed by the mortgagor, according to many precedents in the court of chancery, as Sir *John Hobart* versus Serjeant *Selby*. *Selby* the mortgagee had presented, but there was no institution, and Lord *Cowper* decreed, that the conveyance should be considered only as a security, and that he should withdraw his presentation, and present him that Sir *John Hobart* the mortgagee should nominate. And *Wood* and *Henchman* versus Sir *Bibye Lake* and *Crofts*. *Stanley* being tenant for life of the manor and advowson of *Adderley*, mortgaged it to Sir *Bibye Lake*, who entered before the church became vacant, then *Stanley* grants the next avoidance to *Wood*, the incumbent dies, and Sir *Bibye Lake* presents *Crofts* to the bishop, who refuses him institution, till *Wood* (being mis-informed by his council, that he had no right, but from no imposition practised on him by Sir *Bibye Lake*) consented thereto before the bishop; afterwards *Wood* presents *Henchman*, and they brought a quare impedit, and a bill in this court against Sir *Bibye Lake* and *Crofts*, and Lord *Harcourt* decreed that the mortgage should not be given in evidence upon the quare impedit, and that the defendants should pay costs, (and the Lord Chancellor said in this case, if a quare impedit had been brought in time, he would have removed every thing out of the way in the same manner. And they further insisted, that the defendant *Cook* always promised to present the plaintiff to the said rectory, till such time as the plaintiff refused to comply with terms, which were not proper during the vacancy thereof.

To

To which it was answered by the council for the defendants, first, that as to the pretended trust and agreement, that the defendant *Cook* should present the plaintiff upon the death of his father, the defendant *Cook* has positively denied it by his answer, and the plaintiff has not made the least proof whatsoever of it, and the mortgage deed plainly and expressly proves the contrary.

Secondly, That the defendant *Cook* by virtue of his mortgage had the legal right of presentation in him, 'with an express covenant and agreement entered into by the plaintiff's father, that the said defendant should present, as often as the rectory became void, and that if the right of presentation was not effectually assigned to, and vested in him by the mortgage deed, that then the plaintiff's father, his executors and administrators should from time to time present such persons as the defendant *Cook* should [+17] nominate, and no others.'

This covenant in the mortgage deed is not good, being a collateral further security, for thereby the mortgagee would be intitled to the presentation, as well as to his money.

Objection.
A covenant
in a mort-
gage, by
way of a

collateral further security is not good.

Jennings versus Ward, 2 Vern. 520. *A* lends money to *B* on a mortgage, and takes a covenant from *B* by another deed, that if *A* should think fit, *B* should convey to *A*, so much of the mortgaged estate as should be of the value of the money lent at twenty years purchase. The master of the rolls decreed this covenant to be set aside as unreasonable. This is no further security of a valuable nature, and therefore differs from the case of *Jennings versus Ward*.

Answer.

Thirdly, That the defendant *Cook* had no other security whatsoever for his money, but the mortgage of the said advowson, or right of presentation, in which the mortgagor had no interest, but a term of about sixty three years to come, when the mortgage was made, and which possibly one succeeding incumbent might outlive, and therefore it was highly reasonable, the defendant *Cook* should have the presentation, and that was the reason of those particular covenants, whereby contrary to the other cases (where a manor with an advowson appendant was mortgaged) the mort-

C 2

gagor,

gagor became a trustee of the presentation for the mortgagee.

Fourthly, That the plaintiff himself consented before the bishop to the defendant *John Griffith's* being instituted into the said living.

Objection. This pretended consent was very unfairly obtained, for it is impossible in the nature of the thing to imagine, that such a consent could be a voluntary act, if he had been fully apprized of his right, for he was educated a clergyman, with a view to be provided for by this advowson, and he had no other dependance for a subsistence, and had no manner of consideration for consenting to an act, which would deprive him of his bread, and the only prospect he had for his subsistence, save what was laid before him to delude him, besides there was a misrepresentation of the truth, the defendant *Cook* having told him, that the right of presentation was not in the plaintiff, but in himself, and that he had no occasion for his consent, and this was not in the power of the plaintiff to contradict, the defendant *Cook* having all the title deeds in his custody, the defendants likewise threatened to throw the plaintiff into goal, and other threatenings were made use of to terrify him into a compliance, and at the same time it was insinuated to him, that it would be more for his interest to comply, and as a further imposition he was heated with liquor to induce him to consent, and notwithstanding all those unfair practices, it appears, that at the time of this pretended consent, the plaintiff was in the greatest confusion and scarce knew what he said or did.

Answer. The defendants by their answers, have all denied that they applied to the plaintiff for his consent, or either threatened, or promised him any thing on that account, nor did they think his consent necessary; and when the bishop sent for him, he told him he would not institute the defendant *John Griffith* without his consent, and it is fully proved by the bishop, and his secretary, that the plaintiff did consent, and that no arguments were used by *Griffith* the father, or any body else to bring him to consent, and it is not credible that the reverend prelate should take the consent of a man in drink.

Fifthly,

Fifthly, The defendant *John Griffith* was presented the 4th of *December* 1721, instituted the 14th, and inducted on the 23d of the same month, and the bill was not exhibited till the 27th of *July* 1722, so that six months were elapsed after the institution, and induction, before the bill was filed, and when the church has been full for six months, without any legal claim, or process, the wisdom of the law has thought fit to prevent any litigation, or disturbance after that time.

This was occasioned by the defendant's fraudulent practices, unfair representations, and delusive promises, and consequently this being a case of fraud, the objection is of no weight in a court of equity, as has been always held in the parallel case of the statute of limitations, and fines have been adjudged no bar on the same account; tho' these statutes were made for the good and quiet of the subjects in general.

Objection.

The statutes of limitations and of fines, is no bar in cases of fraud.

The defendants by their answers have denied all those several charges, and the plaintiff has made no proof of them, and by the common law, if the church had been full but a day, the patron was barred, and the statute having enlarged his time to six months, there is no occasion to carry it further, and it would be of as ill consequence not to bring bills within the six months, as not to bring actions.

Answer.

Whereupon the Lord Chancellor was pleased to order, that the plaintiff's bill, so far as it related to the defendant *John Griffith*, should stand dismissed, with costs, because no quare impedit had been brought, nor the bill filed till seven months after institution and induction. Whereas the statute of *Westminster* the 2d Ch. 5. (which has been inviolably observed since the making of it) allows but six months, and on this act his lordship grounded his decree, without considering the circumstances of the case, or by what misinformation, or fraud the plaintiff's consent was obtained; for the statute makes plenarty a bar against all mankind, even in case of a usurpation, if a quare impedit is not brought

The mortgagor's bill to oblige the incumbent of the mortgagee to resign, was dismissed, because not filed till seven months

after institution, and no quare impedit had been brought, and the Lord Chancellor would not consider by what fraudulent practices of the defendants, this delay was occasioned. 2 Inst. 355, 360, 361. Clerg. Law. 504. Co. Lit. 119. b. 344. a. b. Woods's Inst. 160. Hob. 241. 7 Co. 26. a.

This decree was affirmed in parliament, without debate, for the same reason, on Friday the 31st of *January*, 1728-9.

within

within six months, and his lordship said, no bill of this nature had been ever brought in this court, where a quare impedit had not been first brought in that time. And as to the defendant *Cook*, his Lordship ordered, and decreed, that the plaintiff should redeem on the common terms, otherwise his bill was to be dismissed.

DE

[120]

Term, S. Trin.

1727.

In Cur. Cancellariæ.

MOSES HAWKINS, GEORGE DAWES, fen.
& al' Plaintiffs,

SAMUEL MASON, defendant.

Case 12.
In Court
Master of
the Rolls.

JOHNS HAWKINS, a freeman of London, having only one daughter Sarah, the wife of the defendant, whom he had fully advanced in marriage, and no wife, made his will the 2d of June 1720, and thereby *inter al'*, devised to his brother Moses Hawkins and his heirs, a messuage, and house in Berks, 10l. for mourning, and 100l. south sea stock; and to his sister Mary Dawes, 100l. south sea stock, and after her death his will was, that the said stock so given to her, should be divided to her children then living, and 40l. to buy mourning for herself, her husband, her son, and her daughter, and gave to the defendant and his heirs two houses in Wapping, 500l. and 10l. to buy him mourning. And devised to trustees 1000l. south sea stock in trust for his daughter Sarah to be at her disposal, and after several other legacies he gave and bequeathed the rest and residue of his real and personal estate to his daughter Sarah to hold the same during her natural life, and after her decease, he gave and bequeathed the same to her child and children born of her body for ever, in case such child or children should attain the age of eighteen, or be married, but in case they died before such age, or marriage, then in such case, he gave and bequeathed the said rest and residue of his estate as follows. To his brother Moses Hawkins and his heirs for ever all his messuages or tenements in Hounsditch, and

and *Woolpack Alley*, and to his kinsman *Moses Hawkins* and his heirs, the lease of his houses in the *minorities* in *London*. And made his daughter *Sarah* executrix for life, and *Moses Hawkins* his brother, and *George Dawes*, senior, his brother-in-law, executors, from and after her decease. *March* the 21th 1720, the testator died, and *April* the 1st 1721, the defendant's said late wife *Sarah* proved the said will, and she, and the defendant possessed themselves of the testator's personal estate, and *April* the 26th 1722, the defendant's wife died without issue, and thereupon the said *Moses Hawkins* the brother, and *George Dawes* procured letters testamentary on the said will from the prerogative court of *Canterbury*, and *May* the 10th 1722, the defendant took letters of administration to his said wife out of the said court, and this bill was brought by the executors, and legatees, against the defendant, for an account, and satisfaction of their legacies, and that the surplus undisposed of, might be paid to the executors, *Moses Hawkins* and *George Dawes*, senior, for after the death of his daughter without children, the testator has disposed only of part of the residue, viz. his messuages, and leasehold houses. And the defendant by his answer insisted, that he, as administrator of his said wife (the testator's only child living at his death) was intitled to the remainder of the testator's personal estate, which was undisposed of by the said will; and this cause coming on to be heard in the High Court of Chancery before his honour the Master of the Rolls on the 12th of *June* 1727, Mr. Attorney General argued for the defendant.

Resolved
per Holt, C.
9. that an
executor
may be a
witness
concerning
the estate,
if the resi-
due is not
left to him.
1 Mod. 107. *Coke versus Fountain*.

This question must depend on the will, and intention of the testator. There can be no doubt, but that many cases may be mentioned, where executors may have the legal estate in them, and yet be considered in this court only as trustees. An executorship by the civil law (which is the rule in legatary cases) is said to be only a fidei commissum, and the legacies given by the testator are only so many special directions as to the disposal of this trust, and the whole estate vests in the executor till he assents. If one makes an executor, and he dies intestate, before he has fully administered, the next of kin to the testator, and not the next of kin to the executor shall have administration de

bonis

bonis non, but the next of kin to the executor shall have the administration, if the residue is expressly devised to him, which shows plainly that the law makes a difference between barely nominating a man executor, and expressly devising the residue to him, and executors have always been construed trustees, where it appears the testator intended to make them so, as where he devises particular legacies to them, which is an evidence that he intended them no more, for if by making them executors he designed them the whole, it would have been unnecessary and absurd, to have given them any thing in particular, which would be to give them all, and some, and then this is within the reason of those cases, for the testator has left *Moses Hawkins* 10*l.* for mourning, and 100*l.* south sea stock, and 100*l.* to *Mary*, the wife of the other executor, which vests in him as her husband, and 40*l.* for mourning for herself, husband, son and daughter, that is 10*l.* apiece, and the case of *Foster and Moun!*, 1 *Vern.* 473. which was the first case of this nature, did not turn on a fraud, but on an implied trust, and in 1704, Lord Keeper *Wright*, in the case of *Coke versus Walker*, 2 *Vern.* 676. decreed the surplus to the next of kin, where 10*l.* (as here) was given to the executor for mourning, but there is a further evidence in this case, that the testator, did not think, that by making them executors, he gave them any thing, for he has made his daughter executrix for life, and has also given her all the residue of his personal estate for life, which would have been wholly unnecessary, if he thought it had belonged to her as executrix. And the statute of distributions settles the succession of the next of kin, as the common law does of heirs in case of lands. And if a man devises his lands to his heir for life, he shall have the reversion by descent, so here since part of the residue, neither by express words, or by implication, belongs to the executors, the next of kin must of consequence be intitled to it, as if he had died intestate.

There is a difference between making a man executor and expressly devising the residue to him, for in the first case, if he dies before he has fully administered, administration de bonis non, &c. shall go to the next of kin of the testator, but in the other, it shall go to the next of kin of the executor. *Carter*, 125. *Went. Off.* of executors 34. *Dyer*, 372. *Plowd.* 281. *Showers*, 26. *Cro. Ca.* 115. *Swimb.* Part 6. Sect. 1. n. 4. *Magna Charta*, ch. 18. *Perk. tit.* Devise ch. 8. fol. 97.

Doct. and Stud. lib. 2. ch. 10. *Bro. tit.* Adm. n. 141. tit. Ex. n. 149. 2 *Inst.* 32. 17 *Ed.* 3. 27 *Ed.* 3. 88. 29 *Ed.* 3. 13. *Swimb.* part 6. Sect. 3. n. 14. Sect. 20. n. 2. If the executor has a particular legacy, the residue shall go to the next of kin.

Mr. Solicitor General.

This question arose as a consequence of the statute of distributions, for it never was disputed till after that statute. The executor takes the whole in right of the testator, and therefore

therefore if he dies intestate, not his next of kin, but the next of kin to the testator shall have administration de bonis non, and though the executor has a power by law to dispose of the whole, yet what he has not disposed of, the law don't consider as his, but as the testator's, but if he is also residuary legatee, then his next of kin shall have administration, for then it belongs to him in his own right, and not in right of the testator, so that making him executor don't give him an interest in the estate, but only a power over it : Before the statute, an administrator, no more than an executor was obliged to distribute, and if the spiritual court went about to compel him, a prohibition lay, because till the statute, nobody had a better title, which is the foundation a court of equity now goes on, but I allow that since the statute, if it appears from the will, or by proofs, that the testator designed the executor should have the surplus, he certainly must, for a distribution is founded on the testator's intention that his executor should not have it, one evidence of which is the giving him a particular legacy, as is done in this case, but they say here that only one of the executors has a legacy bequeathed to him, and that therefore both are not excluded from the surplus, but in this case legacies are given to both of them, to *Moses Hawkins* expressly, and to the wife of the other executor, and what is given to the wife, is given to the husband, but also 40*l.* is given for mourning, for her, and the husband, and the children, but in the case of *Darwell* and *Bennet*, 2 *Vern.* 677, quoted in the case of *Ball* versus *Smith*, 2 *Vern.* 675. a legacy to one executor excluded the other two from their share of the surplus, and it was decreed to be distributed. If the daughter here had a child or children, the whole residue would have been theirs, then in that case the executors could have taken nothing as such, and yet their authority as executors would have continued, and though this contingency did not happen, yet since it appears that in that case they were to have had a bare authority only, there is no reason to think he designed them more in any other case, and since he gave the residue to his sister expressly for life, he could only design to make her a nude executrix, and then when he appoints the others executors after her decease, he must be supposed to make them executors too in the same sense, suppose the executors had died before the daughter, their authority would have been determined, and they could have no interest. In case his daughter died without children, then he says he gives the rest and residue of his estate as follows, and names only two bequests,

Freem. 203.
S. P.

bequests, and drops the rest, which must therefore belong to his next of kin, but they say he has given her a legacy of 1000*l.* and the residue expressly for life, whereby he has shown his intention that she should have no more, but what the next of kin take is not by the intention of the testator, but by the statute of distributions, because the testator has not completed his will, whereas the executor can only take by the will, and intention of the testator.

Mr. *Lutwych* for the plaintiffs.

Though the learning is still very doubtful, when the surplus belongs to the executor, and when to the next of kin, yet there can be no question in the case before us. In the case of *Foster* and *Mount* the executors were strangers, and had 10*l.* apiece given them for their care and trouble, and Lord Chancellor *Jefferies* ordered the account to be taken before he made his decree, and the surplus on the master's report coming out to be 5000*l.* he decreed it to the children, for it looked like a fraud; and the executors before that time were never questioned, because the law was for them, and no equity was against them, but many cases of this nature have indeed been determined since, though no certain rule is yet laid down, to know when an executor is excluded, no, not even the giving him a particular legacy, but the determination wholly depends on the circumstances of the case, and the intention of the testator, for in *Ball* and *Smyth's* case, 2 *Vern.* 675, a legacy was given to the executrix, and yet the surplus was decreed to her, but here nothing is given to them as executors, he gives them nothing out of that residue of which they were to be executors after the death of [+24] his daughter, but only particular legacies out of his personal estate, so no implication against them can arise from thence, for by this will there are two residues, one devised to the daughter for life, and the other is a part of this first which the testator has made no disposition of after her death, but his intention is plainly against the defendant, by his will he gives the daughter the residue during her natural life only, how then does it appear that he designed her all, would not this be intending her all and some, and this will is no more than the making a provision for his daughter and her children if she had any, if not, for his brother, and brother-in-law; and then since the executors have the legal title in them, what equity is there in this case to take it out of them? Where a fee-simple is devised to the heir for life,

See ant. cas.
3. post. case
26. Where
a legacy is
left to the
executor
and next of
kin, the re-
sidue be-
long to the
executor.
post. cas.
32. cas. 157.
1 Vern. 473,
contra.

life, he shall take the reversion by descent, because no body else has a title, but here the executor has the legal right, to what the testator has not disposed of, here he has left his daughter a particular legacy, who would be intitled to the surplus as his next of kin by the statute of distributions, so may not we say, she has no title, because he has made a particular provision for her, in the case of *Somner versus Hooker*, particular legacies being given to the next of kin, as well as to the executors, the residue was decreed to the executors, for the implication was equally strong, that the next of kin were to have no more, as that the executors were not, and then the law, which is for the executors, ought to take place, and this is not a case where both the executors have legacies, for *George Dawes* has no legacy, for the forty pounds are not bequeathed to him, and then if both the executors have not particular legacies, neither are excluded. Dr. *Cotesworth* brought a bill against *Brangwin* his co-executor, for an account of the surplus undisposed of, and that it might be decreed to him, because the defendant had a particular legacy. But Lord *Cowper* was inclined to think that neither were excluded because both were not, but directed an account to be taken, and after a report made, the cause coming on to be heard before Lord *Harcourt* in 1711, he decreed that the estate should be divided between the executors. An executor in his life-time may do what he pleases with the estate, and if he leaves an executor, he will be entitled to the estate of the first testator, but if the executor dies intestate, an administration de bonis non must of course be granted to the next of kin to the testator.

Mr. Wills.

The council for the defendant would collect the intention of the testator from the particular legacies, he has given legacies indeed to his brother *Moses Hawkins* immediately, but none to the other executor, but devises 100*l.* to his wife for life, and then to her children, which he seems to have done on purpose that her husband might not be excluded, from what he designed for him as executor; but supposing that legacies were bequeathed to both the executors, we are not within the reasons of the common cases, where the executorship and legacy are to commence immediately, because here the legacy is given absolutely, but the executorship only on a contingency, so that it might be the testator's intention that they

they should have these legacies at all events, and the residue on a contingency. Would they have only *Moses* excluded, that would be contrary to the testator's intention, for he designed he should be better provided for than the other executor; or would they exclude the other only, but no case can be mentioned where the surplus was decreed from the executor, if he had no legacy left him. Or would they have both excluded, why then they must be trustees for the defendant's wife tho' the testator by express words has given her the residue only for life, he has also given her 1000*l.* and to the defendant her husband 500*l.* from whence it may be as strongly inferred, that he designed her no more, as that he designed the executors nothing further, and they are executors only of the residue, which is expressly devised to the daughter for life, &c. on a contingency. By their construction the next of kin will have nothing, but the residue will go over to the defendant who is a stranger, while the daughter was alive, who was next of kin, the executors had no title, nor if she had children, and the executors themselves are next of kin, when they come to be intitled.

Mr. Attorney General's Reply.

In the case of *Foster* and *Mount*, the legacies were given to the executors expressly for their care and pains, but there have been many cases since, where legacies given to the executors generally, have debarred them of the residue, and those resolutions have turned upon the impertinence of the thing, of giving him a part, for whom he designed the whole; yet I allow in particular cases, the surplus has been decreed to the executors tho' legacies have been left them, where the intention of the testator plainly appeared, or was proved, as in *Littlebury* and *Buckle's* case, 2 *Vern.* 677. and in *Ball* and *Smith's* case, in which there was evidence of kindness to the wife, which took off the presumption that the testator designed her no more, but in all other cases the executors have been excluded, but I allow that the question will principally depend on the construction of the will; here they say the legacies are given in præsentî, but they are made executors only after the daughter's death, but this objection I think makes against them, suppose they had died in the lifetime of the daughter, they could not have taken, nor their representatives, though the contingency had after happened, and suppose she had left issue, they would have been executors,

Parol proof may be read, that the testator designed the executor or the surplus.

ors, yet could have taken nothing, which shows plainly, that he designed them only an authority, and no interest; and if imports nothing, that he has given the residue to the daughter for life, for that was done purely for the sake of her children, to make the legacy sure to them; and if she had no children, he only gives particular parts over; if he had made no executors, it must be admitted she would have had the residue, but the making executors will not alter the case, for they have only the legal interest in them, but they say this is different from the case of a reversion, which will descend on the heir, tho' the lands are expressly devised to him for life, because here the executor can take, but there no body else has a title, but suppose then cestuy que trust in fee, devises to his heir for life, in that case there is a trustee to whom the reversion in fee by law belongs, yet the trust of the reversion shall go to the heir, and in the cases of personal estate, the next of kin are as strongly intitled to the trust of the surplus, as the heir in the other case is to the trust of the reversion, and there are many precedents where the surplus has been decreed to the next of kin though they have had particular legacies devised to them, for they take by the statute, not by the intention of the testator, the executor wants the will to take by, but the next of kin do not. Here they say a legacy is left only to one executor, but in the case of *Darwell* and *Bennet* that excluded the other two from claiming the residue, and in the case of *Dr. Cotsworth* and *Brangwin*, the question was only between the executors, and it doth not appear that the next of kin were before the Court.

If a legacy is left to one executor neither are excluded from the surplus of the personal estate undistributed of,

His Honour the Master of the Rolls declared, that by giving a legacy to one of the executors, neither of the executors were excluded, and *inter al'* decreed, that the executors were intitled to the surplus (which was about 2000*l*.) and that the defendant should account for the same. 2 *Vern.* 247, 361, 425, 673, 730, 104, 148, 648, 571. 1 *Vern.* 425. 3 *Salk.* 82, *Cas.* 1. 1 *Chan. Cas.* 196.

This decree was affirmed in the House of Lords, on *Wednesday, March the 4th, 1729-30.*

D E

[+27]

D. S. Michael.

1728.

In Cur. Cancellariæ.

ANONYMUS.

AN order was made, that a solicitor's bill should be taxed by a master, and that all proceedings at law should in the mean time be stayed, and whilst the bill was under taxation, the solicitor sues out a commission of bankruptcy against his client. And on a petition to supersede the commission, this was adjudged to be no contempt, nor a sufficient cause to supersede the commission, because the order of reference extended only to bringing actions, and to common and ordinary proceedings.

Case 13.
At the
Chancel-
lor's house,
Lord Chan-
cellor.

A solicitor
may take
out a com-
mission of
bankruptcy
for his fees,
whilst his
bill is under
taxation by
order of
Court.

October the 22d, 1728.

JACOB versus the Earl of SUFFOLK.

Case 14.
At the
Chancel-
lor's house.
Lord Chan-
cellor.

LANDS were conveyed by the late Earl of *Suffolk* to trustees and their heirs, for payment of his debts, to be paid within six months after his decease, and on a bill exhibited by the creditors, the trust was decreed to be carried into execution, and the creditors were to come in before the master, and prove their debts. The Master in about four years makes his report, and on a petition of several creditors to have what interest they should be allowed, ascertained, and from what time. The Lord Chancellor declared it as the practice of the Court, that the principal shall bear interest from the date to the confirmation of the report, and the principal shall bear interest from the date to the confirmation.

What is due
for princi-
pal interest
and costs on
a mortgage
shall carry
interest
from the
confirma-
tion.

2 Vern. 392. post. cas. 139.

the

Where
lands are
subjected to
the pay-
ment of
debts by
simple con-
tract, they
won't bear
interest tho'
stated by the
report, un-
less upon
unreason-
able delay
of payment.

the Court, that where a Master reports what is due on a mortgage for the principal, interest and costs, that the whole aggregated sum shall carry interest from the time the report is confirmed, and that interest shall be paid for the principal, from the date of the report, till its confirmation. And that debts by simple contract though liquidated by the Master's report, will not bear interest, unless the creditors are unreasonably delayed, for though the debtor has provided an additional security for them, by making his lands chargeable with the payment of them, that has not otherwise altered the nature of them, so as to make them carry interest (like debts which originally affect lands) which they did not before, tho' 'twas urged by the Solicitor Gen. that on a mortgage, the interest when turned into principal, did not bear interest, from the nature of the lien, but only from being ascertained by the report, and that therefore it ought to hold so in debts by simple contract, and that here the simple contract creditors ought to have interest for their debts from the six months after the Earl's death, since he had provided for the payment of them in that time by sale or mortgage, and if a mortgage had been immediately made, the estate must have born the interest; or at least that they might have interest from the Master's report, when the several debts became certain, especially for that the creditors had been delayed for near twelve months by a dozen exceptions, which were all over-ruled, and cited a case where it had been done, and affirmed in the House of Lords.

Case 15.

At the
Chancel-
lor's house.
Lord Chan-
cellor.

EX PARTE GAZALET.

ONE previous to his marriage, entered into a bond to a trustee, of the penalty of 1600*l.* conditioned, that if the marriage was had, and his wife survived him, he would leave her 800*l.* or if she died without issue in his life-time, he would pay back 100*l.* of her portion to her father. The marriage took effect, and the husband afterwards becomes a bankrupt. And the trustee petitions to be let in as a bond creditor under a commission of bankrupt sued out against him. And the question was, whether this contingent demand should be considered as a debt, and proved before the

Quære,
Whether a

bond on a contingency can be proved before the commissioners of bankrupt before the contingency happens. 2 *Vern.* 101. Quære, Whether a bankrupt can plead his certificate to an action brought on a bond entered into before bankruptcy, on a contingency that did not arise till after he was cleared.

Commissioners,

Commissioners. And the only doubt with the Lord Chancellor was, whether if the contingency hereafter happened, the bankrupt might not plead his certificate to an action brought on the bond, and therefore he ordered it to stand over to the next day of petitions, to have that point spoke to, for his Lordship declared if the certificate was no bar, he would dismiss the petition, for the contingency might never happen, and though the husband was now a bankrupt, he might recover his credit, and be able to perform the condition if it ever arose, and it was said that it would be no bar, because the cause of action was subsequent to the certificate, and that it had lately been [†] resolved so in *B. R.* in the case of *Tully* and *Sparks*, where one brought an action on a bond that bore date before the bankruptcy, and set forth in his declaration, the condition, which was not broke till after the bankrupt was cleared, the bankrupt pleaded his certificate, and the plea was adjudged insufficient. Because at the time of the certificate, the obligee had no cause of action. [+29]

Mr. Mead insisted that such creditors on a contingency had been often allowed to come in under a commission by Lord Cowper, Lord Harcourt, and Lord Macclesfield, and their proportion of their debt was put out at interest in the name of the assignees, and the interest was paid to the assignees, and if the contingency happened, then the principal was paid to the creditor, but if it never happened, then it went to the assignees, in trust for the other creditors: And he mentioned the case of *Green*, where the money due on a contingency was reserved in this manner. ^{2 Vern. 662.}
^{See post. Caf. 51.}

HILL versus WHITE & ux', & è contra.

Cafe 16.

At the
Chancel-
lor's house.
Lord Chan-
celler.

MR. Hill preferred a petition to his Majesty in his High Court of Chancery, praying a commission to review and rehear a sentence of the Court of Delegates in *Ireland*, and Mrs. White and her husband preferred a cross petition for a commission to review and rehear a sentence of a Court of Delegates in *England*.

Mr. Solicitor General for the petitioner Mr. Hill.

Capt. in White privately married the daughter and only child of Lieutenant General Sancho, without his privity or consent,
D

consent, and the mother of *Marcus Hill*, the petitioner, was sister to the General's wife. In 1719 General *Sanby* died in *Ireland*, on a journey, in company with Mr. *Hill*, and being greatly disobliged at his said daughter's marriage, he a few days before his death, made his will, and appointed the said *Marcus Hill* sole executor, and residuary legatee, after payment of debts and legacies. In *May* 1720, the will was propounded in the Prerogative Court of *Canterbury*, and the probate was opposed by the counter petitioners, but in 1722, a sentence was given in favour of Mr. *Hill*, and the probate granted to him, and on an appeal the sentence was affirmed by eight of the Delegates, *July* 22, and no complaint thereof was ever made till this cross petition. And the testator leaving also considerable affets in *Ireland*, the will was likewise propounded in the Prerogative Court of that kingdom, and a probate was granted to the petitioner, and on an appeal the cause was heard before the Delegates, *January* 1723, on the

[+30] same + evidence as in *England*, and they adjourned till the 7th of *February* following, and on the 18th of *April*, 1728, without being continued by adjournment, and without notice to the parties or their proctors, three Judges met, (and no common lawyer among them) and reversed the sentence of the Prerogative Court, and granted letters of administration to Mrs. *White* the daughter: Wherefore we now prefer this petition to have the said sentence reviewed and reheard, and tho' a commission of review is not a matter of right, but of grace and favour, (as was adjudged in the case of *Powis* and *Andrews*) yet it has never been denied upon good reasons, and we presume our cases are so very different that there are the strongest reasons for this petition, and none of any weight or moment for theirs. In *Ireland* there has been but one sentence against the will, and that given by only three Commissioners; nor are the fraud, and imposition on, and insanity of the testator, suggested by the cross petition, sufficient allegations, because they have been already under consideration of the Judges, that gave the sentence, and they have adjudged them not sufficient to set aside the will. The sentence of the Delegates in *England* was conformable to the sentence of the Prerogative Court, and has been acquiesced under five years, and no precedent can be shewn where after so long an acquiescence, a review has been granted of a sentence of Delegates, who confirmed the sentence of the Prerogative Court.

A commission of review is not a matter of right but of favour.

De Term. S. Michael. 1728.

Doctor *Henchman.*

Numberless inconveniencies would ensue, if a commission of review should be allowed after so great a distance of time. The executor Mr. *Hill* has paid the debts and legacies of the testator, all which are liable to be reversed and undone by this commission, they pray by their cross petition: And therefore there is always a time limited for the bringing of appeals. The civil law allows ten days, and we fifteen, and I have known an appeal disallowed that was brought on the sixteenth day; conformable to which rule, the House of Lords have lately made an order, that appeals to their Lordships shall be brought within five years, and two years was the time allowed to petition his Imperial Majesty in, and this is now the law of the empire. All which rules are founded on a supposition, that the estate is in that time disposed of, and that the circumstances of the parties in such a course of years are greatly altered. The Court of Delegates in *Ireland* have proceeded in a manner new, and unprecedented, four years past between their first sitting on the commission, and their giving sentence. The cause was first heard in *January* 1723, before five Commissioners, and the last hearing was on the 18th of the same month, then they adjourned to the 7th of *February* then next following, then there was a discontinuance, then they met on the 24th of *February*, and there was no settled adjournment as to time or place, so † that the parties could not tell when or where to attend; the next meeting was on the 9th of *April* 1726, another was on the 10th of *January* 1727, and on the 18th of *April* 1728, the sentence was given, tho' neither the council for the petitioner, or his proctor, was present as appears by the acts of the register. The Commissioners in *Ireland* refused to admit five witnesses, whose testimony was allowed in the Prerogative Court in *Ireland*, and by both the Courts in *England*. In *February* 1723, the Commissioners in *Ireland* met to give sentence, but could not agree till 1728. There is no quorum in the *Irish* Commission, and though they set forth in their petition, that all the three Delegates signed the sentence unanimously, that is of no weight, because by the order of the commission, that is necessary to make the sentence good. In *Ireland* the Prerogative Court gave sentence for the will, and only three Judges of fifteen gave sentence in favour of the cross petitioners. In *England* the probate was granted by the Prerogative Court, and their sentence was confirmed.

A time is always limited for bringing appeals, and why?

An appeal from a spiritual court must be brought in 15 days.

4 instit. 339. Supplement to Wentwo.

337. An appeal to the House of Lords must be brought within five years.

[† 31] An appeal to the Emperor must be brought within two years.

De Term. S. Michael. 1728.

sion, because we have new witnesses to examine, and to new matter, which they do not suggest, and therefore we hope your Lordship will make a favourable report of us to his Majesty.

Mr. Attorney General.

One allowed a good witness by the Prerogative, and Court of Delegates, may be refused on a commission of review.

This is such a will, as a Court would allow the probate of with great reluctance, an inofficious testament, in which no notice is taken of the daughter his only child, and would be void by the civil law, and there were two wills found both made in her favour. The testators leaving assets in both kingdoms, makes this a very particular case, but I must observe to your Lordship that this will was made in *Ireland*, and witnessed there, and in that kingdom they might give sentence on the credit of the witnesses, where they were best known, and their characters could be easiest found out, and this indeed appears to be the fact from the complaint of the petitioners, that five of the witnesses, whose testimony was allowed in this kingdom, were rejected there, and may be so here on a commission of review, as in the case of *Drake and Prime*, 6th of *February* 1705, *Abington* was allowed a good witness by the Prerogative, and Court of Delegates, and yet his evidence was refused on a review. Here have been three sentences against one indeed in favour of the will, but not on the same evidence, but only sentence against sentence. As to the errors in the proceedings, it is common not to have due entries from *Ireland*, and is answered by the practice of the Court of Delegates here, the Judges meet, adjourn, and at the day perhaps no Judge comes, yet the proceedings do not fall for that reason, but new warrants are granted to attend, and no entries are made of such warrants. Proceedings of Courts are first taken down in minutes, and are drawn up at large from thence, so that it is not strange that several errors should appear in them. As to the prayer of their proctor, that the sentence might be staid, till the other Judges came, who heard the cause, this might have delayed the sentence for ever, for according to my instructions, they two were dead, when sentence was given. Though the sentences in *England* were very solemn, and in conformity, yet there is sufficient cause for a review, because we have new matter to prove, and by new evidence; and as the law has set no time in which such a petition is to be brought, it lies wholly in the breast of the Crown, and no case can happen in which it can be more properly asked than in this, where a daughter is left poor

poor and † destitute of any provision from her father, and a [†34]
 suit depending at the same time in *Ireland* to set aside the will,
 wherefore it was adviseable to wait till the same was deter-
 mined in that kingdom, and if the Judges there gave sen-
 tence in favour of the will, then to acquiesce, but if they
 gave sentence for the daughter, this then would be a good
 reason for us to pray a review of the sentence given in *Eng-
 land*, and is very necessary to prevent the clashing of jurif-
 dictions, in case the sentence of the Commissioners in *Ireland*
 should be confirmed on the commission of review granted to
 the petitioners, for then in the same kingdom it would be al-
 lowed in one Court to be a good will, and disallowed in an-
 other, and there is no other method for one uniform deter-
 mination, than to have both sentences reviewed by a new
 commission. So that here the length of time can be no ob-
 jection, because it was proper for Mrs. *White* to wait the
 event of the suit in *Ireland*. By the rules of this Court a
 month is the time limited for a rehearing; suppose then a
 decree made in favour of the plaintiff, and in another cause,
 a decree given for the defendant on the same equity, and a
 petition is preferred to rehear the last cause, the Court will
 likewise suffer the first cause to be reheard at the same time,
 tho' the petition is preferred at a greater distance of time,
 than is limited by the course of the Court, to the end that
 there may be one uniform decree in both causes, and reviews
 in Ecclesiastical Courts are of the same nature with rehear-
 ings.

A rehearing
 in Chancery
 ought to be
 brought in
 a month,
 yet if dif-
 ferent de-
 crees are
 made in two
 causes on
 the same
 point, the
 Court will
 grant a re-
 hearing of
 both at the

same time, tho' the petition in the first cause is not brought within that time.

Lord Chancellor.

Though the cross petitioners suggest that they have new
 matter to offer, yet as they have produced no affidavits to
 prove the same, I can take no notice of the allegations of
 their petition. My opinion however is not final, but I am
 only humbly to lay my thoughts before his Majesty. I cannot
 advise the King to grant a commission of review after five
 years acquiescence under the sentence, for that would render
 property unsettled and precarious, and no commission with-
 out proof of new matter was ever granted at such a distance
 of time. If the case stood single, but here in one kingdom is
 The Prero-
 gative and
 Court of
 Delegates in *England* gave sentence in favour of a will, and likewise the Prerogative Court
 in *Ireland*, but the Delegates in *Ireland* reverse that sentence 5 years after the sentence given
 by the Delegates in *England*. Both sides petition his Majesty for a commission of review,
 and the Lord Chancellor declared that he would advise his Majesty to grant a commission
 of review of the sentence of the Delegates in *Ireland*, but to suspend the consideration of
 the other petition till those commissioners of review had given sentence.

a sentence

a sentence for the will, in the other against it, five Delegates in *Ireland* heard the cause, and four years after, three gave sentence. As to the entries, they are but matter of form, and may be rectified, in this case there have been two sentences in *England* for the will, and one in *Ireland*, so that a commission of review of the sentence of the Delegates in *Ireland* is plainly reasonable, but to prevent contradictory decrees this seems to me at present the best method: To lay before his Majesty that the petitioners are well intitled to a commission, and that it would be proper to suspend the consideration, whether a commission should be granted to the cross petitioners, till those commissioners of review have given sentence, if they reverse the sentence of the Delegates in *Ireland* then there will be no occasion for another commission, because the sentences in *England* will agree, if they affirm it, then it will be proper to grant a review of the sentence in *England* to the same Commissioners, that two different sentences on the same will, may not be on record in the same kingdom. But not to be allowed to give new evidence as to facts and matters before examined to. The acts of the Court of Delegates in *Ireland* were produced in this cause signed by the register, and it was adjudged that there needed no affidavit to prove his hand, he being a publick and known officer, as on an appeal to the Lords the party is never put to prove the register's hand to a decree.

[+35]

4 Instit. 341.
25 H. 8. ch.
19. Hard.
216. Caf. 7.
Supple-
ment to
Wentworth
378.
It is not
necessary to
prove the
register's
hand to the
acts of the Court of Delegates, because he is a known officer.

ANONYMUS.

Case 17.
At the
Chancel-
lor's house.
Lord Chan-
cellor.

Mr. Attorney General for the Creditors.

THIS comes before your Lordship, on the creditors petition for your Lordship's judgment, on the report of the Commissioners of the account of the assignees. A commission of bankrupt was taken out against *Watson*, the Commissioners find him a bankrupt, assignees are chosen, and a dividend made; afterwards several other effects of the bankrupt coming to their hands, the creditors petition, that the assignees may account, and make a new dividend, and your Lordship was pleased to order that they should account before the Commissioners, and that the Commissioners might state any thing especially for the judgment of the Court.

Accordingly

Accordingly the Commissioners have taken the account, and certify that *Green*, *Hall*, and *Aires* were the assignees, that *Green* did not appear, and so no account was taken as to him, but only from the other two, that *Green* had received several sums of money, and whether the other two assignees should be charged with his receipts, they submit to the judgment of the Court, that the assignees sold a real estate of the bankrupt, that *Aires* received part of the purchase money, and let *Green* have 67*l.* of it, and they likewise submit to your Lordship, whether *Aires* shall be chargeable with this sum. And it seems reasonable, that all the assignees should be answerable for the effects come to any of their hands, for all are trusted by the creditors, and the commissioners vest the effects in all jointly, and 'tis upon their joint credit † that they are intrusted by the creditors, and it is only for their own ease and convenience, they let one another receive the effects. As to the 67*l.* it is plain that *Aires* must be accountable for it, he admits in his own affidavit that on his receiving 220*l.* residue of the purchase money, upon *Green*'s desire he let him have 67*l.* to lend to some of the creditors, he admits then that he received the money, and therefore he is accountable to the creditors for it, he having paid it over to another assignee, not for the proper purpose, but to lend over, and he trusted *Green* with this sum, for he swears he lent it him upon his own credit, and because he thought him a substantial person, and your Lordship adjudged in the case of *Lane* and *Wroth*, that if one executor pays over to another executor money of the testator he has received, this shall not discharge him of it, and in the case of *Stanley* and *Darlington* the Master of the Rolls was of the same opinion, it coming before him in judgment on the Master's special report in 1727.

[†36]
If one executor pays over assets to the other, he is still answerable for them.
Nels. 8vo
Rep in
Canc. 109.

Mr. *Lutwyche* for Mr. *Hall*, and Mr. *Aires*, two of the Assignees.

Where money is paid to one assignee, the other shall not be answerable, for since an executor or trustee for payment of debts shall answer for no more than he himself received, neither shall an assignee, for executors or trustees for payment of debts are forced upon the creditors; and it is not in their power to change them, but the assignees are trustees chose by the creditors themselves, who give them an equal trust, and can have them changed, and the assignees expressly covenant to answer only severally. Nor is *Aires* to be charged with

De Term. S. Michael. 1728.

with the 67*l.* all the assignees sell the estate, and *Aires* and *Green* come to the place appointed to receive the purchase money, but *Aires* is there first, and receives the money, and whilst he is counting it over, *Green* comes in, and desires to have 67*l.* of it, if *Green* had received this 67*l.* and *Aires* only the rest, without doubt he should not answer for it, and as *Green* came before the meeting was over, it ought, I think, to be considered, as if it had been originally received by *Green*, and as if *Aires* had never received it.

The Lord Chancellor.

Each assignee is chargeable only with his own receipts. But if one pays money to the other, he remains still chargeable by the creditors.

It would be of very ill consequence, if a solvent assignee might discharge himself, by paying money over to an insolvent one, he ought to have kept the money when he received it, and therefore Mr. *Aires* must account for the 67*l.* but neither he, or Mr. *Hall*, are to be charged with what † Mr. *Green* received. 2 *Vern.* 504, 515, 570. 1 *Salk.* 318. 1 *Vern.* 303. 1 *Chan. Cas.* 127. *Wentw. Off. of Ex.* 161. Supplem. to *Wentw.* 316, 328. *Clayt. Rep.* 106, *Cas.* 179. *Keilw.* 51. *Swinb. Part 1. Sect. 7. n. 3.* *Keilw.* 23. 11 *H. 6.* 38, a. *Dyer 2.* *Cas.* 10. a.

ANONYMUS.

Cafe 18.
At the
Chancellor's house.
Lord Chancellor.

A Bankrupt preferred a petition to supersede the Commission, on a suggestion, that the debts of the petitioning creditors did not amount to 200*l.* several of their debts being barred by the statute of limitations. And the Lord Chancellor proposed that this issue should be tried at law, whether the petitioning creditors are creditors for 200*l.* within the meaning of the act; in which trial, the bankrupt was to have the benefit of the statute of limitations, in the same manner as upon a plea of Non assumpsit infra sex annos, but the council for the creditors being unwilling to have this issue tried, the Lord Chancellor superseded the Commission, because the statute would be eluded, if the creditors who had suffered it to run upon their demands, should be allowed to take out a commission.

A commission of bankrupt was superseded, because several of the debts of the petitioning creditors were barred by the statute of limitations.

ANONYMUS.

ANONYMUS.

THE condition of a bond was, for so much money in hand paid, to convey, and assure certain lands: The Master of the Rolls declared, That bonds of this nature were always considered in equity as articles of agreement, and decreed, the condition to be specifically performed, and the obligee having been in possession twenty years, he would not oblige him to prove the payment of the money, which is recited in the condition to be paid in hand.

the condition shall be performed in specie, and the obligee having been in possession 20 years, need not prove the money paid.

Case 19.
At the
Rolls.

Master of
the Rolls.

A bond
conditioned
to convey
lands for
money re-
ceived, is
considered
in equity as
articles, and

WELSH versus FISH.

THE mortgager filed his bill against *Samuel Fish*, and *Mary* his wife, executrix of the mortgage, for an account of the rents and profits, and to be let into a redemption, on payment of what was due, and on hearing the cause, it was decreed, That the Master should take an account of what was due to the defendants, for principal, interest, and costs, and deduct out of the same what he should find the defendants had made by the rents and profits of the premises, and the surplus was to be paid by the mortgagor in a limited time, or he was to be for ever foreclosed of his equity of redemption: pending the account, *Samuel Fish* dies, and the plaintiff brings his bill of revivor, and supplemental bill, [138] against the defendant *Mary* the widow, and against *Mary* the daughter, as administratrix of her father *Samuel Fish*, for a discovery of assets. And *Mary* the daughter pleaded in bar to the bill of revivor, that the defendant *Mary* the widow, was devisee of the mortgaged premises, in trust for her, and that the decree could not be revived against her, because she had never been made a defendant to the original bill, and her council insisted that the bill might have been revived against the defendant the widow only, because she was sued in *Auter Droit*, and the husband was only joined for conformity. And as to the discovery, whether her father left assets or not, she demurred.

Case 20.

At the
Chancel-
lor's house.
Lord Chan-
cellor.

Lord

Lord Chancellor.

Mortgagor brings a bill to redeem on payment of what is due, and a decree is made accordingly. Pending the account the mortgagee dies, and a bill of revivor is filed against his administratrix, and a supplemental bill for a discovery of assets. To the first, she pleads that the suit could not be revived against her, because she was cestuy que trust of the mortgaged premises, and had not been made defendant to the original bill, but the plea was over-ruled, because the suit was not revived against her in her own right, but only as representative of the mortgagee. And as to the discovery of assets, she demurred, and her demurrer was allowed; because the plaintiff (as appeared by the bill and decree) could not have any demands out of them. 2 Vern. 296, 299.

The original bill is only to redeem, and don't pretend, that by the rents and profits the mortgage is paid off and the decree runs in the same manner, so that it is perfectly unnecessary in this case for *Mary* the daughter to admit assets, or to set them forth, and therefore I allow the demurrer; but the plea must be over-ruled, for *Samuel Fish* being decreed to account, that account can't be carried on after his death without his representative being before the Master, and therefore the bill is properly revived against *Mary* the daughter, as his administratrix, but if it had been revived against her as cestuy que trust of the mortgaged premises, then indeed her plea would have been proper, that she had not been made a party to the original bill. But the council for the plaintiff argued, that the demurrer was not good, because tho' the decree directs the mortgagor to pay the overplus, which supposes the balance would be in favour of the mortgagee, and no provision is made that the mortgagee should refund, if the balance came out against him, yet if upon the foot of the account, the mortgagee should be found to have received more than the principal, interest, and costs, the surplus must be refunded to the mortgagor, and therefore it is necessary that the defendant should discover, or admit assets, besides, the account was decreed against the defendant *Samuel*; because he had been in perception of the profits, and his assets are obliged to make good what he shall be found to have received. But the Lord Chancellor denied the first part of their argument, and said that the decree had provided for the second, for by that, whatever *Samuel* had received out of the rents and profits was to be set off against the principal, interest and costs.

[+39]
Case 21.
At the
Chancellor's house.
Lord Chancellor.

+ ATKINS & al' Plaintiffs.
ROWE, Defendant.

THE bill sets forth, that the plaintiffs, the defendant, and one *Cob*, all linen-drappers, lived in three houses contiguous to one another, held by lease of the Grocers Company;

pany, that *Cob* quitted his house, and the leases of the three houses being just expiring, and the plaintiffs, and the defendant, being unwilling to remove from a place where they were well known, and had long inhabited, or to have a bad neighbour in *Cob's* house, and it being the custom of the Grocers Company to appoint a committee, to accept proposals for the renewal of leases, and to report the best purchaser; that thereupon the plaintiffs and defendant came to the following agreement: That one or other of them should take a lease for twenty-one years of the three houses, that one should bid before the Committee, and acquaint the other with his proposal, and that then the others should underbid him, but that the lease should be for the benefit of all; that they should severally pay the rent of the houses they lived in, and that the rent of *Cob's* house should be paid equally by all; that accordingly the defendant *Rowe* proposed to the committee to pay them 400*l.* fine, and 50*l.* a year rent, and the plaintiffs according to their agreement not making so advantageous a proposal, *Rowe* was reported the best bidder, and a lease was made to him upon those terms; and the end of the bill was to have the benefit of this lease, and that the defendant might be considered as a trustee for the plaintiffs. And as to any relief, or discovery, prayed by the bill, the defendant pleaded the statute of frauds and perjuries, and that there was never agreement in writing to the purpose in the bill.

Lord Chancellor.

Suppose I employ one to purchase for me, and he liking the bargain, takes a conveyance to himself, shall he plead the statute? this is the same case. Two neighbours being unwilling to have the third house in strange hands, come to the agreement that has been mentioned; which is not for the lease, no, that agreement was with the Grocers Company, and reduced into writing. Let the plea stand for an answer, with liberty to except, and the benefit of it be saved to the hearing

If two neighbours agree that one of them shall take a lease of houses for the benefit of both, shall the other have the benefit,

though the agreement is not in writing. Q. 2 *Vern.* 627. 1 *Vern.* 296.

BROOM

[40]

† BROOM *versus* HORSLEY.

Case 22.

At the
Chancel-
lor's house.

Lord Chan-
cellor.

To plead to
such part of

the bill as
is not an-

swered, is

bad, because

it puts the

Court to the

trouble to see

what is an-

swered, and

hinders the

plaintiff from

excepting.

TO plead to such part of the bill as is not answered, is a bad form of pleading, because it puts the Court to the trouble of seeing what is, and what is not answered, and deprives the plaintiff of the benefit of taking exceptions to the answer. *Curf. Cancell. 199, 231.*

Case 23.

At the

Chancel-

lor's house.

Lord Chan-

cellor.

MACARTY, alias Lord MUSKERY, & al' Plaintiffs.

GIBSON, Defendant.

THE plaintiffs brought their bill, as residuary legatees of Lady *Jane Macarty*, against the defendant, her executor, for an account of assets, and payment of the residue, an account was decreed, and the Master made his report, to which the plaintiffs excepted, because the Master had allowed the defendant 500*l.* for payment of a legacy, though he had compounded with the legatee for 250*l.* and that therefore he being an executor only in trust for them, they ought to have the benefit of the agreement, and he was to be allowed no more than he really paid. And to prove this composition, they offered to read the deposition of the legatee, which was objected to, because she swore for her own advantage, and would make the executor liable to pay her the residue. But Mr. *Mead* said this could be no objection to reading her depositions for the plaintiffs, if they thought proper, for that would be their loss, as it would lessen the residue. But the Lord Chancellor would not allow her evidence, because she had given a receipt under hand and seal for the whole legacy, attested by two witnesses, and his Lordship declared, he would never suffer any one's oath to be read contrary to their own deed so solemnly executed. So the exception was overruled for want of proof.

The oath of
a legatee
who had
given a re-
ceipt under
hand and
seal for her
whole le-
gacy, was
not allowed
to be read
as evidence,
that she had

only received part. *Curf. Canc. 313.*

A receiver
need not be
served with
a writ of
execution
of a decre-

A receiver appointed by the Court, is an officer of the Court, and need not be served with a writ of execution of a decretal order, but only with a copy of the order, and if he disobeys it, he shall be committed.

ANONYMOUS.

tal order, but only with a copy, and if he disobeys, shall be committed.

† ANONYMUS.

[†41]

Cafe 24.
At the
Rolls.

THE executor and residuary legatee brought a bill against the defendant for a discovery of several of the testator's effects come to his hands, the defendant puts in a full answer, and offers to give the plaintiff 250*l.* for his interest, the plaintiff replies, and after obtains an order to withdraw his replication, and the cause coming on to be heard on bill and answer, the Master of the Rolls declared, That the plaintiff might either pray a decree according to his equity, or according to the offer in the answer, by which the defendant gave the plaintiff his election, which was not waved by the replication, but that the defendant would be bound by his answer, though the plaintiff had replied, and gone to commission.

The plaintiff may either have a decree according to his equity, or the defendant's offer in his answer, though he replies to it.

ANONYMUS.

Cafe 25.
At the
Rolls.

THE testator devised 100*l.* a-piece to his three daughters, payable at twenty-one, or marriage; and if any of them died before their portion became due, her share was to be equally divided among the survivors. One dies under age, and unmarried, another attains her age of twenty-one years, and files her bill against the executor for payment of her legacy of 100*l.* and of 50*l.* the moiety of her sister's share that died, which she was entitled to by survivorship. The executor by his answer craved an allowance out of the principal for maintenance of the plaintiff. But at the hearing the Master of the Rolls declared it was an established rule in Chancery, not to allow maintenance for an infant, beyond the interest of her fortune, and therefore in this case no interest being payable till the principal became due. The executor was intitled to no allowance for maintaining the plaintiff till she came of age.

Chancery never allows maintenance for an infant beyond the interest of their fortune

1 Vern. 255. 2 Vern. 137.

It was also questioned when the plaintiff was intitled to the payment of the 50*l.* whether at the time it was to have been paid to the sister, in case she had lived to receive it, or

Legacy to two payable at 21 or marriage, and if ei-

ther die before payment, to survive. One dies under age, and unmarried. Q. Whether the legacy over shall be paid at the same time with the original legacy, or at the time the deceased would have come to 21. Post. Pag. 473. 2 Bridg. Convey. 191, 259, 280, 220, 232. 2 Vern. 620, 199, 283, Nels. Fol. Rep. in Canc. 62. 1 Anderf. 33. Swinb. Part 1. sect. 7. n. 3. 1 Leo. 278. 2 Vern. 466, 722.

at

at the time the original portion became payable to the plaintiff, but the solicitor for the plaintiff submitted to have the payment of it decreed when the sister would have arrived at twenty-one, and tho' the Master of the Rolls said it was a doubt, he seemed to be of the same opinion.

[+42]

The plaintiff may move for a subpoena returnable

+ The plaintiff may move for a subpoena returnable immediately, against an officer of the Court, without the usual affidavit, because he is presumed always to attend.

immediate, without an affidavit, against an officer of the Court; for he is presumed always to attend.

Case 26.

PAGE & al^r versus PAGE & al.

At the
Chancellor's house.
Lord Chancellor.

THE council for the defendants spoke to this effect. Mr. *Wilkins* devised all his real and personal estate to six relations, in trust, to pay his debts and legacies, and the residue to his said six relations, equally to be divided among them share and share alike, and made them executors." *Peter Daly*, one of the devisees, dies in the life-time of the testator, and after the testator dies, and his heirs at law, and next of kin, bring their bill against the executors for an account of the real and personal estate, and to have the sixth part of *Peter Daly* decreed to them, as a lapsed legacy. And at the hearing your Lordship declared that as to the real estate it was jointly devised in fee to the devisees in trust, for payment of debts and legacies, and your Lordship was pleased to order that an account should be taken of the personal estate, and of the debts, and legacies, and if a surplus remained, the consideration of that was reserved till after the report. The Master has made his report, that there remains a surplus of 3000*l.* in money, besides several securities, and the cause now comes before the Court on this report for your Lordship's directions, to whom this surplus shall be paid. And the only question is, as to the sixth part of *Peter Daly*, Whether it shall survive to the defendants as joint devisees? Or whether it shall go in a course of distribution as a lapsed legacy? And this seems to be determined already by the decree, which has declared it to be a joint devise, as to the real estate, and must therefore be a joint devise of the personal estate also, and his part will survive to the rest, tho' one devisee dies in the life-time of the testator, and therefore this sixth ought to be divided into fifths among the surviving devisees, but the defendants are also executors, and

and therefore if it should be construed as a lapsed legacy; they are intitled to it. Where a particular legacy is given to an executor, it looks like excluding him from the residue; because if the testator had given him nothing in particular, he would have had all, but here is no implied trust for the next of kin, nothing to shew that he designed them any thing; but on the contrary, his intention plainly appears that they should have nothing, because he gives the devisees every thing.

† Mr. Solicitor General for the plaintiffs.

[† 43]

The decree, as far as it goes, has determined in our favour, that the devise is joint by the express words of the will, as to the payment of debts and legacies, but that the residue is to be divided among the defendants share and share alike, so that tho' they are joint devisees in law, as to payment of debts and legacies, they are devisees in common as to the equitable interest in the residue, which is to be divided share and share alike, and therefore that *Peter Daly* dying in the life-time of the testator, his share of the devise of the residue became lapsed and descended to the heir at law, chargeable with the debts and legacies. As to the personal estate, it did not then appear, whether there would be any surplus, after the debts and legacies were paid, so that point was reserved by the decree till after the account was taken, and it being declared by the Court, that the devise of the real estate is a joint devise for payment of debts and legacies, but a several devise, as to the equitable interest in the residue, it must be construed in the same manner as to the personal estate; but supposing it a lapsed legacy, the defendants say, they are intitled to it as executors, and that it was the testator's intention to leave them every thing. But the testator's intention is not the rule to go by, for where the Court decrees the residue to the next of kin, they never suppose that the testator designed it them, but they construe the will for so much to be an incompleat will, and then in conformity to the statute of distributions, dispose of the residue to the next of kin. But supposing we should take the intention for our guide, in this case it would make against the defendants, for the testator devises to six share and share alike, so that each was to have a sixth part only, why then should he have a share of a sixth not designed to him; and tho' the intention of the will is disappointed as to one of them, there is nothing to shew that the testator designed his share

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to

to the survivors, but his intention appears plainly to the contrary. Where there is a residuum, a lapsed legacy falls into it, but here a part of the residuum itself lapses, and the case is stronger than where a particular legacy is given to an executor, for none of the executors here can take any thing as executor, but the whole surplus is disposed of, and each of them is to have a sixth part as legatee, and it would be contrary to the express words of the will to give them any thing as executors, and therefore this lapsed legacy ought to be distributed according to the statute.

Mr. Lutwych.

[+ 44] The devise of the legal estate being joint as to the payment of debts and legacies, the whole estate is liable to them, but † after this trust discharged, the residue being to be divided among the devisees share and share alike, shews that the devise was several in point of interest, and therefore your Lordship decreed the sixth of the real estate to the heir at law, as a lapsed legacy, but chargeable with the payment of the debts and legacies, besides one of the defendants out of his share is to pay 8*l.* a year, and the testator directs the devisees to leave their shares to their children, which are all proofs of a tenancy in common of the equitable interest in the residue, so that it is the same thing now, as if the testator had computed what the residue of his personal estate would amount to, and had left them 500*l.* a piece. The next question then is, whether as executors, the defendants are entitled to this sixth part. If a particular legacy is left to an executor, this has been always taken as an evidence that the testator designed them no more; if a sixth then, or any other part, is left to an executor, shall he claim another part as executor? Is not a sixth part a particular legacy? And it was resolved so in the case of *Collet and Preston*, where a

A freeman of London devised one moiety of his personal estate to his wife, and made her executrix, the other moiety was decreed to be distributed, by this will every one is to have such a proportion, as to the part that is lapsed; the testator died without a will, and therefore it must be distributed, it is what happened since the making the will, and is not provided for.

A freeman of London devised a moiety of his estate to his wife, and made her executrix, the other moiety must be distributed.

Lord

Lord Chancellor.

This is a joint devise, only as to the trust for payment of debts and legacies, but several, as to their interest in the residue, which is to be divided into six equal parts, share and share alike, the devisees are to take nothing as executors, but each of them are to have a sixth part, and his intention is, that they should have no more; one dies before the testator, so this is within the common rule, that a particular legacy given to an executor shall exclude him from the surplus; here the residue is divided among them as legatees, and each is to have a part, and therefore one of the legatees dying in the life-time of the testator, his share must be distributed among the next of kin.

The testator devises his real and personal estate, to six, in trust, to pay his debts and legacies, and the residue to them, equally to be divided, share and share alike,

one dies before the testator, his share of the real estate, shall go to the heir at law, and of the personal, to the next of kin to the testator, as a lapsed legacy, for tho' the legal estate is joint, there interest in the residue is several, and the others can't claim it as executors. See ant. Caf. 3. Caf. 12. Post. Caf. 32. Caf. 157.

A bill of revivor don't lie against a devisee. 1 Chan. Caf. 174, 231, 123. 2 Vern. 548, 672. 1 Vern. 426, 283.

A bill of revivor don't lie against a devisee.

After a decree in a cause, you may have it referred to a master to see whether it was set down irregularly for hearing.

A cause may be

referred for irregularity in the setting down, after a decree.

ANONYMUS.

[45]

Cafe 27.
At the rolls.

THE mortgagee brought his bill to foreclose the defendants, if the money was not paid in a reasonable time, and a decree was made by default, and Mr. Lutwiche prayed, that in case the defendants redeemed, the plaintiff might be decreed not only his costs at law of an ejectment which he had brought to recover the possession, and in this cause, but likewise in a cross cause brought by the defendants, and then depending; but the master of the rolls refused to decree him the costs of the cross cause, because he could take no notice

On a bill to foreclose, the court,

in case the defendant redeemed, would not decree he should pay the costs of a cross cause, which he had brought to redeem, and was still depending.

E 2

that

Court at
law would
not relieve
against the
penalty of

a bond, till the obligor would consent to pay the costs of a former trial, in which the obligee had been nonsuited.

that there was such a cause depending, and the plaintiffs in that cause might proceed, and prevail; and if they did not go on, the cause might be set down ad requisitionem defendantis, and he would have costs; but Mr. *Lutwyche* said, that the decree then would be only personal, and they should have no security for their money, and the plaintiffs might be beggars, and insisted, they were intitled to all the costs they were put to by this mortgage, and quoted a case at law, which he said was much stronger than this, where the court would not relieve against the penalty of a bond, till the obligor paid the costs of a former trial, in which the obligee had been nonsuited.

Case 28.

At the
Chancel-
lor's house.
Lord
Chancellor.

PECK & al', versus PECK & al'.

MRS. *Peck*, and her daughter *Anna Maria*, filed their bill against *John Peck*, Esq; eldest son of *John Peck*, Esq; deceased, as widow and daughter of the said Mr. *Peck*, for dower, and their respective share of Mr. *Peck's* personal estate. To this bill, Mr. *Peck* put in an answer, which was referred to the master for scandal and impertinence, and the master reported it to be scandalous and impertinent, and the defendant excepted to the report; and the council for the plaintiffs argued in support of their exception which was taken to the title of the answer. The several answer of *John Peck*, Esq; one of the defendants, to the bill of complaint of *Anna Baines*, alias *Green*, assuming to herself the name of *Anna Peck*, as pretended wife of *John Peck*, Esq; deceased, and of *Anna Maria Green*, assuming to herself the name of *Anna Maria Peck*, as daughter of the said *John Peck*, Esq; deceased. Whatever reflects on the party, if it is impertinent, is certainly scandalous, for its being material, is the only reason why it is allowed, and tho' a charge is ever so scandalous, and criminal, if relevant and necessary to their defence, they have a right to set it forth, and it is proper to be put in issue; but what is in the title of the answer cannot be examined to, or put in issue, and therefore if it reflects on the party, must be certainly impertinent and scandalous. To which it was answered by the council for the defendant, that the title of the answer was agreeable to the stile of the spiritual court, where if a woman as wife

fues

De Term. S. Michael. 1728.

lues, for the performance of conjugal duties, or to administer, the title of the answer is—such a one, se nominans by the name of the deceased, or of the husband, which is done, to avoid any admission of her right, as wife.

Lord Chancellor.

There was no reason to fear, that the title of the answer should prejudice the defendant, as an admission of the plaintiff's right, or work any conclusion in this court, and therefore I allow the exception. 1 *Vern.* 107. *Nels. Fol. Rep.* in Canc. 72.

If the title of an answer reflects on the plaintiff, it is scandal,

because it is not part of the defence, nor can be put in issue. *Post. Caf.* 42.

TOLLET's Case.

Cafe 29.

At the rolls,

MR. Tollet had a power to settle a jointure on any wife, by deed executed under his hand and seal, he makes a will, and taking notice of his power, bequeaths certain lands to his wife for life; in execution of his power. The master of the rolls allowed the husband had not legally executed his power, because he had settled the lands by will, and not by deed, which was an instrument that took effect in the life of the parties, and was as well known and taken notice of by the law as a fine, or recovery, and that where a will was signed, sealed, and delivered only, it has been adjudged that it should pass as a will, and not as a deed, but that this was a defective execution of his power, which ought to be made good in equity in favour of a wife, or children, and that tho' it was a bad will, it would operate as an appointment, and decreed accordingly, tho' this was a voluntary devise to the wife after marriage, and she brought no fortune.

Post. Caf. 192.

If a will is signed, sealed, and delivered only, it shall operate as a will, and not as a deed.

One has a power to make a jointure by deed un-

der hand and seal, he executes it by will, this is a good execution in equity in favour of a wife. 2 *Vern.* 69, 163, 265. 1 *Vern.* 40, 132. 1 *Chan. Caf.* 263, 264, 10, 17, 23, 103, 159. *Nels. Fol. Rep.* in Canc. 273, 38, 272. 3 *Chan. Caf.* 68, 69. *Cart.* 292. 2 *Ventr.* 350.

Woodward versus Halsey. A had a power to revoke by deed, which he executes by will, (but not in favour of a wife, or children.) The master of the rolls adjudged this

Nels. 8vo.
R. ep. in
Canc. 113.

to

De Term. S. Michael. 1728.

to be a revocation, but the decree was reversed per *King*
Lord Chancellor. *Hob. 312. Sup. to Wentw, 268.*

[+ 47] + WALE, an infant, by PERRY his prochein amy, plaintiff.
Case 30. SALTER & Ux', defendants.

At the
rolls.

The pro-
chein amy,
on affidavit
of his po-
verty, must
give secu-
rity to pay
costs.
Curfus
Cancel.
466.
See Post.
Cas. 57.

THE defendants moved that it might be referred to a
master, to see, whether this bill was exhibited with the
consent of the prochein amy, and that he might give secu-
rity to pay the costs. In the bill he was filed *Mr. Perry of*
Colchester, and an affidavit was read, that he absconded, and
had not been at *Colchester* of many years, and was not worth
a groat: And the plaintiff's council insisted, that this re-
ference was never had, but at the instance of the prochein
amy, on his affidavit, that the bill was exhibited without his
knowledge. But the master of the rolls made an order, that
the prochein amy should give security to pay the costs, and
the quantum was to be settled by the master, and all pro-
ceedings in the mean time to stay: And the case of *Webster*
and *Guy* was mentioned, where the same order had been
made the day before by the Lord Chancellor.

ANONYMUS.

Case 31.

At the
Rolls.

This court
will not
take cogni-
zance of a
sum origi-
nally below
the dignity
of it, tho'
by the ne-
glect or
mispleading

AN action was brought for 5*l.* which, by letting judg-
ment go by default, was increased to 15*l.* and the defen-
dant filed a bill, and moved for an injunction, which was
denied by the master of the rolls, who declared, he had
lately dismissed a bill on the same account, because the sum
was originally below the dignity of the court, tho' by the
neglect, or mismanagement of the party, it had amounted
to a sum, the court would take cognizance of.

of the plaintiff, it has amounted to a larger. Post. Cas. 187.

HUNT

HUNT & al^s, plaintiffs.
BERKLEY & al^s, defendants.

Case 32.

At the
Rolls.

THE testatrix devised her silver tea-kettle, and lamp, with its appurtenances, to the defendant *Berkley*, and to *Anne Stafford*, and *Francis Wolmer*, several pieces of plate, and the residue of her plate to the plaintiff *Brace*, and the residue of her personal estate to *Francis Wolmer*, the defendant, *Berkley*, and to another of the defendants, equally to be divided between them, and also made them her executors. *Anne Stafford* and *Francis Wolmer* died in the lifetime of the testatrix, and the plaintiff *Brace*, the daughter † of *Francis Wolmer* (who was brother to the testatrix, and her next of kin at the time she made her will) was next of kin to the testatrix at the time of her death. And in this case there were three questions. [†48]

First, what passed to the defendant *Berkley* by the devise of the silver tea-kettle, and lamp, with its appurtenances? He claimed the silver canister, tea-pot, and lamp, milk-pot, spoons, strainer, and tongs. But the master of the rolls adjudged, that by this word appurtenances, nothing passed, but the stand or frame that supported the tea-kettle.

By a devise of a silver tea-kettle and lamp, with its appurtenances, nothing passes but the kettle, lamp, and frame.

Secondly, to whom the specifick legacies of plate devised to *Anne Stafford*, and *Francis Wolmer*, who died in the lifetime of the testatrix should go? Whether to the plaintiff *Brace*, as residuary legatee of the plate, or to the executors as legatees of the general residue? And it was argued that they should fall into the specifick residue of the plate given to the plaintiff *Brace*, for that the residue of the whole personal estate is plainly divided by the will into two parts, the residue of the plate which is devised to the plaintiff *Brace*, and the residue of the other personal estate which is devised to the executors, and by the same rule, that if a pecuniary legacy had lapsed, it would have fallen into the general residue, and not into the particular residue of the plate, the specifick legacies shall lapse into her specifick resi-

One devises several pieces of plate to A. and B, and the residue of her plate to C, and the residue of her personal estate to D. A.

and *B* die in the life-time of the testator, their legacies shall lapse into the general residue, and not into *C*'s, for *C*'s is a particular legacy, so expressed, to save the trouble of enumerating particulars.

due,

due, and not into the general residue. But the master of the rolls adjudged, that they should fall into the general residue, and that the devise of the residue of the plate to the plaintiff *Brace*, was not to be considered as a residuary devise, but the testator made use of those words only to save herself the trouble of enumerating the several particulars.

Thirdly, to whom shall *Wolmer's* share of the residue go who died before the testatrix? Whether to the two other executors, and residuary legatees, or to the plaintiff *Brace*, as next of kin. And it was argued for the plaintiff, that the three devisees are plainly tenants in common of the residue, and therefore this share cannot survive to the other two, and that they could not take it as executors, because it is plain that the will designed them nothing as executors, but disposed of the whole residue to them as legatees, and therefore since it appears what the testator intended the executors should have, they cannot have more, and they have also particular legacies devised to them, and the case of *Page* and *Page*, is an authority in point. And the plaintiff *Brace*, who has also a particular legacy, was not the next of kin at the time the will was made; and if her father *Francis Wolmer* had been dead at that time, it is highly probable she should have been made one of the residuary legatees in his room, but if † she had been next of kin when the will was made, the giving her a particular legacy would not have concluded her from claiming this lapsed legacy, as was adjudged by Lord *Somners* in the case of *Baily and Burges* or *Powel*. 2 *Vern.* 361.

Ant. Caf. 26.

[†49]

If the executor, and next of kin, have particular legacies, the surplus shall be distributed. See ant. Caf. 12. post. Caf. 157.

Master of the Rolls,

There is great variety of opinions on this head, I think the testatrix cannot be said to have died intestate as to this part, *nemo potest testatus, & intestatus discedere*, is a maxim in the civil law, if a man makes an executor, he cannot die intestate, but he may, if he makes only a testamentary schedule without an executor. By the civil law the executor is heir, and that law makes no distinction between real, and personal estate, but only between moveable, and immoveable. Executors were first called upon by ordinaries, to distribute for

for the good of the souls of the deceased, and so were administrators likewise, but executors by the common law were intitled to the surplus of the personal estate. The case of *Foster and Mount*, 1 Vern. 473. is the first case where the surplus was decreed to be distributed, it has been said, that that case was decreed upon a fraud in the executors, but Lord *Macclesfield* and I had the decretal order copied out, and the decree was grounded upon the implied trust for the next of kin, as is rightly taken notice of in 2 Vern. 675. this decree was afterwards reversed by the Lords Commissioners, but their decree of reversal was reversed in the House of Lords, after the courts of equity had come to this resolution, the next of kin sued the executors in the spiritual court for an account, and distribution of the residue, in the case of *Caverly* and *Caverly*, and a prohibition was moved for in B. R. by the executors, and granted by Lord *Macclesfield*, who said, if the Court of Chancery would consider the executors as trustees, a bill might be proper in that Court, but that they could not be called to an account on the foot of a trust in the spiritual Court, but nothing further was done in that case. I do not think the executors in this case can be considered as trustees, because the testatrix has made a disposition of her whole estate; but I shall give no opinion, but desire that each side may attend me with precedents. And afterwards in *Trinity* term following, on *Monday June* the 23^d, his honour decreed for the executors.

The next of kin sue the executor or in the spiritual Court for a distribution of the residue, B. R. grant a prohibition. The residue is devised to three equally, and they are made executors, one dies

before the testator, his share shall go to the other two, as executors, and not to the next of kin. See ant. cas. 3. cas. 26.

The testatrix had likewise devised to the plaintiff *Brace*, the use of a cabinet of several valuable curiosities for life, and if she had no children, then she devised it to *J. S.* but if she had children, she gave it her absolutely, and the executors insisted, that she should give security, but did not suggest [+50] that she was poor, or insufficient, but the Master of the Rolls ordered that she should only give a note or schedule of the particulars subscribed by herself, and declared that this was the usual course of the Court.

If the use of goods is devised to one for life, she shall not give security, but

only sign the inventory. See ant. cas. 10. *Nell*. 8vo. Rep. in Canc. 155.

The use of the personal estate being devised to Lady *Copley* for life, it was directed that a schedule and appraisement should be made of all the goods and furniture, &c. and that

that Lady *Copley* should enter into a covenant to restore them without any other damage, than by the reasonable use thereof, wear and tear, and inevitable accidents only excepted, and that the schedule should be annexed to the covenant, and that in case the executor refused to make such an inventory, it should be done by two to be named by my lady, and as many by the person in remainder.

Cafe 33. BRACE & al', verſus the Dutcheſs of MARLBOROUGH,
At the & al, & é contra.
Rolls.

HERE were original and croſs cauſes, in which the creditors of Sir *William Goſtock*, by a great variety of ſecurities, both as to their nature and number, and Mr. *Brace* (to whom, and his heirs, Sir *William* had conveyed all his lands in truſt, to ſell for payment of his debts) were the principal parties, and on hearing theſe cauſes, an order was made that the Maſter ſhould ſtate the ſeveral ſecurities, the Maſter makes his report, and the cauſe coming to be further heard on the report, the eſtate was decreed to be ſold by conſent, and the Maſter was to appoint commiſſioners to enquire into the contents, and value of the lands contained in each particular ſecurity, and the creditors were to be paid according to their priority, and the coſts were to be taxed. And the cauſe now coming back for the directions of the Court on the Maſter's report; the firſt queſtion was, as to coſts, Whether they ſhould be paid to all the parties out of the eſtate in the firſt place? or whether every incumbrancer ſhould be paid his principal, intereſt, and coſts according to his priority? And the Maſter of the Rolls thought it reaſonable (and ſo decreed) that all ſhould be paid their coſts in the firſt place, for though by the decree all parties are to be paid according to their priority, that is to be underſtood only as to their principal and intereſt, for this is not a decree for a redemption, in which caſe each incumbrancer is to be paid his principal, intereſt, and coſts, in order, but for a ſale by conſent, which it is the intereſt of all parties to ſpeed.

On a bill by creditors, a ſale is decreed by conſent, and the creditors are to be paid according to priority, coſts ſhall notwithſtanding be paid to all in the firſt place.

In 1713 Sir *William Goſtock* confeſſed a judgment to Sir *William Wake*, afterwards Sir *William Wake* gets an aſſignment of a mortgage of part of his eſtate made to Lady *Mills* by the ſaid Sir *William Goſtock* in 1687, there being ſeveral intervening mortgages, and other ſecurities, and an elder recognizance.

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recognizance. And the other question was, whether Sir *William Wake*, by getting this mortgage assigned to him, should be paid off the money due on the mortgage, and also on the judgment, before the intermediate creditors.

Master of the Rolls.

If a mortgagee be also a creditor by judgment, or bond, If the heir
the heir shall not redeem without paying of the money due would re-
on the judgment, or bond, to prevent circuitry of action be- deem, he
cause the heir is liable to those incumbrances after redemp- must pay
tion, the equity being affets in his hands, but he that would money due
protect himself by taking in a prior incumbrance, must be a on bond, or
fair purchaser without notice, as a mortgagee, but here is judgment
no purchaser, no particular lands were in contemplation when to the mort-
the judgment was acknowledged, nor had the creditor by gagee.
judgment any interest, in the lands, till an eligit executed, 1 Chan. Caf.
nor can he release, because he has no lien on them. 267, 268.

Mr. Lutwyche.

I do not remember an instance, where a subsequent incumbrancer has been protected, unless he got in the first security of all, and so obtained the legal estate, but here the recognizance is prior to their mortgage, and shall protect our intermediate mortgage.

Mr. Fazakerly.

Mr. Gibbons is the first incumbrancer by the recognizance, and has also intermediate mortgages, so that this is a proper objection for him to make, and if our mortgagee had brought an ejectment against him, she must have been nonsuited, and could never have recovered at law, but the case is different as to the other immediate incumbrances, for suppose *Lady Mills* had brought an ejectment against any of them, they could not have set up this recognizance, therefore we have a good legal demand against every one but *Mr. Gibbons*. It is agreed, that if our last security was a mortgage, instead of a judgment, we might take the advantage of our getting in the old mortgage to be paid both, but I can see no difference between a conveyance and an incumbrance, no body lends money on the record, but in consideration of the interest it carries on the land, which is so far considered, that a purchaser 2 Chan. Caf. 47.
without

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A judgment
creditor
may re-
deem.

without notice must pay a judgment, the money is lent on the security of a moiety of the lands, the borrower has often nothing else, and though you may take his body and goods in execution, yet you may have his lands also, and a judgment creditor may redeem, tho' a bond creditor cannot, because the equity is liable, so that now we have got the legal estate, and have the same equity with the other creditors; nor is our consent to the sale any objection, which was done only to avoid the multiplicity and intricacy of suits, but not to take away our benefit of priority, the money arising by the sale is in lieu of the estate, and is in the same manner chargeable, and priority in the decree must be understood of legal priority, and therefore these two securities being tacked together by equity, are both prior to the others.

Master of the Rolls.

When this cause was first heard, I foresaw numberless difficulties, from the nature, and variety of the securities, and the execution of the deed of trust for the sale, and therefore I thought those I then gave, the only directions could be followed, that the Master should state the several securities, and after I decreed a sale by consent of all the creditors, which otherwise could not have been done, and without a sale it was impossible to have made a decree, for what rule could have been set for redemption, where there were so many securities, and so different in their nature, and all the parties must have had several days given them for redemption one after another, and I think if Sir *William Wake's* claim was good, he could not have the benefit of it for this decree, which was made for a sale by consent of all parties, the parties indeed only consent to the sale, but consenting to the sale is implicitly consenting to the decree, which includes the terms, that the securities should be satisfied according to their priority, which relates to the time only, and therefore I decree the Master's schedule to be a good adjustment of the debts.

At another day the Master of the Rolls spoke to this effect. A puisne judgment creditor gets an assignment of a prior mortgage, shall he by this means be satisfied his judgment preferable to prior mortgage creditors, intermediate between the mortgage assigned, and his judgment? I was the last day of opinion that he could not come at this question for the decree, by which the money was to be applied in payment

payment of the securities, according to their priority, and Creditors are decreed to be paid according to their priority; this is to be understood of priority in point of satisfaction, and not in time. that that was to be understood of priority, according to time only, but I now think it juster to explain it of priority in point of satisfaction, tho' not in time, and therefore if the puisne judgment creditor can unite his incumbrance to the mortgage, he may notwithstanding this decree, and then the judgment will be a security prior in time also, in respect to the time to come, tho' not in respect of the time past; but I cannot find one single case, where a judgment creditor, or any other incumbrancer, by buying in a precedent mortgage was allowed the preference of intervenient securities, tho' I have looked into all the authorities. A judgment, statute, or recognizance is a general lien, whereas a preference is given only to those who had a particular interest in some lands, and had no notice of the prior incumbrances, when they lent their money; and 2 *Ventr.* 337. 3 *Chan. Caf.* 36, 149, 162, 201. 2 *Chan. Caf.* 20, 208, 212. 1 *Vern.* 49, 187. 2 *Vern.* 29, 30, 160, are all cases, where mortgagees purchase in prior incumbrances; and *Finch* quotes three cases in 2 *Ventr.* 337, and says, mortgagees and purchasers may protect, and I am determined in my opinion, that incumbrancers may not, from what Lord *Nottingham* says in 1 *Vern.* 187, that there were very strong arguments against mortgagees or purchasers buying in prior securities to protect themselves, and that there were very strong arguments for it, and that it was a very disputable point till it was settled in the case of *Marsh* and *Lee*, and therefore since it was a disputed point till that case, even as to mortgagees, I shall not now extend it to a puisne incumbrancer. A mortgagee takes particular lands as his security, a judgment creditor has no particular lands in view, and by chance may have those lands extended for his debt, which the debtor himself had not at the time he entered into the judgment, but which came to him after by purchase or descent, this is a point of consequence, but here a puisne incumbrancer gets in an assignment of a prior mortgage, upon which an intermediate mortgagee gets in a recognizance prior to the first mortgage, and fights him at his own weapons.

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point of time.
But see 2
Chan. Caf.
35.

Mr. Attorney General.

I apprehend this is a new case to endeavour to tack a puisne judgment to a prior mortgage, and is different from all the common cases, where one that had a puisne incumbrance
never

never claimed the protection of a prior, but where he took some estate, or interest in particular lands. A mortgagee has an estate in particular lands, or relies on them for a security, therefore if he can get in a prior incumbrance, which gives him a legal estate in the lands, he shall have the benefit of both, he that accepts a judgment, has no estate in the lands, or any interest in particular lands, till the elegit is executed; by suit indeed it may turn to a particular interest, but so may likewise a debt by bond, but this judgment was never extended, nor does the cognisor do any act to deceive the cognisee, as the mortgagor does to deceive the mortgagee, for the mortgagee is deceived, because he thinks, that by lending his money, he gains an estate in the particular lands, whereas it does not appear, whether he who lends on a judgment, lends on the real or personal security, (for he may use it either way) or that he was any way deceived, or made to believe, he had a better security than he finds; and where a man borrows money on a judgment, he never covenants, that his lands

[154] are free from all incumbrances; besides if the defendant would have had this advantage, he should have made a case of it in his answer, and expressly denied notice, or at least should have insisted on it before the Master, but in his objections to the report, he only says, that he ought to have his money on the judgment, as well as the mortgage, but gives no reason; whereas he ought particularly to have set forth, that he lent his money without notice. So that to decree for him, would be to decree for him whether he had notice or not; so that he has not done what is necessary, even in the most favourable cases of purchasers; a small matter would have proved notice of those incumbrances from 1687 to 1713, and priority in the decree could be only meant as to time, there was nothing then appeared to guide the Court in their decree but what arose in point of time, none of these disputes being then started.

Mr. Solicitor General.

The common case is a hard one, that an intermediate mortgage should be defeated by the act of the mortgagor and mortgagee; on a bill to redeem or foreclose, he that is prior in satisfaction may be decreed to be paid first, tho' his security is puisne in time, but then he must make a case for the hearing, and insist upon it, that the second mortgagee should not be allowed to redeem without paying off both the first,

first, and third mortgage; but to unite these securities he must go still further, he must deny notice, and set forth, that he lent his money innocently, and if he can prove these facts, the second mortgagee must pay off both; but then here is a case made for the judgment of the Court, and the decree mentions the particular terms of the redemption, but it would open a way to the greatest fraud, if a puisne incumbrancer might protect himself by buying in a prior mortgage, whether he had notice or not of the intermediate securities when he lent his money, and would be as great a fraud in him as in the mortgagor; so that the point of notice is the chief point, and makes it a fraud or not, and all the cases I have met with, are of mortgagees who had lent their money innocently, and without notice; there if they could get the legal estate, the Court would not take it from them, till they were fully satisfied; a mortgagee is a redeemable purchaser, but did a judgment creditor ever plead himself a purchaser without notice? does he ever inquire into the title of the lands, or lay the deeds before council, or does he contract for any lands? Besides, what they now insist on is not warranted by the pleadings in the cause, or by the decree, and therefore the Court will not aid them to the prejudice of the intermediate securities, who lent their money on the credit of the lands themselves.

† *Mr. Lutwych.*

[+55]

If they have not made such a case, all their mooting is nothing to the purpose: If a creditor would have an equity contrary to the common rule, which is, that he, which is first in time, must be first satisfied, he must make a case of it, to be put in issue, and supported by proofs; he must deny notice of all the mesne incumbrances, when he lent his money on the puisne security; this cause came to a hearing, and a sale is decreed without any notice of this preference, because it was never made a case on the pleadings, or put in issue, and therefore they are not at liberty to insist on it now, or if they were, the law is against them. The judgment creditor has by the *elegit* a right to half the lands, and therefore he would fix his claim on these lands in mortgage, whereas the lands are to be extended by the sheriff, and a moiety to be delivered by him, but the creditor has no particular right to the lands in mortgage by virtue of his judgment, nor certainty that he ever shall, for the sheriff is not bound to deliver him the mortgaged lands, or any part of them as his moiety.

Master

Master of the Rolls.

If a puisne
incumb. an-
cer would
protect
himself by
buying in a
prior in-
cumbance,
he must be
an innocent
purchaser
without no-
tice, and
must insist
upon his
case.

A puisne
judgment
creditor by
purchasing
in a prior
mortgage,
cannot pro-
tect himself
against in-
termediate
mortgages.

[+56]
If the first
mortgagee
lends more
money on
judgment,
without no-
tice of a se-
cond mort-
gage, the

They are too late if the law was with them, they insist indeed by their answer, to be paid off all their securities, but go no further; at the hearing an order is made that the Master should state the several incumbrances, and that he might state any thing specially, they might then have made this case before the Master, the Master makes his report, and then a sale was decreed; then indeed they set out their reasons particularly before the Master, but omit the most material point to deny notice, and there is no reason to send them back, and to break the rules of the Court, especially when the merits seem clearly against them, for though a puisne mortgagee may, I think a puisne incumbrancer cannot avail himself of a prior mortgage, and the Attorney General's argument is very strong, that a puisne judgment creditor is not deceived, though there are never so many prior securities, he never asks what incumbrances are on the lands, but has a lien on the person, and goods, the debtor is not a deceiver, nor is the other deceived, the mortgagor that mortgages his lands twice over is a deceiver, and is condemned as such by Parliament, and is deprived thereby of his equity of redemption, his offering to mortgage the lands imports he has not made a prior mortgage, but if he confesses a judgment, that is no implicit assertion that he has not made a mortgage, but his having made prior mortgages on several parts of his estate, may be the reason, why he gives a judgment, as a lien, on the particular parts not in mortgage, or on the equity of redemption: there is a great difference where the money is first lent on a mortgage, and the mortgagee mortgages the lands + a second time, and then confesses a judgment to the first mortgagee, for here is a deceit, the prior mortgage has put the estate in his hands, and when he lends on the judgment, he depends on the equity standing as it did when he lent the first money. Therefore I decree the creditors to come in according to the report.

second mortgagee cannot redeem, without paying off the judgment.

BRADGATE

BRADGATE v. erlus RIDLINGTON.

Case 34.
At the
Rolls.

THE Master of the Rolls said, it was now a settled point in equity, that where lands are devised to trustees for payment of debts and legacies, the debts shall be paid in the first place. *Hill* 265. *Nelf. Fol. Rep. in Canc.* 195. 1 *Rol. Ab.* 920. *Cas.* 6. 2 *Vern.* 106. 1 *Vern.* 69. *Went. Off.* of Ex. 46, 50, 73, 74. *St. 21 H. 8. ch. 5.* *Dyer* 234. If lands are devised, in trust, to pay debts and legacies, the debts shall be first paid. *Nelf. 8vo Rep. in Canc.* 202. *Post. Cas.* 115.

ANONYMUS.

Case 35.
At the
Rolls.

A Term of two hundred years was limited to trustees, to raise portions for daughters, there was but one daughter, the heir files his bill against the trustees to assign the term as he should appoint, on payment of the portion, tho' the persons interested in the portion were infants, (the children of the daughter, who was dead) yet the time when it was payable being past, the heir may discharge his estate. The heir may discharge his estate when the portion becomes payable, tho' it belongs to an infant.

1 *Vern.* 338. *Nelf. Fol. Rep. in Canc.* 61.

ATWOOD and ATWOOD.

Case 36.
At the
Rolls.

ONE made his will, *inter al'*, in these words, 'I give and devise all my lands to my two brothers, *John* and *Thomas*, and the heirs males of their bodies, equally to be divided between them, and I devise twenty shillings a year to *A B*, during his life, out of my brother *John's* share.' The Master of the Rolls adjudged, that by this devise, *John* and *Thomas* were tenants in tail in common, and not joint tenants for life, with several remainders in tail, and that (them) should relate to the brothers, as well as to their issue, according to the case in 3 *Co.* 39, b. The testator devises to *John Wilcocks* in tail, remainder to *Elizabeth* and *Martha*, and the heirs of their two bodies engendered by equal portions, equally to be divided. The Court gave judgment, that *Martha* and *Elizabeth* were tenants in common in tail. Besides the testator has devised twenty shillings a year to a stranger for life, out of the share of *John*, which shows he designed this annuity at all events should be paid to the stranger for his life, whereas by supposing them joint tenants for life, if *John* should die before the stranger, the whole would have survived to the other brother discharged of the annuity. By a devise to *A* and *B*, and the heirs males of their bodies, equally to be divided between them, *A* and *B* are tenants in tail in common.

Lands are limited to A and B the survivor and survivors of them, their heirs and assigns for ever, to be equally divided between them share and share alike. A and B are joint tenants for life with several inheritances.

In the arguing this case, the council mentioned the case of *Barker and Barker*, 'where the testator directed that with the surplus of his real, and personal estate, lands should be purchased, in trust, for *Jerome Barker* and *Robert Barker*, the survivor, and survivors of them, their heirs, and assigns for ever, to be equally divided between them share and share alike.' *Jerome Barker* died without issue in the life-time of the testator, and the Lord Chancellor *King* adjudged that by this will *Robert Barker* and *Jerome Barker*, if he had lived, would have been joint tenants for life, -with several inheritances to their respective heirs, and that by the death of *Jerome* in the life-time of the testator, the devise of the trust of the inheritance, as to one moiety, became a lapsed devise, and is descended to the heir at law of the testator, and that *Robert Barker* was intitled to the whole by survivorship for life. And this decree was affirmed in the House of Lords on *Thursday April* the 20th, 1727. 2 *Showr.* 452. *Caf.* 416. 1 *Ventr.* 376. 1 *Vern.* 353, 425, 32. 3 *Lew.* 373. *Cro. El.* 443, *Caf.* 7. 695, *Caf.* 6. *Goldsb.* 182. 2 *Anderf.* *Caf.* 10. *Dyer* 25.

Case 37.
At the
Chancellor's house.
Lord Chancellor.

HORNBY versus PEMBERTON.

One co-partner, who lived at *Constantinople*, brought his action for 800*l* against the other, who lived in *London*, for goods consigned to him, the defendant, files a bill for a discovery, account, and injunction, and requires, that the defendant might set forth all books, papers, &c. which belonged to him, or concerned any account between them, in his verbis, & figuris. The defendant in his answer sets forth a particular of all such books and papers, and offers to produce them at *Constantinople*, upon oath, to any person the plaintiff should appoint, and to let him have copies, and the Lord Chancellor was of opinion, that the plaintiff's demand was unreasonable, and the defendant's offer sufficient.

THE defendant in this Court, who lived at *Constantinople*, brought his action against the plaintiff for goods consigned by him to the plaintiff in *London*, to the value of 800*l*. The plaintiff put in bail, and filed his bill against the defendant, as his co-partner for an account, and for a discovery, and injunction, and upon the defendants praying a dedimus, had an injunction of course till answer. And the defendant filed a cross bill. The plaintiff in the original cause required that the defendant might set forth all books of account, letters, entries, &c. in his Verbis, & Figuris, which were in his hands, and belonged to the plaintiff, or which concerned any account between the plaintiff and the defendant. The defendant in a schedule annexed to his answer set forth a particular of all such books and papers, and offers to produce them at *Constantinople*, upon oath, to any person the plaintiff should appoint, and to let him have copies, and the Lord Chancellor was of opinion, that the plaintiff's demand was unreasonable, and the defendant's offer sufficient.

ticular

particular of all books and papers in his hands belonging to the plaintiff, and of all books of account between them, and consented to produce them to any person [†] in *Constantinople*, [+58] the plaintiff would appoint, and let the plaintiff have copies of them at his own charge, the plaintiff *inter alia*, excepted to this part of the answer. The Master reported the answer insufficient, and the defendant took exceptions to the report, and the Lord Chancellor was of opinion, that the plaintiff's demand was unreasonable, and impossible to be complied with, and done purely to keep the defendant out of his money by the injunction, and inveighed severely against the council who took the exception, which he over-ruled with this direction, That the defendant should produce upon oath all books of account, papers, &c. to such person, or persons at *Constantinople* as the plaintiff should appoint. The affidavit was to be settled by a Master, and to be sworn before the Consul, or Ambassador, at *Constantinople*, according to the usage of *English* merchants residing there, and the plaintiff was to take copies of them, if he pleased, at his own charge.

The affidavit was to be settled by a Master, and sworn by the defendant, before

the consul, or ambassador, at *Constantinople*.

Another exception was, that the defendant had not discovered what goods he had consigned in *England* to other people. The defendant in his answer sets forth, that he had consigned several parcels of goods to the plaintiff, but that the plaintiff gave him no account of his receipts, and had refused to accept his bills, which being protested for non-payment, greatly injured him in his credit; and that thereupon he would make no more consignments to him, and submits to the Court, Whether this was not a breach and determination of the articles of co-partnership? And the Lord Chancellor so far allowed this exception, as that the defendant should set forth all goods consigned by him to other persons, on his own account in *England*, and to whom, and on what commissions, from 1719, when he ceased to deal with the plaintiff, for this being a matter of judgment, which at the hearing, is to be determined by the Court, therefore the defendant ought to discover; for suppose he die in the mean time, and it should be determined for the plaintiff, how is he then to come at a knowledge of these consignments, though then he would be plainly intitled to a discovery.

One partner files a bill against the other, for a discovery of what goods he had consigned to others. The defendant submits to the Court, if the plaintiff, by what he charges him with, had not broke the articles. This is an insufficient answer, for if the question should be determined in favour of

the plaintiff, tho' he would be intitled to a discovery, how could he come at it, if the defendant should die in the mean time?

Tho' the answer in the original cause was adjudged insufficient, yet the defendant [159] having sworn 800*l.* due to him, and not being able to put in a further answer

The answer being adjudged insufficient, by the course of the Court the injunction was to continue, and the defendant in the cross cause was not obliged to answer till the defendant in the original cause had put in a sufficient answer. But the defendant having sworn in his answer, that 800*l.* was really due to him, and not being able to put in a further answer in less than two years, his Lordship further ordered, that the defendant should not hinder the defendant from getting an answer to his cross bill, and that he might proceed at law so far as to ascertain his debt, notwithstanding the injunction. And Mr. *Mead* said, that in such particular cases the Court always proceeds contrary to the common rules, and that Lord *Cowper* had obliged a plaintiff to accept an answer from *Tripoli*, which had been ignorantly broke open on shipboard.

from Constantinople in less than two years, the Chancellor made an order, that he might proceed against the defendant to get an answer to his cross bill, and proceed to ascertain his debt at law, notwithstanding the injunction the plaintiff had obtained on the dedimus.

The plaintiff was obliged to accept an answer from *Tripoli*, which was ignorantly broke open on shipboard.

Case 38.
In Court
Lord Chancellor.

FRANCES LUCY, Widow, Plaintiff.

The Honourable ROBERT MOOR, Esq. & al', & è contra.

GEORGE Bohun, Esq. being seized of divers messuages, lands, and tenements of inheritance, and also possessed of a leasehold estate near *Spittlefields* in the county of *Middlesex*, and being likewise possessed of a considerable personal estate, and having four daughters, by his last will and testament in writing, bearing date the 17th of *July* 1705, devised to trustees therein named, and their heirs, all his real estate near *Spittlefields*, or elsewhere in *England*, (not therein before devised) to be sold; and the monies thereby arising, to be subject to the intents of his will declared concerning the residue of his personal estate, as if the same were personal; and gave his youngest daughter *Jane* 3500*l.* to be paid at the age of twenty-one or marriage, which should first happen; and (after other legacies) gave the residue of his real and personal estate to his three youngest daughters, *Mary*, *Elizabeth*, and the said *Jane*, to be equally divided between them, and made his said trustees, and his wife, executors of his said will.

The

The 23d of *December* 1712, articles of agreement were entered into between *George Lucy*, Esq. of the one part, *Mary Bobun*, relict of the said *George Bobun*, and the said *Jane Bobun* (then an infant) of the second part, and the Right Honourable *Allen*, Lord *Bathurst*, and *Gilbert Clerk*, Esq. of the third part, reciting, that a marriage was shortly intended to be had with the consent of the said *Mary*, and that the said *Jane* would be intitled to the sum of 3500*l.* at her age of twenty-one, or day of marriage: And was likewise intitled to a third part of divers lands, tenements, and hereditaments mentioned in her father's will, or to the third part, or share of the monies, or profits arising thereout, and that the said *Jane* was willing to bestow upon the said *George*, in consideration of the said marriage, as + well the said sum of 3500*l.* as also all her interest in any the lands, tenements, hereditaments, chattels, and personal estate of the said *George Bobun*, so soon as she should attain her age of twenty-one to hold the said lands, to the use of the said *George Lucy*, his heirs and assigns for ever, and the said *George Lucy* in consideration of the said marriage, and portion, and of such conveyances, and assurances to be made to him of the residue of the said lands and hereditaments, and for securing to the said *Jane* a maintenance, in lieu of dower, did covenant with the said Lord *Bathurst*, and *Gilbert Clerk*, that he would immediately upon such conveyances made to him, and upon the said *Jane's* attaining her age of twenty-one years, settle upon her a jointure of certain lands of 800*l.* per annum therein particularly described, discharged from incumbrances for her life, and that the reversion of the said lands after her death, together with other lands of 700*l.* per annum, should be settled on the first and other sons of that marriage in tail male, none of the parties, except the said *George Lucy*, executed the said articles. [+60]

After the said marriage had, the said *Jane* joined in a fine with her husband, and her sisters, and their husbands, for selling some part of her father's estate, to raise the said 3500*l.* which was paid to the said *George Lucy* her husband. By indentures of lease and release, dated the 4th and 5th of *March*, 1719, made between the said *George Lucy*, and the said *Jane* of the one part, and the said Lord *Bathurst*, and *Gilbert Clerk* of the other, in consideration of the said marriage, and in performance of the said articles, and for making a jointure for the said *Jane*, and provision for the issue of the

the said marriage, the said *George Lucy* settled the same lands in the said articles agreed on, to the use of the said *Jane* for life for her jointure, and in bar of her dower, and also settled, and limited the same premises, together with other lands and hereditaments of above 700*l. per annum* to the use of himself for life, with remainder to trustees to preserve contingent remainders, and afterwards subject to the said jointure, to the use of the first and other sons of that marriage in tail male. And this settlement was executed by the said *Jane* at that time of full age.

The 13th of *August 1721*, the said *George Lucy* died without issue, and intestate, whereby the inheritance in fee of the lands comprised in the said settlement (subject to the said jointure) descended to *William Lucy*, the plaintiff's late husband deceased, as brother and heir of the said *George Lucy*, and administration likewise of the goods and chattels of the said *George Lucy*, was granted to the said *William Lucy*.

[+61] Soon after the death of the said *George Lucy*, the said *Jane* his widow, took possession of her said jointure, and enjoyed † the same during her widowhood, and in 1722, intermarried with the defendant *Moor*, who in her right enjoyed the same during her life-time; but the said *Jane* never did, pursuant to the said articles, convey her part of the lands of the said *George Bobun*, or assign her share of his personal estate to the said *George Lucy*, in his life-time, or to his heir, or administrator, after his decease.

By indentures of lease and release, dated the 17th and 18th of *June 1723*, between the defendant *Robert Moor*, and the said *Jane* his wife of the one part, and Dr. *Henry Moor*, and Sir *Gustavus Hume*, Bart. of the other part, and by fine levied, the said *Robert Moor*, and *Jane* his wife did bargain and sell to the said Dr. *Henry Moor*, and Sir *Gustavus Hume*, the said *Jane*'s third part of her said father's estate, to the use of the said *Robert Moor* for life, remainder to the said *Jane* for life, remainder to the said *Robert* in fee. In *Michaelsmas term 1721*, *William Lucy* pretending to be intitled, as heir at law to the said *George Lucy*, to the said *Jane*'s third part of her said father's estate, exhibited his bill against the defendant *Robert Moor*, and the said *Jane* to have a conveyance thereof.

The

The said defendant *Robert Moor*, and the said *Jane* put in their answers, and the said *Jane* swore, that the said *George Lucy* her late husband, as they lived happily together, and had no issue, and there having been so great misunderstandings between the said *George Lucy* and his brother *William Lucy*, that *George Lucy* did not so much as visit him for twelve or thirteen years, made the aforesaid settlement on her; and then, and often after told her, he would leave her her own estate to come to her.

In *December* 1723, the said *Jane* died without issue, and administration was granted of her goods and chattels to the defendant *Robert Moor*.

In *February* 1723, the said *William Lucy* also died, leaving *Frances Lucy* his widow, his executrix, who duly proved his will, and also took out administration to the said *George Lucy*, and in *Michaelmas* term 1724, exhibited her bill against the defendant *Moor*, and others, to the same effect with *William Lucy's* bill; and in *Michaelmas* term 1725, the defendant *Moor* exhibited a cross bill against the plaintiff in the original cause, and others, for an account, and conveyance of the said estate, The 12th of *November* 1728, both causes were heard, when Mr. *Fazakerley* and Mr. *Wills*, of council for *Frances Lucy*, spoke to this effect.

† Where a suitable jointure is made, (as in this case, there [+62] was a much greater than Mrs. *Moor's* whole fortune required,) it ought to be intended, to be in consideration of the fortune, tho' it be not expressed, and ought to intitle the husband to such fortune, tho' not actually paid. But here the jointure is expressed, to be made in pursuance of the articles, and by referring to them, is the same as if the articles had been fully recited, and as the lands limited for the jointure are the same in the settlement, as in the articles, the settlement must therefore be upon the foundation of the articles, and Mrs. *Moor's* signing the settlement when she was of age, and her acceptance of her jointure after Mr. *George Lucy's* death, is a full agreement to, and confirmation of the articles, tho' she was under age at the time they were made. That in the case of *Smith* and *Ball*, where an infant lost money at a horse-race, and after he came of age promised to pay it, Lord Chief Justice *Holt* was of opinion, that the promise should bind him; yet a promise without a consideration is
An infant lost money at a horse-race, and promised to pay it after he was of full age, this promise shall bind him
not

not binding, and nothing was due to the other, because he was an infant. 2 Vern. 501. The Lord Viscount *Hesford* marries the defendant Mrs. *Narbone*, who had an estate in lands, and a portion in money, and being both infants, an act of parliament is obtained, for settling a jointure on the wife, in bar of dower: Provided the jointure shall cease, if the wife when of age, did not settle her lands, but nothing is said as to the personal estate, part of the fortune is a mortgage for 1300*l.* taken in a trustee's name, the wife when of age settled her own lands, and after the husband dies, and the mortgage was decreed to the executors of the husband, and that it should not survive to the wife, as a chose in action. And in the case of *Cornsford* and *Farmer*, the husband covenanted to leave the wife such a sum, if she survived him, and he made her a provision more than adequate to that sum, and died before he had reduced her fortune into possession, and Lord *Cowper* decreed the fortune to his executors, against the wife. And tho' Mrs. *Moor* might have waived her jointure, and claimed her fortune which remained unpaid, yet by accepting her jointure, she made her election, and ought to give up her fortune, which was the consideration of her jointure, else she will have a double satisfaction.

Witbers ver-
sus Kelsea,
1 Chan.
Rep. 189.
3 Salk. 65.

Mr. Attorney General for the defendant *Robert Moor*.

[+63] The wife's share of her father's lands is still a real estate, and the parties interested may claim it as such, and it is recited in the articles as real estate, which distinguishes this from the cases that have been mentioned, which are of personal things, or choses in action which belonged to the wife, for Mr *Lucy* could have no title to this share, without a conveyance from the wife, or her trustees, which was never had, † the subsequent facts speak a waiver of the articles, and not an inclination to make them obligatory. We all agree Mrs. *Moor* could not be bound by the articles, at the time of their execution, being then not above seventeen years of age, and so not capable to contract, and they are not executed by her, or her trustees, but only by Mr. *Lucy*, who in consideration of her portion of 3500*l.* and upon her conveying her share of the estate to him and his heirs, covenants he will make such a settlement by way of jointure, and provision for the issue of that marriage; so that the contract is only on his part; and neither the guardian of the lady's, or any of her trustees, are parties, or if they were, their joining in the

the articles, could not bind her, for suppose Mr. *Lucy* had brought a bill against her, and her trustees, to have a performance of these articles, equity would not have compelled her to a specific execution: Yet Mr. *Lucy* would not be without a remedy, for he had taken care to secure himself, being not obliged to settle, unless she first conveyed to him and his heirs, and he might always have said, I will not settle, till you first convey. These articles were executed in 1712, and in 1719 Mr. *Lucy* made the settlement, during which time they had no issue, and Mr. *Lucy* had received the 3500*l.* and she would be intitled to dower out of his lands, which were 2700*l. per ann.* so that Mr. *Lucy* might think it proper to settle these lands of 800*l.* a year on her, and that she should retain her share of her father's lands too. In the settlement indeed, notice is taken of the articles, because he designed to settle the same lands, and to the same uses, but there is no notice in the recital, nor is the settlement mentioned to be in consideration of any conveyance made, or to be made by her of her share of her father's estate, so that the settlement reciting the articles in part, it is plain the parties designed to pursue them only in that part, and she swears by her answer, that he made her this settlement out of generosity, and that he often told her so; and as they have not proved that he insisted upon her first conveying, or that he ever desired her to do so ('tho' she was of age six years before he made the settlement, and he lived two years after making the same) it is a confirmation of her answer, but the thing itself speaks his intention to waive it, because his only remedy was to take advantage of the condition, to insist upon her conveying first, and therefore if he had designed to have had the advantage of it, as it was always in his power to have done so, he would have claimed the benefit of it. Then this is a voluntary settlement made after marriage, in consideration of her portion, and to bar her of dower, and shall a volunteer under the husband claim the benefit of that condition he thought proper to waive? But it is not purely a voluntary settlement, it was in consideration of her portion, and of her waiving her dower, which was of more value than the lands settled; so that it would have been prudent in Mr. + *Lucy* to have made this settlement, tho' he had called on her to convey, and she had refused: But they say she confirmed the articles after the death of her husband, when her infancy and coverture were over, by consenting to the jointure, and receiving the rents and profits of it; but if Mr. *Lucy*,

Lucy designed this settlement without any view to her conveying, nay, by way of discharging her from it, this will be no bar to her enjoying her own lands, and the said *Jane* being an infant when she was married, and the settlement being made long after the marriage, she was entitled to her election, to insist on her dower, or to claim the jointure lands, and *William Lucy*, who was the brother and heir to *George Lucy*, never called upon her to make her election, well knowing that her dower out of the estate descended to him from his brother would have amounted to much more than the lands settled in jointure on her, whereby he was a gainer, so that tho' they both acquiesced under the settlement, no inference can be drawn from thence, that she designed to affirm the articles. And Mr. *Moor* claims title by the conveyance made by his wife, who by the will of her father, and as one of his coheirs, had a right to one third part of his estate, and had done no act to dispose of it to Mr. *George Lucy*, and the plaintiff *Lucy* is only an executrix, and devisee to her husband *William Lucy*, who was brother and heir of the said *George Lucy*, and is neither in blood, or otherwise related to the said *Jane*, or the family of the *Lucy's*, save by being the wife of *William Lucy*, and there appears no reason to make a strain'd construction to give her any part of this estate, contrary to the intention both of the said *Jane*, and of the said *George Lucy*. All cases in equity depend on circumstances, and those that have been quoted are not of weight, because they are differently circumstanced. In the case of Lord *Hereford*, the wife was not first to convey, but by way of a condition subsequent, and if she did not, she was to lose a proportional part of her jointure, which might induce the Court to make that decree, which stands single, and is contrary to the case of *Lister* and *Lister*, 2 *Vern.* 68, where the wife's fortune consisted in money due on bonds, and in lands of inheritance, and the husband before his marriage, made an adequate jointure on his wife, and died before the bonds were altered, or money received, and before any fine levied; and a bill being brought by his creditors after the death of the husband, to make these liable to his debts, the same was dismissed; and Mr. *Vernon* seems to doubt the legality of Lord *Hereford's* case, for he takes notice of three precedents to the contrary.

Mr.

Mr. Solicitor General.

Whether this estate be considered as real or personal, it still remains Mrs. *Moor's*, if she has done nothing to make it her first husband's: And this question will depend on the articles, + the settlement, and upon her enjoyment of the estate after the death of Mr. *Lucy*. They say Mr. *Lucy* would be intitled, tho' there were no articles; which I deny. If a man makes a settlement generally on his wife, he will be intitled only to those rights of the wife the law gives him, but not to that part of her fortune he does not reduce into possession, for that would be making two laws in the same kingdom as to one thing; without doubt persons of full age may enter into such articles as shall make the husband a purchaser of the wife's choses in action, and she only his trustee. But here the wife was an infant, and neither she or her trustees have made any contract, that the husband should have her share of her father's estate; but the husband only contracts to make such a settlement, on condition she convey; and this was a prudent and wise agreement, that as the wife was not of an age capable to contract, she should be left to her liberty whether she would convey or not when she came of age. As to the settlement, tho' it is said to be made in pursuance of the articles, yet it only recites what the husband was to perform, and when it is said to be in consideration of marriage, and of the 3500*l.* and so much of the articles as relates to the conveying the wife's estate is not mentioned, it is a plain waiver by the husband of it, and it was the interest of those that came after him, that he should make this settlement, tho' she did not convey; for her dower in the estate would have amounted to more, and her enjoying the lands is an assent indeed to the settlement (and is a bar to her dower) but not to the articles. In Lord *Hereford's* case, the settlement was made in contemplation of the fortune, and adequate to it; but it is not so here, where it was at the husband's pleasure, whether he would have made it, or not, without a previous conveyance from the wife.

[+65]
Choses in action belong to the representative of the husband, tho' the wife survives, if he made a settlement in view, and consideration of them, not if he made her only a settlement generally.

Mr. *Wills* his reply.

The wife I think is bound by the articles, and they are not waived, and the cases we mentioned, make strongly for us, that this part of the estate would belong to the husband, tho' there were no articles, because the settlement is made in view

view of her portion; and the contrary resolutions that are taken notice of by Mr. *Vernon*, in Lord *Hereford's* case, makes that case, I think, of greater authority, as they shew it to have been decreed on great deliberation, and after hearing precedents against it. But they say, Mr. *Lucy* has waived the benefit of these articles, but their arguments are merely conjectural. If one agrees, that on payment of so much money, he will transfer so much stock, tho' the payment of the money is a condition precedent, yet if he transfers first, shall it be said he waives the payment? But they say, the husband never brought a bill to compel the wife to convey: No, because he could not have bound her, being an infant,

[+66]

One, by articles previous to his marriage, covenants, in consideration of 3500l. portion, and on his intended wife's conveying her lands to him and his heirs; when she came of age, to settle such lands, after marriage he settles those lands, and recites the settlement, to be in performance of the articles, and in consideration of the marriage; and for a provision for the wife

or feme covert, either by the articles, or settlement; but she might have waived them after his death, and bring a bill against his heir to perform them; the settlement is said to be made in performance of the articles, but the whole are not recited because it was only necessary to shew, that he had done every thing he had covenanted to perform on his part, and as she was not then bound, it was not requisite to recite what was to be done on her part; but when she came to convey, it would have been as proper to recite what she was bound to do: and we say, that her entry after his death, is a confirmation of the articles; they say only, of the settlement; but the settlement was made in pursuance of the articles: and Mr. *Lucy* the heir, could not have disturbed her, could not have forced her to make her election, whether she would have the settled lands, or her dower.

And the Lord Chancellor ordered and decreed, That, as to this point, the plaintiff's bill in the original cause should be dismissed; and on the cross bill, it was ordered and decreed, That an account should be taken of the trust estate, under the will of the said *George Bobun*, since the decease of the said *George Lucy*, and one third part of the said rents and profits were to be paid to the plaintiff *Moor*; and that a commission should issue, to divide the estate into thirds, and that after such partition made, the surviving trustees should convey one third to the defendant *Moor*, and his heirs.

(to bar her of dower) and their issue, but never requires her to convey. After his death she enters on the settled lands, this settlement is a waiver of the conveyance by the husband, and she shall hold her own estate too.

This decree was affirmed in Parliament, on *Tuesday, April the 21st, 1730.*

December 10. The second seal after *Michaelmas Term.*

M O T I O N S.

ANONYMUS.

Cafe 39.
At the
Chancel-
lor's house.
Lord Chan-
cellor.

THE mortgagee filed a bill against Cox an infant, to re-
deem lands that were mortgaged to him by the grand-father
of the defendant, or to be foreclosed. The defendant put in
his answer, setting forth, that the mortgaged lands were pur-
chased by his great-uncle in the name of his great-uncle and
his grand-father, but that the money was paid by his great-
uncle, who devised premisses to his grand-father for life, re-
mainder to his heirs male in tail, and so claims paramount
the mortgage, and is not liable to it. The cause was heard
on bill and answer, and an account was decreed, and the de-
fendant was to redeem, or be foreclosed, unless he shewed
cause within six months after he came of age, for the grand-
father appeared to the mortgagee to have a good title, be-
cause by the deed he was joint tenant in fee with his brother,
by whose death the whole survived to him. The defendant
came of age, and being served with a subpoena to shew cause,
he now moved to amend his defence, by putting in a new
answer, and he swore he believed he could now prove, that
the mortgagee had notice of this trust for the great-uncle, at
the time he lent the money, which was not insisted on in his
former answer. But the council for the plaintiff said, that
it never indeed was denied an infant to amend his answer,
where it appeared to be material to his defence, but that this
of the defendant's own shewing, was not any ways material,
for the decree is a decree of foreclosure, unless the defendant
redeems, whereas he would amend his defence not to shew he
has a right to redeem, but to shew he need not redeem,
and consequently he is not affected by this decree; for as he
claims paramount the mortgage, notwithstanding this decree,
he may bring a bill against the mortgagee to reconvey. But
the Lord Chancellor allowed the motion, and said, that the
defendant himself was the best judge at present, what would
be material for his defence, and that since the case of *Sir John
Napier* and *Lady Effingham Howard*, this was a motion of
course.

1 Vern.
295. 2 Vern.
342, 224,
429, 479.
'Tis a mo-
tion of
course for
the defen-
dant after
he comes to
age, to be
at liberty to
put in a
new an-
swer, or a-
mend his

answer put in whilst he was an infant, if he has a day by the decree to shew cause, after
he comes to age.

The

The case of Sir *John Napier* and Lady *Effingham Howard*,
& *è contra*, was to this effect.

Sir *John Napier* an infant, by his prochein amy exhibited a bill against the defendants, as tenant in tail, and heir at law to Sir *Theophilus Napier*, to set aside a settlement made by Sir *Theophilus Napier* on the defendant, Lady *Effingham Howard*, during her marriage to the said Sir *Theophilus*. And the defendant, Lady *Effingham Howard*, brought a cross bill against Sir *John Napier* and the trustees, to have a conveyance made to her and her heirs, of the estates comprized in the said settlement; and both causes coming to be heard, a decree was made, from which both parties appealed, and it was ordered by the Lords, *inter al'*, that as to so much of the decree, as ordered Sir *John Napier's* bill to stand dismissed, so far as the same sought to set aside the settlement, the same should be affirmed, with this addition, unless Sir *John* should within six months after his attaining his age of twenty-one years, shew cause to the Court of Chancery to the contrary, and that the trustees should convey the estates in the said settlement to Lady *Effingham Howard* and her heirs, unless Sir *John* should within six months after he should attain his age of twenty-one years, shew cause to the said Court to the contrary. Sir *John* came of age, and within the six months preferred his petition (supported by affidavits) to the Lord Chancellor, to bring a new bill, or amend his former bill, and to amend his answer to the cross bill, the causes having been greatly mismanaged to his disservice by his solicitor,

[+68]

upon † which, *January* the 27th, 1726, after having adjourned over the same, and directed precedents to be searched, his Lordship, assisted by the Master of the Rolls, ordered, that Sir *John Napier* should be at liberty to amend, or put in a new answer, and should have time till the first day of the next term, but that no precedent appeared, for amending a bill in any points wherein the same had been dismissed upon the merits, but ordered that Sir *John* should be at liberty to rehear the said causes, and to that end, that the original cause should stand over, till after the time by the said order given for amending the answer, or putting in a new answer was expired. And this order was affirmed by the Lords, 1st of *May*, 1727.

If an infant is plaintiff in the original cause, and defendant in the cross cause, and has six months after his infancy, after he comes of age, to shew

cause against the decree, he may amend his answer, or put in a new one; but cannot put in a new bill, or amend his former. *Post. Cas. 170.*

A person

A person, by getting himself admitted a pauper, cannot discharge himself of costs he was liable to, precedent to his admission.

A pauper is liable to costs precedent to his admission.

ANONYMUS.

MR. *Attwood's* bill by an order of Court was referred to the Master to be taxed. And Mr. *Attwood* now moved to discharge the order, unless they deposited the money in Court, on affidavit that so much was due, and that the client absconded, and would not attend the Master. And the Lord Chancellor declared, that he first introduced that practice of bringing in the money, into the courts at law, when he was Lord Chief Justice of the Common Pleas, and that the same rule was afterwards observed in the King's Bench. For the party being stopped from suing at law, he thought it reasonable he should have security for his money, but as it had never been done in Chancery, he would not make a precedent, because the bills were so large; but would so far help him, as to order, that unless the other side procured a report in a fortnight, the said order should be discharged.

Cafe 40.
At the Chancellor's house.
Lord Chancellor.
Eodem die.
If a client, at law, applies to have the attorney's bill taxed, he must deposit the money in court. The Lord Chancellor introduced this rule into the courts of law, but would not

into Chancery, because the bills were so large. On the client's neglecting to attend the Master on the taxation of the bill, the Chancellor would not order him to bring the money into Court, but only that the order of reference should be discharged, if he did not procure a report in a fortnight.

RICH and WILSON.

SIR *Robert Rich* in 1721 settled all his lands in trust, for the payment of debts, and portions to his children, as he should direct by his will. Afterwards he makes his will, and devises 1000*l.* a piece to his five sons, payable at their respective ages of twenty-one, with interest in the mean time, and devises all his personal estate to the plaintiff his lady, for her sole use and benefit, and makes her executrix. † Sir *Robert* dies, and afterwards *Robert*, one of the sons, dies under twenty-one, and Lady *Rich* takes out administration to him, and Mrs. *Wilson*, his sister, sues her in the spiritual Court (she being in possession both of the real and personal estate of Sir *Robert Rich*) for a distribution of the 1000*l.* devised to her brother by his father's will. Lady *Rich* files a bill, and now moves for an injunction to the spiritual Court,

Cafe 41.
At the Chancellor's house.
Lord Chancellor.
Eodem die.

If a portion is charged on lands, payable at 21, and the child dies before, it shall sink into the estate, but if it is

charged on the personal estate, it vests in the child, tho' he dies before the time of payment.

An injunction was granted to the spiritual Court, to stay a suit for a portion charged only on lands. 2 Chan. Caf. 165, 155. 2 Vern. 72, 90, 92, 208, 416, 424, 439, 508. 2 Ventr. 366. 2 Chan. Rep. 286. Nelf. Fol. Rep. in Canc. 112, 432.

Court, because the portion of the son was charged on the real estate, and therefore ought not to be sued for in that Court: and the whole personal estate is devised to the plaintiff. That it was settled in Lord *Paulet's* case, 1 Vern. 204, 321. that where a portion is charged on lands, payable at a certain day, if the child dies before the time of payment, it shall not be raised, but sink into the land for the benefit of the heir; whereas by the ecclesiastical law, a portion payable at a future day out of a personal estate, is due and vests in the party, tho' he dies before. And the Lord Chancellor granted the injunction.

12 December. Exceptions to the Master's report.

SMITH versus REYNOLDS.

Cafe 42.

At the
Chancel-
lor's house
Lord Chan-
cellor.

THE plaintiff filed his bill to be relieved against a bond of 2000*l.* upon which the defendant had brought his action, setting forth that the bond was not entered into for money lent, or any valuable consideration, but purely to serve the defendant, and that it was agreed between them, that it should not be put in suit, to prove which, the plaintiff charged, that no demand had been made from 1703, when the bond was entered into, till the bringing the action; tho' the plaintiff was a gentleman of a large fortune, and the defendant very necessitous; and that the defendant afterwards borrowed of the plaintiff 300*l.* on bond, and that the bond being some how lost, the plaintiff exhibited his bill in this Court against the defendant, and had a decree for the payment. The defendant in his answer, says, That he does not know, or believe, that the plaintiff lost the bond, but believes that he fraudulently concealed or destroyed it. The plaintiff refers the answer for scandal; the Master reports it scandalous, and the defendant took the general exception to the report, that the answer was not scandalous, because pertinent; and the council for the plaintiff argued, That the answer was scandalous, because the words must be designed purely to reflect on the plaintiff, because they are not material, or relevant to the defendant; he should have taken notice of this bond, only as far as it was pertinent, † as to have

have denied that there was any such bond, or any such decree. The bill is brought to have a bond delivered up, and as an evidence that nothing was due on it: We set forth this other bond entered into by the defendant, and our bill, and that the defendant in that cause did not pretend any money was due to him from the plaintiff, and this part of the answer is so wholly immaterial to our charge, that tho' the defendant could prove it, it would be of no service to him in this cause, tho' it might on a bill of review in the other.

The council for the defendant argued, that tho' those words were not material to their defence, yet the plaintiff had made it necessary to set them out, and that if they were out, that their answer might be referred for insufficiency, all the several allegations and charges in the bill are to be answered, as if they were particularly interrogated, and one of the charges of the bill is, that the bond was some how got out of his power, and if we had been asked particularly this question, these words would be pertinent, and the words are not scandalous, what is more common than to charge in a bill, fraud, combination, and confederacy in the defendant, and the words *machinans, & fraudulenter intendens*, are not scandal at common law.

Lord Chancellor.

Though a matter may be very scandalous in itself, it is not to be considered so, if it is pertinent, or if the plaintiff asks impertinent questions, though the answer should be reflecting and impertinent, it would not be scandal: and it is very different to charge fraud and combination in a bill generally, and to insist upon it by oath in an answer. This bill is to be relieved against a stale bond, and as an inducement to prove it satisfied, the plaintiff mentions the subsequent bond, proceedings, and decree in this Court; in which cause the defendant never insisted on being paid the money due by this bond he has now put in suit, and therefore it is to be presumed it was satisfied: All this is material to the cause, but the plaintiff in his manner of setting out this transaction, takes notice, that the bond being some way got out of his custody,

A bill is brought to be relieved against a stale bond as satisfied, and as evidence to prove it, the plaintiff sets forth, that the defend-

ant entered into a later bond for money the plaintiff lent him, and that having lost the bond, he filed a bill against the defendant, and had a decree for payment, in which cause he never insisted on any thing being due to him from the plaintiff, the defendant in his answer says, he does not believe the plaintiff lost the bond, but concealed or destroyed it, this is scandalous, because it is not material to his defence. Ant. Caf. 28.

G

obliged

obliged him to sue in this Court, and the defendant in his answer says, he believes the plaintiff did not lose it, &c. he denies what is not material, and what the plaintiff did not require him to answer, if he had alleged that he had lost it, and had questioned him to it, then his answer would not have been scandalous, tho' immaterial, because the plaintiff led him into it, but now he is impertinent, for going out of the way purely to reflect on the plaintiff. So the report must stand.

[171]

You can't move, or have the directions of the Court, on a report, till it is confirmed.

† You cannot bring on a cause for the further directions of the Court, or move, on a Master's report, till it is confirmed.

You can't move on a decretal order, till it is passed with the Register.

You cannot move on a decretal order till it is passed with the Register.

Case 43.
At the
Chancellor's house.
Lord Chancellor.

Saturday, December 14. The third Seal after *Michaelmas* Term.

M O T I O N S.

ANONYMUS.

THE Attorney General moved to discharge an order, to refer a bill for impertinence, because the defendant had obtained two orders, for time to answer, whereby he admitted the bill, tho' he allowed it might have been referred for scandal, because that ought to be expunged, and not remain on the records of the Court. The Chancellor ordered, That the defendant should procure a report within four days, or the order be discharged.

The defendant obtained an order to refer the bill for impertinence after he had twice prayed time to answer, and the Chancellor ordered, That he should procure a report within four days, or the order be discharged.

Monday,

De Term. S. Michael. 1728.

Monday, December the 16th.

ANONYMUS.

A WOMAN that was found an ideot by inquisition, prayed by herself and council that she might have leave to traverse the inquisition; and the Lord Chancellor, after asking her several questions, made an order accordingly, upon condition she should appear in person at the said trial, at the next assizes, or whenever they brought it on.

she would appear in person at the trial. *1 Vern. 155.*

Case 44.
At the
Chancel-
lor's house.
Lord Chan-
cellor.
One found
an ideot,
had leave to
traverse the
inquisition
at her own
request, on
condition.

DAVY & al' verfus SEYS.

EVAN Seys the defendant, as administrator of *Evan Seys* deceased, (who was executor of *Richard Seys* his father) exhibited an inventory into the spiritual Court, and the plaintiff's the creditors of the intestate, would charge him before the Master according to this inventory, and the defendant insisted, that when he put it in, he thought all the goods in the house were the goods of the said *Evan Seys*, whereas he had since found out, that great part of them were the goods of the said *Richard Seys*; to prove which, he examined a witness in 1727, then † about twenty-two years of age, who deposed, [†72] That she was a servant in the house in 1714, at the time that *Richard Seys* died, and that she lived in the said house some years after, and perfectly well remembered the said goods; and her evidence was disallowed by the Master, because she swore to the remembrance of goods when she was not above nine years of age, and at about thirteen years distance, without having taken any note or memorandum of them; but on exceptions to the report, the Lord Chancellor thought her a very good witness, because she was not examined to the value of the goods, but only as to their being in the house; and though she was but nine years old at the testator's death, she lived three or four years after in the family, and saw the furniture every day; her evidence agreed too with what another person swore, but his Lordship offered them the liberty to try it, which they declined.

Case 45.
At the
Chancel-
lor's house.
Lord Chan-
cellor.
Eodem die.

The evi-
dence of a
servant who
was only
nine years
of age at
the testa-
tor's death,
but lived
three or
four years
afterwards
in the
house, was
allowed to
prove the
furniture
then stand-
ing, 13

years after, tho' she had never taken any memorandum of it.

The Master
of the Rolls
may dis-
charge an
order made
by the
Chancellor
ex parte, or
on a motion
of course.

You may move before the Master of the Rolls, to discharge the order made by the Lord Chancellor, on a motion of course, or an order made ex parte, for only one side being heard, it is as a continuance of the same motion.

PENVILL and LUSCOMB.

Caf. 46.
At the
Rolls.
Eodem die.
See post.
Caf. 75.

LUSCOMB the father, made a mortgage in fee, and died after forfeiture, leaving a son and a daughter by one venter, and a son by another; the eldest son dies, and the single question was, Whether the equity of redemption belongs to the sister of the whole blood, as heir to her brother, or to the brother of the half blood, as heir to his father? And it was urged that here was no *Possessio Fratris*; that if the elder brother had left a widow, she would not have had dower out of this estate, tho' a widow is allowed to redeem a mortgage for years, because a lease for years at law is no bar of dower, and the possession of the mortgagee is so far from being the possession of the mortgagor, that if the mortgagee continue twenty years in quiet possession, it will give him a title even against the mortgagor.

Master of the Rolls.

I do not remember that this question ever came in judgment before the Court, and the reason is, because there are so few mortgages in fee; most mortgages are made for a term of years, reserving a rent, a pepper-corn at least, and then the possession of the mortgagee is the possession of the mortgagor, for the possession of the lessee is the possession of the lessor; as he acknowledges by paying him rent, (for it is necessary that he pay him some rent;) but when a mortgage [173] in fee is forfeited, † the whole estate is standing out, and there can be no constructive possession of the mortgagor or his heir: but it is said, that this mortgage was satisfied by perception of profits, in the life-time of the eldest son, and therefore the mortgagee was only a trustee for him, but then to make the sister his heir, he must have been in possession of this trust, either by filing a bill against the mortgagee, or by the mortgagee paying him the rents and profits, so the statute of fines bars him who has a legal title, if he does not enter within five years, and him who has an equitable title, if he does not bring his bill within five years, which amounts to
A fine will
bar him
who has an
equitable
title, if he
does not
bring a bill
within five years. 1 *Verm.* 226. 1 *Chan. Caf.* 268.

an entry, and Lord Coke says, there might be Possessio Fratrís of a use, before the statute for transferring uses into the possession, which is what we call a trust now, and as the possession of lands is gained by entry, so the possession of a trust is by bill, and therefore the elder brother not having exhibited a bill against the mortgagee, I think the equity of redemption belongs to the second brother, but I shall make no decree now. It has been adjudged in this Court, that if a tenant in tail male special, remainder in fee, dies without issue inheritable, that there can be no Possessio Fratrís of the reversion, for the possession of the estate tail was not the possession of the reversion in fee, but only of the tenancy in tail.

The father mortgages in fee, and dies; after the eldest son dies. Q. Whether the equity shall go to the sister of the whole, or to the brother of the half blood?

If tenant in tail, male special, reversion in fee, dies without issue inheritable, the reversion shall go to the brother of the half blood. *Nelf. Fol. Rep. in Canc. 216. 2 Vern. 189. 1 Vern. 132, 60, 144, 84. 2 Chan. Caf. 124, 63, 78. 1 Chan. Caf. 49, 213, 278.*

Wednesday, December the 18th.

PLEAS, AND DEMURRERS.

COKE and WILCOCKS.

Cafe 47.
At the
Chancel-
lor's house
Lord Chan-
cellor.

THE defendant pleads that his father purchased the lands in question, for a valuable consideration, without notice of the plaintiff's title. And it was argued for the plaintiff, That this plea was not good, because the defendant denies notice in his plea, and not in his answer, which takes away from the plaintiff the liberty of exception. 2 Chan. Caf. 161. So, if fraud is charged in the bill, it must be denied in the answer, and not in the plea. 1 Vern. 185.

Lord Chancellor.

Notice may be denied either in the plea or answer; and if the plaintiff replies to the plea, the defendant must verify it; or if notice ought to be denied by the answer, and is not, but in the plea, the consequence will not be, that the plea is bad, but that the answer is insufficient.

Notice may be denied either in the plea or answer, where a defendant pleads

himself a purchaser for a valuable consideration.

† If a plea is to stand for an answer, without liberty to except, the plaintiff may except to the rest of the answer. [†74] If a plea is to stand for an answer, without liberty to except, the plaintiff may except to the rest of the answer.

And

De Term. S. Michael. 1728.

And this was so resolved by the House of Lords, in the case of *Packer and Starvel*, 1729.

Case 48.
At the
Chancel-
lor's house.
Lord Chan-
cellor.
Eodem die.

The SOUTH SEA COMPANY versus BUMPSTEAD.

Mr. Solicitor General for the defendant.

THE bill is brought by the South Sea Company for a discovery, account, and relief, to which purpose it sets forth, that the South Sea Company in 1723, sent the *Royal George* to the *Spanish West Indies*, and made the defendant Mr. *Bumpstead*, and three other supercargoes, who entered into articles with the said Company, that they would sail directly for *Cartagena* or *Porto Bello*, and not call in at any other place; and covenanted, that if within six months after the return of the ship, any complaint should be made of them to the Company, that they had carried on any unlicensed trade contrary to the articles, and the Company should file a bill against them, they would appear and put in a full answer, and not plead or demur; and that they would not suffer any unlicensed goods to be put on board during their voyage to the *Spanish West Indies*, nor in their return: And as the South Sea Company were by the *Assiento* contract to forfeit their trade if they exceeded their tonnage, or brought home any specie, not the produce of the negroes, or any of the King of *Spain's* subjects, without his licence; they likewise covenanted to indemnify the Company from any loss they might suffer by their violation of this contract. And the bill charges, That in breach of these articles, they in their voyage touched at *St. Christopher's*, and staid there twelve days, and took in one hundred tons of goods, not licensed by the Company; by which delay the galleons arrived at *Porto Bello* before them, whereby they missed the opportunity of their market, and that by their selling their own cargo first at a great advance, they lowered the price of the cargo of the Company; and that they in their return staid seven weeks at the *Bastimentos*, and after at *Jamaica*, and then put in at *Antegou*, and landed their own effects, and got the ship condemned there, as unable to proceed, and put the effects of the Company on board the *Kingsale* man of war, and sent them home. The bill therefore prays a discovery of all these transactions, and an account and satisfaction for the unlicensed goods so put on board, and for 150,000 pieces of
eight,

eight, the produce of them. To this bill, the defendant *Bumpstead* has pleaded, and answered, and has set forth † his [†75] conduct during the whole voyage; by which it appears, that the plaintiffs have no room to complain: and his plea consists of three parts. The first is, to the discovery of any unlicensed goods belonging to him, put on board the said ship, or the produce thereof; to which he pleads the statute 9 *Anna*, which enacts, that it shall not be lawful for the South Sea Company, their agents, or factors, to export from any place but *England*, any *East-India* goods to the South Seas, or *Spanish West Indies*, under the penalty of forfeiting the said goods, two-thirds to the *East-India* Company, and the other third to the Crown: And, that if he should be obliged to discover what goods he put on board at *St. Christopher's*, it might subject him to the forfeitures of that act, which as they did not belong to the South Sea Company, they could not dispense with, or exempt him from; he also pleads the *Assiento* contract, by which the annual ship was to carry but 650 tons; and that the penalty of carrying more was confiscation of the goods, and loss of their trade; and that by the same contract, they were not to bring home any specie, not the produce of the negroes, or any of the King of *Spain's* subjects, without his licence, under severe penalties; and that this discovery might subject them to those penalties, and likewise to the penalties of the bonds they had entered into to indemnify the Company. The other two pleas are not to the discovery, but to the account, and relief prayed. The first is, that the representatives of the other supercargoes are not made parties, tho' they all entered into the same covenants, and that it might appear if they had been made defendants, that they had made satisfaction to the Company, or that the Company had given them releases; or if the plaintiffs should be decreed a satisfaction from the defendant, he might have it over against them pro rata. The other plea is, That the King of *Great Britain*, or his Attorney General, and the King of *Spain* ought to have been co-plaintiffs, because by the *Assiento* contract, the King of *Spain* is intitled to a fourth part of the cargo of the annual ship, and to five per cent. on the other three fourths, and the King of *England* to another fourth part. As to the first plea, no one is certainly bound to discover what shall subject him to a penalty: This Court indeed frequently relieves against forfeitures, but never forces a person to discover what shall subject him to them; and if on our discovery of what goods we
put

[176]

The mort-
gagor may
redeem,
notwith-
standing a
covenant
and affida-
vit not to
redeem.

put on board at St. *Christopher's*, it should appear that they were *East-India* goods, they would be forfeited, and as these forfeitures do not belong to the South Sea Company, they cannot waive them, which is always done when the plaintiff would have a discovery of what would subject the defendant to a forfeiture, and the plaintiffs were so sensible of this that they have waived the penalties of the bonds entered into by the supercargoes for the performance of covenants: And the discovery might also subject the defendant to the penalty of the + Affiento contract, if it should appear that he had carried any thing but negroes, or brought back any specie, not the produce of them, or any of the King of *Spain's* subjects; so that by the common rules of the Court we are not obliged to make any discovery of these matters that would subject us to such penalties and forfeitures, unless the covenant in the articles obliges us to discover, which I think it does not: A court of equity has nothing to do with covenants but to see them executed, in which it uses a discretionary power, because the party may sue upon them at law; now the defendant swears in his answer, that these articles were brought to him ready engrossed, by the Secretary of the South Sea Company, a few days before he set sail, and after all his effects were on board; and that he objected to this covenant, but was obliged to sign it or quit his employment; and tho' this is not such a duress as by law would defeat the covenant, yet this Court will so far consider it, that if either side took the other at an advantage, they will not carry the covenant into execution, since the party may have his remedy at law; besides, the effect of this covenant is, that they shall not make use of that defence which the law allows to every subject. Suppose they had covenanted to refer all disputes to arbitration; yet sure they might have sued in *Westminster-Hall*. In *Stythead's* case, the mortgagor not only covenanted, but made an affidavit that he would not redeem, yet he exhibited a bill and was decreed to redeem: And if parties are relieved against covenants that rob them of the liberty of suing in common with other subjects, much more shall they be relieved against those that deprive them of their legal defence, in case they are sued by others. As to the second plea in bar of the account, it is a general rule, that where an account is to be taken, all concerned in that account are to be made parties to it; now this bill is to have an account of an unlicensed trade carried on by several supercargoes, whereas if any one of them has satisfied the plaintiffs, it is sufficient,

sufficient, and there is an end of the Company's demand against the rest; or if the Company should prevail against the defendant *Bumpstead*, he might be decreed a satisfaction over against the others, to prevent a circuitry of action. And that the load might be laid equally on all, whereas if the defendant *Bumpstead* should bring his bill against the representatives of the other supercargoes, they might shew they had made the Company a satisfaction; and this decree would not bind them. As to the third plea, the plaintiffs by their bill, demand the whole, though they have a right only to part, and though they could not compel the Attorney General to join with them, they ought at least to have made him a defendant.

† Mr. *Wills*.

[+77]

Our plea to the discovery is undoubtedly good, if the covenant does not stand in our way, and that certainly shall not bind the defendant, if one directs by his will, that if any of the legatees contests the will he shall lose his legacy, he may do it notwithstanding, or if a tenant covenants that if his landlord distrains he will not bring a replevin, yet he may replevy, and considering the nature of this covenant, your Lordship will not carry it further than the letter, which is, that if within six months after the return of the ship, a bill should be brought, they would not plead or demur to it. But this bill is brought long before the ship came home, and therefore is not the bill they covenanted not to plead or demur to, so that this covenant is out of the case. As to the other pleas, the charge is against all the supercargoes, for carrying on an unlicensed trade in confederacy, and therefore no account or relief can be prayed against any one of the confederates without bringing all before the Court, and the Company only bring the bill, whereas we are accountable also to the King of *Great Britain* and to the King of *Spain*.

The Lord Chancellor being of opinion for the plaintiffs, and obliged to go to council, would not hear their counsel, but over-ruled the first plea, because it was contrary to what the Company had provided against by an express covenant, and which it was lawful for them to do, and the like plea was over-ruled by Lord *Macclesfield*, after great deliberation, and hearing of counsel, in the case of the *Ea^t-India* Company, to answer any bill they shall file against them, and not to plead or demur. This covenant shall bind them, tho' the discovery may subject them to forfeitures.

pany

pany against *Nash* and *Atkins*. But his Lordship saved the benefit of the second plea to the hearing, though it appeared that the covenant was joint, and several, and over-ruled the third plea, because the Kings of *Great Britain* and *Spain* were only intitled to share of the licensed goods of the said ship, but the bill is for an account of goods not licensed.

^{2 Vern. 244,}
^{1 Vern. 109,}
^{127.}
Hardr. 137.
^{201.}
^{2 Chan. Caf. 198.} *Nelf. Fol. Rep. in Canc.* 117.

You may prefer a petition to the Lord Chancellor, that has been dismissed by the Master of the Rolls, for it is in nature of an appeal, and the party has no other remedy.

Chancel-
lor that has been dismissed by the Master of the Rolls.

[+ 78]
Cafe 49.
At the
Chancel-
lor's house.
Lord Chan-
cellor.

† Friday, December 20.

PETITIONS IN COMMISSIONS OF LUNACY.

EX PARTE BUMPTON.

The lunatic being recovered, and examined in Court, the commission was superseded, and the recognizance of the committees ordered to be vacated, the lunatic declaring they had given him a fair account. *Post. Caf.* 183.

MR. *Bumpton's* two sisters were appointed Committees of his person and estate, and they now joined with him in a petition, that the commission might be superseded, the inquisition qualched, and the bond vacated, the lunatic being recovered of his indisposition, and he appeared in Court, and was examined by the Lord Chancellor, but his Lordship doubted whether he could vacate the recognizance of the Committees, because it did not appear judicially to the Court that they had performed the condition, and asked the opinion of the Attorney General, who thought it might be done, and that it sufficiently appeared the condition was performed, because Mr. *Bumpton*, who was the only person interested, was in Court, and had declared himself well satisfied that his sisters had done their duty and given him a fair account. And an order was made according to the prayer of the petition.

Saturday,

De Term. S. Michael. 1728.

Saturday, December 21.

PETITIONS IN COMMISSIONS OF BANKRUPTS.

EX PARTE RUDDOCK.

THE Lord Chancellor allowed an affidavit of the bankrupt, sworn before a Master extraordinary in *Cork*, to be read: And declared he had known an affidavit sworn before one of our Consuls abroad, allowed to be read by the Courts of law.

allowed to be read. Courts of law will allow an affidavit sworn before a consul to be read.

Cafe 50.
At the
Chancel-
lor's house.
Lord Chan-
cellor.

An affidavit
of the
bankrupt,
sworn be-
fore a Mas-
ter extraor-
dinary in
Cork was

+ Monday, December 23.

PETITIONS IN COMMISSIONS OF BANKRUPTS.

EX PARTE GAZALET.

THIS petition coming on again for judgment, the Lord Chancellor spoke to this effect. By the 7th *Geo. I. ch. 31.* persons who have taken securities for money, payable at the end of three months, or other future days of payment of any person who shall become a bankrupt, and which money shall not be due and payable at such time as he becomes a bankrupt, shall be admitted however to prove their bills or other securities, as if they were made payable presently, and not at a future day, and be intitled to a rateable part of the bankrupt's estate, deducting only interest at the rate of five *per cent.* to be computed from the actual payment thereof, to the time such debt would have become payable. This case of a bond payable at a future day upon a contingency, is not within the act, nor can any interest be deducted for it, as the statute requires, but such creditors are in the same condition they were before the act, and when the contingency happens, they may come in for such effects as remain undistributed. This is not *Debitum in præfenti, solvendum in futuro*, and perhaps never may be a debt, and must the estate wait for ever, the bankrupt too may be a whole man

commissioners of a bankrupt, before the contingency happens.

when

[+79]
Cafe 51.
At the
Chancel-
lor's house.
Lord Chan-
cellor.

See ant.
Caf. 15.

A bond
payable at a
future day
on a con-
tingency is
not within
7 *Geo. I.*
ch. 31. and
cannot be
proved be-
fore the

A bankrupt when the contingency happens, and his certificate will not be a bar to the action, if the plaintiff sets forth the bond and condition in his declaration, for then it will appear the debt did not become due till after the certificate; as was lately adjudged in *B. R.* in the case of *Tully and Sparks*, and therefore I dismiss the petition.

If a bond on a contingency becomes due before all the effects are divided, the obligee shall come in as a creditor to what remains to be distributed.

bankruptcy, but on a contingency did not happen till after his certificate.

And two other petitions of *Chamel* and *Bateman* were reserved for judgment at the same time. The petitioners were creditors by bottomry bonds, which were dated before any act of bankruptcy, and became forfeited after before a full distribution of the effects. The obligees had put in their claim before any distribution, but were not allowed by the Commissioners to prove their debts, or come in as creditors, a dividend was made, and then the contingency happened, and the Lord Chancellor ordered, that they should come in as creditors for a share of what remained undistributed, but so as not to disturb former dividends.

[†80]

Case 52.
At the
Chancellor's house.
Lord Chancellor.

† EX PARTE COKE AND TUCKER,

AND

EX PARTE PRIESTLAND.

THERE were two copartners, and one becomes a bankrupt, and the joint creditors took out a commission against him, and *Coke* and *Tucker* were chosen assignees, and they seized all the joint and separate effects of the bankrupt; and the separate creditors took out a separate commission, and chose *Tucker* and *Priestland* assignees; and *Priestland* brought trover against *Coke* for the separate estate; and *Coke* and *Tucker* petition to stay the action at law, and *Priestland* preferred a cross petition to be at liberty to proceed.

Joint creditors shall be first paid out of the joint estate of the bankrupt, and separate creditors out of the separate estate, but each shall come in for any surplus of either.

And the Lord Chancellor ordered, That it should be referred to one Commissioner of each side, to take an account of the effects belonging to the joint estate, and of the effects belonging to the separate estate; and that what should be found to belong to the joint estate, should be delivered over to the assignees under the joint commission, to be by them applied

De Term. S. Michael. 1728.

applied to the satisfaction of the joint creditors; and what should be found to belong to the separate estate, should be delivered to the assignees under the separate commission, for the benefit of the separate creditors, and if any surplus remained of the joint estate, it was to be applied to the payment of the separate debts, or if any surplus of the separate, to the payment of the joint debts.

2 Vern. 706.
But see 2
Chan. Caf.
139, contra.

At the Sittings in Chancery before *Hilary Term*, 1728-9.

Wednesday, January the 15th.

PLEAS AND DEMURRERS.

WILDBORE & al', versus PARKER & al'.

Mr. Attorney General for the defendants.

Cafe 53.
At the
Chancel-
lor's house.
Lord Chan-
cellor.

THE bill sets forth, that Lord *Fitzwilliams* and Mr. *Wortley Montague* being desirous to serve in Parliament for the city of *Peterborough*, they agreed with the Corporation that my Lord *Fitzwilliams* should give 1000*l.* and Mr. *Montague* 500*l.* to build a bridge and repair a gallery in the church, and the plaintiffs, *Wildbore* and *Delarine*, two of the said city, gave two notes to the defendants, who were members of the corporation, one of which was to this effect. [+81]
We do acknowledge to have received 1000*l.* for the building a bridge, and repairing a gallery in the church, which we promise to pay to the same uses, and the overplus, if any, to such publick uses of the city as shall be appointed by the principal inhabitants; and the other note was an acknowledgment of the receipt of 500*l.* for the like purposes. And the bill charges that these notes were given upon the defendants engaging to use their interest in the corporation for Lord *Fitzwilliams* and Mr. *Montague*, and that the money was to be paid only in case they were returned to serve in Parliament for the said city; that the said candidates never paid any money to the plaintiffs, and that the consideration was not expressed in the notes, to hide the bribery and corruption: That the defendants afterwards invited Sir *Edward O'Brien* to stand for the said city, and pretended they would not return the other two, unless Mr. *Montague* would also give 1000*l.* which not being complied with, the defendants by the

the opposition they gave Lord *Fitzwilliams* and Mr. *Montague*, obliged them to spend about 4000*l.* (which was much more than the notes were given for,) and Mr. *Montague* lost his election, and the defendant the sheriff delivered his precept to a wrong officer, who returned Sir *Edward Obrien*, who made the city a present of 1000*l.* and that the defendants pretend they cannot give up these notes, because they were given for the benefit of the said city; but an information has been filed against the now plaintiffs at their relation to have them established: The bill therefore prays, that the defendants may discover the consideration for which these notes were given, and may deliver them up. And as to such part of the bill as desires the defendants to set forth whether there was not such an agreement to return Lord *Fitzwilliams* and Mr. *Montague*? or what was the consideration of the notes? the defendants demur, because the cognizance of all parliamentary affairs, or of any agreement to return members, belongs to the House of Commons, and because this discovery might subject them to the punishment and censure of the said House: And as to that part of the bill which prays a discovery whether Sir *Edward Obrien* did not give 1000*l.* to the said city? they demur, because the King ought to have been made a party by information, or Sir *Edward Obrien* at least, to see how his own charity should be disposed of: And the defendant the High Sheriff demurs to the discovery of any misbehaviour in the return, because the discovery might subject him to the censure and punishment of the House of Commons. And we demur also to the relief. And tho' we have brought an information in the name of the Attorney General against the now plaintiffs, to have the money due on the notes laid out and disposed for the benefit of the city, yet that information cannot be taken notice of in this cause, but it must be judged of as it stands on their bill and our demurrer. The agreement to give these notes is, as they set it out, a corrupt agreement examinable by the House of Commons, and therefore our demurrer to a discovery is proper, for we are not obliged to discover what would subject us to a penalty, whether it is punishable by common law, statute, or the House of Commons: But if we ought to discover, our demurrer to the relief prayed, is good, for where the agreement is corrupt this Court always stands neuter, and so do even the Courts of common law; for if one brings an information to have the money applied, the defendants to the information file a bill against the relators, to discover the consideration of the notes. Q. If they can demur to the discovery, because it would subject them to a penalty?

action

[+82]

An information is brought for the payment of two notes given for publick uses, and to have the

action for money had and received by the defendant for the plaintiff's use, and which was indeed paid by the plaintiff on an usurious contract, the law will not let him recover on this action, because both of them were equally guilty: And we demur to the prayer of the specific application of the 1000*l.* given by Sir *Edward Obrien*, because the agreement is a corrupt agreement; and because the overplus of the money for which the notes are given, is to be applied to such publick uses as the principal inhabitants shall appoint, and they are not made parties; for this reason also we demur.

Lord Chancellor.

I will respite the demurrer till the information comes to a hearing, tho' you give it the specious name of a charity, it is a plain corruption. But since an information is brought, how can I relieve the plaintiffs.

Mr. Solicitor General for the plaintiffs.

We should be satisfied if the relators in their information would consent to be examined for us; but if we should offer to examine them they would demur, as they do now to our bill; and we aim at a discovery more than a relief, and do not fear the information.

Mr. Attorney General.

An information was brought to me signed by counsel, of 1500*l.* given to publick uses, which, to be sure, I would not have signed, if I had known on what consideration the notes were given; and when the defendants to the information, the now plaintiffs, applied to me to stop proceedings on the information, I ordered an attendance, at which they only produced an affidavit, that these notes were given upon a consideration which had never yet been performed; which I told them they might insist upon very properly in their answer; but they disclosed nothing to me of what they now charge by their bill.

† Lord Chancellor.

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Let the cause stand over to the next day of demurrers, to see whether the defendants the relator in the information, will submit to be examined as witnesses to the consideration for which the notes in question were given; or both sides
may

De Term. S. Michael. 1728.

Post. Caf.
79. S. C.

may in the mean time attend Mr. Attorney General to know his pleasure, whether it be proper to proceed on the information ; and all proceedings are to stay in the mean time.

Cafe 54.
At the
Chancel-
lor's house.
Lord Chan-
cellor.
Eodem die.

DHEGETOFT & al', verſus the LONDON ASSURANCE,
& al'.

January the 15th, 1728.

Quære, If
a bill can
be brought
on a policy
of insurance
taken in a
trustee's
name, on a
ſuggeſtion
that the
witneſſes
live abroad,
and that the
trustee will
not let the
plaintiffs
bring an
action in his
name.

THE plaintiffs are foreigners and copartners, who fitted out a ſhip from *Oſtend* to *China*, and back again ; and the defendant *D'Goniegh* their agent, insured the ſhip and cargo here in *England* by the other defendants, and took the policy in his own name. The ſhip proceeded on her voyage, and called in at *Bencolen*, where the Governor ſeized her as an interloper, and diſpoſed of her and the cargo. Upon which the plaintiffs brought this bill, ſetting forth, That the policy was taken in the name of *D'Goniegh* their trustee, and that he refuſes to let them ſue the other defendants in his name : That the facts happened abroad, and that their witneſſes who could prove them were beyond ſeas ; and therefore they pray a diſcovery and relief. And the defendants demurred to the relief, and their counſel ſaid, That the ſame demurrer was allowed by his Lordſhip the 15th of *January 1727*, in the caſe of *D'Silva* verſus *Wall* and others, where the policy was on a *Portugueſe* ſhip, and it was ſuggeſted in the bill, that the witneſſes were *Portugueſe*, and lived abroad, and that the expences of bringing them over on a trial would be more than the cauſe would bear, and that their trustee would not let them bring an action in his name ; yet his Lordſhip was of opinion, That they muſt recover at law as well as they could, and had no title to be relieved here ; that it was the common ſuggeſtion in every bill that the witneſſes were beyond ſeas, that policies were generally taken in the name of a trustee, and that if he refuſed to let the action be brought in his name, a bill might be filed againſt him to compel him to

The counſel for the plaintiffs inſiſted, That if they had filed their bill againſt the trustee only, he would have demurred, becauſe they had not made the *London Assurance* parties, who might have ſatiſfied them, and that they had brought a proper bill ; and that they ought either to have the liberty to uſe

De Term. S. Michael. 1728.

use the name of the defendant their trustee, or to have a remedy against the other defendants; that the demurrer ought to be over-ruled, because possibly the Court might think proper to relieve them at the hearing; but if the demurrer should be allowed, they would be out of Court, and so lose even the relief against their trustee, which they were plainly intitled to.

Lord Chancellor.

At this rate all policies of insurance would be tried in this Court, for they are generally taken in the name of a trustee, and are made on ships going abroad, and the witnesses live abroad. Let the demurrer be respited, till the defendant *D'Gonieg* has put in his answer, and on the 21st of *November 1729*, the demurer was allowed.

The allowance of the demurrer was affirmed in the House of Lords on Monday the 1st day of February 1730.
Post Caf. 106.

Thursday, January the 16th.

PLEAS AND DEMURRERS.

D'ARANDA versus WHITTINGHAM.

Cafe 55.
At the Chancellor's house.
Lord Chancellor.

TWO became jointly and severally bound in a bond to the plaintiff; both the obligors die, and the plaintiff brings his bill against the heir of one, and the executor of the other obligor; and the defendant the heir demurred, because no administrator or executor of his ancestor was made a party to the bill: And it was argued, That this was a good demurrer, because by the standing rules of this Court, the personal estate is to be applied first to pay debts, and because if the representative of the personal estate was made a defendant, he might shew he had satisfied the debt.

Mr. Lutwych for the plaintiff.

We set forth by our bill, that the intestate absconded for several years before he died, and that we do not know where he died; that the defendant, who was next of kin, refused to take out letters of administration, and that we, as principal creditors, had applied to the Prerogative Court, and were opposed by the defendant, and denied administration, because we could not prove that the intestate left bona notabilia. That we afterwards applied to the Consistory Court of *Bath* and *Wells*, where we likewise failed of administration, be-

H

cause

[+85] The heir may be sued alone if the representative is out of the kingdom. cause we could not prove he died in that diocese, and that the defendant refused to discover where the intestate died. And this general rule (which is a hardship on the plaintiff, that he must make the representative a party, when at law he might sue the heir † alone) is not so sacred, but that the Court dispenses with it in many cases; in the case of *Buckley* and *Eaton*, the Master of the Rolls made a decree against the heir for the payment of a bond debt, tho' the widow the administratrix was not made a defendant, because she was in *Ireland*. And they ought not to demur for this reason, because it is not a thing of absolute necessity, but there are several excuses which the Court are to judge of at the hearing, as that he is beyond sea, not to be found, or the like.

Lord Chancellor.

The heir of the obligor demurs, because his administrator was not made a party, and the demurrer was over-ruled, because he would not administer himself, and had opposed the plaintiff in taking out administration as principal creditor. A debtor by bond dies, leaving no personal estate, so that nobody will administer to him, must an honest and fair creditor, who ought always to be favoured, be obliged to take out letters of administration to him, and thereby subject himself to the suits and actions of all the other creditors, tho' never so vexatious? But as the defendant who had the right, opposed the plaintiff in taking out administration, and would not discover where the intestate died, or administer to him, I may over-rule this demurrer, without breaking in upon the general rule, and without prejudice at the hearing, for want of parties. 1 *Vern.* 95. 2 *Vern.* 195. 2 *Lev. Cock* versus *Crofs.* 3 *Lev. Haight* versus *Langham.* Supplem. to *Wentw.* 357.

Case 56.
At the
Chancellor's house.
Lord Chancellor.

Saturday, January 18.

The second Seal before *Hillary* Term.

M O T I O N S.

ANONYMUS.

An attachment being taken out against the defendant in *Ireland*, since he could not be examined in person to the contempt, a commission was granted into *Ireland* to examine him.

and

and an attachment was taken out for non-performance of the decree. And Mr. Attorney General moved for the defendant, that he might enter his appearance with the register, that the plaintiff might file interrogatories, and that a commission might be granted to *Ireland* to examine him to the contempt, being the only method could be taken, since he could not, according to the course of the Court, be examined in person. And an order was made accordingly.

1 Vern. 187.

† ANONYMUS.

[† 86]

A motion was made that the prochein amy being privileged as steward to the Duke of *Bedford*, might give security to pay costs, or a new one be appointed.

Cafe 57.
At the
Chancel-
ler's house.
Lord Chan-
cellor.
Eodem die.

Lord Chancellor.

I shall not grant such a motion but on affidavit that the prochein amy is insolvent, or in mean and doubtful circumstances; for a privileged person is subject to costs, but here the steward can have no privilege, because the Duke of *Bedford* is a minor.

A prochein
amy shall
not be
obliged to
give secu-
rity, be-
cause he is

a privileged person. See ant. Caf. 30.

Term. S. Hill.

1728-9.

In Cur. Cancellariæ.

Case 58.

Friday, January the 24th.

In Court.
Lord Chan-
cellor.

Lord Viscount FALMOUTH, and others, in the name of themselves, and the rest of the proprietors of the mines and water-courses set forth in the bill, Plaintiffs.

Mr. INNYS, the Earl of RADNOR, Mr. TREFUSIS, and others, Defendants.

Mr. Attorney General for the plaintiffs.

[†88] THE end of this bill is for an injunction, to quiet the plaintiffs in the enjoyment of their right, and to have it established by a decree of this Court. To which purpose the bill sets forth, That Lord *Falmouth* is seized in fee of the manor of *Glantuan* in *Cornwall*, and of a waste called *North Downes*, belonging to the said manor, in which are several copper-mines. That the defendants are seized of a farm called *Kerry Wherry Farm*, which is divided from the said manor by a water-course called *Black Wherry Water*, and that the said water has belonged to the Lord *Falmouth*, and those under whom he claims, time out of mind, that the said Lord *Falmouth* was seized of several stamping mills, erected on the said waste, to the number of five and twenty, and † that on the other side of the water there was not one stamping mill, though those mills are of great profit and advantage in that country; that the said mills were leased to one *Scholars* for ninety-nine years, and that for turning the water to these mills, a wear was erected called *Stamp Head Wear*,

Wear, that Mr. *Foster* leased these stamping-mills from my Lord *Falmouth*, and the mines being frequently overflowed, he erected an engine for the draining of them, and two wears called *Engine Head Wear* and *Little Pool Head Wear*, and that one end of the wears was always fixed on *Kerry Wherry* side, and peaceably suffered till some time before the filing the bill, and that the river was by these wears turned to the mills and engine, by cuts or leaps: That in *Kerry Wherry Farm* there are several tin works, from whence a great deal of water issues by an ancient adit, that emptied itself into the said *Black Wherry Water*, just above *Engine Head Wear*, and that other waters arose from tin mines in the lands of *Innys*, which he purchased from Mr. *Tomkyns*, in which was an adit, which emptied itself also into the river just above the *Engine Head Wear*, and that the mills and engine were greatly assisted by these waters, that above 1000*l.* a month was made by these works, till on the 29th of *May* 1723, when the mines were in full work, Mr. *Innys* in a violent manner broke down the *Engine Head Wear* and *Little Pool Head Wear* and thereby diverted the water which served the said engine and mills, whereby the work was stopped all the year following, and made a new adit in the mines called the *Gump*, and *Wheel Jolly Mines*, and by so doing diverted the water from going into the old adits: and that these mines being worn out he could have no other aim and intention than to distress the plaintiffs; that *Little Pool Head Wear* was erected by the adventurers, about fourteen or fifteen years ago, by the consent of those under whom the defendants claim, that the defendant *Innys* cut several trenches on his side to divert the water, which were of no use or service to him, but only made the water run to waste. This, my lord, is the plaintiff's right to the river, wears, and adits; these are the several diversions and obstructions of the defendants, our right to the waters, appears from our long and quiet enjoyment, which we have fully proved: And can it be supposed, that on a river of so much use, in a country abounding with mines, there should be twenty-five mills on one side of the river, and none on the other, if those on the other side had any right to the water? The fact speaks itself, that they had no right, since they never attempted to erect any: And the defendant *Innys* doth not pretend any such enjoyment of the river, nor denies ours, but says we enjoyed it only for the use of our mills, and that we cannot now claim it for the use of our engines, which is but a late erection, but surely if
we

[†89]

If a bill is brought to be quieted in the enjoyment of a water-course, and of wears for working of stamp-mills and mines, diverted and broke down by the defendants, the Court will grant an injunction before answer, and make an order on the defendant, to put the

we have had time out of mind a sole use of the river, we may employ it in the playing of engines, or any other use we please, and † then the several diversions of the defendant must be an injury to our right. As to breaking down the wears, he says the bank on that side is his, but it doth not appear by the proofs, whose soil it is, and it may be the plaintiffs; but suppose it the defendant's, this is no excuse for his breaking them down, for *Engine Head Wear* has been erected many years, and been quietly enjoyed, which is the strongest evidence that the plaintiff has a right to fix his wear there, tho' the soil should be the defendants, and *Little Pool Head Wear* was erected about fourteen or fifteen years ago, with the consent of the owners of *Kerry Wherry Farm*, and no complaint of it ever made till now, nor any pretence of having a right to break it down. And as to the adits, they have from time to time run into the river, and the stream would be of little use without them. Upon the filing our bill on proper affidavits we obtained an injunction till the coming in of the defendants answers, and afterwards Lord *Macclesfield* made an order that the premises should be repaired, and put in the same condition they were in before the breaking down the wears, at the defendant *Innys* his expence. And the Lords Commissioners continued the injunction till the hearing the cause. In the case of mines and collieries, and diversions of water, there is always a necessity to come into a Court of Chancery, and the plaintiffs can have no adequate remedy elsewhere, tho' they were to bring ever so many actions, but the only proper remedy is to put a stop to the wrong, and restore things to the old condition.

grant an injunction before answer, and make an order on the defendant, to put the premises in the same repair they were before the injury.

Mr. Serjeant *Shepherd* insisted that the plaintiffs ought first to have ascertained their right by a trial at law, and that in the case of *Taylor* and *Hales*, when the plaintiffs counsel moved for an injunction, they produced an exemplification of the verdict, and that after they had prevailed at law, they might bring their bill to have their right established.

A bill may be brought to be quieted and established in the enjoyment of a

But Mr. Solicitor General mentioned the case of *Foster* and *Saul*, and the Lord Chancellor agreed that it was settled otherwise in the case of mines and collieries, lest the mine should be ruined in the mean time, and his Lordship declared a mine or colliery, before the right is established at law, for fear the mine should be ruined in the mean time, and a proper remedy can be had in no other court.

clared

clared that if the plaintiffs should be obliged to proceed at law only, there would be infinite and endless actions of trespass, but that this Court only could give them a proper and adequate remedy, by quieting them in the enjoyment of their right, restoring things to their old condition, and establishing their right by a decree. But then whether the plaintiffs had the right or not, that they insisted on must be tried by issues, and that he would not determine it by the depositions.

1 Vern. 22,
266, 308,
312, 354,
441.

† Mr. Solicitor General.

[490]

Where there is a contrariety of evidence, issues are necessary to be tried before any decree can be made: But I hope here, without directing any, that your lordship will decree for us; for our evidence is positive and uncontroverted, that there are twenty-five mills on our side of the river, and none on theirs, nor no instance given of their having any use of the river. The next fact is, that these wears have been erected many years, and quietly enjoyed by Lord *Falmouth*, till the breaking them down in 1723, and that they were always repaired by the Lord *Falmouth* only, and we submit to your lordship, if these are not sufficient evidence of a sole right to the use of the river, and *Innys* his interruption in 1723 was thus occasioned; Mr. *Innys* had formerly some share in these mines as an adventurer, whose interest is determinable at the will of the lord, and the mines being repaired and put in order by Lord *Falmouth* and his lessees, his lordship was pleased to determine the interest of *Innys*, and in revenge he sets up this scheme to divert the water.

Mr. Peere Williams.

In the case of *Finch* versus *Resbridger*, 2 Vern. 390, a bill was brought to quiet the plaintiff in the enjoyment of a water-course, on the evidence, as here, of a long and quiet enjoyment, and the Court was pressed to direct a trial before they granted a perpetual injunction, but it was denied, because the plaintiff had long and peaceably been in possession of it, and since it was thought reasonable in case of a private water-course, it is much more so in ours, and therefore we hope your lordship will make the injunction perpetual. And the Duke of *Bedford* claimed a right to bring water from *Kensington* to his house at *Chelsea*, and the Lord *Cowper* said, that trial. Chancery will grant an injunction after forty or fifty years quiet possession, tho' that does not amount to a prescription at law.

The Court granted an injunction to quiet the plaintiff in the enjoyment of a water-course which he had peaceably enjoyed for many years without directing a

after

after forty or fifty years quiet possession he would suppose a right, tho' it did not amount to a prescription at law, and decreed a perpetual injunction.

Mr. Serjeant *Shepherd* for the defendant *Innys*.

[191] The plaintiffs insist on three points, First, that they have a sole right to the water; secondly, that they have a right to erect any weirs they please over the river on our grounds; and thirdly, that they have a right to the waters flowing from two adits belonging to our mines into this river, and that we have no right to alter these casual waters. As to the first, if this river is the boundary of the two estates, then the whole does not belong to them, but we have an equal right to the use, but they endeavour to prove their right from a long and quiet usage, which would indeed be a good evidence † of a right, did not we account for it otherwise. Lord *Falmouth's* mines have occasion for the whole use of this water, Mr. *Innys*, and his grandfather *Gregoire*, had a quarter part in these mines; so that there being a unity of possession, it is no wonder while that continued, they were never interrupted in their exercise of this right, but now we have lost our interest in these mines, we have a power to assert our right by pulling down the weirs, and if the plaintiff thinks himself injured, we thereby give him an opportunity to try his title, but it appears that we had an equal right with the Lord *Falmouth* to the use of this water, not only from its being a common boundary, but from our actual exercise of this right, for we have it in proof that whenever any ore was found in the stream, it was always equally divided between the Lord *Falmouth* and Mr. *Innys*, and we say that whenever they pretended to this right, they were always interrupted in the enjoyment of it, and that for this reason our grandfather and we were let into a share in the adventure, and Mr. *Scholars*, who in 1670 built the stamp mills, was then in possession also of *Kerry Wberry Farm*, but when the said mills came afterwards to the possession of Mr. *Craig*, he paid an acknowledgment for this right, so that this unity of possession, and our being a sharer in the works accounts for their long and quiet usage. But secondly, if they had such a right, it would not give them a title to erect the weirs if *Scholars's* mills are new mills, and *Stamp Head Wear* was built for the use of them, they can plead no prescriptive right to it, and much less to *Engine Head Wear*, which was built about twenty years

years ago; and to *Little Pool Head Wear*, which was built about seven years since, and these were the wears we broke down, not *Stamp Head Wear*. And this single point might easily have been tried at law, we have not meddled with the old wear, but only with the two new ones, and the proper way was to pull them up, that it might be determined at law whether we had a right to do so or not. As to the third, it is impossible they should have any such right from the nature of adits, whose only use is to unwater mines, and it is necessary to the due working the mines to alter and change, and to make new adits; for if the vein changes or runs deeper, there must be a new adit, or it must be sunk deeper; and they being only for the use of the mine, they must change as that does, and when they claim a prescriptive right to these waters, and that we should not change them, this is in effect to claim a right to destroy and render our mines useless, whereas by the laws of the stannaries, we may alter these adits as we please, may make them thro' other men's lands, or sink the vein deeper, and as our vein grew more deep, it was necessary to make this new adit, which costs us above 160*l*. And there can be no prescriptive right to the adits of mines, which are supposed to be within time of mind.

† Lord Chancellor.

[192]

The plaintiffs have obtained an injunction to stop one new adit the defendant *Innys* has made, and to restrain him from opening two others, they were apprehensive he designed to make, can you give me an instance of an injunction being granted *quia timet*.

Mr. Attorney General.

This Court will grant an injunction to stay waste on affidavit of a contract for the sale of the timber, and it is the great use of coming into this Court for an injunction to prevent.

This Court will grant an injunction, *quia timet*, as, to stay waste, on affidavit, of a contract for the sale of the timber.

Saturday, January 25, Mr. Robins.

It appears by *Lutterel's case*, 4 *Co.* 84, b. that tho' the plaintiffs had a prescriptive right to the water, they could only divert it, as the prescription directs; now the old course of

of the water was to the stamping mills, and therefore they cannot erect other wears to turn their engine; nor is it any objection that these wears were erected before Mr. *Innys* came into possession of *Kerry Wherry Farm*, for these wears are in nature of a nuisance or an incroachment, and whether the premises continue in the same hands or are aliened, the alienees may have redress or abate it in the same manner as the persons in whose time it was done. 5 Co. 101. b.

Lord Chancellor.

I will not determine the right of the parties, but shall direct issues to be tried at law; one question in this cause is, Whether by custom, or the stannary laws, adits are such fixed courses of water that they cannot be diverted? Another question is, Whether the whole water belongs to Lord *Falmouth*? if so, it is nothing to the defendants what use he makes of it; but still he cannot injure another man by laying the ends of his wears on their lands. As to *Stamp Head Wear*, I should suppose an agreement to do so, because it has been built and enjoyed above threescore years; but I cannot do so as to the two other wears, of twenty and seven years standing.

The first issue must be, Whether the Lord *Falmouth* and those claiming under him have a right to the whole water, or to the use of the whole water, of so much of the stream called *Black River Water*, as runs between *Stamp Head Wear* and *Cheffwater Bridge*.

[193] † The parties could not agree the second issue, which it should be, Whether Lord *Falmouth* had a right to erect the wears? or, Whether the defendant had a right to break them down? and therefore the Lord Chancellor directed an action of trespass to be brought, to which the defendant *Innys* should plead the general issue, and give nothing in evidence but the meer right.

The other issue was, whether Mr. *Innys* and those under whom he claims, have a right to divert or draw off the water running through the three adits of *Gump*, *Wheel*, *Folly* and *Colnoth Mines*, or any or either of them, (by making new adits from these mines or otherwise) from falling into *Black Water River*, in such places as the said waters fell respectively into the said river on or before the 29th of May, 1723?

The

The first and the third issue was to be put into one record, and his lordship thinking it not reasonable that a matter of this value should be tried at the assizes, ordered the said issues and action to be tried at the bar of *B. R.* in which the lord *Falmouth* was to be plaintiff, and *Innys* the defendant, both issues were to be tried by the same jury, and a special jury was to be returned and a view had.

Issues being directed to be tried at bar, the court would not make part of the order, that the defendant should

pay only *nisi prius* costs, if they were found against him.

The council for the defendant *Innys* insisted that it was hard for him alone to stand this trial against all the plaintiffs, and therefore prayed, if the issues were found against him, he might pay only *nisi prius* costs, which *Mr. Mead* said had been often directed, but the Lord Chancellor said that it could not be done.

MUNES versus GOMECCERA.

Case 59.
In Court.
Lord
Chancellor.
Eodem die.

MR. Attorney General for the defendant, moved to supersede two writs of error brought by the plaintiff, contrary to his agreement, and after giving two releases of errors. The defendant *Gomeccera* was bound with the plaintiff in a bond of 500*l.* to *Hubbart* as his surety, *Hubbart* put the bond in suit against the defendant, who paid the money, and had the bond assigned to him, and brought his action against *Munes*, and had judgment, and *Munes* gave him a release of errors, and yet notwithstanding brought a writ of error. And *Munes* being further indebted to the defendant, they came to a general account, and *Munes* gave the defendant two bonds for the balance, with warrants of attorney to confess judgment, and releases of error on each judgment, and *Gomeccera* objecting that, notwithstanding these releases, he might bring writs of error as he had done on the former judgment, he promised him that he would not, and yet has brought two writs of error in the Exchequer Chamber, returnable this day, and as that Court cannot try a release without the aid of this Court, we shall lose the benefit of our releases.

[194]

Lord Chancellor.

I have known it indeed a question, Whether the Exchequer Chamber could try a matter of fact? but the Court were of opinion they could. Error indeed in fact does not lie a matter of fact.

Quare, if the Exchequer Chamber can try a matter of fact.

lie before them by the statute, but this is not an error in fact, but a plea in bar. No bill is depending in this Court, no unfair practice has been committed here, but only a writ of error is sued out, which is a writ of right, and would you have me supersede it on these suggestions?

Mr. Solicitor General.

As the writ issues out of this Court, it is proper to apply to your lordship till it is returned into another Court, and then indeed the application will be proper there, and if there has been any irregularity in the issuing out the writ, or if it issues contrary to the express agreement of the parties, these are sufficient causes to apply to your lordship. An error in fact cannot be tried in the Exchequer Chamber, because they cannot issue a venire; and tho' this is not an error in fact, but a plea in bar, yet if the release should be denied, they cannot proceed, because the Court cannot try it, and so we should lose the benefit of these releases. And tho' a writ of error is a writ of right (and so indeed is every process) yet nothing is more common than where the parties agree not to bring error for the Courts of law to set them aside on motion. And such an agreement may be taken advantage of in this Court as well as at law; for sure a man may agree to depart from his right.

Lord Chancellor.

The Court would not supersede a writ of error, because the plaintiff had agreed not to bring error, and had given a release, because the Exchequer Chamber could not try it, and the defendant had allowed the writ, by making the bail justify. See Post. Cas. 67. Cas. 70.

Let the other side shew cause on *Tuesday* why these writs of error should not be superseded, and proceedings stay in the mean time.

[195]

† *Monday, January 27.*

Cafe 60.
At the
Rolls.

ANDREWS versus TUCKWELL.

A copyholder in fee makes a mortgage thereof, and surrenders to the use of the mortgagee, afterwards he surrenders to the use of his will, and devises the equity of redemption in fee, the Master of the Rolls directed an issue to try the validity of the will, and the jury gave a verdict against the will,

will, because it was not attested by three witnesses. And on the return of the postea, the Master of the Rolls said, that a devise of a copyhold was not within the statute of wills, and therefore in the case of *Bodington and Bodington*, where a copyhold was surrendered to the use of the will, tho' the will was not attested by three witnesses, it was adjudged a good appointment of the uses, and that the copyhold passed by the surrender, but where the equity of redemption of a copyhold is devised, of which there can be no surrender, it must be considered as a devise of lands, and if the will is not attested by three witnesses, the devise is void, and in this case the second surrender made by the mortgagor can be of no avail, because it was a void surrender, and all the estate being before out of him.

A devise of a copyhold is not within the statute of wills, because it passes by the surrender, but a devise of the equity of redemption of a copyhold, is.
2 Vern. 679,
1 Vern. 69.
2 Chan. Caf. 8.

BAILY and PLOUGHMAN.

Cafe 61.
At the
Rolls.

IT was adjudged in this cause, on the authority of the case of *Degg and Degg*, decreed by the present Master of the Rolls, and affirmed on appeal by the Lord Chancellor *Macclesfield* that where a real estate is devised to executors in trust for the payment of debts, tho' the creditors shall be paid according to priority out of the personal estate, which must be distributed in a course of administration, and the executor may retain to satisfy himself, yet neither he or any other creditor shall come in with the other creditors, who have received no part of their debt, to be paid the residue of the debt in an average out of the real estate, but the other creditors shall be first satisfied out of the real estate, in proportion to what was received out of the personal estate, before the others shall be let into any share of the real estate.

Where a creditor is part satisfied out of the personal estate, he shall receive nothing out of the real estate, devised in trust to executors, till the

other creditors have been first paid out of the real estate, the same proportion he received out of the personal. Post. Caf. 180, 181. Caf. 78. Caf. 115. *Nelf. Fol. Rep. in Canc.* 479. 2 Vern. 763, 61, 435. 1 Chan. Caf. 32, 248. 2 Chan. Caf. 54. 2 Vern. 106. 1 Vern. 69. *Wentw. Off. of Ex.* 46, 50, 73, 740. *St. 11 H. 8. ch. 5.* *Dyer* 234.

† ANONYMUS.

[496]
Cafe 62.
At the
Rolls.

IF an estate is devised to trustees to be sold for the payment of debts, the purchaser need not concern himself to see the money applied, but it is otherwise if the debts are particularly specified;

Eodem die.

If lands are specified; but if lands are charged with the payment of debts and legacies, the estate remains charged in whosoever hands it comes.

purchaser

need not see the debts paid, otherwise if they are particularly mentioned; but lands charged with debts and legacies, remain so in any hands. 2 Chan. Caf. 115, 221. 1 Vern. 301. 2 Vern. 5.

Cafe 63.
In Court
Lord Chan-
cellor.

Tuesday, January 28.

WHITWORTH versus HALLET.

Mr. Solicitor General for the defendant.

Bill brought
against the
wife for a
general ac-
count; and
for a spe-
cial account
of 800*l.*
received in
her hus-
band's life-
time, and
of jewels,
plate, and
household
goods.

THE plaintiff as administrator, and principal creditor by judgment, to Mr. *Hallet*, late husband of the defendant *Mary Hallet*, brings this bill for an account of the personal estate of her husband come to her hands, in his life-time and since his decease, and for a special account of his jewels, plate, and household goods, and of 800*l.* she received in her husband's life-time. The plaintiff first endeavours to bring her into a general account, which was a new attempt, to bring a wife to a general account for money received in her husband's life-time, for as the husband cannot bring such a bill, no more can his administrator who stands in his place, then he descends to particulars, and as to the household goods, the defendant sets forth, that Mr. *Crawley* her brother purchased them from her husband for 200*l.* which was their full value, that he assigned them to Lady *Crawley* their mother, who pitying her daughter's circumstances, whom the husband had left with eight children, she permitted her to enjoy the said furniture, and at her death devised to her the use of them for life, separate and apart from her husband, and as to the plate and jewels, she sets out, that by the marriage articles her husband covenanted that in case she survived him she should have, and take to her own use, all such jewels and chamber-plate as were in her use and wear at any time during his life; this covenant, the plaintiff says, is no more than that she should have her paraphernalia, which by law she cannot retain against creditors, which construction makes the covenant of no signification, but the husband intended by this covenant to secure that which would be otherwise precarious. The covenant goes farther than the rule of law, and makes no exception to her retaining them, tho' there should be creditors.

The

* The plaintiff says, this covenant would be an inlet to the greatest fraud, that a husband when he found himself involved in his circumstances, might turn his effects into jewels, and let his wife use them, and so defeat his creditors of their just demands, but it is not saying an ill use may be made of this covenant, that will destroy it, but he must shew it has been done in this particular case, and then no doubt the Court would interpose, but the small value of the jewels not exceeding 320*l.* shews the contrary; as to the 800*l.* she says this was the produce of a separate estate she had of 250*l.* a year, or that if it was not to be understood as such, that she received it in her husband's life-time, and applied it for the maintenance of herself and her family; her husband left her in 1719, with eight children, whom she maintained till 1723; is this 800*l.* more than sufficient to maintain them four years? and she swears, that she sold her own chamber plate to support her family during his absence.

Lord Chancellor.

Does the covenant in the marriage articles give the wife a property? can she retain the jewels and plate specifically? otherwise she can only stand in the place of a covenantee, and be paid in a course of administration. Suppose the husband had disposed of any of them during coverture, could the wife have brought trover against the vendee? she is to have such jewels and plate as she had in her use or wearing at any time during his life, not such as she had at the time of his death, and therefore she must have either a property in all of them, or in none of them, and if it gives her no legal interest, it must stand as a covenant. As to the 800*l.* it is no matter whether it was her's, or her husband's, being received by her four years before her husband's death, and spent in supporting the family; therefore the bill must be dismissed, except as to the jewels and plate, as to which, the wife is only to be considered as a creditor by covenant, and they are to be sold before a master to the best purchaser, and the money arising by the sale is to be paid to the plaintiff the administrator, to be applied by him in a course of administration.

A husband by marriage articles covenants, that if his wife survived him, she should have, and take to her own use, all such jewels and chamber plate as were in her use and wearing at any time during his life, this covenant does not give the wife a property, but after the death of the husband

[she can come in only as a creditor by covenant.]

JANE

[1728] † JANE TAYLOR, an infant, by her prochein amey,
Plaintiff.

Cafe 64
At the
Rolls.
Eodem die. Mr. GERST executor, and Mr. JOHNSON & ux.
residuary legatees of RICHARD FURNIVAL,
Defendants.



RICHARD FURNIVAL the grand-father in 1701, devised to *Jane* the plaintiff, and to Mrs. *Johnson* the defendant, his grand-daughters 500*l.* apiece, proviso, that if either of them died before twenty-one, or marriage, her legacy should survive to the other. And this bill is brought to be paid the interest of this 500*l.* from the death of the testator. The defendant by his answer insists, that the legacy is not payable but on a contingency, and that no interest is due till the contingency happens; but the counsel for the plaintiff argued, that it was a general rule that where a legacy was devised generally, with such a subsequent proviso, that the principal vests in the legatee immediately, subject only to the contingency, and shall carry interest, and vests absolutely if the contingency does not happen to defeat it; and if lands had been devised in this manner, with a proviso, that if the devisee died before twenty-one, or marriage, the lands should go over, the profits in the mean time would belong to the devisee. But a bequest to a grand-daughter is a bequest to a child, and if a legacy to a daughter is made payable at twenty-one, or marriage, it will bear interest in the mean time.

A grand-child is not to be considered as a child. See Post. Caf. 68. 2 Chan. Caf. 26. 2 Vern. 625. But the counsel for the defendants denied, that a grand-child was considered, or had the same favour shewed it as a child, as appeared by the resolution of the Lords, in the case of *Kettle and Townsend*, 1 Salk. 187, Caf. 6. and they denied also, that if a legacy was made payable to a son or a daughter, at twenty-one or marriage, that they should have interest for it, and said that they were only intitled to a maintenance. A legacy payable to a son or daughter at 21, or marriage, cannot bear interest, but the child is intitled to a maintenance. 1 Chan. Caf. 26. 2 Vern. 625.

Master of the Rolls.

One devises. A general legacy is to be paid immediately, therefore the to A 500*l.* proviso that 500*l.* must be put out at interest for the benefit of the grand-child if she dies before 21, or marriage, the legacy should go to B, this legacy vests immediately in A subject to the contingency, and will carry interest. daughter

De Term. S. Hill. 1728-9.

daughter, subject to the contingency; and the master is to see what is convenient to allow the father for the maintenance of his daughter, but the remainder of the interest is not subject to the contingency.

† It was resolved by his Honour in this cause, that if money placed out at interest is called in by the executor without any cause, he shall pay interest for it. [199]

1 Chan. Caf. 60. If an executor calls in mo-

ney out at interest without cause, he shall pay interest for it. *Nelf. Fol. Rep. in Canc.* 457. 2 Chan. Caf. 21, 35, 152, 235. 1 *Vern.* 196. 2 *Vern.* 744, 548.

And that if a legacy is out on a security when the testator dies, immediate interest from his death is due for it, and not only from a year after his decease.

A legacy out on a security when the testator

died, shall bear interest from his death.

WILLY and POULTON.

Cafe 65
At the
Rolls.

IF administration is granted during the minority of two persons, it ceases when one of them comes of age, and administration ought to be granted to him.

Eodem die. Admini- stration during the minority

of two, ceases when one comes of age, and administration is to be granted to him.

Wednesday, January 29, 1728-9.

Cafe 66.
In Court
Lord Chan-
cellor.

Mr. LAD, in behalf of himself and others, the orphans and creditors of the city of *London*, Plaintiff.

The Mayor, Commonalty, and Citizens of *London*,
Defendants.

Sir Robert
Raymond,
Chief Just.
of B. R.

Mr. *Lutwych* for the Plaintiff.

The Master
of the
Rolls.

BY the 5 and 6 of *W. and M.* ch. 10. a perpetual fund is provided for the benefit of the orphans, and the other creditors of the city of *London*; the preamble of which act shews, that the city was considerably more indebted to the orphans and other persons than they were able to pay; wherefore the Parliament, to give them their assistance to pay the said debts, enabled them to raise a perpetual fund for the payment of interest for the said debts at four *per cent.*

I

per

per annum, the legal interest being at that time six *per cent.* and that all the principal and interest due to *Christmas 1693*, should be computed, and cast into one sum; and this fund was to be made up of several yearly sums, which were to be raised by virtue of this act; the clear annual sum of 8000*l.* a year was charged on the lands and revenues of the city; 2000*l.* *per annum* were to be raised out of the personal estates of the citizens; 600*l.* a year was reserved on the lease for twenty-one years of the convex lamps, and after the determination of that lease, all the profits of the public lights [+100] were to be appropriated to + these uses; two shillings and six-pence was to be paid on the binding of an apprentice, and five shillings on his admission to his freedom; and four-pence *per tun* was to be paid on all wines imported into *London*, after the 24th of *June, 1694*; four-pence for meetage of coal and culm sold by the chaldron, and after the 29th of *September* six-pence more *per chaldron* for fifty years; and for coals sold by the tun, six-pence *per tun*, from the said 29th of *September*, for fifty years; and after the said impositions of six-pence *per chaldron* and tun were determined, all the revenues of the city are to stand charged with the further sum of 6000*l.* a year.

From the 24th of *June 1694* to 1712, the annual fund was every year deficient, but since that time it has been more than enough to pay the annual interest of 4*l.* *per cent.* (by the coal duty bringing in more than was imagined) so that there remains now in the chamber of *London* about 47000*l.* And the only question is, whether this overplus shall go to the city of *London*, or whether it shall be applied to make good the deficiencies of former years? and I am surpris'd the city should make this a question, considering they had spent the money of the orphans and their other creditors, and could only pay them by way of composition; or how they can pretend that the fund is only answerable for so much of the 4*l.* *per cent.* as it will yield yearly, and that if it yields less, the orphans must bear the loss; but if more, that they are to have the benefit. The act recites this to be a composition, and establishes a fund for the annual payment of 4*l.* *per cent.* interest, and so proportionably for a greater or lesser sum, and all the money to be raised by virtue of this act is to be appropriated to this use and no other; books of the receipts and disbursements are to be kept, and great penalties are laid on the officers who shall divert or misapply any

any of the said sums. As the whole is to be appropriated, what room is there for this question, which is further cleared up by the nature of the fund, great part whereof is casual, some part indeed is certain, as the 8000*l.* a year. Suppose the city revenues should one year fall short of paying this sum, should not the arrears be made up in subsequent years, if the revenues in the following years exceeded that sum; they might as well say, our lands last year yielded but 4000*l.* this year, 2000*l.* and yet the deficiency of the last year shall not be made up: our case appears plain on the bare stating of it, the act gives the orphans a power to assign their shares, which is done in this manner. They assign all that is due and payable to them, or that shall be due and payable to them, by virtue of this act; therefore since the whole and every clause of the act shews that the whole money was to be appropriated to this use, there can be no doubt but that the surplusses must be applied to make good the former deficiencies.

† Mr. *Willis.*

[†101]

The only question in this cause is, Whether there being for several years great deficiencies in this fund, they shall be made good out of the surplusses of succeeding years? and if the words were doubtful, the act ought to have such a construction put upon it as would be just and reasonable, but there can be no doubt even as to the words. It must be admitted, that the city was greatly indebted when the act was made, that interest at that time was more than 4*l. per cent.* that this act was greatly beneficial to the city, and the only justice in lowering the interest was, that this being certain, would be as good as the common interest of 6*l. per cent.* which was uncertain, whereas if the interest was to arise only as the fund produced more or less, it would be a very unfair composition, but the words are plainly with us, and all the clauses of the act clearly shew, that if there was any deficiency, it was to be made up by the first overplus. The design of the act was to give annuities of 4*l. per cent.* for ever, and to create a perpetual fund for the payment of them, now if the deficiencies are not to be made up, how can the annuities be said to be perpetual, in each clause which mentions the particular sums of which this fund is to consist, they are said to be appropriated for ever to this purpose. Appropriated signifies to be put to that use, and no other,

The meaning of the word appropriated in an act of Parliament, is to put to the particular uses mentioned in the act, and no other.

so that if there was a general surplus, though there was enough to pay the whole interest every year, the city could apply it to no other uses without an act of parliament: for subsequent deficiencies might happen, and if every sum is appropriated, how can the surplus not be appropriated, there is but one instance where the city are at liberty to use any of this money, which plainly shews they cannot in any other, yet even there it was the intention of the act, that any deficiency should be made good. They have by S. 23, a power to apply 2000*l.* a year out of this fund for seven years, towards the expences of the government of the city, but the clause goes on, and says, that if any deficiency should happen, the city is to repay the money, or so much thereof, as shall be necessary to make good the said deficiency, and all the revenues are made chargeable. Here the design of the act was, that there should be no deficiency the first seven years, how then does it appear they intended there should be any afterwards? and by the seventeenth clause of the act the city is impowered to receive such orphans money as executors should lodge with them, and with the money to pay off orphans, who are above the age of twenty-one years, what is due to them for principal and interest: why should they that were to be paid off be in a better condition than they that continued in? This act must be construed as other parliamentary funds are, that where a perpetual annuity is granted, and a perpetual fund for the payment of it, the fund is to be considered as a debtor, and the annuities as creditors, and the arrears are likewise to be looked upon as creditors on the fund; and then there cannot properly be a surplus, till those arrears are paid.

[†102]

Mr. Mead.

By S. 11. of this act it appears that the debt of the city is extinguished, and the corporation discharged, and the compensation given to the creditors, is a perpetual annual interest of 4*l. per cent.* the nature of this fund makes the case stronger, the payments by s. 10. are to be made twice a year, at St. Thomas and St. John the Baptist's day, which was in favour of the orphans, that they should not stay till the four *per cent.* was raised, but they are to have half yearly divided among them what is raised. And by this act the city are made receivers of several branches of this fund: now it would be very odd, if by their wilful neglect of not receiving sufficient

cient one year, and by their receiving more than enough another year, they should be capable of making an advantage of the surplus. And tho' it is provided, that the yearly rents and payments shall be applied for the payment of the said annual sum of 4*l.* or to so much thereof only as the said monies appointed to be raised shall yearly amount unto, to satisfy and pay. The meaning of this clause is only to prevent the postponing of the payment of the annuity, or so much of it as the fund would annually raise, and not to prevent the deficiencies of any one year being made good by the surplusses of another.

Mr. Attorney General for the defendants.

The Mayor and Commonalty by this act are trustees for the orphans, and are also trustees for the city, and therefore if any doubt arose on this act, it was proper for them to submit it to your lordship's judgment. The single question is, as to the overplusses since 1712, Whether they ought to be applied for the benefit of the city, or to make good the deficiencies of former years? and this will depend on the penning of this particular act, notwithstanding what has been said of parliamentary funds, and the word appropriate, and arises on the 10th clause (all the rents, &c. shall for ever be applied for the payment of the annual sum of 4*l. per cent. &c.* or to so much thereof only as the money shall yearly amount to, to satisfy and pay towards the interest, to the said orphans and creditors equally in proportion to their respective interests) the natural construction of this clause is, that if the fund produced 4*l. per cent.* annually, it was to be paid; if it did not, no more was to be paid than it did produce, and if this is not the construction, to what purpose is the word only? The Legislature might think this fund would generally produce the 4*l. per cent.* annually, and that such a construction as they contend for, might occasion long and intricate accounts, to divide a surplus at such a distance† of time [+103] among so many persons interested, and therefore penned this clause to avoid that inconvenience. As to the clause which empowers the city to take out 2000*l.* a year for the first seven years, if our construction is right, their inference is not good; for the city by this clause is only to make good such a deficiency as should be occasioned by the taking out this money, and if what they contend for had been the design of the act, it would have been said as expressly, that the city should make good the deficiencies out of the surplusses, as it had

had said in the other case, that they should make good those, that arose by their taking out the 2000*l.* a year.

Mr. Solicitor General.

This question depends on that clause mentioned by Mr. Attorney General, which appoints how the money shall be applied, and supposes there might be a deficiency; by this clause the money is to be applied for the payment of the 4*l.* *per cent.* but the act, foreseeing a deficiency from the uncertainty of the fund, has provided, in case of that deficiency, by the subsequent words *Or to so much, &c.* and they are not put in barely that the city might not postpone the payments till sufficient was raised for the payment of 4*l.* *per cent.* for then such words would have been made use of; and if the act has made no provision after, by this clause they are only to have 4*l.* *per cent.* if the fund will raise it; if not, what it will raise; and the direct contrary follows from that clause, whereby the city are impowered to make use of 2000*l.* a year. From what the counsel for the plaintiff would infer, it was reasonable what they made use of in that manner should be replaced to the fund, if in several clauses the act supposes deficiencies, and provides for them in one case, and does not in another, does it follow that the act designed to provide for them in both cases? or rather that it designed to provide for them only in one? By this act the stock is transferable, but the act might suppose it would be transferred as other stocks are by a transfer of the capital and growing dividends, and not of the arrears also, as has been practised in the transfer of orphan stock, and then in case the surplusses were to make good the deficiencies, what difficulties would there be to find the proprietors in those several years; some of the funds are temporary, as there might be a deficiency for some years, then a surplus, and then a deficiency, (as what makes a surplus now, will make a deficiency hereafter,) since the act has not directed what shall be done with the surplus, it might design it to make good the deficiencies of subsequent years, for in this sense there would not be any difficulty to find out the creditors, but the difficulties in looking back would be insuperable; so that they have made but one question of what might be made two questions, and if the

[+104] † surplusses must make good any deficiencies, they must remain to answer those of the growing annuities.

Mr.

De Term. S. Hill. 1728-9.

.. Mr. Common Serjeant *Lingard*.

The right of the proprietors arises only from the act, and other clauses plainly point out what we contend for; the 2000*l.* a year might be taken out whether there was a deficiency or not, and was not to be repaid unless a deficiency happened. Suppose during those seven years the fund was sufficient, and the next year a deficiency happened, no part of the 14000*l.* was to be repaid. The seven years were to commence from *Michaelmas* 1693, and the six-pence duty on coals was to commence from *Michaelmas* 1700, and this power of borrowing expiring when a fresh duty arose, looks as if the act had the city in view, and would ease them as to their particular revenues; and they have a right to the benefit of the surplus occasioned by this new duty, because when it ceases they are to be charged 6000*l.* a year further; and as the accounts are to be yearly audited, it looks as if the act provided no further than for every year, and that every thing at the end of that time was to be settled.

Mr. *Fazakerley*.

If the surplusses are to answer the deficiencies, in what manner are they to be applied? are the arrears, or the yearly payments, to be first cleared off? if the arrears grew great, and were first to be paid, they would be only paid, and nothing would be left to satisfy the annual payments. Suppose there is a surplus, and no deficiency, must it lie dead for fear of future deficiencies? there is a clause to make good the deficiency only that shall arise by the city taking from the fund the 2000*l.* a year, and therefore the act having a deficiency also in the clause in dispute directly under consideration, and not making any provision for it, is a strong inducement to think it designed to supply no other deficiency.

Master of the Rolls.

This is a very plain case, and the defendants rely on one word to subvert the scope of the whole act; the design of the act was to make the creditors some satisfaction but the act had a regard to the city too, as well as to the creditors, 8000*l.* a year is provided out of the city lands, the rent of the convex lights, and the subject in general is charged, by a duty on coals imported, to be paid by freemen, or not; this

this debt affected the whole real and personal estate of the city, and for the honour and carrying on the government of it, the act gives the city the relief therein mentioned. The act says, that *For and towards raising a perpetual fund, &c.* [+105] and + then comes the eighth clause; the end of which I think very material, though it has not been taken notice of, after laying a duty on coals, it goes on (*All sums of money as part of the said fund shall be paid into the receipt of the chamber, and are hereby appropriated for the raising the said fund, and applied towards the discharge of the said debt*) and then comes the clause the defendants rely on, which is a very necessary clause, and says, that though there is a deficiency, there shall be a payment pro rata; the act had before said that all should be appropriated, and the word (*only*) tho' we could give no account of it, is not sufficient to overturn the tenor of the act, but it might be inserted for this reason, here are particular branches of the city charged with a rent-charge, and the word might be added to indemnify the city, and to prevent their being accountable for, or their revenues burthened with more than annuities of four *per cent.* otherwise I cannot account for it; as to the twenty-third clause that relates to the 2000*l.* a year, I take it to be very plain that a surplus in any of those years was to make good a deficiency of the others, from the words (*during the whole seven years*) and this will determine the question, for as the act plainly expresses itself as to this case, it is a plain indication of the intention of the Legislature that it should be so in every other, it is the common case of a rent-charge on lands, if any bad years happen the grantee may distrain for all the arrears in better years.

Lord Chief Justice.

I am of the same opinion with the Master of the Rolls, and the whole tenor of the act leaves no room for doubt. Here is a perpetual provision made for a debt, a perpetual fund appropriated, to be considered, as the Master of the Rolls says, as a rent-charge, where all the arrears are to be satisfied. The whole difficulty arises from the word *only*, which is not to control the rest of the act, but I think may be inserted to a good intent. Here was an annual fund established, and an annual payment, and therefore this word might be added to prevent any doubt whether the arrears, if any, or the annual payments, should be first satisfied; and reason and justice is very clear for the plaintiff, and there is no danger of confusion, because the accounts are annually stated, and the arrears are always assigned with the capital.

Lord

Lord Chancellor.

The plaintiff hath no reason to blame the defendants for laying this case before the Court, since, as trustees, they ought to have the direction of it. The surplus that has, and may arise from this fund, would be a great ease to the city, towards the payment of the 600*l.* a year they are charged [†]with, when the duties on coals expire; and the plaintiff ought to thank the city for their frugal management of these revenues, whereby this overplus is occasioned. [†106]

The right arises from the act, the meaning of which, taken together is, that the city being greatly indebted and insolvent, the old debt is extinguished, and a new debt created, of interest of four *per cent.* annually for the old debt for ever; for the payment of which 8000*l.* *per annum* is charged on the city lands, and the others are new duties. All which annual payments, &c. are appropriated to this, and no other use: if any deficiency, it must be submitted to, and is to be made up by a surplus, if any should happen hereafter. And the word *only* was necessarily inserted, otherwise the first due would be first paid, and so the fund of this year would have been applied to the arrear of the year before; to prevent which, the interest is directed to be paid annually; and this is a direct, plain, and easy construction of the act. Be it therefore decreed, that the annual surplusses arising out of the fund for the payment of four *per cent.* interest are to be applied to make good the deficiencies that have been in any precedent years, and the plaintiff and, &c. are to be paid in proportion.

By the 5 and 6 of W. & M. a perpetual fund is established for the payment of interest at four *per cent.* to the orphans and other creditors of the city of London; from 1694. to 1712, the fund was deficient, since that time there has been every year a surplus; this surplus shall not

go to the city, but shall be applied to make good the deficiencies of the former years.

MUNES *versus* GOMECEIRA.

Mr. Lutwyche for the plaintiff.

WE are to shew cause to your Lordship why these writs of error should not be superseded. This is the first motion ever was made of this kind, and I do not know that it has been ever determined that a writ of error should be superseded, lest the defendant in the Exchequer Chamber lose the benefit of a release of errors, or that if a release should be pleaded there, that Court could not try it. They say further, that the plaintiff agreed not to bring writs of error, but there was

Case 67.
In Court.
Lord Chancellor.
Eodem die.
See ant.
Cas. 59.
Post. Cas.

was no cause in this Court, nor was this agreement made an order of this Court; then indeed, if the plaintiff had brought these writs, an attachment would have issued against him for his contempt: but we swear we made no such agreement, and this Court will not take notice of extrajudicial agreements, they might as well move to stop actions, on supposed agreements not to bring them; no, the party must defend himself as well as he can, or bring his action on the promise; besides, the defendant proceeded so far on these writs, that he insisted on bail, and made them justify in open Court, which is a submission to the writ of error.

Mr. Wills.

[+107] The counsel for the defendant have assigned two reasons why these writs of error should be superseded; first, because the plaintiff gave releases of error; but this is of no weight: they allow it would not be of any, if the writs were returnable into any other Court than the Exchequer Chamber; but since the statute gives them a power to examine the judgment, if a release is pleaded, it is a necessary consequence that they can try it, or at least, your Lordship, on this motion, will not determine whether they can or no. Secondly, because the plaintiff agreed not to bring writs of error, which indeed would have been a reasonable cause, if the defendant had immediately applied to your Lordship, and the agreement had been uncontroverted; but he insisted on bail in B. R. which is an admittance of our having a right to bring these writs, and he is now safe and sure of his money at all events,

Mr. Strange.

Two for the defendant swear, there was an agreement not to bring writs of error; and three on our side swear there was no such agreement: and a writ of error may be brought, notwithstanding an agreement to the contrary, unless it is made a rule of Court, and a release of errors is widely different from an agreement not to bring error, and is only to secure the party from any niceties; and they allow this would not be a sufficient foundation to move to supersede these writs, if they were returnable into B. R. but that it is because they are returnable into the Exchequer Chamber, which cannot try a matter of fact; but that is not true: indeed error in fact does not lie there by the statute, because the
party

parties may bring a writ of error in fact coram vobis in B. R. Error in fact
In *Temple* and *Ullock's* case, 1 Sid. 257, Cas. 1. a release of does not lie
errors was pleaded, and they went to trial on it; and there in the Ex-
would otherwise be a failure of justice, but if we should al- chequer
low all they say, the defendant's proceedings on the bail because it
have authenticated these writs. may be
brought co-

ram vobis in B. R.

Lord Chancellor.

There was no necessity to erect a new judicature for error
in fact, for the reason given by Mr. *Strange*; but if a matter
of fact in the Exchequer Chamber is pleaded in bar to a writ If a release
of error, and is put in issue, they can try it as a necessary in- is pleaded
cident; and I remember one of the Barons told me that a in bar to a
fact being pleaded in bar to a writ of error, the Exchequer writ of er-
Chamber resolved to have tried it, if the parties had not ror in the
come to an agreement. Let it be spoke to again on *Friday* Exchequer
next. Chamber,
they can
try it.

† Sir BROOK BRIDGES versus HALES & al'.

[†108]

Mr. Solicitor General for the plaintiff.

Cafe 68.
At the Ld.
Chancel-
lor's house.
Lord Chan-
cellor.
Eodem die.

MR. *Brook Bridges*, the grand-father of the plaintiff, on
the marriage of his son *Brook*, settled lands in trust to the
use of himself for life, remainder to his son *Brook* for life,
with a power to trustees to raise 3000*l.* apiece for younger
children; and by another settlement, a term of five hun-
dred years is limited to trustees for the same purposes, with
several remainders over, according to the usual form of mar-
riage settlements; with a remainder to the grand-father in fee.
Brook Bridges the grand-father dies, and *Brook Bridges* the
son, afterwards Sir *Brook Bridges*, having two children, Sir
Brook Bridges the plaintiff, now about twenty years of age,
and the defendant *Margaret*, now about sixteen years old,
made his will, *inter al'*, in these words:

' I give and bequeath to my daughter *Margaret* 20000*l.*
' to be paid her by my executor, at eighteen years of age,
' or marriage; and I desire that my son and daughter may *Swinb. part*
' be under the care and direction of Sir *Thomas Hales*, and 3. sect. 12.
' Mr. *Hales*. And then the will goes on, and all my debts, n. 6.
' demands, and funeral expences being first paid and satis-
' fied, I give and bequeath the remainder of my personal
' estate,

‘ estate, viz. all my stock in the Bank, South Sea, East India, and Million Bank stock, and South Sea annuities, to my son Brook Bridges, whom I nominate and appoint sole executor of this my last will and testament.’

If a father devises to a daughter a portion equal, or greater than what she is intitled to out of his lands by settlement, that is a satisfaction, but the daughter may have her election. See ant. Cas. 7.

[+109]

And the first question in this cause is, Whether *Margaret*, the daughter, is entitled to the 20000*l.* only, or to the 3000*l.* also, provided for her by the settlement? and by the fixed rules of this Court, if the father devises to his daughter a portion equal, or greater than a sum she is intitled to by settlement out of his lands, this shall be taken as a satisfaction for the portion, and she shall only have her election, and it was so adjudged by Lord *Harcourt*, in the case of *Copley* and *Copley*; there the daughter under the settlement of the grandfather was intitled to 5000*l.* and under the settlement of her father to 8000*l.* and her father also by will devised to her 8000*l.* without saying it was to go in satisfaction of the portion she was intitled to by the settlement; but the Court decreed, that the daughter might make her election, but that she was entitled to only one 8000*l.* And our case does not rest singly on the general rule of the Court, but the settlement also shews it to be the design of the parties, in which there is a proviso, that the said portion shall not be raised, if the daughter is preferred on her marriage by † the father, in his life-time, with an equal fortune; or if he gave her a less, only as much was to be raised as would serve to make it up. And tho’ she was not married in his life-time, yet he leaves her 20000*l.* by will, payable at marriage, or eighteen, so that the parties to the settlement designed she should not have this provision, if the father made her otherwise as good, and he had this settlement in view.

I give the remainder of my personal estate, viz. all my stock in the Bank, &c. to my son, whom I make executor, the whole remainder belongs to the son, for the viz. is only to enumerate the chief parts of the personal estate, but not to exclude him from any.

The next question is as to the remainder, which the defendant *Margaret* says, is restrained by the viz. and that the plaintiff can take no more than is there mentioned, and that she is intitled to a moiety of the residue by the statute of distribution. But the viz. is only to enumerate the chief parts of his personal estate, and not to exclude him from the rest, or if the viz. should occasion any, to remove all doubts, the testator has made him sole executor, whereby all the remainder will belong to him as such, or if it be taken as a specific legacy, why then the remainder must go to pay the 20000*l.* and nothing will be left to be distributed.

And

And we think Sir *Thomas Hales* and Mr. *Hales*, by the words of the will, are appointed guardians to the children, for otherwise they cannot be under their care and direction, but they are unwilling to act without the direction of the Court.

I desire that my son and daughter may be under the care and direction of *A*.

These words amount to the appointing *A*, guardian.

Mr. *Rider*.

The case of *Thomas and Kemish*, 2 *Vern.* 348, is an authority in point, that the devise to the daughter shall be taken as a satisfaction of 3000*l.* portion charged on the lands. ^{2 *Vern.* 255, 258.}

As to the second point a *viz.* may explain, but cannot restrain the words which went before, as an habendum in a deed must not destroy the premises, because it is only to explain or illustrate; indeed where the premises are in general words, the habendum may restrain, because all are included in the general words. In the case of *Stukely and Butler*, *Hob.* 168. a grant was made of all his woods growing on the manor of *Ec.* *viz.* of such particular woods, the *viz.* was held void, because it restrained the general words; besides the words, as the defendant would construe them, would not be sense, for then they would be as much as if he had said, All the remainder of my South Sea, Bank stock, *Ec.* whereas he had not before devised any of those stocks, *Ec.* And if they are to stand in the room of the general word remainder, then it is a specific legacy, and the debts and legacies are to be paid first out of the other personal estate.

† Mr. Attorney General for the defendant *Margaret*. [†110]

The first question is, Whether this devise shall be construed as a satisfaction? though the general doctrine of the Court is against double portions, yet ours differs greatly from the common cases, the portions here are to arise from different funds, and are given by different persons, one is to issue out of lands, the other out of personal estate, the one is charged by the grand-father, the other is given by the father; it is unreasonable to suppose the same person designed to give a double portion, but not that the father designed to add to the fortune of his daughter settled on her by her grand-father. And the proviso is tied up to a daughter married in the life-time of the father.

The

The next question relates to the remainder, which must be confined to the particulars mentioned, and the general words are explained by the subsequent, and it is the proper office of a *viz.* to explain and restrain general words, it must not indeed be repugnant to and destroy them, he does not say all the remainder, and so the daughter *Margaret* will be intitled to a moiety under the statute, notwithstanding the son is made executor: and the testator's intention was, that the debts and funerals should be paid out of his legacy.

The 20000*l.* is to be paid to the daughter at eighteen, or marriage, and though interest generally is not to commence till the time of payment, yet where a portion is devised to a child not otherwise provided for, she is intitled to interest from the time of her father's death.

Mr. *Lutwych.*

I shall make but one observation on the first point, that the portion is not charged on the estate of the father, but of the grand-father, for the father had only an estate for life, and the remainder in fee was limited to the grand-father, but in *Copley's* case the inheritance was charged, but here one devises 20000*l.* to his daughter, none of whose estate was charged with her portion, or liable to pay the same, and therefore the devise cannot be supposed to be intended as a satisfaction.

Where a child has no provision, though her portion is may payable at eighteen, or marriage, she shall have maintenance in the mean time, because it cannot be supposed the father designed otherwise. And I have known interest decreed to be paid from the death of the testator for a legacy to a younger son, payable at a future day, though he was otherwise provided for.

[+ III]

+ Mr. Solicitor General's Reply.

If a legacy is given to a child unprovided for, payable at a future day, it shall have maintenance from the death of the testator.

The general rule is, that no interest is due on a legacy payable at a future day; and even in case of an unprovided child the interest is not given, but only a provision or maintenance, as was adjudged by the House of Lords, the 13th of *May* 1728, in the case of *Glegg and Glegg*. By marriage articles, a term of two hundred years was agreed to be limited to trustees in trust, to raise 3000*l.* for daughters portions, with

with such maintenance as should be thought fit; and after, by a settlement made in pursuance of these articles, a term of two hundred years was limited to trustees, by sale or mortgage, or by the rents till sale, to raise portions for daughters; if but one, 3000*l.* to be paid at twenty-one or marriage, if more than one, &c. and in trust out of the rents and profits in the mean time, to raise such yearly sums for maintenance as the trustees should judge convenient, not exceeding the interest of the portions at five *per cent.* there was only one daughter, and the trustees thought proper to allow her 150*l.* a year, which was the whole interest, for her maintenance. And the Master of the Rolls decreed her to be paid such maintenance, but the House of Lords thought proper to reduce it to 100*l.* a year, but here is no power lodged in trustees.

As to the first point, the case of *Copley and Copley* was decreed after great debate: there the grand-father charged the estate, which he settled on the marriage of his son, with the payment of 5000*l.* for daughters portions; and the father, on the marriage of a second wife, charged other lands with the payment of 8000*l.* to daughters; he had but one daughter, to whom he afterwards devised 8000*l.* By the second settlement he provided 8000*l.* for daughters generally, without taking notice of the 5000*l.* and then he devised away his estate to a stranger, chargeable with 8000*l.* In that case the portions moved from different ancestors, and were payable at different times; by the settlement, at twenty-one, or marriage; by the will, at eighteen, or marriage; there the daughter was disinherited, yet Lord *Harcourt* decreed, that the first 8000*l.* should be taken as a satisfaction for the 5000*l.* and the last 8000*l.* for the first 8000*l.* but gave the daughter her election.

1 Chan. Caf. 301. *N. H. Fol.* Rep. in Canc. 290, 294. 2 *Vern.* 115, 110, 177, 258, 298, 478, 494, 505.

555, 255, 439, 484. 2 *Ventr.* 348. *Pyne's Case.* *Nelf.* 8vo Rep. in Canc. 38.

Lord Chancellor.

The daughter, from the death of her father, till the legacy is payable, is intitled to maintenance. As to all the remainder, the Court declares it belongs to the plaintiff Sir *Brook Bridges*, and that the will sufficiently declares Sir *Thomas Hales* and his son guardians, and they being unwilling to meddle with the estate, a receiver must be appointed by the Master. But I shall make no decree as to the first point, but leave it undetermined † till the daughter comes of age, be-
cause

2 *Vern.* 317. *Nelf.* 8vo. Rep. in Canc. 101.

1 Chan. Caf. 60, 249.

[† 112]

cause here are several settlements, and it does not appear whether she is intitled to any, or what fortune, by them ; or whether the portions were only to be raised, in case there was a younger son and daughter.

N. B. The Court afterwards allowed a maintenance to Lady *Coverley's* daughters, till their portions became payable at twenty-one, or marriage, which were charged on the real estate.

Case 69.
At the
Chancel-
lor's house.
Lord Chan-
cellor.
Eodem die.

ALLEN *versus* ALLEN.

Mr. Solicitor General for the plaintiff.

Mr. *Allen* made his will, and thereby devised, *inter al'*, to the defendant his wife, all his furniture, jewels, linen, chariot, and coach and horses, and all his plate. And this bill is brought against her by the heir of the testator. By this will she claims all the horses on his estate at *Barbadoes* ; whereas the testator only meant the horses used with the coach and chariot ; and under furniture, she would comprehend the marble slabs and chimney-pieces, which in *London* are considered as the furniture of the tenant, and are removeable by them, but things fixed to the freehold are not to be given to the devisee in disfavour of the heir. She also claims the wine, coals, and stacks of hay, and brewing vessels, and pictures, glasses, prints, and books in her own closet ; and under jewels and plate, she lays claim to his watch, pistols, and gold-headed cane ; whereas these words are not to be extended beyond their common meaning.

The council for the defendant argued, That the pictures and prints being used as furniture, would pass by that word, and that marble chimney-pieces and glasses were ornaments every day taken down by tenants, and also upon executions ; and that if she could not take down the marble chimney-pieces in the house in the country, which belonged to the heir, yet that she might take down the marble chimney-pieces and slabs in his house in town, which would otherwise belong to his executors, and which they, as tenants, might take down ; that brewing-vessels were as proper furniture for the brew-house, as kitchen furniture for a kitchen ; that watches would pass either as plate or jewels, and that a gold-headed cane was plate.

Lord

† Lord Chancellor.

[†113]

By the word furniture, the defendant is not intitled to the marble slabs, or chimney-pieces, or any thing fixed to the freehold, in the house in the country, on the testator's own estate; and glasses in pannels are to be considered as part of the freehold, but not if they are screwed in; and there is a great difference between the heir and devisee, or the executor and devisee, and a landlord and tenant. Books are not furniture; and the watch and gold-headed cane will not pass either as jewels or plate.

Tho' a tenant may take down marble chimney-pieces, &c. yet a devisee of the furniture cannot, in prejudice of the heir.

Books will not pass by a devise of furniture. A watch, or gold-headed cane, will not pass by the words jewels or plate, in a will. Post. Caf. 117. 2 Vern. 512, 638, 508. Swinb. part 7. sect. 10. n. 8.

Friday, January the 31st.

MUNES and GOMECEIRA.

Mr. Attorney General for the defendant.

Cafe 70.
In Court.
Lord Chancellor.

THE case in 1 Sid. 257, Caf. 1. is wrong reported, and I have examined the record, and it is a writ of error brought in B. R. of a judgment in C. B. 17 Ca. 2. and it is so reported in 1 Keb. 904.

See ant.
Caf. 59.
Caf. 67.

Lord Chancellor.

It is a jest to say, since the statute gives the Exchequer Chamber a power to examine the judgment on a writ of error, that they cannot try any plea in bar; they may direct a venire fac. for the jury to appear before them, and try it themselves; however, on this motion, I shall not determine whether they can or no. So let the order be discharged.

Monday, February the 3d.

COLMER versus COLMER, & al'.

Mr. Attorney General for the plaintiff.

Cafe 71.
In Court.
Lord Chancellor.

MRS. Colmer, the plaintiff, the widow of Mr. Minter, being intitled to a third part of his personal estate, on a treaty of marriage with the defendant Thomas Colmer, articles

See Post.
Caf. 74.

[114] cles of agreement were entered into, whereby it was covenanted and agreed, that 4000*l.* part of her said share, should be lodged in the hands of her trustees in trust, to pay the interest thereof to the plaintiff for life, for her sole and separate use, and † if she died before her intended husband, then to pay the principal to such uses, and to such persons, as she, by deed or will, should direct and appoint; and for want of such appointment, to the husband; but if the husband died first, to pay the principal to her. And as to the 8000*l.* residue of the said third part, the husband, during his life, was to have the sole management thereof in trade; but if he died before the plaintiff, leaving no issue, or if the issue died in her life-time, his heirs, or executors, within twelve months after his death, were to pay the same to her; or if he died first, leaving issue, the 8000*l.* was to be paid to trustees in trust, to pay the interest to the plaintiff for life, and after her death, in trust, to pay the principal to and among the children, as she should appoint; and for want of such appointment, to pay it among them equally; but if she died first, leaving issue, then to pay the principal, after the husband's death, to and among such children as he should appoint, and for want of such appointment, to the children equally; but if the plaintiff died first, leaving no issue, or if they died in the husband's life-time, the 8000*l.* was to be the husband's. The marriage was had, and the plaintiff being dissatisfied with these articles, which were prepared, and brought to her ready ingrossed to be signed by the defendant the husband, she prevailed upon him, after the marriage, to execute other articles, by which the 4000*l.* which by the first articles was to go over to the husband, in case the wife died first without any appointment, was limited to her children by her former husband, and the 8000*l.* was also to go over to them, and not to the husband, in case the wife died without issue, or the issue died in the husband's life-time. And the husband also covenanted to settle 4000*l.* out of his own estate in trust, in case the wife survived him, to pay the interest to her for life, and after her decease to pay the principal, as she should appoint, and for want of such appointment, to their children; but if he survived, in trust to pay the principal to him, or to his appointment: and he also covenanted, to leave her all the diamonds and jewels which were in her use or wear during the coverture, and that if he survived her, she might dispose by will, of all the plate she had before marriage: and it was further covenanted, that nothing in those articles should

should extend to bar her of dower, or of any part of his personal estate she was intitled to by the custom of the city of *London*, or by the statute of distributions. For some time they agreed very well, but several quarrels arising about her children by her first husband, whose portions the defendant was desirous to get into his hands, he treated her with great incivility and cruelty, denied her children and acquaintance admittance to her; gave the management of his family to a footman, encouraged the servants to insult her, and at length withdrew himself privately, and of the sudden from his house and family, unknown to his wife, and she hearing he was gone to *Portsmouth*, † followed him, where finding he was [†115] gone on board a vessel, she hired a hoy to carry her to the ship, and when the husband saw her coming, he persuaded the captain to cut his cables, and set sail, so that she could not come up to him, upon which she returned to *London*, but in the mean time, the other defendants had entered her dwelling house, and denied her admittance, and had contrived to have the servants she left in the house arrested in sham actions, upon which she was forced to lie with a friend, they took possession of every thing, even of her wearing apparel and jewels, and of the plate that was her former husband's, under colour of a deed of trust, and letter of attorney executed to them by the husband, who in order to deprive her of a subsistence, made an assignment to them of all his debts, goods, and personal estate whatsoever: and also, of all his real estate, which is about 400*l.* a year in possession, and 700*l.* a year in expectancy after his mother's death. Upon this the plaintiff brought her bill against her husband, and his said trustees, for a discovery, and a maintenance out of the estate of her husband, and that he might be compelled to give security to settle the 8000*l.* and 4000*l.* according to the articles, and that the trustees might restore the plate they had taken away. It is proper in this case, my lord, to sue here for a maintenance, and not in the spiritual Court, because there was no separation of the wife from the husband, and it is as reasonable that the wife should have a provision, where the husband deserts and forsakes her, as where through his cruelty, he forces her to forsake him and run away. And there are several precedents, where this Court has allowed the wife a maintenance, on the circumstances of her case, as *Oxenden versus Oxenden*, 2 *Vern.* 493. and *Williams and Callow*, 2 *Vern.* 752. and the present is as strong, or stronger than those cases, the portion here is much greater, and it is

unreasonable he should go away with such a fortune, and not give the wife a maintenance, but the defendants say, she has 4000*l.* separate estate, but this is reduced to 2400*l.* by a loss from the fall of South Sea stock in the year 1720, which does not bring in above a hundred and thirteen pounds a year, nor is this an adequate provision for so great a fortune, and was designed only in nature of pin-money, whilst they lived and cohabited together, and not as a maintenance for her, if they lived asunder. We hope your Lordship will likewise give some directions for securing the 8000*l.* and 4000*l.* which belong to her by the articles, on the contingencies therein mentioned.

Mr. Solicitor General.

[†116] The chief end of this bill is for an allowance, during the absence of the husband, who has no ground of complaint against the wife; and yet, though he received so large a portion with her, he leaves her without any cause, without any † notice, without any provision, and goes to *Maryland*. Where there is a separation for cruelty, or a legal divorce, the spiritual Court will compel the husband to allow the wife alimony; but here is no occasion for a separation or divorce, and the husband is not within the jurisdiction of the Court christian, nor amenable by any process thereof, so that the only relief the wife can have is in this Court; besides he has assigned over all his real and personal estate to trustees, so that they have the whole legal interest in them, and he is intitled to the benefit of the trust only, after the payment of his debts, and no proceedings in any other Court can affect his estate in their hands. A husband is certainly obliged to maintain his wife, and we only apply to your Lordship to compel the trustees to do that which the husband himself ought to do, to afford her a proper and convenient maintenance: and our case is much stronger than either of the cases that have been mentioned in Mr. *Vernon's* reports, in *Oxenden's* case, the wife left the husband for his cruelty and ill usage, of which she was not a proper and impartial judge, but here the husband leaves the wife, she follows him, and he makes the ship cut her cables to hinder her from seeing him, so that in our case the separation is certainly the act of the husband, and he deserts her. In *Oxenden's* case 6000*l.* part of the wife's fortune was lodged in trustees hands, so here the 8000*l.* part of the plaintiff's fortune is in trustees hands too, and the husband by this contrivance, without designing

designing it, has undoubtedly given this Court a jurisdiction. But they say, they are not trustees for us, so it was said in *Oxenden's case*, as to the 6000*l.* the 8000*l.* is blended with the rest of the estate, the trustees are seized to his use of this part, with the rest of the estate, during his life, but after his decease in trust for us, the Court in those cases thought it reasonable the wife should have a maintenance out of what had been once her own estate; they say, the husband has remitted us 50*l.* which is a strong evidence he thought us intitled to something, and as the wife brought him a plentiful fortune, and he is in very good circumstances, she ought to have a handsome provision; is 113*l.* a year sufficient? they say 4000*l.* is a sufficient maintenance; it appears from the articles, she was not, during the cohabition, to maintain herself with bread out of this money; all the family expences were to be borne by the husband, and they had no thoughts at that time of their living asunder, or allowing it, at that time, to have been a reasonable maintenance, it is far otherwise, now part of it is lost, and the interest reduced one *per cent.* As to the 8000*l.* and 4000*l.* we submit to your Lordship's judgment what directions to give, and tho' neither of those sums are payable indeed during his life, yet since he has left us without any thoughts, as appears, of returning, and the whole estate is vested in trustees, we hope your Lordship † will think it reasonable to have so much se-
cured in their hands for those uses, and if they sold the
plate that was the plaintiff's before marriage, they ought to
restore it, for by turning it into money, they make it im-
possible for the husband to perform his covenant; the trust-
tees own they sold all they found in the house, and therefore
this may be a proper inquiry for the Master.

[† 117]

Ant. Caf.

68.

Postea Cafe

74.

Mr. Paunceford.

Though this covenant is not to be performed immediately, yet as the husband has secreted himself, and conveyed away his estate, it is proper to pray of your lordship to have the sums secured to her on the contingency of the articles. As to the maintenance, feme coverts and infants are the objects of the care of this Court; and your lordship has lately thought proper, in the case of *Sir Brook Bridges and Hales*, to allow an infant maintenance out of her fortune, though it was not payable till eighteen, or marriage.

BADGER

BADGER and BADGER.

Cafe 72.
At the
Rolls.
Eodem die.

2 Vern. 551,
428.

One living
in Oxford-
shire cove-
nants to
purchase
lands of
80*l.* a year,
the parties
intituled
chufing the
money, were
decreed to
have 24
years pur-
chafe, which
was the
price lands
fold at in
that coun-
try, but not

THE husband, by articles previous to his marriage, covenants to purchase lands of 80*l.* a year in trust for the issue of that marriage, as tenants in tail in common, remainder in fee to his own right heirs; and on a bill filed for that purpose, a decree was made, that the husband should perform the articles; he dies, and the other children with the eldest son, join in a petition to have the money paid to them, and not invested in a purchase, and an order was made accordingly; and the only question was, at what price the purchase should be settled? and the Master of the Rolls thought at first, that by the covenant the husband was bound only to purchase lands of 80*l.* a year any where in *England* or *Wales*, but afterwards he was of opinion, that since this Court had decreed an execution of the trust, they would likewise take care that it was executed in a reasonable manner, and as the parties lived in *Oxfordshire*, it was most likely the purchase was designed to have been thereabouts, and therefore he ordered the petitioners to be paid after the rate of twenty-four years purchase, which was the usual price lands sold at in that country, and that they should be allowed 80*l.* a year from the death of the father, though they insisted to be allowed the interest at five *per cent.* for the money which was decreed to be paid for the purchase.

the interest of the purchase money, but only the 80*l.* a year.

[† 118]

† ANONYMUS.

Cafe 73.
At the
Rolls.
Eodem die.
Depositions
of a witness
in another
cause, or
Court, may
evidence.

IF a witness is examined in this Court, you may read, without an order, any other depositions of the same person, in the spiritual Court, or elsewhere, in any other cause, so that you make use of them only to confront the evidence he then gives.

be read against him, without order in this court, to shew the inconsistency of his evidence.

Tuesday,

De Term. S. Hill. 1728-9.

Tuesday, February the 4th.

COLMER *versus* COLMER, & al'.

Cafe 74.

In Court.

Lord Chancellor.

Mr. *Lutwyche* for the defendant *Thomas Colmer*, the husband.

THIS is a new case, and of great consequence, and the plaintiff prays more than the Court has ever yet granted, to have a separate maintenance allowed her, because of the ill usage and behaviour of the husband, and of his voluntary and causeless desertion of her; whereas the fact is, that he went to *Maryland* on his own affairs, being a merchant that traded to and from thence; and before his going, he made a settlement, in trust, for the payment of his debts, which amounted to above 20,000*l.* he having lived beyond his circumstances, at the rate of 1500*l.* a year, and allowed his wife 400*l.* a year, besides the interest of the 4000*l.* and yet she run him greatly in debt; so that this is the case of a merchant going beyond seas to settle his affairs, who makes a provision for the payment of his debts in the mean time, and there is no foundation for this bill; besides, he offered to settle her in a house at *Hornsey*, and to provide her with lodgings in town before he went off. The cases in 2 *Vern.* are very different from this, and the want of those circumstances makes this a very new case: in the case of *Lady Oxenden*, the husband brought a bill to have the benefit of the wife's portion, and as, where the husband files a bill to have the benefit of a trust, which he could not have at law, the Court has always obliged him to make the wife a settlement, so they thought it much more reasonable in the like case to compel him to allow her a maintenance; there the wife had no provision, was parted from the husband for his cruelty, and he had a bill in Court to have the trust decreed for him, but here the husband has not exhibited a bill, and this matter is of the jurisdiction of the spiritual Court, the plaintiff ought to sue her husband there for a restitution of conjugal rights; and as to what they object, that they could not serve him with the process of that Court, sure they might, as well as they have served him with † the process of this Court; they had [†119] an order, that service of the other defendants his trustees and attornies, should be good service of him, and *Maryland* is within some diocese, and those who are there may be cited; but suppose they could not, must this Court therefore make decrees for them? they might as well say, we cannot arrest a man

a man on an action at law, because he is gone abroad, or absconds, therefore pray let us be relieved here; but the spiritual Courts have a method of citing the party by putting up the process on the doors of his parish church, and if he does not appear, they seize his effects here, and this Court will enforce the sentence of the spiritual Courts by a sequestration. *Lady Oxenden's* is the first case of this nature; and in the case of *Williams and Calow*, the husband too had brought a bill, which gave the Court a jurisdiction; but there is no precedent, where a woman after having made a bargain for a particular part, for her separate estate, sued in this Court for a further maintenance; can she be said to be in a starving condition? I argue thus; on a supposition that they had made out their case of cruelty and ill usage, but we have proved that she has no reason to complain, but has been treated with great indulgence and good nature, and the gratifying her in her expences was one of the chief reasons which obliged him to go abroad, which appears by the second articles, which the husband entered into, purely out of his kindness to the wife, whereby he settles on her 4000*l.* out of his own estate, and further agrees, that they should not bar her of dower, or of the share of his personal estate she was intitled to by the custom of the city of *London*, or by the statute of distributions, as the first articles did; and is she to be relieved against the creditors on these articles, which are partly voluntary, especially when the creditors are not made parties? nay, supposing her left causelessly, shall she set aside these deeds, made for the payment of his just debts, when she is already provided for? what they further pray as to security, is contrary to the intent of both articles; for in the first, he binds himself to the performance in the penalty of 24,000*l.* and in the second by a covenant, and therefore she must be content with these securities, as was lately adjudged by your lordship in the case of *Whitworth* and *Hallet*, and the covenant as to the diamonds and jewels, are the same in both cases.

Ante Case
63.

Mr. Mead.

Equity will
not better
the securi-
ties, the
parties
themselves
have agreed
to accept of.

No rule is more established than that this Court will not better the securities the parties themselves have agreed to accept of, and bills for that purpose have been always dismissed. She is intitled to the diamonds and jewels on a contingency, by a covenant of the husband, which is no specific lien, as your lordship adjudged in the case of *Whitworth* and *Hallet*, even after the husband's death, though there the jewels

jewels † and diamonds were in the wife's possession too, as also [† 120]
in the case of *Gazalet*, that creditors by covenant, or on a contingency, could not come in under a commission of bankruptcy as creditors, till the covenant was broken, or the contingency happened: so the wife must rely on the security in the articles, and this Court will be the less willing to interpose, as the second articles are voluntary, so that the only question in this case is, Whether the Court can decree a provision to the wife out of the husband's estate assigned to trustees for the payment of his debts. It was proper for the husband to go to *Maryland* to settle his affairs, and it is likely he will return when he has done so, and he cannot be said to have voluntarily deserted her, in order to distress her; and as to cruelty they have not made out a single instance, but have only made proof of some angry and indecent expressions. The evidence in *Lady Oxenden's* case would have been sufficient in the spiritual Court for a separation, and the husband brought a bill to have the portion raised, and the Lord Keeper said, if a husband brings a bill for the wife's portion, the Court always obliges him to make her a settlement, or some provision out of it, and shall not the Court then, when it sees sufficient evidence for a divorce a mensâ & thoro, take care that the wife have a separate maintenance? there the portion was in trustees hands, which the husband could not come at without the assistance of this Court, but here the wife's fortune has been already received, and there are no articles, no trust to be executed. And a bill never was brought, even in behalf of an infant improvidently married, for a settlement or provision, if the husband had got the portion into his possession or power; and in the case of *Williams and Callow*, the original bill was brought by the husband, but they say here is a trust, but it is such a trust as the husband himself cannot vary, nor could he bring such a bill. And how can the Court say what is a reasonable maintenance, where a man is in trade, and gone abroad to get in his effects, and she cannot be said in this case to be in a starving condition; besides the husband had agreed to let his house before he went to *Maryland*, and the trustees offered her the keys, to take out what was her own, and they swear that they have paid in satisfaction of the debts more than they have yet received, which shews the deeds are not fraudulent.

Lord

Not main-
taining his
wife is
a breach of
the hus-
band's re-
cognizance
[† 121]
to keep the
peace to-
wards her.

This is a case proper not only for the spiritual Court, but also for a court of common law, it is a breach of the peace in the husband not to maintain his wife, and if articles of the peace were exhibited by the wife against the husband, and he entered into a recognizance, to not maintain her, would be a forfeiture of his recognizance, by which he binds himself † bene & honeste tractare her. If the plaintiff sued in the spiritual Court, it must be for a restitution of conjugal duties, and then for alimony. I will not enter into the question, who was in fault in this case? the witnesses say, the husband allowed her 400*l.* a year, besides her separate maintenance, and some marks indeed appear of his being a kind husband, but they afterwards fell out, and it is plain he voluntarily left her, and went away without her knowledge, and that when she heard where he was gone, she followed him, and that he made the master cut the cables, that she might not come into the ship, and on her return, she was denied entrance into her own house, and the servants she left there were arrested in sham actions to get them out of the house; so that she was turned out to the wide world: and it plainly appears by the deeds, that he designed to serve her so, and to prevent her from any maintenance out of his estate: what must the wife do in this case? in *Sir Oliver Butler's* case, 3 *Keb.* 187, *Cas.* 44. the wife sued for alimony, and the husband pleaded, that she had a separate maintenance of 300*l.* a year, and the plea was over-ruled; and on a motion in B.R. for a prohibition, it was denied by the Court; first, because a Court of law could take no cognizance of it, because it was a trust; and secondly, because though the wife had a separate allowance, she was intitled to maintenance according to the circumstances of the husband: so that according to the opinion of the Court of Arches, and of the King's Bench, the estate of the husband is to be the measure of alimony. Not to maintain a wife, would in other countries be a sufficient cause of divorce a vinculo matrimonii, the wife is to be maintained according to the port of her husband, and as the husband here has vested the property of all his estate in trustees, the plaintiff has no remedy but in this Court. Wherefore it appearing to the Court, that here was a voluntary desertion of the husband, and that the deeds were fraudulent, and executed with a design to bar her of all maintenance, and the defendants have not proved any debts,

If the wife
sues for ali-
mony, it is
no good
plea, that
she has a se-
parate
mainte-
nance, or
pin-money.

debts, therefore it is to be referred to a Master, to see what The husband is proper to be allowed for the past and future maintenance of band voluntarily and causelessly deserts his wife, and goes to Maryland, having first

made a fraudulent assignment of all his real and personal estate in trust, to pay his debts, the Court decreed the wife a maintenance out of this estate, tho' by articles of intermarriage, she had the interest of 4000l. for pin-money. 2 Vern. 671, 386. 1 Chan. Caf. 250. 2 Chan. Caf. 102. Nelf. Fol. Rep. in Canc. 73, 153.

† PENVIL versus LUSCOMB.

Mr. Rider for the defendants.

[†122]

Cafe 75.

At the
Rolls.

Eodem die.

See ant.

Caf. 46.

AN equitable interest, or at least such a one as the eldest brother had in this case, will not intitle the sister to the equity of redemption; the rule of Possessio Fratris is part of two other rules, one of which is, that he that claims as heir, must make himself heir to him that was last seized; and the other is, that he must be heir of the whole blood. It is not an actual possession of the land that is sufficient to make a Possessio Fratris, but an actual seizin of the fee simple, for if the brother is tenant in tail male special, remainder in fee, and dies without issue inheritable, there shall be no Possessio Fratris of the remainder, and supposing there may be Possessio Fratris of a trust, it must be of a trust in fee, but a mortgagor is only tenant at will to the mortgagee. Suppose an estate is conveyed to one and his heirs, on condition that on payment of the money at the end of the year the feoffee shall reconvey; the mortgagor dies within the year, and his heir enters, he is only tenant at will, and if he dies before the performance of the condition, the sister of the whole blood shall not have the benefit of the condition, but the brother of the half blood; now the same person is intitled to redeem the estate after forfeiture, who was intitled to perform the condition; for this is a performance of the condition in equity. The best rule, if any, to judge of the equity of redemption of a mortgage in fee, is to consider it as a reversion; and the word reversion is accordingly in several acts of Parliament used for an equity of redemption, but there is no Possessio Fratris of a reversion; if there be any Possessio Fratris of a mortgage in fee, it must be where the money is paid; then indeed the mortgagee is as much a trustee for the mortgagor

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mortgagor and his heirs, as if the estate had been conveyed to him on those trusts; but by a perception of the profits, the mortgagor is only tenant at will.

The equity of redemption to the younger brother, because the elder brother had never brought a bill to redeem.
Afterwards the Master of the Rolls decreed the equity of redemption to the younger brother, because the elder brother had never brought a bill to redeem.
The equity of redemption to the younger brother, because the elder brother had never brought a bill to redeem.
The equity of redemption to the younger brother, because the elder brother had never brought a bill to redeem.

[+123]
Case 76.
In Court.
Lord Chancellor.

† Friday, February the 7th.

MILNER versus MILLS, & è contra.

THE original bill was exhibited by the administrator of Mr. Brown, against his heir at law, for an account of the personal estate of the intestate, which he had taken possession of, and the heir filed a cross bill against the administrator, to pay the purchase money for certain lands, which Mr. Brown had articulated for the purchase of in his life-time, out of his personal estate, it being a settled rule in Chancery, that if a person contracts for the purchase of lands, they shall be considered as real estate, and descend to his heir, or he may devise them by will, and his representative shall pay the purchase money out of assets. And the Lord Chancellor decreed accordingly in this case.
Lands contracted for, go to the heir or devisee of the purchaser, and the money must be paid by his representative. Post Case 152. Nelf. Fol. Rep. in Canc. 201, 343. 2 Vern. 213, 322, 1 Chan. Caf. 39. Swinb. part 7. sect 10. n. 8. Nelf. 8vo. Rep. in Canc. 76, 106.

Case 77.
In Court.
Lord Chancellor.

ANONYMUS.

Eodem die. IF the plaintiff replies to the defendant's answer, but never serves him with a subpœna to rejoin, he may rejoin gratis, in order to prove his answer, though the plaintiff cannot force him to rejoin without a subpœna.
The defendant, though he is not served with a subpœna, may rejoin gratis. But by 2 Chan. Caf. 21, the answer shall be taken for true. Curf. Canc. 153, 154, 161.

Saturday,

De Term. S. Hill. 1728-9.

Saturday, February the 15th.

Cafe 78.
At the
Rolls.

CHAMBERS & al', verſus HARVEST, WOODFORD,
& al'.

THE Reverend Mr. *Hayes Woodford* deviſed his eſtate to trustees and their heirs, (whom he alſo made executors) to be ſold for payment of his debts, the trustees reſuſe to act, and the creditors bring in a bill for a ſale, and there were three queſtions at the hearing.

The firſt was, Whether the money ariſing by the ſale of the eſtate ſhould not be diſpoſed of in a courſe of adminiſtration (the trustees being alſo executors?) but his Honour the Maſter of the Rolls decreed, the creditors ſhould be paid ratably, as he had formerly done in the caſe of *Degg* and *Degg*, which was confirmed on appeal by the Lord Chancellor *Maccleſfield*, eſpecially in this caſe, becauſe the trustees had renounced, ſo that there could be no ſale without the aſſiſtance of the Court.

Creditors ſhall be paid pro rata, and not in a courſe of adminiſtration, where an eſtate is deviſed to trustees to ſell for payment of

debts, tho' they are made executors too, eſpecially if they reſuſe to act. Ant. Caf. 61. Poſt. Caf. 181. Caf. 115, 3 H. 6. 3. *Nelf. Fol. Rep. in Canc.* 478, 195. 1 *Vern.* 101, 63. 2 *Vern.* 763, 61, 435, 106, 133, 405, 248. 1 Chan. Caf. 32, 248. 2 Chan. Caf. 54.

The ſecond was, whether the heir at law, who was bound in ſeveral bonds with his father, by way of ſecurity, might not retain? but it was adjudged that he could not, but only come in for a ratable ſhare with the other creditors.

In ſuch caſe the heir can't retain, but muſt come in for a rat-

able ſhare with the other creditors. Poſt. Caf. 180. 2 *Vern.* 61. 2 Chan. Caf. 54.

The third queſtion was, From what time the heir, who was in the receipt of the rents and profits of the eſtate ſhould account? Whether from the time of the filing the bill, or only from the time of pronouncing the decree, as at law, from the time of the judgment? but the Maſter of the Rolls ſaid, that at law they were ſure of judgment in two or three terms, but here there might not be a decree in a conſiderable time, and therefore decreed, he ſhould account from the time of filing the bill, according to the caſe of *Montague and Ford*, lately adjudged by the Lord Chancellor.

And the heir muſt account for the receipt of the rents and profits from the time of filing the bill. 2 Chan. Caf. 225. 1 *Vern.* 282.

Friday,

De Term. S. Hill. 1728-9.

Friday, February 21.

PLEAS AND DEMURRERS.

WILDBORE & al', *versus* PARKER & al'.

Cafe 79.
At the
Chancel-
lor's house.
Lord Chan-
cellor.
Ant. Caf.
53. S. C.

If a bill is
brought for
a reconvey-
ance of
lands grant-
ed to quali-
fy a person
to be elect-
ed, as being
without a
[† 125]
considera-
tion, tho'
the defen-
dant admits
it by his an-
swer, the
Court will
not relieve.

THE defendants, the relators in the information, not consenting to be examined in that cause, for the present plaintiffs, the demurrers, came on again to be argued; and the Attorney General, for the defendants, spoke to the same effect as at the first hearing. What the plaintiffs principally object is, that the defendants have brought an information for the payment of these notes, but how can the plaintiffs avail themselves of that in this suit? they may make a proper defence to it by their answer, and prove it by others, for they themselves charge that these notes were given at a great meeting, and we submit to your lordship, if we should discover the consideration, and it should appear to be what they alledge, whether that would profit them; if they will give such notes, the least punishment they can suffer is to pay them: where lands have been conveyed, to qualify the grantees to be elected Members of Parliament, and bills have been brought for a reconveyance of the estate, as being granted without any consideration, though the defendant has admitted it by his answer, yet the Court has said, as the estate was vested by law, they would give the plaintiffs no assistance, but dismiss their bill; and if an action had been brought on these notes, the defendants could not have brought a bill for a discovery of the consideration and relief, no more than in the case of an usurious contract.

Mr. Solicitor General for the plaintiff.

This bill is in nature of a defence to the original bill or information, and it is proper for your lordship at the hearing of that information to be acquainted with all the circumstances relating to these notes: and our case is very different from what has been said of notes given, or conveyances made on corrupt agreements, they would have this Court decree the payment of notes, which cannot be sued at law, (because they are not made payable to any certain person) and shall not your lordship then consider on what consideration they were given? since they have brought an information, it is proper to consider whether their demand is just, and the now defendants

defendants are to be looked upon as plaintiffs in the information, though it is filed in the name of the Attorney General; suppose then they had brought a bill for payment of these notes, and we a cross bill for a discovery of the consideration, could they have demurred? could they have said, No, we will not tell; the Court shall decree blindfold for us; it never was allowed a party to protect himself in this manner. The Court indeed will stand neuter, where a bill prays to be relieved against a corrupt agreement; but where the end of the bill is for a specifick execution of it, it will certainly first examine into it, and they cannot mention the case of a bill for an execution of a contract, and of a cross bill for a discovery, that a demurrer to the discovery has been allowed; for that is to say, the Court must decree what, if they were acquainted with the whole truth, they would not; no, your lordship must be let into the whole affair. If a Member of Parliament brings his action against another, and the defendant files his bill for relief, the other shall not be allowed his privilege. But they say several were present; what then; if we should examine them; they would demur too, as the relators do now, shall we swear against ourselves, shall we subject ourselves to penalties.

If a Member of Parliament brings an action, and the defendant files a bill, he shall not have privilege. 1 Vern. 329.

Lord Chancellor.

THE demurrers must be allowed, as to the first point, but over-ruled as to the rest, and the sheriff is not obliged to discover. Bribery and corruption are certainly punishable by the common and statute law, and the House of Commons have undoubtedly a power of judging of elections, and the incidents thereof, but that is not the present question.

+ Notes are given for which there is no remedy at law, and the defendants file an information in the name of the Attorney General for the payment of them, must this Court suppose the consideration expressed to be good, without looking into it? Suppose a fraudulent note is obtained, which yet appears fair on the face of it, though fraud is punishable by law, yet if the party comes here to have it executed, or puts it in suit at law on a bill for a discovery, he must answer, though it may subject him to a penalty: so if the defendants will not discover, they shall have no benefit by the information, if that was out of the case, I should be of another opinion. And tho' others were present, if they were parties, they too may refuse to swear, because a discovery would subject them to punishment.

[+126]
If an information is filed for the payment of notes given to publick uses, and the defendants file a cross bill against the relators for a discovery of the consideration of those notes, they cannot demur, tho'

the discovery may subject them to a penalty.

Monday,

De Term. S. Hill. 1728-9.

Monday, February the 24th.

Cafe 80.
At the
Chancel-
lor's house.
Lord Chan-
cellor.

ATTORNEY GENERAL versus WYNNE & ux',
& HUMPHRYS.

WYNNE et ux', versus HUMPHRYS.

Mr. Solicitor General for the defendant *Humphrys*.

THE information is brought at the relation of Mr. Justice *Price* and others, the trustees of a charity, given by the will of Mrs. *Strangerwaies*, against *Watkins William Wynne*, and *Mary* his wife, sister and executrix of the will of the testatrix, and against *Humphrys* her late steward. And as to so much of the information, as seeks to bring the defendant *Humphrys* to account for, or pay over any of the personal estate of the said Mrs. *Strangerwaies* in his hands, he demurs, because by the standing rules of the Court he is liable only to account to the executrix. The executrix likewise has brought her bill against *Humphrys* for an account, to which he pleads a codicil of the said Mrs. *Strangerwaies*, whereby she expressly orders, that he should not be accountable to her executrix for any of her affairs, and discharges him from all accounts of her concerns. And we conceive our demurrer ought to be allowed, otherwise every legatee might bring a bill against the debtor of his testator, whereas a payment to him would not be good, nor could he give the debtor a discharge. And this information is brought against the executrix too, charging collusion, with a design to elude the codicil, whereby it is expressly ordered that he should not be accountable to the executrix. And our plea also is good, for this codicil has been proved by the executrix, though now

[+127] + she charges it to be obtained unduly, and by unfair suggestions, when the testatrix was in extremis; but it appears from the case of *Kerrick* versus *Branfby*, decreed in the House of Lords, Monday March 11, 1727, that this codicil having been proved, must be taken for good, and cannot be litigated but in the spiritual Court. I will not enter into that question, whether if a just creditor had brought this bill, or information, a release, or what would have been a bar to an executor, would have been a bar to him, but surely it will in this case of a legatee.

[+127]
Hardr. 131,
313. 2 Ro.
Ab. 299, 1
Lev. 235, 6.
Vaugh 207,
1 *Shew*.
293. The
validity of
a codicil of
the personal
estate that
has been
proved, can

be only litigated in the spiritual Court. 6 Co. 23. Suppl. to *Went.* 270, 281. 2 *Vern.* 8, 76. 1 Chan. Caf. 80. *Cra. Ca.* 396. 1 *Bulst.* 199, pl. 459.

Mr.

Mr. Attorney General for the plaintiffs.

I shall first consider the demurrer. I allow a legatee or creditor cannot bring a bill for an account against a debtor or accomptant of the testator, because, as has been said, then every legatee or creditor might bring such a bill, but we have made the representative likewise a party to our information, and charged her to be in collusion with the other defendant, so that an account taken in this cause would be final and conclusive against Mr. *Humphrys*; the testatrix has ordered the residue of her money, and her rents in arrear, to be laid out in a purchase of lands, for the charitable uses in her will; Mr. *Humphrys* says the executrix has proved the codicil, we charge that it was obtained in extremis, and that the executrix's proving of it is an evidence of collusion, for by this codicil the will would be intirely frustrated, for not only the arrears are thereby discharged, but also several sums of money which were in his hands; taking this then for a collusion in an executrix, to prove a codicil which amounts to a general release, the next question is, Whether a creditor or a legatee might not bring such a bill? certainly a creditor might, and why not a legatee, who has as certain a right; and tho' an executor must assent to a legacy, yet this Court will enforce him to consent, the relators are residuary legatees, in trust for charitable uses, and therefore are certainly intitled to an answer.

As to the plea, it is certainly improper for us to bring a bill for an account contrary to a codicil we have proved, but then the question is, how far this plea shall operate as a release? it is pleaded to so much of the bill as seeks to impeach, or set aside the codicil, or to bring him to an account, he was employed many years as her steward, and she intended by this codicil, only to release him from any account as such, he insists it will intitle him to notes of hand for money paid for her use, so that the plea would in effect cover her whole personal estate, and the executrix may call him to an account, notwithstanding the codicil, because it does not appear 'till the account is taken, whether there will be enough to answer + debts, therefore he ought to answer, and submit to [+123] the judgment of the Court on the whole, how far the codicil shall extend.

L

Lord

Lord Chancellor.

A creditor or legatee may bring a bill against a legatee or debtor, if he makes the execut- or a party, and charges collusion. 1 Chan. Caf. 277. Nelf. Fol. Rep. in Canc. 303.

One legatee brings a bill against another, (for *Humphrys* by this codicil is a legatee) and the executrix, charging a collusion, which ought not to be said in this case, because the executrix also has brought a bill, and the defendants plea to it, coming on to be argued at the same time, I can now take notice of it, besides the demurrer doth not go to the whole bill, but by his answer he expressly denies all collusion, and if this codicil is not fairly proved, they may contest it in the proper ecclesiastical court, but I must suppose it good; therefore the demurrer must be allowed. But as to the plea, there may be a question how far the codicil shall extend, and therefore let the plea stand for an answer, with liberty to except, as to any matter subsequent to the making the codicil; and the benefit be saved to the hearing.

Wednesday, February the 26th.

SCATTERGOOD versus HARRISON.

The Attorney General for the plaintiff.

Cafe St.
At the
Chancel-
lor's house.
Lord Chan-
cellor.

MR. Scattergood, who lived at *Maderas*, at divers times consigned several goods and effects to his brother-in-law Mr. *Trenchfield* in *London*, afterwards on his coming over into *England*, he sickened and died at *Portsmouth*, having first made his will, and Mr. *Trenchfield* and Mr. *Fenwick* execut- ors; *Trenchfield* only proved the will, and possessed the ef- fects, he died, and left Mr. *Raworth* his executor, who made his will, and appointed the defendant *Harrison* his executor, against whom, as the representative of Mr. *Trenchfield*, the plaintiff brought this bill for an account of the assets of Mr. Scattergood, and an account being decreed, the Master has reported specially, that the defendant claims an allowance of commission money, but we insist that he is not intitled to any allowance, Mr. *Trenchfield* was nearly related to the testator, there was no particular contract with him as factor, and in his accounts he has charged nothing for factor- age, but may be supposed to have done it out of kindness to the testator, and for sake of those large sums of money he had in his hands, for which he paid no interest, at least he is not intitled to any allowance since the testator's death, being executor, and having 100%. legacy given him, and he might have

have refused to act, and your lordship adjudged so the sixth day of last *December*, † in the case of *Sutton* versus *Nightingale*, [†129] for then he did not transact as factor, but as executor, who is intitled to nothing for his care and trouble, but must be allowed all his necessary expences, and in that case Mr. *Nightingale* had no legacy given him.

Lord Chancellor.

Mr. *Trenchfield*, *primâ facie* is certainly intitled to factorage, but if you can shew any thing whereby it necessarily appears he was not to have any, that will destroy the other presumption; you say he has not charged it in his accounts, but as they were not closed, he might have charged it at the foot of them, unless you had shewn that in his accounts with others, he charged factorage immediately, and not at the end of the account.

One who acts as factor or is *primâ facie* intitled to commission, unless you can make the contrary appear.

Mr. *Lutwyche*, for the defendant.

They say we ought not to have any commission, because Mr. *Trenchfield* was a near relation to Mr. *Scattergood*, was made executor, and has a legacy left him, but the legacy is not said to be given him for his trouble as executor, which is very observable, for that would have excluded him from a residue of the personal estate, but he would be intitled to this legacy, though he had refused to act as executor; and tho' an executor is not to be allowed for his ordinary care and pains, yet he is not obliged to go into the trade, and to act, and negotiate for the testator in this extraordinary manner; but they say we are to be allowed our expences, we conceive it proper to settle them by this general allowance of commission-money, because it is hard for us to produce a voucher for every particular sum we expended, and we allowed interest for the several sums of money in our hands.

Mr. *Wills*.

What he did as factor he ought to be allowed for, since he was executor as well as before, for by taking upon him that office, he is not obliged to act as factor; and if he had employed another, he would have been allowed factorage in his accounts: suppose an attorney is made executor, if he has occasion to carry on law-suits on the account of his testator, must he give up his fees.

Lord Chancellor.

I cannot now go out of the report, which says he acted only as executor, and his receipts and payments in the report are set out as executor. Suppose the case to be, (as nothing [†130] † appears to me to the contrary) that Mr. Scattergood brought these effects home with him, and the executor disposed of them, sure he shall be allowed only his charges and expences, but if any thing appeared to be consigned to Mr. Trenchfield by the testator in his life-time, though it came to his hands after his death, (since he acted before as factor) he should be allowed commission for it. Therefore I decree factorage and commission to the defendant, for all the money and goods which came to Mr. Trenchfield's hands in the life-time of the testator, but he is to have no commission for what he did as executor.

An executor is to have no allowance for his care and trouble, but if goods are consigned to a factor in the life-time of his principal, though they come to his hands after his death, and he is made his executor, he shall be allowed commission money. 1 Vern. 316. Nelf. Fol. Rep. in Canc. 361.

Case 82.

At the

Rolls.

Eodem die.

DUNSCOMB versus DUNSCOMB.

MR. *Dunscomb* by his will and codicil, devised certain lands to his wife for life, remainder to the plaintiff his daughter and her heirs, but directed, that if his son paid to his daughter 500*l.* after his wife's death, to be laid out in lands, then the lands he had devised to her after her mother's death, should go to him and his heirs. And the bill is brought to compel the defendant the son to pay this 500*l.* within a reasonable time, or be foreclosed.

One devises lands to his daughter, and her heirs, after her mother's death, but directed, that if his son paid her 500*l.* after her mother's death, to be invested in lands, that the lands devised to her should go to him; this shall be considered on the same foot with every other mortgage.

And the counsel for the defendant insisted, that on every bill of foreclosure, the Court decrees an account to be taken of what is due of one side for principal, interest, and costs, and of the rents and profits of the other, which are first to be applied to pay off the interest, and then to sink the principal, and the defendant to be foreclosed, if he does not pay what is reported due within such a time after the Master's report: and that the same decree ought to be made here, for till the account was taken, they could not tell whether it was worth their while to redeem or not.

On

• On the other side it was argued for the plaintiff, that the payment of the 500*l.* was a condition precedent, and that the defendant had no title to an account of the rents and profits from the mother's death, nor was he to pay interest for the 500*l.* and that money by the will was to be invested in a purchase of lands, whereby it appears the testator did not design the rents and profits should go to sink the principal.

Master of the Rolls.

The defendant must pay interest for the 500*l.* and is intitled to an account of the rents and profits; it is the case of every mortgagee, and here may be a foreclosure, for the defendant has not his life-time to pay the money in, but only a reasonable time after the mother's death.

¹ *Vern.* 7,
214, 232,
33, 190.
² *Vern.* 366.
² *Chan. Caf.*
33, 58, 147,
159.

† *Monday, March the 3d.*

[†131]
Cafe 83.
At the
Chancel-
lor's house.
Lord Chan-
cellor.

Charles Selby Amberst, Esq; Administrator of Dame *Margaret Strode*, his late wife, who was the widow of Sir *George Strode*, deceased, plaintiff.

William Robinson Litton, Esq. devisee of the will of *Litton Litton*, Esq. deceased, who was the only son and heir of the said Sir *George Strode* deceased; *George Darnelly*, a remainder man, under the will of the said Sir *George Strode*, deceased; *Francis Mascall*, and *James Bedingfield*, mortgagees of the estate in question, defendants.

Mr. Solicitor General for the plaintiff.

SIR *George Strode* being seized in fee of the manor of *Itchingham*, and divers lands and hereditaments in the county of *Suffex*, of the yearly value of 500*l.* and upwards, part whereof was subject to two several mortgages made by him to *Francis Brook*, each for a term of one thousand years, for securing the principal sum of 1100*l.* and interest, and other part whereof was subject to another mortgage made by him to *Mary Selyard*, for another term of one thousand years, for securing the principal sum of 500*l.* and interest; and the said Sir *George* being also seized of other estates in the counties of *Worcester* and *Gloucester*, and *Hereford*, subject to other mortgages, did by his last will and testament, dated the 21st day of *May* 1707, ' devise all his manors, messuages, lands, tenements, ' and

‘ and hereditaments, to his only son *Litton Litton*, and the
 ‘ heirs male of his body, remainder to his godson *Strode Bedingfield* for life, remainder to his first and other sons in
 ‘ tail male, upon condition that the said *Strode Bedingfield*
 ‘ and his issue male should change his name of *Bedingfield*
 ‘ to *Strode*, and take the arms of the *Strodes*: and in case
 ‘ the said *Strode Bedingfield* should refuse or neglect to change
 ‘ his surname from *Bedingfield* to *Strode*, then the testator’s
 [+132] ‘ will was, † that the said devise should be void, and in such
 ‘ case, he gave the same to his godson *George Darnelly* for
 ‘ life, remainder to his first and other sons in tail male, he
 ‘ and they changing their surnames in the same manner as
 ‘ *Strode Bedingfield* was to do; and in case he and his issue
 ‘ should refuse, then the devise to him and them was to be
 ‘ void; and in such case, the testator devised the same to his
 ‘ own right heirs.’

What passed by these words in the will.

The testator, Sir *George Strode*, soon after died, and his son *Litton Litton* became seized of the mortgaged premises in *Suffex*, as tenant in tail, subject to the said mortgages, and seized of the reversion in fee as the only son and heir of Sir *George Strode* his father, subject to the several intermediate remainders before mentioned. *Litton Litton* was also seized of a great estate in fee simple in possession, in the counties of *Hertford*, *Bedford*, and *London*, devised to him by the will of Sir *William Litton*, of the value of about 3000*l.* per annum, and by his will dated the 16th of April 1710, ‘ gave to his
 ‘ mother Dame *Margaret Strode* a legacy of 2000*l.*’ and after giving several pecuniary legacies to other persons, the will goes on, ‘ And my further will and meaning is, and I
 ‘ do hereby direct, order, and appoint, that my executrix
 ‘ hereafter named, shall within six months after my decease,
 ‘ pay off and discharge all mortgages, and incumbrances
 ‘ laid, and charged upon my estate in *Suffex*, and heretofore
 ‘ charged by my honoured father Sir *George Strode* knight,
 ‘ deceased, to wit, one mortgage of 1100*l.* lent by Mr.
 ‘ *Francis Brook*, and one other mortgage of 500*l.* lent by
 ‘ Mrs. *Selyard* to my said father; and my will and meaning
 ‘ is, and I do hereby direct and appoint, that the said several
 ‘ mortgage leases shall be kept on foot, and upon payment
 ‘ of the said several sums of money due upon the said mortgages, shall be assigned by the said mortgagees, to my dear
 ‘ and ever honoured mother Dame *Margaret Strode*, for her
 ‘ sole use and benefit, during the remainder of the several
 ‘ terms in the said several mortgages contained. And he
 ‘ further

‘ further gave to his mother a yearly rent-charge of 100*l.*
‘ for her life, to be issuing out of all his manors and lands
‘ in the counties of *Hertford* and *Bedford*. And gave to his
‘ wife *Bridget* a yearly rent-charge of 500*l.* to be issuing out
‘ of all his manors and lands in the counties of *Hertford* and
‘ *Bedford*, for her life.

‘ And as for, and concerning all and every his manors,
‘ messuages, lands, tenements, and hereditaments, which
‘ he the said *Litton Litton* was then seized of, in law or
‘ equity, or which he had a power to give, or charge, he did
‘ give and dispose of the same in the manner following, viz.
‘ If his wife should be with child at the time of his decease,
‘ then he gave all his said manors, &c. to his cousin *Wil-*
‘ *liam Robinson Litton* (who was his mother’s brother’s son)
‘ until such time + as such child should be born, and after [+133]
‘ the birth of such child, if such child proved a son, then
‘ he devised all his said manors, &c. to his said after-born
‘ son, and to the heirs male of his body; the remainder to
‘ his said cousin *William Robinson Litton*, and his heirs; and
‘ in case of the birth of such son, then he devised a rent-
‘ charge of 200*l.* issuing and to be paid by his said son out
‘ of the said manors and lands unto the said *William Robinson*
‘ *Litton* and his heirs, with a power of distress in case of
‘ non-payment; and if the said after-born child proved a
‘ daughter, then he gave to such daughter 5000*l.* to be raised
‘ and paid out of the rents and profits of the said estate, at
‘ the age of eighteen years, or marriage; and if his said
‘ wife should not be with child at his death, then he gave all
‘ his said manors, &c. to his said cousin *William Robinson*
‘ *Litton*, and his heirs. And he ordered his executrix to
‘ pay all his father’s just debts, and gave the residue of his
‘ personal estate, after his debts, legacies, and funeral ex-
‘ pences were paid, to his said wife, *Bridget Litton*, whom he
‘ appointed sole executrix of his will; and he appointed
‘ that all his furniture, goods, and household-stuff, then being
‘ in his manor-seat at *Knebworth*, should remain and continue
‘ in his said house after his death, for the use and benefit of
‘ the said *William Robinson Litton*, to whom he thereby gave
‘ the same.’ *Litton Litton*, soon after the making of this will
‘ died, and his wife *Bridget* proved the same, and *William*
‘ *Robinson Litton* (who was her guardian during her minority)
‘ purchased of the said *Bridget* the benefit of the residue of
‘ *Litton Litton*’s personal estate, and agreed to pay off all the
‘ debts,

debts, and the wife not being with child, *William Robinson Litton* entered on all the premises, in the counties of *Hertford, Bedford, and London*; and added the surname *Litton* to his own, and *Strode Bedingfield* who was intitled to the remainder of the estate in *Sussex*, and of the other lands and premises under the will of *Sir George Strode*, entered on the same, and took the name and arms of *Strode*; and in *Michaelmas* term 1710, exhibited a bill in Chancery against *William Robinson Litton*, *Lady Strode*, *Bridget Litton*, and the mortgagees, to be let into a redemption of the mortgaged premises in *Sussex*; and the cause coming to be heard on the 22d of *February* 1711, a decree was made by Lord *Harcourt*, That the mortgagees should be paid off out of the assets of *Litton Litton*, and upon payment, should assign over their mortgages to *Lady Strode*, or her order; but if the said *Strode* should pay to *Lady Strode* the money due on the said mortgages, with interest, before an assignment of the said terms to her, then the said mortgagees were to assign to *Strode Strode*, or to such persons whom he should appoint; but such assignment was to be subject to such further directions as the Court should think fit to make, when proper parties should be before them.

[+134] † Pursuant to this decree, the defendant *Robinson Litton* paid off the mortgages out of the assets of *Litton Litton*, and the mortgagees assigned to the plaintiff *Selby Amberst*, by the direction of *Dame Strode* then his wife, but such assignments were subject to redemption by *Strode Strode*, or such other persons as should be intitled to the inheritance of the premises under the will of *Sir George Strode*, and to the further directions of the Court. And afterwards the plaintiff, by the appointment of *Strode Strode*, and upon paying to him the said mortgage money, assigned the same to the defendants *Mascul and Bedingfield*, subject to such directions as in the decree. *Lady Strode* died, having first made her will, and the plaintiff her husband residuary legatee of her real and personal estate, who took out administration with the will annexed. And *Strode Strode* being dead without issue, the reversion of the mortgaged premises by the will of *Litton Litton* came to *William Robinson Litton*.

In *Michaelmas* term 1725, the plaintiff brought a bill for a redemption of the said terms, and in *Easter* term 1726, the defendant *William Robinson Litton* brought a cross bill to redeem the said mortgaged terms; and both causes being heard

heard the 13th of November 1727, as to the title of the defendant *Darnelly*, the Lord Chancellor directed a case to be stated for the opinion of the Judges of B. R. who were unanimous in their judgment, that his remainder could not take place, being on a condition precedent, which never happened. *Strode Bedingfield* having taken the name and arms of *Strode*; and therefore the defendant *William Robinson Litton* must take under the will of *Litton Litton*: and now both causes come to be heard before your lordship on the equity reserved; and the question is, Whether *Litton Litton* intended by his will, that his mother should have only the money secured by the said mortgage terms, or the terms themselves? and we think his intention is very plain, (as far as it could take place) to give her the said terms, discharged of the money. By the same will he gives her 2000*l.* and surely, if he had designed her by the clause in question, only the money secured by the said mortgages, he would have ordered his executors to pay her so much money, and not have taken this round-about way: he directs his executrix to pay off the mortgages in six months after his decease, and the leases are to be kept on foot; for what purpose? to raise the like sum for his mother? no; but to be assigned by the mortgagees to his dear mother, for her sole use and benefit, for the residue of the terms; the absolute interest in the leases, when the money was paid off, were to be assigned, and by suffering a recovery he might have barred the remainder-men of their equity of redemption, and he could not have made use of more proper and plain words to shew his intention, to devise to his mother these terms exonerated of the mortgage money. [†135]

But the defendant insists on the decree, whereby *Strode Strode* may redeem, and Lady *Strode* is to assign to him, on his paying off the mortgage money. This decree was right, as the case then stood, for *Litton Litton* could not make those terms absolute against those in remainder, who claimed under the will of Sir *George Strode*, and if *Robinson Litton's* remainder had depended on the same will, he too would have had a right to redeem in his turn, and Lady *Strode* could only have the benefit of the money: but the Court foreseeing that the remainder to *Strode Strode* would be spent in the compass of a life, that at that time he had no issue, and that if he never had any sons, and *Darnelly* no title, another case might happen, such as hath now really come to pass, has made no provision for the defendant *William*

William Robinson Litton, though he insisted in his answer to that bill, that he was intitled to redeem those terms as remainderman in fee, but has left that point open for the judgment of the Court; as the facts likewise have done; which passed subsequent to this decree: *William Robinson Litton* paid off the mortgage money out of the assets of *Litton Litton*, and the terms were assigned to *Selby Amherst*, who assigned them to *Mascal* and *Beddingfield* by the direction of *Strode Strode*, with the same reservations as in the decree. The case between *Strode Strode* and *Lady Strode* was very different from the case between the plaintiff and *William Robinson Litton*, *Strode Strode* took under the will of *Sir George Strode*, but *William Robinson Litton* under the will of *Litton Litton*, who being only tenant in tail with a remote remainder in fee, and not having suffered a recovery, could do nothing to put the intermediate remainder to *Strode Strode* in a worse condition than it was by the will of *Sir George Strode*, and could not make the terms absolute, as to him who claimed by a title paramount; but *William Robinson Litton* claimed under the will of *Litton Litton* himself, who could give him the inheritance, and his mother the terms, which are not to be considered as attendant on the inheritance; and though they were created for a particular purpose, yet the owner might order them to be kept on foot for the benefit of a devisee, as well as have created original terms out of the inheritance by his will, and though this intention could not have its full effect against *Strode Strode*, it may against *William Robinson Litton*; and therefore we hope the plaintiff shall have these terms assigned to him on payment of the mortgage money.

Mr. Fazakerly.

As the question is between two voluntary devisees, neither of them are intitled to a preference. The intention must be
 [+136] † gathered from the words of the will, which must operate, if the testator had a power to devise, and he having the remainder in fee, if the intermediate estates determined, the equity of redemption of these terms was in him and his heirs, which sure he might dispose of; so the only question is, Whether he has disposed of it. The mortgage leases are to be assigned, which extends to the whole interest, the testator knew they were mortgage leases, and of more value than the money they were security for, and as he has declared, they shall be assigned to his mother, he has likewise declared to what purpose, to her sole use and benefit, and for how long a time;

a time; during the residue of the said terms, so that to desire these terms to be taken from her, is to desire contrary to the express words of the will, as he had a power over the whole terms; has he reserved any part of them out of this devise? It is said such a devise is not prudent or reasonable, but your lordship will consider what he has done; not whether he has acted prudently or otherwise; and what he has done is for his mother. It is possible he might design for her the money only; it is possible he might design her the terms; and if so, the words of the will are to turn the balance, and they are in our favour.

As to the decree, that is so far from doing us a prejudice, that it makes strongly for us; for if these terms had been to attend the inheritance, the same directions would have been given as were on the payment of a mortgage to one *Bridges* on another estate, which was expressly ordered by the decree to be assigned over, in trust to attend the inheritance, and the care the Court took in these different directions, shews their opinion, that it was not necessary directly to consider our case, because *Strode Strode* might have children; but it was necessary to decree the mortgage terms should be assigned, as *Strode Strode* should appoint, because he was not only intitled to the equity of redemption, as tenant for life, but he had a right also to be reimbursed pro rata from the owner of the inheritance, but then those assignments are to be subject to such directions as the Court should think fit to make when proper parties should be before them, the decree provided for the only person who was then plaintiff, but it was necessary to reserve the consideration, in case *Strode Strode* should die without issue, whether the terms were absolute in Lady *Strode*, or whether the equity was devised to *William Robinson Litton*, who then claimed it by his answer, and it is therefore very odd for the defendant to insist on this decree, which notwithstanding gives him no equity of redemption, and so is rather against him, or to say that our right shall be determined on implication by this decree.

† The rent-charge devised to the mother is not on this [†139] estate, but on the other lands, which is a further confirmation that he had disposed of these terms to her, and the objection that the devise of the inheritance without the terms is of no value, and that therefore *Litton Litton* cannot be supposed to have devised them to his cousin separate from these leases, is of no weight, because he has left him by the same will several other estates of great value.

Mr.

Mr. *Wills* for the defendant *William Robinson Litton*.

The single question is, Whether by this will the mortgage money only is given to Lady *Strode*, or the terms themselves? The council for the plaintiffs say, the words and intention of the testator are plainly for them, and the decree too; or at least, that it leaves the point at large: I beg leave to differ from them, and say first, that the words of the will are plainly for us. There were two interests in these terms, the legal interest, which was in the mortgagees, and the equitable interest, which was in the owners of the estate; and nothing was intended to be assigned by this will, but the legal interest only, and the testator might, and would have used other words, if he had designed to pass the whole interest, as, that the whole interest, or terms should be for her sole use and benefit, or, that the owners of the estate should have released to her their equity of redemption, or would have devised to her the terms themselves. It is the mortgagees who are to assign to her, and they can assign only the redeemable interest they had, and he says, that the mortgages shall be kept on foot, which are words made use of, when the terms are designed to protect the inheritance, and the words, *For her sole use and benefit*, make no alteration in the sense; for what was she to hold for her sole use and benefit? why what was assigned to her? which was only the interest of the mortgagees: and the words, so the intention of the testator is with us; we were his cousin germain to whom he intended a beneficial devise, and with a design to establish his name, and would he have given away then such a considerable part of the estate, as these terms of a thousand years, and leave us only an idle reversion? he might as well have devised the estate to his mother, and directed his executrix to pay off the incumbrances. They say, if he had designed her the money only, he would never have used such a circuitry; yes, the money was liable to be lost, but these lands he knew were a good security for so much money.

But they say, the decree has not determined this point, and that the reservation is in their favour, but by proper parties the Court could not mean such as would dispute the right to redeem, in case *Strode* died without issue, for
[+140] Lady + *Strode* and *William Robinson Litton* were parties to that suit; so that proper parties to this point were not then wanting,

wanting, and *William Robinson Litton* does not insist in his answer, that he, and not *Lady Strode*, but that he, and not the plaintiff is intitled to the equity of redemption, and the point reserved does not regard *Lady Strode*, but the plaintiff.

Tuesday morning, March the 4th.

Mr. Attorney General for the defendant
William Robinson Litton.

These terms are allowed by both sides to be redeemable ; but the question is, By which of the parties ? whether by the plaintiff, or the defendant *William Robinson Litton* ? and this must be determined by the will, and the decree. As to the first, we shall consider the words, and the intention of the testator. There were two interests in these terms ; the legal interest in the mortgagees, which stood as a security for their money ; and the equitable interest of redemption in those who had the inheritance : and no words of the will are applicable to this equitable interest ; but his intention was, that his executors should purchase the legal interest for his mother, there are no devising words of these terms to her, but only a direction to his executors to pay off the said mortgages, and that the mortgage leases should be kept on foot, for otherwise on redemption, the terms would have merged in the inheritance, then that they should be assigned by the mortgagees to his mother, and there is no direction but as to their interest, and the words, *During the residue of the said terms*, were necessary, because the mortgagees had such an interest, and they would have been inserted in any common assignment, they are still called mortgage terms, and there are directions for his heirs to join in the assignment, or to release the equity of redemption, but barely that the mortgagees should assign, therefore in point of law, this assignment would be for the residue of the terms, and in point of equity, it would be subject to redemption. As to his intention, it is impossible to believe, as the estate then stood, he intended to devise to her these terms of one thousand years ; but it is strange they say, he should use such a circuitry ; if he designed her only the money, why could not he directly have devised it to her. The question never is on the reasonableness of a devise, but what the testator has devised, though better reasons may be given for that, than why he should devise her the terms ; he might rather chuse that

that the incumbrances should be in her hands than in a stranger's, and might think it for her advantage to have her money laid out on such a good security; by their construction, though he designed the bulk of the estate should go in his name, yet he devises away absolute terms of one thousand [†141] † years: why did not he devise the fee to her? he has given his mother a worse estate, without any advantage to him in reversion: and the intention of the testator will further appear, from considering how the estate stood limited at the time of his making the will, *Litton Litton* was tenant in tail, remainder to *Strode Bedingfield* for life, remainder to his first and every other son in tail male, with a contingent remainder to *Darnelly* and his issue male; and *Litton Litton* had also in expectation that his wife might be enfeint of a son. They must suppose then that it was *Litton Litton's* intention, that during the continuance of those estates, his mother should have the mortgage money only, for he could not bar those of their right of redemption, who claimed under the will of *Sir George Strode*, and that he has expressed his intention in the same words, by which after the determination of those estates he gives her the equity too, whereas it was probable those intermediate remainders would continue as long as the terms themselves, so they would make the same words carry two meanings, during those estates to be only a devise of the money, and when they were determined of the terms themselves. We shall next consider the decree in 1710, which has determined this question in favour of us, and that was not the point reserved, because all parties were then before the Court that were proper to contest it. It is agreed, that the will of *Litton Litton* could not prejudice those who claimed under the will of *Sir George Strode*; then who were proper to controvert this point but *Lady Strode* and *William Robinson Litton*, who were both before the Court, and not the sons of *Strode Strode* and *Mr. Darnelly*; for they were not concerned in this question, because they claimed under the will of *Sir George Strode*? By the first clause of the decree, the Master is to take an account of what is due on the mortgages, and *William Robinson Litton* is to pay off what is reported due, out of the assets of *Litton Litton*, and the mortgagees are to assign to *Lady Strode*, for security of so much money, if the Court were of opinion the terms belonged to her, would they have given this direction, that they should be assigned as securities? Yes, they say, because they were subject to redemption by *Strode Strode*, and these

these terms on his paying of the money are to be assigned as he shall appoint: this direction was in regard to the apportionment of the money, for tenant for life is not obliged to pay off the whole mortgage money, but those in the reversion must contribute, and this assignment is to be subject to the further directions of the Court. It is not the assignment to Lady *Strode*, but this to *Strode Strode*, that the Court has reserved a power over, when proper parties were before them, which were those who claimed the inheritance, under the will of Sir *George Strode*, against whom *Strode Strode* had an equity of apportionment. If the Court had designed what they insist upon, the decree would not have made the same reservation on both assignments. *Litton + Litton* directs [+142] that all the mortgages on the estate should be paid off out of his assets, which on payment of the money would consequently attend the inheritance, but when tenant for life came to redeem these particular mortgages in question, it would have been injurious to him for the Court to have directed they should attend the inheritance, because he was intitled to a contribution, and this accounts for the different directions of the decree, as to these, and the mortgage to Mr. *Bridges*, and they cannot vary the decree by this original bill, but they must either rehear that cause or bring a bill of review.

Mr. *Rider*.

By the plain construction of the words of this will, it appears that the testator designed these mortgage terms to his mother only as securities: the first direction is, that his executrix should pay off the mortgages; if he had said no more, this would have been for the advantage of the several remainder-men, but then the mortgagees are to assign to Lady *Strode*; could he use plainer or clearer words to show that he designed her the money only? For the natural meaning of them is, that the mortgagees being paid off, should assign to her, and she stand in their place, and the words, *For her sole use and benefit*, relate only to the enjoyment of them as mortgages. The counsel for the plaintiff own, that during the continuance of the remainders, these terms must be considered only as securities, and can it be imagined, that after so many estates spent, the same words should have another signification? But the decree has plainly determined this question, whereby the mortgage terms are directed to be assigned to Lady *Strode* as securities; if these words stood singly, they would be an incontestable evidence for us, and the

the following words make no alteration, and this assignment is to be subject to such directions as the Court shall think fit to make when proper parties are before them; for this is only spoke of the assignment then last mentioned to *Strode Strode*, and it was necessary to insert those words, for otherwise the several remainder-men would have the benefit of his redemption. But supposing it his intention to give these terms to his mother, the devise cannot take effect. Suppose *Sir George Strode* had created these terms, in trust, to attend the several remainders in tail, and after the expiration of those estates, the remainder over, such a remainder would not be good, because a term cannot be limited over after an estate tail; by this devise they are made terms in gross, and separated from the inheritance, so that a recovery by any of the tenants in tail would not be a bar to it, and therefore such a devise is void, by the doctrine of perpetuities.

[+143]

+ Lord Chancellor.

It seems to me that this question was never before the Court. The decree says, the mortgages shall be paid off, out of the assets of *Litton Litton*, and that the mortgagees shall assign to *Lady Strode*, or her appointment, in order to secure to her the principal and interest, subject to redemption by *Strode Strode*, and then the mortgages were to be assigned to him, and the assignment was to be subject to such directions as the Court should think fit to make, when all proper parties were before them, which must be meant of this last assignment to *Strode Strode*; the bill was brought by *Strode Strode* to have the mortgages discharged: *Lady Strode* by her answer says, she is intitled to the money, and *Robinson Litton* says, he is intitled to the equity of redemption as devisee of the reversion; *Lady Strode* insists, that the mortgage money is to be paid off out of the assets of *Litton Litton*, and the terms assigned to her, but takes no notice of what interest she has in them: and this was the only point for the directions of the Court. The case then before us is no more than this; an estate is limited to one in tail male, remainder to another for life, remainder to his first and every other son in tail male on a contingency, remainder over to another in the same manner, reversion in fee to the tenant in tail; the tenant in tail makes his will, and thereby taking notice of two mortgages on the estate, directs his executrix to pay them off, and that the mortgaged leases be kept on foot, and assigned

signed to his mother for her sole use and benefit, during the remainder of the said terms, which are terms in gross in the mortgagees; if the mortgagor indeed pays off such mortgages, the terms will attend the inheritance, but as he has a property in them, he may certainly disannex them; what then does the testator intend to give by these words? not the money, for the mortgages were to be discharged out of his personal estate; not that the terms might attend the inheritance, or be surrendered, but to the end that the mortgagees might assign them to his mother, not as a trustee, but for her sole use and benefit: so that the words are very plain and clear, and tho' the testator had no power to make these terms absolute against the intermediate remainder-men, yet the will must take place as far as it may, and the decree could go no further against them, than to put the mother in the place of the mortgagees, but now those remainders are all spent; the case is only this: tenant in fee of lands subject to two mortgages, orders his executors to pay off the mortgage money out of his personal estate, and devises the mortgage terms to one, and the inheritance to another, as both parts of such a will are consistent, both the devisees must take; these terms never attended on the inheritance, but are substantive terms, and given to his mother immediately; or suppose they were attendant, † they are not devised over after [†144] the determination of estates tail, for the devise does not take effect till after the death of the testator, when there was only an estate for life in being.

Be it therefore decreed, that it be referred to a Master, to see what is due for principal, interest, and cost on the said mortgages, and that on payment thereof by the plaintiff, the mortgagees shall assign to him, and he is to enjoy the said terms absolute against the defendant *William Robinson Litton*, and his heirs; and the defendant's cross bill is to be dismissed; and as to the defendant *Darnelly*, be it decreed, that he took no estate by the will of *Sir George Strode*.

Post. Cas.
120.

Monday, March the 3d.

MARTIN versus STILES and SHERMAN.

Cas. P. 4.
At the
Rolls.

SIR *James Clark* being seized in fee of the upper and lower mills, made a lease of the lower, which were corn mills, with the water-courses thereto appertaining, to the
M plaintiff

plaintiff for twenty-one years, and covenanted for himself, and those claiming under him, that the plaintiff should quietly enjoy; Sir *James* afterwards lets the upper mills, which were four powder mills and a corn-mill, to the defendant *Styles*, who covenanted that he would not divert, convert, or turn, by himself, his workmen, or under tenants, any of the streams or water-courses coming down to the said mills; or pen up the said streams, whereby the lower mills might be prejudiced for want of water: and *Styles* makes an under lease of the corn mill to the defendant *Sherman*. The plaintiff brings this bill against the defendants, to have the benefit of this covenant, in the place of Sir *James Clerk*, who had covenanted for his quiet enjoyment, and assigns as a breach, that the defendant *Sherman* had penned the water up so high, that the stream run back to *Ember Mills*, instead of running down to the plaintiff's mills: and the plaintiff read evidence to prove, that the defendant penned the water up so high, purely to distress him, and turn it on the *Ember Mills*; on the other hand, the defendants endeavoured to prove, that it was necessary to the working their own mill, that the stream should be penned up so high; that the plaintiff's mills being enlarged drew more water than usual, and that damming up the stream did not make it run back, as they had tried by laying straws on it.

[145]

† Master of the Rolls.

One seized in fee of upper and lower mills, leases the lower with the stream, and covenants for quiet enjoyment, and after leases the upper, and the lessor covenants not to divert or pen up the said streams to the prejudice of the lower mills, the lessor of the lower mills may bring a bill on breach of this covenant, in the room of his lessor, for an injunction, without first bringing an action of trespass.

The landlord having covenanted with the plaintiff, that he should quietly enjoy the streams and water-courses, the plaintiff is intitled to stand in the place of the lessor, to have the benefit of the defendant *Styles's* covenant, not to prejudice or hurt the plaintiff's mills, and to a perpetual injunction without first bringing an action of trespass; and I would grant the injunction according to the words of the covenant; but then, if the plaintiff should apply to the Court for a breach of this injunction, the question would come in dispute, how high the defendant might pen the water? which is not settled by the evidence on either side; and one witness for the defendant swears, that the higher the water is penned up, the better his mill works; and then, though the penning may be a prejudice to the plaintiff, it is not a breach of the covenant, for the defendant himself is in the first place to have the full benefit of the water.

The

The plaintiff cannot have a quod permittat, for that lies only for the owner of the inheritance, regift. 155. So that I am only in doubt how to give the plaintiff a proper relief, and this case is not like to the establishment of a right to a water-course, but rather like to the settling of boundaries, and may be determined, either by persons chosen by the parties, to be approved of by the Master, who may settle how high the defendant may pen the water, consistent with his covenant, or by commissioners.

But at last the Master of the Rolls directed three issues to be tried, First, Whether the defendant had penned up the water, consistent with his covenant, or not? Secondly, If not, how much the plaintiff was damnified thereby? And Thirdly, how high the defendant might pen up the water, consistent with his covenant.

† Friday, March the 7th.

[†146]

Cafe 85.
At the
Chancel-
lor's house.
Lord Chan-
cellor.

The Earl of *Tankerville*, plaintiff.

Sir *George Coke*, Mr. *Ruth*, and Mr. *Mills*, executors of *Charles* late Earl of *Tankerville* deceased, *James* Earl of *Berkley*, surviving trustee, Lord *Limington* and Lady *Bridget* his wife, *William Paulet*, Esq. and Lady *Annabella* his wife, *William Wilmer*, Esq. and Lady *Mary* his wife, daughters of the late Earl of *Tankerville* deceased, Mr. *Gordon*, executor of *Grey Bennet*, one of the younger sons of the late Earl of *Tankerville*, *Elizabeth Mifson*, executrix of Sir *James Mifson*, a trustee, *Charles Bennet*, Esq. commonly called Lord *Ossulston*, eldest son of the plaintiff, *Henry Nevil*, alias *Grey*, devisee under the will of *Ralph Lord Grey*, and *Charles Wilmer*, son of *William Wilmer*, defendants.

Mr. Solicitor General for the plaintiff.

THIS bill is brought for a specifick performance of articles, entered into by the plaintiff's father, previous to his marriage with *Mary*, the daughter of the late *Ford Lord Grey* deceased; and to be relieved against two deeds of appointment, whereby the late Earl of *Tankerville* charged the *Ossulston* estate with the payment of 8000*l.* a piece, for the portions of the defendants, his younger children. And in

[+147] order to set the plaintiff's case in a clear light before your lordship, I shall consider how the several estates of *Ford Lord Grey*, and of *Charles* late Earl of *Tankerville*, stood limited at the time of the execution of these articles: part of the estate of *Ford Lord Grey* was in settlement, and part out of settlement. The lands in settlement were by indentures of lease and release, dated respectively the 31st of *May*, and the first of *June* 1672, † conveyed by *William Lord Grey* his grand-father, in trust to the use of himself for life, remainder to his son *Ralph* for life, remainder to *Ford* the first son of *Ralph* for life, remainder to his first, and every other son in tail male, remainder to *Ralph* the second son of *Ralph* for life, remainder to his first, and every other son in tail male; remainder to *Charles*, the third son of *Ralph* for life, remainder to his first, and every other son in tail male, with proper limitations to trustees to preserve the contingent remainders, and for default of such issue, to the fourth, and every other son of *Ralph*, in tail male successively, remainder to the heirs male of the body of *William* in tail male, remainder to his own right heirs.

In 1681, *Ford Lord Grey*, by indentures of lease and release, conveyed all his lands out of settlement, to *George Earl of Berkley*, and others, and their heirs, in trust, as to part, of the value of 1600*l.* per annum out of the rents and profits, or by mortgage, or sale, or otherwise, as they should think convenient, to pay off and discharge all his debts, by mortgage, statute, or recognizance, and then to raise 20,000*l.* for the portion of his daughter *Mary*, in such manner as he should appoint; and if he should die before any appointment, in trust, for her and her heirs; and after the raising of those sums, then to raise any other sum he should appoint, and for want of such appointment, in trust for those to whom the lands in settlement should come after his decease. And as to the other part, in trust to pay his debts, by bond, specialty, or note, and then in trust, for him and his heirs.

John Lord Ossulston, by his will, and codicil dated the 28th of *November* 1694, devised all his lands to his son *Charles* for life, without impeachment of waste, remainder to his first, and every other son in tail male, remainder to the heirs male of his own body in tail male, remainder to his own right heirs, with a power to his son, and the several heirs male, as they severally and respectively came into possession,

session, to make a jointure for his wife, after the rate of 10*l.* for every 100*l.* of her portion, and to charge the said lands with portions for younger children.

The estates of *Ford Lord Grey*, and of *Charles Lord Ossulston*, standing limited in this manner, articles were entered into, dated the 19th of *June*, 1695, between the said *Ford Lord Grey*, and *Charles Lord Ossulston*, reciting, Whereas a marriage was intended to be shortly had between *Charles Lord Ossulston*, and *Mary*, the daughter of *Ford Lord Grey*, and whereas *Ford Lord Grey* had conveyed part of his estate in trust, *inter al'*, to raise 20,000*l.* for the portion of his said daughter, which money could not be immediately raised, (because as I have already observed † to your lordship, the [† 148] trust was in the first place for the payment of debts, which at that time were not fully satisfied) and whereas by the will, and codicil of *John Lord Ossulston*, the *Ossulston* estate was settled in such a manner on the *Lord Charles*, that he could not make a jointure so soon as the said marriage was intended to be had, (for by the codicil, as the jointure was to be proportionable to the quantum of the portion, it could not be settled till the payment of the portion) *Ford Lord Grey* covenants, if the said marriage took effect, to enter into a security, for the payment of 1000*l.* a year interest, till the raising of the 20,000*l.* in consideration whereof, *Charles Lord Ossulston* covenants, that on payment of the 20,000*l.* he would assure lands in fee simple in the kingdom of *England* of 4000*l.* a year at least, to the use of himself for ninety nine years, if he should so long live, without impeachment of waste, remainder as to part of the value of 2000*l.* a year to his wife for life, for her jointure, remainder of the whole to his first, and every other son in tail male, remainder to his own right heirs: and in case the said *Lord Ossulston* died without issue male, the said lands were to stand charged with the payment of 15,000*l.* for daughters portions, but if he died, leaving issue, and one younger son, or daughter, he, or she, was to have 10,000*l.* for their portion; if more sons, or daughters, they were to have 5000*l.* a piece, to be raised out of the said lands; and it was covenanted and agreed by and between the parties, that if *Lord Ossulston* died before the payment of the 20,000*l.* or the settlement of a jointure, the jointure should not be made, or the portion paid to the executors of *Lord Ossulston*, but to the proper use of *Mary* herself: and if *Mary* died without issue in his life, he was to be paid only 10,000*l.* within one year after her decease:
and

and it was further agreed that if *Ford Lord Grey* died before the payment of the 20,000*l.* the estate charged therewith should descend on *Mary* and her heirs, in lieu of the said portion and jointure. The marriage was afterwards had, and Lord *Ossulston* had six children by his said lady. *Ford Lord Grey*, afterwards Earl of *Tankerville*, died the 24th of *June* 1721, having made his will, and appointed Lady *Ossulston* his sole executrix: and *Ralph Lord Grey* his brother entered on the estate, as next in remainder, the 18th of *May* 1723, articles were entered into between the said *Ralph Lord Grey*, and Lord and Lady *Ossulston*, as sole executrix of her father, the late Earl of *Tankerville* deceased, reciting, That whereas differences had arose between the parties, *inter al*, about several securities which *Ralph Lord Grey* had become bound in with his brother, the late Earl of *Tankerville*, in order to prevent and put an end to the same, it was agreed, that *Ralph Lord Grey* should pay off 8000*l.* due by mortgage of part of the said *Grey's* estate to Lady *Grace Pierpoint*, and *John Savil*, Esq. and 15,000*l.* due by mortgage of another part of the said estate to the Earl of *Rocheſter*, and the said

[+149] mortgages† were to be assigned to Lord *Ossulston* as a security for the payment of 15,000*l.* agreed by these articles to be paid by *Ralph Lord Grey* to Lord *Ossulston*, and that he should indemnify Lord and Lady *Ossulston* from the said mortgages, and that he should pay an annuity of 100*l.* a year to Mr. *Ireton*, and 15,000*l.* to Lady *Ossulston* in full of her portion, and of all her right and title to the premises so mortgaged by her late father as aforesaid: and more effectually to enable *Ralph Lord Grey* to make these several payments, Lord and Lady *Ossulston* covenant, that lands of 2000*l.* a year, part of the lands contained in the settlement of 1672, of which *Ralph Lord Grey* was only tenant for life, should by act of Parliament be settled on *Ralph Lord Grey* and his heirs; and that if there was occasion to raise money before the said act could be passed, they would join with him in the mean time in proper conveyances, and that on payment of the 15,000*l.* they would reassign the mortgages, as *Ralph Lord Grey* should appoint; and Lord *Ossulston* for himself further covenanted and agreed, that on payment of the 15,000*l.* he would settle in jointure on his lady 100*l.* a year for every 1000*l.* of her portion, and pursuant to these articles, 10th of *April*, 1703, Lord and Lady *Ossulston*, by fine, and recovery, and indenture, conveyed the said lands to *Francis Eyles*, for the term of one thousand years (as a security for the repayment of

of 15,000*l.* borrowed of the said *Eyles*, to pay off and discharge the Earl of *Rocheſter's* mortgage) remainder to *Ralph Lord Grey* and his heirs; and on the 24th of *February* 1703, an act of Parliament paſſed to confirm theſe articles, and *Ralph Lord Grey* entered into a bond of the penalty of 30,000*l.* for the payment of the 15,000*l.* and interest to *Lord Offuſton*; but before the ſame was paid, *Ralph Lord Grey* died, having firſt made his will, dated the 13th of *March* 1704, and thereby deviſed all his real eſtate to *Lord Sommers*, and others in truſt, to pay all his debts, and then in truſt to convey the ſame to *Henry Nevil*, alias *Grey*, the defendant, for life, remainder to his firſt, and every other ſon in tail male, with ſeveral remainders over; in 1709 *Lady Offuſton* died. The 25th of *May* 1716, *Charles Lord Offuſton*, then Earl of *Tankerville*, by deed poll, reciting the will and codicil of *John Lord Offuſton*, and his intermarriage with *Mary*, the daughter of *Ford Lord Grey*, by whom he he had ſix children, and that a treaty of marriage was on foot between *Mr. Wallop* and his eldeſt daughter *Lady Bridget*, and that the ſaid *Mr. Wallop* had agreed to accept 8000*l.* in full of her portion: the Earl of *Tankerville* in order to raiſe the money, by virtue of the power given him by the ſaid will and codicil, and of all other powers, appoints and ſets over part of the fee farm rents of the *Offuſton* eſtate to *James Earl of Berkley* and *Sir John Bennet* for a thouſand years, in truſt, to raiſe 8000*l.* as a portion † for the ſaid [+150] *Lady Bridget*, payable at her day of marriage, or at his deceaſe, or in his life-time, as he ſhould appoint: and *Mr. Wallop*, now *Lord Limington*, covenants, that whereas the *Lady Bridget* was intituled to 10,000*l.* by the will of her grand-mother, on payment of the 8000*l.* he would give a releaſe for the 10,000*l.* to the Earl of *Tankerville*, and this deed of appointment is aſſigned to *Lord Limington* to ſecure the payment of the 8000*l.* and the marriage being had, *Lord and Lady Limington* executed a general releaſe to the Earl of *Tankerville*, and the Earl having aſſigned over the bond of 30,000*l.* of *Ralph Lord Grey*, to *Lord Limington* as a ſecurity for the 8000*l.* *Lord Limington* reaſſigns the ſaid deed of appointment to *Sir James Milſon*, in truſt for the Earl of *Tankerville*, his executors, adminiſtrators and aſſigns. The 10th of *December* 1716, *Charles Earl of Tankerville* by deed poll, reciting the will and codicil of *John Lord Offuſton*, and the marriage of *Lady Bridget*, and that her portion was paid, and the reſt of his younger children were unpro-
vided

vided for, by virtue of the power given him by the said codicil, and of all other powers, assigns over several fee-farm rents of other part of the *Ossulston* estate to the same trustees for one thousand years, in trust, to raise 8000*l.* apiece for his younger children after his decease, or in his life-time, as he should appoint. *Henry*, one of the younger sons, died in the life-time of the Earl his father, *Charles* Earl of *Tankerville* made his will, ' whereby he recites the will and codicil of his father, and the two deeds of appointment, ' which he thereby confirms: and lest there should be any ' defect in the execution of his power, or that the said fee ' farm rents should not be sufficient to raise the said portions, ' therefore in further execution of his power, by the said ' codicil, and of all other powers, and authorities him in ' that behalf enabling, he devises all the *Ossulston* estate to ' the same trustees, for a term of two thousand years, if the ' fee farm rents should not be sufficient, with ease and ' speed, to raise the said portions to his daughter *Wallop*, ' and his other younger children, to raise the said portions, ' or so much thereof as the said fee farm rents should not be ' sufficient to raise; it being his intention that the real estate ' thereby devised, should be an additional security, but not ' to give them more than 8000*l.* apiece;' then he devises all the rest, and residue of his real and personal estate to his executors, *Sir George Coke*, *Mr. Ruth*, and *Mr. Mills*, in trust, out of the rents and profits, or by mortgage or sale, to pay *Mrs. Sydney* 200*l.* a year for her life, and the surplus to *Gray Bennet* and *Lady Mary Wilmer*, two of his younger children; and after, by a codicil dated the 16th of *April* 1722, he devises the said surplus to *Gray Bennet*, to be paid him at his age of twenty-one years, and if he died before [+151] that age, to his grand-sons the defendants † *Charles Bennet*, eldest son of the plaintiff, and *Charles Wilmer*; and if either of them died before the age of twenty-one years, then to the survivor of them, and soon after died, and *Gray Bennet* is since dead under the age of twenty-one years.

The first point to be considered arises from the marriage articles of 1695, whereby the late Earl of *Tankerville* covenants to settle lands of 4000*l.* a year, and no settlement having been made, we have a plain demand against his executors, to have lands of that value purchased out of the assets of the said Earl, or to have his personal estate applied to that purpose as far as it will go, but it is said these lands were to be conveyed and assured on a condition precedent, on the payment

payment of the 20,000*l.* which not having been paid, the Earl is not obliged to perform the articles: but it plainly appears that this money was paid; for though it was not actually paid by *Ford Lord Grey* in his life-time, yet the principal was charged on the estate, by the settlement in 1681, and *Ford Lord Grey* confessed a judgment defeated, for the payment of the interest, so that both the principal and interest were secured, which in equity is considered as a payment: besides *Lady Offulston* was executrix of *Ford Lord Grey*, and possessed herself of all his personal estate, which was very considerable, though we do not know the exact amount of it, and therefore it shall be presumed, that the personal estate, with the 15,000*l.* secured to her by *Ralph Lord Grey*, was a full satisfaction of the 20,000*l.* But suppose the late Earl of *Tankerville* had compounded this debt for 15,000*l.* yet in regard to the plaintiff, and his other children, who were no parties to that composition, it must be considered as if the whole was paid. But the executors likewise object, that the late Earl of *Tankerville* at the time of the articles, was not seized of any lands in fee simple, and therefore it cannot be supposed he designed to purchase lands, but that his intention was, that the *Offulston* estate, which is about 4000*l.* a year, should go as a satisfaction according to the articles. But how can the articles bear this construction? whereby he covenants to convey and assure lands in fee simple to such uses, now he was only tenant for life of the *Offulston* estate, and it is no answer, that he would permit his son to enjoy it; for it was not in his power to hinder him, he claimed by the same will with his father, so this is not like the case, where the covenantor suffers lands to descend, but the plaintiff, notwithstanding the large portion of his mother, by these marriage articles would be the purchaser of nothing. But if the *Offulston* estate being taken notice of in these articles, the nearness of the value, and the likeness of the limitations, should induce your lordship to think that these were the lands intended to be settled, that will determine the other question of the portions. By the codicil of *John Lord Offulston*, the power of *Lord Charles* to make a jointure is limited, [†152] but to provide for younger children is indefinite; yet regard must be had to the value of the estate, in the execution of it: the *Offulston* estate is about 3800*l.* per annum, and is charged by the deed polls with the payment of 40,000*l.* so that if the power is considered in this light only, it is not well executed, for tho' the codicil gives the late Earl an unlimited power, this Court will never decree an unreasonable execution of

of it; for by that means, tho' he was only tenant for life, it would be in his power to disinherit his eldest son, contrary to the intention of the donor, that the bulk of the estate should go to him: but if the articles refer to the *Ossulston* estate, they restrain this general power; it was proper on the marriage to ascertain the portions of the younger children, it was therefore agreed, if there were daughters, and no issue male, they should have 15,000*l.* if a son, and younger children, they should have 5000*l.* apiece, and if the father can say, I have made you a satisfaction by the *Ossulston* estate, for the lands to be settled by the articles, the plaintiff sure may say, your unlimited power over that estate is restrained by the same articles; for if the articles are taken in this sense, what advantage are they to the plaintiff, but by a restraint of the power; and the *Ossulston* estate cannot otherwise be taken as a satisfaction of the covenant, for if by the articles he covenants that the *Ossulston* estate should be limited to such uses, it can come to the plaintiff with no greater burthen than the articles charge it. But it is said, that the plaintiff in his answer to a bill filed against him by his late father, has admitted he had a power to charge 8000*l.* apiece for the portions of younger children, and submitted to the raising of them.

As to this objection, your lordship will please to observe, that Lord *Limington* having assigned over the deed poll of appointment of 8000*l.* to Sir *James Misson*, in trust, for *Charles* late Earl of *Tankerville*, the said Earl filed a bill in the name of Lord *Limington* and his lady, against the now plaintiff his son, to have the money raised: and also another bill, in the name of the other younger children, to have their portions raised: to which bills, the now plaintiff put in his answers, and insisted that the said sums were highly unreasonable, and no way proportionable to the value of the estate, and contrary to the intention of *John* Lord *Ossulston* the testator, who designed the estate should continue in the name and blood of the *Bennets*. At this time the plaintiff had no knowledge of the articles of 1695, and being under the displeasure of his father, and in great difficulties, upon some proposals from the late Earl, he agrees to put in other answers, in which he owns the 8000*l.* a piece for the portions, to be well charged, and submits to the raising of them; but at this time too he was a stranger to the marriage articles, which were industriously concealed from him, but the case appeared

appeared to him singly on the will and codicil of † *John Lord Offulston*. Under these circumstances, and ignorance of his title, he was induced to put in those answers. The late Earl died in 1722, and then upon examining his papers, several briefs were found, and cases for the opinion of counsel, wherein these marriage articles are taken notice of: upon which, the plaintiff applied to the defendant *Mills*, who was agent and solicitor for the late Earl, for the said articles, but he denied they were in his hands. The plaintiff filed a bill against him for a discovery, and in his answer he confesses that they were afterwards found among his papers, by one of his clerks; so that the plaintiff's answer being put in, whilst he was ignorant of his title, and it was industriously concealed from him, shall not injure him; for if under this ignorance he had joined in a mortgage or a conveyance, the Court would have relieved him, as appears by numbers of precedents; and the case of an answer only, is stronger, upon which your lordship is to make a decree.

These are the general points in this case; there is likewise another question, that particularly relates to Lord *Limington*: Whether over and above the 8000*l.* he received as a portion with his lady, he is intitled also to 8000*l.* by the will of the late Earl of *Tankerville*? The will takes notice of the appointment of 8000*l.* to Lady *Limington*, and lest the execution of the power should be defective, or the fee-farm rents not sufficient, the testator charges all the *Offulston* estate with 8000*l.* apiece for all his younger children indefinitely, which words they say amount to a new devise of 8000*l.* to Lady *Limington*, as she is expressly mentioned with the younger children. The deed poll of assignment to Lord *Limington* was reassigned by him to the late Earl, who intended by his will not to vary the portions, but to make a further security for the payment of them, it did not appear at that time that the portion was reassigned, and that the late Earl stood in the place of Lord *Limington*, but he has expressed himself in his will, as he did by his bill. But the words, That his intention was not to give them more than one 8000*l.* apiece, exclude all double portions; therefore another question is, How this money shall go? Whether it shall be raised for the executors, in trust for the residuary legatees, or sink into the inheritance for the benefit of the plaintiff; because the power is to be executed in a reasonable manner.

Monday,

De Term. S. Hill. 1728-9.

Monday, March the 10th.

The Lord Chancellor, being assisted by Sir *Robert Raymond*, Lord Chief Justice of B. R. and Mr. Baron *Comyns*, Mr. Solicitor General opened the case again, and argued to the same effect as before.

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† *Tuesday, March the 11th.*

Mr. Lutwych.

The articles in 1695 were entered into previous to the marriage, and on a valuable consideration; and if they are not construed to restrain the power to provide portions for younger children, they will be of little or no import; and tho' it is agreed by those articles, that if *Ford Lord Grey* died before payment of the 20,000*l.* the estate charged should go to *Mary*, in satisfaction of the portion and jointure. It is not said that it should go in satisfaction of the lands to be settled, and the descent of the lands is in itself a payment, tho' Lord *Ossulston* afterwards agreed to accept 15,000*l.* from *Ralph Lord Grey* for the said portion, so that the plaintiff is plainly intitled to the benefit of these articles. The late Earl of *Tankerville* being by the will and codicil of his father, *John Lord Ossulston* tenant for life, with a remainder to his first, and every other son in tail male, and with a power to make a jointure, and provide portions for younger children, covenants by articles previous to his marriage, to settle lands of 4000*l.* a year on himself, and the issue of that marriage, and 2000*l.* a year for a jointure for his lady, and 5000*l.* apiece for the portions of younger children. If we consider these articles without any relation to the *Ossulston* estate, we are in the ordinary case; the plaintiff is a purchaser, and may come into this Court to have a specifick execution of them, and the late Earl, though he had taken no notice of his power in the articles, yet his covenant to settle a jointure, would be construed to be an execution of his power, as was adjudged in *Lady Coventry's* case; but it is hard to say, that the lands which the plaintiff holds under the will of his grand-father, shall be taken, as the lands which his late father covenants to assure; so that in consideration of marriage, and of a portion of 20,000*l.* he covenanted to settle an estate he could not hinder him of: but supposing this estate to be named in the articles, and that the late Earl designed

signed to refer to it, it falls short of the value, and is not an improvable estate, but consists in fee farm rents, which are not as valuable as other estates, because they are not capable of improvement. It is agreed by these articles, that the eldest son should have the lands subject only to 5000*l.* apiece for the portions of younger children, this covenant has abridged the late Earl's general power, and after the execution of these articles, he could no more appoint a larger provision, than he could make a sale of any part of the estate; and if the *Ossulston* estate is to be taken as a satisfaction of the covenant, this is the only thing he parted with by these articles; but supposing them out of the case, no unlimited power † will be established by a decree of this Court, [†155] if it is unreasonably executed. By the codicil it appears, that *John Lord Ossulston* designed the estate should remain in the family, and where the power is executed in such a manner as totally to defeat this intention: it is in the discretion of the court of equity to restrain it; and it appears from the articles, that the parties thereto thought 5000*l.* apiece to the younger children a good execution of the power, tho' the lady brought so great a portion. As to the answer, a Court would relieve the plaintiff against it, even after a decree, as it was obtained from him, without knowing of the articles; and by the plaintiff in that cause concealing from him what was material for him to know, for the bill was really brought by the late Earl, though in the name of the Lord *Limington*, who had assigned over the appointment to him.

Wednesday, March the 12th.

Mr. Attorney General for the defendants, Lord and Lady *Limington*, Mr. *Paulet*, and Lady *Anabella* his wife, and Mr. *Wilmer*, and Lady *Mary* his wife.

This case depends upon the codicil and articles, and may be considered under these two heads, First, Whether the articles ought to be carried into execution? And secondly, In what manner? and whether, so as to defeat the appointments for the portions of younger children? It appears from the articles, that the late Earl was unable to make a present settlement, and these articles were afterwards laid aside, and the Earl always acted without any regard to them, which is a sufficient evidence that the parties waived them, and the setting them up now may create confusion, and defeat subsequent

quent settlements. In 1681, *Ford* Lord *Grey* conveyed certain lands in trust to pay his debts, and raise 20,000*l.* for his daughter's portion, payable as he should appoint, and if it was not raised in his life-time in trust, for her and her heirs, otherwise it was to go as the settled estate at *Chillingham*.

By the marriage articles, *Ford* Lord *Grey* covenants to pay 20,000*l.* for his daughter's portion, no provision is made for the payment of the principal, but he confessed a judgment to secure the payment of the interest; and there was a proviso in the articles, that if Lord *Ossulston* died before the portion was paid, or a jointure made, the portion should not be paid to his executors, but to Lady *Ossulston*: and that if *Ford* Lord *Grey* died before the portion was paid, all the said lands should come to Lady *Mary* and her heirs in full satisfaction of her portion and jointure. The next consideration is, What has happened since these articles? *Ford* [†156] Lord *Grey* died before the † money was paid, and controversies having arose between *Ralph* Lord *Grey*, who succeeded him in the honour and estate, and *Charles* Lord *Ossulston* and his lady, in relation to the estate and incumbrances. By articles dated the 18th of *May* 1703, it was agreed, that *Ralph* Lord *Grey* should pay off the several incumbrances, and 15,000*l.* to Lord *Ossulston*, not only in satisfaction of his lady's portion, but of her right and title to the lands and premises in mortgage; and that Lord *Ossulston* should settle 100*l.* a year for every 1000*l.* This was a new agreement, and Lord and Lady *Ossulston* covenant to convey the inheritance to *Ralph* Lord *Grey* and his heirs, which shews they proceeded on the proviso that had happened, by *Ford* Lord *Grey*'s dying before the payment of the money. But allowing these articles are not waived, but are to be carried into execution, the next question is, Whether the *Ossulston* estate is to be deemed as a satisfaction of the covenant, and whether these articles shall set aside the appointments in favour of the younger children? It does not appear indeed that any lands descended in fee to the plaintiff from his father the late Earl, but his father could have hindered him from enjoying the *Ossulston* estate; for no estate being limited by the codicil to trustees to preserve the contingent remainders before a son was born, the late Earl could have barred the estate by a fine or a feoffment, and this estate comes limited to him as by the articles. The late Earl under his general power appoints a term of a thousand years for raising 8000*l.* to Lady *Limington*,
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ton, and another term of a thousand years, for raising the like portions for his other younger children. The articles are general, they recite indeed, that the *Ossulston* estate was so settled, that the Earl could not make a jointure, but then he covenants to convey lands in fee; so that this general covenant created no lien on any particular lands; where it is agreed by articles to settle particular lands, they create a lien on that particular estate, and the parties are considered in equity to have the same interest, as if the articles were actually carried into execution; but where the articles are general, the person intitled to the benefit of them, claims only as a general creditor by specialty, as was admitted in the case of *Lady Coventry*: in that case a particular power was recited, and the Earl covenanted to settle lands by virtue of his power (or otherwise) which words were adjudged to be only auxiliary; besides settlements were drawn, wherein the particular lands were described, but the Earl died before the execution of them; so these articles can no ways affect his power under the codicil, either in law or equity, which he has executed by these deeds of appointment; and consequently the appointments are good.

And if the articles do not affect or restrain this power, I shall next consider whether it is executed in a reasonable manner. It is plain, *John Lord Ossulston* designed to trust his son with † the execution of this power, and there is no [†157] instance where a court of equity has controlled such a power legally executed by a father in favour of his children, and the testator gave this power to his son, not only with a view to the *Ossulston* estate, but also with regard to any other estate he might be seized of by marriage, or otherwise, at the time of the execution of it, and was the very reason why he gave him a discretionary power; and when the late Earl executed this power, the *Grey* estate also of 3000*l.* a year was descended on the family; But this point is determined by the plaintiff's second answer, which I do not consider now as a good answer in respect of the articles, for if they were concealed from him, without doubt it shall not prejudice him as to them; but as far as the point was open and known to the plaintiff, so far it is a good answer. Now the codicil is particularly stated and set forth by the bills, and there is no proof of any imposition on the plaintiff, and he has constantly paid the interest of the portions since his father's death. The next question relates to *Lord Limington*, who claims 8000*l.* under the will of the late Earl, in which *Lady Limington*

ington is expressly named, and if he does not take by this will, he will not have a shilling out of the estate of her father, though he compounded a debt of 10,000*l.* and 9000*l.* interest, for 800*l.* so it is natural to think the late Earl her father designed her a recompence, and therefore by his will he sets up the appointment, and discharges the trust thereof for himself, in favour of Lady *Limington*; the portions are to be raised for all the younger children, and there is as full a declaration that the 8000*l.* should be raised for Lady *Limington* as for the others, but they rely on the words, *But so as not to give them more than one 8000*l.* apiece*, they show his intention, that only one 8000*l.* for every child should be charged on the estate; but this is not to be applied to the other part of the case, that Lady *Limington* shall not have the 8000*l.* because she before compounded a debt for another 8000*l.* but the words as to her are to be taken in the same sense as to the other children. If his power was well executed, the appointment was good, and the assignment over of it to the late Earl was good, and he had a power to devise it to any person, as we think he has, to Lady *Limington*.

Parol proof not allowed to be read as to the intention of the testator. Post. Cas. 157. N. B. The Court would not allow parol proof to be read, of Lord *Tankerville's* intention to give the 8000*l.* by his will to Lady *Limington*, though her counsel insisted, they might read proof of his having declared so, tho' they could not read it to charge the real estate by the will.

Mr. *Wills*.

Two objections have been made to the raising 8000*l.* apiece for the portions of the younger children, the articles of 1695, † and the unreasonableness of the sums. But the articles do not affect this question for two reasons; first, because they are at an end; and secondly, because if they are still subsisting, and the plaintiff is intitled to have them carried into execution, they create no lien on the *Ossulston* estate, but the plaintiff can have a satisfaction only out of the real and personal assets of the late Earl. The waiver of the articles depends on the words, and the subsequent facts. For Lord *Grey* died before the portion was paid, in which case the articles were not to be carried into execution, for then 1600*l.* a year would descend on Lady *Ossulston*, in lieu of her jointure, and the plaintiff would have no occasion for a settlement, for those lands would come to him by descent from his mother, and the *Ossulston* estate also, by the will of his grand-father.

grand-father. The subsequent transactions also show the articles were not in being, because the parties take no notice of them, and the articles of the 18th of *May* 1703, and the act of Parliament to confirm them, make no mention of these marriage articles, but go on another foot, for if the 15,000*l.* had been paid to make up the 20,000*l.* the late Earl would have covenanted to make a jointure for the whole 20,000*l.* and not for what he received; and though Lady *Ossulston* was executrix of *Ford* Lord *Grey*, if she had retained any assets, the value of them, as that they amounted to 5000*l.* or the like sum, would have been mentioned.

But if the articles still subsist, the plaintiff is not intitled to a satisfaction out of the *Ossulston* estate, for tho' the codicil, and the *Ossulston* estate, are taken notice of in the articles, that recital does not shew he intended to settle that estate, but rather the contrary; for the words are, That *John Lord Ossulston* had so settled the estate, that Lord *Charles* could not make a jointure, so they cannot effect this provision, which we claim not by the articles, but by the will of our grand-father.

As to the unreasonableness of the sums, the case of a trustee and a father is very unlike, and all the parties seem to allow this a reasonable provision, because they thought 5000*l.* a convenient portion when the family was possessed only of the *Ossulston* estate; and by the same rule, 8000*l.* is a reasonable provision, when the *Grey* estate came into the family; for the plaintiff by his answer confesses both estates to be 8000*l.* a year, and his answers are very consistent, for *Henry*, one of his brothers, died between his first and second answer, so that tho' he might think the sums unreasonable when he put in his first answer, yet after the death of one, he might submit to have them raised for the others.

† As to the claim of Lord *Limington*, it does not appear, [†159] that when the late Earl gave him security for his lady's portion, that he designed the appointment should be concealed, but rather that it should be kept on foot, for he might think it proper to raise the money in case any of the children died, or for other reasons, and it is plain by his will he did not design this money should sink into the inheritance, for he directs it to be raised, and has not given it to the other children, or any other person, and his intention might be

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answered, because it would be only putting her in the room of his son, who died between the marriage and the making of his will. And the words, *But not to give them more than 8000l. apiece*, are in our favour, they imply he designed all the younger children should have 8000l. a piece, therefore we must have 8000l. by the will, for we had nothing before out of the estate. And if the portions are to be 5000l. a piece, Lord *Limington* never made any agreement to bar him of this portion, because he was also ignorant of the articles, and as he has had nothing from the late Earl, the portion he received shall not be taken as a satisfaction.

Mr. Mead.

As to the question, whether the appointments are unreasonable, there is a material difference whether the younger children apply to the Court, to have a defective execution of this power supplied; in which case the Court may consider in what manner they will relieve them, or whether the owner of the inheritance comes to set aside the power, though it is well executed at law. It is necessary also to consider the time when these appointments were made. The *Grey* estate was then descended, and these appointments are in favour of the younger children of the same mother, by whom that estate came. They say we are volunteers; but it is, as I said before, a material consideration that we are not plaintiffs, nor are the younger children to be considered merely as volunteers, for Mr. *Paulet* and Mr. *Wilmer* married, and made settlements in prospect of these portions.

Mr. Fazakerley.

If the power stood singly, the only objection would be, that it is unreasonably executed, though there are no cases to warrant what the plaintiff insists on. The Lord *John Ossulston* might have given his son *Charles*, the late Earl of *Tankerville* the whole estate; why then shall the Court control the indefinite power he has given him? and the execution is not unreasonable, if it be considered only in relation to the *Ossulston* estate, the eldest son must be satisfied with the less estate, the more + younger children there are, their quality as well as circumstances must be considered. The plaintiff owns the estate to be 5000l. a year: it is probable too, that Lord *John* gave the late Earl this power, with a view to his
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having a greater estate, if the *Offulston* estate was 8000*l.* a year, no body could think the appointments unreasonable, and is it not the same thing since he has two estates of that value, and this is a provision for children.

The articles does not determine or restrain this power, because they are no lien on the *Offulston* estate. The covenant is to settle lands in fee, the articles indeed take notice of this estate, but not as of the estate that was to be settled, but as of an estate that could not be settled; and since it appears that the late Earl had it under his consideration, if he had designed to settle these lands in his covenant, to assure he would have referred to them.

Mr. Baron Comyns.

John Lord *Offulston*, by his will and codicil, devised the family estate to his son *Charles* for life, &c. with a power to make a jointure, and a provision for younger children. In 1695, *Charles* Lord *Offulston*, on a treaty of marriage with *Mary* the daughter of *Ford* Lord *Grey*, covenants to settle 4000*l.* a year in fee, and that if there was a son of that marriage, and younger children, they should have 5000*l.* apiece for their portions, and the *Grey* estate was charged with 20,000*l.* the portion of *Mary*. By articles entered into between *Ralph* Lord *Grey*, and *Charles* Lord *Offulston*, and Lady *Offulston*, Lord *Offulston* agrees to accept of 15,000*l.* in satisfaction of his lady's portion, and of her right to any of the mortgaged premises, and to settle 100*l.* a year jointure for every 1000*l.* of her portion, but these articles make no provision for younger children. Lord *Charles*, by two deeds poll, appoints 8000*l.* apiece to be raised for the portions of Lady *Bridget*, and his other younger children, out of part of the fee farm rents of the *Offulston* estate, and afterwards by his will, for a further security, and to prevent any defect in the execution of his power, the rest of the *Offulston* estate is made liable to the payment of these portions.

The first question is, Whether 4000*l.* a year are to be purchased and settled on the plaintiff? or, Whether the *Offulston* estate is to be considered as an equivalent? and I am of opinion that it ought; for it was not the intent of the articles that 8000*l.* a year should be settled, which would be the case if lands of 4000*l.* a year should be purchased, but

[+160] that the *Offulston* estate should be settled, for notice is taken of it in the articles; it is about that value, and it was in the power of + the late Earl to settle it, because no estate was limited by the codicil, to trustees to preserve the contingent remainders.

As to the next question of the portions, if it stood singly on the deeds of appointment, or the will, I am inclined to think that 8000*l.* for every younger child ought to be raised, though I allow that this Court will take care a general power be executed in a reasonable manner, but will not interpose if the execution is not apparently unreasonable.

But then another question is, if the marriage articles do not restrain this power? it cannot be denied, but a person may agree to confine himself in the execution of such a power; let us then consider if by these articles the late Earl does not limit his power to raising of 5000*l.* apiece; he plainly intended by these articles to settle 4000*l.* a year in this manner; 2000*l.* a year for the jointure of his lady, 5000*l.* apiece for younger children, and the rest of the estate on the first, and every other son in tail male; he takes care of all the children of the marriage, and if these articles had been carried into execution by a settlement of the *Offulston* estate, the late Earl could not augment or increase those portions, to the prejudice of his eldest son; for by the same rule, he might lessen or diminish them for his advantage: and when he has once executed his power, he cannot execute it again, as is resolved in 1 *Co.* in *Diggs's* case, of a power of revocation. But it is said that the articles create no particular lien on the *Offulston* estate, but I think where a man has such a general power, and he confines himself in the execution of it, that must be applied to the estate over which he has that power.

A power of revocation once executed, cannot be executed again.

The articles of the 18th of *May* 1703, seem to me only to confirm the former articles, which are recited as they could be performed at that time, and the agreement to accept 15,000*l.* in full of her portion, is no variance from the marriage articles, because as there were differences about the raising of this 20,000*l.* the rest might have been paid, or otherwise satisfied, and it does not appear that any variation was designed.

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There is another question too, whether the 5000*l.* for Lady *Limington* not being yet raised, as Lord *Limington* has agreed to take 8000*l.* in full of her marriage portion, shall go to him by the will of the late Earl, or to the executors, but this I shall speak to hereafter.

Lord Chief Justice *Raymond*.

The prayer of the bill is to have the benefit of marriage articles, and to set aside two deeds of appointment. The articles are not waived, but are to be carried into execution, and † they are not determined by the proviso of *Ford* Lord [†162] *Grey's* dying before the portion was paid; by the articles themselves it appears, that provision was made for the payment of the interest, and the principal before was charged on the estate, and by the articles in 1703 there was an agreement either for a composition, or the portion, and no other portion is mentioned, and therefore the first articles were so far carried into execution, that the interest was paid, and the principal compounded, and the composition accepted in full of her portion; and tho' it is said to be in bar of all Lady *Ossulston's* other demands, yet still it is in discharge of her portion too.

As these articles then are to be carried into execution, I think the *Ossulston* estate being permitted to come to the plaintiff, shall be taken by him as a satisfaction, and it looks as if the parties to the articles intended it, for they take notice of this estate, and that it was settled by the codicil in such a manner, that the late Earl could not make a jointure out of it, so soon as the marriage was to be had, (which was three months after) but why was that codicil recited, but with a view to that estate, out of which he could not settle a jointure till the portion was paid, and which he covenants to do on payment.

As to the portions, no doubt the power by the codicil is under the influence of this Court, to see it executed in a reasonable manner; but I do not found myself on that point, because I think the late Earl has restrained himself by the articles; for if the *Ossulston* estate is to be taken as a satisfaction of the articles, it would be strange to say, that the Earl has the same latitude of power left him over that estate he had under the codicil; no; the articles are a purchase of those lands which he covenants shall be charged only with portions of 5000*l.*

As to Lord *Limington's* demands, the late Earl of *Tankerville*, according to his power, has charged Lady *Limington's* portion on the estate, but it is not yet raised, the estate has not bore its burthen, the appointment has been reassigned by Lord *Limington*, in trust for the late Earl of *Tankerville*, his executors, administrators, and assigns. And the question is, Whether a new trust of this assignment is by the will declared for Lord *Limington*? But we shall consider further of this.

Lord Chancellor.

A Court of Equity will take care that a general power to charge an estate] † 163] with portions for younger children, is executed in a reasonable manner.

The power to provide for younger children by the codicil, was subject no doubt to the direction of this Court; but the question now is, If the late Earl has not restrained himself: It appears by the articles not to be the intention of the parties, that 4000*l.* a year should be purchased, Lord *Charles* was † then in possession of the *Ossulston* estate of that value, which would answer the articles, and they plainly refer to the codicil, and this estate; and the reason why the parties went upon articles, and that no settlement was made, was, because Lord *Ossulston* could not make a jointure till the payment of the portion. As to the power, by these articles all the children are purchasers; he has limited the estate to the eldest son, and laid on 5000*l.* apiece for the portions of younger children, and any further charge is null, and the appointments are void for so much. The articles are not waived, but by the plain intention of the parties are still subsisting; I question if they could be waived, supposing the proviso had happened, must the eldest son have nothing at all, because a greater estate descended to the mother.

Lord *Limington* agrees to accept of 8000*l.* and the assignment is made over, in trust, for the late Earl, so the estate not having bore its burthen, this money must be raised *prima facie* for his executors; but the question is, If the will does not amount to a devise of the trust? and then Lady *Limington* will take as a legatee, and must be paid after creditors; but let this point be spoke to on *Friday*.

Friday,

De Term. S. Hill. 1728-9.

Friday, March the 11th.

Mr. Solicitor General for the defendant *Charles Bennet*,
commonly called Lord *Offulston*.

The will of the late Earl of *Tankerville* takes notice of the appointment for Lady *Limington*'s portion, but not that it had been reassigned for his benefit, and that there might be a defect in the execution of his power, or that the fee-farm rents might not be sufficient, and to supply any such defect, or want of value, and for the speedier raising the portions, he devises all the *Offulston* estate, &c. the will makes no variation of the right of the parties, but is rather a confirmation, and there appears no intention in Earl *Tankerville* by this will to transfer any right, or to give a new right; and if the security proved sufficient, and the power was well executed, nothing passed by the will, and the words, *But so as not to give them more than 8000l. apiece*, were put in to evidence his intention, and to avoid the present question, because Lord *Limington* had accepted 8000l. in full of his lady's portion. But it is objected, that the word *Give* shews his intention to give them something by this will; no; he does not design to give them any thing by the will, or to introduce a new devise, but to confirm what was already given, and uses no devising words. The assignment in trust for the late Earl was a secret, at least his will makes it so, and if he had designed to renounce the benefit of this trust, it is not to be supposed † but that he would have used words to that purpose; so that when this 8000l. is raised, Lord *Limington* will stand a trustee for the executors of the late Earl, and it must go into the personal estate, for the benefit of the residuary legatees. [†164]

Mr. Attorney General for the defendants, Lord and Lady
Limington.

The late Earl of *Tankerville*, by the assignment to Sir *James Mifson*, was undoubtedly intitled to the benefit of the appointment of the portion of Lady *Limington*, and to have it raised, either for his own benefit, or for those to whom he should dispose of it; and the question is, Whether he has devised it to Lady *Limington*? It is admitted, he did not advance a shilling for her portion, but compounded a debt of 10,000l. and 9000l. interest for 8000l. this therefore
went

went to increase his personal estate, and it is to be presumed that in honour and justice he would put her on the same foot with her other sisters, and therefore the words shall have this construction put on them, if they are capable of it, as we think they plainly are.

The will recites the appointments he had made in execution of his power; it does not take notice indeed of the assignment to Sir *James Mifson*, not because it was a secret in the family, for that does not appear; or that he would make it a secret by his will, for what purpose would that serve, when at his death it would appear, but because he designed to take no benefit by it, he says, that in execution of his power by the codicil, he charges the whole estate with the payment of 8000*l.* to his daughter *Wallop*, and his other younger children. Suppose then the former execution to be defective, is not this a new execution of his power, expressly in favour of Lady *Limington*, and it is mentioned to be for her, in the same manner and form of words as for the other younger children, and therefore the testator shall be supposed to mean the same thing by the same words; he limits by the will a new term of two thousand years, this is a new legal estate, and a new trust is created for the benefit of Lady *Limington*, the sums are to be levied and raised for the benefit of his four younger children, and he makes no distinction between them, and the words are as plain as if he had said for the benefit of his four younger children, which would have admitted of no dispute. The words, *But not to give them more than 8000*l.* apiece*, shew, that he intended to charge the estate but with one 8000*l.* not that he did not design to devise this 8000*l.* to Lady *Limington*, because she had received 8000*l.* composition money for a debt, and they cannot be taken in this sense in respect of Lady *Limington*, because they are equally applied to all the children, and the dispute in question is not, Whether two 800*l.* shall be raised, but to whom the [+165] trust of one belongs? and those words shew † he designed to give them something, and only manifest his intention, that they should not have two 8000*l.* by his gift, he had given Lady *Limington* nothing before.

Mr. Fazakerly.

By the express words of the will, the trustees are to levy and raise 800*l.* to his four younger children, so that he has explicitly

explicitly declared the trust to be for their benefit, and he says afterwards, It being his intention that the portions should be raised for the benefit of his four younger children; so that to say he designed three of these sums for his younger children, and the fourth for his executors, is saying directly contrary to the words of the will, and the intention of the testator, and he had not in view the 8000*l.* he had paid Lady *Limington*, but only the sums he had charged.

Mr. Baron *Comyns*.

Lord *Limington*, previous to his marriage with Lady *Bridget*, one of the daughters of the late Earl of *Tankerville*, agrees to accept 8000*l.* in full of her portion, and to shew that he did not expect any advantage from the sums to be raised for younger children's portions, pursuant to the power of the late Earl, he assigns all the benefit he might claim thereby to the said Earl: When the Earl made his will, it was certainly in his power to have relinquished this advantage, but the question is, Whether the words are clear to give the 8000*l.* to Lady *Limington*? And from the construction of the whole will, I think they are not; the recitals do not shew any such intention, and it is plain by the directions, that he designed this will only to supply any defect in the power, or value of the fee farm rents; this is his design in express words, and it is hard, by an implied construction, to put a different meaning on them: it is objected, that when he creates new terms of 2000 years, he says the trust of those terms is to raise portions for his four younger children; so doubtless it was, he designed the portion of Lady *Bridget* should be raised as well as the other portions; and it cannot be intended from the words, that these portions should be disposed of in any other manner, than if they had been raised by a decree, or otherwise, and then they who had transferred their right, would have held them in trust for those to whom they had assigned them, the testator could not well have expressed himself otherwise; but he does not say how the money, when raised, is to be disposed, but leaves that to be explained by former agreements. He had made appointments, not only for raising the portion of Lady *Limington*, but of the other younger children, and recites both appointments in his will, and his intention was, that the estate devised should be only an additional security. It is † said that by the words, *But not to give them more than 8000*l.** [1166]
apiece,

Term. S. Hill. 1728-9.

apiece, it is plain he designed to give them something, but I cannot see the inference, he gives nothing by way of devise, but uses those words to exclude any construction that he designed by those new terms, to give more than he had by former appointments.

Lord Chief Justice *Raymond*.

I am of the same opinion with Mr. Baron *Comyns* : There can be no doubt as it stands on the assignment ; for Lord *Limington* has declared himself satisfied, and assigned over the appointment in trust for the late Earl of *Tankerville* ; but the question is, Whether the will gives this trust back again ? and we cannot by implication suppose so, contrary to the express words, the will recites the codicil and the appointments, and lest there should be any defect in the execution of his power, or that the appointment should not be sufficient, he charges all his estate with the portions of his younger children, and vests a term of two thousand years in trustees, for the speedy and easy raising of the said portions, that were to be raised by the appointments : and he says after, that they were to be a further security for the said portions, as to the words, *But not to give them more than 8000l. apiece*, he makes himself the giver by the appointments, and declares he designs to give them no more ; and this he had already given to Lord *Limington*, and the words are strongly against him.

Lord Chancellor.

Lord *Limington* certainly made a disadvantageous bargain, his lady was intitled to 10,000*l.* and interest, and he was not unapprized of her right, because it is recited in his marriage articles ; and he covenants to release it, and to accept 8000*l.* in full of her portion, and afterwards he executes a release and assigns the deed of appointment for raising the money to Sir *James Misson*, for the benefit of the late Earl of *Tankerville* ; but the money must be raised in the name of Lady *Limington*, and she will be a trustee for the Earl : but the question is, Whether she is now a trustee for his executors ; or whether he has devised the trust to her ? he certainly has not in plain express words ; so that his intention must be made out by implication, which can never oust an express declaration. The plain intent of his will was, lest there
should

should be any defect in the execution of his power, or the security, he charges all the estate with a new term, which was not in all events to be liable; but if the fee farm rents were not sufficient. then to raise the portions, or so much as they would not raise, his intention was to raise the sums charged by the appointments. Then come the negative words, + *But not to give them more than 8000l. apiece*, to shew his intention not to give the children more, therefore since Lady *Limington* has received 8000l. and the will says she is to have no more, we cannot construe it otherwise; so her portion being assigned to the late Earl of *Tankerville*, must go to his executors when it is raised.

Mr. *Peere Williams* for the defendants, the younger children.

The late Earl having devised 8000l. apiece to his younger children, and your lordship having determined he had a power to charge the estate with 5000l. only, the residue ought to be made good out of his personal estate. If one grants an annuity out of his manor of *Dale*, and has no such manor, yet the person of the grantor will be liable to the annuity. Children are considered as creditors, and defective surrenders are frequently made good by a court of equity for their benefit. In the case of *Savil* and *Blackett*, decreed in 1722, lands were settled in trust to the use of *A* for ninety nine years, if he should so long live, remainder to trustees to preserve contingent remainders, remainder to his first, and every other son in tail male, remainder over, with a power to *A*, to charge the estate with portions for his younger children: *A*, the trustees, and his eldest son, join in a common recovery of the lands; afterwards *A* makes his will, and reciting his power, charges the estate with 1000l. for the portion of his daughter, and also devises to her 1000l. There the common recovery having extinguished his power, Lord *Macclesfield* decreed that the 1000l. charged on the estate should be paid out of the personal estate of the testator, because it was the case of a daughter; and that it appeared by the will he designed she should have it. In that case the father executed a power he had not, here he has executed his power further than it extends.

And *A*, having a power to charge only 5000l. apiece, the other 3000l. apiece, shall not be made good out of his personal estate, because he designed only to charge the lands, and has devised away the residue of his personal estate. If one grants an annuity out of the manor of *Dale*, and has no such manor, yet his person is liable.

A having a power to charge lands with portions for younger children, suffers a recovery, and after by will reciting his power, he charges the estate with 1000l. for the portion of his daughter, and devises her 1000l. the recovery having extinguished his power, the 1000l. charged on the lands was decreed to be paid out of his personal estate.

Lord

Lord Chancellor.

You need not labour this point; for by the will of the late Earl of *Tankerville*, it appears that these portions are only to be raised out of the lands, and the whole personal estate is devised away. The Court therefore declares, that the articles dated the 19th of *June* 1695, are subsisting and obligatory, and ought to be carried into execution; and that the *Ossulston* estate is the 4000*l.* a year intended by those articles to be settled, which being limited by the codicil of *John* Lord *Ossulston* to the plaintiff in tail male, who was in possession at the death of his father, and *Charles* the late Earl, having done no act to defeat that limitation, it is to be [†168] considered as a † performance of the articles on his part; and therefore, as to so much of the bill as prays a settlement of lands of 4000*l.* a year, on the foot of the said articles, the bill is to be dismissed: And the Court also declares, that the power given by the codicil of *John* Lord *Ossulston* to *Charles* his son, to make provisions for younger children, was restrained by the said articles to 5000*l.* apiece, and that under the deeds of appointment, and the will, 5000*l.* apiece, and no more, are to be raised for, and as, the portions of his son *Gray Bennet*, and of his daughters, *Lady Limington*, *Lady Annabella*, and *Lady Mary*, with interest from the death of the late Earl.

Thursday, May the 1st.]

D.E

Term. Pasch.

1729.

FILEWOOD & al', verſus PALMER & al'.

Mr. Attorney General for the defendants.

Caſe 86.
In Court.
Maſter of
the Rolls.
Lord Chan-
cellor.

THIS is the day for the defendants to ſhew cauſe, why an injunction ſhould not be granted. The plaintiffs, who are tenants of the manor of *Walton upon Thames*, in the county of *Surry*, have brought this bill for an injunction, to reſtrain the defendants from digging clay to make bricks, from cutting down the furze, and hindering them from their right of paſture in the waſte of the ſaid manor, and from incloſing the common fields. The defendant Mr. *Palmer*, who is lord of the manor, granted a liſenſe to the defendant Lord *Shannon*, a tenant of the ſaid manor, to dig for brick-earth to enlarge the offices belonging to his meſſuage within the ſaid manor, under which liſenſe he has dug up about two acres of the waſte, which conſiſts of ſix thouſand; and the plaintiff's affidavits do not ſhew that ſufficient common is not left, and they inſiſt by their bill, that they have a right to dig the ſoil, and take the turf for their meſſuages, ſo that Lord *Shannon*, as a tenant, has a right alſo to the bricks, to be expended on the premiſſes.

The plaintiffs ſay, they have a right of common in the common fields, from the time the corn is taken away, 'till the lands are ſown again, and that our incloſure (which is only 1 of ten acres) is an obſtruction to this right, whereas [170] it will not take away, or prejudice it, Mr. *Palmer* has only made a ditch and a fence on the ſide of the road, to prevent the cattle entering the ſaid fields, as they paſs to and from *Suckbury Ferry*, which carries them from *Middleſex* to *Surry*, and from *Surry* to *Middleſex*, and they are open in ſeveral places for the cattle to come in.

Mr.

Mr. Wills.

The lord has certainly a liberty to make brick in the waste, if he does no injury to the tenants; and the statute of *Merton*, 20 *H. 3.* ch. 4. is in our favour, by which the lord may inclose, if he leave sufficient for the tenants, and if he may inclose, sure he may afterwards do what he pleases with the inclosure, and why may not he use the same liberty in part of the waste without inclosing, for that will be less damage to the commoners, for the grass and furze will grow again, and then they will have the benefit of them, whereas if these two acres had been inclosed, they would have lost all advantage of them.

Mr. Fazakerly.

The waste of a manor belongs to the lord, and he is intitled to every thing in it, from which he is not excluded by the custom of the manor. The plaintiffs intitle themselves to the pasture, furze, and turf, but do not swear we have not left sufficient for them, whereas they ought to have made out very clearly that they were prejudiced. The lord may exercise his dominion, and inclose, though the tenants have a right in every part of it, and if the plaintiffs had brought an action against the lord, they must shew by their declaration, that they could not enjoy the common in so ample a manner. In the northern counties, the lords greatest estates lie frequently in their wastes, and it would be the greatest injury to them, if their tenants could restrain them from digging for coals.

Mr. Solicitor General for the plaintiffs.

This bill is brought by the tenants to establish their customs, and to be quieted in the enjoyment of their common, against incroachments, and sets forth, that as well the freehold, as the copyhold tenants of the manor, have a right of turbary, pasture, and furze, and that the digging for brick by the defendants is an injury to this right, and more prejudicial, than if the lord had inclosed so much; if pits are dug in the inclosure, the damage reaches no further, but if they are dug up and down in the waste, they may prove very destructive to the tenants cattle; and these pits may be considered as a nuisance † in the waste, and the defendants ought to be restrained from digging, at least till they have put in their answers.

We

We do not desire the inclosure to be abated, but only an injunction to prevent further and future inclosures, and the lord cannot inclose, though he leaves gaps here and there for the cattle, because those are not so beneficial, as to have the fields lie open. But whatever right a lord who is owner of the inheritance has, the defendant is not such a one, but only a lessee under the grant of the Crown; so that what he is doing he has no right to do, and is injurious to the Crown, and this Court will take care that the right of the Crown shall not be prejudiced, by what means soever the right appears to them, and therefore will restrain the defendant by injunction from committing further injuries to the Crown.

Master of the Rolls.

I think the defendants have shewn good cause, why an injunction should not be granted, because it would be a prejudice to the lord, who is owner of the soil. By the statute of *Merton*, he may inclose against the tenants, and by the stat. of *Westminst.* 13 Ed. 1. ch. 46. he may approve, against those who have a right of common, if he leave sufficient; if he does not, they have a proper remedy against him at law; but the plaintiffs in their affidavits, do not swear that there is not sufficient common left. I am not satisfied that injunctions as to lands, by the course of the Court ought to be granted before answer, (unless the defendant prays time or is in contempt) only in two cases, to stay waste, because a writ of waste lies at common law, and to quiet a possession on the stat. 18 H. 6. ch. 9. where the plaintiff has been in the actual quiet and peaceable possession for three years last past before the filing the bill. And it seemed to him that this injunction could not be ranked under either of these heads, and he thought the Court should be extreme cautious in granting extraordinary injunctions before answer especially, for he remembered a case where an injunction to stay working a colliery till answer, did irreparable damage. The inclosure is a benefit, rather than an injury to the plaintiffs.

The Court grants injunctions as to lands before answer, in two cases only, to stay waste, and to quiet the possession, where the plaintiff has been three years in peaceable possession, before the filing the bill. 1 Ven. 156. Curf. Cant. 450.

Lord Chancellor.

As to the inclosure, the plaintiffs having a right of common in the common fields, only by reason of vicinage, the others have commons, only by reason of vicinage. *Co. Lit.* 122. a. 7 *Co.* 5, 4 *Co.* 38. b.

The lord may inclose lands in which
lord

lord may inclose ; but if he had no right, this inclosure is a service to the plaintiffs. But the principal question relates to the digging for bricks. If the Court should be hasty in granting + these injunctions, the lord could not open a mine, for fear the tenant should file his bill, because he has a right to the turf. The soil is the lord's, and the commoner has no right to it, or can take it away, or kill a rabbit on it, but is intitled only to the herbage, and that not exclusive of the lord (unless by custom) or in an unlimited manner, but only for the cattle levant and couchant on his tenement ; and shall the Court, before answer, restrain the lord from what is so clearly his right ? the plaintiffs may bring their action, but in this they must declare the lord has not left them sufficient common ; and he may prove and give in evidence they have sufficient, 2 *Vern* 116. there the Court was so far from granting an injunction, that the bill was dismissed, and the plaintiffs left to their remedy at law ; and therefore I allow the cause, and the order for the injunction must be discharged. 2 *Vern*. 301, 356.

[+172]
The tenants file a bill against the lord of the manor, to restrain him from digging brick-earth in the waste, in prejudice of their right of common, and on a motion before answer, the Court refused to grant an injunction, because the soil is the lord's, and the plaintiffs had not sworn that he had not left them sufficient common.

And his lordship and the Master of the Rolls agreed, that the estate of the defendant could not be taken notice of by the Court. The Master of the Rolls said, that possibly after answer, if it appeared the lord was making a very unreasonable use of his ownership of the soil, to the plain damage of the tenants, the Court might grant such an injunction as was now asked ; but he was not satisfied it ought to be granted before answer, be the case what it will.

Case 87.
At the
Rolls.

Saturday, May the 17th.

P E T I T I O N S.

ANONYMUS.

The clerk in Court may proceed here for his bill, either against the solicitor, or client, though he cannot sue the client at law for want of a retainer.

THE Clerk in Court may pray payment of his bill of costs in this Court, either against the solicitor, or the client, tho' he cannot proceed at law against the client, for want of a retainer.

Wednesday,

De Term. Pasch. 1729.

Wednesday, May the 21st.

BARRY versus EDG WORTH.

Mr. Attorney General for the plaintiff.

Cafe 88.
At the
Rolls.

THE bill is brought by Mrs. Barry, the sister of the testatrix, to have the deeds and writings brought into Court for their safe custody, she being intitled, as heir to her + sister, to the reversion of the lands devised to the defendant for life. And the single question for the judgment of the Court is, on these words of the will, 'I give and bequeath all my lands and estate in *Upper Catesby* in *Northamptonshire*, with all their appurtenants, to *William Edgworth*, Esq;'. Whether they carry a fee, or an estate for life only, I allow that the word estate carries sometimes, not only the thing itself, but all the interest the party had in it; as, where the testator devises all his real and personal estate whatsoever; and this was solemnly adjudged in the case of the Countess of *Bridgewater* versus the Duke of *Bolton*, 1 Salk. 256. Caf. 15. though till that resolution, this has been a point much doubted, and often debated; but the word estate does not always, and necessarily carry a fee, for where it is coupled only with personal things, it will extend only to them. The word estate, in this will, is but a description of the thing the testatrix designed to pass: all my estate in *Upper Catesby* is only a local description, but the legal interest cannot be said to lie there, for that is only in consideration of law; and there is a great difference between the words, All my real estate, and the words, All my real estate at such a place.

Ab. Eq. Caf.
178. S. C.

[+ 173]

A devise of
all real and
personal
estate will
pass a fee.
Modern
Caf. 106.

Mr. Robins.

In the case of *Wilkinson* versus *Merryland*, Cro. Ca. 323, the intention appeared plain to give away every thing, yet the fee did not pass. In 4 Mod. 89, *Carter* versus *Horner*, no judgment is given, which shews it was no plain case. In *Smyth* versus *Tindal*, in 1706, it was adjudged in B. R. That by the words, All my lands, tenements, and hereditaments, a fee would pass, but that construction was made in favour of a perpetual charity.

O

Mr.

Mr. Solicitor General for the defendant.

I allow that a devise of all my lands passes only an estate for life, and the counsel for the plaintiff likewise agree, that a devise of all my real estate will extend to all the interest the testator had, and if he was seized in fee, will pass the inheritance; and that there have been no variety of opinions since the case of the Countess of *Bridgewater* versus the Duke of *Bolton*, unless those words of the will are controlled by any other; but in our case there are no other words to make a variance; they say, if the word *estate* is coupled with personal things it will extend only to them; but this argument turns against them, for here the word *estate* is coupled only with lands, † which passes the thing, and the testatrix made use of these words to prevent all doubt, and to shew she intended to pass away all her interest in those lands, which she had before devised by express words. The words in *Upper Catesby* are added by way of restriction of the lands, not of her interest, for she might (for ought appears to the contrary) have other lands lying elsewhere; and 1 Mod. 100, *Wilson* versus *Robinson*, is an authority in print.

[† 174]

3 Keb. 245.
C. 64. 2
Lew. 91.
3 Mod. 45.
Styl. 281.
1 Rol. Ab.
834.

Mr. Peere Williams.

In a will, no strict legal words are requisite; but if the meaning of them is plain, they are to take effect, and no words in a will are to be rejected that can have a reasonable sense put on them. If the word *estate*, is not made use of in this will to pass a fee, it is useless, and put in to no purpose, in many of the book cases, the word may be satisfied by construing it to pass an estate for life; but this is done here by the word lands, so that it must pass the fee, or nothing. In the case of *Wilson* and *Robinson* the same objection was made to the restriction of the place as here, but was over-ruled. In the case of *Norton* versus *Lad*, 1 *Lutwych* 755, the words, I give the whole remainder of all those lands which I have given to my sister *Alice*, passed a fee; but *All my estate*, are more proper words to pass the inheritance, than my whole remainder; and the intention of the testatrix is plain; for she has given the defendant, whom she designed to marry, all her personal estate, even her wedding cloaths, and she takes notice of the plaintiff, her sister, and bequeaths her 100*l.* and I have known many cases adjudged at nisi prius, on the authority of the case of the Countess of *Bridgewater* versus the Duke of *Bolton*.

The words, whole remainder, in a will, pass a fee.

Mr.

De Term. Pasch. 1729.

Mr. Attorney General's reply.

The words, *whole remainder*, are of the same import, as remainder in fee; and the case of *Wilson and Robinson*, though it seems against us, is very distinguishable from ours, there was a particular customary interest, and the words describe and pass all that customary, or tenant right.

Master of the Rolls.

The case of the Countess of *Bridgwater* versus the Duke of *Bolton*, was often argued, and Mr. *Cowper* (afterwards Lord *Cowper*) who was of council with the Duke of *Bolton*, advised him not to bring a writ of error. It has been said that † several cases have been since adjudged accordingly at [†175] nisi prius; and I have known many decrees made in this Court on that authority. In that case many former resolutions were cited that agreed with it, and none that clashed. By that resolution, a devise of all my real estate, or of all my real estate in such a particular place, will pass the inheritance of all the lands the testator had the fee of; for according to Mr. Solicitor General's distinction, confining the words to such a place, does not restrain the interest of the devisee, but the thing; so if the testator has lands in *A* and *B*, a devise of all his estate in *B* will pass the fee.

The word *estate* primarily imports the interest a person has in any thing, but secondarily the thing itself, because it is impossible to have the interest without the thing. The words of this will plainly shew it was the testatrix her intention to pass the fee; she not only gives the thing by the word *lands*, but adds the words, *and estate*; if the words had been, *All my lands, or estate*, I am of opinion that *lands* and *estate* would have been only terms synonymous; but the word *estate* here has an additional sense, and is, as if she had devised all her lands, and all her interest in them.

The word estate, primarily signifies the interest in the thing, and secondarily, the thing itself. Q, What passes by a devise of all my lands, or estate.

By the words, I give and bequeath all my lands and estate in *Upper Cateby*, a fee passes, and the words, In *Upper Cateby*, do not restrain the interest of the devisee, but the thing, so that lands lying elsewhere will not pass.

The case of *Wilson and Robinson* does not come up to this case, for what was his tenant right, but a right to the inheritance sub modo? I have no doubt on these words; and

2 Verm. 690, 564.
1 Chan. Caf. 262, 196,

Styl. 293. 3 Mod. 45, 104, *Skew.* 348. 4 Mod. 89. *Post.* Caf. 133.

De Term. Pasch. 1729.

though it is usual on a point of law for the Court to direct a trial, or a case to be stated for the opinion of the Judges, I shall not do either in this case, but will dismiss the bill, because the plaintiff, after the death of the defendant, may bring an ejectment.

Case 89.
At the
Chancel-
lor's house.
Lord Chan-
cellor.

Friday, May the 23d.

M O T I O N S.

ANONYMUS.

If the plaintiff is in the service of a foreign envoy, he must give security to pay costs. Mr. *Lutwyche* moved that the plaintiff might give security to the senior fix Clerk, not towards the cause, to pay costs, on affidavit of his being in the service, and under the protection of the *Genoese* envoy, and produced a precedent, 8 *Ann.* made by Lord *Cowper*. And the Lord Chancellor made an order accordingly.

[+176] By the rules of the Court a dedimus is returnable the first return of the next term, but by the practice it is not returned, till the second return of *Hilary* and *Trinity* terms, because the vacations between *Michaelmas* and *Hilary*, and between *Easter* and *Trinity* terms are so short, and this practice was allowed by the Master of the Rolls.

returned till the second return of *Hilary* and *Trinity* terms.

DE

Term. S. Trin.

1729.

Monday, June the 16th.

NICHOLAS & al', verſus SOUTHWELL & al'.

Caſe 90.
In Court.
Maſter of
the Rolls.

WHERE lands are deviſed in truſt, to ſell to pay debts, Where
the creditors are ceſtuy que truſt, and may bring a bill for a lands are
ſpecifick execution of a contract, for a purchaſe of part of deviſed for
the lands, or to have the benefit of any other agreement payment of
relating to the eſtate, made by the teſtator in his life-time. debts, the
And it was decreed in this caſe, That the perſonal eſtate creditors
ſhould be applied in the firſt place for the payment of debts; a bill for
if that was not ſufficient, then the real eſtate in poſſeſſion, the execu-
tion of a
next in reverſion, then the ſpecifick legacies, and laſtly, the contract
made by the
wife's paraphernalia. teſtator, for
a ſale of part of the lands.

How the eſtate in ſuch a caſe is to be applied to pay the debts. *Nelf. Svo. Rep. in*
Canc. 179. Swinb. part 6. ſect. 7. Cro. Ca. 343, Moor 213. Caſ. 354.

Tuesday, June the 17th.

THOMAS verſus WILLIAMS.

Caſe 91.
In Court
Lord Chan-
cellor.

Mr. Attorney General for the plaintiff.

MR. *Williams* deviſed to his daughter *Gladis* 250*l.* for
her portion, and for the better ſecurity of the payment, he
deviſed all his real eſtate to the defendant *Lewellin Williams*
his ſon, and his heirs, in truſt, out of the rents and profits,
two years after his deceaſe, to pay the money, and appoint-
ed the defendant his executor. *Michael Williams*, by arti-
cles, reciting, That a marriage was ſhortly intended to be
had with † the ſaid *Gladis*, and that ſhe was intitled to 250*l.*
under the will of her father, and that her mother had
agreed

agreed to give her 250*l.* more, covenants, in consideration of the said 500*l.* to assure lands of 200*l.* a year on the issue of that marriage, and on 100*l.* a year on *Gladis* for her jointure, the marriage was had, and the mother paid the 250*l.* *Michael Williams* made his will, and appointed his wife *Gladis* executrix and residuary legatee, and having never received the 250*l.* in his life-time, it still remained the estate of *Gladis*; some time after, *Thomas* the plaintiff made his addressee to *Gladis*, and pending the courtship, she gave a receipt to the defendant her brother, whereby she acknowledges to have received 250*l.* in full of what remained unpaid as the consideration of her jointure, the marriage took effect, and *Gladis* is since dead, and this bill is brought by the plaintiff, as her administrator, to be paid the said 250*l.* out of the real and personal estate of *Williams* the father, notwithstanding the said receipt, no money being really paid to *Gladis*; but it was executed by her voluntarily, and without consideration, during a treaty of marriage with the plaintiff, and therefore according to the usual equity of the Court, must be considered as a fraud on him.

Mr. Solicitor General for the defendant.

Lewellen Williams was but seventeen years of age when his father died, so that though he proved the will, the mother managed and received all his estate. The marriage settlement was made by Mr. *Williams* a few months after the father's death, and the mother voluntarily agreed to add 250*l.* to the portion of *Gladis*, though at that time she had no fund to pay it out of, but the estate of the son. In 1720, *Michael Williams* died, and *Gladis* the wife, either in her own right, or as his representative, was certainly intitled to the 250*l.* devised to her by the will of her father. The plaintiff *Thomas* afterwards made his addressee to *Gladis*, and she gave this receipt between the courtship and the marriage, and the only question is, Whether this receipt is a sufficient discharge of the legacy in equity? or whether the Court will set it aside, as a fraud on *Gladis*, being executed by her without any consideration, or as a fraud on the plaintiff, who was then under a treaty of marriage with her? But this bill is not brought by *Thomas*, as husband during the life of the wife, though she lived three years after the marriage, but as her administrator, and therefore he can have no better title than she had, but if the coverture was still

still subsisting, neither she or the husband could say there was any fraud in this case. Courts of equity indeed have relieved in many places, where the wife's portion has been considered by the husband as subsisting, and he has made a settlement in view of it, but there is no proof that this legacy was represented to the plaintiff, or considered by him as any part of his wife's portion, or that he made her a settlement in consideration of it; on the contrary, he had only a small collector's place, and no estate, and she brought him 100*l.* a year in jointure, and 1000*l.* in money, and it was the more reasonable, that *Gladis* should give this receipt, because the mother, who advanced her the 250*l.* had no fund to raise it out of, but the brother's estate, to whom she was accountable for it; and it was but justice to her son and herself, to procure this receipt, so this receipt was given for good cause, and cannot be considered as a fraud either on *Gladis* or the plaintiff. In the case of *King* versus *Cotton*, Equity will not relieve the husband against leases made by the wife pending courtship, in trust for her children by a former husband, if he made no settlement in consideration of them. Post. Cal. 151.

Lord Chancellor.

The plaintiff claims only as administrator, and indeed he has no other title, for he is not intitled as husband, because the legacy was never reduced to possession, but I think he has no equity as husband. A mother on an advantageous offer of marriage, adds 250*l.* to the portion of her daughter, the husband dies, and his widow being greatly advanced, the mother prevails on her to return so much to her brother, A sister releases a legacy to her brother pending courtship; the husband, as her administrator, files a bill to set aside this release, as executed by his wife without a consideration during a treaty of marriage, the Court were of opinion, that this was no fraud to set aside the release, because it did not appear that the plaintiff knew she had a right to this legacy, or made her a settlement in view of it, and dismissed his bill, because he sued as administrator.

whose

De Term. S. Trin. 1729.

whose money indeed it was, and to execute this release, before she threw herself away on the plaintiff: Why should I set it aside? It does not appear that the husband ever inquired after this legacy. Suppose she had been pleased to release to a stranger a sum of money she was intitled to as administratrix, I do not see why I should relieve against such a release; and therefore the bill must be dismissed.

Case 92.
At the
Rolls.

Thursday, June the 19th.

CLEAVER & ux', versus SPURLING.

[+180] THE father of Mrs. *Cleaver*, a freeman of *London*, made his will, and thereby recites, That whereas he had no child but Mrs. *Cleaver*, whom he had fully advanced on her marriage, he had a power to dispose of his whole personal estate, † which he therefore devises as *per will*; the testator dies, and the plaintiff's file this bill against the executor, for an account of the personal estate: and the question is, Whether Mrs. *Spurling* is intitled to her orphanage share? or whether this declaration in the will shall bar her?

Master of the Rolls.

A child
fully ad-
vanced is
barred from
her custom-
ary share.

I am of opinion that the daughter being married with the father's consent, and the husband having admitted in his bill, that he received 100*l.* portion, and it being in proof, that the father portioned all his daughters on their marriage, though the witnesses did not know what the portions amounted to, especially, the marriage being about forty years ago, together with the declaration in the will, is a sufficient evidence, that the daughter was fully advanced, and is the best evidence the executor can give; now the father is dead, and the husband is a party, and this advancement will bar her of her orphanage part, and I found myself on the writ, *de rationabili parte bonorum*, Regist. 142, b, which is a topical writ, and lies in *Wales*, *York*, and *London*, where the children by the custom, are intitled to an orphanage share, and the words of the writ are, *Qui in vita patrum suorum non promoti fuerunt*, and it is said, the custom is the same in all these places, so that the writ lies only for children unadvanced, and therefore advancement is a bar: and the supposition is, that the child is fully advanced if the sum does not appear. In *London* a child advanced, whether she is a sole orphan, or whether

whether there are more children, shall be let into her orphanage portion, if it appears under the freeman's hand, that she was not fully advanced, but if the certainty does not appear in that manner, it is presumed that she was fully advanced, and I never knew an inquiry directed by this Court, what the child received, but it must appear under the father's hand; for how could such an inquiry be practicable after the death of the father, when it is the interest of the child to suppress the truth. The case of *Dane versus De la Warre*, 2 Vern. 628, was several times before the Court; there the father had entered the sums advanced by him in his books of account, and upon the Master's taking an account, the advancement appeared not to be equal to a third part of the freeman's estate; but if on the inquiry, it had come out to be equal, or more, it would have barred her. In the case of *Chase & ux', versus the executors of Sir Ralph Box*, Sir Ralph Box, in order to bar his daughter of her orphanage share, who had married the plaintiff without his consent, by the advice of Serjeant Pemberton, which was taken from 12 Co. 113, he declared by his will, that he had fully advanced his daughter in marriage, and mentioned the sum, † which upon an account before the Master, being found not to be a full advancement, she was admitted to her orphan part, by the very means her father proposed to have barred her of it. And it is no objection here, that if the father's will shall be taken as an evidence of the advancement, the child will be at the mercy of the parent, because there is other concurrent evidence to confirm it.

And a child advanced, is presumed to be fully advanced, if the sums do not appear under the father's hand.

[† 181]
But if they do, and are not equal to her customary share, they will be no bar, tho' the father declares her to be fully advanced.

1 Vern. 61, 88, 216, 181. 2 Chan. Caf. 119, 129, 160. 1 Salk. 426. Co. Lit. 176, b.

Mr. Peere Williams for the defendant.

' The testator gave his daughter the plaintiff a legacy of
' thirty-five pounds, in case she or her husband should not
' sue, molest, or trouble his executor for her customary
' share, but do or shall upon payment or tender of the said
' legacy, execute a good and sufficient release thereof; and
' in case they or any of them shall sue or refuse or neglect
' such payment or release, then he devised it over to another.'
This bill is plainly a breach of one word of the condition, which cannot be construed to be in terrorem, because of the devise over.

Master

De Term. S. Trin. 1729.

Master of the Rolls.

If a legacy is devised to a person, who is intitled to a share by the custom of London, on condition they do not sue the executor for that share, a bill against the executor for an account of the personal estate is no breach of

the condition, because the legatee has a right to inquire whether his legacy or share is of most value, which cannot appear till the account is taken. But if the legatee is barred of their customary share, such a bill will be a forfeiture, because the inquiry is needless, and the Court cannot relieve against it, if the legacy is devised over.

In the case of *Clare versus Acmooty*, the testator gave a legacy to his wife, on condition she should not trouble his executor, or sue or molest him for her widow's share. She filed a bill against the executor for an account of the personal estate of her husband, and this was adjudged to be no forfeiture of her legacy, because she had a right to inquire whether her legacy or her customary share was of most value, which could not appear 'till the Master had taken an account, but here such an inquiry is unnecessary, for the plaintiff is barred of her customary share by a full advancement from her father, and so has no election. And the legacy being devised over, the Court can give the plaintiffs no relief, because it cannot mitigate the condition as to them, without injuring the right of the other; and therefore I am of opinion that the plaintiff has forfeited this legacy.

[†182]
Case 93.
In Court.
Lord Chancellor.

† Saturday, June the 21st.

R E H E A R I N G S.

GREEN versus ROD.

Mr. Solicitor General for the plaintiffs.

‘ MR. *Darley* made his will, and thereby devised, *inter al'* all the rest and residue of his goods, chattels, money, debts, plate, corn, grain, and implements of husbandry to his sister *Mary*, whom he made sole executrix of his will: But he declared, that his will and meaning was, that his goods, household-stuff, and implements of husbandry, and the farm in which he lived, for the remainder of the term, should be let and disposed of, and that the money arising thereby, should be put to interest for the use of his sister *Mary*, and if she died without issue, the money so put out, was to be equally divided between his sisters *Teresa* and *Frances*, after the decease of *Mary*, in manner as aforesaid.’ The testator died, *Mary* intermarried with the defendant, and is since dead without issue, and the single question

question is, Whether the limitation over to *Teresa* and *Frances* is good? and I think it is; for the limitation over of a personalty on a contingency, to arise within a life, is allowed; the time of going over is after the death of *Mary*, and the will is to the same effect, as if the words had been, after the death of *Mary*, without issue living at the time of her death; and is the same with the case of *Pinbury* versus *Elkin*, 2 Vern. 758, 766. I devise to my wife *Hester*, all my lands, and tenements, money, cloaths and yarn, to be freely by her possessed and enjoyed, provided, if she die without issue by me, that then Sol. shall remain to my brother after her decease, and made his wife executrix. And Lord *Macclesfield* adjudged the limitation over the Sol. to be good, and said, that the words, dying without issue, in case of a devise of lands were construed to create an estate tail, to support the remainders over; but why should they be taken in that sense in the case of a personal estate, to destroy the remainder over, since the common acceptance of the words, dying without issue, is, if the party never has any children; or if they die in their life-time. Here *Mary* is made executrix, and it is plain she is not to take this legacy in that right, because it is given her for life, and therefore the remainder after her decease, (if the limitation over is not good) will belong to us, as the next of kin of the testator.

I devise to my wife all my lands, money, &c. to be freely by her possessed and enjoyed, provided, if she die without issue by me, that then Sol. shall remain to my brother after her decease, the limitation over of the Sol. is good. [+183]

Mr. Attorney General for the defendant.

If the words, *If she died without issue*, stood single, it is allowed the limitation over would be void, because the word issue will take in all the issues; but it is said, that the following words, *After the decease of Mary in manner as aforesaid*, shew the meaning of the former to be, if she died without issue living at the time of her death, but if the former words are to be understood of dying without issue generally, these latter words must have the same sense too, for they must be taken with reference to the former; so they make no alteration in the devise, but the will must be construed in the same manner as if they were away. And these words, *in manner as aforesaid*, distinguish this case from *Pinbury* versus *Elkin*. In the case of *Forth* versus *Chapman*, the contingency was, *If he die, or shall depart this life, and leave no issue*, those words import, a dying without issue living at the time of his death, yet the present Master of the Rolls adjudged the limitation over to be void, but his decree was reversed on appeal.

A personal estate may be limited over on this contingency, if he die, or shall depart this life, and leave no issue.

The second appeal by the Lord Macclesfield: and this bill is brought for point in the case is, an account against the husband, though he never administered whether the to the wife, and it does not appear that any of the effects, or legacy is the money raised by the sale of them, came to his hands. not lapsed

by the death of the legatee before the contingency happened. *Swinburn* is of opinion that it is, but that author (tho' generally clear) is so perplexed on that head, pag. 313. and the resolution in 2 *Ventr.* 347. which is subsequent in time, being contrary, on considering both, I think, that notwithstanding *Swinburn's* opinion, the legacy in this case is not lapsed, but is transmissible, notwithstanding the death of the brother before the wife.

Lord Chancellor.

A decree has been made against the defendant by default. The plaintiffs might as well file their bill against a stranger, and though they have taken out administration, de bonis non, &c. of Mr. *Darley*, and so may inquire after his assets, into whosoever hands they are come; yet, as they principally claim the benefit of the devise over, how can they have an account without making the representative of *Mary* a party, to see what debts and legacies have been paid, for it is only part of the residue that is devised over; and if *Mary* has wasted the estate, the husband is not liable to a devastavit, but as her representative.

A personal estate may be limited over after a particular dying without issue, but not after a dying without issue generally.

As to the devise over, a personal estate cannot be limited over after a dying without issue generally, but may after a particular dying without issue, viz. living at the time of their death.

[+184] + The first devise to the sister is general, and she is made executrix, if the will stopped here, it would amount to an absolute devise of the whole to her; but then the testator goes on, And my will and meaning is, &c. for the use of my sister *Mary*; he does not say, for her life; and by these words too she has an absolute property: But then the will says, And if she die without issue, (not living at her death, but generally) then, &c. in manner as aforesaid: so the devise over is after an estate tail, and therefore the bill must be dismissed on the whole matter.

after the decease of *Mary*, in manner as aforesaid, the limitation over to the sisters, being after an estate tail is void. 2 *Vern.* 38, 59, 86, 245, 324, 331, 151. 1 *Vern.* 461. 1 *Chan. Caf.* 129, 131, 229. 2 *Chan. Caf.* 209. 1 *Vern.* 234, 257, 304. *Cro. Ju.* 459. Sir *Wm. Jon.* 13. 2 *Roll. Rep.* 129. *Palm.* 48, *Caf.* 333. 1 *Roll. Ab.* 613, 60, cited in Sir *Wm. Jon.* 15, denied to be law in *Lamb and Archer's case*, 1 *Salk.* 225. *Cro. Ca.* 230, 343. *Dyer*, 358. b. *Caf.* 7. 2 *Bulf.* 28. *Pleas.* 519, 53. 8 *Co.* 94. *Godb.* 26. 3 *Leo.* 89. 1 *Anders.* 61. 1 *Roll. Ab.* 611, 612. *Nelf. Fol. Rep.* in *Canc.* 98, 279, 181, 116. *Post. Caf.* 99. *Caf.* 100. 1 *Mod.* 114. 1 *Sid.* 37, 451. 1 *Lev.* 25, 290. 3 *Lev.* 22, 264. 1 *Mod.* 50. 1 *Ventr.* 279. *Bro. tit. Dev.* pl. 13. *March* 106. *Own.* 33. 37 *H.* 6. 30.

If

De Term. S. Trin. 1729.

If an issue is directed, and the defendant's answer is not falsified, or, by the one witness only, the Court often orders it to be read on the trial.

On an issue, the Court often orders the answer to be read

at the trial, if it is not falsified, or but by one witness. 2 Chan. Caf. 8. 3 Chan. Caf. 123. 2 Vern. 555, 283. 1 Vern. 161, 137.

Saturday, June the 28th.

Cafe 94.
At the
Rolls.

CRAY versus WILLIS.

Mr. Lutwych.

MRS. Cray devised all the residue of her estate to her son Samuel, and her daughter Hannah, their executors and administrators for ever, and made them executors. Mrs. Cray died, and afterwards Hannah died, and the question is, Whether on her death the whole survives to Samuel? The residue is left to them generally. In the case of Taylor versus Shore, Sir Tho. Jon. 161, the testatrix devised the residue to the disposal of her executrix, and Sir John Shore her brother, the executrix died, and it was adjudged that this being a legacy did not survive to the brother, and the same decree was made in the case of Cox and Quantock. 1 Chan. Caf. 238.

N. B. In 1 Vern. 482, it is said, that it was decreed in

the case of Cox versus Quantock, that the administrator should not have an account against the survivor, and it is so reported in Nelf. Fol. Rep. in Canc. 176. 1 Lev. 164.

Master of the Rolls.

The testatrix devises the remainder of all her goods and chattels to her son and her daughter, their executors and administrators for ever, both their executors cannot take, unless † they are tenants in common, but the will means, the [† 185] executors or administrators of the survivor. A joint devise or legacy always survives, if there are not some words to create a severance, or tenancy in common.

I devise all the residue of my estate to my son and daughter their executors and administrators, this is

a joint devise, and if one dies, the whole survives to the other. Cartr. 2. 1 Salk. 838. Shower 91.

If a legacy is given to two, and one dies in the life-time of the testator, his share is not lapsed, but survives to the other, and therefore in this case the whole residue survives to Samuel.

If a legacy is given to two, and one dies in the life time of the testator, his le-

gacy is not lapsed, but survives to the other. 1 Vern. 425. Calth. 3, 4, 5. 2 Chan. Caf. 64. 2 Vern. 514. 1 Vern. 482. and it is there said, that in the case of Cox and Quantock, it was decreed, That the administrator should not have an account against the survivor, and it is so reported in Nelf. Fol. Rep. in Canc. 176, Carth. 15. 2 Lev. 209.

ANON

ANONYMUS.

Case 95.

At the

Rolls.

Eodem die.

If a cause

comes to a

hearing on

a bill of dis-

covery, it

must be

struck out

of the

paper, and

the bill cannot be dismissed, because it prays no relief.

A cause being brought to a hearing, where the bill was for a discovery only, the question was, Whether the bill should be dismissed, or the cause struck out of the paper? And his Honour the Master of the Rolls ordered the cause to be struck out of the paper, because a bill is never dismissed, where the plaintiff prays no relief; for the words of a dismissal are, The Court seeing no cause to relieve, &c.

Case 96.

At the

Rolls.

Monday, June the 30th.

WILSON versus NORTH.

A legacy to THE testator devises 100*l.* to *A.* to buy mourning for *A* to buy himself, his wife and children, *A* dies in the life-time of the mourning testator, his legacy is lapsed. 2 *Vern.* 116, 466. for himself, his wife, and children, if *A* dies in the life-time of the testator, is lapsed.

Case 97.

At the

Rolls.

PEGG versus GREEN.

Eodem die.

THE plaintiff on settling accounts with the defendant's testator, gave him a bond for the balance, and they had afterwards other dealings, and the plaintiff brought this bill against his executor, and insisted that the bond should be discounted out of the money, he afterwards gave the testator credit for.

Master of the Rolls.

[†186] The plaintiff cannot set off the credit he gave the testator after the execution of the bond, in discharge of the † bond, but if mutual credit has been given since, one side of the account is to be set off against the other, and such decrees have been often made in this Court. The plaintiff, by giving the bond, has changed the nature of the debt, and taken from himself the advantage of setting it off by future credit, equity, but if a balance is struck in the life-time of the testator, or a bond given for it, the debtor cannot discount it out of the subsequent credit he has given the testator, unless the executor admits assets. *Nelf.* 8vo. Rep. in Canc. 158. 2 *Vern.* 117.

and

and to make such a decree might be compelling the executor to commit a devastavit, unless he admits assets, and I doubt if I could do it, if the account had been only stated, for then debt would lie for the balance, or an infimul computasset. The Master therefore must see what is due for principal, interest, and costs on the bond; and as to the plaintiff's demand for work done, or goods delivered, since the execution of the bond, the defendant must account for the assets, and the plaintiff is to be paid in a course of administration.

Thursday, July the 3d.

HALSEY *versus* SMYTH.

Cafe 98.
At the
Chancel-
lor's house
Lord Chan-
cellor.

THIS cause coming to be heard, and the bill and answer opened, was referred to arbitrators, but nothing being done on the reference, it came on again to be heard this day, and the defendant making default, the question was, Whether the Court should make an absolute decree, or *ex parte*? and Mr. *Lutwyche* for the plaintiff insisted, that decrees *ex parte*, are only made, where the defendants make default on affidavit of service, and reading a piece of the answer, but that a decree *ex parte* was never made, where the bill and answer had been opened, and the cause adjourned over, and that this hearing was to be considered as a continuation of the former hearing, when the defendants did appear. And the Register being consulted, and of the same opinion, the Lord Chancellor pronounced an absolute decree.

A decree *ex parte* is made, on default of the defendant reading the affidavit of service, and a piece of the answer.

But if a cause is heard, and the bill and answer opened, and then is adjourned, tho' the defendant make default at the next hearing, the decree shall be absolute, for the second hearing is to be considered as a continuation of the former, when he did appear.

BALGUY *versus* HAMILTON.

Cafe 99.
At the
Chancel-
lor's house.
Lord Chan-
cellor.
Eodem die.

MR. *Hamilton* by his will directed that his personal estate should be sold, and turned into money, and put out at interest, that his wife *Ann* should have 30*l.* a year out of the produce of it, and that when, and so soon as his only daughter and child *Ann* should attain her age of twenty-one years, that then his wife should have 25*l. per annum*, instead of the 30*l.* Then the will goes on, *Item*, I give and bequeath to my daughter *Ann* all my personal + estate [+187] whatsoever, she paying the said 30*l.* a year, and the lega-
cies

‘cies therein bequeathed, and I make my wife her guardian,
‘and she is to receive the residue of the interest, maintain-
‘ing my daughter thereout; but if my said daughter die
‘before her age of twenty-one years, then my will is, that
‘my wife shall have 400*l.* and that on payment of the same
‘she shall give a discharge for her said annuity, and that then,
‘and immediately from and after my said daughter’s decease
‘without issue of her body, I give and devise all my per-
‘sonal estate to my brother *James Hamilton*, he paying the
‘said sum of 400*l.* to my wife, if then living.’ The testa-
tor died, and *Ann* the daughter died an infant without issue,
and the wife is since dead, and the only question is, Whether
the devise over to the brother is good; or, whether the whole
personal estate vested in the daughter, and on her death shall
go in a course of distribution to her next of kin?

Mr. Solicitor General for the defendant.

The first disposition to the wife of the 400*l.* is indisputably
good, and the words, *And that then and immediately, &c.* are
plainly relative to the preceding words, and as the devise to
the brother is introduced with those words, so it is finished
with the preceding burthen of 400*l.* with this addition, *If*
the wife be then living: And there can be no doubt on the
whole clause, but that the testator meant, if she died with-
out issue before twenty-one, and not if she died without issue
indefinitely, and so the limitation over is good, and the case
of *Martin versus Long*, 2 *Vern.* 151. is an authority in
point.

Lord Chancellor.

Ant. 182. The only question is, Whether the devise over is good?
A devise of a personalty after a dying without issue is cer-
tainly void, and it is as certainly good after a dying without
issue in a limited time; now the words of this will can bear
no other construction, but if the daughter die without issue
before twenty-one; First, the whole estate is devised to the
daughter, and the whole interest to the wife, part as an
annuity for herself, and part for the daughter’s maintenance,
the first contingency is general, if she die before twenty-one
years of age, the wife is to have 400*l.* but who is to pay this
Ant if my daughter die before 21, then
my will is that my wife shall have 400*l.* and that then, and immediately from and after
my said daughter’s decease, without issue of her body, I give all my personal estate to my
brother, he paying the said sum of 400*l.* to my wife, if then living, this, in effect, is a
devise over to the brother, if the daughter die without issue before 21, and therefore is
good.

400*l.*?

400? the brother; so that the latter words must have the same construction, and the will is to this purpose, If my daughter die without issue before twenty-one, my brother is to have the whole estate, he paying my wife 400*l*. The wife is to have the 400*l*. if the daughter die under twenty-one, and the brother being to pay it, if she die without issue, † the estate must come to him at the same time, as a fund out of which it is to be paid.

[† 188]
Ant. Caf. 93.
Post. Caf.
100.

Friday, July the 11th.

APPEALS AND REHEARINGS.

BROOKS versus TAYLOR.

Cafe 100.
At the
Chancel-
lor's house.
Lord Chan-
cellor.

By an order of the Lord Chancellor, this case was stated for the opinion of the Judges of the King's Bench.

JOHN Brooks made his will in the words following, ' I give to my dear wife all my personal estate, with this condition, to give to my three sisters five pounds yearly, for their lives, or the longest liver, presently after my decease, and after my wife's decease, the same I give to my daughter Mary, wife of Mr. Taylor, with the same obligations to my sisters, and then, after my daughter's decease, to the fruit of her body; but for want of such issue or fruit, to my brother and sisters then living, and after them, to their children, and the children of my brother.' Quære, Whether the subsequent limitations, after want of issue of the said daughter's body, or any, and which of them, (the wife and daughter of the said John Brooks being dead without issue) are good, and to whom the estate belongs?

And the Judges certified their opinion in these words,

We are of opinion, that John Brooks being dead, and Mary his daughter being also dead without issue living at her death, the subsequent limitations are good, and that the estate in question belongs to the plaintiffs. And this cause coming now to be reheard, the Lord Chancellor upon this certificate, decreed the estate to the plaintiffs.

I give to
my wife all
my personal
estate,
and after
her decease
to my
daughter
Mary, and

then after her decease to the fruit of her body, but for want of such issue or fruit, to my brother; the limitation to the brother is on the contingency that Mary die without issue living at her death, and therefore is good. Ant. Caf. 93. Post Caf. 99.

P

By

Acts of the Court as a decree, or order, in another cause between the same parties, may be read without an order.

By the constant practice of the Court, acts of the Court, as a decree or order, in another cause between the same parties, may be read without an order.

[1189]

Cause 101.
At the
Chancel-
lor's house.
Lord Chan-
cellor.

† Saturday, July the 12th.

APPEALS AND REHEARINGS.

RAKESTRAW & al' versus BRUYER.

Mr. Attorney General for the defendant.

Sel. Caf. in
Canc. 55.
S. C.

THIS bill is brought by the plaintiffs and their wives, the daughters of the late Mr. *Holford* deceased, to redeem three sets of chambers in *Gray's Inn*, for an account of the profits, and the benefit of a renewal of the term. And the chief question is, Whether this estate is redeemable? Mr. *Holford* in 1687 mortgaged these chambers for 600*l.* to Mr. *Atwood*, and in 1700 the mortgage was assigned to the defendant Mr. *Bruyer*, but Mr. *Holford* not being a party to that assignment, it was not in the nature of a new mortgage. On the 25th of November 1700, Mr. *Bruyer* applied to the Benchers at a pension, for relief: and on the 27th, they made an order that Mr. *Holford* should account, and pay what was due on the said mortgage, or they would proceed against him as they saw cause; and another order was made with the consent of Mr. *Holford*, whereby it was ordered that Mr. *Holford* should pay off the principal and interest, and the duties of the house, and Mr. *Bruyer* assign the mortgage, or that he should deliver possession of the chambers: Mr. *Holford* did not pay the money, but in 1704 delivered possession only of two of the sets of chambers, and continued in possession of the other till the time of his death in 1708, the plaintiffs did not prove his will till the year 1724, though they came of age in 1714, which prevented us from bringing a bill of foreclosure against the representatives of Mr. *Holford*: In 1723 Mr. *Bruyer* obtained a renewal from the house, upon which in 1726 the plaintiffs file this bill; but we think the length of time is a bar to their title, the order of pension to deliver possession was in 1700, and possession of two chambers was accordingly delivered in 1704, so that from that time to the filing of the bill we were two and twenty years in quiet

quiet possession; and the time being begun in the father's lifetime, will run upon the plaintiffs, though they were infants, and if this Court will dismiss the mortgagor's bill to redeem the fee, if the mortgagee has been in quiet possession for twenty years, though the equity of redemption is as valuable at the end of those years as at the beginning, it will much sooner do it, where a term only, which is a wasting security, is mortgaged: after such a length of time, † and the death [†190] of the parties, it is difficult to make up a strict account, to set out the losses by tenants, and a mortgagee is not to be made a bailiff for ever to the mortgagor. The other chambers he died in possession of, may perhaps admit of another consideration, but they are not worth redeeming, because we have not renewed the lease of them, and these bills are not allowed by Courts of equity, to interrupt the repose and ease of these societies of law; and though the Benchers in this case have consented to give up their right, as an ejectment, or a bill of foreclosure will not lie for these chambers, so neither will a bill to redeem, for the remedy ought to be mutual. A bill of foreclosure is to bar the mortgagor of all right in equity to the estate, which by law is already in the mortgagee; but the legal estate of these chambers is in the society, and the Benchers who grant them out, are only their trustees.

But allowing the plaintiffs may redeem, they are not intitled to the benefit of the renewal, for where a renewable lease is mortgaged, and the mortgagee renews, the only foundation the Court has gone upon to give the mortgagor the benefit of this renewal, is the tenant right; but the chambers here were not renewed to *Bruyer* as a mortgagee, but as a Benchers, and the renewal was designed as a personal kindness to him, and the plaintiffs wives could not have renewed, though these chambers had not been in mortgage, because, by the rules of the society, the Benchers can grant leases only to their own members.

Lord Chancellor.

To prevent disputes in these societies of law, all controversies concerning chambers ought to be determined by the Benchers; and Lord Keeper *Wright* refused to relieve the plaintiff, on a bill brought to redeem chambers; but the Benchers in this case desire the parties to resort to a Court of

Disputes in the societies of law are to be determined by the benchers, and the Courts of equity, Equity will not interpose.

equity, and waive determining the question themselves. This term for years in the chambers, springs out of the estate of the trustees, which in equity must be considered as a legal interest; here then is a lease of chambers, with a power of renewal, mortgaged, and assigned to the defendant, and a conditional order of pension for the possession, which cannot be considered as a sale or foreclosure, but the estate is still to be considered as a mortgage, this order is not complied with, but Mr. *Holford* continued in possession of part, so no time run against him, for it must for all the estate in mortgage, or for no part, and no time began till his death in 1708, when the † plaintiffs were infants, and continued so till 1714; I think it reasonable, where a mortgagee continues in quiet possession for twenty years, that the mortgagor should not be let into a redemption, but the plaintiffs are in time, and therefore may redeem, not only the mortgaged term, but every thing excrescent, for the additional term was granted to the defendant, only by virtue of his first term, and eleven years are added expressly to make up the remainder of the first term twenty-one years; so if the defendant is allowed what he paid for the renewal, no injury is done him, and though the plaintiffs are not capable of an original grant of these chambers, yet if they come to them by representation, they may assign them to a member, and the society will renew to him; and therefore the decree of the Master of the Rolls that the plaintiffs may redeem, and are to have the benefit of the renewal, must be affirmed.

[† 191]
If a mortgagee is twenty years in quiet possession, the mortgagor cannot redeem, but if he is in possession of part only, he may, for the time must run on the whole estate, or on no part.
Post. Caf. 122.

Tho' a woman is not capable of a grant of chambers, yet if mortgaged chambers come to her by representation, she shall have the benefit of a renewal by the mortgagee, because she might have assigned them to a member, and the society would have renewed to him in trust for her. 1 Chan. Caf. 102, 190. 2 Vern. 84.

Cafe 102.
At the
Chancel-
lor's house.
Master of
the Rolls.

Tuesday, July the 15th.

MOTIONS.

EX PARTE LEWIS.

The Master of the Rolls would not order a supplicavit to be marked with the sum the sheriff should take security in, because there was no affidavit of the husband's circumstances, as a measure for him to go by. Regist. 89, a. 89, b. Post. Caf. 110. On a ne exeat regnum the sum is indorsed by the affidavit of the plaintiff. Regist. 89, b. 90, a.

MR. *Mead* for the wife, moved for a supplicavit against the husband, and prayed the Master of the Rolls to order, what sum the writ should be endorsed with, for the sheriff to

take in security, and said, that it was the constant practice since the case of *Clavering*, where Lord *Cowper* ordered the writ to be indorfed for two thousand pounds; but the Master of the Rolls granted the supplicavit without an indorsement, and said he had never known it ordered in that Court, or at least, not without an affidavit of the circumstances of the husband, to guide the Court, as there was in the case of *Clavering*; that it was usual indeed, on a *Ne exeat regnum*, to indorse the sum, but there the oath of the party is the measure of the security.

ANONYMUS.

A motion was made for an order to prove an exhibit viva voce, on the hearing exceptions to a Master's report, but the Master of the Rolls denied the motion, and said that no such order was ever made, because on arguing exceptions, you can offer nothing new, that was not before the Master.

exhibits at the hearing of exceptions, because you can offer nothing at the hearing, that was not before the Master.

† *Wednesday*, July the 16th.

PLEAS AND DEMURRERS.

KING versus KING & al'.

THE plaintiff charged by his bill, that the defendant *King*, his father, was tenant for life of the lands in the bill named, remainder to the plaintiff his son in tail; that his father had fraudulently cancelled the deed of settlement, and sold the estate to one of the defendants, and prayed a discovery, and to be relieved.

To this bill the defendant the purchaser demurred, because the plaintiff, by the course of the Court, ought to have made oath of the loss of the deed.

And Mr. *Lutwych* for the plaintiff insisted, that this case was not within the reasoning of that practice, for this bill was If a bill is brought to be relieved against a deed fraudulently cancelled by the defendant, and to have another deed executed, the plaintiff need not make oath of the loss of the deed, because he could have no remedy at law, though the deed was in his hands. 1 *Vern.* 310. 3 *Chan. Rep.* 5. See the following case.

Case 103.

At the
Chancel-
lor's house.

Master of
the Rolls.
Eodem die.

The Court
will not
grant an or-
der to prove

hearing, that

[† 192]

Case 104.

At the
Chancel-
lor's house.

Lord Chan-
cellor.

to

to be relieved against a deed, which had been fraudulently destroyed or cancelled, and to have another deed executed; and the plaintiff could have no remedy at law if he had the deed, and the Lord Chancellor was of the same opinion, and over-ruled the demurrer.

Cafe 105.

At the
Chancel-
lor's house.
Lord Chan-
cellor.
Eodem die.

• WHITWORTH versus GOLDING.

If the
plaintiff
seeks to be
relieved in
equity on
the matter
of a deed,
he must
make oath
of the loss
[† 193]
of it, but
not, if he
prays only
a discovery,
or to have
it produced
at a trial, or
the like.

Nelf. 8vo.
Rep. in

Canc. 78, 79. 1 Vern. 59, contra Curs. Cancel. 40, 217, 223, 229, 231. Nelf. Fol. Rep. in
Canc. 301. See the precedent case.

THE plaintiff sets forth by his bill, that he was lord of a manor in *Kent*, and that the defendant was one of his tenants, that the manor house being repairing, he took all the deeds relating to the said manor out of a closet that lay open, together with a counter-part of his lease, in which there were several covenants, for a breach of which he could bring his action at law against the defendant, if the counter-part was in his hands, and prays a discovery and relief; the defendant makes a full answer to the discovery, that he had delivered all the writings back to the plaintiff, and demurs to the relief, because the plaintiff had not annexed to his bill an affidavit of the loss of the deeds, and the distinction allowed in 1 Chan. Caf. 11, 231. 1 Vern. 180, 247. Nelf. Fol. Rep. in Canc. 266, was admitted in this case, that an oath is necessary, where the bill seeks to be relieved on the matter of the deed, because the want of the deed is the only foundation the plaintiff has, to draw the † cause from law to equity; but where the bill seeks no decree, but only to have the defendant discover, or to have the deed produced at the trial, or the like, the oath is not requisite, because it is not to be presumed that the plaintiff would put himself to the expence of a suit, if the deed was in his own hands: and the demurrer was allowed as to the counter-part, and over-ruled as to the other deeds.

Cafe 106.

At the
Chancel-
lor's house.
Lord Chan-
cellor.
Eodem die.

FALL & al,' versus CHAMBERS & al'.

Mr. Solicitor General for the defendants.

THE plaintiffs dealt in tobacco from *Virginia* to *Scotland*, and insured on that voyage: the policy was taken out in the name of the defendant *Johnson*, and *Chambers* and others under

under writ it. The ship came into port, but the tobacco was greatly damaged, so that the insurees waived all title to it, and left it for the benefit of the insurers, and transferred it to them, and it was afterwards sold to the best advantage, and they were damaged in the sum of 1353*l.* upon which the plaintiffs file their bill setting forth all this matter, and that the policy was taken in the name of a trustee, who refuses to let them sue in his name at law, to recover damages, and pray a discovery and relief. The defendants the insurers, by their answer admit the policy, and make a full discovery, but demur to the relief, because the plaintiff has a proper remedy at law.

It cannot be controverted, but that an action lies on a policy, and the only colour the plaintiff has for coming into this Court is, that the policy is taken in the name of *Johnson*, a trustee, but if this was sufficient to translate the jurisdiction, then all actions on policies would be turned into bills, the agents of foreign merchants always take them in their own name, and if this expedient should prevail, though the parties lived in *London*, they would take the same method. But if the trustee really refuses his name, this indeed is a foundation for the Court to compel him, but not to decree against the debtor, his refusal cannot alter the nature of the action against him, he has a right to have the witnesses examined *vivâ voce* at a trial, where their evidence can be more thoroughly sifted, and considered by a Judge and jury, than on a commission. It is the common suggestion in every bill, that the witnesses are dead, or beyond the seas, out of the jurisdiction of the Courts of law, but here it appears by the plaintiff's own bill, that the loss was in *Scotland*, and that their witnesses live there, tho' this on a demurrer, has been adjudged † not to be a sufficient cause to have relief in a Court of equity, where there is a remedy at law; but that it only intitles the plaintiff to have a discovery on the oath of the defendant, and a commission in aid of his action at law. [†194]

And the same demurrer was allowed by your lordship, in the case of *D'Silva*, where the ship insured was *Portuguese*, and bound on a foreign voyage, and the suggestions were, that the policy was taken in the name of a trustee, and that the witnesses were sea-faring people, and beyond the seas.

Mr.

Mr. Attorney General for the plaintiffs.

This is a proper bill for relief, and the demurrer is not good ; the bill is brought by part owners, to have satisfaction on a policy, against *Chambers*, and other defendants, as under-writers, and against *Johnson* their trustee, on a ship bound from *Virginia* to the river *Dunbar* in *Scotland* ; in the voyage the ship and cargo were greatly damaged, and when they arrived at *Dunbar*, they proceeded to sell her, under proper protests, by a decree of a Court of Admiralty, for the benefit of the insurers, renouncing all right as to themselves ; we charge that the trustee refuses his name, that the transaction was in *Scotland*, and that it was a foreign voyage from *Virginia* thither, and that consequently the evidence must arise abroad. It is proper for a cestuy que trust to come into a Court of equity, on the refusal of his trustee, to have liberty to sue in his name. Suppose a bond is assigned, what is more common than to bring a bill against the obligor and obligee for a satisfaction, and the plaintiff is never sent back to recover the payment at law, tho' the defendant in that case might demur, for the same reasons the defendant here has, but they allow we are proper to pray relief against *Johnson*, but he might have demurred to our bill, if we had not made the other defendants parties, because they might have made us a satisfaction ; but if this demurrer is allowed, the bill will be out of Court as to them, and then *Johnson*, at the hearing, may object for want of parties. And as this matter arises in *Scotland*, and our evidence is there, it is the same thing as if they were beyond the seas, because the process of our Courts does not bind them ; we design to examine the Custom-house officers in *Scotland*, and if we should serve them with a subpoena in *Scotland*, since they are not bound to obey it, sure we have a right to a commission to examine them in *Scotland*. And the objection, that the examination of witnesses viva voce, is greatly preferable to an examination by Commissioners, is of no weight, because this Court, if they are not satisfied with the evidence, may direct an issue.

[†195]

† Lord Chancellor.

If I should give way to this attempt, no action would ever be brought on a policy, and a bill might as well be brought for payment of a bond, on suggestion that the witnesses were abroad,

abroad, or dead; besides, these are transactions that in their own nature must arise at sea, and out of the jurisdiction of the Courts, and they that will take a policy in this kingdom, must be subject to our forms of trials; and who would insure if they were liable to bills? The Jury will take the account, and consider of salvage, and all proper allowances, and do it in all such trials; why cannot the plaintiff bring his witnesses from *Scotland*, as well as is done every day from *Northumberland*, which is the next county to it? The Commissioners will give their officers leave to come to the trial.

His lordship was going to allow the demurrer, but at the instance of the Attorney General, he made the same order he had done before in the case of *Dhegetoft* and the *London Assurance*, ant. Cal. 54, That the demurrer should stand over, till the trustee had put in his answer.

KILDESLEY versus D'FISHER.

Case 107.
At the
Chancery-
lor's house.
Lord Chan-
cellor.
Eodem die.

AN order was made to examine the defendant as a witness, and she demurred to an interrogatory, because she was concerned in interest in the question; and insisted, that she was not obliged to prove the plaintiff's title against herself, and that the usual allegation, That the defendant was not concerned in interest, was left out of the present order.

Mr. Solicitor General for the plaintiff.

This is no good cause of demurrer, since we have submitted to take her oath, though it may be supposed, that she is biased against us; and her own depositions at the hearing may be read for herself, and the other defendants, though she could not read her own answer: and her testimony is unexceptionable, because she cannot be supposed to befriend us. It would be a good objection, indeed, for the other defendants, to say she is interested for us, and therefore it is usual to insert in these orders, that the defendant is not concerned in interest, to shew the Court that he is a competent and indifferent witness.

Lord

Lord Chancellor.

A defend-
ant examin-
[+196]
ed for the
plaintiff,
may demur
to an inter-
rogatory,
because she
is concerned
in interest.
Post. Caf.
124.
2 Chan. Caf.
208.

The method of the Court is, where the plaintiff is obliged to make several defendants purely out of form, to give him leave to examine those who are not concerned in interest, that is, who are not interested for the plaintiff; and it would be hard, when the plaintiff is obliged to make parties not interested, defendants, that he should lose the benefit of their testimony, and therefore the Court gives the plaintiff leave to examine them. But this defendant is not a formal, but a material party in point of interest, what you can expect from her examination, you may have from her answer, which will be evidence against her; and tho' she swears to tell the whole truth on her examination, she need not answer where her interest is concerned, of which she is to judge for herself; and therefore I allow the demurrer.

She likewise demurred to being examined to a deed, whereto she was a witness.

Lord Chancellor.

And if she
is witness
to a deed,
she must be
examined
to the ex-
ecution, but
may demur
to any other questions. Curf. Canc. 244, 284.

If she be a witness, you can examine her to the execution, as to so much therefore, the demurrer must be over-ruled, but not as to any other questions; and therefore the demurrer must stand as to the rest.

Cafe 108.

At the

Rolls.

Eodem die.

DASHWOOD versus BITHAZEY.

THE bill was to foreclose, the defendant appeared, and stood in contempt for not answering to a sequestration, and the cause came on upon the sequestration, for the bill to be taken pro Confesso. And Mr. Solicitor General for the plaintiff, prayed a decree for a sale, instead of a foreclosure, because the security was defective; and if they should afterwards sue the defendant on his bond for performance of covenants, that would open the decree of foreclosure; and he insisted that such decrees were usual. But the Master of the Rolls said, he had never known any, but that where the security was defective, it was often indeed referred to a Master to set Court decreed a sale, instead of a foreclosure, because if the plaintiff sued the defendant on his bond, that would open a degree of foreclosure, and it is usual in such cases to refer it to a Master to set a value on the estate, and decree that the plaintiff should take pro tanto,

a valuation

De Term. S. Trin. 1729.

a valuation on the estate, and the plaintiff was to take it pro tanto; as in the case of *Homden* versus *Tilby*, on a bill of foreclosure of the shops in *Westminster Hall*; but in this case he decreed a sale, because the decree is, that the bill should be taken pro confesso, and not according to the prayer of the bill; and the case of *Nosworthy* and Serjeant *Maynard* was quoted, where the security being defective, the cause stood over, and the plaintiff filed a supplemental bill, and prayed a sale.

† *Wednesday, July the 23d.*

M O T I O N S.

HOLEWORTH versus LANE.

[†197]
Case 109.
At the
Chancel-
lor's house.
Lord
Chancellor.

ON a motion made for the executor of the mortgagee, it was referred to a Master, to see whether the heir of the mortgagee was a trustee within the act, 7 *Ann* ch. 19. the Master reported him to be a trustee within that act, upon which report an order was made, that the heir should assign over the mortgage to such persons as the executors should appoint. And now a motion was made for the defendant to set aside the report, because the heir was not a trustee for the executor by the meaning of the act; and because the reference was made on a motion, whereas the statute requires it should be by petition.

Mr. Solicitor General for the executor.

The constant practice is, to pray a reference by motion, as well as by petition. Petition originally signified a bill, but a motion is a petition, and the word is to be understood of any summary way, in distinction to the proceedings by bill and answer.

The word
petition is
to be un-
derstood of
any sum-
mary way,
in oppo-
sition to the
proceedings by bill.

But they say, this case is not within the statute, because the heir of the mortgagee is a trustee for his executor, only by implication of law. But implied trusts are taken notice of by acts of Parliament, as by the statute of frauds and perjuries, and it was adjudged by your lordship in the case of *Ber-*

Acts of
Parliament
take notice
of implied
trusts.

The heir of the vendee is a trustee by the 7 *Ann.* for the person who paid the purchase money.

tie

tie versus *Vernon*, that the heir of the vendee was a trustee within this act, for the person who paid the purchase-money. The heir of the mortgagee is a trustee both for the executor of the mortgage, and for the mortgagor, and is doubly within the statute, as mortgagee and trustee too, and he is bound to convey, either at the petition of the mortgagor, or of the cestuy que trust.

Lord Chancellor.

You may move, or petition for a reference, whether an infant is a trustee within the 7 Ann.

A motion is a petition, not reduced into writing, and presented, and I do not know that the statute requires those circumstances, and the general practice is to pray a reference by motion; and if the order is not according to the statute, it is void, and without authority.

[+198]

The heir of the mortgagee is a trustee within that act, both for the mortgagor, and the executor of the mortgagee.

† There can be no doubt, but a mortgage in fee descends on the heir of the mortgagee, but it is as certain that the money belongs to the executor, so that the heir is only his trustee; and this was the very inconvenience the statute was made to remedy, that the mortgagor might be willing to pay the money, or the executor might want it; and that in either case, they should not be obliged as formerly, to wait the full age of the heir.

Cafe 110.
At the
Chancel-
lor's house.
Lord Chan-
cellor.

Thursday, July the 24th.

EX PARTE GIBSON.

Lord Chan-
cellor or-
dered a
supplicavit
to be mark-
ed, without
affidavit,
only upon
inquiry of
the husband's circumstances from the solicitor for the wife.

MR. Solicitor General for the wife, moved for a supplicavit against the husband, a mercer in *Pater-noster-row*, no affidavit was read, only the wife's solicitor told the Lord Chancellor, that the husband was in very good circumstances, and his lordship granted the writ, and ordered it to be indorsed with 400*l.* for each surety.

Ant. Caf. 102.

Sir JOHN OSBORN *versus* COWPER.

Cafe. 110.

At the
Chancel-

lor's house.

Lord Chan-

cellor.

Eodem die.

If a plea is

ordered to

stand for

AN injunction was granted till answer, and further order ; the defendant put in a plea, which on arguing, was ordered to stand for an answer, with liberty to except, and the benefit was saved to the hearing ; and the defendant moved to dissolve the injunction.

an answer, the defendant cannot move to dissolve the injunction absolutely, but only nisi.

Lord Chancellor.

You can only move, as on coming in of your answer, that the injunction may be dissolved nisi.

DE

[1199]

D E

Term. S. Michael.

. 1729.

In Cur. Cancellariæ.

Case 112.
At the
Chancel-
lor's house.
Lord Chan-
cellor.

Tuesday, October the 14th.

BAMBRIDGE versus CASTEL.

Mr. *Lutwyche* for the petitioner.

THIS is a petition to your lordship, to supersede a writ of appeal of murder, brought by the widow *Castel* for the death of her husband, against Mr. *Bambridge* and Mr. *Corbet*. The petitioner *Bambridge* was indicted for the said murder, on the 9th of *April* last, and on the King's evidence only, without examining his own witnesses, was acquitted; and on the 9th of *July* following, this writ of appeal was brought, returnable *tres Michael*, directed to the Sheriffs, to attach *Bambridge* and *Corbet*, the appellant having found *Wagstaff* and *Stary* pledges, setting forth their additions, and places of abode. The words of the writ are, *Quia Maria, &c. fecerit vos Securos, &c.* We have inquired after the security mentioned in the writ, and as it appears by our affidavit, they have entered into no recognizance, and therefore we pray your lordship to supersede this writ; it being an injury to the great seal, that any writ should issue which contains a positive falsehood; these are not nominal pledges, but described in the very writ by their names, additions, &c. The law has appointed pledges to be given on every writ, and this writ has accordingly affirmed, that pledges were found, which upon inquiry proves false. The writ ought to have run, *Si fecerit, &c.* Here it is positively said to be done, and is not; therefore the reason of the writ failing, the writ itself too ought to fall to the ground. *Rast. Entr. 46, b.* a writ of appeal of murder was brought returnable in B. R. and

ruled

run, *Si fecerit*;) the † Sheriff returned, that the appellant [†200] had found no pledges; this was adjudged a good return, and the party finding pledges in Court, the record says, an alias was directed: And the appellant shall not avoid what the law makes so essential, by a falsity, by pretending he has found pledges, when he really has not, and the finding pledges is material, that if the appellee be acquitted, the appellant may answer damages pro unjusto clamore suo; and in *Raft. Entr.* 44, a, is set down the summary method the appellee has to recover those damages. If one is indicted for a trespass, and acquitted, he may bring his action, as was adjudged in B. R. in the case of *Savil* versus *Roberts*. One acquitted on an indictment of trespass, may bring his action.

Mr. Kettleby.

The form of the writ is set down in the appendix to the Register, 10, b, here is the difference of *Vos* for *Nos*, and *fecerit* cannot be the future tense, *Because she shall*, for that is not sense, but must be the præter tense. All the precedents are, *Nos*; *Tremain* 16, 28. *Co. Entr.* 56, b. 59, b, only *Raftal*, 46, b, is, *Si fecerit te*; but whether the writ ought to be *Vos*, or *Nos*, neither in this case is done. The statute of *Westminster*, 2 chap. 12, 2 inst. 383, is strongly penned, to prevent the malice of appellants, and pledges on an appeal are more particularly requisite on this statute, than at common law; and it appears, that before this act of Parliament, where the appellee was acquitted, the abettors were formerly punished by death.

Mr. Wynne.

In *Raftal's Entr.* 46, b. the writ is *Si*, &c. If pledges are found, you are to attach; if they are not found, you are not to attach. And there the appellant in person found pledges, which shews there is a necessity to find real pledges, to satisfy both the Crown and the party; so that finding pledges is a condition precedent, but they will say perhaps, that here is no condition precedent, because the writ does not run, *Si*, &c. but *Quia*, &c. but then the reason is much stronger, why your lordship should grant a supersedeas, because the writ contains a direct falsehood, but it is likewise an absurdity; for by what power, or for what reason should the Sheriff take security before the writ was delivered to him.

Mr.

Mr. Strange.

We do not move to quash this writ (for that is only proper after the return, in the Court where it is returnable) but to supersede it, whilst it is in the hands of the ministerial officers the Sheriffs. In the case of *King versus Dee*, in B. R. on a De Excommunicato capiendo, it was moved to quash the writ, because of those general words, *Sive al' Jur' Eccles.* and the Judges said they could not quash it, because [†201] it was not returned † into that Court; upon which they changed their motion, that it might be superseded, which was granted, because it appeared there was an entry in Court, that such a writ had issued, and they gave this remedy to the party, that he might not lie in prison till the return. In the writ of appeal, pledges are not mentioned, as in other original writs, which are directed to the Sheriff generally, to take security; but the pledges are particularly mentioned by name, &c. and in the body of the writ; and the design of pledges would be eluded, if it was sufficient to find them at any time before judgment, for the appellant would never require judgment if the appeal went against him, nor would the pledges stand.

Mr. Attorney General for the appellant.

B. R. may supersede a writ de excommunicato capiendo, for matter intrinsic before the return, because it is inrolled in that Court, on the issuing of it, As this is a motion not to quash, but to supersede the writ, it must be, *Quia emanavit improvidè, or erroneè*, and the manner or irregularity must be something that does not appear on the face of the writ, because it is not returnable into this Court, but if there is any error in the writ itself, that will be a ground to quash it in the Court it is made returnable, after the return thereof; and this case is distinguished from the case De Excommunicato capiendo, because the 5 *Eliz.* chap. 23. requires, that upon the issuing of it, the writ should be inrolled in B. R. so that Court may take notice of it before the return, but the error, or irregularity in this case, must be extrinsic, because the writ is gone out of the Court, and is not now before your lordship.

There is no resolution whereby it appears, that appeals are distinguished from other actions, as to finding pledges, which by the old law ought to be real, to answer amerciaments and damages, but by the course of the Courts for many years (as the curfitor for *London* and *Middlesex*, who attend

attends, is ready to certify to your lordship) no real pledges have been found on appeals; so that if this should be judged necessary, it may be the cause of the reversal of several judgments.

In an appeal of *Mayhem*, which is felonice, Co. Entr. 50. In an appeal of *Do* and *Roe* are the bail, so in the case of *Foxe* versus *Lowe*, *Mayhem*, which record was settled by your lordship and Lord Chief Justice *Eyre* on an appeal of murder by bill. The construction of those words in this writ, *Quia fecerit*, &c. must be, *Because she will*, &c. which is of the same sense, as *Si*, &c. and then there can be no foundation to come here, *Quia emanavit improvidè*, or *erronice*; for then the taking security, is subsequent to the issuing of this writ. But the plaintiff may find pledges at any time before judgment, and for this reason in *Sir Tho. Jon. 154.* where the appellee pleaded in abatement no pledges, and pleaded over, his plea in abatement was + disallowed. And in *Huffy's* case, 9 Co. 71, b. [+202] and *Cro. Jac. 413.* Cas. 2. on error it was adjudged that the Sheriff might execute the writ if he pleased, though the appellant did not find pledges, and it was good, if the party found security while the writ was depending, and this answers the objection, that no pledges is a good return, because the Sheriff may execute the writ notwithstanding, if he pleases. So the 11 H. 4. Fol. 7. (8.) Bro. Abridgm. Pledg. 8. on appeal of *Mayhem*, and in 3d Lev. 344, 345. before the statute of amendment, the want of pledges was amended after error brought. The statute of *Westminst. 2.* relates to abettors, where the appellee is acquitted, and does not relate to pledges, and no enquiry could be had of the abettors, if this writ was quashed, because the life of the appellee was never in jeopardy. And this application is not proper here, but must be taken advantage of, on the return of the writ, by motion, or by a plea in abatement.

Lord Chancellor.

Pledges were certainly requisite by the old law, and must be so still, where it is not altered by acts of Parliament.

Pledges by the old law were to be found on every writ.

Pledges on this writ are given in two places, either to the King in Chancery, or to the Sheriff, the writ in the register

On a writ of appeal, pledges are given, ei-

ther to the King in Chancery, or to the Sheriff.

Q

is,

is, *Si fecerit te*, or *Nos*, &c. but this writ is in a third form different from both, *Quia*, &c. but then this objection is to the writ itself, which I do not think asserts a falsehood that pledges are given, but the *English* of the words is, *Because she will give*, &c. which is only conditional; and this objection, that the writ is not agreeable to precedent, is too early to be made here, but will be proper on the return of the writ. The Sheriff may return, that no pledges are found, and is not obliged otherwise to execute the writ, but the writ is still in force, and not abated, as appears by the precedent that has been cited in *Rast.* Entr. 46, b. for if the writ had not subsisted, the Court of King's Bench could not have granted an alias capias, but the Sheriff may execute the writ if he pleases, though the appellant find no pledges, and the appellee has no remedy till judgment, and cannot plead it: But this is something intrinsic to the writ, and proper for another Court, and therefore the petition must be dismissed.

If a writ of appeal is in these words, *Quia fecerit*, &c. tho' pledges are not found, this is no falsehood, for it does not imply, that the appellant has given security, but that he will. A writ can be superseded in this Court only

for matter extrinsic, but if it is a bad writ, the Court it is returned into, will quash it.

The Sheriff may return no pledges on a writ of appeal, and is not obliged to execute it, if the appellant does not find pledges.

But he may if he pleases, and the appellee cannot plead in abatement, no pledges, and has no remedy till judgment.

An order need not be served, that is made on hearing counsel of both sides. Where an order is made upon hearing Counsel of both sides, there is no occasion to serve it.

[+203]

Case 113.

At the

Chancel-

lor's house.

Lord Chan-

cellor.

Eodem die.

+ TREFUSIS versus Sir J. HIND COTTON,
Lady COTTON, & al'.

SIR *J. Hind Cotton* and Lady *Cotton* filed a bill to have her portion of 6000*l.* repaid, and 500*l.* a year for a jointure settled on her for life, pursuant to marriage articles, with Mr. *Trefusis* her former husband, and an account was directed to be taken of the personal estate of Mr. *Trefusis*; and a decree nisi was made against Mr. *Trefusis*, an infant, her son-in-law; and when he came of age, he was served with a subpoena, to shew cause why the decree should not be made absolute, and he now moved, to have the time for shewing cause enlarged, till Sir *Hind Cotton* and Lady *Cotton* put in their answers to a bill he had filed against them, for a discovery, whether in articles of agreement between his late fa-

De Term. S. Michael. 1729.

they and Lady Cotton, that her share of the personal estate of Mr. Craigs her father, which amounted to 100,000*l.* should be at her own separate use and disposal, Lady Cotton did not, in consideration thereof, agree to waive the benefit of the former marriage articles.

The defendants insisted, that the execution of a decree ought not to be deferred on the bare allegations of a bill, not supported by any affidavits, and that (the decree having directed an account to be taken of the personal estate of Mr. Trefusis) he might have the advantage of this discovery before the Master on personal interrogatories, or might amend his answer.

Lord Chancellor.

The time of six months, allowed by the course of the Court, for a defendant to shew cause why a decree should not be made absolute after he comes of age, is not so sacred, but that in particular cases, and where the matter is of consequence, the Court may enlarge it; it appears very probable, that there was such a private agreement, as is suggested, on Mr. Trefusis his consenting that so great an estate should be at his wife's own disposal, which the son cannot come at by this decree, but only by a discovery from the answers of the defendants; and then he may amend his own answer, and make a better defence, and therefore after the six months are expired, I enlarge the time for three months nisi.

The Court enlarged the time for a defendant to shew cause, after he came of age, why the decree should not be made absolute, till the plaintiffs in the first cause had

put in an answer to a bill of discovery he filed against them, after he came of age.

N. B. On the defendant's coming to shew cause the first day of *Michaelmas* term, this order was made absolute; and that time being out, and the defendants not having put in a full answer, the time was twice enlarged on motion, quousque.

Ant. Caf.
39.

Post. Caf.

170.

Post. Caf.

174.

[+204]

Wednesday, October the 15th.

EXCEPTIONS, &c. TO THE MASTER'S REPORT.

DAVY versus SEYS.

Cafe 114.
At the
Chancel-
lor's house.
Lord Chan-
cellor.

THE bill was brought by creditors against the administrator, and an account was directed, and costs reserved, till the account

On a report
of assets,
costs are de-
creed gene-
rally against
the defen-
dant, and
not out of
assets.

Cro. Ja.
229.
Tew. 169.

account was taken; and by the Master's report it appeared, that the defendant had assets sufficient in his hands to satisfy the plaintiff's demands; and the Lord Chancellor decreed costs generally against the defendant, without directing an inquiry of assets, and said, that he knew no better rule to guide himself by, than that they proceeded on at law, where, if the defendant pleads plene administravit, and the plaintiff recover but two-pence, the Court gives judgment De Bonis propriis, si non, &c. that otherwise no body would sue an administrator, or executor; and that there may be more assets than appear by the Master's report, for the plaintiffs might content themselves to prove sufficient to answer their demands.

WALKER versus MEAGER.

Case 115.
At the
Chancel-
lor's house.
Lord Chan-
cellor.
Eodem die.

Mr. Solicitor General for the plaintiffs.

MR. Meager made his will *inter al'*, in these words; As to my temporal estate, I do hereby charge the same with the payment of all such just debts as I shall happen to owe at the time of my decease, and also with the several legacies herein after bequeathed; then he gives several legacies, and particularly 300*l.* to his daughter; then taking notice that he had surrendered his copyhold estate to the use of his will, he declares it to be to the purposes following. I devise all my freehold and copyhold estate to my son *Thomas Meager*, and his heirs, subject to, and chargeable with all my just debts, and the several legacies by me given; and makes his son *Thomas* executor.' And on a bill brought by the creditors, an account was decreed, and a report has been made, and the cause now comes before your lordship on the equity reserved, and the only question is, since the estate is not sufficient to satisfy the debts and legacies, whether the money arising by the sale of the lands shall be divided equally among the creditors and legatees? or, whether the creditors shall be preferred? [+205] And as in natural & justice the testator ought to pay his debts in the first place, so it plainly seems by the will to have been his intention, tho' he has not declared so in express words. In the beginning of the will, he charges all his temporal estate with the payment of his just debts, &c. and also with the several legacies, &c. which words seem to introduce a second charge; and this further appears from the nature of the

the fund he had then in view; his personal estate, which was the fund subjected by law, was liable to his debts in the first place, and when he adds another not chargeable by law, he shews, he would have his debts and legacies paid out of this additional fund, in the same manner; then he makes his son, whom he devises his estate to, executor likewise; and if he had devised it to him to sell, for payment of debts and legacies, the money would be assets, and the debts must be preferred. 2 *Vern.* 248, *Greaves versus Powel*, and *Beak versus Brown*. *Trin. Term.* 1712. The testator, before the statute 6 and 7 of K. W. of fraudulent devises, bequeathed his lands to his second son, and his heirs, subject to the payment of such debts as his personal estate should not be sufficient to satisfy, and of a legacy of 500*l.* and made his second son and wife executors. This devise being before the statute, the debts amounted to more than the personal estate, and the value of the land; the bond creditors had no lien but by the will, but Lord *Harcourt* said, he would suppose the testator to mean what he ought, and that he designed to be just before he was charitable; and therefore decreed the debts to be paid in the first place. 2 *Vern.* 405.
1 *Chan.*
Cal. 275.

Mr. Attorney General for the defendant.

If this money raised by the sale of the estate, should be applied in the first place to the payment of the debts, the daughter will be left wholly unprovided for. It is allowed, there are no express words in the will directing the debts to be first paid, but they would infer it to have been the intention of the testator; First, From the order of the words: but the order of the words has never been allowed a rule to explain the intention of the testator, which should be first paid; for all things cannot be said together: *And also*, &c. do not imply a secondary consideration, as has been often adjudged in the case of legatees, but that the first legatee must abate, in proportion with the second: And suppose legacies had been first mentioned, should they have been paid in the first place? 1 *Vern.* 31.

Secondly, Because the testator had his whole estate under consideration, and therefore as his personal estate was to go in a course of administration, it is plain he designed his real estate should go in the same manner. But one must go as the law directs; the other as the will.

Thirdly,

[+206] † Thirdly, Because if this devise had been to his executor to sell, the money would have been legal assets, but this is a devise in fee, subject to, &c. and is only an equitable charge, and the executor in this case can be considered only as a trustee, for the devise being to him in fee, who was the eldest son of the testator, the lands descend on him, and it is not a constant rule to prefer creditors; but there are many decrees that they should be paid, *pari passu*, with legatees, because, as to the lands, the creditor takes only by the bounty of the testator, and it is only a legacy to him. 1 *Vern.* 482.

Though the devise in *Beak* and *Brown's* case was before the statute, so that the devisor had a power to defeat his bond creditors of the benefit of his lands, yet he not having done so, the Court might think proper to consider them in the same manner as they would have been intitled if the lands had descended.

Lord Chancellor.

The testator charges all his temporal estate with the payment of his debts and legacies, and then devises all his freehold and copyhold estate to his eldest son and his heirs, subject to his debts and legacies, and makes him executor, the money arising by the sale of the lands shall be first applied to the payment of the debts.

From a view of the whole will, there appears to be no prius or posterius, nor which it was the intention of the testator should be first paid, the debts, or legacies; but it is plain he intended the one as well as the other: All his estate is given to his executors, and his copyhold estate is particularly surrendered to the use of his will, and his whole estate is made subject to debts and legacies, and is given to his executor to enable him to pay them; so, whether the money arising by the sale of the lands is legal, or equitable assets, it must be considered as legal assets, and applied in a course of administration, If *Cestuy que trust* of an estate devises it to his executors to be sold for payment of debts and legacies, this is equitable assets, and yet it has often been decreed to be applied in a course of administration.

Ant. Caf. 61. *Caf.* 78. *Post. Caf.* 181. 1 *Vern.* 63. 2 *Vern.* 133. 1 *Chan. Caf.* 32, 248. 1 *Vern.* 69. 1 *Lew.* 224. *Nelf. Fol. Rep. in Canc.* 88, 195. *Nelf. 8vo. Rep. in Canc.* 202. *Ant. Caf.* 34.

Friday,

De Term. S. Michael. 1729.

† *Friday, October the 24th.*

ANONYMUS.

Mr. Attorney General for the plaintiff.

THE defendant pleaded that such a person not named in the bill ought to be made a party, upon which the plaintiff amended his bill, and made him a defendant, then the first defendant obtained an order for time to answer, and then pleaded, that such a one also, not named in the bill, ought to be a party; and I humbly move your lordship, that this plea may be suppressed, being a second dilatory plea, and coming on irregularly, for by the order the defendant had only time to answer; and though the order is not for time to answer only, but to answer, and a plea has been adjudged an answer in Lord *Strafford's* case, that must be understood of a plea in bar, not of plea in abatement?

[†207]
Case 116.
In Court.
Lord Chancellor.

1 Chan. Caf. 279. 2 Chan. Caf. 208. 1 Vern. 275.

Lord Chancellor.

If a defendant at law, pleads in abatement, the want of parties, he must shew who they are, and must give the plaintiff a good writ: But this plea cannot be suppressed on a motion, but must be set down and argued.

A second plea of want of parties, is not good, for at law, if the de-

fendant pleads want of parties, he must give the plaintiff a good writ, but this plea cannot be suppressed on a motion, but must be set down to be argued.

Saturday, October the 25th.

APPEALS AND REHEARINGS.

In Court.
Lord Chancellor.

CHARLES SELBY AMHERST, &c. plaintiff.
WILLIAM ROBINSON LITTON, & al', defendants.

UPON the petition of the defendant, *William Robinson Litton*, both causes came on to be reheard, and the Lord Chancellor was pleased to declare his opinion in favour of the defendant, *William Robinson Litton*, but offered the plaintiff, if he desired it, to rehear the causes again [†] with Judges, which the plaintiff desiring, it was ordered the said causes should come on again to be reheard on that day fortnight.

[†208]
Ant. Caf.
83.
Post. Caf.
120.

Tuesday,

Cafe 117.
In Court.
Lord Chan-
cellor.

De Term. S. Michael. 1729.

Tuesday, October the 28th.

STRAFFORD versus BERRIDGE.

Mr. Solicitor General for the plaintiff.

‘ MR. *Strafford* by a codicil, devised to Mrs. *Berridge*, his niece in these words, I give and bequeath all that my mansion-house, &c. to Mrs. *Berridge*, during the term of her natural life; also all my goods, chattels, household-stuff, furniture, and other things, now being, and which at the time of my death shall be at, or in my said dwelling house, and the appurtenances; and also the use of all my plate during life; he also devised to her his coach horses, 600*l.* and 20*l.* for mourning’, and by this codicil Mrs. *Berridge* claims 260*l.* in money, which was in the house at the death of the testator. The testator by first giving her his house for life, shews what he meant by his goods and chattels, and so do the following words, household stuff and furniture; for if the words, goods and chattels are to be taken in their full sense, then household stuff and furniture are comprehended under them, and those words would be superfluous, and in this sense the title deeds of his estate, or securities for money, if they were found in the house, would pass; whereas it is plain he did not design to comprehend even the plate under these general words, for he after expressly devises the use of it to her for life; and the words, *Now being, And which*, &c. plainly shew, he did not design to give her money, because it would be so very difficult to prove, that the money in the house at the time of his death, was the identical money he had there when he made his will.

Mr. *Lutwych*.

The general sense of the words of a will are to be restrained, by the intention of the testator, and the other words they are in company with.

The general signification of the words of a will may be restrained by the intention of the testator, and other words they are in company with, as appears from the case of *Merryland* and *Wilkinson*, Cro. Ca. 323, and of *Markham* and *Twifden*, which was decreed by Lord *Harcourt*, after it had been spoke to two or three times. The testator made his will *inter al'* in these words, ‘ All the rest and residue of my estate, chattels, real and personal, I give to my wife:’ By the words, *All the rest and residue of my estate, chattels, real and personal*, only the residue of the testator’s personal estate passes.

His

His lordship decreed † only the residue of the personal estate [†209]
to the wife, tho' a fee would have passed, if the will had gone
no further than the word estate. In this case, the testator,
to shew it was not his intention to pass every thing the words
would extend to, mentions afterwards particulars, as his
coach-horses, and the use of his plate for life, and a pecu-
niary legacy of 600*l*. and though bonds will pass by a grant
of *Omnia Bona*, yet here by the words *Goods* or *other things*,
only furniture and things of the like nature will pass; and
in the case of the Bishop of *Salisbury* and *Dorner*, it was
adjudged by Lord *Harcourt*, that by a devise of *goods*, jew-
els, money, or pictures, did not pass.

Jewels,
money, or
pictures
will not
pass, by a
devise of
goods.

Mr. Attorney General for the defendant.

It is allowed, that all the words of this will are general
enough to take in money, but it is said, they must be restrain-
ed to household goods and furniture, because if they are
taken in the general sense, the words household stuff and
furniture are superfluous; but this is the usual manner of
wording wills, after general words, to enumerate particulars;
and may not we with more reason say, Why did he use those
general words, if he meant nothing by them? and that they
shew his intention to pass more, and the words, *Other things*,
shew he meant every thing that was personal; whereas the
plaintiff, by other things, would have him mean only the
same things, and the words will not comprehend the title
deeds, for they follow the estate, and though he may be
supposed not to have meant securities for money, which are
choies in action, yet this money was a thing in possession, and
actually in the house at the time of his death: And the ex-
press devise afterwards, of the use of the plate to her for
life, shews, that he thought that it would otherwise have
passed to her absolutely by the general words; and these
words must signify more than furniture, for a library of
books, wine in the cellar, &c. if any, would have passed.
I agree, that where words, which by themselves would have
carried the real estate, are mixed with words that will pass
only the personal estate, that it is reasonable to restrain their
general signification, but what authority can they produce to
restrain the sense of these words, which all relate to a per-
sonal estate? The words, *Now being*, *And which*, &c. they
say are a double description of what was to pass, but I rather
think,

think, his intention was to extend the words, either to such things as he had at the time of the making the will, or at his death, in the house; and though he had removed any of the goods, he certainly designed they should pass, and the money in his house at the time of his death, shall be taken to be there, when he made his will, unless the plaintiff can prove it came in since.

[+210]

† Lord Chancellor.

Whether bona & catalla includes money in a fieri facias. I give my mansion house for life, also all my goods, chattels, household stuff, furniture, and other things now being, or which at the time of my death shall be at, or in my said dwelling house, by these words, money in the house at the death of the testator will not pass. *Swinb. part 7. sect. 10. n. 8. 1 Chan. Rep. 190. Ant. Caf. 69.*

There is an opinion, that the Sheriff on a fieri facias cannot seize money, because the money is to be levied de bonis & catallis, but money cannot be levied from money: But not to trifle, the testator cannot reasonably be supposed to have meant money by these words, but only goods of the nature and sort of household goods; and the words cannot be understood in their general sense, for that would take in bonds and securities for money, which there is no colour to suppose the testator designed to pass.

HUNT versus STONE.

Case 118. THE testator devised to an infant an *East India* bond of 100*l.* to be paid at twenty-one, or marriage, and if she died before, he devised it over; and the question was, Whether *Eodem die.* the interest belonged to the executor, or should wait on the principal?

Lord Chancellor.

Devise of an *East India* bond, to be paid at 21, or marriage, and if the legatee died before it was devised over, the interest shall wait on the principal, and not go to the executor.

The testator's intention seems to be, that the interest should follow the principal; he does not give 100*l.* but a specifick *East India* 100*l.* bond.

Friday,

De Term. S. Michael. 1729.

Friday, October the 31st.

M O T I O N S.

VAUGHAN *versus* WELSH.

AN order for the plaintiff to make his election, was discharged on motion, because the defendant had pleaded the statute of limitations, and the plea had not been argued.

to elect till the plea is argued. Post. Caf. 166. 1 Vern. 103.

Cafe 119.
In Court.
Lord Chan-
cellor.

† *Saturday, November the 8th.*

APPEALS AND RE-HEARINGS,

Charles Selby Amberst, Esq. administrator of Dame Margaret Strode, his late wife, who was the widow of Sir George Strode, deceased, plaintiff.

William Robinson Litton, Esq. devisee in the will of Litton Litton, Esq. deceased, who was the only son and heir of the said Sir George Strode, deceased, Francis Maschal, and James Bedingsfield, mortgagees of the estate in question, & à contra, defendants.

[† 211]
Cafe 120.
In Court.
Lord Chan-
cellor.
Sir Robert
Raymond,
Chief Just.
of B. R.
Mr. Justice
Denham.

Mr. Attorney General for the defendant,
William Robinson Litton.

THESE causes come before your lordship to be re-heard, on the petition of *William Robinson Litton*, whereby he insists that the equity of redemption of these terms belongs to him, and not to the plaintiff; First, For that the testator did not intend to give the Lady *Strode* the absolute interest in the terms, but only to give her the same, as a security for the money due upon those mortgages. Secondly, Because if it was his intention to devise the absolute interest in the terms to his mother, such a devise could not take effect in point of law. And, Thirdly, Because this point has been already determined against her by the decree of Lord *Harcourt*.

That this was the testator's intention, appears manifestly from the whole frame of the will, the devise to Lady *Strode* of these mortgaged terms being amongst the pecuniary legacies

cies, and before the devise of his lands, and when he comes to devise his lands to the defendant *William Robinson Litton*, he describes them by the words, *All and every his memors*, &c. which convey the lands in question to him, in as plain and ample a manner, as if the testator had devised them by express words.

[+212] † This intention is still the more evident, if it be considered, that the devise of his real estate to the defendant *William Robinson Litton*, is in the same words, as the devise to the testator's own son, (in case his wife had been with child of a son) and it is not to be imagined that the testator could intend to give these lands from his own son to his mother.

No devise by the testator of these terms but as mortgage interests, could possibly take effect, 'till the determination of the estate to *Strode Strode*, and the estates tail to his sons, and the contingent estates limited to *George Darnelly* for life, and to his sons in tail: and it is hardly to be imagined that it could ever enter into the thoughts of the testator to give his mother a remote interest in lands, which she could never probably either enjoy or sell, and to sever such long terms of one thousand years from the inheritance of his estate, only in order that his mother might have the power of giving them away from his family to a stranger, as the fact has really happened.

The words of the devise in question are proper to convey these estates as securities, and to put his mother in the place of the mortgagees, and such interest only they must necessarily be supposed to pass, so long as any of the before-mentioned intermediate estates, precedent to the testator's reversion in fee, subsists; and there is no reason to imagine that the testator intended his words should have two different meanings.

If your lordship should reverse this decree, Dame *Margaret Strode*, (under whom the plaintiff claims, and who had a jointure besides of 400*l. per annum*) has by the will of her son *Litton Litton*, legacies to the amount of 3600*l.* besides the rent charge of 100*l. per annum* thereby given to her, for her life, which is very near as ample a provision as he designed for an only daughter, in case he had left one. But if the decree stands, then the plaintiff in right of his wife, will receive out of *Litton Litton's* estate, four times as much as the provision made by the said testator for an only daughter, which can never be supposed the testator intended.

But,

But secondly, Supposing it appeared never so plainly to be the testator's intent to devise the absolute interest in the term to his mother, yet we humbly apprehend that such a devise cannot take effect in point of law, because those terms, (or which is the same thing as to the present question) the equity of redemption of them would then at the death of the testator stand limited in the following manner, *viz.* in trust, to attend the freehold and inheritance, so long as the estate + for life of *Strode Bedingfield*, the estates tail of his [+213] sons, and the contingent estates for life, and in tail of *George Darnelly* and his sons, shall last; and the residue, after all those estates spent, not to attend the inheritance, but to be for the benefit of *Lady Strode*, her executors and administrators, as terms in gross: and we humbly conceive that such a devise of the remainder of terms after estates tail is void, as being too remote, when separate from, and not attendant on the inheritance.

Terms indeed attendant on the inheritance, by the rules of this Court may be limited in the same manner as the fee, because they may be barred by a recovery of the estates in tail, and in remainder; but no act of the tenant in tail could cut off these terms, the terms themselves could not be barred, because the tenant in tail can bar only what arises out of his freehold, but these terms were raised precedent to his estate; nor the trusts of them, for nothing puts them in the power of the tenant in tail, but their attendancy; but by this will they are severed from the reversion: Equity considers the trust of a term, as to the limitations of it, in the same manner as a devise of a term, but a term could not be devised in this manner; and there is no difference, whether the term was thus originally limited, or by the devise; because the same consequences and inconveniencies would follow, and then that might be done by two conveyances, which could not by one. Suppose tenant in tail, with a term attendant, conveys to a purchaser, without suffering a common recovery, and the term is assigned in trust for the purchaser, and the tenant in tail dies leaving issue, the issue enters on the estate tail, and suffers a common recovery that will not bar the term, because it was not attendant at the time of the recovery.

But Thirdly, By the decree in the former cause, the Court has determined, that *Lady Strode* was intitled to the said terms, only as a security for the mortgage monies, by decreeing a redemption to *Strode Strode*.

Mr



De Term. S. Michael. 1729.

Mr. Solicitor General for the plaintiff.

[1214] In case the general devise to the defendant *William Robinson Litton*, and his heirs, may be sufficient to include the said premises in *Suffex*, by virtue of the general words, (though not expressly mentioned) yet I humbly apprehend, that both devises of the said premises in *Suffex* being consistent, ought both to stand, and that the devise to the defendant is in nature of a residuary devise, and therefore cannot controul what he had absolutely given his mother before, but that the plaintiff is intitled to the said several terms of years absolutely, † and the defendant only to the reversion in fee of the lands in *Suffex*, the defendant having by the same will a very large estate given to him in possession in other counties. The plaintiff and defendant both derive their respective titles under the same will as voluntary devisees, and therefore it is highly reasonable that the same shall be construed in such a manner, as that an express particular devise of lands, fully and plainly ascertained and described, shall not be defeated or invalidated by a general indefinite clause, and the words *Whereof he was seized in equity, &c.* does not shew that the testator designed the equity of redemption of these terms to the defendant, because the legal interest of most part of his estate stood limited to trustees, and this is not insisted on in the pleadings.

The testator *Litton Litton* having the remainder in fee of the estate in *Suffex*, which was mortgaged, had undoubtedly a power to dispose of the term of a thousand years, and the equity of redemption thereof absolutely, against every one except *Strode Bedingsfield*, who had an estate for life by the will of Sir *George Strode*, and except the contingent remainders created by the same will, if they had happened to take place, which they did not.

As *Litton Litton* had such a power, he has by plain and express words given these terms for years to his mother absolutely, and without any condition, or subject to any redemption, so far as he had power, for he directs that his executors should pay off, and discharge all mortgages and incumbrances, laid upon his estate in *Suffex*, charged by the testator's father, and that the several mortgage leases should be kept on foot, and be assigned to his mother, for her sole use and benefit, during the remainder of the several terms in the said mortgages contained.

The

The defendant's construction of these words rejects the word *sole*; for if the terms are liable to a redemption, she does not hold them *for her sole use and benefit*, but partly for her own benefit, partly for the benefit of another.

Though the mortgagees only are directed to assign, yet more than their legal interest passed by the assignments. Suppose a mortgagor directs the terms to be assigned to another, is the assignee a trustee too? No, the interest of the mortgagor himself passes, as well as the legal estate of the mortgagee, and if the testator has an estate standing out in trustees, is it not the same thing? Whether he devises it to another, or directs the trustees to assign it to him for his sole use and benefit: as to the absurdity, that the same words should bear two meanings, the testator might reason with himself, that at † the worst she should have the 2000*l.* he de- [†215] signed her indeed the terms, if he could, otherwise the money.

And if it was the intention of the testator to devise these terms to his mother absolutely, no rule of law or equity is broke thereby: Here is no devise or limitation of any term in tail, or any tendency to a perpetuity, but only a devise of these terms for years, which were capable of being disposed of by will, according to the interest that the testator had in them; and though *Strode Strode* had such an interest for his life, that he might redeem them by virtue of the will of Sir *George Strode*, in respect of such interest, yet subject thereto, they are well devised to the Lady *Strode*, her executors and administrators.

It cannot be denied but the owner of the inheritance may carve terms out of it, or if there are terms attendant on it, he may sever them from the inheritance by devise, as well as create new terms, or if there are mortgage terms standing out on his estate, he may redeem them and give them away, or direct by his will his executors to redeem them, and assign them absolutely to another; and none who claim under his will can complain; for why should it operate in favour of one devisee, and not of both?

It is not so clear that the trust of a term cannot take effect after an estate tail, that never vested. 1 *Salk.* 158. 2 *Vern.* The trust of a term may be limited over after a contingent estate tail, and is good if the estate tail never vests.

600. *Higgins* versus *Dowler*, *A* demises lands for a term in trust, for *B* for life, then to his first son for the remainder of the term, and in default of issue of such son, to the second, and other sons of *B*, and for want of issue male, to the daughters of *B* for the remainder of the term; when it appeared thus at the first arguing, that no estate tail vested, but was contingent to the son, and never happened; the remainder over to the daughters was adjudged good, tho' when it came out to be an estate tail vested in the father, a contrary judgment was given. But this is no contingent executory devise of the equity, but is a devise that vests immediately; contingent executory devises by law must vest in a short time, because they are not alienable till they are vested: if he had devised to her terms out of the inheritance, they would not be contingent devises, though they could not take effect in possession, but be remainders for years, and such limitations of terms have been disallowed as would create a perpetuity, or such estates as could not be barred. In the Duke of Norfolk's case, 3 Chan. Caf. 1. 1 Vern. 163. the declaration was of the trust of a term, derived out of the estate previous to the limitation in tail, and so could not be barred by docking the intail; but here the devise is out of a reversion on an estate tail, and if *Litton Litton* had issue, they, or *Strode Strode*, by suffering a recovery, would have barred the reversion, and this interest created out of it, behind the estates tail.

[+216]
If tenant
in tail, re-
mainder to
B for life,
remainder
to his first
and every
other son

in tail, remainder to the tenant in tail in fee, of lands subject to mortgage leases, directs his executors to pay off the mortgagees, and assign the leases to another, this is a good devise of the equity of the terms, and the several intermediate tenants in tail by a recovery can bar not only the remainder in fee, but the devise of the equity which arises out of it.

I allow the case Mr. Attorney General put, with this addition, if the purchaser had no notice of the intail at the time of his purchase, for then the term will cover his purchase, but not because it is severed from the inheritance, but from a new equity, that he is an innocent purchaser, and has got the law of his side.

As to the decree, *Strode Strode's* title being under the will of Sir *George Strode*, *Litton Litton* could not deprive him of his right of redemption, in respect of his estate for life, but the defendant *William Robinson Litton* claiming under the will of *Litton Litton* only, can have no greater interest than is given him by the same will, and by the decree of Lord Har-

court,

before the said *Strode Strode* was to redeem the said mortgages, so as to have the said terms attendant upon his said estate for life, he was ordered to pay to Lady *Strode* the said several sums advanced for her benefit out of the assets of the testator *Litton Litton*, and applied in discharging the said mortgages; but the same is not decreed to her in lieu and satisfaction of all her interest in those terms, and therefore the assignments to be made were to be subject to the further direction of the Court, and such assignments were drawn accordingly. But where the Court intended that another mortgage, which was to one *Bridges* upon another estate, should attend the inheritance, it is expressly ordered so by the said decree; and by their way of reasoning, we might as well say, that no one is intitled to the equity but *Strode Strode*, for the decree has provided no further, and there was no occasion to determine this question ante diem, especially between co-defendants, because if *Strode Strode* had children, it would be at an end.

Mr. *Lutwych*.

The testator directs, that the mortgages should be paid off and discharged; now if these are not absolute terms, they will be mortgages in the mother's hands contrary to this express direction; though his will indeed might be controlled by those who had a prior title.

Suppose *Litton Litton* had taken up money on these mortgages, could those who claimed under him have redeemed without paying off all the money? then that would have been a disposition of the equity for so much, and could not he as [4217] well discharge the terms of the whole equity?

If the testator designed his mother these terms as a security, why did not he direct that the other mortgages should be taken in with the 2000*l.* he devised to her?

And as to the objection of the same words passing two different interests, if *Litton Litton* had redeemed these mortgages in his life-time, he would have had a redeemable, and an irredeemable interest in him at the same time.

The general words that follow, cannot defeat our devise, no more than the several rent-charges granted by the testator. *Cro. Eliz.* 9, (2) if the testator first devises the fee, and after an estate for life, both devises shall take effect.

If lands are devised in fee to one, and after to another for life, both devises are good.

R

And

And this is not a void devise; a term for years cannot indeed be limited after an estate tail, and therefore if the testator had devised these terms to Lady *Strode* for life, remainder in tail, remainder over, the remainder over would have been void; but if one has a term for years after an estate tail, cannot he give it away? Can a man have an interest that shall go to his executors, which he cannot dispose of? but the defendant contradicts himself, for he claims these terms, and he is deceived in this point, that he thinks a term after an estate tail, cannot be disposed of.

And this severance of the terms will not create a perpetuity, but is a reversionary interest, which may be barred, for the equitable interest in these terms may be cut off by the several tenants in tail, because it is incident to their several estates, and therefore capable of their several qualities, to be barred, &c. and so as the recovery enlarges the estate, it will enlarge the trust.

If the decree has determined this question, then *William Robinson Litton* has no right to redeem, for the decree has given him none.

Mr. Justice *Denton*.

It does not appear by the former decree, that this question was ever determined.

The testator had plainly a power to devise these terms, but from the whole scope of the will, I think it evident that he designed her them only as securities.

[†218]

† Sir *Robert Raymond*.

This question depends solely on the construction of the will, and being only a devise of an equity must be guided by the intention of the testator, and I think it plainly appears he intended her only the money.

He first gives several legacies out of his personal estate, and then he disposes of his real estate, and the last clause, *As for and concerning all his manors, lands, &c.* explains his intention; I do not mean that this could defeat the first clause, if it had been plain, but as it is obscure, I think it may serve to explain it, if the testator had a son, he was to have

have all his lands, if a daughter, she was to have 5000*l.* and the defendant *William Robinson Litton* the estate; he keeps all his lands together, and when he wrote this last clause, he thought he had made no disposal of any part of them.

The word *Discharge* imports no more than paid off, but the mortgages were then discharged as to the mortgagees.

Then he says the mortgages (which are material words) shall be kept on foot, and the words *For her sole use and benefit*, if the testator intended to secure her only the money, can be applied no further, but must be confined to that only; and to decree her the terms would contradict the last clause, which certainly carries the reversion in fee; for can any one imagine he would give the reversion to the defendant after such terms, if he had designed his mother the interest in the lands he would have used plainer words, and have devised them to her in fee. I ground my opinion on the intention of the testator.

Lord Chancellor.

I shall consider the meaning of the will itself, as far as I can collect it from the words: The testator gives nothing to his mother he then had in him, but directs that his executors should purchase these two terms standing out; and that they should be assigned to his mother, so that his intention was, to purchase these mortgaged terms for her: All his father's mortgages were to be paid out of his personal estate, (and consequently they would sink into, or attend the inheritance) but these two were to be kept on foot for her sole use and benefit, not of those who were seized of the inheritance, but these words can be understood only of that interest the executors were to purchase, *During the residue, &c.* are words of course, and it is pretty odd, to construe the mother to have two distinct interests, one from the mortgagee, that could not be barred by the tenants in tail of the estate, and another out of the reversion that could; or to suppose, that with other like intermediate remainders, reversion in fee to *A*, and seized of other lands in fee, by his will directs his executor to pay off the mortgages in *Sussex*, that they shall be kept on foot, and assigned by the mortgagees to his mother, for her sole use and benefit, during the remainder of the several terms; and as for, and concerning all his manors, lands, &c. which he was then seized of in law, or equity, or which he had power to give, or charge, &c. he devises them to *C.* and his heirs. This is not a devise of the absolute terms to the mother, but of the money only, and the equity of redemption passes to *C.*

A tenant in tail of lands in *Sussex*, and elsewhere, subject to mortgages, remainder to *B* for life, remainder to his first and other sons in tail male

This decree by the same words, the testator designed to give her a re-
was affirm- deemable estate, which might continue as long as the terms
ed in Par- themselves, and an irredeemable one, out of the reversion.
liament, af- Therefore the decree must be reversed, and be it adjudged,
ter great de- That the equity of redemption belongs to *William Robinson*
bate, by 31 *Litton* the defendant, and that he shall hold the mortgaged
lords against 16, on premises absolutely against the plaintiff, his executors and
16, on *Thursday* administrators, and all claiming under the said Dame *Mar-*
the 12th of *garet Strode* deceased, and the plaintiff's original bill be dis-
March, missed.
1729-30.
Ant. Cal.
83.

Monday, November the 10th.

Case 121.
In Court.
Lord Chan-
cellor.

JAMES CLAVERING, plaintiff.

Lady CLAVERING and Sir FRANCIS CLAVERING,
Defendants.

Mr. Attorney General for the plaintiff.

Sel. Cal. in
Canc. 79.
S. C.

OLD Sir *James Clavering*, on the marriage of his son
John, settled his lands in the county of *Durham* in trust, to
the use of *John* for life, remainder to his first, and every
other son in tail male, remainder to *Francis Clavering* the
defendant for life, remainder to his first, and every other son
in tail male, remainder to the plaintiff in tail male, remainder
to *John* in fee, with a power to the several tenants in posses-
sion, to make a jointure.

Sir *John* the son, by virtue of his power, settled the lands,
out of which the points in question arise, on the defendant
Dame *Clavering*, his wife, for her life, for her jointure, and
died, leaving a son *James*, an infant, of about fourteen years
of age, having first made his will, and thereby devised the
guardianship of his said son to the defendant Lady *Clavering*,
who during the minority of her son opened the colliery of
Beckley on her jointure lands. Young Sir *James*, the son,
died abroad on his travels, before he came to the age of
twenty-one years, and the defendant Sir *Francis*, who was
next in remainder for life, entered upon the estate, and con-
tinues to dig in the same mine, and has also made several new
pits, and has cut down several trees, and has carried away a
great deal of the soil in laying a waggon way. Upon which
the plaintiff, as next in remainder in tail, (the defendant Sir
Francis having no sons) has filed his bill for an injunction to
stay waste.

I shall

† I shall first consider, whether the defendant Sir *Francis* has [†220]
a power to dig and open new pits in the same seam. The soil
of *Durham* is mostly coal, and if tenant for life might carry
on a seam in this manner, and dig and open pits at his plea-
sure, it would in effect be the same thing as if he opened a
new mine, because of the difficulty, if not impossibility, to
distinguish.

I shall next consider this case as if the mine was opened
by young Sir *James Clavering* the tenant in tail, and has it
ever been adjudged, that tenant for life in remainder, can
work, and carry on a mine so opened, to the prejudice of
those in remainder? If it had been opened indeed at the time
of the settlement, we allow he might.

But we say, there is no evidence that young Sir *James*
opened the mine, for he was not in possession of that part of
the estate, but that it was opened by the jointuress, who en-
tered into partnership with one *Pit* for digging the coal, and
she could not treat with him as guardian, on the part of the
infant, for if it had proved a losing undertaking, as it was
not carried on by the direction of a Court of equity, the in-
fant would not have been bound by it when he came of age;
he died under age, and before he made his election, and
shall she now say, I opened it as guardian, to give a right to
one in remainder, after the determination of her jointure.

But supposing the defendant Sir *Francis* has a right, we
are proper to pray an injunction to restrain him from working
in a wasteful manner, as from digging away the pillars, whereby
several tuns of coals are lost, and the workmen afraid to go
on, and from working in an unusual manner night and day,
whereby the vein will be spent in two or three years time.

We likewise pray an injunction against a waggon way he
has made, by which he has carried away a great deal of the
soil, and several trees, which is waste in a tenant for life, and
that things may be restored to their former condition.

Mr. Bootle.

Prohibitions lay at common law against the tenant in
dower, or by the courtesy before the statutes of *Marlbridge* Prohibi-
tions of
waste lay at
common law, against the tenant in dower, or by the courtesy.
and

and *Gloster, Co. Lit. 53, b.* and I do not know that a jointurefs can any more commit waste than a tenant in dower, unless she has a power exprefly given to her; and though waste or trover lay in this cafe, we have a right to an injunction to hinder things for the time to come, but waste will not lie againft the defendant Dame *Clavering* the jointurefs, be-
[+221] caufe † of the intermediate eftate for life of Sir *Francis*, nor againft the defendant Sir *Francis*; for the writ muft be brought either in the tenit or tenuit, but he neither is, or has been in poffeffion, but is taking upon him before his time, and the damages given in trover would be but a fmall recompence for the lofs of our inheritance.

Many hills have been levelled, and many tuns of earth carried off in making this waggon way, and the ground might have been arable before, and then it is certainly waste.

Mr. Solicitor General for the defendants.

The chief question is, whether Lady *Clavering* opened this mine as guardian or jointurefs? the plaintiff has read no evidence to prove she opened it for herself, our evidence is very ftrong that she opened it by the advice of her fon's friends for his ufe and benefit; that the books were kept in his name, and that on the death of her fon, though her jointure continued, she put a ftop to the works; she was in poffeffion of the eftate in two capacities, in one of which she might lawfully pen the mine, and not in the other; and therefore, if there is no particular evidence to the contrary, the law will prefume she did it in the rightful manner: And tho' the fon was not in poffeffion, the opening the mine was an injury only to her, which she could, and did difpenfe with for his fake. So this cafe muft be confidered, as if the mine was opened by tenant in tail, but they fay it might have turned to a lofing undertaking, and that the infant would not be bound by it, but where a guardian acts bonâ fide with a good profpect for an infant, fhall she fuffer if any lofs happens, and yet the infant have the advantage, if it proves a beneficial undertaking? and it is plain the plaintiff knew this mine was opened in right of the fon; for on the news of his death he went directly to the colliery, and ordered the works (which were difcontinued by the order of Lady *Clavering*) to be carried on for the benefit of the defendant Sir *Francis*, who was then in *London*, and advifed him afterwards to let it, and fhewed him where a waggon way might be made, which has been fince laid at a great expence, and yet now he prays an injunction.

As

As to the law, I am far from contending that if one tenant for life commits waste, another in remainder for life may continue it; but we say, this mine was opened, not in her own right, but in the right of the tenant in tail, and it does not signify whether it was opened at the time of the settlement, if it was open at the time the defendant came into possession.

† They say the defendant can only work in the same pit, [†222] but not make new ones, but their argument will not hold, unless they can prove mines and pits to be the same, so far as the mine runs, so far the defendant has possession; but they say the whole country is mine, and yet complain that the colliery will be worked out in two or three years, it is no waste either in tenant for life, or for years, to pursue mines that are open; and though the defendant must agree with *Lady Clavering* for a liberty to work these mines, and to come over the soil, this is not waste.

Their next complaint is, that the defendant works irregularly, but if he has a right, though he should work the mine quite away, no injunction will lie, he may sink as many pits as he pleases, he may make the best advantage of it he can; and if the plaintiff could not bring waste, he might have brought an action of trover, and established his right to the coal, and then filed his bill for an injunction, and not have come here in the first place, when the right is so clear against him, and this injunction would oblige *Sir Francis* to break his contracts with his lessees, and subject him to several actions.

It is not yet settled at law, whether laying a waggon way is waste; but suppose it is, the real injury in this case is, only the taking away a few small trees; they own it has been made at a great expence, and instead of impoverishing, it will improve the estate, and when the plaintiff's remainder takes place, will be ready laid for him; whereas injunctions are granted to prevent, not to cause waste; but the plaintiff himself first proposed the making of it, and never objected to it, though it was six months in hand, which is a bar to him in equity, though he had a right.

Lord Chancellor.

The proof is express, that the plaintiff advised the waggon way, and stood still, and saw it done, and digging in the soil is only a trespass against the tenant for life, and I will not oblige them to pull down this way, after they have laid out 1500*l.* on it, because they have cut down a tree or two, or carried off a little of the soil.

The case in short is this, tenant for life, remainder to his first and every other son in tail, with several remainders for life, and in tail, with a power to the several tenants in possession to make a jointure, which the first tenant for life does accordingly, and dies, leaving the jointure's guardian to his son the tenant in tail, and a pit is opened during her possession.

[+223] + And the first question is on the fact, whether this pit was opened for the benefit of the tenant in tail? And there is strong proof, that Lady *Clavering* opened it as guardian, and none to the contrary; and that when she had news of her son's death, she immediately ordered the men to cease from working; and the plaintiff went to the colliery, and ordered the works to be continued for the defendant Sir *Francis*.

The jointure's, and also guardian to the tenant in tail, opens a mine on her jointure lands, for the benefit of the tenant in tail; he dies under age. Q. If the next remainder-man for life can work the mine.

Supposing then the tenant in tail opened this mine, the next question is, Whether the tenant for life, after his death, finding it open, though it was not so at the time of the settlement, may work it, and I am of opinion that he may. The cases in *Coke* upon *Littleton* are all of tenants under leases, but the reason of them will hold in this case; tenant for life cannot take the lands as they were at the time of the settlement, the vesture of the lands is taken away by him that had a power, and therefore he must have the mine in lieu of it.

And if he has a right to the mine, the next question is, whether he can sink new pits? and it was solemnly found at the assizes at *Wells*, on an issue directed out of this Court, in the case of *Helyar* and *Twysford*, of a coal mendippe mine, to the satisfaction of the counsel, and of Mr. Justice *Powel* that tenant for life might dig new pits in the same seam of coal as he pleases, and may work the mine in what manner he thinks most proper.

coal,

coal, and that the opening pits was for the benefit of the air, and the easier coming at the vein, this having been found in a long solemn trial, and before so able a judge, cannot be controverted. This is a new case, and as the plaintiff has set the works agoing for the defendant Sir *Francis*, the tenant for life, and he has been at a great expence, it would be hard to grant him an injunction, and it would be also hard to dismiss his bill; therefore I will retain the bill for a twelvemonth, that he may try his right at law in the mean time.

Mr. *Lutwyche* for the defendants.

I hope your lordship will dismiss their bill, and not countenance them so far as to retain it, for that would be in effect to direct a trial, whereas though the plaintiff should have a verdict at law for him, he is not intitled to any relief in this Court. The laying the waggon way, as well as working the colliery, has been very expensive to the defendant, so that we have a strong equity against the plaintiff, though the law should go for him, because he led us into this expence, and he advised us to let the works, which we have done, and covenanted with our tenants, and would he force us now to break our covenants? and your lordship, by dismissing the bill, takes no right from him.

† In the case of *Mason* versus *Mason*, the mother was both jointress and guardian, and entered into articles for the sale of 1000*l.* worth of timber, and these articles were carried into execution by this Court, but she had no power by her jointure to fell timber.

[+224]

Articles by a guardian for sale of timber, have been carried into execution

by a Court of equity.

In *Savil's* case, the guardian by nurture, cut down seven or eight thousand pounds worth of timber, where the tenant in tail lay a dying, and I moved your lordship for the next in remainder for an injunction, and your lordship denied the motion, because the guardian had a power to make what advantage she thought proper of the estate for the infant, and after the death of the tenant in tail, a bill brought by the remainder-man for relief was dismissed, because the tenant in tail had a power over the inheritance, and the guardian might

This Court denied an injunction to stop the guardian of tenant in tail, who lay a dying, from cutting timber, or to give relief, after his death

for what was cut, for as tenant in tail has a power over the inheritance, so the guardian may exercise that power in what manner she thinks most for the benefit of the minor.

exercise

exercise that power in any manner she thought proper, and the plaintiff here is in *Savil's* condition, he that is in remainder after a tenant in tail, must be subject to the power of the tenant in tail, and what he can do, the guardian may do; and the lands only were in jointure to Lady *Clavering*, for the mine was not open at the death of her husband, afterwards she opens the mine for her son, and agrees to give him a liberty to work it, the tenant in tail then was in possession of the mine, and after his death it came in possession to the next in remainder, and all we derive from the jointure is an excuse from trespass; and as she might have surrendered to the tenant in tail, sure she might dispense with his taking part of the profits.

Mr. Attorney General for the plaintiff.

We have a right to come into this Court to have the title deeds produced at the trial, and if the verdict goes for us, we shall be intitled to an injunction; it is said our bill ought to be dismissed, because we encouraged the defendant Sir *Francis* to go on with the works, what we did was immediately upon the death of young Sir *James*, before we had seen the deeds, or knew our own title, which as soon as we were acquainted with, we brought this bill, and the greatest part of the expence the defendant has been at, was since the filing of it.

Lord Chancellor.

The Court ordered the bill to be retained, that the plaintiff, who was remainder-man in tail, might bring trover for the coals against the defendant, who was a prior remainder-man for life, and the defendant was to produce the title deeds on the trial.

It is too hard to dismiss the bill on this new point of law, and they cannot go to trial without the aid of this Court, let the bill therefore be dismissed, as to the waggon way. And as for the residue, let it be retained for a twelvemonth, 'till the plaintiff has an opportunity to try at law in an action of trover, to whom the property of the coals does belong. [+224] To which end, the defendant is to produce the deeds + at the trial, and if a verdict goes for the plaintiff, the parties may resort back; if against the plaintiff, or he does not proceed, the residue is to be dismissed with costs.

Friday,

De Term. S. Michael. 1729.

Friday, November the 21st.

KNOWLES *versus* SPENCE.

Cafe 122.
In Court
Lord Chan-
cellor.

Mr. Solicitor General for the defendant.

MR. *Knowles* the grand-father of the plaintiff, mortgaged the lands in question to *Lawson* for 138*l.* and *Spence* the defendant entered into bonds with him, to secure the re-payment of the money, which *Spence* afterwards paid, and in 1676 the mortgage was assigned to him by *Knowles* and *Dawson*: In 1685, *Spence* advanced 8*l.* more, which was secured by the said lands, by an indorsement on the mortgage, and in 1696 *Knowles* delivered possession to *Spence*, and in 1699 died, leaving a son the father of the plaintiff, of full age, who lived 'till 1705, and in all that time made no claim or application to the defendant, the plaintiff, his son, was nineteen at the time of his death, and in 1727 filed this bill twenty-two years after his title accrued, and about thirty-two years after *Spence* came first into possession: And the only question is, Whether he may redeem after this distance of time?

It must be allowed that an equity of redemption may be barred by length of time, as well as by a foreclosure, or a release, and in conformity to the statute of limitations, Courts of equity have decreed, that twenty years shall amount to a foreclosure, which is the same length of time, that by the statute bars the party of his right of entry, here above thirty years are lapsed, since the defendant came into possession, and tho' the plaintiff was an infant in 1705, when his father died, his grandfather and father were of full age, and under no disability, and where once the time begins, no disability after can prevent its running on.

And where the mortgagee continues so long in quiet possession, the law is the same whether he entered voluntarily, or on an ejectment; nay, in the first case, the evidence is stronger against the mortgagor, that the security is defective. In the case of *Ord versus Heming*, 1 *Vern.* 418. a demurrer to a redemption, because the mortgage was sixty years old, was over-ruled, because it was expressly charged in the bill, that the mortgagor agreed the mortgagee should enter, and hold till he was satisfied, and in that case, length of time is no bar
[+226]
mortgagor himself, or by the Sheriff. Ant. Caf. 101.
bar

Twenty
years quiet
possession is
a bar to the
equity of
the mortga-
gor, whe-
ther the
mortgagee
was put in
possession
by the

bar, and that being on a demurrer, the Court might be willing to look further into it; but here it is not charged that possession was delivered to the mortgagee, that the mortgage might be paid by the perception of the profits: and the difficulty of accounting is the same, whether the mortgagee was put into possession by the mortgagor or by the sheriff.

The value of the estate, and the easiness of taking the account, are I allow considerations of weight in a doubtful case; the plaintiff says the estate is worth 400*l.* to be sold, and 16*l.* a year, it was valued only at 196*l.* when we came into possession; and though it may be of great value now, by our improvements, that will not give the plaintiff a better equity to redeem. We have made several improvements, we built a barn about twenty-eight years ago, and the workmen's bills are lost or mislaid; so that we are under a disability of proving the sums, and the times they were laid out, to have interest allowed for them.

Lord Chancellor.

I shall endeavour to come as near to the law, and a certain rule as I can; by law the plaintiff is barred of his entry, or account of profits, why should equity then act contrary to law? and since it is necessary to fix a time, no better can be pitched on, than that settled by the law, and therefore the bill must be dismissed. Mortgagees are subjected to too many hardships in this Court, without obliging them to account after such a length of time: Formerly they accounted only as bailiffs for what they actually received; now they are obliged to account not only for what they actually receive, but for what they might have received without their wilful default, and they are allowed nothing for their care and pains, why should the defendant give the plaintiff thirty-two years labour for nothing?

1 Chan. Caf.
102.

If a cause is adjourned over, for want of parties, and the defendant is served with the order, yet he must be served with a subpoena to hear judgment.
If a cause is adjourned over, for want of parties, the defendant is served with the order, he must be served with a subpoena to hear judgment.

All just allowances in a decree do not empower the Master to allow for improvements, but they must be particularly mentioned, which the Court never does, unless the party gives proof of some.
The words, *All just allowances*, in a decree, do not empower the Master to allow for improvements, but the decree must particularly mention them, which it never does, unless the party lay before the Court some proof there have been any.

Wednesday,

De Term. S. Michael. 1729.

† *Wednesday, November the 26th.*

PLEAS AND DEMURRERS.

COTTER versus LAYER.

Mr. Attorney General for the defendant.

[†227]

Cafe 123.

At the

Chancel-

lor's house.

Lord

Chancellor.

MRS. *Layer* being first privately examined, surrendered a copyhold in fee, to such uses as she by any writing, or by her last will and testament, duly attested in the presence of three or more credible witnesses, whether sole or covert, should direct and appoint. And in 1716, she, by her last will, declaration, and appointment, devised the use of it to *Christopher* her husband for his life, remainder to the defendant her daughter, and the heirs of her body. *Christopher* the husband died, and Mrs. *Layer*, in 1724, by articles previous to her marriage with the plaintiff, covenanted to surrender the premises to the use of her, and the plaintiff for their lives, remainder to the use of the plaintiff and his heirs. Mrs. *Layer* is since dead, and the plaintiff has filed his bill to have a specific performance of these articles, and the estate surrendered to him and his heirs. To this bill the defendant has pleaded in bar, the appointment in 1716, and demurred, as to any right he claims by the deed of 1724, because of his own shewing he has no title. And the question on our plea is, Whether the writing in 1716 shall be considered only as an execution of her power, or as a will, which is revoked by her subsequent marriage; and it cannot be considered as a will, for a feme covert cannot make a will, without the consent of her husband, but as executrix; but she may execute a power, or an appointment.

As to the demurrer, it is good, because the plaintiff has not shewed, that she pursued his power. In his original bill he charged that the articles were executed in the presence of two witnesses, and our demurrer to it was allowed; now he has amended his bill, and left out the number of witnesses.

Mr. Solicitor General for the plaintiff.

This plea was put in to our original bill, and over-ruled; for the writing in 1716 must be considered as a last will, which
ment by will, and her husband dies, and she marries again, this is a revocation of her
will, and appointment. 1 Mod. 117.

If a feme
covert
makes an
appoint-

is

[†228]
An ap-
pointment
by will is
subject to
revocation.

is revoked by her marriage, she devises to her husband, the words last will are mentioned, and no use is limited to herself; the defendant says, this is an appointment, not a will; †it is an appointment by will, and so must have the same ceremonies as a will, and will partake of all the qualities of a will, as to be subject to revocation, and the like; as was adjudged on an appointment by will to charitable purposes. 2 Vern. 597.

And as their plea endeavours to set out a title in themselves, so their demurrer is intended to shew we have none; in the original bill, the plaintiff only set out the articles of 1724, which were attested by two witnesses only, without alleging that they were executed previous to his marriage, or for a valuable consideration, and therefore the demurrer was allowed, because of his own shewing it appeared to be a voluntary defective execution of her power. But by our amended bill we charge, that Mrs. *Layer*, by articles previous to her marriage, covenanted for herself and her heirs to surrender to such uses, these articles were obligatory to her, tho' they were attested by two witnesses only, so that her power was not legally executed, and the Court would have obliged her to perform them, and we have a right to have them made good in equity by the defendant, who is to be considered only as her heir at law.

Lord Chancellor.

If the bill
is to have
the defec-
tive execu-
tion of a
power
made good,
the defen-
dant cannot
demur that
the plaintiff
of his own
shewing has
no title.

The defendant demurs, because the plaintiff of his own shewing has no legal title, whereas the end of his bill is for relief, and to have the defective execution of the power made good in equity: Therefore the demurrer must be over-ruled, for the benefit of it is never saved to the hearing; and the plea is proper to be determined at the hearing, and therefore let it stand for an answer.

The benefit of a demurrer is never saved to the hearing. 1 Vern. 478. cont.

Case 124.
At the
Chancel-
lor's house,
Lord Chan-
cellor.
Eodem die.

NIGHTINGALE versus DODD.

Mr. Verney.

In 1715, Mr. *Bobun* being appointed by the *East-India* Company the Governor of *Bombay*, made Sir *Robert Nightingale*

Nightingale and *Mr. Chamberlain* his agents in *England*, and on his return, filed a bill against *Mr. Nightingale*, the representative of *Sir Robert*, and *Mr. Chamberlain*, for an account of the profits of his real estate, and of his remittances; and *Mr. Nightingale* filed a cross bill against *Mr. Chamberlain* and *Mr. Bobun*, for an account of what remittances had been made him to the *East Indies*, and both causes coming on to be heard together, mutual accounts were decreed, and the parties to be examined on interrogatories. Pursuant to this decree, *Mr. Chamberlain* and *Mr. Bobun* were examined before the Master; then *Mr. Nightingale* exhibits this bill against *Mr. Chamberlain* only, (which on his death was revived against his executor *Mr. † Dodd*) and the cause being at issue, ex- [†229] amines *Mr. Bobun* as a witness, and he demurred to those interrogatories only, he had been examined to before the Master in the other causes.

A witness is not to be examined to his own interest, but may demur to the interrogatories, on affidavit, if he is not defendant in the cause, 2 Chan. Cas. 208. A reversioner demurred to his being examined as a witness, because his estate depended upon the same title, and the demurrer was over-ruled for want of an affidavit, because it did not appear he was concerned in interest by the acts of the Court; and though a defendant by answer must discover against himself, yet then he has the advice of counsel; but it is otherwise when he is examined on interrogatories, and he has been already examined to these.

Mr. Attorney General for the plaintiff.

This bill was brought by the plaintiff, as executor of *Sir Robert Nightingale*, for an account of his personal estate against *Mr. Chamberlain*, and is now revived against the defendant *Dodd* his executor. *Mr. Chamberlain* in his answer swore, that his own estate was so mixed with *Sir Robert's*, that he could not distinguish them; this made it necessary for us to examine many witnesses to *Mr. Chamberlain's* dealings, the value and nature of them. *Mr. Bobun* demurs, because other suits are depending; he states his demurrer as a plea, and does not rely on the interrogatories being bad in law, but on matter dehors the former decree, and the examination before the Master on the same interrogatories, so his demurrer is not good in form, and he does not demur because

cause he is concerned in interest, and though he has been examined on interrogatories as a party in the other causes, his depositions cannot be read as evidence against the defendant in this cause, because he had no liberty to cross examine him, and he ought to shew he is concerned in interest.

Mr. Verney.

If a witness could not demur for matter extrinsic to the interrogatories, he could seldom demur, because he was concerned in interest, but the case of the affidavit shews the course of the Court to be otherwise.

Lord Chancellor.

A defendant can demur only for matter appearing in the bill, but a witness may demur for matters dehors to the interrogatory, because he has no other way to [+230] relieve himself, but by demurrer; but then the facts must be verified by affidavits: *Mr. Bohun* in the other causes is to account for, and be examined what assets of *Sir Robert Nightingale* came to his hands, yet sure in this cause he may be examined what assets of *Sir Robert* came into the hands of *Mr. Chamberlain*, and he cannot demur because the interrogatories are the same in both causes, because they may be proper tho' it does to discover both points. Ant. Caf. 107.

Cafe 125.
In Court
Master of
the Rolls.

Thursday, November the 27th.

NIGHTINGALE versus **LOCKMAN, & ux.**

Mr. Attorney General for the plaintiff.

THIS bill is brought by the plaintiff, as executor of *Joseph Gascoign Nightingale*, who was executor of *Sir Robert Nightingale*, against the defendant *Mr. Lockman*, and his wife *Elizabeth*, executrix of her former husband *Mr. Chitty*, for payment out of his assets of 500*l.* *East India* stock, which *Sir Robert Nightingale* transferred to the said *Mr. Chitty*; and the only question in this cause is, Whether the share of the defendant *Elizabeth* of 10,000*l.* which was brought before the Master by *Sir Robert Nightingale* in another cause survives to her, or is to be considered as part of the assets of *Mr. Chitty*?

And

And the case is shortly this. Mr. *Ralph Sheldon*, heretofore husband to the defendant Mrs. *Lockman*, on the 28th of February 1708, made his will at *Calcutta* in the *East Indies*, and thereby gave to the defendant *Elizabeth* one third part of his whole estate, and the remaining two thirds to his two sons, *Ralph* and *Gilbert*; and in case his two sons died under age, then he gave one half of their said two shares to the said *Elizabeth*, and the other half to his three sisters, *Ann*, *Mercy*, and *Winifred*; and appointed the said *Elizabeth*, Mr. *Russel*, and Mr. *Freak*, his trustees, to collect his estate in the *East Indies*, and to remit it to *England* to Sir *Robert Nightingale*, and made Sir *Robert* and his wife *Elizabeth* executors: *Ralph* the son died in the life-time of his father, and *Gilbert* the son, soon after his death, under age. In *Hilary term* 1711, *Prideau Sutton*, who intermarried with the said *Ann Sheldon*, and the said *Ann*, and also the said *Mercy*, and *Winifred* exhibited their bill against Sir *Robert Nightingale*, the defendant *Elizabeth*, and *Jessiah Chitty*, her then husband, to have a discovery, and an account of the estate and effects of the said *Ralph Sheldon* the testator, and to be paid their shares, † and on the 28th of May 1715, the cause coming [†231] to be heard before the Lord Chancellor *Cowper*, his lordship declared, that the defendant *Elizabeth*, then *Elizabeth Chitty*, was intitled to two thirds of the estate of the testator *Ralph Sheldon*, after payment of his debts, and that the other third belonged to the plaintiffs, or those whom they represented, and ordered the same to be distributed accordingly; and further ordered, that Sir *Robert Nightingale* should forthwith bring the sum of 10,000*l.* before a Master, part of the testator's estate admitted by his answer to be in his hands, and the Master was to place it out at interest, on government, or other securities, for the benefit of the parties, to whom the same should appear to belong; and an account was to be taken, and pursuant to this decree, Sir *Robert Nightingale* brought the 10,000*l.* before the Master.

Mr. *Chitty* was intitled to a share of this 10,000*l.* in right of his wife, and it having been paid to a Master, it ought as much to be considered as his assets, as if it had been paid to him, and otherwise, the plaintiff who is a just creditor shall have no satisfaction; he was intitled to this share indeed only in right of his wife, and if it had not been recovered by him in his life-time, it would have survived to her; so the question is, Whether the property was not altered? A bill was
S brought,

A sum of money awarded to the husband, which he was intitled to in right of his wife, goes to the executors of the husband, and does not survive to the wife. The portion of a lunatick by [† 232] order of Court is paid in to a Master, and the husband on making a settlement, is to have it out, he makes no settlement, but assigns the money over to his creditors, and dies, the wife survives, and dies without issue, the money was decreed to his creditors, for the payment to the Master was a payment to the husband, tho' the Court would not let him lay hands on the money without providing for the wife, but she being dead without issue, his right stands here as at law.

brought, and a decree made, that the parties should account, and an exprefs declaration, that Mrs. *Chitty* was intitled to such a share, and that she should be paid accordingly; this is sufficient to vest a property in the husband, but the 10,000*l.* is also directed to be placed out at interest for the benefit of the parties, one of whom was Mr. *Chitty*, in right of his wife, and this money was paid to the Master in the life-time of Mr. *Chitty*, only 'till it appeared to whom it was payable, and the case of *Oglander* versus *Baston*, 1 *Vern.* 296. is an authority in point, where it was adjudged, that a sum of money awarded to the husband, which he was intitled to in right of his wife, should go to his executor, and not survive to the wife. Another authority is the case of *Packer* versus *Windham*, decreed the 9th of *November*, 2 *Geo.* I. Mr. *Packer* was committed to the *Fleet* for marrying a lunatick without consent of this Court; and by an order made on a petition of the mortgagor, her portion of 10,000*l.* which stood out on a mortgage, was paid in to a Master; after, by an order of Court, Mr. *Packer* was discharged out of custody, and part of this 10,000*l.* was to be applied to pay off the incumbrances on the real estate of Mr. *Packer*, which he was to settle to the use of himself for life, remainder to his wife for life for a jointure, remainder to the first, and every other † son of the marriage, and upon his making such settlement, the remainder was to be paid to Mr. *Packer*; and the commission of lunacy was superseded, Mr. *Packer* never made any settlement, but assigned this money to several of his creditors, and growing lunatick, a commission of lunacy was after taken out against him: Mr. *Packer* died, and his wife survived him, and died without issue; and the question between the creditors of Mr. *Packer*, and the representatives of Mrs. *Packer* was, Whether this 10,000*l.* should be considered as the assets of the husband, or whether it should survive to the wife? And Lord *Cowper* declared, that Mr. *Packer* not having complied with the terms of the order, by making a settlement, the order was quite out of the case, and it ought to be considered as if no such order had been made; and that though this Court would not suffer the husband to touch the wife's portion, without making a proper settlement on her, yet the receipt of the Master ought to be considered as the receipt of the husband, because the Court

laid hold of the money only for the security of the wife, and that though choses in action could not be assigned by law, they might in equity, and therefore the wife being dead without issue, so that there was no occasion for a settlement, his lordship declared it to be the assets of the husband to satisfy his creditors. There the wife's portion was brought into Court, and there was no decree, that the husband had any title to it, and tho' this was a chose in action, and the husband died first, yet his lordship considered the payment of the money to the Master, as if it had been paid to the wife; in which case the husband would have had an undoubted right to it; here Mr. *Chitty* was intitled in right of his wife, and Sir *Robert Nightingale* might have paid it to him.

Mr. Wills.

If the decree had expressly directed the share of the wife to be paid to the husband, from that time it would have been his money, though it was not actually paid to him, by the case of *Oglander* and *Baston*: But they say, the decree declares the right to be in the wife only, and not in the husband; but then by parity of reasoning from *Packer's* case, as payment to the Master was adjudged payment to the husband, so here, a payment to the Master shall be adjudged a payment to the wife, then from that time it is no more a chose in action, but becomes the property of the husband.

Mr. Solicitor General for the defendants.

Though the plaintiff is a creditor, he is only a creditor of Mr. *Chitty*, and not of the defendant *Elizabeth*, who is no further accountable than she has assets, and the question is, Whether her share of this 10,000*l.* which is not ascertained at this day, shall be accounted such? [1233] The 10,000*l.* is only directed to be placed out at interest, for the benefit of those to whom it shall appear to belong; it is not directed to be paid to any one, 1700*l.* has been paid out of it to the children of Mr. *Halfey*, (as creditors of Mr. *Sheldon*,) the defendant *Elizabeth's* first husband, to whom she was executrix, whose effects came into the hands of Mr. *Sheldon*, this money was brought in only as part of the assets of Mr. *Sheldon*, for the payment of his debts and legacies. It is admitted, that if money is due to the wife, and is not recovered by the husband in his life-time, it survives to her;

If judgment is recovered by husband and wife, the judgment survives to her; and if this decree had been to pay the money to the husband and wife, his representatives would have no more right than on a judgment at law; but in this case the husband and wife are only defendants, and the payment is directed to be made to the wife only. It is said that this payment to the master is payment to the wife, as in *Packer's* case: The decree in that case takes notice, that by an order of Court, the husband was to make a settlement, and if he had, though he is not legally intitled to the wife's choses in action, yet he is considered in this Court as a purchaser of them, as appears by many decrees; he was bound by the order to do it, but being grown lunatick, and the wife dead without issue, his not doing it was of no disservice to her, or his family; though I allow indeed, that Lord *Cowper* put the order out of the case. But if money out at interest is paid to the servant of the wife, this is a payment to the wife, or if it be paid to her Committee, which was the case of *Packer*, there was no cause in Court, but an order on a petition to pay the money to a master, who in this instance was to be considered as a special committee for the wife. But the payment of this 10,000*l.* cannot be considered as a payment to the wife, it is paid as part of Mr. *Sheldon's* assets, liable to his debts and legacies, and the surplus only is distributable; it is only a depofite of so much of Mr. *Sheldon's* assets, and is not a payment either to the plaintiffs or defendants.

Mr. Verney.

If husband and wife have a decree in right of the wife, the decree survives to the wife. This payment to the master makes no difference in the case. If husband and wife have a decree in right of the wife, the benefit of it survives to the wife, 1 Chan. Caf. 27. *Nanny* versus *Martin*, here the husband has done no act to shew his right, and Lord *Cowper's* reasons, in the case of *Packer* versus *Windham*, make strongly for us; there the wife's portion was actually paid in to a master, which gave the husband an indisputable right to it; but he was prevented by the Court from laying hands on it, without making a provision for the wife and children, but she being dead without issue, his right was to be considered as it stood at law, and as if he had actual possession; but here, the creditor comes while the wife is living, and this money remains as much unapplied as if it was still in Sir *Robert's* hands.

[+234]
Nelf. Fol.
Rep. in
Canc. 145.

hands. No sum is liquidated, that the wife herself is intitled to, as in *Packer's* case, so far it remains a chose in action, and must be considered as so much of the assets of Mr. *Sheldon* not distributed; suppose the husband himself had applied to have had this share paid to him, the Court would have obliged him to make a settlement, we have no provision from him.

Master of the Rolls.

The question is, Whether the defendant *Elizabeth's* share of this 10,000*l.* ought to be considered as the assets of Mr. *Chitty*? I acquiesce in the authority of *Packer* versus *Windham*, which is founded on several settled rules of this Court; but then let us consider whether this case comes within the reason of that: Mrs. *Packer* was a lunatick, under the care of this Court, whom it generally intrusts to a committee, but may take care of them in another manner by provisional orders; so, in that case, as Mr. Solicitor General observes, the Court committed this part of her estate to a master, as to a special committee; and the payment to him was a payment for the use of the lunatick, and vested a right in the husband to the money, though he could not lay his hands on it without making the wife a provision; but she being dead without issue, it is as if no such order had been made, then she being a lunatick, and the money paid to her committee, it is the same as if she had been sane, and the money paid to her, and then the husband would have been intitled to it: But here is no payment to the wife, the decree declares the wife intitled to such a share, and that after the account was taken, and the debts paid, the estate should be distributed accordingly; suppose the decree had been, that the share should be paid to the husband and wife, if the money was not paid 'till after the husband's death, she would be intitled to it, as at law on a judgment, the right survives to the wife, and the executors of the husband cannot bring a scire facias; and the case sure is not the less strong because this decree says it shall be paid to the wife. As to the other part of the decree, the Court only provisionally directs that the money shall be brought before the master; can this be considered as

Bill against husband and wife, the decree declares, that such a share of the testator's estate after payment of debts, belongs to the wife, and such a share to the plaintiffs, and orders it to be distributed accordingly, and that 10,000*l.* part of the assets should be brought before a Master to be put out at interest for the benefit of the parties to whom it shall appear to belong; this is only in nature of an interlocutory judgment, and the wife's share of the 10,000*l.* does not rest in the husband, but survives to the wife.

a payment

[1235] a payment either to the husband or wife? No, the Court cautiously declares it to be for the benefit of the parties, to whom it shall appear to belong, without determining who they were, but another act of the Court was to pass on that question, who had the right to it; in the first place, it belonged to the creditors, and it appears, that some of them have been paid out of it, and this 10,000*l.* is only part of the estate, not the liquidated sum to be distributed, that depended on the master's report, which must be confirmed by the Court, so that this decree is like an interlocutory judgment, *Quod computet*, by which the husband acquires no right; but if he dies, the wife must revive: But if the sum had been liquidated by the master's report, and confirmed by the Court, in the life-time of the husband, still the Court would have considered on what terms the husband should have received it. But there is no foundation to say, that this decree, or the payment to the master, which is only an execution of the provisional part of it, vests any interest in the husband; and therefore the defendant *Elizabeth's* share of this money, cannot be considered as part of the assets of Mr. *Chitty*.

1 *Vern.* 161.
2 *Vern.* 19,
707, 68,
401, 501.
1 *Chan. Caf.*
41, 181,
189. 4 *Inst.*
85, 86, 87.

Suppl to *Wentw.* 310. *Swinb.* part 2, sect. 9. n. 13. *Moor*, 339. *Caf.* 359. *Br.* Ab. tit. Test. n. 11. *Fitz.* Ab. tit. Ex. n. 109. *Post.* *Caf.* 200. *Swinb.* part 6, sect. 7. n. 7.

Cafe 126.
In Court
Lord Chan-
celler.

Friday, November the 28th.

MOTIONS.

MOLINEAUX & ux', versus BIRD, al' COLLINS.

MRS. *Molineaux's* mother was divorced from her husband *causa adulterii* with the defendant, and the father, after the death of her mother, intermarried with the defendant, and by will devised to her all his personal estate, and made her executrix; the defendant proved the will in common form, and the plaintiffs instituted a suit in the spiritual Court, to set aside this will; and the probate granted to the defendant was ordered to be brought in: And the plaintiffs filed their bill for satisfaction out of assets, of 1000*l.* due to the wife by her mother's marriage articles, and for a distributive share of the personal estate of her father, in case he made no will, and the defendant having prayed a month's time to answer, the

the council for the plaintiffs on affidavit of the insolvency of the defendant the executrix, moved the Court, that she might be enjoined from receiving any more of the personal estate 'till the suit in the spiritual Court was determined, and to bring before a master what she had already received, and said, that Lord *Harcourt* had frequently made such orders on a certificate only that the bill was filed.

† Lord Chancellor.

[†236]

I do not think that the defendant, being to set out an account, has affected any delay; but why should not I take care to secure the effects before answer, (as I grant injunctions to stay waste, on a certificate of the bills being filed) since a suit is depending in the spiritual Court to set aside the will? and that it was adjudged by the Delegates, in the case of *Powis* and *Andrews*, that the spiritual Court cannot impound the assets pendente lite; so let an injunction go, to restrain the defendant from receiving any of the effects till answer; and further order, but not till the suit in the spiritual Court is determined.

This Court will grant an injunction to the executor from receiving the assets before answer, when a suit is depending in the spiritual Court to set aside the will, be-

cause that Court cannot impound the effects pendente lite. Post. Cas. 171.

TREACLE versus HARRIS.

Cas. 127.
In Court
Lord Chancellor.
Eodem die.

THE infant by her prochein amy, brought this bill against the defendant Mr. *Harris*, for an account, and to remove him from the guardianship. The prochein amy, and the defendant Mr. *Harris*, were appointed guardians to the infant, by the will of her father. The defendant, who was very poor, married her when she was about nine years old, to his own son, a boy of fifteen; she had an estate in lands of about 60*l.* a year, and 1000*l.* in money: The defendant, in obedience to an order, produced her this day in open Court, and the Lord Chancellor ordered, that she should be delivered the next day, at such a time and place, (for he would not order her then to be delivered in Court, to prevent any disturbance, for the child wept sorely, when she found she was to be parted from her husband) to her clerk in Court, to be delivered over by him to the prochein amy, who was then in the country, the other guardian, who had not misbehaved himself; and his lordship declared, that

since

Two are appointed guardians by will, one marries the ward at nine years of age to his own son of 15, the Court delivered the child to the other guardian till she came to the age of consent, but would not commit the [1237] guardian because he was not appointed under the

great seal, but being in Court, obliged him to enter into a recognizance to appear in the King's Bench, to any information should be filed against him.

The council for the infant would have had the child delivered to the serjeant at arms, till the prochein amy came to town, and said, that such orders had been often made; but the Lord Chancellor would make no such order, and asked, who would pay him?

Cafe 128.
In Court

ANONYMUS.

Lord Chancellor.
Eodem die.

MR. Solicitor General moved for a subpoena returnable immediate against Mr. *Huggins*, (who was committed to *Newgate* for murder, of which he was indicted, and a special verdict found, but not yet argued) and that service of it on the turnkey or keeper of *Newgate*, might be good service, because his servant had denied them access to him.

Lord Chancellor.

Lord Chancellor, as one of the Commissioners of Oyer and Terminer, gave leave to serve

No process can be served on a prisoner committed at the suit of the Crown, without leave, though if he once appears, you may go on against him; but as I am one of the commissioners of oyer and terminer, before whom he was tried, I will make an order, that the keeper of *Newgate* shall admit you in, to serve the process on Mr. *Huggins*.

Mr. *Huggins* with a subpoena, who was in confinement in *Newgate* for murder, of which he was indicted at the *Old Bailey*, and a special verdict found.

Thursday,

De Term. S. Michael. 1729.

Thursday, December the 4th.

MOTIONS.

ANONYMUS.

Case 129.
At the
Chancel-
lor's house.
Master of
the Rolls.

TENANT for life, without impeachment of waste, remainder to his first, and every other son in tail, becomes a bankrupt, and a commission is taken out against him, and the commissioners sell his estate to the defendant, against whom the son of the bankrupt, on certificate of his bill being filed, and affidavit, obtains an injunction to stay waste, which upon coming in of the answer was to be dissolved nisi, and the plaintiff shewed for cause, that he, as tenant in tail, had a right to enjoin any one from committing waste, but the tenant for life himself, and even him in a Court of equity, from pulling † down the mansion house, or cutting down timber ornamental to it, though he has a power by law. [+238]

Master of the Rolls.

The injunction must be continued as to pulling down the mansion house, or cutting down the timber ornamental to it; but dissolved, as to cutting of timber generally, for though there have been great variety of opinions formerly, it is now settled at law, that if a stranger cut down timber, or commit any other waste, it belongs to the tenant for life, who is punishable of waste, and not to the remainder-man in tail, or in fee.

If a stranger
cuts down
timber, or
commits
waste, it
belongs to
the tenant
for life
without im-
peachment
of waste,

and not to the tenant in tail, or in fee, in remainder.

ANONYMUS.

THE joint and several answer of two defendants, was on motion suppressed for irregularity, because it was underwrit jurat, and not jurati, or ambo jurati: And the Master of the Rolls said, he had known such an answer adjudged irregular.

Case 130.
At the
Chancel-
lor's house.
Master of
the Rolls.
Eodem die.
An answer
of two de-

endants underwrit jurat, was suppressed on a motion for irregularity.

ANONYMUS.

A Sequestration, nisi, &c. was moved for against Mr. Gambiere, the warden of the Fleet, for not putting in his answer.

Case 131.
At the
Chancel-
lor's house.
Master of
the Rolls.
Eodem die.

Master

Master of the Rolls.

A seque-
stration,
which is a
kind of a
suspension,
nisi, &c. was
granted
against the
warden of
the Fleet, for
not answer-
ing.
No attach-
ment lies
against him
because he
is supposed
to be always

in Court, and tho' it is directed to the Sheriff, the body when brought in, is turned over to the Fleet. In C. B. if the warden will not appear, they forejudge him his office.

It is common to suspend clerks of Courts, and the wardens of the Fleet. The warden of the Fleet attends this Court, and the Court of Exchequer by two deputies, and therefore no attachment will lie against him, because he is supposed to be always personally in Court, but he cannot be sued by bill in either Court, but only in the Common Pleas, where if he will not appear, they forejudge him his office. The attachment is directed to the Sheriff, but when he brings in the body, the prisoner is turned over to the Fleet. Take your order for a sequestration, which is a kind of a suspension, nisi.

[+239]
Case 132.
At the
Chancel-
lor's house.
Lord Chan-
cellor.

+ Friday, December the 5th.

APPEALS AND REHEARINGS.

MAYEW versus COPPING.

Mr. Solicitor General for the defendant.

The heir
cannot re-
deem with-
out paying
the mort-
gage mo-
ney, and
the money
due by bond
too.

THIS is an appeal from a decree of the Master of the Rolls, and the only question is, Whether a mortgagee, who is also a creditor by bond, shall foreclose the voluntary assignee of the heir at law, unless he pay the money due on the bond? The mortgagor himself might redeem paying only the mortgage money, unless it was agreed that the mortgage should stand as a security for the money due on the bond; the heir indeed must pay both, not because the bond is a real lien on the estate, but to prevent a circuitry of action, because the equity of redemption is assets in equity by descent, but if the heir conveys away the lands before a bill is filed, or an action commenced against him, (and it does not appear that this bill was brought before the alienation of the heir) to a purchaser, by the 4 and 5 of W. 3. the purchaser is not liable, but only the heir, and so if he makes a voluntary conveyance, the heir only must answer; but here the heir is not brought to a hearing, and it does not appear that he is insolvent, and the plaintiff ought to receive no further help than the statute gives him, and this assignment cannot be

De Term. S. Michael. 1729.

be within the statute of *Eliz.* for it cannot be said to be made to defraud his creditors, but his father's, and before the 4 and 5 of *W. and M.* tho' a man bound himself and his heirs in a bond, he might defeat his creditors by a voluntary devise of the lands.

Lord Chancellor.

Suppose before the statute, one sued the heir on a bond, and he pleaded an alienation before the action was brought, and produced a voluntary conveyance in evidence, would not the jury have found that to be fraudulent? and the statute of *Q. Eliz.* makes such conveyances void, the obligor himself before the statute might devise the lands, because they were not bound in his hands; and this is a mortgage in fee, so the equity of redemption is not assets at law, but in equity only the mortgagee files a bill of foreclosure, which must be considered in the same manner as to the heir, as if he had brought a bill to redeem, which he could not have done without paying off both debts: The heir has transferred his right without a consideration; Is not such an assignment fraudulent? The † defendant is not an alienee at law, the plaintiff comes into this Court to get nothing from him, and he cannot redeem but on the same terms with the heir, so the decree must be reversed.

N. B. The Master of the Rolls decreed the defendant to redeem, on paying the mortgage money only, because the plaintiff had not made a case of it, or insisted on the statute.

2 *Vern.* 44, 61, 177, 691, 698.
2 *Chan. Caf.* 164. 1
97.
1 *Vern.* 244, 245, 174. 3 *Salk.* 64. *Caf.* 7.

Thursday, December the 11th.

CANNING versus CANNING.

Cafe 133.
At the
Rolls.

Mr. Solicitor General for the plaintiffs.

MR. *Canning* made his will, *inter al'* in these words, ' All the rest, residue, and remainder of my messuages, lands, tenements, or hereditaments, whatsoever and wheresoever unbequeathed, after my just debts, legacies, and funeral expences are fully satisfied and paid; I give to my executors, in trust for my daughters.' And the question is, Whether these words pass an estate in fee, or for life, only to the executors?

As

As the testator had a power, so it appears to be his intention to pass the fee, which is the rule to construe wills by, and is the reason, why a devise to a man for ever has been taken to be a devise of the inheritance, and the intention is to be gathered, not from one clause only, but from the whole will, the testator plainly designed to make a full disposition of his whole estate; he considers his eldest son and heir at law in the first place, and he devises a messuage, called the *Royal Oak*, to him and his heirs, and thirty pounds a year for his life, to be paid him by his executors out of the lands of *Upper Illington*, in *Warwickshire*, (the estate in question) then he bequeaths several pecuniary legacies, next he devises certain lands to his wife for life, remainder over in fee, and then comes the clause in question.

If a devise is loaded with a perpetual charge that will enlarge the estate, tho' there are no express words to pass the inheritance. 2 Vern. 106. Styl. 203. Moor 852, Cas. 1164.

A reversion in fee may undoubtedly pass by the word hereditament, and a fee may pass from circumstances, and the testator, by making a particular provision for his heir, shews what he designed he should have, and where there is a general devise to executors for a particular purpose, such an estate must be construed to pass to them, as will enable them to execute that purpose; and where the estate is loaded with a perpetual charge, or annuities, it must continue as long as the burthen, though they are no express words to pass the inheritance, † this devise cannot determine with the life of the executors, because the annuity to be paid out of it to the son may last longer, and his intention further appears from hence, that though his heir survived his executors, he gives him only 30*l.* a year for life out of them, and if the estate is not to determine with the life of the executors, they can have no other interest but a fee, and the book cases are full of resolutions of this kind.

A devise of lands paying such a sum, as suppose 5*l.* on the death of the testator, is a devise in fee, because the devisee may die before quarter-day; and so possibly by another construction he might be a loser. 2 Salk. 685. *Smyth* versus *Tindal*, the Court held the devise to *Margaret* a fee, because it was subject to a perpetual charge.

But the words themselves will carry the inheritance, hereditament is a more extensive word, and more clearly comprizes the inheritance than the word estate; and in 3 Mod. 229. *Willows* versus *Lydeot*, Mr. Justice *Powel* was of opinion,

nion, that the word hereditaments imported the inheritance; and if he had devised the inheritance not before disposed of, the reversion in fee would have passed. 1 Salk. 234. Caf. 13. *Cole versus Rawlinson*. 1 Lutw. 755. *Norton versus Lad*. A devise to *A* for life, the whole remainder to *B*, if he survives *A*, if not, then the whole remainder and reversion of all the said lands to my sisters, and their heirs; it was adjudged that *B* took a fee: Here all the remainder, &c. unbequeathed is the same as the whole remainder; and in the case of *Hopewell versus Ackland*, 1 Salk. 239. the Court were of opinion a fee would pass by the words, *Whatsoever I have not before disposed of*; here the words are, *Whatsoever and where-soever unbequeathed*.

Mr. Abney.

These words pass the fee, which appears, first from the word hereditaments, *Co. Lit.* 6. a hereditament is the largest word of all in that kind, for whatsoever is an hereditament, may be inherited be it corporeal, or incorporeal, real, personal, or mixt: But in *Hob. 2. Caf. 2. Widlake versus Harding*, I do give and bequeath unto my cousin and her assigns my now dwelling-house, with all the lands belonging to it, for the term of ninety-nine years; and my said cousin shall have my inheritance, if the law will allow it; it was adjudged the cousin took a fee, by the word inheritance. 2Saund. 388.
Moor 873.
Caf. 1218.
Godb. 207.

Secondly, from the words, *All the residue and remainder*, &c. all the rest of my estate would plainly have conveyed the inheritance, and we think these words are as full and significant, 2 Vern. 564, *Murry versus Wife*, *Nott* devised to his daughter 50l. and all the rest and residue of his real and personal estate to his wife. The wife took a fee. *Alleyn* 28. *Wheeler versus Waldron*. *A* having a manor, and other lands in *Somersetshire*, devised the manor to *B* for six years, and part of the other lands to *C* in fee, and then came this clause, *And the rest of my lands in Somersetshire, or elsewhere, I give to my brother*; and it was adjudged that by the word (rest) the reversion in fee of the manor passed, as well as the lands not devised before, 3 Mod. 228. *Hyley versus Hyley*, all rest and remaining part of his estate he devised to his three grandsons, equally to be divided amongst them, that only excepted which he had given to *Pear*, *Charles*, and *John*, and to the heirs of their bodies; it was adjudged, that without the exception, the reversion in fee would have passed by these words. [†240]

Thirdly,

Thirdly, from the words ‘*Whatsoever, and wheresoever*’
 ‘unbequeathed, after my just debts and legacies, and funeral
 expences are fully paid, and satisfied,’ 2 *Ventr.* 285. 3
Mod. 229. *Cartwright* 50. *Willows* versus *Lydcot*. *William*
Shelton seized in fee of the messuage in question, and divers
 other messuages in the parish of *St. Martin’s*, and other pa-
 rishes, made his will, and thereby devised his houses in the
 other parishes to divers charitable uses, and then devised to
Edward Harris, and *Mary* his wife, the messuage in question,
 for their lives; and then in the following clause, the better
 to enable his wife to pay his legacies, he devised all his mes-
 suages, lands, tenements, and hereditaments whatsoever
 within the kingdom of *England*, (not above disposed of) to
 have and to hold to her and her assigns for ever; and judg-
 ment was given in *B. R.* that the reversion did not pass, but
 that was reversed unanimously in the Exchequer Chamber,
 because there were words in the devise to the testator’s wife
 that would carry the reversion of this house, as an heredita-
 ment not disposed of; and here the words whatsoever, and
 wheresoever unbequeathed are of the same import. 1 *Salk.*
 239. *Hopewell* versus *Ackland*. *John Ackland* being seized in
 fee of the lands in question, devised an annuity to *H* in fee;
 item, he devised his manor of *Bucknal* to *A* and his heirs;
 item, he devised all his lands, tenements, and hereditaments
 to *A*; item, he devised all his goods and chattels, money and
 debts, and whatsoever he had not before disposed of, to the
 said *A*, he paying his debts and legacies, and made *A* his ex-
 ecutor, and per *Trevor* Chief Justice, by the concluding
 words, *And whatsoever I have not before disposed of*, an estate
 in fee will pass, and this is further enforced by the following
 words. He paying, &c. and by the annuity to *H* in fee,
 here the personal estate is not sufficient to pay the debts and
 legacies, and where lands are devised for the payment of debts
 or portions, a fee will pass by words that † would not other-
 wise carry it. *Co. Lit.* 9. b. If a man devises twenty acres
 to another, and that he shall pay to his executors 10*l.* the de-
 visee has a fee simple, 6 *Co.* 16. a, *Colyer’s* case. A man de-
 vised part of his lands to his daughter, and other part to his
 wife for life, with the profits of which she was to educate
 her daughter; and that after her death it should remain to
 his brother, paying 20*s.* to one, and other small sums,
 amounting in the whole to 45*s.* and the yearly value of the
 lands was 3*l.* and it was adjudged that the brother had a fee,
 1 *Vern.* 104, where lands are devised to pay debts and lega-
 cies

Geo. Eliz.
 744, (22.)

[† 241]

cies out of the rents and profits, the lands may be sold, otherwise, if they are to be paid out of the annual rents and profits, and it is a rule in equity, that where lands are given generally to trustees, without mentioning for what estate, they shall be taken to have such an estate as will enable them to execute the trust: now, an annuity is to be paid out of this estate, which may out-last the life of the executors, and therefore their estate must be enlarged.

Mr. *Yates* for the defendant.

These words pass only an estate for life. A devise to one generally, is but an estate for life, and where the Court enlarges it, the intention of the testator must be very manifest, from the words of his will in their common and ordinary signification; and when a man uses technical words, they must be taken in the same sense the law puts on them. In the case of *Norton* versus *Lad*, the whole remainder was expressed, so the whole remainder was adjudged to pass. 1 *Vern.* 65. *Peiter* versus *Banks*, a devise to *A* for life, reversion to *B* and *C*, equally to be divided between them, *B* and *C* are tenants in common for life only.

Here no particular estate in these lands being before disposed of by the will, the words, *All the rest, residue, and remainder*, must relate to his lands, and not to the estate or interest remaining in them, and they are to the same effect as *All my other lands, &c.*

Hereditament is barely a word of description, and will pass only an estate for life, and *per Trevor*, Chief Justice, in the case of *Hopewell* versus *Ackland*, the word hereditament cannot be taken to denote the measure, or quantity of the estate, because it has a proper meaning, and extends to annuities, advowsons in gross, &c. which are not comprized by the words, lands and tenements.

As to the words, *After my just debts, &c.* The words to be sure must have such a construction put on them, that the devisees may not be losers. *Cro. El.* 330. (5.) here the † persons of the devisees are not charged with the annuity, and the trust may be answered, though they have only an [†242] estate for life, the annuity is devised here to the heir himself, so that the reason fails, which might induce the Court to consider

consider this an estate in fee, if the annuity had been to a stranger, because the reversion coming to the heir by descent, paramount to the will, he would defeat the annuity.

Master of the Rolls.

A fee will
not pass by
the word
heredita-
ment.

I shall first consider the word *hereditaments*. Lord Coke, in his first institute, takes notice of the three words mentioned in this will, and that hereditaments is the most comprehensive, which must be understood of the things that pass by it, and not of the estate. I was counsel in the case of *Smyth and Tindal*, and that turned on the collateral warranty, by which the heir of *Margaret* was adjudged to be bound; and the law is now settled in the case of *Hopewell and Ackland*, that a fee will not pass by the word hereditament; and how can we better explain the words of a will, than by the statute of wills? by which any person having manors, lands, tenements, and hereditaments of estate of inheritance, &c. may devise, &c. how absurd would those words be, if the words inheritance and hereditament had the same sense; and in the statute, whereby estates tail are forfeited for treason, are the same words.

I shall next consider whether it appears from any of the other words, or from all together, to be the intention of the testator to give his executors a fee.

If a man
devises par-
ticular lands
for years,
and after
devises the
rest of his
lands, the
reversion of
the lands
devised be-
fore will
pass, as well
as the lands
not before
devised.

2 Vern. 624.

It appears by the case of *Wheeler and Waldron*, that if a man devises particular lands for years, and after devises the rest and residue of his lands, that the reversion of the lands devised for years will pass, as well as the lands not before devised; but there was indeed no judgment in that case, for I had occasion once to search the record, there was a special verdict, and the devise was on condition, that his brother conveyed other lands, and the jury found the value of both estates, and that the lands devised would be just of the same value with the lands to be conveyed; if the reversion passed, there was such a verdict in that case, tho' Lord Chief Justice Holt was of opinion, that a will ought not to be explained by matter dehors.

By a devise
of all my
lands not
settled or
devised, the

In the case of *Cook versus Garard*, 1 Lev. 212. 1 Saund. 180. 2 Keb. 206, 207, 224. *Keep*, seized of *Spain's Hall*, reversion of lands in settlement, or before devised, will pass.

settles

fettles part thereof on his daughter for life, and after by will devises the house to his wife, for a year after his death, and then devises all his lands. *Not settled* or devised to *Thomas + Keep*, habendum to him and his heirs, it was adjudged, that [+243] though this devise was of the lands, not devised or settled, and not of the estate not devised or settled, the reversion passed, though the land itself was settled and devised before; and that the words were to be taken for the residue of the estate in the lands: So 2 *Vern.* 461. *Rook* versus *Rook*, *A* seized in fee, devises *Blackacre* to *B* for life, and to *C*, all his lands not before devised, to be sold, the reversion of *Blackacre* is well devised to *C*: So 2 *Vern.* 559 and 621; but in these and the other cases, the inheritance was expressly devised, but in this case, the question is not, Whether any lands he had before devised, shall pass, but what estate passes in lands he had before omitted to devise? and this case is no more, than if he had enumerated all his several estates, and given them generally to his executors; and these words, *All the rest*, &c. comprehend the particulars only, and not the estate, and mean no more (as has been already well observed) than, *All my other lands*: Here the lands in possession are to pass, so that the words run only to the lands, and not to his interest.

All the rest, residue, and remainder of my messuages, lands, tenements, or hereditaments whatsoever and where-soever un-bequeathed, after my just

debts, legacies, and funeral expences are fully satisfied and paid, I give to my executors in trust for my daughters. By these words, the executors take only an estate for life.

But it has been said, that the testator shews his intention to pass the fee, by giving his son an annuity for life; but if thirty pounds a year are given to the heir, they will not disinherit him, but the estate must be expressly devised away.

As to the words, *After my just debts, &c.* the word *Why paying*, indeed will often pass a fee, because otherwise the devisee may be a loser; and if the devise is to a stranger, it is a condition; if to the heir himself, a limitation; but in the present case, there is no condition or limitation, but only a charge in equity; and the Court will take care the executors shall not be losers, by decreeing a sale of the estate for their lives only; and I never knew the rule broke, that an heir is not to be disinherited, but by plain words, or by words of necessary implication. If a devise is for perform-

ing, &c. in a devise, passes a fee. 6 Co. 16. 3 Co. 20. Bro. title estate pl. 38, 78, tit. Testam. pl. 18. Cro. El. 204, (39.) 1 Vern 425. 38 Ed. 3.

14. *Bridgm.* 84. 152. *Sir Wm. Jon.* 211. *Godb.* 280. *Cro. Ja.* 599. 2 *Mod.* 25. *Moor* 464, *Cal.* 656. *Cro. El.* 497, (18.)

An heir is not to be disinherited but by plain words, or by words of necessary implication. *Sir Tho. Jon.* 113. 2 *Lev.* 249. *Plowd.* 412. *Cro. Ja.* 415. 3 *Bulf.* 193. *Ant. Cal.* 88.

auce of such trusts as cannot be executed without a fee passes, they will enlarge the estate; but here the trust is only for daughters, which may be understood only for the lives of the trustees, and therefore I think the executors have only an estate for life. In *Norton and Lad's* case, it is plain the testator designed to pass the whole remainder, not a particular interest in the remainder, and he explains himself when he further devises it over.

[+244]

Case 134.

At the
Rolls.

+ TILLY versus SIMPSON.

MR. *Tolson* devised all his lands to the defendant *Simpson*, and others, in fee, in trust, to pay the plaintiff 50*l.* a year for his maintenance at *Wesminster* school, and 100*l.* a year at College, and the *Inns of Court*, and when he came to the age of twenty-three years, to account, and pay him the rents and profits, and reconvey the estate to him and his heirs; but if he died before that age, to reconvey the estate to the defendant *Simpson*, and his heirs; and the plaintiff the infant, by his prochein amy, brought this bill against the trustees, *inter al'* for an account of the rents and profits.

Master of the Rolls.

Lands were
devised in
trust, to
maintain
the infant
till he came
to 23, and
then to ac-
count, and
pay him
the rents,
and re-
convey the
estate to

The plaintiff is not intitled to the rents, unless he arrive to the age of twenty-three years, which is a condition precedent, but if he dies before, the surplus profits belong to the heir at law, or to the several heirs in succession, as so much of the estate not disposed of by the will; for they are not given over with the lands to the defendant, and therefore the defendants are not obliged to account, but the infant and the heir at law might have prayed an account by a proper bill, suggesting insolvency in the trustees, and that there was danger of the profits being lost in their hands.

him, but if he died before, to reconvey it to another; the infant is not intitled to an account till he come to 23, for that is a condition precedent, but the surplus profits, if he die before, go to the heir of the testator, not being devised over, but the infant and the heir, on suggestion of insolvency in the trustees, may bring a bill for an account. 2 *Vern.* 138, 247, 425, 571, 644, 645. 1 *Vern.* 21. 1 *Chan. Cas.* 98.

Friday,

De Term. S. Michael. 1729.

Friday, December the 12th.

PLEAS AND DEMURRERS.

WORTHINGTON *versus* WILKINSON.

THE bill was brought for a discovery of a fraud, and relief. The defendant pleaded the statute of limitations.

Lord Chancellor.

The plaintiff, after six years, shall have a discovery of that fraud, which intitles him to his action, which would otherwise be lost by the length of time : So let the plea stand for an answer, with liberty to except, and the benefit of it be saved to the hearing. When there is a plain fraud, the plaintiff may take advantage of it at law. I once tried a gold cause, where the defendant asserted, that between the line and the latitude of 40, the inhabitants fought with arrows pointed with gold, and took in subscriptions to provide ships and men, to make themselves masters of the place.

Case 135.
At the
Chancel-
lor's house.
Lord Chan-
cellor.

A plaintiff
after six
years is in-
titled to a
discovery of
[+245]
a fraud.
A fraud is a
bar to the
statute of
limitations
at law.
Nell. Fol.
Rep. in
Canc. 14,
266.

VAUGHAN *versus* GUY.

The testator made his will, *inter al'*, in these words, ' All the rest and residue of my estate, after payment of my debts, and funeral expences, I give to my executors,' &c. To this bill filed by a creditor, the executors pleaded the statute of limitations.

Case 136.
At the
Chancel-
lor's house.
Lord Chan-
cellor.

Mr. Solicitor General for the defendants.

The plaintiff insists that the will, which was made before the six years were expired, whereby the testator has ordered that his debts should be paid, amounts to a new promise. But these are no more than words of course, and what the law says, where lands indeed are devised to executors, in trust, to pay debts, the testator creates a new fund, and the nature of the debts are altered, and they are to be paid equally, 2 *Vern.* 141. *Goston versus Mill*; and great inconveniences would follow, if this will should revive the debt, or prevent the executors from paying other creditors, and enable them to pay debts, that to pay otherwise would be a devastavit; but

Eodem die.
' All the
' rest and
' residue of
' my estate,
' after pay-
' ment of
' my debts
' and fune-
' ral, I give
' to my ex-
' ecutors,
&c.
Q. If this
amounts to
a new pro-
mise to the
creditors?
Post. Caf.
201. *Sel.*
Caf. in
where Canc. 57.

Where the time begins against a creditor, in the life-time of the ancestor or testator, it goes on as to his executor or heir.

where lands are devised, no creditor can complain, because a new fund is created. Why did the creditor lie by? the debt was contracted in 1720, and the testator died in 1724, so this debt was not barred at that time, which makes the case much the stronger, and it is a known rule, that where the time begins to run, in the life of the ancestor or testator, it goes on, as to his heir or executor, and it was so resolved by the Master of the Rolls, and affirmed on an appeal to Lord *Macclesfield*.

The statute of limitations extends to attornies bills.

It has been resolved that the statute of limitations will extend to attornies bills, though they are things done of record. The Lord Chancellor gave no opinion of this point, but over-ruled the plea for other reasons.

[†246]

Case 137.

At the Chancellor's house. Lord Chancellor.

If the goods sequestered are not sufficient to satisfy his demands the plaintiff may move to revive the order for a serjeant at arms.

† Saturday, December the 13th.

M O T I O N S.

ANONYMUS.

AN order was made for a sale of goods sequestered, and the money arising by the sale, not being sufficient to pay even the sequestrators, the plaintiff moved, that the order for a Serjeant at Arms might stand revived, and an order was made accordingly.

ANONYMUS.

Case 138.

At the Chancellor's house. Lord Chancellor.

Eodem die.

On a decree of foreclosure, the Court will not oblige the plaintiff to lay the title deeds before counsel, for the defendant to get an assignment or sale of the lands, (unless the plaintiff consents to a sale) but only to give a copy of the mortgage deed.

A Decree for a foreclosure nisi, and the defendant moved, that the plaintiff might lay the deeds before counsel, in order to have the mortgage assigned to one who would advance the money; but the counsel for the plaintiff insisted that such an order was never made, but where the mortgagee consents to a sale, for by that he submits to do every thing that is necessary to a sale: And the Lord Chancellor made an order, that the plaintiff should give the defendant a copy of the mortgage deed, at the defendant's charge, but would not oblige him to produce the title deeds, but said he thought it a good reason to enlarge the time to redeem, if the defendant should hereafter apply to the Court for it.

NEAL

De Term. S. Michael. 1729.

NEAL & al', verſus the ATTORNEY GENERAL, & al'. Caſe 139.

THE bill was brought by the creditors of the Duke of At the Chancellor's houſe.
Wharton, for a ſale of his eſtate, and payment of their debts, Lord Chancellor.
and a decree made, the maſter took an account of what was Eodem die.
due to the ſeveral creditors for principal and intereſt, and
made his report, which was confirmed, and by a ſubſequent
order, the Maſter was to carry on intereſt for the principal
ſums reported due, and Mr. *Neal*, one of the creditors,
moved to diſcharge this order, becauſe by the courſe of the
Court, when principal and intereſt are liquidated into one
ſum by a maſter, the whole bears intereſt from the confirma-
tion of the report, the eſtate may not be ſold in many years,
and the plaintiff has done all in his power to obtain his debt,
and if this account had been ſtated by the debtor himſelf, it
† would have carried intereſt. And on a mortgage, when [247†]
principal, intereſt, and coſts, are lumped into one ſum by a
maſter, if the mortgagor, or a ſubſequent mortgagee, pray
longer time to redeem, they always pay intereſt for the whole
ſum.

Lord Chancellor.

When the Court enlarges the time for the mortgagor, or a ſubſequent mortgagee, that is a favour (for they would
otherwiſe be forecloſed) and it is but juſt and reaſonable that
they ſhould pay for it, and that the mortgagee ſhould be no
loſer thereby. The decree in this cauſe is, that the debts
ſhould be paid according to their priority, and it would be
very unjuſt, when the eſtate is deficient, to add a ſurplus
debt to a prior creditor, by the help of this Court, to defeat
the others; beſides you are only a co-plaintiff, and the order
is general, to carry on intereſt on all the principals, and the
reſt of the creditors acquieſce under the order. The Duke
of *Wharton* has affected no delay, but veſted his eſtate in
truftees, for the payment of his debts, and the plaintiff, who
was a creditor by judgment, could not have come at his mo-
ney without this decree; for how could he have extended his
judgment againſt the mortgagees? If the caſe was between
the creditor and the owner of the eſtate, it might have a
different conſideration: So the order muſt ſtand, but with-
out prejudice, if there ſhould hereafter appear to be a ſur-
plus.

If a mort-
gagor or
puiſne
mortgagee
prays to en-
large the
time to re-
deem, he
muſt pay
intereſt for
the whole
ſum report-
ed due for
principal,
intereſt,
and coſts.
But where
a decree is
made for
creditors to
be paid ac-
cording to
their priori-
ty, if the
eſtate is de-
ficient, the
principal

only ſhall bear intereſt, after the confirmation of the report. Ant. Ca. 14.

Wednesday,

De Term. S. Michael. 1729.

Wednesday, December the 17th.

Cafe 140.
At the
Rolls.

BROADWAY versus MORECRAFT.

IN 1693, a reversion was mortgaged, and the mortgagor never paid the interest money: In 1711, the mortgagor and mortgagee came to an account of what was due for principal and interest, and a new mortgage was made for the whole, with a covenant, that at the end of every year, if the interest was not paid within three months after it became due, it should bear interest.

Master of the Rolls.

A covenant in a mortgage, that at the end of every year, if the interest is not paid within three months after it be-

[+248] comes due, it shall bear interest, is a void covenant. Or, that on non payment of the interest at the day, it should be turned into principal,

and bear interest. Or, that in default of payment, the interest shall be advanced from 5*l.* to 6*l.* per cent. Or, to pay 6*l.* per cent. but if the money is paid at the day, to pay only 5*l.* And there is no difference in reason between the two last covenants. 2 *Vern.* 134, 289, 316, 402.

This is a void covenant, and the mortgagor may redeem on the common terms. In the case of Lord *Strutton* and *Meers*, Lord *Harcourt* set aside a covenant, that on non-payment of the interest, at the day it should be turned into principal, and bear interest: And in the case of *Mitchel* and *Pollexfen*, the covenant was declared to be void, that on default of payment, the interest should be advanced from five to six per cent. and † though heretofore the Court made a difference between such a covenant, and a covenant to pay six per cent. but if the money was paid at the day, to pay only 5*l.* yet that distinction has been long out of doors, and both covenants have been set aside in equity. And though all these were cases of mortgages in possession, yet that will make no difference, for the mortgagee knew his security was only a reversion, and thought it sufficient, and he might have brought a bill of foreclosure, or put the bond in suit. This case was affirmed on appeal by Lord *King*.

Cafe 141.
At the
Chancel-
lor's house.
Lord Chan-
cellor.

Friday, December the 19th.

M O T I O N S.

ANONYMUS.

AN estate was purchased, in trust, for the husband and wife, and their heirs, and the husband and wife joined in a mortgage,

mortgage to the vendor, to secure 500*l.* part of the purchase money; the mortgagee brought a bill of foreclosure, and the husband and wife put in a joint answer, the husband dies, and now a motion was made for the wife, that she might amend her answer, put in by coercion during coverture, and insisted on the mortgage not being obligatory on her, because no fine was levied: And 2 *Vern.* 197. was quoted, where baron and feme exhibited a bill for a demand in right of the wife, and the cause proceeded to publication, the baron dies, and the feme marries a second husband, on a new bill it was adjudged, they might examine again the same witnesses, as were examined in the former cause; and 2 *Vern.* 249. *Shelberry* versus *Brigs, & ux.* a bill was brought for a legacy against baron and feme, who was executrix; and it was adjudged indeed, that after the husband's death, the wife should be bound by the answer and depositions; but it was said that in case of the wife's inheritance it was otherwise.

A purchase is made to the use of baron and feme and their heirs, and baron and feme join in a mortgage to the vendor to secure part of the purchase money, the mortgagee files a bill of foreclosure, baron and feme answer jointly, the

baron dies, and the wife moves to amend her answer, and insists that the mortgage did not bind her for want of a fine, but the motion was denied, because an answer has been adjudged equal to a fine, and the mortgage is good in equity, the wife not pretending she was imposed on.

Lord Chancellor.

I shall not grant this motion; for though the mortgage is insufficient at law, I shall consider it as a good mortgage, since the wife do not pretend she was any ways imposed on; and an answer in this Court, has been adjudged equal to a fine.

An answer in equity put in by a feme covert, is equal to a fine.

† P E T I T I O N S.

EX PARTE HALES.

SIR *John Hales* preferred a petition, supported by affidavits, praying that his grandson, an infant of tender years, who was tenant in tail in remainder after his death, of a very considerable estate, might be produced in Court by his mother, and that he might be appointed his guardian, and set forth, that his father a little before his death had embraced the *Roman* Catholick, and that the child was sent to *Bulloign*, to be educated in the same religion.

[+249]
Case 142.
At the
Chancel
lor's house.
Lord Chan-
cellor.
Eodem die.

The mother being served with this petition, swore, that the child was sent by his father to *Bulloign*, in his last illness, by the hands of Mr. *Turner*, without her advice or persuasion.

Lord

De Term. S. Michael. 1729.

Lord Chancellor.

The grand-
father peti-
tioned to be
appointed
guardian in
the room of
the mother,
to his grand-
son who was
sent abroad
to be educated
in the *Romish* religion;
the Court said,
they could
not appoint a
guardian till
the infant was
produced, but
ordered a *Homine Replegiando*
against the person
who carried him over.

I cannot appoint a guardian 'till the infant is produced, and whatever crime they have committed by carrying him out of the kingdom, to educate him in the *Romish* religion, they are punishable for it in the proper Court, and not in this Court: But I will order an *homine replegiando* against Mr. *Turner*, who is swore to be the person who carried him over.

Case 143.
At the
Chancel-
lor's house.
Lord Chan-
cellor.

Saturday, December 20.

LONG versus ELWAYS.

THE plaintiff an infant, by Mr. *Freeman* her prochein amy, filed a bill against the defendant *Elways*, her trustee, for an account of the real and personal estate; and by the decree an account was to be taken, and Mr. *Freeman* was appointed her guardian, and he was expressly ordered, not to marry her without the consent of the Court, and Mr. *Freeman* preferred a petition grounded on affidavits, praying, that it might be referred to a master, to examine all parties upon interrogatories, touching the marriage of the said infant, who were present at the said marriage, persuaders, abettors, and contrivers thereof; and that they might be committed; and that a proper settlement might be made on the lady, who had + 300*l.* a year in lands, with a very good wood on the estate, and about 5000*l.* in money; and set forth, that the young lady was brought up in his own family, and was at the time of the marriage at his own seat in *Hertfordshire*; that about a fortnight before Mr. *Chremer*, a neighbouring gentleman, with his wife and daughter, came to dine with him, that after dinner, Mrs. *Chremer* complaining of night coming on, Mrs. *Freeman* offered them a lodging, which they accepted, and the daughter lay with Miss *Long*; that about a fortnight after, Miss *Chremer* came to dinner, and there being a great deal of company, Miss *Long* and she, after dinner, slipped into the garden, and being missed, upon enquiry they found, they had gone out of the back door of the garden, to the end of a narrow lane, where a coach and six waited them, and carried them to a little ale-house, at about

about two miles distance, where Miss *Long* was married to Mr. *Cæsar*, and the messenger who was sent after them, found Mr. *Cæsar* and the lady, Mr. *Chremer* his wife and daughter, in Mr. *Chremer*'s house, and Mr. *Cæsar* told him he was married to the lady; and Mr. *Freeman* swore that he was no ways privy, or consenting to the match, but an utter stranger to it. And his counsel insisted, that the same order they prayed for, was made in the case of Mr. *Phipps* and Lady *Catherine Annesly*; and that the Court granted a sequestration in the case of Lady *Shaftsbury* and Lady *Gainborough*, that Mr. *Freeman* thought it his duty to make this application to the Court, to clear himself, and to have proper care taken of the lady's portion.

The counsel of the other side argued, that this Court would punish the persons concerned in the marriage, only as they were guilty of a contempt of the Court, and that in this case, no body but Mr. *Freeman* and the lady knew of the order of guardianship, and that this was the reason why a sequestration was granted against Lady *Shaftsbury*, because she was guardian to the young Lord *Shaftsbury*, who was married, and that when her counsel came to shew cause why a sequestration should not issue against the Countess of *Gainborough*, the order for a sequestration was discharged, because though she was present at the marriage, she was not privy to the orders of the Court, that here the parties were not proved to be in contempt, for it is not sworn that they were privy or assisting to the wedding; and that this Court never suffered persons to be examined on interrogatories to bring themselves into a contempt, but where a contempt was expressly sworn against them, gave them leave to be examined on personal interrogatories, by way of purgation, in order to clear themselves, and that this was the case of *Phipps* and Lady *Catherine Annesly*, for there it was expressly sworn, that Sir *Constantine* and Lady *Phipps* managed and brought about the marriage: That † in this case the ward was not disparaged, Mr. *Freeman* had discharged himself, and her portion was secure, her personal estate in the hands of trustees, and her real estate in a receiver's.

The Court suffers persons to be examined on interrogatories, to purge themselves of a contempt, but never to bring themselves into a contempt.

Lord Chancellor.

It was proper for Mr. *Freeman* to apply to the Court, to shew he was not privy to the match. All who were parties, and

All who are concerned in the private marriage of an infant, under the care of the Court of Chancery, are guilty of a contempt; though they are strangers to the order of the guardianship. But this Court will not set up an inquisition, to find out who they are. Nor examine the persons concerned who was the person that married them.

and privies to this wedding, are guilty of a contempt of this Court, though they were strangers to the decretal order; but I shall not set up a general inquisition to find out who they are, but some are probably affected by the affidavits, as Mr. *Chremer*, his wife, and daughter, for when they dined with Mr. *Freeman* a fortnight before the marriage, Miss *Chremer* and Miss *Long* lay together, the day they were married they went into the garden together, and were seen going out of the back door, and the servant who pursued them, found them altogether at Mr. *Chremer's* house after the wedding: Be it ordered therefore, that it be referred to a Master, to see what settlement Mr. *Cæsar* can make, and at the same time when the Master makes his report, let Mr. *Chremer*, his wife, and daughter, shew cause why they should not be committed; but I shall make no order for the commitment of Mr. *Cæsar*, since his uncle Mr. *Freeman* is willing to discharge his person, nor I shall not examine the persons, who was the minister that performed the ceremony: And as no objections have been made to the circumstances of Mr. *Cæsar*, but the lady has provided for herself as well as her guardian could, the Court will consider that in the punishment of Mr. *Chremer* and the others.

Cafe 144.
At the
Chancel-
lor's house.
Lord Chan-
cellor.

Friday, January the 16th.

EXCEPTIONS TO THE MASTER'S REPORT.

CLAYTON versus LUCKIN.

THE plaintiff filed his bill, to be relieved against a bond of 1000*l.* lent to him by the testator of the defendant, and for an account of shop and household goods, a lease of the house, and of several debts, which he had made over to the testator, by assignment, and bill of sale, as a collateral security to pay 60*l.* *per annum*, 'till the payment of the bond. And the defendant brought a cross bill for an account, and an account was decreed, and a report made, to which the plaintiff excepted, because the master had allowed interest for the bond, from the date to the time of the report; [+252] † but had not allowed for the goods, lease and debts, from the time of the sale, and assignment in discount of the interest and principal due on the bond: And the Lord Chancellor

De Term. S. Michael. 1729.

lor allowed the exception, and ordered that it should be referred back to the master, and that the defendant should account for the lease and goods, from the time of the assignment, when his testator came into possession, and carried on the trade, for they were to be considered as money from that time, and for the debts, from the time they were, or might have been received without his wilful default: And that the assignment being in 1713, the testator should be presumed to have received those debts, for which the securities could not be found, and that the money arising thereby, (the plaintiff being likewise indebted to the testator by simple contract) should be first applied to pay the interest due on the bond, then the debts by simple contract, (for it was in the power of the plaintiff to declare how the money should be applied) and then the principal due on the bond.

If the lease, household, and shop goods, are assigned over to another, and he comes into possession, and carries on the trade, from that time they are to be considered as money. Debts are assigned in 1713, the

assignee dies, those debts shall be presumed to be paid for which the securities could not be found.

A person indebted on several accounts, when he pays money may apply it to what debt he pleases. 1 *Vern.* 24, 34, 468. 2 *Vern.* 606. 2 *Chan. Caf.* 83. *Cro. El.* 68, (19.) *Forrest.* 123.

Saturday, January the 17th.

EXCEPTIONS.

MORELY versus BONGE.

Cafe 145.
At the
Chancel-
lor's house.
Lord Chan-
cellor.

THE defendant, as executrix of her husband, who was master of a ship, which traded between *Holland* and *Archangel*, in hemp and other commodities, brought an action of 300*l.* against the plaintiff as owner of the ship for wages, and had judgment by default; and the plaintiff filed a bill for an account, and an injunction, and she was decreed to account, and the master made his report, to which the defendant excepted; because the master had not allowed her several sums for shovers, when the ship was under careen, though they were fairly entered in an account book, kept by her husband, as master of the ship, and several witnesses deposed, he was a man of a fair character, that the expence was necessary, and that it was not usual for masters of ships to take vouchers for such small sums.

Lord

Lord Chancellor.

All the sums under forty shillings would have been allowed by the master to the testator, upon his own oath; and since they are fairly entered in his book, which was regularly kept, and cannot be supposed to be done to serve this turn, † and [†253] are proved to be necessary expences, and it is sworn he was an honest man, they shall be allowed to his executrix, especially after this length of time, and a judgment by default: And to object, that she may examine witnesses in *Holland* or *Archangel*, to the payment of these small sums, is in effect to say, she shall not have justice done her, such an examination would be so chargeable; but though the defendant's case is very hard, I am tied up by the rules of the Court, and therefore can allow the exception only as to sums not exceeding forty shillings: The testator if he was alive must have produced vouchers for the others; and in this case, the plaintiff has made no use of the testator's account book by way of charge.

The Court allowed the executrix sums under 40s. which the testator had fairly entered in an account-book, without proof.
1 Vern.
283, 470.
2 Vern. 167.

DE

[†254]

Term. S. Hill.

1729-30.

In Cur. Cancellariæ.

Friday, January the 23d.

Case 146.
In Court.
Master of
the Rolls.

M O T I O N S.

EX PARTE JONES.

Serjeant Shepherd.

MOVED to discharge a writ de Coronatore Eligendo, and to have a new writ directed to the other coroner, and that the under-sheriff and clerk of the county might be committed on the death of Mr. *Floyd*, one of the coroners for the county of *Cardigan*, a writ was directed to the sheriff, to elect a new coroner in his room, and the clerk of the county writ notices, which were fixed up in the guild-halls of the several towns of the county, that on the 17th of *December*, the sheriff would hold a county court, for the election of a new coroner; Mr. *Jones*, one of the candidates, suspecting some foul play, went to the sheriff some time before the day, and desired him to be at the Court, but he told him there would be no occasion, for nobody opposed him; On the sixteenth, Mr. *Jones* came to *Cardigan*, attended with about two hundred freeholders, and the next day waited with them all the morning at the *Guildhall*, where the under-sheriff designed to put up Mr. *Williams*, and refused to hold the Court that morning, and also in the evening, on pretence that the notice was not given by him, or the sheriff, but by the † clerk; [†255]
time

time the freeholders required the under-sheriff to administer the oath of abjuration to Mr. *Williams*, upon which the under-sheriff, under pretence of administering the oaths, gave him the oath of a coroner, and then taking him by the hand, gave him joy, whereupon all the freeholders cried out they voted for Mr. *Jones*, and demanded a poll; but the under-sheriff told them the election was over.

Master of the Rolls.

The under
sheriff, un-
derpretence
of admini-
stering the
oaths,
swears a
candidate
coroner.
The Court
ordered him
to shew
cause why
he should
not be com-
mitted, and
not to file a
return to
the writ
without

Let the under-sheriff and clerk shew cause why they should not be committed, and though the clerk's being present when the under-sheriff gave the oath, is no reason to commit him, there seems to be a practice and contrivance between them; he gave the notice, and to put off the Court when the freeholders were come, was an abuse, which he so far comes into, as to sign the new notices. As to the discharging the writ, let the under-sheriff bring it with him, and not file a return without leave of the Court, and let the consideration whether the writ shall be discharged, and a new one granted, be reserved till that time: But I cannot direct the new writ to the coroner, because you have not mentioned a sufficient cause in law, but the sheriff will take care that there be no such practice a second time.

leave of the Court. But this is not a good cause at law, and therefore not in equity, to direct the new writ to the other coroner. Registr. 177, a, b.

Case 147.
In Court.
Master of
the Rolls.

EYLES versus WARD.

Eodem die.

A motion
of course
cannot be
opposed,
though no-
tice is given
of it.

THE plaintiff moved, on affidavit of the defendant's keeping out of the way, that service of his clerk in Court, with a writ of execution of a decree, and leaving a copy at the defendant's house, might be good service of the defendant, and that demanding the money of the clerk, might be a good demand on the defendant, and the council for the defendant would have opposed the motion, because the plaintiff had given notice of it, but the Master of the Rolls would not give them leave, because it was a motion of course, and though it is grounded on affidavits, it was the office of the Court to examine, whether they were sufficient or not, and he granted the motion, only as to the demand, for if a subpoena is taken out for costs, which must be served personally, if the party cannot be found, the order is only general, that service of the clerk in Court shall be as good service, as of the party, and yet in that case there is a demand.

Then

Then the council for the defendant insisted, that they must be at the expence to move to discharge this order his Honour was now pleased to make, because it was referred to a master to amend the inrollment: And he made a report, to which they † had taken exceptions, and they were set [†256] down to be argued; so that the plaintiff was putting a decree in execution before it was inrolled. But the Master of the Rolls said, those exceptions were irregular, for the order was for the master to amend, and he certifies that he has amended, and though the master's opinion cannot preclude the defendant, if he has any objections to it, he must move to discharge the report, but cannot except to it, for exceptions are to be taken only to reports, that must be confirmed by the Court, or to special reports, because the Court is to pass judgment on them; but this is barely a certificate, and there is no colour to except; the master has amended, and so the plaintiff is at liberty to serve the defendant with a writ of execution of the decree, and therefore I discharge these exceptions, tho' the Lord Chancellor has made an order to set them down to be argued.

You can except only to reports that need confirmation, or to special reports, but must move to discharge others.

RAY versus TANFIELD.

THE plaintiff moved for an injunction, to stay an action of dower, the husband by his will having devised 9*l.* a year to his wife, for her better support and maintenance during life, and also made her residuary legatee, and insisted that this was devised to her in bar of her dower, and as an additional provision.

Case 148.
In Court.
Lord Chancellor.
Eodem die.

Lord Chancellor.

Though this devise is not within the statute, this Court has gone much further than this case; so let an injunction go, on the plaintiffs giving judgment, with a release of errors, and consenting not to bring error, and to speed his cause; and giving security to pay the damages, and to deliver possession as the Court shall direct at the hearing.

The Court granted an injunction to stay an action of dower, the husband having devised to his

wife 9*l.* a year for her better support and maintenance, and made her residuary legatee.
1 Chan. Caf. 181. 4 Co. Vernon's Caf. 2 Vern. 365, 404. Freem, 211.

Tuesday,

De Term. S. Hill. 1729-30.

Tuesday, January the 27th.

Cafe 149.
At the
Rolls.

SLATER *versus* BUCK.

THE plaintiff's father created a rent-charge out of the premises, to himself for life, remainder to the plaintiff in fee, with a power of revocation, and sold the lands to the defendant's father, which descended on the defendant, from whom the plaintiff purchased an acre of the said lands, and being after his father's death acquainted with his title to the rent-charge, he applied to the defendant, who paid it him several years, and the plaintiff for the rent-arrear distrained, † the defendant replevied, and the plaintiff filed a bill for an apportionment, and an injunction.

Master of the Rolls.

If one, who has a rent-charge issuing out of lands, purchases part of the lands, the whole rent is extinguished; but if part of the lands come to him by descent, the rent shall be apportioned, because the law works no wrong: In the first case, the rent is extinguished, because the purchase is the party's own account, but since the law calls it a wrong, I think this Court would relieve him; but here the plaintiff was unacquainted with his title, when he purchased part of the lands, he was not ignorant of the law, but of the fact, and therefore according to the many precedents, and the common rules of equity, he ought to be relieved: If a man has a personal demand of which he is ignorant, and gives a general release, which in point of law is a bar to him of all demands, yet in this Court it shall release only those demands he was acquainted with, and not those he was ignorant of; but it is said, that it must be presumed the plaintiff knew of this rent, which was created in his favour by his own father; but it cannot be presumed so, for the rent-charge was 30*l.* a year in fee, and the acre of land he purchased was but fifteen shillings a year, and since I am not to presume the plaintiff ignorant of the law, I cannot suppose he would have taken this small conveyance, if he had at that time been acquainted with his title to the 30*l.* a year, and he was no party to the deed, which would have been some presumption he knew it, though he never executed it, and yet in that case I should have expected some evidence of it, and his father might not think proper to acquaint him with the deed, because

If grantee
of a rent-
charge pur-
chases part
of the lands,
the rent
shall be ap-
portioned
in equity;
especially if
he was ig-
norant of
his title to
the rent
when he
made the
purchase.

because it was subject to a revocation, and the defendant paid this rent-charge for many years, and though he says he was not then acquainted with the advantage he had at law, shall I suppose him to be ignorant of the law, and not the plaintiff? Be it therefore decreed, that the lands shall stand charged against the defendant, and all claiming under him, with the 29^l. 5^s. and that the plaintiff shall have his costs at law, and in this Court, and a perpetual injunction against the reply in: I will not direct a new conveyance of such a rent-charge, for fear of mesne incumbrances.

1 Chan. Caf.
31, 273.

† *Wednesday, January the 28th.*

HILL versus BISSEL.

[†258]
Cafe 150.
In Court.
Lord Chancellor.

MRS. *Hill* brought a bill against Mrs. *Bissel*, administratrix, and second wife to her late father Mr. *Bissel* deceased, a freeman of *London*, for an account of his personal estate; an account was decreed, and the master made a special report; and the only question was, Whether a settlement made by Mr. *Bissel* on the defendant, was in fraud of the custom? Mr. *Brandon* by his will devised one third of his personal estate to his daughter, the defendant Mrs. *Bissel*, and the other two thirds to his four grand-children, and in case any of them died before twenty-one, or marriage, their share was to survive to the others, and made Mr. *Goddard*, and his son-in-law Mr. *Bissel* executors; Mr. *Bissel* only proved the will, and possessed himself of the estate, part whereof were two lease-hold houses, which he renewed as executor, on the same trust, and he paid off some incumbrances on the premises, and took assignments of them in trust for himself; afterwards Mr. *Bissel* by deed, reciting the will and the trusts, and that two of the grand-children were of age, and had been paid and released their legacies, and that their legacies were secured for the others, till the contingencies happened, he conveys his wife's third, whereof the houses were part, in trust, to pay him the money he had discharged the incumbrances with, and then in trust, for himself for life, remainder for his wife for her life, remainder for their children. And Mr. *Verney* for the defendant insisted, that this settlement could not be said to be in fraud of the custom, because the custom never attached on it, and that it was resolved in the Court of Exchequer, in the

If a free- case of *Shaw* versus *Vincent*, where a freeman had made such
man of Lon- a settlement of an estate his wife was intituled to as executrix,
don settles an estate that it was not a fraud on the custom.

belonging to his wife as executrix, to the use of himself for life, remainder to his wife, this settle-
ment is not a fraud on the custom.

Mr. *Lutwyche* for the plaintiff insisted, that it appeared by the recital of the deed, that a computation had been made of the personal estate of Mr. *Brandon*, and that the executor had paid, or secured the other two thirds, and that therefore his wife being a legatee of the other third, that vested in him at the same time too, for he could not make it more his own by any act of his, and that it appeared he looked upon himself as owner of it, and that therefore the settlement being made to take effect after his death, it ought not to take place in wrong of the plaintiff his daughter by the first venter.

[+259]

† Lord Chancellor.

A devises a third of his personal estate to his daughter, and two-thirds to his grand-children, and made his daughter's husband, a freeman of London, executor, the husband by deed reciting that the legacies of the

I do not think this settlement is a fraud on the custom, the leases came to him as executor, and he renewed them as executor, subject to the uses and trusts of the will; which shews, he designed they should continue part of the testator's estate; his wife was a legatee, but the leases continue in him as executor, 'till he assents to the legacy, and at the same time that he assents to the legacy, he assigns it over, he might to be sure have disposed of it: I do not think the custom ever worked on this estate, it was not his wife's 'till he assented; but if he had died intestate, it would have gone to the administrator De bonis non of Mr. *Brandon*, and the deed is an assent to the legacy on terms, that he shall reimburse himself the money laid out, and have the estate for his own life: And I shall not construe the custom which is in derogation of the common law in so strict a manner.

grand-children were paid or secured; assigns his wife's share, in trust, to the use of himself for life, remainder to his wife, though this is a settlement to take place after his death, it is not a fraud on the custom. 2 Vern. 98, 272, 612, 685. 1 Chanc. Caf. 310.

You may move to discharge an order, though you are in contempt for not obeying it, and it was resolved by the Lords Commissioners, in the case of the Earl of *Suffolk* and Mr. *Howard*, where Lord *Macclesfield* made an order on the defendant, to produce the writings for the plaintiff's inspection, according to the submission in his answer.

1 You may move to discharge an order, though you are in contempt for not obeying it.

Thursday,

De Term. S. Hill. 1729-30.

Thursday, January the 29th.

M O T I O N S.

KING versus COTTON.

Case 151.
At the
Chancel-
lor's house.
Lord Chan-
cellor.

Mr. Attorney General for the plaintiff.

I AM to shew your lordship cause, why our injunction should not be dissolved on coming in of the defendant's answers. This bill is brought against Lady *Cotton*, and her younger sons by a former venter by Mr. *King*, her second husband, for an injunction to stay proceedings on ejectments, and to have two deeds set aside, which Lady *Cotton* made in favour of her younger children, in fraud of the marriage. Lady *Cotton* being tenant for life of several lands in *Cheshire*, *Lancashire*, and *Surry*, assigned the said lands in *Lancashire* and *Cheshire* to trustees for ninety-nine years, if she should so long live, in trust for herself during widowhood, then to the use of her son *Stephen*, and the heirs males of his body, remainder to her son *John*, and the heirs male of his body, [+260] with like remainders to her other younger children; and assigned her lands also in *Surry* to trustees for ninety-nine years, in trust, to the use of herself 'till marriage, then to her son *John* and the heirs male of his body, with like remainders over to the other younger children, and assigned over 1000*l.* South Sea stock to the same uses, and after intermarried with the plaintiff. These voluntary conveyances, whereby two thirds of her estate are assigned, over and above the stock, were made during a treaty of marriage with the plaintiff, and therefore are a fraud on him, for she appeared to be the visible owner, and therefore the injunction ought to be continued 'till the hearing the cause. And as to the lands in *Surry*, the first limitation, in case of her marriage, being to her son *John* and the heirs males of his body, the whole trust vested in him, and consequently he being dead, will vest in the plaintiff, in right of his wife, who has taken out administration to him.

Mr. Solicitor General.

The substance of our bill cannot be tried on these ejectments, but must be determined by this Court, on the hearing the cause: Lady *Cotton* appeared visible owner of these lands, and they were given in to the plaintiff in the particular of

her estate; *Stephen Cotton*, and the other younger children formerly brought their bill against *Mr. King*, to have the possession of these lands delivered up to them, and the deeds, and your lordship decreed the deeds to be delivered to them, in order to their going to law for the possession, if they pleased; and though in that cause he was only defendant, yet it appearing by his answer, he might have cause to be relieved against these ejectments, it is expressly provided by the decree, that it should be without prejudice to ~~any relief~~ he might be intitled to. There can be no doubt, but that by these assignments, however fraudulent, the legal estates are in the trustees, and the question, whether fraud or not, can never be determined at law, but is proper for equity, and the rather, because the younger children who claim the possession, have only an equitable title too; so it is proper to be determined here, whether they or *Mr. King* have the best title in equity to these terms, and marriage being a good consideration, it is not material whether the plaintiff is a gentleman of fortune or not.

Mr. Lutwyche for the defendants, the younger children.

[+261] *Mr. King* has none, the seven younger children a very good equity, and it was very commendable and conscientious in *Lady Cotton* to provide for them, especially since she married the plaintiff, who it does not appear had any estate to settle on her, though your lordship has been told a formal story of his making his addresses, and that she delivered him a particular ⁺ of her estate, and how much he is defrauded. In 1716 he came over from *Ireland*, courted, and was so fortunate to marry the lady; but these settlements were made in 1715, a year before, when no treaty of marriage was on foot, nor could she have this fraud in contemplation.

The injunction they pray, must arise from some confession in our answers, against whom it is to be granted; and not from the answer of *Lady Cotton*, who is an amicable defendant.

The bill by the younger children was brought to have the deeds produced, to enable them to bring ejectments. *Mr. King* insisted upon by his answer, what he now sets out by his bill, and examined several witnesses, and it appeared to your lordship that there was no fraud; and your lordship decreed,

decreed, not only that the writings should be delivered up, but that we might bring ejectments in the trustees names, (which is all that the Court ever does on a voluntary settlement) whereas if the defendant had made out his case, the Court would not have given us that relief; and why then should this bill restrain us from any privilege given us by that decree? and though the whole equitable interest of the estate in *Surry* vested in *Mrs. Cotton*, as administratrix to her son *John*, yet the other defendants, by the statute of *Jam. 2.* are intitled to seven eighths of it, so that the *Cheshire* and *Lancashire* estates belonging entirely to them, and seven eighths of the estate in *Surry*, it is proper their trustees should take possession. But I think this settlement differs from the common settlements of a long term of years, and being determinable on her life, may be limited over in this manner, because all the limitations are to be determined in the compass of a life, so that there is no danger of a perpetuity, which is the only reason why a term for years cannot be intailed.

Lord Chancellor.

What I ordered as well as I remember, on the former decree was, that the deeds should be delivered by *Mr. King* to the younger children; he insisted that they were fraudulent, and that he ought to keep them. I could not say, a provision made by a mother for her younger children, who had no present maintenance, and small portions, was fraudulent; if she had made a voluntary settlement without a consideration, it would have been a fraud; but these settlements were executed some time before her marriage, and were no secrets, but very publicly known: On the other side, I would not take the possession from him, but left the younger children to their remedy at law, and now they have recovered I do not see why I should grant an injunction, though perhaps there may appear sufficient cause at the hearing. But as to the *Surry* estate, the whole vested in *John* the son, and consequently on his death in his representative, and the law their bill to have the deeds and the lands delivered up to them. The husband insists by his answer, that the settlements being made pending his courtship, were a fraud on him, the conveyance being voluntary, the Court would not order possession to be delivered, but only decreed the deeds to be produced, to enable the plaintiffs, if they thought proper, to bring ejectments in the names of the trustees, accordingly ejectments were brought, and the terms recovered, and the Court, on a bill filed by the husband, denied an injunction to stay proceedings on the ejectments.

A term for 99 years, if one so long live, cannot be intailed.

knows

2 Chan. knows no difference between long and short terms ; and this
Rep. 79, 81. very point has been solemnly determined in this Court.
Ant. Caf. Then the administratrix is seized of the whole trust of the
91. 1 Chan. term in the *Surry* estate, so the injunction must continue as
Caf. 307. to it, and it is not distributable till after his debts are paid,
2 Chan. but let the plaintiff give judgment in the ejectment, with a
Caf. 73. release of errors, and consent not to bring error ; and as to
1 Vern. 7, the other ejectment, the injunction must be dissolved
18, 408.
2 Vern. 17,
270.

Cafe 152,
At the
Rolls.

Saturday, January the 31st.

ALLEYN versus ALLEYN.

Mr. Attorney General for the plaintiff.

SAMUEL Stephenson, on the 29th of *October* 1727, made his will, *inter al*, in these words. ‘ And as to and for all
‘ the reversion and inheritance of my said messuages, lands,
‘ and tenements, I give and devise the same to *Samuel Al-*
‘ *leyn* my grandson, for and during, &c. and as to and con-
‘ cerning my rents, arrear, interest and money due, and all
‘ other my personal estate whatsoever, debts, funerals, and
‘ legacies being first paid and discharged, I give the same to
‘ my executors, to be laid out in a purchase of lands, to be
‘ settled in trust to the said *Samuel Alleyn* my grandson, &c.
‘ and made Mr. *Alleyn* the father of the defendant *Samuel*,
‘ and the plaintiff Mrs. *Alleyn*, his daughter, the wife of
‘ Mr. *Alleyn*, executors.’ *Samuel Stephenson*, after the mak-
ing of this will, on the 13th of *October* 1728, entered into
articles, for the purchase of an estate for 250*l.* and the mo-
ney was agreed to be paid on the first day of *May* following.
The testator by his codicil dated the 29th of *October* 1728,
devised to his daughter *Lydia* lands of 70*l.* a year, to be
purchased for her by his executors, out of his personal estate.
On the 3d of *January* 1728, the testator advances 500*l.* to
the vendor, and takes an assignment of a mortgage for 600*l.*
on the premises, and the deed recites, that whereas *Samuel*
Stephenson had contracted for the purchase of these lands, it
was thereby agreed, that if they were conveyed to him, the
aforesaid sums should be taken as part of the purchase-money,
and the term remain attendant on the inheritance, but if the
premises were not conveyed, that the mortgagor should re-
deem on the common terms. 5 *April* 1729, the testator
died,

died, leaving two daughters, *Esther Alleyn* the plaintiff, and *Lydia*, who is since † dead; Mr. *Alleyn* proved the will, and [†263] by indenture dated the 30th of *April* 1729, the premisses contracted for were conveyed to him and his heirs, for and in consideration of 1100*l.* paid by Mr. *Stephenson* in his life-time, and of 1400*l.* paid by Mr. *Alleyn* out of the personal estate of the said Mr. *Stephenson*; and Mr. *Alleyn* assigned the mortgage, in trust for him and his heirs: Mr. *Alleyn* died, and the lands descended on the defendant, as his eldest son and heir, and Mrs. *Alleyn* the sole surviving daughter and heir of *Samuel Stephenson*, filed this bill, to have the estate reconveyed to her, and the mortgage assigned as she should direct.

The testator having entered into articles for the purchase of this estate, it is considered in this Court from that time as part of his real estate, and cannot pass by his will, because it was purchased after the making of it, and there is nothing peculiar to this case to distinguish it from the common cases; for though after the execution of the articles, the testator took an assignment of the mortgage, that was relative to the articles, and cannot be considered as part of his personal estate, but only as a payment of so much of the money; and the rather, because though the testator died, the conveyance was executed within the time. If these lands had been conveyed to the testator in his life-time, there could be no doubt, but they would descend on the plaintiff his heir at law, and this Court will consider this equitable estate in the same manner.

Mr. *Lutwych*.

This is a very plain case; if one articles for the purchase of lands, if the money is paid in part, or though no money is paid, it has been frequently determined that this is a purchase in equity, and that the lands will descend to the heir, and the executor must pay the money, because the covenant to pay it binds the executor; as on the contrary, in case of a mortgage in fee, the heir of the mortgagee is obliged to convey to the executor, though he has no other provision; then the only question is, whether this estate will pass by the will? But it was settled in the case of *Sir Owen Buckingham*, where the devise was of all the lands the testator should be seized of, that the lands whereof the testator was not seized at the time of the making his will would not pass, for the statutes 32
H. 8.

Moor 404.
Cal. 542.
Gouldsb. 150.
Cre. Eliz.
493. (11.)
[1264]

H. 8. ch. 1, and 34 and 35. H. 8. ch. 5. enables only persons Having lands, &c. to devise them. A man may devise all the personal estate whereof he is or shall be seized, for that is perpetually fluctuating, and therefore if the testator is to be considered as the purchaser of these lands, by entering into articles for the purchase of them in his life-time,† they must descend to his heir, and though the executor paid the money, and took a conveyance in his own name, he is but a trustee for the heir, and the testator devises only the residue of his personal estate after payment of his debts, &c. But this is a debt the vendor could compel the executor of the vendee to pay.

Mr. Wills for the defendant.

The single question is, Whether the estate contracted for shall descend to the plaintiff, or be considered as part of the trust estate to be settled by the will on the defendant, when purchased with the personal estate? If a man devises his personal estate to be invested in a purchase of lands, it is considered as real estate in this Court, and shall go to the heir of the devisee, and not to his next of kin.

Another rule relating to wills is, that the intention of the testator must be observed, and particularly where any thing executory is to be done; in which case, equity will construe a will in the same manner as it does articles; and to fulfil the intention of the testator, will expound it even contrary to the words. It cannot also be denied, that when a man articles for the purchase of a real estate, it shall descend to his heir, and his executor shall pay the money; but this rule holds only between the heir and executor, or the heir and the next of kin, or the devisee of the personal estate; but here the defendant is not the next of kin to the testator, or the devisee of the personal estate, but devisee of the real estate; for the testator devises to him all his real estate, and then gives all his personal estate to his executors, to be laid out in lands for his benefit, which must be considered in the same manner as if the personal estate had been actually invested in lands; so that it is contrary to the intention of the testator that the defendant should have every thing, to call this a real estate, and is putting a different construction on these articles from what they bear at law, purely to defeat his intention, the articles not being carried into execution,
the

the law would still consider this as so much of the personal estate, and did this Court ever put a construction contrary to law on a deed or will, purely to overthrow the intention of the testator, where the dispute is betwixt the heir and next of kin, his intention seems to be that his heir should have it, by his entering into articles, and therefore the Court in that case is carrying on his intention. In the case of *Orm* versus *Orm*, *Vern.* 681. where money due by bond was devised, and part was paid in the life-time of the testator, yet the legatee had the benefit of the whole money, there the legacy was changed by the party himself, here it remained the same, for it was trust money when he died, and the purchase was afterwards carried on with that money, and therefore the estate and trust must go together. [†265]

Master of the Rolls.

I am of opinion that the plaintiff is intitled to this estate contracted for, and the purchase whereof was compleated by the executor; and though the conveyance was taken by the executor in his own name, he is only her trustee; so the question is open, whether this estate shall be considered as real estate? The council for the defendant does not deny that it ought to be considered as real estate, if it was not for the directions of the will, to lay out the personal estate in lands. In the case of Commissioner *Trimuel* who contracted for lands at a future day, and then devised all his lands; Lord *Harcourt* held the lands contracted for would pass, which strongly proves, that lands contracted for are to be considered as purchases, and then it is as clear, that these lands being contracted for, after the making the will, will not pass by it: The case of *Sir Owen Buckingham* was adjudged on an ejectment in the Court of Common Pleas, and afterwards on another ejectment brought in the Court of King's Bench, and that judgment affirmed in Parliament on a writ of error; and therefore since these lands will not pass by the will, and must be considered as part of the testator's real estate, they must descend to the plaintiff, his heir, and she cannot be defeated of them, but by the exprefs words of the will, or by necessary implication; and I think the words of the will, that the residue of his personal estate shall be invested in lands, &c. is not either an exprefs disinherision, or by implication. The personal estate is not to be consider-

Ant. Caf.
76. Lands
contracted
for are con-
sidered in
equity as
purchases,
and the ven-
dee may de-
vise them,
and if the
contract is
after the
making the
will, they
will not
pass by it.
Nelf. 8vo.
Rep. in
Canc. 76,
106. *Mc*

254, Caf. 401. 404, Caf. 542. The testator can devise only the lands he is seized of at the time of the making his will.

But a man may devise all the personal estate whereof he is or shall be possessed.

1 *Salk.* 237,

Caf. 16.

The testator devised all the reversion and inheritance of his lands, &c. to A,

and the residue of his personal estate to his

executors,

in trust, to be laid out

[+266]

in lands to the use of

A, afterwards he

contracts

for a purchase of lands, and dies, these lands belong to the heir of the testator, and not to A. 1 *Chan. Caf.* 39. 2 *Vern.* 679, 688. *Co. Lit.* 392. *Co. Entr.* 364. *Raft.* 274. 34 *H. 6. F. n. B.* 199. 2 *Chan. Caf.* 144. 2 *Vern.* 621. *Plowd.* 342. 32 *H. 8, 1.* 3 *Co.* 25. *Moor* 254. 1 *Anderf.* 348. *Poph.* 87. 2 *Leo.* 120. 1 *Anderf.* 188. *Swinb.* part 7. sect. 11. Part 1. sect. 11. *Fitz. Dev.* 17. *Swinb.* part 3. sect. 6. n. 17.

ed as it stands at the time of the making the will, but at the time of the testator's death, because till that time, it is in a constant fluctuation, but so much of it as would serve for the purchase of these lands lost the quality of personal estate in this Court at the time of his death, and became real estate, and he has shewed his intention to alter the nature of this estate, having by a subsequent act controlled his will as to so much, and this is clear from hence, that if he had lived to complete the purchase, the lands would not have passed as real estate, because the purchase was subsequent to his will, nor as personal estate, because the nature of it was altered, and the accident of his dying before the purchase was completed, makes no alteration: So here is no ground to say, it was his intention to give all his real and personal estate, because, he was going to apply part of his personal estate in such a manner, that it would not have passed by this will, either as his real or personal estate, and it would be the same thing, if he had given the defendant all his real and personal estate, for his intention plainly appears + to take so much out of his personal estate, and he shews no design to pass it as his real estate, because by law it could not pass by this devise.

Cafe 153.
In Court.
Lord Chan-
cellor.

Wednesday, February the 4th.

CHAPMAN & al', plaintiffs.

The Bishop of LINCOLN, MOUNSON, and DOBBS,
Defendants, & è contra.

Mr. *Wills* for the plaintiff.

THIS bill is brought by the plaintiffs, the occupiers of several parcels of meadow, and pasture ground, in the parishes of *Burgh* and *Winthorp*, in the diocese of *Lincoln*, against the Bishop of *Lincoln*, who is seized in fee of the impropriated tithes, Mr. *Mounson*, lessee of the Bishop for three lives, and Mr. *Dobbs* his under tenant, for the establishment of two moduses, and Mr. *Mounson* filed his cross bill, to have tithes paid to him in kind. One modus is, that it

it has been a custom time out of mind for the occupiers of land in *Burgh*, and who do not reside in *Burgh* or *Winthorp*, to pay four-pence an acre for the tithe of hay, and the herbage of pasture lands, not ploughed or sown, on *Good Friday*, or so soon after as demanded. The other modus is, That all those who occupy lands in *Winthorp*, and are not inhabitants of *Winthorp* or *Burgh*, should likewise pay four-pence an acre. And the plaintiffs, though they occupy lands in the parishes of *Burgh* and *Winthorp*, yet they live in other parishes. The modus does not relate to those that reside, but to those that have lands, and are not resident; these two parishes contain near eight thousand acres of land near the sea, and the inhabitants are not sufficient to cultivate and manure them, so these moduses were settled to encourage the inhabitants of the neighbouring towns to occupy these lands, and they pay likewise and contribute to all the parish duties, and the same custom is observed in several adjoining parishes. We have proved a payment of this modus for fifty years, and that the parishioners who paid tithes in kind, on their removal to other parishes, have paid only this modus; and the defendants have not been able to prove, that tithes in kind have been ever paid, and therefore, as our evidence is sufficient, we have a right to have these moduses established, and if the defendants deny these moduses, the Court will first enter into the proof of them, and if they are not fully satisfied with the depositions, † will send them to a [†267] Jury, but if they insist that they are not good in law, they must admit them to be well proved, and this is the constant course in the Court of Exchequer, and it was lately so resolved in *Quarvus's* case to establish a modus for fish, because they would not trouble themselves to give their opinion on an uncertain fact.

Mr. Solicitor General for the defendants.

We have two defences, (and if we prevail in either, the Court must decree for us) that there are no such moduses, or if there are, that they are not good in law, but they say, if we controvert the legality, we must admit the modus, but the old course of the Exchequer was, to consider the legality of the modus, on a supposition it was proved, and not on an admission of it; and why should the Court put the parties to the trouble and the expence of trying a thing that is not material. By these moduses a difference is made between inhabitants

bitants and strangers, in a manner I never heard : In cases between residents and out-dwellers, the modus is generally in favour of the parishioners, and what reason is there for these moduses ; why must the first extend to all strangers but those that live in *Winthorp*, and the second to all but those that live in *Burgh* ? And they cannot be good in law, because it would depend on the occupier whether he would pay tithes in kind or not : A man indeed, by changing the course of his husbandry, may change the nature of the tithe, for he cannot be supposed to do it to defraud the rector ; but it must be presumed that every man will turn his land to the best advantage ; but here, though the land continues in the same plight and condition, the tenant, by removing out of the parish, has it in his power to alter the tithe ; and 1 *Lev.* 116, *Bawdry* against *Busbel*, a prohibition was moved for on a suggestion of a custom, that all the occupiers and tenants of *Skegnes*, that were inhabitants of any place out of the parish, should pay to the vicar only four-pence a year for every acre ; and it was alledged that the plaintiff occupied lands in *Skignes*, but lived out of the parish ; and the Court denied the motion, because the custom was unreasonable to give a greater privilege to foreigners than to inhabitants, who are at a greater charge in respect to their residency, to repairs and vestments for the Church : This case is reported likewise in 1 *Keb.* 602. *Caf.* 76. and it is there said, *per curiam*, that this was an unreasonable custom, and only invented by the country to cheat the parson, and that it was a leaping custom, not fixed to any person certain, or to the land, nor of any permanence : And by *Keeling*, there is no precedent of any modus so variable and dancing : And this case shews, the Court on a supposal of the fact, determined the law, before the modus had

[†268] been proved, and would not † let them try the modus, because it was void in law : These moduses are in favour of foreigners, others of inhabitants, and would subject the rector to the greatest frauds, they have proved that they contribute as much as parishioners to the charges of the parish, and why then should they be eased as to the tithes ? and it is unreasonable that by their removal only the impropiator only should be a loser.

Lord Chancellor.

It is contrary to the rules and methods of all Courts, to determine the law 'till the fact is either admitted or proved : On a motion for a prohibition, the Court is not possessed of the

De Term. S. Hill. 1729-30.

the cause which makes the difference, but if it is once granted, the defendant must either demur, whereby he admits the modus, or plead the general issue; and if the fact is found against him, he has afterwards the benefit of the law. The Court therefore declares, the plaintiffs have proved the moduses to their satisfaction; but having a doubt whether they are good in law, will be assisted by two Judges on *Monday* next, and defers giving an opinion till that time.

The Court will not consider whether a modus is good in law or not, till the modus either admitted or proved.
Post. Caf. 156.

Thursday, February the 5th.

MOTIONS.

ANONYMUS.

THE plaintiff filed a bill in the Exchequer, which was dismissed, and now brought the same bill in this Court, which the defendant moved might be dismissed with costs; but the Lord Chancellor, on consulting the register, said it could not be dismissed on a motion, but the defendant must plead to it, and then it is referred to a master, to see whether it is the same bill or not; but if a bill is depending here, and a second brought for the same matters, the defendant may move, that it may be referred to a master to see whether they are the same, and to dismiss one.

If a bill is depending here and the plaintiff files another for the same matters, the defendant may move to have them referred, and one dismissed.

But if a bill is dismissed in the Exchequer, and then filed here, he cannot dismiss it on motion, but must plead to it.

† Saturday, February the 7th.

APPEALS AND REHEARINGS.

HENRY GIBBS, administrator of his late wife *Elizabeth Gibbs*, late *Elizabeth Davis*, deceased, plaintiff.

HENRY DAVIS, surviving executor of Dame *Margaret Boreman*, deceased, and brother and heir of his late sister, the said *Elizabeth Gibbs*, defendant.

CAPTAIN *Wilkinson*, Lady *Boreman*'s second husband, purchased an annuity of 100*l. per annum* for ninety-nine years, determinable on the death of himself and Lady *Boreman*,

[4269]

Caf. 155.
In Court.
Lord Chancellor.

man, and the longer liver of them, from *Robert Stanton* and *Elizabeth* his wife; and for securing the payment of it, the said *Robert Stanton* acknowledged unto *Anthony Collins* (in trust for the said Captain *Wilkinson* and Lady *Boreman*) a statute staple of 1000*l.* which was defeasanced for payment of the said annuity. And the said annuity being greatly in arrear to Lady *Boreman*, after Captain *Wilkinson's* death, the manor and farm of *Brobrick-Hill*, in the county of *Bucks*, (whereof the said *Robert Stanton* was seized in fee, were extended by virtue of the said statute in Lady *Boreman's* life-time; and she got into possession of the said manor and premises, which were about 60*l. per annum.*

Thomas Young, Lady *Boreman's* fourth husband, before his marriage, by deed and fine, settled the manor of *Cranbrook*, and the lands thereunto belonging in the county of *Essex*, to the use of himself for life, remainder to Dame *Margaret Boreman* for her life, for her jointure, remainder to the heirs of their two bodies, remainder to his own right heirs: And covenanted, that the said jointure lands then were, and during Lady *Boreman's* life-time should be and continue of the value of 400*l. per annum*, free from incumbrances.

In 1675, *Thomas Young* died without issue by the said Lady *Boreman*, and upon his decease, the said lady entered upon the said manor of *Cranbrook*, and the lands thereunto belonging, and enjoyed the same twenty-five years after her [†270] said † husband's death, but the same did not exceed above the yearly value of 200*l.*

The said *Young* having before his marriage with the said Lady *Boreman*, viz. on the 5th of *March* 1670, demised the said manor and premises (except the house, coach-house, and stables, and hay for four horses, and all the wood, timber, and trees) to *Matthew Young*, for a term of fifty-one years, at a pepper-corn rent; the said *Matthew Young*, in consideration of 342*l.* paid by Sir *William Boreman*, Lady *Boreman's* fifth husband, assigned the said manor and premises unto *William Yardley* for the residue of the said term, in trust, to corroborate Lady *Boreman's* said jointure, and for the repayment of the said 342*l.* to Sir *William Boreman*, with damages for the breach of the said covenants of the said *Thomas Young*, in the value of the said manor of *Cranbrook* and premises, for so much as the same fell short of 400*l. per annum.*

Dame

Dame *Margaret Boreman*, widow, was also seized in fee of lands in *Kent*, and being so seized and possessed, she by her last will, dated the 20th of *March* 1719, devised in the words following.

' Item, I give, devise, and bequeath, all my manors, messuages, lands, tenements and hereditaments, and real estate whatsoever, with their, and every of their rights, members, and appurtenances whatsoever, situate, lying, and being within the several counties of *Kent, Essex, Bucks, Bedford*, or elsewhere within the kingdom of *England*, of which I shall be any way seized, or intitled unto, to my nephew *Henry Davis*, and his sister *Elizabeth*, my niece, now wife of Mr. *Henry Gibbs*, to hold to them, the said *Henry Davis*, and *Elizabeth* his said sister, equally, during their natural lives, to be equally divided between them, share and share alike, they jointly paying out of the rents, and profits of the said estate, unto my brother *Richard Davis*, their father, the full sum of 30*l.* a year during his natural life; and from and after the decease of my said brother, nephew and niece, then I give all my said real estate to the right heirs of my said nephew *Henry Davis*, and my said niece *Elizabeth Gibbs*, equally, in equal parts, to hold to them and their heirs as tenants in common, and not as joint tenants: Always provided, that my said nephew and niece, during their joint lives, and by their joint consent, shall and may have full power to dispose, settle, and convey all, or any of the said real estate to them devised as aforesaid, for any purpose, or to, or for any other use or uses, as they shall both agree to and think meet, and their circumstances in this life shall require.'

† And by the same will, after having devised several legacies, [†271] she also devises as follows.

' All the rest, residue and remainder of my personal One posses-
estate, plate, gold, jewels, medals, pictures, household sed of lands
in the coun-
ty of *Bucks*, extended by virtue of a statute staple, and of a mortgage for years in the
county of *Essex*, and seized of lands in fee in the county of *Kent*, devised all his manors,
messuages w lands, tenements and hereditaments, and real estate whatsoever, within the
several co: unties of *Kent, Essex, Bucks, Bedford*, or elsewhere, within the kingdom of *Eng-
land*, of which he should be any way seized or intitled unto, to *A* and *B*, to hold to them
equally during their natural lives; and from and after their decease, then he gave all his
said re: estate to the right heirs of *A* and *B*, in equal parts, to hold to them and their
heirs, and after he devises all the rest of his personal estate, &c. and all his mortgages,
credit: &c. to be equally divided between the said *A* and *B*.

It was adjudged, First, That though the testator had no other lands in *Essex* and *Bucks*,
that the securities would not pass by the first devise, but that that extended only to lands
in fee, but that they passed by the second devise as mortgages and credits. Secondly, That
if they did pass, that the right heirs were words of limitation, and not of purchase.

' goods,

' goods, and furniture, and all my mortgages, bonds, specialties, and credits, whatsoever they shall consist of, (my wearing apparel only excepted) I give and bequeath the same, and every part thereof, (after payment of my debts, funerals and legacies) to be equally divided between my said nephew *Henry Davis*, and his said sister *Elizabeth*, part and part alike.' And she appointed the said *Henry Davis*, and his said sister *Elizabeth*, executors of her will. The 23^d of *April* 1700, Lady *Boreman* died, and the defendant and the said *Elizabeth Gibbs* proved the said will, and the defendant possessed himself of the whole estate.

Some time after, *Theobald Thompson*, and *Mary* his wife, daughter and heir of the said *Thomas Young*, filed a bill against the plaintiff and his wife, and the now defendant pretending thereby, that Lady *Boreman* being dead, the said manor of *Cranbroke* descended to the said *Mary*. And the defendants by their answer insisted, that they were intitled to hold over, not only till they were satisfied the money paid for the said fifty-one years lease, with interest, by Lady *Boreman*, but also till they were satisfied the deficiency of her jointure, which was more than the reversion thereof would make good, and the cause being heard, the Court declared accordingly.

The 25th of *November* 1715, the plaintiff filed his bill against the defendant, in his and his wife's name, and after her death a bill of revivor, and supplemental bill for an account, and share of Lady *Boreman*'s real and personal estate, as administrator to his wife: And on the 28th of *January* 1728, this cause being heard *ex parte*, his Honour, the Master of the Rolls, decreed, that a moiety of the mortgage term, and of the lands extended, belonged to the plaintiff, as part of the personal estate of Lady *Boreman*, and did not pass by a devise of the real estate, and that a commission should issue to divide the said estate in *Essex* and *Bucks*; and this cause being heard again at the Rolls, the 21st of *May* 1729, his Honour in these points confirmed his former decree, and on the 5th of *December* 1729, on a rehearing, the same was affirmed by the Lord Chancellor; and this cause now came on again to be reheard.

[†272]

† Mr. Solicitor General for the defendant.

The chief question is, Whether the plaintiff is intitled as administrator to his wife, or the defendant, as her heir at law?

law? and this depends upon two other questions, Whether the manor of *Cranbrook* and *Brobrick-hill*, is included in the devise to the defendant and his sister, and if it is, what estate they take by the devise.

The manor of *Cranbrook* was held by Lady *Boreman*, not only for the security of 342*l.* but to make good the deficiency of her jointure, which would amount to more than the estate was worth, and the manor of *Brobrick-hill* was extended on a statute staple of 1000*l.* security, for the arrears of an annuity of 100*l.* a year, which would amount to more than the value of the estate, which was but 60*l.* *per annum*, and Lady *Boreman* had been in possession of them many years, and these estates come under the words of the devise, for they are manors and lands, though they are chattels, and she having been so long in possession of them, and having them as a security for more than their value, might look on herself as the absolute owner, and design to pass them as real estate, and the subsequent words shew, that this was her real intention, *Within the several counties of Kent, Essex, Bucks, &c.* and she had no other lands in *Essex* and *Bucks*, so otherwise those words must be rejected, *Of which I shall be any way seized or intitled unto*; sure he is some way intitled to these lands, and her intention to pass them was reasonable, her interest in them being as valuable as the inheritance.

A portion
of tithes in
H passed by
a devise of
all his fee
simple
lands, the
testator
having no-
thing else
there
to satisfy the
words.
1 Rol. Ab.
614.

But words improper to pass a thing have been allowed to carry it in favour of wills, 3 *Leon.* 165. *Styl.* 261. *Rich ver- sus Saunders.* A man was seized in fee of a portion of tithes in *Holford*, and having nothing more there, devises all his fee simple lands whatsoever to his brother and his heirs, and it was adjudged, that the tithes should pass by the word lands, for though they are distinct, and arising out of the land, yet the aptness of words is not so much to be considered as the intention of the testator, who must intend that he made fee simple estate in *Holford*, for he had nothing there but this portion of tithes to satisfy that word: That case is stronger than this in question; there, words that were improper were extended to things that would not fall under that description; but here the words are sufficient, these estates were manors and lands which she was intitled to, and lay in *Bucks* and *Essex*.

But the plaintiff objects the last clause, whereby she devise all her mortgages, credits, &c. But that is no answer to

[†273] to our † objection, that the words in *Essex, Bucks*, must be struck out, if these estates do not pass by the devise, and that is only a residuary clause, and cannot contradict a former devise, which will operate as an exception out of it.

If a term is limited to one for life, and after his decease to his right heirs, right heirs are words of purchase, though they are words of limitation, if a fee was devised in that manner. *Wentw. Off. of Ex. 228.*

The second question then is, Supposing these estates pass, what estate is given? If the plaintiff's wife is intitled only for life, then the plaintiff has no title to her moiety, but if she has an absolute interest in it, he has. First, She devises to them, during their natural lives, and if the devise had gone no further, no doubt but her interest would have determined at her death, then to shew that this was her intention, she begins with a new devise, *I give all my said real estate to the right heirs, &c.* and therefore right heirs must be taken as words of description, and not of limitation, and then the right heirs of *Elizabeth* will be intitled to the one moiety, which belonged to *Elizabeth* for life, and the rather from the nature of the estates, which are only chattels, for if heirs should be taken as words of limitation, then her right heirs would take nothing, but the estate would go to her executors or administrators, but if they are construed words of purchase, heirs may take; and this is agreeable to the case of *Peacock and Spooner*, decreed by the House of Lords, and therefore the strongest authority, 2 *Vern.* 43, 195. and that was on a deed, this is the case of a will, and Lord *Sommers* decreed the case of *Dafforne versus Goodman*, 2 *Vern.* 362. on the authority of the case of *Peacock and Spooner*. *John Bolt*, possessed of a term for ninety-nine years, on his marriage with *Apolline*, assigns the term, in trust, for himself for life, remainder as to a moiety, to *Apolline* for life, for her jointure; remainder to the heirs of the body of *Apolline* by him to be begotten; remainder as to the other moiety, to the children of the body of *Apolline*; they had a son, and it was resolved that heirs of the body were words of purchase, and not of limitation; in this sense the words will have their intended effect, in the other they cannot; but the estates, instead of going to the heirs, will go to the executors. Therefore it was plainly the intention of Lady *Boreman* to pass these estates, and it was likewise her intention to devise them to the defendant, and the wife of the plaintiff for life only, and that those who were to take in the second place, should take as purchasers.

Mr.

Mr. Lutwych.

Here is a single point of law, though we are in a Court of Equity, for your lordship's determination, which is plainly with us, from the authority of the case of *Peacock and Spooner*, which cannot be contradicted. A term for years was assigned, in trust, that baron and feme might receive the profits during their lives, and the life of the longer liver of them, † and after their death, to the heirs of the body of [†274] the wife to be begotten by the husband; and the Lord Chancellor decreed, that the whole interest of the term vested in the wife, but that decree was reversed by the Lords Commissioners, who held that the heirs of the body took by purchase, and their decree was affirmed on appeal by the House of Lords. The plaintiff says, only lands of inheritance will pass by the first words; but sure these chattels real may be considered in one sense as real estate, though they are personal estate, as they belong to the executors, and it is plain the testatrix intended that some estate in *Essex* and *Bucks* should pass, and she had no other in those two counties, and therefore this is within the reason of those cases where things in a will pass by the intention of the testator, though the words he uses are improper.

The second point is, What estate the devisees take: The plaintiff says, the whole chattle interest is in them, to whom the testatrix has expressly devised it for life only, and therefore that construction, if it can, must be prevented. A limitation of chattels real must have another construction from a limitation of an inheritance, and therefore, though in the case of a freehold, these words would make a fee simple, they will not in the case of chattels real, for since the right heirs can only take as purchasers of these terms, the other construction would wholly disappoint the intention of the testatrix. If a fee is limited to one for life, remainder to the heirs male of his body, this is an estate tail; for there though heirs male are taken as words to enlarge the first estate, yet the heirs take, though not as purchasers: But if a term is limited in that manner, if heirs of the body do not take as purchasers, they cannot take at all, but the estate goes to the representatives of the first taker.

And heirs at law are in all doubtful cases favoured, but wherever there is an express devise to an heir at law, that devise was never taken from him by doubtful words or by implication.

As to the last words, they are only general words, and can only be understood of what mortgages and credits, &c. were not before given away. And in the case of *Amberst* and *Liton*, great stress was laid on the last devise of all his lands, &c. whereof he was seized in law or equity, &c. because it was not of all the rest and residue of his lands, &c. as the words of this will are.

Ant. Caf.
120.

[+275]

+ Mr. Attorney General for the plaintiff.

Swinb. part
1. sect. 18.
Bro. Ab.
Tit. Done,
n. 41.

The decree that hath been made in this cause does not contradict former resolutions; the second point now insisted on was not thought of or mentioned 'till this hearing. We must judge of the will not from the first clause only, but from the several clauses of it considered together. It is plain these two estates cannot pass by the first clause from the words themselves and the nature of the estates; the words shew the testatrix designed to give away only what was properly her real estate, and which was capable in its nature of going and descending to heirs; some chattles are indeed called real, because they favour of the reality, as they are interests derived out of the real estate, but they are only personal estate, and belong to the executors, and will not pass by a devise of the real estate. The last words, *And real estate whatsoever*, shew the general words, manors, messuages, &c. are to be carried no further; and when she devises it over, she gives her said real estate, and by the last clause it appears that she did not design to pass them; by the first clause she makes a complete disposition of all her estate, both real and personal; First, she devises all her real estate, then she bequeaths several legacies; and in the last place, she gives All the rest, &c. of her personal estate, &c. and all her mortgages, &c. and though what was due on the securities was of more value than the estates, that will not alter the nature of the interests she had in them: But it is said that if these estates do not pass, there is nothing for the words in *Essex* and *Bucks* to operate on; but it does not appear in the cause that she had no other lands there; but if it did, the inference they have made is too strong, because there are other words which may be satisfied, and these are general words: Suppose the words had been, All my real estate in the kingdom of *England*; if only real estate is to pass, let the words be ever so general, nothing else can.

The

The defendant says, the last clause is only a devise of the residue, but it is not a residuary clause, as to the mortgages, &c. but all her mortgages, &c. are expressly devised, so it is plain that she did not think she had given them away before. But suppose these estates pass by the first devise, then they pass by the last clause as a residue after the death of the daughter, for in the devise over to the right heirs, all the other words are dropt, and only the real estate is given over.

As to the second point, what estate the plaintiff's wife takes; if the words are not sufficient to carry these estates over, the question is at an end; but if they are sufficient, the whole moiety vests in her. But it is said, that right heirs are words of purchase, and only *Descriptio Personæ*; children, or heirs of the body, indeed, may be taken as words of purchase, and † the testator may be supposed to mention them out of kindness or affection, but right heirs are too general words, and can be put in only to enlarge the estate, as words of limitation, for which reason, if a fee is devised to one for life, and then to his heirs, the interests join, and he to whom the devise was only for life, is seized in fee, and therefore freehold and leasehold estate being devised together, the plaintiff's wife must take an absolute estate in both, and the same words must be understood in the same sense as to both estates, and the words are strong words of limitation, and the cases that have been quoted do not come up to the present case. The case of *Peacock* and *Spooner* is greatly different; that was the case of a term of the provision of the husband, assigned and settled by him, and there was not the same reason to adjudge the whole interest to vest in the wife as to vest in the husband, if it had been limited to the heirs of his body, because if a freehold had been limited in that manner, though the wife would have been tenant in tail, yet by the statute 11 H. 7. she could not have barred the issue, and therefore in that case the Court said, they would not assimilate it to the limitation of a real estate, and construe it an estate in tail, for then it being out of that statute, she might bar her issue, whereas if it was a real estate she could not bar them, and heirs of the body do not take barely through the first taker, but per Formam Doni, (though he may bar the estate on a supposed satisfaction) for the donor may be supposed to have a kindness for them, tho' not for heirs general, and therefore those words can be put in only

Why heirs
of the body
are rather
[† 276]
to be con-
strued
words of
purchase,
than right
heirs.

only to enlarge the estate: And the case of *Webb and Webb* is a later resolution, 2 *Vern.* 688. *Edward Webb*, on marriage of his son, and 250*l.* portion, assigned a term to trustees, in trust, to permit *Thomas Webb* to receive the profits for his life, and after his death to permit *Anne* his wife to receive the profits for her life, remainder to the heirs of the body of *Thomas* and *Anne*, during the residue of the term; the wife dies, leaving issue; it was adjudged at the Rolls, upon the reason of the case of *Peacock* and *Spooner*, that the heirs of the body should take as purchasers, and that the whole term did not vest in the father: But on an appeal to Lord Keeper *Harcourt*, and after search of precedents, it was decreed, that the whole term vested in the father, and that the heirs of the body could not take as purchasers, for if the legal estate had been limited in that manner, the father by law must have taken the whole, and the trust of a term must be governed by the same rule, and Lord *Harcourt* went upon this distinction, because the term was not limited to the heirs of the body of the wife, but to the heirs of the body of the husband, and if a freehold had been limited in that manner, the husband could dispose of it, but not the wife, and in all the cases that have been mentioned the words were heirs of the body, and no case has been produced where heirs general have been taken to be words of purchase, because it is so uncertain who they are,

Why heirs of the body are rather to be taken as words of purchase, when a husband settles a term on his wife for life, remainder to the heirs of her body, than when he settles it on himself for life, remainder to the heirs of his body.

[277]

Mr. Solicitor General's reply.

It is not denied, but that in the first clause there are sufficient words to pass these estates, if they are not restrained and tied up by the others, but it is said that the words real estate confine them: I agree that in a legal sense chattles real are not real estate, and therefore if a man have both freehold lands and chattles real in one place, by a devise of all his real estate only the first will pass, because they may satisfy the words, but if he has only chattles real there, they will pass, because otherwise the words would be void, as was resolved in the case of *Roe and Bartlet*, *Cro. Ca.* 213, 292, and it was her intention to pass them, and the words will carry them, and no answer has been given to our objection, that otherwise the words, *In Bucks and Essex*, must be expunged, for at the former hearings it was taken for granted the testatrix had no other lands in those counties. As to the objection, that the testatrix hath dropt all the other words but

Styl. 279.
Bro. Ab.
Tit. Done,
n. 41.

Real

Real Estate in the limitation over, it is strange that in one clause she should give them for life, in the other absolutely, but she devised over whatsoever she before intended to pass as real estate.

It is absurd, they say, that the same words should operate as words of limitation on the freehold estate, and as words of purchase on the leasehold interests, but that arises only from the different nature of the estates; in one case the law unites the estates, and though the words are taken for words of limitation, the heir takes, if the tenant in possession does not defeat the estate; but in case of a term, the heir cannot take if the words are taken only to increase the estate, and that right heirs are words of purchase is further proved, because there come afterwards words of limitation, *To hold to them and their heirs*, so this is the same thing as if a leasehold estate had been devised to two, and after their decease to their right heirs, their executors and administrators.

No such distinction as hath been made between the case of *Peacock* and *Spooner*, and of *Webb* and *Webb*, is mentioned in the report of either of those cases, nor is there any colour for it, the statute of *H. 7.* does not extend to chattles real, and tho' *Webb* and *Webb* is a later authority, yet it is of less weight than *Peacock* and *Spooner*, which was determined by the House of Lords.

There is no difference whether the limitation is to the heirs of the body or to the heirs general, for it is natural for a man to have a regard and view to the blood and heirs of † his family, be they who they will; as to freehold lands, the case is the same, whether the limitation over is in tail or in fee, and there is in both cases the same reason for the distinction as to chattles real, because if the heirs do not take as purchasers, they cannot take at all. [†278]

Lord Chancellor.

One having terms for years as a security for money in two parishes, and an estate in fee in another parish, devises all her manors, lands, and real estate in those parishes, and the question is, Whether the terms shall pass? I agree with the resolution in the case of *Roe* and *Bartlet*, that where one has a substantive term only in such a place, and devises all his lands

By a devise of all his lands and real estate in *A*, a lease will pass, if the testator has no other estate there. But not a lease by mortgage or lands extended.

lands and real estate in that place, the lease will pass; but in this case, there are some fee simple lands that can pass, which makes it differ from the case, where nothing can pass but the terms: But at the time of making her will, the testatrix had only a mortgage and an extent as securities, not substantive terms, and by a devise of all her lands in *A*, *B*, and *C*, terms as securities only cannot pass, and it could not be her intention to devise these estates by this clause, because she afterwards expressly devises *All her mortgages, bonds, credits, &c.* and therefore that devise must extend only to her freehold lands.

Where both freehold and leasehold estates are limited, the same words cannot be words of limitation of the freehold, and of purchase of the leasehold.

But supposing the leasehold estates passed by this devise, the next question is, What estates the plaintiff's wife and the defendant took by it? The defendant allows that in the case of a freehold, if an estate is limited to one for life, remainder to his right heirs, the heirs will take by descent; but they say, that if a term for years is limited in that manner, they will take by purchase: In this case then, both a freehold and leasehold estate being limited, the same words in the same sentence by that rule must be taken as words of limitation of the freehold, and as words of purchase of the leasehold, which it can never be supposed the testatrix intended, and therefore the decree must be affirmed.

2 *Ver.* 324. This decree was affirmed in the House of Lords, on *Friday March 20th, 1729-30.*

[1279]

Case 156.

In Court

Lord

Chancellor.

Mr. Justice

Reynolds,

B. R.

Mr. Justice

Fortescue,

C. B.

† *Monday, February the 9th.*

CHAPMAN & al', plaintiffs.

The Bishop of LINCOLN, Mr. MOUNSON, and Mr. DOBBS, defendants, and *è contra*.

Mr. Solicitor General for the defendants.

Ant. Caf. 153. S. C.

The question is, Whether these moduses are good in law. There is something on the face of them extremely particular, they do not draw a line between the parishioners and the out-dwellers, but he that lives in either of the parishes, and occupies lands in one of them, pays tithes in kind, but if he lives in neither of the parishes, he pays only four-pence an acre.

No

No rule is more established that relates to a modus, than that it ought to be certain in respect of the lands, the person, the time, and the sum; and that it ought to be as certain as the tithe in whose room it comes, but this modus is uncertain in all these respects, if to-day the lands are occupied by the inhabitants of either parish, tithes are to be paid in kind; if to-morrow they are occupied by strangers, this modus only is due. Suppose these lands were jointly occupied by two, one of which lived in either of these parishes, and the other in neither of them, how are they to pay tithe, either both the tithe in kind, or both a modus, or one tithe, and the other a modus? Or suppose the occupier lives one time of the year out of these parishes, and the other in one of them, what is he to pay? and is a modus to depend on the residence of the occupier? which is variable and uncertain, and intirely in his own breast, and the impropiator could not follow so variable a right.

A modus
ought to be
certain.

And as a modus ought to be certain, so it ought not to be subject to any fraud: Tithes must follow the nature of the lands, and only change as they do; but here the change depends on the will of the occupier whether he will reside or not; how is it possible for the rector to deal with these people for his other tithes? If they cannot bring him to their terms, they will threaten to remove to another parish and may cheat him, by removing only to the other side of the hedge, and we have proved this to have been really done, and that one went and built a house on the other side the road in another parish.

A modus
ought not
to be sub-
ject to
fraud.

+ As these moduses then have no reason to support them, [+280] and are liable to this fraud, and we have proved it to have been put in practice, your lordship will not establish them.

They say there are the like customary payments in *Skegnes* and other neighbouring parishes, with this difference, that the modus extends to all strangers, but the custom as to that parish was adjudged at law to be a void custom, 15 *Ca. 2.* in the case of *Bawdrie versus Bushe*, 1 *Keb.* 602. *Ca.* 76. 1 *Lev.* 116.

Mr. *Lutwyche.*

There must be a certainty in a modus, that the parson may know what to demand, and it may be sued for in the Spiritual

tual

tual Court; but can any one tell in this case what the parson will be intitled to? A modus supposes an antient contract to have so much yearly, in lieu and discharge of tithes, and it must be perpetual, but this custom is desultory.

There ought to be a certain and perpetual rule for the parson to go by in his demand; this modus is uncertain too as to the place, it may be converted into arable land, and then it must pay tithe, but when it is pasture or meadow, by only stepping into the next parish, the occupier, instead of paying tithe is only to pay this modus, and the parish may combine together; you shall live in my house, and I will in yours; and there is no reason or foundation for this custom: If any privilege is to be allowed to the occupiers, the parishioners ought to have it, in respect of the burthensome offices they undergo, and as this is a discouragement to the inhabitants, so it is a loss to the parson too, for the more inhabitants there are, the greater are his small tithes; in the case of *Bawdry versus Busbel*, the Court were so clear as to the illegality of the modus, they would not grant a prohibition, and this case is stronger, because the plaintiffs pray to have these moduses established.

Mr. Peere Williams.

To repair
the church
is no good
modus.

[281]

Tithes are the revenue of the Church, and due of common right, which it is unreasonable the parson should be defeated of by the act of the tenant, and so slight an act too as a removal, whereas no modus is good that depends on the act of the party, without it be some benefit to the parson. *1 Rol. Ab. 649. (8.)* to repair and beautify the body of the church, and to find necessaries for it, is no good modus, because the parson has no advantage by it, yet that is a pious and expensive work; but what does the parson gain by the removal? or what expence is the party put to? and if a reasonable commencement if it cannot be shewn, it is not a good modus. The modus is to arise, though the occupier takes only a lodging in another parish, and though he leaves his house empty, what reason, what foundation can be given for it? and it tends to depopulate and desolate a parish, for interest will always be a prevailing motive, a good modus must arise from the consent of the parson, patron, and ordinary, but how can we ever suppose the parson would consent to these moduses?

It

It is a rule as to a modus, that no custom introductive of fraud is to be allowed, 1 *Leon.* 99. *Stebbs versus Goodlack.* *Moor* 913. *Caf.* 1290. The custom was, that the parson shall have for his tithes the tenth land sowed with any manner of corn, and he shall always begin his reckoning at the first land which is next to the church, &c. the parson shewed, that the defendant by fraud and covin, sowed every tenth land which belonged to the parson, very ill, and with small quantity of corn, and did not dung and manure it as he did the other nine parts, by means whereof, whereas the other nine every of them yielded eight cocks, the tenth yielded but three cocks; and for this matter the parson libelled in the spiritual Court, and confessed the custom, but for abusing the custom prayed to have his tithes in kind, the defendant prayed a prohibition, and the parson a consultation, and the opinion of *Wray*, Justice, was, that the custom was against common reason, and so void. *Gro. El.* 446, (10.) It was adjudged in Sir *Charles Morison's* case, quoted in the case of *Gryfinan versus Lewes*, where one prescribed to pay the tenth part of corn in the sheaf, for the tithe of all which in the sheaf, and of all which is raked, that this was an unreasonable prescription, for then he may put the lesser part in sheafs, and leave the greater part to be raked.

A prescription to pay the tenth part of corn in the sheaf, for the tithe of all which is in the sheaf, and of all which is raked, is not good.

Another rule is, that a modus ought to be certain and permanent, 2 *Salk.* 657, *Caf.* 4. *Startup versus Doderidge*, a modus, to pay 2s. in the pound of the improved rent, was held naught, upon a motion for a prohibition, for that is to rise and fall, as the land is let, and the parson cannot know it, 2 *Salk.* 656, *Caf.* 3.

A modus to pay 2s. in the pound of the improved rent is naught. 11 *Co.* 15. B. 3 *Lev.* 255.

And this custom is unreasonable, as it gives a greater privilege to foreigners than inhabitants, 1 *Lev.* 116, and though the reason given in that book is not law, yet the inhabitants are subject to burthensome and expensive offices, from which non-residents are exempt, for by the 43 of *Eliz.* the overseers and churchwardens are to be chosen out of the inhabitants, and therefore there is more reason to favour them.

† If leaving the parish a good consideration? the plaintiffs [†282] do not set out, for what time there must be a non-residence; will a week or fortnight be sufficient?

Mr.

Mr. Attorney General for the plaintiff.

Notwithstanding the defendants have said that a modus ought to be more clear and positive when the plaintiff prays to have it established than when it is set out by way of defence, yet in both cases it must be proved, and must be good in law, which is sufficient. We have proved these moduses beyond all contradiction, and the defendants have not produced one instance that tithe was ever paid in kind, and therefore they must shew very strong arguments against the legality of them, and after such long usage they must not be set aside on slight grounds, to the prejudice of those who have purchased the lands, and whose interests must be considered as well as the parson's.

Two things are necessary to a modus, immemorial usage, and payment of *Quid pro quo*, which we have proved; and secondly, a reasonable commencement, and it is sufficient to shew that a modus might have a reasonable commencement, though we cannot positively prove that was the reason of it; the fact is, that these large parishes contained a much greater quantity of ground than could some years ago be occupied by the inhabitants, therefore that the lands might not lie waste, which would be a loss both to the parsons and the owners, for the encouragement of strangers to occupy these lands, and that the parson might have something, the parson, patron, and ordinary, came to an agreement with them, for the payment of the annual sum, and it is sufficient for us to shew that this might have been the reason for these moduses, but it is not necessary for us to prove it was so.

As to the case in 1 *Lev.* 116, the law makes no difference whether the modus tends to the encouragement of the parishioners or of strangers, and if the customs had extended to all strangers, they would have been more prejudicial to the parson, and the reason of them might have been to prevent any fraud from the two parishes lying so contiguous.

Most of the defendant's objections arise from the case of *Bawdry* and *Bushe*, but no conclusion can be drawn from that case that will govern this. *Keble* has not set forth the modus for pasture and meadow ground, but generally for every acre of land.

Then

† Their first objection is that these moduses are unreasonable, [4283] but I have shewn there might have been a very good reason for their commencement, and therefore any objections to them are of no weight, and the same might be made to many moduses which have been adjudged good in law.

Secondly, It is said that these moduses were invented to cheat the parson, but this is no objection, unless they can prove that such a use has been made of them, that the occupier removed on any quarrel with the impropiator, or to distress him as to the other tithes, and all moduses are liable to fraud, but it is not easy for the parishioner, or prrbable that he would leave his abode on this account, and he would lose more by quitting his house, than he could save by the tithes.

Thirdly, They say these moduses are not certain as to the persons or as to the lands, but a prescription for a modus decimandi need not be more fixed than for a non decimando. The Cisterians were discharged of tithes Quamdiu in propriis manibus, &c. which was a variable prescription as to the persons, why may not lands be liable either to pay tithes, or a modus, in respect of the occupier, as well as by course of husbandry? *Godbolt 194, Brown's case*; there was a modus for tithe hay in a particular field, which was sowed for seven years, that do not destroy the modus, but the rector shall have the tithes of the corn, the vicar the modus for the hay, it might be said in that case, shall it be in the power of the occupier, whether he will pay tithe in kind or not, or to whom he will pay them? that is as variable and dancing as the present customs, and puts it also in the power of the occupier, to whom he will pay.

If a field is sowed for seven years, the rector shall have the tithe of the corn, and that does not destroy the modus for the tithe hay.

Such a modus has been allowed good at law, *Cro. Eliz. 136. (4.) Cotesford versus Pease*, the parson sues the defendant for tithe in specie of certain pastures in *N*, the defendant for a prohibition surmises, that he was an inhabitant in *S*. and that time out of mind every inhabitant there that had pastures in *N* had paid tithes for them to the vicar of *S*, and that the vicar of *S* had paid the parson of *N* two-pence for every acre, and the Court held that the prohibition did lie, for it is as if he had prescribed to pay two-pence for every acre, *Cro. Eliz. 136. (5)*, and there are many cases in the Exchequer in which this modus has been established.

A foreigner may prescribe to pay 2d. for every acre of pasture he occupies.

The

The case in *Rolls* abridgment, that the occupiers used to repair and beautify the church, and therefore ought not to pay tithes, amounted to a non decimando, but here the parson has four-pence an acre,

[1284] † The case of *Startup* and *Doderidge* was to pay two shillings in the pound of the rack rent, or best improved value, which was uncertain, here the sum to be paid is fixed and certain.

Mr. *Wills*.

The constant usage proves that there was such a contract, and we have proved that the same modus has been constantly paid in the parish of *Skegnes*, notwithstanding the prohibition was denied in the case of *Bawdry* and *Bushel*, and the inhabitants have more benefit than strangers, they have the instruction of the minister.

The first objection is, That these moduses are uncertain, which has been fully answered, but they are as certain and permanent as many others which have been established, where a modus is for tithe of hay, and if the lands are sown, to pay tithes in kind; in that case the parson cannot tell before-hand how much he shall have the next year; he cannot tell whether it will be mowed or sown while the lands are occupied by a parishioner, &c. tithes in kind are to be paid, if by a stranger four-pence, &c. A modus is not permanent when any one year nothing is to be paid to the parson, because that would amount to a Non Decimando; but here something must be paid, and these customs are certain as to the lands, they are for meadow and pasture ground, and as to the persons too, they must be paid by the occupier.

The second objection is, that they are liable to fraud, but moduses more subject to fraud have been established; for if they are made use of to cheat the parson, the Court will relieve him, and make them pay tithes in kind, which accounts for the case of *Stebbs* and *Goodlack*, where the Court would not grant a prohibition in support of a cheat, though the modus was confessed; but *Moor*, in the report of that case, 913. Cas. 1290. says a prohibition was awarded, notwithstanding the covin, because the parson might have an action on the case for the fraud at the common law. The glebe do not pay tithes to the vicar, yet if the impropriator put cattle when
yeaping

yeaning on that land, the vicar shall recover the tithes, because of the fraud. *Moor* 909. *Cal.* 1277. *Cro. Eliz.* 467, (25). *Moor* 863. *Cal.* 1185. *Hob.* 39.

The other objection is, That the parson must have a benefit, so he has by these moduses; they cannot mean that the must have as much as the tithe, for then the objection would run to all moduses, but that what comes in lieu of the tithes, must be paid to the parson himself.

† Mr. Creuse.

[†285]

There are many precedents of such a modus being adjudged good, *Hill.* 16. *Ca.* 1. *Rot.* 1548. in C. B. 2 *Brown's Entr.* 194, 195, 196. The vicar libelled for tithes in the spiritual Court, and a prohibition was granted, on suggestion that strangers who occupied lands in that parish should pay a modus of ten-pence an acre; and there are many decrees for the payment of such a modus in the Court of Exchequer. *Trin.* 12 *Ca.* 2. *Piggot* against *Lovel.* The vicar brought his bill to be paid tithes in kind, and the defendant suggested a custom, for foreigners to pay four-pence an acre for tithe of meadow and pasture, and an issue was directed, and a verdict found for the defendant, and the bill was dismissed, both these resolutions were prior in time to the case of *Bawdry* and *Busbel*, which was in the 15 *Ca.* 2. and there have been many such decrees since that time too, *Hill.* 25. *Ca.* 2. the rector filed his bill for such a customary modus of six-pence an acre, and the modus was established, *Trin.* 30. *Ca.* 2. a bill was brought for payment of tithes, the defendant pleaded such a custom as in this case, and two issues were directed, one, whether there was such a custom, and the other what lands the defendant occupied; and the custom being found, the Court decreed accordingly. 32 *Ca.* 2. The bill was brought for tithes, and the defendant pleaded a modus of twelve-pence an acre for lands newly converted to tillage, and four-pence for antient pasture, there the Court were of opinion, that the modus was well proved, and ordered a case to be made for the opinion of the Judges, who were of opinion that this was a void modus, and certainly it was so for being coupled with the twelve-pence for the new converted ground, it could not be good. But afterwards *Mich.* 2 *Wm.* and *M.* *Blaxton* versus *Langton*, the successor of the plaintiff brought a bill for tithes in kind, and the defendant

It is a good modus for those who reside out of the parish to pay 10d. an acre for the lands they occupy in it.

fendant insisted on the modus of four-pence an acre, the plaintiff confessed the custom, but claimed the benefit of the former decree, and declared that to be his only inducement for bringing his bill, but the Court declared it to be a good custom. In the case of *Row* versus the Bishop of *Exeter*, a

A modus of
2d. a hog-
shead for
cyder is
good.

A modus to
repair the
chancel is
good.

A modus to
pay 4s. for
every day's
ploughing is
not good.

But to pay
so much for
every day's
work, with
an averment
of what it contained,
and that it was
certainly known,
is good.

modus to pay two-pence a hogshead for cyder was established. In *Roll's Abridg.* 649. Caf. 8. 650, Caf. 9. it is said the custom would have been good, if it had been to repair the chancel, because that would have been a benefit to the parson, here the thing to be paid is certain, and that is the certainty requisite in a modus. 1 *Kebl.* 612, Caf. 86. a prohibition was refused, on suggestion of a modus to pay four shillings for every day's ploughing of wheat, and two shillings for every day's ploughing of barley, for the uncertainty. But if the modus had been so much for every day's work with an averment that it was certainly known, and how much it contained, it would have had sufficient certainty.

[+286]

+ Mr. Justice *Fortescue*.

What a
modus is.

I think there is no difficulty to determine this question, Whether these are legal moduses or not, and I am of opinion that they are, first I would observe on what moduses are founded, the books say they are real compositions, and they are allowed both by the canon and civil laws, and as they are founded on agreements, they must be contained in some instrument, and if it is lost, the parties are allowed to prescribe, and this was the reason Lord Chief Justice *Holt* went upon, in the case of *Startup* and *Doderidge*, (though he was against the modus) that as it was a contract between the parties, it was hard to break through it, when it was well proved.

But the defendants say, these moduses are unreasonable, I have seldom known this objection made to a modus, because no body can tell at this distance of time whether it was reasonable or not at its first commencement; but the law supposes it was, 8 *Ed.* 4. 13. b. But they are not unreasonable, they are an ease to the parson, for he is not bound to attend foreigners, but it is said that they take more notice of foreigners than inhabitants, but was it not in the power of the parson, patron, and ordinary, to give them what privileges they pleased? they create no burthen on the inhabitants?

But it is objected that they are uncertain, and if they are, then indeed they are not good in point of law, for they would amount to a Non Decimando, but can any case happen in which the parson will not either have this modus, or the tithes? and there is no uncertainty, but what is to be paid on every contingency is fixed: In *Roll's Ab.* 265, a modus to pay a shilling or thereabouts for every acre of arable land was adjudged uncertain, and as the customs are laid with relation to the two parishes, they are an advantage to the rector, and a foreigner may come and reside in the parish, and then he will pay tithes as well as one who occupies lands, and is a parishioner, may leave it, here is no uncertainty in the modus, but the only thing uncertain is, Whether the modus or tithes in kind are to be paid?

A modus to pay 1s. or thereabouts, is not good for the uncertainty.

In this case the parson has a benefit, he has four-pence an acre, and I do not know but once it might be a fourth part of the value of the lands. The modus to repair the church, in lieu of tithes, could not be good, because the parishioner was bound to do it without such a modus, and the doing it was no benefit to the parson; but if it had been to repair the chancel, it had been a good modus, for that would have been an advantage to the parson.

I cannot rely on the case of *Bawdry and Bussel*, it was [†287] determined on a motion, and the prohibition might be denied for other reasons, it is a strange resolution, sure a man may give up his right on what terms he pleases, and the reason mentioned in *Lev.* is not good in law, for it is a settled point that foreigners are bound to contribute to the repairs and vestments of the church, and to pay all parish duties, and Mr. *Creuse's* cases are expressly in point; and in the case of *Bate and Howland*, decreed in the Court of Exchequer, 1726, a modus to pay 4d. an acre for high land, and 3d. an acre for low land, was adjudged a good modus.

Foreigners are bound to contribute to the repairs and vestments of the church, and to pay all parish duties.

A modus for every occupier to pay 4d. an acre for high, and 3d. for low land, is good.

Mr. Justice *Reynolds*.

A modus is a real composition, run into a prescription, made concurrentibus iis, qui de jure requiruntur, who might dispose of the rights of the Church, as well as private persons of theirs, and if these contracts now appeared in writing,

Y

ing,

ing, they would be good, and the memorials being lost, the parties may prescribe, and shall have the same advantage of them as if they appeared; if these customs were universal, they would undoubtedly be good, and then the question will be, whether the restrictions shall make them void, and if they would be good generally, shall the parson object when the restrictions are for his benefit? and it cannot now be discovered, whether the parishes were not formerly united, or did not partake of sacramentals? but if these moduses are so uncertain, that the parson cannot know what to demand, I allow they are bad. All the certainty requisite to a modus is this, that when the circumstances are the same, there shall be the same modus, and it is not uncertain, because the parson is now to have a modus, and now to be paid tithes, for that is as certain as the cases of *Non Decimando*, where the parson has sometimes tithe, and sometimes nothing, and this is no loss to the inhabitants, they do not pay more, though the parson has less, and the surplus is not thrown as a load on their estates.

The single authority for the defendants is the case of *Bawdry* and *Busshel*, which was determined on a sudden motion, and no rule given to shew cause, and is founded on reasons that are not law; and though we have the contemporary reports of *Siderfin* and *Raymond*, they take no notice of that case, and I believe the parties had recourse to another Court that granted a prohibition, because the custom has subsisted in that parish ever since, notwithstanding the prohibition was denied, and that case ought not to be regarded, since it stands single in opposition to so many contrary resolutions, both before and since that time, many of which authorities have been cited by Mr. *Creuse*.

[† 288]

† Lord Chancellor.

A modus
for the oc-
cupiers of
land in
Burgh, not
residing in
Burgh or
Wintborp
modus.

I am of the same opinion; the plaintiffs have proved these moduses to be time out of mind, and the defendants have not produced a single instance of the payment of tithe in kind, and as they relate to so many parishes, it would occasion great confusion to set them aside. Every modus sup-

is a good
posse

poses a composition, which being lost, runs into a prescription. Suppose the composition had been for all occupiers, by the case that has been cited by Mr. Justice *Fortescue*, that would be good, and why should it make the custom unreasonable to restrain it to those that live out of the two parishes? Does making the composition with part only of the occupiers make it illegal? They might contract with whom, and on what terms they pleased; and though *Keeling*, in the case of *Barw-dry* versus *Busbel*, says, there was no precedent of such a modus, Mr. *Creuse* has produced two resolutions before that time, but they not being in print, I suppose he had not seen them, and that case was adjudged on a sudden motion.

There is no uncertainty in these moduses, for then indeed, no time or usage could make them good; they are no more uncertain, than the prescription by the *Cisterians* in *Non Decimando*. Does not the tithe alternately belong to the rector, or vicar, as they are great or small tithe? These customs therefore, being no ways uncertain, and having held so long, must be established on the original bill, and the defendant's cross bill must be dismissed.

Tuesday, February the 10th.

WHEELER versus **SHEER**, & al'.

Case 157.
In Court.
Lord Chan-
cellor.

Mr. *Verney* for the plaintiff.

MR. Granville Wheeler, son, heir, and executor of Sir *George Wheeler*, his father, is plaintiff, *Jonathan Sheer*, and *Bridget* his wife, one of the daughters of Sir *George Wheeler*, *Robert*, *Grace*, and *George Hutton*, the children of *Elizabeth Hutton*, another daughter, *Frances Middleton*, another daughter, and her four children, *Ralph*, *Francis*, *Grace*, and *Richard*, *Thomas Sharp*, and *Judith* his wife, another daughter, *Francisca*, another daughter unmarried, *George*, *John*, *Mary*, and *Grace*, the children of *Mary* another daughter, by posthumous *Smyth*, the executors of the said posthumous *Smyth*, the executors of *Grace Musgrave*, another daughter, and the Attorney General, are defendants. And the bill is brought for your lordship's determination of several points, arising from the will of Sir *George Wheeler*. Sir *George Wheeler* having two sons, and seven daughters, *Frances*, [+289]
† *Francisca*, and *Judith* unmarried, and *Grace*, *Mary*, *Bridget*, and *Elizabeth* married, (to three of which he had

given 800*l.* apiece for their portion, and to the other 1000*l.* by will bearing date the 23d of *May* 1719, devises to the plaintiff several houses in *London*, charged with an annuity to his daughter *Bridget*, to his three unmarried daughters 1000*l.* apiece, to *Grace* 200*l.* to be laid out in lands or an annuity, to *Mr. Hutton* 200*l.* if he augmented his wife's jointure 20*l.* a year, otherwise the 200*l.* was to be laid out in lands, to be settled on the wife; and the like legacy, and on the same terms, to posthumous *Smyth*, to his sons-in-law 10*l.* a piece for mourning, and several legacies to charity, and then the will goes on, 'All the rest and residue of my personal estate, I give to my executors, debts, funerals, and legacies being discharged, in trust, that what remains above 200*l.* to each of them, 100*l.* to be deducted out of the residue, they shall employ to such charitable uses as by codicil I shall appoint, and makes his son *George* and his brother *Charles* executors.' 18th *January* 1721, by codicil, taking notice that since the making his will, *Frances* was married to *Mr. Middleton*, and that he had given her 500*l.* portion, he revokes her legacy of 1000*l.* and devises to *Mr. Middleton* 200*l.* if he settled 20*l.* a year additional jointure on his wife, otherwise the 200*l.* was to be laid out in lands for her use, and directs, that (his daughter *Smyth* being dead since the making his will) the 200*l.* he had devised to her should be divided among her children, and then goes on, 'And whereas I have by my will given the residue to my executors, in trust, &c. now I do hereby direct and appoint that the same shall be applied to such uses and purposes, as by any other codicil or codicils shall be directed and appointed.' The 2d of *March* 1722, he made a second codicil, whereby taking notice, that his daughter *Judith*, since the making his will, was married to *Mr. Sharp*, and that he had given her for her portion an assignment of a mortgage of 1000*l.* he revokes her legacy of 1000*l.* and likewise taking notice, 'that his son *George* was since dead, he constitutes the plaintiff, with his brother *Charles*, the other executor, for the uses, trusts, and purposes in his will, and that he should have and partake of such advantages and benefits, by being one of his executors, as *George* would have taken, and received as such, if he had lived.' The 23d of *October* 1723, he made a third codicil, in which is no direction as to his personal estate, but only devises lands he had purchased in *Kent* in augmentation of a charity, to which he had bequeathed a legacy by his will. Sir *George Wheeler*

Wheeler soon after died, and *Elizabeth Hutton* is since also dead, *Mr. Charles Wheeler* died before probate, and the plaintiff the surviving executor proved the will.

The first question on this will is with Mr. Attorney General, Whether the King shall have the disposal of the surplus of † the personal estate to charitable uses. But the first [†290] codicil is a plain revocation of the last clause in the will, it takes notice of that clause, and directs that the residue should be applied to such uses and purposes, &c. and by his subsequent codicils he has directed to other charitable uses of the surplus.

Mr. Attorney General.

No argument can be drawn in this case from the particular express legacies the testator has given to charitable uses; if it appears to be his intention, that the residue also of his personal estate should be applied to such uses: If this question stood singly on the will, the testator not having appointed the uses by codicil, the disposition of the residue belongs to the crown. *Attorney General versus Siderfin*, 1 *Vern*, 224. *Mr. Siderfin* charged a manor with the raising 1000*l.* out of the profits, to be applied to such charitable uses as he had by writing formerly directed, and no such writing being to be found, the King appointed the charity for the benefit of the mathematical boys of *Christ's Hospital*; so, if a bequest is given to an illegal use, and it shall not be void, for the benefit of the heir, or executor, 2 *Vern*. 266. *Attorney General versus Guise*. So the testator's general intention shall take effect, tho' he has not specified the particular charity, and the King shall apply it.

If one devises 1000*l.* to such charitable uses as he had before appointed by writing, if the writing cannot be found, the King shall apply the money. So, if a devise is made

to an illegal use. 1 *Vern*. 248. *Nals. Rep. in Canc.* 245. *Sir Wm. Jen. versus Pencock*.

The next consideration is, Whether the first codicil is a revocation of this clause of the will. I apprehend a prior will is not revoked by a codicil, but either by express words, or because the codicil is inconsistent with the will, but this codicil is not an express revocation of the will, nor is it inconsistent with it. The testator does not say the uses shall be exclusive of the charitable uses; they say by this codicil he might have given the surplus to any person; why so he might notwithstanding the will, and declared any other use; for the will is not like the reservation of a power by deed.

Lord

Lord Chancellor.

The testa-
tor makes
his will
inter al, in
these words
' All the
' rest of my
' personal
' estate I
' give to
' my ex-

Where a man devises to such charitable uses as he had appointed, that supposes he had made an appointment, though it could not be found, but here it is plain the testator had made no appointment, but only had it in his thoughts to do so; by the codicil he confirms his will, and makes the trust of the surplus more extensive, it was to be in trust for a charity, if he directed any.

' ecutors, in trust, that what remains above 200*l.* to each of them 100*l.* to be deducted
' out of the residue, they shall employ to such charitable uses as by codicil I shall appoint.
' Afterwards by codicil taking notice of the will, he directs the residue to be applied to
' such uses as he by codicil should appoint,' and dies without making any appointment.
The King shall not have the disposal of the trust, as of a general charity.

[+291]

† Mr. Verney.

Nor shall it
go to the
executors,
but shall be
distributed
among the
next of kin,
though they
had parti-
cular legacies,
and it was proved that the testator often declared they should have no more
than 1000*l.* apiece for their portions,

The next question is, between the plaintiff and the other defendants, Whether the residue of the personal estate, whereof the trust is not disposed of shall go to the plaintiff, as executor, or according to the statute of distributions, or the custom of *York*.

I will not trouble your lordship with cases when the surplus shall go to the executor, and when to the next of kin; but this is the most favourable case, for the executor can come before your lordship; he is an only son, and the only child not advanced by the personal estate, the other younger children were provided for by portions given by the testator in his life-time, or by his will; for he designed the devises to them as filial portions, and not as legacies; for by his will he gives his three unmarried daughters 1000*l.* apiece, but having afterwards given two of them portions on their marriage, he by codicil revokes his bequests to them, and we have expressly proved, that the testator often declared he would never give his daughters above 1000*l.* apiece, and that he gave the 1000*l.* to *Francisca*, as her full portion, and the 200*l.* to the other daughters, in augmentation of their portions.

Most of the book cases are of a residue not disposed of, but in this case the surplus is expressly devised to the executors,
so

so that the plaintiff is intitled to it by law, and the testator only reserves to himself a power to declare the trust of it, and the testator did not die immediately, without an opportunity to take this power into consideration; but he afterwards made three codicils, and do not revoke the devise by the first codicil, but only declares the trust should be to such uses and purposes as he should after direct, and he makes no appointment by the other codicils; and on the death of his son *George*, when the testator comes to substitute the plaintiff in his room, he gives him all the advantages he designed the other; and if this point is with us, the other claims of the defendants are at an end.

Mr. Mead.

Sir *George Wheeler* cannot be said to die intestate as to any part of his personal estate; because he has devised the whole residue; he appoints by his second codicil the plaintiff executor, and that he should have the same advantages thereby as *George*, which shews he designed the executorship as an advantage, which cannot be answered by the trifling legacy of 100*l.* apiece, nor is that given to them as executors; therefore since the testator has made no appointment, the trust must result to the executors, and no one can say he has a title to the residue, since by law it belongs to the executors, † and the testator himself has taken notice of the legal privileges and advantages of an executor. [†292]

In the case of *Milner* versus *Hooker* decreed by your lordship April 1726, Mr. *Milner* gave several legacies to Mr. *Hooker* his executor, and also devised to him all his real estate, and legacies likewise to his next of kin; the next of kin filed a bill against the executor for an account, and a distribution of the residue, and your lordship was pleased to say, that the testator having given legacies both to his executor and next of kin, the law must take place, and to decree the residue to the executor. Mr. *Wheeler*, in this case, is son of the testator, and has no personal estate devised to him, and the testator has provided for all his next of kin, which is a plain indication he designed the executor should have the residue, subject indeed to any trusts he should appoint, and therefore he having made no appointment, the plaintiff to whom it belongs by law must have it.

If particular legacies are given to the executor, and to the next of kin, a residue undevise belongs to the executor.

Mr.

Mr. Rider.

By law the executor is intitled to the residue, and it is never taken from him by this Court but where it appears to be the intention of the testator he should not have it, which the defendants would gather in this case from the particular legacy, by the words of the testator the plaintiff is to have the same advantages by being executor as his brother *George*, but the 100*l.* was not given to him as executor, and in consideration of his taking upon himself the burthen of the executorship. But suppose this a particular legacy to him as executor, it is not a manifestation of the intention of the testator to exclude him from the residue. A particular legacy is generally thought indeed to be given by the testator, with a design to exclude the executor, but not where his intention appears stronger to exclude the next of kin, for even where there is equal reason to presume he designed the residue to the one as to the other, the presumption is always in favour of the executor, who has the law with him; and the trust not being declared, it is as if no trust had been mentioned: But the second codicil shews that this was the intention of the testator, to give him all the legal advantages of an executor, for the legacy of 100*l.* cannot be called *Benefits and Advantages*, and we must consider that the testator was making a provision for all his children, and we have proved that he often declared that his daughters should have but 100*l.* apiece, so that to decree them a share of this residue would contradict his intention, and such proofs have been allowed to be read in the House of Lords, and they have decreed upon them, contrary to the case of *Foster and Munt*, 2 *Vern.* 675, 99, 252, 648, 1 *Vern.* 473, though that was a decree of their own house.

Parol proof read, that the testator often declared that his next of kin should have only so much.

2 *Vern.* 675, 99, 252, 648.

[+293]

† Mr. Solicitor General for the defendants.

Where a legacy is given to an executor, or to two executors, equally to be divided between them, it would be mispending time to shew that the Courts of Equity have always taken this devise since the case of *Foster and Munt*, as an implied intent in the testator to give the executor no more, and have decreed the surplus to be distributed.

But it is said, that in this case legacies are also given to the younger children, who are the next of kin, and so the implication is equal, and the law must take place in favour of the

the executor: But nothing is given to Mrs. *Sharp*, by the will or codicil, but the testator having given her 1000*l.* on her marriage, revoked her legacy, but the Court has in many cases decreed a distribution of the residue, where the next of kin have had particular legacies; the next of kin take by the law, by the statute of distributions, not by the intention of the testator, but the executor can take only by the will and intention; and since he designed to give him so much only, the next of kin come in for the residue, without any regard to the intention of the testator.

But it is further objected, that in this case the residue is expressly devised to the executors in trust, and that since no trust is declared, it results to them: This is the first time I ever heard that a man could be a trustee for himself, but the very end of creating a trust, is to sever the legal estate from the equitable estate; and it cannot be said that by making them executors he designed them the advantages the law gives them, because he has devised away all the residue, but 200*l.* and there is no room to imagine that the testator designed them any more; he had some design to give it to charity, if not, it remained undisposed of: So here, by the express words of the will, as well as by implication from the particular legacy, the executors are trustees, and when no Ant. Cal. 3, 12, 26, 32. trust is appointed, this Court has always declared them to be trustees for the next of kin: If a deed of gift is made on such trusts as the donor shall declare, and he makes no declaration, the trust shall result to the heir at law of the donor; and the equitable estate shall not go to the donee, who was designed and made use of barely as an instrument.

By the codicil the plaintiff must be considered as a trustee, as well as *George*, for he is made executor for the same uses, intents, and purposes; so that if *George* was not intitled to the surplus, the plaintiff cannot; one of the uses he was made executor for was to be a trustee of the surplus, and the $\pounds$ 200*l.* was given to them as executors, it is given to them [+294] by the name of executors, and they are to deduct it out of the residue.

The plaintiff, they say, is unprovided for by the personal estate, and the daughters advanced; but he has a real estate of 2000*l.* a year by descent or settlement, and the daughters have only 1000*l.* apiece, which is a strong circumstance in their favour; and the surplus is not above 5000*l.* and the other executor was only a brother to the testator.

They

They have read proofs, that the testator intended the daughters should have but 1000*l.* apiece, on the authority of the case of *Littleburry and Buckley*, 2 *Vern.* 675, that a witness may be read in affirmance of the right of the executor, but not in disaffirmance; whereas he must be read first, before it can be known which way his evidence goes; but what the next of kin take, does not arise from the intention of the testator, but from the statute, so the defendants are intitled to the residue, whatever was the intention of the testator.

Lord Chancellor.

Post Caf. 165. Let this cause stand over 'till *Monday* the 23d day of *February*.

Cafe 158.
In Co. rt
Lord Chan-
cellor.

Thursday, February the 12th.

M O T I O N S.

HAWKINS *versus* CROKE.

THE defendant being in contempt to a sequestration, for want of an answer, the plaintiff obtained an order to set down the cause on the sequestration; the defendant at the day obtains an order for a week's time to answer, and the cause to stand over in the mean time: The defendant puts in an answer, which the Master reported insufficient, and the cause is ordered to be set down again; the defendant puts in a further answer, and an order is made that if the Master did not report it sufficient in four days, the cause should come on again, the Master reported the answer insufficient, the defendant put in a third answer, and the cause coming to be heard, his Honour adjudged that the cause should be heard on the sequestration, and decreed the bill to be taken pro confesso, that it was an indulgence in the Court to adjourn the cause 'till they saw whether the defendant would put in an answer, and that he had abused this indulgence by putting in answers that were insufficient; and which strictly speaking, + were no answers, and that the cause was first set down regularly on the sequestration, and only waited to see if the defendant would make a proper use of the time the Court had given him.

[†295]

An order was made on the motion of the defendant, that it should be referred to a Master, whether the decree was regular

De Term. S. Hill. 1729-30.

regular or not, and the plaintiff moved to discharge this order.

The council for the defendant insisted, that this decree was irregular, because they had been served with a subpoena to put in a better answer, and had paid the costs; and if a defendant will not answer, a plaintiff's bill is taken pro confesso, because he has no opportunity to put the matter in issue; but he may join issue on our answer; and several things in the bill, which by this decree are to be taken pro confesso, are expressly denied in the answer; and no precedent can be shewn that a bill was ever taken pro confesso, after the coming in of an answer. An insufficient answer cannot be said to be no answer, it is a good answer in those points it is not insufficient, or it ought to be taken off the file, and the proper officer would be obliged to certify that an answer was filed; and shall the Court, contrary to that record, decree the bill to be taken pro confesso? but the answer being in, the plaintiff ought to have taken the usual course of the Court, to oblige the defendant to put in a sufficient answer.

N. B. The practice has been against this determination ever since.

Lord Chancellor.

This decree binds the right as well as any other decree, and therefore the order of reference must be discharged, for if there is any error in the decree, it is an error of the judgment, and the defendant must petition to rehear it.

If a decree is made on a sequestration irregularly, the cause must

be reheard, but it cannot be referred to a Master for irregularity. Post Cas. 198.

Monday, February the 16th.

MINUEL versus SARAZINE.

Cas. 159.
At the
Rolls.

THE testator was indebted to the plaintiff 421*l.* and bequeathed him a legacy of 400*l.* this being less than the debt shall not go in part satisfaction. *Nelf. 8vo. Rep. in Canc. 38.*

A legacy less than the debt shall not go in part satisfaction.

1 *Salk. 155, Cas. 5.* 2 *Vern. 593.* 2 *Salk. 503, Cas. 4.* Ant. Cas. 7.

Tuesday,

De Term. S. Hill. 1729-30.

[1296]

Case 160.
At the
Rolls.

† Tuesday, February the 17th.

RODNEY versus HARE, & al'.

The plaintiff having assigned 150 errors in 5 stated accounts, the Master of the Rolls made an order for him to pick out those he would insist on, and consent to waive the rest, if he should be of opinion they were not errors, if he thought them errors, he would either open the accounts, or give him leave to surcharge or falsify.

CAPTAIN Rodney filed a bill against the Colonel and the Agent of the regiment, for an account of his pay, and the pay of the company; and to set aside five stated accounts, signed, errors excepted; and he assigned one hundred and fifty errors in the accounts, and the cause coming to be heard, the Master of the Rolls made an order, that the plaintiff should pick out those errors he would insist on, and give the defendants a note of them, and consent to waive the rest, if the Court should be of opinion that they were not errors; but if the Court, he said, should think them errors, that would be a good cause, either to decree an open account, or to give the plaintiff a liberty to surcharge or falsify.

Where witnesses have been examined, and no replication, the Court at the hearing, or even after a decree, will order a replication to be filed, *nunc pro tunc*.

The defendants having pleaded in bar these five stated accounts, began to read proofs to their plea, and no replication being filed, the Master of the Rolls made an order, that the replication should be filed *nunc pro tunc*, and said that such orders had been often made after a decree; but the defendants insisted that then the cause would not be at issue, for want of their rejoinder, and that though they might rejoin gratis, the plaintiffs could not compel them without a subpoena; but the Master of the Rolls held, that the cause was at issue by the replication, for the issue is offered by the defendants traverse, and a rejoinder is only a fiction of the Court, and is never actually filed.

A cause is at issue by the replication, and a rejoinder is never actually filed.

Case 161.
At the
Rolls.
Eodem die.

STEIGNES versus STEIGNES.

Mr. Solicitor General for the plaintiff.

BARON Steignes made his will in *French*, ' and gave his ' wife, besides all his moveables, plate, jewels, pictures, ' linen, &c. (except his three books of miniature and his ' whole library) 6000*l*. South Sea stock; ' and the question is, What passes by the *French* word *meubles*, which is translated

stated moveables in the will to which the probate is annexed, and by which we must go; but in the *French* signifies only household goods, suppellectilia. The wife insists that by this word all the personal estate is devised to her; whereas the other words confine the sense of it, and shews the testator only meant it of things corporeal, as plate, jewels, linen, and the *&c.* can never extend it to foreign things, the several species he enumerates are corporeal; and there is no specification of any thing incorporeal; so, stocks and debts do not pass: And in the $\dagger$ conclusion of his will, he devises all [$\dagger 297$] his other pretences to his wife; or for the benefit of his adopted son; which takes all his debts out of the word moveables; and the intention of the testator is also plain from another clause of his will, whereby if his wife marries he gives her the plate, jewels, and other moveables in the first clause, for life only.

Mr. Attorney General for the defendant.

The word *moveables* in this will cannot be confined to household goods, for then there would be no reason for the exception for his library and three books of miniature would not pass by the word moveables, for they are not household goods, nor are they comprehended under the particulars.

Nor is the word confined to be things corporeal, but it is to be extended to stocks, debts, *&c.* for bona mobilia not only comprehends all corporeal things, but right, credits, and all personal chattles. But the plaintiff says, the testator has restrained this general sense of the word, by using it with the words, plate, jewels, pictures, linen, which shews he meant something of that kind, but the *&c.* plainly intimates that the testator did not intend to confine the word to those particulars, but to take in other things, and leaves the word to be understood in its full legal sense.

Master of the Rolls.

I am of opinion that the word *moveables* in this will comprehends only corporeal moveables, though if there was nothing to restrain the meaning of it in this clause or in the other parts of the will, the word would take in the whole purely personal estate: The words plate, jewels, pictures, linen, The word moveables, in its full sense, takes in all personal chattles.

But it extends only to corporeal moveables in this will, 'I give to my wife, besides all my moveables, plates, jewels, pictures, linen, &c. (except my three books of miniature and my library) 6000*l.* S. S. stock.' *Swinb. Fol. 172. Went. 430.*

linen, will not confine the generality of the word, though they are only corporeal things, for &c. must signify *et cetera mobilia*; nor is the sense of it restrained by the exception: But the testator, by saying that his wife should have 6000*l.* South Sea stock, besides all his moveables, shews, that in his understanding of the word, moveables would not comprehend stock; for it would be absurd to say she shall have all my stock, and 6000*l.* South Sea stock besides, and he has given away his debts in another clause, and the word cannot be confined to household goods, for he has particularly mentioned his jewels, which are not household goods.

Jon. 225. Spark versus Denn. Swinb. part 7. sect. 10. n. 8.

[+298]
Case 162.
At the
rolls.

† Wednesday, February the 18th.

LOCKYER & ux', plaintiffs.

SIMPSON and BROME, defendants.

Mr. Attorney General for the plaintiffs.

THE plaintiffs filed their bill for a legacy of 2000*l.* given to Mrs. Lockyer by the will of Mr. Tolson; and the executors insist by their answer to deduct out of this legacy the value of a diamond necklace and other presents, made to Mrs. Lockyer by the testator, to the amount of 420*l.* Mr. Tolson was related to the young lady, and intimate in the family from the time she was two years of age, and often declared that from that time he had given her a legacy in every will he made; and a marriage was concluded between them, and he died on the very day that was fixed for the wedding; no condition was annexed to these presents, but they were an absolute free gift, and worn by the lady in the life-time of Mr. Tolson; and the marriage broke off by the act of God, not by the default of the lady or her parents; and if the executors have a right to these presents, they may bring their action for them, but cannot set them off in this Court by way of discount.

Mr. Solicitor General for the defendants.

If these presents do not belong to the plaintiffs, but are to be considered as part of the personal estate of Mr. Tolson, this Court

Court will not decree the executors to pay the legacy, unless the plaintiffs give up these assets, or allow for them, though the testator used no conditional words, when he made these presents; they were not given to the plaintiff absolutely, but the nature of the gift must be collected from the time and other circumstances: The treaty of marriage was then depending, and every thing prepared, two days were set for the wedding, and these presents were made after the first day, the plaintiff's portion of 5000*l.* which was paid and secured to the testator, has been repaid, and the securities delivered up by his executors, who think it as reasonable that these jewels should be restored likewise, because they were presented in view and contemplation of marriage. The plaintiffs allow, that if the lady had refused to marry, the presents ought to be returned, but if the marriage does not take effect, whether it arise from her default, or from accident, if the party who made the presents is in no default, his representative will be entitled to them, 1 *Vern.* 432. *Hammond versus Hicks*, a man and woman being about to marry, surrender their respective copyhold estates to the use of them two and the survivor, the man dies before marriage, and the woman enters on his land, and after thirty years quiet enjoyment, she was decreed to surrender to the heir, and account for the profits, as being a trust for the husband and his heirs till the marriage took effect. The difference between this case and ours is in our favour; if the marriage in that case had been solemnized, and the wife had survived her husband, he could not have aliened the lands from her, but if the marriage in this case had taken effect, these presents would immediately have been in the husband's power, and if the wife survived him, they would have been heirs only in case he had not disposed of them.

[+299]
A man and woman about to marry surrender their copyholds to the use of them two and the survivor, the man dies before marriage, the woman enters on his lands, and after 30 years quiet enjoyment to his heir.

Mr. Luttrell.

Lord North quoted this case, in the case of *Beaumont versus ———*, 2 *Mod.* 140, a person of quality intending a marriage with a lady, presented her with a jewel, and the marriage not taking effect, he brought an action of detinue against her, and the taking it to be a gift offered to wage her marriage breaking off, he brought an action of detinue for it, the Court would not suffer her to wage her law, because the property was not altered.

One intending a marriage with a lady presents her with a jewel, and the marriage breaking off, he brought an action of detinue for it, the Court would not suffer her to wage her law, because the property was not altered.

law,

law, but the Court were of opinion, that the property was not changed by this gift, being to a special intent, and therefore would not admit her to do it; if the man indeed breaks off the match, it is an injury to the lady, and he is intitled to no relief: But death is an accident this Court has always a regard to.

Mr. Attorney General's reply.

The defendants say the particular nature of this gift makes it as much conditional, as if the presents had been given expressly on condition, but they were given to the plaintiff absolutely, and out of kindness, and not barely on the account of the marriage; and if the testator had been asked, whether the lady was to restore them, in case he died before the marriage? he would have thought himself affronted by the question, and how can the Court with certainty declare he intended they should be restored; where two persons come acquainted only on a treaty of marriage, no other reasons can be assigned for the presents, but here the parties were related, and acquainted many years before the treaty, and the legacy he has given her shews he had a kindness for the lady, abstracted from a view of marriage, but the executors say, these presents ought to be given back as well as her portion: A settlement was made in consideration of the portion, but the uses were to the testator and his heirs till the marriage took effect, so his own estate remained in him at the time of his death, and the uses of the settlement never arose, and therefore the money was returned, because there was not *Quid pro* [+300] *quo.* *Co. Lit. 204, a.* If a man gives lands to a woman *Causa matrimonii prælocuti*, and she refuse to marry him, yet she shall hold the estate, and a fortiori, if he dies; and these presents are made in contemplation, but not on condition of a marriage; and to do a thing in view, and contemplation of another, is not the same as to do it on condition; and though the party is disappointed in his views and expectations, that is no cause to refund.

Master of the Rolls.

This gentleman was related to, and began an early acquaintance with the lady, even from her age of two years, and he declared that from that time he had always remembered her in his will; this intimacy increased with her years, and when she grew to a proper age, he made his addresses to her

her with the approbation of her parents, and a marriage was agreed on, her portion paid and secured, and a settlement made; and pending the treaty he made her several presents, without any declaration to defeat them, and two days were set for the wedding; on the first, it was put off, and on the second day he died; by his will he gives her a legacy of 2000*l.* expressly for the kindness he had for her, and that he designed to make her his wife: And the bill is brought for this legacy, and I am of opinion, that if the defendants the executors had a right to these presents, either in law or equity, they should not be obliged to bring an action, or a bill for the recovery of them, but might deduct the value of them out of the legacy; because it is common justice if a legatee brings a bill, and has possessed himself of any of the assets, that he should take them as a satisfaction pro tanto; but I think in this case the executors have no right to these jewels, because no condition being expressed, the law *prima facie*, presumes the gift to be absolute, and is not fond to create a condition to defeat it; the question then is, Whether there are any circumstances that imply a condition. If no motive for these presents could be assigned but the marriage, then indeed it would be more reasonable to suppose this condition: But in this case there are other motives; he was related to her, and had a long and intimate acquaintance with her, of which the marriage was only the effect and consequence, and it would be too great a strain for a Court of justice to fix upon this motive, out of so many others. But suppose this a recent kindness, sprung up from the intention of marriage, a portion was paid, and a settlement made in consideration of it, and the marriage; all this was reduced to writing, but these presents were not brought into the articles as part of the consideration, and therefore ought to be excluded; but I go more upon the nature of this gift, which ought to be taken in an honourable sense, and though the husband by marriage would have become owner of them, yet if he had declared that in case of marriage he designed to take them from her again, they would be † no presents at all, his ostentation of a kindness would vanish, and the treaty be a mere bargain. If lands are conveyed *Causa matrimonii prælocuti*, the man cannot aver the cause, but the woman may, If a legatee brings a bill against the executors, and has any of the assets in his hands, the executors shall not be put to their action, or bill for them, but the legatee must take them as a satisfaction pro tanto. A marriage is agreed on, the gentleman was related to the lady, and acquainted with her from her age of two years, and pending the treaty he makes her a present of jewels, which she

were in his life-time, he died on the day fixed for the wedding, and left her a legacy of 2000*l.* these presents are to be considered as absolute gifts, and not as given on condition of marriage.

If lands are conveyed *Causa matrimonii prælocuti* by a man to a woman, tho' she refuse to marry, she shall hold the lands.

Z

but

Presents
made by an
intended
husband,
ought to be
considered
as absolute
gifts.

but in both cases the condition must be expressed or averred, and if the woman refuses to marry, she shall hold the lands; but here no condition is either expressed or averred, but only supposed or fancied, and they were absolute presents, and she put in possession of them: The question in 2 Mod. was only, Whether time should be allowed to bring compurgators to wage her law, in which the Court would not indulge her, because the Court is always against wagers of law, for fear of perjury, and is desirous to have matters fairly put in issue: Here all the particular circumstances take away any implication of a condition, but if they were all away, I think it becomes a Court of equity to declare presents made by an intended husband, absolute gifts.

Case 163.
At the
Chancel-
lor's house.
Lord Chan-
cellor.

Thursday, February the 19th.

ANONYMUS.

On the re-
turn of an
attachment
for non-
perform-
ance of an
order against

AN attachment for non-performance of an order against one in the *Fleet*, is directed to the warden of the *Fleet*, and on his return that he is his prisoner, you may move for a sequestration.

order against one in the *Fleet*, the next process is a sequestration.

Case 164.
At the
Chancel-
lor's house.

ANONYMUS.

Matter of
the Rolls.
Eodem die.
You may
amend a
bill, paying
common
costs, after
a demurrer is
put in, but
the costs of
the demurrer.

THE Master of the Rolls said, that the plaintiff may move to amend his bill, on payment of twenty shillings costs, after a demurrer is put in, if it is not set down to be argued; and after it is set down, on payment of the costs of the demurrer, and the register being consulted, agreed to the difference.

a demurrer is put in, but after it is set down to be argued, if you amend, you must pay the costs of the demurrer.

Monday,

De Term. S. Hill. 1729-30.

Monday, February the 23d.

WHEELER versus SHEER & al'.

Lord Chancellor.

Cafe 165.
At the
Chancel-
lor's house.
Lord Chan-
cellor.

THIS is the strongest case that can be against the execu-
tors, for the residue is given them expressly in trust, and Ant. Caf.
no trust is appointed, and they are to deduct 100l. apiece out '57.
of the residue.

† Mr. Verney.

[†302]

The next question is, since the executors are not intitled to the surplus, whether the trust of it belongs to the next of kin by the statute of distributions; or whether, (Sir George Wheeler being an inhabitant of the province of York) it is not subject to the custom of that province, as if Sir George had died intestate, and so one moiety will go according to the custom, and the heir be excluded from his share, and the other according to the statute of distributions. By the 4th and 5th of W. and M. ch. 2, the inhabitants of the province of York may dispose of their personal estates to their executors, or others, as they shall please; and the widow and children shall not claim by the custom. The Legislature, in making this statute, had it not in their view to distinguish whether a person died intestate in equity, though not in law, but whether he made a will, or died intestate at law; and the custom is only to take place where there is an administration; but Sir George Wheeler made a good will in law of his whole estate, so the custom is out of the case.

Dr. Strahan.

The 4th and 5th of W. and M. only impowers an inhabitant to make a will, notwithstanding the custom, but Sir George Wheeler as to this residue died intestate, or the statute of distributions could not operate on it, and therefore so much is out of the statute of W. and M. and the custom must operate on the moiety of it, and the residue being in trust for such uses as the testator should appoint, and he having made no appointment, the executors must be trustees for those persons who are intitled by law, and the custom in this place is the law.

Z 2

Mr.

Mr. Fazakerly.

Sir *George Wheeler* has not made a compleat devise, but as to the trust of the residue has died intestate, and therefore since your lordship has declared the executors are not intitled to it, why should not the trust of it go to the persons who are intitled by the custom, as if no devise had been made of it, as a resulting trust will go to a special heir in borough *English*, or gavelkind.

Lord Chancellor.

If an inhabitant of *York* makes [†303] a will, and appoints executors, though the trust of the surplus of his personal estate is not devised, yet this is a compleat will within the 4 and 5 of *W. and M.*

This is a new case: By law the executor is intitled to the whole personal estate, which is as old as the custom, which is the law of that part of the kingdom, and which the statute takes away only where there is a will; if one then makes † a partial will, and no executor, the residue will be subject to the custom; but here are executors, and the residue of the personal estate is devised to them, so this case is within the express words of the statute, then the question is, For whom the executors are to be trustees, not for those who are to take by the custom, by the very letter of the statute; but for those who are intitled by the general law, and the testator devised the residue, to put it out of the custom, so the distribution must be made to the next of kin of Sir *George Wheeler*.
and the custom shall not operate on the surplus.

Mr. Solicitor General.

Your lordship having declared the surplus must be distributed among the next of kin, the next question is, Whether the younger children advanced in the life-time of their father, must bring their portions into hotchpot, as is required by the statute of distributions? and whether the daughter must bring in her legacy of 1000l? but we think nothing ought to be brought into hotchpot, because the portions and the legacy were given the daughters in lieu of their customary shares, for at that time the estate was liable to custom, (though Sir *George* had a power to controul it by making a will) and if he had died intestate, these portions would have barred the daughters from claiming by the custom, and then equity will not construe them a double satisfaction of their customary

customary shares, and of what they are intitled to under the statute of distributions. 2 Vern. 274. *Gudgeon* versus *Ramsden*. An intestate being an inhabitant within the province of *York*, has a son and a daughter, and no wife, and in his lifetime gives his daughter 1000*l.* portion in bar of what she might claim by the custom, this shall be no bar of her distributory part, nor shall she bring it into hotchpotch; and the intent of the statute by bringing things into hotchpot being to reduce the portions to an equality, if the daughters are to bring in what they received in the life-time of their father, *Francisca* must also bring in her legacy, or this equality will be destroyed, and these constructive intestacies are not within statute of distributions.

An inhabitant of *York* gives his daughter 1000*l.* portion, in bar of her customary share, and dies intestate: this shall not bar her of her share under the statute of distributions.

Mr. Verney.

This point principally concerns the heir at law, and since your lordship is of opinion that the residue must be distributed, the directions of the statute of distributions are to be observed, and the heir must have a share, notwithstanding any lands come to him by descent, or otherwise: And the daughters advanced with portions must bring them into hotchpot, and there is no reason why one part of the statute should govern more than another; it was uncertain whether those portions would go in satisfaction of what the daughters were to take by the custom, or by the statute of distributions, [†304] till it was known whether Sir *George* would make a will, or die intestate; and it now appears he did not give these portions to the daughters in lieu of their customary shares, because he had it in his power to bar the custom by making a will, which he has done. In the case of *Gudgeon* and *Ramsden*, the father did nothing to prevent the operation of the custom, so the daughter had two rights in her, and it was unreasonable to construe the 1000*l.* a satisfaction for both of them, but here the daughters have but one right.

Dr Strahan.

The 1000*l.* given to *Francisca* by the will of Sir *George*, is not to be brought into hotchpotch, for where there is an intestacy, or a surplus undevise, nothing is to be brought into hotchpotch, but what was given by the father in his lifetime as an advancement; but this 1000*l.* is a legacy or gift, and the statute can only operate on the surplus undevise, which is to be distributed, but cannot destroy the will.

Lord

De Term. S. Hill. 1729-30.

Lord Chancellor.

Where equity decrees an annuity devised for plus to be distributed among the next of kin, any provisions made by the testator in his life-time, or by his will, shall not be disturbed, and the children advanced by him shall not bring their portions into hotchpotch, for equity regards the statute of distributions only as to the persons who are to take. *Swinb.* part 3. sect. 18. n. 13. *Park.* 109. n. 569.

Though the custom does not attach till the death of Sir George Wheeler, and he had it in his power to control it, yet till he does so, I shall consider his personal estate as subject to it: This is not a case within the statute of distributions, though I have declared the surplus to be distributed among the next of kin, according to that statute; but I only consider it as to the persons who are to take, but not so far as to disturb the provisions made by Sir George Wheeler, either in his life-time or by his will.

Case 166.

At the Chancellor's house.
Lord Chancellor.

If the defendant pleads in bar, he cannot move for the plaintiff to make his election till the plea is argued, for the plea denies he has an election, but says he is not intitled to sue in equity.
Ant. Caf. 119.

Friday, March the 6th.

MOTIONS.

ANONYMUS.

THE defendant put in a plea in bar to the relief sought by the bill, and obtained an order for the plaintiff to make his election, whether he would proceed at law, or in this Court, and on the plaintiff's motion, the Lord Chancellor discharged this order; for the order goes on a supposition, that the plaintiff has an election, and yet the defendant pleads he is intitled to no relief in equity, and therefore the plaintiff is not obliged to make his election till the plea is argued; and Mr. Solicitor General for the plaintiff, quoted the case of *Vaughan and Welsh*, where on a plea of the statute of limitations, the like order was discharged.

[+305]

Case 167.

At the Chancellor's house.
Lord Chancellor.
Eodem die.

If the plaintiff moves to confirm a report nisi, and the defendant shews exceptions for cause, the plaintiff may except too.

† ANONYMUS.

IF the plaintiff moves to confirm the Master's report nisi, and the defendant shews for cause that he has taken exceptions, the plaintiff too may except to the report, notwithstanding his motion.

PYAT

De Term. S. Hill. 1729-30.

PYAT verſus WINFIELD.

TWO co-parceners, one married, baron and feme join with the other ſiſter in a letter of attorney to a third perſon to ſell the timber on the eſtate, which he diſpoſes of accordingly; the baron dies, and the feme brings this bill to reſtrain the purchaſer, and her ſiſter from cutting down the timber, and the Lord Chancellor granted an injunction niſi, but allowed the cauſe ſhewn by the defendants this day; for though in law the letter of attorney was determined, it was good in equity, and an injunction ought not to be granted purely to deprive the purchaſer of his bargain, when one ſiſter had undoubtedly a power, and the other knew what ſhe did, and do not pretend ſhe was impoſed on, and is to have half the money; and his lordſhip ſaid, that ſince the other ſiſter had a power by law to cut down the timber, he did not know how he could reſtrain her, but the plaintiff ought to make a partition: And though this caſe was different, he declared himſelf not ſatisfied with the caſe of the Earl of *Cheſterfield* and Mr. *Viner*, which was quoted by the council for the plaintiff. The Earl of *Cheſterfield* was intitled to one fourth, and Mr. *Viner* to three fourths of an eſtate; Mr. *Viner* was for cutting down ſome timber off the eſtate, the Earl was againſt it, and filed a bill againſt Mr. *Viner*, and Lord *Cowper* granted an injunction, and referred it to a Maſter, to ſee what timber was fit to be cut down, and to make a ſale thereof, and the money was to be paid to the parties according to their intereſts, for both having a title by law, and one being deſirous to have the timber felled, and the other oppoſing it, it became neceſſary for a Court of equity to interpoſe.

The Court granted one tenant in common an injunction, to reſtrain the other from cutting down the timber, and referred it to a Maſter to ſee what timber was fit to be cut down and to ſell it, and to pay the money to the parties according to their intereſts.

ANONYMUS.

BY an order made by the Earl of *Maccleſfield*, the plaintiff may move of courſe for a Serjeant at Arms in all caſes on the return of a cepi corpus, though it was warmly inſiſted upon that ſuch a motion was proper only where the fines and

Serjeant at Arms in all caſes on the return of a cepi corpus.

amerciaments

Caſe 168.

At the
Chancel-
lor's houſe.
Lord Chan-
cellor.
Eodem die.

One co-
parcener
joins with
her husband
and ſiſter in
a letter of
attorney, to
ſell the tim-
ber, which
is ſold ac-
cordingly.
Baron dies,
the Court
denied the
wife an in-
junction,
becauſe the
letter of at-
torney was
good in
equity, for
the wife
was not
impoſed on,
and was to
have half
the money,
and the
other ſiſter
had a power
by law to
cut down
all the
timber.

Caſe 169.

At the
Chancel-
lor's houſe.
Lord Chan-
cellor.
Eodem die.
You may
move for a
cepicorpus.

[4306] amerciaments belonged to the Sheriff, as in † *Middlesex*, &c. for then it would be to no purpose to amerce him for not bringing in the body, but that in other cases, you might have the party brought in by habeas corpus, or the bail bond assigned to you.

Cafe 170.
At the
Chancery
House.
Lord
Chancellor.

Monday, March the 9th.

PLEAS AND DEMURRERS.

TREFUSIS versus Sir HIND COTTON, Lady COTTON,
& al'.

Mr. Attorney General for the defendants.

Ant. Caf.
113.

ON a bill brought by the now defendant *Lady Cotton*, she was decreed the benefit of her marriage settlement, unless the defendant *Trefusis* within six months after he came of age, should shew cause to the contrary: Mr. *Trefusis* came of age, and he and his sister file their bill to discover whether the defendant *Lady Cotton* did not agree to waive the benefit of her marriage articles, on Mr. *Trefusis* settling her father's personal estate, in trust, for her sole and separate use, and to be relieved against the said settlement, and to have an account and distribution of their father's personal estate: The defendants put in a full answer to the discovery, and denied all fraud and imposition, and pleaded the marriage settlement, and the decree, to the relief sought by Mr. *Trefusis*.

Ant. Caf.
39.

A decree cannot be varied or altered by a new bill, and this is an absolute decree ab initio, if the infant when he comes of age cannot shew good cause to the contrary: An infant indeed, after he comes of age, may bring an original bill to set aside a decree, for fraud and collusion between the plaintiff and his guardian, but there is no such suggestion in this bill, and we have denied them by our answer. In the case of Sir *John Napier* and Lady *Effingham Howard* it was adjudged, that an infant when he came of age might amend his answer, but could not file a new bill, or amend the old: And Mr. *Trefusis* may have any relief he is intitled to, under the reservation to shew cause; and a decree, whether it is inrolled or not, may be pleaded to an original bill; if it is not inrolled, the party who thinks himself aggrieved by it, may

may be relieved by a rehearing, if it is inrolled by a bill of review, or sure this decree may be pleaded as a *lis pendens*, and these decrees against infants never are inrolled, so if a decree could not be pleaded 'till inrollment, infants on their coming of age might always bring new bills.

† Mr. Solicitor General for the plaintiffs.

[1307]

We do not suggest or suppose there was any fraud, or collusion in the former cause, but we say that our guardian did not make a proper defence, for want of being acquainted with several particulars, especially with an agreement of Lady Cotton with Mr. *Trefusis* to waive the benefit of her marriage settlement; the defendants say, a decree cannot be impeached by a new bill, I agree that by the rules of the Court an absolute decree cannot, whether it is inrolled or not, but this is a decree nisi; and 'till the day for shewing cause is past, it is in suspense, whether it will be absolute or not, and till that time it is not a complete decree, and if our cause should be allowed, the decree could never be made absolute, and then this plea would be allowed, on a supposition which proves not true; and it is more allowable to set aside decrees against infants by bill than any other decrees nisi, because other defendants are tied down to shew cause on the pleadings, but an infant, if his defence is imperfect, though there is no fraud or collusion in the case, may amend his answer, when he comes of age, if an infant is plaintiff he cannot amend his bill, but may file a bill against his prochein amy, if he has been guilty of any fraud or collusion: But if he is defendant, he is made a party invitus, and he may amend his answer, and file a bill of discovery to that end against the plaintiffs in the former cause, and great part of this bill is for a discovery, and the plaintiffs further pray a distribution of their father's personal estate; and the sister, one of the plaintiffs, was not a party to the other cause, so this is not a bill to vary the former decree, but to enable us to shew cause against it, and for further relief, and is in nature of a cross bill, in which case the plaintiff cannot plead the dependency of the original suit, and it is proper that Mr. *Trefusis* should amend his former answer, and that both causes should come on together.

Mr. *Wills*.

The defendants have pleaded this decree as a final judgment, whereas a decree nisi can be pleaded but as *lis pendens*,

dens, and only in bar of the same bill; but the defendant may bring a cross bill both for a discovery and relief, because he may have a more adequate remedy, by setting forth his case as plaintiff, than by way of defence. Sir *John Napier* was both plaintiff and defendant; but Mr. *Trefusis* brought no cross bill.

Lord Chancellor.

[1308] It is agreed by both sides, that an absolute decree cannot be called in question by bill, for that would make causes endless and decrees contradictory; but it must be final, unless it is reversed on a rehearing, or by a bill of review, or an appeal: A bill was filed against the infant to have the benefit of a marriage settlement, and a decree was made for the plaintiff, and the infant had a half year given after he came of age to shew cause against this decree, but this was an absolute decree, the Court gave their judgment, and nothing can hinder it being absolute, but the defendant's shewing cause; but he cannot come in and controvert this decree by another bill, (and I think the case is stronger against an infant, because he may amend his answer) but he may controvert this decree two ways, if there was any fraud or collusion between the plaintiffs and his guardian by an original bill, or if matter that then appeared was not insisted on, or if he has discovered new matter since, he may amend his defence, and have a bill of discovery, which was the reason I enlarged the time for his shewing cause till the defendants had put in their answers, and he may have the same remedy by amending his answer, as he proposes by this bill: So the plea must be allowed, with this express declaration, that the defendant may insist on all these things in the other cause, and I will give him leave to put in a new answer.

Case 173.
At the
Chancellor's house.
Lord Chancellor.

Friday, March the 13th.

M O T I O N S.

VILLERS & ux[?]. versus Lady OSBORN.

Dr. *Henchman* for the plaintiffs.

MRS. *Villers* and Lady *Anne Montague*, are sisters children, and Lady *Osborn* is sister to the late Mr. *Walsingham* deceased,

deceased, who by will devised a real estate of 1500*l.* a year to Lady *Osborn* for life, and made her executrix, and left a very considerable personal estate, to the amount of 15000*l.* and this bill is brought to set aside the will for the insanity of the testator, that a receiver may be appointed of the rents and profits of the real estate, and for an injunction to stay waste, and to compel Lady *Osborn* and Mr. *Percival* the administrator, pendente lite, to bring into Court all the personal estate come to their hands respectively, and to restrain them from getting in any more, or that if the will should be established, the residue of the personal estate might be distributed among the plaintiff Mrs. *Villers*, and the other next of kin to the testator, and I am humbly to move your lordship for an injunction.

† The plaintiffs put in a caveat against the probate of the will, and the spiritual Court made an order on Lady *Osborn* to bring into Court 400*l.* part of the assets she had received: For tho' the Delegates, in the case of *Powis* and *Andrews*, were of another opinion, yet in that very cause the House of Lords declared, that as the spiritual Courts had the jurisdiction to prove wills of personal estates, they had inherently a power to secure the effects whilst the will was in dispute.

[+309]
The spiritual Court may order the effects to be brought into Court, whilst a will is in contest, and

grant an administration pendente lite. Ant. Caf. 126.

Lord Chancellor.

I was one of the Delegates in the case of *Powis* and *Andrews*, and our chief reason why we thought the spiritual Court could not call in the effects, was, because they might grant an administration pendente lite.

Dr. *Henchman*.

The sentence in favour of the will was given ex parte, and we appealed instantly, and yet the Court was pleased to grant a probate to Lady *Osborn*, and to order her the 400*l.* out of Court; notwithstanding an appeal from a final sentence suspends the sentence below, and ties up the Judges hands; upon this we obtained a common inhibition and citation for Lady *Osborn* to appear before the Delegates, and she not appearing at the return of it, we could only prosecute her for the contempt, and we could have no relief since from the Delegates, because there has been no court day: If she had appeared,

appeared, the Court would have immediately ordered her to bring in the probate and the money; the defendant has no authority to collect in the effects, for our appeal suspends the sentence, and it is unreasonable she should have the assets to defray the expence of this suit more than we: It is still in suspense, whether Mr *Walsingham* made a will or not, neither side can yet claim the personal estate, and therefore it ought to be secured, and not delivered to either side, and the cause is now as much undetermined, as when the 400l. was first ordered to be brought in, and therefore there is the same reason it should be brought into this Court, and the administration pendente lite determined on the granting the probate, and did not revive on the appeal, but the Court of Delegates will grant a new administration; and it will be for the benefit of all parties to appoint a receiver and to stay waste, for it is sworn that no care is taken of the real estate, but that it is let to run to ruin, we are heirs at law of the reversion of the third part, though the will should stand; and as she is tenant for life, she is answerable for any waste committed by strangers.

An administration pendente lite determines by a grant of a probate, and do not revive on appeal, but the Delegates grant a new administration.

[4310]

† Mr. Solicitor General for the defendants.

It is a question, Whether the spiritual Court have a power to call in the effects or not; if they have, then the orders to pay in the 400l. and to pay it out again, were good and legal; if they have not, then it was right in the Court to return the money to Lady *Osborn*, which was called in without authority; the bill is brought to impeach the will, or that Lady *Osborn* the executrix, may be declared a trustee of the residue of the personal estate for the next of kin. The will as to the personal estate cannot be litigated in this Court, as was settled by the House of Lords, the 11th of *March* 1727, in the case of *Kerrick and Bransby*; and she cannot be considered as a trustee for the next of kin, because she is the only surviving sister of the testator, and has no particular legacy left her; but they say they are proper to pray an injunction to secure the effects, because we may make an ill use of the probate, but they forget that here is an administration pendente lite, and if the sentence is suspended by the appeal, the lis is still pendens; but suppose the administration determined by granting the probate, and not revived by the appeal, yet the presumption is in favour of Lady *Osborn*, and they have an absolute inhibition on her, precedent to the citation

A will of the personal estate cannot be contested in equity. Ant. Caf. 80.

citation to appear, and which operates on the service of it, though she does not appear; and an injunction out of this Court cannot be of more avail, so this is not like the case of *Powis* and *Andrews*, here the proper Court has issued a proper process, there was a vast estate in the hands of a person worth nothing, and though the probate was called in, it was made use of in the mean time to receive several large sums; and suppose even a sentence should be given against the will, Lady *Osborn* will be intitled to one third of the personal estate, which is of about 5000*l.* value, and she has received but 400*l.* and the plaintiffs have no title to call the money out of the hands of the administrator, because he gave security in the spiritual Court.

Mr. *Mead.*

In the case of *Powis* and *Andrews*, the bill charged that the executor got in several effects, after the probate was called in, that he was only an executor in trust, and was worth nothing, and yet had set up a very rich equipage; the defendant demurred, which was a confession of the facts, and the plaintiff had liberty to move for the injunction, at the same time the demurrer came on to be argued: The true secret of this cause is, That Lady *Osborn* is above fourscore years of age, and takes the whole surplus of the personal estate as executrix, and therefore if the plaintiffs could delay the probate during her life-time, no right would vest in her, but Administration + Cum Testamento annexo, must [†311] be granted to the next of kin of Mr. *Walsingham*.

Lord Chancellor.

There is no foundation for a receiver, or an injunction to stay waste, for the affidavits only say that the estate is untenant and neglected, not that any waste is committed, or against the administrator pendente lite, for his authority is determined by the appeal, so that he can receive no more, A caveat is put in to the probate of a will, and the executor is ordered to bring 400*l.* he had received into Court, and administration pendente lite is granted, sentence is given for the will, a probate granted, and the 400*l.* paid back to the executor, the parties appeal, the Delegates grant an inhibition and citation, the executor does not appear, and the Delegates not sitting, the plaintiffs file a bill for an injunction, and the Court denied an injunction against the administrator, or to bring in the 400*l.* but granted an injunction against the executor, to restrain him from receiving any more of the assets, till answer and further order.

and

and he has given security to answer for what he has received :
If I should restrain the executrix from getting in the effects,
and she should die intestate, the administrator, *De bonis non*,
&c. would have the residue ; but the spiritual Court have
granted an inhibition, and cannot grant an administration
'till the Court sits, so let an injunction go 'till answer, and
further order, to restrain her from getting in any more of
the assets, but not to bring in the 400*l.* because that was paid
out to her by order of a proper judge.

DE

DE

[1312]

Term. Pasch.

1730.

Tuesday, April the 9th.

MOTIONS.

BIRD versus OWEN.

Case 173.
At the
Chancellor's
house.
Lord Chancellor.

THE defendant, on a petition to the Master of the Rolls, obtained an order to examine one of the plaintiffs, and the prochein amy, saving just exceptions; and a motion was made to discharge this order.

Lord Chancellor.

The order must be discharged as to the plaintiff, but not as to the prochein amy, for there is the same reason why a defendant may examine a prochein amy as a co-defendant; because otherwise the plaintiff by making a material witness defendant or prochein amy, might rob the other defendants of the benefit of his testimony, and if he is examined to any point he is concerned in interest, he may demur; and though he is interested in the costs, this is no reason why he should not be examined for the defendant, but why he should not be examined for the plaintiff.

ANONYMUS.

BY the standing rule of the Court, if the contemnor, being examined on interrogatories, denies the contempt, the

A prosecutor may take out a commission to prove a contempt, and the contemnor can name but one commissioner, and cannot examine witnesses, but may cross examine the prosecutor's, but the Court on application will give him leave to examine witnesses to some special points.

prosecutor

[+313] prosecutor may take out a commission to examine witnesses to prove it; and the contemnor can name only one commissioner, and may cross-examine the prosecutor's witnesses, but cannot examine any witnesses for him; but on proper affidavits the Court will give him leave to examine witnesses to some special points, as the Lord Chancellor did in this case, and declared that he thought it a very hard rule, and that since the prosecutor might examine one in contempt on interrogatories, he ought to be content with his oath.

Case 174.
In Court.
Lord Chancellor.

Wednesday, April the 15th.

M O T I O N S.

Sir JOHN HIND COTTON and Lady COTTON
versus TREFUSIS.

Ant. Caf.
113.

It is a good
cause why a
decree
should not
be made
absolute
against an
infant, after he comes of age, that he has put in a new answer.

THE defendant now shewed for cause, why the decree should not be made absolute, that he had put in a new answer; and the Lord Chancellor allowed the cause, and said, the plaintiffs must proceed upon the answer according to the rules of the Court, as in other cases.

infant, after he comes of age, that he has put in a new answer.

Case 175.
In Court.
Lord Chancellor.

Wednesday, April the 22d.

CHESTER versus CHESTER.

Mr. *Wills* for the plaintiff.

SIR *John Chester* by a settlement in 1687, made on his marriage by Sir *Anthony* his father, being tenant for life, remainder to trustees to preserve contingent remainders, remainder to his first, and every other son in tail male, remainder to himself in fee of certain lands of the yearly value of 1100*l.* on the marriage of his son *William* in 1716; Sir *John* and his said son joined in a common recovery of the said lands, in trust, as to part of the value of 1000*l.* a year, to the use of *William* for life, then to *Penelope* his wife for life, for her jointure, and as to the remainder, to the use of *William* for life, remainder of the whole after the death of *William*.

William and *Penelope*, to trustees for five hundred years, to raise portions for younger children, remainder to trustees to preserve the contingent remainders, remainder to the first, and every other son of the marriage in tail male, remainder to trustees for six hundred years, to raise portions for daughters, remainder † to the heirs male of the body of *Wil-* [†314]
liam, remainder to Sir *John* and his heirs.

Sir *John*, on the marriage of the defendant his son *John*, settled lands of the yearly value of 1600*l.* to the use of *John* for life, remainder of part to his wife for life, for her jointure, remainder of the residue to *John* for life, remainder of the whole to trustees to preserve the contingent remainders, remainder to the first, and every other son of the marriage in tail male, remainder to Sir *John* in fee.

Sir *John Chester* being thus seized of the reversions of these lands, and of other lands in possession, made his will dated the 25th of *January* 1725, and devised to his son *William* and his heirs, some few parcel of lands in possession, and his goods in his house at *Lickleston*; and several legacies to his other children, and to his son *John*, the furniture of his house at *Chigley* for life, and after his death to his son; and all his personal estate to his wife *Frances*, his son *John*, and his son-in-law Mr. *Toller*, whom he made executors, and then he devised to his wife, and his said son-in-law, their executors, administrators, and assigns, ‘ All his messuages, lands, tenements, and hereditaments in *Lickleston*, *Marston*, and *Milbrook*, and elsewhere, not by him formerly settled or thereby otherwise disposed of, for the term of a hundred years, in trust, to apply the yearly rents and profits, to aid his personal estate in payment of his debts and legacies, and when they should be all paid, then he gave and devised the said messuages, lands, tenements, and hereditaments, to his son *John Chester*, and his heirs for ever.’

Sir *John Chester*, soon after the making this will died, and *William* his son, then Sir *William Chester*, is since also dead without issue male, leaving six infant daughters, who as heirs at law to Sir *John Chester* their grandfather, filed a bill by their prochein amy against Sir *John Chester* their uncle, the executors of Sir *John Chester* their grandfather, and the trustees of the terms of five hundred, and six hundred years limited by the marriage settlement of Sir *William* their fa-

ther ; to be decreed the reversions of the lands in settlement, as heirs at law of Sir *John Chester* their grandfather, and the only question is, Whether these reversions belong to the plaintiffs as heirs at law of Sir *John Chester* their grandfather ; or to the defendant Sir *John Chester*, by the will of his father Sir *John* ? and though this is a question at law, the plaintiffs could not try it by ejectments, because the intermediate terms for five hundred and six hundred years are still subsisting.

[†315] † And it is plain from the words, and the intention of the testator, that the reversions of the lands in settlement do not pass to the defendant Sir *John Chester* by this will.

It is an established rule, that heirs are not to be disinherited but by express words, and that if the words are doubtful, they are to be expounded in their favour. The defendant relies on the words, *And elsewhere*, none of the lands in the settlement are mentioned in the will, except the capital messuage and some few parcels that lie in *Lickleston*, for all the rest of the lands lie out of the three places particularly mentioned, but the testator goes on, *Not by me formerly settled*, which words explain his intention ; he does not say, the estates not by him formerly settled, but all his messuages, &c. by him formerly settled, and therefore cannot pass, and these words can be put in to no other purpose but to exclude them ; the defendant would extend the words only to the estates settled, but then these words must be rejected as superfluous, for the word *Elsewhere* would pass these reversions, though these words had been left out, and they are different from the words, *Not by him formerly disposed of*, for the reversions in the testator were not disposed of, but they were formerly settled, and the words are of the same sense as if the testator had said, All his lands not comprized in any settlement, and the following words, *Or thereby otherwise disposed of*, shews that this was his meaning.

And the testator's intention appears further from the other parts of his will, the lands that lie in *Lickleston*, *Marston*, and *Milbrook*, are not above 400*l.* a year, and the lands settled in 1716, which are principally in question, are worth about 1100*l.* a year, and if the testator had designed to pass the reversion of these lands which are so much more valuable, would not he have particularly mentioned them ?

His

His personal estate was near sufficient to pay his debts and legacies, and these remote reversions were not proper for that purpose, and Sir *William Chester* might have barred the reversion of the lands settled on him.

The daughters, (if these reversions do not pass) have not above 4000*l.* to be equally divided among them for their portions.

Sir *John* devised several small parcels of land in fee to Sir *William Chester* of a very inconsiderable value, but with regard to the mansion-house, as the little piece of ground on which the water-house stands, that serves the capital seat with water, and cony-hills which adjoin to the park and mansion-house, and therefore it is reasonable to suppose that the testator † designed the reversions in fee should descend to [†316] the same heirs to whom he had devised these parcels.

Mr. *Verney*.

The words *Or elsewhere* will not always take in, even what the testator is seized of in possession, if it is of a considerable value, 2 *Ventr.* 351, 1 *Vern.* 3. *Wynne* and *Littleton*, whereas the defendant would have lands of 1100*l.* a year pass by the words, *Or elsewhere*, though Sir *John Chester* has particularly devised lands of 400*l.* a year.

This case is very different from the case of Sir *Litton Strode* versus Lady *Ruffel*, 2 *Vern.* 621. there the words were, *All my other lands, &c. out of settlement*, and the reversions were out of settlement, and the words were general, *All my other lands*, without any exception; here the first words are general, and the following are by way of exception, and it is as if the testator had said, the settled lands shall go as they are limited, and I do not design to disturb the limitations, and these reversions were not estates left in Sir *John Chester*, but actually limited to him by the settlements, though in such a manner as he might dispose of them. In the case of *Hyley* and *Hyley*, 3 *Mod.* 228, (which is very near the same with this) it was adjudged, that the reversion did not pass; and when a man excepts all his lands that are settled, shall any one say, he did not mean his whole estate in settlement, but only such a part of it as he could not dispose of.

In construction of wills, the testator's view is to be considered, which in this case was to create an immediate fund for the payment of his debts and legacies, and therefore he could not design to pass these remote reversions, and if they do not pass to his wife and son-in-law for the term of one hundred years, they do not pass to his son the defendant Sir John Chester.

Mr. Serjeant *Eyre*.

The words that follow, *Or elsewhere*, must amount to an exception, or they are of no signification, for otherwise as much would pass by the words, *Or elsewhere*.

The trust of the term is to apply the yearly rents and profits, but what profits can be raised yearly out of such distant reversions? and those words cannot amount to a power to sell, because the debts are to be paid out of the annual profits. 1 Chan. Cas. 240. *Cary* against *Appleton*.

[+317] In the case of Sir *Litton Strode* and Lady *Russel*, the words do not come in by way of exception, and there all the limitations † determined at the death of the testator, in this case there were many intermediate estates, and in that case the testator had expressly devised to his wife, part of the lands in settlement, which shewed, that it was his intention to pass whatever he had a power over.

Mr. *Peere Williams*.

A reversion in fee after an estate tail is not affets at law, or a proper fund for payment of debts; sure these lands were settled at the time Sir *John Chester* made his will, and are excepted by it, if he had expressly devised *the lands by him before settled*, these reversions would have passed, and will they pass by the words, *Not before by him settled*?

Mr. Attorney General for the defendant, Sir *John Chester*.

All the estate of Sir *John Chester* was in settlement, but the lands particularly devised; Sir *William Chester* had been married twelve years, and had several daughters, but no issue male; and it was natural for the grandfather to prevent the estate from descending to the daughters, and to leave it to his son Sir *John*, who was to continue his name: And as we have

have proved that this was his intention, so he has used the most general words to that purpose; a reversion will pass by the word hereditament, and by all his hereditaments in such particular places, *Or elsewhere*, all the reversions the testator was seized of, will pass; and it is a rule in construction of wills, that no words that can have a meaning put on them, shall be rejected; but to what end could the words, *Or elsewhere* be made use of, but to pass these reversions? when the testator had no other lands, but these reversions, that lay out of *Lickleston, Marston, and Milbrook*, and he could not have made use of stronger or plainer words. The decree in the case of *Wynne and Littleton* went upon this reason, that the testator had only lands held in mortgage in the other counties, which would not have passed, though they had lain even in the particular places, because the testator had only his real estate in view.

The words, *Not by him formerly settled*, the plaintiffs say, exclude all his lands in settlement, but in the case of *Sir Litton Strode and Lady Russel*, though the words were stronger to enforce the objection it was decreed otherwise, and that is an authority in point for us; there the words were, *All my other lands, &c.* out of settlement, but these words, they say, are not by way of exception, the words neither in that case, or ours, are express words of exception, but they qualify and restrain the sense of the others; there it might be said the reversions were in settlement, for the word settlement might mean the deed whereby the estate passed; here the words are, *Not by him formerly settled*: These reversions [+318] were not formerly settled, but were part of the old estate of *Sir John Chester*, remaining in him.

Lord Chancellor.

You need not go on, for I shall not determine a case of this consequence without help, but let the cause stand over 'till the second day of causes in next Trinity term, at which time I shall desire the assistance of the Lord Chief Justice *Raymond*, Mr. Justice *Reynolds*, and Mr. Justice *Price*.

Post. Cas.
180.

Tuesday,

De Term. Pasch. 1730.

Cafe 176.
At the
Rolls.

Tuesday, April the 21st.

LEE versus ROOK.

THE defendant, whilst he was under age, borrowed several sums of money of Mr. Lee, and Mr. Lee and his wife joined in a fine, and mortgage of their estate to raise the money: The defendant after he came of age, promised to pay Mr. Lee what money he had received from him, Mr. Lee died, and the plaintiff his wife, as his executrix, brought a bill against the defendant Rook, to redeem and pay off the mortgage money: And at the hearing of this cause, two questions were made, Whether this was a proper bill? And whether the defendant, since the statute of frauds and perjuries, could be bound by this contract concerning lands, which was never put into writing?

Master of the Rolls.

If one borrow money for another on a mortgage of his estate, he may file a bill against him to pay off the mortgage money, and so may every surety against his principal, and shall not be put to his indebitatus assumpsit.

And the covenant in the mortgage to pay the money will bind him. for it is properly his debt and his covenant, and the mortgagor is only a nominal person.

The defendant, after he came of age, having promised to pay the money, this is to be considered as the case of a person of full age, and if I borrow money on a mortgage of my estate for another, I may come into equity (as every surety may against his principal) to have my estate disencumbered by him, and the covenant in the mortgage deed to pay the money, will bind the defendant, for the money being borrowed for him, it is his debt, and the testator of the plaintiff was only a nominal person, but since it does not appear what money the defendant received, the plaintiff by consent is to bring an indebitatus assumpsit, and the defendant is not to take advantage of the statute of limitations; and is to pay 120/. to the plaintiff, admitted by his answer to have been received, and the bill is to be retained 'till after the trial.

[4319]
Cafe 177.
In Court
Lord Chancellor.

† *Friday, April the 24th.*

M O T I O N S.

STAINES versus MADDUX.

BY the decree in this cause, the money recovered was brought into Court, and put out for the benefit of the infants,
the

De Term. Pasch. 1730.

the plaintiffs, and the defendant was to pay costs, and he being run away, the solicitor for the plaintiffs moved the Court to have his bill of costs paid out of this money which was lodged in Court, and insisted that a solicitor was always considered to have a lien on the money recovered, because it was by his means, and at his expence. The prochein amy, who was father to the plaintiffs, and very poor, and stood liable to the solicitor, joined in the motion, and the infants the plaintiffs did not oppose it; and the Lord Chancellor granted the motion, but with some reluctance.

The defendant who was decreed to pay the costs, being run away, and the prochein amy poor, the solicitor was paid his bill of costs, out of money lodged

in Court for the benefit of the plaintiffs, during their infancy.

Saturday, April the 25th.

APPEALS AND REHEARINGS.

HORNSBY versus *HORNSBY*.

Mr. Attorney General for the plaintiff.

Case 178.
In Court
Lord Chancellor.

Sel. Cas. in
Canc. 73.
S. C.

MR. *Hornby* made his will, and devised to his executors, their heirs, executors, administrators, and assigns, all his real and personal estate, in trust, to sell with speed, and to pay his debts and legacies; and gave to his son *Joseph* 600*l.* to be paid with all convenient speed, and to his son *George* 500*l.* to be paid in convenient time after his decease, and in case either of his said sons, *Joseph* or *George*, should happen to die before they received his whole legacy, or any part of the said legacy, or the remainder so unpaid, was to be paid to the survivor, and if both died, their legacies were to go to his two younger sons: *George* died in the life-time of the testator; and the only question in this cause is, Whether his legacy is lapsed, or survives to his brother *Joseph*? And this legacy must survive, 2 *Vern.* 207. Sir *John Borlace* devises to *N. Miller* 1500*l.* to be paid him at twenty-one, to *B. Miller* 1500*l.* when he shall attain the like age; to *E. Miller* 1500*l.* to be paid at eighteen years of age, or marriage; the like to *M. Miller*; and in case one or more of the aforesaid children should happen to die before his, her, or their respective legacy, or legacies, shall become due to them as aforesaid, his, her, or their legacy, or legacies, shall be equally divided amongst the survivors of them; and in case three of them shall happen to die before their

1 *Vern.* 415.

[4320]

their respective ages, or days of marriage, their aforesaid legacies shall be and remain to the survivor of them. *M. Miller* died in the life-time of the testator, and it was decreed her 1500*l.* should survive. 2 *Vern.* 378. 50*l.* is given

One devisees
300*l.* to his
3 daught-
ers at 21, or
marriage,
and if any
died before,
to go to the
survivor,
one died in
the life-time
of the testa-
tor, her le-
gacy shall
go to the
surviving
daughters.
2 *Vern.* 653.
116, 199.
Swinb. in
fol. 171.
If a legacy
is devised to
A, to be

to *Darrel Trelawny* at twenty-one or marriage, and 50*l.* to *Elizabeth Trelawny* at twenty-one or marriage, and if any legatee died before their legacy was payable, it was to go to the brothers and sisters of such legatee. *Darrel* died in the life-time of the testator, and it was adjudged no lapsed legacy, and that it should go to his sister. 2 *Vern.* 611. one devised 300*l.* apiece to his three daughters, at twenty-one or marriage, and if any died before, to go to the survivor; one died in the life-time of the testator, her legacy shall go to the surviving daughters: And the foundation of all these decrees is, that the devise over is to be considered as an original legacy, and for this reason your lordship decreed, where a legacy was given to *A*, to be paid at twenty-one, and if he died before, to go over, and *A* died before twenty-one, that he to whom the legacy was devised over, should be paid it immediately, and not wait till *A* would arrive at twenty-one, and so is the case of *Papworth* and *Moor*. 2 *Vern.* 283. so it is the same thing whether *George* die before, or after the testator.

paid at 21,
and if he die before, to go over to *B*; if *A* dies an infant, *B* shall take presently, and not wait till *A* would be 21, for a devise over is to be considered as an original legacy.

1 *Andersf.* 33. *Cal.* 82. *Ant. Cal.* 25. *Swinb.* part 1. sect. 7, 3. 1 *Leon.* 278. *Perk.* sect. 576, 567. 2 *Vern.* 92. *Dyer*, 59, b. 2 *Vern.* 138. *Moor* 774. *Cal.* 1069. *Relv.* 73. 1 *Brownl.* 85. *Fulbeck's Parall.* 1 part, fol. 42, b. part 4, sect. 17. *Swinb.* n. 9.

Mr. Solicitor General for the defendant.

This legacy is plainly lapsed as to *George*, but the question is, Whether it is a good legacy as to *Joseph*: he says, it is an original devise to him: No, it is first given to *George*, and given over upon a contingency to him, and though the will is made in the life-time of the testator, it cannot take place till after his death, and therefore when he provides for a contingency, he must mean for a contingency to happen after his death, and since this contingency could never arise, *Joseph* could have no title; and this is plain from the words of the will, *And in case either should happen to die before they received, &c.* that is, if the legacies once vested, but were not paid, but the legacy never vested in *George*, and these words distinguish this from the cases that have been mentioned; there the words are, If one dies before the legacy becomes due

due or payable, so if the legatee died in the life-time of the testator, he came within the words, He died before the legacy was due or payable; but here the legacy is to be paid in convenient time after the testator's death, no part could be received till after his death, but if it vested, and part was received, the rest was to go over.

† Lord Chancellor.

[4321]

These are considered as immediate devises, which was the reason why the Court first allowed a devise over of a personality. Here is a devise to two persons to be paid in convenient time after the testator's death, and if either die before the whole, or part is received, the whole, or the remainder is to survive to the other, and one of them dies in the life-time of the testator, his legacy shall go over to the other: This case does not differ from those that have been cited, and the defendant has not produced an authority to the contrary: So if lands are devised to *A* for life, or in remainder to *B* in fee, if *A* dies in the life-time of the devisor, *B* shall take immediately, though it is plain the testator did not design him an estate in possession; and though the legacy is lapsed as to the first taker, yet the next man shall have it immediately; so the decree by default for the plaintiff must be made absolute.

And for this reason, the devise over of a personality was first allowed. *A* devises a legacy to *B*, and a legacy to *C*, to be paid them in convenient time after his decease, and in case either of them should happen to die before they received the

whole, or part, it was to be paid to the survivor, *C* dies in the life-time of the testator, his legacy shall survive to *B*. Chan. Rep. *Prig* contr. *Clay*.

If lands are devised to *A* for life, or in tail, remainder to *B* in fee, and *A* dies in the life-time of the testator, *B* shall take immediately.

Friday and Saturday, May the 1st and 2d.

Mrs. DIANA HOSIER, plaintiff.

Mr. HART, and FRANCES DIANA, his wife, the daughter of the plaintiff, Mr. *Hawes*, the next of kin of the late Admiral *Hosier*, deceased, and Mr. *Baker*, his heir at law, defendants.

Mr. Solicitor General for the defendant *Baker*.

THE bill is brought to perpetuate the testimony of witnesses of the marriage of the plaintiff with the late Admiral *Hosier*, and the legitimacy of her daughter, the defendant, Mrs.

Case 179.
In Court
Lord Chancellor.
Master of the Rolls.

Mrs. *Hart*. And the defendant *Baker* has preferred this petition to your lordship, that the depositions of Mr. *Philips* taken in this cause may be suppressed, and that the plaintiff, the defendant *Hart*, and Mr. *Reynolds*, the examining clerk, may be committed.

[+322] The plaintiff, and the defendant Mrs. *Hart*, as wife and daughter of the late Admiral *Hofier*, brought an ejectment for the recovery of his real estate, and had a verdict chiefly on the evidence of Mr. *Philips*, who swore that he baptized Mrs. *Hart*, and that being afterwards in the *West Indies* a chaplain to a man of war, and relating the marriage, and birth of the daughter among the sea officers, and it coming to the ears of the Admiral, he was at first greatly offended with him, but at last owned to him they were his wife and daughter, and damned all church security; this evidence he gave upon the trial, and his depositions taken in this cause were obtained by corruption, and we hope your lordship will suppress these depositions for that reason, and for the irregularity in taking them.

Mrs. *Hofier* entered into two bonds to the said *Philips*, each of the penalty of 1000*l.* one for the payment of 500*l.* and the other for the payment of 50*l.* a year to him for life, as a reward for what he was to swear at the said trial; but before the trial, the plaintiff being apprehensive that if upon his examination these bonds came to light, (which she had heard Mr. *Hawes* had come to a knowledge of from Mr. *Broom*, the parish clerk) the Court would not allow his evidence, she took up these two bonds, and she and Mr. *Hart* gave another of 1000*l.* to *Mary Thompson*, in trust, for Mr. *Philips*, and which she indorsed in these words, *I assign this bond to Mr. Philips whose right it is*; and *Mary Thompson* signed this indorsement, and *Philips* before and after the trial often said, the bond was given him as a reward, and refused to go down to the assizes, unless the plaintiff gave him ten guineas; and some time after the trial he swore, if the plaintiff would not give him an hundred guineas, the cause should yet go against her; and often said, it was a pity Mr. *Hofier's* relations should be wronged by such a woman, and that he would not do again what he had done for her to gain the Admiral's whole estate, and that he no more believed she was married to the Admiral, than the dog that was passing across the room while he spoke; and the plaintiff allowed him a guinea a week till his death.

After,

After the trial, the bond being put in suit, the parties came to a new agreement, and the plaintiff gave a note of 50*l.* to Mr. *Philips*, which has been since paid, and a bond of 100*l.* to *Mary Thompson* defeasanced, not to be put in suit till three months after the plaintiff had obtained administration of the personal estate of the late Admiral: Then the plaintiff brings this bill to perpetuate the testimony of her witnesses, and particularly of Mr. *Philips*, who being very ill the day he was to be examined, after he had been sworn by the Master, he refused to let the examiner take his depositions, unless the plaintiff would advance him ten guineas, so his examination was deferred till the next day, when she brought the money, and whilst the clerk was taking his evidence, he knocked, and the plaintiff and *Mary Thompson* came up, and the plaintiff in discourse with Mr. *Philips* said, Good God! Cousin, how can you forget yourself to? You have strangely lost your memory, and *Mary Thompson* coming first down, and being asked what Mrs. *Hosier* did above, [†323] she said she was refreshing Mr. *Philips's* memory, and when the plaintiff came down, she said to *Mary Thompson*, Molly, Mr. *Philips's* memory is quite gone, he knew the Admiral above twenty years ago, and now he swears he knew him but five years before his death, and the plaintiff after went up again by herself, and when she came down, she said, she would not for a great deal have been out of the house; and the examiner when he came down, told the plaintiff, upon her asking him how he had performed, that he had at last answered to his satisfaction; and Mr. *Philips* afterwards declared, that he was very sorry for what he had done, that his evidence was false, that he had injured the Admiral's relations, that he had not baptized the child, or ever seen the Admiral, and desired that what he said might not be made publick till after his death.

These bonds are admitted by the affidavits for the plaintiff to have been given to Mr. *Philips*, but not to induce him to give his testimony, but to borrow money on them, to enable Mrs. *Hosier* to go on with her law-suit; but did ever any one enter into a bond to another to pay him 50*l.* a year for his life, as a fund to borrow money on? and he never borrowed but 30*l.* on these securities, of Mr. *Rogers*, and that was for himself; but the defeasance of the last bond plainly proves, it was given as a reward to him to give such evidence as would procure her the administration; because he was not
before

before to have the benefit of the bond, but it could not be designed as a security for borrowing money, because the payment depended on a fact which might never happen, and this appears from his own letters; and being asked if the bonds were given to raise money on, he denied it, and said they were given for a purpose not fit to be mentioned, but which they very well knew, and that the last bond was given in consideration of his delivering up the others; and giving his evidence, and he has disposed of this bond by his will, as part of his estate. As to the irregularity, Mr. *Philips* ought to have attended the examiner alone, or the examiner him, and the plaintiff ought not to have been in the room during the examination; and as this is a bill purely to perpetuate testimony, it is proper for us to apply to your lordship in this manner to suppress these depositions, and all these facts we have made out by our affidavits.

The affidavits of the plaintiff, and of those that were sworn for her, were to this purpose.

[1524] Mrs. *Hester* swore that she was acquainted with Mr. *Philips* several years, and that they went to school together at *Shrewsbury*, and that knowing how she was straitened for money, he proposed, and did raise her several small sums by assignment of the bonds; and others swore, that *Philips* had endeavoured to borrow money of them on these bonds, for the plaintiffs use, as he told them, and she denied the bonds were given him as a reward or on any other occasion, only to raise 100*l.* for himself, in case he should be arrested going to the trial, and that being told the subpoena was a sufficient security, he promised to deliver them up; that *Mary Thompson* told her, she or Mr. *Hart* should never see Mr. *Philips* to serve him with a subpoena, unless they gave him the bond of 1000*l.* that she would endeavour to persuade her aunt to advance the money, and that she might be prevailed upon to leave her that bond; and that she believed *Mary Thompson* kept him out of the way for this purpose, and that Mr. *Philips* was so sensible of it, that he promised after the trial to deliver up this bond; that this objection to the bond was made at the trial and over-ruled, and Mr. *Philips* was examined, and swore, that the Vice-Admiral owned the plaintiff and Mrs. *Hart* for his wife and daughter, that they never heard *Philips* make any such declarations, but that he always said he had sworn the truth, and wished the

the plaintiff and Mrs. *Hart* might long enjoy the estate; that she gave the note for 50*l.* because *Mary Thompson* said she had pledged the bond for that sum, and that she gave the last bond for fear her bail should surrender her up, and that *Mary Thompson* has often promised to deliver up the bond, or to raise her money on it; that she brought this bill to perpetuate the testimony of Mr. *Philips*, because he designed to go teach school in *Ireland*, and that she maintained him, to keep him in *London* 'till he was examined, but denied that there was any contract for that purpose or any allowance, that she lent him ten guineas to pay for his lodging, but denied that he refused to be examined 'till she did, but put off his examination 'till the next day, that he might have clean linen: She denied that she had any such discourse with *Philips*, or *Mary Thompson*, relating to the cause, or with the examiner, or that he made her such answer, that they went up to give Mr. *Philips* wine because he was faint, (but it was sworn on the other side that the wine was in the room, and given him before the examination) that the plaintiff had been often heard to say, that *Mary Thompson* had twice cheated her, and that she had given instructions for a bill to be filed against her to deliver up the bond, that *Philips* said he knew Admiral *Hofier* twenty years, that he always spoke in the plaintiff's favour, and declared in his last illness, that he was glad he had done her justice, and that she had a great many enemies; and that the plaintiff pressing him for the bond, he bid her be easy, and said, By the living God you shall have it: That the Admiral owned that the plaintiff was his wife, and Mrs. *Hart* his daughter.

† Mr. *Reynolds*, the examining clerk, (whose affidavit was [†325] also read) being examined viva voce, declared, that Mr. *Philips* was very willing to be examined, though he was very sick and weak in bed, that growing faint, he desired somebody might be called up to give him wine, that upon his knocking, the plaintiff came up, and gave him some, and then went out, and that she did not prompt him, or complain that he had lost his memory, and that he did not examine him while any body was present; that one of the interrogatories being of the plaintiff's family, Mr. *Philips* said, he had forgot where her father lived in *Wales*, and desired the plaintiff might be called up, and when she came, she informed him, that Mr. *Philips* at first swore he knew the Admiral but five years, but that when he read his depositions over to him, he said he mistook,

mistook, he knew him seventeen years, that he signed the depositions, and said they were true, that *Mary Thompson* met him as he came down, and asked him if Mr. *Philips* had done Mrs. *Hofier* justice, and he told her he hoped he had.

Mr. Attorney General for the defendants, *Hart* and his wife.

It will be of the utmost ill consequence to us to suppress the depositions of so material a witness after his death, for our evidence of what he swore on the trial, must be very uncertain. If a witness concerned in interest is examined, his depositions are not of course to be suppressed, but it is an objection at the hearing of the cause, against their being read, as it would take off his evidence at a trial, and so as to what relates to his credit, and it is the practice of the Court to exhibit articles to the credit of a witness, but it will depend on the evidence, when the cause is heard, whether the depositions shall be suppressed or not, and this is a bill for relief, as well as to perpetuate testimony, and what they have sworn, they may give in evidence on a new trial, and may encounter the evidence of Mr. *Philips* by these witnesses, as they did at the former trial. So then the question will turn on the irregularity of the examination, the witness was sick in bed, and during a long examination grew faint, and desires some wine, the examiner knocks, and the plaintiff and another come up, and give him wine, and then go down again, and the examiner goes on; this is not a sufficient foundation to suppress the depositions, if a witness is examined at the office, nobody is suffered to be present, but in the course of a long examination if the witness is tired, they let him go out of the office, and it is often impossible to do otherwise, for an examination sometimes holds two or three days, and then the witness may see whom he pleases, and if a witness in the course of his examination wants relief, it is no fault in the examiner to call for it, and though it happened [+326] that the plaintiff was one of the persons who came up, that is no reason to set aside the depositions, if she said nothing to prompt him, and the examination stopped while she was present; afterwards the witness could not recollect the name of a place, and the plaintiff informs him, sure this is not a good cause to suppress the whole deposition when it has no influence on the material part of it, and it would be hard that Mr. *Hart* and his wife, who are most concerned in interest should lose the benefit of all the depositions, when the witness

witness might have gone out on pretended business, and asked that or any other question.

Mr. Verney for the defendant, *Baker*.

Our objections are not only to the credit of *Mr. Philips*, but to his competency, and, if what is sworn against him, was proved at a trial against a witness, the Court would not suffer him to be examined; and though here his examination is first taken, our affidavits are not only sufficient to discredit his depositions, when they come to be read at the hearing, but to hinder them from being read, and to have them suppressed.

Master of the Rolls.

These depositions ought to be suppressed for irregularity. A witness under examination at the office may go abroad, from the necessity of the thing, and though this is a great inconvenience, it is impossible to remedy it without depriving the witnesses of their liberty, and confining them 'till their examination is over, but here the witness is not dismissed, but the plaintiff is suffered to instruct him, which is a gross irregularity, and owned by the examiner himself: If a witness is uncertain, or at a loss, as to any question, the examiner ought to take it down that he is so, and not suffer him to inquire of the party concerned, and it is of no consequence whether the question the witness asked the plaintiff was a material question or not; for if it should once be allowed that an examiner might suffer a witness to inform himself in an immaterial point, it would raise endless disputes what was so; but there must be a general rule in all cases; for as the justice of the Court depends on these paper depositions, great strictness ought to be observed in the taking them: So if he was examined in the office, the examiner ought not to let him go abroad for information, or break off in the middle of an interrogatory, but keep him 'till he has finished his examination to that interrogatory, and therefore long interrogatories are in themselves an irregularity. What the examiner has sworn, gives great weight to what is sworn against him: *Mary Thompson* says that when the plaintiff came down, she complained that *Mr. Philips* had lost his memory, and that he had sworn he knew the Admiral [†] only five years, [[†]327] and the examiner owns he first swore so, and then he is no witness to the marriage, which was several years before; and this shakes the credit of the examiner, and confirms their
their

their affidavits; and this examination was not only irregular, but procured by the practice of the plaintiff, and is a very foul examination, the examiner knew the plaintiff had been once at her lodgings, and entertained by her, and she was in the house at the time of the examination; and truly the depositions of such a man as Mr. *Philips* appears to be from these affidavits, is not worth preserving, and makes way for the belief of what they have sworn, and is confirmed by the defeasance, for when the plaintiff had got administration committed to her, she had carried her point; so here is a foul practice and irregularity in obtaining this evidence, and as Mr. *Philips* was examined at the trial, by producing the record, they may swear to the evidence he gave.

I refer to his lordship what punishment the examiner shall suffer, who I think ought not to be trusted for the future in the office.

Lord Chancellor.

The depositions of a witness who was examined in perpetuum rei Memoriam, were suppressed on a petition, after his death; and the examiner discharged and committed for foul practice and irregularity in the taking of them, the plaintiff being suffered by the examiner to instruct him, and the witness being provided, and as he had been examined on a trial to the same points, the plaintiff might give evidence of what he swore.

I agree with his Honour the Master of the Rolls, this is a bill to perpetuate the testimony of the plaintiff's witnesses of her marriage, Mr. *Philips* is her witness only, and the question is, Whether his depositions ought to be suppressed? At a trial at law, as Mr. *Verney* observes, if a witness is proved to be corrupted, he is not suffered to give evidence; here indeed he is first examined, and the question is, Whether the depositions of an incompetent or corrupt witness shall stand on the records of this Court, when the parties are perhaps dead who could prove the corruption, and which were taken in a foul and irregular manner; the clerk knew the plaintiff, and she was in the house when he came to examine, some have sworn that the wine and table stood in the room when the examiner went up; the examiner knocked, upon the witness growing faint, and Mrs. *Thompson* came up, and *Philips* asked her for Mrs. *Hosier*, and Mrs. *Thompson* called her to him, she swears the examiner bid her, and that she heard Mrs. *Hosier* say to Mr. *Philips*, Sure your memory is very bad, when you say you knew the Admiral only five years, and others swear, Mrs. *Thompson* told them Mrs. *Hosier* was above refreshing his memory, and this is confirmed by the examiner; the witness pauses a second time, and then Mrs. *Hosier* is called up again: Can there be a greater misdemeanor than to let the party come up to instruct the evidence?

dence?

De Term. Pasch. 1730.

dence? therefore these depositions must be set aside, the examining clerk committed, and discharged for unfair and irregular practice, and the plaintiff must pay the costs of this application, and of all the affidavits.

† *Wednesday, May the 6th.*

ANONYMUS.

MR. *Guyon* settled 800*l.* in trust, for the sole and separate use of his wife, and to be at her disposal, by deed or will, and he was to be indemnify'd from her debts; the wife made a will and died, her creditors file a bill against the husband, executor, and trustee, for payment of their debts; and the Lord Chancellor decreed, that the husband should be indemnified out of the assets, and all parties paid their costs; in the first place, that the creditors should be paid *pari passu*, and that her trustee, who was a creditor, a mortgagee, and a creditor by bond, should have no preference, because a feme covert by law could not make a mortgage, or enter into a bond; but it was void, and she might plead *Non est factum*, but the executor, who was a creditor, had liberty to retain his debt, and the expences of the funeral, and probate of the will, though the assets were in the hands of a trustee.

be preferred, because a feme covert by law could not make a mortgage, or enter into a bond.

But that her executor, who was a creditor, might retain his debt, though the estate stood out in trust, but not the trustee. *Ant. Cas. 78.* See the next following case. *Ant. Cas. 61. 2 Chan. Cas. 54.*

[+328]
Case 180.
In Court
Lord Chancellor.

The creditors of a feme covert file a bill after her death, to be paid out of a trust estate for her sole and separate use. The Court decreed, that all the creditors should be paid *pari passu*, and a mortgage and bond creditor were not to

Wednesday, May the 13th.

HALL versus KENDALL.

MR. *Wright*, by articles previous to his marriage with *Mary*, one of the defendants, covenanted to lay out 800*l.* in iron works, and that the profit and produce of the trade, in case his wife survived him, should go to her for her life, and after her decease to their children, in such proportion as Mr. *Wright* should appoint, and for want of such appointment, share and share alike.

2 B

Mr.

Case 181.
At the
Rolls.

[†329] Mr. *Wright* made his will, and his wife and two others executors, and taking upon him to dispose of his whole real and personal estate, he directed all his stock in the iron works, and all his personal estate to be sold for the payment of his debts; and devised all his real estate to his executors, and their heirs, in trust, to pay to his wife 40*l.* a year for life in lieu of the provision made for her by the marriage articles, and to pay his debts. The executors contract with the plaintiff for sale of part of the lands, and agree he shall discount out of the purchase money 400*l.* the testator owed him by simple contract, and afterwards contract with him for the purchase of the rest of the lands, and agree he shall retain out of the purchase money 200*l.* which Mr. *Wright* owed by bond to the plaintiff's brother, whose representative the plaintiff is, the plaintiff † files his bill for a specific execution of these articles, and the wife insists, that she is a creditor by specialty, and ought to be preferred to the demands of the plaintiff, and that if the Court should establish these articles, they would decree the executors to commit a *devastavit*, the assets being deficient to satisfy all the creditors; and the great question is, Whether the money raised by sale of the estate is to be considered as legal, or as equitable assets, in the hands of the executors?

Master of the Rolls.

In the case of *Degg and Degg*, where an estate was devised to executors and their heirs, in trust, to sell for payment of debts, I decreed that the money raised by the sale was not legal assets, and the decree was affirmed on appeal by the Earl of *Macclesfield*: But if an authority is given to executors to sell for payment of debts, or if the estate is devised to them and their heirs, to sell to pay debts, the money arising by the sale is assets at law; but where the estate is devised to them in trust, calling them executors, it is only considered as describing the persons who are to sell, and I always strongly
Cro. El. 524,
(54.) incline to an equality among creditors.

Mr. Attorney General for the plaintiff.

The executors, by the articles, expressly agree, that we shall retain what is due to us out of the purchase money, this retainer was part of the terms of our purchase, and the reason why we gave so much for the estate, and the executors
cannot

cannot take advantage of one part of the agreement, unless they will perform the whole; and *Mary* cannot defeat these articles, which she herself entered into. Here is a general and special trust reposed in the executors, which they may be compelled to perform in this Court.

In the case of *Degg and Degg*, the lands were devised to persons (who were afterwards made executors) and their heirs, in trust, for payment of debts, the creditors by specialty had received part satisfaction of their debts out of the personal estate; and they insisted to be paid the residue, preferable to the other creditors, out of the money raised by sale of the real estate, and this brought on the question, Whether the money was assets or not? and your Honour decreed they should receive nothing out of this money, till the other creditors had received as much in proportion as they had out of the personal estate, and the reason of this decree was, that by the statute of fraudulent devises, a devise of lands is void against a bond creditor, except the devise is for payment of debts, so this devise stood as at common law, and the descent being broke by it, the bond creditors had no lien on the lands, †but could only come into this Court to have the [330†] trust performed.

Mr. Lutwyche for the defendant *Mary*.

A devise of lands to executors to sell, implies a trust, so I do not see how such a devise differs from an express devise in trust, &c. and executors being in all cases trustees by their office, it is the same thing whether the trust to sell, is expressed or implied; and a creditor, by taking a superior security, depends upon his having gained a preference to the other creditors. Here the estate is expressly devised to them by the name of executors; in the case of *Degg and Degg*, the estate was devised to them by their particular names, in trust, and in the following part of the will they were made executors, and the Court therefore would not join together their office of executor and trustee; and the statute of fraudulent devises will make no alteration in this case, for all devises, before the statute, broke the descent, and left nothing in the heir.

Master of the Rolls.

An executor or administrator is not a trustee by his office, for then he would be accountable only in a Court of equity,

The testator devises all his real estate to his executors, and their heirs, in trust, to pay his wife 40*l.* a year, and to pay his debts. The money arising by the sale is not assets at law, but in equity, and if there is a deficiency, the creditors must be paid in equal proportion.

and not at law : This case is stronger than the case of *Degg* and *Degg*, this is a trust for a particular purpose, to pay 40*l.* a year to the wife, and she may make her election, to take by the articles, or the will, and she chuses to stand by the articles, whereby she has a specifick lien on the stock for so much as it amounts to, (for it was in the contemplation of the parties that the 800*l.* should be invested in the iron works) and let the Master take an account of the real and personal estate, and if there is not enough to pay all the debts, she must be paid the residue in equal proportion with the other creditors, and in computing what her proportion will amount to, an account must be taken of what is due to her for principal and interest, and the plaintiff cannot retain, but after the account is taken, he may consider whether he will go on with the articles without retaining; for I adjudged the money raised by the sale of the lands not to be assets at law, and I am sure there are a hundred such decrees; for I think the testator designed this a trust in the executors, to be performed under the direction of this Court, and not a legal interest, such as the law gives them.

And the executor cannot retain. See the next preceding case. Ant. Caf. 61. Caf. 78. Caf. 115.

And a creditor by specialty must be paid in proportion to what his principal and interest amount to.

Nels. Fol. Rep. in Canc. 88, 195, 478. 2 *Vern.* 763, 61, 435, 106, 133, 405, 248. 1 Chan. Caf. 32, 248. 1 *Vern.* 101, 63, 482. 2 Chan. Caf. 54. 1 *Lev.* 224. *Wentw.* Off. of Ex. 46, 50, 73, 74. 1 *Vern.* 69. Stat. 21 H. 8. ch. 5. *Dyer* 234. *Swinb.* part 6, sect. 7. n. 7. *Dyer* 152, 264.

Term. S. Trin.

1730.

In Cur. Cancellariæ.

Tuesday, May the 26th.

MOTIONS.

ANONYMUS.

Case 182.
At the
Chancel-
lor's house.
Lord Chan-
cellor.

THE usual order was made, that Mr. *Haywood*, a solicitor's bill, should be rated by a Master, and he be examined on interrogatories what money he had received; and it was now moved, that he should be examined on interrogatories what sums he had paid to counsel, and other persons, on affidavit, of his having charged several items which the party himself had disbursed; and the Lord Chancellor seemed very unwilling to break in upon the usual course of the Court, but made an order, that the Master, in the course of the taxation, might if he thought proper, examine him on oath to any items contained in the affidavits, but not to any other.

The order of taxation impowers the Master to examine the solicitor on proper

on personal interrogatories, only what money he has received, but may move on proper affidavits for the Master to examine him to his disbursements.

But afterwards on a motion to the Master of the Rolls, a general liberty was given to the Master to examine him on oath; and his Honour said, he thought it very reasonable, he should be obliged to clear up every thing in that manner.

Thursday,

De Term. S. Trin. 1730.

[4332]

Case 183.
At the
Chancel-
lor's house,
Lord Chan-
cellor.

Thursday, May the 28th.

EX PARTE FERRARS.

A lunatick
having re-
covered his
understand-
ing, peti-
tioned for a
superfedeas
of the com-
mission, but
the Court
only sus-
pended it
for some
months, to
see if he
was perfect-
ly recover-
ed, because
he had often
relapsed,
and was
found by
the inqui-
sition, a lu-
natick with
lucid inter-
vals.

Ant. Caf. 49.
1 Vern. 155.

EARL *Ferrars* petitioned the Court, that the inquisition might be quashed, the commission of lunacy superse-
ded, and that he might have his liberty, being restored to his
senses; and he appeared personally in Court, with his sister
Lady *Betty Shirley*, the committee of his person, and Dr.
Monroe his physician, who made an affidavit, that the Earl
was restored to his senses for four or five months last past;
and being examined likewise in Court, he declared, he be-
lieved there was no danger of a relapse, because he was
greatly afraid of running into any excesses which might
bring on a return of his disorder, which physicians always
looked upon as a very good symptom; but this petition was
opposed by Mr. *Lawrence Shirley*, brother to the Earl, and
the committee of his estate, because the inquisition found
him a lunatick with lucid intervals; and the surgeon and
apothecary, who formerly attended him, made affidavit, that
after a salivation by Doctor *Hale*, he had enjoyed his senses
for a longer time, and yet relapsed; upon which the Doctor
gave him over, as incurable, and that since that time, whilst
he was under the care of Doctor *Lewis*, he enjoyed a sanity
of mind for several months after a violent fever, and yet his
distemper returned, and therefore his counsel humbly sub-
mitted to his lordship, whether it was not more adviseable
only to suspend the commission till after the fall of the leaf,
to see whether his recovery was perfect or not; and men-
tioned the case of Mr. *Vincent*, a *Yorkshire* gentleman, where
his lordship had made the like order. And the Lord Chan-
cellor made an order, that the Earl should have his full li-
berty, but that the cassetur of the inquisition, and the super-
fedeas of the commission should be suspended 'till the first
day of petitions before *Michaelmas* term.

Monday,

De Term. S. Trin. 1730.

† Monday, June the 1st.

[†333]
Case 184.
In Court.
Lord Chan-
cellor.

CHAMBERS, an infant, under the age of twenty-one years,
by his prochein amy, plaintiff.

JOHN CHAMBERS his father, and ELIZABETH his
wife, and his younger brothers and sisters, and the Earl
of EXETER, defendants.

Mr. Solicitor General for the plaintiff.

WILLIAM Chambers, on the marriage of his son *John*,
the defendant, with *Elizabeth Greenwood*, by articles bearing
date the 18th of July 1718, covenanted to add 3000*l.* to
the portion of *Elizabeth*, which was 3000*l.* and that the
6000*l.* should be paid into the hands of trustees, to be in-
vested in a purchase of lands, to the use of *John* for life,
remainder to *Elizabeth* for life, remainder to trustees to
preserve contingent remainders, remainder to the first, and
every other son of the marriage in tail male, remainder to
John in fee, and two terms were to be limited to trustees, one
to raise 2000*l.* for the portions of younger children, pay-
able at twenty-one, or marriage, or 1000*l.* for the portion of
a younger child, the other for raising 3000*l.* for the portions
of daughters, in case there was no issue male of the marriage,
and the money was to be put out on Government, or other
securities, at the discretion of the trustees, 'till a proper pur-
chase could be found, and the interest of the money was to
go as the profits of the lands when purchased, and the father
further covenanted, on or before the marriage, to settle his
messuage and lands in *Derby*, to the use of himself for life
without impeachment of waste, remainder as to part, to
Elizabeth his wife for life, remainder of the whole, to the
use of his son *John*, and the heirs male of his body, re-
mainder to himself in fee, the marriage took effect. In
1720, the money which stood out in South Sea annuities,
was subscribed by the trustees into the South Sea Company;
and by the loss of that year was reduced to about 3000*l.*
which have never been laid out in a purchase. *William Cham-*
bers having made no settlement, the lands in *Derby*, on his
death, descended on the defendant *John*, who conveyed
them to trustees and their heirs, to the use of himself and
the heirs male of his body, remainder to the heirs of *William*
in fee, † and has since barred the intail by a common reco-
very,

[†334]

very, and the eldest son of *John* filed this bill against the trustees, his father, mother, and brothers and sisters, to have the money laid out in a purchase of lands, to be settled, pursuant to the articles, and the younger children to abate in proportion to the loss, and the lands in *Derby* conveyed in strict settlement. This loss must not fall on the trustees, for not only the act of Parliament indemnifies them, but the articles also authorize them to place out the money as they pleased; and therefore the justice of this case is, that the younger children should abate in proportion with the elder son, and as by the articles they were to have 2000*l.* which is one third of the whole money, and if there was no son, the daughters were to have 3000*l.* which is the half of the money; so they ought to have the same proportion of what is left, whereas if the younger children are to have the whole 2000*l.* they will have twice as much as the plaintiff, and the Court will not put this construction on the articles, so contrary to the intention of the parties, and therefore as we were at first intitled to two thirds, and they to one, the loss ought to be borne in that proportion.

The next question is, How the estate in *Derby* is to be settled? *John* contends, that by the articles he is to be tenant in tail, and that he settled the lands in that manner, and has since barred the intail by a common recovery: If this is the meaning of the articles, it is in vain to pray a settlement, which he may destroy as soon as it is created; but this is a reason why the Court should not direct so vain a settlement, but a strict settlement to be made, as hath been done in many cases, as in the case of *West* and *Erisey*: By articles of marriage, lands were covenanted to be settled on *Richard Erisey* for life, without impeachment of waste, remainder to the heirs male of the marriage, remainder to the heirs male of *Richard Erisey* by any other wife, remainder to the heirs female of the marriage, &c. with a power to *Richard* to make leases; and a settlement was made in the words of the articles: The marriage took effect, and *Richard Erisey* suffered common recoveries of the lands, and sold great part of them, and devised the remainder, and died without issue male, and the issue female of the marriage filed a bill to have the lands settled in strict settlement, according to the intent of the articles, and to have a satisfaction out of the assets of *Richard Erisey* for the lands he sold: The bill was dismissed by the Court of Exchequer, December the 12th,

1720, but this decree was reversed by the House of Lords, the 12th of *February* 1727, and a decree was made according to the prayer of the bill, though the settlement was made before marriage.

† Mr. Attorney General for the defendants.

[†335]

The council for the plaintiff have produced an instance, where the loss has been decreed to fall on one who has a charge on the inheritance; the charge is certain, the value of the lands to be purchased is uncertain, and the charge remains the same, whether the lands to be purchased are of more or less value; and the money being to be laid out in lands, is to be considered as a real estate, and if the lands had been purchased and fallen in value, yet this certain pecuniary charge must have been raised: The money at the time of the articles was invested in South Sea annuities, which might fall in value, yet the parties have not provided for an abatement, if such a case happened. Suppose the stock had rose according to the expectation of the parties, the younger children would have been no gainers by the rise, but the plaintiff would have had all the benefit: so by parity of reason, he ought to bear the loss, and if the money had been laid out in lands, mines, escheats, and other casual profits would have been his.

The general rule relating to marriage articles is, that where lands are covenanted to be settled in tail male, a strict settlement shall be made, if the intention of the parties does not appear to the contrary, because otherwise they shall be supposed to have meant such a settlement; but in this case the parties have declared their intention to the contrary. *William Chambers* knew what a strict settlement was, and has covenanted that the lands to be purchased shall be settled in that manner, but when he further covenants to settle his own lands, he has used a different form of words, which plainly shew his intention to be different, and he has limited different uses of the same lands: He is made expressly tenant for life, and *John* tenant in tail, and this construction of the words is according to law, and the covenant is to settle on *John* and the heirs male of his body generally, and not said by his intended wife, and so it is not to be considered as part of the marriage contract, but as a further advancement of his son.

Lord

De Term. S. Trin. 1730.

Lord Chancellor.

The father on the marriage of his son, covenants to lay out 6000*l.* in a purchase of lands to be settled in [+336] strict settlement, charged with 2000*l.* for the portions of younger children, or 3000*l.* for daughters, if there were no sons, and further covenants, to settle his own estate on his son and the heirs male of his body, the money, by being subscribed into the South Sea Company, was reduced to 3000*l.*

If the younger children happen to die before the age of twenty-one years, or marriage, these contingent portions will never become due. Suppose the money had been invested in a purchase, the younger children would have had no advantage of any accidental profit, but been only intitled to the sum charged, and in case of a loss, would have had no remedy against the heir; but here the money is not yet laid out in a purchase, and a deficiency happens, by placing it out in a lawful way, † allowed by act of Parliament, which includes the consent of every one; and the trustees had also the authority of the parties to dispose of it at their pleasure; if any gain had been made it would have gone to all the children in proportion, as hath been often adjudged in this Court: And now a loss has happened, if the same proportion of what remains be given to the younger children, they have all that was designed them: The parties to the articles never designed that they should have two thirds of the money, but one third only, and designed to provide for all the children; and therefore the defendants must abate in proportion to the loss.

The eldest son must not bear this loss, but the younger children must abate in proportion.

And the lands in possession are to be settled on the son in tail, and not in strict settlement, for they were not designed as a provision for the children of the marriage, but as a further advancement of the son. 2 Vern. 670, 551, 702.

As to the other question, Where a provision is made for children by marriage articles, the Court will take care that an effectual settlement is made on them, but these lands were not designed as a provision for the children, but only the lands to be settled in strict settlement; and therefore there is no reason to alter the nature and quality of the estate, which is expressly an estate in tail, and the covenant is said to be only in consideration of the marriage, and not of the children.

Tuesday,

De Term. S. Trin. 1730.

Tuesday, June the 2d.

Case 185
At the
Rolls.

HINTON versus SCOT, & al'.

MR. *Reynoldson* the defendant, married the defendant Mrs. *Reynoldson*, the daughter of Mr. *Scot*, a freeman of *London*: Mr. *Scot* died, and the husband (who had a considerable portion with his wife on the marriage, and had never made any provision for her) assigned over her orphanage part to trustees, for her sole and separate use during life, and after her decease for her children: The creditors of the husband file this bill against the executors of Mr. *Scot* the husband, wife, children, and trustees, to have this money paid to them as fraudulently assigned.

Master of the Rolls.

I shall suppose the plaintiffs to be creditors prior to the assignment, though they have not clearly proved it. The husband by law is intitled to the estate of his wife, but if he wants the aid of this Court to recover it, he must make a provision for his wife, before the Court will decree it to be paid to him; and he could not recover this chose in action without a subpoena; and at law, if he sues for a chose in action in right of his wife, he must join her in the action; and if he dies before he reduces it into possession, the action survives to her, and the Court imposes terms on the husband, on that principle, that he who would have equity, must do equity: So there only remains to be considered, whether the plaintiffs are not intitled to the interest during the life of the husband. The husband has no title to it, because he has assigned it for the separate use of the wife, then if I decree it to the plaintiffs, I must break through a settlement I think a very reasonable one, for where the husband is indigent, and the wife in a starving condition, the Court has often obliged him to settle the portion on the wife, for her own separate use; so the bill must be dismissed.

The husband in poor circumstances, and his wife wholly unprovided for, settles her orphanage part in trust, for her sole and separate use, his creditors prior to this assignment, shall not set it aside, or have the interest of the money during his life, for this is a reasonable settlement,

and such as the Court would have obliged the husband to make, if he had sued for her orphanage part here.

2 Vern. 270, 302, 17, 61, 64, 68, 67, 190, 493, 501, 626, 659, 760, 707, 671, 401, 752. 1 Vern. 7, 18, 396, 161, 408. 1 Chan. Caf. 41, 271, 189, 225, 307, 181. 4 Inst. 85, 86, 87. Supplem. to *Wentw.* 310. 2 Chan. Caf. 73. Co. Lit. 351.

Wednesday,

De Term. S. Trin. 1730.

Wednesday, June the 3d.

CHESTER versus CHESTER.

Cafe 186.
In Court.
Lord Chan-
cellor.

Lord Chief
Justice Ray-
mond,
Lord Chief
Baron Rey-
nolds.

Mr. Justice
Price.
Ant. Caf.
175.

Mr. *Wills* for the plaintiffs, stated the pleadings as a case, and then went on to this effect.

IT is plain from the words of the clause in question, and from the intention of the testator, appearing out of other parts of the will, that these reversions do not pass.

Two rules are to be observed in the construction of wills, and both of them are in our favour: One, that an heir is not to be disinherited but by plain words, the other, that not only the particular clause is to be considered, but every part of the will together, and if the words are doubtful, they must be explained by the intention.

These reversions do not pass by the word *Elsewhere*, the lands particularly mentioned are not above 300*l.* a year, and the reversion principally in question is 1100*l.* a year, and it cannot be imagined that the testator would particularly describe lands of 300*l.* a year, and leave those of such a great value to pass by so general a word, which is rather a word of course, like an *&c.* and can serve only to pass some little quantity that belongs to the lands particularly set out, though it should lie out of the three places, as was adjudged in Sir *Thomas Littleton's* case, reported in 2 *Ventr.* 351, and in 1 *Vern.* 3. and 2 *Chan. Caf.* 51. by the name of *Wynne* versus *Littleton*. *Wynne* being seized of divers lands in fee, in the several counties of *G. M. D.* within the dominion of *Wales*; and having likewise divers other lands in other counties within the dominion of *Wales*, made over to him in mortgage, which were of more value than the other lands; he devises all his lands in the counties of *G. M. D.* and all his lands elsewhere, within the dominion of *Wales*, to Sir *John Wynne* and his heirs. † It was adjudged, that the mortgaged lands did not pass by this devise, for he could not be thought to mean to comprehend lands of so much value under the word *Elsewhere*, which is like an *&c.* and comes in *currente calamo*; so if he had stopped at the word *Elsewhere*, it could not be supposed he designed to pass these reversions.

But

But the words, *Not formerly settled*, which follow, explain his meaning, and shew he designed these reversions should not pass, for then he would have used the words, *Not disposed of*, which he mentions after, and to say that he only meant that the estates limited by the settlements should not pass, is to say, that he put in the words for no purpose, for those estates could not pass if the words were left out, and I can find no difference between the words, *Lands not formerly settled*, and the words, *Not formerly comprized in any settlement*: So that this clause considered by itself, will not support the construction the defendant puts upon it.

But our construction is strongly confirmed by the other clauses of the will. The devise is, first, to trustees for a hundred years, in aid of his personal estate, to pay his debts, and then to Sir *John* and his heirs; but these reversions are not proper for payment of debts, and no lands come to Sir *John*, but those which first vested in the trustees. It is absurd to think these reversions pass to the trustees as a fund for the payment of his debts, the fund is very sufficient without them; and if it was not, these reversions would be useless, for the money is to be raised out of the annual rents and profits, and Sir *William* might have barred the reversion of the lands settled on him, because he had an intermediate estate tail in him, (though he could not bar his eldest son) and if his lady had a son, the reversion would be of no value, the daughters too had only 400*l.* provided for them by the settlement, and the testator, on the marriage of the defendant, had settled lands of 1600*l.* a year on him.

His intention further appears from that clause of the will, by which he devises some small portion of lands, as *Bury Piece* and *Cony Hills*, to Sir *William Chester* in fee, which come to the plaintiffs by descent; and no reason can be given, why he should devise these lands to Sir *William*, but that they might go with the mansion house, *Cony Hills* lying contiguous to it, and the park; and a water-house being built on *Bury Piece*, to supply the house (which lay very dry) with water; and if his intention was to unite these estates, it is plain he did not design to devise the reversions from his daughters.

† As to the words, the case of *Hyley and Hyley*, 3 Mod. [†339] 228. is a strong authority for us. *Hyley* had issue *William* his eldest
Noy 13, Stockwood versus Swan.

There the testator gave to *A* lands, to *B* a house, and to *C* a house in tail male, and all the rest and remaining part of his estate be devised to *A*, *B*, and *C*, that only excepted which he had given to *A*, *B*, and *C*, and to the heirs of their bodies, it was adjudged, that the exception comprehended the reversions in fee of the lands and houses devised to *A*, *B*, and *C*, but this case is denied to be law.

eldest son, who had issue, *Peter*, *Charles*, and *John*, he devised 1000*l.* to his eldest son, and several parcel of lands to others; then he gave to *Peter*, lands in tail male, to *John*, a house, and a mansion-house in tail male, and in like manner, another house to *Charles*; And all the rest, and remaining part of his estate, he devised to his three grandsons, equally to be divided amongst them, that only excepted, which he had given to *Peter*, *Charles*, and *John*, and to the heirs of their bodies, whom he made executors; then he devised, if either of his said executors died without issue, the part of him so dying, to the survivor and survivors, equally to be divided. *John* died without issue, and the question was, Whether the reversion of his house should be divided amongst his surviving brothers or descend to the heir, and it was adjudged, that the exception in the will did comprehend the reversion in fee, and that it did not pass, but that without such an exception it had passed. In that case the words are very strong; *All the rest, and remaining part of his estate*; and several estates being carved out of the lands, the reversion might be said, an estate *Not before given*.

By a devise of all my messuages, lands, tenements and hereditaments whatsoever not above disposed of, the reversion of a house devised before for life will pass.

The case of *Willows and Lydcot*, 3 Mod. 229, *Carthew*, 50, 2 Ventr. 250, is very different from ours. *William Shelton* seized in fee of the messuage in question, and of divers other messuages in the parish of St. *Martin's*, and other parishes, made his will, and thereby devised his houses in the other parishes to divers charitable uses, and then devised to *Harris* and *Mary* his wife, the messuage in question, for their lives, and in the following clause, the better to enable his wife to pay his legacies, he devised all his messuages, lands, tenements, and hereditaments whatsoever within the kingdom of *England*, not above disposed of, to have and to hold, to her and her assigns for ever, and made her executrix, and judgment was given in B. R. that the reversion did not pass, but was unanimously reversed in the Exchequer Chamber, because there were words in the devise to the testator's wife, that would carry the reversion of this house, as an hereditament not disposed of, there the words were, *Not above disposed of*; tho' the house was settled, it was not disposed of, here the words are, *Not before settled*.

And tho' the case of *Sir Litton Strode* versus *Lady Russel*, 2 Vern. 621, seems to be against us, yet, when the reasons of

of that case are considered, it makes greatly for us. Sir William Litton, by virtue of several settlements, being tenant in tail after possibility of issue extinct of some lands, remainder in fee to trustees, in trust, for him and his heirs, and as to some other lands, being tenant for life, remainder to his first, and every other son in tail male, remainder to trustees in fee, † in trust, for the right heirs of B, whose heir he was, and as to other lands, being tenant in tail, remainder to the right heirs of his father; the value of which lands was about 3000*l.* a year, and being also seized of lands of his own purchase, both freehold and copyhold, of about 600*l.* a year, and possessed of a great personal estate, made his will, and after a devise of part to his wife for life, and other legacies, devised to his nephew all his other lands, tenements, and hereditaments, *out of settlement*, provided he took upon him the surname of *Litton*, and subject to raise 4000*l.* in case the testator left a daughter: It was adjudged, that by the words, *Out of settlement*, the whole family estate was well devised; there all the estates tail ended in Sir William Litton the testator, but here there are several estates tail, intermediate to these reversions, after the death of Sir John Chester; and it appeared plainly that he intended Sir Litton Strode should have the whole estate: The devise to him is, on condition he took upon him the name of *Litton*; so it could not be supposed, that he designed the greatest part of the estate should go from him, and if he had a daughter, he charges the estate with 4000*l.* for her, who would have been his heir. And this charge plainly shewed he did not design she should have the estate. There no lands of less value were before particularly named, and he devised in the former part of his will, to his wife, part of the settled lands by name; which shewed he thought he had a power to devise them; and it is said in that case, if the reversions descended, some of them would go to the testator's sister of the half blood, whom he could not be supposed so much to favour as his nephew of the whole blood, whom he designed to keep up his name. In our case it plainly appears by other parts of the will, that he intended these reversions should descend, and there are no words to shew his intention that they should pass.

By a devise of all my lands, tenements and hereditaments, out of [†340] settlement, the reversion in fee of lands in settlement will pass.

Mr. Verney.

The plaintiffs are the six daughters and heirs at law of the eldest son of the testator, and have but 700*l.* apiece out of

of an estate near 4000*l.* a year, and it is proper to consider the circumstances of the family, for the question is not, Whether these reversions can possibly pass by the words, but whether, after a view of all circumstances, we can suppose that the testator intended to give them away from the eldest branch of the family.

The devise is not of *all his lands*, which would have been strong words against us, but in three particular parishes, and he would not have used these words, if he had designed to pass all his lands, and part only of the settled lands lie in these three places.

[1341] † Then the devise of these reversions must be by the word, *Elsewhere*, but that word, though it is not always rejected, yet it often is, and if we can shew the testator meant something else by it, the reversions shall not pass. Mr. *Vernon* says, the reason of the decree, in *Winne* and *Littleton's* case was, because lands of greater value could not pass by the word *Elsewhere*, and in the case of *Green* versus *Armistead*, *Hob.* 65, the use of the word is shewn, and that it is often put in, for fear the particular description should not be satisfactory and full.

It is plain from the next words, *Not by him formerly settled*, that he did not design to disturb the uses of the settlements, part of the settled lands lay in *Lickleston*, one of the places particularly named, and these words shew a recollection in the testator, and a design that they should not pass, for unless by these words he designed to exclude the lands, they can have no meaning put on them, the estates that were settled he could not pass, so unless they exclude the reversions, they are vain and nugatory. The word *Settlement* has two senses; strict settlement, over which the party has no power, and a settlement in fee or tail, over which he has; and the word settled, in this case, must be taken in that sense that will favour the heir, so these reversions may be said to be settled, though the testator had a power over them, and if he had been asked the question, he would have said the whole inheritance was settled, for these reversions were not left in him, but the whole estate was granted to trustees. In the case of *Sir Litton Strode* versus *Lady Russel*, the testator had no son, and he was making an heir in his room, so the devisee being *hæres factus*, was intitled to all the privileges and advantages of an heir at law; and since his intention plainly appeared to
give

give him all he could, it was reasonable to decree him the reversions, if they could possibly pass by the words. In the case of *Willows* and *Lydcot*, the devise was not of all his lands in three particular places, and elsewhere, but of all his lands, &c. so there was no reason to except one estate more than another. The case of *Hyley* and *Hyley*, is an authority in point for us, and the words of that devise were stronger against the heir than of this. The words, *All the rest and remaining part of my estate*, would certainly comprehend the reversion, *That only excepted which he had given to Peter, Charles, and John, and the heirs of their bodies*, why he had not given them the reversions in fee.

Here the testator devises the furniture of his house at *Chigley*, to the defendant for life, and after his decease to his son, but the furniture of his house at *Lickleston*, and the water-house, to his son *William*, and his heirs, to make the house commodious to them, which plainly shews he had a respect to the settlements he had made, and that he designed these should † go, as the reversions stood limited. I [†342] own the general words of the will may carry the reversions, but the question is, whether the intention of the testator does not appear to the contrary.

Mr. Serjeant *Eyre*.

Lickleston park, which was in settlement, lies in one of the three places mentioned, and the words, *Not formerly settled*, were put in, to distinguish the lands settled from those that were not settled, and the greatest part of the lands in settlement are not mentioned by the testator, because he did not design to pass them, and these reversions may be said to be settled, because they go according to the settlements, and are influenced by them, and liable to be defeated by the tenants in tail. By a devise of all my lands, leases and mortgages will not pass, and if the Court makes this distinction, where the testator has made none, how much more will it take notice of what the testator himself has taken care to distinguish. In the case of *Hyley* and *Hyley*, the reversion did not pass: The words, *Not formerly settled*, are as much an exception, as the words, *That only excepted*, for no certain words are necessary to make an exception, and no sense can be made of these words, but by way of exception.

Mr. Peere Williams.

An exception is to exclude what would otherwise be comprehended, but if the words, *not formerly settled* were left out, the estates settled would not pass, therefore the words must be put in, to exclude the reversions. By the words, *Formerly settled*, the reversions would pass, and it is nonsense to say, *not formerly settled*, and *formerly settled* have the same meaning; and the counsel for the defendant can quote no case, where, by a devise of *all my lands not by me formerly settled*, if an estate tail stood out in a third person, the reversion passed: The testator is not supposed to be at the trouble to devise what is of no value, and what can be so soon destroyed by the tenant in tail. By this devise, he gives the lands, the things he had not settled; he does not say the estates, or so much of them as he had not settled. The word *Elsewhere* might be put in by the scrivener, but the subsequent words must be inserted by the express direction of the testator, and doubtful words are to have the most kind construction put on them in favour of the heir, for which reason, *I give all to my mother*, was adjudged a devise only of the personal estate. 1 Lev. 130.

Mr. Attorney General for the defendant.

[1343] In 1716, Sir *William Chester* was married, and in 1725, Sir *John Chester* made his will, and though Sir *William* had several children, he had no son, but his brother the defendant had, and we have proved the father had a great regard for him, that there had been a misunderstanding between him and his son *William*, and that he designed to leave the defendant all that was in his power.

I shall first consider the meaning of the word *Elsewhere*, and there is no weight in their objections on this head. Though the testator had lands in possession in the three places he has mentioned, and part of the settled lands lay in one of them, yet he had no lands in possession elsewhere. The word *Elsewhere* is the largest and most comprehensive the testator could make use of, and signifies as much as if he had said, *All my lands whatsoever and wheresoever*, and though he first says, *All his lands in Lickleston, Marston, and Milbrook, and elsewhere*, as he ends with general words, the devise is as full as if the particular places were not mentioned; if,

if *and elsewhere* were out, so much of the reversion would pass as lie in the three parishes, by the words *All my messuages, lands, tenements, and hereditaments*, and by the words *And elsewhere*, all his reversions whatsoever are devised. The foundation of the decree in Sir *Thomas Littleton's* case was, that the lands out of *A, B, and C*, would not pass by the word *Elsewhere*, because they were mortgages, which would not have passed though they had lain even in *A, B, and C*, for a mortgage is an estate of a different nature, but Sir *John* had no other lands to answer this word *Elsewhere* but these reversions, and therefore they must pass by it.

The next words to be considered are *Not formerly settled*, which it is said, exclude all lands comprized in any deed of settlement made by Sir *John Chester*, these reversions were not properly settled, the same lands may be considered as settled, and as not settled. If one conveys to *A* for life, remainder to *B* in tail, remainder to himself in fee, the estates for life and in tail may be said to be settled; but the remainder in fee is an estate not settled, for it is not a new estate created by the settlement, but part of the ancient estate left in him.

These words are idle and nugatory, if they are not put in to exclude what was in his power; for what was settled out of his power, would not pass if they had been left out.

This is no objection in the explanation of a will, they shew the testator's intention, not to break in upon any former settlement he had made, and are like those clauses in a will, where the testator confirms a jointure, or a former settlement; which shew his intention to do justice, and that every thing should remain as it was settled: So it is usual, in a will, to devise expressly the personal estate for payment of debts; and yet such a clause is idle, for the estate is answerable, though it was left out: And this objection was made in the case of Sir *Litton Strode* and Lady *Russel*, and had the same answer given to it. [†344]

That case is an authority in point for us, and if there is any difference between the two cases, it is in our favour. There the words were, *Out of settlement*, here, *Not formerly settled*; in that case, they say, the words are part of the devising clause, but here they come in by way of exception,

but there are not exprefs words of exception in either cafe, but of qualification and reftriction; there fettlement might be faid to mean the deed, which in common fpeech is called the fettlement; fo the words might be faid to be the fame, as lands not comprized in any deed of fettlement; here the words muft be applied to the eftates fettled, and though the reverfions in that cafe might be faid to be comprized in the deed, they cannot in this cafe be faid to be eftates fettled, it is faid that the words are general in that cafe, but that in this, there are firft, particular words, and then come fweeping words; but in that cafe, all the words might have been fatisfied with the lands in poffeffion, but in ours, *Elſewhere* has nothing to anfwer it but the reverfions, and though there the teftator had no fon, but here Sir *William Chefter* had feveral children, and his wife was a breeding woman, yet there was a poffibility that Sir *William Litton* might have a fon, and Sir *William Chefter* had no fon, though he had been married nine years, fo it was natural for the father to take care that thefe reverfions ſhould go to the heir male: Here Sir *John Chefter* difpoſes of the reverfions, not to an heir he was inſtituting, but to his ſecond fon, who was his heir male, and was to fupport the name and honour of the family.

A having a manor and other lands in B, deviſes the manor to C for fix years, and part of the other lands to D in fee, and then deviſes, the reſt of his lands in B or elſewhere

In the cafe of *Hyley and Hyley*, the teftator deviſed *All the reſt and remaining part of his eſtate*, which comprehends his whole intereſt, and the exception extends only to part of his intereſt, to the eſtates given to *Peter, Charles, and John*, and to the heirs of their bodies; fo the judgment in that cafe ſeems to be very particular: And in the next cafe, of *Willows and Lydcot*, the ſame Judges were of the ſame opinion, but their judgment was reverſed in the Exchequer Chamber, by eight Judges. And in *Alleyn 28, Wheeler verſus Waldron*, A having a manor and other lands in *Somerſetſhire*, deviſed the manor to B for fix years, and part of the other lands to C in fee, and the *Reſt of his lands in Somerſetſhire*, or elſewhere, he gave to his brother, it was adjudged, that the reverſion of the manor paſſed as well as the lands not before deviſed. As in *Willows and Lydcot's* cafe, the words, *Not above diſpoſed of*, are tantamount to *Not by me* formerly fettled; fo the ſame words are afterwards made uſe of in this [†345] will, and the † plaintiffs muſt admit that they are vain, for the general words would not have defeated any deviſe in the former part of the will, though thoſe words had been omitted.

Their

Their next argument is drawn from the purpose for which these lands were given, to apply the annual rents and profits, in aid of his personal estate for payment of his debts: The testator designed this as a general comprehensive clause, and the lands in possession, as an immediate fund, the others as they dropped in; and though such reversions are not assets to charge the heir on a false plea, they are assets, cum acciderunt, but the payment of his debts was not the only motive of the devise. He had two inducements to pay his debts, and to pass them with that charge to the defendant and his heirs, who was to keep up the honour and name of his family; and the one was as prevailing upon him as the other, so both his designs ought to be taken into consideration, and the nature of the trust will not alter the legal estate, that passes by the words. In the case of *Willows* and *Lydcot*, the devise is introduced with these words, The better to enable my wife to pay my legacies, and the verdict found, that the lands, without the reversion, were sufficient for that purpose, yet it was adjudged that this would not alter the construction of the devise, but that the words should be taken in their full sense.

The testator had it not in his view to devise *Bury Close*, as an easement and convenience to the estate, for he has not devised it in the same manner the lands are settled, but to Sir *William* and his heirs, so that he might have disposed of it as he pleased.

The daughters complain they have but 4000*l.* among them: The mother's portion was but 3000*l.* which, in marriage settlements, is the usual provision for daughters, and they have an estate in fee of 200*l.* a year by descent, which was the reason perhaps why the testator did not increase their portions; but whether they are large or small, the words must be considered according to their legal construction; and since they have taken notice of the circumstances of the family, we must remind them, that by the settlement made on the defendant, he has no power to make a jointure on a second wife, or to provide for the children of the marriage; so that if these reversions do not pass by the will, if Sir *John* should die without issue by his first wife, though he left a son by a second wife, to whom the honour would descend, both the estates would go to the daughters, which we can hardly suppose the testator intended.

There

[†346] There is no difference whether the reversion depends on an estate tail in the testator, or in a third person; in the case † of Sir *William Litton*, if he had a son, the estate tail would have been in him, and if he had afterwards died, that would not have altered the construction of the devise.

Mr. Solicitor General.

By a devise of all my lands in the counties of G. M. D. and elsewhere, mortgages lying out of those counties will not pass.

If the testator had rested at *All my messuages, lands, tenements, and hereditaments*, those words would have carried the reversions, but *In Lickleston, Marston, and Milbrook*, were added, they say, to restrain them, *And elsewhere* can extend only to any little parcel of lands, that lie out of those places, the testator could not have used more comprehensive words; *And elsewhere* will take in all his lands out of those three places, and they cannot shew an authority, where the Court has restrained the sense of that word. In Sir *William Littleton's* case, the other lands were mortgages, and redeemable too at the time of the devise; and the testator had other lands that lay out of the three counties to satisfy the words; so that by the devise of all his lands, the testator could not be supposed to design to pass these mortgages, which indeed were the lands of the mortgagor, and only the personal estate of the mortgagee; and the lands were charged with an annuity of 80/. a year, which was not a proper charge on a mortgage, which might be redeemed the next day, and he had expressly devised the residue of his personal estate, so the mortgages were decreed to belong to the residuary legatee. That case therefore is no authority, to restrain the sense of the word *Elsewhere*: But to shew that the Court either rejected, or restrained the sense of it, they have quoted the case of *Green and Armisteed*, though the words were general, they restrained them indeed from taking in what the testator had before devised, but can they produce any case where the Court were of opinion, that what the party had not before disposed of, would not pass by those words. So, according to the rule they have laid down, the heirs at law are disinherited by express words, and by a different construction, another rule relating to wills would be broke, that no word is to be rejected, that can have a reasonable meaning put on it.

Not formerly settled, the testator could not use plainer words to express his intention to dispose of every thing in his power;

power; but they say, every thing comprized in the settlement is settled. Where an estate for life, or in tail of lands is limited, they are settled lands, but the reversion in fee is not settled: So since the words, *All my messuages*, &c. take in these reversions, in considering how these words are qualified, it is necessary to see if these reversions were formerly settled, and in common understanding they were not; for when people speak of settlements, they do not mean what they have settled on themselves, but what they have settled out of their power, on † their wife, or children, or others: [†347]

And this further appears by the words that follow, *Or hereby otherwise disposed of, settled and disposed of*, are synonymous terms, and shew his intention not to disturb former dispositions, but to give to his son, by this general devise, what he had not before disposed of by settlement or will: They say, in our sense, the words are nugatory, in theirs restrictive, but wills are not to be considered in that strict manner; many words are inserted, not out of necessity, but caution, they shew his care to confirm whatever he had before settled, though there should be any defect in the conveyance, and to give away whatever he could, consistent with his former settlements or dispositions by that will: But in the case of *Sir Litton Strode* versus *Lady Russel*, the same objection was made to the words, *Out of settlement*, and over-ruled; and they have endeavoured to distinguish that case from ours, because the decree was affirmed in the House of Lords. In that case Lord Trever said, the words, *Out of settlement*, were the same as *Not before settled*, and when *Sir William Litton* made his will, he had a prospect of a son, for he made a provision for her, in case he should have a daughter; but they say, the charge on the estate for her, shewed he designed the reversions for his nephew: In that case, lands of 600*l.* a year passed without question, which would have answered the charge, tho' the reversions were not devised; but the daughters in this case have 4000*l.* provided for them by the settlement, which shews the parties to it, at that time, did not design they should have the estate, and the same disposition might continue in *Sir John Chester*, when he made his will, and induce him to devise the reversions. In the case of *Cook* versus *Garrard*, 1 *Lev.* 212, 1 *Saund.* 180, 2 *Kebl.* 206, 207, 224, *Keep* seized of *Spain's Hall*, settles part thereof on his daughter for life, and after he devises the house to his wife for a year after his death, and then devises, *All his lands not settled or devised to Thomas Keep*, habendum

A seized of *Spain's Hall*, settles part thereof on *B* for life, and devises the house to *C*, for a year after his death, and then devises all his lands not settled or devised, by these words, the reversion of *Spain's Hall* passes.

dum to him and his heirs. It was adjudged, that although the devise is of the lands not settled or devised, and not of the estate not settled or devised, that the reversion would pass, although the land itself was settled and devised before, and that the words were to be understood of the residue of the estate. There the objection might be made, Shall the words, *Not devised or settled*, and *Devised or settled*, which are direct contrary, mean the same thing, but the same lands are both settled and unsettled.

34 H. 6. 6. It is objected, that these reversions shall not pass, because
 2. *Anderf.* 59. they are an improper fund for the payment of debts. 1 *Leon.*
Owen 155. 180. *Cro. El.* 524. (54) *Moor* 341. *Caf.* 463. *Townsend*
Moor 341, and *Wale* is an authority to the contrary. A man seized of
Caf. 463. [+348] lands † in possession, and of other lands in reversion, upon
Cro. El. 159, an estate for life, devises, that his executors should have all
 (49.) his lands free and customary in *D* for ten years, to perform
A seized of his will, and the will of his father, with the profits thereof,
 lands in possession, and that after the ten years, his executors, or any of them,
 and in reversion should sell them for the payment of his debts, he dies, the
 upon an estate for life, devises, that his ex- ten years expire, the tenant for life dies, and the executors
 ecutors should have all his lands, and it was objected, that the reversion of the
 should have all his lands, for ten years, to perform over. estate for life passed not, because he had other lands there to
 his will, satisfy the words, and it was not his intent to pass it,
 with the profits thereof, and that after the ten years, his executors should sell them for the because there were not any profits to be taken thereby, but
 payment of his debts; by this devise the lands in reversion pass. the Court resolved to the contrary. And it is in our case
 especially a proper fund, where the reversions are devised

Their argument fails, as to the water-house and *Cony-hills*, unless they can make out, that Sir *John Chester* designed to unite them to the lands he had settled on Sir *William Chester*, but if he had, he would have followed the limitations in the settlement, and not left them in the power of Sir *William* to dispose of. And if he had the same intention as to the goods, he would have devised them in the nature of heir looms, but by this devise they absolutely vested in Sir *William*.

Mr.

Mr. Lutwyche.

It is an odd objection, that *Elsewhere* is too general a word, especially in a will, where it is not usual to name the particular places that lands lie in, as in a conveyance, which first describes the particular places, and then makes use of general words beside; and many estates, of much greater value than these in question, have passed by such a word in wills; they have talked, that it takes in a few stragling parcels only, but they have not told us what they are, and if there was any colour for it, they should have set out such a case by their bill, and if the reversions in the places that are named pass, why should not those that lie out of them pass too? He named the three places particularly, because all his lands in possession lay in them, which at that time were of most value, because the reversions might never fall in, which he therefore leaves to pass by the general words, so that though the reversion that is now fallen in, is 1100*l.* a year, yet it was to come into possession after an estate tail, which answers their objection to the different value of the lands, and all the other objections they have made were raised in the case of *Sir Litton Strode* and *Lady Russel*, and answered by the Judges. *Mr. Vernon* said there, as *Mr. Williams* does here, it is odd that the words *Settled*, and *Not settled*, should have the same meaning; and *Mr. Justice Tracy* answered, that in some sense the same lands may be said to be in and out of settlement, they may be named in the settlement, they may be settled to some purposes, and yet the reversion may remain in the person who made the settlement, † for it [†349] is the same estate, and if it descended to the heirs of the mother before the settlement, it would have remained to them after, so in this sense they are out of settlement. It was objected too in that case, what could the testator mean by putting in the words, *Out of settlement*, but to shew that he would not have the lands that were settled pass, *Mr. Justice Tracy* said, he mentioned the words *Out of settlement*, to explain his meaning to give away all he could dispose of, and to shew an honest intention, not to devise what he had settled, and what he had not a power over.

Though the testator created the term of one hundred years for the payment of his debts, it was also in his view to give the lands to the defendant subject to his debts, and the words *Yearly rents and profits*, are of little use, for he in reversion might

might compel the trustees to mortgage the term, to pay the debts off at once.

As to his intention, we may argue, as the testator has expressly devised some lands to Sir William and his heirs, so if he had designed him these reversions, he would have devised them also to him; so, here these reversions pass to the defendant by the words of the will, and it does not appear to be the intention of the testator to defeat him of them.

Mr. Fazakerly.

A devises
Blackacre
to C, and all
lands not be-
fore devised
to D, by this
devise the
reversion of
Blackacre
passes to D.

The words are comprehensive enough to take in these reversions, All my messuages, &c. in *Lickleston*, &c. and elsewhere, and they must shew how the following words restrain them, *Not formerly settled*, do not confine them, for these reversions were hereditaments not formerly settled, and though part of a man's interest in lands is settled, it does not follow from thence, that what is not settled shall not pass. 2 Vern. 461, A seized in fee, devises *Blackacre* to B for life, and to C all his lands not before devised to be sold. By this devise, the Judges of the Common Pleas certified, that the reversion of *Blackacre* was well devised, and the same sense here must be put on *Not settled*, as was in that case on *Not devised*. 2 Vern. 560, A devised a farm to B for life, and after some legacies, devises *all his other personal estate, lands, tenements and hereditaments, not before devised to C*, the reversion of the farm passed by the general devise to C: These words, they say, must operate by way of exception; they are put in by way of caution; when a man makes a will he does not look into deeds as a purchaser does; suppose then in a deed of settlement there was a power of revocation, an express devise by will of what was settled, would be a revocation: So these words might be inserted to shew that he did not design to disturb former settlements, and for fear of undoing any thing he had done before by not looking into the settlements. [+350] Elsewhere must be retained, + it is a plain intelligible word, and extends to all places; and why should it be rejected, they have not shewn how it can operate, which is in effect to reject it, but we have shewed the meaning of it, and the devise of *Bury Close* is an argument against the plaintiffs, that Sir John Chester designed nothing should pass to Sir William as heir, for that would have descended on him, if he had not disposed of it by his will.

Mr.

Mr. Justice Price.

I shall examine the import and signification of the words of this will.

The devise of *All his messuages, lands, &c.* plainly carry all the lands the testator had in possession and reversion; for in a will, a devise of lands is a devise of the estates the testator has in them; so by these words reversions pass, but then the question is, To what reversions the clause extends? In *Lickleston, &c. and elsewhere*. Wills being often made in time of sickness, people are forced to use general words: And *Elsewhere* is a necessary word in wills, and signifies every where; so all the lands pass he had not settled, then the question is, What lands were settled? most part of the lands were in strict settlement, and the reversions in himself, and it is no repugnancy to say, the same lands are settled and are not settled; the particular estates are settled, but not the reversions, and the testator's intention is plain to raise his son *John*, though *William* had children, he had no sons, but *John* had, and if Sir *William* should have a boy, he was provided for by the settlement, he trusts *John* with the bulk of the estate, charged with annuities to his sisters, and therefore we are to take the words in the largest sense they will bear. When a man devises an estate in possession and reversion, for the payment of his debts by the annual profits, those words must be understood, By the rents of the lands in possession. The words *All the rest and residue, &c. not before devised, not before settled*, have always been adjudged to take in the reversions, and the case of *Wheeler and Waldron*, in *Alley* 28, is a leading case, where the word *Elsewhere* carried the lands the testator had every where. I am guided by the intention of the testator to think these reversions pass to the defendant Sir *John*.

Lord Chief Baron Reynolds.

I am of the same opinion. The case is this, Sir *John* the grand-father being seized in fee of several lands in 1716, on the marriage of his son *William*, he settles the lands principally in question, in strict settlement, the reversion to himself in fee. In 1718, on the marriage of his other son the defendant, he settles other lands on him in strict settlement, the reversion also to himself in fee. In 1725 he makes his will,

[1351] will + and after devising some lands not comprized in the settlement, he devises in the words in question. The plaintiffs are heirs at law of Sir *William*, and old Sir *John Chester*, and consequently what is not disposed of by this will, descends to them; they say they are intitled to the reversions on both settlements, because the words of the will does not extend to them. It is a reasonable maxim, that an heir should not be disinherited but by plain words, for all comes to him as representative of his ancestor; and then, if the words of the will are ambiguous, it is justice he should have it, because there is nothing to divest it out of him. The question then is, Whether these words are ambiguous? the plaintiffs say, they extend only to the lands out of settlement, and that it appears to be the intention of the testator not to devise these reversions from two considerations.

First, Because these lands being given as a fund for payment of debts, these reversions, which are distant and defeasible interests, cannot be within the intention of the testator; but it is most reasonable to suppose that he designed all the lands in his power for a fund, and they might fall in as one has, and be applicable to those purposes, and since they might be serviceable to his intention, there is no reason to exclude them.

Secondly, They say it appears to be his intention not to give these reversions to the defendant, from the devise of the two convenient pieces of land to *William* and his heirs, but no inference can be drawn from thence; he has not devised them in the same channel the lands are settled, but has put it in the power of *William* to defeat his own sons of them.

But they say, the very words have a restraint put on them, for the lands formerly settled are not to pass. I beg leave to consider the word settlement, where the owner of the fee carves several estates out of the inheritance, and reserves the reversion to himself: The lands in law are no further settled than the particular estates; and the reversion is looked on as part of his old dominion, and has all the same incidents, whether they are lands ex parte maternâ, or of the nature of gavelkind, or borough *English*, and in point of law there is no alteration. These reversions then are hereditaments not settled, and so answer the very words, because they are part of his ancient inheritance, and remained in him, and the
cases

cases cited are in point. That in *Alley* is the foundation of them all, and the doctrine of that case is carried further in *Cook* and *Garrard*. *Hyley* and *Hyley* is an interruption to these authorities, and in *Lydcot* and *Willows* the same judgment was given by the same Judges, but reversed in the Exchequer Chamber, and the reversal allowed for law in the case of *Hopewell* and *Ackland*, 1 *Salk.* 239. So we may venture to say, that case is not $\dagger$ law, being contradicted by later [+352] authorities; so reversions will pass. But the plaintiffs say, if they do pass, it can only be of the lands that lie in the three places particularly named. *Elsewhere* is a very general word, and very proper to be made use of in wills, because the testator has not time to look over his writings, and is of a most extensive signification, and proper to carry the different interests of the testator, though it cannot indeed defeat or destroy what the testator evidently intended to devise before, as was adjudged in the case of *Green* and *Armistead*. But it is asked, why then did the testator mention these particular places? It is hard to say why he did, but it was not to be expected that he should mention all the several places his lands lay in; and it is not material what was his reason, because there is nothing to limit the extent of the other word. And Mr. *Lutwyche's* is a good conjecture. And the case of *Sir Litton Strode* and *Lady Ruffel*, which was greatly debated in the Court of Chancery, and the decree affirmed in the House of Lords, is an additional weight to the other cases, for though particular interests in these lands were settled, the reversions were never settled, and so are lands *not formerly settled*, and there is no reasonable difference between that case and ours; though the expressions are different, and though the law would have implied as much as these words, they are explanatory of his intention, not to innovate or break in upon former settlements and devises; and this objection was made in the case of *Sir Litton Strode* and *Lady Ruffel*, and over-ruled. And I should be of this opinion, if I was not confirmed by the authority of that case.

Lord Chief Justice *Raymond*.

I agree in opinion with Mr. Justice *Price*, and my Lord Chief Baron, that the reversions of the lands in *Lickleston*, *Marston*, and *Milbrook*, and out of them, pass; because the words are very full to carry all his lands in possession and reversion; and an imagination only to the contrary cannot defeat

feat the sense of them. The words *All his messuages, lands, &c.* will certainly pass all his reversions; then the question must be, Whether the testator afterwards confines them to those three places? *Elsewhere* is a general intelligible word, and it is very usual in wills to enumerate some few places where the lands are situate, and then to make use of general words by way of precaution, because the testator often has not time to look over his writings, as when he makes a settlement, and therefore since it is a comprehensive word, and of a known plain sense, why should not it have its full operation? Sir *William Littleton's* case is only that the mortgages did not pass, but the lands the testator had an absolute property in, and is not an authority for the plaintiff, and they have cited no other, and why should *Elsewhere* extend only [+353] to little parcels of land, + for it is not taken in its full sense, it cannot carry even little things lying out of the particular places, though they are ever so contiguous and commodious; and there is no reason why 1100*l.* a year should not pass by *And Elsewhere*, if the words will legally pass them.

Not formerly settled, it is said, exclude these reversions, because all the lands in the settlements were formerly settled: These reversions were not properly settled, it is the old use, and in common parlance those lands only are said to be settled that are not in the power of him who made the settlement; and this meaning was put on the words in the case of Sir *Litton Strode* and Lady *Ruffel*. In the case of *Wheeler* and *Waldron*, the rest of my lands was adjudged the same as the rest of my estate in my lands, and this is further explained in the case of *Cook* and *Garrard*, where the reversion passed, though the lands were settled and devised, because that was an interest remained in the testator undisposed of, and this was the foundation of the decree in the case of Sir *Litton Strode* and Lady *Ruffel*.

As to the objection that the term was given for payment of debts, it may be said, that the testator not only designed to pay his debts, but to give the estate to his son *John* and his heirs, and the reversions might fall into possession.

Though the testator gave two small parcels of land to his son *William* and his heirs which lay commodious to the capital messuage, yet he has not united the estates, but devised them so that they might go in a different manner.

These

These words are very plain, and the intention of the testator must appear very strong to the contrary, to induce a Court to go against the authority of the cases of *Cook* and *Garrard*, and *Sir Litton Strode* and *Lady Russel*.

Lord Chancellor.

I am of the same opinion with my Lords, the Judges, and every objection has been so fully stated and answered, that if it was not for the sake of custom, I should not say any thing. I think these reversions plainly pass by the words of the will. *All my lands* will pass all the interest the testator has in freehold lands, whether in possession or reversion; and where a particular estate is devised by will, *All the rest of my lands* will carry the reversion. In *Lickleston, Marston and Milbrook*, † and *Elsewhere*, that is in all places, and in making their wills men have not time to look over their deeds, but make use of general words to supply that defect. It was adjudged in *Sir William Littleton's* case, that the word *Elsewhere* would not comprehend the lands in mortgage, but it would freehold lands, if the testator had any. Then the question is, If these general words are restrained by the following, *Not by me formerly settled*; for it is objected, that these reversions were formerly settled by the deeds of 1716 and 1718. But the meaning of the words is, *Not out of my power*; and in a legal sense they were not settled, because the reversions in the testator were his old estate: If the lands came by the mother, they would descend to the heir a parte maternâ, and are subject to the debts of the ancestor. And all my lands signify, all my estate in the lands; so not the lands contained in the settlements, but the estates not in his power are excluded, according to the authority of the case of *Cook* and *Garrard*. The words, *Not hereby otherwise disposed of*, are as

A being seized of lands in possession, and of the reversions in fee of [†354] lands in settlement, devises to *B*, &c. all his messuages, lands, tenements, and hereditaments in *A*, *B*, and *C*, and elsewhere, not by him formerly settled, or thereby otherwise disposed of, for the term of 100 years in trust, to apply the yearly rents and profits to aid his personal estate

in payment of his debts and legacies, and when they should be all paid, he gives and devises the said messuages, lands, tenements and hereditaments to *C* and his heirs, by this devise the reversion of all his lands passes.

Elsewhere is a very general word, and very proper to be made use of in a will, and by a devise of all my lands in *B*, and elsewhere, all the lands of the testator pass, where ever situated, and of whatsoever value.

The words, *not formerly settled*, do not exclude the reversions of the lands in settlement, for they are the old estate of the testator, and are not properly settled, but the heir takes them by descent, and not by purchase.

The words, *not formerly settled*, in wills, though they have no operation, they shew an honest intention in the testator, to leave every thing as it was settled before the will.

nugatory,

nugatory as *not before settled*, but they shew the testator's intention that every thing should remain fixed, and settled as it stood before the making his will, and is like those clauses in wills which confirm jointures and former settlements, though they add no weight or authority to them. And the testator designed this devise a beneficial interest for his son, as well as for payment of his debts. The case of Sir *Litton Strode* and Lady *Russel* is the same with this. There is no difference between *Out of settlement*, and *not before settled*; and there is no getting over so solemn and settled a decree.

Thursday, June the 4th.

Cafe 187.
At the
Rolls.

M O T I O N S.

Mr. NUGENT, commonly called Lord DELVIN,
versus DANIEL ARTHUR SMYTH.

CREAGH versus NUGENT and SMYTH.

LORD *Delvin* entered into a bond for the payment of 400*l.* to *Daniel Arthur Smyth*, a banker at *Paris*, which *Smyth* assigned in part satisfaction of a debt to *Creagh*, who resides in *Holland*: *Creagh* put the bond in suit in the name of *Smyth*, Lord *Delvin* pleads *Non est factum*, and the plaintiff obtains a verdict. Lord *Delvin* files a bill against *Smyth*, suggesting that *Smyth* was more indebted to him on account, than the money due on the bond. *Smyth* takes out a *dedimus*, and the plaintiff of course obtains no injunction.

[+355] † Sometime after, the plaintiff procures an order to amend his bill, and amends the defendant's copy, but not the record, and lies by for a twelvemonth, upon which *Creagh* brings a bill, charging a collusion between Lord *Delvin* and *Smyth*, who was only his trustee, and that Lord *Delvin* did not make him a party, though he had notice of the assignment to him. That Lord *Delvin* had been lately at *Paris*, and desired *Smyth* not to put in his answer. Lord *Delvin* by his answer denies collusion, says he does not remember he spoke to *Smyth* not to answer, and admits he had notice of the assignment; and *Creagh* now moved to dissolve the injunction in the cause of Lord *Delvin* and *Smyth*.

Master

Master of the Rolls.

Where a bill is brought against the cestuy que trust and the trustee, and the trustee will not answer, I have often known the injunction dissolved on the motion of the cestuy que trust: But this is an extraordinary case to dissolve the injunction on the motion of cestuy que trust, who is not a party in the cause. Mr. *Nugent* enters into a bond to *Daniel Arthur Smyth*, a foreigner, out of the reach of the Court, who assigns it for a valuable consideration to *Creagh*, another foreigner, of which Mr. *Nugent* had notice: An action is brought on the bond, the obligor pleads *Non est factum*, and the plaintiff obtains a verdict, and then Mr. *Nugent* brings a bill against *Smyth*, who was only a nominal person in point of interest, but as he had notice of the assignment, he ought to have made *Creagh* a party. Mr. *Nugent* obtained an order to serve the attorney at law with a subpoena, and the cestuy que trust enters an appearance for Mr. *Smyth*, and on taking out a *dedimus*, the plaintiff of course obtains an injunction; afterwards he procures an order to amend his bill, and he should have proceeded in his cause with expedition, but has done nothing in it since *July* last past, upon which, *Creagh* having no other means to dissolve this injunction, kept up by the default of his trustee, brought his bill. Mr. *Nugent* says, that *Creagh* should have taken care to have got in the answer of Mr. *Smyth*, his trustee; But there was no understanding between them, and he could not force him, and he is in collusion with Mr. *Nugent*: And whereas *Creagh* charges him with having spoke to *Smyth* not to answer, he denies it faintly, he does not remember he did, and the delays in this cause are justly imputed to the plaintiff, because he stopped the proceedings; for when he found *Smyth* did not answer, he should have applied to him, and desired him, and if he made any application to him when he was abroad, he should have set it forth in his answer: And affidavits have been read on the part of Mr. *Creagh*, that Mr. *Nugent* made overtures of satisfaction, and would have paid him by instalments.

suaded by *A* not to answer, and moved to dissolve the injunction in the cause between *A* and *B*, which the Court granted, on his giving security to appear to the bill of *A*, if he made him a defendant; and to abide the order of the Court at the hearing.

† The difficulty in this case arises from Mr. *Smyth* and Mr. *Creagh* being foreigners, and therefore if Mr. *Nugent* should pay the money, and afterwards be relieved on the hearing

the cause, we could not enforce a repayment; but if foreigners sue here, it is for the interest and honour of the nation, they should have justice done to them: And this objection is answered by the offer the council for Mr. *Creagh* have made, that Mr. *Creagh* shall give security to appear to the original bill, if Mr. *Nugent* will make him a party, and to abide the order of the Court at the hearing, and therefore let the injunction be dissolved on those terms.

If a bill is brought for less than 20*l.* the defendant may either demur, or move to dismiss it. Ant. Caf. 31.

Monday, June the 8th.

Caf. 188.
At the
Rolls.

ROBERT LODER, plaintiff.

SEYMOUR LODER, and *Mary* his wife, *John Loder*, and *Jane* his wife, *John Jordan*, and *Anne* his wife, *John Carne*, and *Elizabeth* his wife, the daughters of *Charles Loder*, deceased; *Thomas Whitley* and *Ralph* his son, the heir at law of *John Loder*, and *Mary Loder*, relict and executrix of *Francis Loder*, the son of *Charles Loder*, defendants.

[1357] *JOHN Loder* made his will *inter al*, in these words, ' I give and devise all my manor and rectory of *Hinton*, &c. to my son *Charles Loder*, for ninety-nine years, if he shall so long live, remainder to trustees to preserve the contingent remainders, remainder to the first, and every other son of the body of *Charles* in tail male, remainder to my son *Francis* for ninety-nine years, if he shall so long live, remainder to trustees to preserve the contingent remainders, remainder to the first, and every other son of *Francis* in tail male, remainder to my kinsman *Robert Loder* and his heirs for ever; upon trust, that the said *Robert Loder*, his heirs and assigns, shall pay to all and every, the daughter and daughters of my son *Charles* and *Francis*, and also of my son *Thomas*, as an addition to their portions, the sum of 5000*l.* † equally to be divided between them, in case there shall be more than one: Provided also, that it shall and may be lawful for my son *Charles* and *Francis*, as they severally

severally and respectively come into possession, to charge and make chargeable, by lease, mortgage, or otherwise, the said premises, for the answering or paying such sums of money to and for the portions of their respective younger sons and daughters, and to be paid at such time and times as they shall by any deed or will severally direct and appoint, so as the sums to be appointed by *Francis* do not exceed 2000*l.* and by *Charles* 3000*l.* and with answering such sums for their maintenance, until their portions shall become payable, as they the said *Charles* and *Francis* shall direct; and for want of such appointment, then I will that the lands shall stand chargeable with the payment of 2000*l.* to the younger children of *Francis*, and of 3000*l.* to the younger children of *Charles*, with interest, till they become payable, and such portions are to be paid to the sons at twenty-one, and to the daughters at twenty-one, or marriage, and if any die before their portions shall become payable, then their portions shall go to the survivor, and if all die, they shall sink into the estate; and in the last clause of his will, he devises to his son *Charles* all the rest and residue of his real and personal estate whatsoever undisposed of, whether in law or equity, to him, his heirs, executors, and administrators, for ever, in trust, for the payment of his debts and legacies, and the surplus, if any, to his own proper use and benefit.

John Loder died, and his sons *Francis Loder* and *Charles Loder* are since dead without issue male, and *Charles* made no appointments for the portions of his younger children, and left the four defendants his daughters and heirs at law, and had two sons living at the death of *John Loder*; *Francis*, who was then the youngest, and lived to attain his age of twenty-one years, but before his death, which happened in the life-time of his father, by the death of his brother, be-

The testator made his will in these words, 'I give and devise my manor,

&c. to my son *A* for 99 years, if he so long live, remainder to trustees, &c. remainder to his first, and every other son in tail male, remainder to my son *B* in the same manner, remainder to my kinsman *C*, and his heirs for ever, in trust, that the said *C*, his heirs and assigns, shall pay to the daughters of my sons *A*, *B*, and *D*, 5000*l.* provided also that my sons *A* and *B*, as they severally come into possession, may charge the premises by deed or will, with portions for their younger children, and for want of such appointment, I will, that the lands shall stand chargeable with the payment of 2000*l.* to the younger children of *B*, and 3000*l.* to the younger children of *A* at 21, or marriage, and I devise to my son *A* all the rest and residue of my real and personal estate whatsoever undisposed of, whether in law or equity, in trust, for the payment of my debts and legacies, and the surplus to his own proper use. *B* and *A* die without issue male, and *A* made no appointment for his younger children.'



came his eldest son, intermarried with the defendant *Mary*, whom he made his executrix, and *Thomas Loder*, the son of the testator died, leaving *Anne* and *Elizabeth*, his daughters, who both died in the life-time of *Charles Loder*, *Elizabeth* unmarried, and *Anne* married to the defendant *Thomas Whitley*, who took out administration to her.

[+358] *Robert Loder*, to whom the estate descended, for want of issue male of *Charles* and *Francis*, filed a bill, to have the rights of the several defendants settled, that he might pay the money charged on the estate with safety, and to have the deeds and writings delivered up to him; and at the hearing of the cause, *June* the 2d, there were three questions made.

If any of the daughters living at the death of the testator, die before *C* comes into possession of the estate, she is intitled to no share of the 5000*l*. The first was, Whether the defendant *Thomas Whitley*, as representative of his wife *Anne*, the daughter of *Thomas Loder*, who died before the estate came to the plaintiff, was intitled to a share of the 5000*l*. and the Master of the Rolls adjudged that she was not, and that the 5000*l*. was to be divided only among the daughters who were alive at the time the remainder to the plaintiff came into possession.

A younger son of *A*, at the death of the testator, afterwards comes to be eldest, attains his age of 21, and dies in the life-time of his father, his representative is intitled to no share of the 3000*l*. for being an eldest son before any appointment, *A* could not after have made any appointment in his favour, and the portions by the will did not vest till after the death of *A*, for he might make the appointment at any time during life. The second was, Whether *Mary*, the wife and executrix of *Francis Loder*, who was a younger son of *Charles Loder* at the death of the testator, and attained his age of twenty-one years, though afterwards he was an eldest son, and died in the life-time of his father, was intitled to a fifth part of the 3000*l*. and his Honour decreed that he was not, because he was the eldest son before any appointment was made, and his father could not afterwards have made an appointment in his favour, and the portions given by the will did not vest till after the death of the father, for he might make the appointments at any time during his life.

The third question was, Whether the residue of the estate, after the trust for raising the portions was performed, belonged to the defendant *Ralph Whitley*, as heir at law of the testator; and it being late, the consideration of this was deferred

ferred till *Thursday, June the 4th*, when it appearing, that *Charles Loder* was made residuary legatee of the real estate undisposed of, it was adjudged, that the heir at law of the testator had no right, and that the cause should be adjourned to this day, when it should be argued, whether this was a beneficial devise to the plaintiff, or whether the residue of the trust should belong to the defendants, the four daughters and heirs of *Charles Loder*, the residuary legatee.

And the residue of the estate, after the 5000*l.* is raised, belongs to the heirs of *A* the residuary legatee, and not to *C.*

Mr. Attorney General for the plaintiff.

To determine this question, it is necessary to consider the whole will, the testator was making a disposition of all his estate among his sons and daughters, on the marriage of his son *Thomas* he had settled an estate on him; to his son *John* he devises a rent-charge and several legacies, and provides for his daughter and her heirs, and devises the lands in question to his sons *Charles* and *Francis*, in strict settlement, and on failure of issue male of their respective bodies, to the plaintiff and his heirs upon trust, &c. there can be no doubt but the whole legal estate is disposed of to him, so the only question is on the trust. The defendants say, that the devise being in trust to pay 5000*l.* is only a disposition of the trust pro tanto, and that the residue of it belongs to the residuary legatee; but as we are upon the disposition of a trust, we are to guide ourselves by the intention of the testator. The devise is to *Charles*, for ninety-nine years, if he should so long live, remainder to his first, and every other son in tail male, and the remainder to the plaintiff is to take place only if *Charles* died without sons, in which case his daughters, if he left any, would be his heirs, and the 5000*l.* is to be raised out of the estate for the daughters of *Charles*, *Francis*, and *Thomas*; but can we suppose that the testator intended the remainder of the trust should go to the daughters of *Charles*, in whose favour he had made a particular charge on the estate? And his intention of kindness to the plaintiff appears from a devise of other lands to him and his heirs absolutely, after the death of *Francis* and *Charles Loder*. Where lands have been devised in trust to raise portions out of the rents and profits, or by a sale of the estate, the residue has often been decreed a resulting trust, but here the devise is in trust, to pay, &c. and so comes up to those cases where lands are devised to pay such a sum, which has always been adjudged to be a devise in fee, because the estate

[1359]

is

is given on condition the devisee pay such a sum of money out of his pocket, without any regard to the value of the estate, and the testator takes notice of the plaintiff as his kinsman, which is a material circumstance; for in the case of *Hobart versus Com. Suffolk*. 2 Vern. 644. Lord Cowper declared that the devise could not be intended a bounty, because Lord George was not his relation, as it might have been, if the devise had been to *Colchester* only. And the case of *North and Crompton*, 1 Chan. Caf. 196, is a strong authority for us; *Catherine Crompton* made her will in these words, 'I ordain and constitute *Henry North* my executor, and I give all my estate, real and personal, to dispose of for the payment of all my just debts, and for the performing of all such legacies as I have herein, or by the codicil annexed, bequeathed unto my executor above named;' then she devised 200*l.* to the defendant, her uncle and heir at law. The Lord Keeper and four Judges agreed, there was no implied trust of the surplus of the real estate for the heir; for if the testatrix had intended him the surplus, she would not have given him 200*l.* and by that construction the devisee would have no benefit by the will. So here the testator having made particular provisions for *Charles*, *Francis*, their sons, and daughters, that is an evidence he designed they should have no more.

2 Vern. 252.
I make A
my execut-
or, and I
give him all
my real and
personal
estate, to
pay my
debts and
legacies,
and 200*l.* to
B (who was
his heir at
law) the
surplus of
the real
estate shall
not go to
B, but to
the execut-
or.

[1360]

† Mr. Lutwych.

A trust must be implied from the intention of the testator, but the whole frame of the will shews, that this was intended a beneficial devise to the plaintiff: The testator provides in the first place for his sons, and their issue male, and then for their daughters, and the estate is to go on and continue in his own name, subject only to the particular charge. If the devise had been in trust to sell, that would have shewed the testator did not design to continue the estate in his own name. In the case of *Wych and Packington*, the testator devised a rent-charge of 200*l.* a year out of all his lordships in the county of *Pembroke*, &c. for thirteen years to his wife, whom he made executrix, nevertheless in trust and confidence, to enable her to pay his debts and legacies, and he devised to her all his said lands for life, as an augmentation of her jointure. The Barons of the Court of Exchequer were divided, and the Chancellor of the Exchequer was of opinion that the trust of the rent-charge, after the payments of

of debts and legacies, resulted to the heir at law; and the decree was affirmed in the House of Lords. This case looks more like a trust than ours; the wife had a provision made for her by the will, besides the rent-charge, and it is not likely in our case that the testator intended the plaintiff should have nothing for his trouble.

Mr. Solicitor General for the defendants, the daughters, and heirs of *Charles Loder*, the residuary legatee.

It is proper to consider the intention of the testator, as far as it is agreeable to the rules of law. It is very plain that this will was drawn by a person who understood the law, he makes use of legal words, and of terms proper to conveyances, through the whole will, so the testator must be supposed to understand the difference between a devise in equity, and in law, where the devise is to vest in the party for his own use, and where in trust only: The first devise to *Charles* is plainly a beneficial devise, the remainder to trustees, &c. is in trust only, remainder to the first and every other son, &c. are all beneficial devises, and the devise to the plaintiff is expressly in trust. If lands are devised to a man and his heirs, in trust, to pay a sum of money, the devisee is to be considered as a trustee, unless he can shew the testator intended the contrary, and therefore it is incumbent on the plaintiff to make it appear, that the testator designed he should not be a trustee of the surplus; and all the cases of undisposed parts of trusts, whether created by deed or will, in fee or for years, are applicable to this case, which has nothing new in it: What a use was at law, a trust is now, and if an estate at law was limited to trustees, for particular uses only, the remaining + use resulted to the feoffor: If a term is carved out of the inheritance, to raise portions, as soon as they are raised, though the legal estate remains in the trustees, Courts of equity always decree that the terms shall attend the inheritance; for so much of the trust as the owner has not disposed of remains in him; so here, so much of the trust as is not devised away shall fall into the residuary devise. 2 Chan. Cas. 115, 223. and *Wych and Packington* is a case greatly in our favour, where part only of the trust being disposed of, the residue was decreed to the heir; though the term created out of the inheritance might be supposed to be for the benefit of the wife, whom he had made executrix, as well as to pay debts and legacies. The case of *Hobart* and the Earl of *Suffolk*,

Suffolk, Serjeant *Maynard* devised to the Countess of *Suffolk*, the Lord *George*, and the defendant *Colchester* and their heirs, to the use of them and their heirs, all his several manors and lands upon trust, to convey part, after the death of his wife, to *Hobart* for ninety-nine years, if he should so long live, remainder as to part, to his wife for life, remainder to the first son for life, and other part to his daughter the Countess of *Suffolk*, and her issue male for life, with a cross remainder, on failure of issue male of either of them: And the will said nothing as to the remainder in fee. The Court decreed what of the trust was not disposed of to the heir; but it is said that this devise is in trust to pay, but the devise in that case was in trust to convey, but there is no difference whether the trust is to raise a particular sum only, or to limit particular estates only, the word paying in the cases that have been cited, was put in, to denote the quantity of the estate, not whether it was in trust or not, but that is not in dispute in this case, for the plaintiff has, without doubt, the legal estate in fee. *North* and *Crompton* is very distinguishable from this case, by the first clause he is made executor, and the last devise to him is of the real and personal estate, for the payment of her debts and legacies; by which it appeared to be her intention to make them a common fund, and the whole is to be considered as assets. So this is the same as a devise of the personal estate to him for payment of debts and legacies, in which case he is intitled by law to the surplus, and in equity too, if he is not excluded by the intention of the testator, and there the heir at law had a legacy of 200*l.* though that alone would not have been a sufficient cause for the decree, as appears by the case of *Randal* and *Booky*, 2 *Vern.* 425. but the rule that the heir is to be excluded, where he has something given him, will not hold in this case; for though the daughters have a particular provision, they claim only as standing in the room of their father, who was intitled by the residuary devise, which is a provision for himself, and it is a chance that the daughters are his heirs; but the residuary clause is a full explanation of his intention: He devises to

[+362] *Charles Loder* all his estate, real and personal, either † in law or equity, which remained undisposed of, in trust, for payment of debts and legacies, and the overplus for his own use, he knew that an estate, after a particular charge was paid off, would result to the heir, or sink into the residuum, therefore he gives it in one case to raise particular sums only; but in this clause he expressly devises the surplus for his own use:

This

This is the description of what he devises, and the surplus of this trust is an estate undisposed of.

Master of the Rolls.

I think this is a devise to the plaintiff *Robert Loder* his kinsman, and his heirs, only in trust, to pay the particular sums charged on the estate, and to decree otherwise would be to make a new will for the testator, and go contrary to a multitude of cases, and in point of construction this case is to be considered as if there was no residuary devise.

Where an estate is conveyed on particular trusts if the rest is to be taken as a gift to the party, there will be an end of resulting trusts; and this case is the stronger against the plaintiff, because the testator, when he had disposed of part of the estate by the residuary clause, shews that he knew the overplus would result to his heir, whom he designed to disinherit, and therefore he makes a total disposition of it; and I do not think he designed to make a compleat disposition of his estate till the last devise, for by that he supposes he had not given away all, but that part of his real and personal estate remained not disposed of, it is said that this devise is in trust to pay, not in trust to sell; but I do not think that a devise in trust to sell makes more for the heir than this devise, for in that case it might be said, that the testator designed to change the nature of the estate, and have no regard for the heir, but turn it into personal estate: This devise is to the plaintiff, his heirs and assigns in trust to pay, that is, whoever is in possession of the estate shall pay this sum, and nothing shall be personally demanded of them, but the estate only shall pay, and is a direction to the cestuy que trust to follow the lands, in whosesoever hands they come.

In the case of *North and Crompton*, the real and personal estate were united, the executor was a person favoured, one for whom it appeared the testatrix had a kindness, and the personal estate was not given him in trust, but for his own benefit, therefore it would have been a strange construction to have decreed it a trust for the real estate, or to suppose that she designed him an interest in one, and that he should be only a trustee of the other, when both were blended together.

It

[1363] It has been said, that the calling him kinsman is an implication of kindness. This is not the case of raising a use, † where calling him kinsman would be material, if no consideration was expressed, but of a devise, which in its own nature purports a bounty, and therefore by that rule all resulting trusts would be destroyed; but when the testator gives the estate to the party for particular purposes, that excludes any supposition that he designed it him as a bounty; and he called him kinsman, not to shew he designed him a benefit, but that he was one in whom he could repose a confidence, as a relation and friend: This is a rational motive to cloath him with such a trust, and it is dangerous to lay hold of such appellatives, in order to go contrary to the whole course of precedents, as the case of *London versus Garway*, 2 Vern. 571. A by will devises his lands to trustees upon trust, to sell, and to dispose of the money as he by writing should appoint, and for want of such appointment, then the trustees were to stand seized in trust, for the benefit of his four nephews, and if any of the appointees died before sale, and payment of the money, their share was to go to his nephews. A, by writing, appoints his trustees to pay several sums to several persons, but not near the value of the lands: The surplus was decreed to the heir, as an interest resulting and not disposed of. In the case of *Wyck and Packington*, carving the term out of the inheritance, looked like turning so much into personal estate, yet the surplus was decreed to the heir. *Com. Bristol versus Hungerford*, 2 Vern. 645. A devises his real estate to his executors, to be sold for payment of debts, the surplus, if any, to be deemed personal estate, and to go to his executors, to whom he gives 20l. a piece, the surplus was decreed to the heir, and the decree was affirmed in Parliament, 2 Ventr. 359. If one seized in fee, makes a lease, or devises an estate for years, for payment of debts, if the profits of the lands surmount the debts, all that remains shall go to the heir, though not so expressed, and albeit the case of an executor.

The devise of the other lands to the plaintiff absolutely, is an argument against him, for if the testator designed him this estate too, why did he load one with a trust, and give him the other absolutely? And therefore the bill must be dismissed: *Swinb.* part 4. sect. 4. n. 6.

2 Vern. 247. decreed no trust as appeared by a manuscript report quoted by Mr. Robins, 138, 430. 252, 264. 1 Chan. Caf. 98, 310. 1 Vern. 21. Moor 7, Caf. 24. 123, Caf. 269. 2 Ventr. 56. 3 Lev. 259. 2 Leon. 41, 226. 3 Leon. 165, 130. Dyer 127. Cro. Jac. 74. 1 Rol. Ab. 844.

Saturday,

De Term. S. Trin. 1730.

† Saturday, June the 13th.

APPEALS AND REHEARINGS.

GARRET versus EVERS.

[† 364]
Case 189.
In Court
Lord Chan-
cellor.

MR. *Garret* being indebted to the plaintiff his brother 640*l.* devises to him a mortgage of 693*l.* (of which he had got a decree of foreclosure, but died before the account was taken, or the mortgagor absolutely foreclosed) in these words, ' And to my brother and his heirs, my other freehold estate ' in *Feversham*.'

Lord Chancellor.

The lands in mortgage being devised as real estate, shall be considered as such between the devisor and devisee, and therefore though this legacy is greater than the debt, it shall not go in satisfaction of it; but if assets fall short, it is still to be considered as personal estate, for the payment of debts.

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foreclosure
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name of his other freehold estate in *A*, this mortgage being devised as real estate, shall not go in satisfaction of a less debt, but if assets are deficient, shall be considered as personal estate, for payment of debts.

Monday, June the 15th.

LANSDOWN versus LANSDOWN.

Case 190.
In Court
Lord Chan-
cellor.

THERE were four brothers, the second dies, and the eldest brother enters upon his lands, the youngest brother claims a title, upon which they apply to *Hughes* a schoolmaster, their neighbour in the country, (who often acted as an attorney) for his opinion, who, upon consulting a book called *The Clerks Remembrancer*, gave it in favour of the youngest brother, because lands could not ascend; upon which the eldest brother agreed to divide the estate with the youngest, and declared he would rather do so, than go to law, though he had the right: Upon which, Mr. *Hughes* prepared deeds of lease and release of the moiety, which were executed by the eldest brother, and bonds of the penalty of 300*l.* which was computed to be the value of the moiety, conditioned for quiet enjoyment of their respective shares;

The second brother dies, and his eldest and youngest brother consult a school-master which of them had a right to his lands, he

shares; the youngest brother died, and the moiety descended on the defendant, the infant, his son and heir: And the Lord Chancellor decreed, that the bond, and deeds of lease and release, should be delivered up to the plaintiff, the eldest brother, being obtained by mistake† and misrepresentation, and that the defendant the infant, when he came of age, should convey nisi, &c. and his lordship said, That maxim of law, Ignorantia juris non excusat, was in regard to the public, that ignorance cannot be pleaded in excuse of crimes, but did not hold in civil cases.

gives his opinion in favour of the youngest, upon which they agree to divide the estate, the Court set aside the deeds of conveyance of the moiety, as being obtained by mistake.

That maxim, Ignorantia juris non excusat, relates only to crimes, and does not extend to civil cases.

Thursday, June the 18th.

Case 191.
At the
Rolls.

MOTIONS.

ANONYMUS.

A Motion was made, to direct an Excommunicato capi-endo against a prisoner in the *Fleet*, to the warden.

Master of the Rolls.

An attachment against a prisoner in the *Fleet* is directed to the warden, but an excommunicato capi-endo cannot, notwithstanding the words in the 5 of *Eliz.* The Sheriff or other Officer.

An attachment, in such a case, is directed to the warden of the *Fleet*, but that is not an original writ, and is always returnable into this Court; but I cannot grant this motion, because an Excommunicato capi-endo is a viscontiel writ; and the words of the 5 *Eliz.* That the Sheriff, or other Officer, will not warrant such an order, but are made use of for other reasons; the writ has no Non omittas in it, so the Sheriff, in case of a liberty, can only return Mandavi Ballivo; besides the writ runs into counties palatine, and then it is directed to the Chamberlain, or Chancellor, and by law, if the Sheriff is excommunicated, it is directed to the Coroner.

Saturday,

De Term. S. Trin. 1730.

Saturday, June the 20th.

CARTER versus CARTER.

Case 191.
At the
Rolls.

JOHN Carter devised 8000*l.* to his nephew *George Carter*, to be invested in a purchase of lands, in trust, to the use of *George* for life, remainder to trustees to preserve the contingent remainders, remainder to his first, and every other son in tail male, remainder to trustees, their executors, administrators, and assigns, for fifteen years, without impeachment of waste, with several remainders over, and a power to *George* to make a jointure, and the trust of the term is declared to be, in case there should be no issue male, ' for the raising portions for the daughter and daughters of ' the said *George*, to be paid at such times, and in such manner and proportion, and with and under such provisos and ' limitations as the said *George*, by any writing or writings, ' under his hand and seal, attested by two witnesses, should ' appoint.'

† A bill is brought by those in remainder against *George*, [366†] to have this money laid out in lands: *George* by his answer says, ' That he does appoint, and intends by a writing in ' due form to appoint, that all the rents and profits should be ' collected and applied for raising a portion for his daughter ' *Elizabeth*, in case he should have no other daughter, but if ' he should have more, the rents and profits were to be divided ' equally between them, payable at eighteen years of age, or ' marriage.'

George made an appointment of the whole profits for the jointure of his wife, and died without issue male, leaving *Elizabeth* his only daughter, having never made any appointment of the portion.

And on this bill, which was brought to have the money laid out in a purchase of lands, and the jointure established, two questions were made as to the portion of *Elizabeth*; Whether it would arise if the father made no appointment? and, Secondly, if an appointment was necessary, Whether the answer of *George* was a sufficient appointment.

Mr.

Mr. Rider for the defendant the daughter.

By the intention of the testator, the profits of the whole term were to go to her, if *George* had but one daughter: If a long term is carved out of the inheritance to raise portions, it cannot be supposed that the testator intended all the profits should be applied, but this is a very short term, and only sufficient for that purpose. If the words had gone no further than, *For the raising portions for the daughter and daughters of the said George*, the whole term would have been in trust for the daughter, and the words following do not alter the sense of the foregoing, for they give the father no power to appoint the sum, but only the time, manner, and proportion in which it shall be paid. In the case of *Davy and Hooper*, 2 Vern. 665, 2500*l.* was provided by settlement for the issue of the marriage, in such proportion as the husband should appoint; he died, leaving a daughter, and made no appointment, the 2500*l.* was decreed to her.

As to the second question, nothing of substance that is required in the appointment is omitted in the answer, and the circumstances are prescribed only to ascertain the fact, and to guard more effectually against fraud and imposition; but here the father does appoint upon oath and on record, which is stronger than by any matter in pais, or by deed, so that [+367] there + can be no doubt whether he intended to appoint. If a bill is brought to carry a parol contract into execution, and the defendant admits the contract, that admission shall bind him, and the Court will decree a performance, because then there can be no doubt of the reality of the contract, the end of the statute is answered, there is no danger of perjury in the evidence; and then why should not the Court allow this answer to be a good appointment, and dispense with the circumstances which were tacked to it, only to manifest that it was really executed, as it does in many cases, in favour of a wife, a child, or a creditor.

Mr. Attorney General contra.

The Court in the construction of a term in trust, never makes any distinction whether it be long or short: There is
no

no direction in the will to apply the whole profits: In the case of *Davy* and *Hooper*, a particular sum being mentioned, nothing was left for the husband, but to appoint the time and manner of payment of it; but here the father has a power to proportion, which is to be understood, not only in relation to the number of daughters, but likewise to the profits of the whole term, in case he had but one daughter, and he might appoint her a portion less than the profits, and she could not insist that she was intitled to the whole.

As to the second question, I admit that this Court does sometimes make good a defective execution of a power in favour of daughters; but never a non-execution: The power is, *By any writing or writings under his hand and seal, attested by two witnesses.* And by an answer to a bill in this Court, he says, he does appoint, and intends to appoint, &c. which shews he did not think his answer a sufficient appointment. This is not an appointment by him in writing; the answer is not writ or signed by himself, and is no more than a parol declaration; though it is more solemn and binding than a deed, as to the Court, and parties to the cause. And this is not like the case of a parol contract, where if the defendant does not plead the statute, but admits the contract, he shall be bound to perform it; for there the agreement is on a valuable consideration, which binds the conscience of the party, and seeing the contract is admitted, the end of the statute is answered, for there is no fear of perjury in examining to it; here the appointment is defective in all its circumstances, which were prescribed, not only for the sake of the party to whom the power was given, but also for the sake of the remainder-men, and though this Court will make good a defective appointment in favour of a daughter who has no provision, it never will if she is provided for; because then she cannot be considered as a creditor of the parent: In this case the father has devised to the daughter lands of the value of 20,000*l.* and so it is like the case where a copyhold is devised to a wife or child, if they are provided for, equity will not supply the want of a surrender. [+368]

Mr. Mead.

This power is given by a stranger to the father of the defendant, and is not a power reserved by the owner over his own estate, which is to be construed liberally. If the father had

had appointed a smaller sum than the profits, the trustees could have raised no more, and no case can be mentioned where the construction of the defendant has been put, even on terms created by settlements on marriage for raising portions, though the daughters in such a case are purchasers. If a power is given by deed, and it is executed by will, it is not a good execution; here the power must be meant to be executed by deed; and the answer is not an execution of it; and the case of the parol contract is no way applicable to this, yet I remember in one instance, where the mortgagor confessed by his answer a parol agreement, that the interest should be raised from 5*l.* to 6*l. per cent.* that Mr. Justice Tracy would not decree it contrary to the statute of frauds and perjuries, and in a late case your Honour would not supply the want of a surrender of a copyhold, devised to the wife, because she had 6*ol.* a year given her by the same will.

Master of the Rolls.

This term of fifteen years is not created for the raising any particular sum, or for the raising portions not exceeding such a sum, but in a very unusual manner for the raising portions.

It has been objected, that no distinction ought to be made, whether the term is long or short; yes, I think they may have different considerations, as they manifest different intentions in the testator, in one case, it is not reasonable to suppose he designed the whole profits should be applied, as it may be in the other, where they will only be sufficient to form a competent portion.

This term is not to commence 'till after the death of the wife; for the father having a power given him to limit a jointure, and he having executed that power, lets loose this estate for life, precedent to the estates to his first and every other son, and this term being subsequent to those limitations, must be postponed to the jointure.

[4369] † I am of opinion that this whole term is allotted for the raising the portions, and that it was the intention of the testator
*A devises 8000*l.* to B,*
to be invested in a purchase, in trust, to the use of *B* in strict settlement, remainder to trustees for fifteen years, in trust, 'if *B* have no issue male, for the raising portions for the daughters of *B*, to be paid at such time, and in such manner and proportion, and with and under such provisos and limitations as the said *B* by any writing or writings under his hand and seal, attested by two witnesses, shall appoint.' A bill is brought against *B* to lay out the money in a purchase; *B* in his answer says, 'that he does appoint, and intends by a writing in due form to appoint, that all the rents and profits shall be collected and applied for raising a portion for his daughter *C*, in case he should have no other, but if he should have more, the rents and profits were to be divided equally between them, payable at 18, or marriage.' *B* made no appointment, and died without issue male, leaving *D* his only daughter, the whole profits of the term belong to *D*, though the father made no appointment.

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tator to appropriate the whole profits, and it is no objection to say, he might as well have devised a term to the daughters for fifteen years, because then he could not have left the father this power to adjust the proportion, the profits should be paid to them in, in case he had more daughters than one.

The term is upon trust for raising portions, &c. if no more had been said, there could be no doubt but that the whole profits belonged to the daughter, the term being but fifteen years, and proper for that purpose. But he goes on, *To be paid, &c.* Proportion cannot relate to the profits, in case there should be but one daughter, but must have a reference to the portions, if there were more than one; and it was put in, not with an intention to impower the father to lessen her portion, if he had but one daughter; but if he had several, to proportion it among them, as he should think they deserved: The term is in trust for raising portions, which gives a present interest, and the civil law and ours allows a distinction when the time is annexed to the legacy, and when to the payment only. Suppose he had said, the portions shall be raised by the profits, to be paid, &c. this could be only directory as to the time of payment, and the proportion, in case he had several daughters; and if the estate had been purchased, as the term was without impeachment of waste, the daughters might cut down the timber, and this was in the view of the testator, he was making a provision for his nephew and his children, and if he had sons, he gave them an absolute power over the estate, and to bar all the remainders.

The second question is, if an appointment is necessary to the raising and charging this portion; if the answer is a good appointment, it must be admitted that this is not such an appointment as the will directs, though a writing may be under hand and seal, and not a deed for want of delivery: But the question is, Whether the defendant, being a daughter, is not intitled to have this defective execution made good by this Court? But it is said, here is no execution, and equity will not supply the want of it, either in favour of a child or a creditor, but I think there is a defective execution, and that the circumstances were not added in favour of the remainderman, for the power does not charge his estate more or less, but only ascertains the time and proportions in which what was before charged is to be paid. The answer says, he does appoint, so is a present appointment, and the words, *And*

Or if an appointment was necessary, the answer was such a defective appointment as a Court of equity would make good in favour of a daughter.

[1730] intends, &c. do not derogate from that actual appointment, or shew that he thought it would not avail, but only that he would afterwards execute it in the precise form. If such a power was given to raise portions, a parol appointment would not be good in equity, even before the statute of frauds and perjuries, but the question is, Whether this answer is not such a manifestation of the execution of his power, as this Court will make it good, as well as decree a parol contract admitted by the answer; for the statute was made to prevent perjury in the evidence; but there is no occasion to examine where the contract is admitted, and I think this case is the same, for he could have done nothing that would have made his intention to appoint more manifest than this answer. Where a younger child comes into equity to have the want of a surrender of a copyhold supplied, he must be wholly unprovided for, or have but a very slight provision, though there have been great variety of opinions upon this point, and where all the children have been well provided for, the Court has supplied the want of a surrender against the heir, because the father was the best judge in what manner to provide for his children; and I believe Lord Cowper was the first who refused it, because the younger child was greatly provided for, and the heir had little or nothing; but I have never known this distinction made, or that the Court would enter into the consideration of it, where a younger child has applied to have a defective execution of a power made good. So I am of opinion, that the whole profits of the term belong to the daughter, after the death of the mother.

Equity will not supply the want of a surrender of a copyhold against the heir, in favour of a younger child, unless he has none, or a very small provision.

Nelf. 8vo. Rep. in Canc. 113. But will make good the defective execution of a

power, whether he is provided for, or not. *Ant. Caf. 29. 2 Vern. 163, 265, 69, 564, 609, 310, 1 Vern. 37, 40, 219. 1 Chan. Caf. 103, 159, 263, 264. 3 Chan. Caf. 55. Nelf. Fol. Rep. in Canc. 28, 273.*

Wednesday, June the 24th.

Case 193.
At the
Chancel-
lor's house.
Lord Chan-
cellor.

THORNICRAFT versus HARWOOD.

Mr. Attorney General for the plaintiff.

SIR *John Thornicraft*, the father of the plaintiff, being about eighty years of age, and his son at a small allowance of 40*l.* a year, in 1717 became acquainted with the defendant *Minsbul*, who pretended in friendship to him, to grant him an annuity of 400*l.* a year during the life of his father, for which

which the plaintiff covenanted to transfer to *Minsbul*, or order, 10,000*l.* South Sea stock, six months after the death of his father, and *Minsbul* entered into a bond of 10,000*l.* to the plaintiff, for the payment of the annuity. Afterwards *D'Costa*, in concert with *Minsbul*, advanced 4000*l.* on the covenant, whereby *Minsbul* intimated to the plaintiff, he should be better able to supply his necessities, and pay him the annuity; the money was paid to the plaintiff in notes, and a draft on the bank, but none of it came to the plaintiff's hands, and the plaintiff, according to his agreement, covenanted to transfer ten thousand pounds in South Sea stock to *D'Costa*, six months after the death of his father, and afterwards, on his desire to have the security altered, and advancing 500*l.* [†371] more, the plaintiff entered into a bond of 18,000*l.* to *D'Costa*, for the payment of 9000*l.* after the death of his father, but the plaintiff received but 50*l.* of this money. Sir *John*, the father, soon after died, and *D'Costa* went beyond the seas, and a commission of bankrupt being taken out against him, *Harwood* the assignee brought an action on the bond; and this bill is for relief, on payment of what was really advanced by *D'Costa*, with interest, and for a perpetual injunction; and your lordship was pleased to grant us an injunction, upon our giving judgment, subject to the order of the Court; and the question is, Whether we are to pay the 4000*l.* advanced by *D'Costa*, or only 430*l.* which is all the money came to our hands? This bond was obtained by a gross fraud, and without any consideration; *Minsbul* gave no security but the bond for the annuity, though he agreed to give the plaintiff real security, and he never received but 430*l.* and so this is within the reason and authority of the cases of extravagant bargains with young heirs, where the Court have always set aside unreasonable securities, taken for annuities during the life of the father, as against conscience. *Berry versus Pit*, 2 *Vern.* 14. The plaintiff's father being tenant for life of a great estate, which by his death was to come to the plaintiff in tail, in 1675 he borrowed 2000*l.* of the defendant, and confessed two judgments of 5000*l.* each, with defeasances, that if the plaintiff outlived his father, and within a month after his death paid the defendant 5000*l.* and if the plaintiff should marry in the life-time of his father, and should from his marriage, during his father's life, pay the defendant interest for his 5000*l.* the defendant should vacate the judgments; and that it was the intent of the parties, if the plaintiff did not outlive his father,

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that

that the money should not be repaid. The plaintiff's father died in 1679, and the bill was to be relieved against the said judgments, upon payment of the money lent, with interest; and Lord *Nottingham* did not think fit to relieve the plaintiff against the bargain itself, without paying the 5000*l.* and interest, from a month after the plaintiff's father's death; but this decree was reversed by the Lord Chancellor *Jefferies*, who decreed the defendant to refund all the money, except the 2000*l.* lent, and interest.

Mr. Solicitor General.

[+372] The question is, What relief we shall have against this bond? The assignee insists to be paid double the sum advanced, because of the contingency that the plaintiff would survive his father; but in the case of *Berry* and *Pit* this was determined not to be a sufficient reason, and that the clause, that the money should not be repaid, if the father survived, was put in only to colour the bargain, for if the heir dies in the life-time of his father, he is worth nothing, and is of course unable to pay. We have been notoriously over-reached by *Minsbul*, and if *D'Costa* was concerned in the fraud, we ought to be relieved, though none of the money came back to him; it was unconscionable and fraudulent in him to demand 9000*l.* and gives a colour to believe he was privy to the whole fraud; and though he was not concerned in the fraud, the plaintiff ought not to be charged with more than came to his hands, 1 *Vern.* 467. The plaintiff having jointly with other young heirs, entered into securities for goods taken up at an extravagant price, the Court declared, he should not be answerable for his companions, but liable only to so much of the goods as came to his own hands. 2 *Vern.* 77. The plaintiff, with other young heirs, being drawn in by *Styshead*, with the concurrence of Sir *William Smyth*, to buy goods at an extravagant price, and to accept of assignments of bad securities, and jointly to enter into securities for the payment of the money agreed on, the bill was to be relieved against those securities, and the Court declared, that the plaintiff should be liable only to so much of the goods as came to his own hands, and should not be answerable for his companions; here we were not jointly bound with *Minsbul*, but were defrauded by him, and he is in prison, and worth nothing.

N. B. Lord *Nottingham* in one day made eleven decrees against *Styshead*, and after the first decree, the second cause being opened, and so every one in their order, and the council

council informing his lordship, that every cause was of the same nature, he ordered the register to draw up the same decree in each cause mutatis mutandis.

Mr. Verney for the defendant.

These bonds have been adjudged good at law, because of the hazard, and are of the nature of bottomry bonds, on one contingency the obligee is to have nothing, on the other double the money he advanced, and this Court will never presume a fraud, especially when *D'Costa* really advanced the 4000*l.* to the plaintiff, as is proved by an account found among the papers of *D'Costa*, made up and signed by the plaintiff.

Lord Chancellor.

I think all bonds in general entered into in expectation of the father's death, ought to be discountenanced, and are not like a fair adventure on bottomry; so that the plaintiff must certainly be relieved; but the question is, in what manner? There is no doubt but *D'Costa* paid the 4000*l.* to the plaintiff, but whether there appears sufficient proof that he was concerned in the cheat, that it should not remain with him, he was not originally in the contrivance, but *Minshul* was wholly concerned in it, and little credit is to be given to his testimony, where it is not supported by other circumstances. The sum of his evidence is, that in 1717, *Biron* brought him acquainted with the plaintiff, and he agreed with him, in order to supply his necessities, to pay him an annuity of 400*l.* a year during his father's life, and the plaintiff was [†373] to covenant to transfer to him or his assignee, 10,000*l.* South Sea stock after the death of his father; that he, *Helbert*, and *D'Costa*, did afterwards concert to cheat the plaintiff; *D'Costa* was to advance 4000*l.* and the plaintiff was covenanted to transfer 10,000*l.* South Sea stock to him (but he afterwards swears that *D'Costa* advanced the money on the bond, and not on the transfer of the security) and that the plaintiff was not to keep this money to his own use, but he warily avoids saying for whose use, nor he does not swear that *D'Costa* was to have any of it, and therefore he is not to be affected with the transaction. And he might pay part of it to *Minshul*, as agent to the plaintiff, who acquainted him that he wanted money, and would therefore transfer the security to *D'Costa*, who was ready to advance it, and *Minshul* was

The plaintiff borrowed 4000*l.* and entered into a bond of 18,000*l.* to pay 9000*l.* after the death of his father, who was then about eighty years of age, the Court relieved him against this bond, on payment of the 4000*l.* and interest, was to retain the money to supply the plaintiff's occasions, but this is all talk between him and the plaintiff only; and he does not say that *D'Costa* knew of it, and *Minsbul* was to have 2000*l.* to pay *Helbert* several sums out of it, which he agreed for, before he would introduce him to *D'Costa*, which he does not pretend *D'Costa* knew of; therefore on the plaintiff's payment of 4000*l.* and interest, the defendant *Harwood* is to acknowledge satisfaction on the judgment, and neither side is to have costs.

1 Vern. 167. The plaintiff insisted he ought to have costs, because, 271, 141. though the assignee was a stranger to this transaction, he demanded the 9000*l.* and the defendant claimed costs, because the plaintiff was relieved from a penalty.

2 Vern. 27.
2 Chan. Caf. 120, 136.
Signing and sealing is a good publication of a will.

Signing and sealing is a good publication of a will.

Cafe 194.
At the
Rolls.

BIRCH versus BAKER,

Mr. Solicitor General for the plaintiff.

[+374]

MR. *Lockington* devised a moiety of two thirds of the residue of his South Sea stock, India, Bank, and Orphan stock, leases, East India, and South Sea bonds, mortgages, and other his personal estate, to his sister Mrs. *Colchester*, who, before the said moiety was paid to her, made her will, and as for such share and proportion of her brother *Lockington's* personal estate, she devised all her said share to trustees, to pay 200*l.* out of it to her grandson *Birch*, and the residue of the money arising by the sale of it, was to be put out at interest, for the benefit of her grand-daughter, till she came to the age of twenty-one years: After the making the will, the executor of Mr. *Lockington*, at the desire of Mrs. *Colchester*, and the legatee of the other moiety came to an account, and their respective shares were divided, and paid to each of them, and Mrs. *Lockington's* moiety consisted of several East India and South Sea bonds, and Orphan and Bank stock, part of which she afterwards sold in her life-time for 719*l.* and the question is, Whether that is an ademption of so much of the legacy; or whether we shall not have a satisfaction out of her assets pro tanto.

I shall

I shall lay it down as a rule, that an ademption is not to be presumed, but must be either expressed, or necessarily implied, something must be done to shew the intention of the testator altered or otherwise, though the thing is changed, there is no ademption. Your Honour at a former hearing determined, that the receiving the legacy did not take it away, for that did not shew an alteration of her intention, but it was necessary to ascertain the share, and prevent survivorship; so the present consideration is, whether her sale of part of it afterwards as a divided moiety, is an ademption of so much. This is not like the devise of a horse, or other specifick thing, which if the testator sells afterwards, the legacy is gone; for at the time Mrs. Colchester made her will, she was intitled to nothing in specie, and she devised no specifick thing, and the species afterwards allotted to her were not the things she had before devised, so that her disposing of any of them afterwards, was not an alienation of any specifick thing she had devised, but she designed by her will that her moiety should be turned into money, and 200*l.* of it paid to her grand-son, and the residue to be put out at interest for the benefit of the grand-daughter; so that she does not devise the share itself, but the money arising by it; and then, since ademptions are not to be presumed, what is there in this case that shews an alteration of her intention? not the turning it into money, for that was what she designed by her will; so that this was only pursuing that intention, and preparing things for her trustees, 2 *Vern.* 681. I give my uncle *Orm* 500*l.* viz. 400*l.* due on bond, and 100*l.* in money, the testator after receives part of the 400*l.* and takes a bond for the other part: This was adjudged by Lord *Hardwicke* no ademption of the legacy, because nothing appeared to shew an alteration of intention. It cannot be imagined when Mrs. Colchester made her will, she considered herself as intitled to a sixth part of every species, and then her will cannot be understood as a devise of a sixth part of every species; but she disposes of her sixth part, be it what it will, and orders it to be converted into money; if her receipt is no ademption, why should her sale of it? which is not inconsistent with her will, but carrying on the intention of it.

An ademption of a legacy is not to be presumed.

Stwinb. part 3. sect. 5. n. 2. I give A 500*l.* viz. 400*l.* due on bond, and 100*l.* in money, the testator after receives part of the money, and takes a bond for the residue, this no ademption of the legacy.

† Mr. Attorney General for the defendant.

[†375]

This devise of Mrs. Colchester is the same as if she had devised the particular sorts, and she only expresses herself otherwise

wife for shortness; her said share is given to the trustees, and the turning of it into money is part of the trust; and not of the bequest; and that direction shews, she did not apprehend she was intitled to money, and, if after making her will, she had not called it in, her trustees would have been intitled to a share of each species, which shews the will amounts to a devise of the particular kinds, and not of so much money: I allow an ademption is not to be presumed, but must be shewn by some fact, that takes away the thing, and differs from a revocation, which takes away the bequest, as a later will, or codicil, and the direction to the trustees to sell, does not alter the case, because this was a sale by herself in her lifetime. If the testator devises a bond debt, he designs the legatee the money, yet if he afterwards call it in, the legacy is lost. In the case of *Orm and Smyth*, the legacy of 500*l.* remained, though one of the funds was altered, and the *viz.* made the difference, for the 500*l.* was absolutely given. The executor of Mr. *Lockington*, if the ready money was sufficient, could not turn these species into money, for the payment of the debts; but the residuary legatees were intitled to the specifick shares. Lady *Dover* devised the residue of her personal estate, which consisted of leasehold houses, to a *Roman Catholick*, and your lordship decreed it to be distributed among her next of kin, because the testatrix having left money sufficient to pay her debts, the devise was intitled to the very species, and the executor could not sell them, and she was disabled by the statute to take the leases. Therefore this devise is the same as if she had devised the particulars by name, and the testatrix having afterwards disposed of part of them: As to so much of them the legacy is gone, and it is become part of her own estate. Suppose she had given them away, could the legatee have had satisfaction for them out of her assets?

If the testator devises a bond debt, and after calls it in, the legacy is lost.

Ant. Cas. 8. *A* devises the residue of her personal estate, which consisted in leasehold houses, to *B* a papist, and left sufficient to pay her debts, *B* is intitled to the houses, and the executor cannot sell them, and being disabled by the statute to take, the residue shall be distributed among the next of kin of *A*.

Master of the Rolls.

An ademption is an implied revocation, a declaration of the intention being altered, and must operate as a revocation; the civil law distinguishes, where a legacy is paid in by the debtor, or coercion of law, which is no ademption, because no change of mind appears, and where it is called in by the testator, in which case the legacy is gone: The question

tion then is, if here does not appear a sufficient intention in the testatrix to alter her mind? The brother's estate consisted chiefly in securities, and he gives a moiety of two thirds of the residue of it, enumerating the particular species of which it consisted, to Mrs. Colchester, and she by her will gives this her undivided share, + &c. afterwards a division is made of the brother's estate and stock, and bonds are allotted to her, part of which she sells, and keeps no account of the produce, and the grand-daughter would have her estate debtor to her for so much. Mrs. Colchester, if the debts were paid, might insist upon receiving the specifick estate, and have an injunction of this Court, to restrain the executor from touching or selling the species, and to have an equal share of every species with the other legatee, and not have one set off against the other, unless it was a prejudice to the estate: The executor, for instance, could not have given the leasehold estate to one or other of them, but each might say, I'll have a part of the real chattels. She might have sold her undivided share, and the vendee would have stood in her room, and that would have been an ademption, and will coming to a division of it, and then selling part of it, make any difference? Mrs. Colchester, after making her will, first came to a division and receipt of her share, which did not amount to an ademption, because it was done in concert with the other legatee; and by this step she put it more in her power to dispose of it, and accordingly she afterwards sells part of it, and keeps no account of the produce, but if she had, and the account had been framed in such a manner as shewed her intention, that this should still be considered as part of her brother's estate, it might then be said, she was only carrying on the intention of her will, but having blended the money with her own estate, it shews her intention, that it should be no longer considered as any part of her brother's estate. So I am of opinion, that this sale is an ademption pro tanto; she had a property in her specifick undivided share, and if she had sold it before the division, that would have been an ademption, and why should it not be after division? which enabled her the better to sell it, and she has kept no account of the money.

Legatees of the residue, are intitled to the species of which it consists, if there are other assets sufficient to pay the debts, and may have an injunction to hinder the executor from selling them, and are intitled each of them to a moiety of every species, if they can be divided without prejudice. A devised a moiety of his South Sea stock, leases, South Sea bonds, mortgages, and other his personal estate to B, who before he received

his legacy, made his will, and devised this moiety to trustees, to sell and pay 200*l.* to C, and the residue of the money to D, afterwards B and the legatee of the other moiety come to an account with the executor of A, and their shares are set out and received, and the stock and bonds are allotted to B, who sells part of them in his life-time, without keeping an account of the produce. This is an ademption of the legacy to D pro tanto.

But receiving his share was no ademption, for it did not shew any change of his mind, but was done in concert with the other legatee, to ascertain their moieties, and prevent survivorship. 1 Vern. 95. Swinb. part 7. ch. 20. Raym. 325. 2 Vern. 521.

MORGAN versus MORGAN.

Case 195.

At the

Rolls.

Eodem die.

THIL testator made his will, *inter al*, in these words;
 ' I give and bequeath to my grand-mother all my personal
 ' estate, of what kind, nature, or quality soever, which
 ' I shall be intitled to, as administrator to my father, or
 ' otherwise howsoever, exonerated and discharged of the
 ' payment of all my debts and funeral charges; and subjects
 ' his lands to the payment of his debts and funerals.' The
 defendant insisted that this was a specifick legacy discharged
 of the debts of the son, but not of the father, and would
 take in only the distributive share of the son. The plaintiff,
 that by the words and intention of the testator, all the personal
 estate of the father, as well as of the son would pass, and dis-
 charged of both † their debts, for the distributive share did
 not belong to him as administrator, but he had a right to it
 if he had not taken out administration, and the words sig-
 nify all the legal estate he was intitled to, by taking out the
 letters of administration, which as he might dispose of in his
 life-time, so he might by his will, which will amount to a
 devastavit, and then the debts of the father will become his
 debts,

[†377]

Master of the Rolls.

A man can-
 not commit
 a devastavit
 by will, but
 nothing
 passes, but
 what the
 testator may
 lawfully
 grant.

' I give to
 ' A all my
 ' personal
 ' estate
 ' which I
 ' shall be
 ' intitled to
 ' as admini-
 ' strator
 ' to my fa-

A man, by law, cannot commit a devastavit by his will,
 but only by act executed in his life-time; for the testator can
 give nothing away by a devise, but what he lawfully may;
 and therefore only his distributive share of the personal estate,
 discharged of the debts, can pass. The debts are *Æs alienum*,
 not the personal estate of the father; and he says all my per-
 sonal estate, not all his personal estate. And even if the son
 by committing a devastavit had made them his debts in con-
 struction of law, they should not be considered as such in
 this will, but his estate, &c. is only his share under the sta-
 tute, of so much as remains after payment of the debts, but
 if he has wasted the assets of the father, so that there are not
 sufficient to satisfy his debts, as to so much they are the son's
 debts, and must be paid out of the personal estate.

ther, or otherwise howsoever, exonerated and discharged of all my debts and funerals;
 and the testator subjected his lands to the payment of his debts and funerals. Nothing
 passes by these words that belonged to the father, but the distributive share of the son,
 and tho', if he wasted the assets, by construction of law he made his father's debts his
 own, yet the words of this will must not be taken in that sense, but they must be paid
 out of his personal estate. *Sacinh.* part 3. sect. 6, §. n. 2. *Bro. tit. Adm.* n. 7. *Fitz.*
same tit. n. 3. *Plowd.* 525, 526. *Wentw. Off. of Ex.* 17, 26.

Thursday,

De Term. S. Trin. 1730.

Thursday, June the 25th.

WARD *versus* Sir JOHN EYLES.

Mr. Attorney General for the plaintiff.

Case 196.
At the
Chancel-
lor's house.
Lord Chan-
cellor.

A BILL was brought by Sir *John Eyles*, and the other trustees for the sale of the estates of the late Directors of the South Sea Company, against Sir *John Blunt* and Mr. *Ward*, to have 40,000*l.* repaid, and 1000*l.* South Sea stock transferred to them by Mr. *Ward*, which Sir *John Blunt*, one of the late Directors, had paid him for the purchase of an estate in *Gray's-Lane* and *Wapping*, in the year 1720, and to set aside the said purchase, as fraudulent and subsequent to the time allowed by act of Parliament. By the articles of agreement, Sir *John Blunt* was to pay 20,000*l.* at a day certain, 20,000*l.* when the conveyances were executed, and 10,000*l.* by a transfer of 1000*l.* South Sea stock with the dividends, and the purchase was decreed to be set aside, and the money repaid, and the cross bill is to have the purchase established. The defendants obtained an order to refer the depositions for irregularity, and the Master has certified that they are irregular, because the witnesses were examined to the same matters that were in issue in the original cause, and they were settled by a decree of the Court. The great question in the original cause was, When the articles and conveyances were executed? Mr. *Annesly* being examined, when Sir *John Blunt* laid the articles before him, but not the particular day, deposed it was some time in the winter 1720, and we had an order to examine Mr. *Pearce* *viva voce*, at the hearing, but your lordship was of opinion, we could not examine him to the time. But Mr. *Annesly* being examined in this cross cause, swears, that on looking over the book in which his fees are entered, he finds that the articles were laid before him for his perusal, 6th *January* 1720, which was before the disabling act took place; and Mr. *Pearce* swears, Mr. *Ward* shewed him the articles in *August* 1720; the witnesses are persons of undoubted reputation, and have not proved any thing that tends to contradict what was proved in the former cause, but only what tends to explain and illustrate it; and though I allow that the Court is very tender of examining witnesses after publication, yet they admit of auxiliary or explanatory proofs. *Keilw.* 96, a, b. As where *A* and *B* are supposed to have done such an act, the proof of which is but obscurely set forth

forth in the witnesses' depositions, they not giving any reasonable testimony of their knowledge touching the performance of such act in any particular: Now, if such obscure depositions be published, and the deponent happen to die, others may well depose that they were present at the performance of that act, and so explain the first depositions; but if they depose any thing contrary to the former depositions, or which may alter any part of the substance thereof, such deposition is void, and ought to be rejected. *Hardr. 180. Sir John Langham versus Lawrence.*

Mr. Wills.

The Master has given two reasons why the depositions are irregular, because the witnesses were examined to the same matters in the original cause, and because all those matters were settled and determined by the decree; but this last reason is only proper for your lordship's judgment, and is out of the submission to the Master, the defendant may think the matter by the original bill is not brought properly before the Court, and may be willing to state his own case; but by this argument, no cross cause could be brought to hearing, after a decree in the original cause. The other reason goes to all the evidence, and so is in effect to say, we shall not bring our cause to a hearing, because we cannot read our depositions. It is not proper to examine witnesses to contradict what was sworn in the other cause, but it is agreeable to reason, and the practice of the Court, that where any matter is doubtful in the original cause, to allow auxiliary [1379] proofs in the cross cause to explain it, and this is the reason, why the Court in many cases directs an issue, yet that is liable to the same objection, that the same witnesses may be examined to the same points; indeed if they swear contrary to their depositions, no weight will be laid on their evidence, and so your lordship at the hearing, may give what credit you please to these depositions where they contradict the former: The decree was made, not because the evidence was against us, but because we had not made out the facts necessary to our defence, nothing was proved against us, but we had not proved enough: All we have done in this cause is, to explain and supply what was doubtful, but not to contradict even the plaintiff's evidence. 1 Can. Cas. 228. On an appeal upon a commission of charitable uses, the question was, Whether certain houses were parcel of *Bridewell*, or of *Dorset*

Dorset house? And the Court directed a trial of law, and a commission was moved for, to examine a witness eighty years old, who was not discovered before, and unable to travel: The motion was opposed, because of publication being past; and the Lord Keeper said, though the rule of non-examination after publication had been strict in this point, yet the Court was the judge, and so he ordered a commission. By this it appears, that is discretionary in the Court to grant a commission after publication; and though that was an examination after publication in the same cause, that does not make the case different from ours, for the reason why an examination is not allowed after publication, for fear to introduce fraud and perjury, when the parties know where the cause pinches, is equal, whether the examination is in the same, or another cause.

Mr. Mead.

The trustees by their answer to our cross bill say, that the articles or the indorsement of the payment were not executed when they bear date: These then being matters particularly put in issue in this cause, and publication being past in the original cause before their answers came in, it was proper, and not inconsistent with the rules of the Court, to examine to these points, there was no examination in the original cause to the particular time the articles were executed, and upon the hearing *Mr. Justice Price* was of opinion, that there ought to have been a further inquiry; and the witnesses in this cause give their reasons from written evidences why they can remember the particular day; so this is no more than proving exhibits, and offering explanatory evidence, and giving the witnesses an opportunity to see whether they can find any thing to explain, and fix their evidence: *Mr. Mason* says, he remembers it to be the seventh of *September*, because on that day he received a note from *Sir John Blunt*, drawn on the Sword Blade Company, which he makes an exhibit: So *Mr. Annesly* in his former examination said, sometime in the [+380] year 1720, now he sets out the day, and *Mr. Pearce* is positive from a letter that he saw and perused the articles in *August*; and his deposition is not irregular, because the same witness cannot be twice examined, for he was not examined in the former cause. It is very usual on application, to examine a witness over again before the Master, after a hearing to matters of account and the like; and this being an examination in another cause, there was no reason to apply for leave.

Mr.

Mr. Fazakerly.

Here is an exhibit bearing date in *July*, which is to be presumed was executed at that time, and we have only examined to fortify that presumption; and since we have a right to proceed in our cross cause, it is reasonable we may examine to all the facts necessary to make out our case. The witnesses have refreshed their memories by written entries, which cannot mistake; and if your lordship on application would have granted this examination in the same cause, as being just and reasonable, of common right we have liberty to examine to it in the cross cause without leave. When a Court directs an issue, it is liable to the same objections as this examination: If these depositions should be suppressed, we should be without remedy, though the justice of the case was with us: If your lordship permits them to be read, you may give what credit you please to them; and they will not conclude the property of the defendant; but if your lordship pleases you may direct an issue.

Mr. Solicitor General for the defendants.

The only question is, Whether the examination in the cross cause is regular. In 1723 we brought our bill, and in *May* 1727 the cross bill was filed, publication past in our cause the 9th of *July* following, and our answer came in the *December* after. We set out by our bill, the whole fraud and contrivance, that the houses were set by ward upon fictitious leases to *Mason* at a 1000*l.* a year rent, and fifty years purchase given for them by Sir *John Blunt*; that the agreement was not carried into execution 'till after the 5th of *January* 1720, and that the articles were antedated, and this was the most material point in issue in that cause: The cross bill relates to the same individual thing, to discharge the claims of the trustees, and to quiet the plaintiff in the enjoyment of the money and stock, and is as much by way of defence only, as their answer.

The cause was heard four days by your lordship, assisted by the Lord Chief Justice *Raymond*, the Master of the Rolls, and Mr. Justice *Price*, and your lordship declared the whole
[1381] + proceedings to be fraudulent, and decreed, that *Blunt* and *Ward* should account for the money and stock; and this decree has been signed and inrolled, an account taken, and
a report

a report made: Our answer to the cross bill came in before the decree, or we might have pleaded it in bar to their relief, for a decree can never be varied by a new bill, but by a bill of review only, because the same Court might make contrary decrees on the same equity, and the parties would be intled to the aid of the Court to carry them into execution, so that the process of the Court would fight with itself: They say, as they have a right to go on with their cause, they have a right to prove their case, but they cannot examine to the same matter after publication, either in the same cause, or in a cross cause, because they equally see what is sworn; and on occasions that constant application to the Court to enlarge publication in the original cause, till they have examined their witnesses in the cross cause, that they may not be precluded from examining; and the reason is to prevent perjury, and the contradiction of evidence, to misguide the Court by a misrepresentation of facts, and the eliciting of evidence by explanation. As this is a general rule, let us see whether there is any reason to dispense with it in the present case; they say they examine only to illustrate the former evidence, and to a point that was thought not material in the other cause; but this was the principal point in issue in that cause, and a fact they themselves examined to; but if, after a cause was heard, and the Court laid hold of a defect of evidence, the party might examine to the same matter in a cross cause, it would be the strongest temptation to make out and supply what they find material, and the examination is equally introductive of perjury, whether it contradicts the former evidence, or carries it further upon their finding it material; and they draw their arguments from what the witnesses have sworn in this examination, which cannot be considered; for the question is, Whether the same or new witnesses have been examined to the same matters that were at issue in the original cause, not what they have sworn on the examination: We opposed the examining Mr. *Pearce* vivâ voce, in the other cause to the time; because they could examine him only to the execution, and the reason is, because such a witness may have seen the depositions, and not to save the register a little trouble, but there is not that room for perjury, when he is examined only to the execution: So these depositions are not warranted by the course of the Court, nor by the reasons offered for the plaintiff. As to the cases that have been quoted, it is not said in *Keilway*, whether it was agreed by the Court, or by the council

A decree inrolled cannot be varied by a new bill, but only by a bill of review, or by appeal.

Yonay, pro an exh vivâ voce the hear, but you examine witness only to execution.

cound at the bar, as their opinion, and there the depositions were obscure, and the witness dead, but I am sure the contrary opinion has been held ever since, and their going so far backs a strong proof that the modern practice is against them. The case in *Hardress* is nothing to the purpose; a [13^o 2] trial was directed, and a bill brought for a discovery, and the defendant demurred, because the plaintiff ought not to have supplemental proof in the same cause, and the demurrer was over-ruled; here they would have supplemental proof in the same Court, and to overturn a decree, but it is proper to apply for evidence on a trial, and the one case has no relation to the other. They say the Court after publication often directs issues on the hearing; yes, and the defendants in the former cause pressed for a trial, but your lordship, and his Honour the Master of the Rolls, were of opinion against them, from the extreme danger of perjury, after the parties have measured their strength; and because this whole case was a complication of fraud; and if the Court at that time would not grant them what it often does to the suitors, there is greater reason to adhere strictly to the rules of the Court.

Lord Chancellor.

You need not go on. There is no rule in this Court more sacred, than that witnesses shall not be examined in another cause, to matters in issue in a former: It is sometimes done on an appeal in the spiritual Court in the same cause, viva voce, and informandam Conscientiam Judicis, because the Court are to satisfy themselves all the ways they can. Cross bills were at first unwillingly allowed of; the Court foresaw great inconveniences from them, and the rules relating to them were introduced by Sir *Nicholas Bacon*; they are in the nature of a defence, and were allowed of, that the party might more fully have the benefit of somewhat he could not so well profit himself of being a defendant, though it was at issue in the other cause, but they cannot examine to the same matters after publication, as evidently appears from the motions that are every day made to enlarge publication in the original cause; but the plaintiff has been guilty too of a breach of another rule, that a cross bill is to be brought, time enough to examine to, before publication passes in the original cause, the answer came in before the decree, so they could only answer and deny the facts, and if any thing happens after that hinders an examination to them, that cannot be helped: The decree has established these facts, and can be altered

Cross bills are in nature of defence and were first allowed of the party might state his own motion for his advantage that as a defendant.

altered only by a bill of review, or an appeal, and the matters in issue in the original cause, or settled by the former decree, cannot be examined to in the cross cause; so the exceptions to the Master's report must be over-ruled.

Matters examined to in the original cause, and publication past,

or settled by the decree, cannot be examined to in the cross cause. *Curf. Canc.* 323, 324, 327. *1 Chan. Caf.* 234. *Keilw.* 100, a. *Hardr.* 120. *Pract. Reg. in Canc.* 43, 362, 363. *Introd. to Clerk's Tut. in Canc.* 20, 74. *2 Chan. Caf.* 75, 79, 217. *2 Vern.* 409. *1 Vern.* 253. *1 Chan. Caf.* 155, 25, 233.

† *Friday, June the 26th.*

STANLEY *versus* STOCK.

TWO were jointly and severally bound; both died, and the plaintiff, who was administrator to one of the obligors, filed a bill against his heir, and it was objected at the hearing, that the representatives of the other obligor ought to have been made parties; but the objection was over-ruled, because the obligee may sue them jointly or severally in this Court, as well as at law.

[†383]

Cafe 197.
At the
Chancel-
lor's house.
Lord Chan-
cellor.

If obligors are bound jointly and severally, the obligee may sue them here severally, as well as at law.

2 Lev. 74. *3 Lev. Hait versus Langham.* *Suppl. to Wrenw.* 357.

Thursday, July the 2d.

APPEALS AND REHEARINGS.

HAWKINS *versus* CROKE.

Mr. *Verney* for the defendant.

Cafe 198.

At the
Chancel-
lor's house.
Lord Chan-
cellor.

THIS cause comes before your lordship on an appeal, from a decree of his Honour the Master of the Rolls, and on exceptions taken to the Master's report, of the regularity of issuing the sequestration; but as, if the decree is reversed, that will put an end to the other question, I shall, according to your lordship's commands, confine myself to that. On the 20th of *February* 1728, a sequestration issued for want of an answer, and on the 28th of the same month, the plaintiff obtained an order to set down the cause on the sequestration, that the bill might be taken pro confesso; when the cause came on to be heard, it being alleged for the defendant, that he was willing to answer, the cause was adjourned

Ant. Caf.
158.

[1384]

If a defendant puts in four insufficient answers, he is to be examined on interrogatories in vinculis. But not if he puts in a bad plea and three insufficient answers. If the defendant is in custody, and will not answer, he is to be brought up by several habeas corpus, before the bill shall be decreed pro confesso.

to the 7th of *March*. On the 4th of *March* we put in an answer, which the plaintiff excepted to, and on the 7th of *May* the Master reported insufficient, and the next day we were served with a subpoena for costs, and to make a better answer. On the 14th of *May* we paid the costs, and on the 10th of *July* we put in a second answer, which on the 13th of *July* the Master reported insufficient, then we put in a third answer, which was sworn and filed the 19th of *July*, and on the 21st of *July* 1729, the cause came to a hearing, and the bill was decreed to be taken pro confesso, though we produced a certificate that our third answer was filed, and which not being excepted to, must be taken for a full and sufficient answer, though only two answers are taken notice of in the decree: But as the cause is open on the appeal, we may read to your lordship the certificate, and if the decree was inrolled, we could have a bill of review for $\dagger$ error appearing on the face of it, that we had put in two answers; whereas the foundation of these decrees is, that the defendant would not answer, though the present practice is otherwise; yet anciently, if the defendant would not answer, and a sequestration was returned, the bill was not taken pro confesso, unless the plaintiff could prove the allegations of it, because in all bills they are greatly beyond the truth, in order to come at it. *Vern.* 223. For since the defendant by refusing to answer, deprived the plaintiff of putting matters in issue, the Court gave him a liberty to prove them. In *1 Vern.* 247, the Lord Keeper took time to consider whether he would decree the bill pro confesso; so it is not a very plain case. And *1 Vern.* 228. If one of the defendants is in contempt, and stands out to a sequestration, and the cause is heard against the other, yet he may come in and answer, and the cause may be heard again as to him. And if a defendant puts in four insufficient answers, by the course of the Court, he is to be examined on interrogatories in vinculis, and *1 Chan. Caf.* 279, where a defendant put in a plea, which was over-ruled, and after three insufficient answers, the Chancellor would not commit him to be examined on interrogatories. But in this case, the defendant was in prison at the suit of the King, on a conviction of forgery, in which case the bill ought never to be taken pro confesso, till he has been brought into Court by habeas corpus, and told of the danger he is in if he does not answer, and have a day given him to put in his answer, that the Court may judge whether he is obstinate or unable, through poverty or otherwise

• wife

wife, to answer: And this is the practice, whether he is in custody at the suit of the plaintiff, or of a stranger; *Curfus Canc. 115.* of which the plaintiff was so sensible, that since the decree, he has constantly brought him into Court to enforce the execution of it, though it was more necessary before the decree than since, that the bill might be read to him, and he know what to answer. If the merits are with them, to reverse the decree will not rob them of the benefit, but if they are with us, we are precluded from the advantage of them, by this matter of form.

Mr. Attorney General for the plaintiff.

This decree will appear to be very regular from the circumstances of the case, and the general practice of the Court; when the cause came first to be heard on the sequestration, the plaintiff was undoubtedly intitled of right to a decree, that his bill should be taken *pro confesso*, no answer being then on the file; but then the defendant applies for liberty to answer, and the Master of the Rolls gave him leave, and adjourned the cause; he puts in an answer, which the Master reported insufficient in fifty two exceptions, and the plaintiff obtains an order to bring the cause on again upon the sequestration, when it was alleged, that the defendant had put in a further answer, which being afterwards reported insufficient, the cause came on again, as it did originally, for the liberty to answer was only an indulgence given by the Court, out of the rules, which the defendant had no right to, and had abused; and the defendant in his petition, after the second answer, for the cause to stand over, confesses that he could not put in a full answer, being a prisoner, without a sight of the letters in the custody of the plaintiffs clerk in Court; and since he has not seen them, this is an admission that his third answer is insufficient; then the question is, Whether the cause being set down on the sequestration, the bill might not be decreed *pro confesso*, though the defendant had put in three insufficient answers, whatever was the ancient practice, the present course of the Court is, when the defendant is in contempt to a sequestration, for want of an answer, to take the bill *pro confesso*, and Courts of equity have established this rule in conformity to the Courts of law, where if the defendant appears, and will not plead, by the judgment on *nil dicit*, the whole declaration is taken for true; so if no answer was in, the decree must be admitted

Curf. Canc.
294, 295.

to be regular, and these insufficient answers will not vary the case, but they are to be considered as no answers, for the very reasons on which these decrees are founded, that by the defendant's fault, no issue can be joined for the plaintiff to prove his case, for if the answer is insufficient, the merits of the case are not put in issue; besides, the plaintiff wants the discovery of the defendant to assist him in his evidence, and that in cases of contempt an insufficient answer is considered as no answer, appears from hence; that if the process of contempt is once begun, and an insufficient answer is put in, the plaintiff is not to begin the process de novo, but may carry on the old process, so this bill ought to be taken pro confesso, because the defendant has done nothing to put the matters in issue, and the plaintiff wants his discovery, and cannot otherwise come at a decree. But this is said to be against the course of the Court, by which if the defendant puts in four insufficient answers, he is to be examined upon interrogatories in vinculis: But in that case, there never was any foundation to set down the cause on the sequestration, the process had not been carried on to a sequestration, before any answer came in; and as the plaintiff, if he had carried on the process in part, might have continued it to a sequestration, for want of a sufficient answer; so as he has gone the length, he may revive the sequestration for the insufficiency of the answer; but they say he was a prisoner, and therefore ought to have been brought up by habeas corpus; he was not in custody when he put in his first answer, and is not now at our suit, so we were not obliged to take that method, which is only observed when the defendant lies in prison on a process of contempt in that cause; and though his answer [†386] was filed, it was no answer, and we † were not obliged to receive it, because the costs of the contempt were not paid; for if an injunction is granted on an attachment 'till answer, and further order, though the defendant files an answer, he cannot move to dissolve the injunction on coming in of the answer, 'till he has cleared his contempts: So the strict rules of the Court are with us, The plaintiff was intitled to this decree before any answer came in, and the Court let the defendant put in an answer, not as his right, but as an extraordinary indulgence, to see whether he would make a proper use of it, and when they saw he abused it, only allowed the plaintiff to resort back to what he was at first intitled, and put him in the same state he was in before.

Lord

De Term. S. Trin. 1730.

Lord Chancellor.

By the old practice of the Court, the plaintiff was undoubtedly put to prove his bill by witnesses *vivâ voce*, and so was every plaintiff at law, his declaration, as appears by those words, *Et inde producit sectam*, where *secta* signifies the witnesses.

Formerly the plaintiff was obliged to prove his bill by witnesses *vivâ voce*, before the Court

would decree it *pro confesso*, and also his declaration at law, as appears by these words, *Et inde producit sectam*, where *secta* signifies the witnesses.

Mr. Solicitor General.

If the reason of this case is the same with those in which the bill has been decreed to be taken *pro confesso*, the judgment ought to be the same; and if an insufficient answer was an objection, few bills could be taken *pro confesso*. When the cause came first on to be heard, there was no answer; so the plaintiff was intitled to this decree, and it was the mere indulgence of the Court to allow the defendant time to put in an answer, and the cause in the mean time was adjourned over in the same plight it stood before the defendant put in his answer, which was reported insufficient; and the cause came on again, and the defendant alleged he had put in a further answer, upon which an order was made, that if he did not procure a report within four days, that it was a sufficient answer, the cause should stand first in the paper to be heard; for the Court being suspicious of the defendant, insisted upon his procuring a report, the Master reported the answer insufficient, and then an order was made, that the cause should stand for the 21st of *July*, and he says he put in a third answer on the 19th, but it is not the filing it with the clerk makes it an answer, for the plaintiff was not bound to receive it, because the costs were not paid, and the answer was only thrown in, that the cause might stand over again, and therefore this answer ought to be laid out of the case, and the two former, being insufficient, are no answers, which appears from the method of carrying on the process, and the *subpœna* to make a better answer, is served on the clerk, and not on the defendant, as the first *subpœna*, and if the plaintiff is come † to the end of the line, he can go no further, [†387] but may indeed begin *de novo*; and there is this further reason, why a bill should be taken *pro confesso* upon an insufficient answer, because nothing material perhaps may be answered

1 Chan. Caf.
238.

But this practice was disused, because the plaintiff often comes into equity, because he cannot prove his case, but by the discovery of the defendant.

swered by it, but only combination and confederacy, What then can the plaintiff do? must he set down the cause on bill and answer? that would be an admission that the answer was good, though the Court had given their opinion that it was not sufficient, or must he reply to it, but then he loses the benefit of a discovery from the defendant, which is often the chief end of coming into this Court, because he cannot prove his case, and was the reason why the old practice of proving the bill was laid aside. But they say, if the defendant puts in four insufficient answers, he may be examined in vinculis; but suppose he will not be examined, and the process runs to a sequestration, because the party cannot be found, but an examination in vinculis supposes him found and taken: But still it must come to this at last, that the plaintiff must either set down the cause on bill and answer, or reply to the answer, or have a decree that the bill be taken pro confesso. But it is objected, that it will appear by the inrollment of the decree, that two answers were put in; but it will not appear, and there was no authority to open those answers, but the decree was made on reading only the bill. If there are six defendants, and some of them appear to hear judgment, and some do not, only the answers of those that appeared are opened and inrolled, and yet the answers of the others are parcel of the proceedings.

Mr. Wills.

This decree may be considered as if no answer was in, for the cause must stand in *July* as it did in *February*, because the defendant did not comply with what the Court indulged him in, and which he was not intitled to by the rules of practice; and the Court considers an insufficient answer as no answer, by way of penalty on the party who will not submit to the judgment of the Court, that it is insufficient, which appears from hence, that at the hearing it cannot be opened, and if an injunction is granted till answer and further order; though the defendant answers, and denies all the equity on which the plaintiff prays his injunction, yet if he has not answered the other points of the bill fully, the injunction shall stand; but they say, a third answer came in on the 19th of *July*, which is not excepted to; there was no occasion to have the judgment of the Court on it, because the defendant himself had confessed it insufficient, for he said he could not put in a sufficient answer till he saw the letters, which he has not yet: So,

So, on filing exceptions, it is sufficient if the defendant submits to answer; and this was the answer his Honour the Master of the Rolls gave, That there was no occasion to refer an answer, which † the party himself had allowed insufficient; but this was no answer, because he did not offer to pay us the costs. [†388]

Mr. Mead.

The referring the answers was no acceptance of them, or a waiver of the costs; the plaintiff could not proceed till it was known whether the defendant had put in a good answer, or not; so he must refer it to a Master, who reports it insufficient, the plaintiff was only getting on his cause again by the proper method, and accordingly after the report he applies to have his cause set down again. If an answer is reported insufficient, and the process is carried on to a sequestration, cannot the plaintiff set down his cause on the sequestration? otherwise he is without remedy, or if the defendant is in custody, and will not answer personal interrogatories, may not the plaintiff carry on the process to a sequestration, and have a decree upon it?

Lord Chancellor.

A decree pro confesso is like a judgment by nihil dicit at common law, on delivering a declaration, the defendant has time to appear, and plead; and if he appears, and the rules are out, the plaintiff may sign judgment, but if the rules are out, and the defendant pleads before judgment is signed, no judgment on nihil dicit can be given, but only on the plea. When this cause first came to be heard, the plaintiff was certainly intitled to this decree, which binds the defendant as to the truth, and cuts him out of any defence. And, be his case what it will, he can have no remedy by appeal; so it is reasonable, and one would wish, such a man, if possible, let in to make his defence. At the hearing, the defendant desires the liberty to answer, and the cause is adjourned for that purpose; he put in an answer, and the plaintiff allows his capacity by taking exceptions to it. This decree is, that the bill shall be taken for true, because the defendant will not answer, which is false, because there appears to be an answer, in which the defendant has denied several parts of the bill, and can I presume there is no answer when it appears there is, and that the defendant has confessed the bill, when

*Moor 522,
Cas. 688.
Gro. Eliz.
692; (1.)
Rol. Ab. 2
part 70.
Jon. 88.
Hob. 115.
Glanvil and
Allen's case.*

he has denied it: The same objections may be made in all other cases to the methods of process, and yet they have not been hitherto found unsuccessful. The defendant ought first to have paid the costs, but since the plaintiff has accepted the answers, he cannot say there are none; so I think these are contradictions, but since the defendant submitted to answer, he shall not now say the sequestration issued irregular, and he had a benefit by it; so the exceptions must be discharged.

[+389] And the Court is of opinion, that† the matter of the plaintiff's bill cannot be decreed pro confesso, for want of an answer, because it appears by the records of this Court, that the defendant has put in an answer to the plaintiff's bill, which was accepted by the plaintiff as an answer, by excepting to it, and serving the defendant with a subpoena to make a further answer; and though in several points it was reported insufficient, yet the defendant having denied several material parts of the plaintiff's bill, it cannot be said in this case that he has put in no answer, or be presumed, that the plaintiff's bill is in those points true or confessed: And if the decree should be allowed, it would rob the party of the benefit of his defence.

A cause comes to be heard on a sequestration, the defendant obtains a week's time to answer, and the cause is adjourned, he puts in an answer, the plaintiff refers it for insuffi-

ciency, the Master reports it insufficient, and the plaintiff serves the defendant with a subpoena to make a better answer, the cause comes on again, and the Master of the Rolls decrees the bill to be taken pro confesso, but this decree was reversed by the Lord Chancellor, because he could not presume the bill to be true for want of an answer, when by the records of the Court there appeared to be an answer, (and admitted by the plaintiff by his taking exceptions) and when several material parts of the bill were denied by the answer.

Curf. Canc. 209, 387, 449. 2 Chan. Caf. 133, 237. 1 Prax. Canc. 7. Pract. Reg. in Canc. 330. Introd. to Clerks' Tut. in Canc. 18, 23, 28.

Tuesday, July the 7th.

M O T I O N S,

SHIRLEY *versus* FERRARS.

Case 199.
At the
Chancel-
lor's house.
Lord Chan-
cellor.

ON the hearing of this cause, an issue was directed to try the validity of a deed; and Mr. *Lawrence Shirley* having sent a person to view it in the hands of the Master, he found the deed to be all of his own hand-writing, which he had copied from another, by the command of *Washington Earl Ferrars*; and that the names of the parties, and of the witnesses, and old labels and seals were since put, and affixed

De Term. S. Trin. 1730.

to it; and consequently, that this could not be a deed executed by *Robert Earl of Ferrars* the father of *Washington*, as was pretended. Upon this discovery the plaintiffs file a supplemental bill, and the defendants having prayed a month's time to answer, move to examine this person, *De bene esse*.

Lord Chancellor.

In the Court of Exchequer, if the defendant prays time to answer, they suffer the plaintiff to examine *De bene esse* to a modus and other matters, which lie in the knowledge of several people: This examination is commonly granted by this Court, on affidavit of the great age or sickness of the witness, or that he is going abroad; but the affidavit in this case is not of that nature, but that this being a fact which lies only in the breast of this single person, if he dies before the trial, or is examined in chief, the proof of the fact is lost: So let the motion stand over to the next seal, to see if the defendants will consent to put in their answers in a fortnight, and go to + commission this vacation, and let the plaintiffs make affidavit, that they cannot prove this fact by any other person, and see if they can find any instance of such an order; though if the defendants will not agree to this proposal, I will grant a commission *Ex Debito Justitiæ*, if there is no precedent; and though I do not think the defendants have affected any delay, but that they are intitled of common right to a month's time to answer. [+390]

The plaintiff may examine a person *de bene esse*, though neither old or infirm,

or going abroad, upon affidavit of his being the only person who has any knowledge of the forgery of a deed, or other material fact, for otherwise if he dies before he is examined in chief, the proof of the fact is gone. *Curs. Canc. 275, 294, 300. 1 Prax. Canc. 27. Pract. Reg. in Canc. 166. 1 Vern. 331.*

Friday, July the 10th.

APPEALS AND RE-HEARINGS.

NIGHTINGALE *versus* LOCKMAN.

Lord Chancellor.

Case 200.
At the
Chancellor's house.
Lord Chancellor.

WHATEVER the wife is possessed of, belongs by the Ant. Cas. coverture to the husband, and by reducing into possession ^{125.} the choses in action she has a right to, they become his property;

perty; but when he sues in her right for things in action, he must join her with him in the action; and if he dies before execution, though after judgment, the right will survive to her, and not to his executors; for though the old debt is gone by the judgment, the new one survives; for the judgment is, *Quod recuperent*, and it is not the husband's till it is reduced into actual possession. This bill was brought by the legatees of a third of the personal estate of Mr. *Sheldon*, after payment of the debts and legacies, for an account, and to have the debts and legacies paid; one of the executors was intitled to the other two thirds of the estate, and she and her husband Mr. *Chitty* are made two of the defendants: At the hearing no distribution could be directed till the account was taken, and the debts and legacies paid, which was decreed accordingly, and the Court declared, that two thirds belonged to Mrs. *Chitty*, now Mrs. *Lockman*, and ordered payment; and one of the executors, having admitted by his answer, that he was indebted to the estate of Mr. *Sheldon* the sum of 10,000*l.* he was ordered by the decree to bring the money into Court, to be put out for the benefit of the parties to whom it should belong, not for the benefit of any one of the parties, or as a debt to one certain person, but as part of the estate of Mr. *Sheldon*, and it has been distributed and paid as such: Mr. *Chitty* had no right to any part of this money, but to one third of the estate, after the account was taken, and a distribution made; but during his life no distribution was made, he never reduced his share into possession, but it still remained the estate of Mr. *Sheldon*; and therefore I think that the decree of the Master of the Rolls is right.

[1391]

† Saturday, July the 11th.

Cafe 201.
At the
Chancellor's house.
Lord Chancellor.

PLEAS and DEMURRERS.

LEGASTICK versus COWNE.

THE testator devised his lands to two executors, equally to be divided between them, willing them to pay his debts. To a bill brought by a creditor, the executors plead the statute of limitations,

Lord

De Term. S. Trin. 1730.

Lord Chancellor.

I know Lord *Cowper* was of opinion that where lands were devised in trust for the payment of debts, debts barred by the statute should be paid; but to my knowledge, the lords were of another opinion in the case of the Earl of *Strafford*. I know no power a Court of equity has to controul an act of Parliament, and if lands are given to executors for payment of debts, they are as much legal assets as the personal estate; but under the notion of a trust, you would have me subvert the statute; and the debt has been due to the plaintiff since 1707, and therefore I allow the plea.

A devised his lands to his executors, willing them to pay his debts. Debts barred by the statute of limitations are not within this devise.

Farref. 63. Lord Wharton versus Sir John Robinson. 1 Salk. 278. 1 Vern. 141. 1 Salk. 154.

Wednesday, July the 22d.

PETITIONS.

EX PARTE AYSCOUGHE.

Mr. Attorney General.

Case 202.
At the
Chancellor's house.
Lord Chancellor.

THIS is a petition to your lordship, by the three sisters and heirs at law of the late Sir *John Chaplin*, deceased, and his uncle, who claims a part of the estate, as tenant in tail male under a settlement, for a writ de ventre inspiciendo of his widow, Lady *Chaplin*. Mr. *Maurice*, a bailiff of *Middlesex*, with his wife and daughter, went down to *Tatwell* in *Lincolnshire*, in order to ingratiate himself with Sir *John*, but missing of him there, he followed him to *York* races, and insinuated himself into his company, and hearing him say he designed for *Newmarket*, he offered to bear him company if he would first go to *London* with him, which he refused, but was at last prevailed on, and at *Dunstable* the wife and daughter of Mr. *Maurice* met them, and he persuaded Sir *John* to quit his horse, and travel in the coach with them to *London*, and to lie at his house; and a few days after, Sir *John* went with him and his wife and daughter on a party of pleasure to *Windsor*, and there married the daughter about fifteen years of age, and Sir *John* was about nineteen, who in about three months after died of the small-pox, having

[+392]

ing first made his will, and devised to his lady all his personal estate; and she gives out that she is with child, and this petition is to prevent any fraud or imposition in that affair, and the manner the marriage was brought about is a foundation to believe that any other practice may be made use of to secure the estate, which was the great inducement of the match. And this writ was granted the 7th of *March*, 30th of *W. and M.* in the case of *Dunscumb* and *Doyley*.

Mr. Solicitor General.

One imposition on the family makes room to suspect another, and this writ is provided for cases of this nature, and is a writ of right for the heir, to protect his inheritance from being taken from him by these means. This writ was granted in *Cro. Eliz.* 566, (31) *Moor* 523. *Cal.* 692. The father devised 4000*l.* to a charity on contingency, his son died without issue male, and the son being extravagant, the father directed, that he should have only an allowance 'till he was thirty years of age, the son died without issue male, and an information was filed for the charity, setting forth, that he was drawn in to marry with a woman of an indifferent character, and in years, his widow in her answer swore she was with child, and at the hearing, though this was the case of a personal estate, and no provision made in the register, yet in conformity to the reason of the common law the present Master of the Rolls directed, that the Master should appoint two discreet matrons to inspect her, and certify what condition they found her in; and she being summoned to object before the Master to the matrons proposed, she owned she was not with child. But ours is a case provided for by the common law.

The testator devised money to a charity, on condition his son died without issue male, the contingency happened, his widow in her answer to an information for the charity, swore she was with child, and the Court directed that the Master should appoint two discreet matrons to inspect her, and certify what condition they found her in.

Mr. *Strange*.

There are two things under the consideration of the Court, whether those who apply have a title to pray this writ. In the case in *Moor*, only one of the co-heirs applied, here all join in the petition, and it appears by the register 227, a, that it lies for *Veri Hæredes*. And the next thing is, Whether they lay a proper case before the Court; and there is no occasion to shew there was any ill practice made use of in bringing

ing about the match, for the books take no notice of any such distinction; if the writ issues, there must be an inquiry, and a return made, whether she is with child or not; and if she is, when she is likely to bring forth, and since she † agrees before-hand that she is with child, we are intitled to [†393] the custody of her, 'till she is delivered, and we are willing, as there is no castle on the estate, that she be confined to the house she is now in.

Mr. Lutwych for Lady Chaplin.

This petition is an affirmance of the marriage, and Sir *John* had a right to choose for himself, and the Court is not to inquire what were his inducements, so all they have mentioned of that kind is out of the case. They have not suggested her to be one of a bad reputation; and this is not a writ of right, or of course, but is to be granted only on a special application, where there is some probable ground of suspicion, and they have shewn no more in this case, than there is in every other; the unusual terror and fright the execution of this writ may put so young a lady in, may be attended with very ill consequences, and occasion a miscarriage, which is what perhaps they desire, and the lady desires to come to town to lie in among her friends; she is willing to give them all the satisfaction they can desire, or to submit to any directions the Court shall give, to prevent imposition, and we propose, that two ladies of the sister's acquaintance may attend and examine her if they please, and be at the lying in, which sure will be a greater satisfaction to them than a Jury, and was agreed to in the case of *Duncan* and *Doyley*, though the writ indeed afterwards issued, because she would not let the ladies inspect her according to the agreement. The foundation of the writ is, that she pretends to be with child, but they have no affidavit that they suspect she is not with child, and our affidavits are, that Sir *John* before his death, expressed great joy at her breeding.

Lord Chancellor.

I think this writ in a great measure a writ of right; all writs at first were obtained by petition, though afterwards they came to sue out the most common of course. The chief thing is to prevent a suppositious child, but the first writ issues, to see whether she is pregnant or not, because
you

you cannot otherwise come at the second; and if the sheriff returns that she is with child, then the second, which is the material writ, issues out of the Court of King's Bench or Common Pleas. I would have the writ executed on the young lady in the easiest manner, and most consistent with her modesty, and it would be hard to confine her to the country, since she desires to lie in in town, and you cannot hinder her, for the first does not confine her, but she may go where she pleases, till the second writ issues, which cannot be had till *Michaelmas* term; and there is no fear of her being brought to bed immediately, and she is † willing in the mean time to give you any satisfaction, and that any ladies to be named in the order may wait on her, which will make the execution of the writ more easy. Be it ordered therefore, that the father in Court consenting for the daughter, that she shall come into the county of *Middlesex* by *Michaelmas* day; in the mean time two ladies, mentioned in the order, wait on her at a reasonable notice, and that Mr. *Maurice* give notice to the solicitor of the other side, when she comes to town, and where she is, and that thereupon the writ issue to the sheriff of *Middlesex*, returnable the first day of next term.

[†394]
On a petition for a writ de ventre inspiciendo, it was ordered according to the lady's consent, that two ladies mentioned

in the order might inspect her till she came to town, of which she was to give notice, and then the writ was to issue.

Term. S. Michael.

1730.

In Cur. Cancellariæ.

Saturday, November the 7th.

GOULD versus GRANGER.

Case 203.
In Court.
Lord Chan-
cellor.

THE Lord Chancellor allowed an appeal from the Master of the Rolls, for costs only, and his lordship said, he had known the House of Lords allow an appeal for costs only, tho' the old practice was otherwise.

You may
appeal to
the Lord
Chancellor,
or to the
House of
Lords, for
costs only.

Wednesday, November the 11th.

GOODAL versus RIVERS.

Case 204.
In Court
Lord Chan-
cellor.

Mr. Attorney General for the plaintiffs.

BY articles of intermarriage, dated the 28th of *February* 1688, subsequent to the marriage of Sir *George Rivers* with Dame *Dorothy Fevesfram*, but which are recited to have been agreed upon before the marriage, reciting, that whereas certain lands were charged with a portion of 3000*l.* payable to the said Dame *Dorothy*, at her age of twenty-one years, or marriage, and whereas she was intitled to 3000*l.* under the statute of distributions, as a moiety of her father's personal estate, and the lands therein mentioned. Sir *George Rivers* covenants, in consideration of the marriage, and her said portion,

[†396]

portion, and for making a provision for her, and the issue of the † marriage, that he and his heirs will within six months, convey and assure the lands therein described, of the value of 500*l.* a year to trustees and their heirs, in trust, to the use of himself for life, then to Dame *Dorothy* his wife, for her life, then to the first, and every other son of the marriage in tail male, and in default of issue male, ‘ and if he ‘ should have issue female, then to the trustees and their ‘ heirs, or to the heirs of the survivor of them, in trust, to ‘ sell, mortgage or otherwise dispose of a sufficient part of ‘ the said premises, (the manor of *Chasford* cum pertinentiis ‘ excepted) for raising 4000*l.* for her portion if he had ‘ but one daughter, 5000*l.* if he had two, and 6000*l.* if he ‘ had three or more daughters, to be equally divided between ‘ them, and to be paid to them at their respective ages of ‘ nineteen, or marriage, which should first happen, with ‘ interest for their maintenance and education, after the ‘ rate of 4*l.* per cent. from the death of Sir *George*, or Dame ‘ *Dorothy*, which should first happen, ‘till the said portions ‘ become payable as aforesaid.’ The 21st of *April* 1691, Sir *George Rivers* in pursuance of the said articles, settled the lands therein mentioned, in trust, for Sir *George* for life, remainder to trustees to preserve contingent remainders, remainder to Dame *Dorothy* for life, for her jointure, remainder to the first, and every other son of the marriage in tail male, ‘ Remainder to trustees for five hundred years without ‘ impeachment of waste, remainder to the right heirs of Sir ‘ *George*, and the trust of the term of five hundred years, is ‘ declared to be, that in default of issue male of Sir *George*, ‘ by the said Dame *Dorothy*, the said trustees shall and may ‘ either by and out of the rents, issues and profits, after the ‘ commencement of the said term, or else, by demise, selling, mortgaging, or otherwise disposing of the said premises, or any part thereof, (other than the manor house and ‘ park) for five hundred years, or for any lesser term or ‘ estate, when and in such manner as they, or the survivor ‘ of them, or the executors or administrators of such survivor, shall think fit, levy, and raise the sums hereafter ‘ mentioned, for proportions, and maintenance of daughters, ‘ if one only, who shall attain her age of nineteen years, or ‘ marry, 4000*l.* if two, 5000*l.* if three or more, 6000*l.* to ‘ be equally divided between them, and the yearly sums for ‘ their maintenance and education, from the death of Sir ‘ *George*, or Dame *Dorothy*, which shall first happen, ‘till ‘ such

such daughters shall attain the age of nineteen years, or marry, that is to say, 160*l.* a year for one, 200*l.* for two, and 250*l.* for three or more, during such time as there shall be one, two, three, or more daughters, living after the death of Sir George, or Dame Dorothy, which shall first happen, to be equally divided among them. And the said portions are to be paid to the said daughters at their respective ages of nineteen, or marriage, or as soon after as they can be raised, and the said yearly sums for their maintenance are to be paid from the death of Sir George, [†397] or Dame Dorothy, which shall first happen, 'till their portions become payable. Provided, if Sir George shall survive his wife, and shall well and sufficiently maintain and educate his daughters according to their quality, and with the approbation of the trustees, 'till their age of fourteen, then no maintenance shall be raised, 'till they respectively come to fourteen. Provided also, that the power given to the trustees of selling or mortgaging, shall not injure the estate limited to Dame Dorothy, but that she shall not enjoy the same for her life.' Dame Dorothy died in March 1707, leaving two sons and six daughters, one of the daughters is since dead, and both the sons, the survivor of them on the 9th of October 1727: And the five daughters, the youngest of whom is twenty years old, and three of them married, with their husbands, brought this bill against Sir George Rivers, and the trustees, to have the portions raised by a sale of the reversion, with interest from the death of the surviving brother, at which time they were above the age of nineteen years. In this case, it was the plain intention of the parties, that if the mother died, the portions should be raised in the father's life-time; the portions are to be raised at marriage, or nineteen, and they are to have maintenance in the mean time, either out of the rents and profits, or by sale and mortgage; and though it cannot be raised the first way, till the estate comes into possession, yet it may the other way, and this case stands clear of the objections that

The trust of the term was on failure of issue male,

out of the rents, &c. or by sale, &c. to raise portions for daughters, payable at 21, or marriage, and maintenance till their portions grew due, to be paid by half yearly payments, viz. Christmas and St. John Baptist, the first payment to be made at the first of those feasts next coming or happening after the estate so limited to the trustees should take effect in possession. The father dies without issue male, leaving a daughter who attained her age of 21; it was adjudged that her portion could not be raised in the life-time of the mother, because the maintenance was to precede the portion, and that was not to be raised till after the death of the father and mother, when the term came into possession.

were made in the case of *Brome and Berkeley*, decreed in the House of Lords, *March* the 5th 1728; there the trust was, on failure of issue male, ' by and out of the rents, ' issues, and profits, or by absolute sale, or leasing, or otherwise to raise the portions payable at twenty-one, or marriage, and to raise and pay yearly sums for their maintenance and education, until their portions grow due to be paid, by half yearly payments, viz. *Christmas* and *St. John* the Baptist, the first payment to begin and be made at the first of those feasts next coming or happening, after the estate so limited to the trustees should take effect in possession, so the maintenance was to precede the portion, and that was not to be raised till after the death of the father and mother. But this case is the contrary; the maintenance is expressly to be raised after the death of either father or mother, till they arrive at the age of nineteen years, or marry, and so this case is within all the precedents for the sale of a reversion.

Mr. Solicitor General.

[+398] It plainly appears to be the intention of the parties, that whenever there was a failure of issue male of the marriage, and either the father or mother dead, that the portions should be raised. There is no direction in the articles to raise the portions by the rents, issues, and profits, because the whole estate being limited to Sir *George*, and Dame *Dorothy* for life, the estate could not come into possession while either lived, and therefore on the death of one of them they make the only possible provision for raising a maintenance and portion, by giving a power to the trustees to sell or mortgage. So our application is proper, if the question rested on the articles; and the settlement does not depart materially from them; it limits a term to trustees for five hundred years on failure of issue male, instead of a fee, but this is no material difference, if the term is sufficient for raising these maintenances and portions, or if it is a material one, as the settlement was made in pursuance of the articles, the intention of the articles must rule, govern, and control the settlement, or explain any thing ambiguous in it. The trust of the term is to arise in default of issue male, and is for raising portions and maintenances, either out of the rents, &c. or by demising, selling, &c. which extends to all ways of raising, and the words, *After the commencement of the said term*, have a different meaning in this case from what they bore

bore in the case of *Butler and Duncomb*, 2 *Vern.* 760; there they introduced the declaration of the trust of the term, as failure of issue male doth here, so there the term must first commence in possession, here the issue male must fail before the trust can arise, and therefore in that case the Court adjudged, that they governed the whole trust, and must first happen; here they are made use of in a different manner, and for a different purpose, and are plainly not relative to the whole trust; but to that part of it, *either by or out of the rents, &c.* but then the trust is not confined to that method, but goes on, *or else by demise, &c.* which are indefinite, and not confined to the term in possession; and in this too the settlement differs from the articles which are to control it; besides the portions are to be raised when they marry, or come to nineteen years of age; when those times arrive, nothing is contingent, but the maintenances are likewise to be raised from the death of Sir *George* or Dame *Dorothy*, till they arrive at nineteen years of age, or marry, the maintenances are to arise immediately on the death of the one or the other, yet the whole estate would survive to the other for life, so the plain intention of the parties must be, that they should be raised by sale or mortgage. So that if the portions can be raised by any of the methods of this trust, the daughters have a right to apply to the Court for that purpose, and the intention of the parties is further explained by the proviso in favour of Sir *George*; if he educate the daughters, no maintenance is to be provided till they are fourteen, which implies, if he did not educate them, the † maintenance was [+399] to be raised while they were under fourteen, and after they came to fourteen, even that privilege ceases, and the next proviso supposes, the wife might survive; that by their sale or mortgage, the trustees should not prejudice her estate, which though it be an abundant caution, plainly supposes there might be a sale or mortgage in her life-time.

Mr. *Lutwych* for the defendants.

I admit that articles entered into after marriage, on a consideration which the husband would not otherwise have, are to be looked upon as articles on a valuable consideration, but here Sir *George* was possessed of all the portion Dame *Dorothy* brought before marriage; and there is no instance, where the Court has decreed portions to be raised by sale of a reversion by a voluntary settlement. They say it appears to

be the intention of the parties, that the reversion should be sold or mortgaged, both for the maintenance and the portions. As the maintenances are to be paid every half year, or at the end of every year, there must be an half yearly, or annual mortgage or sale, which would be very strange, and what was never known to be decreed for maintenance; so that if the settlement is capable of any other construction, the Court will avoid this absurdity, and not decree a sale of the reversion, which is always very injurious to the estate, and in this case will be a total disinherison to those in remainder. They say the words, *After the commencement of the term*, refer only to the rents and profits, but in this construction they signify nothing; for nothing could be raised out of the rents, whilst the estate for life was in being, nor till the term came into possession: But I think they extend to the whole trust, and the Court will put this construction on them, to avoid the inconvenience of selling the reversion, which then will not be saleable, by the authority of the case of *Butler and Dunscomb*. But if this construction is with them, still there is left a great latitude to the trustees, by the words, *When and in such manner*, which leave the convenience of time to them; then if the case turns on what is a reasonable and convenient time, since the trustees have submitted it by their answer to the judgment of the Court, they will not think it convenient to sell during the life of the father; and *When* must signify, that if it was inconvenient, the trustees should have a liberty to defer the sale; and though the portions are to be paid at a certain time, there are many cases where it has been adjudged, that the daughters must wait till the tenant for life dies, as *Brome and Berkeley*.

[†400]

† Lord Chancellor.

This case stands clear of all the authorities that are against the sale of a reversion; and it is plain, from several decrees, that a reversion may be sold for daughters portions, though the Court always decrees a sale with great reluctance. These articles are not to be considered as voluntary between the parties, whatever they may be, with respect to creditors: By the articles, the estate in remainder after failure of issue male, is an interest vested, though subject to be defeated by the tenant in tail; and the trust is expressly to sell, mortgage, or otherwise dispose of, (which take in all manner of conveyances) if there should be daughters and no issue male, for their

their portions, payable at nineteen years of age or marriage, with interest after the rate of *4l. per cent.* from the death of the husband or wife; therefore the parties plainly intended the trustees should raise the portions and interest by any method; for the maintenance being given from the death either of the husband or wife, which should first happen, it is plain they took notice that one might be alive, and then since the whole estate is limited to each of them, how can it otherwise be come at, whilst either is alive, but by sale or mortgage? In the settlement, there is some variation from the articles, a term of five hundred years is limited in remainder after an estate tail instead of a fee, and the trust is to arise on default of issue male, which has happened, so that both the term and the trust of it, to raise these portions and maintenances, have begun; if the trust was to begin on the commencement of the term, I should have understood those words, when the term came into possession, but the commencement of the trust was fixed before, and therefore the meaning of those words must be, if the term is commenced, you shall raise them out of the rents and profits, if it is not by sale or mortgage; and the words cannot be carried to the other disjunctive. The words, *When and in what manner* only signify, that the estate shall be sold together, or in parcels, as the trustees think fit; so if the intention can be pursued, the Court is to follow it, and there is no possibility of putting any other meaning on the words, the 6000*l.* is to be paid at nineteen, or marriage; and till then they are to have maintenance, which is to commence from the death of the husband or wife, and which other way can it be raised? And the inconvenience is no objection, since the parties provided it should be so; in case either of the husband's or the wife's death, which has happened; and this is further confirmed by the proviso, that the maintenances should not be raised 'till the daughters came to their respective age of fourteen years, if the father maintained them, by which it plainly appears that maintenance was to arise in his life-time, in case of a personal default on his side,

A term of 500 years is limited in remainder, after failure of issue male of the marriage, in trust, that in de-

fault of issue male, the trustees, out of the rents and profits, after the commencement of the term, or else by demising, selling, mortgaging, or otherwise disposing, raise portions for daughters, and maintenances, from the death of the husband or wife, which should first happen, till such daughters attain the age of 19, or marry, the portions to be paid at 19, or marriage, and the maintenances to be paid from the death of the husband or wife, which shall first happen, till their portions become payable; the wife dies without issue male, the daughters come to the age of nineteen, the portions were decreed to be raised in the life-time of the father, by a sale of the reversion.

and

De Term. S. Michael. 1730.

and is to be paid 'till the portions are payable; and the clause in favour of the jointure shews, the parties thought it might be raised in the life-time, either of the one, or the other, so the plain intention of the parties is, that the daughters should have a maintenance, either on the death of the father, or mother, 'till nineteen or marriage, by rents and profits, if the estate should come into possession; if not, by sale or mortgage. So I am of opinion the portions are to be raised with interest from the death of the surviving brother, by a sale of the reversion.

A TABLE

A
T A B L E

OF THE

PRINCIPAL MATTERS

CONTAINED

IN THE FOREGOING CASES.

ACCOUNT.

Vid. In what case one debt shall be set off in equity against another, 1, 2, under debts.

1. LANDS are devised, in trust, to maintain the infant till he come to 23, and then to account, and pay him the rents, and reconvey the estate to him, but if he died before, to reconvey it to another : The infant is not intitled to an account till he come to 23, but he, and the heir of the testator, on sugges-

tion of insolvency in the trustees, may bring a bill for an account. *Page 244*

2. The plaintiff in his bill having assigned 150 errors in five stated accounts, the Master of the Rolls made an order on him, to pick out those he would insist on, and if he should be of opinion they were not errors, to consent to waive the rest, if he thought them errors, he declared he would either open the accounts, or give the plaintiff leave to furcharge, or falsify. *296*

Persons

Persons accountable, and matters to be brought into the account.

Vid. *Executor how to be charged, &c. under executor, &c.*

1. If an estate is devised in trust, to pay debts, the heir must account for the rents and profits, from the time of filing the bill.

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2. If the lease, household, and shop goods are assigned over to another and he comes into possession, and carries on the trade, from that time they are to be considered and accounted for, as money received. 252

3. The Court allowed the executrix sums under 40s. which the testator had fairly entered in an account-book, without proof. 253

ADMINISTRATOR, *vid.*

EXECUTOR.

AFFIDAVIT.

Vid. *Demurrer, 4. Evidence, 2, 3.*

1. The defendant being to produce at *Constantinople*, books and papers upon oath; the Court ordered the affidavit to be settled by a Master, and sworn before the Consul, or Ambassador. 58
2. If a bill is brought to be relieved against a deed fraudulently cancelled by the defendant, and to have another deed executed: The plaintiff need not make oath of the loss of the deed, because he could have no

remedy at law, though the deed was in his hands.

3. If the plaintiff seeks to be relieved in equity, on the matter of a deed, he must make oath of the loss of it; but not, if he prays only a discovery, or to have it produced at a trial, or the like. 192

AGREEMENT.

Parol Agreement, Statute of Frauds and Perjuries.

1. If two agree, that one shall take a lease of a house for the benefit of both, the other shall have the benefit, though the agreement is not in writing. 39
2. If one borrow money for another, on a mortgage of his estate, the covenant in the mortgage deed, to pay the money, will bind him, for it is properly his debt and his covenant, and the mortgagor is only a nominal person. 318

Agreement, when to be performed in specie, when not.

1. A bond conditioned to convey lands for money received, is considered in equity as articles, and the condition shall be performed in specie. 37
2. The husband by marriage articles covenants, that if his wife survived him, she should have, and take to her own use, all such jewels and plate, as were in her use and wearing, at any time during life: This covenant does not

not give the wife a property, but after the death of the husband, she can come in only as a creditor by covenant. 121

3. Articles by a guardian for sale of timber, have been carried into execution by a Court of equity. 224

Agreement: What shall be said to be a sufficient performance, what not.

Vid. *Performance in equity of a condition or covenant, &c. under condition.*

1. One living in *Oxfordshire* covenants to purchase lands of 80*l.* a year, to be settled, &c. the parties intitled, desiring the money, were decreed to have twenty-four years purchase, the price lands bore in that county, and 80*l.* a year for the time past, but not the interest of the purchase money. 117
2. The father on the marriage of his son, covenants to lay out 6000*l.* in a purchase of lands, to be settled on his son in strict settlement, and to settle his own estate on his son, and the heirs male of his body. The lands in possession are to be settled on the son in tail, and not in strict settlement, for they were not designed as a provision for the children of the marriage, but as a farther advancement of the son. 333

Agreement on marriage.

Vid. *Agreement when to be performed in specie, &c. 2. What shall*

be said to be a sufficient performance of an agreement, &c. under agreement. Average and contribution. 2

ALIMONY.

Vid. *Alimony, &c. under Baron and Feme.*

AMENDMENT.

Vid. *Costs, 7, 8.*

1. A purchase is made to the use of baron and feme, and their heirs, and baron and feme join in a mortgage to the vendor, to secure part of the purchase-money. The mortgagee files a bill of foreclosure, baron and feme answer jointly, the baron dies, and the wife moves to amend her answer, and insist, that the mortgage did not bind her, for want of a fine, but the motion was denied, because an answer is equal to a fine, and the mortgage is good in equity, the wife not pretending she was imposed on. 248

ANSWER.

Vid. *Amendment 1. In what case an infant is favoured, &c. 2, 3. Under infant, plea 12.*

1. The Court obliged the plaintiff to accept an answer from *Tripoli*, which had been ignorantly broke open on shipboard. 59
2. When the Court directs a trial, it often orders the answer to be read, if it is not falsified, or but by one witness only. 184

3. An

3. An answer of two defendants, under writ, jurat, was suppressed on a motion for irregularity. 238
4. An answer of a feme covert, is equal to a fine in equity. 248

Answer, Offer by answer.

1. The plain iff may pray a decree according to the offer of the answer, though he replies to it. 41

Answer, sufficient and insufficient.

Vid. *Injunction*, 1. *Exceptions*, 1.

1. The plaintiff required the defendant, who lived at *Constantinople*, to set forth all books, papers, &c. which belonged to him, or concerned any account between them, in his verbis & figuris. The defendant set forth in a schedule to his answer, a particular of all such books and papers, and offered to produce them upon oath at *Constantinople*, to any person the plaintiff should appoint, and to let him have copies. The Court thought the answer sufficient, and the plaintiff's demand unreasonable. 57
2. One partner files a bill against the other, to discover, *inter al*°, what consignments he had made to others. The defendant by his answer submits to the Court, whether it did not appear by what he had set out, that the plaintiff had broke the articles, and makes no discovery. This is an insufficient answer, because if the question should be determined for the plaintiff, he is

intitled to a discovery, which he would lose, if the defendant should die in the mean time. 58

APPEALS and REHEARINGS.

1. An appeal to the House of Lords must be brought within five years. 30
2. You may appeal to the Lord Chancellor, or House of Lords, for costs only. 395

APPORTIONMENT.

Vid. *Average and Contribution*.

1. If a grantee of a rent-charge purchase part of the lands, the rent shall be apportioned in equity, especially if he was ignorant of his title to the rent, when he made the purchase. 257

ASSETS.

Vid. *Devise of lands for payment of debts, &c. under will. Trust for raising portions, and payment of debts, under trust.*

ATTACHMENT.

Vid. *Attachment, under process.*

ATTORNEY, SOLICITOR.

Vid. *The statute of limitations*, 4. *under limitations. Clerk in Court*, 1.

1. The Court would not oblige an attorney to deliver up title deeds till the plaintiff paid him a bill of costs, which his client, from whom

whom he received them, owed him, because the plaintiff enjoyed the estate under an appointment of the client. 13

2. A solicitor may take out a commission of bankrupt against his client for his fees, whilst his bill is under taxation by order of Court. 27

3. On the client's neglect to attend the Master on the taxation of the solicitor's bill, the Lord Chancellor would not order him to bring the money into Court, but only made an order, that the order of reference should be discharged, if he did not procure a report in a fortnight. 68

4. If a client applies to a Court of law, to have his attorney's bill taxed, he must depose the money in Court. 68

5. The Lord Chancellor introduced this rule into the Courts of law, when he was Lord Chief Justice of the Common Pleas, but would not into the Court of Chancery, because the bills were so large. 68

6. The defendant, who was decreed to pay costs being run away, and the prochein amy poor, the solicitor was paid his bill of costs out of money lodged in Court, for the benefit of the plaintiffs, during their infancy. 319

7. The order of taxation impowers the Master to examine the solicitor as to his receipts only, but you may have an order on proper affidavits, for the Master to examine him to his disbursements. 331

AVERAGE and CONTRIBUTION.

Vid. Devise of lands for payment of debts, &c. 2, 4, 8, 9, under will. The order, &c. in which debts are to be paid. 2. under debts.

1. Specifick legatees, on a deficiency of assets, shall not abate in proportion with pecuniary. 7

2. The father, on the marriage of his son, covenants to lay out 6000*l.* in a purchase of lands, to be settled in strict settlement, charged with 2000*l.* for the portions of younger children, or 3000*l.* for daughters; if there were no sons; half of the money, by being subscribed into the South Sea Company, was lost: This loss must not fall wholly on the eldest son, but the younger children must bear their proportion.

B.

BANKRUPT.

Vid. Attorney 2. Evidence 2.

1. To stop payment is no act of bankruptcy. 3

2. An assignee is answerable only for what he receives. 36

3. But if one assignee pays money to the other, he is still chargeable by the creditors. 36

Vid. Executor how to be charged, &c. 1. under executor, &c.

4. A commission

4. A commission of bankrupt was superseded, because several of the debts of the petitioning creditors were barred by the statute of limitations. 37

5. A bond payable at a future day, on a contingency, is not within 7 Geo. I. ch. 1. and cannot be proved before the commissioners 'till the contingency happens. 28

6. A bankrupt cannot plead his certificate to an action brought on a bond, bearing date before his bankruptcy, on a contingency, did not happen 'till after his certificate. 28

7. If a bond on a contingency becomes due before all the effects are divided, the obligee shall come in as a creditor to what remains to be distributed. 79

8. Joint creditors shall be first paid out of the joint estate, and separate creditors out of the separate estate, but each shall come in for any surplus of either. 80

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Vid. *Agreement when to be performed in specie* &c. 2. under *agreement*. *Dower* 1. *Letter of attorney* 1. *Answer* 4. *Amendment* 1. *Retain, &c.* 1, 2. *Revocation* 1. *Supplicavit under writs*.

1. If the husband is bound to keep the peace towards his wife, to not maintain her is a breach of his recognizance. 120

Estates and Interests of the wife.

Vid. *Alimony, &c.* 3, 4. under *baron and feme*.

1. The husband, by articles previous to his marriage, covenants, in consideration of 3500*l.* portion, and on his intended wife's conveying her lands to him and his heirs, when she came of age, to settle such lands: After marriage he makes a settlement of the lands, and recites it to be in performance of the articles, and in consideration of the marriage, and for a provision for the wife, and their issue; but never requires her to convey her estate. After his death, she enters upon the settled lands, this settlement is a waiver of the conveyance by the husband, and the wife shall hold her own estate too. 59

2. A sister releases a legacy to her brother pending courtship, the husband, as her administrator, files a bill to set aside this release, as executed by his wife without a consideration, during a treaty of marriage: The Court dismissed the bill, because he sued as administrator, and were of opinion, that this was no fraud to set aside the release, because it did not appear that the husband knew she had a right to this legacy, nor did he make her any settlement in view of it. 270

- 3 The portion of a lunatick, by order of Court, is paid into a Master,

Master, and the husband, on making a settlement, is to have it out : He makes no settlement, but assigns the money over to his creditors, and dies without issue ; the wife survives, and dies, the money was decreed to the creditors of the husband, for the payment of the Master, was a payment to the husband, though the Court would not let him lay hands on the money without making a provision for the wife, but she being dead without issue, his right is the same in equity as at law. 231

4. A bill is filed against husband and wife, and others ; the Court declared, that such a share of the testator's estate after payment of debts belonged to the wife, and such a share to the plaintiffs, and decreed a distribution accordingly, and that 10,000*l.* part of the assets should be brought before a Master, to be put out at interest, for the benefit of the parties to whom it should appear to belong. This is only in nature of an interlocutory judgment ; and if the husband dies, the wife's share of the 10,000*l.* survives to her. 234

5. *A* conveys lands for ninety-nine years, if she should so long live, in trust, to the use of herself during widowhood, and then in trust for her younger children, and afterwards marries, the children file their bill to have possession, and the title deeds delivered up to them. The husband by his answer insists, that

the conveyance was fraudulent, being made pending courtship ; the Court would not decree possession, because the conveyance was voluntary, but only ordered the deeds to be produced, and gave them leave to bring an ejectment in the name of the trustees, which they do and recover. The husband files a cross bill, and the Court would not grant him an injunction to stay proceedings on the ejectment. 261

Alimony, and separate maintenance.

Vid. The order and priority in which debts are to be paid, 2. under debts.

1. If the wife sues for alimony, it is no good plea, that she has a separate maintenance, or pin-money. 121
2. The husband voluntarily and causelessly deserts his wife, and goes to *Maryland*, having first made a fraudulent assignment of all real and his personal estate, in trust to pay his debts, the Court decreed the wife a maintenance out of this estate, though she had the interest of 4000*l.* for pin-money by her marriage articles. *ibid.*
3. The baron in poor circumstances, and his wife wholly unprovided for, settles her orphanage part in trust, for her sole and separate use. His creditors, prior to the assignment, shall not set it aside, or have the interest

terest of the money during his life, for it is a reasonable settlement, and such as the Court would have obliged the husband to make if he had filed a bill for her orphanage share. 337

BILL.

Vid. Court of Chancery, 1. under Court.

1. A bill may be brought to be quieted in the enjoyment of a mine or colliery, before the right is established at law, for fear the mine should be ruined in the mean time. 89
2. If a bill is brought for a sum under ten pounds, the defendant may either demur, or move to dismiss it. 356

Bill: Who must be parties.

Vid. Plea 3.

1. A bill may be filed against the heir only, for satisfaction of a bond, if the executor is out of the kingdom. 85
2. Or if he would not administer himself, and opposed the plaintiff in taking out administration as principal creditor. *ibid.*
3. A creditor or legatee may file a bill against a legatee or debtor, if he makes the executor a party, and charges collusion. 128

Cross Bill.

Vid. Examination after publication, 1. under examination.

1. Cross bills are in nature of a defence, and were first allowed, that the party might state his own case more to his advantage than he could by his answer.

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Bill of review.

See Report.

Bill of revivor.

1. Pending the account, the mortgagee dies, and a bill of revivor is filed against his administratrix: She pleads, that the suit could not be revived against her, because she was cestuy que trust of the mortgaged premises, and was not a defendant to the original bill: This is not a good plea, because the cause is not revived against her in her own right, but only as representative of the mortgagee. 38
2. A bill of revivor cannot be brought against a devisee. 44

Dismissal of a bill.

Vid. Bill of discovery, 2. under bill.

1. If a bill is depending here, and the plaintiff files another for the same matter, the defendant may move to have them referred, and one dismissed. 268
2. But if a bill is dismissed in the Exchequer, and then filed here, he cannot dismiss it on motion, but must plead to it.

ibid.

Bill

Bill of Discovery.

Vid. *Answer sufficient*, &c. 2. *under answer. In what cases an infant is favoured*, &c. 4. *under infant. Forfeiture*, 1, 2. *Fraud*, &c. 2. *Affidavit* 3.

1. Mortgagor brings a bill to redeem, on payment of what is due; and a decree is made accordingly. Pending the account, the mortgagee dies, and a supplemental bill is filed against his executor for a discovery of assets, the executor demurred, and his demurrer was allowed, because the plaintiff could have no demands on them. 38
2. If a cause comes to a hearing, where the bill is for a discovery only, it must be struck out of the paper, and a decree cannot be made for the plaintiff, or the bill dismissed, because it prays no relief. 185

Bill pro confesso.

Vid. *Regularity*, &c. 1.

1. Formerly the plaintiff was obliged to prove his bill by witnesses vivâ voce, as his declaration at law, before the Court would decree it pro confesso. 386
2. But this practice was disused, for the plaintiff often filed his bill for a discovery, because he could not prove his case. 387
3. If the defendant is in custody and will not answer, he is to be brought up by several habeas

corpus before the Court will decree the bill pro confesso. 384

4. A cause comes to be heard on a sequestration, the defendant obtains a week's time to answer, and the cause is adjourned: He puts in an answer, and the plaintiff refers it for insufficiency, the Master reports it insufficient, and the plaintiff serves the defendant with a subpoena to make a better answer, the cause comes on again, and the Master of the Rolls decrees the bill to be taken pro confesso, but this decree was reversed by the Lord Chancellor; because he could not presume the bill to be true for want of an answer, when by the records of the Court there appeared to be an answer, (and admitted by the plaintiff, by his taking exceptions) and when several material parts of the bill were denied by the answer.

294

Vid. *Regularity and irregularity*, 1.

Bills of Exchange.

Vid. *Foreign Court*. 2. *under Court*.

1. By the laws of *Leghorn*, if the drawer fails, before the bill is accepted, and the acceptor has no notice of it, he is not obliged to pay the bill, unless he has effects of the drawer in his hands, and then he is to answer only for their value. 2

BOND.

BOND.

Vid. *Who must be parties*, 1, 2.
under bill. Agreement, when to be performed in specie, &c. 1. *under agreement. Bankrupt* 5, 6, 7.
Forfeiture, &c. 3. *Possession* 1.

1. If obligors are bound jointly and severally, the obligee may sue them in equity severally, as well as at law. 383

C.**CHARITY,**

Devise and appointment to a charitable use.

1. The testator makes his will, *inter al'*, in these words, 'All the rest of my personal estate I give to my executors, in trust, to employ to such charitable uses as by codicil I shall appoint. Afterwards by codicil, taking notice of the will, he directs the residue to be applied to such uses as he by codicil should appoint,' and dies without making any appointment; the King shall not have the disposal of the trust, as of a general charity. 290

CLERK in COURT.

1. The Clerk in Court may pray payment of his bill in this Court, either from the solicitor, or client, though he cannot sue the client at law, for want of a retainer. 172

COMMISSION.

Vid. *Contempt*, 1, 6.

CONDITION, OR COVENANT.

Vid. *Special agreements about mortgages, &c. under mortgage. Parol agreement*, 1, and *when to be performed in specie, &c.* 2, *under agreement, forfeiture, &c.* 1, 4, 5.
Injunction, 3.

What is a good performance in equity; what not.

Vid. *What shall be said a sufficient performance of an agreement, &c. under agreement.*

1. *A* devises his lands of about 4000*l.* a year to his son *B* for life, remainder to his first, and every other son in tail male. *B* by articles of intermarriage reciting the devise, covenants, &c. to assure lands in fee of 4000*l.* a year at least, to the use of himself for 99 years, if he should so long live, remainder to his first, and every other son in tail male; the marriage takes effect, *B* dies, and suffers the devised lands to go to his eldest son, they shall be taken as a satisfaction of the lands covenanted to be assured. 167

CONFIRMATION.

Vid. *Interest of money*, 1, 2, 3, 5.

1. You cannot move, or have the directions of the Court, on a Master's

Master's report, till it is confirmed. 71

CONTEMPT.

1. An attachment for a contempt issued against one abroad, and a commission was granted to examine him. 85
2. The Court suffers persons to be examined on interrogatories, to purge themselves of a contempt, but never to bring themselves into one. 250
3. All who are concerned in the private marriage of an infant, under the care of the Court of Chancery, are guilty of a contempt, though they are strangers to the order of guardianship. 251
4. But the Court will not set up an inquisition to find out who they are, nor examine the persons concerned, who was the person that married her. *ibid.*
5. One in contempt for not obeying an order, may move to discharge it. 259
6. A prosecutor may take out a commission to prove a contempt, and the contemnor can name but one commissioner, and cannot examine witnesses, but may cross-examine the prosecutor's, but on application, the Court will give him leave to examine to special points. 312

COPYHOLD.

Vid. *Will and Testament*, 3, 4. *Deeds, &c. defective, made good in equity*, 3, *under deeds*.

2 H

COSTS.

Vid. *Appeals, &c.* 2. *Attorney, &c.* 6. *Redemption, &c.* 1. *under mortgage, prochain amy*, 1, 2. *Pauper*, 1. *Penalty*, 3. *under forfeiture*.

1. If an infant sues for a legacy, costs must be paid out of assets. 5
2. If the plaintiff resides in another kingdom, the defendant may compel him to give security to pay costs. 7
3. On a bill by creditors, if the lands by consent are decreed to be sold, and the creditors to be paid according to their priority; the costs notwithstanding shall be paid in the first place to all the creditors. 50
4. Issues being directed to be tried at bar, the Court would not make it part of the order, that the defendant should pay only nisi prius costs, if they were found against him. 93
5. If the plaintiff is in the service of a foreign Envoy, he must give security to pay the costs. 175
6. On report of assets, costs were decreed generally against the defendant, and not out of assets. 204
7. The defendant may amend his bill paying common costs, after the demurrer is put in. 301
8. But after it is set down to be argued, he must pay the costs of the demurrer. *ibid.*

COVENANT.

COVENANT.

Vid. *Condition.*

COURT.

Foreign Court.

1. The sentence of a foreign Court binds ours. 2
2. Chancery granted an injunction to an action on a bill of exchange, the acceptance having been vacated in the Court of *Leghorn*. 2
3. That he was tried in *Spain* and acquitted, is a good plea to an indictment for murder beyond the seas. 2

Court of Chancery.

Vid. *Bill*, 2. *Foreign Court*, 2. *under Court*.

1. Will not take cognizance of a sum, originally below the dignity of it, though by the neglect or mispleading of the plaintiff, it has amounted to a larger. 47
2. Acts of the Court as a decree, or order in another cause, between the same parties, may be read without an order. 188
3. Disputes in the societies of law, are to be determined by the Benchers, and the Courts of equity will not interpose. 190

Spiritual Court.

Vid. *Portions*; &c. 1.

1. The spiritual Court have a power

to order the assets to be brought into Court, whilst a will is in contest. But see *Injunct*

CREDITOR.

Vid. *Debts*.CUSTOMS of *London*.Vid. *London*.

D.

DE BENE ESSE.

Vid. *Examination De bene esse*, *under examination*.

Debts, Creditor and debtor.

Vid. *Who must be parties under bill*. Vid. *Statute of limitations* 2, 3, 5. *under limitations*. *Payment* 1. *Presumption*. *Devise of lands for payment of debts*, &c. *under will*.

The order and priority in which debts are to be paid.

Vid. *Costs* 3. *Retain*, 1, 2. *Interest of money* 5.

1. Creditors are decreed to be paid according to their priority; this is to be understood of priority in point of satisfaction, and not in point of time. 52
2. The creditors of a feme covert file a bill after her death, to be paid out a trust estate for her sole and separate use, the Court decreed, that all the creditors should

should be paid *pari passu*, and a mortgagee and bond creditor were not to be preferred, because a feme covert by law could not make a mortgage, or enter into a bond. 328

In what case one debt shall be set off in equity against another.

1. Where there is a mutual credit, the balance only is due to the executor in equity. 186
2. But if the account is stated in the life-time of the testator, or a bond given for the balance, the defendant cannot set it off by future credit given to the testor, unless the executor admits assets. 186

DECREE. •

Vid. *Court of Chancery*, 2. *under Court. Bill pro confesso, under bill. Receiver*, 1. *Hearing*, 1. *Regularity and Irregularity* 1. *Foreign Court*, 1. *under Court*.

1. A motion cannot be made on a decretal order, 'till it is passed with the register. 71
2. The words, *All just allowances* in a decree, does not empower the Master to allow for improvements, but they must be particularly mentioned. 226

Decree by default, and absolute.

1. Decree *ex parte* is made, on default of the defendant reading the affidavit of service, and a piece of the answer. 186

2 H 2

2. But if the bill and answer is opened, and then the cause is adjourned, though the defendant make default at the next hearing, the decree shall be absolute; for the second hearing is to be considered as a continuation of the former, when the defendant did appear. ib.

3. A decree against an infant nisi, is an absolute decree. 308

4. And cannot be set aside by original bill, unless for fraud and collusion, between the plaintiff and his guardian. ib.

5. And it is a good cause, why such decree should not be made absolute against the infant, after he comes of age, that he has put in a new answer. 313

DEEDS, CONVEYANCES, and ASSURANCES.

Vid. *Will*, &c. 1.

Deeds, &c. lost or concealed.

Vid. *Affidavit*, 2, 3.

Deeds, &c. defective, made good in equity.

Vid. *Demurrer*, 2.

1. One who had a power to make a jointure under hand and seal, executes it by will, this defective execution was made good in equity, in favour of a wife. 46
2. The trust of a term of fifteen years, is declared to be, ' If A have no issue male, for the raising portions for the daughter ' &c. &c.

'ers of *A*, to be paid at such times, and in such manner and proportion, and with and under such provisos and limitations as the said *A*, by any writing or writings, under his hand and seal, attested by two witnesses, shall appoint.'

A bill is brought against *A*, to lay out the money in a purchase. *A* in his answer says, 'that he does appoint, and intends by a writing in due form to appoint, that all the rents and profits shall be collected and applied for raising a portion for his daughter *B*, in case he should have no other &c.' *A* made no appointment, and died without issue male, leaving *B* his only daughter, this answer is such a defective appointment, as a Court of equity will make good in favour of a daughter. 369

3. Equity will not supply the want of a surrender of a copyhold, against the heir, in favour of a younger child, unless he has none or a very small provision. 370

4. But will make good the defective execution of a power, whether he is provided for or not. 370

Deeds, &c. fraudulent.

Vid. *Estates and interests of the wife*, 2, 5. and *alimony*, &c. 2, 3. under *baron and feme*.

DELEGATES.

Vid. *Witnesses*, 1.

COMMISSION OF REVIEW.

1. A commission of review is not a matter of right, but of favour. 30
2. If five Judges are present, and two are against the sentence, this is no cause for a commission of review. 33
3. The Prerogative and Court of Delegates in *England* give sentence in favour of a will, and likewise the Prerogative in *Ireland*, but the Delegates in *Ireland* reversed that sentence five years after the sentence given by the Delegates in *England*: both sides petition the King for a commission of review, and the Lord Chancellor declared, that he would advise his Majesty to grant a commission to review the sentence in *Ireland*, but to suspend the consideration of the other petition 'till those commissioners of review had given sentence. 34

DEMURRER.

Vid. *Costs*, 7, 8. *Bill of discovery*, 1, under *bill*. *Witnesses*, 3, 4.

1. The benefit of a demurrer is never saved to the hearing. 228
2. If the end of a bill is to have a defective execution of a power made good, the defendant cannot demur that the plaintiff of his own shewing has no title. 228

3. A defendant

3. A defendant can demur only for matters appearing in the bill, but a witness may demur, because he is concerned in interest, though it do not appear by the interrogatory. 229
4. But if it does not appear by the cause, he must make oath of it. 229

his life-time, or by his will, shall not be disturbed; and the children advanced by him shall not bring their portions into hotch-pot; for equity regards the statute of distributions in this case only as to the persons who are to take. 304

DEPOSITIONS.

Vid. *Evidence*, 4. *Examination In perpetuam rei memoriam*, 1. *under examination*.

DEVASTAVIT.

Vid. *Devastavit*, &c. *under executor*.

DISCOVERY.

See *Affidavit*, 3.

DISTRIBUTION.

Vid. *When an undivided surplus shall go to the executor, and when to the next of kin, under executor, &c. Resulting trust, &c.* 4. *under trust*.

1. If the next of kin sue the executor in the spiritual Court for a distribution of the residue, B.R. will grant a prohibition. 49

Statute of Distributions.

2. Where equity decrees an undivided surplus to be distributed among the next of kin, the provisions made by the testator in

DOWER.

1. The Court granted an injunction to stay dower, the husband having devised to his wife 9/1. a year for her better support and maintenance, and made her residuary legatee. 256

E.

ELECTION.

Vid. *In what cases a legacy shall be a satisfaction, &c.* 4. *under legacies, &c.*

1. If the defendant puts in a plea, the plaintiff is not obliged to make his election till the plea is argued, for the plea denies he has an election, but says he is not intitled to sue in equity. 210

ESTATE.

Vid. *Exposition of words*, 2.

Limitations of terms for years, money, &c.

1. A personal estate may be devised over upon this contingency, *If he*

- he die, or shall depart this life, and leave no issue.* 183
2. A personal estate may be limited over after a particular dying without issue, but not after a dying without issue generally. 183
3. 'A personal estate is devised to the use of *Mary*, and if she died without issue, to be equally divided between the sisters of the testator, after the decease of *Mary*, in manner aforesaid;' the limitation over to the sisters, being after an estate tail is void. 184
4. 'And if my daughter die before 21, then my will is that my wife shall have 400*l.* and that then, and immediately from and after my said daughter's decease without issue of her body, I give all my personal estate to my brother, he paying the said sum of 400*l.* to my wife, if then living.' This is a devise over to the brother; if the daughter die without issue before 21, and consequently is good. 187
5. 'I give to my wife all my personal estate, and after her decease to my daughter, and then after her decease, to the fruit of her body, but for want of such issue or fruit, to my brother;' the limitation to the brother is good, if the daughter die without issue living at the time of her death. 188
6. If tenant in tail, remainder to *B* for life, remainder to his first, and every other son in tail, remainder in fee to the tenant in tail, of lands in mortgage, directs his executors to pay off the mortgages, and that they should assign the leases to another; this is a good devise of the equity of the terms, and the several intermediate tenants in tail, by a common recovery, can bar not only the remainder in fee, but the devise of the equity, which arises out of it. 216
7. A term for 99 years, if one so long live, cannot be intailed. 262
8. The devise over of a personalty was first allowed, because it is considered as an original devise. 321

EVIDENCE.

Vid. *Answer*, 2.

1. The examination of a legatee, who had given a receipt for her whole legacy, was not allowed to be read, to prove she received only part of it. 40
2. The affidavit of the bankrupt, sworn before a Master extraordinary in *Cork*, was allowed to be read. 78
3. Courts of law will allow an affidavit sworn before a consul to be read. 78
4. Depositions of a witness, in another cause, or Court, may be read against him in this Court, without an order, to confront the evidence he then gives. 118

Vid. *Court of Chancery*, 2. *under Court*.

EXAMINATION.

EXAMINATION.

Vid. Contempt, 1, 2, 4, 6.

Examination de bene esse.

1. The plaintiff may examine a person de bene esse, though neither old or infirm, or going abroad, upon affidavit of his being the only person who has any knowledge of the forgery of a deed, or other material fact, for otherwise, if he dies before he is examined in chief, the proof of the fact is gone.

390

Examination after publication.

1. Matters examined to in the original cause, and publication past, or settled by a decree, cannot be examined to in the cross cause.

382

Examination vivâ voce.

Vid. Bill pro confesso, 1. under bill.

1. The Court refused an order, to prove exhibits vivâ voce at the arguing of exceptions, because nothing can be offered at the hearing, that was not before the Master.
2. You may prove an exhibit vivâ voce at the hearing, but you can examine the witness only as to the execution of it.

191

381

Examination in perpetuam rei memoriam.

1. The depositions of a witness ex-

amined in perpetuam rei memoriam were suppressed on a petition after his death, and the examiner discharged, and committed for foul practice and irregularity in the taking of them, the plaintiff being suffered by the examiner to instruct him, and the witness proved corrupted, and as he had been examined on a trial to the same points, the plaintiff might give evidence of what he swore.

327

EXCEPTIONS.

Vid. Examination vivâ voce, 1. under examination.

1. If a plea is to stand for an answer, without liberty to except, the plaintiff may except to the rest of the answer.
2. Only special reports, or those which need confirmation, can be excepted to, others must be discharged by motion.
3. If the plaintiff move to confirm a report nisi, and the defendant shew exceptions for cause, the plaintiff may except too.

174

256

305

EXECUTOR and ADMINISTRATOR.

Vid. Who must be parties, 1, 3, under bill. Distribution, 1. Costs, 1. 6. In what case one debt shall be set off against another in equity, under debts. What estates, &c. passes, 6, under will. Injunction, 7, 8. Surplus and residuary legatees, 2. under legacies, &c. Retain, &c. 1. What estate, &c. passes, 3, under will.

will. Devise of lands for payment of debts, &c. 2, 4, 7, 8, under will.

1. If the use of household goods is devised to an executor for life, he must sign an inventory, but shall not be obliged to give security for them. 13

When an undevise surplus shall go to the executor, and when to the next of kin, or the heir at law.

Vid. Distribution, 1.

1. The testator devises his real and personal estate to his six executors, in trust, to pay his debts and legacies, and the residue to be equally divided among them, share and share alike. One dies in the life-time of the testator; his share of the real estate shall go to the heir at law, and of the personal to the next of kin of the testator, and not to the others as executors. 44

2. 'I give all my leases, &c. to my wife for term of her life, and as to any person who may have any claim or demand, as related to me, I give them 12d. each, and I make my wife executrix.' The residue of the terms, after the death of the wife, belongs to her as executrix, and not to the next of kin. 4

3. If the testator leaves his next of kin 5l. apiece, and no more, the residue of his personal estate belongs to his executor, and shall not be distributed. 4

4. If a particular legacy is left to one of the executors only, the residue belongs to both executors. 26

5. One devises the residue of his personal estate to three equally, and makes them executors. One dies in the life-time of the testator, his share shall go to the other two, as executors, and not to the next of kin. 49

6. The testator makes his will, *inter alia*, in these words; 'All the rest of my personal estate I give to my executors, above 200l. to each of them 100l. to be deducted out of the residue, in trust, to employ as I shall appoint.' The testator dies without making any appointment, the residue shall not go to the executors, but shall be distributed among the rest of kin. 290

7. 'I make A my executor, and I give him all my real and personal estate to pay my debts and legacies, and 200l. to B, (who was his heir at law) the surplus of the real estate shall not go to B, but to the executor. 359

Executor, how to be charged, and how to account.

Vid. Persons accountable, &c. 3. under account, report.

1. If one executor delivers assets to the other, he is still answerable for them. 36

Vid. Bankrupt, 3.

2. If

2. If an executor without cause calls in money out at interest, he shall pay interest for it. 99
3. An executor is to be allowed his expences, but nothing for his care and trouble. 130
4. But if goods are configned to a factor in the life-time of the testator, though they come to his hands after his death, and he is made his executor, he shall be allowed commission-money. *ibid.*
5. If a legatee brings a bill against the executors, and has any of the assets in his hands, the executors shall not be put to their action or bill for them, but the legatee must take them, as a satisfaction pro tanto. 300

Administrator Durante Minoritate.

1. Administration granted during the minority of two, ceases when one comes of age, and the administration is to be granted to him. 99

Administrator pendente lite.

1. Determines by the grant of a probate, and does not revive on appeal to the Delegates, but they grant a new administration. 309

Devastavit and conversion.

1. An executor cannot commit a devastavit by his will, for nothing passes, but what the testator may lawfully grant. 377

EXHIBITS.

Vid. Examination viva voce, under examination.

EXPOSITION OF WORDS.

Vid. Purchase, 2, 3, 4, 5. The order and priority in which debts are to be paid, 1. under debts. Guardian, 1, Decree, 2. Words of purchase, &c. under purchase, &c. What things pass by the words, &c. under will.

1. The word *Appropriated*, in an act of Parliament, signifies to be applied to the uses of the act, and no other. 101
2. Estate primarily signifies the interest a person has in a thing, and secondarily the thing itself. 175
3. The word *Petition*, in 7 *Ann.* ch. 19. is to be understood of any summary way, in distinction to the proceedings by bill. 197
4. The word *Moveables*, in its full sense, takes in all personal chattels. 297
5. The words in a will, *Not formerly settled*, though they have no operation, they show an honest intention in the testator, to leave every thing as it was settled, before the making the will. 354

F.

FACTOR.

Vid. Executor how to be charged, &c. 4. under executor, &c.

1. One,

1. One, who acts as factor, is *prima facie* intitled to commission money, unless you can make the contrary appear. 129

FINE and NONCLAIM.

Vid. Fraud, &c. 1. Answer, 4.

1. A fine will bar him who has an equitable title, if he does not bring a bill within five years.

73

FOREIGN.

See under Court.

FORFEITURE, PENALTY.

1. Supercargoes covenant to answer any bill shall be filed against them, and not to plead or demur: This covenant will bind them, though the discovery may subject them to forfeitures. 77
2. If an information is filed for the payment of notes given to publick uses, and the defendants file a cross bill against the relators for a discovery of the consideration of the notes, they cannot demur, though the discovery may subject them to a penalty. 82
3. A Court of law would not relieve against the penalty of a bond, but on the obligor's paying the costs of a former trial, in which the obligee had been nonsuited. 45
4. If a legacy is devised to a person who has a right to a customary share, on condition they do

not sue the executor for that share, if he file a bill against the executor for an account of the personal estate, that is no breach of the condition, because he had a right to inquire which was of the most value, his share or legacy, and that cannot appear 'till the account is taken. 181

5. But if the legatee is barred of his customary share, such a bill is a forfeiture, because the inquiry is needless. And if the legacy is devised over, the Court can give no relief. *ibid.*

FRAUD, COLLUSION, COVIN, CONCEALMENT, IMPOSITION.

Vid. Decree by default, &c. 4. under decree. Who must be parties, 3, under bill, Statute of limitations, 1, under limitations. Injunction, 9. London, 8, 9.

1. Fraud will prevent the operation of the statute of fines and of limitations. 18
2. A plaintiff after six years, is intitled to a discovery of a fraud. 244
3. A fraud is a bar at law to the statute of limitations. 245
4. The second brother dies, and his eldest and youngest brother consult a schoolmaster, which of them had a right to his lands, he gives his opinion in favour of the youngest, upon which they agree to divide the estate, the Court set aside the deeds of conveyance of the moiety to the youngest brother, as being obtained by mistake. 364

G.

G.

GUARDIAN.

Vid. *Agreement when to be performed in specie, &c.* 3. *under agreement. Homine replegiando, 1. under writs. Contempt, 3, 4. Mine, 1.*

1. 'I desire that my son and daughter may be under the care and direction of A.' These words of the will amount to the appointing a guardian.

109

2. Equity denied an injunction to stop the guardian of tenant in tail, who lay a dying, from cutting timber, or to give relief after his death for what was cut, because as the tenant in tail had a power over the inheritance, the guardian might exercise that power in the manner he thought would be most for the benefit of the infant.

224

3. Two are appointed guardians by will, one marries the ward of nine years of age, to his son of fifteen, the Court ordered the child to be delivered to the other guardian, 'till she came of age to consent to marry, but would not commit the guardian, because he was not appointed under the Great Seal; but being in Court, obliged him to enter into a recognizance, to appear in B. R. to any information should be filed against him.

236

H.

HABEAS CORPUS.

Vid. *Habeas corpus under writs.*

HEARING.

Vid. *Subpœna, 2. under process.*

1. If a cause is set down to be heard irregularly, you may have it referred after a decree.

44

HEIR and ANCESTOR.

Vid. *Who must be parties, 1, 2, under bill. Deeds defective, &c. 3. under deeds. Resulting trust, &c. 1. 3, under trusts. Persons accountable, &c. 1, under account. When an undivided surplus shall go to the executor, 1, 7. under executor. Redemption, &c. 7. under mortgage. Retain, 3. What things pass, &c. 4. under will, and 11.*

1. The heir may discharge his estate, when the portion becomes payable, though it belongs to an infant.

56

Matters controverted between the heir and the executor.

1. Lands contracted for, go to the heir of the purchaser, and the money must be paid by his representative.

123

Bargains

Bargains obtained from young heirs.

INFANT.

1. The plaintiff borrowed 4000*l.* and entered into a bond of 18000*l.* to pay 9000*l.* after the death of his father, who was then about eighty years of age. The Court relieved him against this bond, on payment of the 4000*l.* and interest. 373

I.

IDEOT and LUNATICK.

1. One found an ideot had leave to traverse the inquisition, on condition she would appear in person at the trial. 71
2. The lunatick being recovered, and examined in Court, the commission was superseded, and the recognizance of the committee ordered to be vacated, the lunatick declaring himself satisfied with the account. 78
3. A lunatick having recovered his understanding, petitioned to have the commission superseded, but the Court only suspended it for some months, to see if he was perfectly recovered, because he had often relapsed, and was found by the inquisition a lunatick with lucid intervals. 332

IGNORANCE.

Vid. *Fraud*, &c. 4.

1. That maxim, *Ignorantia juris non excusat*, relates only to crimes, and do not extend to civil cases. 365

Vid. *Decree by default*, &c. 3, 4, 5, under decree. *Heir* 1.

In what cases an infant is favoured or privileged; in what not.

1. If an infant loses money at a horse-race, and after he comes of age promises to pay it, the promise shall bind him in law. 62

2. An infant, who by the decree has a day to shew cause, &c. may move of course to put in a new answer, or amend his answer, when he comes of age. 68

3. If an infant is plaintiff in the original cause, and defendant in the cross cause, and by the decree made in both causes, has six months after he comes of age to shew cause, &c. when he comes of age he may amend his answer or put in a new one, but cannot put in a new bill, or amend his former. 68

4. The Court enlarged the time, after the defendant came of age, to shew cause, till the plaintiffs in the first cause had put in an answer to a bill of discovery he filed against them, after he came of age. 203

Infant, trustee within the 7 *Ann.* ch. 19.

1. The heir of the vendee is a trustee within this act, for the person who paid the purchase-money. 197

2. You

2. You may move or petition for a reference, whether an infant is a trustee within this act. 197
3. The heir of the mortgagee is a trustee both for the mortgagor, and the executor of the mortgagee. 198

INJUNCTION.

Vid. Guardian, 3. Estates, &c. of the wife, 5, under baron and feme. Foreign Court, 2, under Court. Dow-er, 1. Portions, &c. 1. Letter of attorney, 1. Joint tenants, &c. 5. Surplus and residuary legatees, 2. under legacies. Trial.

1. The Court adjudged the answer insufficient, and yet gave the defendant in the original cause (who lived at *Constantinople*) leave to proceed against the defendant in the cross cause for his answer, and to ascertain his debt at law, notwithstanding the injunction, because he had sworn 800*l.* due to him, and could not put in a further answer in less than two years. 58
2. If a bill is brought to be quieted in the enjoyment of a water-course, and wears, for working mills and mines, diverted and broke down by the defendant; the Court will grant an injunction before answer, and make an order on the defendant to put the premises in the same condition they were in before the injury. 89
3. One seized in fee of upper and lower mills, leases the lower with the stream, and covenants for quiet enjoyment, and after leases the upper, and the lessee covenants not to divert or pen up the said streams, to the prejudice of the lower mills. On a breach of this covenant, the lessee of the lower mills may bring a bill, in the room of his lessor, for an injunction, without first bringing an action of trespass. 145
4. By the course of the Court, injunctions as to lands, are to be granted before answer in two cases only, to stay waste, and to quiet the possession, where the plaintiff has been three years before the filing the bill in peaceable possession. 171
5. The tenants file a bill against the lord of the manor, to restrain him from digging brick earth in the waste, in prejudice of their right of common, and the Court refused an injunction before answer, because the soil is the lord's, and the plaintiff did not swear, that he had not left them sufficient common. 172
6. If a plea is ordered to stand for an answer, the defendant cannot move to dissolve the injunction absolutely, but only nisi. 198
7. This Court will grant an injunction to the executor, from receiving the assets before answer, if a suit is depending in the spiritual Court, to set aside the will, because that Court cannot impound the effects pendente lite. 236
8. A caveat is entered in the spiritual Court to the probate of a will, and the executor is ordered to bring 400*l.* he had received into

into Court, and administration pendente lite is granted. Sentence is given for the will, and a probate granted, and the 400*l.* paid out to the executor; the parties appeal, the Delegates grant an inhibition and citation, the executor will not appear, the Delegates not sitting, the appellants file a bill for an injunction, and the Court denied an injunction against the administrator, or the executor, to bring in the 400*l.* but granted it to restrain him from receiving any more of the assets, till answer and further order. 311

9. *A* enters into a bond to *B* a foreigner, who assigns it for a valuable consideration to *C* a foreigner, of which *A* had notice, the bond is put in suit in the name of *B*, and a verdict for the plaintiff; upon which *A* files a bill against *B* only, and upon his taking out a *dedimus*, obtains an injunction. *B* does not answer, upon which *C* files a bill against *A*, and *B* his trustee, charging collusion, that *A*, who knew of the assignment, ought to have made him a party, and that *B* was persuaded by *A* not to answer, and moved to dissolve the injunction in the cause between *A* and *B*, which the Court granted, on his giving security to appear to the bill of *A*, if he made him a defendant, and to abide the order of the Court at the hearing. 355

INSURANCE.

Policy of Insurance.

1. Q. If a bill for relief lies on a policy of insurance, taken in trust on a suggestion that the witnesses live abroad, and that the trustee refuses to let them sue the policy in his name. 83

INTEREST of MONEY.

Vid. *Executor how to be charged, &c.* 2. *under executor, &c.* *Partners, 1. Maintenance, 1, 2. Legacies, &c. vested, &c.* 1, *under legacies, &c. what estate, &c. passes, &c.* 3, *under will, &c.*

1. What is due for principal, interest, and costs on a mortgage, shall carry interest from the confirmation of the report. 27
2. And the principal shall bear interest from the date to the confirmation. *ibid.*
3. Where lands are subjected to the payment of debts by simple contract, they will not bear interest, though stated by the report, unless upon unreasonable delay of payment. 28
4. A legacy out on a security when the testator died, shall bear interest from his death. 99
5. Where creditors are decreed to be paid according to their priority, if the estate is deficient, the principal only shall bear interest after the confirmation of the report. 247

INVENTORY.

INVENTORY.

L.

See *Executors*.

JOINT-TENANTS and TENANTS
in COMMON.

Vid. *Legacies, &c. vested, &c.* 3,
under legacies, &c.

1. 'Lands are devised to *A* and *B*,
' and the heirs males of their
' bodies, equally to be divided
' between them.' *A* and *B* are
tenants in tail in common. 56
2. 'Lands are devised to *A* and *B*,
' the survivor and survivors of
' them, their heirs and assigns
' for ever, to be equally divided
' between them, share are share
' alike.' *A* and *B* are joint ten-
nants for life, with several in-
heritances. 57
3. I devise all the residue of my
estate to my son and my
daughter, their executors and
administrators. This is a joint
devise, and if one dies, the whole
survives to the other. 184
4. If a legacy is given to two, and
one dies in the life-time of the
testator, his legacy is not lapsed,
but survives to the other. 185
5. The Court granted one tenant
in common an injunction against
the other, to restrain him from
cutting down the timber, and
referred it to a Master, to see
what timber was fit to cut down,
and to sell it, and to pay the
money to the parties, according
to their interests. 305

LEGACIES and LEGATEES.

Vid. *Average and contribution*, 1.
Interest of money, 4. *Forfeiture*,
&c. 4, 5. *Maintenance*. *Devise*
of lands for payment of debts, &c.
1, 6, *under will*.

1. A legacy is given to two, pay-
able at twenty-one, and if ei-
ther die before, the legacy is to
survive to the other; one dies
under age, his legacy is decreed
to be paid when the deceased
would have come to twenty-one.
41
- But see the next case.
2. If a legacy is devised to *A*, to
be paid at twenty-one, and if he
die before, to go over to *B*, if
A dies an infant, *B* shall take
presently, and not wait till *A*
would be twenty-one. 302
- But see the preceding case.
3. A grandchild as to a legacy or
portion, is not to be considered
as a child. 98

Legacies or portions, vested or
lapsed, or extinguished.

Vid. *Joint tenants*, 4.

1. A devise to *A* of 500*l.* proviso,
if she die before twenty-one or
marriage, the legacy shall go to
B. This legacy vests imme-
diately in *A*, and will carry in-
terest, subject to the contin-
gency. 98

2. *A*

2. A legacy is given to *A*, to buy mourning for himself, his wife, and children, if *A* dies in the life-time of the testator, his legacy is lapsed. 185

3. '*A* devises a legacy to *B*, and a legacy to *C*, to be paid them in convenient time after his decease, and in case either of them should happen to die before they received the whole, or part, it was to be paid to the survivor.' *C* dies in the life-time of the testator, his legacy is not lapsed, but shall survive to *B*. 321

Surplus, and residuary legatees.

Vid. *What estate, &c. Passes, &c. 6. under will.*

1. The testator devises several pieces of plate to *A*, and the residue of his plate to *B*, and the residue of his estate to *C*. *A* dies in the life-time of the testator, his legacy shall lapse into the general residue to *C*, and not into the residue of the plate devised to *B*, for that legacy is not to be considered as a residuary devise, but is a particular legacy expressed in that manner, to save the trouble of enumerating particulars. 48

2. Legatees of the residuum are intitled to the species of which it consists, if there are other assets sufficient to pay the debts, and may have an injunction to hinder the executor from selling them; and are intitled each of them to a moiety of every spe-

cies if they can be divided without prejudice. 376

Ademption of a legacy.

1. An ademption of a legacy is not to be presumed. 374

2. '*A* devised a moiety of his South Sea stock, leases, South Sea bonds, mortgages, and other his personal estate to *B*, who before he received his legacy, made his will, and devised his moiety to trustees, to sell, and pay 200*l.* to *C*, and the residue of the money to *D*.' Afterwards *B*, and the legatee of the other moiety, come to an account with the executor of *A*, and their shares are set out, and received, and the stock and bonds are allotted to *B*, who sells part of them in his life-time, without keeping an account of the produce. This is an ademption of the legacy to *D* pro tanto. 376

3. But *B*, his receiving his share, was no ademption, for it did not shew any change of his mind, but was done in concert with the other legatee, to ascertain their moieties, and prevent the survivorship. *ibid.*

In what cases a legacy shall be a satisfaction of a debt, or other demand on the testator's estate.

1. 8000*l.* is devised to *A*, to be invested in lands, to the use of herself for life, remainder to *B* in fee. *A* devises lands, (which she purchased after the trust

trust for 3000*l.* but not with the trust money) to *B* in fee, and several legacies to others, and makes *B* her residuary legatee. The devise of the lands to *B* shall go in part satisfaction, because the assets would not otherwise hold out to satisfy the legacies. 7

2. Legacy equal to a debt, is to be considered as a payment. 7

3. But if it is less than the debt, it shall not go in part satisfaction. 295

4. If a father devises to a daughter a portion equal to, or greater than what she is intitled to out of his lands by settlement, that is a satisfaction, but she may have her election. 108

5. The mortgagee devises a mortgage, of which he had got a decree of foreclosure nisi, by the name of *his other freehold estate* in *A*, this mortgage being devised as real estate shall not go in satisfaction of a less debt. 364

LETTER OF ATTORNEY.

1. One coparcener joins with her husband and sister, in a letter of attorney to sell timber, which is sold accordingly: Baron dies, the Court denied the wife an injunction, because the letter of attorney was good in equity, for the wife was not imposed on, and was to have half the money. 305

LIMITATIONS.

Statute of Limitations.

Vid. *Fraud*, &c. 1, 2, 3. *Bankrupt*, 4. *Redemption*, 3, under mortgage.

1. The mortgagor's bill to oblige the incumbent of the mortgagee to resign, was dismissed, because he had brought no Quare impediment, nor filed his bill, 'till seven months after the institution, and the Court would not consider whether the delay was occasioned by any fraud of the defendant. 18

2. 'All the rest and residue of my estate after payment of my debts and funerals, I give to my executor.' Q. If the statute of limitations will be a bar to the creditors, if they do not bring their action against the executors, within six years from the cause of action. 245

3. Where the time begins against a creditor, in the life-time of the ancestor or testator, it goes on as to his executor or heir. *ibid.*

4. The statute of limitations extends to attornies bills. *ibid.*

5. *A* devised lands to his executors, willing them to pay his debts, debts barred by the statute of limitations, are not within this devise. 391

LONDON.

1. By the custom of *London*, a freeman may devise over the orphanage part of his sole orphan, if a son, on his dying before twenty-one, if a daughter, on her dying before twenty-one, or marriage, and the orphan cannot make a will to the contrary. 5
2. The Court would not determine the custom of *London* by precedents, and the city books, because the law had appointed a proper trial of them. 6
But *Quære*.
3. If the city certify, that it does not appear to them, whether there is such a custom or not, this is a bad certificate. 6
4. By the 5th and 6th of *W. and M.* a perpetual fund is established for the payment of interest of 4l. *per cent.* to the orphans, and other creditors of the city of *London*, from 1694 to 1712, the fund was deficient, since that time, there has been every year a surplus that shall not go to the city, but be applied to make good the deficiencies of the former years. 106
5. A child fully advanced, is barred of her customary share. 180
6. And a child advanced, is presumed to be fully advanced, if the sums do not appear under the father's hand. *ibid.*
7. But if they do, and are not equal to her customary share, they will be no bar; though the father declares her to be fully advanced. *ibid.*

8. If a freeman of *London* settles an estate belonging to his wife as executrix to the use of himself for life, remainder to his wife, this settlement is not a fraud on the custom. 258
9. *A* devises a third of his personal estate to his daughter, and two thirds to his grand-children, and made his daughter's husband, a freeman of *London*, executor, the husband by deed reciting, that the legacies of the grand-children were paid or secured, assigns his wife's share, in trust, to the use of himself for life, remainder to his wife; though this is a settlement to take place after his death, it is not a fraud on the custom. 259

LUNATICK.

Vid. *Idiot*, &c.

M.

MAINTENANCE.

1. An infant is not to be allowed maintenance, beyond the interest of her portion. 41
2. A legacy, either out of real or personal estate, payable to a son, or a daughter at twenty-one, will not bear interest, but if the child is unprovided for, the Court will allow them a maintenance from the death of the father. 98

MARRIAGE.

MARRIAGE.

Vid, *Contempt*, 2, 3. *Guardian*, 4.

1. A marriage is agreed on, the gentleman was related to the lady, and acquainted with her from her age of two years, and pending the treaty he makes her a present of jewels, which she wore in his life-time: He died on the day fixed for the wedding, and left her a legacy of 2000*l.* these presents are to be considered as absolute gifts, and not given on condition of marriage. 300
2. Presents made by an intended husband, ought to be considered as absolute gifts. 301

MASTER of the ROLLS.

1. The Master of the Rolls may discharge an order made by the Lord Chancellor ex parte, or on a motion of course. 72
2. A petition denied by the Master of the Rolls, may be preferred to the Lord Chancellor. 77

MINE.

1. A jointurefs and guardian to the tenant in tail, opens a mine on the jointure lands for the benefit of the tenant in tail, he dies under age. Quære if the next remainder man for life can work the mine. 223
2. If he can, he may sink as many pits in the same seam of coal as he pleases, and may work the mine in what manner he thinks proper. 223

MORTGAGE.

Vid. *Presentation*, 1. *Statute of limitations*, 1, under *limitations*. *Interest of money*, 1, 2. *Bill of discovery*, 1, under *bill*. *Amendment*, 1. *Parol agreement*, 2, under *agreement*.

1. If one borrows money for another on a mortgage of his estate, he may file a bill against him to pay off the mortgage-money, and shall not be put to his indebitatus assumpsit. 318
2. The mortgagee devises a mortgage of which he had got a decree of foreclosure nisi, by the name of his other freehold estate in *A*, though this mortgage is devised as real estate, it shall be considered as personal estate for the payment of debts, if assets are deficient. 364

Special agreements about mortgages.

1. A covenant in a mortgage of a reversion, that at the end of every year, if the interest is not paid within three months after it becomes due, it shall bear interest, is a void covenant. 247
2. Or that the interest shall be turned into principal, and bear interest on non-payment of the interest at the day. *ibid.*
3. Or that in default of payment, the interest shall be advanced from 5*l.* to 6*l.* per cent. *ibid.*
4. Or to pay 6*l.* per cent. but if the money is paid at the day, to pay

pay only 5*l.* and there is no difference in reason, between the two last covenants. 248

Redemption, Foreclosure.

Vid. *Possessio fratris*, 1.

1. On a bill of foreclosure, the Court would not decree the defendant to pay the costs of a cross cause depending, which he had brought to redeem. 45
2. 'One devises lands to his daughter and her heirs after her mother's death, but if his son paid her 500*l.* after his mother's death, to be invested in lands, he devised the lands to him and his heirs.' This is to be considered on the same foot with every common mortgage. 130
3. If a mortgagee is twenty years in quiet possession, (whether he was put in possession by the mortgagor himself, or the sheriff) the mortgagor cannot redeem, but if the mortgagee was in possession of part of the estate only, he may, for the time must run on the whole estate, or on no part. 191
4. Though a woman is not capable of a grant of chambers in the inns of law, yet if chambers in mortgage come to her by representation, she shall have the benefit of a renewal by the mortgagee, because she might have assigned them to a member, and the society would have renewed to him, in trust for her. *ibid.*

5. A bill of foreclosure being heard on a sequestration, and the security defective, the Court decreed a sale, because if the plaintiff sued the defendant on his bond, that would open a decree of foreclosure. 196
6. On a bill of foreclosure, if the security is defective, it is usual for the Court to refer it to a Master to set a value on the estate, and decree the plaintiff to take it pro tanto. 196
7. The voluntary assignee of the heir cannot redeem, without paying the mortgage money, and the money due by bond too. 239
8. On a decree of foreclosure, the Court will not oblige the plaintiff to lay the title deeds before council, for the defendant to get an assignment, or sale of the lands, (unless the plaintiff consents to a sale) but only to give a copy of the mortgage deed. 246

MOTIONS.

Vid. *Dismissal of a bill*, 1, 2, *under bill. Contempt*, 5.

1. A motion of course cannot be opposed, though notice is given of it. 255

N.

NE EXEAT REGNO.

Vid. *Ne exeat regno, under writs.*

NO ICE.

NOTICE.

Vid. *Securities taken in by an heir, &c.* 1, *under securities, &c.*

1. If the defendant pleads himself a purchaser for a valuable consideration, he may deny notice, either in his plea or answer. 73

O.

OATH.

Vid. *Affidavit.*

OFFER.

Vid. *Answer.*

OFFICE, and OFFICERS.

1. It is not necessary to prove the register's hand to the acts of the Court, because he is a known officer. 35
2. The plaintiff may move for a subpoena returnable immediate against an officer of the Court, without an affidavit, because he is presumed always to attend. 42
3. In the Court of Common Pleas, if the warden of the Fleet will not appear, they forejudge him his office. 238

ORDER.

Vid. *Master of the Rolls, 1. Court of Chancery, 2, under Court. Service, 1. Contempt, 5. Evidence, 4.*

ORPHAN.

Vid. *London, 1, 4, 5, 6, 7.*

P.

PAPIST.

Vid. *Purchase, 2, 3, 4, 5. Resulting trusts, &c. 1, 4, under trusts, &c.*

PARAPHERNALIA.

See *Devise of lands, &c. 6, under will.*

PARISH.

1. Foreigners are bound to contribute to the repairs and vestments of the Church, and to pay all parish duties. 287

PAROLE.

Vid. *Parole agreement, under agreement. How far parole proof may be admitted, &c. under will.*

PARTIES.

Vid. *Who must be parties, under bill.*

PARTNERS and PARTNERSHIP.

1. If one borrows money of the other on his note, he shall pay interest for it, though he had more in the stock than he borrowed. 3

PAUPER.

PAUPER.

1. A pauper cannot discharge himself of the costs he was liable to, precedent to his admission. 68

PAYMENT.

Vid. *Possession*, 1. *In what cases a legacy shall be a satisfaction, &c.*
2, 3. *under legacies. Presumption*, 1.

1. A person indebted on several accounts, when he pays money, may apply it to what debt he pleases. 252

PERSONAL ESTATE.

Vid. *Mortgage*, 2.

1. A by deed pursuant to a power, assigns part of the fee farm rents of his estate, in trust, to raise 8000*l.* apiece for the portions of his younger children, and after by will reciting the deed, left there should be any defect in the execution of his power, or that the rents should not be sufficient, he devises all his estate to the same trustees for two thousand years, to raise the portions, or so much thereof as the fee farm rents should not be sufficient to raise, and devises away all his personal estate. A by his power could only charge the estate with 5000*l.* apiece, the other 3000*l.* apiece shall not be made good out of his personal estate, because he expressly devised it, and designed only to charge the lands. 166

2. A having a power to charge lands with portions for younger children, suffers a recovery, and after by will reciting his power, he charges the estate with 1000*l.* for the portion of his daughter, and devises her a 1000*l.* the recovery having extinguished his power, the 1000*l.* charged the lands was decreed to be paid out of his personal estate. 167

PLEA.

Vid. *Foreign Court*, 3. *under Court. Bill of revivor*, 1. *under bill. Exceptions*, 1. *Injunction*, 6. *Dismissal of a bill*, 2. *under bill. Election*.

1. To plead to such part of the bill as is not answered, is a bad plea. 40
2. If the defendant obtains an order for time to answer, he may put in a plea, if the order is not to answer only. 207
3. A second plea of want of parties is not good. *ibid.*
4. But the plea cannot be suppressed on a motion, but must be set down to be argued. *ibid.*

PLEDGES.

1. On a writ of appeal, pledges are given either to the King in Chancery, or to the sheriff. 202
2. If a writ of appeal is in these words, *Quia fecerit, &c.* though pledges are not found, the writ asserts no falsehood, for the words do not signify that the appellant has

has given security, but that he will. 202

3. The sheriff on a writ of appeal may return no pledges, and is not obliged to execute it, if the appellant does not find pledges. *ibid.*

4. But if he pleases he may, and the appellant cannot plead in abatement no pledges, and has no remedy till judgment. *ibid.*

5. Pledges by the old law were to be found on every writ. *ibid.*

PORTIONS, or provisions for children.

Vid. Average, &c. 2. In what cases a legacy shall be a satisfaction, &c. 4, under legacies. Personal estate, power, trust for raising portions, &c. under trust, &c. Devise of lands, for payment of debts, 10, 11, 12, under will. What estate, &c. passes, &c. 1, under will.

1. If a portion charged on lands is sued for in the spiritual Court, Chancery will grant an injunction. 69

POSSESSION.

How far favoured.

Vid. Injunction, 4.

1. An obligee of a bond conditioned to convey lands for money received, having been in possession twenty years, shall not be obliged to prove the payment of the money. 37

Possessio Fratris.

1. The father mortgages in fee, and dies, the elder brother dies. without filing a bill to redeem, here was no Possessio Fratris, but the equity of redemption belongs to the brother of the half blood. 73

POWER.

Vid. Revocation, Demurrer, 2. Deeds, &c. Defective, made good, &c. under deeds. Personal estate.

1. A Court of equity will take care that a general power to charge an estate with portions for younger children be executed in a reasonable manner. 162
2. *A* devises lands of 4000*l.* a year to his son *B* for life, remainder to his first, and every other son in tail male, and gives him a power to charge the estate with portions for younger children. *B*, by articles of intermarriage, taking notice of these lands, covenants to assure lands in fee of 4000*l.* a year at least, to the use of himself for 99 years, if he should so long live, remainder to his first, and every other son in tail male, and that his younger children should have 5000*l.* apiece for their portions. The marriage is had, *B* dies, and suffers the devised lands to go to his eldest son, they shall be taken as a satisfaction for the lands covenanted to be assured, and the articles are a restraint of the general power to appoint portions,

portions, to 5000*l.* apiece, and any subsequent appointment by *B* of a larger provision, by that power is void. 162, 163

PRESENTATION.

1. If an advowson is mortgaged, and the Church becomes void, the right of presentation is in the mortgagor. 16

PRESUMPTION.

Vid. Office, &c. 2. London, 6.

1. Debts are assigned in 1713, the assignee dies, those debts shall be presumed to be paid, for which the securities cannot be found. 252

PRIVILEGE.

Vid. Prochein Amy, 2. Cofts, 5.

PROCESS.

Subpœna.

Vid. Office, &c. 2.

1. The Lord Chancellor, as one of the commissioners of oyer and terminer, gave leave to serve one with a subpœna, who was in *Newgate* for murder, of which he had been indicted at the *Old Bailey*, and a special verdict found. 237
2. If a cause is adjourned for want of parties, though the defendant is served with the order, he must be served with a subpœna to hear judgment. 226

Attachment.

Vid. Contempt, 1. Sequestration, 3. under process.

1. No attachment lies against the warden of the *Fleet*, because he is supposed to be always in Court, and though it is directed to the sheriff, the body when brought in, is turned over to the *Fleet*. 238

2. An attachment against a prisoner in the *Fleet*, is directed to the warden. 365

Serjeant at Arms.

1. If the goods sequestered are not sufficient to satisfy his demands, the plaintiff may move to revive the order for a serjeant at arms. 246
2. The plaintiff may move in all cases for a serjeant at arms, on the return of a cepi corpus. 305

Sequestration and Sequestrators

Vid. Bill pro confesso, 4, under bill. Serjeant at arms, 1, under process.

1. A sequestration nisi was granted against the warden of the *Fleet*, for want of an answer. 238
2. On the return of an attachment for non-performance of an order, against one in the *Fleet*, the next process is a sequestration. 301

PROCHÉIN

PROCHEIN AMY.

Vid. *Attorney, &c.* 6. *Witness, 5.*

1. The prochein amy, on affidavit of his poverty, must give security to pay costs. 47
2. A prochein amy shall not give security to pay costs, because he is a privileged person. 86

PUBLICATION.

Vid. *Examination after publication, under examination, will, &c.* 8.

PURCHASE and PURCHASER.

Vid. *Notice, 1. Securities taken in by an heir, &c. under securities, &c. will, 5. Devise of lands for payment of debts, &c. 3, under will. Matters controverted, 1, under heir.*

1. If an estate is gone over, it is never brought back on the birth of one who claims by purchase, otherwise if by descent. 11
2. The word purchase, in the 11 and 12 *W. 3. ch. 4.* is to be understood in a legal sense, as opposed to descent. 12
3. A devise of lands is a purchase within the act, or even a devise by construction, as where lands are devised in trust, to be sold for payment of debts and legacies, and to pay the surplus money to a papist. 12
4. So if *A* devises the residue of her personal estate, (which consists in leasehold houses) to *B*, a papist, and leaves sufficient to

pay her debts, *B* being intitled to the houses themselves, is disabled by this act to take. 373

5. If tenant in tail, who is a papist, suffers a common recovery, to the use of him and his heirs, he is not a purchaser within this act, which must be understood of new purchases. 12

Words of purchase, and of limitation.

1. Where both freehold and leasehold estates are limited, the same words cannot be words of limitation of the freehold, and of purchase of the leasehold. 278

R.

RECEIVER.

1. A receiver need not be served with a writ of execution of a decretal order, but only with a copy; and if he disobeys, shall be committed. 40

REGISTER.

Vid. *Office, &c. 1. Decree, 1.*

REGULARITY, or IRREGULARITY.

Vid. *Answer, 5. Hearing, 1.*

1. A decree on a sequestration, cannot be referred to a Master for irregularity, but must be reheard. 295

REHEARING.

REHEARING.

Vid. *Appeals*.

REJOINDER.

Vid. *Replication*, 2.

1. If the plaintiff replies, the defendant may rejoin gratis, in order to prove his answer. 123

REPLICATION.

Vid. *Rejoinder*, 1.

1. Where witnesses have been examined, and the plaintiff never replied, the Court at the hearing, or even after a decree, will give him leave to file a replication, nunc pro tunc. 296
2. A cause is at issue by the replication, and a rejoinder is never actually filed. *ibid.*

REPORT.

Vid. *Interest of money*, 1, 2, 3, 5.
Confirmation, 1. *Exceptions*, 2.
Examination vivâ voce under examination.

RETAIN.

When the heir, executor, or trustee may retain.

1. The creditors of a feme covert file a bill after her death, to be paid out of a trust estate, for her sole and separate use. The executor may retain. 339

2. But not the trustee. 328

3. If an estate is devised to executors, in trust, to pay debts, and the heir is a creditor, he cannot retain, but must come in pro ratâ with the other creditors. 123

4. The testator devises all his real estate to his executors in trust, to pay his debts, and his wife 40*l.* a year. The executor can retain. 328

RETURN OF WRITS, &c.

Vid. *Serjeant at arms*, 2. *Sequestration*, 2, under *process*.

1. By the rules of the Court, a *dedimus* is returnable the first return of the next term, but by the practice, not till the second return of *Trinity* and *Hilary* terms. 176

REVIEW.

Vid. *Commission of review* under *Delegates*.

REVOCATION.

1. If a feme covert makes an appointment by will, and her husband dies, and she marries again, this is a revocation of her will and appointment. 227
2. An appointment by will is subject to a revocation. 228

S.

S.

SATISFACTION.

Vid. *What is a good performance in equity, &c. under condition, &c. In what cases a legacy shall be a satisfaction, &c. under legacies, &c.*

SCANDAL and IMPERTINENCE.

1. If the title of an answer reflects on the plaintiff, it is scandal, because it is not part of the defence, or can be put in issue.

46

2. A bill is brought to be relieved against a state bond as satisfied, and as an evidence to prove it, the plaintiff charges that the defendant entered into a later bond to him for money lent, and that the bond being lost, he filed a bill against the defendant for payment, and had a decree, in which cause he never insisted on being paid this bond. The defendant in his answer says, he does not believe the plaintiff lost the bond, but concealed or destroyed it, these words are scandalous, because they are not material to the defence.

70

3. On a motion to discharge an order of reference of the bill for impertinence, after the defendant had prayed time to answer, the Court ordered the defendant to procure a report within four days, or the order to be discharged.

71

SECURITIES and INCUMBRANCES, JUDGMENT, STATUTE, RECOGNIZANCE.

See Executor, &c. 1.

1. Equity will not better the securities, the parties themselves have agreed to accept of

119

Securities and incumbrances taken in by an heir or purchaser, or subsequent incumbrancer.

1. He who would protect himself by buying in a prior incumbrance, must be an innocent purchaser without notice, and must insist upon his case.

55

2. A puisne judgment creditor, by purchasing in a prior mortgage, cannot protect himself against the intermediate mortgages or incumbrances.

55

SENTENCE.

See Foreign Court, 1, under Court.

SEQUESTRATION.

Vid. *Sequestration under process.*

SERVICE.

Vid. *Receiver, 1. Subpœna, 1. under process.*

1. An order need not be served, that is made on hearing council of both sides.

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T.

T.

TRIAL.

Vid. *London*, 2. *Answer*, 2.

1. The jointurefs, and guardian to the tenant in tail, opens a mine on the jointure lands, for the benefit of the tenant in tail, he dies under age, the next remainder man for life works the mine, the remainder man in tail brings a bill for an injunction, and the Court ordered the bill to be retained for a twelve-month, that the plaintiff might bring trover for the coals, and the defendant was to produce the title deeds on the trial. 224

TRUST and TRUSTEE.

Vid. *Retain*, 1, 2.

Resulting trust, and by implication and construction.

1. An estate is limited in trust to *A* for life, remainder to trustees during the life of *A* to preserve the contingent remainders, remainder to his first, and every other son in tail male, remainder to *B*, &c. remainder to the right heirs of the grantor. *A* is a papist, and has no son, the trust during his life shall go to the right heirs of the grantor, and not to *B*, the next in remainder. 11
2. Acts of Parliament take notice of implied trusts. 197

3. Lands are devised in trust to maintain the infant 'till he come to twenty-three, and then to account, and pay him the rents, and reconvey the estate to him; but if he died before, to reconvey it to another, the surplus profits, if the infant die before twenty-three, go to the heir of the testator, not being devised over. 244

4. *A* devised the residue of her personal estate, which consisted in leasehold houses, to *B* a papist, and left sufficient otherwise to pay her debts, *B* being disabled to take, the houses are to be distributed among the next of kin. 375

Trust for raising portions, and payment of debts.

Vid. *Average*, &c. 2. *Devise of lands for payment of debts*, &c. *under will*. *What estate*, &c. *passes*, &c. 1. *under will*.

1. A term of five hundred years is limited in remainder, after failure of issue male of the marriage in trust, 'That in default of 'issue male, the trustees out of 'the rents and profits, after the 'commencement of the term, 'or else by demising, selling, 'mortgaging, or otherwise disposing, raise portions for 'daughters, and maintenances 'from the death of the husband 'and wife, which should first 'happen, 'till such daughters 'attain their age of nineteen, 'or marry, the portions to be 'paid

‘ paid at nineteen or marriage,
 ‘ and the maintenances to be
 ‘ paid from the death of the
 ‘ husband or wife, which shall
 ‘ first happen, ’till their portions
 ‘ become payable,’ the wife dies
 without issue male, the daughters
 come to the age of nineteen,
 the portions were decreed to be
 raised in the life-time of the
 father, by a sale of the rever-
 sion. 400

2. ‘ The trust of the term was on
 ‘ failure of issue male, &c. out
 ‘ of the rents, &c. or by sale,
 ‘ &c. to raise portions for
 ‘ daughters, payable at 21 or
 ‘ marriage, and maintenance
 ‘ ’till their portions grew due,
 ‘ to be paid by half yearly pay-
 ‘ ments, viz. *Christmas* and *St.*
 ‘ *John the Baptist*; the first pay-
 ‘ ment to be made at the first of
 ‘ those feasts next coming, or
 ‘ happening after the estate, so
 ‘ limited to the trustees should
 ‘ take effect in possession.’
 The father dies without issue
 male, leaving a daughter, who
 attained her age of twenty-one,
 it was adjudged that her portion
 could not be raised in the life-
 time of her mother, because the
 maintenance was to precede the
 portion, and that was not to be
 raised ’till after the death of the
 father and mother, when the
 term came into possession.

ibid.

TRUSTEE within the 7 *Ann.*
 ch. 19.

Vid. *Trusts*, &c. under *Infant*.

TYTHES.

Modus: What is a good modus,
 what is not.

1. The Court will not consider
 whether a modus is good in law
 or not, ’till the modus is either
 admitted or proved. 268
2. A modus for the occupiers of
 lands in *A*, not residing in *A*
 or *B*, to pay four-pence an
 acre for the tythe of hay, and
 the herbage of pasture is a good
 modus. 288

W.

WAIVER.

Vid. *Estates of the wife*, 1, un-
 der *baron*, &c.

WARDEN of the FLEET.

Vid. *Office*, 3. *Attachment*, *se-*
questration under process. *Excom-*
municato capiendo, under *writs*.

WASTE.

1. If a stranger cut down timber,
 or commit any other waste, it
 belongs to the tenant for life
 without impeachment of waste,
 and not to the tenant in tail or
 in fee in remainder. 238

WILL

WILL and TESTAMENT.

1. A man may make a will of his personal estate at fourteen years of age, and a woman at twelve. 5
2. If a will is signed, sealed, and delivered only, it shall operate as a will and not as a deed. 46
3. A devise of a copyhold is not within the statute of wills, because it passes by the surrender. 95
4. But the devise of the equity of redemption of a copyhold is. 95
5. Lands contracted for are considered in equity as purchases, and the vendee may devise them, but if the contract is after the making the will, they will not pass by it. 265
6. For the testator can devise only the lands he is seized of, at the time of making his will. *ibid.*
7. But he may devise all the personal estate, whereof he is or shall be possessed. *ibid.*
8. Signing and sealing is a good publication of a will. 373

How far parol proof may be admitted to explain a will.

1. Parol proof allowed to be read, that the testator often declared that his next of kin should have only so much. 292
2. Parol proof of the intention of the testator, not allowed to be read. 157

Probate.

1. The probate of a codicil of personal estate can be only litigated in the spiritual Court. 127

Devise of remainders over of leases, money, &c.

Vid. Limitations of terms for years, &c. under estate.

Devise of lands for payment of debts and legacies, and portions.

Vid. Retain, 3, 4.

1. If lands are devised to trustees, for payment of debts and legacies, the debts shall be first paid. 56
2. If lands are devised to executors, in trust, for the payment of debts, if a creditor is part satisfied out of the personal estate, he shall receive nothing out of the real estate, till the other creditors have been first paid the same proportion he received out of the personal. 95
3. If lands are devised for payment of debts, the purchaser need not see the debts paid, otherwise if they are not particularly mentioned. But lands charged with debts and legacies, remain so in any hands. 96
4. Where an estate is devised to trustees for payment of debts, and they are also made executors, the creditors shall be paid pro rata, and not in a course of administration, especially if they refuse to act. 123
5. Where

5. Where lands are devised, in trust to pay debts, the creditors, as cestuy que trusts, may bring a bill for the execution of a contract made by the testator, for a sale of part of the lands.

177

6. Where lands are devised, in trust to pay debts, the personal estate is to be first applied, then the real estate in possession, then in reversion, next the specifick legacies, and lastly, the wife's paraphernalia. *ibid.*

7. The testator charges all his temporal estate with the payment of his debts and legacies, and then devises all his freehold and copyhold estate to his eldest son and his heirs, subject to his debts and legacies, and makes him executor; the money arising by the sale of the lands, shall be first applied to the payment of the debts. 206

8. The testator devises all his real and personal estate to his executors and their heirs, in trust, to pay his debts, and his wife 40*l.* a year. The money arising by the sale is not assets at law, but in equity, and if there is a deficiency, the creditors must be paid in equal proportion. 330

9. And a creditor by specialty, must be paid in proportion to what his principal and interest amount to. *ibid.*

10. The testator made his will in these words 'I give and devise my manor, &c. to my son *A* for 99 years, if he so long live, remainder to trustees, &c. re-

' mainder to his first, and every
' other son in tail male, re-
' mainder to my son *B* in the
' same manner, remainder to
' my kinsman *C* and his heirs
' for ever, in trust, that the
' said *C*, his heirs and assigns,
' shall pay to the daughters of
' my sons *A*, *B*, and *D*, 5000*l.*'
If any of the daughters living at the death of the testator, die before *C* comes into possession of the estate, she is not intitled to a share of the 5000*l.* 358

11. In the said will was this clause,
' provided also that my sons *A*
' and *B*, as they severally come
' into possession, may charge the
' premisses, by deed or will,
' with portions for their young-
' er children, and for want of
' such appointment, I will that
' the lands shall stand charge-
' able with the payment of
' 2000*l.* to the younger children
' of *B*, and 3000*l.* to the
' younger children of *A*, at
' twenty-one, or marriage.' *A*
younger son of *A* at the death of the testator, after he comes to be eldest, attains his age of twenty-one, and dies in the lifetime of his father, who never made any appointment, his representative is intitled to no share of the 3000*l.* for being an eldest son before any appointment, *A* could not after have made an appointment in his favour, and the portions given by the will did not vest till after the death of *A*, for he might make the appointment at any time during life. 358

12. ' *A*

12. ' *A* devises 8000*l.* to be invested in a purchase of lands, in trust, to the use of *B* in strict settlement, remainder to trustees for fifteen years, in trust, if *B* have no issue male, for the raising portions for the daughters of *B*, to be paid at such times, and in such manner and proportion, and with, and under such provisos and limitations as the said *B* by any writing or writings, under his hand and seal, attested by two witnesses should appoint.' *B* died without issue male, leaving *D* his only daughter, and made no appointment; the profits of the whole term belong to *D*. 369

What estate or interest passes, and to whom.

Vid. *Joint-tenants*, 1, 2, 3.

1. *A* on a marriage of his daughter *B*, makes an appointment pursuant to a power, of part of the fee farm rents of his estate, in trust, to raise 8000*l.* for her portion, and makes another appointment of other part of the rents in trust to raise 8000*l.* for the portions of his other younger children. The husband of *B* being paid her portion, gives a release, and assigns over the appointment in trust for *A*. ' *A* by his will reciting the appointments, lest there should be any defect in the execution of his power, or that the rents should not be sufficient, he

' devises all his estate to the same trustees for 2000 years, to raise the portions for his daughter *B* and his other younger children, or so much thereof as the fee-farm rents should not be sufficient to raise, but not to give his children more than one 8000*l.* apiece.' This will is not a devise of the portion to *B*, but when the money is raised it must go to the executors of *A*. 163, 164, 165, 166.

2. ' I give and bequeath all my lands and estate in *Upper Catesby*.' This is a devise in fee, and the words, *In Upper Catesby*, do not restrain the interest, but the thing, so that lands lying elsewhere will not pass. 175

3. The testator devises an *East India* bond, to be paid at twenty-one, or marriage, and if the legatee died before, he devised it over. The interest shall wait on the principal, and not go to the executor. 210

4. A tenant in tail of lands in mortgage in *Sussex*, and elsewhere, remainder to *B* for life, remainder to his first and other sons in tail male, reversion in fee to *A*, and seized of other lands in fee, by his will directs his executors ' to pay off the mortgages in *Sussex*, that they shall be kept on foot, and assigned by the mortgagees to his mother, for her sole use and benefit, during the remainder of the several terms. And as for and concerning all his

‘ his manors, lands, &c. which
‘ he was then seized of, in law
‘ or equity, or which he had
‘ power to give or charge, &c.
‘ he devises them to C and his
‘ heirs.’ This is not a devise
of the terms themselves to the
mother, but of the money only,
and the equity of redemption
passes to C. 131, 207, 211

5. ‘ All the rest, residue and re-
‘ mainder of my messuages,
‘ lands, tenements, and here-
‘ ditaments whatsoever, and
‘ wheresoever, unbequeathed,
‘ after my just debts, legacies,
‘ and funeral expences are fully
‘ satisfied and paid, I give to my
‘ executors, in trust, for my
‘ daughters.’ By these words,
the executors take only an estate
for life. 243

6. The testator made his will in
these words; ‘ I give and de-
‘ vise my manor to my son A
‘ for 99 years if he so long live,
‘ remainder to trustees, &c. re-
‘ mainder to his first and every
‘ other son in tail male, remain-
‘ der to my son B in the same
‘ manner, remainder to my
‘ kinsman C and his heirs for
‘ ever, in trust, that the said C,
‘ his heirs and assigns shall pay
‘ to, &c. 5000*l.* and I devise
‘ to my son A, all the rest and
‘ residue of my real and per-
‘ sonal estate whatsoever undi-
‘ posed of, whether in law or
‘ equity, in trust, for the pay-
‘ ment of my debts and lega-
‘ cies, and the surplus to his
‘ own proper use.’ A and B
die without issue male, the re-

sidue of the estate, after the
5000*l.* is raised, belongs to the
heirs of A, the residuary lega-
tee, and not to C. 362, 363

What things pass by the words,
and to whom.

Vid. *Exposition of words*, 5.

1. ‘ I give all my houses, leases,
‘ tenements, and goods what-
‘ soever to my wife for life, and
‘ then to my nephew all my
‘ books, and all my mathemati-
‘ cal rules and instruments.’
By this devise, after the death
of the wife, the nephew is in-
titled only to the books, and
mathematical rules and instru-
ments. 4

2. ‘ The testatrix devised her silver
‘ tea-kettle and lamp, with its
‘ appurtenances, nothing passes,
‘ but the frame that supports
‘ the kettle. 48

3. ‘ I devise the remainder of my
‘ personal estate, viz. All my
‘ stock in the bank, East India,
‘ and million bank stock, and
‘ South Sea annuities, to A,
‘ whom I make executor,’ the
whole remainder belongs to A,
for the viz. is only to enumerate
the chief parts of the personal
estate, but not to exclude him
from any. 109

4. Marble chimney pieces, and
things fixed to the freehold,
will not pass, by devise of the
furniture, in disfavour of the
heir. 112

5. By a devise of jewels or plate,
a watch or gold-headed cane
will not pass. *ibid.*

6. By a devise of furniture, books will not pass. 112.
 7. By the words, 'All the rest and residue of my estate, chattels real and personal,' the residue of the testator's personal estate only passes. 208, 209
 8. Jewels, money or pictures, will not pass by a devise of goods.

ibid.

9. 'I give my mansion house for life, also all my goods, chattels, household stuff, furniture, and other things now being or which at the time of my death shall be at, or in my said dwelling house.' By these words, money, in the house at the death of the testator, will not pass.

ibid.

10. 'I give to my wife, besides all my moveables, plate, jewels, pictures, linen, &c. (except my three books of miniature, and my library) 6000*l*. South Sea stock.' By the word *moveables* only corporeal things pass. 297

11. The testator devised all the reversion, and inheritance of his lands to *A*, and the residue of his personal estate to his executors in trust, to be laid out in lands to the use of *A*, after he contracts for a purchase of lands, and dies, these lands belong to the heir of the testator, and not to *A*. 265

12. One possessed of lands in the county of *Bucks*, extended by virtue of a statute staple, and of a mortgage for years in the county of *Essex*, and seized of lands in fee in the county of

Kent 'devised all his manors, messuages, lands, tenements, hereditaments, and real estate whatsoever, within the several counties of *Essex*, *Kent*, *Bucks*, *Bedford*, or elsewhere within the kingdom of *England*, of which he should be any way seized, or intitled unto, to *A* and *B*, &c. and after he devises all the rest of his personal estate, &c. and all his mortgages, credits, &c. to be equally divided between the said *A* and *B*.' The first devise extends only to lands in fee, and the securities will not pass, though the testator had no other lands in *Essex* and *Bucks*: but they pass by the second devise, as mortgages and credits. 278

13. *A*, being seized of lands in possession, and of the reversions in fee of lands in settlement, devises part of his lands in possession to *B*, and then devises to *C*, &c. all his messuages, lands, tenements and hereditaments in *A*, *B*, *C*, and elsewhere, not by him formerly settled, or thereby otherwise disposed of, for the term of a hundred years in trust, to apply the yearly rents and profits to aid his personal estate, in payment of his debts and legacies, and when they should be all paid, he gives and devises the said messuages, lands, tenements, and hereditaments to *D*, and his heirs.' By this devise, the reversions of all his lands pass. 313, 337, &c.

14. *Elsewhere*

14. *Elsewhere* is a very general and proper word to be made use of in a will; and by a devise of all my lands in *B*, and elsewhere, all the lands of the testator pass, wheresoever situated, and of whatsoever value. 354
15. 'I give to *A* all my personal estate, which I shall be intitled to as administrator to my father, or otherwise howsoever, exonerated and discharged of all my debts and funerals.' And the testator subjected his lands to the payment of his debts and funerals. Nothing passes by these words that belonged to the father but the distributive share of the son, and though, if he wasted the assets by construction of law he made his father's debts his own, yet the words of this will must not be taken in that sense, but they must be paid out of his personal estate. 377

WITNESS.

Vid. *Evidence*, 4. *Demurrer*, 3,
4. *Examination in perpetuam rei memoriam*, under examination.

1. The commissioners of review may refuse a witness, allowed by the Prerogative and Court of Delegates. 33
2. The evidence of a servant, who was only nine years of age at the testator's death, but lived three or four years after in the house was allowed to prove the furniture standing at the time of his death, thirteen years after, tho'

- she had never taken any memorandum of it. 72
3. If a defendant is examined as a witness for the plaintiff, he may demur to an interrogatory, because he is concerned in interest. 195
 4. But if he is a witness to a deed, he must answer as to the execution of it, but may demur to any other questions relating to it. 196
 5. A defendant, by order may examine the *prochein amy*, but not one of the plaintiffs 312

WRITS.

Vid. *Pledges*, 5.

Writ of appeal.

Vid. *Pledges*, 1, 2, 3, 4.

De Coronatore Eligendo.

1. The under sheriff, under pretence of administering the oaths, swears one of the candidates, a coroner; the Court ordered him to shew cause why he should not be committed, and not to file a return to the writ without leave. 254, 55
2. But this is not a good cause at law, and therefore not in equity, to direct the new writ to the other coroner. *ibid*.

Writ of error.

Vid. *Superfedeas*, &c. 1, under writs.

Writ

Writ de excommunicato capiendo.

1. An excommunicato capiendo against a prisoner of the *Fleet*, being a viscontiel writ, cannot be directed to the warden, notwithstanding the words in the 5th of *Eliz. The Sheriff or other officer.* 365

Habeas corpus.

Vid. *Bill pro confesso*, 3, under bill.

Homine replegiando.

1. The grandfather petitioned to be appointed guardian, in the room of the mother, to his grandson, who was sent abroad to be educated in the *Romish* religion. The Court said they could not appoint a guardian 'till the infant was produced, but ordered a homine replegiando against the person who carried him over. 249

De ventre inspiciendo.

1. The testator devised money to a charity on condition his son died without issue male, the contingency happened. The wi-

dow in her answer to an information for the charity, swore she was with child, and the Court, in conformity to the writ, *De ventre inspiciendo*, directed that the Master should appoint two discreet matrons to inspect her, and certify what condition they found her in. 392

2. On a petition for a writ *De ventre inspiciendo*, it was ordered according to the lady's consent, that two ladies mentioned in the order might inspect her 'till she came to town, of which she was to give notice, and then the writ was to issue. 394

Supplicavit.

1. The Master of the Rolls would not order a *supplicavit* quæ to be marked, because there was no affidavit produced of the husband's circumstances, as a measure for him to go by. 191
2. But the Chancellor ordered a *supplicavit* to be marked, without affidavit, only upon enquiry of the husband's circumstances, from the solicitor for the wife. 198

Superfedeas

Superfedeas of writs, &c.

Vid. Bankrupt, 4. Ideot, &c. 2, 3.

1. The Court would not supersede a writ of error, on suggestion the plaintiff had given a release of errors, and had agreed not to bring error, because the Exchequer Chamber could try the release, and the defendant had allowed the writ, by making the bail justify. 94

2. This Court can supersede a writ only for matter extrinsic, but if the writ is bad, the Court it is returned into, will quash it.

202

WRITINGS and DEEDS.

Vid. Trial, 1. Attorney, &c. 1. Redemption, &c. 8, under mortgage.

Y.

YORK.

1. If an inhabitant of *York* makes a will, and executors, though the trust of the surplus of his personal estate is not devised, yet this is a complete will within the 4 and 5 of *W. and M.* and the custom shall not operate on the surplus. 303

FINIS.



