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A General Abridgment of Cases in Equity,
Argued and Adjudged in the High Court of Chancery, &c.

WITH

Several Cases never before published, Alphabetically digested under proper Titles; with Notes and References to the Whole.

And Three TABLES,

The First of the Names of the Cases, the Second of the several Titles, with their Divisions and Subdivisions; and the Third, of the Matter under General Heads.

By a Gentleman of the Middle Temple.

In the Savoy:
Printed by E. and R. Nutt and R. Gosling, (Assigns of E. Sayer, Esq.) for D. Lintot, at the Crofs-Key, against St. Dunstan's Church, in Fleet-street. M.DCC.XXXII.
THE

PREFACE.

As this Work appears unrecommended by any authoritative Approbation, or even a Name in the Title Page, which might introduce it with Advantage; it may perhaps be necessary to say something in this Place relating to its Design, and the Pretence it makes of being Useful.

The Principal Design of it, is to collect and dispose, by Way of Abridgement, under proper Heads, all such Cases adjudged in the Courts of Equity, as are any where in Print; and this is conceived to be a better Method than composing a regular Institute of those Matters: In the Way of Institute, much must always be taken from the private Opinion of the Writer; in this of an Abridgement, Knowledge flows from the Points adjudged, and authentick Resolutions which the Reader has before him.

In Pursuance of this Design, the Reader must expect to find several Cases abridged, from Books which he may reckon of little Weight or Authority; as well as several which have been contradicted by better and later Resolutions; but that no Body may be misled, the Cases on both Sides, with their Reasons, are generally laid down for the Reader to make his own Conclusions.

The Division of the Heads is such, as to the Author seemed best, and itself to direct the Generality of Gentlemen acquainted with these Matters, to the Point they are in search of, tho' it is not to be expected, that in this Article, every Body should be satisfied; Men having such different Modes of Thinking, that in Strictness, hardly any Two can be said to Common-place alike. All that can be done to Remedy this Inconvenience, is to make proper References from Head to Head, where any Degree of Similitude appears, which has been attempted here.

It

112246
The PREFACE.

It has been thought proper, under the Head of Devises, to insert all the Cases upon that Subject which have been determined in the Common Law Courts, as they receive the same equitable Construction in them that they do in the others.

If that, and the making Observations in other Heads, how Equity differs from the Common Law, should be thought to exceed the Design, it's hoped the Benefit of the Reader will make a sufficient Apology for it, as also for the Author's Insertion of several Cases not hitherto in Print, which have been adjudged by those excellent Chancellors, Somers, Harcourt, Cowper and Macclesfield: These Cases in the Table are marked with an Afterisk, to distinguish them from those extracted from the Books already published; and to prevent the Obscurity which might happen from Aiming at Conciseness, they are given more at large than the others; which being already in Print, every Reader has an Opportunity of applying to, when he conceives any Doubt concerning the Abridgment of them.

What perhaps most of all requires an Apology, is, that all the Cases in this Book, adjudged since the Year 1726, were taken by the Author, in Chancery or at the Rolls; all that he offers in Excuse is, that he used his utmost Care and Judgment; but he is assured, that if they suffer nothing by passing thro' his Hands, the great Abilities and unquestionable Integrity of the Learned and Honourable Persons presiding in those Courts, must render them the most useful Part of this Work.

ERRATA.

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Those marked * were never published before.

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CAP. I.
C A P. I.

Abatement and Revivor.

(A) What shall abate the Suit & econc.
(B) Who may revive the Suit, and against whom.
(C) In what manner may a Suit be revived.

(A) What shall abate the Suit & econc.

1. A. Made J. S. and his Widow Executors, the Widow was made Executrix, upon Condition that she did not marry; they exhibit a Bill, and pending the Suit, the Widow marries; and it was adjudged upon a Reference to Bridgman, C. J. that the Widow's Marriage (a) abated the Suit, although it was urged (b) if any of the Parties, Plaintiffs or Defendants die, or if a Feme Plaintiff marries, regularly the Suit abates, but with Respect to an Abatement by the Death of the Parties, it must be by the Death of such as are so far material Parties, and concerned in Interest, as to make it necessary to have their Representatives before the Court, before there can be a final Determination of the Cause.

2. If a Promiss be made to the Husband and Wife during Coverture, and they bring a Bill for Performance, and pending the Suit, the Wife dies, yet this shall be no Abatement. Cary 88. for the whole Interest survived to the Husband.

3. So if the Husband and Wife sue in the Wife's Right, and pending the Suit, the Husband dies, yet the Wife may proceed. 3 Chan. Rep. 40.

4. So if a Bill be exhibited for a Legacy against Baron and Feme, who is Executrix of the Testator, and pending the Suit the Husband dies, this shall be no Abatement of the Proceedings; but had it been concerning the Wife's Inheritance, it might be otherwise. Mich. 1691, between Shebbeary and Briggs, 2 Vern. 249.

5. If Jointenants, or Tenants in Common exhibit a Bill, and pending the Suit one of them dies; yet per Bridgman L. K. the Suit shall not abate. 3 Chan. Rep. 66. But Q, as to Tenants in Common, for a Right descends to their Representatives.
6. If a Cause has been heard on a Bill of Interpleader, and a Trial at Law has been directed to settle the Right between the Defendants, this puts an end to the Suit as to the Plaintiff; so that if he afterwards dies, the Cause shall still proceed, and there needs no Revivor: Ruled on Motion. 1 Vern. 351.

7. The Legal Estate in Question in this Case was vested in two of the Defendants as Trustees in Fee, and the equitable Interest in Fee in another of the Defendants; and the Bill was brought by the Plaintiff now Earl of Winchelsea, the Earl of Nottingham and his four Sons, to supply the Defective Execution of an Agreement made by the Lord Winchelsea's Father, to be settled on the Plaintiffs severally for Life, with Remainder to their first and other Sons successively in Tail, and a Decree was obtained accordingly, and it was referred to the Master to settle the Conveyance; after which the Cestui que Trust in Fee dies; notwithstanding which the Earl of Nottingham and his Sons attend the Master, who reported that he approved of a Draught of a Conveyance, which was a Conveyance only from the Trustees, in whom the legal Estate was vested, to the Use of the Plaintiffs according to the Decree; but the Plaintiff Finch, now Earl of Winchelsea (who by a former Settlement was to have been Tenant in Tail) took Exceptions to the Report; one of which was the Abatement of the Suit by the Death of Cestui que Trust, and that the Master had no Power to proceed till the Suit was revived. But the Court overruled the Exception, and held clearly, that when there were several Plaintiffs or Defendants, that the Death of any of them made an Abatement of the Suit only as to themselves, and that the Suit continued as to the rest who were living; and therefore as to the Defendants the Trustees, that they might well execute a Conveyance of the legal Estate, and were not to wait for any Thing that was to be done by others; but if the Plaintiffs should hereafter desire a Conveyance of the Equitable Interest, they must revive against the Heirs at Law of the Cestui que Trust; and so in all Cases where any thing was required to be done by the Representatives of the Party dying. It was likewise held, that if some of the Plaintiffs refused to join in bringing a Bill of Revivor, that the others may bring such Bill, and make those who refused Defendants. And it was agreed, that a Defendant might bring a Bill of Revivor, as well as a Plaintiff. And it was likewise said, that it was every Day's Practice to order Money out of Court to the Party intitled by the Decree, notwithstanding the Death of some of the Parties. Mich. 1727. between Finch and Lord Winchelsea.

(B) Who may revive the Suit, and against Whom.


2. An Assignee shall have a Scire Facias to revive a Decree, but not before it is sign'd and enrolled, in like Manner as at Law: If there be Judgment for an Annuity, and the Annuitant afterwards sells the Annuity, the Vendee shall have a Scire Facias on this Judgment between Dunn and Allen, 1 Vern. 283, but sid. 1 Vern. 426. S.C.
S. C. where it is said that the *Scire Facias* was disallowed for want of Privity, and a Bill of Revivor was brought and allowed of by the Master of the Rolls, altho' it was objected that an Assignee or Purchaser, who came not in in Privity, could in no case revive, but ought to bring an Original Bill to have a Parallel Decree made, in which it may be used as an Argument to induce the Court to make the like Decree, that there was such former Decree.

3. As when a Devisee having brought an Original Bill in Nature of a Bill of Revivor, and the Question was, whether the Defendant should be at Liberty to make a new Defence, and it was held by my Lord Keeper, that where a Bill, altho' an Original, is only to supply the Want of Privity; and in all other Matters as a Bill of Revivor, the Decree ought to be carried on in the same Manner as it would have been on a Bill of Revivor, if the Plaintiff had claimed in Privity; and there is no Reason why the Devisee should not have the same Advantage of the Decree, as an Heir or Executor, without entering again into the Merits of the Cause; and the Decree on this Bill ought not to be longer or shorter than the first between Clare and Wordsdale, *P. Ch.* 1706. 2 Vern. 548.

4. So if a Bill in Nature of a Bill of Revivor be brought against a Devisee, he cannot dispute the Justice or Validity of the Decree, for then he would be in a better Case than an Heir or Executor: *Per Couper Lord Chancellor*, between Minshull and Lord Mohun. 2 Vern. 672.

5. If there is a mutual Account Decreed; and there happens an Abatement, the Defendant as well as Plaintiff may in such Case revive; between Lord Stowell and Cole; *vide supra* Letter (A) Case. 7. that the Defendant in any Case may revive, as well as the Plaintiff.

6. If an Administrator obtains a Decree, but dies before Intollment, the Administrator *de bonis non* may revive this Decree within the Equity of the (a) Statute of 30 Car. 2. c. 6. between Queen and Curnow. 2 Vern. 237.

(a) By which it is enacted, that an Administrator may sue for a *Scire Facias*, and take Execution upon a Judgment, had in the Name of an Assignee or Administrator.

7. If a Creditor is admitted by Order to come in before the Master, and prove his Debt, and pay his Contribution, he is intitled to revive if the Cause abates. *Trin. 1702*, between Pitt and the Creditors of the Duke of Richmond.

8. If the Plaintiff revives against two only, when there were three Defendants to the Original Suit, his Bill shall be dismissed. *Cary 78*. Quere.

9. But it is not necessary to revive against a Defendant who never answered. 1 Vern. 308.

10. If a Man marries an Administratrix, and the Plaintiff obtains a Decree against him and his Wife, and the Wife dies, the Plaintiff may proceed against the Husband without reviving against the Administrator of the Wife; but the Husband is not bound to answer farther than the Estate he had with his Wife. Between *Jackson and Rawlini*, Mich. 1690. 2 Vern. 195.

11. The Plaintiffs Intestate had obtained a Decree against the Defendant for Payment of a Sum of Money, and also for conveying of Lands and Delivery of Deeds; but before any Thing was done upon it, died intestate; and the Plaintiff having brought a *Scire Facias* to
Abatement and Revivor.

to revive the Decree, the Defendant demurs, because the Heir was not made a Party, and a Decree cannot be revived by Parts; and if the Heir will not join as Plaintiff, he ought to have been made Defendant. On the other Side twas said that the Heir and Adheinfrator are not jointly concerned, and each may Prosecute pro Intereffe suo, and cannot join; and if he had been made Defendant, the Decree would not have been revived against him, because the Bill could only have prayed it might have been revived, as to the personal Estate; and the Court over-ruled the Demurrer, and said it was like a Judgment at Law in Wafte, where there may be two Revivors; it being then objected that the Scire Facias is to revive the whole Decree; whereas it ought to be only as to the Perfonalty: The Court allowed the Demurrer as to the Realty, but ordered the Decree to be revived as to the Personalty; between Ferrars and Cherry, Mich. 1701.

(C) In what Manner a Suit may be revived.

1. If the Suit abates, the Plaintiff may bring either an original Bill, or a Bill of Revivor, at his (a) Election: Adjudged between Spencer and Wray, Trin. 1687. 1 Vern. 463.

(a) When a Suit abates the Plaintiff may bring either an Original Bill, praying that a parallel Decree may be made, or Bill of Revivor, which Revives all the Proceedings had therein before the Decree is signed and inrolled; but if the Decree is signed and inrolled, it ought regularly to be revived by Scire Facias.


3. If one be named Defendant in the Original Bill, who is yet alive, he ought not to be named in the Bill of Revivor, because the Suit never abated quoad him. Hard. 201.

4. But if named in the Bill of Revivor only, he may be named in every Bill of Revivor after, because he was not named Defendant in the Original Bill. Hard. 202.

5. A Cause being heard, and the Decree signed and inrolled, the Plaintiff (the Suit having abated) brought a Bill of Revivor, and the Defendant instituted that he should have revived by Scire Facias, there being a Decree in the Cause; but in regard there were Proceedings relating to Costs, &c. after the Decree was inrolled, which the Scire Facias would not revive, the Court held it well enough. 2 Chan. Rep. 67.

6. If a Cause has slept 12 Months in Court, there shall be no Proceedings had upon it, without first serving a Subpoena ad Faciend. Attornat. 1 Vern. 172.

CAP. II.
C A P. II.

Account.

(A) Who are intitled to have an Account, against whom it lies, and in what Cases.

(B) Matters to be brought into the Account, what shall be allowed or discounted, when an Accountant may charge and discharge himself, and how the Particulars are to be ascertained.

(C) What shall be a good Bar to a Demand of an Account, and where an Account once stated shall be conclusive.

Vide the several Titles of Guardians, Executors, and Trustees, how they shall be charged, and what Allowances they shall have.

(A) Who are intitled to have an Account, against whom it lies, and in what Cases.

Surviving Factor may be compelled to account, not only for himself, but likewise for his Co-factor, although it was admitted that the (a) Executrix of the dead (a) by the Common Law none could be charged in Account, but as Guardian in Scosge, Bailiff, or Receiver, except in favour of Merchants, and for Advancement of Trade, where by the Law of Merchants, one naming himself Merchant, might have an Account against another, naming him Merchant, and charge him as his Receiver. (b) "Jus accrescenti hath no Place. (c) Chain. Cd. 127.

1. If
Account.

2. If a Merchant employs his Apprentice as a Factor beyond Seas, who dies, the Merchant shall have an Account against the Administrator of the Apprentice. *Nel. Chan. Rep.* 125.

3. It was held by the Court, that an Infant was not compellable to account as Factor, tho' it was urged, that by the Custom of Merchants he may, but an Infant may be Executor, and shall be charged, because the Law enables him: So he may be charged in Treaver, because a Tort, but not on Contract, nor as Bailiff, or for Goods to carry on a Trade; and therefore when Infants are Factors, their Friends should give Security for their Accounting. *Trin. 1700.* between *Smalley* and *Smally*.

4. A Trustee made a Letter of Attorney to J. S. to manage and receive the Rents and Profits of the Trust Estate, who did so, and accounted to the Trustee; and now being sued by the *Cestui que Trust*, intitled that the Trustee, and not he, was to account; and that he having already accounted, he might be quiet as to the Plaintiff; but he was decreed to account to the Plaintiff. *Trin. 34 Ch. 2.* between *Pollard* and *Downes*, 2 *Chan. Ca.* 121. The Reporter adds; *Note*, That the Trustee was dead, but that was not yielded as the Reason.

5. The Assignees of Commissioners of Bankrupts brought a Bill to have a Discovery and Account of Money received by the Defendant on Behalf of the Bankrupt: The Defendant pleaded, he received it only as a servile Servant to the Bankrupt, and had accounted for it to him already, and that the Commissioners had already examined him upon Interrogatories; but the *Pla* was over-ruled. *Mich. 1682.* between *Wagstaffe* and *Bedford*, 1 *Vern. 95.* 2 *Flunt.* 358. *S.C.* but quere, whether there were not Circumstances of Fraud in this Case, or a Combination between the Bankrupt and Servant.

6. For if a Man by Answer swears, that what he received he received as a servile Servant, and hath paid it over to his Master, he shall not be put to Account again, but he ought to disclose this Matter in his Answer. 1 *Vern. 136.*

7. So on Exceptions to a Master's Report, which had reported the Defendant's Answer insufficient; the *Lord Keeper* declared, That it was sufficient for a Servant or Apprentice, in Answer to a Bill for an Account, to say in general, that whatever he received, was by him received and laid out again by his Master's Orders. *Mich. 1683.* between *Potts* and *Potts*, 1 *Vern. 208.*

8. The Plaintiff, who was Administrator to her Brother, a Captain in Colonel *Churchill's* Regiment of Marines, having prayed an Account of his personal Pay, and the Pay of his Servants, and also the Pay of the Company; it was intitled upon, on Behalf of the Defendants, that she was only intitled to an Account of the Captains personal Pay, and Pay of his Men, and not for the Pay of the Company, altho' they seemed to admit that a Captain for Land-Service was to recruit his Company, but would have it there was a Difference when he was a Captain of Marines; or if the Captain may be intitled, yet his Administrator was not; but the Court decreed an Account of the Whole. *Hill. 1711.* between *Bells* and *Churchill*, 2 *Vern. 682.*

9. *A.* had a Title to some House, by a Settlement made of them on him and his Wife, but being obliged to go beyond Sea, he left the Deed of Settlement with his Brother, who being afterwards committed
Account.

mitted a Prisoner, the Defendant entered and enjoyed the Houses severals Years; and it was decreed, that he should Account for the Rents and Profits to A. Nol. Chan. Rep. 285.

If a Man, during a Person's Infancy, receives the Profits of an Estate to which the Infant is intitled, and continues to do so for several Years after the Infant comes of Age, before any Entry is made upon him, yet he shall Account for the Profits throughout, and not during the Infancy only. Pasch. 1699. between Tallop and Holworthy, that an Infant shall have an Account of Profits against an Intruder; eide 1 Vern. 295. but if there be a Verdict against his Title, he must recover at Law first.

But if there is no Trust nor Infant in the Case, nor any Entry made by him who is intitled to the mean Profits, Equity will not decree any Account of the Rents and Profits. 1 Vern. 724.

If there are three Part-Owners of a Ship, and one of them refuses to navigate the Ship, and the other two do it against his Consent, and the Ship is lost in the Voyage; yet he who refused shall contribute to the Loss in Proportion, as he was intitled to have an Account of Profits, had there been any. Between Strilly and Winson, 1 Vern. 297.

Two Persons agreed for the Purchase of an Estate in Moieties between them, which Estate was subject to several Incumbrances, which were to be discharged out of the Purchase-Money; one of them had Abatements made to him by some of the Incumbrancers of several Sums due for Interest, and otherwise, which they, in Consideration of Services and Friendship, agreed should be to his own Use; yet on a Bill brought for an Account of the Rents and Profits, the Court would not allow him the Benefit of those Abatements, exclusive of the other; but held, that he must Account for them, the Purchase being made for their equal Benefit, and on a mutual Trust between them. Trin. 1728. at the Rolls, between Carter and Horne.

(B) Matters to be brought into the Account, what shall be allowed or discounted, where an Accountant may charge or discharge himself, and how the Particulars are to be ascertained.

If a Mortgagee or Trustee manage the Estate themselves, there is no Allowance to be made them for their Care and Pains; but if they employ a skilful Bailiff, and give him 20l. per Annum, that must be allowed, for a Man is not bound to be his own Bailiff. Per Cur., 1 Vern. 316.

One deviseth 250l. to his Son, and makes his Wife Executrix, who marries another Husband; in a Bill brought against them for the Legacy by the Son, the Defendants would have discounted Maintenance and Education, which the Court would not permit; for it was said that the Mother ought to maintain the Child; but a Sum of Money paid for the Binding of him Apprentice was allowed to be discounted. 2 Vern. 353.

3. The
3. The Plaintiff came as a Guest to the Defendant's House, at her Invitation, and the Defendant insisted on 5l. a Week, for Diet and Lodging, alleging, that she being a Person of Quality, and courted by several Noblemen, much was spent in Entertainments, and prayed it may be allowed her in Account; but the Lord Chancellor said it was no honourable Demand, and decreed an Account without any such Allowance, it appearing that she came at her Invitation. Between Ardudel and Roll, Mich. 1681. 1 Vern. 19.

4. A Marriage Settlement was to all the Sons of the Marriage in Tail Male successively, and for Want of such Issue to the Daughters, till the Person next in Remainder should pay them 3000l. On Failure of Issue Male the Possession came to the Daughters, who insisted that they should hold the Lands until the Remainder-Man thought proper to determine their Estate by one intire Payment; but on a Bill brought by the Judgment-Creditors, who insisted to be let into a Satisfaction subjoin'd to this Charge, and in Exoneration thereof, to have an Account of the Rents and Profits, it was decreed at the Rolls, that they should Account for the Profits, and that the Rent should be applied, first to pay the Interest, and then to fink the Principal, as in Cases of a common Mortgage, which Decree was affirmed by my Lord Chancellor, with this Variation, that the Principal should not be fink till a third Part was raised above the Interest, and so again when another third Part was raised. Mich. 1706. Between Bagaroze and Chunn, 2 Vern. 523.

5. It was insisted upon (and not denied) to be a Custom between Merchant and Merchant, that all Accounts should be evened on either Side, by Way of Estoppel, especially when the Business is of the same Employment. 2 Chan. Ca. 7.

6. The Defendant had a Bond from the Plaintiff for 50l. in 1684; and in 1685 the Defendant lodged and dined with the Plaintiff, and in 1699, the Defendant brought an Action at Law on the Bond, against the Plaintiff, who brought this Bill to have a Discount for the Diet and Lodging; and though there was no Agreement for that Purpose, and such Length of Time pasted, yet the Master of the Rolls decreed it to an Account, and said, that so it should be if the Defendant had been a Bankrupt, the Plaintiff should have had a Discount against the Commissioners or Assignees, and that a Discount was natural Justice in all Cases. Hill. 1699. between Arnold and Richardson.

7. So where two Persons had mutual Dealings, but before their Accounts settled, one of them die, and the Survivor brought a Bill against his Executors, to have an Account; and that the Plaintiff might (a) discount what he was to pay out of what the Executors were to pay to him; and it was decreed accordingly, altho' it was objected, it may make a Devastation in the Executors. Mich. 1701, between Beaumont and Grover.

(a) That there may be a Discount against the Commissioners or Assignees of a Bankrupt, vide 2 Vern. 418. the Case of Peters and Sumas.

8. The Plaintiffs were Assignees under a Commission of Bankruptcy awarded against Sir Justus Berk, and brought this Bill against the Defendants, to compel them to assign and transfer to the Plaintiffs several Shares in their Stock, to which Sir Justus Berk was entitled, and which in the Year 1720, cost him between 10 and 12000l. The Defendants, by Answer insisted, that Sir Justus Berk was one of the Directors
Directors of their Company, and that in the Year 1720, after his Pur-
chase of the before-mentioned Stock, the Company lent him about
12000 L. and insisted that they ought not to be obliged to let the
Plaintiffs transfer or dispose of the Interest which Sir Juftus had in
their Stock, without Payment of the 12000 L. borrowed, and that by
Virtue of the Act 5 Geor. 1, one Account ought to be set off against
the other; and for that Purpose they had come in as Creditors under
the Commission of Bankruptcy, and had proved their Debt; there
was no Pretence that the Money was lent on the Security of the
Stock; but it was insisted, that on the Credit of the great Parcel of
Stock which Sir Juftus had in their Company at that Time, that
they lent him this Money, and therefore would now flop his Stock
till Payment thereof, or as far as the Value of the Stock would
extend, which now by the great Fall of Stocks would by no Means
satisfy their Debt; but it was decreed at the Rolls, and that Decree
on an Appeal affirmed by the Lord Chancellor, that the Defendants
ought to permit the Plaintiffs, the Assignees, to transfer and dispose
of the Stock for the most they could make of it, and that they
could not flop or retain the Stock for their Satisfaction, either before
or by Virtue of the Statute 5 Geor. 1. And it was remembred to the
Cafe of the Lord of a Manor, and his Copyholders, that the Lord
could not refuse to admit a Person to whom one of the Copyholders
had sold his Estate, on Account of any Debt due to the Lord by that
Copyholder, that as the Lord of the Manor in that Case, though he
had the Freehold of all the Copyhold Estates in him, yet he had
no Right to any of the Copyholders private Copyhold; so here, the
Company had the whole Stock of the Company in them in their
corporate Capacity, yet the Stock of each Proprietor was distinct,
and vested only in himself, wherewith the Company had nothing to
do further than they were invested therewith by the Charter, or Act
of Parliament wither with they were incorporated and impowered, or
ordered to transfer each one's Stock by Transfers to be made in the
Books of the Company; which otherwise every Proprietor might
by Deed, or otherwise, have transferred as he thought fit. And it
was held, that this Case differed from that of the Hudson's Bay
Company, decreed per Lord Chancellor, assisted by Raymond C. J.
and Mr. Justice Price, where there was an express By-Law to sub-
ject the Stock of each Member to satisfy the Debts they should owe
to the Company. And it was said, that this was not like the Case
of Demandary and Metcalf, where a Banker lent 2000 L. on a Pledge
of Jewels, and afterwards lent the same Perfon a further Sum of
Money on his bare Note; yet he was not admitted to redeem the
Jewels without Payment of the Note likewise, for there it was be-
tween two private Persons. And it was held not to be within the
Statute of 5 Geor. 1. which speaks only of mutual Dealings and Ac-
counts, which is not this Case, as Sir Juftus had a fift permanent
Interest in the Stock, and the Money borrowed without Regard thera-
to. And the Court held this was not like the Case of Partnership,
where if any of the Partners borrowed any of the Partnership's Mo-
ney, his own Share should be answerable for it, and he should not
be permitted to come into a Court of Equity, and pray an Account
of his Share of the Partnership, Stock and Effects, without making
Satisfaction for the Debt he owed to the Partnership; for this was a
Transaction between them as private Persons, and on a mutual Cre-
D
dit and Trust; but the Loan of the 12000 l. in the present Case to Sir Juffus, was not in their corporate Capacity, wherein he stood related to them, and held his Stock, but was a Loan by them as private Persons, for which they could not stop his Stock, which he held as a Member of the Company, in their corporate Capacity. 

Trim. 1728, between Melianucci and Royal Exchange Assurance Company.

9. Colonel Russel married the Widow of Lord North and Grey, who was Executrix of her Husband, and kept a Book of Accounts relating to his Estate, and after she married Russel, the same Book was kept and continued on. After he went over Governor to Barbadoes, and his Wife went with him, as did the Servant that made and kept the Book of Account: And there was Proof in the Cause, that the Book was made up from Vouchers, and had paid great Part of the Monies; and the Witnesses believed all the other Monies were paid, and the Plaintiff charged the Defendant only by the Book; and upon Exceptions taken to the Master's Report, the Question was, whether the Master ought not to have allowed the Book as a Discharge as well as a Charge; and after long Debate, my Lord Keeper adjudged it should be allowed as a Discharge; and the rather in this Case, because Colonel Russel, his Lady, and the Servant, were dead in Barbadoes, which amounted to Length of Time, which was always held a good Reason for allowing of it, and so took it to be a good Rule, and fit to be established, that where a Man was charged only by an Oath, or a Book, the same should be his Discharge; and the Case of Melish and Turner, lately adjudged, was cited, where Books had been lost in the Earthquake at Smyrna, so that the Plaintiff could only charge the Defendant Turner, by his own Books, the same Books were admitted to be his Discharge. Mich. 1701, between Darston and Earl of Oxford & al Executors of Colonel Russel.

10. The Defendant was a House-keeper, and her Aunt, who was a very old infirm Woman, lived with her, and she from Time to Time received the Aunt's Money for her, as any was paid; the Aunt died Intestate, and the Plaintiff being intituled to a distributive Part of her Estate, brought a Bill against the Defendant, to discover what Sums of the Intestate's Money she had received for the Intestate. She by her Answer sets out several Sums she had received for the Intestate whilst she lived with her, and at what Time, and that the Intestate had immediately put them out again at Interest, to such and such particular Persons, and set forth other Sums which she had received and paid over to the Intestate. The Cause being heard without Proof on either Side, and an Account decreed, which was referred to a Master, he by his Report charged the Defendant with the Sums confessed by her Answer to be received, and submitted to the Court, whether she was not likewise to be discharged by the same Answer. The Master of the Rolls said, that tho' he look'd on the Defendant in this Case to have acted only in the Nature of a Servant, who by the Justice of this Court may, on a Bill brought against him by his Master's Executors, discharge as well as charge himself by his Answer; yet as the Defendant might in this Case have proved her Answer, as appears by the Answer it self, and had not so done, he referred it back to the Master, and each Side to make what Proofs they could, and he declared, that if the Answer was disproved, as to the Sums put out at Interest, he should give no

Credit
Credit to it as to other Particulars, else inclined it should be a Dis-
charge too, as well as a Charge. *Trin.* 1702. between Bayly and
Hill.

11. An Account being of twenty Years Standing, it was ordered,
that the Defendant may prove on Oath what he cannot prove by
Books and cancelled Bonds, it being of so long a Standing. Between
Peyton and Green, 1 *Cham. Rep.* 146. An Account of fourteen
Years Standing admitted to be proved by Oath. 1 *Cham. Ca.* 127.

12. The Court will not allow any Thing to be placed to Account
under the Head of General Expenses; but the Party must name the

13. The Defendant on Account, shall be discharged by his Oath
of Sums under forty Shillings, but a Party shall not, by Way of
Charge, charge another Person so. 2 *Cham. Ca.* 249. 1 *Vern.* 283,
S. P. where it is said that he must mention to whom paid, for
what, and when; *vide* 1 *Vern.* 470. Where it is said that the Court
being informed, that the Course of the Court was, that an Account-
tant was to be allowed, on his own Oath, all Sums not exceeding
forty Shillings each, so as the Whole was not 100 l. Declared that
Rule seemed very unreasonable, and would consider how to recti-
fy it.

14. In an Account between the Plaintiff, a Gardener, and the De-
fendant, a Seedsmen, the Defendant shall be allowed Sums under
forty Shillings, by Way of Discharge, upon his Oath; but the Plain-
tiff shall not be allowed any Thing on his Oath. Between Marsh-
field and Wesson, 2 *Vern.* 176. *This is now the established Practice
in Chancery.*

(C) *What shall be a good Bar to a Demand of
an Account, and Where an Account once sta-
ted shall be conclusive.*

1. Prays to have an Account of the Sale of Goods taken in Exec-
ution at an Undervalue; the Defendant pleads, that before
he bought the Goods of the Sheriff, and afterwards they were offered
to the Plaintiff for the same Price he gave for them; and the Plea
was allowed good. *Nel. Cham. Rep.* 111.

2. An Account was decreed between the Plaintiff and Defendant;
and it being proved, that the Defendant had altered a Bundle of Pa-
pers; and it being likewise reported by the Master, that he had sup-
pressed the Evidence, the Lord Chancellor disallowed the Defendant's
whole Demand, though he swore he had produced all the Papers;
and his Lordship declared he was satisfied, that all the Papers were
produced. Between *Wardour* and *Beresford*, *Pasch.* 1687. 1 *Vern.*
452.

3. The Bill was to call the Defendant, the Plaintiff's Steward, to
an Account; the Defendant by Way of Plea insisted, that the Plaintiff
had sued here, and also at Law, for the same Matter, and having
her Election, she chose to have her Bill dismissed here, and not
meeting with Success at Law, she now refers back again to this
Court; that the Plaintiff had feited in violent and undue Manner all
his Writings and Evidences, and likewise imprisoned his Person: The
Court
Account.

Court held, that a Dismission upon an Election was no more peremptory than a Nonuit at Law; and that as to the Taking of the Papers, the Detinue of Charters is a good Plea at Law to an Account; yet to say that the Plaintiff did once feize his Writings, is not good; for it is the Detainer that makes the Plea good; and as to the Imprisonment, he may bring his Action; and therefore ruled, that the Defendant should Answer; but ordered, that whereas there was a considerable Sum of Money in the Trunk, that the Money as well as Writings should be restored; for though the Defendant may be greatly in the Plaintiff’s Debt, yet she must not levy her own Debt after that Manner. Between the Countefs of Plymouth and Bladon, 2 Vern. 32.

4. Tho’ an Account be stated under Hand and Seal, yet if there appears any Mistake in it, the Court will order the Parties to go to a new Account. 3 Chan. Rep. 18.

5. The Defendant’s Tellant stated an Account with the Plaintiff, which was signed and sealed by the Parties; but the Plaintiff afterward finding that his Servant had paid 200l, for which he had no Credit given him, prayed a new Account against the Executor, who pleaded the former Account stated, and that he was but an Executor, and knew not how to Account: The Plea was over-ruled, but ordered to proceed no further than Answer without Leave of the Court. 27 Car. 2. between Wright and Coxon, 1 Chan. Ca. 262. Nel. Chan. Rep. 431. S. P. 2 Chan. Ca. 177. S. P.

6. A makes a Jointure of an Equity of Redemption, and afterwards becomes a Bankrupt; the Commissioners assign this Equity of Redemption, and the Assignees state an Account. The Jointrefs brings her Bill to be relieved, alleging Combination between the Assignees and the Mortgagee, and that they had allowed more Money than was due on the Mortgage. Lord Keeper: The Assignees stand in the Place of the Husband, and the Account stated by them ought to be as conclusive as if stated by the Husband; and the Charge is not right in the Bill, being too general; however the Plaintiff had Leave to amend her Bill. Between Knight and Bampfield, 1 Vern. 179.

7. Mortgagor and Mortgagee settle an Account before a Master; and now a subsequent Mortgagee sues for a new Account, supposing the former Account to be false; and made by Consent, but did not insist upon any Particulars; and the Lord Chancellor declared, that the Account should bind the second Mortgagee, if the Fraud and Collusion were answered. Trin. 29 Car. 2. between Needler and Deeble, 1 Chan. Ca. 299.

8. A is Tenant for Life of a Trufi, Remainder to his Sons, A. before a Son born brings a Bill against the Trustees, and an Account is decreed, and afterwards taken; this Account shall bind the Sons, for all Persons that could be made Parties were Parties to the Suit. Between Leonard and Com. Suffex, Mich. 1705. 2 Vern. 526.

9. An Account taken, and a Distribution decreed in the Spiritual Court of a Personal Estate; yet a new Account decreed in Chancery. 2 Vern. 47.

10. The Plaintiff’s Husband and the Defendant had Dealings together as Merchants; the Bill was for an Account; and although it was agreed, that Length of Time was no Bar, yet the Plaintiff’s Husband living many Years after the Trade and Dealings between them ceased, and
and acquiescing to the Time of his Death, the Court dismissed the Bill, and left the Plaintiff to recover at Law, if she could. Between Sherman and Sherman, Mich. 1692. 2 Vern. 276.

11. Among Merchants it is looked upon as an Allowance of an Account current, if the Merchant who receives it does not object against it in a second or third Post. Per Hutchins, Lord Commissioner, 2 Vern. 276.

C A P. III.

Affidavits.

(A) Where an Affidavit is necessary, &c.

(B) Where an Affidavit may be laid to be full and sufficient, and what shall be allowed thereon.

(A) Where an Affidavit is necessary, &c.

1. If a Bill be exhibited, grounded on the Loss of a Bond; per Lord Keeper; as it is the Loss which intitles the Court to Jurisdiction of the Cause, an Affidavit must be made of it. 1 Chan. Ca. 231.

2. But if a Person comes only for a bare Discovery of a Deed, he need not make Oath of the Loss of it; as he must do when he comes for Relief; for he cannot translate the Jurisdiction, without Oath made of the Loss of the Deed. 1 Vern. 247.

3. So where a Bill was brought for a bare Discovery of a Deed, and the Defendant demurred, because the Plaintiff had not made Oath, according to the Course of the Court, that he had not the Deed; upon which this Decision was taken and allowed of by the Court, viz. That where a Person comes for a Discovery, and prays Relief, there it is necessary for him to make Affidavit of the Want of the Deed; but when he seeks but a bare Discovery, or to have it produced at a Trial, it is not necessary; for it is not to be presumed that
that the Plaintiff in either of the latter Cases would do so absurd a
Thing, as exhibit a Bill, if he had the Deed. 1 Chan. Ca. 11. 1 Vern.
180. S. P. But vide 1 Vern. 59. where the Distinction is taken
quite contrary, but seems to be the Mistake of the Reporter.

4. The Plaintiff had pacchured the Manor of Leyborn in the
County of Kent, and the Defendant was Tenant of Part thereof by
a Leafe for Years, which was now expired, at the Rent of 30l. per
Annum; and the Plaintiff by his Bill set forth, that the Court-
Rolls, Title-Deeds, and Writings belonging to this Manor, were
kept in a Closet in such a Room at the chief Mansion-houfe, and
that after his Purchafe, the House being repairing, and Workmen in
the Houfe, the Defendant took that Opportunity and got into the
Closet, and took away all the Writings, and (amongst others) the
Counterpart of the Defendant's Leafe, and charged that the Defendant
had broke severall of the Covenant's in his Leafe; but that for Want
of the Counterpart the Plaintiff could not aicertain his Damages in
an Action at Law to be brought concerning the fame; and therefore
pray'd a Discovery of this Counterpart and general Relief. To
this Bill the Defendant demurred to the Relief only, for that the
Plaintiff had not annexed to his Bill the usual Affidavit, that he had
not the Counterpart in his Custody, and gave a full Answer, by Way
of Discovery, to the whole Bill; but the Demurrer was over-ruled,
for that the Bill was only for a Discovery, and therefore though he
charged that severall of the Covenant's were broken; yet he did not
pray any Recompence or Satisfacion for such Breach, but only com-
plain'd, that for Want of the Counterpart he could not aicertain his
Damages at Law, fo that he had wholly an Eye to Law for his
Satisfacion; and though he prayed Relief generally, that was only
to be applied to the particular Relief he had before pray'd, which
was a Discovery of the Counterpart of the Leafe. 4 Trin. 1729.
between Whitworth and Goulding. S. P. As to the General Relief be-
ing applied to a Discovery, resolv'd the fame Day between King
and King.

5. A Plea of Privilege of an University need not be upon Oath;
but it is sufficient to aver, that the Party is a Scholar resident, 6 &
253. S. P.


7. For where the Defendant pleaded the Privilege of the Exche-
quar, being the Foreign Oppofer, the Plea was over-ruled, becaufe
it was not put in upon Oath. Between Gibbon and Whiteacre,
2 Vern. 83. So a Plea of Outlawry was disallowed, becaufe it was
not put in upon Oath. 2 Vern. 37.

8. There was a Reference to the Six Clerk, whether a Plea of
Outlawry, with an Averment of the fame Perfon, ought to be upon
Oath; and it was urg'd, that it had been so ruled in Lord North's
Time, becaufe it migbt come from the other Side, to aver that he
was not the fame Perfon; and the Court allowed the Plea to be
good, being only the common Averment, but gave Leave to amend

9. A Plea of a former Suit depending for the fame Matter, need
not be upon Oath. 1 Vern. 332.

10. Where
Affidavits.

10. Where a Person is arrested upon an Attachment, the Contempt shall hold good, though no Affidavit be filed at the Time of Taking forth the Attachment, if it be filed before the Return of it. 1 Vern. 172.

(B) Where an Affidavit may be said to be full and sufficient, and what shall be allowed thereon.

1. Declared by my Lord Chancellor Hales, that a general Affidavit of having material Witnesses beyond Sea should not be sufficient, but the Witnesses must be named in the Affidavit, and the Point mentioned to which they can materially depose. 1 Vern. 334.

2. Some Bailiffs, who had served an Execution in Breach of an Injunction, find Money hid in the House, and carry it away, and the Party at whose Suit the Execution was taken out, was ordered to make Satisfaction, who complained of this Order as unjust, saying, that the Parties should be admitted to purge themselves by Oath; and that the Plaintiff should not be admitted to be judge of his own Damages; but my Lord Chancellor confirmed the Order, and said, That a Man who had stolen, would not, sich to forfeit it; and that therefore in Odium spoliatoris, the Oath of the Party injured should be a good Charge on him who did the Wrong. Between Children and Saxby, 25 Car. 2. 1 Vern. 207.

3. An Accountant shall be allowed Sums under forty Shillings on his own Affidavit. 1 Vern. 283. But for this wide Title Account Letter (B).
C A P. IV.

Agreements, Articles, and Covenants.

(A) Agreements and Covenants which ought to be performed in Specie, &c. cont.'

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

(C) Voluntary Agreements, in what Cases to be performed.

(D) Agreements, by whom to be performed.

(E) Concerning the Manner and Time of performing Agreements.

(F) Where the Person or Estate will be made liable to a Covenant or Agreement.

(G) Where there may be Relief when the Agreement is not strictly performed.

(A) Agreements and Covenants which ought to be performed in Specie, &c. cont.'

1. If an Uncle covenants, in Consideration of natural Love, and in order to gain a Reconciliation between his Nephew and his Father, (whom the Nephew had disoblige[d] to settle his Estate on his Nephew: Such Covenant shall be executed in Specie; tho' it be objected, that a Court of Equity cannot decree the Execution of a Covenant or Agreement in Specie; when the Party has a Remedy for Damages at (a) Law. Between W[ise]man and Roper,

(a) Prohibitions have formerly been granted to Inferior Courts of Equity, for decreeing the Performance of Agreements in Specie, as where a Man promised to make a Lease, and refusing, the Court of Marches of Wales decreed a Performance; and a Prohibition was granted. 1 Rol. Abr. 380. Lat. 172. 1 Rol. Rep. 368. But now the Power of Chancery, and other Courts of Equity, in enforcing the Execution of Articles and Agreements, is so well established, that in many Cases, Money agreed to be laid out in Lands shall be considered as
Agreements, Articles, and Covenants.


Lands, and Money; vid.

1 Chan. Ca. 39. and tho' a losing Bargain will sometimes be decreed as well as a Beneficial one, 2 Vern. 432. yet it must ever be observed, that Articles or Agreements, out of which an Equity can be raised for a Decree in Specie, ought to be obtained with all imaginable Fairness, and without any Mixture tending to Surprise or Circumvention; and that they be not extremely unreasonable in any Respect; otherwise a Court of Equity will, according to the Circumstance of the Case, either set the Agreement quite aside, fend the Party to Law, or direct a Trial in a Quantum Damnum.

2. A. having a Lease from the Dean and Chapter of —— sells it to B. and it was agreed, that upon A.'s abating Part of the Money, B. should, upon the King and the Dean and Chapter's Resilution, reconvoy it to A. and tho' it was objected, that this was in Nature of a Wager, and so more proper for a Common Law Court; yet a specific Performance of the Agreement was decreed. 14 Car. 2. between Parker and Palmer, 1 Chan. Ca. 42.

3. J. S. upon a Treaty of Marriage, offered to settle 500 l. per Annum, as a Jointure on his intended Wife, and was intrusted with the Drawing of the Settlement, which the Wife never read, and the Jointure settled was but 400 l. per Annum, and he taking Notice during the Marriage, that the Jointure settled was not so much, and talking of making of it up, but dying before, his Heir was decreed to make it up, altho' there was no (b) Covenant or Agreement prov'd, by which he bound himself to make a Jointure of that Value. Mich. 1681. between Benfon and Bellasis, 1 Vern. 16.

(6) There needs no great Exag- ne in the Words which make a Covenant; for where it appears to be the Intent of Two to do, or not to do a Thing, it will be con- strued to a Covenant, and the rather in Equity, where a Covenant is only considered as an Evidence of an Agreement, as a Bond may be. Vid. 1 Chan. Ca. 254.

4. A Feme sole being Tenant in Possession, agrees with the Heir at Law, who pretended a Title, that in case he did not disturb her, she would leave him the Land after her Death, if she died without Issue of her Body, or 500 l. in Money; the Feme married, and devised to her Husband; and tho' it was urged, that this was all the Portion the Husband had with her, and that he was therefore quasi a Purchaser, and that she being Tenant in Tail, might have docked the Remainder, notwithstanding the Court decreed a Performance of the Agreement. Pach. 1682. between Guilmore and Battison, 1 Vern. 48.

5. If A. upon the Marriage of his Brother, executes a Writing, by which he promises, if the Wife be worth 160 l. and if he dies without Issue, he will give his Lands to his Brother and his Heirs, and the Wife is worth 160 l. And A. himself afterwards marries and settles the Lands in Jointure upon his Wife, and dies without Issue, having devised the Lands to his Wife in Fee, tho' this is urged to be a Limitation to take Effect after a Dying without Issue, and so subject to be destroyed by the Tenant in Tail; yet as the Marriage was proved to be in Expectation of the Performance of this Agreement, it will be good against the devisee of the Wife. Decreed 33 Car. 2. between Goismer and Paddison, 2 Vern. 353, 354.

6. The Plaintiff assigned some Shares of the Excise to the Defendant, who thereupon covenanted to save him harmless, and to stand in his Place touching all Payments to the King; the Plaintiff being sued by the King, brought his Bill to have the Agreement performed in Specie; and altho' it was insisted that the Plaintiff might recover

F Damages
Agreements, Articles, and Covenants.

Damages at Law; and that this was not a Covenant for any Thing certain; and that by this Means a Master in Chancery was to tax Damages instead of a Jury; yet it was decreed that the Defendant should perform his Covenants; and it was directed to a Master, that as often as any Breach should happen, he should report it specially, that the Court, if Occasion should be, might direct a Trial in a Quantum Dammificat. Mich. 35 Car. 2. between Lord Ranclough and Hayes, 1 Vern. 189. 2 Chan. Ca. 146. S. C.

7. If J. S. a Jointref, brings her Bill to have an Account of the Real and Personal Estate of her late Husband, and to have Satisfaction thereout for a Defect of Value of her Jointure Lands, which he had covenanted to be and to continue of such Value; and the Defendant infilts, that this is a Covenant which sounds only in Damages, and Properly determinable at Law; tho' it be admitted that a Court of Equity cannot regularly assesses Damages; yet in this Case a Master in Chancery may properly inquire into the Value and Defect of the Lands, and report it to the Court, which may decree such Defect to be made good, or fend it to be tried at Law upon a Quantum Dammificat. Mich. 1699. between Hedges and Everard.

8. The Condition of a Bond was to settle certain Lands in such a Manor by such a Day; the Obligor dies before the Day, so the Bond was saved at Law; and the Question was, Whether this Court would deem an Execution in Specie: Per Lord Chancellor, the Lands must be settled, and so it has often been done. Pach. 1697. between Holsham and Ryland.

9. By a Marriage-Agreement, which was reduced into Writing, but not sealed, the Son's intended Wife was to have more than would have been left; for the Father indebted his Wife and two Daughters unpreferred; and the Court would not decree it, principally by Reason of the Extremity of it, but left the Party to his Remedy at Law. 31 Car. 2. Anonymus, 2 Chan. Ca. 17.

10. If A. Articles for the Purchase of B.'s Estate, pretending he bought it for one whom B. was willing to oblige, and thereby gets it somewhat the cheaper, when in Truth he bought it for another, Equity will not decree an Execution of this Agreement. Hill. 1682. between Phillips and the Duke of Bucks, 1 Vern. 227.

11. A. on the Marriage of his Daughter to B. covenants that B. shall have his Lands called C. at his Death, cheaper than any other Person, and lives twenty Years after, and devises to B. 1000 l. and to his Daughter, B.'s Wife, 500 l. and devises the Lands to his Grandson; the Court refused to decree an Execution of the Agreement, because of the Uncertainty of it; and it not being mutual, B. not being bound to take it at any Price. Hill. 1700. between Bromley and Jeffries, 2 Vern. 16.

12. An Agreement for a Purchase being obtained by an Attorney from an old Woman of Ninety, and several suspicious Circumstances appearing, the Court would neither decree it to be carried into Execution against the Heir at Law, nor to be delivered up upon a Cross Bill exhibited for that Purpose. Hill. 1708. between Green and Wood, 2 Vern. 632.

(B) Parol
Agreements, Articles, and Covenants.

(B) Parol Agreements, or such as are within the Statute of Frauds and Perjuries, &c.

1. A Bill was brought to have the Execution of a Parol Agreement for a Lease of a House, setting forth, that the Plaintiff, in confidence of this Agreement, had expended large sums of money in repairs, &c., to which the Defendant pleaded the (a) Statute of Frauds and Perjuries, and the plea was allowed. But my Lord Keeper was of Opinion, that if it had been laid in the Bill to be part of the Agreement, that it should be put into writing, it might have altered the case, and possibly require an answer. Hill, 1082, between Hollis and Whiting, 1 Vern. 151.

or out of Land, &c. not put in writing, and signed by the Parties making them, or their Agents, authorized by writing, shall have no greater effect than as Estates at will, except leases not exceeding three Years, from the making whereof the Rent referred shall be two thirds of the full Value of the thing demised.

2. A Bill being afterwards brought in the precedent case, in which it was alledged, that it was part of the Agreement, that it should be reduced into writing; My Lord Keeper said, that the Difficulty was, that the Act makes void the estate, but does not say that the Agreement itself shall be void, and therefore he thought, that if that subsisted, so as to intitle the Party to damages at Law, it might be (b) decreed in Equity, and directed that point to be tried, and that afterwards he would consider farther of it; but as to the improvements made, his Lordship was clear of opinion, that for such as were for use and necessity, and not merely for humour and fancy, the party was to have satisfaction. 1 Vern. 159.

in marriage, or any other treaties, uncertainty, Perjury, or Contrariety of Evidence, several cases not liable to these inconveniences, have been determined to be out of the statute, upon the following distinctions, which seem the more necessary to be mentioned, as many of the printed cases on this subject take no notice of them; and by not giving us all the circumstances of the case, contradict each other; it may likewise be proper to insert the cases themselves which support these distinctions.

3. 1st, That the Agreement be by Parol, and in no part executed, yet if there be no Incertainty, the Court will decree it: As if a Bill be brought for a specific performance of an Agreement, and the subsistence of the Agreement is set forth in the Bill, and confessed by the Defendant's Answer, the Court will decree execution of it; for in this case there is no danger of perjury, which was the only thing the statute intended to prevent. Mich. 1702, between Croydon and Bane, Mich. 1713. Like point between Simondfon and Tweed.

4. 2dly, That the Agreement be by Parol, yet if it be agreed to be reduced into writing, and part of the Agreement is executed, but the reducing of it into writing is prevented by fraud, it may be good. As if upon a marriage-Treaty, instructions are given by the husband to draw a settlement, and by him privately countermanded, and afterwards he draws in the woman by persuasions and assurances of such settlement, to marry him, this shall be executed. Mich. 1719. Sir George Maxwell and Lady Mountacute's case.

5. So
5. So where a Parol Agreement was concerning the Lending of Money on a Mortgage, and the Conveyance proposed was an absolute Deed from the Mortgagor, and a Deed of Defeasance from the Mortgagee; and after the Mortgagee had got the Deed of Conveyance, he refused to execute the Defeasance; yet it was decreed against him on the Fraud, by Lord Nottingham, soon after the making the Statute, a Case quoted and agreed to, in Sir George Maxwell's Case. Mich. 1719.

6. 3dly, When the Agreement is signed but by one Party, yet it may be decreed on the Circumstances of Fraud; as where the Defendant, on a Treaty of Marriage for his Daughter, with the Plaintiff, signed a Writing, comprizing the Terms of the Agreement; and afterwards designing to elude the Force thereof, and get loose from his Agreement, ordered his Daughter to put on a good Humour, and get the Plaintiff to deliver up that Writing, and then marry him, which the accordingly did; and the Defendant fooled by at a Comer of a Street to see them go by to be married; and the Plaintiff was relieved by the Matter of the Rolls upon the Point of Fraud, which was proved. Cited to be adjudged by my Lord Chancellor in the Case of Bawdes and Amburgh, Paech. 1715, between Mallet and Halfpenny, 2 Vern. 373. S. C. reported by the Name of Halfpenny and Baller; but no Mention made of any Fraud, but that the Father was privy and confounded.

7. The Defendant's Son made his Addresses to the Plaintiff's Daughter, and the Plaintiff desiring to know what the Father could settle on him, he told him, that his Father had an Estate of 60l. per Ann. that he was in a good Trade, and would take him in Partner; and said he would satisfy him more particularly by going to his Father, who lived at some Distance off, and accordingly went, and on his Return told him, that he would settle the Estate on him, and take him in Partner; upon which the Plaintiff agreed to settle a Leafhold Estate on him of 2 or 300l. per Annum; but desired the Son to acquaint his Father of it by Letter, who did, and the Father, in his Answer, expressed his Good-looking of the Match, and said he would comply with every Thing he told his Son. On the Marriage-Day the Woman fell sick of the Small-Pox, and the same Day the Son went to his Father's, where he fell sick likewise of the Small-Pox, but in his Sickness was prevailed on to make a Will, and devise the Leafhold Estate to his Father, and died; the Wife recovering, her Father and the pray a Reconveyance of the Leafhold Estate, or that the Agreement might be performed in Specie, and a Discovery of the Letter wrote by the Son, and insinuated, that the Letter and Answer brought the Agreement out of the Statute of Frauds; but the Defendant denying that he knew the Contents of the Letter, tho' he owned he received such a one, and that he had burnt it as Waffe-Paper, my Lord Chancellor (tho' he said it was a Case of great Compassion) doubted whether he could relieve the Plaintiffs, saying, it was only executed according to the Statute, by one Party, and what the Defendant told his Son, might be very uncertain, who perhaps might have magnified Matters in order to enhance his Father in Law's good Esteem of him; but he gave the Parties Time to see if they could agree the Matter. Hill. 1710, between Hall and Butler.

8. 4thly,
8. On a Marriage-Treaty, the Lady's Father proposed to give 450l. Portion, and the Husband was to settle 4 or 500l. per Annum for a Jointure; the Father and intended Husband went to Mr. Minshale's Chambers, who hearing the Proposals on both Sides, took down Minutes or Heads thereof in Writing; and the same Day gave them to his Clerk, to draw a Settlement according to the Terms of the Agreement; the next Day the Father fell sick suddenly, and died in two Hours after, and the next Morning the Marriage was consummated; and on a Bill brought to have a Specifick Performance of the Agreement, my Lord Chancellor decreed it to be within the Statute of Frauds, and said, he knew no Cave where an Agreement, tho' wrote by the Party himself, should bind, if not signed, or in Part executed by him; and that those preparatory Heads might have received several Alterations or Additions, or the Agreement might have entirely broke off upon some further Inquiry of the Party's Circumstances; and this Decree was thought very just by the Bar, who all agreed with my Lord Chancellor, that if the Marriage had been had upon the Foot of this Writing, and the Father had been privy and confenting to it, that he should afterwards have been obliged to execute his Part thereof. Pach. 1715, between Bawdes and Anmurst.

9. If A. agrees to sell the Lands in Questtion to B. and a short Note is drawn of the Agreement, (but not signed by either Party) purporting, among other Things, that B. should have the Lands from Lady-day next, and that he should then pay the Purchase-Money, and Possession is delivered B. who thereupon puts in his Cattle, and makes Intracctions on A.'s other Lands, by which some Differences arose, which to remove, A. desires B. to repeal the Bargain, which he refused; upon which A. sells the Lands to C. who had Notice; B. having tendered the Money and Conveyances the 26th of March following, he will be decreed the Lands; this Agreement being in Part executed, and therefore not within the Statute. Hill. 1685, between Butcher and Stapley, 1 Vern. 353. 2 Vern. 455. S. C. cited in a Case where an Agreement, tho' not signed, yet being in Part executed, was decreed between Pyke and Williams.

10. A. sold Houses to B. for 2000l. a Note was made by A. of the Agreement, and signed by B. only; and it was objected, that this was within the Statute, and that the Note binds not him who did not sign it; and that they must be both, or neither, bound in Equity; but it was decreed that they were both bound. 36 Car. 2. between Hatton and Gray, 2 Chan. Ca. 164.

11. A. agreed by Parol with B. for a Lease, which was drawn, perused, and corrected by A.'s Counfel, and afterwards engrossed; B. signed the Leafe. A. having pleaded the Statute: The Court ordered him to Answer, but saved the Benefit of the Plea till the Hearing. Hill. 1683, between Louther and Carril, 1 Vern. 221.

12. An Administratrix, and her two Children, being intitled to a Leafe of a Houfe, they all agree to make a Leafe to J. S. for ten Years, and the Administratrix alone, with the Privity of the other Two, executes the Leafe; and it was held, that this was out of the Statute, and the Leafe good. Mich. 1683, between Heighter and Sturman, 1 Vern. 210.
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13. A. and B. being joint Lessees of a Building-Leafe, A. by Parol agrees to sell his Interest to B. for four Guineas, and accepts a Pair of Compasses in Hand to bind the Bargain; A. having pleaded the Statute of Frauds, the Court ordered him to Answer the Agreement, being in Part executed, but saved the Benefit of the Plea to the Hearing. Mich. 1587. between Alsopp and Patten, 1 Vern. 472, 473.

14. But where A. and B. being severally in Treaty to purchase a Houle and Toft of Ground of J. S. they agree by Parol, that A. shall defit, and that B. shall Purchase and let A. have Part of the Ground, which he wanted, at a proportionable Price; B. purchases, but refutes to perform the Agreement; and it was held by the Master of the Rolls, this was out of the Statute, being in Part executed by A.'s Defitting; but upon an Appeal my Lord Chancellor held it within the Provision of the Act, and reversed the Decree. Mich. 1708. between Lawas and Bayly, 2 Vern. 637.

15. The single Point of a Case was, whether an Agreement in Writing could be discharged by Parol; and the Lord Keeper North held it might, and dismissed the Bill which was brought, to have it executed in Specie. Pash. 1684. between Gorman and Salisbury, 1 Vern. 240.

16. A. wrote a Letter, signifying his Affent to the Marriage of his Daughter with J. S. and that he would give her 1500 l. and afterwards, by another Letter, upon a further Treaty concerning the Marriage, he went back from the Proposals of his first Letter; but in some Time after declared that he would agree to what was proposed in his first Letter. This Letter was held a sufficient Promise in Writing, and not within the Statute of Frauds and Perjuries, 35 Car. 2. between Bird and Blosse, 2 Vern. 361. and that the last Declaration had set up the Terms of the first Letter again; vid. 1 Vern. 110. a Letter wrote by a Father, promising a Portion, and he confenting, held out of the Statute.

17. On a Bill for a Marriage-Portion, the chief Evidence to support it, was a Letter proved to have been written by the Father's Direction, wherein it was said he would give 1500 l. Portion with his Daughter, and that he was afterwards privy to the Marriage, and seemed to approve of it; and the Portion was decreed the Husband, who had taken out Administration to his Wife; and this Decree affirmed in the House of Lords. Mich. 1694. between Wankford and Fortherby, 2 Vern. 322.

18. On a Treaty of Marriage between the Plaintiff and the Defendant's Daughter, a Meeting was appointed, and an Agreement drawn up in Writing, but signed by neither Party; and the Defendant swore, that tho' it was drawn up in Writing, yet upon some Disputes and Difficulties arising afterwards it broke off; but one Witness swore, that after it was writ, it was read to the Parties, and approved of by them; afterwards the Plaintiff married the Defendant's Daughter, with his Consent and Privyty, who seemed so well pleased, that he helped to set them forward in the Morning, and entertained them at his House; and he was decreed to perform the
Agreements, Articles, and Covenants.

the Agreement. *Hill. 1690.* between *Cookes* and *Maseall,* 2 *Vern.* 200.

19. But where *A.* by Letter under his Hand, promised 1000. to his Niece, but in the same Letter diffus'd her from marrying the Plaintiff, but afterwards was present at, and gave her in Marriage; yet the Court would not Decree the Payment of the 1000. but left the Plaintiff to his Action at Law. *Hill. 1690.* between *Douglas* and *Vincent,* 2 *Vern.* 202.

20. *A.* and *B.* agree, that *B.* shall assign a Term for Years in his House and Plate, and certain Vessels of Beer, for 200 Guineas, whereof one was paid in Hand as Earnest of the Bargain, and three Days after 19 Guineas more; and Part of the Agreement was, that it should be executed by Writing at a certain Time: Upon a Bill for a Specific Performance of the Agreement, *B.* pleaded the (d) Statute of Frauds and Perjuries, and insinuated, that no Part of the Things being delivered, there was no Execution, and that the twenty Guineas were delivered for the Leafe; but the Lord Keeper over-ruled the Plea. *Hill. 34 Car. 2.* between *Leak* and *Morrice,* 2 *Chan. Ca.* 135.

except the Buyer equally receives Part of the Goods sold, or gives something in Earnest to bind the Bargain, or in Part of Payment, or some Note thereof in Writing be made and signed by the Party to be charged with the Contrav, or their Agents thereby lawfully authorised; and no Action is to be brought upon any Agreement, that is not to be performed within the Space of a Year from the making the said Agreement, unless the Agreement upon which such Action shall be brought shall be put in Writing, and signed by the Party to be charged therewith.

(C) Voluntary Agreements, in what Cases to be performed.

1. If there are two (a) Voluntary Deeds or Conveyances of the same Estate, the first shall prevail. 1 *Chan. Rep.* 173.

(a) The Voluntary Agreements and Conveyances are regularly good, so as to bind the Parties themselves, if they are not attended with Badges of Fraud or Circumvention; yet it has been always held Discretionary in Courts of Equity, whether they would intervene, either in aiding or letting them abide; but if they affect Creditors, Purchasers, or even younger Children, a Court of Equity will Interpose.

2. If *A.* makes a Voluntary Settlement of his Estate, without any Power of Revocation, and afterwards devises it, the Devisee being a Volunteer, shall have no Aid against the Settlement; for to relieve in such a Case, would be to establisht it as a Maxim, That no Man can make any Voluntary Dispensation of his Estate, but by his Will only, which would be absurd. 1 *Mich. 1682.* between *Villars* and *Beaumont,* 1 *Vern.* 100, 101.

3. So where *A.* conveyed his Lands to the Use of himself for Life, Remainder, as to a third Part, to his Wife for a Jointure, Remainder of the Whole to his Infant Heir in Tail, and two Days afterwards makes his Will, and devises the same Estate, with other Things, to his Infant Heir in Tail, but subject to the Payment of Debts, in Case his Personal Estate should not be sufficient, and also a Legacy of 250 l. the Personal Estate proving deficients, on a Bill brought to have the Debts paid out of the Lands, that the Legacy may be charged on the Personal Estate, it was held by the Court, that the Settlement, tho' voluntary, yet it was not revocable, and therefore the Teftator was disabled to charge the Lands by his Will. *Trin.* 1687, between *Bale* and *Newton,* 1 *Vern.* 464.

4. *A.*
Agreements, Articles, and Covenants.

4. A, seised in Tail of Freehold Lands, and in Fee of Copyhold Lands, devised the Copyhold Lands to the Defendant, who was intituled to the Remainder of the Freehold Lands, and devised the Freehold Lands to the Plaintiff; the Defendant apprehending there had been a Recovery suffered by the Treator, agreed with the Plaintiff, without any Consideration, that each of them should enjoy the Lands according to the Will; but discovering afterwards, that there had been no Recovery suffered, he brought his Action to recover his Freehold Lands; and the Plaintiff brought a Bill to establisht the Agreement; which was decreed accordingly. Between Frank and Frank. 1 Chan. Ca. 84.

5. If a Man makes a Voluntary Conveyance, and there be a Defect in it, so as it cannot operate at Law, Equity will not decree an Execution thereof; but in some Cases it will be decreed, if intended as a Provision for younger Children. 2 Vent. 365. 2 Vern. 46. S. P.

6. A Father makes a Voluntary Settlement on his eldest Son and his Heirs, without any Power of Revocation; afterwards he makes a Settlement on his second Son for Life, with Remainder to his first and other Sons in Tail, and dies; the first Deed came to the Hands of the eldest Son’s Heir, and the other to the second Son, who brought a Bill to set aside the first; but both Sons having been otherwise provided for, it was held by my Lord Chancellor, that tho’ both Deeds were Voluntary, yet the Consideration of being a younger Child was not sufficient to set aside the First. Between Clavering and Clavering. Hill. 1704. vid. 2 Vern. S. C. 475. differently stated, and several Cases there put to this Purpose.

7. If an Annuity is granted by one to his House-keeper, with a Bond for Payment of it, and the Bond is lost, Equity will decree Payment of the Annuity, so Service is a Consideration, and no turpis contractus shall be presumed, unless proved. Between Lightbone and Weedon. Hill. 1700.

(D) Agreements, by Whom to be performed.

1. If A, by Writing, agrees with B. and C. to pave the Streets in a Parish, and they, in Behalf of the Parish, agree to pay him for it, and this Writing is lodged in the Hands of B. if A. paves the Streets, he must have Relief against the Undertakers, especially in this Case; the written Agreement, which is his Evidence, being in the Hands of one of them; and the Undertakers must take their Remedy against the Rest of the Parish. Mich. 13 Car. 2. between Mersiel and Wymondsal. Hard. 205.

2. If fifteen of the Tenants of a Manor agree to inclose a Common, and it appears that there are eighteen who have Right of Commonage; yet an Inclosure will be decreed, tho’ opposed by Three, for it shall not be in the Power of two or three wilful Persons, to oppose a Publick Good. 3 Chan. Rep. 13, 14.

3. So if the Agreement be to fit a Common, it shall be decreed tho’ opposed by two or three humoursome Tenants, 2 Vern. 103. where it is said, that a Stint is more to be favoured than an Inclosure.

4. If
4. If Tenant in Tail, for valuable Consideration, agrees to convey, he may be compelled in Equity to execute the Agreement; but if he dies, his Issue is not bound thereby, unless he doth some Act whereby he conveys to and confirms the Agreement. 1 Chan Ca. 171. 1 Lev. 239. S. P. Tho' there was a Decree, and the Father stood out all the Procees of Contempt. Between Powel and Powel, Hill. 1708. fo tho' the Father died in Prison, and in Contempt for not performing the Decree, yet the Issue was not bound. 2 Vern. 36. But for this, side by what Acts of the Ancestor shall the Heir be bound, Title Petr.

5. If a Copyholder for Life, where by the Custom there is a Widow's Estate, agrees to sell, and dies; his Widow is no more bound by the Agreement, than one Jointenant is by an Agreement to sell by the other. Pasch. 1688. between Mulgrave and Dalwood, 2 Vern. 63.

6. If a Feme Covert, by Agreement made with her Husband, is to surrender or levy a Fine, though the Husband die before it be done, the Court will by Decree compel the Woman to perform the Agreement. Between Baker and Child, 2 Vern. 61.

7. The Plaintiff's Father applied himself to the Defendant H. a Scrivener, to borrow 200l. who accordingly procured the Money, and the Plaintiff and his Father entred into Bonds for the Payment of it to B. and C. the Plaintiff's Father became afterwards involvent, and he himself also, by Reason of the Debts for which he stood engaged for his Father: The Father having compounded with his other Creditors for seven Shillings in the Pound, the Plaintiff and his Father applied themselves to the Defendant, to know where B. and C. lived, who, instead of informing them, told them that they would stand to any Thing he did; upon which they compounded with him for 10s. in the Pound, 70l. to be paid immediately, which was done, and 30l. at a Day afterwards, which was tendered; and now the Plaintiff prays that the Bonds may be cancelled, and that he may be indemnified; and it was decreed that the Plaintiff should pay B. and C. their whole Money, they not being privy to the Agreement, and that H. tho' he acted as an Agent, should repay him, and indemnify him, according to the Agreement. Hill. 1690. between Parrot and Wells, 2 Vern. 127.

8. If A. articles on Behalf of B. to purchase four Houses in Jamaica, and to pay 800l. for the same, and, pending a Suit to compel the Seller to make out a good Title, the Houses are swallowed up by an Earthquake, yet A. shall pay the 800l. tho' he has not sufficient Effects of L.'s in his Hands. Decreed and affirmed in the House of Lords, between Cafs and Rudell, 2 Vern. 280.

(E) Concerning the Manner and Time of performing Agreements.

1. If an Agreement be to quit the Possession of Lands, the Court will not decree a Conveyance of the Lands themselves; but if the Agreement was to convey Lands, the Court would have decreed the Agreement, tho' the Party was not apprised what Estate he had in the Lands. Lord Keeper. Hill. 1682. between Gerrard and Vaux. 3 Vern. 121.

H

2. If
2. If a Bill be brought to have a Covenant decreed in Specie, whereby the Plaintiff was to have a Pit in the Defendant's Ground for digging of black Stone, and that when the old one failed, he might sink a new Pit; and with a further Covenant, that there should be no other Pit there; and it appears in the Cause, that the Defendant, and those under whom he claims, had been in Possession of a Pit there, and had used the fame for above sixty Years past; the Court, instead of Decreeing the Covenant in Specie, will dismiss the Bill. Hill. 1690. between Scelefield and Whitehead, 2 Vern. 127.

*3. If A. articles to fell Lands to B. (who was his Agent, and greatly intrusted by him in the Management of his Estate) for 15000 l. the whole Money to be paid, or so much Land returned as would make up what he paid short of the 15000 l. and A. conveys Part of the Lands to B. and by his Persuasion values that Part at an Undervalue, alledging it was not material to mention the very Sum, in regard he was to make up the whole 15000 l. and then B. sells this Part to C. and then would have returned so much of the Rest as would make up the 1500 l. tho' the Sale to C. shall stand, yet the Articles shall be set aside as unreasonable; and the rather, because B. had not paid the Money, or returned the Value in Lands, according to the Time prefixed. Decreed and affirmed in the House of Lords, Mich. 1690. between Broom Whorwood and Simpson, 2 Vern. 186.

4. If one is bound to transfer 300 l. East-India Stock before such a Time, which he neglects to do, and the Stock is much risen, he shall be obliged to transfer the Stock in Specie, and account for all Dividends from the Time that it ought to have been transferred. Mich. 1700. between Gardner and Pullen, 2 Vern. 394.

5. If A. covenants on his Marriage to purchase Lands of 200 l. a Year, and settle them for the Jointure of his Wife, and to the first, &c. Sons of the Marriage; and he purchases Lands of that Value, but makes no Settlement; and on his Death the Lands descend on his eldest Son; if the Son brings a Bill for a Specific Performance of the Agreement, the Lands descended will be decreed a Satisfaction of the Covenant. Trim. 1706. between Wilcox and Wilcox, 2 Vern. 558.

(F) Where the Person or Estate Will be made liable to a Covenant or Agreement.

1. If a Man hath Lands subject to the Payment of a Rent-Charge, and grants Part of the Lands to B. and Covenants that that Part should be discharged of the Rent; yet this is not such a Real Covenant, that shall run with the Land, and charge the other Lands with the Whole; but it is only a Personal Covenant which must charge the Heir only in Respect of Assessments. Mich. 1656. between Cook and Arundel, Hard. 87. decreed in Scaccario, 1 Chan. Ca. 212. Like Point decreed cont'.

2. A Purchaser of the Crown-Lands, in the Time of the late Wars, sells Part to the Plaintiff, and covenants to make further Assurance; and he on the King's Restoration had a Lease for Years made to him under the King's Title; and he was decreed to assign his Term in the Part he sold. Hill. 27 Car. 2. between Taylor and Debar, 1 Chan. Ca. 274. 2 Chan. Ca. 212. S. C.

3. If
Agreements, Articles, and Covenants.

3. If a man covenants to settle lands, or an annuity out of lands, and he afterwards purchases lands, having no lands before, and devises it, and dies, this purchased land shall, notwithstanding, be liable to the covenant. Palseh. 1689. between Tooke and Hasting; Vern. 97.

A. and K., his wife being seised in right of the said K. of two pieces of ground by indenture, 25 January, 1632, did grant a watercourse to one J. H. and his heirs, through the said two pieces of ground; and by the deed did covenant for them, their heirs and assigns, from time to time, to cleanse the same, and that all fines and recoveries levied and suffered, or to be levied or suffered of the said grounds, should be and inure to the strengthening and confirming the said watercourse, according to the said grant; and afterwards a recovery was had, and a deed executed, declaring the uses to be as aforesaid; the watercourse by these assignments came to the plaintiff, and the said two pieces of ground to the defendant, who built on the same, and much heightened the ground which lay over the said watercourse, and made it much more chargeable and inconvenient to repair, and as it was alleged (and in part proved) the building had much obstructed the said watercourse; so the bill was for establishing the enjoyment of the said watercourse, and that the defendant, and all claiming under him, might from time to time cleanse the same, according to the covenant: "I was objectted, that the said covenant being a personal covenant, was not at all strengthened by the recovery, and that the plaintiff, and those under whom he claimed, being sensible of it, had for forty years cleansed the same at their own charges; but the court was of opinion, that this was a covenant which runs with the land, and made good by the recovery; and that tho' the plaintiff had cleansed the same at his own charge, whilst it was easy to be done, and of little charge; yet since the right was plain upon the deed, and the cleansing made chargeable by the building, it was reasonable the defendant should do it; and decreed accordingly, and gave the plaintiff his costs. Hill. 1791. between Holmes and Buckley.

(G) Where there may be relief when the agreement is not strictly performed.

1. J. S. having purchased church lands in fee, under the title of the usurer, sold the same to the defendant's testator, and covenanted that he was lawfully seised, &c., the church being restored, and the estate made void. J. S. was relieved against this covenant; there being some proof, that at the time of sealing, the plaintiff, J. S. declared he undertook for his own act only. Mich. 14 Car. 2. between Dr. Caldecot and Hill, 1 Chan. Ca. 15, and a like case said to have been decreed about six months before.

2. A. fell to B. with covenants only against A. and all claiming by, from, or under him; B. secured the purchase-money; but before the payment the land was evicted, but not by any title under A. but by a title paramount, B. sued to be relieved, that he might not be forced to pay, seeing the land was loft, and was relieved. Anonymus, 31 Car. 2. Chan. Ca. 19. reported ex relatione Churchill.
...
C A P. V.

Amendment.

(A) In what Cases to be allowed.

1. A Bill may be \(a\) amended where there are not proper Parties made Defendants to the Suit. 3 Chan. Rep. 92. \(a\) If there be any O-veright or Miflake in the Bill, which requires Amendment before the Defendant’s Appearance, it may be amended, upon Motion, without paying Costs; but if it be amended after Appearance, Costs must be paid: The Costs upon a Demurrer, put in for a Slip or Miflake, are twenty Shillings, which being paid, the Party may amend without Motion; but if any new Matters arise after the Cause is at Issue, which is necessary for the Plaintiff to set forth, this is regularly done by Filing a Supplemental Bill, which the Court will admit upon Motion and Affidavit of such new Matter.

2. So where some Tenants of a Manor brought a Bill against the Lord, to establish certain Customs; and he demurred, because all the Tenants were not made Parties, either as Plaintiffs or Defendants; and the Court gave them Leave to amend their Bill, and to add as many more Plaintiffs as would give them Letters of Attorney so to do; and as to the Rest, to make them Defendants. Nel. Chan. Rep. 114.

3. The Plaintiff set forth a Conveyance in his Bill, without Date, Day, Month, or Year; and upon Demurrer the Court gave him Leave to amend. Nel. Chan. Rep. 260.

4. The Defendant moved to amend her Answer, upon Affidavit, that the Matters untruly set forth, were added in the Margin of the Draught after she had perused it; and so she was thereby surprised; and it being alleged, that no Replication was filed proot Certificate and Affidavit of Notice of this Motion being read, and the Plaintiff making no Defence, it was ordered that she \(b\) amend her Answer in the said Matters mistaken. Between Chute and Lady Dacre, 1 Chan. Ca. 29. And the like Liberty said to be given in Lord Coventry’s Time.

\(b\) The Defendant may, without No-tice, move to amend his Answer in a small Matter; but if it be in a material Point, he must give Notice of the Motion for such Amendment to the Plaintiff’s Clerk or Solicitor; and tho’ it be in a material Point, and after Issue joined, yet the Court will, on Affidavit of Surprise, and Payment of Costs, allow of an Amendment.

5. The Defendant, by her Answer, having confessed that an Award made by her Father might be confirmed, desired Leave to amend her Answer in that Particular, having made Oath that she \(I\) never
never read the Award, and that such Answer was prepared by her Father, who had wronged her in the Award; but the Court refused to give her Leave to amend her Answer. Harcourt versus Lady Anderson, 2 Vern. 424. One Reason seems to be, because the Father was an Arbitrator of her own Choosing.

6. A Recognizance entered into to abide such Order as should be made upon the Hearing of the Cause, being put in Suit against A. who was one of the Sureties; it fell out, that in the Title of the Order for confirming the Report, the Words *Et Us* were omitted; the Defendant at Law took Advantage thereof, and pleaded there was no such Order made in the Cause, and the Plaintiff perceiving the Mistake, obtained an Order from the Master of the Rolls to amend the Title of the Order, by adding the Words *Et Us*, which was afterwards confirmed by my Lord Keeper, although it was to charge a Surety. *Trin. 1700.* between *Spearing* and *Lynn*, 2 Vern. 376.

7. But in a Cause where the Defendant had answered, and the Witnesses were examined, it happened, that in the Title of the Interrogatories, the Plaintiff was called *Thomas* instead of *John*, and the Court would not allow the Depositions to be read, nor the Title to be amended, although most of the Witnesses were, since their Examination, gone to Sea. Between *White* and *Taylor*, 2 Vern. 435. *But Quere, for this seems only a Mistake of the Clerk, whose Errors are frequently amended, she better to carry on the Justice of the Court.*
C A P. VI.

Annuity and Rent-Charge.

(A) What shall be construed a good Annuity or Rent-Charge, and whose Persons and Estates made liable.

(B) How far a Court of Equity will assist, and give a Remedy for Rescinding an Annuity or Rent-Charge, when there is none at Law, and here of Apposition and Extinction.

(A) What shall be construed a good Annuity or Rent-Charge, and whose Persons and Estates made liable.

1. A Man devises all his Lands for the Payment of his Debts; and devises an Annuity out of a certain Town, which the Trustees fell; and it was decreed, that the Annuity should issue out of the other Lands unfold, there being sufficient to pay the Debts. 1 Chan. Ca. 295.

2. An Annuity of 20 l. per Annum, was devised out of a Rectory, and the Glebe being but of forty Shillings per Annu. Value, and the Tithes not liable to a Distress by (a) Law, the Court decreed the whole Rectory to be liable. 1 Chan. Ca. 79.

(a) Of Things which lie in Grant and not in Tenure, no Rent can be referred which will be liable to a Distress, as Advowsons, Tithes, Fairs, Franchises, &c. 1 Inf. 44.

3. If a Man covenants to settle Lands of such a Value, or an Annuity out of Land, and he has no Land at the Time, but purchases Lands afterwards, which he voluntarily devises, yet the Lands shall be liable to the Annuity in the Hands of the Devisee. Between Tooke and Haslings, 2 Vern. 97.

4. A Man having debauched a young Woman, and intending afterwards to put a Trick upon her, settled an Annuity upon her of 30 l. per Annum for Life, out of an Estate which he had nothing to do with; yet the Court of Exchequer decreed him to make it good out of an Estate which he had of his Own; and this Decree was after-
Annuity and Rent-Charge.

afterwards affirmed on Appeal to the House of Peers. Cited in the
Marchioness of Anandale versus Harris, Trin. 1727. and said to
have been adjudged about a Year before.

5. A is Tenant in Tail, subject to a Rent-Charge to B. for Life;
B. and A. died, the Rent-Charge being in arrear; and the Question
was, whether the Issue in Tail is liable to the Executor of B. within
the Statute of 32 H. 8. to pay the Arrears incurred in the Life-time
of his Ancestor; and my Lord Chancellor seemed to be of Opinion,
that the Heir was not liable, he not claiming under the Tenant in
Tail, tho' if the Rent-Charge had continued, he would be liable to
be distrained for the whole Arrear, which was Sumnum Fugis; and
tho' this Case should be within the Statute, yet he said the proper
Remedy against the Issue in Tail was at Law. Between Lord Fair-
fax and Lord Derby. 2 Vern. 612.

(B) How far a Court of Equity will assist, and
give a Remedy for Recovering an Annuity
or Rent-Charge, when there is none at Law;
and here of Apportionment and Extinguish-
ment.

1. Rent of ½ l. 14s. per Ann. was granted by King H. 6. to
Eaton College, issuing out of certain Lands; the Bill sug-
gests, that the College did not know where the Lands lay, so as to
enable them to distrain, and therefore pray that the Executor of the
Tenant may be answerable for the Arrears which the Master of the
Rolls thought reasonable, in Respect that the Personal Estate was
increased thereby; and decreed it accordingly. Between Eaton Col-
lege and Beauchamp. Hill. 20 Car. 2. 1 Chan. Ca. 121.

2. The Bill was for Securing the Payment of 5 l. per Ann. Rent,
and likewise the Arrears thereof, suggesting, that the Deeds by
which it was granted were lost; and there being Proof that it was
constantly paid before the Twelve last Years, the Master of the Rolls
decreed the Arrears and growing Rent, saying, it was reasonable,
because it did not appear what Kind of Rent it was, and so no Re-
medy at Law. 1 Chan. Ca. 120.

3. Where a Bill was brought, suggesting, that the Plaintiff did
not know the Nature of the Rent, nor the Boundaries of the Land,
so as to be able to declare with Exactness; and the Court said they
would decree it; but at the Importance of the Defendant directed a
Trial, whether there was any such Grant, or not. Between Cox and
Foley. 1 Vern. 359.

4. The Plaintiff suggests, that he having the Grant of a Rent-
Charge issuing out of certain Lands, the Defendant, to hinder him
from a Distress, converted the Premisses into Tillage; and my Lord
Chancellor directed to have it tried, whether there was any Fraud
used to prevent the Plaintiff from distraining, and declared, if there
was, he would grant Relief. Between Dacy and Dacy. Mich.
2 Car. 2. 1 Chan. Ca. 144. but if there be a Remedy at Law, Equity
will rarely grant any, or change the Nature of the Rent. Vide
1 Chan. Ca. 185.

5. If
Annuity and Rent-Charge.

5. If a Man grants a Rent-Charge out of all his Lands, and afterwards selleth the Lands by Parcels to divers Persons, the Grantee of the Rent-Charge shall be refrained from Levying the whole Rent on one of the Purchasers. Cary 3.

6. A. on his Marriage, settled a Rent-Charge on his Wife for her Jointure, and afterwards devised to the Wife Part of the Land so settled; and it was held that there should be no (a) Apportionment, for the Devise was intended her as an Advantage; and it was not declared to be in Satisfaction of her Dower, and therefore she may demand for the Rent on any Part of the Land. Between Knight and Anshorp, Mich. 1685. 1 Vern. 347.

Entire Thing. 1 Rel. Abb. 234. As if the Grantee purchase Part of the Land, he cannot bring a Writ of Annuity, because he must declare on the whole Deed. Co. Litt. 148. Likewise if Part of the Land out of which the Annuity issue, is evinced by a prior Title, there can be no Apportionment; but then the Rent of the Land is chargeable, or the Party may bring a Writ of Annuity. 1 Inf. 148. But by the Act of God it may be apportioned; as if Part of the Land out of which the Rent issue, depend on the Grantee. 1 Rel. Abb. 236.

7. If A. hath a Rent-Charge issuing out of certain Lands, and B. having Notice of this Rent, purchaseth these Lands amongst others; and after B. sells the other Lands, and also some few Acres of the Land charged by General Words, and desires A. and her Husband to join in a Fine to the Purchaser, affuring her it would not prejudice her, which was accordingly done; tho' the Rent by A.'s Act was extinguished; yet because there was no Consideration given for, or Agreement to extinguish the Rent, she shall be relieved. 1 Chatt. Ca. 273.

8. A. seised in Fee of a little Messuage of 8 l. per Annum, and possessed of a Personal Estate of 250 l. Value, devised several Legacies, and gave his eldest Son B. the Plaintiff, 5 l. a Year for forty Years, if he should so long live, and devised to his second Son C. the said Messuage in Tail, and made him his Executor and Residuary Legatee. C. during his Life, paid the Annuity, but being now dead, his Wife and Executrix inquires, that there being no Charge on the Lands by the Words of the Will, and that she not having Assets, is not obliged to pay the Annuity; and further alleges, that her Husband having docked the Intail, and conveyed the Premises to J. S. in Trust for the Plaintiff, for the Securing the Payment of 50 l. which he borrowed of him; his Right, if he had any, is by the said Mortgage extinguished; but notwithstanding the Court decreed the Annuity, together with the Arrears to be paid; and an Account of the Profits of the Estate to be taken for that Purpoe, and said, that the Executor being Devisee of the Land, made the Land liable; and as to the Objection of his having (b) extinguished his Right by Acceptance of the Mortgage, it had no Foundation in a Court of Equity. Between Elliot and Hanock. Trin. 1690. 2 Vern. 143.

Which the Rent issues, he shall never afterwards have a Writ of Annuity, for his Remedy is extinguished by his own Folly. Poph. 86. Co. Litt. 148.

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C A P. VII.
C A P. VII.

Answers, Pleas, Demurrers, &c.

(A) What shall be a full and sufficient Answer.
(B) Where the Party may conclude, charge or discharge himself, by his Answer.
(C) What shall be a good Plea, and well pleaded.
(D) What shall be a good Caufe of Demurrer.
(E) Answering, Pleading, and Demurring to the same Bill.
(F) Concerning the Replication.

As to the Manner of Compelling a Defendant to Answer, at what Time, and Answering upon Interrogatories; vide Title Process.

(A) What shall be a full and sufficient Answer.

1. WHERE in a joint and several Answer by A. and B. if A. for himself Answers, and B. says that he hath perused the Answer of A. and believes it to be true, supposing B. charged with nothing of his own Knowledge, such a relative Answer is (a) sufficient; but it is otherwise where the Defendants answer severally. Between Walker and Norton, Hard. 105.

Defendant's own Fact, must regularly be, without saying, To his Remembrance, or, As he believes, if it be laid to be done within seven Years before, unless the Court, upon Exceptions taken, shall find special Cause to dispense with so positive an Answer; and if the Defendants deny the Fact, he must traverse or deny it (as the Cause requires) directly, and not by Way of negative Pregnant; as if he be charged with the Receipt of a Sum of Money, he must deny or traverse, that he hath not received that Sum, or any Part thereof, or else set forth what Part he hath received; and if a Fact be laid to be done, with divers Circumstances, the Defendant must not deny, or traverse it literally, as it is laid in the Bill, but must Answer the Point of Substance positively and certainly. Clarendon's Orders, 18 Car. 2.
Answers, Pleas, and Demurrers.

2. In a Bill for Tithes of Conies by Custom, the Defendants, by Anwser, deny the Custom, but do not discover how many Conies they killed, nor the Value of them; yet it was resolved well enough, (the rather, because the Demand was against common Right) for there being a full Anwser given to the Thing in Demand, till that be tried, the Defendants are not bound to discover; and if it should be otherwise, the Defendant, by a feigned Suggestion, might be forced to discover any Thing; but if in such Case the Matter be found against the Defendant, he shall after be examined upon Interrogatories. Pa.ck. 13 Car. 2. between Randall and Head, Hard. 188.

3. But where there is no such great Inconvenience, as upon a Bill against an Executor, to discover Assets, he must Anwser, tho' he denies the Debt, because it concerns the Act of another. Hard. 188.

4. If a Bill be brought against Three for a joint Demand, and one of them by Anwser says, he believes and hopes to prove the Debt paid; and the Cause is heard on Bill and Anwser as to him, the Plaintiff can have no Decree; for tho' the Defendant does not directly swear that the Money is paid, yet his Anwser must be taken to be true, because the Plaintiff, by not replying to him, has excluded him of the Benefit of his Proof; and the rather, because it appears a Piece of Cunning in the Plaintiff to proceed against him, who was most ignorant of the Matter; but upon Payment of Costs he may reply to the other Defendants. Hill. 1682, between Barker and Wylde, 1 Vern. 140.

5. On Exceptions to an Anwser, the Defendant having sworn he received no more than the Sum of —— to his Remembrance, it was allowed to be a good Anwser. Between Hall and Bodily, 1 Vern. 470.

6. If the Plaintiff excepts to the Anwser, and the Exceptions are referred, and the Matter certifies the Anwser insufficient in the Points excepted to, and then the Defendants fully anwser the Charge of the Bill; but in Truth the Exceptions are longer than the Bill; and the Matter, upon a Reference of the second Anwser, reports the Anwser insufficient in the Points excepted unto, and the Defendants except unto the Report, and insist, that they had anwsered well, having anwsered all the Matters of the Bill; yet they shall Anwser all the Matters of the Exception as well as of the Bill, they not having excepted to the first Report. Between Crispe and Nevil, 1 Chan. Ca. 60.

7. If there are two Defendants to a Bill, and one of them puts in an insufficient Anwser, which is so reported, and on Exceptions to the Matter's Report, his Report is confirmed by my Lord Chancellor; and afterwards the other Defendant puts in jut fuch another Anwser, and insists on the same Matter; the Court, for avoiding of Delay, will judge of the Insufficiency of this second Anwser, without fending of it to a Matter. 1 Vern. 74.

(B) Where
Where the party may conclude, charge or discharge himself, by his answer.

1. The plaintiff brought a bill against the defendant to redeem, or be foreclosed, the defendant, in his answer, offered to pay the plaintiff what was due on his mortgage; but finding afterwards that there was a mortgage prior to the plaintiff's; and that the mortgagor had made a deed of trust of these lands for the payment of his debts; and that the creditors had obtained a decree that they should be paid in proportion with the plaintiff, he would willingly retract; but the it appeared that the circumstances of the case were thus varied, yet the master of the rolls held the defendant to the offer in his answer. *Pasch. 1687, between Holford and Burnell, 1 Vern. 448.*

2. But, where a person having sworn in his answer to avoid a sequestration, that he was satisfied a debt owing to him in a bill now brought by him for the said debt; the master of the rolls would not suffer that answer to be read against him. *Mich. 1669, between Jones and Lenthall, 1 Chan. Ca. 134.*

3. Where the defendant pleaded himself a purchaser for a valuable consideration, without notice, as by the deed, &c. ready to be produced, may appear; and upon arguing the plea, it was ordered to stand for an answer; and it being moved, that the defendant might leave the deed with his clerk in court, that the plaintiff might have the sight and perusal of it, pursuant to the offer in his answer; and though the bar (being asked by the court, how the course was) agreed, that by his offer the defendant had made the deed part of his answer; and therefore it had been the course to order it to be produced; yet my lord chancellor said, he would not bind the plaintiff, being a purchaser, by the improvident offer in his answer. *Mich. 1698, between Watkins and Hatchett.*

4. It was said per curiam, that the case of Howard and Brown was the first case in this court, where, because a man had charged himself by answer, that his answer should be allowed as a good discharge, and that it ought to be the last. *2 Vern. 194.* Where an accountant may charge or discharge himself by answer. Vide *Title Account, Letter (B).*

5. If the plaintiff conveys an estate absolutely to the defendant, and he afterwards brings a bill to redeem, the defendant insists, that the conveyance was absolute; but confesses, that after the money paid, with interest, it was to be in trust for the plaintiff's wife and children; and the plaintiff replies to the answer; the trust will be decreed for the benefit of the wife and children, though no other proof of the trust; for it appears by the defendant's own confession, that he was not to have the estate absolutely. *Pasch. 1693, between Hampton and Spencer, 2 Vern. 288.*

(C) What
What shall be a good Plea, and well pleaded.

1. THE Bill being to be relieved touching a Debt due to the Plaintiff as Executor; the Defendant pleaded an Outlawry of the Plaintiff in Bar, but the (a) Plea was over-ruled, the Plaintiff suiting in autre droict as Executor. Killigrew and Killigrew, of three Kinds, viz.

(a) Pleas in Equity are

to the Jurisdiction; 3dly, A Plea to the Person; 2dly, A Plea in Bar. A Plea to the Jurisdiction must shew, that the Lands lie, that the Matters were transacted, or that the Party lives out of the Power of the Court, and Reach of its Process, as one of the Kingdom, or in a Country, Palatine, &c. but for this, (vide Title Courts, and their Jurisdiction) a Plea to the Person, must shew that the Party is disabled by Outlawry, Excommunication, &c. A Plea in Bar, as it goes more to the Merits, and often causes a personal Dismissal of the Bill, the Court will sometimes order it to stand for an Answer. Pleas of this Kind are various, as Acts of Parliament, Fines and Recoveries, Releases, &c. Purchasing without Notice; but Notice must be denied. 1 Vern. 119. 2 Vern. 261. S. P. by Way of Answer, and not by Way of Pleas. 1 Chau. Ca. 161. And Note, That if there be any Fraud alleged in the Bill, it must be denied by Way of Answer, and not by Way of Pleas. 1 Vern. 183.

2. A former Bill depending was pleaded in Bar of a Second; but tho' both Bills were of the same Nature and Effect, yet as the later had some new Matter: Ordered, that being the Plea was good, the Plaintiff should pay the usual Costs of a Plea allowed, but the Defendant to answer the second Bill, and the former Bill dismissed with twenty Shillings Costs. Between Crofts and Worsley, Mich. 26 Car. 1.


3. The Bill being to have an Account of a Trufte, the Defendant pleaded he was intrusted for three Children, viz. for the Plaintiff, and his two Brothers, and that the other Two not being made Parties, he was not bound to answer; for otherwise he might be thrice called to an Account for the same Matter, and the Plea was allowed. Between Hanne and Stevens, 1 Vern. 110. Who are to be Parties to the Suit, vide Title Bill, Letter (B).

4. The Plaintiff intitles himself as Administratrix; the Defendant pleads the Plaintiff is not Administratrix; it was objected, this was a negative Plea: Per Cur. Allow the Plea, it is a good Plea in Abatement at Law. Between Win and Fletcher, 1 Vern. 473.

5. The Bill was, that the Plaintiff's Father, by Settlement on his first Marriage, was only Tenant for Life, or else Tenant in Special Tail, and the Plaintiff was the eldest Son of that Marriage, and that the Defendant claimed by a subsequent Settlement, having Notice of the first; the Defendant pleaded a Fine levied by the Father, and set forth her Title under the second Settlement, and insisted she was a Purchaser; but did not plead she had no Notice of the first Settlement. Lord Keeper: The Bill being in the Disjunctive, the Defendant might take it either Way; and having pleaded a Fine, which is a Bar, supposing the Father to be Tenant in Tail, allowed the Plea. Between Cressett and Kettleby, Hill. 1683.

1 Vern. 219.

6. Two of the Defendants, being the Officers of the Exchequer, plead the Privilege of the Exchequer; but the Plea was over-ruled, because there was a third Defendant, who had no Right of Privilege.
Between Fanbaw and Fanbaw, Trin. 1684. 1 Vern. 246. Vide Title Privilege.

7. If a Bill be brought for an Account of the Profit of Mines, and the Defendant pleads a special Act of Parliament, which gives an exclusive Jurisdiction of all Matters arising within the Mines to the Courts of A. but does not aver there is a Court of Equity, there the Plea will be over-ruled. Between Brode and Little, 1 Vern. 58.

8. If a Bill is brought to be relieved upon a Trust, and charges the Defendant with Notice of the Trust; before the Taking of his Conveyance, the Defendant, by Way of Answer, may deny the Notice, and plead he is a Purchaser for valuable Consideration, without shewing what the Consideration was; tho' it was objected, that 5 s. is a valuable, tho' not an equitable Consideration; but where the Bill charges Notice, before the Defendant took his Conveyance, and the Defendant, by Way of Answer, denies the Notice at the Time of his Purchase or Contract, and pleads he is a Purchaser, &c. this Plea is naught, being founded upon the Answer, which denies only Notice at the Time of the Purchase; which may be under-foot of the Contract, and not of the Execution of the Conveyances. Mich. 1 Car. 2. between Moor and Mayhew, 1 Chan.Ca. 34.

9. The Plaintiffs being Mortgagees, the Bill was to discover Settlements, and what Estate the Mortgagor had in him; to this Bill the Defendants pleaded two several Settlements, whereby the Mortgagor was only Tenant for Life; but the Plea was over-ruled, because the Defendants did not offer, by Way of Answer, to admit the Tenant for Life to be dead, that so the Plaintiffs might try the Validity of those Settlements at Law; for if they should expect till the Tenant for Life was dead, their Witnesses that could prove the Fraud might be likewise dead; besides, the Defendants pleaded these Settlements to be made after Marriage, in Pursuance of Promises and Agreements made before Marriage, and did not set forth what these Promises or Agreements were. Hill. 1681. Lord Keeper & al. versus Wyld & al., 1 Vern. 139.

10. A Plea of a Purchaser for a valuable Consideration over-ruled, because the Defendant did not allege Seisin and Possession in the Person, from whom he bought. Trin. 1684. between Trecanian and Mose, 1 Vern. 246.

11. The Bill was to be relieved touching certain Lands, which the Plaintiff claimed Title as Heir on the Part of his Father; the Defendant pleaded, that the Mother was the Purchaser of those Lands, and that the Defendant was Heir on the Part of the Mother; but it being not pleaded that the Defendant was Heir of the Whole Blood to the Mother (and in Fact he was only of the Half Blood to the Mother) for that Reason the Plea was over-ruled. Hill. 1686. between Addison and Hindmarsh, 1 Vern. 442.

12. The Defendant pleads, that the Plaintiff brought a former Suit for the same Matters, which Suit is still depending for ought he knows to the contrary; for the Plaintiff it was infilled, that this Plea was not good, because he does not positively aver, that the former Suit is still depending; and no Influence can be taken upon his Knowledge to the contrary; but the Master of the Rolls allowed the Plea, because the Defendant ought not to have set it down to be argued,
for by that he admits that the former Suit for the same Matter is depending; but the Plea ought to have been referred to a Master, to examine whether there was a former Suit depending for the same Matter, or not; and said, there needs no positive Averment, that the former Suit is still depending, for that is examinable by the Master; and the Defendant never swears a Plea of a former Suit depending, but it is always put in without Oath. 1 Vern. 332. cit. Hard. 160. where a Plea was held naught for Want of an Averment in the Conclusion.

13. A Plea was held ill, because it went as to any Fraud suggested, &c. and also because it did not aver, that the Accounts which were pleaded, were just and true Accounts. Mich. 1727. between Hastings and Draper.

14. One Pordant had brought a Bill in this Court against the Defendants, for several Shares in their Stock, and after fold a sixth Part of what he was intitled to from the Defendants to the Plaintiff, who now brought this Bill for his sixt Part; the Defendants pleaded, that Pordant had before brought his Bill for severall Shares, of which the Plaintiff’s now Demand was Part, and that the former Suit was still depending; but because he had not averred, that the Defendants had appeared to the former Suit, or put in their Answer, or that they were so much as served with Proces to appear, the Plea was disallowed; for it is no Suit depending till the Parties have appeared, or been served to appear, but only a Piece of Parchment thrown into the Office, which may lie there for ever, and never come to a Suit; but if the former Suit depending had been well pleaded, the Court was clear of Opinion it would have been a good Plea, tho’ the Bill was brought by another Person, and not by the now Plaintiff; for else the Plaintiff in the other Suit, after his Bill brought, might assign his Shares to twenty several Persons, who might each of them bring several Bills, and so harass the Defendants for what the first Suit was sufficient. Trin. 1729. between Moor and Welsh Copper Company.

(D) What shall be a good Cause of Demurrer.

1. IF in a Bill brought against B. C. D. and E. the Plaintiff sets forth, that he is Keeper of G. Cattle, and prays B. may discover what Title he hath to a certain Meadow which belongs to the said Office, and that the Defendants, as Brewers of the City of G. by Custome ought to pay to the said Keeper, a certain annual Sum, &c. this Bill is naught, because it concerns Things of distinct Natures, and is brought against several Persons, which will occasion several Answers and Examinations; and if suffered to be put all in one Bill, each Party would be obliged to take Copies of what no Way concerned his own Cause, whereby his Charge would be increased to no Purpose. Resolved upon Demurrer, 15 Car. 2. between Berk and Harris. Hard. 337.

2. But where the Defendant demurred, because the Plaintiff’s Bill was brought against several Defendants, for several distinct Matters, yet the Demurrer was over-ruled; because the Plaintiff, by his Bill, had charged the Defendant with Combination, which the Defendant had not denied by Answer. Mich. 1686. between Powell and Arderne, 1 Vern. 416.

3. Where
3. Where a Man demurs, for that the Bill contains several Matters not relating one to the other, and in some whereof the Defendant is not concerned, if by Answer the Defendant doth more than barely deny Combination and Confederacy, he overrules his Demurrer. Trin. 1687. between Heister and Welfon; 1 Vern. 463.

4. A Bill was exhibited against the Defendant, to have her discover, whether she was married since the Death of her Husband, to which she demurred, and assigned for Cause, that several Goods and Chattels were devised to her by her Husband, which she was to enjoy during her Widowhood only, and that a Discovery might amount to a Forfeiture of her Interest in them; and the Court allowed the Demurrer. 24 Car. 2. Munnins versus Munnins, 2 Chanc. Rep. 68. Vide Bills of Discovery, Title Bills.

5. The Bill was to establish an Agreement for a Separate Maintenance for the Defendant's Wife, and (amongst other Things) prayed a Discovery of several Unkindnesses and Hardships, which the Defendant, as it was pretended, had used towards his Wife, to make her recede from this Agreement, to which Discovery the Defendant demurred, for that it was not a Matter properly examinable or relievable in this Court; and the Demurrer was allowed. Mich. 1683. between Hincps and Nelskorpe, 1 Vern. 104.

6. A Bill being exhibited to be relieved against a Bond of the Testatrix's, suggesting, that it was entered into without any Consideration, it being only for that the Testatrix had unlawfully kept Company with the Defendant, and had a Bastard by her; and a Demurrer to that Part of the Bill was allowed; although it seems by the Case to be admitted, that a Demurrer was not the proper Way to be relieved for Scandal, but that the Bill ought to be referred, and the Scandal expunged. Mich. 1682. between Page and Neale, 1 Vern. 107.

7. If an Infant is intituled to the Truf of Lands in Fee, which were devises to her by her Uncle, and she marries without her Father's Consent, and the Father brings a Bill against the Husband and Wife, and her Trustees, to the Intent a Provision might be made for her and her Children, out of the Lands, &c. and the Husband and Wife demurr, this Demurrer will be allowed; for it appears by the Plaintiff's own shewing, that he hath no Right either in Law or Equity to the Lands in Quest of. Pasch. 34 Car. 2. between Micoe and Powell, 1 Vern. 39. but where a Husband is obliged to make a suitable Settlement on his Wife, vide Title Baron and Feme.

8. In a Bill to be relieved against an Award made by some of the Members of the Company, touching the Quantum of Freight due to the Plaintiff, from the Company; the Arbitrators and some of the particular Members being made Defendants, they demurred to the whole Bill, because the Plaintiff could have no Decree against them, and their Answers would be no Evidence against the Company; and the Plaintiff might examine them as Witnesses; and the Demurrer was allowed, without putting them to answer as to Matters of Fraud and Contrivance. Trin. 1700. Dr. Steward versus East-India Company, 2 Vern. 380.

9. A Bill was brought by the Obligee in a Bond against the Heir of the Obligor, alleging, that he having Affets by Dictent, ought to satisfy this Bond, to which the Defendant had demurred, because the
the Plaintiff had not expressly alleged in the Bill, that the Heir was bound in the Bond; and tho' it was alleged, that the Heir ought to pay the Debt, yet that was held insufficient, and the Demurrer was allowed. Between Crossin and Honor, 1 Vern. 180.

10. A Bill being exhibited to discover a personal Estate and Will; the Defendants demurred, because it appeared on the Plaintiff's own showing, that they were neither Creditors or Legatees; and the Demurrer was allowed. NEL. Cham. Rep. 88.

11. A Bill being exhibited to prove a Will, and perpetuate the Testimony of the Witnesses; the Defendant upon Cross Examination of one of the Witnesses, exhibited an Interrogatory to him to discover what Deeds or Settlements he knew the Testator had made, to which the Witnesses demurred, as not pertinent to the Matter in Issue; and the Lord Keeper over-ruled the Demurrer; because he would not introduce such a Precedent as for a Witness to demur; for it did not concern the Witnesses to examine what was the Point in Issue. Albion and Albion, 1 Vern. 165.

12. There can be no Demurrer to a Summons in Nature of a Seire Facias, for the Summons is no Record, nor any where filed. 1 Chan. Ca. 50. Neither can there be a Demurrer to an Answer, vid. 1 Chan. Ca. 56. but vid. 2 Chan. Ca. 8. com'.
that the Defendant, by these Proceedings, had waived his Plea, and therefore the Proceedings regular; so the Cause went on, and the former Decree was affirmed. Mich. 1701. between Lucas and Holder.

4. Where a Defendant has demurred, he may assign another Cause of Demurrer at the Bar, paying Costs; and if such Cause of Demurrer is over-ruled, he ought to pay double Costs; but where a Defendant has pleaded, and there is no Demurrer in Court, he cannot demur at the Bar, tho' he would pay Costs. Between Durham and Redman, 1 Vern. 78.

5. The Plaintiff's Bill was to establish a voluntary Surrender made by him and his Wife of her Land, to the Use of him and his Heirs, against the Defendant, who was the only Daughter and Heir of the Plaintiff's Wife, by a former Husband, and the Wife was now dead; this Surrender was made in Pursuance of a Power referred by a former Surrender to the Wife, to surrender it to such Uses as she by Writing, or Last Will, in the Presence of three Witnesses, should direct or appoint; and the present Surrender, under which the Plaintiff claims, was made in the Presence of two Witnesses only, who subscribed their Names; but the Deputy Steward, who took the Surrender, had set his Name to it, and so might be considered as a third Witness, on which the Bill was brought to establish this as a good Surrender; pursuant to the Power the Defendant pleaded, and made Title under a Will made by the Wife, in Pursuance of her Power, executed in the Presence of three Witnesses, antecedent to the Surrender, to the Use of the Plaintiff, and likewise demurs; for that if the Plaintiff had any Title, it was a Title meerly at Law, and he might bring his Ejectment, if he thought fit; and it was objected, that this Plea and Demurrer were for one and the same Thing, and therefore inconsistent and contradictory in themselves; for the Plaintiff may reply to the Plea, and go on upon that in this Court; but the Demurrer says he has nothing to do in this Court, but must go to Law; so that the one is to keep him here, and the other to send him to Law; and though it is frequent to plead to one Part of a Bill, and demur to another Part; yet it was never known, that the Defendant pleaded and demurred to one and the same Part of the Bill, by Reason of the Inconsistency. On the Plea being first, it was insisted that gave this Court Jurisdiction, and then the Demurrer afterwards, to send the Plaintiff to Law, came too late; or at least it was urged, that the Demurrer had over-ruled the Plea, and that both could not stand: My Lord Chancellor seemed to think the Plea was good as a Plea of the Defendant's Title, and the Demurrer good likewise, as it was a Demurrer to the Plaintiff's Title; but at last he over-ruled the Plea, and allowed the Demurrer. Trin. 1728. between Cotter and Layer.
(F) Concerning the Replication.

1. If there is a Plea and Answer to the same Bill, and the Plaintiff replies to the Plea only, it will be irregular, for the Replication must be to the Answer as well as the Plea. The Cause put off for that Irregularity. Between Niccol and Wiseman, 2 Vern. 46.

2. If the Plaintiff replies to an Answer, and without Rejoinder, and giving Rules for Publication, brings the Cause to an Hearing, the Answer shall be taken wholly true, as if there had been no Replication; for the Opportunity which the Defendant had to prove his Answer was taken from him. 2 Chan. Ca. 21.

3. If after a Plea or Demurrer to a special Replication allowed, the Plaintiff may be admitted to put in a General Replication. Q. & ced. 1 Vern. 351. Where it was urged by Counsel that he may; but the Court refused to give any Opinion.

4. The Plaintiff set down his Cause to be heard on Bill and Answer, and had a Decree against the Defendant by Default; and when the Defendant came to shew Cause against the Decree, it was altered in his Favour; the Plaintiff petitioned to rehear the Cause, and at the Rehearing prayed Leave to reply to the Defendant's Answer, and had it, paying Costs. Mich. 1699. between Lord Donegall and Warr.

CAP. VIII.
C A P. VIII.

Assignment and Privity.

(A) What Things or Interest may be assigned in Equity.

(B) The Privity of Contract or Estate being destroyed, what Remedy Grantees or Assignees shall have against each other in Equity.

(A) What Things or Interest may be assigned in Equity.

1. If a Man indebted to several Persons sells his Lands, and takes a Bond for the Money from the Purchaser, and assigns these Bonds to one of his Creditors, such Assignment is (a) good in Equity. *Nel. Chan. Rep. 299.*

(a) Possibility, Right of Entry, or Thing in Action, or Cause of Suit, or Title for a Condition broken, cannot be granted or assigned over by Law. 1 Inf. 314. And it has been adjudged in B. R. that an Assignee of a Covenant could not sue in Equity to have the Benefit of the Covenant, it being against Law to assign a Covenant; and a Prohibition was granted to the Court of Requests for such a Suit there. 1 Rob. 576. but though a Bond cannot be assigned over, so as to enable the Assignee to sue in his own Name; yet he has by the Assignment such a Title to the Paper and Wax, that he may keep or cancel it. 1 Inf. 233.

2. A Chose in Action is assignable in Equity upon a Consideration paid. *Per Cur*, 2 Vern. 595. but there must be a Consideration. 3 Chan. Rep. 90.

3. If A. assigns Bonds to B. to indemnify him from a Debt for which he was bound for A. and afterwards A. becomes a Bankrupt, the Assignees of A., the Bankrupt can have no better Right to these Bonds than the Bankrupt himself; and he being bound by the Assignment, they are bound likewise. 2 Vern. 428.

4. In the Case of an Assignment of a Bond, the Assignee alone becomes intitled to receive the Money, and Payment to the Obligee after Notice of the Assignment, is not good. *Per Lord Keeper*, 2 Vern. 540. but Payment to the Obligee, without Notice of the Assignment, is good. 1 Chan. Ca. 232. An Assignee must take it subject
Assignment and Privity.

subject to the same Equity that it is in the Hands of the Obligeec. 

Vid. 2 Vern. 692.

5. As if on a Treaty of Marriage between A. and the Daughter of B. the Mother of A. surrenders Part of her Jointure to enable her Son to make a Settlement, and B. agrees to give his Daughter 3000 l. Portion, and A. without the Privity of his Mother, gives a Bond to B. to pay back 1000 l. at the End of seven Years, and B. assigns this Bond to his Creditors; yet it shall be delivered up as obtained in Fraud of the Marriage Agreement; for although a Bond is assignable in Equity, yet it still remains liable to the same Equity that it was in the Hands of the Obligeec. Mich. 1718. between Turton and Benson. 2 Vern. 764.

6. A Seaman assigns his Wages for securing the Payment of a Debt due by simple Contract; and he dying soon afterwards inchoate, and leaving Bond Debts, should be paid only in a Court between Mitchell and Edes. 2 Vern. 391. Note; The Reason hinted at is, because the Agreement to assign, amounted to no more than a Letter of Attorney to receive them, which was revoked by his Death.

7. For where a Seaman assigned his Wages as a Security for Money, and died indebted to other Persons, it was held that this Assignment specifically bound the Wages, and that the Money secured thereby should be paid preferable to all other Debts. Mich. 1707. between Couch and Martin. 2 Vern. 595.

8. An Administrator De bonis non of the Connee of a Statute, had agreed with the Connofor, to assign it in Consideration of a Sum of Money, which, upon the said Agreement, the Connofor had covenanted to pay him, his Executors or Administrators, and then the Administrator died; and the Court decreed the Money to be paid to the Executor of the Administrator, and not to the Administrator De bonis non, although before the Extent it could not be assigned at Law. 2 Vern. 362. The Reporter adds a Note, that there were no Debts appearing of the first Intestate's. If there had been Debts, it would have belonged to the Administrator De bonis non.

1 Rel. Abr. 380.

9. A Man by his Will gives a Legacy of 300 l. to a Feme Covent, without creating any separate Trust of it for her Benefit, and this Legacy was made payable out of a Reversion of Lands expeptant on an Estate for Life; the Husband sometime after makes an Assignment of this Legacy to Trustees; in Trust for the Benefit of his Children; and after by his Will takes Notice again of the same Legacy, and devises it in like Manner for the Benefit of his Children, and makes his Wife Executrix, and dies; the Estate for Life drops, and the Widow applies to the Executor of the first Testator for her 300 l. Legacy; and thereupon she and the Executor come to an Agreement, that she should accept 200 l. only, in full of her said Legacy, and accordingly the 200 l. was paid, and she gave a Release for the whole Legacy; and it appearing in the Cause, that she had Notice both of the Will and Assignment, and that she gave no Manner of Notice of it to the Executor; the Court decreed, that as the Husband had made good Assignment of it in Equity, (tho' as a Chose in Action it was not assignable by Law) that she should be answerable to the Children for the 200 l. she had received; but as to the

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100l. which the Executor had drawn her in to release, he himself should be chargeable, he being thereby no Ways injured, since he ought at first to have paid the whole Legacy; and though this Legacy was charged on a Reversion, which was not an immediate Fund for the raising of it; yet being given to the Wife in present, when the Fund comes in, it shall carry Interest from the Testator's Death, which must likewise go to Children. Mich. 1714, between Atkins and Dawbeny. But of what Things of the Wife's may the Husband dispose, and when, vide Title Baron and Feme.

10. A. poissel of a Term, sells it in Trust to the Use of himself and his Wife for Life, Remainder to A. for Life. Remainder to B. B. cannot, in the Life-time of A. assign his Interest, because but a Possibility. 10 Ca. 47. Lamper's Case, 1 Sid. 188. S. P.

11. Where any Person has the Trust of a Possibility in Remainder of a Term, he has Power to declare, and make a Disposition of the Trust of such Possibility agreed by Counsel. 1 Chan. Ca. 8.

12. Cessui qui que Trust of a Term upon his Wife's Joining with him in a Sale of Part of her Jointure, directs, that after his and his Wife's Death, his Trustees should assign the Rest of the Term to his Wife's Daughter, when she shall attain the Age of twenty-one, or be married; the Daughter marries, and she and her Husband assign their Interest in the Term, in the Life-time of Cessui qui que Trust and his Wife; and the Question was, Whether such a Possibility could be assigned; and per Lord Keeper, it is a Notion that has obtained at Law, that a Possibility cannot be assigned; yet if it were res integra, there is no Reason for it; yet the Rule of Law must be the Rule here, for Equitas sequitur Legem; and he dismissed the Plaintiff's Bill, which sought the Benefit of this Assignment, but without Costs. Between Freeman and Thomas, Mich. 1706. 2 Vern. 563.

(B) The Privity of Contract or Estate being destroyed, what Remedy Grantees or Assignees shall have against each other in Equity.

1. If A. Leases to B. a Wine-Licence for Years, rendering Rent, and B. assigns to C. and C. for valuable Consideration assigns to D. who had no Notice of the Rent, A. shall not charge D. with the Rent, for the Contract was Personal, as in Case of a Lease of a Fair, &c. and Equitas sequitur Legem, especially when the Assignee is a Purchaser for valuable Consideration, without Notice. Mich. 1656. between James and Blank, Hard. 88. but if he had been
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been a Purchaser, with Notice, he would have been liable in Equity during his Enjoyment, though there was no Privity. *Vid.* 2 *Vern.*

2. The Plaintiff demands, by his Bill, six Years Rent arrear, due from the Defendant, and incurred during the Time, that he, the Plaintiff, was Bishop of Exon; the Defendant pleads, that whilst he was Bishop of Exon, he tendered him the Rent, which he refused, having a Mind to impeach his Leafe, and that he being now translated, is not intitled to the Rent, either in Law or Equity. The Lord Chancellor was clear of Opinion, that the Plaintiff had no Remedy at (a) Law; and with the Advice of the Judges decreed, that he should have none in Equity. 23 *Car.* 2. between the Bishop of Sarum and Nofworthy, 2 *Chan.* Rep. 60.

3. If an Assignee of a Lessee assigns it over, Equity will compel him to pay the Rent which became due during his Enjoyment, though the Privity of Estate was destroyed in (b) Law, it being urged, that there were twenty Precedents of the Kind. My Lord Chancellor said, that if there were not one, he would not have doubted to have made a Precedent in this Case. 1 *Paff.* 1683. between Treadle and Cooke, 1 *Vern.* 165.

4. If a Lessee of a College makes an Under-Lease, and covenants with his Lessee, that he would renew his Leafe, and add a further Term of three Years to his Leafe, and he renewes the Leafe; but instead of adding the three Years, he assigns it to J. S. *J.* S. having Notice of the Covenant, will be obliged to add the three Years. Decreed between Finch and Earl of Salisbury, *Nel.* *Chan.* Rep. 212.

5. So if A. makes a Leafe for three Years, and in Consideration of the Lessee's laying out 100 l. in Improvements, covenants to grant a new Leafe at the End of the Term, at the same Rent; the Purchaser of the Inheritance shall make good this Covenant. *Mich.* 1703. between Richardson and Sydenham, 2 *Vern.* 447.

6. If a Lessee for Years, with Covenants to repair, assigns it to J. S. by Way of Mortgage, and J. S. never enters, Equity will not compel him to repair, tho' he had the whole Interest in him; and tho' it was his own Folly to take an Assignment of the whole Term, when he should have taken a derivative Leafe, by which Means he would not be liable at Law. *Trin.* 1692. between Sparkes and Smith, 2 *Vern.* 275. but *vid.* 2 *Vern.* 374. where such an Assignee, tho' he never entered, and had lost his Mortgage-Money, was by Law compelled to pay the Rent; and having sued in Equity, could have no Relief.

7. If a Lessee for Years, who is bound by Covenant to repair, makes an Under-Lease in Trust for J. S. and the Lessee is dead, and the Premisses out of Repair; yet the Leslee shall not compel J. S. in Equity to repair, unless the Executors of the first Lessee are insolvent; for tho' the Privity of Estate is destroyed in Law, yet he shall not have Recourse to this Remedy, whilst he has any left against the Executors of the first Lessee. *Mich.* 1682. between Goddard and Keate, 2 *Vern.* 87.

C A P. IX.
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Award and Arbitration.

(A) Concerning the Submission.
(B) The Parties to the Submission.
(C) The Arbitrators or Umpire, and herein of the Commencement and Revocation of their Authority.
(D) The Award, for what Causes let aside.
(E) Concerning Submissions and Awards made pursuant to a Rule of Court.

(A) Concerning the Submission.

If two submit themselves to the Arbitration of J. S. of all Controversies, _ita quod_, &c. de _præmissis_, and J. S. makes an Award of Part only, so that the Award is void in Law; this shall not be made good in a Court of Equity. Between Robinson and Bish, adjudged 7 Jac. in B. R. and a Prohibition granted to the Counsel of York. 1 Rol. Abr. 377.

2. So if the Award differs from the Submission, it shall be as well void in Equity as at Law. 1 Chan. Ca. 186. Nef. Chan. Rep. 141. S. P.

3. If the Submission to an Award be (a) conditional, _ita quod_ an Award be made _de_ or _super_ _præmissis_, &c. there, if the Award be not of the Whole, it is void; but if the Submission be not conditional, as aforesaid, then though the Award be but of Part of the Matter referred, it is good for so much as it settles, tho' it leaves other Things at large. Per Lord Maynard, 2 Vern. 109.

(e) The Distinction which has obtained with Respect to conditional Submissions, is where the Submission does in general set forth all the Matters in Controversy, with a special Conclusion requiring, or so that the Award be made of all the said Matters; in which Case it has been held necessary to make a final Determination of all the Particulars enumerated. _Cra. Eliz. 838_. But if there be no such Enumeration nor special Conclusion, then the Award may be good, though it make an End of Part of the Matters only. 1 Rol. Abr. 257. 8 Ca. 97. b. And since the Courts of Law and Equity have of late been less nice in the Construction of Awards; it is now agreed to be a stated Rule in Awards that are conditional, or laid to be _de_ or _super_ _præmissis_, that if the Words used in them be in their own Nature more comprehensive, and so extensive to Things not within the Submission; yet it shall be intended that there was no other Matter between the Parties for them to lay hold on, but what was submitted, if the contrary be not shown; _s. c. commensu_. If the Words are more narrow and less comprehensive than to take in all the Matter of Submission; yet it shall be intended that no more was in Controversy than what the Words naturally comprehend, if the contrary be not likewise shown. 6 Mod. 578.
(B) The Parties to the Submission.

1. If all the Parties to the Suit consent to refer the Matter to J. M. and J. S. one of the Parties signifies his Consent, by signing a Paper to that Purpose, so that the Award be made at a certain Day therein limited, and no Award is then made; but afterwards the Court, in the Presence of all the Parties (except J. S. who was absent) but his Solicitor confining on his Behalf, refer it back to J. M. but not finally to determine, who made an Award; and it was resolved, that the Solicitor's Consent should not bind his Client; tho' it was objected and admitted, that an (a) Attorney's Assent to a Reference on Behalf of his Client should bind him at Law, And who are Between Colwell and Child, 1 Chan. Ca. 86. 1 Chan. Rep. 195. S. C. bound by their own and others Submissions, vide 1 Red. Abs. 268. March 111. Sul. 351. 3 Liv. 17. If one Partner, on Behalf of himself and the other Partner, submits, &c. tho' the Partner that did not submit is not bound, yet he who submitted shall perform the Award. 2 Mod. 237.

2. If A. and B. Executors of J. S. on the one Part, and C. his Widow on the other Part, submit to Arbitration, the Arbitrators may make an Award, not only of Matters in Difference between A. and B. jointly, or A. and B. separately, and C. but also of Matters between A. and B. provided they have Knowledge of the whole Fact, and all the Parties interested are before them. Between Carter and Carter, 1 Vern. 359.

(C) The Arbitrators or Umpire, and herein of the Commencement, Determination and Revocation of their Authority.

1. If the Submission to an Award be, so as the Arbitrators make their Award at, or upon the 27th of March then next; and if the Arbitrators make no Award then, if the Umpire make his Umpirage on the same Day, the Umpire cannot make his Umpirage on the same (a) Day, tho' the Arbitrators disagree, for they have all that Day to make their Award, 2 Vern. 100. (a) If there be a Submission to Two, so as they make their Award before Midsummer; and if they cannot agree, then to such Umpire as they choose, so as he make his Umpirage before Midsummer; and an Umpire is chose accordingly, this is good, and so will his Umpirage be, if made; because the Arbitrators had determined their Power before by choosing an Umpire; but if the Umpire be named in the Submission, he cannot make his Umpirage before the Time given to the Arbitrators to make their Award in be expired. For Holt C. J. 1 Saik. 71, 72. but for this vide Cum Car. 263. Ren. 506. 1 Laiton. 544. 2 Mod. 169. 2 Vern. 116. 1 Saik. 70.

2. If by the Submission the Arbitrators have Power to chuse an Umpire, and they not agreeing, throw Cro's and Pile which of them should name the Person; and the Umpire thus chosen makes his Umpirage; the Court will set it aside. 2 Vern. 485.

3. If the Parties in Court sign an Order, by Consent, to refer their Matters to Arbitrators, finally to determine, and their Award to be final, and stand ratified by Decree, without any Appeal; yet one of the...
Award and Arbitrament.

(4) A Sub-
mision to an
Award may
be com-
menced by Deed, such Authorities in their own Nature being revokable, as a Letter of Attorney, &c.
who made irrevokable by express Words; but in such Case the Bond is forfeited; but if it had been
without Obligation, one might revoke and forfeit nothing. Et non submissione est writur Alitio. 8 Ca. 82.

(D) The Award, for what Causes set aside.

1. UPON a Submission, by Consent and Order of Court, an Award was made, that a Bond should be given by
the Guardian, that the Infant, at his full Age, should convey the Lands in Question; and Nottingham L. C. held, that when the Parties
themselves chuse their own Judges, this Court will not relieve against the Award, unless it be in Case of Corruption, exceeding Authority,
and the like; but when there is a Reference by Order of this Court, and the Award appears inequitable, the Court will not decree it;
and in this Case, it being unreasonable that the Guardian should give such a Bond, for the Infant may die, or if he live to
Age, may refuse to convey, and therefore would not decree it; and he said further, that he would never decree an Award to bind an
Infant. 1 Chan. Ca. 279.

2. If the Arbitrators award a Thing impossible, or repugnant to be done, the Award shall be set aside. Vid. 1 Chan. Ca. 87.

3. The Plaintiff called the Defendant, who was a Butcher, Bankrupt Knowe, which being submitted to Reference, the Arbitrators
gave him 495 l. to repair his Honour (as they called it in the Award) and the Court thought the Damage too excessive, and set aside
the Award, but directed a Trial at Law; and the Jury gave him 10 l. Butcher of Croyden's Case, 3 Chan. Rep. 76. 2 Vern. 251. S.C.
cited; where it is said, that the Court did not set aside the Award, barely for excessive Damages, but because it appeared that one of the
Referees was the Butcher's Cousin.

4. If Tenant for Life commits Waste to the Value of 380 l. and his Estate is but 70 l. per Ann. and an Action of Waste is brought
against him by him in Remand, and it is submitted to a Reference by Rule of Court; but before an Award made, the Tenant
for Life repairs the Places wasted to 40 l. and forbids the Arbitrators, and likewise the Umpire, to proceed in making any Award; but
notwithstanding the Umpire awards the Party 380 l. Yet the Court will not set aside the Award, there appearing no Fraud or Collusion
in the Matter. Pach. 1683. between Brown and Brown, 1 Vern. 157. Altho' it was objected, that 380 l. was near the Value of an E-
state for Life of 70 l. per Ann.

5. If the Arbitrators appear to have an Interest in the Cargo touching which the Award is made, and therefore put too great a Value
thereon; and in five Days after the Award made the Money awarded is attached by the Arbitrators for Debts owing to them; the Court
will set aside the Award. Hill. 1691. between Earle and Stocker, 2 Vern. 251.

6. If a Submission is to three Arbitrators, or any Two of them, and Two of them by Fraud or Force will exclude the other, that a-

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lone is sufficient to vitiate the Award; or if they have private Meet-
ing, and admit one of the Parties, but give no Notice to the other, and suffer the Party's Attorney, whom they admitted, to draw up the Award, such Award shall be set aside for Partiality and Unfair-

7. If it appears that the Arbitrators went upon a plain Mistake, either as to the Law, or in a Matter of Fact, the same is an Error appearing in the Body of the Award, and sufficient to set it aside. 2 Vern. 705. But the Plaintiff failing to make out his Case by Proof, his Bill was dismissed.

8. The Plaintiff and Defendant had submitted to an Arbitration by Bond; and an Award was made, not binding by Form of Law, by which the Plaintiff was to pay the Defendant 900 l. and to seal a Release to the Defendant; and the Defendant was to assign several Securities he had from the Plaintiff. The Plaintiff sold some Land to raise the 900 l. expecting the Defendant would receive it; and he gave him Intimation he would, and tendered him the 900 l. and a Release executed by the Plaintiff; and Execution on the Plaintiff's Part of the Award was extrajudicial, and not good in Stri. Chanceller decreed it should be performed in Specie. Pach. 1687, between Norton and Mascal, 2 Vern. 24.

9. But where a Bill was exhibited to have an Execution of an Award, which was performed by neither Party; and the Defendant demurred, because there was no precedent that a Court of Equity had ever carried such Awards into Execution; and the Demurrer was allowed. Mich. 1704, at the Rolls, between Bishop and Wobber.

(E) Concerning Submissions and Awards made pursuant to a Rule of Court.

1. If an Award is made a Rule of Court, according to a Submis-
sion for that Purpose, and an Attachment is taken out for not obeying the Award, and then the Party dies against whom the At-
tachment issues, the (a) Act of Parliament directing it to be car-
ried on by Attachment, as is done in other Courts, for disobeying a Rule of Court; by the Death of the Party, the Attachment is gone, and the Remedy lost. Mich. 1703, between Wibber and Bishop, 2 Vern. 444.

(a) By the 9 & 10 W.3. cap. 15. The Parties may agree, that their Submission to the Award or

Umpirage of any Person or Persons, shall be made a Rule of any of his Majesty's Courts of Record; and may inter such their Agreement in the Condition of their Bond, &c. and a Rule of Court shall thereupon be made, that the Parties shall be concluded by such Arbitrarism or Umpirage; and in Case of Disobedience thereto, the Party neglecting or refusing shall be subject to all the Penalties of Con- tamning a Rule of Court, unless it appears on Oath, that such Award was corruptly and unduly procured; in which Case it shall be set aside by any Court of Law or Equity, &c. Provided that this Statute shall extend only to such Matters for which there is no Remedy, but by Personal Action or Suit in Equity.

2. If an Award is made pursuant to an Order of Court, the Party ought first to move the Court to confirm the Award, as is done upon a Master's Report, and either Side is at Liberty to except to it. 1 Vern. 469.

3. If there be a Submission to a Reference by Order of Court, and the Award to be made to be confirmed by the Decree of the Court, without Appeal or Exception; yet Exceptions to the Award will be admitted; ruled upon Debate. 2 Vern. 109.
C A P. X.

Bankrupt.

(A) Concerning the Commission and Commissioners.

(B) What shall be said the Bankrupt's Estate, or such an Interest in him as the Commissioners may assign.

(C) Who may be allowed to come in as Creditors.

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

(A) Concerning the Commission and Commissioners.

1. The Granting a Commission of Bankruptcy is not a Matter discretionary, but de jure; for tho' the Words of the Act of Parliament are, that the Chancellor may grant, yet that may was in Effect must. Per North L. K. Alderman Backwell's Cafe, 1 Vern. 152. And so he said it had been resolved by all the Judges.

2. But though the Granting a Commission be ex Officio, yet it must be at the Request of Persons interested; for if twenty swear that J. S. is a Bankrupt, yet a Commission cannot be awarded without a Petition for that Purpose. Per North Lord Keeper, Backwell's Cafe, 2 Chan. Ca. 190.

3. If all the Creditors who petitioned for a Commission, should agree to have it discharged or superseded, it may be granted. 1 Vern. 209. Per Jeffries; Lord Chancellor; and if other Creditors, who were not Petitioners, should pray a Renewal of the Commission, or a Revocation of the Supersedeas; Q. if it may not be granted, especially if the Supersedeas was within four Months after the Granting the Commission. Vide 2 Chan. Ca. 192, 193. 1 Vern. 208.

4. If a Commission is granted, and the Bankrupt dies, yet the Commissioners may proceed. 2 Chan. Ca. 193.

5. If the King dies, the Commission abates, but a new Commission may be taken out, and the Commissioners shall proceed from where they left off. 2 Chan. Ca. 193.

6. If
6. If a Creditor offers Proof of his Debt to the Commissioners, which they disallow, and Distribution is not made, my Lord Chancellor will hear the Proof, and give Order therein; tho' he said at first, that it was fit to leave it to the Course the Statute had provided. 1 Chan. Ca. 275.

7. If one is examined by the Commissioners touching the Bankrupt's Estate; yet he may be re-examined in Chancery. 2 Chan. Ca. 73.

8. If the Commissioners make a fraudulent Distribution of the Bankrupt's Estate, it may be set aside in Chancery, even on a Petition. Per Trevor and Hutchins Lords Commissioners, 2 Vern. 162.

9. But it seems a Distribution by the Commissioners among the Creditors, upon a supposed Value of the Bankrupt's Real Estate, where the Commissioners had no Money to distribute, is not fraudulent, and to be set aside. Vid. 2 Vern. 158.

(B) What shall be said the Bankrupt's Estate, or such an Interest in him as the Commissioners may assign.

1. If a Lessee covenants with his Lessee and his Assigns, to renew his Lease, and the Lessee becomes a Bankrupt, and the Commissioners assign this Covenant, the Assignee cannot have any Relief against the Lessee: Adjudged, upon a Reference to J. Windham and B. Turner; and the Bill of the Assignee dismissed accordingly. Hill. 17 Cas. 2, between Drake and the Mayor of Exeter, 1 Chan. Ca. 71. 2 Vern. 97. S. C. cited.

2. But the Commissioners may assign an Equity of Redemption. 1 Chan. Ca. 71. 2 Vern. 97. S. P. Per Cur. The Clause in the Statute being, that the Assignee may perform Conditions not broken, and Conditions performable.

3. If A. devises 800l. to be invested in Land, for the Benefit of the Wife of J. S. for her Life, and afterwards for her Children; and the Interests of the Money, in the mean Time, to go to such Persons as ought to receive the Profits, and J. S. becomes a Bankrupt, the Interest of this 800l. shall not be liable to the Bankruptcy, this not being any Trust created by the Bankrupt, but a Maintenance intended the Wife, and given to her by her Relation. Pasch. 1689. between Vandenaker and Desbrough, 2 Vern. 96.

4. If the Father, on his Son's Marriage, covenants during his Life, to pay his Son 15l. per Ann. and the Son becomes a Bankrupt, his Creditors shall not have the Benefit of this Agreement. Mich. 1690. between Moyes and Little, 2 Vern. 194.

5. But if a Father devises a Legacy of 600l. to his Son, payable at twenty-one, and the Son obtains a Decree for it, and 637l. is repaid due; but before the Money is paid the Son becomes a Bankrupt; yet the Commissioners may assign the Legacy and Benefit of the Decree; ruled upon a Demurrer. Hill. 1701. between Toulson and Groat, 2 Vern. 432.
6. A Man had devised Lands which were in Mortgage, to be sold, and the Surplus of the Money to be paid to his Daughter; the Daughter married a Man, who soon after became a Bankrupt, and the Commissioners assigned this Interest of the Wife's; the Husband died, and the Assignees brought this Bill against the Wife and Trustees, to have the Land sold, and the Surplus of the Money paid to them; but the Court would not assist in stripping the Wife (who was wholly unprovided for) of this Interest, but dismissed the Bill. *Mich. 1698.* at the Rolls, between *Parker* and *Dykes*.

7. A Legacy of 1000l. was given to one, after the Death of her Mother, when she should attain the Age of twenty-one Years; and the Defendant was appointed Trustee for the Raising and Payment thereof out of certain Lands; the Legatee was drawn into an improvident Match with one, who soon after became a Bankrupt, and the Commissioners assigned all his Effects, and gave him a Certificate of his Conformity; and the Assignees brought a Bill against the Trustee for this 1000l. who insisted, that the Assignees could be in no better Condition than the Husband; and that if he were Plaintiff he could not prevail, without making a suitable Provision on his Wife; and that this Legacy being liable to a double Contingency, viz. the Death of the Mother, and the Legatee's arriving at the Age of twenty-one Years, at the Time of the Bankruptcy, was not such an Interest as could be assigned: The Court held, that though both Contingencies have since happened; yet those being since the Assignment of the Bankrupt's Estate, and since a Certificate of his having conformed himself in every Thing to the Acts, he was now discharged as a Bankrupt; and this Portion could not pass without a new Assignment, which the Commissioners could not make, their Commission being determined, and so dismissed the Bill. *Mich. 1717.* between *Jacobson* and *Peer Williams*.

(C) **Who may be allowed to come in as Creditors.**

1. If one lends Money to a Bankrupt, after a Commission sued out against him, but before actual Notice of it, he cannot come in under the Statute, as a Creditor; by two Lords Commissioners against one. *2 Vern.* 156. A Debt voluntarily paid a Bankrupt shall be paid over again; *secut* if recovered by due Course of Law. *1 Vern.* 94. *but for this vide Title Notice.*

2. A. on his Marriage, gives a Bond to leave his Wife 500l. or a Third of his Personal Estate, at her Election; A. becomes a Bankrupt; and it was decreed, that the Wife should come in as a Creditor, on her Bond; and what shall be paid in Respect thereof, to be put out to Interest, which is to be received by the Creditors, during the Bankrupt's Life, and the Principal to be paid the Wife, if she survives him. *Trin.* 1710. between *Holland* and *Callisford*, *2 Vern.* 662.

3. But where a Bond was given by the Husband, for Payment of a Sum of Money to his Wife, in Case she survived him, and the Husband after became a Bankrupt: And per Lord Chancellor, there can be nothing stopped, by Way of Dividend, out of the Bankrupt's

Estate,
Bankrupt.

Estate, to answer this contingent Debt or Demand, when it happens; but where a Bottomrec-Bond was entred into, and the Ship returned safe before the Dividend actually made, they were let into a Share of that Dividend, tho' the Bond was contingent at first, because the Contingency was then at an End. *Mich. 1728. Ex parte Chawell verus Caffaner.*

4. A. and B. enter into Partnership, and by Indenture of Copartnership agree, that all such Debts as should be owing on the Joint Account, should be paid out of the Joint-Stock, and that the Joint-Stock should not be charged with the private or particular Debts of either of the said Partners. A. and B. became Bankrupts, and a joint Commission was taken out against them; and the Commissioners having assigned all their Estate to the Creditors on the Joint-Stock; J. S. who was a separate Creditor to one of them, brought his Bill to be admitted into a Share; and it was declared by the Court, that the Estate belonging to the joint Trade, as also the Debts due from the same, ought to be divided into Moieties, and that each Moiety of the Estate ought to be charged, in the first Place, with a Moiety of the joint Debts; and if there be enough to pay all the Debts belonging to the joint Trade, with an Overplus, then such Overplus ought to be applied to pay particular Debts of each Partner; but if sufficient shall not appear to pay all the joint Debts; and if either of the Partners shall pay more than a Moiety of the joint Debts, then such Partner is to come in before the Commissioners, and be admitted as a Creditor for what he shall so pay over and above his Moiety, and decreed accordingly. *34 Car. 2. between Lord Craven & al. and Knight & al., 2 Chan. Rep. 226.*

5. A. B. and C. were Partners in the Trade of a Dry Salter, C. imbezils and waftes the Joint-Stock, contracts private Debts, and becomes a Bankrupt; the Commissioners assign the Goods in Partnership, on a Bill brought by the other Partners; they insisted to have an Account, and the Goods sold, out of the Produce of the Goods, the Debts owing by the joint Trade might be paid in the first Place; and that out of C.'s Share Satisfaction may be made for what C. wafted; and that the Affignees could be in no better Case than the Bankrupt himself, and were intitled only to what his third Part would amount unto clear, after Debts paid, and Deductions for his Imbezilment; and the Court seemed to be of that Opinion, but sent it to a Maller to take the Account and state the Case. *Trin. 1693. between Richardson and Goodwin, 2 Vern. 293.*

6. A. and B. being joint Traders, a Commission of Bankruptcy issued against them; their separate Creditors now applied by Petition, that they might be let in for their Debts, upon the respective separate Estates of the Bankrupts, under that joint Commission, the separate Estates being of small Value, and would not bear the Charge of Taking out two new Commissions against them separately; and the Lord Chancellor ordered them to be let in to prove their respective separate Debts upon the joint Commission, they paying Contribution to the Charge of it, and directed, as the Joint or Partnership Estate was in the first Place to be applied to pay the Joint or Partnership Debts; so in like Manner the separate Estate should be
be, in the first Place, to pay all the separate Debts; and as separate Creditors are not to be let in upon the joint Estate, until all the joint Debts are first paid; so likewise the Creditors to the Partnership shall not come in for any Deficiency of the joint Estate, until the separate Debts are first paid. Mich. 1715. ex parte Cawdor, 2 Vern. 706.

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

1. If A. sells Land to B. who afterwards becomes a Bankrupt, and Part of the Purchase-money is not paid, A. shall not be bound to come in as a Creditor, under the Statute, but the Land shall stand charged with the Money unpaid, tho' no Agreement for that Purpose. Between Chapman and Tanner, 1 Vern. 267.

2. If A. being beyond Sea consigns Goods to B. then in good Circumstances in London, and before the Goods arrive, B. becomes a Bankrupt, whereupon A. consigns them to another, and the Assignees of the Commission pray Relief, and a Discovery; and a Trial at Law is directed, whether such Consignment vested a Property in B. and a Verdict is found for the Assignees; yet Equity will not oblige them to come in as Creditors, it being allowable by any Means to prevent the Goods coming into the Hands of B. or the Assignees. Hill. 1690. between Wiseman and Vandeput, 2 Vern. 203.
CAP. XI.

Baron and Feme.

(A) What Things are vested in the Husband by the Marriage.

(B) What Acts of the Wife's before Marriage shall the Husband aboind, as done in Derogation of the Rights of Marriage.

(C) How far the Husband shall be bound by the Wife's Acts before Marriage.

(D) How far by her Acts during Coberture.

(E) How far a Feme Cobert shall be bound by the Acts in which she has joined with her Husband.

(F) What Contracts between Husband and Wife are dissolved by the Marriage.

(G) In what Cases the Husband must make a suitable Provision on his Wife, when he sues for her Fortune.

(H) Suits and Proceedings by and against Husband and Wife, how to be.

(I) Concerning the Wife's Pin-Dowry and Paraphernalia.

(K) Concerning Alimony and separate Maintenance.

(L) What Right survives to either of them by the Dissolution of the Marriage.

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(A) What Things are vested in the Husband by the Marriage.

A Feme Sole having assigned her Term in Trust for herself, before Marriage, the Husband alone mortgages the Term; and it was decreed, that such Mortgage was not good; and it was likewise admitted by the Court, to be the constant Practice, since Queen Elizabeth's Time, to set aside
Baron and Feme.

aside and frustrate all Incumbrances and Acts done by the Husband, with Respect to the Wife's Term, in Trust for her, and that he could neither charge nor grant it. *Per Finch Lord Keeper, 25 Car. 2. between Doily and Perfull, 1 Ch. Ca. 225. But the Law is now changed in this Particular.*

2. For where A. having disposed of a Term settled in Trust on his Wife, by a former Husband; tho' it was decreed void by Finch, Lord Keeper, yet upon an Appeal to the House of Lords, the Decree was reversed. Sir Edward Turner's Case, 1 Vern. 7.

3. It came afterwards in Question, upon an Assignment made by the Husband of such a Term, whether he could dispose of it; and it being urged that it had been lately adjudged in the House of Lords, that he might, my Lord Chancellor wondered at that Resolution, which he said would not amount to an Act of Parliament, so as to change the Law; but at last decreed such Disposition good, saying, there must not be one Kind of Equity above Stairs, and another here; and thought that from henceforth it would not be sufficient to have the Husband's Consent, and Privy to an Assignment of a Term in Trust for the Feme, before Marriage, unless he was likewise made a Party to the Assignment. *Mich. 1681. between Pitt and Hunt, 1 Vern. 18.*

4. A Term being settled in Trust on the Wife by a former Husband, the second Husband first mortgages it, and then he and the Mortgagee assign it to J. S, who brought a Bill against the Wife and her Trustees, to have the legal Estate assigned to him; and it was held, that the Husband may as well dispose of a Term in Trust for the Wife, as if the legal Estate was in her; and decreed accordingly, altho' the Husband had made no Settlement on the Wife. *Trin. 1692. between Tudor and Samyne, 2 Vern. 270.*

5. A made a Settlement, whereby he created a Term for Years in Trust, to raise 400l. a-piece for his two Daughters; one of them marries B, and he and his Wife brought a Bill, and had a Decree to have the 400l. raised and paid; but before it was raised, B. assigns the Benefit of this Decree to one J. S. in Trust for Payment of his Debts, and made him Executor, and died, leaving his Wife and one Child unprovided; the Creditors brought a Bill to have the Benefit of the said Assignment; and tho' it was insisted upon, in Behalf of the Wife, that there was a Difference between a Term in Trust to raise a Sum of Money for a Woman, and a Trust of the Term itself for a Woman; yet the Master of the Rolls held, that this was a Term for Years, and not a Sum of Money, and therefore not to be distinguished from Sir Edward Turner's, and must decreed it (though against his Conscience) that there may be an Uniformity of Judgments. *Trin. 1703. between Walter and Saunders; but for this vid. Letter (L).*

6. If a Legacy be given to a Feme covert, who lives separate from her Husband, and the Executor pays it to the Feme, and takes her Receipt for it; yet on a Bill brought by the Husband against the Executor, he shall pay it over again, with Interest; for Payment to the Wife is not good. Decreed *Mich. 1684. between Palmer and Trevor, 1 Vern. 261.*

7. A devises the Surplus of his Personal Estate to his Daughter, the Wife of B, for her separate Use, and makes her Executrix; and my Lord Chancellor seemed to be of Opinion, that the Devise being 3
to her, and not to Trustees, that what comes to her by Law belongs to the Husband; but there was no Decree made in it. 2 Vern. 659.

(B) What Acts of the Wife's before Marriage shall the Husband avoid, as done in Derogation of the Rights of Marriage.

1. A Widow makes a Deed of Settlement of her Estate, and marries a second Husband, who was not privy to such Settlement; and it appearing to the Court, that it was in Confidence of her having such Estate that the Husband married her, the Court set aside the Deed as fraudulent. Between Howard and Hooker, 2 Chan. Rep. 81.

2. So where the intended Wife, the Day before her Marriage, entered privately into a Recognizance to her Brother; and it was decreed to be delivered up. 2 Chan. Rep. 79.

3. So where a Conveyance was made by the Wife, before her Marriage, to Trustees, in Trust, that they should permit her to receive the Rents and Profits of the Estate, and Act in every Thing as she, whether sole or covert, should appoint; the Lady being crazed in her Understanding, endeavoured to run away from her Husband, and flirted up her Creditors to sue him; and the Conveyance appearing to be without the Husband's Privity, my Lord Chancellor held it to be in Derogation of the Rights of Marriage, and decreed the Possession of the Estate to the Husband, and a Conveyance from the Trustees to the Six Clerks, that it might be subject to the Order of the Court. Hill. 1686. between Carleton and Earl of Dorset, 2 Vern. 17.

4. A Woman, on Agreement before Marriage with her Husband, being to have a Power to act as a Feme Sole, and the Husband dying, and she marrying again, the second Husband not being privy to the Settlement on the first Marriage; it was decreed, that the second Husband should not be bound by that Settlement made on the former Marriage. Between Edmonds and Dennington, a Case cited to be decreed, 2 Vern. 17.

5. But where a Widow, before her Marriage with a second Husband, assigned over the greatest Part of her Estate to Trustees, in Trust for Children by her former Husband; and that it was inflected, that this was without the Privity of the Husband, and done with a Design to cheat him; yet the Court thought that a Widow may thus provide for her Children, before she put herself under the Power of a Husband; and it being proved that 8000 l. was thus settled, and that the Husband had superseded the Deed, he was decreed to pay the whole Money, without directing any Account. Mich. 1689. between Hunt and Matthews, 1 Vern. 408.

(C) How
(C) How far the Husband shall be bound by the Wife's Acts before Marriage.

1. A. Made a Settlement of Lands for the Payment of his Debts, and the Trustees not at all acting, his Wife, after his Death, enters and takes the Profits, and marries again, and she and her Husband continue to take the Profits, and he likewise dying, she marries another, who also continues to take the Profits; and a Creditor being unsatisfied, it was decreed by the Master of the Rolls, that the last Husband should answer, not only for the Profits received by himself, and Wife whilst sole, but likewise for what was received by the second Husband, and not the Heir at Law; and of the same Opinion was my Lord Chancellor. Between Gilpin and Smith, 1 Chan. Ca. 80. but he referred it to the Parties to moderate the Matter.

2. If a Man marries an Executrix, he shall answer for so much of the Personal Estate as she possessed, although he took it as a Portion with her; and this not only in Favour of Creditors, but likewise of an Heir. Pach. 1688. between Bachelor and Bean, 2 Vern. 61.

3. But if a Feme Administratrix waives the Assets, and then marries, and dies, the Husband is liable to no more than the Value of what came to his, or his Wife's Hands after the Marriage. Decreed Mich. 1689. between Sanderson and Crouch, 2 Vern. 118.

4. If the first Husband and Wife are guilty of a Deswaiving, and there is a Bond-Debt due: Per Cur. This makes such a Lien by the Deed, that the second Husband is bound; but where there is barely a Breach of Trust, or a Debt by simple Contract, there, in Equity, the Plaintiff ought to follow the Estate of the Wife, in the Hands of the Executor of the first Husband. Hill. 1684. between Norton and Sprig, 1 Vern. 309.

5. A Feme Sole bought Goods, but did not pay for them, she afterwards married, and dying, the Goods came to the Husband's Hands; the Creditor, who sold the Goods, brought a Bill against the Husband for a Discovery, to which the Husband demurred; and the Demurrer was over-ruled by my Lord Chancellor, who, with some Earnestness said, he would change the Law in that Point. 25 Car. 2. between Freeman and Goodham, 1 Chan. Ca. 295.

6. But it has been since held, that where a Man married a Woman Trader, who died, and at her Death was indebted to several Persons for Wares which she had bought of them, and which were by her in Specie at the Time of her Death, and came to the Hands of her Husband; that tho' a Bill be brought against him, that he may either pay for those Goods, or let the Persons have them again; yet he may still, that he is neither Executor nor Administratrix to his Wife, and therefore not liable to her Debts, and that all her Goods belong to him by Law; ruled upon Demurrer. Trin. 1700. between Blackmore and Ley; but Q.

7. The Defendant had married an Administratrix to her former Husband, to a Share of whose Personal Estate the Plaintiff was intitled; the Administratrix was likewise intitled to a Third, and before her second Marriage had wafted great Part of the Estate, and then
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died; and this Bill was brought against her Husband, to have an
Account of the Estate, and a Satisfaction for his Share; and being
heard at the Rolls, an Account was decreed to be taken of what of
the Estate had come to the Hands of the Administratrix before her
second Marriage; and the Plaintiff to have a Satisfaction against the
Defendant absolutely, for so much as came to his or his Wife's
Hands after Marriage, and for what came to her Hands before her
second Marriage, to have Satisfaction against the Defendant, so far
as he had any Estate of his Wife's; and this Decree was affirmed by
my Lord Chancellor, Pach. 1706, between Powell and Bell; and
it was said to have been several Times held, that where a Man
marries a Woman, without stipulating for any particular Fortune,
or making any Settlement; if after the Death of the Wife, Debts of
hers appear, the Husband not being a Purchaser, in such Case shall
be answerable for the Debts of the Wife, in Equity, as far as he
had any Money or other Personal Estate of hers.

(D) How far by her Acts during Coverture.

1. The Wife received money due on a Bond entered into by
one to her Husband; she usually received and paid money
for him; and the Husband having got Judgment on the Bond, he
was ordered to acknowledge Satisfaction thereupon. 15 Car. 2.
between Seabourn and Blackstone, 1 Chan. Ca. 38.

2. Several Goods were devised to A's Wife for Life, and after her
Decease to J. In this Case, the A. and his Wife were parted, and
there had been great Suits for Alimony; and she, during the Separation,
had wafled the Goods; yet the Lord Keeper thought it reason-
able, that the Husband should be charged for this Conversion of the
Wife's, B.'s Title being Paramount the Feme's, and not under her.
Hill. 1632, between Lord Paget and Read, 1 Vern. 143.

3. If the Wife, whilst she lives separate from her Husband, and
has a separate Maintenance, buys Goods of Trade with a who know
of the Separation and Maintenance, they cannot sue the Executors
of the Husband for these Goods, neither will Equity give the Execu-
tors any Relief, because they have a very good Defence at Law.
Mich. 1682, between Ferrars and Ferrars, 1 Vern. 71.

(E) How far a Feme Covert shall be bound by
the Acts in which she has joined with her
Husband.

1. If a Man seised in Tail, for valuable Consideration, bargains
and sells to another in Fee, and covenants that he and his
Wife will levy a Fine for better Assurance; and it is agreed, that 30 l.
Part of the Consideration-Money, shall be paid unto the Baron,
upon the Conuance of the Fine by the Baron and Feme; and after
the Baron and Feme acknowledge a Fine, before a Judge, in the
Circuit, in the Vacation; and the said 30 l. is paid to the Feme, the
Baron being sick a-bed, and the Baron dies before the Term, and
thereupon the Feme stops passing the Fine, and after brings a Writ

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of Dower; the Bargainee shall have no Remedy in Equity against the Dower, because it is against a Maxim in Law, that a Feme Covert should be bound without a Fine. Mich. 5 Car. 1. between Ho- dy and Lan., 1 Rot. Abr. 375. but Q.

2. For if a Feme Covert, by Agreement made with her Husband, is to surrender or levy a Fine, th'o' the Husband die before it be done, the Court will, by Decree, compel the Woman to perform it. Per Cur', between Baker and Child, 2 Vern. 61.

3. If Baron and Feme levy a Fine of the Wife's Land, to enable them to take up the Sum of 400 l. and they make a Mortgage for it, and after the Mortgage is forfeited, the Husband pays in Part of the Mortgage-Money, but afterwards borrows as much more of the Mortgagee as he had paid in before; the Mortgagee having the Estate in Law in him by the Forfeiture of the Mortgage, shall hold the Land against the Heir of the Wife until the whole Money is paid; and if the Heir will not pay Principal, Interest, and Costs, he must be foreclosed. Decreed, Pachb. 1682. between Reamon and Sacheverell, 1 Vern. 41.

4. The Earl of Huntingdon, and the Countes Eliz. his first Wife, the Mother of the present Earl, join in a Mortgage of her Inheritance for 4500 l. to pay for the Place of Captain of the Band of Pensioners, and subject to the Mortgage, which was for a Term for Years; the Estate was settled to Countes Elizabeth for Life, Remainder to the now Plaintiff, her Son, in Tail; and the late Earl, in the Mortgage-Deed, covenants to pay the Money; and the Provizo was, that on Payment of the Mortgage-Money the Term was to cease; the Mortgage was severall Times assigned, and particularly in 1683, and the Countes joined in it; and there the Provizo was, that on Payment of the Money by them, or either of them, the Mortgage Term was to be assigned, as they, or either of them should direct or appoint. The Mortgage bore Date, Aug. 1. 1682. on the 5th of the same August, the late Earl, by Letter, thanked the Countes, for having sealed the Mortgage; and added, that the Profits of the Office should be religiously applied to pay off the Incumbrance; but yet afterwards, when Money came to be paid in, he paid off the Mortgage, but took an Assignment thereof in Trust for himself, and by Will devised his Perfonal Estate to the Defendant, the Countes, his second Wife, and the Benefit of this Mortgage. The Plaintiff's Bill was to have the Mortgage assigned to him; but the Lord Keeper declared, he could not decree for the Plaintiff; but upon the usual Terms of Redemption, on Payment of Principal, Interest, and Costs, discounting Profits; but upon Appeal to the Lords, the Plaintiff obtained a Decree to have the Mortgage assigned to him. Pachb. 1702. between the Earl and Countes of Hun- tingdon, 2 Vern. 436, 437.

5. If the Wife joins with her Husband in a Fine, to raise 400 l. by Mortgage of her own Estate, to buy a Place for her Husband, and the Husband dies, this shall be considered as a Debt due from the Husband, and shall be paid out of his Personal Estate, if there be enough to pay all his other Debts. Mich. 1714. between Tate and Auflin., 2 Vern. 689.

6. If a Man marries a Woman, who has a Jointure in some Houses which are burnt down, and they, on a Fine leived by them of the Houses, borrow 1500 l. to rebuild them, and by Deed between the Husband
Husband and Conunee only, the Equity of Redemption is referred to the Husband and his Heirs, and he lays out 3000l. in Building; the Wife, she being no Party to the Deed, by which the Redemption was referred to the Husband, shall redeem, and not the Heir of the Husband. Decreed by Nottingham L. C. and affirmed by North L. K. Hill. 35 Car. 2. between Brend and Brend, 1 Vern. 213.

7. If a Feme Covert agrees to sell her Inheritance, so as the might have Part of the Money, and the Land is sold, and her Part of the Money is put into Trustees Hands, this Money shall not be liable to the Husband's Debts, although the afterwards agreed it should be liable. Decreed between Rutland and Molineux, 2 Vern. 64.

(F) What Contrasts between Husband and Wife are dissolved by the Marriage.

1. If the Husband and Wife by Deed, agree before Marriage, that the Wife shall have Power to dispose of her Estate as she pleases, during the Coverture, and the Deed is put into the Hands of F. S. her former Agent, who, during the Coverture, pays the Rents and Profits to the Husband, with the Wife's Approbation, F. S. shall not be answerable for what he had received and paid to the Husband, during Coverture, for the Agreement being between the Husband and Wife only, it is determined by the Marriage. Decreed Pach. 15 Car. 2. between Darcy and Chute, 1 Chan. Ca. 21. but Q. of this Reason.

2. An Agreement was made between the Husband and Wife, and others on her Behalf, before Marriage, that she should dispose of her Goods, &c. as she pleased; and the Husband dying, the Question was, whether they belonged to her, or should go to the Executors of the Husband, the Marriage being an Extinguishment of the Agreement; but there is no Resolution. 1 Chan. Ca. 117. 1 Vern. 408. S. P. But no Resolution; and the Covenant or Agreement there said to be with the intended Wife only.

3. A Man entred into Articles with his intended Wife, to settle certain Lands on her, &c. the Marriage is solemnized, and the Husband died before any Settlement made; yet it was decreed, that the Heir of the Husband should execute the Agreement, though it was urged, that the Marriage was a Waiver of the Benefit of it, and a Release in Law. Mich. 30 Car. 2. between Haymer and Hayner, 2 Vern. 343.

4. The Plaintiff being Executrix and Refiduary Legatee of her former Husband, lends 100l. to A. and B. and took a Note for it in her own Name, and a Bond in a Trustee's Name, and after marries B. one of the Obligors; and it was held that the Bond was not exting. Pach. 1693. between Cotton and Cotton, 2 Vern. 290.

5. A Man entred into a Bond, conditioned to leave his intended Wife 1000l. the Husband mortgages his Estate, and died; and it was decreed, that tho' the Bond was by Law void, being extinguished by the Marriage, yet it should be made good in Equity; and that the Wife may redeem and hold the Land till she was satisfied her Debt. Hill. 1704. between Aiton and Pierce, 2 Vern. 480.

(G) In
(G) In what Cases the Husband must make a suitable Provision, when he sues for her Fortune.

1. A Man sued in the Spiritual Court for his Wife's Portion, and the Court of Chancery granted an Injunction to stay Proceedings till such Time as he had made a competent Jointure. 

2. So where A. married the Legatee and Executrix of J. S. who, together with his Wife, demanded 200 l. due by Bond to the Testator; the Defendant confessed the Debt, but insisted, that the Husband not having made any Provision or Settlement on his Wife, was not intitled to the Money; and the Court declared, that the Security should remain as it was till such Time as the Husband should make a suitable Provision, or till further Order from the Court. 

3. But if the Husband and Wife demand the Execution of a Trust of a Real Estate devised by Will, for the Benefit of the Wife, it must be decreed according to the Will, for the Wife is Cessui que trust, who, when she has Execution, may dispose of it as she pleases; but in Case of a Personal Demand, my Lord Chancellor said, the Court may impose Terms on the Husband. 

4. An Infant intitled to the Trust of Lands in Fee by a collateral Ancestor, marries without her Father's Consent, and the Father brings a Bill against the Husband and Wife, and her Trustees, that a Provision might be made on her out of those Lands; the Husband and Wife demur to the Bill; and the Demurrer was allowed; for it appears by the Plaintiff's own shewing, that he has no Right either in Law or Equity to the Lands; But my Lord Chancellor said, that if the Husband had been Plaintiff, and seeking any Favour from the Court, he could then make him do what was reasonable. 

(H) Suits and Proceedings against Husband and Wife, how to be.

1. A Legacy was given to a Feme Covert; the Husband alone exhibited a Bill for it; to which there was a Demurrer, because the Wife was not made a Party; and the Demurrer was allowed, for of Things merely in Action belonging to the Wife, as a Bond, &c. she ought to join in Suit; fons of a Rent running in the Wife's Right after Marriage; for if the Husband alone should sue, and be dismissed, that will not conclude the Case; and if he die before Judgment or Decree, the Wife cannot revive the Suit. 

2. A Feme Covert, who has a separate Maintenance, may sue without her Husband; resolved upon Demurrer. 

3. A
3. A Wife, whose Husband is banished by Act of Parliament, may act in every Thing as a Feme Sole. 2 Vern. 104.

4. A Bill was exhibited against the Husband and Wife, concerning the Wife's Inheritance; and the Proceeds of Contempt; and it being moved, that the Bill might be taken pro confesso, it was opposed, because the Wife had in the interval obtained an Order to answer; in which she set forth a Title to herself; and the Court decreed, that the Bill should be taken pro confesso against the Husband only, and that he account for all the Profits of the Land received since the Coverture, and the Profits which shall be received during the Coverture. Hill. 1 Jac. 2. between Ward and Meath, 2 Chan. Ca. 173.

5. A Bill was brought by the Plaintiff against the Husband and Wife, Daughter of the Plaintiff; the Husband put in a Plea in the Name of him and his Wife, and swears to the Plea, but the Wife would not be sworn; and the Husband moved that the Plea might be accepted, suggesting that the Wife did it by Combination with her Mother; and it was ordered that the Bill do stand for the Husband, and the Plaintiff to proceed against the Wife. 1 Chan. Ca. 296.

6. If Husband and Wife exhibit a Bill for a Demand in Right of the Wife, the Defendants Answer, Witnesses are examined, and Publication passes, and the Husband dies, and the Wife marries a second Husband; if they bring a new Bill, they may examine again the same Witnesses as were examined in the former Cause. 2 Vern. 197. but see 1 Vern. 249. cont.; tho' held that it might be otherwise, if the Demand had been of the Wife's Inheritance.

7. If a Bill be brought against Baron and Feme for a Demand out of the separate Estate of the Feme, and the Husband is beyond Sea, and not amenable by the Proceeds of the Court; yet if the Wife is served with a Subpoena, she must appear and answer the Plaintiff's Bill. Between Dubois and Hole, 2 Vern. 613.

8. Upon the Marriage Treaty, the Husband agreed that the Wife should have her own Fortune to her own Use, to dispose of as she thought proper; he afterwards running in Debt, was arrested by his Creditors; and the Wife, in Consideration of their discharging the Action, gave her Note for the Payment of the Money; the Creditors exhibited a Bill against the Husband and Wife, and took out Subpoena's against both, and actually served the Wife, but not the Husband, he being at Rotterdam; but neither the Husband nor Wife appearing, an Attachment was taken out against both; and the Husband still keeping out of the Way, the Wife was taken up, and being moved to be discharged, my Lord Keeper and the Master of the Rolls, held that in this Case the Proceeds was regular enough; and that the Husband was joined in the Suit only for Conformity. Mich. 1711. between Bell and Commissary Hyde.

9. If the Wife's Answer differs from the Husband's, it shall not prejudice the Husband, as if he confessed a Truth; which he denies. 1 Cham. Ca. 79. for she can be no Witness against her Husband. 2 Vern. 79.
(1) Concerning the Wife’s Pin-Money and Paraphernalia.

1. If by a Marriage-Settlement, a Term is created for raising 200l. per Ann. as Pin-Money, for the Wife’s separate Use, which is constantly paid her by the Husband’s Steward, except the last Year before the Husband’s Death; there being but one Year in arrear only, it shall be paid; but it would be otherwise if it had been in arrear several Years. Trin. 1691. between Offley and Offley.

2. The Plaintiff’s Relation (to whom he was Heir) allowed his Wife Pin-Money, which being in arrear, he gave her a Note to this Purpose, I am indebted to my Wife 100l. which became due to her such a Day; after, by his Will, he makes Provision out of his Lands for Payment of all his Debts, and all Monies which he owed to any Person, in Trust for his Wife; and the Question was, Whether the 100l. was to be paid within this Trust; and my Lord Keeper decreed not, because in Point of Law it was no Debt, because a Man cannot be indebted to his Wife; and it was not Money due to any in Trust for her. Hill. 1701. between Cornwall and Earl of Mountague; but Q, for the Tefator look’d on this as a Debt, and seems to intend to provide for it by his Will.

3. If a Woman has Pin-Money, or a separate Maintenance settled on her, and she by Management of good House-wifry, saves Money out of it, she may dispose of such Money so saved by her, or of any Jewels bought with it, by Writing in Nature of a Will, if she die before her Husband, and shall have it her self, if she survive him, and such Jewels, &c. shall not be liable to the Husband’s Debts. Pach. 1692. between Herber and Herbert; and the Precedent of Sir Paul Neals’s Case cited to the same Purpose; the Wife allowed what she had saved out of her Pin-Money against the Devisee of the Real Estate. Mich. 1694. between Miller and Wikes.

4. If a Woman, on her Marriage, refers to herself a Power of Disposing of her Personal Estate as she thinks proper, all that the dies possess’d of is to be taken to be her separate Estate, or the Produce of it, unless the contrary can be made appear; and as she has a Power over the Principal, to the May dispose of the Produce or Interest. Hill. 1705. between Gore and Knight. 2 Vern. 535. 1 Vern. 245. S. P. where it is laid, that there had been several Decrees ratifying such Disposition.

5. If a Woman, by her Marriage Articles, agrees to have no Part of the Husband’s Personal Estate but what she should give her by Will, this bars her of her Paraphernalia. Per Car. 2 Vern. 83.

6. The Husband devis’d the Wife’s Jewels to her for Life, the Remainder over to his Son; one Point of the Case was, whether they should go to the Administrator of the Wife, being her Paraphernalia; and tho’ it was agreed, that where a Husband dies Intestate, or does not by Will dispose of the Jewels of his Wife, the may claim them, (in Case there be no Debts); yet as he may (a) devise them, and as he has in this Case given them to her for Life only, and she has not made any Election or Claim to them as her Paraphernalia, they cannot go to her Administrator. 2 Vern. 246, 247.

(a) That the Husband may devise them, save Cre. Car. 343.
(K) Concerning Alimony and separate Maintenance.

1. If a Husband turns away his Wife, or uses her with Cruelty, by which Means she is obliged to leave him, Chancery will, upon her own, or her Prochein Amy's Application, decree her a separate Maintenance, suitable to her Degree and Quality, the Fortune she brought, and her Husband's Circumstances. Cary 124. 1 Chan. Rep. 4. S. P. 1 Chan. Rep. 164. S. P.

2. If Husband and Wife agree to live separate, and that the Wife shall have so much a Year, such Agreement will be decreed in Equity. Nel. Chan. Rep. 73.

3. If there is a Decree for a separate Maintenance, and the Husband offers to be reconciled, and the Wife refuses, tho' the Court will suspend the Payment of the Money, yet will order all the Arrears to be brought into Court; and, according as there is Necessity, vacate the Decree, or give the Wife, upon any ill Usage, Liberty to resort to, and have the Benefit of it. 26 Car. 2. between Whoreswood and Whoreswood, 1 Chan. Ca. 250.

4. A Feme Covert, who had by her Husband's Consent 50 l. per Ann. settled on her, and who had, upon a Sentence in the Spiritual Court, obtained a Decree for 50 l. per Ann. more for Alimony, suggests by her Bill, that her Husband had, on Purpose to defraud her, procured the Tenants to surrender their Estates on which the said Rents were recovered, and prayed that it might be made good to her by the Decree of this Court; but it appearing that she was a very J ewd Woman, and had eloped, and her Husband offering in his Answer to take her again, my Lord Chancellor would make no other Order in it, but that the Husband should stand in the Place of the Tenants, and admit the Rent payable; and she to recover it at Law as well as she could. Palcb. 1682. between Mildmay and Mildmay, 1 Vern. 53.

5. The Husband and Wife agree to part, and the Wife's Father agrees, upon the Husband's giving him a Note to pay back the Wife's Portion, to save him harmless from any Debts his Wife may contract, and against all Demands for her Maintenance; the Wife, with her Child, went thereupon and lived with the Plaintiff, her Father, and were maintained by him; and he now brought his Bill to have the Portion paid; which was decreed, on his giving Security to indemnify the Defendant against the Debts and Maintenance of the Wife and Child, although the Husband now offered to take his Wife home, and maintain her and her Child, and to allow the Plaintiff for the Time past. Mich. 1700. between Seelng and Crawley, 2 Vern. 386.

6. If by Marriage Articles 6000 l. Part of the Wife's Portion, is agreed to be invested in Land, and settled in Trust for the Husband for Life, then to his Wife for Life, Remainder as a Provision for younger Children, Remainder to the Husband in Fee; and the Husband, by his Cruelty, forces his Wife to live separate from him; the Court will decree the Interest of the 6000 l. to be paid the Wife for her separate Maintenance, till Cohabitation, there being no Issue, the Money lying dead; and it being a Trust which is properly to be directed
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rected by this Court. *Pac.b. 1705. between Oxenden and Oxenden, 2 Vern. 493.
7. A Wife, having been used with Cruelty by her Husband, becomes intituled to 3000 l. as her Share of her Mother's Personal Estate, who died Intestate; and it was decreed, that the Wife should have the Interest of it for her separate Use, and then to the Husband, if he survived; and afterwards the Principal to be paid the Issue; and if no Issue, then to the Survivor of the Husband or Wife. *Pac.b. 1711. between Nisbolls and Danvers, 2 Vern. 671. The Reporter adds a *Memorandum, that the Husband had given a Note to his Wife, that if he should again use her ill, she should have her Share of her Mother's Estate to her own Use. *Vid. 2 Vern. 752. a separate Maintenance decreed a Wife.
8. A Bill was brought to subject the Defendant's Jointure to the Payment of her Debts, which she contracted whilst she had a separate Maintenance from her Husband. *Per Lord Chancellor, had the separate Maintenance continued, there would have been some Reason to follow that, and make it liable; but that being at an End, there is no Reason that the Jointure should be liable; and the Bill was dismissed; and the rather, because the Executor of the Husband, who might have paid the Money, was not made a Party. *Pac.b. 1685. between Kenge and Delavall, 1 Vern. 326.

(L) What Right survives to either of them, or their Representatives, by the Dissolution of the Marriage.

1. If Baron and Feme have a Decree for Money, in the Right of the Feme, and then the Baron dies, the Benefit of the Decree belongs to the Feme, and not to the Executor of the Husband: Certified by Hyde C. J. and his Certificate confirmed by my Lord Chancellor. *Mich. 15 Car. 2. between Nanney and Martin, 1 Chau. Ca. 27.
2. If Money is left in a Trustee's Hands, for the Benefit of a Feme Covert, and the Husband dies, it shall go to the Feme, and not to the Executors of the Husband, he having made no Disposition of it in his Life-time. Decreed *Pac.b. 1683. between Twifden and Wife, 1 Vern. 161.
3. The Husband, in Consideration of 500 l. Portion, Part in Lands and Part in Bonds, owing to the Wife, sottles a Jointure of 45 l. per Ann. and the Husband dying before any Fine levied of the Lands, or Alteration of the Bonds, the Creditors of the Husband sue the Widow and the Executor of the Husband; and it was held, though there was not sufficient Personal Estate besides, that as these Securities remained unaltered, and as the Law had cast them on the Widow, Equuity could not take them from her; tho' it was urged, that the Wife had a Jointure settled on her adequate to the Portion. *Trin. 1688. between Lister and Lister, 2 Vern. 68.
4. But if upon an Intermarriage between A. and B. who has an Estate in Land, and a Fortune in Money, and who are both Infants,
An Act of Parliament is obtained for settling a Jointure on B. the Wife, in Bar of Dower; provided that the Jointure shall cease, if the Wife, when of Age, does not settle her Land, &c. but nothing is said as to the Personal Estate, and Part of the Fortune is a Mortgage of 1300l. taken in a Trustee's Name, tho' the Wife, when the came of Age, settled her own Land only; yet the Husband dying, the Mortgage shall go to the Executors of the Husband, and shall not survive to the Wife as a Chose in Action. Decreed 1705. between Blois and Countess of Hereford, 2 Vern. 501. And my Lord Keeper laid it down as a Rule, that in all Cases, where a Man makes a Settlement equivalent to the Wife's Portion, it shall be intended that he was to have the Portion, tho' there is no Agreement for that Purpose. Note: This was a Chose in Action in Equity, and some Stress laid on that, tho' it does not appear by this Report.

5. If a Man marries a Woman intituled to a Mortgage in Fee, and after Marriage assigns his Interest in the Mortgage to Trustees to call in the Money, and lay it out in Land to be settled on the Husband and Wife, and their Issue, Remainder to the Heirs of the Husband; and the Husband and Wife die without Issue, this Mortgage being a Chose in Action, shall go to the Executor of the Wife, and not to the Executor of the Husband. Decreed Mich. 1.00. between Burnet and Kinnasten, 2 Vern. 401.

6. A. being indebted to a Feme Covert, becomes a Bankrupt, the Husband pays the Contribution, and dies before any Distribution, and then the Wife died; and it was held, that the Executors of the Wife were intituled to the Dividend, for the Husband paying Contribution, does not alter the Property of the Bond. 2 Vern. 707.

7. But if a Sum of Money is awarded the Husband, which he is intituled to in Right of his Wife, and the Husband dies before it is paid, it will go to his Executors, and not survive to the Wife, the Award being a Sort of Judgment which has changed the Property. Pasch. 1686. between Oglander and Biston, 1 Vern. 396.

8. If a Man marries an Orphan of London, who dies before 21, yet her Share shall survive to the Husband, and shall not go to the other Children. 1 Vern. 88.

9. If an Inheritor gives a Term for 1000l. Years to Trustees, and she and her intended Husband declare the Trust to be for the Husband for Life, and after his Death for the Wife and her Heirs; and afterwards the Husband and Wife by Fine Surconcess, grant a Term of twenty-one Years, referring the Rent to the Husband and Wife, and the Heirs of the Wife; yet the Administratrix of the Wife shall not have the Benefit of the Rent referred. 2 Vern. 62.

10. If one dies intestate, leaving a Daughter, the Wife of J. S. and the Daughter dies before any Distribution made, and the Husband dies intestate, the Share of the Daughter shall go to the Administrator of the Husband, and not to her Administrator; but the Reporter refers to the Decree. Mich. 1693. between Cary and Taylor, 2 Vern. 303.

11. Baron and Feme, Jointenants for their Lives, Baron sows the Lands, and dies before Severance; and the Question was, whether the Wife, or Executor of the Husband, should have the Corn; and the Court proposed, that each should take a Moiety, which was agreed to. Rounser's Cafe, 2 Vern. 322.
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12. A purchases a Walk in a Chase, and takes the Patent to himself, and to his Wife, and J. S. during their Lives, and the Life of the Survivor; the Husband dies indebted, yet the Wife was decreed the Benefit of the Patent during her Life, for she cannot be a Trustee for her Husband; but after her Death, J. S. is to be a Trustee for the Husband's Executor. Trin. 1688. between Kingdome and Bridges, 2 Vern. 67.

13. If the Husband lends out Money in the Names of himself and his Wife, upon Mortgages and Bonds, and dies, the Wife is intitled to the Money by Survivorship, if there are sufficient Assets besides to pay the Husband's Debts. Trin. 1712. between Chrift's Hospital and Budgin, 2 Vern. 683.

14. The Plaintiff's Grandfather was Tenant for Life of a Farm, and the Inheritance was in the Plaintiff's Father, to whom he is Heir, on the Marriage of the Plaintiff's Father with the Defendant, who had a Portion of 300 l. in her Brother's Hands, and secured by his Bond to her; the Father and Grandfather join in settling this Farm upon the Defendant, for her Jointure; and this Settlement is expressly to be made in Consideration of 100 l. paid to the Grandfather, for the Marriage Portion of the Defendant, which 100 l. was paid to him accordingly by his Brother; the Marriage took Effect; and the Defendant's Husband died indebted in several Bonds wherein he and his Heirs were bound; and Actions were brought against the Plaintiff as his Heir on the said Bonds, to subject the Real Estate descended to the Payment of them; and he brought his Bill to have the remaining 200 l. of the Portion applied in Discharge of these Debts, which was decreed by the Master of the Rolls; but upon an Appeal to my Lord Chancellor, the Decree was reversed, and held, that it survived to the Wife, tho' he said, that if the Settlement had been in Consideration of the whole Portion, and had been equivalent to it, it must have gone to discharge the Husband's Debts. Mich. 1697. between Cleland and Cleland.

15. Richard Middleton, upon a Marriage-Treaty with Barbara Wynn, agrees in Consideration of 1250 l. Portion, secured to her by Bond from her Brother, to clear his Estate, being 70 l. per Annum, of Incumbrances that were then upon it, within six Months after the Marriage should be had; and for every 100 l. he should receive, to settle 10 l. per Annum on her for a Jointure, and to settle Lands on the first and other Sons of that Marriage; Barbara was no Party to these Articles; the Marriage takes Effect; Barbara dies within the six Months, without Issue; Richard, on a second Marriage with one Dorothy — who had a Portion of 1600 l. in Trustees Hands, by Articles agrees to lay out 1250 l. he was intitled unto in Right of his first Wife; and this 1600 l. when received, in the Purchase of Lands, to be settled on Dorothy for a Jointure, and for a Provision for the Issue of that Marriage, which Marriage after takes Effect, and then Richard dies before he had got in either of the Portions; and my Lord Keeper decreed it to the Representatives of Richard, and that it should not survive to the Administrator of the first Wife, he being a Purchaser, by his Agreement to discharge his Estate; and being in no Default, the Wife dying within the six Months, which prevented the Making the Settlement. Pafch. 1711. between Medish and Wynn.

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Bill.

(A) By whom it may be brought.
(B) Who are to be parties to it.
(C) Matters proper by a Bill in Equity.
(D) Bills of Discovery, and herein of what Things there shall be a Discovery.
(E) Bills quaä Time, in what Cases proper.
(F) Bills of Peace to prevent Multiplicity of Suits.
(G) Cross Bills.
(H) Supplemental Bill.
(I) Bills of Interpleader.
(K) Certiorari Bills.
(L) Bills of Review and Reversal.
(M) Bills original after a Decree.
(N) Bill taken pro confesso.

(A) By whom it may be brought.

1. The King may sue in Chancery for Equity. 1 Rol. Abr. 373.
2. The Chancellor himself may sue or be sued in Equity, but he cannot make a Decree in his own Cause. 1 Rol. Abr. 373.
3. If an Alien purchases Lands in the Name of another, admitting the King is intitled to the Truth, yet he must sue in Equity to have it executed. 1 Rol. Abr. 194.
4. The Church-wardens may join with a poor Person who is chargeable to the Parish. March 90.
5. A Bill may be brought in Behalf of an Infant in Ventre sa mere, and an Injunction obtained to stay Waste. 2 Vern. 711.
6. Any
6. Any one may bring a Bill as Prochein amy to an Infant, without his Consent, because it is at his Peril that he brings it, to be answerable for the Event; but none can bring a Bill in the Name of a Feme Covert, as her Prochein amy, without her Consent; and if such Bill be brought, upon her Affidavit of the Matter it will be dismissed; agreed by the Court. Mich. 1713. between Andrews and Cradock.

(B) Who are to be Parties to it.

1. If a Man grants a Rent-Charge, and afterwards sells the Lands by Parcels, and the Grantee sues for the Rent, he must make all the Purchasers (a) Parties. Cary 3; 33. S. P.

(a) If Two, or more, have a joint Interest, regularly they must be all Parties to the Bill; so if Two, or more, are liable to a Demand, you cannot proceed against one alone. 1 Vern. 195. So all Executors, Trustees, or their Representatives, are to be made Parties; but this Rule may be dispensed with, if any of them are not amenable, or if they have stood out Process to a Sequestration.

2. But in Case of a Charity, it is not necessary that all the Tenants should be made Parties, for the Charity shall not be put to that Difficulty; but the Tenants may, if they seek a Contribution, undertake to make them Parties to the Information, or help themselves by such Course as they shall think fit. 1 Salk. 163.

3. If there be an Agreement in a Parish, by a Vestry Order, that 100 l. per Ann. shall be paid to A. for a Lecture in the Parish, in a Bill for the Recovery thereof, all the Parties to the Order must be made Defendants; otherwise it cannot be decreed. Mich. 15 Car. 2. between Henchman and Ayer, Hard. 33.

4. The Bill being to have an Account of a Trust, the Defendant pleaded, that he was intrusted for three Children, viz. for the Plaintiff, and his two Brothers; and that the other Two not being made Parties to the Suit, he was not bound to answer, for otherwise he might be thrice called to an Account for the same Matter; and the Plea was allowed. Mich. 1682. between Hanne and Stevens, 1 Vern. 110.

5. But if A. devises several Legacies to B. C. and D. and that if his Estate fell short, each to abide in Proportion; but if it increased, that each Legacy should increase in Proportion; in this Case one alone may sue for his Legacy; and it is not necessary that the other Legatees should be made Parties. Mich. 34 Car. 2. between Haycock and Haycock, 2 Chan. Ca. 124. Th'o' one Legatee may sue, yet if the Reidue of the Personal Estate be devised to Three; Q. Whether one of them may alone sue for his Part; and vid. Nol. Chan. Rep. 243. where it is held that he cannot.

6. If a Bill be exhibited against the Sheriff and Plaintiff at Law, to be relieved against a Bail-Bond, assigned by Fraud by the Sheriff; let the Proof of the Fraud be never so strong, yet if the Plaintiff at Law is not served with an Order to answer, so as to be made a Party, the Plaintiff can have no Relief: Ordered by the Matter of the Rolls. Mich. 1682. between Israel and Nairnborne, 1 Vern. 87.

7. A Bill being exhibited for Discovery of a Bankrupt's Estate; the Defendant demurred thereto, because the Bankrupt was not made a Party; and the Demurrer was allowed. Hill. 1688. between Sharp and Gomon, 2 Vern. 32.

8. Upon
8. Upon a Bill for a specific Performance of a Covenant under Hand and Seal with A for the Benefit of B A must be made a Party to the Suit; but if it had been only a Promife, either A or B might have brought the Action According to the Case in * Ttel. * Rolls v. Chester's Reports. Hill. 1638. between Cooke and Cooke, 2 Ver. 36; Yates 1771.

9. If a Perfon claims any Thing due from the TTeftator, the Executive must be made a Party. NEL. Chan. Rep. 334. All Executors must sue and be sued. 3 Chan. Rep. 92.

10. If a Legatee of a Term sues for it, he must make the Executive a Party, although he allidges he has his Affent; between Moor and Blagrave. 1 Chan. Ca. 277.

11. So if an Executive does actually release, yet he must be made a Party to the Suit. Hill. 1681. between Smithby and Hinton; 1 Ver. 31.

12. But if the Plaintiff sues one Executor, and allidges in his Bill that he does not know who the other Executive is, and prays a Discovery, this will be no Cause of Demurrer, ruled. Mich. 1682; between Bowyer and Cover. 1 Ver. 95.

13. In a Bill to be relieved touching a Lease for Years, or other personal Duty against Executors, though the Executors be not Executors in Trust; yet it is not necessary to make the Cestui que Trufts, or Residuary Legatees, Parties. 1 Ver. 261.

14. In a Bill to be relieved against an Award, made by some of the Members of the E. J. Company, touching the Quantum of Freight due to the Plaintiff from the Company; the Arbitrators, and some of the particular Members being made Defendants, they demurred to the whole Bill because the Plaintiff could have no Decree against them; and their Answers would be no Evidence against the Company; and the Plaintiff might examine them as Witnesses. And the Demurrer was allowed without putting them to Answer, as to Matters of Fraud and Contrivance. Trin. 1700. between Dr. Steward and the East India Company, 2 Ver. 380.

15. If any one sue in Chancery an Executive of an Obligor to discover Aftets, all the Obligors must be made Parties; that the Charge may lie equal. 2 Ver. 348. The Reporter adds a Quere, Whether the Principal may not be sued without thofe who are bound as Sureties. Vid. NEL. Chan. Rep. 105, where it is held not to be neceffary to sue all the Obligors; and that any one who is compelled to pay the Money, may compel the Others to contribute.

16. But 'tis clear, that if a Judgment be had at Law against one Obligor, you may sue the Executive of him alone to discover Aftets, &c. because the Bond is drowned in the Judgment. 2 Ver. 348. 2 Chan. Cas. 29. 8 P.

17. If one of the Defendant's is prosecuted to a Sequestration, the Caufe may be carried on without him. Mich. 1699. between Parker and Blackburn.

18. The Plaintiff being Residuary Legatee, brought his Bill against the Defendant, who was one of the Executors (without his Co-executor, who was beyond Sea) to have an Account of his own Receipts and Payments: The Defendant affirmed that his Co-executor ought to be made a Party; but my Lord Chancellor ordered the Cause to go on, and said, that if any Thing appeared difficult on the Account, the Court would take Care of it. And as a Bill may be brought against one Factor without his Co-factor, being beyond Sea,
Bill.

Sea, that the same Reason held her. Mich. 1698. between Cowslad and Cely.

19. Bernard Spark, in 1661. made his Will, and amongst other Legacies devised an Annuity of £20 per Annum to B. to be paid Quarterly, and gives other Legacies; and then has this Clause, all the rest of my real and personal Estate not before bequeathed, (my Debts being paid, I give to my Brother John Spark, and makes him sole Executor) and he paid the Annuity several Years, and made his Will, and charged all his real and personal Estate with this Annuity, and devised all his real and personal Estate in England (Part of which was the Estate of Bernard) to his two Daughters, who were Defendants; and all his real and personal Estate in Barbadoes, to his two other Daughters that lived in Barbadoes; and were no Parties to this Suit: The two Daughters here paid the Annuity several Years, but then stop'd Payment; on Pretence, that the Words of Bernard's Will did not charge his real Estate with this Annuity; or if they did, yet the personal Estate ought to be first exhausted, which did not appear to be: And the real and personal Estate in Barbadoes being equally liable by the Will of John, the Daughters, who have those, ought to be made Parties, for they might have made Satisfaction; or however, they ought to have been before the Court, that the Defendants might, at the same Time, have a Decree against them to pay their Proportion; for though at Law the Party may take his Remedy against which he pleases; yet in Equity, all must be Parties, that Right may be done to all at the same Time. On the other Side it was said, admit it to be so, in Case it may be easily done, yet 'tis impracticable in this Case, and therefore ought not to be required, and so held my Lord Keeper; and that the Lands were charged by Bernard's Will; and if any Satisfaction has been made by those in Barbadoes, it lay on the Defendant's Part to shew it. Pash. 1702, between Quintins and Yard.

20. Sir Edmund Fortescue, in the Year 1664. settled his Estate upon Powel, Glendale and Harris, in Trust to pay his Debts in the first Place, then to pay such Portions as he should give to his Children; and lastly, his Legacies, and the Overplus, to be laid out in a Purchase in Trust for the first Son, and the Heirs of his Body, and so for the Second, &c. and for want of such Issue in Trust for himself and his Heirs; the Plaintiff, his Grand-daughter and Heir at Law, on whom the Trust devolved, brought her Bill against the Administrator and Heir at Law of Harris, (Powel, Glendale and Harris being dead) to discover some Lands purchased with the Overplus Money by Harris, who had formerly been a Servant in Sir Edmund's Family, and who alone had transacted the Trust. To which it was objected, that the Representatives of the other Trustees ought to have been before the Court; but the Plaintiff insisting only to have an Account of what came to the proper Hands of Harris, and of his Receipts and Disbursements only, and not of any Joint-Receipts or Transactions by him, with the other Trustees; the Objection was over-ruled. Hill. 9. Ann. between Lady Selby and the Executors of Harris & al.
(C) Matters proper by a Bill in Equity.

Vid. Title Courts and their Jurisdiction; Letter (B).


2. A Solicitor may have a Bill for Fees only, if for Business done in this Court; and so he may when the Business is done in another Court, if it relates to another Demand the Plaintiff makes in this Court. 1 Vern. 203.

3. A Bill in Equity will lie for recovering antient Quit-Rents, though very small, as two or three Shillings per Annum. Between Cox and Foley, 1 Vern. 339.

4. (a) A Suit for small Tithes, not proper for Chancery; neither has it been used; per Sir John Churchill, as Amicus Curiae. 2 Chan. Ca. 237.

5. The Plaintiff being Executor, and his Testator greatly indebted, and being desirous to be rid of the Assets as fast as they would go, and that his Payments might not be afterwards questioned, brought a Bill against all the Creditors, to the Intent they might, if they would, contest each other's Debts, and dispute who ought to be preferred in Payment; the Defendant being a Creditor demurred, for that the Bill contained Multiplicity of Matter wherein he was not concerned. But the Court over-ruled the Demurrer, and held it a proper Bill, and a safe way for an Executor to take. Hill. 1688.

between Buckle and Atlee, 2 Vern. 37.

6. If A obtains a Decree before the Ordinary for an Isle in a Church, and he brings a Bill for the Decree of this Court to quiet him in Possession, the Bill will be dismis's'd with Costs; for this Court executes not its own Decrees by Bill, without examining the Justice of them. Pach. 1691, between Baker and Child, 2 Vern. 226.

(D) Bills of Discovery, and herein of What Things there shall be a Discovery.

1. If the King grants the Goods of a Felon, the Grantee may compel any one, in whose Possession they are, to discover them Cary 1.

2. If a Person is out-lawed, a Bill may be exhibited by the Attorney General to discover his real and personal Estate; for the Outlawry is in Nature of a Gift or Judgment to the King. Mich. 1555, between the Protector and Lord Lumley. Hard. 22.

3. A Bill was exhibited by the Attorney General in the Exchequer, wherein it was charged, that the Defendant, being a Merchant, had concealed the Custom of 290 Casks of Curran; and for the better effecting thereof, had given 40l. a-piece to two Customs-House Officers; and Relief and Discovery prayed; but upon a Demurrer it was doubted whether the Defendant should be bound to discover. Hard. 137. Hard. 201. S. P. adjourned, where it was allsedged, the Attorney General would not prosecute for the Forfeiture, but for the Duty only.

4. If
4. If the Plaintiff alledges that the Defendant had caused the Plaintiff's Port Wines to be seized as French Wines, on purpose to raise the Price of the Market, and to sell his own Wines at a better Rate, and detained the Plaintiff till he had sold his own Wines, and then relinquished his Prosecution, well knowing that the Plaintiff's Wines were Port Wines: And he prays an Answer and Discovery to those Matters, in Order to his bringing an Action. The Defendant may plead the Act for Prohibiting of French Wines, and a Penal Clause therein on any Man that should seize Wines, and afterwards relinquish his Prosecution; and it will be allowed. *Mich. 1682.* between *Bird* and *Hardwick*, 1 *Vern.* 109.

5. If it is charged by the Bill, that the Defendant, in 1659, by Colour of an Order of Sequestration by the Committee, had seized several Tithes, &c. due to the Plaintiff, the Plaintiff may pray a Discovery of the Particulars so taken, and their Value; as where a Man by Colour of a Title enters into a House, &c. and possessest himself of the Goods, &c. for it may be impossible for the Plaintiff to discover the Particulars, without such Bill; and this is a Charge not by Way of Trespass, but under Colour of Title: So where a Bill is proved, and the precedent Administration revoked, such Bill is usually necessary for the Discovery of the Goods; and yet in Strictness of Law, there was a Trespass; resolved upon a Demurrer, between *Cage* and *Warner*, *Hard.* 182.

6. A Bill was brought to discover who was Owner of a Wharf and Lighter, to enable the Plaintiff to bring an Action for the Damages his Goods sustained by the Lighter's being over-let by Negligence of the Lighterman; to which the Defendant demurred; but the Demurrer was over-ruled. Between *Sir John Heathcote* and *Sir John Fleet*, 2 *Vern.* 442.

7. So where the Ship, called the Turkey Merchant, taking Fire by the Neglect of the Master or Ship's Crew, the Plaintiff, who was one of the Freighters, and had his Goods burnt, brought his Bill to discover who were Partowners of the Ship, to enable him to bring his Action; to which the Defendant demurred, and inferred that this was like the Café where a Fire happens in a Man's House, and burns his Neighbours also; although he is liable to Damages at Law, yet the Plaintiff, in such Café, shall not be afflicted in Equity; but the Court held that the Café put was not parallel; for though the Law gives an Action, yet it doth not arise out of any Contract or Undertaking of the Party: And that this and the precedent Café came within the Reason of the Café of any common Carrier; and therefore over-ruled the Demurrer. *Mich. 1703.* between *Morse* and *Buckworth*, 3 *Vern.* 443.

8. A Bill was brought to discover who was Tenant of the Freehold, in order to bring a Formedon, to which there was a Demurrer, and it was allowed. *Hill 1683,* between *Stapleton* and *Sherrard*; 1 *Vern.* 212. though the Café of Bickerton and Bickerton was quoted to the Contrary. *Vid. Cary* 22. where it is said that such Bills have been frequent.

9. A Demurrer to a Bill brought to discover the Tenant to a Précipe on a voluntary Conveyance, allowed. *Mich. 1684.* between *Sherburn* and *Clerk*, 1 *Vern.* 273. 1 *Vern.* 213. *S. P.* per *L. Keeper*, who said that there were Ways of knowing it without.

4
Bills.

10. If a Bill be exhibited to discover whether a Woman be married or no, and Marriage would be a Forfeiture of her Estate, she is not obliged to discover such a Bill dismissed. 24 Car. 2. between Mynins and Mynins, 2 Chan. Rep. 86.

11. If a Bill be brought to establish an Agreement for a separate Maintenance, and the Wife seeks a Discovery of hard Usage, the Husband may demur to that Part, and it will be allowed. Mich. 1682. between Hinks and Netthorp, 1 Vern. 204.

12. The Plaintiff's Bill was for a Discovery of a Personal Estate that was devised to Charities relating to the College of; the Defendant pleaded that the Will was not yet proved, but was controverted in the Spiritual Court; but the Court over-ruled the Plea, a Discovery of the Estate being for the Benefit of all Persons interested therein, and necessary for the Preservation thereof. Pach. 1688. between Dulwich College and Johnson, 2 Vern. 49. 1 Vern. 106. S. P. accord, where the Right of Administration was contested.

13. The Plaintiff having obtained a Judgment against the Defendant on a Bond of 1400l. Penalty for Payment of 700l. and Interest, brought his Bill, setting forth this Judgment, and complained that the Defendant, to deprive him of the Benefit of it, had assigned his Estate to Trustees, that he had lent 1200l. to R. and G. who were since become Bankrupts in the Name of one E. but that it was in Trust for the Defendant; and therefore prayed a Discovery of the Matter: And that the Plaintiff might come in under the Statute of Bankruptcy for this 1200l. Debt; and that the Commissioners might not make any Distribution till this Matter was determined. The Defendant demurred, for that there could not be a Discovery of a Man's personal Estate in his Life-time; and for that this Bill was in Nature of a Foreign Attachment, which the Practice of this Court did not admit or countenance; but the Demurrer was over-ruled. Pacl. 1686. between Smithier and Lewis, 1 Vern. 398, 399.

14. But where A. obtained Judgment against B. and brought a Bill against C. for a Discovery of B.'s Goods which C. had got into his Hands; and the Defendant demurred because the Plaintiff had not allledged he had taken out Execution against B. and the Demurrer was allowed. Pacl. 1686. between Angel and Draper, 1 Vern. 399.

15. The Bill was to discover whether the Defendant had not assigned over a Leafe; the Defendant pleads that there was a Provifo in the Leafe, that in Case he assigned over, the Leafe should be void; and that this being in the Nature of a Penalty or Forfeiture, he ought not to be compelled in a Court of Equity to discover for the Plaintiff: It was said that this was not a Penalty, but Part of the Contract; yet the Plea was allowed. Hill. 1700. between Fane and Atlec.

16. The Defendant was one of the Super-Cargoes of the Royal George, belonging to the Plaintiffs; and on his being so appointed, entered into a Bond, with Suresties, of 5000l. Penalty, not to trade to any of the Places prohibited by the Act of the 9th of the late Queen, for erecting the South-Sea Company, or contrary to the Affento Contrad with the King of Spain, and several other Restrictions; and he on his Part covenanted not to trade to any of the said Places, or contrary to the said Contract; and covenanted not to plead or demur to any Bill, which should be brought against him in Equity, for a Discovery of his Trading or Dealings contrary to
to his Agreement; and this Bill was brought, charging him with several Breaches of Covenant, to the Prejudice of the Plaintiffs, to the Amount of several 1000l. and for a Discovery thereof, &c. and the Plaintiffs by their Bill waived the 5000l. Penalty of the Bond. To this Bill the Defendant pleaded the Statute 9 Anne and several Articles of the Assiento Contract, whereby whoever traded contrary thereunto, were liable to great Penalties, as Confinement of Ship and Goods, and several other Forfeitures. And it was strongly urged, that by Law no one was bound to discover any Matters which tended to subject him to Penalties or Forfeitures; that it was the Business of Courts of Equity to relieve against, not to assist Forfeitures; and that this Covenant not to plead or demur, was illegal and void in itself, as it tended to deprive him of the Benefit of the Law, like a Covenant, not to bring a Replevin, or such like; but the Plea was overruled, because he certainly might, if he thought fit, forego or waive the Benefit of the Law in those Particulars, which here he has expressly covenanted to do; and which were the more necessary to be required of him, as the Plaintiffs themselves were under like Penalties in Case of any of their Factors or Agents traded contrary to that Act, or the Assiento Contract: And this Covenant not to plead or demur, was purposely to obviate the Pretence, that he ought not to discover any thing whereby to subject himself to any Penalties; which since he has expressly consented to and covenanted for, he shall not now be at Liberty to object to the Illegality of: And it was said to be so resolved in a like Case between the E. I. Company and Atkins, in the Time of the Lord Macclesfield, on a very solemn Debate. Mich. 1728. South-Sea Company, versus Bunstead.

(E) Bills quia Timet in What Cases proper.

1. A. Had the Use of Goods and a Library for Life, Remainder to the Plaintiff's Wife, who was dead; but he, as her Administrator, brought his Bill to have the Goods, &c. secured to him after the Death of A., which was decreed accordingly. 12 Car. 1. between Bracken and Bentley, 1 Chan. Rep. 110.

2. A Bill was brought to deliver up an Apprentice's Bond and Indentures, he being out of his Time; and it was ordered that the Master do either bring his Action within a Year, or deliver up the Bond and Indentures; for if it were at the Master's Choice to play as long as he pleased, he would perhaps play till the Apprentice's Witnesses were dead. 17 Car. 2. between Baker and Shellbury, 1 Chan. Ca. 70.

3. The Defendant's Testator gave the Plaintiff 1000l. to be paid at the Age of Twenty-one Years: The Bill suggested that the Defendant, who was Executor, wafted the Estate; and therefore the Plaintiff prayed that he might give Security for the Payment of the Legacy at such Time as it should become due, which the Master of the Rolls decreed accordingly. Hill. 2. Car. 2. between Duncumbus and Stint, 1 Chan. Ca. 121.

4. If A. being seised of Lands in Fee, grants a Rent-charge issuing thereout, and after devises the Lands to B. for Life, the Remainder to C. in Fee, and dies, C. may compel B. to pay the Arrears, for fear
fear all should fail on C. in Reversion; although it was urged that this was a remote Possibility. *Hill 25. Car. 2.* between Hayes and Hayes, 1 Ch. Ca. 223.

5. If A. is bound for B. and has a Counter-bond from B. and the Money is become payable on the Original Bond, Equity will compel B. to pay the Debt, though A. is not sued; for it is unreasonable that a Man should always have such a Cloud hang over him; *per North, L. Keeper, 1 Vern. 190.*

(F) **Bills of Peace to prevent Multiplicity of Suits.**

1. UPON a Motion for a new Trial after Verdicts upon two Issues, which were directed, the one to try whether the Lord of a Manor had a Grant of Free Warren, and the other, in Case he had the Grant of Free Warren, whether there was sufficient Common left for the Tenants; my Lord Chancellor said, That those Matters were properly triable at Law; but it being urged that the Bill was brought to prevent Multiplicity of Suits, and was in Nature of a Bill of Peace, a new Trial was granted upon Payment of full Costs. *Mich. 1681.* between How and the Tenants of Mugrave, 1 Vern. 22. Cary 3. Bills of Peace proper in Equity. 1 Vern. 266. where several Tenants of a Manor claimed a Right to the Profits of a Fair; and a Bill was allowed to Establish it.

2. A Bill shewing that one Commoner had recovered one Shilling, or other small Damages, against the Plaintiff for oppressing the Common, or for using the Common where he ought not; and therefore, that the Defendant, another Commoner, may accept of like Damages, for what is past, to prevent Charges at Law, is in Nature of a Bill of Peace, and proper in Equity. 1 Vern. 308.

3. A. directed B. to pay to C. what Sums C. should want, C. accordingly received two Sums of Money (amongst others) of B. for which he gave Receipts, as by the Order of A. A. and C. come to an Account, which being stated, they gave mutual Releases; but the two Sums not being entered in the Books of A. were not accounted for by C. B. not having received any Allowance from A. for the two Sums, prefers his Bill against C. to have the Money paid back. C. confessed the Receipts, but insisted that he ought not to pay the Money, for that they never had any Dealings together but upon the Credit of A. and it was to be presumed that the Plaintiff had an Allowance from A. he never paying the Defendant any thing but upon the Credit of A. and the Receipts so worded. But the Court decreed that the Defendant should return the Money, for the Plaintiff has a fair Claim against the Defendant to avoid Circuit of Suits; for otherwise it would only turn the Plaintiff on A. and A. on the Defendant again in Equity, to set aside the Release, and to have an Allowance of these Sums. *Show P. C. 17.*
(G) Cross's Bills.

1. A Cross's Bill is a Bill brought by the Defendant against the Plaintiff, in a prior Suit depending, it must be brought before Publication past in the other Suit, except the Plaintiff in the Cross Bill will go to hearing upon the Depositions already published, because of the Danger of Perjury and Subornation. Vid. Nek. Chan. Rep. 103.

2. If there be a Bill exhibited in one Court of Equity, there may be a Cross Bill in another; as if the Mortgagor exhibits a Bill to redeem in the Exchequer, the Defendant may bring a Bill in Chancery to fore-close. Per North, L. Keeper. 1 Vern. 221.

(H) Supplemental Bills.

1. The Plaintiff brought a Supplemental Bill for Discovery of more Evidence, touching a Matter of Account; to which the Defendant pleaded the former Bill, and that the Cause was heard, and an Account directed; but he was ordered to answer to all Matters in this Bill not answered unto in the former cause, but the Plaintiff not to reply or proceed any farther without order. 30 Car. 2. between Bovee and Skipwith, 2 Chan. Rep. 143.

2. In a Bill of Review a new Supplemental Bill may be added. Hill. 1682, between Price and Keyte, 1 Vern. 135.

(I) Bills of Interpleader.

(a) A Bill of Interpleader is a Bill exhibited by a third Person, who not knowing to whom he ought to look to render a Debt or Duty, fears he may be hurt by some of the Claimants, and therefore prays that they may interplead, so that the Court may judge to whom the Thing belongs; and he thereby rendered safe on the Payment: And this he may do whether any Suits be actually commenced against him in Law or Equity, or is only in Danger of being molested by the Printed Orders; it appears that the Plaintiff, in a Bill of Interpleader, must annex to his Bill, or upon filing thereof make an Affidavit that there is no Collision between him and any of the Parties.

(K) Certiorari Bills.

(a) A Certiorari Bill is a Bill brought to remove a Cause out of the Mayor's Court, his Witnesses living out of that Jurisdiction, and inferring other Matters relating to an Account not in Controversy in the Mayor's Court. After Examination of Witnesses, upon Suggestion that the Cause is out of its Jurisdiction, or that the Witnesses live out of the Jurisdiction, or upon some good Reasons given why equal Justice may not be had in such Court; but whether after a Decree in any such Court a Bill of Appeal or Review will lie to Chancery to reverse it, 2 & 3 Ed. 1 Vern. 171, 184. 443.
Bills of Review and Reversal.

1. If the Chancellor errs in a Decree in a Matter of Law, and it appears within the Decree, this Decree may be reviewed for this Error. 1 Rol. Ayr. 332.

2. So if the Chancellor errs in his Conscience upon a Matter of Fact proved before him, there may be a Review upon this Matter, because there needs no Examination; but this may be reviewed on the old Depositions; and this is usual. 1 Rol. Ayr. 382.

3. But if the Chancellor errs in his Decree upon a Matter of Fact, this Decree is final, and cannot be reviewed, because they cannot go upon a new Examination of Witnesses now; for after Publication this cannot be done. 1 Rol. Ayr. 382.

4. No new Evidence, or Matter which might have been used in the first Cause, and of which the Party had then Knowledge, shall be sufficient Grounds for a Bill of Review. 3 Chan. Rep. 76. 1 Chan. Ca. 43. S. P. Laid down by Counsel as a Maxim. 2 Chan. Rep. 45. S. P.

5. No Errors can be assigned on a Bill of Review, but Errors in Law; and such must appear from the Facts stated in the Decree; if new Matter is after discovered, it can only be assigned for Error, by Leave of the Court. Pech. 1683. between Milisbo and Williams, 1 Vern. 166. 1 Vern. 292. S. P. per Car.

6. If a Man brings a Bill of Review, to which there is a Demurrer, and the Demurrer allowed, he cannot afterwards bring a new Bill of Review. 1 Vern. 44. 1 Vern. 417. S. P.

7. So where a Bill was taken pro confesso, and a Bill of Review brought, to which the Defendant demurred, which was allowed;
and a new Bill of Review being brought, the Defendant demurred; and for Cause shewed, that a Bill of Review lies not after a Bill of Review; and the Demurrer was allowed. *Hill* 1682. *between Denmy and Filmore*, 1 *Vern.* 135. 2 *Chau. Ca.* 133. *S. C.*

8. Where a Demurrer to a Bill of Review is allowed, it may be inrolled; but if over-ruled, that cannot be inrolled, so as to prevent the Demurrer's being re-argued. *Hill* 1690. *between Woots and Tucker*, 2 *Vern.* 120. *Per Curiam.*

9. A Decree was obtained for a large Sum of Money, and a Bill of Review was brought; and new Matter assigned for Error; and the Rule of Court was pleaded, viz. that the Defendant ought first to pay the Money into Court before the Bill brought: But *per Cur*’, let him give good Security, and we will dispence with the Rule. *14 Car.* 2. *between Lovel and Darrey*, 1 *Chau. Ca.* 42.

10. On a Motion to stay Proceedings on a Decree, until the Plaintiff was heard on a Bill of Review, it being inferred upon, that a Bill of Review was in itself a *Supersedeas*, and like a Writ of Error at Law; but *per Lord Keeper*, the Decree shall be performed to a Tittle before any Bill of Review be allowed, unless the Plaintiff will swear that he is not able to perform the Decree, and will surrender himself to the *Fleet*, and lie in Prison till the Matter be determined on the Bill of Review. *Hill* 1682. *between Williams and Mellish*, 1 *Vern.* 117.

11. Upon a Motion, that a Bill of Review might be admitted, without Payment of the Costs of the former Suit, amounting to 150 l. for which the new Plaintiff, as was pretended, had been in Execution almost twenty Years, and was not able to pay them. *Per Cur*'. Upon his making Oath that he is not worth 40 l. besides the Matter in Question, and besides a Suit depending between the same Parties, to foreclose a Mortgage, the Debt being pretended to be overpaid, he shall be admitted to bring his Bill of Review without Payment of Costs. *Mich.* 1684. *between Fiston and Maclesfield*, 1 *Vern.* 264. *vid.* 1 *Vern.* 292. where it is said, that paying of Costs, upon bringing a Bill of Review, is dispensed with by a late Order. 1 *Vern.* 292.

(M) **Bills original after a Decree.**

1. A *Feme Covert*, after Separation from her Husband, had a Decree for Alimony, which Decree was confirmed on a Bill of Review; but the Husband being willing to be reconciled to his Wife, and to cohabit with her, exhibited an original Bill to set aside the Decree; and it was held by Finch Lord Keeper, assifted by North C. J. to be a proper Bill. *Hill* 26 *Car.* *between Whorwood and Whorewood*, 1 *Chau. Ca.* 250. where it is said to have been resolved, that where a Decree is temporary, or for special Ends, an original Bill lies, to shew that the Purposes of the Decree are satisfied, and to put a Period to it. *Vid.* 2 *Chau. Rep.* 128.

2. An original Bill to execute a Decree of Lands against a Purchaser, who claimed under Parties bound by that Decree, was allowed good on Demurrer thereto, by the Lord Keeper. *Trin.* 26 *Car.* 2. *between Organ and Gardiner*, 1 *Chau. Ca.* 231.

3. If
3. If a Bill be brought to have the Benefit of a former Decree, the Plaintiff cannot examine Witnesses, much less the same Witnesses to the Matters in Issue in the former Cause; but on such a Bill the Court may examine the Justice of the former Decree; but then it must be by Proofs taken in the Cause wherein that Decree is made. *Per Car.* 2 *Vern.* 409. *sid.* 1 *Cham. Ca.* 45. where it is said, that no original Bill ought to be brought to explain a Decree, on any Matter precedent to the Decree.

4. An original Bill, barely in Nature of a Bill of Revivor, and not broader or longer than a Bill of Revivor, only does not open the first Decree, to have it looked into; but if it be to enforce a Decree, or carry it further, then it opens the Cause. *Pasch.* 1706. between *Vare* and *Wardall*.

(N) **Bill taken pro confesso.**

1. If the Defendant appears to the *Subpoena*, and prays a further Day to answer, and has it, and afterwards stands out all the Processes of Contempt, the Bill will be taken *pro confesso*. *Nel. Cham. Rep.* 800. 65.

2. But if the Defendant hath not appeared, the Court will not decree the Bill to be taken *pro confesso*, but will order a Sequestration against his Real and Personal Estate, until he clears his Contempt. *2 Cham. Rep.* 283.

3. The Defendant being a Prisoner in the *King's Bench*, refused to answer; whereupon it was prayed, that the Bill might be taken *pro confesso*, if he did not answer by a certain Day; but the Court was of Opinion, that the Bill could not be taken *pro confesso*, unless the Defendant was in the Prison of the Court; whereupon he was removed by *Habeas Corpus* into the *Fleet*, and having a Day given him to answer, and he still refusing, the Bill was taken *pro confesso*, and he was ordered to be kept close Prisoner. *Nel. Cham. Rep.* 800. 50.

4. A Quaker being in Contempt for not answering upon Oath; and he being by Order brought to the Bar, my Lord Chancellor admonished him of the Peril of Persevering; but he still refusing to answer on Oath, the Bill was taken *pro confesso*. *29 Car.* 2. *Anonymus*. *2 Cham. Ca.* 237.

5. The Court of *Policies* and *Assurances* in *London*, having decreed a Bill to be taken *pro confesso*, after the first Summons, their Decree for this Reason was reversed. *1 Vern.* 223.

**C A P. XIII.**
C A P. XIII.

Bonds and Obligations.

(A) Concerning Bonds voluntarily entered into.
(B) When the Consideration of Entering into a Bond fails, in what Cases there shall be Relief in Equity.
(C) What shall be said an illegal Consideration, and herein of Bonds of Resignation, criminal Conversation, and such as deprive a Man of the Benefit of the Law.
(D) Unreasonable Bonds relieved against.
(E) Bonds given in fraud of Marriage Agreements, relieved against.
(F) Marriage Brokage Bonds, what shall be void as such.
(G) Bonds obtained from young Heirs, in what Cases to be relieved against.
(H) Bond and Penalty, in what Cases moderated in Equity.
(I) In what Cases a Defect in the Bond, or the Want of it, will be supplied in Equity.
(K) Concerning Co-obligors and Sureties.

(A) Concerning Bonds voluntarily entered into.

If a Man enters voluntarily into a Bond, tho' there was no Consideration; yet if there was no Fraud used in obtaining it, the Bond shall not be relieved against in Equity.

21 Car. 2. between Wright and Moor, 1 Chan. Rep. 157.

But a voluntary Bond shall not be paid in a Course of Administration, so as to take Place of Real Debts, though by simple Contract; but such voluntary Bond shall be paid before Legacies. Decreed by Harcourt Lord Chancellor, between Jones and Powell.

(B) When
(B) WHEN THE CONSIDERATION OF ENTERING INTO A BOND FAILS, IN WHAT CASES THERE SHALL BE RELIEF IN EQUITY.

1. IF a Lessee assigns his Lease, and the Assignee, in Consideration of such Assignment, gives him a Bond of £300, conditioned to pay him £10 a Year, and the Rent to the Lessor, and the Assignee suggests, that the Lease being forfeited (as in Truth it was) there is no Consideration; yet if the Assignee may have the full Benefit of his Agreement, as he had in this Case, by the Lessor's not taking Advantage of the Forfeiture, he shall have no Relief. Decree 25 Car. 2. between Powell and Morgan, Nis. Chan. Rep. 49.

2. If an Officer in the Army agrees to surrender his Commission to J. S. in Consideration of £100, for which a Bond is given, and he surrenders accordingly, and J. S. cannot get himself admitted, yet J. S. shall have Relief against this Bond, save only against Interest and Costs. Decree Mich. 1682, between Berrisford and Dene, 3 Vern. 98.

3. In a Bill to be relieved against four Bonds entered into by the Plaintiff's T.esator to the Defendant, for quitting his Post, and procuring the Plaintiff's T.esator to be admitted Purer of one of the King's Men of War: It was held per cur., that the Bonds could not be set aside, and that they could give no Relief, except for Interest and Costs, on Payment of the Principal. Hill. 1693, between Symonds and Gibson, 2 Vern. 308. Q. of the Circumstances of this Case, for no more of it appears in the Book.

4. But where a Bond was entered into before the Wars, conditioned to pay £40 per Annum, for twelve Years, out of the Profits of an Office, which Office was taken away by the Usurpers, but was again revived at the King's Restorati; and it was held, that the Obligor should not be liable for more than the Time which the Office continued. Decree 17. Car. 2. between Lawrence and Brierley, 1 Chau. 72.

5. So if a Citizen of London is seized and possessed of Houses of a publick Title, and likewise of a Personal Estate, and devises £1000 l. to his Daughters, and makes his Nephew Executor, who enters into a General Recognizance to the Chamberlain of London, for the Payment of the £1000 l. and the Lands of a publick Title, by the Restorati of the King, revert to the right Owner; and the Personal Estate, by the Fire of London, is very much lessened, so that it is doubted, whether the Whole will make up the £1000 l. the Recognizance shall be made Use of no farther than to make good the Value of the T.esator's Estate, over and above the Losses by Fire, and the King's Return. Decree Mich. 22 Car. 2. between Holt and Holt, 1 Chau. 190.
(C) What shall be said an illegal Consideration, and herein of Bonds of Resignation, criminal Conversation, and such as deprive a Man of the Benefit of the Law.

1. If a Man who has a Title to Lands applies himself to a Counselor, to recover such Lands, and the Counselor refuses, unless the Party will give him a Bond, conditioned to give him half the Land, when recovered, such Bond shall be delivered up, and the Counselor shall have no more than his reasonable Charges. Decreed Mich. 32 Car. 2. between Skapholme and Hart, Nal. Chanc. Rep. 477.

2. The Defendant, upon his Presenting the Plaintiff to a Parsonage, took a Bond from him to resign, which, though in it self lawful, yet the Patron making an ill Use of it, viz. by preventing the Incumbent from demanding Tithes in Kind, the Court awarded a perpetual Injunction against the Bond. Mich. 1886. between Durison and Sandys, 1 Vern. 411. vid. 1 Vern. 131. where it was sent to be tried at Law, whether Bonds of Resignation were (a) good, or not; my Lord Chancellor saying, that Precedents in the Case were not directly to the Point.

(a) Such Bonds have been held good in Law, where there appeared to be no Corruption or dmoniacal Contract; and that a Man may bind himself to resign, as in Case of Plurality, Non-residence, or till the Patron's Son is of Age, and qualified to take the Benefice; but if it had been for a Leave of the Glebe, or Tithes, or Sum of Money, that had been Simony within the Statute. Vid. Cen. Eliz. 150. Cen. Faw. 248.

3. The Guardian of an Infant presented to a Living, and took a Bond from the Incumbent to resign within two Months after Request of the Patron, or his Heirs, it being design'd that he should have the Living himself, when capable; the Patron afterwards died an Infant at the University, leaving two Sitters, who were his Heirs, and they presided the Incumbent to resign; and for not doing it, put the Bond in Suit, and recovered Judgment; and this Bill was brought to be relieved against the Bond and Judgment; and it was proved in the Caufe, that they had treated with the Incumbent, to fell him the perpetual Adwowsfon, and had said, that if he would not give 700l. for it, they would make him resign. Per Lord Keeper, the Proof in this Case lies on the Defendant's Part, and unless they make out some good Reason for removing him, I shall certainly decree against the Bond. Bonds for Resignation have been held good in Law; the Statute of 31 Eliz. against Simony, made the Penalty upon the Lay Patron; and I do not remember any Case of Resignation-Bonds before that Statute; and they have been allowed since, only to preserve the Living for the Patron himself, or for a Child, or to restrain the Incumbent from Non-residence, or a vicious Course of Life; and if any other Advantage be made thereof, it will avoid the Bond; and where it is general, for Resignation, yet some special Reason must be shewn, to require a Resignation, or I will not suffer it to be put in Suit; if it should not be so, Simony will be committed without Proof or Punishment; a particular Agreement must be proved, to resign for the Benefit of the Friend that would be predestined; and without
Bonds and Obligations.

out such Agreement the Bond ought not to be sued, but for Misbehaviour of the Parson; and here are Proofs in this Case of Endeavours to get Money out of the Plaintiff, and decreed a perpetual Injunction against the Bond, and Satisfaction to be acknowledged upon the Judgment; and the Plaintiff to give a new Bond of 200l. Penalty to reign; but that not to be sued without Leave of the Court. Mich. 1701. between Hilyard and Stapleton.

4. If a Bond is given to a House-keeper for secret Service, and it does not appear that she was a common Strumpet, Equity will not relieve against it. Mich. 1691. between Bainbour and Maning, 2 Vern. 242.

5. But if it appears that there was Turpis Contractus, and that the Woman used to Practice after that Manner, and used to draw in young Gentlemen, Equity will relieve. 1 Vern. 483. vid. 2 Vern. 187, where it is said, that tho' the Court may refuse Relief, when the Party who is culpable makes his Application; yet it is otherwise when his Executor sues.

6. The late Marquis of Anandale having had criminal Conversation with the Defendant, his House-keeper, for two Years, and having a Child by her, who afterwards died, the Marquis gave a Bond of 4000l. Penalty, conditioned to pay her 2000l. within three Months after his Death; and sometime after the Marquis executed a Deed, whereby he agreed, either to pay the 2000l. or to lay it out in an Annuity, and settle it on the Defendant Harris, and her Child; and the Marquis being dead, and this Bond put in Suit, this Bill was brought to be relieved against the Bond, as being given pro Turpi causa; and the Defendant's Cross Bill was for a Discovery of Attains, and Payment of the 2000l. and the Court dismissed the original Bill, and decreed an Account and Satisfaction for the Defendant on her Cross Bill, as being Premium Pudoris; and a Cause was cited of Ord and Blackett, where Mrs. Ord, a young Lady of about fourteen Years of Age, and intituled to 12000l. Fortune, was seduced by Sir William Blackett, who settled on her 300l. per Annum for Life; and the young Lady had a Decree for the 300l. as Premium Pudicitiae; so in a like Case in the Exchequer about a Year ago, where a Man having debouched a young Woman, and intending afterwards to put a Trick on her, made a Settlement upon her of 30l. a Year for Life, out of an Estate which he had nothing to do with; yet the Court decreed him to make it good out of an Estate which he had of his own. This Decree was afterwards affirmed on Appeal to the House of Peers. Hill. 1727. between the Marchioness of Anandale and Harris.

7. If a Man who is made Tenant in Tail enters into a Recognizance not to suffer a Recovery, such Recognizance shall be delivered up, as creating a Perpetuity. Moor 809. Adjudged upon a Reference to the Judges out of Chancery.

8. So if one settles his Land upon his Daughter in Tail, and takes a Bond from her not to commit Waste, and the Daughter levies a Fine and commits Waste, and the Bond is put in Suit; yet Equity will relieve against it. Hill. 1691. between Jervis and Bruton, 2 Vern. 251.

9. But where the Father settled Lands on his Son in Tail, and took a Bond from him, that he should not dock the Intail on a Bill to be relieved against the Bond; it was decreed to be good; for if
the Son would not have given the Bond, the Father might have only made him Tenant for Life. *Trin. 1691.* between *Freeman* and *Freeman*, 2 *Vern. 233.*

(D) Unreasonable Bonds relieved against.

1. **THE Plaintiff, for 90l. lent, got a Bond of 800l. from the Defendant, when he was drunk, and had Judgment thereon; the Defendant, in Right of his Wife, was intituled to certain Lands that were catted in other Persons in Law, in Trust for her; the Bill was to have those Lands subjected to the Plaintiff's Satisfaction here, in as much as the Defendant was intituled to the Trust in the Right of his Wife; but the Court would not give the Plaintiff any Relief, not so much as for the Principal he had really lent; and the Bill was dismisse'd. *Parch. 23 Car. 2.* between *Rich* and *Sydenham*, 1 *Chan. Ca. 202.*

(a) But if the Defendant, in this Case, had come into Equity, to set aside the Judgment for Fraud, Equity would have obliged him to pay the Plaintiff what was really lent, according to that Maxim, *He that would have Equity done him, must do it to others.*

2. A Man who had fallen out with his Mother, settled his Mansion-house on his Brother, but first took a Bond from him in his Sister's Name, that the Brother should not permit his Mother to come into the House; and the Bond was decreed to be set aside. *Mich. 1686.* between *Traitor* and *Traitor*, 1 *Vern. 413.*

(E) Bonds given in Fraud of Marriage Rights and Agreements relieved against.

1. **If A. on a Treaty of Marriage of his Sister with B. lets her have 160l. privately, that her Fortune may appear as much as was insinuated upon by B. and takes her Bond to repay it; and the Executor of A. puts the Bond in Suit against the Executor of the Sister, who survived the Husband, the Bond shall be given up as fraudulent. Decreed between *Gale* and *Lemoine*, 1 *Vern. 475.* Note: It is laid down as a Rule in Equity, that where the Son, without the Privity of the Father or Parent treating the Match, gives a Bond to refund any Part of the Portion, it is void. 1 *Saik. 156.*

2. If on a Treaty of Marriage between A. and the Daughter of B. the Mother of A. surrenders Part of her Jointure to enable her Son to make a Settlement, and B. agrees to give his Daughter 3000l. Portion; and A. without the Privity of his Mother, gives a Bond to B. to pay back 1000l. at the End of seven Years, the Bond shall be delivered up as obtained in Fraud of the Marriage Agreement. Decreed *Mich. 1718.* between *Turton* and *Benson*, 2 *Vern. 764.*

3. But where a Son, in Consideration of 3500l. which he was to have as a Marriage Portion with B. his intended Wife, covenanted that his Father would settle 300l. per Annum. on her as a Jointure; and the Father settled it accordingly; and the Son gave a Bond; to leave his Wife 1000l. if she survived him; the Son died, and the Father pretended the Wife ought not to have any Benefit of this Bond, for that it was in Fraud of the Marriage Agreement; and cited the Case of Sir Nicholas Butler and Sir Henry Chancery, where, on the Marriage
riage of Sir Henry's Son with Sir Richard's Daughter, it was agreed, that the young Couple should have so much for present Maintenance; the Son privately agrees with his Father, to release Part of it; and that was set aside, tho' there the Son, as was said, gave nothing but his own, and he might dispose of his present Maintenance as he thought fit; so here the Son gives nothing but his own Money: But per Cur', the Cases are not alike; there the Father was Party to the Articles, and deceased by the under-hand Agreement contrary to the Articles; but here the Son is only Party to the Articles, and was to have all the Portion, and might give it as he pleased; and decreed that there should be no Relief. *Mich. 1699.* between Gifford and Gifford.

6. If a Bond is given in common Form for the Payment of Money; but proved that the Consideration was, that the Obligor should marry such a Man, or should pay the Money due on the Bond, the Court will relieve against it, for Marriage ought to be free, and without Compulsion. Adjudged *Trin. 1689.* between *Key* and *Bradshaw,* 2 *Vern. 102.*

7. So if *A,* being a Widow, gives a Bond to *B,* of 100 l., if she marry again, and *B* gives a Bond to the Widow, to pay her Executors the like Sum, if she should not marry again; and the Widow soon after marries, her Bond shall be delivered up. Decreed *Hill. 1690.* between *Baker* and *White,* 2 *Vern. 215.*

(F) Marriage-Brogage Bonds, What shall be void as such.

1. If *A* gives *B,* a Bond of 100 l. for procuring him a Wife, which is effected accordingly, such Bond shall be cancelled. *Tob. 27.*

2. The Plaintiff gave a Bond to the Defendant, conditioned, in Effect, that if the Plaintiff married *F,* then the Plaintiff to pay a certain Sum of Money; the Defendant procured the Marriage, and put the Bond in Suit; but it was decreed to be delivered up, the young Gentlewoman having 2000 l. Portion, and the Man being sixty Years of Age, and having seven Children. *Paffb.* 2 *Jac. 2.*

3. It was decreed in Chancery, that a Bond of 1000 l. Penalty, for the Payment of 500 l. given for the Procuring a Marriage between Persons of equal Rank, Fortune, &c. was good; but upon an Appeal to the House of Lords, the Decree was reversed; for that such Bonds to Match-Makers are of dangerous Consequence, and tend to the Betraying and Ruining Persons of Fortune and Quality, and are not to be countenanced in Equity; and that Marriage ought to be procured by the Mediation of Friends and Relations; and that such Bonds would be of evil Example to Executors, Guardians, Trustees, Servants, and others, who have the Care of Children. Between *Hall* and *Potter,* *Show. P.C.* 76.

4. Mr. Dairell's Maid had prevailed with his Niece (who was about fifteen Years old, and lived in the same House with him, and was intituled to a good Fortune) to marry his Journey-man, without the Consent or Knowledge of her Uncle; and for the good Offices she was to do him in that Affair, he had given her a Bond of 100 l. condi-
Bonds and Obligations.

89. tioned to pay her fifty Guineas at six Months End; and after he had got the Niece's Good-will, by the Help of this Maid, and she had been prevailed with to go into a Hackney-Coach with him, in order to marry him, he gave the Maid fifty Guineas more; the Marriage was had, and the Bond not being paid, was put in Suit, and Judgment obtained on it; and this Bill was brought against the Defendants, (the Maid having married Brunning) to be relieved against this Bond, and to have the fifty Guineas repaid, for that the Bond was entred into, and the Money given for no good Consideration, but only on Account of this Marriage Brokage: And the Master of the Rolls decreed the Bond to be given up, and Satisfaction to be acknowledged on the Judgment, and the fifty Guineas received to be repaid; and if it were not done on Service of the Order, the Defendants were to pay Costs, and this notwithstanding the Husband infested by his Anfwer, that he look'd upon this as his Wife's Fortune, and had married her in Prospect of it; and this Decree was affirmed by my Lord Keeper Wright. Mich. 1700. between Goldsmith and Brunning.

5. If a Bond is given to a Father, in order to obtain his Consent to the Marriage of his Daughter, to repay Part of the Portion, if the Daughter died without Issue, where the Daughter was intitled to her Portion by a collateral Ancestor, the Bond will be set aside as a Marriage-brokage Bond. Decree of Mich. 1707. between Keat and Allen, 2 Vern. 588.

6. If the Mother, who is Guardian to her Daughter, takes a Bond from the Husband, to give her a Release within two Years after the Marriage, such Bond is of the same Nature with a Marriage-brokage Bond, and shall be delivered up; for there is no Difference between giving a Bond for procuring a Marriage, and a Bond to release Part of what became due. Decree of 8 Ann. between Duke Hamilton and Lord Mohun, 2 Vern. 652. 1 Salk. 158. S. C.

(G) Bonds obtained from young Heirs, in what Cases to be relieved against.

1. If A. lends B. and C. 200l. and they enter into a Bond to him of 1000l. to pay him 800l. within three Months after either of their Fathers died, or they were married. C.'s Father dies, and B. marries, and his Portion is in the Hands of Trustees, A. shall not subject the Portion for the Payment of the Debt, it being an unreasonable Security. 3 Chan. Rep. 75.

2. A young Gentleman, and two others, imployed one B. to borrow 500l. B. imployed C. who spoke to D. a Silkman, and bought of him Silks for 500l. A. gave a Bond and Judgment for the Money, and B. sold the Silks for 250l. and kept 50l. for his own
and C's Pains, and paid but 200l. to A. and it was decreed that the Bond should be given up upon Payment of the 200l. and Interest; but the Reporter makes a Quere as to Interest. 28 Car. 2. between Waller and Dalt, 1 Chan. Ca. 276. Nél. Chan. Rep. 314. S. P. decreed; and the Court would not give Interest.

3. The Defendant being an Exchange-Man, had for many Years past practised on young Heirs, by selling them Goods at extravagant Values, and to be paid Five for One, and more on the Death of their Fathers; and had in that Manner obtained from the Plaintiff, and two other young Gentlemen, that were Heirs to good Estates, several Securities, wherein they were bound severally and jointly in 4000l. for Payment of great Sums of Money; and the Court decreed the Plaintiff's Security to be given up, on Payment of what the Defendant really and bona fide paid to him alone, and for his own proper Use. Between Bill and Price, 1 Vern. 467.

4. A Tenant for Life, Remainder to his first Son in Tail, Remainder to his Nephew B. B. enters into several Statutes to C. for Payment of Ten for One upon the Death of A. in case he died without Issue Male in the Life of B. C. in the Life of A. brings a Bill to compel B. either to pay the Principal and Interest, or be foreclosed any Relief against the Bargain; B. by Answer declares the Bargain fairly made, and intends to abide by it, and that he would seek no Relief against it. A. dies, and C. being dead, B. brings his Bill against the Executor of C. and notwithstanding B.'s former Answer, he is relieved against the Bargain on Payment of Principal and Interest, without Costs; and my Lord Chancellor declared, that there being no further Proceeding than the Bill and Answer, that was only to double Hatch the Cheat. Decreed Hill 1690. between Wiseman and Beale, 2 Vern. 121.

(H) Bond and Penalty, in what Cases moderated in Equity.

1. If the Obligee has received the greatest Part of the Money due on the Bond, at the peremptory Time and Place, and will nevertheless extend the whole Forfeiture immediately, refusing, soon after the Default, to accept of the Residue tendered to him, the Obligor may find Aid in Chancery. Cary 2.

2. If the Plaintiff gives the Defendant a Bond of 50l. not to dispare his Trade, and the Plaintiff afterwards seeing a Customer of the Defendant's cheating a Parcel of Flounders, says unto him, Why would you buy of the Defendant, these Fish sink; and the Defendant puts the Bond in Suit, and has a Verdict, Equity will not relieve, because of the Smallness of the Sum: But per Lord Keeper, it would be otherwife, were the Penalty greater, as 100l. or upwards. Michb. 22 Car. 2. between Tale and Ryland, 1 Chan. Ca. 283.

3. The Plaintiff being in Execution, the Defendant would not discharge him without Payment of the (a) Penalty of the Bond, which he having done, the Court decreed the Defendant to refund all, except Principal, Interest and Costs. Nél. Chan. Rep. 437.

(a) But now by the 4 & 5 Ann. cap. 10, the Defendant, pend- ing any Action on a Bond, may bring in Principal, Interest and Costs in Law and Equity, and the Court shall give Judgment to discharge him.

4. If
Bonds and Obligations.

4. If one is bound by Bond to transfer 300l. East-India Stock, before September the 30th, then next, though the Stock is much risen; yet the Defendant shall be deeded to transfer the 300l. Stock in Specie, and to account for all Dividends from the Time that it ought to have been transferred. Between Gardner and Pullen, 2 Vern. 394.

5. If the Vendor of Lands enters into a Recognizance of 1000l. Penalty, for the quiet Enjoyment of the Vendee, tho' the Lofs the Vendee sustains by having the Land evienced be much greater; yet the Court will not go beyond the Penalty of the Bond. 1 Chan. Rep. 95.

6. So if a Master of a Ship covenants with the East-India Company to pay a certain Mulct for every Cloth, &c. carried in the Ship, and the Master takes J. S. as his Mate, who makes the like Agreement with him, mutatis mutandis, and gives a Bond of 50l. Penalty, that he should not carry Cloth, &c. tho' J. S. without the Knowledge of the Master, carries so many Cloths that the Mulct came to 70l. and the Master is obliged to pay it; yet he shall not, on his own Application, charge J. S. for more than the Penalty of the Bond. 1 Chan. Ca. 226.

7. So where there was a Settlement or Devise for Payment of Debts, and there was a Bond-Debt due, the Interests of which had outrun the Penalty, although such Conveyances for Payment of Debts are construed favourably; yet the Creditor on a Bill brought by him could not have more than the Penalty. 1 Salk. 154. decreted; for note, That where an Obligee is Plaintiff, a Court of Equity will not carry the Debt beyond the Penalty, because he has chosen his own Security; but it is otherwise as to the Obligor, for he who seeks Equity from him, must do it to him; and therefore,

8. If Lands are extended on a Statute or Judgment, at much less than the real Value, and the Conufee will come into Equity, to make the Conufee Account, according to the real Value, he shall not be relieved without paying the Conufee all that is due to him for Principal, Interest, and Costs, tho' they exceed the Penalty. 1 Vern. 350. So if the Obligee be delayed by Injunction. 1 Vern. 35.

9. So where the Plaintiff came to be relieved against the Penalty of a Bond, though it was so deeed; yet it was, on the Payment of Principal, Interest, and Costs; and tho' they (b) exceeded the Penalty, yet the Decree was affirmed in the House of Peers. Spoon. P. C. 15.

(1) And this seems to be the Reason why an Obligee, who enters up Judgment, but does not take out Execution, shall, notwithstanding, have Principal and Interest from the Time of Entering up the Judgment; for though, after Judgment entered, he is not entitled to Interest at Law, yet as he is entitled to the Penalty by Law, Equity will not relieve against it, without paying Principal, Interest and Costs.

(1) In what Cases a Defect in the Bond, or the Want of it, Will be supplied in Equity.

1. If one of the Obligor's Names is omitted by the Scrivener to be indorsed in the Bond, and yet he signs and seals the Bond, such an Accident is proper to be relieved against in Equity. Per Couper Lord Chancellor. 3 Chan. Rep. 99.

2. If for 200l. borrowed, the Obligor enters into a Penal Bond for 400l. but the Clerk, instead of Quadringenta Libris writes Quadraginta Libris, yet it shall be good. 2 Chan. Ca. 225.

3. If
3. If a Bond is taken away fraudulently, and cancelled, the Obligee shall have as much Benefit by it as if it were not cancelled. *Nel. Chan. Rep.* 184.

4. If a Grantee in a voluntary Deed, or Obligee in a voluntary Bond lose the Deed or Bond, they shall have Remedy against the Grantor or Obligor in Equity. *1 Chan. Ca.* 77. Quere, for these Matters are discretionary.

5. *J. S.* a little before his Death, entered into a voluntary Bond to his Housekeeper, for the Payment of an Annuity of 30l. per Ann. and the Bond being lost, his Representatives were decreed to pay the Annuity, or the Penalty of the Bond, though it appeared that there were no Wages due to her. *Hill.* 1700. between *Lightborne* and *Weedon.*

(K) Concerning Co-obligors and Sureties.

1. If two are bound jointly, and one dies, the Survivor only is liable in Equity; but it is otherwise if they were bound jointly and severally. *2 Vern.* 99. *per Cur.*

2. An Obligee shall have Remedy against a Surety where the Bond is lost, especially if the Money was lent on the Surety’s Credit. *1 Chan. Ca.* 77.

3. But if upon the Taking out Administration, two are bound as Sureties, and afterwards the Sureties take up their Bond, and procure the Prerogative Court to take insufficient Security; yet they shall not be any farther chargeable in Equity than in Law. Between *Ratcliff* and *Groves,* 1 *Vern.* 196. that a Surety shall not be further liable in Equity than at Law. *Vid.* 2 *Chan.* 22.

4. If the Principal in a Bond, being arrested, gives Bail, and Judgment is had against the Bail, and the Sureties are afterwards sued on the original Bond, and are obliged to pay the Money, the Sureties shall have the Judgment against the Bail assigned to them, in order to re-imburse them what they had paid, with Interest and Costs; and the Sureties in the original Bond are not to be contributory, for the Bail stands in the Place of the Principal. *Pash.* 1708. between *Parsons* and *Pridgock,* 2 *Vern.* 608.

5. A Bond-Creditor shall, in this Court, have the Benefit of all Counter-bonds or collateral Security given by the Principal to the Surety; as if A. owes B. Money, and he and C. are bound for it, and A. gives C. a Mortgage or Bond to indemnify him, B. shall have the Benefit of it, to recover his Debt. *Mich.* 1692. between *Maure* and *Harrison.*

6. If A. be bound in a Bond for Payment of Money, and B. be bound with him as his Surety only, and the Bond happens to be lost, Equity will set up the Bond, as well against a Surety as against the Principal, because the Bond was once a legal Charge against both. Decreed 1700. between *Sheffield* and Lord *Cavendish.*
C A P. XIV.

Charity.

(A) What shall be a good charitable Use.
(B) What shall be a superstitious Use, or a Charity, to which the King is intituled.
(C) Where a Defect, with respect to the Lands or Goods appointed, or the Persons to take, shall be supplied in favour of a Charity.
(D) What shall be said to be appointed to a Charity, and whose Persons and Estates made liable.
(E) What shall be a Mis-employment of a Charity, as by altering it from the Donor's Intentions; not increasing the Rents as the Price of Things increases, &c.
(F) Concerning Commissioners of Charitable Uses.

(A) What shall be a good Charitable Use.

1. I F a School-House is created by the voluntary Contributions of the Inhabitants of A. on the Waste of the Lord of the Manor, and the Lord enfeoffs Trustees in Trust that the Inhabitants of A. may for ever have a School, as of the Gift of the Lord of the Manor. This is not a Free-School, and so not a Charity within the Statute of 43 Eliz. for which the Inhabitants have a Right to sue in the Attorney General's Name. 2 Vern. 387.

2. So if the Lord of a Manor should create a Mill, and convey it to Trustees, to the Intent that the Inhabitants might have the Convenience of Grinding there; this would not be a Charity within the (a) Statute; per L. Keeper, 2 Vern. 387.

(a) The 43 of Eliz. cap.
4. Enacts, That the Commissioners shall enquire of the following Uses as good and charitable, viz. for Relief of aged and impotent, and poor People; for Maintenance of sick and maimed Soldiers, Schools of Learning, Free-Schools, Scholars in Universities, Houses of Correction; for Repairs of Bridges, of Ports and Havens, of Canals, of Churches, of Sea Banks, of Highways; for Education and Preferment of Orphans, for Marriage of poor Maids, for Supportation and Help of young Tradesmen, of Handicrafts-men, of Persons decay'd; for Redemption or Relief of Prisoners or Captives, for Ease and Aid of poor Inhabitants concerning Payment of Fifteenths, setting out of Soldiers, and other Taxes, for other Things within the Purview of the Statute. Vid. Dake's Char. Uses, 109.

3. If
Charity.

3. If Money is given to maintain a preaching Minister, though this is no Charitable Use (a) mentioned in the Statute; yet per L. (4) A Gift of Lands, &c. Keeper, and two Judges, it is within the Equity of the Act; and it was ordered to be paid accordingly. Pop. 139.

4. An Impropritor devised to one that served the Cure, and to all that should serve the Cure after him, all the Tithes and other Profits, &c. though the Curate was incapable of taking by this Devise, in such Manner, for want of being incorporate, and having Succession yet my L. Finch held, that the Heir of the Devisee should be feized in Truth for the Curate for the Time being. 2 Vint. 492.

5. A Devise of Lands to the Company of Leather-Sellers in London, to maintain a Charitable Use there, was upon an Appeal to my L. Chancellor held good, notwithstanding the Statute of Wills prohibits the Devising to a Corporation in Mortmain; and there said that there were several Precedents of the Kind. Duke's Cha. Ufes 80.

6. So if there be a Devise to the principal Fellows and Scholars of Jesus College in Oxon, and their Successors, to find a Scholar of his Blood; though this Devise be void in Law, because the Statute of 34 H. 8. of Wills disallows of Devises to Corporations in Mortmain; yet it shall be good, as a Limitation and Appointment to a Charity, within the 43 Eliz. De Lay's Cafe, Hob. 136.

7. So where a Devise was of Lands to Trinity College in Cambridge, for the Maintenance of a Fellow there; and if any Cavil should hinder this Devise, or that the same cannot go to the College by Reason of the Statute of Mortmain, then he devised the same to S. S. and his Heirs; and upon an Information exhibited by the Attorney General, to have this Land established in the College, it was decreed accordingly, notwithstanding the said Statute and the said Clause in the Will. 1 Lev. 28. The King versus Newman in Can.

(B) What is a superstitious Use, or a Charity, to which the King is intitled.

1. If any Lands, Tenements, Rents, Goods, Chattels, &c. have; or shall be given, towards the finding a stipendary Priest, for Maintenance of an Anniversary, or Obit Lamps, or Torches, &c. to be used at certain Times, to help to save the Souls of Men out of supposed Purgatory: These are superstitious Uses, which are given to the King. Vid. the Statute 1 E. 6. cap. 14. Cro. Fac. 51, 4 Co. 104. Duke's Char. Ufes 106.

2. But if there be a Charitable Use intermixed with the Superstitious Use, so that they may be distinguished, there the King shall have only so much as is given to the Superstitious Use. 4 Co. 104.

3. If Lands are given upon Condition to find a Priest, this is a Superstitious Use within the Words. 4 Co. 104.
4. If Lands are limited to a Man's Kindred, to pay certain Sums of Money to Superflitious Uses, the King shall have the Lands; but if it had been so limited, that his Friends or Kindred should have the Residue of the Profits above the Superflitious Use, this had saved the Land. *Duke's Char. Uses* 106. and the King should only have the Sums of Money thus limited.

5. If One gives 20l. per Ann. for the finding of a Priest, and appoints to the Priest 10l. per Ann. in this CASE all shall go to the King, for the Residue shall be intended for the finding of Necesaries; otherwise it is, if a Condition be annexed to the Gift to give 10l. per Ann. to a Priest: For there the King shall have but 10l. *Duke's Char. Uses* 107.

6. An Inquisition having found that one A. had devised to J. S. and her Heirs, absolutely, without any Trust that she did it for the Good of her Soul; and that the Devisee owned that this Estate was not hers, but belong'd to God and his Saints: And the Court of K.B. held that this could not be averred to be a Superflitious Use, by Reason of the Statute of Frauds; and said, that a Monk may take now by Purchase, and seemed to think so of a Nun: But an Information being preferred in the Exchequer for a Discovery, and an Application of the Devise to an Use truly charitable, it was held that the Statute of Frauds did not bind the King; that he, as Head of the Commonwealth, is intrusted and empowered to see that nothing be done to the Disburthen of the Crown, or the Propagation of a False Religion; and that at End intitled to pray a Discovery of a Trust to a Superflitious Use: And that this being a Superflitious Use, the King shall order it to be applied to a Proper Use. *4 W. and M.* between the King and Lady Portington, 1 Salk. 162.

7. If a Charity is devised to the Poor indefinitely, the King shall have the Difposal thereof. *Nel. Chan. Rep.* 243.

8. A. having devised 1000l. to be applied to such Charitable Uses as he had by Writing under his Hand formerly directed, and no such Writing being to be found, it was held that the King should appoint, who gave it to the Mathematical Boys in Chriff's Hospial; which was decreed accordingly; and that the Parties should be indemnified from the Writing referred to. *Hill. 1683.* between the Attorney General and Syderfin, 1 Vern. 224.

9. A. being a beneficed Clergyman, devised 600l. to Mr. Baxter, to be distributed by him to sixty pious ejected Ministers, and adds that he did not give it them for the Sake of their Nonconformity, but because he knew many of them to be pious and good Men, and in great Want: He also gave Mr. Baxter 20l. and 20l. more to be laid out in a Book of his. Intituled, Baxter's Call to the Unconverted, And it was held by North L. K. that this was a superflitious Use, which though void, yet the Charity is good, and shall be applied in eodem genere; and therefore decreed it for the Maintenance of a Chaplain for Chelsea College. *Trin. 1684.* between the Attorney General and Baxter, 1 Vern. 248. But this Decree was reversed, 1 W. and M. by the Lords Commissioners, 2 Vern. 105.

10. A. devised a Salary for Maintenance of Independent Lectures in three Market-Towns, and devised the Estates thus charged to his Nephew, who afterwards devised it for the Payment of his Debts; a Bill was brought to have the Lands sold for Payment of the Debts; and afterwards, upon an Information for the Charity, the growing Payments
Payments and Arrears were decreed, and the Independent Lectures changed into Catechistical Lectures in the same three Market Towns; and this, though there were not sufficient to pay the Debts. Combe's Cafe said to be decreed, 1679. 2 Vern. 267.

11. A. by Will charged his Estate with an Annual Sum for the Maintenance of Scotchmen, in the University of Oxon, to be sent into Scotland to propagate the Doctrine of the Church of England there; and Presbyters being settled in Scotland by Act of Parliament, the Question was, whether this Device should be void, and so fall into the Estate, and go to the Heir; or should be applied Cy Pres, but there is no Resolution. Pach. 1692. between the Attorney General and Gis, 2 Vern. 266.

(C) Where a Defect with Respect to the Lands, Goods, &c. appointed, or the Persons to take, shall be supplied in Favour of a Charity.

1. An Appointment of Lands to a Charity will be good, though there be neither Livery of Seisin nor Attornment. Duke's Char.Uses 109, 110.

2. If a Debt owing by Statute, Bond, Judgment, or Recognizance, which in Law is a Thing in Action, is given for the Creation of a Free-School, this shall be a good Appointment within the Statute to maintain a Charitable Use: Decreed 3 Car. 1. Duke's Char. Uses 79.

3. If Copyhold Lands are devised to a Charity, they shall pass without any Surrender, and shall bind the Heir; but the Lord shall not lose his Fine. Duke's Char. Uses 110.

4. Tenant in Tail may devise Lands to a Charity, and such Device shall be good, though there was neither Fine or Recovery. Duke's Char. Uses 110. 2 Vern. 453. S. P. decreed.

5. If a Feme Covert Administraatrix devises to a Charity, it shall be good. Damus's Cafe, Moor 822.

6. But if an Infant, Lunatick or Feme Covert, do by Will or by Deed give any Thing to a Charitable Use, it shall be void. Duke's Char. Uses 110.

7. If A. devise Freehold Lands to a Charity, but the Will is not executed in the Presence of three Witnesses according to the Statute of Frauds, this Will being void shall not operate as an Appointment. Mich. 1707. Attorney General versus Barnes, 2 Vern. 597. 1 Salt. 163. S. P.

8. If Lands are given to Church-Wardens of a Parish to a Charitable Use, although the Device be void in Law, they not having a Corporation capable of taking in Succession; yet they shall be capable for this Purpose: Decreed. Duke's Char. Uses 82.

9. If Lands are devised to a Corporation by a wrong Name, as to the Mayor and Chamberlain, instead of Mayor and Commonalty; yet as the Intent of the Testator appears it shall be good. Mayor of London's Cafe. Duke's Char. Uses 83.

10. If Money is given to a Parish, generally it shall be intended to be to the Poor of the Parish. 1 Chan. Ca. 134.

Cc

11. Money
11. Money was given for the Good of the Church of Duke; and this was resolved to be a good Gift, notwithstanding these general Words. Duke's Char. Uses.

12. If one devises Lands to A. for Life, Remainder to the Church of St. Andrew's in Holborn; in this Case the Patron of the Church shall have this Remainder. Duke's Char. Uses 113.

(D) What shall be laid to be appointed to a Charity, and whose Persons and Estates made liable.

1. If one devises the Rents of his Lands to a Charitable Use, by this the Land itself is devised; so a Devise of the Rents and Profits. Duke's Char. Uses 112.

2. If a Man, who has made a Lease of his Lands, devises the Rent to a Charity, this shall be construed largely, for a Devise of the Rent then reserved, or afterwards to be reserved on an improved Value. Duke's Char. Uses 71.

3. If A. seizes of a Manor of the Yearly Value of 240 l. devises several Legacies, and particularly to his Heir at Law 40 s. and then adds, That being determined to settle for the Future, after the Death of me and my Wife, the Manor of F. with all Lands, Woods, and Appurtenances to Charitable Uses, I demise to M. N. &c. upon Trust that they shall pay yearly, and for ever, several particular Sums to Charitable Uses, amounting in the Whole to 120 l. per Ann. and gives the Trustees something for their Pains: And there being an Overplus, it was decreed to go in Augmentation of the Charities, it appearing to be the Testator's Intent to settle the whole Manor; and that the Heir should have no more than the 40 s. Between Arnold and Attorney General, Show. P. C. 22. in Domo Proc. affirmed on Appeal.

(a) Though Purchasers for valuable Consideration without Notice, are by the express Words of the Statute exempted from having their Purchases impeached, yet the Persons selling, and disposing of Lands, Goods, &c. in Breach of their Trust, and having Notice of the Charitable Use, shall make Satisfaction; so shall their Heirs and Executors, as far as they have Effect. Duke's Char. Uses 66.

4. If two Executors jointly intermeddle with the Receipt of Money, and one trifles the other with Money given to perform a Chattitable Use, and he waives it, and dies involuntarily, the surviving Executor shall be (a) charged therewith; but focus, if he had not meddled in the Execution, or had not joined in proving the Will. Duke's Char. Uses 66.

5. If a Rent-charge is granted to a Charitable Use out of Lands, in several Counties, the Commissioners are to charge this Rent by their Decree, upon all the Lands in every County, according to an equal Distribution, having a Regard to the yearly Value of all the Lands charged, and cannot by their Decree charge one or two Masters with all the Rent, and discharge the Residue in other Counties and Places, for that would be decreeing contrary to the Intent of the Donors. Duke's Char. Uses 65.

6. The Town of A. was, upon a Commission of Charitable Uses, decreed liable to a Charity; and the Grantees distrained for the whole
Charity.

whole on One, who held only Part of the Lands chargeable: And it was held that the whole Town being made chargeable, they might sue for the whole on any Part; but a Commission was awarded to apportion each Man's Share. 1 Chan. Rep. 91. Vide 1 Salk. where it is held that all the Tenants of Lands, liable to a Charity, need not be made Parties to the Suit.

(E) What shall be a Mif-employment of a Charity, as by altering it from the Donor's Intentions, not increasing the Rents as the Price of Things increase, &c.

1. If one who hath a Lease of Lands charged with a Charity, commits Waste, this is such a Mif-employment for which the Commissioners may decree the Lease void. Vid. Duke's Char. Ufes 115.

2. To keep the Profits of Land or Money given to a Charitable Use in one's Hands, whether it be concealed or not; not to pay it when it is due, or convert it to other Use, is a Mif-employment, for which the Commissioners may decree Satisfaction. Duke's Char. Ufes 116.

3. If Money be given for the Relief of the Poor, and it is paid out to build a Conduit, this is a Mif-employment: Adjudged 3 Car. 1. Duke's Char. Ufes 94.

4. Several different Charities were given to a Parish, viz. 12l. per Ann. for repairing the Church, 6l. per Ann. for mending the Highways, and so much to the Poor; in all 40l. per Ann. And the Trustees having paid 10s. a Day to a Lecturer, and laid out other Parts of it for the Service of the Parish, but not according to the Directions of the Donor: It was held by my Lord Chancellor, that if it should be admitted that Parishioners might charge and apply Parochial Charities as they thought fit, it would destroy all Charities; and therefore ordered, that for what was paid the Parish they should not be allowed a Parting; but that for the other Payments they should be allowed the Money; being promiscuously paid for several Years before; but that for the Future, it should be paid according to the Terms of the Charity. Pach. 1682. between Man and Ballet, 1 Vern. 42.

5. A Man having devised 50l. per Ann. for a Lecturer in Polemical or Casuistical Divinity, so as he was a Bachelor or Doctor in Divinity, and fifty Years of Age, and would read five Lectures every Term, and would at the end of every Term deliver fair Copies of the same, to be kept in the University; and in Default of such Lecturer, he gave that 50l. per Ann. to College in Oxon. With the Consent of the Heir, Application was made to mitigate the Rigour of the Qualifications, viz. That a Man of 40l. might be capable; that three Lectures may be sufficient every Term; and that if fair Copies were delivered in every Year, it may suffice: But my L. Chancellor refused to intermeddle, though no Opposition was made, and said, that it was not in the Power of the Heir to alter the Disposition of his Ancestor. Pach. 1682. Attorney General on the Behalf of Peter-house College in Cambridge, &c. 1 Vern. 55.

6. If
6. If Trustees under-let the Land, and make a Lease good by Law, yet the Commissioners may make this Lease void, and order the Settlement of the Land on other Trustees. *Duke's Char. Ufes* 123.

7. If one give his Land, then worth 10l. a Year, to maintain a Preacher, School-master, and poor People in Deal, and the Land after comes to be worth 100l. a Year, it must be all employed to increase the several Charities. The School of *Thetford's Cafe*, 8 Co. 130. where Lands were set at an Under-value, and had been for a long Time so enjoyed, the Lease was set aside, and the Tenant decreed to pay the Arrears of the Rent according to the full Value. *2 Vern. 414.*

8. If in the Constitutions for founding an Hospital, it was ordained that no Lease should be made for above Twenty-one Years, and the Rent not to be raised, nor above three Years Rent taken for a Fine, though the Tenant of the Hospital Lands is intitled to a beneficial Lease upon Renewal; yet this Constitution is not to be followed according to the Letter; but as Times alter, and the Price of Provisions increases, so the Rent ought to be raised in Proportion. *Mich. 1707. Watson and Hinworth Hospital, 2 Vern. 596. Vide 2 Vern. 746. S. P.*

**Concerning Commissioners of Charitable Uses.**

1. **Commissioners may appoint Trustees, and enable a certain Number, and their Heirs, to demife the Lands, &c. for the best Advantage of the Charity; or that when such a Number of them die, the Survivors may elect Others, and so continue the Number appointed. *Duke's Char. Ufes.*

2. If Trustees to a Charitable Use mis-behave themselves by making Leases at low Fines, and small Rents, &c. the *Commissioners have Power to enquire of Abuses, of Breaches of Trust, of Negligence, of Mis-employment, of not Employing, of Concealing, of defrauding, of Mis-converting, of Mis-government, &c. See this Statute expounded, 2 scaf. 710.*

3. The Commissioners are not to enquire of the Mis-employment of any Charitable Use in another County, than that wherein the Lands given to such Use do lie. *Duke's Char. Ufes* 118.

4. If the King erects a Free-School, and gives Lands to it, and appoints four Knights, and their Heirs Males of their Bodies, to be Governors and Visitors, and that none others shall intermeddle but Knights, by the saving in the Statute the Commissioners are excluded from having any Jurisdiction. *Duke's Char. Ufes* 125.
Commissions for Examining of Witnesses.

5. So if Lands be given to a Charitable Use, and the Donor appoints Trustees, and likewise Visitors, to see the Trust performed; in this Case the Commissioners cannot, by Virtue of the Statute, intermeddle. But if the Visitors are Trustees also, then the Commissioners shall have Jurisdiction. *Duke's Char.* Ufis 124.

Things excepted in the Statute, and concerning which the Commissioners can have no Jurisdiction, are those relating to Colleges and Halls in either of the Universities of *Cambridge* and *Oxford*, the Colleges of *Westminster*, *Eton*, and *Winchester*, Towns Corporate, where there are Special Governors, Colleges, Hospitals, or Free Schools, which have Special Visitors, or Overseers appointed to them by the Founders; also Purchasers for valuable Confederation without Notice, &c. are protected by the Statute.

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CAP. XV.

Commissions for Examining of Witnesses.

(A) In what Cases a Commission will be granted.

(B) Concerning the Commissioners, and the Execution and Return of the Commission.

(A) In what Cases a Commission Will be granted.

1. *If a Man is to perfect his Answer upon Interrogatories, or to be examined for a Contempt, although the Rule of Court be, that he shall be examined in four Days, or stand committed; yet if the Party be in the Country, he shall have a Commission to take his Examination.* *Vern.* 187.

2. If certain Exhibits of Writings, which were given in at a Commission for Examination of Witnesses, are altered and interlined since the Commission executed, a new Commission will be granted to examine as to this Matter; but not as to the Merits on new Interrogatories.
Commissions for Examining of Witnesses.

terrogatories. Hill. 25 Car. 2. between Richardson and Loutber, 1 Chan. Ca. 273. tho' it was objected, that the Party had a Commissioner present, and that he could not know it, but by the Discovery of his Commissioner, who ought not to discover the Examination.

3. But where a Witness alleged, that he had mistaken himself at a Commission, and the Commission being returned, he came to London, and made Oath, that he was surprized; upon which a special Commission issued to re-examine the Witnesses, which was done accordingly; but this special Commission was suppressed by the Master of the Rolls, by the Advice of the Six Clerks, as contrary to

(a) But it is now the Practice of the Court, to obtain an Order, on Motion, and Affidavit of Surprise, to have the Witnesses examined one was in Court, or his Depositions amended, the Witnesses being first examined before an Examiner; but when he is examined in Court, or when his Depositions are read, the Order for that Purpose must be produced in Court.

4. If after Publication, any new Matter arises upon Debate, or Hearing the Cause, which may be thought material by the Court, a new Commission may be granted. 2 Chan. Ca. 75.

5. A general Affidavit of having material Witnesses, beyond Sea, shall not be sufficient for a new Commission; but the Witnesses must be named in the Affidavit, and the Point mentioned to which they can materially depose. 1 Vern. 334.

Concerning the Commissioners, and the Execution and Return of the Commission.

1. If the Commissioners misbehave themselves, the Court may grant an Attachment against them; but regularly a Commission cannot be suppressed, but upon a Reference and Certificate of Irregularity. Cary 43.

2. If a Commissioner in a Cause be himself to be examined as a Witness, he must be first examined; and if others be before him examined in his Presence, he cannot afterwards be examined, having heard the former Examinations; and for that Cause a Commissioner was examined in Court, his former Depositions being suppressed. 2 Chan. Ca. 79.

3. When a Commission is returnable sine dilatione, if it be within the Kingdom, it must be returned by the second Return of next Term; if executed afterwards, it is void, and the Depositions ought to be suppressed. Per Curæ, 2 Vern. 197.

C A P. XVI.
CAP. XVI.

Common.

(A) In what Matters relating to a Common Will a Court of Equity interpose and exert a Power.

1. If one Commoner, who had recovered 10. Damages at Law against another for Oppressing the Common, brings a Bill against the Defendant at Law, to examine his Witnesses, and prove his Right of Common in perpetuum rei memoriam, such a Bill will not be admitted till such Commoner has recovered at Law in Affirmance of his Right. Hill. 1684. between Pawlet and Ingres, 1 Vern. 308.

2. But if the Bill had been, that one Commoner had recovered 1s. or other small Sum for Damages against the Plaintiff for Oppressing the Common, or for using the Common when he ought not, and therefore that the other Commoner may accept of the like Damages for what was past, to prevent Charges at Law, that had been in the Nature of a Bill of Peace, and proper in this Court. 1 Vern. 308, 309.

3. A Man having granted to J. S. Common in his Down for 100 Sheep and five Rams, the Bill complained, that the Grantor over-flock’d the Common; so that the Plaintiff, the Grantee, could have no Benefit of the Grant, and prayed the Grantor might be enjoined not to over-flock, &c. but upon Debate the Court (a) dismissed the Bill. Mich. 1689. between Fines and Cobb, 2 Vern. 116.

(a) For a Commoner may have an Action, if the Lord, or any other Person sucharges the Common. F. N. B. 125. 9 Co. 112. S. P.

4. If the Lord of a Manor incloses Part of the Common, and suggests that it is only an Improvement within the Statute of Morton, and the Tenants, by Force, throw open the Inclosures, Chancery will grant an Injunction, and direct an Issue to be tried at Law, whether there was sufficient Common left beyond what was inclosed. Decreed Hill. 1697. between Arthington and Fawkes, 2 Vern. 306. 2 Vern. 301. S. P.

5. There was an Agreement for an Inclosure, but all that claim’d Common were not Parties to it; and although it was inflicted upon, that to decree the Agreement would be to do a manifest Wrong; yet...
yet the Court decreed it, and said, that if any that had Interest were not Parties to the Agreement, they could not be bound, and so at no Prejudice; but however, that it should not be in the Power of Two or Three wilful Persons to oppose a publick Good. 1 Chan. Ca. 48.

6. So where an Agreement was between the Lord and some of the Tenants to flint a Common, it was decreed, though opposed by one or two humourous Tenants. Trim. 1689. between Delabere and Beddingfield, 2 Vern. 103. and there said, that an Agreement to flint was more favoured than an Agreement to inclose.

7. But in a Case where it was not charged in the Bill, that the Defendant would be benefitted by the Inclosure, nor charged that there was any Agreement for an Inclosure; on a Demurrer, for these Reasons, the Bill to compel the only Freeholder in the Manor to consent to an Inclosure, was dismissed. 1 Chan. Rep. 259.

8. A Common which has been inclosed for thirty Years, shall not afterwards be thrown open. Hill. 1681. between Silway and Campson, 1 Vern. 32.

9. So where there was a Decree for an Inclosure twenty Years since, to which the Husband agreed; but the Wife having an Estate within the Manor, and her Husband's Agreement not in Strictures binding her, she would now disturb the Inclosure; but it being proved that she was benefitted by the Inclosure, the Court decreed that it should stand. Puscb. 1687. between Rothwell and Widdrington, 1 Vern. 456.

10. If the Lord of the Manor enfranchises a Copyhold with all Commons thereunto belonging or appertaining, and afterwards buys in all the other Copyholds, and then disputes the Right of Common with the Copyholders he had enfranchised, and recovers at Law; tho' the Common be (b) extinct at Law, yet it shall subsist in Equity, and the same Right of Common as belonged to the Copyhold will be decreed. Hill. 1691. between Syant and Stuker, 2 Vern. 250.

(b) Where the Lord's Enfranchising a Copyhold, with all Common thereunto belonging, is an Extinguishment at Law. Vid. 2 Co. 253. Task. 189. Moore 667. 1 Browel. 173, 250. and where a Release of Common in one Acre is an Extinguishment of the whole Common, or where the Unity of Possession of the whole Land makes an Extinguishment, vide 4 Rep. 31. 1 Litt. 123. 8 Rep. 136.
C A P. XVII.

Conditions and Limitations.

(A) Who are to take Advantage of a Condition, or will be prejudiced by it.

(B) In what Cases the Breach of a Condition, or the Non-performing of a Condition precedent or subsequent, will be relieved against, the Waster resting in Compensation.

(C) In what Cases a Gift or Devise, upon Condition not to marry without Consent, shall be good and binding, or void, being only in Terrors.

(A) Who are to take Advantage of a Condition, or will be prejudiced by it.

If by a Settlement Lands are limited to the second Son in Fee, provided that if the eldest Son die without Issue, the second Son shall, within six Months after the Death of the eldest Son, pay 100£ to a Sister; or in Default thereof the Land to go to the Sister and her Heirs; and the eldest Son dies without Issue, and the Sister dies within the six Months; upon the second Son's refusing to pay the Money, the Land shall go to the Heir, and not to the Executor of the Sister; for to decree otherwise, would be to destroy the known (a) Difference between a Condition and a Limitation. Decreed, with the Assent of the two Chief Justices, Trin. 1686. between the Earl of Winchelsea and Wentworth. 1 Vern. 402, 430. S. C.

(a) Words which create a Condition are, upon Condition, so that, to the Intent,

to pay, to the Excheq. Co. Lit. 204. Hard. 10, 11. but as to Words which make a Condition in a Will, the'not in a Deed, vol. 10. Co. 40, 41. And there it is held, that if there be express Words of Condition annexed to the Estate, it cannot be construed a Limitation, as the Words, Quamvis, dummodo, dum, quosquis, durante, &c. But this Opinion is now exploded; for the Words which properly create a Condition must be used; yet if the Estate be limited over, it shall be a Limitation. 2 Brow. 65, 66. 1 Red. Abr. 51. 1 Med. 86. And per Hale Ch. Baron. There is no other Case to warrant the contrary Opinion, but that of 10 Co. 40. and by him it may properly be called a conditional Limitation, 1 Vern. 199. of which the Heir cannot take Advantage, tho' it may determine the Party's Estate without Entry or Claim, which seems to be the chief Difference between a Condition and Limitation. Also if Lands are devised to the Heir at Law, upon Condition that he pay a Sum of Money, or do any other Act; this, on Failure of Performance, shall be construed a Limitation, tho' not mentioned; for if it was a Condition, no Body could take Advantage of it, the Benefit of Conditions annexed to the Real Estates belonging to the Heir, as those to the Personal do to the Executor. Co. Eliz. 203. 161. Co. 22. 1 Vern. 112. 2 Med. 7. 1 Lawm. 309.
2. A Man seised in Fee, devised Lands to his Daughter, and her Heirs, and his Mind is, That if his Son pay to her 50l. then his Son shall have Land; the Money was not paid at the Day; the Daughter sold the Land; and it was decreed against the Vendee, the Son paying the Money, for the Court took it to be but in Nature of a Security. Hill. 30 Cor. 2, between Bland and Middleton, 2 Chan. Ca. 1. But the Reporter being of Opinion, that the Son took but an Estate for Life, adds a Quere, why a Fee-simple should be (as it was) decreed him, seeing thereby he had more Benefit by the not performing the Condition, than if he had performed it.

3. A Man devised Lands called S. to his younger Son, and declared, that if he should be any Way hindred from enjoying them, then in Lieu thereof, he should have all the Land at B. A Moiety of the Lands called S. were evicted from the Devisee, who thereupon insisted to have the whole Lands at B. but the Court decreed that he should have as much of the Lands only at B. as were equal in Value to those evicted. Mich. 1684. betweenTyler and Tyler, 1 Vern. 270.

4. If Legacies are given by Will to four Grandchildren, upon Condition, that as they come of Age, they shall release all claims to the Testament's Estate, this Condition must be taken distributively, and such only as refuse to release shall forfeit their Legacies. Per L. K. 2 Vern. 478.

5. A Man having Issue a Son by the first Venter, and two Sons and six Daughters by a second Wife, settles his Estate in Question on his eldest Son by his second Wife in Tail Male, Remainder to his second Son by his second Wife, and the Heirs Males of his Body; and in Default of such Issue, to the Son by the first Wife; provided, if both his Sons by the second Wife died, without Issue Male; so that the Estate came to the eldest Son; that then his eldest Son, or his Heirs, should, within four Months after the Estate came to him, or them, pay 1000 l. to his Daughters; or in Default, the Trustees therein named to enter and raise it: The Son by the second Wife entred and suffered a Recovery of one Moiety of the Lands, and died without Issue, and the other Son by the second Wife died also, by which one Moiety of the Land came to the Heir of the eldest Son by the first Wife; and the Moiety thus descended was decreed liable to the whole Sum of 1000 l. although it was objected that the Estate never came to the eldest Son; and tho' a Moiety came to his Heirs, yet as so great a Benefit did not accrue to him as was intended, he should be only answerable in Proportion. Mich. 1698. between Hooley and Booth, 2 Vern. 359.

6. F. S. having Issue three Sons, William his eldest, Nathaniel his second, and Daniel his third; William died in the Life-time of his Father, leaving Issue only a Daughter; afterwards the Father devises the Estate in Question to Anne his Wife for her Life, and after her Death to his Son Daniel, and his Heirs; provided that if Nathaniel do, within three Months after the Death of my Wife, pay to Daniel, his Executors or Administrators, the Sum of 500 l. then the said Lands shall come to my Son Nathaniel, and his Heirs; the Wife lived several Years after, and during her Life, Nathaniel died, leaving the Plaintiff his Heir, and the Wife afterwards dying, the Plaintiff brought this Bill within three Months after her Death, praying, that upon Payment of the 500 l. he might have a Conveyance of the Estate; and the principal Point in the Case was, whether this 500 l. being
Conditions and Limitations.

being to be paid by Nathaniel within a limited Time, and he dying before that Time came, whether his Heir at Law could now, on Payment of the Money, make a Title to these Lands; for it was agreed that he was not Heir at Law to the Testator; and it was infused upon, that he could not; that this was a Condition precedent, and meerly personal in Nathaniel, who had neither jus in re, nor ad rem, and could neither have devised or releas’d, or extinguish’d this Condition; and being a bare Possibility, and he dying before it was performed, his Heir could not make it good; and tho’ the Word Heirs be used in the Devise to Nathaniel, yet that is not designed to give them any Estate originally, but to denote the Quantity of the Estate which Nathaniel was to take; and for this were cited Lampet’s Case, 10 Co. and Brett and Rigden’s, Plow. Co. On the other Side it was insisted, that this was like the common Case, Ca. Lit. 205. 219. b. where a Feoffment is made, on Condition that the Feoffor shall, before such a Day, &c. there if the Feoffor die before the Day, his Heir may perform the Condition, for the Reasons there mentioned; and that it being so at Law, it should still be construed more liberally in Equity, where the Letter of a Condition is not always required to be strictly performed; and for this was cited 1 Can. Ca. 89. Bertie and Falkland, 3 Can. Ca. That the Possibility of performing this Condition was an Interest or Right, or Scientia juris, which vested in Nathaniel himself; that he survived the Testator; and therefore this differed from Brett and Rigden’s Case, Plow. Co. 110. that consequently such Right, Possibility or Interest, descended to his Heir, and might be performed by him; as before the Statute de domis, the Possibility of Reverter descended to the Heir of the Donor; and for this were cited Purfoy versus Rogers, 2 Saund. Cro. Car. 338. Cro. Jac. 591. 8 Co. Mathew Manning’s Case, and others; the Cause being first heard by the Master of the Rolls, was thought by him a Matter of great Difficulty, and therefore he appointed the Counsel to speak to it when the Court was full. Afterwards it was decreed by my Lord Chancellor, with the Assent of the Master of the Rolls, for the Plaintiff, on Litt. Scf. 334, 335. And my Lord Chancellor said, that though a Condition, in Strictness of Law was not devisable, yet since the Statute of Uses, the Devisee may take Benefit of it by an equitable Construction, &c. and that Nathaniel might have releas’d or extinguish’d this Condition. Mich. 5 Geo. 1. between Marks and Marks.

(B) In what Cases the Breach of a Condition, or the not performing a Condition precedent or subsequent, will be relieved against, the Matter resting in Compensation.

1. If A. conveys Lands to B. &c. and their Heirs, upon Trust, that if C. the Son of A. within six Months after the Death of A. should secure to Trustees 500 l. for the younger Children of C. then after such Security given, to convey to C. and his Heirs, and until the Time for giving such Security, in Trust for the eldest Son of C. and in Default of such Security to convey to such eldest Son and his Heirs; if C. dies before any such Security given; yet this Condition
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(a) Conditions precedent being only in Nature of a Penalty, the Intent of the Trust shall be regarded, which was to secure 500 l. to the younger Children. Trin. 19 Car. 2. between Wallis and Crimes, 1 Chinn. Ca. 89. 1 Mod. 307. S. C. citad.
must at Law be punctually performed before the Estate can vest. A Condition subsequent is when the Estate is executed, but the Continuance of such Estate depends on the Breach or Performance of the Condition; the this Dissolution is often mentioned in Courts of Equity, yet the prevailing Dissolution is to relieve against Conditions, where Compensation can be made, whether they be precedent or subsequent, as appears by this and several other Cases.

2. The Testator devised his Estate to the Defendants in Trust, for the Use and Benefit of the Plaintiff, but declared his Will to be, that the Plaintiff should have no Benefit of the Devise, unless the Plaintiff's Father should settle on the Plaintiff two full Thirds of the Estate settled on the Father on his Marriage; and in Default thereof the Estate to the Defendants; the Father made no Settlement on the Plaintiff, but devised all his Estate to him for Life, but subject to the Payment of Debts; it was admitted, and so adjudged by the Court, that this Estate was executed in the Plaintiff by the Statute of Uses, and consequently that this is a Condition subsequent; yet the Court declared, that though Conditions subsequent, which are to devest an Estate, need not be literally performed; yet even in such Case, if the Party cannot be compensated in Damages, it would be against Conscience to relieve, and therefore ordered the Master to examine the Value of the Estate devised, and the Amount of the Debts which that Estate was charged with, and to report to the Court, whether, after Debts paid, there would be two full Thirds of the Father's Estate which was settled on him in Marriage, left to the Plaintiff; and upon a Rehearing would not vary the former Order; declaring that the Difference was, whether this Case lay in Compensation, or not; and if a Compensation was made, he would relieve against the Breach of the Condition; but in Case a sufficient Compensation was not made, he would then consider farther of it. Pajeeb. 1683. between Popham and Bampfield, 1 Vern. 79, 167. S. C. 2 Vern. 222. S. C. cited as a Case in which there was Relief. 2 Vern. 338. S. C. cited as a Condition which was relieved against.

3. If a Feme Covert, having Power by Will to devise Lands, devises them to her Executors to pay 500 l. out of them to her Son; provided that if the Father gives not a sufficient Release of certain Goods to her Executors, that then the Devise of the 500 l. should be void, and go to the Executors; and after her Death a Release is tendered to the Father, and he refuses; yet upon making the Release after the Money shall be paid to the Son; for it was said to be the standing Rule of the Court, that a Forfeiture should not bind where a Thing may be done after, or a Compensation made for it, as where the Condition is to pay Money, &c. and though it is generally binding where there is a Devise over; yet here it being to go to the Executors, it is no more than the Law implicates. Between Cage and Russel, 2 Vent. 357.

4. If a Man devises Lands to 7. S. upon Condition to pay 20000 l. to his Heir at Law, viz. 1000 l. per Ann. for the first sixteen Years, and 2000 l. per Ann. after, till the Whole should be paid, and the Heir enters for the Non-payment of one of the 1000 l. per Ann. 7. S. shall be relieved upon Payment of the 1000 l. together with Interest from
from the Time it became payable, without any Deduction for Taxes, the Court declaring, that where-ever they can give Satisfaction or Compensation for the Breach of a Condition, they can relieve. Mich. 6 Ann. between Grunston and Lord Bruce, 1 Salk. 156. 2 Vern. 594. S. C.

5. If one having three Daughters, devises Lands to his Eldest, upon Condition, that she, within six Months after his Death, pay certain Sums to her two other Sisters; and if she failed, then he devised the Land to his second Daughter on the like Condition, &c. the Court may inlarge the Time for Payment, though the Premisses are devised over; and in all Cases that lie in Compensation the Court may dispence with the Time, tho' even in Case of a Condition precedent. Patch. 1691. between Woodman and Blake, 2 Vern. 222. Note the following Case, which seems to be between the same Parties, is otherwise stated.

6. One seised in Fee of Lands of £1000 l. Value, settles it so, that in Case his eldest Daughter, within six Months after his Death, should pay £600 l. to the Wife of his other four Daughters, then the Eldest to have the Land; but if she failed in Payment, then the second to have the like Privilege; the six Months past without Payment; and the eldest Daughter having assigned over her Interest to one to whom she was indebted, by which the Estate was to go out of the Family, contrary to the Intention of the Donor; the Court took Time to consider, whether they could retrieve in this Case, or not. Between Woodman and Blake, 2 Vern. 166.

7. If the Father makes a voluntary Settlement on his eldest Son in Tail Male, Remainder to a second Son, &c. in which is a Proviso, that if the Eldest did not pay the Second £600 l. at his Age of twenty-one Years, that then the Estate of the Eldest should, in Law and Equity, cease; and the Father afterwards marries a second Wife, and by Deed, taking Notice of the former Settlement, and that the Son had not paid the Money, conveys the same Lands to the Wife of his Children by his late Wife; the eldest Son shall not be relieved, the Conveyance being partly voluntary, and the Condition special, that his Estate should cease in Law and Equity. Patch. 1687. between Longdale and Longdale, 1 Vern. 456. and the Son’s Bill dismissed accordingly; and the rather, for that the Son had set up a Leaf against his Father, which was obtained by Surprise; and the Deed in Law was defective, and amounted only to a Declaration of Truf."
the Condition ought to have been observed. L. Salisbury’s Case, 2
Vent. 365. but Vid. 2 Vern. 223. S. C. Reported, where it is said,
that the Father treated with the Lord Salisbury about the Marriage,
though he died before it was had; and there the Decree is quite con-
trary: And with this last Resolution agrees Skin. Rep. 285. S. C.
10. A. devised his Lands to Trustees for three Years, and if within
the three Years there happened a Marriage between G. who was a
distant Relation, and of the same Blood; and W. his Niece and Heir
at Law then to W. for Life Remainder to her first Son, &c. in Tail
Male by G. to be begotten: But if the Marriage should not take
Effect within the three Years, or if the Marriage should be, before
the Years of Consent, and not ratify’d when of competent Age, then
to F. in Tail, who was likewise a remote Relation of the Testator,
but not of the same Blood. The Marriage between G. and W. did
not take Effect within the three Years, though several Proposals were
within the Time made by her Friends to his Guardians, but not ac-
cepted by them; and though she herself had pressed the Match as
far as the Modesty of her Sex would permit. She afterwards mar-
ried the Plaintiff, and by her Bill, prayed the Benefit of the Devise,
the Condition being answered by her to what she was capable of
doing, having married a Person, as was urged, equal in Circumstances,
&c. to G. but her Bill was dismissed, by the Advice of Holt and Trehy,
Ca. 129. 1 Saik. 231. S. C. where it is said that the Decree was re-
versed in the House of Lords. 2 Vern. 333. S. C. where it is said,
that the Matter was ended there by Compromise.

(C) In what Cases a Gift or Devise, upon Condi-
tion not to Marry without Consent, shall
be good and binding, or void, being only in
Terrorum.

1. If there be a Portion of 8000l. given to a Woman, provided
the marriage not without the Consent of A. and that, if she
marries without his Consent, she shall have but 100l. per Annum.
Yet if she marries without his Consent, she shall be relieved, for the Pro-
viso is in Terrorum only. Trin. 15. Car. 2. between Sir Hen. Bellafis
293. S. P.

(e) A Devise
upon Condi-
tion not to
marry at all,
or to mar-
ry a Person of
such a Profession or Calling, is void by our Law, whether there be a Limitation over, or not; but if it
were upon Condition not to marry a Papist, or a certain Person by Name, it may be good. 1 Vern.
20. But by the Civil Law, a Gift or Devise upon Condition not to marry without Consent is void, tho’
there be a Limitation over; for the Maxim there is Maximinum obs. Liberum; per Hals G. F.

2. But it was said, that if the Portion upon such Marriage had
been limited over to another, it had been (a) otherwise. 1 Chan.
Ca. 22. 2 Chan. Rep. 95. S. P. decreed; 2 Vern. 357. S. P. decreed,
and the Distinction taken at supra.

3. If by Lease 9000l. is secured for a Feme Sole, in Case she
marries not contrary to the Liking of A. and if she doth, then for
such Person as A. shall nominate; and for want of such Noma-
tion, for A. and the marriages without the Consent of A. yet he can-
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not dispose of the Lease otherwise than for her Benefit. Mich. 16. Car. 2. between Fleming and Waldgrave, 1 Chan. Ca. 58. 2 Vern. 573. S. C. cited, where it is said, that there may be a Difference between a Condition that she shall not marry without Consent, and where it is that she shall not marry against Consent.

4. If A. devises a Mesuage, &c. to B. his Wife for Life, Remainder to C. his Grand-Daughter in Tail, upon Condition that C. marries with the Consent of his Wife, and D. and E. or the major Part of them; and if she marries without their Consent, or dies without Issue, devises the same to F. and her Heirs; and after C. steals away, and is married without the Consent of any of them; and all of them, as soon as they heard of it, protest against the Marriage, but afterwards consent to it; and then B. dies, and D. and E. swear that they do not know but that if their Consents had been asked before, there might have been such Reasons given that they might have assented; yet C. shall not be relieved in Equity, for the subsequent Affent cannot defeat the Estate which was before vested in E. And there shall be no collateral Averment that it was intended only in Terraein. Between Pry and Porter, 1 Chan. Ca. 138. Upon the first Hearing, a decretal Order was made by the Master of the Rolls, that she should be relieved; but upon a Re-hearing by the L. Keeper, assented by the three Chiefs, her Bill was by their unanimous Opinion dismissed. 1 Mod. 300. S. C. 2 Chan. Rep. 26. S. C.

5. A. by Will gives his Grand-daughter 200l. on Condition she continued with his Executors till she was Twenty-one; but if she was taken from them by her Father, (who was a Papist) or married against the Consent of his Executors, then he gave her but 10l. The Daughter was placed by the Executors with a Clergyman, who, before she was Twenty-one, with Consent of one of the Executors, permitted her to make a Visit to her Father; and he took that Opportunity to marry her to a Papist, and she was decreed the Legacy at the Rolls; but upon a Re-hearing the L. Keeper held that she should have but the 10l. only: And he said, that in this Case there was no Difference between a Condition that she shall not marry without Consent, and that she shall not marry against Consent. Hill. 1706. between Creagh and Wilson, 2 Vern. 572. Quare, Whether there was any Limitation over.

6. Lands were settled in Trust for raising Portions for Daughters, payable upon their Marriages, with the Consent of Trustees; but if they married without such Consent, then to remain over to another, &c. The Daughters were old, and never intended to marry, but to lay out their Portions in a Purchase of Annuities for their Lives; and it was held that they should have their Portions immediately, upon giving Security to indemnify against the Persons to whom the Portions were devised over: Deceased 25 Car. 2. between Needham and Vernon, Nels. Chan. Rep. 62. 2 Vern. 452. S. P. decreed upon giving Security to refund, if the Condition should be broken, though no Mention made that the Daughters did not intend to marry.

7. A. devised 300l. to B. her Daughter, and that if she married under Twenty-one, without Consent of the Executors, or major Part of them, the Legacy to go to the Children of her Sister, the Wife of C. and made C. and two others Executors; B. being at the House of C. there marries his Son by a former Wife with his Privity, being under Twenty-one, B. and her Husband bring a Bill for the Legacy, C. in
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C. in Favour of his other Children, insists that the Legacy is forfeited. The other Executors confessed they had Notice of the Courtship, and did not contradict or disapprove of it; and the 300l. was decreed the Plaintiffs, there being at least a tacit Consent. Hill 1706. between Meggert and Meggett, 2 Vern. 580.

8. If the Father devises Lands in Trust to permit his Daughter to receive the Rents until her Marriage, or Death, and in Case she marry with the Consent of Trustees, then to convey the Premises to her and her Heirs; but if she died before Marriage, or married without such Consent, then to convey to other Perfons. The Daughter afterwards marries with the Consent of her Father, who fettes Part of the Lands on her and her Husband, and dies, this Settlement shall be no Revocation of the Will as to the Devise of the other Lands to her; and by the Father's confenting in his Life-time, the Condition is dispenc'd with. Mich. 1716. between Clerk and Berkeley, 2 Vern. 720.

9. A. devis'd to his Daughter M. the Plaintiff 100l. to be paid by his Executors upon her Day of Marriage, or Age of Twenty-five Years, which should first happen, upon Condition that she should marry with the Consent of such and such Perfons; and if she married without their Consent, then to have 50l. only, and no more; and gave the Residue of his personal Estate to the Defendants. M. married the Plaintiff, without such Consent, before she was Twenty-one: And it was held by the Master of the Rolls, that this was more than a Clause in Terrorem, and that the Devise of the Surplus of the personal Estate, was a Devise over of the 50l. on M.'s Disobedience. Mich. 1699. between Amos and Horner.

10. The Defendant's Father devised to him, who was his Heir at Law, all his Lands, &c. (except such and such Parts) charged with the Sum of 2500l. to his Daughter (since married to the Plaintiff) at her Age of Twenty-one Years, or Marriage, which should first happen, and devised the excepted Lands in Trust to be sold for the Payment of his Debts: Provided that if his said Daughter should marry in the Life-time of her Mother, without her Consent first had in Writing, then 500l. Part of the said 2500l. should cease, and should be applied towards Payment of his Debts charged on the said excepted Lands; and appoints his Wife to be Guardian of his said Daughter, and makes her Executrix, and dies: The Daughter attains her Age of Twenty-one Years, and without the Consent or Privity of her Mother, inter-marries with the Plaintiff, who was a Gentleman of some Estate, and called to the Bar, but had made no Settlement or Provision for his Wife; and therefore the Defendant, the Heir at Law, refused to raise or pay any Part of his Sister's Portion; and insists likewise, that by her Marriage without her Mother's Consent, 500l. Part of her Fortune, was become forfeited: Whereupon the Plaintiffs brought their Bill to have the whole Portion raised by Sale of the Lands charged therewith. Per L. Keeper: This is a Portion to be raised out of Lands, and therefore to be considered as Land; and though it be to go towards Payment of Debts on Breach of the Condition, and there appears One hundred and twenty Creditors concerned, yet none that are in Danger of losing their Debts; and it is then to be considered as it stands upon the Condition itself; and therefore the Plaintiff must have her whole Portion; for the Testator has appointed two Periods of Time to intitle her to it, viz. Marriage,
Marriage, or the Age of Twenty-one: And as she has attained that Age, it becomes a vested and settled interest in her not to be devest-ed by the Marriage without the Consent of the Mother, for that Consent cannot in any Reason be carried farther than during her Minority. *Hill.* 1712. between *King* and *Withers.*

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**C A P. XVIII.**

**Contribution and Average.**

(A) Contribution and Average in what Cases.

(B) In what proportion.

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**A) Contribution and Average in what Cases.**

1. If a Man grants a Rent-charge out of all his Lands, and afterwards sealeth them by Parcels to divers Persons, and the Grantee of the Rent-charge will from Time to Time levy the whole Rent upon one of the Purchasers only, he shall be eafeed in Equity by a Contribution from the Rest of the Purchasers. *Cary* 3.

2. One Executor, who pays Debts and Legacies, may compel the other to contribute. *Toth.* 89.

3. If the Collector of Fifteenths levies all the Tax within one Township, upon one Inhabitant, he shall have the Aid of the Court of Exchequer to make the others contributory. *Lane* 65.

4. If Tenant in Fee mortages his Estate, or charges it with a Sum of Money, and after devises it to one for Life, Remainder to another in Fee, Equity will compel the Tenant for Life to bear his Proportion of the Mortgage or Charge, that all may not fall on the Remainder Man. *Decree Hill.* 25. *Car.* 2. *between Hays* and *Hay*, 1 *Chan. Ca.* 223.

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5. So
5. So if it be a Rent-charge, Equity will make the Tenant for Life pay the Arrears. 1 Chan. Ca. 223. per Curiam.

6. A on his Marriage agrees to settle Lands for the Benefit of his Wife and their Issue, and afterwards aliens Part of those Lands; and my L. Nottingham decreed that the Jointreves should have the Deficiency of her Jointure made good out of the Inheritance of the Lands remaining unfoiled: But that Decree was reversed by Jeffries, L. C. who held, that where the Jointreves and Issue claim by the same Settlement, they shall contribute proportionally in the Discharge of any prior Incumbrance on the Estate. Hill. 1686. between Carpenter and Carpenter, 1 Vern. 440.

7. If A devises his real Estate to his Son for Life, Remainder to his first Son, &c. in Tail, with Remainders over, and devise a specifically a Leasehold Estate to his Daughter, and dies, not leaving Asets to pay Debts, which effected as well his real, as personal Estate, the Son and Daughter shall contribute in Proportion in paying the Debts, each Estate being liable at Law. And the Teller's Intention equal between them both: Decreed Hill. 1717. between Short and Long. 2 Vern. 756.

8. If a Man, who is a Widower, settles Lands to raise 100 l. a Year for his eldest Son, and 100 l. apiece for his younger Children, and afterwards he marries again, and has Children by his second Wife; the Children by the second Wife shall be equally intituled with the other younger Children; and though the Portions of the younger Children are by the Settlement to be paid according to their Seniority; yet in Case of a Deficiency, they shall be paid in Average: Decreed Mich. 1 Jac. 2. between Brathwait and Brathwait, 1 Vern. 334.

9. One Surety may compel another in Equity to contribute towards Payment of a Debt for which they were jointly bound. Tish. 41. 1 Chan. Rep. 34. S. P.

10. If three are bound as Sureties in Recognizance, and one of the Sureties is sued at Law, and the other Surety, together with the Principal, happens to be insolvent, he who is sued may compel the other Surety to contribute a Moiety. 1 Chan. Ca. 246. 1 Chan. Rep. 120. S. P. 1 Chan. Rep. 150. S. P.

11. If you sue in Chancery the Executor of one Obligor to discover Asets, you must make all the Obligors (a) Parties, that the Charge may be equal. 2 Vent. 348. but a Quere is put, Whether you may not sue the Principal, and leave out them which are bound only as Sureties.

12. But it is held clearly, that if a Judgment be had at Law against one Obligor, you may sue the Executor of him alone to discover Asets, because the Bond is drowned in the Judgment. 2 Vent. 348.

13. The Plaintiff being one of the Owners of a Ship, loaded on Board her 210 Tuns of Oil, and the Defendant loaded on Board her 80 Bales of Silk, upon a Freight, by Contract, both to be delivered at London; the Ship was pursed by Enemies, and forced into an Harbour, &c. and the Mafter ordered the Silk on Shore, being the most valuable Commodity (though they lay under the Oils, and took up a great deal of Time to get at them.) The Ship and Oils were afterwards taken, and the Owner of the Oils brought his Bill to have Contribution
Contribution and Average.

Contribution from the Owner of the Silk; and although it was admitted that, if Goods were thrown over-board in Strife of Weather, or in Danger, or just fear of Enemies, in Order to save the Ship and the rest of the Cargo, that which is saved shall contribute to a Reparation of that which is lost; and the Owners of the Ship shall be Contributors in Proportion; but in this Case the Loss of the Oils did not save the Silks, neither did the saving the Silks lose the Oils: And the Bill was dismissed accordingly; which Dismissal was confirmed in the Houfe of Lords. Show P. C. 18, 19.

14. If one makes a Lease, and the Lessee covenants to pay the Rent, and to repair the Premises, &c. and the Lessee makes 100 Under-Lessees, and the Rent is behind, and the Premises out of Repair, and the original Lease is avoided for Non-payment of Rent; and some of the Under-Lessees bring a Bill to be relieved against the Forfeiture; though Equity will not apportion the head Landlord's Rent; but the Under-Lessees, who are Plaintiffs, must pay the whole Rent in Arrear, and repair all the Houses; yet they may compel the other Under-Lessees to contribute in Proportion. Trim. 1689. between Webber and Smith, 2 Vern. 103.

15. A Man devised a Rent-charge of 10l. per Ann. to A. issuable out of Black Acre, with a Clause, that if it should be behind, it should be lawful for him to enter, and hold till he was satisfied; and by the same Will devised a like Rent-charge of 10l. per Ann. to B. issuable out of the same Land, with like Clause of Entry, &c. the Land was not of sufficient Value to answer both the Rents; and they were both in Arrear, and both Devisees had brought several Ejectments, and had recovered; and the Defendant being in Possession, the other Grantee brought his Bill to have an Account of the Profits, and that one moiety might be applied to satisfy the Arrears of his 10l. per Ann. and it was decreed accordingly. Hill. 1697, between Eure and Eure.

16. On a Marriage Treaty between the Defendants, 3000l. being the Wife's Fortune, and 3000l. more added to it by William Chambers, Father of the Defendant John, were invested in Lottery Annuities, in the Name of Trustees; and thereupon by Indenture, 18 July 1718, previous to the Marriage, reciting that 6000l. was so invested in Lottery Annuities, it was agreed that the same should be turned into Money, and laid out in a Purchase of Lands to be settled to the Use of the Defendant John for Life, then to Trustees during his Life to support, &c. then to Elizabeth the intended Wife for her Life, with Remainder to Trustees for Two hundred Years, Remainder to the first and other Sons successively in Tail Male, with Remainder to William Chambers in Fee: And it was thereby declared, that the Two hundred Years Term was in Trust, that in Case the Defendant John should have a Son, and one or more other Children, then the Trustees, after the Death of John and Elizabeth, should, by Mortgage or Sale, raise for younger Children, if more than one, 2000l. between them, and Interest at 1l. per Cent. per Ann. for their Maintenance; and that till such Purchase, the Trustees, with the Consent of John and Elizabeth, should let the 6000l. continue in Annuities, and pay the Interest to such Persons as would be intituled to the Lands, and the Trustees not to be answerable for more than they received, or for each other. And by the said Indenture, William Chambers covenanted, in Consideration of the said Marriage,
Marriage, to settle several Lands, therein particularly mentioned, to the Use of himself for Life; then to John Chambers in Tails Male, with Remainder to himself in Fee. The Marriage took Effect, the 6000 l. was not laid out in a Purchase, but in the Year 1720, by Consent of John and Elizabeth, and the Trustees, being in Lottery Annuities, was subscribed into the South-Sea Company, whereby a Loss of about 3000 l. happened. William Chambers was dead, having made no Settlement of the Lands, specifically agreed to be settled, which therefore were descended to the Defendant John, his Son, in Fee; the Defendants had Issue the Plaintiff, their only Son, and four Daughters, who were likewise Defendants: And this Bill was brought to have the Remainder of the 600 l. laid out in a Purchase, and settled pursuant to the Uses before-mentioned; and the first Question was, on whom the Loss of the Money subscribed into the South-Sea Company should fall; and as to that, it was agreed on all Hands, that the Trustees having subscribed the Lottery Annuities into the South-Sea Company, by Consent of the Defendants John and Elizabeth, were indemnified therein, not only by the Terms and Covenants in the Settlement, but also by the Act of Parliament made in the Year 1720, wherein every one’s Consent was involved; and whereby Trustees were generally empowered to subscribe Orders and Annuities, &c. And therefore it was argued for the Defendants, the Daughters, that the Loss should fall wholly on the Son; that Lands were of an uncertain Value; and if Lands had been purchased, and they had afterwards increased never so much in Value, by discovering of Mines, or otherwise, that the Plaintiff, the Son, would have had the whole Benefit thereof, without any Increase to the Daughters of their Portions: That in Equity, an Agreement to purchase is considered, as if a Purchase were actually made; and there the Loss ought to fall on the Plaintiff, and the rather, for that if the Stock itself had risen never so high, as it was expected it would, and did rise to a very great Price, the Daughters could only have their 2000 l. and therefore as the Plaintiff was intitled to all the Advantage in Case of a Rise, it was reasonable he should bear the Loss now that a Fall had happened; and therefore the Daughters ought not to be contributary to this Loss: But on the other Side it was argued, and decreed, that the Loss should fall in Proportion on the Daughters, as well as the Son; that the Parties had an equal Regard to the Son, as well as the Daughters; that the Son was to sustain the Name of the Family, and was to take first, and more immediately than the Daughters, whose Portions came afterwards, by Way of Charge only on the Estate; that the Constriction contended for was to over-throw one Part of the Settlement; and that if the Loss had been a little more, the Daughters must have had all, and the Sons nothing; that the Parties have ascertained the Proportion each were to have: And this is the Measure the Court ought to guide themselves by; and accordingly sent it to a Master to take the Account, and to proportion the Loss between the Parties. Pufch. 1730. Between Chambers and Chambers.
(B) In what Proportion.

1. If a Mortgagor devises the mortgaged Lands to A. for Life, Remainder to B. in Fee, and the Mortgagor redeems the Lands, A. shall have one Third, and B. two Thirds of the Mortgage Money; and this per Lord Chancellor is the ordinary Rule of the Court in such Cases. Mich. 1682. between Brent and Beest, 1 Vern. 70.

2. So if one devises Lands which are in Mortgage to A. for Life; Remainder to B. in Fee; A. shall contribute one Third towards the Discharge of the Mortgage: Decreed 1 Chanc. Ca. 271. Neil. Chan. Rep. 220. S.C.

3. But if Lands in Mortgage are devised to A. for Life, Remainder to B. in Fee, and A. takes an Assignment of this Mortgage in a Trustee’s Name, though B. might have compelled A. to contribute one Third towards Payment of the Mortgage, in Respect of his Estate for Life; yet if A. be dead, and the Bill is brought against his Executor, he shall be obliged to contribute only in Proportion to the Time that A. his Tsettator enjoyed it: Decreed Trin. 1686. between Clyat and Battison, 1 Vern. 404.

4. A. devised to B. for Life, and after one third Part of the Reversion to each of his three Sisters respectively, and her Heirs: The Sisters brought a Bill for Discovery of Incumbrances on the Estate; and to compel the Defendant, Tenant for Life, to bear his Share and Proportion thereof, alledging, that their Reversion would be of little Benefit to them if the Debt were suffered to in-crease by Non-Payment of Interest, &c. and charged, that the Defendant had cut down Timber, for which he ought to be accountable: The Court decreed the Defendant to pay two Parts in Fee of the Debts, and the Plaintiffs the Reversions the other remaining three Fifths, and the Defendant to account for the Timber; and what was raised by it, to be taken as so much in Part of what the Reversions were to pay. Pasch. 1692. between Humphreys and Hales, 2 Vern. 267.

5. If by a Settlement two Estates, the one in Norfolk and the other in Suffolk, are subjected to the raising a Portion of 2000L. for a Daughter, by a Term of a hundred Years, commencing after the Decease of two several Lives; the one upon Suffolk Estate, and the other on the Norfolk Estate; and the Life on the Suffolk Estate falls, and the Daughter brings her Bill for the 2000L. and J. S. to whom that Estate was come, pays the 2000L. And afterwards the Life on the Norfolk Estate falls, by which the Fee-Simple thereof descends on the Daughter. J. S. who paid the 2000L. shall have Contribution out of the Norfolk Estate in Proportion to its Value, only the Suffolk Estate shall be valued as an Estate in Possession, and the Norfolk Estate, as an Estate in Reversion: Decreed Hill. 1697. between Henningham and Henningham, 2 Vern. 355.
C A P. XIX.

Copyhold.

(A) Concerning the Power of Chancery over Copyhold Estates, the Acts of Lords and Tenants, and in what Cases it has been exerted.

(B) In what Cases a defective Surrender, or the Want of it, will be supplied in Equity.

(A) Concerning the Power of Chancery over Copyhold Estates, the Acts of Lords and Tenants, and in what Cases it has been exerted.

1. If the Lord will turn out his Copyholder, who payeth his Customs and Services, or will not admit him to whose Use a Surrender is made, or will not hold his Court for the Benefit of a Copyholder, or will exact arbitrary Fines, when they are customary and certain, the (a) Copyholder shall have a Subpœna to restrain or compel him, as the Case shall require. Cary 3, 4.

(a) Copyholders were formerly Tenants at Will of the Lord, their Lands being Parcel of the Lord's Demesnes; but now those Copyholders stand on a surer Foundation, if they perform those Duties which their Tenure requires; for if the Lord turns them out, they may either sue a Subpœna out of Chancery, to be relieved, or have an Action of Trespass against the Lord; for although they are Tenants at Will of the Lord, yet they are Tenants at Will according to the Custom of the Manor, which the Lord cannot break without Reason. Co. Lig. 60. b. 61. a. 4 Rep. 21. 9 Rep. 79. Prescription, and that the Lands are Parcel of the Manor, are incident to, and the very Pillars on which every Copyhold Estate stands. 4 Rep. 24. 1 Lev. 58. 4. Custom is the Life and Soul of Copyhold Estates; for if Copyholders break their Custom, they are subject to the Lord's Will; the Customs of Manors are so various, that it is impossible to ascertain them, they must, however, be Times out of Mind; they must be reasonable, according to common Right; they must be upon good Consideration; they ought to be compulsory, not left to the Liberty of the Tenant, to observe or not observe them; they ought to be certain; they ought to be beneficial to the Lord or Tenant: And if there are no Customs to direct Copyhold Estates, they must be directed by the Rules of the Common Law. 1 Lev. 38. Coke's Comp. Cop. 33.

2. Equity will oblige the Lord to hold a Court. Cro. Jac. 368. for no Action on the Case will lie against him, if he refuses; and therefore there is no Remedy but in Chancery. 2 Burr. 336.

3. If
3. If an erroneous Judgment be given in a Copyhold Court in a
Formedon, or the like, a Bill may be exhibited in Chancery to re-
verse it. 1 Rol. Abridg. 373. A Bill may be exhibited, altho' the King
is Lord of the Manor. Lane 98.

4. The Court of Chancery has exercised a Jurisdiction in rectify-
ning and reverting the Judgments given in Copyhold Courts, when-
ever they appeared unjust and unreasonable; but for any Errors in
Matters of Form, Equity will not interpose. Vide 1 Instr. 60. Owen
63. Moor 68. 4 Rep. 30. 1 Rol. Abridg. 60.

5. A Bill was exhibited to compel the Dean and Chapter of St
Paul's, as Lords of the Manor of ——— to receive a Petition in
Nature of a Writ of falsa Judgment, to reverse a Common Recov-
ery suffered in the Manor Court about thirty Years before, whereby a
Remainder in Tail was barred, suggesting several Errors in the Pro-
ceedings therein; and though in Truth the Errors assigned were such
as would be gross Errors in a Freehold Estate; yet my Lord Chancel-
lor Jefferyes diffilmed the Bill. Between the Dean and Chapter
and Lewis Ruggle, 1 Vern. 367, from which Decree of Diminution
there was an Appeal to the House of Lords; and there the Decree
was affirmed. See P. C. for Common Recoveries, not being adver-
sary Suits, but common Averages, Equity ought rather to sup-
ply Defects than to affix in the Annulling of them.

6. A Copyholder of Lands in Fee, where by the
Custom of the Manor, the Lord had as a Profit apprendre, the Cut of the
Woods and
Underwoods growing on the Copyhold, obtains a Grant from the
Lord of all the Woods and Underwoods growing, or which hereafter
should grow on the said Copyhold Lands, to him and his Heirs;
and it was held, that this should not merge in the Copyhold, altho'
it was alleged to be only a Profit apprendre; and
there urged, that if a Copyholder pays a Rent to the Lord, and the Lord
grants or releaves this Rent to his Tenant, that this shall merge in
the Copyhold. Mich. 1681. between Faulkner and Faulkner, 1
Vern. 21, 22.

7. If a Tenant in Tail of a Copyhold, Remainder to himself in
Fee, purchases the Freehold of the Lord, and then sells to J. S. and
dies; and after thirty Years Possession, the Son of A. sets up a Title
as Issue in Tail, the Purchaser shall hold against him the Freehold;
having attracted the other Estate which was at Will. Hill. 1685, be-
tween Parker and Turner, 1 Vern. 393.

8. If a Copyholder in Fee takes an Infranchisement of his Copy-
hold in the Name of a Trustee, and devises the Land to his younger
Son, who falls to J. S. and the Heir at Law recovers in Ejectment,
as he might do upon his Ancestor's Admittance, and J. S. the Ven-
dee, brings his Bill, he shall be relieved in Equity, and hold against
the Heir. Decreed Hill. 1685, between Dancer and Evett, 1 Vern.
392.

9. If a Copyhold is granted to Three successively, and there is no
Custom proved, that the first Taker had Power of Disposing of the
Whole, nor that the first Taker paid the Purchase-Money, it shall
not go to the Executor of the first Taker, but shall go in Succession.
Pach. 1692, between Rundle and Rundle, 2 Vern. 264.

10. But if by the Custome the first Taker may dispose of the
Whole, and he likewise pays the Purchase-Money, it shall not be a
Trufc for the other Two, but shall go to his Executor. 1 Chan. Ca.
310,
Copyhold.

310. Altho' it was objected, that the Heir or Executor cannot be intituled to the Trust of a Freehold for Life: But _vid. 2 Vern. 264._ where it is held, _per Cur._ that an Executor or Administrator is intituled to the Trust of an Estate _per ante cie_, whether Freehold or Copyhold, or an Office; and _vid. the Statute 4 & 5 Ann._

(b) There can be no Occupant of a Copyhold Estate _per ante cie_, for the Prejudice it would do the Lord; for upon the Death of the Tenant the Lord shall enter immediately. _Per Hyl. C. I. 1 Salt. 188._

11. If a Copyholder for Life, where by the Custom there is a Widow's Estate, agrees that _f. s._ shall hold and enjoy it during his Life, and the Widowhood of such Woman as he should leave at his Death, and enters into a Bond for that Purpose; yet the Widow shall not be bound by that Agreement. Decreed _Pash._ 1688, between _Misgrace_ and _Dasbrewed_, 2 Vern. 63.

12. The Widow of _Cessini que Trust_ of a Copyhold Estate ought to have her _Free Bench_, as well as if the Husband had the legal Estate in him. 2 Vern. 585, _per Curiam._

13. Copyholds cannot be intituled within the Statute _de donis_; but they may by Common Law, and then Surrenders or Plaints in Nature of Fines and Recoveries may bar them, as well in the Court Baron as at Common Law, if the Copyhold has been such, which is the Rule in those Cases. _Cary 30._ That Copyholds may, by Custom, be intituled; yet that such Intail is not within the Statute _de donis_, _vid. 2 Chan. Ca. 174_. 2 Vern. 585. And if there be no particular Custom for barring the Intail, a Surrender will do it. _Per Curiam_, 2 Vern. 705.

14. Tenants by Copy shall not pay any uncertain _c_ Fines by Change of their Lords by Alienation, but by Death, which is the Act of God; for otherwise the Lord might oppress the Tenant by frequent Alienations. _Cary 9._

15. If the Lord insists upon an extravagant Fine for a Renewal, he shall be restrained to what is (d) reasonable, altho' the Fine is arbitrary and uncertain; but having demanded ten or twelve Years Value of the Land, the Court decreed him only Two. _2 Chan. Rep. 134_. _Nel. Chan. Rep. 154._ an arbitrary Fine moderated in Equity.

(d) If the Fine demanded is unreasonable, the Copyholder is not obliged to pay it; and though he himself only thinks it unreasonable, and afterwards it is adjudged reasonable; yet it is no Forfeiture, because it is a Matter of Controversy. _1 Rep. Abs. 503._ 2 Rep. 2.

16. But where a Copyholder in Fee made a conditional Surrender for securing a Sum of Money at the End of six Months; the Money not being paid, and the Mortgagee willing to continue his Money, they defired the Lord that the old Surrender might be taken up, and a new one made for six Months longer; but the Lord insisted on an arbitrary Fine of Two Years Value, and that the Mortgagee should come in and be admitted; and the Court being of Opinion, that Equity could not relieve against the Fine, the Matter was ended by Compromise, and a Fine of 40 l. paid to the Lord, the Estate being 100 l. _per Annum._ _Mich. 1699._ between _Tredway_ and _Fatherby_, 2 Vern. 367.

37. If
Copyhold.

17. If an Infant Copyholder is admitted, and the Lord cotteth the Custody of him to his Mother, and the Infant's Tenant commits a Forfeiture by cutting down Trees, which being presented and found a Forfeiture, the Lord enters during the Infant's Nonage, and the Land is held by him and his Heirs forty Years; yet the Copyholder shall have Relief. Cary 8.

18. A Copyholder for Life had committed a Forfeiture by Cutting of Timber-Trees, which was found such by a Trial and Verdict at Law, and the Lord entred and admitted the Defendant, who was the Remainder-Man; the Copyholder exhibited his Bill to be relieved against the Forfeiture, offering, that if it should appear to be Waste to make Satisfaction; and an Iflue being directed to try, whether it was the primary Intention in Cutting the Timber to do Waste; and it being found for the Plaintiff, it was decreed he should be relieved, and that the Defendant, the Remainder-Man, should deliver Possession, and Account for the rents Profits. Hill. 19 Car. 2. between Thomas and Porter, 1 Chan. Ca. 95.

19. A having two Copyholds held of the Manor of B, cuts Timber (pretending a Custum for it) on the one, and employs it in repairing the other; the Lord brought an Ejectment, supposing this to be a voluntary Waste and a Forfeiture; and upon the first Trial there was a Verdict against the Lord, but upon a new Trial there was a Verdict for the pretended Custum; and it being admitted, that by the Custum of the Manor, when Timber was wanting on one Copyhold Tenement, the Lord, by his Bailiff, might assign Timber for Repairs on any other of the Copyhold Estates: My Lord Keeper relieved against the Forfeiture on Payment of the Cost of both the Trials at Law, and likewise of this Suit. Hill. 1705. between Nash and the Earl of Derby, 2 Vern. 537.

20. The Plaintiff brought his Bill to be relieved against a Forfeiture of his Copyhold Estate; and the Case appearing to be, that he had been guilty of the greatest Disobedience possible to his Lord, that after six several Presentments upon him to repair it, and an Entry by the Lord for the Forfeiture, he brought an Ejectment; and when upon the Trial, a Rule was entred into by Consent, and made a Rule of Court, that upon Payment of 4l. to the Lord for his Costs, (which were not a fourth Part of the Costs he had put the Lord to) and putting the Estate into Repair, he should be admitted to it again; yet he never complied with the Rule, nor made any Offer of Costs to the Lord; but instead of that, brought another Ejectment, and was non-suited; and now after nine or ten Years more brings his Bill, and had been several Times amerced for not appearing at the Court, and refused to do Fealty, either upon Oath, or (being a Quaker) upon Affirmance; and upon these Circumstances my Lord Keeper declared he ought to have no Relief; or if he were to be relieved, yet it must be upon Payment to the Lord of all his Costs, and putting the Estate into good Repair, which would be more Charge to him than his Interest in the Estate would be worth, having only an Estate for Life therein, and dismissed the Bill, but with Costs; and my Lord Keeper likewise declared, that though this were a voluntary Waste and Forfeiture (against which it was objected this Court never gave Relief); yet he thought the Rules of Equity not so strict, but that Relief might even be given against voluntary
luntary Wafe and Forfeiture. Mich. 1710. between Cox and Hig-

ford, 2 Vern. 664. S. C. confusely stated.

(B) In what Cases a defective Surrender, or
the Want of it, will be supplied in Equity.

1. If a Man devises a Copyhold Estate to a Charity, it shall be
a good Appointment within the Statute of Charitable Uses,
though there was no Surrender to the Use of his Will. Nel. Chan.
Rep. 75.

2. If A. contracts with B. for the Purchase of a Copyhold Estate,
and pays the Purchase-Money, and B. agrees to surrender the
Premises at the next Court, but dies before the next Court; or any
Surrender made, Equity will supply the Want of the Surrender.
Decreed Hill. 33 Car. 2. between Barker and Hill, 2 Chan. Rep. 218.

3. A Man seised of a Copyhold Estate, borrowed 400l. of the
Plaintiff 1698, and surrendered into the Hands of two customary Te-
nants, the Copyhold in Question to be presented at any Court after
Sept. 1699, defeasible on paying the 400l. and interest; the Mortgagor
paid the interest for four Years together; but no Care was taken to get
the Surrender presented; and in the mean Time the Mortgagor be-
came a Bankrupt, and died intestate and insolvent. After his Death
the Surrender was tendered, but the Homage refused to present it; be-
cause by the Custom of the Manor, confirmed by Act of Parliament,
all Surrenders were to be void, if not presented in twelve Months af-
fter they were made; and my Lord Chancellor (tho' he at first dou-
bted) decreed, that the Surrender should be supplied against the Af-

4. So in a Case where A. lent B. 200l. on a Surrender of some
Copyhold Lands, which A. neglected to get presented at the next
Court, and was therefore void, according to the Custom of the Man-
or, tho' B. afterwards sold these Lands to J. who took a Surren-
der, which he presented, and was admitted; yet he having Notice
of A.'s Right, my Lord Chancellor decreed against him, and that A.'s
defective Surrender should be made good. Pafch. 1708. between
Jennings and Moore, 2 Vern. 609.

5. A. Tenant in Tail of the TrufT of a Copyhold Estate, with
Remainder over, and the Trustees refusing to surrender the legal
Estate to him, he brings his Bill to compel them; and pending that
Suit he goes to the Lord's Court; and offers to surrender, but is reju-
ved, not having the legal Estate; and thereupon he makes his Will,
and devises his Estate to his Wife and Children: The Court con-
ceiving the Will sufficient to bar the Intail of a Trust, and he having
done all he could, decreed the Estate to go according to the Will. Hill.
1706. between Orway and Hutton, 2 Vern. 585. Celfui que TrufT of a
Copyhold Estate, having an equitable Interest only, my devise it
without any Surrender. 2 Vern. 680. per Curiam.

6. If a Provision is made by Will for younger Children out of some
Copyhold Lands, and there is a Defect in the Surrender, Equity will
supply such Defect against the eldest Son and Heir at Law. Decreed
Hill. 1682. between Hardham and Roberts, 1 Vern. 132. and many
Precedents said to be in Court of the like Nature.

7. So
7. So Equity will supply the Want of a Surrender of a Copyhold, as well for an elder Son as for a Younger, in Case of Gavelkind Copyhold. Vid. 2 Vern. 165. and several Precedents there cited of Surrenders supplied in Favour of younger Children, Creditors and Purchasers.

8. But where one devised a Copyhold Estate to his Grandson; and my Lord Soames decreed the Will good, and that Equity ought to supply a Surrender in such Case, as well as in Case of a Son; yet on Appeal the House of Lords revered the Decree, and held, that Equity ought not to supply such Defect in Disfavour of the Heir at Law, unless it were in Favour of a Son or Daughter, nor then either, if it was to disinherit the eldest Son. Between Kettle and Townend, 1 Salk. 187.

9. A Man seised of Lands, which by the Custom of the Manor, could only pass by Deed, Surrender and Admittance, and having a natural Daughter, does by Deed, in Consideration of 300l. therein mentioned to be paid by the said Daughter, grant and convey those Lands to her and her Heirs; and she was admitted accordingly; but no Surrender was made of those Lands, as the Custom required; and at the Foot of the Admittance was a Proviso, that her reputed Father should hold and enjoy those Lands for his Life; also in the Deed was a Covenant for farther Assurance; no Money was proved to be paid by her; and it being agreed that this Conveyance was defective for Want of a Surrender; the Question was, whether Equity could supply it in Favour of a natural Daughter; and it was held, that it could not, that tho' her Father might be obliged by the Law of Nature to provide for her, yet here she was to be considered as a meer Stranger to him; that tho' the Father might have a great Affection for her, yet that was no such Affection as would raise an Use at Law; that the Covenant for farther Assurance being only auxiliary, and depending on the original Conveyance, if that were void, the Covenant must be void or repugnant; and decreed accordingly. Mich. 1717. between Farquhar and Robinson.

10. A Man devised his Copyhold, being Burrough Englishe, to his eldest Son, and devised Houses to his youngest Son, which Houses were soon afterwards burnt down, and never entred upon by the younger Son; and as this Case was circumstances, the Court would not supply the Want of a Surrender in Favour of the eldest Son. Pach. 1692. between Cooper and Cooper, 2 Vern. 265.

11. A younger Son brings a Bill, and furnishes that a Copyhold which his Father had devised to him by Will, was surrendred to the Use of his Will, or however, that being for the Advancement of a Child, it ought to be made good here: He made no Proof of any Surrender, nor that a Court was called for that Purpofe, nor any Proof that any of the Court-Rolls were lost (which was pretended); and he was well provided for, without this Copyhold; and the elder Brother was in Possession twenty Years, by Consent of the Plaintiff; fo the Bill was dismiss'd, with Costs. Pach. 1700. between James and James.

12. A Man feised of Frehold and Copyhold Land, devises both for Payment of Debts and Legacies, but the Copy was not surrendred to the Use of his Will, and the Frehold was sufficient for the Debts; and the Question was, whether the Court would supply the Want of the Surrender, and lay the Legacies on the Frehold, and the Debts on
on the Copyhold, as when there are simple contract Creditors, and Bond or Judgment Creditors, and personal Assets not sufficient to pay both; and the Master of the Rolls held, that the Want of a Surrender could not be supplied for the Sake of the Legatees; and he said that it was never yet done, especially where they are meer Strangers, as here, and dismissed the Bill. Hill. 1699. between Rafter and Stock.

13. A Man seised of some Freehold Estate, and also of a Copyhold Estate, devised all his Real and Personal Estate for the Payment of his Debts, and died without any Surrender of the Personal Estate; and the Freehold and Personal Estate not being sufficient for the Payment of the Debts, it was urged, that a Surrender should as well be supplied in this Case, as if no Freehold Estate had been devised at all; but my Lord Chancellor said, he thought the Precedents had not gone so far, and that he could not relieve in this Case, principally, because the Testator's Intention did not appear to him to pass the Copyhold Estate by a Devise of his Freehold, a Copyhold being of the lowest Regard, and looked upon in the Eye of the Law, but as an Estate at Will. Trin. 1715. between Chalilis and Casbom.

14. A Man being seised of several Freehold and Copyhold Lands in Bereford, the Freehold being about 72 l. per Ann. and the Copyhold about 16 l. and being also seised of another Freehold Estate in Ailsbury, of about 3 l. per Ann. and all the several Estates above-mentioned, being in Mortgage for 600 l. the Mortgagor made his Will, and thereby devised all his Lands in Bereford to his Wife and her Heirs, and died without Issue, leaving his Brother, who was his Heir at Law; and whether this Court would supply the Want of a Surrender to the Use of his Will, as to the Copyhold Lands in Bereford, was the Question; and the Master of the Rolls was of Opinion, that it ought not; first, Because the Words of the Devise are satisfied by the Freehold Lands in Bereford, which passed thereby; and therefore it was not certain that he intended to give her the Copyhold likewise; but, adly, if he had so intended, yet the Brother, who was his Heir at Law, would thereby be disinherited of almost the whole Estate, and have nothing but the 3 l. per Annnum in Ailsbury; and though the Court will in all Cases supply the Want of a Surrender for Payment of Debts, yet not for the Wife against an Heir at Law, who would be disinherited thereby, or for younger Children against an Elder, to make them in a better Condition than the Elder. Mich. 1729. between Ros and Ros.
CAP. XX.

Costs.

(A) Who shall pay Costs, and in what Cases.

1. If an Executor is Defendant in Equity, and there is a Decree against him, yet he shall not pay (a) Costs, though an Awarding of Costs is a Manner discretionary in the Court, and its Power herein always exercised according to the Circumstances of the Case, and the Litigiousness of either of the Parties; if the Court cannot relieve against a Forfeiture, the Bill will be dismissed without Costs; frequently each Party is to bear his own Costs; the Expense either Party is put to by the Delays, Contempts, &c. of the other, are only remitted or purged by the Payment of Costs, unless the Court order otherwise: Executors, Guardians, Trustees, are usually exempt from Costs, or awarded Costs out of the Estate in their Hands, unless they have greatly misbehaved themselves; also an Heir at Law, in most Cases, is exempted from paying Costs.

7. A Solicitor prosecuted a Suit in the Name of a Stranger, who not being to be found, the Master of the Rolls declared, that if there were one Precedent in the Case, he would make another, and order the Solicitor to pay Costs. 1 Chan. Ca. 71.

3. A brought a Bill in Forma Pauperis, to which the Defendant put in a Plea and Demurrer, which were both over-ruled; and it was insisted upon, that he should have no Costs, being at none; but my Lord Somers, after long Debate and Inquiry of all the antient Counsel and Clerks, who agreed that he should have Costs, ordered him his Costs like other Suitors; for tho' he is at no Costs, or but small Costs; yet the Counsel and Clerks do not give their Labour to the Defendant, but to the Pauper. Pafch. 1701. between Scarthmer and Foulkard.

4. If a Bill be brought to call a Trustee to an Account, and he by Answers submits readily to it, though on the Account he be found in Debt; yet he shall pay Interest for the Balance, only from the Time of the Account liquidated, and no Costs if he has not misbehaved himself. Hill. 1705. between Parrot and Treby.

5. If a new Trial, or a second Issue be directed, it must be upon Payment of Costs. 2 Vern. 75.

6. A Demurrer was allowed, but without Costs, because it came in by Commission without any Answer. 1 Vern. 282.

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7. If
7. If a Feme Sole exhibits a Bill, and pending the Suit, marries, and the Baron and Feme bring a Bill of Revivor, and obtain a Decree with Costs, they shall have the Costs of the whole Suit, excepting the Bill of Revivor, altho' it was objected, that the Abatement was the Party's own Act; and that if the Defendant had been in the Right, and so to have Costs, yet he could not have compelled the Plaintiffs to revive. *Parch* 1685, between *Durham* and *Knight*, 1 *Vern*. 318. *that he might have compelled them to revive*, vid. *Title Abatement and Revivor, Letter (A).*

8. Upon a Motion to dismiss a Bill, wherein the Plaintiff had proceeded to an Answer only, with twenty Shillings Costs. *Per Lord Keeper,* that was a Rule made at least fifty Years since; and there is no Reason, if a Defendant has been put to greater Charge, why he should not have his full Costs, and that for the Future it should be referred to a Master to tax Costs in such Cases. *Hill*. 34 *Cur*. 2, 1 *Vern*. 116, 1 *Vern*. 334. *Like Order made.*

9. If a second Mortgagee brings a Bill to redeem the first Mortgage, who had been put to great Charge in foreclosing the Mortgagor; the Cost which the first Mortgagee has been at shall not be taxed, as in Case of an adversary Suit, but he shall be allowed all his Costs and Charges, as is done in Case of a Solicitor who lays out Money for his Client; and the Profits of the mortgaged Premises shall be first applied to pay off those Costs before it goes to sink the Principal. *Decreed Mich*. 1690, between *Lomax* and *Hide*, 1 *Vern*. 185.

10. A Bill of Exchange was obtained by Fraud and ill Practice; and the Court declaring it a gros Fraud, ordered the Party Costs to be ascertained by his Oath. 2 *Vern*. 133.

11. If a Copyholder commits a Forfeiture, which is found so at Law, and he afterwards exhibits a Bill to be relieved, it must be on Payment of Costs both at Law and in Equity. 2 *Vern*. 537. But if it were in such a Case, as that the Court could not relieve, yet they would not decree Costs against him.

12. The Commissioners of Charitable Uses cannot decree Costs on the Statute 45 **Eliz.** but if there be an Appeal from their Decree, my Lord Chancellor may decree the Costs, not only of the Appeal, but likewise of the Commission; and tho' they decree Costs, yet that shall not, upon an Appeal, be sufficient to reverse the Decree; for my Lord Chancellor may either fursease or lessen the Costs, or exempt the Party from them intirely. *Parch*. 1700, between *Rockley* and *Keyly.*

**C A P. XXI.**
C A P. XXI.

Courts and their Jurisdiction.

(A) Concerning the Jurisdiction of the ordinary and limited Court in Chancery, proceeding according to Law.

(B) Concerning the Jurisdiction of the extraordinary and unlimited Court in Chancery, proceeding according to Equity.

(C) Concerning the Jurisdiction of Chancery in Foreign Parts.

(D) Concerning the Jurisdiction of the Court of Equity in the Exchequer, and how it interferes with Chancery.

(E) How far Chancery will exert a Jurisdiction in Matters cognizable in Inferior Courts, as the Ecclesiastical Courts, University Courts, Chester, Durham, &c.

(A) Concerning the Jurisdiction of the ordinary and limited Court in Chancery, proceeding according to Law.

1. In Chancery there are two Courts, the one Ordinary, which proceeds according to the Laws and Statutes of the Realm, called the Petty Bag Side, and which has been a Court Time out of Mind: The other is called the Extraordinary Court, and proceeds according to the Rules of Equity. 4 Inst. 79. 2 Inst. 552.

2. The
2. The (a) ordinary Court hath Power to hold Plea of Scire Fac. for Repeal of the King's Letters Patent, Monstrans de droit, Traver-
veries of Offices, Partition in Chancery of Scir. Fac. upon Recon-
gnizances in this Court, Writs of Audita Querela, and Scir. Fac. in
Nature of an Audita Querela, Dowments in Chancery, the Writ
de dote Assiignanda upon Offices found, Executions upon Statutes
Staple or Recognizances, in Nature of a Statute Staple upon the
Act 23 H. 8. but the Execution upon a Statute Merchant is return-
able either into the K. B. or C. B. 4 Infl. 80.

3. This Court is Officina Jusititie, out of which all original Writs
and Commissions, which pass under the great Seal, do Issue; and
for these Ends this Court is always open, so that One from hence
may in Vacation have a Habecas Corpus, Prohibition, &c. which Issue
out of other Courts only in Term Time. 4 Infl. 80, 81.

4. All Personal Actions, by or against any Officer or Minister, in
Respect of their Service or Attendance, may be determined in this
Court. 4 Infl. 80.

5. This Court cannot hold Plea of Land, but it may of Trespasses
or Debt. 20 H. 6. 32.

6. The Proceedings in this Court are all in Latin, but they are
not inrolled in Rolls, but remain in Filaciis. 4 Infl. 80.

7. If the Parties defend to issue, this Court cannot try it by a
Jury, but the Lord Chancellor delivereth the Records with his
proper Hands into the King's Bench, to be tried there; because for
that Purpose both Courts are accounted but one, and after Trial
had to be (b) remanded into Chancery, and there Judgment to be
given: But if there be a Demurrer in Law, it shall be argued and

decided in this Court. 4 Infl. 80.

8. An Inquisition was taken, and a Forfeiture of the Office of
Warden of the Fleet found, and the Defendant pleaded to Issue; and
after Issue joined, several other Persons came in by Way of Mon-
strans de droit, and pleaded, and a Demurrer to them, and the
Record was carried into B. R. by the Clerks of the Petty Bag,
without any Order of the Court; in order to have the Issue tried.
And now two Questions were moved; whether the Record were
well removed, because it was done by the Clerks of the Petty
Bag, because it ought to be by the Lord Chancellor Propria
Manu. undly, Whether the Record be entirely removed, there being
an Issue as to One, and a Demurrer to the Rest. As to the first
Point, my L. Keeper was of Opinion clearly, that the Record was well
removed; for what is done by the Hand of the proper Officer of the
Chancellor, may be well enough said to be done by him,

Propriud
Courts and their Jurisdiction.

Propria Manu. And though the Clerk of the Petty Bag carrying the Record without an Order, has committed a Fault to this Court; yet that will not prevent the Record from being well removed; And as to the ad. he was of Opinion that the Record was entirely removed, on Consideration of the Cases of Jefferson and Dawson. 2 Saund. 6. The King and Stoughton, 2 Saund. 157. and the Prince's Cafe, 8 Co. Mich. 1700. Between the King and the Warden of the Fleet.

9. In a Cause on the Latin Side, on a Motion that the Defendant might stand committed for not vacating his Letters Patent of Reprizals, it was moved that they might be at Liberty to bring a Writ of Error in the King's Bench, for which was cited Dyer 315. 4 Inst. 80. &c. But my L. Keeper said all these Books were founded only on the single Opinion of my L. Dyer; and though he thought the Jurisdiction of Chancery, even on the Latin Side, not subjected unto, nor to be controlled by the King's Bench; and that he would (c) enjoin all such Writs of Error. Hill. 1682. between the King and Cary.

(a) That upon a Judgment given in this Court, a Writ of Error doth lie returnable into the King's Bench. Vid. 13 Ed. 3. 21 Aff. 34. Dyer 311. Plea. 591. and per L. Case: The Stile of the King's Bench is coram Regis, but the Stile of the Chancery is coram Regis in Cancelleria, and Addias Probat Minoritatem. 4 Inst. 80.

(B) Concerning the Jurisdiction of the extraordinary or limited Court in Chancery, proceeding according to Law.

1. The King cannot grant a Commission to determine a Matter of Equity, but it ought to be determined in Chancery, which hath had Jurisdiction (a) Time out of Mind. 12 Co. 113. proceeding according to Law, King's Bench, Common Pleas, and Exchequer, have had Jurisdiction, Time out of Mind, seems settled by the best Authorities. 9 Ed. 4. 43. Doler and Student, c. 7. 4 Inst. 78. 2 Ed. 69. But at what Time the Court of Chancery first exercised an extraordinary Power of acting and deciding according to the Rules of Equity, seems from the Diaries and Obscurity of the Matter very doubtful. It is however agreed, that its Commencement is much more modern than any of the other Courts; that neither the Mirror, Glanvil, Britton, Britton, or Fleta, mention any Thing of this Court as proceeding according to the Rules of Equity. The most probable Opinion is, that the Equity Side of the Court of Chancery began in the Time of E. 3. Lambert in his Anb Chase says, that when the Courts of Chancery and King's Bench ceased to be Ambulatory, and became settled Courts in a certain Place, (which was the 4 Ed. 3.) that then the King committed to his Chancellor, together with the Charge of the great Seal, his only legal, absolute, and extraordinary Pre-eminence of Jurisdiction, &c. but the Writ or Proclamation, 21 Ed. 3. directed to the Sheriffs of London, by them to be made public, seems to have given it an Establishment, by which the King commanded that all Business, relating as well to the Common Law of the Kingdom, as to such by special Grace cognizable by him should be prosecuted before the Chancellor, &c. and this Delegation afterwards received the Sanction of an Act of Parliament, 25 Ed. 3. which Act is thought, by others, to have first given it Authority. Vid. 1 Law. 542. that this Court did from this Time exercise a Jurisdiction in Matters of Equity, seems evident from the Rolls of Parliament. Vid. 1 Rot. Abr. 351. And the Complaints made in Parliament of the Exercise of this Power to the Subversion of the Common Law. Vid. Rot. Parl. Ann. 2 R. 1. 1 R. 2. and this occasioned the Statute 13 Rich. 2. c. 6. which reciting that People were compelled to come before the King's Council, or in the Chancery, by Writs grounded on untrue Suggestions, enacted that the Chancellor for the Time being, presently after such Suggestions be untruly found, and proved untrue, shall have Power to ordain and award Damages according to his Discretion, to him which is so untruly troubled as aforesaid, &c. which instead of Diminishing, increased the Power and Jurisdiction of this Court.

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2. A
Courts and their Jurisdiction.

2. A Cause shall not be examined upon Equity in the Court of
Roquetts, Chancery, or other Court of Equity, (b) after Judgment
at the Common Law. 1 Rol. Abr. 381.

(4) The Reasons given were, 1st, Because it draws the Matter determinable by the Common Law ad alio Examn., viz. a Trial by Witen-
ness. 2dly, After Judgment, the Parties ought to be at Peace and Quiet; and if it should be otherwise, every Plaintiff would begin in Equity, which would tend to the utter Subversion of the Common
Law. 3dly, A Court of Equity being no Court of Record, cannot hold Plead of any Thing of which
Judgment is given, which is a judicial Matter of Record. 3 Sfn. 123. But as the allowed Province of
Equity is to correct and moderate the Rigour of the Law, and likewise to give Relief in Cases for which
human Wisdom was not capable of providing positive Laws; surely it is but reasonable that Equity
should have a Power of interposing after a Judgment at Law; especially if it be considered how uncertain
the Law is before it be determined; and as this Reasoning has occasioned the contrary Practice, which
being now established, it will be sufficient only to mention the Authorities on this Head, viz. 4 Inf. 26, 97. 3 Inf. 123. Dal. 81. Mer. 586. Pl. 1139. 916. Pl. 1300. 1 Lem. 241. 2 Lem. 115. 3 Lem.
2 Bull. 301, 302. 3 Bull. 115. 1 Lem. 241.

(5) Sequel of the (c) Reasons were first introduced by Sir Nichlas Be-
cen, in Q. Etc. Reign, before which, Chancery found some Difficulty in enforcing its Decrees; and for some
Time after was controverted by the Common Law Courts. Vid. 4 Inf. 84. 1 Rol. R. 86. 3 Bull. 54. 1 Rol.
Rep. 190. Lit. Rep. 166. Egerius imposed a Fine on Sir Thos. Thimbleby, for not performing his Decree
concerning Lands of Inheritance, and estrated the same in the Exchequer; but he was discharged of it;
for otherwise, by a Mean he might bind the Interest of the Land when he had no Power. 4 Inf. 84. So where
the Lands of one Waite were extended by a Process out of Chancery, and he brought his Affix in the
Common Pleas, and was relieved. 4 Inf. 84. A Person committed to the Fleet for not performing
a Decree made subsequent and contrary to a Judgment at Law, was by Hobbs Corpus, out of the
King's Bench, admitted to Bail, and afterwards discharged. Cro. Jac. 341.

(4) It has been held that a Court of Equity could not de-creede against a Max-
im of Law. 1 Rol. Abr. 376. And therefore it has been adjudged, that one Executor could not compel the other to Account. 1 Rol.
Rep. 265. And that one Joint Tenant could not sue his Companion. 1 Rol. Abr. 376. And that if an Obligor
lost his Bond, he was without Remedy. 1 Rol. Abr. 375. Where the Lessor entered upon the Lessee, and
inforced his Rent, it was held that he had no Remedy in Equity. Lat. 149. So where the Party be
came remediless by his own Act, as by paying Money without an Acceptance. 1 Rol. Abr. 374. So where
one made a Promise for valuable Consideration to make a Lease; and it was held that the Party could
not sue on this Promise in Equity, because he might have an Action on the Cafe. 1 Rol. Abr. 280. But all these Resolutions in the Common Law Courts have been long since exploded, and the constant Prac-
tice otherwise. Boni Jus dicit aemulare justitiain.

5. A Bill was brought for a Discovery against an Executor, and
the Executor pressed for a Dismission, because the Plaintiff had the
Effect of his Suit, viz. a Discovery, but per Curiam, as to a Dis-
mission to Law, because the Plaintiff hath a Discovery here, when
this Court can determine the Matter, it shall not be a Hand-maid
to other Courts, nor beget a Suit to be ended elsewhere; and therefore
retained the Bill. Mich. 26. Car. 2. between Barker and Dee,
2 Chas. Ca. 200.

6. If
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6. If A sues in Chancery for certain Lands, and (e) afterwards sues in the Common Pleas for the same Lands, the Court of Chancery will grant an injunction to stay his Proceedings in the Common Pleas till the Matter is heard in Chancery. Cary 71.

7. If a Man has his Election to proceed at Law, or in Equity, and the Bill is for Land and mean Profits, he may elect to proceed in an Ejectment at Law for the Possession; and in Equity, upon the Account, because at Law he can recover Damages for the Mefine Profits, from the Time only of the Entry laid in the Declaration. 1 Vern. 105.

8. Equity will not suffer a Penalty to be demanded, if the Party will perform that for the Non-Performance of which the Penalty is given. 2 Chan. Ca. 88.

9. Equity will not affist a Forfeiture. Vid. 2 Vern. 127. When a Parson brings a Bill for Tithes, he must waive the Forfeiture. 1 Vern. 60.

10. The Bill was at the Relation of several Freemen of the Weavers Company, against the Defendants and other Bailiffs, Wardens, and Assistants of the said Company, setting forth their Incorporation, tempore H. 2, but that the Freemen being imposed upon, and abused, by the governing Part of the Corporation, had a farther Charter and Rules granted them, tempore Car. 1, but that the Defendants had been guilty of many Breaches and Violations of their Charters, and had oppressed the Freemen, &c. and mentioned some Particulars; and for a Discovery of the rest, and that they might be decreed for the Future to observe the Charters, and to have an Account of the Revenue of the Corporation which the Defendants had mis-spent, &c. was the End of the Bill; to which the Defendants demurred, because, as to Part of the Bill, it was to subject them to Prosecutions at Law, and to a Quo Warranto: And as to the other Parts, the Plaintiffs had Remedy by Mandamus, Information, or otherwise, and not here; and of the fame Opinion was my L. Keeper, who said it would ulurp too much on the King’s Bench; and that he never heard of any Precedent for such a Case as this, and so allowed the Demurrer. Mich. 1705, between the Attorney General and Reynolds & al.

11. If a Trustee does, by Fraud and Combination with the Cestui que Trust, endeavour to evade any penal Law, as the Statute of Simony, &c. under Pretence that a Trust is only cognizable in Equity, and that Equity should not affist a Penalty or Forfeiture, yet Chancery will aid remedial Laws, and not suffer its own Notions to be made use of to elude any beneficial Law. Parch. 1706. between the Attorney General and Hindley.

12. The Plaintiff brought her Bill to have an Account of the real and personal Estate of her late Husband, and to have Satisfaction thereout for Defect of Value of her Jointure-Lands, which he covnanted to be, and to continue of such Value: The Defendants insisted it was a Matter properly triable at Law, and she ought to be sent there to try it, for if she were damnified, this Court could not afford Damages; but my L. Chancellor said the Matter might enquire into it well enough; and therefore sent it to him to examine and report, and
and said if he found there were any Difficulties in it, he could send it to be tried afterwards. Mich. 1799, between Hedges and Everard.

13. A Devisee of Lands being in the Possession of them, brings a Bill to prove the Will, and prays Relief; the Heir brings on the Caufe ad requisitionem Defitis, and infills the Bill ought to be dismissed, because no Merit for a voluntary Devisee, where no Debts or Legacies are to be paid, to have a Decree against the Heir; but the Master of the Rolls said, it is the Busines of this Court to quiet Possessions, and gave the Defendant a Year to try the Validity of the Will, and then to refer back to the Court. Hill. 1702, between Woodgate and Woodgate.

14. The Plaintiff's Father married Sir James Langham's only Daughter, and upon the Marriage, Articles were entred into between the Defendant and the Plaintiff's Father, by which the Defendant covenants that he would, within six Months after the Marriage, pay the Plaintiff's Father 10000l. and that his Executrix should pay him 10000l. within six Months after his Death; and the Plaintiff's Father covenanted to make the Wife a Jointure of 1500l. but no Covenant for making any Settlement upon the Children: The Marriage took Effect, and the Defendant paid the 10000l. and the Jointure was made, and both the Plaintiff's Father and Mother being dead, and the Defendant being grown very old, and having married a fourth Wife, the Plaintiff his Grandson brought this Bill, pretending that the Defendant was grown very Weak in his Understanding, and wholly influenced by his Wife, and it was greatly feared would spend or make away his Estate, and not leave wherewithal to pay the 10000l. at his Death; and therefore to have the Money paid presently, the Defendant having an Allowance of the Interests, or at least that he might give better Security to pay it when it became due, was the Bill: The Defendant swore by his Answer, that on the Marriage Treaty no other Security was infilled upon but the Covenant; and that if there was, he would not have conrtented to it; and though it was infilled upon that this was like the Case of Executors, who are every Day compelled to give Security for the Payment of Legacies payable at a future Day; yet my Lord Chancellor dismissed the Bill, and said, that to do it here, would be to alter the Terms of the Agreement; and that though this Court had Authority to compel Executors to give Security, yet it was because they were considered as Trustees for the Legatees: And no Agreement one way or other. Hill. 1698, between the Earl of Warrington and Sir James Langham: But upon an Appeal to the House of Lords, the Matter was compromised.

15. The Plaintiff having recovered Judgment against J. S. (but no Writ of Execution sued out) supposing some particular Effects of J. S.'s to be in the Defendant's Hands, brought a Bill to discover them in order to subject them to his Judgment. The Defendant demurs because there is no Equity to compel such a Discovery, and no such Bill would lie against the Debtor himself, much less against a third Person. My L. Keeper seemed to agree it would not lie against the Debtor himself, nor to have a general Discovery from a third Person, but only for particular Things, as this Bill was, and over-ruled the Demurrer. Mich. 1705, between Taylor and Hill. Vid. Bills of Discovery, Title Bill.

17. If a Conveyance be gained indirectly, though it be by Deed and Fine, yet a Court of Equity can relieve against it: Resolved Mich. 1693, between Woodhouse and Brayfield, 2 Vern. 307.

18. A Bill was brought to have a Will set aside, being obtained by Fraud and Circumvention; and my L. Chancellor was clear of Opinion that a Will may in Equity be set aside for Fraud or Circumvention. Mich. 1700, between Welby and Thornagh.

19. But it has since been decreed in the House of Lords, that a Will of a real Estate could not be set aside in a Court of Equity for Fraud or Imposition, but must first be tried at Law on dehisce vel non, being Matter proper for a Jury to enquire into. July the 28th, 1728, between Bramshy and Kerridge.

(C) Concerning the Jurisdiction of Chancery in Foreign Parts.

1. If there are two Joint-tenants of Lands which lie in Ireland, and one of them prefers a Bill for an Account of the Profits, and for a Partition of the Lands, the Bill will be good as to the Profits which are in the Personalty, but not as to the Partition which is in the Reality; for a Commission to make Partition cannot be avoided into Ireland. Hill. 27. Car. 2. between Cartwright and Pettus, 2 Ch. Cas. 214.

2. A. obtained an Annuity or Rent-charge, charged on certain Lands of B.'s in Ireland. B. suggesting some fraudulent Practice here in London, in obtaining it, exhibited his Bill against A. being here to be relieved; A. pleaded to the Jurisdiction of the Court, the Land lying in Ireland; but the Plea was over-ruled, and he was ordered to pay Costs for endeavouring to oust the Court of its Jurisdiction; per Nottingham, L. C. Mich. 1682, between the Earl of Argyle and Mulchamp, 1 Vern. 77. 1 Vern. 135. S.C. and the former Resolution affirmed by North, L.K. upon a Re-hearing; who said that the Objection that the Court could not sequester the Lands in Ireland was of little Weight, for that it did not appear but that the Defendant had other Lands in England, which would be subject to a Sequestration.

3. So where a Bill was exhibited against A. to answer a Contract made of Lands that lay in Ireland; and though the Lands lay in Ireland, and the Title was under the Act of Settlement there, yet a ne exeat Regnum was granted, and Process against him to answer; and when he afterwards went into Ireland without answering, he was sent for by special Order from the King, and made to answer the Contempts, to abide the Julicr of the Court. Between Archer and Preston, and cited by the L. C. 1 Vern. 77.

4. If a Trustee lives in England, the Chancery may decree the Trust, though the Lands lie in Ireland, although it was objected, 1st. That in this Case there had been two Judgments in the Courts of Law in Ireland, and three Bills in Equity. 2dly, That the Trustee came here occasionally, and that it would be unreasonable to keep him from his Concerns to attend this Suit. 3dly, That the Case arises upon Facts properly triable in Ireland, viz. Whether Cftus
Courts and their Jurisdiction.

que Trust were the same Person who died in Rebellion, which was twice tried before in Ireland, and found against the Plaintiff, partly, that this Case depends on the Construction of the Act of Settlement in Ireland; but these Objections were overruled, the Proof being full as to the Identity of the Person; two Chief Justices concurred with my Lord Chancellor, that the Judges here were proper Expositors of the Irish Laws. Mich. 1686, between the Earl of Kil-
daro and Sir Morrice Ennfather and Fitzgerald, 1 Vern. 419.

5. The Bill was, that the Defendant might redeem a Mortgage of the Island of Sarke, or be foreclosed; the Defendant pleaded in the Jurisdiction of the Court, that the Island was Part of the Duchy of Normandy, and had Laws of their own, and were under the Ju-
risdiction of the Courts of Guernsey; but the Plea was overruled, because the Mortgage was of the whole Island, and for that the Defen-
dant was served here; for Equitas agit in Personam. Pisc. 1705, between Toller and Carteret, 1 Vern. 494. vid. 1 Ch. Ca. 243, where it is said by Sir W. Maynard, that Court could not by Decree bind the Isle of Man, it being out of the Power of any Sheriff.

(V) Concerning the Jurisdiction of the Court of Equity in the Exchequer, and how it inter-
terces with Chancery.

1. If a Cause has been heard in the Exchequer, and two several Trials directed, viz. Will, or no Will, and in both a Verdict is for the Plaintiff; and yet the Court discharges the Bill, but without Prejudice in Law or Equity; the Plaintiff, by an original Bill in Chancery, may have Relief for those Matters. 1 Ch. Ca. 155.

2. A Bill was exhibited in Chancery concerning Tithes and Bounds of a Parish, which proceeded to Answer and Replication; then the Plaintiff exhibited another Bill in the Exchequer, and his Witnesses were examined, and now proceeds again in Chancery, and replies; the Defendant pleaded the Proceedings and Examination in the Ex-
chequer, and ruled good as to the Examination of the same Mat-
ters, which being examined to there, were not to be examined in Chancery. 1 Ch. Ca. 293.

3. A Mortgagor brought a Bill in the Exchequer to foreclose, the Mort-
gagee pleaded a Bill in Chancery to redeem, to which the Mort-
gagee pleaded the former Bill depending in the Exchequer; and the Plea was overruled, tho' it was urged, that if the Deputy Remember-
er should take the Account one Way, and a Matter here should take it another, it would breed Confusion; and that if this Court should be of Opinion, that there ought to be no Redemption, and the Ex-
chequer should decree a Redemption, the Jurisdictions would clash; But per Lord Chancellor, the Exchequer, tho' an antient Court of Equity, yet is but a private Court, and its Jurisdiction for getting in the King's Revenue, and if there should happen any of the Inconve-
niencies mentioned, there are several Procedents, that Injunctions have gone to the Exchequer in such Cases. Hill. 1833, between the Earl of Newburgh and Wren, 1 Vern. 220.
4. A Decree was obtained in the Exchequer against two of the Inhabitants of Bridgendworth, to establish a Custom for all the Inhabitants there, to grind at the King's Mills; and this Decree was had without any Trial, and afterwards affirmed in the House of Peers; and now this Bill was brought in Chancery by other Inhabitants of Bridgendworth, to prevent Multiplicity of Suits, and to examine Witnesses in perpetuum rei memoriam, and to discover Evidences in the Defendant's Hands; and in the Bill they deny that there is any such Custom for Grinding, &c. and allege, that the former Decree in the Exchequer was obtained by Collusion, and that the Defendants would not bring any Actions at Law, till the Plaintiff's Witnesses were dead; and they likewise pray a Discovery, whether the Inhabitants in new Foundations as well as old, are obliged to grind at the King's Mills; to this Bill the Defendants pleaded the former Decree in the Exchequer, and Affirmance in the House of Peers in Bar, and also demurred to the Bill, but had not, as was affirmed, denied the Collusion charged by the Bill; and the Court held, that the Tenor of the Bill was directly to question the Justice of the former Decree, and that the Charge of Collusion need not be answered, being only inferred to give the Court Jurisdiction; and if there was any Redress, it must be by Application to the House of Peers. Mich. 1699, between Fay & al. and Brawne.

5. The Plaintiffs, as Assignees under a Statute of Bankruptcy, pray an Account of the Estate of Hind the Bankrupt, seised by the Defendants, on Pretence of Debts owing to the King, by Virtue of several Extents sued out for that Purpose, viz. one original Extent for the King, and two other Extents in Aid by the Defendants, who were Farmers of the Excise, it being objected that this Matter was properly cognizable in the Court of Exchequer, which was the King's Court of Revenue; and that this Court would not examine what was the Quantum of the Debt due to the King, or how far the Extents were necessary: The Lord Keeper allowed the Objection and dismissed the Bill; and as to the Precedents which had been produced, where this Court had held Plea in like Cases; he said they did not come up to this Case, for in the Case of (a) Caspil and Brewer, (a) 1 Vern. the Defendant who sued the Extent in Aid, confessed by Answer he had sufficient of his own Estate to pay the King's Debt; and in the Case of Chobomy and Scurry, it appeared to be a fraudulent Contrivance by an Extent in Aid, to gain a Preference to a Debt of an inferior Nature. Pash. 1701. between Brown and Trant, 2 Vern. 426.

(E) How far Chancery will exert a Jurisdiction in Matters cognizable in inferior Courts, as the Ecclesiastical Courts, University Courts, Chelten, Durham, &c.

1. If A. and B. are made Executors, and both prove the Will, but A. only acts as Executor, and dies, leaving his Wife Executrix, and a Legatee sues B. in the Spiritual Court, he being liable there by his Joining in the Probate of the Will; yet per Lord Keeper, the Judgments of the Ecclesiastical Courts are as well subject to the Equity
Courts and their Jurisdiction.

Quity of this Court as the Judgments at Law; and he inclined to
give Relief in this Case, the Party being without Remedy by Ap-
peal, for the Delegates are to judge according to the Eccleisaistical
Laws. *Pasch. 23 Car. 2.* between Vanbrugh and Cock, 1 Chan.
Ca. 200.

2. If an Infant Legatee sueth in the Ecclesiaistical Court, and af-
ferwards in Chancery, the Suit depending in the Ecclesiaistical
Court cannot be pleaded in Bar, for there is no such Security for
the Infant’s Advantage as here, especially as to Interest and bringing in
an Account. *Hill. 33 Car. 2.* between Howell and Waldron, 2 Chan.
Ca. 85.

3. A Bill was brought to have Distribution of an Intestate’s Es-
state, according to the Statute 22 Car. 2. to which the Defendant
pleaded, that the Ordinary is made Judge, and appointed to take
Security, and that the Plaintiff ought not to sue here; but the Lord
Chancellor over-ruled the Plea. *Pasch. 34 Car. 2.* between Pamplin
and Green, 2 Chan. Ca. 95. 2 Vent. 362. S.P.

4. The Widow in the Spiritual Court set up a Procurator for her
Children, the Infants, and gets her Account passed there, and each
Child’s Proportion ascertained there, and Distribution decreed; and
on giving new Security, got the old Security discharged; but the
Court, without Regard to the Proceedings in the Spiritual Court,
decreed an Account of the whole Estate. *Pasch. 1888.* between Bis-
fell and Actell, 2 Vern. 47.

5. If there be Fraud in obtaining a Will relating only to a Per-
sonal Estate, let the Fraud be ever so apparent; yet it is not exa-
minalible in Chancery after the Will is proved in the Spiritual Court,
and so long as that Probate is in Force. Between *Archer* and *Moffe*,
2 Vern. 8.

6. A Will of a Personal Estate obtained by Fraud, and by getting
the Party to swear, that it should not be revoked; yet after Probate
in the Spiritual Court is not to be controverted in Equity; but if a
Party claiming under such Will comes for any Aid into Equity, he
shall not have it. Between *Nelson* and *Oldfield;* 2 Vern. 76.

7. If the Plaintiff exhibits his Bill to be relieved touching some
Lands in Cornwall, and the Defendant being *Head of Exeter College*
in Oxford, pleads the Privilege of the University of Oxford, and that
he ought to be sued in the Vice-Chancellor’s Court in Oxford only,
his Plea will be over-ruled; for Matters of Freehold are excepted out
of their Charter; and their Court can, at first, have but a lame Juris-
diction as to Lands in Cornwall. *Hill. 36 Car. 2.* between Stephens
and Dr. Berry, 1 Vern. 212.

8. The Plaintiff sets forth in his Bill, a *Contract* under Seal with
the Defendant, for making a Lease of certain Lands in Middlesex,
and prays an Execution of the Agreement; to which the Defendant
pleaded, that he was Head of a College in Oxford, and sets forth the
Charters of, &c. empowering the University to inquire and proceed in
all Pleas and Quarrels in Law and Equity, &c. and concluded to
the Jurisdiction of the Court; but the Plea was over-ruled; 1st, Be-
cause the Charter ought properly to be extended to Matters at Com-
mon Law only, or to Proceedings in Equity which might arise in
such Cases, and not to meer Matters of Equity, which are originally
such as to execute Agreements in *Specie.* 2ndly, Conuance of Pleas
is never to be allowed, unless the inferior Jurisdiction can give Re-
medy;
Courts and their Jurisdiction.

9. A Claim of Privilege cannot be put in by Writing, but it must be by Way of Plea, but it need not be on Oath. 1 Chan. Ca. 237. The Privilege of any inferior Court cannot be objected to at hearing, but must be pleaded. 2 Vern. 484.

10. A Man cannot sue in the Chancery of Chester for a Thing which in Interest concerns the Chancellor there, because he cannot be his own Judge, and therefore he may in this Case sue in the Chancery of England; otherwise there would be a Failure of Right. Between Sir John Egerton and Lord Derby, 12 Co. 113.

11. If a Man hath Cause to complain in Equity of a Matter arising within the County Palatine of Chester; if the Defendant lives out of the County Palatine, he may be sued in the Chancery here, or otherwise there would be a Failure of Justice, for Proceedings in Equity binding the Person only, if the Person lives out of the Jurisdiction of the Chamberlain of Chester, there can be no Relief there. 12 Co. 113.

12. A Bill was exhibited to have an Account of the Profits of Lands which the Defendant had received on Trust for the Plaintiff during his Minority, and for Money received on Bonds belonging to the Plaintiff, and for Writings, &c. the Defendant pleaded, that the Lands lay in Cheshire, and that he lived in Cheshire in the County Palatine of Chester, and therefore not within the Jurisdiction of this Court; and though Precedents were ordered to be searched, and on View of them a Master certified, that tho' the Privilege of the Counties Palatine was allowable, yet it was between Parties dwelling in the same County, and for Lands there; yet the Plea was overruled. Hill. 14 Car. 2. between Edgeworth and Davies, 1 Chan. Ca. 40.

N n C A P. XXII.
C A P.  XXII.

Creditorz and Debtorz.

(A) Where there is a Provision by Deed or Will for Payment of Debts, what Debts shall be paid.

(B) The Order and Manner in which Debts shall be paid, or what Precedence one Kind of Debt shall have over another in Equity.

(C) What shall be a good Payment, to whom, and at what Time.

(D) Where Debts of a different Nature are due, and a general Payment is made, to which Debt it shall be applied.

(E) What Conveyance or Disposition shall be fraudulent as to Creditors.

(A) Where there is a Provision by Deed or Will for Payment of Debts, what Debts shall be paid.

1. F A. makes a Deed of Trust of Lands for Payment of his Debts, to take Effect after his Death, and the Words of the Deed are, *Monies owing by him*, and a Schedule is annexed to the Deed, wherein Mention is made of $1000$, to A. and $500$, owing to B. and then there is this *Item, viz. The Sum of $3000$, owing to other Persons*; this Deed shall not be construed to charge the Lands with Debts contracted afterwards, tho' they exceed not the Sum mentioned in the Schedule. Decreed *Hill. 1681. between Purefoy and Purefoy, 1 Vern. 18.*

2. A. had a Demand of $500$, against B. and had run it up to $2700$, and obtained a Decree for it in Chancery, from which B. appealed to the *House of Lords*, where the Decree was affirmed: It was observed, that B. at the pronouncing this Decree in the House of Lords, fell down in a Swoon, and within a Week afterwards died, as supposed, of Grief; but he first got a Petition answered, for a Re-
a Rehearing, and in his Sickness devis’d all his Lands for the Payment of his Debts; and my Lord Keeper said, that this could not be intended a Provision for A’s Demand, which he denied upon Oath, and in which he died a Martyr; however, at length decreed, that after all Debts upon simple Contract were paid, A should come in and be paid his Debt, if he could find Assets. Hill. 1682. between Norden and Norden, 1 Vern. 142. 1 Vern. 431. S. C. cited, and said to be adjudged by my Lord Keeper North, not to lie within the Intent of the Provision for Payment of the Testator’s Debts.

3. A Man devised his Lands for the Payment of his just Debts; the Testator, whilst a Student at Cambridge, (but of Age) had, by Surprize, been prevailed upon to give a Covenant for Payment of a Portion to his Sister; but he afterwards contested this Debt; and though he was decreed to levy a Fine to subject Lands for the Payment of it, yet he refused so to do: Per Curiam, this being a just Debt, shall be paid, though perhaps not within the Intent of the Provision. Decreed Hill. 1686. between Lord Hollis and Lady Car, 1 Vern. 431.

4. If one by Will or Deed subject his Lands to the Payment of his Debts, Debts barred by the Statute of Limitations, shall be paid; for they are Debts in Equity, and the Duty remains; the Statute hath not extinguished that, tho’ it hath taken away the Remedy. 1 Salk. 154. 2 Vern. 141. S. P. decreed.

5. A Man borrows a Sum of Money on the Mortgage of a Ship, and covenants, that whatever Money the Mortgagee should advance for Insurance of the Ship in a Voyage, she was then about to make, that he would repay it; but there was no Covenant for Repayment of the Principal Money itself; the Mortgagee insures the Ship, and the Mortgagor repaid him that Money; then the Ship proceeds on her Voyage, and returns home; and being afterwards to go out on another Voyage, the Mortgagee treated with a Person concerning the Insurance, but could not agree for the Rate, and thereupon the Ship went out and was lost in the Voyage; and now between the Mortgagee and the Executors of the Mortgagor, the Question was, whether the Mortgagee should come in for his Principal Money as a Creditor by simple Contract; and it was argued that he ought not, because there was no Covenant for Payment of the Mortgage-Money, so that he must be supposed to rest himself on the Ship only for his Security, and that being lost, so is his Money too; but on the other Side it was urged, that if he had taken no Security at all for his Money, he had then, without Question, been a Creditor by simple Contract; and surely the Taking Security ought not to put him in a worse Condition, especially now that the Security being lost and gone, his Debt rests wholly on the simple Contract; and of the same Opinion was my Lord Chancellor Harcourt, and pronounced his Decree accordingly 1713. between Thomas and Terrey.

6. If a Man lieth in Tail of Lands, of which there is a Term in Trustees to attend the Inheritance, levies a Fine, and by Deed subjects the Land to a Debt of 1000l. but declares, that after the Debt paid, the Land should be to the old Uses, and after devises the Land for Payment of all his Debts, the Lands shall be liable to all his Debts in general. Decreed Mich. 1682. between Turner and Gwynne, 1 Vern. 99, 100. but the Reporter makes a Quære; for it seems he was but Tenant in Tail of the Inheritance, and so could not change it by
by his Will, unless it be intended he had still a Power of doing it
lodged in him, by Reason of the Fine, notwithstanding he had de-
cclared, that after the Payment of the 1000l. it should go to the
former Uses.

7. On the Marriage of the Plaintiff with Edward, Earl of War-
wick, in 1696. previous thereto a Settlement was made by the Earl
to the Use of two Trustees, for ninety-nine Years, if the Earl and
Countess should so long jointly live, in Truth, out of the Rents and
Profits to pay to the Countess, for her separate and personal Use, by
Way of Pin-money, 400l. per Annum quarterly, and subject thereto
that and the Rest of the Estate was to the Earl for Life; Remainder as
to Part to the Countess for Life for her Jointure; Remainder of the
Whole, as the said Estates should determine, to the Use of the First
and other Sons of that Marriage successively in Tail Male, with Remain-
der in Fee to the Earl; the Marriage takes Effect, and July 1701,
the Earl being taken ill makes his Will, whereby he charges, as far
as he was able, all his Real Estate with the Payment of his Debts,
and soon after dies, leaving only one Child, Edward-Henry, then
Earl of Warwick. At the Time of his Death there was a Year and
three Quarters of the Pin-money in arrear, and he was likewise in-
debted to several other Persons in considerable Sums of Money,
which his Personal Estate would not extend to pay and satisfy; and
there being no Executor named in the Will, the Lady Eliz. Rich,
his Sister, as Principal Creditor, took out Administration to him,
with the Will annexed; and nothing but the Reversion in Fee of the
whole settled Estate, being in his Power to charge with the Payment
of his Debts, this Reversion could not be affected or fold, during the
Continuance of the Estate-tail, as it was liable to be docked by a
Recovery by the Tenant in Tail; Earl Edward-Henry attained his
Age of twenty-one Years in 1719, and soon after levied a Fine to
the Use of himself and his Heirs, and in 1721, died without Issue In-
testate and unmarried; and upon his Death the Estate descended to
the Defendant; and the Plaintiff, the Countess, his Mother, took out
Letters of Administration to the said Edward-Henry; and now this
Bill was brought by the Countess for a Satisfaction of the said
Arrears of Pin-money, and by the other Creditors of Earl Edward,
for a Satisfaction of their Debts; and in order thereto, for an Ac-
count of the Real and Personal Estate of Earl Edward; and that if
the Personal Estate were not sufficient, that the same might be paid
out of the Real Estate, which now, by the Failure of Issue Male,
was become Assets, according to the Will of Earl Edward. It was
insisted upon, for the Defendant, that the Earl and Countess living
together, and no Demand being proved to be made of these Arrears
of Pin-money, that it was in the Nature of a Present of them to the
Earl, or a Waiver of them, and that at most, in such Cases, the
Court never allowed more than a Year's Arrear; because it was im-
possible, but that at the Husband's Death, some Arrears must be,
unless they were always paid punctually at the Day, and therefore a
Year has been always held to be as much as was reasonable to allow
in those Cases; but in this Case the Court allowed the Whole, as
the Whole were proved to be in arrear; and that between Husband
and Wife, who lived well together, three Quarters of a Year made
but little Difference. Another Point insisted upon for the Defendant
was, that by the Fine levied by Earl Edward-Henry, the Estate-
(B) The Order and Manner in which Debts shall be paid, or what Precedence one Kind of Debt shall have over another in Equity.

1. If Lands are devised to Trustees for Payment of Debts, Debts by simple Contract, and Debts by Specialty, shall be paid in Proportion; and though the Trustees are Creditors to the Testator, or Sureties for him, yet they shall not be allowed to prefer themselves. 2 Chan. Ca. 54. That all Debts, when the Devise is to a Trustee, shall be paid in Average, except those that affect the Land. Decreed Vid. 1 Vern. 63.

2. But if the Lands are devised to an (a) Executor, they become (a) That they become legal Affairs in the Hands of the Executor, and shall be paid in a Court of Administration, and according to the Precedency or Superiority at Law. Decreed Mich. 1682. between Girling and Lee, 1 Vern. 63. 2 Chan. Rep. 262. S.C. an Executor, Resolved 1 Chan. Ca. 248. 1 Rol. Abr. 920. Hob. 265.

3. If one devises Lands to his Nephew, and his Heirs, whom he makes his Executor in Trust to sell, for Payment of Debts and Legacies, the Debts and Legacies shall be paid in Average; for he having devised to him and his Heirs, knew that he designed, that it should go in a Court of Decent; and he to take as a Trustee. 2 Vern. 133. But Q: whether the Debts should not be preferred; and vid. 2 Vern. 248. the Case of Sir John Bowles cited; where, upon a Trust for Payment of Debts and Legacies, tho' it was decreed by my Lord Keeper Bridgman, that they should be paid Pari Passu, and each to bear the Loss in Average; yet my Lord Nottingham revered the Decree, and ordered the Debts to be first paid; and said he would not let a Man die in his Grave. Note: This has since been the constant Practice with Respect to Debts and Legacies; but as to Creditors, they shall be all paid in Average, except such whose Debts affect the Land. Vid. 2 Vern. 405.

4. If on the Estate of J. S. there are several Mortgages, Judgments and Statutes; and he likewise owes several Debts by Bond and simple Contract, and some Parts of his Estate are mortgaged no less than
than thrice over; and in this Manner, viz. to A. there is a subsequent Mortgage of Lands, on which B. had a prior Mortgage of a Moiety of the Lands contained in A's Mortgage, and also of several other Parcels of Land: C. has a prior Mortgage of the other Moiety of the Lands comprised in A's Mortgage, and also of several other Lands; and J. S. having subjected his Estate for the Payment of his Debts, it was held by my Lord Chancellor, that to avoid Confusion, the subsequent Mortgages having a Right to redeem the real Securities should be first paid, and then the Bonds and simple contract Debts in Average; although it was urged, that the subsequent Mortgages, &c. should be paid in Average with the Bond and simple contract Creditors, their Securities not affecting the Lands, the legal Estate being in the first Mortgagee. It being likewise urged, that a Judgment Creditor should have Satisfaction before a second Mortgagee, as at (6) Law my Lord Chancellor thought it reasonable, but for the above Reasons left him to get it at Law, if he could. Decreed Mich. 1682, between Child and Stephens, 1 Vern. 101. 5. It was decreed at the Rolls, that Mortgages were to be paid in the first Place, and then Judgments, and then Recognizances, &c. but upon an Appeal to the House of Lords, it was adjudged, that Mortgages were not to be preferred to other real Incumbrances; but that Mortgages, Judgments, Statutes and Recognizances should take Place, according to their Priority, and as they stood in order of Time. Mich. 1705, between the Earl of Bristol & al and Hungerford, 2 Vern. 524. 6. If Creditors have joined in a Bill, and obtained a Decree for Payment of their Debts out of real and equitable Assets, none of them shall be permitted to obtain a Preference of the others, by obtaining Judgments against the Executors; and per Lord Keeper, where there are legal and also equitable Assets, the Creditors, who will take their Satisfaction out of the legal Assets, shall have no Benefit of the equitable Assets, until the other Creditors, who can only be paid out of those Assets, have thereout received an equal Proportion of their respective Debts. Decreed Feb. 1702, between Sheppard and Kent, 2 Vern. 435. 7. If the Tenant seised in Fee, enters into a Statute, and devises a Legacy of 500 l. and the Consecue takes all the Personal Estate in Execution, so that nothing is left to pay the Legacy, Equity will decree the Real Estate to stand charged with the Legacy. 2 Chan. Ca. 4. 2 Chan. Ca. 117. S. P. decreed. 8. If there is a Debt owing to the King, Equity will order it to be paid out of the Real Estate, that other Creditors may have Satisfaction of their Debts out of the Personal Assets. 1 Vern. 455. 9. One died, leaving a Debt by Judgment, and another due by Bond, and the Judgment-Creditor being at a good Understanding with the Heir, levied his Debt out of the Personal Estate; and Hutchinson, Lord Commissioner, inclined to relieve the Bond-Creditor, and that he should stand in the Place of the Judgment-Creditor, and charge the Land with his Debt; for as the Heir has often the Assistance of a Court of Equity, in having the Personal Assets applied in
Creditor and Debtor.

Easé of the Real Estate; it is but reasonable that he should do Equity to others: But the Reporter refers to the Order. 2 Vern. 182.

10. If one dies indebted by Mortgage and simple Contract, and the Executor applies the Personal Assets in Discharge of the Mortgage, the simple contract Creditor shall stand in the Place of the Mortgagee, and the one of them gets Judgment of Assets cum accessor; yet as their Relief is only in Equity, they shall be paid in Average. Deed of Mich. 1718, between Willson and Fielding, 2 Vern. 763.

11. But where H. seised in Fee, and indebted by Bonds, by Will gives Legacies to his Children (whom he had otherwise provided for before) and devises his Lands to his eldest Son in Tail; and he being also made Executor, he pays the Bonds with the Personal Estate; and the Legatees brought a Bill to come against the Real Estate in the Place of the Bond-Creditors; the Court admitted to admit, that if the Lands had descended, the Legatees might have been relieved in this Manner; but since the Testator had devised them, it was resolved, that they ought to be exempted; for it was as much the Testator's Intention, that the Devisee should have the Land, as the others should have their Legacies; and a specific Legacy is never broke in to in order to make good a pecuniary One; and the Children being otherwise provided for, are not in the Nature of Creditors. Per Harcourt Lord Chancellor, upon an Appeal from a Decree of the Master of the Rolls, who held, that the Real and Personal Estate should be charged, that both the Debts and Legacies might be paid. Between Horn and Merick, 2 Salk. 416.

12. If Lands are devized in Trust, to pay Mortgages in the first Place, and then Legacies; and the Trustee is made Executor, who mortgages the Lands to pay other Debts, the last Mortgage shall be paid before the Legacies. 1 Vern. 69.

13. The Husband, in Consideration of his Wife's Joining with him in a Fine, and parting with her Jointure of 40l. per Ann. gives her Trustee a Bond to settle other Lands of 40l. per Ann. on the Wife for Life, Remainder to the Heirs of her Body; the Husband being indebted in other Bonds, dies intestate, and the Wife takes Administration, and confesses Judgment to her Trustee, on a Bill by another Bond-Creditor. Deed of the Wife's Bond as to herself only, to be performed before the Plaintiff is paid; but the Children to have no Benefit of this Bond preferable to the other Bond-Creditors. Between Cottle and Fripp, 2 Vern. 220.

14. If A. purchases Lands of B. and mortgages back these Lands for Part of the Purchase-money, and gives a Note to B. for 200l. the other Part thereof, and A. devises these Lands to be sold for Payment of his Debts; this 200l. Note, tho' for Part of the Purchase-money, shall not be preferred to other Debts, nor be a Charge on the Lands in Equity. Mich. 1692, between Bond and Kent, 2 Vern. 287.

15. If a Freeman of London gives a voluntary Judgment, payable three Months after his Death, it shall be postponed to Debts by simple Contract, and to the Widow's customary Part, but will bind the Freeman's Legatory Part. Between Fairbear and Bowers, 2 Vern. 202.

16. A voluntary Bond shall not, in a Course of Administration, take Place of Real Debts, tho' by simple Contract, but shall, notwithstanding,
withstanding, be paid before Legacies. Decree per Lord Harcourt between Jones and Powell.

17. If a Man recovers a Judgment or Sentence in France for Money due to him, the Debt must be considered here only as a Debt due on simple Contract. 2 Vern. 540.

18. The Arrears of Rent incurred in the Life-time of the Tela-tor, shall be paid before Bond-Debts, tho' refrerred on a Parlce Leafe. 1 Vern. 490.

19. If J. S. devises his Lands for the Payment of Mortgages, Judgments and Recognizances that affected the Land and then other Debts; and there is a Recognizance not inrolled, it shall be taken but as an Obligation, and be paid as a Debt by Specialty. 2 Vern. 750.

20. So where a Recognizance being inrolled by special Order of the Court, after the Time for Inrolling of it was elapse; and the Conufor, betwixt the Date of the Recognizance and the Inrolling of it, borrowed Money of J. S. upon a Judgment, which was now over-reached by the Recognizance; and the Estate of the Conuor being in Mortgage prior to the Recognizance, so that neither the Recognizance nor Judgment could reach the Estate without the Aid of Equity; and the Court inclined to give the Preference to the Judgment-Creditor. 2 Vern. 234. vid. 2 Vern. 272. that Bond-Debts and Debts ascertained, shall be preferred to Debts which only found in Damages.

21. J. S. entered into a Bond, wherein he bound himself and his Heirs to pay 100 l. within six Months after his Death, and became indebted to the Plaintiff Neave in 45 l. by simple Contract, and died intestate, not leaving personal Assets sufficient to pay his Debts; the Defendant was his Son and Heir, and had real Assets from him by Deed of the Value of 100 l. and he took out Administration to his Father; and six Days before the 100 l. became due, by the Condition of the Bond, agrees with the Obligee to convey the Freehold Lands descended to him in Satisfaction of the Bond, and the Conveyances were drawn and ingrossed accordingly; but before the Execution of them, he gives the Obligee thirty Shillings to have the Consideration of the Deed razed, and made to be for so much Money paid instead of Delivery up of the Bond; but no Money was paid, but only the Bond delivered up; Neave the Plaintiff demanding his Debt, he insisted he had paid the Bond out of the personal Assets, and had none left to pay him; whereupon he brought this Bill, and the Defendant insisted, that he being both Heir and Administrator, had a Liberty to pay the Debt out of what Assets he pleased; that he had not paid the Bond out of the real Assets, nor ever intended so to do; but upon the whole Matter the Court declared the Bond to be well paid out of the real Assets, and decreed the Debt and Costs out of the personal Assets. Hill. 1695. between Neave and Alderton.

22. Upon a special Report it was adjudged, that in Relation to other Debts, in Point of Priority of Satisfaction, a Duty decreed should take Place before Debts on simple Contract and Bonds, and next to Judgments. 1 Vern. 143.

23. So where an Administrator paid Money on Specialties, though without
Without notice of money due by (a) decree, and had fully ad-
ministered the effects; yet he was obliged to pay the money decreed.

2 Vern. 37.

A decree made against the tenant before a statute acknowledged by him; and a prohibition granted to the Council of Trent accordingly. 1 Petr. Abs. 371. An obligation becoming due after the death of the tenant, shall be satisfied before a decree in Chancery. Sp. 38. But the law has since changed, and decrees are now held to be equal to judgments at law. Vol. 2 Vern. 83.

(C) What shall be a good payment, to whom, and at what time.

1. If J. S. a scrivener, lends the money of A. to B., and takes security by mortgage, in trust for A. and A. has the security always in his possession, and B. pays the money to the scrivener, who becomes insolvent, such payment will not discharge B. for having paid the money, without taking up his security, is an evidence that he trusted the scrivener more than A. Decreed on view of precedents, between Hen and Comishy, 1 Chan. Ca. 93.

2. So if money is paid to one who usually received money for the obligee, yet if such receiver has not the custody of the bond, payment to him will not be good. Between Gerrard and Baker, 1 Chan. Ca. 94.

3. A man intrusts a scrivener to put out his money, he takes bond for it, and afterwards delivered the bond to the obligee, but receives the interest from time to time, and afterwards called in the principal; and the obligee paid the principal to the scrivener, and took a note from him to deliver up the bond (he having it not when the money was paid in) then the scrivener writes to the obligee to send him the bond, which he accordingly does, but takes the scrivener's note, either to deliver back the bond, or to pay the money; before the money paid, the scrivener breaks, and the obligee, for a little money, gets back the bond from the scrivener's clerk, and puts it into suit; and this bill was brought by the obligee to be relieved, and have the bond delivered up, which was decreed accordingly, with costs; for the court held, that from the time the bond came into the scrivener's hands, he was trustee for the obligee (the money being paid); and it is plain the obligee trusted the scrivener, not only with putting out his money, but with the custody of his security. Pauch. 1691. between Abbington and Orme.

4. The interest-money of a mortgage being paid to a scrivener, who became insolvent; the question was, who should bear the loss: it was admitted, 1st, That if the scrivener be intrusted with the custody of the bond, the obligee may receive either principal or interest. 2dly. That if the scrivener be intrusted with the mortgage-deed, but not the bond, he hath only an authority to receive the interest, but not the principal, because the giving up the deed is not sufficient to restore the estate; but there must be a reconveyance; whereas as the giving up a bond is in law an extinguishment of the debt. 3dly. That the the scrivener has neither the custody of the mortgage nor bond, yet if the mortgagee agrees that the mortgagor shall pay the interest to the scrivener, the interest may be well paid to the scrivener as long as the mortgagee lives. 4thly. That if his executor receives interest from the scrivener, which became due after the
Mortgagee's Death, he thereby renoues the Agreement, and the Mortgagor shall not bear the Los, if the Scrivener breaks, which was the principal Point in this Case. Decreed at the Rolls, and affirmed by Cooper Lord Chancellor, on a Rehearing, 7 Ann. between Whitlock and Wastham, 1 Salk. 157.

5. If A. and B. being Trustees of Money, for the separeate Use of a Feme Covert, lend it to C. who gives Bond to the Trustees, and the Trust is declared in the Condition, and the Bond is kept by the Feme; and B. having received Money for C. they settle an Account, and B. gives C. a Receipt for 100l. as received for the Use of the Feme, and B. becomes insolvent, C. shall not be discharged of this 100l. the Trust being declared in the Condition, and the Feme having the Bond in her Custody. Decreed Hill. 1705. between Baldwin and Billingsey, 2 Vern. 539.

6. If there are two Executors, and one of them is decreed not to receive any more of the Testator's Estate, and a Creditor, by Mortgage to the Testator, being present at the Pronouncing the Decree, but not a Party to the Suit, pays Money to the Executor, against whom the Decree was, he shall pay it over again. Decreed Trin. 34 Car. 2. between Harvey and Montague, 1 Vern. 57, 122. S. C.

7. If an Obligor pay the Money to the Obligee after Assignment of the Bond, and Notice thereof, such Payment will not discharge him. 2 Vern. 540.

8. If a Feme Mortgagee, on her Marriage, settles the Estate on her self for Life, Remainder to the Issue of that Marriage, and the Mortgagee brings a Bill to redeem, and she omits setting forth the Settlement in her Answer, and the Mortgagor has a Decree to redeem, and he pays her the Mortgage-money; and afterwards the Issue of the Mortgagee brings an Ejectment on the Settlement, and recovers the mortgaged Premises, the Mortgagor shall be relieved, having paid his Money pursuant to the Decree, and having been in no Fault; for if the Issue was cheated, it was by his own Mother. Decreed 1690. between Chapmain and Duncimp, 2 Vern. 142.

9. The Plaintiff was indebted to the Defendant upon two Notes, and the Defendant obtained Judgment at Law against him for the Money; and then deferring the Defendant's Forbearance, he told him, that if he would procure one Defoy to give him his Note for the Money, he would accept of it, and acknowledge Satisfaction on the Judgment, and deliver up the Plaintiff's Notes; and being to go forthwith out of England, he left the Plaintiff's Notes with his Agent here, to be exchanged for Defoy's, in Cafe the Plaintiff procured them, and the Plaintiff accordingly procured two Notes payable to the Defendant, which he delivered to the Defendant's Agent, and took up his own Notes; and the Attorney at Law paid all further Proceedings, but would not acknowledge Satisfaction on the Judgment, having no Orders for it from his Client; and before Defoy paid any of the Money, he failed, and then the Defendant proceeded at Law on the Judgment; whereupon the Plaintiff brought this Bill to be relieved, and suggested, that he had discounted the Money with Defoy, and made him Satisfaction; but he made no Proof of any such Thing, and therefore at the Hearing his Bill was dismissed by the Master of the Rolls; and this Decree was affirmed by my Lord Keeper on Appeal. Hill. 1700. between Grubarr and Gairand.
10. If a Mortgagee, by Will, remits Part of the Mortgage-money, provided the Rest be paid within three Years after his Death, and the Devisee fails to pay the Money, he shall lose the Benefit of the Devise. 1 Chan. Ca. 52.

11. So if a Creditor agrees with his Debtor to take a Sum of Money less than his Debt, so that it be paid precisely at such a Day, and he fails of Payment, and afterwards brings his Bill, suggesting some equitable Excuses, why he did not pay precisely at the Day, and that he tendered the Money within a Day or Two afterwards; yet his Bill will be dismissed; for Cujus est dare ejus est dispromere, 1 Vern. 210. but if the Security was bettered, as by another's becoming bound with him. Q. & c vid. 1 Chan. Ca. 110.1

12. But if a Deed of Trust is created for Payment of such Creditors as come in within a Year, a Creditor will not be excluded, tho' he doth not come in till after the Year. 1 Vern. 260, 319. S. C.

(D) When Debts of a different Nature are due, and a general Payment is made, to which Debt shall it be applied.

1. If A. is indebted by Security, carrying Interest, and also on simple Contract, and he pays Money generally, it shall be taken to be paid towards Discharge of the Debt which carried Interest; for it is natural to suppose that a Man would rather elect to pay off the Money for which Interest was to be paid, than the Money due on Account. Mich. 1681. between Heyward and Lomax, 1 Vern. 24. but Q.

2. For if A. indebted by Speciality, and also on simple Contract, pays several Sums, and enters them in his Book, on Account of what was due by Speciality, this Entry shall not be sufficient to make the Application; for altho' the Rule of Law is, that Quicquid solvitur, solvitor secundum modum solvens; yet this Rule is to be understood, when the Perfon, at the Time of Payment, declares on what Account he pays the Money; but if the Payment is general, the Application is in the Perfon receiving. Per Lord Chancellor, Hill. 1707. between Manning and Weferne, 2 Vern. 606.

3. If A. is indebted to B. by Bond, in which J. S. is bound as Surety, and also by simple Contract, and A. states an Account of both Debts with B. and makes a Bill of Sale for securing the Balance, which proves deficient, the Bill of Sale shall be applied towards the Discharge of both Debts in Proportion: And per Lord Chancellor, solely for this Reason, that both Debts had been cast into one stated Account, and the Bill of Sale made towards Satisfaction of the whole Debt. Decreed Hill. 1681. between Bevis and Roberts, 1 Vern. 34.

4. If a Creditor, by Judgment, and also by Bond, receives 200l. in Part, of the Purchaser of the Estate of the Debtor, but gives no Notice that he would apply it to the Bond-Debt, it shall be applied towards Satisfaction of the Judgment, being Part of the Purchase-money. Decreed Trin. 1687. between Bres and Marfo, 1 Vern. 468.

(E) What
(E) **What Conveyance or Disposition shall be fraudulent as to Creditors.**

1. **The Wife joined with her Husband in a Mortgage, and levied a Fine, with Intent to Bar her Dower; and in Consideration thereof, the Husband agreed the Wife should have Redemption of the Mortgage; and the Husband afterwards mortgaged the Estate twice more; the subsequent Mortgages brought their Bill to Set Aside the Agreement as (a) fraudulent against them, which was decreed: But the Wife had her Dower secured to her. 1 Vern. 294.**

(a) By the 15 Eliz. cap. 5. All fraudulent Conveyances of Lands, &c. Goods and Chattels, to avoid the Debt or Duty of another, shall (as against the Party only, &c. whose Debt or Duty is to be avoided) be utterly void, and every of the Parties to such fraudulent Conveyance, &c. being privy therunto and justifying the same, shall forfeit one Year's Value of the Goods, &c. provided this Act shall not extend to Grants made bona fide, and upon good Consideration, to Persons not privy to such Collusion, or having no Notice or Knowledge thereof.

2. The Father makes a voluntary Settlement on Trustees, on Trust, to raise Money to pay his Debts therein mentioned, and Portions for his younger Children, referring 50 l. per Annuity to himself for Life, Remainder to his Son, &c. and the Father continues in Possession, and twelve Years after contracts Debts by Bond: And per Hutchins Lord Commissioner, the Settlement is fraudulent as to the Plaintiffs, who are Bond-Creditors, the Trustees having never entered; and a Deed, tho' not fraudulent at first, may afterwards become so, by being concealed, or not purveyed; but the other two Commissioners doubting, it was sent to be tried at (b) Law. Pageb. 1692. between Hungerford and Earle, 2 Vern. 261.

(b) If A. makes a Bill of Sale to B. a Creditor, and afterwards to another Creditor, and delivers Possession, at the Time of Sale, to neither; after C. gets Possession of them, and B. takes them out of his Possession, C. cannot maintain Trust, because the first Bill of Sale is fraudulent against Creditors; and so is the Second; yet they both bind A. and B.'s is the elder Title, and the naked Possession of C. ought not to prevail against the Title of B. that is prior, where both are equally Creditors, and Possession, at the Time of the Bill of Sale, is deliver'd over to neither. Trim. 1706. between Baker and Lyd. Per Eliz C. J. but as to fraudulent Conveyances and Bills of Sale, see the following Authorities, which are the most remarkable Cases in the Books on this Subject. Tello. 156. Cre. Fac. 270. 1 Brow. 111. 6 Co. 18. 3 Co. 80. Mor. 618. 2 Buck. 126. 1 Rel. Abr. 179. Palms. 214. 2 Lem. 223. 3 Co. Litt. 3 b. Cre. Eliz. 810. 11 Co. 48. Drye 351. 5 Co. 60. Mor. 614.

3. If A. conveys Lands to the Use of himself for Life, with Power to mortgage such Part as he shall think fit, Remainder to Trustees to sell to pay all his Debts, and afterwards becomes indebted by Judgments, Bonds and simple Contracts, this Conveyance is fraudulent, as against the simple contract Creditors, they having no Notice of the Settlement; for he having reserved a Power to mortgage what Part he pleased, it amounted, in Effect, to a Power of Revocation, and therefore fraudulent, as against Creditors by Judgment. Trim. 1705, between Farback and Murbury, 2 Vern. 510.

4. J. S. by a Bill of Sale, made over his Goods to a Truce for the Defendant, who lived with him as his Wife, and was so reputed, he also purchased a Lease of the House wherein he dwelt, in the Name of Truce, and declared the Trust thereof to himself for Life, then in Trust for the Defendant during the Requidue of the Term; and the Court held the Bill of Sale to be fraudulent as to the Plaintiffs, who were Creditors; but as to Declaration of the Trust of the Term, that it was good, and not liable to his Debts, the whole
Creditor and Debtor.

Term never being in him; and it being so settled on the Purchase; and that he might have given the Money to the Defendant to have purchased the Lease herself. Hill. 1704. between Fletcher and Lady Lidley, 2 Vern. 490.

5. The Plaintiff had brought his Action against M. for lying with his Wife; and 13 January, 1689. M. made a Conveyance of his Land to Trustees, in Trust, to pay his Debts mentioned in a Schedule annexed to the Deed, and such other Debts as he should appoint, within ten Days in Hillary-Term following; the Plaintiff recovered 5000l. Damages against M. and brought this Bill to be relieved against the Deed as fraudulent against him, and made to defeat him of his Debt. Per Cur, this Deed is not fraudulent, either in Law or Equity, for such Debts as are named in the Deed; for the Plaintiff was no Creditor at the Making of the Deed; and tho' it were made with an Intent to prefer his real Creditors before this Debt, when it came afterwards to be a Debt; yet it was a Debt founded in Maleficio, and therefore it was conscientious in him to prefer the other Debts before it; but the Plaintiff may come in upon the Surplus after the Deeds mentioned in the Schedule, or appointed within ten Days, pursuant to it, are satisfied. Mich. 1699. between Lewknor and Freeman.

6. A Man binds himself and his Heirs in a Bond, and dies, leaving a Real Estate to descend to his Heir, and the Heir having aliened the Real Estate, the Obligee brought a Bill against the Heir and Purchaser to be relieved, on the (c) Statute against fraudulent Devises; and my Lord Chancellor relieved him. Note: It was objected, that that Statute being introductive of a new Law, the Relief on it ought to have been at Law. Pasteb. 1702. between Bateman and Bateman.

Charge out of the same, whereof the Devisors shall be seated in Fee-simple, in Possession, Reversion, or Remainder, shall be deemed to be fraudulent, and void against Creditors, upon Bonds, or other Specialties, their Executors, Administrators, &c. and such Creditors shall have their Action of Debt against the Heir at Law, and the Devisors, jointly, &c.

7. Though by the Statute against fraudulent Devises, a Man is prevented from defeating his Creditors by his Will; yet any Settlement or Disposition he shall make in his Life-time of his Lands, whether voluntary, or not, will be good against Bond-Creditors, for that was not provided against by the Statute, which only took Care to secure such Creditors against any Impostion which might be suppos’d in a Man’s last Sicknes; but if he gave away his Estate in his Life-time, this prevented the Defect of so much to the Heir, and consequently took away their Remedy against him, who was only liable in Respect of the Lands descendent; and as a Bond is no Lien whatsoever on Lands in the Hands of the Obligor; much less can it be so when they are given away to a Stranger. Decreed Trin. 1718. between Parslowe and Weedon.

Q q C A P. XXIII.
C A P. XXIII.

Customs of London and York.

(A) What shall be deemed a Freeman of London's Estate, and subject to the Custom.

(B) What Disposition made by a Freeman of his Estate, shall be good or void, being in fraud of the Custom.

(C) Persons intituled to the Benefit of the Custom, and subject to it.

(D) Concerning the Custom with Respect to the Children of a Freeman, and here of Advancement, bringing into Hotchpot, Subsidyship, and Forfeiture.

(E) Concerning the Widow of a Freeman, and what shall be a Bar of her Customary Share.

(F) Concerning the Legatory of dead Man's Share, what shall go out of it, and how it shall be distributed.

(G) Concerning the Custom of York.

(A) What shall be deemed a Freeman of London's Estate, and subject to the Custom.

If a Freeman of London has a Mortgage in Fee, this shall be counted Part of his Personal Estate, and will be subject to the Custom. 1 Chan. Ca 285. per Cur.

(a) When this Custom first began, the Citizens of London had no regard at all to a Real Estate, for they did not suppose any Freeman of London would purchase such Estate, but would employ his whole Fortune and Stock in Trade, and for the Benefit of Commerce; which is the Reason that neither Estates of Inheritance nor Feeholds in Houses, Lands, &c. are within the Custom. Mich. 1710. between Clowell and Littister argpendo.

2. But
2. But a Leafe for Years, waiting on the Inheritance of a Citizen, shall not be reckoned a Chattel, to be divided among the Children by the Custom; agreed by Counsel, and admitted by the Court. 2 Ch. Ca. 160.

3. A Citizen and Freeman of London, poiss'd of a Leafe worth 150l. bought the Reversion and Inheritance thereof in the Name of Trustees, for 150l. and died; and whether this Leafe, being Assets at Law, should be Part of his Personal Estate, subject to the Custom of London (there being no Declaration that it should attend the Inheritance) was the Question; and it was decreed, that tho' this Leafe would be Assets at Law to pay Debts, yet it should attend the Inheritance, tho' there was no Declaration of Truth that it should do so, and not be liable to the Custom; per Nottingham Lord Chancellor; and this Decree was confirmed on a Rehearing, by North Lord Keeper. Hill. 1653. between Dowse and Derwall, 1 Vern. 104. the Custom of London shall not prevent the Attendance of a Term on the Inheritance. 1 Vern. 2. per Nottingham Lord Chancellor.

4. On a Marriage of B.'s Daughter with A. a Freeman of London, B. the Father, settles a Term for Years in Truth, that A. the Husband should receive the Rents and Profits till such Time as D. and E. or the Survivor of them, should otherwise appoint, and then such Person as they should appoint; and for Want of such Appointment, for such Persons as the said A. by Will should appoint; and for Want of such Appointment, then in Truth for the Executors and Administrators of A. the Trustees having made no Appointment; the Question was, whether this Term should go according to that Appointment, or be looked upon as Part of A.'s Personal Estate, who was a Freeman of London, and so go according to the Custom; and my Lord Keeper was of Opinion, that it was not to be looked upon as Part of A.'s Personal Estate, because it was never in him, but was settled by his Wife's Father, and therefore not subject to the Custom. Hill. 1702. between Grice and Gooding.

5. If a Freeman of London is made both Executor and residuary Legatee, and he dies before he has made his Election, whether he will take as Executor or Legatee; yet the Legacy must be considered as such, and will be subject to the Custom of London. 1 Ch. Ca. 310. per Lord Chancellor.

6. A Citizen of London having been a great Chymist, and spent great Part of his Estate in that Study, had given to the Defendant, who had married one of his Daughters, a little before his Death, several Receipts for making Strong-waters, which the Plaintiff, who had married the other Daughter, and who had only 400l. Portion given him, allledged, were worth 500l. per Ann. certain Profit; and to induce the Court to think they were of Value, he offered the Defendant 500l. for his Interest in them, and prayed, that upon his bringing his 400l. into Hotchpot, the Defendant might be obliged to account for them; but my Lord Chancellor said, that he would not so far Countenance these Receipts (which is only a Piece of Quackery, and serves only to cheat the People) as to put a Value on them in Chancery; and the Plaintiff refusing without, to bring his 400l. into Hotchpot, the Bill was dismissed. Mich. 1682. between Jenks and Holford, 1 Vern. 62.
(B) What Disposition made by a Freeman of his Estate, shall be good or void, being in Fraud of the Custom.

1. If a Freeman of London is possessed of a Term for Years, and he voluntarily assigns it as a Provision for his Child, and dies, yet his Wife shall have her (a) customary Share therein; so found by a Jury on an Issue directed out of Chancery, and tried before Hale Ch. Juf. Between City and City, 2 Lev. 130.

(a) Though the Father cannot dispose of the customary Part from his Children; yet he may, by his Will, appoint, that if one dies before twenty-one, another shall have his Part. 1 Lev. 227. but 2 Lev. 130. 

2. If a Freeman of London makes a Deed of Trust of a Term for Years, to the Use of his Will, and he by Will declares it to be, a Deed and Declaration will be void, being against the Custom. Decreed to Car. 1. between Nott and Smithies, 1 Chan. Rep. 84.

3. A Citizen of London being possessed of a Term for Years, assigns the same in Trust for himself for Life, paying 20l. per Ann. to his Son by his first Wife, Remainder to his said Son during the Residue of the Term; and it was made a Doubt, whether this Assignment was good within the Custom of the City of London, so as to bind the other Children; and it was referred to the Recorder to certify. Patch. 1689. between Clerke and Leatherland, 2 Vern. 98.

4. A Freeman of London having three Saffards by T. L. confesses a Judgment to her in 1000l. defeasance for Payment of 500l. in three Months after his Death; and it was held, that this Judgment being voluntary, should not prevail against Debts by simple Contract, nor against the Widow of the Freeman, but that she must have her Share according to the Custom of the City, without any Regard had to this Judgment; but his Debts being paid, the Judgment will bind the legatory Part. Decreed Hill. 1690. between Faireheard and Baisers, 2 Vern. 202.

5. A Freeman of London, by Deed in Nature of a Will (the Words of which were, I give and devise, but it was sealed and delivered) gave several Goods to his Children, but kept them in his Possession; and it was held per Curiam, in Favour of the Widow, that if Goods are absolutely given away by a Freeman in his Life-time, this will stand good against the Custom; but if he has it in his Power, as by Keeping of the Deed, &c. or if he retains the Possession of the Goods, or any Part of them, this will be a Fraud upon the Custom. Mich. 1692. between Hall and Hall, 2 Vern. 277. vid. 2 Vern. 612. S. P.

6. A Freeman of London having one Daughter, and three Grand-children by a Son deceased, by Deed assigns over several Leaves in Trust, to pay any Sum not exceeding 1000l. as he should appoint; and by Deed and Will he appoints 500l. to his Daughter, and the Remainder to his Grandchildren; and it was held, that this was in Fraud of the Custom, and void as to the Moiety which the Daughter was intituled to. Decreed Trin. 1712. between Turner and Jennings, 2 Vern. 685.

7. But
7. But if Money be given by a Freeman of London to be laid out in Land, and settled on his eldest Son for Life, Remainder to his first and other Sons in Tail, this shall not be reckoned any Part of the Personal Estate, neither is the Son obliged to bring it into Hoth-pot, to intitle him to a Share of the Personal Estate. Per Lord Chancellor, Mich. 1685, between Annand and Honeywood, 1 Vern. 345.  
2 Chan. Ca. 118. S. C.

8. A Freeman of London, who was a Widower, and had several Children, being possessed of a very considerable Leasehold Estate, on a second Marriage conveys these Leaves, in Consideration of 2000l. Portion, in Trust for himself for Life, Remainder to his Wife for Life, in Lieu and Bar of all Dower, Custumary Estate. Or, Remainder to the first Son of that Marriage, and so to every other Son; and in the Settlement there was an Agreement, that the Trustees should sell these Leaves, and invest the Money in the Purchase of Lands of Inheritance, to be settled to the Ules aforesaid; but the Husband dying before any Purchase made, it was held, 1/2, That the Wife was barred from claiming any other Part of the Personal Estate. adly, That the Children by the first Venter could have no Right to those Leaves; neither would this Settlement prevent the Children of the second Marriage from coming in for a Share of the Rest of the Personal Estate; for by the Agreement these Leaves are now to be considered in Equity, as if a Purchase had been actually made, and the Freeman had paid the Money out of his Pocket: Decreed Mich. 1700, between Hancock and Hancock, 2 Vern. 665. S. C.

(C) Persons intitled to the Benefit of the Custom, and subject to it.

1. If an Heir or Coheiir has a Real Estate settled on him by his Father, he shall, notwithstanding, come in for his Share of the Personal Estate, according to the Custom of (a) London, certified to be the Custom. Hill. 1683, between Civil and Rich, 1 Vern. 216.  
2. Jon. 204. S. P. Per Curiam.

Mind, and there has been a Custom, that if any Freeman or Freedwoman dies, leaving Orphans under Age, unmarried, that they have had the Custody of their Body and Goods, and that the Executors and Administrators have used to exhibit true Inventories before them; and if there appeared to be any Debts, to be bound to the Chamberlain, to the Use of the Orphans, in a reasonable Sum, to make a good Account thereof upon Oath, after they have received them; and if they refused, to commit them till they were bound; this is a good and reasonable Custom; and if the Ecclesiastical Court will compel them to make an Account there against this Custom, a Prohibition lies. Hob. 247.

2. If a Freeman of London leaves London, and resides in the Country, yet on his Death his Personal Estate shall be (b) liable to the Custom. 2 Vern. 110.

Inhab or die in London. 1 Rot. Hyp. 316. 1 Sid. 550. All the Children of a Freeman, the he dies, and they were born out of London, shall be Orphans, 1 Vern. 180. 1 Med. 80. If a Legacy be given by one Freeman to the Children of another, it shall be subject to the Custom. Hall. 50. If an Orphan is taken out of the Custody of a Person to whom the Court of Orphans has committed him, they may imprison the Offender till he produces the Infant, or is delivered by Court of Law, 1 Sid. 550. Reym. 116. S. C. adjudged. 1 Lawe. 162. S. C. adjudged. So if any one (tho' not a Freeman) without the Consent of the Court of Aldermen, marry such Orphan, under the Age of twenty-one, though out of the City, they may fine and imprison him for Non-payment thereof; for if the Custom should not extend to Marriages out of the City, their Power would be but in vain. Hill. 25 & 26 Cai. s. between the King and Harwood, 1 Vern. 178. 1 Lex 32. S. C. Adjudged 1 Med. 79. S. C.
3. A Citizen of London dies, leaving a Widow, and no Children, but has several Grandchildren living at the Time of his Death; and the Quittance was, whether they were within the Custom of the City of London, or not; and the Lord Chancellor taking Time to consider of the Case, and consulting the Recorder and several of the Aldermen, delivered his Opinion, that Grandchildren were not within the Custom of the City of London. Pach. 1686. between Fowke and Hunt, 1 Vern. 397.


(D) Concerning the Custom With Respect to the Children of a Freeman; and here of Advancement, bringing into Hotchpot, Survivorship, and Forfeiture.

1. ANY Provision made by the Father, in his Life-time, for his Children, is an Advancement within the Custom, unless it be declared by Writing, that they are not sufficiently advanced; and for some Time it was held, that in such Writing there must be Mention made, what Sum they received from their Father, because of bringing it into Hotchpot. 1 Vern. 89. Per Curiam: But whether there be any Difference in giving a Portion before, or after Marriage, or whether Presents at Christnings and Lyings-in are to be reckoned an Advancement. Q. & vid. 1 Vern. 61.

2. By the Custom of the City of London, where a Child is married with the Father's Consent, and there is a Portion given in Marriage, such Child is debarred from claiming any Benefit of the Orphanage Part, unless the Father shall by Writing under his Hand and Seal, not only declare, that such Child was not fully advanced, but likewise Mention in certain, how much the Portion given in Marriage did amount unto, that so it may appear what Sum is to be brought into Hotchpot. 1 Vern. 216. But this Matter seems to be well settled by the following Case and Certificate.

3. Sir Ralph Box, a Freeman of London had two Sons and two Daughters, both the Daughters were married in his Life-time; and upon the Marriage of one of them with the Plaintiff, Sir Ralph entered into Articles, to give 2000 l. with her for her Portion; and there being an Expectation that her Grandmother would leave her something considerable at her Death, which the Plaintiff's Friends were not willing to rely on; Sir Ralph covenanted to pay the further Sum of 400 l. for what the Grandmother should leave her; the Marriage took Effect, and Sir Ralph paid the 2000 l. and 400 l. and the Grandmother died, and left the Plaintiff's Wife nothing; and now Sir Ralph being dead, the Plaintiff and his Wife brought this Bill, suggesting, that she was not fully advanced, tho' Sir Ralph had declared by his Will, that she was, and therefore ought to have an Account of his Personal Estate, and her Portion ought to be made up to her a full customary Part; the Court desired the Recorder of London to certify what the Custom of the City was in such
such Cases, who certified, "a) and my Lord Chancellor said, "b) that the Certificate being the proper Trial in this Case, and being a-against the Defendant; for when the Certainty of the Advancement appears, the Father's declaring, or not declaring her fully advanced, as by an Or- does not avail, an Account must be taken of the Estate, and the Majesty's 2000 l. must be made up her full customary Part, and the 400 l. High Court paid for the Grandmother's Legacy must not be taken as any Part, of Chancery of the 14th of May last, that being paid on a Bargain only. Decreed Trin. 1699. between that depend- Chace and Box. 

ing, between James Chace and Elizabeth his Wife, Plaintiffs, and Sir Ralph Bar, Knight, Defendant, the Lord Mayor and Aldermen, are required to certify the Custom of London, by the Mouth of the Recorder, in the Points following, (sic.) Whether if a Citizen of the said City hath, in his Life-time, advanced any of his Daughters in Marriage with a Portion of Money, and shall by any Writing under his Hand and Seal, declare such Daughter was by him fully advanced; whether such Daughter, by the Custom of the said City, is not excluded from having or demanding any further, or other Part of her Father's customary Estate, as an Orphan of the said City, or whether the shall, after her Father's Decease, have a Share of his customary Estate, bringing what she received on her Marriage, into Hotchpot: We, the Lord Mayor and Aldermen of the said City of London, having heard the said Parties, and their Counsel learned in the Law, do humbly certify your Lordship, that by the Laws and Customs of the City, if any Freeman's Child, Male or Female, be married in the Life-time of his or her Father, by his Consent, and not fully advanced to his or her full Part or Portion of his or her Father's personal or customary Estate, as he shall be worth at the Time of his Decease; then every such Freeman's Child so married, as aforesaid, shall be excluded and debared from having any further Part or Portion of his or their said Father's personal or customary Estate, to be had at the Time of his Decease, except such Father, by his Last Will and Testament, or some other Writing by him written, and signed with his Name or Mark, shall declare or express the Value of such advancement; and then every such Child, after the Decease of his or her said Father, producing such Will or other Writing, and bringing such Portion so had of his or her Father, or the Value thereof, into Hotchpot, shall have as much as Will make up the same a full Child's Part or Portion of the customary Estate his or her said Father had at the Time of his Decease; submit them, if any Father shall, by any Writing under his Hand and Seal, declare such Child was by him fully advanced. Dated, &c.

4. A Freeman of London having advanced his Daughter with a Portion, and intending to exclude her from any further Share (on some Displeasure taken against her) made his Will, and thereby recites, that he had advanced her with 300 l. and upwards, gives her five Shillings, and no more, and died; and after his Death the said Daughter brought a Bill to have the said 300 l. made up a Moiety of his Estate (he having no other Child, and the Custom not extending to Grandchildren) and had a Decree accordingly, for the Words and upwards, are Certum in Incerto, and not to be regarded, tho' it was objected it might be 1000 l. or 2000 l. or any other Sum above 300 l. Decreed Hill. 1704. between Bright and Smith.

5. A Settlement of a Real Estate on a Child is no Advancement, nor to be brought into Hotchpot. 1 Chan. Ca. 160. Neither does a Devise of a Real Estate bar the Child of its customary Share of the Personal Estate. 2 Vern. 753.

6. If a Freeman of London advances a Child in Part by a Portion which is to be brought into Hotchpot, such Portion or Advancement must be brought into the orphanage Part only. Per Lord Chancellor Mich. 1685, between Beckford and Beckford, 1 Vern. 345. 2 Vern. 281. S. C. decreed, viz. that the Estate left by the Testator, shall be fifth divided into three Parts, viz. the Widow's third Part, the orphanage Part, and the legatory or testamentary Part, and then what the Children in Part advanced had received, shall be brought into the orphanage Part only, and not to increafce the whole Estate; and therefore.

7. If there be an only Child in Part advanced in the Father's Life-time, such Child shall not bring her Part into Hotchpot, there being none.
156 Customs of London and York.

none in equal Degree with her; agreed between Fane and Bening,
2 Vern. 234. 2 Vern. 650. S. P. between Dean and Lord Delawarr;
and tho' there be a Widow, yet she is to have her Third exclusive.
2 Vern. 754. S. P. for if it were to be brought in, it must fall a-
gain into the Child's Part.

8. If a Freeman of London dies, leaving two Daughters and a
Wife, and one of the Daughters dies, tho' after a Division and Par-
tition of the Perfonal Estate, yet the surviving Sister shall have the
Whole of the orphanage Part. Per Lord Chancellor, Trim. 1713,
between Loefies and Lewen.

9. If a Child intitled to an orphanage Share dies before twenty-
one, and unmarried, her Share will survive to the Rest of the Chil-
dren, tho' she makes a Will, and devizes it away at seventeen Years
of Age. Per Cur., 2 Vern. 559.

10. But if a Man marries an Orphan, who dies under twenty-one,
her orphanage Part shall not survive to the other Children, but shall
go to the Husband. Between Fouke and Lewen, 1 Vern. 88.

11. If a Man marries a City Orphan, and her Portion is in the
Chamber of London, and he dies before her Age of twenty-one,
this shall not be looked upon as a Deposilum for the Husband, but
as a Debitum or Clofe in Action, which he not having taken out, or
reduced into Possifion, must survive to the Wife. An. Phefam's
Cafe, 2 Vent. 340. 1 Chan. Ca. 181. S. C.

12. If the Daughter of a Citizen of London marries in his Life-
time against his ConSent, unless the Father be reconciled to her before
his Death, she shall not have her orphanage Share of his Perfonal
Estate; and it would be unreasonable to take the Custom to be o-
erwise. Hill. 1 & 2 Jac. 2, between Foden and Howlett, 1 Vern.
354. Per Lord Chancellor.

(E) Concerning the Widow of a Freeman, and
What shall be a Bar of her customary Share.

1. If a Freeman of London dies without Issue, his Widow shall
have her Widow’s Chamber, and a Moiety of the Rest of the
Perfonal Estate; and as to the other Moiety, she may plead herself
Administratrix to her Husband, and a Provifio in the Act of Distribu-
tions, that it should not prejudice the Custom of London, and the
Plea will be allowed. Hill. 1681. between Mathews and Newby,
1 Vern. 132. But Q. as to this last Point, for the Provifio in the Act
extends only to the customary Share; and therefore the dead Man’s
Share must be divided according to the Statute of Distributions.

2. A Freeman of London having no Children, made his Will,
and thereby devised a Chattel Leaf to one, and all his Books to an-
tother, and as to all the Rest of his Estate, confifting in Money,
Goods, Mortgages and Credits, he gave the yearly Profts and Bene-
fit thereof to the Plaintiff, his Wife, for Life, by quarterly Pay-
ments; and directed his Executors, out of his Estate, to pay the
Plaintiff’s Funeral Charges after her Death, and devised to her the
Use of his Plate, &c. during her Life, and directed that his Stock
and Estate in the Hands of one J. C. should remain there during his
Wife’s Life, and the Produce paid to her for her Maintenance, and
devised several particular Legacies; and after the Death of his Wife,

devised
devised over the Surplus and Residue to his Brother’s Children; on a Bill brought by the Widow, it was decreed at the Rolls, that by the Custum of London, she should have her Widow’s Chamber, and one intire Moiety of the Personal Estate, after Debts paid, as well of the Lease and Books which were specifically devised away, as of all the Rest and Residue of his Estate, by the Custum of the City of London, and should have the Benefit of the other Moiety for Life, by the Will, and decreed an Account accordingly, which Decree was confirmed upon an Appeal to the Lords Commissioners. Mich. 1689, between Webb and Webb, 2 Vern. 110.

3. J. W. a Freeman of London, on a Treaty of Marriage with M. P., a Widow, who had a considerable Fortune and several Children, agrees that he should have only 600l. of her Fortune, and the Residue to be settled for her separate Use, and after her Death, for the Benefit of her Children; and accordingly an Indenture was prepared and executed before Marriage, whereby she, with his Assent, assigns over her Fortune to Trustees, in Trust, that she should receive the Profits of it for her own separate Use during her Life, and after her Death, that the same should go and be divided equally among her Children, and J. W. in Consideration of the intended Marriage and Marriage-Portion of 600l. makes a Settlement on her, and at the End of the Deced covenants, that if the said M. P. should survive him, then his Executors should pay and deliver to the said M. P. 600l. out of his Personal Estate; the Marriage takes Effect, J. W. dies without Issue; and it was insisted upon, that the Widow was intitled to this 600l. in the first Place, pursuant to the Marriage Agreement, and to a full Moiety of the Personal Estate, as his Widow, by the Custum of London; but the Master of the Rolls held, that the Agreement, mentioning him a Citizen of London, shews that the Custum might well be in View at that Time, and that this Compounding for 600l. in all Events, exempted her out of the Reason of the Custum; and decreed accordingly. Hill. 1711, between Whitthill and Phelps, vid. Letter (B) 7th. S. P.

4. A Widower and Widow being about to intermarry, and having only Personal Estate, by Articles made before Marriage, agreed, that in Case the Husband survived, he should have 2000l. only out of his Wife’s Personal Estate, and the Rest to be at her Disposal, &c. and in Case the Wife survived, then she was to have 2000l. only out of the Husband’s Personal Estate, without paying only, or no more; the Husband being a Freeman of London died, and his Wife brought her Bill for an Account of his Personal Estate, over and above the 2000l. and to be let into her customary Share thereof; but it was decreed, that the equal Construction of these Articles must be, to exclude the Wife from any further Share out of the Estate; and though the Words were not so full to exclude her; yet the Intent of the Articles appearing to be a mutual reciprocal Agreement between them for settling each other’s Claim, ought not to be extended larger on one Side than the other; and therefore the Wife must have only the 2000l. Decreed Mich. 1714, between Pott and Lee.

5. On a Treaty of Marriage between the Defendant and her late Husband, Edmond Waterman, deceased; Indentures of Lease and Release, by Way of Settlement, were executed; whereby, in Consideration of the intended Marriage, and 2000l. Marriage-Portion,
tian, Lands to the Value of 200 l. per Ann. were limited to the Defendant for Life, for her Jointure, and in full of all Dower and Title of Dower to any Lands, Tenements or Hereditaments, whereof or wherein her said intended Husband was, or should be feised of any Estate of Inheritance during the Coverture between them; and in the Release, William Waterston, Father of Edmund, covenanted, that in Case Edmund survived him, that then all his Real and Personal Estate, whereof he should die feised or poiseless, should descend and come to Edmund, his Heirs, Executors and Administrators; the Marriage takes Effect, William Waterston dies; whereby some Real Estate and a considerable Personal Estate came to Edmund, then Edmund makes his Will, and having no Issue, devises 500 l. to his Wife, and some other Legacies, and devises the Residue of his Personal Estate to be laid out in a Purchase, to be settled on the Plaintiffs, Benelli, who were his Nephews, and makes the Plaintiff, Atkins, his Executor, and dies; and the Bill was brought against the Widow for a Discovery and Account of the Personal Estate, and that it might be laid out in a Purchase, and settled pursuant to the Directions in the Will; the Widow insinuated by her Answer, that her Husband was a Freeman of London, and that he dying without Issue, she, as his Widow, was intitled to a Moiety of his Personal Estate, as her customary Share; and whether she were so intitled, or not, was the single Question; for the Plaintiffs it was urged, that she was not, for that by this Settlement she was provided for already; and by the Custom of London, where the Widow is compounded with, as they call it, she cannot be let in to any other Part of her Husband's Personal Estate; that this was founded on very good Reason, that the Wife might not depend for Subsistence on the Casualties of Trade, and other Contingencies, whereby the Personal Estate might be liable; and therefore, since she had in all Events secured herself of a Provision, and taken out so much from the Husband's Power of disposing of, she ought to rest satisfied with that Provision, that if this had not been intended in full of her customary Part, there would have been negative Words, or some Provision in the Settlement, that it should not extend to exclude her of her customary Share; that the Personal Share was under Confideration, as appears by the Covenant concerning the Disposition of it, in Case the Husband survived his Father; and therefore the Provision being general, must be intended to be complete, and to exclude her from any other; and on this Side were cited several Cafes wherein a Composition with the Wife has been held a Bar of her customary Share: On the other Side it was argued, that she ought not, by this Settlement, to be excluded from her customary Part; that if no Settlement had been made, she would, on her Marriage, have been intitled to her Dower at Common Law out of the Real Estate, and to her customary Share out of the Personal Estate; that this Jointure came only in Lieu of Dower of the Real Estate, and that by the Act of Parliament 27 H. 8, and therefore could be no Recompence for her customary Share of the Personal Estate; that she was intitled to one by the Common Law, and to the other by the Custom; and a Recompence provided for one of them only, could be no Recompence for the other, which she claimed by a distinct independent Title; that there being no negative Words in the Deed made it the Stronger;
that they did not intend to exclude her of her customary Share; and therefore it was tied up barely in Bar of her Dower and Title of Dower; and supposing by the Settlement, there had been a Provision for her out of the Personal Estate only, and that had been expressed to be in full of her Share of the Personal Estate, would that have excluded her from her Dower of the Real Estate? no more ought this Jointure, which goes only in Bar of her Dower of the Real Estate, be construed to exclude her from her customary Share of the Personal Estate; and the Entries in the City Books must be intended where the Composition (as they call it) was only out of the Personal Estate; and as to the Cafes which have been in this Court, they are all to this Purpo. My Lord Chancellor said, he thought the Reason of the Case very strong for the Defendant, but that this Point might be settled in a proper Way, desired to have the Custom certified, whether such Jointure before Marriage being limited to be only in Bar of her Dower, should preclude her likewise of her customary Share; afterwards the Custom was certified to be, that where a Freeman, before Marriage, makes a Settlement on his intended Wife, and the same is thereby declared to be in full, then the Bar of her Share of his Personal Estate, that she is thereby barred to claim any of his Personal Estate after his Death; but if the same were expressed to be in Bar only of her Dower, or Thirds of Lands, Tenements and Hereditaments, they said the same had never been in Controversy in this Court, nor had they any Custom concerning it. It was afterwards decreed to be no Bar of the customary Share. P. Feb. 2 Geo. IV. 6. In this Case the Custom of London was certified to be, that if a Woman, before her Marriage with a Freeman, accepts a Settlement out of his Personal Estate, without Notice taken of the Custom, this bars her of any customary Share of his Personal Estate after his Death, if she survives; but note, this means only, that she cannot singly and merely, by Virtue of the Custom, claim any other Part; not that she is thereby debarred from the Benefit of any Gift or Devise he thinks fit to make her. Trin. 1727. between Lewen and Lewen.

(F) Concerning the legatory or dead Man's Share, what shall go out of it, and how it shall be distributed.

1. A Citizen of London devised 700 l. for Mourning, and the Question was, Whether it should come out of the whole Estate, or only out of the legatory Part; for it was insisted, that if there had been no Directions by the Will, or if the Will had only directed, that the Expences of the Funeral should not exceed such a Sum, then the Deduction must have been out of the whole Estate. But per Curiam, Mourning devised by the Will must come out of the legatory Part, and not lessen the Orphanage or customary Share. Mich. 1691. between Drakins and Buckley, 2 Vern. 240.

2. If a Freeman of London dies Intestate, leaving a Wife and Children, one Third of his Personal Estate, and the Widow's Chamber must go to the Wife, and one other Third to the Children, and
and the dead Man's Third must go according to the Statute of Distributions, viz. Two Thirds to the Children, and the other Third to the Wife, and that this dead Man's Third was not at all under the Control of the Custum; agreed on as an undoubted Rule. Trin. 1718. between Walfum and Skinner, 2 Vern. 559. 8 P. 733. If a Freeman of London devises Legacies more than the legatory Share comes to, the Legatees shall abate in Proportion; and if a Legacy be given to a Child, tho' this shall go out of the legatory Part, and cannot go in Part of Orphanage; yet if the legatory Part is not sufficient, the Legatee must abate in Proportion. Vid. 2 Vern. 754. 2 Vern. 111.

4. A Citizen of London being possessed of a Personal Estate to the Value of 18000l. and having made a competent Jointure to his Wife on his Marriage, it was agreed, that he might dispose of two Thirds of his Personal Estate by his Will, viz. one third Part, which would have belonged to his Wife; had he not made a Settlement on his Marriage in Lieu thereof, by which Means her customary Part comes to be at his Disposal, and one other third Part, which is the legatory Part, which every Citizen may dispose of by his Will; and having two Sons and two Daughters, he makes his Will, and by it devises two Thirds of his whole Estate to his Daughters, and one Third to his Sons; hereupon the Chamber of London would have distributed his Estate in this Manner: 1st, To make an equal Division of the customary Part, viz. of 6000l. amongst all the four Children, which was 1500l. a-piece; and then allot two Thirds of the Residue to the Daughters, and one Third to the Sons; so that by this Division each Daughter should have only 3500l. and each Brother should have 3500l. But the Lord Chancellor declared, that the Intent of the Testator did to him plainly appear to be, that his Daughters should have two intire Thirds of his whole Estate, which is 6000l. a-piece; and it was decreed accordingly. Pach. 1681. between Love and _______ 1 Vern. 61.

5. In this Case it was held, that where a Freeman of London made his Will, and devised Legacies to his Children more than their orphanage Part would amount unto, without taking any Notice whatsoever of the Custum, that these Legacies shall be a Satisfaction of their orphanage Shares, to which they were intitled by the Custum; in the Nature of a Debts, and that the Legacies shall not come out of the testamentary or dead Man's Part, because it is held in this Court, that they shall not take both by the Will and the Custum too; but where such Legacies are less than their orphanage Shares, whether they shall be pro tanto in Satisfaction, he was in great Doubt, and sent it to the City to certify, though he seemed rather to think they should, in that Case, take both, especially if none of the Devises in the Will were thereby disappointed. Trim. 1729. at the Rolls, between Nicholls and Nicholls.

(G) Concerning the Customs of York.

1. If a Freeman of London dies in the Province of York, seized and possessed of a Real and Personal Estate, the Custum of the City of London, for the Distribution of his Personal Estate, shall prevail.
vail, and controul the Custom of the Province of York. 2 Vern. 48.
held clearly per Curiam.

2. So if a Freeman of London dies in York, his Heir shall come in
for a Share of the Personal Estate, tho' by the Custom of York he
is debarred thereof, for the Custom of London, which follows the
Perfon, shall be preferred to that of York, which is only local.
Mich. 1688. between Cholmely and Cholmely, 2 Vern. 82. per Curiam.

3. If a Man within the Province of York dies Intestate, leaving a
Wife and no Child, the Wife shall have one Moiety of the Personal
Estate by the Custom, and the other Moiety being without the Cuf-
tom, shall be distributed, according to the Act of Distributions.
Decreed Trin. 1687. between Stapleton and Sherrard, 1 Vern. 465. 134.
305. 432. S. C.

4. A Man who lived in the Province of York died Intestate, hav-
ing advanced all his Children in his Life-time; and it was held,
that the Personal Estate which he died possessed of, should be set-
tled according to the Act for settling Intestate’s Estates. Mich. 1683.
between Goodwin and Ramsden, 1 Vern. 200. Vide 2 Vern. 263. where
a Person, who was an Inhabitant of the Province of York died Intes-
tate, having before his Marriage made a Settlement on his Wife in
Bar of her customary Share, and leaving Children; the Question
was, how Distribution should be made, but there is no Resolution.

5. The Intestate being an Inhabitant in the Province of York, left
Ilue a Son and a Daughter only, and no Widow; the Daughter had
a Portion given her in Marriage in Lieu and full Satisfaction of what
she might claim by the Custom of the Province of York; the Son
was also advanced by a Settlement of Lands; and the Question was,
how the Estate should be distributed; for the Heir it was inferred
that now the Custom of the Province of York is to be quite laid
out of the Case, and the same Distribution made of the Estate as of
any other Intestate’s Estate, and by Consequence the Daughter to
bring her Portion into Hotchpot, but the Heir to have a full Share,
without Regard to what Lands had been settled upon him; But per Cur,
the Daughter must not bring back her Portion into Hotchpot,
for that came in Lieu of the customary Part; and was the Price the
Father thought fit to give her for the same. Trin. 1692. between
Gudgeon and Ramsden, 2 Vern. 274.

6. An Inhabitant of York, having on his Marriage settled his
Real Estate on himself for Life, Remainder as to Part on his Wife
for a Jointure, Remainder of the Whole to his first and other Sons
in Tail, Remainder to his own right Heirs; the Question was, whether
the Son was thereby excluded by the Custom of the Province of
York, from having any Share of his Father’s Personal Estate;
which Point being directed to be tried on an Issue at Law; and it be-
ing found that he was thereby debarred, the same was decreed ac-
cordingly. Trin. 1700. between Constable and Constable, 2 Vern. 375.

T t

C A P. XXIV.
C A P. XXIV.

Decree.

(A) Concerning the Drawing up and Inrolling of Decrees.

(B) Who are bound by the Decree.

(C) Concerning Errors in the Decree.

(D) Concerning the Performance and Execution of a Decree.

(A) Concerning the Drawing up and Inrolling of Decrees.

i. In the Drawing up a Decree, it is not sufficient for the Register to recite the Bill and Answer, and then add, that upon the Reading of the Proofs, and hearing what was alleged on either Side, it was decreed so and so; but the Facts which were proved, and allowed by the Court as proved, must be particularly mentioned in the Decree; otherwise if a Bill of Review be brought, those Facts shall be taken as not proved; for else a Decree could not be reversed by a Bill of Review. 1 Vern. 214.

2 Chan. Ca. 161. S.P.

2. A Decree being pronounced in Michaelmas-Term, and the Defendant dying soon after, on a Motion to have it inrolled, it was held by my Lord Chancellor, to be a Thing often done; and that it was like a Judgment at Law, which, if pronounced before, may be entred, after the Party's Death; and the Decree was inrolled accordingly. 2 Chan. Ca. 227. NEL. Chau. Rep. 169. S.P. 3 Chan. Rep. 73. S.P.

3. So where a former Decree of Dismission being pleaded in Bar to a second Bill, it was objected, that the Dismission and Decree could not be pleaded in Bar, because the Decree was not signed and inrolled; and if the Defendant would have it, that it was a Suit still in Being, then the Plea was a Plea in Abatement only: But per Cur, Either that Suit was for the same Matter as the Present, or not; if not, you ought to have moved to have had the Plea referred; but if it is, then
then that Suit is either depending or determined, and either Way is pleadable. Hill. 1684. between Priorman and Priorman, 1 Vern. 310.

4. But if an Administrator obtains a Decree, that he, his Executors or Administrators may redeem a Mortgage, and he dies Intestate before Inrolment of the Decree, such Decree shall not afterwards be inrolled for the Benefit of his Administrator, for the first Administrator's Title is gone. 2 Chan. Ca. 248.

(B) Who are bound by the Decree.

1. ALL original Parties to the Suit, and likewise all those who come in pendente lite, and are made Parties thereto by Process, are bound by the Decree. 1 Chan. Ca. 3. 150.

2. If there are two Executors, and one of them by Decree is prohibited to receive any more Money, or meddle farther with the Testator's Effects, and a Mortgagor to the Testator, who was present at the Hearing and Pronouncing the Decree, afterwards pays the Mortgage-money to the Executor who had the Decree against him, he must pay it over again. 1 Vern. 57. 132. S. C. But for this vide Title Notice, and what shall be a Lis Pendens.

3. An Agreement by some Tenants of a Manor to inelose or fence a Common, will be decreed in Equity, and such Decree will bind two or three humoursome Tenants who oppose it. 1 Chan. Ca. 48, 2 Vern. 103. S. P.

4. So where a Bill was brought by some few Tenants of Greatstock Manor against the Lord, to settle the Customs of the Manor, as to Fines upon Deaths and Alienations; and an Issue was directed to be tried at Law, and found, that upon the Death of the Lord or Tenant, there was due an uncertain Fine, but not exceeding a Twenty-penny Fine, that is, twenty Years old Rent; and upon Alienation of the Tenant, a Fine altogether uncertain and arbitrary; and it was insisted upon, that there being but some of the Tenants Parties to this Bill, the Reft would not be bound by this Trial: But my Lord Keeper held they would; and he said he remembered the Case of Neither Wiersdale, between Lord Gerrard and some few of the Tenants, and Lord Nottingham's Cafe in the Dutchy, concerning the Customs of Daintree Manor, for Grinding and Baking at the Lord's Mill and Bake-house, and said in these and 100 others, all were bound, tho' only a few Tenants Parties; else where there are such Numbers, no Right could be done, if all must be Parties, for there would be perpetual Abatements; and it is no Maintenance for all the Tenants to contribute, for it is the Cafe of all; and in the Exchequer and Dutchy it would certainly be so, and no Difference when it is here, and he cited Sir William Boothby's Cafe in the Dutchy last Michaelmas-Term, where a Bill concerning the Custom of Grinding at the Lord's Mill was amended, and made to be on Behalf of the Plaintiffs, and all the Reft of the Tenants; and as to the Objection, that the Courts of Exchequer and Dutchy, are Courts of Revenue, and go by other Rules than ordinary Courts of Equity, he said, that was of no Weight, and held, that all must be bound here as well as there. Mich. 1701. between Brown and Howard.
5. The Plaintiff being Vicar of the Parish Wirksworth in Derbyshire, brought a Subpœna in the Nature of a Scire facias, against the Defendants, to enforce the Performance of a Decree made 5 Car. 1. by which (amongst other Things) it was decreed, that all the Miners within the said Parish, as well for the Time being as to come, should pay the tenth Dile of Lead Oar cleansed, &c. to the Vicar of the said Parish for the Time being, for Tithes, &c. the Defendants appeared to the Scire facias, and set forth, that they claimed not in Privity under any of the Parties to that Decree, and that some of them were seised of Miners not then found out or opened, and that there had not been any Performance or Execution of the Decree, and other Matters in Avoidance. The Court held, that the Decree extends to all Miners within the Parish for the Time being, or to come; so the Defendants are within the Letter, and expressly bound by the Decree; and, as long as the Decree stands in Force, must obey. Mich. 1690. between Browne and Booth, 2 Vern. 184.

6. If a Devisee obtains a Decree to hold and enjoy the Lands against the Heir, who it was supposed had suppressed the Will, and pending this Suit a third Person gets an Assignment of a Mortgage made by the Testator, and then purchases the Equity of Redemption of the Heir, having Notice that there was such a Will, the Purchaser shall not be admitted to dispute the Justice of the Decree, nor to try at Law, whether the Will was not cancelled by the Testator. 2 Vern. 216.

7. But if a Mortgagee, after ten Years Suit, four Reports, and two Trials at Law, obtains a Decree to foreclose, and an Account is taken, &c. yet such Decree, &c. will not hinder a subsequent Incumbrancer from redeeming the first Mortgagee; neither shall he be concluded by the Account taken in the first Suit. 2 Vern. 663.

(C) Concerning Errors in the Decree.

1. Matters assigned for Error in a Decree, must appear in the Decree itself; for being inrolled, it is such a Record as must be tried by it self; but if a Fact be mistaken at the Hearing and decretal Order, that may be rectified upon a Rehearing. 1 Chan. Ca. 54. Vide Bills of Review and Reversal, Title Bill.

2. If a Feme Sole exhibits a Bill, and during the Proceedings marries, and no Notice is taken of it, but the Cause proceeds, and there is a Decree for the Defendant; this will not be sufficient Cause to reverse the Decree, being no Error appearing in the Decree, but a Matter which should have been pleaded in Abatement, and of which the Defendant alone might have taken Advantage. 1 Chan. Rep. 231.

3. So if a Mortgagor has a Decree against the Mortgagee to have a Redemption, and pending a Reference, the Suit abates by the Death of one of the Parties, Defendants; but the Account goes on, and the Master is attended by the Executor of the Party dying; and makes his Report, which is confirmed and 'decree'd; this, after twenty Years, shall not be sufficient Error, so as to intitle the Devisee of the Mortgagor to a new Account. 20 Car. 2. between Slingby and Hale, 1 Chan. Ca. 122.

4. Sir
4. Sir George Downing brought an Appeal in the House of Lords from a Decree made in the Court of Chancery, by Consent, suggesting, that tho' the Register, in drawing up the Order, had drawn it as a Decree, by Consent, (and the Minutes were so too); yet he never did consent to such Decree, nor his Counsel neither; or if they did, it was without his Authority, and made Affidavit of it; but the Appeal was dismissed. Hill. 1699. between Downing and Cane.

5. John Grice, by Will, devises his Real Estate to his Wife for Life, and after to Thomas, his Son, for ninety-nine Years, if he should so long live, charged with the Payment of 500 l. a-piece to John and Thomas, the two eldest Sons of his Son Thomas, at their Ages of twenty-one Years, and dies; afterwards John, the Grandson, dies in 1694, an Infant, and Intestate; after, in 1698, Thomas, the Father dies, without taking Administration to John, his Son; and this Bill was brought to have an Account and Distribution of the Personal Estate of John Grice, the Grandfather, Thomas, the Father, and John, the Son; and on hearing the Cause, the Court had decreed the 500 l. Legacy, devised to John, the Grandson, to be distributed amongst his Mother, Brother, and Sisters, equally; and a Bill of Review being brought to reverse this Decree, the first Error assigned was, that on the Death of John, the Grandson, in the Life of Thomas, his Father, his 500 l. Legacy vested in his Father, by the Statute of Distributions, tho' he took not Administration to him, and therefore ought not to have been distributed as the Personal Estate of John, the Grandson, but as the Personal Estate of Thomas, the Father, and then the Mother would be intitled to a Third of it; and it was admitted that it ought to have been so; but it was insisted, that this Error did not appear in the Body of the Decree, as drawn up; for tho' it was laid in the Bill, that the Grandson died in 1694, and the Father in 1698; and that it is confessed in the Answer, they died about the Times in the Bill; yet the Defendants, being Infants, their Admission is not sufficient, unless proved; and it shall be supposed it was not proved, because, if it had, the Court could not make such a Decree, and the Proofs cannot now be referred to. On the other Side it was said, taking the Facts to be, as it appears on the Decree, as drawn up and inrolled, it is a plain Error, and it must be so taken now; and the Question is not at present, whether an Infant's Admission be good, or not. My Lord Keeper held it an Error appearing in the Body of the Decree; so the Decree was opened. Trin. 1706. between Grice and Goodwin.

6. There having been a Decree made for a very liberal Allowance for the Maintenance of an Infant out of a Trust Estate, and not according to the Trust; upon a Rehearing, it was endeavoured to fet aside the Decree: But per Curiam, where an Infant recovers by Decree of the Court, the Court may, by the Approbation of the Infant's Relations, allot him a Maintenance, tho' no Provision in the Trust for that Purpose; and this founded on natural Equity; and tho' in this Case the Decree went beyond natural Equity; yet a Decree being made in it, we will not reverse it, though possibly we would not have made the Decree. 2 Vern. 256.
(D) Concerning the Performance and Execution of a Decree.

1. The Lord Chancellor for the Time being, will enforce the Execution of Decrees, though made by a prior Lord Chancellor; and tho' they are allged to be unreasonable, yet will affit with the utmost Proceeds of the Court till they come regularly before him to be reversed. 2 Chan. Rep. 127.

2. If by Decree Mortgage-money is to be paid at a certain Time, yet in Case of inevitable Necessity, the Court may enlarge the Time, tho' the Decree be signed and enrolled. 1 Chan. Ca. 64.

3. But where the Court had decreed, that either the Defendant should pay a Sum of Money by a Time therein, for that Purpose limited, or that in Default thereof, that the Plaintiff should hold and enjoy the Lands charged therewith; and a Writ of Execution of the Decree had issued, and an Attachment for Non-performance thereof; and upon the Return of the Attachment, the Defendant moved he might appear and be examined; and it was insifted he ought to be admitted thereto, for that he might shew that the Proceeds issued not regularly, or that he had paid the Money, or had a Release, &c. but the Master of the Rolls ordered the Proceeds to go on, and would not admit the Defendant to appear to be examined, unless he would give Security to perform the Decree. Mich. 1688, between Roper and Roper, 2 Vern. 91.

4. The late Lord Allington’s Estate was decreed to be sold for Payment of his Debts and Legacies, and that all Parties interested should join in the Sale; and accordingly the Estate (being about 2000 l. per Ann.) was sold to F. S. and Conveyances executed, in which there was a Covenant for further Assurance; afterwards F. S. sold away 1600 l. per Ann. of the Estate to another Person, and was constrained to deliver all the Deeds to him, so that he had none left to make out any Title to the 400 l. per Ann. that remained unsold; and therefore moved the Court, that the Parties to the Conveyance to him, might be ordered to execute a Duplicate of the Conveyance to be kept by him, they refusing to do so on the first Motion: My Lord Keeper said, he looked upon it to be within the Covenant for further Assurance, and ordered that a Duplicate should be executed, but that it should be indorsed on it, that it was only a Duplicate; but the Matter being moved again by the other Side, the Order was discharged; for that the Decree being once executed, the Court had no more to do in it. Mich. 1700, between Napper and Lord Allington.

That a Decree is equal to a Judgment, and be paid accordingly in a Course of Administration, vid. Title Creditor and Debtor; that the Benefit of it survives to the Wife, vid. Title Baron and Feme.
C A P. XXV.

Deeds, and other Writings.

(A) Who is obliged to produce them, to whom, and upon what Terms, and how they are to be kept.

(B) Of suppressing and cancelling Deeds and Writings, and the Consequence thereof.

(C) Deeds, and other Instruments entered into by fraud, &c. in what Cases to be relieved against.

(D) Defect in a voluntary Deed, in what Cases aiding in Equity.

(A) Who is obliged to produce them, to whom, and upon what Terms, and how they are to be kept.

1. The Plaintiff was a Remainder-man in Tail in a voluntary Settlement, and the Bill was for a Recovery of the Deed; but it appearing to the Court, that the intail was discontinued, the Court would not relieve the Plaintiff. *Hill* 1688. between *Kelly* and *Berry*, 2 *Vern.* 35. *Vid.* Bills of Discovery, Title Bill.

2. So where a Bill was exhibited to discover an antient Deed of Intail, alleged to be in the Defendant's Hands, and the Defendant pleaded a Conveyance made to himself of the Estate in Question; and that if there was any such Intail, the same was discontinued; and the Court allowed the Plea, and said, they would not aid the Plaintiff in Tail against a Discontinuance, tho' by a voluntary Conveyance. *Pasch.* 1688. between *Bance* and *Phillips*, 2 *Vern.* 50. Where Affidavit must be made, that the Party who prays a Discovery of a Deed, &c. has it not in his possession, *vid.* Title Affidavit, Letter (A).

3. If an Heir at Law brings a Bill for Deeds and Writings against the Widow of his Ancestor, he must establish her Jointure, though it was made after the Marriage, and not pursuant to any Marriage-
Articles, but purely voluntary. 1 Vern. 479, 480, per Curiam, vid. 2 Chan. Ca. 4.

4. A brought a Bill against one who was Assignee of a Leafe, and charged, that the Defendant knew that the Leafe was expired, and that the same did appear by Writings in his Custody; the Defendant pleaded, that he was a Purchaser of the Leafe, and that at the Time of the Purchase he was informed, that there were fifty-seven Years to come in the Leafe, and therefore gave after the Rate of nineteen Years purchase for it, and the Plea was allowed. 2 Vern. 255.

5. A Bill was exhibited for a Discovery, whether in a Mortgage made by A to B, which had been assigned to the Defendant, there was not some Truf't declared for the Benefit of the Plaintiff; the Defendant, by Anfwer, denied there was any Truf't declared for the Plaintiff; and the Anfwer being replied to, the Question at the Hearing was, whether the Defendant should be obliged to produce the Deed; and the Lord Keeper said, he would not oblige him; for by this Method all Purchasers might be blown up. But the Reporter adds a Q. tamen. 2 Vern. 463. For this vid. how far Purchasers, without Notice, are favoured, Title Purchafe.

6. If there be a Deed of Settlement, under which two Persons claim, the Court will (a) order it to be brought into Court for its safer Custody, and both Parties to use it as they have Occasion, and take Copies of it, if they please. 2 Chan. Ca. 42.

(a) If a Man failed of Lands in Fee hath divers Charters, Deeds and Evidences, and maketh a Feoffment in Fee, either without Warranty, or with Warranty only against him and his Heirs, the Purchaser shall have all the Charters, Deeds and Evidences, as incident to the Lands, & ranting Time, to the End he may the better defend the Land himself, having no Warranty to recover in Value; for the Evidences are as it were the Sinews of the Land, and the Feoffor not being bound to Warranty, hath no Use of them; but if the Feoffor be bound to Warranty, so that he is bound to render in Value, then is the Defence of the Title at his Peril; and therefore the Feoffee in that Case shall have no Deeds that comprehend Warranty, whereas the Feoffor may take Advantage; also he shall have such Charters as may serve him to discern the Warranty Paramount; also he shall have all Deeds and Evidences which are material for the Maintenance of the Title of the Land, but other Evidences which concern the Possession, and not the Title of the Land, the Feoffee shall have them. Co. Lit. 6, a. 1 Co. 13, 2.

7. A on the Marriage of his Son, settled several Lands in this Manner, viz. as to Part, to the Use of himfelf for Life, and after to the Use of his Son for Life, then to his first and other Sons in Tail, and for Want of such illice, to the Use of the Plaintiff, who was his Brother, and his Heirs; and as to other Part of the Lands, to the Use of the Son for Life, and after to the Use of the Wife for her Jointure, then to the first and other Sons in Tail, and for Want of such illice, to the Plaintiff and his Heirs; the Son and Wife died without illice in the Life-time of A. and after their Deaths A. got the Settlement and cut it in Pieces; but the Counterpart was intire, and in the Hands of A. and the Bill was brought to discover it, and have it preserved; and the Counterpart being confessed in the Anfwer, the Plaintiff obtained an Order at the Rolls to have it brought into Court, and a Motion was made to have that Order discharged, for that the Remainder to the Plaintiff was meere voluntary, and therefore he ought not to have any Aid from a Court of Equity; but the Court would not discharge the Order, but made the Deed be brought into Court, there to remain, and thereby hinder A. from selling the Estate from the Plaintiff. Trin. 1691. between Brookbank and Brookbank.
(B) Of suppressing and cancelling Deeds and Writings, and the Consequence thereof.

1. A. Suppressed a Marriage-Settlement, by which a Remainder in Tail Male was limited to the Plaintiff's Father; and all the prior Estates being spent; upon Proof made, that the Settlement came to the Defendant's Hand, and that he had confessed it in Answer to a former Bill, tho' he now denied it; the Master of the Rolls decreed the Plaintiff should hold and enjoy the Estate, and this Decree was confirmed by my Lord Keeper. Trin. 1706. between Eyton and Eyton, 2 Vern. 380.

2. So where a Person confessed, that he in a Passion had burnt his Marriage-Articles; but it being made appear, that he produced them at the Execution of a Commission subsequent in Time to the Day on which he pretended to have burnt them, he was committed to the Fleet, until he should produce them; and altho' he afterwards made Oath he had them not, and could not produce them; and that it was insisted for him, that altho' the Burning of the Articles was a great Misdemeanor, yet a Man was not to suffer perpetual Imprisonment; because he could not do what was impossible for him to do; yet he could not be discharged until he had confuted to admit the Articles were to the Effect in the Bill. Trin. 1706. between Sanfion and Rawsey, 2 Vern. 561. vid. 1 Chanc. Ca. 292, 293. S. P.

3. If A. on his Marriage with B. settles Lands on her for a Jointure, which were subject to an Intail, and C. the Brother of A. is privy to the Intail, and infringes the Jointure-Deed, and has the Deed of Intail in his Custody, and owns that he cancelled it, being under an Apprehension that A. would dock the Intail, and A. devises the Inheritance to J. S. and dies without Issue, the C. recovers in Ejectment on the Deed of Intail; yet Equity will decree the Widow her Jointure; but J. S. being a voluntary Devisee, can have no Relief. Mich. 1691. between Rame and Pole, 2 Vern. 239. decreed and affirmed in the House of Lords. Vid. Title Notice.

(C) Deeds, and other Instruments entred into by Fraud, &c. in what Cases to be (a) relieved against.

1. A. For 300l. granted to the Defendant B. a Rent-Charge of 300l. per Ann. out of Lands in Ireland, of 1000l. per Ann. to hold to B. and his Heirs, to commence from the first Michaelmas or Lady-day, after the Death of A. without Issue Male, with a Provision, if the said A. had any Issue Male, who should attain the Age of twenty-one Years, the Grant should be void; A. died without Issue, and on a Bill to be relieved against this Rent-charge, the Court decreed a Reconveyance or Leafe thereof on Payment of the 300l. and Interet; it appearing in the Cause, by Proof, that A. was young and necessitous, and had lived an idle dissolute Life, and that the Debaucheries, in which B. was often a Companion with him, would soon end his Days; that he made this Bargain without the Advice of X x any
any Friends or Councill of his own; and that he was utterly incapable of getting Children, as appeared by the Oaths of his Surgeons. 

Puffh. 1684. between the Earl of Ardglass and Muschamp, 1 Vern. 237.

2. But where A. had an Inn in Newcastle descended to him, which was let at 64 l. per Ann. but subject to a small Mortgage, and A. being very Poor, was inveigled to sell it for 80 l. and afterwards brought a Bill to be relieved, but was dismissed: My Lord Chancellor declaring, that tho' the Bargain was not a fair one; yet as it was not attended with strong Badges of Fraud, there could be no Relief against it. Mich. 1702. between Wood and Fenwick.

3. If a Bond be entred into by Force and Terror, but so as not to make it Durefs, the Court may relieve against it, at least not suffer it to be carried into Execution in Equity. 2 Vern. 497. per Curiam.

4. A Man possessed of a Lease for three Lives of a Rectory, devised the Rectory by his Last Will; but that being void, it came to his three Daughters, as Coheirs and special Occupants: There being a Suit in Chancery, the Husband of one of the Daughters, fearing to be in Law, and being made to believe that he should be forced to pay the Costs, released the Arrears that should be coming to him for his Share of the Rectory to the other Sistres, who were to bear the Charge of the Suit; and his Share of the Arrears amounting to 1000 l. the Release was set aside, it being a Misapprehension in him. Hill. 1681. between Gee and Spencer, 1 Vern. 32. vid. 1 Vern. 20. where it is declared by my Lord Chancellor, to be the constant Rule in Equity, to avoid (a) a Release, where there is Suppression Veri, or Sus-

(a) A. had a Judgment for 6000 l. against B. B. gave A. a Legacy of 5 l. and died. A. on Receipt of this 5 l. gave the Executor of B. a Release in this Manner: I acknowledge to have received of C. 5 l. left me as a Legacy by B. and do release to him all Demands which I against him, as Executor of B. can have, for any Matter whatsoever; and it was adjudged, that the Generality of the Words, All Demands, should be restrained by the particular Occasion mentioned in the former Part thereof, viz. the Receipt of the 5 l. Legacy, and should not be a Discharge of the Judgment. Puffh. 1 W. & M. between Knights and Ogle, 1 Lec. 101. adjudged.

(D) Defect in a voluntary Deed, in what Cases aided in Equity.

1. Having two Nephews, who were his Heirs at Law, by Conveyance executed in his Life-time, settled all the Lands to the Use of himself for Life, Remainder to his Issue, if he should happen to have any, Remainder to his Nephews; but in the Enumeration of the Particulars of the Lands, a Mistake was made; but the Conveyance being merely voluntary, the Court refused to amend it, but left the Lands to descend equally between them. 1 Vern. 37, 38.

2. But if a Man makes a voluntary Settlement as a Provision for his younger Children, and for their Maintenance, such voluntary Conveyance shall be supplied and made good in Equity. 1 Vern. 40. vid. 2 Vern. 475. That if there are two voluntary Deeds or Conveyances, the First shall prevail: And vid. Title Agreements, Letter (C).
A Wife, whose Husband is banished for his Life by Act of Parliament, may (a) make a Will, and in every Thing act (2) by 34 & 35 H. 8, it is declared in express Words, 104. that a Devise of any Manors, Lands, &c. by a Feme Covert, Infant, Ideot, or New Comer, is not good; that such only, who have
Devises.

have a sound and disposing Memory, can devise, st. 6

104. and the Legatees under the Lady Sandy's Will, whose Husband was so banished, decreed their Legacies.

Ca. 25. c. 9. Jus. 497, and that it is not sufficient that they be able to answer to familiar and usual Questions. If a Man makes a Will in his Sicknees by the over Impomptuity of his Wife, to the end he may be quiet, this shall be said to be a Will made by Restraint, and shall not be good. Syl. 427.

(4) The Husband may not bind himself which hath as Executrix, without the Affent of the Husband or by Covenant his (b) Agreement after. 1 Rol. Abr. 608.

or Bond to permit his Wife by Will to dispose of Legacies, &c. and this will be such an Appointment as the Husband will be bound to perform. Corp. Est. 27, Corp. Cons. 219, 376, 597, but it does not operate as a Will, neither ought it to be proved in the Spiritual Court. 1 Mod. 211, 212. For the Property passes from him to her Legatee, and it is his Gift. 3 Mod. 211, per Curiam. If he once affirms, he cannot after differ; and where he is bound by Agreement and her makes a Will, his Consent shall be implied till the contrary appears; and what shall be such a Evidence to an Affent, vid. 3 Mod. 172, 173. What Religious Persons were disabled from making a Will, vid. Rol. Abr. 608.

3. If a Feme Covert makes and publishes her Will, and devises Land by it, and her Husband dies, and then she dies, the Devise is void, because the Confirmation is founded upon the Making and Publishing, which are void Acts. Plow. 344.

4. So if one, being under the Age of 21 Years, makes his Will, and thereby devises his Lands, and after attains the Age of 21 Years, and dies without making any new Publication thereof, this Devise is void, Mich. 15 Car. 2. between Herber and Forbale. 1 Sid. 162. agreed per Curiam, upon a Trial at Bar.

(c) Some Books mention the Age of 17, others that an Infant may make his Testament, and constitute his Executors for his Goods and Chattels at 18. Co. Life but as the Common Law hath appointed no Time, it therefore depends wholly on the Spiritual Court. 2 Mod. 315, per Curiam; and it was said, that they sometimes allowed Wills made by Persons of Fourteen Years of Age; but however it being a Matter within their Jurisdiction, the Courts of Law will not intermeddle. 2 Mod. 315. 2 Term. 210.

6. Tenant in Tail to him, and the Heirs of his Body, with the Reversion expectant in Fee, cannot devise the Land in Fee to another, though he dies without Issue. 31 Ass. 3 (c) adjudged, Quere Rationem.

(e) Because at Common Law it was only a Possibility, and not a grantable or deürifiable; but whether such a Reversion could be devised by Papal will in the Crown, oid. Syll. 409, 410. Dusibsters, and there said, that the Statute of which the tenant’s help not the Cullom.

7. Tenant in Tail may devise Lands to a Charity, and such Devise shall be good, tho’ there was neither Fine levied, or Recovery suffered of the Lands. Duke’s Ch. Ufes 110. 2 Vern. 453. 5. P. decreed.

8. If there be two Jointenants of Lands, and one of them devises that which belongs to him, and dies, this is a void Devise, and the Devise taken nothing, because the Devise does not take Effect till after the Death of the Devisor; and then the Surviving Jointenant takes the whole by a prior Title, viz. from the first Foement; but in this Case, if the Devisor survives the other Jointenant, then the Devise is good for the Whole, because he being the surviving Jointenant has the whole by Survivorship, and then the Words
Devises.

Words of the Will are sufficient to carry the whole Estate; besides at the Time of making the Will, tho' he was not sole Tenant of the Land, yet he was seised per se moi & per tout; and it is impossible to fix upon any particular Part which he meant to devise, because he could not then call one Part of the Land more his own than another; and the most Genuine Construction seems to give the whole Land, since he was seised per tout of it at the Time of the Devise.

Lit. Sec I. 387. Perkins Sec f. 500.

9. A Wife may be a Devisee tho' not a Grantee to the Husband; for as the Grant had been void, because the Husband and Wife are but one Person in Law, so the Devise is good, because it does not take Effect till after the Death of the Husband, and then they are no more one Person. Co. Lit. 112. 1 Rol. Abr. 610.

10. A Devise to the Principal, Fellows and Scholars of Jesu College in Oxford, and their Successors, for Maintenance of a Scholar, is good by the Statute of charitable Uses, tho' such Devise had been Mortmain by the Statute of Wills. Hob. 136. Flood's Case Vid. Tit. Charity.

11. A Man might have devised to an Infant in Vente sa mere, tho' the Devisee died before the Infant was born, and so no Effect, and the Freehold shall be in the Heir in the mean Time; (g) Dubitatur. 11 H. 6. 13.

Vente sa mere per omnia in Presenti be good, has been much doubted, because it is not to take Effect at the Time of the Death of the Devisee; and since by the Devisee he is to take immediately after the Death of the Devisee, the Freehold cannot be in Abeyance by the Act of the Parties; but the better Opinion seems to be that such a Devise is good, it will be sufficient barely to mention the Authorities pro and con. See 30s. 2 Mod. 9. 1 Lev. 135. Moor 177. Pl. 312. 220. Raym. 165. 1 Ken. 831. 2 Bulle. 273. 1 Rol. Rep. 210. 137. 2 Rol. Rep. 335. Raym. 83. Carter 5. 87. 2 Mod. 293. And by Finch L. Keeper, the Doubt arises upon the Statute of Wills, which enables that it may be lawful to devise to any Person or Persons, &c., but that at Common Law without Question it was good. 2 Mod. 9. but a Man cannot surrender a Copyhold to an Infant in Vente sa mere. 1 Rol. Rep. 109. 137. 254. 2 Bulle. 273.

12. A Devise to an Infant in Vente sa mere, when he is born, is undoubted good, and the Freehold shall descend in the mean Time. 1 Lev. 135. 1 Rol. Abr. 609.

13. So is a Devise to an Infant in Vente sa mere, with a new Publication of the Will after his Birth. Cro. Eliz. 423.

14. So if Lands be devised to A. for Life, the Remainder to a Posthumous Child, this is a good Contingent Remainder, because there is a Person in Being to take the Particular Estate; and if the Contingent Remainder vests during the Continuance of the particular Estate, or eo Insanite that it determines, it is sufficient. Moor 637. vid. 3 Lev. 408. 4 Mod. 259. 282. the Case of Reeve and Long, and vid. 10 and 11 W. 3. cap. 16. whereby Provision is made for preferring Remainders for the Benefit of Posthumous Children.

15. If Lands are devised to two Men, and the Child with which the Devisee's Child is enfeint, the Child shall take by the Devisee, but whether jointly or in Common, Quere. Moor 177.

16. A Bailliff may be a Devisee of Land, but a Monk cannot.

Dyer 323.
Devises.

(a) By the Common Law no Land or Tenements were devisable by any last will, or Testament, neither could they be transferred from one to another, but by solemn Livery and Seisin, Matter of Record, or sufficient Writing. Co. Lit. 111. b. The Reason of this is owing to the Nature of the old Feuds and Tenures; for if this were permitted, the Lord would be disappointed, not only of the Profits of Ward, Mortage and Relief; but likewise it would be in the Power of his Tenant, by deviseing to a Stranger to put on him a Person, who had neither Ability of Mind, or Strength of Body; tho' the one was requisite to sit him in his Courts, and the other to defend his Person in the Field. (b) If a Stranger devise the Devisee, if he dies before the Devisee, the Devise is void. 39 El. 6. 18 b. but if he re-enters, the Devise shall be good, for he was seized as intestate. 1 Saith. 238.

1. If the Father devises Lands to his youngest Son, and the eldest Son knowing thereof enters into the Land, and disfresses the Father, and so continues till the Death of the Father, by which the Will is void; yet because it was made void by Deceit and Covin, it shall be made good in Chancery; per Lord Chancellor, in Roswell and Ebury's Cafe. 1 Rol. Abr. 378.

2. If 3 articles, for the Purchase of Lands, but before any Conveyance executed, he devises all his Lands to be for the Payment of his Debts and Legacies; these Lands will pass, altho' he was not seised at the (c) Time of the Will, and tho' there was no new Publication: So if a Man devises all his Lands for Payment of his Debts, and afterwards Purchases Land, Equity will decree a Sale of the purchased Lands, altho' there was no Precedent Articles. Trin. 35 Car. 2. between Prideaux and Gibbon. 2 Chan. Ca. 144.

(c) If a Man devise Lands in which he has nothing, and after purchases them, such a Man, tho' he has seised, not being within the Statue of Will, for he is not a Persons having. 1. 454. So where a Man devises to his Wife all such Sums of Money, Land, Tenements, and Estate whatsoever, whereof at the Time of his Decease he should be possessed; and after the making of the Will, he purchased the Lands of the Custome of Gavelkind, and died without making any Publication; and it was held, that these Purchased Lands did not pass, for they were not free at the Time of the making of the Will, and the form of Form ofpleading was, that the Testator was seised, and that being seised, the same is an Evidence of the Law; and there is no Difference as to Lands devisable by Custome or by Statue; but such Devise of Things Personal is good, tho' the Testator had them not at the Time of making his Will, because they go to the Executor, and pass not by the Will, but by the Assent of the Executor to whom the Will is only directory: Adjudged Mich. 6 Ann. in B. R. on a Writ of Error, out of the C.B. and confirmed also on a Writ of Error in the House of Lords, between Butler and Coe. 1 Saith. 253, 238.

3. If A. purchases Copyhold Lands, and dies before Admittance, having first devised all his Copyholds to T. S. the Copyhold Lands contracted for will pass by the Will; or in any Cafe, if there are Articles for a Purchase, and the Purchaser makes his Will, and dies before any Conveyance executed, yet the Lands shall pass in Equity. Trin. 15 Car. between Davie and Readsham. 1 Chan. Ca. 39.

4. A. employs B. to article for the Purchase of Lands, which B. did, and the Articles were made in April, but the Possession was not to be delivered till the Michaelmas following; A. before Michaelmas, or a Conveyance executed, but after Payment of the Purchase Money, devised by sufficient Words to J. S. and afterwards A. takes a Conveyance of the Lands so article for, to him and his Heirs and dier; and it was held, that the Land passed by the Will, and that an Equitable Interest is as well devisable, as a Legal Estate. Hill. 1711. between Greenbil and Greenhil. 2 Vern. 679. the Reporter adds a Quere, whether the Testator, after the Date
Devises.

Date of the Will, having taken a Conveyance to himself and his Heirs, it did not amount to a Revocation.

5. On a Treaty of Marriage Articles were entered into, where by the Sum of 700 l. being the Wife's Portion, and 700 l. more added to it on the Part of the Husband, in all 1400 l. was agreed to be laid out in the Purchase of Lands, to be settled on the Husband for Life, Remainder to the Wife for Life, Remainder to Trustees, to support Contingent Remainders, &c. the Marriage takes Effect, the Husband dies without Issue, and before any Purchase made pursuant to the Articles, having first devised all his personal Estate to the Defendant, who was his Wife, and all his real Estate to the Plaintiffs, who were his Nephews, and one of them his Heir at Law, and made his Wife Executrix, but took no manner of Notice of the 1400 l. on a Bill brought by the Plaintiffs to have this 1400 l. as they would have the Land, if the Purchase had been made pursuant to the Articles; for the Wife took more by the Devise, than she would be intitled to under the Settlement, had it been made; and therefore it was agreed, that if it were to be considered as Lands, she could not have both, the Devise of the personal Estate being more than an Equivalent, and therefore a Satisfaction; and it was held by my Lord Chancellor, that as this Case is, if a Purchase had been made, even after the making this Will, tho' at Law such Lands would not pass, yet in this Court there could be no Question, but the Plaintiffs would have the Benefit thereof by the Relation to the Articles; and thro' no Purchase was made, yet by the Agreement, the 1400 l. is to be looked upon in a Court of Equity as a real Estate, and as such must go to the Plaintiffs; and decreed accordingly per Harcourt Lord Chancellor, and affirmed by my Lord Coxeir, Pabch. 1715. between Lingen and Sowry.

6. A Man feied in a Fee, devised his Lands in Trust, to fell Part for Payment of his Debts, and till his Debts were paid, to pay 100 l. per Ann. to his natural Daughter M. and after the Debts paid, 300 l. for her Life; and if she have Children, to convey successively to those Children; but if the die without Issue, then to convey to the eldest Son and Heir of J. C. his Nephew, and the Heirs of his eldest Son; but if he claim any thing during the Life of M. then both Father and Son to be excluded from having any thing out of his Estate. The eldest Son of J. C. was A. who had two Sisters, B. and T. A. died leaving Issue J. who in the Life of M. devised the Lands in Question to J. S. and died without Issue; and after the Death of M. without Issue, the Trustee conveyed to the Sisters of A. and their Heirs; and the Question being between the Sitters and the Devisee of J. it was decreed by the Lord Keeper, Treby Chief Jusitice, and Baron Powel, that this being but a meer Possibility during the Life of M. the Devise was void, and the Lands well conveyed to the Sisters B. and T. Trin. 7. W. 3. between Bishop and Fountain, 3 Lees. 427, 4:8.

7. J. S. who was to have had a considerable Advantage by a Will, was drawn in by Fraud and False Suggestons, to make a Composition for his Interest, and to give a Release; afterwards J. S. being sensible of the Fraud, makes his Will, and thereby (after other Legacies) he devises all the rest of his Goods and Chattels whatsoever to his Wife, upon Condition, that she paid all his Debts, and made her sole Executrix; and it was held, that his Right to set aside
Devises.

The release was devisable, and the words proper for that purpose: Decree, Triu. 1701, between Drew and Merry.

(C) What Words pafs a Fee in a Will.

1. If A. devises Land to B. to give, sell, or do what he pleases with it, these words by the (a) Intent of the Devisor, convey a Fee to B. or if the Words were to B. & sanguini suo, they would pass a Fee, because the Blood runs through the Collateral, as well as Lineal Line. Co. Lit. 6 b. Bentl. 11. 1 Rol. Abr. 834.

(a) 'The' a set form of Words, and the Word 'Heirs' particularly, are necessary in Deeds to convey an Inheritance, yet may they be dispensed with in last Wills, at which Time it is presumed, that the Tenantor is Insuper Censeill; and therefore, if a Man devises Lands to another in Perpetuam, or in Feud. Simplex, or to him and his Allies for ever, or to him and his, or that such a one shall be universal Heir, in all these Cases a Fee passes by the Will; for it is evidently the Devisor's Intention, that the Gift should continue beyond the Life of the Devisee. Co. Lit. 6 b. 1 Bulst. 232. Bentl. 11. More 57.

2. A Devise to a Man and his Successors carries a Fee, for by the Word Successors is intended Heirs, quia Heres succedit Patri. Cro. Jac. 416. 1 Rol. Abr. 835.

3. If a Devise be in these Words, I release all my Lands to A. and his Heirs, A. has a Fee-simple, for where the Intention of conveying appears, the Law dispenses with the Form in a Will. Bentl. 30.

4. I appoint that F. S. shall have my Inheritance, if the Law allows it, or that F. S. shall be Heir of my Lands; these Words are sufficient to convey a Fee. Hob. 2.

5. If a Man devises Land to his Wife for Life, and after her Death, to his three Daughters, equally to be divided; and if one dies before the other, then one to be Heir to the other, equally to be divided; this last Clause gives a Fee to the Daughters; for the Word Heir is Nomen operaticum, and chiefly in a Will shall be taken in its full Extent; and then it reaches the most remote Heir. 1 Rol. Abr. 833.

6. A. devises Land to his Son and Heir; and if he dies before his Age of 21 Years, and without Issue of his Body then living, the Remainder over, he survives the 21 Years; and sells the Land; and the Sale was adjudged good; for he had a Fee-simple presently, the Estate-Tail being to commence upon a subsequent Contingency; between Collen & Wright. 1 Sid. 148.

7. If a Man devises Lands to A. for Life, and after his Decease, the whole Remainder of these Lands to B. these Words pass a Fee in the Remainder to B. between Norton and Ladd. 1 Lat. 762.

8. If Lands are devised to Trustees, without any Words of Limitation to support the Trust of Estates of Inheritance, they by Implication must have an Estate of Inheritance sufficient to support the Trust; for there is no Difference between a Devise to a Man for ever, and to a Man upon Trusts, which may continue for ever; Adjudged in the Case of Shaw and Wright. Pash. 1 Geo. 2. in B. R.

9. If A. devises Land to B. for Life, the Remainder to C. paying several Sums in Grofs; C. hath a Fee, tho' all the Sums together do not amount to the annual Rent of the Land, for the Devisee shall be intended for his Benefit; and if he had only an Estate for Life, he might die before he would receive the Legacies out of the Land,
Devises.

Land, and consequently be a Loser; for where there is a Sum in
goods to be paid, then the Devisee hath a Fee, tho' the Sum be not
to the Value of the Land. 
10. So if A. devises Lands to B. in Consideration that B. will re-
lease 100l. due to him, to the Executors of A. B. has a Fee-simile
upon his Release of the Debt, for the Devise shall be intended for
his Benefit, and an Estate for Life might be determined before he
could receive 100l. out of the Land. Bell. 15.

11. If a Man devises 100l. in Legacies, to be paid within a Year;
to several Persons, out of Land of the Value of 10l. yearly, and
then devises the Land to another, the Devisee has a Fee in the Land;
for though the Devise be not to him paying 100l. yet since he must
take the Land subject to the Charge of the Legacies, he must have
a Fee to have any Benefit by the Devise. 2 Lev. 249. vid. 2 Salk.
685. S. P.

12. But if A. devises Lands to B. paying so much, or such Sums
out of the Profits of the Lands, the Devisee takes but an Estate for
Life; for although he takes the Land charged, yet he is to pay no
farther than he receives, and so can be no Loser. 6 Co. 16. 2 Mod.
Rep. 25.

13. So if the Devise had been to B. paying an annual Sum to an-
other, this had been an Estate for Life, for he may pay this out of
the yearly Profits, without any Loses to himself. Vid. Cro. Car. 158.

14. If a Man devises to his younger Brother all his Lands, Ten-
ements and Hereditaments, and all his Personal Estate, and whatever
else he had in the World, and makes him Executor, desiring him to
pay his Debts and Legacies; the Devisee has a Fee-simile by these
Words: Adjudged on a special Verdict in C. B. Hill. 1713. between
Ackland and Ackland, 6 Vern. 887.

15. If a Man devises 50l. to be paid in three Months, and all the
Reit and Residue of his Real and Personal Estate whatsoever, he
gives to his dearly beloved Wife, whom he makes sole Executrix;
by these Words, the Wife has a Fee-simile in the Lands. Decreed
Mich. 1706. between Murray and Wife. 2 Vern. 564.

16. So where the Testator being seized of Copyhold and Freehold
Lands, devised all the Rest of his Estate, whether Freehold or Co-
pyhold, to his Wife and Children, equally to be divided amongst
them; and it was held, that the Word Estate must signify the In-
terest he had in the Land, and so pays a Fee. Between Carter and
Horner, 4 Mod. 89. for this vid. Stil. 281. 2 Leb. 91. 1 Mod. Rep.
100. 2 Chan. Ca. 262.

17. A. devised in the following Words, I give certain Lands to
J.S. and, I give to John, Earl of B. my Son in Law, 5000l. and
all my Mines, all which I give to my said Son in Law, his Execu-
tors and Assigns, together with my Plate and Jewels, and all other
my Estate Real and Personal, not otherwise disposed of by this my
Will, for to be given by him to his Children, as he shall think con-
venient, I solely trusting to his Honour and Discretion, that he will
give them such Provision as will be necessary; and another Clause
was,

Whether the Word Paying out of Lands in general, and not mention-

in Time, so that a Loser may appear, passes a Fee-simile, Q. & vide 2 Vern. 106.
was, whereas I have contracted for the Sale of my Fee-farm Rents, my Will is, that if my Debts shall not be satisfied out of my other Estate, my Executors (whereof the Earl was one) shall and may sell some Part, or all of them, for Payment of them, notwithstanding the Rents are not devised by this my Last Will; and the Question was, whether his Fee-Farm Rents should pass to the Earl of B. and for what Estate. Es per Holt Ch. Jult. who delivered the Resolution of the Court, the Rents pass by these Words, All my Real and Personal Estate, for the Word Estate is Genus Generalissimum, and includes all Things Real and Personal, and the Fee of the Rents pass, at least the whole Estate of the Devisee, for all his Estate is a Description of his Fee. Countees of Bridgewater and Duke of Bolton, 1 Salk. 236.

18. J. B. a young Lady, being in eight Days Time to be married to the Defendant, being taken ill, made her Will, and after several specifick and pecuniary Legacies, devises in these Words, Rom. I give and bequeath all my Lands and Estate in Upper Catesby in Northamptonshire, with all their Appurtenances, to William Edgeworth of St. Margaret's, Esq; and made him and Mrs. Rudge, Executors and Revisary Legatees, and die seised of a Real Estate of the Value of 200l. per Annum, and possessed of about 3000l. Personal Estate, and the Plaintiff's Wife was his Sister and Heir; and the only Question was, whether the Defendant had an Estate in Fee, or only for Life; and it was agreed, that a Devise of all his Estate would have passed a Fee; but a Difference was endeavoured between such a Devise of all his Estate generally, and a Devise of all his Estate at such a Place; that this was only a Description of the Place where the Estate lay, and no Devise of the Interest which he had in that Estate farther than for Life; and it was agreed clearly, that a Devise of all his Lands would pass only an Estate for Life, and not the Estate in Fee, which he had in those Lands; but the Master of the Rolls was clear of Opinion, that he had an Estate in Fee, because the Lands passed by the first Words, and the Interest in those Lands by the Second; and if the Word Estate meant nothing more than the Lands, it would be useless; but if the Devise had been of all his Lands or Estate at such a Place, he thought that would not have passed the Fee, but would have been taken, according to the common Acceptation, for his Lands at such a Place; but as this was, it must be a Fee, and decreed accordingly at the Rolls. Pach. 1729. between Barry and Edgeworth.

19. But where a Man seised of Black-ace in Fee by Mortgage, which was forfeited, and of White-ace as his own Inheritance, devised White-ace to his Brother, and then devised all the Reidue of his Goods, Leafes, Mortgages, Estates, Debts, Ready Money, and other Goods, whereof he was possessed, after Debts and Legacies paid, to his Wife, and made her Executrix, and died; and it was held, that this was no Devise in Fee to the Wife, of the mortgaged Land, for the Word Estate is coupled here with Chattels, which intended that he meant only Estates for Years; and the rather, because the Words, whereof he was possessed, shows, that he intended only to give her Chattels, and the Mortgage-money, and not the Inheritance of the Land. Between Wilkinson and Merryland, Cro. Car. 447. 1 Rol. Abr. 834.

4 (D) What
What Words pass an Estate-tail, and for Life.

1. If Lands are devised to one, and if he die before Issue, or if he depart, not leaving Issue, or if he die, not having a Son, all these Limitations (a) create an Estate-tail. 2 Vern. 766. (a) Here it must be observed, that the Intent of the Devisee will supply those Words which are necessary in Conveyances at Common Law: As if Lands are devised to a Man and his Heirs Male, the Law will give him an Estate-tail, and supply the Words (of his Body); so a Devisee to one, and femin. suc., creates an Estate-tail; but a Devisee cannot direct an Inheritance to descend against the Rules of Law; and therefore if a. devises to B. and his Heirs Male, though this is an Estate-tail, yet if B. has Issue a Daughter, who has Issue a Son, he shall never inherit; for the Rule is, whoever claims as Heir in Tail Male, must convey his Deseint wholly by Heirs Male. Ca. Lit. 9. §. 25, 271. Hob. 55. 1 Vern. 228.

2. So if a Man devises in these Words, And if it please God to take my Son R. before he shall have Issue of his Body, so that the Lands descendent to his Brother, this is an Estate-tail in R. Owen 29.

3. If A. devises to the eldest Son J. S. and the Heirs Males of his Body, for the Term of 500 Years; provided, if he, or any of his Issue Male alien the Premises, then to remain over, this is an Estate-tail, and the Limitation for 500 Years void; for though generally a Devisee to a Man, and the Heirs of his Body, for 1000 Years, is a Term, and not an Inheritance; yet here the Tsettator's Intent was, that it should be an Inheritance; because, by the Provise he took Care to advance the Issue of J. S. but if it should be a Term, then by the Descendent of the Inheritance on J. S. the Term would be merged, and the Issues would be unprovided, for J. S. might alien the Estate. 10 Rep. 78. Moor 772. S.C.

4. A. having two Sons, B. and C. devised Black-ace to B. and his Heirs, and White-ace to C. and his Heirs; and further willed, that the Survivor of them should be Heir to the other, if either of them died without Issue; though the first Words were sufficient to pass an Estate in Fee, yet the subsequent Words correct them, and pass only an Estate-tail, and the Remainder in Fee was not contingent, but executed, each Son being Tenant in Tail of the Part to him devised, with the Remainder to the other. Cro. Fac. 695.

5. If a Man devises Lands to his Wife for Life, and after to her Son J. S. and if he dies without Issue, having no Son, then the Remainder over, J. S. the Son, by this Devise, takes an Estate in Tail Male; for though the Devise to the Son, and if he dies without Issue, had been a good Tail general, yet when the Deviseor went further, and said, having no Son, he thereby explained what Issue he intended should inherit the Land, and limited it to the Issue Male. 1 Rot. Abr. 837.

6. A. feised of Lands devised them to his Wife, if she did not marry; and if she did, then his eldest Son presently after her Decease, to enter and hold the Land to him and the Heirs Males of his Body, the Remainder to his other Sons in Tail Male; the Wife did not marry, yet the Court resolved that the Lands were intailed by the Will, taking the Intention of the Deviseor to be, that the Intail should be created in all Events; but that the eldest Son should not enter till ater
Devises.

ter the Decease of the Wife, unless in Case of her Marriage, and then to enter presently. Between Lunsford and Cheek, 3 Lev. 125.

7. But where A. devised all his Land to his Wife; until his Son should be twenty-four, and then to his Heirs for ever; and when he came to twenty-four, she should have the third Part for her Life; and if he dies before twenty-four, then she to have all for her Life, and after her Decease, if the Heir has no Issue, the Remainder to B. the Remainder to the right Heirs of the Devisee; the Heir came to twenty-four, but no Estate-tail was created by the Will; for the Fee-simple descended to him, and the Limitation was to take Place, if he died before the Age of twenty-four, which he did not. Dyer 124 a. 1 Rol. Abr. 839.

8. A Man devised all his Fee-simple Lands to his Wife for Life; and after her Death to A. B. and C. his three Daughters, equally to be divided; and if any of them die before the other, then the others to be her Heirs, equally to be divided; and if they all die without Issue, then to others named in the Will; and it was adjudged that the Daughters had an Estate-tail. Cro. Jac. 448. 1 Rol. Abr. 836.

9. So where the Devise was to a Man and his Heirs, and if he die without Issue, that then the Land shall go to A. and B. or the Survivor of them; adjudged an Estate-tail in the first Devisee, for in these Cases, the Extent of the Word Heir is confined to the Descendants, or Issue of the Devisee, since otherwise, the Limitation over cannot vest, according to the Intent of the Devisee, for they will not allow a Limitation of a Fee upon a Fee. 1 Rol. Abr. 836. Moor 864. Hob. 75. Poll. 487. Cro. Jac. 448.

10. A. having Issue B. and C. devised some of his Land to B. his eldest Son, and the Heirs of his Body, after the Death of his Wife; and if B. died, living his Wife, then to C. his Son, and devised other Lands to his other Sons, and the Heirs of his Body; and if he died without Issue, then to remain over; B. died in the Life of the Wife, and yet it was adjudged that C. could not enter into the Land while any Issue of B. remained; for the Words of the Devise, that if B. died, living the Wife, did not abridge the Estate-tail which was given by the former Words, because the Testator could not be supposed to intend to prefer the younger Son before the Issue of the Elder, especially when he had in the former Part of the Will settled it on the Elder, and made the same Provision of other Lands the same Way, for the younger Son. 1 Buls. 230, 231.

11. A. devised Land to B. his Son, and if C. his Daughter survived B. and his Heirs, then she should have the Lands; and it was adjudged, that B. had but an Estate-tail, for the Word Heirs must be intended Heirs of his Body, for he could not die without collateral Heirs while his Sister was alive; but if the Will had said, that if J. S. a Stranger, survives B. and his Heirs, then he should have the Land, there B. had a Fee-simple, and then the intended Remainder must be void, for it is to vest on a Contingency of B.'s Dying without Heirs, which is too distant to expect, and the whole Fee-simple being in B. there can be no present Interest to vest in a Stranger. Cro. Jac. 415, 416. 1 Salk. 233.

12. So where A. devised to B. for his Life, and to his Heirs; and for Want of Heirs in him, to C. in the same Manner, and for Want of Heirs of him, to D. and his Heirs for ever; the Jury found that B. and
and C. were Brothers, and that D. was next Cousin and Heir to them, though not mentioned in the Will; and the Court held, that they had but an Estate-tail, and the Remainder in Fee to D., good; for D. being Cousin and Heir to them, proves, that he intended Heirs of the Body; also Want of Heirs of him, are to be taken for Want of Heirs of his Body. Between Parker and Thacker, 3 Leiz. 70. 7 Co. 4.
13. A Devise to J. S. in perpetuum, and after his Decease, Remainder to his Heir Male in the singular Number, is an Estate-tail, for Heir is nonen Collectivum. 1 Bull. 219. 1
14. If A. devises to B. for his natural Life, and after his Decease he gives the same to J. S. and his Heirs for ever; and for Want of such Issue to J. S. and his Heirs for ever, provided that B. may make a Jointure of all the Premises to such second Wife, which she may enjoy during Life; this is an Estate-tail in B. for the Word Issue is nonen collectivum, and takes in the whole Generation. Between King and Melling, 1 Vans. 225. 2 Leiz. 58. S. C.
15. But where Lands were devises to A. and his Wife, and after their Decease to their Children, they having then a Son and a Daughter; it was adjudged that A. and his Wife had but an Estate for Life, for no greater Estate had passed at Common Law; and the Intent of the Devisor must plainly appear, or they will never admit of a Conjunction different from what they would allow in Conveyances executed in the Life-time of the Party; and for that Reason, when the Devise is to B. and his Children, or Issue, B. having Issue at the Time of the Devise, it must take Effect according to the Rules of the Common Law, and B. can have but an Estate for Life jointly with his Children; but if A. had devised his Lands to B. and his Children, or Issue, and B. had none at the Time of the Devise, then he takes an Estate-tail; for it is plain, by the Intent of the Devisor, that the Children shall have the Land, and they cannot take as immediate Devisees, for they were not in esse, nor by Way of Remainder, for the Devise was immediately to B. and his Children, and they shall be taken as Words of (b) Limitation, ciz. as Children of his Body. Wild's Case, (b) if Lands are devises to one without more Words, this passes for an Estate for Life; so if the Devise had gone further, to him and his Assignes, these Words of themselves had not enlarged the Estate. Co. Liz. 9. A. But the an express E-estate for Life is given to the Ancestor, with a Limitation to the Heir or Heirs of his Body, or his Issue; yet regularly the Ancestor takes an Estate-tail, according to the Rule laid down in Wedes's Case, 1 Co. 99. ciz. that where the Ancestor takes an Estate of Freehold, a Limitation to his right Heir, or Heirs of his Body, are Words of Limitation, and not of Purchase; but the Exceptions to this general Rule will not appear by the Cases themselves.
16. If a Man devises to A. for Life, and afterwards to the next Heir Male, and to the Heirs of the Body of such next Heir Male, this is only an Estate for Life in A. for the Inheritance is limited or granted on the Estate of the Heir in the singular Number, and therefore he shall take by Purchase. Archer's Case, 1 Co. 66.
17. But where a Man devises Land to his Son for ever, and after his Decease, the Remainder to his Heir Male for ever, with other Remainders over; this was held an Estate-tail in A. for tho' the first A a a

Devise
Devise being to him for ever, would give him a Fee-simle, yet the subsequent Words, to his Heir Male, shew what Sort of Inheritance the Devisor intended him; and the Word Heir being nonem collecti
vum, is sufficient in a Will to create an Inheritance. 1 Bull. 219.
1 Rol. Abr. 836.

18. If Lands be devised to A. and B. equally to be divided, they have but an Estate for Life, for this can mean no more than that they should severally occupy the Land. Cro. Eliz. 330. 1 Rol.
Abr. 834.

19. A. seised in Fee of a House and Land belonging to it, devises the Moiety of the House to his Wife for her Life: Item, He devises the other Moiety of his House to his second Son. Item, He devises the said House, and all the Land belonging to it, to his second Son; yet the Son took but an Estate for Life, for the second Devise to the Son had its Effect, by conveying a Moiety of the House and Land which he had not by the first Devise; and there are no Words in the Will to create a larger Estate. 1 Rol. Abr. 834.

20. If a Man devises Lands to his three Daughters, equally to be divided between them; and if one of them die before the others, that then the others shall be her Heirs, these Words give them no Intent, but for Life only, because it is not to them and their Heirs, or Heirs of their Bodies; wherefore they have only an Estate for Life, with crofs Remainders of each one’s Part to the Survivors for Life. King
and Rumbal, 1 Rol. Abr. 836.

21. A Copyholder in Fee surrenders to the Use of his Will, and by Will devises his Copyhold Lands to his Wife; and if she hath Issue by the Devisor, that the Issue shall have it at his Age of twenty-one Years; and if the Issue die before that Age, or before his Wife, or if she hath no Issue, then she shall chose two Attornies, and she to make a Bill of Sale of my Lands to her best Advantage; and per Cur
riam, she hath only an Estate for Life, and having no Issue, hath no Interest to dispose, but an Authority only to nominate two who shall fell, and the Vendee shall be in by the Will. Between Beal’ and
Shepherd, Cro. Car. 199.

22. A Man seised in Fee made a Settlement of his Lands on G.
his Son for Life, Remainder to his first, &c. Son in Tail Male, Re
version in Fee to himself; and afterwards he made his Will as fol
loweth: As touching my Lands and Tenements, my Will is, that if my Son’s Wife die, during the Life of her Husband, without Issue Male, that then he shall have Power to make a Jointure to any other Wife, and for Want of Issue of his said Son, then the Lands shall be and remain to his Son by any other Wife, and his Grand
daughter shall have 4000l. and in Case of Failure of Issue Male by his Son G. then all his Lands shall go to his Grandchildren and their Heirs, share and share alike; and the Court held, that it could not be made an Estate-tail, by Tacking the Estate by the Will to the Estate for Life in the Settlement, on purpose to sup
port the contingent Remainder, because the Settlement and Will are two distinct Conveyances, and therefore Judgment was given, that this was not an Estate-tail. Between Moor and Parker, 4 Mod.
316.

23. One by Will devises Lands to A. for Life, without Impeachment of Wafe, and in Case he shall have Issue Male, to such Issue

Male,
Male, and his Heirs for ever; and after the Death of A. in Cave he leave no Issue Male, to B. and his Heirs for ever, and die, A. suffers a Common Recovery, and declares the Use to himself in Fee, and by his Will devises it to C. in Fee, and dies without Issue; and the first Question was, whether by this Devise A. took an Estate in Tail Male, or only for Life; and it was held to be but an Estate for Life in A. if, Because it was devised to him expressly for Life, and that without Impeachment of Waste, which would have been needful if it were an Estate-tail. I这样说, The Words, and in Cave A. die without Issue Male, or leave no Issue, are not to be taken sUBLIMTANTIVELY and absolutely, but relatively to what was said before, vis. if A. die without Issue, he shall take the Fee as before is appointed; and these oblique Words cannot be intended to destroy by Implication the Estate expressly devised before to the Issue Male of A. and there is no Uncertainty in these Words, to the Issue Male, which of them shall take, if there be several; for the eldest shall take the Fee by Purchas; and the Court being ready to give Judgment on this Point; Justice Powel, junior, started another, vis. Whether these Remainders should take Place as executory Devises or contingent Remainders; upon which it was twice argued, but before any Judgment, the Parties agreed, according to 3 Lev. 431. but in Salk. 224. S. C. it is said to have been further held; that this Limitation to the Issue was not an executory Devise, being after a Freehold but a contingent Remainder, so that a posthumous Son could never take; but there is no Judgment between Lodgington and Kime, 3 Lev. 431. 1 Salk. 224, but per Ryn. Ch. Juit. in the Case of Shaw and Weight, it was determined, and Judgment entered. Pach. 9 W. 3, that it was only an Estate for Life; and it was likewise decided in the same Manner in Chancery, and on Appeal in the House of Lords.

24. J. S. devised his Estate to Trustees, and their Heirs, in Trust for A. for Life, and to his first and other Sons in Tail; but in Cave A. died without an Heir Male of his Body begotten, the Trust to be void, and in such Cave he gave the Estate to the Defendants; and it was held, that these Words, If he die without Heir Male of his Body begotten, did not give him an Estate-tail by Implication, nor enlarge an express Estate devised to him for Life. Between (c) Bamfield and Popham, 2 Vern. 427, 449. S. C. 1 Salk. 236. S. C. but stated, that the Devise was to A. for Life, Remainder to the first Son of A. in Tail Male, and so on to the tenth Son in Tail Male, &c. by which it was construed in the Words (c) Note. The Case is fixed for the Opinion of the Court of Common Plass, was in the Words

Following, viz. A. died in Fee of the Lands in Question, anno 1674, made his Last Will in Writing, and thereby devised the said Lands to certain Persons therein named, and their Heirs, in Trust, by Woodhouse and Fines for Leases, to raise Money for the Payment of his Debts; and after his Debts paid, in Trust for, and for the Use of B. for his Life; and after his Death, in Trust, for the Use of his first Son, and the Heirs Male of his Body; and after the Decease of the first Son without Heir Male, then in Trust for such other Son and Sons, and their Heirs Male, as should be begotten by the said B. in Seniority one after another; provided that if the said B. shall die before he come to the Age of 21 Years, or at any Time thereafter, without Heir Male lawfully begotten of his Body, that then the Trust so limited to the said B. should be utterly void; and in such Case, from and after the Death of the said B. without Heir Male by him lawfully begotten, the Trustees to stand feoffed to the Use of C. and his Heirs; the Testator afterwards annexed a Codicil in Writing to the said Will, and thereby reciting, that he was minded to make some Alterations in his Will, and that he had devised all his Real Estate to the said B. and the Heirs Male of his Body, by the said Codicil declared, that if it should happen that the Said Estate in Tail should determine by the Death of the said B. without Issue, before he attain the Age of twenty one Years, then the said Lands should be enjoyed by the Father of the said B. for his Life, to commence from and immediately after the Determination of the said Estate in Tail, as aforesaid: The Testator died soon after the making the said Codicil; the Trust, as to the Payment of Debts, is performed, and B. entered on the Premises, and now enjoys them, &c. What Estate B. hath by the said Will and Codicil? Note: B. is Cousin and Heir to A. the Devise; and it was certified by the unanimous Opinion of
25. If A. devises to D. his Daughter for Life, and after her Decease to her first Son, and the Heir of his Body; and if he die without Heirs of his Body, then to her second and other Sons, &c. and the Heirs of their Bodies; and after them to N. in eadem forma; and for Default of such Issue, to J. S. in Fee; and after the Will was finished, but before Publication, the Tefiator adds this Clause, Memorandum, the Intent and Meaning of the Tefiator is, that D. shall not alien the Lands given to her, that they shall be to her Heirs Males; and for Want of such Issue to N. this restrictive Clause explains the Intent of the Tefiator; and therefore B. shall have an Estate for Life only, and not an Estate-tail by Implication. 1 Jac. 2. between Friend and Bouchier, Skin. 240.

26. If A. devises Lands to Truefnums to pay Debts and Legacies, and then to settle the Remainder of one Moiety of what should remain unfold to H. and the Heirs of his Body, by a second Wife, and in Default of such Issue, to her Son F. and the Heirs of his Body, the other Moiety to F. and the Heirs of his Body, with Remainers over, Taking special Care in such Settlement, that it never be in the Power of either of my said Sons F. or H. to draw the Instail of either of the said Moieties given them, as aforesaid, during their, or either of their Life or Lives, this Estate being only executory, it must be construed, as if like Provision had been contained in Marriage-Articles; and therefore the Sons shall only have Estates for Life conveyed them; but it must be without Impeachment of Waife. Deceased Mich. 1705. between Leonard and the Earl of Suffolk, 2 Vern. 526.

27. A Man seised in Fee, devised to J. B. for his Life only, without Impeachment of Waife, and from and after his Decease, then to the Issue Male of his Body lawfully to be begotten, if God shall bless him with any, and to the Heirs Males of the Bodies of such Issue lawfully begotten; and for Default of such Issue, Remainder to J. B. and the Heirs Males of his Body; and for Want of such Issue he limits two Remainders over in the same Words; and it was adjudged, that J. B. took only an Estate for Life, for the Estate was given to him for Life, and there was a Limitation afterwards to his Issue, which was a Description of the Person who was to take the Estate-tail. 11 Ann. between Backhouse and Wells.

28. A devises Lands to his Wife for Life, and for her better Support he gives and bequeaths unto her the Sum of 500l. to be raised by her Executors or Administrators, by Sale of Timber, or by Sale of any Part of the Premises, or otherwife, by digging, finking, getting, and Sale of Coal on the Premises, or any Part thereof, and his Executors, and Administrator's Choice and Election; and if my said Wife shall happen to die before the said Sum be raised, as aforesaid, then such Person whom she had appointed in her Life-time, to raise, for which I give them and her full Power and Authority; provided, nevertheless, that if either my Sifters hereafter named, or such
Devises.

such Person for whom my Trustees hereafter named shall be Trustees, shall pay unto my Wife, her Executors, &c. the said Sum of 500l. that the said Power of Selling shall cease; and after the Decease of my said Wife, I devide all my Estate before-mentioned to A. B. and C. and the Survivor and Survivors of them, upon the Trustees hereafter-mentioned, that is to say, in Trust for my Sistors A. L. and D. E. equally betwixt them during their natural Lives, without committing any Manner of Waffe, from and after the Decease of my said Wife; provided always, that what Sum or Sums of Money, in part or in full of the said 500l. hereby left my Wife, shall be really paid my Wife, her Executors, &c. by either my said Sistors; that in that Case my Will is, that such Money be likewise raised by getting of Coal on the Premises only; and if either of my said Sistors happen to die, leaving Issue or Ilues of her or their Bodies lawfully begotten, or to be begotten, then in Trust for such Issue or Ilues of the Mother’s Share, or else in Trust for the Survivor or Survivors of them, and their respective Issue or Ilues; and if it shall happen that both my said Sistors die without Issue, as aforesaid, and their Issue or Ilues to die without Issue or Ilues lawfully to be begotten, the said Trustees to stand and be intrusted to and for my Kinship J. S. and the Heirs Males of his Body, &c. and for Want of such Issue, then in Trust for R. G. &c. And the chief Question was, whether this was an Estate-tail, or an Estate for Life in the Sistors, who survived the Wife; and it was adjudged an Estate-tail in the Sistors in the Great Sessions for the County of Flint; which Judgment was reversed on a Writ of Error in the King’s Bench; but on a Writ of Error in the House of Lords, the last Judgment was reversed, and the first established, by the Opinion of Eyres Ch. Jut. Ch. Bar. Pengelly, and Fortescue Jut. against the Opinion of all the Rest of the Judges, who held it only an Estate for Life in the Sistors. Between Shaw and Weigh, 28 April, 1729.

29. A. devised certain Lands to his eldest Son for Life, without Impeachment of Waffe, Remainder to J. S. his Grandchild for Life, without Impeachment of Waffe, with a Power to him to limit a Jointure of the same Land to any Woman he should marry, for her Life; and after his Death he devised the Lands to the first Son of J. S. the Grandchild in Tail, and so to the sixth Son; and then devised, that if J. S. the Grandchild should die without Issue Male, the Land should remain to J. B. And the Question was, what Estate J. S. took by the Will; and it was certified by the Court of C. P. that he took but an Estate for Life only; which was decreed accordingly. Patch, 1707, between Langley and Baldwin. Note per Raym. Ch. Jut. in the Case of Shaw and Weigh, an Estate-tail was raised here by Implication, because the express Devise was not to all the Sons; for if there had been more than Six, and the Six dead, must the Heir at Law have it before a seventh Son.

36. The Plaintiff’s Father, by his Will, devised the Estate in Question to the Plaintiff for Life, without Impeachment of Waffe, Remainder to Trustees, during his Life, to support contingent Remainders, with Remainder to the Heirs of the Body of his said Son, Reversion to himself in Fee, with a Power to the Son to make a Jointure of such a Part, and devised likewise a considerable Personal Estate to be laid out in a Purchase of Lands, and settled to the same.Use; and the only Question was, whether the Plaintiff took an Estate-
Devises.

tail, or only an Estate for Life, by this Will; and the Master of the Rolls having taken Time to consider of it, decreed, that he took only an Estate for Life, as the Words were express, and had all the other Marks attendant on an Estate for Life, and consequently, that the Heirs of his Body should take by Purchase; and though the Estate would vest in the first Son, as Tenant in Tail, by Way of Purchase, yet not so as to exclude the other Sons, or their Issue, from taking the like Estate, whenever his Estate determined for Want of Issue; and this he said was so resolved in the Case of Trevor and Treesor, by Lord Macclesfield, affixed with the Judges; and as for the Personal Estate, there could be 'res Difficulty as to that than in the Conveyance of the legal Estate in Possession; and for that he cited 2 Vern. 526. Mich. 1728. between Pampillon and Vyce.

(E) Of executory Devises of Lands of Inheritance, and here of contingent Remainders, and cross Remainders, as far as they relate to this Place.

1. A Fee cannot be limited on a Fee, as if Lands are limited, to one and his Heirs; and if he dies without Heirs, that it shall remain over to another; this last Limitation is void; so if Lands are given by Deed to one and his Heirs, so long as J. S. hath issue, and after the Death of J. S. without Issue, to remain over to another, this Remainder is likewise void, because the first Devisee had a Fee, tho' it was a base and determinable Fee. Dyer 41. a. Brook 234. 1 Co. 85. b. Bulst. 195. Plow. 29. 2 Leon. 69. Co. Lit. 15. a. Popbl. 34. 2 Rol. Rep. 220. Godolph. 355.

2. But yet in a Will such Limitations may be good upon a Contingency that may happen within the Compass of a Life, or Lives, in eile, or a reasonable Number of Years; but this not by Way of direct Remainder, but by Way of (a) executory Devise. Cro. Eliz.

(a) An executory Devise is defined a future Interest, which cannot vest at the Death of the Testator, but depends upon some Contingency, which must happen before it can vest; of which there are three Kinds, 1st. Where the Deviseor departs with his whole Fee simple, but upon some Contingency qualifies that Disposition, and limits a Fee on that Contingency; and this is new in Law, as appears by the following Cases. 2d Sort is, when the Deviseor gives a future Estate to arise upon a Contingency, but does not part with the Fee at present, but suffers it to descend to his Heirs as a Devise, till his Debts are paid, &c. to the Heirs of J. S. when he shall have one; and thence have been frequent: But note, that if an Estate be limited upon a Contingency, after a particular Event, capable of supporting a Remainder, it shall then be construed a contingent Remainder, and not an executory Devise. Of the 3d Sort are Leasehold Interests or Terms for Years, for which vid. infra Letter F, and vid. 1 Salk. 326. 2 Saund. 380. 1 Salk. 329.

3. One devised Land in London to the Prior and Convent of B. ita quod reddant annuatim Decano & Capitulo Sancti Pauli 14. Marks; and if they fail of Payment, that their Estate shall cease, and that the said Dean and Chapter, and their Successors, shall have it; and it was held by Baldwin and Fitzgerald (the greatest Lawyers of their Age, as my Lord Vaughan lays) that this Remainder was void, because the first Devisee carrying a Fee, nothing remained after to be diposited, and executory Devises after a Fee-simple, were in former Ages unknown. 1 Brook 234. Dyer 53. a. Vau. 271. and per Nottingham Lord Chancellor, tho' this Doctrine is now exploded.
ploded, yet the Case of Hinde and Lyon, 19 Eliz. 3 Leon. 64. is the first Case wherein the contrary has received a solemn Resolution.

4. One having Iflue three Sons, A. B. and C. by his Will, in Writing, devises Lands to B. his second Son, and his Heirs for ever, and if B. die without Iflue, living A. then A. to have those Lands to him and his Heirs for ever; B. enters and suffers a Common Recovery to the Use of himself and his Heirs, and then devises those Lands to the Plaintiff and his Heirs, and dies without Iflue, living A. and it was adjudged, 1st, That B. had a Fee-simpie by the Devise to him and his Heirs for ever; and that the other Words would not so correct or qualify it as to make it an Estate-tail, not being, if he die without Iflue generally; but upon the Contingency of his dying without Iflue, living A. so that if he survived A. or died in the Lifetime of A. leaving Iflue, A. was to have nothing; and this being a Contingency to happen within the Compas of Lives then in Being, tho' the first Devise was after a Fee, yet the Limitation over upon such Contingency was good, and not within the Danger of a Perpetuity; for the Remainder to A. is not a Remainder directly, which cannot be after a Fee, but takes Effect by executor Devise; and upon Determination of the first Estate, by the happening of the Contingency, carries over the Land to the other. 2dly, It was adjudged, that this being a meer collateral Possibility, was not bound by the Recovery, unless he to whom it was limited had been Party by Way of Voucher; for it had not Existence at all when the Recovery was suffered, and therefore the Recompense in Value could not extend to it. Mich. 18 Jac. 1. in B. R. between Pells and Browne, Cro. Jac. 590. 1 Rol. Abr. 611. S. C. Palm. 131. 2 Rol. Rep. 216. 2 Leon. 111. Vaugh. 273.

5. One by Will devises Lands to his Mother for Life, and after her Death, to his Brother in Fee; provided, that if his Wife (being then enfeite) be delivered of a Son, that then the Land should remain to him in Fee, and dies, and the Son is born; and it was held, that the Fee of the Brother should cease, and vest in the Son, by Way of executionary Devise, upon the Happening of the Contingency. Dyer 127. in Margine.

6. One having Iflue A. his only Daughter and Heir apparent, by Will devises Lands in D. to her and her Husband, and her Heir, upon Condition, that they should assure Lands in F. to his Executors, and their Heirs, to perform his Will; and if they failed, then he devised the said Lands in D. to his Executors, and their Heirs, and died; and it was adjudged to be no Condition; for then by the Defeate to the Daughter, being Heir, it would be destroyed; but it was held a Limitation, or an executionary Devise to his Executors, in Case the Assurance was not made; and that they might, for Breach thereof, enter and fell; for tho' a Fee cannot be limited upon a Fee absolute, yet upon a Fee determinable it may, and enures as a new original Devise to take effect, when the first Devisee failed to make the Assurance. Dyer 33. a. in Margine, Palm. 135. Cro. Jac. 592. Cro. Eliz. 359. S. C. T

7. If A. devises Lands to B. for five Years, from Michaelmas following, the Remainder to C. and his Heirs, and A. dies before Michaelmas; yet this is a good Remainder, tho' it cannot vest before the particular Estate begins; and the Freehold cannot be in Expectancy, for in the mean Time the Fee shall descend to the Heir. Cro. Eliz. 878.

8. One
Devises.

8. One devises Lands to his Wife, till his Son came to the Age of twenty-one Years, and then that his said Son should have the Lands to him and his Heirs; and if he dies without Issue, before his said Age, then to his Daughter and her Heirs; this is a good contingent or executory Devise to the Daughter; if the Contingency happens, and in the mean Time the Fee descends to the Son as Heir; and if he lives to twenty-one, tho' he after die without Issue, or leaves Issue, tho' he die before twenty-one, yet the Daughter is not to have the Lands, because he is to die without Issue, and before twenty-one, or else the Daughter cannot take. 2 Rol. Rep. 197, 217. Palm. 132.

9. But where one having Issue three Sons, A, B, and C, devises to his Son A, after the Death of his Wife, to him and the Heirs of his Body lawfully begotten, in Fee-simple; and if he die in the Life of my Wife, that then my Son C shall be his Heir, and dies; A hath Issue, and dies in the Life of the Wife; and it was adjudged that the Issue should have the Land after the Death of the Wife, and not C. for it was in Effect a Devise to the Wife for Life, Remainder to A in Tail, Remainder to C in Fee, upon the Contingency of A's Dying in the Life of the Wife, and does not abridge the Estate-tail expressly given A. by his Dying in the Life of the Wife. Between Spalding and Spalding, Cro. Car. 185.

10. Baron and Feme being seised of a Copyhold, to them and the Heirs of the Baron, he surrenders it to the Wife of his Will, and then devises it to the Heirs of the Body of the Feme, if they attain the Age of Fourteen, and dies without Issue; and then he marries a second Husband, and has Issue that attains the Age of Fourteen, and then she dies; and whether this was a good Devise by Reason of the double Contingency, seilicet, the having Heirs of her Body; and that such Heir should live till 14, was doubted; but it was admitted, that if the Devise was good, it must be by Way of executory Devise, which is allowable when to take Effect within the Compass of a Life, but not after a Dying without Issue, for that tends to a Perpetuity; and it cannot take Effect by Way of Remainder; for it is a new Devise to take Effect after her Death, and is not as a Remainder joined to her Estate; but the Court being divided upon the Point of the Contingency, it was agreed to be adjudged into the Exchequer Chamber; and the Reporter supposes the Parties agreed afterwards, for he heard no more of it. Between Snow and Cutler, 1 Lea. 135.

11. If a Man having only one Sister and Heir, who had Issue A, and after married B, by whom she had Issue C and D, devises Lands to his Sister until C attains twenty-one, and after C attains that Age, to C and his Heirs; and if C dies before twenty-one, then to the Heirs of the Body of B, and their Heirs, as they shall attain their respective Ages of twenty-one, and dies; C dies before twenty-one, living B and after B dies, D either as Heir of C in whom the Fee was vested, or as Heir of the Body of B, (though he could not be so during the Life of B,) being of Age after the Death of B, shall have the Estate by Way of executory Devise, and not the right Heir of the Devisee. Between Taylor and Biddulph, 2 Mod. 289. adjudged.

12. If A. hath Issue two Sons, viz. B. and C. and devises Lands to B. for Life, and if he dies without Issue living at his Death, that then the Fee shall remain to the Heirs of B. for ever, by which Devise B. has only an Estate for Life, the Remainder to his Heir not executed;
executed; and tho' the Reversion descended on B. as Heir of A., yet it drowned not the Estate for Life against the express Devise and Intention of the Will, but left an Opening, as it was termed, for the Interposition of the Remainder, when it shall happen to interpose between the Estate for Life and the Fee; and that this being a contingent Remainder, and not an executory Devise, was barred by the Recovery suffered by B. Between Holmés and Plunkett, 1 Lec. 111. 7, 13. If one devises Lands to his Wife for Life, and if she hath a Son, and causeth him to be called by the Christian and Surname of Sampson Shelton, then after her Death devies the same to her Son; and if he die before twenty-one, to the right Heirs of the Devisor, and dies; and after the Wife marries Broughton, by whom she has a Son, which she caused to be christened Sampson Shelton, &c. the Devise is good by Way of contingent Remainder, but not by Way of executory Devise; for when a contingent Estate is limited, and depends upon a Freehold, which is capable of supporting a Remainder, it shall never be construed an executory Devise, but a contingent Remainder; adjudged, and that the Reversion descending to the Heir of the Devisor till the Contingency happened by the Bargain and Sale, and Fine thereof, by the Heir of the Devisor to B. and his Wife, and their Heirs, before the Birth of their Son, the contingent Remainder was destroyed. Between Purfield and Rogers, 2 Stann. 380. 14. A. having two Sons, B. and C. devised Lands to B. for fifty Years, if he should live long; and as for my Inheritance after the said Term, I devise the same to the Heirs Males of the Body of B. and for Default of such Issue, then to C. and the Court resolved, 1st, That B., had not an Estate-tail by Implication, upon the Words without Issue, because the Devisor had given him an Estate for Years by express Words; and the Court cannot make such a Construction against express Words, when thereby they would drown the Estate for Years, and make an Estate of Inheritance. 2dly, The Court held this Devise to the Heirs Males of the Body of B. to be void in its Creation, for Want of an Estate of Freehold to support it; and they seemed not to think it an executory Devise, because it was limited as a Remainder, and because it was limited per verba in praesen. for if one devise his Estate to the Heir of J. S. and J. S. is living, the Devise shall not be construed an executory Devise, and such a Devise is therefore void; but if it were to the Heir of J. S. after the Death of J. S. that is good as an executory Devise. 3dly, The Court held the Limitation to the Heirs of B. was become void by the Event, whatever it was in its Creation, because John is now dead without Issue. 4thly, The Court held, that if the Remainder to the Heirs Males of B. was void in Point of Limitation, then the next Remainder limited to C. took Effect presently. Between Goodright and Cornish, 1 Stalk. 226. 4 Mod. 255. S. C. 154. A. seised in Fee, devised to Trustees for eleven Years, and then to the first Son of A. and the Heirs Males of his Body, and so on to the second, third, &c. Sons in Tail Male; provided they the said Sons shall take on them my Surname; and in Case they, or their Heirs, refuse to take my Surname, or die without Issue, then I devise my Land to the first Son of B. in Tail Male; provided he take my Surname; and if he refuse, or die without Issue, then to the right Heirs of the Devisor. A. had no Son at the Time of the Devise, and died without Issue; and B. had a Son, who was living at

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the Time of the Devise, who took the Surname of the Devisor; the whole Court agreed, that the Devise to B. was not a contingent Remainder, because of the precedent Estate for Years, which could not support it; it appears likewise by the Case, to be the Opinion of Treby Ch. Juft. and Juft. Powell, that it could not be good as an executory Devise; if it were considered as a Devise to the Heirs of A. being limited per verba in praesentia; but Blencow Juft. held, that the Devise to the Son of A. was future; for he supposed the Tellerator knew that A. had no Son, and the rather because he does not name him; but it was adjudged and affirmed in B. R. that the Remainder to C. was good, and vested in him. Scatterwood and Edge, 1 Salk. 229.

16. A Man devised Lands to his Executors till his Son should come of Age, and when his Son should come of Age, then he should enjoy it, for him and his Heirs; this is a Remainder executed in the Son, and not in Contingency; for the Words when and then, in this Case, only denote the Time when the Remainder is to execute, and will no more make the Remainder contingent, than in the common Case, when a Leave is made for Life or Years; and after the Decease of the Tenant for Life, or the Expiration of the Term for Years, then to remain to another; for tho' the Words be, after the Term it shall remain, yet it is a present and not a contingent Remainder; for where Words refer to that which must needs happen, there shall be no Contingency. Boraston's Case, 3 Co. 19.

17. A. having Issue five Sons (his Wife being enseisit with a Sixth) devised two Thirds of his Land to his four younger Sons and the Child in jeture sua mere, if it were a Son, and their Heirs; and if they all die without Issue Male of their Bodies, or any of them, that the Lands shall revert to the right Heirs of the Devisor; by this Devise the younger Sons are Tenants in Tail in Possession, with crofs Remainders over to each other; and no Part shall revert to the Heirs of the Devisor till all the younger Sons be dead without Issue Male of their Bodies. Dyer 303. Hob. 33.

18. A Man having two Sons, devised Part of the Lands to one of them, and his Heirs, and the Rest to the other and his Heirs; and further Wills, that the Survivor shall be Heir to the other, if either dies without Issue; by this the Devises are Tenants in Tail, with Remainder in Fee executed of each other's Part. Cro. Jac. 695.

19. But where a Man having three Sons, and Sealed of three House, devised a House to each Son and his Heirs, with this Proviso, that if all his said Children shall die without Issue of their Bodies lawfully begotten, that then all his said Messuages shall remain over, and be to his Wife and her Heirs; and it was held in this Case, that these Words did not raise any crofs Remainders, but that at the Death of any of the Sons his House shall go immediately to the Wife; and though a crofs Remainder may be by Implication, where Lands are limited to Two, yet they cannot rise where Three or more Houses are limited to Three without express Limitation, because of the Inconvenience. Between Gilbert and Witty, Cro. Jac. 655, sid. 1 Vent. 224, where per Hale Ch. Juft. no crofs Remainders can be created by Implication in a Deed, nor any in a Will between Three, or more, unless the Words of the Will do plainly express the Intent of the Devisor to be so; as where Black-ace is devised to A. White-ace to B. and Green-ace to C. and if they die without Issues of their Bodies,
Devises.

Bodies, vel alterius corum, then to remain, there by Reason of the Words alterius corum, cross Remainder shall be.

(F) Of executory Devises of Leases for Years, and here of the Limitation of the Trust of a Term, as far as it relates to and agrees with the Devise thereof.

1. If a Termor devises his Term to A. for Life, the Remainder to another, tho' A. has the whole Estate (for that is in him during his Life) and so no Remainder can be limited over at Common Law; yet it is good by Way of (a) executory Devise. Cro. Jac. 198. (a) The great Question in these Cases

was, whether the Disposition of the Term to a Man for his Life, was not such a total Disposition of it, that no Remainder could be limited over, it being in the Eye of the Law a greater Estate than for any Number of Years; which was resolved in the Affirmative, in the Reign of 6 E. 6. Dy. 74. by all the Judges of England; but this Resolution seeming very severe, and against natural Justice, that a Man should be hindered from making Provision for his Family, and the Contingencies of it occasioned a contrary Resolution. 18 Eliz. 3. Li. 46. Dy. 55. for the Judges observing the good Effect such Limitations by Way of Trust had, which were allowed in Chancery, permitted Farmers to dispose of their Leases in the same Manner by Last Will; and then the Chancery, the better to fix them in it, allowed of Bills by the Remainder-man to compel the Devisee of the particular Estate to put in Security, that he in the Remainder should enjoy it, according to the Limitation; but when they perceived that this multiplied Chancery Suits, they resolved that there was no need of that Way. 10 Co. 47. a. 52. b. 1 Ch. 451. but that the particular Devisee should not have Power to bar the Remainder-man; so that the Law has been long settled, that executory Devises are good, provided the Contingency is to happen within a Life or Lives, all in effe; for there can be no Tendency to a Perpetuity, which was one great Mistake apprehended from those Kind of Limitations; but what Kind of executory Devises do, or do not tend to a Perpetuity, will be best seen by the Cases themselves.

2. If A. possess'd of a Term for Years, devises it to B. his Wife for eighteen Years, and after to C. his eldest Son for Life, and after to the eldest Illue Male of C. for Life, tho' C. had not any Illue Male at the Time of the Devise, and Death of the Devifor; yet if he had Illue Male before his Death, this Illue Male shall have it as an executory Devise; for altho' there be a Contingent upon a Contingent, and the Illue not in effe at the Time of the Devise, yet in as much as it is limited to him but for Life, it is good, and all one with Manning's Case, upon a Reference out of Chancery to Justice Jones, Croke, and Barkley, between Cotton and Heath, by them resolved, without Quidon. 1 Rol. Abr. 612.

3. If A. possess'd of a Term devises it to B. his Wife for Life, and after her Death to his Children unpreferred; and after B. dies, C. then being the only Daughter of A. shall have it; for an executory Devise, that hath a Dependence on the first Devise, may be made to a Person uncertain. 1 And. 60. 61.

4. If one possess'd of a Term, devises it to his Wife for Life, the Remainder to his first Son for Life; and if he dies without Illue, to his second Son, &c. the Remainder to the second Son is void; for the Remainder of a Term cannot depend upon a Possibility to remove as the Dying without Illue; although it was objected, that the Devise was not to the first Son, and his Illue (in which Case it was agreed it should go to his Executor) but it was given to him for Life only, with an executory Devise to the second Son, upon the Contingency of the first, not having Illue at the Time of his Death. Between Love and Hindmarsh, 1 Lea, 390. 2 Chan. Rep. 14. S. C.

5. If
Devises.

5. If a Man possesse of a Term for Years, devises it to D. his Wife for Life, and after to W. his eldest Son, and his Assigns; and if he dies without Issue then living, to T. this being a perpetual Limitation by Intendment of Law, is void; and if Men should be admitted to make such Devises, there would not be any End of them, nor any Certainty. Between Child and Bayly, Cro. Jac. 459, 460, 1 Rol. Abr. 613. Note: The Authority of this Case is shaken by the Duke of Norfolk's; and denied to be Law. 1 Salk. 225.

6. If a Man possessed of a Term, devises it to his Son, and if he dies unmarried, and without Issue, to his Daughters; and if his Son be married, and has no Issue then living to enjoy it; then after the Death of his Son's Wife, he devises it to his said Daughters; the Devise to the Daughters is void, being a Limitation after the Death of their Brother without Issue; for it is not to be taken (as objected) that the Dying should be without Issue living at his Death, and so the Contingency to happen within the Compass of a Life; and if it should be intended of such a Dying without Issue, yet the Court held it would be void, according to Child and Bayly's Case; for tho' such a Devise hath prevailed in Case of an Inheritance, as in Pell and Brown's Case, yet it hath not yet prevailed in Case of a Term; and the Court said, they would not extend the Devises of Chattels to make Perpetuities, farther than they had been. Between Gibbons and Summers, 3 Lev. 22, 23. Q.

7. A. having Issue several Sons (the eldest Non Compos) created a Term for Years, and by another Deed declared the Trust thereof to his second Son, and the Heirs Males of his Body, Remainder to his other Sons; provided, that if his eldest Son died without issue, or not leaving his Wife enfeint with a Child, living the second Son, so that the Earl dom of —— descended on the second Son, then the said Term to remain to the third Son, and the Heirs Males of his Body, with like Limitations to the other Sons; the eldest Son died without Issue, living the Second; and this Limitation to the third Son was held good; and so decreed by my Lord Nottingham, contrary to the Opinion of the three Chief Juries, who affixed him. 3 Chan. Ca. 1. The Duke of Norfolk's Case. Note: This Decree was reversed by North Lord Keeper, 1 Vern. 163. but upon an Appeal to the House of Lords, the last Decree was reversed, and Lord Nottingham's establishe, 1 Chan. Ca 53. Note: executory Devises and Limitations of the Trust of a Term are governed alike. 1 Vern. 234.

8. If a Term is devised to A. and the Heirs of his Body, and if A. die without Issue, living B. then to B. this is a good Limitation, the Contingency arising within the Compass of a Life. Adjudged between Lamb and Archer, 5 W. & M. in B. R. 1 Salk. 225, and Child and Bayly's Case denied to be Law.

9. F. S. devises to his Son a Leasehold Estate, to his Executors, Administrators and Assigns for ever; but if he died before twenty-one, without Issue, in that Case devises it over to his Brother; and the Question was, whether the Remainder over was good; it was objected, that it was a Perpetuity, for that the Remainder depends on the Son's Dying without Issue; for if he die before twenty-one, tho' he leaves a Child, and that Child afterwards dies without issue, the Son may be said to be dead before twenty-one, without Issue; Sed non allocator; and the Court decreed the Remainder over good. Trin. 1690, between Martin and Long, 2 Vern. 151. And a like Cafe
Cafe said to have been adjudged in the Exchequer, between Smith and Smith.

10. One F. being possessed of a Term for Years, devises it to his Wife for Life, and after her Death to R. F. for her Life; and after her Death to T. F. and his Children; and then devises in this Manner; and if it shall happen the said R. F. to die before the Expiration of the said Term, not having Issue of his Body then living, then to go over to the Plaintiffs for the Residue of the Term; the Defendant's Title was by an Assignment of R. F. and T. F. of all their Estate, Right, Title and Interest. R. F. was dead, and T. F. died without Issue, and the Plaintiff brought his Bill to have an Assignment of the Term pursuant to the Will; all that was insisted upon for the Defendant, to difference this Cafe from the Duke of Norfolk's of a Term, and of Pell and Browne's Cafe, of a Fee, was, that this Contingency of his Dying without Issue, was not confined to his own Death, but that the Words, when living, should relate to the Words, before the Expiration of the Term; and so this went further than any of the Cafes had ever yet been carried, for he might have Issue for several Generations; and yet if such Issue failed at any Time before the Expiration of the Term, then it was to go over; and this, in a long Term, tended plainly to a Perpetuity, and therefore ought not to be allowed; but by the Devise to T. F. and his Children, and the subsequent Words, and if he die without Issue, the whole Term and Interest was vested in him, and he might dispose thereof as he thought fit; and it could not be restrained by the Words when living, which related only to the Words, before the Expiration of the Term, and so the Remainder over to the Plaintiff void; but for the Plaintiffs it was argued and decreed, that the Remainders to them was good, by Way of executory Devise, and that the Words, when living, must relate to the Time of his Death; for otherwise there would be no Difference between this and the common Limitations of a Term to one, and the Heirs or Issue of his Body; and if he dies without Issue, the Remainder to another, which is void; for there it must likewise be intended, if he die without Issue before the Expiration of the Term, or during the Term; since after the Expiration of the Term he can limit no Remainders over, because nothing remains then to be limited; but here it being limited over upon this Contingency, if he die without Issue then living, viz. at the Time of his Death, it is good, because the Contingency must happen within one Life, or not at all; for upon his Death it will be certainly known, whether he leaves Issue, or not; if he does, the Contingency cannot take Place; if he does not, then it may; and this being to happen within the Compaft of a Life, is good as an executory Devise, and differs in nothing from the Duke of Norfolk's Cafe, save only that there it was by Provise; and also upon the Death of another Person, without Issue then living, and here it is upon his own Death, which makes no Manner of Difference. Fletcher's Cafe, decreed Trin. 1709.

11. A Man possessed of a Term for thirty-one Years, devises it to his Son H. during his Minority; and if he attains to his Age of twenty-one Years, then to him during his Life, if the Term shall so long continue, and no longer, and after his Death to such of his Issue to whom he shall devise it; but if he die without Issue, then to his other Son G, for the Residue of the Term. H. afterwards died
without Issue, or without making any Disposition of the Residue of the Term; and the only Question was, whether by the Words of this Will the whole Term did not vest in H. and it was decreed, that it did not; for the Words, die without Issue, have a twofold Meaning, either without Issue at the Time of his Death, or without Issue whenever the Issue fails; and tho' in Case of an Inheritance, if Lands are devised to one, and if he die without Issue, the first Devisee takes an Estate-tail by Implication, which shall go to his Issue, and they shall take in a Course of Descendant to all succeeding Generations; but to make such a Contraction in the Case of a Term, which cannot come to the Issue by Descendant, is unnecessary, and therefore in such Case, the other Construction of the Words, which is most natural and obvious, shall take Place; and it shall be intended only, if he die without Issue living at the Time of his Death, and consequently the Dying without Issue being confined within the Compass of a Life, hinders not the Remainder over; but it may well take Place by Way of executor Devise, according to the former Resolutions. Decreed Pasch. 1718. between Targett and Gant.

(G) Of Terms for Years, and uncertain Interests by Devise.

1. A Man devises his Land to his Executors for Payment of his Debts, and after Debts paid, the Remainder over; and it was admitted clearly, that the Remainder was good; but the Question was, what Estate the Executors had, for there being no particular Estate limited, if an Estate should be adjudged for them for Life, it might determine before they received sufficient to answer the End of the Devise; for on their Death it would not go to their Executors; and it was adjudged an uncertain Interest, which should go from Executor to Executor for Payment of Debts. Cro. Eliz. 315. 8 Co. 96. 1 Rol. Abr. 819.

2. A. devises his Lands to his Executors, till his Son comes of Age, the Profits to be employed in the Performance of his Will, tho' the Son dies before he be of Age, yet the Interest of the Executors continues till he might be of Age, if he had lived; for since the Intent of the Devisor governs in Wills, it might destroy that, if the Executors Interest ceased at the Death of the Son; for it is reasonable to believe, that the Testator found, on a Computation, that the Profits of the Land, in that Time, would answer his Debts, &c. so that this is a good Devise of the Term, till the Son would be twenty-one, tho' he die before. 1 Chan. Ca. 113. 3 Ca. 20. b. Boraston's Case. 8 P.

3. If a Man devises Land to his Wife, till his Son comes of Age, to provide his Children with Necessaries; though the Wife dies before the Son comes of Age, yet her Interest does not determine by her Death, because it was not a Matter of meer Confidence, but shall go to her Executors; but if the Devise had been, that his Land should descend to his Son, but that his Wife should have the full Profits thereof, until the full Age of his Son, for his Education; here is nothing devised to the Wife but a meer Confidence, that she shall take the Profits for the Education of the Son; and by the Will she is but in Nature of a Guardian or Bailiff, for the Benefit of the
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the Infant, which determines by her Death. *Cro. Eliz. 252. Dyer*

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4. A Man devis'd certain Lands to his Wife, till his Son and Heir apparent should attain to his Age of twenty-one Years, and when his Son should attain to his Age, then to his Son and his Heirs, and died; the Son lived to the Age of thirteen Years, and then died; and the Wife supposing that she had a Title to hold the Lands till such Time as the Son would have attained his Age of twenty-one Years, in Case he had lived to that Time, continues in the Perception of the Rents and Profits of the said Lands for several Years; and the Bill was brought against her by the Heir at Law of the Son, to have an Account of the Rents and Profits from the Death of the Son; and tho' the Wife was Executrix likewife of her Husband, yet it not being devised during that Time for Payment of Debts, nor any Creditors, or Want of Assets appearing, it was held by my Lord Chancellor, that the Wife's Estate determined by the Death of the Son, and that the Remainder vested presently in the Son upon the Testator's Death, and was not to expect till the Contingency of his Attaining his Age of twenty-one Years should happen; for then in this Case it never would have vested, he dying before that Age, and therefore decreed the Wife to account for the Profits from the Time of the Son's Death; and upon a Rehearing his Lordship continued of the same Opinion, and grounded himself on the Distinction taken in 3 Co. 19. and 6 Co. 35. *Hill. 1713. between Mansfield and Dugard.*

5. If a Copyholder devises his Land to A. and B. his two Sons, and to the Heirs of their two Bodies begotten, and Wills that each of them shall enter at the Age of twenty-one Years, the Executors shall not take the Profits till they are both of full Age; but he who comes of Age first shall enter, and then the other when he comes of Age, and they shall hold the Land jointly. *Cro. Jac. 259. Tel. 183. vid. 1 Bulst. 48. cont.*

6. A. devised to B. during his Exile; and if it please God to restore him to his Country, or if he die, then to J. S. B. was a Dutchman, and had a Pension from the States; but upon some displeasure the States deprived him of his Employment and of his Pension, and gave them to another, whereupon he voluntarily left the Country, and lived here with A. who had been his Acquaintance beyond Sea; and after his coming hither, a War happened between the Dutch and English, and afterwards a Peace was concluded between the two Nations; yet B. continued here, and whether his Estate was determined, was the Question; and the Court held it was not, for that the Exile intended by A. was the leaving his Country, because of the States Displeasure to him, and the withdrawing of his Pension upon that Displeasure. *Between Pages and Volsius, 2 Leo. 191.*

7. A. devised his Land to B. and C. and the Survivor of them, till 800 l. should be raised out of them; and it was adjudged that B. and C. should have the Land no longer than they might have received it out of the Profits; and that if a Stranger enters after the Death of the Deviser, they may have an Account of the mean Profits, but cannot hold the Land longer than the Sum might have been levied; for if that were allowed, they might make it an eternal Charge on the Heir's Estate; but if the Heir himself enters and disturbs them, they
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they may hold over, for the Heir shall have no Benefit of his own Wrong, or they may have their Action against him at their Election. 4 Co. 82. Corbet's Calk, Cro. Eliz. 800. 1 Salk. 153. S.P.

(H) Of Devises by Implication.

1. If A. devises Lands to his Heir, after the Death of his Wife; this is a good Devise to the Wife for Life by (a) Implication; for by the express Words of the Will, the Heir is not to have it during her Life; and if the Wife has it not, none else can, for the Executors cannot intermeddle. 1 Rol. Abr. 843. 1 Vern. 22. S. P. 2 Vern. 572. S. P. 2 Vern. 223. S. P.

(a) The Law in conveying of Estates did not regularly suffer any to pass by Implication, because it is a Manner of transferring no Way agreeable to the Plainness and Solemnity of the Law: As if A. surrendered to the Use of D. and B. and for Want of Issue to B. the Remainder over to C. This in a Conveyance at Law had been but an Estate for Life to B. and no Estate nul by Implication; but as there has been greater Favour and Latitude allowed in the Disposition of Estates by Will; and in the Constitution of them, the Judges, to support the Intent of the Devisor, where it was very apparent, have admitted Estates by Implication, tho' to the Differion of the Heir at Law: But where such Estates arise, it must be by a necessary, and not a possible Implication or Intention in the Devisor; for the Heir's Title being plain and obvious, no Words, by Contraction, shall impeach it, which will bear a contrary Signification. Vaugh. 265.

2. If a Man devises to a Stranger, after the Death of his Wife, this gives the Wife no Estate for Life, by Implication; for it is but a Demonstration when the Estate of the Stranger shall commence. Bro. Dec. 52. Cro. Jac. 75. 1 Vern. 22. 2 Vern. 572. 2 Vern. 223.

3. If one having a Wife and two Daughters, Heirs at Law, devises Lands to one of the Daughters, after the Wife's Death, this gives the Wife an Estate for Life, tho' the Daughter was but one of the Coheirs. 2 Vern. 723.

4. If a Man possessed of a Term for Years, devises it to his Son, after the Death of his Wife, and the Wife is made Executrix, she shall have the whole Term as Executrix, for there cannot be an Estate for Life of a Term by Implication, as there may be of an Inheritance. Moor 635.

5. A. seized of a Manor, Part in Demesnes, and Part in Services, devised all the Demesnes to his Wife expressly for Life, and all the Services for fifteen Years, and then devised the whole Manor to a Stranger after her Death; it was resolved, that the last Devise should not take Effect till after her Death, and yet she should not have the Services for her Life by Implication, but that the Heir should enjoy the Services, after the fifteen Years, tho' she were still alive, for there appears no necessary Implication, that she should have the Whole for her Life, with an Exclusion of the Heir; and a possible Implication is not sufficient to exclude him; for nothing, but the apparent Intent of the Devisor, can do that; but if the Devisor had said, that after the Death of his Wife, and the Stranger, the Heir should have the Manor, the Wife by a necessary Implication shall have the whole Manor for her Life; for the Devisor's Intent is plain, that the Heir is not to have the Manor, while the Stranger and the Wife lives, and the Stranger cannot take any Thing whilst she lives. Moor, pl. 24. Vaugh. 365.

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6. One having Issue a Son, who was his Heir apparent, and two Daughters, devises in these Words, if it happen my Son B, and my two Daughters to die, without Issue of their Bodies lawfully begotten, then all my Lands shall be and remain to my Nephew D, and his Heirs for ever, and dies; and it was held, if, That no express Estate was by this Will given to his Children. *Therefore, Nor any Estate by Implication, because then it must be either a joint Estate for Life, with several Inheritances in Tail, or several Estates-tail in Succession one after another; the left it cannot be, because uncertain which shall take first, which next; and the first it shall not be, because the Heir at Law shall not be disinherit without a necessary Implication, which in this Case there is not, for it is only a Designation and Appointment of the Time when the Land shall come to the Nephew; as if he had devised thus, I leave my Land to defend, or, I give my Land to my Son and his Heirs, till he and my two Daughters die without Issue, or so long as any Heirs of the Body of him and my two Daughters shall be living; and then, or for Want of such Heirs, I devise the same to my Nephew; this is good as a future and executory Devise; and in the mean Time the Land shall descend to the Heir at Law, he having made no Disposition thereof. Between Gardiner and Shelton, Vangb. 159.

7. A devises to B, and his Heirs Males, and if he dies without Heirs of his Body, then to remain to C in Fee; this is but an Estate in Tail Male to B, for the Law supplies the Words, of his Body, and since the Devisor only gave it by express Words to him and his Heirs Male, it would be against his plain Words, to let in Issue Female by Implication on the other Words, viz. If he dies without Heir of his Body. Dyer 171.

8. So if a Man devises to A, and the Heirs of his Body; and if he die without Heirs, these last Words will not give the Devise an Estate in Fee by Implication. 2 Vern. 45. Where an Estate for Life may be enlarged by Implication, viz. Letter (D).

(1) Of Devise of Lands for Payment of Debts.

1. A Man seizes of Copyhold Lands, surnames them to the Use of his Will, and then by his Will says, My Debts and Legacyes being first deducted, I devise all my Estate, both Real and Personal, to J. S. and it was held by my Lord Chancellor, that this should amount to a Devise to fall for the (a) Payment of Debts. Pashb. 1682. between Newman and Johnson, 1 Vern. 45.

(a) Creditors are so far favoured in Equity, that whenever it appears to be the Testator's Intent, that his Lands should be liable to his Debts, Equity will make them subject, tho' there are not express Words of Charge; but mea, that there must be something more than a bare Declaration, that his Debts should be paid, otherwise it shall be intended out of the Personal Estate, and the Real will not be liable, as appears by the Cases on this Head.

2. A devises all his Lands to B, and the Heirs of his Body; and in another Part of his Will, reciting, that he owed B. Money upon Account, he therefore devised to him all his Personal Estate, and made him Executor, willing him to pay his Debts; and upon the Reading of the Will, though the Clause as to the Payment of Debts, seemed to relate to the Personal Estate only; and though the Lands were devised to B. in Tail, with a Remainder over to another;
another; and that it was objected, that a Tenant in Tail could not be a Trustee; yet the Court decreed both Real and Personal Estate to be sold for Payment of the Telleator's Debts. *Mich. 1686.* between *Coulady* and *Pollham,* 1 *Vern.* 411. 2 *Vern.* 229. *S.C.* cited, and the Decree said to be affirmed in the House of Lords.

3. But where a Devise was in the following Manner: *I will all my Debts shall be paid before any of my Legacies or Gifts herein after-mentioned,* and devises several pecuniary Legacies; and after, in the same Will, devises Lands to *J. S.* on Condition to pay a certain Rent to *J. N.* and other Lands to *J. S.* on Condition to pay 5 l. per Ann. to *J. D.* and the Question was, whether these Lands were by the Will subjected to the Payment of the Telleator's Debts, or only to the Payment of the particular Rents thereout devised; and the Court held, that the Lands were not subjected to the Payment of the Telleator's Debts, for the general Clause in the Beginning of the Will, shall be intended only of the Personal Estate, and the pecuniary Legacies thereout devises. *Paich.* 1687. between *Eyles* and *Cary,* 1 *Vern.* 457.

4. If *J. S.* devises his Lands to his Brother, who is his Heir at Law in Fee, and likewise devises several Legacies, and makes his Brother Executor, desiring him to see his Will performed, according to the Trust and Confidence he had repose in him; this makes the Real Estate liable; for the Telleator needed not have devised the Estate to his Brother, being Heir at Law, unless he intended that he should take them chargeable with the Debts and Legacies. Decreed *Paich.* 1691. between *Alock* and *Sparhawk,* 2 *Vern.* 218. and affirmed in the House of Lords.

5. A. devised in the following Words: *I do by this my Will dispose of such worldly Estate as it hath pleased God to bestow upon me; first, I will that all my Debts be paid and discharged, and out of the Remainder of my Estate, I give and bequeath unto my Wife 300 l. My Mind and Will is, that my Wife have one Moiety of what is left, after my Debts paid.* Item, *I give to my dear Brother R. B. a Close lying in the Parish of —— and for the remaining Part of my Estate, as well Real as Personal, I give and bequeath unto my Brother J. B. aboue I make Executor; and it was held clearly, that these Words subjected his Real Estate to the Payment of his Debts. 2 *Vern.* 690.

6. So where *A.* being seised of a Real Estate, and also possessed of some Personal Estate, made his Will in Writing, and thereby devised in these Words: *Imprimis, I will and Devise, that all my Debts, Legacies and funeral Charges shall be paid and satisfied in the first Place.* Item, *I give and devise,* and then proceeds to dispose of his Real and Personal Estate; the Personal Estate not being sufficient; the Question was, whether that Clause in his Will should amount to a Charge on his Real Estate for the Payment of his Debts, Legacies and Funerals; and my Lord Chancellor *Cooper* was clear of Opinion, that it should; for as to his Debts it was but natural Justice they should be paid, and his Personal Estate would have been liable to the Payment thereof, whether he had given any Directions in his Will about them, or not; when therefore he Wills and Devises, that his Debts, Legacies, and Funerals, shall be paid and satisfied in the first Place, these Words must be intended to give a Preference for those Purposes to any other whatsoever; and since he does
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does not devise his real or personal Estate to any Person in particular for these Purposes, the Persons who come within that Description must be supposed to be within his View; and it must be taken as a Devise for their Benefit, preferable to any other Disposition whatsoever, either of his real or personal Estate, and consequently both of them are thereby made liable thereto: Decreed Hill. 1715. between Trot and Vernon. 2 Vern. 708. S. C. where it is said, that some Strifes was laid on the Word Devise.

7. If Lands are devised to Trustees, for the Payment of Debts and Legacies out of the Rents and Profits, the Trustees may sell the Land if self. 1 Vern. 104. 2 Chan. Ca. 205. S. P. decreed.

8. But if the Devise be to pay Debts and Legacies out of the annual Rents and Profits, by these Words the Lands shall not be sold.

1 Vern. 104.

9. If there be a Devise of a Sum certain, to be raised out of the Profits of Lands, and the Profits will not amount to raise the Sum in a Conveniend Time; per Lord Chancellor, it is the Law of this Court to decree a Sale. 1 Vern. 256. 2 Vern. 357.

10. A. devises, that his Executors shall receive the Rents, Issues and Profits of his personal Estate, in the first Place, to pay 60l. per Ann. to one for Life, and after that Person's Death, out of the Remainder of his Estate, his Debts being paid, to raise Portions for several Children, payable at Twenty-one, and Maintenance in the mean Time, and devises all his Lands in several Parcels to several Persons at future Times; and the Master of the Rolls held, that the Lands were liable to be sold, and that the Sales should be out of all the Devise's Lands, unless the personal Estate were sufficient, or the Rents and Profits in a Reasonable Time, and ordered an Account to be taken thereon in the first Place. Trin. 1687. between Berry and Askam. 2 Vern. 16.

(K) Of Devises of Things Personal; as Goods, Chattles, &c. by what Description, and to whom good.

1. If a Man who has Debts due to him by Bond, and who is likewise posses'd of a Term for Years, devises one Moiety of his personal Estate to his Wife, and afterwards several Legacies to other Persons, and the Residue to J. S. the Wife shall have one compleat Moiety, if the other is sufficient to pay the Debts, and she shall have a Moiety of the Lease; tho' it was objected, that a Lease was not usually reckoned personal Estate, between Lee and Hale.

1 Chan. Ca. 16.

2. If a Man posses'd of a Lease for Years, bequeaths several Legacies of Plate and other Goods to several Persons, and after devises all the Residue of his Goods to his Wife, his Debts and Legacies being paid, and makes her sole Executrix; by this Will the Lease passes to her as Legatee; for though by a Grant of omnia Bona, a Lease passes not, yet by the Civil Law Bona, including all Chattles, and this being a Legacy, the Judges of the Common Law in this Case, ought to be guided by that Law. Cro. Eliz. 387.

3. If a Man devises 1200l. to J. S. and by general Words devises all his Goods, Chattles, and Household Stuff, in and about his House.
House to the said J. S. Money in the House will not pass, he having a particular Legacy devis'd to him. 2 Chan. Rep. 190.

4. Plate and Jewels will not pass by a Devise of Utensils. Dyer 59.

5. But by a Devise of Household Goods, Plate will pass. 2 Vern. 638.

6. If a Nobleman possessed of a Collar of SS, and of a Garter of Gold, and a Buckle annexed to his Bonnet, and of many other Buttons of Gold and precious Stones annexed to his Robes; and of many other Chains, Bracelets, and Rings of Gold, and precious Stones, devises all his Jewels to his Wife, and dies; the Garter, and Collar of SS pass not, because they are not properly Jewels, but Ensigns of Honour and State; and the Buckle in his Bonnet, and the Buttons pass not, because annexed to his Robes, but all the other Chains, Rings, Bracelets and Jewels pass; Earl of Northumberland's Case, upon a Reference to Wray and Anderson C. Justices.

Owen 124.

7. J. S. by Will devises thus; Item, my Will and Pleasure is, that the Furniture and Pictures in my Houses at A. B. and C. shall always remain there, and not in the Power of my Executors to dispose of, but shall go with my said Housé, to such of my Grandchildren, as shall be in the Possession thereof; and then appoints that the Plate, gilt with Gold, belonging to his Chapel at — together with the Ornaments thereof, should remain to the perpetual Use of the said Chapel, and makes D. Executor; to whom he gives all his personal Estate, except what is before bequeathed, of what Nature or Kind soever, for his own proper Use; and the Question was, if the Plate the Testator constantly used, and removed with him, when he went from one House to another, should go to the Executor by the last Clause, or belong to the Houses, under the Word Furniture; and my Lord Keeper was of Opinion, that Furniture in a large House takes in Plate, but not here, because he distinguished the Chapel Plate from the Furniture; and the Plate of ordinary Use, that was carried with him, could no more be said the Furniture of one House, than of the others, and he meant only the particular Furniture of each House; so the Plate went to his Executors, and liable to the Plaintiffs, who were Creditors, Mich. 1705, between Franklin and the Earl of Burlington; vid. 2 Vern. 512. S. C. where it is said to have been adjudged, that the Plate pulled by the Devise of his Furniture and Pictures. Sed Q.

8. If a Man devises his House, and all his Goods and Furniture therein to his Wife for Life, and after her Decease, to his Son R. and his Heirs, except his Pictures, which he gives to his Sons A. and B. and he has Pictures in Boxes, as well as those hung up in the House, and likewise Pictures at his Death, which he had not at the Time of the making the Will; and it is proved in the Cause, that he had Skill in Pictures, and frequently bought Pictures, and sold them again; the Exception of the Pictures shall extend, as well to the Pictures hung up as Furniture, as to those in Boxes, and as well to those in the House, at the Time of the Will, as to those bought in after the Will made; so that they shall pass to his Sons A. and B. per Lord Keeper, Hill. 1705. between Gayre and Gayre. 2 Vern. 538.

9. If a Man devises to his Wife, all his personal Estate at a Place called H. all his personal Estate, as Coaches, Horses, &c. there at
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the Time of his Death shall pass, tho' not there at the making of the Will, the personal Estate being fluctuating and varying until the Time of the Testator's Death. *Mich. 1714.* between Sayer and Sayer. 2 *Vern. 688.* *per Curiam,* *vid. Swinb. 438.*

10. But if *J. S.* devises all his Household Goods and Furniture, which should be in his House at *R.* at his Death to his Wife, and afterwards going beyond Sea, his Steward gets the head Landlord of the Houfe, to accept of a Surrender of the Lease of the House, and removes the Goods to another House, and writes an Account of this to *J. S.* who approves of it; the Goods will not pass by the Will to the Wife; otherwife, if they had been removed by Fraud to defeat the Legacy, or by any tortious Act, without the Privity of the Testator: Decreed *Hill. 1716.* between the *Earl* and *Countess of Shaftsbury.* 2 *Vern. 747.*

11. So if a *Man* devises to his Son the Furniture of his House at *D.* and two Years afterwards, orders Goods which he had bought in *London,* to be carried to his House at *D.* and agrees with Carriers for that Purpofe, but dies before the Goods are removed from *London;* thefe Goods shall not pass by the Will, as Part of the Furniture of the House at *D.* Decreed *Hill. 1716.* between the Duke of *Beauford,* and Lord *Dundonald.* 2 *Vern. 739.*

12. A *Man* devises all the Arrears now due, and unjustly detain’d from me by the *Dean* and *Chapter of York,* to be employed in a certain Charity; and the Question was, whether the Arrears incurred after the making of the Will, and a small Time before the Death of the Testator, and which were never demanded by the Testator, should pass; and *per Lord Keeper* not; for tho’ a general Devise of all a *Man’s* Goods will carry all he had at his Death, tho’ purchased after the making his Will; yet here it is confined to the Arrears due at the making the Will: Decreed *Trin. 1701.* between the *Attorney General* and *Bury.*

13. If a *Man* devises his Silver Tea-kettle and Lamp, with the Appurtenances, nothing shall pass but the Kettle and Lamp, and the Box wherein the Lamp was placed, and not the Silver Tea-pot, Milk-pot, Tongs, Strainer or Canisters: Resolved at the Rolls, *Mich. 1728.* in a Case between *Hunt* and *Berky.*

14. A *Man* devised to his Niece all his Goods, Chattels, Household-Stuff, Furniture, and other Things which then were, or should be in his House at the Time of his Death, and some Time after died, leaving about 265 l. in ready Money in the House; and it was decreed, that this ready Money did not pass; for by the Words other Things shall be intended Things of like Nature and Species with those before mentioned. *Mich. 1739.* between *Travford* and *Berrige.*

15. If a *Man* devises 40 l. to be paid *J. S.* by him to be disposed of, in such manner as the Testator should by a private Note acquaint him with, and dies; without such Appointment this is a good Bequest to the Party: Decreed *Parch. 20 Car. 2.* between *Martin* and *Clerk. 2 Chan. Ca. 198.*

16. If one devises his Lands to *B.* in Fee, paying 400 l. whereof 200 l. to be at the Devise of his Wife, by her last Will, to whom she shall think fit; and the Wife dies intestate, her Administrator shall have this 200 l. the Property thereof being absolutely vested in *Ff*
the Wife: Decreed Mich. 1690. between Robinson and Drumgal. 2 Vern. 181.

17. If one devises his Lands for the Payment of his Debts and Legacies, and devises 400 l. a-piece to two of his Sisters, and to his Third as much as his Executor should think fit; the Third shall have 400 l. also, and be made equal to her other Sisters, if the Estate will hold out: Decreed Trin. 1690. between Marcham and Brown. 2 Vern. 153.

18. If Money is devised to younger Children, where there are divers Daughters and a Son, who by Birth is a younger Child, but is Heir at Law to a fair Inheritance, he shall not be considered as a younger Child, so as to take by the Devise. 12 Car. 2. between Breton and Breton. 3 Chan. Rep. 1. 1 Chan. Rep. 224. S. P. decreed.

19. If a Man devises Lands to be sold for the Increase of Children's Portions, a Child born since the Will shall have a Share. 2 Chan. Rep. 211.

20. If one devised 20 l. a-piece to all the Children of his Sister B, and the Question was, whether a Child born after the making of the Will, and before the Death of the Tsettator, should take by Virtue of the Devise; and the Court decreed it to extend to the after-born Child; the Word Children comprehending all. Trin. 1689. between Garland and Mayot. 2 Vern. 105. but if it had been to the Children by Name, Q. & Vid. Dyer 177. 1 Inst. 112 b.

21. A Man by Will devised all his Goods in such a House to G: for Life, and after his Decease to the Heir of J. S. and the Point was, whether he that was Heir of J. S. should take these Goods as Devisees, and the said Goods go to his Executors; altho' such Heir die in the Life-time of G. or whether he that was Heir to J. S. at the Time of G.'s Death should have them; and tho' it was urged, that these Goods were only the Furniture of the Capital House, yet my Lord Chancellor was of Opinion, that they absolutely vested in him that was Heir of J. S. at the Time of his Death; and decreed accordingly, between Danceys and the Earl of Clarendon. 1 Vern. 35.

22. A Man devised his Estate to his Wife for Life, and after her Decease to his Son T. his Heirs and Assigns for ever; provided if T. died without Issue of his Body, then he bequeathed unto his Daughters M. and E. 200 l. to be equally divided between them, and to be paid out of his Estate, within six Months after the Decease of the Survivor of the Wife and Son; the Wife died, and T. died, leaving Issue, who died within three Months after the Father; and the Court held, that this personal Legacy could not be intended to arise upon any remoter Contingency, than that of T.'s dying without Issue living at his Death; and therefore dismissed the Bill, which sought the Benefit of it. Trin. 1712. between Nichols and Hooper. 2 Vern. 686.

23. If A. devises 1500 l. in Trufts for the Children of B. and B. has only one Child, and several Grandchildren, the Child only shall take, and the Grandchildren shall not come in for Shares; but if B. had not a Child living, the Grandchildren might have taken by the Name of Children. Vid. 2 Vern. 106.

24. If a Man devises the Surplus of his Estate to his Grandchildren, living at his Death, Grandchildren born after his Decease
ceafe shall not take; for if he had so intended it, he would not have refrained it to Children living at his Death: Decreed Hill. 1715. between Mulgrave and Party. 2 Vern. 710.

25. If one devises the Surplus of his personal Estate to the Children of A. and B. and neither of them has a Child at the making of the Will, or the Death of the Testator, the Devise is Executory, and shall extend to any Children that A. and B. shall afterwards have, and the Children of each shall take per Capita, and not per Stirpes; they claiming in their own Right, and not as representing their Parents; per Curiam. Mich. 1715. between Weld and Bradbury. 2 Vern. 405.

26. The Duke of Bolton by his Will devised in these Words, eis. Item, I give and bequeath unto such of my Servants, as shall be living with me at the Time of my Death, one Year’s Wages, Per Lord Keeper, Stewards of Courts, and such who are obliged to spend their whole Time with their Master, but may also serve any other Master, are not Servants within the Intention of the Will; but I will not narrow it to such Servants only that lived in the Testator’s House, or had Diet from him. 2 Vern. 546, 547.

(L) When a Devise shall be in Satisfaction of a Thing due.

1. S. upon his Wife’s joining with him in the Sale of Part of her Jointure, gave a Note to pay her 7 l. 10 s. per Ann. for her Life; and upon a second Sale of a farther Part of her Jointure, gave her a Bond to pay her 6 l. 10 s. per Ann. for her Life; and afterwards by Will, without taking Notice either of Bond or Note, devised unto her 14 l. per Ann. for Life; and it was held, that the Devise should be in Lieu and Satisfaction of the Bond and Note. Paroch. 1705. between Brown and Dawson. 2 Vern. 498. per Cur.

2. So if A. by Marriage Articles agrees to leave his Wife 800 l. and her Jewels, &c. but it is declared, that notwithstanding the Articles, she should not be debarred of any Thing he should give her by Will; and A. by Will makes a Disposition of his whole Estate among his Children, &c. and gives his Wife 1000 l. the Wife must waive the Articles, or the Will, for she cannot have both; for his making a Disposition of the whole Estate shews, that he intended, that every Part should be performed. Paroch. 1706: between Lady Herne and Herne. 2 Vern. 355.

3. But if A. gives a Bond to B. her Servant, to pay her 20 l. per Ann. quarterly for her Life, free from Taxes; and by Will, without taking Notice of the Bond, gives B. 20 l. per Ann. for her Life, payable Half yearly, but not paid free of Taxes; B. shall have both the Annuities, for that by the Will not being so advantageous as the first, cannot be presumed a Satisfaction: Decreed Hill. 1704. between Atkinson and Webb. 2 Vern. 478.

4. So where A. on his Marriage covenanted to purchase, and settle a Jointure of 20 l. per Ann. on his intended Wife; and if he died before such Purchase or Settlement made, she should have 300 l. out of his Estate for her own Life; the Marriage was had; and the Husband died before any such Settlement was made; but by his Will he devised to his Wife 330 l. for her Life; with Power to dif-

5. pose
Devises.

pole of 30 l. Part thereof at her Death; and it was held 1st, That she had a Right to 300 l. and Interest, and that the Executor could not now be at Liberty to settle 20 l. per Ann. as the Tefator might have done. 2dly, That she should have the 330 l. as an additional Bounty, and Provision for the Wife: Decreed Trin. 2705.

5. By a Marriage Settlement, the intended Husband was made Tenant in Tail, and a Provision was made of 3000 l. a-piece for the Daughters; the Husband afterwards docked the Intail, and devised to the Daughters 3000 l. a-piece; and it being proved, that the Tefator had declared after making the Settlement, that he would add to his Daughters Portions; and it being urged, that the cutting of the Intail was for this Purpose; the Court decreed the Daughters both Sums. 13 Car. 2. between Pile and Pile. 1 Chan. Rep. 199.

6. By a Marriage Settlement, in Case of Failure of Issue Male, a Remainder of the Estate was limited to Daughters, until they should raise 3000 l. for Portions; there was Issue of the Marriage, a Son and two Daughters; the Father devised 700 l. a-piece to the Daughters, and died; the Son afterwards made his Will, and devised to the Daughters to the Amount of 7000 l. without mentioning of its being in Lieu or Satisfaction of any Thing due to them, and gave his Land to his Heirs Males, and died without Issue; and it was held clearly, that the Father's Legacy could be no Satisfaction, not being adequate in Value; besides the Father had then a Son living, and it was altogether contingent and uncertain, whether 3000 l. would ever arise, and become payable or not; and therefore it was but reasonable, that the Father should make some certain Provision for his Daughters; but as to the Son's Legacy of 7000 l. it was, by two Lords Commissioners against Rawlinson, decreed a Satisfaction; but upon an Appeal to the Lords, the Decree was reversed; for the Daughters being Heirs at Law, and disinherited, there was no Ground for the Court to make a strained Construction to their Prejudice, in Favour of a voluntary Devisee. Pasch. 1692. between Duffield and Smith. 2 Vern. 258.

7. A. on the Marriage of his Daughter, gave a Bond to the Husband for the Daughter's Portion, and afterwards by Will, devised Land of much greater Value to the Husband and Wife, and their Heirs, and died, and there being a Defect of Assets to pay Debts, the Question was, whether the Devise of those Lands should be a Satisfaction; and the Court held that Cases of this Nature depend upon Circumstances; and that where a Legacy has been decreed to go in Satisfaction of a Debt, it was grounded upon some Evidence, or at least a strong Presumption, that the Tefator did so intend it; but there is no room for that in this Case; it plainly appearing, the Tefator intended to give all he could to his Son-in-Law and Daughter, and defraud his Creditors; and therefore the Devise of the Land must not be in Satisfaction of the Bond-Debt. Trin. 1693.

8. H. owed his Niece A. 100 l. by Bond, and having two other Nieces B. and C. makes his Will, and bequeaths 300 l. to his Niece A. and to his other two Nieces 200 l. a-piece; after that he borrowed another 100 l. of his Niece A. and being indebted to her 200 l. died; and to prove, that the 300 l. should go in Satisfaction of the Debt, it was insisted upon as a Rule in Equity, that where the Tefator being
being indebted, gives his Debtor a Legacy greater than his Debt, it shall go in Satisfaction; for a Man shall be intended to be just before he is kind; otherwife where a Legacy is lef, for that is neither to be just nor kind, and shall not be taken to go in Satisfaction of any Part. But per Couper Lord Chancellor, it might be as good Equity to confine him to be both just and kind, if he intended to be both; that if any Part of this 300 l. be applied to the Payment of the Debt, as for so much it is not a Gift, whereas a Legacy must be taken to be a Gift or Gratuity; and there being Assets, and some Proof of the Testator's greater Kindness to A. than his other Nieces, his Lordship decreed her the whole 300 l. over and above her Debt. Mich. 6 Ann. between Cutbitter and Peacock, 1 Salk. 155. Vid. 2 Salk. 508. where my Lord Harcourt reverfed a Decree of the Master of the Rolls, upon the Circumstances of the Cause, and Intention of the Party; that the Legacy the greater, should not be a Satisfaction for what is due to the Debtor.

9. A. by Will gave six several Annuities for Lives, three of 10 l. each, and three of 5 l. each, to be paid out of his personal Estate, and gave all the rest of his real and personal Estate to E. his Wife, whom he made sole Executrix; the Annuities were his Sisters, and their Children; and about two Years after, the Wife makes her Will, and gives two Annuities of 5 l. each to two of the 5 l. a Year Annuities in her Husband's Will, but gives them to them and their Heirs, in case they happen to over-live such a one, who by her Husband's Will had 10 l. per Ann. for Life; she the likewise gives another Annuity of 10 l. per Ann. to one and her Heirs, and another of 5 l. per Ann. to another and her Heirs, who had each of them the like Annuities for Life by the Husband's Will; but in the Disposition of these Annuities, she takes no manner of Notice of her Husband's Will, or that they had any Annuities thereby given them; and the only Question was, whether the four Annuities given to the Persons in Fee by the Wife's Will, should be taken to be only in Satisfaction of the like Annuities for Life, given to the same Persons by the Husband's Will, and it was argued that they should; because the Husband's Annuities being payable only out of his Personal Estate, and the Wife being his Executrix, she was in the Nature of a Debtor for them; and where-ever a Person by his Will gives a Legacy, as great or greater than the Debt he owes to the Legatee, it has been always taken to be a Satisfaction of the Debt; but per Lord Chancellor, this Doctrine has already been carried too far, and he would never carry it farther; for though it is true, a Man ought to be just, before he is bountiful, and therefore shall be presumed to pay a Debt, rather than give a Legacy to the same Person, when it is the same Sum, or more than he owes him; yet why may he not be both just and bountiful, when there are Assets to answer both; as in the present Cause; and there can be no Pretence to say, that the two first Annuities of 5 l. each can be a Satisfaction of the like Annuities given by the Husband, because they are given upon the Contingency of over-living such a one, which has not yet happened, and possibly never may; and then shall the Annuities for Life which are certain, be extinguished, by giving the same Persons Annuities in Fee on a Contingency which may never happen; and if that be so, as to these Annuities, there is no Reason to imagine the Wife had a different Intention as to the others, or that she intended two of them should go in Satisfaction.
of the like Annuities given by her Husband, and the other Two not; and the Cases where a Legacy has been held to be a Satisfaction of a Debt, are, where the Debt was owing by the same who gave the Legacy; but if such Legacy be given upon a Contingency, or to take Place at a future Day, it is no Satisfaction of the Debt; and therefore in the Principal Case it was decreed, that the Annuities given by the Wife were distinct additional Annuities, and not an Enlargement only of the Husband’s Annuities, from an Interests for Life to an Interest in Fee, as it was urged to be, and therefore should go in Satisfaction of those Annuities; which the Court held they should not; but that the Annuitants should take both. Trim. 1729. between Crompton and Sale, at my Lord Chancellor’s.

(M) Of void Devises.

1st, **By Devising what the Law already gives**, or what the Policy of the Law will not admit.

2dly, **By Incertainty in the Description of the Thing devised**.

3dly, **By Incertainty in the Description of the Person to take**.

4thly, **By the Devisee of Lands dying in the Life-time of the Devisor**.

10. **By Devising what the Law already gives, or what the Policy of the Law will not admit.**

1. **If a Devise be made to J. S. and his Heirs, who is Heir at Law to the Devisor; this is a void Devise, and the Heir shall take by Defecent, as his better Title, for the Defecent strengthens his Title, by Taking away the Entry of such as may possibly have Right to the Estate; whereas if he claims only by Devise, he is in by Purchase.** 1 Rol. Abr. 626. Hob. 30. Plowd. 545. Godb. 461.

2. So if a Man devises Lands to his Wife for Life, Remainder to J. S. who is Heir at Law in Fee, this is a void Devise to J. S. because, after the Disposition of the particular Estate, the Reversion would have gone without any farther Disposition in the same Manner it is now limited by the Will. 2 Leon. 101. 1 Rol. Abr. 626. Hob. 30.

3. A seised of Lands on the Part of his Mother, devises them to his Executors for sixteen Years, for Payment of his Debts, and after devises them to his Heir at Law ex parte Materna; this is a void Devise to the Heir at Law; for tho’ it was urged to support the Devise, that if it obtained, the Heir of the Part of the Father might in the End inherit, which he could never do, if the Devise be rejected; yet the Court adjudged the Devise void, because this is no Alteration made in the Tenure of the Estate, nor is the Quality thereof any Way altered; but whether the Devisee taketh by the Will, or by Defecent, it is a Fee-simple; and it were but alium agere to make him take by Will. Between Hedger and Rome, 3 Lea. 177.

4. But where another Estate is created by the Will, than would descend to the Heir at Law, or where the Quality of the Estate is altered
Devises.


5. As where a Man had Issue a Son and a Daughter, and devised that his Land should descend to his Son, and if he died without Issue of his Body, then the Land to go over, &c. the Son by this Devise took an Estate-tail, though Heir at Law to the Deviser, because here is an Estate-tail created by the Will, and the Heir must claim under the Will, or the Remainder will be void. *Hob.* 30. 1 Rol. Acr. 610.

6. So where a Man has Issue only three Daughters, and devises his Land to them and their Heirs; this is a Devise to the Heir at Law; and yet good, because the Devise makes them Jointtenants, in which Survivorship takes Place; whereas had they taken by Descent, they had been Copartners, and the Will altering the Generality of the Estate ought to prevail. *3 Lee.* 128.

7. If a Man devises Land in Fee to A. and if he dies without Heirs, then M. shall have it, the second Devise is void, for a Fee cannot depend on a Fee; for no Man can say when the Heirs of A. will fail, and to allow the Remainder to M. good, upon such a distant Contingency, is to perpetuate the Estate in the Family of A. and yet preserve a Remainder or Interest in M. which very possibly may never vest; and as these Estates are unalienable, tho' all Mankind joined in the Sale; therefore the Reason and Policy of the Law will not suffer them to have a longer Duration than a Life or Lives in Feoff, and wearing out together, or the Term of twenty or thirty Years: But for this vid. Letter (F).

8. A. devised his Manors, Messuages, &c. to the *Drapers Company,* and their Successors, upon Trust, to convey to B. for Life, and to his first Son, and all other his Sons for Life, and to their Issue Male for Life, and for Want of such Issue, to J. for Life, and to his Issue Male for Life, &c. and so to a great Number of them for Life; and so to convey restes restes; and the Court held this Attempt to make a perpetual Succession of Estates for Life to be vain and impracticable; however, that there ought to be a strict Settlement made, and the Intent of the Tcopiator followed, as far as the Rules of Law will admit of; and therefore directed a Settlement to be made so, that such who were in Being should be only Tenants for Life; but where the Limitation was to a Son not in Being, there he must be made Tenant in Tail Male. *Hill.* 1716. between *Hubberston* and *Hamberston,* 2 Vern. 737.

9. A. devised all the Rest of his Personal Estate by Leaves, in Trust, or otherwise, to his three Nephews, A. B. and C. and makes them Executors, and Wills, that they shall give Bond to each other; that in Case either die without Issue of his Body, to leave at their Death all the said Chattels and Personal Estate to the Survivors and Survivor of them; and the Bill was to have the said Bonds given; but was dismis'd, being an Attempt to intail a Personality. *Trin.* 1703. between *Williams* and *Williams.*

2dly, By Uncertainty in the Description of the Thing devised.

1. If a Man being seised of Lands within a Borough where Lands by Custom are devisable by Parol Devises in these Words, *I give...*
all to my Mother, all to my Mother; the Lands pas not, for the Words are too (a) uncertain, and not sufficient to disinherit an Heir.

(a) Devises are void and rejected where the Words of the Will are so general and uncertain, that the Testator’s Meaning cannot be collected from them; according to that Rule; as the Heir at Law has a plain and uncontroversial Title, unless the Ancester disinherit him, it were severe and unreasonable to set him aside, unless such Intent of the Testator’s is evident from the Will, for that were to far, up and prefer a dark, or at least a doubtful Title, to a clear and certain one; but as it is likewise a Rule in the Construation of Wills, not to reject any Words in the Will which can have a Signification; these two have been the Occasion of several Doubts and Resolutions concerning the Intention of the Testator, about the Disposing of his Effects, whether he meant his Real or Personal, or what Part of either of which he intended to pass by the Words of the Will.

2. If one having Lands in Feo, and other Lands for Years, devises all his Lands and Tenements, the Feo-simle Lands only pas; but if a Man had Leaves for Years only, and no Feo-simle Lands, by the Devise of all his Lands and Tenements, the Leaves for Years pas; for otherwise the Will should be meerly void. 

Croc. Car. 293, per Curiam.

3. So if a Man being seised of a Messuage in A, and of a Messuage and several Lands in B, devises to J. S. his Houfe in A, with all other his Lands, Meadows, Pastures with all and singular their Appurtenances whatsoever in B. yet the Houfe in B. shall not pass; for tho’ by a Feoffment or Leave of Lands in B. Houfes will pass, because to be taken most strongly against the Feoffor, &c. and the Land passing, the Houfe thereupon must also pass; yet Wills are to be taken according to the Intention of the Devisor; and when he devises his Houfe in A, and Lands in B. it cannot be presumed that he would have more pass than by the Words is expressed. 2 And. 123.

4. If a Man is seised of Lands in a Vill, and in A. and B. two Hamlets within the same Vill, and devises all his Lands in the Vill, and in A. and dies, no Part of the Land in B. shall pass; for his naming one Hamlet only, fully shews his Intent, that the Lands in the other should not pass. Dyer 261.

5. But where a Man having two several Moieties of Lands by Purchase of the same Person, one lying in Kent, and the other in Essex, and he devised all his Moieties in Kent; and it was held that both passed, for the Words being, all his Moieties, they cannot be satisfied with one Moiety only, 1 Bull. 117. 2 Bull. 176. Hob. 173. wid. Nov. 11. 2. Cro. Eliz. 658.

6. If one seised of Lands called Hayes-Land, lying in two Vills, viz. A. and B. devises all his Land in A. called Hayes-Land, to his youngest Son, and his Heirs, and in another Part wills, that if his said Son dies without Issue, that his Wife shall have Hayes-Land, and dies; and the Son dies without Issue; the Wife shall only have that Part of Hayes-Land which lies in A. because no more was devised to the Son. Cro. Eliz. 674. But per Popham, if the Devise had been to the eldest Son, and if he dies without Issue, &c. perhaps the Should have had all, because the eldest Son had all, Part by Devise, and Part by Defeunt.

7. If a Man seised in Feo of two Houfes in D. adjoining the one to the other, and the one is in the Possession of A. and the other in the Possession of B. which is also the Corner-house in the Street of the Town, and he devises his Corner-house in the Possession of A. and B. by these Words, only the House, which is in the Possession of B. shall pass, which is the Corner-house, and not the other House which
is in the Possession of A. though it be next adjoining thereto, for his Intent appears to be so. 1 Rol. Abr. 613, 614. Cro. Car. 447. vid. Stil. 261.

8. A. sold Lands to B. but before a Conveyance was executed, B. sold the same Lands to C. and then A. conveyed to C. and C. being thus feisd, devised the Land to his younger Son in these Words, I bequeath to R. my Son, all my Land which I purchased of B. whereas in Strickness of Law he purchased them from A. who conveyed them to him; yet this was allowed to be a sufficient Description of the Land, and consequently a good Devise of it, because the Purchase was really made from B. the Money being paid to him. Between Throp and Thompson, 2 Leon. 120.

9. If one devises his House wherein J. S. dwells, called the White Swan in Old-street, to J. N. &c. and dies, and at the Time of his Death and making of the Will, J. S. occupied the Entry only, and Three of the upper Rooms of the House, and others occupied the Garden and other Parts of the House; yet all the House passes, for the House imports the whole House, and the Sign of the White Swan makes it still more certain. Cro. Car. 129. 1 Jon. 195. S.C.

10. If a Man is feisd of a Messuage and two Acres of Land in A. and of two Acres of Meadow in B. and hath used and occupied the two Acres of Meadow, being four Miles distant from his said House, together with his said House and Lands in A. and devises the House cum omnibus & singulis pertinentiis suis adinde spectant to J. S. the two Acres of Meadow shall not pass, for by the Words cum pertinentiis, Lands pass not, but such Things only as may be properly appertaining, otherwise if the Words had been cum terris pertinentiis, for then the Lands used therewith should have passed. Cro. Car. 57.

11. If A. devises several pecuniary Legacies, and also some Lands, and then devises all the Rest and Residue of his Money, Goods and Chattels, and other Estate whatsoever, to J. S. whom he makes Executor, he having other Lands, they shall pass by the Will. Decreed Trim. 27 Car. 2. between Tirrel and Page, 1 Cham. Ca. 262.

12. But if a Man feisd in Fee of three Tenements, and possess'd of divers Goods, and of a Leafe for Years, devises one Tenement to one of his Sons, and another Tenement to one of his Daughters, and then adds: Item, I make my two Sons Executors of all my Goods, moveable and immovable, and all my Lands, Debts, Duties and Demands; by this Clause, no Estate in the three Tenements, of which the Devisee was feisd in Fee, pass'd to the Executors by Force of the Words, and all my Lands, because that these Words might well be satisfied, by the Leafe for Years of Land, which pass'd by it. 1 Rol. Abr. 613.

13. A. devised in the following Manner: I make my Niece Executive of all my Goods, Lands and Chattels; the Tollator had a Real and Personal Estate, but no Leales or Interest for Years in any Lands whatsoever; and the Question was, whether any, or what Estate pass'd in the Lands by this Devise; and my Lord Chancellor was clear of Opinion, that the Real Estate did not pass by those Words; and that the Word Lands was not (as objected) useles, and to be rejected, for that in all Probability there might be Rents in arrear of those Lands which would pass to the Niece by her being H h h made
made Executrix. Pasch. 1717. between Piggot and Pennrice, de-
creed.

14. If A. devises certain Lands to his youngest Son in Fee, and de-
vises all his Lands in D. to his Wife for Life: Item, I give to her
for Life, the Lands which I hold of G. T. Item, I give to her all
the Lands which I purchased of J. S. Item, I give my Lands to
my Son E. and his Heirs for ever; not only the Lands purchased
of J. S. but also the Reversion of all the others do pass by these
Words: Adjudged 35 Car. 2. between Barrow and Gameam. Skin.
130.

15. If A. being seised of the Manor of A. and of other Lands in
the County of S. devises the Manor of A. for six Years, and Part of
the other Lands to J. S. in Fee, and then comes this Clause, And the
Rest of my Lands in the County of S. or elsewhere, I give to my
Brother, &c. by this Devise he shall have the Reversion of the Ma-

16. If A. seised in Fee, devises several Houses to a Charitable Use,
and devises a Meadows to J. S. for Life, and by another Clause de-
vises to his Wife, the better to enable her to pay his Legacies, all his
Meadows, Lands, Tenements and Hereditaments, not above dispo-
sed of, this will pass the Reversion of the said Meadows, though it
was found that the Wife had sufficient to pay the Legacies. Mich.
W. & M. between Willows and Lydcot. 2 Vent. 285. Adjudged
upon a Writ of Error in the Exchequer Chamber, and the Judg-
ment given in B. R. reversed. 1 Lev. 212. S. P. adjudged; vid. the
Cafe of Hiley and Hiley, 3 Mod. 228. which seems cont., but has
been denied to be Law in several of the following Ciates.

17. J. S. seised in Fee, devised Black-ace to A. for Life, and de-
vised to B. all his Lands not before devised, to be sold, and the Mo-
oney to be divided between his younger Children; the Question was,
whether the Reversion of Black-ace past by the Devise of all his
Lands not before devised; and it having been referred to the Judges
of the Common Pleas, they unanimously agreed, and certified that
the Reversion was well devised; and it was decreed accordingly.
Hill. 1703. between Rooke and Rooke, 2 Vern. 461.

18. A. by Virtue of several Settlements, being Tenant in Tail af-
ter Possibility of Issue extinct of some Lands, Remainder in Fee to
Truftees, in Truf for him and his Heirs; and as to some other
Lands, being Tenant for Life, Remainder to his first and other Sons,
Remainder to Trustees in Fee, in Truf for the right Heirs of B.
whole Heir A. was; and as to other Lands, being Tenant in Tail,
Remainder to the right Heirs of his Father, whose Heir he likewise
was; and being likewise feised of a very considerable Real Estate of
his own Purchase, and possessed of a large Personal Estate, made
his Will, and devised some Part of his Lands to his Wife for Life,
and gave several Legacies; and having no Issue, devised all other his
Lands, Tenements and Hereditaments, out of Settlement, to his Ne-
phew, provided he took on him his Surname, subject to raise 4000L.
in Cafe the Tefator left a Daughter; and it was held by my Lord
Chancellor, attested with the Maker of the Roll, Trevor Ch. Juf,
and Juft. Tracy, that all the Estates thus settled, passed by the Will,
notwithstanding the Words, out of Settlement; for the Word Heredi-
tament comprehends a Remainder or Reversion, as well as an E-
Devizes.

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19. So where A. being seised in Fee of Lands in D. upon the Marriage of his eldest Son, settled those Lands on him in Tail Male, Remainder to his own right Heirs; and being seised in Fee, in Posseccion of other Lands in M. L. and N. devised all his Moistring, Lands, Tenements and Hereditaments in M. L. N. or elsewhere, not by him formerly settled, for the Payment of his Debts; and after Debts paid, then to J. S. a second Son, and his Heirs, for ever, and died; and soon after the eldest Son died, not having barred the Remainder, without issue Male, but left several Daughters; and it was held by my Lord Chancellor, assised with Raymond Ch. Juft. Reynolds C. B. and Mr. J. Price, 1st, That the Word elsewhere was a sufficient Description of the Lands in D. the of greater Value than those in M. L. and N. and that the it was of it self a signifi- cant and expressive Term; yet it was the rather so in this Case, because there was no Lands or Out-skirts not particularly enumerated, to which it could be applied, but to those in D. zedy, That the Words, Moistring, Lands, Tenements and Hereditaments, were sufficient to pass the Revercion of the Lands in D. notwithstanding the Exception or restrictive Words, not formerly settled. Decreed Trim. 1730, between Chester and Cheshler.

20. But if A. devises Lands to B. in D. S. and T. and all his Lands elsewhere, and he hath a Mortgage of Lands that did not lie in D. S. or T. which is of more Value than the Lands in D. S. and T. the mortgaged Lands will not pass, for he could not be thought to mean to comprehend Lands of so much Value, under the Word elsewhere, which is like an &c. that comes in currente calame, 33 Car. 2. Sir Thomas Littleton's Case, 2 Vent. 351. decreed; but the Reporter says there were other Circumstances in the Case, which shew'd that it was not his Intention that the mortgaged Lands should pass. Vid. 1 Vern. 3. S. C. Where it appears that there were some small Parcels of Land not specified; and of the same Nature of those devised, to which the Court held the Word elsewhere was applicable, and not to the mortgaged Lands, which were of a different Nature and of greater Value; and that the Testator had charged the Lands devised with a Rent-charge of 8l. per Annum, which he never could intend should ifiue out of Lands which were every Day redeemable.

21. By a general Devise of all Lands, Tenements and Hereditaments, Mortgages in Fee, tho' forfeited, will not pass, nor will they pass by such a general Devise, though the Equity of Redemption is, after the Making the Will, foreclosed or released. 2 Vern. 623. per Curiam.

22. A Man having settled all his Estate of Inheritance upon his Wife for Life, for her Jointure, makes his Will, and thereby devises several pecuniary Legacies to several Persons, and then says, All the Rest and Residue of my ESTATE, Chattels Real and Personal, I give and devise to my Wife, whom I make sole Exeuctrix; and the only Question was, whether by this Devise the Revercion of the Jointure Lands passed to the Wife; and my Lord Keeper having taken Time to consider of it, delivered his Opinion, that it did not, because the precedent and subsequent Words explain his Intent, to carry only his Personal Estate; for in the first Part of his Will, having given only Legacies,
Devises.

Legacies, and no Land whatsoever, the Words, All the Rest and Residue of his Estate, are relative, and must be intended Estate of the same Nature with that he had before devised, which was only Personal; for having before given no Real Estate, there could be no Rest or Residue of that out of which he had given away none; then the Words, Chattels Real and Personal, explain the Word Estate, and shew what Sort of Estate he meant; and make the Devise, as if he had said, All the Rest of my Estate, whether Chattels Real or Personal, &c. and so confine and restrain the extended Sense of the Word Estate. Decreed Hill. 1712. between Markam and Twifden.

3dly, By Uncertainty in the Description of the Person to take.

1. If A. devises Lands to the eldest Son of J. S. by the Name of William, when in Truth his Name was Andrew, yet the Devise shall to the eldest

(a) A Devise be (a) good. Nol. Chan. Rep. 403.

Son of J. S. is good, or to his Second or Youngest; so is a Devise to the Wife of J. S. or though the be called Em for Ethyn, and to Robert Earl of, &c. though his Name was Henry, Co. Litt. 3. A Devise to the Stock, Family, or House, is good, and shall be intended of the Heir. Hob. 33.

2. If a Man has two Sons named I. and devises to his Son I. all his Lands, this is a void Devise for the Uncertainty, unless it can be proved that the Thtator meant one of them in particular, by the elder Sons being beyond Sea, probably dead, &c. for these Circumstances clear up, the Intent of the Thtator; and such Averment is admitted, because it is consistent with the Will; and the Contrauction and Judgment thereon must be genuine, because taken from the Words of the Will. 5 Co. 68 b.

3. If a Man hath Issue two Sons and two Daughters, and devises his Land to his Wife for Life, and that after her Death the same shall remain to his Issue; this is a void Devise as to the Remainder; for having several Children, it is uncertain what Issue is intended.

(b) Vid. Raym. 83. 5. C. cited, and denied to be Law, and 3 Lev. 433. am. and 6 Co. 17.

4. If a Man has Issue eight Daughters, by three several Venters, and one Son, and devises his Land to his youngest Daughter, the Remainder to his Son in Tail, the Remainder to his two Daughters by the middle Venter for Life, the Remainder Proximo de Sangaine of the Devisor, and dies; and after the eldest Daughter has Issue, and dies; and after the Son, and all the other Daughters, except the two Daughters by the middle Venter, to whom it was given for Life, die without Issue, the Issue of the eldest Daughter shall have it. Palm. 303. vid. Stil. 240.

5. If a Man devises all his Lands to one of his Cousin Nich. Amberst's Daughters, that shall marry a Norton within fifteen Years, and dies; and Nich. Amberst having three Daughters, one of them marries a Norton within the fifteen Years; this is a good Devise to her, notwithstanding the Uncertainty; and the Law supplies the Words, who shall first marry, &c. Mich. 15 Car. 2. between Bate and Amberst, Raym. 82. adjudged.

6. If a Man devises Lands to J. S. in Trust for A. and the Heirs of his Body, Remainder to B. for Life; and further Wills, that if A. die without Issue, and B. be then deceas'd, then, and not otherwise, he
he gives the Lands to J. N. and his Heirs, though A. dies without Issue, and B. survives; yet after the Death of B. J. N. shall take; for the Words, if B. be then deceased, express the Testator’s Meaning, that B. should be sure to have it for Life; and also shew when J. N. should have it in Possession. 2 Vent. 363.

7. A. devises Land to Trustees in Fec., in Trust, to pay Debts and Legacies; and after those Debts paid, then to sell; and if any of the Testator’s Name would buy it, such Person to have it for 200 l. less than the Value; one of the Testator’s Name brings a Bill for this Benefit of Pre-emption, but delays bringing of it till twenty-five Years after the Testator’s Death; and the Bill was dismissed, per Lord Chancellor; for if two of the Testator’s Name should claim the Benefit of the Devise, who must have it. Hill. 1685. between Huckstep and Mathews. 1 Vern. 362.

8. A. devised Lands to Trustees, in Trust for his Daughter for Life, Remainder to the second Son of her Body to be begotten in Tail Male, and so to every younger Son; and in Default of Issue Male to her eldest Daughter, and so to the first Son of her Body, taking upon him the Name and Arms of the Testator; and adds further, that he did not by Will devise the Estate to the eldest Son, because he expected that his Daughter would marry so prudently, as that the eldest Son would be provided for; the Daughter married, and had Issue a Son, who died in twelve Months after his Birth; the afterwards had another Son born, after the Death of the First; this second must take, according to the Words of the Will, though contrary to the Intention of the Testator. Trin. 1716. between Trafford and Allen. 2 Vern. 666. decreed.

9. If A. B. and C. being Aliens and Brothers, A. has Issue a Son, and B. and C. are naturalized, and B. purchases Lands, and devises them to the Heir of his Brother A. and his Heirs; and B. dies, living A. and his Son, the Devise is void, for the Uncertainty who is intended thereby; for A. being an Alien, can have no Heir; or however, being living, can have none during his Life; but per Glyn, Ch. Just. if it had been found that the Son of A. was the reputed Heir of A. tho’ A. was an Alien, yet his Son might have taken by this Devise. Trin. 1656. between Foster and Rawley. 2 Sid. 23. 51.

10. A Man had Issue a Son and Daughter, the Daughter was married, and had Issue two Daughters; the Father devised, that all his Lands should descend to his Son; provided that if his Son died without Issue of his Body, then my Land to go to my right Heirs Male of my Name and Polterity for ever; the Son died without Issue; and upon Ejectment between the Brother of the Deviseur and the Daughters, this was held a void Devise, because neither could claim under the Description of the Will; not the Brother; because, tho’ he was of his Name, yet he was not his (a) Heir; and tho’ the Daughters were his Heirs, yet they were not of his Name, and so not within the

(a) This Resolution is founded on a Rule laid down in the Old Books, viz. that he who taketh by Description or Purchase, as Heir, must be Heir general or compleat Heir; for Instance, if Lands are devised to the Heirs of J. S. and J. S. is living at the Death of the Testator, the Devise is void, for Nulla est heres vivens; so if Lands are devised to the right Heirs Males of J. S. and the Heir of J. S. is a Female, the Devise is void; or if the Devise was to the Heirs Females, and the right Heir had been a Male, it would be void in the same Manner; to which Purpore, vid. Mor. 860. 2 Sm. Lit. 24. b. 2 Laps. 52. Dyer 99. Hab. 35. 1 Co. Anon’s Case; 1 Co. 185. Story’s Case; but notwithstanding those Authorities, this Doctrine has been shaken by the following more modern Resolutions, in which it is held, that a special Heir may take by Purchase, and that a
Devises.

Description of a Person by the Name of Heir, the not Heir general, operating with the Intention of the Tefator, is sufficient to ascertain the Person to take.

11. If a Man devises Lands to A. and his Heirs, during the Life of B. in Trust for C. and after the Death of B. to the Heirs Males of the Body of B. now living, B. having one Son then living; by this Devise a Remainder is immediately vested in the Son; for the Words, Heirs Males now living, in a Will, are a full Description of the Son, who then was the Heir apparent of B. and known by the Devisor (who was his Uncle and Godfather) to be so. Mich. 29 Car. 2. between James and Richardson, 2 Jones 99. adjudged in B. R. but (b) reversed in the Exchequer Chamber.

(b) Note: The Judgment of Reversal was reversed in the House of Lords. 2 Lew. 233. S. C. and Per Leving, this Point was tried again upon a new Ejectment, and like Judgment given as at first in B. R. which was confirmed in the Exchequer Chamber, and likewise in the House of Lords. 1 Vent. 396. S. C. by the Name of Burdett and Durden, 2 Vent. 311. S. C. Bayn. 590 & C. 3 Exch. 32. S. C. Polk. 457. S. C.

12. A. devised in this Manner: I give to my eldest Heir Male, and his Heirs Males, for ever, all my Lands in such a Place; and if there be a Female, she to have 12 l. per Ann. as long as she lives; the Tefator had two Sons, the eldest of which died in his Life-time, leaving Issue a Daughter; and it was adjudged that the Lands should go to the second Son, and not to the Daughter of the Eldest, tho' she was Heir general. Trin. 3 W. 3. Rot. 1484. between Baker and Hall in C. B.

13. A. devises all his Lands to B. and C. and the Survivor of them, for the Term of twenty-one Years, for the Payment of his Debts and Legacies, and after Payment the Term to cease; and after the End, or sooner Determination of that Estate, he devises the Premises to the first Son of his Body, and to the Heirs Males of the Body of such Son lawfully issuing; and for Default of such Issue, to B. for ninety-nine Years, if he so long live, without Impeachment of Waste, Remainder to the first and other Sons of B. and the Heirs Male of their Bodies successively, Remainder to C. for ninety-nine Years, if he so long live, Remainder to his first and other Sons in Tail Male successively, Remainder to the Heirs Males of my Aunt, Mrs. Eliz. Long, Wife of Richard Long, Clerk, lawfully begotten, with Remainder to his own right Heirs; and by his Will gave 150 l. Annuity to Dorothy Beaumont, his Sister, the Plaintiff in Error, for Life, and 500 l. to her Children; and to his Aunt, Eliz. Long, 100 l. and to her Children 500 l. and dies without Issue; B. and C. entred by Virtue of the Devise for twenty-one Years; and afterwards both died without Issue, and John Beaumont and Dorothy his Wife, entred in Right of Dorothy, as Heir at Law to the Tefator; the Term for twenty-one Years being determined, and the Debts and Legacies paid, and Thomas Long, eldest Son of Eliz. (the having, at the Time of making the said Will, three Sons, viz. the said Thomas, and two others) entered and brought Ejectment; and in the Exchequer, Judgment was given by the Lord Chief Baron Ward, Price and Locell, against Baron Bury, for the Plaintiff, Thomas Long; but in Trinity-Term 1713, this Judgment was reversed in the Exchequer Chamber; and
Devises.

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upon Error brought in the House of Lords, it was argued, that this Reverfal should be affirmed, 1st, Because *Dorothy* being Heir at Law to the Teflator, her Right, as such, was to be favoured; and all Devises to disinherit an Heir at Law were to be taken strictly. That to make this Devise good to *Thomas Long*, it must be conformed either a contingent Remainder, or the Words *Heirs Male* be taken as a *Descripção Persone*, to vest in him as a contingent Remainder; it cannot be good for Want of a Freehold to support it, all the preceding Eftates being only for Years; besides, if it were good as a contingent Remainder, in its Creation, yet *Eliz. Long*, the Mother, being alive when the particular Eftate determined, it cannot vest, because *Non est heres viventis*; as a *Descripção Persone*, it cannot vest, for that ought to be such a Description as *vice nominis*, which the Words *Heirs Male* (being a legal Term, and not accompanied with any other Words to determine the Sene otherwise as Heir apparent, or Heir now living, &c.) cannot amount to; and Word *begotten* doth not determine the Sene otherwise; nor does any Intent appear to confine the Devise to the Issue Male of *Eliz. Long*, much less to *Thomas Long* only, as the Person described in this Devise; but notwithstanding these Reasons, it was adjudged, that the Judgment should stand, and the Judgment of Reverfal be reverfed. tho' ten of the Judges were of Opinion, that the Devise was void, and only the three Judges (Lovel being dead) before-mentioned, held it good. *Mich. 1713. in Dona Procerum, between Beaumont and Long.*

14. *F. S.* devised to Trustees, in Trust, after Debts and Legacies paid, to convey to *A.* his Cousin, and the Heirs Male of his Body; and for Want of such Heirs Male; then to the Heirs Male of the Body of *B.* his Great Grandfather; and for Want of such Heirs Male, to his own right Heirs for ever; and gave to his Sister 2000 l. to be put out at Interest during her Life, she to receive the Interest, and after her Death to her Children, and died; and soon after *A.* died without Issue, and *C.* being Heir Male of *B.* the Teflator's Grandfather, but not Heir General, there being a Daughter of an elder Brother; the Question was between him, and the Teflator's Sister and Heir at Law, who had the 2000 l. devis'd to her, whether the Devise was void, or not; and my Lord Chancellor held the Devise good, and that *C.* should take as a Person sufficiently describ'd and intended by the Teflator. Decreed *Mich. 1716. between Newcomen and Barkham,* 2 *Vern.* 729. and this Matter well debated.

4thly, By the Devise of Lands dying in the Life-time of the Devisor.

1. If a Man devises Lands to *A.* and his Heirs, and *A.* dies in the Life-time of the Devisor, *B.* the Heir of *A.* shall take nothing by the Will, for the Heirs of *A.* were not named as immediate Takers, but only to express the Quantity of the Eftate that *A.* should take. *Trin. 10 Eliz.* between *Bret and Rigden,* *Plow. Com.* 345. Adjudged per *totam Curiam, prater Walch,* tho' after the Death of *A.* the Devisor said to *B.* that he should be his Heir, and should have all the Lands which *A.* should have had, if he had out-lived the Devisor. *Vid. 2 Lev.* 243. And what amounts to a new Publication, Title Will.

2. So if a Man devises Lands to *A.* his second Son, and to the Heirs of his Body; and after his Death, without Issue, then to *B.* his third Son in Tail, &c. if *A.* hath Issue, and dies in the Life of the Devisor,
for; and then the Devisor dies, B. shall have the Lands presently; for the Devise to A. being void, it is as if it had never been made. Hill. 36 Eliz. between Fuller and Fuller, Cro. Eliz. 422, 423. But if the Devise had been to the Devisor's eldest Son in Tail, Remainder to the second Son, and the eldest Son had died in the Life-time of the Devisor, leaving Issue. Q. 2.

3. If a Man devises to A. and his Heirs, to the Use of C. and his Heirs, and C. dies in the Life-time of the Devisor, his Heir can take nothing; but the Devise will be to the Use of the Devisor, and his Heirs. Hortop's Case, 1 Leon. 253. Cro. Eliz. 243.

4. But if there be a Devise to A. for Life, Remainder to B. in Fee; tho' A. dies in the Life of the Devisor, B. shall take, or if A. refuses, he shall take. Plow. 344. Cro. Eliz. 423. 1 Co. 101. a.

5. If a Man devises his Lands to his Wife for Life, and after to his four Daughters and Heirs, equally to be divided between them, share and share alike, to hold to them and their Heirs for ever; and one of the Daughters dies, having Issue a Son, and then the Devisor dies; the Will is void for a fourth Part. Hill. 1656. between Pach-mau and Coke, 2 Sid. 53, 78. adjudged.

6. So if A. has Issue two Daughters, B. and C. and he devises some Tithes and Money to B. and gives Legacies to her Children, but declares, that he having married without his Consent, she should have no Part of his Real Estate, and devises his Real Estate to C. in Tail, Remainder to B. for Life, and to her first, &c. and C. marries in the Life-time of the Textractor, leaving Issue; tho' afterwards A. makes a Codicil to his Will, and devieth some particular Legacies out of his Personal Estate; yet as that does not amount to a Re-publication of his Will, B. must have the Lands immediately after the Death of the Devisor, tho' contrary to the Intention of the Devisor, the Authorities be fo. Per Lord Chancellor, Mich. 1716. between Hutton and Simpson, 2 Vern. 722.

7. If a Man devises Lands to A. and B. and their Heirs; and A. dies in the Life of the Devisor, B. shall take the whole Land. Mich. 16 Car. 2. between Davis and Kemp, Carter 4, 5.
C A P. XXVII.

Dower and Jointure.

(A) Of what Estate of the Husband's, with Respect to the Nature and Quality thereof, shall a Woman be endowed.

(B) What shall be a Satisfaction of good Bar of Dower, and how far a Dowries shall be favoured in Equity.

(C) Of Jointures, and in what Cases a Jointress shall be more favoured or restrained in Equity than at Law.

(A) Of what Estate of the Husband's, with Respect to the Nature and Quality thereof, shall a Woman be endowed.

1. If A. in Consideration of 100l. by Bargain and Sale inrolled, conveys to B. and his Heirs, to the Intent that B. shall redeem to A. for Life, with a Condition, that if A. paid the 100l. at the End of twenty Years, the Bargain and Sale should be void; and B. redeemés accordingly, and dies, his Wife shall be endowed; for tho' B. redeemed upon the former Agreement, yet A. takes it, subject to the Title of Dower; and it was his Folly, that he did not join another with the Bargainee, as is the antient Course in Mortgages. Passch. 6 Car. 1. between Nash and Preston, Cro. Car. 190. agreed in Cancellaria, by Jones and Coke; and upon a Conference with the other Justices certified accordingly. Show. P. C. 72. S. C. cited.

2. If a Husband, before Marriage, conveys his Estate to Trustees and their Heirs, in such Manner as to put the legal Estate out of him, tho' the Trust be limited to him and his Heirs; yet the Wife shall not be endowed of this (a) Trust-Estate. Passch. 1712. between Bos- (a) Of a Use (not executed) tomley and Lord Fairfax, agreed clearly, and admitted per Curiam in Cancellaria, 1 Chan. Rep. 254. S. P.

neither shall the Husband be Tenant by the Curtesy, vid. Prob. 349. 1 Co. 115. 4 Co. Verne's Case, Dn. and Sum. lib. 2. cap. 25. Dyer 11. Pl. 47. But as to the Husband's being Tenant by the Curtesy, vid. 2 Term. 583. 601. and 6. if there be any Difference.
3. If a Father purchases Lands in his eldest Son's Name, and
the Son is put into Possession, who afterwards falls sick, and in his
Sicknes the Father gets him to execute a Deed, declaring his Name
was made Use of only in Trust for him; and the Son recovers and
continues in Possession, and marries; after his Death, his Wife shall
be endowed; notwithstanding this Declaration of the Trust; and tho' the Father had got a Conveyance of the legal Estate from the
younger Son; for per Lord Chancellor, this is a secret and fraudulent
Deed of Trust to deceive Creditors and Purchasers, and therefore re-
versed the Master of the Rolls's Degree, who had decreed it for the
Father. *Parch.* 1762. 6 between *Rateman* and *Batemun, 2 Vern.* 436.

4. If a Man devises Lands to his Executors for Payment of Debts,
and after Debts paid, to his Son in Tail; and the Son marries, and
dies before Debts paid, the Estate of the Executors is only a Chattel
Interest, and will not hinder the Son's Wife of Dower; but the Wife's
Dower cannot commence in Possession, nor Damages be recovered
for detaining it, but from the Time of the Debts being paid, 2 Vern.
404. *per Curiam.*

5. If the Lands of F.S. are sequestr'd for a Personal Duty, and he
marries and dies, though the Lands were sequestr'd before Marriage,
yet the Wife's Right of Dower will attach them; for this Sequestra-
tion shall not so far bind or cover them, as to hinder the Wife of
her Dower. 1 Vern. 118. ruled on Demurrer *per Lord Keeper
North.*

(B) What shall be a Satisfaction, or good Bar
of Dower, and how far a Dowrie's shall be
favoured in Equity.

1. If a Man devises certain Lands, Money, Goods, &c. in Lieu
of Satisfaction of Dower, the Wife cannot have both; but
she may waive the Devise, and (b) claim her Dower. 2 Chan. Ca.

2. F.S. devised Legacies to his Wife out of his Personal Estate,
and devised to her Part of his Real Estate during her Widowhood,
and devised the Residue of his Estate to Trustees for twenty-one
Years, for Payment of Debts and Legacies; and the Remainder of
the whole Estate he devised to the Plaintiff, (who was his Godson,
and of his Name, but a remote Relation) for Life, and to his first
and other Sons in Tail; and my Lord Chancellor *Somer* decreed,
that though it was not declared in the Will to be in Lieu and Satisfi-
cation of Dower; yet as it may be plainly collected to be so intende-
ed (he having made Disposition of his whole Estate) and as a collat-
eral Satisfaction may be a good Bar to Dower in Equity, tho' not at
Law; that she must either take her Dower, and waive the Devise, or
Dower and Joiture.

Lawrence and Lawrence, 2 Vern. 365. But this Decree was reversed by Wright Lord Keeper. Mich. 1702. which Decree of Reversal was affirmed in the Houfe of Lords, with 30l. Costs, 17 May, 1717. The Lady Radnor's Husband was seised in Tail of the Lands in Question; but there was a Term for ninety-nine Years, prior to his Estate (which was created for Performance of several Trusts in the Earl of Warwick's Will, which were all performed, and after to attend the Inheritance) he levied a Fine and suffered a Recovery, and fold the Estate to J. S. who had Notice of the Marriage; but his Wife not joining, she, after his Death, recovered Dower, with a Cease Execution, during the Term, and brought her Bill to have this Term removed, and to have the Benefit of her Judgment, and Recovery at Law; but the Court held, that this being against a Purchaser, Equity ought not to give her any Relief, and therefore dismissed the Bill. Between the Lady Radnor and Vendebundy, 1 Vern. 356. 2 Chem. Ca. 172. S. C. which Decree of Dismission was affirmed in the Houfe of Lords. Show. P. C. 69, 70.

4. A Term was raised in Black-acre, in Trufit, to indemnify A against Incoherence that might affect White-acre, which he had purchas'd of B. the Defendant; and the Widow of the Son and Heir of B. brought a Writ of Dower of Black-acre against the Plaintiff, who was an Infant; and his Guardian had let her take Judgment at Law, without setting up the Term, or taking any Notice of it; and the Infant brought his Bill to be relieved against the Judgment; and the Court held that this Case was the same with Lady Radnor's; the Term being created to indemnify a Purchaser, must continue so, and subject to that, must be in Trufit for the Heir; and there is no Difference where the Widow is Plaintiff or Defendant; for it is the Want of Equity excludes her from Relief. Hill. 1700. between Wray and Williams, 2 Vern. 378. S. C. but no Resolution.

5. But where a Widow brought her Bill to be relieved against a Term for Years, assigned in Trufit, to attend the Inheritance, and which had been set up by the Heir at Law only in Bar of her Title; and the Master of the Rolls decreed for the Widow, and that the Term should not stand in her Way; though it was objected, that it was the Title with a Purchaser, who had Notice. Mich. 1705. between Dudley and Dudley, S. P. Decreed Pasch. 1710. between Higford and Higford.

6. A Dowref can redeem a Mortgage, paying her Proportion of the Mortgage-money; and as to the Refit, she may hold over till the is satisfied. Decreed Hill. 1700. between Palmer and Danby.

7. If the Wife joins in a Mortgage, and leves a Fine, with an Intent to bar her Dower, and in Consideration thereof the Husband agrees that she shall have the Equity of Redemption in Lieu of her Dower; and he afterwards mortgages the same Estate twice more, though this Agreement be fraudulent against the subsequent Mortgagees, so as to intitle the Wife to the whole Equity of Redemption; yet she shall have her Dower if she survives her Husband, and shall not be put to her Writ of Dower; because the Estate may be so conveyed away by some of the Mortgagees, that possibly she may not know against whom to bring her Writ of Dower. Hill. 1684. between Dolin and Coleman, 1 Vern. 594.

8. If
Dower and Jointure.

8. If J. S. apprehensive of a Charge of High Treason, makes a Conveyance of his Lands to his Son, and afterwards marries a second Wife, a Court of Equity will order that such Conveyance be not made Use of to hinder such second Wife of her Dower. 3 Chan. Rep. 94.

9. If there be a fraudulent and partial Assignment of Dower by the Sheriff, Equity will relieve against it. Hill, 1683, between Hoby and Hoby, 1 Vern. 218, 219. 2 Chan. Ca. 160. S. C.

(C) Of Jointures, and in what Cases a Jointure's shall be more favoured or restrained in Equity than at Law.

1. A Man, upon his Marriage, made a Settlement, whereby he was Tenant for Life, then to his Wife in special Tail, of Lands of 400l. per Ann. Value, with Remainder to the right Heirs of the Husband; the Husband and Wife joined in Barring this Settlement, and a new Settlement was made in this Manner, eis. to J. S. and his Heirs, in Trust as to Lands of 150l. per Ann. for the Wife, and the Heirs of her Body; and for Want of such Issue, in Trust for the Husband and his Heirs; the Husband died without Issue, and the Wife suffered a Recovery, and devised the Lands for the Payment of her Debts, and died without Issue, on a Bill brought by the Heir of the Husband against the Defendant's Creditors of the Wife; the Question was, whether this was such a Jointure made on the Wife, so as to make the Recovery a Forfeiture within the Statute 11 H. 7. for the Defendants, it was objected, that a Court of Equity ought not to give any Assistance, because the Statute makes the Recovery a Forfeiture of her Estate, and gives a Remedy by Way of Entry; and in this Case she has only a Trust, and no Estate to forfeit; it was likewise urged, that this Case was out of the Words and Meaning of the Statute, for the Limitation here is to the Wife in general Tail; and on Failure of Issue of that Marriage, her Issue by any other Husband, would have had the Land, and might, without Doubt, have suffered a Recovery, and barred the Remainder; and the Statute only intended to provide for the Issue of the Husband, whose the Lands were; it was further urged, that these Lands could not be paid the Husband's; for the Wife, by parting with her former Settlement, which was 400l. per Ann. for this of 150l. per Ann. was a Purchaser of thefe Lands; and if the Wife, in Consideration of this Settlement, had sold Lands of Inheritance of her own, it would not have been within the Statute. On the other Side it was said, that this was to aid a Forfeiture; but as the Statute makes the Suffering a Recovery a Forfeiture, and gives an Entry to the Person that has the next Estate; so in another Place it makes all Recoveries suffered by a Jointre's void; and upon that Clause it is proper to come into Equity, to have an Execution of the Trust; and this Case is within the Words of the Statute, for the Statute says, any Estate limited to the Wife, or to her Use; and this Statute was before the Statute H. 8. of Uses, at which Time a Use was the same Thing that a Trust is now; next, the Statute says, limited for Life, or in Tail; now a general Tail is as much an Intail as a special One, and as much within the Words
Words of the Statute, and the Statute intended to provide for the
Remainder-man as well as the Issue. The Objection of her being a
Purchaser, is quite to take away the Statute, for so is every Join-
treis; and if she had kept her former Jointure, that had been under
the same Restrictions; and of the same Opinion was my Lord
Keeper, and decreed accordingly. *Trin.* 1700. between *Symson*
and *Turner.*

2. On a Motion to stay a Jointreis, Tenant in Tail after Possibili-
*ty* &c. from committing Waife; the Court held, that she being a
Jointreis within the 11 *H. 7.* ought to be restrained, being Part of the
Inheritance, which by the Statute she is restrained from aliening,
and therefore granted an Injunction against wilful Waife. *Hill.* 1701.
between *Cook* and *Winford.*

3. If A. charges Land in D. with a Portion for a Daughter by a
fist Venter, and then marries and settles Part of those Lands as a
Jointure on a second Wife, who has no Notice of the Charge; and A.
believing that the Portion would take Place of the Jointure, by Will
gives other Lands to the Wife in Lieu thereof; and the Wife, by
Combination with the Heir, refuses to accept of the Devise; the
Daughter shall hold the other Lands which descended to the Heir,
till satisfied her Portion. *Hill.* 1683. between *Reeve* and *Reeve.*
1 *Vern.* 219.

4. If A. in Consideration of a Marriage-Portion, Articles to settle
a Jointure, and dies before the Portion paid, or Settlement made;
and the Wife takes out Administration to him, and so becomes inti-
tled to the Money, and then brings a Bill against the Heir of the Hub-
band, to have the Jointure settled, she shall have no Relief, for she
is not intitled to the Jointure and Money too; but the Reporter
adds a *Quare,* for she is intitled to these two Demands in distinct
Capacities, and Debts may hereafter appear to exhaust the Assets;
and in Case the Husband had actually received the Portion, and it
had been in his Possession, she would have had it as his Administra-

5. But if *f. s.* before Marriage, articles to settle a Jointure on
his intended Wife, and the Marriage is consummated; and the Hub-
band dies before any Settlement made, an Execution of the Articles
will be decreed in Equity. 2 *Vern.* 343.

6. If *f. s.* gives a voluntary Bond after Marriage, to make a
Jointure to his Wife, and he makes a Jointure accordingly, and the
Wife gives up the Bond, and the Jointure is evicted, the Jointure
shall be made good out of the Personal Estate, there being no Cre-
ditors; for the Delivery up of the Bond by a Feme Covert could no
Way bind her. *Hill.* 1686. between *Beard* and *Nuthall,* 1 *Vern.*
427.

7. If a Man covenants to settle Lands of such a Value as a Join-
ture, and this Covenant is omitted in the Settlement, yet it subsists
in Equity; but the Value of the Lands is not to be estimated ac-
cording to the present Value, but as they were at the Time of the
Jointure settled, unless the Covenant be so. *Hill.* 1683. between
*Speake* and *Speake,* 1 *Vern.* 217, 218.

8. If there be a Jointreis, and a Covenant that her Jointure shall
be of such a yearly Value, and it falls short; though her Estate be
not without Impeachment of Waife, yet she may commit Waife, so
far
far as to make up the Defect of the Jointure, and Equity will not prohibit. *Mich. 1698.* between *Carew* and *Carew,* at the Rolls.

9. *J. S.* made a Settlement on his eldest Son for Life, with Remainder to his first and other Sons in Tail, Remainder over, with Power for his Son to appoint any of the Lands not exceeding 100 l. per Ann. to any Wife he should afterwards marry, for a Jointure, (the Father being under an Apprehension that he was then married to a Woman which the Father disliked, and had no Intention his Son should provide for); the Father died, and the Son married that (tho' there was strong presumptive Proof that he was married to her before) and after Marriage appointed certain Lands to Trustees, in Trust for her, for a Jointure, and covenants, that if they were not of 100 l. per Ann. Value, that upon Request made to him, any Time during his Life, he would make them up so much out of other Lands in his Power; he lived several Years, and no Complaint was made, that the Lands were not of that Value, nor Request to make it up, and died without Issue; on a Bill brought by the Widow to have the Jointure made up 100 l. my Lord Keeper said, that a Provision for a Wife or Children was not to be considered as a voluntary Covenant, and therefore decreed the Deficiency to be made up, notwithstanding the Circumstances of the Case, and her Neglect in not Requesting it during Coverture, for the Laches of a Feme cannot be imputed to her. *Hill. 1701.* between *Fothergill* and *Fothergill.*

10. If *A.* in the Life-time of his first Wife, settles Lands to the Use of himself for Life, Remainder to his first and other Sons in Tail, and the Wife dies without Issue; and *A.* on his second Marriage, in Consideration of a Portion paid, agrees to settle Part of the Lands as a Jointure on his second Wife, the Court will set aside the first Settlement, as fraudulent against the Jointreis, who is a Purchaser for valuable Consideration. 1 *Cham. Ca.* 100.

11. If a Feme Covert joins with her Husband in a Fine and Mortgage of her Jointure Lands, then refusals a Trust for her when the Mortgage is paid, to have the Lands again. 2 *Cham. Ca.* 161.

12. So if a Feme Covert joins with her Husband in a Mortgage of her Jointure Lands, she may redeem; and if she pays more than the third Part of the Principal Money, her Executor shall hold the Lands till re-imburc'd. 2 *Cham. Ca.*

13. So if a Jointure is made of Lands which are mortgaged, the Wife may redeem, and her Executor shall hold over till repaid with Interest. 1 *Cham. Ca.* 271. 2 *Vent.* 343. S. P. decreed.

14. If the Heir brings a Bill against a Jointreis to discover Deeds and Writings, he is not intituled to see them, unless he confirms the Wife's Jointure, tho' the Jointure was made after Marriage. 1 *Vern.* 479.

15. So if a Bill is preferred against a Jointreis, to answer, whether her Husband had any other Title than as Assignee of a Mortgage, and she denies that she had any Notice of this Mortgage, and says, that her Husband told her that he was in by Defect, she shall not be obliged to answer, whether her Husband had any other Title than as Assignee of the Mortgage. *Mich. 1715.* between *Stephens* and *Guale.* 2 *Vern.* 701.
Evidence, Witnesses, and Proof.

(A) Of the Sufficiency and Disability of a Witness.
(B) What will be admitted as Evidence, and will amount to sufficient Proof.
(C) Where parol or collateral Evidence will be admitted to explain, confirm, or contradict what appears on the face of a Deed or Will.
(D) Of examining Witnesses, exhibiting Interrogatories, publishing and suppressing their Depositions.
(E) Of examining Witnesses de bene esse, and establishing their Testimony in perpetuum rei memoriam.

(A) Of the Sufficiency and Disability of a Witness.

1. A. Exhibited a Bill to be relieved touching an Annuity charged on the Estate of the Defendant's Wife; and examined his Brother as a Witness for him, who had a like Annuity charged on the Estate of the same Deed; and though it was urged, that he had Satisfaction made to him in Lieu of it; and had released his Right; yet it not appearing by any Proof in the Cause, the Court put off the Hearing, and gave the Plaintiff Liberty to examine Witnesses, to prove that the Brother had released the Annuity before he was examined as a Witness in the Cause. *Trin.* 1700: between *Culpeper* and *Fairfax*, 2 *Vern.* 375.

2. A Witness was examined whilst she was interested; before the Hearing; and the Cause being heard, and decreed to an Account, she was re-examined after the Hearing; before the Master on the Account, having first released her Interest; and it was objected, that she ought not to be read, for having been examined whilst interested; and her
her Depositions published, she was thereby ingaged, and almost under a Necessity of Standing to what she had before sworn, and could not be free to retract or contradict it; but the Lord Keeper overruled the Objection. Mich. 1704. between Callow and Minc, 2 Vern. 472.

3. If a Bankrupt has assigned and released all his Estate and Right to the Assignees, he may be examined as a Witness for them. 2 Vern. 637. Per Curiam, a Legatee of a small Legacy, as 5 s. to a private Person, or 5 l. to a Nobleman, may be a Witness for the Will. 1 Vern: 254.

4. Upon an Appeal from the Rolls, it was objected to the Evidence of one Norris, as a Witness examined in the Cause, and read at the Hearing at the Rolls, that since that Hearing, in Answer to a Bill exhibited against him, he had confessed, that on the Day on which he was examined as a Witness, he took a Bond of the Plaintiff, that if the Plaintiff recovered the Estate in Question, he would convey Part of it to the said Norris; and per Lord Keeper, Holt Ch. Juft. and Powel Juft. this Answer must be read to take off his Evidence as a Party interested. Mich. 1704. between Needham and Smith, 2 Vern. 453, 454. And per Lord Keeper, though a Witness is examined an Hour together at Law, if in any Part of his Evidence it appears that he was a Party interested, the Court will direct the Jury, that he is no Witness, nor any Regard to be had to his Evidence.

5. Several Persons were examined as Witnesses no Ways concerned in Interest, and the Cause heard, and Issues directed to be tried, but the Trials were not carried on, and the Cause slept many Years, and after abated; and then those Persons who had been examined as Witnesses, became Heirs at Law, and thereby interested in the Matter; the Cause was revived and reheard, and the same Issues directed to be tried; and the Persons who had been so examined (being now Plaintiffs) prayed to have an Order, that their Depositions taken when they were disinterested, might be read as Evidence at Law for themselves; and my Lord Keeper ordered it accordingly; and likened it to the Case, where one is the only, or only surviving Witness to a Deed, becomes after the Party interested, his Hand may be proved at Law; so if a Witness to a Deed becomes blind. Then the Cause proceeded to Trial at Bar in C. B. where the whole Court held, these Depositions could not be read without Consent, the Parties being living; but the Defendant contended, and had a Verdict for him; and the Plaintiff obtained a new Trial, and then would have had the same Order; but my Lord Keeper said, since the Judges had resolved otherwise, he could not take upon himself to make that Evidence which was not, and therefore only ordered they should be read in Evidence, as by Law they might. Trin. 1702. between Holcroft and Smith.

6. But where one who was examined as a Witness when disinterested, and afterwards became intitled to the Estate in Question, and the Court of Chancery allowed his Depositions to be read, vid. 2 Vern. 699. And there said, that the Reason why the Deposition of a Witness, taken whilst unconcerned in Interest, could not be made Use of at Law, was founded on that Rule of Law, viz. that where the Witnesses is living, and might be produced at the Trial, the Deposition of such Witness shall not be read.

7. A
7. A Co-Plaintiff, tho' but a Trustee, cannot be examined as a Witness for the other Plaintiff. 1 Vern. 230. But one Defendant may be examined as a Witness for another. 2 Chanc. Ca. 214. S.P.

8. Plaintiffs cannot examine each other as Witnesses in the Cause; because, if the Cause miscarries, the Plaintiffs will be liable to Costs, and therefore their Swearing is to exempt themselves; and it is their own Choice that they are made Plaintiffs, for without their Consent they could not; but Defendants are forced into the Cause; and if their being made Parties should absolutely invalidate their Testimony, it would be in the Power of any one who had a Mind to oppress another, to deprive him of his Defence, by making the most material Witnesses Defendants in the Suit; and therefore any of the Defendants to a Suit may be examined as Witnesses, laying such Exceptions to their Credit. Mich. 1715. between Cazen and Beachfield, agreed per Curiam in Canc.

9. A Commissioner may be a Witness, but he ought to be examined before any other Witnesses. 1 Vern. 369.

10. In a Suit to set aside a hard Award, the Arbitrator or Umpire, who made the Award, may be examined as a Witness. 1 Vern. 157, 158.

11. A Bond of 400l. Penalty was entered into; and the Question was, whether it was for the Benefit of the Corporation of — or for the Defendant; and the Witnesses for the Plaintiffs being all Members of the Corporation, it was objected, that they could not be read, they swearing for their own Benefit; which Exception was allowed; but it appearing that the Plaintiff had crossed-examined some of the Plaintiff's Witnesses, not only to Questions barely whether they were of the Corporation, or not, but to other Questions, which tended to the Merits of the Cause; the Lord Keeper declared, that made them good Witnesses, though they were Members of the Corporation; and upon their Evidence it was decreed for the Plaintiffs. Mich. 1684. between the Corporation of Sutton Coldfield and Wilson, 1 Vern. 254. And per Lord Keeper, a Corporation ought to have a Town-Clerk and Under-Clerks, that are not Freeman, that they may be competent Witnesses, upon Occasion; and he said, that he thought it very hard in the Case of the Water-bailage of London, that no one Freeman of the City, though it was not 6d. Concern to him, could be admitted as a Witness.

12. The Suit being touching the Loss and Misapplication of a Sum of Money given for the Benefit of the Parishioners; the Question was, whether any Inhabitant of the Parish ought to be admitted as a Witness; for the Plaintiff it was insisted, that the Interests was so minute and inconsiderable, that it could not be presumed to influence the Witnesses, or bias him in his Evidence; but per Curiam, the Caes where the Party was concerned in Interests, though never so small, have always prevailed; and it was so resolved upon great Debate, in the Case of the City of London, concerning the Water-Bailiff. Pasch. 1694, between Dodwell and Nutt, 2 Vern. 317.

13. If an Executrix to a first Husband marries a Second, and a Bill is exhibited against them to discover a Truft, and they in their Answers disagree in the Matter, the Wife confessing what the Husband denies; and what the Plaintiff can prove only by one Witness; the Plaintiff may have no Relief; for one Witness is not sufficient against
the Husband's Answer; and the Wife's Confession will not avail, for she can be no Witness against her Husband. 2 Chan. Ca. 39.

14. So where the Plaintiffs, who were Infants, and the Children of the Defendant's Wife by a former Husband, exhibited a Bill to have an Account of the Estate left them by their Father, and of the Produce thereof; and upon the Hearing it was referred to an Account, and the Defendant and his Wife were to be examined on Interrogatories, for Discovery of the Estate, the Wife being at Variance with her Husband, and living a-part from him, on her Examination, made the Estate of the Plaintiffs (who were her Children) as great as she could; thereupon to fix a Charge upon the Husband; the Plaintiffs, upon a Petition to the Master of the Rolls, obtained an Order to examine the Wife as a Witness against the Husband de bene esse; and the Master, upon her Evidence, had charged the Husband with several Sums of Money, as Interest and Produce of the Infants Estate; but upon Exceptions to the Report, the Lord Chancellor disallowed her Evidence, and declared the Wife could not be Witness against her Husband. Trin. 1688, between Cole and Gray, 2 Vern. 79.

15. The Plaintiff was Servant to the Defendant's Wife, Mrs. Baldwin, and had in several Services saved about 50l. the Defendant and his Wife having for some Time lived separate, the Wife passed for a Widow, and the Plaintiff knew nothing of her being married; Application was made to Mrs. Baldwin, by one Bussey, (who was like wife, a Defendant) to borrow 100l. on a Mortgage; Mrs. Baldwin told him, she could only let him have 50l. of her own Money, but that she could get the other 50l. of a young Woman; accordingly, soon after, she acquaints Bussey, that she had got the 100l. and directed the Mortgage to be made to herself by the Name of Pleabald, that being her maiden Name, though she sometimes went by the Name of Baldwin, and at other Times by the Name of Tuite; having been the Widow of one Tuite; the Mortgage was made accordingly, and some Time after she gave the Plaintiff a Bond of the Penalty of 100l. for Payment of 50l. and Interest, and this she gave by the Name of Tuite; Bussey made several Payments of Interest to Mrs. Baldwin, and knew nothing of her Marriage neither; afterwards, Mr. Baldwin, having Notice of the Mortgage, gets that and all the Writings relating to it, into his Custody, and some Time after Mrs. Baldwin obtained a Sentence of Divorce from her Husband, upon Pretence of ill Usage; and on Discovery of the Marriage, the Bill was brought against the Husband and Wife, and Bussey, to charge this 50l. either on the Mortgage, or upon the Perfon of the Husband; the Wife put in a separate Answer, wherein she disclaimed all the Matter as above-mentioned; Bussey, by his Answer, confessed what is before set forth, and moreover, that Mrs. Baldwin had told him lately, that the Plaintiff was the young Woman she meant, and of whom she had the 50l. the Husband, by his Answer, insinuated upon his Title by Law to this Mortgage, and 100l. and denied, to his Knowledge, that 50l. or any Part of it, was the Plaintiff's Money, and said, he believed this Suit to be set on Foot, on Contrivance between the Plaintiff and his Wife, to get so much Money on it of him; the Plaintiff examined, by Order of Court, Bussey as a Witness, and his Deposition was in Effect the same as his Answer, which in Truth was nothing more than an Account of what he had heard the Wife say on this Occasion, so that the whole Evidence was in Effect the Wife's
Evidence, Witnesses, and Proof.

Wife's; and whether that should be allowed in this Case, was the principal Question: The Court agreed clearly, that the Wife shall never be admitted by an Answer, or otherwise, as Evidence to charge her Husband, as where a Man marries a Widow Executors, &c. her Evidence shall not be allowed to charge her second Husband with more than she can prove to have actually come to her Hands; but the Master of the Rolls said, this was perfectly a new Case; for here she transacted this Affair with Buffey and the Plaintiff as a Feme, and neither of them knew or had Notice of the Marriage; and the Husband himself, as was proved in the Cause, on some other Occasions, had given in to the Concealment of the Marriage; and therefore the Court did allow of her Evidence, as it was supported by what Buffey said, and thought, upon the whole, the Evidence of the Wife sufficient to prove 50 l. Part of this Money, to be the Plaintiff's, not considered as a Wife, but as she transacted and appeared throughout as a Feme Sole, and therefore decreed the Plaintiff the 50 l. with Costs. Hill. 1719. between Rutter and Baldwin.

(B) What shall be admitted as Evidence, and will amount to sufficient Proof.

1. A Bill in another Cause is not to be read as Evidence against the Plaintiff named in it, unless it be proved, that it was exhibited with his Privy, for any one may file a Bill in another's Name, 17 Car. 2. between Wolle and Roberts, 1 Chan. Ca. 64.

2. The Depositions of Witnesses taken in a Cause, which was heard thirty Years before, were ordered to be made Use of, the same Matters being then under Examination as at present; and the Plaintiff's Title not then appearing, and the Witnesses being since dead, though none of the present Parties were Parties to the former Suit, except the Territants. Potal. 18 Car. 2. between Terwitt and Gresban, 1 Chan. Ca. 73.

3. Where the Defendant's Counsel moved, that they might be at Liberty to read Depositions in this Cause, which were taken in a Cause where the Plaintiff's Father was a Party to the Suit, being in all Matters the same, but on the other Side it was objected, that the now Plaintiff not claiming as Heir, and his Father being only Tenant for Life, those Depositions could not be read against him; and upon long Debate, the Defendant had only the common Order, for Leave to read those Depositions at the Hearing, saving just Exceptions. Mich. 1686. between Coke and Fountain, 1 Vern. 413. And it was said to be a common Case, that where one Legatee has brought his Bill against an Executor, and proved Assets; and afterwards another Legatee brings his Bill, that he should have the Benefit of the Depositions in the former Suit, tho' he was not Party to it.

4. So where J. S. devised his Real Estate for the Payment of his Debts, and the Surplus to the Plaintiffs, and the Creditors exhibited a Bill against one J. N. and made the Plaintiffs Parties; to set aside some Conveyances obtained by him, by Fraud from the Teffator, and had a Decree to that Purpose; afterwards, the Plaintiffs, who were intituled to the Surplus, exhibited a Bill likewise against J. N. relating to the said Fraud; and it was held, that there being the same Question in both Causes, and J. N.'s Defence being the same;
that the Depositions in the former Cause should be read against him. Mich. 1703, between Nevil and Johnson, 2 Vern. 447. That a Man's Answer in the Spiritual Court, or voluntary Oath before a Justice of the Peace, may be read against him in Chancery, by Order, vid. 1 Vern. 53.

5. The Defendant, on presenting the Plaintiff to a Living, took a Bond from him to resign, and after put it in Suit, and recovered, and levied 98 l. and the Plaintiff's Bill was for Relief; the Defendant did not, by Answer, pretend any Misbehaviour, yet examined to several Misbehaviours; and it was urged that these Depositions could not be read, because those Misbehaviours were not in Issue; and so inclined my Lord Keeper, but after allowed them to be read, and founded his Decree on them. Hill. 1702, between Hodgson and Thornton.

6. The Defendant having obtained a Bill of Sale of Goods, and likewise a Note from his Brother, a little before his Death, for Payment of 300 l. the Plaintiff insisted theee were voluntarily given, and for a Colour only, and that underneath the Note, the Defendant had subscribed an Acknowledgment, that no Debt was due to him; the Defendant, by Answer, swore his Debt, and denied that there was any such Defeasance or Acknowledgment; it appeared upon the Proof that the Defendant deposited the two Instruments he had so obtained, in the Hands of A. B. his Sister, and afterwards wrote to her to send him the two Instruments, by a special Messenger sent for that Purpose, and that she should not let any Body see them; his Sister sent them, but sat up all Night to take Copies of them, as she declared in her Life-time (being dead before the Commencement of the Suit); and upon producing the Copies so taken by the said A. B. there appeared to be such Acknowledgment under-written, that there was no real Debt; and upon inspecting the Instruments produced by the Plaintiff upon stamp'd Paper, it appeared that the Bottom was torn off; and my Lord Chancellor allowed the Copies to be read being the Hand-writing of A. B. although not proved to be true Copies. Hill. 1707, between Winn and Loyd, 2 Vern. 603.

7. A Deed to lead the Ufes of a Fine was inrolled for safe Custody only, and a Copy from the Inrollment being offered in Evidence, it was objected, that it was no Evidence, being inrolled for safe Custody only; nor is the Inrollment it self, without particular Circumstances to support it, as proving the original Deed was in the Defendant's Custody or Power, or accidentally lost, &c. and of that Opinion was the Master of the Rolls, who said, that in Case of an Inrollment for safe Custody, the Deed may be said to be recorded; but where a Bargain and Sale is inrolled pursuant to the Statute, the Inrollment is a Record, so that a Copy of it may be read in Evidence. Mich. 1704, between Combes and Spencer, 2 Vern. 471. The Reporter adds a Note, that afterwards, upon a Rehearing, an Issue at Law was directed, whether such Deed of Ufes was executed; and upon the Trial, a Copy of the Deed was allowed to be read, and a Verdict for the Deed. 2 Vern. 591. S. C.

8. The Defendant having suppressed a Marriage-Settlement, by which a Remainder in Tail Male was limited to the Plaintiff's Father, and all the prior Estates spent; upon Proof made that the Settlement came to the Defendant's Hand, and that he had conveyed it to an Answer to a former Bill, though he now denied; the Master
of the Rolls decreed the Plaintiff should hold and enjoy the Estate; and this Decree was confirmed by my Lord Keeper. 2 Vern. 380. {vid. 1 Vern. 457. S. P.}

9. A Bill was exhibited touching the Plaintiff's Jointure, which the Bill charged was, by parol Agreement, made on the Marriage, agreed to be 400 l. per Annum; the Defendant pleaded, that after all Treaties and Agreements touching the Marriage-Settlement, a Jointure was actually settled and accepted, and the Marriage thereupon had eighteen Years before: And per Lord Chancellor, the Jointure Deed is an Evidence, that all the precedent Treaties and Agreements were resolved into that; but ordered the Defendants to Answer, and gave the Benefit of the Plea to the Hearing. 1 Vern. 369.

10. The Plaintiff having lent 7. S. 600 l. on a Mortgage, and afterwards discovering that the Estate was pre-mortgaged to the Defendant, got in an old satisfied Incumbrance, and brought his Bill to compel the Defendant to redeem, or be foreclosed; and it was objected, that the Plaintiff, in this Case, (as between him and the Defendant, who was a Purchaser,) ought to have proved the actual Lending and Payment of the Consideration-money; and that producing the Deed or an Acquittance, was not sufficient; but the Court held it well enough, and that the Producing the Deed or Acquittance was sufficient Evidence. Mich. 1692. between the Lord Chief Justice Holt and Mill, 2 Vern. 279. {vid. 1 Vern. where, by the Master of the Rolls, there are four Things favoured in Equity, viz. Livery, Attornment, Affent to a Legacy, and the new Publication of a Will; and in either of these Cases a slender Evidence will serve the Turn.}

11. Some Bailiffs, who had served an Execution in Breach of an Injunction, find Money hid in the House, and carry it away; and the Party, at whose Suit the Execution was taken out, was ordered to make Satisfaction, who complained of this Order as unjust, saying, that the Parties should be admitted to purge themselves by Oath, and that the Plaintiff should not be admitted to be Judge of his own Damages; but my Lord Chancellor confirmed the Order, and said, that a Man who had stolen, would not stick to forswear it; and that therefore, in Odium solitioris, the Oath of the Party injured should be a good Charge on him who did the Wrong. 1 Vern. 207, 308. S. C. cited.

12. If there be but one Witness against the Defendant's Answer, the Plaintiff cannot have a Decree, it being Oath against Oath. Pach. 1683. between Alum and Fourdon, 1 Vern. 161. 3 Chan. Ca. 123. S. P.

13. The Defendant denied Notice of the Plaintiff's Title, the Plaintiff proved it by one Witness, which, by the Usage of this Court, is not sufficient to ground a Decree for the Plaintiff, being Oath against Oath; but the Court has been to direct a Trial at Law; but in this Case my Lord Keeper said, he did not see the Difference between doing it per Plura and per Pasciora, for to lend it to Law to be tried, where the Jury will certainly find it on the Testimony of one Witness; and then Decreeing it on that Verdict, is the same Thing as Decreeing on one Witness, without trying it at all, and therefore directed it to be tried; but that the Plaintiff should admit the Defendant's Answer to be read at the Trial, not as Evidence, for that he said it could not be, nor should they admit it to be true; but to be

N n n sworn,
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frorn, so that the Defendant might have the Benefit of his Oath at Law, as in this Court, if it would weigh any Thing with the Jury. Poscb. 1706. between Ibbotson and Rhodes, vid. 2 Vern. 554. S. C.

(C) Where parol or collateral Evidence will be admitted to explain, confirm, or contradict what appears on the Face of a Deed or Will.

1. The Earl of Gainsborough made his Will, and thereby devised several Legacies, and charged his Real Estate with the Payment of them and his Debts, and devised his Estate, so charged, to the Defendant, his Nephew, and made the Plaintiff, his Wife, Executrix; and the Bill was brought to have the Peronal Estate discharged from the Debts and Legacies, suggesting, that the Creditors threatened to come upon, and exhaust the Personal Estate, and that it was the Intent of the Testator, that she should have the Personal Estate clear to herself, and that the Directions for making the Will were so; but that either by the Mistake or Contrivance of the Person who drew the Will, it was not so expressed; the Defendant demurs, for that no such Averment could, or ought to be admitted against the Will in Writing; but by Rawlinson and Hutchins the Demurrer was over-ruled, and they said, that though such an Averment could not be (a) admitted where it was to make the Party a Title, yet where it was only to rebut an Equity, as it is in this Case, it might; and cited the Case of Crompton and North, 1 Chau. Ca. 196, where Mrs. Crompton devised her Lands to Sir H. North, to be sold for Payment of her Debts, which were very small, and the Heir would have had the Surplus a Trust for him; and the Court was of Opinion, that Sir H. North might be admitted to prove Mrs. Crompton's Intent otherwise, and the Case of Kingwill and Ogle, 8 May, 17 Car. 2. and Foster and Munt, and Pring and Pring, 2 Vern. 99. Afterwards the Cause coming on to be heard, on the Proofs it appeared plainly, that my Lord's Intention was, that she should have the Personal Estate, clear of the Debts; which was decreed accordingly; and that if it were taken from her by the Creditors, she should come in as a Creditor on the Real Estate; and 27 Feb. this Decree was affirmed in the House of Peers. Between the Countess and Earl of Gainsborough, 2 Vern. 252. S. C.

(a) The constant Rule of Law has been, to require all parol Proof brought to supply the Words of a Will, or to explain the Intent of the Testator, and that nothing should be averred, is the express Resolution in Lord Chetwynd's Case, 5 Ca. 67, and this Rule has since been thought necessary to be adhered to, not only on Account of the Statute of Frauds and Perjury, which was made to prevent Perjury, Contrariety of Evidence, and Uncertainty; but because little Regard ought to be had to the Expressions of the Testator, either before or after the Making his Will; because, possibly those Expressions might be used by him, on Purpose to controul or disfigure what he was doing, or to keep the Family quiet, or for other former Motives and Inducements, which cannot, after his Death, be found out; but this Rule has received a Difibution which has greatly prevailed of late, viz. between Evidence offered to a Court, and Evidence offered to a Jury; for in the last Case, no parol Evidence is to be admitted, left the Jury might be inveigled by it; but in the first it can do no harm, being to inform the Confidence of the Court, who cannot be biased or prejudiced by it. Vid. 2 Vern. 99, 537, 623.

2. So where J. S. devised all his Household-Goods, as Woolen, Linen, Pewter and Brass whatsoever, except a Trunk under the Chamber Window; and the Question was, whether the parol Proof of the Person who drew the Will, should be admitted to explain these
Evidence, Witnesses, and Proof.

these Words; and my Lord Keeper thought it might, notwithstanding the Statute of Frauds and Perjuries; for it here neither adds to, nor alters the Will, but only explains which of the Meanings shall be taken; as in Case of a Devise to Son John, when the Testator had Two of the same Name; and here the Word (As) may be a Restriction, or if the following be as particular Instances, it may not restrain the Word (whatsoever); and he thought the Words imported, to carry all the Houmold-Goods; and the Master of the Rolls being of that Opinion too, the Proof was read. Mich. 1705, between Pendleton and Grant, 2 Vern. 517. S. C.

3. J. S. having three Daughters, and several Grandchildren and Great Grandchildren, made his Will, and devised the Surplus of his Estate to be equally divided amongst his three Daughters, and all his Grandchildren and Great Grandchildren, that should be living within two Years after his Death, and died; and within two Years after his Death other Grandchildren were born; the Plaintiffs examined Witnesses, to prove J. S.'s Intent, that none born after his Death should take; and the Question was, whether they could be admitted to read this Proof; and my Lord Keeper was of Opinion, that such Proof might be admitted; for the Witnesses were to read, but their Depositions were only, that J. S. said so or so, or to that Effect, which my Lord said, signified nothing, for, that makes the Witness the Judge; and he ought to set down the very Words, for the Court to judge of; but without this Proof, my Lord held, that the Words in the Will (within two Years after my Death) were to be taken restrictively, and extended to none born after; and decreed accordingly, which Decree was affirmed in the House of Lords. Trin. 1700, between Dayrell and Molesworth, 2 Vern. 378. S. C. reported on another Point.

4. The Testator made his Will, and his Brother Executor, and devised to him his Real Estate, and thereby willed, that his Executor, out of his Rents in arrear, and other his Personal Estate, and out of half a Year's Rents and Profits of his Real Estate, after his Death, should pay his Debts and Legacies therein after-mentioned, and amongst other Legacies, devised 40L per Ann. to the Plaintiff, his Wife's Nephew, to maintain him at Cambridge, to be paid by his Brother and Executor; the Brother alleging, that he had fully administered the Personal Estate, and also the half Year's Profits of the Real, which incurred after the Testator's Death, refused to pay the 40L per Ann. and tho' it was admitted, that the Will had only made the half Year's Rents and Profits of the Real Estate liable; yet upon the Evidence of one J. N. who swore that the Brother promised the Testator, that he would pay the Plaintiff the Annuity; it was decreed for him by the Master of the Rolls, and confirmed by my Lord Keeper. Trin. 1705, between Oldman and Letchford, 2 Vern. 506.

5. A. devised to B. Lands of 60L per Annum Value, paying 100L which he owed J. S. and 100L more, which he by Bond owed J. N. and after some small Legacies, devised the Rest of his Personal Estate to the Plaintiffs his Nieces; it happened that the 100L by Bond, was not due to J. N. but to S. H. and therefore the Devises of Lands refused to pay it, insisting it should be paid out of the Personal Estate; but the Person who drew the Will having swore that
that the Toflateor intended the Debt due to S. H. the Master of the Rolf; decreed the Devisée of the Lands liable; which Decree was affirmed by my Lord Chancellor, who said, he saw no hurt in admitting collateral Proof to make certain the Person, or the Thing described. Mich. 1707. between Hodgson and Hodgson, 2 Vern. 593.

6. A. devised to his Wife some particular Legacies; and made her Executrix, but made no Disposition of the Surplus of his Personal Estate; and the Court admitted parol Proof, to shew that the Toflateor intended her the Surplus, being to out an Implication or Rule in Equity; and on the Evidence decreed for the Wife. 2 Vern. 648, 736. S. P. Parol Proof admitted, to shew that a Legacy greater than a Debt due to the Legatee, was not in Satisfaction of the Debt. 2 Vern. 593, 594.

7. If A. purchases in the Name of B. A. may be admitted to prove that he paid the Purchase-money, and so make it a resulting Truist, or Trust by Implication of Law for himself. 1 Vern. 366.

8. An Entry in the Steward's Book, and a parol Proof by the Foreman of the Jury, admitted as good Evidence, that a Female covert surrendered her whole Estate, although the Surrender upon the Roll, and the Admissión thereon, was but of a Moiety. Pafch 1706. between Hill and Wigglet, 2 Vern. 547.

(D) Of examining Witnesses, exhibiting Interrogatories, Publishing and Suppressing their Depositions.

1. A Master examined one Witness three Times to a Matter of Account, and the Depositions were suppressed. 2 Chan. Ca. 79.

2. If an Interrogatory is leading, that is sufficient to suppress the Deposition. 2 Vern. 472.

3. Interrogatories, and the Depositions of a Witness taken on them; had been suppressed, for that the Interrogatories were leading, and then Publication passed; and the Court was moved, that a new set of Interrogatories might be drawn, and settled by the Master, for the Examination of this Witness, whose Evidence was very material, and yet must be wholly lost, unless the Court would indulge them this Way; and though the Practice was admitted to be always against it; and it was urged to be of dangerous Consequence; yet one Precedent being produced to this Purpose, and the Interrogatories which had been suppressed being such as might be drawn by many other Counsel, without an Apprehension of their being leading; the Court, to let in the Party to the Benefit of his Witness's Testimony, ordered Interrogatories to be put in and settled by a Master, for his Examination over again. Trin. 1718. between Spence and Allen.

4. 'Tho the Rule be, that after Publication, no new Witness can be examined, nor a Witness before examined re-examined; yet on special Circumstances set forth by Motion and Affidavit, the Rule may be dispensed with. 1 Chan. Ca. 228. 2 Chan. Ca. 75. 1 Chan. Ca. 25.

5. Upon
5. Upon a Motion for Leave to examine after Publication upon making the usual Oath of not having seen the Depositions, the Lord Keeper declared, that in such a Case, the other side should be at Liberty to examine at large, as well as cross examine the Witnesses produced by the Party that made the Motion, (which was all he might do formerly) and his Reason was, that a Crafty Solicitor may lie on the Lurch, and examine nothing till after Publication is past, and the other Party may think himself secure, and so not examine to those Points, which he could otherwise have proved, in regard he finds his Adversary has not examined to those Matters: And when once Publication is past, and the Party that examined has seen his own Depositions, then the Side that lay still having tied up his Adversary, so that he can only cross examine the other’s Witnesses, applies for on Order upon the usual Affidavit to enlarge Publication; and when he has got that Order, then he comes in with a whole Cloud of Witnesses; And tho’ it may be thought hard, that any one should have Liberty to examine after he has seen the Depositions, yet his Lordship thought it a reasonable Penalty on such as would not examine in Time, or that should lie on the Catch, to take Advantage of the other Party, and ordered the Registrar to take Notice of it as a fixed Rule for the Future. *Mich. 1684. 1 Vern. 253.*

6. If Interrogatories are exhibited in the Examiner’s Office, and Witnesses examined thereon, either Party may without Application to the Court, or Order for that Purpose, exhibit one or more Interrogatories, or a new Set of Interrogatories for further Examination of the same, or other Witnesses: But when a Commission is taken out, there no new Interrogatories, or Set of Interrogatories can be exhibited without Motion and Order of the Court; and the Reason of the Difference is, because the Examiner is an Officer of Credit, and sworn, and therefore presumed to be impartial, and that he will not disclose the Depositions; whereas Commissioners are private Persons, and therefore without Leave of the Court, no new Interrogatories can be added before them; agreed by the Court and Bar. *Ploch. 1714.* between Andrews and Brown.

**(E) Of examining Witnesses de bene esse, and establishing their Testimony in Perpetuam rei Memoriam.**

A Cause having been heard, and referred to an Account, the Plaintiff afterwards moved to examine two of the Defendants de bene esse, which was ordered, unless Cause were shewn; and the Defendant’s Counsel in shewing Cause took this Difference; viz. that (a) After a altho’ it was an (a) Order of Course to examine a Defendant de bene esse, faving just Exceptions; yet when the Cause was open, and it the Court will, on Affidavit, that any of the Witnesses are aged or infirm, sick, or going beyond Sea, so that the Party is in Danger of losing their Testimony, order them to be examined de bene esse, which will make their Depositions valid in that Cause only, and against those who are Parties to it; but if it appear, that they might afterwards have been examined in Chief, regularly, such Depositions shall not be made Use of. To establish Testimony in Perpetuam rei Memoriam, a Bill must be filed against all those concerned in Interest, setting forth the Title, and that the Party is in Danger of losing the Benefit of the Testimony of several Witnesses by their Age, Sickness, &c. and the Depositions taken in, such a Case, will not only bind the Parties in that and all other Suits, but likewise all those claiming by or from them. *Vid. Stiles PLR. 387.*

O o o appeared
appeared that the Defendants were Parties interested, it was proper to shew it as Cause against such an Order before the Witnesses were examined; which Difference was allowed of; but it appearing in this Case, that the Defendants had given Release of their Right, the Cause was disallowed. *Pach.* 1687, between *Glover and Faulkner.* 1 *Vern.* 452.

2. The Plaintiff examined his Witnesses de bene esse, in *Mich.* Vacation, and in *Hill.* Term following, the Defendant put in his Answer; and five Weeks afterwards, before any Replication filed, or Examination in Chief, the Witnesses died; and it was moved, that this Deposition might be read; and it was likewise prayed, that it might be made use of at Law (altho' by the strict Rules of the (b) Common Law, no Depositions of Witnesses taken de bene esse, or before Life joined can be read or given in Evidence) and that the Defendant might be ordered not to oppose the Reading of at the Trial there; which my Lord Keeper held reasonable; for that otherwise an Examination de bene esse would be to no Purpose. 1 *Vern.* 331.

3. If one makes a Will, and afterwards becomes a Lunatick, a Bill will not lie to perpetuate the Testimony of the Witnesses to it in the Lunatick's Life-time. 1 *Vern.* 105.

4. If there are two Persons, and each of them pretends to be the Purchaser of a Reversion after an Estate for Life, and one of them exhibits his Bill to try his Title, and to perpetuate the Testimony of his Witnesses; such Bill will be dismissed, not being proper in the Life-time of Tenant for Life. 2 *Vern.* 159.

5. A Bill was exhibited to examine Witnesses in *Perpetuum rei Memoriam,* to prove a *Modus Decimundi,* the Defendant demurred, for that the Bill was to establish a Custom against the Church, and in Prejudice of Tithes, which are due *Communi Jure*; and several Precedents were cited, where Bills to have a *Modus* decreed, were upon a Demurrer dismissed; but this Bill being only to preserve Testimony, the Lord *Keeper* thought it reasonable the Defendant should Answer, and over-ruled the Demurrer. 1 *Vern.* 185. *Vid.* 1 *Vern.* 308, 441.

6. But where a Bill was exhibited to prove a Will, and to perpetuate the Testimony of the Witnesses, the Defendant pleaded himself a Purchaser without Notice of any such Will; and insisted, that unless there had been a Verdict in Affirmance of such Will, (nothing hindring the Plaintiff, but that if he had a Title, he might recover at Law) the Plaintiff ought not to be admitted to examine the Witnesses, thereby to hang a Cloud over a Purchaser's Estate; and upon Debate the Court allowed the Plea. *Hill.* 1685, between *Beckinal* and *Arnold.* 1 *Vern.* 354.
CAP. XXIX.

Executors and Administrators.

(A) Executors, in what cases more or less favoured in a Court of Equity, than elsewhere.
(B) What shall be Aliens.
(C) When upon the death of one of the Executors, the surplus of the personal estate, after debts and legacies paid, shall survive to the other.
(D) Where the surplus of the personal estate belongs to the Executor, or he is to be a trustee for the next of kin to the Testator.
(E) Of remedies by one executor against another, and how far the one shall be answerable for the other.
(F) Of administration, to whom to be granted, who are intituled to a distribution, and in what proportion, and here of bringing into potch-pot.

(A) Executors, in what cases more or less favoured in a Court of Equity, than elsewhere.

1. A. By Will gave the three children of B. (the eldest of whom was not ten years old) 200 l. B. the father, sued the executor in the Consistory Court for these legacies, who brought his bill, offering to pay them, provided he might be indemnified; to which the father demurred, because the matter was properly cognizable in the Consistory Court; but the demurrer was overruled; my Lord Chancellor declaring, that the matter was proper here, and that if the matter had proceeded to a sentence in the Ecclesiastical Court, it would be proper to come here for the executor's indemnity; and that here legatores were to give security to refund, but not there; and this court will see the money put out
executors and administrators.

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out for the benefit of the children. hill. 1681. between hoaroll and waldron. 1 vern. 26.

2. if the spiritual court go about to compel an executor to pay a legacy without security to refund, a prohibition shall go. 1 vern. 93. per lord chancellor.

3. the plaintiff being executor, and his testator greatly indebted, and being desirous to be rid of the assets, as far as they would go, and that his payments might not be afterwards questioned, brought a bill against all the testator's creditors, to the intent they might, if they would, contest each other's debts, and dispute who ought to be preferred in payment: the defendant being a creditor demurred, for that the bill contained multiplicity of matter, wherein he was not concerned; but the court overruled the demurrer, and held it a proper bill, and a safe way for the executor to take. 2 vern. 37.

4. a widow possessed herself of her husband's personal estate; and paid several of his debts, and after his executor got the estate out of her hands; and upon a bill preferred by her, it was decreed by consent of counsel, that she should be allowed for all payments made, which were incumbent on the executor to pay, according to the course of law; but as to payments made out of order and rule, which the law left the executor liable to, she should not be allowed, if they were to the prejudice of the executor. 15 car. 2, between ayre and ayre. 1 chan. ca. 33.

5. if a widow possessed herself of the personal estate as executrix under a revoked will, and pays debts and legacies, but has no notice of the revocation, she shall be allowed those payments in equity. vid. 1 chan. ca. 126.

6. but where an administrator possessed himself of the intestate's goods, and devised legacies and died, and his executor without compulsion, and pending a suit in right of the intestate, to recover the goods, paid the legacies; and the court would not relieve him, because the payment was voluntary, and with notice, that the right to the intestate's goods was controverted. 31 car. 2, between hodges and waddington. 2 chan. ca. 9.

7. if an administrator exhibits a bill for a discovery of the personal estate of the intestate, and the defendant pleads, that the party made a will, and that it is now litigated in the spiritual court; yet equity will decree a discovery. mich. 1682. between wright and blick. 1 vern. 106.

8. if three several actions at one time are brought against an executor, and he to each action pleads rei ipsa nos minus ultra 100 l, and to upon each action there is judgment for 100 l, and therefore prays an injunction; yet per lord keeper, he can have no relief; for in cases proper for law, a man must defend himself by legal pleadings; and every executor ought to be careful in the first place to cover his assets with a judgment. 1 vern. 119.

9. so where an administrator exhibited a bill to be relieved after a special plena administravit pleaded; and verdict and judgment thereon upon pretence, that the attorney at law, without direction pleaded, that the defendant had not notice of the original, until the 12th of march, and had then fully administered; and liber taken, that the defendant had notice before the 12th, viz., the 6th of march; whereas in truth he had fully administered before the 6th of march.
March, and before the Original purchased, so that the Right was never tried at Law; yet the Bill was dismissed at the Rolls, and the Dismission affirmed upon an Appeal to the Lord Keeper. Mich. 1695, between Stephenson and Wilson. 2 Vern. 325.

10. But where an Executor exhibited a Bill, to be relieved against a Judgment obtained against him, and furnisht, that he gave Directions to his Attorney to plead specially, that he had not Affets ultra what would satisfy Debts of a higher Nature; but that the Attorney pleaded generally Plenemont Administris and on the Issue, a Letter which he had been persuaded to write by the Importunity of the Defendant’s Friends, giving an Account of the Testator’s Estate, and in which was an Acknowledgment of 300 l. due to the Testator on a Mortgage; was given in Evidence, and held sufficient by the Court and Jury to charge them; but he proving that this Mortgage was worth nothing, there being three Precedent Mortgages on the same Estate; and that he had not Notice of it at the Writing of the Letter, the Court relieved him. Trin. 1690, between Robinson and Bell. 2 Vern. 146, 147.

11. In Debt against an Executor for 700 l. the Executor pleaded ne unques Executor, and on proving at the Trial, that a Chimney-back, or some other flight Thing came to the Defendant’s Hands, the Plaintiff had a Verdict; but Equity relieved against, cited by Hutchins Lord Commissioner, to be adjudged in Lord Bacon’s Time.

2 Vern. 147.

12. So in another Case upon the like Plea of ne Unques Executor, the Plaintiff proved the Defendant took Money for a Pot of Ale sold by the Testator in his Life-time; and Equity relieved between Cryer and Goodhand. 2 Vern. 148, cited by Hutchins Lord Commissioner, to be adjudged by Lord Nottingham.

13. The Executor of an Executor shall be liable in Equity for any Waite or Wrong done by his Executor; altho’ at Law it is considered as a Peronal Tort, which dies with the Executor. 2 Chan. Ca. 217, per Lord Chancellor.

14. An Executor of an Executor is not liable at Law; but there may be Remedy had against him in Equity: 2 Mod. 293, the Executor of an Executor, who commits a Devastatis, liable in Equity.

1 Chan. Ca. 303.

15. If A. devises Legacies, and makes B. and C. Executors, and B. makes C. and D. his Executors, and dies; and they possess themselves of the Estate of A. they may be both charged in Equity; for tho’ in Point of Law, the Executorship survived to C. and D. is not privy, yet the Estate of A. in whose Hands forever, ought to be liable. Trin. 15 Car. 2. between Nicholson and Sherman. 1 Chan. Ca. 57. resolved upon Demurrer: vid. 3 Vern. 73. that a Creditor may follow the Testator’s Estate into whose Hands forever it comes, notwithstanding any Assignment of it by the Executor.

16. If A. makes B. Executor, and after Debts and Legacies paid, devites residuum bonorum to C; if B. put not in all the Goods into his Inventory, or under-values those he puts in; C. before the Debts are paid, may sue B. in Equity, to enforce him to shew the very Value of the Goods. Pasch. 1 Car. 1. Palm. 409. per Dodd and Crew.
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17. A Bill may be exhibited in Equity to discover Aliens. 2 Chan. Rep. 37. against an Executor, and he thereupon decreed to pay Debts and Legacies. 2 Chan. Ca. 100. must charge that Goods came to his Hands. 1 Chan. Ca. 216. but not till he is sued at Law. Hard. 115. Qs.

18. A was bound to B. in a Bond of 100 l. and B. made his Will, and C. Executor thereof; and after declared his farther Will that A. should have the Bond, and died; C. proved the Will, but omitted this Codicil; and to compel him to prove it, A. sued C. before the, &c. Pending which the Bond was sued at Law; A. having filed his Bill for Relief, it was resolved that there should be no Relief for the Legacy before the Codicil proved, and that then he should be relieved against the Bond by reason of the Legacy; but the Court supported the Injunction till, &c. Paffb. 1657. between Took and Fitz-John. Hard. 96.

19. A Bill was exhibited, suggesting that the Defendant had set up a Will, pretended to be made by one, who died in the great Sickness in London; and that the Defendant pretending to be Executor of it, endeavoured, being In solvent, to get in the Debts due to the Testator; whereas the Will was unduly obtained, and was litigated in the Spiritual Court; and the Court on Motion ordered, that the Debtors to the Deceased's Estate should forbear to pay any Money, till the Matter settled in the Spiritual Court; although it was urged, that the Objection of Insolvency might be made to every Executor. Paffb. 18 Car. 2. between Smallpiece and Angwin. 1 Chan. Ca. 75.

20. Equity will oblige an Executor to pay Arrears of Rent, tho' the Person of the Testator was not liable at Law. 1 Chan. Ca. 121.

21. The Defendant's Testator gave the Plaintiff 1000 l. to be paid at the Age of Twenty-one Years; the Bill suggested, that the Defendant wasted the Estate, and therefore the Plaintiff prayed he might have his Security to pay this Legacy when due; which was decreed accordingly by the Master of the Rolls. Hill. 20 & 21 Car. 2. 1 Chan. Ca. 121.

22. So where the Testator devised a Legacy to his Child an Infant, payable at the Age of Twenty-three, and made his Wife Executrix and Re sidual Legatee, and she married a second Husband and died; and he took out Administration de bonis non, with Will annexed; (his Wife being Residual Legatee) and upon a Suggestion of Insolvency, the Court decreed him to give Security to pay the Legacy when it should become payable. Mich. 1691. between Reus and Noble. 2 Vern. 249.

23. If an Executor or Administrator receives in Money, which was secured to the Testator, and he lends it out again, and receives Interest for it, yet he shall not be accountable for the Interest; for he lends it out at his own Peril; and there is no Difference when the Debtor voluntarily pays in the Debt, and when he is compelled to it: Decreed Hill. 31 Car. 2. between Grovesnor and Carterright. 2 Chan. Ca. 21. 2 Vern. 197. S. C. cited, and said to have been adjudged otherwise by my Lord Chancellor, but reversed in the House of Lords. 2 Chan. Ca. 35. S. P. decreed. Vid. 1 Vern. 197. cont. and there held by my Lord Chancellor to be reasonable, that Executors in all Cases should answer Interest, if they had used the Money in Trade, or received any Interest for it; and that the

Objection
Object of the Executors, being answerable for the Money, if it should miscarry or be lost, was of little Force now, because a Man may infure his Money for one per Cent. and therefore decreed the Executor liable, unless he made Oath that he kept the Money by him. 2 Chan. Ca. 153. S. C. that an Executor or Trustee, tho' not impoverished or directed to place out Money at Interest, yet if he makes Interest, he shall be accountable for it: Decreed 2 Vern. 548.

24. In this Case a Difference was taken by my Lord Chancellor; that if an Executor or Trustee of Money places it out in the Funds, or on other Security, whereby he gains considerably, that he shall have the whole Benefit thereof to himself, in respect of the Hazard he run of being a considerable Loser thereby, which he must have born: But if such Executor or Trustee were an insolvent Person at the Time of placing out such Trust Money, there the Capi que Trust shall have the whole Benefit gained thereby, as he only would have born the Los thereof, if any had happened; the Trustee or Executor, by reason of his Insolvency being incapable thereof, and consequently running no Hazard at all. Mich. 1718. between Bromfield and Wykerley.

25. A made his Will, and gave several Legacies, and made B. his Kinman Executor and Residuary Legatee; great Part of his Estate consisted in East-India Stock, and he by his Will directed his Executor to turn his Estate into Money, as soon as conveniently might be; East-India Stock bore then a good Price, and several of the Legatees called for their Legacies; and the Executor taking the Estate to be sufficient to pay all, gave them Bonds for their Legacies, but kept the Stock so long, till it fell so low, that he had not Assets to pay the Legacies; and the Executor brought his Bill to have those, to whom he had given Bonds for their Legacies, abate; and that those that were unpaid, might take their Legacies in Proportion, at the Rate the Stock was then at; but my Lord Keeper would not give him any Relief against those that had Bonds; and as to the others, he was to answer for the Stock at the Value it was of at the End of the Year, after the Testator's Death. Hill. 1707. Keyling's Case.

26. An Executor lost a Bond due to the Testator, which was urged, in behalf of a Bond-Creditor, he should stand charged with, and make good the Debt to the Testator's Estate; and for the Executor it being insisted, that a Bond is not Assets at Law, but a Creditor must expect until the Money due upon it be recovered; nor is the Los of a Bond a Depravation at Law, and it would be hard to make the Executor answer it out of his own Estate, in case the Obligor was insolvent (as in this Case he was) especially in Equity; and the rather, for that the Losing of the Bond did not lose the Debt, but might be recovered in Equity; and the Executor had already brought a Bill against the Obligor for that Purpose; and the Court inclined to charge the Defendant with the Debt, but for the Prefent only directed, that the Executor should prosecute the Suit brought by him against the Obligor, with Effect, in order to recover the Money due on the Bond that was lost, and respited the Judgment obtained by the Bond-Creditor in the mean Time. 2 Vern. 299.
Executors and Administrators.

27. If an Administrator brings Trespass for Goods, and recovers, and takes Part in Hand, and accepts a Covenant for Satisfaction of the Residue, and the Debtor afterwards fails, this is a Decisis in the Executor; between Norden and Lecture, cited by my Lord Chancellor, to be adjudged in B. R. and affirmed on a Writ of Error in the House of Lords. 1 Vern. 474.

28. An Heir at Law being sued, paid a Bond-Debt of his Ancestor's, in which he was bound, and afterwards brought his Bill against the Executor, to be reimbursed out of the Personal Assets; the Executor delivered up a Bond of the Testator's, and took another Bond from the Obligor, in which J. S. was bound as Surety with him; tho' it was admitted, that at Law, this did charge the Executor as a Conversion, and Receipt of so much of the Testator's Estate; yet as the Security was intended to be bettered by it, and as the Heir at Law was Plaintiff, the Court decreed, that the Executor should not be chargeable, but that he should assign a Security to the Heir. 1 Chan. Ca. 74.

29. A purchased a Leavehold Estate of an Executor, who had waived a great Part of the Assets; having Notice, that there was a Bond-Creditor of the Testator's, whose Debt was 100l. unsatisfied, and out of the Purchase-Money he had an Allowance of a Debt of 200l. due to him from the Tefator, and a Debt of 550l. due to him from the Executor himself; the Remainder being 150l. he paid the Executor, on a Bill brought by the Bond-Creditor, to have Satisfaction for his Debt out of the Leavehold Estate, being Part of the Testator's Assets; tho' for the Defendant it was insisted, that an Executor may sell, and with the Money, when he has it, pay his own Debts: And for the same Reason he may, upon Sale, discount and allow the Purchaser, the Debt he owes him; and the rather in this Case, because he paid 150l. in Money, with which the Executor might have paid the Plaintiff's Debt; yet it was decreed by the Master of the Rolls, and confirmed by my Lord Chancellor for the Plaintiff; saying that the Defendant was a Party, and consenting to, and contriving a Decisis. Mich. 1708. between Crane and Drake. 2 Vern. 616.

30. After a Suit commenced in Equity, an Executor shall not be allowed any Voluntary Payments. Hill. 1685, between Bright and Woodward. 1 Vern. 369. per Curiam. 2 Chan. Ca. 201. S. P. per Curiam.

31. So where an Executor confessed a Judgment pending a Bill in Equity, and the Court held that it should not be allowed upon an Account of Assets. Pasch. 1867. between Surrey and Smalley. 2 Vern. 457. 2 Vern. 63. S. P. per Curiam; but if he is sued at Law by one Bond-Creditor, pending a Suit against him in Equity by another, he may confess Judgment to the Bond-Creditor, who sues him at Law. 2 Vern. 299, 300.
(B) What shall be (A) Affets.

1. Purchased Lands in his own Name, and took an Assignment of a Mortgage Term for Years, in the Name of two Trustees, and died, leaving his Wife Executrix; and the Plaintiff, his Heir at Law, brought a Bill to have the Term assigned to him, for that it was attended the Inheritance, which is decreed accordingly; although it was insisted upon, in behalf of the Executrix, that it was a Term in Goods, and that there being no Mention in the Assignment that it should attend the Inheritance, it should be Affets, and not enjoyed as a Chattel: Hill, 1620, between Tiffin and Tiffin: 2 Vern, 1, 2, but Q, if there was any Want of Affets.

2. For where a Man took an Assignment of a Term in a Trustee's Name, and the Inheritance in his own Name; it was held, that the Term is attendant upon the Inheritance; yet it shall be Affets for Payment of Debts, as well as a Term in a Man's own Name is Affets at Law; but with this Difference, that the Heir shall have the Benefit of the Surplus of the Trust of a Term, and not the Executor after Debts paid, but if a Term be expressly declared by Deed to be Attendant on the Inheritance, then such a Term shall not be made Affets in Equity, and the Reporter says, this Point was not directly in the Case, but came in by way of Argument only. Mich. 1683, between Chapman and Bond: 1 Vern. 188, 189. vid. 1 Vern. 104, that such a Term shall be Affets to pay Debts, tho' not Subject to the Custody of London, a Chan. Ca. 173, S. P. per Curiam, and a Note added by the Reporter, that it was contrary to former Resolutions.

3. But where A. failed in Fee, in Consideration of a Marriage-Portion, demeant certain Lands for ninety-nine Years to B. and C. under the Rent of a Pepper-Corn, upon Trust, that they should redeem them in the following Manner, e. g. to A for ninety-nine Years and eleven Months, if he should live so long, reserving the Rent of a Pepper-Corn for the whole Life of A. and after his Death, a Rent of 1500 l. per. Ann. during the Life of his Wife, as a Jointure for her, and after her Death, a Pepper-Corn for the Residue of the Term; B. and C. redeemed accordingly. A. died indebted 5000 l. by Bond-Debts, and 18000 l. by Simple Contract, and left not above 6000 l. Personal Estate; on a Bill brought by the Creditors, to have this Term made Affets, it was held by three Judges, the Matter of the Rolls, and my Lord Chancellor, that this Term being raised for a particular Purposo, could not be liable to any other Debts than the Inheritance was, and decreed accordingly. Pach. 1683, between Baden & al and the Countes Dowager of Pembroke.

2 Vern. 52, 53.

4. By the Statute of Frauds and Perjuries, the Trust of an Inheritance is made (B) Affets at Law, but the Trust of a Term is not; and by a Clause in the Statute, when Judgment is obtained against the Testator, the Sheriff may take the Trust Estate into Execution.

(B) What shall be Legal, what Equitable, Affets, and the Order in which Debts shall be paid, Title Creditor and Debtor, Letter (B).

Q q q

5. If
5. If A. purchases a Walk in a Chafe, and takes the Patent to himself and his Wife; and J. S. during their Lives, and the Life of the Survivor; and the Husband dies indebted, yet the Wife shall have the Benefit of the Patent during her Life, tho' A. had not left Affets to pay his Debts; but after her Death, J. S. must be a Trustee for the Executor: Decreed. 2 Vern. 57.

6. J. S. on the Sale of Lands, takes a Bond from the Purchaser, to pay any Sum or Sums of Money not exceeding 500 l. as he should by Will appoint; and J. S. by Will distributes it, and appoints Payment of it to several of his Relations; the Bill was brought by the Creditors of \\textit{J. S.} for Satisfaction out of Affets, and \textit{(inter alia)} to have the 500 l. applied towards Payment of their Debts; and the Court held, that J. S. having Power to dispose of the 500 l. it must be looked upon as Part of his Estate; and decreed it to be Affets, liable to the Plaintiff's Debts. Trin. 1694, between Thompson and Towne. 2 Vern. 319.

7. So where A. by Marriage Settlement, having a Power to charge an Estate with any Sum not exceeding 3000 l. for such Purposes as he thought fit, by Deed appointed the 3000 l. as a Collateral Security for quiet Enjoyment of an Estate he had sold; and if no Incumbrance did appear, the Appointment was to be void, and by Will devised the 3000 l. to his Daughter; and upon a Bill brought by the Creditors of A., the 3000 l. was decreed to be applied to the Payment of his Debts. 2 Vern. 465.

8. If A. devised of a Leasehold Estate to him and his Heirs for three Lives, settles it on his Daughter and her Husband for their Lives, Remainder to the Ufe of his own Executors and Administrators; and the Daughter and her Husband die, and A. dies indebted by Simple Contract, having devised this Estate to his Wife, the Ufe of this Estate being limited to the Executors and Administrators of A. makes it Personal Estate in A. and being Personal Estate, A. cannot devise it exempt from his Debts, though due but by Simple Contract: Decreed. 2 Vern. 719. Vid. 1. Vern. 234.

(C) Where upon the Death of one of the Executors, the Surplus of the Personal Estate, after Debts and Legacies paid, shall survive to the other.

1. If a Man makes B. and C. Executors, and deviseth to them \textit{residuari} \textit{bonorum}, &c. after Debts and Legacies paid; and after B. dies, the Surplusage shall (a) not survive, for it shall be supposed, that the Tchator intended an equal Share to his Executors, and decreed for the Administrator of B. accordingly, but much to the Disatisfaction of the Bar; for where the Intention is Secret, and not declared, it must give way to the Legal Intent. Mich. 26 Car. between Cox and Quantock. 1 Chanc. Ca. 238.

(a) 2. For the Residua of the Residue of the Residua, (since have been otherewise in Equity, and it seems well settled, that the Survivor shall have the whole by Law; as where a Man devised Goods to A. and B. and the Executor attented to the Legacy; and A. died, and his Executor filed in the Spiritual Court for A.'s Share, there being no Survivipship in such Case, by the Ecclesiastical Law, whereupon B. filed a Prohibition, and declared; and upon Demurrer and Argument, it was adjudged the Prohibition should stand; for by the Assent of the Executor, the Intereit was vested in the Legatees, and became a Chattel in them, governable by the Rules of the Common Law. Mich. 29. Car. 2. between Bajjard and Stakely. 2 Lea. 209. Vol. 1. Lea. 161, 170.


2. A Man having devised the Surplus of his Estate, after his Debts paid, to A. and B. A. died; and it was adjudged in the Delegates, and decreed by the Lord North, and confirmed by Jeffries Lord Chancellor, that this was a Joint Devise, and should Survive to B. and the Lord Chancellor's Opinion was, that if A. and B. had been made (b) Executors, and A. had posseffed a Moiety of the Goods, and died, it would have been all one. Mich. 1687. between Lady Shore and Billingsey. 1 Vern. 482.

Ca. 64. Draper's Case resolved, S. P. resolved between Cos and Quainton, 2 Vern. 453.

3. So where a Man devised all the Rest and Residue of his Goods, Chattels, and Personal Estate to two Persons, their Executors and Administrators, and one of them died; and it was, on a Bill brought by his Executor against the Surviving Devisee, held, that the Survivor should take the whole to his own Ufe, and should not be a Trustee, as to a Moiety, for the Representatives of him who is dead; and that they were to be considered as Jointenants, where Survivorship takes Place, as well in Cales of Chattels, as in Cales of Inheritance. Trin. 1729. between Gray and Willis at the Rolls.

4. A. made his Will, and after several Legacies, gave and devised all the Rest and Residue, and Remainder of his Personal Estate to three Persons, whom he made his Executors; one of them died in the Life-time of the TESTATOR; and the only Question was, whether the two surviving Executors should have the Whole, or whether the third Part should be distributed, according to the Statute amongst the next of Kin; and the Master of the Rolls, on Time taken to consider of the Case, and citing most of the Authorities, both out of the Civil and Common Law, was of Opinion, and decreed accordingly, that the two surviving Executors should take the Whole. Trin. 1730. between Hunt and Berkeley, at the Rolls.

(D) When the Surplus of the Personal Estate belongs to the Executor, or he is to be a Trustee for the next of Kin to the Testator.

1. A. By Will devised particular Legacies to his Children, and Grandchildren, and 10 l. a-piece to A. and B. whom he made Executors for their Care; the Surplus of the Personal Estate being 5000 l. and upwards; the Question was, whether the Surplus should be a Trust for the Children, or go to the Executors; and it was decreed (a) a Trust for the Children. Mich. 1687. between Pfeffer and (c) Since this Case, there have been Varieties of Resolutions, both in Chancery, and the House of Lords on this Head; notwithstanding which, this Matter seems as undetermined as any in Equity; for tho' the Law calls the whole Personal Estate on the Executor; yet as the Intention of the Testator is chiefly to be regarded in a Will, if it appears by a strong and necessary Implication, that the Executor was not to have it to his own Use, Equity will decreed him a Trustee for the next of Kin to the Testator; and therefore it items agreed, that if Strangers, or distant Relations are made Executors, and Legacies are given them for their Care and Trouble, that they shall not have the Surplus, but where the Executors are as nearly related, as those who claim as next of Kin; and they have had all Legacies given them, tho' perhaps some of them greater, and some of them less; great Doubt has been, in which Instances it has (as appears by the Cases) been determined according to the Intention of the Testator, collected not only from the Words of the Will, but likewise from collateral Proof of Testator's greater Kindness, &c. which upon these Occasions has been admitted, sometimes for the Executor, and sometimes for the next a kin.

2. A. By
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2. A. by Will gave several Legacies therein specified, to all her next of Kin by Name; and likewise gave particular Legacies to M. and P. two dissenting Ministers, and made them her Executors, but did not make any express Disposition of the Surplus of the Personal Estate; and the Executors were obliged to account and distribute the Surplus amongst the next of Kin of the Testator. Mich. 1698, between Bayley and Powell, 2 Vern. 361. decd.

3. So where A. made B. his Executor, and gave him 20 l. for Mourning, and B. not being of Kin to the Testator, the Surplus of the Personal Estate was decreed to be distributed. Pasch. 7 Ann. between Cook and Walker, 2 Vern. 676. S. C. cited.

4. So where A. gave 100 l. Legacy, and the Interest of 300 l. to his Wife for her Life, and made her E. and C. Executors, and gave to B. 20 l. for Mourning; and the Surplus was decreed to be distributed. Trin. 1 Ann. between Durwell and Benne, 2 Vern. 677. cited.

5. A. made his Will to the Effect following, I dispose of my Estate after-mentioned, and what else I have in the World, in Manner and Form following, and then gives several Legacies to his Relations, amounting to near the Value of his Estate (as appeared by a Calculation of his own Hand-writing by him, about that Time made) and made B. and C. Executors, and gave them 20 l. and intreated them to take the Trouble of getting in his Estate; the Testator lived ten Years after, and acquired an additional Estate, and died, not having altered, nor new published his Will; and on a Bill brought by the next of Kin against the surviving Executor, it was decreed, that the surviving Executor was but an Executor in Trust, and that the new acquired Estate should go to the Legatees in Proportion to their Legacies. Trin. 1690, between Cordell and Noden, 2 Vern. 148. Decreed by the Lords Commissioners, and Rawlinson rested much on the Words, I dispose of my Estate after-mentioned, and what else I have in the World, &c.

6. So where one made his Will, and his Wife Executors; and lived twenty Years after the Will, and acquired an Estate, and the Surplus was decreed to be distributed. 13 W. 3. between Ward and Lane, 2 Vern. 677. cited to be adjudged.

7. A. devised Lands to be sold for Payment of his Debts, and Wills, that the Surplus shall be deemed Part of his Personal Estate, and go to his Executors, and gives to his Executors 100 l. a-piece as a Legacy; and the Question was, whether the Executors should have the Surplus to their own Use, or should distribute, according to the Statue of Distributions; for the Executors it was insisted, that the Surplus should be Part of his Personal Estate, and go to them, and that he meant it them to their own Use; and his giving them a Legacy of 100 l. a-piece, cannot alter the Case, for the Surplus perhaps might be nothing; and therefore he gave them the 100 l. that they might at all Events be sure of something, and not to exclude them of the Benefit of the Surplus; and this being a Devise of the Surplus after Debts and Legacies paid, cannot be a Trust in them, for then all their Trust is performed, when Debts and Legacies are paid; on the other Side it was said, that the Words in the Will, that the Surplus should be Part of his Personal Estate (and go to his Executors) were only intended to exclude the Heir, who else would have had it, and not to give any greater Interest to his Executors than
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than they would have had otherwise; and of the same Opinion was my Lord Chancellor; and decreed accordingly. Hill. 1697. between the Lord Bridfol and Hungerford.

8. But where a Man devis'd his Library of Books to A. (except ten Books, such as his Wife should choose, as Plays, Romances, Sermons, but not Law-Books) and made his Executrix; and it was held by my Lord Keeper, that she should not by this Devis'e be excluded from the Benefit of the Surplus of the Personal Estate. Trim. 1704. between Griffith and Roger; decreed.

9. So where one not of Kin, but a Stranger, was made Executor, and had considerable Legacies given him; although it was decreed by Sir Peter King, in the Mayor's Court, in Favour of the Testator's two Brothers, that the Surplus should be distributed; yet upon Appeal to the House of Peers, that Decree was reversed; not barely as it stood upon the Will, but that parol Proof ought to be received in Favour of the Executor's Title, consistent with the Will; and the Proof being full as to the Testator's frequent Declarations, that his Executor, though a Stranger, should have the Surplus; it was decreed accordingly. Between Littlebury and Buckley S. P.; decreed on the parol Proof, between the Lady Granville and the Dutchess of Beauford, 2 Vern. 648; affirmed in the House of Lords. Vid. Title Evidence, Letter (C).

10. A possessed of a long Term for Year's, by Will devided it to his Wife for Life, and after her Death to the Child thee was then enfeint with, and if such Child died before it came to twenty-one, then he devided one third Part of the said Term to his Wife, her Executors and Administrators, and the other two Thirds to other Persons, and made his Wife Executrix of his Will, and died; and the Bill was brought against her by the next of Kin to the Testator, to have an Account and Distribution of the Surplus of his Personal Estate not devided by the Will; and two Questions were made, first, Whether the Devise to the Wife of one third Part of the Term was good, because it happened she was not then enfeint at all; and so the Contingency, upon which the Devise to her was to take Place, never happened; the other Question was, whether this Term, being Part of the Personal Estate, and expressly devided to her for Life, with such other contingent Interest on the Death of the supposed enfeint Child before twenty-one, should shut her out from the Surplus of the Personal Estate, which belonged to her as Executrix, and so the Surplus go in a Course of Administration, to be distributed amongst the Plaintiffs, as next of Kin; as to the first Point, my Lord Keeper delivered his Opinion, that tho' the Wife was not enfeint at the Time of the Death of the Testator; yet the Devise to her of such third Part of the Term was good, and as to the other Point dismissed the Plaintiff's Bill, and to set in the Executrix to the Surplus of the Personal Estate, not withstanding the Devise to her of Part, as aforesaid. Mich. 1711.

11. A was Executrix of B, her former Husband, and after married C, who, by his Will in 1686, devided to his Wife the Plate and Goods she had brought him in Marriage; and two silver Salvers, in Lieu of Plate that had been changed away, and made her Executrix, and died, leaving a Daughter by a former Wife, and his Wife enfeint of a Daughter; and there being no Devise of the Surplus of the Personal Estate, the Question was, whether she should take it as Executrix,
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trix, to her own Use, or liable to Distribution; and my Lord Keeper decreed the Surplus to the Wife, as well for that this Will was made before the Cae of Foster and Mant, as also for that in this Cae nothing is devised to the Wife, but what was her own before; and as she was Executrix to her former Husband; but principally, because where a Wife is made Executrix, it is to be presumed she was not made so to have barely an Office of Trouble, but of Benefit, to take the Surplus. Hill. 1711. between Ball and Smith. 2 Vern. 672.

12. The Plaintiff married one Mrs. Allen, Sister to William Allen, who being possesed of a Peronal Estate, to the Value of about 2000 l. and being taken ill, makes his Will in Writing the very Day before his Death, and thereby devises several Legacies to his Relations, and amongst the Rest, gives the Plaintiff, his Sister, about 1000 l. and gives 70 l. to Mr. Searle and his Wife, and their four Children, to buy them Mourning; and gives to his dear and most esteemed Friend, Mrs. Sarah Serle (one of the Daughters of Mr. Serle, to whom he had made his Address in Way of Marriage) 500 l. and gives his Horse and Furniture to one of the Defendants, by his Christian Name and Surname, and his Clothes to be disposed of by his Executors, and then concludes; as to the 70 l. I am intituled to in the South-Sea Company, and the Rest of my Personal Estate, I will, that the same shall be sold for Payment of my Debts and Legacies, and I make Mr. John and Mr. Thomas Serle my Executors, and dies; the Executors were two of the Children of Mr. Serle, and intituled to their Proportion of the 70 l. devised for Mourning, and one of them to the Horse and Furniture; but were no Ways related to the Testator; the Surplus of the Personal Estate came to about 600 l. and this Bill was brought against the Defendants, the Executors, to have an Account thereof; and that it might be paid to the Plaintiff, whose Wife was the only Sister, and next of kin to the Testator; and for the Plaintiffs, it was intituled, that the Executors were mere Strangers, no Ways related to the Testator, and that they had particular Legacies left them for Mourning out of the 70 l. and one of them had a Horse and Furniture expressly devis'd to him, and therefore it was not reasonable that they should go away with the Surplus of the Personal Estate; on the other Side it was intituled, that the Defendants being Executors, they represented the Testator; that they stood in his Place, and were intituled to whatever he left undisposed of; that this was the antient Law for many Ages, and therefore the legal Title being in them, they ought not to be defeated of it, without a manifest Intention of the Testator to the contrary; that here appeared no such Intent in the Will, for they are not named, either by the Christian Name or Surname, or so much as by the Name of their Office, till the very Close of the Will; nay, it was in Proof, that the Testator did not so much as consider whom he should make his Executors, till he had disposed of all the Legacies; that the giving one of them his Horse and Furniture, was only to exclude the other, who, by being Executor with him, would have been equally intituled to it, and could not be construed a Legacy to shut them out of the Surplus, since it rather regarded the other Executor than the Plaintiff, the next of kin; that they had it fully in Proof, that the Testator being asked, whether he would not give his Sister more, answered, he would not; that being asked, who should have the Surplus, or what should become of the Surplus? he said
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his Will should stand as it was, and that he had a very great Regard for the Defendant's Family, and was to have married their Sister; that these Proofs being in Affirmance of the Disposition which the Law made to the Executors, might be read; and that several Resolutions, since the Case of Foster and Munt, had pared away the Authority of that Case, and therefore prayed that the Bill may be dismissed. My Lord Chancellor was clearly of Opinion, that the Proofs being in Affirmance of the Disposition, ought to be read, and said, that they were so full as to make an End of this Case; that without a strong and violent Implication, the Executors ought not to be defeated of the Residue; that here was no such Implication in this Will; but rather the contrary; that to make Sce with the last Clause, it must be construed as a Devise of the South Sea Stock, and the Rest of his Personal Estate, to his Executors; for it immediately follows, and I make John and Thomas Serle my Executors, which could have no Relation to the Direction for Sale, unless by giving them the Surplus, which should arise by Sale; and as there appeared no strong or violent Implication to induce any other Construction, he could not give into so great a Change of the Law, but must Decline for the Executors; and accordingly did so. Hill. 1716. between (b) Batchelor and Serle.

(E) Of Remedies by one Executor against another, and hold far the one shall be answerable for the other.

1. If two Executors make Partition of the Specialties, &c. of the Testator, and after one of them releases an Obligation, which by the Partition belonged to the other; though the Debtor had Notice of the Partition, yet the other Executor shall not be relieved in Equity, unless the Release was procured by Fraud, or without a full Satisfaction; the Debtor must then satisfy the Overplus. Moor 610. but vid. Hard. 108. and Q whether he has not Remedy against the Executor.

2. A. made B. and C. Men of good Credit, his Executors; C. being a Banker, received all the Money, but B. joined with him in the Receipts, taking his Note, to shew that he received not the Money; and per Harcourt Lord Chancellor, If two Trustees join in a Receipt, and one receives the Money, he only who receives shall be liable; If there be two Executors, and they join in a Receipt, and one only receives the Money; as to Creditors, who are to have the utmost Benefit of the Law, each is liable for the Whole, though one Executor alone might give a Discharge, and the Joining of the other was unnecessary; but as to Legatees, and those claiming Distribution, who have no Remedy but in Equity, the Receipt of one Executor shall not charge the other; for the Joining in the Receipt is only Matter of Form, the substantial Part is the actual Receiving; and this only is regarded in Conscience. Mich. 12 Ann. between Churchill and Hopson. 1 Salk. 318.

3. But where one made two Executors, and devised all his Estate to his Wife for Life, and after to be equally divided amongst the Plaintiffs, who brought their Bill against the Executors for an Account;
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count; and the Defendants, by Answer, charge themselves jointly, and discharge themselves jointly; and inter alia charge themselves with two Notes for 200l. East-India Stock, and afterwards, pending the Suit, sold the said East-India Stock, and joined in the Transfer of it; but whether any Acquittance were given for the Purchase-money, did not appear: Cox, one of the Executors, becomes insolvent; and if Pitt, the other, should be charged with the whole Purchase-money, or only a Moiety, was the Question. Pitt, on Examination after the Hearing, having sworn he was perjured by Cox to join in the Sale, but received only a Moiety of the Money; and it was decreed by the Master of the Rolls, and affirmed by my Lord Keeper, that he should be charged with the Whole, notwithstanding the Caves of Heaton and Marriott, and Fellow and Owen: for they were Trustees of a Real Estate, where there was a Neediness for both to join; but these were Executors, where no such Neediness was; for one Executor might have fold without the other; besides, this was done pendente lite, and no Application made to this Court; and there is nothing to discharge Pitt, but his own Examination. Hill, 1708. between Murrell, and Cox and Pitt, 2 Vern. 570. S. C.

(F) Of Administration, to Whom to be granted, Who are intitled to a Distribution, and in What Proportion, and here of bringing into Hotchpot.

I. If an Intestate dies before the Year 1670, yet Administration being granted after the Making of the (a) Statute, his Personal Estate is liable to a Distribution. Mich. 1709. between Brice and Whitening, 2 Vern. 642.

(a) By the 22 & 23 Car. 2. cap. 10. All Ordinaries and Ecclesiastical Judges, upon granting Administration, must take Bond of the Administrator, with Two or more Sureties, with Condition, that the Administrator shall make a true and perfect Inventory of all the Goods and Chattels of the Decedent, and exhibit it into the Registry of the Ordinary's Court by such a Day, and to administer according to Law, and to make a true and just Account thereof, and to make Distribution as follows, viz. one Third to the Wife of the Intestate, the Residue amongst his Children, and such as are his legal Representatives, if any are dead, other than such Children who shall have any Estate by Settlement of the Intestate in his Life-time, equal to the other Shares; but those Children who have been advanced by Settlements or Portions by the Intestate, not equal to the other Shares, shall have so much of the Surplus as will make all equal; and the Heir at Law shall have an equal Share in the Distribution with the other Children, without any Consideration of what he had by Defect, or otherwise, from the Intestate. If there are no Children, nor legal Representatives of them, in such Case, one Moiety shall be allotted to the Wife, the Residue equally to the next of Kin of the Intestate, in an equal Degree, and those who legally represent them, there shall be no Representation amongst Collaterals, after Brothers and Sisters Children; and if there is no Wife, then all shall be distributed amongst the Children; and if no Child, then to the next of Kin to the Intestate, in an equal Degree, and their Representatives; no Distribution shall be made till a Year after the Decease of the Administration. By the 25 Car. 2. cap. 3. the above Act shall not extend to the Estates of Feme Coverta that die Intestate, but that their Husbands shall have Administration of their Personal Estates, as before the Making of the Act; and the Husbands are not compellable to make Distribution of their Personal Estates. By the 1 Jac. 2. cap. 17. No Administrator shall be cited to render an Account of the Personal Estate of the Intestate, other than by Inventory, unless it be at the Instance of some Person, in Behalf of a Minor, or of one having a Deed out of such Personal Estate, or Creditor, or next of Kin. If after the Death of the Father, any of his Children shall die Intestate, without Wife or Children, in the Life of the Mother, every Brother and Sister, and the Representatives of them, shall have an equal Share with the Mother; such Part of any Intestate's Estate within the City of London or Province of York, as any Administrator hath by Virtue only of being Administrator, shall be subject to Distribution, as in other Cases, and the Custom observed therein shall not be subject to extend to it.
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2. If Administration is granted to Two, and one dies, yet the Administration does not cease; for it is not like a Letter of Attorney to Two, where, by the Death of one, the Authority ceases; but is rather an Office; and Administrators are enabled to bring Actions in their own Names, come in the Place of Executors, and therefore the Office survives. *Mich. 1705.* between *Adams* and *Buckland*, 2 *Vern.* 514. per Lord Keeper.

3. If a Man makes his Will, and his Son Executor, but makes no Disposition of the Surplus of the Personal Estate; the Son dies without proving of the Will; the Ttstator is dead Inter alia as to the Surplus, and the same shall be distributed amongst the next of Kin of the Ttstator. 2 *Vern.* 634.

4. On the Statute for the better settling of Intestate Estates; the Question was on that Clause of the Statute, that there should be no Representations among Collaterals beyond Brothers and Sistors and Children, whether to be intended of Brothers and Sistors to the Intestate; or whether, when Distribution falls out amongst Brothers and Sistors, though remote Relations to the Intestate, Representation shall be admitted; and the Court held, that the Representation should be only between the Brothers and Sistors to the Intestate. *Trin. 1691.* between *Maw* and *Harding*, 2 *Vern.* 233. S. P. resolved on a Motion for a Prohibition in *B. R.* 1 *Salk.* 250. vid. 2 *Vern.* 168. S. P.; but no Res溶液.

5. If one dies Intestate, leaving a Grandmother, and Uncles and Aunts, the (b) Grandmother is intitled to the Personal Estate, in Exclusion of the Uncles and Aunts. *Trin. 1719.* between *Woodroff* and *Winkworth*, held clearly per *Curiam*.

6. If there be Grandfather, Father, and Son, and the Father dies Intestate, the Son shall have the Administration, and not the Grandfather. *Vid.* 2 *Vern.* 125.

7. A. had three Brothers, one died, leaving three Children, another Two, and the third Five; then A died Intestate; and it was resolved, that Distribution should be per Capita, and not per Stirpes, and that all the Children should have equal, because none take by Way of Representation, but all as next of Kin. *Mich. 1695.* between *Walshe* and *Walshe*, resolved in *Canis*.


9. The Plaintiff's Father, on the Marriage of the Daughter of B. covenanted, in Case of a second Marriage, to pay the first Son by the first Wife 500l. there was a Son and several other Children of the first Marriage; the Father died Intestate; and it was held, that the Heir must bring the 500l. into Hotchpot, although in Nature of Purchaser, under a Marriage-Settlement. *Hill. 1708.* between *Phiney* and *Phiney*, 2 *Vern.* 638, 639.

10. Mr. Freeman (late Chancellor of Ireland) in the Year 1693; on his Marriage, entered into Articles, in Consideration of the said Marriage, and of 4000l. Portion, to settle such an Estate to the Use of himself for Life, Remainder to his intended Wife for Life, S *f* Remainder
Remainder to the first and other Sons of the Marriage successively, in Tail Male, Remainder to Trustees for 1000 Years, in Trust, to raise Portions for Daughters, in Case there were no Sons; that is to say, if but one such Daughter, the Sum of 5000 l. and if two, or more, then the Sum of 6000 l. equally between them, to be paid and payable at her and their respective Age or Ages of eighteen Years, or Days of Marriage, which should first happen; and 80 l. per Ann. Maintenance in the mean Time, to each Daughter, with Remainder to his own right Heirs, and gave a Bond of 10000 l. Penalty, for Performance of Covenants; the Marriage takes Effect, and they had but one Daughter only, and no Son; then the Wife dies, and afterwards Mr. Freeman married a second Wife, and on that Marriage made a Settlement of this Estate amongst others; but the second Wife, or her Trustees, had no Notice of the Articles made on the first Marriage. Afterwards Mr. Freeman died Intestate, leaving a Son and a Daughter by his second Wife, and left a Personal Estate to the Amount of 20000 l. and upwards, at the Time of his Death, which was in 1710; the Daughter by his first Wife, at that Time, was about twelve Years of Age, and some Time since intermarried with the Plaintiff, they brought their Bill to have an Account of the Personal Estate of Mr. Freeman, and their distributary Share thereof; and the only Question was, whether this 5000 l. should not be looked upon to be so far an Advancement of the Plaintiff, the Wife, that if she would have any farther Share of her Father's Personal Estate, they must bring this 5000 l. into Hatchpot, upon the several Clauses and Intent of the Statute 21 & 22 Car. 2, for the Distribution of Intestates Estates.

For the Plaintiff it was argued, that they were intitled to a distributary Share of the Personal Estate left by the Father at the Time of his Death, without Regard to this 5000 l. which was no Advancement, either within the Words or Meaning of the Act of Parliament, which intended only an Advancement of Children after they come in effe, and when they were about being married or disposed of in the World; but this, if any, was an Advancement long before the Plaintiff was born, and when it was wholly unknown and uncertain, whether there ever would be such a Daughter.

That it was likewise contingent and uncertain, after she was born, whether she would ever be intitled to this Fortune, or not; for if she had died before eighteen, or Marriage, it would have sunk into the Inheritance, for the Benefit of the Heir at Law, according to the Case of Pawlett and Pawlett, 2 Vent. And she was but twelve Years of Age at the Time of her Father's Death, and therefore might have died before she was intitled to this 5000 l.

That her distributary Share of her Father's Personal Estate vested in her immediately on her Father's Death, or not at all, and then it could not be devested out of her, by the Accident of her attaining eighteen, or being married, whereby this 5000 l. became due.

That this 5000 l. was a Debt upon the Father's Estate, which she was intitled to as a Creditor or Purchaser, in Consideration of her Mother's Marriage and Portion; for which was cited the Case of Feast and Feast, 3 April, 1726, where, on a Marriage-Treaty, Sir Felix Feast covenanted to leave his Wife 2000 l. at his Death, 2000 l. to his eldest Son, and 1000 l. a-piece to his younger Children, and afterwards, being a Freeman of London, died, leaving several younger Children;
Children; and it was held in that Case, that the 1000l a-piece to
the younger Children being due only by Covenant, was a Debt on the
Personal Estate, and not being to be paid till after the Father's
Death, was no Provision or Advancement, either within the Statute
of Distributions, or the Custom of London, to bar them of their
custody or distributory Shares of their Father's Personal Estate,
which were greatly advanced at the Time of his Death.

To shew that this was not an Advancement within the Statute,
were considered the several Clauses of the Act; and it was urged,

1st, That the Statute mentions only two Cases wherein there is
to be any bringing into Hotchpot: 1st, Where the Child had been
advanced by the Father with any Estate. 2dly, Where he had been
advanced with any Portion; as to the first, the Plaintiff cannot be
paid to have any Estate by these Articles, for the Word Estate in the
Statute, means Lands in Opposition to Portion; and in the latter
Part of it, 'his mentioned Lands by Settlement expressly; but in the
present Case, the Plaintiff cannot be paid to have any Provision of
Lands, the Settlement of the Lands being only in the Nature of a
Mortgage, for her Portion. 2dly, That this Portion is not within
the Statute, as an Advancement by the Intestate in his Life-time, be-
ning neither payable nor demandable till after his Death; and there-
fore in the Case of Rowland and Shepherd, where the Father agreed
to give in Marriage with his Daughter, the Sum of 7000l. to be
paid by Installments of 1000l. a Year, and the Father had paid 6000l.
of this Portion, but died before the last 1000l. became due; and on a
Bill brought for a Distribution of his Personal Estate, it was decreed
by Lord Macclesfield, and affirmed by your Lordship, that this 6000l.
paid, was not Part of the Advancement to be brought into Hotch-
not, but that the remaining 1000l. was a Debt to be paid out of
the Personal Estate.

2dly, That the Statute must operate, either at the Time of the
Father's Death, or within a Year after at furthest; but in this Case
the Plaintiff was not intitled to her 5000l. either in her Father's
Life-time, or within a Year after; and is the Distribution to wait till
it be seen, whether she would attain eighteen, or be married?

Suppose there had been a Son at the Time of the Father's
Death, who had after died without Issue, would this Portion have
been an Advancement in the mean Time, so as to debar her of her
distributory Share; for being contingent at first, such Value cannot be
set on it in Equity, as Gamblers do on Chances; and if Part is to
be laid up till the Contingency happens, it is no Advancement in the
mean Time; nor is there any Infancy, that one distributory Share
should be laid up to make a Heap.

3dly, This 5000l. was not a voluntary Provision moving from
the Father, but the Plaintiff was a Purchaser thereof, in Considera-
tion of her Mother's Portion; and suppose a Child had Money of his
own, and agreed with his Father, in Consideration thereof, to have
a Portion from his Father, after his Death; or if a collateral Rela-
tion had purchased such a Portion from the Father for his Child,
certainly this would not be an Advancement; and the Intent of the
Statute was to make them all equal out of the Father's Personal E-
state, not out of what was purchased for them by others, or by the
Mother, as in this Case.
Executors and Administrators.

And it was likewise argued, that this was not a Debt originally payable out of the Personal Estate, but that it was originally payable out of Lands, notwithstanding the 10000l. Bond for performing of Covenants; and though the Defendants, who claim under the Settlement made on their Mother's Marriage, shall not be affected as to the Lands thereby settled for Want of Notice; yet as to the Lands not comprized therein, they shall be liable in the first Place; and if they are not sufficient, the Personal Estate must be applied in Aid to make it up, by Reafon of the Bond.

Besides, no Case can be produced where a Portion settled by Marriage-Articles, had been brought into Hotchpot, as an Advancement by the Father; and yet it must often have happened, that Fathers who have made such Settlements, have died Intestate, and is therefore of great Consequence.

On the other Side it was argued for the Defendants, that in the first Place no Settlement being made pursuant to the Articles, and the Bond for Performance thereof, the Land will in no Sort be subject thereto, but in Aid of the Personal Estate, if that were deficient; and that too by the Assistance of a Court of Equity on the Agreement; for between the Heir and Executor, the Personal Estate shall be applied in the first Place to discharge Incumbrances, even on the Real Estate, and would have been so in this Case, where it rested barely in Covenant, and on the Bond.

That the 5000l. thus provided for by the Settlement, was an Advancement within the Meaning of the Statute, which appears throughout to intend and preserve an Equality between the Children; and if any Finesse of Reasoning were to be made Use of in the Construction thereof, it ought rather to be in Support of that Intent.

That the subject Matter of the Statute was chiefly Personal Estate, and yet there is no Reason to exclude a Provision by a Real Estate; and therefore where the Statute says, other than such Child who shall have an Estate by Settlement, why should not that be extended both to Real and Personal Estate; it is true, the Statute is not perfectly correct, according to the Rules of Grammar; and therefore, where Portion is mentioned in the first Part, 'tis omitted in the Second; and what is called Estate in the first Part, is called Land in the Second.

That if these Lands are in Equity to be considered as a Settlement of Lands, then it is an Advancement according to the Act; if they are not to be considered as a Settlement of Lands, then it is an Advancement by a Portion; and as to the Objection, that this was not a voluntary Provision of the Father, but arose from the Contract of the Parties; it was answered, that the Statute makes no such Distinction, and therefore neither ought this Court to make it; for the Act only intended an Equality between the Children, whether the Provision was voluntary, or by Purchase; and a Child provided for either one Way or other, is provided for; and it is not like the Cafus pur, where a Child, either with his own or a Relation's Money, purchases an Estate, or a Sum of Money from the Father; for this certainly is no Provision by the Father, but a direct Sale, as much as it would have been to any Stranger; and in the Case of Newland and Shepherd, the Question was not, whether the 6000l. paid,
paid should not be brought into Hotchpot, if she had desired to be
let into a further Share: but whether the 6000 l. being more than
her Share of the Whole, she should, besides, have the other 1000 l.
and it was decreed that she should; besides, there is no Pretence to
say, that the Custom of London is to govern an Act of Parliament.

That this Portion, though not payab]e till after the Father's
Death, was, neverthelelfs, a Provision for her by him, in his Life-
time, as the Act speaks, as the principal Part of it, vis. the Securi-
ty was executed by him in his Life-time; and as he was not at Li-
berity to controul it; and suppose he had given such a Portion at
his Death, would not this be a good Provision within the Statute;
and here the Portion is payable as soon as possibly it can be wanted;
vis. at eighteen, or Marriage, and a Maintenance of 80 l. per
Annurn in the mean Time; and tho' it is true, that a Portion out of
Lands sinks in the Inheritance, if the Party dies before it becomes
payable; which, if it were of a Personal Estate it would not; that
is not material, since the Statute makes no Distinction, whether the
Portion is payable out of the Real or Personal Estate.

That if a Bill had been brought immediately after the Father's
Death for a Distribution, there could be no Inconvenience in set-
ting a part of a Sum to answer the Contingencies, when it should hap-
pen, no more than in the Case of Debts, which is every Day done;
and there are some whose Estates are not got in till several Years
after their Deaths; and a Distribution may very properly be made
thereof from Time to Time, as they come in; neither is the Distribu-
tion wholly to wait till all are got in; and in the Cafes of Fin-
ney and Finney, and Long and Hutchinson, it was decreed, that
the Heir at Law should bring into Hotchpot whatever Share he re-
ceived out of the Personal Estate, if he would have any more; and
in the Cafe of Kelway and Kelway, on the Statute 31 Jac. 1. it
was held, that where a Man dies, leaving a Wife, and no Children,
that the Wife being intitled to one Moiety of his Personal Estate,
the other Moiety shall be distributed equally between his Mothe-
rs, and Brothers and Sisters; and yet the Cafe of leaving a Wife is not
mentioned in that Statute.

The Court were all clear of Opinion, that this was an Advan-
cement by the Father in his Life-time within the Meaning of the
Statute, though contingent and future, so that she could not have
that and her distributory Share likewise; and the Matter of the
Rolls said, that the Civil Law made no Difference between a Real
and Personal Estate, but only moveable and immovable; and the
Words of the Act, which speak of a Provision made by the Fa-
ther in his Life-time, are very proper to distinguish between that
and a Provision made by his Will; and cited the Writ De rationa-
bili parte bonorum, and Scainb. 200. to prove that a future Provision
will exclude the Heir, or any other of the Children; and cited Pau-
lett and Paullett, 2 Vent. 1 Vern. 321., and the Chief Justice said,
suppose the Father had left but 2000 l. Personal Estate, it would be
extremely hard, that the eldest Daughter should have her 5000 l.
and a Share of the 2000 l. too.

And per Lord Chancellor, the Cafe of Feasts and Feasts is not to
be cited in this Cafe, that being a Cause by Consent, and the
Question very little considered; and he said, he thought any Settle-
ment in, or out of Lands, either by Annuity, Rent or Portion, would be a Provision within the Statute; and that such Provision might be valued and brought into the Collatio honorum, if they think it worth their While, that the 5000 l. whether called contingent, or not, is an Interest, and such a one as would happen within a reasonable Time, viz. six or seven Years after the Father's Death, and there was then no Son; and it was such an Interest as was valuable.

That the Distribution must be made as the Estate stands at the Father's Death, and the Parties are to give Bond to refund, if Debts afterwards appear; and future Debts due to the Intestate must be distributed, as they can be got in; that here the Contingency has happened, and she is now at Liberty to say, whether she will stick to that Provision, or bring into the Computation of Collatio Honorum, in order to have an equal Share with the Rest. But as to the 80 l. per Annum Maintenance, that is not to be brought in, being only for the Education and Maintenance of the Daughter, which the Parents were best Judges of; and accordingly the Decree was pronounced. Mich. 1727, between Edwards and Freeman, per Lord Chancellor, assailed with Raymond Chief Justice, the Master of the Rolls, and Price and Fortescue Justices.
CAP. XXX.

Fines and Recoveries.

(A) What Estate or Interest may be barred or transferred by Fine or Recovery.

(B) What Charges and Incumbrances on Lands, are barred and destroyed by Fine and Recovery.

(C) What Charges and Incumbrances are made good by Fine and Recovery.

(D) Where Equity will supply a Defect in a Fine or Recovery.

(E) Fines and Recoveries: in what Cases barred or set aside in Equity.

(A) What Estate or Interest may be barred or transferred by Fine or Recovery.

1. If Cecilius que Trust in Tail levies a Fine, or suffers a Recovery, such Fine and Recovery shall have the same Operation, as if it were an Estate at Law, especially if it be on a Consideration paid. *Patch.* 16 Car. 2. between Goodrick and Brown. 1 Chan. Ca. 39. 2 Chan. Ca. 213. S. C. cited; and said to be the first Precedent of the Kind. 1 Chan. 68. S. P.: where it is said to be Bridgman's Opinion, that it should not Bar, but it is now well settled; for,

2. If A. conveys his Estate to Trustees, in Trust that they shall convey to such Persons, and for such Estates, as he shall by Will Direct; and then by Will directs, that the Trustees shall convey to B. his Son in Tail Male, Remainder to C. in Tail Male, Remainder to the right Heirs of the Testator, and B. being in Possession, suffers a Recovery without the Trustees; this shall bar the Estate Tail.
Tail in Equity, for a Trust is a Creature of Chancery, and to be
governed by the Rules of Equity, and not by the Niceties of the
13. 2 Chan. Ca. 78. S. C. a Trust Estate in Tail, is not within the
Statute de dominis; and therefore may be barred by Fine or Recovery.
440. S. P. decreed between Washborn and Downes, 1686. where it
is said, that it has not been doubted since Lord Bridgeman's Time,
but that a Fine and Recovery will bar, as at Law.
3. If A. be Cessui que Trust for Life, Remainder in Trust for B. in
Tail, Remainder in Fee to C. B. cannot, by suffering a Recovery,
bar the Remainder, if there be no good Tenant to the Precipe.
2 Chan. Ca. 64. between Lord North, C. J. and Chaumberon; per
4. If Cessui que Trust in Tail, with Remainder over leaves a Fine,
dies without Issue, and five Years pass, and Non-claim; per Lord
Keeper, this shall bar the Remainder between Basket and Petrice.
1 Vern. 226. but if there be an Entry and Claim, quere whether
the Remainder is barred. Vid. 2 Chan. Ca. 24. And vide how Trust
Estates are barred or conveyed, and what shall be a Breach of
Trust in the Trustee, Title Trust.
5. If a Trustee sells the Land to a Stranger, that has no Notice
of the Trust, and a Fine with Proclamations, and five Years pass;
and afterwards the Trustee for valuable Consideration really paid,
purchases these Lands again from the Vendee; per Lord Chancellor
and Chief Justice North, the Trustee shall stand seised as at first,
as if there had not been any Fine levied. Mich. 34. Ca. 2. 1 Vern.
60, between Bevvy and Smith. 2 Chan. Ca. 184. S. C.
6. A. seised in Fee, in Trust for B. for full Consideration, con-
veys to C. the Purchaser, having Notice of the Trust, and afterwards
C. to strengthen his own Estate, levies a Fine; B. the Cessui que
Trust, in that Case, shall not be bound to enter within the fifth
Year. A Case put by my Lord Chancellor, and agreed to by the
Counsel, for C. having purchased with Notice, notwithstanding any
Consideration paid by him, is but a Trustee for B. and so the Estate
not being displaced, the Fine cannot Bar. 3 Vern. 349.

(B) What Charges and Incumbrances on
Lands are barred and destroyed, by Fine and
Recovery.

1. If T. S. seised in Fee, devises to his Children and others, Seve-
ral Sums of Money, to be paid at Distinct Times, by 50l. 70l
Years, out of Lands; and one Payment of 50l. in one Year, and
then the Lands are aliened by Fine; and five Years and Non-claim
pass, the Devisees are barred by the Fine of these Sums, which
flew this after the Levy of it, but not of the 50l. which became
due before; for a Trust is barred by a Fine, between Wakeria
and Warner. Thil. 31 Ca. 2. 2 Chan. Ca. 347. Quere of this
Case, for,
2. If J. S. devises Lands to B. in Tail, Remainder to C. in Tail, subject to the Payment of Legacies; and C. levies a Fine, and five Years, and Non-claim pacts, and C. grants a Rent-charge to A. and mortgages to B. yet the Legacies are not barred by the Fine, and Non-claim; for C. having no Title but under the Will, the Purchasers must be presumed to have Notice of the Legacies, and the Contents thereof. *Trim. 1710. between the Drapers Company and Tardley. 2 Vern. 662.*

3. To a Bill to redeem a Mortgage, the Defendant pleaded a Fine with Proclamations, and Non-claim for five Years; but the Plea was over-ruled, the Mortgagee having a Right to retain the Land, till his Money was paid; and this was a new Way of foreclosing a Man of his Equity of Redemption. *Hill. 1682. between Holden and the Duke of York. 1 Vern. 132. but vide 2 Vern. 189. where it is held, that a Fine and Non-claim shall be a Bar to an Equity of Redemption; and there said, that it had been so ruled by my Lord Chief Justice Hale, in Sir Nicholas Stratton's Case.*

4. A Fine and Non-claim is a good Bar to a Bill of Review, *per Lord Commissioner Hutchins. Mich. 1690. between Lingard and Griffin. 2 Vern. 189, 190. Q.*

(C) **What Charges and Incumbrances are made good, by Fine and Recovery.**

1. If Tenant in Tail confiscates a Judgment, or mortgages the Lands, and afterwards suffers a Recovery to a collateral Purpose, that Recovery shall enure to make good all his precedent Acts and Incumbrances. *1 Chas. Ca. 720.* But if a Fine is levied for a particular Purpose, pursuant to a Decree, Equity will not permit any other Use to be made of that Fine. *1 Chas. Ca. 49. 2 Vern. 56. S. P. arguedo.*

2. A. devised to B. the Father for Life, Remainder to C. his Son an Infant in Fee, and devised 400l. to the Son, to be paid at Twenty-one, and made the Father Executor, and left 3000l. Personal Assets; and B. having spent the Personal Assets, mortgaged the Lands to J. S. and made Affidavit, that they were Free from Incumbrances, and that he was settled in Fee, and levied a Fine for corroborating the Mortgage, and also declared the Use thereof to him and his Heirs; the Son having entred for a Forfeiture, the Mortgagee bought his Bill to be relieved; and the Court decreed, that the Mortgagee, notwithstanding the Forfeiture, should hold and enjoy the Lands against the Son, during the Life of the Father. *Hill. 1699. between Willis and Finex.*

(D) **Where**
(D) Where Equity Will supply a Defect in a Fine.

1. If Cessui que Trust in Tail, being in Possession under the Trustee, who had the Freehold in him, suffers a Recovery, in which he himself is Tenant, and so no good Tenant to the Precipe; yet this shall bar the Remainder in Fee of the Trust. 2 Chan. Ca. 63. But it seems, that if Tenant in Tail, covenants to levy a Fine and he dies before it is executed, tho' the Fine has proceeded to a Caption, yet Equity will not make it good, altho' for valuable Consideration. Vid. 2 Vern. 5.

2. A. has two Sons, B. and C. A. on the Marriage of B. covenants before the End of Easter Term then following, to levy a Fine to the Use of B. and the Heirs of his Body, Remainder to the Use of C. and the Heirs of his Body, Remainder to A. in Tail, Remainder to him in Fee; the Fine was levied as of Easter Term, but the Marriage being put off till after Easter Term, the Deed was not dated till after neither; so the Fine was levied before the Date of the Deed, and by Consequence the Deed was no Declaration of the Uses of that Fine; the Father died, and then B. died, leaving Issue W. and W. having borrowed some Money of J. S. mortgages the Lands to him, and dies without Issue. C. claiming under the Settlement, brings his Bill to have it established, and that the Defect before-mentioned may be supplied; but in Regard, the Consideration of B.'s Marriage did not extend to him, the Court refused him any Relief. Mich. 1703; between Staplehill and Bully.

(E) Fines and Recoveries, in what Cases vacated or set aside in Equity.

1. A. Having prevailed, by the Means of an Attorney, with a Woman, to levy a Fine of some Houfes, and to execute a Deed, leading the Uses thereof to him and his Heirs; and it being proved, that the, at the Time of levying the Fine declared, that the must make Use of some Friend's Name in Trust; and afterwards by Will declaring, that he only levyed such Fine in Trust, the better to dispose of her Estate; and having devised it to J. S. subject to the Payment of her Debts, the Court decreed not only the Estate liable to the Debts, but also a Conveyance to J. S. the Devisee. Mich. 1693; between Woodhouse and Brayfield. 2 Vern. 307.

2. If Lands are devised to Trustees, till Debts paid, and then to an Infant, and his Heirs; and J. S. a Stranger enters on the Lands, and levies a Fine, and five Years and Non-claim pass; and the Infant, when of Age, brings an Exception, but is barred, because the Trustees ought to have entered; yet Equity will relieve, and not suffer an Infant to be barred by the Laches of his Trustees, nor to be barred of a Trust Estate, during his Infancy; and the Infant in this Case, shall recover the mean Profits. Mich. 1699, between Allen and Sayer. 2 Vern. 388.

3. A. having inveigled his Wife to levy a Fine of her Land to him, when she lay on her Death-Bed, pretending, as was suggetted,
he was to have it only for his Life; and a Dedimus was sent into
the Country to take the Fine, and the Caption was taken about
100 Miles from London, the very Day she died; and because the
Fine would not have flood, the Party being dead before the King's
Silver was paid, the Writ of Covenant was razed in the Teffe, and
made to bear Date ten Days backward; and all other Parts of the
Fine were razed likewise, and made to correspond with it; and the
King's Silver was paid, and so all appeared on the Record to have
been done before the Death of the Woman; on a Bill brought to
have the Fine set aside, or to have a Reconveyance, it was held by
the Court, that the Chancery has a Power to relieve, as much
against a Fine, obtained by Fraud or Practice, as any other kind of
Conveyance; yet that such Relief was not by decreeing a Vacate of
the Fine, but by ordering a Reconveyance; but that for any Error
in the Fine, or Irregularity, or ill Practice in the Commissioners, it
was a Matter properly cognizable in that Court where the Fine was
levied, and for which that Court may (a) vacate the Fine; and (a) Husband
and Wife, the
there being no Proof of Fraud or Practice in this Case, the Bill was
dismissed. Hill. 1700. between St. John and Turner.

Fine, and they being brought into the Court of Common Pleas by Complaint of the Remainder Man, a
Vacate was entered of the Fine; quoad the Woman, and an Information ordered to be exhibited against the
Commissioners. Hutchinson's Case. 3 Lev. 76. et al. 2 Vent. 50. where a Wife being an Infant, levied a Fine,
and the being dead, it could not be set aside; but the Court held, that they might Fine the Commis-


C A P. XXXI.


(CAP. XXXI.

Guardian.

(A) Of the Appointing and Removing of a Guardian.

(B) What Acts of his, with Respect to the Infant's Estate, shall be good.

(C) How to be charged, and how to account.

(A) Of the Appointing and Removing of a Guardian.

1. If the Father of an Infant is indebted to 7. S. and the Father by Deed grants him the Guardianship of his Children, with a Covenant not to revoke it, and gives a Penal Bond for Performance; and a Bill is brought to bring the Guardian to an Account, and to remove him; tho' the Guardian is willing to do as the Court shall direct; yet in Regard there is a just Debt due, the Court will not restrain him from receiving the Rents and Profits, only from abusing his Person. Hill. 1686. between Lecone and Shiers. 1 Vern. 442.

2. If a Person appointed Guardian, pursuant to the Statute (a) 12 Car. 2. dies, or refuses to take upon himself the Guardianship, my Lord Chancellor may appoint a Guardian; but a Guardian cannot be otherwise appointed, than by bringing the Infant into Court, or his praying a Commission to have a Guardian appointed him. Hill. 1699. between Loyd and Carew.

(a) 12 Car. 2. a Father under Age, or of full Age, by Deed in his Life time, or by Will, in Presence of two Witnesses, may dispose of the Custody of his Child under twenty-one Years of Age, and not married at the Time of his Death; whether born, or in utero sine morte, during his Nonage, to any in Possession or Remainder, other than Papish Recusants; which Persons may maintain any Action of Trespass against wrongful Takers away, or Retainers of such Child, and recover Damages for the Child's Use, and may take into their Custody, his Lands, Personal Estate, &c. according to such Disposition, and bring Actions as Guardians in Sorge might do. This Act shall not prejudice the Custum of London, nor any other City or Town Corporate, &c.

A. devised the Guardianship of his Son, who was seven Years of Age, to his Wife, who was Mother-in-Law to the Infant; and the marrying meanly with her own Servant, the Uncle gets Possession of.
Guardian.

of the Infant, and sends him to be educated in a Protestant College in France; and upon a Homine Replegando, it was held by my Lord Chancellor, that tho' in Case of a Guardian by (b) Common Law, this Court may remove him; yet here being a Guardian according to the Statute, he could not be removed, but that he would make her give Security, not to marry the Infant inter Annon Nubiles, and the Uncle was ordered to fend for the Boy. 29 Car. 2. between Foster and Denny. 2 Chan. Ca. 237.

appears any Danger of their Abusing either the Infant's Perish or Estate; and there are several Infrances of this Kind, as Sible 456. Hard. 96. 3 Chan. Rep. 58. 1 Sid. 424. 3 Selw. 177. but there are none where a Statute Guardian has been totally removed. Some, where such Terms have been imposed on the Guardian, as effectually to prevent his doing any Thing to the Prejudice of the Infant; but none, whether such Causes may not arise, for which he may be totally removed, notwithstanding the Statute; as if he become Mad, Lunatick, &c. a Guardianship is not assignable, neither shall it go to the Executors or Administrators, being a Personal Trust. Vaugb. 180.

(c) The Court of Chancery may assign one of the Six Clerks to be Guardian to an Infant. 2 Chan. Ca. 163. Nel. Chan. Rep. 880. 44. S. P.

till he is fourteen Years old, who has only a Personal Estate; but if there be both a Real and Personal Estate, such Appointment is void. Vide 2 Lev. 165, 217.

(B) What Acts of his, With Respect to the Infant's Estate shall be good.

1. The Plaintiff's Father mortgages to J. S. and dies, leaving the Plaintiff and C. both Infants; and C. Heir at Law; Defendant as Guardian enters on the Lands, and with the Profits paid off the Mortgage, and took an Assignment to other Persons; the Defendant having married his Daughter to C. who died without Issue; it was fitted for the Defendant, that he paid off the Mortgage with his own Money, and that he had not enough of the Infants; and that if he had, he could not justify Disposing of it in such Manner (by which it would prevent its coming to the Administrator,) but it being proved, that he called in Part of the Infants Rents for that Purpoze; and because it was most for the Infants Advantage to pay off the Mortgage, it was sent to an Account: And if the Profits received, were sufficient to pay it, the Defendant was to convey; but if they fell short, the Plaintiff was to lay down as much as, with what the Plaintiff laid down, as would make it up. Hill.

22 Car. 2. between (a) Bridgett Dennis, by Sir Alexander Frazier (d) 1 Vern. her Committee, and Sir Thomas Badd. 1 Chan. Ca. 156. vid. 2 Chan. 456. S. C. cited and agr, agreed to, by my Lord Chancellor, because the Money would in Equity be liable in his Hands to discharge the Mortgage, so he did the Administrator no Wrong.

2. An Estate having descended to an Infant, subject to Incumbrances; and the Question being, whether a Guardian might, without the Direction of a Court of Equity, apply the Profits to discharge the Incumbrances, or other of them, or whether they should not be accounted Personal Estate; and so the Administrator of the Infant be intitled to them, if the Infant died in his Minority; it was held by the Court, that a Guardian, without any Div

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rection, may pay the Interest of any Real Incumbrance, and the Principal of a Mortgage; because that is a direct and immediate Charge on the Land, but not any other Real Incumbrance. Hill. 1700. between Palmer and Danby.

3. But where a Widow, who was Guardian to her Son, received the Rents and Profits of his Estate, and paid off Debts by Specialty, but took Assignments of the Bonds; the Son dying in his Minority, she brought her Bill against the Defendant the Heir, for a Discovery of Affects by Dissent, to satisfy the Money due by Bond, she claiming the Profits as Administratrix to her Son; and it was held by the Court, that the Guardian was not compellable to apply the Profits of the Estate of the Infant Heir, to pay off the Bond-Debts. Hill. 1707. between Waters and Ebrall. 2 Vern. 606.

4. A Guardian to an Infant, having a considerable Sum of Money in his Hands, that was raised out of the Infant's Estate, lays out, with the Consent of his Grandmother, 3000 l. in a Purchase of Lands, which lay contiguous to the Infant's Estate; and takes the Purchase in the Name of J. S. for his Benefit, if when he came of Age, he should agree thereto, and allow that Money on Account. The Infant dying in his Minority, it was held by my Lord Chancellor, Chief Baron Atkins, and Mr. Justice Lutwicke, against the Opinion of the Master of the Rolls, that tho' neither the Heir nor Administrator of the Infant were entitled to the Lands, yet the Guardian must account for this 3000 l. to the Administrator of the Infant; and that it was not in the Power of the Guardian, without the Direction of this Court, to turn the Personal into Real Estate, by which it would descend to the Heir; and that the Objection, that an Infant may make a Will at Seventeen of his Personal Estate, but not of his Real, was not answered. Between the Earl of Winchelsea and Norcliff, 1 Vern. 403, 435. S. C.

5. If a Guardian borrows Money of A. to pay off an Incumbrance on the Infant's Estate, and promises to give A. Security for his Money, but dies before it is done; though A.'s Money is applied to pay of the Incumbrance, yet the Court will not decree him Satisfaction out of the Infant's Estate; but if the Sum disbursed exceeds the Profits of the Estate for so much, A. shall have an Account as Money due to the Guardian, and it shall be raised out of the Infant's Estate. Hill. 1704. between Hooper and Eyles. 2 Vern. 480.
(C) Guardian, how to be charged, and how to Account.

1. If a Guardian takes a Bond for the Arrears of Rent, he thereby makes it his own Debt, and shall be (a) charged with it. 26 Car. 2. Wale and Buckley. 2 Chan. Rep. 97. 

(a) A Guardian on his Account shall have Allowance of all reasonable Expenses; and if he is robbed of the Rents and Profits of the Land, without his Default or Negligence, he shall be discharged thereof, upon his Account.

2. If a Guardian to an Infant, whose Lands are incumbered, to the Value of 600 l. buys it off with 100 l. of the Infant's Money, he shall not charge the Infant with the 600 l. 2 Chan. Ca. 245.

3. If a Guardian to an Infant takes an Assignment of the Mortgage, altho' the Mortgagee never entred; yet per Lord Keeper Wright, as to the Profits received out of the Mortgaged Lands, the Guardian shall be taken to be in Possession as Mortgagee, and not as Guardian; but the Reporter adds a Q. 2 Vern. 471.

CAP. XXXII.
CAP. XXXII.

Heir and Ancestor.

(A) By what Acts of the Ancestor shall the Heir General be bound.

(B) By what Acts shall an Heir Special, or Illue in Cafl, be bound.

(C) Heir, in what Cases laboured in Equity.

(D) Where Charges and Incumbrances on the Lands shall be raised, or shall link in the Inheritance, for the Benefit of the Heir.

(E) Where the Heir shall have the Benefit and Aid of the Personal Estate.

(F) In what Cases there shall be a resulting Trust for the Benefit of the Heir.

(G) What Things shall go to the Heir, and not to the Executor.

(H) What shall be Allers by Descent in the hands of the Heir.

(I) Unreasonable Bargains and Securities obtained from young Heirs, in what Cases to be set aside.

(A) By what Acts of the Ancestor shall the Heir General be bound.

1. If Lands are devised to the Wife for Life, and afterwards to be sold by the Executor, for younger Children's Portions, and the Executor and Wife die; the Children may compel the Heir to sell, tho' the Executor had only an (a) Authority: Ruled upon Demurrer. Mich. 15. Car. 2. between Garfoot and Garfoot. 1 Chan. Ca. 35.

(a) By the Common Law, if Lands are devised to be sold by an Executor, by which he has only an Authority, and he dies, no Sale can be made; so if an Authority only be given to two, and one dies, the Survivor cannot sell; but it is otherwise where an Authority is given them, coupled with an Interest, as by a Devise of Lands to them to be sold. 1 Inf. 112, 113, 191.
2. If T. S. devises his Lands to his Executors, to sell and pay Debts, the Heir shall be compelled to join in the Sale; per Lord Keeper, who said it had been so ruled in the House of Lords. Trin. 27 Car. 2. between Foule and Green, 1 Chan. Ca. 262.

3. If Lands are settled on Trustees, for raising of Maintenance and Portions for Daughters; and a Bill is brought for a Sale, and that the Heir might join, he shall be compelled to join, tho' it is objected that he has no legal Estate in him. Pash. 1689; between Roll and Roll. 2 Vern. 99, where it is said, that several Cases to that Purpose were cited; vide the Case of Pit and Pelham. 1 Chan. Ca. 176. several Precedents quoted, where the Lands were decreed to be sold, tho' no Executor named, or tho' he died before any Sale made. And vide 2 Vern. 420. where it is resolved, that the Heir may have the Lands sold, if it appears for his Advantage, as well as the younger Children may insist upon a Sale.

4. If A. contracts to sell Land, and receives good Part of the Purchase Money, but dies before a Conveyance is executed; and a Bill is brought against the Heir, he shall (b) convey, and the Money shall go to the Executor; especially if there are more Debts due than the Defactor's Personal Estate is sufficient to pay: Mich. 1692. Deceased between Hawkins and Savoy. S.P. 2 Vern. 215. between Baden and Countess of Pembroke; compellable, in a Court of Equity, to make the Lease; for this is against the Common Law. 3 Jac. 1. between Chapman and Bower. 1 Roll. Abr. 371, 372. Quere.

(B) By what Ads shall an Heir Special, or Issue in Tail be bound.

1. If Tenant in Tail bargains, and sells the Lands, yet this cannot be made good in Equity against the Statute, by which he is disabled to bar his Issue; resolved per Lord Keeper, and Lord Hobert, between Cavenish and Worsley. Hob. 203.

2. But if Tenant in Tail agrees to convey, he may be compelled in Equity to execute the Agreement; but if he dies, his Issue is not bound thereby, unless he doth some Act whereby he contents to, and confirms the Agreement. Trin. 22 Car. 2. between Rossi and Rosi. 1 Chan. Ca. 171; 1 Lev. 239. S.P. in Cancellaria.

3. If Tenant in Tail agrees to sell his Lands; and receives Part of the Consideration Money, and upon his not making good the Sale by a Fine or Recovery, a Bill is brought to compel him thereto; and a Decree pronounced accordingly; and he stands out all Process against him to a Contempt, and then dies without perfecting the Sale, yet his Issue shall not be compelled to perfect it: Adjudged on a Bill brought against the Issue to revive the Decree. Hill. 1708; between Powel and Powel. 6 C. cited, and admitted by my Lord Chief Baron Gilbert, in the Argument of the Earl of Coventry's Cafe. Pash. 1714. for the Heir comes in under the Statute de donis singulis; and is not any Way deriving from the Ancestor, who contracted.
4. If Tenant in Tail sells at a full value, and receives the Consideration-money, and covenants to levy a Fine, and is deeded to do it; yet dying (theo in Prison, and in Contempt, for not performing the Decree) the fine in Tail cannot be bound by it. Between West and Lower, 2 Vern. 306.

(C) Heir, in What Cases (a) favoured in Equity.

1. If J. S. devises Lands to his Wife for Life, and the Heir claims the Lands by an Intail, and prays a Discovery of the Writings, which by Order are brought into Court, and on a Motion ex parte, given to the Heir, and among them the Deed of Intail is found; and the Wife insists on having back the Deed, unless the Heir would confirm her Estate, and that she is more than a bare Volunteer, it being a Provision for her; yet it not appearing to be pursuant to Marriage-Articles, it shall be considered only as a Bounty; and the Heir having a good Title shall be aided. Mich. 32 Car. 2. 2 Chan. Ca. 4.

2. If Husband and Wife levy a Fine of the Wife’s Lands, and by the Deed the Wife is declared to the Husband and his Heirs, and the Husband, without any Consideration, devises it to J. S. J. S. being a voluntary Devisee, shall have no Aid in Equity for the Deed, against the Heir of the Mother, but will be left to help himself at Law as he can. Hill. 34 Car. 2. 2 Chan. Ca. 134.

3. If J. S. by Will devises 3000l. to his three younger Children, which Sum was a Mortgage due from J. T.; and by his Will adds, that for the more sure Payment of it, that in Case his Son and Heir, whom he appointed Executor, should not pay the same according to his Will, then he devised the Land for the Payment thereof, and appoints it to be paid them at twenty-one, or Marriage, which should first happen, and a Maintenance out of his Land, in the mean Time, and J. T. obtains a Decree for Redemption of his Mortgage, on Payment of the Money against the Executor, and the Infants, who appeared by their Mother as Guardian; and the Money is brought into Court, and placed out by the Master, on a Security which proves ill; yet the Heir shall not be compelled to pay it over again to the younger Children, for the Lands are made only supplantually chargeable in Case J. T. had failed, or in Case the Heir and Executor had received, and refused to pay it to the Children; and tho’ a Real Security for Childrens Portions shall not be changed into a Personal one; yet in this Case it was not in the Power of the Heir to prevent J. T.’s redeeming the Mortgage. Mich. 1685. between Oldfield and Oldfield, 1 Vern. 356.

4. If an Estate is limited to Trustees for Payment of Debts and Legacies, and the Trustees raise the whole Money, but do not apply it according to the Trust, yet the Heir shall have the Lands discharged; and the Trustees must take their Remedy against the Trustees; for the Money being once raised, the Land shall be discharged. 1 Salk. 155. in Down Procerum.

5. But
5. But if A. being Tenant for Life, Remainder to his first Son in Tail, Remainder over, has a Power to charge the Estate with 250L. per Annu. Annuity, for any Term not exceeding four Years, and A does by Deed charge the Premises with 350L. per Annu. for four Years, to commence from his Death, in Trust, to raise 1000L. Part to be paid to B. and the other Part to C. the Son pays B. what was due to him, and he delivers up the Deeds, and they are suppressed; and the Son takes the Profits for four Years, and more, and leaves a Daughter his Heir at Law, and leaves no Personal Assets, the Lands shall be liable in the Hands of the Daughter to pay C. with Interest, though the Term for Years is expired, and the Person dead who received the Profits. Mich. 1690. between Smith and Smith, 2 Vern. 178.

(D) Where Charges and Incumbrances on the Land shall be raised, or shall sink in the Inheritance for the Benefit of the Heir.

1. If S. by Settlement charged his Lands with the Payment of 4000L. a-piece to his two Daughters, to be paid them at their respective Ages of twenty-one Years, or Days of Marriage, and reserved to himself a Power of otherwise ordering it by his Will; and by his Will made within a Day after, he confirms their Portions, and that they shall be paid as mentioned in the Settlement; one of the Daughters dies before twenty-one; and unmarried, and her Mother sued for the Portion as Administratrix to the Daughter; but it was held, that this Portion should not be raised, but should sink in the Inheritance for the Benefit of the Heir at Law; though it was admitted, that if it had been a Sum of Money devised, and the Legatee had died before the Time of Payment, it would have gone to the Administrator; but here the Settlement is operative; and the Wife is a Jointree otherwise provided for. Pash. 1 Jac. 2. between Pannel and Pannel, 2 Vern. 366, 367. 1 Vern. 204. 2q. 34. S. C. where a Note is added; that it was affirmed in the House of Peers, S. P. admitted in the Case of Edwards and Freeman, Mich. 1737. and S. C. cited. 56th. 2q. 34. 2 Vern. 366. 367.

2. If a Term is created by a Marriage-Settlement, to raise 3000L. for Daughters Portions, within twelve Months after the Death of the Survivors of the Husband and Wife; and there being but one Daughter, the Father by Will devises the Trust Lands to make good his Wife's Jointure, and to raise 3000L. for his Daughter's Portion; the Daughter dies at the Age of five Years, the Portion being to be raised out of Land; as she could have no Occasion for it at that Age, it shall not be raised for the Benefit of her Administrator. Pash. 1762. between Brown and Brown, 2 Vern. 439. Note; The Daughter died within the Year, but it does not so appear by this Report.

3. Upon a Marriage-Settlement, a Term was created for raising Portions for younger Children, viz. 1000L. to the Eldest of the younger Sons, and 500L. to every other younger Son; and so for the Daughters, to be paid at such Time as the Trustees, in their Discretion, should appoint; the Father leaves two Sons and two Daugh-
Daughters: the youngest Son, before any Appointment made by the Trustees, dies at seventeen, being then an Apprentice; and it was held, that though there was no Time limited for the raising of it, by which it was urged to be an Interest vested; yet as he died before he could have any Occasion for it, and before any Appointment by the Trustees, that it should sink in the Inheritance, and not go to his Sisters, who had taken out Administration to him. Hill. 1701. between Warr and Warr.

4. If one devises 1000 l. to his Daughter, for her Portion, charged upon a Real Estate, and payable at twenty-one, and the Daughter dies before twenty-one, the Portion shall sink in the Land; but it is otherwise if no Time had been limited for the Payment of the Portion; for in that Case it goes to the Executors of the Daughter; and there is no Difference where the Portion is secured by a Settlement or Will, if secured out of a Real Estate, and the Party died before it is payable; for in either Case it sinks in the Land. Mich. 1688. between Smith and Smith, 1 Vern. 92. vid. 2 Vern. 416. S: P. resolved, and there said, that there was no Difference where the Land was charged by Will, and where by a Settlement.

5. So where one by Will charged his Lands with 6000 l. for the Child with which his Wife was Prsente enfeite, if it proved a Daughter, with a Clause of Entry for Non-payment; a Daughter is born, who dies; and it was decreed that the 6000 l. should not be raised for the Benefit of her Administrator. Hill. 1690. between Norfolk and Gifford, 2 Vern. 208.

6. But where Lands are devises to be sold for Payment of Portions to younger Children, and one of the Children dies after the Portion becomes payable, though before the Land sold, yet his Administrator shall have it, being an Interest vested. Mich. 1684. between Bartholomew and Meredith, 1 Vern. 276. vid. 2 Vern. 508, where a Portion to be paid pursuant to a Marriage-Settlement, was held an Interest vested, being made to carry Interest, though the Party died before it became payable.

7. So where on a Marriage-Settlement, Lands are limited to the Husband for Life, Remainder to the Wife for Life, Remainder to the first, Gt. Sons of the Marriage in Tail Male, Remainder to J. S. in Fee; provided, if there be no Issue. Male of the Marriage, and there be one or more Daughters living at the Husband's Death, then the Trustees to stand seised, subject to the Jincture, to the Intent such Daughter or Daughters should receive out of the Rents 1000 l. and 100 l. per Ann. Maintenance; but no Time limited for the Payment of the Portions; the Husband dies, leaving only one Daughter, who lives to seventeen, and by Will disposes of the 1000 l. and it was decreed, that this was a vested Interest in the Daughter, and well disposed of by her Will. Trim. 1688. between Earl Rivers and Earl of Derby, 2 Vern. 72.

8. If A. by Will gives 500 l. to his Daughter, to be paid by his Executors at the Age of twenty-one, out of his Personal Estate and Rents of his Real; and if not raised by that Time, the Executors to stand seised, and take the Rents till the 500 l. is raised; and after Payment gives the Land to his Son; the Daughter marries at eighteen, and dies under twenty-one, leaving Issue a Daughter; the Husband takes Administration, the Portion shall be raised; and that by a Sale, tho' the Land, by Reason of Incumbrances, will produce lit-
Heir and Ancestor.

7. An Estate was devised to the eldest Son, provided he or his Heirs pay 100l. a-piece to his three Sisters, at their Age of twenty-one, or Marriage; one of the Daughters dies before twenty-one, unmarried; after 7. S. buys the Estate, and thinking it subject to the dead Daughter's Portion (a Bill being brought for it in this Court) gave Bond to her Executrix to pay it; but being afterwards advised, that the Land would not be liable, he brings his Bill to be relieved against it; and it was held by my Lord Keeper, that though by the Law now used in this Court, the Land would not be liable to the Portion; yet, perhaps, when the Bond was given, it might have been otherwise taken; and there being no Fraud in getting the Bond, he would not relieve against it. Mich. 1702. between Smith and Avery.

10. Upon a Marriage-Settlement, a Term was created for raising Portions for Daughters at eighteen, or Marriage; there was a Son and a Daughter of the Marriage; the Son died, and the Inheritance descended to the Daughter, who attained her Age of eighteen Years, and then fell sick, and in her Sickness made her Will, and thereby gave some small Legacies, and then gave all, whatsoever she had a Power to dispose of, to her Mother, and made her Executrix, and died, not having attained her Age of twenty-one Years; and the Question was, whether by the Defect of the Inheritance to the same Person that was to have the Portion raised, the Land shall be thereby discharged of the Portion, or whether the Defendants should have Right to it by the Will of her Daughter; it was decreed for the Mother; and that the Land could not be discharged of the Portion till the Daughter had been of Age to make her Election to have it so; especially the having made her Will, and in general Words devised it to her Mother: On an Appeal to the Lords, this Decree was affirmed. Hill. 1701. between Thomas and Keymis.

11. A Term was created for raising a Daughter's Portion; but it being extinguished by the Defect of the Inheritance on the Daughter, it was revived again in Equity, for the Benefit of Creditors. Between Powell and Morgan, a Case cited 2 Vern. 208. vid. Title Creditor and Debtor.

(E) Where the Heir shall have the Benefit and Aid of the Personal Estate.

1. If an Heir is sued upon a Bond-Debt of his Ancestor's, in which he is bound, and he pays the Money, the Executor shall reimburse him as far as there are Personal Acts of the Testator's come to his Hand. Pach. 18 Car. 2. between Armitage and M'calf. 1 Chan. Ca. 74. vid. 2 Chan. Ca. 5. That the Personal Estate in the Hands of the Executor shall be employed in Eafe of the Heir, by whatever Means the Heir became indebted, as Heir for the Personal Estate, having received the Benefit by contracting the Debt, it is reasonable that Satisfaction should be made out of it.

2. If a Man mortgages Lands, and covenants to pay the Money, and dies, the Personal Estate of the Mortgagor shall, in Favour of the Heir, be applied to exonerate the Mortgage. Between Cope and Cope, 2 Salk. 449. in Canc.
3. But if the Grandfather mortgages, and covenants to pay the Mortgage-money, and the Lands descend to his Son, and his Son dies, having a Personal Estate and a Son, the Son's Personal Estate shall not go in Aid of this Mortgage. 2 Salk. 450.

4. So where A. mortgages his Lands to B. and afterwards sells it to C. for 1000 l. which includes the Mortgage-money, C. shall pay the Mortgage, and shall have no Aid of the Personal Estate of A. for he has made it his own Debt. 2 Salk. 450. vid. 1 Vern. 37. that where the Equity of Redemption is purchased, the Mortgage shall not be discharged out of the Personal Estate.

5. If Lands in Mortgage are devised to F. S. the Devisee shall not have Aid of the Testator's Personal Estate in the Hands of the Executor. Hill. 27 Car. 2. between Cornish and Mew. 1 Chan. Ca. 271. vide 1 Vern. 36. Pockley and Pockley cont, where it is held by my Lord Chancellor, that not only the Heir, but likewise a Devisee, or Hates fatus, shall have the Benefit of the Personal Estate; and 2 Chan. Ca. 84. S. C. and S. P. and that Debts shall be paid out of the Personal Estate in Favour of a Devisee, though a Widow, who claims a Third by the Custom of the Province of York, is prejudiced thereby. 2.

6. If there be no Covenant in the Deed for the Payment of the Mortgage-money, yet the Personal Estate shall be liable in the Hands of the Executor. 2 Salk. 449. 1 Vern. 435. S. P. argendo.

7. But if a Mortgage in Fee is made redeemable at Michaelmas 1710. or at any other Michaelmas, on six Months Notice, and no Covenant to pay the Money; and the Mortgagor continues in Possession, pays the Interest, and by Will devises his Personal Estate to his Wife and Daughter; the Personal Estate is not liable in Ease of the Real, there being no Covenant either expressed or implied. Mich. 1715. between Howell and Price. 2 Vern. 701.

8. If an Heir has Lands descended to him, incumbered with a Mortgage, and he, before any Application made by him to have Aid of the Personal Estate, disposes of them, he cannot afterwards come upon the Personal Estate; for the Equity that an Heir has, is that the Lands may descend clear to the Family. Mich. 1702. between Wood and Fenwick.

9. If a Man makes a Settlement of his Estate on Trustees, for Performance of his Will, and Payment of Debts and Legacies, and at the same Time makes his Will, and thereby devises that the Trustees shall pay several Legacies, and that the Surplus shall go to the Heir, and makes his Wife Executrix, but does not expressly devise the Personal Estate to her; the Personal Estate in this Case shall be applied in Ease of the Real. Hill. 28 Car. 2. between Lord Grey and Lady Grey. 1 Chan. Ca. 296.

10. If Lands be devised for the Payment of Debts and Legacies, and the Residue of the Personal Estate be given to the Executors, after the Debts and Legacies paid, the (a) Personal Estate shall, notwithstanding, as far as it will go, be applied to the Payment of the Debts, and the Land charged no further than is necessary to make up the Residue. Poth. 32 Car. 2. 2 Vent. 349.

(a) By the several Cases adjudged on this Head, the general Rule appears to be, that the Heir at Law shall have the Personal Estate in Exoneration of the Real, unless there be express Words to exempt it, or unless the Intent of the Testator strongly appears, that it should be exempt.
11. If a Man devises Lands for Payment of his Debts, and makes an Executor, and leaves a Personal Estate, no Part of the Personal Estate shall go to the Payment of the Debts; because by making of an Executor, the Testator's Intent appears, that the Executor should have the Goods, the Testator having made another Provision for the Payment of his Debts; but if a Man disposes of Lands for the Payment of his Debts, and after dies Intestate, the Personal Estate shall be chargeable in the Hands of the Administrator; for no such Intent appears, as before, per Sergeant Fountain, and admitted by the Master of the Rolls, 18 Car. 2. between Felsham and Harlston, 1 Lev. 203. Q. and vide 2 Vern. 120. That a Devisee of Lands charged shall have it before an Executor, unless it be expressly devised to him.

12. If a Man devises his Free-farm Rents to be sold for Payment of his Debts, and the Surplus to go betwixt his Heir at Law and his younger Brother, and devises his Household-Goods to go with his House, and the Residue of his Personal Estate to his Sister; the Personal Estate shall not be applied to pay Debts in Ease of the Real. Mich. 1716. between Wainwright and Bondlone, 2 Vern. 718. And per Lord Chancellor, there is a Difference where an Estate is only charged with Payment of Debts, and where it is devised to be sold out and out to pay Debts. Vide 2 Vern. 359. And that in the first Case, the Residue of the Personal Estate shall not go in Exoneration of the Real.

13. A. by Will gives several pecuniary Legacies, and after devises Lands to Trustees, and their Heirs; in Trust, that they do and shall, by Mortgage or Sale of the said Premises, or any Part thereof, pay and satisfy his Debts, and the said Legacies and Funeral Expenses; then he devises all his Goods, Chattels, and Household-stuff, in such a House to another, and then goes on in these Words, All the Rest and Residue of my Personal Estate, I give and devise to my Wife, whom I make sole Executrix. Per Cur. The Residue of the Personal Estate belongs to the Wife, in the Nature of a Spesific Legacy, exempt from Debts, Legacies and Funerals; for though the Personal Estate is the natural Fund for them; yet here he has expressly provided another for that Purpose, by Words of an imperative Signification, that the Trustees do and shall, &c. which is stronger than a bare Charge of them on his Real Estate, and might be intended only auxiliary to his Personal Estate, which Will, without Words of Exoneration, might be liable in the first Place; and though the Words Rest and Residue of his Personal Estate, are generally understood, Rest and Residue after Debts, Legacies and Funerals; yet here they are relative to the last Antecedent of the Devise of his Goods, Chattels and Household-stuff at such a House, and pass to his Wife as a Specifick Devise, in the same Manner as the next preceding Devise did to the Devisee thereof, and are to be understood the Residue of what he had not before particularly devis’d; not the Residue after Debts paid. Hill. 1724. between Adams and Meyrick, at the Rolls.
(F) In what Cases there shall be a resulting Trust for the Benefit of the Heir.

1. If Lands are appointed to pay Debts, the Heir is intituled to have the Lands when the Debts are paid; if to be sold, he is intituled to the Surplus; but if there be any Abufe, he must take his Remedy against the Trustee, and not against the Purchaser. 34 Car. 2. between Curpepper and Affon, 2 Chan. Ca. 115. Q. If not in some Cases against a Purchaser; and vide of what Things a Purchaser must take Notice at his Peril, Title Notice.

2. If a Term for Years is created for a particular Purpose, as to raise Portions, &c. the Surplus shall go to the Heir. 1 Salk. 154.

3. But where J. S. made her Will in the following Words, viz. Iordan and constitute H. N. to be my Executor of this my Last Will, and I do 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; and gives several Legacies in Money, and amongst others, 100 l. to her Uncle, who was Heir at Law; and by a Codicil gives the Sister of H. N. her Executor, 500 l. but gives him nothing; and it was held by my Lord Keeper, and four Judges, that there was no resulting Trust for the Benefit of the Heir, and that H. N. had a Fee, for otherwise he would reap no Benefit by the Devil. Hill. 22 Car. 2, between North and Crompton, 1 Chan. Ca. 196, 197.

4. If Lands are devised to Trustees to sell, and out of the Money arising by Sale, amongst other Sums, to pay 100 l. to his Heir at Law, and no Disposition is made by the Tefator of the Surplus of his Estate, the Land shall not be turned into Personal Estate; nor more sold than is necessary to pay the Legacies; and the Heir shall have the Residue as a resulting Trust. Pfclb. 1701. between Randall and Bookey, 2 Vern. 435.

5. So if A. by Will devises his Land to Trustees, to sell, and to dispose of the Money as he by Writing should appoint; and for Want of Appointment to his four Nephews, and A. by Writing appoints his Trustees to pay several Sums to several Persons, but not near the Value of the Land, the Heir shall have the Residue, and not the Nephews, as an Interest resulting, and not disposed of. Decreed Hill. 1706. between the City of London and Garway, 2 Vern. 571.

6. If A. devises his Real Estate to Executors, to be sold for Payment of Debts, the Surplus, if any be, to be deemed Personal Estate, and go to his Executors, to whom he gives 30 l. a-piece, the Surplus shall be a Trust for the Heirs at Law. Decreed and affirmed in the House of Lords, between Counts of Bristol and Hungerford, 2 Vern. 645.

7. If Lands are devised to three Persons, and their Heirs, to the Use of them and their Heirs, upon the Trusts after-mentioned, and then the Tefator directs them to convey Part to A. for Life, and other Part to be in Tail, but gives no Direction as to the Remainder in Fee, tho' Two of the Trustees be related to the Tefator; yet the Remainder will not belong to them, but be a resulting Trust for the Benef.
Heir and Ancestor.

Benefit of the Heir. 

Hill. 1795. between Hobs and Countess of Suffolk. 

1. But where J. S. by Will devises to his Cousin, T. M. by Name, all his Mortgages called, &c. to have and to hold, to him and his Heirs for ever in Trust; to be sold for the payment of all his Debts and Legacies, within a Year after his Death; and makes him Executor; but gives him no Legacy, tho' he was as nearly related to him as the Heir at Law; and it was held by two Lords Commissioners against one, that there should be no refunding Trust for then the Executor, who was taken Notice of as Cousin, would have nothing but his Labour for his Pains. Mich. 1695. decree between Cunningham and Mellish; which was affirmed in Parliament.

(G) What Things shall go to the Heir, and not to the Executor.

1. If there be a Mortgage in Fee, and two Defeats call, and there is more due on it than the Value of the Land, and tho' the Mortgagor says he will not redeem, yet it shall go to the (a) Executor, and not to the Heir, the Equity of Redemption not being foreclosed or released. Mich. 1689. between Tabor and Grover.

2. Vern. 367.

(a) To whom the Mortgage Money is to be paid, Title Mortgage, Letter (B.)

2. But if a Mortgage in Fee enters for a Forfeiture, and after seven Years Enjoyment absolutely sells the Land to J. S. and his Heirs; this Estate shall not be looked upon to be a Mortgage in the Hands of J. S. so as to make it Part of his Personal Estate; but it shall be for the Benefit of the Heir. Mich. 1684. between Cotton and Her. 1 Vern. 271.

3. If a Man has several Mortgages, one of which is a Mortgage in Fee, on which he entred for a Forfeiture; and he devises those Lands, which were mortgaged in Fee, to his two Daughters, and their Heirs; and the other Mortgages to them, their Executors, &c.: and one of the Daughters dies, her Share of the mortgaged Lands in Fee shall go to her Heir, and not to her Administrator; for it was the Testator's Intent, that those Lands should pass as Real Estate, tho' between him and the Mortgagor they were but a Mortgage. Hill. 1706. between Noy and Mordaunt. 2 Vern. 581.

4. If the Heir of the Mortgagee forecloses the Mortgagor, yet the Land shall go to the Executor, unless the Heir thinks fit to pay him the Mortgage Money, and then he may have the Benefit of the Mortgage. 2 Vern. 67.

5. If Money by Marriage Articles be agreed to be laid out in Land, and settled on the Husband and Wife for Life, Remainder to their Issue, Remainder to the Husband in Fee; with a Proviso, that in Case the Husband died without Issue, the Wife might make her Election, whether she would have the Land or Money: The Husband dies before any Purchase made, leaving his Wife Enfeoffed of a Daughter, A a a a
Daughter, who was born soon after his Death, but died at a Month old; this Money shall not be laid out in a Purchase, for the Benefit of the Heir of the Husband, but shall go to the Wife, as Administratrix to her Husband and Daughter; but it would be otherwise, had a Bill been brought in the Life-time of the Infant, per North. Lord Keeper Hill. 1684. between Keeley and Actwood. 1 Vern. 298, 299. but this Decree was reversed by Lord Jeffreys; who held, that the Money was bound by the Marriage Agreement, 1 Vern. 276. But if Money be agreed to be laid out in Land, in a Marriage Settlement, and there is no Issue, whether this Money shall be looked upon as Land, and thereby defeat simple Contract Creditors, 2 Queer. 50. 1 Salk. 154.

6. If the Wife’s Portion, and the like Sum of the Husband’s Money, is agreed to be laid out in Land, to be settled on them, and the Heirs of their Bodies, without mentioning how the Remainder over should be limited, and they both die without Issue, and before any Purchase made; the Money shall be paid to the Heir of the Husband, and not to the Administratrix of the Wife, tho’ she survived the Husband. 2 Peteb. 1687. between Knight and Atkins. 2 Vern. 20. 21.

7. If by Marriage Articles it is agreed, without any positive Covenant, that 500l. being the Wife’s Portion, should by the Consent of the Husband and Wife, be laid out in Lands, and settled on the Husband and Wife for their Lives, Remainder to the Heirs of their two Bodies, Remainder to the Heirs of the Body of the Wife, Remainder to the Wife’s Brother in Fee, and the Wife dies without Issue, and then the Husband dies; the 500l. not being laid out, this Money shall not be taken as Land, and therefore go to the Brother, to whom the Fee was limited; per Tresor and Rawlinson Lords Commissioners, against Hutchins. 2 Peteb. 1691. between Symons and Rattes. 2 Vern. 227.

8. If a Man purchases Lands in his own Name, and takes an Assignment of a mortgage Term, in the Name of a Trustee, yet the Term shall attend the Inheritance, and go to the Heir, Hill. 1680. between Tiffin and Tiffin. 1 Vern. 1.

9. So if a Purchaser takes the Mortgage Term in his own Name, and the Inheritance in the Name of a Trustee, yet it shall go to the Heir, tho’ not mentioned to attend the Inheritance. 2 Peteb. 15th. 18. between North and Langton. 2 Chon. Ga. 156. 2 Chon. Rep. 271. S. C. but where a Term attending on the Inheritance, shall or shall not be Assesso, wide what shall be Assesso, Title Executo and Administrator.

10. If a Woman, who is a Cestui que Trust of a Term, having the Inheritance in her, marries and dies; the Term shall attend the Inheritance, and not go to the Husband as Administrator of his Wife. Mich. 1705. between Bess and Stanford. 2 Vern. 520. 1 Salk. 154. S. C.

11. If the Plaintiff’s Father feited in Fee of Lands, articles to pay 2l. 1000l. to build an House on the Premises, and dies before the House is built, the Heir may compel the Builder to build it, and the Father’s Executor to pay for it. Decree between Holt and Holt. Mich. 1694. 2 Vern. 322.
What shall be Estates by Ascendancy in the Hands of the Heirs.

1. An Equity of Redemption of a Mortgage in Fee, tho' not an Estate at Law, yet is an Estate in Equity; and if assigned or released by the Heirs, he shall be answerable for the Value. Pochin's 1688: between Sawley and Cottier. 2 Vern. 67.

2. If a Man obtains Judgment against an Heir, who has a Reversion in Fee descended on him, the Judgment is only of Estates, quando acciderint, and the Creditor cannot by a Bill in Equity compel the Heir to yield the Reversion, but must wait until it fails. Hill's 176. between Fortrey and Fortrey. 2 Vern. 134.

Unreasonable Bargains and Securities obtained from young Heirs, in what Cases to be set aside. Vide Title Bonds.

1. If an Heir Apparent be intituled to an Estate Tail, after the Death of his Father, which, if in Possession, is worth 800 l., and he is cast off by his Father, and destitute of all Means of Livelihood; and he for 30 l. paid him in Money, and 20 l. per Ann. secured to be paid him, during the Joint Lives of him and his Father, absolutely conveys his Remainder in Tail to J. S. and his Heirs; and the Father lives ten Years after this Conveyance, yet the Heir shall be relieved against this Conveyance, although it was absolute, and tho' J. S. had lost his Money if the Heir had died in his Father's Life-time; per Nottingham L. C. Trin. 34 Car. 2. between Not and Hill. 1 Vern. 167, 168, but upon a Rehearing, this Decree was reversed by North Lord Keeper, who said he could not relieve the Heir, unless it be declared a Law in Chancery, that no Man must deal with an Heir in his Father's Life-time; but upon a second Rehearing, this last Decree was reversed, and the right established by Jefferies L. C. who said, that he took it to be an unrighteous Bargain from the Beginning, and that nothing which happened afterwards could help it. 2 Chan. Cas. 120. S. C. 2 Vern. 27. & C.

2. If one intituled to an Estate, after the Death of two old Lives, takes 350 l. to pay 700 l. when the Lives fall, and mortgages the Estate as a Security; tho' both the Lives die within two Years, yet there shall
Of Ideots and Lunaticks.

(A) Of Ideots and Lunaticks, who are such, how found, to whose Custody to be committed; and here of the Power and Duty of their Committees, and of Abuses done them.

(B) What Acts of Ideots or Lunaticks are good, void or voidable.
Of Ideots and Lunaticks.

Fratres and Assigns, my Lord Chancellor inclined that it could not; for tho' it be an Advantage and Emolument to the King, yet it is coupled with a Trust; and if the Grantee should die intestate, or make an Infant Executor, it would be highly Inconvenient; and he said there was no Precedent of any such Grant from the Time of the making the Statute de Prerogat. Regis, Mich. 1681. between Prodlors and Phrazier. 1 Vern. 9. 1 Vern. 137. S. C. where it is said, that my Lord Keeper North refused to do any thing in it, till the Validity of the Patent was determined in a Legal way. Vid. 3 Mod. 43. S. C. where in B. R. the Grant to the Executors was held good; for the King has the same Interest in an Ideot, that he had in his Ward, which always went to the Executor of his Grantee; but it was otherwise with a Lunatick.

2. If an Inquisition find that such a one was an Ideot for eight Years last past, such Inquisition is void; for an Ideot must be found to be so a nativitate, otherwise it is not an Ideot, but a Lunatick only. Between Prodlors and Phrazier, 1 Vern. 12. per Lord Chancell. Vid. 3 Mod. 43. S. C. in B. R. where this finding was held sufficient; for the Inquisition finding the Party an Ideot, the Aiding eight Years was superfluous.

3. A Woman was found a Lunatick, and the Custody of her was committed to a Stranger; on Application made by her Sifer, to have the Custody, she intilled, that as she was next of Kin, so she was the properest Person for that Purpose; for being intitled to Administration to the Lunatick, she would be the more careful of her Effects, and the Objection to a Guardian as next of Kin, who may inherit, will not hold in this Place, because there is no Inheritance. My Lord Chancellor held, that this was not a Matter of Right, but of Prudence, and that he would not remove her from the Custody of the Stranger, nor ever grant the Custody of a Lunatick to one who should make gain of it, but he said the Sifer should be called to the yearly Account before the Master. Lady Cope's Case, 2 Chan. Ca. 239.

4. A Lunatick, before he became such, made a Mortgage of a good Part of his Estate for 50l. afterwards his Committee transferred this Mortgage, and took up 3 or 400l. more upon it; and my Lord Keeper declared, the Mortgage should stand a Security for 50l. only; and he likewise held, that the Committee of a Lunatick has an Estate but during Pleasure, and therefore cannot make Leases, nor any ways Incumber the Lunatick's Estate, without special Order of this Court, where the Profits are not sufficient to maintain the Lunatick. And as to Improvements and Buildings made by a Committee, on the Lunatick's Estate, that the Heir, upon the Lunatick's Death, must be let into the Estate, without making any Allowance for such Improvements. Mich. 1684. between Filler and Merchant. 1 Vern. 262.

5. The Committees of a Lunatick, having invested Part of the Lunatick's Personal Estate, in a Purchase of Lands, made in the Lunatick's Name, to him and his Heirs; the Question was, whether the Committees had not exceeded their Power, by changing the Personal Estate into a Real Estate, and thereby defeating the next of Kin, in Favour of the Heirs at Law. And after great Debate, and upon reading the Statute made touching the Granting of the Custody of the Lunatick, whereby it is provided, that the Surplus shall be safely
Of Ideots and Lunaticks.

If a Man forcibly takes away a Lunatick, whilst she is under Commitment, and marries her, this is such a Contempt, for which the Court of Chancery will commit him; but if the Marriage is afterwards held good in the Spiritual Court, (as it may be by being consummated in one of her lucid Intervals) and if upon Inspection it appears, that she is restored to her Understanding, the Husband shall be discharged, and the Commiion of Lunacy vacated. Trin. 1702.

Mrs. Ather's Case.

(B) What Acts of Ideots or Lunaticks are good, void or voidable.

1. If a Man who is non Compos Mentis aliens Lands, this shall not be restored to himself in Chancery, upon a Matter of Equity, against the Maxim of the Common Law 1 Roll. Rep. per Lord Chancellor and J. Dodderidge. Q.

2. J. S. by Inquisition, was the 23d of June 1664. found a Lunatick, with a Retrospect of 17 Years; it was likewise found, that he alligned a Debt sufficiently secured to him for the Purchase of a certain Manor; and on a Bill brought in his Behalf by the Attorney General, Justice Tyrrell, held, that he ought to be relieved, and of the same Opinion was my Lord Keeper, on a Rehearing; and said, that it was not necessary, that the Lunatick should be a Party, but gave the Defendant leave to traverse the Inquisition. Mich. 20 Car.


3. C. cited, and there held, that it is necessary, that the Lunatick should be made a Party; focus of an ideot, and that it was dispensed with in the above Case, because he should not be admitted to justify himself.

3. If A. Tenant for Life, with Remainder to his first Son in Tail, Remainder to B. in Fee, and A. being non Compos, surrenders by Deed to B. before he has a Son, this Deed of Surrender is absolutely void, and the contingent Remainder not destroyed. Between Thompson and Leach; adjudged in B. R. and affirmed on a Writ of Error, in the House of Lords. Shaw P. C. 150. 2 Sail. 427. S. C.

3 Lev. 284. 2 Sail. 576. S. C. vid. 2 Chan. Ca. 193, where a Conveyance made by a Person of weak Understanding was set aside; and 2 Vern. 189.

4. A. obtained a Purchase at a great Undervalue by Deeds, Fines and Recoveries, from one who was a Lunatick; and on Application of his Committee, the Purchase was set aside. 2 Vern. 678. vid. 2 Vern. 414, that a Settlement made by a Lunatick, tho' not unreasonable, shall be set aside; vid. 1 Vern. 155, where the Court directed that a Settlement, which was intended to be made by one who was found a Lunatick, but, it was urged, was restored to his Understanding, should be made by Flete in C. B. that the Judges might inspec
Of Idiots and Lunatics.

inspect and examine him; *vid. 1 Vern. 105.* that a Will made by one who afterwards becomes *non Compos,* is not revoked by his being found afterwards a Lunatic; and that a Bill will not lie to establish the Testimony of the Witnesses to it in *Perpetuum rei Memoriam.*

5. A Bill was brought by a Lunatick and his Committee, to set aside a Settlement, which had been obtained from him by the Defendant, before the Issuing out of the Commission of Lunacy; but subsequent to the Time, wherein by the Commission he was found to have been a Lunatick, and the Bill charged several Acts of Inximity and Distraction, previous to the Making of the Settlement, and the Issuing out of the Commission; and charged likewise, that the Commission of Lunacy was still in Force. To this Bill the Defendants demurred, for that 'twas against a known Maxim of Law, that any Person should be admitted to fulfill himself, because, during the Continuance of the Lunacy, he cannot be supposed to know what he did: But my Lord Chancellor overruled the Demurrer, and said, that Rule was to be understood of Acts done by the Lunatic to the Prejudice of others, that he should not be admitted to excuse himself on Pretence of Lunacy; but not as to Acts done by him, to the Prejudice of himself; besides, here the Committee is likewise Plaintiff; and the several Charges of Lunacy are by him, in Behalf of the Lunatick; and it has been always held, that the Defendant must answer in that Cause; and so he was ordered to do here, tho' the Settlement was not unreasonable in itself, being only to limit the Estate in Question to the Defendants, the Unclefs, in Case of Failure of Issue Male of the Lunatick, with Power for the Lunatick to charge the same with considerable Portions for his three Daughters, and a Power of Revocation. *Misch. 1729.* between *Ridler* and *Ridler,* at my Lord *Chancellor's.*
C A P. XXXIV.

Infant.

(A) Infants, how far favoured in Equity.
(B) How far bound in Equity, oz lets favoured than at Law.
(C) What Acts of Infants are good, void, oz voidable.

(A) Infants, how far favoured in Equity.

If a Man intrudes upon an Infant, he shall receive the Profits but as Guardian, and the Infant shall have an Account against him in (a) Chancery, as Guardian. 1 Vern. 295; per Lord Keeper.

1. The interest of Infants is so far regarded and taken care of in this Court, that no Decree shall be made against an Infant, without having a Day given him, to shew Cause after he comes of Age: An Infant may, by his Prochein amy, call his Guardian to an Account, even during his Minority: If a Stranger enters and receives the Profits of an Infant's Estate, he shall, in Consideration of this Court, be looked upon as a Trustee for the Infant. Per Hals Ch. Jul. in his Argument of the Case of Lord Falkland and Bertie, 2 Vern. 342. this Court will Decree building Leases for forty Years, of Infants Estates, when it appears to be for their Good. 2 Vern. 324.

2. If a Man, during a Person's Infancy, receives the Profits of an Infant's Estate, and continues to do so for several Years after the Infant comes of Age, before any Entry is made on him; yet he shall account for the Profits throughout, and not during the Infancy only. Decreed Pasch. 1699. between Tallop and Holkworthy.

3. An Infant cannot be foreclosed, without a Day to shew Cause after he comes of Age; but the proper Way in such a Case is to decree the Lands to be sold to pay the Debts, and that he will bind the Infant; per Cur. Between Booth and Rich, 1 Vern. 295. But if there be a Mortgage, and it depends on a disputable Title, so that no Money can be had by an Assignment of it over, Equity will not Decree an Infant to be foreclosed till he comes of Age. 2 Vern. 351.

4. If Lands are devised to be sold for Payment of Debts, the Lands may be decreed to be sold without giving the Heir, who is an
Infant.

an Infant, a Day to shew Caufc, when he comes of Age, for no-
thing defcends to him; but if he is decreed to join in the Salc, he
must have a Day after he comes of Age. Decreed on a Bill of Re-
view. Hill. 1701. between Cooke and Parsons, 2 Vern. 429.
5. If an Infant puts in an Answer by Guardian, and there is a De-
cree againft him, without any Day given him to shew Caufe, fuch
Answer shall not be read, or admitted as Evidence againft him
when he comes of Age; but if a fuperannuated Defendant puts in an
Answer by his Guardian, it fhall be read againft him at any Time
after; for he is supposed to grow worfe, and is not to have a Day to
flew Caufe. Per Lord Keeper, Trin. 1704. between Sir Richard
Leving and Lady Cavery.
6. If A. devifes Lands to Trustees, until Debts paid, and then to
an Infant and his Heirs, and J. S. enters and levies a Fine, and five
Years pafs; and the Infant, when of Age, brings an Ejectment, but
is barred, because the Trustees fhould have entred, yet Equity will
relieve, and not fuffer an Infant to be barred by the Laches of the
Trustees, nor to be barred of a Trufc Estate during his Inancy; and
the Infant, in this Cafe, fhall recover the mean Profits. Decreed
Mich. 1699. between Allen and Sayer, 2 Vern. 368.
7. A Court of Equity may, by the Approbation of an Infant's
Relations, allot the Infant Maintenance out of a Trufc Estate, tho'
there be no Provision in the Trufc for that Purpofe; and this is foun-
ded on natural Equity. Trin. 1691. between Englefield and Engle-
field, 2 Vern. 236.

(B) Infants, how far bound in Equity, or less
favoured than at Law.

1. Infants have been obliged to Answer in Equity, when the Parol
should have demurred at Law. Toth. 108.
2. A Sequefhration may iflue againft an Infant. 2 Chan. Ca. 163.
3. Infants may be foreclosed of the Equity of Redemption. Vid.
1 Vern. 295. 2 Vern. 350.
4. If an Anceftor dies indebted by Bond, in which the Heir is ex-
pressly bound, and leaves no Personal Affets, and the Lands defcend
on an Infant Heir, whether Equity will, during the Minority of the
Heir, decrees Satisfaction. Quere & vid. 1 Vern. 173. Where it is
faid, that Infants may be fued in Equity, and that there is no Prece-
dent, that the Parol fhould demur; and 1 Vern. 418. where the
Matter of the Rolls faid, that he thought fuch a Decree reafonable;
but the Reporter adds a Dubitatur to it.
5. If one gives her Son other Lands in Lieu of Lands intailed,
and by her Will gives her intailed Lands to her Daughter, and
takes a Bond from her Son to permit her Daughter to enjoy the in-
tailed Lands, and the Son dies, leaving an Infant Son, who being in
Posseflion of the Lands that came in Recompence, brings an Eje-
clement for the intailed Lands; but by Reafon of the Infancy of the
Grandfon, the Bond cannot be fued; if the Daughter brings a
Bill, she fhall by Decree be quieted in Posseflion of the intailed
Lands, until six Months after the Infant comes of Age, and then the
C c c c
Infant
Infant may shew Causa. Trin. 1691. between Thomas and Gyles, 2 Vern. 232.

6. If Lands are given by Will to a Woman, and the Heirs of her Body, and it is declared, that if she left no Sons, and only two Daughters, the Eldest should pay the Youngest 300l. and have the whole Estate; if there are two Daughters only, and the 300l. is not paid, and the younger brings a Bill for an Account of Profits, and for Possession of half the Estate, the Court will Decree the eldest Sister, though an Infant, to pay the 300l. in six Months, with Interest from the Mother's Death, or in Default to account for Profits of a Moiety, and the Moiety to be set out by Commissioners, and to be held and enjoyed by the younger Sister; but the Elder being an Infant, must have a Day to shew Causa when she comes of Age. Hill. 1704. between Gundry and Baynard, 2 Vern. 479.

7. An Infant shall be bound by Conditions in Fact, and such Conditions as he can perform in Equity as well as in (a) Law. Vid. Fry and Porter's Cafe, 1 Mod. 300. 2 Vern. 343.

(a) An Infant is bound by all Conditions, Charges and Penalties in an original Conveyance, whether he comes to the Estate by Grant or Defect. 1 Esp. 233 b.

8. A gave Lottery-Tickets amongst her Servants, on Condition, that if any of them came up a Prize of 20l. or more, they should give one Half to her Daughter; the Ticket given the Foot-Boy, who was an Infant, came up 1000l. Prize; and it was held, that the Daughter was well intitled to a Moiety; for a Gift to an Infant, on Condition, binds him as well as another Person. Trin. 1706. between Scot and Houghton, 2 Vern. 560.

(C) What Acts of Infants are good, void, or voidable.

1. If an Infant sells Lands for Money, and purchases other Lands with the Money; yet this Sale made by the Infant, shall not be helped in Chancery, because the Person of the Infant is disabled by a Maxim in Law. 16 Jac. 1. per Lord Chancellor, Dodderidge and Hutton, 1 Rol. Abr. 376.

2. But if an Infant makes an Agreement, and receives Interest under it after he comes of full Age, such Agreement shall be decreed against him. Hill. 1682. between Franklin and Thornbury, 1 Vern. 132.

3. So if an Infant makes an Exchange of Lands, and continues in Possession, after he comes of Age, he shall be bound by it. 2 Vern. 225. per Curiam.

4. If A, an Infant, desires that Lands subject to a Trust for Payment of younger Children's Portions, might not be sold, and offers by his Answer, to settle other Lands for raising the Portions, A shall be bound by the Offer made by him in his Answer; if the other Side are thereby delayed; and if the Infant A does not immediately, after his coming of Age, apply to the Court, in order to retract his Offer, and amend his Answer. Decreed between Cecil and the Earl of Salisbury, 2 Vern. 224.

5. If an Infant borrows a Sum of Money, for which he gives a Bond, and devolves his Personal Estate (being of sufficient Capacity) for
Infant.

for the Payment of his Debts, particularly those he had set his Hand to, this Bond-Debt shall be paid. Decreed 1651, between Hampshire and Lady Sydenham, Nisi. Chan. Rep. 800. 55.

6. If an Infant Executor afflicts to a Legacy, such (a) Aisent shall be good, if there are sufficient Assets besides to pay Debts; secut. not. Per Lord Keeper Finch, 1 Chan. Ca. 216.

cannot bind himself, by his Aisent to a Legacy. 3 Rep. 29. Cre. Eac. 719.

7. An Infant may administer at seventeen, but cannot commit a Devascravit till he is of (b) full Age. Per North Lord Keeper, (c) Where an Infant is made Executor. Administration must be granted cum Testamento assenti, to his Guardian, or next Friend, durante Minoritate; but the Administration ceases when the Infant is seventeen Years of Age; so if an Infant Executive, before seventeen Years of Age, take a Husband of full Age, the Administration premintly ceasing. 5 Rep. 29. 6 Rep. 61; 2 Leg. 398. But if an Infant is inlent to an Administration of the Goods of an Inheritance, Administration shall be granted to another till he is twenty-one; because a Minor cannot enter into a Bond, with Sures, to administer faithfully, as required by the 22 & 23 Car. 2.

8. An Infant Female may make a Will, and dispose of her Personal Estate at Twelve; an Infant Male at seventeen, or at fifteen, if proved to be of Discretion; agreed in the Case of Bishop and Sharp, 2 Vern. 459, by the Civil Law at fourteen; and this Age is now admitted of in Chancery.

9. An Infant may be a (c) Trustee. 2 Vern. 561. (c) And by the 7 Ann.

8pp. 19. Infants seized or possessed of Estates in Fee in trust, or in Mortgage, are enabled to make Conveyances of such Estates.

10. In this Case it was urged, that by the Custom of Merchants, Infants were compellable to Account as Pardors; but the Court held, that tho' an Infant may be an Executor, and shall be charged, because the Law enables him; so he may be charged in Trover, because a Tort; yet neither on a Contract, nor as Bailiff, nor for Goods to carry on a Trade, can he be charged; and therefore when they are made Pardors, Security ought to be taken from their Friends, for their Accounting. Trim. 1700. between Smallly and Smallly.

11. A. having married an Heir, who was but eighteen Years of Age, and the being with Child, A. petitioned the King, that he would be pleased by Privy Seal, to direct his Justices of the Common Pleas, to take a Fine or Common Recovery, so that the Petitioner may be free of an Estate for Life in the Premises; the King, in Answer said, that he was satisfied of the Petitioner's Merit, but referred it to the Lord Chancellor, to report what was fitting to be done therein; who, upon hearing Counsel, declared he thought the Petition reasonable, and that he would report the same to the King accordingly. Sir Humphry Mackworth's Case, 1 Vern. 451. Note; Serj. Maynard observed, that the Petition was inartificially drawn, in praying, that a Fine or Common Recovery may betaken, for that a Fine cannot be taken from an Infant, but a (d) Recovery (d) An Infant, may, by the King's Special Direction.

Guardian, cannot suffer a Common Recovery; but if he obtains a Privy Seal for that Purpose, he may suffer a Recovery. 10 Rep. 45. Where such Recoveries have been, sed. Hob. 199. Cre. Cor. 197. 1 Rel. Abr. 731. And sed. 2 Selk. 381. where J. S. being of the Age of nineteen Years, his Sifer, who was the next to Remainder, and also his Heir, married one of his Poormen, and he petitioned the King for Leave to suffer a Common Recovery, who referred it to the Judges of the Common Pleas, before whom several Precedents of Recoveries suffered by Infants, upon Privy Seals, were cited; but the Judges having observed, that fewer of the Petitions were by Fathers, upon the Marriage of their Sons, and an equal Recompence given; and that there was neither Father nor Marriage in the Case, they disallowed it, and said, that this Matter had been carried too far already.

C A P. XXXV.
C A P. XXXV.

Injunction.

(A) Injunctions, in what Cases, and when to be granted.
(B) What shall be a Breach thereof.

(A) Injunctions, in what Cases, and when to be granted.

1. A Trustee having contracted to sell an Estate to one Person, and the Cestui que having actually sold it to another, who moved for an (a) Injunction to quiet him in the Possession, being disturbed by the Trustee; it was held by my Lord Keeper, that an Injunction for Quietin the Possession, is only grantable where the Plaintiff has been in Possession for the Space of three Years, before the Bill exhibited, upon a Title yet undetermined; or in Case the Cause hath been heard, and Judgment passed upon the Merits of the Cause by the Court.

(a) Injunctions to stay Waste, ced. Title Waste; Injunctions to stay Proceedings at Law, ced. Title Courts, and their Jurisdiction, that Chancery will not grant an Injunction, unless a Right appears, ced. 1 Vern. 127. 2 Chan. Ca. 165. 1 Vern. 276. 112. will grant a perpetual Injunction. Vid. 2 Chan. Ca. 80. 1 Chan. Ca. 75. 2 Chan. Ca. 165.

2. If a Person is sued at Law for irregularly serving the Process of this Court, an Injunction will be granted to stay the Proceedings at Law, for the Irregularity is only punishable in this Court. 1 Vern. 269.

3. An Injunction is never to be granted before a Bill filed. 4 Instr. 92. ced. 1 Vern. 156. where it is said, that the Defendant cannot have an Injunction, because he has no Bill filed.

4. But where a Mortgagee brought a Bill to foreclose, and pending the Suit an Advoceon appendant to the mortgaged Manor became void; and the Mortgagee being hindered from Prefenting, brought his Quare Impedit, and the Court granted an Injunction on the Defendant's Application, tho' he had no Bill filed. 2 Vern. 401.

5. So
5. So where a Cause abated by the Death of the Lady Gerrard, and the Defendant was her Executor, who being served with a Copy of the Bill of Revivor, and my Lord Keeper's Letter, would not appear, being in Privilege; and upon Motion an Injunction was granted, though the Cause was not revived; and the Cause of Armstrong and Jackson was cited, where, before a Demurrer determined, the Plaintiff had an Injunction, on Motion. Trin. 1700. between the Duke of Hamilton and the Earl of Macclesfield.

6. So where the Lord Wharton had an Injunction to quiet him in the Possession of the Mines in Question; and upon Hearing of the Cause, an Issue was directed, to try whether the Mines in Question were within the Plaintiff's or Defendant's Manor; the Issue was tried at Bar, and found for the Plaintiff; then the Plaintiff died, and a Bill of Revivor was brought; and before the Time for Answering was out, or the Cause revived, the Plaintiffs moved for an Injunction to stay the Lord Wharton's Working the Mines, having Affidavits, that since the Verdict against him, he had trebled the Number of Workmen, and between that and Candlemas would work out the Mines; and an Injunction was granted, tho' the Cause was not revived. Mich. 1702. between Robinson and Lord Wharton.

(B) What shall be a Breach thereof.
1. If there be a Suit in Equity concerning Title to a Close, and thereupon an Order is made, that the Defendant shall suffer the Plaintiff to enjoy the Close, till, &c. and notwithstanding, the Defendant, upon a Title of Common, puts in his Cattle; this is no Breach of the Injunction, for the Common was not in Question by the Bill. Hill, 8 Jac. 1. Bent's Case, Lane 96.
2. In this Case, the Question was, whether the Plaintiff was intitled to Relief for meane Profits received by the Defendant, whilst a Cause was pending in this Court; and the Defendants had an Injunction; and my Lord Keeper held he was not intitled, but from the Time of Entry; for if the Plaintiff entered, he might recover at Law, and the Injunction did not prevent his Entry. 2 Vern. 519.
C A P. XXXVI.

Interest Money.

(A) What Debt shall carry Interest, and from what Time.

(B) Where there may be Interest upon Interest.

(C) Where the Interest may exceed the Penalty.

(D) How Debts, contracted before the Statutes that restrain Usury, shall carry Interest.

(E) What Interest a Debt contracted in a Foreign Country shall carry here.

(A) What Debt shall carry Interest, and from what Time.

1. If A. gives a Legacy to his Granddaughter an Infant, to be paid at such Time, and in such Manner as his Wife, who was his Executrix, thought fit and best for his Granddaughter; and the Executrix lives near twenty Years, and dies without paying the Legacy; the Legacy shall be paid with Interest from the Death of A. tho' there was no Demand made of it in the Life of the Executrix. Decreed Trin. 1684. between Churchill and Lady Speake. 1 Vern. 251. a Legacy payable at a certain Day, shall carry Interest from the Time of Payment. 1 Vern. 262. but Quere, whether there must not be a Demand; for,

2. Where a Legacy was devised to J. S. to be paid at a certain Time, yet it was held, that it should not carry Interest, but from the Time of a Demand made, tho' otherwise of a Debt. Pafch. 1791. between Jolliff and Crew, and cid. 2 Salk. 415. where it was held per Cooper Lord Chancellor, that in Case of a Person of full Age, he shall not have Interest, but from the Time of Demand; focus of an Infant, because Laches shall not be imputed to him.

3. If a Mortgage is forfeited, and the Mortgagor meets the Mortgagor, and pays to him, I have money now, I will come and redeem the Mortgage; and the Mortgagor replies, that he would hold the mortgaged
Interest Money.

mortgaged Premises as long as he could; and when he could hold them no longer, let the Devil take them if he would. And afterwards the Mortgagor goes to the Mortgagee's House, with Money, more than sufficient to redeem the Mortgage, and tenders it there; but it does not appear, that the Tender was to the Mortgagee, or that he was within; yet a Redemption will be decreed, and the Mortgagee shall have no Interest from the Time of the Tender, because of his Willfulness. Decreed Mich. 15 Car. 2. between Manning and Bourges. i Chau. Ca. 29. and a like Case said to be between Peckham and Lettou, about a Year before.

(B) Where there may be Interest upon Interest.

1. J. mortgaged his Estate to the Plaintiff, and died, leaving the Defendant his Daughter and Heir, who was an Infant, and had nothing to subsist on, but the Rents of the mortgaged Estate; and the Interest being sufficed to run in Arrear three Years and a Half, the Plaintiff grew uneasy at it; and threatened to enter on the Estate, unless his Interest might be made Principal; upon which the Defendant's Mother, with the Privy of her nearest Relations; stated the Account, and the Defendant her self (who was then near of Age) signed it; and the Account being admitted to be fair, it was held by my Lord Chancellor, that the regularly Interest shall not carry Interest, yet that in some Cases, and upon some Circumstances, it would be Injustice, if Interest should not be made Principal; and the whole in the Case, because it was for the Infant's Benefit; and without this Agreement, would have been instituted of Substanz. Decreed Parch. 1699, between the Earl of Chesterfield and Lady Cromwell, and affirmed by my Lord Keeper Wright, Mich. 1793.

2. If a Mortgagee assigns over the Mortgage, all the Money due to the Mortgagor for Principal and Interest being paid by the Assignee, the Interest shall be accounted Principal in the Hands of the Assignee, but the Account between him and the Mortgagee shall not conclude the Mortgagor; neither shall the Interest be accounted Principal, unless there was a fair and actual Assignment, and the Money really paid. Parch. 17 Car. 2. between Smith and Pemberton. i Chau. Ca. 67. vid. i Chau. Ca. 258. S. P. per Lord Keeper, and by him said to be the constant Rule in Equity; and that there was not a Case to contradict it, except that of Porter and Hотор in Lord Shaftsbury's Time; vid. 1 Vern. 168, 169. S. P. where my Lord Keeper said, that he thought it reasonable that the Interest should carry Interest with Respect to an Assignee; and that tho' it was received otherwise in the House of Lords, in the Case of Porter and Hотор; yet it was on Account of the particular Hardships which attended that Case in all its Circumstances.

3. If A. mortgaged for 450 l. payable at the End of five Years; with Interest at 5 l. per Cent. in the mean Time; and about two Months before the End of the five Years, the Mortgagee assigns over the Mortgage for 560 l. being the Principal and Interest then due; the 460 l. shall carry Interest, tho' the five Years were not elapsed; the Mortgage being forfeited by the Non-payment of Interest. Decreed Hill. 1699, between Gladman and Heuchman, 2 Vern. 135. vid. i Chau.
Interest Money.

1 Chan. Ca. 258. where it was declared by my Lord Chancellor, that it should be a Rule, that a Mortgagee (the Mortgage being forfeited) should have Interest for Interest; but Q.

(C) Where the Interest may exceed the Penalty.

1. If one by Will or Deed subject his Lands, for the Payment of his Debts, and there is a Debt due by a Bond, the Interest of which hath out-run the Penalty, yet it shall not carry Interest beyond the Penalty; for the Design of subjecting the Lands was not to increase the Debt, but to give a farther Security; but if the Deviser or Trustee neglects to pay in a reasonable Time, he shall, after such Neglect, pay Interest beyond the (a) Penalty; per Cooper Lord Chancellor: 1 Saule 154.

(a) The' it be the regular Practice in Equity, as well at Law, that an Obligor shall not pay more than the Penalty of the Bond, the Obligee, having chosen his own Security, and made himself Judge. Vid 1 Vern. 542. 2 Vern. 709. Yet a Court of Equity will sometimes extend the Debt beyond the Penalty, as where the Obligee has been delayed by Injunction; vid. 1 Vern. 350. To fo delayed by Privilege of Parliament; vid. Show P. S. 15. But Note, a Diversity is often taken, where the Obligee, and where the Obligor was in Equity. For in the last Case, the Court will sometimes, upon relieving against the Penalty, decree Principal and Interest, tho' the Interest exceed the Penalty, pursuant to that Rule, that He, who would have Equity done him, must do it to others. And this seems to be the Reason, why an Obligee shall have Interest after he has entered up Judgment; for tho' in Stricketh, it may be accounted his own Fault, why he did not take out Execution, yet as by the Judgment, he is invited to the Penalty, it does not seem reasonable that he should be deprived of it, but upon paying him Principal and the Interest, which incurred as well before as after the entering up of the Judgment.

(D) How Debts, contracted before the Statutes that restrain Usury, shall carry Interest.

1. If a Mortgagee receives Interest upon an old Mortgage, after the Rate of 8l. per Cent. after such Time as the Interest is reduced to 6l. per Cent. by the Statute, yet he shall not be obliged to allow or discont the 2l. per Cent. toward Satisfaction of the Principal. Decreed Trim. 1688. between Walker and Penrie, 2 Vern. 78. 2 Vern. 145. S. C. where upon a Bill of Review, Rawlinson and Hutchins, Lord Commissioners, held the Decree should be reversed, against Lord Treco; but it seems to be now settled, that the Statute of 2 Ann. cap. 16. which reduces the Interest of the Money to 5l. per Cent. has not a Retrospect to any Debts contracted before, but that they shall carry Interest according to the Interest allowed, or Agreement made at the Time the Debt was contracted.

(E) What Interest a Debt contracted in a Foreign Country shall carry here.

1. If S. contracted a Debt in Ireland, for which he gave a Bond, and coming into England he was arrested here for the Debt; and having brought a Bill for Relief, he insinced among other Things, that he should not be obliged to pay Irish Interest, the Money being now to be paid here; but the Court held, that he must pay Irish Interest, and that in all Cafes Interest must be paid according
according to the Law of the Country where the Debt was contracted, and not according to that where the Debt is sued for; but held it reasonable, as the Money was now to be paid here, that the Plaintiff should have an Allowance for the Return of it out of Ireland, Trin. 1701, between the Earl of Dungannon and Hackett, and several Precedents were cited to this Purpose, as the Case of Lane and Nichols, in which Turkisb Interest was allowed on a Contract made there, tho' both Parties had been long in England; so Indian Interest was allowed on a Contract, made there between Harvey and the East-India Company; and a Case on the Earl of Donegall's Will, who living in England devised a Rent-charge out of his Estate in Ireland; and it was held that it should be according to the English Value, the Will being made here.

2. If a Debt be contracted in Ireland, and a Bond given for securing of it in England, it shall carry English Interest, Mich. 1700, between L. Ranelagh and Sir John Champant, 2 Vern. 395, but Quare of this Report; for it appears, that Sir John Champant was Deputy-Receiver to L. Ranelagh, who was Vice-Treasurer of Ireland; and that he had accepted and paid several Bills drawn on him by my Lord from England, amounting to a great deal more than the Fees and Profits of his Place; and that my Lord sent him over a Bond for the Overplus payable there; and it was held, that this Bond on a Suit here, should carry Irish Interest.

3. The Plaintiff being a Merchant, had Sugars due to him in Nevis, on Bond, with Interest at 10 l. per Cent. being the common Interest of the Country; he intrusted one J. S. his Agent there to receive those Sugars, and to return them hither. J. S. receives the Sugars, but never returns them, but dies, leaving the Defendant his Executor, against whom the Plaintiff brought his Bill; and tho' it was urged, that J. S. being an Attorney, should be excused from Interest, or at most should only pay the Interest this Country allows; yet it was held, that the Defendant should pay 10 l. per Cent. Interest, and that J. S.'s being only an Agent or Attorney, did not excuse him, because he had misbehaved himself. Trin. 1701, between Ellis and Loyd.
Jointenants, and Tenants in Common.

(A) What shall be a Jointenancy, and not a Tenancy in Common.

(B) What shall amount to a Severance of the Jointenancy.

(A) What shall be a Jointenancy, and not a Tenancy in Common.

1. If two Persons advance a Sum of Money by Way of Mortgage, and take the Mortgage to themselves jointly, and one of them dies; when the Money comes to be paid, the Survivor shall not have the Whole, but the Representative of him who is dead shall have a Proportion. Decreed 7. Car. 1. between Petty and Steward, 1 Chan. Rep. 57.

2. But if Two take a Lease jointly of a Farm, the Lease shall survive; but the Stock on the Farm, though occupied jointly, shall not survive, neither shall a Stock used in a joint Undertaking, in the Way of Trade, survive; and therefore not necessary in Articles of Copartnership, to provide against it; per Lord Keeper. Hill. 1683. between Jeffreys and Small, 1 Vern. 317. And per Lord Keeper, where Survivorship is to take Place, is where Two become interested by Way of Gift, or the like. Vide 1 Vern. 33, 361. whether if Two joint Purchasers pay Share and Share alike for a Purchase, and one dies, the Whole shall survive.

3. The Commissioners of Sewers had sold and conveyed Lands to five Persons, and their Heirs, who afterwards, in order to improve and cultivate these Lands, entered into Articles, whereby they agreed to be equally concerned as to Profit, and Loss, and to advance each of them such a Sum, to be laid out in the Manurance and Improvement of the Land; and it was held, that they were Tenants in Common, and not Jointenants, as to the beneficial Interest or Right in these Lands, and that the Survivor should not go away with the Whole.
Jointenants, and Tenants in Common.

Whole, for then it might happen that some might have paid, or laid out their Share of the Money; and others, who had laid out nothing, go away with the whole Estate. Decreed at the Rolls, Trin., 1729, between Lake and Gibson: And his Honour held, that where Two, or more, purchase Lands, and advance the Money in equal Proportions, and take a Conveyance to them and their Heirs, that this is a Jointenancy, that is, a Purchase by them jointly of the Chance of Survivorship, which may happen to the one of them as well as to the other; but where the Proportions of the Money are not equal, and this appears in the Deed it self, this makes them in the Nature of Partners; and however the legal Estate may survive, yet the Survivor shall be considered but as a Trustee for the others, in Proportion to the Sums advanced by each of them. So if Two, or more, make a joint Purchase, and afterwards one of them lays out a considerable Sum of Money in Repairs or Improvements, and dies, this shall be a Lien on the Land; and a Trust for the Representative of him who advanced it; and that in all other Cases of a joint Undertaking or Partnership, either in Trade, or any other Dealing, they were to be considered as Tenants in Common, or the Survivors as Trustees for those who were dead.

4. If a Man covenants to stand seised to the Use of A, for Life; and after to Two, equally to be divided, and to their Heirs and Assigns for ever, the Inheritance shall be in (a) Common, as well as the Estate for Life; and there is no Difference where it is to Two equally divided, and where to Two equally to be divided. 2 Vent. 365, 366. eid. Shaw. P. C. 210. where it is admitted, that there is no Difference between divided, and to be divided; and that Distinction is now exploded.

between them and their Heirs respectively; and Gould and Torton Justices, held it a Tenancy in Common, by Reason of the apparent Intent of the Parties; but Holt Ch. Jus. held it a Jointenancy, and that the Word equally, imported no more than to have alike; and as to the Word divided, he held, that did not import a Tenancy in Common, for their Possession must be entire, & pro indiviso, to divide would be to destroy it; and it is strange to create an Estate from a Word, which implies only, what would destroy it. 1 Sa. 338. But the same Case being cited Mich. 1750, in the Case of Singer and Phillips, was laid by Counsel to be answered, according to my Lord Holt’s Opinion; in which Case it was held by the Master of the Rolls, that there was a Difference between Words which create a Tenancy in Common in a Will and a Conveyance; for that though the Words, equally to be divided, in a Will, create a Tenancy in Common; yet it is not by Force of the Wills itself, but by the Intent of the Testator, that there should be no Survivorship; and he laid there were but two Ways of creating a Tenancy in Common by Conveyance, viz. either by limiting it to them expressly as Tenants in Common, or else by limiting a Moiety, or a Third, or other undivided Part, to one; and the other Moiety, or Third, to another. motive for if otherwise, though the Words, equally divided, be used; yet they shall signify only an equal Division and Proportion of the Profits.

5. If a Man conveys his House and four Farms to Trustees, upon Trust, that his two Sisters might cohabit in the Capital House, and equally divide the Rents and Profits of the four Farms betwixt them, and the Whole to the Survivor of them, this shall be a Jointenancy. Decreed Mich. 1694, between Clerk and Clerk, 2 Vern. 322. for although the Words, equally to be divided betwixt them, do sometimes, in a Will, make a Tenancy in Common; yet it is only by Way of (b) Conformity.

If a Man devises Lands to his two Sons, and their Heirs, for ever, and the longer Liver of them, to be equally divided between them after his Wife’s Death; this shall be a Tenancy in Common in the Sons; adjudged 3 Lev. 375. by three Judges against one; and that the Latter Words being in a Will, shall control the former.

6. If
Jointenants, and Tenants in Common.

6. If A. devises Lands to Trustees, and their Heirs, in Trust, that the Profits should be equally divided between his Wife and Daughter, during the Wife's Life; and after her Death he devises the same to the Use of his Daughter in Tail, with Remainders over, and the Daughter dies during the Mother's Life; this being a Tenancy in Common, shall go to the Administrator of the Daughter, during the Mother's Life, and shall not be a reserving Trust for the Benefit of the Heir. Decreed Mich. 1701. between Phillips and Phillips, 2 Vern. 430. vid. 1 Vern. 65. where the Words, equally to be divided, was decreed a Tenancy in common.

7. J. S. devised a Term for Years, and all her Interest therein, to her two Daughters, they paying yearly to her Son 25 l. by quarterly Payments, viz. each of them 12 l. 10 s. yearly, out of the Rents of the Premises, during his Life, if the Term so long continued; and my Lord Chancellor held it clearly to be a Tenancy in Common, the 25 l. being to be paid by the two Daughters equally, in莫ities. Mich. 1685. between Keew and Roufe, 1 Vern. 353.

8. If J. S. directs by Will, that 240 l. shall be laid out in the Purchase of Lands, and settled on M. and the Heirs of her Body; and if she die without Issue, then on the Children of E. which she should leave behind her, and M. dies without Issue, before any Purchase had, and afterwards the Trustees lay out the Money in a Purchase, and convey the Lands to the two Children of E. and their Heirs, who hold it for several Years, and then one of them dies, the Survivor shall not have the Lands. Decreed Pach. 1688. between Saunders and Brenee, 2 Vern. 46. 3 Chan. Rep. 214. S. C. reported contrary, and there said, that if the Money had not been invested in a Purchase, it would not survive. Vid. 2 Vern. 556. where it is held, that Survivorship must take Place as well in Equity as at Law.

9. A Man having a Mortgage for Years makes his Will, and thereby devises all his Personal Estate, of what Nature soever, to his Executors in Trust, for the Payment of his Debts, and afterwards devises the Residue and Overplus of his said Personal Estate to his two Daughters, equally to be divided between them, and dies; the Debts being satisfied, the Daughters contract with the Mortgagor for the Purchase of the Equity of Redemption to them and their Heirs; one of the Daughters devises her Share and Interest to the Plaintiff, and dies; and it was held, that this Purchase of the Equity of Redemption and Inheritance was a Tenancy in Common, the Mortgage devised to the two Daughters being so, and this Purchase being founded on the said Mortgage. Decreed Pach. 11 Ann. between Edwards and Fashion.

10. J. S. devised his Leasehold House to his Wife for Life, and after her Death, he devised it to A. and her three Sons, equally amongst them; and it was decreed, that they took it as Tenants in Common, though there was no Mention of any Division to be made. Pach. 1718. between Warner and Hone.

11. One devised 100 l. to Five, equally to be divided between them and the Survivors and Survivor of them; and if A. (one of the Five) died before Marriage, her Share to go over to another Perfon; and it was decreed, that they took this 100 l. as Tenants in Common, and that the Words, and the Survivors and Survivor of them, to make them Jointenants, would be a Contradiction to the first Words, whereby they were made Tenants in Common, and that they should be
Jointenants, and Tenants in Common.

be construed to extend only to such who were Survivors at the Death of the Tenant, and therefore inferred to prevent a Lapse; and this is the Stronger, by the Limitation over of A's Share upon a Contingency, by which it is plain, the Tenant did not intend her to be a Jointenant with the Rest; and as the Devise was to all Five, they must all take alike; and not A to be Tenant in Common, and the other four Jointenants. Mich. 1730. at the Rolls, between Stringer and Phillips.

(B) What shall amount to a Severance of the Jointenancy.

1. Three Persons being jointly interested in the Trust of a Term for Years; one of them mortgaged his third Part; and the Question was, whether the Jointenancy was severed; and though it was admitted to be a settled Point in Chancery, that if one devises his Lands in Fee, and afterwards mortgages them to another in Fee, that it is but a Revocation pro tanto only; yet my Lord Comper held, that this was not like the Case of a Will, in which it may be for the Mortgagor's Advantage, not to have it construed a Revocation; but that in the Case of a Jointenancy, which is a Thing odious in Equity, it would be a Disadvantage to the Mortgagor not to have it construed a Severance; for if he should die first, all must go from his Representative to the Survivor. Mich. 8 Ann. between York and Stone, 1 Salk. 158.

2. The Plaintiff's Husband and Defendant had enjoyed a Church-Lease in Moeties under an Agreement, that there should be no Benefit of Survivorship; but upon the last Renewal the Lease was taken in both their Names, and no express Agreement against Survivorship; the Plaintiff's Husband falling sick, by Deed assigned his Moiety of the Lease to his Wife, and by his Will devised it to her; and there being no Proof of the Agreement, and the Grant to the Wife being void; it was decreed, that the Will could not sever the Jointenancy. Mich. 1700. between Moyle and Gyles, 2 Vern. 385.

3. If A. and B. are Jointenants, and A. makes a Lease for Years of his Moiety, to commence upon his Death, if B. shall so long live; this is a Severance of the Jointenancy, and the Lease will bind B. if he survives. 2 Vern. 323.

4. If one Jointenant agrees to alien, and does it not, but dies; this will not sever the Jointenancy, nor bind the Survivor. 2 Vern. 63.

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CAP. XXXVIII.
C A P. XXXVIII.

Legacies.

(A) Of vested or lapsed Legacies, being to be paid at a future time of certain Age, to which the Legatees never arrived.

(C) Of a lapsed Legacy, by the Legatee's dying in the life-time of the Testator, and here, in what Cases it shall be good, and best in another Person, to whom it is limited over.

(C) Of specific and pecuniary Legacies, and here of abating and refunding.

(D) Of the time of payment of a Legacy.

(E) To whom to be paid.

(F) Where Legatees shall have interest and maintenance.

(G) Ademption of a Legacy.

Of devises of things personal, to whom, and by what description good, and where it shall be in satisfaction, vid. Title Devises. Legacies given upon condition, vid. Title Conditions and Limitations; and vid. Title Remainder, for Legacies limited over.

(A) Of vested or lapsed Legacies being to be paid at a future time of certain Age, to which the Legatees never arrived.

1. If a sum of money is bequeathed to one at the age of twenty-one years, or day of marriage, to be paid to him with interest, and he dies before either, yet the money shall go to his executor. 29 Car. 2. Cobberie's Case, 2 Vent. 342. 2 Chan. Ca. 155. S. C. 2 Salk. 415. S. C. cited, 2 Vern. 673. S. C. cited.

2. But
2. But if Money be bequeathed to one at his Age of twenty-one
Years, and he dies before that Age, the Money is (a) lost. 2 Chan. Ca. (a) The
135. 2 Salk. 415. S. P.
Rule and
Definition
In these Cases is agreeable to the Civil Law, which is, that if a Legacy be devised to one gene-

erally, to be paid or payable at the Age of Twenty-one, or any other Age, and the Legatee dies be-

for that Age: yet this is such an Interest vested in the Legatee, that his Executor or Administrator

may be for and recover it; for it is in abeyance in present, though settlement in future, the Time being an-

nexed to the Payment, and not to the Legacy itself; so if the Legacy is made to carry Interest, the

Words, to be paid, or payable, are omitted, it shall be an Interest vested; but if a Legacy be devised to

one at Twenty-one, or if, or when he shall attain the Age of Twenty-one, and the Legatee dies before

that Age, the Legacy is lapsed. Dyer 76. 1 Korn. 177. Off. Eas. 327. Scob. 311, 312. Veu. 2 Vern. 416.

Where my Lord Keeper Wright was of Opinion, that there was no Foundation for this Definition, and

that the Testator's Intention was equal in both Cases; but note, that was in a Case wherein the Legacy

Was to arise out of the Real Estate; which, by the better Authorities, shall not go to the Representa-

tive of the Legatee, but shall sink in the Inheritance, for the Benefit of the Heir, as much as if it were

a Portion provided by a Marriage-Settlement; for which see Title Bar, and 2 Vern. 35, 617, 608. and

2 Vent. Pascoi and Fathes; but when it was to be paid out of the Personal Estate, the above Definition

has been allowed of, as well before as by all the subsequent Chancellors; and my Lord Cooper said,

that the it was at first introduced upon very tender Reasons, and probably upon no other, but from

a constant Withholding in the Civil Law, to Breach in Favour of a particular Legatee against the Refi-

duary Legatee, who went away with the whole Surplus of the Personal Estate, yet as Chancery has now

a concurrent Jurisdiction with the Spiritual Court in Matters of this Nature, he thought it highly rea-

sonable, that there should be a Conformity in their Resolutions, that the Subject might have the same

Measure of Justice in which Court ever be tried.

3. If a Portion is devised to a Child, with Interest, but not to be

paid, or payable, until the Child attain twenty-one Years, or was

married; and the Child dies under twenty-one Years, and unmar-

ried; yet the Portion shall go to the Administrator of the Infant.

Trin. 1637. between Collins and Metcafe, 1 Vern. 402. ddoceed.

4. So if a Legacy of $0. l. is devised to J. S. when of the Age of

sixteen Years, and Interest in the mean Time to be paid quarterly;

this is a Legacy vested, because it carries Interest. Mich. 1711.

between Stapleton and Cheele, 2 Vern. 673. deceeed.

5. But if A. devises in these Words, ctc. I give 100 l. a-piece to

the two Children of J. S. at the End of ten Years after my De-

case, and the Children die within the ten Years, this is a lapsed

Legacy, and is so in all Cases where the Time is annexed to the

Legacy it self, and not to the Payment of it. Between Skill and

Dye, 2 Salk. 415. per Cooper Lord Chancellor; though it was ob-

jected, that this differed from the Case, where a Man devises 100 l.

to J. S. at his Age of Twenty-one, because it is a Contingency,

whether he will attain to that Age; but the Expiration of the ten

Years is inevitable.

6. So where one being possesed of a very considerable Personal

Estate, Part in Jamaica, and Part in England, and being himself resid-
ing in Jamaica, made his Will, and thereof several Executors, some for his Estate in Jamaica, and others residing in England, for his Estate here, and amongst other Things devised in these Words, ctc. I give and bestowe to J. S. now under the Custody of R. D.

the Sum of 2000 l. at the Age of twenty-one Years, to be paid by my Executors in England, and devised all the Reit and Residue of his Estate to the Plaintiff, and died; J. S. having attained his Age of Eighteen, made his Will, and thereby devised this Legacy, and all his Estate, to the Defendant; and my Lord Chancellor held this a lapsed Legacy, and that it was a vain Endeavour in the Defendant's Counsel, to confute it a present Legacy, and therefore vested by the Word Now; because it was a plain Description of the Condition of
of the Legatee, viz. Now, under the Custody of, &c. for otherwise they must lie at Rest, which would be playing with the Words; and though the Word paid was made Use of, yet it was plainly intended a Designation of the Persons by whom the Legacy was to be paid, viz. by his Executors in England, which was proper, he having two Sets of them. Trin. 1715. between Onslow and Southdean.

(B) Of a lapsed Legacy, by the Legatee's Dying in the Life-time of the Testator; and here, in what Cases it shall be good, and void in another to whom it is limited over.

1. A. By Will, reciting, that B. owed him 400l. gave and bequeathed that 400l. to him, provided he, out of the 400l. paid several Sums in the Will mentioned, to his Wife and Children, and the Rest and Residue he freely and absolutely gave to him, and willed and required the Executor to deliver up the Security immediately upon his Death, and not to claim or meddle with the Debt, or any Part thereof; but to give such Release or Discharge, as B. his Executors or Administrators should require or think fit; B. died in the Life-time of the Testator; and it was held, that the Money directed to be paid the Wife and Children was well devised; but as to the Residue devised to the Debtor himself, that it was a lapsed Legacy, he dying in the Life-time of the Testator; although it was admitted, that if the Testator had said, I forgive such a Debt, or, that my Executor shall not demand it, or shall release it, that would have been a good Discharge of the Debt, though the Debtor died in the Life-time of the Testator. Mich. 1705. between Elliott and Davenport, 2 Vern. 521. decreed.

2. A. devised an Estate to his Wife for her Life, and after to the Plaintiff, his Nicce, and her Heirs, upon Condition, and to the Intent, that she pay 400l. to such Person as his Wife, by her Will in Writing, or any other Writing, should direct and appoint, and die; the Wife after marries a second Husband, and then makes a Will in Writing, and thereby reciting the Power given her by her former Husband's Will, appoints the 400l. to be paid to her Husband, his Executors or Administrators; and that when he shall have fully received the 400l. he shall pay 100l. out of it to B. 50l. to C. and 50l. to D. and makes her Husband her Executor, and then goes on and says, that she has published this her Laft Will and Testament in the Presence of three Witnesses; and the Husband subscribed that he does approve of this Will; afterwards the Husband died before her, and makes her Executrix of his Will and Residuary Legatee; then B. and C. die both Intestate, and afterwards the Wife dies, and the Defendants take out Administration to her, with the Will annexed, and also Administration to B. and C. and the Question was, whether this Appointment being made by Will, and the Appointee dying before the Appointor, this should be in the Nature of a Legacy, and so the Appointment void, the Testatrix surviving the Nominee; and my Lord Keeper held, that if it was a Thing purely Testamentary.
Legacies.

tary, it would be plainly a lapsed Legacy; but that in this Case the 400l. was not in its own Nature testamentary, but they take as Nominees; and 'tis but the Execution of a Trust; and decreed the Money to be paid. Mich. 1700. between Burnett and Holgrave.

3. E. made her Will, and devised in these Words, I give unto my loving Kinsham R. H. the Sum of 300l. one 100l. Part whereof, he doth owe me, which I do intend to give to my Cousin S. H. his youngest Daughter; but my Will and Desire is, that he will give the said 300l. to his Daughter S. H. at the Time of his Death, or sooner, if there be Occasion for her better Advancement and Preferment; the Testatrix, at the Making of her Will, was in England, and it so fell out, that R. H. died in Ireland, eight Days before the Death of the Testatrix; afterwards S. H. died at the Age of Sixteen, and unmarried, and the Plaintiff was her Administrator; and it was decreed at the Rolls, and affirmed by my Lord Chancellor, that the Words, I desire, or I Will, amount unto an express Devise, and that the One hundred Pound Bond to the Testatrix, should be assigned to the Plaintiff, and the 200l. paid him, with Interest from the Exhibiting the Bill. Mich. 1704. between Earle and England, 2 Vern. 466, 467. Although it was infilfed up-on, that a Benefit was designed R. H. and that he was not a bare Trustee, for he was to have the Interest of the 300l. for his Life, unless his Daughter had Occasion for it before his Death, which she had not.

4. But where A. devised to his Sister 350l. upon Condition that she, at or before her Death, should give to her Children 200l. thereof, and the Sister died in the Life-time of the Testator; and it was held, that the whole 350l. was lapsed; for it being a Devise of Money, the absolute Property vested in the first Legatee. Mich. 1689. between Birkhead and Coward, 2 Vern. 116. ruled on Demurrer.

5. If A. devises 1500l. a-piece to the four Children of J. S. by Name, to the Sons to be paid at their Age of twenty-one Years, and to the Daughters at Eighteen, or Days of Marriage; and in Cafe one or more of the aforesaid Children shall happen to die before his her, or their respective Legacy or Legacies shall become due, then such Legacy or Legacies shall go to the Survivors of them; and in Cafe three should die, then the Survivor to take the Whole; if one of the Children dies in the Life-time of the Testator, the Survivors shall take that Share, and it shall not be a lapsed Legacy. Hill. 1690. between Miller and Warren, 2 Vern. 207. decreed; 2 Vern. 611. S. P. decreed between Ledjome and Hickman.

6. So where a Legacy of 50l. was given to A. at Twenty-one, or Marriage, and 50l. to B. at Twenty-one, or Marriage; and in the Clofe of the Will, the Testator added, if any Legatee dies before his Legacy is payable, the same shall go to the Brothers and Sisters of such Legatee; A. dying in the Life-time of the Testator, it was adjudged no lapsed Legacy, but that it should go to the Brothers and Sisters. Trin. 1700. between Darrel and Molecoath, 2 Vern. 378. 2 Vern. 653. and 744. S. P. decreed. 1 Vern. 425. S. P. and 2 Chan. Rep. 187. S. P. and between Northey and Burbage, Hill. 1617. S. P. decreed.

GGGG

7. So
Legacies.

7. So where a Man devises to A. and B. the two Daughters of his Brother G. to be paid within a Year after the Death of his Wife, viz. 50 l. to A. and 50 l. to B. if they shall be both alive at the Time of Payment; but if either of them shall die before, then the said 100 l. to the Survivor of the said two Daughters; one of the said two Daughters died in the Life-time of the Testator; and the only Question was, whether the surviving Daughter should have the whole 100 l. or only the 50 l. and Rawlinson and Hutchinson, Lords Commissioners, were clearly of Opinion, that she should have the whole 100 l. they said, that by the first Clause of the Will, it is a joint Devise to them of the 100 l. in which Case, if the Will had gone no farther, if one had died, it would have survived to the other, then the Vis. that comes after is only a Severance of it, in Case they should both live to the Time of Payment, which they did not; and then the last Clause of the Will, in Case either died before the Time of Payment, is a new Substantive Devise of the whole 100 l. to the Survivor; and decreed accordingly. Mich. 1691. between Scoolding and Green.

(C) Of specific and pecuniary Legacies, and here of Abating and Refunding.

1. If A. by Will devises to his Wife all his Personal Estate at a Place called W. and devises to B. a Legacy of 500 l. and several other Legacies, and Afsets prove deficient to pay the 500 l. and other Legacies; yet the Wife's Legacy being a specific Legacy, shall take Place. Mich. 1714. between Sayer and Sayer, 2 Vern. 688. that a specific Legatee shall not abate in Proportion with a pecuniary one. vid. 2 Vern. 111. N. I. Chan. Rep. 293. 2 Chan. Ca. 25, 171. 1 Vern. 31. 2 Salk. 416.

2. S. having 4000 l. secured to him by Bond, in the Names of A. and B. in Trust for himself, devised it to his Daughter (now married to the Plaintiff) and made her Refiduary Legatee; and by the same Will devised a Lease he had in a Farm to R. D. and there not appearing Assets at his Death to pay his Debts, this Farm devised to R. D. was sold for Payment of Debts; afterwards, by Decree of this Court, the 4000 l. was adjudged to be Assets to pay Debts, and was brought into Court, there to remain for that Purpose; the Plaintiff proposed to have what remained of the 4000 l. paid out of Court to him, all Debts being (as was said) paid; and the Defendant R. D. opposed it, till he had first had a Satisfaction out of it, for the Value of the Farm devised to him, and sold for Payment of Debts; the Court held, that the Devise of this Sum of Money was a specific Legacy, and therefore R. P. can have but a proportionable Part of the Value of his specific Legacy out of it. Mich. 1700. between Lord Casleton and Lord Fanshaw.

3. If a Man devises a Specific Legacy, and likewise other Legacies, tho' the other Legacies fall short, yet the Legatee must have his Specific Legacy intire; but if a Man devises several Legacies, as 100 l. to one, and 50 l. to another; &c. there, altho' he directs the Legacy of 100 l. to be paid in the first Place, yet if the other Legacies fall short, then the Legatee of the 100 l. must make a proportionable
Legacies.

4. A Creditor shall make Legatees refund, when Assets become deficient, tho' there be no Provision made for refunding. 1 Vern. 94. 2 Vern. 360. S. P. 2 Vern. 205. S. P.

5. So where A. being indebted to B. made C. his Executor, and C. wafted the Estate and died, having devised several Legacies, and made D. Executor, which Legacies D. paid; and B. having exhibited a Bill against D. the Executor of C. for his Debt due from the first Testator, and against the Legatees in the Will of C. to compel them to refund their Legacies, there not being sufficient Assets of the first Testator; and it was decreed accordingly. 1 Vern. 163. that a Creditor shall follow the Assets in Equity, into whose Hands ever they come. Vid. 2 Vern. 205.

6. One Legatee shall compel another to refund where the Assets become deficient, tho' there be no Provision made for refunding; 1 Vern. 94. but if the Executor is solvent, and he voluntary paid the Legacy, the unsatisfied Legatee may come upon him, and oblige him to pay it out of his own Purse. 1 Chan. Rep. 133. 2 Chan. Ca. 132. and therefore the Executor is always to be made a Party to the Suit. 1 Chan. Ca. 136. 248. 2 Vern. 360.

7. If an Executor pays out the Assets in Legacies, and afterwards Debts appear, of which he had no Notice at the Time of Payment of the Legacies, he by a Bill in Equity may compel the Legatees to refund, 1 Chan. Ca. 136. if he had been compelled by a Decree in Equity to pay the Legacies, he may make the Legatees refund. 2 Vern. 205. per Cur.

8. But if an Executor voluntarily pays a Legacy, or assigns to the Devise thereof, he cannot, either in Favour of other Legatees or Creditors, compel the Legatee to refund. 2 Vern. 205. 2 Chan. Ca. 9. 2 Chan. Rep. 148. 2 Chan. Ca. 145. 1 Vern. 90. 453. 460. but for this, vid. Title Executors and Administrators, Letter (A.)

(D) Of the Time of Payment of a Legacy.

1. If a Legacy is given to a Child, payable at Twenty-one, and the Child dies before, tho' his Administrator shall have the Legacy, yet he must wait for it till such Time as the Child, if he had lived, would have come to Twenty-one; 2 Vern. 199. but if it had been payable to the Infant with Interest. Q.

2. But if a Legacy is devised to J. S. to be paid at 23 Years of Age, and if he die before, to go over to A. and B. and J. S. dies an Infant, the Legacy shall be paid presently. Hill. 1692. between Passworth and Moor. 2 Vern. 283. devised.

3. A. by Will gives a Legacy to B. at Twenty-one, and if he died before Twenty-one, then to the Plaintiff; B. dies before Twenty-one; and the only Question was, whether the Plaintiff was entitled to the Legacy presently, or must wait till B. if he had lived, would have been Twenty-one; and on Time taken to consider of it, my Lord Chancellor was of Opinion, the Plaintiff was entitled to the Legacy presently; but where a Legacy is given to one to be paid at Twenty-one, so as to be an Interest vested in him presently, tho' not payable till Twenty-one; if the Party dies before that Age, his
his Executors or Administrators shall not have it till the Legatee, if he had lived would have been Twenty-one Years of Age. *Trin. 1728.* between *Laundy* and *William Decreed* at my Lord *Chancellor's.*

4. A Legacy of 500 l. was given to the Defendant's Tenant when he should be 24 Years old; the Plaintiff being his Sitter, and Executor to the Tenant that gave the Legacy, paid the Legatee 250 l. of it at Twenty-one, to put him out into the World, and gave him a Bond, to pay him the other 250 l. at a Day certain, which was the very Day he would attain his Age of 24 Years: He died before that Age; to a Bill to have the 250 l. repaid, and the Bond delivered up, the Defendant pleaded the Payment; and the Bond which was for Payment at a certain Day, and became a Duty thereby; and upon Debate, the Plea was ordered to stand for an Answer, the Lord *Chancellor* declaring, it was fit to be heard on the Merits. *Mich.* 1687. between *Lake and Alderne.* 2 *Vern.* 31.

(E) To whom to be paid.

1. If a Legacy of 125 l. is devised to an Infant, who is but ten Years old, and at that Age paid by the Executor to the Infant's Father for his Benefit; and the Father afterwards becomes insolvent, yet the Executor shall not be obliged to pay it over again; but if the Executor took Security to be indemnified, then he paid it at his own Peril, and shall pay it over again. *Hill.* 26 & 27 *Car.* 2. between *Holloway* and *Collins.* 1 *Chan. Ca.* 245. but this Matter seems well settled by the following, as well as several other Resolutions.

2. A Legacy of 100 l. was devised to an Infant of about ten Years of Age; the Executor paid this Legacy to the Father, and took his Receipt for it; when the Infant came of Age, the Father told him he had such a Legacy of his in his Hands, but could not pay it immediately; but however would not have him trouble the Executor about it, for that he would give it him: Upon this the Son rested satisfied for about 14 or 15 Years, and he and his Father carried on a Joint Trade together, and then became Bankrupts. And upon a Commission taken out against the Son, this Legacy of 100 l. was assigned amongst other Things for the Benefit of his Creditors; and the Plaintiff, the Assignee of the Commission, brought this Bill against the Executor, to have an Account, and Payment of the Legacy; and for the Defendant it was infinited, that this would be an extreme Hardship on him, if he should be obliged to pay it over again, that he had already fairly and honestly paid it to the Father, whilst he was in good Circumstances. And if Application had been made sooner, he might have his Recompense over against the Father; that the Father was by Nature Guardian to his Children, and such Payments to him have formerly been allowed good; though now indeed this Court has thought fit to extend their Care farther for such Children, and disallowed such Payments; but the Circumstances of this Cafe were such, that the Defendant it was hoped, would not be answerable again for it. My Lord Chancellor said, that if the Father had not made his Son such Promise of Recompense, and the Son had acquiesced all that Time, the Cafe might have been more doubtful; but this Promise of his Father, drew him to forbear applying.
Legacies.

plying to the Executor sooner; and since his Father had not, nor could now make good his Promise, being a Bankrupt likewise, the Reason of the Son’s Forbearance was at an End; and he thought the Rule of this Court, in not suffering Parents to receive their Children’s Legacies, was founded on very good Reason; and therefore, left this Case might hereafter be cited as a Precedent, when the Circumstances attending it were forgotten; and to discontinue, and deter others from paying such Legacies to the Parents, (tho’ he did not deny the Hardships of this particular Case) he decreed against the Executor, which was affirmed on a Rehearing. *Mich.* 1715. between *Dolley* and *Tollferry*.

3. If a Legacy be bequeathed to a *Feme Covert*, Payment of it to her alone is not good, and the Executor shall pay it over again to the Husband. *1 Vern.* 261.

(F) Where Legatees shall have Interest and Maintenance.

1. Legatees exhibit a Bill against the Executor, and by their Guardian pray, that he may be obliged to allow them Maintenance; to which the Executor demurred, because the Legatees were under Age, and their Legacies not payable, till they were 21 Years of Age; but the Demurrer was over-ruled. *Mich.* 16 *Car.*

2. Between *Kensfey* and *Parrot*. *1 Chan.* *Ca.* 60.

2. If a Father devises Legacies, or Portions to his Daughters or younger Children, to be paid, or payable at their respective Ages of 21 Years, or any other Time certain, without making any Provision for their Maintenance in the mean Time, and die; in this Case they shall have Interest for their Portions from his Death, till paid, because the Father was obliged to have provided for them if he had lived; but if such Portions had been devised to them by a Stranger, to be paid, or payable at such an Age, their Legacies should not carry Interest in the mean Time; because he being a Stranger, was under no such Obligation to provide for them. *Trin.* 1712. between the Attorney General and *Thompson*.

3. A Father by his Will gave £2000 a-piece to his two Daughters, payable at Twenty-one, and charged on Land and Personal Estate; and the Personal Estate being exhausted in Debts, my Lord Chancellor held, they should have a reasonable Maintenance out of the Real Estate, until their Legacies became payable, and allowed them 80 l. per Annum. each. *Trin.* 1739. between *Conway* and *Longville*.

(G) Ademption of a Legacy.

1. A. devided to his Daughter 200 l. *Item*, I give to her my Household Goods, if she shall not be married in my Life-time, and afterwards in his Life-time, he gives with his Daughter in Marriage above 200 l. and dies, not having revoked or altered his Will; and the Court held, that the Legacy was extinguished by the Portion. *Mich.* 1689. between *Jenkins* and *Powel*. *2 Vern.* 114. vide *1 Chan.* *Ca.* 301. *1 Vern.* 95.

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2. The Defendant's late Husband made his Will in Writing, and thereby amongst other Things devised as followeth: viz. I give and devise to A. my good and only Uncle, the Sum of 500 l. that is to say, that Bond and Judgment he gave me for 400 l. and 100 l. in Money, and makes the Defendant his Executrix, and defers her to be kind and affixing to his Uncle, that he might live as became a Gentleman: The Uncle some Time after fold an Estate, and with the Money paid off 320 l. and took up the Bond, and had the Judgment vacated, and gave a new Bond for the Remaining 80 l. and some Time after the Testator died; and the Uncle having Notice of this Will, brought his Bill for this Legacy of 500 l. the Defendant insisteth, that this was a Specific Legacy of that particular Bond and Judgment; and they being cancelled and altered before the Testator's Death, was an Ademption of the Legacy, as to so much; and besides they urged, that this Payment of the 350 l. amounted to a Release of so much of the Legacy, and therefore the Plaintiff would have no Right but to the Remaining 100 l. On the other side it was insisted, that the Divisibility is where the Money is voluntarily paid in by the Person who owes it, and where the Testator fues for and recovers it: In the first Case, the Legacy continues still good, because the Money only comes home to the Personal Estate; but in the other Case, the Testator by suing for it, shews that he intended to make it his own, and therefore would not leave it to the Legatee to recover; and the Justice of the Uncle ought not to prevent the Affection of the Nephew: And no Alteration of his Intention appeared; my Lord Keeper was clear of the same Opinion, and decreed the 80 l. Bond to be delivered up, and the Residue of the Legacy to be paid. *Hill. 1711*.

between *Orme* and *Smith*. 2 Vern. 681. S.C.

3. One by Will devised thus: *Item*, I give and bequeath to my Granddaughter *Mary Ford* (the Plaintiff) the Sum of 40 l. being Part of a Debt due, and owing to me for Rent from G. M. the allowing what Charges shall be expended in getting in the same. *Item*, I give and bequeath unto my Grandsons A. and B. the Rest and Residue of what is due and owing to me from the said G. M. which is about 40 l. more, to be equally divided between them, they allowing Charges as aforesaid; after the Testator received the whole Debt owing for Rent from G. M. for the Plaintiff it was insisted, that there was a Difference between a Specific and a Pecuniary Legacy; that tho' the Disposing of a Specific Legacy might be an Ademption of it, yet this being a Pecuniary Legacy, the Paying the Money to the Testator, would be a Loss of it: On the other Side was insisted upon the Difference between a Voluntary, and Compulsory Payment; that tho' the first was no Ademption, yet the second was, and that the Testator obliged G. M. to pay in the Money; but my Lord Chancellor was of Opinion, that there was no Foundation for the Difference taken in the Books, between a Voluntary and Compulsory Payment; for the latter might be with an Intent to secure the Legacy on all Events, and decreed the Plaintiff the 40 l. Legacy. *Trin. 1728*, between *Ford* and *Fleming*. Vide 1 Roll. 614. *Moor* 789. *Raym.* 335. *Swin. Part 7*. *Scit.* 20.

*Went.* 64.
C A P. XXXIX.

Limitation of Suits and Demands.

(A) What Rights, Actions, or Demands, are deemed out of the Statute of Limitations, in Equity, and where such Rights, Actions, or Demands, tho' once barred, may be revived, or set up again.

(b) Length of Time, how far regarded in Equity.

(A) What Rights, Actions, or Demands, are deemed out of the Statute of Limitations, in Equity, and where such Rights, Actions, or Demands, tho' once barred, may be revived and set up again.

1. A Trust is not within the (a) Statute of Limitations. March (a) By the 21 Jan. 1.

the Case, other than for Slander, Actions of Account (other than what concerns Merchandize between Merchant and Merchant) Actions of Treason, Quo Præteritum Procta, Debt upon Lending or Contract, without Specialty or Arrearages of Rent, for Detinue, Trespass, Replevin, shall be commenced within Six Years after the Cause of Action, and not after. But the Right of Infants, Feme Covern, nuncupati, Persons imprisoned, or beyond Sea, is saved; so that they commence their Suits within the Time above limited, after their Imperfections removed. Provided, that if in any such Actions, Judgment is given for the Plaintiff, and the same is reversed for Error; or if a Verdict is for him, and upon Motion in Arrest of Judgment, it is given against him; or if the Defendant is outlawed in the Suit, and does after reverse the Outlawry; in these Cases the Plaintiff, his Heirs, &c. may commence a new Action within a Year, and not after; by 6 & 7 Ann. cap. 16. the Plaintiff's Right is as much saved, when the Defendant is beyond Sea, as if he were to himself; provided he brings his Action within such Time after his Return, as is limited by the 21 Jan. 1.

2. The Plaintiff, who was Son and Executor of C. J. Heath, who was made C. J. at Oxon, during the Difference between the King and Parliament, (but never sitting at Westminster-Hall) exhibited a Bill against the Defendants, Prothonotaries of the K. B. at that Time, to have an Account of the Money, &c. received by them during that Time, by an implied Trust virtutæ Officij; to which the Defendants
Limitation of Suits and Demands.

Defendants pleaded the Statute of Limitations; but upon Argument the Plea was over-ruled. 15 Car. 2. between Sir Edward Heath and Henry & al. 1 Chan. Ca. 20. 3 Chan. Rep. 8. S.C.

3. So where the Plaintiff exhibited a Bill, to have an Account of Money received by the Defendant from his Father (whose Executor he was) who gave it to him to compound for his Estate, sequestr for Delinquency at Goldsmiths-Hall; and it was ordered accordingly; the Court declaring it a Truift, and therefore not within the Statute of Limitations. Mich. 15 Car. 2. between Sheldon and Weldman. 2 Chan. Ca. 26.

4. So where my Lady Hollis lent 100l. and in the Note, which was given for it, Mention was made, that it should be disposed of as my Lady shall direct; and a Bill being exhibited for it, the Court held it a Depositor, or Truift, and Decreed Payment of it, the other wise it was barred by the Statute of Limitations. 2 Vern. 345.

5. A Charity is not barred by Length of Time, or within the Statute of Limitations. 1 Vern. 256.

6. A Legacy is not within the Statute of Limitations. 1 Vern. 7. The Statute of Limitations is no Plea in Bar to (i) an Account. Pach. 1687. between Scudmore and White. 1 Vern. 456.

The Statute of Limitations, but Accounts stated between Merchant and Merchant are barred by the Statute. 1 Vern. 89, 90. 2 Sand. 124.

8. If a Man recovers a Judgment or Sentence in France, for Money due to him, the Debt must be considered here only as a Debt by Simple Contract, and the Statute of Limitations will run upon it. 2 Vern. 540, 541. per. Cur.

9. A Bill was exhibited to be relieved, touching a Rent charged upon Lands, by Will; the Defendant pleaded the Statute of Limitations, and that there had been no Demand or Payment in 40 Years; and the Court held, that the Case Cook's Reports, on the Statute Hen. 8. concerned only Custody, Rents, between Lord and Tenant, and not any Rent which commenced by Grant, or whereof the Commencement could be shewn. Trin. 1691. between Collins and Goold. 2 Vern. 235.

10. If one receives the Profits of an Infant's Estate, and 6 Years after his Coming of Age, he brings a Bill for an Account, the Statute of Limitations is as much a Bar to such a Suit, as if he had brought an Action of Account at Common Law; for this Receipt of the Profits of an Infant's Estate is not such a Truift, as being a Creature of the Court of Equity, the Statute shall be no Bar to; for he might have had his Action of Account against him at Law, and therefore no Necessity to come into this Court for the Account. For the Reason why Bills for an Account are brought here, is from the Nature of the Demand; and that they may have a Discovery of Books, Papers, and the Parties' Oath, for the more easy taking of the Account, which cannot be so well done at Law; but if the Infant lies by for fix Years after he comes of Age, as he is barred of his Action of Account at Law, so shall he be of his Remedy in this Court; and there is no fort of Difference in Reason between the two Cases. Trin. 1719. between Lockey and Lockey, per Curiam.
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11. If there is no Executor against whom the Plaintiff may bring his Action, he shall not be prejudiced by the Statute of Limitations, nor shall any Laches in such Case be imputed to him.

2 Vern. 695.

... dies before judgment, the six Years being then expired, this shall not prevent his Executor. 3 Salk. 424, 425. 4 Salk. 421. But if an Executor sues upon a promissory Note to the Teflator, and dies before judgment, and six Years from the original Cause of Action are actually expired, and the Executor of the Executor brings a new Action in four Years after the first Executor’s Death, the Statute of Limitations shall be a Bar to such Action. For though the Debt does not become irrecoverable by an Abatement of the Action after the six Years elapsed by the Plaintiff’s Death, yet the Executor should make a recent Prosecution, to which the Clause in the Statute that provides a Year after the Reversal of a Judgment, &c. may be a good Direcution, or Shew, that he came as early as he could, because there was a Contet about the Will or Right of Administration; for the Statute was made for the Benefit of Defendants, to free them from Actions when their Witnesses were dead, or their Vouchers lost. Trim. 7 Geo. 2. between Wills and Huggins, adjudged in E. R.

12. If a Man sues in Chancery, and pending the Suit there, the Statute of Limitations attaches on his Demand, and his Bill is afterwards dismissed, the Matter being properly determinable at Common Law; in such Case the Court will preserve the Plaintiff’s Right, and will not suffer the Statute to be pleaded in Bar to his Demand. 1 Vern. 73, 74. But if in such Case the Plaintiff was not stayed by the Act of the Court, as Injunction, &c. &c. &c. vid. 2 Chan. Ca. 217, 2 Chan. Rep. 205, 214.

13. If a Man devises all the Rest and Residue of his Personal Estate, after Debts and Legacies paid, to J. S. and several of the Creditors are barred by the Statute of Limitations, who notwithstanding bring Actions against the Executor, and refuse to plead the Statute of Limitations, yet Equity will not, in Favour of J. S., to whom the Surplus is devised, compel the Executor to plead the Statute. Mich. 1699. between Lord Castleton and Lord Fanshaw adjudged.

14. If a Man by Will or Deed subject his Lands to the Payment of his Debts, Debts barred by the Statute of Limitations shall be paid; for they are Debts in Equity, and the Duty remains; the Statute hath not extinguished that, ther’ it hath taken away the Remedy. 1 Salk. 154. 2 Vern. 141. S. P.

15. If a Man has a Debt due to him by Note, or a Book-Debt, and has made no Demand of it for six Years, so that he is barred by the Statute of Limitations; yet if the Debtor, or his Executor, after the six Years, puts out an Advertisement in the Gazette, or any other News-Paper, that all Persons, who have any Debts owing to them, may apply to such a Place, and that they shall be paid; this (tho’ general, and therefore might be intended of Legal subsisting Debts only) yet amounts to such an Acknowledgment of that Debt which was barred, as will revive the Right, and bring it out of the Statute again. Pach. 1714. between Andrews and Brown decreed.

16. So if after the six Years the Debtor, upon Application for that particular Debt, acknowledges it, and promises Payment, this revives the Debt, and brings it out of the Statute; because, as the Note it self was at first but an Evidence of the Debt, so that being barred, this Acknowledgment and Promise is a new Evidence of the Debt; and being proved, will maintain an Assumpsit for Recovery of it. Pach. 1714. between Andrews and Brown, per Cur.

(iii) (B) Length
(B) **Length of Time, how far regarded in Equity.**

1. **If a Person** has enjoyed an Estate twenty-five Years, though he cannot prove that Livery and Seisin was made of it, yet he shall not be molested; for Equity, after such Length of Time, will presume Livery. *Toth. 54.* 1 *Vern. 196.*

2. **So if a Person** is in Possession of a Copyhold Estate forty Years, under a Will, though he cannot prove that there was any Surrender to the Use of that Will, yet Equity will supply that Defect after such Length of Time. 1 *Vern. 195.* 2 *Chan. Ca. 150. S. C.*

3. The Plaintiff exhibited a Bill to set aside a Conveyance made by his Father twenty Years ago, and alleged, that at that Time his Father was *Non Compos*; but the Court dismissed the Bill, and said, that after twenty Years, it was not proper to examine, whether a Person was *Non Compos*, or not. 1 *Chan. Rep. 40.*

4. The Plaintiff exhibited a Bill against the Executors of a Purchaser of certain Lands from him, to have 500L Part of the Purchase-money paid, which was decreed to be paid him thirty-three Years before; but the Executors having pleaded, that the Plaintiff and Defendant lived near each other, and that no Suit was commenced against their Testator in his Life-time, though the Plaintiff might have eaily done it; the Court held the Plea good. 2 *Chan. Rep. 44.*

5. So where a Bond of twenty-two Years old came to the Hands of an Executor, and in as much as the Obligee, till about seven or eight Years past, lived near the Testator, and never demanded any Interest; the Court conceived the Bond was satisfied, and ordered it to be cancelled. 1 *Chan. Rep. 78.* vid. 1 *Chan. Rep. 88. S. P.* 1 *Chan. Rep. 106.*

6. A exhibited a Bill to have a specific Performance of a Covenant, whereby the Plaintiff was to have a Pit in the Defendant's Ground for digging of *black Stones*, and that when the old one failed, he might sink a new One, and that there should be no other Pit for digging *black Stone*; but it appearing that the Defendant, and those under whom he claim'd, had been in Possession of a Pit there above sixty Years, the Bill was dismissed. *Hill. 1690.* between *Scolefield and Whitehead*, 2 *Vern. 127.*

7. A Common which has been inclosed for thirty Years, shall not afterwards be thrown open. 1 *Vern. 32.*

8. The Defendant held a Copyhold of the Manor of *Ipeing*, at the Rent of eight Shillings per Ann. and it so appeared by the Court-Rolls of *Hen. 8. of Phil.* and *Mary,* and down to *Car. 1.* and in the 12 *Car. 1.* the Defendant's Mother was admitted, as of the Manor of *Ipeing.* The Owner of the Manor of *Dean,* which he purchased from *J. S.* who formerly was Owner of both Manors, brought his Bill to compel Payment of the 8L per Ann. and although he admitted that the Copyhold was held of the Manor of *Ipeing,* and not of the Manor of *Dean,* yet the Rent having been paid to him for near twenty Years, which was the only Evidence he had to shew for it, the Arrears and growing Rent were decreed to him; and a Trial at Law denied, though prayed by the Defendant. *Mich. 1705.* between *Steward and Bridger*, 2 *Vern. 516, 517.*


Limitation of Suits and Demands.

9. A devises his Estate to B. his Son, charged with 500l. to his Granddaughter, the Daughter of B. payable at Twenty-one, or Marriage; B. on the Marriage of his Daughter, gives her 1500l. Portion, but no Notice is taken of the 500l. Legacy, nor any Release given for it; twenty Years afterwards, the Daughter and her second Husband bring a Bill against the Father for the 500l. and the Bill was dismissed, for the 1500l. shall be presumed a Satisfaction, especially after such a Length of Time. 2 Vern. 484. A Legacy presumed to be paid after a great Length of Time. 2 Vern. 21.

C A P. XL.

Master and Servant.

(A) What Remedy they have against each other.

(B) How far answerable for each other, to others.

(A) What Remedy they have against each other.

1. A Bill was exhibited to be relieved against an Apprentice Bond and Articles, and to have them up; and upon Hearing, it was ordered, that the Defendant do, within certain Time, eis. one Year, bring his Action, and go to Trial thereupon for his Damages; or in Default thereof, the Bond and Articles to be delivered up; and the Reason given was, that if it were in the Defendant's Choice to stay his Action as long as he pleased, he would stay till the Plaintiff's Writ was served upon him, and this Practice of putting the Master to sue, or to deliver up the Indentures, was said to be usual. Hill. 17 & 18 Car. 2. between Baker and Shelbury, 1 Chan. Ca. 70.

2. A put his Son an Apprentice to an Apothecary, and gave with him a Sum of Money, and allowed the Youth 10l. per Ann. for his Clothes; the Defendant having put away his Apprentice, after he had lived some Time with him, by Reason of Negligence and Misdemeanors laid to his Charge; the Court decreed the Master to refund 30l. of the Money, and the rather, because the Indentures were
Master and Servant.

were not (a) inrolled, so as the Matter was not properly cognizable before the Chamberlain of London. Trin. 1688. between Therma and Abell, 2 Vern. 64.

3. A. placed his Son with an Attorney, at the Time he lay ill of the Sicknes whereof he afterwards died, and gave 120 l. with him, and Articles were executed, by which it was provided, that in Case the Master died within one Year, that then 60 l. of the Money should be returned; it happened that the Master died within three Weeks after Sealing of the Articles and Payment of the Money; and on a Bill brought against his Executor, the Court decreed 100 Guineas to be paid back to the Father, notwithstanding the Agreement of the Parties. Trin. 1687. between Newton and Rowe, 1 Vern. 460.

4. If an Apprentice marries without the Privity of his Master, yet that will not justify his turning him away, but he must sue his Covenant. 2 Vern. 492.

5. But by the Custom of London, a Freeman may turn away his Apprentice for Gaming. 2 Vern. 291.

6. A. gave the Defendant B. a Spanish Merchant, 600 l. to take his Son Apprentice, and entered into a Bond of 1000 l. for his Fidelity, and at the same Time took a Covenant from his Master, that he should, at least once a Month, see his Apprentice make up his Cash; the Defendant brought an Action on the Bond, alleging, that the Apprentice had run out 800 l. and on a Bill to be relieved, my Lord Keeper held, the Meaning of the Covenant was, that the Defendant should not only see to the Casting up of the Cash, that it was right in Figures, but to see the Cash effectually made up; and therefore decreed the Plaintiff should be answerable for no more than the Master could prove the Apprentice imbezzled in the first Month, when the Imbezzlement began. Mich. 1705. between Mountague and Tidcombe, 2 Vern. 518.

(B) How far answerable for each other, to others.

1. A. As Master of a Ship, of which the Defendants were Part- Owners, bought several Goods of the Plaintiffs, as Beef, Bisket, Sails, &c. A. failed, and on a Bill to compel the Defendants to pay, they insisted that A. only was liable, because he had Money from the Part-Owners to pay the Plaintiffs; but the Court held, that the Master was but a Servant to the Owners, and where a Servant buys, the Master is (a) liable; and though the Owners paid their Servant, yet if he paid not the Creditors, they must stand liable, and therefore decreed the Owners to pay the Plaintiffs their Debts in Proportion to their respective Shares and Interests in the Ship. Hill. 1709. between Speering and Degrave, 2 Vern. 643.

2. The Plaintiff Graham was Pricey Purse to King James the Second, and also Master of his Buck-knouts; the Defendant, Stamper, was a Lacedman, and by his Friends made Interest to the Plaintiff,
tiff, that he might be made use of to furnish Lace, &c. for the King's Hunt, and was employed accordingly, and Graham did likewise deal with him on his own private Account, and he was from Time to Time paid for what he furnished for the King's Liveries, &c. out of the Privy Purse; but on King James's going away, the Defendant brought an Indebitavit. Assumpsit against Graham, as well for what he had furnished for the King's Use, as for what he had furnished for Graham's own particular Use, and recovered for both; and on a Bill brought to be relieved, the Circumstances of the Case appeared to be, that Stammer had been permitted to furnish Lace and Fringes, &c. for the King, on his Desire and Application made to Graham; on his Behalf; that the Entries in the Day-Book of such Goods as were delivered for the King's Use, was without Price, that they may be added in the Leiger-Book, higher or lower, as they had a Prospect of sooner or later Payment; that the Defendant, from Time to Time, had been paid out of the King's Privy Purse; and one Witness swore, that he said he expected Payment from the Privy Purse, and not elsewhere; that the Account of the Goods delivered to the King's Use had been paid off to about ten Months, but the Account of Goods delivered on Graham's private Score, was of four Years Continuance, which shows that he kept them as distinct Accounts, that none of the Goods delivered for the King's Use came to Graham, nor was there any particular Promise to pay for any of them; and the Court held, that if the Law should be, that he that speaks for, or fetches Goods for his Master, without any particular Promise of paying for them, is liable to pay for them (which they seemed to doubt); yet on these Circumstances the Plaintiff was intitled to Relief, and accordingly ordered, that the Defendant should only take out Execution for so much as the Plaintiff was indebted to him on his own Account. **Trin. 1692.** between Graham and Stammer, 2 Vern. 146. S. C.
C A P. XLI.

Mortgages.

(A) Of the Nature and different Kinds of Mortgages, and herein of the Power of Equity in supplying Defects in favour of the Mortgagee, and in Making that a Mortgage which otherwise would be an absolute Conveyance.

(B) Of the Equity of Redemption, at what Time.

(C) Of the Persons to redeem.

(D) Of Foreclosure, and here of Opening the Foreclosure; Parties foreclosed, and Tender and Refusal of the Mortgage-money.

(E) Where there are several Mortgagees of the same Estate, what Remedy they have against the Mortgagee, and against each other.

(F) Where a Mortgagee may protect himself by Buying in precedent Incumbrances.

(G) Where a Person who comes to redeem must do Equity to the Mortgagee before he will be admitted.

(H) Mortgage-money, to whom to be paid.

(I) Mortgagee answerable for the Profits, and how to account.

(K) How the Assignee of the Mortgagee is to account.

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(A) Of the Nature and different Kinds of Mortgages, and herein of the Power of Equity in supplying Defects in favour of the Mortgagee, and in Making that a Mortgage which otherwise would be an absolute Conveyance.

1. A Mortgage is the same Thing as the Hypotheca of the (a) Civilians, and may be defined a Pledging of Lands, or other immovable

Pignus and

Hypotheca; the Pignus was when any Thing was obliged for Money lent, and the Possession passed to the Creditor; the Hypotheca was when the Thing was obliged for Money lent, and the Possession remained with
immoveable Thing, for Money lent in such Manner, that the Profit or Ulymfruiclis of the Thing pledged remains with the Debtor till such Time as Default is made in Payment of the Money at the Time appointed.

obliged to the same Diligence in Keeping them, as he used about his own; so that if the Goods were lost by the Negligence of the Creditor, an Action lay, for the Property being transferred to the Creditor, for a particular Purposè, he was to keep them at his Peril: If the Debtor did not redeem the Thing pledged, the Creditor was to foreclose the Redemption of the Debtor; or if the Money was not paid, the Creditor had his Acta Pignoratia, or Hypothecaria; but if the Money was tendered or paid to the Creditor, the Contract of Pignoration was dissolved, and the Debtor might have the Pledge back as a Thing lent; Jefson. Cas. 791. and this seems to have introduced the Notion among us of the Debtor's Right of Redemption.

2. There were no Mortgages of Lands whilst the antient feudal Tenures continued, because the Feud was filled with a Tenant from the Lords original Bounty; but when a Liberty of Alienation was given, two Manner of Ways of Mortgaging were made Use of, which Littleton distinguishes between, and calls by the Names of Vadium vienum and Vadium mortuum. Co. Lit. 205.

3. The Vadium vienum is where a Man borrows 100 l. of another, and makes an Eflate of Lands to him, till he hath received the said Sum of the Issues and Profits of the Lands; and it is called Vadium vienum, because neither the Money nor the Land is for ever, and the Lands are constantly paying the Money, and they are not left as a dead Pledge, in Case the Money be not paid; and this seems to have been the most antient Way of Pledging. Lit. Sec. 205.

4. The Vadium mortuum is so called, because it is doubtful whether the Feoffee will pay the Money at the Day limited, or not; and if he do not pay, the Land, which is but in Pledge, upon Condition for the Payment of the Money, is taken from him for ever, and so dead to him; and if he do pay it, then the Pledge is dead to the Tenant of the Land; the antient Way of making those Mortgages was by a Charter of Feoffment on Condition, that if the Feoffee, or his Heirs, paid the Sum to the Feoffee, or his Heirs, he should re-enter and re-poll, and sometimes the Condition was contained in the Charter of Feoffment, and sometimes it was disannulled by another Charter made at the same Time. Co. Lit. 322. Maddox 318.

5. These Sort of Conveyances were subject to these Inconveniences, that if the Money were not paid at the Day, the Eflate became absolute, and was subject to the Dower of the Wife of the Feoffee, and all other his Real Charges and Incumbrances, though he were afterwards permitted to perform the Condition. Co. Lit. 221. Cro. Cat. 190.

6. But the Courts of Equity have set this Matter right, and have maintained the Right of Redemption, not only against Tenant in Dower, and the Persons that come under the Feoffee, but even against Tenant by the Courtly, and the Lord by Escheat, that are in the Post; because the Payment of the Money doth, in Consideration of Equity, put the Feoffee in statu quo, since the Lands were originally only a Pledge for the Money lent. Hard. 465, 469.

7. If Tenant in Tail demiseth Lands for ninety-nine Years by Way of Mortgage, under a Condition of Redemption, and on his Marriage suffers a Recovery; and in Consideration of the Portion settles a Jointure, and then borrows more Money of the Mortgagee, and appoints the Term as a Security, the Recovery inures to make good the
the Term; and if the Mortgagee had no Notice of the Jointure, he shall be allowed the second Money lent as well as the first. 1 Chan. Ca. 119, 120.

8. If a Copyholder in Fee surrenders to the Use of the Mortgagee in Fee, and the Copyholder becomes a Bankrupt before Premiament, and there is no Premiament; yet per Cooper Lord Chancellor, tho' the Surrender was void in Law for Want of a Premiament, and that might be the Laches of the Mortgagee, in not procuring of it, yet the Surrender was a Lien, and that bound the Land in Equity; and the Assignee under the Commission of Bankruptcy ought not to be in a better Case than the Bankrupt, who was plainly bound in Equity by this defective Conveyance. Mich. 8 Ann. between Taylor and Wheeler. 2 Salk. 449.

9. The Plaintiff lent a Sum of Money on the Mortgage of some Houses, and had a Bond for Payment of the Money, as usual in such Cases; afterwards he lent a farther Sum of 2000l. on the Equity of Redemption, and had a Bond for that likewise; afterwards the Mortgagor becomes a Bankrupt, and by some Accident the Value of the Houses sunk so much, that they were not sufficient to raise the Mortgage-money first lent; and on a Bill brought to have them sold, and that as to so much as they fell short to answer the first Mortgage-money, the Mortgagee might come in upon his Bond as a Creditor; it was so decreed; and as to the 2000l. lent upon the Equity, which was worth nothing, it must stand singly upon the Bond. Patch. 1695. between Wiseman and Carbonell.

10. A lends Money to B. to carry on certain Buildings, and takes a Mortgage from him to secure 16000l. with Interest, and by another Deed executed at the same Time, takes a Covenant from B. that he should convey to him, if he thought fit, Ground-Rents to the Value of 16000l. at the Rate of twenty Years Purchase; and on a Bill brought to redeem, the Matter of the Rolls decreed a Redemption, on Payment of Principal, Interest and Costs, without Regard to that Agreement, but set aside the same as unanswerable; for a Man shall not have Interest for his Money, and a collateral Advantage besides for the Loan of it, or clog the Redemption with any by-Agreement. Mich. 1705. between Jennings and Ward. 2 Vern. 520.

11. If the Condition of a Mortgage is, that the Mortgagor should redeem during his Life, or that the Mortgagor, and the Heirs of his Body, should redeem; yet Equity will admit the general Heir of such Mortgagor to a Redemption, because this can be no Purchase, since there is a Clause of Redemption; and when the Land was originally only a Pledge for Money, if the Principal and Interest be offered, the Land is free; and it would be very hard, that it should be in the Power of the Scrivener, or gripping Ulurer, by such impertinent Restrictions, to elude the Justice of the Court. 1 Vern. 33, 190. S. C. 2 Chan. Ca. 147. S. C.

12. But if a Man borrows Money of his Brother, and agrees to make him a Mortgage, and that if he has no Issue Male, his Brother should have the Land; such an Agreement made out by Proof, may well be decreed in Equity. 1 Vern. 193. per North Lord Keeper.

13. A, in Consideration of 1000l. made an absolute Conveyance to B. of the Reversion of certain Lands after two Lives, which at that Time were worth little more; and by another Deed of the same Date, the Lands are made redeemable any Time during the Life of
Mortgages.

the Grantor only, on Payment of the 1000l. and Interest; A. died, not having payed the Money; and it was held by my Lord Nottingham, that his Heir might redeem, notwithstanding this restrictive Clause; and that it was a Rule, once a Mortgage and always a Mortgage, and that B. might have compelled A. to redeem in his Life-time, or have foreclosed him; but on a Rehearing, Lord Keeper North revered the Decree on the Circumstances of this Case; for it appeared, by Proof, that A. had a Kindness for B. and that he had married his Kinwoman, which made it in the Nature of a Marriage-Settlement; he likewise held, that B. could not have compelled A. to redeem during his Life; which made it the more strong. 33 Car. 2. between Newcomb and Bonham, 1 Vern. 7, 214. S. C. 232. S. C. 2 Vent. 364. S. C. where it is said, that Lord North's Decree was affirmed in the House of Lords. Vid. 1 Vern. 268.

14. If A. mortgages Lands to B. worth 15l. per Annum for securing 200l. and at the same Time B. enters into a Bond, conditioned, that if the 200l. and Interest is not paid within a Year, then he to pay to A. his Executors or Administrators, the further Sum of 78l. in full for the Purchase of the Premises, &c. and A. dies within the Year, and the Money is paid the next Day after the Mortgage is forfeited to his Administrator; yet A.'s Heir may redeem, paying the 200l. and likewise the 78l. that was paid the Administrator. Mich. 1687. between Willer and Winnell, 1 Vern. 488. deced.

15. So where A. for 550l. made an absolute Assignment of a Church-Lease for three Lives to B. and B. by Writing under his Hand agreed, that if A. paid 600l. at the End of the Year, B. would reconvey; B. died, leaving C. his Son and Heir; Two of the Lives died, and the Lease was twice renewed by C. and his Father; and though it was near twenty Years since the Conveyance was made, yet the Master of the Rolls decreed a Redemption on Payment of the 550l. and the two Fines, &c. Mich. 1688. between Manlove and Ball, 2 Vern. 84. vid. 1 Vern. 183, 394. where a Mortgage was allowed to redeem before the Time agreed on.

(B) Of the Equity of Redemption, at what Time.

At a Rehearing before my Lord Keeper, assisted with Justice Vaughan and Turner, concerning the Redemption of a Mortgage which had been made above forty Years, my Lord Keeper declared, that he would not relieve Mortgages after twenty Years, for that the Statute of Limitations did adjudge it reasonable to limit the Time of one's Entry to that Number of Years, unless there are such particular Circumstances as may vary the ordinary Case, as Infants, Femes Covert, &c. who are provided for by the very Statute, though those Matters in Equity are to be (a) governed by the Course of the Court; and that it is best to square the Rules of Equity, of Mortgages; yet where a Man comes in at an old Hand, it hath been sometimes decreed, that the Possessor should account no further than for the Profits made in his own Time, to discourage the Stirring in such dormant Titles; but the common Doctrine in the Courts of Equity, is that Mortgages are not within the Statute of Limitations, though that Statute is mentioned sometimes as a proper Direction to go by; for the Courts of Equity are tender of Settling any

(a) Though there is no Time limited for Redemption

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Mortgages.

2. A Bill was exhibited to redeem a Mortgage, to which the Defendant demurred, because by the Plaintiff's own Shewing, it appeared the Mortgage was sixty Years old; but upon Argument the Demurrer was over-ruled, because it was charged in the Bill, that the Mortgage agreed the Mortgagee should enter, and hold till he was satisfied, which is in the Nature of a ->Mortgage; and in such Case the Length of Time is no Objection. Mich. 1686, between Orde and Horning, 1 Vern. 418.

3. So where a Bill was exhibited to redeem a Mortgage made in 1634, though the Mortgagee entered in 1650, and there were three Defections on the Defendant's Part, and four on the Part of the Plaintiff; yet the Length of Time being answer'd for the greatest Part by Infancy or Coverture; and for as much as in 1686, a Bill was brought by the Mortgagee to foreclose, and an Account then made up by the Mortgagee, the Court decreed a Redemption, and an Account from the Foot of the Account in 1686. Trin. 1700, between Procter and Cooper, 2 Vern. 377.

4. But where a Mortgage was made to A. in the Year 1639, to indemnify him against Debts, for which he was ingaged for the Mortgagor, and in the Year 1649, he entred into the mortgaged Premises, and had Possession, and afterwards conveyed away several Parts of the mortgaged Premises to several Persons, and several Sales and Marriage-Settlements had been made of them. In the Year 1663, a Bill was brought to redeem, but all the Affirmees were not Parties; and a Decree to an Account, and a Report made, and Exceptions taken to that Report; and so it rested for about eighteen Years, and then another Bill was brought, and another Decree to redeem, but no Prosecution upon it from the Year 1676 till 1697, and then the Plaintiff having purchased the Equity of Redemption of those Lands (inter alia) from the Heirs of the Mortgagor, brought his Bill to redeem; the Objections against it were, the Length of Time, the many derivative Titles that had been made, and when no Suit was depending, and the Difficulty of Taking the Account; to which it was answer'd, that there had been fresh Purpurs, and that the Difficulty of the Account had been occasioned by the Mortgagees themselves, and that there were Infants in the Case; my Lord Keeper held, there ought to be no Redemption, and that Length of Time excuses the Mortgagee for taking the Estate for his Own, and using it accordingly; and none that have come in under him have done amiss; and though there were Infants in the Case, yet the Time having begun upon the Ancestor, it shall run even upon Infants, as it is at Law in the Case of a Fine; and there is one great Objection to a Redemption in this Case, that it does not appear, that the Plaintiff paid any Thing for this Equity of Redemption, only had it thrown into his Bargain. Hill. 1700, between St. John and Turner, 2 Vern.. 418. S. C.

5. The
Mortgages.

5. The Plaintiff's Grandfather in the Year 1686, had made a Mortgage of the Estate in Question, which was proved to be about nine or ten Pounds per Annum, for securing 100L. in the Year 1696. this Mortgage was assigned over to the Defendant, who by Agreement was then let into Possession, and had continued so ever since, and was now about ninety Years of Age; the Mortgagor died several Years since, leaving the Plaintiff's Father, his eldest Son and Heir of full Age, who likewise died in the Year 1714. leaving the Plaintiff his eldest Son and Heir, then about twelve Years of Age, who brought this Bill for an Account, and to be let into a Redemption of the Estate in Question, but which the Defendant had been in Possession of thirty-three Years, and so was greatly over-paid his Principal and Interest; but my Lord Chancellor diminished his Bill, and ordered it to be entred down, as one of the Reasons for diminishing the Bill, that the Plaintiff had no Remedy by Ejectment at Law to recover the Possession, being barred by the Statute of Limitations, and he thought that a reasonable Guide for this Court to follow, as to the Redemption in Equity; and tho' the Plaintiff was an Infant at his Father's Death. Yet the Computation of Time began long before, when there was no Infancy in the Case, and therefore will run on against Infants after. Mich. 1729. between Knowles and Spence.

(C) Of the Persons to redeem.

1. A Person who comes in by a voluntary Conveyance may redeem a Mortgage. 1 Vern. 193. admitted, he who comes to redeem a Mortgage, must shew a Title. 1 Vern. 182.

2. If a Man enters into a Bond, in which he binds himself and his Heirs, and dies, leaving a Real Estate to descend to his Heir, subject to a Mortgage for Years, and the Heir sells the Equity of Redemption; the Obligee cannot redeem the Mortgage, without first having a Judgment at Law against the Heir. Panch. 1702. between Bateman and Bateman.

3. The Mortgagee in Fee after Forfeiture was attainted, and the King seised, and whether the Mortgage should redeem Dubitatur. Hard. 465.

4. A mortgaged his Lands upon Condition, that if he or his Heirs repaid 100L. at such a Day, he should re-enter before the Day he dies, leaving Issue a Daughter, his Wife Enfrant with a Son; the Daughter pays the Money at the Day, and then the Son is born; the Daughter shall keep the Lands, and the Son shall not recover against her; for the Daughter is in Nature of a Purchaser, where the hath regained the Land by her own Vigilance, which otherwise had lapsed at Law to the Mortgagee. Cro. Car. 87. 1 Ca. 99.

5. If a Man devises Lands which are in Mortgage to A. for Life, Remainder to B. in Fee; A. shall contribute one Third towards the Discharge of the Mortgage. 1 Chan. Ca. 271. vid. 2 Vern. 117. and Title Contribution and Average, Letter (B).

6. If a Jointresa, who is to hold the Land free from Incumbrances, pays off a precedent Mortgage, her Executors shall hold over till they are satisfied; because such Tenant for Life, ought to be reimbursed the Money he paid to set her Estate free, and in the Condition
Mortgages.

1. On his Marriage agreed to leave his Wife 1000 l. if she survived him; the drawing of the Agreement was left to the Parson of the Parish, who made a Bond from A. to his intended Wife in 2000 l. conditioned to leave her 1000 l. if she survived him; the Marriage was had, and A. died, leaving a Freehold and Copyhold Estate in Mortgage, and which were mortgaged together; and it was held, that the Wife should redeem, as well the Freehold, as Copyhold, and hold over till she was satisfied. Hill. 1704. between Acton and Pierce. 2 Vern. 480.

10. A. joins with B. her Husband, in making a Mortgage for Years of her Inheritance for 4500 l. to supply the Husband's Occasions, to pay for the Place of Captain of the Band of Pensioners; and subject to the Mortgage, the Estate was settled to A. for Life, Remainder to her Son in Tail. B. in the Mortgage Deed covenants to pay the Money, and the Provivio was, that on Payment of the Mortgage Money, the Term was to ceaze; the Mortgage was several Times assigned, and particularly in 1683. and the Wife joined in it; and there the Provivio was, that on Payment of the Money by them, or either of them, the Mortgage Term was to be assigned, as they, or either of them should direct or appoint. A few Days after the Mortgage was made, B. by Letter thanked his Wife for having sealed it, and added, that the Profits of the Office should be religiously applied to pay of the Incumbrance; but afterwards, when Money came in, tho' he paid off the Mortgage, yet he took an Assignment thereof in Trust for himself, and by Will devised his Personal Estate, and the Benefit of this Mortgage, to his second Wife; and on a Bill by the Son of the first Wife, to have this Mortgage assigned him, it was declared by my Lord Keeper, that he could not decree for him, but upon...
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upon the usual Terms of Redemption, on Payment of Principal, Interest and Costs, discounting Profits; but upon an Appeal to the Lords, the Son obtained a Decree to have the Mortgage assigned to him. 2 Pocoh. 1702, between the Earl and Countess of Huntington. 2 Vern. 437.

11. So where A. and his Wife mortgaged the Wife's Estate, and A. covenant to pay the Money, but the Equity of Redemption was referred to them and their Heirs; the Husband dying, it was decreed, that the Mortgage should be discharged out of the Husband's Estate. 2 Hill. 1707, between Pocock and Lee. 2 Vern. 604.

(D) Of Foreclosure, and here of opening the Foreclosure; Parties foreclosed, and Tender and Refusal of the Mortgage Money.

1. A Mortgagee obtained a Decree against a Mortgagor, and all the Creditors whose Debts effected the Estate, that they should redeem, or be foreclosed. One of the Creditors pays the Money by the Consent of the rest, and has the Mortgage assigned to him; and agrees with them, that if they would pay his Money at a further Day, they should redeem him; otherwise, that he should have the Lands absolutely; and it was held on a Bill brought by the other Creditors, that they should redeem, tho' the Creditor who paid the Money had been in Possession 20 Years, and had made great Improvements, they allowing only necessary Repairs, and lasting Improvements. Hill. 1682, between Exton and Greaves. 1 Vern. 138.

2. There being a first and a second Mortgage made of the same Estate, the Mortgagee brought a Bill against the second, to compel him to redeem, or to be foreclosed, and foreclosed him accordingly; it so happened, that the first Mortgagee by his Will, devised the Premises to the Mortgagor, and thereupon the Second Mortgagee brought a new Bill to set aside the first Mortgage, and to be let into a Satisfaction of his Money; the Defendant pleaded the former Suit and Decree Foreclosure; but the Plea was over-ruled. 1691, between Cook and Sadler. 2 Vern. 235.

3. If a Mortgagee has a Decree of Foreclosure, tho' that Decree be signed and enrolled, yet if he after brings an Action of Debt on the Bond given at the same Time for Payment of the Money, and Performance of the Covenants in the Mortgage Deed, such Action opens again the Foreclosure, and lets in the Equity of Redemption of the Mortgagor. 1739, between Dashwood and Blythway, at the Rolls.

4. A Man makes a Mortgage, and afterwards makes a Marriage Settlement of the Equity of Redemption, wherein he limits it on the Wife, and then on the Issue of his Body, with Remainder in Tail to his Brother; the Mortgagee exhibits his Bill against the Mortgagor to have his Money, or that he may stand foreclosed, without making the Brother a Party, and has a Decree accordingly; and afterwards the Mortgagor dies without Issue, and the Lands remain to the Brother by the Marriage Settlement, who prefers his Bill to redeem; and it was dismissed, for having made those Parties to M m m m the
the Bill of Foreclosure, who were Parties to the Mortgage, he did as much as was Necessarv; for perhaps it was impossible for him to know all the Parties against whom to seek a Foreclosure, and this would keep him an eternal Bailiff to the Mortgagor; besides, to open an Account after Length of Time, against a Person, who by Law was obliged to keep no Account, in Favour of a meer Volunteer, is unreasonable. 1 Chan. Ca. 217, 220.

5. Tenant for Life, the Reversion in Fee; he in Reversion mortgages his Estate in Fee, and the Mortgagor devifeth it, the Devifee may bring his Bill against the Mortgagor, and need not make the Heir of the Devifeor a Party; because he hath no Interest in the Lands at all, it being all devis’d away from him, and he need only foreclose the Mortgagor. 2 Chan. Ca. 32.

6. If a Man mortgages Lands, and then confesses several Judgments, and some of the Persons that have Judgments give the Mortgagee Notice, and after he obtains against the Mortgagor a Decree to foreclose; such Person that gave Notice of their Interest, shall notwithstanding redeem, because they are Creditors for a valuable Consideration, and the Mortgagee had Notice of them, so that he might have made them Parties to his Bill; but the Persons that gave no previous Notice of their Judgment, are totally barred of all Redemption by the former Decree. 1 Chan. Rep. 170, 171.

7. But when a Bill was exhibited by a second Mortgagor to redeem, and the first Mortgagee pleaded his Mortgage, and a Decree to foreclose the Mortgagor, without Notice of the second Mortgage, yet the Plea was over-ruled. Mich. 1707. between Godfrey and Chadwell. 2 Vern. 601.

8. If the Mortgagor (a) tenders the Money, and the Mortgagee refuses, he loseth the Interest from the Time of the Tender, because it is but a Pledge for the Money; and if the Money be tendred, he ought not to keep the Pledge; and no Man ought to pay for the Forbearance, when he hath the Money ready. 1 Chan. Ca. 29. 2 Chan. Ca. 206. S. P.

(a) If upon a Mortgage, a Tender be made of the Money at the Place appointed, for Payment at any Time of Day specified in the Condition, and the Mortgagee refuses, the Condition is saved for ever, and the Mortgagor need not pay at the Place appointed, till the last Inhabit of the Day, because by the express Letter of the Condition, the Money is to be paid on the Day indefinitely; nor needs there be any new Tender afterwards within a convenient Time, because by the Words of the Contrac’t, both Parties ought to acquiesce, and upon such Refusal, the Land is discharged, because upon the Tender, the Domine is void; and if it be on a Feodiment the Condition is performed, and the Feoditor may re-enter; but the Money lent dath yet remain a Debt or Dury, because it was a Debt by the original Lending of the Money, whether it had been so secured or not; and tho’ the Securitv fails according to the Words of the Agreement, yet there is the fame natural Justice that the Money should continue. 5 Co. 114. 6 Co. 115. 175.

9. The Plaintiff had made a Mortgage in Fee of his Estate, which by several Mefines Assignment was come to Sir William Dodwell; and there being likewise two several Terms for Years standing out, they were assigned to Trustees, in Trust for Sir William Dodwell, to Protect the Inheritance, and subject to the same Equity of Redemption; the Plaintiff and Sir William Dodwell settled an Account of what was due, and there appearing to be due thereon 4400l. Principal Money; the Interest was then paid off, and at the same Time Sir William Dodwell gave a Note, whereby he promised, that on Payment of the Sum of 4472l. or thereabouts, on the 23d of October, then next, being the Interest computed to that Time, he would reconvey the Inheritance to the Plaintiff and his Heirs, and would procure
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cure his Trustees to assign the two Terms for Years, as the Plaintiff should direct. In August following Sir William Dodwell died, and the Defendants were his Executors; and he likewise left the Defendant Mary, his only Child, and Heir at Law, an Infant of about eight Years of Age; the Plaintiff provided the Money, and on the 23d of October, tendered a Bank-Bill of 4500 l. to one of the Executors, (there being four in all) for him to take thereout what was then due for Principal and Interest; but the Executors having none of them proved the Will, he refused to accept of the Tender; upon which the Plaintiff asked him, if he objected to the Legality of the Tender, being in a Bank-Bill, and not in Money, and that if he did, he would presently turn it into Money; to which the other answered, he had no Objection to the Tender; but not having proved the Will, he would not accept of the Money. Afterwards the Plaintiff made the like Tender to another of the Executors, who likewise refused to accept of it, not having proved the Will; but he objected to the Legality of the Tender, not being in Money; Afterwards all the four Executors proved the Will; and the Bill was brought to redeem, on Payment of 4400 l. and Interest to the 23d of October, being the Time mentioned in the Note; and that the Plaintiff might not be obliged to pay Interest beyond that Time, as the Defendant's Executors insisted he ought; and 'twas held by my Lord Chancellor, that this Tender in a Bank-Note, was not strictly speaking a Legal Tender; but since it was proved the Plaintiff offered to turn it into Money, that made it a good Tender. 3dly, it was clearly agreed, that any, or either of the Executors, before Probate, might have received, and given a good Discharge for the Money, especially when, as appeared in this Case, they afterwards proved the Will, and so were Executors ab initio. 3dly, That tho’ they were Executors only in Trust for the Daughter, who was an Infant, yet none of them could be in a better Case than Sir William Dodwell himself could have been, if he had been living; and such Tender under these Circumstances would have bound him; so it will his Executors and Devisee; and therefore decreed a Redemption on Payment of the 4400 l. and Interest to the 23d of October, the Time mentioned in the Note, and no longer, and no Costs on either Side; and the Infant Heir at Law, on Payment of the Money to the Executors, was to convey the Inheritance descended to her according to the Act 7 Ann. for obliging Infant Trustees to assign and convey. Hill. 1719. between Sir John Austen, and the Executors of Sir William Dodwell, at my Lord Chancellor’s.

(E) Where
(E) Where there are several Mortgages of the same Estate, what Remedy they have against the Mortgagor, and against each other.

1. If a Man mortgages Lands by a defective Conveyance, and afterwards mortgages to a second Person, by an Assurance, that is good and effectual, without Notice, the Second shall prevail, because that carries the Legal Title, and Equity will not interpose, when both are equally upon a valuable Consideration; but if a Man mortgages by a defective Conveyance, and there are subsequent Creditors, whose Debts did not originally affect the Land, Equity will supply such defective Conveyance against such subsequent Incumbrances, who acquired a Legal Title afterwards; for since the subsequent Creditors did not originally take the Lands for their Security, nor had in View an Intention to affect them, when afterwards the Lands are affected, and they come in under the very Person that is obliged in Conscience to make the defective Security good, they stand in his Place, and shall be postponed to such defective Conveyance. Mich. 1670. between Burgh and Francis, by Sir Henage Finch, Lord Keeper.

2. The Mortgagor being Son-in-Law to the Mortgagor, having entred, and afterwards suffered the Mortgagor to take the Profits for several Years, without requiring Interest; it was held by the Court, that the Interest of the first Mortgagor should not affect the Lands, so as to keep out the Second Mortgagor longer than he would have been, had the Interest been duly paid; it was likewise held, that if a Mortgagor, after Notice of a subsequent Mortgage, joins with the Mortgagor, in a Sale of the Lands to a Stranger, the Money received by either, for the Purchase, shall sink so much of the Mortgage Money. Mich. 1691. between Bentham and Haincourt.

3. If A. has a first Mortgage, and B. a second, and subject to these Mortgages the Estate is settled on C. for Life, Remainder on D. an Infant; A. may bring a Bill to foreclose, though B. has not the like Remedy over against D. who because of his Infancy cannot be foreclosed. Mich. 1705. between Draper and Jennings. 2 Vern. 518.

4. If a First Mortgagor brings a Bill to foreclose the Mortgagor, and an Account is directed and taken between them, such Account shall bind the Second Mortgagor, tho' he was no Party to the Bill, if there was no Fraud or Collusion in the taking of it. Trin. 29 Car. 2. between Needler and Deeble. 1 Chit. Ca. 299.

5. If a Man mortgages certain Lands to one Man, and mortgages those Lands, with some others to another, tho' this seems to be a Case omitted out of the Statute against clandestine Mortgages; yet if it appears to be a Contrivance to evade it, as if an Acre or two of Land were only added, this will not exempt it; but a Person who will take Advantage of the (a) Statute, must be an honest Mortgagor; and therefore if a Man has used any Fraud or Practice in obtaining

(a) By the 4 & 5 W. & M. cap. 16. if any Person shall borrow any Money, and for the Payment thereof shall suffer a Judgment or Recognizance, and shall afterwards borrow any other Sum of another, or for other valuable Consideration, and for securing the Repayment and Discharge thereof,
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In a Second Mortgage, he shall not have the Benefit of the Statute therefor, shall mortgage Lands to the Second Lender, or to any other Person in Trust for him, and shall not give Notice to the Mortgagor of such Judgment, etc. In Writing before the Execution of the said Mortgage, such Mortgagor shall have no Benefit in Equity of Redemption of the Lands mortgaged, unless such Mortgagor, or his Heirs, upon Notice given by the Mortgagor in Writing, under Hand and Seal, attested by two Witnesses of such former Judgment, etc., shall within six Months, pay off and discharge the same, and cause the same to be vacated and discharged. And if any Person who shall once mortgage Lands for valuable Consideration, shall again mortgage the same Lands, or any Part thereof, to any other Person, the former Mortgage being in Force, and shall not discover in Writing to the Second Mortgagor the first Mortgage, such Mortgagor shall have no Relief, or Equity of Redemption against the Second Mortgagor, but such second or third Mortgagors, may redeem any former Mortgage; this Act shall not extend to bar any Widow of any Mortgagor of her Dower, who did not legally join with such Husband, in such Mortgage, or otherwise lawfully exclude herself.

6. If A being about to lend Money to B, on a Mortgage, sends C to inquire of D, who had a Prior Mortgage, whether he had any Incumbrance on B's Estate; and it is proved that C went to him, and spoke to him accordingly; D's Mortgage shall be postponed. 2 Vern. 554. vid. 2 Vern. 370.

7. One Goff, being possessed of the Thatched House at St. James's, on a Building Lease for 60 Years, mortgages it to Dr. Lancaster, and one Habberfield, for securing 600/. which the Defendant afterwards paid off, and advanced to Goff 600 l. more, and took an Assignment of this Mortgage, but had not the original Lease delivered to him, till some Days after the Assignment. Goff afterwards being in a declining Way, proposed to borrow of the Plaintiff 350 /. on a Mortgage of a Vault and two Rooms, Part of the mortgaged Premises; and on a Treaty for that Purpose, one Remington, who acted for the Plaintiff, desired to see the Original Lease. Goff told him that he had it not by him, but that his Lawyer kept all his Writings for him, as not thinking it safe to truft them in his own House, where all sort of Company resorted; upon which Goff goes to the Defendant, who was an Attorney in the City, tells him he was about agreeing with a Person for the rebuilding Part of the Premises, at so much a Foot Square, which would better his Security, and desired him to let him have the Original Lease, that he may see the Dimensions of the House; the Defendant would not truft him with the Lease in his own Power, but goes along with him to the Thatched House; and after he had been there some Time, Goff sends for the Plaintiff and Remington, told them he had now the Original Lease, which they might see; and upon their coming to his House, Goff goes into the Room where the Defendant was, and desires him to let him have the Lease, to shew the Person he had mentioned, for that he was now in the House; and accordingly the Defendant lets him have the Lease, which he carries to the Plaintiff and Remington; and they being satisfied therewith, lends him the Money, and took a Mortgage of the Vault and two Rooms, insetting at the same Time to have the Original Lease delivered to them; but Goff urging, that it concerned much more than the Plaintiff had in Mortgage, and that he could not part with it, the Plaintiff permitted him to keep it, and he thereupon in about an Hour's Time delivered it again to the Defendant, without acquainting him with what he had done; and the Defendant swore expressly in his Answer, that he had no Notice of this Transaction, or of the Plaintiff's Mortgage. Afterwards the Plaintiff lent Goff a further Sum of Money.
Money, and prevailed on the Defendant to let him have the Original Lease a second Time; but there was no Proof that the Defendant knew the Occasion of it, and he by his Answer expressly denied his having Notice of it. Afterwards Goff failed, and thereupon the Defendant brought his Ejectment, and recovered, and this Bill was brought to have the Defendant's Mortgage postponed, upon Pretence that here was a manifold Fraud on the Plaintiff, and that the Defendant was privy to it; and at the Rolls, the Plaintiff had a Decree accordingly, but on Appeal the Decree was reversed; but my Lord Chancellor said, if a Man makes a Mortgage, and afterwards mortgages the same Estate to another, and the first Mortgagee is in Combination to induce the second Mortgagee to lend his Money; this Fraud without doubt will in Equity postpone his own Mortgage; so if such Mortgagee stands by, and fees another lending Money, on the same Estate, without giving him Notice of his first Mortgage, this is such a Misprison as shall forfeit his Priority; but here is no manner of Proof that the Defendant knew any Thing of the Plaintiff's lending his Money; nay if there had, yet the Plaintiff appears Guilty of so much a groser Neglect, that he ought not to prevail; for the Defendant intrusted Goff with his Original Lease, but for a very little while, the Plaintiff takes his Word that he could not part with it, and leaves it wholly in his Power, to go on in defrauding whom else he had a mind to; besides, it appears the Defendant was imposed on by Goff; for he parted with the Lease only to better his own Security, and had the most specious Pretence that could be for it; and therefore it cannot without manifest Proof, be objected to him, that he let Goff have his Lease to shew the Plaintiff, or with a Design to draw in the Plaintiff to lend his Money, and diminish the Bill with Costs, unless the Plaintiff should within such a Time redeem the Defendant; and for Precedents were cited Raw and Pott, the Countfs of Bridgewater and Ruffell, and one Clare's Caffe of Yorkshire. Mich. 1716. between Peter and Ruffell.

(F) Where a Mortgagee may protect himself by buying in precedent Incumbances.

1. If a Man mortgages Lands to A. and afterwards makes a subsequent Mortgage to B. without Notice at the Time of making the Mortgage, and B. purchases in a precedent Mortgage, which stands out at Law, tho' nothing on it be due in Equity, or a Statue, whereon Money is due, which he extends, he shall hold the Land till he is satisfied what is due upon both Securities, tho' he had Notice of A's Mortgage, before his second Purchase of the prior Security; because having at first innocently lent his Money, he may do what he can to secure that Money from being lost; and when he hath purchased in the prior Incumbrance, he hath a Title at Law, and being equally on a valuable Consideration with the mean Incumbrancer, it is but just that Equity should leave it in the same Manner, that it flood at Law; for there is no Room for Equity to interpose, to take away the Security the Law had given, where the Perdon that has the Security comes into the Title without any Corruption at all; and it were Partiality, and not Equity to interpose, where the Security gives the fair Lender a good and legal
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Title; and it is all as one, whether such third Lender, or Purchaser, takes in a Mortgage, that is an Interest vested, or a Statute that is only a Charge, for both are Real Liens; and sufficient to overthrow the Title of the Meane Incumbrancer, or whether Money be due on the first Incumbrance, or not since, that does not alter the Legal Title. Marsh and Lee. 2 Vent. 337, 338. 1 Chan. Ca. 162, 163. S. C. 1 Chan. Ca. 36. Hard. 173. 1 Chan. Ca. 149, 150. 2 Chan. Ca. 208. 1 Vern. 187. 1 Chan. Ca. 20. 166. 2 Vern. 157, 159.

2. A Man mortgages the Manor and Rectory of D. to A. and afterwards mortgages the Rectory to B. without Notice of the Mortgage to A. and then B. purchased a precedent Incumbrance on both the Manor and Rectory; and the Question was, when B. had received all the Money due on the first Security, whether he should receive any more Profits of the Manor, or only keep the Incumbrance on Foot, to protect the Rectory; which was argued before Finch Lord Keeper, in the Presence of Wild and Twifden; and the two Judges held, that B. should not receive the Profits of the Manor, after the first Incumbrance was satisfied, because he had taken the Rectory only for his Security of that Sum; and it would be unreasonable to give him a Security beyond what he had in his Original Intention; but the Keeper over-ruled it; for that when he had purchased the precedent Incumbrances, that comprehended both the Manor and Rectory, and were forfeited at Law, and therefore it was reasonable, that the Estate should not be taken away by the Meane Incumbrancer in a Court of Equity, which by no Method could be evicted at Law, unless such Person would do Equity, and pay the whole Money due on both Securities. 1 Chan. Ca. 201, 202.

3. If a Man lends 600l. on a Mortgage, and afterwards discovering, that the Estate is premortgaged to J. S. he gets in an old satisfied Incumbrance, and brings his Bill against J. S. to redeem, or be foreclosed; he need not prove the actual Payment of any Money for such precedent Incumbrance, the having the Deed, or an Acquittance being sufficient, altho' it is objected, that J. S. is equally a Purchaser with him. 2 Vern. 279.

4. If a prior Mortgage or Statute be bought in, pending a Bill brought by A. against the Mortgagor and B. who buys in such precedent Statute or Mortgage, to foreclose, tho' this Purchaser be pendente lite, yet it will protect B. he being at Liberty to do what he can for his own Security. Trin. 1687. between Taylor and Leigh. 2 Vern. 29.

5. But where A. made a Mortgage to B. and afterwards a Commission of Bankruptcy was taken out against him, and the Commissioners made an Assignment of his Estate, and then C. lent the Bankrupt 2000l. on a second Mortgage, having no Notice of the Bankruptcy, tho' he afterwards got in the first Mortgage; yet it was held by two Lords Commissioners against one, that this prior Mortgage should protect the Mortgage subsequent to the Bankruptcy; for every one is bound to take Notice of a Commision of Bankruptcy. 2 Vern. 157, 160.

6. And tho' a Purchaser or Mortgagee may buy in an Incumbrance, or lay hold on any Plank to protect himself, yet he shall not protect himself by the taking a Conveyance from a Trustee after he had Notice of the Trust; for by taking such Conveyance, he becomes the Trustee himself. Vid. 2 Vern. 271. (G) Where
(G) Where a person who comes to redeem must do Equity to the mortgagee before he will be admitted.

1. If a mortgagor borrows more money of the mortgagee upon bond, where the heir is bound, and dies, the heir of the mortgagor shall not redeem without paying the bond-debt, as well as that secured by the mortgage; because, when the condition is broken, so that the term or interest becomes absolute in the mortgagee; if the heir of the mortgagor will have equity, he must do equity, by the payment of the whole money due to the mortgagee; and this is called a rebuttal; but if the bill was exhibited by the mortgagee to foreclose; there, if the heir of the mortgagor tender principal, and costs, it sufficeth without tender of the money due on the bond, because such bond was not originally any lien on the land it self; and if that be tendered, for which the land was originally pledged, there is no reason to debar the heir of his right of redemption. 2 Chan. Ca. 164. 2 Chan. Rep. 147. 1 Vern. 245. 2 Chan. Ca. 194, 195.

2. So where a husband and wife levy a fine of the wife's land, to enable them to take up the sum of 400 l. and they make a mortgage for it, and after the mortgage is forfeited, the husband pays in part of the mortgage-money, but afterwards borrows again the same sum of the mortgagee; and it was decreed, that the mortgagee having the estate in law in him by the forfeiture of the mortgage, he should hold the land against the heir of the wife until the whole money was paid; and if the heir would not pay in the whole principal, interest, and costs, he should be foreclosed. Poch. 1682. between Reason and Sackeverell, 1 Vern. 41.

3. So if a lessee for years mortgages his term, and afterwards borrows money of the mortgagee on bond, and dies, his executor shall not redeem without paying the bond as well as the mortgage. 2 Vern. 177.

4. The plaintiff pawned some jewels to K. who signed a writing, that they were to be redeemed in twelve months, otherwise for the 110 l. lent, they were to be as bought and sold, K. within a short time after delivers over the jewels, together with some plate of his own, to M. a bookseller, as a pledge for 200 l. and K. afterwards borrowed 38 l. and 50 l. of M. on promissory notes, to be repaid on demand, and M. by answer insulti, it was agreed, that the pledge should be a security, as well for the money on the notes as for the money first lent, but could make no proof of any such promise or agreement; and though a redemption was decreed, yet it was on payment of all that was due to M. as well upon the notes as on the pawns; but the goods of K. which were pawned, were to be first applied as far as the value of them would extend. Mich. 1715. between Demainbray and Metcalf, 2 Vern. 698, 691. S. C.

5. If A. is bound in several bonds with B. as his surety for 4000 l. and A. conveys the manor of C. to B. by way of mortgage, to counter-secure him against the bonds for 4000 l. and A. dies, and after D. the son and heir of A. becomes bound with B. for 2000 l. more,
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more; but there was no Agreement that the Mortgage should be a
Security to D. against the Bonds for 2000l. and after B. dies, his
Heir shall not be permitted to redeem upon Payment of the 4000l.
only, but must give D. a harmless, as well touching the 2000l. as the
4000l. for he that would have Equity help where the Law cannot,
must do Equity to the Party against whom he seeks to be relieved.

Hill. 19 & 20 Car. 2. between St. John and Holford, 1 Chron. Ca. 97.

6. If A. acknowledges a Statute to B. for Payment of 800l. with
Interest, which being forfeited, and the lands extended upon it, A.
for a valuable Consideration, lets the same lands in Tail, and af-
ter borrows Money of B. and by Articles it is agreed, the Statute and
Extent shall stand a Security for the hath Money, and after A. dies,
and the 800l. with Interest is satisfied by Reception of the Profits,
yet the Issue in Tail shall not be relieved against the Penalty of the
Statute; for though the Heir has an Equity, by Reaflow of the Tail,
made upon a Consideration, yet the Money lent raises an Equity for
B. so that B. hath both Law and Equity; whereas the Issue in Tail
hath Equity only till the Penalty is satisfied. Mich. 14 Car. 2. be-

7. If a Man makes two severals Mortgages of several Lands, and
dies, and one of the Mortgages is of an intailed Estate, or is deficient
in Value, the Heir of the Mortgagor shall not be admitted to redeem
one without the other. 2 Vern. 207. neither shall the Mortgagor him-
self redeem the one, and leave the defective Mortgage, but he must
take both together. 1 Vern. 29, 245. S.C.

8. The Plaintiff, as Assignee of a Statute of Bankruptcy, brought
his Bill to redeem a Mortgage of the Manor of Newington in Kent,
made by the Bankrupt to the Defendant; the Defendant, by Anfwers,
insists, that he first lent the Bankrupt 200l. on a Mortgage of a
particular Tenement, and afterwards lent him 300l. on a Mortgage
of the Manor of Newington, which was of better Value than the
Money due; but the first Mortgage was deficient in Point of Value;
and it was held, that if the Plaintiff will redeem one, he must re-
deem both. Hill. 1697. between Pope and Onslow, 2 Vern. 286.

9. If a Man has a Debt owing to him by Mortgage, and another
on Bond from the same Person, he cannot tack them together against
the Mortgagor, but he shall be let into a Redemption, on Payment
of the Mortgage-money (a) only; but the Heir in such Case shall
not be let into a Redemption, without Payment of both, because
the Land in his Hand is chargeable with the Bond, even at Law;
and since the (b) Statute against fraudulent Devises, the Devisee of
the Equity of Redemption is in the same Case with the Heir, and
cannot redeem without Payment of both, because the Statute makes
such Devise void, as against Creditors, and then the Devisee stands
in the same Place as the Heir must have done, if no Devise had been
made; but before that Statute such Devisee would not be liable to
the Bond-Debt. Trim. 5 Geo. 1. between Chalils and Cusborne.

(a) 1 Vern. 344. Where it is

(b) 1 Vern. 344. Where it is

10. A. mortgaged his Estate to B. and then assigned the Equity
of Redemption to C. afterwards D. obtained a Judgment against A.
and B. the Mortgagee assigns to D. his Mortgage, and then C. ten-

ners

1. 2 Vern. 207.

2. Vern. 257.

3. Vern. 245.

4. Vern. 344.

5. Vern. 207.


7. Vern. 245.

8. Vern. 207.

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ders the Money due on the first Mortgage to D. who had Notice of the Assignment of the Equity of Redemption, upon his Purchasing in his first Mortgage; and it was here objected, that D. having the legal Estate in him by the Assignment of the forfeited Mortgage, and C. having only an equitable Interest, not supported by the legal Estate, that if C. would have Equity, he ought to do Equity, by paying off both Monies to D. but it was answered and resolved by the Court, that C. should redeem, paying only the Money due on the Mortgage, and not what was due on the Judgment, because the Equity of Redemption was never bound by the Judgment, for the Judgment was not confessed, so as to become a real Lien upon the Estate at the Time when this Equity was assigned; and therefore the Judgment could never charge or affect it, and consequently C. purchased an Estate, not bound by the Judgment, and by Consequence the Judgment-Creditor, by Purchasing in the Prior Mortgagor, could never defeat the Interest of C. Trin. 1708. between Breerton and Jones, at the Rolls.

11. It was also declared, that if a Person that had a first Mortgage should, without the Consent of the Mortgagor, purchase in a subsequent Judgment, that a mortgagor or Assignee of the Equity of Redemption, should not be obliged to pay the Money due on both Securities, in order to redeem; because such Transaction of the Mortgagor was only to load the Estate without the Consent of the Owner, when he had no Prospect of bettering his own Security. Between Breerton and Jones.

12. If the Father is Tenant for Life, Remainder to his Son in Tail, and the Father mortgages to J. S. who finding his Title defective, lends 100 l. to the Son, and takes a Mortgage from him of the same Land, &c. the Son may redeem, paying the 100 l. only, for the Son is a Stranger to the Estate of his Father. Hill. 31 & 32 Car. 2. between Bromley and Hamond, 2 Chan. Ca. 23.

13. So where a Lunatick, before he became such, made a Mortgage of good Part of his Estate for 50 l. and the Committee transferred this Mortgage, and took up 3 or 400 l. more upon it; and my Lord Chancellor declared the Mortgage should stand a Security for the 50 l. only. Mich. 1684. between Foster and Merchand, 1 Vern. 262.

(H) Mortgage-money, to whom to be paid.

1. Where a Mortgage was made upon Condition, that the Mortgagor paid a certain Sum to the Mortgagor, his Heirs, Executors or Administrators, that then the Mortgagor should re-enter, and the Day passed without Payment, and the Mortgagor died; great Doubt was, whether the Money should be paid to the Heir or Executor of the Mortgagor; and it was formerly held, that where the Heir was named in the Condition, and no Bond or Covenant given to make it appear a Personal Matter; and there was no Deficiency of Afflicts to pay Creditors; that in such Case the Heir parting with the Benefit descended to him, should have the Money on the Mortgage. 1 Chan. Ca. 88. 1 Chan. Rep. 181, 182-3.

2. But afterwards it was truly settled in several Cases by my Lord Chancellor Finch, that the Money should go to the Executors or Admi-
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Administrators, and not to the Heir; and the Reason was, because Equity follows the Law; and at Common Law, if Conditions or Deceasances of Mortgages are so penned, as to Mention is made either of Heirs or Executors, in that Case the Money ought to be paid to the Executors, because the Money came out of the Personal Estate, and therefore ought to return thither again; but if the Deceasance appoints the Money to be paid to the Heir or Executor disjunctively, if the Mortgagor pay the Money precisely at the Day, he may elect to pay it either to the Heir or the Executor; but where the precise Day is past, and the Mortgage forfeited, all Election is gone in Law, for in Law there is no Redemption; and when the Case is reduced to an Equity of Redemption, it were perfectly against Equity to revive the Election of the Mortgagor, because that would only tend to the Delay of the Payment of the Money as long as he pleased, and end in Compiliotions to pay the Money into that Hand which would use him best; and to say that the Election should be in the Court, would be to place an arbitrary Power in it, which would tend to the Inconvenience of the Subject, since no Man could safely pay the Money in such Cases, without applying to the Court in a Suit in Equity; and therefore since there ought to be a certain Rule, a better cannot be chose, than to come as near as can be to the Rule and Reason of the Common Law; and as the Law always gives the Money to the Executor, where no Person is named, or where the Election to pay, either to the Heir or Executor, is gone and forfeited in Law, it is all one as if neither Heir nor Executor were named in the Condition; and then Equity following the Rules of the Common Law, ought to give it to the Executor; for in natural Justice and Equity, the principal Right of the Mortgagor is to his Money, and his Right to the Land is only as a Deposit or Pledge for his Money; and therefore the Money ought to be paid to the proper Hand that the Mortgagor has appointed Receiver of it, and that is his Executor; and then the Heir, who is only a Trustee to keep the Pledge, ought to deliver it back to the Mortgagor; and though the Heir has the Use and Benefit of the Land till redeemed; yet he has it only as a Pledge, and therefore is a Trustee to restore it when the Money is paid to the proper Hand, and the Heir himself, though he be proper to keep the Pledge, being Land, yet he is not proper to receive the Money, it being merely Personal, and it is not hard that the Heir should part with the Land, without having the Money that comes in Lieu of it, because the Money was originally parted with from the Personal Estate, and had immediately come into the Hands of the Executor, had it not been placed out on this Real Security; and therefore it has been since decreed, whether the Executor has Affets, or not, that the Mortgage-money should be paid him.


3. If the Heir of the Mortgagor forecloses the Mortgagor, the Executor being no Party, upon a Bill by the Executor against the Heir of the Mortgagor and the Mortgagor, the Land will be decreed the Executor. Between Gobe and the Earl ofCarlisle, 2 Vern. 66. cited to be adjudged.

4. But
Mortgages.

4. But if the Executor of the Mortgagee, after a Foreclosure by the Heir, brings a Bill to have the Benefit of the Mortgage, the Heir, if he thinks fit, may take the Benefit of the Foreclosure to himself, paying the Executor the Mortgage-money and Interest. 2 Vern. 67. per Curiam.

5. If there be a Mortgage in Fee of a long Standing, and there are two Defcants caft since the Mortgage was made; and though the Mortgagor, by Answer, says he will not redeem, yet the Mortgage shall go to the Executor, and not the Heir, the Equity of Redemption not being foreclosed or released. Between Labor and Greaves, 2 Vern. 367.

6. But if a Mortgagee in Fee enters for a Forfeiture, and after seven Years Enjoyment, absolutely sells the Land to J. S. and his Heirs; the Estate shall not be looked upon to be a Mortgage in the Hands of J. S. fo as to make it Part of his Personal Estate, but it shall be for the Benefit of his Heir. Mich. 1684, between Cotton and Ies, 1 Vern. 271.

(1) Mortgagee answerable for the Profits, and how to Account.

1. T HE Mortgagee is answerable in Equity when he comes into the Possession of the Lands, for the Profits that he made of the Lands, and not for the Profits that he might have made, unless there were Fraud; for it is the Fraud and Laches of the Mortgagor, that he would let the Lands lapse into the Hands of the Mortgagee by the Non-payment of the Money; and when it doth, he is only a Bailiff for what he doth receive; but is not bound to the Trouble and Pains of Making the best of what is another's. Tho'b. 133. 1 Vern. 476, 477.

2. If a Mortgagee in Possession assigns over his Mortgage; without Affent of the Mortgagor, the Mortgagee is bound to answer the Profits, both before and after the Assignment, though assigned only for his own Debt; for he is under a Trust to answer the Profits of the Pledge; and it is a Breach of Trust to assign such Pledge to a Person insolvent; but quare, if the Mortgagor hides, so that he cannot be served with a Subpœna to foreclose, whether the Mortgagee may not assign, and not be answerable for the Profits after Assignment. 3 Chan. Ca. 3.

3. A Mortgagee shall not be bound by any Proof, that the Land was worth so much, unless you can likewise prove that he did actually make so much of it, or might have done so, had it not been for his wilful Default, as if he turned out a sufficient Tenant, that held it as so much Rent, or refused to accept a sufficient Tenant that would have given so much for it. 1 Vern. 45.

4. If a Mortgagee manages the Estate himself, there is no Allowance to be made him for his Care and Pains; but if he employs a skilful Bailiff, and gives him 20 l. per Ann. that must be allowed, for a Man is not bound to be his own Bailiff. 1 Vern. 316.

5. If an Infant, by his Guardian, endeavours to overthrow the Mortgage, by a supposed Intail, and after a special Verdict and great Agitation at Law, the Mortgagee prevails, and the Infant brings his
Bill to redeem, the Mortgagor having sworn he paid and expended above 120l. in defending his Mortgage at Law, although he had but 60l. Cofts allowed him there, shall not be held down to the Taxation at Law, but shall, on the Account, be allowed all he laid out or expended; and if the Mortgagor, in this Case, fearing that his Mortgage would be defeated at Law, gets Administration as Principal Creditor, in the Spiritual Court, he shall be allowed the Cofts expended there also. Hill. 1705. between Ramden and Langley, 2 Vern. 536.

6. The Mortgagor obtained Judgment in Ejectment, and entred on the mortgaged Premises, and thereby prevented other Creditors, that had subsequent Incumbrances, from entering, and yet permitted the Mortgagor to take the Profits; and the other Incumbrancers coming to redeem him, the Court ordered the Mortgagor should be charged with all the Profits he had, or might have received since his Entry. 1 Vern. 270.

7. So where a Bankrupt, before he became such, having made a Mortgage of his Estate, and the Assignees of the Statute brought an Ejectment for Recovery of the Lands comprised in the Mortgage, and the Mortgagor refused to enter, but suffered the Bankrupt to take the Profits, and to fence against the Assignees with the Mortgage; and it was held, that the Mortgagor should be charged with the Profits from the Time of the Ejectment deliver'd. Mich. 1684. between Chapman and Tanner, 1 Vern. 267, 258. S. P.

8. A. mortgaged the Manor of T. to B. to which an Advowson was appendant, B. brought a Bill to foreclose, the Church became void, and he likewise brought a Quare Impedit at Law; and on a Motion to stay the Proceedings on the Quare Impedit, the Court held, that though A. had no Bill, yet being ready, and offering to pay the Principal, Interest, and Cofts, if B. will not accept his Money, Interest shall cease; and an Injunction to stay Proceedings in the Quare Impedit granted, for the Mortgagor can make no Benefit by Preventing to the Church, nor can Account for any Value in Respect thereof, to sink or lessen his Debt; and the Mortgagor therefore in that Case is but in the Nature of a Trustee for the Mortgagor. Mich. 1700. between Amburst and Dawling, 2 Vern. 401.

(K) how the Assignee of the Mortgagor is to Account.

1. If the Mortgagor assigns his Mortgage, and the Mortgagor comes to redeem against the Assignee all Monies really paid by the Assignee, either as Principal or Interest, shall be Principal to the Assignee, and shall bear Interest; otherwise it is if the Assignee had not paid the Money; and the Assignment was only colourable, in order to load the Mortgagor with Compound Interest. Between Smith and Pemberton, 1 Chan. Ca. 67, 258. 1 Vern. 169. 2 Vern. 135.

2. If a Stranger gets an Assignment of a Mortgage for less than is due, the Mortgagor or his Heir shall not redeem, without paying all the Money due; but if a Man purchases the mortgaged Lands, without Notice of this Incumbrance; whether he has not an Equity to redeem them, for what was really paid by the Stranger, Quare 1 Vern. 336.

pppp 3. But
3. But if there are subsequent Incumbrancers or Creditors in the Case, a Man who buys in a prior Incumbrance, shall against them be allowed only what he really paid, though there was in Truth a greater Sum due. 1 Vern. 476.

CAP. XLII.

Notice.

(A) Of presumptive Notice, and where Notice to one Person shall affect another.

(B) How far a Man is affected who acts against express Notice, or contrary to what he is obliged to take Notice of at his Peril.

(C) Purchasers without Notice, in what Cases favoured.

(A) Of presumptive Notice, and where Notice to one Person shall affect another.

1. If A., having Notice that Lands were contracted to be sold to B., purchases those Lands, and takes a Conveyance to the Son and his Heirs; though the Son had not Notice of B.'s Contract: yet Notice to his Father shall affect him. Mich. 15 Car. 2: between Ainsley and Kendal. 1 Chan. Ca. 38.

2. So if one who purchaseth for another hath Notice of a dormant Incumbrance, it shall affect the very Purchaser. 1 Chan. Ca. 38. per Curiam.

3. If a Man lends Money on a Mortgage, and the Scrivener who was intrusted to draw the Mortgage-Deed, had Notice of a prior Mortgage, this Notice shall affect the second Mortgagee. Vid. 2 Vern. 974.

4. So, if A. having Notice of an Incumbrance, purchaseth in the Name of B., and then agrees that B. shall be the Purchaser, and he
accordingly pays the Purchase-Money without Notice of the Incumbrance; tho’ B. did not employ A. nor knew any Thing of the Purchase till after it was made, yet B. approving of it afterwards, made A. his Agent ab initio, and therefore shall be affected by the Notice to A. 2 Vern. 609.

5. A. purchased Lands, having Notice of a Settlement, which was delivered to him amongst other Writings, whereby it appeared, that the Vender was but Tenant for Life, Remainder to his first, &c. Sons in Tail Male; upon his Purchase he took in a Mortgage Term, which was prior to the Settlement, and entred, and afterwards sold the Lands to B. and C. who had Notice; upon a Bill brought by the Son, after the Death of his Father, who was but Tenant for Life, against B. and C. his two Veneees; it was decreed, that as to the two Veneees, who were Purchasers without Notice, the Bill should be dismissed, and that A. should account for the Purchase Money, which he received, with Interest, from the Death of the Tenant for Life, thereout discounting what was due on the Mortgage Term, made prior to the Settlement. Mich. 1700. between Ferrars and Cherry. 2 Vern. 384.

6. A. purchased an Estate with Notice of an Incumbrance, and then sold it to B. who had no Notice, who afterwards sold it to C. who had Notice; and it was held by the Master of the Rolls, that by this, the first Notice to A. the first Purchaser was revived, and that C. the last Purchaser should be liable to the Incumbrance, as if the Lands had never been in the Hands of one who had no Notice; but upon a Rehearing, my Lord Keeper reversed it; for otherwise an Innocent Purchaser without Notice, must be forced to keep the Estate, and cannot sell it. Hill. 1695. between Harrison and Forke.

7. A. makes a Conveyance to B. with Power of Revocation by Will, and limits other Uses; if A. disposes to a Purchaser by the Will, another Purchaser subsequent is intended to have Notice of the Will, as well as of the Power to revoke, and this is in Law Notice; and so it is in all Cases, where the Purchaser cannot make out a Title; but by a Deed, which leads him to another Fact, the Purchaser shall not be a Purchaser without Notice of that Fact, but shall be presumed cognizant thereof; for it is causa Negligentia, that he sought not after it. Mich. 30 Car. 2. between Moor and Bennett. 1 Can. Ca. 246. 1 Vern. 149, 319. 8. P. 2 Vern. 662. 3 P.

(B) How far a Man is affected who acts against express Notice, or contrary to what he is obliged to take Notice of at his Peril.

1. A. Made B. and C. his Executors, and died; C. obtained a Decree against B. to hinder him from receiving any more of the Personal Estate, &c. and a perpetual Injunction for that Purpose was granted before any Sequestration against B. 7. 8. who was indebted by a Mortgage of 1000 l. to the Testator, paid the 1000 l. to B. and has his Mortgage delivered up to be cancelled; but it appearing, that he paid the Money after Notice of the Decree, (being Present at the Hearing, &c.) he was ordered to pay it over again. Trin. 34 Car. 2. between Harvey and Montague. 1 Vern. 57, 122. S. C.
Notice.

2. If A. Lends B. her Brother-in-Law 100l. and takes Bond for it in the Name of T. S. and upon some Difference between A. and B. B. puts the Bond in Suit, in the Name of T. S. her Trustee, and B. to avoid Expense confesses Judgment, and afterwards pays the Money to T. S. the Trustee, he shall be obliged to pay it over again, having Notice of the Truth; and it is sufficient Evidence of Fraud and Notice, that there was a new Attorney made to acknowledge Satisfaction on the Judgment, and not the Attorney on Record, who was first employed by A. Mich. 1690. between Pritchard and Langher. 2 Vern. 197.

3. If a Man has a Debt due to him by Bond, and he assigns the Bond to T. S. and the Obliger, after Notice of the Assignment, pays the Money to the Obliger, such Payment is not good. 2 Vern. 540. but if he had paid it without Notice of the Assignment, it would be otherwise. 1 Chan. Ca. 232.

4. An Administrator pays Money on Specialties, without Notice of Money decreed, and had fully administrad the Assets; and the Court nevertheless decreed, that the Administrator should pay the Money. Decreed Hill. 1688. between Searle and Hale. 2 Vern. 37, 88. S. P. for a Duty decreed is equal to a Judgment at Law.

5. If a Devisee obtains a Decree, to hold and enjoy certain Lands against the Heir, who it was supposed had suppressed the Will, and pending this Suit, a third Person gets an Assignment of a Mortgage made by the Testator, and then Purchases the Equity of Redemption of the Heir, with Notice that there was such a Will, the Court will not admit him to examine the Juslice of the former Decree, nor to try at Law, whether such Will was cancelled or destroyed by the Testator. Hill. 1690. between Finch and Newham. 2 Vern. 216, 217.

6. A Purchaser or Mortgagee shall not protect himself, by taking a Conveyance from a Trustee, after Notice of the Truth; for by taking such Conveyance he becomes the Trustee himself. 2 Vern. 271. So if a Man purchases from a Trustee with Notice, and levies a Fine, and five Years past, yet it shall not avail; for by Purchasing from the Trustee with Notice, he becomes the Trustee himself. 1 Vern. 149.

7. If an Executor in Trust for an Infant, Residuary Legatee, renews a Lease, Part of the Testator's Personal Estate in his own Name, and afterwards mortgages it, and assigns the Equity of Redemption to a Trustee, to sell for Payment of his own Debts, and the Trustee sells to one who had Notice of the Infant's Title, the Purchase will be set aside. 1 Vern. 484.

8. A Man who lends Money to a Bankrupt, after a Commission sued out against him, but before actual Notice of it, cannot come in under the Statute as a Creditor; by two Lords Commissioners against one who doubted. 2 Vern. 157.

9. The Earl of Newport had two Daughters, and he devised Newport House, to the Daughter of his eldest Daughter in Tail, which she had by the Earl of Banbury; provided, and upon Condition, that she marry with the Consent of her Mother, and two other Trustees, or the major Part of them; if not, or if she should die without Issue, then he devised the said House to one Porter in Fee. The Lady Anne Knowles, the first Devisee, married Fry, without the Consent of her Grandmother or Trustees; and it was adjudged against her,
Notice.

her, upon Point of Notice, that it was not necessary, because her Grandfather had not appointed any Person to give Notice; and he might have imposed any Terms or Conditions upon his own Estate; and all Parties concerned had the same Means to inform themselves of such Conditions. Between Fry and Porter, adjudged in C. B. 1 Venr. 199. 2 Lev. 21. S. C. 3 Keb. 19. S. C. and in Chancery, 1 Chan. Ca. 142. 1 Mod. 86, 300.

10. But if Lands are conveyed or devised to an Heir at Law, upon Condition, as he has a more Worthy Title which is by Difcent, expresses Notice must be given him thereof. 8 Co. 9. Frances's Case. 3 Mod. 28, 29. Mallon and Fitzgerald.

(C) Purchasers Without Notice, in What Cases favoured.

1. A Man who purchases without Notice of any prior Incumbrance, or on any prior Right to the Estate, shall not have his Title impeached in Equity, neither shall he be compelled to discover any Writings, &c. which may weaken his Title; nor shall he have any Advantage taken from him, by which he may defend himself at Law. Nel. Chan. Rep. 9, 34, 35. 2 Chan. Ca. 47, 48. 2 Vern. 599, 701. he must plead himself a Purchaser without Notice. 1 Vern. 179. but he need not set forth the Consideration he paid. 1 Chan. Ca. 34.

2. A Bill was exhibited to prove a Will, and perpetuate the Testimony of Witnesses; the Defendant pleaded himself a Purchaser without Notice of any such Will, and insisted, that unless there had been a Verdict in Affirmance of such Will, (nothing hindring the Plaintiff, but that if he had a Title he might recover at Law) the Plaintiff ought not to be admitted to examine his Witnesses thereby to hang a Cloud over a Purchaser's Estate; and upon Debate, the Court allowed the Plea. Hill 1 & 2 Jac. 2. between Beechinal and Arnold. 1 Vern. 354.

3. Tenant for Life, Remainder to his first Son, mortgaged for 1500 l. the Deed of Settlement was then produced, and seen by the Purchaser, who notwithstanding lent the Money, being advised, that Tenant for Life not having then any Son born, could destroy the Contingent Remainders, whereas in Truth there was a Son born five Days before the lending of the Money; but the Mortgagee having no Notice thereof, and having got the Deed of Settlement, the Court would not relieve against the Purchaser, but dismissed the Bill. Trin. 1671. between Brampton and Barker. 2 Vern. 159, cited by Lord Rawlinson.

4. The Plaintiff's Bill was to set aside a Conveyance made to the Defendant by A and that the Defendant was no real Purchaser; or if he were, yet before his Purchase he had Notice, that the Estate was subject to a Truft for the Plaintiff; and that such a Leaf in the Defendant's Custody mentions it; Defendant swears himself a Purchaser without Notice of any Truft, and that the said Leaf mentions no such Truft; Plaintiff replies, and the Defendant proves his Purchase, and the Plaintiff proves no Notice upon him; but at the Hearing insisted he ought to produce the Leaf, to shew there was no such Mention of the Truft; and the Defendant insisting he was

Qqqq
not obliged to produce it, he being a Purchaser; for the Plaintiff it was argued that he ought to produce it, because his Answer being replied to, he ought to prove it, which without shewing the Deed he cannot; and he takes upon him to judge what Deed will amount to Notice, and what not; which he ought not to do; for implied Notice is as strong as express Notice; and if the said Lease mentions only the Date, and Parties of another Deed which mentions a Trust, 'tis an implied Notice, which the Defendant may not know, and therefore ought to produce it, that the Court may judge of it; on the other Side it was said, that by the constant Rules of this Court, a Purchaser was not obliged to shew his Title; and this is an Attempt to alter that Rule by a side Wind; and 'tis as easy in a Bill to say it is in some of the Deeds, as in any one in Particular, and then he must expose them all, which would be of dangerous Consequence to Purchasers. 'Twas replied, if the Deed be not to be produced then, if one has a Mortgage, with a proviso of Redemption, yet if the Mortgagee will be so hardy as to swear it an absolute Purchase, and the Mortgagor has no Counterpart, he must lose his Estate. The Matter of the Rolls thought, as this Case is, it ought to be produced; but my Lord Keeper held otherwise; and he said it was but a side Wind to make a Purchaser expose his Title, and would not do it, unless the Plaintiff had made some Proof towards falsifying his Answer, to induce him to it. Mich. 1704. between Hall and Atkinson.

5. But where a Defendant pleaded himself a Purchaser for valuable Consideration, and denied by way of Answer, that he had Notice of the Plaintiff's Title at the Time of his Purchase or Contract, and the Plea was over-ruled, for an evasive Denial is not sufficient; and here the Word Purchase might be understood, when the Contract for the Purchase was made; and it might be he had no Notice then, and might have Notice after, before or at sealing the Conveyance. Mich. 15 Car. 2. between Moor and Mayhew. 1 Chur. Ca. 34.

6. A Purchaser for valuable Consideration, shall hold, or take Place against a prior voluntary Settlement, tho' he had express Notice thereof at the Time of his Purchase, such voluntary Settlement by 27 Eliz. being made void against a Purchaser, with or without Notice. Mich. 1727. between Tonkins and Evans, per Cur.

-CAP. XLIII.
CAP. XLIII.

Portions.

(A) Portions and Provisions for younger Children made good in Equity.

(B) At what Time Portions shall be raised, or Reversionary Estates or Terms sold for that Purpose.

(A) Portions and Provisions for younger Children made good in Equity.

1. A. Having Issue a Daughter by a former Venter, charged his Lands at B. for Payment of 3000l. Portion to such Daughter; and afterwards married a second Wife, and made her a Jointure of a Moiety of those Lands at B. without taking Notice of this Charge of 3000l. and afterwards by Will, thinking that this 3000l. charged as aforesaid, would be good against the Jointure; and taking no Notice thereof, devises to his Wife other Lands in T. in lieu of her Jointure in B. and died; the Wife, and Son and Heir agreed together, to defeat the Daughter of her 3000l. Portion; and therefore the Wife finding that the Settlement which was made on her Marriage, tho' subsequent in Time, would yet prevail against this Charge of 3000 l. which was voluntary and fraudulent as to her, adhered to her Jointure, and refused to accept of the Devise; but on a Bill brought by the Daughter, my Lord Keeper decreed, that she should hold such Part of the Lands in T. as should be equal in Value, to such of the Lands in B. as were comprised within the Jointure, until her Portion was raised. Hill. 1683. between Reeve and Reeve. 1 Vern. 219. 1 Vent. 363. S. C. vid. 2 Vern. 321.

2. If a Man by Will gives 3000l. to his Younger Children, which Sum is due from J. S. and secured by Mortgage; and adds, that for the more sure Payment of the said Sum, in case his Son and Heir, whom he appointed his Executor, should not pay the same according to his Will, then he devises his Lands to his younger Children, for the Raising and Payment thereof. C. and dies, J. S. prefers
Portions.

prefers a Bill against the Heir, and younger Children to redeem; and Pursuant to a Decree for that Purpofe, the 3000l. is put out by a Mafter, upon a Security that proves ill; the eldest Son shall not be compelled to pay it over again to the younger Children. Mich. 1685.

between Oldfield and Oldfield. 1 Vern. 336, 337; for it was not in the Power of the Heir to compel J. S. to keep the Money in his Hands.

3. But if the Lands of the Heir be charged with Portions for Infants, payable at Twenty-one, or Marriage, the Portions shall not be admitted to be paid in before they shall grow due, in Eafe of the Land, nor shall the Real Security be turned into a Perfonal one. 1 Vern. 338. per Curiam.

4. If by a Marriage Settlement, Portions are provided for Daughers, the Father cannot by his Will annex any Condition to the Payment of them, or devife them over in cafe of the Death of any of the Daughters, before their Portions become payable. 1 Vern. 452. per Curiam.

5. Tenant in Tail, with Remainder in Fee to himself, levies a Fine, and settles his Estate on Trustees, in the firt Place, to pay his Son and Heir 100l. per Ann. and then to make Provision of 100l. a-piece for his younger Children, to be raised and paid according to their Seniority, and a Maintenance in the mean Time. In this Cafe the Lord Chancellor decreed, 167. That whereas at the Time of the Settlement, the Party that made it was a Widower, and had eight Children by his first Wife, and declared, that he intended not to marry again; yet in Regard he afterwards married a fecond Wife, and had many Children by her, that the Children by the second Wife were equally intituled with the Children of the first, to have the Benefit of this Provision for younger Children. 2dly, That whereas the Deed directs the Provision for his younger Children should be raised, and paid according to their Seniority, that yet in Cafe there should happen a Deficiency, the eldest should not have more, and the younger less, but they should all be paid in Average. 1 Vern. 335.

6. If by Marriage Settlement 2500l. is provided for the Issue of that Marriage, in such Proportion as the Husband shall appoint, and he dies without making any Appointment, leaving a Daughter, only the Daughter shall have the 2500l. between Davy and Hooper. 2 Vern. 665.

(B) At what Time Portions shall be raised, or Reversionary Estates or Terms loid for that Purpose.

1. A. Made a Settlement to the Ufe of himself for Life, Remainder to the Ufe of his first Son in Tail Male, Remainder to Trustees for forty Years, Remainder to himself in Fee; the Term was declared to be Trufi, that in Cafe it should happen, that the faid A. should die without Issue Male of his Body, then the Trustees should raise 5000l. for Daughters Portions, payable at the Age of Twenty-one or Marriage, with a Provision for Maintenance; in the mean Time the Wife died, leaving two Daughters, and no Issue Male; and
and it was resolved, that the Right to the Portion was vested by the Mother's Death, without Issue Male in the Life of the Father; for otherwise the Father might live so long, that the Portions might be of little Service. Between Greaves and Mattison, 2 Jon. 201.

2. So where a Settlement was made to the Husband for Life, Remainder to the Wife for Life, Remainder to the first, and other Sons in Tail Male successively, Remainder to Trustees for 200 Years; and the Term was declared to be upon Trust, that the Trustees after the Death of the Husband and Wife, should out of the Rents and Profits raise and pay 4000 l. for younger Children, at their Age of Twenty-one Years, unless the Person in Remainder should raise and pay the same; and the Term was decreed to be sold, and the Portions raised in the Life-time of the Father and Mother. Mich. 1 W. & M. between Helier and Jones.

3. A Settlement on the Marriage of A. with B. was made on the Husband for Life, Remainder to the Wife for her Jointure, Remainder to the first, and other Sons; and in Case of Failure of Issue Male of that Marriage, if there should be Issue Female only one Daughter, then to Trustees for 500 Years in Trust to raise 500 l. for such Daughter, to be paid at her Age of Twenty-one Years, or Day of Marriage, which should first happen, next after the Death of the Father and Mother, or within six Months after either of those Days or Times: And there being one Daughter only, and the having attained Twenty-one, and her Father being dead, the Portion was decreed to be raised in the Life-time of the Mother. Hill. 1703; between Gerrard and Gerrard, 2 Vern. 458.

4. So where by a Marriage Settlement, Lands were limited to the Husband and Wife for their Lives, Remainder to the Heirs Male of their Bodies; and if there should be no Issue Male of their Bodies, and one or more Daughters, then to the Trustees for 500 Years from the Decease of the Survivor in Trust, by Sale or Mortgage, to raise 1000 l. for Daughters Portions; but there was no Time appointed for the Payment of them; and the Father died, leaving a Daughter only, the Portion vested in the Daughter, in the Life-time of the Mother; it was decreed to be raised by a Sale, with reasonable Maintenance in the mean Time, tho' no Maintenance was provided by the Settlement. Hill. 1703; between Stainforth and Stainforth, 2 Vern. 460.

5. But where the Defendant, upon his Marriage by Leave and Release, fell to Part of his Estate to the Use of himself for Life, Remainder to Trustees during his Life, to support contingent Remainders, Remainder to Trustees for 500 Years upon the Truste after mentioned, Remainder to the Heirs Males of his Body, on the Body of M. his then Wife to be begotten, Remainder to his own right Heirs, and declares the Term of 500 Years to be upon Trust; "That in Case he should happen to die without Issue Male of his Body, on the Body of his said Wife begotten, or that the Issue Male begotten between them should happen to die without Issue Male of their Bodies, before they or some of them respectively attain their several Ages of Twenty-one Years, and there should be Issue, one or more Daughter or Daughters, of his Body on her begotten, either born in, or after his Life-time, who should be unmarried, or not provided for, as herein after is mentioned, at the Time of his Decease, then such Daughter, if but one, to have 2000 l. for her Portion; Rrrr and
"and if two or more such Daughters, then they to have 2000l., be-
tween them, to be paid, and payable at their respective Ages of
Eighteen Years, or Days of Marriage, which should first happen,
or as soon as they could be raised; and in Case the said Portion or
Portions of the said Daughter or Daughters, shall not be paid ac-
cording to the Purport and Intent of these Presents, then the Tru-
fees, or the Survivor of them, their Executors, &c. shall and
may, out of the Rents, Issues and Profits, or by Mortgage or Sale of
the said Premises, raise, make up and pay the said Portion and
Portions, to the said Daughter and Daughters; and in the mean-
time, and until the said Portion and Portions shall respectively
become payable as aforesaid, the said Trustees, their Execu-
tors, &c. should out of the Rents, Issues, and Profits of the
said Premises, raise, and pay the yearly Sum of 30l. a-piece, for
the Maintenance and Education of such Daughter or Daughters;
provided, that if the Defendant in his Life-time, either before, or
after the Death of his Wife pay, or secure to be paid to the said
Daughter or Daughters, (which shall be unmarried at the Time of
his Death) the said Portion or Portions, or if he shall have Issue
Male, who shall live to Twenty-one Years of Age, then, and in
such Case, the said Term of 500 Years to cease, and be void." Afterwards the Wife died without Issue Male, leaving only one Daughter
the Plaintiff's Wife, who was upwards of twenty Years of Age; and the Defendant having married a second Wife, and refusing to give the Plaintiff one Penny Portion with his Wife, the Bill was brought to have a Decree for Sale of the Term in Remainder presently, and the Portion with Interest paid from her attaining Eighteen Years of Age; but my Lord Chancellor having taken Time to consider of it dismissed the Bill: The Difficulty he said in this Case, was occasioned by the Multiplicity of Words, and therefore to apprehend it the bet-
ter, he had rejected the immaterial Words, and retained only those that were material; then he took Notice, that the Term was a
Term veiled and falseable; the only Question was, whether it was to
be sold; and this depended on the Declaration of the Trust; for if
the Trust had declared the Portion to be raised at Eighteen, or
Marriage, she should not have paid for her Portion, till the Death of
her Father, but the Term in Remainder should have been sold presently,
and so has been the conflant Practice of this Court; nay if the Term
it self had been limited on a Condition precedent, as if the Father
should die without Issue Male of his Body, by such a Wife, then to
Trustees for 200 Years, to raise Portions for Daughters at Eighteen
or Marriage, tho' in this Case the Condition was precedent, even to
the Vefling of the Term; yet upon the Death of the Mother with-
out Issue Male, the Precedents have gone, that the Term should be
sold in the Life-time of the Father; and this Court hath warranted
the Title, tho' the Term it self was not vested, which is a
much stronger Case than this, where the Term is vested presently,
and the Trust is only conditional; tho' he said, if this Case was res
integra, he should not have gone so far in either of those Cases, be-
cause the plain and natural Meaning of the Deed cannot be to
raise the Portions in the Life-time of the Father, when the Fund
out of which it is to be raised, is not to take Effect till after his
Death; but thus far the Court has gone, and the Reason that may
be presumed for it was, that in Equity they look'd on the Death of
the
the Wife without Issue Male, an equitable Performance of the Condition, tho' it was not so literally at Law, till the Father's Death; because all that was contingent in the Condition by the Death of the Mother, without Issue, had happened; 'twas now impossible he should die leaving Issue Male by her; for he was now become as it were Tenant after Possibility; and it was now no more than if it had been limited if he should die, or when he should die, the Remainder to Trustees, &c. which is a Remainder vested presently, because it depends upon that which must certainly happen; so if the Condition had been annexed to the Execution of the Trust of the Term, yet upon the Death of the Mother without Issue Male, the Term should have been sold in the Life-time of the Father, for the same Reasons as in the other; and the Reason of the Court's having gone so far, was to promote suitable Matches, and that Women might have their Portions when they were likely to do them most Service; for as this Court does sometimes prolong the Time for Payment of Money, so it may sometimes shorten and abridge it; and had this Case been like the others before mentioned, he should have decreed it accordingly; but this materially varies from them; for in none of them are the Words following, viz. unmarried, or unprovided for, as herein after mentioned at the Time of his Decease; which Words are a Description of, and fail only with the Person who is to have the Portion, viz. such Daughter as is unmarried, or unprovided for at the Death of the Father; and tho' in this Case she is already married, yet she may be provided for in the Father's Life-time; and so this Part of the Contingency, whether she will be unprovided for at her Father's Death, is still to come; for the who will claim the Portion by this Settlement, cannot say she is unprovided for at his Death, which during his Life none can say; and this Construction is the stronger from the Clause, which appoints the Maintenance, for that is only out of the Rents and Profits; whereas the Portions are to be out of the Rents and Profits, or by Mortgage or Sale, and Rents and Profits in the first Clause, being put in Contra-distinction to Mortgage or Sale in the second, must be restrained, and cannot warrant Mortgage or Sale; and the Maintenance being appointed in the mean Time, that is from Failure of Issue Male till payable, if the Portion should be then due, the Maintenance would run on the Father's Estate for Life; which surely will not be pretended; but this is put beyond Dispute by the Provisto, if he should pay, or secure to be paid, &c. And tho' the Words or unprovided for there are left out, this is but vitium Clerici, and must be inferred to make it agree with the other Parts of the Deed; and then this Provisto was to give him Liberty to determine the Term, which the Plaintiff would now have sold, for Payment of the Portion in his Life-time, to any Daughter which should be unmarried, or not provided for at his Death; and as to the Cafes on this Head, he said, that in most of them, in which the Term was decreed to be sold, there were no Conditions precedent, either to the Vefling of the Term, or Execution of the Trust; and decreed accordingly, Trim. 1710. between * Corbet and Maidcal.

6. A Settlement was made on the Husband for Life, Remainder to the Wife for Life, and to the first and other Sons in Tail, and in Default of such Issue, to Trustees for 500 Years in Trust, after the Commencement of the Term, to raise 4000 l. as Portions for the

*1 Saik. 130.
S. C. 2 Vern.
660. S. C.
5 Char. Rep.
190. S. C.
the Younger Children of the Husband and Wife, payable at Twenty-one or Marriage, by Rents, Profits, Sale, or Mortgage; the Father died, leaving only a Daughter, who married the Plaintiff at Fifteen; and it was held, that the Portion should not be raised in the Life of the Mother, nor that any Interest should accrue for it during the Mother's Life, because the Trust is to raise the Portion, after the Commencement of the Term, which must be intended when it comes into Possession. *Trin.* 1718. between *Butler* and *Duncomb*, 2 *Vern.* 760. Quere of this Case, it seems to be ill reported.

7. A Settlement was made in the usual Form, with a Limitation to Trustees, for want of Issue Male, to raise Portions for Daughters, to be paid at Twenty-one or Marriage, which should first happen, by and out of the Rents and Profits, or by Mortgage or Sale, as they should think fit; and in the mean Time, and till the said Portions should become payable, the Trustees to raise 100l. per Ann. for the Maintenance of each of them; the Father died, and one of the Daughters having married the Plaintiff, this Bill was brought to have the Portion raised, but was dismissed, because the Portion being to be raised out of the Rents and Profits, or by Mortgage or Sale, plainly shewed, that it was not to be raised till such Time as the Trustees might make use of the Election given them by the Settlement to raise it, either out of the Rents and Profits, or by Mortgage or Sale; but during the Life of the Mother, who had it in Jointure, they could not raise out of the Rents and Profits; therefore neither by Mortgage or Sale, which were all inferted in one and the same Clause, and a discretionary Power lodged in the Trustees, to use either the one Way or the other, and till they had the Election of using either of those Ways, they had no Power at all; besides that, the Maintenance being to precede the Raising of the Portions, if there was no Maintenance to be raised in the Mother's Life-time, the Portions were not to be raised in her Life-time, as they were not to take Place till after the Maintenance; and my Lord Chancellor, and the Master of the Rolls, both said, that the Cases on this Head had gone too far already, and mangled all Estates, and that they would never decree Portions to be raised in the Father's Life-time, where it could possibly bear any other Construction; and this Decree was affirmed in the House of Lords. *Mich.* 1728. between *Brown* and *Berkeley.*
(A) Power, when well created, and when determined.

(B) Of the right Execution of a power, and where a Defect therein will be supplied.

(A) Power, when well created, and when determined.

1. If a Man gives Instructions to put his Will in Writing, and that his Mendicacies, &c. should be sold by A. and B. for the Payment of his Debts and Legacies, and dies; and after A. dies, B. and the Heir at Law will be compelled to sell.

2. So if Lands are devised to be sold, and no Person is named for that Purpose, the Heir must do it. 1 Chan. Ca. 177. 1 Chan. Rep. 283. S. P.

3. If Trustees are impowered to pay Portions at prefixed Days, out of the Rents and Profits of Lands, and the Rents and Profits will not amount to the Sums to be paid, they may sell the Lands. 1 Chan. Ca. 175. 2 Vern. 1, 7. S. P.

4. If a Man has Power to charge Land with any Sum, not exceeding the Sum of 3000 l. he may charge it with 3000 l. and Interest besides; for the Intention is to charge the Premises with 3000 l. Principal Money, and that of Course carries Interest, and none would lend such Sum on such Security, if the Law were otherwise. Pafch. 12 Ann. between Lord Kilmurry and Geory, 2 Salk. 538. in Canc.

5. A Man makes a Settlement on the Marriage of his Son with one B. and (inter al.) there is this Preamis, provided that if the said B. shall happen to survive her Husband, not having Issue, or without Issue of their Bodies, lawfully begotten between them, then B. to have Power to sell and dispose of such Lands; the Husband dies leaving Issue; some Years after that Issue dies without Issue, and then the Wife sells those Lands; and it was held that her Power took

6. A Man makes a Settlement, wherein was a Power, that he might from Time to Time, by Deed or Writing under his Hand and Seal, revoke the Uses thereof, and by the same, or any other Deed, limit and declare new Uses: In pursuance of this Power, he revokes the old Uses, and by the same Deed limits new Uses, without annexing any new Power of Revocation to the new Uses; afterwards thinking he had, by Virtue of the first Settlement, a Power of Revocation *totes quoties*, he by another Deed revokes the last Uses, and again declares other Uses of the same Lands; and if he had such Power was the Question. It was agreed he might in the Deed of Revocation have annexed a Power of revoking the Uses thereby declared, and might afterwards have executed that Power accordingly; but in this Case there being no such new Power of Revocation annexed to the new Uses, 'twas decreed that his Power of Revocation by the first Deed was executed, and at an End, and by Consequence, that the Revocation afterwards was without any Warrant, and so the Uses limited upon the first Revocation must stand; and this Decree was affirmed in the House of Peers. *Trin.* 1717. between Hel and Bond.

(B) Of the right Execution of a Power, and where a Defect therein will be supplied.

1. If one hath Power to make a Leaf for ten Years, and he makes a Leaf for twenty Years, yet in Equity this is good for ten Years of the twenty, and so has been settled several Times. *Trin.* 15 Car. 2. between *Pawcy* and *Bowen*, 1 *Chan. Ca.* 23.

2. One having a Power to make Leaves for 21 Years in Possession, made a Leaf to A. for Twenty-one Years in Trust for the Payment of Debts; but the Leaf was made to commence from a Time to come, and so not pursuant to the Power, yet being made for the Payment of (a) Debts was supported in Equity. Between *Pollard* and *Green*, 1 *Chan. Ca.* 11 1 *Chan. Rep.* 185. *S.C.*

*a* Tenant for Life, with Power to make Leaves for Twenty One Years, rending the ancient Rent, makes a Leaf for Twenty-One Years, to begin such a Day after; this is not pursuant to the Power, and consequently void, because it is a future Leaf which this Power does not warrant; for if he might make it in Reversion, or in Future, tho' but a Month after, he may as well make it to begin Twenty Years after, or after his Death, and so defeat the Intent of the Power, which being to charge the Estate of a third Person, is to be taken strictly; and to this Purpose are several Cases, as *Psalm.* 489. 9. *Cor. Eliz.* 5. 6 *Ca.* 35. 1 *Lev.* 5. 5. 3 *Lev.* 15. 10. 4 *Lev.* 62. *Mor.* 199. *Pep.* 5. *The.* 122. *Cor. Ca.* 318. *R. Abl.* 161. *Raym.* 247.

3. A Man made a voluntary Settlement on his Son for Life, and after to his first and other Sons in Tail, with Power for the Son to make a Leaf in Possession for Ninety-nine Years, determinable on three Lives; and also to make Leaves for Sixty Years to commence after his Death, if he had Issue Male, to continue so long as he had Issue Male: the Son makes a Leaf to his Father in Trust, for one of his younger Children; but the Leaf was not pursuant to the Power; yet it was decreed good, and taken to be as a Leaf made by the Father after a voluntary Settlement. *Mich.* 1698. between *Godding* and *Godding.*

2. But
4. But where a Reversionor upon an Estate for Life, made a Settlement on herself for Life, with Power for her being Sole, to make Leaves for three Lives in Possession; and she and her Husband in the Life-time of the Tenant for Life, made a Leaf for Twenty-one Years, Habendum, from the Date; and it was held not pursuant to her Power; for by the Marriage she put herself in the Power of her Husband; and my Lord Keeper took a Diversity between a naked Power, and a Power which flows from an Interest; for where a bare Power is given to a Feme by Will to sell Lands, altho' she afterwards marries, she may sell the Lands, and may sell to her Husband; but where a Feme, upon a Settlement of her own Estate, reserves a Power which flows from an Interest, that Power ought to be executed by the Feme whilst Sole; and yet he said, such Power ought to be taken liberally, tho' formerly they were taken strictly. 

Hill. 15 Car. 2. between the Marquess of Antrim and the Duke of Buckingham. 1 Chan. Ca. 17.

5. A. on the Marriage of his eldest Son B. makes a Settlement of certain Lands on B. for Life, Remainder to his first, second and third, &c. Sons in Tail, Remainder to C. a second Son for Life, and to his first, &c. Remainder to himself in Fec. with a Power to B. and C. severally as they shall come into Possession, to make Leaves for three Lives, or Twenty-one Years, or any Number of Years determinable in three Lives, in this Manner. First, Of all, or any of the Lands anciently and accustomedly demised, whereof Fines have been usually taken, reserving the ancient, usual and accustomed Rents or more. Secondly, Of all the other Lands, reserving the most improved Rents that can be got; and that the Tenants should seal and execute Counterparts of their Leaves; B. died without Issue, C. entred, and being seized with a sudden Sickness, when he had no Rent-Rolls, or old Leaves to guide him, taking Notice of his Power generally, executes two Leaves, one of the Lands not anciently or accustomedly letten, and thereon reserved the best improved Rent; and on the other reserved the several ancient and accustomed Rents, but does not specify what those Rents are, and died; and it was held clearly by my Lord Cowper, Holt and Trevor, Ch. Justices, that the first Leaf was void, and not warranted by the Power; nothing being so uncertain as what shall be said the most improved Rent; and my Lord Cowper and Trevor against Holt, held, that the second Leaf was void also for Uncertainty, and the inconvenience he in Remainder or Reversion would be put to, in not being able to avow for the Rent with Exactness; by which Means he may be no-suitcd, and so prevented of having any Benefit of the Lands; and tho' a Court of Equity may decree such a Leave; good between the Le flor and Le fice; yet as there appears no Consideration in this Case, it is not proper that the Court should interpose in supplying a Defect, and thereby lay a Charge on the Right of a third Person. 

Hill. 1705. between Orby and Lady Mabyn, 2 Vern. 531, 543.

6. J. S. having four Children, viz. two Sons, and two Daughters, settles his Estate on Trustees, to the Use of himself for Life, Remainder to his Wife for Life, and after her Decease, to the Use and Uses of such Child and Children, and in such Shares and Proportions as he should appoint, by any Writing by him to be signed, in the Presence of two Witnesses; and in Default of such Appointment, to his eldest Son in Tail; he by his will by him signed, and
attested by several Witnesses, devises a Rent-Charge out of those Lands to his youngest Son, and to the first and other Sons of his Body successively in Tail; and further Wills, that in Case his said Son die without Issue Male, so as the Estate should come to his eldest Son, then he to pay 500 l. a-piece to his Daughters; the Son dies without Issue, and the Bill was brought by the Daughters to have the 500 l. a-piece, according to the Will; the eldest Son by way of Plea set forth the Deed of Settlement, and Power prout, and insisted, that the Power was not well purfued or executed by the Will; (to wit) that the Testator might have distributed the Land amongst his Children, in such Proportions as he thought fit, but had not Power to grant or devise a Rent-Charge, or Sums of Money, as he had taken up by his Will to do; but the Court disallowed the Plea, and ordered him to answer the Bill. Trim. 1788. between Thwaytes and Dye, 2 Vern. 80.

7. If A. on his Marriage, conveys Lands to a Trustee, to the Use of himself for Life, Remainder to his Wife for Life, Remainder to the Heirs of their Bodies, Remainder to A. in Fee; Proviso that in Default of Issue of the Marriage, the Trustee shall convey to such Utes as the Survivor of the Husband or Wife shall appoint; altho' the Husband devises the Land, and dies first without Issue, yet the Wife has a good Power of disposing of the Estate by her Appointment. Trim. 1700. between Spearin and Lynn, 2 Vern. 376.

8. A. By a Marriage Settlement is Tenant for Life, Remainder to Trustees to raise 4000 l. for younger Children's Portions, as A. should appoint, Remainder to his first, &c. Sons in Tail. A. having several Children appoints the 4000 l. amongst his younger Children, and particularly 2600 l. thereof on B. his second Son, who was then under a Treaty of Marriage; the eldest Son died six Years afterwards, whereby B. became eldest Son, and intitled to the whole Estate after his Father's Death; and thereupon A. made a new Appointment of the 2600 l. amongst his other younger Children; and it was held, that tho' B. was a Person at the Time, capable of taking within the Power of appointing, yet it was upon a tacit or implied Condition, that he should not afterwards happen to become the eldest Son, and that this was a defeasable Appointment, not from any Power of revoking, or upon the Words of the Appointment, but from the Capacity of the Person; and decreed accordingly. Hill. 1705. between Chadwick and Doelman, 2 Vern. 521.

9. On a Marriage Settlement 2500 l. was provided for the Issue of the Marriage, in such Proportion as the Husband should appoint; he died leaving only a Daughter, and made no Appointment, and the 2500 l. was decreed her. Mich. 1710. between Dace and Hooper, 2 Vern. 665.

10. If a Man gives Legacies to his Children to be paid at Twenty-one, or Marriage, and if any of them dies before Twenty-one or Marriage, the Legacy of such Child to be disposed to one or more of the Children then living, in such Manner as his Wife, whom he made Executrix, should think fit; and one of the Children dies under Age and Unmarried, the Mother may appoint such Legacy to any one of the other Children, and it will be good. Mich. 1705. between Thomas and Thomas, 2 Vern. 513.

11. But if an Executor has a general Power to distribute a Sum of Money amongst Children at Discretion, and he makes an unreason-
Simonable or indifferet Disposition, it will be controlled in a Court of
Equity. 2 Vern. 513. per Curiam.

12. So where a Man having two Daughters, one by a former
Wife, and another by his second Wife, devised his ESTATE to his Wife,
to be distributed between his Daughters, as his Wife should think
fit; and the having given 1000l. to her own Daughter, and but
100l. to the other, the Court decreed an equal Distribution. Be-
tween Craggs and Petre, 1 Vern. 335.

13. A. devised his Personal Estate, and 400l. to be raised out of a
Trout Estate, to be distributed by two of his Daughters, his Execu-
trixes, amongst themselves and their Brothers and Sisters, according
to their Need and necessity, as they in their discretion should think
fit; and my Lord Keeper decreed the Heir at Law a double Share
thereof, as looking upon him as standing moft in Need thereof;
which Decree was affirmed in the House of Lords. Pagh. 1701. be-
tween Warburton and Warburton, 2 Vern. 421.

14. If a Man makes a Settlement of his Estate on his eldest Son in
Tail, with a Power by Deed or Will, under Seal, to charge the
Lands with any Sum not exceeding 500l. and he prepares a Deed,
and gets it ingrossed, by which he appoints the 500l. to his younger
Children, and dies before it is signed or sealed; yet this shall amount
to a good Execution of his Power in Equity, the Subsistance being
performed. Mich. 27 Car. 2. between Smith and Aiston, 1 Chan.
Ca. 264.

15. A. by Settlement intailed his Estate, with Power of Revoca-
tion, by any Writing publish'd under his Hand and Seal, in the Pre-
sence of three Witnesses; the Land defend'd to his Son, who mort-
gaged it to J. S. who brought his Bill to forceloof; and it appearing
that A. had by his Will, wherein he recited his Power, declared
that he revoked the Settlement, tho' but two Witnesses who signed, but
another present; yet my Lord Chancellor decreed, that the Mort-
gage-money should be paid, and said, that in Strictnes here was a
good Execution of the Power, a third Witness being present, tho' he
did not sign his Name; and if there had not, yet it was proper that
such a little Circumstance should be helped in Equity. Hill. 32
Car. 2. between Sedge and Freeland, 2 Vent. 350.

16. Tenant in Tail, with Power to make a Jointure of Lands in the
Counties of A, B, and C. Remainder in Tail to J. S. marries and
receives 3000l. Portion with his Wife, and by Articles before his
Marriage, covenants to settle a Jointure, but dies before any Settle-
ment was made; the Wife dies, and her Executrix brings a Bill to
have an Account of the Profits of the Lands, which by the Articles
were covenanted to be settled in Jointure against the Remainder-man,
who had upon his Marriage settled those Lands upon his Wife and
her Issue, but with Notice of the Power in the first Tenant in Tail,
to make a Jointure; and my Lord Chancellor dismissed the Bill, there
being no Equity for the Executrix of the first Jointress against the Sec-
ond and her Issue, who was equally a Purchaser with the first.
Mich. 1686, between Ellis and Hole, 1 Vern. 406. 2 Chan. Ca. 29,
30, 87. S. C. but no Resolution.

17. But where A. Tenant for Life, with Power to make a Jointure
of 1000l. per Annum, upon his Marriage covenanted to make a
Jointure on his Wife of 1000l. per Annum, and pursuant thereunto
a Settlement was made, and a particular of Lands which were men-
tioned
tioned to be worth 1000l. per Ann. was set out for the Jointure, but in Truth fell short, and were not above 600l. per Annum; and on the Joindow's Bill, the Court decreed the Jointure to be made up 1000l. against the Issue in Tail, though it was urged, that he was not privy to the Marriage-Treaty, nor guilty of any Fraud. Trin. 1700. between the Lady Clifford and Lord Clifford, 2 Vern. 379.

18. Sir Edward Gold, the Plaintiff, and his Lady, intermarried in 1683, and some Years after the Marriage an Estate of Inheritance of about 100l. per Ann. descended to the Lady; whereupon she and her Husband, by Indenture, assigned and conveyed this Estate to Trustees, and their Heirs, in Trust, to permit the Lady from Time to Time, notwithstanding her Covertury, without her Husband, and not to be subject to his Power or Controlling, to apply and dispose of the Rents, Issues and Profits thereof, as she should by any Writing under her Hand and Seal, in the Presence of Two or more Witnesses, direct and appoint, with a Power likewise for the Trustees to make such Sales, Mortgages, or other Conveyances of the Lands themselves, as the Lady should in like Manner direct and appoint: The Lady, by Parimony and Frugality had, in about twenty-two Years Time, saved about 1400l. out of this her separate Estate, 790l. whereof she had invested in East-India Bonds, 200l. in twenty Lottery-Tickets, and had the Residue in Ready Money and Broad Pieces; the Defendants were her Nieces, for whom (having no Children) she had a very great Regard and Love; and having given them, with her Husband’s Privy, four of the Bonds, she lodges the other Three in the Trustees Hands, taking their Note for the Delivery of them, and afterwards directs the Trustees to deliver the other Three to whomsoever should bring their Note, and then gives the Note to one of the Defendants, who thereupon, by her Orders, goes to the Trustees, and gets up the three Bonds from them; and those Bonds the Lady told her Nieces, she intended should be theirs after her Death, but that she expected to have the Interest arising thereby during her Life; she afterwards, some short Time before her Death, delivers likewise to one of her Nieces a Canister, wherein were 400 Guineas, and several Broad Pieces of Gold, telling her, she intended that to be divided between her and her Sister, after her Death; and likewise directed the Trustees to divide the twenty Lottery-Tickets between her Nieces, after her Death; all this Transaction was only by Word of Mouth, without any Writing whatsoever, but was fully proved in the Cause. In 1712, the Lady Gold died, and Sir Edward, her Husband, having taken out Administration to his Lady, brought his Bill against the Defendants, to have an Account and Delivery up of the East-India Bonds, and of the Money so delivered to them, and likewise against the Trustees for the twenty Lottery-Tickets, and the Nieces brought a Crook-Bill to establish their Title to the Money and Bonds, and to have the twenty Lottery-Tickets delivered to them, according to the Direction of my Lady Gold. It was urged for Sir Edward, that this Power to his Lady to dispose of the Profits of her Estate, was not before Marriage, that she was not a Purchaser of it, but that being after Marriage, and voluntary, it ought to be construed strictly; that these Powers being in Derogation of the Rights of Husbands, were not allowed at Law; and the Courts of Equity had supported them, yet that was only where the Power was strictly and
and literally purfued; that the Defendants were neither Children nor Grandchildren, and but remotely allied to the Lady; that through defective Executions of Powers had been sometimes supplied in this Court, for the Sake of a Wife or Children, or for the Sake of Creditors, yet it was never yet carried so far as to affiit Strangers; and that it was to be remembled to the Cafes of Copyhold Lands, where the Want of a Surrender had never yet been supplied, but in the three Instances before-mentioned, or for Charitable Uses; that Circumstances were frequently imposed on the Parties themselves to prevent Surprize; and that if these Circumstances were not purfued, a Court of Equity would not affiit, especially any Person who claims by a voluntary Disposition; and so was the Duke of Albemarle's Cafe, where the Revocation was to be in the Presence of six Witnesses, whereof three were to be Peers; yet that Circumstance could not be aided; that for small trifling Sums they agreed it was not necessary the Lady should make a Writing under her Hand and Seal attested, according to her Power, but for such considerable Sums as these were the Power must be purfued, or else the Disposition would be void; that in this Cafe, if the Lady had made a Will in Writing, unless attested by two Witnesses, it would not have been good, much less this Parol Disposition, and consequently the Husband intitled to them as Administrator to his Wife. On the other Side it was insifted, that it was a strange Doctrine to advance, that the Wife in this Cafe must be bound strictly to purfue the Power, when she had the Money in her own Hands; that the Intent of that Power was only in Cafe she had disposed of it to any other Person, whilst it remained in the Trustees Hands, before ever she had received it; that it could not be pretended, but that the Trustees might pay it to her self, without any such Writing; that they had so done in this Cafe, and that she was then at Liberty to have spent it, or to give it away, as she thought fit; that it was hard to say, she had a Power over it whilst in the Trustees Hands, and yet that, as soon as she received it herself, and consequently as soon as it became useful to her, that then it should be the Husband's, unless she purfued her Power; that if she had taken up Clothes or Goods of any Tradesman, surely it would not be pretended, but that she having the Money in her own Pocket, might pay them without any such Writing under her Hand and Seal; that therefore the Cafes cited were not to the Purpose; for here the Money being in her own Hands, she was at Liberty to give or dispose of it as she thought fit; that the Direction to the Trustees to deliver these Tickets to her Nieces, after her Death, was a Kind of Donatio caufa Mortis; and that as she, being in Possession of them herself, might have given them to her Nieces; so she might direct her Trustees afterwards, when they had them by her Delivery. My Lord Chancellor said, there was no Difference in those Cafes, whether the Power were given before Marriage, or after; for if the Disposition is to take Place in Virtue of this Power, it must be strictly purfued in either Cafe; that he thought it should rather be taken more liberally, when given after, than when before Marriage; for then the Husband could be supposed to be under no Temptation of giving it, as he might before Marriage, in Hopes of prevailing on his Wife after, to give it up, or relinquish it; that therefore it must be intended, he fully designed she should have the Benefit of it; that the Reason why the Will of a Femme Covert was not good, was not for Want of Power in the Wife; for
for if the Husband consented, the same Instrument which he executed as her Will, would be sufficient to pass it, and it would go out of her Property; that she having in this Case received the Money, had absolute Power to dispose of it as she thought fit; that she might have given it away absolutely, or upon Terms; that if, as it was agreed, she might dispose of little Sums, why not of great ones? where was the Difference, where must the Bounds be set? that by this Power she was made in the Nature of a Feme Sole; and as such a Disposition in that Case would have been good, why not in this? her Administrator in that Case could not have impeached such a Disposition, no more can her Husband in this, who has no other Right but as Administrator; that the Disposition by her was perfect and compleat; that the Referring the Interest to herself during Life, bound indeed the Party, but did not defeat the Gift; that it was in her Power to give it on what Terms she pleased, and either present, or at a future Time, and that her Death made no Difference in the Case; and as she might have paid any Tradesman’s Bill without such Writing, so she might dispose of the Whole, or of Part, in the same Manner; and so decreed the Whole 1400l. to be well disposed of to the Neices, in regard the Money being paid to her, was absolutely in her own Disposal. *Paffb. 1719. between Gold and Rustland.*

19. *A. devises his Lands to B. his eldest Son, for Life, Remainder to his first and other Sons in Tail Male, Remainder to his second and third Sons in like Manner, with Power to every Person who should, by Virtue of the Will, be seised of the Lands by any Writing indentured under his Hand and Seal, to settle a Jointure on his Wife of 500l. per Annum; provided such Wife shall have a Fortune equivalent to such Jointure, and died; B. entred, and on Treaty of Marriage with the Plaintiff, covenanted in Consideration of 10000l. Marriage-Portion, that he or his Heirs would, after the Marriage, at his own Coasts and Charges, according to the Power given him by his Father’s Will, or otherwise, by good Conveyances, settle Lands of 500l. per Annum, upon the Plaintiff, for her Jointure, to commence in Possession immediately after his Death, if she survived him; the Marriage took Effect; afterwards B. got a Settlement made and ingrossed pursuant to his Power and the Marriage Covenant, but by various Accidents was prevented from Signing the Deed, and being taken ill, died suddenly, not having the Deed by him, and having expreseed (as was fully proved) great Uneasiness at its not being perfected, and left the Plaintiff by his Will (which he had made some Time before) a Legacy of 3000l. besides what is settled on her by the Marriage-Articles; and it was decreed by my Lord Chancellor, asfist with the Master of the Rolls and Mr. Baron Price and Mr. Baron Gilbert, that this defective Execution should be supplied in Equity, so as to bind the Estate in the Hands of the Remainder-man; altho’ it was objected, that she had a Remedy by the Covenant against the Heir and Executor of the Husband; and that, by the Words in the Covenant, he was at Liberty to make a different Provision for her. *Paffb. 1724. the Earl of Coventry’s Cafe.*
CAP. XLV.

Privilege.

(A) What Persons are intitled to Privilege.
(B) Of Proceedings by, or against a privileged Person.

(A) What Persons are intitled to Privilege.

1. A Member of the Convocation is to be allowed the same (a) Privilege with a Member of Parliament. 3 Chan. Rep. 38.

2. The Widows of Peers ought to have no Privilege, because they are not to be called to Counsel; but they are to have Privilege of Peers, not to be arrested; declared by my Lord Chancellor Finch to have been so resolved in Parliament. 19 Dec. 1676. 2 Chan. Ca. 224.

3. Two of the Defendants, being the Officers of the Exchequer, plead the Privilege of the Exchequer; but the Plea was overruled; because there was a third Defendant, who had no Right of Privilege. 1 Vern. 246.

(B) Of Proceedings by, or against a privileged Person.

1. If a Member of Parliament sues at Law, and a Bill is exhibited in Chancery to be relieved against that Action, the Court will make an Order to stay Proceedings at Law till Answer, or further Order, although the Court will not proceed against a Member who has Privilege of Parliament. 1 Vern. 329.

2. The Court granted an Injunction against a Member of Parliament, but at the same Time ordered that no Attachment should be taken out. 3 Chan. Rep. 21.

3. The Plaintiff having brought a Bill to redeem an old Mortgage against the Defendant, who was then an Ambassador at the Court of Spain; the Defendant obtained an Order, that all Proceedings should cease until his Return from his Embassay; the Plaintiff moved to discharge the Order; and upon Debate it was agreed, a Protection lies for an Ambassador, quia Profecturus, or quia Moratur.
Proces.

4. The Plaintiff being protected by the Genoese Ambassador, was ordered, though after an Answer put in, to give Security to answer the Costs in the same Manner as if he were a Foreigner; because by the 7th of Ann. all Procesess against Ambassadorators, and their Servants, are made void; so that if the Bill should be dismissed, no Procesess could issue against him; and a Precedent was produced the 25th of July, 1709, between Barrett and Buck, where the like Order was made by my Lord Cowper; and that Case was likewise after Answer was put in, Pasch. 1729, between Goodwin and Archer.

C A P. XLVI.

Proces.

(A) Of issuing, serving, and returning a Process, by, and against whom, at what Time, and here of Contempts.

(B) Of Sequestrations.

Of Injunctions, vide Title Injunction.

(A) Of issuing, serving, and returning a Process, by, and against whom, at what Time, and here of Contempts.

1. If a Cause has slept twelve Months in Court, there shall be no Proceedings had upon it, without first serving a Subpnea ad faciendum Attornati. 1 Vern. 172.

2. If a Man is arrested upon an Attachment, the Contempt shall hold good, tho' no Affidavit be filed at the Time of Taking forth the Attachment, if it be filed before the Return of it. 1 Vern. 172.

3. If
3. If one be taken up on an Attachment, either in Process or in Execution after a Decree, yet in both Cases, on his appearing before the Regifter, he is to be discharge, and to answer the Interrogatories at large, not in Custody; and if he be continued in Custody, the Court, on Motion, and appearing before the Regifter, will discharge him. *Hill.* 1700. between *Danby* and *Lawson.*

4. So if the Sheriff take one up on Attachment in Process, he is to give a Bond of 40l. Penalty to the Sheriff, to appear and answer; but for one taken up in Execution after a Decree, the Sheriff may insist on Security proportionable to the Duty; but in both Cases, on the Register's Certificate that the Party has appeared, the Sheriff is to deliver up the Bond; agreed to by the Registrars, and ruled by the Master of the Rolls. *Hill.* 1700. between *Danby* and *Lawson.*

5. The Plaintiff obtained an Order, that Service of Process to appear, at a Defendant's last Place of Abode, should be deemed good Service, and left the same at the House where he lodged, and carried on the Process to a Sequestration, and then brought on the Cause against the other Defendant, who insisted, that if the Plaintiff ought to be relieved against him, he ought to have a Decree over, against the other Defendant; and therefore he was concerned to see that the Proceeding was regular, and insisted, that it being above twelve Months since the other Defendant had left that Lodging, the Service was not good; and of that Opinion was the Court. *2 Vern.* 369.

6. If after Process of Contempt, the Defendant put in an insufficient Answer, and so reported, the Plaintiff shall not, as formerly, begin with Process at the *Subpana,* but shall go on to the Attachment with Proclamation, and other Process, as if the Answer had not been put in. *1 Chan. Ca.* 238.

7. A Distinction was taken by the Solicitor General, and agreed to by the Court, as reasonable and agreeable to the Meaning of the printed Orders of the Court, that if Process to a Messenger, or any other Process of Contempt has gone out against a Defendant for Want of his Answer, that on Tender of the Costs of those Contempts, if the Plaintiff accepts them, and the Answer, on looking into it, appears to be insufficient, so that the Plaintiff takes Exceptions, and the Defendant is obliged to put in a further Answer; that in order to compel the Defendant to put in such further Answer, if not put in in Time, the Plaintiff must begin all Process *de novo,* and go on with it regularly, because his Acceptance of the Costs was Remission of all former Contempts, and purged them; but as an insufficient Answer is really no Answer at all, in the Judgment of the Court, if he refuse to accept the Costs, and the Answer being put in on Exceptions taken to it, it is reported insufficient, he may go on with the Process where he left off, to compel putting in a further Answer, without beginning *de novo,* as in the other Case. *Trin.* 1728. between *Haistwell* and *Grainer.*

8. Process issued against the Defendant till Proclamation returned, then came a general Pardon; and the Defendant appeared and demurred to the Bill, which the Plaintiff moved to set, because though the Contempt was pardoned, yet the Delay was a Loss to him; but the Court ordered them to proceed on the Demurrer; for by the Pardon the Defendant stands *rectus in curia.* *1 Chan. Ca.*

9. Upon a Motion for a Serjeant at Arms, on a Commision of Rebellion returned, it was held, that by the King's Demise, every Process
Process.

Process of Contempt not executed, is determined, so that the Party must begin again at an Attachment; but where any Process is executed, and a Cepi Corpus returned, there the Process stands good. 1 Vern. 300.

10. But when an Attachment was fined out in the Time of King Charles the Second, and executed three Days after his Demise, but before Notice of his Death; and it was adjudged to be well executed, and the Proceedings thereon regular. 1 Vern. 400. Q.

(B) Of Sequestrations.

1. If a Defendant is in Contempt, and in Prison for not Performing a Decree, the Court will order a Sequestration against his Real and Personal Estate. 2 Chan. Rep. 151. of the Antiquity of Sequestrations, and that they are proper and necessary Processes, vid. 1 Chan. Ca. 92. 1 Vern. 421.

2. Upon an Affidavit that the Defendant was gone into Holland to avoid the Plaintiff's Demand against him; and he having been arrested on an Attachment, and a Cepi Corpus returned by the Sheriff, the Court, upon Motion, granted a SERJEANT at Arms against him; and upon the Return thereof granted a Sequestration. 1 Vern. 344.

3. A Sequestration that ISSUES as a mesne Processes of the Court, will be discontinued and determined by the Death of the Party; but where a Sequestration issues in Pursuance of a Decree, and to compel the Execution of it there, tho' the same be for a Personal Duty, it shall not be determined by the Death of the Party. 1 Vern. 58. Q, 1 Vern. 118, 166.

4. A Sequestration binds from the very Time of Awarding the Commission, and not only from the Time of Executing it, and its being laid on by the Commissioners; for if that should be admitted, then the inferior Officer would have Ligandi & non Ligandi Potestate. 1 Vern. 58.

5. The Party who takes out a Sequestration, shall not be answerable for the Acts of the Sequestrators, for they are the Officers of the Court; as if they have Power to fell Timber, and they fell to the Value of 7000 l. and bring only 2000 l. into the Account. 1 Vern. 160, 161.

6. Sequestrators on a mesne Processes are accountable for all the Profits, and can retain only so far as to satisfy for the Contempts. 1 Vern. 248.
C A P. XLVII.

Purchase and Purchaser.

(A) Who is deemed a Purchaser in Equity.

(B) Purchasers, in what Cases favoured in Equity.

(C) Where a Purchaser, who purchases from one who has only a Power to sell, must see that the purchase Money is rightly applied.

Of Purchasers without Notice, and of presumptive Notice, *vid.* Title Notice.

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(A) Who is deemed a Purchaser in Equity.

1. Essee at a Rack Rent, tho' he paid no Fine, is a (a) Purchaser, and shall avoid a voluntary Conveyance. *2 Vern. 327.* (a) *Tho' the*

*Word Purchases, in Law,*

Is of a very extensive Signification, and comprehends every Species of Acquisition in Contradistinction to hereditary Devise and Bequest. *Lit. Setl. 12.* Yet in Equity a Purchaser is considered as a Person, who innocently, without Fraud or Surprise, for valuable Consideration, acquires a Right or Interest, and is therefore so far favoured and protected, that his Title shall not be impeached. In Equity, no Planks that he can lay hold on, and by which he can secure himself at Law, shall be taken from him, neither shall he be compelled to discover any Thing that will weaken his Title, *St.* *Vid.* Title Notice and Bills of Discovery, Title Bill, and 1 *Cham. Ca. 356.* 2 *Cham. Ca. 48, 161, 253.* 3 *Vern. 27.*

= *Vern. 339.* 2 *Vern. 158, 159.*

2. A. entred into Partnership in Fifths, with three others, for twenty-one Years, in digging for Mines in A.'s Lands, A. to have two Fifths, and in Consideration of his Ownership of the Land, to have a Tenth out of the Share of the other Partners, and they covnanted to bear Profits and Losfs in Proportion; provided, if any one of the Partners should be minded to defilt, and signify such his Intention, and pay his Share of the Charges and Expences to that Time, the Agreement as to him, on his Releasfing his Interest to the Rest to be void, pursuant to the Articles; they searched for Mines, and after two Years Time, and the Expence of about 120L. they discovered a valuable Mine, and worked for about the Space of three Months, and then A. died, and his Widow set up a voluntary Settle-
ment made after Marriage; and the Court inclined, that the Partners were as Purchasers, and that the voluntary Settlement should not stand against them. *Mich. 1695,* between Shaw and Lady Stanf., 2 *Vern.* 326.

3. If a Man in Consideration of a Marriage-Portion, settles a Jointure on his Wife, and makes a Provision for the Issue of that Marriage, the Wife and Children are to be considered as Purchasers for valuable Consideration; and though the Settlement was made after Marriage, yet if it was made pursuant to Articles entered into for that Purpose, previous to the Marriage, it is the same Thing; and the Jointreis, in such Case, shall avoid a prior voluntary Conveyance, and shall not be obliged to discover Writings, nor any Thing else that may prejudice her, unless she has her Jointure confirmed to her. 1 *Cham. Ca.* 99. 1 *Vern.* 440, 479. 2 *Vern.* 701.

4. But if the Settlement was made after Marriage, and not pursuant to Marriage-Articles, it will be fraudulent against Creditors, but it will be good against a subsequent Purchaser, with Notice, tho' not against one without; for the Wife and Children are to be considered more than mere Volunteers; but if the Matter refers barely in Covenant or Agreement, it will never be carried into Execution against a subsequent Purchaser, without Notice, who has got a legal Title, nor against a second Jointreis, without Notice, who brought in a Marriage-Portion. *Vid.* Title Dower and Jointure Letter (C). 1 *Vern.* 17, 217, 286.

5. If a Wife joins with her Husband in letting in an Incumbrance on her Jointure, and barring an Estate in Tail Male, and they limit the Uses to the Husband for Life, Remainder to the Wife for Life, Remainder to their two Daughters, this does not make the Daughters Purchasers, so as to shut out a Judgment-Creditor of the Husband's, antecedent to the Barring the Estate-tail, for it is a voluntary Gift from the Wife to the Husband. *Trin.* 1700, between Ball and Burnford.

(B) *Purchasers, in what Cases favoured in Equity.*

1. A Purchaser came into a Man's Study, and there laid Hands on a Statute that would have fallen on his Estate, and put it up in his Pocket, and he having thereby obtained an Advantage in Law, tho' fo unfairly, and by fo ill a Practice, yet the Court would not take that Advantage from him. Sir John Fagg's Cafe, cited 1 *Vern.* 52, 53. 2 *Vern.* 159. *S. C.* cited.

2. If a Release be obtained from a Grantee of a Rent-Charge, without any Consideration, and by Fraud, yet a Purchaser will be admitted to take Advantage of it. Between Harcourt and Knoicel, 2 *Vern.* 159, cited to be adjudged by Rawlinson Lord Commissioner.

3. The Plaintiff and Defendant had each of them purchased a Reversion expectancy on the Death of Tenant for Life; the Plaintiff brought his Bill, that he might preferve their Testimony, and be admitted to try his Title in the Life-time of Tenant for Life; but for as much as the Purchaser was a Defendant, the Court would do nothing in it, and he lost the Land for Want of examining his Witnesses.
Purchase and Purchaser.

Between Seybourne and Chifton, 2 Vern. 159. cited by Lord Commissioner Rawlinson, vid. 1 Vern. 354.

4. If a Purchaser buys in an old Statute or Mortgage, tho' nothing be due upon it, yet he shall be admitted to defend himself by it at Law; but for this vid. how far a subsequent Mortgagee shall defend himself by buying in a precedent Incumbrance, Title Mortgage, and 1 Vern. 50, 187. 2 Vern. 29, 30, 81, 271.

5. A purchased the Manor of D. in which were certain Lands called B. and P. the Manor, at the Time of the Purchase, was in Mortgage for a Term of Years, and the Mortgage was paid off, and the Term assigned in Trust to attend the Inheritance; afterwards A. upon the Marriage of his Son, settles Part of these Lands, and amongst them the Lands called B. and P. but no Care was taken of the Mortgage Term, that stood out; afterwards A. being in Possession, contracts with the Defendant to sell him all the said Manor, except the Lands called B. and P. but shews Part of the Lands of B. and P. as Part that he would sell, but the Defendant did not know that any Part of the Lands were called by that Name; and in the Conveyance to the Defendant there is an Exception of Lands called B. and P. After the Purchase-money paid, the Defendant was excited of Part of the Lands called B. and P. (which he did not know by that Name, for they had been shewn to him as Part of his Purchase, and he had paid for them) by the Plaintiff, who claimed under A.'s Son; upon which the Defendant having found the old Term that was on Foot at the Time of A.'s Purchase, and got an Assignment of it, upon which the Plaintiff brought his Bill to be relieved, and to have an Assignment of the Term; and that as to the Lands called B. and P. he was no Purchaser of them, for they were expressly excepted in his Conveyance; but my Lord Chancellor was of Opinion, that these Lands being shewn to the Defendant as Part of his Purchase, and he not knowing them to be excepted by the Name of B. and P. was in Equity a Purchaser of them; and the Court ought not to assent in defeating of him, and therefore dismissed the Bill as to all the Lands purchased by him. Mich. 1698. between Oxzick and Brocketts.

6. A. on his Marriage settled Lands, which were intailed on his Wife for a Jointure; his Brother was privy to the Marriage, and ingrossed the Jointure-Deed, and concealed the Intail; A. died without Issue, having devised the Lands to J. S. the Brother recovered in ejectment; on a Bill brought by the Jointress and J. S. for Relief, the Brother confessed that he was privy to the Marriage-Treaty, and ingrossed the Jointure-Deed, and that he had then the Deed of Intail in his Hands, but did not mention his Title, nor deliver the ancient Deed of Intail, because he apprehended his Brother would dock the Intail; and the Court decreed the Jointress to hold and enjoy her Jointure against the Brother, and all claiming under him, and a perpetual Injunction against the Judgment in ejectment; but as to J. S. who claimed the Reversion and Inheritance by a voluntary Devise, the Bill was dismissed; and this Deed was affirmed in the House of Lords. Mich. 1691. between Raw and Pole, 2 Vern. 239.

7. So where a Mother who was absolute Owner of a Term, was present at a Treaty for her Son's Marriage, and heard her Son declare, that the Term was to come to him at his Mother's Death, and was a Witness to the Deed, by which the Revolution of the Term was
was settled on the Issue of that Marriage; and on a Bill brought by the Issue of that Marriage, she was compelled to make good the Settlement; and to settle the Reversion of the Term accordingly. *Trin. 1690.* between *Hunsden* and *Cheyne*, 2 *Vern.* 150.

8. So where a younger Brother, having an Annuity of 100 l. per Ann. charged on Lands by his Father's Will, contracted with A. to sell him this Annuity; A. goes to B. the elder Brother, and tells him he was about to buy this Annuity of his younger Brother, and desired to know if his younger Brother had a good Title to it, and whether his Father was seised in Fee at the Time of Making the Will, and whether the Will was ever revoked; B. told him he believed his Brother had a good Title to it, and that he had paid him this Annuity these twenty Years; but withal, told him, that he heard there was a Settlement made of his Father's Lands before the Will, and that the said Settlement was in the Hands of J. S. and that he had never seen it, and therefore could not tell him what the Contents of it were, but encouraged him to proceed in his Purchafe, telling him, he had not only paid his Brother his Annuity to that Time, but had paid his Sistres 3000 l. under the same Will; afterwards B. gets a Settlement in his Hands, by which the Lands out of which the Annuity issued was intailed, and would thereby avoid this Annuity; but on a Bill by A. to have the Annuity paid, or the Purchafe-money back again; the Court decreed Payment of the Annuity, purely on the Encouragement given by the elder Brother. *Hill. 1682.* between *Hobbs* and *Norton*, 1 *Vern.* 136.

9. A. possessed of a Term for 100 Years in 1638, made his Will, and B. who married his Daughter, Executor, and devised the Term to his own Wife; the Executor assented, she entered, and after three Years died; after her Death the Executor entred and enjoyed the Term till 1650, and then sold it to one, who surrendered, and then took a new Lease for 200 Years, and laid out 250 l. in Building on the Premises; B. died, and his Wife survived him till the Year 1669. J. S. who married the Daughter of B. being beyond Seas twenty Years, and not knowing of his Title, came into England in 1670, and being informed of this whole Matter, and of his Title in Right of his Wife, took Administration to the Wife of A. and recovered by Virtue of the Term for 100 Years in an Ejecution; the Purchaser and Builder exhibited a Bill to be relieved against this dormant Title; and *Grimsdon*, Master of the *Rolls*, the Possession going so long, and divers Purchasers, and the last Purchaser under the new Term, having no Notice of the old, or of the dormant Title to the Residue of the Term of 100 Years; adjudged the Purchaser should be relieved, and hold the Land till he was repaid his Charges in Building, discounting the Profits received after the Purchafe, which J. S. perceiving, and that the Value would not exceed 22 l. per Ann. and that the Residue of the old Term was only for thirty-two Years; he agreed (by Advice of the Master of the *Rolls*) to take 80 l. of the Purchaser, and to release his Title to the old Term. *Mich. 27 Car. 2.* between *Edin* and *Battal*; 2 *Lev.* 152. *in Cane*.

10. The Plaintiff having a Lease of certain Mills for twelve Years, which were near expired; the Lessee, on his Marriage, makes a Settlement of these Mills to the Use of himself for Life, then to the first and other Sons of that Marriage in Tail Male, Remainder to his
own right Heirs; afterwards the Plaintiff takes a new Lefee of these Mills from the Father for thirty Years, and lays out 2800l. in new Building and improving them; the Defendant was the eldest Ifue Male of the Leflor, and during the Time the Plaintiff was making these Improvements, went to his Father, and told him, he had no Power to make any such Lefee; that after his Death the Estate would be his, but never acquainted the Plaintiff with this, or of the Settlement made on his Father's Marriage; but on the contrary, writ to the Plaintiff to take Care to keep one of the Mills in particular in Repair; then the Father dies, and the Son recovers in an Ejecution against the Lefee, who thereupon brought his Bill to be quieted in the Possession of the Mills during the Residue of his Lefee, for that the Defendant was fully acquainted with the Circumstances of this Lefee, knew his Father had no Power to make it; and yet never forbid or cautioned the Plaintiff from going on with his Repairs, but on the contrary, stood by and saw them, and encouraged him in the Proceeding therein, and therefore the Plaintiff had a Decree to hold during the Residue of his Term; for though the Defendant was not privy to the making of this Lefee, but that was only the Fraud of the Father; yet he being to have the Estate after his Father's Death, and taking Notice thereof to his Father, and that he had no Power to make any such Lefee, and yet suffering the Plaintiff to go on in his Repairs thereof, with a Design to reap the whole Benefit thereof when his Father was dead, was such a Fraud and Practice in him as ought to be discomfuted in this Court, for Qui taceat assentire videtur; and therefore it was decreed that the Plaintiff should enjoy for the Residue of his Lefee. *P. 171.*

between Haning and Perrers.

11. The Plaintiff's Wife, before her Internmarriage with the Plaintiff, being possessed of a Term for Years, as Executrix to her first Husband, and which was liable as Assets to the Payment of his Debts; in order thereto, and to raise Money for that Purpose, the Plaintiffs, after their Marriage, entered into an Agreement with the Defendant, for Sale of the House in Question for the Residue of the Term, for 450l. whereof 210l. was to be applied in Discharge of a Mortgage thereon, to one J. S. and the remaining 240l. was to be paid to the Plaintiffs; accordingly the Plaintiffs executed an Assignment of the House to the Defendant, with a Receipt indorsed thereon for the whole Purchase-money; but the Defendant did not then pay the Purchase-money, but gave a Note for the Payment of 210l. Part thereof to J. S. the Mortgagee, and of the remaining 240l. to the Plaintiffs; and for the Non-payment thereof, the Plaintiffs brought their Bill to have a specific Performance, and Payment of the Money accordingly; the Defendant, by his Answer, admitted the whole Case to be as above set forth, but insisted, that he ought not to be bound thereby, for that the Plaintiffs could not make him a good Title, they having, by Articles before Marriage, agreed to settle this House for the Benefit of themselves and their Issue, of which he had no Notice at the Time of his Purchase; and for a Discovery of these Articles, and to have up his Note on a Re-assignment of the House, the Defendant brought his Cross-Bill; the Plaintiffs, by their Answer, admitted there were such Articles, but insisted, that the House lying in Middlesex, those Articles were never registred in the Middlesex Office, and therefore void, as against the Plaintiff; but on a Hear-
ing at the Rolls, the Master of the Rolls decreed the original Bill to stand discharged, with Costs; and on the Cross-Bill decreed the Note given for the Purchase-money, to be delivered up on a Re-alignment of the House; and the Plaintiff in that Cause likewise, to have his Costs, by Reason of the Plaintiff's Fraud in concealing the Articles; and this Decree was affirmed by my Lord Chancellor. Mich. 1727, between Beatmiff and Swibb.

12. So in a Cause between two Purchasers of Lands in Yorkshire, where the second Purchaser having Notice of the first Purchase, but that it was not registered, went on and purchased the same Estate, and got his Purchase registered; yet it was decreed, that having Notice of the first Purchase, though it was not registered, bound him, and that his getting his own Purchase first registered was a Fraud, the Design of those Acts being only to give Parties Notice, who might otherwise, without such Registry, be in Danger of being imposed on by a prior Purchase or Mortgage, which they are in no Danger of when they have Notice thereof in any Manner, tho' not by the Registry. Between Blades and Blades, by my Lord Chancellor King decreed.

(C) Where a Purchaser who purchases from a Person who has only a Power to sell, must see that the Purchase-money is rightly applied.

1: If Lands are appointed for Payment of Debts, the Purchaser, though there results a Trust to the Heir, is not concerned whether the Personal Estate was sufficient to pay the same, or whether too much was sold, or the Creditors paid; for he having paid the Purchase-money, shall hold against the Heir and Creditors, and their Remedy must be against the Trustee or Person empowered to sell. 2 Chas. Ca. 115.

2. But if Lands are devised to be sold for Payment of Debts in a Schedule, in that Case the Purchaser is bound to see the Purchase-money applied to the Payment of those Debts; but if the Trust be general, to pay Debts, tho' he has Notice of them, yet the Purchaser is not obliged to see the Money applied. Mich. 1692, between Abbot and Gibbs, 1 Vern. 301. S. P.

3. If Lands are vested in Trustees by Act of Parliament, to be mortgaged for a particular Purposes, it is incumbent on the Mortgagee to see the Money applied accordingly. Trin. 1686, between Carterel and Hampson, 2 Vern. 5.

4. A. had an Interest for a Term for Years in a Printing-Office, and made his Will, and devised his Term in the Printing-Office to his Executors, in Trust, by Profits, &c. to raise 2000 l. for the Portion of his Daughter, and then for other Trusts, and died; the Executors mortgage this Term for 1000 l. to J. S. on Pretence of Want of Affairs to pay the Tettator's Debts; and the Plaintiff, the Assignee of the Mortgagee, brings his Bill to foreclose the Equity of Redemption; the Daughter opposed it, and infilled this Mortgage ought not to take Place till her Portion was raised, for that the Said Term was devised to the Executors in Trust for that Purpose in the first Place, and the Mortgagee could not but have Notice of it; and that there were no Debts
Debts of the Testator; or if any, the Mortgagee at his Peril ought to lose the Money applied to discharge them, and to be allowed no more than he could make out to be so applied. Lord Keeper: Where a Trust is to last for Payment of Debts in a Schedule, the Purchaser, at his Peril, is to lose the Money applied to the Payment of these Debts; but here the Question is, how far an Executor's Power does extend over a Chattel which has a Trust annexed to it; the Law has intrusted the Executor with the Personal Estate to pay Debts; and unless he has a general Power, he has none at all; for if he cannot sell, none can buy, and the general Trust must take Place; and a Purchaser is not bound to prove the Debts, or the Number of them, or the Application of the Purchase-money, therefore the Sale is good; but after, on Appeal to the House of Lords, they altered this Decree, and preferred the Portion. Quae Causam inde. Mich. 1703. * a Vern. 444 5 C. 2

CAP. XLVIII

Remainder.

(A) Of what Things a Remainder may be made.

1. If one hath the Office of Park-keeper, Forester, Gaoler, Sheriff, &c. to him and his Heirs, he may grant these Offices to one for Life, Remainder to another for Life, &c. for Omne majus continet in se minus; and as they are grantable over in Fee, so may they be granted in Succession to one for Life, with Remainders over, &c. So of Lands, Houses, Rents, Commons, Easements, or any other Interest or Profit in esse, whereof the Grantor hath the absolute Property to him and his Heirs for ever. Plow. 379. b. 381. a. 9 Co. 48, 97.

2. But where a Man seised of Lands in Fee, granted thereout a Rent-charge to one for Life, or Years, Remainder over to another, in Fee, or in Tail, &c. and it was doubted if this Remainder were good, because this Rent had no Existence at all before the Grant, and the Grantor cannot be said to have any Part of the Rent left in him, as he would have of Land, because he first gave Being to the Rent,
Rent, and bounded the Time of its Existence; which being run out, nothing thereof remains to grant over to another, and a Remainder is to be granted out of that which would otherwise be a Reversion in the Grantor; which here this Rent cannot be, being newly created; but yet in this Case, by the better Opinion of the Books, and a Judgment directly in Point, such Remainders of a Rent newly created, has been held good; for as the Grantor might at first have granted it in Fee, or for ever, having such perpetual and durable Interest in the Fund, out of which it was to arise; so he may Share and divide his Grant, and give Part thereof to one, and Part to another, in Succession; and the rather, because the particular Estate and Remainders are but one Estate as to the Grantor, divided in Limitation only, being limited to pass out of him all at the same Time; and as to him make no Difference, whether one or more take Benefit jointly, or in Succession one after another; but if he grant such Rent for Life, or Years, to one, without going farther; he cannot after grant the Reversion thereof to another, because he has no Reversion in him, for the Reason before given; and the Reasons of this Case will go likewise to Commons, Estovers, &c. newly created.

3. If one be created Baron, Viccount, &c. by Patent, and after, in the same Patent, the same Honour is granted to another in Remainder; yet this operates as a new Grant, and not as a Remainder, for the King had no Reversion of that Honour in him, though he had still the same Power of appointing one in Succession to take it, as he had of granting it to the first. Scoe. P. C. 5, 11.

4. But what seems most proper to be inquired into under this Head, is the Reason and Practice of limiting Remainders in Personal Goods or Chattels, for they in their own Nature seem incapable of such a Limitation, because being Things transitory, and by many Accidents subject to be lost, destroyed, or otherwise impaired; and also the Exigencies of Trade and Commerce requiring a frequent Circulation thereof, it would put a Stop to all Trading, and occasion perpetual Suits and Quarrels, if such Limitations were generally tolerated and allowed; but yet in Last Wills and Testaments such Limitations over of Personal Goods or Chattels have sometimes prevailed, especially where the first Devisee had only the Use or Occupation thereof devised to him, for then they held the Property to continue in the Executors of the Testator, and that the first Devisee had no Power to alter or take it from them; yet in either Case, if the first Devisee did actually give, grant, or sell such Personal Goods or Chattels, the Judges would very rarely allow of Actions to be brought by those in Remainder, for Recovery thereof; hence it came to pass, that it was a long while ere the Judges of the Common Law could be prevailed on to have any Regard for a Devise over, even of a Chattel Real, or a Term for Years after an Estate for Life limited thereon, because the Estate for Life being in the Eye of the Law of greater Regard and Consideration than an Estate for Years, they thought he who had it devised to him for Life, had therein included all that the Devisee had a Power to dispose of; and though they have now gained that Point upon the antient Common Law, by establishing such Remainders, and have thereby brought that Branch out of the Chancery (where they frequently helped the Remainder-man, by allowing of Bills to compel the first Devisee to give Security); yet it was
was at first introduced into the Common Law, under the new Name of *Executor Devisae*, and took all the Sanction it has since received from thence, and not as a Remainder, (for which *vid. Title Devisae*); but as to Personal Goods and Chattels, the Common Law has provided no sufficient Remedy for the Devicee in Remainder of them, either during the Life of the first Devicee, or after his Death; therefore the Chancery seems to have taken that Branch to themselves in Lieu of the other which they lost, and to allow of the same Remedy for such Devicee in Remainder of Personal Goods and Chattels, as they before did to the Devicee in Remainder of Chattels Real, or Terms for Years. *Dyer 7. Cro.Car. 347. Plow. 521. a. Godol. 356. Swinb. 137.*

5. Therefore where a Man devised 600l. a-piece to two Daugh-
ters, and the Residue of his Personal Estate to his Son, and if either of his Children died during their Minority, the Survivors to be Heirs to the Deceased by equal Portions; the Son died; and one Sister brought a Bill against the Executors, and the other Sister, to have her own 600l. and the Half of the Brother's Personal Estate; and had a Decree accordingly, but was forced to give Security to pay back her own 600l. in Case she died during her Minority; though it was said, if she died during Minority, leaving Issue, it would be a hard Case. *Chan. Ca. 199.*

6. A Device was made of the Use of Goods, Plate and Household-
stuff, to one for eleven Years, and after to another, and held a good Device; and a Decree to deliver them accordingly after the eleven Years. Between *Jolly and Will., 2 Chan. Rep. 137.*

7. So upon a Device of certain Books, Jewels and Rarities to one for Life, and after of the Things themselves to another; he in the Remainder brought a Bill in the Life-time of the first Devicee to have Security for their forth-coming after the Death of the first Device; and the Court being assisted by two Judges, held the Remainder good, but ordered them to move for the Security another Time. Between *Vachell and Leman., 2 Chan. Rep. 151.*

8. A Farmer devised his Stock (which consisted of Corn, Hay,
Cattle, &c.) to his Wife for Life, and after her Death to the Plain-
tiff; it was objected, that no Remainder can be limited over of such Chattels as these, because the Use of them is to spend and consume them; but the Master of the Rolls said, the Device over was good; but said, if any of the Cattle were worn out in using, the Defendant was not to be answerable for them; and if any were sold as uncles, the Defendant was only to answer the Value of them at the Time of the Sale; and an Account was decreed to be taken accordingly. *Mich. 1702. between Hayle and Burrodale.*

9. The Distinction which has been taken between the Device of a Personal Thing to one for Life, Remainder to another, and the Use thereof to one for Life, with a Remainder over, seems now exploded in Conformity to the Civil Law; and likewise as the Testator's Intention appears the same in both Cases. *37 H. 6. 1 Brok. 254. (57) Title Devisae, 13 Co. 5, 16. Owen 33. 2 Vern. 245.*

10. Therefore if a Man devises Household Goods to his Wife for Life, and afterwards to his Son, this is a good Device over, and the same as if the Device had been only of the Use of the Goods to the Wife for Life. *Mich. 1696. between Hide and Parrot, 2 Vern. 331. deemed. Between Gibbs and Barnardiston, S.P. Hill. 1711. deemed.*

11. But
11. But if Money, Goods, or other Personal Chattels are devised to one and the Heirs of his Body, or to one, and if he dies without Heirs of his Body, the Remainder, this Remainder is totally void, and the Courts of Equity will not allow of a Bill by the Remainderman to compel Security, &c. or to have the Money, &c. after the Death of the first Devisee; but it shall go to his Executors or Administrators; for the first Devisee gives the absolute Property of a Personal Estate, as a like Devisee of a Real Estate before the Statute de donis gave a Fee, upon which no Limitation could be made further; and as the Heirs are the Representatives to take a Real Estate, so are the Executors to a Personal Estate; and this is not within the Statute de donis, but remains as at Common Law. 2 Vern. 349. 2 Chan. Ca. 94. 2 Chan. Rep. 66, 153. 1 Chan. Rep. 129, 260. 1 Vern. 329. 1 Salt. 156. 2 Vern. 600.

12. And yet where a Devise was of Money and Goods to one for Life, and if the Devisee died without Issue, then to go over to another, this was held a good Devise over; for the first Limitation being expressly for Life, the Words after could not inlarge it by Implication, as they could a Real Estate, and then it falls within the common Rule of other Cases, where the Limitation is held good, the Contingency being to happen within the Compass of a Life or Lives in feo. 1 Chan. Rep. 411. but for this vid. executor Devises of Terms for Years, Title Devises.

13. So where a devise in the Words following,viz. And the Rest and Residue of my Estate unqualified, shall be put forth to Interest by my Executors, and one Half of the Interest shall be paid to my Sister A. C. during her Life, and the other Half of the Interest unto her Daughter A. S. and she to have one Half of my Household Goods, and after her Mother's Decease to have all the Interest during her Life; and my Will is, that if the said J. S. die without issue of her Body, the Principal of the Residue shall be divided equally between M. and F. and such Children as are or shall be born of their Bodies then living; and it was held, that the Remainder to M. and F. was good. Pach. 1688. between Smith and Clever. 2 Vern. 38, 59.

14. A Term for 900 Years was assigned to Trustees, in Trust to permit the Husband and Wife, and the Survivor of them, to receive the Profits for so many Years of the Term, as they, or the Survivor of them, should happen to live; and after their Deaths to the Use of the Heirs of the Body of the Wife, by the Husband to be begotten; and it was held, that the Heir of the Body took by Purchase, and that it did not vest absolutely in the Mother, who survived, so as to go to her Administrator. Mich. 1690. between Peacock and Spooner, 2 Vern. 43, 195. decreed, and affirmed in the House of Lords.

15. But afterwards a Decree at the Rolls, grounded upon the Case of Peacock and Spooner, was reversed, and decreed the Limitation to the Heir Male void; and that the Whole vested in the Father by the Limitation to him for Life, Remainder to the Heirs of his Body. Hill. 1710. between Webb and Webb. 2 Vern. 668.

16. A being possess'd of an Annuity of 14 l. per Annum for ninety-nine Years, out of the Exchequer, on his Marriage, covenants with B. and C. to pay this 14 l. per Annum to his Wife, for her separate Use, and after the Death of either of them, then to the Survivor for Life; and after the Death of both, then to the Child or Children to be begotten between them; and in Default of such Child or Children, then
then to his own Executors and Administrators for the Residue of the Term; A. and his Wife had Issue only one Son, who lived to the Age of five Years, and then died; and after the Death of A. and his Wife, the Plaintiff took out Administration to the Son, and brought his Bill against the Executors of A. for this Annuity; and it was inserted upon, that the Limitation to the Executors and Administrators of A. was void, being after a Limitation to the Child and Children, which was the same as if it had been limited to the Issue; and a Settlement of a Term on Trustees, in Trust to permit the Father to receive the Profits for so many Years of the Term as he should live, and after to permit the Mother to receive the Profits for so many Years of the Term as she should live; and then in Trust to permit their Child or Children, or Issue, to receive the Profits for the Residue of the Term, will bear no Limitation over in Default of Issue or Children, in Cafe there be any one in Being, no more than such a Limitation of the Term itself would be good; for this would be to introduce and revive all the Inconveniences of a Perpetuity, which have been so long since exploded, and the Trust of a Term must be limited in the same Manner, as the Term itself will bear a Limitation; but my Lord Chancellor said, this being by Way of Covenant, no more passed out of him than to serve the Uses expressed, and it was not a Disposition of the Annuity itself, but only a Covenant to pay the 14 l. per Ann. in such Manner; and since it was never devested out of A.' he would not, on this Bill, on any Pretense of Equity, clear it out of him, or his Executors, and so dismiss'd the Bill, though he did not at all dispute the Case; if it had been of a Term, or the Trust of a Term, settled in such Manner, that the Remainder would not have been good; but here there was only a Covenant to pay the 14 l. and not the Annuity itself, which was thought, at the Bar, to be an over nice Distinction. Tris. 1715.

CAP. XLIX.
C A P. XLIX.

Rent.

(A) In what Cases there may be Remedy for Rent in Equity, when none at Law.

(B) In what Cases the Lessor may be relieved against the Payment of Rent in Equity.

(A) In what Cases there may be Remedy for Rent in Equity, when none at Law.

1. If a Rent be devised by Will in Writing, a Court of Equity may compel the Tenant of the Land to give Seisin, because by Intendment the Tenant of the Land was Inops consili at the Time of the Devise. Moor 805. Lat. 147.

2. So if a Man grants a Rent-ject, Equity will decree Seisin to be given, and the Rent to be paid to the Grantee. 1 Rol. Abr. 378. 1 Chan. Ca. 147.

3. A Bill was exhibited for the Payment of 3l. for a Rent of 5l. per Ann. Arrear, for twelve Years, suggesting that the Deed by which it was created was lost; and there being Proof that it was constantly paid before the twelve last Years, the Master of the Rolls decreed, that the Arrears and growing Rent should be paid, because it did not appear what Kind of Rent it was, and so no Remedy at Law. Hill. 20 & 21 Car. 2. between Collet and Jaques, 1 Chan. Ca. 120.

4. So where a Bill was brought, suggesting, that the Plaintiff did not know the Nature of the Rent, nor the Boundaries of the Land, so as to be able to declare with Exactness; and the Court said, that it ought to be decreed; but at the Importunity of the Defendant directed a Trial, whether there was any such Grant, or not. 1 Vern. 359.

5. A Rent of 1l. 14s. was granted by King H. 6. to Eaton College, issueing out of certain Lands; the Bill suggested, that the College did not know where the Lands lay, so as to enable them to distress, and therefore pray that the Executor of the Tertenant may be answerable for the Arrears; which the Master of the Rolls thought reasonable, in Respect that the Personal Estate was increased thereby; and decreed it accordingly. 1 Chan. Ca. 121.

6. So
Rent.

6. So where the Plaintiff by his Bill suggested, that he having the Grant of a Rent-charge issuing out of certain Lands; the Defendant, to hinder him from a Disaffirm, converted the Premises into Tillage; and my Lord Chancellor directed to have it tried, whether there was any Fraud used to prevent the Plaintiff from disaffirming; and declared, that if there was, he would grant Relief. 1 Chan. Ca. 144.

7. A feised of an Estate, devised it to B. and thereout devised 100 l. per Ann. to his Father, payable half-yearly, and in Default of Payment, to enter and disclaim, and the Disaffirm to detain until the Arrears paid; the Father dying, his Widow and Executrix brought her Bill for Satisfaction of the Arrears; and the Master of the Rolls decreed the Arrears with Costs and Charges, and she to enter and enjoy until satisfied. Mich. 1700. between Foster and Foster, 2 Vern. 386. but vid. 2 Vern. 382. where on a like Bill my Lord Keeper refused to relieve the Plaintiff; the Party having provided a Remedy by Disaffirm, must be satisfied with it, unless some particular Fraud is proved, as letting the Land lie fescht, or depauperating it in the Night-time, to prevent a Disaffirm; and 1 Chan. Ca. 185. that Equity will not grant a Remedy for Rent, when there is one at Law, nor change the Nature of the Rent, so as to make the Person liable, unless there was Fraud, &c. in preventing a Disaffirm.

(B) In what Cases the Leesee may be relieved against the Payment of Rent in Equity.

1. THE Plaintiff was Tenant to the Lady M. of a House in London, at a certain Rent; he left the House and went to Oxon to King Charles I. and then sent his Servant with the Key of the House to the Lady, and desired her to re-enter and accept the Surrender; the said she would advise with the Defendant, her Son in Law, (who then sat in the House of Commons, and was on the Side of the Parliament) afterwards she refused to accept of a Surrender; the House was made an Hospital by the Parliament for maimed Soldiers; the Defendant, as Executor to the Lady, brought Debt at Law against the Plaintiff, for Rent incurred whilst the House was so used; and on a Bill to be relieved against the Action, my Lord Chancellor took Time to advise; but declared, that if he could, he would relieve the Plaintiff. Pech. 19 Car. 2. between Harrison and Lord North, 1 Chan. Ca. 83.

2. A Leesee for Years under a certain Rent, and Covenants to repair, makes 100 Under-leafes; the Premises not being repaired, nor the Rent paid, a Re-entry is made, and the original Leaf avoided, Six of the Under-Leeseees having brought a Bill against the Head Landlord and first Leesee & al's; the Court held, that there could be no Decree to apportion the Head Landlord's Rents, nor any Relief for the Plaintiffs, but on their Payment of the whole Rent in arrear, and Repairing all the Premises; but having so done, they might compel the Rest of the Under-tenants to contribute. 2 Vern. 103.

§ A C A P. L.
Tithes.

(A) Tithes, of what Things, and by whom to be paid.

(B) Of a Modus.

(A) Tithes, of what Things due, and by whom to be paid.

1. Though Beasts of the Plough are exempt from paying Tithes, because by the Labour of such Cattle, Tithes of another Kind arise; yet if Oken are turned to graze, and fattened for Sale, they shall from such Time pay Tithe for the Herbage they eat, being no Way beneficial to the Parson in any other Tithes. Between Edmonis and Sandys, Show. P. C. 192.

2. A Bill was exhibited to be relieved for Tithe Oar in B. a Township within the Rectory of C. and the Court held, that Tithe Oar was not due of common Right, but by particular Custom only, and therefore directed a Trial to be had at Law, whether there was any, and what Custom within the said Township for the Payment of Tithe Oar, with Direction to the Judge to indorse the Poftec, how the Custom was found upon the Trial. Psch. 1688. between Nicol and Wiseman, 2 Vern. 45.

3. It was decreed in the House of Peers, on Appeal from the Court of Exchequer, that the Tithes of a Mill are Personal Tithes, against several seeming Authorities or Doubts in the Books; and that in Consequence of their being Personal Tithes, not the tenth Toll or tenth Dill of the Corn ground belongs to the Parson, but the tenth Part of the clear Profits, after the Charges of erecting the Mill, and the other Charges of Servants, Horfes, and other Expences deducted. Between Nett and Chamberlaine, 1706.

4. If a Man hath a Nursey of Trees, and he sells them, and pulls them up himself, he shall pay the Tithe; but if he sells them particularly to another, the Vendee shall pay the Tithes, as in Case of Tithe of Corn, if sold standing, the Vendee shall pay the Tithes; but
Tithes.

if sold after Severance, the Vendor must. Mich. 16 Car. 2, between
Grant and Hedging, Hard. 380, 381.

5. Tithes for the Agistment of Cattle are payable by the Owner
of the Cattle, for the Cattle take the Profits and Herbage of the Soil;
so in Case of Commons. Hard. 184, per Curiam; and the Chief
Baron said, the Owner of the Soil might pay them; but clearly, the
Agistor is compellable to pay them.

(B) Of a Modus.

1. A Bill was exhibited to examine Witnesses in perpetuum rei
Memoriam, to prove a Modus Decimandi; the Defendant de-
murred, for that the Bill was to establish a Custom against the
Church, and in Prejudice of Tithes that are due Communi Jure;
and several precedents were cited, where Bills to have a Modus
(a) deeded, were, upon Demurrer, dismissed; but this Bill being (b) It was
only to preserve Testimony, the Lord Keeper thought it reasonable
the Defendant should answer, and over-ruled the Demurrer. Trin.
1683. between Somerset and Fatherby, 1 Vern. 185.

Equity would
lie to establish a Modus, or customary Manner of paying Tithes, especially if the Custom had not been
formerly doubted, to such Bills, they have been dismissed; but the
constant Practice now is, to retain such Bills, and to decide on the Pleadings, or to direct a particular
Point to be tried at Law, concerning the Reality of such a Custom, or the Legality of it. 1 Chau. Rep.
27. 1 Chau. Ca. 187.

2. A Bill was brought to establish a Modus, or customary Manner
of Payment of Tithes, which was thus, that every Person not inhab-
ting or refiding within the Parish, having Lands, Meadow or Pa-
strate Ground, have used to pay for every Acre, Time out of Mind,
on Good-Friday, 4d. per Acre, and so in Proportion for a greater or
lesser Quantity than an Acre, to the Parson, in Lieu of Tithes of
those Lands; but when the Owner lived or inhabited within the Pa-
risb, then to pay Tithes in Kind of those Lands; and the only Que-

tion was, whether this was a good Modus, or not.

It was insisted upon for the Parson, that it was not a good Modus,
for the Uncertainty of it; and for that was cited and relied on a
Case in 1 Lev. 116. and the same Case 1 Keb. 692, where it is called
a Leaping or a Dancing Modus, and there held not to be good for
that Reason, for he may live in the Parish to Day, and remove out
of it to morrow; and how can the Rectory, in a Case of such Uncer-
tainty, know how to make his Demands, when it is in the Power of
the Parishioner to defraud him thereof, by going out, or coming in-
into the Parish at his Pleasure; and it is the Property of a Modus, that
the Parson may as well know how to demand it, as the Tenant to
pay it; but here it is wholly in the Power of the Tenant to make it
either a Modus, or payable in Kind, just as he pleases; and if Two
Should agree thus, you shall live in my House within the Parish, and
I in yours out of the Parish, this will alter the Tithes for the Time;
or if there should be two joint Leefees, and one should live in the
Parish, and the other out of the Parish, what is to be done in this
Case.

That Tithes are of the Revenue of the Church, and any Thing
done in Derogation thereof is to be taken strictly.

That
That this *Modus* is to arise by the Act of the Party, and no *Modus* can arise by the Act of the Party, but what is for the benefit of the Parson; but here it is to arise by the Act of the Party, and yet is to the prejudice of the Parson; for the difference between Tithes in Kind and this *Modus*, are 10 d. per Ann. 1 Rol. Abr. 649.

This *Modus* tends to depopulate the Parish, so as there may be none to preach to; and all Cussums founded in fraud, are to be disallowed, as 1 Leon. 99. Cro. Eliz. 446.

But on the other side it was argued, that this was a good *Modus*; that as on the one hand the Parson is not to be defrauding of his Dues, so on the other hand a *Modus* is not to be over-turned on light grounds; that if they should, Purchasers might be affected, who came in under a Perfusion, that such *Modus*s are all they are to pay; that it is not necessary to shew upon what particular reason every *Modus* began, if it may be supposed to have a reasonable beginning; that this might begin when there were more lands in the Parish than the Inhabitants could manure, and yet the Owners of those lands who lived elsewhere, should be obliged to pay 4d. an Acre for them, though it is not necessary to shew the reasons on which they began.

That all *Modus*s may be said to be an invention to cheat the Parson; and so in some books they are called, as they are less than Tithes in Kind.

That as to its being a Leaping or Dancing *Modus*; so was that of the Cistercians, and other religious orders, who paid Tithes of land *quandis in propriis Manibus excoluntur*; so Tithes are payable of Hay whilst it continues Meadow; but if broken up, the Tithes thereof cease till laid down again; and by Godb. 194. it appears there to be in the Power of the Occupier to chuse, whether to pay his Tithes to the Parson or Vicar, and yet held good.

That this is not such a new case as the other side would have it imagined; for Cro. Eliz. 396. is a case of this purpose, tho' perhaps it might not occur at the time the case in 1 Lev. 1 Keb. came in Queffion; and that it is not so easy a matter to remove out of a Parish at Pleasure; nor is it to be suppos'd any one would do it merrily to cheat the Parson; and it was said in general, that this *Modus* was as certain and permanent as most *Modus*s, or even as Tithes in Kind, which depend on the choice of the owner, whether he will plough his land for corn, or mow it for Hay; and here it is so far certain, that the Parson is every year secure of having either Tithes in Kind, or 4d. per Acre; and if there is any fraud proved, the Parson will, notwithstanding, recover Tithes in Kind, as 1 Leon. 99. and the case afore cited in 1 Lev. and 1 Keb. was exploded, and denied to be law; and the following cases in the Exchequer were quoted as Authorities in Point. Ashby and Pattison, Trin. 12 Car. 1. Askford and Newcomen, Trin. 2 Car. 2. Plaxton and Langston, Mich. 2 W. & M. Reynolds and Appland about two years ago, and also Moor 999, Hob. Cooper and Andrews, and 2 Brown Ent. 595, 6.

The Court held it a good *Modus*, and said, that all *Modus*s were at first upon an agreement between the Parson, Patron and Ordinary, by some Deed or Instrument in Writing, in the Nature of a Contract or Agreement; which, tho' now lost, yet being run out into a prescription, continues good; that here is no uncertainty in the *Modus*, for the Parson is always sure to have the 4d. per Acre, or else the Tithes...
Tithes in Kind; nor is there any Burthen on the Reft of the Parishioners, by one or two going out of the Parish; and a Leaping or Dancing Modus, is where the Modus itself varies, and is sometimes more and sometimes less, which is not the present Case; and decreed accordingly by the Lord Chancellor, assifted by Mr. Justice Reynolds and Justice Fortescue; my Lord Chancellor said, the Case in Keble might perhaps be the Occasion of this Suit. Trin. 1730. Chapman verus Bishop of Lincoln.

C A P. LI.

Trade and Merchandize.

(A) Of Principals and Factorts.
(B) Of Partners in Trade.
(C) Of Policies of Insurance, and Bottomry-Bonds.
(D) Of Part-Owners, Masters, and Freighters of Ships.
(E) Of Customs amongst Merchants relating to Accounts, and Notes given by them for Money.

(A) Of Principals and Factorts.

I. If a Factor saves the Customs of Goods due to a Foreign Prince, and such Saving, by the Laws of that Country, is Felony in the Factor, and a Forfeiture of all the Freight, the Factor shall have the Benefit of the Customs saved, and not the Employer, for he run the Hazard wholly, and has the Possession, which is a Right against all, except him that hath the very Right. Trin. 15 Car. 2. between Smith and Oxenden, 1 Chan. Ca. 25. two Merchants having certified, that the Benefit of the Non-payment of the Customs belonged to the Factor; and Two others, that it belonged to the Imployer. 1 Chan. Ca. 76. S. P.

3 B

2. But
Trade and Merchandise.

2. But if the Duties or Customs are due to our King, and the Factor saves them, and a Bill is brought by the Merchant against him, he shall be obliged to discover them; for this Custom being founded in Fraud, is void. Mich. 15 Car. 2. between Barr and Vandal, 1 Chanc. 30.

3. If A. employs B. as his Factor to sell Cloth, and B. sells the Cloth on Credit, and before the Money is paid, B. dies indebted by Specialty more than his Assets will pay; this Money shall be paid to A. and not to the Administrator of B. as Part of his Assets, but thereout must be deducted what was due to B. for Commission; for a Factor is in Nature only of a Trustee for his Principal. Hill. 1708. between Burdett and Willet, 2 Vern. 638.

4. The Plaintiff being a Factor in Blackwell-Hall, advanced Money for his Principal, relying, as was surmised, on the Credit of Cloths refting in his Hands, to re-imburse himself; the Clothier died, his Administrator sued at Law for the Cloth; and the Factor prayed, that he might be allowed, on Account, the Monies he advanced, but was dismissed; for if there are Debts of a higher Nature, it would be a Devastation in the Administrator, to pay or discount the Plaintiff's Debt. Mich. 1689. between Chapman and Derby, 2 Vern. 117. vid. 1 Vern. 428.

(B) Of Partners in Trade.

1. If two Persons engage in a joint Undertaking in the Way of Trade, or enter into Copartnership, it is not necessary to provide against Survivorship. 1 Vern. 217.

2. The Plaintiff's Husband (to whom she is Administrator) and the Defendant were Copartners for many Years in the Trade of a Druggist; the Plaintiff brought her Bill for a Discovery of the Estate, and her Proportion and Dividend thereof, &c. the Defendant answered; and it appearing that many Debts owing to the joint Trade stood out, it was moved, on Behalf of the Plaintiff, that an able Attorney might be appointed to sue for and recover those Debts, it being alleged in the Bill, that the Defendant carrying on a distinct Trade for himself, with the Persons that were Debtors to the joint Trade, to oblige them, he forbore to call in their Debts; and it was ordered accordingly, unless the Defendant, within a Week, would give Security to the Plaintiff to answer her Moiety of the Debts that were standing out. Hill. 1682. between Eftwick and Conningby, 1 Vern. 118.

3. A. and B. were Partners, as Woollen-Drapers, A. received Money in the Shop of J. S. and gave a Note for it, signed by himself and Partner, A. and B. being both dead, and A. not leaving sufficient Assets, it was held on a Bill brought by J. S. against the Executors of both the Partners; that this Note being given by one of the Partners, it should bind both; and that the at Law it binds only the Executor of the surviving Partner, yet in Equity the Creditor may follow the Estate of the other, though no Proof was made that this Money was brought into the Stock, or used in Trade. Trin. 1693. between Lane and Williams, 2 Vern. 277, 292.

4. A. B. and C. were Partners together in the Trade of a Dry Saltier, C. imbezils and waftes the Joint-Stock, contracts private Debts,
Debts, and becomes a Bankrupt; the Commissioners align the Goods in Partnership; A. and B. brought a Bill for an Account, and to have the Goods sold to the best Advantage; and infilled, that out of the Produce of the Goods, the Debts owing by the joint Trade ought to be paid in the first Place, and that out of C.'s Share, Satisfaction ought to be made for what C. had wafted or imbeziled, and that the Assignees could be in no better a Case than the Bankrupt himself, and were intitled only to what his third Part would amount unto clear, after Debts paid, and Deductions for his Imbezilments; and the Court seemed to be of that Opinion, but sent it to a Master to take the Account and state the Case. *Trin. 1693. between Richard-son and Goodwin 293. cit. Title Bankrupt.*

(C) Of Policies of Insurance and Bottomry-Bonds.

1. Where a Policy of Insurance is against Restraint of Princes, that extends not where the ensued shall navigate against the Law of Countries, or where there shall be a Seizure for not paying Custom, or the like. *2 Vern. 176. per Hutchins Lord Commissioner.*

2. The Defendant had lent 300 l. on a Bottomry-Bond, and afterwards insured 450 l. on that Ship with the Plaintiff, for six Guineas per Cent. Premium, as interest for Money lent, &c. the Ship outlived the Time at which the Money was payable, and afterwards was lost in the East-Indies; the Defendant recovered the Money on the Bottomry-Bond, and afterwards sued the Insurers upon their Policy, who brought their Bill to be relieved, for that the Money insured by the Policy, was the Money lent upon the Bottomry, and that the Defendant was no otherwise interested in the Ship; and that the Money being paid, no Use ought to be made of the Policy; and the Court decreed the Policy to be delivered up. *Trin. 1692. between Goddard and Garrett.*

3. But where the Defendant lent the Plaintiff 250 l. on a Bottomry-Bond, and afterwards insured on the same Ship; but the Insurance was larger as to the Voyage, there being Liberty to go to other Ports and Places than what were contained in the Condition of the Bottomry-Bond; the Ship being lost, the Defendant recovered the Money on the Policy of Insurance, and also put the Bottomry-Bond in Suit, the Ship, though lost, having deviated from the Voyage mentioned in the Bond; the Plaintiff brought his Bill, pretending the Defendant ought not to have a double Satisfaction, to recover both on the Insurance, and also on the Bond, he having insured only in Respect of the Money he had lent on the Bottomry, and had no other Interest in the Ship or Cargo, and therefore the Plaintiff would have had the Benefit of the Insurance, paying the Premium; but the Court held, that the Defendant having paid the Premium, was intitled to the Benefit of the Policy, and run the Risco, whether the Ship was lost, or not; and the Insurers might as well pretend to have Aid of the Bottomry-Bond, and to discount the Money recovered thereon, as the
the Plaintiff to have the Money recovered on the Policy to ease the Bottomry-Bond. Mich. 1716. between Harman and Vankatton, 2 Vern. 717.

4. On a Policy of Insurance on Goods by Agreement, valued at 600 l. and the Insured not to be obliged to prove any Interest; the Lord Chancellor ordered the Defendant to discover what Goods he put on board; for although the Defendant offered to renounce all Interest to the Insurers, yet he referred it to a Master, to examine the Value of the Goods saved, and to deduct it out of the Value or Sum of 600 l. at which the Goods were valued by the Agreement. Mich. 1716. between Le Pyrre and Farr, 2 Vern. 716.

5. The Plaintiff entred into a Penal Bond of Bottomry, to pay 40 l. per Month for 50 l. The Ship was to go from Holland to the Spanish Islands, and so to return for England; but if the perished the Defendant was to lose his 50 l. She went accordingly to the Spanish Islands, took in Moors at Africa, and upon that Occasion went to Barbadoes, and then perished at Sea; the Plaintiff being fixed on the Bond and Penalty, sought Relief, pretending that the Deviation was on Necessity; but his Bill was disapproved, faying as to the Penalty. 2 Chan. Ca. 130. 2d. 2 Salk. 444.

6. But where J. S. entred into a Bottomry-Bond, whereby he bound himself, in Consideration of 400 l. as well to perform the Voyage within six Months, as at the six Months end to pay the 400 l. and 40 l. Premium, in Case the Vessel arrived safe, and was not lost in the Voyage; and it fell out, that J. S. never went the Voyage, whereby his Bond became forfeited; and he preferred a Bill to be relieved; and in Regard the Ship lay all along in the Port of London, and so the Defendant run no Hazard of losing his Principal, the Lord Keeper thought fit to decree, that the Defendant should lose the Premium of 40 l. and be contented with his ordinary Interest. Mich. 1684. between Deugilder and Depeisler, 1 Vern. 263.

7. A Part-Owner of a Ship borrowed Money of the Plaintiff upon a Bottomry-Bond, payable on the Return of the Ship from the Voyage she was then going in the Service of the East-India Company, and the East-India Company broke up the Ship in the Indies; and the Owners brought their Action against the Company, and recovered Damages, but they did not amount to a full Satisfaction; and the Obligee brought his Bill to have his proportionable Satisfaction out of the Money recovered; but his Bill was disapproved, and he left to recover as well as he could at Law; for a Court of Equity will never assist a Bottomry-Bond which carries an unreasonable Interest. Mich. 1701. between Dandy and Turner.

(D) Of Part-owners, Masters and Freighters of Ships.

1. If there are three Part-owners of a Ship, and one of them refuses to fit out the Ship, and the others do it without his Consent, and the Ship is lost in the Voyage; yet he who refused to join shall bear his Proportion of the Losses, for he would have been intitled to a Share of the Profits, if there had been any; but in Case the other two Part-owners had applied to the Court of Admiralty (as regularly they ought to have done) that Court would have made an Order, that...
that upon one Part-owner's Refusing to navigate the Ship, the other
Two should have Liberty to do it alone, and should not have been
accountable to the Part-owner that refused to join, for any Part of
the Profits; and then, in Case the Ship had been lost, the whole Lofs
must have rested on those Two who set out the Ship. Hill 1684. be-
tween Strelcy and Winfon, 1 Vern. 297.

2. Where the major Part of the Part-owners of a Ship settle and
agree an Account of the Profits of a Voyage, it shall conclude the
Reilt. Trim. 1687, between Robinson and Thompson, 1 Vern. 465;
per Carian.

3. A Master of a Ship, without the Owner, treated with the
Plaintiff, a Merchant, for the Freight of the Ship at eighty Tuns,
and accordingly entered into a Charter-Party with him, to sail from
London to Falmouth, and thence to Barcelona, without altering the
Voyage, and there to unload at a certain Rate per Tum; and for
Performance the Master binds the Ship, Tackle, &c. valued at 300L:
the Master deviates and commits Barratry, by which the Merchant,
in Efect, loseth his Voyage and Goods; the Merchant had a Sen-
tence against the Master and Ship in Barcelona, which was confirm-
ed in a higher Court in Spain; and the Owner having brought Tro-
ver for the Ship, the Merchant exhibited his Bill to be relieved ag-
ainst this Action, and likewise another Action brought for Freight;
and it was held by my Lord Chancellor, that the Charter-Party hav-
ing valued the Ship at a certain Rate, the Owner is not liable fur-
ther; and the Master is liable for Deviation and Barratry, for should
it be otherwise, Masters would be Owners of all Men's Ships and E-
fates. 2 Chau. Ca. 238.

4. But where A, a Master of a Ship, of which the Defendants were
Part-owners, bought several Goods of the Plaintiffs, as Beef, Bisket;
Sails, Cordage; the Master failed, and a Bill was exhibited to com-
pel the Defendants; the Part-owners, to pay; who insinmed, that A,
only was liable; and besides, that he had Money from the Owners to
pay the Plaintiff; and the Court held, that A was but a Servant to
the Owners, and where a Servant buys, the Master is liable; and if
the Owners paid their Servant, yet if he paid not the Creditors, they
must stand liable; and therefore decreed the Owners to pay the Plain-
tiffs their Debts in Proportion to their respective Shares and In-
terests in the Ship. Hill 1709. between Sperling and Degrave;
2 Vern. 643.

5. The Plaintiff, a Merchant in London, hired the Defendant's
Ship to freight for a Voyage to Boudeaus; at 3 L. 10s. per Tum, it
happened that an Imbargo was laid on all Merchant Ships for six
Weeks; the Ship afterwards proceeds on her Voyage to Boudeaus;
and the Defendant not discovering what Agreement he had made with
the Plaintiff in England, the Plaintiffs Factors and Correspondents
there agree to allow the Defendant 6d. 10s. per Tum, upon which
latter Agreement the Defendant recovered at Law; a Bill being ex-
hibited for Relief against this, second and under-hand Agreement;
obtained, as was alleged, by Fraud, was dismistled; for the Defen-
dant was at Liberty to make a new Agreement, by Reason that the
Performance of the first was obstructed by the Imbargo; after laid
on all Merchant Ships! Mix. 1691. between Draddy and Deacon,
2 Vern. 242.
6. A. and B. Part-owners of the Ship Falcon, and C. the Master, by Charter-Party agree with the East-India Company, that the Ship should be ready to sail the 10th of March, 1683, and should go from Port to Port, and to any Port or Place within the Limits of the East-India Company’s Charter, as they should direct, but was to be dispatched back for England, on, or before the 24th of Jan. 1684. or so soon after as to save her Moor for England that Year, or in Default of her being dispatched within the Time aforesaid, the Owners were to pay four Months Demurrage, at 7 l. 10s. per Diem for her Moor for loft, and her pay in India after the 20th of Jan.-uary 1684, with this further Clause, that the Company might detain the Ship in their Implyment in Trade or Warfare for any longer Time, not exceeding twelve Months, after the 20th of Jan. 1684, after the Rate of 7 l. 10s. and 6 d. per Diem Demurrage, until the Ship should be dispatched from the last lading Port, or Expiration of the twelve Months, which shall first happen: but after the twelve Months expired, the Ship to return to England, and the Company not to be liable for any further Demurrage, or any Damage that may accrue by her Detention after that Time; and the Company covenant, on the Ship’s Arrival in England, to pay Freight for 300 Tun, and Demurrage from the 20th of Jan. 1684, until the Ship should be dispatched, for the Space of twelve Months after the said 20th of Jan. 1684. And it was thereby provided, that until six Days after the Ship shall have returned to the Port of London, and made a right and full Discharge of all her Lading, the Company are not to pay, nor to be liable to pay any of the Sums of Money agreed on for Freight or Demurrage, or for detaining the Ship in India; but being the Intent of the Parties, that if the Ship should be lost, either in her outward or homeward bound Voyage, nothing should be paid by the Company for Freight or Demurrage; the Ship set Sail according to the Charter-Party, arrived in India, and was employed by the Company in Trading from Port to Port for one Year and upward; and arrived in India, Nov. 23. 1684, and was to enter into Demurrage in four Months afterwards, which was the 23rd of March, 1684, and the twelve Months after (during which Time, the Company by their Charter-Party, might detain her,) ended March 23, 1685, but the Ship was employed in the Company’s Service, so that she arrived at Surat until 1686. and from thence was ordered to Bombay, where the Ship having been so long detained in those Seas, was surveyed, and found not sufficient for a Voyage to England; and on Sept. 24. 1686, the Seamen were discharged, and the Ship left there, the Company refusing to pay any Thing for Freight or Demurrage; because by the express Provision of the Charit-Party, they were not to pay until six Days after the Ship’s Arrival in England, and discharged of her Lading; and if they were to pay any Thing, yet they were to be charged with Demurrage until March 23, 1685, only, as is provided by the Charter-Party, and refused likewise to account for the Value of the Ship, or shew how that they had disposed of her; the Part-owners brought a Bill for Relief; and the Court held, that tho’ the Charter-Party was so penned, that nothing could be recovered at Law, yet the Plaintiffs having a just Demand, ought to be relieved in Equity; and therefore decreed, that the Company should account for what they made of the Ship, that they should
Trade and Merchandize.

should pay Demurrage according to the Rate mentioned in the Charter-
Party, and that they should also be charged in Respect to Freight. Hill. 1690. between Edwin & al and the East-India Company, 2 Vern. 210.

7. So in a Case, where by the Agreement there was no Freight to be paid for the outward-bound Cargo, but only a certain Rate per Tun for the homeward-bound Cargo; and when the Ship arrived beyond Sea, the Factor had no Goods at all to load the Ship with; and the Court decreed Payment of the Freight. Between Westland and Robinson, 2 Vern. 212. cited.

8. So where the East-India Company took Bonds from the Mariners and Officers of a Ship, not to demand their Wages, unless the Ship returned to the Port of London; and the Ship arrived at a delivering Port, and was afterwards taken by the French; and it was held by my Lord Chief Just. Holt, in an Action tried by him, and likewise in Chancery, that the Seamen and Officers should have their Wages to the Time of the Arrival of the Ship at the delivering Port. 2 Vern. 727.

(E) Of Customs amongst Merchants relating to Accounts, and Notes given by them for Money.

1. If one Merchant sends another an Account stated, and he desires him to write to him speedily, and send his Exceptions; and the Account is referred upon fourteen Years, it shall not afterwards be unravelled. 1 Chai. Ca. 127. Per Curiam.

2. So where the Plaintiff’s late Husband and Defendant had Dealings together as Merchants, and he exhibited a Bill for an Account; although it was agreed, that the Length of Time was no Bar, yet the Plaintiff’s Husband living many Years after the Trade and Dealings between them ceased; and after some Differences and Disputes had arisen between them, and acquiescing to the Time of his Death; the Court dismission the Bill, and left the Plaintiff to recover at Law, if she could. Mich. 1692. between Sherman and Sherman, 2 Vern. 276. and per Hutchinson’s Lord Commissioner, amongst Merchants it is looked upon as an Allowance of an Account Current, if the Merchant that receives it does not object against it in a second or third Post.

3. One Agris, a Goldsmith, having 150l. of Berkley’s Money in his Hands, gives him a Note, whereby he promises to pay to him, or Order, on Demand, the Sum of 150l. Berkley being indebted in the same Sum to the Plaintiff, delivers over that Note to the Plaintiff, but without making any Indorsement; Plaintiff presently carries this Note, and likewise another Bill for 80l. which he had upon one Jackson, to Sir Stephen Eanes and Hales Goldsmiths in Lombard-street, who were his Bankers or Cashiers, and they gave him a Note to this Effect, viz. Received of Mr. Trowell (the Plaintiff) 230l. upon Account; and in the Margin it was written thus, Berkley 150l. Jackson 80l. and this Note was signed by Sir Stephen and Hales, they presently send their Dunne to Agris to demand the Money, but he put them off from Time to Time, for about thirteen or fourteen Days,
Days, though the Dunner had been several Times with him for the Money; and afterwards Agris fails; it was proved in the Caufe; that Agris was solvent after the Note given by Sir Stephen Evans, and had paid above 800 l. to severals People; upon Agris’s failing, the Plaintiff applies to the Defendants, Sir Stephen Evans and Hales, for Payment of the 150 l. Sir Stephen not thinking himself obliged to pay it, sends the Plaintiff to Berkley, to whom the Note was first given, and he likewise refusing Payment, the Plaintiff brought his Bill against them for a Satisfaction, and had a Decree at the Rolls, to charge Sir Stephen Evans and Hales; from which Decree they appealed to my Lord Keeper; and indicted they were not chargeable with this Money, that they took Agris’s Note only as Servants to the Plaintiff, and had several Times sent their Dunner to demand the Money; that his promising them Payment was the Reason they did not give Notice, nor return the Note to the Plaintiff; that their Manner of giving Notes in Lombard-street was different from those given by Goldsmiths at Temple-Bar; yet in Substance they were the fame, and amounted to no more than a Receipt for the two Notes from such Persons, for so much Money, which; when they received, they Promised to be accountable for; that this Bill was but in Nature of an Action of Account against them as Bailiffs, or Receivers of so much Money; and at Common Law, if such Action had been brought, and upon the Trial it appeared they had received no Money, the Jury would have found against the Plaintiff; that the Reason that lead Sir Stephen to give a Note in such Form, was a Cafe Mich. 2 Ann. between Ward and him, where the Cafe was, that the Plaintiff Ward being indebted to one Fellows in the Sum of 60 l. and having a Note from Sir Stephen Evans for 100 l. when Fellows came for his Money, Ward sends a Servant with him to Sir Stephen, with a Bill of 100 l. and ordered him to pay Fellows the 60 l. and indorse it off the 100 l. Note; but Sir Stephen having a Note on one Wallis for 60 l. 10 s. gives that Note to Fellows, who pays him the 10 s. overplus, and goes away with the Note, the next Day Wallis fails; and upon an Action brought by Ward for the 100 l. the Court of B. R. was of Opinion, that the Delivery of the Note upon Wallis for 60 l. 10 s. was no Payment, and therefore Ward recovered the whole 100 l. and therefore Sir Stephen now only gave a Note for so much received on Account, and the Note in the Margin, shewing from whom it was due, made it plain, he only acknowledged the Receipt of such Notes; but had no Design to charge himself with the Money till it was received; but my Lord Keeper was clear of Opinion, that the Note imported an Acknowledgment of so much Money received on the Plaintiff’s Account; that the Entry on the Margin could at most only shew how it was received; and that the Note spoke it self whatever the Forms and Meaning of such Notes were, and therefore affirmed the Decree. Mich. 1710, between Trouvel and Sir Stephen Evans & al.

2

G A P.  LII.
(A) In what Cases a new Trial may be granted, or the Venue changed by a Court of Equity.

1. The Defendant's Wife had pawned her Husband's Plate to the Plaintiff for 110l. for which the Defendant in Trover had recovered 115l. Damages against the Plaintiff, and Judgment for it; the Plaintiff exhibited his Bill to be relieved against the Judgment, and to have a new Trial, suggesting that the Defendant was privy to the Pawnning, and received the 110l. and the Proofs being read, it appeared that the Defendant had confessed so much; which, if it had been proved at the Trial, it was agreed the Defendant could not have recovered on the Trover; but there being no Proof now, that the Defendant at Law could not, by Reason of any Accident, have his Witnesses at the Trial, the Court would not, on any Neglect of his, grant a new Trial. *Hill.* 15 & 16 *Car.* 2, between *Curtefs* and *Smalridge,* 1 *Cham.* Bills for *Ca.* 43.

or for granting a new Trial, are not reduced to any great Certainty; the Grounds for Relief, in the first Cafe, is Partiality in the Jurors; for though, by the Law, the Trial is to be by a Jury de Vicino, yet if it appears that one of the Parties is so powerful in Interest in the County, and by that Means the other is in Danger of not having equal Justice done him, the Court will order the Trial in an indifferent County. *Vern.* 439, 167. Grounds for a new Trial are, new Evidence discovered, which could not possibly be made Use of in the first; Perjury in the Witnesses; Partiality in the Jurors, &c. all which must be made out to the Satisfaction of the Court. *Vid.* 1 *Cham.* *Ca.* 65.

2. But where an Action was brought against an Administrator, who pleaded *Plene administravit,* and the Trial was brought down by *Prociso;* and at the Trial, the Defendant being put to prove a Sum of 50l. paid before the Plaintiff's Original, which not being provided to do, a Verdict was against him; yet after finding the Note, whereby his Witnesses was enabled to swear that Matter on a Bill brought in Chancery, a new Trial was granted. *Hill.* 28 *Car.* 21, between *Hennell* and *Kelland.*

3. So where a Bill was exhibited for a new Trial, suggesting the Plaintiff's Mark to the Bond was forged by one *Webb,* and on that Surprize the Defendant had recovered against him at Law; all the pretended Witnesses to the Bond being dead, and a new Trial was granted. *Mieb.* 1691, between *Goddrington* and *Webb,* 2 *Vern.* 2401.
4. The Plaintiff's Wife had a Bond of 100l. entred into, to her, by her Uncle, as a free Gift (as she pretended) to be paid after his Death; and this Bill was brought to discover the Obligor's Assets, and to have a Satisfaction out of the real and equitable Assets; the Defendant inflished the Bond was forged, and therefore ought to have no Countenance or Assistance of a Court of Equity; and there were considerable Proofs of its being so, so it went to Law to try factum vel non, and found for the Bond; and then the Plaintiff came back to the Court, and had a Decree for a Satisfaction out of the Assets; for it was said, that the Validity of the Bond having been so solemnly determined at Law, where it was only triable, the Plaintiff ought to have the common Justice and Assistance of this Court; the Defendant being dissatisfied with this Decree, petitioned for a Rehearing; and the Cause coming to be reheard, the former Decree was affirmed; the Defendant pressed much for another Trial, but that was denied; for it was said, if it were granted, and a Verdict against the Bond, the Plaintiff might, with as much Reason, ask another Trial, and so Matters would be made more unreasonable to grant a new Trial in this Case, because several of the Plaintiff's Witneces, who gave Evidence at the former Trial, were since dead; but the Defendant being still more dissatisfied, appealed to the House of Lords, who granted a new Trial, and it was found against the Bond. Hill. 1700. between Wharton and Tilley, 2 Vern. 378, 419. S. C.

5. An Issue was directed to be tried touching the Custom of the Manor of ——— which was found against the Plaintiff; and the Cause being heard on the Equity referred, it being alleged to be a Cause of Value, and concerning all the Copyholds in the Manor, a new Trial was directed upon Payment of Costs. Trin. 1688. between Edwin and Thomas, 2 Vern. 75. 1 Vern. 489. S. C. 1 Vern. 298. where it is said, that upon one Trial it was not proper to make a Decree to bind the Inheritance.

6. But where the Plaintiff, being a Purchaser, came into Equity for Writings, and a Partition of Lands; the Defendant inflished there was an Intail, and the Plaintiff's Purchase not good; the Court, on the first Hearing, gave the Plaintiff a Year's Time to try his Title; an Ejaculate was brought, and a Copy of the Deed of Intail was produced, but the Original loft, and not proved to be executed; Verdict against the Intail; the Cause being set down on the Equity referred, the Defendant inflished, he ought not to be bound by one Trial in a Matter of Right of Inheritance, but the Court refused him any Relief, being only a Decree for a Partition; but the Reporter adds a Quere tamen. Trin. 1691. between Bliman and Brown, 2 Vern. 232.

7. A Factor buys Chese for his Principal, and then breaks; and an Action is brought against the Principal, and a Recovery at Law; the Plaintiff here, endeavoured in the Court of Law, to have got a new Trial, but was denied; then he brought his Bill, and suggested for Equity, that before the Chefe bought, he had countermanded the Authority of the Factor, and that the Defendant had Notice of it; and that since the Trial, the Plaintiff found that the Principal Witnefs, on whose Testimony the Recovery was had, was a Partner with the insolvent Factor, (but that was not proved); another Suggestion was, that there could not be an indifferent Trial in Suffolk, for that almost all the Freeholders there were concerned in Interest, and
and had declared they would never find against their Countrymen; but the Court refused to grant a new Trial. Raff. 1792, between Toosey and Young, 2 Vern. 427.

C A P. LIII.

Trust and Trustees.

(A) When a Trust shall be said to be raised.

(B) Of resulting Trusts, or Trusts by Implication.

(C) What shall be a Trust, and not an Use executed by the Statute.

(D) What Act of the Trustees shall defeat the Trust, or be a Breach of Trust in him.

(E) What Act of the Trustees jointly with Cestui Que Trust, or by Cestui Que Trust only, shall defeat the Trust, or destroy contingent Remainders.

(F) When a Trust is to be executed, what Estate or Interest is to be conveyed, and to whom.

(G) Trustees, how to Account, and what Allowances to have.

(H) How far Trustees are answerable for each other.

(A) When a Trust shall be said to be raised.

If a Man devises 1500 l. to A. and B. for such Uses as the Tettator had declared to them, and by them not to be disclosed, and he discloses the Trust to A. who by Letter discloses it to B. this shall be a Trust, and the Letter is a good Declaration thereof, though either, or both the Trustees be dead. Trin. 1689. between Crooke and Brook. 2 Vern. 106.

When a Trust is well raised for Payment of Debts, edd. Devices for Payment of Debts, Title Dovers; Resulting Trusts for the Benefit of an Heir, Title Heir; where Executors shall be Trustees for the next of Kin, Title Executors and Administrators.

2. But
2. But if a Man devises 40 l. to be paid to his Cousin J. S. and by him to be disposed of in such Manner as the Testator should, by a private Note, acquaint him with, and dies, without having made any such Appointment; this shall be a good Bequest to J. S. and shall not go to the Executors, from whom it was intended to have been given away. 1 Chan. Ca. 198.

3. If an Impropiator devises to one that served the Cure, and to all that should serve the Cure after him, all the Tithes and other Profits, &c. tho' the Curate is incapable of Taking by this Devise in such Manner, for Want of being incorporeal, and having Succession, yet the Heir of the Devisee shall be feited in Trust, for the Cure for the Time being. 2 Vent. 349. decreed by Finch Lord Chancellor.

4. A lent B. 100 l. and in the Note which was given for it, Mention was made, that it should be disposed of as A. should direct; on a Bill exhibited for it, the Court declared it was a Deposita or Trust, and decreed Payment of it, tho' it was barred by the Statute of Limitations. 2 Vent. 345.

5. If A. in Consideration of 80 l. conveys an Estate absolutely to B. and afterwards A. brings a Bill to redeem, and B. by Answer insists, that the Conveyance was absolute, but confesses, that after the 80 l. paid, with Interest, it was to be in Trust for the Wife and Children of A. and A. replies to the Answer; though there be no other Proof of the Trust, yet it will be decreed for the Wife and Children. Palf. 1693. between Hampton and Spencer, 2 Vern. 288-9.

6. So if J. S. makes his Will, and his Wife Executrix, and the Son afterwards prevails on his Mother (by telling her that the Executorship would be troublesome to her, &c.) to get J. S. to make a new Will, and Name him Executor therein, he promising to be a Trustee for the Mother, which is done accordingly, and in that Will there is but a small Legacy given the Wife; this will be decreed a Trust for the Wife on the Point of Fraud, notwithstanding the Statute of Frauds and Perjuries. Hill. 1684. between Thyn and Thyn., 1 Vern. 296.

(B) Of resulting Trusts, or Trusts by Implication.

1. If a Man purchases Lands in another's Name, and pays the Money, it will be a Trust for him that payed the Money, tho' there be no Deed made, declaring the Trust thereof; for the Statute of Frauds and Perjuries extends not to Trusts raised by Operation of Law. 2 Vent. 361. 1 Vern. 366. S. P. admitted; but there said, that the Proof must be very clear, that he paid the Purchase-money.

2. If there are three Lessors of a Church-Leafe, and one of them surrenders the old Leafe, and takes a new Leafe in his own Name, it shall be a Trust for all. Mich. 1684. between Palmer and Young, 1 Vern. 276. per Curiam.

3. A.
3. A. and B. agreed together to take a Lease of a Colliery for less than three Years, for which they contracted at a certain Rent; but by the Agreement the Lease was taken in A.'s Name only; tho' at the Time of the Executing thereof, the Lessee insisted, that B. should be a joint Lessee with A. and should receive a Moiety of the Profits, and be answerable for a Moiety of the Rent, and refused to let it on any other Terms, and accordingly demanded and received a Moiety of the Rent from B. on a Bill brought by B. A. pleaded the Statute of Frauds and Perjuries, and that there was no Declaration of a Trust in Writing; B. insisted that it was good, being a Lease for less than three Years; or if his Title was not good on that Account, yet it was good as a refuting Trust; as to the first, the Court held, that tho' a Lease for three Years may be good by Parol, yet when such a Lease is made in Writing, the Trust of that Lease cannot be declared by Parol; and as to the second, ordered the Plea to stand for an Answer; (the Judge, who sat in my Lord Chancellor's Absence, being in Doubt about it, tho' he inclined to over-rule the Plea). Mich. 1683: between Riddle and Emerson, 1 Vern. 108.

4. A.'s Father had executed a Grant of the next Avoidance of a Church to B. the Defendant's Father, who was a Clergyman, and a Perfon much intruited and employed by him; and the Grantee knew nothing of the Making of this Grant; and being examined in a Cause, had deposed, that he did not purchase it; and it was held, that this was a refuting Trust to the Grantor, there being no other Trust declared. Hill. 1697: between the Duke of Norfolk and Brown.

5. But if the Mortgagee assigns over his Mortgage to J. S. and declares a Trust thereof by Parol for A. and B. there being in this Cause an express Trust declared, though by Parol only, it shall prevent a refuting Trust to the Assignor; for the Statute of Frauds, which saves refuting Trusts, extends only to such as were refuting Trusts before the Statute; and a bare Declaration by Parol before the Act would prevent any refuting Trust. Trin. 1693: between Lady Bellasis and Compton, 2 Vern. 294. but no Deed.

6. If a Father purchases Lands in the Name of his eldest Son, this shall be an Advancement for the Son, and not a Trust for the Father, though the Father has been in Possession of it, and has received the Rents and Profits thereof. Hill. 28 Car. 2. between Lord Gray and Lady Gray; 1 Chan. Ca. 296. 1 Chan. Ca. 27. S. P. 2 Chan. Ca. 231. & P. and there said to be the conflant Rule.

7. So where the Lord of a West-Country Manor (his Tenants refusing to renew) made a Lease to his Daughter for ninety-nine Years, and afterwards said the Estate to J. S. who had Notice of the Lease, and took a collateral Security, that the Daughter should release within four Years after the attained his Age of twenty-one Years; and though it was intiul, that this was a Trust for the Father, and that it was the usual Method; that Lords of West-Country Manors took, when the Tenant in Possession refused to renew; yet my Lord Chancellor held it no Trust for the Father, but an Advancement for his Child, and that the Purchaser having purchased with Notice of it, and taken a collateral Security, he must make the [best of his Security]. Trin. 1687: between Jennings and Selleck, 1 Vern. 467. decreed.
8. So if a Father purchaseth a Copyhold Tenement in the Name of his eldest Son, an Infant of about eleven Years old, and lays out 400l. in Improvements, pays the Purchase-money, and all the Fines, and enjoys it during his Life (but having surrendered it to the Use of his Will) devises it to his Wife for Life, and after to his younger Children, who were otherwise unprovided for; and the eldest Son recovers in Ejectment; the Wife and Children cannot be relieved against it, for the Purchase shall be considered as an Advancement for the Son, and not a Trust for the Father, tho' he enjoyed it during his Life; for the Son was but an Infant at the Time of the Purchase. 

Pach. 1687. between Mumma and Mumma, 2 Vern. 19. 2 Vern. 28. S. P. decreed.

9. A Man bought Copyhold Lands of the Nature of Borough Englishe, in the Name of his eldest Son, but there was no Declaration of Trust in Writing; but the Plaintiff would have had it a Trust for the Father, who, as well as the eldest Son, were both dead; it was agreed the Father paid the Purchase-money, and many Witnesses were examined on both Sides, and Acts of Ownership, as Receipts of Rents, Repairs, &c. proved in both Father and Son; so that the Proofs, as to that Matter, seemed to be pretty equal; but there being no Declaration in Writing, that it was a Trust for the Father, the Court decreed it an Advancement for the Son; which was affirmed in the House of Lords. 

Trin. 1701. between Shakes and Shakes.

10. So if a Father purchaseth Lands in his eldest Son's Name, and the Son is put into Possession, who afterwards falls sick, and in his Sickness the Father gets him to execute a Deed, declaring his Name was made use of only in Trust for him; and the Son recovers, and continues in Possession and marries; after his Death his Wife shall be endowed, notwithstanding this Declaration of Trust; and tho' the Father had got a Conveyance of the legal Estate from the younger Son; for this is a secret and fraudulent Deed of Trust to deceive Creditors and Purchasers. 

Pach. 1702. between Bateman and Bateman, 2 Vern. 436.

11. If the Grandfather takes Bonds in the Name of his Grandchildren, the Father being dead, this shall be an Advancement for the Grandchildren, and not a Trust for the Grandfather; for the Father being dead, the Children are under the immediate Care of the Grandfather. 

Pach. 32 Car. 2. between Ebrand and Dancer, 2 Chan. Ca. 26.

(C) What shall be a Trust, and not an Use executed by the Statute.

1. If Lands are devised to Trustees, and their Heirs, in Trust for a Feme Covert, and that the Trustees shall from Time to Time pay and dispose of the Rents and Profits to the said Feme Covert, or to such Persons as she, whether Sole or Covert, shall appoint, and that her Husband shall have no Benefit thereof; and as to the Inheritance, in Trust to such Persons as she by Will, or other Writing under her Hand, should appoint; and for Want of such Appointment to her and her Heirs, this shall be a Trust, and not an Use
Ufe executed by the (a) Statute. Mich. 1806. between Nervil and (a) By the
Saunders, 1 Vern. 415.

Provided that the Ufe and Possession shall be always united, by declaring, that where any arc or shall be
sold of any Lands, &c. to the Ufe or Truf of any other, by Reacon of any Bargain or Sale, Feoff-
ment, Fee, Recovery, Contrafl, Agreement, Will, or other wife, by any Means whatever, Cofrei qui
Ufe, or he to whom the Ufe the Lands are feifed in Feem-fimpie, Free-tail, for Life, Years, or otherwise, or
he who hath any Ufe in Reversion, or Remainder, &c. shall be deemed to be in Possession of the Land
to all Intent and Purpohes; and where one is feifed of Lands to the Ufe or Intent, that any her shall
have an yearly Rent out of the fame Lands, Cofrei qui Ufe, or he to whom Ufe the Rent is granted,
shall be deemed in Possession thereof, &c. of the Rent, and of like Estate, as he that had the Ufe.

But notwithstanding this Statute, there are three Ways of creating an Ufe or a Truf, which still re-
 mains as at Common Law, and is a Creature of the Courts of Equity, and subjeft only to their Control
and Direction: 18. Where a Man feifed in Fee raftes a Term for Years, and limits it in Truf for A.

Note. for this the Statute cannot execute, the Tenant not being feifed. Why, Where Lands are limited to
the Ufe of A. in Truf, to permit B. to receive the Rents and Profits, the Statute can only exe-
clute the final Ufe. 14th. Where Lands are limited to Trustees to receive and pay over the Rents and
Profits to such and such Perfons, for here the Lands must remain in them to answer these Purpoeses
and those Points were agreed to. Thm. 1750. between Symon and Turner, in Curiae.

2. But where a Man devised the Rents and Profits of certain Lands to J. B. the Wife of W. B. during her natural Life, to be
paid by his Executors, into her own Hands, without the Intermed-
dling of her Husband, and after her Deceafe he devised them to
others; and it was held by Cokeby and Eyre Judges, that the Lands
themselves belonged to the Wife, against Holt Ch. Juft. who held
strongly, that the Executors were only Trustees for the Wife. Between
South and Allen, 1 Salk. 238.

3. If Lands are devis'd to Trustees, and their Heirs, on Truf to
permit A. to take the Profits for his Life, and after the Trustees to
stand feifed to the Ufe of the Heirs of the Body of A. A. has an E-
state-tail execut'd in him: for this being a plain Truf at Common
Law, what is fo, must be execut'd by the Statute, which mentions
the Word Truf, as well as Ufe. Between Broughton and Langley;
2 Salk. 369. 1 Lat. 323. S. C. and per Holt Ch. Juft. the same
Point conf. in the Cafe of Burchett and Durdant, 2 Vent. 312, is
not Law.

4. But where Lands were devis'd to Trustees; and their Heirs, in
Truf to pay several Legacies and Annuities, and to pay the Surplus
of the Rents and Profits to a married Woman, during her Life, for
her separate Ufe, or as she should direct; and after her Death the
Trustees to stand feifed to the Ufe of the Heirs of her Body, with
Remainders over; and the Question was, whether this Devise to pay
the Surplus of the Rents and Profits to the Wife, was such a Ufe or
Truf as was execut'd by the 27 H. 8. for if it was; then it was
urged, that she being Tenant for Life, the Limitation after to the
Heirs of her Body being coupled with it, gave her an Estate-tail,
according to Shelley's Cafe, 1 Ch. but if it did not, then the eldest Son
was to take as a Purchafe: and it was held by the Court, that she had
only a Truf for Life, and consequently the Heirs of her Body must
take by Purchafe: and the rather in this Cafe, because it was limited to
the Heirs of her Body severally and succesively, as they should be
in Seniority of Age and Priority of Birth, and the Heirs of their re-
spective Bodies infuing: and a Difference was taken between this Cafe
and that of Broughton and Langley, 2 Salk. for there it was to per-
mit A. to receive the Rents and Profits for Life: but here it is a
Truf in the Trustees; to pay over the Rents and Profits to such and
such Perfons; and therefore the Estate must remain in them to an-
swer these Trusts, otherwise she must be the Trustee, contrary to
Trust and Trustees.

the express Words of the Will. Mich. 1728. between Jones and the Lord Say and Seal, decreed and affirmed in the House of Lords.

(D) What Act of the Trustees shall defeat the Trust, or be a Breach of Trust in him.

1. If A. seised in Fee, in Trust for B., for full Consideration, conveys to C. who has Notice of the Trust; and afterwards C. to strengthen his own Estate, levies a Fine to B. the Cestui que Trust is not bound to enter within five Years; for C. having purchased with Notice, notwithstanding any Consideration paid by him, is but (a) a Trustee for B. and so the Estate not being displaced, the Fine cannot bar. 1 Vern. 149. agreed per Curiam.

(a) Trusts are so far regarded and supported in Equity, that regularly no Act of the Trustee shall prejudice the Cestui que Trust; yet though a Purchaser, for valuable Consideration, without Notice, shall in no Case have his Title impeached in Equity; yet the Trustee must, especially in Equity, make good the Trust; and my Lord Hobart is of Opinion, that an Action lies against him at Common Law; but if he purchases, with Notice, then he becomes the Trustee himself, and shall be accountable for every Act of his, as the Trustee was, and if either becomes insolvent, the Cestui que Trust has his Remedy against the other. The Trustee of a Legacy dying before the Legacy is paid, shall not prejudice the Legatee; so if a Trustee of Land die without Heir, though the Lord by Elchest will have the Land at Law, yet it will be subject to the Trust in Equity. Trin. 1704. between Eales and England; so if A. purrs our 100l. at Interest in the Name of B. who after becomes a Feud de Fe., A. may be relieved against the King upon this Trust, in Equity, upon the Statute of 53 H. 8. cap. 39. vid. Hard. 176 466, 595 459. Law 54.

2. So if an Executor, in Trust for an Infant, Residuary Legatee, renews a Lease, Part of the Testator's Perpetual Estate, in his own Name, and first mortgages it, and then assigns the Equity of Redemption to a Trustee, to sell for Payment of his own Debts, and his Trustee sells to one who had Notice of the Infant's Title, the Purchase will be set aside. Mich. 1887. between Walley and Walley, 1 Vern. 484. decreed.

3. If a Trustee sells the Land to a Stranger, who has no Notice of the Trust, and a Fine and Proclamation, and five Years pass, and the Trustee afterwards, for valuable Consideration really paid, purchases the Land again from the Vendee, the Trustee, notwithstanding the Fine, &c. shall stand seised as at first, and as if the Land had never been sold. Mich. 34 Car. 2. between Bovey and Smith, 1 Vern. 60, 61, 144. 2 Chan. Ca. 124. S. C.

(E) What Acts of the Trustee, jointly With Cestui que Trust, oz by Cestui que Trust only, shall defeat the Trust, oz destroy contingent Remainders.

1. If Trustees in a Settlement to support contingent Remainders, (a) But if a Trustee joins with a Cestui que Trust in Suit in any Conveyance, to bar the Intest, this is no Breach of Trust; for it is no more than what he may be compelled to, tho' the Trustee himself might have barred such Intest without his joining; and that not only by Fine or Recovery, but likewise by Fœdimint, Bargain or Sale, Devise or Surrender (if the Intest be of a Copyhold, and there is no particular Custom which requires a Common Recovery); for such Intest is not within the Statute de dani, but remains as at Common Law; and being a Trust is governable only by the Rules of Equity, and not by the Niceties of the Law; and this Theme is to be supported, not only by the latter, but by the far greater Number of Authorities; and in Cases wherein the very Point is at debate, tho' there are Obiter Sayings and Opinions, which have made some Distinctions, and others, which have fairly contradicted it. Vid. 1 Chan. Ca. 49 813. 1 Chan. Rep. 98. 2 Chan. Ca. 79 64. 1 Vern. 13 440. 2 Vern. 153. 2 Vern. 153 583 702.
Trust and Trustees.

2. But where a Settlement was made in Consideration of a Marriage, and 3000 l. Fortune, and for settling the Lands in Question, in the Name and Blood of the Husband; and the Lands were limited to Trustees, in Trust for the intended Husband for 99 Years, if he should so long live, Remainder to Trustees during his Life, to support contingent Remainders; Remainder to the first and other Sons of that Marriage, Remainder to the Heirs of the Body of the Husband, Remainder to the first and other Sons of that Marriage, Remainder to the right Heirs of the Body of the Husband, Remainder to the right Heirs of the Husband; the Marriage took Effect, and the Husband and Wife and Trustees to support, &c. by Fine and other Conveyance settle these Lands on the Husband for ninety-nine Years, if he should so long live; Remainder to Trustees, during his Life, to support contingent Remainders; Remainder to the Wife for her Life, for her Jointure, Remainder to the first and other Sons of that Marriage, Remainder over to severals others, and then the Husband and Wife died without Issue; and the Plaintiff being Heir at Law to the Husband, brought his Bill to set aside this second Conveyance by the Trustees, as being made in Breach of their Trust; and insinced, that they were Trustees, as well for the Support of this Remainder as of the Remainder to the first and other Sons, all being contingent Remainders; and that such Conveyances ought to be set aside, as has been the Practice of this Court, at least the Opinion of the Court these twenty Years past. My Lord Chancellor held it to be so as to the first and other Sons, who came in, and were to be considered as Purchasers under the Marriage-Settlement and Portion, and said it would be dangerous for any Trustees to make the Experiment, for that it was most certainly a Breach of Trust; and if it should ever come in Question, he thought this Court would set aside such a Conveyance, not but that he said the Case might possibly be so circumstanced, as that this Court would not relieve against it; but where Relief is to be given, in such Cases it is only to those who come in and claim as Purchasers, as the first and other Sons, but all the Remainders after to the Heirs of the Body of the Husband, Remainder to his right Heirs, are meerly voluntary, and not to be (b) aided in this Court; and therefore dismissed the Bill. Mich. 1713. between Tipping and Piggott.

3. So if a Settlement on a Marriage-Treaty be made on the Husband for ninety-nine Years, if he live so long, Remainder to Trustees to preserve contingent Remainders; Remainder to the Heirs of the Body of the Husband by the Wife, Remainder to the Heirs of the Husband; and there is Issue two Sons and a Daughter; and the Wife being dead, the Husband and Trustees join with the eldest Son in a Fine or Coverture to J. S. this is a good Bar of the Trust Estate, and the Trustee's joining is no Breach of Trust, for they were Trustees purely for the Tenant in Tail, and to preserve his Estate, and not to stand in Opposition to him for the Sake of those who were to come after him. Mich. 1717. between Ellice and Osborne.
4. J. S. by a Marriage-Settlement was Tenant for ninety-nine Years, if he should so long live, with Remainder to Trustees and their Heirs during his Life, to support contingent Remainders, with Remainder to his first and every other Son successively in Tail Male, Remainder to Trustees for 500 Years, in Trust to raise Portions for Daughters, if there were no Issue Male, or that such Issue Male died without Issue before Twenty-one; J. S. had Issue a Son, and being of Age and about to marry, he and his Father bring a Bill to have the Trustees join in making an Estate, in order to suffer a Common Recovery, that he might be enabled to make a Settlement on his Marriage; and it was urged, that the Trustees were only Trustees for the Son, and ought to execute Estates as he should direct, he having the Inheritance in him; and that the End of the Trust was to hinder the Father from defeating the Son of the Estate; on the other Side it was urged, that these Trustees were not only Trustees for the eldest Son, but were designed as a Guard to the whole Settlement; that the Mother being living, there might be other Children, and for the Trustees to join, would be a Breach of Trust; and if there should be Daughters, they would by this Means be entirely stript of their Portions; and though the Term for raising them was unskilful-
drawn in putting it behind the Estate-tail to the Sons; yet this Court had set it sometimes before those Estates; there being a Daughter, in this Case my Lord Harcourt directed, upon giving Security for the Daughter’s Portion, that the Trustees should join in the Recovery. Trin. 11 Ann. between Fremin and Charleton.

5. By a Marriage-Settlement, Lands were settled on the Husband and Wife for Life, Remainder to Trustees to preserve contingent Remainders; Remainder to their first, and every other Son in Tail Male; and the Husband and Wife being married twelve Years, and having no Issue, and having contracted Debts, they bring a Bill, and pray that they may be enabled to sell Part of the Lands for Payment of the Debts; and the Trustee consented, provided he might be indemnified; and though it was urged, that there were Precedents of like Cases; yet my Lord Chancellor refused to make any such Decree, saying, he had known People married near twenty Years without Issue, and after had Children; but at the Importunity of Coun-
sel, gave them Time to attend him with Precedents. Trin. 1683; be-

tween Davies and Weld, 1 Vern. 181.

6. But where A. having mortgaged his Lands, and also confessed a Judgment, and he afterwards, on a Marriage-Treaty, settled the Lands thus incumbered to the Use of himself for Life, Remainder to Trustees to support contingent Remainders, Remainder to his Wife for Life, Remainder to his first and other Sons in Tail, Remainder to his own right Heirs, and having no Issue, articulated to sell the Lands to J. S. who brought a Bill for a specific Performance of the Agreement, and suggested, that the Trustees refused to join, and that the Mortgagee threatened to enter; and it was decreed, that the Trustees should join and be indemnified, the Estate being of an Equity of Redemption only; and there being no Issue (though the Husband and Wife were married six Years) and the Wife, on her Exam-

ination in Court, confessing freely thereunto. Mich. 1693. between Platt and Sprigg, 2 Vern. 303. But note; those Settlements can rare-
dy be broke through, but by an Act of Parliament.

7. Sir
7. Sir John Trevor, late Master of the Rolls, being seised of the
Estate in Question, which was the antient Estate of the Family, and
of the Value of £351. per An. or thereabouts, on his Marriage with
Jane Puleston, Widow, enters into Articles on the 2d of October,
1669, with the said Jane, and with William Salisbury and Sir Ri-
chard Loyd, as her Trustees, whereby, in Consideration of the in-
tended Marriage, and of the Love and Affection he had and bore
to the said Jane, and the Heirs Males of their two Bodies, he doth
for himself, his Heirs, Executors and Assigns, covenant, pro-
mise and grant, with the said Trustees, their Heirs and Assigns, that
he would, at his own Costs and Charges, before the End of two
Years next after the Date thereof, at the Request of the said Trus-
tees, their Heirs and Assigns, settle, convey and assure to the said
Trustees, and their Heirs, as they or their Heirs, or their Counsel
should direct and appoint the Lands in Question, to the several Lim-
itations and Uses in thefe Presents mentioned and expressed; and also
in the said Settlement and Conveyance, as shall be agreed on by the
said Sir John Trevor, William Salisbury and Sir Richard Loyd, and
to no other Use or Uses whatsoever, viz. To the Use of Sir John
Trevor for Life, without Impediment of Waite, and after his De-
ceafe, to the Use of the said Jane Puleston for her Life, and after her
Decease of the said John Trevor, upon the Body of the said Jane Puleston to be begot-
ten, and the Heirs Males of such Heirs Males issuing; and for De-
fault of such Issue, to the Use of the right Heirs of Sir John Trevor
for ever, with a Covenant from Sir John Trevor, with the Trustees
and their Heirs, that the said Premises shall remain to the said Jane
Puleston, during her natural Life, after the Death of the said Sir
John Trevor, free from all Incumbrances, and a Covenant in the
Words following: And the said Sir John Trevor doth further, for
him and his Heirs, grant and agree to and with the said William Sa-
lisbury and Sir Richard Loyd, their Heirs and Assigns, that in Case
the Uses and Limitations in thefe Presents are not hereafter well and
truly raised, according to the true Intent and Meaning of thefe Pre-
sents, that then the said Sir John Trevor, and his Heirs, shall stand
and be seised of all and singular the said Premises, until such Time
that a further Assurance of the said Premises be made, to such Uses
and Uses, Intents and Purposes, as herein before-mentioned, expressed
and declared; and soon after the Marriage took Effect, and Sir John
had Issue by the said Jane, the Plaintiff, his eldef Son, the Defend-
ants, three younger Sons, and two Daughters; these Articles were
laid by for several Years, and nothing further done upon them; but
in 1692, Sir John Trevor levies a Fine of these Lands; and the two
Trustees being dead, without having ever requested a Settlement, the
Plaintiff, some Time after this Fine, marries against his Father’s
Confent, and by several other Acts of Weakness and Disobedience,
became so obnoxious to his Father, that 29 Septemb. 1692. Sir John
Trevor makes a Deed, wherein he recites these Articles, that he had
thereby agreed to settle and convey these Lands to the Use of himself
for Life, Remainder to the said Dame Jane his Wife, for Life, Re-
mainder to the Heirs Males of his Body, on the Body of the said
Dame Jane to be begotten; and reciting that his Son Edward (the
Plaintiff) was very weak and disordered in his Understanding, and
that all Methods to improve him had been ineffectual; and also reci-
ting,
ting, that he had married with a strange Woman, and thereby brought disgrace on his Family, to the Ruin thereof; and that he was of a furious Spirit towards his Brothers and Sisters; therefore, and for several other Causes and Considerations, Sir John declares, that it was the Intent and Meaning of the said Parties, at the Time of Levyng the said Fine, that the same should be and inure to the Ufe of himself for Life, without Impeachment of Wafe, then to the Ufe of the said Dame Jane for Life, Remainder to the Defendant, John Trevor, his second Son, and the Heirs Males of his Body, with like Remainders to Arthur and Tudor Trevor, his two youngest Sons, with a Remainder to his own right Heirs; and a Proviso, that if any of his three younger Sons should marry without his Consent, that then he should have Power to demeise or Leave the said Premises for the Term of 500 Years, reserving Rent, or no Rent, as he thought fit, to any Person or Persons he should think fit; and the 16th of October next following, he makes a like Settlement of other Lands, of the Value of 630 l. per Annum and upwards, and the 20th of May, 1717, dies Intestate, leaving a Personal Estate to the Value of about 40,000 l. and also a Real Estate in Ireland, of the yearly Value of 750 l. or thereabouts, being let out on Leases for Lives, and worth to be sold, about 24,000 l. and also some new purchased Lands in England, of the Value of 300 l. per Annum or thereabouts, and by his Death the now purchased Lands, and the Estate in Ireland, descended to the Plaintiff, his eldest Son, who also became intituled to his Share of the Personal Estate, which amounted to upwards of 9000 l. After his Death John Trevor entred on the Lands settled on him, as aforesaid, for which he being provided for beyond his Share of the Personal Estate, could have no Part thereof, by Reason of the Statute of Distributions; and this considerably augmented the Shares of Edward the eldest Son, and the other Brothers and Sisters; notwithstanding which, the Plaintiff, the eldest Son, brought his Bill to have the Trust performed, and a specific Execution of these Articles, and that the Lands comprised in the Articles may be conveyed to him, and the Heirs Males of his Body, according to the Purport of the said Articles, and to have a Discovery of the Deeds and Writings, and an Account of the Rents and Profits from the Time of his Father's Death. It appeared that these Articles had been thrown by for several Years as useles, and were, after Sir John Trevor's Death, found at the Bottom of an old Trunk; but the Plaintiff having gotten the same into his Custody, brought this Bill for a specific Performance thereof.

For the Defendants it was insifted, that though by the first Part of the Articles they seemed to be only executory, yet by the last Part, by the Covenant to stand sealed, that they were actually and immediately executed; that he thereby covenanted to stand sealed to the before-mentioned Uses, till a Settlement was made thereof according; that no such Settlement having ever been made, the Uses continued to be executed by Virtue of that Covenant, that by these Uses he was plainly Tenant in Tail, then by the Fine had bound his Issue, and made himself Master of this Estate, which he might settle and dispoze of as he thought fit; that he was Tenant in Tail, appeared from this, that if a Settlement had been made pursuant to the very Words of the Articles, he had an Estate-tail in himself; that wherever the Ancestor takes an Estate for Life, and afterwards in the
the same Deed, a Limitation is made to the Heirs Males or Heirs Females, of his Body to be begotten; that in such Case the Heirs Males, or his Heirs Females take by Descent, and not by Purchase; that this is a known and standing Rule of Law which has never yet been shaken; that the Limitation after to the Heirs Males of such Heirs Males was Tautology, and of no Use; that it was saying no more than what the Law would have said without those Words; and therefore, if there were two such Limitations one after another, they would not impeach or control the first Limitation; and this appears clearly by Shelley's Cafe, 1 Co. and in a Cafe of * Legat and Shewell in this Court, where the Judges of C. B. by Certificate under their Hands, gave their Opinions accordingly; that the Settlement being actually executed, the Law was open, and the Plaintiff had no Occasion to come into this Court for a specifick Execution of what was already executed; that this was plain from the Covenant, that the Wife should enjoy during her Life, free from Incumbrances; and this Covenant does not go to the whole Estate agreed to be settled, but only to the Estate for Life of the Wife; that if the Issue were intended to take as Purchasers, this Covenant would have been extended to the whole Estate, as the Issue under this Marriage Contract were Purchasers of it, as well as the Wife; but the Heirs Males of the Body of Sir John Trevor coming in only by Virtue of the Intail, it would have been vain and idle to have carried that Covenant beyond the Estate for Life of the Wife, because it would only be a Covenant for himself, that the Clause without Impeachment of Waft did not necessarily argue an Estate for Life in Sir John Trevor; that it was for the sake of the intervening Jointure to his Wife, which would have obstructed that Power without express Words; and he might have been enjoined from Waft in this Court, for the Preservation of her Jointure, if he had not referred to himself an express Liberty of committing Waft; that this Court was not bound in all Cases to carry Articles executory (admitting this were so) into Execution; that if the Nature and Circumstances of the Case were such as to make it inequitable and unconscientious, this Court would never decree a specifick Execution of Articles; that in this Case it was unreasonbale to ask Assistance of this Court, when so much greater Compensation was to come to the Plaintiff; that by the Defect of so great a Real Estate, and the Accesion of so great a Share of the Personal Estate, the Plaintiff was abundantly recompensed for the Value of the Estate in Question; that it was in Sir John Trevor's Power to have prevented him of either, and his not doing it was equivalent to an express Davit thereof to him, and therefore ought to be looked on as a Satisfaction; that in the Cafe of Blandy Wigmore, in this Court, where the Husband, before Marriage, gave a Bond to leave his Wife worth 500 l. if she survived him; and he afterwards died Intestate; and her distributive Share came to above 500 l. this was adjudged a Satisfaction of the Bond; that Sir John Trevor plainly took it, he had a Power over this Estate, that his Judgment was so well known, that he never would have attempted it, if he had not thought it clear; that the Disobedience and Behaviour of his Son, the Plaintiff, were such, as put him under a Necessity of considering the Nature and Extent of his Power over this Estate; and since he who was so good a Judge in Cases of this Nature, had disposed of the Estate, this Court would
would presume he had Power so to do, and that the Motives of his Proceeding herein were just and warrantable.

But notwithstanding these Reasons it was decreed for the Plaintiff; my Lord Chancellor said, this Case ought to be considered now as if this Bill had been brought within two Years after the Making of the Articles; that if a Bill had been then brought, there could have been no Doubt but that a Settlement must have been decreed pursuant to the Intention of the Articles; that upon Articles the Case was stronger than on a Will, that Articles were only Minutes or Heads of the Agreement of the Parties, and ought to be so modelled when they come to be carried into Execution, as to make them effectual; that the Intention of the Parties was only to give Sir John Trevor an Estate for Life, that if it were otherwise, it would have been vain and ineffectual; and it would have been in his Power, as soon as the Articles were made, to have destroyed them; that then the Consideration of Love and Affection which he had to Jane, and the Heirs Males of their two Bodies would have run thus, that he did, in Consideration thereof, settle an Estate on himself, which he might give away from his Heirs Male whenever he thought fit; that this was much stronger, by Reason of the Limitation, and to the Heirs Males of such Heirs Males ensuing; that the Conruction contended for by the Defendant, would make these Words perfectly useless and idle; that he did indeed admit it to be so reported in Shelley's Case; 1 Co. but he said, 16, That was not at all material to the Principal Point in Question there. 34ly, That in Anderson's Report of that Case, nothing like it was taken Notice of, and he said, that few or none of the Points reported by my Lord Coke, were the Resolutions of the Court. 34ly, That the Reason of that Case was, for that if it had vested in the eldest Son by Purchase, and that Heirs Males of the Body should have only been a Description of a Person; that then, if he had died without Issue, there had been (as was then held) an End of the Estate-tail, and none of the younger Sons could have succeeded to it; but this has been held otherwise since that Time, and a Judgment in Point, in Carter's Reports, (as he remembred) that the Estate-tail should go to all the Sons successively, notwithstanding its vesting in the eldest Son by Purchase; that he did not know how the Case of Legatt and Sherwell was; but if it were as cited, he thought it not Law; that the Intention of the Articles was plain, to make the Issue of that Marriage Purchasers; that they were wholly relative to a subsequent Settlement to be made, that the Agreement to settle to the Uses therein, and also in the said Settlement to be agreed upon, could only be intended such other Uses as were necessary to make the Settlement effectual; and that it could never be intended other Uses inconsistent with, and repugnant to those Articles; that if that had been their Intent, it had been in Effect but an Agreement with the Trustees to settle those Lands as he thought fit; that the other Uses to be agreed upon, must not be such as would overthrow the present Uses, but such as would establish and support them; that this could only be by a Limitation to Trustees to support the contingent Remainders; that this Limitation to the Heirs Male of his Body was in Effect but a Limitation to his first and other Sons; and if the Articles had been so penned, would not this Court have decreed a Limitation to Trustees to preserve them; or if by Fine, or otherwise, they
they had been destroyed before they took Place; would not this Court have set them up again; that the Limitation to the Heirs Males of his Body, upon these Articles, was but a contingent Remainder, and yet such as within the Intent of the Parties ought to be preferred; that the Covenant to stand seised was until such Time as the Uses therein were well and truly raised, according to the true Intent and Meaning of the Articles; that if a Settlement had been made defective in any Particular, that would not have been final or conclusive; that a second Settlement must have been made till the Uses therein were well and truly raised; that this Covenant for ever subsisted till such Settlement were made; that he did not believe that it was Sir John Trevor's Opinion, that he was absolute Master of this Estate; and might dispose of it as he thought fit; that if that had been his Opinion, he would have thought it sufficient to have levied a Fine thereof, without transmuting down his Son to Posterity with such a Blemish; that the Reason of that could only be to discourage his Son from attempting to break into the Settlements he had made of this Estate; that if it were otherwise, he thought it no Imputation on Sir John Trevor's Judgment; that the Provocations he might be under from his Son's Disobedience and Misbehaviour might so far bias his Judgment, as to incline him to think he had Power over this Estate, that he would not look on these Settlements in 1699, as made by Sir John Trevor, Master of the Rolls, but as made by a Father, provoked by the undutiful Behaviour of an eldest Son; that he hoped never to see the Time when this Court should so far have Power as to judge what Behaviour of a Son should amount to a Forfeiture of his Estate, and therefore thought, if the Settlement had been made, no Misbehaviour of the Son could amount to a Forfeiture of it; that as to the Estate defended on the eldest Son, this came to him by Accident, it was not given to him by his Father in Satisfaction of the Articles; and there may happen a Case where no Estate at all may defend to an eldest Son; and if a Father, upon such Articles, should have Power to defeat an eldest Son, and leave him no other Provision, it would be of dangerous Consequence to establish a Precedent of such a Power; that though the eldest Son in this Case happened to be well provided for, so were the younger Sons too; and as they were sufficiently provided for, there was the least Reason to take away this from the Eldest; that this Estate being specifically agreed to be settled, it was a Trust for the eldest Son, which he came here to have an Execution of, and not to have a Remuneration or Satisfaction for it; that this Trust passed with the Lands into whose Hands forever they came, and could not be defeated by any Act of the Father, or the Trustees; and therefore decreed a Conveyance to the Plaintiff, and the Heirs Males of his Body; and an Account of the Profits from the Father's Death, and the Deeds and Writings to be delivered up. Trin. 1719, between Trevor and Trevor. This Decree was affirmed in the House of Lords.

(F) Where
(F) When a Trust is to be executed, What Estate or Interest is to be conveyed, and to Whom.

1. A Husband, as Administrator to his Wife, obtained a Decree against the Trustees to raise her Portion; but he being a younger Brother, having made no Settlement on her, and having a Son by her, the Money was decreed to be raised, and put out for his Benefit for Life, then to the Son for Life, and if he leave Issue, then for such Issue; but if he dies without Issue, and the Father survive, he to have it. Pateb. 1700. between Wytham and Cawthorn.

2. Upon a Marriage, Articles were entred into, whereby it was agreed, that the Wife's Portion should be laid out in the Purchasing of Lands, which should be settled on the Husband and Wife for their Lives, and the Life of the longer Liver of them, and after to the Heirs of the Body of the Wife, by the Husband to be begotten; yet the Master of the Rolls decreed the Settlement to be to the first and other Sons, &c. so as the Husband and Wife might not have Power to bar the Issue. Mich. 1698. between Jones and Laughton.

3. So where an Estate was limited to A. and B. in Trust for C. and the Heirs of his Body; Proviso, that if he die without Issue, then in Trust for D. for Life, with Remainders over; and C. brought his Bill to have the Trustees make a Conveyance of the legal Estate to him, and that it might be to him in Fee, to prevent his suffering a Recovery; the Trustees, by Anwser, submitted to the Court, but the other Remainder-men, who were Defendants, opposed the executing any legal Estate to C. because he would then suffer a Recovery, and defeat the Intent of the Donor, which was, that it should be preferred for them, in Case C. had no Issue; they alleged, that C. had married improvidently and was extravagant, and would spend the Estate, and cited the Case at the End of Twine's Case, 3 Co. where, if an Improvident Man makes a voluntary Settlement, to put it out of his Power to spend his Estate, this Settlement shall be supported, even at Law; and therefore a Court of Equity will never help an extravagant Man to defray such a Settlement as this; and that in the Case of Sir Fra. Gerrard, the Lord Chancellor Jefferyes had refused to decree the Trustees for Sir Francis, and the Heirs of his Body, with a Remainder to a Charity, to convey the legal Estate, so as to enable him to suffer a Recovery; on the other Side it was said, there was no Reason my Trustee should hold my Estate, whether I will, or no; and that if a Court of Equity did not decree a Conveyance, in such Case, it would be establishing a Perpetuity; and that the constant Course of this Court is, that when Money is given to be laid out in a Purchase, to be settled in Tail, with Remainders over, the Court will decree the Money to him that was to be Tenant in Tail, if he desire it, to prevent Circuit; but the Master of the Rolls decreed the Trustees to execute a Conveyance to C. in Tail, but would not decree the Conveyance to be in Fee, though pressed to it; and he said there may be many Reasons why a Court of Equity would not decree a Conveyance at all, in such a Case.
Trust and Trustees.

4. But where on a Treaty of Marriage; Articles were entred into for the Wife for Life, Remainder to Trustees to preserve contingent Remainders, with Remainder to the Heirs of the Body of the Wife by the Husband to be begotten, with other Remainders over; and the Marriage took Effect; and a Settlement was made to the Husband and Wife for their Lives successively, Remainder to Trustees to preserve contingent Remainders, Remainder to the first Son of that Marriage, and the Heirs of the Body of such first Son; and so to the Second, and other Sons of that Marriage, and the Heirs of the Body of the Wife, by the Husband to be begotten; they had Issue one Daughter only; then the Husband died, and the Wife married a second Husband, and they both joined in a Fine and Recovery, by which the Daughter being barred of her Inheritance, brought her Bill to carry the Articles into Execution; for that by the Settlement Care was taken of the Daughters, pursuant to the Intention of the Articles; but no Care was taken of the Daughters, in regard the Limitation to the Heirs of the Body of the Mother by the first Husband, made her Tenant in Tail general, and consequently at Liberty to defeat her Daughters, as she has now done by this Fine and Recovery, which was contrary to the Intention of the Articles, which were to make an effectual Provision for the Issue of that Marriage; but my Lord Chancellor said, if no Settlement had been made, and you had come hither to have enforced the Making of one pursuant to the Articles; 'tis true, this Court would have taken Care that the Daughter should like wise have been secured of the Provision intended them by the Articles, by limiting a Remainder to the Daughters, and the Heirs of their Bodies to be begotten, on Failure of Sons; but here a Settlement being actually made, and accepted by the Parties; and in the Provision for the Sons, stricter than the Articles themselves imported; and for the next Remainder, it being limited in the very Terms of the Articles, he could now make no Alteration in it; and though a Difference was offered, where the Settlement was made before Marriage, and where after; that where it was before, this Court would not interpose, as they might, where it was after Marriage; yet the Court had no regard to this Distinction, but dismiss'd the Bill. Pash. 1715. between Burton and Hastings.

5. But where on a Treaty of Marriage between the Defendant and the Plaintiff Joanna; the Defendant, entred into a Bond to the Plaintiff Joseph, Father of the Plaintiff Joanna, with Condition, to surrender certain Copyhold Lands to the Use of himself for Life, Remainder
Trust and Trustees.

remainder to the Plaintiff Joanna, for Life, Remainder to the Heirs of their two Bodies to be begotten, with Remainder to the Heirs of the Husband; the Marriage took Effect; and a Bill was brought against the Husband to compel a Surrender pursuant to the Intent of this Bond; and the Husband making Default, at the Hearing was decreed to surrender to the Use of himself for Life, Remainder to the Use of his Wife for Life, Remainder to the Use of their first and other Sons in Tail general successively, with a Remainder to the Daughters of their two Bodies to be begotten in Tail general; and that in the mean Time, till such Surrender was made, the Court declared that the Copyhold Land should be held and enjoyed according to thefe Uses. Psal. 1716. between Nandick and Wilkes.

6. W. B. devised 300l. to her Daughter M. to be laid out by her Executrix in Lands, and settled to the only Use of her Daughter M. and her Children; and if she died without Issue, the Lands to be equally divided between her Brothers and Sisters then Living; the Plaintiff married M. the Legatee, and had Issue by her, but she and her Child being both dead, and the Money not laid out in Land, the Bill was, that the Plaintiff might either have the Money laid out in Lands, and settled on him for Life, as being Tenant by Courtesy, or in Lieu of the Profits of the Lands might have the Interest of the Money during his Life; and it was held by the Court, that if it had been an immediate Devise of Land, M. the Daughter would have been, by the Words in the Will, Tenant in Tail, and consequently the Husband would have been Tenant by the Courtesy; and in Case of a voluntary Devise, the Court must take it as they found it; although upon the like Words in Marriage-Articles, it might be otherwise, where it appeared the Estate was intended to be preferred for the Benefit of the Issue; and therefore decreed the Money to be considered as Lands, and the Plaintiff to have the Interest or Proceed thereof for his Life, as Tenant by the Courtesy. Hill. 1705. between Sweetapple and Bindon, 2 Vern. 536.

7. A. by Will bequeathed the Surplus of his Personal Estate to be laid out in a Purchase of Lands to be settled on B. his Nephew, for Life, and after his Death to the Heirs Males of the Body of the said Nephew, and to the Heirs Males of the Body of every such Heir Male, severally and successively one after another, as they shall be in Seniority of Age and Priority of Birth; every elder and the Heirs Males of his Body to be preferred before every younger; and for Want of such Issue, to his Brother C. the Plaintiff, for his Life, &c. in the same Manner, B. the Nephew, brought a Bill to have an Execution of the Trust (but C. the Plaintiff was no Party to the Suit) and had a Decree, that an Account should be taken of the Affairs, that the Estate should be laid out in Land, and that to be settled by the Approbation of a Master, according to the Direction of the Will; after the Account was taken, B. petitioned the Court, suggesting, that if the Money should be laid out in a Purchase, he was to be made Tenant in Tail of the Land by the said Will, and might immediately have it; and therefore prayed, that no Purchase might be made, and obtained an Order to that Purpose, and had the greatest Part of the Money paid him; but before the Rent was paid, died without Issue, having first made his Will, and subjected all his Real and Personal Estate to the Payment of his Debts; and this Bill was
brought by C. to have an Account of the Estate, and that it might be laid out in a Purchase for his Benefit; for that B. was not, by his Uncle's Will, to have been Tenant in Tail, as he alleged, and that the former Proceedings were collusive, and he no Party to them, and so not bound by them. It was said, it is plain, from the Frame of the Will, that the Tello's Meaning was, that his Nephew B. should be only Tenant for Life, and not have Power to bar his Issue; and then a Court of Equity will decree it to be settled according to the Intent of the Tello; and the Case of Leonard and Earl of Saffex was cited, and the common Case of Marriage-Articles, where, though they were so worded, as that if a Settlement were made in the precife Words of them, the Husband would be Tenant in Tail; yet this Court has decreed it to be settled on the Husband for Life only, and then may upon the first and other Sons; or the other Side it was said, if the latter Words in this Will signify any Thing, It is no more than what is included in the first, & expresso currem que tacit infant nihil operatur; that this therefore is an equitable Estate, and may be barred by Deed, &c. Lord Keeper: There having been a Decree already in this Case, it must depend on what it is at Law; and I am inclined to think the Judges there may take it to be an Estate-tail; if it were res integra, I think the Court had better in such Cases decree the Trust to be executed according to the (a) Letter, and let the other take what legal Advantages he can; but that has gone too far to be disturbed now the Thing is done, and not open to me; and then may be a Parity of Reaon between a contributive Tenancy in Tail, and an express one; and Parity of Reaon to have an equitable Tail bound by Decree (not by Deed) as a Real one by Recovery, where Settlements are agreed to be made upon valuable Considerations, this Court will aid in artificial Words; and make an artificial Settlement; but I never knew it done for a bare Voluntet; the Doubt in Shelley's Case, I C. arose about the Word Heirs; but, as I said before, this must depend on what it is at Law; therefore let a Case be made, and I will desire the Opinion of the Judges of the C. B. upon it. Pach. 1706; between Legatt and Shawell, 2 Vern. 551. S. C. Note; Afterwards, all the Judges certifie their Opinion, that B. the Nephew, had but an Estate for Life.

(a) It is now consistently held in Chancery, that if Lands are vested in Trustees to the Use of one, and the Heirs of his Body, with Remainder over, that the Trustees are not to convey a Trust, but an Estate-tail, though he will have Power to bar the Intestate.

8. Henry Collingwood, the Plaintiff's Brother, having married Catharine Moreton, the only Daughter and Heir at Law of George Moreton, in order to pay off several Debts which were charged on his own Estate, and likewise several Debts which were charged on his Wife's Estate, both by her Father and her two Brothers, who were dead, and also by herself, by Lease and Release and Fine, in 1709. Henry and his Wife conveyed the Wife's Estate to Trustees and their Heirs, in Trust to sell and dispose thereof, and of every or any Part thereof, for Paymcht of the said Debts, with Interest and Charges; and if any Money should remain in the Trustee's Hands, they were to pay it to the said Henry and Catharine his Wife, as the said Henry and Catharine should by any Writing duly executed, before
fore three or more Witnesses, direct or appoint; the Trustees sold all the Lands, except two Farms, and paid all the Debts; Catharine died in the Life-time of her Husband, leaving Issue only a Daughter, who was married to the Defendant; Henry Collingwood, by his Will, 4th of Jan. 1710, devises thus: I give to my dear Brother, George Collingwood, (the Plaintiff) all my Lands and Houfes, with the Ap- purtenances lying and being in A. to the Use of him and his Heirs, and dies, leaving no other Lands in A. but the two Farms above-mentioned, which were his Wife's, and remained unford after his Death; the Defendants entred on these two Farms, claiming them as the Inheritance of the Mother, and that from her they descended to the Defendant, her Daughter; and they insisted, that Henry had no Power under the Settlement, to dispose of the unfold Farms, but that the same, or the Trust thereof, descended to the Defendant; upon which this Bill was brought for a Discovery of the Settlement and Fine, and to have a Conveyance from the Trustees; and it was insisted on for the Plaintiff, that it appeared by the Settlement, that all the Estate was intended to be sold; in which Case Henry surviving, would have been intituled to what was unfold, as he would have been to the Purchase-money, if sold, and consequently had a Power of disposing thereof; and that the Trustees, after the Trusts perfor- med, sold feised in Trust for Henry and his Heirs, who had by his Will well devised the same to the Plaintiff; the Defendants insisted, that the Reason of subjecting the whole Estate to be sold for the Payment of Debts, was, that there might be a sufficient Fund for that Purpose, not to empower the Trustees to sell the Whole for the sake only of turning it into Money; when it appeared that Part thereof would be sufficient; that they had accordingly done their Duty, in selling as much as was necessary; and for what remained unfold, it was a re- sulting Trust for the Defendant, the Heir at Law, and that as it was the Wife's Inheritance, it was not subject to the Husband's Debts, but at her Pleasure; and when she has been so kind as to let in them on her own Estate, it would be unreasonable to carry it further, and take away her whole Estate from her, only to enable her Husband to give it away, and even disinherit, as he has done in this Case, both his own and his Wife's only Daughter and Heir at Law; and in this Case there was an Overplus in Money, even of what was actually sold, which the Husband gave away to a Woman he had Children by, and gave his own Daughter but one Guinea; but my Lord Chancellor was of Opinion for the Plaintiff, and decreed a Con-veyance to be made to him by the Trustees of the unfold Estate, and said, that the Trustees having Power to sell the Whole, it must be considered in Equity as if actually sold, in which Case the Money would have gone to the Husband, and so must the Land too, else it would be in the Power of the Trustees to make it Land, or make it Money, at their Pleasure, and so to give it to whom they should think fit; but the Intention appearing to be, that the Residue should go to the Husband and Wife, and the Survivor of them, it must go accordingly, whether Land or Money. P. 1727. be- tween Collingwood and Wallis.

9. So where A. having five nieces, his Coheirs at Law, who had each of them several Children, devised a very considerable Estate to Trustees, and their Heirs, to be sold, and to put the Money arising by such Sale, into five equal Parts and Shares, and out of each 5th
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Part or Share, to pay 100 l. a-piece to the several younger Children of each of his five Nieces, and the Residue of the Money of each 1/6th Part to be paid to such of his said five Nieces as should be then living; and in Case of their Deaths, then their Shares to be equally divided among their younger Children, which should be alive at the Time the Dividends were, or ought to be made; great Part of this Estate was sold many Years since, and the 1000 l. a-piece to the several Children of the five Nieces had been paid, after which the Nieces themselves being intitled to the Remainder of the Trust Estate, chose not to have it fold, but continued to receive the Rents and Profits thereof in five equal Shares for several Years; and they being all now dead, the eldest Son of each of them claimed it as a resultant Trust for their respective Mothers, and that from them it descended to their eldest Sons, as Heirs at Law; and the rather, for that all the Purposes for which the Trust was created, being satisfied, their Mothers might, in their Life-times, have compelled the Trustees to have executed Conveyances to them respectively of the unfold Estate; and they, as their Heirs at Law, stood in their Place, and had the same Right; and that otherwise it would be in the Trustees Power, by delaying or hastening the Sale, to give the Surplus to whom they pleased; and that it was now two Years ago since the Trust was created, and yet great Part of the Estate remained still unfold; but the Court directed the Rest of the Estate to be sold, and the Money to be divided among the younger Children of each Niece, according to the Will, as it would have been if the Nieces had died before the 1000 l. a-piece to their younger Children had been paid, or before sufficient of the Estate could have been sold for the raising thereof, the Tethor plainly intending that the younger Children of each Niece, not their eldest Sons, or Heirs at Law, should stand in their Mother's Place; and greatly blamed the Trustees for having so long delayed the Sale. Paff. 1727. between Davers and Folkes.

(G) Trustees, how to Account, and what Allowances to have.

1. The Defendant was Trustee to the Plaintiff, an Infant, who received for him 40 l. in gold; the Trustee was robbed by his own Servant, who lived with him in the Houfe, of 200 l. and this 40 l. which last Sum was only proved by his own; yet my Lord Chancellor allowed it on Account, for he was but to keep it as his Own. Hill. 30 Car. 2. between Morley and Morley, 2 Chit. Ca. 2.

2. A Trustee shall not be charged with imaginary Values, but only as Bailiff, tho' very supine Negligence might indeed, in some Cases, charge a Trustee with more than he had received; but the Proof thereof must be very strong; and it is a Hardship on him, that he is allowed nothing for his Pains. 1 Vern. 144. and said, that it was a hard Rule to charge a Trustee with what he had made, or might have made, without his willful Default; but the Reason was, because the Court could never yet find where else to fix the Measure.

3. If a Trustee sues for the Trust Estate, and obtains a Decree with Costs, of Course, and the Costs taxed him are short of his Real Costs; and the Cessui que Trust exhibits a Bill for an Account of the Trust Estate; the Trustee, in his Disbursements, shall be allowed...
the full and necessary Costs, and shall not be concluded by the Costs tax'd. Hill. 24 Car. 2. between Amand and Bradburne, 2 Cham. Ca. 138.

4. If two Estates are conveyed to a Trustee for Payment of several and distinct Debts, and the Heir at Law brings a Bill for an Account, and afterwards prays that the Bill may be dismissed as to one of the Estates, yet an Account shall be taken of both Estates. 1 Vern. 28.

5. A. devised 100 l. a-piece to four Children, payable at Twenty-one, or Marriage, with Maintenance, not exceeding the Interest; in the mean Time B. was appointed Trustee of a Trust Estate, to raise and pay the Legacies as aforesaid; and he paid 20 l. in placing out one of the Children Apprentice, who died before his Age of twenty-one Years; and the Court held that the 20 l. was well laid out, and that the Trustee should be allowed it. 2 Vern. 137.

6. But if a Trustee for the Payment of Children Portions, pays one of them his full Share, and the Trust Estate decays, he shall not be allowed such Payment. 2 Cham. Ca. 132. per Lord Keeper; and it was urged, that though the Appointment was to pay one in the first Place, &c. yet it would not be good, as it did not denote Preference in the Quantity of the Sum to be paid; but my Lord Keeper was of another Opinion as to this Point; but it was clearly agreed, that a specific Legatee may be paid in the first Place; but for this vid. Title Legacy.

7. Although an Executor or Trustee is not impowered or directed to place out Money at Interest; yet if he makes Interest, he shall be accountable for it. Posch. 1706. between Lee and Lee, 2 Vern. 548. decreed accordingly.

But afterwards a Difference was taken by my Lord Macclesfield, viz. that if an Executor or Trustee of Money places it out in the Funds, or on other Security, whereby he gains considerably, that he shall have the whole Benefit thereof to himself, in Respect of the Hazard he run of being a considerable Lofer thereby, which he must have born; but if such Trustee or Executor were an insolvent Person at the Time of placing out such Trust-money, there the Cestui que Trust shall have the whole Benefit gained thereby, as he only could have born the Loss thereof, if any had happened, the Trustee or Executor, by Reason of his Inolvency, being incapable thereof, and consequently running no Hazard at all. Mich. 1719. between Bromfield and Wyckerly.

(H) how far Trustees are answerable for each other.

1. If two Trustees for the Sale of a Trust Estate, join in a Conveyance of it to a Purchaser, and each of them receives 1000 l. and they, likewise join in Receipts for the Consideration-money, tho' afterwards one of them becomes insolvent, yet the other is not liable to the Money received by him; for their joining (without which the Estate could not be sold) was absolutely necessary. Cvo. Car. 312. 2 Vern. 515. S. P. 1 Salk. 318. S. P.

2. But
WAISTE.

(1) Waste, in what Cases restrained in Equity.

1. If there be Lease for Life, Remainder for Life, the Reversion or Remainder in Fee, and the Lease in Possession, wastes the Lands, the be is not punishable for Waste by the (a) Common Law; yet he shall be restrained in Chancery, for this is a particular Mischief. 1 Rol. Abr. 377. Moor 534, S. P.

1 Vern. 23. S. P.

the Continuance of the Remainder, though after its Determination, he is. 1 P. C. Litt. 54. 1 Inst. 301.

2. But if such Lease has in his Lease an express Clause of, without Impeachment of Waste, he shall not be (b) injoined in Equity. (c) Although a Court of Equity will not alse a Forfeiture, yet the Tenant in Possession shall be restrained in Equity from committing Waste in all Cases, in which Waste is punishable by Law; and for this Purpose, an Injunction will be granted before the Bill is filed; also an Injunction will be granted to stay Waste in Behalf of an Infant in Ventrue for more; Equity will likewise, in some particular Cases, restrain the Tenant from committing Waste, where it is punishable by Law, either by the Nature of his Estate, or by express Grant of, without Impeachment of Waste; but where by the Agreement of the Parties, the Lease is made without Impeachment of Waste, Equity will not restrain the Lease from cutting Timber, Plowing, opening Mines, &c. the such Lease shall be restrained from pulling down Houses, defacing Seats, &c. 1 Ch. Rep. 53, 14, 106, 116. 1 Vern. 394, 311. 1 Salk. 161. 2 Ch. Co. 51. 2 Ch. Rep. 346.

3. On the Marriage of his eldest Son, in Consideration of 1000l., Portion, settled (inter alia) Raby Castle on himself for Life, without Impeachment of Waste; Remainder to his Son for Life, and to his first and other Sons in Tail Male; afterwards, having taken some Displeasure to his Son, he got 200 Workmen together, and of a sudden stript the Castle of the Lead, Iron, Glafs, Doors and Boards, &c. to the Value of 3000l., and the Court, on the Son’s filing his Bill, granted
ed an Injunction to stay committing of Wafe in pulling down the
Gaffle; and upon Hearing the Cause, decreed not only the Injunction
to continue, but that the Gaffle should be repaired, and put in the
same Condition it was in; and for that Purpose a Commission was to
issue to ascertain what ought to be repaired, and a Muster to see it
done, at the Charge and Expense of the Father, and the Son to
have his Costs. Hill. 1716. between Vane and Lord Bernard, 2 Vern.
738, 339. 1 Salk. 161. S.C.

4. If A. is Tenant for Life, Remainder to B. for Life, Remainder
to the first and other Sons of B. in Tail Male, Remainder to B. in
Tail, &c. and B. (before the Birth of any Son) brings a Bill against A.
to stay Wafe, and A. demurs to this Bill, because the Plaintiff had no
Right to the Trees, and none that had the Inheritance was Party; yet
the Demurrer will be over-ruled, because Wafe is to the Damage of
the Publick, and B. is to take Care of the Inheritance for his Children,
if he has any, and has a particular Interest himself, in Case he comes
to the Estate. Trin. 1700. between Dayrell and Champsell.

5. On a Motion for an Injunction to stay a Joint rents, Tenant in
Tail after Possibility, &c. from committing Wafe; it was urged,
that the being a Joint rents within the 11th of H. 7. ought, in Equity,
to be restrained from cutting Timber, that being Part of the Inherit-
tance, which by the Statute she is restrained from aliening; and the
Court granted an Injunction against wild Wafe in the Site of the
House, and pulling down Houses. Hill. 1701. between Cooke and
Whaley.

6. But where a Joint rents, who had a Covenant that her Jointure
should be of such a yearly Value, which fell short, the her Estate
was not without Impeachment of Wafe; yet the Court would not
prohibit her committing Wafe, so far as to make up the Defect of
her Jointure. Mich. 1698. between Carew and Carew. But if an Ac-
tion of Wafe be brought against her, if Chancery will enjoin the Ac-
tion, Q.

7. A. devised Lands on which Timber was growing, to his Wife
for Life, Remainder to B. in Fee, paying several Legacies within a
limited Time, and in Default of Payment, the Remainder to C. he
paying the Legacies; and on a Bill brought by B. the Court gave
him Leave to cut Timber for the Payment of the Legacies, tho' it
was opposed by the Tenant for Life and the Devisee over, he mak-
ing Satisfaction to the Widow for Breaking the Ground by Carriage,
Wafe, &c. Trin. 1690. between Claxton and Claxton, 2 Vern. 152.

8. So where a Man created a Term for 500 Years, in Truf for
himself and his Wife for Life, Remainder to Trustees for Payment
of Debts and Annuities; and by Will devised the Reversion thereof
to A. for Life, without Impeachment of Wafe, Remainder to his
first and other Sons in Tail Male, with Remainder over; and B. be-
ing in Want, the Court gave him Leave to cut down Timber to the
Value of 500l. though the Debts and Annuities were not paid, the
Trustees having no Power to sell the Timber, the Debts being like-
to have a long Continuance, and there being a great Deal of decaying
Timber on the Estate. Hill. 1690. between Simpson and Leigh,
2 Vern. 218.
CAP. LV.

WILLS AND TESTAMENTS.

(A) What shall be established in Equity as a good Will of a Real Estate, and here of the Circumstances requisite by the 32 H. 8. cap. 1. and the 29 Car. 2. cap. 3.
(B) Of Testaments and Nuncupative Wills.
(C) Fraud in obtaining a Will, where examinable.
(D) Of Repugnation, and in what Cases it will make the Will good.
(E) Of Revocations in Equity.

(A) What shall be established in Equity as a good Will of a Real Estate, and here of the Circumstances requisite by the 32 H. 8. cap. 1. and the 29 Car. 2. cap. 3.

BY the Common Law, no Lands or Tenements (except by particular Custom) were deviseable by any Last Will or Testament, neither could they be transferred from one to another, but by solemn Livery of Seisin, Matter of Record, or sufficient Writing. "LITT. 111. b. (a) Because it was presumed, that the Testator would do that in Extremis, that he would not do in his Health; that it proceeded from the Discrepancy of his Mind, by the Anguish of his Discontent, or by supine Persuasion, to which in his Sickness he was more subject. 1 Rob. Abr. 608."

1. The true Reason seems to be from the Nature of the feudal Tenure, and the Relation that was first established between the Lord and his Tenant. For tho' Donations, after Length of Time, were made to the Tenant and his Heirs, or the Heirs Males or Females of his Body, under certain Duties and Services expressly referred, or which the Law created, and tho' the Words Heirs, &c., be Words of Limitation, and appropriated to measure out the Length or Continuance of the Estate; yet they were always understood the Heirs of the present Tenant, who being liable to the same Services when they came into the Tenancy, the Lord was to have the Tuition and Education of such Heirs, in Case they happened, by Reason of their Minority, to be incapable of performing the Services, that so he might, by his Care and Discipline, secure to himself Tenants always capable thereof, either in their own Persons, if they happened to be Males, or by proper Marriages with his Tenants, if they proved to be Females; and therefore by no Act of the Tenant's could he dispense of the Feud, so as to defeat the Lord of the Advantages of his Seigniory; and hence it was, that a Tenant could not dispose it, even to his own Heir, so as to make him a Purchaser thereof; for then he coming in, not by the Donation of the Lord, but by the Disposition of the Tenant, that he remained liable to the naked Services; yet the Lord left the Advantages of Wardship, Marriage, &c., which were annexed only to those who came in upon the Terms of his own Donation by Devise.
Wills and Testaments.

2. But the (b) Statute 32 H. 8. cap. 1. enacts, That every Person (c) having Manors, Lands, &c. shall have Power to give, (d) dispose, will, and devise by Will in (e) Writing, or otherwise, by Act executed in his Life-time, all his said Manors, Lands, &c. to any Law, Statute, &c. to the contrary notwithstanding, &c.

Since the Making thereof; but as the Statute 29 Car. 2. is not the proper Pattern to follow, having altered the Form, by requiring more Ceremony and greater Executiveness, it will be sufficient barely to mention some of the Cases on this: (a) That the Lands must be free, and therefore Lands purchased after the Will is made, will not pass, (d) Plowm. 342. Title Devises. Letter (B). (d) A Devises of an Authority to Executors to follow, within the Act. (a) Act 31 Geo. 1. *c. 45.* (c) A Man beyond Sea wrote a Letter, in which he did good Will, Mort. 235. Prym. 245. (d) If a Man had ordered one to make his Will, and thereby to devise White acre to A. and his Heirs, and Black acre to C. and his Heirs, and he had written the Devise to A. but before the Devise to C. was wrote, the Devisee had died; yet as to A. this had been a good Devisw. 3 Ca. 31. b. So if a Will was held good, where a Lawyer took only short Notes, with Design to reduce it into Form, which he afterwards did: but the Devisee died before it was read to him. 1 Anti. 34. Xero. 369. Dyre 31. f. Bov. 4. A Will wrote without the Appointment of the Testator, if read to him, and approved by him, good. Signing and Sealing was not necessary. 1 Sets. 2. 97. a. March 206. 2 Lem. 35. 1 Sid. 315.

3. An Uncle having devised his Estate from his Nephew and Heir at Law, a younger Brother of the Heir at Law, at the Uncle's Funeral, snatched the Will out of the Hands of the Executor, and tore it in many small Pieces, but not all, of them, and particularly such Part wherein was the Devise of the Land, were picked up and stitched together again; and on a Bill, to have the Will established, it was decreed, that the Devisee should (f) hold against the Heir, and he to convey to him, although there was no direct Proof made, that the Heir directed the Tearing of the Will. Mitch. 1702. between Haines and Haines, 2 Vern. 441.

(b) A Will, the known to pieces by Rats in the Life of the Devisee, if by joining the Pieces together the Contents can be known, will be good; so if a Will continues in Writing at the Death of the Devisee, tho' burnt, or of old age, it shall stand good. 1 Anti. 35. 4. A Writing in form of an Instrument, is held, and allowed, if proved so to be intended a Will, shall be good, as such. 1 Coron. Ca. 243. 1 Mod. 117.

4. A. by Will in Writing, attested by three Witnesses, devised a Copyhold Estate to his Wife; afterwards the Testator, on the Day of his Death, directed his Nephew to obliterate some Devises, but nothing as to the Copyhold devised to his Wife, and then caused a Memorandum to be wrote, that he examined, perused and approved of the Will, as so obliterated and altered by his Nephew, in his Presence, but did not republish it in the Presence of (g) three Witnesses, but directed his Nephew to have it wrote out fair; but before it was brought back, he became delirious; and this was held a good Will as to the Copyhold. Patch. 1705, between Burkitt and Burkitt, 2 Vern. 498.

(a) By the 29 Car. 2. c. 5. it is enacted, that all Devises of Lands or Testaments deviseable by the Statute of Wills, or any Custom, shall be in Writting, and signed by the Party devising, or some other in his Presence, by his Direction, and shall be attested and subscribed in his Presence, by three or four credible Witnesses, or else shall be void.

5. If a Will is attested by three Witnesses, who severally signed their Names, not being present together; yet each Signing being in the Presence of the Testator, makes it a good Will within the Statute. 2 Coron. Ca. 109.

6. But if a Man subscribes and publishes his Will in the Presence of two Witnesses, and they subscribe it in his Presence, and after makes a Codicil in Writing, reciting, that he had made a former Will, and confirmed the same (except what was excepted by the Codicil) and declares,
Wills and Testaments.

...declares, that the Codicil should be taken as part of his Will, and publishes it in the Presence of one of the same, and another Witness; this is not a good Will, for there were not three subscribing Witnesses in the Presence of the Testator; and one of the Witnesses to the Codicil never saw the Will. Between Lea and Libb. 3 Mod. 262. adjudged, though objected the Will and Codicil made but one Will, and the Circumstance of three Witnesses wanting to complete the Will, was perfected by the Codicil.

7. So if a Man makes a Will in several Pieces of Paper, and there are three Witnesses to the last Paper, and none of them ever saw the First; this is not a good Will. 3 Mod. 263. per Curiam. A Will void for Want of Witnesses will not operate as an Appointment to a Charity. Vid. 2 Vern. 498. and Title Charity.

8. The Testator directed the Witnesses to go into another Room seven Yards distant, to attest his Will, in which there was a Window broken, where the Testator might see them; and it was held, that this Will was according to the Statute of Frauds; for though the Statute requires Attestation in his Presence, to prevent obstructing another Will in the Place of the true one; yet it is enough if the Testator might see; it is not necessary, that he should actually see them signing; for at that Rate, if a Man should but turn his Back, or look off, it would vitiate the Will; and here the Signing was in the View of the Testator; he might have seen it, and that is enough; so if the Testator being sick, should be in Bed, and the Curtain drawn. Pulf. 3 Jac. 2. between Shires and Glasecock, 2 Sar. 688. adjudged in C. B. on a feigned Illness.

9. If the Testator writes the Will with his own Hand, though he does not subscribe his Name, but seals and publishes it; and three Witnesses subscribe their Names in his Presence, it is a good Will, for his Name being written in the Will, it is a sufficient Signing; and the Statute does not direct, whether it shall be at the Top, Bottom, &c. Between Leman and Stanley, 3 Lev. 1. adjudged per totam Juriam; and by three Judges against one, the Sealing is a Signing within the Act; And note; It is not said in the Act, that the Signing shall be in the Presence of the three Witnesses at the same Time. 3 Mod. 219.

(B) Of Testaments and Noncumulative Wills.

1. A. Being very ill, desired B. to make her Will, who wrote down only Names and initial Letters to this Effect, viz. To Tho. West 200l. to Jo. Dav. 100l. to Reb. Crw. 50l. to Sif. to Self 10l. and so to several other Persons in like Manner, to above 400l. which being more than her Estate; B. made an Alteration in the second Column, by subtracting Part of the Sums from some of the Legatees, as set down in the second Column, and then told A. the Sense of the proposed Devises; there were two Persons in the Room that did not hear any Thing that passed between A. and B., but only heard the Testatrix at last pronounce, that all was well; B. went to a Scrivener to have the Devises drawn out at Length and in Form, and before she returned the Testatrix died; the Judge below pronounced for this Will, but upon an Appeal to the Delegates it was reversed; and in this Case it was agreed, that if the Will had been written in Words at Length, so as they had carried a Sense and
Meaning in themselves, it had been a good Will; for that there was one Witness that wrote it, and Two that heard the Testatrix pronounce, that it was well; which would have been intended to have amounted to a second Witness, in regard it appeared on all Hands, by several Witnesses, that the Testatrix did then seriously dispose herself to making her Will; and for that was quoted the Case of one Pepper, where a Person disposed herself to make her Will, and dictated it to a Person, who wrote it down; and another, not called in as a Witness, lay behind the Hangings out of Curiosity, and yet such Will was allowed to be good, being proved by those two Witnesses; but they distinguished that Case, because the Will was not substantive, but was to take its Scene from the Interpretation of the Witnesses, and so there would be Induendo upon Induendo; which made it purely a Nuncupative Will; and as such, not being attested by the Number of Witnesses appointed by the (a) Statute of Frauds and Perjuries, the Will and Legacies were void. 26 Feb. 17/10, between Davis and Glover, before the Delegates.

(a) By the 29 Car. 2. cap. 5, it is enacted, that no Nuncupative Will shall be good, where the Estate bequested exceeds the Value of £50, that is not proved by the Oath of three Witnesses that were present at the Making thereof, nor unless the Testator bid the Persons present, or some of them, bear Witness, that such was his Will, or to that Effect; nor unless he made in the last Sickness of the Deceased, in his Dwelling-House, or where he had been resident ten Days, or more, before the Making of the Will; except when surprized and taken sick from home, and died before his Return; and by the same Act, after six Months, passed after Speaking the preceding Testamentary Words, no Testimony shall be admitted to prove any Nuncupative Will, unless the Testimony or Substance thereof was committed to Writing within six Days after the Making the said Will. — And by the same Act, no Probate of any Nuncupative Will shall pass the Seal of any Court, till fourteen Days after the Testator's Death, nor shall be proved till the Procurator have issued a Warrant to Cell in the Widow or next of Kin to contest it, if they will. — Provided Soldiers in garrison, and Mariners at Sea, may dispose of their Personal Effects, as they might before the Act.

2. Dr. Shalhuor, by Will in Writing, gave 200 l. to the Parish of St. Clements Danes; and after Thee, the Reader, coming to pray with him, his Wife put him in Mind, to give 200 l. more towards the Charges of Building their Church, at which, tho' Dr. Shalhuor was at first disturbed, yet after said, he would give it, and bid Thee take Notice of it; and the next Day bid Thee remember of what he had said to him the Day before, and dies that Day; within three or four Days, after, the Doctor's Wife puts down a Memorandum in Writing of the said last Devise, and so did her Maid; Thee died about a Month after, and amongst his Papers was found a Memorandum of his own Writing, dated three Weeks after the Doctor's Death, of what the Doctor said to him about the 200 l. and purporting that he had put it in Writing the same Day it was spoken; but that Writing which was mentioned to be made the same Day it was spoken, did not appear, and these three Memoranda did not express agree; about a Year after, on Application by the Parish to the Commissioners of Charitable Uses, and producing these Memoranda, and Proof by Mrs. Shalhuor, and her Maid, they decreed the 200 l. but on Exceptions taken by the Executors, the Decree was discharged of this 200 l., and my Lord Chancellor held it not good, because it was not proved by the Oath of three Witnesses; for the Mrs. Shalhuor and her Maid had made Proof, yet Thee was dead; and the Statute in that Branch requires not only three to be present, but that the Proof shall be by the Oath of three Witnesses. Trin. 1504, between Philips and the Parish of St. Clements Danes.

3. A Daughter deposits 180 l. in the Hands of her Mother (the Defendant) and afterwards makes her Will in Writing, and thereby devises
devises several Legacies, and makes her Mother Exequitrix, but takes no Manner of Notice of this 180 l. afterwards, by Word of Mouth, she desires her Mother to give this 180 l. to the Plaintiff, if she thought fit, and then soon after died; the Mother proved the Will, and this Bill was brought against her, to have the 180 l. paid; the Mother, by her Answer, admits she had such a Sum in her Hands; that her Daughter did make such a Request to her, but that she left it to her Election, whether she would give it to the Plaintiff, or not, by the very Form of the Devise; and insisted, that she did not think fit to give it to the Plaintiff; and in this Case it was agreed, that this was not good as a Nuncupative Will, being above 30 l. and not reduced into Writing within six Days after the Speaking, as the Statute requires. 2dly, That if the Defendant had inflicted on the Statute of Frauds and Perjuries, the Court could not have relieved the Plaintiff, as upon a Truth; but in this Case the Defendant having by Answer confessed the Truth, there was no Danger of Perjury, from Variety of Proof, which was the Mischief the Statute intended to provide against, and therefore the Court took it to be in Nature of a Truth, and decreed for the Plaintiff; and relied principally on the Cafe of Kingsman and Kingsman, where a Man devised away an Estate of 2000 l. per Ann. and upwards, from his Son and Heir, to a Bargeman, and by his Will devised 20 l. a Quarter to his Son; and at the Time of his Will desired, that if his Son gave him no Trouble or Disturbance concerning his Will, and behaved himself well, that he might make it up 40 l. a Quarter, if he thought fit; and the Court decreed the 40 l. to the Son. Palm. 1718. between Jones and Nabbs. But note; the 40 l. per Quarter, in the Cafe of Kingsman and Kingsman, seems to have been decreed purely upon the Circumstances and Hardship of the Cafe; but in the present Cafe there were no such Circumstances or Ingredients of Hardship on the Plaintiff.

(C) Fraud in obtaining a Will, where examinable.

1. Made his Will, and thereby gave the Plaintiff the greatest Part of his Personal Estate, to the Value of 5000 l. as was proved in the Cafe; but one B. his Maid Servant, had in his Sickness, prevailed on him, (as was alleged) to make another Will, and to marry her, a Week before his Death, when he lay in his sick Bed, at Six of the Clock at Night, tho' it was really proved by two Ministers, that she was, a Year before, actually married to the Defendant M. and was then his Wife, and that M. procured the Licence for the Marriage of A. to B. and this Will being set up by M. Executor to B. though it appeared there was as gros a Practice as could be in gaining the Will, the Testator being Non Compos, both at the Time of Making this Will, and also at the Time of this supposed Marriage, and that in his Health, he knew that M. and B. were married, and that B. supprest the first Will; yet that Will fo set up, being proved in the Prerogative Court, and the Matter in Question being purely relating to the Personal Estate, the Lord Chancellor was of Opinion, that whilft that Probate flood, this Matter was not examinable in Chancery; and tho' the Fraud was fully proved, as aforesaid, and was opened to him, he would not hear any Proofs read, but dismisseed the Bill. Trin. 1686, between Archer and Mosse, 2 Vern. 8, 9. 5 L. 5. But
2. But though Wills gained by Fraud, and proved in the Spiritual Court are not to be controverted in Equity; yet if the Party claiming under such Will comes for any Aid in Equity, he shall not have it. 2 Vern. 76.

3. It being urged, that a Will concerning Land is only triable at Common Law, and that the Party there may take Advantage of any Fraud or Impostion on the Testator, and therefore not proper to be examined into, or set aside in Equity upon Pretence of Fraud or Surprize. My Lord Chancellor held, that there may be a Fraud in obtaining a Will that may be relievable in Equity, and of which no Advantage can be taken at Law; as if a Man agrees to give the Testator 2000 l. in Bank-Bills, if he will devise his Estate to him; and on the Delivery of such Bills, makes his Will, and devises his Estate to him, and the Bills prove to be forged or counterfeit. 2 Vern. 700.

4. But it has been decreed in the House of Lords, that a Will of a Real Estate could not be set aside in a Court of Equity for Fraud or Impostion, but must first be tried at Law, on Decisis vel non, being Matter proper for a Jury to enquire into, July the 28th, 1728, between Branchy and Kerridge.

(D) What Will amount to a Republication, and Where a Republication Will make the Devise good.

1. If a Man devises certain Lands, and after aliens the Land to a Stranger, and repurchases; and after shews his Intent, that the said Will shall be his Will, this is a new Publication, and the Land shall pass by the Devise. 44 E. 3. 33. 2 R. 3. 3. Vid. 1 Vern. 330.

2. So the Testator's Saying, his Will was in a Box in his Study, amounted to a new Publication. Between Cotton and Cotton, 2 Vern. 209. cited to have been tried before North Ch. Juft.

3. If a Man seised of Lands, devises all his Lands to J. S. and afterwards purchaseth the Manor of D. and after writes in his Will, that J. D. shall be his Executor; yet this is not any new Publication to make the Lands pass. 1 Rol. Abr. 618.

4. But if after the Purchase of the Manor of D. he delivers the first Will as his Will, and says, that it shall be his Will, without putting any Words thereto; yet this is a new Publication, to make the Lands newly purchased pass. 1 Rol. Abr. 618. 1 Salt. 237.

5. So if a Man seised of Lands in D. devises to another, by his Will in Writing, all his Lands in D. and after purchaseth other Lands in D. and after one J. S. comes to him, and requests him to give him the Buying of the Lands last purchas'd; and he Answers him, that he will not, but that his Intent was, that those Lands should go to his Executors (for the Devisee was made Executor by the Will) as his other Lands should; and after the Devisee caufes a Codicil to be Writ, in which there is a Devise of several Personal Things, as Corn, and Implements of Houffhowld, and annexes it to his first Will; and after dies without other Publication; yet this shall be a sufficient Publication to make the Lands newly purchased pass by the Will, for there needs no other Words in the Will than there were before; and his Intent appears, that it should be his Will

by

6. But if a Man has Issue two Daughters, A. and B. and he devises Lands to A. and to the Heirs of her Body, and for Want of Issue to B. and A. dies in the Life-time of the Testator, leaving Issue, though after the Testator annexes a Codicil to his Will, and thereby dispoises of some Part of his Personal Estate; yet this will not amount to a Republication of the Will, nor give any Title to the Issue of A. Mich. 1716. between Hasted and Simpson, 1 Vern. 1716. Resolved per Curiam, though the Testator had decla red in his Will, that B. had married against his Consent, and that what he had given her, was in full of her Portion, and in Bar of any further Part of his Real Estate.

7. If one devises a Lease to his Daughter, and afterwards renews the Lease, and afterwards adds a Codicil to his Will, without taking any Notice of the Lessee, whether the Renewal of the Lease is a Revocation, and whether the adding a Codicil to his Will is Republication, Quara, 16 vid. 2 Vern. 209.

8. If a Man has Issue three Sons, A. B. and C. and devises Lands to B. in Tail, Remainder to C. and B. has Issue two Sons, and dies; and after the Devisor says, my Will is, that the Sons of B. shall have the Lands devised to their Father, as they should have had if he had lived, and had died after; and then the Devisor dies, whether this should amount to a new Publication ab initio, and two Judges against Two. Fuller and Fuller, Cro. Eliz. 422.

9. If J. S. has Issue two Sons, William and Robert, and Robert has Issue a Son named Robert, and J. S. devises Lands to his Son Robert, and his Heirs, and by the same Will gives his Grandson 50, and Robert, the Son dies; and after J. S. by Parol, republishing his Will, says, Robert my Grandson, shall take by my Will, as Robert my Son should have done; yet the Grandson shall not have the Lands, for Lands cannot pass by Will in Writing, and his Son Robert cannot import his Grandson Robert, especially when by the same Will he has made a Distinction between Son and Grandson. Hill. 30 Car. 2. between Strode and Berager, 2 Lev. 243. The Judgment to the contrary given by three Judges against the Opinion of Scrogs, in the Common Pleas, is said by the Reporter to have been reversed in B. R. (as he heard) though it was argued, that the Words of the Will were proper enough to pass the Lands to the Grandson; for that the Addition of Grand, only imported a Distinction between Father and Son while Living; but that the Father being dead, at the Time of the Republication, the Grandson must properly be described by the Name of Son. 2 Mod. 313. S. C. 2 Vent. 341. 1 Jon. 133. Remy. 408.

(E) Of Revocations in Equity.

1. A Man makes his Will duly executed and attested, according to the Statute of Frauds and Perjuries, and at the same Time in like Manner, executes a Duplicate thereof; some Time after the Testator having a Mind to change one of his Trustees, orders his Will to be wrote over again, without any Variation whatsoever from the First, save only in the Name of that Trustee; and when it was so wrote
wrote over, he executes it in the Presence of three Witnesses, and the three Witnesses subscribed their Names, but not in his Presence; after
this the Testator cancels the Duplicate, by tearing off the Seal, and
then dies; and the Question was, whether this second Will, not being
good as a Will to pass Lands, should yet be a Revocation of the
first; and if it should not, whether the Cancellating the other should
be a Revocation thereof within the Statute of Frauds and Perjuries;
and it was decreed, that neither the Making the Second, nor the
Cancellating of the First, was a Revocation thereof, though in the
Second there was an express Clause, that he did thereby revoke all
former and other Wills, wherein my Lord Chancellor took this Di-
finition, that the Second was not intended barely a Revocation of
the First, so as to signify his Intention of dying Intestate, or without
any Will; but it was intended as an effectual Will to pass the Lands
unto the Persons, and in the Manner thereby devised; and therefore, if
it was not good as a Will to that Purpose, it was no Revocation of
the First; but as it was supposed to be valid as a Will for passing the
Lands by the Second; and if a Man by his Will devises Lands to A.
and after makes a second Will, and thereby devises the same Lands
to B., if this second Will be not good as a Will to pass the Lands to
B., it shall be no Revocation of the Devise in the First to A., for it
is plain, A. was to lose only what B. was to gain; and if B. gains
nothing by the Second, A. shall lose nothing that was given him by
the First; but if a Man executes a second Will, which appears to
have no other Intention than to revoke the First, and to die Intestate,
though this Second be not in all Circumstances duly executed as a
Will whereby to pass Lands, yet it will operate as a Revocation of
the First; and as to the Cancellating or Tearing of the first Will, that
is no Revocation of it in this Case, because that was no self-suffi-
cient independent Act, but done to accompany, or in a Way of Affir-
mation of the Second; it was done from an Opinion, that the Second
had effectually revoked the First, and therefore he tears the First, as
of no Use; but if the First was not effectually revoked by the Second,
that Act of Tearing the First will not destroy it either; for tho' a
Man may, by the Statute of Frauds, as effectually destroy his Will,
by Tearing or Cancelling it, as by making a Second; yet if he does
make a Second, and intends that as a Revocation of the First, if it be
insufficient for that Purpose, as in the principal Case, the Tearing and
Cancelling being only in Consequence of his Opinion, that he made
a good second Will, shall not destroy the First; but it ought to be set
up again in Equity, *Hill. 1716, between *Onions and Tyers de-
creed. Vid. 3 Mod. 220, 158. 3 Lev. 86, 87.

2. But if a Man cancels or revokes either the Duplicate or origi-
nal Will, this is an effectual (a) avoiding of both, they being both but
one Will, and therefore must stand or fall together. *Vern. 742, per
Curiam; and said to have been so resolved in Sir Edw. Seymour’s Case,

* 1 Vern.
742, 7. 8.
(a) By the
29 Car. 2, cap. 2, it is
enacted, that
no Devise in
Writing, of
Lands, Tenements or Hereditaments, or any Clause thereof, shall be revocable, otherwise than by some
other Will or Codicil in Writing, or other Writing declaring the same, or by burning, Cancelling, Tear-
ing, or obliterating the same by the Testator himself, or in his Presence, and by his Direction and Con-
sent, but shall continue, &c. unless altered by some other Will or Codicil in Writing, or other Writing of
the Devise, signed in the Presence of Three, or more, credible Witnesses, declaring the same. And
by the same Act, no Will in Writing concerning Personal Estates shall be repealed, nor any Clause or
Bequest therein altered by Words, or Will by Word of Mouth only, except the same be in the Life of
the Testator committed to Writing, and read to, and allowed by him, and proved to be done by three Wit-
tnelles.—But where a Man by Will in Writing devised the Residue of his Personal Estate to his Wife, and
after, the dying, he by a Nuncupative Codicil, bequeathed to 7, 3, all that he had given to his Wife; and
it was resolved good; for by the Death of the Wife, the Devise of the Residue was totally void; and the
Codicil was no Alteration of the former Will, but a new Will for the Residue. *Raym. 538.

1

3. A
3. A Man makes his Will in Writing, and thereby devises all his Real and Personal Estate to his Wife, her Heirs and Executors, in Trust to pay his Debts and Legacies, and then devises several Legacies to his Children, and other Persons, and concludes, *In Witness whereof I have, to this my Last Will and Testament, containing nine Sheets of Paper, and to a Duplicate thereof, to be left in the Hands of such a one, set my Seal to every Sheet thereof, and to the last of the said Sheets my Hand and Seal, in the Presence of three Witnesses, who all subscribed their Names in due Form of Law; afterwards the Testator being minded to add other Trustees to his Wife, and make some little Alterations in his Will, sends for a Scrivener, and gives Directions to prepare a Draught of Instructions for another Will, which the Scrivener does accordingly, which the Testator read over and approved very well, and made his Hand to it; and being at a Tavern, thinking he had now made a new Will, he pulls out of his Pocket the first Will, and tears off the Seals from the first eight Sheets, which the Scrivener being, asked him what he was doing. *Why says he, I am cancelling my first Will. Pray, says the Scrivener, hold your Hand, the other Will is not perfected, it will not pass your Real Estate for Want of being executed pursuant to the Statute of Frauds and Perjuries. I am sorry for that, says he; and immediately defiled from tearing off the Seals; and in some short Time after dies, without having done anything further to perfect the second Will; or cancelling the first; after his Death; on Application to the Spiritual Court by the Wife, who made Executrix of this Last Will; they sentenced it a good Will as to the Personal Estate, and admitted her to prove it; and on a Bill brought by the Legatees against the Wife and other Trustees, to have a specific Performance of the Trusts in the first Will, and that the Estate might be sold pursuant to the Directions of that Will; it was insisted upon, that the first Will was revoked, either by Making of the second, or by the Tearing off the Seals from the first; but my Lord Chancellor held, that the subsequent Will could be no Revocation as to the Real Estate, not being executed according to the Statute of Frauds and Perjuries; and that as to the Tearing off the Seals from the first eight Sheets, that not being done *anime cancellandi, was no Revocation; and that the Seal remaining Whole to the last Sheet, was sufficient, and in Strictness it was not necessary that all the Sheets should be sealed; but because the Spiritual Court had sentenced the Second a good Will of the Personal Estate, his Lordship held it a good Will for the whole Personal Estate; and that such Legatees of Personalities in the first Will, as are left out in the Second, must lose their Legacies; but for those that had Legacies by the first Will, chargeable on the Real Estate, if the same Legacies were devises to them by the second Will, that they should still continue chargeable on the Real Estate; provided such Legacies were not increased or enlarged by the second Will; for though the second Will was not sufficient in itself to charge the Real Estate, yet since the Real Estate remained well devised by the first Will, they should be still secured by that Real Estate, for they were not devised out of Land like a Rent, but only secured by Land, which before was well devised; but for other new absolute Personal Legacies devised by the Last Will, they should be chargeable only upon the Personal Estate, and should have the Preference to be first paid out of the Personal Estate before the other Legacies in the first Will,
Wills and Testaments.

Will, charged upon the Real Estate, because they had their several Funds out of which they were to be paid. *Hill. 6 Ann.* between *Hyde* and *Hyde*.

4. If A. devises Lands to B. and his Heirs, and afterwards mortgages the same Lands to *J. S.* for Years, or in Fee, tho' a Mortgage in Fee be a total Revocation at (a) Law, yet in Equity it shall be a Revocation *pro tanto* only. *1 Vern.* 319, 342, 97, 141, 182. *1 Salk.* 158. *S. P.* admitted to be a Settled Point in Equity.

5. So if a Man seised in Fee, devises it to *J. S.* in Fee, or for Life, and afterwards makes a Lease to *J. D.* for Years; this, even at Law, shall not be a Revocation, but during the Years; for his Intent does not appear further than during the Term for Years. Between *Mountague* and *Jafferes*, *1 Rol. Abr.* 616.

6. So if a Husband possess'd of a Term for forty Years, devises it to his Wife, and after leaves the Land to another for twenty Years, and dies, this Lease is not any Revocation of the whole Estate, but only during the twenty Years, and the Wife shall have the Residue by the Devise. Between *Wilcox* and *Kent*, *1 Rol. Abr.* 616.

7. But if A. devises Lands to B. and his Heirs, and twelve Years after leaves the same Lands to B. for sixty Years, to commence after his Death, and delivers the Deed to a Stranger, to the Use of B., who does not deliver it to B. till after the Death of A., this is a Revocation of the whole Estate; for both Estates are not consistent, nor can vest in B. at the same Time; and it was plainly the Intention of the Devisor, that B. should have the less Estate only. *Hill. 45 Eliz.* between *Coke* and *Bullock*, *Cro. Jac.* 49. adjudged, tho' objected, that it was the Intention of A. that B. should have his Liberty to take by the Lease or Devise, B. not having agreed to the Lease in the Life of A.

8. But if the Lease made to the Devisee had been to begin either in *Præsenti* or *Futuro*, in the Life of the Devisee, it had not been a Revocation; for inasmuch as the Lease might have determined in his Life, it was consistent with his Will. *Cro. Jac.* 49. *per Curiam*.

9. So where A. by Will devis'd to his younger Son a certain Mefuage for ninety-nine Years, if three Lives lived so long, yielding and paying to his Sister, the Plaintiff, *20 l. per Ann.* until twelve Years old, and thence *40 l. per Ann.* for Life; and afterwards the said A. for *300 l.* Fine, demifed the said Meffuage to *J. S.* for ninety-nine Years, if three Lives lived so long, yielding and paying *50 l. per Ann.* to A. the Teflator, his Heirs and Assigns; and tho' it was held at the *Rolls* to be a Revocation, yet on an Appeal to my Lord Keeper, he decreed it to be no Revocation, and that the Daughter should be paid her Annuity; and he said, that the Rule is, where a subsequent Act shall amount to a Revocation by Implication, it must be a necessary Implication; and the Act must be wholly inconsistent with the Devise. *Pausb. 1705.* between *Lamb* and *Parker*, *2 Vern.* 495.

10. So if A. devises Lands to Trustees to pay his Debts, and then to pay his Wife *200 l. per Ann.* for her Life; and the Teflator living several Years after, his Debts increased from *200 l.* to *1000 l.* for *800 l.* whereof his said Trustees were bound, and afterwards A. the Teflator, by Deed and Fine, conveys his Lands to his said Trustees, to sell to pay his Debts, and the Surplus to him and his Heirs; and though the Wife joined with him in the Fine and Conveyance; yet this shall be no Revocation of the Wife's *200 l. per Ann.* and she shall have the *200 l. per Ann.* out of the Surplus of the Money, after the Debts paid.
paid. Mich. 1691, between Vernon and Jones, 2 Vern. 241. decreed; but the Reporter adds a Q.

11. But in a Cafe where Edward, Earl of Lincoln, had mortgaged the Manor of S. to the Defendant Wynn, and his Heirs, for 12000 l. and afterwards, by his Will, in Default of Issue Male of his own Body, devised it to Sir Fran. Clinton, (who was to succeed him in the Honour) for his Life, with Remainder to his First and other Sons in Tail Male, with other Remainders over; and appointed that his Household-Goods, at his chief House at S. should remain there as Heir-looms to the next Heir Male, who should be Earl of Lincoln; and made Sir Francis Clinton Executor; afterwards the Earl (who was very whimsical) took a Fancy to one Mrs. Calvert, Daughter to the Lord Baltimore, and fancied he would marry her; (though it was proved in the Cafe, there never was any Intention of such Marriage in her, or in any of her Relations, nor any Treaty about it,) and in this Fancy he makes a Lease and Release of those Premises to the Defendants Davenport and Townsend, and their Heirs, (in Consideration of the said intended Marriage, as it was expressed,) to the Use of himself and his Heirs, till the said intended Marriage took Effect; then as to Part in Trust for Mrs. Calvert, and her Heirs, in Lieu of her Dower; and as to the Rest in Trust, that the Trustees should sell it; to disim- cumber that Part limited to Mrs. Calvert, and the Surplus of the Money to his Executors and Administrators; there was no farther Progress towards the Marriage; and some Time after the Earl died, without any Alteration of his Will, and the Honour descended to Sir Francis Clinton (who had but a very small Estate; if any,) who died soon after; and the Plaintiff, his eldest Son and Heir, an Infant of about seven Years old, brought his Bill to have the Redemption of the Mortgage, and a Conveyance of the Estate, and the Defendants A. B. and C. who were Cousins and Coheirs of Earl Edward, brought a Cross-Bill, that they might redeem and have the Estate conveyed to them; and the only Question was, whether this Lease and Release were a Revocation of the Will; it was said for the Plaintiff, that the Earl had but an equitable Interest (the whole Estate being before mortgaged in Fec,) and therefore it ought to be considered according to Equity; and that the such a Lease and Release would have been a Revocation of a Devise of a legal Estate, yet it will not be so here; for the Reason the Law goes upon in judging it a Revocation is, because the Lease and Release is a Conveyance of the Estate, and so ex necessitate rei, a Revocation of the Devise; and it is plain the Law goes upon this, and not upon any supposed Alteration in the Peron's Will; for if a Man makes a Will, and thereby devises Lands to J. S. and his Heirs, and afterwards articles to sell the Lands to J. D. and his Heirs, and receives the Purchase-money, and dies before any Conveyance made, these Articles will be no Revocation of his Will; and yet it is as plain his Mind and Intention, as to those Lands, is altered, as much as if he had actually made a Conveyance to J. D. and in Cafe of an equitable Interest, the Lease and Release makes no Alteration of the Estate, so as to induce a Necessity of adjudging it a Revocation, as there is in Cafe of a legal Estate; it is plain as to his Intention, that he did not intend any Revocation of Alteration of his Will, unless, or until that Marriage should take Effect; for by the Release it is limited, that till that Marriage it should be to him and his Heirs, which is just as it was before; and that Mar-riage
riage having never taken Effect, the Estate continues just as it was; and it cannot be pretended, that this Leave and Release are any express Revocation of his Will; and the Court of Chancery is so far from following the strict Rules of legal Revocations, that it often relieves against them; and therefore if a Man devise Black-acre to J. S. and his Heirs, and afterwards mortgages to J. D. and his Heirs, this in Law is a Revocation of the Devise, and yet in Equity it shall be none farther than to let in the Mortgage; and to this Purpose were cited several Cases; and therefore since the Court of Equity mult interpose for one Side or 'tother, it was concluded it ought to interpose for the present Earl, and that he ought to have the Redemption of the Estate, as devised by the Will of Earl Edward; for the Defendant it was said, that such a Leave and Release would have been a Revocation of a Devise of a legal Estate, and that equitable Estates are governed by the same Rules that legal Estates are; and there is no Fraud or Circumvention, nor other equitable Circumstances, to make the Court vary from that Rule in this Case; and the Will is in Disinherition of the Heir, who is always favoured in all Courts; and as to the Cases put, where Mortgages have been held to be no Revocation in Equity, it was said the Reason of that is, because Mortgages are not considered as Conveyances of the Estate, but only Charges upon it; and my Lord Keeper was of this Opinion, and decreed the Plaintiff's Bill to be dismissed, and the Cohere's to have the Redemption of the Mortgage. Trin. 1695. between the Earl of Lincoln and Rolls &c. Show P. C. 154. S. C. and the Decree confirmed in the House of Lords.

12. So where Sir John Huband, by Will in Writing, dated the 12th of Febr. 1708. devised several pecuniary and specific Legacies, and then gave all the Rest of his Real and Personal Estate after all his Debts and Legacies paid, to John Pollen, on Condition he took the Name of Huband upon him, and the Heirs Males of his Body, with divers Remainders over; afterwards, by Leave and Release, the 30th of Aug. 1709. Sir John Huband, together with J. S. his Trustee, conveyed several Manors and Lands in the County of Warwick, to Trustees and their Heirs, to the Use of himself for Life, without Impeachment of Wate, and that the Trustees and their Heirs should execute such Conveyance and Conveyances thereof, as the said Sir John, by Writing under his Hand and Seal, or by their Last Will and Testament should direct or appoint; and in 1710, Sir John died, without altering or revoking the said Will, or making any other Appointment touching the said Real Estate; and the Question was, whether this Leave and Release were a Revocation of the Will, or not; the original Bill of Pollen being to establish the Will, and the Cross-Bill to set aside the Will, and have an Account of the Profits; and it was decreed, that the Leave and Release were a Revocation of the Will. Mich. 1712. between Pollen and Huband.

13. A. having issue four Daughters, and no Male Issue, devises Lands to Trustees in Trust, to permit his Daughter S. to receive the Rents and Profits until her Marriage or Death; and in Case she married with the Consent of Two of the Trustees, and her Mother, then to convey the Premises to her and her Heirs; but if the died before Marriage, or married without such Consent, then to convey to other Persons, afterwards S. marries in the Life-time of her Father, and with his Consent, and he settled Part of those Lands on her
Wills and Testaments.

her and her Husband, and died; and it was held, that this Settlement was no Revocation of the Will, as to the Devise of the other Lands; Mich. 1716. between Clarke and Berkley, 2 Vern. 720. Vid. Where a Devise shall be a Satisfaction, Title Devise, Letter (L).

14. A made his Will, and thereof made his Brother Executor, and devised unto his Executor all his Estate both Real and Personal, and four Years afterwards he marries, and then by a Codicil makes his Wife his Executrix; and the Question was, whether the Brother should have the Personal Estate; and it was urged, that he should, for he does not take it as Executor only, but by express Words of Gift in the Will; and it appears, that there was not only a Benefit intended him as Executor, for even the Real Estate was devised to him; but it being in Proof, that he had not any the least Real Estate in the World, it was said by my Lord Chancellor, that the Personal Estate was designed him only as Executor; and it was thereupon decreed for the Widow, the Executrix. 1 Vern. 23.

15. J. S. being a Bachelor, made his Will, and devised a Legacy of 500l. to his Brother, and other Legacies to other Persons, and devised his Real Estate to Eliz. Clofe, and her Heirs, and afterwards intermarried with the same Eliz. Clofe, and died, leaving her Price ment enfeint with a Son, without making any Alteration in his Will; and the main Question in the Case was, whether this Alteration in the Testament's Circumstances, did of itself, without more ado, amount to a Revocation of the Will; those who argued for its being a Revocation, relied on the Case of one Ayres, in which it was resolved by the Judges, that where a Man that was unmarried made a Will, and devised away his Estate, and afterwards married and had a Child, and died without making any Revocation of his Will, that this Alteration of Circumstances was in it self a Revocation of the Will; and a Case was cited out of Cicero, where one thinking his Son dead, devised his Estate to another, yet the Son returning, held he should have it, because it was not to be supposed he would have disinherited him without Reason; on the other Side it was argued, that the Alteration of Circumstances might in some Cases amount to a Revocation of a Will; yet not in this, for here is nothing but what a reasonable Man might do, nothing unjust or unjustifiable; it appeared he had an Intention of marrying Eliz. Clofe when he made the Will, though perhaps he might not know, when he died, that his Wife was enfeint; or if he did, yet it is not uncommon for many, who are kind to, or fond of their Wives, to leave their Children wholly in their Power, to make them the more Dutiful to her, and that he must know the Son would be the Wife's Heir as well as his, and would have the Estate as such, if she did not dispoze of it from him: My Lord Keeper was clear of Opinion, that Alteration of Circumstances might be a Revocation of a Will of Lands as well as of a Personal Estate; and that notwithstanding the Statute of Frauds and Perjuries, which does not extend to an implied Revocation; but no such Alteration appears here, for no Injury is done any Person; and those are provided for whom the Testator was most bound to provide for; and so established the Will. Trin. 1702. between Brown and Thompson.
CAP. LVI.

WRITS.

(A) Of WRITS of Error, and WRITS mandatory, when to issue.

(B) Of superseding WRITS, for what Causes.

(A) Of WRITS of Error, and WRITS mandatory, when to issue.

1. A. Being indicted for not coming to Church, and found guilty, Application was made to the Attorney General; they might bring a Writ of Error; but he refused thereof; and thereupon the Lord Keeper was moved for such a Writ; but he said, that though he had the Custody of the Great Seal, yet he would make no Use thereof, but according to the Course of the Court, and therefore could not put the Seal to a Writ of Error, till it had been first signed and allowed by the Attorney General; and he took it, that a Writ of Error in a criminal Matter was ex gratia Regis in all Cases; but where Provision is made for the same by the Statute, and is not due ex debito justitia, or de cursu; but if there were real Error in the Case, and a Writ of Error was not sought for Delay, the Way was to Petition the King, and he would give Directions for inspecting the Proceedings, and see if there was real Error, or whether a Writ of Error was sought purely for Delay. Pach. 1683, between Crawle and Crawle, 1 Vern. 170, 175. S. P. And the Attorney General said, that A. being indicted on the Statute 3 Jac. 1, no Error could avail him, and the Indictment could not be quashed, nor the Proceedings avoided, otherwise than by Conformity.

2. A Motion was made, that the Lord Keeper would grant a mandatory Writ to the Chief Justice of the King's Bench, to command him to sign a Bill of Exceptions in the Case of the Lord Gray & al., who were convicted for a Riot in London; and they produced a Precedent, where, in a like Case, such Writ had issued out of Chancery to the Judge of the Sheriff's Court in London; but the Lord Keeper denied the Motion, for that the Precedent they produced
Writs.

ced was to an inferior Court, and he would not presume, but the Chief Justice of England would do what should be just in the Cause; for possibly you may tender a Bill of Exceptions which has false Allegations in it, and the like; and then he is not bound to sign it; for that might be to draw him into a Snare; and said, if they had wrong done them, they might right themselves by an Action on the Cause; and if this Court had a Power to grant such a Writ, the same was discretionary only, as Writs of Error are in criminal Causes, which are discretionary, and not de curfu. Trin. 1683, 1 Vern. 175.

(B) Of superseding Writs, for what Causes.

1. A. Being excommunicated for a Contumacy, and a Writ of De excommunicato capiendo awarded, it was moved for a Supersedeas to the Writ, by Reason that the Significavit was general and uncertain; but it was said by the Lord Chancellor, that a Supersedeas could not be granted on that Ground; but if the Excommunication were not for any of the Offences within the Statute 5 Eliz. and the Significavit did not express the same, the Remedy expressly appointed upon that Statute is Habeas Corpus, and upon the Return of it the Parties shall be discharged; but it being then alleged, that an Appeal was brought, and Security given to prosecute it with Effect, a Supersedeas was awarded, the Lord Chancellor saying, that the Appeal was a Supersedeas of it itself. Mich. 1681. The King versus Smeller, Russell, &c.

2. Upon a Motion made for a Supersedeas to a Writ De Cautione admittenda, for that they had taken a Writ to the Sheriff, without any Affidavit filed; that the Bishop refused to admit of Caution, and for that Reason a Supersedeas was awarded; and the Lord Keeper declared, that finding this Court often troubled for Writs De cautione admittenda, he thought the Right of it was, that if there was a Sentence for a Man to pay Money, or to do any other Thing in the Spiritual Court, a Man ought first to perform that, before he is admitted to his Writ De cautione admittenda; for it is in vain to take Security Parere mandatis Ecclesiae, whilst a Man refuses the Sentence; but the Reporter adds a Quere, for suppose a Man be excommunicated for not coming to Church, or not receiving the Sacrament; how can he do that till his Caution is admitted, and he absolved. Hill. 1682.

3. An Excommunicato capiendo having been awarded, was on Motion superseded before the Return of it; for the Generality of the Significavit whereon it was awarded, which was only, that the Party was excommunicated in Quaestam causa appellations & Querele; for the Chancellor held clearly, that till the Return of the Writ, the Court of King's Bench cannot relieve him; and if this Court cannot help him neither till the Return of the Writ, he must in the mean Time lie in Prison; and this he was clear in, without entering into the Question which was made in this Cause, whether, after the Writ returned and filed in B. R. according to the Statute 5 Eliz. that Court had not the sole Power of proceeding on it; for till the Writ returned and filed there, they had nothing to do with it, either by Way
Way of Qualifying or Superfeding it on Motion; and two Precedents were cited to Geo. 1. where such Writs had been superfeded quia improvise Eman, before the Return in B. R. and he said the Cases of King and Fowler, and of the Bishop of St. Davids, 1 Salk. 293, 294, may be good Law, as they were after the Writs returned and filed; and yet this Court could not be oufed of its Jurisdiction in the mean Time, before the Return and filing of the Writ in B. R. and my Lord Chancellor said, that at the Common Law the Excommunicato Capiendo was not returnable till the Pluries, but went first, and then an Alias; and if that not obeyed, then a Pluries; and if not then returned; then an Attachment to the Sheriff. Hill. 1727.

between Barlow and Collings.

4. Thomas Bambridge, late Warden of the Fleet, was indicted for the Murder of one Castle, a Prisoner in the Fleet, and acquitted; and the Widow brought an Appeal; the Writ was directed to the Sheriff, and returnable the first Day of next Term in B. R. being illused out of the Chancery; the Writ was, Quia Maria Castle fecerit vos sequer per Plegios A. and B. (naming them particularly with their Additions) de apellat sua prosequendus ideo practimus vobis quod attachietis per Corpus, &c. And now it was moved in Chancery to supercede this Writ, for that in Truth no Pledges were found or entred, notwithstanding the naming of them in the Writ, as appeared by Affidavit; and it was said, that Pledges in an Appeal were grounded on the Statute of Ws. 2. which takes Notice of vexatious Appeals brought by Perpons who had nothing to anfwer Damages, in Cache they did not proceed, or that the Appellee was acquitted; and the Bringing of a Man's Life twice in Jeopardy, was of such Consequence, that if the Appellor was not sufficient to anfwer the Damages, his Pledges or Sureties ought, and therefore were they required to be real, and not fictitious Persons, like John Doe and Richard Roe; and they ought likewise virtually to give Security to prosecute the Appeal. That they could not move in the King's Bench to quaff this Writ, because it was not returnable there till the first Day of the Term; and if they could not move to supercede it here, a Man must lie in Prison without Bail or Mainprize for a whole long Vacation, as Bambridge has done in this Case, upon an erroneous Writ, without Recrefs. It was also argued, that the Writ was absurd, and neither Grammar nor Senè; for it should have been Si Maria Castle fecerit vos sequer, and not Quia vos feceris, the Word Quia relating to the Time past, and the Word Fecerit to a Time future; and that the Precedents are Si A. B. fecerit vos sequer, in the Nature of a Condition precedent; so that till the Appellor has made the Sheriff secure, by finding of Sureties, he is not to attach him; or it should have been Quia A. B. vos feceris sequer; so that the Sureties are either to be given to the King before the Issuing of the Writ; and then it is Quia nos, or to the Sheriff after the Issuing thereof; and then it is Si A. B. feceris vos; and so are the Precedents in Rafiā 44, 46. Co. Ent. and others, and the Sheriff may return to the Writ Non invenit Plegios; and though it is said in 2 Jon. 154. and other Books, that the Appellor may find Sureties at any Time before Judgment, that cannot be; for then, if the Appellor finds that the Appellee is likely to be acquitted, he will never demand Judgment at all, and then the Party's Life may be brought twice
twice into Danger, and yet have no Recompence in Damages against an unjust Appeal; and it was resembled to an *Excommunicato Cupiendo*, which is returnable in *B. R.* they cannot move there to quash the Writ till it is returned and filed, because till then the Writ is not in Court, but in the Sheriff’s Hands; but if the Writ issued *erroneice* or *Improvode*, this Court from whence it issued, may call it in or supersede it; and the Great Seal ought not to be affixed to an erroneous or irregular Writ; but it was argued on the other Side, and agreed by my Lord Chancellor, that this Writ did not issue *erroneice* or *Improvode*, that that must be something extrinsick to the Writ itself, that if there be any Defect in the Writ, they may move to quash it, when it comes into the *King’s Bench*, if they think fit; that by the Precedents in *Raffal* and 2 *Fin. 154* it appears, that the Appellant may find Sureties in Court, if the Sheriff return *Non inventit Plegios*, or even at any Time before Judgment; that the Statute of Westminster the Second, was not made for the Finding of Pledges, but for the Punishment of the Abettors, and that there were very many Precedents, where no Sureties were actually found, that the Sheriff may, if he will, attach the Party without finding Pledges, because they may be found afterwards, or he may refuse to attach him, and return *Quia non inventit Plegios*, that *Quia A. B. fecit vos secur*, because the Party will find Pledges, is as good as *Si fecerit*, and that the Party may either find Sureties to the King, and then it is *Quia nos*, or to the Sheriff, and then it is *Si vos*, *Cf.* so the Motion was disallowed. Octob. the 14th, 1729. Bambridge’s Cafe.
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