



2023

Edward Barradall's Reports of Cases in the General Court of Virginia (1733-1741)

William Hamilton Bryson

University of Richmond - School of Law, hbryson@richmond.edu

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Recommended Citation

Edward Barradall's Reports of Cases in the General Court of Virginia (1733-1741) (W. H. Bryson ed., 2023).

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**EDWARD BARRADALL'S
REPORTS OF CASES IN THE
GENERAL COURT OF VIRGINIA
(1733-1741)**

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GENERAL COURT OF VIRGINIA
(1733-1741)**

Second Edition

Edited by

W. H. BRYSON

RICHMOND, VIRGINIA

2023

Edward Barradall's reports of cases in the General Court of Virginia (1733-1741)
Authors: Edward Barradall 1704-1743,(Reporter); William Hamilton Bryson 1941-(Editor)
Print Book: 2023, Second edition.
Richmond, Virginia, 2023.

edited by W. H. Bryson.

273 pages ; 28m

Subjects:

Virginia.—General Court

Law

Law reports, digests, etc

Virginia

Early works

History

Sources

1700-1799

Library of Congress Subject Headings:

Virginia.—General Court

Law reports, digests, etc.—Virginia—Early works to 1800

Law—Virginia—Sources

Virginia—History—18th century—Sources

Répertoire de Vedettes-Matière:

Jurisprudence—Recueils, re'pertoires, etc.—Virginie—Ouvrages avant 1800

Droit—Virginie—Sources

Virginie—Histoire—18e sie`cle—Sources

Genre:

Early works.

History.

Sources.

Early works to 1800.

Recueils, re'pertoires, etc. Ouvrages avant 1800.

Bibliography:

Includes bibliographical references and index.

OCLC Number/Unique Identifier: 1406036252

EDWARD BARRADALL

Edward Barradall was born in London, the son of Henry Barradall and Catherine Blumfield Barradall. He was baptized on 17 October 1703 in the parish church of St. Paul's, Covent Garden. Both of his brothers and two of his sisters came to Virginia in the 1730s. Edward Barradall was in Virginia by February 1731. From at least then until about 1733, he practiced law in the county courts of Caroline County and the Northern Neck. His law reports begin in 1733, and so it is to be presumed that that is the year he moved his practice from the county courts to the General Court in Williamsburg. He lived in Williamsburg from then until his death in 1743. The excellence of his legal mind is demonstrated by the high quality of his arguments in that court as published herein.

On 5 January 1736, Barradall married Sarah Fitzhugh. She was the daughter of William Fitzhugh, Jr. (1674-1713), a member of the Council of State and of the General Court from 1712 to 1713.

Barradall's law practice was very successful from the beginning. On 5 May 1736, he was appointed to the bench of the James City County Court, which sat in Williamsburg. A year after that, he was made the presiding justice. In November 1736, he was elected Mayor of the Town of Williamsburg, and, when his term of office expired, he was made the town Recorder. In 1737, he was made Attorney General of the colony and judge of the Court of Vice-Admiralty. He was elected in 1738 to the House of Burgesses to represent the College of William and Mary. While in the General Assembly, he served as the Chairman of the Committee on Courts of Justice.

He died on 19 June 1743 in Williamsburg, and was buried in the churchyard of Bruton Parish Church.¹

THE REPORTS

Virginia Colonial Decisions: The Reports by Sir John Randolph and by Edward Barradall of Decisions of the General Court of Virginia, 1728-1741 Edited, with Historical Introduction by R. T. Barton. Boston, Mass.: The Boston Book Company, 1909, vol. 2; reprint, Clark, N.J.: Lawbook Exchange, 2005, vol. 2.

Barradall's reports cover the period from April 1733 to October 1741. They are printed at volume 2, pp. B33-B363. These ninety-five cases are from the General Court of Virginia, which sat in Williamsburg in the Capitol building. Robert Thomas Barton (1842-1917),² the editor, gives an extensive historical introduction to his edition of these reports.

Barradall's case reports are primarily reports of his own arguments which were delivered in court. His contemporary reporters in England usually gave extensive coverage to the arguments of counsel also, and so this is not at all unusual. What is noteworthy is that the reasons of the judges for their judgments are very sparse. The reason for this is that only three of the judges at this time were legally trained, and thus their opinions were very brief and not very learned. However, the court was expected to follow legal precedents, and Barradall cites them to the court to support his arguments, not only English cases but also earlier General

¹ B. Tarter, 'Barradall, Edward', *Dictionary of Virginia Biography*, vol. 1, pp. 351-353; R. E. Nance, 'Edward Barradall', in W. H. Bryson, *Virginia Law Reporters before 1880* (1977), pp. 71-74; W. H. Bryson, *Virginia Law Books* (2000), pp. 96-97.

² W. K. Winfree, 'Barton, Robert Thomas', *Dictionary of Virginia Biography*, vol. 1, p. 376.

Court cases. Barradall does not hesitate to critique the judgments of the court, but, again, this was common also among the English law reporters of the period.

THE MANUSCRIPTS

Harvard Law School MS. 533

264 p.; 38 cm. This copy was once owned by Gustavus Adolphus Myers (1801-1869), a prominent Richmond lawyer, and it was given by him to William Green (1806-1880). At the beginning of the text, at the top of page 1, is written 'Wm. Green from his friend Gustavus A. Myers.' In 1881, this manuscript was sold by Green's estate¹ for \$25 to Brinton Coxe (1833-1892), a Philadelphia lawyer. It was acquired by the Harvard Law School on 25 February 1903. It has marginalia by William Green and others.

Barradall's original manuscript has been lost; thus, this is the manuscript that is the basis of this present edition. This edition prints the cases in chronological order, as the lost original was most certainly so ordered. The later marginalia has not been transcribed.

Library of Congress MS. KfV 2447 .A4 V57 1742

1 v. ([4], 241, [13] p.); 33 cm. (fol). Six of Barradall's cases are copied here. This manuscript was in the Library of Congress in 1849.² It was consulted by William Green (1806-1880) and by Robert Thomas Barton (1842-1917).

Library of Virginia MS. acc. no. 18

361 p. This is the copy of Barradall's reports that was the foundation for Barton's edition.

This copy was owned by Conway Robinson (1805-1884). While it was in his possession, it was borrowed by William Green, according to a note by Green written at the end of his own copy, the copy that is now in the Harvard Law School library. Robinson gave this his copy to the Virginia State Library (now the Library of Virginia). Philip Cary Nicholas (1829-1900), the librarian of the Virginia State Library when this manuscript was donated, added some cases that he copied from William Green's copy, and a gap of four lost pages, *i.e.* pages 357 to 360 has been filled in.³

William Green (1806-1880) and William Wallace Scott (1845-1929), a former librarian of the Virginia State Library and then Law Librarian of Virginia from 1903 to 1929, added a few marginal notes to this manuscript and to the first edition of it. These are copied in Barton's edition.

¹ R. A. Brock, comp., *Catalogue of the Choice and Extensive Law and Miscellaneous Library of the Late Hon. William Green, LL. D.* (1880), p. 199, no. 2322 3/4.

² *Catalogue of Books in the Law Department of the Library of Congress* (December 1849), p. 79, no. 224.

³ R. T. Barton, *Virginia Colonial Decisions* (1909), vol. 1, pp. 1-22.

Virginia Historical Society MS. Mss4 V81935a1, part 1

251, [3] p. Pages 1-32, 37-40, 57-96 are missing. Eleven of Barradall's cases are copied here; there are numerous marginalia by William Green. This manuscript was donated in 1849 to the Virginia Historical Society by John Taylor, Jr., of Caroline County, Va.

Thus, we see that these manuscripts were known in early nineteenth century Virginia. Thomas Jefferson copied twenty-six of these reports into his reports of Virginia cases.¹ There was, indeed, a proposal in 1852 to publish them,² but this did not happen until 1909.

THE GENERAL COURT

The General Court of Virginia was a collegiate court composed of twelve lay magistrates, presided over by the Governor. They did not give extensive reasons for their judgments, and, therefore, these reports are primarily of the arguments of counsel, which are quite elaborate and well reported. The judges of the General Court before 1776 were the same men who composed the Governor's Council of State and the upper house of the General Assembly of Virginia. Thus, they exercised judicial, executive, and legislative powers, similarly to the Privy Council in England. The General Court sat in Williamsburg every April and October.

At the time of these reports, the General Court was composed of the following gentlemen.

James Blair (c. 1655-1743) was educated at Marischal College, Aberdeen, and received his M.A. in 1673 from the University of Edinburgh. He was the Bishop of London's commissary, *i.e.* deputy, in Virginia, the first President of the College of William and Mary, and the rector of Bruton Parish Church in Williamsburg. He was the great-uncle of John Blair, Jr. (1731-1800), one of the first justices of the Supreme Court of the United States.³

William Byrd, II (1674-1744), was called to the bar at the Middle Temple on 12 April 1695⁴ and elected a Fellow of the Royal Society in 1696. He was admitted to Lincoln's Inn *ad eundem* on 22 October 1697, and made a Master of the Bench on 7 May 1724.⁵ He was a member of the House of Burgesses from 1696 to 1697 and appointed to the General Court in

¹ T. Jefferson, *Reports of Cases Determined in the General Court of Virginia* (1829, reprint 1981), pp. 8-72.

² See J. W. Randolph's publisher's notice in George Wythe, *Decisions of Cases* (2d ed. by B. B. Minor, 1852), pp. [v], [xliv].

³ T. W. Tate, 'Blair, James', *Dictionary of Virginia Biography*, vol. 1, pp. 539-543; J. B. Bell, 'Blair, James', *Oxford Dictionary of National Biography*, vol. 6, pp. 82-85; P. Rouse, Jr., *James Blair* (1971).

⁴ H. A. C. Sturgess, *Register of Admissions to the . . . Middle Temple* (1949), vol. 1, p. 230; C. H. Hopwood, *Middle Temple Records*, C. T. Martin, *Minutes of Parliament of the Middle Temple* (1905), vol. 3, p. 1429; M. Tinling, ed., *The Correspondence of the Three William Byrds* (1977), vol. 1, pp. 178-179.

⁵ *Records . . . of Lincoln's Inn, Admissions* (1896), vol. 1 p. 353; *Records of Lincoln's Inn; The Black Books*, vol. 3, pp. 268, 335 (1899).

1709. His first wife was the daughter of Daniel Parke (d. 1710), Governor of the Leeward Islands, and the sister of the wife of John Custis (1678-1749).¹

John Carter (c. 1695-1742) was admitted at the Middle Temple on 30 April 1713 and called to the bar on 27 May 1720.² He matriculated on 12 January 1714 at Trinity College, Cambridge, but soon returned to his law studies in London. He was the Secretary of the Colony of Virginia. He was the son of Robert ('King') Carter (c. 1663-1732).³

John Custis (1678-1749) was appointed on 25 April 1701 a justice of the peace to sit in the Northampton County Court; he was a member of the Virginia House of Burgesses in 1705, 1706, and 1718. His wife was the daughter of Daniel Parke (d. 1710), Governor of the Leeward Islands, and the sister of the first wife of William Byrd, II (1674-1744). His son was the first husband of Martha Dandridge (1731-1802), who later married George Washington (1732-1799). Custis was an amateur botanist and was a friend of Mark Catesby (1682-1749), John Bartram (1699-1777), and Peter Collinson (1694-1768).⁴

William Dandridge (1689-1744) was a Virginia land owner and an officer in the British Navy; he was the uncle of Martha Dandridge Custis Washington (1731-1802).⁵

Cole Digges (1692-1745) was a member of the House of Burgesses in 1715 and 1718 and a justice of the peace in the York County Court in 1734. He was a plantation owner and a merchant in Yorktown.

John Grymes (1692-1748) was a substantial planter at Brandon, Middlesex County.

Thomas Lee (1690-1750) was educated at the College of William and Mary. He was a justice of the peace in the Westmoreland County Court and a member of the House of Burgesses. He was the land agent for the Fairfax proprietary of the Northern Neck. He was the father of Richard Henry Lee (1732-1794) and Francis Lightfoot Lee (1734-1797), both of whom were signers of the Declaration of Independence.⁶

Philip Lightfoot (1689-1748) was a prosperous merchant; he was the Clerk of York County from 1707 to 1733.

William Randolph (1681-1742) attended the College of William and Mary. He was a lawyer and had an extensive practice in the county courts in the section of Virginia where he resided. Also, he was the Clerk of Charles City County from 1705-1709 and Clerk of Henrico County from 1710 to 1720. From then until 1727, Randolph was a justice of the peace sitting

¹ M. H. Quitt, 'Byrd, William', *Dictionary of Virginia Biography*, vol. 2, pp. 466-470; P. D. Nelson, 'Byrd, William', *Oxford Dictionary of National Biography*, vol. 9, pp. 329-331; P. Marambaud, *William Byrd of Westover* (1971); R. C. Beatty, *William Byrd of Westover* (2d ed. 1970).

² H. A. C. Sturgess, *Register of Admissions to the . . . Middle Temple* (1949), vol. 1, p. 272.

³ E. G. Evans, 'Carter, John', *Dictionary of Virginia Biography*, vol. 3, pp. 73-75.

⁴ S. B. Bearss, 'Custis, John', *Dictionary of Virginia Biography*, vol. 3, pp. 636-639; E. G. Swem, ed., *Brothers of the Spade* (1957); J. L. Zuppan, ed., *Letterbook of John Custis, IV* (2005).

⁵ K. J. Hayes, 'Dandridge, William', *Dictionary of Virginia Biography*, vol. 3, pp. 677-678; V. C. Hall, Jr., *Portraits in the Collection of the Virginia Historical Society* (1981), pp. 66-67.

⁶ A. H. Tillson, Jr., 'Lee, Thomas', *Oxford Dictionary of National Biography*, vol. 33, pp. 125-126; P. C. Nagel, *The Lees of Virginia* (1990), pp. 33-48.

in the Henrico County Court. He was a member of the House of Burgesses from 1715 to 1726. He was the older brother of Sir John Randolph (1693-1737), the Williamsburg lawyer and law reporter.¹

John Robinson (1683-1749) was made a Justice of the Peace in the Middlesex County Court in 1706, and he was elected to the House of Burgesses in 1710. He was the nephew of John Robinson (1650-1723), Bishop of London, and the father of John Robinson (1705-1766), the Speaker of the House of Burgesses and Treasurer of Virginia.²

John Tayloe (1687-1747) was made a justice of the peace on the Richmond County Court in 1714.³

Sir William Gooch (1681-1751) attended Queen's College, Oxford. He was the lieutenant governor of Virginia. His older brother, Thomas Gooch (1675-1754), was the Bishop of Ely and the Master of Gonville and Caius College, Cambridge.⁴

They were a well-educated and well-connected group. Robert T. Barton was dismissive of the intellectual and legal abilities of the judges on the General Court of Virginia.⁵ While it is certainly true that they were appointed to the bench for other than their legal abilities, they were intelligent and generally educated persons. After having heard technical legal arguments over the course of many years, which these reports demonstrate, they must have picked up enough legal knowledge to function adequately as a court of law. In fact, two of them, William Byrd and John Carter, had been called to the bar after a period of legal study in England, and William Randolph had had a substantial legal practice. Others had sat as judges in the local county courts and been members of the lower house of the Virginia legislature. They were all wealthy landowners and had to deal with complicated legal issues in their daily personal lives. The English law books were readily available in Virginia to all of them.⁶ If the lawyers had thought that the judges were not capable of understanding complicated legal arguments, as Barton suggested, the lawyers would not have troubled themselves to make them, which they clearly did.

Barradall does not hesitate to critique the court's judgments. Sometimes, he disagrees with their conclusions. 'Never was an argument so little understood' wrote Barradall at the end of his report of *Richardson v. Mountjoy* (1739), Case No. 76. However, in the case of *Banks v. Banks* (1739), Case No. 74, he agrees that the court's conclusion was correct, even though they ruled against his client and his argument.

¹ G. S. Cowden, *The Randolphs of Turkey Island*, Ph. D. diss., College of William and Mary, 1977, pp. 141-157; V. C. Hall, Jr., *Portraits in the Collection of the Virginia Historical Society* (1981), p. 209.

² E. L. Shepard, 'Virginia Governors from Essex County', *Essex County Historical Society*, vol. 26, p. 1 (May 1985); E. G. Evans, 'Robinson, John (1705-1766)', *Oxford Dictionary of National Biography*, vol. 47, pp. 365-366.

³ L. C. Kamoie, *Irons in the Fire: the Business History of the Tayloe Family* (2007), p. 17.

⁴ P. D. Nelson, 'Gooch, Sir William', *Oxford Dictionary of National Biography*, vol. 22, pp. 740-742.

⁵ R. T. Barton, *Virginia Colonial Decisions* (1909), vol. 1, p. 212, n. 7, and p. 218.

⁶ As for the law books in the library of the General Court, see B. Tarter, 'The Library of the Council of Colonial Virginia', in W. M. Billings and B. Tarter, ed., *"Esteemed Bookes of Lawe" and the Legal Culture of Early Virginia* (2017), pp. 37-56; for the colony of Virginia generally, see W. H. Bryson, *Census of Law Books in Colonial Virginia* (1978).

EDITORIAL PRINCIPLES

The Harvard Law School manuscript is the basis of this edition. All of the known manuscripts are copies of the original, and, therefore, this present edition corrects the typographical errors of Barton's edition and the misunderstandings of the original copyists. Furthermore, the cases have been reordered to be in chronological order.

This edition of these cases does not include the opinions of counsel that Barradall published at the beginning of his first edition nor the two opinions at the end of the manuscript. These belong to the class of legal literature commonly called *consilia*, but not *decisiones*.

Barton's edition is a good scholarly transcription, faithfully giving the original spelling and abbreviations of the manuscript that he used. However, this present edition is one made for lawyers, giving the modern spelling and punctuation with the abbreviations fully expanded. This will render the text as clear and understandable as possible to modern readers, especially non-lawyers who may not be fully familiar with the technical vocabulary of the law. Furthermore, this accords with the rule of *idem sonans*, which is that a word is the spoken word not the written word, and thus spelling is not relevant.

In the footnotes, the references to the Virginia statutes are to William Waller Hening, comp., *Statutes at Large of Virginia*, hereinafter Hening's Statutes, the English statutes are to the *Statutes of the Realm*, hereinafter SR, and the parallel citations to the English case reports are to the *English Reports Reprint*, hereinafter E.R. As is the tradition of law reporting, the names of the judges are put in small capitals and the names of the lawyers in italics.

Barradall's reports have been re-formatted here according to the current standard of law reporting. The headnotes and the footnotes are of this editor's own composition; they are designed to locate these reports within the broad sweep of Anglo-American legal history. The reporting of cases is an ancient and unbroken tradition going back to the latter years of the reign of King Henry III.

Although the judges of the General Court of Virginia during the time of these reports were educated persons, only three of them were learned in the law, *viz.* William Byrd, John Carter, and William Randolph. These arguments by Barradall are, therefore, interesting in that they show how a good lawyer presented complicated legal points of law to a court that was composed primarily of laymen.

The Virginia law reports of Edward Barradall and of Sir John Randolph¹ and the Irish cases edited by Andrew Lyall for the Selden Society² and, perhaps also, the Maryland law reports of Harris & M'Henry, vol. 1, pp. 20-160, illustrate the early eighteenth century diaspora of the common law of England.

¹ *Sir John Randolph's Reports of Cases in the General Court of Virginia (1729-1735)* (W. H. Bryson, ed., 2015).

² *Irish Exchequer Reports: Reports of Cases in the Courts of Exchequer and Chancery in Ireland 1716-1734*, edited by A. Lyall (2009), Selden Soc., vol. 125.

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**EDWARD BARRADALL'S
VIRGINIA REPORTS**

1

Murdock v. Thornton
(April 1733)

A judgment debtor is not in execution before the judgment creditor requests that a writ of execution be issued by the clerk of court.

Appeal from Stafford [County Court].

The question in this case was whether a man confessing judgment in custody is in execution without a prayer of the plaintiff.

The Case of Diggs and Fleming, in this court,¹ was insisted on, which was [thus]. One [*blank*] confessed judgment in custody, and was discharged by the county court upon the Act for Relief of Insolvent Debtors.² The Act speaks only of persons in execution. So, unless he was in execution, the county court had no power to discharge him.

But it was adjudged the court had power to discharge him and, consequently, that he was in execution.

For the appellant, plaintiff below, it was also insisted that the entry of the *committitur* was only [a matter of] form and that the clerk should do it of course without a prayer, that, in England, it was the mere act of the attorney who entered it upon the roll.

For the appellee, it was answered such practices would be inconvenient, for, thereby, the plaintiff would be forced to take execution against the body when, perhaps, he had rather have it against the estate.

[It was] adjudged that he was not in execution without a prayer, and so the county court judgment was affirmed.

[Other copies of this report: Conway Robinson, *Practice in the Courts of Law and Equity in Va.* (1832), vol. 1, p. 137.]

2

Reeves v. Waller
(October 1733)

The Act of 1 Geo. II, c. 3, s. 14, did not exclude plaintiffs from an appeal of small judgments, but only defendants.

The plaintiff brought an action upon the case in the Essex County Court for 40s. won upon a horse race, and had a verdict in his favor. In arrest of judgment, it was objected that

¹ *Fleming v. Diggs* (1732), Randolph Va. 113.

² Act of 1726, c. 3, s. 30, 4 Hening's Statutes 165-166.

the plaintiff ought to have sued by way of petition upon the Act of 1 Geo. II¹ for the recovery of small debts. And, for this reason, judgment was stayed, and the plaintiff [was] ordered to pay costs.

And now, I [*Edward Barradall*] moved for a writ of error. The doubt was whether it could be allowed, the principal debt being under £5 and no appeal or supersedeas ought to be granted by the Act of 1 Geo. II.

I [*Barradall*] insisted that the Act did not mention writs of error and that the subject was entitled to them of common right.

But the court seemed to incline that writs of error were within the Act. However, a writ of error was allowed upon the authority of *Spotswood and Harrison's Case* in this court, in which the court came to a solemn resolution that the Act did not intend to exclude the plaintiff from an appeal etc. but the defendant only. See the Act, c. 3, s. 14.

[Other copies of this report: Jefferson 8.]

3

McCarty v. McCarty's executors
(October 1733)

A debt will be discharged where the debtor is made an executor of his creditor's will.

In chancery.

Daniel McCarty, being possessed of a large personal estate and, among others, of a bond debt of £291 and interest due from John Fitzhugh, one of the defendants, makes his will. And, after several legacies, he devises the residue to his three sons, Dennis, B., and T., and makes them executors. But, because they were under age, he makes the said John Fitzhugh and the other defendants, executors in trust until T. arrived to seventeen. This bill was brought by Dennis, one of the sons and residuary legatees, against the trust executors for an account of the residue of which John Fitzhugh's bond is charged to be part.

John Fitzhugh answers separately, and submits whether the debt be not extinguished by his being made executor, which, he says, he believes was the testator's intention, because of the defendant's coming to see him in his last sickness and expressing some uneasiness about this bond. The testator said, if he thought any child of his would trouble him for it, he would burn it before his face. He says he married the testator's eldest daughter and that the testator promised to give him as much as he gave any of his other daughters, that he gave the defendant only nine Negroes in his lifetime and two by his will, and that he gave two daughters £500 apiece by his will. And the defendant hopes to be allowed as much out of the bond as will make his wife's portion the same. He says he employed the testator to purchase an estate for him, which the testator bought for himself and devised to the complainant. And he hopes that will be considered.

This cause was heard upon the bill and answer.

Hopkins, for the plaintiff, insisted that the debt, though extinguished at law, is assets in equity. And he cited 8 Edw. IV, fo. 3; *Nichols against Chamberlayne*, Nel. 44, same case 3

¹ Act of 1727, c. 3, s. 14, 4 Hening's Statutes 188.

Ch. Rep.; Flud and Rumsey, Yel. [*blank*]; Phillips against Phillips; 1 Ch. Ca. 292, same case Finch 410; Wankford against Wankford, 1 Salk. 299; Dorchester against Webb, 1 Cro. 372.¹

Sir John Randolph, for the defendant: The testator's intent was to discharge the debt by making John Fitzhugh executor, as may be inferred from his discourse with John Fitzhugh mentioned in his answer, that collateral proof is admitted in equity to explain a testator's intention. And he cited Lady Granville against Duchess of Beaufort, 2 Vern. 648, and *id.* 593, 736.²

This rule was also insisted on 'he that will have equity must do equity', that the defendant had a great deal of equity against the testator upon the several matters disclosed and sworn in his answer, particularly, that about his wife's portion and the land.

The bill was dismissed.

Note it seemed to be agreed by Sir John Randolph that the debt was assets, which is certainly a clear point.

And the court's opinion, as I took it, turned upon the matters disclosed in the defendant's answer.

Vide Sir John Randolph's argument for the defendant, No. 42.³

[Other reports of this case: *sub nom.* McCarty v. Fitzhugh (1733), Randolph Va. 152.]

[This case is cited in Scarbury v. Barber, executor (1739), see below, Case No. 73.]

4

Nicholas v. Burwell

(October 1733)

In this case, the legacy in issue never vested, but lapsed upon the death of the legatee.

In chancery. Nicholas and his wife v. Burwell's executors.

Burwell, by his will, devises to the child his wife was *enceinte* with, if a son, £2000, if a daughter, £1000, when such child arrived at the age of twenty-one. After the testator's death, his relict was delivered of a daughter, who died before twenty-one. And this bill was

¹ YB Pas. 8 Edw. IV, f. 3, pl. 4 (1468); *Nicholls v. Chamberlaine* (1646), Nelson 44, 21 E.R. 785, 2 Chancery Rep. 89, 21 E.R. 737; *Flud v. Rumcey* (1609), Yelverton 160, 80 E.R. 107; *Philips v. Philips* (1676), 1 Chancery Cases 292, 22 E.R. 806, Reports *tempore* Finch 410, 23 E.R. 223, also 2 Freeman 11, 22 E.R. 1024, 79 Selden Soc. 457; *Wankford v. Wankford* (1703), 1 Salkeld 299, 91 E.R. 265, also 3 Salkeld 162, 91 E.R. 753, Holt K.B. 311, 90 E.R. 1072, 11 Modern 38, 88 E.R. 869, 1 Freeman 520, 89 E.R. 390; *Dorchester v. Webb* (1634), Croke Car. 372, 79 E.R. 924, also Hutton 128, 123 E.R. 1150, W. Jones 345, 82 E.R. 182.

² *Lady Granvill v. Duchess of Beaufort* (1709), 2 Vernon 648, 23 E.R. 1023, also 1 Peere Williams 114, 24 E.R. 317, 1 Eq. Cas. Abr. 245, 21 E.R. 1021, 2 Eq. Cas. Abr. 415, 22 E.R. 352; *Hodgson v. Hodgson* (1707), 2 Vernon 593, 23 E.R. 985, also Precedents in Chancery 229, 24 E.R. 112, 1 Eq. Cas. Abr. 231, 21 E.R. 1012; *Batchellor v. Searl* (1716), 2 Vernon 736, 23 E.R. 1081, also Gilbert Rep. 125, 25 E.R. 88, 1 Eq. Cas. Abr. 246, 21 E.R. 1023, Chan. Repts. *tempore* Geo. I, 243.

³ *McCarty v. Fitzhugh* (1733), Randolph Va. 152.

brought by the plaintiff and his wife, the testator's relict, for her part of the £1000 devised to the posthumous daughter.

The defendants demurred because it appeared by the complainant's own showing the daughter died before twenty-one and so the legacy never vested.

Randolph, for the defendants: There is a difference where money is devised to one at such an age or when they come to such an age and where to be paid at such an age. In the first place, if the legatee dies, it is a lapsed legacy, but, in the other case, it shall go to the executor or administrator, that the reason of this distinction is rather from a compliance with the civil law and the determinations of the spiritual court that there may be an uniformity in judgment than from any real difference in the nature of the thing, that, as there was no spiritual court here, the distinction should be exploded, and that the legacy lapsed in both cases. He cited Swinb. 310, 313; Wentworth; Cloberry's Case, 2 Vern. 343, 2 Ch. Ca. 155, same case 2 Ch. Rep. 155; Godb. 182; Smell v. Dee, 2 Salk. 415; Lord Pawlet's Case, 2 Ch. Rep. 165, same case 2 Vern. 366; Cave and Cave, 2 Vern. 508; Yeats and Fettiplace, *id.* 416; Smith and Smith, *id.* 92; Carter v. Blesto, *id.* 617; Onslow and South, Eq. Ca. Abr. 295, 296.¹ *Vide plus ibidem.*

But, if this be not a lapsed legacy, it is not payable until the child would have been twenty-one. And he cited 2 Vern. 283, Papworth against Moore, Eq. Ca. Abr. 299; 2 Vern. 199.²

Hopkins, for the complainants, insisted that the distinction between a legacy given at such an age and to be paid at such an age was exploded, there being no real difference and the intention of the testator was the same in both cases and that the intention ought to govern. He said the legacy vested in both cases and should go to the executor. He cited Sanders v. Erle, 2 Ch. Rep. 8^o 188; Luke against Aldern, 2 Vern. 31; and 2 Vern. 199.³ And said the cases of Yates and Fettiplace, Lord Pawlet's, and Smith and Smith would not affect this case because, there, the charge was upon land and it was to ease the heir.

¹ H. Swinburne, *Brief Treatise of Testaments and Last Wills*; T. Wentworth, *Office of Executors*; *Cloberry v. Lamden* (1678), 2 Ventris 342, 86 E.R. 476, 2 Chancery Cases 155, 22 E.R. 892, also 2 Freeman 24, 22 E.R. 1035, 1 Eq. Cas. Abr. 294, 21 E.R. 1055, 2 Eq. Cas. Abr. 539, 22 E.R. 454, 79 Selden Soc. 509, 529; *Anonymous* (1611), Godbolt 182, 78 E.R. 111; *Smell v. Dee* (1707), 2 Salkeld 415, 91 E.R. 360; *Lady Poulet v. Lord Poulet* (1683), 2 Chancery Reports 286, 21 E.R. 680, 2 Ventris 366, 86 E.R. 489, also 1 Vernon 204, 321, 23 E.R. 415, 496, 2 Freeman 93, 22 E.R. 1079, 1 Eq. Cas. Abr. 267, 21 E.R. 1036, Lords' Journal, vol. 14, p. 87, Chan. Repts. *tempore* North, 230; *Cave v. Cave* (1705), 2 Vernon 508, 23 E.R. 925, also 1 Eq. Cas. Abr. 275, 21 E.R. 1042; *Yates v. Fettyplace* (1701), 2 Vernon 416, 23 E.R. 868, also Precedents in Chancery 140, 24 E.R. 67, 12 Modern 276, 88 E.R. 1319, 2 Freeman 243, 22 E.R. 1185, 1 Lord Raymond 508, 91 E.R. 1239, 2 Eq. Cas. Abr. 541, 559, 653, 654, 22 E.R. 456, 471, 548, 550; *Smith v. Smith* (1688), 2 Vernon 92, 23 E.R. 669, 1 Eq. Cas. Abr. 268, 21 E.R. 1037, Chan. Repts. *tempore* Jac. II, 503; *Carter v. Bletsoe* (1708), 2 Vernon 617, 23 E.R. 1005, also Precedents in Chancery 267, 24 E.R. 129, Gilbert Rep. 11, 25 E.R. 9, 2 Eq. Cas. Abr. 540, 22 E.R. 455; *Onslow v. South* (Ch. 1709-1710), 1 Eq. Cas. Abr. 295, 21 E.R. 1056, Chancery Repts. *tempore* Anne 182.

² *Papworth v. Moore* (1692), 2 Vernon 283, 23 E.R. 783, 1 Eq. Cas. Abr. 299, 21 E.R. 1059; *Anonymous* (1690), 2 Vernon 199, 23 E.R. 730.

³ *Sanders v. Earle* (1680), 2 Chancery Rep. 188, 21 E.R. 653; *Luke v. Alderne* (1687), 2 Vernon 31, 23 E.R. 629, also Chan. Repts. *tempore* Jac. II, 406; *Anonymous* (1690), 2 Vernon 199, 23 E.R. 730.

As to the objection that the suit was brought too soon because the daughter would not have been twenty-one if alive, he cited *Lady Lodge's Case*, 1 Leon. 277, 278, and *Sanders v. Erle*, *supra*.¹

The demurrer was allowed.

See Mod. Ch. Ca. 105, 106,² [where it is] said to be a standing rule in equity that, where a portion or legacy is to be paid at a time to come out of lands, if the legatee dies before the day, the legacy is sunk and gone, but it is otherwise if the legacy is to be paid out of a personal estate.

So, where portions were charged on lands and, if any of the children died before twenty-two or marriage, to go to the survivors, one dies, that portion shall not be paid before it would have become due had the child lived. *Select Cases in Chan.* 15; 2 Hop. 89.³

[Other reports of this case: *Randolph Va.* 140.]

[This case is cited in *Swiney v. Dandridge* (1732), *Randolph Va.* 148.]

5

Micou v. Corbin
(October 1733)

Where commissioners appointed to state an account have done so, judgment can be entered thereupon for the creditor.

This was an action of account rendered. Persons were appointed by the court to settle the accounts between the parties, who having returned an account stated, judgment was now prayed for the balance found due to the plaintiff.

Randolph, for the defendant, opposed a judgment, and said the judgment of auditors in account was not final, that this was not like the common case where matters of account are referred by assent, that the auditors had mistook their office and should have pursued the method prescribed in the books in actions in this nature, *i.e.* where there is any doubt or dispute, to make up an issue and send it to the court for trial. And he cited a precedent to that purpose.

The court overruled the objection, it having been the practice here to proceed in this manner, and [they gave] judgment for the plaintiff.

[This case is cited at *Conway Robinson, Practice in the Courts of Law and Equity in Va.* (1832), vol. 1, p. 76.]

¹ *Lady Lodge's Case* (1584), 1 Leonard 277, 74 E.R. 253; *Sanders v. Earle* (1680), *ut supra*.

² *Bateman v. Roach* (1724), 9 Modern 104, 88 E.R. 344, also 2 Eq. Cas. Abr. 293, 303, 332, 536, 543, 561, 566, 22 E.R. 246, 255, 283, 452, 457, 472, 477.

³ *Feltham v. Feltham* (1725), *Select Cases tempore King* 15, 25 E.R. 197, also *Chan. Repts. tempore Geo. I*, 1109; the reference to Hopkins's Virginia reports is to a manuscript that has been lost for a good 200 years. This paragraph is added from the Library of Virginia manuscript.

Stith v. Soane
(October 1733)

In this case, the court admitted as res judicata a fact in issue that had been adjudged in a former action between different parties and upon a different issue.

This was an information against the justices of Charles City [County] [Soane and others] for not keeping a sufficient prison.

The plaintiff offered in evidence the record of a judgment in an action brought against him when Sheriff for an escape, in which it was found by the jury that the prison was insufficient.

And [it was] allowed by all the court, except GRYMES, who thought it should be only admitted to prove the damages the Sheriff had sustained, but not the insufficiency of the prison.

Rex v. Moore
(October 1733)

The law does not recognize fractions of days.

As to dates of statutes, the day on which a statute was enacted is not counted.

There are no official ports in Virginia for the purposes of importations; thus, coming within the capes is an importation.

An information was brought against the defendant upon the Act of 5 & 6 Geo. II,¹ laying a duty upon slaves, for not transmitting to the collector of the duties a list of the slaves by him sold imported in the ship A.

The defendant offered as witnesses the master and steward of the ship.

To whom Mr. Attorney [General Clayton] objected, as parties in interest, having slaves of their own aboard.

But the court seemed to think it no objection.

And [it was] said at the bar, if two are concerned in a trespass and one is indicted, the other may be a witness for or against him.

And [it was said] by *Sir John Randolph*, if one is sued for any matter for which another is also chargeable, that other person may be a witness.

The jury found a special verdict that the Act was passed 1 July 1732 about four in the afternoon and the ship came to an anchor off Back River the said 1 July about two leagues from the shore, came into the capes about twelve, and came to anchor between seven and eight, and could have got up to York if they had had a pilot. On the second of July, the ship got into the mouth of the York River, on the third to Yorktown, and entered the fifth.

Two questions were made upon the verdict, first whether the day of passing the Act was exclusive or inclusive, second, whether this was an importation. The words of the Act are 'from and after the passing of this Act, there shall be paid etc. for all slaves imported or brought into this colony and dominion for sale' etc.

¹ Act of 1732, c. 3, s. 11, 4 Hening's Statutes 320.

As to the first, for the king, it was insisted there could be no fraction of a day and the Act, being passed the first of July, that whole day must be included. And Clayton's Case, 5 Rep. 1,¹ was cited.

Hopkins, for the defendant, agreed there was no fraction of a day, but insisted the day of passing the Act was excluded and, consequently, this importation was before the Act. And he cited Clayton's Case, *supra*, and the case in *Dyer*, 5 Eliz., 218, there cited, which seemed to be in point. Also he cited Holt's opinion in *Robert Howard's Case*, 2 Salk. 625, and *Lord Rockingham against Oxenden*, 2 Salk. 578.²

As to the second, he [*Clayton*] insisted for the king that the place where the ship anchored 1 July was not within any port and so no importation.

To which it was answered there are no ports laid out here as in England and that coming within the capes with an intent to come straight to Virginia is an importation.

Judgment [was given] for the defendant.

[Other copies of this report: Jefferson 8.]

8

Rex v. Pryor
(October 1733)

Even though the victim of an assault has settled his claim, the party who committed the assault can be criminally prosecuted.

Indictment for an assault.

It was moved by the defendant that the indictment might be dismissed because the defendant, before the bill found, had given his note to the prosecutor for two pistoles in satisfaction of the assault.

But the court refused to dismiss it, because there is a fine to the king.

9

Meggs v. Bates
(October 1733)

The transfer of one person's debt to another person's account is a sufficient consideration for a promise to be enforceable.

Appeal from Essex [County Court].

This case was upon a special verdict where it was found the defendant promised to pay the debt of another but no consideration of the promise was found. It was insisted for the appellant, the defendant in the action, that this was a *nudum pactum* and void, as well in law as in equity and justice, since it was neither an advantage to him that made the promise nor a

¹ *Clayton v. Presenham* (1585), 5 Coke Rep. 1, 77 E.R. 48.

² *Thomas v. Popham* (1563), 2 *Dyer* 218, 73 E.R. 483; *Howard's Case* (1699), 2 Salkeld 625, 91 E.R. 528; *Lord Rockingham v. Oxenden* (1705-1711), 2 Salkeld 578, 91 E.R. 487, also *Precedents in Chancery* 239, 24 E.R. 116, *sub nom. Lord Rockingham v. Penrice*, 1 *Peere Williams* 177, 24 E.R. 345, *Chancery Repts. tempore Anne* 391.

loss to him to whom it was made. And the plaintiff had still his remedy against the principal, since he was not discharged.

The cases cited for the appellant were Doctor and Student 210; Mar. 203; Pop. 183; Cro. Jac. 207, 213, 438; 1 Ventr. 9, 27, 159; Cro. El. 19, 703; 1 Salk. 364.¹

But notwithstanding all those authorities expressly in point, the court adjudged it a good promise. And the county court's judgment [was] affirmed.

These authorities were not denied, nor one book quoted against them. But the argument was the common case of merchants' giving credit in their stores and who, every day, transferred one man's debt to another's account.

N.B. There seems to me a great difference in the cases where credit is given in a store. The delivery of the goods is a good consideration. And, as to the case of transferring debts, there is also a good consideration if credit is given to the principal, for, thereby, he is discharged.

10

Rex v. McClanahan
(April 1734)

Where a county court fills in a blank commission to the position of sheriff and that person refuses to act, he is not liable to the penalties for refusing because he was never properly commissioned to the office of sheriff.

[An action of] debt [was brought] for 3000 pounds of tobacco on the Act 7 Geo. I, for refusing the office of sheriff.²

The case was that the defendant was the first of the three recommended by the county court. A blank commission was sent up to the clerk of the county court under the seal with directions from Mr. Robertson to offer the commission to the defendant, and, if he refused, to put in the name of the next person recommended. The defendant refused before the county court, and the commission was filled up with the name of another.

And whether the defendant was liable to the penalty of the Act was the question.

The words of the Act are 'that every person hereafter commissioned to be a sheriff and refusing shall forfeit' etc. In this case, the defendant never was commissioned; his name was never in the commission, and so he is not within the Act.

Judgment [was given] for the defendant.

Note it was said the practice of sending out blank commissions under the seal was of dangerous consequence and it was not safe for any man to fill them up.

¹ *St. German's Doctor and Student* (T. F. T. Plucknett and J. L. Barton, edd., 1974), 91 Selden Soc. 229; *Hammon v. Roll* (1642), March 202, 82 E.R. 475; *Beven v. Cowling* (1626), Popham 183, 79 E.R. 1277; *Woodford v. Deacon* (1608), Croke Jac. 206, 79 E.R. 180; *Buckingham v. Costendine* (1608), Croke Jac. 214, 79 E.R. 186; *Mayho v. Buckhurst* (1617), Croke Jac. 438, 79 E.R. 274; *Clipsam v. Morris* (1669), 1 Ventr. 9, 86 E.R. 7, also 1 Levinz 248, 83 E.R. 391, 1 Siderfin 396, 82 E.R. 1178, 2 Keble 401, 443, 453, 84 E.R. 251, 278, 284; *More v. Lewis* (1669), 1 Ventr. 27, 86 E.R. 19; *Barber v. Fox* (1671), 1 Ventr. 159, 86 E.R. 108, also 2 Williams Saunders 134, 85 E.R. 859, 2 Keble 811, 836, 84 E.R. 512, 529; *Lutwich v. Hussey* (1583), Croke Eliz. 19, 78 E.R. 285; *Wichals v. Johns* (1599), Croke Eliz. 703, 78 E.R. 938; *Courtney v. Strong* (1705), 1 Salkeld 364, 91 E.R. 316, also 2 Lord Raymond 1217, 92 E.R. 304, 6 Modern 265, 87 E.R. 1012.

² Act of 1720, c. 4, 4 Hening's Statutes 84-87.

[Other copies of this report: Jefferson 9.]

11

Lightfoot v. Lightfoot
(April 1734)

A remainder of a chattel limited upon a contingency that may happen in a few years is a valid estate.

Francis Lightfoot by his will devises, among other things, as follows:

I give all the remainder of my estate, real and personal, to my son Francis and the heirs male of his body and, if he die without such issue or if there be any failure hereafter in the male line, then, I give the same to my brother, Philip Lightfoot, and his heirs, he or they paying to my daughter £2500 in full compensation for the same.

The testator's son lived two or three years after his father. He died young and without issue.

And now, a bill is brought by the daughter for the residue of the personal estate devised to the son and for the profits of the real estate from the death of the father to the death of the son.

To which bill, the defendant demurred.

And the great question was whether the remainder to Philip Lightfoot of the personal estate was good.

Hopkins, for the defendant: Such a remainder of a personal thing may well be, it being upon a double contingency, either of the son's leaving no issue male at his death or if there should be afterwards any failure in the male line. The first contingency being within the compass of a life, the remainder on that contingency is good, and that contingency has happened. He agreed the remainder upon the second contingency was void and, if the son had left issue at his death, Philip Lightfoot, the remainderman, could not have taken. He cited *Pinbury v. Elkin*, 2 Vern. 758, 766.¹

Randolph, for the defendant: The old books are that a personal thing cannot be limited. But this opinion was exploded ever since the Restoration [in 1660]. And now, a more liberal construction of wills is allowed to support the testator's intent. October 1730, *Edmonds v. Hughes*, adjudged in this court.² But, if the remainder was not good, the last words in the limitation to the defendant plainly shows the testator intended his daughter should have but £2500. He said that the plaintiff, by contesting the will, would forfeit her legacy. He cited *Hern v. Hern*, 2 Vern. 555; *id.* 580.³

¹ *Pinbury v. Elkin* (1717-1719), 2 Vernon 758, 766, 23 E.R. 1095, 1099, also Precedents in Chancery 483, 24 E.R. 217, 1 Peere Williams 563, 24 E.R. 518, Chan. Repts. *tempore* Geo. I, 636. [Other citations illegible.]

² *Edmonds v. Hughes* (1730), Randolph Va. 60.

³ *Herne v. Herne* (1706), 2 Vernon 555, 23 E.R. 959, also 1 Eq. Cas. Abr. 203, 21 E.R. 991; *Noys v. Mordaunt* (1706-1607), 2 Vernon 581, 23 E.R. 978, also Gilbert Rep. 2, 25 E.R. 2, Precedents in Chancery 265, 24 E.R. 128, 1 Eq. Cas. Abr. 273, 21 E.R. 1041, Chancery Repts. *tempore* Anne 44.

But this seems quite from the purpose.

Mr. Attorney [General *Clayton*], for the plaintiff: This remainder is not good. The son has an estate tail by the words of the will, and a chattel cannot be entailed. *Whitmore and Craven*, 1 Vern. 326, 2 Ch. Ca. 167; *Alice Lowman's Case*, Poll. 37.¹

The demurrer [was] allowed.

See *Fitzg.* 314, a case directly in point adjudged *contra*. And see the cases there cited pro and con; see also *Gilb.* 105, *Seale v. Seale*.²

[Other reports of this case: *Randolph Va.* 120.]

[This case is cited in *Spicer v. Pope* (1736), see below, Case No. 43, *Jefferson* 46; *Slaughter v. Whitlock* (1737), see below, Case No. 50.]

12

Berryman v. Booth
(April 1734)

The birth of a child operates as a revocation of a prior will.

A writing purporting to be a will was found among the papers of the plaintiff's father after his death. It was signed by him, and three persons subscribed as witnesses. By this, he gives all his estate to his wife. Sometime after the date of this writing, he has a son, the plaintiff, born. And, then, he declares he would make his will, and he died soon after this declaration. The wife, soon after his death, proves this writing as his will in common form, and obtains a probate. Two of the witnesses to this writing are dead, and the third swears she does not remember signing it.

The plaintiff now brings his bill against the defendant, who married the testator's wife, for divers slaves that were the plaintiff's father's and came to the defendant's hands by the marriage aforesaid. The bill suggests that the plaintiff's father died intestate or, if the aforesaid writing should be adjudged a will, the birth of the plaintiff afterwards was a revocation of it.

Mr. Attorney [General *Clayton*], for the plaintiff: There being no proof to this writing *per testes* or that it is the testator's handwriting and one of the witnesses declaring she does not remember signing it, this could not be looked upon as a will, especially if the declaration after the birth of a son be considered, which strongly implies he had no will at that time or, at least, that he had an intention to alter it. And it is no wonder the wife proved it, who gained so considerably by it, that, if this could be taken for a genuine writing, yet the birth of a son afterwards is such an alteration in the testator's circumstances that a revocation may well be

¹ *Whitmore v. Weld* (1685-1686), 1 Vernon 326, 347, 23 E.R. 499, 513, 86 E.R. 490, *sub nom. Whitmore v. Lord Craven*, 2 Chancery Cases 167, 22 E.R. 897, also 2 Ventris 367, 2 Chancery Reports 383, 21 E.R. 694, Chan. Repts. *tempore* North, 453; *Boucher v. Anthram* (1671), Pollexfen 37, 86 E.R. 504, also 2 Chancery Reports 65, 21 E.R. 617.

² *Attorney General, ex rel. Goldsmiths Company v. Hall* (1731), *Fitz-Gibbons* 314, 94 E.R. 772, also *W. Keylinge* 13, 25 E.R. 470, 2 Eq. Cas. Abr. 293, 348, 22 E.R. 246, 297; *Seale v. Seale* (1715), *Gilbert Rep.* 105, 25 E.R. 72, also Chan. Repts. *tempore* Geo. I, 147, *Precedents in Chancery* 421, 24 E.R. 188, 1 *Peere Williams* 290, 24 E.R. 393, 2 Eq. Cas. Abr. 38, 346, 716, 22 E.R. 33, 294, 602.

presumed. Otherwise, here is a child sent abegging. And he cited *Lugg v. Lugg*, 2 Salk. 529;¹ and the Case of Shelton's Will, in this court, where, the testator having several children born after making his will, a revocation was presumed and adjudged accordingly.

Hopkins, for the defendant: The validity of the will cannot be contested here in this suit, but should be in the county court where the probate was granted or upon an appeal in this court. 2 Vern. 8, *Moss v. Archer*; 2 Vern. 76, *Nelson v. Oldfield*.² But this is a good will, and it appears upon the face of it to be genuine. And wills are seldom proved in any other manner in England. And, if this be a will, the birth of a son afterwards does not revoke it. By the civil law, a testament is annulled by the birth of a child. Domat, vol. 2, 40. But not by the law of England. Swinb., 2, p. 174.³

The decree [was] for the plaintiff.

[This opinion is cited in *Worsham's adm'r v. Worsham's ex'r*, 32 Va. (5 Leigh) 589, 592 (1835).]

13

Isbell v. Butler
(April 1734)

The value of a gift as a advancement to a child is the value at the time of the gift.

In this case, a question was made whether a slave given by an intestate in his lifetime to a younger child should be taken at the value he was when given or the value at the testator's death.

Et per totam curiam: At the value when given.

Et recte ut opinionem, though *Randolph* and *Hopkins* were *contra*.

[Other copies of this report: Jefferson 10.]

14

Jennings v. Willis
(April 1734)

A court can grant a rehearing after a judgment has been rendered but before it has been entered.

There was a solemn argument in this case. And the county court judgment was affirmed by seven judges against two.

Upon reading the orders the next morning, *Sir John Randolph* moved that the court would hear another argument.

¹ *Lugg v. Lugg* (1699), 2 Salkeld 592, 91 E.R. 497, also Misc. Delegates Repts. 84.

² *Archer v. Mosse* (Ch. 1686), 2 Vernon 8, 23 E.R. 618, also Chan. Repts. *tempore* Jac. II, 246; *Nelson v. Oldfield* (Ch. 1688), 2 Vernon 76, 23 E.R. 659, also Chan. Repts. *tempore* Jac. II, 485.

³ J. Domat, *Civil Law in its Natural Order* (1722); H. Swinburne, *Brief Treatise of Testaments and Last Wills*.

And it was granted, which note, as being without precedent.
In April 1735, there was a like instance between Chew and Stevens.¹

15

Graves v. Kennan
(October 1734)

A verdict for unreasonable damages will be set aside.

A complaint for a chest without stating the particular contents of the chest is a sufficiently definite pleading.

Appeal from Essex [County Court].

In [an action of] detinue for a chest of medicines of the value of £40, upon *non detinet* pleaded, the jury found that the defendant did detain the chest [and] that it was of the value of 6d., and gave damages of £10. And judgment [was given] for the plaintiff below.

Upon an appeal, an exception was taken to the verdict, that it was uncertain, finding that the defendant, 'did detain' not that he 'does detain' and so not pursuant to the issue; besides, the jury value the chest only to 6d., yet give £10 damages, which is unreasonable and absurd.

And, for these reasons, the judgment was reversed, and the record remitted to the county court for a new trial.

An exception was also taken to the declaration that detinue would not lie for a chest of medicines without setting forth the particular medicines.

Randolph, for the appellant, said it would not be good in trover and that trover and detinue were all one. And he cited Palm. 393; Stile 482; 1 Ven. 114; 2 Lev. 85; 3 Lev. 18; 1 Vent. 317; Sid. 445; Carth. 131.²

Barradall, for the appellee: Trover and detinue are not the same, and greater certainty is required in detinue than trover. 2 Salk. 654. But this is certain enough in detinue. All the certainty requisite is that it may be described to the jury and known by the sheriff when he comes to make delivery. Co. Lit. 286b; 2 Bulstr. 308.³ And that may very well be in this case. It would be almost impossible to describe every particular medicine, and the plaintiff must have failed in his proof if he had done so. But, if trover and detinue are all one, then this declaration is certainly good, for trover will lie of a box full of linen of the value of £20; Cro.

¹ *Legan, lessee of Chew v. Stevens* (1736), see below, Case No. 40.

² *Laurence v. Turnor* (1623), Palmer 393, 81 E.R. 1139, also 2 Rolle Rep. 370, 81 E.R. 858; *Clark v. Fitzwilliams* (1655), Style 482, 82 E.R. 880; *Elpicke v. Acton* (1671), 1 Ventris 114, 86 E.R. 79; *Miller v. Green* (1673), 2 Levinz 85, 83 E.R. 461; *Blackhouse v. Moore* (1681), 3 Levinz 18, 83 E.R. 555; *Davis v. Price* (1677), 1 Ventris 317, 86 E.R. 205, also 3 Keble 693, 694, 815, 830, 84 E.R. 957, 958, 1028, 1037, 1 Freeman 438, 89 E.R. 328; *Taylor v. Wells* (1670), 1 Siderfin 445, 82 E.R. 1208, also 1 Ventris 71, 86 E.R. 50, 1 Modern 46, 86 E.R. 721, 2 Williams Saunders 74, 85 E.R. 743, 2 Keble 623, 640, 84 E.R. 392, 403; *Nightingale v. Bridges* (1690), Carthew 131, 90 E.R. 680, also Shower K.B. 135, 89 E.R. 496, Holt K.B. 473, 90 E.R. 1160.

³ *Hartford v. Jones* (1698), 2 Salkeld 654, 91 E.R. 556, also 3 Salkeld 366, 91 E.R. 877, 1 Lord Raymond 393, 91 E.R. 1161; E. Coke, *First Institute* (1628), f. 286; *Isaack v. Clark* (1615), 2 Bulstrode 306, 80 E.R. 1143, also Moore K.B. 841, 72 E.R. 941, 1 Rolle Rep. 59, 127, 81 E.R. 326, 377.

Jac. 664; for a library of books; 1 Ven. 114; for 290 *pecies argenti*; 1 Salk. 219; for twenty ounces of cloves and mace without distinguishing how much of either; 2 Sal. 654; for a case of spirits; Far. 141. And besides the cases above cited, [see] 2 Saund. 74; 1 Sid. 98; 2 Show. 315; Skin. 147; 3 Lev. 336; 1 Sid. 263; 1 Keb. 807.¹

And *per totam curiam praeter* CARTER, the declaration is certain enough.

16

Anonymous
(October 1734)

Lands granted before 1710 are not forfeited by the nonpayment of quitrents.

A question was made if lands granted before 1710 should be forfeited for want of payment of quitrents within the Act of 1710 and that of 1713.²

And [it was] adjudged that such lands are not within those acts.

But query of this judgment, for the Act of 1713 seems clearly to comprehend them. *Vide* ss. 9 and 10. Besides, there is this inconvenience, if the patentee of lands granted before the Act deserts the land and removes out of the colony, the king can have no remedy for the quitrent and yet cannot grant the land to another. Yet, in April 1741, the same point was adjudged that these old grants were not within those acts. The case was between Bourden and Hill, and the petitioner suggested as well the want of cultivation as the nonpayment of the quitrents. It was proved that there had been no cultivation within fifty-six years. (The patent was granted in 1674.) But the court said it ought to be proved there never was any improvement, or they would presume it at this distance of time which seems a strange opinion, especially in the king's case. The petition was dismissed.

17

Hunt v. Harratson's executors
(April 1735)

Upon a writ of inquiry in a scire facias against an executor, the court costs include attorney's fees.

A judgment was confirmed in the Office against Harratson in his lifetime. And now, upon a *scire facias* against the executors, a writ of inquiry was executed.

¹ *Bancroft v. Coe* (1623), Croke Jac. 664, 79 E.R. 575; *Elpicke v. Acton* (1671), *ut supra*; *Campbell v. St. John* (1694), 1 Salkeld 219, 91 E.R. 194, also 1 Lord Raymond 20, 91 E.R. 909, Comberbach 306, 90 E.R. 494; *Hartford v. Jones* (1698), *ut supra*; *Blainfield v. March* (1703), 7 Modern 141, 87 E.R. 1150, also 2 Lord Raymond 824, 92 E.R. 50, 1 Salkeld 285, 91 E.R. 252, Holt K.B. 44, 90 E.R. 922; *Taylor v. Wells* (1670), *ut supra*; *Maihu v. Flower* (1662), 1 Siderfin 98, 82 E.R. 993, also 1 Levinz 99, 83 E.R. 317, 1 Keble 353, 421, 428, 488, 83 E.R. 990, 1030, 1034, 1069; *Parkhurst v. Shefton* (1683), 1 Shower K.B. 315, 89 E.R. 961, also Skinner 142, 90 E.R. 66; *Chambers v. Warkhouse* (1692), 3 Levinz 336, 83 E.R. 717, also 3 Salkeld 140, 91 E.R. 739; *Pledal v. Thisleworth Hundred* (1665), 1 Siderfin 263, 82 E.R. 1094, also 1 Keble 918, 939, 83 E.R. 1319, 1331.

² Act of 1710, c. 13, s. 20, 3 Hening's Statutes 526; Act of 1713, c. 3, s. 10, 4 Hening's Statutes 41.

The question was whether a lawyer's fee should be taxed in the bill of costs. And [it was] ruled that it should.

18

Darby v. Stringer
(April 1735)

A patent for land from the crown is conditional upon the patentee's actual physical settling upon the land.

A petition for land [was] granted in 1669 as lapsed for want of seating upon slight proof of a seating many years ago, though [there was] no appearance of it now. [It was] adjudged that the land was saved.

[Other copies of this report: Jefferson 10.]

19

Harwood v. Grice
(April 1735)

An executor of a will can be a witness to prove the will.

Supersedeas.

The county court refused to let an executor be a witness to prove a will.

Randolph said it was the most known thing in the world that an executor might be a witness. If he was a legatee, he must release his legacy.

And [it was held] *per curiam* he is a good witness.

Vide [G. Duncombe], *Trial per Pais*, 309. And *quaere*, in the case of Hill against Hill, April 1737,¹ the like point was held in a trial on a feigned issue directed out of chancery to try whether a will or no will.

20

Waddill v. Chamberlayne
(April 1735)

An action of deceit lies for the knowing sale of defective goods where the buyer cannot discover for himself the defect, and this is so even though the seller did not give any express warranty of soundness.

The plaintiff declares that the defendant, fraudulently and deceitfully, sold to him a slave for a great price £25, knowing the said slave, at the time and for a long time before, labored under an incurable disease not discovered by the plaintiff and was of no value.

There is a verdict for the plaintiff.

And I [Barradall] have moved in arrest of judgment that this action will not lie without a warranty. This is an action upon the case in the nature of deceit, and such actions, I agree, will lie in some cases, but not in this. The charge here is no more than selling of a thing of

¹ *Hill v. Hill's executors* (1737), see below, Case No. 38.

small value for a great price and not discovering the defects. And, however inconsistent this may be with natural justice, it is tolerated by the universal consent of mankind where buying and selling is used. The principal advantage in the way of commerce is to sell dearer than you buy. And, as to the quality or goodness of a commodity, the law has left it at large pretty much to the conscience of the seller, who too often takes advantage of the buyer's ignorance. The law has provided a guard against those impositions to those who are prudent enough to make use of it, that is a warranty from the vendor of the goodness, value, etc. But, without such warranty, no action will lie for any little fraud or overreaching in the value or goodness of the thing sold. But, in such cases, the rule is *caveat emptor*. And, if the law was otherwise, there would be no end to actions, but every contract almost in buying and selling might produce one. There is no rule of law perhaps more universally known than this. It is in everyone's mouth what frauds are practiced every day in the sale of horses; yet I never heard of an action brought without a warranty. No man thinks himself obliged to discover the defects of the thing he sells, and, unless the buyer is prudent enough to exact a warranty, I take it he is without a remedy.

I will not deny but there are some instances where an action will lie for deceit in a sale without an express warranty, as where it is a thing unlawful in itself, as the selling of bad victuals. 9 Hen. VI, 53b; 11 Edw. IV, 6b; Kel. 91; Cro. Jac. 197, 470.¹ But the reason given in all these cases is that it is prohibited by law to sell bad victuals, which proves the action would not lie but for that reason.

So, if I sell a thing affirming it to be mine when it is another's, this affirmation amounts to a warranty if I am in possession; otherwise, not. 1 Salk. 210, *Medina against Stoughton*.² So are divers other cases which prove there must be either an express warranty or something that amounts to it in construction of law. And it is evident from the Case of *Medina* etc. that, if I sell a thing out of my possession affirming it to be mine, though this is an apparent fraud, no action will lie, for, there, *caveat emptor* says the book.

There is a case that I suppose will be quoted against me. And, if that is law, then this action will lie. But I humbly conceive it is not. 9 Hen. VI, 53b, in 1 Ro. Abr. 90.³ If a man sells a piece of cloth knowing it not to be well fulled, an action of deceit lies, for this is a warranty in law says Rolle. But the book says no such thing, nor, indeed, is the point adjudged in the case, but cited to be adjudged in another case. It is only a saying *obiter* of one of the judges, and can carry no great authority with it, especially as it is not supported by any subsequent resolutions, but the whole current of authorities since is contrary. There is the opinion of Frowick in Kelw. 91; and of Popham in new Dier 75, *in margine*, *Chandler against Lopus*, in favor of this point, but the first is a single opinion.⁴

And, as to the second, though it was adjudged in the King's Bench according to the opinion of Popham, yet that judgment was reversed in the Exchequer Chamber. Cro. Ja. 4. If a man sells a pipe of wine that is corrupted and does not warrant it to be good, no action

¹ YB Mich. 9 Hen. VI, f. 53, pl. 37 (1430); YB Trin. 11 Edw. IV, f. 6, pl. 10 (1471); *Anonymous* (1507), Keilwey 91, 72 E.R. 254; *Roswel v. Vaughan* (1607), Croke Jac. 196, 79 E.R. 171; *Southern v. How* (1618), Croke Jac. 468, 79 E.R. 400, also 2 Rolle Rep. 5, 26, 81 E.R. 621, 635, J. Bridgman 125, 123 E.R. 1248, Popham 143, 79 E.R. 1243.

² *Medina v. Stoughton* (1700), 1 Salkeld 210, 91 E.R. 188, also 1 Lord Raymond 593, 91 E.R. 1297, Holt K.B. 208, 90 E.R. 1014.

³ YB Mich. 9 Hen. VI, f. 53b, pl. 37 (1430), 1 Rolle, Abr., *Action sur Case*, pl. P, 1-3, p. 90.

⁴ *Anonymous* (1507), Keilwey 91, 72 E.R. 254; *Chandelor v. Lopus* (1605), 1 Dyer 75, n., 73 E.R. 160, n., also Croke Jac. 4, 79 E.R. 3.

lies. F.N.B. 94c;¹ Bridgman 127. And 1 Ro. A. 90, *contra*, is not warranted by the book, for it appears in the case there was a warranty. It is said, indeed, the warranty is not material. But what is the reason given why? Because it is prohibited to sell corrupt victuals. Bridg. 127, Southern against How, a case of a counterfeit jewel, which the defendant knew to be so, [was] adjudged no action lay without a warranty. In the report of this case, Cro. Ja. 468, the counsel for the plaintiff labor this distinction where the deceit is *sciens* or not. No judgment is given by the report there; but, in Bridgeman, judgment was given for the defendant because the action would not lie without a warranty except in the case of bad victuals, which goes upon another reason, as I have showed.²

If a man sells a horse that is lame or diseased without a warranty, no action lies. F.N.B. 94c; Bridg. 127; 1 Ro. Ab. 90, 4. This is a common case and what everybody knows, and was never yet denied. Nay, if there is an actual warranty, it extends only to secret infirmities, not such as are visible and apparent, as the want of an eye or any other defect within the knowledge of the five senses, as the book of 11 Edw. IV, 6b, expresses it. So is the civil law. 1 Domat, 85, 10. Yet it is a fraud and deceit in the seller not to discover this defect to the buyer. But here, *caveat emptor*, 1 Sal. 211, Butterfield against Burroughs, is not *contra*, but rather warrants this opinion, for, there, the court said they would intend it a secret infirmity, being after a verdict.³ This case of a horse I take to be directly in point, for where is the difference between a horse and a slave as to this matter? If an action will not lie in one case, neither will it in the other, as I conceive.

As to the difference taken where the deceit is *sciens* or not, it has its foundation from that opinion in 9 Hen. VI, 53b, only cited. As I have observed, [there is] not one adjudged case since to support it, but the whole current of authorities, as well as common experience, [is] against it. I will agree this difference is taken with respect to the property in several cases. 1 Danv. 178.⁴ If a man sells a thing knowing it to be another's, an action will lie without a warranty. But this point is settled in Medina against Stoughton, cited before. In my little reading, I could never find a precedent of such a declaration as this, but the precedents are all upon warranties. And I believe no such precedent can be shown. And, if there cannot, it will go a great way to prove my argument. Sir Edward Coke says an argument drawn from books of precedents and entries is very forcible.

In short, Sir, if this action is maintainable, a great deal of learning we meet with in the books upon the subject of warranties might have been spared. It must be useless and insignificant, and the rule *caveat emptor* may be thrown out of doors. I expect to be told that this is arguing in favor of fraud, that this makes buying and selling a mere cheat, and learned lessons we shall hear no doubt concerning the immorality of the thing. But, however such kind of reasoning may serve to gain popular applause and raise a high idea of the orator's integrity, it will never, I am sure, prevail with discerning judges.

The laws of society and civil government are not founded upon the strict rules of natural justice. Public convenience oft requires they should be dispensed with; the punishment of theft

¹ A. Fitzherbert, *Nouvelle Natura Brevium*;

² *Southern v. How* (1618), *ut supra*.

³ A. Fitzherbert, *Nouvelle Natura Brevium*; *Southern v. How* (1618), *ut supra*; 1 Rolle, Abr., *Action sur Case*, pl. P, 4, p. 90; YB Trin. 11 Edw. IV, f. 6, pl. 10 (1471); J. Domat, *Civil Law in its Natural Order* (1722); *Butterfield v. Burroughs* (1706), 1 Salkeld 211, 91 E.R. 189.

⁴ *Roswell v. Vaughan* (Ex. 1607), Croke Jac. 196, 79 E.R. 171, 1 Danvers, Abr., *Actions upon the Case*, pl. 19, p. 178, also Exch. Repts. 1604-1648, 35.

bears no proportion to the crime. Yet it is found necessary to make it so severe. I need not mention other instances; they are obvious enough. Therefore, to make specious harangues concerning the morality or immorality of an action that is to be determined by the laws of a particular society is arguing neither like a lawyer or a politician.

It is a rule of all governments, I believe, that the good of the majority is to be preferred agreeable to this. We have a maxim in the common law *lex citius tolerabit privatum damnum quam publicum malum*. Therefore, the judges in their determinations do not so much regard what the injury is to particular persons but what the general convenience or inconvenience will be. An argument *ab inconvenienti* is very forcible in law, for the rule is *omne quod est inconveniens est illicitum*.

Now, Sir, I conceive the inconveniences will be manifold if it be established for law that an action will lie for selling a thing of small value for a great price or for selling a commodity without discovering the defects, which are the charges in this declaration. It will tend to multiply suits without end. Every man that is displeased with his bargain will have it to say the thing is not so good or worth so much as I thought. And, if this shall be a foundation for an action, a desire of revenge or a proneness to be litigious may produce a lawsuit out of every bargain that is made. How much more reasonable is it that a particular person should sometimes suffer than such a general inconvenience be introduced, especially since the law has put it in the power of every man to secure himself against impositions of this kind by requiring a warranty. And, if he does not do it, he suffers through his own folly and negligence, and the law is not to be blamed.

If this action will lie, every vendor of slaves imported will be subject to the same. It frequently happens that there are distempers among their slaves but the seller does not think himself obliged to publish this to the world, nor is it thought criminal even to use arts to conceal it. Numbers of these distempered slaves have been sold, and the consequences sometimes are very fatal. But I never yet heard of an action being brought, though we may expect for the future to see them very frequent if this is established as a precedent.

I will beg leave to mention a case adjudged here last court, *Lewis v. Golston*. It was in chancery. Lewis brought a bill against Golston, suggesting the want of witnesses to be relieved concerning the sale of two slaves which he alleged the defendant warranted to be sound but were, in truth, distempered. The defendant denied the warranty. And, though it was proved the slaves had been distempered for some time and until just before Lewis bought them and that the defendant knew it, yet the court denied any relief because the warranty was not proved. If equity could not relieve in such a case, much less can an action at law be maintained.

I remember very well. Sir John Randolph, who was then of my side of the question, argued an action would not lie without a warranty. He said those little arts which are used every day in the way of buying and selling and in putting off bad commodities were no grounds of an action. Nay, he went so far as to say all trade was a kind of fraud. How right he is in his opinion I must submit. But I am apt to think his argument now will not be very consistent with his doctrine then.

There is one thing I have omitted to mention, and that is the rule of the civil law in buying and selling. *In pretio emptionis et venditionis, naturaliter licet contrahentibus se circumvenire*. The civil law is universally allowed to be the most equitable perfect law in the world. And yet this kind of art and overreaching in buying and selling is tolerated. And, indeed, there could be no such thing as buying and selling if it was not.

I am persuaded then, Your Honors will not be induced from any plausible pretence of the immorality of the thing to give judgment against the law. I take the law to be clear in favor of the defendant. And I pray that judgment may be stayed.

Judgment was given in this case for the plaintiff in April 1735.

[Other copies of this report: Jefferson 10.]

[Other reports of this case: Randolph Va. 156.]

21

Rex v. Anonymous
(October 1735)

Where a person has been convicted of a crime by a jury from a wrong venue, the conviction will be set aside, and the defendant will be tried again before a proper jury.

One [*blank*] was indicted for stealing a horse, and found guilty.

In arrest of judgment, it was showed that the *venire facias* was awarded to a wrong county.

And, thereupon, [it was] adjudged to be a mistrial.

Mr. Attorney [General Clayton] moved the prisoner might be remanded and a new *venire facias* awarded. He mentioned the maxim that a man should not be twice put in danger of his life, but he said, here, the prisoner's life had not been in danger, the jury that tried him having no power to convict him.

And he was remanded accordingly.

He cited 6 Rep. 14, Arundel's Case in point, and, 4 Rep. 39, 40, 45a, 47a, where an indictment is insufficient, a man may be indicted again. See 2 Hawk. 377, s. 10, 379, s. 15.¹

22

Morris v. Chamberlayne
(October 1735)

A person who has an interest in the outcome of the litigation is incompetent to testify as a witness.

If a servant is sent to receive money and gives a discharge without receiving the money, that discharge does not bind the master, because the servant did not pursue the authority given by the master.

An undersheriff is the agent or servant of the sheriff.

Supersedeas.

It was suggested that the defendant, the plaintiff below, had delivered a writ against one [*blank*] to the plaintiff's undersheriff, and ordered him to take no security on purpose to get a judgment against the sheriff, which he did. The undersheriff was offered to prove this.

It was objected he was no good witness, being answerable to the now plaintiff and so concerned in interest. The plaintiff offered to release him.

But the court would not admit him a witness.

Note he was an indigent person, and the plaintiff did not actually release him, [but] only offered to do so.

¹ *Regina v. Arundel* (1594), 6 Coke Rep. 14, 77 E.R. 273, also Moore K.B. 594, 72 E.R. 780, Gouldsbrough 133, 75 E.R. 1045; *Vaux v. Brook* (1586), 4 Coke Rep. 39, 76 E.R. 982; *Regina v. Yong* (1586), 4 Coke Rep. 40, 76 E.R. 984; *Regina v. Vaux* (1591), 4 Coke Rep. 44, 76 E.R. 992; *Wrote v. Wiggles* (1591), 4 Coke Rep. 45, 76 E.R. 994; W. Hawkins, *Pleas of the Crown*.

LEE, TAYLOE, and RANDOLPH were for admitting him, but RANDOLPH, next morning, changed his opinion, because the witness was not actually released. Lee and Tayloe were not in court.

If he had been actually released, he ought to have been a witness; *vide* [*blank*].

The plaintiff declares upon an *indebitatus assumpsit* for money and tobacco had and received to his use. Upon *non assumpsit* pleaded, the jury find a special verdict, upon which the case appears to be [thus]. The plaintiff was Sheriff of New Kent [County] *anno* 1733, and had the collection of the quitrents, levies, and fees. One Birch was his Undersheriff, and paid him 5000 pounds of tobacco for the profits of his office. There was due from the defendant £6 12s. 4d. for quitrents and 7737 pounds of tobacco for county levies and officer's fees of his own and other peoples' that he had received. Birch, being indebted to the defendant more than that money and tobacco, before the year 1733, gives the defendant receipts for those quitrents, levies, etc. And he gives himself credit in the defendant's book for the same, but no money or tobacco was paid except by that discount. And the defendant or Birch have not paid the plaintiff any part of that money and tobacco. If the law be for the plaintiff, the jury find £71 1s. 10d. damages.

The questions upon this case, I [Barradall] take to be two, first, whether the defendant is chargeable at all to the plaintiff for the quitrents etc. discounted with Birch, the Undersheriff, and for which he has his receipts, second, if he be, whether the plaintiff can maintain an *indebitatus assumpsit* for the quitrents etc. due from the defendant himself.

There is a difference taken as to the money received for quitrents and the tobacco received for levies and fees. The quitrents are said to be the king's treasure and, coming to the defendant's hands, he is answerable, and so perhaps he would to the king if we were in a dispute with the crown, for it must be owned the law is particularly careful to secure the king's debts. His treasure is looked upon as the treasure of the commonwealth which is *pacis vinculum et bellorum nervi*. And, therefore, he has sundry prerogatives for obtaining them. He can have execution of body, lands, and goods at once. A subject can have no execution against the king's debtor without first securing the king's debt. (*Per* 33 Hen. VIII, c. 39.¹) If process for the king be commenced before judgment, the king shall have a remedy against the debtor of his debtor *cum multis aliis*. If a man intermeddle with the king's treasure, pretending a title, he shall be answerable for it to the king. 11 Rep. 89, Earl of Devonshire; Godb. 291, 292.² All this is true, but nothing to the purpose.

The question here is not between the king and a subject, nor ought the money in this case, as I conceive, be regarded as the king's debts. It seems, therefore, foreign and absurd to talk of his prerogative. The case as to this point is no more than this. An officer of the crown employs a person under him who receives the king's money and pays it to a third person. The officer sues this third person for money received to his use. How is the king concerned in all this? Will his treasure be impaired if the plaintiff should not recover? How, then, can this be regarded as his debt? Is the plaintiff entitled to an execution against body, lands, and goods? Will he be preferred to another subject in the point of execution? Can the plaintiff have a remedy against the debtor of the defendant? If I am answered in the negative, as sure I must be, it will be evident to a demonstration this is not the king's debt, nor can it be regarded as such if it was the plaintiff would have all these privileges. Therefore, without entering into the dispute whether the defendant would be answerable to the king or not, which I conceive is nothing at all to this case, I shall close this point with an observation of Sir

¹ Stat. 33 Hen. VIII, c. 39, s. 37 (*SR*, III, 886-887).

² *Earl of Devonshire's Case* (1607), 11 Coke Rep. 89, 77 E.R. 1266; *Coke's Case* (1632), Godbolt 289, 78 E.R. 169.

Matthew Hale that to make the king's prerogative a state to recover other men's debts is unreasonable, inconvenient, and mischievous. Hard. 404.¹

This plausible pretence of the king's debt being removed, the case is, in short, this. An undersheriff who had farmed the profits of the sheriff's office directs a person to whom he is indebted to receive divers quitrents, levies, and fees, and discounts them together with what this person owed himself on the same account but, of his own private debt, and gives receipts. The Undersheriff proves insolvent. The Sheriff is forced to pay the king and the public officers. And whether the Sheriff can recover against the person who received these quitrents by the Undersheriff's order is the question.

It is said, if a master send his servant to receive money and the servant pays it again to the person he received it of in discharge of his own debt, this shall be taken as money received to the master's use. And I agree that it will be so. But, then, I think that is nothing like the case at bar.

The Undersheriff here cannot be taken as a servant. He had farmed the office for a great premium, and, so, was not subject to the direction or control of the Sheriff, who had delegated his whole power to him and, therefore, had no right to intermeddle in the receipts and payments. But the Undersheriff was surely to manage that and everything else relating to his office as he thought most for his own advantage and benefit. It is inconsistent in the nature of the thing that the Sheriff should intermeddle, for, by that means, he might deprive the Undersheriff of all the profits which he paid so largely for. If the Sheriff, then, had no power to direct the receipts and payments or, in any manner, to control the Undersheriff, how can the Undersheriff be regarded as his servant or how can money received by the order of the Undersheriff be money received to the Sheriff's use?

The case, therefore, is not like that of the master and servant, for there is an apparent fraud and the person receiving the money knows very well it is the master's. And, therefore, it is reasonable he should be answerable to the master. But, in the case at bar, I conceive the money and tobacco was in no sort the Sheriff's nor subject to his disposal (though it be true that he is answerable to the king and the public creditors). He had fully authorized the Undersheriff to receive and pay. The defendant transacted this matter with the person so authorized and who, alone, had a right to transact it.

If I employ a factor and he pays his debts with my effects, what remedy have I against his creditors? Suppose the Undersheriff had actually received this money and tobacco and paid the same to the defendant. Could the Sheriff then have demanded it as money received to his use? I believe not. I cannot then conceive any difference in the reason of the thing between actually receiving and paying and discounting, as in this case.

This case is of very general concern. Almost every man pays his quitrents etc. to the Undersheriff. And, often, no doubt by way of discount where a man has an account open with the Undersheriff. And this, I believe, is the first time such a payment has been disputed. But, hereafter, it will be unsafe to transact any business with an Undersheriff if the defendant is chargeable in this case. And I must submit whether such a determination will not be introductive of a general inconvenience.

But, here, it is pretended there is a mighty fraud because the money was never actually paid to the Sheriff. I cannot conceive in what this fraud consists. A public collector, being indebted to a man, appoints him to receive some public debts and then allows him to apply them in discharge of his own private debt. Few men I believe would scruple to do this or think it any point of dishonesty or fraud. And, as to the money not being actually paid, that is answered before.

The second question is, admitting the defendant is answerable, whether the plaintiff can maintain an [an action] *indebitatus assumpsit* for money etc. received to his use for the

¹ *Attorney General v. Poultney* (1665), Hardres 403, 145 E.R. 519.

defendant's own quitrents etc. paid the Undersheriff by way of discount, as appears in this case. And I conceive he cannot.

This discount must be admitted to be a payment or not a payment. If it be a payment, the Undersheriff was sufficiently authorized to receive them. His discharge we have, and there can be no foundation for this action as to them. If this discount be not a payment, as has been strongly urged, it must be owned they are still due. But, then, the remedy to recover them is not by an action, but distress. Nay, there is an express law that no action shall be brought unless the party be returned insolvent. What pretence then has the Sheriff to maintain this action or, indeed, any action at all? Certainly, if these quitrents etc. are not paid, they must be recovered in the name of the king and the officers to whom they are due.

I conceive the plaintiff has no right to recover any part of this money and tobacco of the defendant. Much less can he maintain this action for the defendant's own quitrents. And, [if] the law be against the plaintiff upon either point, judgment must be given against him, the damages being entire.

Sir John Randolph, for the plaintiff: It was not insisted that this was to be regarded as the king's debt. But he insisted the Undersheriff was no more than a servant. And he cited Dalton, *Office of Sheriff*, that, if a servant is sent to receive money and gives a discharge without receiving it, that discharge shall not bind the master, that it was a general rule a master was not bound by the act of a servant if the servant did not pursue the authority given by the master. And he cited *Doctor and Student*, Dial. 2, c. 42, p. 258; 6 Mod., *Ward v. Evans*, fo. 36.¹

He said this was a fraud and covin between the Undersheriff and defendant. And a covinous payment was not good. 1 Keb. 300; a man was indicted for paying his poor rate to an indigent overseer against the order of the justices; and 5 Co. 95, *Goodal's Case*, where a pretended payment of money to satisfy a condition was not good.²

But neither of the cases seem to the purpose. That in *Keble* does not say the payment was not good, but the man was indicted for disobeying the justices' order. And, in *Goodal's Case*, the reason given is because an estate of inheritance by the payment of the money was to be divested and, therefore, it ought to be a true payment and performance of the condition.

Judgment [was given] for the plaintiff October 1735. LEE, RANDOLPH, GRAYMES, CARTER, DIGGES, and the Governor [GOOCH] for the plaintiff; LIGHTFOOT, TAYLOR, CUSTIS, ROBINSON, [and] BYRD [held] for the defendant; BLAIR gave no opinion.

For the point of master and servant, see 3 Sal. 234.³

[Other copies of this report: Jefferson 14.]

¹ *St. German's Doctor and Student* (T. F. T. Plucknett and J. L. Barton, edd., 1974), 91 Selden Soc. 270; *Ward v. Evans* (1703-1704), 6 Modern 36, 87 E.R. 799, also 2 Salkeld 442, 91 E.R. 382, 2 Lord Raymond 928, 92 E.R. 120, 1 Comyns 138, 92 E.R. 1002, 2 Salkeld 442, 91 E.R. 383, 3 Salkeld 118, 91 E.R. 726, 12 Modern 521, 88 E.R. 1492, Holt K.B. 120, 90 E.R. 965.

² *Goodall v. Wyatt* (1597), 5 Coke Rep. 95, 77 E.R. 202, also Jenkins 261, 145 E.R. 187, Gouldsborough 176, 75 E.R. 1076, Moore K.B. 708, 72 E.R. 855, Croke Eliz. 383, 78 E.R. 629, Popham 99, 79 E.R. 1209.

³ *Wayland's Case*, 3 Salkeld 234, 91 E.R. 797, or *Boulton v. Arltsden* (1697), 3 Salkeld 234, 91 E.R. 797, also Holt K.B. 641, 90 E.R. 1255.

Doe, ex dem. Myhil v. Myhil
(October 1735)

In this case, the court found that the claimant of the land in issue was a bastard and thus not able to inherit it.

Edward Myhil, seised in fee, devises the premises in question to his daughter Elizabeth for life, remainder of one moiety to Edward, son of Lockey Myhil, in tail male, and of the other moiety to Joshua Myhil in tail male, with several other remainders over in tail, remainder to his own right heirs. In which will, there is a clause in these words:

Whereas, to my unspeakable grief, my wife, Ann, did some years past elope from me and has ever since lived in adultery and has lately bore a child of her body, I not having had carnal knowledge of my said wife for several years last past, therefore, I do not think fit to give or bequeath any part of my estate, real or personal, to my said wife or her child.

The testator and his wife Ann separated about five years before his death. Two years, she lived at her brother's. Afterwards, she removed to a house near Mallory's upon his plantation about a mile from the testator's, where she lived three years. And, about four months before the testator's death, she had a child, the lessor of the plaintiff, born, and, soon after the testator's death, she married Mallory. Elizabeth, the devisee for life, is dead, and the estates tail are all spent and the lessor of the plaintiff claims the premises as in his reverter as heir at law to the testator. The sole point, therefore, in the case is whether the lessor be a bastard or not.

It is evident from all the old authorities that, by the common law, if the husband be within the four seas, *i.e.* within the jurisdiction of the king of England, and the wife has issue, such issue is legitimate, and no proof shall be admitted that it is a bastard unless the husband be under an apparent impossibility of procreation, as but eight years old or the like. Bracton, lib. 4, 278, 297; 1 Inst. 244a; 1 Ro. Abr. 358. If a woman elopes and lives in adultery with another and has issue, this is no bastard. 1 Ro. Abr. 358, 4, 5. If a married woman goes into another country and takes a husband and has issue by him, the first husband being within the seas, the issue is *mulier*. *Ibid.* 6.¹

It must be owned, however, that, in later times, the general rule I [Barradall] first laid down has been understood under some limitation, as if the husband be without the four seas all the time of the wife's going with child, though he happen to be within just at the delivery, the child is a bastard. If there be a divorce *a mensa et thoro*, it shall be intended that due obedience was paid to the sentence, and, in that case, the issue is a bastard unless access is proved. But, if they live separately without a sentence, access shall always be presumed. Yet, if it is found by a verdict the husband had no access, the child will be a bastard. 1 Sal. 122, 123.²

Upon the reason and principles of the common law, I [Barradall] suppose, if a man be within this colony and his wife has issue, such issue is legitimate unless under some of the

¹ *Bracton on the Laws and Customs of England* (S. E. Thorne, ed., 1977), vol. 3, pp. 312, 361; E. Coke, *First Institute* (1628), f. 244; 1 Rolle, Abr., *Bastard*, pl. B, 4, 5, 6, p. 358.

² *Parish of St. George v. Parish of St. Margaret* (1706), 1 Salkeld 123, 91 E.R. 115.

circumstances just now mentioned. Now, in this case, the husband was within this colony and lived within a mile of the wife and was under no impossibility of procreation. Here was no divorce *a mensa et thoro*, nor was the separation by compulsion of any court, but, for anything that appears, it might be by consent; at least, it was without a sentence. And, in that case, access is to be presumed unless the jury find there was no access. And that is not found, though I remember that point was much labored at the finding of the verdict.

It will be argued, perhaps, from the circumstances of this case that it ought to be presumed there was no access. The woman lived upon Mallory's land, and married him soon after her husband's death. And the testator in his will declares that his wife had eloped from him and had a child in adultery and that he had had no carnal knowledge of her for several years. But I conceive all these circumstances avail nothing; access must be presumed unless the jury find otherwise.

Neither is there much in these circumstances. What, because the woman lived upon Mallory's land and he married her soon after her husband's death, must it, therefore, be presumed they lived in adultery together before? Is there any reason, justice, or charity in such a presumption? But, admitting that to be true, that proves nothing as to the husband's access, who might come to his wife, especially as they were so near, notwithstanding the adultery between her and Mallory, which will not bastardize the issue if true.

Then, as to the testator's declaration in his will, surely it will not be pretended that is any evidence or any ground for a presumption. At this rate, the fair sex will be in a very unhappy situation, and they will have little reason to boast of the indulgence of our laws to them. It shall be in the power of an ill natured husband by a blast of his breath or stroke of his pen not only to ruin their reputation but also deprive them and their children of all their civil rights. By the same rule that this will is evidence against the legitimacy of the children, it would be also of the wife's elopement in case of dower. But such testimony never sure was offered.

If the man was alive, he could not be a witness, nor would his oath be taken. How much less his word. A man's declaration in his will was never yet thought any proof of the fact related. There would be much the same reason in it in this case as to indict a man for an offence and then offer the indictment as evidence of the offence, for, set aside this will, there is not a syllable of the wife's living in adultery in the whole verdict or that the husband had not access. It would, therefore, be absurd as well as full of mischief and inconvenience to look upon this will as any evidence as to this point or at all to influence the determination of it. And I hope it will be entirely thrown out of the question. *Vide* Macc. R. 439.¹

And, then, I take the case to be very clear, for, if any presumption is to be made, it ought to be in favor of legitimation, which the law always favors insomuch that, in many instances, no proof will be admitted against it, as if a child is born but one day after the marriage and the child was begot by another, such child is legitimate, and no proof or averment will be admitted against the legitimacy. 1 Ro. Abr. 358, 2, 3.² This is certainly as hard a case as where a man and his wife live separate. But public convenience makes such institutions necessary, and the judges in their determinations inviolably adhere to them, the point of bastardy and legitimacy depending altogether upon the particular laws of each society and differing almost in every country.

Sir John Randolph, for the defendant, insisted upon two points, [first], that the lessor of the plaintiff was a bastard, second, if he was not, yet he was clearly excluded by the intention of the testator in his will to take any estate in the premises. He agreed the old law

¹ *Asgill v. Hunt* (1719), 10 Modern 439, 88 E.R. 800, also *Strange* 178, 93 E.R. 463, *Fortescue* 347, 92 E.R. 884.

² 1 Rolle, Abr., *Bastard*, pl. B, 2, 3, p. 358.

to be as it was opened. And he said it was introduced by the superstition of Rome upon the opinion and doctrine that marriage was a sacrament but that, since the Reformation, the law had been otherwise taken, that the cases cited out of Rolle were all before the Reformation except that of 358, 4,¹ which was in the Star Chamber and, therefore, not of much authority, that Coke built upon the old authorities, but the judges, in later times, had exploded these barbarous and absurd resolutions. And he cited a case in 1717 out of a book, [*blank*] pa. 94, concerning the removal of a bastard from one parish to another where a child born of a wife was adjudged a bastard though she lived all the time in St. Andrew's Parish, the husband in St. Bride's.² (But note it appears in the case the husband and wife had not seen one another and so [it was] within the rule in Sal. 123.)

He said that, the jury having found they separated five years, it must be intended there was no access, that a negative was not to be proved, and so the jury could not find otherwise than they have.

He agreed the will, if it stood single, would not be evidence, but, being supported by other circumstances, it ought to be taken notice of. He cited the Case of Reason and Tranter for the murder of Mr. Lutterall, State Trials, vol. 6, fo. [*blank*],³ where Mr. Lutterell's declaration after he was wounded, being his last words, was given in evidence and that a will was the last words of a man and ought to be believed, especially where it was supported by other circumstances. And, so, he concluded upon the whole that the lessor was a bastard.

To the second point, he said it was clearly the intention of the testator that the lessor of the plaintiff should take nothing. And, therefore, by the remainder to his right heirs, he must intend his next heir exclusive of the lessor. And so the person who was such next heir might take by that remainder and that 'right heir', in this case, was only *descriptio personae*.

He said the rule laid down by Coke, 1 Rep. 103, Shelley's Case, and 1 Inst. 24b, 26b, and 164a,⁴ that a person who will take as heir by purchase must be a complete right heir, was only Coke's opinion and was a groundless distinction inconsistent with right, reason, and common sense, that, in wills, the intention of the testator is to govern. And, therefore, an heir male might take by a devise though he was not a complete heir if it appeared to be the intention in the will. And, for this, he cited 2 Vern. 732, Newcomen and Barkham.⁵

To the second point, it was answered for the plaintiff that so wild an argument could not be expected and, therefore, nothing had been said upon this head, that the lessor claimed nothing by the will, but was in by descent, that no one could take any estate by force of the remainder to the testator's right heirs, that remainder being void, that it was one of the most known and settled rules in law where a man makes a gift in tail, remainder to his right heirs,

¹ 1 Rolle, Abr., *Bastard*, pl. B, 4, p. 358.

² *Parish of St. Andrew's v. Parish of St. Bride's* (1717), Sessions Cases 35, 93 E.R. 35.

³ *Rex v. Reason and Tranter* (1721), 6 State Trials 195 (F. Hargrave, ed., 1777), also 1 Strange 499, 93 E.R. 659.

⁴ *Wolfe v. Shelley* (1581), 1 Coke Rep. 88, 76 E.R. 199, also 3 Dyer 373, 73 E.R. 838, 1 Anderson 69, 123 E.R. 358, Moore K.B. 136, 72 E.R. 490, Jenkins 249, 145 E.R. 176; E. Coke, *First Institute* (1628), ff. 24b, 26b, 164.

⁵ *Newcomen v. Barkham* (1716-1717), 2 Vernon 729, 23 E.R. 1078, also Precedents in Chancery 442, 461, 24 E.R. 197, 207, 1 Strange 35, 93 E.R. 368, Lincoln's Inn MS. Misc. 506, p. 1, Gilbert Rep. 116, 131, 25 E.R. 81, 92, 1 Eq. Cas. Abr. 215, 21 E.R. 999, 2 Eq. Cas. Abr. 717, 22 E.R. 603, *sub nom. Brown v. Barkham*, Chancery Repts. *tempore* Geo. I, 222.

such remainder is void. 1 Inst. 22b.¹ So it was in this case. And the reversion is indisputably in the heir at law of the devisor.

But, admitting the remainder good, the rule of law, wherever a person will take as heir by purchase, he must be a complete heir (however slighted) is an established rule and was never denied and has not only Coke's authority, but Dy. 274; Hob. 31.²

It must be owned, however, that, in devises, a man may sometimes take as heir or heir male without being a complete heir, either from the apparent intention of the testator that such a particular person shall take or where the word 'heir' etc. is taken only as a *descriptio personae*. 1 Vent. 372, Pibus and Mitford; 2 Vent. 311, Jones and Richardson, two cases cited in 2 Vern. 732, *supra*.³ And that case in Vernon, which is no more than this, that one, as heir male, though not heir general, may take by the name of heir male as a sufficient description of the person, the testator's intention appearing to be so. If it could be pointed out in this case who the testator intended by his right heir, these cases might be somewhat applicable, but, without that, they are nothing to the purpose.

However that be, the remainder here, in its creation, was void, and the reversion undisposed of by the will, which descended to the heir at law upon the testator's death, and, accordingly, we claim it as heir.

Judgment [was given on] October 1735 that the lessor was a bastard and that he was excluded by the will, *per totam curiam*.

[This report is cited at Scarbury v. Barber (1739), see below, Case No. 73.]

¹ E. Coke, *First Institute* (1628), f. 22.

² *Mutton's Case* (1571), 3 Dyer 274, 73 E.R. 613; *Counden v. Clerke* (1614), Hobart 29, 80 E.R. 180, also Moore K.B. 860, 72 E.R. 955, 1 Eq. Cas. Abr. 213, 21 E.R. 998.

³ *Pibus v. Mitford* (1673-1674), 1 Ventris 372, 86 E.R. 239, also 2 Levinz 75, 83 E.R. 456, 3 Keble 239, 316, 338, 84 E.R. 697, 741, 754, 3 Salkeld 337, 91 E.R. 859, T. Raymond 228, 83 E.R. 119, 1 Modern 98, 121, 159, 86 E.R. 761, 780, 800, 1 Freeman 351, 369, 89 E.R. 262, 275, Lincoln's Inn MS. Misc. 500, ff. 214v, 224, 236; *James v. Richardson* (1685), 2 Ventris 311, 86 E.R. 458, also Pollexfen 457, 86 E.R. 610, T. Raymond 330, 83 E.R. 172, 2 Levinz 232, 83 E.R. 533, 3 Keble 832, 84 E.R. 1039, T. Jones 99, 84 E.R. 1166, 1 Ventris 334, 86 E.R. 216, 1 Freeman 458, 472, 89 E.R. 343, 353, 1 Eq. Cas. Abr. 214, 21 E.R. 998, Lincoln's Inn MS. Misc. 557, f. 94, pl. 2, Skinner 205, 90 E.R. 95, Comberbach 153, 90 E.R. 400, Carthew 154, 90 E.R. 694, Holt K.B. 223, 224, 90 E.R. 1022, 1023, 1 Eq. Cas. Abr. 214, 21 E.R. 999, Dodd 60; *James v. Richardson* (H.L. 1685), *Durdant v. Burchett* (H.L. 1690), 2 Ventris 311, 86 E.R. 458, also Pollexfen 457, 86 E.R. 610, T. Raymond 330, 83 E.R. 172, 2 Levinz 232, 83 E.R. 533, 3 Keble 832, 84 E.R. 1039, T. Jones 99, 84 E.R. 1166, 1 Ventris 334, 86 E.R. 216, 1 Freeman 458, 472, 89 E.R. 343, 353, 1 Eq. Cas. Abr. 214, 21 E.R. 998, Lincoln's Inn MS. Misc. 557, f. 94, pl. 2, Skinner 205, 90 E.R. 95, Comberbach 153, 90 E.R. 400, Carthew 154, 90 E.R. 694, Holt K.B. 223, 224, 90 E.R. 1022, 1023, 1 Eq. Cas. Abr. 214, 21 E.R. 999, Dodd 60.

Legan, ex dem. Armistead v. Newton
(October 1735)

In this case, a grant of land from the crown lapsed, and the subsequent grant was held to be valid.

The lands in question were granted to Beheathland Gilson by a patent September 27, 1667, and again granted to Thomas Gilson, October 20, 1670, as lapsed from Beheathland. She, at the time of the grant to her, was but a year old. She died in October 1693, being then the widow of one Stork. And, by her will, she devised the premises to her daughter Elizabeth, whose heir apparent the defendant is. Elizabeth was born in 1687, married in 1702 to the defendant's father, who died in 1728. The land was first seated for Beheathland in 1692, according to the law then, and [there was] no seating before. The defendant has Beheathland's right, and is 33 years old. In May 1705, Augustine Smith obtained a grant of the aforesaid lands as lapsed from Thomas Gilson, and the lessor of the plaintiff has his title. Smith seated it, according to the condition of his grant.

But, except the seating by Beheathland and that by Smith, no person has ever lived upon the land until the defendant entered in 1729 and settled a plantation. Only one Daniel, after 1710 by permission of the lessor, tended part of the land several years. Smith and the lessor have paid the quitrents from the time of the grant to Smith and ever since the defendant's entry to this time. And whether the lessor or the defendant have title to these premises is the question.

For the clearer understanding of this case, I [*Barradall*] shall divide what I have to say into five points or questions. First, I shall consider whether the infancy of Beheathland, the first grantee, did or could excuse the forfeiture for the breach of condition in not seating within three years. If not, then, second, whether the second grant to Thomas Gilson was good. Third, whether the seating in 1692 by Beheathland did or could give her any right or be taken as a performance of the condition either of the first or second grant so as to make the third grant to Smith void. Fourth, if this seating be taken as a performance of the condition of the second grant, whether the defendant has any title under Thomas Gilson, the second grantee. Fifth, admitting the grant to Smith is void, whether the possession of the lessor of the plaintiff above twenty years before the defendant's entry was not a bar to that entry and is a good title in the lessor.

First, I take it to be very clear that the infancy of the grantee will not excuse the breach of the condition. There are two sorts of conditions in law, [either] implied in the deed or express. The breach of conditions in law in the case of infancy will sometimes cause a forfeiture and sometimes not. 1 Inst. 233b, 380b; 8 Rep. 44b.¹ But infancy will never excuse a forfeiture in the case of the breach of a condition in a deed, as if land be given to an infant upon condition or he purchase such estate or even if an estate upon condition descend to him, he is bound by such condition, and must take notice of it at his peril, for, if the condition be broken during his minority, the land is lost. Bro., Condition, 114, Coverture and Infancy, 71; Plo. 375, Stowell; 8 Rep. 44b, Whittingham; 1 Inst. 380b; 1 Mod. 86, 300, and 2 Lev. 22,

¹ E. Coke, *First Institute* (1628), f. 233b, 380b; *Whittingham's Case* (1603), 8 Coke Rep. 42, 77 E.R. 537.

Porter v. Fry, a notable case;¹ an estate was given to a granddaughter, an infant, upon condition she married with consent and, if she married without consent, then [there was a] devise over; she married without consent under age. And one point [that was] adjudged is that her infancy would not excuse the breach of the condition. And even equity refused to relieve against it. And so in the Case of Bertie and Lord Falkland, 2 Vern. 343, the like point was resolved.² *Lege* 8 Rep.; 1 Mod.

This is the law in the case of a subject, and it is stronger in the king's case, for these conditions are always taken strictly and as most for the king's benefit.

If the Act of 11 Ann., c. 4,³ for saving infants' rights in case of a lapse should be objected, I answer an Act made so long after and providing only for cases futurely happening can never influence this case. Besides, this case is not at all within the purview of that Act, which only saves infants' rights in case of lapse, not where they are original grantees or purchasers. And now I have mentioned this Act, I must take notice of it as a further proof that infancy will not excuse the breach of a condition, for, if it would, this Act had been needless. I hope then it is clear that the infancy of Beheathland, the first grantee, did not excuse the forfeiture for the breach of condition.

And it is next to be enquired, second, whether the second grant to Thomas Gilson be good. It is the nature of an estate upon condition that, if the condition be broken, the grantor has a right of entry. If he cannot enter, as in some cases he cannot, he must make a claim. And, in either case of entry or claim, the estate determines, and not before. 1 Inst. 218a.⁴

It will be objected, perhaps, that the king cannot enter for a condition broken until the breach is found by an office. Pop. 26.⁵ And I agree that, regularly, there ought to be an office. But, then, I say it was never practiced in this country. I mean in a strict and formal sense, for something in the nature of it has been always used and practiced, at least from the year 1662. By an Act made then, c. 69,⁶ no patent is to be granted for land as deserted for want of planting within three years until proof be made before the Governor and Council and an order from them for the patenting thereof. Thus, the law stood here until the [Act of] 9 Ann., c. 13,⁷

¹ YB 31 Edw. III, Lib. Ass., p. 188, pl. 17, Brooke, Abr., *Conditions*, pl. 114, Brooke, Abr., *Coverture & Infancie*, pl. 71 (1357); *Stowel v. Lord Zouch* (1569), 1 Plowden 353, 75 E.R. 536; *Whittingham's Case* (1603), 8 Coke Rep. 42, 77 E.R. 537; E. Coke, *First Institute* (1628), f. 380b; *Williams, ex dem. Porter v. Fry* (1670), 1 Modern 86, 300, 86 E.R. 752, 898, 2 Levinz 21, 83 E.R. 434, also 2 Chancery Reports 26, 21 E.R. 606, 1 Chancery Cases 138, 22 E.R. 731, 1 Eq. Cas. Abr. 111, 282, 333, 21 E.R. 918, 1047, 1083, 1 Freeman 31, 89 E.R. 26, 1 Ventris 199, 86 E.R. 135, T. Raymond 236, 83 E.R. 122, 2 Keble 756, 787, 814, 867, 84 E.R. 478, 498, 515, 548, 3 Keble 19, 84 E.R. 570.

² *Lord Falkland v. Bertie* (1696), 2 Vernon 333, 23 E.R. 814, also 1 Salkeld 231, 91 E.R. 205, 3 Chancery Cases 129, 22 E.R. 1008, 2 Freeman 220, 22 E.R. 1171, 12 Modern 182, 88 E.R. 1248, Holt K.B. 230, 90 E.R. 1026, Colles 10, 1 E.R. 155, Dickens 25, 21 E.R. 176, 1 Eq. Cas. Abr. 110, 21 E.R. 917, Chan. Repts. *tempore* Harcourt, p. 17.

³ Act of 1712, c. 4, 4 Hening's Statutes 31-32.

⁴ E. Coke, *First Institute* (1628), f. 218.

⁵ *Crocker v. Dormer* (1593), Popham 22, 79 E.R. 1143.

⁶ Act of 1661, c. 69, 2 Hening's Statutes 95.

⁷ Act of 1710, c. 13, 3 Hening's Statutes 517.

when a new method was established for this purpose, which is too well known to need reciting. The old method as well as the new were instituted in the room and are in the nature of an office. It is indeed notorious that, under the old Act, lands were frequently granted upon a mere suggestion that they were lapsed without any further enquiry. And, therefore, this court, upon proof made that the land was saved, has frequently adjudged such second grants to be void, and with good reason, because they were founded upon a false suggestion and the king was deceived.

But there can be no pretence of that kind in this case, because it is found in the verdict that this land was not seated until 1692, above twenty years after this second grant. And, at this distance of time, it must be presumed the grant was regularly obtained according to the directions of the old Act, since nothing appears to the contrary. And, in the grant itself, it is mentioned to be by order of the General Court. If, then, this grant was regularly obtained, there was an enquiry in the nature of an office, according to the course and practice of those times, and, then, the king might enter, as he did, and he granted the lands to Thomas Gilson. And such a grant is undoubtedly as good as any other under the same circumstance. Nor has the validity of such grants been ever disputed, except where it has been proved that the land was saved. Here, then, is a period to Beheathland's right and title under the first grant, and the legal estate in the premises vested in Thomas Gilson.

How Beheathland ever gained any other right or title will be incumbent on the defendant to show. For my part, I cannot so much as guess at it, for I cannot conceive, third, that her seating in 1692 (which is the third point) could give her any right or be taken as a performance of the condition of the first or second grant, which, if it should, would consequently make the third grant to Smith void. I have before observed that, if the grant to Thomas Gilson was good, the legal estate of Beheathland determined when that grant was made. I cannot conceive, then, how a tortious act of her twenty years after could regain that estate she had forfeited so long before. I call this seating of hers in 1692 a tortious act, for, if the grant to Thomas Gilson is good and his estate continued, it was a disseisin or trespass upon him. If his estate did not continue, but was become forfeited, it was an intrusion upon the king. I am really at a loss to divine what arguments can be made use of to prove that such an act can give any legal right or title. And, therefore, I must be silent until I hear what they are. Sure, it will not be pretended this was any performance of the condition of the first grant to Beheathland twenty years after the condition broken and entry made for the breach and, thereby, the estate determined.

Neither can this seating be taken as a performance of the condition in the second grant, as I humbly conceive, being so long after the time limited in the grant for performance. I shall admit that a seating by one who has no right shall enure to the benefit of those who have right. But, then, I think this seating ought to be within the time limited. Suppose we were in the case of a subject. An estate is granted upon a condition to be performed within three years which is not done, the grantor does not enter, but suffers the grantee to continue in possession, who, many years afterwards, performs the act required by the condition. I believe this would not be taken as a performance of the condition or bar the grantor of his entry. And, if not in the case of the subject, much less in the king's case, where conditions are always taken strictly and as most for the king's benefit. And the equity will sometimes interpose to save a forfeiture where the design and intention of the grantor is fulfilled though the condition be not strictly performed. That was never known in the king's case. Besides, the intention here was not fulfilled, which was to have the land seated and cultivated. I conceive, then, this seating in 1692 was no performance of the condition of the second grant. And, then, the grant to Smith in 1705 is a good grant. And the lessor of the plaintiff has a clear title.

Fourth, but, if this seating can be taken as a performance of the condition of the second grant, it must next be seen if the defendant has any title under Thomas Gilson, the grantee. Upon which head, I shall not need to say much because I am sure no title at all appears, either in the defendant or Beheathland, under whom alone it is the defendant pretends to claim. They

were neither of them heir to Thomas Gilson, nor was any conveyance ever made by him of his right so that there can be no pretence of any legal title under him. If they will set up an equitable title, as I do not know what they may pretend to, it will be unnecessary to give any answer. We are at common law, and, I presume, the determination will be upon the legal title and not any imaginary equitable one if any such is pretended.

fifth, admitting the grant to Smith is not good, then, it is to be considered whether the possession of the lessor of the plaintiff above twenty years before the defendant's entry was not a bar to that entry and gives the lessor a good title in this case.

By the Stat. 21 Jac., c. 16, ss. 1, 2, which are enacted here *totidem verbis* 9 Ann., c. 13,¹ any person having a right of entry must make that entry within twenty years after the title descended or accrued or is barred from such entry with the usual savings to infants, married women, etc., who may enter within ten years after the disability be removed. This Act being express that the party shall be barred if he does not make his entry within twenty years, a possession of twenty years is compared to a descent that tolls the entry. And, therefore, if a man has been so long in possession and another enters upon him and puts him to his [action of] ejectment, that possession shall be as good a title in him (though plaintiff) as if he was the defendant and still in possession, because the defendant's entry was not lawful. 2 Sal. 421, *Stokes v. Berry*. There is another rule, too, that, if a man has a prior possession and another enters upon him without title, the priority of possession is a good title against such an entry. Vaugh. 299, *Craw v. Ramsey*; 2 Saund. 112.²

The lessor of the plaintiff and those he claims under were in possession from the time of Smith's grant in 1705 until the defendant's entry in 1729, which is twenty-four years. And this possession is a good title unless some incapacity has intervened in the defendant or those he claims under, admitting any title does appear for him. And, if no such does appear, then the priority of possession is a good title against the defendant's entry without any title at all. *Lege Salk*.

Because I would not take up time unnecessarily, I will agree that, if Beheathland had a good title in her at the time she devised to her daughter, Elizabeth, our twenty years possession will not avail, because Elizabeth, in whose time our whole possession was, has been under the incapacities of infancy and coverture during all that time. But I hope it is clear she had no title after the grant to Thomas Gilson. And, then, though the seating in 1692 should be taken as a performance of the condition of the second grant and so the grant to Smith is void, yet the defendant, having no title under Thomas Gilson, our priority of possession is a good title against his entry. At least, the twenty years possession is undoubtedly a good title against Thomas Gilson and all claiming under him, there appearing no incapacity as to them.

Randolph, for the defendant, said the question was whether the second or third grant were good, that, where an estate was granted upon condition, though the condition was broken, the estate continued until the entry of the grantor. And, where an entry was necessary in the case of a subject, an office was so in the case of the king. Therefore, that the breach of the condition of the first grant must be found by an office before the estate of the first grantee was determined, that it did not appear in this case by any proof that the condition of the first grant was broken before the making of the second grant, nor even so much as that the party was

¹ Stat. 21 Jac. I, c. 16, ss, 1, 2 (*SR*, IV, 1222); Act of 1710, c. 13, s. 9, 3 Hening's Statutes 521-522.

² *Stokes v. Berry* (1699), 2 Salkeld 421, 91 E.R. 366, also Holt K.B. 264, 90 E.R. 1044; *Craw v. Ramsey* (1670), Vaughan 274, 124 E.R. 1072, also 2 Ventris 1, 86 E.R. 273, Carter 185, 124 E.R. 905; *Coryton v. Lithebye* (1670-1671), 2 Williams Saunders 112, 85 E.R. 814, also 2 Levinz 27, 83 E.R. 437, 1 Ventris 167, 86 E.R. 114, 2 Keble 803, 838, 850, 84 E.R. 507, 530, 538.

summoned, which was certainly requisite according to natural justice. But the second grant might be made without any enquiry into the truth or hearing the party, as grants frequently were in the old times. And, then, it is certainly void. He cited Pop. 53 to prove that an office in the king's case countervailed an entry in the case of a subject.¹

(*Quaere* of this, for, by Pop. 26,² there must be an entry after the office.)

He compared this to the case of Carter and Baylor, though there is really no kind of similitude between them. That case, which happened in [*blank*], was in short this. Edward Hill obtained a patent in 1683 for 2717 acres. In 1693, he gave the land to Edward Chilton and Hannah, his wife, who was his daughter, and their heirs. In 1698, Edward Chilton, alone, sold to Baylor, who cleared enough to save the land according to the law then. And, afterwards, in 1704, he obtained a new grant of the same land as lapsed from Hill. Hannah survived her husband, Edward Chilton, and Mrs. Carter was her heir. And so, if the grant in 1704 to Baylor was not good, she had an undoubted title. And it was adjudged that grant was not good, the land being saved before, and, though it was saved by a stranger, not the grantee or those who claimed under him, it should enure to the benefit of those who had the right.

Judgment [was given] for the plaintiff, October 1735, by the opinion of LEE, TAYLOE, ROBINSON, BYRD, BLAIR, and the Governor [GOOCH]; RANDOLPH, CUSTIS, DIGGES *contra*.

[This report is cited at *Doe, ex dem. Fitzhugh v. Burwell* (1735), see below, Case No. 25.]

25

Doe, ex dem. Fitzhugh v. Burwell
(October 1735)

The question in this case was whether an action of ejectment can be based upon a title that cannot be defeated because of the statute of limitations.

Thomas Wilkinson obtained a patent dated June 8, 1662, for 6000 acres of land formerly granted to him by a patent in June 10, 1658. Part of which land, he sells. And, by his will, April 25, 1688, he devises the rest to his wife Ann and daughter Elizabeth and, if his daughter died before fourteen, then all to his wife in fee. The daughter died before fourteen. After whose death, the wife, then Ann Goodall, by deed August 29, [*blank*], gives the premises devised to her son-in-law, William Thomas, and Hannah, his wife, her only daughter, and their heirs.

Thomas and his wife, by deed, October 26, 1692, sell to William Fitzhugh, the father of the lessor of the plaintiff, who devised the same to him. And he and his father have been in possession ever since, at least above twenty years. It appears by the depositions, before the bringing of this suit, there is no title found for the defendant, and his first clearing upon our land was about fifteen years before this suit.

The objection to this title is that Thomas and his wife were joint tenants and she was not privately examined upon passing the deed to Fitzhugh. So, it was merely the deed of the husband, and he alone could not make a good title, not even for a moiety, but the wife, after his death, might enter into the whole, for they took by entireties. 1 Inst. 187, 188, 299b, 351, 326a.³

¹ *Finch v. Riseley* (1594), Popham 53, 79 E.R. 1169.

² *Crocker and York v. Dormer* (1593), Popham 22, 79 E.R. 1143.

³ E. Coke, *First Institute* (1628), ff. 187, 188, 299b, 326, 351.

It must be owned our title does not appear indefeasible. Yet I [*Barradall*] conceive our possession above forty years under the grant from Thomas and his wife is a good title to maintain an [action of] ejectment. If the husband survived, we have an undoubted indefeasible title, for he, being a joint tenant with his wife, would have the whole by survivorship. We have his whole right, and he or his heirs can never claim against his deed. Now, as at this distance of time, it cannot be proved whether he or his wife died first, it ought to be presumed that his wife did in favor of so long a possession, for a continued and quiet possession is a violent presumption of a title. And that, in the law, is taken for a full proof. 1 Inst. 6b.¹ But, further, this possession would bar even the wife and her heirs, admitting she survived, in an ejectment unless she or they were under some incapacity. Twenty years possession is a good title in ejectment. The reason is that, by the Act of Limitation, a man is barred of his entry after twenty years. And, therefore, so long a possession is compared to a descent that takes away an entry. 2 Sal. 421, *Stokes against Berry*; *vide Armistead and Newton, ante*.²

Our title, then, may possibly be indefeasible, and is undoubtedly a good title against all but the heirs of the wife, especially against the defendant, who entered without any title at all. It appears the first entry (or rather trespass) of the defendant was but about fifteen years ago and that only by clearing some land. And there is no title or pretence of title set up in the defendant. If this clearing a little ground within our bounds is adjudged a disseisin, a man in this country will hardly know when he is in possession of land. I conceive the defendant can be regarded only as a trespasser. And, then, surely our possession is a good title against him. But, if this is looked upon as an ouster of us, yet we had a prior possession. And that alone is a good title against one entering without any title at all. *Vaugh. 299, Craw and Ramsey; 2 Saund. 112*.³

It seemed to be agreed in the Case of Woodford and Corbin that, if it appeared in the verdict Woodford had had possession of the land in his patent (though not of the spot in controversy), he had a good title and the defendant was but a trespasser. And because his possession did not appear upon the verdict, judgment was against him. Now, as our possession is found, I hope judgment will be for us.

This cause was agreed by the parties.

¹ E. Coke, *First Institute* (1628), f. 6b.

² Stat. 21 Jac. I, c. 16, s. 1 (*SR, IV, 1222*).; *Stokes v. Berry* (1699), 2 Salkeld 421, 91 E.R. 366, also Holt K.B. 264, 90 E.R. 1044; *Legan, ex dem. Armistead v. Newton* (1735), see above, Case No. 24.

³ *Craw v. Ramsey* (1670), *Vaughan* 274, 124 E.R. 1072, also 2 Ventris 1, 86 E.R. 273, Carter 185, 124 E.R. 905; *Coryton v. Lithebye* (1670-1671), 2 Williams Saunders 112, 85 E.R. 814, also 2 Levinz 27, 83 E.R. 437, 1 Ventris 167, 86 E.R. 114, 2 Keble 803, 838, 850, 84 E.R. 507, 530, 538.

Lutwidge v. French
(October 1735)

The question in this case was whether a court of equity can grant a remedy in a case after there has been a final judgment at common law for the same matter.

Appeal from Stafford [County Court].

The appellant brought an action at law against the respondent upon a bond in the penalty of 12,000 pounds of tobacco conditioned for payment of 6000 pounds of tobacco, to which the defendant pleaded payment. There was a verdict for the plaintiff, and he had judgment for the penalty to be discharged on the payment of the principal and interest.

The respondent exhibits a bill to be relieved against this judgment, setting forth that he, by his marriage with the widow of one Triplet, became possessed of the estate belonging to his children. And, being willing to do the best for them, in 1720, he bound out Francis Triplet, whom he makes a defendant, to the defendant Lutwidge, who was the master of a ship. And the bond aforesaid was given for payment of the apprentice fee, viz. 6000 pounds of tobacco, which Triplet promised to allow out of his estate when he came of age.

The defendant Lutwidge neglected to instruct Triplet according to his indentures so that he left him five or six months before his time out, and was so ignorant in his business he was forced to turn bricklayer to get a livelihood.

In 1725 or 1726, the complainant performed great services for Lutwidge of more than the value of 6000 pounds of tobacco, for which he charged nothing in regard of his aforesaid bond. The defendant, by letter dated [*blank*], desired the plaintiff to pay a small sum of money for him and he would make him a present of what else was between them, which sum the plaintiff paid. Afterwards, the plaintiff had considerable dealings with the defendant and settled several accounts, particularly one for 24,626 pounds of tobacco and £23 1s. 4d. And the bond [was] never brought to an account so that plaintiff never expected to be charged with it, apprehending the defendant intended to acquit the same for the plaintiff's great services

The defendant Triplet, after he came of age, recovered his whole estate of the plaintiff without allowing the said 6000 pounds of tobacco. And the plaintiff, therefore, prays to be relieved, either against the said judgment or against Triplet.

The defendant Lutwidge pleads the verdict and judgment aforesaid in bar, and also demurs, for that there is no equity in the bill, that the plaintiff may have a remedy for his pretended services at law, that the court cannot decree a performance of the agreement concerning Triplet's apprenticeship nor assess damages for the nonperformance or for the plaintiff's pretended services, that the defendant Lutwidge is no way concerned in the transactions between the plaintiff and the other defendant Triplet, nor ought they to be a bar to his having the effect of his judgment.

The County Court overruled this plea and demurrer, which I [*Barradall*] conceive is error.

As to the plea, if we may credit Sir Edward Coke and other old authorities, anciently, it was held that, after a judgment at law, a court of equity could not interpose upon any pretence whatsoever, 3 Inst. 119, etc., that the Statute of Praemunire, 27 Edw. III, 1, prohibits it under great penalties, and the 4 Hen. IV, c. [*blank*], is express that, after a judgment, the parties shall be in peace until the judgment is undone by attainr or error.¹ Thus, the law was

¹ E. Coke, *Third Institute* (1644), p. 119; Stat. 27 Edw. III, c. 1 (*SR*, I, 329); Stat. 4 Hen. IV, c. 23 (*SR*, II, 142).

taken for some ages, and there are several instances where, in the hardest cases, the Chancery refused to relieve after a judgment at law. And many have been convicted of a praemunire upon the [Statute] 27 Edw. III, for suing in Chancery after such a judgment.

But this point coming in question in the time of James I, it was by his command referred to the Attorney General and Solicitor General and other able lawyers, who certified their opinions that the Chancery might relieve after a judgment at law and that the said statutes 27 Edw. III and 4 Hen. IV did not prohibit it. And thus it rested for forty years until the [year] 22 Car. II, when an action was brought on the [statute] 27 Edw. III for suing in Chancery after a judgment at law. The case is *King against Standish*, and it is reported in several books, 1 Sid. 463, where it seemed to be the opinion of Keling, C.J., and Twysden that the defendant had incurred the penalty of the Statute. By 1 Mod. 59, it was adjourned for the opinion of all the judges. And by 1 Lev. 40, Hale being then Chief Justice, it was his opinion that the case was not within the Statute, and so nothing further was done in it. It was Hale's opinion that the [Statute] 27 Edw. III did not prohibit the Chancery from examining judgments at law and with good reason, because the Chancery, as a court of equity, was not *in esse* at that time, but, yet, he was of opinion that the [Statute] 4 Hen. IV did restrain the Chancery from examining judgments at common law, as appears in *Cole and Forth*, 1 Mod. 94.¹

However, it must be acknowledged that, of late days, the Chancery, as it has extended its power and jurisdiction in other instances insomuch that almost all causes of moment are first or last determined there, so also in this particular of relieving after judgments at law. Yet this has been very sparingly done where there has been a verdict and the merits of the cause fairly tried, as in this cause.

And there is less reason the Chancery should exercise such a power here, where the strict rules of law are not very rigidly adhered to, either by judges or juries. And the defendant having the liberty of discount, which he has not by the laws of England, he has many advantages in his defence, which he could not have in England. And, though it might be mischievous to carry the point so far as never to give relief after a verdict or judgment, yet, on the other hand, it would be much more mischievous to countenance it upon all occasions unless there is some very apparent wrong or injustice in the case. And that is for two reasons mentioned by Sir Edward Coke, 3 Inst. 123, first, that it will draw matters determinable at the common law *ad aliud examen* which should be tried by a jury by the fundamental laws of England, second, every plaintiff will choose rather to begin in equity whither he must come at last to the subversion of the common law, which last mischief is found pretty true in experience, as I have already observed.

Now, it will be proper to observe what is the wrong and hardship complained of here to induce this court to unravel a judgment upon a verdict at law. And it really amounts to no more than this, that the complainant performed great services for the defendant, for which he charged nothing in expectation the defendant would not charge him with the bond upon which the judgment was obtained. This is the only pretence that has any appearance of hardship. As to the other suggestions in the bill concerning the nonperformance of the articles of apprenticeship and Triplet's promise to allow the 6000 pounds of tobacco out of his estate etc., I shall show presently they cannot be any reason for unravelling this judgment.

And, as to these pretended services, if there were really any such, the complainant might have made proof of them upon the trial at law. And the jury would have made an allowance by way of discount. Perhaps, this was done, and the jury thought he deserved nothing. If it was

¹ *King v. Standish* (1670), 1 Siderfin 463, 82 E.R. 1218, 1 Modern 59, 86 E.R. 730, 1 Levinz 241, 83 E.R. 387, also 2 Keble 402, 661, 787, 84 E.R. 251, 415, 497, Gray's Inn MS. 35, f. 679, 73 Selden Soc. 13; *Cole v. Forth* (1672), 1 Modern 94, 86 E.R. 759, also *sub nom. Cole v. Green*, 1 Levinz 309, 83 E.R. 422, *sub nom. Greene v. Cole*, 2 Williams Saunders 228, 85 E.R. 1022.

not, it was the complainant's neglect. And equity will not relieve against such negligence. 1 Ch. Ca. 43.¹

But, besides, he does not pretend the defendant ever promised to give up this bond in consideration of those services, though he would endeavour to infer as much from a letter wherein the defendant desires him to pay a small sum and that he would make him a present of what else was between them. But, if he had intended to make so considerable a present as 6000 pounds of tobacco, he would hardly have mentioned it so slightly. The letter must, therefore, be taken to relate to the subject matter upon which it was written, *viz.* an account of some transactions between them that year. And this can never be taken as a release of the bond either in law or equity.

There being, therefore, really no equity in the bill, there is likewise a demurrer to it for that cause, for, first, admitting there were really services performed, this court cannot assess damages for those services nor give the plaintiff a recompense for them. The proper and natural remedy is an action at law, where a jury will give as much as he reasonably deserved. It is a known and settled rule that a court of equity cannot assess damages nor give relief where the plaintiff can have a remedy at law. Now, this judgment upon the bond will be no bar to the plaintiff's recovering at law for his services. And, therefore, this pretence can be no reason for impeaching this judgment.

Second, the next pretence is that the defendant did not perform the articles of apprenticeship. But I would fain know what the plaintiff has to do with that. These articles are between the defendant Lutwidge and Triplet, and Triplet is entitled to a recompense for the breach of them if any be. But suppose the plaintiff was. What can a court of equity do? To decree a performance of them is impossible, nor can they assess damages for the breach. And I suppose it will not be thought reasonable the whole apprentice fee should be lost because some particular part of the articles was not performed. The remedy, therefore, here must be at law to recover damages for the breach.

Third, the last pretence is certainly the strangest in the world. It is a promise made by an infant, which, for anything that is pretended, Lutwidge was an entire stranger to. Can that then be a reason that he should not recover at law, because a third person for whom the money was advanced promised to repay it? Besides, this promise, made by an infant, is *ipso facto* void. Nor did equity ever enforce the performance of such a promise. And, as to Triplet's recovering his whole estate without allowing for this tobacco, it is nothing to Lutwidge, who really gave a valuable consideration for this bond, according to the plaintiff's own showing, *viz.* by taking Triplet [as his] apprentice.

And so, I hope it is evident there is no equity in the plaintiff's bill. I, therefore, pray that the County Court's order may be reversed, that the injunction may be dissolved, and the plaintiff have the effect of his judgment at law.

Vide 1 Vern. 176 and 316,² where equity refused to relieve after a judgment at law.

¹ *Curtess v. Smallridge* (1664), 1 Chancery Cases 43, 22 E.R. 685, also 2 Freeman 178, 22 E.R. 1143, 1 Eq. Cas. Abr. 377, 21 E.R. 1114, 2 Eq. Cas. Abr. 173, 22 E.R. 148.

² *Barbone v. Brent* (1683), 1 Vernon 176, 23 E.R. 397, also Chan. Repts. *tempore* North 153; *Barker v. Holder* (1685), 1 Vernon 316, 23 E.R. 493, also Chan. Repts. *tempore* North 440.

Field v. Cocke
(October 1735)

Where a new sheriff is appointed, the old sheriff must turn over to him by an indenture any prisoners in his custody or the new sheriff will not have custody of them so as to be liable for an escape.

This is an action upon the case for an escape upon a mesne process. A verdict is found for the plaintiff. But this point was reserved to be argued whether Pitchford, the prisoner who escaped, was so delivered by Winn, the old sheriff, in whose time he was first committed, to the defendant, the now sheriff, as to make the defendant, chargeable for this escape.

The case is thus. The day the defendant was sworn, Winn, the old sheriff, brought the keys of the prison into the court house where the defendant was, and laid them upon the table, saying there were two prisoners in jail, upon which the defendant took up the keys. Pitchford was one of these prisoners, and he remained in jail sixty-one days afterwards, during which time, he was fed by the defendant's order until he broke prison.

It is clear from these circumstances the defendant had Pitchford in his custody at the plaintiff's suit. But it will be objected, I [Barradall] suppose, that the old sheriff ought to have delivered him over to the defendant by indenture, without which, in judgment of law, the prisoner is not in the custody of the now sheriff. And I agree this is a formal circumstance required by law in some cases, that is where prisoners are in execution. I call it a formal circumstance, because it seems to have no foundation in natural justice, for, if the prisoner be really delivered and the new sheriff has him in custody and knows for what cause, there can be nothing said why, in reason, he ought not to be chargeable for his escape as much as if he was delivered over by indenture. However, I must allow this ceremony is made necessary by our law, but, then, it is only, as I said, where prisoners are in execution.

I must own, upon the best search and enquiry I have been able to make, I do not find any case where it is expressly and in point resolved that prisoners not in execution need not be turned over by indenture. But there are several cases where, by necessary inference, I conceive the law must be taken to be so. And the reason why we do not find it expressly resolved may be because it is a well known settled point and so has never been brought in question.

Sir Thomas Reed's Case, 2 Ro. 116,¹ who was indicted for suffering a prisoner attainted of felony to escape; an exception was taken to the indictment, that it did not appear he had the custody of the prisoner by indenture and, then, he ought not to be charged for his escape. But it was held, if the sheriff took upon him the custody of the prisoner without delivery by indenture and suffered him to escape, he may be indicted, because it is the suit of the king. The case says this is an instance where a sheriff may be chargeable for an escape, though the prisoner be not delivered by indenture, and proves that circumstance is not always necessary.

King against Sir Eusebie Andrews, Cro. Jac. 380;² one Burdet was arrested upon a [writ of] *latitat* at the plaintiff's suit by Sir John Iseham, the old sheriff, and, by him, *in exitu ab officio*, left in prison and delivered to the defendant, who suffered him to escape. And, without argument, it was adjudged for the plaintiff. Here was no delivery by indenture. The prisoner was only left in prison. The case is somewhat obscurely reported, and the manner of delivery does not seem to be directly brought in question, but we may presume it would have been

¹ *Rex v. Reade* (1620), 2 Rolle Rep. 146, 81 E.R. 715.

² *King v. Andrews* (1615), Croke Jac. 380, 79 E.R. 325.

insisted on if a delivery by indenture had been necessary. And the decision of the case without argument makes the inference very strong that the law was clear and settled in every point that could be insisted on.

Vide Dalton 16; notice by word, if accepted, [is] sufficient. Mr. Dalton in his *Office of Sheriff* and all other authors I have read on this subject say the old sheriff must assign over by indenture all writs not executed by him and the bodies of prisoners in execution. Now, if prisoners not in execution were also to be so assigned, the distinction would be useless, and we should be told that all the prisoners in the prison must be so assigned. All the cases I have ever read upon this subject are where the prisoners were in execution, which I think is a pretty strong argument on my side since it is reasonable to suppose there have been instances enough of prisoners not in execution turned over from one sheriff to another that have, afterwards, escaped. And, consequently, this point would have come in question if it had not been clear and settled, as I said. If there is no judicial resolution and I am pretty sure there is not nor any author who expressly says a delivery by indenture is necessary where prisoners are not in execution, since it must be allowed to be only a mere piece of ceremony, I hope it will be carried no further than the cases carry it.

Another argument I draw from the form of the indenture from one sheriff to another, which we find in the books, Dalton 18, in which there is no mention made of any but prisoners in execution. Now, if it was usual or necessary to assign those not in execution, we should certainly find the form and manner how they should be recited in the indenture as well as those in execution. An argument from precedents is very frequent in our books, and Sir Edward Coke says it is of great weight in the law. And it will be so much the greater in this case, as the precedents are consistent with what all the authors who treat on this subject say, they speaking only of prisoners in execution which would be a needless distinction, as I have observed, if all prisoners were in the same predicament as to this matter.

It may be difficult to assign a reason why the ceremony is requisite in one case more than the other. But it is as difficult to give a solid reason why it is requisite at all. The principal one given in the books is because the new sheriff, without notice what prisoners are in jail and for what cause, will not know whether it be lawful for him to detain them or when he may discharge them. But, if he has such notice without an indenture, the end and intention of the law in requiring an indenture is answered. And yet it is certain the new sheriff is not chargeable for prisoners in execution unless they are assigned by indenture to him. All that can be said is that it is a mere formal circumstance that has obtained its force from long usage and custom. And, being nothing more than a piece of ceremony, it ought not to be carried further than to those cases where the law is clear and express. And I am sure it is not so in this case but the contrary may be rather inferred. If, then, this case is to be determined upon the reason of the thing and the principles of natural justice, since one of the sheriffs must be liable to the plaintiff's action, I shall submit whether the old sheriff, who was in no fault, having given the defendant sufficient notice, or the defendant, the now sheriff, who actually had the prisoner in custody a long time and, then, suffered him to escape ought to be chargeable.

On the other side were cited Dalton, [*blank*] edit., 514; 3 Rep. 71, *Westbie's Case*, Pop. 85, same case; 1 Sid. 335, *Hanmer v. Warner*, and Keb. 224, same case; and 1 Sal. 272, *Watson v. Sutton*.¹ And [it was] insisted there was no difference whether the prisoner was in execution or not [so] that an assignment by indenture was necessary in all cases.

And so was the opinion of the whole court.

¹ *Westby v. Skinner* (1595-1597), 3 Coke Rep. 67, 76 E.R. 783, Popham 85, 79 E.R. 1197, also Croke Eliz. 365, 78 E.R. 613, Moore K.B. 688, 72 E.R. 841; *Hanmer v. Warner* (1667), 1 Siderfin 335, 82 E.R. 1141, 2 Keble 224, 84 E.R. 140; *Watson v. Sutton* (1701), 1 Salkeld 272, 91 E.R. 238, also 12 Modern 583, 88 E.R. 1535.

Note several were of opinion the action would not lie against either sheriff unless it appeared that the escape was through the sheriff's negligence.

28

Mason's Case
(April 1736)

The Statute of Limitations runs against bills of exchange.

A case was cited by *Sir John Randolph* of Col. Mason's, where it was adjudged the Act of Limitation¹ would run against a bill of exchange, *contra ejus opinionem meamque quidem*.

29

Jameson v. Vawter
(April 1736)

Where a defendant demurs to the evidence, the court must make the plaintiff join or direct the jury to find specially.

Appeal.

Error was assigned that the defendant below offered to demur to the plaintiff's evidence being *viva voce*, and the court would not make the plaintiff join.

Per curiam: The court should have made the plaintiff join or have directed the jury to find specially; judgment [was] reversed.

Randolph, for the plaintiff, denied the authority of Middleton and Baker, Cro. Eliz. 751, and he cited 1 Inst. 72,² and [G. Duncombe], *Tryal per Pais*, 418.

30

Ivey, ex dem. Ivey v. Fitzgerald
(April 1736)

A verdict in an action of ejectment must find that the plaintiff had a title to the land in issue; if they do not so find, the verdict must be set aside.

Appeal from Nansemond [County Court].

The case upon the verdict is Morris Fitzgerald, seised in fee of 100 acres of land, died so seised intestate and without issue. After his death, Henry Fitzgerald, his brother of the half blood, entered and died seised. And the premises descended to his daughter, the defendant. The lessor of the plaintiff is the son and heir of Thomas Ivey, who was uncle *a parte materna* to Morris Fitzgerald. But it is not found that either the lessor of the plaintiff is or his father was heir at law of Morris Fitzgerald.

¹ Act of 1705, c. 34, 3 Hening's Statutes 377-381; Act of 1730, c. 5, s. 9, 4 Hening's Statutes 275.

² *Middleton v. Baker* (1600), Croke Eliz. 752, 78 E.R. 983; E. Coke, *First Institute* (1628), f. 72.

Upon this verdict, I [*Barradall*] conceive the plaintiff cannot have a judgment, no title appearing in his lessor. It is only found he is the son of the uncle *a parte materna*, but not that he is heir at law. And, unless he is so, he has no title. If it should be argued that it ought to be presumed he is heir, I conceive the court are to judge upon the verdict as it is found and cannot add to or diminish from it. Especially, here, in the case of an appeal, the court are to judge upon the record. Besides, there is no great reason to presume the lessor is heir from any nearness of relation, it being very remote with respect to the succession in this case, for, not only brothers and sisters of the whole blood, but the most distant relation on the father's side have a right to succeed before him. And, perhaps, there may be many such, and, then, he is not heir in verity. But, admitting he should be so in fact, as it is not found, the court cannot intend it. If it be considered how absurd it must appear to posterity that a man should have a judgment to recover land without having any title, I hope no more need be said, only this, that the consequence will be only paying the costs of this suit; the plaintiff may bring another action.

Admitting the lessor is heir, his entry is taken away, and so he cannot bring [an action of] ejectment, but he must resort to another action to recover if he has any title. The case, as to this point, is thus. Morris Fitzgerald dies seised; the defendant's father, a stranger, enters and dies seised, the premises descend to the defendant, his daughter and heir. The defendant's father in this case was an abator. The difference between an abator and a disseisor is this, an abator is one who, between the death of the ancestor and entry of the heir, interposes and enters; such an entry is called an entry by abatement. A disseisor is one who wrongfully puts out another that is actually seised. The defendant's father, in this case, after the death of Morris Fitzgerald, entering before the entry of his heir was, as I said, an abator. This entry of the defendant's father was undoubtedly a tortious act, and the heir of Morris Fitzgerald might at any time have entered upon him during his life. But, neglecting to do that and the defendant's father dying seised, whereby the freehold and inheritance was cast upon the defendant by act in law, *i.e.* by descent, this descent takes away the entry of the heir. And he is put to his action, which, in this case, if the lessor is the heir, must be a writ of cosenage. This is the express doctrine of Littleton, s. 385, in the case of a disseisin. And Coke, in his *Commentary* 237b,¹ says there is the like law of an abatement or intrusion. This was a law introduced in favor of descents, which are of high estimation in law and looked upon as the worthiest means of coming to lands. In respect whereof, the heir has divers privileges and particularly this, that he shall not be subject to be ousted by the entry of anyone claiming title, but the person so claiming is put to his action. The reason given is because the heir cannot by intendment of law suddenly know the true state of his title. It is an institution of great antiquity and so known and settled a point [that] I presume it will not bear any sort of contest.

There is a Statute that perhaps may be objected, 32 Hen. VIII, 33,² which enacts that, in the case of a disseisin, the entry shall not be taken away by a descent to the heir of the disseisor unless such disseisor had five years quiet possession before his death. And, in this case, it does not appear the defendant's father was so long in quiet possession. And it is true it does not appear so upon the verdict, though the fact, I am told, is so. Now, I might with as much reason argue that this fact ought to be presumed, as the plaintiff does, that it ought to be presumed he is heir. But I shall make use of no such argument. My answer to the objection is that the Statute does not extend to an abatement, as I have shown our case to be. It speaks only of disseisins. And, because it is in some sort penal, as it takes away a privilege the heir had at the common law, the Statute is restrained to the express words, and is not taken by equity or extended to any case not within the words. Coke's authority is express; 1 Inst. 238a, that

¹ T. Littleton, *Tenures*, s. 385; E. Coke, *First Institute* (1628), f. 237.

² Stat. 32 Hen. VIII, c. 33 (SR, III, 788).

the Statute does not extend to an abator or intruder. So it is said in Pl. 47a, *Winbish against Talbois*.¹ Neither does it extend to the feoffee or donee of a disseisor, 1 Inst. 401a, note 65, but is restrained to the single case mentioned in the Statute, of a disseisor's dying seised. This Statute then cannot affect this case, the defendant's father being an abator, as I have showed. At the common law, such a descent as in this case takes away an entry. And, consequently, the plaintiff's lessor could not bring an ejectment, but must resort to his real action if he has any title. I pray the judgment may be affirmed

Randolph, for the appellant (the plaintiff), said it must be intended the plaintiff is the heir, though not expressly found, it appearing he is a cousin and the defendant's not setting up any title as heir nor showing any other person to be so, which point he said was adjudged in *Cro. Quaere*.

As to the descent taking away the entry of the plaintiff, he said no advantage could be taken of that matter upon this verdict because all the matter relating to it was not found, that the plaintiff might be under age or other disability and then the descent would not take away his entry. He compared it to the Act of Limitation,² of which he said no man could take advantage upon a special verdict unless the verdict found that the person to be barred was under no disability and that it was incumbent upon those who would take advantage of the Act to show that matter, for which he cited 1 Lutw. 804, *Whally against Read and Hall*.³

To which last matter, it was answered that it was true the descent would not take away the plaintiff's entry if he was under a disability, but that, not appearing, ought not to be intended, that it was a rule a disability should never be presumed. See *Plo. 176*.⁴ The parallel between a descent that tolls an entry and the Act of Limitation was very just, but the law was quite otherwise than had been stated. The words of the Act of Limitation are 'no entry shall be made within twenty years' etc. Therefore, a possession of twenty years, *prima facie*, must be a bar in ejectment. If the plaintiff will avoid the bar, he must show he is within the saving of the Act. If the Act be pleaded to an [action of] formedon, the tenant only says the plaintiff did not prosecute his writ within twenty years after the cause of action accrued. And this is certainly a good bar unless the plaintiff by way of replication show something to avoid it. The pleading is the same in personal actions. By parity of reason, the law must be the same upon a special verdict. The defendant is only to show his possession to the jury. And it is sufficient for him if they find that certainly. It is the plaintiff's business to show his disability if there is any in the case and not the defendant to show he was under no disability, which being a negative might be difficult, perhaps impossible, for him to prove to the satisfaction of a jury. The law is the same in the case of a fine with proclamations, which is certainly a good bar unless something is shown on the other side to prevent it. *Plow. 176*; *Whally and Reed*, if rightly understood, makes nothing against this argument. The court said no advantage was to be taken of the Act of Limitation, in regard all the matter touching it was not found, from whence I collect that the point of the limitation, which it appears was not the principal point in question, was not intended to be insisted on at the finding of the verdict. And, so, the facts concerning it were not offered to the jury. The judges, knowing this, declared no advantage should be taken of it, because, indeed, it was a sort of trick.

Judgment [was given] for the appellant, the plaintiff, April 1736.

¹ E. Coke, *First Institute* (1628), f. 238; *Wimbish v. Tailbois* (1550), 1 Plowden 63, 55, 75 E.R. 63, 89.

² Act of 1710, c. 13, s. 9, 3 Henning's Statutes 521-522.

³ *Whalley v. Reede* (1704), 1 Lutwyche 804, 125 E.R. 421.

⁴ *Hill v. Grange* (1557), 1 Plowden 164, 75 E.R. 253.

Note my argument about the descent seemed to be little understood. It was new to the court as it seems.

[This report is cited at Legan, *ex dem.* v. Washington Parish (1738), see below, Case No. 58.]

31

Rose, executor of Bagg v. Cooke
(Part 1)
(April 1736)

An infant defendant who is a devisee must plead to and defend against a lawsuit, and cannot have a continuance during his minority.

[In an action of] debt on a bond against the heir and devisees of John Cooke, the defendants plead three of them are under age, and pray the parol may demur, to which plea, the plaintiff demurs. And the question is whether the defendants ought to have their age or not.

This action lay not at the common law, but is given by the statutes 3 & 4 Will. & Mar., 13, and the 6 Geo. II. The first is enforced here by the Act 12 Geo. I, 3.¹ Before the making of which, if a man devised his land by will and died indebted, his creditors had no remedy against the land. But, now, an action is given by that Statute against the heir and devisee jointly.

I [Barradall] must observe the defendants, in their plea, do not allege any other title to the land than as devisees or that the defendant, the heir, has any land by descent. Therefore, I could not counterplead, as I must have done if they had said in their plea the lands descended. But I have demurred, conceiving the law to be very clear, that, upon this plea and as the truth of this case is, the defendants ought not to have their age.

I must first beg leave to premise that, wherever a man takes an estate from his ancestor or any other, he must take it by descent or by purchase, by descent when the law casts the inheritance upon him without any act of his ancestor, by purchase when the estate is given him by deed or will or however otherwise he comes to it if it be not by descent. Lit., s. 12.² The defendants here are not in by descent; none but the heir could be so. Therefore, they must be in by purchase. The truth is an estate tail is devised to the heir by the will. And wherever the heir has another estate given him than he would have by the law, he is a purchaser. All this is so clear it cannot be disputed. It is, indeed, admitted by the plea, the defendants not alleging any other title than under the devise. And, consequently, they must be in by purchase.

Now, as to the matter of age prayer, by which, if it is granted, the suit is to be suspended until the full age of the defendants, it is an ancient privilege of the common law introduced in favor of infants upon a presumption that they have not the understanding to know their estate or to maintain or defend their right. And, therefore, the law will not hazard a trial, by which they may be forever barred of their inheritance until their full age. This privilege is peculiar to the law of England. The civil law is otherwise. Indeed, the guardian, by that law, has a

¹ Stat. 3 Will. & Mar., c. 14 (SR, VI, 320-321); Act of 1726, c. 3, s. 28, 4 Hening's Statutes 164.

² T. Littleton, *Tenures*, s. 12.

much greater power than by our law; he can even alien a minor's estate in some cases. 3 Bul. 143; 1 Domat, 166, 167.¹

At the common law, in many real actions where an infant was a demandant and in all except a very few where he was tenant, he had his age if he was in by descent. And the court *ex officio* ought to grant it, and not suffer the infant to plead if he would. And, if a judgment was had against him by default, it was error. And it is so still where he ought to have his age. 2 Danv., *Error*, 98.

However age is now taken away by Statute in several actions. 6 Rep. 4b, Markal's Case.² I agree that, in actions of debt against the heir, the defendant had his age at the common law, and so he has still, because he cannot be charged as heir unless he is in by descent. But, where he has some land by purchase and some by descent, he shall answer as to that he has by purchase, and shall not have his age. 1 Danv. 263, 3.³

Now, it may be said that, as devisees are made liable by the Statute in the same manner that heirs are at the common law, they too ought to have their age, as the heir would. But I conceive not, because the devisees are in by purchase and not by descent. And, where the heir is in by purchase, he has not his age, as I have said. Indeed, it is a clear and settled point of law and was never yet disputed that, where an infant is in by purchase, he shall not have his age. The old books are full of this doctrine. But real actions having been much disused for above 100 years past, we find little upon this subject in the later authorities. Rolle has collected, most of the cases out of the year books; 3 Hen. VI, 46, is a case in point, for there was a devise to the heir in tail, and [it was] adjudged that, as he was not in by descent but by the will and so, by purchase, he should not have his age. See 1 Danv. 263, 13, this case abridged and read [. . .]; 1 And. 21, Waller against Lamb; the defendant denied his age because [he is] in as an occupant and so *quasi* a purchaser and not by descent; Carter 88, *arguendo*, an infant shall not have his age where he is in by purchase in terms of the law; 'age prier', is defined to be where an action is brought against an infant for lands he has by descent; there, he must show this matter to the court, and pray that the plea may stay. And, in praying age, the tenant or defendant always alleges he is in by descent, as appears by the precedents; old Rastell, 26; Fitz., Age, 15, 58, 22, 105.⁴ From which, the inference would be strong if there were no express authorities that, unless the defendant is in by descent, he shall not have his age. But there are express authorities, and, therefore, it will not admit of a dispute.

Another strong argument may be drawn from the silence of the books and reports since the making of the Statute 3 & 4 Will. & Mar. upon this subject. We have not one case, and, in a course of forty years, it is impossible, but it must frequently have happened that infants devisees have been sued upon this Statute. Yet there is no instance that ever they prayed their

¹ *Harbert v. Bynion* (1615-1616), 3 Bulstrode 134, 81 E.R. 115, also Croke Jac. 392, 79 E.R. 335, 1 Rolle Rep. 250, 323, 81 E.R. 467, 516, Moore K.B. 847, 72 E.R. 945; J. Domat, *Civil Law in its Natural Order* (1722).

² *Markal's Case* (1593), 6 Coke Rep. 3, 77 E.R. 258.

³ 1 Danvers, Abr., *Age*, pl. 3, p. 263.

⁴ *Stamford's Case* (1425), YB Trin. 3 Hen. VI, f. 46, pl. 1, Fitzherbert, Abr., *Age*, 15; *Pole's Case* (1350), YB Mich. 24 Edw. III, f. 36, pl. 45, 1 Danvers, Abr., *Age*, pl. 3, p. 263; *Waller v. Lamb* (1574), 1 Anderson 21, 123 E.R. 32, also 3 Dyer 321, 73 E.R. 727, Benloe 232, 123 E.R. 163; *Smith v. Paynton* (1666), Carter 71, 86, 124 E.R. 830, 840; W. Rastell, *Entries*; YB Trin. 11 Hen. IV, f. 94, pl. 56, Fitzherbert, Abr., *Age*, 58 (1410); *Laton v. Ellerker* (1414), YB Trin. 2 Hen. V, f. 11, pl. 13, Fitzherbert, Abr., *Age*, 22; *Pole's Case* (1350), *ut supra*, Fitzherbert, Abr., *Age*, 105.

age, which I think is a strong proof that they are not entitled to it. And, because it is a clear and settled point, it has never been brought in question.

As to the reasons why the law allows this privilege in the case of descents only and not where an infant is in by purchase, I presume they may be these. When an infant comes to an estate by descent, the law casts the inheritance upon him, and he cannot by intendment suddenly know the true state of his estate in respect of that want of knowledge [that] the law adjudges in him. But, when he is in by purchase, which in judgment of law is his own act, the presumption of his incapacity to know his estate must cease. The law, too, is favorable to descents, as the worthiest means of coming to an estate. And, therefore, divers privileges are annexed to it. A descent, in many cases, will take away the entry of him that has the right. Many other instances there are of these privileges annexed to descents. But whatever the reasons may be, the law is so clear and express [that] I apprehend it cannot be receded from in a judicial determination.

Per totam curiam: The defendants shall not have their age.

April 1736. Note the court seemed to think, if the heir had any land by descent, he ought to have showed it in his plea and, then, as to that, the parol ought to demur, but not for the whole. The devisees, in that case, ought to answer and the heir too as to the land devised. See 1 Danv. 263, 3. So was Sir John Randolph's opinion, as I took it.

To the argument above may be added that the Statute has no saving to infants until they come of age. And there is no reason to presume the makers intended them that privilege. The design and policy of the Act was to give creditors an ample remedy to recover their debts. And consistently with that design, the Act must be construed the most extensively and beneficially for them. The Statute does in some sort devert the lands out of the devisees and vest it in the creditors.

Infants are bound as well as others by acts of Parliament unless there is a saving clause or else why are such saving clauses added. Here is no saving clause in the Statute; *ergo* their right is bound as well as others.

N.B. When the tenant in a real action prays his age, he pleads by his guardian that his ancestor died seised and the tenements descended to him etc. *Vide* my Rastell, *Entries*, 26, tit. Age, 16, which proves, if he was in by purchase, he could not have his age. *Vide supra*. *Post* 160.

[The second part of this report is printed below, see Case No. 42.]

[This case is cited at Conway Robinson, *Practice in the Courts of Law and Equity in Va.* (1832), vol. 1, pp. 161, 288.]

Burges, *ex dem.* v. Hack
(April 1736)

In this case, the devise in issue created a contingent estate.

David Fox, seised in fee of the premises in question, devises the same to his son William and daughter Elizabeth:

To have and to hold to my said son and daughter, their heirs, and assigns forever to be equally divided between them at their respective ages of twenty-one years or day of marriage of my said daughter, which shall first happen. And, in case of the mortality of either of them before they shall accomplish their respective ages or the day of marriage of my said daughter or without issue of their bodies lawfully

begotten, then I give the whole to the survivor. And, in case both die before they do accomplish their respective ages or without issue of their or one of their bodies lawfully begotten, then I give and bequeath the said plantation to the right heirs of me, the said David Fox, forever.

The said William and Elizabeth, after the death of the testator, entered, and were seised. And William died before twenty-one or the marriage of Elizabeth and without issue. Elizabeth married Peter Hack, and had issue by him, Nicholas, her only child, who is dead without issue. And, by his will, he devised the premises to the defendant. The lessor of the plaintiff is the testator's heir at law, *viz.* the granddaughter of David, his eldest son.

The question is whether Elizabeth, the surviving devisee, took an estate tail or a fee simple contingent by the will of the said David Fox. If the first, the estate tail is spent by the death of Nicholas, her son, without issue. And, then, the lessor, as the testator's heir at law, has a good title to the reversion, not by force of the limitation to the right heirs, for that is void in point of limitation, but by descent. If Elizabeth took a fee simple, the defendants have a good title.

The solution of this point depends upon the construction of the will. I [*Barradall*] shall, therefore, propose the consideration of the following particulars as necessary and conducive to point out and show the testator's meaning, the law, and the rule for the construction of wills: first, what estate the devisees took by the first part of the devise, 'to have and to hold to my said son and daughter, their heirs, and assigns forever' etc.; second, how the estate created by those words is qualified by the succeeding clause, 'and in case of the mortality of either of them' etc.; third, what estate the survivor took by those words, 'then I give the whole to the survivor'; fourth, how that estate is enlarged or qualified by what follows, 'and in case both die' etc.

By the first part of this devise, an absolute estate in fee would have vested in the devisees without all question. But, then, this estate is qualified by the subsequent words 'in case of the mortality' etc. And I humbly conceive they make it an estate tail with cross-remainders. This is what I shall endeavor to demonstrate as well from the words of the will as the plain and apparent intention of the testator.

I beg leave to premise that the word 'issue' in a will is equal to and of the same import with 'heirs of the body'. This, I presume, will not be denied, being a known and settled point. Now, a devise to one and his heirs and, if he die without heirs of his body, remainder over is clearly an estate tail for, though the first words 'to him and his heirs' carry a fee simple, the subsequent clause 'if he die without heirs of his body' show what heirs were intended in the first part of the devise, *viz.* heirs of the body. The law is the same if the limitation be upon a dying without issue, because, as I said, the word 'issue' in a will is of the same force with 'heirs of the body'. The authorities in law as to this point are very plentiful. 1 Ro. A. 835, 1; 836, 7, 9; 839, 3, 4; Cro. Jac. 448, 685; Ro. 29; 1 Ven. 227, 229; 3 Mod. 106; 9 Rep. 128; Skin. 17, Raym. 425; Skin. 559; FitzG. 12, 25.¹

¹ *Webb v. Herring* (1617), 1 Rolle, Abr., *Estate*, pl. O, 1, p. 835, also 1 Rolle, Abr., *Estate*, pl. P, 5, p. 836, Croke Jac. 415, 79 E.R. 355, 3 Bulstrode 192, 81 E.R. 162, 1 Rolle Rep. 398, 436, 81 E.R. 563, 590, J. Bridgman 84, 123 E.R. 1217, 1 Eq. Cas. Abr. 180, 21 E.R. 972; *King v. Remball* (1617), 1 Rolle, Abr., *Estate*, pl. P, 7, p. 836, Croke Jac. 448, 79 E.R. 384, also 1 Eq. Cas. Abr. 182, 21 E.R. 974; *Johnson v. Smart* (1614), 1 Rolle, Abr., *Estate*, pl. P, 7, p. 836; *Clache's Case* (1573), 1 Rolle, Abr., *Estate*, pl. U, 3, p. 839, also 3 Dyer 330, 73 E.R. 747; *Clarke v. Davie* (1593-1595), 1 Rolle, Abr., *Estate*, pl. U, 4, p. 839, also Croke Eliz. 313, 78 E.R. 564, Moore K.B. 593, 72 E.R. 779; *King v. Melling* (1672), 1 Ventris 214, 86 E.R. 144, also 2 Levinz 58, 83 E.R. 448, 3 Keble 42, 52, 95, 84 E.R. 584, 589, 614, Pollexfen 101, 86 E.R. 526, 3 Salkeld 296, 91 E.R. 835, 1 Eq. Cas. Abr.

This is the case of the first part of our devise, which is to William and Elizabeth and their heirs, and, in case of the mortality of either of them before twenty-one etc. or without issue, the whole to the survivor. The limitation over upon a dying without issue makes an estate tail, according to the cases cited, though, by the first words, a fee simple passed, for the word 'issue' in the second part of the clause shows what heirs were intended in the first part, *viz.* heirs of the body.

The word 'heirs' in a will without anything more is often taken to be heirs of the body where the testator's intention is apparently so. A., having two sons, devises his land to the youngest and his heirs and, if he die without heirs, then to the eldest. This was adjudged an estate tail in the youngest, for 'heirs' here must necessarily be intended heirs of the body. Otherwise, the remainder over would be fruitless, because the elder brother was heir general and would have taken as such without the remainder. 1 Ro. A. 836, 5, 6, 2 Cro. 415, *Webb v. Herring*; 1 Sal. 233.¹ Indeed, it is a kind of established rule, where lands are devised to one and his heirs and, if he dies without heirs, remainder over to another who is heir general to the first devisee, that it is an estate tail in the first devisee, for, in such case, 'heirs' must be intended heirs of the body for the reasons just now mentioned. 3 Lev. 70; Br. 84; 2 Cro. 448; 1 Lut. 810, 813.²

Now, this is exactly our case. The testator had only two children, William and Elizabeth, the devisees, by one marriage; so each was heir general to the other. And the remainder being limited to the survivor according to the rule in the cases just cited, heirs in the first part of the devise must be intended heirs of the body without the assistance of the succeeding clause. But, when, in that the remainder is limited upon a dying without issue, it seems to put the matter beyond dispute that heirs in the first part was intended heirs of the body, consequently, that the devisees took an estate tail and nothing more. *Vide Mo. 637.*³

There is a difference, and I suppose it will be insisted on on the other side, where a remainder is limited upon a dying without issue generally and where it is to depend upon some contingent circumstance, as dying without issue in the life of another or within such an age, in which cases no estate tail is created, but only a fee simple contingent, as are the cases of *Pell and Brown*, Cro. Ja. 590, 1 Ro. A. 835, 2, same case, and 4; *Hard. 148*, *Hall and Deering*;

181, 21 E.R. 973; *Hanchet v. Thelwal* (1686), 3 Modern 104, 87 E.R. 66; *Sunday's Case* (1611), 9 Coke Rep. 127, 77 E.R. 915; *Holmes v. Meynell* (1681), Skinner 17, 90 E.R. 9, T. Raymond 452, 83 E.R. 236, also T. Jones 172, 84 E.R. 1202, 2 Shower K.B. 136, 89 E.R. 842, *sub nom. Maynell v. Read*, Pollexfen 425, 86 E.R. 599; *Moor v. Parker* (1694), Skinner 558, 90 E.R. 251, also 4 Modern 316, 87 E.R. 417, 1 Lord Raymond 37, 91 E.R. 921, 1 Eq. Cas. Abr. 182, 21 E.R. 974; *Shaw v. Way* (1728), Fitz-Gibbons 7, 94 E.R. 628, also 1 Eq. Cas. Abr. 182, 185, 21 E.R. 975, 976, 8 Modern 253, 382, 88 E.R. 180, 272, Fortescue 58, 92 E.R. 760, 2 Strange 798, 93 E.R. 856, 1 Barnardiston K.B. 54, 94 E.R. 38, 21 E.R. 974, 976, 2 Eq. Cas. Abr. 315, 359, 22 E.R. 267, 305.

¹ *Webb v. Herring* (1617), *ut supra*; *Nottingham v. Jennings* (1700), 1 Salkeld 233, 91 E.R. 207, also 1 Lord Raymond 568, 91 E.R. 1279, 1 Comyns 82, 92 E.R. 970, 1 Peere Williams 23, 24 E.R. 279, 2 Eq. Cas. Abr. 308, 22 E.R. 260.

² *Parker v. Thacker* (1682), 3 Levinz 70, 83 E.R. 582, also 1 Eq. Cas. Abr. 180, 21 E.R. 973; *Webb v. Herring* (1617), *ut supra*; *King v. Remball* (1617), *ut supra*; *Whalley v. Reede* (1704), 1 Lutwyche 804, 125 E.R. 421.

³ *Church v. Wyat* (1595), Moore K.B. 637, 72 E.R. 808.

Sid. 148, Collenson against Wright.¹ And this difference, I admit, but conceive it is not our case, for, here, the dying without issue stands by itself and is not coupled with the contingencies of dying within age or before the daughter's marriage, but separate from them by the disjunctive 'or'. If it had been in case either of them die within age and without issue, there, perhaps, it would be within the distinction. But, here, the sentences are disjoined, and must be taken distributively, and, then, the dying without issue has no relation to or dependance upon those contingencies. This cannot be thought merely a cavil about words, but the particles make really a great difference in the sense, for instance, if I promise to build a house and give £500, I must do both. But if the promise is to build a house or pay £500, the doing of either will discharge the promise.

And this distinction, I insist on in the case at bar is not of my own invention, but we find it taken in the books. Soulle and Gerrard, Cro. El. 525, is a case in point,² which is a devise to one and his heirs and, if he die within age or without issue, remainder over; the devisee had issue, and died within age; the question is between the remainderman and the issue; and [it was] adjudged for the issue. And it is there said to be an estate tail. And so it must be in consequence of that judgment.

This case is exactly ours. And I am much mistaken if there is any authority to contradict it or any book where the case is denied to be law. I know very well many cases may be shown, where the limitation over is upon a dying within age and without issue, that it has been adjudged a fee simple contingent. But that is not the case here. And, upon the distinction I have taken, I conceive all the books may be reconciled.

There is a case in Poll. 645, Price against Hunt,³ that I suppose will be much relied on on the other side. The case is a devise to a son and his heirs and, if he die before he attain to twenty-one or have issue of his body living, remainder over to Francis Cowley. The son lived to twenty-eight, and, then, died without issue. The question is between Cowley, the remainderman, and the heir of the son not whether it was an estate tail in the son, as indeed it was not, but whether the remainder could take effect, one of the contingencies upon which it was limited having happened, viz. the son's attaining twenty-one, and [it was] adjudged it should not.

Now the difference between this case and ours is very obvious. The remainder there is to commence upon the son's dying without issue living, which is certainly a contingency, and differs very much from a limitation upon a dying without issue generally, as our case is. I have already taken this difference, and allowed that, where the dying without issue is attended or coupled with any contingent circumstance, there, it makes no estate tail, but it is a fee simple contingent. But, in our case, the dying without issue stands singly, and is disjoined from the contingencies of dying before age or marriage.

This case then of Price and Hunt proves no more than this, that, where a remainder is limited to commence upon two contingencies in the disjunctive, if either of them happen, the

¹ *Pell v. Brown* (1620), Croke Jac. 590, 79 E.R. 504, 1 Rolle, Abr., *Estate*, pl. P, 2, p. 835, also Palmer 131, 81 E.R. 1012, 2 Rolle Rep. 196, 216, 81 E.R. 746, 760, Godbolt 282, 78 E.R. 165, J. Bridgman 1, 123 E.R. 1157; *Hanbury v. Cockerell* (1651), 1 Rolle, Abr., *Estate*, pl. P, 4, p. 835; *Hall v. Deering* (1659), Hardres 148, 145 E.R. 425; *Collenson v. Wright* (1663), 1 Siderfin 148, 82 E.R. 1024, also 1 Eq. Cas. Abr. 176, 21 E.R. 969.

² *Soulle v. Gerrard* (1596), Croke Eliz. 525, 78 E.R. 773, also *sub nom. Sowell v. Garret*, Moore K.B. 422, 72 E.R. 671.

³ *Price v. Hunt* (Ex. 1684), Pollexfen 645, 86 E.R. 674, also Dodd 53, 289, Exch. Repts. *tempore* Car. II, 591.

remainder cannot take effect, which I shall readily grant, but I conceive it is nothing to this purpose.

Besides, to construe this a contingent fee will be to make the remainder to the survivor vain and idle, for, then, in that case, the use of such a remainder must be to prevent the estate from going to the heir of the first devisee in case he should die before twenty-one or without issue. But it can never be supposed the testator had any such intent in this case, because he has limited the remainder to that very person who was and would have been heir to the devisee in case he died before twenty-one or without issue. And so, if this is construed a contingent fee, the remainder must be useless. Certainly then, this was not his intent, but his intention in limiting this remainder was to exclude his own heir from taking upon the determination of the estate given to the first devisee, as he would have done upon the death of the devisee without issue in case this remainder had not been. The inference from this is clear; he did not intend a contingent fee, but an estate tail. 1 Sal. 233; 1 Ro. A. 836.

It is a rule in the construction of wills that such construction should be made as will make the whole will consistent. But to construe this a contingent fee is inconsistent with the remainder over, as this case is. Therefore, it must be an estate tail.

The construction I contend for is not only supported by the words of the will, but by the clear intention of the testator, as I conceive he certainly intended the remainder should take effect whenever there was a failure of issue, and not only upon the contingency of dying without issue within age etc., as I hope is in some measure evident from what has been said, but will appear still more clearly if we consider the latter part of the devise, upon which the present question properly depends. The words are:

Then I give the whole to the survivor, and, in case both die before they do accomplish their respective ages or without issue of their or one of their bodies lawfully begotten, then I give and bequeath the said plantation to the right heirs of me, the said David Fox.

The first words, 'then I give the whole to the survivor', carry no estate of inheritance, but the survivor by force of those words without more would have only an estate for life in a moiety. 1 Ro. A. 835, 836.¹ We must, of necessity, have recourse to the latter part of the clause to make it a greater estate. And, by that, indeed, it is clear he intended an estate of inheritance. And what kind of inheritance, the word 'issue' shows, *viz.* an estate tail. There is no other word in the whole clause to carry an estate of inheritance but that. And, therefore, it must either be an estate for life or an estate tail. But, if it should be taken as an estate for life and the words 'in case both die without issue' etc. are taken as words of determination, *i. e.* to show when the estate given by the first words should determine, this absurdity will follow, that the survivor had an estate for life, determinable upon his dying without issue. And it is not to be supposed the testator intended such an absurdity. In order, therefore, to satisfy the words of the will and make the testator's meaning consistent with reason and good sense, the will must be construed as I would have it, *viz.* that the survivor was to have an estate tail in the whole, which, I hope, appears clearly to be the testator's intention. If the court is of another opinion, then, I insist the survivor had only an estate for life in one moiety, and we, as heir at law, are well entitled to that moiety. Query, and *vide* Skin. 339.²

I will beg leave to add one case in law, which I believe will not be denied. If lands are devised to a man without saying more and, in case he die without issue, remainder over, this

¹ *Hanbury v. Cockerell* (1651), *ut supra*.

² *Middleton v. Swain* (1693), Skinner 339, 90 E.R. 151, also Comberbach 201, 90 E.R. 428, 2 Eq. Cas. Abr. 361, 22 E.R. 307.

is clearly an estate tail. I must submit whether that be not the case here. The survivor is to have the whole, and, in case he die within age or without issue, remainder over.

To conclude, we are heir at law. And, if there is any doubt about the construction of this will, such construction should be made as is most in our favor. The law is favorable to the heir upon many accounts. Before the Statute 31 Hen. VIII,¹ the ancestor could not devise away his land from him[self]. And, since that Statute, devises that tend to deprive him of his inheritance are always construed as much in his favor as may be. It is, indeed, a known and established maxim that, in doubtful constructions, the heir is to be favored, wherefore, if the testator's intention was not so evident, as I hope it appears, judgment ought to be for the plaintiff.

[See the] case of Barber and Timson, in this court about twenty years [ago], where the will was in the same words and adjudged an estate tail.

Needler, for the defendant, insisted much on the word 'assigns' in the first part of the devise, which he said showed the testator intended a fee, 2 Sal. 622,² that, if it should be construed an estate tail, that estate is determinable by the death of the devisee before twenty-one. And, then, it will follow that, if the devisee had died before twenty-one and left issue, that issue must be disinherited, which can never be thought the testator's meaning. Therefore, 'or' here must be taken for 'and', and, then, it is clearly a contingent fee. He cited 1 Ro. Abr. 835, 4, *Henbury and Cockerell*; Hard. 148, *Hall and Deering*; 1 Sid. 148, *Collenson and Wright*, but he principally relied on *Price and Hunt*, Poll. 645; *vide* 2 Vern. 86, 151; *Skinn.* 144; *Pell and Brown*, Cro. Ja. 590.³

April 1736, judgment [was given] for the defendant, *viz.* that it was a contingent fee, by the opinion of TAYLOE, RANDOLPH, CUSTIS, GRYMES, ROBINSON, BLAIR, and the Governor [GOOCH]; LIGHTFOOT, CARTER, DIGGES, BYRD *contra*.

[This report is cited in *Hawkins, ex dem. v. Thornton* (1737), see below, Case No. 49; *Timson v. Robertson* (1739), see below, Case No. 66.]

¹ Stat. 32 Hen. VIII, c. 33 (SR, III, 788).

² *Idle v. Cook* (1705), 2 Salkeld 620, 91 E.R. 525, also Holt K.B. 164, 90 E.R. 989, 1 Peere Williams 70, 24 E.R. 298, 11 Modern 57, 88 E.R. 883, 2 Lord Raymond 1144, 92 E.R. 257, 2 Eq. Cas. Abr. 299, 22 E.R. 252.

³ *Price v. Hunt* (Ex. 1684), *ut supra*; *Pawlet v. Dogget* (1688), 2 Vernon 86, 23 E.R. 665, also Chan. Repts. *tempore* Jac. II, 497; *Martin v. Long* (1690), 2 Vernon 151, 23 E.R. 704, also Precedents in Chancery 15, 24 E.R. 8, 1 Eq. Ca. Abr. 192, 21 E.R. 983; *Sommers v. Gibbon* (1683), *Skinner* 144, 90 E.R. 67, also 2 Eq. Cas. Abr. 335, 22 E.R. 285 [query]; *Pell v. Brown* (1620), *ut supra*.

Anderson, *qui tam* v. Winston
(April 1736)

The question in this case was whether the defendant was guilty of usury under the then current statute.

[An action of] debt on the Act 3 & 4 Geo. II, 12, against taking excessive usury,¹ the plaintiff declares that the defendant, after the 29 September 1730, *viz. ultimo* July 1731, at etc., upon a certain contract between the defendant and one John White made, did receive of the said White by way of a corrupt bargain and loan £3 current for gain, use, interest, and giving a day of payment of £20 current by the defendant to the said White lent over and besides the lawful interest of 6 percent against the form of the Act of Assembly etc. And, in another action, he declares in the like manner for taking 36s. for interest and giving day of payment of £12, in which actions the jury find specially that White, sometime in June 1730, borrowed of the defendant £20 current and, in July, £12 more. And he gave separate bonds for the payment of £20 and £12 sterling at the end of a year. In April 1732, White and the defendant, made a settlement and, for the first year, White was charged for principal money on both bonds £36 16s. current and, in October following, White paid the said £36 16s. and interest at 6 percent from the respective days of payment in the bonds, and the defendant received it. And, if the court adjudge the defendant guilty, they find him guilty of taking the said £4 16s., above 6 percent upon the said bonds.

And I [Barradall] take it, upon the matter found, the defendant is not guilty of any breach of the said Act, before the making of which, there was no law here that settled the rate of interest, nor were men subject to any penalty, though they took 20 percent or even 50 percent. Now, this Act provides:

That no person, after the 29 September 1730, upon any contract to be made after that time, for loan of any monies, wares, etc. shall take above 6 percent *per annum* for forbearance, and all bonds etc. made after that time where more is reserved shall be void, and any person, who, after the time aforesaid, upon any contract to be made after the said 29 September, shall receive above 6 percent, shall forfeit double the value of the money etc. lent etc.

It is plain this Act was intended to refer only to contracts made after the 29 September 1730. The penning of it is very strong to exclude all contracts made before. 'After the 29 September' and 'after the time aforesaid' is repeated no less than four times. Indeed, it would be very strange to subject men to such severe penalties when they transgressed no law then in being. I suppose it will not be pretended that any bond taken before 29 September 1730, where more than 6 percent reserved, is void. Then, neither can the receiving the money upon such bond subject the obligee to the forfeiture of the double value, for it is the receiving upon a contract made after 29 September [that] is made penal by this Act.

This, I take to be very clear upon the words of the Act as well as evident from the reason and justice of the thing. And, therefore, it may be needless to mention the authorities upon this head. But, as there are cases directly in point adjudged upon the statutes of usury in England, I will beg leave to mention two or three. Hawkins, 1, P.C., 244, is express that a contract made before the Act 12 Ann., which reduces interest to 5 percent, is not within that Statute,

¹ Act of 1730, c. 12, 4 Hening's Statutes 294-296.

but that it is lawful to receive 6 percent, the legal interest before, upon such a contract. See Dalton 13; Ray. 195.¹

But we need go no further than to the last Act against Usury, 8 Geo. II, 5,² to prove such contracts are not within the first Act, upon which this action is founded. The title of it is to make void certain contracts for paying excessive usury. It recites that there were several contracts subsisting made before the passing of the first Act or between the passing and the commencement. And, though there was no law in being to punish such unreasonable lenders, yet such contracts, which were always unrighteous, ought not to be binding. It is, therefore, enacted that all bonds etc. made before 29 September 1730, where any interest above 6 percent is agreed to be paid, shall be void as to all interest above 6 percent.

Here is the judgment of the legislature that contracts made before the first Act or between the passing and commencement are not punishable by any law. And all the punishment inflicted by this Act is only to make such contracts as were then subsisting void as to all interest above 6 percent. But there is no penalty for receiving the money upon such contracts. If there was, the defendant would not be within it, the matter for which this prosecution is set on foot being transacted long before the making of this Act and was not a contract then subsisting.

If, then, the defendant did not take above 6 percent upon a contract made after the 29 September 1730, I conceive he is not guilty of the breach of any law. And that there is nothing found in this verdict to prove he did is very clear. In June and July 1730, he let White have £20 and £12 current, and took his bond for payment of the like sum sterling at the end of a year. This, I hope, was a contract before the 29 September 1730. It was lawful then for the defendant to receive the money due upon these bonds. I mean without being subject to any penalty. In April 1732, White and the defendant made a settlement. At this time, the defendant might lawfully receive the sterling money reserved on the bonds, as I said, and he might also lawfully receive 6 percent interest upon this money from the time it ought to have been paid. And this is all he did do. The sterling money is paid in cash at 15 percent, the lowest exchange, which makes £36 16s., the money received upon this settlement together with interest upon it from the time it was payable by the bonds at 6 percent.

If there is any pretence of a contract after the 29 September 1730 in all this, it must be when this settlement was made. But, upon that, he took no more than 6 percent. And, however unreasonable it might be to take 15 percent upon the first contract, which was before the law, it is plain he has not taken more than is allowed by the law on any contract since. And, therefore, he is not guilty of any breach of the Act of Assembly unless it is construed that the receiving money after the 29 September 1730 upon a contract before that time where more than 6 percent is reserved is within the Act.

But I humbly conceive such a construction can never prevail, being against the express words as well as the intention of the Act, which, as I have observed, is penned in the strongest terms to exclude all contracts before. It is against the sense of the legislature here since the making of it, as I have showed from the second Act against Usury against the rule of construction in such cases, as appears from the cases I have read adjudged upon this point in England against the private sentiment, as we may suppose, of Sir John Randolph, who we all know had the penning of the second Act and was very active in promoting it. And also [it is] against natural justice to punish any man for an action innocent in itself with respect to human laws by a law made *ex post facto*, which kind of laws have been always condemned as unjust. And, therefore, to make such a construction of a law against the express words of it, I apprehend, can never be thought right.

¹ W. Hawkins, *Pleas of the Crown*; Stat. 13 Ann., c. 15 (SR, IX, 928); M. Dalton, *Office and Authority of Sheriffs*.

² Act of 1734, c. 5, 4 Hening's Statutes 895-897.

And I hope the consequence of such a determination will be considered. It must affect a great number of people who thought they might lawfully take more than 6 percent before the Act and, perhaps, in conscience might do so, for, with deference to the learned gentleman's opinion, I think some men under some circumstances may as lawfully take 10 percent as others may 5; I mean *foro conscientiae* and abstracted from positive laws. And this, most of the writers of the law of nature agree.

I own that usury seems to have been always condemned by the ancient laws of England, though a usurer was only punishable by ecclesiastical censures in his lifetime. But, if it was found by twelve men after his death that he died a usurer, he was compared to a thief. His goods were forfeited to the king, and his lands escheated. 3 Inst. 151.¹ And, as usury was an offence punishable by the law of the church, we frequently find it said to be against the law of God, not that it is prohibited by the Gospel, though it might be so by the canons and decrees of the pope, which last, in the times of superstition, the artful priest taught the world to believe were as much the law of God as the Gospel itself. But now, mankind are more enlightened. And Protestants, at least, allow nothing to be against the law of God but what is prohibited in Holy Writ. 1 Hawkins 245.

As to the prohibition in the Jewish law, that is not at all obligatory upon Christians. The law of Moses was promulgated to a particular people, and only binding upon them to whom it was promulgated. It was not intended nor is anywhere said to be a universal law to mankind. And that it is not binding upon Christians, that is the ritual and political part of it, we have the authority of the Church, *viz.* the 7th of the 39 Articles.² It is true the moral part is there said to be binding. And so, it would be if it was not in the law of Moses. The moral law being entirely and universally obligatory upon mankind.

But, in truth, this prohibition is not a general but a partial prohibition respecting the Jewish nation only, for they are permitted to take usury of a stranger, though not of one another, which is a plain proof that usury is not against the moral law, for, if it had [been], the Jews, who were the sanctified and chosen people of God, would never have been permitted the practice of it at all. Indeed, it is impious to suppose that God would tolerate the practice of a thing simply and naturally unlawful. This prohibition, then, to the Jews was merely political, first, to obviate the advantageous disposition so observable in that people and to prevent it from running out into oppression of one another and, second, thereby to cement them into a closer bond of amity to each other, third, to secure and strengthen that democratical government Moses intended to institute by preserving some kind of equality in property, upon which principles, the laws of jubilee and against alienating land forever were also instituted.

It must, however, be owned the primitive Christians took no usury, probably out of a superstitious reverence to the Mosaic law, which might be the first occasion of its being condemned by the Church, though, afterwards, abused by the clergy, who made a market of that as well as other offenses by the practice of commuting for penance.

Whoever has a mind to be further convinced that usury is not against natural justice, let him read Puffendorf's *Law of Nature*, b. 5, c. 7, s. 8, *ad finem*, and Barbeyrac's notes thereupon,³ where he may see it proved to a demonstration that it is neither against the law of God nor of nature, but even necessary in the present state of human affairs and of great use in all trading countries.

¹ E. Coke, *Third Institute* (1644), p. 151.

² *Book of Common Prayer*, Articles of Religion, No. 7.

³ S. Puffendorf, *Law of Nature and Nations*, with notes by M. Barbeyrac, trans. by B. Kennett.

Grotius, who seems to condemn the name, allows the thing. He says l. 2, c. 12,¹ there are some things that look like usury, but are pacts of another nature, as the amends that ought to be made a creditor for the loss he is at in being out of his money etc., which is allowing the very thing contended for, viz. if I lend money or money is owing to me, I ought to have something for the use of my money and the loss I sustain for want of it. This is the very principle upon which usury is proved to be consistent with natural justice. It is no matter whether you call it usury or interest, amends or damages. The thing is the same. And, certainly, in the present state of human affairs, where many persons' estates consist all in money and they cannot, nay, it would be inconvenient that they should employ it in trade and husbandry. No just reason can be given why they should not make a profit of their estate as well as those who have lands and rent them out, especially, when their money is as useful to the commonwealth, for no considerable trade could be carried on without it.

Usury was allowed by the Roman law. Puffendorf, 276, note 4. And it is practiced in almost all civilized nations, at least, in all Christendom. It is indeed prohibited by the Alcoran.² But even the professors of that religion evade it by lending money to have a certain share, as a fourth or fifth part of the gain made by it, which is the same thing, for, in equity, there is no difference whether I agree for a certain gain beforehand or run the risk of an uncertain one. Puffendorf, pag. 276.

As to the quantum that may be taken for usury according to natural justice, Grotius, *ad Lucam*, 6, 35,³ proportions it not by the gain of the borrower, but the loss that accrues to the lender, and that so much ought to be paid by the borrower, as the lender, in the way of his calling, usually makes of his money, allowance being made for hazard, but because it would be difficult to prove and adjust this exactly. And such a latitude would give an opportunity to ill men to insist upon too great an interest. The policy of most nations has reduced it to a certain standard, which is more or less according to the different circumstances of each state. In trading countries, as in Holland, it is very low 2½ or 3 percent; in Venice, where there is no trade, it is 8 percent; and interest is high in all the inland parts of Germany. The rate of interest in England has been reduced from time to time as money has grown more plenty and its trade increased. By the [Statute] Hen. VIII, it is prohibited to take more than 10 percent under a penalty. This is the first law that made usury cognizable in the king's court. Thus, it continued until Jac. I, when interest was reduced to 8. After the Restoration, it was reduced to 6. And, by the [Statute] Ann. to 5.⁴ In most of the English plantations, I am told, it is now at 10; 12 [percent] was permitted by the Roman law until the time of Justinian, who reduced it to 8. Puffendorf, 276, note 4. Thus, it varies in different countries and in the same country according to the different circumstances of it.

To conclude, where the rate of interest is settled by law in any country, no good man ought to take more, though it was not prohibited under a penalty. But, where there is no law, the rule laid down by Grotius seems very equitable, viz. in proportion to the loss that accrues to the lender. And, therefore, a trading person who usually makes a great profit of his money may with good conscience require more than one whose money lies dead upon his hands, from whence, I would observe that the taking of more than 6 percent before there was any law by some men under some circumstances was not so very criminal and unrighteous as is pretended.

¹ H. Grotius, *De Jure Belli ac Pacis*, book 2, chapter 12, section 21.

² Quran, 2:275-2:280.

³ H. Grotius, *Annotationes in Novum Testamentum*; Luke, chap. 6, verse 35.

⁴ Stat. 37 Hen. VIII, c. 9 (SR, III, 996-997); Stat. 21 Jac. I, c. 17 (SR, IV, 1223-1224); Stat. 12 Car. II, c. 13 (SR, V, 236-237); Stat. 13 Ann., c. 15 (SR, IX, 928).

Yet, I should be sorry to be thought an advocate for excessive usury, as it is certainly introductory of great oppression. And I am heartily glad it is settled by law. All that I contend for is that a man may not be punished for any contract of this sort before there was any law to make it penal. And I hope judgment will be given for the defendant.

This case was agreed by the parties, and so no judgment [was] given.

34

Tute v. Freeman
(October 1736)

Where a case has been brought within the jurisdiction of a court, a jury can award damages for less than the jurisdictional amount.

[In an action of] *indebitatus assumpsit* for £25 for goods sold, money paid, and services done, the jury found only £9 3s. damage.

Randolph moved that no judgment ought to be given, the damages being under £10 sterling, and so the action will not lie in this court.

Barradall, e contra: Judgments are given here every day where the damages found by the jury are under £10 if the cause of action laid in the declaration is for so much. And so the practice was agreed to.

And the motion was overruled.

Sed vide the case of *Pinchback v. Rogers*, October Court 1739, where it is adjudged *contra*. And the case of *James Bray* was cited, who was nonsuited, the balance of a bond being under £10 sterling.

[Other copies of this report: Jefferson 24.]

35

Jones v. Langhorn
(October 1736)

When a chattel is given to one for life with a remainder over, the devisee for life has only the use, and the property vests in the remainderman.

In [an action of] *detinue* upon a special verdict, the case was a woman, possessed of slaves devised to her during life and, after her death, to another, marries, and joins with her husband in a deed of mortgage of these slaves for 99 years. The husband dies. This action is brought by the mortgagee against the wife for recovery of the slaves.

Barradall, for the plaintiff: The deed is undoubtedly void as to the wife, and, so, it is merely the act of the husband. The question then is solely this, whether the husband in this case could dispose so as to prevent any title or interest from surviving to his wife. And I conceive clearly that he might. It is agreed that the slaves in this case are to be considered as chattels, the devise to the wife being before the Act¹ making them a real estate. I shall then consider the interest accruing to the husband in the wife's estate, which is different according to the nature and quality of that estate in her lands etc. He acquires a freehold during the coverture or an estate for life if there is issue between them. In chattels real, he acquires a property and a power of disposing in his lifetime, but not by will. If he dies first without disposing, they

¹ Act of 1705, c. 23, 3 Hening's Statutes 333-335.

survive to her. If she dies first, they survive to him. 1 Danv. 705, 8; 1 Inst. 351a. But, as to chattels personal, marriage is an absolute gift of all such in possession whether the husband survive or not. Co. Lit. 351b.¹ And this I presume whether the wife has an absolute or only a temporary or qualified property, for all the right and interest of the wife, be it more or less, is by the marriage transferred to the husband, and vests in him by way of gift. There is no case in law that makes any difference. Nor is there any in the reason of the thing. If the husband has a right to the greater, by the argument *a majori ad minus*, he has also a right to the less, for that *omne majus continet in se minus* is a rule of law as well as an axiom of philosophy. Certainly, it must appear absurd that the law should give the husband chattels in which the wife has an absolute right and not those in which she has a lesser interest. The husband's right as to chattels personal was always the same. And, as to chattels real, it has been carried further in later times than formerly, for he may now dispose of the trust of a term, as was adjudged about Michaelmas 1680 in the House of Lords in Sir Edward Turner's Case, 1 Vern. 17, which is the first case of that sort, the law being otherwise before, but since has been always held according to that determination. 1 Vern. 18; 2 Vern. 270, *Tudor v. Samyne*.²

Now whether the interest of the wife be only for life or in the whole term, it will certainly make no difference whatever interest she has. The husband has a power of disposing. And, if in chattels real, surely, in chattels personal too, in which he acquires a more absolute right by the marriage.

If 1 Inst. 351 be objected that the husband shall not charge his wife's chattel real, though he may dispose, but, if she survive, she shall hold it discharged, that rule does not hold in chattels personal, as this case is. Besides all that is meant by that is that he shall not charge her term with a rent. 1 Ro. Abr. 344, 5, and 346, 2.³ But I question whether the law be so at this day, the husband's power over the wife's term being enlarged since Coke wrote in the instance just now mentioned. And it is certainly absurd a man should have a power of disposing and not of charging. Then, our case is different too. Here is a mortgage, and the estate and interest become absolute in the law for the term by nonpayment of the money, and only an equity of redemption [was] left in the mortgagor.

Randolph, for the defendant: Slaves here are to be considered as chattels. Now, the property of a chattel cannot be divided so as that part of the property shall vest in one and part in another. But, when a chattel is given to one for life with a remainder over, the devisee for life has only the use, and the property vests in the remainderman. It is upon this distinction alone that remainders of chattels are allowed, for, if the property vested in the first devisee, the remainder over must be void because the gift of a chattel for an hour is a gift forever, that the wife here having only the use and no property, this use vested in the husband only during his life. But he had no power of disposing so as to conclude the wife after his death, though the disposition might be good during his life. And he cited 1 Inst. 351a, where a difference is taken between a property and a bare possession, as, where a woman has goods as bailee or executrix, this bare possession is not given to the husband by the marriage. He also cited Mor. 522, *Thomson v. Butler*, where the husband's release of the wife's annuity was adjudged no bar after

¹ 1 Danvers, Abr., *Baron and Feme*, pl. H, 8, p. 705; E. Coke, *First Institute* (1628), f. 351.

² *Turner's Case* (1678-1681), 1 Vernon 7, 23 E.R. 265, also 1 Eq. Cas. Abr. 58, 21 E.R. 871, *sub nom. Turner v. Turner*, Dodd 38, 79 Selden Soc. 711, *sub nom. Turner v. Bromfield*, 1 Chancery Cases 307, 22 E.R. 814, Lord's Journal, vol. 13, p. 681; *Tudor v. Samyne* (1692), 2 Vernon 270, 23 E.R. 774, also 1 Eq. Cas. Abr. 58, 21 E.R. 871.

³ YB Mich. 7 Hen. VI, f. 1b, pl. 6 (1428); YB Mich. 9 Hen. VI, f. 52, pl. 35 (1430); 1 Rolle, Abr., *Baron & Feme*, pl. G, 5, p. 344, and pl. I, 2, p. 346.

his death.¹ And he mentioned the Case of *Brown v. Willis*, in April 1731, in this court, which he said was in point. He said it would be a hard case upon women, especially widows marrying second husbands, if they happen to survive, that it would be inconvenient too since the slaves might be taken in execution for the husband's debts or sold by him to the prejudice of those in remainder.

To which it was replied that it was true in the language of our books, by the devise of a chattel for life with remainder over, the first devisee has only the use, and the property vests in the remainderman, that this distinction was kept up upon the ground of that old rule of law, the gift of a chattel for an hour is a gift forever. But, in effect, the first devisee has a property during life, having all the marks of ownership, except that of selling absolutely. Whatever profits can be made are his; he may maintain [an action of] trover, and even dispose during life. And, certainly, this is something more than a bare possession, which is the case 1 Inst. 351. And so [it is] nothing like this. The use here is coupled with an interest. And, wherever there is an interest, there must be some degree of property, for what is property but a power of using and disposing, which a devisee of a chattel for life has during life. Certainly then, such a devisee has a qualified property nobody will dispute, but he may sell during life. Marriage is an alienation, a gift in law equivalent to any alienation in fact. It is agreed the slaves here vested in the husband during life. If they vested at all, they must for the whole interest the wife had, it being all transferred by the marriage.

It is absurd to talk of the hardships upon women unless it be a hardship that anything should vest in the husband by the marriage. Is it harder that a lesser interest should vest in the husband by the marriage than a greater. The argument from inconvenience is full as ridiculous since chattels so taken may as well be taken for the debts of the wife as for the debts of the husband or sold by her in prejudice of the remainderman. It may be an argument against allowing such devises at all, but it is none against the husband's right in such a case.

Judgment [was given] for the defendant, *per totam curiam praeter* LIGHTFOOT and TAYLOE.

A like case between Clements and Walker was argued in April 1739. And the same judgment was given by RANDOLPH, GRAYMES, CARTER, DIGGES, and the Governor [GOOCH]; CUSTIS and ROBINSON *contra*.

[Other copies of this report: Jefferson 37.]

[Other reports of this case: Randolph Va. 148.]

Stretton v. Martin
(October 1736)

A written statement of an absent witness is not admissible in evidence unless it was made under oath.

[In an action of] debt on a bond with a condition to pay a certain sum so soon as a release should be procured from the owners of the ship *Prince Eugene* of all their right to said ship and delivered to John Willis, agent of the obligor in London, the defendant pleaded the plaintiff did not procure such release and deliver the same to Willis. The plaintiff replied that he did.

¹ *Thompson v. Butler* (1598) Moore K.B. 522, 72 E.R. 733, also Croke Eliz. 721, 78 E.R. 955.

Upon the trial of the issue joined, the plaintiff produced a certificate under the hand of Willis that such release was delivered to him, which certificate was proved to be signed by Willis.

It was objected that this was no evidence. If Willis was present in court, he must give his evidence upon oath. Therefore, at least, he ought to have made an affidavit of the truth of this certificate, and that sworn before the Lord Mayor would be good evidence by the late Act of Parliament.¹ But this certificate was no more than an assertion without an oath, which was never allowed as evidence in any court

E contra: Though the general rule of law be that every witness must testify upon oath, the case here is very different. Willis is appointed the defendant's agent for a particular purpose. Now, if the defendant himself had acknowledged under his hand to have received such release, it would certainly be good evidence. By the same rule, this certificate is evidence, for Willis is in the place of the defendant, and the defendant is bound by his act.

To which it was replied we must be in an unhappy circumstance if the certificate of our agents in England without an oath shall be evidence of any matter of fact that may affect our property. It is a case of general concern, and nobody knows whose turn it may be next. It is true, where a man appoints an attorney or agent for a particular purpose, he is bound by his act. But that is not the case. Willis, here, was to be purely passive to receive the release; if he has done so, no doubt, we are concluded. But this we say ought to be made to appear by something more than a bare say so. If the certificate be true, Willis may easily make an affidavit. And there is no reason in this case that his word should be taken.

The court was unanimously of opinion that this certificate ought not to be admitted as evidence.

And so the jury found for the defendant.

The plaintiff tendered a bill of exceptions, which was sealed in court, and appealed.

Taylor v. Graves
(October 1736)

The question in this case was the intent and operation of a devise of certain slaves.

In [an action of] detinue.

A case was agreed, viz. R.P., possessed of the slaves in question, by his will dated in 1712, devises to his daughter Mary the use, labor, and service of them during her life and, after her decease, the said slaves and their increase to fall to her heirs of her body lawfully begotten forever. Mary had issue, a daughter living at the time of the devise and the death of the testator, but she died before the mother, who is also dead. And the plaintiff claims as heir to the testator.

Mr. Attorney General [*Clayton*], for the plaintiff: By the Act of 1705, slaves are made a real estate, though the law is now altered by the Act of 1727 with respect to gifts and devises of slaves that they can only be given and devised as chattels personal.² There is, however, a proviso in this last Act that, where slaves have been before given for life and the remainder thereupon limited to another, that such remainders shall be good in law to transfer the absolute property to the remainderman.

¹ Stat. 5 Geo. II, c. 7.

² Act of 1705, c. 23, 3 Hening's Statutes 333-335; Act of 1727, c. 11, 4 Hening's Statutes 222-228.

The testator here has given only an estate for life to his daughter with a contingent remainder to the heirs of her body, and, there being such when the contingency happened, *viz.* at her death, the remainder is void, and the plaintiff as heir at law to the testator is entitled to these slaves.

Barradall, for the defendant: I conceive that slaves in this case are to be considered merely as chattels. But, before I speak to that, I shall show that, taking them to be real estate, the plaintiff can have no title. If this was a devise of lands, Mary would take an estate tail by the words of this will and not an estate for life with a contingent remainder to the heirs of her body. It is a rule laid down in *Shelley's Case*, 1 Rep. 104b; 1 Inst. 22b, 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. And so it was adjudged. 1 Vent. 214, 225, *King and Melling*; and *Fitzg.* 7, *Shaw and Weigh*.¹

There are, however, some exceptions to this general rule. In the case of wills, where the testator's intention is apparent to lodge the inheritance in the issue, as *Lodington and Kyme and Backhouse and Wills*, cited [at] *Fitzg.* 22; *Shaw v. Weigh*; see *Raymond's* argument in that case; in *Wild's Case*, 6 Co. 17, a difference is taken where the ancestor has issue living at the time of the devise and where not, that, in the first case, the issue shall take by way of remainder; and so *Hale's* opinion seems to be, 1 Vent. 229, upon the authority of that case.² But I take the law to be otherwise settled at this day. Nor is there any authority to support that opinion since *Wild's Case*, which too was against the opinion of two judges. I conceive then, by this devise, Mary had an estate tail, and, then, the absolute property vested in her, for slaves could never be entailed before the Act of 1727 and, under that Act, only when annexed to lands. The constant resolutions of this court have been so.

[It was argued] on the other side, if heirs of the body here are taken as words of purchase and slaves are to be considered as real estate, then the remainder being contingent and void in the event by Mary's leaving no issue, the plaintiff is certainly well entitled.

But slaves, in this case, are no more than chattels. It is true the Act of 1705 makes slaves a real estate to some purposes, but not to all. They are to descend to the heir if a man dies intestate and a woman is to be endowed of them. But there is an express proviso that sales and alienations of them may be made in the same manner as before making the Act. There was some difference of opinion in the construction of this Act, which occasioned the Act of 1727, not to alter the first Act, but to explain and amend it. And, where a subsequent act explains a former, it cannot be said to alter it, but only points out the true construction. The words of the

¹ *Wolfe v. Shelley* (1581), 1 Coke Rep. 88, 76 E.R. 199, also 3 Dyer 373, 73 E.R. 838, 1 Anderson 69, 123 E.R. 358, Moore K.B. 136, 72 E.R. 490, Jenkins 249, 145 E.R. 176; E. Coke, *First Institute* (1628), f. 22b; *King v. Melling* (1672), 1 Ventris 214, 225, 86 E.R. 144, 151, also 2 Levinz 58, 83 E.R. 448, 3 Keble 42, 52, 95, 84 E.R. 584, 589, 614, Pollexfen 101, 86 E.R. 526, 3 Salkeld 296, 91 E.R. 835, 1 Eq. Cas. Abr. 181, 21 E.R. 973; *Shaw v. Way* (1728), Fitz-Gibbons 7, 94 E.R. 628, also 1 Eq. Cas. Abr. 182, 185, 21 E.R. 975, 976, 8 Modern 253, 382, 88 E.R. 180, 272, Fortescue 58, 92 E.R. 760, 2 Strange 798, 93 E.R. 856, 1 Barnardiston K.B. 54, 94 E.R. 38, 21 E.R. 974, 976, 2 Eq. Cas. Abr. 315, 359, 22 E.R. 267, 305.

² *Lodington v. Kime* (1695), 3 Levinz 431, 83 E.R. 766, 1 Salkeld 224, 91 E.R. 198, also 1 Lord Raymond 203, 91 E.R. 1031, 2 Eq. Cas. Abr. 331, 22 E.R. 282; *Backhouse v. Wells* (1712), 10 Modern 181, 88 E.R. 683, Fortescue 133, 92 E.R. 791, Gilbert Cas. 20, 129, 93 E.R. 247, 282, 1 Eq. Cas. Abr. 184, 21 E.R. 976; *Shaw v. Way* (1728), *ut supra*; *Wild's Case* (1599), 6 Coke Rep. 16, 77 E.R. 277, also 1 Eq. Cas. Abr. 181, 21 E.R. 973, Gouldsborough 139, 75 E.R. 1050, *sub nom.* *Richardson v. Yardley*, Moore K.B. 397, 72 E.R. 652; *King v. Melling* (1672), *ut supra*.

last Act respecting the present question are worthy of observation. It recites the difference of opinion in constructing the first Act, and then enacts 'that the said Act shall hereafter be construed and the true intent and meaning is hereby declared to be'. No other construction then can now be made than what is hereby declared to be the true construction. It is not at all material whether the case happened before or since the Act of 1727. The law was always the same. This last Act does not alter the first, as I said. It only explains, and points out the true construction. And the words of the last Act are mighty plain (and so indeed I think are the words of the first) that, in sales, gifts, and devises, slaves are to be regarded merely as chattels. 'A sale, gift, or devise is to transfer the absolute property as if such slave were a chattel.'

Taking, then, slaves to be chattels, the plaintiff can have no kind of pretence. It will not be denied but that a chattel may be given for life with a remainder over. It is not material whether the chattel itself be given or only the use for life. The law makes the same construction in both cases, *viz.* that the first devisee has only the use and the absolute property vests in the remainderman. The use only is given by his will to Mary for life and, after her death, the slaves are to fall to the heirs of her body. If 'heirs of the body' here are taken as words of purchase as *descriptio vel designatio personae*, the daughter of Mary took the remainder as a person well described, and, then, the absolute property vested in her, and the slaves must go to her heirs and not to the testator's. If they are not words of purchase, but words of limitation, then, Mary has an estate tail given to her, and such a devise will pass the absolute property of a chattel.

But supposing the remainder void by Mary's leaving no issue at her death; in that case, I conceive the absolute property vested in Mary, for I take the law to be very clear that, if a chattel is given to one for life or the use for life (for there is no difference) and no remainder is limited or a remainder, that is void, either in its creation or in the event the absolute property vests in the devisee for life, and can never resort back again to the representative of the testator. (*Quaere de hoc.*)

It has been endeavored in this case to compare slaves to chattels real. And many cases there are of devises of this sort, some of which have been cited, to what purpose, I am still to learn.

Cotton and Heath, 1 Ro. Abr. 612; a devise of a term for life and, after, to the eldest issue male, [it was] adjudged the issue male shall have it as an executory devise though none were in being at the time of the devise, which is stronger than our case, there being here an heir of the body living at the time of the devise.

Peacock and Spooner, 2 Vern. 195, is exactly this case, only stronger, as it was in the case of a deed; a term was assigned in trust to permit a husband and wife and the survivor to receive the profits during their lives and, after their deaths, to the use of the heirs of the body of the wife; here, the heirs of the body took by purchase and as a person well described.

Id. 362, Dafforn and Goodman, same point adjudged. But Webb and Webb, *id.* 668; the same point coming in question, was adjudged the devisee for life had the whole term, and that case is the same with ours.¹

It is not material to the plaintiff whether the devisee for life or the heir of the body has the right, for, in either case, he has none. And I cannot imagine upon what rule of law he can pretend to any. I shall only observe further that, in all the cases upon this subject, the question

¹ *Cotton v. Heath* (1638), 1 Rolle, Abr., *Devise*, p. 612, pl. L, 3, also Chan. Repts. *tempore* Coventry 287; *Peacock v. Spooner* (1688-1690), 2 Vernon 43, 195, 23 E.R. 638, 727, 2 Freeman 114, 22 E.R. 1094, 1 Eq. Cas. Abr. 362, 21 E.R. 1104, Chan. Repts. *tempore* Jac. II, 429, Dodd 95; *Dafforne v. Goodman and Bolt* (1699), 2 Vernon 362, 23 E.R. 828, also Precedents in Chancery 96, 24 E.R. 46, 2 Freeman 228, 231, 22 E.R. 1176, 1179; *Webb v. Webb* (1710), 2 Vernon 668, 23 E.R. 1036, also 1 Peere Williams 132, 24 E.R. 325, 2 Eq. Cas. Abr. 363, 22 E.R. 309.

is between the heir of the body and the executor of the first devisee, who shall have the remainder. But there is no instance that ever the executor or heir of the testator set up a title to such remainder.

Judgment [was given] for the defendant *per totam curiam*, but, upon what point, I could not learn.

[Other copies of this report: Jefferson 40.]

[This case was cited by William Green (1806-1880) in his argument in *Moon v. Stone*, 60 Va. (19 Gratt.) 130 at 320, 321 (1869).]

38

Hill v. Hill's executors
(October 1736)

A will cannot be established against an heir without a trial at law.

This was a bill in chancery brought against the heir to have possession of the land delivered to the executors for executing certain trusts pursuant to the testator's will. The will had been proved in the county court, and the heir at law summoned, according to the Act of Assembly.¹ But, now, it was insisted that a court of equity would never establish a will against an heir without a trial at law. 8 Mod. 90.

And *per totam curiam praeter* TAYLOE, a trial at law was directed.

[This case is cited in *Harwood v. Grice* (1735), see above, Case No. 19.]

39

Corbin v. Chew's administrators
(Part 1)
(October 1736)

An administrator may not pay out of the decedent's estate a judgment upon a simple contract obtained after notice of an action.

An administrator may not retain for a debt by a simple contract to himself against a bond creditor.

[In an action of] debt upon a bond.

And, on *plene administravit* pleaded, two questions were made: first, whether an executor might retain for his own debt by simple contract against a bond creditor; second, whether judgment upon simple contracts obtained since the action brought on the bond may be pleaded or given in evidence on *plene administravit* against this bond debt, for, as to such judgments or payment of simple contract debts before notice (by action) of the bond, there can be no

¹ Act of 1711, c. 2, s. 1, 4 Hening's Statutes 12-14.

question, but they may be pleaded against the bond debt. *Vide* 1 Mod. 175; 3 Mod. 115; 1 Vent. 199; 2 Saund. 49; Vaugh. 94; 3 Lev. 113; FitzG. 77, 78; 2 And.¹

As to the first, for the defendant, it was argued that an executor may retain for his debt by simple contract against a bond creditor. It is a general rule that an executor may retain for his own debt. Wentworth, *Office of Executor*, c. 12, tit. 'Debts by Specialty', says this is to be understood where the executor's is of equal dignity with the creditor's. And he puts a case, if the testator be indebted to other men by a judgment, recognizance, or statute and to the executor only by specialty, the executor cannot prefer himself, which is true in the case put. But this proves not the point in question, which is where the executor's debt is by simple contract and the creditor's by bond. And there is a great difference between the cases, for executors are bound to take notice of judgments but not of bonds, as I [Barradall] shall show presently. Wentworth's opinion, then, is nothing to the point. And I will confess I can find no judicial resolution in the books. The solution of it must, therefore, depend upon the reason and nature of the thing, from whence I take it to be clear that the executor may retain.

The authorities are numberless that an executor may pay a debt by simple contract without an action before a debt by specialty whereof he had no notice. *Vide supra*. And this notice must be by action too. 1 Mod. 175; Wentworth 144. If, then, he can pay a creditor, it would be very hard and unreasonable if he cannot pay himself. This would be to put him in a worse condition than another creditor in the same circumstance and deprive him of the power of doing as much for himself as for a stranger, which is against sense and reason as well as against a rule of law, *in aequali jure, melior est conditio possidentis*, which, by such means, would be really inverted. And the executor's possession would put him in a worse state, *viz.* out of a possibility of obtaining a debt by simple contract before a debt due to another by bond, which he might do if he was not executor. And, as the only way he can pay himself is by retaining, doubtless he may well do it.

I take the law to be likewise clear that, where a suit is commenced against an executor on a specialty and, afterwards, another is brought on a simple contract, the executor may lawfully confess this last action, and the judgment be pleaded in bar to the action on the specialty. This I shall endeavour to prove presently.

If the law be so, which I shall suppose at present, is it not absurd to imagine an executor has a power to prefer a stranger but not himself. And, therefore, as he cannot have a remedy by an action (for he cannot sue himself), the law undoubtedly will give him an adequate remedy, *viz.* a power to retain. Otherwise, his executorship puts him in a worse state than he would be without, which the law could never intend (nor is there one instance where the law is so), being against the rule I just now mentioned.

I conceive it, then, to be clear, both from the principles of the law as well from the reason and nature of the thing, and I am sure highly consistent with natural justice, that an executor by simple contract may retain against a bond creditor.

Second, whether a judgment obtained upon debts by simple contract since the action brought by the plaintiff on his bond may be pleaded or given in evidence against the bond debt, I will agree that to pay a debt by simple contract voluntarily before a debt by obligation whereof the executor had notice is a *devastavit*. But I conceive it is not so to satisfy a judgment

¹ *Brooking v. Jennings* (1674), 1 Modern 174, 175, 86 E.R. 809, 810, also 1 Freeman 150, 89 E.R. 109; *Harman v. Harman* (1685), 3 Modern 115, 87 E.R. 74, also Comberbach 35, 90 E.R. 327, 2 Shower K.B. 492, 89 E.R. 1060; *Seaman v. Dee* (1672), 1 Ventris 198, 86 E.R. 134, also 2 Levinz 39, 83 E.R. 443, 2 Keble 860, 879, 84 E.R. 544, 557, 3 Keble 15, 84 E.R. 568; *Trethewy v. Ackland* (1670), 2 Williams Saunders 48, 85 E.R. 649, also 1 Modern 33, 86 E.R. 710, 2 Keble 591, 84 E.R. 371; *Edgcomb v. Dee* (1670), Vaughan 89, 124 E.R. 984; *Britton v. Bathurst* (1683), 3 Levinz 113, 83 E.R. 604; *Davies v. Monkhouse* (1729), FitzGibbons 76, 94 E.R. 660.

obtained upon a simple contract before a debt by obligation. And I take it to be a settled point in law that, where an action is brought against an executor and, pending that, another is brought against him, he may lawfully confess this last action, and the judgment shall be a good bar to the first if there is no covin. D. and Stud. 157; Wentw. 144; Mo. 678; Cro. El. 462.¹ And there is no difference where the first action is for a debt by specialty and the second upon a simple contract. Keil. 74 is expressly in point. And it is there said to be clear law that, when a judgment is given against executors, such a recovery is a good plea to all other actions. And 9 Edw. IV, 12; executors are chargeable to him who first has judgment. And no distinction is made as to the debts. Nor do I find that distinction taken in any of the cases upon this subject. *Vide* 1 Sid. 21. And Vaugh. 95, Edgcomb and Dee, is express in the point that such a judgment upon a simple contract, though the action was commenced after another action brought upon a specialty, may well be pleaded to the action on the specialty.²

The law has left it in the breast of the executor to prefer one creditor before another in many cases, as charity or other equitable motive may induce. And an executor, in conscience, ought not to withstand or delay a suit if he thinks the debt just of what nature soever it be. There may and often is more equity and charity to pay a debt by a simple contract than one upon a bond. Besides, a judgment is the act of the court and compulsory and binding upon the executor, and, if it is no bar to other actions, he must pay it out of his own pocket.

The cases that I suppose will be showed on the other side will appear to be chiefly upon the point of payment without a judgment of debts by simple contract after notice of debts by specialty, which, undoubtedly, the executor ought not to do voluntarily. But there is no case (I speak within the compass of my own knowledge and inquiry) where it is expressly resolved that a judgment may not be paid though obtained after an action commenced upon the specialty. And I take 9 Edw. IV, 12; Keil. 74; and Vaugh. 94 to be affirmative resolutions in the point, which I conceive are more cogent and ought to be more regarded than twenty cases which prove nothing but by way of inference. And an express resolution against me, I believe, cannot be shown. *Post* 169.

[For the second part of this report, see below, Case No. 48.]

40

Legan, *ex dem.* Chew v. Stevens
(October 1736)

In this case, the grant of land by a crown patent was set aside because of the deceit on the crown, the land not having been properly surveyed and the grantee having knowledge thereof.

There has been a survey with a jury in the country and a special verdict found here, upon which the case is [thus]. In September 1726, Col. Taylor, a sworn surveyor surveyed (or pretended to survey) for the lessor of the plaintiff 1000 acres of land, of which he returned a plat, and a patent was granted June 10, 1727. This land, except about sixty poles from the

¹ *St. German's Doctor and Student* (T. F. T. Plucknett and J. L. Barton, edd., 1974), 91 Selden Soc. 200-201; T. Wentworth, *Office and Duty of Executors*; *Scarle's Case* (1602), Moore K.B. 678, 72 E.R. 834; *Green v. Wilcox* (1596), Croke Eliz. 462, 78 E.R. 700, also 1 Brownlow & Goldesborough 50, 123 E.R. 658.

² *Langstone v. Dyne* (1505), Keilwey 74, 72 E.R. 235, 116 Selden Soc. 481; YB Trin. 9 Edw. IV, f. 12, pl. 4 (1469); *Blundivell v. Lovedell* (1661), 1 Siderfin 21, 82 E.R. 946; *Edgcomb v. Dee* (1670), Vaughan 89, 124 E.R. 984.

beginning, was not marked or measured before the issuing of the patent. And this, Chew, the lessor of the plaintiff, knew. The defendant, afterwards, surveys 1000 acres, and obtains a patent in September 1728, which takes in part of the land within the bounds of Chew's patent. This was marked and measured. And the surveyor, the said Taylor, told the defendant the land was free and not taken up before.

It appears by the jury's report in the country that the surveyor told Chew, when he began his survey and ran the sixty poles, that he could not then finish it, being Saturday night, but he would when he came up to finish two other surveys he had begun the day before. It appears also that, in January 1728, when the defendant first began to seat his land, Chew forewarned him from digging upon the land in controversy. The survey is of no other use than to show how the grants interfere. And the sole question in the case is whether the grant to Chew, the lessor, be good or not.

The objection is that the surveyor's returning a plat without marking and measuring the land, and that with Chew's privity, is a false suggestion, and, so, the king was deceived and, therefore, his grant void.

This point has been once already labored very strenuously, and, once, Your Honer has determined that the grant is good. But Sir John Randolph is now to convince you of your mistake. However, I [Barradall] hope this case will not be drawn into a precedent that, after judgment is passed, a cause shall be suffered to be argued again because a lawyer or his client happen not to be satisfied.

It must be my task to endeavor to show that this grant is good. And, though I shall not produce so many cases as I presume you will be entertained with on the other side, I hope to prove, first, that there is no such deceit in this case as will make void the king's grant, second, that to determine this grant void will introduce a general mischief and inconvenience upon the subjects here.

As to the first, the king is of that great eminence and consideration in the law that many little defects and omissions will make his grant void, which, in the case of a common person, have no such effect. Such are misrecitals, wrong suggestions, nonrecitals, etc. But the reason is not, as I conceive, because the king's honor is concerned, as was argued last court, but because the king is supposed to attend to the great affairs of government, and cannot take notice of matters of lesser moment, as a common person may and ought to do. Hob. 224.¹ And the true reason why the law adjudges the king's grants void in cases of deceit are, first, to punish the party for his fraud, second, to prevent damage and prejudice to the king's interest, which would often happen if such grants were allowed. Hob. 223.

Yet it is not every circumstance that strictly may be called deceit nor every wrong suggestion that will make void the king's grant. And, where the king is not deceived in the consideration in his title, in the value of the land, or in the restraint he intended to make for his benefit, or, generally, where it is not to the prejudice of himself or his subjects, the grant will be good. Even false considerations will not always defeat the king's grant, as where it is personal and executed, as for money paid or service done, though the money was not actually paid or the service done, the grant will be good. 10 Rep. 67, 68, St. Savior's; Br., Patents; 4

¹ *Needler v. Bishop of Winchester* (1615), Hobart 220, 80 E.R. 367, also 1 Brownlow & Goldesborough 162, 123 E.R. 730.

Mod. 415; Sav. 37; 3 Leon. 248; Pl. 455a.¹ The reason is, though this be a deceit, yet the law does not esteem it so weighty or material as to destroy the grant. Hob. 222.

If there was anything in the argument of the king's being injured in point of honor, this sort of deceit is as injurious to his honor as any other. But, as I never read or heard of that argument until last court, until I have some better authority for it than Sir John Randolph, he must excuse me if I look upon it as a mere refined speculation of his own. In other cases, it has been thought to be for the honor of the king to make his grants valid, not to destroy them, as in the point of construction. If two constructions can be made and, by one, the grant will be void and by the other good, for the honor of the king and benefit of the subject, such construction shall be made as will support the grant. 10 Rep. 67b, St. Saviour's; 6 Rep. 6, Sir John Molin. And, certainly, it is more for the honor of the king to pass over small faults where it is not to the prejudice of himself or his subjects than to be too rigorous in taking advantage of them. In the case of a common person, I am sure we should think so. 2 Inst. 496, 497; 1 Mod. 196. Read Hob. 222 and St. Saviour's Case; 2 Inst.; 2 Mod. 1.²

If the king, by an office found, has a manor in ward and grants the said manor by a certain name, 'which said manor was lately seised in our hands' etc. and, in truth, the said manor was not seised, this shall not avoid the grant though false, for it is not material and was only added for the greater certainty of that which was certain enough before. 10 Hen. IV, 2, Sir John Lestrangle, cited in Legat's Case, 10 Rep. 113a.³

Queen Elizabeth granted to Thomas Markham the office of keeper of the parks or woods of B., which said office the earl of Rutland lately held, whereas the said earl never held the said office. And it was resolved by the Chancellor, Attorney [General], and Solicitor General, to whom it was referred that the grant was good notwithstanding that false suggestion. So, if the king demise a manor by special name which manor was lately in the tenure of J.S., but, in truth, he never had it, yet the grant is good, for, in these cases, the king is not deceived in his title nor in the value of that he intended to grant nor in the restraint which he, for his profit, intended to make. Sir Thomas Markham's Case,⁴ cited in Legat's Case, *supra*, *quod lege*.

Henry VII, *anno* 19 [1503 x 1504], granted to G.B. the manor of B. in tail male and, *anno* 24, by letters patent, reciting the former and that they were surrendered and cancelled, by virtue whereof, the king was seised in fee, granted the said manor to the said G.B. and F., his wife, and the heirs of G., without any grant of the reversion. And the question was if the reversion would pass by this last grant. It was objected, first, that the estate tail was not recited as continuing whereof the reversion might be granted but as determined and, therefore, the king granted it as a thing in possession when he had only the reversion expectant. Second, the king

¹ *Attorney General v. Churchwardens of St. Saviour, Southwark* (Ex. 1613), 10 Coke Rep. 66, 77 E.R. 1025, also Lane 21, 145 E.R. 266, Exch. Repts. 1604-1648, p. 116, record and argument of counsel: Georgetown Univ. Law Sch. MS. B88-1, f. 208v, Cambridge Univ. Lib. MS. II.5.124, f. 90v; Brooke, Abr., *Patentes*; *Strode v. Birt* (1695), 4 Modern 411, 87 E.R. 473 [query]; *Anonymous*, Savile 37, 123 E.R. 999; *Harris v. Wing* (1590), 3 Leonard 242, 74 E.R. 660; *Wroth's Case* (Ex. 1573), 2 Plowden 452, 75 E.R. 678.

² E. Coke, *Second Institute* (1642), pp. 496, 497; *Rex v. Bishop of Rochester* (1675), 1 Modern 195, 86 E.R. 824, 2 Modern 1, 86 E.R. 906, also 3 Keble 412, 84 E.R. 795; *Needler v. Bishop of Winchester* (1615), *ut supra*; *Attorney General v. Churchwardens of St. Saviour, Southwark* (Ex. 1613), *ut supra*.

³ *Wroxham v. Andrew* (1408), YB Mich. 10 Hen. IV, f. 2, pl. 3, 10 Coke Rep. 113, 77 E.R. 1099.

⁴ *Earl of Rutland v. Markham* (1580), 10 Coke Rep. 113, 77 E.R. 1099.

thought by the surrender of the first letters patent the estate tail was determined and that he was seised in fee, in which he was deceived. Third, the king was deceived in the estate he granted, for he intended to grant an estate in fee in possession and not a reversion expectant. But it was adjudged that the grant was good to pass the reversion, for, here, was no wrong done to anyone and less passed by the grant, *scil.* the reversion, than the king intended, and so [there was] no prejudice to him. 6 Rep. 55, Lord Chandos. *Lege 2 Mod.* 1.¹

Where was the regard to the king's honor in this case or those others I cited? Yet it is evident he was deceived, but the deceit was not material no ways to his prejudice and so not weighty enough to make void his grant. Many other instances of the like kind might be given. But these I hope may suffice to show that, though the king be deceived, if it be not in the consideration that is real, in his title, in the value of the land, or in the restraint he intended to make for his benefit, the grant may be good.

It will remain then to consider whether the king was so deceived in the present case, whether the deceit alleged be so weighty or material as that it should make the grant void. The method established here for granting the king's lands has been always the same; a survey is first to be made, and a plat returned before any patent issues, not that there is any positive law for this, but it has been the course and usage from the first settlement, and took its rise and continues its force merely from the king's authority and institution, who, no doubt, may establish any other method for granting his lands if he pleases. Now, that many patents must have been granted formerly without the ceremony of marking and measuring the land (the want of which is the great fraud and deceit here complained of) must be evident to anyone who considers the state of things upon the first settlement of the English here. The Indians were then in great numbers all over the country, and it could not be done with any safety or security. And, indeed, the disputes we have concerning the bounds of the old grants prove this point to a demonstration, since, in many of them, there appears never to have been any marked lines or boundaries and, almost in all, a vast difference between the courses and distances of the patent and the ancient possession under them. But I never yet heard that any of those grants have been impeached because the land was not marked etc., though we may expect they will if it is Your Honors' opinion that that defect is sufficient to avoid the king's grant, that being equally necessary then as now. There was no positive law then, nor is now, making it necessary or essential. And, therefore, by the same reason that a grant made ten years ago is void for want of that circumstance, a grant made fifty or 100 years ago must be void for want of the like circumstance. The length of time will make no difference in the case of the king.

It will be said, perhaps, there is an act of Assembly directing the surveyor to bound the land surveyed by him by marking trees. And it is true there is such an Act.² And, no doubt, the surveyor ought to have done it. But, then, I must observe that Act is merely directory to the surveyor. The title is An Act Directing the Duty of Surveyors, 4 Ann., c. 22. And the whole scope of it plainly shows nothing more was intended. There is not a syllable of the king's grants or that they shall be void if the surveyor does not do his duty. Nor would the king, I presume, be pleased to be so prescribed to. This Act, then, is nothing to the purpose, only to show the surveyor has not done his duty, which I allow. But it is no consequence, I hope, that, therefore, the king's grant is void. I am sure the Act says no such thing.

But, here, Chew, the grantee, was privy to this neglect of duty in the surveyor. And this is made a mighty aggravating circumstance. It may be necessary, therefore, to obviate the force of that objection. It was said last court that the grant was a mere forgery, that there was a combination between Chew and the surveyor, though, to what end, I know not and shall be

¹ *Duke of Chandos's Case* (1606), 6 Coke Rep. 55, 77 E.R. 336; *Rex v. Bishop of Rochester* (1675), *ut supra*.

² Act of 1705, c. 22, 3 Hening's Statutes 329-333.

glad it may be pointed out. It is found, indeed, that Chew knew the land was not marked or measured when he took out his plat. But, then, it appears in the depositions that the surveyor, when he began the survey, made an excuse for not finishing it, that it was Saturday night, but promised to do it when he came up to finish some other surveys. This Chew might reasonably suppose he would do in the nine months which passed before he sued out his patent. But, admitting he was somewhat too hasty in getting a plat and obtaining a patent before this was done, I cannot see how this can be termed a fraud. It was rather a piece of ignorance, an error of the judgment, not any depraved or sinister intention. Nor does there appear any advantage he could possibly propose by it to himself nor any fraud upon the king, for the full composition was paid, no more land within the bounds than mentioned in the grant and the full quitrents [were] honestly paid ever since, neither could he intend or foresee any prejudice to another. He might well think the surveyor would finish his survey according to his promise. And, if he did not do it, it is he alone [who] is guilty of the fraud, and not Chew. And he ought to answer for the injury done to the defendant, which he or his representatives may undoubtedly be compelled to, notwithstanding the contrary was asserted last court.

This mighty fraud, then, in Chew, of being privy to the surveyor's neglect, when fairly stated and considered, appears to be no more than a piece of ignorance and folly without any probability of a fraudulent or sinister intention, either with respect to the king or anyone else. The surveyor is undoubtedly inexcusable. But, then, whether his neglect of duty ought to make void the king's grant must be humbly submitted.

I shall now speak a word to the second point, which was to show the general mischief and inconvenience that will be introduced if it is determined that any neglect of duty in a surveyor or his omitting to mark and measure the land surveyed shall make void the king's grant. I have had occasion already to speak of the old grants upon the first settlement here by the English. And it is evident, I hope, from what has been said that the lands then could not be marked or measured. It is further notorious that, in later times, surveyors have been very remiss and negligent in their duty.

Many plats upon which grants are founded have been returned without stretching a chain or marking a tree. Therefore, if it is determined that grants are void for these slips and frauds of the surveyor, it will introduce a universal confusion and shake, for aught I know, half the titles in the country. No purchaser can be safe under a possession though ever so long if the crown thinks fit to repeal the grants, for no time will bar the king. In short, to determine that a grant is void because the surveyor did not mark and measure the land before he returned his plat will be in effect to declare that half the patents in this country are void.

Now, the judges, in their determinations, have regard to the generality of the subjects' cases and the inconvenience that may ensue. 1 Rep. 52.¹ Vaughan lays it down as a rule that, where the law is known and clear, though unequitable or inconvenient, the judges must determine as the law is. But, where the law is doubtful and not clear, the judges ought to interpret it to be [as] least inconvenient. To apply this, as it is far from being clear that the defect of the surveyor in not marking and measuring the land is such a deceit or false suggestion as will make the king's grant void and as such a determination will be introductive of a general mischief and inconvenience and tend to destroy many men's titles to their inheritance, I hope it will not be Your Honors' opinion.

As to any hardships that may be pretended on the defendant's part and I remember a great deal was said at that last court, I hope Chew is not to answer for that, it being altogether the surveyor's fault, of whom he must seek for his remedy. And, as to losing his houses, which is part of the hardship complained of, that is owing to the defendant's own folly and obstinacy, since it appears Chew forewarned him building upon the land in controversy, alleging it was within his bounds. And the defendant could not be ignorant that it was so by offering to

¹ *Attorney General v. Bushopp* (1595-1600), 1 Coke Rep. 26, 76 E.R. 64.

purchase of him. So his damage upon this account is of his own seeking, and ought not to be at all considered. And I must submit whether the hardship will not be as great upon Chew to lose his land merely for a neglect of duty in the surveyor, for I can consider it in no other light, when he has honestly paid the king his rights, which is in the nature of purchase money, has no more land than he ought to have, and has paid the full quitrents ever since the time of his grant. But, in truth, the hardships on either side should be thrown out of the question. And the general inconvenience is what ought to be considered. This I hope I have sufficiently shown.

And so I humbly pray judgment for the plaintiff.

Randolph, for the defendant: The question is not whether the plaintiff's grant be absolutely void but whether it be good against the defendant, who has obtained a fair grant and observed all the rules prescribed by the law, whereas the plaintiff's grant is a mere forgery, procuring a plat to be returned, and taking out a patent upon it, when he knew the land was not surveyed, was a very great fraud upon the king, a false suggestion of the party himself, and must make the grant void, at least so far as not to hurt an innocent person, as the defendant is. The rules for granting lands here have been the same from the first settlement of the country. The first charter to the Company empowered the governor and council to settle the privileges of adventurers, which was done by allowing fifty acres to each adventurer. The same course was observed after the dissolution of the Company without any positive authority until the time of James II, when a new clause was added to the Governor's commission to grant fifty acres for importation. But no land was granted for money until 1703. Surveying was always necessary and required before any grant was made. And, where an essential circumstance is wanting, the grant must be void. *Vernon's Case*, 1 Vern. 370; *Vernon and Benson*, Mod. Ch. Ca. 47.¹ Much more here where the party himself was privy to this neglect of duty in the surveyor and so joined with him in the deceit upon the king. The partaker in a fraud is equally guilty with the contriver. The law abhors all kind of fraud. A fine, though the most solemn conveyance, if levied by fraud and covin, is void. 3 Rep. 77, *Fermor's Case*.² As to the inconvenience, this case must be distinguished from those where the surveyor alone is in fault and the grantee no ways privy.

In that case, it might be hard that an innocent person should suffer for the neglect of duty in an officer, but, here, the party knew the officer had not done his duty. It was a contrivance and combination between them, and a great piece of presumption, and a notorious deceit upon the king for the plaintiff to take out a patent upon such a piece of forgery as the plat was. Surely, no favor or countenance is due to such a practice, especially when an innocent man is to be oppressed and ruined by it. To prove the grant void were cited *Alton Woods Case*, 1 Rep. 40b; *Vow's Case*, cited in *Legat's*, 10 Rep. 110b.³

In April 1735, judgment was given for the plaintiff by the opinion of seven judges against four. But, upon the great importunity of the defendants' counsel, the court was prevailed upon to hear another argument, which was made October 1736, when BLAIR and BYRD having changed their opinions, judgment was given for the defendant, by the opinion of those two and RANDOLPH, GRYMES, CARTER, and DIGGES; LEE, TAYLOE, CUSTIS, ROBINSON, and the

¹ *Attorney General v. Vernon* (1685-1686), 1 Vernon 370, 23 E.R. 528, also Chan. Repts. *tempore Jac. II*, 127; *Vernon v. Benson* (1723), 9 Modern 47, 88 E.R. 307.

² *Fermor v. Smith* (1602), 3 Coke Rep. 77, 76 E.R. 80, also 2 Anderson 176, 123 E.R. 607, Jenkins 253, 145 E.R. 180.

³ *Attorney General v. Bushopp* (1595-1600), 1 Coke Rep. 26, 76 E.R. 64; *Vowe, ex dem. v. Smith* (1580), 10 Coke Rep. 110, 77 E.R. 1096.

Governor [GOOCH] *contra*. LIGHTFOOT, formerly for the defendant, now doubted; CARTER did not hear the first argument.

Note the court's opinion turned upon the fraud, as it was termed, in the plaintiff, *viz.* his knowing the land was not surveyed.

41

Winston v. Henry
(October 1736)

The undisposed residuum of a decedent's estate is to be distributed to the next of kin, and does not pass to the executor of the will, even where the executrix is the decedent's widow.

Chancery. Winston *et ux.* v. Henry *et ux.*, administratrix of Syme.

John Geddes, having a wife and one daughter married to Bobby, by whom she had two daughters, the plaintiff Rebecca, her eldest, and Elizabeth, and she was also *enceinte* of a son, by his will, May 18, 1719, devises to his wife three slaves during her life and the absolute property of six more. And he gave her during life a plantation called Toter Fort and the use of all his stock, household stuff, etc. on that plantation and the use of all his household stuff, stock, etc. at Sandy Point. And he declared that, after his wife's death, the principal stock and appraised value of the goods should be made good to those who had power to demand them by that will. And, after his wife's death, he gave all his household stuff etc. at Toter Fort to her daughter and her daughters to be equally divided among them. And he gave his daughter's eldest son, if any such there should happen to be, all the stock and household stuff at Sandy Point. And he gave his wife the use of most of his plate (naming the particulars) during life. And he gave her all his china, and, after his wife's death, he gave the use of his plate to his daughter and, after her death, to her eldest son, if no such, to her eldest daughter. He, likewise, gave his wife £100 of the money in Mr. Perry's¹ hands. The rest to be equally divided betwixt his daughter and her three aforesaid children. And he appointed his wife guardian to the plaintiff Rebecca and sole executrix. And he desired she should return a settled account of his estate in Virginia and money in England, but should not be obliged to give security during her widowhood, because of the great confidence he placed in her just management, for herself and others. And, by a codicil to his will, he declared that the household stuff etc. given to his daughter's eldest son at Sandy Point, in case there should be no such, he gave to be divided betwixt his daughter and her children already mentioned. But he made no disposition of the surplus of his estate.

The wife proved the will, and possessed herself of all the testator's slaves and personal estate, amounting, besides the plate devised and 29 oz., 8 per weight, [?] more, to £689 14s. 4½d., but never returned a settled account of the estate or of the monies in England. And, soon after the testator's death, she married one Syme. The testator's daughter, soon after his death, was delivered of a son, who died at seven years old, before the testator's wife. Syme possessed himself of all the testator's estate, and, as guardian to the plaintiff, got all the estate so as aforesaid devised to her and also what she had from her father, who died in 1725. After the death of the testator's wife in 1728, Syme married the defendant Sarah, and he died intestate. She administered, and married the defendant John.

This bill is brought to have the plate delivered, a moiety of the principal stock at Sandy Point, and Toter Fort, and of the appraised value of the household stuff and a moiety of the

¹ Micajah Perry (d. 1721) or Richard Perry (d. 1720) or Micajah Perry (d. 1753), merchants in London; J. M. Price, *Perry of London: a Family and a Firm on the Seaborne Frontier, 1615-1753* (1992).

residue of the testator's personal estate, including £200 and costs recovered by Syme and his wife of the executors of one Danzie, she and her sister being next of kin, and to have an account of the plaintiff Rebecca's estate and of the profits while Syme was guardian.

The defendant Sarah answers alone, and says Syme paid Bobby and his wife, the plaintiffs' father and mother, more money than belonged to her and her children in the hands of Perry, and prays to be allowed those payments, that the testator's wife lived eight years and used the stock and household stuff all that time, and hopes Syme's estate shall not be answerable for the appraised value but for the value at her death. She says she is ready to deliver the plate and pay the plaintiffs what is due to them by Geddes's will, and annexes several accounts of the estate, and submits how far the estate of Syme is chargeable. She says she is ready to account for the profits of the plaintiffs' estate while Syme was her guardian, being allowed for her maintenance and education. And, as to that part of the bill praying a decree for a moiety of the residue of Geddes's estate, she demurs, and insists the residue belonged to the executrix or, if it did not, the plaintiffs are not entitled to so much as a moiety.

In this case, there are three points: first, upon the demurrer, whether the surplus of Geddes's estate is to go to the executrix or next of kin; if to the next of kin, what part the plaintiffs are entitled to; second, whether the payments made by Syme to the plaintiffs' father and mother and to the mother's second husband of the plaintiffs' legacy are good payments to bar her in this case; third, whether the defendants are answerable for the appraised value of the household stuff etc. or the value when the testator's wife died and whether an allowance is to be made for the goods worn out and the stock that died in her lifetime, as is sought by one of the accounts annexed to the defendants' answer.

First, whether the surplus not being disposed by the will is to go to the executrix or be divided among the next of kin, it is said in our old books that the making of a man executor is a gift of all the testator's personal estate. And so the law was taken for some ages until after the Statute of Distributions, 22 & 23 Car. II,¹ since when, a change in the law has been introduced as to this matter, insomuch that it is now become a kind of settled rule in equity that, where the surplus is not disposed of and the executor has a particular legacy given him, such surplus shall not go to the executor, but to the next of kin, and the executor shall be taken as a trustee for them. Where the executor has no particular legacy, the law still remains as it was, and he shall have the surplus. The reason of this change in the law, I [*Barradall*] apprehend to be this. Before the Statute of Distributions, the right to intestate's estates was very unsettled. It remained pretty much in the breast of the ordinary to dispose as he thought fit, for to whomsoever he granted administration, he had a right to the whole estate. At the common law, he had a power to dispose as he thought fit to pious uses, and was not obliged to pay the intestate's debts until the Statute of Westminster II. The [Statute] 31 Edw. I gives him power to grant administration to the next of kin, but the [Statute] 21 Hen. VIII, 5, enacts that he shall grant administration to the widow or next of kin or both.² Yet, after this Statute, if administration was granted to a stranger, unless there was an appeal in fourteen days, the wife and children were excluded, and the administrator could run away with the whole estate, which mischiefs the Statute of Distributions has remedied by directing a distribution among the wife, children, and next of kin, let the administration be granted to whom it will. *Vide* 3 Mod. 59-64, *Palmer against Allicock*.³

¹ Stat. 22 & 23 Car. II, c. 10 (*SR*, V, 719-720).

² Stat. 13 Edw. I (*Westminster II*), c. 19 (*SR*, I, 82); Stat. 31 Edw. III, stat. 1, c. 11 (*SR*, I, 351); Stat. 21 Hen. VIII, c. 5, s. 2 (*SR*, III, 286-287).

³ *Palmer v. Allicock* (1685), 3 *Modern* 58, 87 *E.R.* 37, also 2 *Showers K.B.* 407, 486, 89 *E.R.* 1010, 1056, *Comberbach* 14, 90 *E.R.* 314, *Skinner* 212, 218, 90 *E.R.* 98, 101.

Now, it is plain, before this Statute, no one could set up a right to the surplus of an estate undisposed of by will. The next of kin had no right to it unless [he was the] administrator, and no administration was then, or is now, granted where there is a will, so that the law, of necessity, threw the surplus on the executor, there being no other person that could claim it. But now that this Act has established a right in the next of kin, where a man does not dispose of the residue or surplus of his estate, equity will regard him an intestate as to that, and decree a distribution among the next of kin, that is, where the executor has a particular legacy given, as I have already said, and that for this reason, that it is absurd to suppose a man should intend to give all and some to the same person. And, therefore, the devise of a particular legacy makes the implication very strong and violent [that] the testator did not intend more, because, if he did, the particular legacy must be useless.

I take the law to be very clear and settled as to this matter where strangers are made executors. But I must own the resolutions are not so unanimous where the wife is executrix. Yet I believe it will appear the cases are more and weightier that a wife executrix shall not have the surplus than that she shall. Then, there are such particular circumstances in this case to differ it from any that can be shown that I am persuaded it will be Your Honors' opinion she ought not to have the surplus in this case.

The first case of this sort that we meet with is *Foster and Munt*, 1 Vern. 473,¹ where the executor gave particular legacies to his children and to his executors £10 apiece for their care, and the surplus [was] decreed to be distributed. *Bailey and Powell*, 2 Vern. 361, Ch. Ca. Abr. 244, 2. The testatrix gives particular legacies to all her next of kin by name and also to her executors; the surplus was decreed to be distributed. [There are] many other cases where strangers were executors. *Vide* Ch. Ca. Abr. 244. And [there is] no authority to contradict them, except where parol proof has been admitted to prove the testator intended the surplus to his executor, as *Batchelor and Searl*, 2 Vern. 736, Ch. Ca. Abr. 246, and *Littlebury and Buckley* there cited; *vide* Mod. Ca. Eq. 9, *Rashfield and Careless*, *ibid.* 11 and 27.²

Then, as to the cases where a wife is made executrix, I conceive the law is the same unless, from the nature of the particular legacy or some other collateral circumstance, it may be presumed or can appear the testator intended the surplus to the wife.

Darwell and Bennet, cited [at] 2 Vern. 677; the testator gave his wife £100 and the interest of £300 for her life, and made her and others executors. The surplus was decreed to be distributed.³

¹ *Foster v. Munt* (1687-1689), 1 Vernon 473, 23 E.R. 598, also 1 Eq. Cas. Abr. 243, 21 E.R. 1020, 2 Eq. Cas. Abr. 433, 443, 22 E.R. 368, 378, Dodd 78, Chan. Repts. *tempore* Jac. II, 368.

² *Bailey v. Powell* (1698), 2 Vernon 361, 23 E.R. 827, 1 Eq. Ca. Abr. 244, 21 E.R. 1021, also *Precedents in Chancery* 92, 24 E.R. 44, 2 *Freeman* 225, 22 E.R. 1175; *Batchellor v. Searl* (1716), 2 Vernon 736, 23 E.R. 1081, 1 Eq. Cas. Abr. 246, 21 E.R. 1023, also *Gilbert Rep.* 125, 25 E.R. 88, *Chan. Repts. tempore* Geo. I, 243; *Buckley v. Littlebury* (1711), 3 *Brown P.C.* 43, 1 E.R. 1165, 1 Eq. Cas. Abr. 245, 21 E.R. 1021, 2 Vernon 677, 23 E.R. 1040, *Lincoln's Inn MS. Misc.* 10, p. 86; *Rachfield v. Careless* (1723), 9 *Modern* 9, 88 E.R. 281, also 2 *Peere Williams* 158, 24 E.R. 680, 1 *Strange* 568, 93 E.R. 705, 2 Eq. Cas. Abr. 416, 424, 441, 22 E.R. 353, 361, 376, *sub nom. Russell v. Carlison*, *Chan. Repts. tempore* Geo. I, 958.

³ *Darwell v. Bennet* (1708), 2 Vernon 677, 23 E.R. 1040.

Ward and Lane, cited [at] 2 Vern. 677; a man made a will and his wife executrix; he lived twenty years afterwards, and acquired an estate. The surplus [was] decreed to be distributed.¹

Lady Granville v. Duchess of Beauford, 2 Vern. 648; the duke gave the use of the table plate to the duchess for life, and made her executrix. The surplus was decreed to be distributed by Lord Cowper. This was reversed by the House of Lords, not upon the face of the will, but upon the parol proof, as I conceive, that the duke intended the surplus to the wife. And so this case is rather for us. The very admitting of proof being a strong argument the executrix would not have the surplus without. And there is no sort of proof in this case. Another reason for this reversal was because the duchess had not an absolute, but only a special, property in the plate devised to her. Mod. Ch. Ca. 10.²

But, here, the wife has several absolute legacies. The strongest case against us is Ball and Smith, 2 Vern. 675; Smith devised to his wife some plate and goods she had as executrix to a former husband, and the surplus was decreed to the wife. The two reasons given for this decree are because the will was made before the case of Foster and Munt and for that nothing was devised to the wife but what was her own before, reasons that will not hold in our case where the wife has a very large and ample provision. The Chancellor himself, Lord Harcourt, seemed not to be perfectly satisfied, but hoped for settling the point, as he said it would receive the judgment of the House of Peers. Whether it ever did does not appear.³ So this is only the opinion of Lord Harcourt supported by no preceding authority against that of Lord Cowper in the case next before and the authority of Darwell and Bennet and Ward and Lane before remembered.

Then, the particular circumstances of this case differ much from that of Ball and Smith. There, the wife had nothing given her but was her own before, and so, in effect, [it was] no legacy. Here, the wife has very great legacies, six slaves and £100 sterling absolutely, besides the use of other slaves, two plantations, stock, and household stuff for life. From whence, the implication is very strong and violent that he did not intend her any more than what is particularly given, for, if he intended her the surplus, the particular legacies are useless.

But there is still something further in this case, and that is a clause in the will which seems clearly to show the testator did not intend the surplus to the wife. He directs her to return a settled account of his Virginia estate and money in England, and directs that she shall not give security because of the great confidence he placed in her just management for herself and others. To what purpose was she to return a settled account if she was to have the whole surplus? Then, that expression of managing for herself and others is a plain indication he did not intend her the whole so that, besides the general rule where a particular legacy is given to the executrix that she shall not have the surplus, here are the words of the will itself, from which I conceive the implication is made stronger that the testator in this case did not intend the surplus to his executrix. All these circumstances considered, which differ this case so much from that of Ball and Smith, the only authority in point against us, and, as that case is opposed by more numerous authorities and the Chancellor himself seemed to doubt, I hope there is no

¹ *Ward v. Lane* (1701), 2 Vernon 677, 23 E.R. 1040, 1 Eq. Cas. Abr. 244, 21 E.R. 1021.

² *Lady Granville v. Duchess of Beauford* (1709), 2 Vernon 648, 23 E.R. 1023, also 1 Peere Williams 114, 24 E.R. 317, 1 Eq. Cas. Abr. 245, 21 E.R. 1021, 2 Eq. Cas. Abr. 415, 22 E.R. 352; *Rachfield v. Careless* (1723), *ut supra*.

³ *Ball v. Smith* (1698-1711), 2 Vernon 633, 675, 23 E.R. 1014, 1039, also 2 Freeman 230, 22 E.R. 1178, 1 Eq. Cas. Abr. 245, 21 E.R. 1022, 2 Eq. Cas. Abr. 133, 434, 22 E.R. 114, 369.

reason to depart from the general rule that an executor shall not have the surplus where a particular legacy is given, but that it shall be distributed among the next of kin.

As to the share of the surplus the plaintiffs are entitled to, I conceive it is a moiety if any Geddes left only one daughter, whom the plaintiff and her sister represent. If the surplus does not belong to the executrix, the representatives of the daughter must be entitled to it, and, consequently, the plaintiff to one moiety. The defendants, I suppose, would bring in the wife to have a share of the surplus with the daughter. But I apprehend she ought not to be let into any share any more than to the whole. It is true, if Geddes had died intestate, the Statute of Distributions would have given a third to the wife. But this case is very different. We are now before the court not for the distribution of an intestate's estate, but to take the surplus from the executrix upon a presumption or implication that the testator did not intend it to her. This intention is proved by the devise of particular legacies to the executrix, from whence we say the implication is strong and violent he did not intend her any more. This argument, then, is as strong to exclude her from any share of the surplus as from the whole. The surplus in these cases is taken in equity as a trust in the executor for the next of kin. But this must be understood of such as the testator has not excluded by his will. Here is no room to imply a trust for them whom the testator has declared shall not have it. And, therefore, in this case, if he did not intend his wife more than is particularly given, his intention is clear to exclude her from any share of the surplus. And, then, the plaintiffs are well entitled to a moiety.

This point is not touched in any of the cases *supra*, only in that of Lady Granville against Duchess of Beauford; it seems the duchess was to have a third.

Second, whether the payments made to the plaintiff's father and mother and to the mother's second husband are to be allowed as a satisfaction of the plaintiffs legacy, and I conceive not. It is true, formerly, the Chancery did allow a payment to the father of a legacy given to an infant to be a good payment, with this difference, which seems to have little foundation in reason, *viz.* if the executor took security to indemnify him, then he paid it at his own peril and should be chargeable to the infant notwithstanding such payment, but, if he took no security, the payment was good against the infant. 1 Ch. Ca. 245.¹ But this practice giving a handle to indigent parents and knavish executors to juggle infants out of their rights, the Chancery, of later times, has thought fit to extend their care further for infants. And such payments are now always disallowed. It is become a settled rule and even where the circumstances are ever so hard, such payment will not be allowed. So it was decreed by Lord Cowper, Michaelmas 1715, between Doyley and Tollferry, where the hardships upon the executor were very singular, the son living fifteen years after he was of age and having a promise from his father when in good circumstances to pay it, though he, afterwards, became insolvent. But the Chancellor, to discountenance the payment of infants' legacies to their parents and that the case might not be cited as a precedent when the particular circumstances attending it were forgotten, decreed against the executor. Ch. Ca. Abr. 300, 1 Wil. 285, same case, Reports in Equity 103, same case.²

By this case, it appears to be a settled rule in equity to disallow the payment of an infant's legacy to the parent. And after reading this case, it may seem needless to say anything more upon this head. But to put this point beyond all dispute, I must observe further that Mr. Syme, who pretended to make these payments, was actually the plaintiff's guardian. It is admitted in the answer, and the defendants submit to account for the guardianship. This

¹ *Holloway v. Collins* (1675), 1 Chancery Cases 245, 22 E.R. 782, also 1 Eq. Cas. Abr. 300, 21 E.R. 1060, 73 Selden Soc. 134.

² *Dagley v. Tolferry* (1715), 1 Eq. Cas. Abr. 300, 21 E.R. 1061, 1 Peere Williams 285, 24 E.R. 391, Gilbert Rep. 103, 25 E.R. 72, also *sub nom.* *Dagley v. Aubery*, Lincoln's Inn MS. Misc. 380, pt. 3, p. 149, Chan. Repts. *tempore* Geo. I, 145.

pretended payment then to the father must be looked upon as a mere fraud, especially, when the nature of this pretended payment is considered, which appears by the accounts annexed to the answer. Mr. Syme sells to Bobby, the plaintiff's father, his wife's estate for life in the Toteró Plantation, and the consideration Bobby was to pay, viz. £127, is charged in the defendant's accounts as a payment in part of the plaintiff's legacy. And this is the greatest part of what is pretended to be paid to the plaintiff's father.

As to the payments to the mother or her second husband, I presume nothing need be said. There is no instance that such payments were ever allowed under any circumstance, much less then in this case. I am sorry to observe Mr. Syme's conduct carries not the fairest appearance. Surely, it was his business as the plaintiff's guardian to retain what belonged to her and not pay it to a father or mother that he knew were indigent and careless. The principal reason why a payment to a father was formerly allowed was this, that the father is by nature guardian to his child. But that reason must cease where there is another guardian, so that, here, was no kind of pretence to pay to the father.

And, therefore, this pretended payment must be looked upon as a contrivance of Symes to secure the money due from Bobby upon the sale of the plantation. And so it is a fraudulent payment that ought to meet with no countenance in equity, admitting such payments were sometimes allowed. But, as the rule of equity is general, that no payment to a father of his child's legacy is good under any circumstances, here can be nothing said to support such a payment upon the particular circumstances of this case.

Third, whether the defendants are answerable for the appraised value of the household goods or the value when the testator's wife died and whether any allowance is to be made for the goods worn out and the stock that died in her lifetime, I conceive there is no ground for the first part of this question. The testator's will is express that the appraised value of the goods shall be made good to those in remainder. I hope what the testator has expressly directed shall be complied with. Nor is there anything in the objection that may be made that, then, the legacy is of small benefit. It is to be considered the wife has very great legacies besides. And it is surely some advantage to have the use of things during life to pay their value at a great distance of time, as, in this case, after death. However that be, the testator's words are express, and there is no room to make other construction.

And, if so, then, certainly, no allowance is to be made for the goods worn out by the testator's wife. There is a great difference between this case and a common devise of the use for life, with a remainder over. In the common case, I agree, if the goods are worn out in the lifetime of the devisee for life, he in remainder must be contented with what is left of the specific goods devised. But, here, we are not to have the goods, but the appraised value after the wife's death. And so it is the same as if he had said 'my wife shall have the goods, paying the appraised value at her death'. This was clearly the intention. And, if we are to have the appraised value at all, we must have the value of the whole goods.

As to the cattle that died in the wife's life, I think no allowance ought to be made for them neither. The testator directs that, after his wife's death, the principal stock shall be made good to those in remainder. By which, I apprehend he intended that his wife should have the use and benefit of the stock and the increase, but that as good a stock as the principal was at his death should be made good after her death to those in remainder. It cannot be supposed he intended only what should be left of the specific stock should go to those in remainder; that must have been a useless devise after a life, since he could not suppose many of them would be then left. Therefore, by directing the principal stock to be made good, he must intend a stock of equal value. And, then, it is nothing to the purpose if they had all died. The wife might have refused the legacy if she did not like it, but, having accepted it, she must perform the condition upon which she accepted it, that is to account for a stock of equal value to those in remainder. As she had the use of this stock and the benefit of the increase, she ought to bear the loss. *Qui sentit commodum etc.*

Randolph, for the defendant: The surplus of an estate undisposed of by will has been sometimes decreed for the next of kin and sometimes for the executor, according to the testator's intention. [This is] the rule to govern these cases. The wife here brought a great fortune to the husband, who was a beggar. Upon the marriage, he articed to give her £200 besides a third of his estate, as appears from a clause in his will. The provision made for her by the will is not equal to that. And it ought to be presumed the testator intended to do justice, which he will not unless the wife has the surplus. Marriage articles ought to be supported. And the wife had such an equity by those articles as ought to rebut the plaintiffs. Besides, there is a great difference where the wife and where a stranger is made executor. And there is no instance where the surplus has been taken from a wife executrix except that of *Ward and Lane*, *supra*. It is not to be supposed a man makes his wife executrix merely to give her an office of trouble, but rather of benefit to take the surplus. He cited *Griffith and Rogers* and *Jones and Westcomb*, Ch. Ca. Abr. 245, 8, 10; *Ball and Smith* and *Bachelor and Searl* *supra*, both which were much relied on. He agreed the payments were not good, but he insisted the plaintiffs ought to take the stock and household goods in the condition they were at the wife's death and that the defendants were not accountable for the appraised value.¹

Reply: The testator's intention is the undoubted rule to govern cases of this sort. And this intention may be either expressed or implied. The argument here is drawn from an implied intention of the testator, a strong and violent implication that he could not intend the surplus after devising so many and valuable legacies. And, without a strong and violent implication, I agree, the surplus is not to be taken from the executor, which is all that can be collected from the Case of *Bachelor and Searl*, so much relied on. Parol proof was there admitted in favor of the executor's title. And without that proof, the same Chancellor, *Cowper*, decreed against the executrix in the Case of *Lady Granville and Duchess of Beauford*, *supra*. As to the case of *Griffith and Rogers*, the wife there had only ten books given her, and it could not be supposed the testator intended her no other provision. *Jones and Westcomb* is indeed a stronger case, but, possibly, it turned upon the nature of the particular legacy, being a term, which is a chattel real, and [there was] no devise to the wife of any estate merely personal. And, then, both these cases are within the rule I first laid down. Note this last was a decree of Lord *Harcourt* and about the same time with *Ball and Smith*. There seems to be little foundation in reason for the difference, where a wife and where a stranger is executor, especially, where the wife has a handsome provision, as, in this case. Certainly, the implication is as strong that the testator intended no more in the one case as the other. The circumstances of the wife's bringing a great fortune and the marriage articles are not at all in proof, and so ought not to influence. But admitting all to be true that is said, the husband, by the marriage, acquired the absolute property in his wife's fortune and might dispose as he pleased. Nor can it be thought reasonable or equitable that he should give all to his wife and leave his child and grandchildren to starve. And, as to the marriage articles, it will be time enough to talk of them when a performance of them is sought for.

October 1736, the court decreed the surplus to be distributed and the wife to have one-third, that the payments were not good, that the defendants should account for the value of the household stuff at the time of the wife's death and for as good a stock as was left by the testator at his death, and pay the plaintiffs a moiety of the value.

As to the distribution of the surplus, see *Farrington v. Knightley*, Prec. Chan. 566, and 1 Will. 544, in which last, all the cases are collected and settled clearly for a distribution where

¹ *Griffith v. Rogers* (1704), 1 Eq. Cas. Abr. 245, 21 E.R. 1021, also *Precedents in Chancery* 231, 24 E.R. 112; *Jones v. Westcome* (1711), 1 Eq. Cas. Abr. 245, 21 E.R. 1022, also *Precedents in Chancery* 316, 24 E.R. 149, *Gilbert Rep.* 74, 25 E.R. 52, *Chancery Cases tempore Harcourt*, p. 128; *Ball v. Smith* (1698-1711), *ut supra*; *Bachelor v. Searl* (1716), *ut supra*.

the executor has a legacy, and [it is] no different whether a wife or a stranger be the executor. See also Prec. Chan. 323.¹

[This report is cited at Conway Robinson, *Practice in the Courts of Law and Equity in Va.* (1835), vol. 2, pp. 98, 121.]

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Rose, executor of Bagg v. Cooke
(Part 2)
(October 1736)

After a defendant has been granted a continuance, he cannot afterwards plead in abatement, but he must plead in bar to the merits of the case.

Rose, executor of Bagg v. Cooke *et al.*

The defendants having pleaded that they were under age and prayed that the parol might demur, upon a demurrer, judgment was given *quod respondeant ouster*. After which, they pleaded in abatement of the writ that there is another devisee in the will not named in the writ, to which the plaintiff replied an imparlance, the former plea, and judgment. And, thereupon, they demurred.

And it was argued for the plaintiff that this plea, being in abatement, could not be pleaded after an imparlance, which was a known and settled point. 1 Vent. 76, 137; Sti. 187; 2 Lutw. 22, 24; 8 Mod. 43, 381.²

It is true matter of abatement may be pleaded after a special imparlance. And it is also true that the defendant here, in the [clerk's] office, had a special imparlance granted. But the plea is pleaded without any notice of it. And, therefore, they have waived and lost the benefit of it.

The nature of an imparlance is nothing else but the continuance of the cause to a further day for the defendant to advise what to plead. *Terms of the Law*, 289. And, when the defendant has anything to plead in abatement, he takes his imparlance with *a salvis sibi omnibus advantagiis etc.* And this is called a special imparlance, after which, matter of abatement may be pleaded, as I [Barradall] said.

In England, these special imparlances are granted by the Secondaries in the King's Bench and the Prothonotaries in the Common Bench, as they are by the Clerk here out of court. And there are various sorts of them, as with a saving exception to the writ, to the writ and

¹ *Farrington v. Knightly* (1719-1721), Precedents in Chancery 566, 24 E.R. 254, 1 Peere Williams 544, 24 E.R. 509, also 10 Modern 442, 88 E.R. 801, 2 Eq. Cas. Abr. 245, 421, 424, 440, 22 E.R. 208, 358, 360, 375, Lincoln's Inn MS. Misc. 384, pp. 20, 161, Chan. Repts, *tempore* Geo. I, 624; *Colesworth v. Brangwin* (Ch. 1712), Precedents in Chancery 323, 24 E.R. 153, also Gilbert Rep. 79, 25 E.R. 56, 2 Eq. Cas. Abr. 438, 22 E.R. 373, Chancery Repts. *tempore* Anne 414.

² *Putt v. Vincent* (1670), 1 Ventris 76, 86 E.R. 53, also 2 Keble 632, 84 E.R. 398; *Putt v. Nosworthy* (1671), 1 Ventris 135, 86 E.R. 93, also 2 Keble 795, 810, 84 E.R. 502, 512; *Weston v. Plowden* (1650), Style 187, 82 E.R. 634; *Bartelot v. Burton* (1704), 1 Lutwyche 22, 125 E.R. 12; *Colvin v. Fletcher* (1722), 8 Modern 43, 88 E.R. 33.

declaration, or with a saving of all exceptions whatsoever. Hard. 365; 1 Sal. 1.¹ And, when the defendant comes to plead, he shows the nature of his special imparlance in his plea. And this is of necessity for two reasons, first, that the court may judge whether the matter he pleads is proper after such an imparlance, because, if it be not, the plea will be judged naught, for instance, if the imparlance be only with a saving to the writ or bill, he shall not plead to the jurisdiction or any matter of abatement of the count or declaration, 1 Sal. 1; Hard. 365, second, that the imparlance may be made a part of the record. And so are all the precedents that I have seen of special imparlances. 1 Lutw. 6, 44.² The Clerk in making up this record can take no notice of this imparlance, not being in the plea. So, if the record was made up here, as it is in England, before trial, it could not appear there had been such an imparlance, nor will it appear to posterity. And then, if judgment is given upon this record for the defendant, it will not appear but that this court's opinion was that matter of abatement may be pleaded after a general imparlance, which I presume it is not. From hence, I argue the necessity of showing the imparlance in the plea and that, where the defendant does not do it, it is in effect a waiver of it. At least, this plea is defective in form, the precedents being all against it. And, in pleas of abatement, which are generally for delay, the greatest strictness and nicety of pleading is required. The reason is because they are not to be encouraged or favored.

But, if this objection will not hold, this plea, being after another dilatory plea and a judgment thereupon *quod respondeat ouster*, can never be good. It is as known and settled a rule as any in practice that two dilatory pleas shall never be allowed to one action. The reason is that, by the same rule, twenty may be pleaded. And, so, the plaintiff [be] delayed *ad infinitum*. And this reason is so forcible it needs no comment. For authorities, see 2 Sand. 41.³

There is, however, an exception to this rule where the cause of abatement has happened since the last continuance. Now, every plea in judgment of law is dilatory that tends to obstruct or delay the trial of the merits and right of the cause, within which notion, both these pleas of the defendants come. The first plea, that the defendants are under age and, therefore, praying that the parol may demur, is to delay the process until the defendant's full age. The plea now under consideration is to obstruct the trial of the merits by abating the writ. These, then, certainly, are both dilatory pleas, and, therefore, this last is not to be allowed.

Note this plea ought not to have been received. And the proper way would have been to have refused it in the office and so brought it before the court upon a motion. 2 Sand. 41.

If the court is against me in this point, then, I object to the matter of this plea, that it is frivolous and really no cause of abatement. The objection is that there is another devisee who is not named in the writ.

The Statute⁴ upon which this action is founded does not require that all the devisees should be joined in the writ. And it ought to be construed so as to give the most ample, ready, and beneficial remedy to creditors. Now, it often happens that there are disputes upon a will

¹ *Clapham v. Lenthall* (Ex. 1664-1665), Hardres 365, 145 E.R. 499, also Exch. Repts. *tempore* Car. II, 31; *Duncombe v. Church* (1696), 1 Salkeld 1, 91 E.R. 1, also 12 Modern 102, 88 E.R. 1194, Comberbach 390, 90 E.R. 547, Holt K.B. 588, 90 E.R. 1125, 1 Lord Raymond 93, 91 E.R. 958.

² *Gawen v. Surby* (1704), 1 Lutwyche 5, 125 E.R. 3; *Wentworth v. Squibb* (1704), 1 Lutwyche 43, 125 E.R. 23.

³ *Careswell v. Vaughan* (1670), 1 Williams Saunders 38, 85 E.R. 585, also 1 Modern 7, 86 E.R. 688, 2 Keble 553, 563, 574, 603, 610, 84 E.R. 347, 354, 361, 379, 384.

⁴ Stat. 3 Will. & Mar., c. 14 (SR, VI, 320-321); Act of 1726, c. 3, s. 28, 4 Hening's Statutes 164.

who shall take by such a particular devise. And must the creditors wait until that is determined? Certainly, no. But, if other lands are devised concerning which there is no dispute, the creditor may sue these last devisees, and have judgment against them. And there is no inconvenience that judgment should be against some devisees only and not against all, because those against whom judgment is had may compel the others in equity to contribute. Further, a man may take upon him[self] to devise lands he has no title to. And shall a creditor who knows this be compelled to sue the devisee of such land with other devisees and so create an unnecessary expense on both sides? Certainly, the Act can never receive such a construction.

Besides, it appears by the Act itself that some devisees ought not to be sued. There is a proviso that devises for paying just debts or for raising younger children's portions pursuant to articles before marriage shall be good. And, where lands are so devised, the devisees ought not to be sued or joined in the writ against the other devisees. Therefore, in this plea of the defendants, upon the face of it, is no good cause of abatement. The plea is only that there is another devisee. Now, it is plain by the Statute all devisees are not liable. Therefore, the defendants should have shown not only that there was another devisee but that he was liable, by alleging he was not within the proviso before mentioned. Otherwise, it cannot appear to the court that he ought to be joined in the writ. And, consequently, the plea is not good.

But the truth is that this devise to Timmons, the devisee not named, is clearly within the aforesaid proviso. And that was the reason he was not joined in our action. The devise is of 1500 acres to him in fee. Then follows:

he, paying 1261 pounds of tobacco due to my estate to my executrix and no otherwise, to have the said land, the said tobacco being due for composition and other fees for lands taken up, on which account, I have devised to him the said tract.

The case between this Timmons and the testator is pretty plain from the words of the will. They had taken up lands together, which I suppose were granted to the testator alone, who, like an honest man, devises half to Timmons, upon paying the composition. This I say is pretty plain from the will, and is the truth of the case. Now, to what purpose should this man be sued, since nothing is devised to him but what was properly his own? He had the equitable right, and might at any time have compelled a conveyance of the legal [title] from the testator or his heirs. This land could not be made subject to the testator's debts in his lifetime, nor can it be since his death. It would, therefore, have been an unnecessary expense and trouble to this devisee as well as the plaintiff to have joined him with the defendants in this action.

I might further insist that this case is undoubtedly within the equity and meaning of the proviso in the Statute. But enough, I hope, has been said to show that this devisee ought not to have been sued. And this plea, as to the matter of it, is naught.

Mr. Attorney General [*Clayton*], for the defendant: The matter of this plea is a good cause of abatement, and well enough pleaded. If the devisee is such a one as ought not to be sued, it comes properly on the plaintiff's part to show that by way of a replication. But the defendant is too late to plead this matter after a former dilatory plea and judgment *quod respondeat ouster*.

And so judgment was given that the defendant should answer further.

N.B. what is said above that this plea should not have been received. October 1736.

[For the first part of this report, see above, Case No. 31.]

Spicer, administratrix of Stone v. Pope
(October 1736)

A devise of property that is not in esse at the testator's death is void.

Spicer, administratrix etc. of Stone v. Pope *et al.*

John Stone, by his will, April 27, 1695, devises his plantation and the profits of his slaves and personal estate to his wife during life. And he declares his will to be that:

his son, Richard Metcalf, and daughter, Ann, his wife, live upon the said plantation after her death during their lives and also keep and employ the Negroes upon the said plantation, making use, as they shall see cause, of all the profits of his said land and clear produce of his said Negroes, stock, and plantation except the increase of his said Negroes thereafter given away.

Then, he devises to Mary and Elizabeth, two daughters of Richard and Ann Metcalf, a Negro apiece by name and to John, their son, a Negro child, the next that should be born. Then follows this clause:

I give unto my daughter Ann's children that she shall bear hereafter one Negro child apiece as it shall please God the Negro women shall bear them; further, it is my will that, if any of the said children prove disobedient to them, that the said Richard Metcalf and Ann, his wife, do keep them until they shall submit themselves in obedience to their parents.

Then, he gives all his personal estate to be divided among Richard and Ann Metcalf's children after their deaths. And he makes Richard Metcalf, Henry Fleet, and Edwin Conway executors.

The testator's wife died before him. And Metcalf, upon his death, got all the slaves and personal estate into his possession without proving the will, which was not produced until after his death in 1699. And it was then proved in the Richmond [County] Court by the witnesses only. Ann Metcalf, after her husband's death, got possession, and, marrying one Barrow, he was thereby in possession. Ann survived Barrow, and died in 1728. She had four children by Metcalf, Mary, Elizabeth, and John, aforesaid, and Sarah born after the will made, to whom, after their mother's death, Stone's estate belonged by his will.

The plaintiff, one of these children, having never received any part except the slave devised to her, sues out an administration *cum testamento annexo*, Metcalf and Conway, two of the executors, being dead without proving the will, and Fleet, the other, refusing. And she brings this bill for a discovery of the slaves and personal estate of Stone that they may be divided according to his will and she have her fourth part.

The defendants set up several titles to these slaves, some of them under the other children of Richard and Ann Metcalf and others under the children of Ann by her second husband, Barrow, who they say are entitled to a child apiece. And the defendant Rust has some plate and other things of Stone's estate.

Before I [*Barradall*] speak to the merits of this case, I will beg leave to clear it of two objections very much insisted on at the trial at law, *viz.*, first, the staleness of the plaintiff's claim after a division, as pretended, of the slaves pursuant to Stone's will, second, the irregularity pretended in the plaintiff's suing out administration.

As to the first, it is true the testator had been dead a long time, but the plaintiff's title did not accrue upon his death, but on the death of Ann Metcalf, the survivor of the devisees for

life, which happened no longer ago than 1728. In 1729, the plaintiff sued out administration, and this suit has been depending ever since, so that we sued as soon as ever our title happened. And, as to the division talked of, the plaintiff never had one slave or other part of the estate except the slave devised to her, so that whatever division has been among the rest is nothing to her. She has never had her part. And, surely, there is no injustice in seeking to obtain it.

Second, as to the irregularity in the administration, I apprehend that point cannot now properly be enquired into. In England, we know the granting of administration is the province of the spiritual courts, and the Chancery cannot control them. But, if they proceed irregularly, the course is to obtain [writs of] prohibition and mandamus from the common law courts. And, in the case of a probate of a will, though great fraud has appeared in making the will, equity has refused to set aside the will so long as the probate was in force. 2 Vern. 8, Archer and Moss; 76, Nelson v. Oldfield.¹

Now, this court has, it is true, a threefold jurisdiction, as a court of equity, a court of common law, and it has also jurisdiction of testamentary matters. But, then, these jurisdictions must not be confounded. The proper bounds between each ought to be kept up. And this court, as a court of equity, will no more intermeddle with testamentary matters than, if they were sitting as a court of law, they would judge by the rules of equity. This administration, then, must be taken to be regular until it is repealed, which this court, as a court of equity, cannot do. But to take away all occasion of cavil, I will show that this administration is perfectly regular, the course of the spiritual court being, where the executors refuse or die before probate, to grant such an administration as this, viz. *cum testamento annexo*. 1 Sal. 304, Wankford against Wankford.² And that was the case here. Two of the executors were dead and the other refused. An administration *de bonis non* would have been improper, as none of the executors ever proved the will. I will only add that the plaintiff, having a right by the will, might have brought this suit without taking administration at all. But she was first advised to bring an action at law. And so an administration was necessary.

The questions arising upon the merits of this cause may be: first, what estate or interest Richard and Ann Metcalf had in the slaves and personal estate by the will; second, whether the devise of the personal estate to their children after their deaths be good and what will pass by this devise of personal estate; third, whether the devise to John Metcalf and to the children said Ann should bear thereafter of a Negro child apiece, as the Negro women should bear them, be a good devise. If it be, then, fourth, whether Ann's children by her second husband, Barrow, are entitled to a Negro child apiece by that devise.

First, as to the interest Richard and Ann Metcalf had, there is no express devise to them of the slaves or personal estate. The testator only directs that 'they shall keep and employ the Negroes upon the land, making use of all the profits of his land and clear produce of his Negroes, stock,' etc., which can be construed no more than a devise of the use and occupation. But, then, by the devise to their children after their death, they have the use for life by implication. And, surely, it cannot be pretended they had any greater estate or interest. At least for my part, I cannot perceive the least color to give them anything more.

And then, certainly, second, the remainder limited to their children after their death is good. There is only personal estate mentioned in the devise. However, it will hardly be disputed but that the slaves pass by such devise, because, at that time, they were no more than

¹ *Archer v. Mosse* (1686), 2 Vernon 8, 23 E.R. 618, also 1 Eq. Cas. Abr. 136, 405, 21 E.R. 940, 1136, Chan. Repts. *tempore* Jac. II, 246; *Nelson v. Oldfield* (1688), 2 Vernon 76, 23 E.R. 659, also 1 Eq. Cas. Abr. 136, 406, 21 E.R. 940, 1136, Lincoln's Inn MS. Misc. 498, p. 90, Chan. Repts. *tempore* Jac. II, 485.

² *Wankford v. Wankford* (1703), 1 Salkeld 299, 91 E.R. 265, also 3 Salkeld 162, 91 E.R. 753, Holt K.B. 311, 90 E.R. 1072, 11 Modern 38, 88 E.R. 869, 1 Freeman 520, 89 E.R. 390.

personal estate. The question, then, is whether the remainder of a chattel personal may be limited after the death of one or more persons. And, surely, it will not be denied that it may. It was, indeed, formerly a question, though it was allowed that the use might be given to one for life, with a remainder over, which seems to be our case. But, now, no difference is made between a devise for life and a devise of the use for life, as the testator's intention is the same in both cases. To serve that intent, the judges will construe the devise for life to be only of the use. And, then, the remainder over is good. These sorts of devises were first introduced in terms for years and settled in *Matthew Manning's Case*, 24, 8 Rep. 94b, under the name of executory devises and, afterwards, in *Lampet's Case*, 10 Rep. 47b, and are, now, extended equally to chattels merely personal, provided the limitation be appointed to arise within the compass of a life or lives in being. And it makes no difference be the lives never so many, for there must be a survivor, and so it is only the life of that survivor. And as a learned judge used to say the candles are all lighted at once. 1 Sid. 451, 1 Sal. 229.¹

The cases upon this head are very numerous. I shall only mention a few.

Wood v. Sanders, 1 Ch. Ca. 131, and cited in the *Duke of Norfolk's Case*, 3 Ch. Ca. 35, was a devise to the father for sixty years if he so long live, then, to the mother for sixty years if she so long live, then, to John and his executors if he survive his father and mother; if he died in their lifetime, having issue, then to his issue; but, if he died without issue, living the father or mother; then to Edward. John died without issue in the life of his father and mother. And it was adjudged that the remainder was good.² Here, the remainder was not to take effect until after the death of three persons and the contingency of one dying without issue in the life of another, which is stronger than our case.

Smith v. Clever, 2 Vern. 38, 59. The testator directed the residue of his estate to be put to interest and half the interest paid to his sister during her life and the other half to her daughter and, after the mother's death, the daughter to have all the interest during her life, and, if she died without issue of her body, he devised the principal over. The daughter died without issue, and the remainder over was adjudged good. So, in *Rachel's Case* cited in that *supra*; a devise was to the wife for life and, if she were with child, then, to that child and, if that child died without issue, remainder over, which remainder was adjudged good. In both these cases the limitation is after two lives and a contingency of dying without issue.³

Clargis v. Duchess of Albemarle, a devise of jewels for life, remainder over, 2 Vern. 245, and *Hyde and Parrot*, 331, same point; so *Pinbury and Elkin*, 758 and 766; a devise to the wife and, if she died without issue by the testator, £80 to remain over. And the remainder

¹ *Manning's Case* (1609), 8 Coke Rep. 94b, 77 E.R. 618; *Lampet's Case* (1612), 10 Coke Rep. 46, 77 E.R. 994, also *sub nom. Lampit v. Starkey*, 2 Brownlow & Goldesborough 172, 123 E.R. 880; *Love v. Windham* (1670), 1 Siderfin 450, 82 E.R. 1211, also 2 Chancery Reports 14, 21 E.R. 602, 1 Levinz 290, 83 E.R. 412, 2 Keble 637, 84 E.R. 401, 1 Ventris 79, 86 E.R. 55, 1 Modern 50, 86 E.R. 724, 1 Eq. Cas. Abr. 191, 21 E.R. 982; *Scatterwood v. Edge* (1697), 1 Salkeld 229, 91 E.R. 203, also 12 Modern 278, 88 E.R. 1320, 1 Eq. Cas. Abr. 189, 21 E.R. 980, 2 Eq. Cas. Abr. 337, 22 E.R. 287.

² *Wood v. Saunders* (1669), 1 Chan. Cas. 131, 22 E.R. 728, also Pollexfen 35, 86 E.R. 503; *Howard v. Duke of Norfolk* (1681), 3 Chancery Cases 1, 22 E.R. 931, also 1 Vernon 163, 23 E.R. 388, 2 Swanston 454, 36 E.R. 690, Pollexfen 223, 86 E.R. 568, 2 Chancery Reports 229, 21 E.R. 665, 2 Freeman 72, 80, 22 E.R. 1066, 1070, 79 Selden Soc. 904, 922, 999, Dodd 42, Oxford Bodleian Library MS. Rawlinson C.347.

³ *Smith v. Clever* (1687-1688) 2 Vernon 38, 59, 23 E.R. 635, 647, also Chan. Repts. *tempore Jac. II*, 326; *Richel's Case*, E. Coke, *First Institute* (1628), f. 377.

was good.¹ And the like point was adjudged in this court April 1734, between Lightfoot and Lightfoot,² where the remainder was limited upon a double contingency of dying without issue male or if there should be any failure in the male line. For further authorities, see FitzGibb. 314, Goldsmiths' Company against Hall.³

But this remainder is made good by the express provision of our Act of 1727,⁴ which is that, where any person, before the Act, had by will disposed of any slaves for life or lives and thereupon limited any remainder, such remainder shall be good, which is exactly our case.

Third, whether the devise to John Metcalf and the children that Ann Metcalf should have of a Negro child apiece, as the Negro women should bear them, be a good devise. And I conceive not. A devise may be to a person not *in esse*. But I never yet read that a thing not *in esse* could be bequeathed. (It may be by the civil law, 2 Domat 159.) It is a known rule that a bare possibility cannot be devised. So is the Case of Bishop and Fountain, 3 Lev. 427,⁵ which was a remainder limited after an estate tail. I know of nothing in our law so nearly resembling this case as that I have mentioned of possibilities. Cases in point cannot be expected, there being no slaves in England. The case of villains comes the nearest to slaves. But I find nothing concerning them as to this matter. It is certainly no more than a possibility whether a woman shall have a child. And, therefore, I think the devise of a child that shall be afterwards born is not good. Slaves are to be considered in this respect as chattels, and were really nothing more at the time of this devise. Now, I believe the devise of a calf, colt, etc. that should be born afterwards would not be good. Besides it would be very inconvenient to allow of such devises. The owner of the mother, we may suppose, would not be very careful either of the mother in her pregnancy or of the child after it was born, and, sometime, it must remain with its mother. And this might occasion the loss of many an infant, which is certainly a humane consideration. Besides, the owner of the mother must be both at the charge and trouble, which seems unreasonable where he is to have no benefit. The children, therefore, ought to follow the property of the mother. And, especially, in this case, where neither person nor thing was *in esse* at the time of the devise.

If it be said that the intention of the testator must be observed, I agree it that is where his intention is consistent with the rule of law. No intention of a testator is sufficient to entail a chattel, because it is against a rule of law. And so here, it is against a rule of law that a possibility should be devised.

But, if this devise should be allowed, then, there remains another question, fourth, whether the children of Ann Metcalf by her second husband, Barrow, be entitled to a child apiece by this devise. The words of the will are these, 'I give unto my daughter Ann's children that she shall bear hereafter one Negro child apiece, as it shall please God the women shall bear

¹ *Clarges v. Duke of Albemarle* (1691), 2 Vernon 245, 23 E.R. 758, also Nelson 174, 21 E.R. 819; 1 Eq. Cas. Abr. 66, 21 E.R. 880; *Hide v. Parrat* (1696), 2 Vernon 331, 23 E.R. 813, also 1 Peere Williams 1, 24 E.R. 269, 1 Eq. Cas. Abr 361, 21 E.R. 1103; *Pinbury v. Elkin* (1717-1719), 2 Vernon 758, 766, 23 E.R. 1095, 1099, also Precedents in Chancery 483, 24 E.R. 217, 1 Peere Williams 563, 24 E.R. 518, Chan. Repts. *tempore* Geo. I, 636.

² *Lightfoot v. Lightfoot* (1734), see above, Case No. 11, Randolph Va. 120.

³ *Attorney General, ex rel. Goldsmiths Company v. Hall* (1731), Fitz-Gibbons 314, 94 E.R. 772, also 2 Eq. Cas. Abr. 293, 22 E.R. 246.

⁴ Act of 1727, c. 11, s. 10, 4 Hening's Statutes 224.

⁵ J. Domat, *Civil Law in its Natural Order* (1722); *Bishop v. Fountaine* (1695), 3 Levinz 427, 83 E.R. 764, also 1 Eq. Cas. Abr. 175, 21 E.R. 969.

them.' If we went no further and considered the case upon this part of the clause by itself, it would be clear the children by Barrow would be entitled. But the intention of a testator must be collected from the whole will. And, therefore, when we consider the scope of this before us and, particularly, what immediately follows the devise above in the very same clause, it will be evident the testator intended only Ann's children by Metcalf. What follows is 'further it is my will that, if any of these children prove disobedient to them, that the said Richard Metcalf and Ann, his wife, do keep them until they shall submit themselves in obedience to their parents.' The whole clause runs thus [*blank*].

After reading it, there will need little comment to prove that the children here meant are the children of Richard and Ann Metcalf and no other. The latter part of the clause is not strict grammar, but the meaning is obvious enough, 'if any of said children prove disobedient to them'. Here 'them' should refer to the two persons mentioned before. But Ann only is named in the first part of the clause, which makes it more than probable that it was the mistake of the writer in not naming Richard in that first part. Upon this supposition, which I am sure has some foundation and will reconcile the clause to grammar and good sense, the point is put beyond all dispute. But, further, 'them' here must be understood of the parents of the children, for who else can children be disobedient to. Besides, it appears from the latter part of the clause, 'until they submit to their parents'. Now, who those parents are is immediately explained, 'if the said children prove disobedient to them that, the said Richard and Ann Metcalf shall keep'. Here 'them' is sufficiently explained to be Richard and Ann Metcalf. Then, this word 'said' ('said Richard and Ann') proves they should have been both named before. It is absurd to suppose the testator should direct Richard and Ann Metcalf to keep slaves devised to the children of Ann by a second husband, because Richard must be first dead before she could have such children, so that, of necessity, he must mean the children of Richard and Ann and no other. And upon consideration of the whole clause, I think nothing can be plainer. It is further evident from the whole scope of this will that the testator had in view the providing for Ann's children by Richard Metcalf only. It is more than probable he had not under consideration what afterwards happened, that Richard Metcalf would die first and Ann marry a second husband, since there is not the least notice taken of that or of the children of such second marriage through the whole will. The remainder of the personal estate is limited to the children of Richard and Ann Metcalf. And no other children are named, or, I dare say, intended, by the testator.

If it be objected that the children of the second marriage are as nearly related to the testator and it was as reasonable he should provide for them as the other, I answer, perhaps, he would have done so could he have foreseen there would have been such children. But, as I have said, he had no such thing in view or under consideration. He never thought of such a second marriage. And, as to any equity that may be pretended in construing the will in favor of the children of the second marriage, there is no equity in construing a will against the plain intent and meaning of a testator. Such a latitude in constructing wills would subvert that right men naturally have to dispose of their own. A man is not bound to give his estate in the most reasonable and equitable manner, but his will is the law as to that. The question is not what the testator ought to have done, but what he has done. So here, the question is not whether the children of the second marriage ought not in equity to have a part of their grandfather's estate but whether the grandfather has given them any by his will. And that, I conceive, clearly, he has not. He never so much as thought of them.

Upon the whole, I hope it appears that Richard and Ann Metcalf had only the use of the slaves and personal estate during life and that the remainder to their children after their deaths is good, that the devise of the Negro children not born is void, or, if it be not, that the children of Ann by her second husband, Barrow, can claim nothing by that devise.

And so, I pray a decree that the slaves and personal estate of the testator now in being may be delivered up to the plaintiff to be divided pursuant to his will.

In this case, it was agreed that the remainder to the children of Richard and Ann Metcalf was good and that the devise of the Negro children not *in esse* at the testator's death was void. And so the court decreed an account of the slaves and personal estate in order to have them divided pursuant to Stone's will. October 1736.

[Other copies of this report: Jefferson 43.]

[This report is cited in Taylor v. Yarborough, 54 Va. (13 Gratt.) 183, 189 (1856); Conway Robinson, *Practice in the Courts of Law and Equity in Va.* (1832), vol. 1, p. 527.]

44

Bernard v. Stonehouse
(April 1737)

A person may recover damages for an ejectment even after the leasehold has expired.

In [an action of] ejectment.

The term being expired, the question was whether the plaintiff might proceed for damages. The action of *ejectione firmae* is no more than an action of trespass in its nature, and was and still is the proper remedy for a termor for years who is ejected before his term ended, either by the lessor or a stranger, in which action, the plaintiff is to recover damages for the trespass and injury done him in ejecting him and his term if there be any to come. The declaration in this action proves the nature of it. It sets forth a lease made to the plaintiff, by virtue of which, he entered and that the defendant, with force and arms, ejected him to his damage. There is not a word of recovering the possession in the declaration so that, as, in all other actions of trespass, damages are the principal thing to be recovered and the term only an incident if there be any to come. Di. 117; Cro. El. 854; Palm. 337; 9 Co. 79, 80; Hale's F.N.B. 505, 506. If the plaintiff enter pending the suit, this shall not abate the action, which proves the term or possession are not the principal thing to be recovered but the damages. F.N.B., *supra*, in the notes.¹

The writ of *quare ejecit infra terminum* is not unlike this, being the proper remedy for a termor for years where his lessor ousts him and enfeoffs another. In which case, he cannot have an *ejectione firmae* against the feoffee because he did not oust him. But the law gives him this writ in which, as in the other, he shall recover his term and damages. And, in this suit, if the term expire pending the writ, the suit shall not abate. F.N.B. 457.

Thus, it is clear that, where there is a real lease and an ejectment, the expiration of the term will not hinder the suit from proceeding. Indeed, it would be absurd and unjust that it should, because an injury is done in ejecting a man, for which he ought to have recompense. And this is the remedy the law has appointed. But it seems to be agreed that, in the case of a real lease, the law is so.

The objection here is that ejectments, as now practiced, are all a fiction, a new invention to try titles, and there is no real trespass or ejectment in the case. And, therefore, the same rules and reason cannot nor ought to govern them as where there are real leases.

¹ *Jones v. Weaver* (1556), 2 Dyer 117, 73 E.R. 258; *Wright v. Wheatley* (1601), Croke Eliz. 854, 78 E.R. 1080, also Noy 37, 74 E.R. 1007; *Royston v. Egleston* (1623), Palmer 336, 81 E.R. 1111, also Croke Jac. 654, 79 E.R. 565; *Peytoe v. Chitty* (1611), 9 Coke Rep. 77, 77 E.R. 847, also Godbolt 149, 78 E.R. 91, 1 Brownlow & Goldesborough 133, 123 E.R. 712, 2 Brownlow & Goldesborough 128, 123 E.R. 854; A. Fitzherbert, *Nouvelle Natura Brevium* (1730).

I admit that most ejectments now-a-days are brought to try titles and that very often there is no real lease. But it is a mistake to say there never is, for there is sometimes a necessity where there is no one upon the land. And, no doubt, it sometimes happens that a real termor is ejected, and, then, this is still the only remedy. It is true that the lease, the entry, and the ouster in these actions that are brought to try titles have often no real existence but are mere fictions, but yet the confession of them upon record, which the defendant by rule of court is compelled to, makes them have all the operation and effect of realities. And the defendant shall never be admitted to aver against his own confession upon record that there is no real lease; whatever the truth may be, he is estopped from saying it. Indeed, the confession of the lease, entry, and ouster are of no use if the defendant may afterwards deny those facts he has confessed. This practice, then, as I conceive, has not at all altered the nature of the action of *ejectione firmæ*. But the declaration, the judgment, and other process is the same as if a real lease, entry, and ouster was, for, long before this practice was introduced, it was usual to try titles in this action of *ejectione firmæ*.

In the ancient time, the usual way of trying titles and recovering possession was by a real action. The process of which, everybody knows is very tedious and difficult. And, besides, a greater inconvenience attended, and that was the peril of being concluded by a single verdict, for, if a verdict was found against the demandant, he was forever barred to bring any other action unless of a higher nature. This it was [that] gave rise to the invention of trying titles in this action of *ejectione firmæ* where the process is speedy and easy and a verdict is no bar or conclusion of the right. But the plaintiff or defendant may bring another ejectment if he will.

In the time of Lord Dier, who was made Chief Justice 1 Eliz. and lived to the 24 [Eliz.], this was the method of practice in the King's Bench where, indeed, no real action can be brought. But, then, there was always a real lease sealed and an actual entry and ouster, as is still the case sometimes. Lord Dier observing that, by this practice, most men chose to have their titles tried in the King's Bench, which lessened the business of the Common Pleas, he first introduced this method of obliging the defendant to confess the lease, entry, and ouster, and established the practice upon the foot it is now, that, upon delivering a declaration to the tenant in possession, if he would not appear and confess the lease etc., judgment should be entered against him by default. And this method, being found easier than the old way of actually sealing leases, soon became the practice of both courts, and has continued so ever since.

No man will say that the nature of this action is at all altered or changed where a real lease is sealed, although the title do come in question. Neither can it then upon these feigned leases, since, by the confession, they have all the effect of real ones. It is common in actions of trespass for the title of lands to come in question. And they are often brought for no other end. Yet the nature of the action is still the same, and so is the ejectment.

In 9 Co. 77, *Peytoe's Case*,¹ it is adjudged that accord and satisfaction is a good plea in ejectment, and the reason given is because damages are the principal thing recovered. Those who argued against the opinion agreed that, if the term expired pending the writ, it would be a good plea because then only damages could be recovered.

And I must beg leave to add the authority of Sir Edward Coke in his *First Institute*, who expressly says that, though the term incur pending the suit, the action shall not abate. He takes a difference where part of the action determines by act in law and the like action remains for the residue and where the like action does not remain for the residue. In the last case, he says the suit shall abate but not in the other. And this he illustrates by two examples, first, of an action of waste brought against a tenant for another's life and, pending the writ, the *cestui que vie* dies, yet the action shall go on for damages, and so in ejectment, if the term incur, yet the action shall proceed for damages, because, in both cases, an action will lie for damages only. And these cases are exactly parallel, for, in the first, the action of waste, the proper and regular

¹ *Peytoe v. Chitty* (1611), *ut supra*.

judgment is to recover the place wasted and damages, but judgment cannot be for the place wasted after the death of *cestui que vie* when the interest of the tenant in the land is determined; yet it shall go on for damages. And so in ejectment, though the term be ended and we cannot recover that, yet we may proceed for damages.

I must observe that this book of Sir Edward Coke was written long after this new method of practice, as it is called, was introduced. And so were most of the cases cited. 3 Mod. 249 is a more modern authority, and Mr. Danvers, who wrote much later, has the same point in his *Abridgment*, 2 part, 757. In the case of Shaw and Weigh, Fitzgibb. 17, which happened in the first year of the present king, Lord Raymond, who delivers the opinion of the court, says that, the term being expired, the plaintiff cannot have judgment for the possession, only for the damages, which is a plain and very recent authority that the action does not abate by the incurring of the term. It has indeed been offered to account for the opinion by taking a difference where there is a verdict and where there is none, and yet, in the Case of Shaw and Weigh, there was a verdict, which there is not in this case.¹

But where is the sense or reason of this difference? The argument is that, by the expiration of the term, the foundation of the action is destroyed, the lease is expired, and it is absurd there should be a judgment when it is known the possession is the thing intended to be recovered. Is not this argument equally strong whether there be a verdict or not? If the plaintiff's right of action is really determined by the expiration of the lease, what good reason can be given why he should recover after verdict more than before?

In other cases, it is not so. But, where the right of action determines, a verdict will not help the plaintiff. Indeed, it would be absurd that it should. And, therefore, the granting that, after a verdict, the action may proceed does allow that there is a right of action in the plaintiff though the term be expired.

This difference, as it has no foundation in reason, so neither is there any authority for it. But there are authorities expressly against it. It may be fashionable, for anything I know, to despise My Lord Coke and his authority, which is express that you may proceed to recover the damages though the term be expired. Now, how can you proceed to recover damages if they be given before? This cannot be said with any propriety, and Coke was a very exact writer. 3 Mod. 249 is said to be the saying of counsel. But it is not denied on the other side, and, so, it is of some weight. Danvers, a most accurate writer and good lawyer, says the same. And lastly Lord Raymond, whose authority alone is sufficient.

The cases on the other side cited out of Salkeld are nothing to the purpose. The court refused to enlarge the term, but they did not say they could not proceed for damages. But, say they, the motion would be useless if the plaintiff might proceed for damages. That is a great mistake. Possession is certainly some advantage. In England, we know it is a very great one. The expense and delay attending lawsuits there is a sufficient reason for the plaintiff to move to enlarge the term to prevent the charge and delay of another suit which he must be at to recover the possession. The death of the lessor does not abate a suit, though it is equally well known to be his suit and not the lessee's, as well as that the term is a fiction. [There is] no reason that it should abate nor no inconvenience that it should not. If the law was so, the late acts to prevent suits abating in other cases would have taken in this.

Upon this very clear point, the Court, at first, was against me. But, upon hearing a second argument, judgment was given that the plaintiff might proceed for damages, by the

¹ *Capel v. Saltonstal* (1688) 3 Modern 248, 87 E.R. 164; Danvers, Abr., *Voucher*, p. 757; *Shaw v. Way* (1728), Fitz-Gibbons 7, 94 E.R. 628, also 1 Eq. Cas. Abr. 182, 185, 21 E.R. 975, 976, 8 Modern 253, 382, 88 E.R. 180, 272, Fortescue 58, 92 E.R. 760, 2 Strange 798, 93 E.R. 856, 1 Barnardiston K.B. 54, 94 E.R. 38, 21 E.R. 974, 976, 2 Eq. Cas. Abr. 315, 359, 22 E.R. 267, 305.

opinion of LEE, TAYLOE, RANDOLPH, CARTER, GRYMES, ROBINSON, BYRD, the Governor [GOOCH]; LIGHTFOOT, CUSTIS, DIGGES, *contra*; BLAIR *dubitante*.

45

Parsons v. Lee
(April 1737)

A sheriff is liable in debt for an escape of a prisoner out of his custody even though he later retake the prisoner.

Appeal. Parsons v. Lee, Sheriff of Stafford [County].

[An action of] debt [was brought] for an escape. The defendant pleads *nil debet*, and the jury find a special verdict that Seale, the prisoner, escaped through the insufficiency of the prison and not any neglect of the sheriff. This was in August. And, in February, the sheriff obtained an escape warrant, and retook him before the issue [was] joined. And he was in prison at the finding of the verdict. And it is found the prisoner appeared publicly at King George Court House, where he lived, two or three court days after the escape.

And whether this retaking shall excuse the escape is the question.

It is said in some books that the retaking must be before the action brought or it shall not excuse. But other books are that a retaking before issue joined shall excuse. Wi. 35. And it seems not denied. Cro. Ja. 657.¹ And this opinion seems most reasonable, for it will be hard upon the sheriff, especially in this country, where a man escapes through the insufficiency of the prison, as this case is, and against the will of the sheriff that he must be liable if an action is immediately brought, as it may be the same day, though he, afterwards, retake the prisoner upon fresh suit.

But it will be said fresh suit was not made in this case. The sheriff did not take out an escape warrant until six months after. But what is the escape warrant to the purpose? The sheriff might make a fresh suit without such a warrant, and take him in any other county by the common law. And the escape warrant, which is given here by 11 Geo. I,² is only in aid of the sheriff and the plaintiff. Therefore, it is no proof that he did not make a fresh suit because he did not sue out an escape warrant sooner. Neither is there anything in that that the prisoner appeared publicly at the court house of another county. The sheriff might be pursuing him elsewhere, and he is not to be presumed knowing of what passed in another county. As to the distance of time between the escape and retaking, there is nothing in that. He might be taken a year after the escape. Godb. 177.³

As it does not appear, then, that the sheriff did not make a fresh suit, it ought to be presumed he did, for, as escapes are so penal to sheriffs, the judges ought to make such favorable construction as the law will permit in favor of sheriffs, who are the officers and ministers of justice. And the judges will never judge one to make an escape by any strict construction. 3 Rep. 44, Boyton's Case.⁴

¹ *Lelloe's Case* (1622), Winch 35, 124 E.R. 30; *Whiting v. Reynel* (1623), Croke Jac. 657, 79 E.R. 568.

² Stat. 11 Geo. I, c. 22.

³ *Stone's Case* (1610), Godbolt 177, 78 E.R. 108.

⁴ *Burton v. Andrews* (1592), 3 Coke Rep. 43, 76 E.R. 733, also Moore K.B. 299, 72 E.R. 592.

And these are certainly very hard actions upon the sheriff. They have always been thought so in this country. And I am mistaken if sheriffs have not been excused where the escape was through the insufficiency of the prison without the sheriff's fault without any retaking. Much more here, then.

The plaintiff was not injured, having the effect of her execution, viz. the body of the debtor. [It is] most reasonable everyone should bear his own burden.

In this case, it was adjudged the retaking would not excuse the sheriff, and the county court's judgment was reversed.

[Other copies of this report: Jefferson 49.]

46

Rex v. Harrison
(April 1737)

A county court can give a person a license to erect a gate across a public road.

The defendant, was presented by the grand jury for erecting gates in the king's highway. The defendant, pleaded a licence from the county court.

to which Mr. Attorney [General Clayton] demurred. And upon argument, he insisted that all gates erected in the highway are nuisances at the common law and that the county courts here had not power to give a licence to erect a nuisance. He cited Cro. Car. 184; see also 1 Jo. 221; 1 Bul. 203; 2 Ro. A. 137; and Hawk. P.C. 199, 9, 212, 50.¹

For the defendant, it was urged there was a great difference between England and this country as to this matter. Travellers here are not so numerous nor wheel carriages very common so that the inconvenience could be but small. And, on the other hand, considering the manner of fencing here, a small piece of land would be rendered useless if gates were not allowed. It was further urged that the Act of the 4 Ann., cap. 39,² did seem to give the county courts a kind of absolute power with respect to roads.

The court was unanimously of opinion that the plea was good.

[Other copies of this report: Jefferson 50.]

¹ *James v. Hayward* (1630), Croke Car. 184, 79 E.R. 761, also W. Jones 221, 82 E.R. 117, 2 Rolle, Abr., *Nusans*, pl. C, p. 137; *Rex v. Springal* (1612), 1 Bulstrode 203, 80 E.R. 890; W. Hawkins, *Pleas of the Crown*.

² Act of 1705, c. 39, 3 Hening's Statutes 392-395.

Robinson v. Armistead
(April 1737)

In this case, the court held for the defendant either because of the plaintiff's laches in bringing the suit long after the issue arose or because the plaintiff had no title, the land in issue having passed out of his ancestor by survivorship to the defendant's ancestor.

Chancery.

The bill sets forth that John Armistead and Robert Beverley, deceased, jointly purchased 100 acres of land in the County of Gloucester, which was conveyed to them by deed January 17, 1680, for the consideration of £50, that Beverley, by his will, August 20, 1686, devised his half part to his daughter, Catherine, in tail, and, soon after, died. After which, Armistead became solely possessed of the premises, and died possessed. And after his death, John Armistead, his eldest son and heir, entered, and was possessed, and died possessed. After whose death, his son and heir, John Armistead, entered, and died possessed, leaving the defendant, John Armistead, his son and heir, an infant, that the said Catherine, at the death of Beverley, was an infant, and, before twenty-one, married John Robinson, Esq., the plaintiff's father, now living. And he died in 1726, leaving the plaintiff, her eldest son and heir, then an infant. And, since the death of Armistead, the grandson, the defendants Burwell, Armistead, and Dudley, in the right of the defendant, Armistead, an infant, have entered into the premises claiming the whole by survivorship, and refuse to make partition with the plaintiff, praying, therefore, that the defendants may answer the premises and the plaintiff be relieved according to equity.

The defendants demur, and answer, and assign two causes of demurrer: first, that the plaintiff seeking to be relieved against a right of survivorship accrued by the course of the common law to the defendants' great-grandfather so long ago as 1686, there is not sufficient matter of equity in the bill to entitle the plaintiff to such relief, especially, at this distance of time; second, that the plaintiff has no good title, for that Beverley, being jointly seised with Armistead, could not by law devise, but such devise is void, both in law and equity.

For answer, they say they are strangers to most of the matters in the bill, but believe there was such a conveyance to Beverley and Armistead, the deed being in one of their custody, have heard it was agreed between them that the longest liver should have the whole, and that Armistead, the great-grandfather, gave the plaintiff's mother a slave, which she declared she thought the full value of any right she might have to the said land and, therefore, would never sue for it or suffer her husband to do, so [they] submit whether a quiet possession of fifty years under a legal title ought to be now impeached upon the pretence in the bill.

I [*Barradall*] am now to speak to the demurrer. It is granted, by the bringing of this bill, that Armistead and Beverley, by the purchase and conveyance to them, were joint tenants. It is not pretended that one paid more of the purchase money than the other or that there was any agreement that survivorship should not take place or any other equitable circumstance to differ this from the common case of joint tenancies. The question, then, upon the first cause of demurrer is whether equity will relieve against the right of survivorship between two joint purchasers paying equally for the purchase or, in other words, whether equity shall control, and overturn the most ancient and established rules of law, for I take this *jus accrescendi* or right of survivorship between joint tenants to be of as great antiquity as anything in our law. It is not the subject of any written law now extant, but is a part of the *lex non scripta*, vulgarly called the common law.

It was introduced, as I presume, with the feudal law. And it had its origin probably from this, to prevent the dividing and multiplying of tenures. See 1 Sal. 392.¹ But this is only my own conjecture, for I confess I am not lawyer enough to know whether this *jus accrescendi* is a part of the feudal law or obtains in Lombardy and those other countries where that law is received. It is certainly unknown in the civil or Roman law in the sense we speak of. There is indeed a *jus accrescendi*, a right of accretion by that law. But, then, it is in cases of a different nature, *i.e.* of succession and legacies, where there are two heirs or legatees and one refuses or becomes incapable to take his share, the other has the whole *jure accrescendi*. 2 Domat 85.²

But however this law was first introduced or whatever was the reason or policy of its first institution, it is without doubt very ancient among us, as appears by Littleton and Sir Edward Coke's *Commentary* and from Bracton, lib. 4, 262b. And it obtains as well between joint tenants of lands as of chattels real and personal, except between joint merchants or partners. 1 Inst. 181a, 181b.³ And I take it to be clear that this survivorship takes place in equity as well as at law, except there be an agreement to the contrary or some other circumstance upon which equity may construe or presume a trust in the surviving party for the benefit of the deceased.

In the case of joint purchasers, I take this difference, where two purchase jointly and pay the consideration equally, unless there is some agreement to manifest their intention that survivorship shall not take place, it shall be taken that they agreed to run the chance and hazard of survivorship, which is equal to both. And so it may be compared to a wager. And, then, there is no more injustice or hardship with respect to natural justice that the survivor should have the whole than that the winner of a wager should insist on the money won. But, where one purchaser pays more than the other or, in the case of a lease, lays out more in repairs, there, it cannot be supposed that they agree to run the risk of survivorship because of the inequality and because, by that means, he that is at little or no expense might run away with the whole, which, being unequitable, a court of equity will relieve against survivorship by constructing a trust in the surviving party, and so preserve the respective interests of either party in proportion to the money advanced. See Ch. Ca. Abr. 290, c. 3.⁴ And this appears from the following cases; £200 was devised by a will to be laid out in lands and settled to the use of A. and the heirs of her body remainder to the children of B.; before the money was laid out, A. died without issue; the trustees, afterwards, purchased and settled the lands on the children of B. jointly in fee, according to the will; one of the children died, and [it was] adjudged the survivor should have the whole. 3 Ch. Rep. 214, *Sanders versus Ballard*, Carth. 15, same case; this case is likewise reported at 2 Vern. 46, contrary, *viz.* that the survivor should not have the whole, but the report there is very short and without any reason, whereas the other books assign the reasons of the decree, and are much fuller, and, therefore, more probable to be right.

¹ *Fisher v. Wigg* (1700), 1 Salkeld 391, 91 E.R. 339, also 1 Peere Williams 14, 24 E.R. 275, Holt K.B. 369, 90 E.R. 1104, 3 Salkeld 206, 91 E.R. 779, 1 Lord Raymond 622, 91 E.R. 1316, 1 Comyns 88, 92, 92 E.R. 974, 976, 12 Modern 296, 88 E.R. 1332, 1 Eq. Cas. Abr. 291, 21 E.R. 1053, 2 Eq. Cas. Abr. 535, 22 E.R. 451.

² J. Domat, *Civil Law in its Natural Order* (1722).

³ E. Coke, *First Institute* (1628), f. 181; *Bracton on the Laws and Customs of England* (S. E. Thorne, ed., 1977), vol. 3, p. 272.

⁴ *Lake v. Gibson* (1729), 1 Eq. Ca. Abr. 290, 21 E.R. 1052.

And, in these last, there is a difference taken in case the money had not been laid out, nothing of which appears in *Vernon*.¹

And this, I take to be a case in point. The plaintiff's husband and the defendant and their ancestors had long enjoyed a church lease in moieties, and had often renewed under an agreement to take no advantage of survivorship; upon the last renewal, there was no express agreement to bar survivorship. The plaintiff's husband, being sick, by deed assigned his moiety to his wife and also devised it to her by will. Yet it was decreed the plaintiff should not be relieved against the survivorship and that the grant and devise are both void. 2 Vern. 385, *Moyse against Gyles*.² This may appear a hard case, since there was room for equity to presume the last lease was renewed under the same agreement as the former or to make good the defective conveyance to the wife. But the grant and devise being void in law and no agreement appearing to the contrary, the common law was suffered to take its course, and equity would not relieve against it.

A lease for lives was made in trust for two; one dies; [it was] decreed the survivor shall have the whole, for the trust must go as the term at law would have done. And, as survivorship would have taken place at law, so it must in equity. Easter term 1706, *Aston et al. versus Smallman et al.*, 2 Vern. 556.³ Here, in the case of a trust, which is properly under the direction of equity, the court would not interpose or hinder the course of the common law.

These I take to be very strong cases. I shall now read another, a very recent one, where you will have the opinion of the present Master of the Rolls [Jekyll]. *Lake and Gibson*, Ch. Ca. Abr. 290, c. 3. For further authority, see 1 Vern. 33, 217, 360.⁴

These cases do, I think, very fully make out the rule I laid down and the difference I have taken, viz. that survivorship takes place in equity as well as at law, unless there be an agreement to the contrary or some other circumstance to induce a presumption of a trust. Nothing of which appears in this case, not the least equitable circumstance whatever. And I will be bold to say that, in a case of this nature, there is no instance to be given that a court of equity did relieve against survivorship. It would indeed be setting up such a power in the Chancery to control and overturn the common law as must render right and property very precarious. Instead of being determined by fixed and settled rules and principles, law and right must depend upon arbitrary decisions which are ever fluctuating and contradicting one another.

This is, I believe, a case of the first impression. And, if the plaintiff succeeds in overturning this ancient rule of law, I shall expect next to have a bill brought by the younger children against the heir to have the inheritance divided. Since I am sure, in the reason of things and according to natural justice, there is as little, I may say less, reason that the eldest son should run away with the whole estate and the younger children be left to starve than that, of two joint tenants, the survivor should take the whole.

¹ *Saunders v. Ballard* (1687-1688), 3 Chancery Reports 214, 21 E.R. 770, Carthew 15, 90 E.R. 614, *sub nom. Saunders v. Browne*, 2 Vernon 46, 23 E.R. 640, also 1 Eq. Cas. Abr. 292, 21 E.R. 1054, Chan. Repts. *tempore* Jac. II, 318.

² *Moyse v. Gyles* (1700), 2 Vernon 385, 23 E.R. 846, also Precedents in Chancery 124, 24 E.R. 60, 1 Eq. Cas. Abr. 293, 21 E.R. 1055.

³ *Aston v. Smallman* (1706), 2 Vernon 556, 23 E.R. 960.

⁴ *Lake v. Gibson* (1729), *ut supra*; *Hayes v. Kingdome* (1681), 1 Vernon 33, 23 E.R. 288, also 79 Selden Soc. 917; *Jefferys v. Small* (1684), 1 Vernon 217, 23 E.R. 424, also 1 Eq. Cas. Abr. 290, 370, 21 E.R. 1052, 1109, Chan. Repts. *tempore* North 267; *Usher v. Ayleward* (1685), 1 Vernon 360, 23 E.R. 522, also Chan. Repts. *tempore* Jac. II, 207.

I shall say nothing here of our long possession, nor enter into the dispute how far the Act of Limitation¹ may bar in this case, conceiving it to be very clear upon what has been said that equity ought not to relieve in this case.

For the same reason, I shall be very short in speaking to the second cause of demurrer, which is that the plaintiff has no good title, admitting survivorship does not take place. His title is under the will of Beverley, who being jointly seised with Armistead, could not devise, but such a devise is void, both in law and equity.

There is no rule of law more universally known than that a joint tenant cannot devise. But to demonstrate, it is to be considered that lands were not devisable at the common law, except in particular places by custom. The statutes of 32 [Hen. VIII, 8,] and 34 Hen. VIII, 5, give men a power to devise their lands.² And, by the express words of this last Act, they must be sole seised. So was the common law before the Statute. Where lands were devisable by custom, a joint tenant could not devise. Lit., s. 289; 1 Inst. 185.³ So the Statute was made in conformity to the common law. This devise is, therefore, void. And so it was adjudged in the Case of Moyse and Gyles, *supra*. The plaintiff then has no title. If anyone has, it is Beverley's heir, who, at least, should have been made a party to this suit.

Needler, for the plaintiff: Survivorship has no foundation in natural justice. The reason why it takes place at law is from an implied consent. But that is not sufficient in equity. Besides, here, the implication is destroyed by Beverley's will, which shows it was not his intention survivorship should take place.

Suppose a man should lay out his whole fortune in a purchase with another jointly and die. Would it not be a most cruel determination to send his posterity abegging and let the survivor run away with the whole? In the case of grants from the crown to two jointly, it has been often adjudged in this court that the survivor should not have the whole land. (*Quaere*.) Regularly, survivorship never takes place in equity but in a case of a gift to two jointly. In a case of a purchase, equity always construes it a trust in the survivor.

The cases cited for the defendant are chiefly of terms which are inconsiderable. Besides, precedents are of little weight in equity, where every case must stand upon its own bottom, that, if it was a trust in the survivor, the devise by Beverley was a good appointment in equity. An equitable interest is devisable, as, where one has agreed for the purchase of lands and dies before the conveyance, he may devise the lands.

He cited *Petit and Steward*, 1 Ch. Rep. 57;⁴ *Jefferys and Small*, 1 Vern. 217; and *Usher and Ayleworth*, 1 Vern. 360. But note the first is a case of money lent on a mortgage and one advanced more than the other. The second is the case of a joint stock in a farm. And even there, it is said, if a lease of the farm had been taken, the interest would survive. And the third is the case of a building lease, where one advanced more in building than the other, so that they all fall within my distinction *supra*. In this last case, relief was denied because of a purchase and length of time, *quod nota*.

April 1737, the demurrer was allowed by the opinion of the whole court.

¹ Act of 1734, c. 6, s. 9, 4 Hening's Statutes 402.

² Stat. 32 Hen. VIII, c. 1 (SR, III, 744-746); Stat. 34 & 35 Hen. VIII, c. 5 (SR, III, 901-904).

³ T. Littleton, *Tenures*, s. 289; E. Coke, *First Institute* (1628), f. 185.

⁴ *Petty v. Steward* (1631-1632), 1 Chancery Reports 57, 21 E.R. 506, also 1 Eq. Cas. Abr. 290, 21 E.R. 1052, Chan. Repts. *tempore* Coventry, 181.

Corbin v. Chew's administrators
(Part 2)
(April 1737)

In [an action of] debt on a bond.¹

Upon the special verdict, there are two questions: first, whether the defendants' paying judgments upon simple contract obtained after full notice of this action be a *devastavit*; second, whether an executor may retain a debt by simple contract against a bond creditor.

First, I [*Barradall*] agree that, if an executor pays a debt by simple contract, *i.e.* without a specialty, voluntarily without coercion of suit before a debt by bond or other specialty whereof he has notice, it is a *devastavit*. But I apprehend it is not so to satisfy a judgment obtained on such a simple contract, even though an action is brought and the executor has full notice of a debt by specialty before such judgment is had, as was the case here.

It is true the law has instituted a certain method or order to be observed by executors in the payment of debts, which is as follows: first, he is to pay debts of or upon record; second, debts by specialty; third, those without specialty. *Curs. Wentw.* 131.² But this is to be understood where an executor pays debts without coercion of suit, for, where an action is brought and judgment is had against an executor, let the debt be of what nature it will, I conceive the executor is bound to satisfy that judgment before any other debt of the testator, except debts of record.

If it be objected that, where an executor has notice of debts by specialty, he may prevent any judgment on a debt by simple contract by pleading those debts in bar, and, if he will not, it is his own folly, I answer that it is true an executor may plead such debts by specialty in bar to an action on a simple contract if he pleases, but I apprehend he is not bound to do so.

In the payment of a testator's debts, the law has left many things to the conscience and discretion of the executor, who may lawfully prefer one creditor to another as charity or other equitable motive may induce. In debts of equal dignity before an action [be] brought, it is commonly known that an executor may prefer which creditor he pleases. So, where an action is brought and, pending that, another is commenced, the executor may lawfully give way to and confess this last action, and the judgment shall be a good bar to the first, if there be no covin, as appears by *Doctor and Student* 157; *Curs. Wentw.* 144; *Mo.* 678, *Scarle's Case*; and *Cro. Eliz.* (462), *Green v. Wilcox*.³

And no difference appears by these books where the first action is for a debt by specialty and the last for a debt without a specialty. But *Keil.* 74 is more express that, when a judgment is given against executors, such a recovery is a good plea to all other actions. And so I understand the book case 9 *Edw. IV*, 12, there cited. Executors were sued, and, pending that action, a stranger recovered in another action, and [it was] adjudged a good plea. *Edgcomb v. Dee, Vaugh.* 95, is an authority in point that a judgment obtained upon a simple contract,

¹ For the first part of this case, see above, Case No. 39.

² *T. Wentworth, Office and Duty of Executors.*

³ *St. German's Doctor and Student* (T. F. T. Plucknett and J. L. Barton, edd., 1974), 91 *Selden Soc.* 200-201; *T. Wentworth, Office and Duty of Executors*; *Scarle's Case* (1602), *Moore K.B.* 678, 72 *E.R.* 834; *Green v. Wilcox* (1596), *Croke Eliz.* 462, 78 *E.R.* 700, also 1 *Brownlow & Goldesborough* 50, 123 *E.R.* 658.

pending a former action brought on an obligation, is a good bar to such action.¹ Consequently, to satisfy such a judgment can be no *devastavit*, which is the question now before us.

From all these cases, I hope it is clear that the order to be observed by executors in the payment of debts can refer only to such payments as are made without coercion of suit. But, where actions are brought, he that first gets judgment must be first satisfied. Curs. Wentw. 144. And, in this, as has been said, the executor may lawfully show favor by confessing one action and delaying the other. And it is very equitable and convenient that such a power should reside in the executor, since there is certainly no natural difference between a debt by specialty and a debt without, but there may and often is more justice and commonly more charity to satisfy a debt of the latter sort other than the former. The principal reason why the law gives the preference to the former is that the writing makes the debt more clear and certain, but, when there is a judgment for a debt without a writing, that is then become as certain. And, therefore, [there is] no reason after judgment that one should be preferred to the other.

It was an opinion of old that an action would not lie against an executor upon a simple contract. And, upon this, probably, was founded the difference the law has made between debts of that sort and debts by specialty, because it might seem unreasonable that an executor should have the liberty of paying debts to which he was not bound before debts he was bound to pay. This old rule of law, having no foundation in reason or justice, has been long since exploded or, rather, a way has been invented to elude it by turning actions of debt upon simple contract into actions upon the case upon a promise implied by law, as was settled about 150 years ago in *Slade's Case*, 4 Co. 92,² so that, executors being now liable to actions for debts of this sort, no kind of reason remains why debts by specialty should have the preference after there is a judgment, for the other courts of equity, in cases properly under their direction, make no difference at all between one sort of debt and the other.

If lands are devised to trustees to be sold for the payment of debts, creditors by simple contract shall be let in equally with creditors by specialty, and they shall be all paid in equal proportion. 2 Ch. Ca. 54; 1 Vern. 63; 2 Vern. 405.³ (But note, if the devise be to executors to pay debts, the land is legal assets, and debts must be paid according to their priority at law.) And the reason is because there is no natural difference between one sort of debt and the other, as has been already observed. And, therefore, equity will make none. I hope, therefore, as the difference is merely artificial, introduced upon reasons that now no longer subsist, especially, after a judgment, this point will be carried no further than there are clear authorities for. And I am much mistaken if any case can be shown where it is expressly and in point adjudged to be a *devastavit* in an executor to pay a judgment obtained on a debt by a simple contract before a bond debt of which he had notice, whereas I take 9 Edw. IV, 12; Keilw. 74, and Vaugh. 95, to be affirmative resolutions for me. And, consequently, they are more cogent, and will weigh more than twenty cases which prove nothing but by way of inference.

Second, whether an executor may retain a debt by simple contract against a bond creditor, it is a general rule that an executor may retain to satisfy a debt due to himself. But this, says Wentworth, in his *Office of Executor*, 141, is to be understood where the executor's debt is of

¹ *Langstone v. Dyne* (1505), Keilwey 74, 72 E.R. 235, 116 Selden Soc. 481; YB Trin. 9 Edw. IV, f. 12, pl. 4 (1469); *Edgcomb v. Dee* (1670), Vaughan 89, 124 E.R. 984.

² *Slade v. Morley* (1602), 4 Coke Rep. 91, 76 E.R. 1072, also Moore K.B. 433, 667, 72 E.R. 677, 827, Yelverton 20, 80 E.R. 15.

³ *Gell v. Adderly* (1681), 2 Chancery Cases 54, 22 E.R. 843, also 1 Eq. Cas. Abr., 21 E.R. 943, *sub nom. Gell v. Orme*, 79 Selden Soc. 883; *Girling v. Lee* (1682), 1 Vernon 63, 23 E.R. 312, 1 Eq. Cas. Abr. 141, 21 E.R. 943; *Anonymous* (1700), 2 Vernon 405, 23 E.R. 863.

equal dignity with the creditor's. And he puts a case that the testator is indebted to others by judgment, statute, or recognizance and to the executor by bond; there he cannot retain. I shall not deny Wentworth's opinion to be law in the case put. But I apprehend a great difference between that case and ours, where the creditor's debt is by bond and the executor's by simple contract. Judgments, statutes, [and] recognizances are all debts of record of which the executor is at his peril to take notice without information of the creditor. 21 Edw. IV, 21b; 2 Vern. 89.¹ (*Vide* 2 And. 159; 1 Mod. 175; and 3 Mod. 115,² and *quaere*.) And, therefore, if a judgment be had against him upon a bond and he satisfies it before he knows of these debts by record, it is a *devastavit*, and he must pay the money again out of his own pocket, so that an executor cannot under any circumstance pay a bond debt before a debt by a judgment etc. But the law is not so with respect to debts by specialty and those without, for an executor may lawfully pay these latter, even without a judgment, before he has notice of debts by specialty. 3 Lev. 113; FitzGib. 77, 78.³ And even after notice, which must always be by an action, he may give way to a judgment for a debt by a simple contract, though the action on the specialty be first commenced, as I hope has been demonstrated.

Allowing then Wentworth's opinion to be law, which, however, I do not find is supported by any authority before or since he wrote, I conceive it is nothing to the present question. Nor have I met with one judicial resolution in the point. The matter then, I presume, must be determined upon the reason of the thing and the rule of equity and natural justice. And if so, I hope clearly to demonstrate that the executor in this case ought to retain.

It is absurd to suppose that the law gives a man power to do a greater benefit to another than to himself. Yet such will be the consequence if the executor may not retain in this case, for, immediately upon the testator's death, he may pay a creditor by simple contract without an action and before a creditor by specialty can possibly bring an action. And such a payment is undoubtedly good against any debt by specialty. So, where an action is brought on a specialty and, afterwards, another is brought on a simple contract, the executor may confess this last, and it shall be a good bar to the first, as has been shown. Now, shall an executor have it in his power to do thus much for another and yet have no remedy himself in the like case? Surely, no. But, as he can neither sue himself nor pay himself, the law must give him an adequate remedy, that is by suffering him to retain. Otherwise, his executorship will put him in a worse state than another creditor, whereas the rule of the law is, *in aequali jure, melior est conditio possidentis*. Where the right is equal, possession puts a man in the better condition.

Now, it must be allowed that the right between an executor and a creditor, where both debts are by simple contract, is equal, yet the executor may satisfy the creditor, but not himself. This is surely a strange way of reasoning. It actually inverts the rule of law (just now mentioned), for the executor's possession puts him in a worse state instead of a better. He shall be without a possibility of obtaining his debt, while another creditor can easily get his, especially, with the executor's favor, which he may lawfully show. I must submit whether this be not against sense and reason. It has already been observed that there is no natural difference between debts by specialty and debts by simple contract and that courts of equity make none.

¹ YB Pas. 21 Edw. IV, f. 21, pl. 2 (1481); *Searle v. Lane* (1688-1689), 2 Vernon 37, 88, 23 E.R. 634, 667, also 2 Freeman 103, 22 E.R. 1086, 1 Eq. Cas. Abr. 332, 21 E.R. 1082, British Library MS. Hargrave 71, f. 86, pl. 4, Lincoln's Inn MS. Misc. 498, p. 93.

² *Berelock v. Rode* (1602), 2 Anderson 157, 123 E.R. 597; *Brooking v. Jennings* (1674), 1 Modern 174, 175, 86 E.R. 809, 810, also 1 Freeman 150, 89 E.R. 109; *Harman v. Harman* (1685), 3 Modern 115, 87 E.R. 74, also Comberbach 35, 90 E.R. 327, 2 Shower K.B. 492, 89 E.R. 1060.

³ *Britton v. Bathurst* (1683), 3 Levinz 113, 83 E.R. 604; *Davies v. Monkhouse* (1729), FitzGibbon 76, 94 E.R. 660.

Since, then, the law is silent as to the matter now before us, I hope the rule of equity will be no bad one to follow, especially, when the contrary determination will be attended with so much hardship upon the executor whom the law intends to favor as much as possible and will clash with a rule of law first introduced in favor of executors.

E contra were cited 1 Mod. 175; 1 Sid. 21, 230; 3 Mod. 115; Cumb. 318; FitzG. 77; and Dr. and Student 157, to the first point,¹ see also [*blank*]. To the second point were cited Went. 141; 3 Lev. 355; Lex Test. 180.²

And judgment [was given] for the plaintiff April 1737.

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Hawkins, *ex dem.* v. Thornton
(April 1737)

In this case, the devise in issue was found to create an estate tail.

[In an action of] ejectment.

Thomas Hawkins, seised in fee, by his will, February 8, 1675, devises thus:

I give all my lands equally to be divided between my two sons, Thomas and John, and their heirs lawfully begotten forever. But, in case my wife be with child of a son, then I give him an equal part of all my lands, and, if any of them should happen to die before they come of age, the land still to fall to the surviving sons or son, and, if they all die, then to my daughters etc. to be equally divided between them and the heirs of their bodies lawfully begotten forever.

There was no after-born child. Thomas, the son, died under age and without issue. John, the surviving son, entered into the whole, and sold to the defendant. The lessor of the plaintiff is heir of the body of John. The question is whether the testator's sons took an estate tail or a fee simple by the devise to them; if [it be] an estate tail, the lessor of the plaintiff is heir in tail, and has a good title.

It must be my [*Barradall*] task to endeavour to show that the testator intended an estate tail to his sons and not a fee simple. I will beg leave to premise that there is a great difference between deeds and wills in the construction and exposition of them. The same words will not have the like operation or effect in the one as in the other. In deeds, the wisdom of the law has appropriated certain peculiar words as terms of art not to be supplied by any other and without which an estate of inheritance cannot pass or be created, as the word 'heirs' is absolutely necessary to create a fee simple and 'heirs of the body' a fee tail, though these words 'of the body' may be supplied by other words *ex vi termini* importing as much. Nor will such estates pass by deeds without these words, be the grantor's intent and meaning never so plain.

¹ *Brooking v. Jennings* (1674), 1 Modern 174, 175, 86 E.R. 809, 810, also 1 Freeman 150, 89 E.R. 109; *Blundivell v. Lovedell* (1661), 1 Siderfin 21, 82 E.R. 946; *Browne v. Purchas* (1664), 1 Siderfin 230, 82 E.R. 1075, also 1 Keble 808, 83 E.R. 1255; *Harman v. Harman* (1685), 3 Modern 115, 87 E.R. 74, also Comberbach 35, 90 E.R. 327, 2 Shower K.B. 492, 89 E.R. 1060; *Anonymous* (1695), Comberbach 318, 90 E.R. 502; *Davies v. Monkhouse* (1729), Fitz-Gibbon 76, 94 E.R. 660; *St. German's Doctor and Student* (T. F. T. Plucknett and J. L. Barton, edd., 1974), 91 Selden Soc. 200-201.

² T. Wentworth, *Office and Duty of Executors*; *Shafto v. Powell* (Ex. 1693), 3 Levinz 355, 83 E.R. 727, also *sub nom. Shaftoe v. Hooke*, Dodd 134, 331, 1 Freeman 333, 22 E.R. 1237, 89 E.R. 248; W. Nelson, *Lex Testamentaria*.

But, in wills, the law is not so strict. A greater latitude is allowed, and a more liberal construction is made of them. The intention of the testator is the rule and law to govern the exposition of them, which intention is to be collected from the whole will. And, therefore, where that is apparent, any estate may pass without those terms of art or any peculiar form of words. The reason of this difference is that a man may have advice and assistance in the drawing of deeds, and it is his own folly if he has not. But wills are supposed to be and, indeed, often are made *in extremis* in a man's last moments when he is destitute of assistance, *inops consilii*. And, therefore, there is reason some indulgence should be shown and construction made according to the intention without regard to strict and legal forms. Instances of this sort are frequent in the books.

A devise to a man 'forever' or to one and his assigns carry a fee simple, though, in a deed, they would give no more than an estate for life for want of the word 'heirs'. But, because the intention is plain from the words 'forever' and 'assigns' that the testator intended more than an estate for life and that the devisee should have an absolute right, that intention supplies the want of formal words; so, a devise to a man and his heirs male or to one and his issue or to one and his heirs and, if he die without issue, remainder over, all these make estates tail in a will, though the like words in a deed would carry a fee simple. In the last instance, it is observable that, though a fee simple would pass by the first part of the devise by the word 'heirs', yet the testator's intention being collected from the latter part, *viz.* if he die without issue, that the heirs intended are heirs of the body. The law, which makes a construction upon the whole will, adjudges it an estate tail. And so, in the devise now before us, the same words in a deed would carry a fee simple. But, here, in this will, I conceive they make an estate tail by the plain intention of the testator, which may be collected both from the words he makes use of in this devise to his sons and from other circumstances appearing on the face of the will, as I shall observe presently, first, from the words of the devise, which are 'to my sons and their heirs lawfully begotten forever'. These words 'lawfully begotten' are quite superfluous and unnecessary to create a fee simple. It is reasonable to suppose the testator intended something by them. And what could he intend but that the heirs should be begotten by his sons. I will appeal to all the world, if a man unskilled in the law, when he speaks of his heirs lawfully begotten, does not mean the heirs begotten of his body. And it is a rule that words in a will are to be taken in the sense they are used in common speech. Had the devise been to the sons and their heirs lawfully begotten by them, it had been clearly an estate tail, for the heirs begotten by them must be of their body. Here, indeed, we want these words of art 'by them' and 'of their bodies'. But I must submit whether the intention be not plain to pass an estate tail, and, then, these words may be supplied. ('Lawfully begotten' are words naturally belonging to estates tail. Talbot 24.¹)

Another rule of law in the construction of wills is that they shall be so construed as to make all the words have some effect or operation if it may be. But these words 'lawfully begotten' can have none at all in this case if the devise to the sons is construed to be a fee simple. I have already observed that a devise to a man and his heirs male make an estate tail, 1 Inst. 27a,² not from the force or operation of the words in law, for, in a deed, such words would carry a fee simple, but from the intention of the testator, who is supposed to mean something by the word 'male'. And, so, I say, here, the testator meant something by the words 'lawfully begotten'. And I cannot conceive what he could mean unless it was that the heirs should be begotten of his sons' bodies.

But the testator's intention to give an estate tail to his sons may be further collected from the limitation over in case his sons died under age. If the sons take a fee simple subject to the contingency of living until twenty-one, as I suppose will be contended for on the other side,

¹ *Clare v. Clare* (1734), Cases *tempore* Talbot 21, 25 E.R. 638.

² E. Coke, *First Institute* (1628), f. 27.

then, the limitations over, which are first to the survivor in case either son die under age and, then, to the daughters if they both die, must be vain and fruitless, because the surviving brother would be heir to the other and so would the sisters to the surviving brother and take the land without this limitation, for none of them could alien before they came of age. But the land must of necessity descend to the next heir. Now, a will shall never be so construed as to make any devise vain and fruitless if another construction can be made that will make every devise have some effect. And the reason is because it cannot be supposed that a man intends to make a void devise. And, therefore, rather than that shall be, sentences shall be transposed and words made to have a meaning they are not naturally capable of, for instance and to the purpose now before us, the word 'heirs' without anything more shall be construed heirs of the body where a limitation over will be void without such construction, as was adjudged in *Webb and Herring*, 3 Bul. 192, 1 Ro. Abr. 836.¹ A devise to his son, Francis, after the death of his wife and, if his three daughters overlive their mother and Francis and his heirs, then to them for life with a remainder over, the question was what estate Francis had, and [it was] adjudged an estate tail, for the word 'heirs' must be intended heirs of the body. Otherwise, the limitation over to the daughters would be void, they being heirs to their brother, and would have taken the land without the limitation if the testator had intended a fee simple. And, so, I say here the surviving brother would be heir to his brother and take the land without the limitation in this will if the testator had intended a fee simple. And so, in like manner, would the daughters from the surviving son. And, therefore, he must intend an estate tail, or the limitation over is vain and fruitless.

So 3 Mod. 123, *Blaxton and Stone*; a man, having two sons, devises to his eldest and, if he dies without heirs male, then to the other son; [it was] adjudged an estate tail in the eldest though there wants the word 'body', for the intent may be collected that the testator intended an estate tail, because, without the devise over, it would have gone to the second son if the eldest had died without issue. 1 Sal. 233, *Nottingham v. Jennings*; A., having three sons, devises to his second son and his heirs forever and, for want of such heirs, then, to his own right heirs; [it was] adjudged an estate tail, for 'heirs' here can import nothing more than issue, because the son could not die without heirs, living heirs of the father. See also *Talbot* 1.² All which cases prove that the word 'heirs' in a will are often construed heirs of the body, but, especially, where there is a limitation over that must be vain and idle without such a construction.

Third, the nature of the estate given to the testator's daughters in this will is a further proof of his intention in the devise to his sons. He gives them an estate tail in express words 'to them and the heirs of their bodies'. And it is very reasonable to suppose he intends the like estate to all his children, especially, if we consider that men are generally more fond of entailing lands in the male than female line. The difference of the expression in the two devises I take to have proceeded from the ignorance of the writer, who I believe was no lawyer and, possibly, imagined that 'heirs lawfully begotten' and 'heirs of the body' had the same import and meaning. And so, indeed, they have in common speech in the understanding of men unskilled in the law, as I have had occasion already to observe. And so this difference of expression can make none in the intent, which, upon the whole will, I hope is pretty clear to give an estate tail to all his children.

¹ *Webb v. Herring* (1617), 3 Bulstrode 192, 81 E.R. 162, 1 Rolle, Abr., *Estate*, pl. P, 5, p. 836, also 1 Rolle Rep. 398, 436, 81 E.R. 563, 590, *Croke Jac.* 415, 79 E.R. 355, *J. Bridgman* 84, 123 E.R. 1217, 1 Eq. Cas. Abr. 180, 21 E.R. 972.

² *Blaxton v. Stone* (1687), 3 Modern 123, 87 E.R. 79, also *Skinner* 269, 90 E.R. 122; *Nottingham v. Jennings* (1700), 1 Salkeld 233, 91 E.R. 207, also 1 Lord Raymond 568, 91 E.R. 1279, 1 Comyns 82, 92 E.R. 970, 1 Peere Williams 23, 24 E.R. 279, 2 Eq. Cas. Abr. 308, 22 E.R. 260; *Tyte v. Willis* (1733), *Cases tempore Talbot* 1, 25 E.R. 626.

The case most resembling this is *Church and Wyat*, Mo. 637;¹ one, by will, devises part of his land to the child his wife went with and to his or her heirs lawfully begotten, and the residue, he devised to a daughter that was born to have to her and the fruit of her body and, if she died without fruit of her body, that it should remain to the child *in ventre sa mere* and, if both died without fruit, then to J.S. And he willed that one should be heir to the other. The question was what estate the afterborn child had. And [it was] adjudged that the word 'heirs lawfully begotten' in the premises and that 'one should be heir to the other' in the end of the devise made an estate tail without the word 'body'. And this, I take to be exactly our case. The devise is to the sons and their heirs lawfully begotten and, if either die under age, the land still [is] to fall to the survivor and, if both die, then 'to the daughters', which words, I presume, will be agreed to be of the same import and meaning as if he had said that one should be heir to the other, for so in effect they are to be.

But it will be objected, if this is adjudged an estate tail, then, if the sons had issue and died before twenty-one, the issue must be disinherited, which the testator could never intend.

In answer to this, I say that, where the words of a will are doubtful and will admit of two interpretations, that construction ought to be made which is most agreeable to reason and justice. But, where the words of a will are clear and express, I apprehend no such latitude is allowed, but the construction must be according to the words of the will, though it may be attended with a seeming hardship or inconvenience. In this case, the words of the will are express that, if either son die under age, the land shall go to the survivor. And, therefore, though it may seem hard that the issue of the son dying should be disinherited, if he had any, and died before twenty-one, it is the express will of the testator, and must be submitted to.

But with respect to the argument now before us, there is really nothing at all in this objection, for it is equally strong whether the sons take a fee simple or a fee tail, since, in either case, the issue would be disinherited if the devisee died before twenty-one, for the limitation over is not upon dying without issue or under age, but, generally, upon dying under age.

And so this case is nothing like *Burgis and Hack*,² which was argued in this court last April. That case was a devise to a son and daughter, their heirs, and assigns. And, in case of the mortality of either before twenty-one or the marriage of his daughter or without issue, then, the whole to the survivor. This, indeed, was adjudged a fee simple subject to the contingency of living until twenty-one or having issue. And, principally, I believe, for this reason, that, if it had been adjudged an estate tail, then, in case the devisee had died before twenty-one, though he left issue, that issue would be disinherited, which it was said the testator could not intend. However, the court were not unanimous in that judgment, and there is an appeal not yet determined.

The difference between that case and this has been already observed. There, the limitation over was upon dying under age or without issue; here, [it is] upon dying under age only. In that case, it was argued to be an estate tail by implication only and that by force of the words 'dying without issue', for the first words were strong to carry a fee simple 'to them, their heirs, and assigns'. Here, we say an estate tail passes by force of the words in the devise itself, *viz.* 'heirs lawfully begotten', so that the resolution in that case will not at all influence the determination of this. Upon the whole, I hope it is evident, both from the words of the devise and other circumstances in this will, which have been observed, that the testator's intention was to keep his estate in his name and family and that it should not be in the power of his sons to disinherit their issue. And so I pray judgment for the plaintiff.

For the defendant, it was said the word 'body' or something tantamount was necessary to make an estate tail, Co. Lit., sect. 31; 7 Co. 42, that the Statute *De Donis* required that

¹ *Church v. Wyat* (1595), Moore K.B. 637, 72 E.R. 808.

² *Burges v. Hack* (1736), see above, Case No. 32.

voluntas donatoris should be *manifeste expressa*.¹ And, here, the testator's intention to give an estate tail was far from being plain or manifest, that the words 'lawfully begotten' were of no signification nor operation in law, for every heir must be lawfully begotten. The Case of Church and Wiat, Mo. 637, proves that those words alone would not make an estate tail without the assistance of the latter clause, 'that one should be heir to the other'. And there was a further reason for that judgment, *viz.* the remainder over if both died without fruit etc., which is afterwards mentioned by the reporter to make an estate tail, though [it is] not said to be a reason for the judgment, so that, upon the matter, that case was an authority against the plaintiff. There is no case in the books where the words 'lawfully begotten' are adjudged to make an estate tail. *Vide* Prec. Chanc. 131, 132.²

That the cases cited for the plaintiff to prove the word 'heirs' in a will is often construed heirs of the body are nothing to this case, for, in all of them, there is a remainder over on dying without heir or without issue. But, here, the limitation over was upon dying before twenty-one, which is very different. The testator intended no more than to limit the estate over in case of that contingency. And, if the first words did not make an estate tail, as they certainly did not, the limitation over signified nothing at all, but the sons took a fee simple, subject to the contingency of living until twenty-one. That the limitation of an estate tail to the daughters was so far from being an argument that the same estate was intended to the sons, that it was a strong argument to the contrary, for it is reasonable to presume the testator knew the different import and meaning of the words 'heirs of the body lawfully begotten' and 'heirs lawfully begotten', especially as he uses the words 'lawfully begotten' in both places. And the difference of the expression, if it proves anything, proves a difference in the intent. And there may be a good reason why he should rather entail his lands on his daughters than his sons, *viz.* that it should not be in the power of a husband to prevail on them to disinherit their issue.

The argument drawn from the limitation over being to the person who would have been heir to the first devisee is fallacious as well as from the purpose, for, in the event there were but two sons, if the wife had been *enceinte* of another, he would have taken with the survivor of the other two, and, so, the disposition is different from what the law would make and the remainder over [is] not useless.

It was insisted that heirs were to be favored, especially, in doubtful cases, and the following books were cited, Poll. 426, Meynell and Read, that words uncertain, as 'lawfully begotten' were, ought to be rejected; 6 Co. 16, Wild's Case; Cro. Eliz. 472; and the Case of Burgis and Hack was also relied on.³

April 1737. Judgment [was given] for the plaintiff that it was an estate tail by the opinion of LEE, LIGHTFOOT, TAYLOE, RANDOLPH, CUSTIS, GRYMES, CARTER, and DIGGES; ROBINSON, BYRD, BLAIR, and the Governor [GOOCH] *contra*. Query.

N.B. the arguments that seemed to prevail most were the vulgar acceptance of the words 'lawfully begotten' and the limitation over being to the next heir. *Vide* 2 Lev. 162, Tilly and Collier.⁴

Vide post 190.

¹ E. Coke, *First Institute* (1628), f. 27; *Beresford v. Beresford* (1607), 7 Coke Rep. 41, 77 E.R. 471; Stat. 13 Edw. I (Westminster II), c. 1 (SR, I, 71-72).

² *Barret v. Wells* (1700), Precedents in Chancery 131, 24 E.R. 63.

³ *Maynell v. Read* (1677), Pollexfen 425, 86 E.R. 599, also 79 Selden Soc. 521, 740, 903; *Wild's Case* (1599), 6 Coke Rep. 16, 77 E.R. 277, also 1 Eq. Cas. Abr. 181, 21 E.R. 973, Gouldsbrough 139, 75 E.R. 1050, *sub nom. Richardson v. Yardley*, Moore K.B. 397, 72 E.R. 652; *Burges v. Hack* (1736), see above, Case No. 32.

⁴ *Tilly v. Collier* (1676), 2 Levinz 162, 83 E.R. 499, also 3 Keble 589, 84 E.R. 895.

[This report is cited in *Hawkins v. Baughan* (1737), see below, Case No. 55.]

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Slaughter v. Whitlock
(April 1737)

There can be no remainder over after a gift of a chattel.

Martin Slaughter, by his will of August 23, 1732, devises four Negroes to his son, George, the plaintiff, and the lawful issue of his body forever and four Negroes to his daughter, Judith, and the lawful issue of her body forever, but, 'if either my son or daughter shall die without such issue, the survivor to have an enjoy the said slaves and their increase'. Judith was possessed of the slaves devised to her, married the defendant, and died without issue. The question is whether the limitation over to the survivor, who is George, the plaintiff, be good.

I [*Barradall*] shall agree that slaves here are to be considered merely as chattels. It was a great while before limitations over of chattels were allowed, for the rule of law was that the gift of a personal chattel for an hour is a gift forever. However, the use of a chattel might be limited to one and the remainder to another, and this was always allowed. But, about the beginning of King James I, the law began to be altered. And, in devises of terms for years, which are chattels real, the judges would allow of a remainder over after a devise for life. This was first settled in *Matthew Manning's Case*, 8 Rep. 94b, and, afterwards, in *Lampet's Case*, 10 Rep. 47b, and was introduced under the name of executory devises.¹ It was longer before the judges would admit of such a remainder of chattels personal. But, after the Restoration [1660], when personal chattels began to grow large, such limitations of chattels merely personal began to be allowed upon a distinction that at once preserved the old rule of law sacred and inviolate and, at the same time, satisfied the intention of the testator, for, in case of a devise for life, with remainder over to another, the judges construed the first devise to be only of the use, and, then, the remainder over stood well with the rule of law I first mentioned, so that, now, it is no longer a question but that such a limitation may be both of chattels real and personal, provided the contingency upon which these limitations are to take place be appointed to arise within a reasonable number of years or within the compass of a life or lives in being. And this is as far as the law will admit of such limitations over of chattels.

I shall proceed now to consider whether the devise before us will come within this rule. The devise is, in short, to two and the issue of their bodies and, if either die without issue, remainder to the survivor. It will be said, I presume, that here are words to make an estate tail, that a chattel cannot be entailed, and so the absolute property vested in the first devisee and the remainder over is repugnant and void. I shall agree that, if the subject of this devise was a real estate, these words would carry an estate tail, for the word 'issue' in a will is of the same import as 'heirs of the body'. But I conceive there is a great difference where the subject of the devise is a real estate and where it is a personal estate, for, in the last case, the word 'issue' has not the same construction as in the first. A devise of land to one for life and, if he die without issue, remainder over, gives an estate tail by implication and construction of the testator's intention that the remainder over should not take place until the first devisee was dead without issue. But, in such a devise of a chattel, I conceive the first devisee has only the use and the estate shall not be enlarged by implication, it being contrary to the nature of the thing given to be entailed. And, therefore, the same construction is not made as in the other case, but

¹ *Manning's Case* (1609), 8 Coke Rep. 94b, 77 E.R. 618; *Lampet's Case* (1612), 10 Coke Rep. 46, 77 E.R. 994, also *sub nom. Lampit v. Starkey*, 2 Brownlow & Goldesborough 172, 123 E.R. 880.

dying without issue is taken to be a contingency, which, being restrained to the time of the devisee's death, falls within the common rule of a limitation upon a contingency to happen within the compass of a life. 'Issue', *ex vi termini*, does not import heirs of the body.

The limitation in this case is, if either die without issue, then, to the survivor. Here, if the dying without issue is taken generally, whenever there shall be a failure of issue, the limitation over cannot be good, because that will tend to a perpetuity, which the law abhors. And it is the true reason why limitations over of personal things are restrained. But I conceive the testator meant no more than this, that, if there was no issue living at the death of the son or daughter first dying, that, then, the slaves should go to the survivor. The words of a will are to be taken as they are understood in common speech. Now, among the vulgar, a man is said to be dead without issue if he leaves no children at his death; 'issue' and 'children' are words synonymous in common parlance.

Smith and Clever, 2 Vern. 38, 59; the interest of a sum of money was devised to one for life and, if he died without issue, the principal to go over, and the remainder [was] held good, for, to serve the intention of the party and support the remainder, the dying without issue was applied to the time of the death of the first devisee.¹

Pinbury and Elkin, 2 Vern. 758, 766, Prec. Cha. 484. A devise to his wife, provided, if she died without issue, then, £80 to remain to his brother after her decease, and the remainder was held good, for the dying without issue must be understood leaving issue at her death. And it cannot be supposed the testator intended his brother should have it if issue failed 100 years after.²

Target and Grant, Ch. Ca. Abr. 193, and cited [at] Fitzg. 317. A term was devised to one during his infancy and, if he attained his age of twenty-one years, then, to him for life and to such of his children as he should leave it to, and, if he should die without issue, then, he limits it over, which was held good, for the dying without issue was restrained to the time of the death of the first devisee.³

Forth and Chapman, cited [at] Fitzg. 317, and Rep. 1 Will. 663; a devise of a real and personal estate to A. for so much of it and, for the rest, to B. and, if either depart this life leaving no issue, then, to such a one, which limitation as to the personal estate was held good, leaving no issue, importing a dying without issue at his death. See Hughes and Sayer; Maddox and Stains; cited Fitzg. 318.⁴

¹ *Smith v. Clever* (1687-1688), 2 Vernon 38, 59, 23 E.R. 635, 647, also 2 Chancery Reports 410, 21 E.R. 702, 1 Eq. Cas. Abr. 362, 21 E.R. 1104, Chan. Repts. *tempore* Jac. II, 326.

² *Pinbury v. Elkin* (1717-1719), 2 Vernon 758, 766, 23 E.R. 1095, 1099, Precedents in Chancery 483, 24 E.R. 217, also 1 Peere Williams 563, 24 E.R. 518, Chan. Repts. *tempore* Geo. I, 636.

³ *Target v. Gaunt* (1718), 1 Eq. Cas. Abr. 193, 21 E.R. 983, Fitz-Gibbon 317, 94 E.R. 773, also 1 Peere Williams 432, 24 E.R. 459, 10 Modern 402, 88 E.R. 782, Gilbert Rep. 149, 25 E.R. 104, 2 Eq. Cas. Abr. 343, 22 E.R. 292, Chan. Repts. *tempore* Geo. I, 353.

⁴ *Forth v. Chapman* (1719-1720), Fitz-Gibbon 317, 94 E.R. 773, 1 Peere Williams 663, 24 E.R. 559, also 2 Eq. Cas. Abr. 292, 359, 22 E.R. 245, 306, Chan. Repts. *tempore* Geo. I, 660; *Hughes v. Sayer* (1718), 1 Peere Williams 534, 24 E.R. 504, also 2 Eq. Cas. Abr. 291, 22 E.R. 244, Chan. Repts. *tempore* Geo. I, 442; *Maddox v. Staines* (1727), 2 Peere Williams 421, 24 E.R. 796, also 2 Eq. Cas. Abr. 341, 22 E.R. 291; *Attorney General, ex rel. Goldsmiths Company v. Hall* (1731), Fitz-Gibbons 314, 94 E.R. 772, also W. Keylinge 13, 25 E.R. 470, 2 Eq. Cas. Abr. 293, 348, 22 E.R. 246, 297.

All which cases prove that dying without issue have a different import and construction as the subject is a real or a personal estate, for, in all the cases above cited, they would have been taken as an increase of interest and made an estate tail if the devise had been of a real estate. But, being of a personal estate, they are construed to be words of contingency only.

Upon the reason and authority of these cases, I presume the determination of this court was grounded in the Case of Lightfoot and Lightfoot, heard in this Court April 1734,¹ which was thus. The testator devised as follows, 'I give all the remainder of my estate, real and personal, to my son, Francis, and his heirs male of his body, and, if he die without such issue male or if there be any failure hereafter in the male line, then, I give the same to my brother'. And [it was] adjudged that the remainder over of the personal estate was good, though limited upon a double contingency and though the words undoubtedly gave an estate tail to the son in the lands. And this I think a much stronger case than ours.

But there is still something further in this devise that plainly shows the testator did not intend the remainder over should take place upon a dying without issue generally, but the words do obviously restrain the contingency to the compass of a life and that, by limiting the remainder to the survivor 'in case either die without issue, then, to the survivor,' which words, I conceive, do clearly demonstrate that the dying without issue must be in the lifetime of the other or else the survivor could not take. *Vide* Prec. Cha. 528, *Nichols v. Skinner*.² This, I apprehend, puts it beyond all dispute that the testator did not intend the remainder should take place upon a dying without issue generally. Now whether it be construed leaving issue at the death of the devisee or dying without issue in the lifetime of the survivor, in either case, the contingency is to happen within the compass of a life, and so [it is] within the general rule of such limitations.

If the last construction prevails, then it is like the Duke of Norfolk's Case, 3 Ch. Ca. 1,³ only stronger, that being upon a deed and this upon a will, that case was in short, thus. A term for years was created by one deed and, by another, the trust thereof declared to the second son and the heirs male of his body, provided, if the eldest son died without issue, living the second, so that the earldom of A. descended to the second son, then, the term to remain to the third son and the heirs male of his body, with remainders over. And this remainder to the third son upon the contingency of the eldest dying without issue in the lifetime of the second was held good.

So *Lamb and Archer*, 1 Sal. 225. A devise of a term to A. and the heirs of his body and, if he die without issue, living B., then to B., this limitation was held good, being upon a contingency to happen within the compass of a life. *Vide* 2 Vern. 86, 151; Ch. Ca. Abr. 193, 10.⁴

¹ *Lightfoot v. Lightfoot* (1734), Randolph Va. 120; see above, Case No. 11.

² *Nichols v. Skinner*, Precedents in Chancery 528, 24 E.R. 236, also 2 Eq. Cas. Abr. 364, 22 E.R. 310.

³ *Howard v. Duke of Norfolk* (1681), 3 Chancery Cases 1, 22 E.R. 931, also 1 Vernon 163, 23 E.R. 388, 2 Swanston 454, 36 E.R. 690, Pollexfen 223, 86 E.R. 568, 2 Chancery Reports 229, 21 E.R. 665, 2 Freeman 72, 80, 22 E.R. 1066, 1070, 79 Selden Soc. 904, 922, 999, Dodd 42, Oxford Bodleian Library MS. Rawlinson C.347.

⁴ *Lamb v. Archer* (1693), 1 Salkeld 225, 91 E.R. 200, also 12 Modern 44, 88 E.R. 1154, Skinner 340, 90 E.R. 151, Comberbach 208, 90 E.R. 432, Carthew 266, 90 E.R. 758, Holt K.B. 227, 90 E.R. 1024, 1 Eq. Cas. Abr. 192, 21 E.R. 982; *Pawlet v. Dogget* (1688), 2 Vernon 86, 23 E.R. 665, also Chan. Repts. *tempore* Jac. II, 497; *Martin v. Long*, 2 Vernon 151, 23 E.R. 704, also Precedents in Chancery 15, 24 E.R. 8, 1 Eq. Ca. Abr. 192, 21 E.R. 983; *Fletcher's Case* (1709), 1 Eq. Cas. Abr. 193, 21 E.R. 983.

So that, here, whether dying without issue be construed leaving issue at his death or whether it be construed dying without issue in the lifetime of the survivor, the remainder over is good either way. And both the contingencies have happened. And one of these constructions ought to be made, though the words of the will were not so plain as I conceive they are, and that to support the remainder over, which otherwise must be void. It ought never to be supposed that a man intends a vain void devise if any other construction can be made. And the rule of law is to construe a will so as to make all the parts of it stand if it may be, which, in this case, can only be by the construction I contend for. And this will offer no violence to the words, but rather preserve the plain intention of the testator by supporting the whole will, for, I must submit, whether it be not more reasonable to suppose that the testator intended the remainder should take place in case the devisee left no issue at his death, living the survivor, than upon so remote a contingency as a failure of issue 100 or 500 years after, I conceive the word 'survivor' plainly restrains it to the first.

There is a case in FitzG. 314, *The Goldsmiths Company against Hall*, that I suppose will be much relied on. But, when it comes to be considered, it will appear to differ much from this. The devise was thus:

I give and bequeath all my real and personal estate unto my son Francis Hall and to the heirs of his body to his and their use. And, if my said son shall die, leaving no heirs of his body living, then, I give and bequeath so much of my said real and personal estate as my said son shall be possessed of at his death to the Goldsmiths' Company.

In this case, it was the opinion of My Lord Chancellor that the absolute property of the personal estate passed to the son and that the limitation over was void. But the principal reason was this, because the Company was to have no more than the son should have left unspent. And so, he had a power to dispose of the whole, and, consequently, the absolute ownership passed. There is another reason, indeed, given, which is that words which give an estate tail in the land must transfer the entire property of the personal estate. But that can weigh nothing in the present case where the devise is merely of chattels. And I have before observed the difference there is where the subject of the devise is of a real estate and where it is of an estate personal.

In the case of *Lamb and Archer, supra*, the devise was to A. and the heirs of his body, which would be clearly an estate tail in the case of lands. And yet, there, the limitation over was adjudged good. So, in the *Duke of Norfolk's Case*, the term was limited to the second son and the heirs male of his body, and yet the remainder over was held good. Which cases prove the difference where the subject is a real estate and where a personal estate. Here, we are in the case of a personal estate. It is repugnant to the nature of it to be entailed, and, therefore, it ought not to be supposed that the testator intended so if another construction can be made.

Adril [?], for the defendant: If we were in a case of lands, the first part of the devise would create an estate tail without all question, and it would need no assistance from the subsequent clause to make it so by implication. And it is a rule that words in a will creating an estate tail in lands carry the absolute property in personal things. In all the cases cited *contra*, the first devise was only for life, which, to support the testator's intention, was construed to pass only the use and that the express gift should not be construed to be enlarged by any subsequent words, as dying without issue or the like, as it would in a case of a devise of lands. But, where the absolute property is once given, as in this case, the same thing cannot be given over. He cited 1 Ch. Ca. 129; 1 Vern. 35, 326; 2 Vern. 255, 347; 1 Sal. 156; FitzG. 314, which was much relied on.¹

¹ *Vachel v. Vachel* (1669), 1 Chancery Cases 129, 22 E.R. 727; *Danvers v. Earl of Clarendon* (1681), 1 Vernon 35, 23 E.R. 290, also 1 Eq. Cas. Abr. 202, 21 E.R. 990; *Whitmore v. Weld* (1685-1686), 1 Vernon 326, 23 E.R. 499, also Lincoln's Inn MS. Misc.

April 1737, judgment [was given] for the defendant by the whole court, except LEE and the Governor [GOOCH].

And I think very rightly. But *vide* 1 Will. 534, Hughes v. Sayer; a devise of personal estate to A. and B., and, upon either of their dying without children, then to the survivor, was held a good limitation over. See also Pinbury and Elkin, 2 Vern. 758, Prec. Cha. 484. And a difference was taken in this last between a devise of a chattel to one and the heirs of his body with a remainder over and a devise to one generally and, if he die without issue, remainder over.¹

[This report is cited in Giles v. Mallicote (1738), Case No. 57; Nance v. Roy (1739), Case No. 71.]

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Brooking v. Dudley
(April 1737)

The payment of a judgment to an infant party's prochein ami binds the infant.

Brooking v. Dudley, Dixon v. Brooking, and Collier v. Brooking, in three actions of detinue for slaves, upon a special verdict, the case is [thus]. Judith Whale, being possessed of several slaves, intermarried with Ralph Emery, and died in 1724. The plaintiff Brooking, being her heir at law, after her death, brought an action of detinue in this court against Emery for the slaves. And, being an infant, one William Brooking is named his next friend or *prochein ami* in the said suit. In this action, the plaintiff had judgment to recover the slaves or £120, the value in April 1727. And, upon the trial, the court gave their opinion, which is entered upon record, that the slaves did not vest in Emery by the marriage. At the end of this judgment, there is an odd sort of rule entered to this effect, that, in case the value found by the jury exceeded the appraisement of these slaves (in the King and Queen County Court), that the plaintiff would release so much as the same exceeded and, if the appraisement was more, the plaintiff was to have execution for so much more. Soon after this judgment, in May 1727, Emery sold one of the slaves to the defendant Dudley and two others to Dixon and Collier, the plaintiffs, in the other actions, which are the slaves in dispute, for as much money as the slaves were appraised to, and paid the money to William Brooking, the *prochein ami*. But they knew of the judgment when they purchased. The plaintiff Brooking was then about twelve years old, and had no guardian until after he was fourteen, when he chose William Lawson.

The question in this case is whether the sale by Emery after the judgment and the paying of the money to the *prochein ami* shall conclude the plaintiff, who was then under age, or be any bar to his right. But, first, it may be necessary to show the origin of the plaintiff's title to

498, p. 17, British Library MS. Add. 35978, f. 48, 1 Vernon 347, 23 E.R. 513, 2 Chancery Cases 167, 22 E.R. 897, 2 Chancery Reports 383, 21 E.R. 694, 2 Ventris 367, 86 E.R. 490; *Jesson v. Jesson* (1691), 2 Vernon 255, 23 E.R. 766; *Thomas v. Kemeys* (1696), 2 Vernon 348, 23 E.R. 821, 2 Freeman 207, 22 E.R. 1163, Colles 112, 1 E.R. 206, 1 Eq. Cas. Abr. 269, 21 E.R. 1037; *Higgins v. Derby* (1707), 1 Salkeld 156, 91 E.R. 145, Chancery Repts. *tempore* Anne 110, also *sub nom.* *Higgins v. Dowler*, 2 Vernon 600, 23 E.R. 992, 1 Peere Williams 98, 24 E.R. 311; *Attorney General, ex rel. Goldsmiths Company v. Hall* (1731), *ut supra*.

¹ *Hughes v. Sayer* (1718), *ut supra*; *Pinbury v. Elkin* (1717-1719), 2 Vernon 758, 766, 23 E.R. 1095, 1099, Precedents in Chancery 483, 24 E.R. 217, also 1 Peere Williams 563, 24 E.R. 518, Chan. Repts. *tempore* Geo. I, 636.

these slaves and, then, to consider how far the act of a *prochein ami* shall bind an infant, upon which the solution of the question in this case does properly depend.

As to the plaintiff's title, if the question was now whether the slaves vested in Emery by the marriage, I [Barradall] presume it would be determined that they did upon the Explanatory Act of 1727,¹ which is express in the point. But there having been a judgment in the case, that Act has very judiciously provided that the property shall be established according to the judgment, and it is not now to be questioned. It is clear, then, that the plaintiff has a good title, unless, by some act since that judgment, his title is defeated.

To proceed, then, in the enquiry how far the act of a *prochein ami* shall bind an infant, it may be necessary to see what the office of a *prochein ami* is. The law is very careful and tender to preserve the rights of infants, who are presumed to want discretion for the conduct and management of their affairs. And, therefore, all acts or contracts of theirs, except for necessities, are void in law, except there be a benefit or appearance of such resulting to the infant. Cro. Car. 502, Loyd v. Gregory; 3 Mod. 301, 307, Thompson v. Leach; 2 Danv. 767, etc.² Upon the like presumption and reason, it is that the law will not allow an infant to sue or defend an action in proper person or to make an attorney for that purpose, but he must always sue and defend by *prochein ami* or guardian to be assigned by the court. And he may prosecute a suit by either, but he must always defend by a guardian. It is a great error to confound the office of a guardian and *prochein ami* together, as some authors do, for there is certainly a great difference between the power and authority of the one and of the other. The guardian is an office at common law and, at the common law, an infant could only appear by guardian. The *prochein ami* was introduced by the Statutes Westminster I, 48, and Westminster II, 15,³ upon certain cases of necessity, as, first, where an infant is to sue his guardian for waste, second, where he is eloined, so that he cannot be present in court, as he always must to pray a guardian to be assigned to him. And it was only in these cases that suing by *prochein ami* was used until a long time after the making of these statutes. But, at length, it being found more convenient, as the infant was not obliged to be in court when the *prochein ami* was admitted, it became a general practice. And it is so at this day, for an infant now seldom or ever sues by guardian. 2 Inst. 261, 390.⁴

A guardian assigned by the court to defend for an infant has a very great power. His acts shall bind the infant, and he may even acknowledge satisfaction of a judgment. Lill. Abr. 656; Mo. 852.⁵ But, then, the law, ever careful of the infant's interest, has given him an action against his guardian to recover damages for any prejudice he may sustain by the act or default of the guardian, who being appointed by the court, care is always taken that he be a person responsible, that the infant may not be disappointed or defeated of his recompense.

But the case is quite otherwise with the *prochein ami*, who is a mere nominee appointed in compliance with the forms of law but without any power at all. No act of his shall bind the infant, nor can he do anything to his hurt or prejudice that will be binding. And the reason is

¹ Act of 1727, c. 11, 4 Hening's Statutes 222-228.

² *Lloyd v. Gregory* (1638), Croke Car. 501, 79 E.R. 1032, also W. Jones 405, 82 E.R. 212; *Thompson v. Leach* (1690), 3 Modern 296, 301, 87 E.R. 196, 199, also 3 Levinz 284, 83 E.R. 691, 2 Ventris 198, 86 E.R. 391, Holt K.B. 357, 623, 90 E.R. 1097, 1244, 1 Eq. Cas. Abr. 278, 21 E.R. 1044.

³ Stat. 3 Edw. I (Westminster I), c. 48 (SR, I, 38); Stat. 13 Edw. I (Westminster II), c. 15 (SR, I, 82).

⁴ E. Coke, *Second Institute* (1642), pp. 261, 390.

⁵ J. Lilly, *Practical Register*; *White v. Hall* (1616), Moore K.B. 852, 72 E.R. 949.

because the infant can have no remedy against him. He can have no action at the common law, because the *prochein ami* was not an office at the common law, but was introduced by Statute, as has been observed. Neither is an action given by any statute. Nor is there any instance of such an action in any of our books. It would then be extremely hard and not at all consonant with the spirit of our laws, so tender of infants' rights, as has been observed, if the act of a *prochein ami* should prejudice an infant when he must be without a remedy for the damage he suffers.

I will beg leave to read a case or two that I hope will prove and illustrate what has been offered on this head. Palm. 295, Simpson *et al.* against Jackson, Cro. Ja. 640, same case; Sti. 369.¹ From these cases and what has been said as well as from the reason of the thing, I hope it is sufficiently evident that a *prochein ami* has no power at all to intermeddle in a judgment obtained by an infant and that any act of his prejudicial to the infant is void. I might add the inconvenience that must follow from a contrary determination, for, then, any person under a pretence of friendship to an infant may thrust himself into this office of a *prochein ami*; he may receive his money; release his right; and, if he prove insolvent, the infant will be without any kind of remedy, by which means half the infants in the country may be ruined.

If, then, no act of Brooking, the *prochein ami*, can hurt the plaintiff if the payment of the money to him by Emery be no payment at all in discharge of the judgment, as I think must follow from the doctrine I have advanced, it will also be pretty clear, I hope, that the pretended sale of the slaves by Emery, upon the circumstances of this case, cannot hurt the plaintiff's right or be any bar to his recovering them. I call this sale of Emery pretended, because I believe it will evidently appear that the sale, in fact, was Brooking's and Emery's acting in it was only an artifice to blind the world. It was certainly a fraudulent contrivance between Brooking, Emery, and the purchasers to cheat the plaintiff out of his slaves.

Brooking, the *prochein ami*, was a needy man, and all he wanted was to get money into his hands. The purchasers, who, no doubt, had a good bargain in the slaves, were conscious that Brooking himself could not sell them if they were actually delivered to him. And so they agree upon this fine artifice that Emery should pretend to sell them, though the money was paid to Brooking. The facts in the verdict prove all this to a demonstration. The slaves were sold soon after the judgment. Emery, indeed, takes upon him to sell them, but Brooking receives the money of the purchasers, who knew of the judgment at the time. The purchasers, then, are inexcusable, being privy to the fraud and contrivance. And, surely, no favor is due to men that will thus combine to rob infants of their rights. This sale, then, I conceive, must be looked upon as Brooking's; Emery was only his agent, the better to color the fraud. And, then, sure, it will not be pretended that this sale shall bar the plaintiff from recovering. It was never yet allowed that a lawful guardian could sell the slaves of his ward, much less one who has really no power or authority over the infant or his estate. It is really a case of general concern, and may affect all the infants in the country.

I cannot tell whether any stress will be laid on the rule that is entered at the end of the judgment which I opened. Perhaps, it may be said it is the act of the court and shall bind the infant, and, then, it plainly imports that the plaintiff was to have money in lieu of the slaves.

But, Sir, I take this rule to be the strongest evidence in the world of the fraud and contrivance intended to be carried on from the beginning, I mean by the *prochein ami* in order to get money into his hands. And it must certainly be regarded as his act, and not the act of the court, for, I presume, this court never intended to give him a power to sell the slaves or to take money in lieu of them. Besides, the rule is void in itself, for it is not made by consent; only the plaintiff agreed, and he agrees not only for himself, but the defendant, too. (Read the rule.) No man will say the defendant was bound by this rule. And, if it was not reciprocally obligatory, it must be void. Sure, it must raise the indignation of this court to see their rules

¹ *Simpson v. Jackson* (1622), Palmer 295, 324, 81 E.R. 1089, 1105, Croke Jac. 640, 79 E.R. 552; *Anonymous* (1653), Style 369, 82 E.R. 785.

made a state and property of to color and carry on a fraud in prejudice of infants, whose care is their peculiar province.

But, admitting this could be regarded as the act of the infant, still it would be void, though upon record, for, as I have already observed, no act of an infant, though of record, if any ways prejudicial to him, shall bind him. It is a known law that, even a fine levied by him may be avoided during his infancy. 1 Inst. 131a, 380b.¹ And this action was brought before his full age. Besides, the obvious meaning of this rule is no more than this, that, if the plaintiff could not have the slaves again, he should have as much money as the slaves were appraised to. It was never intended to exclude the plaintiff from having his slaves if he could get them. And, then, the rule is nothing to the purpose unless the money had been actually paid to him, which it was not.

The hardship upon the defendants will be no more than this, that they must sue Brooking for their money again. And whether it is not more reasonable that they should be put to that trouble than that the plaintiff should lose his slaves must be submitted. Had they been fair purchasers without notice of the judgment, something might be said in their excuse. But they knew at the time they were buying the slaves of an infant; they were privy and consenting to the juggle and contrivance of the *prochein ami*, and so were parties to the fraud. I hope no countenance will be given to fraud in this court nor so ill a precedent established that a *prochein ami* may sell the slaves of an infant.

By the laws of this Colony, every guardian must give security before he can act as such. And, for omitting to take security, the justices are answerable.² And so the infant's right and interest is sufficiently protected. But a *prochein ami* gives no security. And, if he proves insolvent, the infant is ruined.

For the defendant, it was said that, by the judgment, the defendant had an election to pay the money or deliver the slaves and that, by the payment of the money, the property of the slaves was divested out of the plaintiff. It was granted that nothing done to the infant's prejudice should bind him, but that here was no injury to him. The value of the slaves was paid to a person having sufficient authority to receive, for, if the *prochein ami* could not receive the money, there was no other person to whom it could be paid, the infant having no guardian. If the Sheriff had levied the money on an execution, he must have paid it to the *prochein ami*. And where is the difference? The infant was in no worse case than if a guardian had acted in this manner, which, it is allowed, he might do. The infant might have his action against the *prochein ami*, that here was really nothing of fraud in the case nor any occasion for underhand dealing, for Emery might lawfully sell the slaves after the judgment. If execution had been sued out and the Sheriff could not get the slaves, he must have levied the money. Where then was the fraud or injury to the infant?

A great deal was said of the power of guardians. And it was industriously endeavored to confound the offices of a guardian and *prochein ami* and make them the same. It was also much insisted on that great service was done to the infant by bringing the suit, for, if it had been delayed a little longer, until the Explanatory Act was made, the infant would not have recovered at all.

April 1737, judgment [was given] for the defendant.

Note the court seemed not to take the difference between a guardian and a *prochein ami*, nor to consider the general inconvenience of allowing such power to a *prochein ami*, and the advantage to the infant by having the suit brought seemed to weigh much.

[This report is cited at *Palmer v. Word* (1738), see below, Case No. 60; *Conway Robinson, Practice in the Courts of Law and Equity in Va.* (1832), vol. 1, p. 123.]

¹ E. Coke, *First Institute* (1628), ff. 131, 380b.

² Act of 1705, c. 33, ss. 14-15, 3 Henning's Statutes 375-376.

Major v. Dudley
(October 1737)

An account of a decedent's estate that was judicially approved many years before will not be re-opened.

In chancery.

A bill was brought against the defendant, who had married an executrix that was dead, for an account of the testator's estate come to his hands. The defendant, about twenty years before, had exhibited in the county court an account of debts and disbursements paid out of the testator's estate, to which he made oath. And the same was received and recorded without any examination into the truth of those payments. As the children of the testator came of age, they severally petitioned the county court, and some of them brought suit to have their share of the father's estate. Upon which petitions and suits, several orders were made for persons to settle an account of the testator's estate. And, in all those settlements, the account first exhibited by the defendant was allowed as a good discharge for so much.

In the present case, it was referred to persons to settle an account of the estate, who, having some doubt about allowing this account, they prayed the opinion and direction of the court.

The court was unanimously of opinion for allowing the account in regard to the distance of time, though the defendant had not one voucher to produce. And, as to the length of time, the transaction was of little more than twenty years standing, and the suit had been depending ten years.

[Other copies of this report: Jefferson 51.]

Hayward v. Chrisman
(October 1737)

Slaves held in dower pass to the heir of the doweress's husband upon her death.

In chancery.

Henry Hayward, possessed of divers slaves and other estate, by his will, *inter alia*, devised the guardianship of his children to his wife, and he left five slaves to work and maintain his wife and children, besides the profits of the estate he had left them. And he died without making any other disposition of these five slaves, leaving Henry, his eldest son, who, dying before his mother, devised the slaves to the defendants, who, after the mother's death, recovered them in an action at law.

And now, a bill is brought by the younger children of the first testator for a share of the value of the said slaves.

For the plaintiffs, it was insisted that, by the Act of the 4 Ann., 23,¹ they were entitled to a share of the value, their father being intestate as to these slaves.

For the defendants, it was said that there was an exception in the Act of the widow's dower, the value of which was not to be divided among the younger children and that these

¹ Act of 4 Anne, c. 23, 3 Hening's Statutes 333-335.

slaves were intended by the testator in lieu of the widow's dower and, therefore, not to be divided.

And of that opinion were the whole court.

[Other copies of this report: Jefferson 52.]

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Farrow v. Farrow
(October 1737)

No estate in land can pass without a written deed of conveyance.

A contract to be enforceable must be supported by some consideration.

A court of equity cannot make a decree based only on a person's intention alone.

He that will have equity must do equity.

Chancery.

Abraham Farrow, father of the plaintiff and defendant, being seised of divers lands, by his will, devises them among his children, and, afterwards, he purchases lands of one Barton, which, both before and after he bought it, he declared he intended for his son, Abraham, the plaintiff, whom he seated upon it. And the plaintiff has made improvements. The father, in his last sickness, procures a promise from his eldest son, the defendant, to convey this land to the plaintiff. And this bill is brought to compel a conveyance accordingly.

The promise is confessed by the defendant. But [it was] sworn by him to be made upon an apprehension that his father had no will, he having declared some few days before that he had none, only two papers containing pieces of wills, neither of which he liked, and he would alter them or make a new will. One of these papers is since established as the will, by which the defendant, has a very slender provision, only 750 acres of poor land and the reversion of 200 more and not a penny of the personal estate appraised to £500, whereas the plaintiff has lands to three times the value, exclusive of Barton's, besides slaves and other estate, so that the defendant is almost disinherited.

When the will was in contest, the plaintiff proposed to the defendant to release his right to the manor plantation, about 200 acres, not so valuable as Barton's, which is given to the plaintiff by the will if the defendant would convey Barton's land to him. This, the defendant agreed to. But, after the will was established, the plaintiff claimed both, and refused to stand to his agreement, for which reason, the defendant, not believing it was his father's intention that the plaintiff should have Barton's land and the manor plantation too, brought an [action of] ejectment in the County Court for Barton's land, and had a judgment to recover.

The equity set up by the plaintiff in order to have a conveyance of the land in question is founded, first, upon the father's declaring, both before and after the purchase, that he designed the land for the plaintiff, second, upon the defendant's promise to his father, when sick, to convey it.

I [Barradall] shall consider both these points abstracted from the circumstances appearing in this case, and see what effect or operation they have at law. Then, I will enquire how far a court of equity will interpose in cases of this nature, and, afterwards, consider this case in all its circumstances. After which, I hope, it will be no difficult matter to convince the court that the plaintiff ought not to be relieved.

The father's declaration, if it can operate at all at law so as to convey any estate to the son, must be as a covenant to stand seised. And so it would had it been committed to writing. But, being only by parol, it cannot operate as a covenant to stand seised, which, being a conveyance to use, cannot be good unless put in writing, for no use can be raised by parol. So is Callard and Callard, 2 Ro. A. 788, Mo. 687. The father being upon the land says to his son 'I do here, reserving an estate for my own and my wife's life, give unto thee and thy heirs

forever these my lands' etc. In this case, it was adjudged that no use could arise to the son, being by parol. And the like point is adjudged in 1 Sid. 26, Hore and Dix; and 82, Foster and Foster.¹ But this is *ex abundantia*. The laws of this country are express that no estate in land pass but by deed, so that this declaration can avail nothing at law.

Then, as to the defendant's promise to his father, there being no consideration to induce that promise, it is void in law. There is no rule of law more universally known than *ex nudo pacto non oritur actio*. I need say no more since the very bringing of this suit is a confession that the plaintiff is without a remedy at law.

I shall proceed then to consider how far a court of equity will relieve in cases of this nature. And, first, as to the father's declaration, this it is said sufficiently shows his intention that the plaintiff should have the land, which, to be sure, cannot be denied. But then, that intention, I humbly conceive, is not sufficient alone, for a court of equity to make a decree upon a man's intention to do an act without the concurrence of those forms and circumstances which the law requires is of no signification at all, as may be illustrated by various instances. If a man makes a will and declares an intention to revoke it, but does not actually revoke it, this intention will not amount to a revocation. So, if a man devises his land by a nuncupative will or, in England, makes a will in writing and there is but one circumstance or formality required by the Statute of Frauds² wanting or, if a deed be signed and sealed, but not delivered, in all these cases, the intention is apparent, but yet a court of equity will not relieve. From these instances and many others that might be named, it is evident that a man's intention alone is not a sufficient ground or foundation for a court of equity to make a decree. In the Case of Callard and Callard, cited *supra*, the father's intention was plain to give the land to his son; yet that intention not being manifested according to the forms of law, nothing passed. Nor do we read that the son attempted to support this gift in a court of equity. Indeed, I am yet to learn if there be any case where a court of equity has decreed an heir to convey merely upon the intention of his ancestor to give the land to another. The argument is as strong and the case equally equitable where the ancestor devises land by will without writing that the heir should be compelled to convey to the devisee. The intention is sufficiently evident, but there never was an instance of that kind, I can venture to affirm.

The Case of Clavering v. Clavering, 2 Vern. 473,³ is a very strong one to prove that a man's intention alone without the concurrence of those forms and ceremonies which the law, for very wise ends, has appointed to the consummation of every act is not a sufficient reason for a court of equity to interpose and interrupt the course of the law. The case was thus. Sir James Clavering made a settlement in 1684, under which the defendant claimed. In 1690, he made another settlement without any regard to that of 1684, under which the plaintiff claimed. There was no power of revocation in the deed of 1684. But it was in proof that the deed was not published or delivered out by Sir James and was found among his waste papers at his death, that the deed of 1690 was often mentioned by him as the settlement of that estate and so indorsed with his own hands. And he told the tenants the plaintiff was to be their landlord. But notwithstanding all these circumstances to favor the settlement of 1690 and though Sir James's intention was very plain and evident, yet no relief could be had against the settlement of 1684,

¹ *Callard v. Callard* (1597), 2 Rolle, Abr., *Uses*, pl. 1, p. 788, Moore K.B. 687, 72 E.R. 841, also Croke Eliz. 344, 78 E.R. 593; *Hore v. Dix* (1661), 1 Siderfin 25, 82 E.R. 948; *Foster v. Foster* (1662), 1 Levinz 55, 83 E.R. 294, 1 Siderfin 82, 82 E.R. 983, T. Raymond 43, 83 E.R. 24, 1 Keble 160, 225, 274, 319, 83 E.R. 874, 913, 942, 970.

² Stat. 29 Car. II, c. 3, ss. 5, 18 (*SR*, V, 840, 841).

³ *Clavering v. Clavering* (1704-1705), 2 Vernon 473, 23 E.R. 904, also Precedents in Chancery 235, 24 E.R. 114, 7 Brown P.C. 410, 3 E.R. 267, 1 Eq. Cas. Abr. 24, 21 E.R. 845, 2 Eq. Cas. Abr. 351, 22 E.R. 299, Chancery Repts. *tempore* Anne 30.

in which there being no power of Sir James, he could not resume the estate whatever his intention or inclination might be.

There is, indeed, a very great difference between conveyances made to a purchaser for a valuable consideration and voluntary conveyances without any consideration at all. In the first, if there be any defect in point of form or ceremony, a court of equity will always interpose, and compel a perfect conveyance according to the agreement of the parties. But, in the latter, equity scarce ever intermeddles, except in some special instances where creditors or younger children are concerned. 2 Vent. 365; 1 Vern. 37, 38, 40.¹ They are left to their operation at law.

And *valeant quantum valere possunt* is the rule, for equity will not assist them. And this difference is well founded both in reason and justice. In the case of a purchase, there is a meritorious act on the part of the purchaser, *viz.* the payment of the consideration. And natural justice requires that he should have a good title made to him and not lose his purchase for want of a mere ceremony. But, in the case of a voluntary gift, there is no merit in the donee. It is from the mere favor of the donor that he has anything. And, therefore, he must take the gift as it is, for better or worse. Equity will not stretch to assist him, especially, against an heir whose right and title are favored, both in law and equity.

Had the ancestor, then, in this case, gone much further than he has done, had there been a deed actually executed but that was imperfect for want of some circumstance, as if there had been a feoffment without livery, even in such case, the conveyance being voluntary, a court of equity, I conceive, would not compel the heir to perfect it, but would leave the same to its operation at law. Much less, then, ought this parol declaration to be assisted against the heir. 2 Ch. Ca. 133, 134; 1 Vern. 37, 38.²

I come now to speak to the defendant's promise made to his father to convey this land to the plaintiff, his brother, without any regard to the circumstances attending it. This promise, as I have already observed, is void in law, being made without any consideration. And I conceive it is void in equity too. At least, I can safely say I never yet read or heard of an instance where a court of equity compelled a performance of a promise of this sort. It is natural justice that there should be a *quid pro quo*. And, where there is not, promises of this kind will fall within the rule and reason of voluntary conveyances. They must operate as they can at law, for they are never assisted in equity. It is, indeed, a rule that equity will not relieve against a maxim of the common law. And it is a maxim *ex nudo pacto non oritur actio*.

From what has been said, I hope it is pretty evident that the pretenses set up by the plaintiff to entitle him to a conveyance of the land in controversy from the defendant have no solid or equitable foundation, taking them in the most favorable light for the plaintiff. But, when the circumstances attending this case are considered, which I must now beg leave to speak to, I believe it will appear that there is as little honesty as equity on the plaintiff's part and extreme hardships on the defendant's if he shall be compelled to convey this land.

It has been opened that, at the time the defendant made the promise to his father to convey the land to the plaintiff, he apprehended there was no will; his father told him so. In the event, it falls out there is a will, by which the plaintiff, who is a younger child, has more than three times the estate given him than is given to the defendant, the heir at law. Is there any reason or justice, then, that anything more should be done for this younger child and the heir be quite disinherited, though it does not appear he ever offended his father or gave him any cause to disinherit him? Was this younger child unprovided for, there might be some appearance of equity. But, when he is so amply provided for and will, at all events, have a

¹ Note (1684), 2 Ventris 365, 86 E.R. 488; *Lee v. Henley* (1681), 1 Vernon 37, 23 E.R. 292, also 1 Eq. Cas. Abr. 170, 21 E.R. 965; *Thompson v. Attfield* (1682), 1 Vernon 40, 23 E.R. 294, also 2 Chancery Reports 216, 21 E.R. 661, 1 Eq. Cas. Abr. 170, 21 E.R. 965.

² *Anonymous* (1681), 2 Chancery Cases 133, 22 E.R. 882; *Lee v. Henley* (1681), *ut supra*.

better estate than the heir, surely there can be no reason that a court of equity should lend any assistance to disinherit an heir under such hard circumstances and against a constant and established maxim that the heir is to be favored. See 2 Sal. 416.¹

But, after all, it is somewhat surprising that a man should come into equity to compel the performance of a promise altogether voluntary and, at the same time, refuse to perform an agreement on his part, that is really more than voluntary and such an agreement, as I conceive, a court of equity ought to compel the performance of. The defendant, in his answer, swears that, when the will was in contest, the plaintiff proposed to him to release his right to the manor plantation if he would convey Barton's land to the plaintiff, and this was agreed to by the defendant, though the manor plantation is not near so valuable as Barton's. This agreement is likewise proved by a witness who heard the plaintiff acknowledge it. But see the justice and honesty of the plaintiff. As soon as the will is established, he flies from this agreement, refuses to perform it, and, now, he will have Barton's land and the manor plantation too. It is a maxim he that will have equity must do equity. And, surely, it is equally reasonable and equitable that the plaintiff should perform his agreement as that the defendant should perform his.

I beg leave to observe the justice of the defendant. In this agreement, he had all the reason in the world to believe from what his father told him that the will would not be established and then the manor plantation had descended to him, yet he is content, upon the plaintiff's releasing this slender prospect of a right, to comply with what he took to be his father's intention, for he swears he does not believe his father intended that the plaintiff should have Barton's land and the manor plantation too. Nor is it reasonable to suppose he should intend to leave his heir, who had never disobliged him, without a house to put his head in.

It may be objected, perhaps, that the plaintiff, when he made this agreement, was doubtful of his right to the manor plantation, that, if he had been sure the will would be established, he would not have made it. Such an argument may be a proof of the plaintiff's cunning, but not of his honesty. But to obviate the force of this objection, if there is any in it, that an agreement founded upon a mistake, that is where a man thought he had not a right, when he really had, is binding in equity, [note the following case].

A man, seised of freehold lands in tail, with a remainder to his elder brother, and of copyhold lands in fee, devises the freehold lands to his younger brother and the copyhold to his elder brother. And the devisees agree that the lands should be enjoyed by them accordingly. And this agreement was established in equity, though it appeared that the elder brother thought the entail of the freehold lands was docked and the younger brother, to draw on the agreement, made him believe so, when, in truth it was not. 1 Ch. Ca. 84, *Frank v. Frank*.²

This case, I think, is a full answer to any objection that may be made that the plaintiff, when he made this agreement, did not know his right. But the objection is really ridiculous in this case and must turn upon the plaintiff since we may, likewise, object that the defendant did not know he should lose the manor plantation when he promised to convey Barton's to the plaintiff. There remains not, then, in my humble apprehension, the least pretence why the plaintiff's agreement should not be enforced as well as the defendant's promise made under the circumstances appearing in this case if the court should be of opinion that the plaintiff ought to be relieved at all.

But, after putting the defendant to all the trouble and charge he has done and refusing to perform an agreement proposed by himself for settling this difference between two brothers and an agreement that, in equity, as I conceive, he is bound and compellable to perform, I hope

¹ *Herne v. Merick* (Ch. 1712), 2 Salkeld 416, 91 E.R. 362, also 1 Peere Williams 201, 24 E.R. 355, 1 Eq. Cas. Abr. 143, 21 E.R. 944, Chancery Repts. *tempore* Anne 507.

² *Frank v. Frank* (1667), 1 Chancery Cases 84, 22 E.R. 706, also 1 Eq. Cas. Abr. 24, 21 E.R. 845.

the plaintiff is entitled to no extraordinary favor. But, as it is a case without precedent, that ever an heir has been compelled to perfect a defective voluntary conveyance or to perform a promise made without any consideration and upon a misapprehension too and the case in all its circumstances is extremely hard upon the defendant, I hope the plaintiff will have no relief at all, but that his bill will be dismissed.

And, upon the hearing in October 1737, the bill was dismissed by the opinion of the whole court.

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Hawkins v. Baughan
(October 1737)

In this case, the devise in issue was found to create an estate tail.

The question here was the same as in Hawkins and Thornton, *ante* 172.¹

And judgment was again given for the plaintiff by the opinion of LEE, TAYLOE, RANDOLPH, CUSTIS, GRYMES, CARTER, DIGGES, and BYRD; ROBINSON, *contra*. So BYRD changed his opinion.

But the defendants appealed.

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Godwin v. Kinchen's executors
(April 1738)

In this case, the testator intended that his deceased sister's children should take only that share that his sister would have been given, i.e. equally with his other siblings.

In chancery.

Matthew Kinchen, by his will, after several particular legacies, devises thus:

and all the rest of my estate, goods, and chattels whatsoever I give to my brother, William Kinchen, and my three sisters Elizabeth, Martha, and Patience, and James Godwin's three children, James, Martha, and Matthew.

The question was what share of the residue Godwin's children, the plaintiffs, were entitled to, they claiming each a seventh part and the defendants insisting they were entitled to no more than a fifth among them.

Godwin's children were born of a sister of the testator, who was dead. And the writer of the will proved that, after the testator had directed several particular legacies, he asked him how he would dispose of the rest of his estate, upon which he answered 'I give it to my brother and sisters' and, after some pause, added 'and James Godwin's three little children I cannot abide to leave them out. Put them in for a share.' Godwin having four children then living, the writer asked which three, upon which the testator named them; the other child was so ill his life was despaired of. There were other witnesses in the room who heard the testator say put Godwin's children in for a share or to that purpose.

¹ *Hawkins, ex dem. v. Thornton* (1737), see above, Case No. 49.

Needler, for the plaintiffs: This is a joint devise, and so all the legatees are equally interested. It differs from the Case of *Tucker v. Tucker's executors*, *post* page 51.¹ Here are not the words 'equally divided' and the children here are described by their names, which they were not in that case. Where the law determines the force and operation of a devise, the testator's intention is not to be enquired into. That is only to be recurred to where the words are ambiguous. Here the words are very plain to make it a joint devise, and construction ought to be made upon the words and the legal intent of the testator, as appears by *Cox and Quantock*, 1 Ch. Ca. 238, where it is said that, when the intention is secret and not declared, the secret intent must give way to the legal intent.² There is a difference where the children are not described by their names and where they are. In the first case, they must take collectively as in *Tucker and Tucker's Case*, but not in the second. As to the proof in the case, the witnesses vary. I admit that parol proof is sometimes allowed to explain a testator's meaning. But that is only where it is to corroborate and strengthen the legal meaning and intention, not where it is to oust it.

Barradall, for the defendants: Upon the words of this will, it is plain enough that Godwin's children are to be taken collectively as one person, and were so intended by the testator. But, when the proof and other circumstances in this case are considered, I think the point is put beyond all doubt or question. It is argued on the other side that this is a joint devise and that, therefore, all must take equally. The question here is not whether the legatees take jointly or severally but what proportion the testator intended to each. To talk then of a joint devise may serve to amuse, but it proves nothing to the point in question. I own this argument is quite unintelligible to me. If by being a joint devise is meant that the legatees take as joint tenants and, consequently, that the right of survivorship will take place between them, I deny that it is a joint devise in that sense, for there can be no survivorship among these legatees, as is proved by the Case of *Cox and Quantock*, cited on the other side. If Godwin's children had not been named, it is agreed they must have taken collectively as one person. I ask then whether this devise might not as well be called joint in that case as it is now. The naming of the children can certainly make no difference. It is a very strange and new doctrine to say that the testator's intention is only to be regarded where the words of a will are doubtful. The numberless cases and perpetual controversies there are upon the subject of devises are sufficient confutation of such an assertion. Do not our books tell us that the intention of a testator is the pole star to direct us to find out his meaning? But it is said this intention, when secret, is not to prevail against the express legal intent. I do not well apprehend the force of this distinction nor remember to have seen it anywhere but in the book cited on the other side. And I must observe that it is only a remark of the reporter and the case itself is quite against his argument.

The case is *Cox and Quantock*, *supra*; two were made executors, and the residue was devised to them; one died; his administrator sued for a moiety of the surplus; and [it was] decreed for him for this reason, that the testator intended an equal benefit to both. This is said to be to the dissatisfaction of the bar. And the reporter adds his reason which is so much relied upon in this case though all the authorities since agree with the resolution in the case and are against the reporter's opinion. *Vide* [*blank*].

Is there anything more frequent in our books than to see the intention of a testator prevail against the legal sense and import of words? Indeed, if the intention be secret, as Mr. Needler states the proposition, I do not know how it should prevail. An intention must be more or less apparent or it cannot be known at all. But, if by a secret intention is meant a hidden or implied

¹ *Tucker v. Tucker's executors* (1740), see below, Case No. 80.

² *Cox v. Quantock* (1674), 1 Chancery Cases 238, 22 E.R. 779, also Repts. *tempore* Finch 176, 23 E.R. 97, 2 Freeman 140, 22 E.R. 1114, 73 Selden Soc. 102, 1 Eq. Cas. Abr. 242, 21 E.R. 1019.

one in contra-distinction to that which is expressed, then the distinction is not true, nor has any foundation in reason or authority.

I take it, then, the testator's intention is to be sought after in this case, which, if it be not sufficiently evident upon the face of the will itself, I think is put beyond all controversy upon the proof and circumstances. But I must first clear the proof from some objections. It is said the witnesses vary. There is no kind of variance except that one heard more than the other. The writer of the will, who was nearest the testator and most attentive, heard more than they who were at a distance in the room. It is also objected against the proof in general that it ought not to be regarded at all, being to oust the legal intent, and that parol proof is never admitted but to corroborate and support the legal intent. This is another distinction that I must own I am a stranger to. Neither can I agree that there is any express legal intent in this case. It must be owned to be in some sort doubtful upon the words of the will whether the testator intended the plaintiffs should have each of them a share or only one share among them and that parol proof and collateral circumstances are admitted to explain a testator's intent that appears doubtful. Surely, [it] will not be denied, there being so many cases express in point. 2 Vern. 99, 252, 506, 517, 593, 648, 673, and 675.¹ It is for this purpose we offer our proof. And, surely, it must have its weight. And, if it has, it can hardly remain a doubt with anyone that the testator intended no more than one share to the plaintiffs.

I cannot imagine why the naming the children by their names should make any difference, as is much insisted upon, though without any reason assigned that I have heard. But this was necessary to avoid the force of the determination in Tucker and Tucker's Case, where, indeed, the children are not particularly named. But admitting such a distinction ought to prevail in general cases, here, it can avail nothing, because it appears the occasion of naming them was accidental and because Godwin had four children. The children of Godwin are not so nearly related as the other legatees, being only a sister's children. It is a natural presumption that men have the greatest affection to their nearest relations. If the mother of these children had been alive, can it be supposed the testator would have made so great a difference as to give three times as much to her as to the rest of his brothers and sisters? Much less reason is there to suppose he could intend so much for her children, for whom he must be presumed to have a less degree of regard and affection. To put them in the place of the mother was certainly all he intended and to consider them as her representative. It appears, too, in the proof these children were little in his thoughts. His manner of taking notice of them is a very strong circumstance to prove he did not intend to so great an advancement and provision so much beyond what he did for his own brothers and sisters.

[It was] decreed that plaintiffs were entitled only to one-fifth among them, by the opinion of LEE, TAYLOE, LIGHTFOOT, CUSTIS, GRYMES, and BYRD; CARTER and DIGGES, *contra*; ROBINSON thought the surplus ought to be divided into thirds, *viz.* the brother to have one-third, the sisters another, and Godwin's children another; April 1738.

¹ *Pring v. Pring* (1689), 2 Vernon 99, 23 E.R. 673; *Countess of Gainsborough v. Earl of Gainsborough* (1692), 2 Vernon 252, 23 E.R. 764, 2 Freeman 188, 22 E.R. 1152, 1 Eq. Cas. Abr. 230, 21 E.R. 1010; *Oldham v. Litchfield* (1705), 2 Vernon 506, 23 E.R. 923, also 2 Freeman 284, 22 E.R. 1214, 1 Eq. Cas. Abr. 231, 21 E.R. 1011, 2 Eq. Cas. Abr. 44, 22 E.R. 39; *Pendleton v. Grant* (1705), 2 Vernon 517, 23 E.R. 931, also 1 Eq. Cas. Abr. 230, 21 E.R. 1011; *Hodgson v. Hodgson* (1707), 2 Vernon 593, 23 E.R. 985, also Precedents in Chancery 229, 24 E.R. 112, 1 Eq. Cas. Abr. 231, 21 E.R. 1012; *Lady Granville v. Duchess of Beaufort* (1709), 2 Vernon 648, 23 E.R. 1023, also 1 Peere Williams 114, 24 E.R. 317, 1 Eq. Cas. Abr. 245, 21 E.R. 1021, 2 Eq. Cas. Abr. 415, 22 E.R. 352; *Wingfield v. Atkinson* (1711), 2 Vernon 673, 23 E.R. 1038; *Ball v. Smith* (1698-1711), 2 Vernon 633, 675, 23 E.R. 1014, 1039, also 2 Freeman 230, 22 E.R. 1178, 1 Eq. Cas. Abr. 245, 21 E.R. 1022, 2 Eq. Cas. Abr. 133, 434, 22 E.R. 114, 369.

[This report is cited in *Tucker v. Tucker's executors* (1740), see below, Case No. 80.]

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Giles v. Mallicote
(April 1738)

The question in this case was whether the devise in issue created a vested or a contingent interest.

In [an action of] detinue upon a special verdict. Andrew Giles and Mary, his wife, and Mary Mallicote, plaintiffs v. Morey Mallicote, defendant.

The plaintiff's father, Thomas Mallicote, by his will, devises to his son, John, Quashey, a Negro man, to his son, Thomas, the child his Negro woman Betty then went with, and Tomboy, a Negro man. And he gives slaves to his other children, and declares his will that his wife should have the work of his sons' Negroes until they came of age, 'and, if either of his children should die without heirs of their body lawfully begotten, then that their part should be equally divided between the survivors'. And he gives Negro Betty to his wife during life and, after her death, to be divided with her increase among his children. The testator's sons, John and Thomas, are dead, and would not be twenty-one if now living. The slaves in question are Quashey and Tomboy, specifically devised to John and Thomas, and Quashey, a boy, the child Betty went with at the making of the will but not born until after the testator's death. The plaintiff Mary, the wife of Giles, is the testator's wife named in the will (though not so found in the verdict). And the plaintiff, Mallicote, is one of the testator's daughters. The defendant is the testator's eldest son and heir and heir to his brothers, John and Thomas, and is more than twenty-one years old.

There are but two questions in this case upon the merits: first, whether the testator's wife has a right to keep the slaves devised to John and Thomas until the time they would have been twenty-one or whether her interest determined at their deaths; second, whether the devise to Thomas of the child Betty went with be good though the child was not born until after the testator's death. And let these points be determined either way, there will remain a necessity to make a third question, *viz.* whether the plaintiffs can join in this action.

The case as to the first point is briefly this. A man devises slaves to his children and wills that his wife should have the work of them until his children come of age. The children die before they come of age. The question is whether the wife's interest determines by their death or whether she shall keep the slaves until the time the children would have been twenty-one if they had lived. It will be granted, I presume, that this devise to the wife must be taken *reddendo singula singulis*, *viz.* that she is to have the work of the slaves until the children respectively come of age, and that each child as it comes of age is entitled to the slaves given to it. *Cro. Ja.* 259, *Aylor and Chep*.¹ And it will be further granted, I believe, that, in construction, this devise must be taken as if the limitation was to the wife first until the children come of age and, afterwards, to them. Indeed, otherwise, the devise to the wife cannot be supported.

Now, in devises of this sort, there is a very great difference where they are made for payment of debts, to maintain children, or upon any other trust and where they are merely for the benefit of the devisee, for, if a man devised lands to his executors until his son comes of age for payment of his debts or performance of his will and then to his son, there, though the son die before he come of age, the interest of the executors does not determine, but they shall

¹ *Aylor v. Chep* (1610), *Croke Jac.* 259, 79 E.R. 222, also *sub nom. Aylet v. Chippin*, 1 *Brownlow & Goldesborough* 147, 123 E.R. 720, *Yelverton* 183, 80 E.R. 121, *sub nom. Eyliff v. Chopley*, 1 *Bulstrode* 42, 80 E.R. 746.

hold the land until such time as he would have been of age if he had lived. Boraston's Case, 3 Co. 19; Di. 210a; Cro. Eliz. 252; 1 Ch. Ca. 113.¹ But, if a man devises land to his wife until his son comes of age and then to the son in fee and the devise to the wife is not expressed to be for performance of his will, education of his children, or for any other particular purpose, but is purely for her own benefit, in that case, if the son die before twenty-one, the wife's interest is determined, and the land shall go to the heir of the son presently. Hilary 1713, between Mansfield and Dugard, decreed Cha. Ca. Abr. 195, 4.²

The reason of the difference in these two cases is plain. In strictness of law, the estate determines in both cases, for, if a man makes a lease or grants land to another until his son comes of age, the lease or grant is subject to the contingency of the son's living until that time if he dies before the lease or grant determines. Boraston's Case, 3 Co. 19b; agreed *per totam curiam*; 6 Co. 35b; Plo. 273.³ And this is of necessity, for grants being taken strictly according to the words, unless the estate was to determine by the death of the son, it must continue forever, because the son will never be of age. Now, the great difference between a devise and a grant is this, that, in a devise, a more liberal construction is allowed. And it is not so much the form of words as the intention of the testator that governs the construction. But yet, where there is no apparent intention to the contrary, a devise as well as a grant must be construed according to the legal sense and operation of the words. 1 Sal. 238, Aumble and Jones.⁴ And, in such a case, no greater interest will pass by a devise than would pass by the like words in a grant. The resolution in Boraston's Case, *supra*, is founded upon the intention of the testator collected from the nature and manner of the devise. The case was a devise to executors, 'until H.B. should accomplish his full age of twenty-one years and the mesne profits to be employed by the executors towards performance of the will.' It was said it should be presumed that the testator had computed that the profits of his estate by the time his son would be of age would pay his debts, and, therefore, though the son died before, the executors should hold the land until such time as he would have been of age, because, otherwise, the testator's intention in providing for the payment of his debts must be frustrated, his debts unpaid, and his will unperformed, which are certainly very strong and cogent reasons to induce such a construction of the will. And so, where the devise is for any other particular purpose, as the maintenance of children or the like, it may be reasonable to make such a construction. But, where the devise is general, no trust to be discharged but purely for the benefit of the devisee, there is no equitable ground or motive to induce a more ample and liberal construction than according to the legal import and operation of the words, nor any intention of the testator appearing to carry the devise further than the words in their legal sense will carry it. And this I take to be the reason in Mansfield and Dugard's Case, *supra*, and, upon which distinction, Boraston's Case and that are reconciled. That case was thus. A man devised lands to his wife until his son should attain his age of twenty-one and then to his son and his heirs; the son died at thirteen, and, though the wife was executrix, yet it not being devised for the payment of debts nor any

¹ *Hynde v. Ambrye* (1587), 3 Coke Rep. 16, 76 E.R. 664, also 1 Eq. Cas. Abr. 190, 194, 21 E.R. 980, 984; *Stile v. Tomson* (1562), 2 Dyer 219, 73 E.R. 464; *Smith v. Havens* (1591), Croke Eliz. 252, 78 E.R. 507; *Carter v. Church* (1668), 1 Chancery Cases 113, 22 E.R. 719, also Lincoln's Inn MS. Hill 125, f. 55, pl. 3.

² *Mansfield v. Dugard* (Ch. 1712-1714), 1 Eq. Cas. Abr. 195, 21 E.R. 984, also Chancery Repts. *tempore* Anne 457, Gilbert Rep. 36, 25 E.R. 26.

³ *Hynde v. Ambrye* (1587), *ut supra*; *Bellamy v. Fish* (1605), 6 Coke Rep. 34, 77 E.R. 303, also Croke Jac. 71, 79 E.R. 61; *Say v. Smith* (1564), 1 Plowden 269, 75 E.R. 410.

⁴ *Aumble v. Jones* (1709), 1 Salkeld 238, 91 E.R. 211.

creditors or want of assets appearing, the Lord Chancellor Harcourt held that the wife's estate determined by the death of the son, and, upon a rehearing, he continued of the same opinion.

I will beg leave to read Boraston's Case and this.

Now, the devise before us is exactly the same as this last, only, here, the slaves are devised first to the children and then to the wife. But, in construction, as I have already observed, the devise to the wife must be taken first. The devise in this case is generally to the wife. No debts are to be paid or any other trust discharged, but it is merely for her benefit. And she is also made executrix. No two cases can be more parallel in all their circumstances. And I hope My Lord Chancellor's opinion will be taken for good law, especially when the reason of the difference between a devise of this sort and a devise for payment of debts (as Boraston's Case and the other above cited are) is so clearly accounted for.

I shall now proceed to consider the second point, whether the devise of a Negro child in the mother's belly be good though the child is not born until after the testator's death. The objection, I suppose, will be that the thing given was not *in esse in rerum natura* at the time of the devise. And so, being no more than a possibility, [it] is not devisable. I shall agree that possibilities which are remote are not devisable. But I take a difference between a near and a remote possibility. Jacob's *Dictionary*, verbo 'Possibility'. It was never yet questioned but that the profits of land might be devised for a time. And, in this very will, the work, *i.e.* the profits of the work of the slaves, are devised to the wife for a time. Now, the profits are not *in esse*; they are but a possibility. So the profits that shall be made of a certain commerce may be devised. And I can see no difference between devises of this sort and the devise of a Negro child that shall be born, especially when the child is actually *in ventre sa mere*, for, then, it has a sort of existence. Anciently, it was murder to procure the destruction of such a foetus. And the law takes notice of a child *in ventre sa mere*, for a devise to such is good, and, though it be but a possibility, it must be allowed to be a very near possibility and must happen in a short time. For my part, I can see no good reason why such a devise should not be good. It clashes with no rule of law that I know of, nor is attended with any inconvenience. Why then should not the testator's will be performed? But I would not be understood as if I contended for carrying devises of this sort any further than where the child is actually in the mother's belly. It would be very inconvenient to allow a devise of the second, third, or fourth child that shall be born for reasons that are very obvious, though even such a devise as that is allowed by the civil law, for a man may devise *quidquid illa ancilla peperisset*. 2 Domat 159, s. 18.¹ And it is clear from the same author that the civil law admits of devises of things that are not *in esse*, as the fruits of a farm, the profits of a commerce, and the like. Now, it may be worth considering that, in England, legacies are properly recoverable in the spiritual court, where the civil law is the rule of decision, though the Chancery, for many years, has exercised a concurrent jurisdiction with them. But, then, the Chancery has some regard to the determinations of the civil law in matters concerning legacies, as that noted distinction between a legacy given to one at the age of twenty-one and where a legacy is made payable at twenty-one, which is allowed to have a very slender foundation in reason but, because the distinction is kept up in the civil law, the Chancery observes it too, that the subject may have the same measure of justice in which court soever he sues. Ch. Ca. Abr. 295, 2, *in notis*.²

And I humbly hope that this court will pay the same regard to the decisions of the civil law in matters concerning legacies, at least so far as it is not inconsistent with the spirit of our laws nor attended with any inconvenience. And, then, it is mighty clear that the devise of a child *in ventre sa mere* is good. But here, as I said, it will be necessary to stop and not to suffer devises of this sort to be carried any further because of the inconvenience that will follow.

¹ J. Domat, *Civil Law in its Natural Order* (1722).

² Note, 1 Eq. Ca. Abr. 295, 21 E.R. 1056.

I shall now speak to the third point, whether the plaintiffs, can join in this action, for this must of necessity be made a question, let the merits be determined either way, because the plaintiffs have several and distinct rights. If the merits are determined against the defendant, then, the plaintiffs, Giles and his wife, have a right to the slaves in question, and the plaintiff Mallicote has no pretence of right. But, if the merits are with the defendant, then, the plaintiffs, Giles and his wife, have no right. But the plaintiff Mallicote does pretend some right in that case.

Upon the very state[ment] of the question, the absurdity appears of joining the plaintiffs in this action, for they cannot have both a right to recover. But, if one has a right, the other has not. This is really a new kind of policy, and the first time I believe it was ever practiced. It is having two strings to the bow; if we cannot recover by one title, we will by the other. But I doubt the consequence will be that they will recover by neither. There is no instance in the law that I know of where two persons having distinct and several interests can join in an action. But it is a common exception in arrest of judgment where two join to object, that their interests are several, as Di. 320a; Stile 203; 2 Lev. 27; 3 Lev. 362.¹ But, if there was no authority, the reason of the thing speaks plainly enough. If judgment be given for the plaintiffs, it must be that the plaintiffs recover. But will the court give such a judgment when one of the plaintiffs has no right to maintain the action? Who shall have the damages in this case? Not he, I hope, that has no right to recover them. Yet, if any judgment is given for the plaintiffs, they will both have an equal right to the damages. Besides who can tell for whom the jury intended these damages? Perhaps, they might be intended for the person who has no right to maintain the action. And is there any reason then that the defendant should pay? The damages here were certainly designed for Giles and his wife. But, if they have no right to maintain the action, ought they to have any damages? I need say no more in so plain a point, especially as it is no new objection in this court. Even in the case of an ejectment, where one of the lessors had no title upon such an objection, the court would give no judgment. It has been twice so adjudged, as I have been told, in the cases of Meachen and others against Burwell and Dewberry and others against Smith.²

But, if the plaintiffs, Giles and his wife, have no right, as I hope it is clear they have not, the plaintiff Mallicote has really no right at all, or, if she has, it is not such a right as will maintain an action of detinue. The title she sets up is under the remainder limited by the testator's will to the surviving children in case of the death of either without an heir of their body. Now, this remainder I conceive is void, being limited upon too remote a contingency, viz. a dying without issue which may not happen in 1000 years, and no limitation of a chattel can be upon a contingency unless the contingency is to happen within the compass of a life or lives in being or within a reasonable number of years, as twenty or thirty. 1 Sal. 229. But this point was settled in the Case of Slaughter and Whitlock, argued last court (*post*), where slaves were devised to one and, if he died without issue, remainder over. It was adjudged the remainder over was void and the absolute property vested in the first devisee so that the defendant, as heir at law to his brothers, is solely entitled to the slaves in question.³

¹ *Vaux v. Draper* (1650), Style 203, 82 E.R. 646; *Lithebury v. Coriton* (1671), 2 Levinz 27, 83 E.R. 437, also 1 Ventris 167, 86 E.R. 114, 2 Williams Saunders 115, 85 E.R. 814, 2 Keble 803, 822, 838, 850, 84 E.R. 507, 519, 530, 538; *Ward v. Brampton* (1693), 3 Levinz 362, 83 E.R. 731.

² *Meekins v. Burwell* (1729-1732), Randolph Va. 34, 129; *Denn, ex dem. Dewberry v. Smith* (1731), Randolph Va. 77.

³ *Scatterwood v. Edge* (1697), 1 Salkeld 229, 91 E.R. 203, also 12 Modern 278, 88 E.R. 1320, 1 Eq. Cas. Abr. 189, 21 E.R. 980, 2 Eq. Cas. Abr. 337, 22 E.R. 287; *Slaughter v. Whitlock* (1737), see above, Case No. 50.

Or admitting this plaintiff has a right, it is no more than as tenant in common with her other brothers and sisters. The remainder is limited to be equally divided between the survivors. Now, surely, no lawyer will say that one tenant in common of a chattel can maintain an action of detinue against the other tenant in common where there are only two, much less where there are more than two, as in this case. Every one of them has the same right that the other has. And, by the same rule, that the plaintiff Mallicote can maintain this action against the defendant, if she recovers, another of the surviving brothers or sisters may recover of her, and the defendant, again, may recover of that brother or sister or even of the plaintiff herself. And so there would be no end to suits and controversies. This sufficiently shows the reason of the law why one tenant in common shall not have an action at law against the other. 1 Inst. 200a.¹ The remedy must be in equity. Indeed, that remedy is pointed out by the Act of 1727, c. 11, s. 18.²

This case was compromised, and so no judgment was given.

[Other copies of this report: Jefferson 52.]

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Legan, ex dem. Bernard v. Washington Parish
(April 1738)

In this case, the disputed boundaries of the land in issue were determined in favor of the plaintiff, and the facts of this case did not support the defendants' plea of the statute of limitations.

In [an action of] ejectment. Legan, lessee of Richard Bernard, plaintiff; Washington Parish, Dishman, Weedon, John Brown, and William Brown, defendants.

This suit being brought to settle the plaintiff's bounds with some of the defendants and to try his title with others, there has been a survey in the country and a trial at the bar there. The jury have given a special verdict, upon which the case is [thus]. In 1651, a patent was granted to Ann Bernard for 1000 acres of land. And, in 1654, another patent for 1500 acres, including the 1000 acres, under which the plaintiff claims. Ann Bernard died seised. And the premises descended to her son, Richard Bernard, who died in 1691, having, by his will, devised the same to his sons, Philip and John. John had the whole by survivorship, and died in 1709, having, by his will, devised to his son, the lessor of the plaintiff, who is also his heir and was twenty-five years old when this suit was brought.

In 1689, John Bernard, the grandfather, who lived in Gloucester [County], made a letter of attorney to William Buckner to sell part of this land. And, in 1691, Buckner, for a small consideration, takes upon him to sell two parcels to Thomas Weedon and Alexander Shairs, under whom the defendants, Dishman and Weedon, claim. These deeds are made in the name of Buckner himself, and not in the name of Bernard, who, indeed, was dead before the date of them. Dishman and Weedon have been in quiet possession from the making of these deeds to the bringing of this suit, and died seised before the suit was brought in the lifetime of the plaintiff's father. There is no title at all for the other defendants, except what they can derive from possession, proved by several depositions which are found by the jury, together with the surveyors' and jury's report in the country. And the jury further find that the black lines in the surveyor's plat are the true bounds of the plaintiff's patent.

¹ E. Coke, *First Institute* (1628), f. 200.

² Act of 1727, c. 11, s. 18, 4 Hening's Statutes 227.

The bounds being thus settled, the court will not, I [*Barradall*] presume, suffer that matter to be brought again into dispute. The points, then, arising upon this verdict are three: first, whether the defendants, Dishman and Weedon, have a good title under the deeds from Buckner; if not, then, second, whether the grantees in those deeds dying seised in the life of the plaintiff's father will avail anything; [third], whether the possession of any of the defendants will give them a title or bar the plaintiff from bringing this suit.

I [*Barradall*] shall begin with the title of Dishman and Weedon. And I conceive the deed from Buckner, as attorney of our grandfather, is void for two reasons: first, because it is not made in the name of the principal, but of the attorney himself; second, because the principal was dead before the deed was made and, consequently, the attorney's power determined. Co. Lit. 52a, b.¹

As to the first, it is a known and settled rule that, when a man has authority given him as attorney of another to do an act, he must do it in the name of the person who gives the authority, for the attorney is in the place and represents the person of his principal. Co. 9, 76b, *Comb's Case*.² This is proved by the general form of letters of attorney, which runs, as indeed the letter of attorney in this case does, 'for me and in my name to make, seal,' etc. But there are besides several adjudged cases in point.

The king by letter patent gave authority to his surveyor to make leases. The surveyor causes a lease to be made between the king of the one part and J.S. of the other part, concluding 'in testimony whereof' the said surveyor put his seal. This lease was adjudged void, because the surveyor put his own seal and not the king's, whose attorney he was, and without the king's seal, it was not his lease. Mo. 70, 71.³

Sir Thomas Dabridgcourt obtained a decree in Chancery against Sir Anthony Ashley for £1000. Sir Thomas made a letter of attorney to his son to compound the suit, which he did for 200 marks and made a release to Sir Anthony in his own name. This release was ruled in Chancery to be void, because not made in the name of his father. Mo. 818. And a like case is there remembered of leases made by Sir Francis Walsingham as attorney of Sir Philip Sidney in his own name, which were likewise ruled to be void in Chancery.⁴

The reason upon which these cases stand, I take to be this, that every authority delegated to another must be strictly pursued. Otherwise, it is void. 1 Inst. 52a, 258a.⁵ And, as in the cases cited, the authority given was to make leases in the name of the constituent, that authority was not pursued, which is the very case here. The deeds are made in the name of Buckner, the attorney. The authority given is to sell and the deeds 'for me and in my name and as my act to deliver', so that, the attorney not having pursued his authority, his act, *i.e.* these deeds, are void.

But they are also void for another reason, *viz.*, second, that Bernard, the principal, was dead before the date of the deeds and so the authority which Buckner had as attorney was determined. This is so plain from the reason of the thing as well as express authorities in law that it would be misspending time to say much on the subject. Lit., s. 66,⁶ puts a case of a

¹ E. Coke, *First Institute* (1628), f. 52.

² *Comb's Case* (1613), 9 Coke Rep. 75, 77 E.R. 843, also 1 Rolle, Abr., *Authoritie*, p. 330.

³ *Anonymous* (1564), Moore K.B. 70, 72 E.R. 447.

⁴ *Dabridgcourt v. Ashley* (1612), Moore K.B. 818, 72 E.R. 925.

⁵ E. Coke, *First Institute* (1628), ff. 52, 258.

⁶ T. Littleton, *Tenures*, s. 66.

feoffment and a letter of attorney to make livery; there, if the feoffor dies before livery, it cannot be made afterwards, for which he gives this one plain reason, because, after his decease, the right of the lands is forthwith in his heir or some other. This case put by Littleton is stronger than that before us, for here is no deed executed, only an authority given to make a deed in his name. And, therefore, I will beg leave to add to the reason of Littleton another of my own, *viz.* that it is impossible the authority should be pursued, because the deed must be made in the name of the principal, which cannot be after he is dead.

I might add further that, in this case, the lands are devised, and the devise, taking effect immediately upon the death of the testator, was a countermand in law of the authority given to his attorney in the same manner as making a second letter of attorney is a countermand or revocation of a former. Sir Edward Coke, in his *Commentary*, 52b, has adopted this doctrine of Littleton, and adds that a letter of attorney to make livery after the death of the feoffor is void, from whence it follows that it was not in the power of Bernard to empower Buckner by letter of attorney to sell the land after his death, if he had it in his intention, which does not appear, though, without question, he might have given him such power by his will. I shall, then, take it for granted that the deeds from Buckner to Weedon and Shairs are void and that nothing passed to the grantees. And, then, the second point in the case and which concerns the title of these defendants only is whether the dying seised of Weedon and Shairs, the grantees, in the life of the plaintiff's father will avail anything.

The finding in this case is so odd that I am forced to guess at the meaning of it. But I suppose it may be insisted that a descent takes away an entry, admitting which, I answer it is not found there was a descent from Weedon and Shairs to their heirs, only that they died seised, which they might do and the land not descend, for they might devise it away or a stranger might enter after their death and abate. And, in either case, the dying seised will signify nothing, for it is the descent and not the dying seised which takes away the entry. For illustrating this, I must beg leave to consider a little the law on this head. In judgment of law, the worthiest means of coming to an estate is by descent, and, therefore, the law has annexed to it divers privileges, particularly this we are now speaking of, that a descent shall take away an entry, the meaning of which is that, where a person comes to an estate by descent, there, though another has a good title, he shall not be allowed to enter upon the heir, who is in by descent, but shall be put to his action to recover, *Lit.*, s. 385,¹ that is a real action, for I shall agree, if our entry is taken away, we cannot maintain an [action of] ejectment. But, here, it is only found that the grantees of Buckner died seised, not that there was any descent. And, as one might well be without the other, I conceive this dying seised avails nothing at all. It does not take away the plaintiff's entry.

But there is still another objection, *viz.* that it does not appear when these grantees died seised only that it was in the lifetime of the plaintiff's father. Now, he was an infant when his father died in 1691, and he continued so for many years, dying a young man though eighteen years after his father's death. And, if the plaintiff's father was an infant at the time of the descent (admitting there really was a descent in the case), such descent would not take away our entry, for the law, ever careful of the rights of infants, will not suffer that they shall be prejudiced by anything that happens during their nonage. In all our Acts of Limitation,² there is a saving to the rights of infants, and, so, in all cases at the common law, where time or any act in law will take away a right, there is an exception to the case of infancy, as in this, of a descent taking away an entry, and many others. *Litt.* 402.³ Now, as the plaintiff's father might be and probably was an infant when this pretended descent happened, it signifies nothing at all.

¹ T. Littleton, *Tenures*, s. 385.

² *E.g.* Act of 1734, c. 6, s. 9, 4 Hening's Statutes 402.

³ T. Littleton, *Tenures*, s. 402.

If the defendants will say he was not under age, I answer it was incumbent upon them to have that found in the verdict, according to a late resolution in this court, between Ivey and Fitzgerald upon an appeal from Nansemond [County]. It was in April 1736 (*ante* 125).¹ The case was in ejectment upon a special verdict, wherein a descent was found which, I insisted, took away the plaintiff's entry. But John Randolph argued that we could have no advantage from that, unless it appeared that the plaintiff was under no incapacity at the time of the descent and that it was incumbent upon the defendant to show it if he would take advantage of such descent, of which opinion the court was, and judgment [was] given accordingly. And this being a parallel case, I hope, the court will be of the same opinion.

I am now come to the third and last point and which is the great question of the case, whether there has been such a possession in any of the defendants as will give them a title or bar the plaintiff of his entry.

The possession of the defendants, Dishman and Weedon, has been under the deeds I have been speaking of. But, as to the other defendants, the parish and the Browns, it does not at all appear how they first came into possession. They show no kind of title, either by grant from the crown or any of the plaintiff's ancestors, or that the land in controversy is within the bounds of any such grant. But all the title they have to rely upon is barely possession. In speaking, therefore, to this point, it may be necessary to show, first, that such a possession as this, in controversies about bounds, has not been usually favored in this court, or, second, if it has, that we are not barred in this case by the Act of Limitation and, consequently, that no possession, though ever so long, can avail the defendants.

But, first, I must beg leave to state the facts relating to this question. I shall admit the possession of the defendants to be the strongest the witnesses speak of, *viz.* fifty years, though they say between forty and fifty. And I must observe that, so long as 1673, the plaintiff's grandfather commenced a suit against one Horton, under whom the parish claims, for settling the bounds of the land now in contest. This suit, by the artifices of Horton, was protracted until the year 1686, when it was dismissed without any judgment because it had been so long depending. This period falls in very near with the time the witnesses say the defendants have been in possession. A few years after this, in 1690 or 1691, our grandfather died, having devised to his two sons, Philip and John, both infants. John had the whole by survivorship, and died a young man in 1709, leaving the plaintiff, an infant, who brought this suit before he was twenty-five years old, about eight years ago, I think. And, in this suit, the defendants have used all the chicanery and little arts they could devise to delay it.

Under this view of long suits protracted by the arts of the defendants and the infancy of the plaintiff's father and himself, this title the defendants would build upon possession must appear to be very indifferently founded, since every possession that can give a right must be peaceable and uninterrupted and there must be no incapacity in the party who has a right to claim or enter.

But, as to this point of possession with respect to bounds, I never understood in all the determinations I have heard in this court any other regard was paid to it than as it was a presumptive evidence of right in cases where, perhaps, there was no other certain rule of determination. For instance, in the case of lands adjoining to each other claimed under different patents, it is a known thing that, in most of the old patents, the bounds are described with so much uncertainty and often contradiction that it is next to impossible to determine from thence what the true bounds are or ought to be. And, therefore, as the best guide and rule in such dark and perplexed controversies, the court have generally settled the bounds according to the ancient possession, where it has appeared to be peaceable and uninterrupted. But, where the bounds of a patent are certain and evident and any person has encroached within those bounds without any kind of title, I believe no instance can be given of a determination in this court that a possession of this kind, without more, should give a title, much less where there have been continual

¹ *Ivey, ex dem. Ivey v. Fitzgerald* (1736), see above, Case No. 30.

controversies and disputes or incapacities in those who had the true right and title, as appears to be the case here.

Indeed, it would be utterly inconsistent with the spirit of our laws to determine that possession should give a right where there are incapacities in the persons that should claim. I have had occasion already to observe the great care both the statute and common law have always taken of infants' rights. And it is the same with respect to other incapacities. Nothing that happens during the incapacity can possibly hurt them. And I will beg leave to add that, in natural justice, there is no reason why the longest possession should give a right, since, in the nature of things, a wrong becomes only the more aggravated the longer it has continued. Institutions of this kind may be convenient for society and, without doubt, are so. But, then, they ought to be confined to the positive law, and carried no further. And I humbly conceive there is no positive law in this case, no act of limitation, that will bar the plaintiff of his entry or action, as I shall now endeavour to show.

In speaking to this point, it may be necessary just to remember the several acts that have been made in this country that can any way respect the present question. In 1662, an Act was made entitled lands five years in possession (cap. 72). By this Act, if a man, having right to lands, did not prosecute his claim within five years, he was forever barred with a saving, however, to infancy and other incapacities. This was certainly a very severe law. But yet it subsisted above forty years, until 1705, when an Act was made repealing it, and much to the purport as to the matter of limitation with that we now have. But there being some things in this Act not approved of by the king, it was repealed by proclamation, as I have been told. And it is also repealed in express words by the Act of 1710, the only Act we now have as to this matter. And, supposing the Act of 1662 to be revived by the repeal of the Act of 1705, it is again repealed by the general repealing clause in the Act of 1710.¹

This Act of 1710, then, is the only law now in force respecting the present question, for, I presume, it will not be pretended that this court can judge upon any act that is repealed, from whence it will follow that the possession of the defendants before 1710 is quite out of the question. And, if the plaintiff has pursued his right within the time limited by this Act, no possession, though ever so long, can bar him. The words of the Act, so far as respects the present question, are:

That no person or persons that now hath or have or which hereafter may have any right or title of entry into any lands etc. shall at any time hereafter make any entry but within twenty years next after his or their right or title has heretofore descended or accrued or hereafter shall descend or accrue provided that, if any person or persons that hath or shall have such right or title of entry be or shall be at the time of such right or title first descended, accrued, come, or fallen within the age of 21 years, *feme covert*, *non compos*, imprisoned, or out of the colony, such person may make his entry within ten years after the incapacity removed.

It is plain that the makers of this Act had under their consideration two things, *viz.* to provide for those rights and titles that had accrued before the Act and for such as should accrue afterwards, as to the first persons having such rights are to make their entry etc. within twenty years from the time their right first accrued. But, if they were under age or other disability at the making of the act, by the proviso, ten years is given them after the disability removed to make such entry. The words of the Act are so extremely plain they will admit of no comment.

Now, in this case, the lessor of the plaintiff had a right of entry at the time this Act was made, which accrued to him upon the death of his father. By the enacting part, which has been read, he was to make his entry within twenty years from the death of his father, which

¹ Act of 1661, c. 72, 2 Hening's Statutes 97-98; Act of 1705, c. 21, 3 Hening's Statutes 323-324; Act of 1710, c. 13, ss. 9, 11, 3 Hening's Statutes 521-523.

happened in 1709. But this he has not done. But, then, being an infant when the Act was made, he has by the proviso ten years after his coming of age. And this suit was brought before he was twenty-five. And, so, he is within the time limited by the proviso. Thus, having made our entry within the time limited by the Act of 1710 and there being no other act in force whereby the longest possession can bar us, I apprehend it to be extremely clear that the lessor of the plaintiff is not barred by the possession of the defendants in this case. And, as it is clear that we are not barred by the Act of Limitation, so I hope that the possession relied on by the parish and the defendants, the Browns, which is all the title they have, will avail nothing under the circumstances of this case and that the defendants, Dishman and Weedon, have no title under the deeds from Buckner. And, then, judgment, I presume, will be given for the plaintiff for all the land within the black lines determined by the jury to be the true bounds of his patent. And I humbly pray judgment accordingly.

There was no argument made as to the title of Dishman and Weedon nor any worth noting as to the other points.

So judgment was given for the plaintiff for all the lands within the black lines, April 1738.

59

Faldo, ex dem. Powell v. Thurmer
(October 1738)

A possibility cannot be granted over, assigned, or released; therefore, a grant made at a time when the grantor had no estate cannot convey the right which afterwards accrues to him.

In [an action of] ejectment. Faldo for Seymour Powell and Ann, his wife v. Thurmer.

Argol Ransha, seised of 300 acres of land, died intestate, leaving two daughters, Ann and Sarah, to whom the same descended. Ann married George Jackson, and had issue by him Ransha, George, Sarah, and Ann. Ransha Jackson, being seised of a moiety of the said 300 acres by descent from his mother, devised the same by his will to Robert Thurmer, who had married his sister Sarah, for their lives, remainder in fee to their son, George Thurmer, and he died without issue. Which moiety is the premises in question. Sarah Thurmer had no other child but George before-named. And the said Robert Thurmer, Sarah, his wife, and George, their son, are all dead, George leaving no issue and dying in 1725. George Jackson survived George Thurmer, and is dead without issue. But Robert Thurmer survived him. Ann, the other daughter of George and Ann Jackson, is one of the lessors, and, as aunt and heir at law of George Thurmer, claims the premises.

George Jackson, the son, before the death of George Thurmer, viz. in 1723, by deed, in consideration of £10, sells to Robert Thurmer all the right, title, and interest which he then had or should have at any time thereafter to all the land that formerly belonged to Argol Ransha. The defendant, is heir at law to Robert Thurmer, and sets up a title under this deed, so that the sole question in this case is whether this deed from George Jackson, made at a time when he had no estate, right, or interest, can operate at all to convey the right which afterwards accrued to him upon the death of George Thurmer, whose heir he was, for, if nothing passes by this deed, the title of the lessors is clear, both as heir of George Thurmer and George Jackson.

It is really admirable that any lawyer will offer to argue so clear a point and contend against a maxim and rule of law, viz. that a possibility cannot be granted over or released, 1 Inst. 214a,¹ which is as well known and as settled a point as that the eldest son shall inherit. In Westminster Hall, I [Barradall] am sure the court would not suffer an argument to be made.

¹ E. Coke, *First Institute* (1628), f. 214a.

When this deed was made, Robert and George Thurmer were both alive. Robert had an estate for life, and George the remainder in fee. What right or interest then could George Jackson have? It is true he was presumptive heir to his nephew and so had a possibility of having the land upon his dying without issue. But this possibility could not be granted over or released, as I have said. There is a great difference between a bare possibility and a future interest that will certainly happen, one time or other, as a reversion or remainder expectant upon the determination of any particular estate, as, in this case, after the death of George Thurmer. George Jackson, as uncle and heir to him, had a remainder in fee expectant upon the death of Robert and Sarah Thurmer, and, without doubt, after George Thurmer's death, he might have granted or released his interest. But, having no more than a bare possibility during George Thurmer's life, he could not grant or release that, but his deed is absolutely void. And if he himself had survived Robert Thurmer, the tenant for life, he might have entered into the land against his own deed.

It must be owned there are words sufficient in this deed to carry a future right if the same was grantable, 'all the estate etc. that I shall have hereafter'. Littleton, in his chapter of Releases, sect. 466,¹ takes notice that such words are usually put in releases, but he says they are of no effect because no right passes but that which the releasor has at the time of the release made. This he illustrates by putting the following case. If there be a father and son and the father is disseised and, the son living, the father releases to the disseisor all the right which he has or may have, yet, after the father's death, he may enter upon the disseisor against his own deed, for nothing passed by it, all the right when he made the deed being in his father.

I suppose there is the same reason between any other ancestor and heir as between father and son. And, then, this case is exactly ours except as to the disseisin. George Thurmer and George Jackson were ancestor and heir; George Jackson releases or grants; it is the same thing in the life of George Thurmer. This deed, I say, is void, and nothing passed by it, because all the right at the time of the deed made was in George Thurmer. I think the cases are exactly parallel.

There are, besides, an infinite number of cases in the books where it has been adjudged that a possibility cannot be granted over, assigned, or released. 4 Rep. 66b, in Fullwood's Case; 10 Rep. 47, 48, Lampet's Case; 3 Lev. 427, Bishop and Fountain; 1 Inst. 265b.² But it is misspending time to say more in so clear a point. I shall, therefore, only just observe the reason and policy of the law in not admitting a possibility to be transferred. And it is upon the same ground that a thing in action shall not, viz. for avoiding of maintenance, suppression of right, and stirring up of suits, 1 Inst. 214a, which are certainly excellent reasons and show the wisdom and justice of the law in discountenancing and prohibiting everything that may have a tendency to such mischiefs.

Judgment [was given] for the plaintiff.

¹ T. Littleton, *Tenures*, s. 466.

² *Cartwright v. Roberts* (1591), 4 Coke Rep. 64, 76 E.R. 1031; *Lampet's Case* (1612), 10 Coke Rep. 46b, 77 E.R. 994, also *sub nom. Lampit v. Starkey*, 2 Brownlow & Goldesborough 172, 123 E.R. 880; *Bishop v. Fountaine* (1695), 3 Levinz 427, 83 E.R. 764, also 1 Eq. Cas. Abr. 175, 21 E.R. 969; E. Coke, *First Institute* (1628), f. 265b.

Palmer v. Word
(October 1738)

The record in this case was found to be a final judgment and to be binding on the parties.

In [an action of] detinue for slaves upon a special verdict, the case is [thus]. The plaintiff's mother, when she married his father, Martin Palmer, deceased, was possessed of several slaves, particularly, one called Bridget. Palmer died before his wife in 1717. And, by his will, he devised Bridget to the plaintiff and other of the said slaves to his other children, and he made his wife and two others executors. The wife, afterwards, married the defendant. And, in 1721, an action of detinue was brought in the King and Queen [County] Court in the name of the plaintiff and his brothers and sisters by their next friends, Martin and Roger Palmer, against the defendant and his then wife, as one of the executors of said testator, for Bridget and the other slaves devised to them, in which action, the general issue was pleaded. And, upon a trial, a verdict was given for the defendants:

Which verdict is admitted to record, and the suit dismissed with costs, and, at the defendant's motion, the plaintiff is ordered to pay them 15s. for an attorney's fee.

These are the very words of the record.

The slaves in question are the children of Bridget born after the death of the plaintiff's father, and the plaintiff claims them under the devise in his father's will.

It will not be made a question, I [*Barradall*] suppose, but that Bridget and the other slaves of the plaintiff's mother vested in his father upon the marriage between them. The Act of 1727,¹ explaining that, which declares them to be a real estate, has expressly settled the law in this point. But, then, there is a proviso in the Act in these words:

Provided that nothing in this Act contained shall be construed to change or alter the property of any slave or slaves which, by the judgment of the General Court or any County Court, have been heretofore adjudged to belong to any person or persons whatsoever, but such judgment shall remain and, forever hereafter, shall be deemed and taken to be valid and binding.

Now, in this case, the defendant says there has been a judgment, *viz.* the record in King and Queen [County] Court found in the verdict. The sole question, therefore, is whether this record be such a judgment as, within the meaning and intention of the proviso aforesaid, will bar the plaintiff from claiming the slaves in question or from bringing this suit.

It may be necessary in the first place to enquire into the reason and policy of this proviso, which, at first view, seems a little hard, as it gives a sanction to judgments whether the determination was right or wrong. Before the Explanatory Act, various constructions were made of the old Act.² And, as the preamble expresses it, contrary judgments [were] given, particularly in this point, whether a woman's slaves vested in her husband by the marriage, it was thought necessary to settle the law in this and other controverted points. But, then, as it might be a great hardship upon purchasers, introduce a great revolution in property, and be productive of numberless lawsuits if all the judgments given for above twenty years before

¹ Act of 1727, c. 11, 4 Hening's Statutes 222-228.

² Act of 1705, c. 23, 3 Hening's Statutes 333-335.

contrary to this explanation should be made void, it was, therefore, provided that the Act should not extend to alter the property of any slave that, by the judgment of any court, had been adjudged to belong to any person.

This, being, as I apprehend, the reason and policy of introducing this proviso, it will follow, I think, pretty clearly that the judgments here intended are only such where it appears the property of the slaves have been adjudged by the courts and which are valid, effectual, and binding in the law upon the party against whom the judgment is given. It will never be construed, I presume, that this proviso intended to give a sanction to judgments that were void in themselves or not binding upon the party against whom they were pronounced.

It was never intended to take away the right of bringing a writ of error to reverse any judgment of this kind if there was other cause for doing it than the adjudging the property of the slaves. For instance, if a judgment was obtained by fraud or if an infant had been sued and appeared by an attorney instead of a guardian, which is error, it can never, I say, be supposed to be the intention of the law-makers to make such judgments valid or to give a sanction to them. But the judgments intended by this proviso are only such where it appears, first, that the property of the slaves was adjudged to belong to some person and that upon some controverted point which the Explanatory Act settles, that, second, such judgment be valid in law and binding upon the party against whom it is given and such as would be a good bar to another action.

I will now beg leave to examine the record produced by the text I have laid down. And I believe it will appear to be deficient in both instances, *viz.* that it does not appear the property of the slaves was adjudged and that it is not valid or binding in law. Here is the record. (Read it.)

This record, Sir, is nothing more than a relation or account of a trial, that a jury was sworn, a verdict [was given] for the defendant, and the suit [was] dismissed. It is not said, nor does it appear, that the court gave any judgment at all, much less that the property of the slaves was adjudged to be in the defendant. It was certainly a matter of law whether the slaves vested in the husband or not. And, if that was the question at this trial, which I insist upon, it does no ways appear the jury should have found a special verdict or, at least, the court have directed them as to the matter of law. There is nothing but a bare presumption that this point was at all in question. The suit, indeed, is in the name of children and against the executor of the husband, but it does not follow that, therefore, this point was in question. If presumption is to weigh or prevail, it ought to be made in favor of the court and jury that they did their duty, which they certainly did not at this trial. If it was left to the jury to determine whether the slaves vested in the husband by the marriage, it was a matter of law, which the court should have determined.

But, if we are to go upon conjecture and presumption, I will beg leave to offer mine too. This suit is, to be sure, as absurd a one as ever was brought. It is an action of detinue by four plaintiffs, who had separate interests against one executor, though there were three who proved the will to recover several specific legacies devised to the plaintiffs. This appears in the declaration. Now, first, the plaintiffs could not join. Second, [an action of] detinue would not lie against one executor alone. And, third, neither would such an action lie for a legacy, for the legatee could have no property but by the delivery of the executor. And the proper remedy was in chancery. Now, it is as reasonable to suppose that all or some of these points were insisted on at the trial and induced the jury to give their verdict as that they took upon them[selves] to determine whether the slaves vested in the husband. If it be said these were matters of law, the same answer is given as to the presumption they would make.

After all, it is a new way of arguing upon records to make suppositions and presumptions of things that do not appear. The rule of law is *inter non existentia et non apparentia, eadem est ratio*. There is no difference between things that do not appear and things that are not. If, then, it does not appear that the property of the slaves was adjudged by the court upon this trial, it must, I conceive, be taken for granted that it was not.

Indeed, there will be no end to making presumptions. The jury might find as they did for want of proper evidence to prove the property of the slaves or that the executors had debts to pay. And, then, the legatees had no right to their legacies. In short, suppositions and presumptions will multiply without end. And, therefore, I hope they will be entirely rejected.

But, second, the record produced is really no judgment. Every judgment is the act of the court, and the law has prescribed certain forms to be observed in entering them up and which, if not pursued, the judgment is ineffectual, not binding in law, but may be reversed for error. Neither will it be any bar to a second action brought for the same matter. The words '*ideo consideratum est*' are essential to every judgment. And the law is so nice and strict that no other words, though of the same import and signification, are sufficient. One reason given, and a good one, is that it ought to appear that judgment was given on due consideration. 1 Inst. 39. The very adding of other words will make the judgment erroneous. 3 Danv. 56, pl. 21 to 24.¹ Now, in the record before us, it is so far from being entered that it was considered that it is not so much as said to be ordered, except with respect to the lawyer's fee. Nor [is there] any other word to show it was the act of the court, so that this is really nothing more than an account of a trial, but [it is] no judgment at all.

Should this exception be overruled, there is still another and a stronger remaining. It is not entered that the plaintiff shall take nothing by his bill. These are words so absolutely essential that, without them, the judgment is of no efficacy at all. It cannot be pleaded in bar to a second action brought for the same matter. It may be reversed for error. It is a known and settled rule that every judgment to be a good bar to another action must be a complete judgment in law, both as to the matter and manner. As to the matter, it must appear that the very right of the cause was determined in the former action. As to the manner, it must be entered up in the form the law has prescribed. Now, these words '*quod querens nil capiat*' is a phrase of art not to be supplied by any other words and, without which, no judgment can be a bar to another action. Cro. Jac. 284, *Level v. Hall*, 1 Bro. 81, same case; 2 Mod. 294, cited Holt R. 552, *per Holt*.² And this point I have known adjudged in this court.

If, then, this is not such a judgment as would bar the plaintiff from bringing another action in case this Act had not been made, I hope the Act will not be construed to give a sanction to such judgments which strictly speaking and, in the eye of the law, are really no judgments at all.

A third objection to this record called a judgment is that it is against infants and so not final or conclusive upon them. The law is very tender and careful of the rights of infants, so that no act done during their nonage to their prejudice, unless they have a remedy over, is binding upon them. Upon this reason it is, there is a difference where an infant is a plaintiff and where he is a defendant. Where he is defendant, he may be bound if he defends by a guardian and not else, but never where he is a plaintiff. When an infant is sued, a guardian ought to be appointed by the court to defend him. And, if he loses his cause by his mismanagement or default, the common law gives him an action against his guardian to have a recompense in damages. But, where an infant brings an action, be it by *prochein ami* or guardian, for it may be by either, the law gives him no action at all in case of any neglect or default to his prejudice. And, therefore, no judgment given against an infant plaintiff is binding and conclusive upon him. In this last case, the guardian or next friend are not appointed by the court, but anyone who will thrust himself into the office may be so for that purpose.

¹ E. Coke, *First Institute* (1628), f. 39; 3 Danvers, Abr., *Error*, pl. B, 21-24, p. 56.

² *Level v. Hall* (1611), Croke Jac. 284, 79 E.R. 244, 1 Brownlow & Goldesborough 81, 123 E.R. 679; *Rose v. Standen* (1678), 2 Modern 42, 294, 86 E.R. 930, 1081, also 1 Modern 207, 86 E.R. 832, 3 Keble 844, 84 E.R. 1045; *Pope v. St. Leger* (1693), Holt K.B. 550, 90 E.R. 1203 [query].

I had occasion in an argument two or three courts ago between Brooking and Dudley¹ (*ante* 182) to show the difference between a guardian and a *prochein ami* and that, though the offices were often confounded, they were really very widely different. It seems, however, unnecessary at this time to enter into that point of learning. It may suffice, I hope, to show an authority for the difference I have taken, where an infant is a plaintiff and where a defendant, which, if rightly understood, will serve for an answer to any cases that may be produced to prove the power and authority of a guardian and make it evident they only relate to cases where an infant is a defendant. *Simpson v. Jackson*, Palm. 295.²

The law in this is founded upon the highest reason, for how easy would it be, by covin and collusion, to juggle infants out of their rights if an action brought in their name by a pretended next friend should be final and conclusive upon them. The infant can have no action or any other kind of remedy. It will be no answer to say there is no fraud appearing in this case. My argument is general, that judgments against infant plaintiffs are not conclusive, because there may be great prejudice arising to infants. It is an argument *ab inconveniēti*, which is sufficient to prove a thing unlawful. It concerns all the infants in the country. And I doubt not will be well considered.

Thus, sir, I hope this record is no bar at all to the plaintiff's title to the slaves in question. First, it does not appear that the property of the slaves was at all adjudged or determined upon this trial, and the proviso relied upon is express where the property has been adjudged. Second, here is really no judgment in the eye of the law nor would this record be any bar to another action for the same matter. And, consequently, it can be none to this. Third, it is a judgment, if it can be called so, against an infant, and so [it is] not final or conclusive. For all these reasons, I conceive this record is no judgment within the meaning and intention of the proviso. And so I pray judgment for the plaintiff.

[In] October 1738, judgment was given for the defendant, *viz.* that the record found was a good judgment within the proviso, which I own very much surprised me, and the more as there was not one good reason or argument offered on the other side. But the counsel for the defendant seemed to be convinced that the plaintiff ought not to be barred by the record found.

TAYLOE, GRYMES, CARTER, ROBINSON, DIGGES, BYRD, BLAIR, and the Governor [GOOCH] [held] for the defendant; LEE, RANDOLPH, and CUSTIS [held] for the plaintiff.

[This report is cited in *Edwards v. Bridger* (1740), see below, Case No. 84.]

61

Harrison v. Halley
(April 1739)

Pursuant to the Act of 5 Geo. II, a judgment debtor's real property can be levied upon and sold.

A judgment having passed against the defendant and the plaintiff as Sheriff, the plaintiff had an attachment upon the Act of Assembly³ against the defendant's estate. And it was against his lands as well as goods. The Coroner returned that the defendant had no goods and that he

¹ *Brooking v. Dudley* (1737), see above, Case No. 51.

² *Simpson v. Jackson* (1622), Palmer 295, 324, 81 E.R. 1089, 1105, also Croke Jac. 640, 79 E.R. 552.

³ Perhaps Act of 1730, c. 8, s. 13, 4 Hening's Statutes 284-285.

had attached a parcel of land, upon which the plaintiff had judgment, and the land [was] ordered to be sold as goods taken on a [writ of] *feri facias*.

Barradall: This is the first attachment that has been granted against lands since the Statute 5 Geo. II, For the More Easy Recovery of Debts in the Plantations,¹ upon the equity of which this practice is founded.

[Other copies of this report: Jefferson 58.]

62

Boys v. Hoggatt
(April 1739)

Payment of a bill of exchange will be presumed after twenty years.

An action was brought upon a bill of exchange protested more than twenty years ago. The defendant pleaded he owed nothing. And, at the trial, he insisted that payment ought to be presumed at such a distance of time, according to Holt's opinion [in] 6 Mod. 22.²

The jury found for the defendant.

63

Webb v. Elligood
(April 1739)

A sheriff must keep a debtor in execution in prison for twenty days before releasing him where the judgment creditor refused to pay the sheriff's fees or put up a bond for their payment.

Appeal from New Kent [County Court].

This was an action against the appellant, Sheriff, for an escape. And, upon a special verdict, the case was the plaintiff, respondent, had judgment against one Gilmet in custody and prayed him in execution. He had been thirty-two days in custody before at another's suit. And the Sheriff, knowing him to be insolvent, demanded of the plaintiff's attorney security for the prison fees, who refused to give him security. And, thereupon, the Sheriff discharged him.

The question in this case was whether the Sheriff was obliged to keep him twenty days before he discharged him.

And the court was of opinion that he ought to have done so, and affirmed the county court's judgment.

[Other copies of this report: Jefferson 59.]

¹ Stat. 5 Geo. II, c. 7.

² *Anonymous* (1703), 6 Modern 22, 87 E.R. 786.

Rogers, administratrix v. Spalden
(April 1739)

Affidavits of a debt by an absent creditor that were made before the action was filed are not admissible in evidence.

Rogers, administratrix of Rogers v. Spalden.

The plaintiff, living in England, had taken proofs of her debt by an affidavit before the Lord Mayor of London, pursuant to the Act of Parliament of the 5 Geo. II, For Recovery of Debts in the Plantations.¹ And now, upon the trial, these affidavits were offered in evidence.

But it was objected that, when they were taken, no suit was depending and the Act only extended to cases where suits were actually depending. And it was said the defendant ought to have notice.

And of that opinion was the whole court, except GRYMES and DIGGES.

And so the affidavits were not allowed to be given in evidence.

The plaintiff appealed.

[Other copies of this report: Jefferson 58.]

Dunn v. Wythe
(Part 1)
(April 1739)

In this case, the court found that it was the testator's intent that his widow, who was his executrix, should take the residue of his estate as executrix and that it should go into her own estate.

Et e contra. In chancery.

Samuel Simmonds, by his will, gives his wife all his real and personal estate during her widowhood and, if she marries, then he gives one-half of his estate to Daniel Dunn's children and the other half to Matthew Noblin's children. And he makes his wife executrix, who lived several years and never married and is now dead. The question is whether Simmonds's estate shall go to Dunn's and Noblin's children by force of the devise or as next of kin or to the wife's executor. They cannot take by the devise, [it] being limited to them upon a contingency that never happened, *viz.* the wife's marriage.

The question, then, is whether, after the wife's death, the estate shall be distributed among the next of kin or whether the wife gained an absolute property by the devise to her and being made executrix.

And I [*Barradall*] conceive, as the case is, the wife gained an absolute property by the devise or, if not, yet she shall take as executrix to her own use and not as a trustee for the next of kin. I shall agree that, if the wife had married, the limitation over to the plaintiff upon that contingency had been good and they had been well entitled. But that not happening, it is quite out of the question any further than that it may serve to show the testator's intention. I shall, therefore, consider this merely as a devise of chattels during widowhood without any remainder over, for, I take it, there is no difference between a remainder upon a contingency that never

¹ Stat. 5 Geo. II, c. 7.

happened and no remainder at all. Under this view, I conceive the absolute property vested by the devise during widowhood. The gift of a chattel for an hour is a gift forever. There is no instance where a devise for life has been adjudged to pass only the use unless there was a remainder over.

But, if we have not the absolute property by the devise, we certainly have as executrix. And the next of kin, I conceive, can never be entitled, as the case is. The making of a man executor is a gift of the personal estate in law. But it must be owned that, since the Restoration [in 1660] and making the Statute of Distributions,¹ there are several instances where a man has disposed of part of his estate and taken no notice of the residuum that, in equity, the executor has been taken as a trustee for the next of kin and that the executor should not have it. But there are many cases, too, where it has been adjudged for the executor against the next of kin, especially where the wife is made executrix, so that there is no general rule. It depends altogether upon the circumstances of the case and the intention of the testator.

But this case does not seem to be within the reason or rule of any of the cases in the books on this subject. They are all where some part of the estate is disposed of and another part left entirely undisposed, whereas, here, the disposition to the wife is of the whole estate, and there is properly no residuum undisposed of. There is no instance in the books of a question of this kind. But admitting there is no difference as to this point, we are then to consider whether it can be supposed to be the testator's intention that the executrix should not have the residue.

It will be said that the giving a particular legacy makes a strong and violent presumption and implication that the testator intended no more. And it is true that, in many cases, it has been so adjudged. But I deny it to be a universal rule and that, in many cases, especially where the wife has been executrix, it has been determined that the wife should have the surplus notwithstanding she had a particular legacy, as *Ball and Smith*, 2 Vern. 675.² *Smith* devised to his wife some plate and goods she had as executrix of a former husband. The surplus was decreed to her, principally, because it could not be presumed the testator intended only an office of trouble to the wife but rather of benefit to take the surplus.

Batchelor and Searl, Gilb. Rep. 127,³ where two strangers were executors and had a legacy for mourning and one of them a horse and furniture, yet the surplus was decreed for them. And [it was] there said that, in no case unless the implication was violent and such as could not be resisted, the executors ought to be shut out of the surplus which belonged to them as representing the testator. And for many ages, they were entitled to it by law.

Lady Glanvel and the Duchess of Beaufort, 2 Vern. 648; a devise to the duchess of the use of the table plate and he made her executrix; the surplus was decreed to be distributed, but [it was] reversed in the House of Lords, because she had only a special property. *Mo. Cha. Ca.* 10.⁴ This is our case exactly. *Griffith and Rogers*, Ch. Ca. Abr. 245, 8, a wife had some books

¹ Stat. 22 & 23 Car. II, c. 10 (SR, V, 719-720).

² *Ball v. Smith* (1698-1711), 2 Vernon 633, 675, 23 E.R. 1014, 1039, also 2 Freeman 230, 22 E.R. 1178, 1 Eq. Cas. Abr. 245, 21 E.R. 1022, 2 Eq. Cas. Abr. 133, 434, 22 E.R. 114, 369.

³ *Batchellor v. Searl* (1716), Gilbert Rep. 125, 25 E.R. 88, also 2 Vernon 736, 23 E.R. 1081, 1 Eq. Cas. Abr. 246, 21 E.R. 1023, Chan. Repts. *tempore* Geo. I, 243.

⁴ *Lady Granville v. Duchess of Beaufort* (1709), 2 Vernon 648, 23 E.R. 1023, also 1 Peere Williams 114, 24 E.R. 317, 1 Eq. Cas. Abr. 245, 21 E.R. 1021, 2 Eq. Cas. Abr. 415, 22 E.R. 352; *Rachfield v. Careless* (1723), 9 Modern 9, 88 E.R. 281, also 2 Peere Williams 158, 24 E.R. 680, 1 Strange 568, 93 E.R. 705, 2 Eq. Cas. Abr. 416, 424, 441, 22 E.R. 353, 361, 376, *sub nom. Russell v. Carlison*, Chan. Repts. *tempore* Geo. I, 958.

devised; this did not exclude her from the surplus. Jones and Westcomb, *ibid.* 10;¹ a devise to the wife of a term for her life and, after her death, to the child she was then *enceinte* with; [it was] adjudged this devise did not exclude her from the surplus.

[There is] no instance where a surplus was taken from a wife executrix, except Darwell and Bennet, cited in Ball and Smith, and, there, two strangers were executors with the wife, and Ward and Lane, cited *ibid.*,² where a man lived twenty years after making his will and acquired a great estate, which went upon another reason, *viz.* a presumed alteration of mind with that of circumstance.

From these cases, it appears there is a great difference where the wife and where a stranger are made executors. There is no instance but in the two last cited where the surplus has been taken from the wife. And they are very particular. The reason of the difference I take to be grounded upon this distinction, that, where strangers are made executors, there is room to presume he intended no more than what is particularly devised, as not being supposed to have that affection for a stranger as his relations. But, where the wife is executrix, he is presumed to have a larger share of affection for her than any relation, and so [there is] no reason to take the surplus from her. The great reason why, when a particular legacy is given to the executor, the surplus shall be distributed is from an implied intent in the testator not to give more than he has mentioned. Upon this ground, I conceive there is in this case as strong an implication to oust the next of kin, for he devises to them only in case his wife marries, which may as well exclude them from taking in any other manner as the executor because of a particular legacy. The implication, I say, is as strong that the testator did not intend them any part of his estate but upon that contingency, which, never happening, they are utterly excluded. If he had intended they should take after his wife's death, it was an easy matter to express it, so that here is implication against implication and, the legal title being in the executor, the determination ought to be in his favor, it being a rule that law and equity shall prevail against equity alone.

It is allowed that the intention of the testator is to govern in these cases, and this intention is to be collected from the words of the will. I must submit whether the intention be not very plain, that the plaintiffs should not take unless his wife married. And I conceive that his giving to his wife during widowhood and limiting over in case of marriage and then making her executrix is the same as if he had said, in case she does not marry, she shall have all, for the making of a person executor in the judgment of the law is a gift of the whole personal estate. There could be no use in making her executrix but to that end, there being no legacies and all given to her. Some men we know are very solicitous about their wife's marrying a second time, and lay them under restraints. And it will be no unreasonable construction of this will to suppose that was this testator's intent. It is very consistent with the words of the will that, by making her executrix, he did intend she should have all in case she did not marry. Here was no child; so the wife was entitled to half. By acceptance of the will, she is in a worse case.

On the other side, it was argued that this devise to the wife during widowhood gave only an estate for life and so only the use passed, that the testator's intention was that the children should take upon the wife's death or marriage.

But the court were of opinion that the wife's executor was well entitled, principally, as I took it, upon the intention of the testator, which they took to be that, if the wife did not marry, she should have the whole estate.

¹ *Griffith v. Rogers* (1704), 1 Eq. Cas. Abr. 245, 21 E.R. 1021, also Precedents in Chancery 231, 24 E.R. 112; *Jones v. Westcome* (1711), 1 Eq. Cas. Abr. 245, 21 E.R. 1022, also Precedents in Chancery 316, 24 E.R. 149, Gilbert Rep. 74, 25 E.R. 52, Chancery Repts. *tempore Anne* 338.

² *Darwell v. Bennet*, 2 Vernon 676, 23 E.R. 1040; *Ward v. Lane* (1702), 1 Eq. Cas. Abr. 244, 21 E.R. 1021.

For the plaintiffs, *viz.* Dunn's children, [were] RANDOLPH, GRYMES, CARTER, and LIGHTFOOT; for the defendant, the wife's executor, [were] LEE, TAYLOE, ROBINSON, DIGGES, BYRD, and the Governor [GOOCH].

N.B. There were slaves as well as personal estate, but no difference was made.

[For the second part of this report, see below, Case No. 72.]

66

Timson v. Robertson
(April 1739)

In this case, the devise in issue created an estate tail.

Samuel Timson, by his will, devises the premises in question to his son John and, if he died within age or without issue, remainder over. John entered, lived to be twenty-one, and, by his will, devised to William Timson, and died without issue. William died without issue in 1726, twenty-three years old. The lessor is his heir.

The questions are, first, whether John had an estate tail or a contingent fee, second, whether the plaintiff [is] barred by the Act of Limitation.¹

The testator certainly intended an estate in fee on a contingency of living to be twenty-one or having issue. If it be construed an estate tail, as that estate would be determinable on the death of the devisee before twenty-one, it will follow that, if he had died before twenty-one and left issue, that issue would be disinherited, which the testator could never intend.

The word 'issue' in a will is not always a word of limitation. It is sometimes and often taken as a word of purchase as *designatio personae*. Here, it was only made use of to show when the testator intended the estate given to John should determine, *viz.* if he died under age or without issue, then the estate was to go over. The dying without issue here are words of determination. If the word 'or' here can be taken for 'and', it will be mighty clear. Then it will run if he die under age and without issue.

In *Price and Hunt*, Poll. 645,² in a devise of this sort, it was so taken as a devise to his son and his heirs and, if he die before he attain twenty-one or have issue of his body living, remainder over; the son lived to twenty-eight, and died without issue. In a dispute between the heir of the son and the remainderman, it was adjudged for the heir that the son had a fee subject to two contingencies, either of living until twenty-one or having issue, and, one of the contingencies having happened, the remainder could never take place. And, there, [it was] argued that the word 'or' must be taken for 'and', as in *Sowell and Gerrard's Case*, there cited, Cro. Eliz. 525, Mo. 422, a devise to his son and his heirs and, if he die within age or without issue, remainder over; he died before twenty-one, but left issue, and, between the remainderman and issue, [it was] adjudged for the issue as heir of his father and that 'or' should be taken for 'and'.³ By the report of this case in *Croke*, it seems as if the judges took it to be an estate tail, and so is a case against us. But that does not appear in *Moor*, and the judgment does not prove it, because, if it was a contingent fee, the defendant had title as heir

¹ Act of 1734, c. 6, s. 9, 4 Hening's Statutes 462.

² *Price v. Hunt* (Ex. 1684), Pollexfen 645, 86 E.R. 674, also Dodd 53, 289, Exch. Repts. *tempore* Car. II, 591.

³ *Soullé v. Gerrard* (1596), *Croke* Eliz. 525, 78 E.R. 773, *sub nom.* *Sowell v. Garret*, Moore K.B. 422, 72 E.R. 671.

to his father, the devisee, as well as if it was an entail. Then, this case is old and several resolutions since [are] contrary to it.

Hanbury and Cockerel, 3 Danv. 179, 4.¹ A devise to his two sons in fee, provided, if either die before marriage or before twenty-one and without issue, remainder to the survivor [was] adjudged no estate tail but a fee on a contingency. Hall and Deering, Hard. 148; before twenty-one and without heirs of his body [was] agreed to be a fee, but [there was] no judgment. Collenson and Wright, 1 Sid. 148; before twenty-one and without issue [was] adjudged a fee contingent. Sommers and Gibbon, Skinner 144; a devise to his son and his heirs and, if he die without issue unmarried, to his daughter [was] a fee in the son.² In all these cases, the words 'dying without issue' are not taken as words of limitation but as words of contingency or determination to show when the estate first given should determine and the other commence, viz. if he happen to die not having issue and in consequence if he happen to have issue, the contingency falls out, and the first devisee has a fee, and the remainder can never take place.

These cases are the same with Sowell and Gerrard; only the word 'and' is here instead of 'or'. But 'or', in that case, was construed to be 'and' as well as in Price and Hunt. And so the reason that governed the cases [is] the same. Burgis and Hack, in this Court, April 1736;³ a devise to his son and daughter and their heirs and, in case of the mortality of either before twenty-one or day of marriage of the daughter or without issue, the whole to the survivor and, if both die before twenty-one or without issue, then to the testator's right heirs [was] adjudged a fee contingent.

In the principal case, this was adjudged an estate tail upon the authority of Sowell and Gerrard, having been so adjudged above twenty years ago in this court.

N.B. The plaintiff was certainly barred by the Act of Limitations, though the court gave no judgment on that point.

For the plaintiff, [were] LEE, RANDOLPH, ROBINSON, BLAIR; for the defendant, [were] LIGHTFOOT, TAYLOE, CUSTIS, GRYMES, CARTER, DIGGES, BYRD, and the Governor [GOOCH].

[This report is cited in and Vass v. Phillips (1739), see below, Case No. 75, and Timson v. Scarburg (1741), see below, Case No. 96.]

67

Goodloe v. Dudley
(April 1739)

A bond of an undersheriff to indemnify the sheriff is valid and enforceable.

Appeal from Caroline [County Court].

[Upon a] bond from the Undersheriff and security to pay 1500 pounds of tobacco and save harmless and indemnify the High Sheriff etc., the defendant pleads the Statute 5 & 6 Edw. VI, against buying and selling offices,⁴ and avers the 1500 pounds of tobacco was for the deputation of the defendant. The plaintiff demurs.

¹ *Hanbury v. Cockerell* (1650), 1 Rolle, Abr., *Estate*, pl. P, 4, p. 835.

² *Hall v. Deering* (1659), Hardres 148, 145 E.R. 425; *Collenson v. Wright* (1663), 1 Siderfin 148, 82 E.R. 1024, also 1 Eq. Cas. Abr. 176, 21 E.R. 969; *Sommers v. Gibbon* (1683), Skinner 144, 90 E.R. 67, also 2 Eq. Cas. Abr. 335, 22 E.R. 285.

³ *Burges v. Hack* (1736), see above, Case No. 32.

⁴ Stat. 5 & 6 Edw. VI, c. 16 (SR, IV, 151-152).

I [*Barradall*] believe this is the first time the office of sheriff has been thought to be within this Statute, for, though it may seem to come within the general words, *viz.* an office that concerns the administration and execution of justice, yet, if we consider the whole law, it will appear it could never be intended of the sheriff's office. The penalty is that the party selling shall forfeit all his right, interest, and estate in the office and the party buying be disabled in law to hold the office and the promises and bonds to be void.

Now, I would ask what right, estate, and interest a sheriff has in his office. Everyone knows it is an office of burden and charge. Men are subject to penalties if they refuse to execute it. The words 'right, estate, and interest' plainly show the Act intended only offices of profit, for no man can be said to have an estate and interest in an office of burden. Then, he is to forfeit the office. It will be an easy expedient (though the notion I believe is somewhat new) for a sheriff to get rid of his office if it is within this Act. He has nothing to do but to make a bargain with an undersheriff for a sum of money, and he is discharged. If this could be done, men would not pay such great fines as they do in London for not serving. At this rate, there would hardly ever be a sheriff. Everyone would be shifting the office off himself.

But there was no occasion for this Act to extend to the sheriff. There was one made 100 years before, 23 Hen. VI, 10,¹ prohibiting sheriffs to let their counties to farm. This is the Statute the defendant should have taken advantage of. And it is a plain mistake in his lawyer. No other statute was ever thought to extend to sheriffs as to this matter. The 23 Hen. VI is a private act of which the judges cannot take notice unless it be pleaded. 4 Co. 76b; Hob. 13; 1 Vent. 85; 2 Lev. 151.²

But the question now is whether the plea be good, which clearly is not. The other Statute is now out of the question. It does not appear in the condition that this tobacco was given for farming the office. And it might be for another cause. The demurrer only confesses it so far as that it must not be denied on the argument of this plea. But it is not such a confession as is any evidence of the fact. But, if the [Statute of] 5 & 6 Edw. VI does extend to sheriffs, it has been adjudged not to be in force in the plantations. 4 Mod. 222, Sal. 411, Blankard against Galdy.³

Farming of offices is not so unlawful as may be imagined. The Statute only extends to cases where a sum in gross is agreed for; if the agreement is to pay so much out of the fees and profits, and not at all events, it is not within the Statute. 2 Sal. 466, Culliford v. De Cardonel, 468, and 6 Mod. 234, Godolphin v. Tudor.⁴ So if there be a salary annexed and a lesser sum is reserved, it is not within the Statute. *Ibid.* The Statute intended only to prevent extortion in offices, which men would be tempted to if they paid a large sum for a deputation

¹ Stat. 23 Hen. VI, c. 9 (SR, II, 334-336).

² *Armiger v. Holland* (1597), 4 Coke Rep. 75, 76 E.R. 1047, also Moore K.B. 542, 72 E.R. 746, Croke Eliz. 601, 78 E.R. 844; *Norton v. Simmes* (1614), Hobart 12, 80 E.R. 163; *Parker v. Welby* (1670), 1 Ventris 55, 85, 86 E.R. 39, 59, also 1 Modern 33, 57, 86 E.R. 710, 728, 2 Williams Saunders 150, 85 E.R. 887, 1 Siderfin 439, 82 E.R. 1204, 2 Keble 591, 626, 630, 657, 670, 84 E.R. 372, 394, 397, 413, 421; *Rex v. Watts* (1675), 2 Levinz 151, 83 E.R. 493.

³ *Blankard v. Galdy* (1693), 4 Modern 215, 222, 87, E.R. 356, 359, 2 Salkeld 411, 91 E.R. 356, also Holt K.B. 341, 90 E.R. 1089, Comberbach 228, 90 E.R. 445.

⁴ *Gulliford v. De Cardonell* (1697), 2 Salkeld 466, 91 E.R. 402, also 12 Modern 90, 88 E.R. 1184, Comberbach 356, 90 E.R. 525, Holt K.B. 506, 90 E.R. 1178, Comyns 1, 92 E.R. 927; *Godolphin v. Tudor* (1704), 6 Modern 38, 234, 87 E.R. 800, 984, also 2 Salkeld 468, 91 E.R. 403, 3 Salkeld 251, 91 E.R. 807, 1 Brown 135, 1 E.R. 468.

at all events. But, if they have a certain profit or chance for a profit out of the fees, they are not to be under the same temptation.

I shall agree, if this bond is void as to payment of tobacco, it is so for the whole. There is a difference where part of a condition is void by the common law and where by statute. In the first case, it may be void in part and stand good for another part. But, where part of the condition is against the Statute, it is wholly void. The reason is because the Statute says the bond shall be void, and, therefore, it cannot be set up in part. Hob. 14, Norton and Sims; 3 Co. 82b, 83a; 1 Vent. 237; 1 Mod. 37; Carter 229, *Pearson v. Humes*; 2 Danv. 21, 8.¹

I hope it will be considered how hard a case it will be upon the plaintiff if the plea be adjudged good. The whole bond will be void, and he [will be] without any remedy against his Undersheriff, though guilty of ever so many breaches. It will be his utter ruin and destruction. This suit is chiefly brought to recover quitrents, for which the plaintiff himself is sued. [There is] no honesty in the plea. The practice is usual and, under some circumstances, justifiable.

Judgment [was given] for the plaintiff that the plea was not good *per totam curiam*.

N.B. In Brownlow, *Latine Red.*, 216, 218,² this Statute is pleaded to a bond for the payment of money with an averment that the plaintiff sold the defendant the office of undersheriff, for which money he gave the bond. There was an idle replication and a demurrer. But the author observes that the reason of such a replication was because the date of the Statute was mistaken, for, otherwise, the plea was good. *Sed quaere et nota*. The case of Blankard and Galdy was a deputation of the office of Provost Marshall of Jamaica, which is the same office as Sheriff with us, and no exception was taken that it was not an office within the Act.

In the argument of this case, it was said that 23 Hen. VI had no penalty and, therefore, 5 & 6 Edw. VI was necessary to be extended to the office of sheriffs. But that is a mistake; there is a penalty of £40 by the [Statute of] 23 Hen. VI.

[Other copies of this report: Jefferson 59.]

[This report is cited in *White v. Cook*, 51 W. Va. 201, 210, 41 S.E. 410, 414 (1902).]

Rex v. Oldner and Brilehan
(April 1739)

A seizure of property that is wreck is not a felony.

The prisoners were indicted for feloniously taking certain goods, the property of persons unknown. Upon the evidence, the case appeared to be that a ship was stranded in the Chesapeake Bay near the shore which is in Princess Anne County. The prisoners went on board, and took the goods mentioned in the indictment, which it was supposed belonged to some persons that were lost.

For the prisoners, it was insisted: first, that this offence was committed on the sea and so triable in the Admiralty; second, that these goods were wreck and felony could not be committed of them; third, no property was proved in the goods.

¹ *Norton v. Simmes* (1614), *ut supra*; *Attorney General v. Twyne* (1601), 3 Coke Rep. 80, 76 E.R. 809, also Moore K.B. 638, 72 E.R. 809; *Mosdel v. Middleton* (1673), 1 Ventris 237, 86 E.R. 158, also T. Raymond 222, 83 E.R. 116, 3 Keble 133, 84 E.R. 636, 1 Modern 116, 86 E.R. 775; *Parker v. Welby* (1670), *ut supra*; *Pearson v. Humes* (1671), Carter 229, 124 E.R. 932; *Lee v. Colshill* (1596), 2 Danvers, Abr., *Condition*, pl. Y, 8, p. 21.

² R. Brownlow, *Latiné Redivivus: A Book of Entries* (1693), p. 216.

To which, it was answered, first, the question is whether the place where this ship was run aground can be taken as part of the body of the county. This is a new question in this part of the world. In England, I [*Barradall*] take it it would be clearly within the county. By several statutes in England, the jurisdiction of the Admiralty is restrained and is confined to the main sea or coasts of the sea not within the body of any county. By 15 Ric. II, 3, the Admiral has no jurisdiction of any contract, plea, or quarrel done within the bodies of the counties, either by land or water, except of the death of a man or mayhem in great ships hovering in the great stream beneath the points of the rivers.¹ By 27 Eliz., 11 (no such act is now in force or in print), giving the Admiralty cognizance of offenses done on the main sea or coasts of the sea, being no part of the body of any county, first, if it be within the county so that a civil action will lie, *a fortiori*, it ought to be so for criminal matters. It is for the safety and benefit of the subject. 2 Hen. IV² restrains from suing in the Admiralty where the common law has cognizance, and gives double damages.

In anno 6 Hen. VI, [there was] an action brought on this Statute for suing in the Admiralty for trespass for taking three ships lying in Bristol Haven, and judgment [was given] for the plaintiff. *Anno* 12 Hen. VI, a like action for suing in the Admiralty for trespass in entering ships and carrying away goods in the haven of Yarmouth in Norfolk. The Thames at Billingsgate *infra corpus comitatus*. Replevin for taking a ship in the coast of Scarborough [was] good. [It is] no part of the sea where you may see from one land to the other.³ It is safest for the subject to restrain the Admiral's jurisdiction, for, if the defendants are tried upon the Statute 11 & 12 Will. III, they cannot have clergy.⁴

This [is] neither upon the main sea nor upon the coasts of it. And so it must be within the body of some county. It is so near the shore that the county may easily have knowledge of the fact. And, in all such cases in England, the water is taken to be within the county.

Second, it is certain a felony cannot be committed of goods wrecked until after a seizure. The reason is because there must be a property in some person of goods stolen to constitute a felony, though it be not necessary to prove the true proprietor. Upon the same reason, no felony can be committed of waifs or strays. It is clear then this must be understood of goods so wrecked that they become forfeited, either to the king or some other by virtue of the king's grant.

By the common law, wherever a ship was wrecked or cast away and the goods cast ashore, they became forfeited to the king. But this was thought extremely hard, and seemed to be adding misery to the unfortunate. And, therefore, to alleviate the matter a little, so long [ago] as Edward I's time, by the Statute Westminster I, cap. [*blank*], it is provided that, if a man, dog, or cat escape alive, it shall not be deemed a wreck nor the goods forfeited, but they are to be secured by the coroner, sheriff, etc. This last indulgence is enlarged by the Statute 12 Ann., cap. [*blank*],⁵ for, even after the year, the goods or produce are to be returned to the Exchequer, and delivered to the owner upon an affidavit before a Baron; so that goods, in such a case, do not come under the denomination of wreck in the judgment of the law, though they may be called so in common conversation. The property remains still in the owners, and is not forfeited. And, therefore, the reason upon which the law is founded, that a felony cannot be committed of a wreck, does not hold.

¹ Stat. 15 Ric. II, c. 3 (*SR*, II, 78-79).

² Stat. 2 Hen. IV, c. 11 (*SR*, II, 124).

³ *Anonymous* (1611), 12 Coke Rep. 79, 77 E.R. 1357.

⁴ Stat. 11 Will. III, c. 7 (*SR*, VII, 590-594).

⁵ Stat. 3 Edw. I, Westminster I, c. 4 (*SR*, I, 28); Stat. 13 Ann., c. 21 (*SR*, IX, 971-973).

But here, the goods were not thrown ashore. The people were endeavoring to save them, and the prisoners did go aboard, and rob them.

Third, the indictment is good *cujusdam ignoti*. Hawkins 94, 29; Dalton, cap. 156; Dy. 99, pl. 61; 1 Hale's P.C. 512.¹ So, for murder *cujusdam ignoti*. 2 Hale 181. The goods in such case belong to the king. The law will sometimes feign a property rather than suffer a criminal to escape, as for robbing a church in vacation; an indictment may be for *bona capellae* in the custody of such a one. So *bona domus et ecclesia*. But, here, the master has a kind of special property, which answers 8 Mod. 146,² for, there, it might be the goods were the accused's. But, here, it is otherwise.

The court gave judgment upon the second point only, *viz.* that the goods were wreck and felony could not be committed of them. And so the prisoners were acquitted.

69

Rex v. Cross
(April 1739)

Where an animal has been taken up as a stray, it is not a crime for someone else who is not its owner to seize it.

In the Court of Oyer and Terminer following, one Cross was indicted for horse stealing. And, upon the evidence, it appeared the horse belonged to one Buckner in Gloucester, and had strayed into Prince William, where he was taken up by one Earl, and kept on his plantation three or four months, from whence the prisoner took him, apparently with a felonious intent,³ having offered to sell him. Earl had published notices at the churches as the Act of Assembly³ directs.

The court started a doubt that this horse, being a stray, as they termed it, felony could not be committed by taking it.

To which, it was answered a stray is deemed to be a beast found wandering about the fields, whose owner is unknown. *Pecus quod elapsum a custode campos pererrat ignoto domino*. Spelman, *in verbis*, Terms of the Law.⁴

By the law of England, strays were originally in the crown, though they are now generally in the hands of subjects by grant or prescription, as lords of manors, etc. When a stray is found and seized by the lord, he is to make proclamation at the two next market towns three several days, and, if the owner does not appear within a year and day, it is forfeited to the lord.

By a stray, here, we mean much the same thing as in England. By the 4 Ann., 13, it seems as if any person may take up a stray. The taker-up is to set up a notice at the church and the court house. And, if the owner does not appear in a year, the stray is to be valued, [and] the property is vested in the taker-up. But he is answerable for the value to the owner.

It is the current of our books that a man cannot commit felony of wreck, treasure trove, waif, stray, or such like, which, however, ought to be understood under some restrictions, for I [Barradall] take it the rule only holds while the beast is actually wandering or at large and

¹ W. Hawkins, *Pleas of the Crown*; M. Dalton, *Sheriffs*, f. 156; *Anonymous* (1554), 1 Dyer 99, 73 E.R. 216; M. Hale, *Pleas of the Crown*.

² *Rex v. Burnaby* (1723), 8 Modern 146, 88 E.R. 110.

³ Act of 1705, c. 13, 3 Hening's Statutes 275-276.

⁴ H. Spellman, *Glossarium* (1687), p. 208.

that, after seizure by the lord, felony may be committed of such a beast as well as any other. Dalton and Hawkins, in speaking of this matter, are both express that felony cannot be committed before seizure. Dalton, *Justice*, 373; 1 Hawkins 94. Sir Edward Coke and Sir Matthew Hale both intimate the same. If any find treasure trove, waif, or stray and convert them, it is no larceny, says Sir Edward Coke, 3 Inst. 108. Sir Matthew Hale puts the case of a man's finding a purse in the highway, which no circumstance can make a felony, he says. And then he adds the like in taking of a wreck, treasure trove, a waif, or stray. 1 Hale 506.¹ Which passages I think plainly show that these authors mean a taking before seizure. Nay, Sir Matthew Hale adds that the party taking them must really believe them to be such at the time, for, otherwise, says he, every felon would cover his felony with that pretence. *Ibid.* So, if a horse strays into a neighbor's ground or common, it will be a felony to take him. *Ibid.* Thus, even before seizure, under some circumstances, a felony may be committed of a beast that is a stray.

Then, the inconvenience in this country will be very great if, when a horse gets out of his owner's inclosure and happens to be taken up for a stray, he may be stolen with impunity.

But the court were of opinion that it was no felony. And so the prisoner was acquitted. There were, I think, only six judges against five.

70

Ewell v. Miller
(April 1739)

An action sounding in contract does lie at common law before any damage has been done to the plaintiff.

Ewell, heir of Ewell against Miller and his wife, administratrix of Myars.

The plaintiff declares in [an action of] covenant upon a deed from the intestate to the plaintiff's father dated in 1708, whereby, in consideration of £150, he sells to him certain lands, and covenants to warrant, defend, save harmless, and keep indemnified the said land to the grantee against all and every person and persons whatsoever that should thereafter make any claim or pretend any title. And he avers that the intestate or the defendants have not defended, saved harmless, etc. (in the very words of the covenant) and that so the intestate or the defendants have not kept the covenant of the intestate but broke the same.

The defendants plead that the plaintiff and his father, from the making of the deed to the bringing of this suit, have peaceably enjoyed without the molestation, interruption, or hindrance of any person whatsoever.

The plaintiff replies that the intestate and his wife were seised in the right of the wife, and made the deed aforesaid, which they acknowledged, but there is no record of her privy examination, and that so the intestate or the defendants have not defended, saved harmless, and kept indemnified the said land against the claim and title of the wife.

And, to this replication, the defendant demurs.

I [*Barradall*] think I might with reason in this case find fault with the declaration for that the assignment of the breach is too general and also with the replication, as it is no answer at all to the defendants' plea, inconsistent upon the face of it, and a departure from the declaration, as I think. But I will waive all cavil and exception to the pleading, and confine myself to speak to the merits of the cause alone, by endeavoring to show that, taking this case as it appears upon the pleadings, there is no breach shown of the covenant upon which the plaintiff declares.

¹ M. Dalton, *Country Justice*; W. Hawkins, *Pleas of the Crown*; E. Coke, *Third Institute* (1644), p. 108; M. Hale, *Pleas of the Crown*.

The case, upon the pleadings, is in short this. A man and his wife, seised in right of the wife, sell and convey land by deed which they acknowledged, but there is no record of the wife's examination. There is a covenant in the deed to warrant, defend, save harmless, and keep indemnified the land against the claim and title of all persons.

This deed has been made almost thirty years [ago], and the plaintiff and his father have peaceably enjoyed without the claim or disturbance of the wife or any other ever since. And the question, I take it, properly is whether the plaintiff can maintain an action on the covenant to warrant, save harmless, etc., because the privy examination of the wife is not recorded, for that is all the breach assigned

The very state of the question, in my humble opinion, shows the absurdity and ill ground of the plaintiff's action, for, where is the sense or propriety to say we have not warranted, saved harmless, etc., because the Clerk omitted to record the wife's examination, an act not in our power to compel him to and which it was the business of the purchaser to look to, especially, when it is not pretended that the plaintiff has at all suffered by this omission, but it is admitted that the wife has never disturbed him. He and his father have had quiet possession these thirty years.

Covenants are to be considered, first, according to the force and operation of the words in law, second, according to the intention of the parties. Now, a covenant in these words to warrant etc. have no further operation in law than to subject the covenantor to make good all damages that the covenantee sustains by reason of lawful evictions. Sir Edward Coke's opinion, in 1 Br. 21, is express that, in a covenant to warrant and defend, there must be a title paramount and a lawful eviction before an action will lie, so that a title alone without eviction will not do. And there is this plain reason for it, perhaps, the title may never be exerted. The Case of Foster and Wilson, in Ow. 100,¹ proves the same point as to the words 'save harmless and indemnified'. A man made a lease and covenanted to save harmless against P.B. In an action of covenant, the breach assigned was that P.B. entered and ejected him, but [it was] not said with title. And it became a question whether the covenantor was to indemnify against all entries of P.B., whether by right or wrong. And a difference is there taken and settled that, where a covenant is general against all persons, there it shall be extended only to evictions with lawful title, but, where it is special against A.B., there, it shall be extended to all evictions of A.B., either rightful or wrongful, which fully proves there must be some eviction before an action will lie.

But the Case of Griffith v. Harrison, 1 Sal. 196,² is more express in the point. A man assigned a lease, and covenanted to keep indemnified against all arrears of rent. There was rent in arrear, but the plaintiff had never been sued for it, yet he brought an action on this covenant. And [it was] adjudged the action would not lie, for, in all covenants to save harmless, there must be an actual damnification before there can be said to be a breach. To apply this case, here, they say, the wife's not being examined, her title is lying out against them, and they are liable to be evicted, which is true. But they never have been evicted or disturbed these thirty years. Therefore, the plaintiff is not damnified. What right then has he to this action?

Another strong case and which seems the very parallel of this is Grocock v. White, Mo. 175;³ debt on a bond with a condition to save harmless and defend certain land against J.S. and all others. The defendant pleaded, as we have done, that the plaintiff was never lawfully

¹ *Walter v. Dean and Chapter of Norwich* (1611), 1 Brownlow & Goldesborough 21, 123 E.R. 640, also Moore K.B. 875, 72 E.R. 967; *Foster v. Mapps* (1589), Owen 100, 74 E.R. 929, also 1 Leonard 324, 74 E.R. 295.

² *Griffith v. Harrison* (1693), 1 Salkeld 196, 91 E.R. 176, also 4 Modern 249, 87 E.R. 377, Skinner 397, 90 E.R. 177.

³ *Grocooke v. White* (1583), Moore K.B. 175, 72 E.R. 513.

disturbed. The plaintiff demurred. And [it was] adjudged for the defendant that the plea was a good bar. Indeed, it was not so much as pretended that the action would lie without some disturbance. But the question and doubt was upon the word 'lawfully', whether the obligor was not obliged to defend against an unlawful as well as a lawful disturbance. Now here, we have pleaded the plaintiff never was disturbed at all, without distinguishing between lawful and unlawful disturbance. And so our case is stronger, it being admitted that the plaintiff never has been disturbed at all.

These cases, I hope, fully prove that there must be an eviction or other damnification before a man can have an action on a covenant of this kind. Indeed, if there were no authorities in law, the reason of the thing, in my opinion, speaks plainly enough. Shall a man have an action before he is injured and when, perhaps, he never may be? What rule or measure can there be for a jury to assess damages? The Chancery, indeed, by an extraordinary power, will sometimes allow of a bill *quia timet*, as it is called, because the plaintiff is apprehensive of danger. But I never yet heard of such an action at law. In Chancery, it is only to have security. But here, damages must be given for a thing that may or may not happen and before the plaintiff has suffered any wrong or sustained any damage.

And, as it is very clear that this action cannot be maintained from the force and operation in law of the words of this covenant, so there is as little reason to support it from any supposed intention of the parties. But, upon consideration of the whole deed, I think it is evident there could be no such intention in making this covenant, because there is another proper covenant to provide against any defect in the conveyance, as this circumstance of the wife's not being examined must be allowed to be one. And that is a covenant for further assurance. This is a usual covenant in deeds, and inserted for the very purpose in case there be any defect in the conveyance to compel the grantor to perfect it. But the plaintiff has not thought fit to ground his action upon this covenant, perhaps, for a reason that I shall have occasion to remark presently. But this covenant for further assurance is, I think, a full demonstration that it was not the intention of the parties in making the covenant the plaintiff has declared upon to subject the covenantor to an action for any defect in the conveyance or because the wife was not privily examined, which is the breach assigned.

I cannot well imagine, then, what can be offered on the other side to support this action. It may be said, indeed, that nothing passed out of the woman by the deed and her title lies out against them. I have, I hope, clearly shown that the title lying out signifies nothing unless there is an eviction or, at least, some actual damage suffered. And I will beg leave to add that, perhaps, the woman never will disturb them or, if she should, it may be to little purpose; their possession of thirty years may be a good bar to her title by the Act of Limitation.¹ The husband, I believe, has been dead above twenty years, and she must sue within ten years after her discoveriture, and can have no advantage of a second disability. If, then, the plaintiff has a good title against the wife, which may be true, ought he then to recover damages in this action or, if the wife or her heir never sues, there is as little reason. Besides, as I have observed, it is impossible for a jury to tell what damages ought to be assessed.

Perhaps, the woman is ready to make a better conveyance and to release her right and title. Ought the plaintiff then to recover? At least, he should have asked her before he had sued. And, if she had refused, a good action would have lain, though not on the present covenant, as I conceive, but upon that for further assurance. But this would not answer the plaintiff's purpose so well, who, after using the land for thirty years, whereby it is become of little value possibly would now rather have his consideration money again by way of damages than have a good title made to him. And, this, I believe, was the true motive to bringing this suit. But, as it has no foundation, either in law or justice, I hope judgment will be for the defendant.

For the plaintiff, it was argued that, if a man lay open to an action or if the damnification was certain and inevitable, an action would lie before the actual damnification, that the wife's

¹ Act of 1734, c. 6, s. 9, 4 Hening's Statutes 402.

title was lying out, and she would certainly recover, and it would be inconvenient that they should wait until the wife sued, because, in the meantime, the estate might be all administered. The following cases were cited, *Bush v. Ridgley*, Cro. El. 264; 5 Co. 24, *Broughton's Case*; 3 Bul. 233, *Abbotts v. Johnson*; and *Sir Anthony Mayne's Case*, 5 Co. 24.¹

But judgment was given that the demurrer was good *per totam curiam*, April 1739.

[Other reports of this case: Randolph Va. 154.]

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Nance v. Roy
(April 1739)

By the statute law that was in force at the time of this dispute, the slaves of an intestate are considered as a real estate and descend as lands of inheritance in fee, but, as to a gift or devise of slaves, there, they are considered as personal chattels.

In [an action of] detinue for a slave, upon a special verdict, the case is [thus]. John Nance, possessed of the slave in question and others, by his will dated February 2, 1731, gives to his wife, Mary, 'all his estate, both real and personal, all his household goods and movables whatsoever during her natural life'. And he makes her sole executrix. Afterwards, he devises away a Negro girl, and gives some small legacies, but he makes no other disposition of the estate given to his wife. The wife is dead, having, in her lifetime, given the slave in question to one Perry, from whom the defendant is a purchaser for a valuable consideration. The plaintiff claims as heir at law of the testator.

The sole question in this case is whether, by the devise for life and making the wife executrix, the absolute property of the testator's slaves vested in her or whether the plaintiff, as heir at law of the testator, is entitled to them after her death.

In order to give this question a proper solution, it will be necessary, first, to see whether slaves in this case are to be considered as a real or personal estate, for that they participate of the nature of both and vary as the subject matter is different, I [*Barradall*] think, no man can dispute. For instance, when a question is made concerning the slaves of an intestate, they are then without question to be considered as a real estate, being to descend as lands of inheritance in fee. But where a question is made concerning a gift or devise of slaves, there, I conceive, they must be considered as mere personal chattels.

That slaves in their nature are nothing more than chattels must be granted and were so for a long time in this country, until the Act of 1705, c. 23,² which has altered the nature of them and made them a real estate in some cases. Upon this Act, there was great variety of opinions and different constructions. Some, adhering too strictly to the letter without a proper attention to the spirit and intention of the Act, would have slaves to be a real estate almost in all cases, though the plain and obvious meaning and design of the Act was no more than to make them so where a person died intestate. The true reason of making that Act and the policy of it being to prevent widows and administrators from running away with the slaves and to

¹ *Bush v. Redgeley* (1561), Croke Eliz. 264, 78 E.R. 520; *Broughton v. Pretty* (1600), 5 Coke Rep. 24, 77 E.R. 86; *Abbotts v. Johnson* (1616), 3 Bulstrode 234, 81 E.R. 197; *Main v. Scot* (1596), 5 Coke Rep. 20, 77 E.R. 80, also Moore K.B. 452, 72 E.R. 689, Croke Eliz. 449, 479, 78 E.R. 689, 731, Popham 109, 79 E.R. 1217, 2 Anderson 18, 123 E.R. 523, Jenkins 256, 145 E.R. 182.

² Act of 1705, c. 23, 3 Hening's Statutes 333-335.

preserve them for the benefit of the heir for the improvement and cultivation of his land, a policy very necessary and expedient, considering the method of improving lands here.

And that this was the true design and intention of that Act, we need only recur to the Act of 1727, c. 11,¹ made for explaining it, which has so clearly settled every doubt and controversy that had arisen or can arise upon the construction of the first Act that there cannot now well be any difference of opinion. And let any man consider these two acts together and tell me one instance wherein slaves are made a real estate, except in the case of persons dying intestate. I say nothing here of annexing slaves to entailed lands as quite from the present purpose.

If, then, slaves are to be taken as a real estate in no other case but where the owner dies intestate, it follows that, when they are made the subject of a gift or devise, they must be considered merely as chattels. Indeed, the words of the last Act of Assembly are extremely plain that, in every case where the property is transferred from one to another, that they shall pass as chattels. The clause I rely upon runs thus:

Whenever any person shall by bargain and sale or gift, either with or without deed, or by his last will and testament in writing or by any nuncupative will, bargain, sell, give, dispose, or bequeath any slave or slaves, such bargain, sale, gift, or bequest shall transfer the absolute property of such slave or slaves to such person or persons to whom the same shall be sold, given, or bequeathed in the same manner as if such slave or slaves were a chattel.

Nothing can be more full and express than the words of this clause. And, after reading it, I think it would be taking up time impertinently to say any more; where a slave is bequeathed, it shall pass the absolute property as if such slave was a chattel. Here, a slave is bequeathed to one for life and [there was] no remainder over. And, if such a bequest of a chattel would transfer the absolute property, it must, likewise, transfer the absolute property of a slave.

The question, then, is whether the bequest of a chattel to one for life without limiting any remainder over and making the legatee executrix will pass the absolute property of such chattel to the legatee.

It is an old and established rule of law that the gift of a chattel for an hour is a gift forever. And, though of late, remainders over of chattels (as we improperly term them) have been admitted, yet, when the reason of those determinations are considered, it will appear that they do not break in upon this rule of law. The law does in no case admit of the remainder over of a chattel personal in the strict sense of the word 'remainder'. It is true the use may be given to one for a time and the property limited to another which limitation of the property is often called a remainder, but, improperly, as I conceive, for a remainder *ex vi termini* is something that is left or remaining of a thing in part disposed of before. Now, no degree of property passes by the gift or devise of the use of a chattel. If there did, there could be no limitation over, but the whole property vests in him to whom the limitation over is made, which, therefore, cannot with any propriety be called a remainder. If a man, by a deed, gives a chattel to one for life without limiting it over, the absolute property will pass without all question. And so it will if he does make a limitation over, for that is repugnant and void, because, by the gift for life, the whole property passes, according to the old rule I have mentioned, that the gift of a chattel for an hour is a gift forever, and nothing more remained to dispose of. But, if a man, by a deed, give the use of a chattel to one for life and, after his death, to another, such limitation over is good, because no property passed to the first, only the bare use, but the whole property vests in the latter.

¹ Act of 1727, c. 11, 4 Hening's Statutes 222-228.

In wills, indeed, no difference is made whether the first bequest be expressly of the use or not if it can be collected from the will that the testator intended only the use. And, therefore, a bequest to one for life and, afterwards, to another is good, for the first bequest is construed to pass only the use and that for this very reason, because, otherwise, the limitation over could not be supported. The reason of this difference between a will and deed is that deeds are construed strictly according to the words, but, in wills, a greater latitude is allowed, and the intention of the testator will supply the want of apt words, upon which ground it is that, in the case before put, where a chattel is devised to one for life and, afterwards, to another, that the first devise is construed to pass only the use, because, otherwise, the testator's intention in making the limitation over would be frustrated, and, therefore, to serve that intention and support the limitation over, such a construction is made.

It is plain, then, that the first devise is construed to pass only the use merely for the sake of supporting the limitation over. And it as clearly follows that, where there is no such limitation nor any other clause or words in a will to show that, by a devise for life, the testator intended only the use should pass or to make such construction necessary that the property must pass by such devise. Construction must, then, be made according to the legal sense and operation of the words, for it is a rule in the construction of wills as well as deeds that the legal sense of words must be adhered to unless the testator's intention be apparent to give them another meaning.

Now, in the devise before us, the words of the will are clear to pass the thing itself and not the use, 'all my estate, both real and personal, I give to my wife during life'. There is no limitation over or other clause in the will to show the testator intended only the use or to make such a construction necessary. And, therefore, to make such construction would be contrary to all the rules of construction before laid down and must offer a manifest violence to the plain import and meaning of the words, which, I conceive, is never done unless, from other parts of the will, it may be clearly implied that the testator's intention was otherwise. And it is apparent that, in these determinations, even in the case of wills, that the old rule of law is still preserved sacred and inviolate. The first devise is construed to pass only the use, for, if the property once passed, there could be no limitation over. The property of a chattel can never be in two persons distinctly at the same time. But, if it is given only for an hour, it passes forever, and nothing remains in the giver. [There is] no instance of a devise for life passing only the use unless [there be a] remainder over.

But, admitting such a construction should prevail, which I can hardly suppose that nothing more than the use passed to the wife by the devise to her for life, the next question is in whom the property vested, whether in the plaintiff as heir at law or in the wife as executrix. And I conceive it vested in the executrix, and not the heir. I have already proved, I hope, sufficiently that slaves are in no case a real estate descendible to the heir but where the owner dies intestate. And the consequence, I apprehend, is clear that, wherever a man, by his will, disposes of his slaves in any manner, the heir can have nothing to do with them. By such disposition, the owner alters or rather preserves the nature of slaves, and makes them mere personal chattels. Whenever a slave is bequeathed, it shall pass as a chattel says the Explanatory Act. If, then, they are to be considered as chattels, as I humbly conceive they must in this case, then, whatever right or property remained undisposed by the devise to the wife for life vested in her as executrix. It is a known thing that all chattels go to the executor, and not to the heir. And the very making of a man executor is in judgment of law a gift to that person of all the testator's personal estate, which all passes to him and he has a right to it unless otherwise disposed of by the will, except in some cases where the executor is taken as a trustee for the next of kin. If, then, the bequest for life does not pass the absolute property, I hope that bequest and making the legatee executrix are sufficient to pass all the estate the testator had.

Objection: The words of the will are express to pass no more than an estate for life. That was clearly the intention of the testator, and that intention ought to be supported, and such construction made as will support it.

Response: It is true that the rule for construction of all wills is the intention of the testator. But, then, this is to be understood under some restriction, *viz.* that such intention be consistent with the rules of law, for no intention, though ever so apparent, can pass an estate or interest, either in real or personal estate, against those rules. For instance, if a man devise lands in fee and, then, limits the same land over to another, the limitation over is repugnant and void, it being against a rule of law that any estate should be limited after a fee. So, if a devise be of chattels to one and the heirs of his body, which words create an estate tail, yet the entail is void because it is against a rule of law that a chattel should be entailed. It avails nothing then, as I conceive, to say the testator's intention is apparent if that intention clashes with any rule of law, as it does in this case. Here is a devise of a chattel to one for life and no remainder over. The rule of law says the gift of a chattel for an hour is a gift forever. And, therefore, though the intention be plain to pass no more than an estate for life, yet, inasmuch as such intention is inconsistent with that rule, I humbly conceive it cannot prevail against the rule. And this I hope is a full and clear answer to all that can be urged from the testator's intention in this case.

Objection: If a term be devised to one for life after the death of the devisee, it shall go to the executor of the devisor. 1 Sal. 231, *Eyres against Falkland*; 1 Mod. 54, 55, same point *per Twisden*; and 2 Vern. 332;¹ where chattels are devised for a limited time, it shall be intended only the use of them, *per* [*blank*]. And, here, slaves, being a real estate after the estate for life ended, ought to go to the heir.

Response: The case of a term, which is a chattel real, and that of a personal chattel, as our case is, are very different. There may be a remainder limited of a term by a deed as well as by a will. *Duke of Norfolk's Case*, 3 Ch. Ca. 1.² There is also a reversion in chattels real, which can never be in chattels personal, for, if the property once passes, it is gone forever, and can never revert, *i.e.* come back again to the giver. But, because there is a reversion of a term, where it is given for life, it may come back again to the executor of the devisor. The case of a term, then, is nothing to the present purpose. And, as to the saying of the Lord Keeper (*supra*), it must be understood according to the subject matter. The case before him was a bequest of chattels to one for life, with a remainder over, and the question was whether the remainder over was good. Says the Keeper, where chattels are devised for a limited time, it shall be intended only of the use. And, therefore, says the reporter, he allowed the remainder over to be good, so that this saying of the Lord Keeper plainly can only be applied to devises with a remainder over, and is not to be taken generally in all cases. Nor is there one determination, nor even an opinion, that I know of where a devise of a chattel for life without any remainder over passes only the use. On the contrary, it is evident that such a devise is construed to pass no more than the use merely for the sake of supporting the remainder over.

But, if this case of a term shall be thought [to be] anything parallel, yet, as slaves here are not to be considered as real estate, as I have endeavoured to show, then, the reversion vests in us as executor. And so the case of a term is for us, and not against us.

¹ *Eyres v. Faulkland* (1698), 1 Salkeld 231, 91 E.R. 204, also 1 Lord Raymond 325, 91 E.R. 1112; *Love v. Wyndham* (1670), 1 Modern 50, 86 E.R. 724, also 1 Ventris 79, 86 E.R. 55, 1 Siderfin 450, 82 E.R. 1211, 1 Levinz 290, 83 E.R. 412, 2 Keble 637, 84 E.R. 401, 2 Chancery Reports 14, 21 E.R. 602, 1 Eq. Cas. Abr. 191, 21 E.R. 982; *Hide v. Parrat* (1696), 2 Vernon 331, 23 E.R. 813, also 1 Peere Williams 1, 24 E.R. 269, 1 Eq. Cas. Abr 361, 21 E.R. 1103.

² *Howard v. Duke of Norfolk* (1681), 3 Chancery Cases 1, 22 E.R. 931, also 1 Vernon 163, 23 E.R. 388, 2 Swanston 454, 36 E.R. 690, Pollexfen 223, 86 E.R. 568, 2 Chancery Reports 229, 21 E.R. 665, 2 Freeman 72, 80, 22 E.R. 1066, 1070, 79 Selden Soc. 904, 922, 999, Dodd 42, Oxford Bodleian Library MS. Rawlinson C.347.

Needler, for the plaintiff, allowed the question to be whether the devise of a chattel for life passed the absolute property. And he insisted that only the use passed and no property by such a devise. He cited *Clargis and Duchess of Albemarle*, 2 Vern. 245. He said it was a general rule that a devise for a limited time passed only the use, *Hyde and Parrott*, 2 Vern. 331, and that, where only the use was devised, no property passed, only the occupation, for, where the property first vested, there, he agreed the absolute right vested. He cited *Ow. 33*, *Dyer's* opinion, that the devise of the use of plate to one and the heirs of his body passed no property, but the devisee had only the occupation. 1 Sal. 231, *Eyre and Falkland*. Where a man disposes of a part of a term, the residue is in his executor.¹ And he said the reason why there was no case of this sort but where there was a remainder over was because there never was in England a devise of chattels for life without a remainder over.

He agreed the reason why a devise for life was construed to pass only the use was to serve the testator's intention. And, here, the intention was that, after the wife's death, the slaves should go to his heir. And there was as much reason and equity to make such construction in favor of the heir as of the remainderman, that the heir was to be favored, and the equity was against our construction, that the intent was express to give only an estate for life. And it would be strange to make a construction to pass an interest against the testator's intent.

As to the wife's taking as executrix, the giving her a legacy excludes [her] from the surplus.

To which it was replied that, in all the cases cited out of Vernon, there was a remainder over, and, then, it is agreed only the use passes by a devise for life. The case in *Salkeld* is answered before. And, as to that in *Dyer*, the devise there was expressly of the use; besides, that opinion would hardly pass for law at this day.

Construing a devise for life to pass only the use is to serve the testator's intent without doubt. But in what? Why, in supporting the remainder over, which would be otherwise void. It is to support an intent appearing upon the face of the will and not one collected from extrinsic circumstances. To talk of an intent out of the will is somewhat new and uncommon. The true and only reason why these devises are construed to pass only the use is that the whole will may take effect, as is said in *Clargis and Duchess of Albemarle*. And it was the very reason of allowing these sort of devises at first. *Manning's Case*, 8 Rep. 94b. From which, case it is plain that a devise for life will pass the absolute property if there is no remainder over.²

To say there never was a devise of this kind in England without a remainder over will want something more than a bare assertion to obtain credit. Wills are often drawn by ignorant people, there as well as here. And there being no instance of such a case in the books will rather prove, as I conceive, that this was never made a question in England, as, I daresay, it never was, rather than that no such case ever happened there.

But there are cases where a devise for life, with a remainder over, that has been void has been adjudged to pass the absolute property, as *Brown and Pitman*, *Gilb. Rep.* 75; a devise of personal estate for life and, afterwards, to all such issue as he should have, and, for want of issue, remainder over, the devise over [was] agreed to be void, and the first devisee had a

¹ *Clarges v. Duke of Albemarle* (1691), 2 Vernon 245, 23 E.R. 758, also *Nelson* 174, 21 E.R. 819; 1 Eq. Cas. Abr. 66, 21 E.R. 880; *Hide v. Parrat* (1696), *ut supra*; *Anonymous* (1565), *Owen* 33, 74 E.R. 879; *Eyres v. Faulkland* (1698), *ut supra*.

² *Manning's Case* (1609), 8 Coke Rep. 94b, 77 E.R. 618.

decree. *Gibbs and Bernardiston*, *id.* 79; a devise to one and, if he die without issue, remainder over; the whole interest vests in the first devisee; *Prec. Ch.* 323, same case.¹

Webb and Webb, 2 *Vern.* 668; a devise of a term in trust to permit Thomas Webb, the defendant's father, to receive the profits for his life and, after his death, the wife for her life, remainder to the heirs of their bodies; the father assigned the term. The question was between the assignee and the heir whether the term vested in the father. And [it was] adjudged at first that it did not, but afterwards [it was] reversed. See also *Ch. Ca. Abr.* 362, 16, *Bass and Gray*.²

In all these cases, the remainder was held to be void and, therefore, that the devise for life carried the absolute property. Now, if such a devise will pass the absolute property where there is a remainder over that is void, upon the same reason, it will where there is no remainder at all.

As to the intent of the testator, that must consist with the rules of law. (*Ante.*) This is evident from the cases just now cited, where the intent was clear to give only for life. So *Slaughter and Whitlock* in this court, adjudged in April 1737 (*ante* 178), which was a devise of slaves to two and their issue and, if either die without issue, remainder over.³ Here was a clear intent that the survivor should take upon the death of the other without issue. But this making a kind of entail, the remainder over, was adjudged void. It is not strange, then, that an interest or estate should pass against a man's intent. The law often supervenes that intent where it is inconsistent with any of its rules.

There cannot be the same reason or equity to make a construction in favor of the heir as of the remainderman, because, in the latter case, the testator's intent is plain and express and to be collected out of the will itself. In the other, it is nothing more than imagination and supposition, and the testator, possibly, might never have his heir in his thoughts. And, as to the heir's being favored, that rule holds only in the case of lands, and goes upon a very different reason. Besides, here, slaves are admitted to be a personal estate. How then can they go to the heir?

As to the particular legacy excluding the executor from the surplus, there is a difference where a wife and where a stranger is executor, for which see *Dun and Wythe* in reports, *ante* 36.⁴

There were two arguments made in this case. The last in April 1739, when judgment was given for the defendant, *viz.* that the absolute property vested by the devise for life, by the opinion of LEE, LIGHTFOOT, GRYMES, ROBINSON, DIGGES, and BYRD; TAYLOE, RANDOLPH, CUSTIS, and CARTER, *contra*. LIGHTFOOT and ROBINSON changed their opinions, and so did CARTER.

¹ *Brown v. Pitman* (1710), *Gilbert Rep.* 75, 25 *E.R.* 52, also 2 *Eq. Cas. Abr.* 490, 22 *E.R.* 416; *Gibbs v. Barnardiston* (1711), *Gilbert Rep.* 79, 25 *E.R.* 55, *Precedents in Chancery* 323, 24 *E.R.* 152, also 2 *Eq. Cas. Abr.* 322, 358, 22 *E.R.* 275, 304.

² *Webb v. Webb* (1710), 2 *Vernon* 668, 23 *E.R.* 1036, also 1 *Peere Williams* 132, 24 *E.R.* 325, 2 *Eq. Cas. Abr.* 363, 22 *E.R.* 309; *Basse v. Gray* (1715), 1 *Eq. Cas. Abr.* 362, 21 *E.R.* 1104, also 2 *Vernon* 692, 23 *E.R.* 1049, *Gilbert Rep.* 97, 25 *E.R.* 67.

³ *Slaughter v. Whitelock* (1737), see above, Case No. 50.

⁴ *Dunn v. Wythe* (1739), see, Case Nos. 65, 72.

Dunn v. Wythe
(Part 2)
(April 1739)

In this same court, the day before, the Case of Dun and Wythe, *supra*,¹ was argued, which was briefly this. Simmonds, by his will, gives his wife all his real and personal estate during her widowhood and, if she married, then he gave one-half to Dun's children and one-half to Noblin's, and he made his wife executrix. The wife never married, and died. And the question was whether she had an absolute property by the devise to her or whether the slaves and personal estate should go to the devisees by virtue of the devise over or as her next of kin, which they were.

It was adjudged that, the remainder over being limited upon a contingency that never happened, the devisees could not take by virtue of that. And they took the testator's intention to be no more than to restrain the wife from marrying and that, if she did not marry, she should have the absolute property. It was also compared to the case of a devise for life with a void remainder, which passed the absolute property, according to Brown and Pitman; Gibbs and Bernardiston; and Webb and Webb (*ante* 204); Forth and Chapman, 1 Will. 665, 666.²

[It was held] for the plaintiff, *viz.* that the property did not vest, [by] RANDOLPH, GRYMES, CARTER, and LIGHTFOOT; for the defendant, that it did vest in the wife, LEE, TAYLOE, ROBINSON, DIGGES, BYRD, and the Governor [GOOCH].

Query if those cases mentioned above of a devise for life with a void remainder over do not all turn upon this point, that the remainder made a kind of entail and so the absolute property vested; not so in Forth and Chapman. But note Manning's Case, 8 Co. 95.³ It seems admitted that the devise for life would vest the absolute property if there had not been a remainder over. So, in Forth and Chapman, 1 Will. 665, 666; a devise for a day or an hour of a term with a remainder over that is void passes the whole term if the intent appears that the whole was to go from the executors, by Jekyll, Master of the Rolls.

[This report is cited in Nance v. Roy (1739), see above, Case No. 71.]

¹ See above, Case No. 65.

² *Brown v. Pittman* (1710), Gilbert Rep. 75, 25 E.R. 52, 2 Eq. Cas. Abr. 490, 22 E.R. 416; *Gibbs v. Barnardiston* (1711), Gilbert Rep. 79, 25 E.R. 55, Precedents in Chancery 323, 24 E.R. 152, 2 Eq. Cas. Abr. 322, 358, 22 E.R. 275, 304; *Webb v. Webb* (1710), 2 Vernon 668, 23 E.R. 1036, 1 Peere Williams 132, 24 E.R. 325, 2 Eq. Cas. Abr. 363, 22 E.R. 309; *Forth v. Chapman* (1719-1720), 1 Peere Williams 663, 24 E.R. 559, also Fitz-Gibbon 317, 94 E.R. 773, 2 Eq. Cas. Abr. 292, 359, 22 E.R. 245, 306, Chancery Repts. *tempore* Geo. I, 660.

³ *Manning's Case* (1609), 8 Coke Rep. 94b, 77 E.R. 618.

Scarburg v. Barber, executor
(April 1739)

In this case, a widow made a claim against her deceased husband's estate upon a bond made by him to her, and the claim was disallowed by the court.

In chancery. Scarburg and Anna Maria, his wife, plaintiffs, against Barber, executor of Barber, defendant.

The bill sets forth that the plaintiff Anna, before her marriage with the testator, lent him divers sums of money to pay his debts, viz. in July 1729, £191 10s. sterling by a bill drawn on John Maynard, in December following, £30 by a like bill, in January 1731, £40 by another bill, and other sums [which] amount to £69 9s. 6½d. current, and she sold him goods to amount to £7 15s. current, in the whole £261 10s. sterling and £77 4s. 6½d. current, that, upon a treaty of marriage, the testator agreed she should enjoy all her separate estate, notwithstanding the marriage, and that he should likewise pay her what he owed. And, in April 1731, he gave a bond to the plaintiff in the penalty of £1000 with a condition for the performance of the said agreement, which bond is annexed to the bill, that the testator, by his will, has only devised to the plaintiff her separate estate, without directing the payment of the money he owed before the marriage. Therefore, to have satisfaction for that money out of the testator's estate is the bill.

The defendant's answer [is] he knows nothing of the testator's being indebted to the plaintiff before the marriage and never heard of the bond until a year after the marriage. He denies he knows upon what account it was given or that there was any such agreement before the marriage, as in the bill. He knows the stock and cattle raised on the testator's plantation for several years, both before and after marriage, were used by the plaintiff and that the tobacco made on a plantation of the defendant, descended to him from his grandmother, for four years before the marriage, were shipped under the plaintiff's mark, and he has heard and believes the tobacco made on his father's plantation was shipped in the same manner and the produce carried to the plaintiff's account.

He says the testator, about six weeks before his death, told him that, through the plaintiff's persuasion, he had paid her son, John Timson, £50 in hopes to get a little ease, but he found there was no such thing unless he would give all from his children to hers, which he would not do, and he wished he had not paid the £50. He made his father's will, who directed him to give the plaintiff everything she was possessed of at the marriage, saying it was more than she deserved and, but for his word's sake, he would not give her a farthing more than the law [does], besides which he gives her dower in his lands. He has often heard his father complain of hardships he suffered from the plaintiff. He never saw the bond but in the [clerk's] office; he believes it to be his father's writing, the condition whereof is thus.

The condition of this obligation is such that, if the above bound W.B., his heirs, executors, and administrators shall at all times hereafter suffer the above named A.M.T. peaceably and quietly to keep, possess, and dispose of as she shall think fit all and every part of the estate that she is now possessed of, both real and personal, without the molestation of him the said W.B., his heirs, etc. and do hereby further oblige myself, my heirs, etc. to pay to the said A.M.T. what I am justly indebted to her, then the above obligation to be void etc.

He says his father's slaves and personal estate were appraised only to £232 13s. 9d. He cannot tell what his debts are. The plaintiff, after his death, entered into her dower of his lands, and has all her separate estate.

And, upon this answer, he demurs because the money pretended to be lent and the bond were before the marriage and it does not appear there was any agreement the money should be paid notwithstanding the marriage, by which the defendant is advised the bond and all debts due before the marriage are extinguished at law and, as this case is, ought not to be set up in equity.

The proofs in the cause are but few. And they are principally about the money lent. The plaintiff has exhibited some accounts current and bills of lading, a love letter from the testator, and the draught of a bond formerly offered by him. And it is proved for the defendant that the plaintiff holds her dower in the testator's lands and has her separate estate and that she had two crops of the testator seven years before the marriage.

The great question in this case is whether the plaintiff ought to be paid out of the testator's estate the money she lent him before the marriage. The equity set up is a pretended agreement before the marriage that the testator should pay the plaintiff what he owed her notwithstanding the marriage. This is suggested in the bill, but not proved, as I conceive.

I [*Barradall*] shall, therefore, in speaking to this cause, endeavour to show, first, that there is not any certain or positive proof of the agreement pretended and, second, if there was, that the agreement is derogatory to the rights of marriage and such as a court of equity will not support. I shall not rely much upon the demurrer, because we are gone into proofs and the whole equity of the cause is before the court.

It cannot, I think, be said that there is any direct or positive proof of the agreement suggested in the bill. The bond which is alleged to have been given for performance of the agreement has not a syllable in it of an intended marriage or that the condition should be performed notwithstanding the marriage. Neither is there one witness who proves any such thing, and the defendant denies that he knows anything of such an agreement.

It appears, indeed, from the papers exhibited that the testator courted the plaintiff many years before the marriage and offered her very good terms but they were not accepted. This was four years at least before the marriage. And [there is] no proof of any overtures within those four years or that he continued in the same mind. And yet these are the circumstances relied upon to make out the agreement suggested in the bill.

One of these papers is a love letter dated in 1722, nine years before the marriage. There is another love letter without a date and the draught of a bond sent in it. The date of the bond is cut out, with design, I suppose, to impose it for a thing of a later date than it really is, but the figure 7 may be seen pretty plainly at the end. And so we may conclude it was dated in 1727, four years before the marriage. I must submit whether a man's courting a woman four years before he married her and, then, offering her advantageous terms is any evidence of a subsequent marriage agreement suggested to be made four years afterwards when there is no kind of proof that the courtship continued or that the man remained in the same mind. And, if it be no evidence, as I humbly conceive it is not, then are the plaintiffs without the least shadow of proof of the agreement suggested.

The most that can be said is that these circumstances make some sort of presumption that the bond mentioned in the bill was for performance of a marriage agreement, for it is no necessary consequence that, because a man once makes an advantageous offer to his mistress, that he should be always so disposed at any distance of time. On the contrary, we know men's tempers and inclinations are very subject to change and, especially, in matters of this sort, when a mistress is obstinate.

The presumption, then, in this case must be very light, which, according to Sir Edward Coke, proves nothing at all. And, if the difference between the conditions of the two bonds be considered, it must further weaken the presumption. In that of 1727, notice is taken of an intended marriage, whereas nothing of that is mentioned in the bond of 1731. By the first, the testator was to make over all his own estate as well as the plaintiff's, a most extravagant proposal. The condition of the latter is only that she shall have her own estate and he pay her what he owed her. As there is so great a difference between the two conditions and one mentions an intended marriage and the other not, as there is no proof of the courtship's

continuing from 1727 to 1731, I cannot conceive that the bond in 1727 is any kind of proof that the bond of 1731 was given on the same occasion or for the same purpose, but the contrary, I think, is rather to be presumed.

Then, the testator's declaration, mentioned in the defendant's answer, when he made his will, is a further argument against this presumption. After directing a bequest of the plaintiff's separate estate and her dower in his lands, he said it was more than she deserved and he would not have done so much but for his word's sake, which plainly imports that whatever marriage agreement he had made was only verbal or rather that he had only made a promise to the plaintiff, which, perhaps, might be after the marriage, to do what he did.

This bequest and declaration of the testator, I presume, will have some weight. In the Case of Myhil and Myhil, October 1735, where the question was whether the plaintiff was a bastard, the declaration of the husband in his will, that he was so, was much relied on. And the case of one Tranter, a bailiff tried for the murder of Mr. Lutterel, was urged where Mr. Lutterel's words in his last moments were allowed as evidence against the prisoner. Here, we have the will and the last words of the testator against the presumption they would set up.¹

But it will be argued, perhaps, *quorsum hoc*, to what purpose was this bond given. This, I think, will admit of an easy answer by showing that the condition may have a sufficient effect and operation without supposing it to be made for the performance of a marriage agreement. The first part of the condition is that the plaintiff shall keep, possess, and dispose of all the estate she was then possessed of without the molestation of the obligor. Suppose the plaintiff had anything in her possession which the testator had or claimed a right to (and this is no improbable conjecture since it appears they lived together and she had the entire use and disposal of his estate). This part of the condition would have its effect in securing to the plaintiff a good title to the thing so in her possession and the latter part of the condition that he should pay what he owed her might be intended as a better security for the payment of what he owed.

Thus, we see this bond might be given for another purpose than for the performance of a marriage agreement. The condition does not necessarily import that it was given for that end, but may have a sufficient operation to other purposes.

Since then, there is not the least mention of an intended marriage in the condition. Since the condition may without any forced or strained construction have a sufficient operation without supposing a marriage agreement and since there is no direct or positive proof of such an agreement, I hope the agreement suggested in the bill shall not be supported barely upon a slight presumption without other proof, especially, when the presumption is as strong or stronger from the circumstances that have been taken notice of that there was no such agreement.

It is well known that marriage is a gift in law of all the wife's personal estate, that it extinguishes all debts and contracts between the husband and wife. And this right a court of equity is always very tender to preserve, and, I apprehend, will never take from the husband what the law gives him or set up a debt which the marriage has extinguished without clear proof of an agreement to that purpose, which I take to be wanting in this case.

But, if the court shall be of opinion that the agreement is sufficiently proved and that the bond is not extinguished by the marriage, then, I must endeavor to show, second, that this agreement is not such a one as a court of equity ought to support, as being derogatory to the marriage rights.

It will be said that marriage agreements are always favored, which I agree to be true in this sense, that an agreement, fit and proper to be decreed, will receive a favorable interpretation for the support of it, according to the intention of the parties. But I deny it to be a universal rule that all marriage agreements are to be favored, because there are some of

¹ *Doe, ex dem. Myhil v. Myhil* (1735), see above, Case No. 23; *Rex v. Reason and Tranter* (1722), 1 Strange 499, 93 E.R. 659, 6 State Trials 195 (F. Hargrave, ed., 1777).

such a nature that a court of equity will not support them at all. And this I take to be of that kind.

The usual method in marriage contracts is to make use of a third person as a trustee. However, I will not pretend to say but that an agreement between the intended husband and wife without the intervention of a third will sometimes be supported in equity and that whether the agreement be by promise, articles, or bond. But, then, if the agreement be between the husband and wife alone, I take a difference where the same is to have execution during the coverture and where the execution of it is future to the marriage. Of the first kind are such where the husband agrees that the wife shall have anything to her own use or at her disposal during the coverture. The latter sort are where the husband agrees to leave his wife so much at his death, that she may dispose by will, or the like. In the first case, as the agreement is without question extinguished at law, so I take it a court of equity will never set it up, because it is derogatory to the rights of marriage and in a manner inconsistent with the nature of it, for, by the marriage, the law puts the wife and everything she has under the power and control of her husband. And, consequently, an agreement to suffer her to dispose of money during the coverture must derogate from and be inconsistent with the husband's power and the wife's subjection. But, in the second case, I take it the agreement is neither extinguished at law or in equity. It is only suspended during the marriage, and, after the death of either party, may be set up, either at law or in equity, as the case may require.

This will appear very evident from the following cases, *Clark v. Thompson*, executor of Isaac, Cro. Ja. 571;¹ assumpsit in consideration that, [if] the plaintiff would marry the testator, he would leave her worth £500; it was objected the promise was extinguished by the marriage, but [it was] not allowed, because it was not a duty in the life of the husband and judgment [was given] for the plaintiff.

Gray v. Acton, 1 Sal. 325;² a bond was given before the marriage from the husband to the wife with a condition, if she survived and he left her £1000, to be void; Holt, C.J., was of opinion the bond was extinguished by the marriage, being a present debt, and the condition was collateral, but [he] allowed a covenant or promise to such effect had been good, because they raise no present duty, but two other justices held the debt was only suspended, because it was not payable during the marriage and was only a debt on a contingency.

Thus, at law, we see, if the agreement is not to have execution during the coverture, it is not extinguished by the marriage. And we shall see presently that equity follows the law.

Darcy v. Chute, 1 Ch. Ca. 21;³ the plaintiff being a widow and seised of a jointure, Mr. Chute, the defendant's father, before the marriage with her, agreed by a deed between them that it should be lawful for her, during the coverture, to receive and dispose of the rents of her jointure. The court declared that the agreement before the marriage with the plaintiff herself was immediately extinguished by the marriage and refused relief.

¹ *Clark v. Thompson* (1620), Croke Jac. 571, 79 E.R. 489.

² *Gage v. Acton* (1700), 1 Salkeld 325, 91 E.R. 288, also 1 Comyns 67, 92 E.R. 962, 1 Lord Raymond 515, 91 E.R. 1244, 1 Freeman 512, 515, 89 E.R. 385, 387, Carthew 511, 90 E.R. 892, Holt K.B. 309, 90 E.R. 1071, 12 Modern 288, 88 E.R. 1327.

³ *Lady Darcy v. Chute* (1683), 1 Chancery Cases 21, 22 E.R. 673, also 1 Eq. Cas. Abr. 63, 21 E.R. 877, *sub nom. Lady Dacres v. Chute*, 1 Vernon 160, 23 E.R. 387, 2 Chancery Cases 104, 22 E.R. 867, 1 Eq. Cas. Abr. 352, 21 E.R. 1097, 3 Chancery Reports 6, 21 E.R. 711, 2 Freeman 148, 22 E.R. 1120.

Pridgeon v. Pridgeon's executors, 1 Ch. Ca. 117.¹ An agreement was made by the plaintiff and others on her behalf before the marriage with the testator that, notwithstanding the marriage, the rents and profits of all her own estate and what personal estate and goods she had should be at her own disposal. It was held by the Keeper, Bridgman, assisted with two judges, Hale and Archer, that the agreement was extinguished by the marriage. And Hale takes the difference I rely on, between an agreement for anything to be done future to the marriage and where the agreement is to have execution during the coverture. In the first case, he says the agreement is not extinguished by the marriage, but is in the latter. I will beg leave to read the case, as, I presume, it will be satisfactory to the court to have that great and good man's opinion in his own words.

Thus, it appears the same distinction is kept up in equity as at law. If the agreement is extinguished at law, equity will not set it up. If it be not extinguished at law, as where the execution is future to the marriage, there is no doubt but equity will decree it, which is all that is proved by the cases cited on the other side. And this difference, well considered, reconciles all the cases we meet with in the books upon this subject, though, at first view, they may seem to clash and contradict one another.

The agreement in this case as set forth in the bill is to have execution during the marriage. It is that the plaintiff shall keep and dispose of her own estate and the testator pay her what he was indebted to her. And so, I apprehend, it is not such an agreement as a court of equity will support.

It would, indeed, be the greatest absurdity that such an agreement as this should subsist after the marriage, for every debt of the wife vests in the husband by the marriage. And so the same person would be both bound to pay and entitled to receive if the debt subsisted. For this reason, it is and, for avoiding this absurdity, that the law extinguishes the debt. And the same reason will hold good why it should not be set up in equity. And I believe I may venture to say there is no instance where a court of equity has set up an agreement of this kind, but they have often refused so to do, as appears from the cases cited.

Objection: *Haymer v. Haymer*, 2 Vent. 343;² an agreement between a husband and a wife before the marriage that he should settle lands on them and the heirs of their bodies; [it was] decreed against the heir of the husband. This is within my distinction, for here was nothing to be done during the coverture inconsistent with the marriage rights or derogatory from them.

Cotton and Cotton, 2 Vern. 290; a woman executrix of a former husband lends £100 to A. and B. and took a note for it in her own name and a bond in a trustee's name, and, afterwards, married B. It was held this debt was not extinguished. The report is short, and the reasons of the judgment [are] not given. But I take the reason it turned upon was because the woman lent the money as executrix and so the debt was not extinguished at law, the husband being indebted to her *in auter droit*, as our books phrase it. *Vide* 1 Sal. 326.³ But here is nothing of a marriage agreement in this case, and so nothing to the present argument. If anything, it serves to show that, upon these occasions, law and equity go hand in hand.

Acton and Peirce, 2 Vern. 280,⁴ is a bond to the wife to leave her £1000, in which case it is not extinguished, either at law or in equity.

¹ *Pridgeon v. Pridgeon* (1668), 1 Chancery Cases 117, 22 E.R. 721, also Lincoln's Inn MS. Hill 125, f. 56.

² *Haymer v. Haymer* (1678), 2 Ventris 343, 86 E.R. 476, also 1 Eq. Cas. Abr. 63, 21 E.R. 877.

³ *Gage v. Acton* (1700), *ut supra*.

⁴ *Acton v. Peirce* (1704), 2 Vernon 480, 23 E.R. 908, also Precedents in Chancery 237, 24 E.R. 115, 1 Eq. Cas. Abr. 63, 316, 21 E.R. 877, 1071.

Fursor v. Penton, 1 Vern. 408;¹ a covenant between a husband and a wife before marriage that she should dispose £300 notwithstanding the marriage. The money was lodged in a trustee's hands, and the husband brings a bill against him for it, suggesting the covenant was extinguished by the marriage. The trustee, in his answer, says it is hard a trust should be defeated because the agreement was improvidently made between the husband and wife. The reporter says the court inclined to dismiss the bill, but there is no resolution. This case, not being adjudged, can be of little weight. But it is easy to distinguish it from the cases cited. There was a trustee before the court with a sum of money in his hands, upon which the court could easily lay their hands. And, as all trusts are creatures of Chancery, the court might, perhaps, have taken upon them to direct the payment of the money according to the trust without regard to the informality of the agreement. But here is not a trust or a trustee in the case before us. And so the cases can in no sort be compared together.

N.B. the reporter seems to incline to the difference I take, and, thus, I hope, it is evident that the agreement set up, if it was fully proved, which I can by no means admit, is not such a one as a court of equity ought to support. It may seem needless, then, to make any further observations. However, to show there is no great hardship on the plaintiff, I must beg leave to make a remark or two.

It appears upon the defendant's answer and is in part proved that the plaintiff, for several years, shipped the testator's tobacco under her mark, and received the produce, and killed and made use of the testator's hogs and cattle. In the account exhibited by her, she has given credit for no more than £35 11s. for the produce of tobacco, and that in a general article without saying how many hogsheads she received or when. And there is no credit at all for cattle or hogs. This must appear a very inconsiderable allowance for the labor of eleven or twelve hands for several years, three according to her own account. Then, she charges £24 for tools and clothes for the Negroes. So the net produce is but £11 11s.

It appears, further, upon the answer, that the testator told the defendant six weeks before his death he had, at the plaintiff's importunity, paid her son £50 to get a little ease, but she would not be satisfied without having all from his children, as, indeed, is plain from this suit. No allowance is offered to be made for this £50.

The claim the plaintiff sets up amounts to more than the whole estate of the testator. So, if she succeeds, not only the testator's children will be sent a begging, but several of his just creditors [will] be defrauded of their debts. And, besides all this, the plaintiff holds her dower in the testator's lands.

It is a maxim those who will have equity must do equity. And, surely, there is as much reason and justice that the plaintiff should account for the profits of the testator's estate while she received them and for the £50 paid her son as that the testator's estate should be liable for this pretended debt to her. It is a piece of justice to the creditors and children of the testator. Now, I believe, if a reasonable allowance is made for the profits received by the plaintiff out of the testator's estate, if the £50 paid her son, and the advantage she has made from the dower in the testator's lands be deducted out of her claim, I mean so much of it as is proved, there will be little or nothing due to the plaintiff.

In the Case of *McCarty v. Fitzhugh*, about six years ago,² which was a bill to compel the payment of a bond debt due to the plaintiff's father from the defendant, who was one of his executors, the defendant, in his answer, disclosed divers equitable demands he had against the testator. And, without other proof, the court allowed those demands to balance the bond debt,

¹ *Fursor v. Penton* (1686), 1 Vernon 408, 23 E.R. 550, also Chan. Repts. *tempore* Jac. II, 281.

² *McCarty v. Fitzhugh* (1733), Randolph Va. 152, *sub nom.* *McCarty v. McCarty's executors*, see above, Case No. 3.

and the suit was dismissed. I hope there is the same equity in this case to regard the defendant's demands.

But there is a further circumstance in this case which I apprehend will bar the plaintiff's pretended equity if the agreement was ever so fully proved. It appears that the plaintiff has accepted what the testator gives her by his will, viz. her separate estate and dower in his lands. This acceptance, I take to be a waiver of the benefit of this pretended agreement. I must submit whether this case be not within the equity of the Act 1 Geo. II, 11,¹ which enacts that a widow shall declare within nine months whether she will accept the provision made for her by her husband's will, if she fails, she is forever barred to claim anything more than is given her by the will. Here, the wife is so far from making any declaration that she will not accept that she, actually, enters upon what is given her. It is plain from what the testator declared when he made his will that this devise was intended in satisfaction of what he promised, which must be understood of the marriage agreement. The wife accepts it. This acceptance I rely upon bars her from claiming anything more, both by the Act of Assembly and in natural equity and justice. There can be no reason she should have the benefit of the devise and this pretended agreement, too, to the defrauding of the creditors and ruin of the testator's children.

Upon the whole, I conclude, first, that there is no direct or positive proof of any marriage agreement at all. And the presumption on their side is very light in itself, and is also opposed and balanced by as strong or stronger presumption on our side, second, the condition of the bond does not necessarily import that it must be given for the performance of a marriage agreement, because it may have a sufficient effect and operation to other purposes, third, if the agreement was ever so fully proved, yet it is extinguished by the marriage, being to have execution during the coverture and so derogatory to the rights of marriage and inconsistent with the nature of it, fourth, the defendant, has divers equitable demands against the plaintiff to the value of hers, and, if she will have equity, she must do it, fifth and lastly, she has waived this pretended agreement, and barred herself from claiming the benefit of it by accepting the provision made for her by her husband's will. For all these reasons, the plaintiff has no kind of pretense to relief in this case. And, therefore, I hope the bill will be dismissed.

And it was dismissed by the opinion of the whole court *praeter* GRYMES, CARTER, and BLAIR; LIGHTFOOT and DANDRIDGE gave no opinion, April 1739.

In this case, an appeal was prayed for. But the plaintiff acknowledged at the bar her son had received the £50 mentioned in the answer, which reduced her demand to under £300 sterling. It was denied.

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Banks v. Banks
(April 1739)

In this case, the devise in issue created an estate tail.

In chancery.

William Banks, by his will, devises thus:

I give and bequeath to my son Ralph Banks conditionally that he no way alienate or transfer my land hereafter mentioned to any other use than to the use and uses that shall be by me herein declared all and every part of my home dividend of land where I now live, even to him, my son Ralph, and the heirs of his body lawfully begotten forever, meaning his children, present or hereafter, to whom the right and inheritance of, in, and to the said land shall descend and go in case they or any of

¹ Act of 1727, c. 11, s. 21, 4 Hening's Statutes 228.

them survive him, but, in case he survives all of them, that my said son, Ralph, shall be at his own liberty to will and devise the premises as he shall think fit.

The question is whether Ralph, by this devise, took an estate tail or only an estate for life and his children an estate in fee in joint tenancy after his death in case they survived him.

And I [*Barradall*] conceive that Ralph took only an estate for life with a contingent fee, however, in case he survived all his children and that such of his children who survived him take an estate in fee in joint tenancy.

It seems needless to enforce that plain and almost uncontroverted doctrine that, in the construction of wills, the precise form of words is not so much regarded as the intention of the testator and that this intention is to be collected from the whole will. To illustrate this by a familiar instance, if a devise be to A. and his heirs in one part of a will, which words we know make a fee simple, yet, if, afterwards, in another part, the estate is limited to another in case A. die without issue, it makes an estate tail by implication and construction of the testator's meaning collected from both these passages or clauses. In this and twenty other instances that might be mentioned, it appears that later words or sentences in a will may so control or explain former words as to give them a different sense and meaning from what they naturally or in strict construction of law would bear. It is, indeed, so known and plain a rule in the construction of wills that I am persuaded it will not be denied on the other side.

To apply this to the present case, here is a devise to one and the heirs of his body. This, without all question, would make an estate tail if nothing followed or preceded to show the testator had another meaning and intention, which I must now endeavour to show. But I will first beg leave to read the whole clause in the will relating to this devise.

I apprehend, Sir, upon the bare reading, it must appear the testator intended something more than merely to give his son an estate tail. What need of so many words for that purpose when a single line would have done? I apprehend, too, it is as plain that the testator intended the 'inheritance' (it is his own expression) should go to all the children of his son who happened to survive him and, then, the son could not take an estate tail, for, if he did, the inheritance would be in him, and go to his eldest son alone.

There is nothing in the whole clause that carries the least appearance of an estate tail being intended to the son but the words 'heirs of the body'. And, when it is considered for what purpose the testator made use of those words and what he meant by them, as he himself has explained it, it will be mighty clear, as I conceive, that he did not intend them as words of limitation or with any design to increase or enlarge the estate given to his son, but to quite another purpose.

In the first part of the devise, he gives to his son, Ralph, without adding more, upon condition, too, that he should not alien or transfer to any other use than the use and uses mentioned in his will. It will be agreed that nothing more than an estate for life would pass to Ralph by these words. And I must submit whether this be not some proof of the testator's first and primary intention to give no more than an estate for life. Then, the condition not to alien, in my apprehension, is a further proof that he did not intend an estate tail, since the most ignorant know that a tenant in tail cannot alien or sell. But it is not, perhaps, so well known that a tenant for life with a contingent fee, which is the estate I conceive the testator intended Ralph, cannot sell. And that might be the occasion of adding this condition then he is not to alien to any other use than the use and uses in the will. Would a man have expressed himself thus who intended nothing more than an estate tail? What could he mean by the uses in his will if that was his intent and there was but one use or estate intended to be given.

To proceed to the will, after this devise to his son and this condition, he adds 'even to him, my son, Ralph, and the heirs of his body forever, meaning his children, present or hereafter'. Had the devise gone no further than to the heirs of his body, I agree, it would have made an estate tail, but, when he adds 'meaning his children' etc., he has explained what he meant by 'heirs of the body', viz. the children present and hereafter, which is a clear proof he did not intend the words 'heirs of his body' as words of limitation to increase or enlarge the

estate given to his son, but only as a designation or description of his sons' children. And, therefore, in our law, the phrase 'heirs of the body' here cannot be taken as words of limitation, but as words of purchase, not to increase or enlarge the estate given to his son, but to point out other persons he intended should take by this devise.

It is a very usual thing in wills to construe the word 'issue', 'issue male heirs of the body' and such like to be words of purchase, that is a designation or description of a person intended to take. It is a rule of law laid down in *Shelley's Case*, 1 Co. 99, and other books that, where the ancestor takes an estate of freehold, a limitation afterwards to his right heirs or heirs of his body are words of limitation, and not of purchase, as a devise to a man for his life, which is an estate of freehold, and, after his death, to the issue of his body; this makes an estate tail, as was adjudged [in] *King v. Melling*, 1 Vent. 225. But, notwithstanding this rule, where issue in such a devise appears by the testator's intention to be only *designatio personae*, there it shall be taken as a word of purchase, and the testator's intent shall prevail against this rule of law, as in *Archer's Case*, 1 Co. 66, cited in *FitzG.* 24; a devise to A. for life and, afterwards, to the next heir male and the heirs of the body of such heir male, it was adjudged that A. took only an estate for life and the heir male took by purchase, for words of limitation being grafted on the word 'heir' show it was used as *designatio personae* and not for limitation of estate.¹

In a late case between *Papillon and Voyce*, in 1728, before the late Master of the Rolls, a devise to his son for life, remainder to trustees for his life to support contingent remainders, remainder to the heirs of the body of his said son, reversion to himself in fee, [it was] decreed the son had only an estate for life and that the heirs of his body should take by purchase. *Abr. Ca. in Eq.* 184, 30; see also *Bamfield and Popham*, *id.* 133, 24; *Backhouse and Wells*, cited in *Shaw and Weigh*, *FitzG.* 22; *Clerk and Day*, *ibid.* 24, and *Raymond's* argument in that case.²

In all these cases, the words 'heirs of the body', 'issue male', and 'heir male' were construed to be words of purchase, notwithstanding the rule of law before mentioned, the testator's intention appearing to be so, which intention, in the two first cases, was collected principally from his grafting the inheritance on the estate given to the issue. And so they are cases directly in point to prove, first, that, in a will, 'issue', 'heirs of the body', *et similia*

¹ *Wolfe v. Shelley* (1581), 1 Coke Rep. 88, 76 E.R. 199, also 3 Dyer 373, 73 E.R. 838, 1 Anderson 69, 123 E.R. 358, Moore K.B. 136, 72 E.R. 490, Jenkins 249, 145 E.R. 176; *King v. Melling* (1672), 1 Ventris 225, 86 E.R. 151, also 1 Ventris 214, 86 E.R. 144, Pollexfen 101, 86 E.R. 526, 3 Keble 42, 52, 95, 84 E.R. 584, 589, 614, 2 Levinz 58, 83 E.R. 448, 3 Salkeld 296, 91 E.R. 835, 1 Eq. Cas. Abr. 181, 21 E.R. 973; *Baldwin v. Smith* (1597), 1 Coke Rep. 63, 76 E.R. 139, also Croke Eliz. 453, 78 E.R. 692, 2 Anderson 37, 123 E.R. 533; *Shaw v. Way* (1728), *Fitz-Gibbons* 7, 24, 94 E.R. 628, also 8 Modern 253, 382, 88 E.R. 180, 272, Fortescue 58, 92 E.R. 760, 2 Strange 798, 93 E.R. 856, 1 Barnardiston K.B. 54, 94 E.R. 38, 1 Eq. Cas. Abr. 182, 185, 21 E.R. 974, 976, 2 Eq. Cas. Abr. 315, 359, 22 E.R. 267, 305.

² *Papillon v. Voyce* (1732), 1 Eq. Cas. Abr. 185, 21 E.R. 977, also 2 Peere Williams 471, 24 E.R. 819, Lincoln's Inn MS. Misc. 384, pp. 343, 346, 362, W. Kelynge 27, 25 E.R. 478, *Fitz-Gibbons* 38, 94 E.R. 643, Forrester 15; *Popham v. Bamfield* (1701-1703), 1 Vernon 79, 167, 344, 23 E.R. 325, 391, 510, 1 Salkeld 236, 91 E.R. 209, Chancery Repts. *tempore* Anne 26, 2 Freeman 269, 22 E.R. 1203, 1 Eq. Cas. Abr. 108, 21 E.R. 916, 2 Eq. Cas. Abr. 308, 22 E.R. 260, *sub nom.* *Bampfild v. Popham*, 2 Vernon 427, 449, 23 E.R. 873, 888, 2 Freeman 266, 22 E.R. 1201, 1 Peere Williams 54, 24 E.R. 290, Holt K.B. 233, 90 E.R. 1028, 1 Eq. Cas. Abr. 183, 21 E.R. 975, ; *Backhouse v. Wells* (1712), 10 Modern 181, 88 E.R. 683, Fortescue 133, 92 E.R. 791, Gilbert Cas. 20, 129, 93 E.R. 247, 282, 1 Eq. Cas. Abr. 184, 21 E.R. 976; *Shaw v. Way* (1728), *ut supra*.

are often taken as *designatio personae* or words of purchase and, second, especially, where it appears the testator intended the inheritance should go to and vest in the issue, which is the case here, as I shall show presently.

In the Case of Shaw and Weigh, before mentioned, the question was whether 'issue' should be taken as a word of limitation or purchase. Lord Raymond who delivers the opinion of the court observes, fo. 24, 25, that 'issue' in a conveyance is a word of purchase, but, in wills, it is governed and directed by the intent of the party. And he adds, when 'issue' is *designatio personae*, it can carry only an estate for life to him whose issue is to take by such designation.

Now, in the case before us, nothing can be clearer than that, by 'heirs of the body', the testator intended no more than a description of his son's children. He has told us so himself, meaning, says he, his children. And, then, by the rule laid down by Raymond, the son can take no more than an estate for life. But, when we consider what follows the word 'children' in the will, the matter seems to be put beyond all doubt or question. The words are 'to whom', *i.e.* the children, 'the right and inheritance of, in, and to the said land shall descend and go in case they or any of them survive him'.

Here are words of inheritance grafted upon and annexed to the word 'heirs' or children. And, therefore, expressly, the reason of Archer's Case and the Case of Lodington and Kyme, before cited,¹ where the words 'heirs male' and 'issue male' are construed words of purchase, even against an established rule of law that they shall be words of limitation where the ancestor takes an estate of freehold merely because the inheritance is limited or grafted upon the estate given to the issue. Here, the testator has expressed himself in the clearest terms that the inheritance shall descend to the children. And so the case is rather stronger than those, as it does *ex vi termini*, and, in the most obvious sense, exclude the father from taking the inheritance.

Further, the inheritance is not limited to the eldest son, which would make it look more like an estate tail, but to the 'children, present' and future if 'they or any of them survive him'. The words 'children, present' and future and 'they or any of them' show he intended an equal benefit to all the surviving children, and not that one should run away with the whole, as he will do in case Ralph is construed to take an estate tail.

In a few words, can there possibly be a doubt of a man's meaning and intention who gives land to his son and his children and, then, declares that the inheritance shall descend to the children after the father's decease, which is the sum and substance of the devise before us? What can be intended by such a devise but an estate for life to the father and a fee to the children?

To construe this an estate tail in Ralph, all the latter part of the clause where the testator declares the inheritance shall descend to the children must be entirely rejected and thrown out of the question, contrary to a known and established rule of construction that a will shall be so construed as to make all the parts of it stand and all the words have some effect if they are significant and sensible. FitzG. 23, *per* Raymond.² Now, that these words are significant and sensible cannot be disputed. Nay, they have a plain, apparent, and express meaning and, therefore, they must not be rejected. And I insist upon it that they cannot have any effect or operation but by the construction I contend for, which construction gives them the force and effect they were intended for and is plainly expressed, *viz.* that the children shall have the inheritance.

¹ *Baldwin v. Smith* (1597), *ut supra*; *Lodington v. Kime* (1695), 3 Levinz 431, 83 E.R. 766, 1 Salkeld 224, 91 E.R. 198, also 1 Lord Raymond 203, 91 E.R. 1031, 2 Eq. Cas. Abr. 331, 22 E.R. 282.

² *Shaw v. Way* (1728), *ut supra*.

As the whole will is before the court, I must beg leave to take notice of a circumstance which may serve further to show the testator's intention. There was an elder son than Ralph, the devisee, to whom the testator gives £50 in bar from ever claiming any part of his estate, from whence I think it is plain he intended to exclude this eldest son entirely from the inheritance. But, if this is construed an estate tail in Ralph, there is a reversion expectant undisposed of and which descended to the eldest son, so that, upon a failure of issue in Ralph, the estate would come to him. This cannot well be supposed to be the testator's meaning when he has given such a legacy to his eldest son in bar of his claiming any part of his estate. Now, by the construction I contend for, the fee simple vested either in Ralph, if he survived, all his children or in the children if they survived him. And so there is nothing left to descend to the eldest son.

Upon the whole, I conclude that the words of the devise before us can never be satisfied but by construing it to carry an estate for life to his son with a remainder in fee to such of his children as survived him and, if he survived them all, then a fee to him upon that contingency. This, I say, I apprehend must be the construction from the force of the words from whence we are to collect the testator's meaning and intention.

Ante 219, Lodington and Kyme, 1 Salk. 224 and FitzG. 23, cited by Raymond; a devise to A. for life and, in case he shall have issue male, to such issue male and his heirs forever and, if he die without issue male, remainder over [was] adjudged that A. took only an estate for life and that the issue took by purchase, the inheritance being annexed and limited to the word 'issue'.

In this case, the court were all clearly of opinion that the testator intended nothing more than an estate tail to Ralph and that what was added after 'heirs of the body' should be rejected as superfluous. And so the bill was dismissed. April 1739.

Which I think [is] a right judgment.

[This case is cited in *Vass v. Phillips* (1739), see below, Case No. 75.]

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Vass v. Phillips
(April 1739)

In this case, the devise in issue created a contingent estate.

John Penn, by his will, January 13, 1676, devises thus 'I give and bequeath to Ann Sharpe my plantation' etc., the premises in question. And, after other bequests, follows this clause 'and for my land which I have given to Ann Sharpe, if it should please God to die without issue, I give to my friend, Thomas Harwar, otherwise to she and her heirs forever.'

The question is what estate Ann Sharpe took by this devise, whether an estate tail or a fee simple upon the contingency of leaving issue at her death. If the former, the plaintiff has a good title; otherwise not.

It must be agreed that, by the first part of this devise, Ann took only an estate for life. And it will be further admitted, I [*Barradall*] presume, that, if the second clause had gone no further than the limitation over to Harwar, it would have been clearly an estate tail in Ann. The doubt, then, and difficulty, if there is any in the case, must arise from these latter words, 'otherwise to she and her heirs forever', whether these words show an intention in the testator to give any other estate to Ann than would have passed by the first words if these had not been added. And I conceive not but that he intended an estate tail and no other estate to Ann.

It is a common doctrine that the intent of the testator is the rule and guide for the expounding of wills, that this intention is to be collected not from any particular sentence or clause, but from the whole will taken together, and that, to serve this intention, even sentences are sometimes transposed.

It is also a well known and settled point that 'issue' in a will always imports and is taken to mean heirs of the body. They are terms equivalent and indeed are so taken in divers acts of Parliament, as Westminster II, *De Donis*, and 34 Hen. VIII, of Entails Settled by the Crown; 1 Vent. 229.¹

This being premised, I shall proceed to consider the devise before us. The testator, when he first disposes of the land to Ann, limits no estate. And, consequently, she could take only an estate for life by that part of the devise, as has been observed. Then, when he comes to enlarge this estate for life and give an estate of inheritance, it is remarkable he makes use of the word 'issue', if she dies without issue, remainder over, which is the same as if he had said without heirs of the body. This, I think, plainly shows that the first and primary intention of the testator was to provide for Ann's issue as well as herself, for it will be granted me that this limitation over upon a dying without issue would make an estate tail if the will went no further. 3 Danv. 180, 7, 9, 181, 12; 1 Vent. 229; FitzG. 12, 25.²

It is, indeed, an estate tail by implication only, but, then, it is by a plain and necessary implication of the testator's intention that the issue should have the land until the remainder took place. And, in a will, it is not material whether an estate be given by implication or express limitation. It is the intent alone that is to be regarded so that there is really no difference between a devise to one and his issue and a devise to one and, if he die without issue, remainder over. Only, in the first case, he has an estate tail by express limitation and, in the other, by implication. FitzG. 12.

If, then, this devise be considered as a devise to Ann and the heirs of her body or issue, which is the same, I would ask whether, when the testator in the latter part of the clause comes to speak again of Ann and her heirs, it is not reasonable to suppose he meant the same heirs he had just mentioned before. If he did, there is an end of all doubt and difficulty in the case.

And that he did mean the same heirs, I think, may be fairly collected from the following consideration. First, we know that, in common speech, 'heirs' are generally applied to a person's children. If a man leaves no children, it is common to say he left no heirs. And words in a will are to be taken as they are understood in common speech. If, then, we can suppose that this testator thought 'issue' and 'heirs' imported the same thing, it will account for his making use of the words 'issue' in one place and 'heirs' in another, for, when men have annexed the same idea to two different terms or words, they make use of those terms indifferently as they occur to memory.

Second, upon the face of the will, it appears the testator had an intention to provide for Ann's issue as well as herself. And this, as has been observed, seems to have been his first and primary intention.

Third, there are many cases in law where the word 'heirs' in a will has been construed and interpreted to mean heirs of the body, especially, where the word 'issue' or 'heirs of the body' have been likewise made use of by the testator in the same will. Some of which cases, I shall briefly mention.

¹ Stat. 13 Edw. I (Westminster II), c. 1 (SR, I, 71-72); Stat. 34 & 35 Hen. VIII, c. 21, s. 7 (SR, III, 922); *King v. Melling* (1672), 1 Ventris 225, 86 E.R. 151, also 1 Ventris 214, 86 E.R. 144, Pollexfen 101, 86 E.R. 526, 3 Keble 42, 52, 95, 84 E.R. 584, 589, 614, 2 Levinz 58, 83 E.R. 448, 3 Salkeld 296, 91 E.R. 835, 1 Eq. Cas. Abr. 181, 21 E.R. 973.

² *King v. Remball* (1617), 3 Danvers, Abr., *Estate*, pl. P, 7, p. 180, also Croke Jac. 448, 79 E.R. 384, 1 Eq. Cas. Abr. 182, 21 E.R. 974; *Johnson v. Smart* (1614), 3 Danvers, Abr., *Estate*, pl. P, 9, p. 180; *Robinson v. Miller* (1609), 3 Danvers, Abr., *Estate*, pl. P, 12, p. 181; *King v. Melling* (1672), *ut supra*; *Shaw v. Way* (1728), Fitz-Gibbons 7, 94 E.R. 628, also 8 Modern 253, 382, 88 E.R. 180, 272, Fortescue 58, 92 E.R. 760, 2 Strange 798, 93 E.R. 856, 1 Barnardiston K.B. 54, 94 E.R. 38, 1 Eq. Cas. Abr. 182, 185, 21 E.R. 974, 976, 2 Eq. Cas. Abr. 315, 359, 22 E.R. 267, 305.

Webb and Herring, Cro. Jac. 115, 1 Roll Abr., 836, 5;¹ a man had a wife, a son, and three daughters; he devised land to his son after the death of his wife and, if his three daughters survive the wife and the son and his heirs, to them for their lives. This was adjudged an estate tail in the son and that 'heirs' must be intended heirs of the body, because he could not die without heirs general, living the daughters.

1 Roll Abr. 836, 6;² if a man has issue two sons and devises land to the younger and, if he dies without heirs, to the elder, the younger has an estate tail, for 'heirs' must be intended heirs of the body by reason of the remainder over, which would be otherwise idle, because the elder would take the land as heir to his brother without it.

Nottingham v. Jennings, 1 Salk. 233;³ a devise to the younger son and his heirs forever and, for want of such heirs, then to his own right heirs [was] adjudged an estate tail in the son, for the testator must mean heirs of the body, because the son could not die without heirs general, living heirs of the father.

King v. Remball, 1 Roll Abr. 836, 7;⁴ a man devised land to his three daughters and, if either died before the other, the one to be the other's heir and, if they all died without issue, remainder over [was] adjudged the daughters had an estate tail, for the latter clause, 'if they die without issue', explains what heirs were intended, where it is said that one should be heir to the other.

These cases, I think, serve to prove two points, first, that the word 'heirs', in the understanding of people unskilled in the law or in common speech, as we say, imports the same as issue or heirs of the body and, second, that the word 'heirs' in a will is often taken to mean heirs of the body. And the last case proves further that, where the two terms, 'issue' and 'heirs' are both made use of in the same devise, it is taken that the same heirs are meant in both cases. Indeed, the common case of a devise to a man and his heirs and, if he die without issue, remainder over, puts this last point beyond contradiction, for it was never denied but that such a devise made an estate tail and that 'heirs' in the first part of the devise should be intended such heirs as are mentioned afterwards, *viz.* issue.

And it is not material, I take it, whether issue happens to be mentioned first or last. The intention is collected from the word more than the manner of placing it, as a devise to a man and the heirs of his body and, if he die without heirs, remainder over, makes an estate tail, 2 Vern. 281, *per curiam*, though heirs of the body are mentioned first and heirs last, for it is supposed the same heirs are intended in both places. Indeed, the first words in a will are often taken as the best expositors of the testator's meaning and to serve as a guide to those that follow, as in Buck and Frenchman's Case, 1 And. 8. (it is Tuck and Frenchman in Dy. 171); a devise to his wife for life, remainder to his cousin and the heirs male of his body and, if he die without issue (not saying 'male'), remainder over, [it was] adjudged the cousin had only an estate in tail male, for, though the latter words, 'if he die without issue', would make an

¹ *Webb v. Herring* (1617), Croke Jac. 415, 79 E.R. 355, 1 Rolle, Abr., *Estate*, pl. P, 5, p. 836, also 3 Bulstrode 192, 81 E.R. 162, 1 Rolle Rep. 398, 436, 81 E.R. 563, 590, J. Bridgman 84, 123 E.R. 1217, 1 Eq. Cas. Abr. 180, 21 E.R. 972.

² *Anonymous* (1616), 1 Rolle, Abr., *Estate*, pl. P, 6, p. 836.

³ *Nottingham v. Jennings* (1700), 1 Salkeld 233, 91 E.R. 207, also 1 Lord Raymond 568, 91 E.R. 1279, 1 Comyns 82, 92 E.R. 970, 1 Peere Williams 23, 24 E.R. 279, 2 Eq. Cas. Abr. 308, 22 E.R. 260.

⁴ *King v. Rembal* (1617), 1 Rolle, Abr., *Estate*, pl. N, 1, 2, p. 833, also Croke Jac. 448, 79 E.R. 384, 1 Eq. Cas. Abr. 182, 21 E.R. 974.

estate tail general, yet heirs male, being mentioned before, show the intention what heirs were meant. In Godb. 16, it is said the same point was adjudged between Glover and Tracy.¹

Which last cases prove that issue or heirs of the body being named first or last does not differ the case, but a special heir, being once named, it is reasonable to suppose the same is intended by the general term 'heir'. And there may perhaps be this further reason too for such a construction, that, by 'heirs', common people generally intend issue or heirs of the body.

But it will be objected to me, I suppose, that, by this construction, the latter words in the devise, 'otherwise to she and her heirs forever', are quite useless; Ann would have had an estate tail without them, and it shall never be supposed a man intends to make a fruitless devise.

I answer it is no uncommon thing to meet with tautology and useless repetitions in a will. Sometimes, words that are perhaps strictly unnecessary are added for the clearer manifestation of the testator's meaning and sometimes, and that very frequently, through the unskillfulness of the writer. We are to consider that wills are supposed to be made and indeed often are *in extremis*, in a man's last moments, when he has not opportunity for good counsel or advice and so are written by men unskilled in the law. It is for this very reason that so great a latitude is allowed in the construction of wills, and strict and legal forms dispensed with.

Now, these words might be added either by the direction of the testator *ex abundantia* to show more explicitly his intention to give Ann an estate of inheritance, which she had only by implication before, but, then, whether he did not mean the same kind of inheritance he had mentioned before is what must be submitted. Or these words might be added through the unskillfulness or wantonness of the writer *currente calamo*, as we say. FitzG. 29.² And, supposing either of these to be the case, the addition of them can weigh nothing.

But, taking this objection in its full strength, allowing these words to be quite unnecessary to give an estate tail to Ann, which I must grant, yet, on the other hand, if it be considered that here is an apparent intention that the issue of Ann should have the land, it must be submitted whether so plain an intention ought to be defeated by a construction collected from words, the meaning of which, at best, is doubtful, especially, when another construction may be made of those words consistent with the apparent intention. The question, in short, is whether it be better to follow certainty or doubt and uncertainty. It is certain an estate tail will pass by the first part of the devise. It is, at best, but uncertain what was intended by these latter words.

The case of Banks and Banks (*ante* 218), heard the other day in this court,³ cannot be forgotten.

I rely on the limitation over to Harwar in case Ann die without issue as what makes an estate tail in Ann. The words 'dying without issue', where they are general and indefinite not circumscribed by time nor tied up to any contingency, always make an estate tail in a will. I grant there are many cases where the limitation is upon dying without issue before twenty-one or living another or without issue living, that, in leaving issue at his death, that it has been adjudged no estate tail was created by those words 'dying without issue', as Pell and Brown, Cro. Jac. 590, which was a devise to one son and, if he died without issue living, another son, remainder over; Hall and Deering, Hard. 148; a devise to one and his heirs and, if he die

¹ *Buck v. Frencham* (1558), 1 Anderson 8, 123 E.R. 325, *sub nom. Turke v. Frencham*, 2 Dyer 171, 73 E.R. 375, also Moore K.B. 13, 72 E.R. 407, Benloe 68, 123 E.R. 53; *Glover v. Tracy*, Godbolt 16, 78 E.R. 10.

² *Shaw v. Way* (1728), *ut supra*.

³ *Banks v. Banks* (1739), see above, Case No. 74.

without issue before twenty-one, remainder over; *Collenson and Wright*, 1 Sid. 148, where the remainder is limited upon dying before twenty-one and without issue living.¹

In all these cases, the first devisee was adjudged to have a contingent fee because the dying without issue could not be taken as words of limitation, being either circumscribed and limited to fall within a certain time or tied up to the contingency of happening in the life of another. But I think I may venture to say that there is no case where the dying without issue is absolute and indefinite, as here, that these words have been taken as words of contingency or, to speak more properly, as words of determination, but have always been taken to be words of limitation, either to enlarge or qualify the estate given before.

I make use of the word 'determination' in opposition to 'limitation'. The latter has been just explained by the former. I mean where the dying without issue is construed to be only an indication of the testator's mind when he would have a particular estate given before determine and another estate given afterwards commence, as in the case just now cited, of a devise to one and his heirs and, if he die without issue before twenty-one, remainder over. Here, the devisee has an estate in fee determinable upon his dying without issue before twenty-one. If he dies before that time, his estate determines, and the remainder commences. And so, in most of the cases upon this subject, the question is whether 'dying without issue' are to be considered as words of limitation or of determination. *Hard*. 148.

Now, to consider the case before us in this view, whether 'dying without issue' are to be taken as words of limitation or of determination. It will, I think, be pretty evident they could never be intended the latter, for, by the first part of the devise, Ann has only an estate for life and, if 'dying without issue' are construed as words intended to show when that estate should determine, this absurdity will follow, that Ann took an estate for life determinable upon her dying without issue. Now, the rule is that a testator shall never be supposed to intend absurdities. And, therefore, any construction having such a tendency ought to be rejected. Then, I believe, in all the cases where 'dying without issue' are construed words of determination, an estate of inheritance was given before.

Query; *Collenson and Wright* seems not so.

I beg leave to observe further the force of the words 'dying without issue'. Where they are general, as here, I know no instance where they have not been adjudged to make an estate tail and that sometimes against a seeming intention of the testator to the contrary, as, where an express estate for life is first limited, which is the case of *King and Melling*, 1 Vent. 214, 225, in *Hale's* time.² The case was a devise to the son for life and, after his decease, to the heirs of his body by a second wife and, for want of such issue, remainder over, with a proviso that the son might make a jointure to his second wife. Here was an express estate for life. The limitation to the issue was after the son's decease, and there was a power to make a jointure, which was unnecessary if an estate tail was intended. Yet, notwithstanding these objections, such was the force and operation of the limitation to the issue and, for want of such issue, remainder over, that it was adjudged to make an estate tail in the son. This is looked upon as a leading case, and the authority of it has never been shaken.

So, in the Case of *Shaw and Weigh*, FitzG. 7, heard in the House of Lords, April 1729, which, as to this point, was a devise in trust for his two sisters during their lives without

¹ *Pell v. Brown* (1620), *Croke Jac.* 590, 79 E.R. 504, also 1 Rolle, Abr., *Estate*, pl. P, 2, p. 835, *Palmer* 131, 81 E.R. 1012, 2 Rolle Rep. 196, 216, 81 E.R. 746, 760, *Godbolt* 282, 78 E.R. 165, *J. Bridgman* 1, 123 E.R. 1157; *Hall v. Deering* (1659), *Hardres* 148, 145 E.R. 425; *Collenson v. Wright* (1663), 1 *Siderfin* 148, 82 E.R. 1024, 1 Eq. Cas. Abr. 176, 21 E.R. 969.

² *King v. Melling* (1672), 1 *Ventris* 214, 225, 86 E.R. 144, 151, also 2 *Levinz* 58, 83 E.R. 448, 3 *Keble* 42, 52, 95, 84 E.R. 584, 589, 614, *Pollexfen* 101, 86 E.R. 526, 3 *Salkeld* 296, 91 E.R. 835, 1 Eq. Cas. Abr. 181, 21 E.R. 973.

committing waste and, if either of them happen to die, leaving issue or issues, then, in trust for such issue or issues of the mother's share or else in trust for the survivor or survivors of them and their respective issue or issues, and, if both my said sisters die without issue and their issue or issues die without issue, remainder over. Here, it was objected that an express estate for life was given and the restraining from committing waste was a plain indication in the testator to pass no greater estate, for it would have been impertinent to add such a clause if he intended an estate tail, because such a power is incident to an estate tail. And it could not be thought he would restrain from committing waste and, yet, put it in their power to alien the whole land, as a tenant in tail might do, by docking the entail. There are other circumstances in the devise that are taken notice of to prove the testator intended only an estate for life. But it was argued on the other side that the word 'issue' in a will is a word of limitation and, being devised first to the sisters and, afterwards, to their issue and, for want of issue, remainder over, it made an estate tail. And so it was adjudged.

These cases show how forcible issue or a limitation upon dying without issue are in a will. They create an estate tail by operation of law, as Hale said in *King and Melling*, *supra*, 1 Vent. 232. It is possible the testator intended but an estate for life, yet, by consequence and operation of law, it is an estate tail, according to the rule in *Shelly's Case*, 1 Co. 99. Where the ancestor takes an estate of freehold and there is a limitation afterwards to his right heirs or heirs of his body, that they are words of limitation and not of purchase. 'Issue' in a will is equivalent to heirs of the body. And it matters not whether an estate given by a will be by implication or express limitation. And, therefore, according to this rule, a devise to one and, if he die without issue, remainder over, would make an estate tail by operation of law if there was not so apparent an intention from the words, as I conceive there is in the present case. But we have no occasion to rely on the operation of law, because no express estate for life is given. And so our case is stronger than either of those last cited.

I must not omit to mention the Case of *Timson and Robertson*, adjudged in this court,¹ which was a devise to one and his heirs and, if he died before twenty-one or without issue, remainder over; here, notwithstanding there was a seeming intention to restrain the dying without issue to the age of twenty-one, yet it was held to be an estate tail. The words there, in my humble opinion, were much stronger to create a contingent fee than in this case.

Objection: The testator's intention is plainly this, first, to give Ann an estate for life, then, if she happen to die without issue to Harwar; otherwise, that is, if she leaves issue at her death, to her in fee, and so she took a fee simple upon the contingency of leaving issue at her death.

Answer: By this construction, the natural force and import of the words 'dying without issue' must be rejected. Had the words been 'if she happen to die leaving no issue' or 'without issue living' or any other word added to show that he intended to restrain the generality of the term 'dying without issue', there might have been some color for such a construction. But it being left absolute and at large here, to make such a construction must confound the distinction that has been always kept up between a limitation upon dying without issue generally and where it is restrained to a particular time or tied up to some contingency. The cases that I have cited and all the cases that can be cited will show they turn upon this distinction. Besides, as it was so easy for the testator to have added a word or two in case he had any such intent, it is reasonable to infer from his not doing so that he had no such intent.

As for any stress that may be laid upon the latter words 'otherwise to she and her heirs forever', it has been answered already. They might be thrown in through the unskillfulness of the writer or they might be superadded to show more expressly the testator's intention to give Ann an estate of inheritance. But, then, we say, having made use of the word 'issue' before in the same clause, it is natural to conclude he meant the same heirs in both places.

¹ *Timson v. Robertson* (1739), see above, Case No. 66.

We think it apparent the testator had an intent to provide for Ann's issue as well as herself, that he never intended the remainder to Harwar should take place so long as there was any issue of Ann, and, in consequence, that he intended the issue should have it in the meantime until the remainder took place. And then it is clearly an estate tail. We think this appears to be his first and primary intent. And we submit whether construction ought not to be made to serve that intent rather than a different one prevail that will entirely destroy it. And we hope it will be considered that this latter construction is to be inferred only from a few loose words added perhaps by chance and which, at the same time, may very well bear an interpretation consistent with the construction we contend for.

We rely on the Case of Banks and Banks, where superfluous words added after the limitation of the estate tail were rejected because the meaning of them was doubtful, and upon the Case of Timson and Robertson, where the words 'dying before twenty-one' were rejected to make way for the more express intent collected from the words 'dying without issue' to make an estate tail.

Objection: But the remainder to Harwar gives him only an estate for life. And it is absurd to suppose the testator would give such an estate after an estate tail.

Answer: This is no uncommon thing in wills often (as has been observed) written in a hurry and without counsel or advice. In the Case of Webb and Herring, cited above, the estate given to the daughters in case they survived the son and his heirs was expressly for their lives. Yet this was made no objection, but adjudged an estate tail in the son, even where the remainder has been adjudged void in point of limitation. Yet it has been adjudged an estate tail by force of the remainder, as Nottingham and Jennings, *ante*, 1 Salk. 233. So that nothing can be inferred from the nature of the estate given to Harwar to show the testator's intent one way or other.

Objection: A later devise controls a former, and, here, the later words give a fee.

Answer: I agree, where two devises are inconsistent with each other, as where, by the first, land is given to A. and, by the second, to B., there, perhaps, the later devise shall prevail, that which is last written being presumed to be the testator's last will and mind. But this rule cannot hold where the same thing is twice devised to the same person. There, it is to be collected from the whole will what estate the testator intended to pass. And it is not always the last any more than the first that is regarded. This is evident from the Case of Buck and Frenchman *ante*. The first devise was to the heirs male; the latter to the heirs of the body, yet it was held to be an estate in tail male. Here, the first words guided the construction. In King and Remball, *ante*, heirs are mentioned in the first devise and issue in the latter. This was adjudged an estate tail. Here, construction was made from the latter words. From these instances, it is plain that the intent is collected from the whole will. And, sometimes the first, sometimes the last words govern the construction.

Objection: An express estate shall not be destroyed by an estate by implication.

Answer: That is true taken thus. An implication of an estate of inheritance shall not ride over an express limitation of an estate of inheritance before. 1 Vent. 230, by Hale. This was, I take it, the reason of the resolution in Popham and Bamfield, 1 Salk. 236. A devise to A. for life, remainder to his first son in tail male, and so on to the tenth son, and, if A. died without issue male, remainder over, here, A. having an estate for life and an estate of inheritance being limited to the sons, they could not collect a contrary intent by implication to give A. an estate tail.

But it is far from being a general rule that an estate by implication shall never prevail against an express estate. The contrary is evident from the cases of King and Melling and Shaw and Weigh, before remembered, as well as from the common case of a devise for life and, if he die without issue, remainder over, which was never denied to make an estate tail, notwithstanding the express estate for life. FitzG. 12.

April 1739, judgment was given for the defendant, *viz.* that it was a contingent fee, having been so adjudged once before in 1730. The court's opinion seemed to turn upon the word 'otherwise', which they said showed plainly an intention to give a different estate if Ann

had children. For the plaintiff [were] LEE, TAYLOE, CUSTIS, and DIGGES; for the defendant [were] LIGHTFOOT, RANDOLPH, DANDRIDGE, GRYMES, CARTER, BYRD, and BLAIR.

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Richardson v. Mountjoy
(April 1739)

In this case, the conveyance in issue was held to be void by the Act of 1710, c. 13, which prohibits the docking of entails.

Appeal from Richmond [County Court]; in [an action of] trespass, on a special verdict.

The case is Joseph Belfield and Mary, his wife, seised in fee in the right of Mary, by a deed, October 16, 1715, give and grant to Thomas Mountjoy, oldest son and heir of Mary, 1600 acres of land, more or less, the remaining part of a tract of 2500 acres, to hold the plantation and 1000 acres adjoining in fee tail and the remaining 600 acres, be the same more or less, in fee. The said Mary Belfield and Thomas Mountjoy, by lease and release 2 and 3 April 1717, in consideration of £83, sell and convey to William Woodbridge 600 acres of land, part of the said 1600, by certain metes and bounds, described in the deeds with general warranty against them and their heirs. Mary, at the time of making these deeds, was a married woman, but lived separate from her husband. And, upon her marriage, there were articles that she should have the power to alien and dispose of her lands without her husband, which he permitted her to do. Upon a survey, it appears there are but 1000 acres to satisfy the whole 1600, including that conveyed to Woodbridge. Mary Belfield died before Thomas Mountjoy, who is also dead without issue. The plaintiff is heir at law to both. William Woodbridge entered into the 600 acres, and died seised. And, after his death, John Woodbridge, his son and heir, entered. And the defendant, by his command, dug the soil, which is the trespass supposed. And, if John Woodbridge has title to the 600 acres conveyed to his father, then *pro querente*; if not, *pro defendente*.

The county court were of opinion that Woodbridge had not a good title, and gave judgment for the plaintiff.

But I [Barradall] conceive that judgment is erroneous. I must observe the plaintiff's title in this case is as heir to Mary, the donor, the estate tail being determined by the death of Thomas Mountjoy, the donee without issue. And so he claims 1000 acres in his reversion. The defendant's title is under the purchase from Mary Belfield to Thomas Mountjoy.

In this case, there are four points to be considered: first, whether the deed of a married woman made alone and without her husband, but by his consent and in pursuance of articles before marriage, will bind the wife and her heirs, and, if so, then, second, whether a reversion in fee expectant upon the determination of an estate tail may be conveyed and will pass by deeds of lease and release; third, admitting no estate passed out of Mary Belfield by the lease and release from her and Thomas Mountjoy, whether those deeds may not at least operate and be taken as an explanation of the first grant from Belfield and his wife to show which was the land intended to pass in fee; fourth, admitting the 600 acres conveyed to Woodbridge to be part of the land entailed, whether the warranty of Thomas, the tenant in tail, descending upon the plaintiff, who is heir to the donor, will not bar him.

First, the deed of a married woman simply taken, without all doubt, is void. Bro., *Faits Enrolled*, 14; Cro. El. 700; Hob. 225.¹ But the question is how far the husband's license and consent will make it valid, for the rule is *modus et conventio vincunt legem et pacto aliquid*

¹ *Anonymous* (1537 x 1538), Brooke, Abr., *Faits enrol*, pl. 14; *Brereton v. Evans* (1599), Croke Eliz. 700, 78 E.R. 936; *Needler v. Bishop of Winchester* (1615), Hobart 220, 80 E.R. 367, also 1 Brownlow & Goldesborough 162, 123 E.R. 730.

licitum est quod sine pacto non admittitur. Here, it will be proper to consider the reason why the deed of a married woman is void. It is because the law supposes she has no will of her own, but is *sub potestate viri et eum in vita contradicere non potest*. Hob. 225. So that it is a law introduced in favor of women to secure their inheritance that they may not be compelled by their husbands to alien them against their will.

Let us now consider how far this reason can influence the present case. Here is an agreement between a husband and wife upon marriage whereby a power is given the wife for her benefit to alien the land without the husband, which power she executes. And to obviate the objection that she did this through her husband's influence, it appears they lived separate and she was even privately examined. Thus, the reason why the law adjudges the deeds of married women void does not subsist in the present case. *Et cessante ratione legis cessat ipsa lex*.

In this case, the husband could not control the wife in making this deed. A court of equity would have compelled him to perform the articles if he had attempted it. And there do not want instances in the law where the act and deed of a married woman alone without her husband is good and shall bind her and her heirs. If a fine be levied by her without her husband, this shall bind if the husband avoid it not during the marriage. 7 Rep. 8; Hob. 221; a husband and wife levy a fine of the wife's land to uses with a proviso that they, at any time during their lives, may make leases; the wife during the marriage made a lease, and [it was] adjudged good by virtue of the proviso. Godb. 327. It is a known rule that a married woman cannot make a will, yet, if the husband, upon the marriage, covenants that she may make a will, any disposition in pursuance of that power will be good, though perhaps not strictly as a will.¹

The inference to be drawn from these cases is clearly this, that, though the act or deed of a married woman, simply taken, may be void, yet the consent of the husband, either tacit or express, will make it good and binding upon her and her heirs. And there is both these concurring in the present case. The express consent [is] by the articles, the tacit [is] by not avoiding or endeavoring to avoid the deeds during the coverture. Therefore, I hope they are binding upon Mary Belfield and her heirs.

And, if so, then, the next thing to be enquired is, second, whether a reversion expectant etc. can be conveyed and will pass by deeds of lease and release. And that such a reversion may be conveyed, I believe no man will dispute. 2 Rep. 61a, Wiscot's Case; Yel. 149; Sal. 233, Badger and Loyd; 6 Rep. 155. Neither can there be any question but it will pass by lease and release. 2 Lilly, Abr. 483.²

Before the Statute 27 Hen. VIII, of Uses,³ a reversion would not pass by deed without attornment. But attornment is not necessary upon any conveyance within that Statute. And a reversion may well pass without it, for the Statute transfers the possession to the use. 1 Inst. 309b.⁴ Now, a lease and release being a conveyance within the Statute, 2 Mod. 250,⁵ all the

¹ *Earl of Bedford's Case* (1586), 7 Coke Rep. 7, 77 E.R. 421; *Needler v. Bishop of Winchester* (1615), Hobart 220, 80 E.R. 367, also 1 Brownlow & Goldesborough 162, 123 E.R. 730; *Anonymous* (1623), Godbolt 327, 78 E.R. 192.

² *Giles v. Wiscot* (1599), 2 Coke Rep. 60, 76 E.R. 555, also Croke Eliz. 482, 78 E.R. 733; *Poole v. Nedham* (1608), Yelverton 149, 80 E.R. 100; *Badger v. Lloyd* (1710), 1 Salkeld 232, 91 E.R. 206, also Comyns 62, 92 E.R. 960, 1 Lord Raymond 523, 91 E.R. 1249.

³ Stat. 27 Hen. VIII, c. 10 (SR, III, 539-542).

⁴ E. Coke, *First Institute* (1628), f. 309.

⁵ *Barker v. Keat* (1677), 2 Modern 250, 86 E.R. 1054, also 1 Modern 262, 86 E.R. 868, 2 Ventris 35, 86 E.R. 293, 1 Freeman 249, 89 E.R. 179.

estate of the grantors, whether in possession or reversion, was transferred, and did well pass to the grantees. The title the plaintiff sets up is by descent from Mary Belfield, one of the grantors, which descent is broken and prevented by these deeds and is a bar to any such claim.

But, if these deeds cannot operate so as to convey any estate from Mary Belfield, yet, third, it may be taken as an explanation of the first grant from Belfield and his wife to Mountjoy to show which were the lands intended to pass in fee by the said first grant. The premises in that first grant have no certain description or boundaries, but [is] in general terms, 1600 acres, more or less, the remaining part of such a patent. It was supposed there was then so much of that patent unsold and, upon that supposition, 1000 acres are limited in tail and 600 in fee, but [there are] no certain boundaries to either. Upon this grant, it was reasonable to conclude the grantee had 600 acres in fee. So Woodbridge thought. And, in order to be as secure as possible and to take away all objection that the land he purchased was part of the 1000 acres entailed, he gets the 600 acres surveyed, marked, and bounded, and procures Mary Belfield, the first grantee, to join in the conveyance with Mountjoy, the grantee, which he thought would be a sufficient declaration which was the land intended to pass in fee by the first grant.

If these deeds cannot operate so as to pass an estate out of Mary Belfield unless they take effect in this manner as an explanation of the first, they can have no operation at all as to Mary, the consequence of which will be that an honest purchaser, who acted with as much caution as a man well could, must lose his land, and be without any remedy for his money, for Mountjoy is dead insolvent. But I hope the court, rather than suffer such a piece of hardship and injustice, will support the deed, and make it effectual, one way or the other. Judges will and ought to do everything to assist honest purchasers. And rather than a deed shall have no operation, [judges] are even subtle in inventing reasons to support them. *Ut res magis valeat quam pereat*.

And, if the court is of opinion that the 600 acres conveyed to Woodbridge were the premises intended to pass in fee by the first grant, then, we have a good title under Thomas Mountjoy.

But, if it is taken to be part of the land entailed, then I say, fourth, that the warranty of Thomas, the tenant in tail, descending upon the plaintiff, who is heir to Mary, the donor, will bar the plaintiff of his reversion. This is a point well known and settled. There are three kinds of warranties, lineal, collateral, and that [which] commences by disseisin. Lit., s. 697. A warranty is called lineal, not in respect to the warranty, but the title of the land, and is defined by Lit., s. 703, to be where the land would have descended from the person making the warranty if that warranty had not intervened.¹ And so, *ex opposito*, a collateral warranty is where the land could not descend from the person making the warranty nor the heir claiming the land, by any possibility, convey his title from him. As to warranties that commence by disseisin, we have nothing to do in this dispute.

At the common law, all warranties, except such as commenced by disseisin, bound the heirs of those who made them, and were a bar to such heirs to claim anything in the tenements, to which the warranties were annexed. Lit., s. 697. And so, I apprehend, they do still unless they are restrained by some statute.

The first Statute that restrains warranties is Gloucester, c. 3, which enacts that the alienation of a tenant by the curtesy with warranty shall be no bar to the issue unless assets in fee simple descend to the issue from the father. The next is Westminster II, 1, which restrains the warranty of a tenant in tail from barring the issue in tail.² And it must be this Statute, if any, that restrains the warranty from barring in this case. But, that, I conceive, it

¹ T. Littleton, *Tenures*, ss, 697, 703.

² Stat. 6 Edw. I (Gloucester), c. 3 (*SR*, I, 47); Stat. 13 Edw. I (Westminster II), c. 1 (*SR*, I, 71-72).

does not, for it does not extend to restrain the warranty from barring those in reversion or remainder and the plaintiff claims in reversion. The reason given for this distinction is because the warranty is lineal to the issue, but, to those in remainder or reversion, collateral. And there is no statute (in force here) that restrains collateral warranties, though it had been often attempted in Sir Edward Coke's time, as he says. 1 Inst. 373. And, since his time, a Statute has been made 4 & 5 Ann., 16, that restrains some collateral warranties, but it is not in force here or, if it was, does not reach this case, as I shall show presently. Sir Edward Coke's opinion is expressly in point, 1 Inst. 374b, that the warranty of a tenant in tail will bar those in reversion or remainder, notwithstanding the Statute of Westminster II, and is, indeed, a known and settled point of law. Mo. 96.¹

Nor is there one authority against it but an argument in Vaugh. 365, *Bole v. Horton*,² in which case, the court was divided, and no judgment given. Nor do I know of any case since that favors that opinion. But the distinction of lineal and collateral warranties, which Vaughan would explode, is still kept up, as appears from the said Statute 4 & 5 Ann., which, as I said, restrains some collateral warranties, viz. of a tenant for life and those who have no estate of inheritance in possession. The words are these [*blank*].

Now, this Statute, if in force here, would not reach our case, because Mountjoy, who made the warranty, had an estate of inheritance in possession, viz. an estate tail. And so such a warranty as this is would bind in England, being left, as at the common law, unrestrained by any statute. Consequently, it must bind here. And, then, the plaintiff is barred by it to claim anything in reversion.

Objection: This warranty will not bar, because the reversion was not divested or put to a right before or at the time the warranty was made. 10 Rep. 96, 97; *Seymor's Case*. The lease and release is a conveyance upon the Statute of Uses. And no such conveyance will make a discontinuance. Only so much passes as the grantor may lawfully pass. And, so, the reversion is not touched or displaced. 10 Rep. *supra*, 1 Bul. 162; 3 Leon. 16; 9 Rep. 106a, b.³ Consequently, the plaintiff may lawfully enter. And, wherever there is a right of entry, no warranty will bar. 2 Lilly, Abr., 684; Jacob, [*Law Dictionary*], *verbo*, 'Warranty'.

In the Case of *Dudley against Booth*, in this Court, it was adjudged that a warranty created upon a lease and release was a bar. But they changed their opinion, April 1741, between *Dudley and Perrin*, *post* [*blank*].⁴

For the respondent, it was insisted that, there being only land enough to satisfy the 1000 acres entailed, the whole must be taken as entailed. And, then, the deed of 1717, being to defeat the estate tail was void by the Act of 9th Ann., c. 13,⁵ which enacts that all fines etc., acts, and things whatsoever done towards the cutting off, avoiding, or defeating any estate tail shall be to all intents and purposes null and void.

And of that opinion was the whole court, except RANDOLPH and DIGGES, April 1739.

¹ E. Coke, *First Institute* (1628), ff. 373, 374, Stat. 4 & 5 Ann., c. 3, s. 21 (SR, VIII, 460); Stat. 13 Edw. I (Westminster II), c. 1 (SR, I, 71-72); *Anonymous* (1572), Moore K.B. 96, 72 E.R. 465.

² *Bole v. Horton* (1673), Vaughan 360, 124 E.R. 1113.

³ *Heywood, ex dem. Seymor v. Smith* (1612), 10 Coke Rep. 95, 77 E.R. 1070, 1 Bulstrode 162, 80 E.R. 853; *Anonymous* (1582), 3 Leonard 16, 74 E.R. 512; *Bicknel v. Tucker* (1612), 9 Coke Rep. 104, 77 E.R. 883, also 2 Brownlow & Goldesborough 153, 123 E.R. 869.

⁴ *Booth v. Dudley* (1729), Randolph Va. 29; *Dudley v. Perrin* (1741), see below, Case No. 92.

⁵ Act of 1710, c. 13, s. 4, 3 Hening's Statutes 518-519.

But, surely, this was a most strange determination. And the case could never be rightly understood by the court. The Act never intended to make the deeds of a tenant in tail absolutely void, but only with respect to docking the entail. If it did, no action of covenant could be maintained on such a deed. Yet many such have been brought in this court. Neither could a warranty with assets be a bar, as was adjudged between Booth and Dudley. The Statute *De Donis* restrains a tenant in tail from aliening as well as this Act of Assembly, but no such construction was ever made. How does this answer the argument that the reversion passed by the deed of 1717 or the point of the warranty? Never was an argument so little understood.

[This report is cited in *Dudley v. Perrin* (1741), see below, Case No. 92.]

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Smith, ex dem. Smith v. Smith
(October 1739)

In this case, the deed of gift in issue created a fee simple, being a conveyance to a use.

[An action of] ejectment.

Mary Smith, seised in fee, March 2, 1702, makes a deed poll in these words:

For the natural love and affection that I bear to my son, George Smith, I do make this my deed of gift of the said 200 acres of land [the premises in question] unto him, the said George Smith, and his heirs forever after my decease. But it is my true intent and meaning to have free ingress and egress into all and every part of the said premises during my natural life. And, if it shall happen that the said George Smith shall die without heirs, then I give the said land to my son, John, and his heirs forever.

George Smith died without issue in the life of the grantor, after whose death, she, with her second husband, Fairfax, conveyed the premises in question to the defendant, and is since dead. The lessor is brother and heir of George Smith.

The only question in this case is whether any estate passed to George Smith by this deed, for, if any estate did pass, I [*Barradall*] think it cannot be disputed but that it was a fee simple, and, then, the lessor of the plaintiff, as his heir, has a good title.

The objection, I apprehend, will be that the estate being limited to him after the death of his mother is void, for that a freehold cannot be limited *in praesenti* to commence *in futuro*.

It must be agreed that the maxim of the common law is a freehold shall not commence *in futuro*. But, since the making of the Statute of Uses,¹ the maxim has in a manner lost all its force and effect, for it is universally agreed that the maxim will not hold upon any conveyance by way of use, but only in conveyances at the common law, as we call them. It will be, therefore, necessary to see whether this deed is to operate as a conveyance at common law or as a conveyance to use.

The distinction between these two kind of conveyances is well known. Conveyances at common law are such as were in use and practice before the Statute of Uses, 27 Hen. VIII. Conveyances to use are such as have been introduced since the making of that Statute. The different rules of construction upon the one and the other of these conveyances are as well known. Conveyances at common law are construed strictly according to the strict and rigid rules of the common law, but conveyances to use are allowed a more liberal construction. They participate in some sort of the nature of wills. They are construed according to equity and the

¹ Stat. 27 Hen. VIII, c. 10 (SR, III, 539-542).

just intention of the parties. The reason of this difference, I shall have occasion to show presently. 1 Inst. 49a; 1 Vent. 138, 373; Nel. Lut. 242; Poll. 525; 8 Rep. 93; 3 Lev. 370.¹

But I will first beg leave to examine a little the reason of the maxim just now remembered, viz. that a freehold shall not commence *in futuro*. It is regularly a rule of law that the freehold shall never be put in abeyance, that is so as not to be existing in some person. And both this rule and the maxim we are speaking of are founded upon this reason, that there may be always a tenant to the *praecipe*. I say, regularly, the freehold shall not be in abeyance, because, in some instances *ex necessitate rei*, it may be so, as where an incumbent dies, until the church is full again, etc. Co. Litt. 342, 343.²

For the clearer understanding of this, it may be necessary to explain what is meant by a tenant to the *praecipe*. Anciently, until within 200 years or less, where a man was disseised or had a title to lands, he had no remedy to recover the possession but by a real action (ejectments are an invention of later times). Now, the first process in a real action is called a *praecipe*, and the law requires that the defendant or person against whom such *praecipe* is brought should have a freehold in the land, whence he is called tenant, *i.e.* tenant of the freehold. It is obvious, then, that, if the freehold could be put in abeyance so as not to be existing in any person, a man who had a right to recover the possession of any lands could have no remedy for want of a proper person against whom to bring his *praecipe*. And this would be the consequence of it in a conveyance at common law, a freehold might be created *in praesenti* to commence *in futuro*, because, in all such conveyances, there is a transmutation of possession, and no estate is left in the grantor. And, therefore, as the freehold would be out of him by the conveyance, if it should be allowed to be good, it must be in abeyance, that is in nobody until the future estate commenced. This I take it is the true reason of the maxim that a freehold shall not commence *in futuro*.

But we shall see presently that this reason will not hold in conveyances to use and that, therefore, the maxim cannot at all affect such conveyances. It will, however, be necessary, in the first place, to show that the deed before us ought to be construed as a conveyance to use. And, then, I hope, I shall have an easy task to prove that George Smith took a good estate by way of a future use. These are the two points I shall insist on.

As to the first, the judges of late days for more than a century past have laid aside the ancient, stiff adherence to the rigid rules of the common law in the construction of deeds. They have more regard to the substance, that is the estate intended to be passed, than to the shadow that is the manner of passing. 3 Lev. 371.³ And, therefore, if a deed cannot operate one way so as to give it the effect intended, they will construe it to operate another way. And this

¹ E. Coke, *First Institute* (1628), f. 49; *Crossing v. Scudamore* (1671), 1 Ventris 137, 86 E.R. 94, 2 Levinz 9, 83 E.R. 428, 1 Modern 175, 86 E.R. 810, also 1 Freeman 368, 89 E.R. 274, 2 Keble 754, 784, 84 E.R. 476, 495, Lincoln's Inn MS. Misc. 500, ff. 149, 155; *Pibus v. Mitford* (1673-1674), 1 Ventris 372, 86 E.R. 239, also 2 Levinz 75, 83 E.R. 456, 3 Keble 239, 316, 338, 84 E.R. 697, 741, 754, 3 Salkeld 337, 91 E.R. 859, T. Raymond 228, 83 E.R. 119, 1 Modern 98, 121, 159, 86 E.R. 761, 780, 800, 1 Freeman 351, 369, 89 E.R. 262, 275, Lincoln's Inn MS. Misc. 500, ff. 214v, 224, 236; *Sleigh v. Metham* (1704), 1 Lutwyche 782, 125 E.R. 410; *Coltman v. Senhouse* (1680), 2 Levinz 225, 83 E.R. 530, 2 Shower K.B. 11, 89 E.R. 762, T. Jones 105, 84 E.R. 1169, Pollexfen 523, 86 E.R. 633, also *sub nom. Coleman v. Stenhouse*, Dodd 32, *sub nom. Coldham v. Senhouse*, 3 Keble 855, 84 E.R. 1051; *Smalman v. Powys* (1609), 8 Coke Rep. 93, 77 E.R. 616, also 2 Brownlow & Goldesborough 291, 123 E.R. 948; *Osman v. Sheafe* (1693), 3 Levinz 370, 83 E.R. 735, also 2 Lutwyche 1205, 125 E.R. 669.

² E. Coke, *First Institute* (1628), ff. 342-343.

³ *Osman v. Sheafe* (1693), *ut supra*.

sometimes against the seeming intention of the parties as to the manner of operation. They consider the principal intention, that is the passing of the estate, and construe the deed so as to fulfil that intention. And they will never suffer a deed to be defeated or to have no effect if, by any means, they can construe it so as to give it the effect intended. Lord Hobart, who lived about 100 years ago, commends those judges who are curious and even subtle to invent reasons and means to make deeds effectual according to the just intention of the parties. Hob. 277. And Sir Matthew Hale quotes this passage upon two occasions as an excellent rule for judges to follow. 1 Vent. 141, 378.¹

The deed before us can operate only three ways, either as a feoffment, a bargain and sale, or a covenant to stand seised. The first is a conveyance at common law. The two latter are conveyances to use. Everybody knows that livery of seisin is necessary to a feoffment and that, in a conveyance to a use, there must be a good consideration to raise the use. This deed cannot operate as a feoffment for want of livery. It cannot operate as a bargain and sale for want of a proper consideration, *viz.* the payment of money, which is the only good consideration to raise a use by way of bargain and sale. 1 Vent. 137.² If, therefore, it does not operate as a covenant to stand seised, it must be absolutely void, and can have no effect at all. The intention of the grantor in making it must be entirely defeated. And how consistent that will be with the constant resolutions of the judges will best appear from the cases themselves.

The first I shall take notice of is *Tebb and Popplewell*, 2 Ro. Abr. 786 (40 Eliz.).³ A woman, in consideration of a marriage to be had between her and one F., by a deed enrolled, gave, granted, and confirmed land to A. and his heirs with a clause of warranty, but no livery was made. The deed, being enrolled, showed an intent it should operate as a bargain and sale. The words 'give' and 'grant' and 'confirm', which are proper to a conveyance at common law, showed an intent it should operate as a feoffment. But, because it could not operate as the latter for want of livery nor as the former for want of a good consideration, *viz.* money, therefore, rather than the deed should be void, it was adjudged a good use did arise to A. by way of a covenant to stand seised, there being a consideration, proper to raise an use in such a conveyance, *viz.* marriage.

N.B. It is not expressly said to operate as a covenant, but it could no other way. Poll. 534 takes it so.⁴

The next that I find in order of time is not until after the Restoration, *viz.* 22 Car. II, *Crossing and Scudamore*, 1 Vent. 137, 2 Lev. 9, 1 Mod. 175.⁵ A man, in consideration of natural love, gave, granted, bargained, sold, aliened, enfeoffed, and confirmed to his daughter and her heirs. There was a covenant for quiet enjoyment and a warranty in the deed, and the same was enrolled. It was objected, as in the last case, that the deed could not operate as a bargain and sale for want of consideration, that the words of the deed and the covenant and warrant were proper to conveyances at common law and it was not the intention the estate should pass by way of a use. But it was adjudged that the words 'give' and 'grant' etc. would

¹ *Earl of Clanrickard v. Viscount Lisle* (1615), Hobart 273, 80 E.R. 418, also 1 Brownlow & Goldesborough 153, 123 E.R. 724; *Crossing v. Scudamore* (1671), *ut supra*; *Pibus v. Mitford* (1673-1674), *ut supra*.

² *Crossing v. Scudamore* (1671), *ut supra*.

³ *Tebbe v. Popplewell* (1598), 2 Rolle, Abr., *Uses*, pl. O, 1, p. 786.

⁴ *Coltman v. Senhouse* (1680), *ut supra*.

⁵ *Crossing v. Scudamore* (1671), *ut supra*.

raise a use and that, since it could not operate as a bargain and sale, it should as a covenant to stand seised, notwithstanding the enrollment rather than the deed should be defeated.

29 Car. II, Walker and Hall, 2 Lev. 213.¹ A man, in consideration of marriage, gave, granted, and confirmed to his intended wife with a letter of attorney in the deed and a blank for the attorney's name. A memorandum was indorsed that livery was made by [*blank*], but [there were] no witnesses to the livery. Here, it was objected that the intent appeared plainly to make a conveyance at common law, *viz.* a feoffment. But, because the deed could not operate as such for want of livery, it was adjudged to enure as a covenant to stand seised that the deed might have its effect.

30 Car. II, Coltman and Senhouse, 2 Lev. 225, 2 Show. 11, T. Jo. 105, Poll. 523.² A., by indenture between him and his mother, covenanted and agreed that, if he died without issue of his body, that, then, he gave, granted, and confirmed to his mother. There were several covenants prior to this in the deeds from the mother to the son. And the consideration expressed was for the advancement of the son. The question was whether this deed should operate as a covenant to stand seised. And, though it was objected that it seemed rather an agreement to compose matters between mother and son and that it rested only in covenant and there was no consideration to raise a use to the mother, yet it was adjudged that a good use was raised by way of a covenant to stand seised, that being the intent of the parties. And [it was] said that, where the intent appears to pass an estate but the conveyance is defective, it shall be supplied and made good by way of use to fulfil that intent. And, here, the intent was manifest that the mother should have the estate if the son died without issue.

N.B. the judgment in this case is misprinted in Pollexfen, being said to be for the plaintiff instead of the defendant. All the other reports are so, and the case is always cited as so adjudged. 3 Lev. 372. The argument and judgment here are full to both points of this, particularly in Pollexfen, (*quem lege*).

1 W. and M., Harrison and Austin, Comb. 128, Carth. 38, 2 Mod. 237.³ A., by a deed poll, reciting that he had no issue and that it was his intent, if he died without issue, that his lands should remain in his blood and kindred, in consideration of natural love, gave, granted, and confirmed to B., his niece, to the use of himself for life, remainder to the said B. in tail. Afterwards, he made a feoffment, and the niece entered for the forfeiture. In this case, the niece having only an estate for life granted to her out of which the uses should arise, the remainder to her in tail could never take effect if this deed was construed to enure by way of a transmutation of possession, because a use cannot be larger than the estate out of which it rises. It was, therefore, adjudged to operate as a covenant to stand seised, because it could not take effect any other way to give B. her remainder in tail.

N.B. this case was adjudged against the grantor himself.

2 W. and M., Lade and Barker, 2 Vent. 260, 3 Lev. 291, 4 Mod. 149.⁴ A father, in consideration of natural affection and £5, gave and granted a rent charge to his son. The deed was not enrolled, nor [was there] any attornment, for want of which, it was objected it could not take effect as a grant, which was allowed, but [it was] adjudged it should enure as a covenant to stand seised, there being a consideration of affection.

¹ *Walker v. Hall* (1677), 2 Levinz 213, 83 E.R. 524.

² *Coltman v. Senhouse*, *ut supra*.

³ *Harrison v. Austin* (1688-1689), Comberbach 128, 90 E.R. 385, Carthew 38, 90 E.R. 627, 3 Modern 237, 87 E.R. 154.

⁴ *Lade v. Baker* (1690-1692), 2 Ventris 145, 149, 260, 266, 86 E.R. 359, 361, 428, 432, 3 Levinz 291, 83 E.R. 695, 4 Modern 149, 87 E.R. 316, also Comberbach 190, 90 E.R. 421, Carthew 253, 90 E.R. 750, 3 Salkeld 306, 91 E.R. 840.

5 W. and M., Osman and Sheaf, 3 Lev. 370, 2 Lutw. 1205, a deed was made in these words:

Know ye that I, Mary Waller, for the affection I bear to my cousin, Sir William Brodman, do give and grant to him and his heirs my rent of £14 *per annum* to hold to him and his heirs from and after my decease if I die without a son of my body living at my decease.

The question was whether any estate passed to Brodman. The objection was that the deed was intended to operate as a grant by the words 'give and grant' and, then, there was a freehold to commence *in futuro*. And so, the grant was void. But [it was] adjudged it should operate as a covenant to stand seised, as it could take effect no other way rather than the deed should be void. I submit if this be not a case in point.

9 Will. III, Sleigh and Metham, Nel. Lut. 242. J.C., in consideration of marriage and a portion to be paid, did covenant, grant, and agree (not saying with or to whom) all that messuage etc. to the use of himself for life, then, to his wife for life for her jointure, with a remainder over. It was objected this deed was senseless, there being no person named with whom it was covenanted, that words must be added to make the sense perfect which was never allowed. But [it was] adjudged the deed should operate as a covenant to stand seised and that the court would supply words to make the deed sensible. *viz.* 'to be'. And, then, he covenanted the land to be to the use etc. And this to support the intent of the parties and that the deed might not be defeated.

From these cases, it appears that the judges will always construe a deed to operate that way which will most effectually answer the intent of the parties, that no precise form of words is necessary to make a deed operate this way or that, that, even where there is a seeming appearance upon the face of the deed that the parties intended a common law conveyance, yet to support the principal intent of the parties, *viz.* the passing the estate, they will construe it a conveyance to use, in short, that they will even supply words where they are wanting rather than a deed shall be void or have no effect.

Now, in the case before us, the argument is much stronger that the deed should operate as a covenant to stand seised than any of the cases cited for besides that the deed must be utterly void and have no operation at all if it be not so construed. The consideration, *viz.* affection, is purely applicable to such a conveyance and no other. There is no covenant, warranty, or other circumstance upon the face of the deed to show it was intended a common law conveyance, so that it may be fairly inferred to be the intent of the parties that it should operate as a covenant to stand seised. And, then, as the intent is evident as to passing the estate, what good reason can be given why a construction should not be made to serve that intent rather than the deed be void, *ut res magis valeat quam pereat*. *Vide* Macc. Rep. 46.¹

Thus, having shown that this deed, by all the rules of construction which have prevailed for more than a century past, ought to be construed as a covenant to stand seised, the second point to be proved is that, taking it as such, the estate limited to George Smith after the death of the grantor is good by way of a future use.

This, I hope, is in a great measure evident from the cases that have been cited. I will, however, beg leave to examine the thing to the bottom. And I will begin with considering the nature of uses.

Before the [Statute] 27 Hen. VIII, uses were nothing more than secret trusts and subject only to the cognizance and jurisdiction of a court of equity, for, if a man conveyed land to others to the use of himself, the estate of the land was in the feoffees, and the *cestui que trust*

¹ *Lord Say and Seal's Case* (1711), 10 Modern 40, 88 E.R. 617.

had only a right in equity to take the profits, and, if the feoffees refused to suffer him, his only remedy was to compel them in Chancery. 1 Rep. 134b; 8 Mod. 186.¹

It is said the principal inventors of uses were fear and fraud, fear in the times of civil wars, particularly, those between the houses of York and Lancaster to screen the estates from forfeiture, fraud to cheat the lord of wardships, escheats, etc., and to hinder tenants to the *praecipue* from being known. Far. 71; 1 Rep. 123.²

These mischiefs, being great, were fit to be remedied, for which the [Statute] 27 Hen. VIII was made. This Statute unites the possession to the use so that, now, whoever has the use has also the possession and the estate in the land. But, still, these uses preserve so much of their ancient nature as to be construed according to equity and conscience, and not according to the strict rules of the common law, as is evident from the cases that have been cited. Where a deed declares the intent and only wants some words or declares it so as that it suits not with the rules of law in other conveyances, yet, if the intent be plain, such as equity before the Statute would have decreed, the Statute has done as much and executed the possession to the use. Poll. 527.³

Now, I believe it will not be disputed but that, if a feoffment had been made before the Statute to the use of a third person after the death of the feoffor, equity would have compelled the feoffee to suffer such third person to take the profits after the death of the feoffor. And, if so, the Statute had done the same in our case, as equity would have done before it was made.

It is a rule in all conveyances to use that so much of the use as is not disposed of is in the owner of the land, 1 Inst. 22b, as if a feoffment be made to the use of a man's will or to the use of another twenty years hence or after the death of the feoffor. In all these cases, the use is in the feoffor by result or implication until the future use comes *in esse*; so, in covenants to stand seised, as there is no transmutation of possession, but the estate in the land out of which the uses are to arise is in the covenantor. Where any future use is limited, the use remains in the covenantor until the future use comes *in esse*. *Vide* 6 Rep. 18; Poll. 58, 65, 66; 1 Vent. 374.⁴

Woodlet and Drury, 2 Roll Abr. 791;⁵ a man made a feoffment, and declared the uses to be after the marriage between him and A. to himself and the said A. and their heirs; [it was] adjudged that a good estate for life was raised to A. after the marriage and that the feoffor had the use until the contingency happened.

Lord Paget's Case, cited in the Rector of Chedington's Case, 1 Rep. 154;⁶ Lord Paget covenanted to stand seised to the use of a stranger for the life of him, the covenantor, and, after his decease, to the use of two others for twenty-four years and, after the expiration of that

¹ *Dillon v. Freine* (1594), 1 Coke Rep. 113, 76 E.R. 261, also 1 Anderson 309, 123 E.R. 489, Popham 70, 79 E.R. 1184.

² *Shortridge v. Lamplough* (1702), 7 Modern 71, 87 E.R. 1102, also 2 Salkeld 678, 91 E.R. 576, 3 Salkeld 386, 91 E.R. 888, Holt K.B. 621, 90 E.R. 1244, 2 Lord Raymond 798, 92 E.R. 33, 1 Lutwyche 351, 125 E.R. 184; *Dillon v. Freine* (1594), *ut supra*.

³ *Coltman v. Senhouse* (1680), *ut supra*.

⁴ *Parker v. Clere* (1599), 6 Coke Rep. 17, 77 E.R. 279, also Moore K.B. 476, 567, 72 E.R. 706, 763, Croke Eliz. 877, 78 E.R. 1102, Croke Jac. 31, 79 E.R. 24; *Weal v. Lower* (1673-1689), Pollexfen 54, 86 E.R. 509, also 2 Freeman 107, 22 E.R. 1089, 1 Eq. Cas. Abr. 266, 21 E.R. 1035; *Pibus v. Mitford* (1673-1674), *ut supra*.

⁵ *Woodlet v. Drury* (1595), 2 Rolle, Abr., *Uses*, pl. 1, p. 791.

⁶ *Lord Paget's Case* (1591), 1 Coke Rep. 154, 76 E.R. 346.

term, to the use of the son of the covenantor in tail. It was adjudged that the uses to the stranger and for the term were void for want of a proper consideration and so the same as if no use had been limited, but that the use to the son was well raised and that, by operation of law, Lord Paget had an estate for life, the use remaining in him until his death, at which time, the use to the son was to commence.

Pibus and Mitford, 1 Vent. 372; a man covenanted to stand seised to the use of the heirs of his body by a second wife; [it was] adjudged that he had an estate for life remaining in him, the same not being disposed of (and so he was tenant in tail).

These cases show that, in conveyances to use, so much of the use as is not disposed of is in the covenantor, as has been mentioned. Now, in the case before us, the estate limited to George Smith not being to commence until after the decease of his mother, the covenantor, the use, in the meantime, remained in her, *viz.* during her life, from whence it is clear the freehold by this deed was never put in abeyance. There was always a tenant to the *praecipe*, so that the grounds and reason of the maxim that a freehold shall not commence *in futuro* fail in this case. And, consequently, the maxim cannot affect us, according to the rule *cessante ratione legis cessat ipsa lex*.

But the cases of Coltman and Senhouse and Osman and Sheaf, before remembered, are fuller to our case than those last cited. The first is 'if he should happen to die without issue, then, [he did] give, grant, and confirm to his mother'. Here, the estate was to commence after the death of the covenantor without issue. The other is an express grant 'to have and to hold after the death' of the grantor. Yet both these limitations were held good by way of use. And to serve the intent of the parties, the deeds were construed to operate as covenants to stand seised, notwithstanding the words made use of were words of conveyance at common law. And, though, by the whole form and structure of the deeds, they were as unlike such a conveyance as ours can possibly be said to be.

This point is not altogether new in this court. It came in question in the Case of Lawson and Connor, adjudged here in October 1731,¹ which, as to this point, was shortly thus. Anthony Lawson, seised of 850 acres and 100 acres, by a deed, gave and granted one moiety to one Fulcher during his life and, after his death, to revert to him, the donor. And, after his decease, he gave one half of the 850 acres to his son, Thomas, his heirs, and assigns to be possessed immediately after his decease, and the other half and the 100 acres, he gave to his son, Anthony, in the same manner. One question was whether any estate passed to Anthony. And [it was] adjudged there did arise a good estate to him by way of use, the deed being construed to operate as a covenant to stand seised. And so [there was] no want of a particular estate to support the future use. The estate remained in the covenantor until the estate to the son commenced. Hopkins MSS. A, *penes me*, 25, 37,² and a memorandum that Mr. Randolph, who was of the other side, agreed the judgment was right.

This case, I take to be much stronger than ours, for, here, the deed as to the estate granted to Fulcher could not operate as a covenant to stand seised, but, with respect to him, it must operate as a conveyance at common law. And yet, because the estates to the sons could not be supported or have effect but by such a construction to serve the intent of the party, which was apparent, to pass such estates to the sons and because the deed might not be defeated, it was construed to enure as a covenant to stand seised, which resolution is consistent with the cases that have been cited. And I make no doubt but the like construction will be made upon our deed.

¹ *Lawson v. Connor* (1731), Randolph Va. 99.

² The manuscript of Virginia law reports made by William Hopkins (d. 1734) has been lost for over 200 years.

Objection: *Pitfield and Pierce*, 2 Roll Abr. 789, Mar. 50 (15 Car.).¹ A man gives and grants to his son after his decease to hold to him and the heirs of his body, remainder over. There was a proviso that the son should pay to the father £8 *per annum* during life, the lord's rents, and all other duties. [It was] adjudged no estate passed to the son by this deed, for they would not construe it to operate as a covenant to stand seised, because they said it did not appear that the grantor intended to make himself only a tenant for life, [it] being granted after his decease before the *habendum* and that the intent was to convey at common law. These are the reasons in Rolle.

Answer: This is the case commonly relied on in questions of this sort, but has never had any great weight. It is contrary to *Tebb and Popplewell*, which was before it in point of time. And the authority of it is quite pared away by fifty different resolutions since.

Besides according to Hale, 1 Vent. 141, the principal reason of the judgment was the absurd contrivance of the deed, reserving an estate for life to the father and yet providing for the payment of rent to him by the son. And the judges would not help out a deed so contradictory and repugnant in itself. In *Poll. 529*, it is said the case was not adjudged on much debate and that *Croke and Jones*, both reporters of that time and judges of the court, take no notice of it, to which may be added that, according to Rolle, the judgment turned upon the intent of the party, not in the substance, but in the shadow, *viz.* the manner of passing, which has been since quite exploded, many judgments having been given against the seeming intent of the parties as to the manner of passing the estate rather than the deed should be defeated, as is evident from *Crossing and Scudamore* and other cases cited above.²

Objection: *Osborn and Bradshaw*, Cro. Jac. 117;³ a father, in consideration of love, bargained, sold, gave, granted, and confirmed to the son and his heirs. The deed was enrolled. [It was] held the land should not pass unless money had been paid.

Answer: All that can be collected from this case is that it was held the deed was not good as a bargain and sale because no money was paid. It does not appear that it was adjudged it could not operate as a covenant to stand seised, nor was there occasion to argue that point, because it appears in the case the deed operated by way of confirmation, the son being in possession. And so the deed had its effect.

Objection: *Foster and Foster*, 1 Lev. 32.⁴

Answer: This can be nothing to the case at bar. The deed there was adjudged to raise no use, because it was a mere agreement of something future to be done. It rested only in covenant, and was not an actual covenant.

The same answer [goes] to *Sir Thomas Seymour's Case*, Wi. 61; *Hule and Cockerill*, 3 Lev. 156, both covenants to levy fines to certain uses and no fines [were] levied, and *Mo. 112, pl. 267*, a covenant that his land should descend, remain, and come to his daughter. In all which cases, it was held no use did arise for the same reason, *viz.* that the matter rested in covenant only and the deeds were not intended actual conveyances.⁵

¹ *Pitfield v. Peirce*, (1639), 2 Rolle, Abr., *Uses*, pl. 2, p. 789, March 50, 82 E.R. 406.

² *Crossing v. Scudamore* (1671), *ut supra*; *Coltman v. Senhouse* (1680), *ut supra*.

³ *Osborn v. Churchman* (1606), *Croke Jac.* 127, 79 E.R. 111.

⁴ *Foster v. Foster* (1662), 1 Levinz 55, 83 E.R. 294, also 1 Siderfin 82, 82 E.R. 983, T. Raymond 43, 83 E.R. 24, 1 Keble 160, 225, 274, 319, 83 E.R. 874, 913, 942, 970.

⁵ *Bainton v. Regina* (1547), 1 Dyer 96, 73 E.R. 209, Winch 61, 124 E.R. 52, also 2 Leonard 156, 74 E.R. 439, 3 Leonard 74, 74 E.R. 550, *Gouldsbrough* 8, 75 E.R. 960; *Hule v. Cockerill* (1683), 3 Levinz 126, 83 E.R. 611; *Anonymous* (1583), Moore K.B. 122, 72 E.R. 481.

Hore and Dix, 1 Sid. 82, is as little to this case; no use did arise there, because the deed was to strangers in consideration of love to the son and the use to the son could not be supported upon the use limited to the strangers, it being a rule that a use cannot be raised upon a use.¹

Objection: Samon and Jones, 2 Vent. 318;² a man, in consideration of affection to his wife, son, and daughter, gave, granted, and confirmed to the son to hold to him and his heirs to the use of the grantor for life, remainder to the wife for life, remainder to the son in tail, remainder to the daughter; the deed was not executed by livery or enrollment. So, the question was whether it should operate as a covenant to stand seised or be void. [It was] adjudged it should not operate as such, because the intent was apparent to transfer the estate to the son and that the uses should arise out of his estate, so that it must have offered a manifest violence to that intent to construe it a covenant to stand seised, in which cases, the uses arise out of the estate of the covenantor.

Answer: It was this plain intent that the deed should take effect by transmutation of possession that was the sole reason of that judgment. But, unless some such intent is pointed out in this case, the resolution will not help, but rather be for us, because there is an express declaration of a contrary intent in our deed, *viz.* that the covenantor should have the estate during her life, from whence, it is plain she did not intend to change the possession or, as we say, that the deed should take effect by transmutation but rather in the manner we contend for by way of a covenant to stand seised.

Davis and Speed, 2 Salk. 675, 4 Mod. 153, Show. P.C. 104.³ A husband and wife levy a fine of the wife's lands to the use of the heirs of the body of the husband by the wife, remainder to the husband in fee. The husband, wife, and issue all died. The query was whether the heir of the husband or the wife should have the land. [It was] adjudged for the heir of the wife and that the remainder to the husband in fee was void, for, taking it as a remainder at common law, there was no particular estate to support it. None was expressed, and, if any was to be implied, it ought to be in the wife, being her inheritance, and, then, she dying before the issue, the particular estate determined before the remainder vested. And, taking it as a springing executory use, it was void, because after dying without issue, which the law will not expect. This according to Salkeld, but Shower, as to the last point, is that the intent was to raise an estate *ex praesenti*. And, therefore, it ought not to be construed executory or contingent, which I take to be the better reason, for I apprehend a use may be limited after a dying without issue. *Vide* Coltman and Senhouse, *ante*, *sed quaere*.

Answer: This, being by a fine and so a conveyance at common law, can be nothing to the present question.

October 1739, judgment [was given] for plaintiff by the opinion of RANDOLPH, CUSTIS, GRYMES, CARTER, ROBINSON, DIGGES; for the defendant, LIGHTFOOT, BYRD, Commissary [BLAIR], and the Governor [GOOCH].

¹ *Hore v. Dix* (1661), 1 Siderfin 25, 82 E.R. 948.

² *Samon v. Jones* (1690), 2 Ventris 318, 86 E.R. 463, also Dodd 72, 73.

³ *Davis v. Speed* (1692-1698), 2 Salkeld 675, 91 E.R. 574, 4 Modern 153, 87 E.R. 318, Shower P.C. 104, 1 E.R. 72, also 12 Modern 38, 88 E.R. 1150, Skinner 351, 90 E.R. 156, Holt K.B. 730, 90 E.R. 1302, Carthew 262, 90 E.R. 755.

Oldum v. Allerton and Pope
(October 1739)

The question in this case was whether a civil action lies against a justice of the peace and his sheriff for damages that result from a false conviction.

In [an action of] trespass for taking away a slave, upon not guilty pleaded, the jury find a special verdict that the defendant Allerton, being a Justice of Westmoreland [County] made a warrant to the Constable to bring before him (not saying or any other justice, as is usual) the plaintiff and one Tebbs, inspector at Yeocomico, to answer the complaint of Joseph Gardner for taking divers draughts out of several hogsheads of tobacco contrary to the Act of Assembly¹ in that case made, that the Constable appointed a day for a hearing and summoned five witnesses, four of which, with Tebbs, appeared, but the plaintiff did not. And Oldum, saying he would not come, the defendant proceeded to hear the complaint in his absence, and gave judgment in these words:

It being plainly proved to me that Mr. Samuel Oldum, one of the inspectors at Yeocomico, took five samples or draughts out of five hogsheads of William Tyney's tobacco this year and likewise two draughts out of two hogsheads of Mr. Opie and two draughts out of two hogsheads of Thomas Gardner and two draughts out of two hogsheads of Mr. Gilfrey's tobacco and did not return the draughts into their respective hogsheads whence they were taken, and this he did without the knowledge of Tebbs, the other inspector, except one other hogshead of Joseph Gardner, when they were both jointly concerned in taking out one draught and not returning the same, I, therefore, order the said Oldum to pay 20s. for every draught so taken away and Daniel Tebbs his proportionable part of the draught he was concerned in taking away to Joseph Gardner, who made the complaint, with costs, *alias* execution.

Upon which judgment, an execution was indorsed thus:

I command you to attach so much of the estate of Samuel Oldum as will make the sum of £11 10s. likewise thirty pounds tobacco for costs in order to satisfy the within judgment obtained by Joseph Gardner against the said Oldum for the reasons therein mentioned.

Which execution was directed to Thomas Pope, Subsheriff, to execute. Pope, the defendant, by virtue of said execution seized the slave in the declaration, which is the trespass supposed.

The question is whether the taking by virtue of this judgment and execution be a good justification. And I [Barradall] conceive not.

To demonstrate this, it will be necessary, in the first place, to see how far a judge and how far an officer may be liable to an action for things done by them *quatenus* such.

First, as to the officer, the rule of law is *qui jussu judicis aliquid fecerit non videtur dolo malo fecisse quid parere necesse est*. What is done by the command of a judge shall not be taken to be done with an ill intent or maliciously because there is a necessity of obeying. But, then, this rule must be understood where the judge has a proper jurisdiction, for it is another rule in law *judicium non a suo judice datum nullius est momenti*. A judgment given by

¹ Act of 1732, c. 9, s. 13, 4 Hening's Statutes 337-338.

a judge who has not jurisdiction is of no force. This point was long ago settled in the Case of the Marshalsea, 10 Co. 69;¹ in [an action of] trespass and false imprisonment, the defendant justified by an execution from the Marshalsea in a case upon an *assumpsit*; two questions were made, first, whether the Marshalsea had jurisdiction of such actions, if not, then, second, whether the defendant, having the warrant of that court, should be punished for false imprisonment. It was resolved that the Marshal had not jurisdiction and that, therefore, an action lay against the officer, notwithstanding the warrant of the court, for all was *coram non iudice* and officers are to know their duty at their peril.

The difference there taken and which has been allowed ever since is where a court has jurisdiction and proceeds erroneously and where they have no jurisdiction at all. In the first case, the officers and ministers are not liable to an action, for they are obliged to obey and are not to examine whether the process be regular or not. But, in the latter case, where the court has not jurisdiction, they cannot be punished for disobeying. The *nesesse parere* does not hold, and, therefore, if they execute process in such a case, they must answer it at their peril.

Upon this difference, all the cases since have turned, as appears in Seaborn and Savaker, 2 Ro. Abr. 560; Nichols and Walker, Cro. Car. 394; Dye and Olive, Mar. 117; Webb and Batchelor, 1 Vent. 273; Lucking and Denning, 1 Salk. 201, 202; and other cases that will be mentioned presently.²

This being the settled law with respect to officers, let us now see how it stands in the case of judges. And upon the reason of the thing, one might venture to say that the judge ought not to be in a better condition than the officer, nor, indeed, is he, for a judge shall sometimes be liable for exceeding his authority when the officer who executes his process shall be excused.

It must be allowed to be a settled rule that a judge shall not be liable to an action for a mistake in his judgment, nor will the law allow it to be supposed that a judge is influenced by malice, partiality, or revenge. And, therefore, no action of conspiracy will lie against him for anything done by him as judge, 12 Co. 63, Floyd and Barker, nor an action of false imprisonment though the imprisonment be illegal, as appears in Bushel's Case, 1 Mod. 119, such an action against the Lord Mayor, Recorder, etc. of London for committing a juryman for giving a verdict against the evidence; Hale declared his opinion that the action would not lie; so Hammond v. Howell etc., 1 Mod. 124, a like case; the court declared an action would not lie for a wrongful imprisonment any more than an erroneous judgment.³

All this, I agree to be true where the judge has jurisdiction of the subject matter. But, if a judge will usurp a jurisdiction that he has not and, under color of that, imprison or do any other act that affects the liberty or property of the subject, the party grieved may certainly have

¹ *Hall v. Stanley* (1612), 10 Coke Rep. 68, 77 E.R. 1027, also 1 Brownlow & Goldesborough 199, 123 E.R. 753, 2 Brownlow & Goldesborough 124, 123 E.R. 851.

² *Seaborne v. Savaker* (1635), 2 Rolle, Abr., *Trespas*, pl. 2, p. 560; *Nichols v. Walker* (1635), Croke Car. 394, 79 E.R. 944, also W. Jones 355, 82 E.R. 187, 2 Rolle, Abr., *Trespas*, pl. 1, p. 560; *Dye v. Olive* (1641), March 117, 82 E.R. 437; *Webb v. Batchelor* (1675), 1 Ventris 273, 86 E.R. 182, also 2 Levinz 139, 83 E.R. 487, 3 Keble 476, 507, 84 E.R. 832, 848, 1 Freeman 396, 407, 488, 89 E.R. 294, 302, 367; *Lucking v. Denning*, 1 Salkeld 201, 91 E.R. 180, also Holt K.B. 186, 90 E.R. 1001.

³ *Floyd v. Barker* (1607), 12 Coke Rep. 23, 77 E.R. 1305; *Bushell's Case* (1670), 1 Modern 119, 86 E.R. 777, also Vaughan 135, 124 E.R. 1006, also T. Jones 13, 84 E.R. 1123, 1 Freeman 1, 89 E.R. 2, *State Trials* (Cobbett, ed., 1810), vol. 6, col. 999, Lincoln's Inn MS. Misc. 500, f. 177, pl. 3, note also *Bushel v. Starling* (1674), 3 Keble 322, 84 E.R. 744, *Bushel v. Howel* (1674), 3 Keble 358, 84 E.R. 765; *Hamond v. Howell* (1674), 1 Modern 184, 86 E.R. 816, also 2 Modern 218, 86 E.R. 1035.

an action against him, for, though he acts as judge, he really is not so. The proceeding is *coram non iudice*, as the books phrase it. Hard. 483; Cro. Car. 394.¹

This is so plain in the reason of things, it seems not to want authority to support it. I will, however, for the satisfaction of the court, mention a case or two presently. But, first, I would observe that, wherever an officer is liable to an action for executing the precept of a judge who has not jurisdiction, *a fortiori*, the judge himself ought to be liable. He is, indeed, the principal aggressor and cause of the wrong. It is done by his command. And it is a known rule he that commands a trespass is as guilty as he that actually commits it.

I would also observe that all inferior courts and judges are in their nature and constitution limited and circumscribed, some as to place, as courts of corporations and justices of peace, some as to the person, as the Marshalsea, anciently, one of the persons, at least, was to be living within the verge, 10 Rep. 75, 77, and some as to the subject matter, as commissioners of excise, of sewers, etc., Hard. 483. To which, I may add justices of peace in cases where they have not an ordinary and general jurisdiction, but only a particular power or authority given to them by some act of Parliament.

Every one of these limited jurisdiction must take care to keep within their own bounds and not exceed their power. If they do both, the judges and those who act under their authority are liable to the action of the party grieved, as may be seen from the following cases.

Nichols and Walker etc., Cro. Car. 394, 2 Roll Abr. 560; trespass by an officer for levying a poor rate by virtue of a justice's warrant, which rate was not legally assessed, judgment [was given] for the plaintiff, for, though justices had a power to grant a warrant for levying a poor rate, yet their power was limited only to rates well assessed.

Terry and Huntington, Hard. 480; [an action of] trover for goods levied by a warrant from commissioners of the excise, who, upon the Act of 12 Car. II, 23,² had adjudged low wines to be strong waters perfectly made; this Act lays a duty upon several liquors and, among others, upon strong waters perfectly made. The makers and retailers are to account for this duty as the Act directs under a penalty, and offenses against the Act are determinable before the commissioners. It was argued for the defendant that the commissioners acted as judges and it was only a mistake in their judgment. But it was held by the court that, though they acted as judges, yet they had only a limited jurisdiction, which they had exceeded, that low wines were another species than strong waters upon which the duty was laid, and so gave judgment for the plaintiff. Those who argued for the defendant agreed that, if the commissioners had not jurisdiction the action lay. And it was agreed on both sides that, in such case, both the judges and the officers would be trespassers. This case being very full to all the points of my argument, I will beg leave to read it.

In the Case of Gwyn and Poole, Nel. Lut. 293,³ it is taken as a rule by Powell, Justice, in his argument that all inferior judges and officers, where they proceed in a cause that may reasonably appear not to be within their jurisdiction, are liable to actions; otherwise, where it cannot so appear. Upon this reason, the judgment in that case turned. It was an action against judge, officer, and plaintiff in an inferior court for arresting in a cause arising *extra jurisdictionem*. And it was held that, as it could not appear but by a plea where the cause of action arose, the judge and officer were not liable. But it is admitted that, if a plea to the jurisdiction had been offered and refused or if it had been received and the court, afterwards, proceeded, an action would lie.

¹ *Terry v. Huntington* (Ex. 1668), Hardres 480, 145 E.R. 557, also Exch. Repts. *tempore* Car. II, 122; *Nichols v. Walker* (1635), *ut supra*.

² Stat. 12 Car. II, c. 23 (SR, V, 255-259).

³ *Gwinne v. Poole* (1692), 2 Lutwyche 935, 1560, 125 E.R. 522, 858.

The same point is admitted in *Crump and Halford*, 4 Mod. 349, Skin. 445.¹ And, in this last case, there is an instance mentioned where the judge would be liable though the officer would be excused, as, if a justice should issue a warrant to apprehend a felon without an oath made of a felony committed, the officer would be excused for executing it, but the justice would be a trespasser. The reason of which is plain that the justice had a power to issue a warrant for apprehending a felon and the officer was not to examine whether the oath was made or not; the justice had jurisdiction, and he was bound to obey.

These cases I think fully prove that an action will lie against inferior judges for exceeding their jurisdiction as well as against their officers. And this is further proved by the Statute of Westminster I, c. 35, which prohibits inferior courts to proceed in contracts etc. out of their jurisdiction, and gives double damages to the party grieved, which damages can be only recovered by an action. There is a writ in the Register, 98, under the title 'trespass' grounded on this Act. *Vide* 2 Inst. 230.²

Besides which, we have common experience of actions against justices for whipping, putting in stocks, etc. where they have exceeded the power the law has given them, some of which I have known in this court.

I shall then take it for granted that the judge as well as the officer is liable to an action where he exceeds his jurisdiction. And now it remains to show that the defendant Allerton in the judgment and execution he awarded against the plaintiff has exceeded the power and authority given to him by the law.

I will first beg leave to premise that a judge may exceed his jurisdiction two ways, first, where he has no kind of jurisdiction at all of the subject matter, second, where he has a jurisdiction but that jurisdiction is limited and restrained, as where a justice of peace is appointed to determine any particular matter not within his ordinary and general jurisdiction as a justice. There, if he exceeds the power and authority given to him by the statute or if he proceeds in any other manner than the statute has directed, he exceeds his jurisdiction, and becomes a wrongdoer, for, as Hale observes in *Terry and Huntingdon*, every limited authority implies a negative *viz.* that the judge shall not proceed otherwise than according to the authority given. And the pretence of its being a mistake in judgment shall not excuse, because it would open a door to the most arbitrary proceedings. Nor is there any reason it should excuse, because their power is plainly marked out by a written law and which they must follow at their peril.

It is not like the case where the judge has a general jurisdiction and undefined authority. There, it would not only be hard to punish him for what may possibly be only a fault in the understanding more than the will, but it would tend to the infinite delay of justice. Upon such reasons as these, the law is founded that a judge shall not be punished for a mistake in a matter whereof he has a general jurisdiction, reasons that do not hold where the power of the judge is limited and plainly pointed out.

I shall now proceed to the case before us. There is a clause in the Act of Assembly, 5 & 6 Geo. II, which prohibits inspectors from converting samples to their own use under a penalty to be recovered before a justice. It is this Act, if any, that must support the justice in what he has done. The Act is not found in the verdict. But, being a general law, I shall agree the court ought to take notice of it. The clause runs thus:

No inspector shall hereafter take or convert to his own use or otherwise dispose any draughts or samples of freight or crop tobacco but the same if fit to pass shall be

¹ *Crump v. Halford* (1694), 4 Modern 347, 87 E.R. 436, Skinner 445, 566, 90 E.R. 197, 254.

² Stat. 3 Edw. I (Westminster I), c. 35 (SR, I, 35); *Registrum Brevium*; E. Coke, *Second Institute* (1642), p. 230.

put into the hogshead out of which the same was drawn under the penalty of forfeiting 20s. for every draught so taken away contrary to the directions of this Act to be recovered before any justice of the peace of the county where the offence is committed.

The offence here described is taking or converting to the inspector's own use or otherwise disposing any draughts of crop tobacco and not returning the same into the hogshead if fit to pass. The principal part of the offence is the taking the draught to his own use. This we know was the mischief complained of and intended to be remedied. The returning it back into the hogshead was only added for the more explicit direction of the inspector in his behavior, but was never intended so indispensable a duty as that the bare omission of that should subject the inspector to the penalty, for suppose the draught should happen to be bruised or broken in the drawing or, by any accident after, before it was put in again or suppose the owner should desire it not to be put in, which I am told is often the case, shall the inspector, in either case, be liable to the penalty? It will not surely be pretended.

To constitute this offence, then, I conceive these three things are requisite, first, that the sample be taken out of a crop hogshead, so are the words of the Act, second, that the inspector take the tobacco to his own use or otherwise dispose of it against the will or without the knowledge of the owner, for, surely, the owner may give it up if he pleases, and, third, that the tobacco be fit to pass. This I take to be the plain and obvious meaning of the Act. And, as the penalty is inflicted only for taking away draughts contrary to the directions of the Act, for so are the express words, unless the draughts were taken under the circumstances just now described, the inspectors ought not to have been condemned to the penalty, as I humbly conceive.

The next thing, then, to be considered is whether the justice has convicted the plaintiff of such an offence as is described in the Act, for, if he has convicted us of another offence, I presume, it will not be said that this Act can be any justification.

I will take the Justice's own words for what he says appeared and was proved to him:

It being plainly proved to me that Samuel Oldum took five samples or draughts out of five hogsheads of William Tyney's tobacco etc. and did not return the said draughts into their respective hogsheads.

This is all the Justice says was proved to him, 'that he took the draughts out and did not return them again'. As to taking the draughts out, that he was obliged to do, the not returning them then is all that is laid to his charge as criminal.

Now, if this be not the offence intended by this Act, if, under some circumstances, the inspector might very innocently act in this manner, then it will follow that the Justice has exceeded the power and authority given him by this Act, which is only to convict of the particular offence there described. And so the Justice and his officer are both trespassers.

And it is plain, I think, that what we are convicted of is not an offence within the Act or, indeed, any offence at all. It must be owned that, under many circumstances, the inspector is not obliged to return the draught into the hogshead as, first, if it was not crop tobacco, second, if it was not fit to pass, third, if the owner should desire him not. And either of these might be the case for anything that appears to the contrary upon the judgment. It is not said they were crop hogsheads out of which the draughts were taken, neither is it said that the tobacco was fit to pass or that the inspector took the tobacco to his own use or otherwise disposed of it without the knowledge or against the will of the owner. Nay, it is not so much as said that what he had done was contrary to the directions of the Act; so that there is not room to suppose any of these facts. And there is much less reason to suppose the last of them because it is not the owners that complain but a busy fellow that turned informer in hopes to get the penalty, which, indeed, the justice has given to him apparently against the law, as I shall show presently.

But I apprehend further that no suppositions are to be made of things that do not appear. There is a record which is relied on as a justification. And Your Honors are to determine from what appears upon the record whether it be a good justification or not. The rule of law is *inter non existentia et non apparentia, eadem est ratio*, as no averment will lie against the record. And we must not be admitted to say that anything in it is not true. So, neither must they be allowed to aver anything that does not appear upon the face of it.

And, since it does not appear, as I apprehend, that the inspector was guilty of the offence mentioned or had done anything to subject him to the penalty therein mentioned, the Justice had no power or authority to give judgment against him.

The Case of Terry and Huntington, *supra*, is exactly the same with this. The commissioners of excise are made judges of an offence against an Act of Parliament.¹ They convict a man of an offence, which, in their opinion, was within the Statute. An action is brought against the officer who executed their precept. The judges are of opinion that the matter for which they had convicted the plaintiff was not an offence within the Act and that, therefore, the commissioners had exceeded their jurisdiction and power which was limited to the officers in the Act. And it was held that both they and their officers were liable to an action. So here, if the Justice has convicted us of an offense not within the Act, his thinking it to be within the Act will not excuse either him or his officer. As the commissioners of excise exceeded their power in judging low wines to be strong waters perfectly made, so, the Justice here has exceeded his jurisdiction in judging the not returning a sample into the hogshead whence it was taken to be the offence for which the penalty is inflicted by this Act of Assembly.

To make this more plain, suppose the Justice had given judgment for 40s. for every offence, instead of 20s. I presume it will be granted we might have an action in that case. And, if we might in any case where the justice exceeded or did not pursue the power given him, surely, we are entitled to it when he convicts and condemns us to the penalty without being guilty of the offence.

It would have made a mighty difference in the case if the Justice had been only mistaken in his judgment of the fact, that is, if, upon the evidence, he had been of opinion we were guilty, though we were not, so, in that case, we must have been without a remedy, because the law has made him judge of the fact and it is within the power and authority given to him. But, in this case, the Justice has taken upon him[self] to make that offense against the Act, which I conceive is not so. And so has plainly exceeded his power, which is only to convict of the particular offence therein described.

If this point can want any further enforcing, I desire it may be considered how dangerous it must be to the liberty and fortunes of the subject to vest a single justice with so much power, as must be the consequence of the doctrine on the other side. If he may not only convict of the offense in the Act but also make that an offence which the law has not made so, who can be safe in their persons or estates? This would be transferring the legislative power to him and open a door to all the violence and oppression imaginable. Justices may be governed and blinded by their passions. I wish there was not something of that in this case. But, however that be, it must be allowed to be too dangerous a power to be lodged in a single hand. And, therefore, the laws have very wisely provided this fence of an action where the Justice goes beyond the power and authority given him.

But the Justice has not only exceeded his power in making that an offense which the law has not made so, but he has likewise done so in giving a judgment not warranted by the law, and that in several instances, first, as to one of the offenses, he has split the penalty between the two inspectors and has given judgment for 10s. only to the plaintiff. Second, he has given costs, though none are given by the Act, and so has subjected the plaintiff to a greater penalty than the law has inflicted. It will be no answer to say the costs are but small. The objection is

¹ Stat. 12 Car. II, c. 23 (SR, V, 255-259); Stat. 12 Car. II, c. 24, ss. 14, 15 (SR, V, 262).

he had no power to award any costs. *Ergo*, in so doing, he exceeded his jurisdiction. By the same rule that he could award 30 pounds tobacco, he might have awarded £30. In *Crump and Halford's Case*, *ante*, it seems admitted by the argument for the defendant that, [if] costs had been given where they ought not, the action would lie. They labor to prove the Act intended costs.

But the most weighty objection of all is the third, that he has given the penalty to the informer. The penalty is not appropriated by the Act, in which case, it is a known rule that it goes to the king. 11 Co. 68a. So here, His Majesty is not only defrauded, but the subject put in a worse state than the Act intended. He is to lie at the mercy of the informer instead of the king. If the penalty had been adjudged to the king, as it ought, the plaintiff, by an application, might have got it remitted. And I dare believe he would have met with so much favor under the circumstances of this case.

This is exceeding power with a witness. It is not at all unlikely the legislature designed in not appropriating the penalty to leave room for an application to the crown where a justice was too severe or partial. It might be thought a proper security against arbitrary and violent proceedings. But the Justice here was resolved to stop the fountain of the king's lenity, and, effectually, to ruin the plaintiff if he could. If this is allowed, hard will be the fate of every poor inspector who happens to be obnoxious to a country justice, who will undertake the execution of an office, that may put it in the power of his enemy to ruin and destroy him, even though he is ever so innocent.

A fourth objection to the judgment is its being for £11 10s., which, I think, is more than a single justice can give judgment for. Without doubt, he might have given judgment for twelve different offenses or 200, but, then, as the offenses must be several, so ought the judgments. The ordinary power of a justice in civil cases is limited to 20s. Now, should a justice in a civil case, under pretence that the plaintiff had several demands against the defendant, give judgment for more than 20s, I daresay, he would be thought to exceed his authority, though, perhaps, he might very well have given separate judgments, as, suppose 20s. to be due by an obligation and 20s. by an account, he might give several judgments for these sums, but not one judgment for both. This, indeed, may be said to be but an informality. And, if there was nothing more in the case, I should not much insist upon it. But it is really attended with a very bad and dangerous consequence, for, if this penalty had been given to the king, as it ought, by crowding these offenses into one judgment and thereby making the whole penalty exceed £10, the Governor could not, as I conceive, have extended the king's favor, though the case had been ever so deserving of it. This is, surely, a worthy consideration. Suppose a justice should arbitrarily and unjustly give judgment against a man for 500 breaches of this or any other law and put them in one judgment, if the justice took care to pursue the law in giving his judgment, the party must be without any kind of remedy, though the partiality and injustice were ever so notorious.

Let it be considered what a dangerous power this would be in the hands of a single person subject to no control. Human nature is too depraved to depend altogether upon the virtue and integrity of the judge. Power is apt to intoxicate and spoil the best tempers. And, therefore, it is in a manner absolutely necessary that the fences against arbitrary power should be kept up. I dare say it was never the intention of the law makers when they inflicted this penalty to put it in the power of a single justice to ruin any inspector if he pleased, which will be the consequence if he may crowd as many offenses as he pleases into one judgment, as I have endeavored to demonstrate.

It will be argued, I suppose, that it is very hard upon justices who serve in their office without any reward to be subjected to actions if they happen to be mistaken. And this is a very plausible way of talking.

In answer to it, I would desire to be understood that I make a great difference between things done by a justice by virtue of his general authority and where they are done by virtue of a particular limited power given to him by a positive and written law. In the first case, any little slip or mistake, in point of formality especially, is never regarded, nor can he be punished

for it. But, where a positive written law has plainly pointed out his power and authority, there, if he does not strictly pursue the power given him, he must answer for it, for, as I have already observed, every limited authority implies a negative, *viz.* that they shall proceed according to that power, and not otherwise. And there is no great hardship upon the justice, in this last case. He may act very safely if he follow the directions of the law. And it may very reasonably be deemed rather a fault in the will than the understanding if he does not, whereas, in matters where he has a general undefined authority, it is not always so easy for him to know precisely his duty and power. And, therefore, it is more reasonable to make some allowances, though even in those cases, if he exceeds his power in any great degree, as where he whips a man without authority for so doing, he shall be subject to an action.

But admitting there may be sometimes a little hardship upon the justice in these actions, that is not, I conceive, to be brought in competition against a general inconvenience. It is contrary to a maxim in law. And, surely, there cannot be a greater inconvenience than to suffer a country justice, where his power and authority are plainly marked out and bounded, to deviate from or exceed the power given to him under a pretence of mistake. The consequence is plain that, under such pretence, the most arbitrary and oppressive actions might be sheltered.

Besides, the Justices, in these cases, are always very tenderly dealt with by the jury in their damages if it appears to be a mere mistake in judgment. On the contrary, where there are any marks of violence or oppression of partiality or passion, they make them smart for it in damages, as indeed they ought.

This leads me to consider a little whether anything of that kind appears in this case. I am very unwilling to make personal reflections at anytime, nor shall I ever do it but where my duty obliges me to it. And, here, in justice to my client, I think I ought to take notice of and point out some circumstances appearing in this case that carry no very good aspect.

First, the warrant is special to appear before the defendant only and not any other justice, as the usual form is. Second, the matter was heard in the plaintiff's absence. It appears, indeed, the Justice was told he would not come. But, surely, in a matter of this moment and value, one default might have been passed over, and another day appointed. And then, if the plaintiff had failed, the Justice could not have been blamed. And there was the more reason in this case, as the plaintiff was an inspector and might be under a necessity of attending the warehouse just at that time or be subject to a penalty for not being there. I must submit whether these circumstances do not carry an appearance of something like heat and passion to say no worse. At least, we may suppose the jury thought so from the damages they have given.

I only mention this to obviate the stress that may be laid on the hardship of the case. It can never be thought a hardship if the justice was influenced by passion or resentment. And, though the law will not allow such a thing to be presumed from the manifest inconvenience that would follow, yet, when facts are found by a jury that plainly prove such a disposition, I do not see how a court can help judging so.

But, however that be, if the Justice has acted illegally, if under color of his authority, the property of the plaintiff has been invaded, and he subjected to great loss and damage, apparently against the law. I must submit whether the loss and injury to him be not more worthy consideration than any compassionate regard to the Justice, supposing him to be ever so innocent.

For the defendant, was cited *Greenvelt v. Burwell*, 1 Salk. 396,¹ which case proves nothing but what is admitted in the argument above and rather strengthens than invalidates it.

Yet judgment was given for the defendant October 1739 by a great majority of the court.

¹ *Groenvelt v. Burwell* (1700), 1 Salkeld 144, 200, 263, 396, 91 E.R. 134, 179, 231, 343, also 1 Lord Raymond 252, 454, 91 E.R. 1065, 1202, 3 Lord Raymond 278, 92 E.R. 687, Comyns 76, 92 E.R. 967, Carthew 421, 491, 90 E.R. 844, 883, Holt K.B. 536, 90 E.R. 1195.

To the cases above cited for the plaintiff, may be added *Rex v. Chandler*, 1 Salk. 378.¹ A summary conviction ought to be construed strictly so as to show the fact an offence within the Act, because the subject is deprived of a trial *per pares*.

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Jones v. Porter
(April 1740)

A court will not compel an heir to make a further conveyance in order to cure a defect in a conveyance made by his ancestor.

In chancery.

The bill sets forth that William Porter and Jane, his wife, in the right of Jane, were seised in fee of 99 acres of land and 400 acres in Middlesex, and agreed to sell the 99 acres to Thomas Jones, the plaintiff John's father, and 400 acres to the plaintiff Roger. And, accordingly, by deed, dated 1703 between Porter and his wife and the said Thomas Jones, they conveyed said 99 acres to Thomas Jones in consideration of 3960 pounds tobacco. And, by another deed in 1704 between Porter and his wife and the plaintiff, Roger, they conveyed the 400 acres to the plaintiff Roger in consideration of £160 sterling. And, in both deeds, Porter and his wife covenant for further assurance, and they also gave a bond to the plaintiff Roger for performance of covenants.

Porter and his wife came to court to acknowledge these deeds, but, by the mistake or ignorance of the clerk, the entry of the acknowledgment is that the wife relinquished her right of dower, and no notice is taken of the privy examination.

Porte died in 1705, and Jane his wife survived him, and died in 1709, leaving issue Francis Porter, her eldest son. And Thomas Jones died many years ago, leaving issue, the plaintiff John, his eldest son. And the plaintiffs continued in quiet possession until 1732, when Francis Porter, son and heir of the said Jane, brought an [action of] ejectment for recovery under the pretence his mother was not privately examined. And, upon a special verdict, he had judgment to recover, and he threatens to sue out [a writ of] *habere facias possessionem*, though it is plain upon the face of the deeds the defendant's mother intended to convey and she always acquiesced under it, never pretended she was not privately examined, but, on the contrary, in her widowhood, declared she had joined freely and voluntarily in the sale and was satisfied with it.

Francis Porter died pending [the action of] ejectment. And the defendants are his heirs at law. And the end of the bill is to have the defect of the private examination supplied and the defendants to make a perfect and absolute conveyance to the plaintiffs, being purchasers for a valuable consideration.

The defendants, being infants, by their guardian, put in a plea and answer. They plead the Act of 1734,² which enacts that, where the clerk has not taken notice of the private examination, it shall be taken the married woman was not examined. And for answer, they say they were infants at the time of the transactions charged in the bill and know nothing of them and hope the court will not compel them to part with their inheritance legally descended to them. And they pray to have the benefit of the judgment at law.

¹ *Rex v. Chandler* (1700), 1 Salkeld 378, 91 E.R. 329, also 1 Lord Raymond 545, 581, 91 E.R. 1264, 1288, Holt K.B. 214, 90 E.R. 1017, Carthew 501, 508, 90 E.R. 887, 891, 5 Modern 446, 87 E.R. 755.

² Act of 1734, c. 6, ss. 7, 8, 4 Hening's Statutes 400-401.

The proofs in the cause are very short. [There was] only one witness, William Hammett, who says he was in company with Jane Porter in her widowhood and asked her for what reason she agreed to sell the land to the Joneses. She answered that she nor her family could not have their healths upon it nor make corn for support of their family, that, though Mr. Jones thought he had a good bargain, she wished it might prove so, and was glad the land was sold.

There need be little said to the plea, which seems quite unnecessary. We do not pray this court should decree that the woman was privately examined, but to have the defect or want of that circumstance supplied. I [*Barradall*] shall never pretend to say that a court of equity can control an act of Parliament or an act of Assembly, however severe it may be upon particular persons. And we cannot help thinking this Act somewhat severe upon us, being made while the suit at law was depending.

We allow, then, that the woman was not privately examined; the law has declared so, and we must submit. The question properly before Your Honors and the only question is whether a court of equity will supply a defect of this kind when it appears, as I think it must be allowed to do in this case, that she had agreed to part with her inheritance and was consenting and willing without the coercion of her husband.

This consent and agreement appears from the wife's executing the deeds. The grant and all the covenants are in her name as well as the husband's. She enters into the bond for performance of covenants, and she comes to court in order to acknowledge. She acquiesces under the deed, and declares in widowhood that she had agreed and was glad the land was sold. These circumstances and proof must be convincing that the woman was actually consenting and willing to part with her inheritance.

Then, I say whether the want of a private examination may be supplied by a court of equity or whether the heirs of the woman shall not be compelled to make a good and legal conveyance is the question before the court. And I hope I shall have no great difficulty to persuade Your Honors that we ought to have such a decree and that the same is consistent with the constant course of equity in cases of the like nature.

This method of the private examination of married women is peculiar to the laws of England, renowned for its great favor and regard to women. It was introduced to preserve and protect the inheritance of the wife from the arbitrary will and disposal of the husband that she might not be compelled by his threats or cruelty to part with it against her will. It is nothing more, then, than a particular mode or ceremony instituted for a particular purpose. And I humbly conceive that, if the end for which this ceremony was introduced can appear to have been answered, that is, if it appear that the wife was not compelled against her will, it is the same thing in natural equity and justice as if the ceremony had been ever so formally complied with.

The law has appropriated particular forms and ceremonies almost to every kind of conveyance. Livery is essential to a feoffment, and a surrender to pass a copyhold. And the courts of common law that are tied up to strict and rigid rules will never dispense with the want of these ceremonies. But it is the peculiar province of equity to supply these defects, especially in favor of a purchaser for a valuable consideration, as we are. It is even a kind of maxim that equity regards the substance and not the circumstance of every act.

To examine this case by that maxim, does it not appear here that the woman was willing and intended to part with her inheritance? And is not that the substance of the act? The defect is only in a circumstance, the want of a private examination. The cases in the books are numerous where equity has supplied the want of a livery in a feoffment and the want of a surrender in passing a copyhold in favor of purchasers and sometimes even in favor of younger children. I will beg leave to read two short ones for the court's satisfaction. *Thompson v.*

Atfield, 2 Ch. Rep. 216; *Hardham v. Roberts*, 1 Vern. 132.¹ These cases may suffice to show the constant course of equity to be as I have said, viz. to supply defects in conveyances in favor of purchasers.

Now, if equity will supply the want of a livery in a feoffment and the want of a surrender in passing a copyhold, which ceremonies must be allowed to be as essential in point of law to the respective conveyances as the examination of the wife can be where her inheritance is to pass, I shall beg to know what good reason can be given why a court of equity should not interpose and assist an honest purchaser in the one case as in the other, when it is manifest it was the voluntary intent of the wife to pass her estate.

If the motive and reason of the determination be considered, it will appear they have as great weight in the present case as those cited. The true reason, as I conceive, is because, when there appears a fair contract between two parties and one has paid his money for the land, the vendor is become a kind of trustee in equity for the vendee and so compellable in equity to make or perfect a conveyance as the case may require that the vendee may have the legal as well as equitable title in him.

Now, I will beg leave to suppose that Porter and his wife were now alive and this suit was brought against them instead of the heirs of the wife. Upon the proof there is in this case that the wife was consenting and that the purchase money was paid, I presume there would be no manner of question but that we should have a decree we now seek for against them to perfect the conveyance or that we should enjoy against them and their heirs. Nay, though the woman should deny her consent, if it was made evident by proof and the purchaser in confidence of it had paid the money, equity would without doubt consider such a proceeding as a fraud, and relieve against it.

Now, I would fain know what greater equity the heir can have than the ancestor. The title they derive is under this ancestor. And the same equity that would run against the ancestor must run against the heir. If then, it be allowed that we could be relieved against the ancestor, as I think cannot fairly be denied, I do humbly insist that we are entitled to the same relief against the now defendants, her heirs.

Objection: [There is] no instance of equity relieving in such a case in England.

Answer: That is not strange because it is a case that never could happen in England. I mean there never could be such a question. The only way for a married woman to pass her inheritance in England is by a fine or recovery. And, though she ought to be privately examined, yet, if a fine is levied by the husband and wife and the wife is not examined, it shall bind her and her heirs, Coke's Reading, sect. 7,² so that when the fine is once levied, the purchaser is secure, and has no occasion to apply to a court of equity though the married woman in fact was not examined.

Hence, it is plain this is a question that never could be made in England. And, therefore, it is no wonder we meet with no cases in point. But I think there are cases where a court of equity has done as much or more and in instances that must be allowed to be as strong as this because the ceremony of private examination must have been dispensed with. *Baker and Child*, 2 Vern. 61.³ It seems to be mentioned by the court as an established rule that, where a married woman agrees to join with her husband in making a surrender or levying a fine though the husband die before it be done, equity will compel her to perform the agreement.

¹ *Thompson v. Atfield* (1682), 2 Chancery Reports 216, 21 E.R. 661, also 1 Vernon 40, 23 E.R. 294, 1 Eq. Cas. Abr. 170, 21 E.R. 965; *Hardham v. Roberts* (1683), 1 Vernon 132, 23 E.R. 366, also Chan. Repts. *tempore* North 45.

² E. Coke, *Le Reading sur Lestatute de 27 E. 1 appelle Lestatute de Finibus Levatis* (1662).

³ *Baker v. Child* (1688), 2 Vernon 61, 23 E.R. 648, also Chan. Repts. *tempore* Jac. II, 458.

If, where there is only a bare agreement of the wife, equity will compel her to perform it. I must submit if there be not a much stronger reason in this case where an agreement does not only appear but the wife actually executes a conveyance which happens to be defective only in a circumstance.

I rely upon our being an honest purchaser for a valuable consideration. Purchasers are ever favored in equity. And the court will often stretch in their favor. Indeed, nothing can be more consonant to natural justice than this, that, where a man has paid his money, he should have all the assistance of the law to protect and secure him in the possession of the thing purchased.

If this case be considered only under the notion of an agreement (and surely the agreement of the wife in this case cannot be controverted), I humbly conceive this court ought to interpose upon the authority of the case just cited. It is indeed the peculiar province of equity to compel the specific performance of agreements, even where the party may have a remedy to recover damages at law. And, in this case, we can have no effectual remedy at law; the husband is dead insolvent, and we must entirely lose our purchase money and improvements unless this court will assist us.

Fraud, accident, and trust are said to be the three principal things about which a court of equity is conversant.

In this case, there is a fraud on the defendant's part, that they would take advantage of the defect in their ancestor's conveyance. There is accident in two instances, *viz.* the mis-entry of the Clerk and the death of the woman. And there is a trust by the payment of the money and the wife's agreement.

This is undoubtedly a case of great compassion. Here is an honest purchaser before the court. And the only objection to his title is a defect in the conveyance and that only in point of circumstance or ceremony. This defect is not attempted to be taken advantage of by the grantor. But the heir, after a quiet possession of thirty years, contests the act of the ancestor, always acquiesced under by her. [Here is] a purchaser without any remedy unless assisted by this court. The relief sought [is] against no rule of equity, attended with no inconvenience, against no act of Parliament, equitable and reasonable in itself, and agreeable to the course of equity in similar cases. And, if it be so, if the thing desired be no more than natural justice will [do], if it neither interferes with nor violates any one established rule of equity, there can want neither argument nor precedent to induce a court of equity to decree for us.

Francis, for the defendant: The end of this bill is to repeal an act of Assembly. Equity cannot decree against an act of Parliament. There is no instance where a statute requires a particular act for transferring an inheritance that a court of equity will dispense with that act. If a tenant in tail agrees to levy a fine and dies before it is done, equity will not compel the issue in tail to convey. Nothing but the actual levying the fine can take the inheritance from the issue. If a bargain and sale be made without an enrollment, equity will not supply it nor any circumstance that is required by the Statute of Frauds as to wills.¹ It is not the province of equity to relieve against blunders. And to decree in this case for the plaintiff will be to annul a law made for securing women's inheritances. The rule of the civil law is, where equity would annul a law, the law must prevail.

To which it was answered, what is desired by the bill will neither annul the act of Assembly or be contrary to it. The end of the bill is not to establish the woman's conveyance, which is allowed to be defective, but to compel a better conveyance to a purchaser for a valuable consideration. This sufficiently obviates all that has been said about decreeing against an act of Parliament. As to the cases put, they are by no means parallel; the issue in tail shall not be compelled to convey where the fine is not perfected, because he does not come in under the tenant in tail but by force of the gift in tail. The tenant in tail in his lifetime would be compelled to levy a fine if he so agreed. And so, here, the woman would be compelled to make

¹ Stat. 29 Car. II, c. 3, s. 5 (SR, V, 840).

a better conveyance if she was alive; and the same equity must run against her heir. As to the case of enrollment, though equity would not decree the deed good if not enrolled, yet it would decree a better conveyance to a purchaser, which is all we ask. And, as to the Statute of Frauds, the same answer may be given as to the case of a tenant in tail. We do not attempt to set this conveyance up as good, but desire a better, because it is not good. Besides, surely, there is a difference between a purchaser and a devisee. And, though it is said it is not the province of equity to relieve against blunders, yet we see nothing is more common than for equity to relieve against mistakes and defects in conveyances and, especially, in favor of honest purchasers.

In this case, the bill was dismissed by the opinion of a great majority of the court.

Deeds acknowledged to be enrolled but not enrolled are yet good. Hutt. 1; 1 And. 229; Dyer 355a. In cases of fraud, equity should relieve even against the words of a statute. 1 Wms. 620.¹

[Other copies of this report: Jefferson 62.]

[This report is cited in *Knight v. Triplett* (1740), see below, Case No. 88.]

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Tucker v. Tucker's executors
(April 1740)

In this case, all of the devisees took per capita.

In chancery.

The question was upon these words in the testator Tucker's will:

I give all my ready money and outstanding debts to be equally divided between Robert Tucker, John Tucker, John Cooke, Robert Cooke, and Mr. Jacob Walker's children and, in case any of Mr. Walker's children die before they come of age, that their parts go to the survivor of them children.

Whether Walker's children, who are four in number, shall have each of them an equal share with the Cooke's and Tucker's or only one share among them [was the question].

Barradall, for the plaintiff: I apprehend it to be pretty clear from the words of this clause that the testator intended Mr. Walker's children should stand in the place of one person from the manner of his expression, for why should not he have named them particularly as he does the Cookes and Tuckers if he designed each of them the same share.

But, when the whole scope of the will is considered, the answer of Boush, one of the defendants, who wrote the will, and other circumstances attending this case, I hope the testator's intention will appear very clear to give no more than a fifth part to them. It will be agreed, I presume, that, in devises concerning chattels or personal estate, parol proof and collateral circumstances may be admitted to explain a testator's intention that appears doubtful from the words of the will.

¹ *Combes v. Inwood* (1617), Hutton 1, 123 E.R. 1057; *Anonymous* (1590), 1 Anderson 229, 123 E.R. 445; *Duke of Somerset's Case* (1577), 3 Dyer 355, 72 E.R. 797; *Countess Dowager of Montacute v. Maxwell* (1718-1720), 1 Peere Williams 618, 24 E.R. 541, also 1 Strange 236, 93 E.R. 494, *Precedents in Chancery* 526, 24 E.R. 235, 1 Eq. Cas. Abr. 20, 21 E.R. 842, 2 Eq. Cas. Abr. 592, 22 E.R. 497, *Chan. Repts. tempore Geo. I*, 510.

The cases to this purpose are numerous. 2 Vern. 99, Pring and Pring; 252, Countess of Gainsborough against Earl of Gainsborough; 506, Oldham against Lichford; 517, Pendleton against Grant; 593, Cuthberd against Peacock; 648, Lady Granvil *et al.* v. Duchess of Beaufort; Wingfield against Atkinson, 675; Ball against Smith; and Littlebury and Buckley, there cited; Mod. Ca. L. and Eq. 9, Rachfield and Careless; Dayrell and Molesworth, Ch. Ca. Abr. 231, 3.¹

These cases prove that parol proof and collateral circumstances are admitted not only to explain but sometimes to control the meaning of words in a will.

Now, the proof and circumstances in this case are, first, that the writer of the will, Boush, one of the defendants, apprehended the testator's meaning to be to give only one-fifth to Walker's children. And he gives such reasons for it as I think must convince everybody else, *viz.* that the mother of these children, who was dead at the time, was but in equal degree with the other legatees, she was the sister of the plaintiffs, and because, if they were to have half, they would have more than one-fifth of the whole estate and because the testator did not think of making Mr. Walker his executor until put in mind.

I must dwell a little upon each of these reasons.

First, that the mother was but in equal degree with us. It is a natural and reasonable presumption that a man has the greatest affection and regard for his nearest relations. Upon this ground it is that an heir shall not be disinherited without express and plain words, which is a known rule of law. And, upon the same ground, I conceive it is just to suppose, in the disposition of personal estate, a man would have an equal regard to his relations in the same degree unless there appeared to have been some cause of disgust where his intention is very plain. In this case, the legatees, the Cookes and Tuckers, were the testator's nephews; Mr. Walker's children [were] his niece's children, and their mother [was] dead. From this circumstance, no man would conclude the testator had a greater regard for his niece's children than his nephew's, who are nearer in relation, especially, as in this case, there was so far from being any quarrel or dislike towards the nephews that, from the whole scope of the will, it will appear he had it principally in his intention to prefer them. And one of them, the plaintiff, actually lived with him. And I think I may venture to say the words are far from plain to give each of Walker's children an equal share, but rather the contrary.

The second reason assigned by Boush is that, if Walker's children have half the ready money etc., they will have more than an equal share of the whole estate. Whether it is reasonable to suppose from the scope of this will that the testator could intend to advance these children so much more than his nephews, I must beg leave to observe a little upon the will. The

¹ *Pring v. Pring* (1689), 2 Vernon 99, 23 E.R. 673; *Countess of Gainsborough v. Earl of Gainsborough* (1692), 2 Vernon 252, 23 E.R. 764, also 2 Freeman 188, 22 E.R. 1152, 1 Eq. Cas. Abr. 230, 21 E.R. 1010; *Oldham v. Litchford* (1705), 2 Vernon 506, 23 E.R. 923, also 2 Freeman 284, 22 E.R. 1214, 1 Eq. Cas. Abr. 231, 21 E.R. 1011, 2 Eq. Cas. Abr. 44, 22 E.R. 39; *Pendleton v. Grant* (1705), 2 Vernon 517, 23 E.R. 931, also 1 Eq. Cas. Abr. 230, 21 E.R. 1011; *Cuthbert v. Peacock* (1707), 2 Vernon 593, 23 E.R. 986, also 1 Salkeld 155, 91 E.R. 143, 1 Eq. Cas. Abr. 205, 232, 21 E.R. 992, 1012; *Lady Granville v. Duchess of Beaufort* (1709), 2 Vernon 648, 23 E.R. 1023, also 1 Peere Williams 114, 24 E.R. 317, 1 Eq. Cas. Abr. 245, 21 E.R. 1021, 2 Eq. Cas. Abr. 415, 22 E.R. 352; *Wingfield v. Atkinson* (1711), 2 Vernon 673, 23 E.R. 1038; *Ball v. Smith* (1698-1711), 2 Vernon 633, 675, 23 E.R. 1014, 1039, 2 Freeman 230, 22 E.R. 1178, 1 Eq. Cas. Abr. 245, 21 E.R. 1022, 2 Eq. Cas. Abr. 133, 434, 22 E.R. 114, 369; *Buckley v. Littlebury* (1711), 3 Brown P.C. 43, 1 E.R. 1165, 1 Eq. Cas. Abr. 245, 21 E.R. 1021, 2 Vernon 677, 23 E.R. 1040, Lincoln's Inn MS. Misc. 10, p. 86; *Rachfield v. Careless* (1723), 9 Modern 9, 88 E.R. 281, also 2 Peere Williams 158, 24 E.R. 680, 1 Strange 568, 93 E.R. 705, 2 Eq. Cas. Abr. 416, 424, 441, 22 E.R. 353, 361, 376, *sub nom.* *Russell v. Carlison*, Chan. Repts. *tempore* Geo. I, 958; *Dayrell v. Molesworth* (1700), 1 Eq. Cas. Abr. 231, 21 E.R. 1011, also 2 Vernon 378, 23 E.R. 839.

testator never once takes notice of Walker's children except in the devise now before us, whereas he speaks of his nephews in several places, gives them several legacies, and makes them residuary legatees, which I think is a plain proof that he had it more in his intention to advance them than Walker's children, whom he only once names.

The third reason is that he never thought of making Walker executor until put in mind, which is a further argument that he had not his children so much in view or the advancement of them as of his nephews, some of whom are of his name.

If it be objected that what Mr. Boush swears is only his opinion, I answer it is something more, he was the writer of the will. And one who takes words from the mouth of another to commit to writing may from the way and manner of the party's expressing himself be a better judge of what he means and intends than any person can possibly be who reads the words afterwards. And Boush says, when he wrote the will, he did believe the testator intended no more than one-fifth for Walker's children, so that this is certainly something more than a bare opinion. And I dare say it will be considered as a strong circumstance, at least, to prove the testator's intention, that the writer of the will at the time he wrote it apprehended the testator's intention to be so.

Thus we have not only the evidence of the writer of the will, but the other strong circumstances, viz. the intention of the testator from the whole scope of the will, the true rule for construing all wills, the inequality this will occasion contrary to the presumed rules of affection.

And on the other hand, I do not know one circumstance that can be offered on the other side to favor the construction they contend for. There could be no inducement from the circumstances of the children's father to provide so largely for them. Mr. Walker is very well able to provide for his own children. The children's mother was dead, and we may rather suppose his affection was lessened from that circumstance. There is no proof of extraordinary affection to these children. And the truth is he conversed but little with Mr. Walker, whereas the plaintiff lived with him, so that I apprehend they have nothing to rely upon but the words. And I conceive the words may very well receive the construction I contend for. The word 'equally' may very well import equal according to the relation of the several legatees, especially as he has not mentioned the children's names, but seems by the manner of the expression to consider them as one person, as the representatives of their mother.

But, if there is any doubt upon the words themselves, the testimony of the writer, the scope of the will, and the other circumstances, which have been observed sufficiently and I conceive incontestably, show the testator's meaning.

For the defendant, it was insisted that the word 'equally' could not be satisfied unless the children had each of them a share, that it was the genuine construction and the testator could not have expressed himself in any other manner to give it them, that there was no difference between naming the children and not, that there were no cases where parol proof or circumstances were admitted to influence the construction of a will but to make certain a person or thing, *Cole and Rawlinson*, 1 Salk. 325; *Cary and Bertie*, 2 Vern. 337; *Rachfield and Careless*, Mo. Ca. L. and Eq. 9, were cited,¹ that there were circumstances in their favor. The testator might intend a provision for his niece's children in case Walker married again. The Tuckers had good fortunes from their father. [It is] uncertain what Walker might do for his children.

¹ *Cole v. Rawlinson* (1703), 1 Salkeld 234, 91 E.R. 207, also 2 Lord Raymond 831, 92 E.R. 55, Holt K.B. 744, 90 E.R. 1309, 3 Brown P.C. 7, 1 E.R. 1141, 2 Eq. Cas. Abr. 300, 22 E.R. 252; *Lord Falkland v. Bertie* (1696), 2 Vernon 333, 23 E.R. 814, also 1 Salkeld 231, 91 E.R. 205, 3 Chancery Cases 129, 22 E.R. 1008, 2 Freeman 220, 22 E.R. 1171, 12 Modern 182, 88 E.R. 1248, Holt K.B. 230, 90 E.R. 1026, Colles 10, 1 E.R. 155, Dickens 25, 21 E.R. 176, 1 Eq. Cas. Abr. 110, 21 E.R. 917, Chan. Cases *tempore* Harcourt, p. 17; *Rachfield v. Careless* (1723), *ut supra*.

There were also cited these cases, *Weld and Bradbury*, 2 Vern. 705, a devise to the children of J.S. and J.N., who had neither of them any living at the time of the devise or the testator's death, [it was] adjudged children born afterwards should take and, that, *per capita* not *per stirpes*. *Walsh and Walsh*, Ch. Ca. Abr. 249. A. had three brothers; all died before him, leaving several children; [it was] adjudged children should take *per capita* not *per stirpes* because they do not take by way of representation, but all as next of kin.¹ And [there was] a case out of Swinburn, where a father and his children were made executors and residuary legatees, and [it was] held that each of the children should have a share.

To which it was answered, admitting the word 'equally' *ex vi termini* imports that each shall have the same part; yet, here, we are in the case of a will, where the intention is to govern without regard to the precise and strict signification of the words. And the question here is whether the testator did not consider Mr. Walker's children collectively, as representing their mother. In that view, the word 'equally' may very well be satisfied by giving them a fifth. The matter depends upon the meaning and intention of the testator.

The children not being particularly named is certainly an argument that the testator considered them collectively, though, if they had been named, it would have made but little in favor of their argument.

It is strange it should be said there are no cases where parol proof is admitted but to make certain a person or thing after so many have been mentioned which prove the contrary, *viz.* that it is admitted to explain a testator's meaning.

But admitting it to be so, we are within the distinction; we are here endeavoring to ascertain the person in some sort. *Cole and Rawlinson* and *Cary and Bertie* are upon a devise of lands, where I agree parol proof is not admitted. The reason of which is the Statute.² And, in *Rachfield and Careless*, it is only said no evidence shall be admitted where the will explains itself, which admits that evidence may be [admitted] where the will wants explanation, and, though such proof is not allowed to a jury, it is always allowed to the court in equity. Ch. Ca. Abr. 230, *in notis*.³

The circumstances relied on in their favor are forced and merely conjectural and no great compliment to Mr. Walker as to the Tuckers having good fortunes. That is not the case of the *Cookes*, but, probably, he intended to keep up his name and family.

Weld and Bradbury was cited, I suppose, because there happens to be the words '*stirpes*' and '*capita*' in it, for it is nothing like this case.

The person, to whose children the devise was, had none living at the time of the devise, and, therefore, it was held an executory devise to such children as they should afterwards have and the children to take *per capita*. There was nothing in the case to show he intended otherwise, and, without doubt, in a general devise to a man's children, they shall take equally, which is all the case cited out of Swinburn proves.

Walsh v. Walsh is still less to the purpose. The question there was upon the Statute of Distribution.⁴ A man had three brothers who all died before him and all left children. And it was held the children should take *per capita*, being all in equal degree of relation. There, they did not take by representation, all their fathers' being dead, but, if one had been living, it had been otherwise.

¹ *Weld v. Bradbury* (1715), 2 Vernon 705, 23 E.R. 1058, also 1 Eq. Cas. Abr. 203, 21 E.R. 990; *Walsh v. Walsh* (1695), 1 Eq. Cas. Abr. 249, 21 E.R. 1025, also *Precedents in Chancery* 54, 24 E.R. 27.

² Stat. 29 Car. II, c. 3, s. 5 (SR, V, 840).

³ *Countess of Gainsborough v. Earl of Gainsborough* (1692), *ut supra*.

⁴ Stat. 22 & 23 Car. II, c. 10 (SR, V, 719-720).

In the Case of Godwin v. Kinchen's executors,¹ heard in this court in April 1738, the devise was thus, 'all the rest of my estate, I give to my brother William Kinchen and my three sisters, Elizabeth, Martha, and Patience, and James Godwin's three children, James, Martha, and Matthew.' And it was held and so decreed that Godwin's children took collectively and had but a fifth.

And so, in this case, after two arguments, it was decreed for the plaintiffs, that Walker's children took collectively and were entitled only to one-fifth among them.

But note this decree was reversed upon an appeal and, chiefly, as I have been informed, by reason of the word 'parts' in the limitation over to the survivor of Walker's children.

81

Burwell v. Ogilby
(April 1740)

Where a testator has willed that his debts be paid, the executor must pay his debts out of the decedent's real estate.

In chancery.

One Ogilby, by his will, devised as follows:

As to what relates to my temporal estate, I appoint as my whole and sole executrix my beloved wife. Item, I desire all my lawful debts be paid after my funeral charges; Item, I leave all estate at the discretion of my executrix to be equally divided among my children born in Virginia and that my wife shall possess the house and lots during widowhood, but, if she marries, the house and lots to be sold and equally divided among all my said children.

There being a deficiency of personal assets to pay the testator's debts, the creditors by simple contract brought this bill against the executrix and children to subject the house and lots devised above to the payment of their debts

Barradall, for the plaintiffs: The lands and tenements of a person deceased are not subject by the common law to the payment of debts by simple contract, though they are to debts by specialty. But, as there is no foundation in natural justice for this distinction and the civil law makes no difference between debts of the one sort and the other nor even a court of equity in cases of bankruptcy and mere equity, as trusts etc., therefore, equity is always ready to assist simple contract creditors to subject the lands to a satisfaction of their debts where the personal assets are deficient.

If an executor pays debts by specialty out of the personal assets, equity will relieve the simple contract creditors, and charge the lands to the value of the debts by specialty paid by the executor. And so, in the case of a will, the most liberal construction will be made to subject the lands, and this seems founded both in charity and justice, for we ought charitably to suppose every man intends to pay his debts. And it is certainly just and right that they should be paid.

The words of the will are 'as to what relates to my temporal estate, I appoint my wife executrix. Item, I desire all my debts may be paid after my funeral charges'. The words 'temporal estate' include real and personal. Then, immediately speaking of his debts is a plain indication he intended they should be paid out of his whole estate. He designed to provide for them in the first place.

¹ *Godwin v. Kinchen's executors* (1738), see above, Case No. 56.

Then, the will goes on, 'I leave all my estate to the discretion of my executrix to be equally divided among my children and that my wife shall possess the house and lots during her widowhood but, if she marries, to be sold etc.'

This clause shows he intended his wife and executrix should dispose of his whole estate. And, having provided for the payment of his debts first, it must be intended out of the estate given to his executrix. The very making a proviso for payment of his debts imports an intent to subject his real estate, because personal would be subject without. Cases of this sort [are] frequent.

Cloudsly and Pelham, 1 Vern. 411; a devise of lands to B. in tail, then, reciting that he owed B. money, he devised to him all his personal estate, willing him to pay his debts, though the clause as to payment of debts seemed only to relate to personal estate, and the lands were entailed. Yet [it was] held that the lands were liable.¹

Alcock and Sparhawk, 2 Vern. 228; A. devises his land to his brother and heir, and makes him executor, and desires him to see his will performed; the lands were held liable to debts.²

Beachcroft and Beachcroft, 2 Vern. 690; 'I do by this my will dispose of such worldly estate etc. First, I will that all my debts be paid.'³

Trott and Vernon, Abr. E. 198, 6; 'I will and devise that all my debts, legacies, and funerals be paid and discharged in the first place.'⁴

Lord Warrington and Lee, Rep. Ch. and K.B. 39. 'As to all my worldly estate etc., I give and dispose in manner following, *imprimis*, I will that all my debts be discharged and paid.'⁵

Harris and Ingleden, cited in the case *ultimo*; 'And as touching such worldly estate etc., my debts being first paid and satisfied, I will and devise' etc.⁶

In all which cases, it was decreed that the lands were liable to the payment of the testator's debts.

The number of these cases show the concurred opinion of many great men.

The two first cases turn upon all the estate being devised to the executor, and, then, there is an implied trust. The latter three turn all upon this expression in the beginning 'as to all my worldly estate', providing for his debts in the first place.

We have the reasons of all these cases, first, the testator has given all to his wife and executrix, second, he begins 'as to my temporal estate', third, he provides for his debts in the first place.

¹ *Cloudsley v. Pelham* (1686), 1 Vernon 411, 23 E.R. 552, also 1 Eq. Cas. Abr. 197, 21 E.R. 986, Chan. Repts. *tempore* Jac. II, 279.

² *Alcock v. Sparhawk* (1691), 2 Vernon 228, 23 E.R. 748, also 1 Eq. Cas. Abr. 198, 21 E.R. 987.

³ *Beachcroft v. Beachcroft* (1715), 2 Vernon 690, 23 E.R. 1047, also 1 Eq. Cas. Abr. 198, 21 E.R. 987.

⁴ *Trott v. Vernon* (1715), 1 Eq. Cas. Abr. 198, 21 E.R. 987, also Gilbert Rep. 111, 25 E.R. 77, Precedents in Chancery 430, 24 E.R. 192, 2 Vernon 708, 23 E.R. 1065, 2 Eq. Cas. Abr. 291, 22 E.R. 244.

⁵ *Earl of Warrington v. Leigh* (1732), W. Kelynge 39, 25 E.R. 485, also 2 Eq. Cas. Abr. 372, 22 E.R. 316, Lincoln's Inn MS. Misc. 384, p. 365, Forrester 21.

⁶ *Harris v. Ingledew* (1730), 3 Peere Williams 91, 24 E.R. 981, 2 Eq. Cas. Abr. 74, 169, 233, 255, 422, 462, 768, 22 E.R. 64, 144, 198, 216, 358, 393, 652.

In this case, it was decreed *per totam curiam praeter* RANDOLPH and CUSTIS that the house and lots should be sold to satisfy the plaintiff's debts and that the sheriff of the county should sell to the highest bidder and the executrix and heir make a conveyance to the purchaser.

[This report is cited in *Dancy v. Willard's administratrix* (1741), see below, Case No. 93.]

82

Anonymous
(April 1740)

The distributive part of a decedent's estate that goes to a married woman vests in her husband, and, upon his death, is payable to his administrator.

A man marries a woman entitled to a distributive part of her father's estate, and dies before distribution. Query whether this distributive part survives to the wife or shall go to the administrator of the husband. The general rule of law is that things in action do not vest in the husband by the marriage unless reduced to a possession during the marriage, but survive to the wife. 1 Inst. 351b.¹

I cannot easily apprehend how this distributive part can be distinguished from any other debt, duty, or interest of the wife's. It seems to be as much a thing in action, as a debt due by a bond or otherwise or a legacy, which [it] must be admitted do not vest in the husband merely by the marriage unless there be a judgment during the marriage or some other act to alter the property, as a promise to the husband, an assent to the legacy, or the like.

But, even in the case of a judgment at law for the debt or a decree in equity for the legacy, if the husband dies before execution, the benefit of the judgment or decree survives to the wife, and she shall have execution and not the executor of the husband. 1 Ch. Ca. 27, *Nanny and Martin*, 1 Ch. R. 233, same case, for, by the judgment, the debts attached in them jointly, *Carth.* 415; *Skin.* 632, so that, if the husband survives, he shall have it; if the wife, she shall have the benefit.²

In this case, then, if there had been a recovery of the distributive part by a decree and the husband had died before the decree was satisfied, the wife would have had the benefit. How much more so when there is no recovery or any act to attach this interest in the husband?

Objection: *Cary and Taylor*, 2 Vern. 302;³ A. married B., the daughter of J.S., who dies intestate. B. dies before distribution; A. also dies before distribution or administration taken to his wife. The query was whether the administrator of the husband or the administrator of the wife was entitled to B.'s distributive part of her father's estate. It was agreed in this case that the distributive part was an interest vested. But the doubt was whether it was so vested as a legacy assented to that it should vest in the husband without [his] taking administration to his wife. And it was argued for the husband's administrator, the plaintiff, that, since the Statute for

¹ E. Coke, *First Institute* (1628), f. 351b.

² *Nanney v. Martin* (1663), 1 Chancery Cases 27, 22 E.R. 676, 1 Chancery Reports 233, 21 E.R. 559, also 2 Freeman 172, 22 E.R. 1138, 1 Eq. Cas. Abr. 68, 21 E.R. 881; *Woodyer v. Gresham* (1697), *Carthew* 415, 90 E.R. 840, also 1 Salkeld 116, 91 E.R. 109, *Comberbach* 455, 90 E.R. 455, *Skinner* 682, 90 E.R. 303, *Holt K.B.* 101, 90 E.R. 954; *Dalby v. Champernoone* (1696), *Skinner* 631, 90 E.R. 283, also *Holt K.B.* 228, 90 E.R. 1025.

³ *Cary v. Taylor* (1693), *Vernon* 302, 23 E.R. 795, also 1 Eq. Cas. Abr. 69, 21 E.R. 882.

Settling Intestates' Estates,¹ the administrator is but in the nature of a trustee and the taking administration as the acceptance of a trust, and implies an assent that the estate should be distributed according to the Statute. And, therefore, the distributive shares ought to be considered not only as a legacy but as a legacy assented to and, consequently, go to the husband's administrator. This was the counsel's argument, but what the decree was, whether in favor of the husband's administrator or the wife's, does not appear by the book. But the reporter adds at the end '*tamen vide* the decree'. By which manner of expression, I should judge the decree was rather against the argument than in favor of it. However, it must be allowed that it remains uncertain how the determination was, and, therefore, it can be no further an authority than the reason of the argument may prevail.

And I must own it does not appear to me to have any great force in it. Thus far, I agree that the distributive part ought to be considered as a legacy and, consequently, as an interest immediately vested. But why it should be considered as a legacy assented to any more than every legacy given by a will, I cannot comprehend, for, as to the administrator's being in the nature of a trustee, I take an executor to be so too. And there is not only an implied assent to perform the will, but he takes an oath to do so too. And, therefore, to me, the argument is as strong for a legacy vesting in the husband as this distributive part.

Yet it seems admitted that it would not vest without the executor's assent. I do not find that the point has been determined in any case, either before or since. And there being no resolution in that case, it is no authority, nor, indeed, does it weigh with me at all for the reasons I have mentioned.

Besides, that case differs from the present in this material circumstance, that the right or interest accrued during the marriage and so the assent, if it was to be implied, must be intended to the husband. But, here, the right or interest accrued to the wife before marriage. And, therefore, this implied assent that is talked of must be to the wife, and the right or interest could never attach in the husband upon any such implied assent nor without some subsequent act, nothing of which appears in this case. And so, upon the matter, this case, if it is an authority, is rather against the plaintiff than for him. Then, in that case, too, the wife died first, and the husband survived. Here, the wife is the survivor, which makes a material difference, as I shall mention presently.

Another case that has been mentioned is *Fouke and Lewen*, 1 Vern. 88.² A man married a citizen's daughter. She died before twenty-one, and, before her husband had received her orphanage part. He brings a bill for it. It was insisted that, by the custom of London, the share survived to the other children. But the court said that, though there might be such a custom where an orphan died before twenty-one unmarried, yet it could not take place where the orphan married and the interest of her share vested in the husband. All that this case proves is that an orphan's share, who marries and dies before twenty-one does not survive to the other children. There is indeed mention made of her share vesting in the husband, but whether it vested in such a manner as to go to him without taking an administration to his wife is not said.

And I am of opinion that it did not vest in him absolutely but that, if the wife had survived, she would have been entitled to it and not her husband's administrator, according to *Pheasant's Case*, 1 Ch. Ca. 181, 2 Vern. 340,³ which, as to this point, was thus. A man married an orphan whose fortune was in the Court of Orphans. He received about £40 and no more, and died, having devised the residue. The question was whether he could devise it or,

¹ Stat. 22 & 23 Car. II, c. 10 (SR, V, 719-720).

² *Fouke v. Lewen* (1682), 1 Vernon 88, 23 E.R. 331, also 1 Eq. Ca. Abr. 69, 154, 156, 21 E.R. 882, 953, 955.

³ *Pheasant v. Pheasant* (1670), 1 Chancery Cases 181, 22 E.R. 752, 2 Ventris 340, 86 E.R. 475, also 3 Chancery Reports 69, 21 E.R. 731.

in other words, whether it survived to the wife. And it was held that this money was a chose in action, that it did not vest in the husband, and, therefore, he could not devise it, but it survived to the wife.

This is a resolution in point almost. At least, I can discover no essential difference between this case and that now before us. The query made was whether the money in the Chamber of London was to be considered as a *debitum* or a *depositum*. If the latter, it seems admitted that it would vest, but it was held to be a *debitum*, because [an action of] trover would not lie for it, as it would for a *depositum*, and it was not recoverable without an action.

So I say the distributive part in the case before us is a *debitum* and not a *depositum*. Trover will not lie for it, nor can it be recovered but by a suit in equity.

This case agrees best with ours in circumstance. Here, the wife survived. In the other two cases, the husband was the survivor, and, in the latter case, he might have taken an administration to his wife for anything that appears. The point of survivorship may make a great difference.

There are many things a husband and wife have a joint interest in and which go to the survivor, as a decree or judgment for money due in the right of the wife.

Upon the whole, I conclude that it must be a great absurdity in the law to give this interest to the husband without any judgment or decree during the marriage, when, if there had been such a judgment or decree and the husband had died before execution, the benefit would have survived to the wife.

I, therefore, look upon this distributive share as a thing in action that did not vest merely by the marriage. There was no act during the marriage to attach the interest in the husband. And so it must survive to the wife, and not be subject to the husband's debts.

D'aeth and Baux, 1 Mod. Ca. L. and Eq. 63;¹ a motion for a prohibition to the spiritual court for suffering a married woman to sue singly upon the Statute of Distributions² because it was properly so vested in the husband that it might be released by him. But [it was] denied *per curiam*, for this was a chose in action and so much the wife's that she shall have it by survivorship.

This was a case in James City [County Court] upon a special verdict.

And the court gave judgment for the husband's administrator that the wife's distributive part vested in the husband, much against my opinion.

Brock, *ex dem.* v. Lyne
(October 1740)

A reversion which never vested descends to the heir of the donor, not to the heir of the donee of the first gift that never vested.

Susanna Orrill, seised in fee, makes a deed of gift to her son and heir, Orrill, in tail. She dies, leaving issue, this son and a daughter by her first husband and a son by a second husband. Orrill, the donee, dies without issue. The lessor of the plaintiff is his sister and heir, and the defendant is the donor's son by her second husband, and is her heir.

The query is whether the reversion which was expectant upon the determination of the estate tail created by the deed from Susanna Orrill to her son Orrill upon the death of Orrill, the son, descends to the heir of Orrill, the son, who is the plaintiff, or to the heir of the donor, Susanna Orrill, who is the defendant.

¹ *D'aeth v. Baux* (1711), 10 Modern 63, 88 E.R. 627.

² Stat. 22 & 23 Car. II, c. 10 (SR, V, 719-720).

Barradall for defendant: It must be agreed on all hands that, after the deed from Susanna Orrill to her son whereby she gives him only an estate tail, there was remaining in her a reversion expectant upon the determination of that estate tail. The reversion, upon her death, descended to her son, Orrill, the tenant in tail, and, after her death, he was tenant in tail with the reversion in fee expectant, all which I agree.

Upon the death of Orrill, the son, without issue whereby the estate tail determined, this reversion expectant, they say, descended to the sister and heir of Orrill, the son. But I say it descended to the heir at law of the donor, who is the defendant. This is the point between us.

It is a rule of law that I hope will not be denied that whoever claims an inheritance as heir must make himself heir to him who was last seised of the fee. 3 Co. 41, 42; Co. Lit. 11b, 15a.¹

Now Orrill, the son, was never seised of the fee simple. He was tenant in tail, and the fee simple was only expectant. The person who was last seised of the fee was Susanna Orrill, the donor, and whoever claims the inheritance must make himself heir to her, which the plaintiff is not, but the defendant.

In 3 Co. 42a, Ratcliff's Case, it is expressly said he who claims a reversion or remainder expectant as heir ought to make himself heir to him who made the gift. Susanna Orrill made the gift; the defendant is her heir, not the plaintiff.

In the rules which govern descents, we are not to look for solid reasons to support them; it is enough if the law is clear and settled.

The rules of descent vary in almost every country. And, perhaps, we shall find few of them founded upon the principles of right reason or natural justice. The rules of the civil and common law are widely different, and the lawyers of both sorts contend for the excellency of each. The inheritance descends to the eldest son by the common law, whereas, by the civil law, I mean the Roman, all the children succeed to the inheritance. The common law utterly excludes the half blood. By the Roman law, they succeed in the second place. In both these instances, the civil law seems to be preferable, more agreeable to nature and justice.

By the rules of descent that obtain in the law of England, the plaintiff cannot claim the inheritance as heir to her brother, because her brother never was seised or possessed of the fee simple.

The rule of law is *possessio fratris de feodo simplici facit sororem esse haeredem*. The rule is mentioned by Lit., sect. 8,² where, speaking that the half blood cannot inherit, he puts the case of a man having a son and a daughter by one marriage and a son by another. If, says he, after the death of the father, the elder son enters and dies without issue, the inheritance shall descend to his sister, but, if the elder son dies before he enters, then, it shall descend to the brother of the half blood, as heir to his father, because, says he, it is *possessio fratris* etc.

Coke, in commenting upon this section and this rule of *possessio fratris*, 1 Inst. 14, 15, puts several cases where the sister cannot inherit. And they all turn upon this point, where there is not an actual possession in the brother, for it is that that must make the sister heir. *Possessio*, says he, is *quasi pedis positio*. And, therefore, it is held in Ratcliff's Case, before-mentioned, that, if there be not an actual possession or if the inheritance be such of which an actual possession cannot be gained *per pedis positionem*, the half blood shall come in.

Now the inheritance here is a reversion expectant, which it is impossible in nature could ever be reduced to an actual possession *per pedis positionem*. And, therefore, by the rules of law, the sister cannot inherit, but it must descend to the heir of the donor.

Nay, in some cases, though the son actually enters, the sister shall not inherit if this possession is afterwards defeated by a legal title, as where the widow of the father recovers

¹ Norton, *ex dem. Ratcliff v. Rowland* (1592), 3 Coke Rep. 37, 76 E.R. 713; E. Coke, *First Institute* (1628), ff. 11, 14-15.

² T. Littleton, *Tenures*, s. 8.

dower against him. If the elder son dies in the life of the tenant in dower, his sister shall not inherit, but the brother of the half blood as heir to the father, because the elder son never had a rightful possession. 1 Inst. 15. If the father makes a lease for life or a gift in tail and dies and the eldest son dies in the life of tenant for life or in tail, the brother of the half blood shall inherit, because the tenant had the freehold and the elder brother only a fee simple expectant. *Ibid.* So here, the elder brother was in possession; it is true, but of what? Why, of an estate tail, but he had only a fee simple expectant.

Another case put by Coke cannot be distinguished from this. A gift is made to a man and his wife and the heirs of their two bodies, remainder to the heirs of the husband. They have issue a son; the wife dies; the husband marries again, and has issue, another son, and dies. The eldest son enters, and dies without issue; the second son, though of the half blood, shall inherit, for the eldest son was not actually seised of the fee simple which was expectant, but only of the estate tail, for the rule says he is *possessio fratris etc.* But, here, the elder brother was not possessed of the fee simple but of the estate tail.

This case is exactly ours. The son here, upon the death of his father, was tenant in tail with the reversion in fee expectant. He died without issue, and it was adjudged that the younger brother of the half blood, as heir to the father, should inherit, and not the heir of the elder brother.

For the plaintiff, it was argued by *Needler* and *Lewis* to this purpose. Upon the death of Susanna Orrill, the donor, the reversion expectant descended to her son, Orrill, the donee, who was her heir at the time. This descent must exclude the defendant, who cannot claim as heir to Orrill, the son, being only of the half blood, but, upon his death, the reversion must descend to his heir, who is the plaintiff. Upon the descent of the reversion to Orrill, the son, he was seised of it, and might have aliened or devised it. There was not, indeed, an actual possession, which cannot be by any possibility of an estate in expectancy.

But if he could dispose of it, surely, it ought to descend to his heir.

Suppose he had actually devised or aliened it. Could the defendant, then, have claimed against such disposition? It is not pretended.

The descent to his heir is the disposition of the law, and must work as strongly as the act of the party.

The rule *possessio fratris etc.* relied on by the defendant can extend only to cases where an actual possession can be had. It would be unreasonable to carry it to cases where possession cannot be had, which would be inconvenient and create confusion. The cases for the defendant came not up to this. The last cited out of Coke's *Institute* was governed by the remainder in the deed, and a remainder is different from a reversion.

The donor never intended the defendant should take anything in the land. He was not born when the deed was made. Upon the descent of this reversion to Orrill, the son, it vested in him absolutely to all intents and purposes. Otherwise, it would be in abeyance, which the law will not suffer. And this was much relied on.

The defendant is neither heir to the donee, nor was so to the donor when the reversion happened. In what right, then, can he claim?

To which it was replied, a great deal of pains has been taken to prove a point which nobody denies, that a reversion expectant upon the determination of an estate tail may be aliened or devised. If Orrill, the son, had disposed of the reversion in this case after the descent upon him, the present question would not have been made, which seems, indeed, to be strangely misunderstood on the other side, for it does not depend upon the reasonableness or unreasonableness of the thing nor upon the power Orrill had to dispose, which is admitted, but upon certain fixed and settled rules of law which govern descents. If the reason of the thing was to govern abstracted from those rules, I should be glad to hear a good and solid one assigned why the half blood should not inherit. Yet it is upon that rule or principle that the plaintiff can have any pretence of title. And it is upon another rule, *viz. possessio fratris etc.* that the defendant's title depends

Everyone who has a fee simple, either in possession or reversion, has a power to dispose, but, if he does not do it, the inheritance must go according to the rules of law which govern descents.

To say the rule *possessio fratris etc.* extends only to cases where possession can be had is a flat contradiction of the plainest and most positive authority and some of the best in the law. In Ratcliff's Case, it is expressly said that, if the inheritance be such of which an actual possession cannot be gained, the half blood shall come in. And, as to any inconvenience or confusion that may be the consequence, it wants pointing out, for I cannot conceive any.

It is said the case cited out of the *Institute* is not parallel because the remainder there was created by a deed. It is true the remainder to the husband is created by the deed, but, then, upon his death, the remainder descended to his son, who took it by descent, and not by purchase. And so, after his father's death, he was tenant in tail, with the remainder in fee expectant. Where then is the difference between that case and this?

Here, the remainder descended to him from his mother. In the case cited, the son was tenant in tail with a remainder in fee expectant, which remainder descended to him from his father. I know no difference between a reversion and a remainder in fee but in the manner of the creation. A reversion is where the owner does not part with his whole estate. Then it is said to revert or come back to him after the determination of the particular estate. A remainder is where the owner parts with his whole interest, giving a particular estate to one and the fee to another, which is called a remainder. And such remainder in fee will descend in the same manner as a reversion in fee. There is no kind of difference between them as to the business of descent.

The disposition of the law is doubtless as strong as the disposition of the party. But we say the law disposes in our favor, which is the point to be determined.

The donor's intention in the deed is quite out of the case. We are contending about the descent of the reversion, and claim nothing under the deed or that [it] is disposed of by the deed.

It is no good consequence that, because the reversion descended to Orrill upon the death of his mother, which we admit, that, therefore, it must descend from him to his heir. The cases cited prove the contrary, and clearly show that a reversion expectant does not descend in the same course an estate in possession does. There are other instances of this in the law. If there be a father and son and the son purchase land and make a lease for life and die, the reversion descends to his uncle, who dies, the father cannot be heir to the uncle of this reversion, because he was never actually seised. 1 Inst. 11b.

And, as to the argument that the fee would be in abeyance if it did not vest absolutely in Orrill, the son, every estate in expectancy may be said to be in abeyance, *vide* Plunket and Holmes, 1 Lev.,¹ for the word is derived from the French *bayer*, to expect. 1 Inst. 342b.² And there is no inconvenience that a reversion expectant upon an estate of freehold should be in abeyance, for the true reason why the law will not suffer the fee to be in abeyance (which I admit it will not, except in some instances *ex necessitate*) is because there would want a tenant to the freehold against whom a *praecipe* might be brought.

But this cannot happen where the fee is expectant on the determination of an estate tail, because there is a tenant of the freehold, *viz.* the tenant in tail. The rule, in truth, is only that the freehold shall not be in abeyance, for there are many instances where the fee may, as in the case of a lease for life, remainder to the right heirs of J.S.; the fee simple is in abeyance during the life of J.S. 1 Inst. 342b. So, if a tenant in tail grants all his estate, the grantee has only an

¹ *Plunket v. Holmes* (1661), 1 Levinz 11, 83 E.R. 271, also T. Raymond 28, 83 E.R. 15, also 1 Siderfin 47, 82 E.R. 961, 1 Keble 29, 119, 83 E.R. 792, 848.

² E. Coke, *First Institute* (1628), f. 342.

estate for the life of the tenant in tail, and the fee or inheritance of the tail is in abeyance during the life of tenant in tail. Lit., s. 650.¹

Upon the whole, though we are neither heir to the donee nor was so to the donor when the reversion descended from her, yet, inasmuch as the reversion was only expectant, by the rules of law in cases of descent, we are entitled to this reversion, because we are now heir to the donor and there never was nor could be such a possession as the law requires to make the sister, that is the plaintiff, take as heir to her brother.

Judgment [was given] for the defendant by the opinion of LEE, TAYLOE, GRYMES, and CARTER; RANDOLPH, CUSTIS, and ROBINSON [held] for the plaintiff.

84

Edwards v. Bridger
(October 1740)

A final judgment that was not properly entered in the record is not res judicata.

This was an appeal in an action of debt from the county court. The plaintiff had brought a former action, in which judgment was given against him, but it was not entered *quod querens nil capiat per billam*. This former judgment was pleaded in bar to the present action. There was a demurrer to the plea, and judgment in the County Court [was given] against the plaintiff.

But the judgment was reversed here, and the plaintiff had judgment for his debt.

The Court remembered a case of this kind several years ago, where they had given the like judgment. But note, in the Case of Palmer and Word, October 1738,² which see *postea*, this same point was insisted on, but not regarded by the court.

85

Curle v. Sweeney
(October 1740)

A crown grant of riparian land over which the tide ebbs and flows is null and void where the grant is made to anyone other than the upland riparian owner.

[In an action of] ejectment.

The plaintiff being seised of a lot of land in the Town of Hampton abutting upon the River Hampton and so described in the grant from the feoffees of the town land to the plaintiff's ancestor, the defendant, in the plaintiff's infancy, upon a suggestion that he had by industry gained some land out of the river, obtained a grant from the crown of a small parcel of land to be made out of the river before this lot. And he builds a house upon posts directly before the lot, under which house, the water ebbs and flows, so that the ground it stands upon is between high and low water mark. The grant from the crown of which the plaintiff's lot is parcel is bounded by the river or abutting upon it. And the river is navigable.

The plaintiff brings this [action of] ejectment to recover the house aforesaid built by the defendant before his lot.

The query is properly this, when the king grants land bounded by or abutting upon the sea or a navigable river where the water ebbs and flows whether the grantee has not a right to the land between high and low water mark or to any land that may be gained out of the river.

¹ T. Littleton, *Tenures*, s. 650.

² *Palmer v. Word* (1738), see above, Case No. 60.

All lands here are held mediately or immediately of the crown. And so they are in England, and, therefore, must have been first granted by the prince to the subject. Now there are numberless grants from the crown in England bounded by the sea, river, etc., but no one I believe ever saw a grant of land between the high and low water mark. Yet such land may be parcel of the manor of a subject, 5 Co. 107, Sir Henry Constable,¹ from whence I think it follows that, by the grant of land abutting upon or bounded by a river, the grantee has a right to the land or soil between the high and low water mark.

I conceive too that, if the water leaves the land or the grantee by industry gains land out of the water, it belongs to him and not to the crown.

It has indeed been a question, where the salt water has left a great quantity of land upon the shore, whether the prince shall have it by his prerogative or the owner of the land adjoining. It is made a query in Dier 326b, and he refers to several authors. But he cites a case 43 Edw. III, of the Abbot of Ramsey, who was sued on behalf of the king for forty acres of marsh. The abbot pleaded that he held such a manor next to the sea where there was a marsh which was sometimes lessened by the flux and increased by the reflux. And the title was found for the abbot.² And the reporter says Pas. 17 Eliz., in such a case in the Exchequer about Sandwich, a verdict was solemnly given against the queen.³ But there is a case in the margin of the book, of the Corporation of Romney, adjudged 8 Eliz., which is more express. It is thus. If the sea marks are gone so that it cannot be known whether there ever was land, there, the land gained from the sea belongs to the king, but, if the water covers the land at the flowing and leaves it at the ebbing so that the sea marks are known, if such land is gained from the sea, it belongs to the owner.⁴

In this case, the water ebbs and flows upon the land claimed by the defendant. But, if it was actually gained out of the water by industry, it belongs to the owner of the land adjoining, who is the plaintiff. It is plain, then, the king could not grant this land, which, by law, belonged to the subject and which he, in effect, had granted before. The defendant's grant is unusual and the first of the kind in this country or, I believe, in any other subject to the crown of England. I might add further that this grant was obtained in the lessor's infancy. And if grants of this sort are encouraged, no man who has lands upon navigable rivers can be secure of the greatest advantage attending them, viz. a landing prospect etc.

For the defendant, it was not attempted to support the grant from the crown. But it was insisted that the deed from the feoffees of the town to the plaintiff's ancestor did not take in the land where the house stood, for that the number of chains mentioned in the deed did not reach so far, which was admitted to be true.

But it was answered that the deed was bounded by the river. The town was laid out upon the river. And the king's grant, out of which the town land was taken, was abutting upon the river, by which the plaintiff had a right to the land left by the river if any was really left but that, in this case, there was none left, for the soil upon which the house stood was that upon which the water ebbed and flowed.

¹ *Constable's Case* (1601), 5 Coke Rep. 106, 77 E.R. 218, also 1 Anderson 86, 123 E.R. 367; British Library MS. Lansdowne 1088, f. 69; S. A. Moore, *A History of the Foreshore* (1888), pp. 224-241 (Sir John Constable's Case and Sir Henry Constable's Case).

² *Abbot of Ramsey's Case* (1369), S. A. Moore, *A History of the Foreshore* (1888), pp. 158-159, Exch. Repts. Middle Ages 26, Note, 3 Dyer 326, 73 E.R. 738.

³ *Digges v. Hamond* (1573), 3 Dyer 326, 73 E.R. 738, 110 Selden Soc. 347, and *Attorney General, ex rel. Nelthorp v. Hammond* (1575), S. A. Moore, *A History of the Foreshore* (1888), pp. 219-224.

⁴ Note (1573), 3 Dyer 326, 73 E.R. 738.

And it was further urged to show the inconvenience of allowing the defendant's pretensions that, by such practices as the defendant had used, there might not in time be a landing place left to Hampton Town.

Judgment [was given] for the plaintiff *per totam curiam*.

86

Coleman v. Dickenson
(October 1740)

Property held in trust for a woman does not vest in her husband upon their marriage nor does it go to the husband's administrator upon his death.

In chancery.

James Alderson and Ann, his wife, by deed dated 10 July 1712, reciting that Ann, at her marriage, was possessed of three slaves and that, by the law, they were real estate, bargained and sold the slaves to one Hunter for sixty years if the said James and the Negroes should so long live, in trust and to the use of the said James and Ann for their lives and to the use of the survivor if the Negroes should so long live, with this proviso that, if Ann should die before James, it should be lawful for her, by will, to dispose of the Negroes after his death and with this further proviso, that, if the Negroes had any increase during the term, that they should be taken care of until they were fit to be removed from their parents.

The husband died first. The wife, who had made a will before his death, republished it afterwards. And, by this will, she has taken upon her to dispose not only of the three Negroes mentioned in the deed but also their increase to the plaintiff Elizabeth.

The query is whether, as the husband died first, the wife had the power by this deed or otherwise to dispose of the Negroes or their increase.

When this deed was made, it was the general opinion that a woman's slaves did not vest in her husband by the marriage. This was the construction of the Act of 1705 by which slaves were first made a real estate. It will however be allowed that this was a mistaken opinion and a wrong construction of the Act. The Explanatory Act of 1727,¹ having declared that:

where any slaves have been or shall be conveyed, given, or bequeathed or have or shall descend to any feme covert, the absolute property is thereby vested in the husband.

After repeating these words, I may venture to take it for granted that the slaves of Ann Alderson vested in her husband by the marriage. And it will scarce be pretended, I presume, that the husband's mistake as to his right, which appears in the recital of the deed, did at all lessen or destroy that right.

From these premises, these two conclusions follow: first, that the wife can have no pretence of right but what she can derive from the gift or disposition of her husband; and, second, that, as the husband had the absolute property in these slaves, so much of that property in them and their increase as was not disposed of by the deed now before us remained in the husband, and, upon his death, must go to his representatives.

The business, then, is to see how far the property of these slaves or their increase is disposed of by this deed.

It is scarce worth observing that this deed is to be considered merely as the act of the husband. It is well known a married woman cannot make a deed in any case except where she

¹ Act of 1705, c. 23, 3 Hening's Statutes 333-335; Act of 1727, c. 11, 4 Hening's Statutes 222-228.

is empowered by some particular law or agreement so to do. But, as the wife here had really no interest in the thing conveyed, her joining or not joining in the deed cannot differ the case.

The deed, then, I conceive, ought to be considered thus. A husband conveys his slaves to trustees for sixty years if he should so long live to the use of himself and his wife and the survivor for life with a power to the wife, if she died first, to dispose by will after his death. I say nothing here of the second proviso which regards the increase; that I shall consider by and by.

What is there more in this deed than a limitation to the husband and wife for life with a power to the wife to dispose upon the contingency of her dying in her husband's lifetime? If this contingency never happened, can she have a right to dispose by virtue of this power? Certainly no. And that is truly all the question in the case.

There is surely some difference between an absolute power and a limited one or a power that is to arise upon some future contingency. If a man give his executors a power to raise a sum of money out of his estate in case he leaves a daughter, this power cannot be executed if he leaves no daughter, because it is to arise upon that contingency and not otherwise. So here, the power given to the wife is not a power of disposing at all events but only upon the contingency of her dying in her husband's lifetime. The words of the deed are not only plain to this purpose, but it was apparently the intention of the parties, for, under the mistaken notion they were that the slaves did not vest in the husband, they concluded that, if the wife survived, she would by law have a power to dispose, and, therefore, there could be no necessity to provide for that, but only that she might dispose during the marriage if she died first.

Thus, neither from the words of the deed nor the intention of the parties, is there the least ground to infer that an absolute power of disposing was designed to the wife, but only a power upon a contingency, which, not happening, she had no power of disposing by virtue of this deed. And, if she had none by the deed, she had none at all, as I hope I have demonstrated.

Let us consider a little further the nature of this deed. It is a conveyance to a trustee for sixty years if the husband so long lived. This trust and term then were to continue no longer than the life of the husband, and, so, upon his death, they both expired and determined. And, consequently, the power which was to be executed during the term must cease and be void. Neither the trust nor the term nor the power given to the wife from the frame and nature of this deed could possibly subsist after the husband's death.

As to the mistaken notion of the parties with respect to the right to those Negroes, as that mistake could not alter or destroy the husband's right, so neither can it be any argument to give this deed a different construction or operation from what it would have had if the husband had known it. Perhaps, if he had, he never would have executed this deed at all.

If, therefore, we regard the operation of this deed in point of law or if we regard the intention of the parties in making it, it is plain the wife had no power of disposing but upon the contingency of her dying in her husband's lifetime. And, therefore, her disposition to the plaintiff is void.

Equity will often supply a defective execution of powers. But I never read or heard that a court of equity would create new or different powers from those created by the parties or extend or enlarge them beyond what the words of the deed or the intention of the parties would carry them. Yet this is what must be contended for to support the wife's disposition in this case. The power created by the deed is upon a certain contingency which never happened. And yet they will have it that the wife may dispose by virtue of that power. What is this but setting up a different power in the wife from that given her by the deed.

As to the increase of the three slaves mentioned in the deed we have been speaking of, which are the other six slaves claimed by the plaintiff under the will of Ann Alderson, I really cannot even conjecture what may be said in support of the plaintiff's title to them.

The bill (whether designedly or not I cannot tell) does not mention those six slaves as the increase of the three, though I daresay they will be granted to be such, but only sets forth that Ann Alderson devised the three slaves in the deed and six others without showing her title

to them. This is one of the causes of demurrer that it is not suggested she had any right to the increase or to dispose of them.

I have already observed, and I hope it will be granted, that so much of the property of the three slaves and their increase as is not disposed of by the deed remained in the husband, the whole property vesting in him by the marriage.

Now, it is plain from the whole tenor of the deed as well as a particular proviso of it that the increase were never intended to be within the trust thereby created. The term is limited for sixty years if James Alderson and the three Negroes should so long live, so that, if the three Negroes had died, the whole trust had determined. The proviso which gives the wife a power of disposing upon the contingency mentioned takes notice only of the three slaves without saying anything of the increase, all which is sufficient to show that they were never intended to be comprised within the trust at all.

But there is a second proviso which puts the matter beyond all doubt. By this, there is an express provision concerning the increase that they shall be allowed to remain with their parents until they were fit to be removed. So that whatever the determination may be with respect to the wife's right of disposing the three Negroes, I conceive the matter as to the increase will admit of no doubt or question.

On the other side, it was urged that the limitation of the trust being to the use of the husband and wife for life and to the use of the survivor, that the wife, surviving, was well entitled to the slaves mentioned in the deed and that the property of the increase must follow that of the parents.

And so it was decreed by the court.

87

Buckner v. Chew
(October 1740)

Where land is conveyed by acreage 'more or less', the grantee cannot sue for an ejectment unless he is evicted from the whole parcel of land.

In chancery.

The case was shortly this. Chew, the defendant's father, in 1707, sold and conveyed to the plaintiff's father two parcels of land containing by estimation 2520 acres, be the same more or less. And, in the deed of conveyance, were the usual covenants in the case of purchase. A great part of the land was recovered from the plaintiff by an elder title.

The bill suggested that Chew, after the conveyance to the plaintiff's father, gave to the defendants, some of them his sons and others married to his daughters, considerable estates, and he, afterwards, died insolvent. And the end of the bill was to have a discovery of the estates given to the defendants and that the same might be subjected to satisfy the plaintiff the value of the land he had lost.

The defendants, by their answers, insisted that the estate given to them by their father was so given before the plaintiff was evicted and so not done with intent to defraud the plaintiff and that the conveyance from Chew, being of 2520 acres more or less, the plaintiff could have no right to a remedy for the deficiency nor unless evicted out of the whole.

Two of the defendants, J. Chew, one of the sons, and Johnston, who married one of the daughters, also pretended by their answers that the estate given to them was in consideration of marriage, of which some proofs were taken. There were also some proofs concerning the value of the plaintiff's loss and of the estate given the defendants.

Barradall, for the plaintiff: The points in this case are two, first, the conveyance being 'more or less', whether we can have a remedy for a deficiency, second, [as to] estate given to defendants before an eviction, whether [it is] subject to the plaintiff's demand. If these [go] in

the plaintiff's favor, third, how far the plaintiff's loss and estate in the defendants' hands are ascertained.

The first point [is] a strange one: the common form of deeds, words of course or, at most, intended to supply only little mistakes. In the construction of deeds, the intention [is] to govern what was the contract and intent here.

The grantor, in consideration of £120 sterling, conveys two parcels of land containing by estimation 2520 acres, be the same more or less, covenants to warrant the premises and every part thereof, that he is seised in fee, and has a good right to convey, that the grantee shall quietly enjoy, and that he will make further assurance of all and singular before-granted premises.

This [is the] usual form and covenants of purchase for valuable consideration. [There is] no instance that 'more or less' must oblige a purchaser to be satisfied with half [of what] he bought.

Here is a valuable consideration, equivalent to the land sold at time. [It is] reasonable to suppose so much was agreed for. The manner of penning the covenants show the intent further; if the covenants [were] not intended to extend to the quantity, [it] would have been an exception.

Pannel's deed to Chew shows what Chew intended to purchase and the same he intended to sell. These circumstances prove the contract and the intent.

'More or less' [are] words of course added *currento calamo* [and] cannot control a plain agreement.

If the words were unusual, something might be inferred. The notion is new. There is no authority.

[It is a] universal concern to purchasers. If [there were] but 100 acres, we must have been contented, according to the doctrine of the defendant. [It is] introductory of fraud.

[The] second point [is] whether the estate given to the defendants [is] liable, being before eviction. Two of the defendants, J. Chew and Johnston, pretend to something of a consideration, viz. marriage. It will be, therefore, proper to consider, first, the voluntary, then, the pretended consideration, as voluntary, fraudulent, and void against creditors. By the common law and the old Statute, fraudulent gifts to deceive creditors are void. 13 Eliz., 5, is a useful Statute made.¹ The preamble [is] to this effect, for avoiding and abolishing of feigned, covinous, and fraudulent feoffments, gifts, etc. devised to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, etc. [It] enacts that every feoffment, gift, etc. by writing or otherwise made to or for any intent or purpose before declared or expressed shall, against the person whose action etc. are, shall, or might be anywise disturbed, hindered, delayed, or defrauded, be void etc., any pretence, color, or feigned consideration notwithstanding; proviso not to extend to gifts upon good consideration and *bona fide*. The Act was penned with care and caution. Every voluntary gift by a person in debt [is] fraudulent within this Statute. The law supposes so, though, perhaps, [it was] not done with a direct intent to defraud. [See the] cases *Holcraft*, Di. 294b; *Margaret Fletcher and Lady Sedley*, 2 Vern. 490; *Sir Anthony Bateman*, 1 Mod. 76.²

Objection: Here is a gift made before the plaintiff [was] damnified.

Then, the query is whether this differs the case. I conceive not. [It is] plain 13 El. had in view cases of this sort; the words are to defraud creditors and others of their actions, suits, debts, damages, etc.

¹ Stat. 13 Eliz. I, c. 5 (SR, IV, 537-538).

² *Holcraft's Case* (1613), 3 Dyer 294, note, 73 E.R. 661, note; *Fletcher v. Sedley* (1704), 2 Vernon 490, 23 E.R. 913, also 1 Eq. Cas. Abr. 148, 21 E.R. 949; *Bateman's Case* (1671), 1 Modern 76, 86 E.R. 744, also 1 Ventris 166, 86 E.R. 112.

In *Pauncefort and Blunt*, cited in *Twine*, 3 Co. 82,¹ [it was] resolved it extends not only to creditors, but to all others who have a cause of action or suit, penalty, or forfeiture.

Here, we had a cause of action immediately upon the covenant that he had a good title; such actions are not new here. *Washington and Wyat*. But, if that was not the case, we are within the provision of the Act. The words are 'against persons whose actions etc. are, shall, or might be anyways delayed, hindered, or defrauded'.

Now, that we have a cause of action cannot be denied, and our action is hindered and defrauded by these conveyances.

Suppose a bond for the payment of money at a future day. The Act [is] always construed liberally. *Pauncefort and Blunt*, before cited, one indicted of recusancy.

The doctrine on the other side [is an] encouragement to fraud; men will not be afraid to dispose of bad titles. [It is a] general concern to purchasers. The law implies a trust in cases of this sort. *Twine*, 81.²

Consider now the case of *J. Chew and Johnston*. *Johnston* says, upon a treaty of marriage with the grantor's daughter in 1723, he promised him as a portion 1000 acres of land and a Negro boy worth £150, that he received some things, which he mentions, but not near the value. [There is] no proof of this promise, but it seems contradicted by two witnesses, *Nicholas and Elizabeth Hawkins*.

The defendants' oath [is] no evidence. [It] would not be so against the grantor nor consideration of a creditor. [It is] impossible to prove a negative, viz. no such promise. Circumstances alone are all that can be expected. If a defendant's oath [is] to prevail singly, the Act [is] easily evaded, [which is] dangerous.

[There is] less reason here, because the answer [is] contradicted in other points. He says he had only two Negroes. We prove [this] by three witnesses, *N. Hawkins, Franklin, and Graves*, that he had three, and, by *Tribble and Franklin*, that he had 220 acres. *J. Crew* says his father, being indebted to one *Cary*, told him, if he would help to pay that debt, he would give him 335 ares of land and four Negroes, that he paid £25; his father, in 1724, put him in possession and, in 1728, in consideration of *H.B.*'s consenting to defendant's marriage [to] his daughter, by deed, made the same over and two slaves more.

[There is] no proof of this money being paid, which might easily be had. The discourse between *Chew* and *H.B.* proves the estate was given before the marriage and before that discourse; so it could not be to induce *H.B.*'s consent. We have a deed. The consideration [is] only £8 and natural affection. The defendant's oath [can]not to prevail against this.

But let us consider this in the strongest light for the defendants. In one case, the father gives his daughter a portion, but no settlement [is] made; in the other, he gives his son an estate to procure a good match, but [there is] no settlement neither. It is a settlement only [that] can make a valuable consideration, for, then, they are in the nature of purchasers. A settlement after marriage [is] not good against creditors. *Upton and Bassett*, Cro. El. 445; Cro. Ja. 158.³

If this [be] allowed, [it would be] easy for a man to cheat his creditors. Marriage is only a valuable consideration where [there is a] settlement. But, there being no settlement, the marriage makes no difference, but the gifts are equally voluntary as if there was no marriage in the case.

As to *Johnston*, I say he has not proved any such promise on his marriage, as he pretends. Or, if there was, as he made no settlement, he is not to be considered as a purchaser.

¹ *Pauncefoot v. Blunt* (1593), 3 Coke Rep. 82, 76 E.R. 816.

² *Attorney General v. Twyne* (1601), 3 Coke Rep. 80, 76 E.R. 809, also Moore K.B. 638, 72 E.R. 809.

³ *Upton v. Basset* (1595), Croke Eliz. 445, 78 E.R. 685; *Colvile v. Parker* (1607), Croke Jac. 158, 79 E.R. 138.

As to J. Chew, he proves nothing of the money he pretends to have paid. Or, if he did, he could only be a purchaser *pro tanto*.

As to his marriage, it is a mere farce to insist upon it. But there is no proof the estate was given in consideration of that marriage. The deed of conveyance proves it was upon another consideration, *viz.* natural love and £8, and that ought to prevail before the defendant's oath.

If there was proof of the £8 being paid, he might be a purchaser for so much. But, as the deed contradicts his answer as to the *quantum* paid and there is no proof of either, in such an uncertainty, the court must reject both, as I hope they will.

The rule laid down in Twine's Case is that a gift which defeats others should be made on as high and valuable consideration as the things which are thereby defeated are. According to this rule, nothing but money can be a valuable consideration to defeat a debt. And, then, the marriages are nothing to the purpose.

If the court is of opinion that the estate in the defendant's hands ought to be subjected to the plaintiff's demand, it will be proper in the next place to see what the loss and damage of the plaintiff is. Upon the proofs, by moderate computation, it was estimated at £240.

If the court are not satisfied with the computation, they must direct a trial at law on a [writ of] *quantum damnificatus*.

The next thing to be considered is in what manner the estate in the defendants' hands is to be made liable. And I take it the course of equity is to decree the estate to be delivered up and sold to satisfy, for the grantees are considered merely as trustees, as has been already observed.

But, if this shall be thought severe, as the defendants' have settled upon the lands, we hope they shall be accountable for the full value now, for, if the estate was in the hands of the heir or administrator, we should recover according to that value.

The first point only was spoken to by the defendants.

Upon which, a great majority of the court were of opinion that the plaintiff ought not to be relieved, as the conveyance was of so much more or less unless the plaintiff had been evicted out of the whole.

Which I think was a strange determination.

88

Knight v. Triplett
(October 1740)

The recording statute that declares that an unrecorded deed is void as against subsequent purchasers applies to protect subsequent purchasers who had notice of the prior unrecorded deed.

In chancery.

The defendant made a purchase of certain lands, of part whereof the plaintiff had a lease for years, which was not recorded. The defendant had notice of this lease before his purchase, yet brought an [action of] ejectment, and had a judgment at law. And this bill was brought to be relieved against this judgment and to establish the lease against the defendant, in regard he had notice of it and so he was not deceived but, with respect to him, it was the same as if it had been recorded.

To this bill, the defendant demurred. And, to support the demurrer, it was argued that, by the Act of Assembly of the 8 Geo. II, c. 6,¹ this lease, not being recorded, was void against a purchaser. The words of the Act are to this purpose. All deeds etc. whether for passing a

¹ Act of 1734, c. 6, s. 3, 4 Hening's Statutes 398.

freehold or term of years not recorded shall be 'void as to all creditors and subsequent purchasers'.

It is a rule that equity never decrees against an Act of Parliament, which, indeed, would be transferring the legislative power.

It is true this Act was made to prevent purchasers being deceived, and, here, the purchaser had notice, and so could not be deceived.

But I answer the Act has made all deeds not recorded void, and there is no exception where the purchaser has notice. And, as the Act makes no exception, neither can a court of equity. This notice can never make that good which the Act has declared void. Besides, the defendant might think he might safely purchase notwithstanding the lease, as the Act had declared it void, and that is the truth.

In this view, it must bring a strange hardship upon the purchaser. He is informed of an encumbrance, takes advice of a lawyer, who tells him the encumbrance cannot affect him because an Act of Parliament had declared it void, and yet, afterwards, this encumbrance shall be set up under pretence of notice.

There is no instance of this in the law, but there are cases exactly parallel against it.

By the Statute 27 El., 4, against Fraudulent Conveyances,¹ it is enacted that all deeds made to defraud or deceive purchasers shall be void. This is very like our Act; all deeds not recorded shall be void.

A man makes a purchase, and has notice before of a deed that was fraudulent within this Statute. And it was adjudged that he should avoid the fraudulent deed notwithstanding the notice, for this reason, because the Act had by express words made it void and his notice could not make that good which the Act had declared void. Standen's Case, cited in Gooch's, 5 Co. 60b.²

The Case of Porter and Jones³ was much harder than this, for there was a purchaser for a valuable consideration without any kind of remedy, whereas the plaintiff may have a remedy for damages against Thompson. But, there, the court would not relieve, because this very Act had declared the deed was not binding.

The hardship can never induce the court to decree against a positive law; besides, the hardship is not so great, as there is a remedy against Thompson. And the hardship may be greater upon the purchaser, who has paid the full value of the land upon a supposition the plaintiff's lease was void and who purchased under the sanction of the Act.

The demurrer was allowed, and the bill dismissed with costs.

Sed quaere.

Senior v. Morris
(April 1741)

If the arbitrators cannot agree, they must appoint an umpire to decide the matter, which umpire decides independently of the arbitrators.

An award of an umpire that is uncertain is invalid.

Error to reverse a judgment of the County Court of Caroline [County] in an action of debt brought there by the defendant against the plaintiff Senior.

¹ Stat. 13 Eliz. I, c. 5 (SR, IV, 537-538).

² *Standen v. Bullock* (1605), 5 Coke Rep. 60, 77 E.R. 147.

³ *Jones v. Porter* (1740), see above, Case No. 79.

The plaintiff below declared on a bond in the penalty of £40, the condition of which was to stand to the award of Fleming and Baber, arbitrators, provided they shall agree and, if they disagree, then, to the award of an umpire to be chosen by them.

The defendant craved oyer, and pleaded no award. The plaintiff replied that the arbitrators took upon them the burden of the award, but, disagreeing in several matters, they chose one Scott an umpire and that they and Scott having taken upon them the burden of the award, they made an award, which is set forth. It is a masterpiece of nonsense.

The defendant demurred. Judgment [was given] for the plaintiff; and a writ of enquiry [was granted]. The jury gave £5 12s. 8d. damages. Judgment [was] entered for the damages and not for the penalty of the bond.

On the demurrer, a judgment ought to have been given for the defendant.

Objection 1: The award being made by the arbitrators and umpire is not according to the submission or the power given them. The power given to the arbitrators is to determine if they can agree; if not, they are to choose an umpire. The award recites that the arbitrators could not agree, yet they join in making the award. Upon their disagreement, their power was determined, and the umpire was solely to determine. The arbitrators and umpire are different judges, and cannot have a concurrent jurisdiction. 1 Sid. 455, *Coppin and Hurnard*, 1 Danv., 540, 2. There never was an instance of such an award. Arbitrators cannot determine part and the umpire another part unless expressly so provided, 1 Ro. A. 262, 7, 8; Danv. 542. Umpire in the common signification denotes a person that is to make an end if others cannot. It is true, if a submission be to four and to the umpirage of J.S., they may all join, but it is otherwise if their power is divided. 1 Bul. 184, which is in point.¹

Objection 2. The award is uncertain. An award is in the nature of a judgment, and ought to be certain. Danv. 543, 1, and notes. And it ought to be wholly decisive. Can there be said to be certainty in nonsense? Here is nothing actually awarded. It is said they agree the gaming to be entirely false gaming and not anything is to be recovered that was supposed to be won by gaming and that the said Senior pay all costs etc. Nothing certainly [was] awarded, not that suits shall be dismissed, nor is it said what costs Senior shall pay. It does not put an end to the controversy. No release is to be executed [*blank*] *ex parte*. An award to pay costs of such a suit generally is not good. 1 Sal. 75. Otherwise, if such, as a Master, shall tax.² But, here, it is not said the costs of what suits.

Objection 3: The judgment [was] wrong. [It] should have been for the penalty etc.

The judgment [was] reversed.

¹ *Coppin v. Hurnard* (1670), 1 Siderfin 428, 455, 82 E.R. 1198, 1214, also 2 Williams Saunders 127, 85 E.R. 849, T. Raymond 187, 83 E.R. 98, 1 Levinz 285, 83 E.R. 409, 1 Modern 15, 86 E.R. 694, 2 Keble 562, 619, 84 E.R. 353, 389; *Barber v. Giles* (1618), 1 Danvers, Abr., *Arbitrament*, pl. P, 2, p. 540; *Curson v. Sturmer* (1460), YB Mich. 39 Hen. VI, f. 9, pl. 15, 1 Rolle, Abr., *Arbitrement*, pl. P, 7, 8, p. 262; 1 Danvers, Abr., *Arbitrament*, pl. P, 7, 8, p. 542; *Anonymous* (1612), 1 Bulstrode 184, 80 E.R. 873.

² 1 Danvers, Abr., *Arbitrament*, pl. Q, 1, p. 543; *Winter v. Garlick* (1704), 1 Salkeld 75, 91 E.R. 71, also 2 Salkeld 797, 91 E.R. 650, 6 Modern 195, 87 E.R. 949.

Smither v. Smither's lessee
(April 1741)

In this case, it was held that the devise in issue created a fee simple, and not a life estate, in the devisees.

Appeal from Gloucester [County Court].

[In an action of] ejectment for the moiety of 864 acres of land, a special verdict is found, upon which the case is [thus]. John Smither, seised of the said 864 acres in fee and having issue eight sons, devises as follows:

I give to my wife all my full and whole estate, movables and immoveables, so long as she lives the wife of John Smither, and, at her death, all to be equally divided among their children, only Moses Smither I give and bequeath besides one young cow, and, more, I give and bequeath to my son Ambrose one feather bed and furniture and one young mare, and, then, the full and whole estate to be equally divided amongst them under before as the land and all.

The sons entered and were seised. And three of the younger, Robert, Richard, and Ambrose, sold and conveyed their right to their brother Moses, who is dead. And the lessor is his heir. The defendant John is the eldest son of the testator.

The question in point of law is whether the sons, by the devise to them, have an estate in fee or for life only.

But the verdict is very imperfect. It is not found that the testator's wife is dead. And, by the words of the will, the sons can have nothing until after her death. The lessor cannot, therefore, have judgment on this verdict.

Then, the county court have given judgment for a moiety of the 864 acres, whereas, if the sons take an estate in fee, it is plain the lessor is not entitled to so much, for Moses, her father, is expressly excluded by the will. She has only the right of three of the other sons. There were seven besides Moses. She cannot then be entitled to more than three-sevenths. The county court have, therefore, certainly erred in giving judgment for a moiety. And the judgment must be reversed.

But I conceive the question in point of law is against the lessor and that the sons have only an estate for life by the devise above and that the reversion descended to the heir at law, the defendant.

The testator devises his 'full and whole estate, movables and immoveables,' to his wife for life if she continued his widow, for so it must be understood. And, 'at her death, all to be equally divided among their children'. Then, he gives some particular legacies, and concludes thus, 'then, the full and whole estate [is] to be equally divided amongst them under before as the land and all'. These are all the words of the will that concern the present question.

By the first words, 'his full and whole estate, moveables and immoveables', there is no doubt but his lands will pass. And so, in consequence, they will by the word 'all' in the devise to the children. But, then, there are no words to show what estate or interest in this all the children are to take. It is only to them to be equally divided. [There is] no mention of heirs or any other word to show the testator intended an estate of inheritance or any more than an estate for life. As to the words 'equally to be divided', they import no more than that the children shall hold separately, but do not show how long they shall hold. Nor is there anything in the latter part of the will that shows any intention to give an estate of inheritance to the children or more than an estate for life. The words import no more than what was said before, 'my full and whole estate is to be equally divided between them under before as the land and all'. The

words 'under before as' are insensible, but the whole clause can import no more than this, 'my full and whole estate to be equally divided, as before, the land and all', so that it is only repeating what was sufficiently expressed before with this difference only, that the land was not expressly mentioned before, though it was sufficiently implied by the word 'immoveable'. There is nothing here anymore than in the former part of the will to show what interest or estate in the land the children shall have.

It is a common doctrine, and not to be denied, that the intention of the testator is the rule for expounding, provided this intention be sufficiently expressed in the will and is not contrary to the rules of law. But, where the intent is not plain, the same construction is made of wills as of deeds. *Wild's Case*.¹

Upon this account, the law dispenses with all form in wills. Nor are the same words necessary to create an estate of inheritance upon a will, as upon a deed. Yet, there must be some word or expression in the will to show a testator intends such an estate, or, else, it will no more pass by a devise than it will by a conveyance.

And I take it to be a settled rule in the construction of wills that, if a man devises his lands or all his lands to another without more or without adding some word whereby it may appear he intended more than an estate for life, that only an estate for life passes by such a devise. 1 Sal. 235.²

The words here are 'all to be equally divided among my children'. Neither the word 'all' nor the words 'equally to be divided' show any intent that the children should have longer than for life. The word 'all' can only import all the particulars before specified that are given to the wife, as I shall show more fully presently. And 'equally to be divided' imports only that they shall hold separately, but not how long, as has been adjudged in many instances.

A man devised lands to his sons and daughters to be equally divided, and [it was] held they had only an estate for life and not in fee, for the equal division does not go to the continuance of the estate, but to the several occupations. 1 Ro. Abr. 834, 13, by Coventry, Lord Keeper, upon advice with Justice Jones, who certified the law to be so.³

A man having three daughters devised his land to his wife for life and, after his death, to his three daughters to be equally divided; [it was] adjudged that the daughters had only an estate for life. *King v. Remball*, 1 Ro. Abr. 834, 1.⁴ This is exactly the case here.

One devised all his lands and goods after his debts and legacies paid to R., T., and M., his children, to be equally divided between them; [it was] adjudged [that] only an estate for life passed to the children. *Dickens v. Marshall*, Cro. El. 330, Mo. 594, pl. 804, same case.⁵

These cases sufficiently prove that the words 'equally to be divided' do not enlarge an estate given, but refer only to the several occupation.

¹ *Wild's Case* (1599), 6 Coke Rep. 16, 77 E.R. 277, also 1 Eq. Cas. Abr. 181, 21 E.R. 973, Gouldsbrough 139, 75 E.R. 1050, *sub nom. Richardson v. Yardley*, Moore K.B. 397, 72 E.R. 652.

² *Cole v. Rawlinson* (1703), 1 Salkeld 234, 91 E.R. 207, also 2 Lord Raymond 831, 92 E.R. 55, Holt K.B. 744, 90 E.R. 1309, 3 Brown P.C. 7, 1 E.R. 1141, 2 Eq. Cas. Abr. 300, 22 E.R. 252.

³ *Anonymous* (1627), 1 Rolle, Abr., *Estate*, pl. N, 13, p. 834.

⁴ *King v. Rembal* (1617), 1 Rolle, Abr., *Estate*, pl. N, 1, 2, p. 833, also Croke Jac. 448, 79 E.R. 384, 1 Eq. Cas. Abr. 182, 21 E.R. 974.

⁵ *Dickens v. Marshall* (1594), Croke Eliz. 330, 78 E.R. 579, Moore K.B. 594, 72 E.R. 780, also Gouldsbrough 182, 75 E.R. 1080.

But, then, here are the words 'my full and whole estate' in the first part of the will in the devise to the wife. And also the same words with the addition of 'lands and all' in the latter part of the will. And these are the words, if any, that can possibly carry a fee. But I conceive they cannot by any reasonable intendment or construction in this case.

I shall readily agree that, if a man devises all his estate or his full and whole estate, as here, or all the residue of his estate without more, that a fee will pass by such words. And this is all that can be collected from the great case between the Countess of Bridgewater and the Duchess of Bolton, 1 Sal. 236 and 6 Mod. 106,¹ though, in that case, it was not those words alone which influenced the opinion of the court. There was a power given by the will to the earl of Bridgewater, the devisee, to give to his children as he thought convenient, which further evinced the testator intended a fee.

But I conceive a great difference between a devise in that manner and this now before us. It is certain that the word 'estate' in a will may sometimes comprehend both the thing and the testator's interest in it. But it is as certain that it sometimes signifies only the thing, and not the interest of the testator in that thing. Where a man gives all his estate without more, it is reasonable to suppose he intends both the thing and the interest, but, where a man gives all his estate for life, there, it is plain he cannot intend all his whole interest. And, therefore, 'estate', in that case, can be intended only of the thing.

In the Case of Hanchet and Thelwall, 3 Mod. 104,² the devise was thus. 'I give and bequeath to my son Nicholas my houses in Westminster and, if it please God to take away my son, then, I give my estate to my four daughters, share and share alike.' Here, the word 'estate' referring to the houses, it was held and agreed that the testator could not mean his interest but only the houses and that, therefore, by those words, the daughters took only an estate for life.

Now, in this case, I apprehend it to be extremely plain that the testator by the word 'estate' meant only his lands and goods, and not his interest in them. He gives his 'full and whole estate, movables and immoveables', to his wife for life. I would ask what idea it can be supposed the testator annexed to the term 'estate' here. Certainly, he could not mean his interest in his estate, because he gives it to his wife for life only. He must then understand by it the thing only, which indeed he has further explained by adding the words 'moveables and immoveables'. And it is in effect no more than if he had said 'I give my lands and goods to my wife for life.'

Then follows, 'after my wife's decease, all to be equally divided among my children.' All what? Why, all his lands and goods or his estate, moveables and immoveables, for they are the same; not all his interest in the lands and goods. The word 'all' must necessarily refer to the things, the particulars before specified.

And it appears by the case of Dickens and Marshall, before cited, that, where a man devised all his lands and goods after his debts and legacies paid to be equally divided among his children, that they had only an estate for life. And the same point appears in Pettywood and Coke, Cro. El. 53, *post*.³

The latter words in the will are the same in substance with those that go before. After giving some legacies, he says then the 'full and whole estate to be equally divided among them under before as land and all.' Now, what can be the full and whole estate mean here but that

¹ *Countess of Bridgewater v. Duke of Bolton* (1704), 1 Salkeld 236, 91 E.R. 209, 6 Modern 106, 87 E.R. 866, also Holt K.B. 281, 90 E.R. 1054, 1 Eq. Cas. Abr. 177, 21 E.R. 970, 2 Eq. Cas. Abr. 299, 22 E.R. 252.

² *Hanchet v. Thelwal* (1686), 3 Modern 104, 87 E.R. 66.

³ *Pettywood v. Cook* (1587), Croke Eliz. 52, 78 E.R. 314, also *sub nom. Putnam v. Cook*, 3 Leonard 180, 74 E.R. 619.

he had mentioned before and given to his wife. When a man makes use of the same expression twice in the same will, it is reasonable to suppose he means the same thing in both places. It is, I think, beyond all question that, by the words 'full and whole estate' in the devise to his wife, he could mean only the thing that is his lands and goods and not his interest in them. And must we not then suppose he meant the same thing in the latter part of his will? The insensible words 'under before as', which I think must be understood as 'before', plainly refer to the former devise. If, then, the former devise does not carry a fee, neither can this.

And, here, by the addition of the words 'land and all', I think it is still further evident that, by 'estate' he meant his land and not his interest in it. And, if so, there are no words to give the children more than an estate for life.

If it be objected that the testator perhaps might think that, by giving all his lands and goods to his children, [a] fee would pass, I answer a testator's intention is to be collected from the words of his will and not from suppositions and imaginary notions. The law gives a favorable interpretation to wills upon a supposition that they are made in a man's last moments when he has not opportunity for good advice. But we are not for this reason to make any construction that cannot be fairly collected from the words of the will.

When a man gives all his lands and goods to his children and says no more, it is reasonable enough to suppose he intends them a fee in the lands. But, as there are no words to manifest that intention, they can take only an estate for life. And the devise here is no more in effect.

It is true the word 'heirs' is not necessary to carry a fee, as it is in a deed, but there must be some words as 'forever', the word 'assigns', or the like to show more than an estate for life was intended.

In this case the devise is only to the children to be equally divided. And, as those words do not enlarge the estate, there are no other words that can.

I will mention one case more where we have the words 'all' and the words 'equally to be divided', and yet the devisees were adjudged to have only an estate for life. It is *Pettywood and Coke*, Cro. El. 53, 1 Leon. 129, 193, and 3 Lev. 180, same case,¹ which was thus. A man seised of three messuages and having a wife and three children, Robert, Christian, and Joan, devised all his messuages to his wife for life, remainder of one to Robert and his heirs, of another to Christian and her heirs, and of the third to Joan and her heirs. And, if any of them die without issue, then the other surviving shall have *totam illam partem*, all that part, between them to be equally divided. Robert died without issue. Joan survived. And it was held that she had only an estate for life in Robert's part, notwithstanding the words 'all' and 'equally to be divided'.

I shall conclude with a known rule of law, that the heir is to be favored and, especially, in doubtful cases. We claim under the heir. The case at best is but doubtful whether the testator intended a fee to his children.

And, therefore, I hope the court will not disinherit the heir whom the ancestor is always presumed to favor without a manifest intention appearing to the contrary.

The judgment [was] affirmed, *viz.* that the sons took a fee.

¹ *Pettywood v. Cook* (1587), *ut supra*; *Colebourn v. Mixtone* (1558), 1 Leonard 129, 74 E.R. 120.

Nelson v. Seayres
(April 1741)

The question in this case was whether, for the purposes of the Statute of Limitations, a cause of action for indemnity accrues before a demand is made upon the indemnitor.

[In an action of] case.

And [the plaintiff] declares that one Edward Seayres, deceased, the defendant's father, being indebted to the plaintiff in £220 sterling and £17 12s. 2d. current, the defendant, on the 10 April 1733, in consideration that the plaintiff would trust the defendant's father for more money and goods, promised to pay not only the said £220 sterling and £17 12s. 2d. current, but all other sums the defendant's father should afterwards become indebted (in case his father did not pay the same) when he, the defendant, should be thereunto required.

And he avers that, trusting to this promise, between the said 10 April and last of January, he lent money and sold goods to the defendant's father, amounting to £112 17s. sterling and £316 16s. 6d. current besides the money he was before indebted and that Edward Seayres, in his lifetime, did not pay £221 16s. 4d., part of the said money, of which the plaintiff gave notice to the defendant May 1, 1737.

The defendant has pleaded the Act of Limitations, viz. that the cause of action did not arise within five years.¹ The plaintiff has replied that it did.

It is certainly more than five years since the promise was made, but the cause of action did not arise on the promise. The defendant did not undertake to pay at all events but only if his father did not, of which he must have notice and a request be made to him before he could be liable.

The cause of action here could not arise until a notice and request, for the defendant could not know that his father had not paid until such notice and request. And I think it must be agreed that, if the plaintiff had not alleged a notice and request in his declaration, he could not have maintained this action.

Notice is always necessary where the matter lies in the breast of the plaintiff and not of the defendant. And, if notice and request are necessary to support the plaintiff's action, the consequence is plain that he could have no cause of action until such notice and request. The defendant's undertaking in this case is a special one to pay if his father did not. The plaintiff could not have brought an action on this promise immediately nor until there was a failure by the father.

The promise is what we call executory; something future is to happen or be done before any cause of action can arise. If a man promises for a valuable consideration to pay a sum of money in case A. and B. are married. Here, the cause of action cannot arise until the marriage and, though the marriage be twenty years after the promise, the action will lie.

The son in this case gives the father, a general creditor; he becomes his security to pay for all goods and money the father shall take or receive of the plaintiff. No time was limited when the goods or money shall be received. Upon the faith of this promise, there are dealings for two or three years. Surely, in any view, it must be allowed that the cause of action did not arise until the end of the dealings. And we have sued within three years from that time.

It is a rule that the Statute can be no bar until the plaintiff's cause of action is complete.

The dog of A. killed some of B.'s sheep; A. promised, in case B. would not sue him for the sheep, to make him a recompense upon request. Several years after, B. did request, and A. refused to pay, upon which B. brought an action. A. pleaded the Act of Limitations,

¹ Act of 1705, c. 34, 3 Hening's Statutes 377.

it being more than six years since the promise. But [it was] held not good, for the cause of action did not arise until the request. *Shutford v. Borough*, Godb. 437.¹ [It was] adjudged and there said, if a promise is made to pay £10 when a man marries or comes from Rome, though his marriage or return be ten years after, he may have his action, for the cause of action is not complete nor does arise until the marriage or return.

[In an action of] *assumpsit*, in consideration that the plaintiff had delivered a deed to the defendant, he promised to redeliver it upon request and alleges a request, the defendant pleaded he did not promise within six years. And, upon a demurrer, the plea was held ill because the action did not arise on the promise, but on the request. 1 Lev. 48, *Webb v. Martin*.²

[In an action of] *Assumpsit* in consideration that the plaintiff at the defendant's request would receive A. and B. into his house as guests and diet them, the defendant promised etc. The defendant, pleaded he did not assume within six years, and, upon a demurrer, [it was] held ill, for it is not material when the promise was made but when the cause of action arose. 2 Sal. 422, *Gould v. Johnson*.³

The defendant's lawyer very well knew he could not plead *non assumpsit*, and has pleaded very properly. But this case shows that, where the duty arises on a consideration, executory or future, the cause of action does not arise from the promise but from the performance of what we call the meritorious cause. To apply the last case, the action did not arise on the promise, but either from the delivery of the goods or the request. If from either of these, we have sued within time. In [an action of] *trover*, the cause of action does not arise on the *trover*, but from the conversion. And, therefore, if a *trover* be before six years and a conversion afterwards and the action is brought within six years after the conversion, the Statute will not bar. Far. 99, *Wortley Montague against Lord Sandwich*.⁴

This case was compromised.

Dudley v. Perrin, executor
(April 1741)

In this case, the action was timely commenced and not barred by the Statute of Limitations, nor was the claim barred by any warranty.

[*Barradall*], for the defendant.

In [an action of] *ejectment* upon a special verdict, the case was [thus]. Elizabeth Ransone, seised in fee tail of the premises in question, married Robert Dudley. They had issue, the lessor, their son and heir, born in 1692. Dudley died in October 1701. In September 1710, Elizabeth married one Elliott, who died in November 1716. She died in September 1718. In October 1726, the lessor brought an [action of] *ejectment*, in which suit, judgment was given against him in October 1729. And this suit was brought in April 1739. Dudley and his wife,

¹ Stat. 21 Jac. I, c. 16, s. 3 (*SR*, IV, 1222); *Shutford v. Borough* (1628), Godbolt 437, 78 E.R. 257.

² *Webb v. Martin* (1661), 1 Levinz 48, 83 E.R. 291, also 1 Keble 177, 197, 83 E.R. 885, 897, *sub nom.* *Ward v. Martine*, Siderfin 66, 82 E.R. 973.

³ *Gould v. Johnson* (1703), 1 Salkeld 25, 91 E.R. 24, 2 Salkeld 422, 91 E.R. 367 also 2 Lord Raymond 838, 92 E.R. 60, 3 Lord Raymond 7, 92 E.R. 533, Holt K.B. 34, 90 E.R. 916, *sub nom.* *Booth v. Johnson*, 7 Modern 143, 87 E.R. 1152.

⁴ *Montague v. Lord Sandwich* (1702), 7 Modern 99, 87 E.R. 1121.

by lease and release, both dated 16 October 1694, acknowledged, but the wife, not examined, sell and convey for valuable consideration to James Ransone. In the deed of release, is this clause:

And lastly the said Robert Dudley and Elizabeth, his wife, do by these presents firmly oblige themselves, their heirs, executors, and administrators, the said land, tenements, hereditaments with all and singular its rights, members, jurisdictions, and appurtenances and every part and parcel thereof as is before expressed unto the said James Ransone, his heirs, and assigns to warrant and ever defend.

James Ransone, by his will, devised to his sons, George, Robert, and Peter, in fee. And they, for valuable consideration, sell and convey to Thomas Booth, who, by his will, devises to his executors, the defendants, to be sold. The defendants and those they claim under have been in quiet possession ever since the deed to Ransone in 1694, save when the [action of] ejectment was brought in 1726.

The lessor had lands in fee simple by descent from his father to the value of £288 15s., and the premises are of the value of £323 15s. The lessor being issue in tail of his mother, it must be admitted that he has a good title unless he is barred by the Act of Limitations¹ or by the warranty of his father in the deed of conveyance to Ransone. These, then, are the two points in the case.

And, first, I [*Barradall*] conceive the lessor is barred of his entry by the Act of Limitations, 9 Ann., 13.

The case as to this point is shortly thus. Dudley and his wife, in 1694, sell to Ransone. Dudley died in 1701. The wife, in September 1710, married one Elliott, who died in November 1716. She died in December 1718. The lessor brought an [action of] ejectment in October 1726. Judgment was given against him in October 1729, and this suit was brought in April 1739.

The defendants have been in possession under the conveyance in 1694 ever since the making of it. This conveyance in 1694 from Dudley and his wife, she not being examined, must be considered merely as the act of the husband. And, as such, at the common law, it would have made a discontinuance, and taken away the wife's entry. But that is saved by the [Statute] 32 Hen. VIII, 28,² to her and her heirs, who, by that Statute, may enter after the husband's death.

A right of entry, then, in this case accrued to the lessor's mother upon the death of her husband, Dudley, in 1701. At this time, there was an Act of Assembly subsisting made in 1662³ whereby five years possession was a bar. But that Act, being repealed by the [Act of] 9 Ann.,⁴ I shall not pretend to say the court can take any notice of it.

In October 1710, the Act of 9 Ann. was made, which enacts to this purpose:

that no person or persons that now hath or have or which hereafter may have any right or title of entry into any lands etc. shall at any time hereafter make any entry but within twenty years next after his or their title hath heretofore descended or accrued or hereafter shall descend or accrue and, in default thereof, they and their heirs shall be utterly excluded and disabled from such entry, provided that, if any person that hath or shall have such right or title of entry be or shall be at the time

¹ Act of 1710, c. 13, s. 11, 3 Hening's Statutes 522-523.

² Stat. 32 Hen. VIII, c. 28 (*SR*, III, 784-786).

³ Act of 1661, c. 72, 2 Hening's Statutes 97-98.

⁴ Act of 1705, c. 21, 3 Hening's Statutes 328-329.

of such entry first accrued within age, feme covert, etc., such person may, notwithstanding the twenty years are expired, make his entry so as such person, within ten years next after the disability removed, take benefit of and sue for the same and at no time after said ten years.

This Act, repealing that of 1662, revived the right of entry of the lessor's mother, which was barred by the old Act. But, then, this Act has a retrospect with regard to titles accrued before the making of it, persons then having a right must enter within twenty years from the time his right first accrued. The words of the Act are express and plain to this purpose.

Now, the person having a right of entry in this case when the Act was made was the lessor's mother, whose right first accrued upon the death of her husband, Dudley, in 1701, as has been observed.

By the enacting part of this Act, she and her heirs ought to have entered within twenty years from the time her right first accrued. Now, no ejectment was brought until 1726. But luckily for the lessor, his mother was married just a month before the Act was made. And so being under coverture by the proviso or saving clause, she and her heirs had ten years to enter from her discoverure, which happened in November 1716. And the lessor brought the ejectment in October 1726, just a month within time. If he had stayed a month longer, he would have been barred of that ejectment. Now, he brings another [action of] ejectment at the distance of twelve years and a half from the first 9½ years after judgment was given against him and more than twelve years after the time allowed by the Act for him to make his entry is expired.

And the question is whether the bringing of that ejectment in 1726 has taken the case out of the Act of Limitations, for, if it has not, the time allowed by that Act is elapsed, and the lessor is clearly barred. I shall be glad to hear, for I must own I am at a loss to guess what reasons can be offered for the affirmative. Sure I am that there is no authority, but I think there is an authority in point on the other side of the question. If there was not, I take it to be clear upon the words of the Act of Assembly upon the reason of the thing and the manifest inconvenience that would follow if the law was otherwise that the bringing of an ejectment is not making an entry so as to take a case out of the Act of Limitations.

First, as to authority, by the [Statute] 4 Hen. VII,¹ fines levied as there mentioned are declared to conclude both strangers and privies, but there is a saving to all persons other than the parties 'so that they pursue their title, claim, or interest by way of action or lawful entry within five years'.

One, having a title, brought an ejectment within five years after his title accrued. And the question was whether this was an entry or claim so as to avoid the bar of the fine. And [it was] resolved that it was not and that the confession of a lease, entry, and ouster should not prejudice the defendant. 1 Vent. 42, *Clark v. Phillips*.²

By our Act, persons must make their entry within twenty years after their title accrues or, in default thereof, to be barred. But there is a saving to persons under an incapacity, who may enter after the twenty years, 'so as such person, within ten years after the incapacity removed, take benefit of and sue for the same'.

The words of our Act and those of the Statute are the same in substance. And, if the bringing an ejectment is not making an entry in the one case, neither can it in the other. The cases are parallel, both in law and reason.

As to the confession of lease, entry, etc., that is a rule a defendant is forced into by the court. And it would be very strange if that should turn to his prejudice. But, in reality, it is not

¹ Stat. 4 Hen. VII, c. 4 (*SR*, II, 529-530).

² *Clark v. Phillips* (1669), 1 Ventris 42, 86 E.R. 30, also 1 Williams Saunders 319, 85 E.R. 441, 1 Modern 10, 86 E.R. 690, 2 Keble 555, 84 E.R. 348.

the entry of the lessor that is confessed, but of the nominal plaintiff. The rule only confesses that a lease was made by the lessor, that the lessee, the nominal plaintiff, entered, and that the defendant, ousted him. Certainly, then, where an entry is necessary to make a title, this rule can signify nothing. 1 Salk. 259; 1 Vent. 332; *sed vide* 248, Hale's opinion *contra*. The court takes notice that the ejectment is fictitious and the entry is not real. 1 Salk. 245.¹

Second, let us consider this point upon the words of the Act of Assembly. All persons must enter within twenty years after their title first accrued 'and, in default thereof, shall be barred'. This is the enacting part, the saving clause is 'that persons under incapacity may enter after the twenty years, so as it be within ten years after the incapacity removed and at no time after'. These words, 'at no time after', are very strong and seem calculated to exclude entries under any pretence after the ten years. If the makers of the Act intended to except this case of an ejectment brought within time, why did they not mention it? The words of the Act are general. *Et ubi lex non distinguit nec nos distinguimus* say the judges. The words are very express that persons shall not enter after ten years. How, then, can the court adjudge that the lessor here may enter after more than twenty?

Did the lessor, by his ejectment in 1726, acquire a new or a different right of entry from what he had before? Surely, it cannot be pretended. And, if not, if he has only the same right of entry now he had then, the Act is a clear bar to that right.

But, third, the reason of the thing and the great inconveniences that would ensue if the law was otherwise sufficiently prove the law to be as I contend, *viz.* that the lessor is barred by the Act of Limitation, notwithstanding his ejectment in 1726.

The acts of limitations were made for the security of honest purchasers. Upon this account, they always meet with a favorable and liberal construction for the benefit of purchasers. The mischief intended to be remedied was the setting up of stale titles. Therefore, says the Act, no one shall be allowed to make an entry after such a time.

But how will this mischief be remedied if persons are allowed to enter after the time limited by the Act? Will not purchasers be often deceived if such a practice prevails and so the principal design and intention of the Act [will be] defeated? Purchasers often rely on these acts of limitations as their greatest security. If they are suffered to be evaded under any pretence, no purchaser can be safe.

But further in this case, I would ask, has the lessor by his ejectment in 1726 acquired a right of suing again at any distance of time? If not, when is the Act of Limitations to bar him? When is it to begin to run? The act points out no other periods but from the first accruing of the right and the removal of the incapacity. The time is long since elapsed from those periods; no new right of entry has since accrued to the lessor.

It is not plain? From hence, if we go beyond the time limited by the Act, we shall neither know where to begin nor where to stop. By the same rule and reason that the lessor may maintain this ejectment, in case he miscarries, he may bring another at the distance of another twelve or even twenty years, and so a fourth *in infinitum*. At this rate, the longest possession will signify nothing, and the acts of limitations are made in vain.

The inconvenience then of departing from the act is manifest. Titles may be set up under the same pretence as in this case at any distance of time; suits multiplied without end; honest purchasers deceived; the longest possession of no effect; and the acts of limitations utterly defeated. An argument *ab inconvenienti* is very forcible.

¹ *Little v. Heaton* (1702), 1 Salkeld 259, 91 E.R. 227, also 2 Lord Raymond 750, 92 E.R. 1, Holt K.B. 264, 90 E.R. 1044; *Anonymous* (1678), 1 Ventris 332, 86 E.R. 215; *Anonymous* (1673), 1 Ventris 248, 86 E.R. 166; *Smartle, ex dem. Newport v. Williams* (1694), 1 Salkeld 245, 280, 91 E.R. 216, 245, also 3 Levinz 387, 83 E.R. 743, Holt K.B. 478, 90 E.R. 1163, Comberbach 247, 90 E.R. 457.

I will add only one observation more upon a clause in another Act of Limitations, viz. 4 Ann., 35, of personal actions.¹ There is a proviso that, if the plaintiff bring an action within time and has a verdict but judgment is stayed or reversed for error, he may bring a new suit within a year. And there is the same proviso in the Statute 21 Jac. I.²

It is reasonable to think, if the law makers had intended to allow the bringing of a second ejectment or action for lands, they would have inserted the same proviso as to them and especially the makers of the Statute, because they are both in the same Act. Ours are two different acts, but copied almost *verbatim* from the Statute.

There being no proviso as to the lands is not only a strong argument but a kind of proof that they did not intend to allow of a second suit or action in that case.

But, if there was such a proviso, it would not help the lessor, for it extends only to cases where the plaintiff's right is affirmed by a verdict, and, then, he must sue within a year. Here, judgment was against the plaintiff, and he has not sued again until 9½ years after.

This proviso is a proof the law makers did not intend a second action should be brought after the first, except in the cases excepted.

Taking this case, then, in any view, I cannot see what foundation there is for saying the plaintiff may maintain the present ejectment because he brought another formerly within time.

The Act of Assembly gives no such right. On the contrary, the words are express that no entry shall be made after the time there limited. [There is] no proviso within the equity or intendment of which the lessor can bring himself, but rather a strong presumption that no such thing was intended. [There would be] manifest inconveniences if the law was so. And, lastly, [there is] a case in point that bringing an ejectment is not making an entry.

Objection: But these statutes are sometimes taken by equity, and, under particular circumstances, it has been allowed to bring personal actions at least after the time where an action has been before commenced within time.

Answer: I agree such a second action has been sometimes allowed in personal actions. There is not the same inconvenience with respect to purchasers. But, in those actions, it has been only allowed in the case of the plaintiff's death. And even there, the executor or administrator must make a recent prosecution. And what shall be deemed so, the judges are to determine upon the circumstances of the case. In general, the year mentioned in the proviso just now taken notice of has been thought a good direction to the judges. And, therefore, where an executor lay by four years, it was adjudged not to be a recent prosecution, by Raymond and *totam curiam*. *Wilcox v. Huggins*, FitzG. 170, 289.³

The defendant's possession in this case has been forty-six years. There have been two purchases and two devises. the defendant's testator was a purchaser for a valuable consideration. The acts of limitations were made in favor of purchasers. And we rely upon them to protect and secure us.

If the lessor is not barred by the Act of Limitation, then the second question is whether the warranty of his father in the deed of conveyance to Ransone is a bar to him. And this I shall consider, first, without regard to the assets descended and, second, with regard to those assets.

The case as to this point is shortly this. A woman, tenant in tail, marries her husband, aliens with warranty, and leaves assets in fee simple to a certain value, which, with the warranty, descend upon the issue in tail.

¹ Act of 1705, c. 35, 3 Hening's Statutes 381-384.

² Stat. 21 Jac. I, c. 16, s. 4 (SR, IV, 1223).

³ *Wilcox v. Huggins* (1730-1731), Fitz-Gibbon 170, 289, 94 E.R. 705, 760, also 1 Barnardiston K.B. 335, 349, 382, 94 E.R. 226, 235, 258, 2 Barnardiston K.B. 5, 94 E.R. 319, 2 Strange 907, 93 E.R. 932, 1 Eq. Cas. Abr. 305, 21 E.R. 1064.

The subject of warranty being pretty uncommon in this court, I hope I may be excused if I enlarge a little upon it. A warranty is a covenant real annexed to land whereby a man and his heirs are bound to warrant the same. 1 Inst. 365a. Of these warranties, there are three kinds, lineal, collateral, and such as commence by disseisin. Lit., s. 697.¹

A warranty is said to be lineal or collateral, not in respect of the warranty but of the title of the land; thus, a warranty descending from father to son may be collateral, though the descent of the warranty is without all question lineal. And that will appear to be the case here. A lineal warranty, then, may be thus defined where the lands to which the warranty is annexed would have descended to the heir from the ancestor making the warranty if that warranty had not intervened and prevented it.

And so, *ex opposito*, a collateral warranty is where the lands could not descend from the ancestor making the warranty nor the heir, by any possibility, derive a title under him. Lit., s. 703, 704, 705; and Com., 717, and Com.²

Warranties that commence by disseisin having nothing to do with the present case, I shall take no further notice of them.

The warranty of the defendant's father in this case must be collateral according to the above definition, because, though the warranty descends lineally to him from his father, yet the lands to which the warranty is annexed, being the inheritance of his mother could not descend to him from his father nor he, by any possibility, derive a title to them under his father.

I have entered into this distinction of lineal and collateral warranties that the authorities I shall produce may be the better understood, not that I think the terms of any great use in the true learning and explanation of warranties, but rather I conceive with a great man, Vaughan, that they serve more to perplex and intricate than to illustrate any useful learning on the subject. *Vide* Vaugh., *Bole and Horton*.³ Littleton has made his chapter of warranty very obscure with these terms. And Coke, in his *Commentaries*, has rendered it more so.

The principal learning on warranties is to know whether a warranty binds or not. And that is the question here.

Now, at the common law, all warranties, except such as commenced by disseisin, were binding. And, descending upon the heirs of those who made them, they were bars to such heirs to claim anything in the lands to which the warranties were annexed. This doctrine Littleton expressly teaches. [Littleton], s. 697. If they bound at the common law, they must do so in all cases unless the law is altered by some statute. [There are] only four statutes which restrain warranties, *viz.* Gloucester; Westminster II, *De Donis*; 11 Hen. VII; and 4 & 5 Ann., 16, but this last is not in force here.⁴

The Statute of Gloucester, which was the first, restrains the warranty of a tenant by the curtesy and of the husband of the wife's inheritance in her lifetime from barring the heir of the wife unless assets in fee simple descend from the father to the heir, of which more by and by.

The Statute of Westminster II, upon which estates tail were first introduced, speaks nothing expressly concerning warranties, but, in general terms, restrains all kinds of alienations of tenants in tail from barring the issue and, consequently, alienation with warranty. The words are '*non habeant potestatem alienandi quo minus ad exitum illorum remaneat (sc. tenementum) post coram obitum.*'

¹ E. Coke, *First Institute* (1628), f. 365; T. Littleton, *Tenures*, s. 697.

² T. Littleton, *Tenures*, ss. 703-705, 717; E. Coke, *First Institute* (1628), f. 376.

³ *Bole v. Horton* (1673), Vaughan 360, 124 E.R. 1113.

⁴ Stat. 6 Edw. I (Gloucester), c. 3 (SR, I, 47); Stat. 13 Edw. I (Westminster II), c. 6 (SR, I, 77); Stat. 11 Hen. VII, c. 20 (SR, II, 583); Stat. 4 & 5 Ann., c. 3, s. 21 (SR, VIII, 460).

The [Statute] 11 Hen. VII restrains the warranty of a woman tenant in dower for life or in tail of her husband's gift. But, of this, nothing need be said in the present case. The statutes of Gloucester and Westminster are those only which concern the present question. I shall, therefore, consider the case upon both these statutes, and, first, upon the Statute of Westminster. The lessor's mother, in this case, was a tenant in tail. And, if this alienation with warranty had been made by her, it would not have barred her issue, at least without assets, because such an alienation is expressly restrained by the Statute of Westminster. And the warranty in that case must have been lineal, because the issue must derive his title under the tenant in tail.

But the Statute has only restrained the alienation of a tenant in tail from barring the issue, for even such an alienation with warranty will bar a remainderman or even the donor of his reversion if the warranty descends upon him. 1 Inst. 374a, b. (*Sed quaere* as to a donor, and *vide* Bole and Horton). And so, in like manner, the warranty of any collateral ancestor descending upon the issue in tail will bind the right of the estate tail and bar the issue, for such warranties are not restrained by the Statute. 1 Inst. 374b.¹

This doctrine may seem very harsh. But the law is, however, very clear and plain. And it is to be considered that the law in this case is not so much founded upon the reason of things or what may be called strict natural justice but upon certain rules and principles introduced and established for public convenience.

Littleton, in his chapter of Warranty, s. 712, says that a collateral warranty is a bar to him that demands a fee tail unless in cases that are restrained by the statutes. And he puts several cases to illustrate this doctrine. If lands be given to a man and the heirs of his body who marries, discontinues the tail, and dies, and his wife, after his death, release to the discontinuee with a warranty, this warranty, descending upon the issue in tail, is collateral and a bar. [Littleton], s. 713.² In this case, the alienation with warranty of the husband, who was a tenant in tail, would not have barred his issue because such warranty would have been lineal and is restrained by the Statute of Westminster. But the warranty of the wife descending upon the issue in tail is a bar because her warranty is collateral to the issue and is not restrained by the Statute, for no collateral warranty is restrained by the Statute of Westminster, as appears from 1 Inst. 374.

This case differs nothing in substance from the present. There, the husband was tenant in tail, and the warranty of the wife barred the issue. Here, the wife was tenant in tail, and the warranty of the husband, as we say, bars her issue. So, if a tenant in tail discontinue, the [tenant in] tail has issue and dies, and the uncle of the issue release to the discontinuee with warranty and dies without issue, this warranty, descending upon the issue in tail, is a bar. Littleton, 709, and Commentary.

If a tenant in tail has issue, three sons, discontinues the tail, and dies, and the middle son releases to the discontinuee with warranties and dies without issue, this warranty, descending upon the eldest son, is a bar to him to recover the estate tail. [Littleton], s. 708.

In both these cases, the warranty must be collateral because the issue in tail cannot derive a title under his uncle nor the elder brother from the middle. And they are bars, not directly and *a priori* because they are collateral warranties, but because no collateral warranty is restrained by the Statute of Westminster.

There are a number of other cases in Littleton to the same purpose. [Littleton], ss. 710, 716, 718, 719. And Coke, in his *Commentary on Littleton*, s. 709, says it had been attempted in Parliament to restrain collateral warranties unless assets descended from the same ancestor, but it never took effect because it would weaken common assurances. 1 Inst. 373b and p. 374b. In the place already cited, he says that a collateral warranty made by a collateral ancestor does

¹ E. Coke, *First Institute* (1628), f. 374.

² T. Littleton, *Tenures*, ss. 712, 713.

bind the right of an estate tail without assets. And the reason thereof he says is the Statute *De Donis*, for that it is not made by the tenant in tail, as the lineal warranty is.

After reading some of the authorities I have quoted, I hope I shall have sufficiently proved that the warranty of the lessor's father descending upon him is a bar in this case without any regard to the assets descended. *Lege Litt.*, s. 697, 712, 713, 708, 709; 1 Inst. 373b and 374b.

As to the reason of the law why a collateral warranty shall bar, I can find only one, and that is mentioned by Coke in his *Commentary on Littleton*, 709, viz. a presumption the law makes that no one would unnaturally disinherit his lawful heir unless he left him a greater advancement. *Nemo praesumitur alienam posteritatem suae praetulisse*. And against this presumption, he says the law will admit no proof. How solid or satisfactory this reason may be is not my business to enquire. It is enough that I have showed the law to be clear and plain in the point.

But I cannot conclude without taking notice of one authority more, a passage in Coke's *Second Institute* 274,¹ in his commentary upon the Statute of Gloucester. And the rather because it is expressly in point. His words are 'if the lands are entailed to the wife, the collateral warranty of the husband shall bar.' And so I shall leave this point.

I am next to consider this case upon the Statute of Gloucester. And I endeavor to show that it is not within that Statute, as I hope I have already proved it not to be within the Statute of Westminster.

The words of the Statute of Gloucester are these:

If a man alien a tenement that he holds by the law of England, his son shall not be barred by the deed of his father (from whom no heritage to him descended) to demand and recover by writ of mort d'ancestor of the seisin of his mother although the deed of his father doth mention that he and his heirs are bound to warranty. And, if any heritage descend to him on his father's side, then he shall be barred to the value of the heritage to him descended etc. Likewise, in like manner, the heir of the wife shall not be barred of his action after the death of his father and mother if he demand the inheritance of his mother by writ of entry, which his father did alien in the lifetime of his mother.

The first branch of this Statute relates to an alienation by a tenant by the curtesy; the latter to an alienation made by the husband in the wife's lifetime of her land. It is within the latter branch only [that] this case can be brought if it is within the Statute at all, which I conceive it is not.

When this Statute was made, 6 Edw. I, there were no estates tail in the present notion of them. They were introduced upon the Statute Westminster II, [which was] not made until seven years after, 13 Edw. I. It cannot, therefore, be supposed that the makers of the Statute of Gloucester could intend to restrain the alienation of an estate not then in being. And, though the word 'inheritance', which is the word made use of in the Statute, may in its general signification as well be applied to estates tail as a fee simple, yet, for the reason given in this case, it must be restrained to fee simple estates only, which were the only inheritances then known in the law.

Upon this reason, I presume, Coke, in the passage just now cited from his *Second Institute* in his commentary upon this Statute and this branch of it, says, if the land is entailed to the wife, the collateral warranty of the husband shall bar, which proves this opinion that the Statute only extends to fee simple estates of the wife.

Then Littleton, s. 712, before cited, says 'a collateral warranty is a bar to him that demands the fee tail, except in cases that are restrained by the Statute and in other cases, as

¹ E. Coke, *Second Institute* (1642), p. 294.

shall be said hereafter.' And, in all the cases put by him as examples to his general rule, there is not this of the husband's alienation with warranty of the wife's entailed lands although, in s. 732, he particularly comments upon this branch of the Statute. So that it was plainly Littleton's opinion as well as Coke's that the Statute does not extend to estates tail.

In all our English statute books, the words of the Statute of Gloucester are 'inheritance of his mother'. But the original in French (though not so in Coke) is 'heritage on marriage', as appears in Hawkins' *Statutes* and also in Lit., s. 728 and 732, above cited, in which last section, he says heritage is intended of fee simple lands and marriage of lands given in frank marriage. And Coke, in his comment on this section, says frank marriage is only put for example, for that the Statute extends also to estates tail. How to reconcile this with his opinion in 2 Inst. 294, above cited, I cannot tell. Nor is it easy to conceive how the Statute could extend to estates not then in being (as estates tail in the present notion of them were not) unless it be taken by equity. *Ideo quaere* the law.

But I will agree that this Statute is sometimes taken by equity to extend to cases not expressly within the letter and, particularly, in the very case of estates tail, as if a tenant in tail alien with warranty and leave assets in fee simple to descend to the issue, although the Statute of Westminster restrains all alienations indefinitely and this Statute of Gloucester was made before there were any estates tail, as has been observed. Yet, by an equitable construction of both statutes, it has been held for many ages that the warranty of a tenant in tail with assets is a bar to the issue in tail, as well as a warranty by the husband with assets shall bar the heir of the wife. The law is grounded upon these reasons. It is supposed the tenant in tail intends to put his fee simple lands in lieu of the entailed lands, and it would be of no use to change one land for the other, which would only tend to multiply suits, for, if the issue should recover the entailed lands, the purchaser, by force of the warranty, would recover in value out of the fee simple lands. Therefore, for avoiding these suits, the judges thought it best to make one a bar to the other. 21 Edw. III, 28, 29; 38 Edw. III, 23b; Plo. 110; 2 Inst. 293, 335; 1 Inst. 366a, 374b; 8 Co. 52, Sims' Case.¹

But the equity of this Statute has not been carried so far as to the present case, viz. an alienation by the husband of the wife's inheritance in tail, as is proved, both from Litt. and Coke. And, therefore, I conclude that this case is quite out of the Statute of Gloucester and, consequently, that there being or not being assets does not differ the case.

But, if this case should be taken to be within the equity of the Statute, then, there being assets, the warranty is unquestionably a bar to the value, for, though no mention is made of assets in the latter branch of the Statute that speaks of an alienation in the wife's life. Yet the words 'likewise in like manner' so couple the two branches together that it has been always taken and understood that warranty and assets are a bar in that case as well as if the alienation was by a tenant by the curtesy. 2 Inst. 294.

And the words of the Act in the first branch are very express 'that, if any heritage descend to the heir from his father, he shall be barred to the value.' 21 Edw. III, 28, 29; 1 Inst. 365; 8 Co. 52, 53, Sims' Case.

In this case, the assets descended are of the value of £288 15s., the premises £323 15s., so that, in any view, the lessor can only have a judgment for the value of £35.

For the plaintiff, it was insisted as to the first point that, having brought his second [action of] ejectment within ten years after the judgment against him in the first, he was within the equity of the saving clause of the Act of Limitations.

And so the Court seemed to think.

As to the second point, it was insisted that the lease and release made no discontinuance, the estate was not divested, displaced, or turned to a right, and so the warranty was no bar.

¹ YB Mich. 21 Edw. III, f. 28, pl. 4 (1347); YB Mich. 38 Edw. III, f. 23, pl. [19] (1364); *Fulmerston v. Steward* (1554), 1 Plowden 102, 75 E.R. 160, also 1 Dyer 102, 73 E.R. 225; *Game v. Syms* (1608), 8 Coke Rep. 51, 77 E.R. 549, also Croke Jac. 217, 79 E.R. 189.

This, being unanswerable, was acquiesced under.

Judgment [was given] for the plaintiff, April 1741, rightly as to the second point. But query as to the first. *Vide* as to the second point, *ante* 141, the Case of Richardson and Mountjoy, and these authorities: 1 Inst. 388b, 271b; Lit., s. 606; Seymour's Case, 10 Co. 96b; 1 Saund. 260, Cart. 208.¹

[This report is cited in Richardson v. Mountjoy (1739), see above, Case No. 76.]

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Dancy v. Willard's administratrix
(April 1741)

The question in this case was whether a creditor of a decedent's estate can be paid out of the decedent's real estate where the personal estate is insufficient.

Dancy *et al.* v. Willard's administratrix.

The case is shortly this. A man dies intestate, leaving two parcels of land and a personal estate not sufficient to pay his debts. He has no heir in this colony. His widow takes administration, and also enters upon the land. She administers all the personal estate, paying, among others, a debt by bond.

The plaintiffs, being simple contract creditors unsatisfied, bring this bill against the administratrix, praying a discovery of the personal estate and a satisfaction out of that, but, if that is not sufficient, then out of the rents and profits of the real estate in her possession, and, if they are not sufficient, then, that the lands may be sold.

The personal estate is deficient. The bond debt paid by the administratrix is more than the debts claimed by the plaintiffs. The question is whether, under the circumstances of this case, the heir being absent and unknown and the defendant in possession of the land, the court will decree a satisfaction to the plaintiffs out of the lands.

It is charged in the bill that, if the heir could be brought before the court, he would be compelled to make the plaintiffs a satisfaction out of the lands descended to him, because the bond debt with which he is chargeable has been paid out of the personal assets.

And this, I [Barradall] thought so clear a point in equity that I did not expect I should be put to the trouble of saying much on that head. But, as I understand this point is to be disputed, upon which all our equity is built, I shall be obliged to enlarge a little.

I take it to be a universal rule in equity that, where creditors who can charge the real estate will yet take satisfaction out of the personal whereby there is a deficiency of assets to satisfy other creditors who can only charge the personal estate at law, equity will put the last mentioned creditors in the place of the first, and decree them a satisfaction out of the real estate. This is certainly agreeable to natural justice that the heir should bear that burden the law has cast upon him when, otherwise, his ancestor's debts cannot be satisfied. It is founded upon the rule of equality and another rule 'he that will have equity must do equity'.

In the nature of things abstracted from positive laws, all debts are equal, and ought to be equally satisfied. Equity, however, will not so far supersede the law as to subject the real estate at all events. But, where there are debts with which that is chargeable, it will lend its assistance to put that burden upon it, which, by law, it ought to bear, and will take away from the heir

¹ *Richardson v. Mountjoy* (1739), see above, Case No. 76; E. Coke, *First Institute* (1628), ff. 388, 271; T. Littleton, *Tenures*, s. 606; *Heywood v. Smith* (1612), 10 Coke Rep. 95, 77 E.R. 1070, also 1 Bulstrode 162, 80 E.R. 853, *Jenkins* 51, 145 E.R. 37; *Took v. Glascock* (1669), 1 Williams Saunders 250, 85 E.R. 298, *Carter* 208, 124 E.R. 920.

his unreasonable gain to make up the loss which the simple contract creditors would otherwise sustain.

And, as the heir is entitled in equity to the aid and assistance of the personal estate where he is charged with his ancestor's debt and there is personal estate sufficient to pay it, so, by the same rule of equity where the personal estate is swept away by debts with which he, as heir, or the lands descended to him are chargeable, he ought to satisfy those creditors who can only charge the personal estate at law.

Besides, it is obvious that, unless equity did interpose upon these occasions, a door would be open to great frauds, for how easily might an executor by combination with the heir suffer all the personal assets to be taken for debts with which the heir is chargeable and so entirely defeat the simple contract creditors. Thus, as well to prevent frauds as to do equal justice to creditors, it has long obtained as a settled and established rule in equity that, wherever debts with which the real estate is chargeable are paid out of the personal assets and there is not sufficient [assets] left to satisfy other creditors, that the real estate shall be answerable for the value of the debts paid.

And this equity has not been only extended to creditors but even to legatees, as, where a testator mortgaged his land and also entered into a statute to the mortgagee and, by his will, devised a legacy of £500 and the mortgagor took the personal estate in execution upon the statute so that there was not sufficient [assets] left to satisfy the legacy, the legatee had a decree against the heir to be satisfied out of the land. 2 Chan. Cas. 4, Anonymous.¹

If equity will give this assistance to a legatee, how much more to a creditor. Indeed, the Chancellor in that case declared that, though the personal estate ought to be applied to ease the heir where he is chargeable with his ancestor's debts, yet, where there was a deficiency of assets to pay other creditors or even legatees, the heir should not turn his charge upon the personal estate but that, where both could be satisfied, both should be satisfied. And he said it looked like a fraud to charge the personal estate with the mortgage. And he cited several precedents of the like decrees. The like point is determined in *Culpeper and Ashton*, 2 Chan. Cas.² And there, [it was] said, when the personal estate is employed in ease of the heir and lands, so much of the real estate as is eased shall be liable.

So, there being a judgment creditor and a bond creditor and the judgment creditor took the personal estate in execution upon a bill brought by the bond creditor to be put in the place of the judgment creditor, Commissioner Hutchins was for relieving him saying, in many cases, the heir has the favor and assistance of the court to make the personal estate liable to debts in ease of the real. And he thought it reasonable *e converso* that, as the heir was to have equity, he ought to do equity. But what the decree was does not appear. *Porey v. Marsh*, 2 Vern. 182. An executrix having applied part of the personal estate to pay off a mortgage, simple contract creditors had relief against the heir. *Wilson v. Fielding*, 2 Vern. 763. A man indebted by bond gave legacies to his children, and devised his real estate to his eldest son in tail; the son, being executor, paid the bond with the personal estate, and the legatees brought a bill against him to be paid out of the land. The Master of the Rolls decreed in favor of the legatees. But the Chancellor, Harcourt, reversed the decree upon the distinction that the lands here were devised and that it was as much the testator's intention [that] the devisees should have the land as the legatees their legacies. But he admitted, if the lands had descended, the legatees ought to have been relieved. 2 Salk. 416, *Hern v. Merrick*. Here, the testator was indebted by bond (as in the present case); this bond was paid out of the personal assets. The legatees come for a satisfaction out of the real estate, and would have had it, but for the devise. Here are creditors,

¹ *Anonymous* (1679), 2 Chancery Cases 4, 22 E.R. 819.

² *Culpeper v. Aston* (1676-1682), 2 Chancery Cases 115, 221, 22 E.R. 873, 919, also 1 Eq. Cas. Abr. 272, 21 E.R. 1040, 73 Selden Soc. 443.

and there is no devise. Surely then, we are entitled to as much equity as a legatee, and ought to be relieved. Read Talb. 54; Max. Equity 11.¹

Upon the authority of these cases, I may venture to conclude that, if the heir was before the court, there could be no question but that the plaintiffs ought to be relieved against him.

The only question then is whether, under the circumstances of this case, the heir being absent and unknown and the defendant in possession of the land, the court will not subject the land in the hands of the defendant in the same manner as they would if it was in the hands of the heir to satisfy the plaintiff's demands. *Vide* 1 Will. 99, *Gawler v. Wade*.² There will certainly be a failure of justice if the court will not interpose. The heir may never come here. He may sell without coming. And, then, the plaintiffs must be quite without a remedy.

I can see no difference in reason between this case and the common one, where an absent person is indebted and has effects in the hands of a third person, in which case this court relieves every day.

The defendant is undoubtedly accountable to the heir for the profits and, consequently, to the plaintiffs, who are his creditors. Admitting that the defendant ought not to account for any profits past upon the matters disclosed in her answer, yet, surely, she will be for future profits. Let her, then, either pay an annual rent until the debts are discharged or deliver up the land to be sold.

One parcel would satisfy the plaintiffs; the defendant may keep the other for her dower. And, as the land is of small value and will not pay the plaintiffs in many years, we hope one parcel will be decreed to be sold. It is the course of equity where profits will not pay debts in a reasonable time. And it was so decreed here lately in one *Ogilby's Case*. *Boni judicis est ampliare jurisdictionem*. A court should extend the arm of justice further than usual where there would be otherwise a failure of justice. By *Jekyll, Counsel, Prec. Ch. 329*.³

As to the distinction between debts that are an actual lien upon the land and those with which the heir is chargeable in respect of the lands descended to him, there is no foundation for it in reason or authority.

[There is] no such distinction in any of the cases. And, though they are all except *Salk* upon mortgages etc., which are actual liens, yet the reasons they turn upon hold as strongly where they are not so, but the heir is only chargeable. The reasons are, first, upon the rule of equality that all the creditors may be satisfied; second, because the heir has frequently the aid of the personal estate and, therefore, ought to do the same equity he receives; and, third, to prevent frauds and combinations between the heir and the executor. All these reasons equally hold, whether the land is chargeable itself or the person of the heir in respect of the land.

But the case in *Salkeld* was upon a bond debt, and so it is a full answer to this objection. See also Talb. 54, Chancellor's opinion.

¹ *Porey v. Marsh* (1690), 2 Vernon 182, 23 E.R. 719, also 1 Eq. Cas. Abr. 143, 21 E.R. 944; *Wilson v. Fielding* (1718), 2 Vernon 763, 23 E.R. 1098, also 10 Modern 426, 88 E.R. 792, 1 Eq. Cas. Abr. 143, 21 E.R. 944; *Herne v. Meyrick* (1712), 2 Salkeld 416, 91 E.R. 362, also 1 Peere Williams 201, 24 E.R. 355, 1 Eq. Cas. Abr. 143, 21 E.R. 944, Chancery Repts. *tempore Anne* 507; *Lutkins v. Leigh* (1734), *Cases tempore Talbot* 53, 25 E.R. 658; R. Francis, *Maxims of Equity*.

² *Gawler v. Wade* (1707), 1 Peere Williams 99, 24 E.R. 312, also 2 Eq. Cas. Abr. 165, 22 E.R. 141, Chancery Repts. *tempore Anne* 105.

³ *Burwell v. Ogilby* (1740), see above, Case No. 81; *Bell v. Hyde* (1711), *Precedents in Chancery* 328, 329, 24 E.R. 155, 156.

Edmondson v. Tabb
(April 1741)

The question in this case was whether an escheat warrant should be given to a brother of the half blood or to an aunt of the decedent.

In Council.

Thomas Allaman, seised in fee of 700 acres of land, died intestate, leaving issue, Judith, a daughter by his first wife, and, by his second wife, three sons, John, Thomas, and William. John and Thomas both died under age without issue. William entered, and was seised, and died seised in 1732, leaving a wife, Thomas, a son, and Sara, a daughter. After his death, his widow continued in possession, and married John Tabb, by whom she had issue, Humphry Toy Tabb.

Thomas, the son of William, died soon after his father under age and without issue. Sara died in 1741 without issue, being about twelve years old. Tabb and his wife, being in possession, sued out an escheat warrant in order to obtain a grant of the land, either to the wife, as being in possession, or to their son, Humphry Toy Tabb, brother of the half blood to Sara.

An inquisition has been taken and returned. Judith, the daughter of Thomas Allaman, the grandfather, enters a caveat. She is aunt of the half blood on the father's side to Sara. Since the inquisition, Tabb and his wife are both dead.

I [*Barradall*] appear for their son, the brother of the half blood. And the question is whether Your Honor will order a grant to him or to the aunt of the half blood.

They are both equally excluded from the succession by the rules and maxims of law concerning descents. I presume, therefore, Your Honor will consider this case abstracted from those rules, and favor that party whose pretensions are best supported by reason, equity, and natural justice.

The aunt's equity is founded solely in this, that the inheritance came originally from the Allamans. And she, being one, ought to be preferred to my client, who is only a brother of the half blood by the mother's side, and not of the blood of the Allamans. This, at first view, may seem an argument of some weight, but, when closely considered, it will appear to have little foundation in the reason of things and strict natural justice. Its whole weight and force, if I mistake not, take its rise from the rules of law concerning descents. It is a rule in the law of descents that an inheritance coming from the father shall never resort to the line of the mother, but shall rather escheat.

This rule is in a manner peculiar to the law of England. I cannot say it is absolutely so, because I have read that, in some of the provinces of France, which are governed by their own particular customs, the same rule obtains. But it is not the public or general law of the kingdom, neither is it an institution of the Roman or civil law, of the Jewish, or Grecian laws, or any other laws that ever I read of.

It is very certain mankind are generally prepossessed in favor of the laws of their country, and are apt to think them the most agreeable to nature and reason. But I humbly apprehend that the rule we are speaking of is a mere arbitrary institution not founded on the reason of things or natural equity and justice, for, where is the reason that a very remote relation on the father's side should be preferred to a very near relation on the mother's; nay, that the land shall rather escheat than come to such near relation. The law of nature calls the nearest relations to the succession, for this reason, that men are bound by the laws of society to provide for them in the first place. And the presumption is that there is the greatest affection towards them. Every law, then, that excludes the nearer relations in favor of the more remote is, in my humble opinion, contrary to the law of nature and reason.

I have said thus much, Sir, in hopes it may serve to prove what I at first advanced, that our adversaries' pretensions are not founded in the reason of things and natural justice but take their whole force from a rule of law concerning descents which I apprehend has nothing to do in the present question nor prove anything as to the reason and equity of the thing, for, though these rules ought to be strictly adhered to in courts of judicature where the judges are bound by an oath to determine according to law, yet, where a matter is left at large to the will of the prince or of those who act under him, I humbly conceive the law of nature and reason is the best guide to follow.

This, Sir, is the answer I give to the pretensions of our adversary. I will now beg leave to say a word of the equity on our side.

And, first, I apprehend that, as we are in possession and have made the first application, we are entitled to a grant by the charter granted to this country the 18 Car. II.¹ The words of the Charter are:

All lands possessed by any subject inhabiting in Virginia which is escheated or shall escheat shall and may be enjoyed by such inhabitant and possessor, his heirs, and assigns forever paying two pounds tobacco for every acre.

I cannot say how this Charter may have been construed. But it seems plain to me that the intent was that the possessor of any land escheated should be preferred to a grant of it. How else can the words be satisfied, 'all lands possessed which shall escheat shall and may be enjoyed by such possessor'? If this was not the intent of the charter, I should be glad to know what the use of the clause was or if those words 'lands that shall escheat'. I shall submit this point to Your Honors. I thought it my duty to urge this matter for my client, and the rather as I have not known any determination of the kind.

But, if this will not prevail, then, I humbly contend that we are the nearest relation, a brother of the half blood. And, on that account, we have the best title to be preferred. It will scarce, I presume, be disputed but that a half brother is a nearer relation than a half aunt. If, then, the rules of law concerning descents and the arguments deducible from thence are out of the question, as I conceive they are, I do humbly contend that, by the law of nature, we have the best right to succeed.

There is no law, I believe, except the law of England that absolutely excludes the half blood from the succession. And I believe it would puzzle a man to assign any one tolerable reason why it should be so, I mean, in the reason and nature of things.

The Roman or civil law is certainly much more equitable, which allows brothers of the half blood to succeed in the second place, that is, where there are none of the whole. And, in collateral descents, [it] makes no distinction between the whole and half blood.

The Jewish law makes no distinction between the whole and half blood. Nor do I remember to have read of any such distinction in any of the Grecian laws.

The Roman law is allowed to be the most equitable law in the world, and, I presume, will be thought no bad guide to follow. Besides, it is plain that there is no other foundation for the difference between that and the law of England but the rule concerning descents, for, even by our law, in the succession to chattels, no difference is made between the whole and half blood.

Upon the whole, I rely, first, upon the charter. We are in possession, and made the first application. Second, that, if we are excluded by the rules of law, so are they. And then, as we are the nearest relation, we have the best title to be preferred. Third, we should even succeed by the Roman law. And, as that is the best pattern of natural equity and justice, I hope it will be a good rule for Your Honors to follow.

¹ Act of 1705, c. 21, 3 Hening's Statutes 317.

The reason why the laws prefer the nearest relations is from a presumption that the intestate would have done so if she had made a will. If this argument is to weigh, there can be little doubt but that a person would rather prefer a brother of the half blood than an aunt.

I only add that we have some equity in applying first and having been at the expense of an inquest etc.

Our rules of descent are mere arbitrary institutions not founded on the reason of things or natural justice and had no better foundation, perhaps, than accident or the humors or designs of particular men. They are not the subject of any written law, but have been introduced by custom and usage, and have undergone various alterations, as appears from Sir Matthew Hale, *History of the Law*.

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Hill v. Henry
(October 1741)

Where a creditor makes his debtor his executor, the debt is not thereby discharged where the debtor does not probate the will.

Appeal. Hill *et ux.*, executrix of Clopton v. Henry *et ux.*, administratrix of Syme.

The plaintiff declares upon an *indebitatus assumpsit* for £2 2s. 9d. and 837 pounds of tobacco due by the intestate Syme to the testator Clopton.

The defendant pleads that Clopton made his last will and testament in writing, and appointed Syme one of his executors, which said will was proved, as the law directs, to be the last will of Clopton in the Court of New Kent [County], by pretext and reason whereof the said Syme was discharged of his said debt. And he prays judgment *si actio*. They also plead *nil debet* and *non assumpsit infra quinque annos*. Upon these two last pleas, there were issues, and a demurrer to the first.

Upon arguing the demurrer, the county court was of opinion that the plea was not sufficient to bar the plaintiffs' action. And upon the issues, the jury found for the plaintiffs £9 2s. 3 3/4d. damages. The defendants have appealed.

The only question here is whether the defendants' plea be a good bar. And I [Barradall] hope to show it is not, either for the matter or the manner of it.

The matter of the plea is shortly this, that the plaintiffs' testator made a will, and appointed the defendants' intestate one of his executors and that the will was proved to be the will of the testator in due form of law.

It is insisted that this making the intestate an executor is a discharge of the debt. It is a common doctrine that, where the debtee makes his debtor executor, the debt is extinguished.

But this rule is liable to several exceptions, as, first, where the executor dies before he proves the will, second, where the executor refuses [to act] before the ordinary, for the rule of law is founded on these reasons, first, that a man cannot sue himself, second, that the same hand being both to receive and pay it amounts to an extinguishment, which reasons do not hold where the executor dies before he proves the will or where he refuses.

The making the debtor executor amounts to payment and a release, but, if the debtor will not accept the executorship, it can have no operation, for you cannot force a man to accept a release against his will. *Per Holt, Sal. 307.*¹

Here, it does not appear that Syme proved the will or ever administered. The fact must be taken as it stands upon the pleadings. It is only said that Syme was appointed an executor and that the will was proved in due form, but it is not said that Syme proved it. A will may be

¹ *Wankford v. Wankford* (1703), 1 Salkeld 299, 91 E.R. 265, also 3 Salkeld 162, 91 E.R. 753, Holt K.B. 311, 90 E.R. 1072, 11 Modern 38, 88 E.R. 869, 1 Freeman 520, 89 E.R. 390.

proved *per testes* and yet the executor refuse. If Syme did not prove the will, he was not the person entitled to receive, and so falls not within the reason of the rule of a debtee making his debtor executor amounting to a release.

Objection: But, here, Syme was only an executor with others, and, though it be not pleaded that the other executor proved the will, it appears sufficiently by the record the plaintiffs' suing as executrix. And, where the debtor and others are made executors and the other executor proves the will, but the debtor does not, the debt is extinguished; so it is if the debtor refuse and die before the other executors, for he might come in notwithstanding this refusal.

All which must be admitted. And if it appeared to the court that the will proved by the plaintiff and the will mentioned in the plea wherein Syme was appointed executor were the same, the argument would be conclusive. But I conceive it does not.

This case, as I have said, must be taken as it stands upon the pleadings. The plea is no more than that Clopton made a will and Syme one of his executors and that that will was proved. Now it will scarce be denied but that a man may have two wills and several executors, Cur. Went. 12, which appears by the Case of Hitchen and Bassett, 2 Sal. 592.¹

It is not pleaded that the will wherein Syme was appointed executor was the same will proved by the plaintiff or that it was proved by any other of the executors. And, if the will was not proved by any other of the executors, it is no release or extinguishment. When men will make use of such extraordinary methods to avoid the payment of a just debt, it cannot be thought hard to hold them to the greatest strictness in pleading.

Here, the defendant should have craved oyer of the probate and then have pleaded that Syme and the plaintiff were both made executors. And, then, the matter would have appeared clearly and judicially to the court.

It is possible there might be two wills. The fact cannot now be enquired into, but Your Honors will judge upon the pleadings.

It shows an extraordinary temper of litigiousness in the defendant to contest this matter, for, even though the debt should not be recoverable at law, yet, in equity, it will indisputably be subject to creditors or even legatees in some cases. Here, there are creditors unsatisfied.

What is meant by the debts being extinguished is no more than that an action will not lie to recover, for it is assets in the hands of the executor, and, as such, liable to the testator's debts. And that is the reason Holt says it amounts to payment and a release.

The Case of Wankford and Wankford, 1 Sal. 299, where all the learning on this head is collected was no more than this. The obligee made the obligor executor, who administered part of the testator's goods, but never proved the will, and died. The action was brought against the heir of the obligor who pleaded this matter. And it was adjudged that the debt was extinguished, though the will was not proved, because the executor had administered and so had put it out of his power to refuse. But here Syme never administered.

The judgment was affirmed.

¹ T. Wentworth, *Office of Executors; Hitchins, ex dem. Nosworthy v. Basset* (1688), 2 Salkeld 592, 91 E.R. 495, also 3 Modern 203, 87 E.R. 131, Comberbach 90, 209, 90 E.R. 362, 433, 1 Shower K.B. 537, 89 E.R. 738, *sub nom. Basset v. Noseworthy* (Ch. 1670-1674), Reports *tempore* Finch 102, 23 E.R. 55, Nelson 135, 21 E.R. 809, 73 Selden Soc. 37, 62, *sub nom. Noseworthy v. Basset* (1685), 1 Vernon 351, 23 E.R. 516, *sub nom. Hungerford v. Nosworthy* (1694), Shower P.C. 146, 1 E.R. 99, related cases *sub nom. Seymour v. Noseworthy* (Ex. 1664-1665), Eq. Cases Exch. 1, Hardres 374, 145 E.R. 504.

Timson v. Scarburg
(October 1741)

In this case, the devise in issue created an estate tail.

Samuel Timson, seised in fee of 800 acres of land called Vaulx Hall Plantation, by his will, January 8, 1694, devises thus:

I give to my two sons, William and Samuel, all that tract of land where I now live commonly called Vaulx Hall Plantation to be equally divided between them, William to have the manor house and plantation into his half and Samuel the plantation whereon Robert Rickman now lives into his half, to them and their heirs forever, but, if it shall please God either of them shall die before they come of age or without issue lawfully begotten, then to the survivor of them and their heirs forever.

William and Samuel entered, and were severally seised of their moieties. William lived until twenty-one. And having issue three sons, William, John, and Samuel, and being seised of the premises devised to him and also of 150 acres of land adjoining, which he had purchased, which said devised premises and 150 acres are the premises in question, by his will, August 18, 1716, devised the premises in question thus:

I give to my son William my dwelling house and part of my land on Queen's Creek [describing the boundaries] to him and his heirs lawfully begotten forever. Item, I give to my son John all the rest of my land on Queen's Creek to him and his heirs lawfully begotten forever. But, if it should please God to take [either] or one of them out of this world before they come of age or have no son, then to the survivor of these two or his eldest son.

Then he devises other lands to his son Samuel. And then follows this clause:

If neither William nor John leave no son behind them, then, my son Samuel to have it all to his heirs.

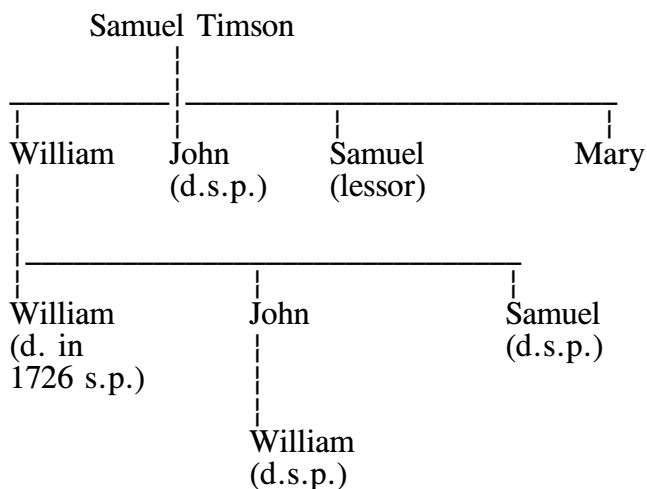
William and John, the sons and devisees, entered, and were seised. and then Samuel, their brother, died without issue. William lived to be twenty-one, but died without issue. And, by his will, 26 April 1726, he devised his part to his brother John in tail male. And, in the conclusion of his will, there is this clause:

Item, I give the remainder of my estate, lands, and interest to my brother John Timson and his heirs forever.

John Timson lived to be twenty-one, had issue a son, William, and, by his will, devised to the defendant's wife for life. This will is not found at large as the others are.

William, the son of John, died an infant without issue. The lessor is Samuel, the son of Samuel Timson, the first testator, and is his heir at law. He is also heir at law of William Timson, the father, and of his three sons, William, John, and Samuel. And so is the male heir of the whole family.

The pedigree stands thus:



In this case, there must of necessity be two questions made, one upon the will of Samuel Timson, which respects the moiety of Vaulx Hall Plantation, *viz.* 400 acres of the premises in question, and the other upon the will of William Timson, his son, which may either respect the whole premises or only the 150 acres purchased by William Timson, as the determination happens to be upon Samuel Timson's will.

The first question, then, is upon Samuel Timson's will, what estate his sons, William and Samuel, take in the lands called Vaulx Hall Plantation devised to them. The devise is to this purpose:

I give to my two sons, William and Samuel, Vaulx Hall Plantation to them and their heirs forever, but, if it shall please God either of them should die before they come of age or without issue lawfully begotten, then to the survivor of them and their heirs forever.

The question is whether William and Samuel took an estate tail or a fee simple upon the contingency of living until twenty-one or having issue. If [it is] an estate tail, William is dead without issue, and Samuel, who survived, is the lessor, and has, undoubtedly, a good title. If [it is] a contingent fee, then the lessor can have no title under this will.

I [*Barradall*] shall be very short in speaking to this question because this court very lately in April 1739, upon the same words as are in this devise in another clause of the same will adjudged that such words make an estate tail. I was then on the other side of the question, and labored to persuade Your Honors to be of opinion that it was a contingent fee, but in vain. Whether the gentleman on the other side may succeed better, I cannot tell. The case in which this opinion was given was between the now lessor, Timson, and Robertson.¹ It was upon a devise in the will of Samuel Timson in these words:

I give and bequeath to my son John 200 acres of land to him and his heirs forever, but, if it shall please God he shall die under age or without issue, then to my daughter Mary and her heirs.

John lived until twenty-one, but died without issue. The lessor claimed as heir of John, and, if John had taken a contingent fee by the devise, would have had a good title. But it was

¹ *Timson v. Robertson* (1739), see above, Case No. 66.

adjudged to be an estate tail. And so Mary, the daughter, had a good title by the remainder over.

In the present devise, the words [are]:

to my sons, William and Samuel, and their heirs, but, if either of them die before they come of age or without issue, then to the survivor and their heirs.

There is no difference between the words of one devise and the other; only, in one, it is if they die under age and, in the other, if they die before they come of age, which are the same in sense. The lessor, therefore, hopes that the same words in the same will will have the same construction now. They make for his title, as they were adjudged to have when they made against his title.

The words that we rely upon to make an estate tail are, 'if either die before they come of age or without issue'. This word 'issue' in a will is always taken to mean heirs of the body. And whenever it can be applied to the word 'heirs' in any former part of the will, [it] qualifies the generality of the term 'heirs', and restrains it to heirs of the body. It is a common and known doctrine that, if a devise be to one and his heirs and, if he die without issue, remainder over that, though the first words made a fee, yet the word 'issue' that comes after shows that the testator did not intend heirs general in the first part of the devise, but only heirs of the body. And so, taking the testator's meaning upon the whole will, it is plain an estate tail was intended. Here, the devise is to William and Samuel and their heirs and, if either die before they come of age or without issue, remainder over.

The word 'issue' shows what heirs were meant in the first part of the devise, *viz.* heirs of the body. And Your Honors have adjudged that the words 'before they come of age' do not differ the case from a general devise of the kind.

In *Timson and Robertson*, the case principally relied upon was *Soule and Gerrard*, Cro. El. 525,¹ which was thus. A man devised to his son and his heirs and, if he die within age or without issue, remainder over; this was adjudged an estate tail. And it is, to be sure, a case directly in point.

There is also a later case, *Tilly and Collier*, 2 Lev. 162,² where the devise, as to this purpose, was shortly thus. The devisor had three daughters, Susan, Ann, and Elizabeth, and devised his lands to his wife until his heir came of age, and, if Susan, his heir, die without heirs before twenty-one so that the land fall to Ann, then he devises further. These words, 'if Susan die without heirs before twenty-one', it was held made an estate tail in her and not a fee.

And so I shall leave this point, hoping my client will not be so unfortunate to have the same point adjudged against him both ways.

The next question in this case is what estate William and John, the sons of William Timson, took by the devise to them in their father's will. And this question is necessary with respect to the 150 acres which William Timson, the father, purchased and which he has devised with his moiety of Vaulx Hall Plantation to his sons, although he had only an estate tail in Vaulx's. And, if he had a fee in Vaulx's, then this question respects the whole premises, as has been said.

The devise in this William Timson's will is thus:

I give to my son William part of my land at Queen's Creek to him and his heirs lawfully begotten forever. I give to my son John all the rest of my land at Queen's Creek to him and his heirs lawfully begotten forever. But, if it should please God

¹ *Soule v. Gerrard* (1596), Croke Eliz. 525, 78 E.R. 773, also *sub nom. Sowell v. Garret*, Moore K.B. 422, 72 E.R. 671.

² *Tilly v. Collier* (1676), 2 Levinz 162, 83 E.R. 499, also 3 Keble 589, 84 E.R. 895.

to take [either] or one of them out of this world before they come to age or have no son,

then he devises lands to his son Samuel, and adds, 'if neither William or John leave no son behind them, then my son Samuel to have it all to his heirs'.

Nothing can be clearer, I think, than that the testator intended the fee should vest in his son Samuel, for, though the first devise to William and John is to them and their heirs, yet it is with the addition of those words 'lawfully begotten', which, in common speech, are generally understood of heirs of the body. Yet admitting a fee simple would pass by these words, upon what follows, there can be no doubt what heirs the testator meant in this part of the devise, 'if either die before they come to age or have no son, then to the survivor or his eldest son.' The heirs meant are plainly the sons of the devisees or their heirs male, for they are the same, and not their heirs general.

The words here are the same as in Samuel Timson's will, [except] only 'son' instead of 'issue'. And the word 'son' is as much descriptive of heirs male as the word 'issue' is of heirs of the body in general. If, therefore, the words in Samuel Timson's will make an estate tail general, the words here will make an estate in tail male. But, if there could arise a doubt on this part of the will on account of the words 'before they come of age', yet the last clause seems to put the matter beyond all question, 'if neither William or John leave no son behind them, then my son Samuel to have it all to his heirs.' The remainder to Samuel is to take place when William and John are dead without sons, that is without issue male.

It will scarce be disputed that, if a man devises to one and his heirs and if he leaves no son, remainder over, that the devisee has an estate in tail male. And that, in effect, is the devise here. 'Son' does certainly as strongly import heirs male as 'issue' does heir of the body in general.

In *Bilfield's Case*, cited by Hale in King and Melling, 1 Vent. 231,¹ the devise was to A. and, if he dies not having a son, then to remain to the heirs of the testator. And [it was] adjudged that 'son' was *nomen collectivum* and that it was an entail.

So in *Millner and Robinson*, Mo. 682,² one devised to his brother John and, if he died, having no son, then to his brother William for life and, if he died without issue, having no son, remainder over. It was held that John, the first devisee, had an estate tail. This case is also in 1 Ro. Abr. 837, 12, but, there, the devise is stated to be to the wife for life and, afterwards, to the son and, if the son dies without issue, having no son, that another shall have it, [was] held an estate in tail male to the son.

But there can scarce want cases to support so plain a point, for what can a man mean by the word 'son' but heirs male and what are heirs male but sons.

So that I apprehend it to be extremely clear that the testator, William Timson, intended only an estate in tail male to his sons William and John and that, upon default of male heirs, the land should go to his son Samuel in fee. William and John are both dead without issue. Samuel is also dead, and the lessor is his heir.

Thus, upon the will of Samuel Timson, the lessor seems to have a good title to Vaulx's Plantation. But, if that could be a doubt upon the will of William Timson, he has clearly a title not only to that but to the 150 acres purchased by William Timson and so has a good title to the whole premises in question.

And, if William and John, the sons of William, had only an estate tail, it may seem unnecessary to take any notice of their wills. William has taken upon him[self] to devise his part to his brother John in tail, and John has taken upon him[self] to devise the whole to the

¹ *Bilfield's Case* (1600), 1 Ventris 231, 86 E.R. 155.

² *Millner v. Robinson* (1600), Moore K.B. 682, 72 E.R. 837, 1 Rolle, Abr., *Estate*, pl. P, 12, p. 837.

defendant's wife. But these devises must be void if they had only estates tail, as, I apprehend, is extremely clear.

Objection: Admitting that William and John, the sons of William Timson, took only an estate tail and that Samuel had a remainder in fee, this remainder was vested in him, and so, upon his death, descended to his heir, who was his brother William. And William, by his will, has devised this remainder to his brother John by these words, 'I give the remainder of my estate lands and interest to my brother John and his heirs.' Then John, being tenant in tail with the remainder in fee expectant, might devise to the defendant.

Answer: I shall not dispute but that the remainder limited to Samuel upon his death descended to his brother William. And I shall agree that William might devise this remainder and that it would pass by the devise alone. But, as John, the devisee, was heir of his brother William, he must take this remainder by descent and not by the devise.

It is not indeed material how John took this remainder. I agree that he was tenant in tail with the remainder in fee expectant and that he might have devised this remainder. But this I conceive he has not done. And, therefore, the same is descended upon the lessor, who is his heir.

I have already observed that John Timson's will is not found at large or referred to in the case. And, therefore, it must be taken to be as stated and agreed to in the case. The words of the case are that he made his will and, thereby, devised the premises in question to the defendant, Anna Maria, for life. It is agreed that he left a son at his death, who is since dead. (But the will, I believe, was made before he had a son.) The question then is whether the tenant in tail with the remainder in fee expectant, having issue, can devise in this manner.

The intent of the testator is to be considered by the devise, as here stated. He certainly intended to pass a present interest, but that he could not do, having issue at his death. The devise, therefore, is void.

The Act of the 9 Ann. says 'no estates tail shall be cut off, avoided, or defeated by any ways or means whatsoever but by Act of Assembly.'¹ And every act and thing done towards cutting off, avoiding, or defeating any estate tail is thereby declared to be null and void. But this devise would have avoided and defeated the estate tail, as there was issue at the testator's death. Therefore, it is void.

A devise void in its creation cannot be made good by matter *ex post facto*, as, if an infant makes a will and lives to be of age but dies without a new publication, the will is void. So of a married woman if she does not republish after discoverture.

Further though a remainder in fee may be devised, yet there must be apt words to pass it. The testator's intention to pass such an interest must appear. Here, the intention appears quite otherwise. The devise as stated is of the premises in question and to pass *in praesenti*. This can never be construed a devise of a remainder expectant and to take effect *in futuro*, as it must be to make the devise good, because it was certainly void against the devisor's issue. But this question only respects the 150 acres purchased by William Timson if the devise in Samuel Timson's will be an estate tail.

Judgment [was given] for the plaintiff.

N.B. the counsel for the defendant only argued the first point, which, being adjudged against the defendant, he would not argue the second. The objection above was not mentioned.

¹ Act of 1710, c. 13, s. 4, 3 Hening's Statutes 518-519.

Tazewell v. Harmanson
(October 1741)

The question in this case was whether the testator intended to create a contingent remainder or not.

In [an action of] ejectment for 400 acres of land, upon the facts agreed, the case is [thus]. William Andrews, seised in fee of 1000 acres, granted by patent to one Taylor, by deed poll dated in 1664 for divers valuable considerations (but none particularly expressed), demises, leases, and to farm lets the said premises to Thomas Harmanson for his and his wife's life. And, after their decease, he gives, grants, enfeoffs, and confirms the said land to four sons of Harmanson as follows, to Thomas 300 acres, to William 250 acres, to John 250 acres, and to Henry 200 acres. And, if old Harmanson and his wife decease before the sons come of age, it shall be lawful for them, at the age of twenty-one, to enter upon their parts; the same to have, enjoy, and possess as their own proper and real estates in fee simple to them and their heirs lawfully begotten of their several and respective bodies forever. This is the substance of the deed. It is recorded, but no livery appears to be made.

Thomas Harmanson, the father, enters, and, in 1667, obtained a patent for 800 acres as surplus land within the bounds of the said patent to Taylor to hold to him and his heirs. After which, he caused a division of the 1000 acres to be made among his four sons, according to the proportions given them by the deed. And, being seised both of the 1000 acres and 800 acres, by his will dated in 1696, he devises thus.

I confirm to my four eldest sons the several dividends of land by me given to them and their heirs forever as the same was divided by Mr. Daniel Eyre, which they have passed bonds to each other to be content with under the penalties and according to the conditions there inserted.

And, in another clause, he devises to the said sons in fee 'all' the remaining part of his dividend which lies at the head of the land given them and was not divided with the rest to contain their several divisional lines as they now run to the head line etc. The lands mentioned in the first devise are the 1000 acres. Those mentioned in the second devise are the 800 acres.

Thomas Harmanson died. Henry, one of the sons, entered into the 200 acre parcel of the 1000 acres allotted him by the division, and devised to him as aforesaid and into other 200 acres contiguous parcel of the said 800 acres, which said 400 acres are the premises in question.

Henry Harmanson, by his will dated in 1709, devises the said premises (by the name of his Dwelling Plantation) to his wife for life, after her death, to the child she then went with (if a male) in tail, remainder to his son Matthew (the now defendant) in tail with several remainders over. And, being in possession of a tract of land, as guardian to his son, the defendant, descended to him from an uncle, he devised the same by the name of the land whereon John Johnson lived to his daughters, Tabitha and Sophia, in tail with a remainder over. And then follows this proviso:

Provided that, if the child my wife now goes with should be a daughter and my son Matthew should enjoy and possess the plantation I now live on and should disturb or should not make over or convey the said plantation to my daughters, Tabitha and Sophia, as aforesaid given or disturb my wife during her natural life, that, then, I bequeath the plantation I now live on to my daughters, Elizabeth, Tabitha, and

Sophia, and their heirs and that my son Matthew shall have no part or parcel of my estate save 1s.

Then Harmanson died. His wife entered into the Dwelling Plantation and quietly enjoyed it until her death in 1738. The unborn child proved to be a son. He lived to be 28, but died without issue before his mother. The defendant, after his father's death, entered into the land devised to his sisters, Tabitha and Sophia, and sold it. And, after his mother's death, he entered into the Dwelling Plantation, and is now possessed. Elizabeth and Tabitha, two of daughters and devisees of Henry Harmanson, mentioned in the proviso, are dead. And the lessor, Sophia, is the surviving daughter and devisee.

The principal question in this case arises upon the will of Henry Harmanson, the defendant's father, whether the defendant, by entering into the land devised to his sisters, which I call Johnson's Plantation, and selling it has not forfeited and lost all right and title to the Dwelling Plantation under the remainder limited to him of that plantation and whether, upon such entry and alienation, a good estate in remainder did not arise to the daughters to whom the Dwelling Plantation is limited over in case the defendant did not perform the proviso or condition mentioned in the will, and, if, so, then, the mesne estate being all spent, the lessor, who is the surviving daughter, has undoubtedly a good title.

But, as it may be made a question what estate Henry Harmanson had in the Dwelling Plantation, whether he had a fee in the whole or only in part, there will arise another question, *viz.* what effect or operation the deed poll from Andrews in 1664 had and whether any and what estate passed thereby to the grantees. If nothing passed by that deed or the sons took an estate in fee, then, clearly, Henry Harmanson had a good estate in fee in the whole 400 acres. If an estate tail passed to the sons, then he had only a fee in 200 acres, *viz.* his part of the 800 acres devised to him by his father, of which I think there can be no dispute. And so, as this point is determined, the principal question will respect either the whole 400 acres or only 200 acres.

I shall begin with this last question. And, first, I say the deed poll of 1664 could have no operation at all and that nothing passed thereby to the grantees. Every deed must enure and take effect either as a conveyance at common law or a conveyance upon the Statute of Uses,¹ which we commonly call a conveyance to use.

In every conveyance to use, there must be a proper consideration to raise the use or a deed cannot operate as such. The only considerations that are sufficient to raise a use are blood, marriage, or payment of money. A use cannot be raised upon a general consideration, as if one, by an indenture for divers good considerations, bargains and sells his land to another and his heirs; nothing passes thereby. 1 Co. 176, *Mildmay's Case*, resolved.²

The consideration here is only general, *viz.* for divers considerations. This deed, then, cannot operate as a conveyance to use.

Neither can it operate as a conveyance at common law. The only method by which an immediate estate in possession could be transferred from one to another by the common law was by a feoffment or a fine, except in the case of an exchange. This deed, if it can operate at all as a conveyance at common law, must be a feoffment. But it cannot operate as such for want of livery of seisin, which is necessary to every feoffment, gift, in tail or for life, or other deed where a freehold shall pass. *Lit.*, s. 59.³

¹ Stat. 27 Hen. VIII, c. 10 (*SR*, III, 539-542).

² *Kingsmill v. Sharington* (1582-1584), 1 Coke Rep. 175, 76 E.R. 379, also Jenkins 247, 145 E.R. 174, Croke Eliz. 34, 78 E.R. 300, Moore K.B. 144, 72 E.R. 495.

³ T. Littleton, *Tenures*, s. 59.

This is so well known it needs no illustrating. I conclude then that this deed poll had no effect or operation. Nothing passed by it either to Thomas Harmanson or his sons. Thomas Harmanson, by his entry, was nothing more than a disseisor. Andrews might have entered upon him.

If it be objected that, in old deeds, livery is to be presumed, I shall grant it under this restriction, where the estate and possession has gone according to the deed, but that was not the case here.

It is plain old Harmanson entered, claiming a fee, for he takes upon him[self] to divide the land among his sons, makes them give bonds to stand to the division, and, by his will, confirms the land by him given to them, as the expression in the will is 'to them and their heirs'. He assumes a right of disposing, which is a manifest proof of his claiming a fee. By his entry, then, at first, he gained a tortious fee. And his possession gave him a good title against all but Andrews and his heirs.

Henry Harmanson, one of the sons and the defendant's father, after old Harmanson's death, enters into 200 acres, part of the 1000 acres given and devised to him, and also into the 200 acres, part of the 800 likewise devised to him. And he also claims a fee, for he takes upon him to devise the whole to his wife for life, remainder to the child *in ventre sa mere* in tail, remainder to the defendant in tail.

And, after his death in 1709, the defendant sets up no title under the deed, but suffers his mother to enjoy for near thirty years. And, even now, the title he sets up is under his father's will, for he shows no other. It is not so much as found that he is heir in tail.

It is evident, then, that the estate and possession have not gone according to the deed. Old Harmanson claimed a fee. His son, Henry, did the same. And the defendant admits it by the title he sets up and by suffering his mother to enjoy for thirty years under his father's will. There is no room, therefore, to presume a livery in this case, but rather the contrary, no regard having been had to the deed in all these transactions.

I conceive, then, that, Henry Harmanson, the testator, had a good estate in fee, both in the 200 acres, part of the 1000, and also in the 200, part of the 800, and might well devise the whole, which, indeed, is a point that scarce ought to be disputed, since both the plaintiff and the defendant claim under his will, as I have shown.

It being so clear, at least in my apprehension, that no estate at all passed by the deed poll, it seems unnecessary to enter into the inquiry, whether, by the words of that deed, the sons would have had a fee simple or a fee tail. It is a matter that would admit of great dispute, being in a deed. But I shall not trouble Your Honors with it.

I shall now speak to what I call the principal question, which will respect either the whole land in dispute or only 200 acres, as the determination happens to be upon the other question.

The case as to this point is shortly this. Henry Harmanson, seised in fee of the premises in question, devises the same to his wife for life, remainder to the child *in ventre sa mere*, if a son, in tail, remainder to his son, the defendant, in tail, with other remainders over. He devises another parcel of land, to which he had no title, but was the defendant's to his daughters, Tabitha and Sophia, in tail. And then follows the proviso upon which the question arises, in these words, 'provided' etc.

It happened in event that a son was born, who lived until 28 and then died without issue before his mother. The defendant, after his father's death, entered into the Plantation (Johnson's) devised to his sisters, and sold it. And, after his mother's death in 1738, he enters into the Dwelling Plantation, which are the premises in question.

And the question is whether, as the defendant did disturb and did not make over the land devised to his sisters, he can claim anything in the Dwelling Plantation and whether, upon his non-performance of that condition, the lessor, who is the survivor of the sisters to whom the Dwelling Plantation is limited over in the case of such non-performance, has not a good title, the mesne estate, *viz.* the estate for life to the wife and the estate tail to the unborn son being both spent.

The proviso is but oddly penned, but the testator's intent is to be collected from the whole will. And taking the whole will together, it seems exceeding plain that the testator intended, if his son would not make over the land devised to the daughters, that he should have nothing in the Dwelling Plantation.

The proviso begins: 'If the child my wife goes with should be a daughter and my son should enjoy the Dwelling Plantation and should disturb or should not make over the lands devised to my daughters or should disturb his mother during her life'. Then, he gives the Dwelling Plantation to his daughters and his son to have no part of his estate.

It is contended that the testator only intended to oblige his son to make over the land devised to his daughters in case the unborn child was a daughter. And it must be owned the first part of the proviso seems to countenance such a construction. But, then, such a construction does not seem consistent with the other parts of the will.

First, he devises to his daughters absolutely and without any regard to the unborn child's being a son or a daughter, which shows an intent that they should have his lands at all events. But, then, reflecting that the land was not his to give, he obliges his son under a penalty to convey the land to them. And, not having in contemplation all the events whereby the Dwelling Plantation might come to his son, he speaks only of that which was nearest in prospect, *viz.* the unborn child's being a daughter.

But can it be fairly collected from hence that he did not intend to oblige his son to convey the land devised to his daughters but on that contingency when he had absolutely devised it to them before without regard to that contingency? Certainly not. His intention was to oblige the son to convey the lands to his daughters or else that he should take nothing in the Dwelling Plantation, but, in such case, he limits over the Dwelling Plantation to the daughters as an equivalent.

Here is a father who has several children, and he is making a provision for them all. One of them has an estate. The father is willing to give him another estate provided he will make over his own to his sisters. There is nothing uncommon or unreasonable in all this. It seems a prudent, fatherly provision.

Taking the case in this view, let it be asked whether it was not as much the father's intention that the daughters should have something as the son. He is willing they should have their brother's estate but, if he will not consent to it, then he has provided an equivalent, *viz.* the estate he had given to his son. This is the construction we contend for. The son would not make over his own estate. Therefore, we say we are entitled to the equivalent.

But the son says he will have his own estate and the other too. I [*Barradall*] must submit whether this can be reasonably thought the testator's meaning.

It is no objection to say the estate given the son was only in remainder and that it was unreasonable he should make over his estate upon so remote an expectancy. The business is whether the testator has ordered it so. If he has, it must be submitted to. It was certainly in the son's election whether he would accept of this remainder upon the terms it was given. And, if he did not think it worth his while, ought he now, because in the event the remainder is come to take place, set up a title discharged of the terms or condition upon which it was given? Such reasoning has more of amusement than argument.

It was, I conceive, as much the testator's intention that his daughters should have Johnson's Plantation or, as an equivalent, an estate in remainder in the Dwelling Plantation, as it was that the son should have any estate in the Dwelling Plantation. If the son will not let us have Johnson's Plantation, how can this intent be satisfied unless we have the Dwelling Plantation?

Then, nothing can be stronger to show the testator's intent that the son should have nothing in the Dwelling Plantation if he did not perform the condition. He not only limits it over to the daughter, but adds 'my son to have no part or parcel of my estate'. He intended to oblige him under the penalty of losing all to make over the land to his sisters. And, since he has not done so, what pretence of right can he have?

It is no uncommon thing in wills to construe the copulative 'and' as the disjunctive 'or'. And so *vice versa* where such construction will best support the testator's meaning. There are many cases in the books to this purpose.

Now here, in this proviso, if the first copulative 'and' is read 'or', the case will admit of no dispute, for, then, it will run thus. If the child be a daughter or if my son should enjoy the Dwelling Plantation, there could not then possibly be a doubt but that, if the son, by any event, came to enjoy the Dwelling Plantation, it should go over if he did not make over the land to his sisters. And, as that from other parts of the will may be reasonably collected to be the testator's meaning, I must submit whether it be any forced interpretation to construe 'and' here as a disjunctive.

This may appear the more reasonable upon this consideration, that those words 'if my son should enjoy the Dwelling Plantation' etc. are no ways necessary but the sense and meaning of the testator would be complete without them unless they were intended for the purpose we contend.

The sentence would run thus without those words, 'if the child be a daughter and my son should not make over etc., then I give the Dwelling Plantation to my daughters.' If the child had been a daughter, the son would have enjoyed the Dwelling Plantation as the next in remainder. The other words, then, 'or if my son should enjoy' etc., were not necessary unless it was to signify that, if his son, by any event, came to the Dwelling Plantation, it should go over if he did not perform the condition.

If, then, it was the testator's intention that the son should have no estate in the Dwelling Plantation unless he made over the land to his sisters, which he has not done, it will scarce be a question, I believe, but the lessor has a good title. The case will be then no more than this. A devise to A. for life, remainder to B. in tail, remainder to C. in tail upon condition that he do such an act, and, if he fails, then to D. It cannot be doubted, I think, but that this devise to D. is good by way of a contingent remainder. It is a remainder to take effect upon this contingency in case the son disturbed or did not make over the land to the daughters. But, although this remainder was contingent in its creation, yet, upon the son's entering and aliening the land, it became vested for, then, the contingency happened, upon which it was to take effect. And now, the mesne estates being spent, the persons in remainder have undoubtedly a good title.

Such a limitation after a fee simple would be good, though not as a remainder, yet as an executory devise, as Fulmerson's Case, cited in Pell and Brown, Cro. Ja. 592, which was shortly thus. A devise to Sir Edward Cleer and his wife and the heirs of Cleer upon condition that they should convey lands to the executors and, if they failed, their estate should cease and the executors should have the land etc. And it was held that this limitation, though after a fee, was good by way of an executory devise.¹

Here, the limitation is after an estate tail, upon which a remainder may be limited. And, therefore, it is good by way of a contingent remainder. Such a remainder is contrary to no rule of law, and, when a man has a fee simple, he has such an absolute power and dominion over his estate that he may give it in any manner and under what conditions, restrictions, and limitations he pleases; so [long as] his disposition do not clash with the rules of law.

And so I pray judgment for the plaintiff.

This case was compromised.

¹ *Fulmerston v. Steward* (1594-1596), Croke Jac. 592, 79 E.R. 506, also *sub nom. Cleer v. Peacock*, Croke Eliz. 359, 78 E.R. 607.

Anderson v. Ligan
(October 1741)

In this case, the claim for the land in issue was barred by the Statute of Limitations.

Thomas Ligan, seised in fee of 200 acres of land, the moiety of which are the premises in question and having issue, four sons, William, the eldest, Richard, his second, and two others, by his will, 10 January 1675, he devises the same to his son William:

But, in case my son William die without heirs, then my land above expressed to return to my son Richard or the next surviving son.

William entered, and was seised, and had issue, Thomas, his eldest son, and William. And, by his will, 21 January 1688, he devised the said premises to his sons, Thomas and William, in fee to be equally divided between them, and he died in 1689.

After his death, his widow occupied the whole until his sons came of age, who, respectively, as they attained to twenty-one, entered into the said land, but made no division.

Thomas, the son of William, died in 1705, left issue, a son and three daughters, Phoebe, Mary, and Elizabeth. The son died an infant in 1706. Mary is dead without issue. Elizabeth is one of the lessors; she was born in 1701, and she married the other lessor in 1718.

Elizabeth and Phoebe or those claiming under them have been in quiet possession of part of the said 200 acres, viz. 100 acres from the death of their brother in 1706. And the defendant, who is William, the son of William, from the time of his entry, has been in possession of the rest. But the land in his possession has never been separated or divided from the other. The defendant is 59 years old.

Phoebe, who married one Walthall, with her said husband, by deed of 6 March 1720, conveyed all her right to said land, by estimation 82 acres, to Alexander Marshall. The lessors, by lease and release on 1 and 2 January 1723, conveyed to the said Marshall 80 acres, parcel of the said land by the name of one-third part of 247 acres. But Marshall, by deeds dated 6 March 1737, conveyed back to Walthall and his wife and the lessors all his title, claim, and interest to the land so conveyed to him.

The first question is whether the devise in Thomas Ligan's will to his son William be an estate tail or a fee. If an estate tail, the lessor Elizabeth is one of the co-heirs in tail, viz. one of the daughters of Thomas, who was eldest son of William, the first devisee. And so she must have a clear title unless she is barred by the Act of Limitations,¹ which must be the second question and, indeed, the only one in this case. As to the covenant by the lessor to Marshall, it is void by the Act of 1710,² Elizabeth being only tenant in tail. But, if not, Marshall has reconveyed, and so Elizabeth is remitted to her first estate.

And, first, I [*Barradall*] think it can scarce be disputed but that William Ligan, the son of Thomas, took an estate tail by the devise in Thomas Ligan's will. By the first part of the devise, no estate is limited but by what follows, 'in case my son die without heirs, then to Richard'. William has an estate of inheritance by implication.

But the question is whether a fee or a tail.

The word 'heirs' in a will is often taken respectively, that is to say for heirs special, and not heirs general, where the testator's intention appears to be so.

¹ Act of 1710, c. 13, s. 10, 3 Hening's Statutes 522.

² Act of 1710, c. 13, s. 4, 3 Hening's Statutes 518-519.

Now, when a man devises to one and his heirs and, if he die without heirs, remainder over to another who is heir general of the first devisee, it is plain he cannot mean the heirs general of the first devisee, because, then, the limitation over would be idle and vain, for the heir general would take it by course of law if the devisee left no children. The testator, then, in such a case, must mean heirs of the body. And, so, such a devise, by the apparent meaning and intent of the testator, makes an estate tail. And so it has been adjudged in several instances, as [follows].

Webb and Herring, 1 R. Abr. 836, 5; 3 Bul. 192; devise to his son Francis after the death of his wife, and, if his three daughters outlive their mother and Francis and his heirs, then to them for life. 'Heirs' here was held to be meant heirs of the body of Francis, the daughters being his heirs general, and so Francis had an estate tail.¹

Braxton and Stone, 3 Mod. 123; a man, having two sons, devises to the eldest and, if he die without heirs male, remainder to the other; [it was] adjudged an estate tail in the eldest.²

Nottingham and Jennings, 1 Sal. 233; one, having three sons, devises to the second and his heirs forever and, for want of such heirs, to his own right heirs; [it was] adjudged the testator must intend the heirs of his body, because the son could not die without heirs general, living heirs of the father, and so [it was] an estate tail in the second son.³

See also the cases in 3 Danv. 180, and No. 6, *ibid*.

Here, the remainder limited upon William's dying without heirs is to his brother Richard, who was his heir general. And so clearly [it is] an estate tail.

If this was an estate tail in William, the plaintiff is a granddaughter and one of the co-heirs in tail, and so has a good title unless barred by the Act of Limitation, which is the second question and, in truth, the only point in the case.

William, the tenant in tail, takes upon him[self] to devise to his two sons, Thomas and William, in fee. After his death, his wife occupied the whole until the sons came of age. And, then, they, respectively, entered, but never made any division. Thomas, the eldest son, died in 1705, [and] left issue, a son and three daughters. The son died in 1706 without issue, and one of the daughters, Mary, is dead without issue. The lessor, Elizabeth, is another of the daughters, and she was born in 1701, and married in 1718 to the other lessor.

The defendant, who is William, the son of Thomas, has been in possession of that part of the 200 acres in dispute 38 years, *viz.* from his entry after he came of age.

I say we are within the saving clause of the Act of 1710 or, second, if not, we have been in possession as well as the defendant, [there having been] no division or separation. And so the Act of Limitation cannot run against us.

The Act of 1710 gives a right of entry to persons then having a right so that they enter within twenty years from the time the right first accrued. And there is a proviso or saving clause that, if persons then having such right of entry are under the disability of nonage, coverture, etc., that they may enter within ten years after the disability be removed.

When this Act was made, the lessor, Elizabeth, and her sister, Phoebe, had a right of entry as issue in tail of their father. This right first accrued to them upon the death of their brother in 1706. And, so, by the enacting part, they ought to have entered within twenty years

¹ *Webb v. Herring* (1617), 1 Rolle, Abr., *Estate*, pl. P, 5, p. 836, 3 Bulstrode 192, 81 E.R. 162, also 1 Rolle Rep. 398, 436, 81 E.R. 563, 590, Croke Jac. 415, 79 E.R. 355, J. Bridgman 84, 123 E.R. 1217, 1 Eq. Cas. Abr. 180, 21 E.R. 972.

² *Blaxton v. Stone* (1687), 3 Modern 123, 87 E.R. 79, also Skinner 269, 90 E.R. 122.

³ *Nottingham v. Jennings* (1700), 1 Salkeld 233, 91 E.R. 207, also 1 Lord Raymond 568, 91 E.R. 1279, 1 Comyns 82, 92 E.R. 970, 1 Peere Williams 23, 24 E.R. 279, 2 Eq. Cas. Abr. 308, 22 E.R. 260.

from that time, *viz.* in 1726. But the lessor, Elizabeth, was under age when the Act was made, and she married under age, and has continued under coverture ever since.

The question, then, is whether her right is not saved to her. Had she lived to be of age and then married, I agree she must have been barred, because the disability then would have been removed and she [were] in a capacity to exert her right.

But, here, before the first disability [was] removed, she falls under another equally within the saving clause. We contend, then, that, by the equity and intendment of this clause, our right is preserved to us.

Suppose we had become *non compos [mentis]* before our full age. Surely we should not be barred if we sued within time after recovery. Why should we, then, in this case? We hope it will be the court's opinion that we are within the equity and intendment of the proviso.

But, if not, we say, second, the Act of Limitations cannot run against us at all, as this case is circumstanced. The defendant's title is under a devise of William, the tenant in tail, his father and our grandfather. This devise must be agreed to be void. And, so, the defendant had no right of entry.

It is found that our father and the defendant entered, respectively, as they came of age, but never made any division, that the lessor and her sister and those claiming under them have been in quiet possession of part, *viz.* 100 acres, ever since their brother's death in 1706, and the defendant has been in possession of the rest, but his part was never separated or divided from the other.

Now, by the will of William, under which the defendant claims, no particular part is given to him but the whole [is] to be equally divided between the lessor's father and him. It cannot, therefore, be said that, under that devise, he had a right to one part more than another. And the possession, both of the lessor and the defendant, has continued an undivided possession to this day.

Now the rule of law is, where two are in possession, one that has right and another that has not, the law will adjudge the possession to be in him that has right. Littleton, s. 701; Plowd. 233b, same point; 1 Sid. 385, same point.¹ Here is an undivided possession both in the lessor and the defendant. And, as the defendant entered without any title, it is exactly the case put by Littleton. If, then, the law adjudges the possession in us, the Act of Limitations cannot run against us. The lessors are not above seven or eight years out of time from her full age. She was not of age until 1722, and had ten years after, *viz.* until 1732. Here, an estate tail is to be defeated by possession, and the issue in tail [was] under disability.

Judgment [was given] for the defendant by the opinion of LEE, CUSTIS, GRYMES, ROBINSON, BYRD, and the Governor [GOOCH]; TAYLOE, LIGHTFOOT, DIGGES *contra*.

¹ T. Littleton, *Tenures*, s. 701; *Willion v. Berkley* (1562), 1 Plowden 223, 75 E.R. 339; *Lord Kenoul v. Whitchcott* (1668), 1 Siderfin 385, 82 E.R. 1171.

APPENDIX

99

Carter v. Baylor
(1733 x 1735)¹

A patent of land from the crown is valid where the settling upon it is done with consent by a stranger to the patent.

Edward Hill obtained a patent in 1683 for 2717 acres. In 1693, he gave the land to Edward Chilton and Hannah, his wife, who was his daughter, and their heirs. In 1698, Edward Chilton, alone, sold to Baylor, who cleared enough to save the land according to the law then. And, afterwards, in 1704, he obtained a new grant of the same land as lapsed from Hill. Hannah survived her husband, Edward Chilton, and Mrs. Carter was her heir. And so, if the grant in 1704 to Baylor was not good, she had an undoubted title.

And it was adjudged that grant was not good, the land being saved before, and, though it was saved by a stranger, not the grantee or those who claimed under him, it should enure to the benefit of those who had the right.

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Lewis v. Golston
(October 1734)²

In this case, a warranty of merchantability was not proved.

In chancery.

Lewis brought a bill against Golston, suggesting the want of witnesses, to be relieved concerning the sale of two slaves which he alleged the defendant warranted to be sound but were, in truth, distempered.

The defendant denied the warranty.

And, though it was proved the slaves had been distempered for some time and until just before Lewis bought them and that the defendant knew it, yet the court denied any relief because the warranty was not proved.

¹ This opinion is taken from the reporter's note in the case of *Legan, ex dem. Armistead v. Newton* (1735), see above, Case No. 24.

² This case is taken from Barradall's argument in *Waddill v. Chamberlayne* (April 1735), see above, Case No. 20.

Bourden v. Hill
(April 1741)¹

An old land patent will not be vacated for a lack of cultivation after a great length of time.

These old grants were not within those acts.² And the petitioner suggested as well the want of cultivation as the nonpayment of the quitrents.

It was proved that there had been no cultivation within fifty-six years. (The patent was granted in 1674.)

But the court said it ought to be proved there never was any improvement, or they would presume it at this distance of time.

Which seems a strange opinion, especially in the king's case.

The petition was dismissed.

¹ This opinion is taken from the reporter's note in the case of *Graves v. Kennan* (October 1734), see above, Case No. 15.

² Act of 1710, c. 13, s. 20, 3 Hening's Statutes 526; Act of 1713, c. 3, s. 10, 4 Hening's Statutes 41.

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