Miscellaneous Reports of Cases in the Court of Delegates From 1670 to 1750

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MISCELLANEOUS REPORTS OF CASES
IN THE COURT OF DELEGATES
From 1670 to 1750
Center for Law Reporting

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MISCELLANEOUS REPORTS OF CASES
IN THE COURT OF DELEGATES
From 1670 to 1750

EDITED BY

W. H. BRYSON

Richmond, Virginia

2016
INTRODUCTION

In 1971, G. I. O. Duncan published a learned and useful book entitled *The High Court of Delegates*. This excellent treatise describes the jurisdiction, administration, procedures, and records of this court with exceptional clarity. In 2004, the substantive law of the Court of Delegates was fully and admirably expounded by R. H. Helmholz in *The Oxford History of the Laws of England, Volume 1, The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s*. For the next step in the study of this court to be taken, more of the source materials from this court need to be made available, and it is to further this goal that this collection of reports of cases is published.\(^1\) Although the official records, including the decrees, of this court have been preserved in the Public Record Office, nevertheless, the unofficial reports composed by the lawyers and judges give a unique, if sometimes quirky, insight into the law, and the reasons of the law, that was adjudicated there. Therefore, this collection of reports of cases has been compiled and disseminated.

When I first approached the publication of reports from the Court of Delegates, I considered the inclusion of all of them. However, the

investigations demonstrated that, after about 1750, the systematic reporting of cases in the English courts of civilian and ecclesiastical law had begun, and many of these reports were already in print. Therefore, 1750 is the terminus ad quem for this book. Then, after I had finished all further searches for case reports, only two had been found before 1670. Thus, that date has been made the terminus a quo, with these two earlier cases included as a bonus. Perhaps the reason for this paucity of reports before 1670 was the prohibition on the judges to explain their reasons, as stated by Sir Julius Caesar in 1613. This was also the contemporaneous custom in the courts of France.

Giving reasons invites debate. Debate over the correctness of a judicial decision tends to undermine it. Furthermore, finality is not served by debate. This is the reason why, today, trial court judges instruct juries to return general verdicts, i.e. verdicts giving no comments or explanations.

However, jurisprudence thrives on debate, thesis and antithesis. Practicing and academic lawyers very much want to understand the reasons of the law, particularly the law as it is applied by the courts. Moreover, it is good for the general public’s confidence in the administration of justice to know that the rules of the law are reasonable and predictable. As Justice Charles S. Russell of the Supreme Court of Virginia put it: ‘It is very helpful to counsel, litigants, and appellate courts when trial judges give careful, patient, and reasoned explanations for their rulings. It is not conducive to a good public perception of the administration of justice when rulings are made peremptorily and without explanation. Even if such rulings have been carefully considered, they may appear to be arbitrary snap judgments to litigants and spectators.’

The reports of cases in the Court of Delegates were privately made, even though the court was not supposed to give its reasons, and, certainly, none were given in the court’s official records. These scattered and very miscellaneous reports have been gathered together here for the aforesaid reasons.

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Should anyone be interested in the period after 1750, the following manuscripts of reports in the Court of Delegates await their editors:

University of Kansas MS. E 181 (1765-1769)
Middle Temple MS. 6 (1771-1777) (cases from Doctors’ Commons)
Harvard Law School MS. 4055, vol. 2 [formerly MS. 2093.2] (1795-1801)
Middle Temple MS. 39G (1815-1840) (cases from Doctors’ Commons)

There well may be others that are presently unknown to this writer.

There are many cases in the English common law courts concerning writs of prohibition and mandamus that touch on the jurisdiction and the law of the ecclesiastical courts, but this present collection of cases includes only cases in the Court of Delegates itself. Also, this collection of reports does not include the transcript of the divorce case of the Countess of Essex v. the Earl of Essex (Del. 1613). There is a substantial collection of reports of ecclesiastical cases in the English courts, including the Court of Delegates, from about 1714 to 1731 in Lincoln's Inn MS. Misc. 147; as an edition of this collection is presently being prepared for the press elsewhere, these cases are not included herein. Another manuscript collection of cases from the ecclesiastical and admiralty courts, including the Court of Delegates, is Columbia Univ. Law Sch. MS. M 315; several of the reports in this manuscript have been included here, but many more are not usable because the book is so tightly bound that the entire text cannot be presently read. This book will have to be disbound before a proper transcription can be made of it.

It is interesting to observe that many cases from the Court of Delegates were cited in later cases and, indeed, many of the cases reported here were cited by later reports. While this may not prove the existence of a systematic idea of binding judicial precedent, it shows that prior cases were thought to be persuasive and useful as precedent. Indeed, the very making and publishing of case reports indicates that someone thought that they might be valuable in the future. If so, for what? The obvious answer is valuable as precedents, whether binding or simply persuasive in argument. Fundamentally, we all believe that like cases should have the same consequences, i.e. like results. Otherwise, there could be no predictability in life; without predictability there would be tyranny and anarchy and general nothingness.

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1 State Trials (F. Hargrave, ed., 1776), vol. 1, col. 315.
The Court of Delegates was created at the beginning of the Reformation in England by a Statute in 1534\(^1\) in order to replace appeals from the English ecclesiastical courts to the Papal Curia in Rome. It was abolished in 1833, when its jurisdiction was transferred to the Judicial Committee of the Privy Council as a part of a general and larger movement for law reform in England.\(^2\)

In the latter third of the seventeenth century, when the House of Lords was asserting and defining its judicial jurisdiction to hear appeals from the other high courts, it expressly decided not to assert any jurisdiction over cases in the High Court of Delegates.\(^3\)

The cases reported herein are appeals from the following courts, involving the issues indicated:

**Archbishop of Canterbury:**
- Probate etc., 59
- Marriage, 8
- Divorce, 3
- Clergy supervision, 3
- Churchwardens, 2
- Church rates, 3
- Church attendance, 1
- Defamation, 1
- Heresy, 1

**Archbishop of York**
- Probate etc., 1

**Archbishop of Dublin**
- Probate etc., 3
- Marriage, 2
- Clergy supervision, 1

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\(^1\) Stat. 24 Hen. VIII, c. 12 (SR, III, 427-429); Stat. 25 Hen. VIII, c. 19, ss. 4-6 (SR, III, 461).

\(^2\) Stat. 2 & 3 Will. IV, c. 92; Stat. 3 & 4 Will. IV, c. 41.

Admiralty
Collision, 1
Freight, 2
Mariner’s wages, 1
Forfeited Estates Commissioners
Ownership of land, 2
Chivalry Court
Right to coats of arms, 1

These statistics do not necessarily represent the actual business of the court, but only reflect the cases reported here, which are somewhat random. There are many more reports in the manuscripts that have not yet been located, and there are probably other reports in print that were not identified.

Many thanks are due to the following archivists who rendered invaluable assistance in the compilation of this collection: Rebecca Campbell Cape and Isabel Planton of the Indiana University Lilly Library, Caitlin Goodman of the Free Library of Philadelphia, Erin Kidwell of the Georgetown University Law School Library, and Sabrina Sondhi and Sarah Shin of the Columbia University Law School Library. Also, we express our great appreciation to David Yale and the Selden Society for permission to reprint several of their case reports.
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The Court of Delegates has the jurisdiction to hear appeals from the Court of Admiralty in a matter involving the possession of freight in a ship.

Moore K.B. 814, 72 E.R. 923

The Lord Legate of Spain sued in the Court of Admiralty against Reginald Plage of Hamburg, a subject of the king of Denmark, where the case was thus. Plage was pressed from Lisbon in Portugal to serve the king of Spain with his ship to transport soldiers to Rio de la Plata. And he had letters of favor from the viceroy of Portugal to trade to Brazil. He performed the service of transportation. And, afterward, for fourteen months together, he
traded openly and publicly in Brazil. And then, having freighted his ship in Brazil for transportation to Hamburg, he became bound with sureties in the custom house in Brazil to exonerate the merchandises according to the manner there used at St. Michael’s to the intent to satisfy the customs due there to the king. The ship was afterwards forced by a tempest so that it could not touch there. But it was compelled by the tempest to the coast of England.

The Ambassador of Spain, alleging that the goods were forfeited to the king of Spain by the not touching of the ship at St. Michael’s and the non-payment of the customs there, sued in the Admiralty here in England, where he found the goods.

And Doctor Crompton, judge of the Admiralty, gave a sentence with the king of Spain to have possession of the goods, but he did not determine the interest and right of them.

Upon which sentence, Plage sued to the Lord Chancellor to have an appeal.

And Doctor Crompton alleged that an appeal does not lie, because the sentence was not of the right or interest, but only of the possession.

Upon which doubt. The Lord Chancellor [Lord Ellesmere] heard counsel, to wit Doctor Gentiles and Doctor Hone, for the appeal, and Doctor Farrand against it.

And in the end, the Lord Chancellor [Lord Ellesmere] himself went into his closet and then he brought out a book of the civil law, in which he found a precise text that an appeal lies as well where the sentence is for the possession as where it is upon the interest and right. And, upon this, he granted an appeal.

2

Sparke v. Denne
(Del. 1630)

A devise of ‘goods and chattels’ does not pass choses in action.

In this case, the administration of a decedent’s estate was given to the next of kin of the testator.
The case between Sparke and Thomas Denne of the Inner Temple on an appeal to the Delegates was thus. John Denne made his will, and, by it, he devised several legacies in money to several persons. And, in the end, he devised the residue 'of all my moveable goods and chattels' to his wife, and he made his wife his executrix, and, having divers debts due to him on bond, he died. And his wife, before [taking out] probate of the will, scil. on the same day, died.

After her death, the administration of the goods of John Denne cum testamento annexo was given to the sister of the wife, who had married Sparke.

And, upon this, the appeal was brought by Thomas Denne, the brother of the said John Denne.

And the Commissioners’ Delegates, who sat and gave a sentence in the cause, were the bishop of Ely [Buckeridge], Jones, Whitlock, Harvey, and Croke, justices, and there were no others there. And it was after several arguments of doctors Eden and Duck, and Crawley, Brampton, and Noy, the sentence was that the said administration should be revoked and a new administration granted to the said Denne cum testamento praedicto annexo. And the reason was that, by the devise of ‘all my moveable goods and chattels’, debts, which are jura, were not devised, so that there was not anything that was devised. Therefore, the administration there should be committed to the next friend of John Denne. But, if all the goods, chattels, and debts had been devised and no residue, then the administration belonged to the devisee, because he had all the estate, according to 22 Eliz., Dyer. And, upon this difference, the first administration was reversed, and the new administration granted. And it was una voce by all of the said commissioners, and they decreed that an obligation should be taken from Thomas Denne that he would pay all the legacies and perform the said will etc.

It was moved by Noy that, upon the Statute of 31 Edw. III, there was not any remedy to compel the ordinary to commit the administration to the next of kin. And he thought that a writ could be granted out of the Chancery to compel and command him thus to do it, as a cautione admittendo to make

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an absolution. And he cited a precedent, that a writ was granted to the bishop of Oxford to compel him to give chrism to those within the deanery of St. Burian.¹

But the Commissioners spoke nothing to this.

[Other copies of this report: 2 Phillimore Ecclesiastical 246, 161 E.R. 1133.]

3

**Chapman v. Musgrave**

(Del. 1671)

*The next of kin of the half blood is capable to have the administration of a decedent’s estate, but the next of kin of the whole blood is to be preferred.*

Columbia Univ. Law Sch. MS. M 315, pt. 1, f. 3v

Hilary term 1670/1.

Chapman, deceased intestate, has two children by the whole blood and one by the half. Query to whom the administration belongs, whether to the whole blood or to the half.

For the whole blood, *Sir Robert Wiseman* [cited] Petrus Ancharanus, quest. 2, lib. 3, *per totam:* ‘*In statuto loquente de successionibus appellazione fratris non venit fratris ab uno latere conjunctus quia utiusque conjunctus est proximior eo qui ab uno tantum latere est conjunctus.* n. 15.’ Coke on Littleton, cap. 1, sect. 6, lib. 1; Cooke Reports, 3d, Ratcliff’s Case, fol. 41.² The half blood never inherits land, but, for want of the whole blood, it escheats.

[It was] declared by the judges of the common law at Serjeants’ Inn that the half blood was capable of the administration, but the whole blood was to be preferred before the half as to the administration if there was no legal exception against the whole, which exception was left to the discretion of


the judge, whereupon administration was granted to the whole blood, giving
security to pay half a share to the son of the half blood. The estate is to be
divided into five parts and the whole blood to have two parts apiece and the
half one.

Math v. Lewis
(Del. 1671)

In this case, the will in issue was not sufficiently complete to be admitted to probate.

Math and Gunning, executors contra Lewis and Vaughan.

Ezekiel Langston sent for Mr. Haggott, a counsellor of law, to come to
make his will. Haggott took instructions for a will in minutes; none [was]
with the decedent at the taking of these instructions but Mr. Haggott. Before
Mr. Haggott could reduce the same minutes into writing and return with
them, the decedent died. He appointed some in trust executors for his broth-
ers, Sir T. Langston and Joseph Langston.

Haggott swears the minutes were taken by him from the mouth of the
decedent, according to the decedent’s intention, but [there was] no publica-
tion etc. [It was] sworn by others that Haggott was sent for by the testator,
that he was in the room with the testator, the door was bolted, pen, ink, and
paper [were] called for, a writing [was] seen upon the table, [it was] believed
in the house that the decedent was making his will.

[The question was] whether one witness is sufficient to prove a will and
how far these indicia do amount.

Dr. Mylles, pro testamento: Testamentum licet non sit secundum apices juris
civilis tamen si certum et indubitatum sit judicium testatoris sustinetur in foro
animae jure naturali et gentium. Mantica, lib. 2, tit. 14, n. 23; Simon de
Praetis, lib. 2, fol. 195, n. 41; Castrensis, 1 part, Consilia, 456; Dyer, Case

\textit{Sir Robert Wiseman [ . . . ] contra testamentum}: At common law, by reason of the Statute,\textsuperscript{2} lands pass by notes or instructions taken in a table book and proved by one witness, as the scribe with one witness is sufficient, being supported by the assistance of the verdict of a jury. But, as to personal estates, wills require such proofs as the civil law allows of. The several circumstances here are not to the substance of the will, and, therefore, not sufficient.

It was agreed by Justice Morton and Baron Littleton that the will was good as to the lands but not to the personal estate.

It was declared by Justice Morton that, if a man intend to give the manor of Dale to John of Styles and the manor of Sale to John of Noakes and notes are taken of the first bequest, but, before notes are taken for the second bequest, he dies, the will is good as to the manor of Dale.

It was judged against the will by Morton [and] Littleton, doctors Lloyd, Clarke, and Penrice. 8 March 1670[/71].

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\textbf{Hord v. Simpson}

(Del. 1672)

Personal property can be held in trust, but it cannot be entailed.

\textsuperscript{1} Brown v. Sackville (1552), 1 Dyer 72, 73 E.R. 152.

\textsuperscript{2} Stat. 32 Hen. VIII, c. 1 (SR, III, 744-746).
8 November 1672. Serjeants’ Inn.

Edward Simpson made his will. He made Robert Bampford, his grandchild, executor and residuary [legatee]. He appoints two friends, Stanley and Peacock, executors in trust until Robert Bampford should be eighteen years of age. He gives Patrick Bampford, brother of Robert, a legacy, with this clause that, if Robert or Patrick die during minority, his part should go to the survivor (Robert survived), but, if both should die without issue, then what is given to them shall go amongst the kindred, which are named, share and share alike.

The executors in trust prove the will. Both Patrick and Robert die without issue. Joyce Hord, mother and curatrix of John Bampford, another grandchild of the testator, and who was half brother to Robert, takes administration of Robert’s estate for the use of her son. And, then, she prays administration de bonis non of Edward Simpson.

The kindred in remainder, who, by the will, were to have the legacy given to Robert and Patrick if they both died without issue, oppose it and obtain administration de bonis non before the judge of the Prerogative [Court] after the information.

[For the] first, [were cited] by Sir Robert Wiseman, Jason, l. post mortem, § fin., Digestum, De legatis, p. 1, n. 3. Ademptio legati sub conditione deficienter facit legati dispositionem esse non puram sed conditionalem.

Sir Walter Walker, for the next of kin to Robert, [cited] 17 Caroli primi, March’s reports, fol. 106.1

Hord appeals.

[It was] agreed that no entail can be made of property, but, of ‘use’, there may, as the use of goods or money. The estate was all personal, and the property was invested by the will in Robert. And no chattel, either real or personal, can be entailed, else they would go to perpetuity, which the law allows not. A piece of plate given to A. and, if A. has no issue, then to B. [is a] void legacy to B., because the remainder may be given to C. and D. and so in infinitum. Secondly, by reason of the uncertainty, whether children or not.

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1 Anonymous (1641), March 106, 82 E.R. 432.
The administration *de bonis non* of Edward granted to the kindred who had the remainder was revoked and granted to John Bampford, the next of kin and half brother to Robert.

Serjeant Maynard [cited] Dyer, fol. 372, fol. 314, pl. 97.¹

VAUGHAN, TWISDEN, WILD contra; doctors ALWORTH, LLOYD, LOWE, TRUMBULL pro.

Roll’s Abridgment, fol. 610, lit. K, n. 4.² Coke, *Institute*, 4 pt., cap. 8 (Court of Chancery), pag. 87. A., possessed of lands for years, demised them to B. and the heirs of his body; B. enters by consent of the executor, has issue, and aliens the lands. The alienation bars the issue, for a term of years cannot be entailed. *Anno* 31 Eliz., in a case between Higgins and Milles, it was certified by Anderson and Walmesley that no estate in tail could be of a term and that the alienation of the devisees bars the issue.³ [J.] Godolphin, *[Orphan’s Legacy]*, ‘Of Legacies and Devises’, pt. 3a, cap. 12, n. 3; [blank] v. Whitmor’s Case, f. 46.

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6

**Johnston v. Perrier**

(Del. c. 1673)

*In a suit concerning the validity of a marriage, additional evidence may be taken after the case has ended.*

Columbia Univ. Law Sch. MS. M 315, pt. 1, f. 21

Alexander Johnston sues Ann Perrier upon a contract of marriage. By the Judge Delegates, the parties are assigned *ad probandum et probatum habendum etc.*, which time is elapsed.

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Ann Perrier’s counsel alleges that Johnston’s witnesses who spoke to the contract depose that they were behind one of the doors in the Garter House garden and heard them contract themselves in the garden etc., which being a permanent thing and the truth may be discovered by a view of the door and the place where the contractors sat or stood, whether it were possible for such words to be heard at such a distance through such a door as is sworn to, they prayed a *descendendum fore* and that the judges of the civil law would assign to go to Serjeants’ Inn that it might be debated and decreed by all the judges in the commission.

It was agreed by the civilians that a *descendendum fore* was but an ordinary act and, therefore, might be determined for or against by them without the assistance of the other judges. However, to satisfy the counsel’s prayer, it was decreed to go to Serjeants’ Inn.

Johnson’s counsel offered to join with them in a *descendendum fore* if the defendant would do more in the cause but go presently to sentence, which the defendant being not willing to, the plaintiff’s counsel denied that a *descendendum fore* could be granted in regard that the cause had been assigned *ad probandum et probatum habendum*.

Notwithstanding such assignation and a conclusion in the cause, yet new proofs may be had in a matrimonial cause, it being a privileged cause and equal in all respects of law to a criminal [cause], which admits of new proof at the instance of the *rei* after conclusion. *Digestum, De quaestionibus*, tit. 18, lib. 48, l. unius 18, § 9. Cognitum de criminibus praesidem oportet ante diem palam facere custodias se auditurum, ne hi, qui defendendi sunt, subitis accusatorum criminius obprimantur quamvis defensionem quocumque tempore postulante reo negari non oportet, adeo ut propterea et differantur et proferantur custodiae.

Gaill, lib. 1, obs. 107, n. 12. *Causa matrimonii est ardua et requirit probationes liquidissimas, et criminali aequipariter, unde non obstante conclusione aut publicatione testium, novae probationes fieri possunt quia sentencia in causae matrimoni maxime contra matrimonium lata nunque in rem judicatam transit.*

In any civil cause, after the conclusion, proof may be admitted *per evidentiam rei* by a view, then much more in a marriage cause.

Maranta, pars 6, *De conclusione in causa etc.*, n. 6, fol. 358. *Admittitur probatio per rei evidentiam et aspendum loci, quia ista probatio superat. esse [?] genus probationis, secundum Baldum etc.*
Ex parte Dixey
(Del. 1676)

A bastard cannot have a legal cousin.

A person who did not intervene in a lower court cannot have an appeal from that court's decision.

Where the courts of common law may legally award a writ of prohibition to the Court of Delegates, an appeal to that court should not be granted.

73 Selden Soc. 258
(Lord Nottingham's reports)

January 27 Car. II.

Hugh Revell, a bastard of Sir William Willoughby, died intestate possessed of a considerable personal estate. The ordinary, by direction of the king, grants administration to Henry Killigrew. Mary Dixey demanded a commission of appeal, which I [Lord Nottingham] denied:

1. Because she is not pars laesa, for, though she be sister to the reputed father, yet is she no kin to the intestate, for a bastard can have no cousin;

2. For this reason, the estate belongs to the king as nullius in bonis. So is the law of France, as may appear by Monsieur Papon, 3 vol., lib. 6, fol. 413, ad iterum arrests notables, lib. 21, [tit. III.] arrests, and in Monsieur le Maistre’s Playdoiers, 77; and so is the law of nations: Grotius, lib. 2, De Jure Belli, c. 9, sect. 1; and so it was ruled in England, 4 Car. 1, Scaccario, per Walter [Chief Baron],1 and in Mich. 3 Car. 1, in the Journal of the House of Commons, where this was doubted. The only reason was for fear creditors might be delayed of their debts if they were put to sue the king by petition and had not an administrator to deal with, which mischief is here prevented;

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1 Anonymous (Ex. 1628), Paynell Exch. 187.
Miscellaneous Reports of Cases in the Court of Delegates from 1670 to 1750

3. This administration is not within the Statute of 21 Hen. VIII, but a common law administration founded on the prerogative;

4. Where two are in equal degree and the ordinary grants to one, there can be no appeal, for the power is executed; a fortiori where there is no affinity;

5. Mary Dixey was not admitted below as a contradictor, and, therefore, cannot now appeal;

6. Where the courts of common law may justly award a prohibition to the Delegates, there, it is not ex debito justitiae to grant a commission of appeal, but it [is] rather a duty to deny it;

7. To grant it can do nobody any good, but it may hurt the king by delay; therefore, it ought to be denied;

8. Lastly, suppose the right to this estate were uncertain, which I do not admit, and that, in a case of so doubtful [a] right the ordinary had election to grant administration where he pleased, yet, when the ordinary has determined that election in favor of the king, there is no reason, by a commission of Delegates, to restore a power of election again, which may be determined to the prejudice of the king and, by consequence, may raise a dispute in law which is now at peace.

Therefore, I [Lord Nottingham] concluded that, though there had been a good ground of appeal if the king’s right had not been preferred, yet there was no color for appeal where the ordinary had done his duty and paid a due respect to the prerogative.

And it is to be noted that Anne Revell, the mother, though living did not appear to contest the administration. Had she been rejected below and now desired a commission of appeal, there might have been more color for it, because, as the children of a bastard do certainly succeed their father and succeed each other, so the mother seems to have a natural right to the administration where there are no children. But yet that would have made no altera-

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tion on this case, for, by our law, a bastard is not so much as of the blood of his mother. See for that 13 Eliz., Dyer, Worsly's Case.¹

Nota, Mary Dixey can have a citation at any time, not an appeal, because [there is] no sentence against her, she being no party or contradictor.

8

Cole v. Mordant
(Del. 1676)

An appeal is granted as a matter of law; a review is granted as a matter of the judge's sound discretion.

Where a party has agreed not to seek a review, the court should not grant a review.

73 Selden Soc. 356
(Lord Nottingham's reports)

May 28 Car. II.

The testator, who was eighty years old when he died, had (not long before) married a young woman of eighteen, who lived not very decently with him about three years before his death. He made his will, viz. anno 1668, which he published in September 1671, and he died in January following. By his will, he had given £3000 in charitable legacies. This will was found at another house than that wherein he died, sealed up with two bills of goldsmiths enclosed and endorsed 'my will'.

As soon as he died, his wife was very inquisitive after a will in order to know who should bury him. But, this will not appearing until after the burial, when she found herself defeated and the bulk of the estate given to Mordant, who was the brother of her husband's first wife, she labored to set up a nuncupative will made by her husband in extremis, whereby the whole estate should be given to her.

¹ Gerrard, qui tam v. Worseley (1580), 3 Dyer 374, 73 E.R. 839, also 1 Anderson 75, 123 E.R. 361.
And when the cause was ripe for sentence in the Prerogative Court, to avoid a sentence which she feared against her, she appealed to Delegates upon a gravamen in that some of her witnesses were rejected. In that point, she was relieved, and all her witnesses were admitted and heard, and, here, the nuncupative will was positively sworn by no less than nine witnesses, which being an unusual number of witnesses to such a kind of will and being encountered with several other proofs, they who were [of counsel] for Mrs. Cole proposed that a trial at law might be had touching this will in a feigned action at the King's Bench bar. Which, being without all example in the Court of Delegates and a dangerous precedent for the civil lawyers, was nevertheless consented to by the counsel for Mordant, so as it might tend to expedition and that Mrs. Cole would consent to be bound by that sentence which the Delegates should give after a verdict and not seek any review.

And this being agreed to by her and entered inter acta, the cause was tried at the bar, and, after ten hours evidence, [there was] a verdict for the written will against the nuncupative will and the nine positive witnesses with great approbation of the court, there appearing manifest perjury in some of the witnesses and subornation in Mrs. Cole.

And, when the cause came back to the Delegates, sentence was given against Mrs. Cole, who immediately petitioned the king for a review. His Majesty referred it to me [Lord Nottingham] to do therein as should be just. I heard counsel on both sides.

The counsel for Mrs. Cole said there had been but one sentence and one trial in the case, which were hard to make final; that three of the Delegates differed from the other five; and that her renunciation of a review was not drawn up as an order of court, nor could be unless the doctors had subscribed, so it appeared only by the minutes.

The other side alleged that the sentence was in effect nemine dissentiente praeter Sir John Birkenhead, for six subscribed, though one of them differed, and the seventh was the bishop of Durham, [who] suspended and gave no opinion at all because he had come late one morning; that a review, if it were not ex eisdem actis, would let in an ocean of new proof; if it were, then the verdict and the consent not to review would also appear, for, if it be registered inter acta, that is enough without the doctors' subscription. But the true intent of a review was that all benefit of the verdict might be lost, because, in strictness, that can be no benefit upon a civil law proceeding.
I said that, as this cause was, neither the matter nor the manner of it could bear a review, not the matter, because, at best, it was setting up a parol revocation of a written will by a nuncupative will in extremis, which was not to be favored. And I hoped one day to see a law that no written will should be revocable but by writing, for a bill to that effect amongst many others had been twice read in two several sessions;¹ not the manner, because a solemn trial had been had with a great expense and a solemn sentence after that trial and all under a consent not to review.

And [I] took a difference between an appeal and a review. An appeal is *ex debito justitiae*, a review is only *ex gratia*, as appears *Inst.*, 4th part, 341.² And, therefore, in a late case between Ellis and Layton,³ where there had been a consent in the spiritual court not to appeal to the Delegates so as costs might be spared, I remember I admitted the appeal and granted the commission of Delegates notwithstanding, because the appeal was due *ex debito justitiae*, and, if the consent barred it, it was pleadable before the Delegates, who knew how to judge of it. But a review being only *ex gratia*, he that departs from his own consent is not entitled to any favor. If any man consent before me to bring no writ of error and yet do it, besides that is a contempt, I do immediately dissolve his injunction and refuse to grant him any trial, because all favor is forfeited.

Ellis v. Layton
(Del. 1676)

An appeal is granted as a matter of law; a review is granted as a matter of the judge’s sound discretion.

The acquiescence in a final judgment upon the remission of court costs amounts to a renunciation of an appeal.

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¹ Stat. 29 Car. II, c. 3, s. 21 (SR, V, 842).
³ *Ellis v. Layton* (Del. 1676), see below, Case No. 9.
79 Selden Soc. 463  
(Lord Nottingham’s reports)

November-December 28 Car. II.

A commission of review was prayed in this case. One Parsons died anno 1674, leaving two sisters. Then Ellis and Parsons, a remote kinsman, join together and set up two nuncupative wills, one supposed to be [executed] five weeks before his death in a kitchen, another in extremis. Both these were overruled, and sentence was given against the nuncupative wills, and costs were taxed.

Parsons assents to the sentence, so as costs might be spared. Afterward, Ellis did so too, yet he appeals to the Delegates.

And I [Lord Nottingham], at his instance, granted a commission of Delegates for the reasons before [given].¹ The Delegates confirm the sentence, because an acquiescence under it upon remission of costs amounts to a renunciation of the appeal.

And now, Ellis prayed a commission of review, not of the sentence of the Delegates, but of the original sentence against the nuncupative wills, and so endeavoured to be heard upon his proofs to set up those wills.

I denied the review:

1. Because it is only ex gratia, not ex debito justitiae as an appeal, and this case deserved no favor;

2. Because the first sentence was acquiesced in upon remission of costs and a second sentence had declared this acquiescence to amount to a renunciation, and so there was no way to come at the first sentence while the second remained in force;

3. I saw Ellis did not think it worth his while to pray a review of the second sentence, which was only grounded upon matter of law, but labored to set aside the first sentence grounded upon fact, that his witnesses might be heard again, which I thought neither decent nor practicable as this case is.

It was after attempted in Parliament, but the Lords rejected the petition.²

¹ Cole v. Mordant (Del. 1676), see above, Case No. 8.
² Note also Cottington v. Gallina (H.L. 1678), 79 Selden Soc. 661, where the House of Lords refused to hear an appeal from the Court of Delegates.
In re The Ralph and Mary
(Del. 1677)

A review lies to a sentence in the Court of Delegates in an admiralty case as a matter of discretion, but not of right.

Where both judgments below are the same, a review will only be granted where the appellant pays into court the damages awarded below.

Columbia Univ. Law Sch. MS. M 315, pt. 2, f. 7, pl. 1

26 November 1677.

Potter and company, owners of the Ralph and Mary, after two conformable sentences against them for half damages in £498 done to the owners of the Transport, petition His Majesty for a review.

The Allotted Providence, sinking the Constant Thomas and Robert was condemned in the Admiralty in whole damages £400 and odd pounds, which judgment was confirmed by the [Court of] Delegates. The owners of the Allotted Providence petition for a review.

Both were referred to Lord Chancellor Finch. He delivered his opinion that, if the judgments had been contrary, then a review should be granted without any terms or conditions. But, in regard there have been two judgments in both cases, no review except the full sum condemned in be brought into court; that, being done, they shall have reviews.

79 Selden Soc. 573
(Lord Nottingham's reports)

November 29 Car. II.

Two several petitions were presented to me [LORD NOTTINGHAM] praying a second commission of review of two several sentences given by the Court of Admiralty and confirmed by the Delegates in two marine cases concerning the damage done by one ship to another.

And, this day, I heard the civilians and common lawyers on both sides. The first case was [that], the ship Ralph and Mary meeting at sea with the ship.
Transport in the daytime, there was a collision between them, and the ship Transport sued in the Admiralty to have this damage repaired.

The Admiralty and the Delegates taxed the Ralph and Mary with the moiety of that damage which happened to the Transport, for which the Ralph and Mary prayed a review because the Transport was not reciprocally taxed with the moiety of the damage which happened unto the Ralph and Mary. And they cited Grotius, De Jure Belli, lib. 2, cap. 17, inst. 21, where he holds that dominius cujus navis sine ipsius culpa navi alterius damnum fecit natura ad nihil tenetur, quamquam multorum populum legibus ut et nostra damnum tale dividi solet ob culpae probandae difficultatem. Which text I thought was ill applied to this case, for, where the collision is in the daytime, it is not so very hard to prove by whose fault it happened, though there be a likelihood of bold swearing on both sides.

The other case was that the ship Constant Thomas, burden forty tons, meeting in the night with the ship called the Allotted Providence, the two ships fell foul on each other. And yet the Constant Thomas is sentenced in the Admiralty and the Delegates to pay the whole damage done to the Allotted Providence. For which the Constant Thomas prays a review. And it did seem to me much more reasonable in this case than in the former that the damage should be divided, for, when the collision is in the night, then, if ever, the proof is difficult where the fault lies.

But the civilians made some doubt whether any review at all did lie in Admiralty cases by reason of the words of the Statute of 8 Eliz., cap. 5,1 which says that, in marine cases, a definitive sentence by the Delegates shall be final and no further appeal is to be made.

But this I overruled and held clearly that a commission of review was not intended to be excluded by these words:

First, because the practice was always contrary;
Second, because My Lord Coke, when he would prove the king’s prerogative to grant a commission of review in causes ecclesiastical, notwithstanding the negative words in 24 Hen. VIII, c. 12, and 25 Hen. VIII, c. 19, [s. 4], that no further appeal should be made,2 uses this for his chief argu-

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1 Stat. 8 Eliz. I, c. 5 (SR, IV, 488).
ment, that the like words in 8 Eliz., c. 5, do not exclude a review in marine
causes. Inst., 4th part, 341;¹

Third, this way of arguing was very natural, for the Statute of 25 Hen.
VIII, c. 19, touching appeals, refers to the usage of the Admiralty, like as has
been done in cases of the Admiralty;

Fourth, it were absurd and would tend to a failure of justice to take
from the king the dernier resort and lodge it in the Delegates. What were this
but to exhaust the fountain of justice and have him without power who gives
power to others, as a fountain does waters cumulative not privative? And,
therefore, if a final sentence be given by the Constable and Marshal in causa
armorum, which is according to the civil law, yet an appeal lies to the king,
as we see, 4 Inst. 125.² And, upon this ground, it is that, where several acts
of Parliament lodge an authority in some particular persons, yet these stat-
utes are expounded by my Lord Hobart in the Case of Commendams, page
[146],³ to intend nothing but to ease the sovereign of labor, not to deprive
him [of] power;

Fifth, yet these negative words [in 8 Eliz., c. 5] have still some good
effect, and that is that they render all commissions of review to be only mat-
ters of grace and not of right, for, if they could be demanded of right, they
would be as common as appeals and used for delay;

Sixth, therefore, in matters of grace, circumstances must be well consid-
ered and due caution used that grace be not abused. And, in this case, I [LORD
NOTTINGHAM] declared that, if the parties condemned would first obey the
sentence and deposit the money taxed by it, then and not otherwise, I would
admit them to a review, for so is the rule in Chancery, grounded upon great
reason, that no man should be admitted to a favor while he stands in a state
of disobedience and contempt.

And the parties did presently offer to deposit the money.

³ Colt v. Bishop of Coventry (1612), Hobart 140, 80 E.R. 290, also Moore K.B.
898, 72 E.R. 982, 1 Rolle Rep. 451, 81 E.R. 600, Jenkins 300, 145 E.R. 219,
Cambridge Univ. Libr. MS. Dd.3.86, part 5, Oxford Bodl. Lib. MS. Eng.
hist.c.494, Lincoln’s Inn MS. Hale 80(g).
Lady Gerrard v. Humble

(Del. 1678)

An apology for defamation must be made in the same public place as where the defamatory words were spoken.

Columbia Univ. Law Sch. MS. M 315, pt. 1, f. 31

Lady Gerrard sued George Humble, Esquire, in a cause of defamation *coram decano* that Humble said to Sir Thomas Gerrard, her husband, in the churchyard coming out of church ‘You are a cuckoldly dog’ or ‘cuckoldly cur.’

Sir Robert Wiseman gave a sentence against Humble and enjoined him to perform a shroud of penance before the minister, churchwardens, four parishioners, Sir Thomas, and his lady if they would be present in the vestry. The Lady Gerrard would have this penance to be done in the church after the sermon or in the churchyard as the people were coming out of church. And, because the judge did not order this penance, the lady appealed to the Delegates.


Second, it is the constant practice.

Third, [there are] but two sorts of penance in use, either private, as the minister’s house, or in public, as the vestry. And the judge has observed the practice.

The court reversed Sir Robert Wiseman’s sentence and ordered reclamation in the church.
March 5, 1677[178]. Bishop of London [Compton], Dr. Fauconberge, Dr. Edisbury, Dr. Hedges.

Besides, a case [was] quoted by Dr. Masters of an appeal from him as Chancellor of Exeter for having not enjoined a penance sufficient, Eeles c. Bagnall, about twelve years since, which Sir Giles Sweit remitted because the judge had chosen the place to have penance done, it being arbitrary and in his power so to do.

12

*In re The George*  
(Del. 1679)

*Where a defendant appeals to the Court of Delegates, he must pay the money due by the lower court's decree into court pending the appeal.*

Columbia Univ. Law Sch. MS. M 315, pt. 2, f. 7, pl. 2

17 January 1678/9; Serjeants’ Inn.

Mariners of the ship *The George* sue Potts, the owner, for wages. Upon a summary hearing, Sir Richard Lloyd condemns in £374. Potts appeals. The Lord Chancellor [Lord Nottingham] grants a commission. Potts, before the [Court of] Delegates offers bail. The proctor for the mariners refuses to have bail, and they pray the money to be brought into court, which was ordered by doctors Fauconberge, Brice, [and] Edisbury.

Potts still insists to give bail and offers an allegation in the merits, which is admitted the 16th of December and assigned *ad probandum et probata habendum* the 10th of January *sub ea conditione ut allegatio et probatione habeatur pro nullis* in case Potts does not bring in the money the 10th of January.

[On] 17 January, he procures a meeting of all the judges in the quorum and prays this decree to be reversed. But they confirm the order of their co-delegates, *viz.* justices Atkyns, Bertie, Dolben, and Dr. Fauconberge.
Gravenor v. Cartwright
(Del. 1679)

_A petition for a review of a decree will not be granted where there will be no damage to the plaintiff by the rejecting of the petition._

79 Selden Soc. 733
(Lord Nottingham's reports)

February 31 Car. II.

A commission of review was prayed to revise a sentence given by the Delegates in a case of administration. John Cartwright of Aynho, the intestate, died possessed of a personal estate worth £40,000, having four grandchildren, whereof one, _viz_ Mary, was of full age and married to Mr. Gravenor. The other three were infants. Administration was first granted _pendente lite_ and then absolutely to the guardian and curatrix of the infants.

And, now, this was prayed to be reviewed as being illegal and contrary to the Statute, for we are not in the case of an administration _durante minore aetate_ of an executor, which is out of the Statute,¹ but in the case of such an administration which ought to be granted according to the rules of the Statute, _viz_. to the next of kin, whereof, in this case, there be four in equal degree, but three of them being wholly incapable in respect of their infancy, and one of them, _viz_. Mary, capable.

It follows that administration ought to have been granted to her and not to the guardian or curatrix of the infants, for a curatrix of the next of kin is not the next of kin within the Statute and, otherwise, the Statute shall be in effect repealed and the power of the ordinary enlarged, for, now, the administration is not granted neither to the person requesting, as the Statute speaks, but to another to their use.

Now, a statute is never expounded in an improper sense but _ad evitandum absurdum_ or to prevent injustice, and no precedent can be shown where the next of kin has been passed by, for which cause, a review was prayed, the

rather because, in this case, there has been but one instance, the sentence before the Delegates being the first sentence in the principal matter, for the cause was brought before them by an appeal from an interlocutory [order] etc., and, in this sentence, the judges were divided.

On the other side, it was said it would be difficult to know how or to whom to direct a commission of review, since there had been six judges already at the Delegates and three of them chief justices. But, however, there was no cause for review, for the ordinary has power to grant administration to any in equal degree, and, if any of these infants had been of age, they might doubtless have been preferred. The only doubt is because it is granted to the guardian. Wherein first, it is plain that, notwithstanding the words of the Statute, 'next of kin', yet the interest of the parties concerned does preponderate. And, therefore, the residuary legatee or the husband of the wife shall take administration before any kindred.

Secondly, it is not so very material at this day to whom the administration is granted as it was at the making of the Statute of 21 Hen. VIII, c. 5, for, then, it was an interest in the administrator who claimed all tanquam haeres factus. Now, there must be a distribution.

Thirdly, it were a greater cause of complaint if the administration should be granted to Mrs. Gravenor, who is a married woman, for, though the other three children be under age, yet there is no reason that the interest of a fourth part should carry it away from the three parts. And, therefore, Mrs. Gravenor has no cause to complain, unless it be that her husband lose the opportunity of embezzling the estate, with which he is by no means to be trusted, for part of the personal estate consists in leases for years of lands which do lie intermixed with Gravenor's. Besides, Gravenor is by articles to have but £5000, and that has been offered to be paid him and whereof he does pretend that those articles were gained from him by surprise by showing him a will in 1647 which excluded him, but concealing from him a will in 1657, which though it were a void will, or rather a lapsed will, as the civilians call it, because all the legatees and executors therein named died in the lifetime of the testator, yet it amounted to a revocation of the will in 1647, which was the only inducement to those articles. Nevertheless, Gravenor has been offered security likewise for all that shall be coming to him in equity over and above the articles. And, therefore, he ought not to be let into the administration and so to carve for himself.
Fourthly, the guardians of the infants had by consent of all parties had in pursuance of these articles administration granted to them *pendente lite*. If, now, it should be granted to Gravenor, then all goes backward again. And, whereas it is objected that the Statute is quite evaded and made insignificant if administration may be granted to one who is not next of kin, the answer is that the mother of the two children and curatrix of the third takes only *ad commodum* of all the infants. So the intent of the Statute is observed, if not the letter, and, since an infant may make a request by his guardian, there is a party desiring the same within the words of the Statute. Besides, the Statute gives the judge a discretionary power to favor whom he please *in equali gradu* with the grant of administration. And it can never be assigned for error that the judge did not exercise his discretionary power well.

I [Lord Nottingham] said I thought the Judges Delegates had done very well in granting administration as they have done, but that it was not my part to pronounce one way or the other. The question before me was only whether a commission of review should be granted. Wherein, first, I take it to be no objection that there have been six judges of the common law at the Delegates, for that may happen in most cases and, then, there should be never any review at all. Nor do I see any danger of delay in granting a commission of review in this case, for the administration *pendente lite* will still subsist, and, though a commission of review be only *ex gratia*, yet, now, there ought to be a greater propensity to it than ever, because there can be no resort to Parliament by way of appeal for any injustice done in the spiritual courts, as was ruled *supra*, 839, Cottington's Case,\(^1\) especially in this case where it is evident there has been but one hearing.

But yet, since it was evident likewise that it would be greatly to the prejudice of the infants if this administration should be repealed and that it could not be much to the prejudice of Gravenor if it continued, because he was offered to be paid his £5000 agreed for by the articles and security for whatever should be further coming to him in equity beyond the articles, I proposed as an expedient that the cause in equity\(^2\) should be speeded and brought to a hearing next term and, then, the full extent of Gravenor’s right

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\(^1\) *Cottington v. Gallina* (H.L. 1678), 79 Selden Soc. 661.

\(^2\) *Gravenor v. Cartwright* (Ch. 1679), 79 Selden Soc. 757, 764, 2 Chancery Cases 21, 22 E.R. 827, 1 Eq. Cas. Abr. 43, 239, 21 E.R. 861, 1017.
would be known, and, in the meantime, things to remain in the state they now are, which was consented to.

79 Selden Soc. 759  
(Lord Nottingham’s reports)

And I [LORD NOTTINGHAM] declared that I would grant no commission of review to disturb the administration, because the plaintiff might be well secured without it and the other three parts were not fit to be put in the plaintiff’s hands.


14

In re Will of Stonywel  
(Del. 1679)

A nuncupative codicil is valid to pass a lapsed legacy.

T. Raymond 334, 83 E.R. 174

9 December 1679. Serjeants’ Inn.

George Stonywel, 2 September 1679, makes his will in writing and makes Elizabeth, his wife, his executrix, and he gives all the residuum of his estate, after some legacies paid, to her. Elizabeth dies in his lifetime, viz. 5 September 1679, and George, the testator, having notice of the death of his wife, makes a nuncupative codicil dated 6 September 1679, and he gives to George Robinson all which he had given to his wife, and he dies 13 September 1679. And the single question was whether this nuncupative codicil be allowable notwithstanding the Statute of Frauds and Perjuries, 29 Car. II,1 the words whereof are:

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1 Stat. 29 Car. II, c. 3, s. 21 (SR, V, 842).
That no will in writing concerning any goods or chattels or personal estate shall be repealed, nor shall any clause, devise, or bequest therein be altered or changed by any words or will by word of mouth only, except the same be in the life of the testator committed to writing and, after the writing thereof, read unto the testator and allowed by him and proved to be so done by three witnesses at the least.

And it was resolved by Sir Hugh Wyndham, Justice, myself [Sir Thomas Raymond], and several civilians joined with us in the commission that, as this case is, the nuncupative codicil is good, for, by the death of Elizabeth before the testator, the devise of the residuum became totally void, and so there was no will *quatenus* as to that part and, so, the nuncupative codicil was *quasi* a new will for so much and it was no alteration of the will as to so much, because there was no such will, its operation being determined.

And whereas it was objected that, by the same reason, if any part of a will in writing shall be made by force or fraud, the thing so given and specified in such part may be devised by a nuncupative codicil and so the will [was] altered contrary to the words of the Statute, we answered that, if such part of a will were so obtained, it was no part of the will and, so, such codicil would be no alteration of what was not, but it would be an original will for so much. So, if A. be possessed of an estate of £1000 and, by a will in writing, gives £500 of it to B., he may give the residue by a nuncupative will, so as he do not alter the executor.

15

**Cotton v. Cotton**

(Del. 1679)

*Evidence cannot be taken upon an affidavit produced in a judge’s chambers.*

Columbia Univ. Law Sch. MS. M 315, pt. 1, f. 33
Nicholas Cotton died in 1675. His will pleaded bore date in 1650. One witness subscribed, viz. William Longhurst, his then servant, since deceased. And so it was pleaded by the executrix, his widow.

[First, the] proof made was notam habeat manum; second, comparison; third, two single testimonies that he had made his will many years ago; fourth, the executrix [made a] suppletory oath.

It was omitted to prove that the subscribed witness was dead. Thereupon, Sir Richard Lloyd, after hearing the cause, takes an affidavit in his chamber that he was dead. And he examined another testimony in that point viva voce in the court when he pronounced for the will.

It was appealed a gravamine for taking such proofs after the conclusion and, likewise, a sententia definitiva.

The judges at Serjeants’ Inn pro gravamine [held] they were unduly taken and that it was natural to make proof of the witness’s death before circumstances could be allowed. And the Judges Delegates offered the cause to be opened to prove the same. But it was agreed that the widow’s proctor should allege it on oath and desire the proctor’s answer on oath of the other side, which was confessed. And so the will [was] judged.

Wild, Jones, Wyndham, doctors Masters, Brice, Oldys, Fauconberge.

[Connected cases: Cotton v. Cotton (Ch. 1679), 2 Chancery Reports 138, 21 E.R. 639.]

16

Taylor v. Lady Shore
(Del. 1681)

Where an executor dies without having proved the decedent’s will and the residuary legatee is granted administration and also dies, the latter’s widow and executrix can be granted administration of the first decedent’s estate.

T. Jones 161, 84 E.R. 1197
5 July 33 Car. II.

Before Jones and Dolbin, Justices of the King’s Bench, and others, Commissioners Delegate, the case was thus. Mary Shore, widow, made her will, and thereof nominated Dame Elizabeth Wheeler her executrix. And she gave the residue of her goods to the disposal of her executrix and Sir John Shore, her brother, and died. Lady Wheeler, not having proved the will, makes her own will, and thereof makes Elizabeth Taylor executrix. After the death of Lady Wheeler, administration of the goods of Mary Shore cum testamento annexo was committed to Sir John Shore, who, by his will, makes his wife his executrix, and dies. And afterwards, administration de bonis non etc. of Mary Shore was committed to Lady Shore, wife and executrix of Sir John. And the said Elizabeth Taylor having prayed administration to be granted to her, which being denied, she appealed to the Delegates.

And, at first, it was agreed that the bequest of the residue by the words aforesaid was a bequest of the interest, and not an authority only; second, that this interest, or the moiety of the residue, did not accrue by survivor[ship] to Sir John Shore, in this case of a legacy, as it would in a gift of goods at common law; third, it was resolved that, though administration might be granted to the appellant and appellee together, yet there was no cause of appeal.

And the grant of the judge a quo of the administration was confirmed, and the appellant condemned in £10 costs.

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**In re Estate of Boone**

(Del. 1682)

The filing of an inventory of a decedent’s estate can be dispensed with where the estate is solvent and all of the creditors and legatees have been paid off.

A bill of review will not be granted upon the supposition of purely speculative facts.

T. Raymond 470, 83 E.R. 245
18 July 1682.

The case was thus. Thomas Boone, a merchant of Excester, made his will, and died possessed of a personal estate of £100,000, which lay in several places, and upon several securities. He left three sons and five daughters, and he gave his five daughters £3000 apiece. He gave his second son, Christopher Boone, £2000 to be paid him at three several payments, and he gave him no more, because he found him improvident. He makes John, his eldest son, his sole executor, who proves the will and swears to bring in an inventory. A time to do it is assigned him by the judge of the Prerogative Court of Canterbury.

And he not doing it, Christopher, June 1680, takes out process and cites him before the judge of the Prerogative Court, who is satisfied that there needs no inventory. The will is proved *per testes*, and, 22 May 1680, sentenced to be a good will. The cause why the judge thought an inventory not necessary was because the two first payments were made and releases given and, then, for the last, by the will, but £4 *per centum* was due, and John allowed £6 and also offered Christopher the last payment.

Christopher, not being satisfied with this, appeals to the Delegates, who hear the whole cause and sentence that there was no need of an inventory at the plaintiff’s instance.

And now Christopher, upon a commission *ad revidendum* the sentence of the Delegates, prays that the sentence may be reversed and that John may at his instance be compelled to bring in an inventory. His reasons alleged by his counsel were:

First, there may be found another will wherein Christopher may be executor, and then he will be to seek for the estate;

Second, there may be specialties taken by the testator in the name of Christopher, and there being no trust declared, the same will be construed an advancement for Christopher;

Third, John, the present executor, may die intestate, and then the administration *de bonis non* will belong to Christopher;

Fourth, the Statute of 21 Hen. VIII, cap. 5,¹ says that the executor shall make a true and perfect inventory;

Fifth, John has sworn so to do, and no judge can dispense with his oath.

But, notwithstanding these arguments, the sentence was confirmed by North, Lord Chief Justice of the Common Bench, Wyndham, Justice, and myself [Raymond], and Dr. Newton, and Dr. Oxenden. And, as to the three first arguments, there shall not be presumed another will, specialties, or dying intestate. And, as to the fourth, the intention of the Statute was for the advantage of legatees and creditors, and, here, the legacy is tendered, and no creditor complains. And it is found that John has acknowledged in his hands £23,000 more than what will pay the debts and legacies. And, by the Statute, the inventory is to consist only of goods, chattels, wares, and merchandises, and not of things in action. And this estate consists mostly of specialties. And it would be very disadvantageous to debtors, as this case is, to have their debts discovered when no necessity requires. And the ordinary does frequently dispense with a longer time to bring in an inventory, and so he may dispense with the inventory upon cause. And such inventory was dispensed with in the estate of Sir Henry Martin, who died 1641, and in the Case of Vandeput, 1647. And so the sentence was confirmed.

18

**Overbury v. Overbury**
(Del. 1682-1684)

*A will of a personal estate is presumed to be revoked by the subsequent birth of a child.*

Columbia Univ. Law Sch. MS. M 315, pt. 1, f. 98

The judges in Overbury’s Case were, anno 1682, Lord Chief Justice Jones, Baron Atkyns, Justice Levinz, doctors Hedges, Newton, Littleton, Brice. The civilians were all of opinion that the marriage and child revoked the will made in favor of the brother, especially considering the later will began by the decedent. Atkyns and Levinz were for the first will that the child nor the imperfect last will did revoke it. Lord Chief Jones agreed with the civilians upon the last head, that the last will was a revocation, but the child would not have been.
The tenor of Overbury's will [was]:

In the name of God almighty, amen, I, Nicholas Overbury, by the grace of the same Almighty, do, being in good and full remembrance, make and appoint this my last will and testament in form following: *Imprimis*, I give and bequeath my soul and spirit unto the Almighty, who gave it, in hopes of acceptance by the sufferings of Christ, my savior; for my temporal goods, my desire is that, after my body [is] buried in the parish of Barton on the Heath near my father's, it may there remain until the great resurrection; next, I give to the poor of the said parish £5 to be disposed in one year after [by] my executor, hereafter named, at his discretion £5; *Item*, I give to my true servant £10 besides his due wages; *Item*, I give unto my wife, Catherine, all my utensils of household stuff, my plate and jewels excepted.

By the first will, he gave all to his brother and made him executor.

2 Shower K.B. 242, 89 E.R. 915

Upon an appeal before a sentence to the Delegates, it was adjudged that, if a man make his will and dispose of his personal estate amongst his relations and, afterwards, has children and dies, that this is a revocation of his will, according to the notion of the civilians, this being an *inofficiosum testamentum*.

*Columbia Univ. Law Sch. MS. M 315, pt. 1, f. 44v, pl. 2*

Nicholas Overbury, a single man, makes his will in 1660 and his brother Walter Overbury, executor. He marries in 1668 [and] dies in 1681. He leaves a wife and child. [There were] declarations of kindness to his wife and child and unkindness to his brother. A [will] begun was found in his pocket, being a preamble only, to be buried at the discretion of the executor hereafter named.

[It was] objected no will in writing can be revoked but by [ . . . ] in writing.

Justice Jones said, if nothing at [all] had been in writing, the will in 1660 had been good. Here is something in writing. Whereupon, administration was granted to the widow with that preamble annexed. The sentence [was] *contra testamentum*. 

42
Hurst’s Case  
(Del. 1682)  

*A canon cannot restrict a statutory right of appeal.*

79 Selden Soc. 934  
(Lord Nottingham’s reports)

November 34 Car. II.

One, Hurst, an attorney in Canterbury, being indicted for not coming to his parish church and receiving the Sacrament, was also cited into the spiritual court and prosecuted before the archdeacon for the same offence. He pleads the prosecution in the temporal court. This plea is overruled.

He appeals to the Delegates, where the matter rests three years without further agitation, Hurst thinking that the labor to prosecute had lain on the other side. Whereupon, it was adjudged that Hurst had fallen from his appeal and so the cause was remitted back to the archdeacon, where Hurst pleads the same plea again and is again overruled.

From which last sentence, he again appealed and prayed a new commission to Delegates.

This was opposed because Hurst did now appear to be a factious appellant and, by the Canons, 1 Jac., the 98th Canon, no factious appellant is to be admitted to his appeal.

But I [Lord Nottingham] granted the commission, as I was bound to do *ex debito justitiae*, for two reasons; one, because Hurst was not yet convicted for a factious appellant and, then, by their law, is not within the Canon, but, chiefly, because the Canon in this point is void, for the Statute of 25 Hen. VIII having given the subject the benefit of appeal, so as to be prosecuted within fifteen days, it is not in the power of the Convocation by any canons they can make to lessen or weaken this remedy or to obstruct it by superinducing any new conditions or qualifications upon it which the Act

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of Parliament does not require. And, therefore, the Canon which bars all such appeals until conformity is void.

Thompson v. Rebow
(Del. 1682)

A ship is liable for damages done to freight through the negligence of the master.

Georgetown Univ. Law Sch. MS. B88-7, p. 370, pl. 2
(Edward Ward’s reports)

Michaelmas [term] 1682. Sir Stephen Thompson et al., merchants and freighters v. Rebow et al., owners of the ship Jacob and Mary, before the Delegates, viz. Justice Jones, Justice Dolben, and Baron Atkyns and divers civilians.

The case was thus. One Langly, master of the ship, was at Bordeaux in December 1679 upon a trading voyage. And, there, the factors of the merchants and freighters and the said master signed bills of lading for carrying sixty-two tuns of French wines in the said ship from Bordeaux to Hamburg and there to be delivered to such persons by name. But, afterwards and before the departure of the ship, another agreement was made between the factors and the master and reduced into writing in the form of a charter party for the carrying of the wines to Humber Road and there to deliver them into vessels to be prepared by the merchants to carry them beyond the sea, the bills of lading notwithstanding. The said ship arrived in Yarmouth Road in good time, but the master refused to carry the wines to Humber Road, but he stayed with his ship and the wines in Yarmouth Road for the space of four or five months, in which time twelve or thirteen tuns were embezzled and the others deteriorated four or five pounds per tun. And the merchants and freighters [were] put to the charge of a further £100 in looking after the wines and putting vessels into Humber Road [. . .] the wines according to the charter party and other damage and loss accrued to the wines, for recompense in which cases, the merchants and the mariners sued the ship and the owners of it in
the [Court of] Admiralty. And they had a sentence there for £550 damages, from which sentence, the owners appealed and alleged that the ship or the owners of it are not liable to the damages in this case, inasmuch as the counsel alleged the agreement was to carry them to enter the wines into Humber Roads, which is in England, and such importation is otherwise prohibited by the Act of Parliament 29 & 30 Car. II as a nuisance and great penalties are inflicted upon the importers and the wines themselves are to be destroyed, and, on account of this, the agreement is utterly void and it cannot be alleged against this Act.

And, on account of this, Pollexfen and Holt, for the appellants, argued upon this ground that, when anything is prohibited by the common or statute law to be done, all covenants, contracts, and agreements to do such a thing prohibited are void and not binding upon any party though, in the words of the act, they are not made void. And an instance is the case of simony upon the Statute of 31 Eliz. and the Case of Mackaller and Doderick, Cro. Car. 337, 353, and 361, and Bridge and Cage’s Case, 2 Cro. 103. And the reason is that they never will allow or will maintain a contract [against] law and that the obligation upon the ship here is not beyond that which the law admits.

And these cases of the law were not denied by the other part, but I [Edward Ward] observed for the merchants and freighters that no offense in this case appears against the Act of Parliament, because there is not any offense or importation within or against this law if the ship or the wines do not come into a port in England and it does not appear judicially to the Delegates that Humber Roads is within any port of England or within England.

And for this cause and reason, after great debate, the Delegates rejected the pretense of the offense against the Statute, but the judges all declared that, if it had appeared that Humber Roads was within a port or England, that no sentence had not been good, but it did not appear within the cause, and the Delegates cannot take notice of this if the truth had been that it was within a port. And the Delegates gave no regard to the bills of lading for Hamburg, being solely colorable and contradicted by the agreement afterwards.

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And, in this case, it was admitted that the ship is liable for the damages to the merchants and freighters sustained to their goods for the fault or default of the master where the original contract was legal. See [C. Molloy,] Liber de Jure Maritimo et Navali, fo. 211, 212. And the Delegates gave some regard to the answer of the merchants, who admitted that the wines were designed to be brought to the Humber River and that, if they could obtain leave for the entry of them at Hull for Oporto wines, they believed that they would have brought them to Hull if they came to the Humber. But, in truth, the wines were carried from Yarmouth to Holland by the merchants.

And the sentence was affirmed, but the damages were reduced to £200.

21

Emerton v. Emerton
(Del. 1683)

*When there are common law judges appointed to a Court of Delegates, the court should sit at one of the Serjeants' Inns.*

T. Raymond 475, 83 E.R. 248

On Friday January 5, 1682[/83], in a matrimonial cause between Emerton alias Hyde alias Dunblane contra Emerton before Commissioners of Delegates and to the former commissioners a commission of adjuncts being procured, all the judges who were therein named and were then in town received a note subscribed by the Lord President of the Council, the earl of Radnor, the duke of Ormond, Lord Steward of the Household, Sir Leolin Jenkins, Knight, Principal Secretary, Doctor Hedges, and Doctor Saint John, two doctors of the civil law, condelegates with the judges, in these words:

*We do appoint to meet and consult about a day for the hearing and determining this cause upon the ninth day of January next in the council chamber at Whitehall between the hours of nine and eleven in the forenoon of the same day and do require the proc- tors on each side to attend accordingly, dated this sixteenth day of December 1682.*
At the receipt whereof, the judges were somewhat troubled, for that they heard nothing of it before and it is to attend at Whitehall, whereas all commissions of delegates wherein any of the judges are named have always been heretofore executed at one of the Serjeants’ Inns, because the judges are constantly employed in the public affairs of the kingdom, in the business in their several courts, and other things, which cannot be done so conveniently for the subjects elsewhere. And also, every summons upon such commissions used to be signed by one of the judges named in the commission, which was herein wanting.

And, thereupon, six of the judges repaired together to the Lord Keeper North to inform him of the matter and to desire his directions, who seemed to advise that we attend according to the note, but he put the judges in hope that the ancient course should be observed in hearing the cause. He told the judges that the like had been attempted in Henry Martin’s time under pretence that, because bishops were named in the commission, the commission ought to be executed at Doctors’ Commons, but the king ordered that the judges should not stir from their usual places of executing such commissions.

This (ut dicitur) did now arise from the promotion of Sir Leolin Jenkins, who is a civilian, and he would favor his profession as much as might be.

22

Gunter v. Buckenham
(Del. 1683)

The rector of a church has the right to occupy the chancel and the duty to keep it in repair, and any prescription to the contrary is disfavored and must be strictly proved.

Lincoln’s Inn MS. Misc. 557, f. 2, pl. 1
(Edward Ward’s reports)

23 May 1683; before Commissioners of Review. Mrs. Gunter v. Buckenham, rector of Rackham [?], in the County of Sussex, touching repairs of the chancel.
In this case, upon an appeal, it was held by Justice Jones and Justice Dolben and other Delegates that a layman by prescription can have the sole right to the chancel in a church as to seats and burial there exclusive of the parson. And, in respect of it, he can be charged with the new building and repairs of the chancel de tempore in tempus. And the Delegates, in this case, decreed Madam Gunter to repair the chancel for this reason, upon which she procured a commission of review to the bishop of London [Compton] and others, who, upon a hearing of the cause this day, reversed this decree as well upon the reason that such a prescription is not favored as upon the reason that there were not sufficient proofs that the chancel had been repaired always by the ancestors of Madam Gunter as of right. But, in truth, they have in kindness sometimes repaired it and constantly sat and buried in it. But [they] never claimed it to be exclusive of the parson though there was not any proof that any parson ever sat or buried in it.

And the court held that there should be an unquestionable proof in such a case that severs the benefit and repairs of the chancel from the parson, to whom, by common right, the chancel and the repairs of it belong, to make such a prescription if such a prescription can be good in law.

And the cause of this suit was that the chancel being ruinous, the parson endeavored to lay the charge upon Madam Gunter.

I [Edward Ward] was for the plaintiff.

[Other copies of this report: Georgetown Univ. Law Sch. MS. B88-7, p. 425.]

23

Pullen v. Clewer

(Del. 1684)

A parish priest's disobedience to his bishop is a just cause for his deprivation from his church.

An office of trust is void upon a neglect of duty. The cure of souls is a public office, and neglect of that duty will result in a forfeiture.

1 Haggard Ecclesiastical App. 2, 162 E.R. 760
11 June 1684. At Serjeants’ Inn.

The following, extracted from the process deposited in the Registry of the Court of Delegates, is a summary of the proceedings in a cause of office instituted originally in the Court of Peculiars by O. J. Pullen, a parishioner of Croydon, against Dr. Clewer, the vicar thereof, wherein the judge pronounced a sentence of deprivation and that sentence was affirmed in the High Court of Delegates.

30 June 1682. Before Sir Richard Lloyd, surrogate of Sir Robert Wiseman, Dean of the Arches, sitting at St. Vedast, Foster Lane, Clewer, D.D., in person, and Pullen, consented to day, place, and judge.

Clewer alleged his suspension for not attending the visitation of the archbishop in Croydon Church, and prayed it to be relaxed.

Pullen dissenting and alleging that Clewer had committed very many crimes, and had neglected his cure, and that he, Pullen, was ready to promote the office, upon which the judge assigned him promoter. And the articles were immediately exhibited.

These articles were in the name of Sir Robert Wiseman, as Dean, or Commissary, of the Arches, against William Clewer, S.T.P., vicar of Croydon, County of Surrey and Deanery and jurisdiction of Croydon:

for his soul’s health and for the reformation of his manners and excesses and especially for the neglect of his cure of souls and of the execution of his clerical office in not preaching nor reading the common prayers, as set forth in the book called the Common Prayer Book, on Sundays and holidays, in not baptizing infants, and not reading prayers for the burial of the dead, and for omitting the due celebration of the sacrament.

The presentments of the churchwardens of Croydon were annexed to the articles, which also objected that the vicar was of a quarrelsome temper and, in the nineteenth article:

that, after the decree of suspension had been read in Wimbledon parish church, and, on the same day, Sunday, had been, before the time of divine service in the afternoon, made known to Clewer, he did not desist from officiating.
The twenty-sixth article prayed that Clewer might be punished for his excesses and condemned in costs.

Upon these articles being exhibited, Clewer again prayed his suspension to be relaxed. And he alleged that an attachment had issued against him from the Exchequer, on which account, he had not dared to attend at the visitation. And he then produced a witness, who swore to the attachment being out.

At the petition of Pullen, the articles were then admitted, and Clewer was assigned to answer ‘quatenus de jure astringitur, et non aliter’.

On 6th July, Sir Richard Lloyd decreed the suspension to be relaxed and letters testimonial to be made out, and admonished Clewer to be attentive to his cure in the future.

Clewer then gave a negative issue to the articles. And witnesses were examined in support of them.

On the 12th of December (1682), an order dated 4th December was exhibited from the barons of the Exchequer, empowering the judge to proceed in the Peculiars, notwithstanding the order to stay the cause (dated 28th November, 34 Car. II), obtained by surprise, on the part of Clewer. It was, however, a part of the order of the 4th of December that Pullen should show cause on the first day of the following term why [a writ of] prohibition should not go to the ecclesiastical court, there being an information against Clewer then pending in the Exchequer for the said offence.

On the production of this order, Pullen alleged that Clewer was vicar of Croydon etc, and, after enumerating all his clerical defects ‘in grave scandalum Christianae religionis et periculum animarum parochianorum’, prayed and the judge, having heard advocates, decreed suspension pendente lite and that a proper minister to be approved by the ordinary should be appointed and the profits of the vicarage sequestered.

On the 20th of December, the proctor of Clewer alleged an appeal from this order, as made during the term probatory. This appeal seems to have been abandoned, as, on the next court day, 20th of January, the cause proceeded, and the proctor for Pullen exhibited an order ‘pro exoneratone regulae pro prohibitione’.

An allegation had been admitted on the part of Clewer in the preceding Michaelmas term. And he had been assigned to give in his further allegation if any, when, on the 15th of February, he prayed further time.
Pullen, in person, objected, and porrected a definitive sentence, which
the judge then signed.

The sentence was to this effect:

_Pronunciamus Gulielmum Clewer a vicaria et ecclesia parochiali de Croydon cum suis juribus membris et pertinentiis universes privandum penitus et amovendum fore ac privari et amoveri debeare._

_Eandumque vicarium et ecclesiam parochialem de Croydon vacuam de persona Gulielmi Clewer esse et sic esse debeare ad omnem juris effectum pronunciamus, decernimus, et declaramus sicque privamus, amovemus, et pronunciamus per praeentes (and condemn him in costs)._  

/Gulielmus Trumbull; Richard Lloyd, Surr.

From this sentence, Dr. Clewer appealed. And the following notice
of the case in the High Court of Delegates is extracted with the marginal
observations from a folio commonplace book in the library of the College of
Advocates at Doctors’ Commons in the handwriting of Sir Richard Raines
and Sir Charles Hedges.

Dr. Clewer, vicar of Croydon, in the year 1666, was presented for neglect
of duty and dismissed with a monition. And _anno_ 1681, he was presented for
not reading prayers, not burying, nor christening, and then again monished
_sub poena suspensionis_. He, not appearing at the visitation next following,
was suspended, after which, he appeared and the suspension was taken off.
And he was again monished, but he, taking no more care than formerly, was
articled against in June 1682, from whence, he appealed to the Delegates. But
the sentence was confirmed against him by the judges at Serjeants’ Inn, the
bishop of London [Compton], the bishop of Peterborough [Lloyd], Lord
Chief Justice Jeffreys, Mr. Justice Wythens, Mr. Justice Holloway, Sir Thomas
Exton, Dr. Fauconberge, Dr. Pinfold, Dr. Hedges for deprivation, the bishop of Ely [Gunning], Mr. Justice Charlton, Mr. Justice
Windham, dissenting.

The truth of the fact was that several persons died unbaptized, several
wanted Christian burial, non-residence, not reading prayers, and, to these
neglects, were added obstinacy and no amendment, notwithstanding the sev-
eral monitions.
For the doctor, it was urged that his absence was for the benefit of the church, that, for omissions and negligences, the punishment was but suspension. Canons 68, 69, Jacob (1603).\(^1\)

Against the doctor was urged Parson’s Law, c. 17 (Degge, c. 9, p. 146, 7th ed.); Dr. Zouch, Descriptio Juris et Judicii Ecclesiastici, part 4, § 9 (Zouch, De Politia Ecclesiae Anglicanae, London 1705, 8vo.). Any common default after monition is sufficient. Brownlow’s Rep., part 1, p. 70; Magna negligentia to be removed, c. conquerente, Extra., De clericis non residentibus (Decretum Gregorii, lib. 3, tit. 4, c. 6); et ibi Ancharanus, caus. 11, quest. 1, c. petimus (’Non residers in beneficio etiam modicae aemitationis illo privari debet.’ vide vol. 2, p. 13; Petrus Ancharanus, Super Decretalibus Commentaria, 3 vol., Lugdunum 1519, F; Decretum, 2da pars, causa xi, quaest. 1, c. 19); Oldradus, Consilia, 195, Residere obligatus, et contumax privatur, 81 D (vide p. 100, ed. Venetiis, 1585, F) (sed quaere), c. 8, gl.; Barbosa, De Officio et Potestate Parochi, c. 18, n. 8, for not baptizing deprivable (Lugdunum 1634, 4to; Diaz uses the same words on this point as Barbosa, ‘Si infirmus sibi (presbyters) commendatus, sine baptismo moritur, deponendus est’ etc.); and c., quicunque de consecratione; Diaz, Practica Criminalis Canonica; Lindwood, c. quamvis de vita et honest. cler.; et c. quoniam reus de poenis, verbo ‘continuato diutius’ (Lindwood, lib. 3, tit. 1, and lib. 5, tit. 15, De Poenis); Otho, c. Ad Vicariam, de officio vicarii, a vicar to swear residence and to reside (Constitutiones Othonis, tit. De Instit. Vicarii, and John de Athon, In Const.); De officio vicarii, Extra., Vicarius non dat. Vicarium, verbo ‘Vicarii teneantur’, et verbo ‘in propriis personis’ (Decretum Gregorii, lib. 1, tit. 28); Residentia quidem, c. Exirptandae, Extra., De praebendis (Decretum Gregorii, lib. 3, tit. 5, c. 30); De Clericis Non Residentibus, Lindwood, c. Cum hostis, verbo ‘residente’ (vide Lindwood, lib. 1, tit. 12; lib. 3, tit. 4; et c. De Poenis); Incorrigibilis quisque, Abbas, c. Cum ab hinc (vide Panormitanus, c. De Clericis Non Residentibus; note the doctor never was suspended ob crimina commissa for neglects, but only for non-appearance, yet he was deprived); Maiolus, De irregularitatibus, lib. 5, c. 26, n. 4; 5 Rep., Specot’s Case,\(^2\) the same is cause for deprivation, which is for refusing a clerk; Doderidge, Treatise of Advowsons (vide Doderidge’s Compleat Parson, p. 72, London 1641, 4to), [there are] three causes of deprivation,

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want of capacity, crime, and contempt of an ordinary; and *ad Vicarium de
Institut. vicarii; Beneficium datur propter officium, causa 1, q. 1 (Decretum,
secunda pars, causa 1, quaest. 1), et ibid. gl.; Parson’s Law; 2 Jacob.

All the judges agreed that disobedience to the ordinary is just cause of
derprivation. Allen v. Nash, 13 Car. I, King’s Bench; Weedon’s Case, *anno*
1675, in the Arches.

At the common law, an office of trust is void upon neglect of duty. 1
Inst. 233. Cure of souls is a public office, and neglect of duty is a forfeiture.
The concern is greater in the case of a cure of souls than in any temporal
office. Caudrey’s Case, 5 Rep.; he was deprived because he offended against
the trust of his office, and that too for the first offence, though the Stat. Hen.
VIII* says for the second, for the Statute is but affirmative of the ecclesiasti-
cal law and he was deprivable by that law. The Statute alters not the canon
law, for the Statute is in affirmative words which cannot repeal, so it does
but increase the penalty. Godbolt 259, Bishop of Salisbury’s Case; Siderfin’s
reports, The Town Clerk of Guilford’s Case.

The bishop of London [Compton] was of opinion that the doctor’s
crime was against his oath, against his trust, and also that he was incorrigible
in not amending upon monition, and, therefore, is to be deprived.

The bishop of Ely [Gunning] [held] that a man was deprivable for
obstination, but he saw no obstination or disobedience to this court, and all that
appeared was but a non-feasance, and so not to be deprived.

The bishop of Peterborough [Lloyd] [held] that, at ordination, he had
made a vow to observe the commands of his ordinary, that he had sworn
canonical obedience, and to be resident at his institution, and he had bro-
ken both, that obstination and incorrigibility were added to these crimes, and,
therefore, deprivable, and, if not so, the Church might throw up all jurisdic-
tion and every little vicar might set up for himself in defiance of his ordinary,

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2 *Cawdry v. Atton* (1594), 5 Coke Rep. 1, 77 E.R. 1, also Popham 59, 79 E.R.
   1175, Moore K.B. 228, 72 E.R. 547.
3 Stat. 34 & 35 Hen. VIII, c. 1, s. 17 (*SR*, III, 896-897).
4 Bishop of Salisbury’s Case (1614), Godbolt 259, 78 E.R. 151; *Rex v. Campion*
   (1658-1660), 1 Siderfin 14, 82 E.R. 942, 2 Siderfin 97, 82 E.R. 1277.
that the canon of King James, and Spelman’s *Concilia*, 376, speaking only of suspension, means only for the first neglect.

Lord Chief Justice JEFFREYS [held] positively for deprivation.

Mr. Justice WINDHAM [held] that non-feasance was no just cause for deprivation, and he was only for a sequestration, urging the ill consequence of deprivation for neglect only.

Mr. Justice CHARLTON [held] the 88th Canon of King James and Spelman’s *Concilia* did but suspend for refusing, which is more than a bare neglect, and no reason to outstrip the Canon.

Mr. Justice WYTHENS [held] that the punishment was severe but not too much.

The rest agreed thereto.

[Other reports of this case: Columbia Univ. Law Sch. MS. M 315, pt. 1, f. 40.]

24

**Richardson v. Dejeune**

(Del. 1685)

*Where co-executors act together, they are jointly and severally liable to the decedent's estate, its creditors, and the distributees.*

*The executor of an executor must pay the latter's obligations to the first decedent's estate so far as the latter has left assets.*

Lincoln's Inn MS. Misc. 557, f. 97, pl. 2

(Edward Ward’s reports)

21 July 1685, at the Delegates. Richardson v. and ads. Dejeune and Thair.

The case was thus. Honor Bulloigne made a will in 1663 and, of it, two executors, *scil.* Isaac Vanney and James de Jeune. And he gave the residue of his personal estate among the children of his wife Jane to be equally divided among them at such a time. Both of the executors proved the will and joined in exhibiting an inventory and in disposing and selling the goods and paying the debts and funerals and in making an account of all of the personal estate and the disposal of it. The clear balance and the residue of which that and
the will should come to the residuary legatees was £288 5s. 7d., which sum
the executors divided among themselves. And each took the moiety and
gave a bond for the other to pay his moiety to whom [it was] due and to save
him and his executors harmless. After which, i.e. in 1666, Isaac Vanney, one
of the executors died, having made his will and his wife executrix, who pos-
sessed herself of his personal estate. And she died insolvent. And, when the
time came at which the said residue should be divided among the residuary
legatees, Richardson, one of the said legatees, demanded all of his part from
the appellants, being the executors of James Dejeune, who was the surviving
executor of Honor Bulloigne and left sufficient [assets] to pay all the debts
with a surplus.

And upon the hearing of the cause in the spiritual court, Sir Richard
Lloyd gave a sentence for Richardson to recover all of his part from the execu-
tors of the surviving executor, from which sentence, the said executors, the
appellants, appeal. And they assign two matters for their relief:

First, that they are only chargeable for the moiety of the balance that
their testator received and not for this moiety that the other executor had.
And they compared it to the common case that an executor is not chargeable
for the receipt or the tort of the other executors. And, for this, they relied on
the Case of Townley and Sherborne, Bridgman 35 and Cro. Car. 312, where
it was ruled that one trustee or one executor is not chargeable for the receipt
or tort of the other.

To which, it was answered by Richardson’s counsel and resolved by Sir
Thomas Jones, Chief Justice of the Common Bench, and Sir Job Charlton,
one of the judges of the same court, and Sir Francis Wythens, one of the
judges of the King’s Bench, with several civilians, being the Delegates, that
this case varies from the common case, because, though it is to see that, in
many cases, the receipt or tort of one executor does not affect or influence the
other, yet it is when they severally, and not jointly, meddle. But, here, as both
of the executors jointly intermeddled, sold, and disposed and joined in acts
for the estate, in this case, both are liable for all. And, on account of this, the
death of one and the failure of the payment of his moiety is not an exemp-
tion of the other, but he remains liable as the surviving joint tenant, and the

1 Townley v. Sherborne (1633), J. Bridgman 35, 123 E.R. 1181, sub nom. Townley
balance of the account is not properly the estate of the testator with which
the executors were trusted, but the product of this with which they trusted
themselves. And on account of this, each of them is liable for all, which is
evidenced by the taking of the bonds for each indemnity. And executors can
prevent such mischiefs either by not meddling or only by meddling with such
a certain part of the testator’s estate.

Second, it was objected that the appellants were not chargeable more
than for this moiety that their testator possessed, though the other point
was against them, inasmuch as the permitting the other executor to have the
other moiety of the balance was a *devastavit* in their testator, and, on account
of that, a personal tort, which *moritur cum persona*. And, for this, they relied
upon the Case of Sir Bryan Tuke, 3 Leon. 341, and Browne and Collins’s
Case, King’s Bench, 27 Car. II, L. 2, 253,¹ which cases prove that *devastavit*
does not lie against the executors of wasting executors.

As to this, it was answered by Richardson’s counsel and resolved by all
of the Delegates that this permitting of the other executor to have this moiety
was not in the judgment of the law a *devastavit* to excuse his executors who
have assets from his estate from the payment of the said moiety also, because,
in the judgment of the law, the surviving executor receives all, and, though
the goods were sold and disposed by the executors in their lifetimes, yet the
money arising by this sale or disposition will be assets in them and anything
of their hands or to themselves will make them liable to pay the whole. And
another construction would be perilous to all creditors [and] legatees where
the executors possess themselves of a great personal estate that they sell or
convert into money or another estate and, afterwards, die, leaving assets to
pay the whole if it will be construed a *devastavit* and, on account of this, his
executor is not chargeable.

And it was observed by the counsel of Richardson that, in equity courts
and ecclesiastical courts, executors of wasting executors, if they have assets
from the wasting executors, are liable to pay the debts and legacies of the
first testators. And this is the constant practice. And the rule that [an action
of] *devastavit* does not lie against executors of wasting executors is when the

¹ *Tucke’s Case* (1590), 3 Leonard 241, 74 E.R. 659; *Brown v. Collins* (1674), Lincoln’s
Inn MS. Misc. 500, f. 253, also 2 Levinz 110, 83 E.R. 473, 1 Ventris 292, 86 E.R.
188, 1 Freeman 392, 89 E.R. 291, 3 Keble 462, 530, 84 E.R. 824, 861.
wasting executor does not leave assets, and, on account of this, it is purely a personal tort.

Also, that the ecclesiastical court does not go upon in rules for proceeding against wasting as the common law goes [is] because, by the common law, if a woman executor takes a husband who wastes the estate and the wife dies, even though, by the common law, there is no remedy, yet there is by the ecclesiastical law, and a [writ of] prohibition in such a case [is] denied, as Roll, Executors, 919, F, 2, 3, 3 Jac.1

And, in the principal case, the sentence was affirmed with costs.

1 Edward Ward was for Richardson, and Holt and Philips [were] for the appellants.

[Other copies of this report: Georgetown Univ. Law Sch. MS. B88-7, p. 601.]

25

Waller v. Joyce
(Del. 1685)

The maternal grandfather will be preferred for the administration of a decedent's estate before the paternal uncles and aunts.

Lincoln's Inn MS. Misc. 557, f. 105, pl. 2
(Edward Ward's reports)

Michaelmas 1685.

Upon an appeal, it was held clearly by Baron Atkyns and Justice Charlton and all the civilians that the grandfather by the mother's side will be preferred in an administration before the uncles and aunts of the father's side though the personal estate came by the father, the grandfather being in loco parentis and the son of his daughter half [?] blood to him and, in the common cases, the father will be preferred before the brother or sister and the degrees and distances are equal. And thus the administration granted to the grandfather was confirmed. And, if the grandfather and uncle were in equali

1 Popham v. Williams (1605), 1 Rolle, Abr., Executors, pl. F, 2, 3, p. 919.
and no superiority in such a case, administration granted cannot be repealed and granted to the other. But, here, they held that the grandfather was of more close kin within the Statute 21 Hen. VIII,¹ though it was alleged that he was not so near within the Levitical law² to which the Statute 21 Hen. VIII respects as to proximity of kin.

Note Serjeant Pemberton gave his opinion under his hand that the uncles and aunts are more near to the son than the grandfather on the part of the mother of the son and will be preferred in the administration. But he gave no reason or authority for it. And this opinion was the ground of the suit. But it was resolved *ut supra*.

I [Edward Ward] was for the uncles.

[Other copies of this report: Georgetown Univ. Law Sch. MS. B88-7, p. 615, pl. 1.]

26

**Littleton v. Herbert**  
(Del. 1686)

*Trustees appointed by a will are not the executors of the will, but they serve only to perform the testamentary trust.*

Lincoln’s Inn MS. Misc. 557, f. 113  
(Edward Ward’s reports)

Sir Charles Littleton *et al.* v. Herbert, at the Delegates, 18 February 1685/[86], when the Judges Delegates were divided in opinion, and, afterward, it was heard before them and Commissioners of Adjuncts, 6 June 1686, and administration was committed to Herbert in trust for the daughter.

And the case was thus. Sir Thomas Lynch, governor of Jamaica, having lands, goods, and chattels there and in England and being in England and

¹ Stat. 21 Hen. VIII, c. 5, s. 2 (*SR*, III, 286-287).

² Leviticus, chap. 18, verses 6-18.
having a wife called Vere, the sister of the admiral and Chief Justice Herbert and, by her, a daughter called Philadelphia, made his will 30 August 1681 and his wife executrix, Sir Charles Littleton and five others, three of whom live in England and the others in Jamaica, trustees and overseers to his will to see things to be performed as he had directed in his will. And he gave them £50 apiece and £100 apiece to those who survived his wife and daughter. And, in divers parts of the will, he limits his legacies, bequests, and maintainances to the wife and daughter to the discretion of the trustees to enlarge or diminish at pleasure. And, upon the frame of the will, it was provided that the daughter will have all the estate if she survives. But it was provided that, if the daughter marry without the consent of the wife and the major part of the trustees, that then it will be in their power to give to her what part and to make what settlement they please. And, in case of the death of the daughter, he devised his estate over, in which he entrusted the trustees. And there was such a clause in the will ‘I desire and appoint my executors and overseers hereafter named to see all my debts justly paid.’ And, while his debts are paying, he appoints £200 per annum to the wife and £120 per annum to the daughter for maintenance ‘or what more my estate will bear if my overseers and trustees see convenient’.

And it was insisted for the trustees and overseers that they were *quodammodo* executors with Vere, being appointed with her to see his debts paid and, if not executors, still they were such trustees to whom administration *cum testamento annexo* must be granted them by and in it, being entrusted with the management of his estate.

And of such opinion were Atkyns, Baron, now Chief Baron, and Justice Charlton. But now, the Commissioners Adjuncts, the bishop of Rochester [Sprat] and Atkyns, Chief Baron, *mutata opinionem*, and Justice Lutwych, at first of counsel with Mr. Herbert, and the other Delegates were of opinion, first, that the trustees were not executors, because it is against 21 Hen. VI, fo. 6b,1 where one is made coadjutor to the executor to pay debts, this does not amount to an executor, though, if one had not been expressly named executor, it would have amounted to make him executor. Thus, here, the express nomi-

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1  YB Mich. 21 Hen. VI, f. 6, pl. 16 (1442).
nation of an executor excludes an executor by construction. And, as to the nominating them trustees, this was only for the benefit of the daughter, who should have the residue of the estate, and, if the testator, by the death of the executrix, is now dead intestate, administration *cum testamento annexo* must be committed *ad opus et commodum infantis*, to whom, of right, it belongs if she was of age and, though she is not of full age, that it will be thought to take more care of her and her estate than her uncle and next relation.

And administration was granted accordingly to Mr. Herbert etc. to the use and benefit of the infant Philadelphia.

[Other copies of this report: Georgetown Univ. Law Sch. MS. B88-7, p. 629.]

27

**Petre v. Earl of Cardigan and Bawd**

*(Del. 1686)*

_in this case, a nuncupative will was held to be sufficiently proved._

Lincoln's Inn MS. Misc. 557, f. 140

*(Edward Ward’s reports)*

16 December 1686, touching the will of one Peckham.

Peckham, the 6 May 1685, gave instructions to Francis Bagshaw, esq., a barrister of the Middle Temple, to make his will, both of his lands and of his goods. Bagshaw, in the presence of Peckham, put the legacies into writing but trusted his memory as to the executors and all the estate, real and personal, which Peckham said he gave to Petre and made him also executor. This will was engrossed in form by Bagshaw, after which Petre brought a message from Peckham that, in lieu of £40 *per annum* given by the instructions to Anna Maria Bawd, the now contestant against the will, that he gave to her £200, upon which Bagshaw caused the will with this alteration to be engrossed and presented it the 20th of May 1685 to Peckham, who was sick but completely
sensible, and he read it to him truly. And, in the reading of it, Peckham corrected a mistake in the name of one legatee, and he approved of the will. But he said that he was at this time sleepy and weary and troubled with a cough, and, on account of this, he could not sign and seal the will at this time. But he said he might come again when he would, meaning Bagshaw. Bagshaw left him. And it was circa four or five in the afternoon of the 20th, and Peckham died the next day in the forenoon without any signing of the will.

And there was not any witness of this matter and transactions of the will except Bagshaw. But it was proved by another that, circa the same time that Peckham gave instructions for his will, that Peckham declared that Petre will be his executor and will have his estate and that he had or would give instructions for the making of his will. And two others deposed that they had heard Peckham declare that he would give to two legatees the same legacies that they had in the will.

And this positive and full testimony of Bagshaw and the other circumstantial proof of the other three witnesses were held good proof of the will as to the personal estate that remained as it was before the Act of Frauds and Perjuries,¹ though it was greatly opposed that the proof is by a single witness, which the common law rejects, and that it was proved that the party, before his sickness, declared that he would not make a will and he was always unwilling and declined. But notwithstanding this, such a deliberate act of giving instructions and approving his will outweighed his former declarations of his averseness to making a will.

Wythens and Wright, judges of the King’s Bench, were of the Delegates.

I [Edward Ward] was for Petre; Sir John Holt and Pollexfen were for Bawd.

[Other copies of this report: Georgetown Univ. Law Sch. MS. B88-7, p. 676.]

¹ Stat. 29 Car. II, c. 3, s. 5 (SR, V, 840).
Hicks and Meggs v. Singleton
(Del. 1688)

Where two co-plaintiffi lose a case, only the one who proceeded in bad faith will be liable for court costs.

Columbia Univ. Law Sch. MS. M 315, pt. 1, f. 56

John Singleton, 15 December 1684, makes Elizabeth, his relict, executrix and residuary [legatee]. He dies in April 1686. [She], finding a bond of £100 due upon Ma. Meggs, alias Orrange Mall, to the decedent, demands it in May 1686, Meggs said she had no will of the decedent then. August following, Meggs started up a will wherein she had a legacy particularly of £100 and Alexander Hicks, a grandchild of the decedent, and herself executors. Her will was judged against by Sir Richard Raines. But, before, in regard Meggs had got a sentence for her will in poenam, the relict, as soon as she knew it, entered her appeal.

Money [was] due to the decedent out of the Exchequer. And both, by virtue of the probates demanding it, the Lord Treasurer sent to Sir Richard Raines to know which was the true will. Both parties being called, it was agreed the relict should withdraw the appeal, Meggs's witnesses should stand as examined, the relict should give in interrogatories and plead, and both sides should set down by Sir Richard Raines's determination, renouncing all appeals.

Judgment was given for the first will June 1687. Meggs prays a commission of appeal. The relict opposes the agreement.

The Lord Chancellor [Jeffreys] said it would be proper before the [Court of] Delegates.

[It was] urged before them who were of opinion that Meggs was barred, but her counsel urged that Alexander Hicks was not before the judge at the time of the agreement, so [he was] not bound.

The relict denied there was such a one in being. Meggs proved there was. And, after such proof, Hicks comes into England.

The Delegates allowed the appeal.
9th March 1687/88, a remissory sentence was given. But, because Hicks was innocent in the contrivance of setting up the will made the 21st of January 1685/[86], which the court was of opinion was forged, they condemned only Meggs in costs.

Justice Alibone, doctors Newton, Bramston, Waller.

29

Clarkson v. Spateman
(Del. 1688)

Upon an intestate succession, first cousins take per capita where all of the preceding generations are deceased.

Dodd 101

There were three brothers, A., B., and C.; B. had issue, one child, and died; C. had issue, six children, and died. A. died intestate.

And [it was] resolved that his estate will be distributed per capita and not per stirpes for all the old stock being gone, they now claim as next of kin and not by representation. But it would have been otherwise, if any of the old stock had survived, as if B. had survived A., the intestate, there he would have a moiety and the children of A. the other moiety.

Note below, Coning and Menzies.¹

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Young v. Pierce
(Del. 1689)

Where one of the next of kin to an intestate decedent releases the right to inherit, this release also releases the right of administration of the estate.

¹ Conning v. Menzies (1711), Dodd 225, 229, Equity Cases Exch. 678.
Upon an appeal to the Delegates, the case was that Henry Peirce died intestate, leaving issue Jo. Peirce and Anne Peirce, his personal estate being valued at about £3500. Anne Peirce agreed to take £1500 for her share, and, thereupon, agreed that Jo. Peirce should take administration, and she released her right to the personal estate. Jo. Peirce paid the £1500 and died. And he makes Young his executor, and he devises to him all his personal estate, there being £1000 out upon bond of Henry Peirce’s estate. The question was whether Young, the executor of the son, or Anne, the daughter, who was since married to Mr. Webbe, should have administration.

And Dr. Raines, the judge in the Prerogative Court, gave it to Young, whereupon Mr. Webbe and his wife appealed.

And the Delegates of the common law were Powell, Gregory, and Turton, and the civilians were Littleton and Newton etc. And they affirmed the sentence in the Prerogative Court, because they said that Young, as executor of Jo. Peirce, was in equity entitled to all benefit of the personal estate of Henry Peirce by reason of the agreement. And it was like Isted’s Case,1 of an executor dying intestate that was a residuary legatee; administration shall be committed to him; and one Henson’s Case was cited, where a will is made and no executor appointed, administration shall be committed to the residuary legatee.

But it seems to me that the law is contrary, because the administrator, as he is now invested with interest and power, was first created by Stat. 31 Edw. III,2 for, before that Statute, an administrator was but the ordinary’s servant, for neither the ordinary nor administrator could sue for a debt or release a debt or dispose of or alien any of the intestate’s estate. And, by that Statute and the Statute of 21 Hen. VIII, 5,3 administration of an intestate’s estate is to be committed to the next of kin.

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And the books of law say that the ordinary must strictly pursue his power and that it is not at all left to his discretion. 9 Co., Hensloe’s Case; Cro. Car. 106, Jones 175.1

And, although several contests have been concerning administration, yet there was never any appears but where there was a pretence of an equality, if not a proximity of kin, as, in these cases following, questions have been made, as:

1. Whether a father or mother were of kin, which is now settled, as appears by Bro., Administrators, 47; 3 Co., Ratcliff’s Case;2
2. Whether the half blood;
3. Whether the wife; that is settled by the express words of 21 Hen. VIII, 5;
4. After that, whether the husband; that was settled in the Case of Jones and Roe, Cro. Car. 106, Jones 175; so curious have the judges always been in construing and pursuing that Statute.

It is said in the books, amongst other things, that, by these acts, the person is now determined and the judges ought strictly to pursue the statutes and that it is not at all left to discretion. 9 Co. 38, Hensloe’s Case; Jones 175.

And as to the release, it was insisted that could not operate upon a future right. And they cited Co. Litt. 265a, b; Hob. 45.3

But yet the sentence was affirmed.

2 Eq. Cas. Abr. 423, 22 E.R. 359

Michaelmas 1689.

A. died intestate, leaving issue B. and C., his personal estate being valued at about £3500. C. agreed to take £1500 for her share and that B. should
take administration, and she releases her right to the personal estate. B. paid the £1500, makes D. his executor, and devides to him all his personal estate, and, then, he dies. There being £1000 out upon bond of A.’s estate, the question was whether D., B.’s executor, or C., the daughter, who was since married to E., should have administration.

And the judge of the Prerogative Court gave it to D., which sentence was affirmed by the Delegates, because, they said, that D., as executor of B., was in equity entitled to all benefit of the personal estate of A. by reason of the agreement.

31

**Simons v. Cuthbert**  
(Del. c. 1690)

*Where an action for a church rate has been settled out of court, the judge cannot thereafter proceed ex officio.*

Columbia Univ. Law Sch. MS. M 315, pt. 1, f. 66

Cuthbert was presented by Simons, the churchwarden, for not paying 4s. 10d. to a rate, and articles were exhibited. The cause came to be concluded *ex consensu partium*. Simons, afterwards, offers an allegation.

Dr. Oldys, the judge at Aylesbury, opens the cause and admits the allegation [and holds for the] appellee for opening the cause after it was concluded *ex consensu*.

[It was] judged in the [Court of] Arches pro gravamine. Simons appealed to [the Court of] Delegates.

**Sir Richard Raines, Bramston, Waller, Walton** confirmed the judgment in the [Court of] Arches.

The question was whether this cause, being for a church rate and on a presentment, was such a cause of office that the judge might open it *ex officio*.

[It was] agreed that it was not by reason there were articles given and *litis contestato*. Clerke, *Praxis*; Menochius, *De Arbitrariis*, c. 35; Asinius, *Praxis*, f. 100, lim. 23.
Morgan v. Fielder
(Del. 1690)

A final judgment cannot be appealed from after a great length of time.

Columbia Univ. Law Sch. MS. M 315, pt. 1, f. 67

Priscilla Morgan contra John Feilder.

Anno 1670, Fielder sues Morgan in causa jactitationis matrimonii. Morgan pleads (loco responsio) she is married to him. Morgan fails in proof. [There is a] sentence by Sir Giles Sweit that perpetuum silentium impone ad fore Morgan and that Fielder was free to marry any other. Morgan does not appeal. Fielder, anno 1672, two years after the sentence, marries his now wife, Mary Jones, [and] had nine children, whereof five are living. Morgan does nothing until eighteen years after, viz. Hilary term 1689/90. And, then, she petitions for a commission of delegates.

The commission was denied because, [first, it was] agreed that there was no counter-appeal;

Secondly, if there had been, yet it was deserted;

Thirdly, it was a design to get money, for, by her lies, she said, if Fielder would agree with her, she would [agree] for money.

7 February 1689/[90]. The Commissioners of the Great Seal were Lord [sic] Maynard, Keck, Rawlinson.

Licet sentencia sit ex illis quae non transeunt in rem judicatam tum ab ea non post appellari post lapsos decem dies. Scaccia, De appellationibus, qu. 12, n. 67. Quod licet huiusmodi sententiae non transeant in rem judicatam si tum sit appellatio ita deseritur. Appellatio sicut in aliis. Ex eodem, qu. 17, lim. 1, n. 7.

St. 24 Hen. VIII, c. 12, § 7; a party aggrieved shall or may take his appeal within fifteen days.

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1 Stat. 24 Hen. VIII, c. 12, s. 3 (SR, III, 429).
Herbert v. Cotton
(Del. 1690)

An administration durante minore aetate cannot be repealed merely because the infant ward later married.

Columbia Univ. Law Sch. MS. M 315, pt. 1, f. 70

Trinity term 1690.

Sir Thomas Lynch makes a will, his wife executrix, and his only child, Philadelphia, residuary legatee. The executrix died before the testator. Administration durante minore aetate et in usum of Philadelphia was granted to Colonel Herbert, her uncle.1

In November 1689, she, being about thirteen years of age, is married to Mr. Cotton, who was about seventeen. She and her husband choosing Sir Robert Cotton guardian, the judge of the Prerogative [Court] pronounces the administration granted to Herbert to be expired because of the marriage and grants it to Sir Robert Cotton in usum etc.

Herbert appeals.

The Delegates, by reason that the administration to Cotton or to any else must be granted in usum etc. and after the same manner as it was granted to Herbert and, because Cotton had not proceeded against Herbert as a mal-administrator, but only ex eo capite, because her condition was altered from a single life to a married life, the Delegates, viz. Lord Chief Justice Holt, Justice Dolben, Sir John Powell, Newton, Waller, Bramston, reversed the decree of the Prerogative [Court] and continued the administration in Herbert.

Prince’s Case2 is only when the woman, a minor, married a [person of] majority.

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1 Littleton v. Herbert (Del. 1686), see above, Case No. 26
Earl of Bath v. Duke of Berwick
(Del. 1691)

*A contract not to make a will is not enforceable.*

Columbia Univ. Law Sch. MS. M 315, pt. 1, f. 73

Easter term 1691.

Christopher, duke of Albemarle,¹ makes a will *anno* 1675 and the earl of Bath executor. *Anno* 1681, in a deed, he recites that will and confirms it and agrees to avoid any future, sudden, or surreptitious will that he will not revoke that unless by an instrument under his hand and seal whereof shall be six witnesses and three of them to be peers of England and unless he tenders 6d. to one of the parties in the deed. *Anno* 1687, he makes another will to which are but three witnesses and none of them peers. The question was what force this derogatory clause in the deed should have.

The *sedes materiae* about derogatory clauses are *Digestum, De legatis*, l. 1, *Si mihi et tibi*, 12; *§ In legatis*; *Digestum, De legatis*, l. 3, *Si quis*; Swinburne, part 7, § 14, n. 4, 8, 9, 10, 11.²

There were three duplicates of the last will, one delivered to Lady Pierpoint, one to Mr. Monck, one he carried with him to Jamaica.

Lord Chief Justice Pollexfen swore that the duke advised with him about the last will.

Notwithstanding the earl was in the decedent’s favor and did all his business for him to the decedent’s death, yet the circumstances being so many for the last will, the whole court pronounced for it, the marquess of Carmarthen, President of the Council, the earl of Nottingham, the earl of Pembroke, Lord Chief Justice Holt, Justice Dolben, Justice Rokesby, Sir Charles Hedges, Dr. Pepper, Dr. Tindall.


² H. Swinburne, *Brief Treatise of Testaments and Last Wills* (1590), ff. 263-266.
Countess of Thanet v. Countess of Clare
(Del. 1692)

The question in this case was whether a legatee and executrix of a will who renounced all interests under the will and also the executorship can be a witness to prove the will.

British Library MS. Egerton 3357, f. 141

The Right Honorable the Lady Katherine, countess of Thanet, wife of the Right Honorable Thomas, earl of Thanet, against the Right Honorable, the Lady Margaret, countess of Clare, wife of the Right Honorable John, earl of Clare, in a cause of appeal from a pretended grievance; Exton; Chapman; in the Court of Delegates.

This was in the first instance a cause or business in the Prerogative Court of Canterbury about granting administration with the last will and testament annexed of the Right Noble Henry, duke of Newcastle, deceased, dated the 26th May 1691, the Right Noble Frances, duchess dowager of Newcastle, his relict and executrix therein named having renounced the execution thereof, controverted between the Right Honorable the Lady Margaret, countess of Clare, wife of the Right Honorable John, earl of Clare, daughter of the said deceased, of the one part, and the Right Honorable Katherine, countess of Thanet, wife of the Right Honorable Thomas, earl of Thanet, another daughter of the said deceased, of the other part.

The said will, being opposed and denied by the said countess of Thanet, was propounded in due form of law by the countess of Clare, an allegation given and admitted, witnesses thereupon produced, sworn, and examined,

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some by commission in the county, others here in the Prerogative Court, and, in the said court, the Right Noble Frances, duchess dowager of Newcastle, having renounced the execution of the will, as aforesaid, and also renounced and disclaimed all legacies given and bequeathed unto her in and by the said will and all right, title, interest, and benefit which she might have or claim in the real or personal estate of the said deceased by virtue of the said will, was produced as a necessary witness on behalf of the said countess of Clare and prayed to be admitted and sworn, which was opposed on behalf of the countess of Thanet, and alleged that, by law, the said Lady Duchess was not to be admitted a witness in this cause. And a day was desired and accordingly appointed to argue the point in law.

Sir Richard Raines, judge of the said Prerogative Court, upon a solemn hearing of the matter argued in law by counsel on both sides, was of opinion that the said Lady Duchess ought by law to be admitted and sworn a witness in this cause under all limitations and did so admit and swear her, from which the said countess of Thanet has appealed, pretending the judge has done her a grievance in admitting and swearing the said Lady Duchess a witness in the said cause as aforesaid.

And the cause is now before the Judges Delegates upon the point of grievance. And the question is whether the said judge of the Prerogative Court has done well or ill in admitting and swearing the said Lady Duchess a witness, as aforesaid.

The case is thus, viz. the Right Noble Henry, duke of Newcastle, made his last will and testament in writing, bearing date the twenty-sixth day of May 1691 and therein, amongst other things, did give and bequeath in these words, viz.:

I give and bequeath unto my dear wife Frances, duchess of Newcastle, all and singular my baronies, castles, manors, man- sion houses, capital messuages, messuages, farms, cottages, lands, tenements, and hereditaments whatsoever and wheresoever with full power and authority for her, my said wife, to cut down, fell, sell, and dispose of all and every my coppice and spring woods wheresoever the same be, except in Welbeck and the lands settled upon my daughter Clare as aforesaid, in trust for the payment of my debts. And, after my debts paid, I give and bequeath the revenue of all my said estate unto my said dear wife for the term of
her natural life. And, after her decease, I give and bequeath all and singular my said baronies, castles, manors, mansion houses, capital messuages, messuages, farms, cottages, lands, tenements, and hereditaments unto my said dear daughter, the Lady Margaret, countess of Clare, and to the heirs of her body lawfully begotten or to be begotten.

And he did further give and bequeath in these words following, \textit{viz.}:

And, lastly, I give and bequeath all my plate, goods, chattels, household stuff, and personal estate whatsoever to my said dear wife, Frances, duchess of Newcastle, whom I make sole executrix of this my last will and testament.

The said Lady Duchess did in the month of February 1691/92 appear personally in court and renounce the execution of the said will and did take the usual oath and such her renunciation was admitted.

The said Lady Duchess, afterwards, \textit{viz.} on the twenty-ninth day of March 1692, by two instruments in writing under her hand and seal freely and duly executed, did utterly renounce and disclaim all and every legacy and legacies given and bequeathed under her in and by the said will and all right, title, and interest which she might have or claim in the real or personal estate of the said duke by virtue of his said last will and testament and all manner of advantage and benefit which might come or arise to her by such last will and testament or any legacy or bequest therein or thereby to her given or bequeathed, which two instruments were on the 24th of May 1692 exhibited in the said court and then and there by the said Lady Duchess acknowledged and declared to be by her freely signed and sealed and were on the first of June 1692 admitted by the said court.

It was observed by the counsel for the countess of Thanet that the Lady Duchess was not by law to be admitted a witness:

First, because she had a great interest by the will in the real and personal estate of the said duke, both as legatee and executrix, (1) the real estate being given to her for life, (2) the personal estate being given to her absolutely, (3) and she was made executrix of the will;

Second, because, by the general rule of law, a parent cannot be a witness for a child nor a child for a parent, but there being an exception that a parent
may be a witness between two children, because there is supposed to be parity of affection, it was urged that, in this case, there was a disparity of affection in the Lady Duchess to the countess of Clare and the countess of Thanet, the Lady Duchess having, as is pretended, shown greater affection and kindness to the countess of Clare than to the countess of Thanet, which was endeavored to be made out (1) by two letters exhibited which Her Grace wrote to the earl and countess of Thanet since the duke's death, (2) by Her Grace's renunciation of the execution of the will, (3) by her renouncing and disclaiming all her legacies, both real and personal estate given and bequeathed to her by the said will that she might be admitted a witness for the countess of Clare and let the said countess of Clare into the present possession of the real estate.

It was answered by the counsel for the countess of Clare:

First, that the said Lady Duchess has now no interest in the will, either as executrix or legatee or any other way, she having in due form of law renounced (1) the execution of the will as executrix and her renunciation was admitted, (2) and also having renounced and disclaimed all and every legacies and legacy given and bequeathed unto her in and by the said will and all right, title, and interest which she might have or claim in the real or personal estate of the said duke by virtue of his said will and all manner of advantage which might come or arise to her by such will or any legacy or bequest therein or thereby given or bequeathed to her, as by the two instruments aforementioned exhibited and admitted in the Prerogative Court may appear;

Second, that the said Lady Duchess is mother as well to the countess of Thanet as the countess of Clare and no disparity of affection could be presumed from a mother to her children but that they were both equally dear unto her, and what is in the letters do not show a disparity of affection but a zeal for justice and truth, and that her quality is such that renders her beyond all suspicion;

Third, that, by Her Grace's renunciation of the execution of the will and of her legacy of the personal estate, if that be not subject to the payment of the duke's debts, it must be divided amongst his children and the countess of Thanet will have as great a share thereof as the countess of Clare;

Fourth, that, as to the legacy or devise of the real estate which is by the said will given to the said Lady Duchess for her life for the payment of the duke's debts, his debts are in truth so great that it is impossible for the Lady Duchess to discharge them and so could have no benefit by that legacy
or devise and, therefore, to avoid the great trouble and encumbrance which otherwise she must bring upon herself, she was resolved not to intermeddle in the said estate and has, therefore, utterly renounced and disclaimed all right, title, and interest which she might have or claim of, in, to, or out of the said real estate by virtue of the said will;

Fifth, that the whole estate of the duke is computed to be about £10,000 per annum, that there is of the said estate out in jointures about £5000 per annum, that the debts upon the said estate at the duke’s death were at least £72,500 principal money and the interest for the same (a great part at £6 per centum) about £4000 per annum, and paid for fee farm rents and annuities £750 per annum and taxes [blank] per annum, besides debts upon book and funeral charges £2000;

Sixth, that the countess of Thanet has the liberty to examine the Lady Duchess upon cross-interrogatories and to take exceptions to her testimony after she is examined, so that the question is now only whether she shall be examined as a witness and not how far her testimony shall avail when she is so examined.

Upon the whole matter, the judge of the Prerogative Court declared his opinion that the said Lady Duchess of Newcastle ought by law to be admitted and sworn a witness in this cause under all limitations, and he did so admit and swear her. And it is prayed on behalf of the countess of Clare that the Judges Delegates will pronounce he did well and confirm his decree.

The earl and countess of Thanet’s case upon their appeal to the Judges Delegates, for that the judge in the court below does admit the duchess of Newcastle a witness to prove a will alleged to be made by the duke of Newcastle the twenty-sixth of May 1691, whereby he has given away all his real and personal estate from his daughter, the countess of Thanet. The duke, by his will devises all his manors and lands to the duchess in trust for the payment of his debts, and, after the debts paid, he devises the same to the duchess for life, then to the countess of Clare and the heirs of her body, then to the Lady Arabella, his youngest daughter and the heirs of her body. And, then, he gives all his goods and personal estate whatsoever to the duchess and makes her sole executrix. The duke’s estate was always esteemed and owned by him to be £11,000 per annum.

What his debts are or what jointures are on the estate does not yet appear. The duke had three several mansion houses, which were all fur-
nished with things suitable to his quality, as Welbeck, Bolsover Castle, and Nottingham Castle, the furniture of which places, the live and dead stock on the lands which the duke had in his own possession, the plate, jewels, and ready monies, the arrears of rents of so great an estate (in a time when rents were ill paid) cannot be supposed to be worth less than £12,000.

And the duchess has released all this to be a witness only to prove this will that the countess of Clare may take out letters of administration with the said will annexed. Upon the duke's death, the duchess possessed herself of his goods and household stuff and acted as executrix in receiving and paying monies owing to and from the duke's estate, this with the menaces used by the duchess to her daughter, the countess of Thanet if she joined with her husband to oppose this will are conceived to be sufficient reasons why the duchess should not be admitted a witness in this case.

[Other reports of this case: Columbia Univ. Law Sch. MS. M 135, pt. 1, f. 74v.]

36

**Ness v. Hutton**

(Del. 1692)

*A will witnessed by two entirely disinterested witnesses and one witness who is a child of a legatee is valid.*

Columbia Univ. Law Sch. MS. M 315, pt. 1, f. 76, pl. 1

Michaelmas term 1692.

Robert Bellamy, in his last sickness, by a nuncupative will, gives all his estate for his relations in the presence of four witnesses, whereof two were the daughters of Ness. [It was] agreed the estate was above £30. The question was whether the two daughters could be witnesses.

That they could not was showed the l. *Parentes* in the Digest, *Non sunt idonei testes pro parentibus*, and the *Codex*, wherein it is said *repelluntur [ . . . ]*; likewise the canon law, Extra, c. 4, qu. 2 & 3.

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1 Perhaps *sive* or *sine*.  

75
Sir Richard Raines, judge of the Prerogative [Court] rejected them and gave a sentence contra testamentum.

Ness appealed to the [Court of] Delegates, who were Justice Dolben, Justice Powell, Baron Powell, Sir Charles Hedges, ipse.

The question was whether the Statute of Frauds and Perjuries' requiring a third witness, the testament must be agreeable to the rules of the civil law or of the common law, which allows children to be witnesses for their parents.

The court agreed that, if [there were] but one entire witness and two children, that would not be sufficient. But there being two entire witnesses as would have proved the will before the Statute and the Statute requiring a third, they did conjecture that the Parliament intended a witness according to the acceptation of the common law and not to the civil law.

I dissented.

A sentence for the will, but no costs, was given.

37

Roberts v. Roberts
(Del. 1694-1695)

Adultery and cruelty are not the only grounds for a divorce from bed and board.

Columbia Univ. Law Sch. MS. M 315, pt. 1, f. 76, pl. 2
Hilary term 1693/94.

Mrs. Roberts sued her husband for cruelty before Dr. Edisbury, Commissary of Westminster, with a design to get alimony, but her proctor, as she said, colluding with her husband, confessing the cruelty in two court days, gets a sentence of separation against her consent, as she said, whereupon, she brought a querela nullitatis before the same judge to set his own sentence aside by reason of several nullities. But he confirmed his former sentence, from which confirmation, she appealed to the [Court of] Delegates.

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1 Stat. 29 Car. II, c. 3, s. 5 (SR, V, 840).
In Easter term 1694, doctors Patrick, Moor, and Plank, the bishops of Ely [Patrick], Norwich [Moore], and Chester [Stratford], Justice Eyre, Baron Powell, doctors Waller, Tindall, Bramston, Harwood reversed the sentence of separation because a bond had not been taken before the sentence passed for their not marrying, according to the canon.

Columbia Univ. Law Sch. MS. M 315, pt. 1, f. 81

Michaelmas term 1695.

After Mrs. Roberts had set aside the sentence of divorce, she cites her husband in causa restitutionis obsequiorum conjugalium before Dr. Bramston, surrogate to the Chancellor of Winchester. He, being of an opinion that, by reason of her former suit, she could not maintain such an action, thereupon, dismissed him.

Dr. Oxenden, dean of the Arches, upon the appeal brought by her, allows the action. And, after allowing some time to see if they could be reconciled, but in vain, [he gives] a sentence of restitution for her, and enjoins him to receive her and entreat her as his wife.

[Upon] his appealing to the [Court of] Delegates and upon his reasons and proofs why he could not receive and live with her by reason of her extravagances, saying she did not care if he were damned and her children ruined so she could but ruin and damn her husband etc., he, likewise, making an oath that, if he lived with her, he was in danger of his life, gave a sentence of separation, settling some alimony upon her.

Justices Rokeby, Powell, and Eyre, Sir Charles Hedges, Dr. Waller, Dr. Pagett, Dr. Cooke.

[. . . ] were against a separation, which is only in case of adultery and cruelty.

This was primae impressionis.
Chater v. Hawkins
(Del. 1695)

The question in this case was whether a judgment to stand in the pillory renders a person infamous and incompetent to testify in court as a witness.

3 Levinz 426, 83 E.R. 763

Chater and others against Hawkins, executor of Hawkins. Before the Court of Delegates at Serjeants’ Inn in Fleet Street.

Hawkins, being a prisoner in Newgate for opprobrious words spoken of the Mayor of London and under some distemper of mind, but of a great personal estate to the value of £10,000, made his will there, attested by several witnesses. And, upon the hearing of the cause in the Prerogative Court, sentence being there against the will and administration committed, the cause came hither by appeal coram Delegatis, viz. Lloyd, bishop of Litchfield, Lloyd, bishop of St. Asaph, Treby, Chief Justice of the Common Bench, Rokesby, a judge of the same court, and John Powell, Jr., one of the Barons of the Exchequer, with Dr. Oxenden and other civilians, where, for avoiding the testimony of two witnesses to the will, two records were produced, whereby they were severally convicted, the one for publishing a libel and the other for singing a song against the government, and both of them adjudged to the pillory. But no proof there was of their having stood in the pillory, only the said records were produced. And after their examination in the ecclesiastical court, but, before the sentence there, came the General Pardon,¹ whereby they were pardoned.

And the question here was whether their examination and testimony given in the ecclesiastical court shall be admitted for evidence.

And, first, it was admitted that they being convicted and adjudged to the pillory at the time that they gave their testimony in the ecclesiastical court, the Pardon afterwards did not make their testimony good, if it were not good when it was first made; second, that the judgment of pillory makes the

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¹ Stat. 6 & 7 Will. & Mar., c. 20 (SR, VI, 607-613).
infamy though they were never set in the pillory, but, third, the great question of the case was whether the conviction and judgment for those crimes should make them infamous and destroy their testimony notwithstanding the judgment of pillory, for it was said on one side that the books, as Britton; Co., 3 Inst., etc.,¹ which speak of infamy by the judgment of pillory, speak only of a judgment of pillory for such cases as import deceit and fraud, as cheats etc., and that it is from the nature of the crime that the infamy arises, and not from the judgment.

Whereunto it was answered that it is the judgment upon which the infamy arises, and not from the nature of the crime, as if one be convicted of cheating, he is still a witness if he has not had judgment of pillory for it.

Second, it was said that pillory, although it infers infamy by the common law, yet, by the canon and civil law (whereby they are to adjudge in this case, being of a will) does not import infamy, except the cause for which it is inflicted be infamous. And herewith the civilians seemed to agree.

And, after the counsel were withdrawn, for this cause only, as Rokesby and Powell afterwards told me, the matter itself not being infamous by the canon or civil law, the depositions of the witnesses were admitted for evidence, notwithstanding the judgment of pillory, by the whole court. And the sentence in the Prerogative [Court was] reversed, and the will [was] adjudged to be good.

2 Salkeld 689, 91 E.R. 584

Chester v. Hawkins.

The disability flows from the infamous judgment, and not from the nature of the crime, for, if a man be convicted for a cheat and adjudged to stand in the pillory, he cannot be a witness. [It is] otherwise if he be not adjudged to stand in the pillory.

Also they held the infamy was by the judgment to stand in the pillory, and not from the actually standing there, and that he was disabled to be a witness, though he never stood.

Note, in these cases, the disability is a consequence, and the pardon, which makes him de caetero a new creature, discharges all consequences, dependencies, etc.

39

**Thwaites v. Smith**
(Del. 1696)

*The children of legatees are not competent to be witnesses to the will.*

1 Peere Williams 10, 24 E.R. 274

An appeal was brought before the Court of Delegates from a sentence given by Dr. Watkinson, chancellor of the archbishop of York, for the validity and probate of a will of a personal estate. The single matter in question was that there were only three witnesses to the will, and two of those happened to be children of the residuary legatee.

Wherefore it was insisted that those two children were not competent witnesses, forasmuch as, by the civil law, the child was not allowed to be a witness for his parent, and so was the express text thereof, as appears by the Digest, tit. *De testibus*.¹ And this was said not to be any of the solemnities or ceremonies of the civil law, for, then, it might not be binding here, no part thereof being obligatory or necessary to be observed among us but what is required by the law of nature and nations. But the reason of this prohibition of children from bearing witness in cases where their parents were concerned proceeded from the affection and duty they owed to their parents. And so was Albericus Gentilis in his tract *De Testibus*, qu. 2, fo. 230.

In answer to which, it was allowed to be true that, by the civil law, children were incapacitated as above, but, then, the same was urged to be only one of the ceremonies of that law and so not of force with us, just as a woman was thereby prohibited to be a witness, whereas our law knew of no such prohibition. But admitting these children was exceptionable for that reason, yet

¹ *Digestum*, 22, 5.
here remained one witness altogether without exception, and, by the civil law,
one good witness might supply the deficiency of another exceptionable wit-
ness. See Farinacius, *De testibus*, q. 62, fo. 199, whose words are ‘testis unius
inhabitatis et defectus suppletur ex fide et habilitate alterius’.

And it being ordered by the civilians that precedents should be searched
for the appellant, the Case of Marwood *versus* Metcalf\(^1\) was produced, where,
upon an appeal from the court of York to the Delegates, this very excep-
tion was insisted upon and at length allowed; also the Case of Sir Thomas
Littleton, where the like exception prevailed. But this last case not being
before a Court of Delegates, there were no common law judges.

For the defendant was showed the precedent of [ blank ] lately adjudged
by a Court of Delegates, where Mr. Justice Powell, Jr., was in the commission
and present and which, at the hearing of this principal case, he remembered.
The point there was upon the revocation of a will; and whereas by the Statute
of Frauds,\(^2\) it is enacted that no will shall be revoked, but, where the writing
revoking it is signed in the presence of three witnesses, it fell out that there
were in that case three witnesses, two whereof were unexceptionable, but the
third, being the child of the residuary legatee, was, for that reason, objected to
as no witness by the civil law. But it was decreed by the judges delegates that,
there being two good witnesses, which were sufficient to prove the revocation
by the civil law, though the Statute required a third witness, yet that other
witness added by the Statute, needed not to be qualified according to the
civil law, from whence the common lawyers inferred that our judges have not
looked on themselves as bound up by the rules of the civil law, but at liberty
to follow their own, where the two laws differ.

To which it was replied, first, that this, being a will of a personal estate
only, was proper to be determined by the canon and civil laws and that the
judges had, in all such cases, conformed thereto; indeed, where some tempo-
ral matter depends on an ecclesiastical cause and is necessary to be determined
with it, there, though the ecclesiastical judges may try such temporal matter,
yet they ought to do it by the rules of the common law, to which it properly
belongs; else the common law judges would interpose by sending [writs of]


\(^2\) Stat. 29 Car. II, c. 3, s. 6 (*SR*, V, 840).
prohibition, and that with this distinction were all the cases wherein the temporal judges had differed from the civilians to be reconciled.

Secondly, that, in this case, the having of one good witness would not help the disability in the rest, for that was to be understood where the exception went only to diminish in part the credit of the witnesses, as on account of friendship, or even relation in a further degree, but not in the case of an exception to a child, who was absolutely prohibited to be any witness at all.

Thirdly, that the exceptions to witnesses in the civil law and in a cause triable by them were not to be compared to such exceptions as might lie against witnesses at common law, where the trial was by jury, but rather to exceptions to the jury. And this of relation was a good cause of challenge to a juryman even at common law.

Lastly, (as the strongest argument in favor of the exception) the constant practice was appealed to and that the defect could not be supplied by another entire witness was said to appear from Swinburne,¹ who, giving an account of the practice and law here in that particular, expressly says, when the law resists the examination of witnesses, it shall not be supplied by any other witness.

Whereupon the common law judges agreed with the civilians that these two children were not to be allowed as witnesses. Therefore, the will failed for want of proof, one witness being by the civil law as no witness, and so administration was granted to Twaites, the appellant.

Powell, Sr., was a little doubtful, but thinking that, in this case, he was to be bound by the civilians, he, at length, agreed. And the sentence given at York was reversed.

Afterwards, a commission of review was sued out upon this sentence, but the parties agreed, and the executor renounced.

1 Lord Raymond 91, 91 E.R. 957

A. makes his will and B. executor, and he devises divers legacies and, afterwards, all the residue of his goods, if there shall be any remaining, to C. and D.; E. and F., son and daughter of C. and D., were witnesses to prove this will. And G., the third witness, was without exception.

And it was adjudged by the Commissioners Delegates, of whom the two Powells, Justices, and Sir Samuel Eyre, Justice, were three, that E. and F. cannot be admitted to be witnesses to prove this will, because their father and mother, upon a contingency, *viz.* if there shall be any remainder of the goods after the legacies before devised shall be paid, shall be legatees.

[Other reports of this case: Columbia Univ. Law Sch. MS. M 315, pt. 1, ff. 79v, 81v.]

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**Crane v. Copping and Cory**

*(Del. c. 1697)*

*In this case, it was proved that the codicil in issue was properly executed and witnessed.*

Columbia Univ. Law Sch. MS. M 315, pt. 1, f. 91

Richard Ireland, clerk, about eighty years of age and blind, makes a will the 31 of December 1690. And he makes Mr. Crane and Dr. Parham, executors. This had been read to the decedent and had three witnesses to it. And much was given in it to the town of Norwich. [On] 8 February following, he sends for Henry Palmer, an attorney, and makes a codicil. And he gives to Mrs. Cory and Mrs. Copping legacies, and he gives away in all near £500. There were three witnesses to the signing, sealing, and publishing, *viz.* Henry Palmer, the writer, John Levery, and Margery, his wife. The two last said upon interrogatories that they did not hear the will read. Palmer swears it was publicly read, which word ‘publicly’ he used, bringing his deposition ready written to the Register.

Robert Clerke, a witness, swore that, in September 1691, which was a year before his death, the testator living to September 1692, the testator said he had given by a codicil £500 more than he had given in his will. But this witness had been a kind of a solicitor in the cause.

Dr. Pepper, Chancellor of Norwich, gave a sentence for the codicil. Crane, the executor appeals. And Dr. Oxenden, Dean of the Arches, gives
a sentence against the codicil. The legatees in it appeal to the [Court of] Delegates.

One question was whether he was in February 1690[/91] of sound mind and memory. But that soon vanished, it not being believed that there was much alteration of the decedent's memory in five week's time, it being agreed by the executor that he was of sane memory at the making of the will.

But the main question was whether the codicil was read to the decedent and upon the credit of Palmer alone that the codicil was read by him, which must be, if at all, before the two Laverys were called in.

The Delegates gave a sentence for the codicil, for the two Laverys said, when they came into the room, Palmer was writing the last words.

Pro codicillo: Bishops of Oxford [Hough] and Peterborough [Cumberland], two common law judges, Sir Charles Hedges.

Contra codicillum: Sir Richard Raines, Dr. Pagett, Dr. Cooke.

41

Lugg v. Lugg
(Del. 1699)

The subsequent marriage and birth of a child revokes previous wills, especially where the testator died leaving an incomplete draft of a new will.

Columbia Univ. Law Sch. MS. M 315, pt. 1, f. 97

Hilary term 1698/9; John Lugg contra Elizabeth Lugg, widow.

Richard Lugg, a clerk in Chancery, dies in February 1697[/98]. He leaves his wife, Elizabeth, and one daughter, Margaret, about twelve years old, [and] a brother, John, who had six or seven children. Anno 1674, twenty-four years before his death, when a bachelor, he made his will all written with his own had, but not signed or sealed or witnessed. But, at the bottom were these words, 'written with my own hand signed, sealed, and published to be my last will and testament in the presence of'. His estate was then about £10,000, and, at his death, was increased in land and money to £25,000.
John, the brother and executor, to whom the residue was given in trust for his children, propounds this will in the Prerogative Court. And he proves that the decedent always declared his daughter would not be [of] such a fortune as people thought her, for that would make her a prey to the world and that he never designed to make up the fortunes of a broken family by his labors and that £5000, £6000, £7000, £8000, or £10,000 was enough for any woman and the highest proof of his intentions to his daughter was that, if he married her [off], he would give her £6000, but, if he died before her marriage, he would leave her £10,000 and that would make her happy and that he had rather marry her to an honest country gentleman of £500 per annum than any lord in the land. And he proved [this] by one witness, William Nurse, that, in Trinity term 1694, which was three years before his death, at St. John's Head Tavern in Chancery Lane, discoursing with him about his will, the decedent took a writing out of his pocket and told him it was his will of his own hand and laid it open on the table before him, which appeared sullied and worn in his pocket. He said he intended to have it fairly written by some good hand and get three or four of his old acquaintances and publish and declare it. Nurse named Mr. Hope and Mr. Brooks, two of his acquaintances that had lived at Hays, that wrote fine hands. The decedent said he knew it, but he did not design that any so nearly related to Hays should know what he designed by his will. Soon after, company [?] coming in, he put it [in] his pocket again. And he believes the will exhibited is the same.

The testator’s wife brought him a copyhold [of an] estimated value of £1200, which was settled upon her on the marriage. After his marriage and the birth of his daughter, he purchased lands, of the value of £400 per annum, which descended to his daughter.

This will was found in the decedent’s possession in the cover of a pocket book, which was in a portmanteau trunk, wherein were mortgages and other papers of moment, which portmanteau trunk he carried always with him when he went out of town.

It is likewise proved that he frequently said that he had heirs enough for his estate, that his brother John had a great many children, that he had relations of his own name and family that he must not nor would forget, and that he advised people to have wills by them and that he was a fool that died without a will.
It was likewise proved that George, the son of John, had been his clerk and a slave to him for eight years before his death, to whom the decedent resigned his place in the Six Clerks Office, worth £300 or £400, a month before his death. And he often declared he would do well for him and take some further care of him or make some further provision for him, but he would not let him know what kindness he designed, that he might not depend upon it to lessen his diligence in his business, and that he had but an indifferent affection for his wife and would leave her little enough, for another husband should not spend what he had gotten.

It was urged on the other side that the subsequent marriage and the child did revoke this will by the civil law and that it was proved by Mr. Perkins that, four days before he died, he desired his assistance in making his will, for he had no will. And he said, having several mortgages, his debtors would be at a loss, because his daughter was not of age and could not discharge or continue them. And he desired his advice. He advised him to make trustees and named Nicholas Hooper and Mr. Masmore. The decedent said he could not ask so much trouble from Mr. Hooper, but would only desire his assistance as to the education and marriage of his daughter, who was said Mr. Hooper’s goddaughter. Then, Perkins wrote, as he desired, a paper with blanks as follows, which the widow exhibited and which he designed to finish the Sunday following. But he died on the Saturday before.

As to the mortgages forfeited made to me or other mortgages whatsoever and all my personal estate whatsoever, either bonds, bills, leases, or ready money, I devise to Nicholas [blank] and make them executors of this my will in trust, nevertheless, that they or the survivors or survivor of them shall from time to time as occasion shall call in the moneys due on any of the said mortgages, bonds, bills, rents, or other securities and make such assignments, conveyances thereof, or leases, grants, etc. of any of my said estate as shall be necessary and the benefit and advantage thereof as follows. [blank] And, as to my freehold messuages, lands, and tenements in the parish of Heese and County of Middlesex or elsewhere, I give, devise, and bequeath to Margaret, my only daughter, and her heirs, but, in case she happen to depart this life before she attains her age of twenty-one years or die without issue of her body living at the time of her death, then, I give the same
to my two older brothers, George and Robert Lugg, during their natural lives and the life of the longest liver of them, share and part alike, and, after their decease, to John, my third brother, for his natural life and, after his decease, to George Lugg, his eldest son, and his heirs. And I desire and appoint Nicholas Hooper, Esq., to be guardian to my said daughter, her godfather, and that he will be pleased to give his directions for her education and marriage as he shall think best for her.

It appeared by Perkins’s deposition that the decedent designed, at some time, to do something for his brother John’s children. And it seems to be implied by the said instructions that the personal estate was not designed for the daughter. The last words of the devise thereof being ‘to the uses following’, which instructions seem not inconsistent with the will and the rather that Oliver Atkey swears that Perkins, the second day after the decedent’s death, told him that, when he told the decedent his estate was too much for one daughter and that £7000 or £8000 would match her happily, he intended to do no otherwise and that he would give the greatest part of his personal estate to his relations.

It was urged by the widow’s counsel that the law which governed Overbury’s Case1 must be the law in this case.

The response [was] there seems a great difference in that the declarations of the decedent were all against his brother in favor of his wife and child. Secondly, the will was always in his brother’s possession; this was in the decedent’s possession. In that, [there was] a revocation, *viz.* ‘make and appoint that my last will and testament’. In this, [there was] no revocation of his former [will]. In that, legacies [were] given. In this, [there was] none but of land, which cannot take place, because it was not signed by the decedent nor witnessed. In that, there were two wills pleaded, and the question was which was the true one and it was pronounced that that which was of his own writing was the *ultima voluntas*. In this case, that paper that was written by Perkins by the decedent’s order was not pleaded as a will, so that the administration by the [Court of] Delegates was granted with the widow with the will annexed.

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1 *Overbury v. Overbury* (Del. 1682-1684), see above, Case No. 18.
The judges in Overbury's Case were, anno 1682, Lord Chief Justice Jones, Baron Atkyns, Justice Levinz, doctors Hedges, Newton, Littleton, Brice. The civilians were all of opinion that the marriage and child revoked the will made in favor of the brother, especially considering the later will began by the decedent. Atkyns and Levinz were for the first will that the child nor the imperfect last will did revoke it. Lord Chief Jones agreed with the civilians upon the last head, that the last will was a revocation, but the child would not have been.

The tenor of Overbury's will [was]:

In the name of God almighty, amen, I, Nicholas Overbury, by the grace of the same Almighty, do, being in good and full remembrance, make and appoint this my last will and testament in form following: *Imprimis*, I give and bequeath my soul and spirit unto the Almighty, who gave it, in hopes of acceptance by the sufferings of Christ, my savior; for my temporal goods, my desire is that, after my body [is] buried in the parish of Barton on the Heath near my father's, it may there remain until the great resurrection; next, I give to the poor of the said parish £5 to be disposed in one year after [by] my executor, hereafter named, at his discretion £5; *Item*, I give to my true servant £10 besides his due wages; *Item*, I give unto my wife, Catherine, all my utensils of household stuff, my plate and jewels excepted.

By the first will, he gave all to his brother and made him executor. For the will of Lugg [were cited] Vulteius, *Jurisprudentia Romana*, lib. 3, cap. 71; *Digestum, De militari testamento*, l. 7, *Agnationem posthumi vel quasi non rumpetur testamentum militis*, l. Militis, eodem § 2. A soldier by the civil law could *praeterire liberos si sciverit esse natos, si autem ignoraverit rumpitur testamentum*, if he died in that ignorance. But, if he lived and was informed that he had a child or that his wife was with child, he could revive that will which before was *ruptum* by declaring *volo illud testamentum valere*. Swinburne, 7th part, § 15, n. 3; Mantica, lib. 12, tit. 2, in fine.

*Contra testamentum*, [it was] urged that that in Mantica was only in revoking legacies but that Mantica, in the precedent title, *viz.* tit. 1, lib. 12, *Ex quibus conjecturis testator videatur recessisse a priore voluntate*, there is no such thing. Mascardus, *Conclusiones*, 1286, n. 153.
It was urged that the paper Mr. Nurse spoke of was rather some other paper and not this, which the testator in 1694 showed as his will, for there was nothing then proper to be transcribed, the mother and brothers not being mentioned in the cause.

Sir Richard Raines gave a sentence that the decedent died intestate 20 January 1698/9. [On] March the 3rd following, upon the appeal brought by John Lugg, the judges all confirmed the sentence, *viz.* Lord Chief Justice Treby, Justice Powell, Justice Turton, Dr. Oxenden, dean of the Arches, Sir Charles Hedges, judge of the Admiralty, Dr. Lane, Dr. King, Dr. Lloyd. The civilians were all of opinion that the child did revoke by the civil law all wills in England being to be made *jure militare* and so revoked *jure militare*; besides, the paper written by Perkins was an indication of a revocation.

The common lawyers said a marriage and a child alone would not revoke, but the last paper was a sort of a revocation, especially considering the whole circumstances, *viz.* that the will pleaded was never signed, sealed, or published, made when the testator was sick, as if he intended only to have a draft by him to be signed and sealed if he grew worse, that it was a neglected paper, being found in a book of old accounts, the last account being of eight years' standing, and, besides that, it was not a proper paper to be transcribed, as Nurse swore it was to have been of 1694, considering the circumstances then of the testator's saying withal that the civil law was very just.

And Treby said that it was good reason that the same law which allowed wills in England, *viz.* the *jus militare*, should take place in the revoking of wills, and it was plain that a soldier's will was revoked *agnatione posthumi* unless he republished it or set it up again, which was not well proved in this case by the testimony of Mr. Nurse.

Counsel *pro testamento*: Sir Thomas Pinfold, Dr. Newton, Dr. Cooke, Serjeant Wright, Mr. Ryder, Mr. Northey, Mr. Mulsoe; *contra testamentum*: doctors Oldys, Bramston, Waller, Sir Thomas Trevor, Attorney General, Sir Bartholomew Shower, Mr. Baggs.

The tenor of Mr. Lugg's will pleaded: To be buried in St. Clement's Danes, reciting himself of New Inn, remits to his mother and brother George all debts and gives to George £800 to be laid out in a purchase of lands by his executor and to be settled on George for life, remainder to his heirs male, and, in default, to his nephew and godson, George, eldest son of John Lugg and
his right heir; to his brother Robert £1000, £500, part thereof, to be laid out in lands and settled on him and his heirs male, and, in default, to his nephew, John, son of brother John Lugg, and his heirs; [blank] to brother Adam £800, executor to pay Robert and Adam £500 each, part of their said legacies out of the first money that shall come to his hands and the rest in convenient time after; to the poor of Sherwell £10 to be divided at the discretion of the executor within a year after [his] death and orders the executor to lay out £100 within two years of his death in erecting three monuments for himself and two sisters deceased to be placed next to his father's in Sherwell Church; to his clerk, Richard Snow, £20 within six months:

to my honored friend Mr. John Elphick and his good wife, Elizabeth, £2 for two rings and to my much esteemed friend Mrs. Elizabeth Elphick one broad piece of gold to buy her a ring and to Mrs. Mary and Mr. Thomas Elphick, their son and daughter, and to Oliver Atkey and his wife 20s. each to buy them rings, to my chamber-fellow, Mr. Perkins, all my interest and right to the bed and furniture of the chamber we enjoyed together in New Inn (my clerk's bed and furniture excepted).

And he makes [his] brother, John Lugg of Lyons Inn, sole executor, to whom he gives the residuum for the use of his nephews and nieces, the sons and daughters of the said John Lugg, equally or the survivors of them; the executor to give his own bond to brother George to dispose the same at interest and to account for and pay such principal and interest to his said children at their ages of twenty-one or marriage, which first happens:

in witness whereof I have herunto set my hand and seal, the 6th day of October 1674 and in the 26th year of King Charles II. Written with my own hand, signed, sealed, and published to be my last will and testament in the presence of [blank].

2 Salkeld 592, 91 E.R. 497

Before a Commission of Delegates, one, being single, made his will, and he devised all his personal estate to J.S. Afterwards, he married and had several children, and died without other will or disposition.
And now *coram Delegatis*, of which Treby, Chief Justice, was one, it was ruled that, there being such an alteration in his estate and circumstances so different at the time of his death from what they were when he made the will, here was room and presumptive evidence to believe a revocation and that the testator continued not of the same mind.

For revocation of uses etc., *vide* 1 Co. 112, 173, 174; 6 Co. 33, 34; 10 Co. 86, 143; Cro. Car. 472; Chan. Cas. 242; 2 Lev. 149.¹

[Other copies of this report: 2 Lee 208, 161 E.R. 31.]

Lincoln’s Inn MS. Misc. 147, p. 35, pl. 4

In this case in Salkeld’s reports, the revocation of this will is put solely on the point of a subsequent marriage and [it was] so determined in the [Court of] Delegates. But it has been said by Sir Nathaniel Lloyd and Dr. Pinfold there was in that case a subsequent will begun but not finished. [They] were of the Commission of Delegates.

1 Lord Raymond 441, 91 E.R. 1193

It was decreed by Commissioners Delegates, of whom Treby, Chief Justice of the Common Pleas, was one, since the last term, that, where A. had made his will and thereby devised all his personal estate to B. and C. and, afterwards, A. married D. and had by D. several children, and then died without having taken any notice of this will, that this marriage of A. with D. amounted to a revocation of this will, but that it was only a presumptive

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revocation, and, therefore, if, by any expression or any other means, it had appeared that the intent of A. was that this will should continue in force, the marriage would not have been a revocation of it. And the sentence in the spiritual court was affirmed.

*Ex relatione magistri Chessyre.*

[Other copies of this report: 12 Modern 236, 88 E.R. 1287.]

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42

**House and Downs v. Lord Petre**

(Del. 1700)

*A right of executorship of a will can accrue by a right of survivorship.*

Columbia Univ. Law Sch. MS. M 315, pt. 1, f. 111v

Robert, lord Peter, *anno* 1638, makes his will and his eldest son, William, executor. *Anno* 1677, William Peter makes his will and his wife, Lucia, his relict, and John Todd, executors. Lucia only proves. And *anno* 1679 (John Todd surviving), she makes her will and Francis House and her son, John Peter, executors. And, to her son, she gives the residue. Francis House only proves the will, and, *anno* 1693, he makes his will, John Peter surviving, and he makes Valentine House and Edward Downs executors, who both proved. In Trinity term 1700, John Todd, the surviving executor of William Peter, renounces the executorship of William Peter’s will, from whence on the supposition that Robert, lord Peter, had no executor, Thomas, lord Peter, his son and Mrs. Mary Heange, grandchild of Robert, lord Peter, contend before Sir Richard Raines, of the Prerogative [Court] for the administration of Robert, lord Peter, *de bonis non etc. cum testamento annexo* and the administration. The said administration *de bonis non etc.* was granted to Thomas, lord Peter, as next of kin.

Valentine House and Edward Downes, as executors of Francis House, executor of Lucia Peter, executrix of her husband, William Peters, executor of Robert, lord Peters, bring an original appeal to the [Court of] Delegates, being set up (as supposed) by Mrs. Heange, on the other side, to interrupt
the privity between House, Downs, and Lord Robert, and the Lord Thomas. Whilst the appeal was depending, on the 15th of November 1700, [she] procures John Peters, the surviving executor of his mother, Lucia Peters, to prove her will, which [?] probate was exhibited. But John Peter was no party in the cause.

[On] 19 December 1700, [it was] judged \textit{nemine contradicente} by the Lord Chief Justice Holt, Justice Powell, and Baron Hatsell, Sir Thomas Pinfold, Dr. Lane, and Dr. Pagitt that, by reason that John Peters had taken on him probate of Lucia's will, the privity as to Valentine House and Edward Downs was discontinued and that John Peters was executor of the executrix of the executor of Robert, lord Peter. But they assigned another day \textit{ad audiendum voluntatem} about revoking the administration \textit{de bonis non cum testamento annexo} granted to Thomas, lord Peter, because John Todd, the surviving executor of William Peter, had renounced and whether the Lord Robert might not be said to have no executor [ . . . ] that renunciation.

In the debate, it was agreed that a surviving executor might prove after the death of his co-executor and thereby prevent the executor of his co-executor to be executor of the first testator.

1 Robertson Ecclesiastical 415, 163 E.R. 1086

Chief Justice Holt, Mr. Justice Powell, Mr. Baron Hatsell, Sir Thomas Pinfold, King's Advocate, and doctors Lane and Pagitt.

Robert, lord Petre, died in 1638, and, by his will, he appointed his brother, William Petre, Esq., and two others his executors. William Petre alone took probate, and he survived the other two executors. He died, and he appointed Lucy, his wife, and Henry Todd his executors. Lucy alone proved the will in January 1678. A power was reserved to Henry Todd, who survived Lucy, but he renounced by proxy 18th June 1700 all right and title to the wills of William Petre and Robert, lord Petre. Lucy appointed by her will, not House and Downs, but her son, John Petre, Esq., and Francis House, her executors. Francis House alone at first took probate 8th May 1680, and a power was reserved to John Petre, who proved 15th November 1700. In June 1700, subsequently to the renunciation of Todd, the right to the administration of the unadministered effects of Robert, lord Petre, was disputed between Thomas, lord Petre, the son, and Maria Heneage, the granddaughter ('\textit{nepotem ex filia}') of Robert, lord Petre.
An act on petition was entered into on the 28th June in the Prerogative Court. And, after argument, the judge, Sir Richard Raines, decreed the administration *cum testamento annexo* to the son, Thomas, lord Petre. And, on the 1st July, he was sworn administrator. A few days afterwards, an appeal was commenced in the Court of Delegates, and the appellants were Edward Downs and Valentine House. The cause proceeded. And, finally, on 19th December 1700, the court pronounced against the appeal, and condemned the appellants in the costs.

1 Salkeld 311, 91 E.R. 274

19 December 1700. At the Court of Delegates in Serjeants’ Inn Hall.

Robert, lord Petre, died in the year 1638, and he made William Petre, Esq., his brother, his executor. William Petre died, and left Lucy, his wife, and one Henry Todd, his executors. Only Lucy proved the will. She died, and left House and Downs, her executors. Afterwards, Henry Todd renounced the executorship of the will of William Petre, and administration was granted to the lord Petre, now defendant, of the goods and chattels of Robert, lord Petre.

House and Downs, being executors of Lucy, insisted that this administration belonged to them.

And it was agreed by the whole court, as well civilians as common lawyers, that Henry Todd being a joint executor with Lucy, and surviving her, the sole right of executorship to William Petre did accrue to him by survivorship, though he never concurred in proving the will nor acted as executor, and this right was not divested out of him until he receded from it by an actual renunciation, by which both William Petre and Robert, lord Petre, as from that time died intestate, so as to entitle the ordinary to grant administration of the remaining personal estate, but not so as by relation to render effectual the will of Lucy and transmit those executorships to the plaintiffs.

1 Salkeld 307, 91 E.R. 271

In My Lord Petre’s Case, which was before a Commission of Delegates at Serjeants’ Inn where the case was that several executors were named in the will, and one refused, and the other acted, and those that acted died, and administration was committed before any refusal by the surviving executor to J.S, the administration was held to be void, because the refusing executor
surviving might, notwithstanding his former refusal, have taken upon him the executorship. And, afterwards, on another refusal of the surviving executor before the ordinary, administration was committed to the Lord Petre, and it was held to be good. And, upon that title, he maintained in this court an action of trover for a jewel.¹

1 Robertson Ecclesiastical 415, 163 E.R. 1086

The substance of Lord Petre's Case, as given in Wankford v. Wankford, 1 Salkeld 307,² is not correct, for the editor [J. E. P. Robertson] has ascertained that, between the 8th May 1680, when Lucy Petre's will was proved, and the 1st July 1700, when administration was granted to Thomas, lord Petre, of the unadministered effects of Robert, lord Petre, no administration passed, either of the will of Robert, lord Petre, William Petre, or Lucy Petre. If the Chief Justice [Holt] did in Wankford's Case make the statement attributed to him respecting Lord Petre's Case, he must have spoken merely from memory after a lapse of more than two years from the decision. The report of the case was not published until 1717.

Anonymous
(Del. c. 1700)

The question in this case was whether an executor of a will who renounced can later come in and administer the decedent's estate.

1 Salkeld 311, 91 E.R. 274


But, in another matter, the common lawyers and the civilians disagreed. And the common lawyers held that, where there are several executors and one renounces before the ordinary and the rest prove the will, by the common law, he who renounced may at any time afterward come in and administer, and, though he never act during the life of his companions, he may come in and take on him the execution of the will after their death and shall be preferred before any executor of his companions. Vide 21 Edw. IV, 23; Office of Executors 6; Hard. 111; contra, 9 Co., Hensloe's Case, Dy. 160.¹ But the civilians held that, by the civil law, a renunciation is peremptory.

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**Deye v. Ashby**
(Del. 1700)

*In this case, the defendant was improperly served with process, and the case was sent back to the lower court for further proceedings.*

Columbia Univ. Law Sch. MS. M 315, pt. 1, f. 111

Michaelmas term.

William Dye was cited in the Prerogative [Court] to bring in an inventory. He brought in one imperfect, to which Ashby gave in a next allegation. Dye gave an answer. Ashby alleged the answer was not full, on which a voluntatem was assigned. On the hearing of counsel, Dye's answer was judged imperfect, and he was in Trinity term 19 June 1700 decreed to be cited to give a fuller answer by the next court day, which was the 28th of June. On the 23d and 25th of June, the apparator went to his last habitation to endeavor to serve him with the decree. And, not finding him, he did on the 25th make a return before me as surrogate that he had sought him, and I decreed a viis et modis at the petition of the proctor of Ashby returnable on the 28th, the

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same day the [ . . . ] was returnable. And, not appearing, he was then excommuni-
cated [ . . . ]. Dye, the same day, appealed to the [Court of] Delegates.

The question was whether the proctor for Ashby should not have stayed
until the 28th and made his return then of the decree and then have prayed
a viis et modis or whether, at any time within three days before the 28th, he
could allege and certify that Dye had been sought and pray a viis et modis
returnable the 28th [ . . . ] for Dye that the return ought to have been in
court. Clerk's, Practice, tit. 13, 14, 15, 16, 17, 20, part De litigatione, n. 51;
Mynsinger, obs. 77; Vantius, De nullitatibus, Ex defectu citationis, n. 23.

The counsel for Ashby answered that those laws were in case the party
was cited and then he must be expected until the day of the return before
anything further can be prayed.

Precedents were searched. And, by them, it appeared that the practice
had been that three days before the day of the return of a decree for an answer
or to perform somewhat whilst a cause was depending, the officer might cer-
tify before the judge in his chamber that the party was sought and the proctor
might pray and obtain a viis et modis returnable the same day as the decree.
But this will not be adjudged good in an original citation at the beginning
of a cause.

And so it was adjudged by the [Court of] Delegates, who decreed male
appellatam and remitted the cause.

Pro Dye: Justice Blencowe, Baron Hatsell, Dr. Oxenden, dean of
the Arches, Dr. Thomas Ayloffe; for Ashby: Dr. Waller.

Observe [that] Dye was an ill man, which made the judge of the
Prerogative [Court] to be quick upon him.

Counsel for Dye: doctors Bramston, Clements, Cooke.

45

Haydon v. Gould
(Del. 1700-1710)
A marriage ceremony that was not performed by a properly ordained priest is void.

Columbia Univ. Law Sch. MS. M 315, pt. 1, f. 96
Margaret Gold contra John Haydon.

Rebecca Haydon, alias Tyto, dies. Gold, the sister, puts John Haydon, praying administration, to prove that he was the husband. He proves his courtship and that, the first of September 1688, in a religious congregation called the Sabbath Keepers, he was married by the minister of that congregation by the words of the [Book of] Common Prayer, ‘I take thee’ etc. The minister pronounced them man and wife, said prayers, and gave the blessing. There was full proof of cohabitation and reputation of man and wife to the time of her death, which was about nine years [ago] and that Gold, her sister, and all her other relations owned the marriage and called him brother after their sister was dead and gave consent that he should take administration as the lawful husband. After which, some differences arising amongst them, Margaret Gold insisted that the administration should be reversed.

Swinburne, *Espousals*, sect. 1, n. 2, sect. 11, § 45, sect. 17. There must be a solemnization or a celebration of the marriage by the laws of England.

The minister who married them was dead. And there was no proof that he was a minister in holy orders nor any ground to presume he was. No marriage is good by the constitution of England but by the prescribed form, which is to have a priest. Stat. 2 & 3 Edw. VI, c. 21; 5 & 6 Edw. VI, cap. 12, Act of Uniformity; 12 Car. II, c. 33, Act for the confirmation of marriages. 1

The necessity of making that Act shows that no other marriages are good by our constitution than those made according to the usage and customs, that is by a priest in holy orders. Stat. 19 Hen. III, c. 17. 2 The woman was endowed at the church door.

The judge was of opinion to revoke the administration, but he put the cause off for a week to see if Haydon could prove that the minister was in orders. But, no proof being made thereof, but rather that the parchment which was contended he showed in his lifetime for his orders was a license only to hold a conventicle, dated about 1674, about which time King Charles II granted a toleration.

[On] 28 February 1698[99], the judge revoked the administration granted to Haydon, and granted it to Gold.

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1 Stat. 2 & 3 Edw. VI, c. 21 (SR, IV, 67); Stat. 5 & 6 Edw. VI, c. 12 (SR, IV, 146-147); Stat. 12 Car. II, c. 33 (SR, V, 296).

Vide Swinburne, *of Wills*, pt. 1, § 10, n. 12, fol. 35.

Columbia Univ. Law Sch. MS. M 315, pt. 1, f. 110v

Vacation *post termino Trinitatis* 1700; John Haydon *contra* Margaret Gold and Mary Franklin.

Rebecca Haydon, *alias* Tito, wife of John Haydon, dies 26 January 1696[97]. John and Rebecca were of the sect called Sabbatarians or Sabbath Keepers. And they were married the 2nd of September 1688 in their congregation by one Henry Perkins, their preacher. Richard Gould, husband of Margaret Gold, had £180 of Robert’s fortune in his hand. The two sisters, Margaret Gold and Mary Franklin, entered *caveats* against John Haydon’s having administration as husband of Rebecca, but, being then not resolved to oppose the marriage, subducted the *caveats* and consented that the administration should be granted to him, which was.

Afterwards, to prevent Haydon’s having the £180, they call him to show cause why the administration should not be revoked and granted to them as next of kin, whereupon Haydon pleaded his marriage, *viz*. his courtship with the knowledge of all the relations of him and Rebecca, especially Margaret Gold and May Franklin; secondly a settlement of marriage was made during the courtship that [. . . ]; thirdly, that, before the marriage, there were discourses in the congregations of such intended marriage to the end that any person that could might object against the marriage; fourthly, that the minister declared they came to solemnize a marriage and, after reading some places in Scripture of the duties of marriage and some advice given by the minister, he said to Haydon ‘Wilt thou have this woman to thy wedded wife to live together after God’s holy ordinance in the holy state of matrimony?’ Haydon answered ‘I will.’ Then, the minister said to Rebecca in the same manner; she answered ‘I will.’ Then, John, taking Rebecca by her right hand, said ‘I, John Haydon, do in the presence of God and this assembly take thee Rebecca Tito to my wedded wife to have and to hold from this day forward for better, for worse, for richer, for poorer, in sickness and in health, to love and to cherish till death us do part according to God’s holy ordinance’ or to that effect. Then, she, with her right hand, taking him by his right hand, said the same words or to the same effect. Then, the minister pronounced them man and wife, and said ‘those whom God hath joined together let no man put asunder.’ They loosed hands. The minister read some Scripture sentences
suitable to the occasion, and had some prayers for a blessing, and the contract was then executed. And, though he, then, gave her no ring, yet a short time after, he gave her two guineas. Cohabitation and reputation at the house of her sisters were fully proved. He buried her as his wife. And, before and after her death, the sisters and their husbands wrote several letters acknowledging him to be her husband.

Sir Richard Raines, judge of the Prerogative [Court], revoked the administration granted to him and granted it to the sister Mary Franklin. Haydon appealed.

[On] 4 July 1700, judgment was confirmed by the [Court of] Delegates, scil. Lord Chief Justice Treby, Justice Powell, Dr. Oxenden, Dr. Newton, Dr. Cooke, Dr. Lloyd.

Observe that Haydon took on him to prove before the judge of the Prerogative [Court] that Henry Perkins, who married them, was in orders of the Church of England, but he failed in his proof.

1 Salkeld 119, 91 E.R. 113

4 July 9 Anne. At the Court of Delegates in Serjeants’ Inn, Fleet Street.

One had issue three daughters, Margaret, married to Richard Gould, Elizabeth, who married Franklin, and Rebecca, who married Haydon. Rebecca deposited £180 in the hands of Gould, and she took his bond payable to Franklin for her use. Rebecca died, and Haydon, her husband, took administration.

And now Richard Gould and his wife sued a repeal upon this suggestion, that Rebecca and Haydon were never married. And it appeared in fact that they were Sabbatarians and they were married by one of their ministers in a Sabbatarian congregation and that they used the form of the Common Prayer, except the ring, and that they lived together as man and wife as long as the woman lived, viz. seven years.

On the other hand, it appeared that the minister was a mere layman, and not in orders, upon which the letters of administration were repealed, and a new administration was granted to Margaret Gould etc.

And now that sentence, upon an appeal, was affirmed by the Delegates, for Haydon, demanding a right due to him as husband, by the ecclesiastical law, must prove himself a husband according to that law to entitle himself in this case. And, though, perhaps, it should be so, that the wife, who is the
weaker sex, or the issue of this marriage, who are in no fault, might entitle themselves by such marriage to a temporal right, yet the husband himself, who is in fault, shall never entitle himself by the mere reputation of a marriage without right.

In this case it was urged that this marriage was not a mere nullity, because, by the law of nature, the contract was sufficient, and, though the positive law ordains that marriage shall be by the priest, yet that makes such a marriage as this irregular only, but not void, unless the positive law had gone on and ordained it expressly to be so. Vide Mo. 169, 170; Bracton, lib. 4, c. 8, 9; 3 Jac. I, c. 5, 13.¹

But the Court ruled ut supra, and a case was cited out of Swinburne,² where such a marriage was ruled void. And an Act of Parliament was made to confirm the marriages contracted during the usurpation, viz. 13 Car. II, c. 35,³ and the constant form of pleading marriage is that it was per presbyterum sacris ordinibus constitutum.

Powell v. Beresford
(Del. 1707)

A holographic will can be valid and admitted to probate.

2 Lord Raymond 1282, 92 E.R. 341

On an appeal to Delegates from a sentence of the Prerogative Court, the case was this. John Beresford, having had a long acquaintance with Mrs. Powell, afterwards, married the respondent. But having £500 of Mrs. Powell’s


² H. Swinburne, Treatise of Spousals (1686).

in his hands, on the 7th of December 1704, he made a will or testamentary schedule, all of his own handwriting as follows:

In the name of God, amen. I, John Beresford, of the Inner Temple, Esq., do make this my last will and testament for fear of mortality, until I can settle it more at large. I do give and bequeath the sum of £1000 unto Dorothy Powell, to be paid by my executor, administrator, and, for sure payment thereof, I do charge all the real and personal estate which I have in the world, I being very desirous to make a provision for the said D. Powell, for several good reasons inducing me thereunto. In witness whereof, I have hereto set my hand this present 7th day of December 1704.
Signed John Beresford.

And he delivered the same to the said Dorothy Powell. And about a fortnight before his death, which happened in January 1704[05], Mr. Beresford did declare he had left with Mrs. Powell an unquestionable security for £1000 charged upon his real and personal estate and that he had done the same for fear of mortality, until such time as he could make a full and complete will, which he declared he would do so soon as his wife was brought to bed to see if it were male or female.

He died suddenly 6 February 1704[05], leaving his wife, the appellant, then lying-in of a daughter. The widow, afterwards, came to take administration to her husband. And a caveat being entered by Mrs. Powell, she appeared and pleaded this will or schedule testamentary and proved by four witnesses what is alleged before. She was also examined on interrogatories on the prayer of the respondent, on which she deposed, that she was married to Mr. Beresford 18 July 1700 at his chambers in the Inner Temple by Robert Harsnet, clerk, since deceased. (But the marriage was not insisted on, Harsnet being dead.)

His hand was proved by three witnesses, who swore they knew his hand and believed it to be all [in] his hand. A deed was proved to be executed by him, to which his name was subscribed, by witnesses that saw him subscribe his name thereto. And four senior proctors were sworn to examine and compare the letters and characters John Beresford wrote to such deed and the characters and letters John Beresford subscribed to the will and to report their
judgment to the court upon their oaths, who returned they found they were one and the same handwriting of John Beresford, the testator.

The cause coming to be heard before the judge of the Prerogative [Court], Sir Richard Raines, he gave sentence against the will and pronounced that John Beresford died intestate without any will at all by him made.

And, on this appeal being heard before the Delegates, among whom were Lord Chief Justice Holt, Baron Price, and Judge Dormer, the sentence was reversed, and they pronounced for the will.

*Robert Raymond* [was] counsel for the appellant.

2 Eq. Cas. Abr. 761, 22 E.R. 646

Easter [term] 6 Ann. [1707].

A.B. made a will or testamentary schedule all of his own hand writing as follows:

> In the name of God, amen. I, A.B., do make this my last will and testament for fear of mortality until I can settle it more at large. I do give and bequeath £1000 unto D.P. to be paid by my executor [or] administrator, and, for sure payment thereof, I do charge all the real and personal estate which I have in the world, I being very desirous to make a provision for the said D.P. for several good reasons inducing me thereunto. In witness whereof, I have hereunto set my hand this present 7th day of December 1704. Signed A.B.

And he delivered the same to the said D.P. And, about a fortnight before his death, A.B. did declare he had left with D.P. an unquestionable security for £1000, charged upon his real and personal estate, and that he had done the same for fear of mortality until such time as he could make a full and complete will, which he declared he would do so soon as his wife was brought to bed to see if it were male or female. He died suddenly 6 February 1704, leaving his wife, then lying in of a daughter.

The judge of the Prerogative Court gave sentence against the will, and pronounced that A.B. died intestate.

On appeal to the Delegates, among whom were Holt, Chief Justice, Price, Baron, and Judge Dormer, the sentence was reversed, and they pronounced for the will.
Bridges v. Duke of Newcastle  
(Del. 1712)

When the next of kin has no interest in a decedent’s estate, its administration can be given to someone else who does have an interest in it.

3 Phillimore Ecclesiastical 381, 161 E.R. 1359

Lord Hollis died. Bridges claimed administration as next of kin. The effects were vested by an Act of Parliament\(^1\) in the duke of Newcastle to pay the debts of the deceased.

Sir Charles Hedges, first, and, afterwards, the Delegates held that the next of kin was excluded and granted the administration to the duke of Newcastle.

The principle is clear that the next of kin, when he has no interest, may be excluded, and the administration may be granted to a person who has an interest in the effects.

Trap v. Finley  
(Del. 1713)

Preaching lecturers must be given special licenses to preach in churches.

Indiana University, Lilly Library  
MS. ‘Cases in the Exch.’, vol. 5, p. 27  
(Robert Price’s reports)

23 February 1712[/13]. Mr. Trap v. Finley, Afternoon Lecturer of St. Olave, Old Jewry, London.

\(^1\) Private act of 1697 (SR, VII, 293).
A lecturer [is] a new institution in the Canons of 1603, c. 36. ¹

By the Statute 14 Car. II, for uniformity,² a lecturer is to subscribe the Articles.

A Papist not convict may present; so may a Jew or a corporation or a company; it is but a recommendation. The bishop refuses to admit, for one may choose a dissenting minister if allowed.

Before the Toleration [Act],³ all [were] obliged to come to church.

A parish is a civil institution for the inhabitants to come to church.

Who chooses a lecturer is a religious right. They cannot preach in another pulpit without a special license. [One] must show that lecturers are licensed and qualified, like as a conviction of a Papist must be shown.

The bishop of London refused to license a lecturer of Chelsea. Dr. Atterbury had a license to be lecturer of St. Bride’s.

The reformed churches abroad in Holland, the magistrates name; they must be brethren, but the congregation approves.

Parishioners are united to the parson as their head.

It is absurd that here the Dissenters should choose a lecturer. They neither come to church nor pay them.

There ought to be the minister’s consent.

In this case, [the court] repeal[ed] the sentence of the Arches and confirm[ed] the sentence of the bishop of London.

The Delegates, the bishops of Chester [Dawes] and Hereford [Bisse], Justices Powell and Tracy, and Baron Price, doctors Herriot, Raines, Wood, and Strahan, sentence for the appellants, whereby a license or faculty was granted to him as Afternoon Lecturer of the united parishes of St. Olave, Old Jewry, and St. Martin, Ironmonger Lane, he first taking the oaths and subscribing, as by law required. Joseph Trapp being present in court, with an audible voice, read the Thirty-Nine Articles of the Church of England and declared his assent and consent thereto, and he subscribed the three articles required by the 36th Canon. And then, he took the oaths of allegiance and supremacy and canonical obedience. The judges condemned Finlay in £20 costs.

³ Stat. 1 Will. & Mar., c. 18 (SR, VI, 74-76).
Pelling v. Whiston  
(Del. 1713-1714)

The Court of the archbishop of Canterbury has original jurisdiction in cases of heresy where the defendant resides in a place that is exempt from the local bishop’s jurisdiction.

1 Comyns 199, 92 E.R. 1033

Dr. Pelling being minded to exhibit articles of heresy against Mr. Whiston, who dwelt within the exempt and peculiar jurisdiction of the Dean and Chapter of St. Paul’s, Dr. Harwood, by letters of request, on the 18th of November 1712, requests Dr. Bettesworth, official of the Arches, to call the said Mr. Whiston before him and hear and determine the said cause.

Dr. Bettesworth, by letter, dated the 19th of December 1712, recommended it to him to proceed in this as in other causes of ecclesiastical cognisance, there being no suggestion of any reason why the cause should not be brought before the proper ordinary.

On the 14th of February 1712, Dr. Harwood, by new letters of request, for it may be doubtful whether he, as commissary of the peculiar jurisdiction, can proceed to a final hearing or inflict proper punishment etc., appeals his request to Dr. Bettesworth, official etc., to call Mr. Whiston before him and determine the said cause.

Before this, viz. on the 26th of January, Dr. Pelling prays a citation from the Court of Arches against Mr. Whiston for heresy. Dr. Bettesworth takes time to consider of this prayer until the next court.

At the next court, viz. on the 4th of February, Dr. Bettesworth orders his answer to the letter of request of Dr. Harwood to be sent to him.

At the court held on the 16th of February, Dr. Pelling prays again a citation. And counsel is heard thereon on the 25th of February, when Dr. Bettesworth decrees that letters of request from Dr. Harwood lie not before

him, because, in a case of heresy, the bishop of the diocese has jurisdiction in places otherwise exempt within his diocese, and notwithstanding the Statute of Citation, a heretic may be cited to appear before him upon letters of request from the judge of the peculiar or by process sub mutuo etc. and, therefore, he cannot decree a citation etc.

On the 2nd of March, Dr. Pelling appeals to the Delegates, upon which the queen appoints a Court of Delegates. Upon the 1st of July 1713, the matter came to be heard before the Delegates.

And it was insisted on by Dr. Paul and Sir Peter King, that a superior judge is not obliged to accept letters of request, for no law says that he is so obliged, and it would be inconvenient, since the fees would all belong to the inferior judge, and unreasonable, since the superior judge cannot oblige the inferior to grant such letters of request, and, therefore, he ought not to be obliged to accept them.

Secondly, the inferior judge in this case had no jurisdiction, for he cannot excommunicate, degrade, or deprive. Stat. 2 Hen. IV, c. 15, speaks of the bishop of the diocese, and so is 10 Hen. VII, c. 17.

Thirdly, the bishop of the diocese has jurisdiction in case of heresy in places exempt.

Fourthly, there was no cause depending before Dr. Harwood, and the Arches have jurisdiction only in case of appeals by patent.

But it was answered by Sir Nathaniel Lloyd, myself [John Comyns], and Dr. Henchman and so resolved by the Court of Delegates that the refusal of the citation by Dr. Bettesworth was a fault for which this appeal was proper, for first, Dr. Harwood, the judge of the exempt jurisdiction, had a jurisdiction in the cause, though he could not inflict the censures of degradation or deprivation.

Secondly, the bishop of the diocese had no jurisdiction in this case, for, by the Stat. 23 Hen. VIII, c. 9, no person shall be cited to appear before any ordinary, archdeacon, commissary, official, or other judge spiritual out of the diocese or peculiar jurisdiction where the person cited is inhabiting at the

1 Stat. 23 Hen. VIII, c. 9 (SR, III, 377-378).
time of citation unless, first, for any spiritual offence omitted or committed, by the bishop or other spiritual judge;

Secondly, for cause of appeal;

Thirdly, in case the bishop or other immediate judge do not or will not convene the party;

Fourthly, or be party directly or indirectly;

Fifthly, or, in case the bishop or other inferior judge by right or commission make a request to the bishop or other superior ordinary to determine in cases where the canon law or civil law affirm execution of such request to be lawful.

Therefore, the bishop, by the express words, is restrained in all cases, except those five, from citing any to appear before him dwelling in peculiars, and, consequently, in a case of heresy, as well as any other. Cro. Car. 162, Cadwallader versus Brian.¹ But, by a proviso in this Statute, every archbishop may cite any person dwelling in any diocese within his province for cause of heresy if the bishop or other immediate ordinary consent or do not his duty in punishing the same.

It is true the bishop, upon request from an inferior judge, may cite etc., but such inferior judge must be subordinate to him. But the Dean and Chapter of St. Paul’s, having an exempt jurisdiction, are not subordinate, but in an equal degree with the bishop. The person exempt, as Lindwood expresses it, vices gerit episcopi, and, therefore, the letters of request from Dr. Harwood ought to be to the archbishop, who is his superior ordinary, and not to the bishop of London.

If a man have bona notabilia in several peculiars, administration shall be granted by the archbishop, not the bishop. Per Twisden and Windham, 1 Lev. 78.²

A suit in the Arches against any in the diocese of London is good, for there was an ancient composition between the bishop and archbishop, which amounts to a general licence. Cro. Car. 339; dubitante Ray. 91.³ And when a suit is in the archdeacon’s court, request shall be made to the bishop, for the

² Anonymous (1662), 1 Levinz 78, 83 E.R. 306.
power of the archdeacon was derived from him, and not to the archbishop per saltum. Hob. 16, 186.\(^1\) So, where a peculiar is subordinate to the bishop, as it may be. Michaelmas 14 Car. II, Tull \textit{versus} Osberson.\(^2\)

Since then, the Arches, which is the court of the Archbishop, is the superior ordinary, to whom the cause ought to be transmitted from the peculiar of the Dean and Chapter of St. Paul’s. The judge of the Arches, by refusing a citation etc., denied justice.

Whereupon, the Delegates reversed the sentence and ordered a citation for Mr. Whiston to appear before them, which was served.

And Mr. Whiston put in an allegation to the jurisdiction, that the Delegates are not \textit{judices competentes}, being empowered by their commission only to hear and determine a cause of appeal between Dr. Pelling and Dr. Bettesworth, to which Mr. Whiston was no party, and that they had no original or ordinary jurisdiction by their commission etc.

\textit{1 Haggard Consistory} 433, 161 E.R. 607

In 1714, there was a suit before the Delegates promoted by Dr. Pelling against Whiston for heresy in publishing doctrines contrary to the Articles of Religion. The Statute of Elizabeth\(^3\) was not mentioned.

In that case, after the Convocation had passed a censure upon the book, Dr. Pelling applied to Dr. Harward, the commissary of the dean and chapter of St. Paul’s, to be permitted to promote articles against Whiston in that Court. Dr. Harward thought, on consideration of the crime and its legal punishment, degradation from the ministerial functions, that, as he had not his commission from any bishop, it was not in his power to degrade a clergyman and, therefore, that he had not authority to judge of heresy, whereto that degradation belonged. He, therefore, refused the cause, and he intimated that he thought it belonged to the Court of Arches.

The Dean of the Arches, Dr. Bettesworth, on application being made to that court, gave it as his opinion and determination that the matter not coming before him by appeal, as causes ought to do in his court, and the cause

\(^{1}\) \textit{Hutton’s Case}, Hobart 15, 80 E.R. 166; \textit{Jones v. Jones}, Hobart 185, 80 E.R. 332.

\(^{2}\) \textit{Tull v. Osberson} (1662), 1 Siderfin 90, 82 E.R. 989, 1 Keble 367, 83 E.R. 998.

having been already under the cognizance of Convocation and belonging properly to the bishop of London, he could not receive it in the first instance.

Application was then made in the way of appeal from the refusal of the Dean of the Arches to the Chancellor for a commission of Delegates. And a special commission was granted, consisting of the bishops of Winchester [Trelawney], Bath and Wells [Hooper], Chester [Dawes], Hereford [Bisse], and Bangor [Hoadley], Lord Chief Justice Trevor, Sir Robert Tracy, knight, one of the judges in the Court of King's Bench, Sir Robert Price, a Baron of the Exchequer, with doctors Wood, Pinfold, Paske, Phipps, and Strahan.

The Court of Delegates held that the Dean of the Arches had done wrong in rejecting the petition and that the cause did lie before him and that he ought to have entertained it. They further retained the cause, and, thereon, they issued a citation to Whiston to appear before them etc. on a certain day, when articles were exhibited against him at the office of the Delegates nominatim.

The cause proceeded, and there appears to have been a full argument on the merits of the case. But the suit was afterwards dropped.

[Related Pamphlets: Reasons for Not Proceeding against Mr. Whiston by the Court of Delegates. . . . [London, 1713?]; Several Papers Relating to Mr. Whiston's Cause before the Court of Delegates. . . . [London, 1715].]

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**Stanley v. Sayer**

(Del. 1713)

*The question in this case was whether the administration of a decedent's estate should have been given to the decedent's principal creditor or to his next of kin.*

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MS. 'Cases in the Exch.', vol. 5, p. 28

(Robert Price's reports)
17 December 1713.

The defendant got administration as principal creditor. The plaintiff, as sister to [blank] Gumbleton, deceased, would repeal or revoke the defendant’s administration and upon appeal. [There was a] citation *viis et modis* in another province [and] process *de mutuo*. The appeal [was] lodged within fifteen days.

In this Case of Stanly and Sayer, the Delegates were Barons Bury and Price and Justice Dormer, doctors Bettesworth, Newton, Herriott, Phipps, and Strahan.

This, as Mr. Rushworth took it, was a point whether an appeal was deserted for want of prosecution within the year. *Itill*, the proctor for the appellant, offered to hear the cause without delay, waiving all allegations.

The judges admitted his client into a second year and concluded the cause, saving the process, and assigned it for information and sentence next court, saving a liberty to the party appellate to propound [a will] and [ . . . ] any matter he shall think material for his client and condemned the appellant in costs *retardati processum*, but reserved the taxation to the end of the suit.

The parties, afterward, went into proofs in the principal cause, which was as Mr. Rushworth [ . . . ]. Afterwards, [it was] agreed between the parties, for he cannot find they ever went to sentence.

A proxy [was] made, and the appeal [was] not deserted, and sentence [was] in the year. *Writs of error and appeals have certain times or else are non prossed*. As to the objection that the principal creditor [was] preferred to the next of kin, the plaintiff was called in by process and never claimed or prayed administration, though she appeared by proctors. Where a party approves by an attorney, he cannot avoid an act of court but must take a remedy against him.

If sentence [is] not within the year, yet if [one] show diligence, [it] prevents desertion of the appeal. *If a common citation, there, *viis et modis*, the plaintiff did join in the commission of appraisement [and] never desired to administer. Praed v. Nanney not admitted *secundum* [ . . . ] until the return of the inhibition and monition and proper parties.*

There lies a [writ of] *mandamus* if [he] grants administration where he shall not and had no right.
Sayers v. Sayers  
(Del. 1714)

In this case, administration of a decedent’s estate was given to the guardian of the decedent’s child rather than to the decedent’s estranged widow who had eloped with her lover.

Indiana University, Lilly Library  
MS. ‘Cases in the Exch.’, vol. 5, p. 54  
(Robert Price’s reports)

14 June 1714. Henry Sayers by Mr. Mewsby, guardian, against Mary Sayers, widow. Mr. Justice Tracy, barons Bury and Price, doctors Clements, Herriott, Phipps, Strahan, and Kinaston.

[This was an] appeal on the right of administration to [blank] Sayers, father to the plaintiff and husband to the defendant. The wife [was] proved [to be] a very ill woman and she kept company with Noble, who after[wards] killed her husband. And she was an unkind mother.

It was insisted that, by 21 Hen. VIII, ca. 8,¹ that administration is to be granted to the widow or next of kin. It is not discretionary. The mal-conversation does not forfeit her right of administration.

The Case of Mascall and Bucknall v. Fish, 1670; administration to the husband [was] granted to the widow against the son. 3 Cro. [blank], Ognel’s Case.² The eldest son against seven or eight younger children ought to have the administration.

[Where there are] several executors and, if one [be] seventeen years of age, he shall have the administration.

The widow shall have administration against the creditor and next of kin. The cognition is between the widow and the guardian of the infants

and, though the next of kin and the creditor join, yet the widow shall have administration.

The Statute 31 Edw. III, ca. 4; the husband or next of kin to the wife, but not the wife to the husband.

Simbol v. Harding, 1695; a woman convicted of adultery had administration granted to her by Sir Thomas Pinfold.

If a woman elopes, she loses her dower.

1 Vent. 219; Grotius, lib. 2, ca. 2; Mascall v. Spencer, 1670; administration [was granted] to the widow before the son; Bucknell v. Fish, 1677; administration [was granted] to the husband from the brother; 1 Ro. Ad. [blank]; Hob. 250; 1 Sid. 179; [ ... ] v. Parker; 1 Sid. 315.  

Administration *durante minore aetate* or *pendente lite* [is] not within the Statute, but is left to discretion.

The Statute of Distributions requires security. If the wife cannot give it, it is a disability.

The ordinary has jurisdiction, but he must follow the law.

No immoral act is an objection, but a legal objection only [is] to be regarded.

Infancy is no objection where a minor has a guardian. Wats v. Wats; a mother had administration from the widow.

9 Rep. 31.  

[There was a] sentence against the appeal with £100 costs. The judges swore the guardian of the minor administrator.

[Other reports of this case: Lincoln’s Inn MS. Misc. 147, p. 46, pl. 3.]


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1 Stat. 31 Edw. III, stat. 1, c. 11 (SR, I, 351).
Whitehead v. Jennings
(Del. 1714)

Where a person makes a will, then revokes it by a later will, then revokes the second will, and then dies, he dies intestate.

1 Phillimore Ecclesiastical 412, 161 E.R. 1028

Prerogative [Court] 1712, Delegates 1714.

Anthony Keck made his will in August 1701. In 1712, he made another of a totally different tenor, in which his nephew was appointed executor and residuary legatee. In an excess of passion against his nephew, he burnt the latter will. He, afterwards, became reconciled to him, and he sent for Mr. Tolson, his attorney, to make a new will. Before the attorney arrived, he was taken suddenly ill, and he died in the course of the night, calling anxiously for him. The will of 1701 was propounded.

But the court pronounced for an intestacy.

[Other reports of this case: Jennings v. Whitehead, Lincoln’s Inn MS. Misc. 147, p. 33, pl. 3.]

Sands and Lloyd v. Pearce
(Del. 1715)

A wife cannot renounce a will or an administration of a decedent’s estate where it would be a prejudice to her husband.
19 January 1714[//15]. Sands and Lloyd v. Ch. Pearce and Sarah, his wife, executrix to Michael Roll.

The defendant Sarah pleaded *nolle proponere*, which is not a renunciation, yet the husband may proceed. She is a necessary party, and the husband for conformity. She cannot vary from her husband in a plea.

The wife cannot renounce a will to prejudice her husband.

A wife may come in and intervene.

The allegation is relevant and not criminous but civilly pursued.

By the wife’s *nolle proponere*, she does not renounce the executorship nor prejudice a right to a legacy or the residue.

An executor who renounces the executorship and legacy may be a witness, but she cannot, being a wife.

*Ubi noluit patere repudiavit.*

The citation makes a party, and [he] has costs.

Contestation makes a cause.

If the wife is not a party, then it is a nullity, and she must have the probate of the will.

Where the residue is given to the wife, the husband must have it.

*E contra:*

A *nolle proponere* by the wife is a refusing to prove the will and is a renunciation. And then administration *cum testamento annexo* is to be granted.

It is a doubt if a married woman executrix can make an executor without her husband.

If [there is a ] disclaimer by the defendant, it is at an end.

[There is a] difference where [it is] of ecclesiastical cognizance and where incident to a jurisdiction where [there is] but one witness to a will, which is refused; there shall be a [writ of] *mandamus* to the court to prove it.

A husband and wife are two persons in the civil law. And, if two executors, one *nolle proponere* is *repudiare*, and, by allegation against, the other may *proponere*, and, if not, administration *cum testamento annexo* [can be granted].
Citation and proxy to appear is right and is [ . . . ] allegation against the will for insanity and not against the wife.

If a proctor does not appear, then [they are] to proceed in poenam [?].
The sentence [is] against the husband and wife and legatee.
The citation [is] to the wife to show if he made a will or died intestate.

If *nolle proponere*, administration is granted.
She is no party litigant, but [she is] to be foreclosed.
A wife cannot prejudice her husband, but he may force her [to act] for his interest.

*Nolle bona possidere* is the same as a *nolle prosequi*, which is a disclaimer.
If a husband propound, administration must be in the wife’s name.
If a wife renounce, any legatee may propound the will.

The majority of the court, *viz.* five judges and one civilian against five civilians were for the plaintiff in the appeal, that the wife should propound [the will] or the husband for her.

The Delegates, being Mr. Justice Tracy, Mr. Baron Price, doctors Clements, Raines, Paske, Phipps, and Strahan, sentence for the appellants and assigned to hear on the grant of the administration first session of next term before the condelegates at Doctors’ Commons and on taxation of costs in the grievance.

The condelegates at Doctors’ Commons, *viz.* doctors Clements, Raines, Strahan, and Phipps, on 28 January 1714[/15], taxed the costs at £10 and decreed administration of the goods etc. of Michael Rolles, deceased, to Anne Sands, widow, the decedent’s daughter, she first exhibiting an inventory upon oath and giving the usual bonds.

1 Lee 254, 161 E.R. 94

19 January 1714[/15]. Delegates present at the sentence: Mr. Justice Tracy, Mr. Baron Price, Dr. Clements, Dr. Raines, Dr. Paske, Dr. Phipps, and Dr. Strahan.

Mr. Rolls made his will, by which he gave his estate to his daughter Pearse. The will was duly executed and witnessed, and he, before the witnesses, declared it as his will. After his decease, Mrs. Pearse refused to prove it, because her husband should not be benefited, with whom she was at variance, and then he propounded it. It appeared fully that the testator was insane and that, though he had published it properly, Mrs. Pearse had tutored him and
taught him what to say. The will was set aside. The being able to say ‘yes’ or ‘no’ is not a sufficient capacity.

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Sacheverell v. Sacheverell
(Del. 1717)

In this case, an affidavit of marriage made by a decedent was admissible into evidence on the issue of the validity of the marriage.

1 Strange 35, 93 E.R. 368

5 March 1716/17. At Serjeants’ Inn in Chancery Lane before a Court of Delegates.

The marriage of the plaintiff came in question after her husband’s death upon granting administration. And it appeared they were married under feigned names at the Fleet. The widow produced an affidavit of the intestate made by him before a surrogate of Doctors’ Commons that he was married to her, which affidavit agreed with the register and referred to it.

But it was objected that the taking this affidavit was an extrajudicial act, there being nothing at that time before the ecclesiastical court.

But the court here allowed it to be read in confirmation of other evidence. And the appeal was dismissed with £100 costs, and the marriage confirmed.

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Williams v. Lady Osborne
(Del. 1717-1718)

Semiplena probatio is that degree of evidence which would incline a reasonable man to either side of the question and implies that a positive witness has not deposed to the principal fact. In such a case, the plaintiff can give a suppletory oath.
19 December 1717. At Serjeants’ Inn, Fleet Street. Coram Delegatis, Archibald, earl of Islay, John, lord Carteret, William [Talbot], bishop of Salisbury, Peter King, Chief Justice of the Common Bench, Robert Price, one of the barons of the Exchequer, Tindall, Parker, Kinaston, Phipps, and Strahan, doctors.

Williams libelled against the Lady Osborne to compel her to perform matrimonial rights, laying the marriage in his libel to be a clandestine marriage. She denied the marriage in her answer upon oath. And, witnesses being examined, publication passed. And the judge hearing the cause proposed, and, thereon, Williams’s proctor prayed, that Williams might be admitted to his supplenary oath, id est to swear the fact of the marriage, which being done, the lady, instantly, appealed from the admission of this supplenary oath as a gravamen. But an appeal from a gravamen not stopping the farther proceedings of the judge until an inhibition, the judge in this cause went on and decreed for the marriage.

And, now, the appeal on the said gravamen came on to be heard before the said Delegates. And the appeal was ab admissione dicti Gulielmi Williams ad praestandum juramentum suum supplétorium in subsidium probationis solemnizationis et confirmationis matrimonii praetensi inter eum et dictam Honorabilem Feminam Dominam Bridgetam Osborne in dicta causa allegata et a decreto pro admissione dicti Gulielmi Williams ad hujusmodi juramentum subeundum et a ministratione ejusdem juramenti praefato Gulielmo Williams et ab omnibus ex inde sequentibus etc.

And it was insisted on in the first place by the appellant that without entering into the consideration of the proof made in the cause and taking that to be as strong as possible for the marriage, yet, by the civil or canon law, a supplenary oath was not admissible in a matrimonial cause, at least not in a clandestine marriage, which makes the party criminous and takes away his credit or, if it were, yet the law of the land, the 25 Hen. VIII, cap. [blank], takes it away, enacting that all canons and constitutions against the law of England shall be void, and the law of England, except one case for necessity,

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Miscellaneous Reports of Cases in the Court of Delegates from 1670 to 1750

viz. an action against the hundred for a robbery, admits not any man to be a witness in his own cause.

But the Delegates resolved that, by the common law, a suppletory oath is admissible in a matrimonial cause as well as any other and that the parties being guilty of a clandestine marriage does not make him so criminous as to make him incapable of being admitted to his suppletory oath and that the 25 Hen. VIII does not alter the method of proceeding in ecclesiastical courts. But, if suppletory oaths were admissible before the 25 Hen. VIII, they are so still and that, since the Restoration [in 1660], there have been instances of suppletory oaths, as Salmon v. Tunstal, 1672, a suppletory oath was admitted in a testamentary cause, for which there was an appeal. And, in September 1673, the Delegates pronounced the suppletory oath to be well taken by the judge a quo. And [in] Cartwright v. Fix, a testamentary cause, a suppletory oath was denied, and an appeal for the denial and 8 November 1674 pronounced for the appeal. And, in the Case of Wagan v. Symonds, 1667, a suppletory oath was admitted on a cause of jactitation of marriage.

The use of the suppletory oath is, when there is but semiplena probatio, as a proof by one witness etc., the judge in his discretion permits the plaintiff to swear, and so his oath is put against the defendant’s oath and is a subsidiary proof of his case.

The Delegates having in this case first resolved that a suppletory oath is admissible, even in a matrimonial cause, proceeded in the next place to the reading of the proof taken in the cause. And, on the reading thereof, they were of opinion that there was semiplena probatio and that there was sufficient proof for the judge to admit the plaintiff to his suppletory oath and pronounced against the appeal, which they did Wednesday 22 January 1717[/18], the cause having been adjourned to that time.

[Other copies of this report: Indiana Univ. Lilly Library MS. Parker ‘Collection of Reports by the Late Lord King’, p. 130, 130 Selden Soc. 130.]

1 Strange 80, 93 E.R. 397

22 January 1717[/18]. Before the Delegates at Serjeants’ Inn.

The question below was whether Mr. Williams was married to the Lady Bridget Osborne, the minister who performed the ceremony having formerly confessed it extrajudicially, but now denying it upon oath, so that there being
variety of evidence on both sides, the judge, upon the hearing of the cause, required, according to the method of ecclesiastical courts, the oath of the party, which the civilians term the suppletory oath, that he was really married, as he supposes in his libel and articles.

The accepting of this oath (as was agreed on both sides) lies in arbitrio judicis, and is only used where there is but what the civilians esteem a semiplena probatio, for, if there be plena probatio, it is never required. And, if the evidence does not amount to a semiplena probatio, it is never granted, because this oath is not evidence strictly speaking, but only a confirmation of evidence. And, if that evidence does not amount to a semiplena probatio, the confirmation of it by the party’s own oath will not alter the case.

Upon admitting the party to his suppletory oath, the Lady Bridget Osborne appeals to the Delegates, so that the question now was not upon the merits, whether there really was a marriage or not, but only upon the course of the ecclesiastical courts, whether the judge, in this case, ought to have admitted Mr. Williams to his suppletory oath, as a person that had made a semiplena probatio of that which he was then to confirm.

The questions before the Delegates were two: first, whether the suppletory oath ought to be administered in any case to enforce a semiplena probatio; second, admitting it might, whether the evidence in this case amounted to a semiplena probatio, so as to entitle Mr. Williams to pray that his suppletory oath might be received.

First, as to the first, it was argued to be against all the rules of the common law that a man should be a witness in his own cause. It is not allowed in the temporal courts in any case but that of a robbery, which being presumed to be secret, the party is admitted to be a witness for himself. In the temporal courts, no man can be examined that has any interest, though he be no party to the suit, for minima exceptio tollit sacramentum juratoris.

On the other side, many authorities and precedents were cited out of the civil law to prove this practice of allowing the suppletory oath.

And, therefore, the court held that, by the canon and civil law, the party agent, making a semiplena probatio, was entitled to pray that his suppletory oath might be received. And, though it be against the rules of the common law, yet this being a cause of ecclesiastical cognizance, the civil and not the common law is to be the measure of their proceedings, and, therefore, this
practice, being agreeable to the civil law, is well warranted in all cases where
the civil law is the rule. And the exercise of it lies in arbitrio judicis.

Second, it being, therefore, established that a person making *semiplena probatio* is entitled to his oath, the next question was what is, according to
the notion of the civilians and canonists, a *semiplena probatio*. With them, it
was argued on behalf of the lady that nothing is esteemed as a *plena probatio*
unless there be two positive unexceptionable witnesses to the very matter of
fact as to the marriage, that a *semiplena probatio*, which is the next degree of
evidence, is what is affirmed by the oath of one witness as to the principal fact
and confirmed by concurrent circumstances.

And, first, it must be *per unum testem*; secondly, evidence that con-
cludes necessarily, and not by presumption, thirdly, that has no presump-
tion to encounter it, and, fourthly, the witness must be *honesta persona*; that
matrimonial causes require the greatest certainty and, where that is the sole
question, the proof ought to be fuller than where it comes in by incident, as
on granting an administration.

To this, it was answered on the other side that *semiplena probatio* implies
no more than what the common lawyers call presumptive evidence and that
is properly called presumptive evidence which has no one positive witness to
support it, but relies only on the strength of circumstances. And, when there
is one witness who deposes directly to the principal fact, this immediately
ceases to bear the name of presumptive and assumes that of positive evidence.
And that which in the temporal courts passes for positive evidence is the same
degree of evidence with the *plena probatio* of the canonists and civilians. The
suppletory oath does *ex vi termini* import that there has been no one positive
witness to the principal fact. And he that demands to be admitted to take his
oath does thereby admit that he has produced no conclusive evidence to the
point in issue, and, therefore, *pars ipsa fungitur officio testis*.

There is no fixing the bounds of a *semiplena probatio*, for, in many cases,
circumstances may overbear positive evidence, and, then, if those circum-
stances should not be esteemed to amount to a *semiplena probatio*, when the
positive evidence would exceed it, that would be to overthrow the positive
evidence by that which is not so strong.

*Semiplena probatio*, therefore, they concluded to be that degree of evi-
dence which would incline a reasonable man to either side of the question
and implies, in the notion of it, that a positive witness has not deposed to the principal fact.

And, in this case, though there was no positive conclusive evidence, but only such as depended on circumstances, as confessions and letters and unusual familiarities, yet the Court thought it amounted to a *semiplena probatio* and, consequently, that the Dean of the Arches had done right in admitting Mr. Williams to his suppletory oath. And, therefore, they dismissed the appeal with £150 costs.

N.B. Before this appeal upon the point of the *gravamen*, the judge below had given sentence *in principali* in favor of the marriage, and the appealing upon this collateral point was only to protract the time. To obviate this, the Court of Delegates, instead of remitting the cause to the Arches, retained it *ad instantiam partis*, and, 11 December 1718, heard it upon the merits, and confirmed the former sentence.

[Earlier proceedings in this case: Lincoln's Inn MS. Misc. 147, p. 160, pl. 3.]

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**Millesent v. Fisher**

(Del. 1719)

*The question in this case was whether a marriage with a certain deceased person was valid or not and whether a child of that marriage was legitimate or not.*

Indiana University, Lilly Library

MS. ‘Cases in the Exch.’, vol. 5, p. 30

(Robert Price’s reports)


In [a suit for] jactitation of marriage, they had a sentence to be free of the marriage. She, after, [had] liberty [to sue] for restitution of conjugal duties against J.M. and recites the former sentence and was remitted.

The objection against the first sentence [was, because there was] no proctor in the cause, [it] is a nullity. Alice [was] summoned in London, and
she lived in Norfolk. [There was] no decree for an answer, and the husband [was] not called in. [There was] no act in open court. The sentence [was] not in [good] form, but the sentence [was] imposed on the wife. The minor admits an appeal by a guardian. *Res judicata* [lies] not against one who is no party. [When] J.M. appeals to the Delegates, the sentence is suspended. The original cause [was] in the [Court of] Arches, which should be by letters of request, and it has no original jurisdiction, and [it is] not proper, not being an original cause.

If out of the jurisdiction, [she] must plead below the Statute of 23 Hen. VIII1 if it appears on the proceedings.

The question is the legitimacy of William Millesent.

The sentence of jactitation is no bar to the plaintiff, who was no party, nor is it a conclusion.

Griffin v. Griffin; the Case of Lady Bridget Osbourne, Lord King’s MS. rep. 130, Lady Bridget Osbourne’s Case, before the Delegates, 19 December 1717 and 22 of January in the same year, 1 Strange 80.2

In the case of the Statute of Distributions,3 one may fail and the other proceed.

A sentence where [there is] a defect of citation is a nullity.

No proxy; no answer.

No consummation [was] laid in the proceedings.

Alice [was] condemned in costs in the former suit, and yet [there was] no monition or excommunication.

[There is] no sentence of bigamy, though a sentence of jactitation.

The question is whether the will of J. Millesent is good and whether William Millesent has the right to oppose it and deny that William Millesent is legitimate, which is but an incident.

Sacheverell and Sacheverell4 [is] about a marriage.

[There is] no sentence in the manner of getting it; no consummation or cohabitation.

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1 Stat. 23 Hen. VIII, c. 9 (SR, III, 377-378).
2 *Williams v. Lady Osborne* (Del. 1718), see above, Case No. 55.
4 *Sacheverell v. Sacheverell* (Del. 1717), see above, Case No. 54.
This is by incident to bastardize one after the death of one of the parties. A sentence of divorce is not good after death.

7 Rep., Ken's Case;¹ [they] may dissolve a marriage in the life of the party where the factum of the marriage is proved.

Res inter alios acta is not binding.

An appeal suspends a sentence from execution, but it is still an evidence, like [a writ of error in an action [at common law].

Pride v. Lord Bath, 3 Lev., Salk.; Thomas, duke of Albemarle, had another wife living when Duke Christopher was born.²

A sentence is an evidence, and all that claim under it are bound. 4 Rep., Bunting's Case, 29, Moor 169.³ The cohabitation with reputation will entitle one to dispute the will, though no factum of the marriage [be] proved.

Where [there is] a sentence of nullity, [one] may plead it, and not produce it, like an audita querela, and an appeal upon the nullity will lie.

Nullity must be pleaded before the same judge. But, where a sentence is pretended to and no advantage [is] taken of the nullity, it is bad and must not be brought in by way of an incident.

[Upon] a certificate of a citation in order to [have] an excommunication, if a proctor appears, it is enough.

Want of a proxy is no nullity.

Griffin v. Griffin [was] upon a proceeding to consummate a marriage duly.

The judges having sat until between one and two in the morning were divided in opinion.

Itill, proctor for the party appellant, offers to consent that Holman's client, the appellant, may be admitted to contradict as to the will.

Mr. Holman alleged that had been offered and overruled.


Catten v. Barwick
(Del. 1719)

In the absence of a local custom to the contrary, churchwardens are to be chosen by the parson and parishioners jointly, and, if they cannot agree, then one is chosen by the parson and the other is chosen by the parishioners.

1 Strange 145, 93 E.R. 439

27 February 1718[/19]. At a Court of Delegates in Serjeants’ Inn in Fleet Street.

By the 89th Canon,¹ churchwardens are to be chosen by the parson and parishioners jointly, and, if they cannot agree, then one by the parson and the other by the parishioners. In the parish of Bridge [blank] in Yorkshire, the custom is for the parson to appoint one and the two old churchwardens the other, but it goes no further.

In this case, the two churchwardens could not agree; so one presents Barwick and the parishioners at large chose Catten.

It was insisted for Barwick that his case was like that of coparceners, where, if they disagree, the ordinary may admit the presentee of which he will, except the eldest alone presents.

On the other side, it was said that the cases widely differed, for, in the case of a presentment, the ordinary has a power to refuse, but he has not so in the case of churchwardens, for they are a corporation at common law and more a temporal than a spiritual officer. And a case was cited to be adjudged in the King’s Bench where, to a [writ of] mandamus to swear in a churchwarden, the ordinary returned that he was servus minime idoneus etc. But a peremptory mandamus was granted, because the ordinary was not a judge in that case.

The court held that, by this disagreement, the custom was laid out of the case, and, then, they must resort to the canon, under which Catten being duly elected. They decreed for him [with] £60 costs.

Delahay v. Hopegood
(Del. 1719)

Where a marriage settlement gives a woman the power to make a will, she can do so and make an executor, and the executor can prove the will.

Indiana University, Lilly Library
MS. ‘Cases in the Exch.’, vol. 5, p. 29
(Robert Price’s reports)

22 December 1719. Thomas Delahay, [appellant], and Hopegood, executor of Mary Delehay, wife to Thomas Delahay.

Thomas Delahay covenants before marriage to give his intended wife Mary power by writing or will to dispose of the surplus of £6000. In April 1708, she recites her power and makes a will and Hopegood executor.

An executor may make an executor.

If a husband covenants that a wife shall make a will, her executor cannot prove the will, but administration must be granted with the schedule annexed, that is the will. 1 Co. 7; Salk. 313; Far. 147; 1 Cro. 219, Marriot; [blank] 376 [. . . ]; Godolphin, Orphan’s Legacy, 39; Repertorium, 34; Swinb. 57; 1 Ro. Ab. 608.¹

A power to make a will implies making an executor.

A testament carries an executor with it.

[One] may grant administration to a legatee or a devisee. 1 Rep., Ogden’s Case.²


The judges agreed that the wife could make an executor and probate [is] good.

The Delegates, Baron Price, justices Dormer and Eyre, doctors Pinfold, Strahan, and Kinaston, sentence against the appeal. And the case [was] remitted with £35 costs.

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**Roper v. Smith**
(Del. 1719)

*The question in this case was who should be granted administration of the deceased’s estate where the will was defeated by the testator’s later marriage and birth of a child.*

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MS. ‘Cases in the Exch.’, vol. 5, p. 53
(Robert Price’s reports)


[This was an] appeal. Captain Cleasby made a will 27 March 1699 and the plaintiff executrix. And, in 1708, he married Grace Smith and had a daughter by her. There was a temporary will, and so he died intestate.

1710, Lug v. Lug;1 a will was made when [the testator was] a bachelor, and after[wards], he married and had a child; [it was held to be] no will.

The witnesses differed on the point of the time of the marriage, which was not so necessary, being but an incident in the cause and not relevant in order to [have] an administration.

Stockard v. Bury; Neur [was] a witness to the marriage, but they cohabited and, by relation, [were] reputed man and wife, and they owned their

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1 Lugg v. Lugg (Del. 1699), see above, Case No. 41.
marriage and had children, and [it was] allowed general proof of the marriage for an administration.

It was said that, when a will appears, he could not die intestate. A will under his own hand is in court, thought not propounded, the fact of the marriage not proved.

[It was] a clandestine marriage and no license [was] exhibited or banns published.

The appellant put in a caveat against administration, having a will and [it] made her executrix. And the defendant claims [ . . . ] interesse as wife to have administration to her husband, [he] dying intestate.

The Case of Overbury: ¹ he had a brother, whom he made executor, and after[wards] he married and had a daughter. The marriage was a sort of revocation of the will, and administration was granted to the wife as if he died intestate.

Shelley’s Case; he made a will and his son executor; [he] revoked his will because his son [was] dead.

The appeal was discharged, and the cause was remitted to the Commissioners.

Arthur v. Arthur
(Del. 1720)

An appellate court can grant an extension of the time to appear upon good cause shown.

A marriage in Ireland by a Roman Catholic priest is valid and will be recognized in England.

¹ Sir Thomas Overbury’s Case, Lincoln’s Inn MS. Misc. 147, p. 36, pl. 1, see above Case No. 18.
In Hilary term 1719[20]; an appeal from Ireland in a marriage cause.

The archbishop of Dublin rejected the evidence of A.B., a Popish priest, that solemnized the marriage between the parties, because he did not produce his orders. From which, his wife appealed to the Delegates in England.

Thirteen months were expired before she did any proper act before the Delegates. She prayed to be admitted into a second year [and] assigned for reasons that the Irish packets were stopped three weeks by contrary winds and the party herself was a week on her journey to London from the time of her landing in England.

The judges admitted her into a second year and allowed A.B., the Popish priest, to be read as a witness. And they gave a sentence for the marriage.

2 Haggard Consistory 401, 161 E.R. 784

24 June 1720.

This was a case of appeal from the Consistorial and Metropolitical Court of Dublin in a suit of restitution of conjugal rights on the part of the wife, in which the lawfulness of the marriage was denied on the other side as contrary to the laws, statutes, and canons, and the provisions of the Act of Parliament¹ in Ireland, for the prevention of clandestine marriages of minors of certain estate and condition etc. The Court below had pronounced the libel of the wife not proved.

But the Delegates reversed that sentence and decreed to the effect of her prayer.

A marriage by a Popish priest by the Roman ritual has been pronounced for. But that was a marriage in Ireland between parties, both Catholics, where the laws with respect to Papists are different, which laws, as the laws of the country in which the contract was made, the court would respect. And in that case, there was a consummation that purified any condition in the contract.

¹ Stat. 6 Anne, c. 16.

[There was an] appeal from a sentence of the archbishop of Dublin to the Prerogative [Court] and from thence to the Delegates as to the marriage of the plaintiff [Katherine Hachet] to the defendant [Benedict Arthur], being both Roman Catholics. And the archbishop determined against the marriage, because the Popish priest did not prove his orders. But it appeared to the Delegates that he officiated as a priest several years, and [there was] a certificate from a nominal bishop that he was ordained and always [was] so esteemed. But the factum of the marriage was fully proved and the defendant’s confession.

If the parties are young or [there is] disparity or inveiglement, it may be an evidence of a clandestine marriage and fraud. But that does not vacate the marriage.

Whether the priest was of age to be a priest does not vacate a marriage. Salk. 190, Heydon v. Gale. The civil law requires stricter proof as to the identity of the parson by confronting the parson than the common law. A witness [can be] excommunicated for being at a clandestine marriage. The testimony ought to be suppressed.

It is essential in a marriage that he be a priest. If not, it is but a contract in praesenti.

If a Romish priest turns Protestant, he must be re-ordained. By the Church of Rome, a clandestine marriage is void ipso facto, and so is the Council of Trent. And this being by a Romish priest, it shall be void by that law.

So the marriage is void by our law if within the second degree, or second cousins, and within the fourth degree by the canon law.

The terms of matrimony in the Romish Church are a condition that they agree with the rules of Holy Church, that is must agree with the canons.

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1 *Haydon v. Gould* (Del. 1700-1710), see above, Case No. 45.
In the form of infant baptism, if not baptized before and so for marriage, [one] shall not be twice baptized or twice married at one time.

A conditional consent will not make a marriage.

_E contra:_

It is objected that the marriage is void by the Popish law. We are to be judged by the Protestant law and the law of England.

The pretended fraud in the plaintiff’s securing her fortune in trustees was prudent, the defendant being under age.

The cohabitation for five months is a great argument. And, as to the priest, they of the church of Rome conceal their orders, being penal. And, as to the identity of the person, it is well proved.

There is no disparity in fortune, age, or family, no circumvention. Cohabitation is great proof of marriage. And [there was] a contract two months before marriage.

A priest officiating and common reputation is good proof.

Mr. Sacheverel’s marriage [was] proved and the name of the priest [was] not known.¹ The priest swore himself a priest and his officiating and his orders.

The Popish marriages in an ambassador’s chapel is clandestine; yet not void by our law.

The first and second degree of relation[ship] are not forbidden by the law of England.

The defendant asserts the right to marry him, and he has declared it in writing.

If a bishop ordains a priest under age or lame [?] and he marries two, it does not vitiate the marriage.

Lady Bridget Osborn was married by Hall,² and he denied it; yet it was adjudged a good marriage.

Smith v. Constantine; she was married by one Baker, but could not prove him a priest; yet it was adjudged a good marriage.

The pope allows clandestine marriage here, which he would not tolerate in Rome.

¹ _Sacheverell v. Sacheverell_ (Del. 1717), see above, Case No. 54.
² _Williams v. Lady Osborne_ (Del. 1718), see above, Case No. 55.
If a clandestine marriage, [she] shall have no dower by Act of Parliament.¹
If [one] married \textit{infra annos nubiles} or by force and, after[wards], they cohabit, it purges the error.

The Council of Trent is of no authority, not being received in England or Ireland.

First cousins cannot marry by the Roman law, and yet [such marriages] cannot be set aside, nor is it a proper matter for a [writ of] prohibition.

The Statute 12 Car. II, ca. [\textit{blank}], confirming marriages by justices of the peace.²

The Delegates repealed the sentence of the archbishop of Dublin and pronounced for the marriage.


\section*{Harrison v. Archbishop of Dublin}
(Del. 1720)

\textit{A person put by a dean and chapter into possession of a living with cure of souls is subject to the visitation of the bishop and is required to take a license from the bishop for serving the cure and for preaching.}

Indiana University, Lilly Library
MS. ‘Cases in the Exch.’, vol. 5, p. 32
(Robert Price’s reports)

3 March 1719[/20].

[There was an] appeal from a sentence of the Archbishop of Dublin, who obliged them [Harrison and Higgins] to take a license to serve a cure and were suspended by him notwithstanding they are prebendaries and are

¹ Stat. 3 Jac. I, c. 5, s. 10 (\textit{SR}, IV, 1080).
exempt from the archbishop’s jurisdiction, being collated and instituted by the dean and chapter of Dublin.

[In] 33 Henry VIII [1541], the priory of Dublin was granted to the dean and chapter of Dublin. [In] 2 James I [1604], the patent is confirmed, and [there are] three canonical prebends with cure of souls without institution or license. [It is] a royal foundation, and they are installed prebendaries.

Donatives under the visitation of a bishop must have licenses.

St. Martin’s le Grand is a royal foundation and has a living annexed.

By the Canons of 1603, no minister can serve a cure without a license. 36th Canon. [One] cannot preach without a license. 45th and 46th Canons.¹

3 Rep. 74, Dean and Chapter of Norwich; Davies Rep. 3, 73; 2 Ro. Ab., Prerogative, 211, pl. 14, 229; 10 Rep. 31, Sutton’s Hospital’s Case; Dy. 273.² Every spiritual person is visitable in doctrine and morals. F.N.B. 50, a visit of a free chapel; [ . . . ] 45; [ . . . ] 61, [ . . . ]; Michaelmas 13 Will., King’s Bench, Finch v. Harrison.³ [One] may not preach in a donative [church] without a license, but may read prayers. Sed vide 1 Mod. 90; Articles of 31 & 32 Hen. VIII, c. 13, abbeys out of the jurisdiction of the bishop may be after[wards] within.⁴

If the king does not appoint a visitor, the ordinary is the visitor. A prebend is visitable though in [ . . . ]. A church which was presentable by induction is become a donative by instalment though there may be an exemption as to the possession, but not to the person of a clergyman.

Lynwo[ood] 288; an abbot cannot preach without a license unless [he has a] privilege.

² Case of the Dean and Chapter of Norwich (1598), 3 Coke Rep. 73, 76 E.R. 793, also 2 Anderson 120, 165, 123 E.R. 577, 601; Case of Proxies (1604), Davis 1, 80 E.R. 491; Case of Commendams (1611), Davis 68, 80 E.R. 552; Case of Proxies, 2 Rolle, Abr., Prerogative le Roy, pl. E, 14, p. 231; Case of Sutton’s Hospital (1612), 10 Coke Rep. 1, 77 E.R. 937, also Jenkins 270, 145 E.R. 194; Walrond v. Pollard (1568), 3 Dyer 273, 293, 73 E.R. 610, 659.
³ Finch v. Harris (1702), 12 Modern 640, 88 E.R. 1573.
⁴ Allane v. Exton (1672), 1 Modern 90, 86 E.R. 756, also 2 Keble 876, 84 E.R. 554; Stat. 31 Hen. VIII, c. 13, s. 18 (SR, III, 738).
Statute 14 Car. II, ca. 4;¹ [one] cannot preach without a license and [. . . ] his assent and consent.

1718, King's Bench, Mr. Herbert's new chapel [in] Westminster, his license was from the bishop, not the dean and chapter of Westminster.²

This does not extend to university [. . . ] or to prebends annexed to a professorship. A prebend appropriate by a dean and chapter is visitable.

Lynwood, _De Locato et Conducto_.

A church appropriate is not exempt of visitation. It is a perpetual incumbency in relation to the bishop. The same in the case of a donative as to the method of institution, and yet it is visitable.

Kennett's _Impropiations_, Appendix; an appropriated abbey [was] sequestered.

Most deans and chapters arose from dissolved abbeys and are under the power of the ordinary and are visitable by him.

The dean and chapter collate to the prebend but do not license, and none but the bishop can.

This case was in the House of Lords on a [writ of] prohibition.³ Where a church is annexed to a prebend, a license is not necessary, but the bishop, to prevent false doctrine, may cite the person of a clergyman to appear, though not to take a license, if within his jurisdiction.

The *ius commune* of every bishop is to take care of souls in his diocese. A license to preach is a different power.

The prebendaries that have these churches make a sort of perpetual curates. The church annexed to a prebend is the corps of the prebend.

The bishop may admonish or punish for false doctrine or bad morals.

*E contra:*

The prebendary is in by instalment not induction nor license, yet he has care of souls.

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The Act of Uniformity\(^1\) is in [force in] Ireland, but [one] cannot say the Canons of 1603 entered there.

11 Hen. IV, 9; Dr. Watson, 110, 122; 2 Ro. Ab. 356, 357.\(^2\)

A donative is by a layman. The bishop [was] not concerned; yet, if he will preach, he must take a license of the bishop. They are called rectors or curators.

Layne [was] instituted in the time of Popery; [it was] good, and [he was] well instituted until deprived.

Prebendarii et curatorii take a license to preach.

A rectory impropriate is annexed to some spiritual person or corporation and do not need institution and induction. The consent of the ordinary is implied. It is the corps of the prebend. Presenting it is not originally the interest of the rector.


Though donative, he cannot be deprived, yet he may be called to account for marrying without a license or for heresy.

The dean and chapter of [St.] Paul's have the gift of St. Giles' Cripplegate, and they institute and the bishop visits, and yet [there is] not a license. The same [holds] for St. Bene't's Church.

Canons 43, 113.\(^3\)

The dean and chapter nominate a prebendary and give him plenary possession.

Where a master of a college or a professor has a living, the bishop must approve; [it is] not so when a dean and chapter nominate or elect.

Statute 12 Anne; the bishop is to settle the stipends of curates.\(^4\) 5 Rep., Caudry's Case; Plow. 496; Statute 25 Edw. III.\(^5\)

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The dean and chapter of St. Paul’s have an exempt jurisdiction in several parishes in London, and an appeal from them is to the archbishop [of Canterbury] and not the bishop of London. The same have the dean and chapter of Salisbury.

The *ius commune* is with the bishop, and the other side must show the exception. The old dean and chapter before the Reformation had an exempt jurisdiction.

[It was] adjudged for the archbishop of Dublin that the church is in his jurisdiction by the bishops of Gloucester [Willis], Lincoln [Gibson], and Carlisle [Bradford], Chief Baron Bury, Baron Price, doctors Bettesworth, Penrice, Kinaston, and Phipps, civilians. The sentence was against the appeal, and the cause was remitted with £20 costs. In this cause, the point was whether a person put by a dean and chapter into possession of a living with cure of souls and subject to the visitation of a diocesan be obliged to take a license from the diocesan for the serving of such cure and preaching.


### Radcliffe’s Case
(Del. 1720)

*The suffering of a common recovery is not such a conveyance as to incur the disabilities of Roman Catholics to receive real property.*

9 Modern 172, 88 E.R. 382

The late Lord Derwentwater,¹ the appellant’s father, being a Roman Catholic and tenant in tail male of the lands in question with several remainders over, did upon his marriage with the daughter of Sir John Webb suffer a common recovery etc. And he declared the uses thereof to himself and his

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heirs. And, afterwards, by lease and release, he settled the said lands to the use of himself for life, then on trustees to preserve contingent remainders, then to his first and other son and sons of that marriage in tail male, with several remainders over.

Afterwards, the said Lord Derwentwater was attainted of treason and executed.¹ The appellant, his son, being then an infant, put in his claim before the Commissioners. And, by the opinion of four against three, the claim was dismissed. From this decree of dismissal, he now appeals.

The single question was whether a Papist, by suffering a common recovery and having a marriage settlement, shall be a purchaser within the Statute 11 & 12 Will. III,² for, if he is, then this recovery and settlement are void.

And this depends upon the construction of that Statute, by which it is enacted that:

after the 29th of September 1700, persons educated in, or professing, the Popish religion, who shall not within six months after they attain the age of eighteen years take the oaths of allegiance and supremacy and make and subscribe the declaration etc. shall be disabled, but not their heirs or posterity, to inherit or take any lands etc. in this kingdom etc. . . . . [and] that, after the 10th of April 1700, no Papist shall purchase, mediately or immediately, any lands, tenements, or hereditaments within this kingdom or profits out of the same, but all such estates or profits out of lands shall be void.

The counsel for the appellant argued that it was never yet questioned whether a tenant in tail, being a Papist, could suffer a common recovery, for, if he could not, then he would be barred of disposing his estate and from providing to pay his debts and to make provision for younger children, that the intent of this Statute was to hinder Papists from making new acquisitions and to prevent the growth of their landed interest, but not to take from them the power of disposing their estates. It was to make new purchases void, but not the alterations or modifications of their own estates.

¹ State Trials (F. Hargrave, ed., 1777), vol. 6, col. 1.
² Stat. 11 Will. III, c. 4, s. 4 (SR, VII, 587).
The word ‘recovery’ is not mentioned in this Statute, and there is no word under which it may be comprehended, unless it is the word ‘purchase.’ But it would be a strained construction to make the appellant’s father a purchaser within this Statute by suffering this recovery and declaring the uses thereof, because a purchaser always comes to the estate by the act of the party. But, here, the tenant in tail came to his estate by act of law, and, therefore, a Papist will be a tenant by the curtesy and tenant in dower notwithstanding this Statute, because, in both these cases, the estate is got by act of law, and not as a purchaser by the act of the party.

Besides, a purchaser must buy the estate of somebody, which, in this case, cannot be either of the reversioner or those in remainder, because they are strangers to the recovery and never executed any conveyance.

Neither can this tenant in tail be a purchaser in respect to the tenant of the praecipe or to the recoveror, because they are only made parties by the direction of the law and through necessity, and have nothing in reality but a seisin in fee for an instant, so that, if this recovery should be construed as a purchase, there will be a grantee or donee without a grantor or donor and the tenant in tail must be a purchaser of himself.

When a tenant in tail suffers a recovery, he makes use of that privilege which he has by law of having a power over those in remainder or reversion, which power he executes by suffering the recovery, for it cannot otherwise be done, but it is inconsistent to say that, by this means, he purchases the remainder or reversion when it is only a bar to them to claim the estate.

Therefore, if it be a bar, it cannot be called a purchase.

Besides, in suffering a recovery, nobody is considered but the tenant in tail, for, if he declare the uses thereof and if the recoveror should declare other uses, those declared by the tenant in tail are good, and the other void. So, if a tenant in tail be disseised and the disseisor and disseisee join in a fine and they and the cognizee declare separate uses, those which were declared by the disseisee, and those alone, are good. From which, it may be inferred that the tenant in tail is the only party interested in the recovery or fine and that the recoveror or cognizee are only made parties through necessity to keep up the forms of recoveries, which are of so great value in the law that the Chief Justice Dyer tells us that he was not worthy to wear a gown who should speak against them.
My Lord Coke, in his *First Institute*, calls a recovery a common conveyance. And it is a privilege so inseparably incident and annexed to an estate tail that the tenant in tail cannot by any means be deprived of it. Therefore, if a gift in tail be made on condition that the donee shall not suffer a recovery, this condition is repugnant and void, because the law gives him a power so to do.

In the principal case, if the appellant’s father had declared the uses to himself and his heirs, this would not have been a new use but the old one, so that, if he had been seised *a parte materna* and, after the recovery, had declared the uses to himself and his heirs, in such case, the heirs *a parte materna* should inherit, and those *a parte materna* would not, and, if he had declared no uses, then, by operation of law, the use would result to the heirs *a parte materna*, and they would have immediately been seised in fee.

It has been pretended that every alteration of the estate shall be taken to be a purchase within this Statute. But it is quite otherwise, for, if a Papist is seised of a defeasible estate and levies a fine thereof with proclamations and five years pass without any claim, now, by this means, the estate is become indefeasible; this is certainly an alteration of the estate, but nobody will say it is a purchase.

So, where the father, being a Papist, settles his lands upon his son with a power of revocation and after he executes that power so that the estate is revested in the father, this is likewise an alteration of the estate. But it was never yet called a purchase.

Before the Statute *de Donis* etc., where lands were given to a man and to the heirs of his body etc. upon condition that, if he die without issue, the same should revert to the donor, yet, after issue born, he had power to alien and to bar such issue and all possibility of reverting to the donor, which he could not do before he had issue, so that the getting a child made a great alteration in his estate. But no man can say that he became a purchaser by getting a child.

It was not insisted on by the counsel on the other side that the Lord Derwentwater could not make any settlement, for, certainly, if he had been tenant in fee simple, this settlement had been good. But his gaining a fee simple by suffering a recovery as tenant in tail and declaring the uses thereof

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makes no alteration as to that matter, because a common recovery is a conveyance, which a tenant in tail is entitled to make by law, and thereby to do as much as any tenant in fee can do. And the power of suffering such a recovery is inseparably incident to every tenant in tail and so closely united to the estate that, as a tenant in fee cannot be restrained by any condition to alien, so neither can a tenant in tail from suffering a common recovery.

But the reason of the Commissioners' decree is for that the Lord Derwentwater, by suffering this recovery etc., did acquire a new and greater estate than he had before, so that, by this means, he became a purchaser of such estate.

It is true his estate is new modelled, but not new made. And, take it altogether, he has a less estate after suffering the recovery than he had before, for, if the recovery and the declaration of the uses and the settlement be looked upon as one conveyance, for so it is in law, then, instead of an estate tail, he has only an estate for life. And there is an express authority that the recovery and the deed to lead the uses and the settlement are but one conveyance, for so it was resolved in The Lord Cromwell's Case,1 where the bargain, the recovery, and the fine, though made at several times, yet all, being made by the mutual agreement of the parties, were but one assurance and tended to perfect the bargain.

Where a tenant in tail levies a fine or suffers a recovery and declares no uses, in such case, the use is to him and his heirs, for it can never result to him in tail, because that estate is extinguished by the fine and barred by the recovery. And, therefore, this lord having by an express deed declared what is implied by law, this express declaration and deed must be brought under that maxim, *viz. expressio eorum quae tacite insunt nihil operatur*.

It has been said that, if the Lord Derwentwater had been tenant in fee, this settlement had been good. Now, if that be admitted, then a tenant in tail, in some sense, has as large an estate, for, as a tenant in fee may by feoffment, bargain and sale enrolled, lease and release, etc. dispose the fee, so may a tenant in tail by using the proper means he has by the law, which is by

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suffering a recovery, so that, though he is not tenant in fee \textit{in actu}, he is so \textit{in potentia}. And it plainly appears in the books that he has the whole power over the estate in his hands, for the remainderman cannot charge it but at the will of the tenant in tail, for, if he suffers a common recovery, all such charges are barred as well as all the remainders and shall never take place, though the tenant in tail should die without issue. And that is the true reason why a remainder after an estate tail is of no consideration in the eye of the law, for it shall not be deemed assets in the hands of the heir. And, if an action should be brought against him, in such case, \textit{riens per descent} is a good plea for him.

For these reasons, it was prayed that the decree of the Commissioners might be reversed.

The counsel on the other side, who argued against the appellant, admitted several things which were alleged on his behalf, as that a tenant in tail has the power of suffering a recovery and, by that means, to bar the issue in tail and, likewise, all remainders and reversions and that such power is inseparably annexed to his estate and cannot be restrained by any condition and that, where he suffers a recovery and declares no uses, there, the use results to him and his heirs. But, notwithstanding all this matter, the Lord Derwentwater was a purchaser both within the meaning and letter of this Statute.

It cannot be denied but that the word ‘purchase’ is mentioned in this Act, \textit{viz}. ‘no Papist shall purchase any lands’ etc. Then, it must be considered whether this case comes within the legal signification of that word. And, as to that matter, My Lord Coke\textsuperscript{1} tells us that every man who has an estate has it either by right or by wrong; if by right, then it must either be by purchase or by descent; so that there are but two ways to have a rightful estate, of which purchase is one. Therefore, this lord, after he had suffered the recovery and declared the uses etc. not coming in by descent, it must necessarily follow that he came in by purchase.

In the same book,\textsuperscript{2} it is said, that he is a purchaser who comes to lands either by conveyance or title. Now, this lord came to the lands in question by conveyance. Therefore, he is a purchaser.

\textsuperscript{1} E. Coke, \textit{First Institute} (1628), f. 2.

\textsuperscript{2} E. Coke, \textit{First Institute} (1628), f. 3.
The word ‘purchase’ has been taken in this sense in other acts of Parliament and particularly in the Statute of Mortmain,\(^1\) by which it is enacted, that ‘lands purchased by people of religion shall be forfeited and that, hereafter, no purchase shall be made to the use of spiritual persons.’ Yet, if a conveyance of lands is made to them by way of gift or by will, they were accounted purchasers of such lands.

Words in acts of Parliament are always to be understood in that sense the law puts on them. Now, the design of this law was to put such hardships on Papists that they might be obliged to part with their landed interest and transfer the same to Protestants.

A mortgage made to a Papist is void so that the incapacity of taking lands in any case is meant by this Statute. Therefore, this lord could not alter his estate tail and turn it into a fee simple.

The words in this Act are very express, \(\textit{viz.} \) ‘that no Papist shall purchase.’ It does not say for a valuable consideration, but generally without any manner of restriction. But, in several statutes, a distinction is made between a purchaser generally and a purchaser for a valuable consideration. And, if the Parliament had intended the latter, it is probable it would have been expressed in this Statute.

Now, in construction of acts of Parliament, it has been an old rule that every mischief not expressly provided against is intended to be remedied by the act. And, in the case of Roper \textit{v.} Radcliffe, where the decree in Chancery was reversed in the House of Peers,\(^2\) it was held that a devise was a purchase within the meaning of this Statute. And, if a devise be a purchase, certainly, a recovery and a declaration of the uses to himself and his heirs must be a purchase, especially when, by the Statute, he is capable of taking any use. And he cannot take any resulting use by implication of law, for that would be contrary to the maxim \textit{expressio facit cessare tacitum}, and he had plainly expressed the uses by the deed.


Now, if this lord should take by virtue of this recovery and declaration of uses, either expressed or implied, he would have quite another estate than what he had before, and the females would inherit, which they could not before, for, after making this settlement, if this lord had issue a son, who had issue a daughter, she would now inherit, which she could not do before, because he was tenant in tail male.

As to the objection which has been made, that, if this recovery should be adjudged void by virtue of this Statute, it would incapacitate Papists from selling their estates to Protestants, the answer is that there is no clause in the Statute which puts them under such an incapacity, the Parliament intending it for the benefit of Protestants. And, therefore, it ought to be taken in the largest sense and to extend to every conveyance by which a Papist shall take lands as well as to a purchase for a valuable consideration.

It has likewise been objected that, the power of suffering a common recovery being a privilege inherent to an estate tail, it could never be the intent of the Parliament to restrain that privilege, especially since the word ‘recovery’ is not mentioned in the Statute.

It is very true the word itself is not mentioned. But, as a recovery is a purchase, it may properly be said to be within the words of the Statute and, consequently, within the intent thereof. And to prove that a recovery is a purchase, it was insisted that, as soon as it is suffered, there is an estate in fee in the recoveror and all the uses arise out of his estate, and a purchaser, even for a valuable consideration, must claim the estate of the recoveror and not of the tenant in tail who suffered the recovery.

Now, the intent of this Act was to hinder Papists from taking greater and better estates than they had before, viz. from taking a fee simple where, before, they had only an estate tail, and to restrain them from making settlements to perpetuate their estates in their families.

Where a Papist is tenant in tail, remainder over to another, and he in remainder conveys his estate to the tenant in tail, this would be a purchase and void within this Act.

Now, in the principal case, the Lord Derwentwater got the remainder by suffering this recovery. But the case is the same whether he got it by conveyance or recovery, for both are void by this statute, which, if it should be otherwise construed, it would be in the power of a Papist tenant in tail to bar the remainder in fee in a Protestant. And, though it may be said that it
shall bar the issue in tail and the remainders so that they shall never take any advantage against it, yet the Crown, being a stranger to the recovery, may set it aside, because, in respect of the Crown, the estate tail is in esse. So is the Case of Crocker v. Kelsea,1 where a tenant in tail levied a fine and declared the uses to himself and his heirs; it was resolved that the estate tail was barred as to him who levied the fine and as to his issue, but that, in rei veritate, it was not determined, for all strangers might say that it was in being.

It is true when a tenant in tail suffers a recovery, everyone who comes in by such recovery comes in continuance of the estate tail and must be liable to all the charges made by the tenant in tail, and the charges of those in remainder are barred. But this does not prove that an estate tail is as large as an estate in fee, which is the point now in question. Therefore, if this lord has gained a new and greater estate than he had before, it is plain such estate is void, within the intent and words of this Statute.

The question is not whether a recovery suffered by a tenant in tail shall bar the remainders and contingencies expectant upon such estate but whether he who suffered the recovery shall after the making of this Statute take any advantage of it after it is suffered.

As to the case put on the other side, viz. that, where a tenant in tail ex parte materna suffers a recovery and declares no uses, in such case, the use shall be to the heirs a parte materna, this is not law. It is true it is so where a man is tenant in fee simple, but not where he is a tenant in tail.

Upon the whole matter, it was insisted that the Lord Derwentwater was a purchaser within the words and intent of the Statute. Therefore, it was prayed that the appeal might be dismissed.

But the decree of the Commissioners was reversed by the Delegates by the opinion of four against Justice Fortescue.

By the court: It is plain that a Papist under the age of eighteen years at the time of making this Statute may take either by descent or purchase and that the word 'purchase' in this Statute is only a modification of the estate, and shall not be taken in the full extent of the word, for those purchases are only intended by the Statute by which Papists enlarge and extend their landed

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interest, and not where, by deeds of settlement, the ancient family estate is new modelled without making any new acquisition so that, even at this day, a purchase by limitation in a settlement or by a devise to a Papist under the age of eighteen years is good, so as such Papist, within six months after he comes to that age, conform and take the oaths etc. Otherwise, he loses the perrnacy of the profits during his life only.

1 Strange 267, 93 E.R. 514

Sir Francis Ratcliffe, being seised in fee of the premises in question, by lease and release dated 19 & 20 March 1687[/88], settled the same to the use of Edward, his first son, afterwards earl of Derwentwater, for life, remainder to his first and every other son and sons in tail male, remainder to the right heirs of Sir Francis. Earl Edward, the tenant for life, died, leaving James his eldest son, who entered and was seised of the entail. And, 1 May 1712, being at that time a Papist, he conveyed the premises to two persons who were Protestants in order to make them tenants of the freehold until a common recovery was suffered, which was accordingly had and suffered, of part of the lands in the Common Bench Easter [term] 1712 and of the other part, lying in the County Palatine of Durham, 19 June 1712. Both which recoveries were declared to be to the use of Earl James in fee. Earl James, being thus seised of the fee, by lease and release, on 23 & 24 June 1712, on his marriage with Sir John Webb’s daughter, conveyed the lands to the use of himself for life, then to the lady for life, remainder to the first and every other son and sons of that marriage in tail male, with several remainders over, and proper limitations to trustees to preserve contingent remainders. The marriage took effect, and the claimant, Mr. Ratcliffe, was the eldest son. Earl James, 19 February 1716[/17], was attainted of high treason, and, by the Statute 1 Geo.,¹ all estates tail, whereof persons attainted were seised, are vested in the Crown in fee.

The Commissioners seize this estate as forfeited by the attainder of Earl James, upon which Mr. Ratcliffe puts in his claim, insisting that Earl James was only tenant for life, and himself had now the right to his remainder in tail, the estate for life being determined by the execution of Earl James. On

23 December 1718, the claim was disallowed, the Commissioners being of opinion that Earl James was disabled by the [Statute of] 11 & 12 Will. III, c. 4, to suffer such recoveries, and, consequently, he remained tenant in tail under the settlement of Sir Francis, and so the Crown is entitled to the fee.

The claimant appeals to the Delegates from the determination of the Commissioners.

It was argued several times at the bar on the behalf of the public and the claimant. But there being a difference of opinion in the court, there will be no occasion to take notice of the arguments of the counsel, since everything that was materially offered on either side is again repeated in the judgment of the court.

The Delegates were five of the judges, viz. Mr. Justice Powys, Mr. Justice Tracy, Mr. Baron Montagu, Mr. Justice Fortescue, and Mr. Baron Page, who all delivered their opinions seriatim. And, though four of these concurred in opinion to reverse the decree, yet they gave such very different reasons for that opinion as makes it necessary to state each of their arguments at large in order to show the grounds they severally went upon.

The great question in this case is whether a Papist tenant in tail can since the [Statute of] 11 & 12 Will. III suffer a recovery to the use of himself in fee, for it was agreed on all hands that, if the recovery had been immediately to the uses declared by the subsequent settlement, it would have been good.

This general question depends upon the construction of the disabling clause in that Statute, whereby it is enacted:

that from and after the 10th of April 1700, every Papist, or person making profession of the Popish religion, shall be and is hereby disabled to purchase, either in his or her own name, or in the name of any other person or persons, to his or her use, or in trust for him or her, any manors, lands, profits out of lands, tenements, rents, terms, or hereditaments within the kingdom of England, etc. and that all and singular estates, terms, and any other interests or profits whatsoever out of lands, from and after the said 10th day of April to be made, suffered, or done, to or for the use or behoof of any such person or persons, or upon any trust or confidence, mediately or immediately, to or for the benefit or relief of any such person or persons, shall be utterly void and of none effect to all intents, constructions, and purposes whatsoever.
And, if the recoveries be within this disabling clause, then *nihil operatur* by the deed and recoveries, and the claimant’s father remained tenant in tail as before, and the estate is forfeited to the Crown. If not, then he became tenant for life by the new settlement, and the claimant has a right to his remainder in tail, as limited to him by that settlement.

Mr. Baron Page’s argument: This is a case of very great consequence, not only on account of the particular estate now in contest, which is very considerable, but also as it affects the estates of multitudes of Papists and Protestants who have purchased under them and as it is before a court from which there is no appeal.

I am of opinion that the claim of the appellant was well founded, and, consequently, the decree of the Commissioners, disallowing the claim, is erroneous, and ought to be reversed.

The great question is whether a Papist tenant in tail can since the 11 & 12 Will. III suffer a recovery to the use of himself in fee. This is the single point to which it must all at last be reduced.

It has been insisted on for the public that, by the words of the Statute, the late earl was incapacitated to suffer these recoveries. And to make the argument the stronger, it was urged that they were two distinct clauses, which have no relation to each other, and that the last carries the incapacity of a Papist much farther than the first.

Whether they are two clauses or one only, I shall not determine, since that is not material to guide us in the construction, where the only question is whether the latter part is distinct from or relative to the former. I think the words of both parts are relative to each other, and the latter are only explanatory of the former. They are only different ways of expressing the same thing, in which one perhaps may in itself be of a stronger import than the other, but yet they were intended by the legislature to convey the same sense, only in a fuller light.

It was said that, unless the latter words are carried farther than the former, they will be entirely useless. But to show that acts of Parliament are not so nice upon that head, but make use of different expressions as often to clear up their meaning in what went before as to add new matter, I shall observe that this very clause now before us is no new one amongst our statutes, but it is used in several of them upon occasions that show they must be merely syn-
onymous with what was said before. Thus 1 Jac. I, c. 4, § 6,\(^1\) makes persons passing or sent beyond the seas into Popish seminaries incapable of inheriting, purchasing, taking, and enjoying any manors, lands, profits, goods, and chattels whatsoever; but, not content with those words, it goes on and enacts that ‘all estates, terms, and interests’ (in the very words of our Statute) shall be utterly void and of no effect. And yet it is evident these could not carry the incapacity of Papists farther than the former words had done, since those exclude him from all benefit whatsoever in any real or personal estate within the realm of England.

But what is more full if possible to our purpose is 25 Car. II, c. 2, commonly called the Test Act,\(^2\) by which persons elected into offices and refusing to take the oaths and receive the Sacrament are made incapable ‘to take, occupy, and enjoy the said offices or employments, or any part of them, or any profit or advantage appertaining to them’. And yet the Parliament, to prevent any equivocation and to make the matter plain to the laymen, declares further ‘that all such office or offices, employment or employments, shall be void’, which no one will say can signify more than what was expressed in the preceding sentence.

I shall mention but one Statute more, which is that of 1 Ann., concerning the purchase of the forfeited estates in Ireland,\(^3\) by which it appears how apprehensive the Parliament was of the danger which might arise to the kingdom by a landed interest subsisting in the Papists, and, therefore, amongst other things, it was designed as a prevention of any of those estates from ever returning into Popish hands. For this purpose, it enacts ‘that all Papists shall be forever disabled to purchase any of those lands’ and, further ‘that all acts whatsoever suffered or done of such lands to or in trust for any Papist shall be void’. This Statute seems to have been the very pattern of the Act now before us, and, though it is impossible to find any use for the latter words not implied in the former, yet the legislature we see did not think it improper to express their minds different ways, both with regard to the disability of the person and the nullity of the acts done for his benefit, though they both, in the end, amount but to the same thing. Here was certainly no intention in

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\(^1\) Stat. 1 Jac. I, c. 4, s. 6 (SR, IV, 1021).
\(^3\) Stat. 1 Ann., c. 6, s. 133 (SR, VIII, 38).
the Parliament to disable the Papists from selling or disposing of their own estates. The restraint was only from purchasing and taking, and it was equal to them, who were the seller or disposer, whether the estate moved from a Papist or a Protestant; the Papist was in all cases alike still disabled from being the taker.

Having now, as I think, cleared this case from any difficulty it might lie under upon account of the different wording of the Statute and shown that no advantage can be taken against the claimant from the peculiarity of some expressions in the latter part, which were added by the legislature only out of abundant caution and to prevent mistakes, I shall now proceed to show that, according to the true intent and design of this Statute, the late earl was not restrained from suffering such recoveries as he did.

And the first thing I would set out with is to observe that this is a penal law. It takes from persons what by the common law of England is their birthright, and, upon that account, it is to be interpreted strictly and in such a manner as not to carry the penalty farther than the open and evident intent of the Statute, which is a rule of construction that always has, and I trust, ever will prevail.

Now, the first and plain view of this law was to prevent the great mischief that had been experienced from the power which the moneyed men amongst the Papists had of increasing their landed interest in England and, consequently, of investing themselves with a larger share of power and influence in the country. To remedy this mischief, the Statute provides that, for the future, no Papist shall make any new acquisition in lands. But there is not any word in it that looks like a design to take from them their own estates, which they had before. As to those, it meddles not with them, but leaves them where it found them. We should then at least endeavour to guard against any interpretation that tends to the taking away or abridging their present estates, because, in so doing, we act most agreeably to the sense and meaning of the legislature.

Before the suffering of these recoveries, it appears the late earl was tenant in tail. Every estate tail has this property inseparably annexed to it, that the possessor of it has a right to suffer a recovery. Should, therefore, this Statute be expounded in such a manner as to hinder the effect of a common recovery on a Papist’s estate tail, it would be taking away one present right which he has as an inherent quality in his own estate and so far extending the
penalty and hardships of this law beyond its principal design, which I have
before shown had regard only to new acquisitions. And, being a penal law, it
is to be construed strictly. I must, therefore, own myself at a loss to find out
the reason why we are to thwart that ancient and constantly allowed rule of
construction by going out of the words and, in my opinion, out of the intent
of the Statute. That the power of suffering a recovery is incident to an estate
tail, I believe will not be denied. Mildmay's Case, 1 Co., and 6 Co. 40,¹ are
full to that purpose. And, there, it is said too that all conditions to the con-
trary are void and that a tenant in tail has the power over, though he has not
the whole fee simple in himself.

So is the Case of Benson v. Hodson, 2 Lev. 26, 1 Mod. 8,² where Lord Hale,
accounting for a recovery's being a bar to the remainderman, says that
a recovery is a conveyance or method of defeating those limitations, excepted
out of the Statute de Donis, which never intended to hinder it, and that the
recompense in value is not the reason why the remainderman or reversioner
is barred.

But, as an answer to all this, it is urged that how true soever it is that
the earl was seised in tail and the power of suffering a recovery is the right of
every tenant in tail, yet the Statute we are now upon has in fact separated this
estate and that right; they are to take the Statute as they find it, and, then, it
has sufficiently deprived him of the power of suffering a recovery by disabling
him from purchasing.

The ground of this argument is that the destruction of the estate tail by
a recovery and the taking an estate to himself in fee is a purchase within the
meaning of the Statute.

Now, consider the analogy between common sense and this construc-
tion. Would it not surprise a man who asks who you purchased your estate
of to be told you purchased it of yourself? Whose was it before? Why, it was
mine, and I purchased it of myself. Would not a person unacquainted with

¹ Mildmay v. Standish (1582-1584), 1 Coke Rep. 175, 76 E.R. 379, also Jenkins
² Benson v. Hodson (1674), 2 Levinz 28, 83 E.R. 438, 1 Modern 108, 86 E.R. 768,
also T. Raymond 236, 83 E.R. 123, 1 Freeman 362, 89 E.R. 269, 3 Keble 274,
287, 292, 84 E.R. 717, 724, 727.
the chicanery of the law think you designed to banter him by such an answer? And I believe the Parliament never thought of such a purchase where the same person is both donor and donee, grantor and grantee.

I agree it was the intent of the Statute in general to prevent the acquisition of estates by the Papists, and, therefore, if there is a deficiency of any words which might directly comprehend them, we may supply it for that purpose. Thus, I take a devise to be within the Statute or, if a Papist should be suffered to disseise another and then gain a release from the disseisee or, where he is tenant for life, should levy a fine and the five years should pass; in all these cases or any other of gaining any estate or interest in lands which he could not have purely by his own act and without the procurement or connivance of the person whose right is lost, I take it he will be disabled by the Statute. But I can go no farther, this being in my opinion the utmost extent that either the words or meaning of it can bear. And, if we should attempt to carry it further, the mischief aimed at will not be prevented but increased. The Popish interest instead of being lessened will be considerably advanced.

I cannot but think the effect of such a construction will be to fix a perpetuity to the estates of all the Papists in England. And, instead of removing by degrees all the landed interest out of Popish into Protestant hands, it will tend to keep it entirely amongst the Roman Catholics, for to make a Papist incapable of suffering a recovery equally hinders the sale to a Protestant or a Papist.

Or should the latter part of the Statute be interpreted in the utmost latitude the words will allow of and as a disjoined and separate clause from the former, consider what absurdities we must run into that way. All acts for his benefit or relief are made void. And, therefore, I cannot but think those words, when stretched as large as some people would have them, will prevent even a sale to a Protestant, since no man can be supposed to part with his estate to a stranger but in view of some benefit to himself. But I hope it will never be pretended that the Parliament designed any such thing by that expression when it is evident the Statute was calculated to enforce and oblige Papists to such a sale.

But, if we must interpret the word ‘purchase’ here not according to common understanding, which one would imagine acts of Parliament were most calculated for, but in its legal sense, in opposition to taking by descent, yet, then, I say the earl was seised under this recovery much more in the way
of a descent than a purchase, for this purpose. It is to be observed that, by the
first settlement, Sir Francis became tenant for life, with a reversion in fee to
himself after the estate tail, of which the late earl was seised before his suffer-
ing the recoveries, should be spent. This reversion in fee descended on the late
earl at the same time the estate tail came to him, and he continued seised of
both until the recovery. Now, what effect had the recoveries on these estates?
Why, as to the entail, it extinguished that, but it could not touch the fee. The
consequence of which was that, all the impediment being removed, he was
then in possession only of that ancient reversion in fee, which descended to
him from his grandfather.

4 Mod. 1, the Case of Symmonds v. Cudmore; a tenant in tail with
a reversion in fee makes a lease not warranted by the Statute and dies. The
issue, before entry, levies a fine. And it was held that the lease was good, for
this reason, because the tenant in tail, by levying the fine, did not carry off
the estate tail so as to avoid the lease, but only extinguished it, and so he was
in as heir at law to his father of his reversion in fee, and must, therefore, take
that estate together with the father’s charge upon it.

Now, suppose the late earl’s father had made such a lease and died and
the earl, before entry, had suffered a recovery. Would not this have let in his
father’s encumbrance or can there be any difference whether the entail be
extinguished by the fine or recovery? Whatever act it is, that, by removing
the intermediate estates, lets in the reversion. It is exactly the same thing.
The encumbrances on that reversion and the incidents to it must be let in
too. And, therefore, if the earl had been originally seised ex parte materna, he
would have been in of the fee on the recovery on the same side.

Common recoveries, it is well known, are only as common assurances
to be interpreted in the same manner and to convey a title in the same condi-
tion as other conveyances do. Now, if one seised in fee enfeoffs J.S. to the use
of himself for life, remainder to the use of the feoffee in fee, the feoffee is in

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1 Symons v. Cudmore (1691-1693), 4 Modern 1, 87 E.R. 226, also 1 Salkeld 338,
91 E.R. 296, 2 Salkeld 619, 91 E.R. 524, 3 Salkeld 335, 91 E.R. 857, 1 Shower
K.B. 370, 89 E.R. 646, 12 Modern 32, 88 E.R. 1145, 1 Freeman 503, 89 E.R.
379, Skinner 284, 317, 328, 90 E.R. 128, 142, 146, Carthew 257, 90 E.R. 753,
Holt K.B. 666, 90 E.R. 1268, Dodd 100, 127.
only by way of remainder, and not of the reversion as of the residue of the
estate which was in him as feoffee. 1 Inst. 22b; Dyer 361.¹

The law looks upon the deed to lead the uses and recovery as both
together making one conveyance. And, therefore, when it happened that the
person to whom a conveyance was made, in order to make a tenant to the
praecipe, was also lessee for years of the same land. It was adjudged in the Case
of Fountain v. Cooke, 1 Mod. 107,² that the lease was not extinguished, as
it would have been in any other case, because the law considers the recovery
with all its appurtenances but as one conveyance and each of the instruments
to bring it about but as part of it.

What I have been saying now to prove that Earl James was in under the
recovery, rather by descent than by purchase, is supposing it to be true that all
are seised of their estates either by descent or purchase. But, indeed, I think
there is another way of coming to an estate, and that is by operation of law, as
in the cases of tenants by the curtesy, dower, and the lord by escheat. In each
of which, there is nothing either of purchase or descent, but the law casts the
estate on the husband, the widow, and the lord without any act of their own
or prior seisin of their ancestor. And, under this rank, perhaps, we may place
the estate gained by the late earl under the recovery. He is not seised of any
new or really different estate from his first tail, for the entail and fee are in law
equal estates, and, therefore, capable of being exchanged. 1 Rolle. Abr. 813.³
But, by the means of this recovery, the operation of the law has new molded
it, and put it in a different form from what it was before.

The sum of what I have said under this head is that he is not in by pur-
chase, taking it in the legal sense, which is prevented from having any effect
by the Statute. But he is in either by descent or operation of law, both which
are confessedly not within the Statute.

But, then, the objection recurs from the latter words of the Statute,
which, say they, are general and extend to his own acts, that the law does not
regard from whence, but to whom, the estate comes. And, therefore, let the

¹ E. Coke, First Institute (1628), f. 122; Windsor’s Case (1578), 3 Dyer 361, 73
E.R, 809.

² Fountain v. Coke (1674), 1 Modern 107, 86 E.R. 768.

³ 1 Rolle, Abr., Eschange, (G) De quel estastes poët estre, p. 813.
act be done by the Papist himself or by any other, if, thereby, any estate or benefit accrues to the Papist, it is made void.

But first, had the Statute intended the Papist’s own acts, it would have been natural to have mentioned any acts suffered or done by him, whereas the words only ‘to’ or ‘for’, which can never include ‘by’, for ‘to’ is no more than to himself, and ‘for’ implies to another for himself.

But, in the next place, let us consider the consequences of such an extensive construction. The Act says ‘anything done for the benefit or relief of a Papist shall be void’. Now, let those words be but understood in their full extent to mean all acts done by himself or others in relation to his estate that are for his benefit. And I may venture to say they will not leave him even the least mark of ownership in that which is confessedly his own land. Plowing and sowing, making leases (which infants are allowed to do as what is beneficial to them) mortgaging, though to a Protestant, or selling in order to raise money to redeem himself from slavery, will all come within the comprehensive meaning now set up of the words ‘benefit’ and ‘relief’, for not one of these acts but are in some measure done with a prospect of his benefit or relief.

I mention these, not as things insisted on in terminis, but what must follow as a consequence of leaving the main design of the Statute to find out an exposition most to the embarrassment of Papists. For I am bold to say the Parliament never thought of carrying matters to such a length. Nor can it be imagined that a Papist tenant for life with a power of committing waste is by this Act debarred from so doing and made incapable of digging mines, cutting stone, and the like, and yet this is a stronger case than ours, since it is to the disherison of the reversioner.

Agriculture is much favored and encouraged by the law, whereas we are now inventing a method how all the lands in the hands of Papists must lie forever uncultivated.

The case most relied on by the counsel for the public was that of Roper v. Radcliffe, which was adjudged upon an appeal to the House of Lords, where an estate was devised to be sold for payment of debts and legacies and the surplus to go to a Papist. And the devise of the surplus was held void upon the present Statute, as being an interest and profit out of lands.

But I must own my inability to find how that case has any relation to this before us. I am sure it is very consistent with my interpretation of the
word ‘purchase’. It was an interest out of land, not his own, but another’s. And this was such a profit as gave him as full a power over the land as if it had not been directed to be sold, but devised to him chargeable with debts and legacies, for he might, if a Protestant, have come into a court of equity and compelled the trustees to convey to him on payment of the debts and legacies. This, therefore, was to all intents a devise of another’s land, which I have before admitted to be within the Statute.

But, say they, consider what you are doing. Are not you giving a Papist tenant in tail in possession a power to bar a Protestant remainderman and does not this tend to keep the land amongst the Papists instead of drawing it to the Protestants? Does not this enable the ancestor to keep the heir steady to his own religion for fear of being disinherited? And is not this a strengthening of the Popish religion?

To this I answer that it is but a vain terror, and it can follow no more this way than that which is admitted on all hands would have been good, for, did not everybody agree that, if the recovery, instead of being to the use of Earl James in fee, had been immediately to the uses declared by the subsequent settlement, then everything would have been right and as it should be? And where is there any essential difference between the two methods of new molding the estate? The argument of mischief holds both ways. Nay, it is universal in one and but particular in the other, for I am apt to think nobody who has the settling of Roman Catholic estates for the future will ever follow the precedent of this case.

Whether this recovery was suffered really in order to make the settlement on marriage or whether we can take notice of it as such, I do not think it very material. It is true it is not expressly averred to have been for that purpose, but yet there is testimoni um rei that it was, for the Durham recovery was 19 June 1712 and the release is dated the 23rd, which was as soon as a letter could come to London to signify that the recovery was suffered.

Upon the whole, I am of opinion, it never was the intention of the legislature to deprive Earl James of any right he had to his own estate. Being tenant in tail, he had a right to suffer a recovery and new mold his estate. He has done so and raised a good right in Mr. Ratcliffe, whose claim, I think, was well founded, and ought to have been allowed.

Mr. Justice Fortescue’s argument: I shall make two questions in this case: first, whether this conveyance is a purchase within the Act; second, if it
should not come under that strict notion of the word ‘purchase’, whether it is
not affected by the latter part of the Statute, which speaks of all acts suffered
and done to or for the benefit or relief of a Papist.

As to the first, I take it for granted that he who takes by purchase is
a purchaser, and the consideration is not material, as has been allowed by
my brother. And, in the Case of Roper v. Radcliffe, it was agreed that there
was no distinction between taking by purchase and being a purchaser. Let us
then see what it is to take by purchase. Litt., § 12,¹ says, he takes by purchase
who comes to lands by his own act and agreement, and not by descent. The
opposition between purchase and descent is that the former is the effect of
a man’s own act; the latter, the act of law without, and perhaps against, his
own act. The meaning of descent is not confined to that particular case where
lands come down from the ancestor to the heir, but, wherever the freehold
is vested in any person by the act and course of law, such person is in in the
nature of a descent. 1 Inst. 18b.² I must, therefore, differ from my brother as
to his notion of tenant by the curtesy, dower, and escheat. A tenant by escheat
is said to come in as heir in loco haeredis. Bro., Eschat, 33,³ where the lord’s
taking by escheat is put upon the same foot with the heir’s taking from his
ancestor.

The same is to be said of a tenant in dower and by the curtesy. And I
never until now heard of that third sort of taking estates, which my brother
calls taking by operation of law, as distinguished both from a purchase and a
descent. Lord Coke, indeed, does mention a third sort by creation, but that
is foreign to our case, and may, besides, be very properly referred to the head
of purchase.

If the act of law concurs with the act of the party, it is a purchase. If the
act of law only works the vesting of the estate, it is then a taking by descent.
This is the case of the recoveror. He is in, it is true, by operation of law, but
his own act is that which first gave motion to it, and, consequently, he is in
by purchase. No one would doubt where the recovery is to the use of a third
person, but that he is in by purchase, and yet he too is equally in by operation
of law. The late earl, then, was within the express words of Littleton, for he

¹ T. Littleton, Tenures, s. 12.
² E. Coke, First Institute (1628), f. 18.
³ YB Trin. 9 Hen. VII, f. 2, pl. 3, Brooke, Abr., Eschat, pl. 33 (1494).
not only took by operation of law, but in conjunction with his own act and deed executed.

But we are told this is only the legal sense of the word; there is another vulgar sense more intelligible to the understanding of the generality of the world, and the Statute is to be intended in that sense.

I must own this is the first time I ever heard that judges are to lay aside the legal sense of a law and run about to find the meaning in which it is received by rustics and plebeians. The word ‘purchase’ has a known signification, in which it has constantly been used by lawyers without any variation. And I can never suffer myself to go from that without an express direction in the body of the statute.

It is said this is not a purchase. Why? Because he took no new estate, but he was in only of his ancient use. What estate had he before the recovery? Only an estate tail with a distant remainder in fee after several intermediate remainders in tail to the second, third, and other sons. What estate has he now by the recovery? One single fee simple in possession, that is the several particular estates that were before partly in him and partly in others are now joined together and made one in him alone. Now, can anyone say that the whole is the same with some of its parts, or that he has the same estate now he has everything in him as he had when others shared it with him?

But then again, the objection is altered, and we are told that the recovery only removes the impediments and leaves him in, just as he was at first. Be it so; he still gains a new hereditament which he had not before, and it amounts to the same thing, whether this is effected by taking away the encumbrance or adding something new. In numbers, everyone knows the removing a subtraction is making an addition.

But to prove that he was in of his old estate in fee simple, several cases have been cited. The case of a fee Simple to the use of the feoffor for life, remainder to the feoffee in fee, is very little to the purpose. It is grounded on what is said in 1 Inst. 23, that whoever is seised of an estate has both the estate of the land and also the use or the right to take the profits, and, therefore, so much of the use as he does not dispose of continues still in him as his old estate, and so shall go to the part of the mother from whence the estate originally moved. But all this goes on the supposition of a present fee simple in the feoffor, which, in our case, is removed to a great distance, after the determination of several other estates.
Another case urged with as little reason is that of Symmonds v. Cudmore, where a tenant in tail with an immediate reversion to himself in fee makes an unwarranted lease and dies; the issue, before entry, levies a fine. And it was held he shall not now avoid the lease. But this is distinguished from the present case by the same difference as the former, the reversion in fee was immediately in him after his estate tail, so that he really had the whole estate in the land in himself, only it was cut into two parts. But, here, the estate tail in possession and the fee in reversion are disjoined by the intermediate remainders in other persons, who consequently take off part of the whole inheritance. All that this case amounts to is only to prove that, where a man has two estates in him, a lease which he makes is issuing out of both, and, therefore, when one of them is spent or any ways removed, it shall be served out of the other.

A case was cited upon the argument, where a tenant for life with a contingent remainder in tail, remainder to the tenant for life in fee, makes a feoffment to the use of himself in fee, and it was held that this use in fee was only his old estate. Now, there is no doubt but that this must be his old estate, for he was all along seised of the fee simple, liable only to be opened upon a contingency. All that the feoffment did was making the contingency impossible ever to happen, and so it incapacitates the person who was to be the taker. But this makes no addition to the estate; it only makes that estate absolute in the tenant, which before was liable to be broken in upon and interrupted. When a fee simple conditional and an absolute one meet, they are consolidated. Hob. 223; Salk. 338.1

The Case of The Earl of Lincoln, Show. Parl. Cases 154,2 is stronger than this. There, Edward, earl of Lincoln, seised in fee, made his will, and devised the lands in question to the plaintiff; afterwards, by lease and release, he conveyed them to the use of himself in fee until an intended marriage should take effect, and then to the common marriage uses. The marriage never took effect, and he died without issue or other disposition of the premises. The question in Chancery was whether this conveyance was a revocation

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1 Needler v. Bishop of Winchester (1615), Hobart 220, 80 E.R. 367, also 1 Brownlow & Goldesborough 162, 123 E.R. 730; Symons v. Cudmore (1691-1693), ut supra.

2 Earl of Lincoln v. Roll (1698), Shower P.C. 154, 1 E.R. 105, also 1 Eq. Cas. Abr. 411, 21 E.R. 1140.
of the will, and it was held there to be so. And the decree was affirmed in the House of Lords, because the estate in fee gained by the conveyance was not the old estate which the earl had in him before, it being limited after a different manner and to be determined on a certain qualification. Now, if this variation of the estate was sufficient to destroy his old estate and put him into a new one, there is much more reason here the late earl of Derwentwater should be adjudged in of a new estate, when it is agreed here is an alteration of his estate and it is so great as to vary the very course of descent, which is certainly a mark of a different estate.

It has been said here is a vendee without a vendor. But this is only a jingle of words. In the case of a devise, there is a purchase, as my brother admits, but there is nothing of a vendor in the case. If the words ‘vendor’ and ‘vendee’ cannot be made use of, the law supplies other relative words that are as much to the present purpose. There is ‘devisor’ and ‘devisee’, and, in our case, I do not see why ‘recoveror’ and ‘recoveree’ may not be used, which may answer the same end and be applicable according to the different kinds of purchase.

In supposition of law, the recoveror is in by purchase; he has gained an estate from the tenant in tail, which he had not before, and the tenant in tail has by intendment of law a recompense in value for it. And the fee which is recovered is nothing of that estate which was in the tenant in tail. It is not derived from him, nor can the recoveror make his title under him. This appears evidently from the Statute of 7 Hen. VIII, c. 4, which was made on purpose to remove an inconvenience that arose from this want of privity between the recoveror and the tenant in tail. By that Statute, the recoveror has power given him to avow and justify for the rents, services, and customs reserved, in the same manner as the tenant in tail might have done, which supposes he could not have done so before. And that Statute had been useless if the recoverors had been in of the same estate which the tenant in tail had before, for, then, according to Doctor and Student, c. 26; Co. Litt. 101,² he might avow and justify under his title. But the recoverors do not affirm the possession of the tenant in tail, from whom they recover, nor claim by him, but, rather, disaffirm and destroy his estate. And, therefore, they cannot allege

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¹ Stat. 7 Hen. VIII, c. 4 (SR, III, 178).
any continuance of their title by him so that the recoverors do not come in by
the *per or cui*, but in the *post*, and, consequently, are seised of a very different
estate from the tenant in tail.

The reason why the remainderman has no part of the recompense in
value upon a recovery is because that recompense is a fee, upon which no
remainder can be limited.

To conclude this head, I think, if the old fee cannot take place so as to
make him tenant in tail at the time of his attainder, then the new one must,
which I hold to be a purchase, and, as such, made void by the Act.

But, as to the second point, whether the estate of the late earl be not
within the latter part of the Statute, an interest arising to him by virtue of
some act or thing had, done, or suffered for his benefit, it has been said by my
brother Page that this latter clause ought to be tied up to the former and as
intended to take in nothing more than what was before comprehended under the
word ‘purchase’.

But first, here are no words by which this is referred to the foregoing
part. In the next place, I must observe that the latter words are more gen-
eral than the former and, though sometimes subsequent particular words do
restrain more general ones that precede, yet I never heard that general ones
that come after were restrained by particular ones that preceded. Should we
interpret this Statute in the manner my brother is contending for, we should
render the most common form of speaking and writing vain, where a person
that would take in everything begins with enumerating particulars and, then,
lest anything should have escaped him, adds the most general words he can
think of to supply all possible deficiencies.

The first clause disables the party to purchase, and the second makes all
estates etc. for his benefit void. But, if the latter words are to signify purchases
only, there could have been no need of them, it being precisely the same thing
to disable the party to purchase and making his purchase void. I shall give
you two instances of this. The first is Rex v. Corporation of Portsmouth, on
the [Statute of] 13 Car. II, c. 1, § 12,¹ which enacts that no person shall be
elected into any office that shall not have taken the Sacrament, and every per-
son elected shall take the oath, and, in default thereof, such election shall be
void. I objected that the words ‘in default thereof’ were to be understood only

of taking the oaths, and not the Sacrament. But the court said that could do us no service, because the incapacity of being elected which was created before in those who had not received the Sacrament was the same thing as making their election void, and so there was no occasion for those latter words. The other instance is that of Magdalen College Case,\(^1\) where, by statute, all leases and grants by that College are made void, and it is there adjudged that this is the same thing as disabling them to make any grants or leases.

I can easily admit these latter words to be explanatory of the former, but still in such a manner as to carry the disability farther than those did, for the legislature considered that there were several ways by which Papists might come to estates, which would not come under the notion of purchase, though equally within the mischief it intended to remedy. And, therefore, that they might be sure not to leave any part of the danger unguarded, they added those latter words in order to take in all which the former would not.

In our case, indeed, the Statute does not say the conveyance to a Papist shall be void, but the estate shall be so. This amounts to the same thing as a lease to a monk for life, remainder over in fee; the whole deed is void, because it can have no effect unless it passes the particular estate, that being necessary to support the remainder. 9 Hen. VI, 24b, Bro., \emph{Grants}, 133.\(^2\) But, if the conveyance can have another effect, the deed shall be good to that purpose, though the particular estate be void. Thus, a devise to a monk for life, remainder over, is not void; though the monk cannot take, it shall be good for the remainderman. But, in the present case, the recovery itself is void, because it can have no other effect but to pass an estate to a Papist, and, since the recoverors cannot take for his use, they cannot take at all.

The matter, therefore, may be reduced to this dilemma. Either the estate tail is barred or it is not barred. If it is barred, the fee is in the recoverors and the same moment in Lord Derwentwater. If it is not barred, then the entail continues, and, consequently, is forfeited by his attainder.

My brother calls this a relative clause, but I can find but one word of that nature in it, which is such, and that has nothing to do with purchasers,


\(^2\) YB Trin. 9 Hen. VI, ff. 23, 24, pl. 19, Brooke, Abr., \emph{Gravutes}, pl. 133 (1431).
but is used only to show that the same persons, Papists, I mean, are concerned
in this as well as the former clause. Indeed, there are other words in it which
can have no relation to purchases, such as the words ‘trust’ and ‘suffered’.

It was said the word ‘suffered’ may be understood of suffered by dis-
seisin; though I should allow of this, yet it does not follow that it does not
extend to common recoveries too. In truth, the word is applicable to both
cases, and many others, as in Magdalen College Case, where the words of the
Statute are the same as here, and [it was] held that a fine and non-claim is
within the word ‘suffered.’ Otherwise, it would be to no purpose to prevent
alienations, if, by suffering a fine to be levied and five years to pass without a
claim, the estate might be passed.

Now, let us consider whether the interest gained by this recovery suf-
fered by Lord Derwentwater himself is not to the purposes of this Act the
same as if he had gained it under a recovery suffered by another. I think it is.
It is an act by which he procures to himself a larger and more valuable estate
than he had before, and he gets it too by taking away from another person.
As Doctor and Student expressly says, he gets what he has from the remainder-
man. It makes no difference that all this acquisition is only in the same lands,
for a larger and better estate in the same lands is all one in this respect as a
new acquisition of new lands from a stranger. Thus, where one devised lands
to J.S. for life and ‘all other my lands’ to B., it was held, All. 28; 1 Lev. 212,1
that the reversion of the lands before devised to J.S. for life passed, because a
further interest in the same lands was construed by law as so much new land.

Suppose the remainderman had conveyed his right to the late earl. Can
anyone doubt whether this had been a new acquisition within the Statute?
Now, where is the difference whether he gains the same thing by his own act
or the act of another? It is equally in both cases a new hereditament which he
has acquired in the same lands, and that is the same as other lands. 2 Vent.
286.2

1 Wheeler v. Walroone (1642), Aleyn 28, 82 E.R. 898; Cooke v. Gerrard (1667-
1668), 1 Levinz 212, 83 E.R. 374, also 1 Williams Saunders 170, 85 E.R. 171,
2 Keble 206, 224, 84 E.R. 129, 140.

2 Willows v. Lydcot (1689), 2 Ventris 285, 86 E.R. 443, also 3 Modern 229, 87
It is said that this Statute had no intention to take anything away from the Papists which they had, but only to prevent their having any more lands, and that to suffer a recovery is a power and right inherent in every tenant in tail.

To this, I answer the Statute does not, nor does my argument need it should, restrain a Papist from suffering a recovery to the use of a Protestant. But whether it intended to take away this power when it is to be used for the benefit of a Papist is the question. To say there is no express intention to prejudice the present right of Papists to their estates is of no weight, because whatever is comprehended under the general incapacity put upon them by the Statute has the same force as if it was actually named. And I think I have proved that the present case is so.

It may be said that the Parliament intended not to take away any right from Protestants, but yet we see it does, for it prevents their selling to a Papist, who may offer more for it than another. So in the Statute 1 Geo., against traitors, it was far from the principal design of that Statute to injure good subjects and Protestants, and yet it has taken away a real interest from them, for it vests all estates tail of traitors in the Crown in fee, whether the remainder or reversion be in a Protestant or a Papist. It is the consequence of the Statute, and it cannot be helped.

But to make this objection the stronger, it is said that this right of suffering a recovery is so closely connected with the very estate of a tenant in tail that it cannot be taken away by a condition.

I agree such a condition generally is void, but not where it restrains the alienation to a particular person. This is our very case. The suffering of a recovery is left open for the use of Protestants, but restrained only as to a particular sort of persons. Whether a recovery by a Papist tenant in tail to his own use is not one suffered for the benefit of a Papist as well as where it is suffered for the use of another Papist is a question not at all affected by this objection. Nor does the Statute regard whether it be by a Papist, as my brother imagines, but, if it be to or for a Papist, it is sufficient.

I would now consider whether the law has not some known species of incapacity under which the case of the Papists upon this Statute may be ranked. I think it has. Capacity and incapacity to purchase have been long

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1 Stat. 1 Geo. I, stat. 2, c. 20.
known in our law and signified certain precise conditions or circumstances of persons, which lawyers have been at no loss to determine. When this Statute, therefore, incapacitates certain persons to purchase, it must be understood to put them into the same condition in this respect as those were in whom the law formerly took notice of as incapable of purchasing, such as monks and other religious persons. And the Parliament seems to have had their eye upon these sort of persons and to lead us to make this comparison in using the same form of expression to describe the incapacity in this Statute which is made use of in the [Statute] 31 Hen. VIII, c. 6, which enables monks to purchase after deraignment.¹ The Papists, then, are to be considered in the same condition as monks, and, as substantia non recipit majus aut minus, the incapacity to purchase must be equal in both. And, consequently, he can no more take an estate by virtue of a common recovery by whomsoever suffered than a monk could have taken it.

I cannot imagine how the danger of perpetuities comes to be laid in the way. Nobody pretends that a recovery to the use of a Protestant is prohibited, and, as long as Papists are at liberty to suffer them, though with that limitation, they may mortgage, they may sell, or any ways load their estates, and so carry forward the very end and purpose of the Statute, which was to remove the land of the nation out of Popish hands by obliging them to sell. Nor is this any real damage to the Papist himself, since, though he parts with his land, he has an equivalent for it.

It has been said by some of the counsel that this point was determined in the Case of Thornby v. Fleetwood, post 318.² But this objection was never made in that case. And, indeed, it had been very impertinent, for, first, one of the recoveries in that case was before this Statute, but, if both had been since, it could not have made for the plaintiff, because, if they had been void, it would have given him no title, for then Charles, lord Gerard, had been seised in tail and the heir in tail is now living. But the true point in that case is whether Lord Gerard took any estate at all so as to enable him to suffer a recovery.

Another objection has been made that to destroy this recovery of Lord Derwentwater would be dangerous to many Protestant purchasers, who have

¹ Stat. 31 Hen. VIII, c. 6 (SR, III, 724-725).
come in under such titles. But whatever this might have been formerly, it is now removed by the Statute 3 Geo., cap. 18,¹ which secures Protestant purchasers and looks backward as well as forward by enacting:

that no purchases made or hereafter to be made by Protestants of Papists shall be impeached on account of any disability the Papists were laid under, either by 1 Jac. or our statute.

Having thus answered the inconveniences urged on one side, let us now see whether there are no unanswerable ones of the other. And I think there are, for, first, to establish this recovery is to give Papists a power of cutting off Protestant remaindermen and so far taking away the very landed interest of Protestants. Second, they will be able by this means to turn the course of descent as it shall serve the purpose of removing the estate out of a Protestant into a Popish line. Third, they will have a power of making themselves tenants in fee and, upon occasion, to distribute freeholds in a county and influence the state of our legislature by the votes they make at their election. Fourth, it puts the heir too much in the power of the ancestor, who may make use of his liberty, with a view to prevent the conversion of his successor.

Upon the whole, I am of opinion this recovery is within the words of the Statute, both as a purchase and as a greater and better estate which is gained from the remainderman and turns to the benefit of a Papist, for the danger can never be the less where he gets it for nothing than where he pays a valuable consideration. If it be within the words, why is it not within the meaning? Is not the meaning to be collected from the words and the words to be interpreted according to law? It is certainly right what the judges said in Roper’s Case that the words of a statute are to be taken in a legal sense, unless the intent appears to the contrary. And to say the acts of a stranger only are restrained and not of the Papist himself is to speak without any warrant from the Statute, for that makes no such difference, but leaves the persons conveying all upon the same foot with no other regard but to whom it is conveyed.

I would now mention some cases to justify and clear my opinion. Roper’s Case, I apprehend, is much stronger than this. That was a devise of lands to trustees to be sold and, after payment of debts and legacies, the surplus was to go to a Papist. And it was adjudged in the House of Lords that

¹ Stat. 3 Geo. I, c. 18, s. 4.
this devise of the surplus was void, not upon account of the possibility that
the Papist might have the land itself, for, in such cases, if the Chancellor takes
care that the trust be executed and the land sold, the Papist can never have the
land, and, in fact, the land was sold when that cause came into the House of
Lords, so that it was really but a pecuniary demand. But, because of the con-
nection with land and because it might draw that along with it, it was held
to be within the Statute. And, in the present case, here is a greater and more
valuable interest in land gained by a Papist, which makes it much stronger.

Another case I shall mention was Humphrey’s Case, which came out
of the Northern Circuit to be argued above. A lessee for ninety-nine years
yielding rent surrendered to a Papist, the reversioner in fee. And it was held
nothing passed, and the surrender was void. It was held so by My Lord Chief
Baron Ward. Now, I would observe that, in that case, the reversioner did not
take by purchase, but the benefit which accrued to him was by a merger of the
term. But, because it was an enlargement and a bettering of his estate, it was
held to be within the Statute. And where is the difference whether his estate
be enlarged before or behind by the addition of a particular estate preceding,
intervening, or coming after his own? The only thing that is material is the
increase, and there is that in our case, as well as in the other.

To conclude, the words of this Statute are general and as large as could
be contrived to take in all conveyances and to obviate such objections as are
now set up. The rule of law in construction of these statutes warrants the tak-
ing them in a full latitude, for its being a penal law will entitle it to no favor
where religion and the public are concerned. And so it was resolved in Foster’s
Case and Magdalen College Case. The Statute takes in both considerations.
It is made for the preservation of Church and State, and, therefore, is to be
carried to its utmost extent.

For these reasons, I am of opinion that the claim was well disallowed,
and, consequently, the decree of the Commissioners ought to be affirmed.

Mr. Baron Montagu’s argument: This is a case of great importance, as
it is on the construction of a Statute, which, though made twenty years ago,
has never yet been fully considered. And it is of difficulty too, because two

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1 Shoyle v. Foster (1614), 11 Coke Rep. 56, 77 E.R. 1222, also 1 Rolle Rep. 88,
81 E.R. 349, 2 Bulstrode 324, 80 E.R. 1158; Magdalen College Case (1615), 11
learned judges have already differed, and I believe I shall differ from both in many points.

It appears that, at the time of the suffering of this recovery, there was a marriage settlement on foot, and it is evident to me that the recovery was had for that end. Lord Derwentwater is a tenant in tail of an ancient family estate with remainders over. When a treaty of marriage was on foot between him and Sir John Webb's daughter, in order to make a jointure and provision for the marriage, he agrees according to the common method of conveyances to make a tenant to the praecipe in order to suffer a recovery, and he declares the uses to himself for life, then to his wife for life, remainder to the claimant as first son in tail. Such recovery was had, and the marriage took effect. He was attainted of high treason. And the question is whether the estate is forfeited so as to exclude the first son of the marriage.

For my own part, I think the matter will come to this dilemma, either Lord Derwentwater took by virtue of this settlement or he did not. If he did take, then, it was for life only, and he could forfeit nothing but an estate for life, and, being dead, the claimant's estate tail must take place. If he did not take by virtue of this settlement, what hindered him? The Statute, say they, of 11 & 12 Will. III, which makes him incapable of purchasing. And, if so, then nothing was in him to forfeit.

The only way of avoiding this dilemma is that which brother Fortescue has taken, by saying that not only the uses to Lord Derwentwater himself are void but the whole conveyance is void also; nihil operatur by all this. Here has been a bargain and sale to make a tenant to the praecipe, a recovery suffered, uses declared, and all this comes to nothing. This, I take it, is the foundation of the judgment given by the Commissioners. But, surely, he that considers the words of the Statute, which says only 'that all estates and interests for a Papist shall be void', but mentions nothing of the conveyance itself, cannot be of that mind. But it is said it amounts to the same thing in the present case, for, if the uses made are void and he is disabled to take and so the conveyance carries nothing, it is really making the conveyance itself void. And the case of a monk is put to support this, where a lease to him for life, remainder over, is void as to the whole conveyance on account of his incapacity. I agree it is so where the conveyance is to a person incapable of taking. And so, if, in our case, the conveyance had been to a Papist, this might have been true. But here are several persons capable of taking concerned in this conveyance.
There are several remainders over that may be good, since they are to persons who do not yet appear to be Papists. And the present claimant is young and may become a Protestant. There are also trustees to preserve the remainders from the ceasing or forfeiture of the particular estate so that I cannot see that Lord Derwentwater's incapacity will make the whole conveyance void when it may and was intended to subsist for other purposes than that of passing an estate to a Papist.

Let us consider this whole conveyance particularly. Here is first a bargain and sale to Vaux for a valuable consideration, *viz.* 5s. He is a Protestant, therefore, without doubt, everything is right thus far to vest the estate in him and make him tenant to the *praecipe*. Supposing now the subsequent recovery be entirely void. The estate, then, remains in him. This appears evidently from Poulter's Case, 1 Co.,¹ that, though superstitious uses are void, yet, if a penny had been given as a consideration, it would be sufficient to pass the estate absolutely to the feoffees to their own use; otherwise, it would revert to the feoffor. In our case, the consideration is greater, for 5s. was actually paid. And this shows that the uses to a Papist may be null and yet the conveyance not be void.

If, then, the bargainee is seised of this estate, it must be out of Lord Derwentwater, and it cannot be otherwise, unless the *praecipe* be brought against Vaux.

The next thing is the recovery. And this is gained by one Ridley. He, too, is a Protestant capable of taking, and, consequently, the recovery vests the fee simple in him. Should, now, the uses of this be void, the consequence would be that Lord Derwentwater would gain nothing by it, and it would make him incapable of losing anything also, since all the estate he had is passed away to others already.

Brother Page says that it is the right of a tenant in tail to suffer a recovery. I agree it is so, with this limitation, that no act of Parliament declares his suffering it a forfeiture, as in the case of a tenant for life. But how comes it to be his right? It is the right in common justice of all mankind to bring a [writ of] *praecipe* when they have a better right than the tenant in tail, and, when the recovery passes against him, it is because, in intendment of law, the demandant has the better right. This is the ground of the judgment, and this

is the true reason of its being a bar to the remainderman as well as to the tail. The demandant recovers a clear fee simple, on which no remainderman can depend, without any regard to, or being at all affected by, the particular limitations of the estate of which the tenant was seised. All the dependents on the estate tail can have nothing to say to him who comes in under the recovery paramount to the tail.

My brother who argued first mentioned the case of Benson v. Hodson, in 1 Mod., but did not make use of the point resolved by the court, but only the saying of Lord Hale in relation to recoveries. I never found my opinion on the dictums of reporters, in which they are very apt to mistake the words and sense of the judges from whom they take them. And so it seems to be in that case. Lord Hale is there reported to have said that the recompense in value is not the reason why common recoveries are bars to the remaindermen, but because those are conveyances excepted out of the Statute de Donis. But it is the text of Litt. § 688 that, if a tenant in tail suffered a feigned recovery, the issue might falsify it in a [writ of] formedon. This shows that, at common law, such recoveries as we now make use of to bar estates were not known. And, therefore, it would have been ridiculous in the Statute de Donis to have excepted recoveries, since common recoveries were not used, and recoveries on good title could not be imagined to be included. If issue was taken on the disseisin alleged in the writ of entry and found for the demandant and so the recovery on a point tried, this, at common law, would bar the issue there, laying an attaint against the jury, though, where it was by default, it would not. But, afterwards, another middle way was found out and favored by the judges to prevent the inconvenience of perpetuities. And that was, where the tenant in tail appeared and vouched over and the vouchee made default and, so, there was a judgment for a recompense to one and for the land demanded to the other, this judgment, though by default and without an issue tried, was held a bar, on account of the recompense in value.

My brother Page’s notion of Lord Derwentwater’s coming in under this recovery by operation of law, as something distinct from either a purchase or descent, is very new and uncommon. One of his instances of an estate’s passing in that manner is the case of a tenant by escheat. But I think my brother Fortescue’s opinion is right as to that, for he certainly comes in by descent, in loco haeredis.
But why is not this taking by the recovery a purchase? I wonder how that can be made a question amongst lawyers. Is not this the very point in Shelley’s Case,¹ where old Edward Shelley is adjudged to be a purchaser of a new estate by suffering a recovery?

But, then, the question is whether this be a purchase within the meaning of the Statute of King William. As to that, I think I need not enter into it, because the case turns upon the dilemma I mentioned before.

My opinion is that the conveyance and recovery are good, and, if My Lord Derwentwater gained any estate, it was but for life. If he gained none, he had nothing to forfeit so that taking it either way, he being now dead, the Commissioners had no right to seize his estate. And, consequently, their decree ought to be reversed.

Mr. Justice Tracy’s argument: I am of the same opinion with my brother who argued last that the decree of the Commissions ought to be reversed.

The question is whether the recovery be void or not, which depends on that part of the Statute by which every Papist is disabled to purchase in his own or another’s name, and all estates, terms, and interests had, done, and suffered for his benefit or relief are made void. I take this to be one entire clause, and the latter part was put in only to explain and enforce the former. And there was great reason for it. The first part only disables Papists to purchase lands but not interests or profits out of lands. And, therefore, the latter was necessary to disable him to purchase those as well as the lands themselves. But, if the latter part is to be construed as a distinct independent clause, then the first part would be rendered wholly insignificant, since the latter has all that the first has and much more. So, in 1 Jac. I, c. 4, from whence this clause is taken, persons passing or sent into Popish seminaries beyond the sea are made incapable as to themselves only, and not as to their heirs, of inheriting, purchasing, or taking any manors, lands, etc. ‘and all estates, terms, and interests made, suffered, or done to or for their benefit and relief shall be void’. Now, this must be taken all together but as one entire clause, for, otherwise, the latter part will be a repeal of that part of the foregoing which makes them incapable only as to themselves, and not as to their heirs.

But, now, as to the meaning of the clause before us. It sounds strange to me that the act of the tenant in tail himself on his own estate should make him a purchaser of it. A purchase I take to be *acquisitio rei alterius*, either by free gift of the former owner or for a valuable consideration. 1 Inst. 18b. But what is a common recovery? It is nothing but a common conveyance and the only method which the law gives the tenant in tail of enjoying his estate in its full latitude. And it is as much the proper conveyance of a tenant in tail as a feoffment is of a tenant in fee simple, and it is, therefore, very unlikely to be restrained by the general words of a statute. I think it could not be the intent, since there are no express words to that purpose. And I am the more inclined to such an opinion in this case, because it appears to me that such a restraint, instead of promoting any end of the Statute, serves to defeat its principal design.

The strength of all that has been said to bring the recovery within the disabling clause lies in this, that the fee gained is a new and greater estate than Lord Derwentwater had before, and so it makes him a purchaser.

But this is more in appearance than in the nature of the thing. I think the recovery cannot be said to give any new estate, because it operates only by way of bar, and an estate or interest barred is extinct and gone and cannot properly be said to be transferred. The suffering of a recovery is no more than making use of that very power which the law had given him over his own estate. And, when he has by this gained the fee, he has in reality got no greater interest in it than he had before. The course of descent only is altered, so that it shall now go to one sort of heir, whereas, during the continuance of the entail, it would have gone to another. But, as to himself, he had the whole estate absolutely at his own disposal before, and he has no more than that now. How then can this be said to be a purchase, especially in so penal a law?

But, if this is a new estate, from whom does it come? Not from the remainderman or reversioner, for their estate is gone and extinguished. And, therefore, the case of a grant from the reversioner of his reversion is very different, and so of a surrender of a tenant for life to the reversioner. In both which cases, there is an estate really taken from another man by his own act and consent. So [it was] in Lord Lincoln's Case, cited by my brother Fortescue. He had devised the estate, and then he made a lease and release to the use of himself and his heirs. And it was held to be a revocation of the will. But this would be the same if a man after making his will makes a feoffment
to the use of himself and his heirs. This is a revocation, because it shows an alteration of his mind, but yet, in that case, it is confessed he would be in of the same estate.

The recoveror is merely a nominal person, which the law requires in order to fulfil the solemnity of a recovery, but he has nothing at all to do with the estate. And, if the tenant makes no declaration of uses, the law will do it for him, for the estate passes only from the tenant in tail and not at all from the recoveror. And so it was held in the Case of Abbot v. Burton, Salk. 591.1

The case of a feoffment and refeoffment is very different, because the estate in that case was once really out of the feoffor and, when it comes back again by the express act of the feoffee, it comes as a perfectly new estate. But, in our case, in consideration of law, the estate was never out of the tenant in tail. The bargain and sale to make a tenant to the praecipe are but one conveyance, and, to whomever the use is limited, he takes immediately from the tenant in tail.

I cannot think the lord by escheat comes in by descent, as has been said. There is no foundation for it in Co. Litt. 18b. He only says that such an estate differs from one by purchase, because he comes in by operation of law, as he does that comes in by descent. But this does not prove that the lord by escheat comes in by descent.

But, now, if the law itself, as I have said, would make a declaration of uses of the recovery to the tenant in tail in fee, which can be nothing but the old estate which he had before this conveyance, it is the same thing if there be an express limitation in the same manner as the uses would have resulted. This was adjudged upon two ejectments in the Case of Godbolt v. Freestone, 3 Lev. 406.2 A man seised ex parte materna makes a feoffment to the use of himself for life, remainder to his wife for life, remainder to the issue of his body, remainder to his own right heirs. He and his wife died without issue. And the question was between the heir of the part of the father and the heir of the part of the mother. And [it was] held that this was the old use remaining in him, and there was no difference whether the use be by express limitation

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or implied by the law without limitation, and, therefore, should go *ex parte materna*.

Some stress has been laid on the word 'suffered' in the Statute, as particularly adapted to the case of a recovery. And I should think this of some weight could that word be applied to no other recovery but this. But there is room enough for the use of that word without taking in the present case. It may be applied to the case of a fine, to a recovery of a stranger's estate by a Papist, fairly or by collusion, and, in general, to all recoveries whereby a Papist is to gain some really new estate.

But, if this recovery should be strictly within the letter of the Statute, yet I do not think it is within the meaning of it. The intent of the Statute was to take away the capacity Papists had of acquiring new estates, not the power of disposing of their old ones. And, on this ground, I conceive there may be several cases put, where even new estates may be gained, and yet not be within the meaning of the Statute. As if a Papist had before the Statute made a settlement to himself for life, with remainders over, and a power of revocation, and, after the Statute, he had executed that power; he has now gained a new estate, and yet, as this is only making use of the power he had over his own estate, I think it will not be within the Statute. Suppose a Papist should in an [action of] ejectment recover an estate. Will anybody say this is within the Statute? Or suppose, before the Statute, he had a particular estate with a condition of accruer of the fee on the performance of a certain act. Shall he not perform this and gain the fee to himself, notwithstanding the Statute? Surely, he shall, for the Statute had no retrospect to take away any right vested in a Papist.

Another reason why I think it not within the Statute is because it will not answer any end of the Statute to construe it so. The end of it was to lessen the Papists property in land. But how can this be answered by forcing them to continue their ancient estates? By virtue of the tenancy in tail, they have an equal share of power and influence in the country as if they had the fee. They have the same power in elections. They may give freeholds, and not only make votes, but even give capacities to stand as candidates for an election, for he may make them an estate for life, and I am apt to think a tenant in fee would go no farther.

But not barely to say this construction will not answer the end of the Statute, I am bold to say this construction will in a great measure defeat it.
by making the estates of Papists much more secure than they were before. By allowing these recoveries, all Papists in remainder and reversion are cut off. The estate becomes assets in the hands of the heir. It is liable to charges in favor of younger children. And all sorts of encumbrances, which are excluded by the continuance of the tail, are let in. And it is subject to more forfeitures, particularly for felony, which the tail is not liable to. And, thus, by loading the estate, a Papist will be at last obliged to sell, and then the end of the Statute is answered.

No argument can be drawn from the unreasonableness of putting the remainderman and reversioner into the power of the tenant in tail, for we see the Statute of Forfeitures has taken no care of them at all. And why we should be more solicitous for them than the legislature was, I can see no reason.

The Case of Roper v. Radcliffe I think not at all like this. The true reason of that judgment was that, if he had taken by the devise, it was looked on in the nature of a purchase of the land itself. My brother Fortescue says the estate was sold before the hearing in the House of Lords, but I do not know that.

This Statute is now twenty years old, and many purchases have been made under such recoveries as these, which were never questioned until now. And, though there is a Statute lately made for the security of such purchasers, yet I cannot but pay a very great regard to the opinion of so many learned men, who have gone on in this method ever since the Statute.

As to the point of the reversion in fee expectant upon the intermediate remainders’ being now let in by this recovery, it was mentioned by the counsel, but I shall not give my opinion upon it, because I think it not necessary, and, besides, it is a very important point, only the Case of Symmonds v. Cudmore goes a good way to prove it.

Upon the whole, I think this recovery to the use of Lord Derwentwater in fee was good. And, therefore, the decree of the Commissioners ought to be reversed.

Mr. Justice Powys's argument: Before I deliver my opinion, I would just take notice of what is agreed in this cause, which is, first, that a Papist may suffer a recovery in order to make a title to a Protestant purchaser, and second, that, if the recovery had been declared immediately to the use of

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1 Stat. 3 Geo. I, c. 18, s. 4.
Lord Derwentwater for life etc. *prout* the settlement, it would have been well enough, which I take to be a great concession.

I am of opinion to allow the claim. There have some things been mentioned in this case that seem not so necessary to be insisted on, because that which I take to be the main point is not affected by them, as whether the estate is so fixed in the tenant to the *praecipe* as to continue in him if the recovery should be void. But I take it the whole conveyance is of a piece and must stand or fall together. And, if the recovery is made void, I think the whole conveyance must be so too.

Another matter not so necessary is *quid operatur* by all this. Whether, under this recovery, Lord Derwentwater is in of his old or a new estate, I shall take no notice of this, but go directly to that which will determine the whole case. And I am clearly of opinion that the recovery suffered in this manner is not within the Statute.

Originally, an estate tail was fee simple conditional, and the tenant had the same power of aliening it after issue had that a tenant in fee simple now has. It was this that *potestas alienandi* was struck at by the Statute *de Donis*, which had no intention to alter the nature of the estate, but left it to continue as it was before. Salk. 619.¹

But, then, they began to feel the inconvenience of perpetuities, and, upon that, they looked out for a method to trip up the Statute *de Donis* and make these entailed lands capable of being purchased. For this purpose, common recoveries were set up and allowed. And these are said, Salk. 338,² to have taken off the protection of the Statute *de Donis*, which is as pretty an expression as I have met with. And the use of these recoveries for that purpose is grown so common that they are now looked upon merely as a method of conveyance, by which the power of alienation that tenants in tail have over their estates is to be exercised and the estate conveyed is not supposed to arise out of the estate of the recoveror, but of the tenant in tail only. Hence it is that recoveries have all along been construed most favorably, not under the notion of a judgment in a suit at law, but as a common assurance. And Cromwell’s Case directs the judges not to look into them with eagles’ eyes. They have been allowed even of advowsons, though no *praecipe* lies of them.

¹ *Symons v. Cudmore* (1691-1693), *ut supra*.

² *Symons v. Cudmore* (1691-1693), *ut supra*. 
The preciseness of form, which is required in other writs, is not necessary in them. \(^2\) Remainders and reversions expectant on estates tail are so much in the power of the tenant in tail that they are of little or no consideration in law.

It is said that the recovery enlarges the estate. But I deny it, for the estate tail is still a fee simple conditional, as before the Statute of Westminster II, and that, in the eye of the law, is equal to an absolute fee simple, and, therefore, capable of being exchanged for it. It is not an enlargement, but only a removing of an obstacle.

Suppose, before the Statute of Will. III, a Papist had been in possession of an estate defeasible upon tender of a ring and, after the Statute, that right of tender had been released. Will anybody say this is a purchase of a new estate, and, as such, made void by the Act. I believe nobody would offer to assert it.

As the estate is not enlarged by the recovery, so what is gained under it is served out of the old estate. It is not a new estate which is gained, but only an excrescence, as a new sprout can never be called a new tree. Hence, all grants and encumbrances made by a tenant in tail are still charged on the estate in fee. It takes them as related to the former estate, whereas, if this was a real recovery of an estate paramount to the tail, all those charges would be gone.

I think this right to suffer a recovery is such an inseparable interest as cannot be taken away without express words. \(^1\) And I am of opinion with my brother who argued last that to allow of these recoveries is a weakening of the Popish interest, for the reasons which he has given.

There is another thing proper to take notice of, which arises out of the Statute we sit upon, which vests the estates tail of traitors in the Crown in fee. This shows the sense of the legislature as to the tenant in tail’s estate, that it is in effect the same as a fee and that he is the perfect master of the whole fee. Otherwise, they would be guilty of an injustice too great to suppose them capable of in stripping the remainderman, who has committed no crime, of his estate merely because the intermediate tenant had committed treason.

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According to the opinion of the four judges who argued for the claimant, the decree of the Commissioners was reversed, and such judgment was given as should have been given below, viz. that the claim be allowed.

[Other copies of this report: Free Library of Philadelphia MS. LC 14:81, f. 76v.] [Other reports of this case: 2 Eq. Cas. Abr. 621, 22 E.R. 520.]

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Morgan v. Caswall
(Del. 1720)

The question in this case was whether a creditor of a decedent should have administration of his estate where the executor of his will was of suspect credit.

Lincoln’s Inn MS. Misc. 147, p. 103, pl. 4

25 September 1720, Dr. Andrew; Dr. Sayer; Delegates.

Upon a suit of a will wherein Morgan was pretended executor, an appeal was made from the Prerogative [Court] to the [Court of] Delegates.

Upon appeal, counsel for Sir George [Caswell] suggested that Morgan was insolvent, litigious, and flown [from] his country several years upon a suspicion of high treason [and] moved that, under these circumstances, he should give security to answer for costs.

[There was] no proof, and the suggestion [was] denied. The prayer [was] refused, and Morgan was allowed to go on without.

Indiana University, Lilly Library
MS. ‘Cases in the Exch.’, vol. 5, p. 52
(Robert Price’s reports)


[There was an] appeal upon a grievance that the plaintiff being executor yet the defendant, who had a grant by a deed of some money and rent in arrear, would have a limited administration to himself quoad what Knight
conveyed to him *non obstante* the plaintiff was executor. It was said there ought to be no partial administrations by law. If [there is] an executor, though poor, he is entitled to the probate. The [Court of] King's Bench would by [a writ of] *mandamus* command a probate.

Stat. 31 Edw. III;¹ where [one] dies intestate, administration must be granted. But, if there is a will, it is a nullity.

Fox v. Gresbrook, Plow. [ *blank* ]; 2 Lev. 182;² 2 Jo. 12. [One] may make several executors as to several parts of the estate, and yet they are but one executor in law.

Dy. 3, 4.³

Thin's Case, 1711; where a limited administration was granted where there was a will, but the will was doubted, and where there were deeds much questioned, which the ecclesiastical court could not judge of but incidentally or as a matter of discretion. They cannot judge a trust good or bad.

Granting administration in a prerogative court is ministerial.

Where the next of kin refuse administration, a creditor may have it and put a bond in suit.

Stat. 25 Hen. VIII;⁴ administration [is] granted to the widow or next of kin. A prerogative court [may] vary from the Statute where an interest is in a party. Administration should follow the interest, as a residuary legatee is entitled.

There may be a will which may be revoked by a subsequent will and yet not be well executed.

The court overruled the judge of the Prerogative [Court] as to the grievance. And so the cause is retained upon the merits.

This cause of Morgan and Caswell was appealed from a grievance and was heard 13 December 1720 by Baron Price, justices Dormer and Eyre, doctors Penrice, Pagitt, Wood, Andrew, and Sayer, who gave a sentence for the appeal with £50 costs and admitted the allegation given by Grenly in

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³ *Anonymous* (1527), 1 Dyer 3, 73 E.R. 8, also YB Trin. 19 Hen. VIII, f. 8, pl. 1.
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**Court v. Allcock**  
(Del. 1720)

*The question in this case was whether the undisposed residuum of a decedent’s estate belongs to the executors or to the next of kin.*

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(Robert Price’s reports)


[There was an] appeal from a sentence in Dublin. William Alcock, 14 April 1717, by a will and four codicils, made the defendants executors. And he gave each of them a £100 legacy besides other specific legacies. And he gave the plaintiffs, who were his near relations, legacies. He did not dispose of the residue, which the defendants claim as executors and the plaintiffs claim as next of kin, entitled by the Statute of Distributions,¹ as dying intestate *quaod* the residue. And the sentence in Dublin [was] for the defendants.

In support of the sentence were cited Register 143; Co. Entr. 564; 2 Jon. 32, 179; Lindwood 175, 171; 5 Rep., Caudry's Case, 16; 2 Ro. Ab. 217, pl. 1; 2 Jon. 331, 334; 9 Rep., Hensloe's Case; Shower Rep. 73, 293; Salk. 299; Lynwood 179, 183; Littlebury and Buckly; the Duchess of Beauford’s Case; 1 Vent. 303, 2 Lev. 182, 3 Keb. 725, Abraham and Cunningham;

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¹ Stat. 22 & 23 Car. II, c. 10 (Re. V, 719-720).
Calverly v. Calverly, Mich. 12 Anne, King's Bench. Where an executor [was] made and had a legacy and [there was] no disposition of the residue, and the ecclesiastical court called the executor to distribute, the King's Bench granted a [writ of] prohibition and [held] that the executor had the right. Lynwood 108; Foster and Munt, 1688, in the [Court of] Chancery; Perkins, devise, sect. 525.2

For the appellant, [it was] insisted it has been a recent opinion, though not decided, that, where an executor has a legacy, he shall not have the residuum.

Agard v. Gifford, 1 August 1717; [there was a] bill of discovery as next of kin against the executor; the defendant demurs; Lord Chancellor Cowper would not hinder the plaintiff from a discovery whether the assets [were] great or full because he doubted the case. The Case of Lord Torrington [was] the same.

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Swinburn, of Wills, 6 part, no. 4, fo. 1; Wangford v. Wangford, in Salk.; Ray.; Poor v. Poor; Constitution of Ottobon 83, 84; Vaughan 182, Beddle v. Constable.¹

The judges and civilians were divided in their opinion. Doctors Wood, Pagitt, Penrice, and Bettesworth were for the appellants and that the defendants, though executors, ought to produce the inventory in order to [have] a distribution to the next of kin, that law and equity were for them.

According to Swinburn, before cited, the heir, not the executor, has the whole. In the Duchess of Beaufort’s Case, the legacy was a burden [and] no profit. [In] Lord Torrington’s Case, each executor had a £100 legacy, and Lord Cowper made it distributory.

In this will, the £100 legacy to each executor is over and above what was given before [and] must be for labor and pains.

The executor is quasi heir, but is a trustee, and he has his reward and is quasi [ . . . ] executor.

[One] cannot die testate and intestate; the hereditas was to the whole real and personal estate by the civil law; not so by our law.

Petit v. Smith; [ blank ] made his brother executor and gave him a £5 legacy. Dr. Oxenden did sentence him accountable and to distribute the residue. So did Sir Richard Raines in the year 1699, and Lord Somers and Sir John Trevor, Master of the Rolls, were of the same opinion.²

Henry Powle made two executors and [gave] a legacy to one of them. This was heard before Dr. Bettesworth in the [Court of] Arches, and he sentenced the residue to be distributed.

The judges Baron Price, Justice Dormer, Justice Eyre, and Dr. Pinfold were of opinion for the defendants, that the residue belongs to them as executors. By the common law, executors are instituted to the whole. Foster and Munt went upon the intent, that being the executor had a legacy [and] no more was intended him, when the law gave the whole. He would not

¹ H. Swinburne, Brief Treatise of Testaments and Last Wills (1590), f. 216v; Wangford v. Wangford (1703), ut supra; W. Lindwood, Provinciale . . . including the Constitutions of Otho and Othobon; Bedell v. Constable (1664), Vaughan 177, 124 E.R. 1026.

give a part if he intended the whole. Littlebury v. Buckly; the legacy did not exclude the executor. Lord Torrington's Case, which went no farther than to overrule the demurrer, but no distribution was decreed. It is plain the testator did not intend to die intestate, having provided for his relations and next of kin. Calverly and Calverly; a [writ of] prohibition, which showed the sense of the common law court.

There being four against four and the judges [being] all of one side, the case is left for a commission of adjuncts.

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Brown v. Heath
(Del. 1721)

In this case, an imperfect testamentary schedule was admitted to probate as the decedent's will.

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(Robert Price's reports)


The defendants propounded a testamentary schedule of Brown, which the judge of the Prerogative [Court] decreed the will [and] administration. And Brown, the relation, appeals to the Delegates.

There was a parchment and a blank [space] for the residue. And [it was] never read over.

The executor had no legacy, but [was] entitled to the residue. [He] made Dr. Dollen his executor, who renounces, [and] gave two charities to charity schools.
A testamentary schedule was good before the Statute of Frauds\textsuperscript{1} for disposing of lands if the instructions were in writing and the party died before.

Dy. 72; 3 Cro. 100, Nash v. Edwards; Aleyn 54.\textsuperscript{2}

The executor at common law has the whole personalty. A military disposition, by the civil law, was a general testamentary disposition.

A letter of instructions [was] found about the testator or drawn by his order.

Godolphin and Swinburne.\textsuperscript{3} If a will be incomplete and shows an intention, it is enough.

Twyty v. Pool; [the testator was] worth £5000, and he gave £2000 by [his] will and went no further, and he made two executors; though [it was] not complete, [it was] adjudged for the will.

Sir William Robinson had a will executed in the presence of three witnesses. It was fraudulent and set aside. There was offered a draft of a will that had erasures and interlineations, though not finished, yet it was sentenced to be the will because it answered the intention [of the decedent].\textsuperscript{4}

The Sons of the Clergy, by this will, have £500 and interest. Every blank filled in this will appears of it so far.

None but the testator can make a will, and none can set it aside without a revocation.

The maker of the unfinished or incomplete will did not design to die intestate, and he declared he intended a new will.

Procrastination in executing a will is no revocation.

An unexecuted will will carry a personal estate. Imperfection in a will does not vacate a will, because the law disposes of the rest.

Swinburne, par. 12.

\textsuperscript{1} Stat. 29 Car. II, c. 3 (SR, V, 839-842).


\textsuperscript{3} J. Godolphin, Orphan’s Legacy; H. Swinburne, Brief Treatise of Testaments and Last Wills.

\textsuperscript{4} Note Annesly v. Palmer (1722), 9 Modern 7, 88 E.R. 280.
Imperfection will avoid by the civil law, but if it be a provision for a 
child or a charity or a military will, the *ius gentium* helps it if it be not com-
plete. It shows his intention was for charity.

An intention to revoke a will for a personal estate must be by a plain 
demonstration of such his intention. Uncertainties shall not revoke certain-
ties, or saying he would revoke is not a revocation. Mentioning a will is an 
abrogation of the will.

To have the possession of a will or of instruction (if for a personal 
estate), if [in] his own hand, is good, though he did not sign the will and 
would conceal his name.

It was objected that a [. . . ] executor is a trustee and not in his own 
right.

The law has given to the next of kin a right of administration, which is 
better than an uncertain will.

This parchment is without month or year, nor had a hand or seal, nor 
[was] ever read.

Pool and Twitty; he took the instructions and read them. One witness 
proved the reading, and the instructions [. . . ] made two witnesses.

[In the Case of] Sir William Robinson, both wills were executed; the 
first was erased and obliterated by his own hand, which was affirmed. And the 
latter was set aside for fraud.

Imperfections in a will are variable and ambulatory until death. But his 
approbation gives them a sanction.

The popular motive of charity must not take the place of justice.

The testamentary schedule was established, and the sentence of the 
Prerogative [Court was] affirmed.

The sentence was against the appeal, and the cause was remitted with 
£10 costs.

[Other reports of this case: Lincoln's Inn MS. Misc. 147, pp. 27, 129, 163.]
Pindar v. Pindar
(Del. 1722)

A judicial separation and alimony can be granted to a wife in a case of adultery and cruelty.

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MS. ‘Cases in the Exch.’, vol. 5, p. 71, pl. 2
(Robert Price’s reports)

14 February 1721. Baron Price, Justice Dormer, doctors Pagitt, Wood, Paul, Kinaston, and Andrew. The sentence was against the appeal, and the cause was remitted with £55 costs. Mary Pindar v. Matthew Pindar.

The libel was against the defendant for a separation for cruelty and adultery. [It was] proved that he lay with his maid, that he had £600 per annum, called his wife a ‘barren bitch, a beggarly, morose bitch’. In a case of adultery, there is no need of two witnesses.

Alimony is a third, a fourth, or a fifth part of what a husband has, not of her portion. A husband must aliment her. Alimony is the fifth part and discretionary where there are children.

Sir James Astey’s Case of alimony; [it was] allowed by the court to his lady £300 per annum.

The husband in such suits bears the charges on both sides. If he pays more, he may have it out of the alimony and interest if not paid.

The sentence was confirmed with £60 costs.
Hutchinson v. Vincent
(Del. 1722)

A motion to proceed in forma pauperis will be granted in consideration of the petitioner’s present estate only.

Indiana University, Lilly Library
MS. ‘Cases in the Exch.’, vol. 5, p. 71, pl. 1
(Robert Price’s reports)

20 April 1722. Baron Price, justices Dormer and Eyre, doctors Penrice, Pagitt, Kinaston, and Andrew. [There was a] sentence against the appeal, and the cause was remitted. Robert Hutchinson, appellant; Thomas Vincent, executor of John Hutchinson.

John Hutchinson gave directions for drawing his will, and he gave certain legacies, and he made Vincent executor. But he could not sign the will, but he declared it to be his will.

Objections against the will were made by interrogations.

No will in Scotland in extremis [is allowed]; [one] must go twice to church and twice to market before a will is allowed.

The sentence was confirmed.

Lincoln’s Inn MS. Misc. 147, p. 90, pl. 2

6 February 1721[/22] and 12 December 1722; Delegates.

Hutchinson, upon an appeal to the [Court of] Delegates from the Prerogative [Court] in a cause of a will, prayed to be admitted [in forma] pauperis. And he made oath that, debts paid, he was not worth £5.

It was objected that, in the will which he opposed as next of kin, £50 was left to him, so that, in case the will stood, he had £50 effects. And, if it was pronounced against, he would come in for a distribution, which would be considerable, and, therefore, he should be obliged to show the debts he owed would amount to £50.

It was adjudged that this affidavit was sufficient.
An affidavit is usually made that one is not worth £5 except from the event of the suit, which was for intestacy, as in the case above.

[It was] ordered by the court that the expenses should be discharged by the administrator *pendente lite*.

[Related cases: Hutchinson v. Vincent (Ch. 1723), 9 Modern 27, 88 E.R. 293, 2 Eq. Cas. Abr. 441, 22 E.R. 375.]

68

**Powis v. Andrews**

(Del. 1722)

Where witnesses were examined to prove a will, then the will was mislaid, the pleadings were amended, witnesses were examined to prove a duplicate will, and then the original will was found, the question was whether the original witnesses could be further examined.

British Library MS. Stowe 403, f. 39

12, 13 December 1722; Serjeants’ Inn Fleet Street.

[This was an] appeal from the judge of the Prerogative Court about proving the will of one Powel, to whom Andrews was executor, dated 10 February 1721/22. And Powis, being admonished to bring in all scripts and scrolls etc., brings in another will dated 6 June 1720, wherein he is made executor.

The first exception [was] for want of parties, that Powis had appeared by his proctor, but did not set out his interest.

But, *per curiam*, he, bringing in the will and being examined upon interrogatories, is properly a party.

Then he went on. And the case was [as follows].

The will of Andrews was propounded by Alexander, a proctor, and he produced two witnesses on the first allegation, which is called a *condidit testamentum*. These witnesses were sworn and admitted and ready to be examined to this *condidit*, which is the common proof of the original, identical will, as that that will was read over, the party approved of it, said it was his, was of
sound mind, and saw him execute and set their hands etc. Soon after, this will was lost or, rather, mislaid by the officer. And, to supply this defect, Alexander gives in a second allegation, in the twelfth article of which, two witnesses are produced to prove a copy of this will, the original being lost, which was not a proof of the original, identical will, but to the same effect as in the *condidit*. These witnesses were fully examined, and publication [was] ready to pass, but did not. And then, the original will [was] found. Then Alexander alters several of the articles, altered as superfluous, because the will [was] found. And he would give in an additional article to the twelfth article to prove the will now found.

And the judge rejected this article that was additional, because it was redundant. And he decreed the witnesses to be examined again on the *condidit*, who had been examined on the twelfth article. And he suffered those depositions of the twelfth article to stand, which some of the civilians said he might have suppressed, from which Powis appealed.

And that decree was affirmed unanimously, but without costs or expenses of either side, because it was a new case, which had never happened before and so agreed.

Dr. Lloyd said it was a rule in the civil law that, after witnesses were repeated, *i.e.* after they went to the judge, which is after the examination, and acknowledge them before him to be true and he signs them, the same witness cannot be examined over to the same fact unless it be *incontinenti*, *i.e.* within twenty-four hours, because the law presumes he may confer with the party and may be tutored. But, if he comes again within an hour, said Dr. Strahan, after repeating, the judge asks him if he had been with the party and, if he had, he admits him not.

Lutwyche said the rule in [the Court of] Chancery was, on the examination of witnesses, he shall not go away until he has finished his depositions.

But Chesshyre denied it and said it was only should not go away until he finished one interrogatory, for the other would be impossible.

Dr. Paul: [There is] no instance in our law that one and the same witness was ever re-examined to the same facts in different allegations. Indeed, in the [Court of] Admiralty, where a ship is taken as a prize etc., one may examine *in foro praeparatorio*, but when one comes in and makes a claim, the same witnesses shall be examined again, because they could not be cross-examined before. But, *in foro contradictorio*, it is never done.
Dr. Strahan quoted 1 Chanc. Rep. 25, 233.¹

Chessbye: In Chancery, where, for a slip or want of notice, depositions are suppressed, one may have a new one and examine the same witnesses. But here, as was observed, the witnesses and the twelfth article stand unsuppressed.

The Court held these witnesses to the twelfth article, which was to a copy, were not to the same matter as to the condidit, for that is to the original will and to the identity of it, which runs through all the parts of its execution and all the qualities, i.e. the preparation, directions, instances of sanity etc., for the counsel for the appellant agreed that the original will might be annexed to the twelfth article, but should be restrained to the identity that that was the original, of which the other was a copy.

But counsel said they could not tell how to restrain them and that the will being found and the twelfth article now out of the case and so the impediment being now removed, they were restored to their former right of examining upon the first article, i.e. the condidit, so only to reinstate us. When a person is examined as a witness, he cannot make a discovery to the party, for he is admonished not to discover under the penalty of perjury.

When the judges were agreed, Dr. Henchman objected to the word 'sententia' in our decree. And he said it ought to be 'justitia'. This was opposed by all the doctors of the other side.

And Dr. Tindall said he knew the objection made and so did most of the other doctors.

And the Register said it was just as the party would pray, and, if they prayed 'sententia', it was so.

But Dr. Henchman said it was improper, for sententia was where there lay an appeal, but where there lay no appeal, 'justitia' was the proper word and that he had made the objection several times and it had been allowed.

And the judges thought 'justitia' was a more decent and proper word. And that was inserted, and 'sententia' was struck out.

[Other proceedings in this case: Andrews v. Powis (Del. 1728), see below, Case No. 76.]

Austin v. Cocke  
(Del. 1723)

A lost will can be established upon proper proof.

Indiana University, Lilly Library  
MS. ‘Cases in the Exch.’, vol. 5, p. 74, pl. 1  
(Robert Price’s reports)

20 June 1723. Nathaniel Austin, appellant, against Nathaniel Cocke. Mr. Baron Price, Mr. Justice Dormer, and civilians.

[There was an] appeal against a sentence of [the Court of] Arches which established the will of Nathaniel Austin made in 1701. The defendant was her daughter and made her son-in-law Palmer executor of the will in writing. And the will is lost. But Mr. Palmer and one more prove the execution and the hearsay of Palmer, the executor, so that, in 1720, administration was granted to the defendant cum schedulis testamentarum annexo.

The plaintiff is the defendant’s brother, and he would repeal the administration. The length of time is the objection. But the defendant was in possession of the personal estate from the beginning.

The Case of Abercromby [was] where no will was perfected but [was] begun, and, so far, proved and allowed.

Sir Edward Seymour’s Case [was] where there was parol proof of a deed, which was lost, and [it was] allowed.¹

Culpeper and Wilby; they proved a will, though lost. Duncannon and Kinnet [?] [was] the same.

The sentence [was] confirmed.

[Earlier proceedings in this case: Lincoln’s Inn MS. Misc. 147, p. 30.]

Anderton v. Commissioners of the Forfeited Estates
(Del. 1723)

A professed monk can own land.

9 Modern 54, 88 E.R. 311

Upon an appeal from the decree of the commissioners etc. to the Delegates, the case appeared to be thus. Sir Laurence Anderton [d. 1724], being the eldest son of his father, went to Douai and there became a monk. Thereupon, Francis [1680-1760], the next brother of Sir Laurence, assumed the title and possessed himself of the estate of the family. But being concerned in a rebellion and taken prisoner at Preston in Lancashire, he was tried and found guilty of high treason. And, being pardoned as to his life, the commissioners seized the estate. And, thereupon, Sir Laurence, the monk, claimed it, insisting before the commissioners that his brother Francis had no right.

The commissioners having examined Sir Laurence upon oath by virtue of a power given them by that Statute,¹ which vests the forfeited estates in the king and, upon his said examination, he having confessed he was a monk, they decreed for the crown, for that, by the appellant’s profession, he was dead in law and, by consequence, incapable to take. And, therefore, the estate must immediately vest in his brother Francis, who being attainted of treason, the estate must be forfeited. And, thereupon, by the opinion of four of the commissioners against three, a decree was made for the king.

From which decree Sir Laurence Anderton appealed to the Delegates, who were Justice Powys, Justice Tracy, Justice Fortescue, Baron Montagu, and Baron Page. And the case was argued at Serjeants’ Inn Hall in Fleet Street, by Sir Philip Yorke, Solicitor General, in behalf of the appellant, and by Sir Robert Raymond, Attorney General, for and in behalf of the commissioners.

The counsel for the appellant insisted that there were two reasons which might induce the court to reverse this decree, first, for that it does not appear that the appellant is a monk professed, for, though, upon his examination, he

¹ Stat. 3 Geo. I, c. 20.
confessed he was a monk, yet he may be a monk and not a monk professed, but, if he was (which is not proved in this case), yet he is capable of taking this estate, for, though at common law, a monk professed was dead in law and, by consequence, incapable of taking an estate, yet, since such disability did arise by some canons of the Popish Church, which was the ruling Church at that time, and those canons being now abolished by Act of Parliament,¹ and there is no means left to try whether a man is a monk professed, or not, therefore, such profession shall work no incapacity in any man to take and enjoy an estate; so that, if it could be proved that the appellant was a monk professed, yet this decree ought to be reversed.

On the other side, it was argued for the respondents that, the appellant being taken into and living in a convent in foreign parts, there could be no possible means of proving him a monk but by his own confession and he having upon his examination confessed himself to be a monk, it must necessarily follow he is professed, because he is not a monk until profession. And, as a monk professed was by the common law of England made incapable of taking or enjoying an estate, because he was accounted dead in law, so it was not by the canons alone of the Popish Church, but even by the common law of this nation that such incapacity did arise. Therefore, the same disability still remains unless it can be shown that there is some statute which enables a monk professed to take and enjoy an estate, which they do not on the other side pretend to show.

The Solicitor General [Sir Philip Yorke] replied, that, if to say a man is a monk must imply that be is a monk professed, then the constant addition of that word in our law books would be impertinent, which it is not, for it is always used to show the difference between a monk and a monk professed. But, admitting the appellant is a monk professed, yet the law, as now established, does not take any notice of such profession. And, if it was a disability, it is not so now, because there is no method of trying whether a man is a monk professed or not, for the trial at common law was by the certificate of the bishop. But, as the law now stands, no bishop can certify a profession of being a monk. Therefore, it would be a very great hardship if this should work an incapacity, when there is no means of trying it. And, if it cannot be tried, then it is plain that the law does not take any manner of notice of it.

The decree was reversed by the opinion of the other four against Montagu, so far as to order that the appellant might bring an [action of] ejectment against the commissioners and try his title at law and that the decree should not stand in his way.

But in a little time afterwards, Sir Laurence took the oaths and received the communion according to the Church of England and became a Protestant and so enjoyed his estate without any farther trial.

2 Eq. Cas. Abr. 623, 22 E.R. 523

Trinity 9 Geo. I [1723].

J.S., the eldest son of A., became a monk. Thereupon, B., the next brother of J.S., assumed the title and possessed himself of the estate of the family. But, being concerned in a rebellion and taken prisoner, he was tried and found guilty of high treason. And, being pardoned as to his life, the Commissioners seized the estate.

And, thereupon, J.S., the monk, claimed it, insisting before the Commissioners that his brother had no right.

J.S., on his examination before the Commissioners confessing himself a monk, they decreed for the crown, for that, by J.S.’s profession, he was dead in law and, by consequence, incapable to take, and, therefore, the estate must immediately vest in his brother, who being attainted of treason, the estate must be forfeited. And, thereupon, by the opinion of four of the commissioners against three, a decree was made for the king, from which J.S. appealed.

And Powys, Tracy, and Fortescue, Justices, Montagu and Page, Barons, Commissioners Delegated, reversed the decree, so far as to order that the appellant might bring an [action of] ejectment against the Commissioners and try his title at law and that the decree should not stand in the way.

But, afterwards, J.S. took the oaths and received the communion etc. and became a Protestant. And so he enjoyed his estate without any farther trial.

An Englishman professed abroad was always and is now capable in England, and this was the better opinion.
Franklin’s Case
(Del. 1725)

A commission of review is discretionary with the court.

A commission of review will be refused where the purpose is to bastardize a person.

Select Cases tempore King 47, 25 E.R. 215
4 August 1725.

A marriage was had and, afterwards, a second marriage, by which there was issue and none by the first. Both the marriages were had in Ireland. There was a sentence was in the Consistory Court in Ireland for the marriage, which sentence was reversed by the Delegates there.

Now, application is made for a commission of review, which was objected to, for that, though commissions of review had frequently gone in respect of sentences relating to wills in Ireland, that was because the law here and there, as to them, are both the same, but it is not so in respect of marriage.

Lord Chancellor [LORD KING]: By the [Statute] 32 Hen. VIII, c. 38, where there is issue, a marriage shall not be set aside for precontract. That still is the law of Ireland, though altered here by 2 & 3 Edw. VI, c. 23, and, though 2 Edw. VI is repealed by 1 Phil. & Mar., yet it is revived by 1 Eliz., c. 1.¹

But though the law be different, if a commission should go, they must judge by the Irish laws.

A commission of review is not of right, but gratuitous and discretionary. That it is so must have been for some reasons, to re-examine where were [there are] visible hardships. The only end aimed at here by granting the commission is to bastardize the issue, which I shall never advise the king to do. If

¹ Stat. 32 Hen. VIII, c. 38 (SR, III, 792); Stat. 2 & 3 Edw. VI, c. 23 (SR, IV, 68-69); Stat. 1 & 2 Phil. & Mar., c. 8, s. 4 (SR, IV, 247); Stat. 1 Eliz. I, c. 1, s. 3 (SR, IV, 351).
there had been no issue, it had been very different. Let them enjoy the good fortune of their legitimacy.

2 Peere Williams 299, 24 E.R. 739

A woman was supposed¹ to marry A. first and, afterwards, during his life, to marry B. And, in a cause of jactitation of marriage in the spiritual court in Ireland, the first marriage was affirmed. But, on an appeal to the Delegates in Ireland, the same was disallowed, and the second marriage adjudged good. By the second marriage, there was issue, but none by the first.

And, now, there was a petition for a commission of review to reverse this last sentence of the Delegates in Ireland.

Lord Chancellor [Lord King]: A commission of review is not a matter of right, but purely in the discretion of the crown. And there being issue by the last marriage and none by the pretended first marriage, this commission of review tends to bastardize and render illegitimate the innocent issue by the last marriage, which ought not to be favored, so that I am against granting this commission of review, and shall advise the crown accordingly.

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Popping v. Rhodes
(Del. 1725)

In this case, a commission of review was granted pending a common law indictment of forgery of the same will.

Select Cases tempore King 48, 25 E.R. 215

On Rhodes's will, a sentence was had for the will. And, afterwards, Rhodes was indicted for forging it. Pending which indictment, on the suggestion of subsequent discoveries as to the forgery and that the sentence was wrong, [they] apply for a commission of review.

¹ I.e. alleged.
Which was opposed as not being proper until after the trial of the indictment, for it would be disclosing the king’s evidence, and, if sentence should he had against the will, it might influence the jury on the indictment.

On the other side, it was said it was the constant course to grant a commission of review where [there was] only one sentence or where one of the Delegates dissents. And it would be very hard to have the commission depend on the success of the indictment, as the law is very tender in fixing a crime on a particular person. But, in the spiritual court, the only question will be whether it be forged or not.

Chancellor [Lord King]: Here are subsequent discoveries, and they say, besides, that the first sentence was wrong. The cause has been but once heard, and it would be very hard not to grant a commission of review. And [there is] no occasion to wait the issue of the indictment; that depends on its own circumstances and particular niceties.

On appeal, one may bring new matter; aliter in review, unless there be a clause to receive it. On appeal, one may bring new matter, but, in review, one must proceed ex eisdem acts, unless there be a clause to receive new matter, which was added here.

He doubted whether they should not pay the costs of the trial before the Delegates, as in granting a new trial.

But Sir Nathaniel Lloyd informing the court that it is never done on review, no costs [were awarded].

[Earlier proceedings in this case: Lincoln’s Inn MS. Misc. 147, p. 23, pl. 1.]
22 January 1725[26]; Serjeants’ Inn, Chancery Lane.

Lord Allinton died in the year 1723, leaving a complete will made in the year 1685 and also three testamentary schedules made about the year 1708, all of which were very imperfect. By the complete will of 1685, Sir John Jacobs was appointed executor and residuary legatee.

The duke of Somerset prayed that the said will should be set aside and that Lord Allinton should be pronounced to have died intestate, alleging that the above mentioned schedules did amount to a revocation of the will.

It was urged by the counsel for the duke that the beginning the said schedules was a manifest proof that the deceased did not intend the said will should stand as his last will and testament and that any such declaration in writing was sufficient to revoke a testament, because the intention of the deceased only was to be considered, and, in this case, the beginning of new testamentary schedules in which he declared expressly that he did thereby revoke all former wills by him made, using these words ‘hereby revoking’ etc., was a full proof that he did not intend the former will should stand, especially considering that the former will was near forty years old and that there had happened a very great change in the circumstances and condition of the deceased since his making of it. And to show farther that he did not intend it to be of any force, it was proved that he said he had no will.

The question upon the whole matter was this, whether the imperfect schedules which contained only some few legacies, would amount to a revocation of a will [that was] complete, which still remained uncancelled.

Dr. Bettesworth, in the Prerogative Court, gave a sentence for the will against the schedules, and the Delegates confirmed the said sentence.

In this case, Serjeant Comyns, counsel for the will, said in his reply that a declaration of a man that he has no will is no proof against a will found. Serjeant Jeffrey's Case, in Goldsborough, f. 33; a latter will in confirmation of a former is no revocation of a former. A will is a complete act, and, therefore, a man may revoke without any devise. An incomplete will may revoke a complete one, but every inchoation of a will with a general clause of revocation is not sufficient. There is a great diversity where sudden death prevents the completion of a schedule and where it is intermitted voluntarily. A will that is partial may revoke one that is general. Where anything is done animo

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1 Gibson v. Platless (1586), Gouldsborough 32, 75 E.R. 975.
testandi, that, though incomplete, is a revocation si non animo testandi secus. Inserting something in the body of a schedule is not of the same force as the testator’s signing it with his own hand. A man’s approving what is written is not sufficient if he did not direct it.

Dr. Henchman on the same side: The Delegates, in this case, must either pronounce for the will or declare an intestacy, because the schedules have not been propounded. If the deceased is pronounced to have died intestate, the schedules can be of no use, whereas they do contain bequests recoverable at law, and, therefore, the schedules ought to be taken as part and parcel of the will. A testament without an executor is not valid as a testament. Swinburne, part 5, no. 4.1 Without an executor, no will can subsist. Therefore, such a will cannot revoke one with an executor, unless it be made in extremis. It is a rule of all laws that agnatio liberorum rumpit testamentum. The bare writing something in a paper is not a confirmation of the whole.

Dr. Phipps on the same side: A contraria voluntas is not estimated from any small variation in a will, but from the essential parts of it being changed, and these are the nomination of an executor etc. Gratiani, Disceptationes Forenses, discep. 764, nu. 1. A general clause of revocation does not revoke, but it must be made simpliciter as to the former will. Ibid., nu. 7 et nu. 26. A diversity is to be taken where a revocation is in general and where it has a respect to a testament to be made. The one case has a respect to intestacy; the other to a different devise to be made and, then, the parties under an intestacy being certain, and, in the other case, not; such a general revocation is more to be regarded than the other.

Dr. Andrew, on the same side: [There is] no instance of an imperfect schedule of fourteen years’ standing ever [being] pronounced for as a testament in any ecclesiastical court. They are only held good when the deceased was morte prevenus from finishing it. Swinburne, part 7, cap. 12.2

Dr. Sayer, on the same side: A second will with the same executors is no revocation. The Case of Fuller contra Wicks et alios, in the Prerogative [Court], anno 1715.

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1 H. Swinburne, Brief Treatise of Testaments and Last Wills (1590), f. 197v.
2 H. Swinburne, Brief Treatise of Testaments and Last Wills (1590), f. 257v.
N.B. The schedules not having been propounded, the Delegates did not pronounce them to be a part of the will, but took no notice of them. (This case also is transcribed from the MS. notes of Sir George Lee.)

The Judges Delegates present at the sentence in The Duke of Somerset v. Sir John Jacobs (on 22nd January 1725/26) were the bishops of St. Asaph [Wynne], Gloucester [Wilcocks], and Hereford [Egerton], lords Bathurst and Guildford, Chief Baron Gilbert, Mr. Justice Reynolds, Sir Henry Penrice, Judge of the Admiralty, Dr. Tindall, and Dr. Audley.

1 Phillimore Ecclesiastical 441, 161 E.R. 1037

Lord Alington died in 1722. The will propounded was dated in 1685. It was stated in the argument on Hemming's Case¹ that there was clear proof before the court that Lord Alington had made another will within a few years of his death, in which Sir John Jacob was executor, containing a wholly different disposition of his property, but that this latter will could not be found, and that it was on this point that the case turned. On investigation, however, of the proceedings, it appears that there was no proof whatever before the court of any second will ever having been completed, nor could the case have turned on this point. Several inceptions of wills with revocatory clauses were produced. And the question was whether these inceptions of wills, coupled with length of time and great change of circumstances, would amount to the revocation of a will.

And the court decided in the negative.

[Earlier proceedings in this case: Lincoln's Inn MS. Misc. 147, pp. 20, 33, 156.]

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In re Petition of Wright
(Del. 1726)

A commission of review can be granted so that new parties can intervene.

¹ Passey v. Hemming (Del. 1812).
A commission of review had been granted by Their Excellencies, the Lords Justices, upon the petition of A., B., C., etc. in a cause that had been before the [Court of] Delegates concerning the will of one Rhodes. And now the counsel of one Thomas Wright were to show cause why the commission should not be amended.

The cause was thus. A final sentence had been given by the Delegates establishing the will of Rhodes, and, afterwards, it appearing that there had been great fraud and collusion and false swearing in this cause, the Lords Justices were applied to to grant a commission of review. It bore great debate and was long deliberated whether such a commission could issue. At length, it was resolved that it should. The petitioners that applied for this commission were A., B., C., etc. and one Thomas Wright. It appeared that Thomas Wright lived here in town and had negotiated this cause for his mother who lived in the country in Lancashire. His mother was party to the suit in the ecclesiastical court and before the Delegates and was next of kin to the testator Rhodes, whose will she sought to impeach. But Thomas Wright had joined in the petition in his own name without taking notice that he was agent for her. She died and made Gilbert Wright her executor, who proved her will. A., B., C., etc. and Thomas Wright, upon whose petition the commission has issued and who had possession of it, agreed with the person who claimed under the pretended will and kept the commission in their custody so that there were no proceedings upon it. By this means, Gilbert, the representative and executor of his mother, could have no benefit of the commission. And upon this whole matter, it was now moved that Gilbert’s name might be inserted in the commission instead of the name of Thomas and the commission might be brought into court for that purpose.

My Lord Chancellor King refused to amend the commission, for he said that the testatrix of Gilbert, his mother, was not a party to this petition and had not joined in it, that Thomas Wright had presented the petition in his own name and not as agent to her.

But Dr. Henchman of the [Doctors’] Commons, who attended with other civilians upon this occasion, having laid it down that, by the rules and practice of their courts, such a commission being granted was in the nature of an appeal and opened the cause, so that a person who had an interest, though
not a party in the cause before, might come in and have the benefit of pro-
ceeding upon this commission.

My Lord [LORD KING], upon Gilbert’s payment of the commission
to be taxed, ordered that the commission should be brought into court for
Gilbert to have liberty to make use of it and proceed upon it as he could by
the rules of the ecclesiastical court.

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Desmith v. Ployart
(Del. 1727)

*The questions in this case were whether the papers propounded were the decedent’s will and, if so, whether a specific legacy therein was revoked.*

British Library MS. Lansdowne 588, f. 112

10 March 1726[/27]. Before the Delegates in Serjeants’ Inn in Fleet Street.

The first point arises on the probate of a will whether scraps of paper
may be a good will.

Second, the testator devises £500 *per annum* out of his land. He, then,
subscribed his annuities. Query if it is a revocation of the legacy.

Hilary 10 Anne, Orme v. Smith.1

Fazackerley: A. devised a £400 bond; then the testator received the
money. This is not a redemption of the legacy, though the fund is gone out
of which etc. In this case, it was adjudged that it should be paid out of the
personal estate. 3 Lev. 1; a writing is a will, [and it is] is sufficient without
signing it.2

Dr. Strahan: A good will may be written on the back of a letter or [in a]
pocket book if [it is] intended as such.

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A man is entitled to the privilege of a military [will] only *infra annum post dismissionem*. But, so long as he continues a soldier, the will is good, even twenty years after if he continues a soldier.

The question now is [not] whether it is a subsisting legacy, but whether the will is good. The annuities stand now in his book under that name.

*In dubiis pro causa pia judicandum est,* Mantica, *De Conjecturis Ultimarum Voluntatum.* If there are two wills without a date and, in one, there is a legacy for a charity and there are no circumstances to determine either way which was last, it shall be determined in favor of that will that gives the charity.

*Wilbraham,* of counsel of the charity: The devisees for the charity being admitted parties, thus, they were not parties below. It is a good appointment of a charity in the Statute 49 Eliz.¹ The protection of a child was a good cause to set aside a will in the old civil law; not in the present civil or common law. Duke of Somerset’s Case.²

The objection as to the law of time was overturned (after forty years).

A lease after a devise is only a revocation *pro tanto.* Swinburne.³ If the same thing is devised to two in the will and the codicil, they shall take it jointly. Barker v. Lord Zouch, 1 Ch. R. 42.⁴ A feoffment to such uses as he should appoint [is] no revocation of a former will. 1 Ch. R., Cole v. Jenkins. A trust is no revocation of a will not intended to revoke the will but to prevent a forfeiture. The South Sea [Company] stock is a good fund out of which it may be paid. Dr. Brown v. Heath and Pocklington.⁵ B. wrote down some heads of a will and sent for an engrossment from London, and he died, the will being left imperfect, and this was adjudged in the Prerogative Court to be a good will, and it was confirmed on an appeal.

Dr. {blank}, Ployart’s advocate: The minister of a church is a guardian of a church. I have known cases where legacies given to a church have been decreed to the ministers.

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² *Duke of Somerset v. Jacobs* (Del. 1726), see above, Case No. 73.
³ H. Swinburne, *Brief Treatise of Testaments and Last Wills*.
⁵ *Brown v. Heath* (Del. 1721), see above, Case No. 65.
Serjeant Chesshyre admitted and distinguished the Case of Orme v. Smith. That was a devise of £500, viz. a £400 bond and £100 in money; there, the *viz.* was rejected; it had been a good devise of £500 though the *viz.* had been out of a thing not *in esse*.

Dr. Phipps: An imperfect will shall not be made good unless the party was surprised by death immediately after the making of it, not if he lived a long time after.

Holman v. Walthoe. Signing is necessary to acknowledge it to be his will, except in cases where he intended to sign it and he was surprised by death.

Curia: We cannot make it good as an appointment of a charity by the Statute of Elizabeth.

But query if it is a good legacy.

The party to the charity below submitted to the sentence and have not appealed.

Cited by counsel, Mantica, lib. 2, tit. 15, n. 6, *De Conjectionis Ultimarum Volentatum*. The law is stronger than circumstances to defeat a written will than to set up a nuncupative one. *Institutum*, lib. 2, tit. 17, l. 7; Mo. 834. A design to alter is not sufficient, and, if he dies first, the will is good. Plumstead v. Plumstead; Fitzmorris v. Long. Three schedules were propounded together and pronounced good, because the legacies were the same. And it is no different of executors [where] only one was struck out. 2 Edw. III, 3; Godfrey v. Southerst, Michaelmas 1716. Nuncupative wills may be good, but not to revoke a written will, by the Statute of Frauds and Perjuries.¹

Memorandum: This case was taken from an old note of it and is imperfectly reported.

[Other proceeding in this case: Lincoln’s Inn MS. Misc. 147, f. 4; Ployart v. de Smith (Prerogative Court 1728), 2 Lee 555, n., 161 E.R. 438, n.]

¹ Stat. 29 Car. II, c. 3, s. 21 (SR, V, 842).
Andrews v. Powis
(Del. 1728)

In this case, a later will was declared null and void and a prior will was admitted to probate.

1 Lee 242, 161 E.R. 90

Serjeants’ Inn, Fleet Street, between Hilary and Easter terms 1728. Judges Delegates: Marquess of Tweedale, Earl of Lincoln, Wilcock, bishop of Gloucester, Waugh, bishop of Carlisle, Page and Reynolds, justices of the King’s Bench, Hale, Baron of the Exchequer, Sir Henry Penrice, Judge of the Admiralty, Dr. Tindall, and Dr. Audley.

Mr. Powell, deceased, made his will the 6th of June 1720, by which he appointed his nephew, Mr. Powis, executor and residuary legatee. Subsequent to that, viz. on the 10th February 1720-21, he made another will, by which he appointed Mr. Andrews nude executor, and he made his children residuary legatees. The testator died the 11th February 1721-22, and Andrews took probate of his will the next day, and possessed himself of the estate. Mr. Powis took out process to call him to bring in the probate and propounded the will made in favor of himself in June 1720 as the last will of the deceased. And he alleged that Andrews’ will was obtained by fraud and deceit, when the testator was insane and incapable to dispose by will or otherwise.

Mrs. Collyer and other relatives of the deceased appeared and opposed both wills, and prayed the deceased might be pronounced to have died intestate, alleging that he was under an insanity previous to the making even of Powis’ will, which continued to his death.

In the run of this cause in the Prerogative Court, the original will of Andrews was mislaid in the office, whereupon a motion was made to examine the witnesses to the engrossed copy, to which the court assented. Before publication of their depositions, the original will was found.

This motion was pleaded in an allegation by Andrews, who prayed that he might be at liberty to re-examine the said witnesses to the original will and to their own subscription thereto, which the court admitted.
And Powis appealed from it to the Delegates as a grievance.
The Delegates were of opinion that the judge of the Prerogative Court had done right, and remitted the cause.\(^1\)

Some time after, upon a motion by Powis and a suggestion that the estate was not safe in the hands of Andrews, the judge decreed he should bring into court £1000 and be subject to the further order of the court as to the rest.

Andrews appealed from their decree to the Delegates.

Then Powis filed a bill in Chancery to oblige Andrews to lodge the estate there.

The Lord Chancellor King made a decree that the money should be lodged in Chancery in aid of the spiritual court, he having been misinformed that the Delegates were of opinion that the judge of the Prerogative Court had no power to order it into his court.

Andrews appealed from this also to the House of Lords. The Lords confirmed the Lord Chancellor’s decree, and Lords Harcourt and Trevor declared that every ecclesiastical judge had a full power to decree any money that was under litigation before him to be deposited for safe custody in his court.\(^2\)

The Delegates were of opinion that the judge of the Prerogative Court had not done right in ordering the money into court, because he had not sufficient evidence that Andrews misemployed the estate, and, therefore, they retained the cause, but, afterwards, on more full proof, required the £1000 to be lodged in the Registry.

It appeared from the evidence on all sides that the deceased was a man of very odd temper, great humorsomeness, and positiveness, and very covetous, that, before the making of Powis’ will, he was seized with a paralytic fit, by which his understanding was impaired, that he did extravagant actions, and appeared sometimes like a man frantic. But it did not appear that he was out of his senses at the time of the execution of the said will, which was made with deliberation, and signed by witnesses of reputation and credit. There were duplicates of the will, one part kept by the testator and the other by the

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\(^1\) *Powis v. Andrews* (Del. 1722), see above, Case No. 68.

writer. And proof was made that the deceased declared affection to Powis at that time.

In order to set aside this will, the next of kin insisted that he was under an absolute insanity or weakness of mind, and was not capable of doing any serious act from the 17th November 1719 until his death.

On behalf of Andrews' will, it was insisted that he was perfectly capable at the time of making Powis' will, which was fully and duly executed, and that he continued so until his death, that, at the time of making the latter will, he had cancelled the former by tearing off the seal and throwing it into the fire with a declaration that it should not be his will, that the latter will was fully executed, being signed, sealed, and published by the testator, and subscribed by three witnesses, that the testator declared a great dislike to all his relations, and was greatly offended with Powis for not taking a person apprentice whom he had recommended to him, and that he had declared great satisfaction in the kindness and regard he had met with from Mr. Andrews and his family, and that he would reward them for it.

On the contrary, it was urged that Andrews had by cajolery and stratagem in persuading him to have a lamp set up in his chamber, by which the house was in danger of being fired, induced the deceased to fall out with his former landlord, Mr. Atterbury, with whom he had long lodged, in order to draw him to his house, that, after he had so drawn him to his house, he endeavoured by false suggestions to alienate his affections from Powis, that he and his family kept him in constant custody, and would not suffer him to be seen, that Andrews was only an acquaintance of the deceased, who, while his understanding was good, had frequently declared a very ill opinion of him, that, before the making of that will, he had had a second fit of the palsy, by which his understanding was so much impaired that he did not know his most intimate acquaintance, that he was almost utterly incapable to read a written hand, and that, therefore, his letters were always read to him, that the will was wholly written by the executor, whose family was to get £90,000 under it, that there were no instructions for making it proved to have been given by the testator, nor did it appear in evidence that it had been read over to the testator or that he knew the contents of it, that the witnesses to it were the executor's wife, who could be no witness at all, a poor barber, and a servant-maid, both of whom had received money or presents and had made declarations contrary to what they had deposed on oath.
Heads of the arguments of the counsel for Andrews:

Sergeant Chesshyre: The deceased had reasons for revoking Powis’ will. One was that he had lent £11,000 to Powis, for which he had promised him a mortgage, but he had not kept his word. Secondly, he continued a partnership trade with a person he disliked. Thirdly, he desired him to take a relation apprentice, which he had not done. He resolved to quit his lodgings before he went to Andrews and would have gone to another place. He declared he would leave nothing to his relations; he directed Andrews to write a will from the old will, altering only the executor from Powis to Andrews and changing the residuary legatees. A will made deliberately, though without witnesses, is a good will. Declarations of witnesses in common discourse shall not take away the force of their depositions. A man shall not be permitted to swear against what he has signed and attested. The deceased recognized his will by mentioning it three or four days after the execution to the barber, who witnessed it.

Dr. Henchman: The questions are whether the deceased had an animus testandi tali modo, whether he had a capacity, whether he freely and voluntarily made Andrews’ will. It is objected that the executor wrote it and insisted that, by the civil law, the will is void. But, in reality, it was otherwise, for, by that law, only his legacy would have been void and the writer subject to the penalty of the Lex Cornelia de falsis. If a man writes a legacy to his son, sub potestate, it is void. If to an emancipated son, it is otherwise by that law, and, in England, the paternal power is not admitted.

An evidence to a deed is a good evidence to a will. In the Case of Twisden contra Townsend, Prerogative [Court], Michaelmas term, 1727, Sir Thomas Twisden, the executor, wrote the will; [there was] no proof that it was read over to the deceased, but instructions were proved, and the court pronounced for it.

In Lord Macclesfield’s will, the subscribing witness denied his hand, he had custody of the will, and was the only surviving witness, but the will was pronounced for. When a witness contradicts his former deposition, it is a rule of law that statut priori juramento. Where iterable acts are deposed to by witnesses, they, by the civil law, are esteemed contesting witnesses.

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1 Digestum, 48, 10.
Dr. Pinfold: The evidence does not prove the will was read over to the deceased, but that is not essential, for a will may be good, though nobody can prove that it was read to the testator.

Dr. Kinaston: Dr. Mead deposes that, when he attended the deceased in August 1721, he was then sensible. And the apothecary deposes the same. The subscriptions to the receipts exhibited agree with the signatures of the will. Hammond, the banker, swears he would have paid any money upon view of a note signed with that hand. No law requires instructions for a will, nor that the will shall be read by or to witnesses. In the Case of Herne v. Johnson, no instructions were given, nor was the will read over, but the court was satisfied with the evidence of the subscribing witnesses. Extrajudicial declarations, though made by a man on his death bed, are not admissible against his oath. Gaill, [Practicarum Observationum], lib. 1, obs. 104, nu. 7, 8.

Dr. Andrew: Every man has an undoubted right to dispose of his estate as he pleases. And no court can enquire into his reasons. Every man is supposed to intend what he executes. Poverty is no objection to a witness. In dubiis benigna interpretatio fienda est. The confession of a counsel cannot bind a party; the confession of a proctor does, because he is dominus litis. The proof of disaffection to his relations is clear. The fact of Powis’ will also stands uncontroverted. The relations have proved that the deceased had the same odd behavior before he made Powis’ will as after. Mr. James Monk, an old acquaintance of the deceased and who is no friend to Andrews, swears that, ‘after the deceased returned from Shrewsbury, he was frequently with him, and he was sane’. Eight or ten witnesses agree with Monk in this point. He went to the Exchange, and received and paid money at his bankers. Mrs. Atterbury speaks to his insanity, and yet she swears her husband was angry with her for disobliging the deceased, because he might otherwise have done something for them. Therefore, they supposed he had a capacity to make a will. Andrews’ character is unspotted. The testator was disobliged with Powis for not taking Mrs. Cross’s son apprentice. The deceased was not easy to be imposed upon.

It has been objected that, if a man writes himself heir, he would by the Lex Cornelia de falsis have been infamous. The answer to that is that, even by that law, if a man had written his emancipated son heir to any one, he would have been subject to no punishment. L. 11, Digestum, Ad legem Cornelia de falsis.
The testator recognized his will, for Ditcher, whose evidence stands unimpeached, says that Powell declared after he had made his will that he would give Andrews his estate, which declaration was a recognition of the will. And he also, three or four days after it was made, said to Phillips, the barber, who witnessed it, ‘Barber, you are a witness to my will, by which I have given my estate to Andrews and his family; if my relations dispute it with them, be an honest man and speak the truth.’ Declarations of witnesses are not admissible contrary to their oath. In the case of Creswell v. Creswell, in the Prerogative [Court] 3d November 1715,¹ instruction were given for a will; the writer drew a will from it, and another contrary which he gave the testator, and he signed it, and the writer was a witness to it; afterwards, he would have appeared as a witness to prove the forgery, but the court would not admit him, since he had signed the paper as a witness and rejected the allegation setting forth this matter. In the Case of Bird and Bird v. Wollaston, Delegates, February 1723, [there were] three witnesses to a will; two swore to the testator’s capacity at the time of execution; the other contrary; the court rejected his evidence.

Mr. Fazakerley: The will itself imports an \textit{animus testandi}. There are many instances in Chancery of committing men as lunatics upon evidence only that they could not manage their own affairs. There are two positive subscribing witnesses to the \textit{factum} of the will, who must be perjured if the fact was otherwise, which the court will be tender of declaring without full evidence directly proving the contrary. Extrajudicial declarations are allowed by all judges to be the slightest evidence. The Statute of Frauds² was made to prevent frauds in the making of wills, and does direct that no evidence shall be received to prove a nuncupative will after six months, unless the nuncupation was reduced to writing in six days after the death of the testator. There may be frauds as well in the setting aside as in the constituting of wills, and the admission of evidence to prove frequent declarations made a long time ago tends to that purpose. Sir Edward Becher, Lord Mayor, Mr. Linyer, Common Serjeant, and others of reputation prove Mr. Andrews’ good character.

Heads of the arguments of the counsel for Powis’ will:

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¹ Creswell v. Creswell (1715), Lincoln's Inn MS. Misc. 147, p. 160, pl. 2.
Mr. Lutwyche: Frauds are properly cognizable in the Delegates. [There is] no instance where Chancery has interposed to set aside a will for a personal estate on account of fraud, but that court always has declared it does belong to the spiritual court. If we have not the full force of our evidence here, we cannot have it anywhere. In the Case of Bransby and Herridge,1 Bransby made his father executor. By fraud and false representations of the father, Herridge persuaded him to revoke it, and, by a new will, to appoint him executor. The will contained lands, and, therefore, as to the lands, the Chancery set it aside on account of the fraud, and declared Herridge a trustee for the personal estate to the use of the father, by which the ecclesiastical jurisdiction was saved, and the probate continued unrevoked. This matter is now under appeal to the Lords.

Andrews persuaded the deceased to do what would occasion a quarrel between him and his landlord, that he might draw him to his own house. The deceased came under the incapacity for making a will, mentioned by Swinburne, part 2, sect. 1. It appears that he was almost if not totally incapable to read writing, and, therefore, he was in the nature of a blind man, whose will ought to be read over to him before witnesses. Swinburne, [Brief Treatise of Testaments and Last Wills], part 2, sect. 11. But there is no proof of reading this will of Andrews to the deceased.

It appears from an interrogation put to one of the witnesses that Phillips, the barber, being asked whether he had not given a note for £60 lent to him by Andrews, answered, ‘Yes, but it was only for a blind.’

Mr. Reeves: Powis’ will was made deliberately, while the testator was sane. Not every small degree of understanding is sufficient for making a will, but the testator ought to have a sound and disposing mind. When a devise is extraordinary, some reason ought to be shown why the testator was induced so to do. The deceased used expressions of strong dislike to Andrews. The time for taking Cross’s son apprentice was not come when Andrews’ will was made. Therefore, that was no reason for disaffection to Powis. Powell made a general order to Hammond to pay Andrews what money he should demand, which order was made soon after he came to Andrews’ house, and it is a proof

that he was insane or grossly imposed on. It is said that, if a man only subscribes his will without witnesses, it is good, but that is only where there is no suspicion of fraud. The will in favor of Andrews was not read to the deceased, and he could not read it himself; therefore, he could not certainly know the contents. Any degree of sanity is not sufficient for making a will. Marquess of Winchester's Case, Coke, 6 Rep., f. 23.\(^1\) It is the constant practice in common law courts to admit proof of declarations made by witnesses contrary to their evidence on oath.

Dr. Strahan: Dr. Mead and the apothecary only talked with the deceased about his illness, and he was able to give account of that; so can a child of six or seven years old. The old man was in the custody of Andrews and his family, for some of them always attended him wherever he went. Some of his friends, particularly Mr. Thomson, was refused seeing him, on pretence he was not well. Observations were made by Andrews' people on all letters from Powis in order to reflect on him and diminish the deceased's affection to him. And some of his letters were concealed by Andrews. It appears from Andrews' own witnesses, as well as Powis', that he was in low circumstances when the deceased came to live at his house, which might be an inducement to him, by any means, to acquire to his family this great estate. The general order to Hammond to pay to Andrews on demand was within a month after Powell came to his house, so that the management of the deceased began as soon as he had got him into his custody. Andrews proved the will the day after Powell died, and he entered on the estate immediately. He entered the probate in all the public offices, and, by that means, he took up a large sum after the probate was called into the Prerogative Court on the commencement of this suit. And, upon that, an order was made upon him by the court to bring in £1000. [There were] no declarations of Powis in favor of Andrews previous to his will.

In the Case of Sands and Floyd contra Pearse, Delegates, 1715,\(^2\) Mr. Rolls made his will, by which he gave his estate to his daughter Pearse. The will was duly executed and witnessed, and he, before the witnesses, declared it as his will. After his decease, Mrs. Pearse refused to prove it, because her hus-

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\(^1\) Marquess of Winchester's Case (1599), 6 Coke Rep. 23, 77 E.R. 287, also Hetley 120, 124 E.R. 390.

\(^2\) Sands and Lloyd v. Pearse (Del. 1715), see above, Case No. 53.
band should not be benefited, with whom she was at variance, and then he propounded it. It appeared fully that the testator was insane and that, though he had published it properly, Mrs. Pearse had tutored him and taught him what to say. The will was set aside. The being able to say ‘yes’ or ‘no’ is not a sufficient capacity. Combe’s Case, Moore’s Rep., f. 759.1

Dr. Sayer: Where there has been insanity, the degree of evidence is different. Powis’ will is reasonable, because he is a nephew of the deceased. Duplicates were made of the will, and one was in the custody of the testator himself; but this latter will has always been in Andrews’ custody. The deceased declared he had made Powis his heir, spoke kindly of him, even after Andrews’s will was made; his affection to Andrews grew, according to the witness, in five or six weeks’ time. Dr. Harwood was interrogated [as to] what the deceased said to him concerning his relations or will. On his first examination, he said nothing of disaffection, though not interrogated to that point. He swore the deceased was displeased with Powis. Andrews was sworn to the probate of his will by Dr. Harwood, to whom he made a present at that time of £50 for mourning, on account of the Doctor’s old acquaintance with the deceased. In October preceding Andrews’ will, Powell declared he would give the greatest part of his estate to Powis. Minors, until a certain age, cannot dispose, though they can do common things and answer common questions. Integritas mentis is necessary in a testator. Digestum, lib. 28, tit. 1, l. 2; Swinburne, part 2, sect. 2, nu. 2.

Mr. Hamilton: A man who designs to act honestly will take care to have witnesses of figure and reputation. When the testator executed Powis’ will, he declared [it] to the witnesses whom he had made residuary legatees. The civil law directed that a testator should write the name of his heir himself, or declare it to the witnesses. Codex, De testamentis, l. 29, in pr.; Instituta, De testamentis ordinandis, 4.

Herbert and Lownds, 3 Car. I, Chancery Cases, October 22.2 Mr. Bland made his will in favor of his children. When he grew weak, Lowndes, a scrivener, persuaded him to make a will and deeds in favor of him. [There was] much evidence that the testator was weak. The court decreed that he was

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1 Combe’s Case (1605), Moore K.B. 759, 72 E.R. 888.

2 Herbert v. Lowndes (Ch. 1628), 1 Chancery Reports 22, 21 E.R. 495, also 118 Selden Soc. 578.
not absolutely insane, yet, since there was fraud and management, the deeds 
should be set aside, and ordered that Lowndes should not execute the will 
without his co-executor.

Maudley, *ibid.*, p. 123,¹ wills and deeds were set aside on account of man-
agement of weak persons. Fraser *contra* Duke of Devonshire, Lord Harry 
Cavendish made certain deeds in his last sickness, fully executed, and [there 
was] no proof of insanity. But Lord Chancellor Cowper said ‘A man in so 
weak a condition could not have an understanding adequate to what he was 
about’, and, therefore, he decreed that the deeds were void, and the decree 
was confirmed by the Lords.

But [it was said] by Baron Hale those deeds were set aside, because they 
were not executed pursuant to the powers reserved to him, and it was on that 
account Lord Cowper said ‘it did appear that he had not a mind adequate to 
what he was about.’

Mr. Strange: There are three points before the court, Powis’ will, Andrews’ 
will, or an intestacy. The same degree of capacity is necessary to revoke as to 
constitute a will. The Case of Frost v. Hendrey, 4 Mod., fo. 60. In the draught 
for Powis’ will, blanks were left for the name of the executor, which the testa-
tor filled up, but having written the name ill, he disliked it, and ordered new 
ones to be drawn, and, then, in the presence of the subscribing witnesses, he 
had the blanks filled up with the name of Powis, as executor and residuary 
legatee. One draught was kept by himself, the other by Baldwin, who wrote 
or procured them to be written. All the instructions pretended for Andrews’ 
will were only to get the names of Dr. Harwood’s children, to whom, as it is 
pretended, the deceased did desire to leave legacies, notwithstanding which, 
the names of those children are not inserted in the will.

Heads of the argument of the counsel for Mrs. Collyer and others of the 
relations of the deceased, who contended for an intestacy:

Dr. Paul, the King’s Advocate: The deceased declared to his brother 
Jeremy when he was dying that he would be a father and an uncle to his chil-
dren. He frequently gave presents to Mrs. Collyer, daughter to Jeremy. From 
November 1719, when he had his paralytic fit, he did no act, as appears from

¹ Aynsworth v. Pollard (1636), 1 Chancery Reports 101, 21 E.R. 519; Maudy v. 
Maudy (1639), 1 Chancery Reports 123, 21 E.R. 526.
the evidence, that required judgment. In 1719, he laid up a dividend warrant in his closet, and he did not know what he had done with it, but said it was stolen from him. And he said he could dispose of no money without the advice of his nurse who attended him. Powis applied to Murray, the old man's keeper, to procure him a will, and applied to the deceased for a deed of gift. It does not appear that the deceased himself read the instructions taken by Mr. Baldwin. The deceased attempted to fill up the blanks, was not able to do it, attempted to fill up the second draughts, though he knew he was not able to do it before, which showed a want of understanding. He could not read, which proceeded from want of understanding only, because there is no proof he had lost his sight. [He was] so weak in mind that no prudent person would trust him with fire. The time he went from Atterbury's, [he was] so frantic in his behavior that Mr. Reece would not receive him as a lodger. When he left Atterbury's, he could not reckon with Atterbury for what he owed for his lodgings. He went to Mrs. Rogers, his milliner, with whom he was well acquainted, but he did not know her, took Thompson, a man of sixty years of age and tall for a little lad of about fourteen or fifteen. He that writes himself heir is infamous. Per totam tituli Codicis, De his qui sibi adscribunt, a testator must have integritas mentis. Combe's Case, 1051, Moore's Rep, fo. 759. An executor charged with forgery was cleared as to the punishment for that, but the will was set aside, because the testator was not sane. Duarenus, disp. 1, nu. 27.

Phillips, the barber, declared 'If evidence was wanting against a person who was under a criminal prosecution at the Old Bailey, he would lend an oath to stitch him up.' He declared he had signed Powis' will for Andrews when the testator was out of his senses. A bribed person is no good witness. Extra., De testibus, cap. 1; Digestum, De falsis, leg. 1 and 2; Nepos de Monte Albano, nu. 75; Bartolus, super, sc. 1, Digestum, De falsis. When a witness is interested, he is not to be admitted. If a man thinks, though falsely, he had a right of commoning, he cannot be admitted at common law to prove a commoning.

In the Case of Gore's Will, in the Delegates, the attorney who drew the will swore the testator read it over, and another witness swore he signed it. It was proved contra he was so weak he could not write, nor was able to read, his sight being distempered with the jaundice. The Delegates pronounced against the will.
Miscellaneous Reports of Cases in the Court of Delegates from 1670 to 1750

Hester Gordon, her will in the Prerogative [Court]. A small piece of paper signed, as it seemed by Gordon, was propounded as her will. It did not appear who wrote the body of it. She had thereby given her estate to two of her children in prejudice of a third, but it was assigned a reason in the paper why she disinherited the other, *viz.* that she had given her £2000 for her marriage portion. [There was] no proof of this will further than the subscription. The Court pronounced against it. The party did not appeal.

In the Case of Young and Young, in the Delegates, Byne, a Fleet parson, swore he married the parties; afterwards, he made an affidavit that he had sworn falsely before and that he had been bribed to do it. The Delegates had no regard to his former deposition in the cause.

In the case of Twisden *contra* Townshend. The will was read over to the testatrix in the presence of the witnesses, and she declared to others she had made Sir Thomas Twisden her executor.

In the Case of Lady Bridget Osborne,¹ she swore she had never been married to Williams. Hall, the parson, alleged to have solemnized the marriage, swore he had not married them. But the marquis of Carmarthen, her brother, swore she had confessed her marriage to him. And it was proved the parson declared he had strong compunction of mind for a great offence. Upon this evidence, the Delegates pronounced for the marriage.

Mr. Lee: Such proof is to be admitted in all cases as is suited to the nature of the case. There is not sufficient evidence to pronounce for Powis' will. The exceptive evidence to Andrews' will is so strong that the will stands on a comparison of hands only. A declaration of a witness may be received to contradict his evidence.

In the Case of Wood v. Cozens, Sheffield made his will. [There were] three witnesses to it. One swore expressly to his capacity and the due execution of it; another was a legatary, and so [was] repelled; the third swore he was not capable; he had before sworn the contrary in Chancery. The Court had no regard to his evidence, but affirmed the will on proof by one witness of the due execution. This case is now before the Lords.

¹ *Williams v. Lady Osborne* (Del. 1718), see above, Case No. 55.
Rex v. Hayes, King’s Bench;¹ Hayes forged a bond, brought a witness to prove it, and recovered upon it. Afterwards, that same witness was admitted by Chief Justice Raymond to prove the forgery, and, upon that evidence and other circumstances only, he was convicted thereof.

There are no expressions of disaffection to relations until he became insane in 1719. [There were] public instances of insanity in May 1720, immediately preceding Powis’ will, which was made in June 1720. To prove that the testator had not a legal capacity to make a will and that the witnesses to Andrews’ will were not sufficient, he cited Swinburne on Wills, part 4, sect. 24, nu. 2; part 4, sect. 27, nu. 10; Godolphin, part 3, cap. 25, nu. 9; Swinburne, part 7, sect. 14, nu. 5; Godolphin, part 1, cap. 18, nu. 5; cap. 8, nu. 2. Those only are to be esteemed good. Witnesses quorum fides non vacillate, Digestum, De testibus, lib. L, 1.

Reply for Andrews’ will:

Dr. Henchman: In articulo mortis, a man may revoke by a less solemn instrument. Swinburne, part 2, sect. 25.

In the Case of the Duke of Somerset and Sir John Jacobs,² there were three schedules imperfect in their dispositions and without executors. They did not revoke the complete will for want of perfection.

The testator, in this case, was not blind, for he signed the will, and, therefore, had the capacity to write. And it appears in evidence that he went to his closet and fetched a receipt from among other papers, which he could not have done if he had been incapable to read. The subscription to the will is proved by Hammond on a comparison of hands, and that is a genus probandi, though not the best. Dr. Mead has sworn that the deceased gave him such an account of his distemper, that he prescribed from it, and also that he believed he was capable to make a will.

In the Case of Medlicot and Murford, a will was written by the executor, and no instructions nor reading were proved. One of the witnesses swore he believed the signing to the will was his hand. The will was pronounced for.


² Duke of Somerset v. Jacobs (Del. 1726), see above, Case No. 73.
Incontinence is an objection to a witness. Covarruivas, *Practical Conclusions*, lib. 2, cap. 13, nu. 8. When the deceased tore the seal from Powis’ will, he said ‘take notice of what I have done. I have now cancelled my former will.’

The rest of Andrews’ counsel spoke on the reply to much the same purpose.

*Per curiam*: After a long and full hearing for several days of counsel on all sides, the court was very unanimously of opinion that Powis’ will was the true last will of the deceased and that the will in favor of Andrews was null and void. And they condemned Andrews in £100 costs.

This judgment was given on the 28th February 1727-28, at Serjeants’ Inn, in Fleet Street.

(N.B. An attempt was made to have examined Andrews’ wife as a witness to the will, and a *voluntatem* was prayed before the Condelegates at Doctors’ Commons on that point, but it was afterwards waived.)

[Other reports of this case: Lincoln’s Inn MS. Misc. 147, p. 151.]

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**Hill v. White**

(Del. 1728)

*Upon a petition for a review, allegations of new matter must be supported by affidavits.*

*A signature of a public officer need not be proved by an affidavit.*

*A petition for a review will be granted in order to prevent inconsistent judgments.*

-- Mosely 29, 25 E.R. 251

Mr. Hill preferred a petition to His Majesty in his High Court of Chancery, praying a commission to review and rehear a sentence of the Court of Delegates in Ireland. And Mrs. White and her husband preferred a cross-petition for a commission to review and rehear a sentence of a Court of Delegates in England.
Mr. Solicitor General [Talbot], for the petitioner Mr. Hill: Captain White privately married the daughter and only child of Lieutenant General Sanchy without his privity or consent. And the mother of Marcus Hill, the petitioner, was sister to the General's wife. In 1719, General Sanchy died in Ireland on a journey in company with Mr. Hill. And, being greatly disobliged at his said daughter's marriage, he, a few days before his death, made his will, and he appointed the said Marcus Hill sole executor and residuary legatee, after payment of debts and legacies.

In May 1720, the will was propounded in the Prerogative Court of Canterbury, and the probate was opposed by the counter-petitioners. But, in 1722, a sentence was given in favor of Mr. Hill, and the probate was granted to him. And, on an appeal, the sentence was affirmed by eight of the Delegates, July 22, and no complaint thereof was ever made until this cross-petition. And the testator leaving also considerable assets in Ireland, the will was likewise propounded in the Prerogative Court of that kingdom. And a probate was granted to the petitioner, and, on an appeal, the cause was heard before the Delegates, January 1723[/24], on the same evidence as in England. And they adjourned until the 7th of February following. And, on the 18th of April 1728, without being continued by adjournment and without notice to the parties or their proctors, three judges met (and no common lawyer was among them), and reversed the sentence of the Prerogative Court, and granted letters of administration to Mrs. White, the daughter. Wherefore, we now prefer this petition to have the said sentence reviewed and reheard, and, though a commission of review is not a matter of right, but of grace and favor, as was adjudged in the Case of Powis and Andrews, yet it has never been denied upon good reasons. And we presume our cases are so very different that there are the strongest reasons for this petition and none of any weight or moment for theirs.

In Ireland, there has been but one sentence against the will and that given by only three Commissioners; nor are the fraud and imposition on and insanity of the testator suggested by the cross-petition sufficient allegations, because they have been already under the consideration of the judges that gave the sentence. And they have adjudged them not sufficient to set aside the will. The sentence of the Delegates in England was conformable to the

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1 Andrews v. Powis (Del. 1722-1728), see above, Case Nos. 68, 76.
sentence of the Prerogative Court, and has been acquiesced under five years, and no precedent can be shown where, after so long an acquiescence, a review has been granted of a sentence of Delegates who confirmed the sentence of the Prerogative Court.

Doctor Henchman: Numberless inconveniences would ensue if a commission of review should be allowed after so great a distance of time. The executor, Mr. Hill, has paid the debts and legacies of the testator, all which are liable to be reversed and undone by this commission they pray by their cross-petition. And, therefore, there is always a time limited for the bringing of appeals. The civil law allows ten days, and we fifteen. And I have known an appeal disallowed that was brought on the sixteenth day, conformable to which rule, the House of Lords have lately made an order that appeals to their Lordships shall be brought within five years. And two years was the time allowed to petition His Imperial Majesty in, and this is now the law of the Empire. All which rules are founded on a supposition that the estate is in that time disposed of and that the circumstances of the parties in such a course of years are greatly altered.

The Court of Delegates in Ireland have proceeded in a manner new and unprecedented, four years past between their first sitting on the commission and their giving sentence. The cause was first heard in January 1723[24] before five Commissioners, and the last hearing was on the 8th of the same month; then, they adjourned to the 7th of February then next following; then, there was a discontinuance; then, they met on the 24th of February, and there was no settled adjournment as to time or place, so that the parties could not tell when or where to attend. The next meeting was on the 9th of April 1726; another was on the 10th of January 1727[28], and, on the 18th of April 1728, the sentence was given, though neither the counsel for the petitioner nor his proctor was present, as appears by the acts of the Register.

The Commissioners in Ireland refused to admit five witnesses, whose testimony was allowed in the Prerogative Court in Ireland and by both the courts in England. In February 1723[24], the Commissioners in Ireland met to give sentence, but could not agree until 1728. There is no quorum in the Irish Commission, and, though they set forth in their petition that all the three Delegates signed the sentence unanimously, that is of no weight, because, by the tenor of the Commission, that is necessary to make the sen-
tence good. In Ireland, the Prerogative Court gave sentence for the will, and only three judges of fifteen gave sentence in favor of the cross-petitioners.

In England, the probate was granted by the Prerogative Court, and their sentence was confirmed by eight Delegates out of fourteen. And, though here are not three conformable sentences on appeal, which are never impeachable, yet here are three similar sentences and four years acquiescence, in which case, no precedent can be shown that a review was ever granted. And the daughter is not left unprovided for, but is seised by the same title with the petitioner of the moiety of an estate descended on her from her mother.

Dr. Strahan: No objection can be made to our petition. The most irregular steps have been taken by the Commissioners in Ireland, four years past, between taking the informations and giving sentence. Five judges were present when the informations were taken, and but only three when sentence was given, and the other judges had no notice of their meeting and, where any of the judges take upon them to give a sentence without the rest, all the proceedings are null and void. Mr. Hill’s proctor petitioned the court that the three would not proceed to sentence until the other two met, which was at that time granted. And their reasons might have convinced the other three.

As to Mrs. White’s petition, no instance can be given where a review has been granted after five years acquiescence. Most countries now observe the Imperial law. Where they vary from it, it is in shortening the time; as, in Holland, it is restrained to a year, that property may not be unsettled after a long distance of time.

Dr. Bramston: The only foundation for this cross-petition is the single sentence in Ireland, where five witnesses were not suffered to give evidence, whose testimony had been objected to in the Prerogative Court in England and allowed, and, on an appeal, the Delegates were of opinion they were good witnesses and remitted the cause.

Dr. Palmer, for the cross-petitioners: This case is the first of the kind that I remember. The proceedings have been set out as if those in Ireland were subsequent to those in England, whereas both went on pari passu. This will, whereby an only child is disinherited, was made in extremis, the testator upwards of seventy years of age, his distemper a diarrhoea, which, being improperly stopped, turned to a lethargy. The will was made on the eighth. He died on the tenth of the month. It is said his intention by the will was to give several particular legacies and the residue to Mr. Hill, whereas no legacies
are given by the will, but by the codicil, which is more properly Mr. Hill’s will, for, thereby, he promises by way of a note subscribed by himself that he would pay those several legacies. And the legatees, who were the menial servants of the General, his groom and such like, having received and given releases for their legacies, were admitted witnesses to prove the will.

Mr. Hill is a mere stranger in blood to the testator, nor could the displeasure he had conceived at his daughter’s marriage be the cause of this pretended will in favor of Mr. Hill, for the deceased was afterwards reconciled and very kind to her. And two wills were found in his study in England, by which nothing is given to Mr. Hill.

As to the proceedings on the Commission in Ireland, the Statute in that kingdom requires no quorum, and common lawyers are but of late years necessary in the commissions in England.

And as to the length of time, Dr. Crawley was deprived for simony by the Delegates, and a review was granted by King William III at about five years distance, and the sentence was reversed, and he was restored to his archdeaconry, which Dr. Oldis had enjoyed in the meantime. Nor is the king limited to any time. It is not necessary that the counsel or proctors should be present when sentence is given. But it is very usual for the judges, after hearing, to declare we will not give the gentlemen who are of counsel any further trouble of attendance. And what they mention as irregularities are common in these commissions. Sometimes, the judges adjourn to a certain day, and, then, if none attend, they are adjourned sine die. Mr. Hill is as much in fault as the cross-petitioners, for, if he thought the proceedings were delayed, he ought to have applied for a day, and the Register is to attend the judges to sign a warrant for that purpose.

And as to the objection that five Commissioners were present at the informations and that only three gave sentence and that the other two might have been of a different opinion, this would have been no sufficient foundation for a review, though the five had been present and the two had actually disagreed, as was adjudged by Lord Harcourt in the Case of Tindar versus Hopkins, three being sufficient to join in opinion by the words of the commission.

We pray a commission, because we have new witnesses to examine and to new matter, which they do not suggest. And, therefore, we hope Your Lordship will make a favorable report of us to His Majesty.
Mr. Attorney General [Yorke]: This is such a will as a court would allow the probate of with great reluctance, an inofficious testament, in which no notice is taken of the daughter, his only child. And it would be void by the civil law. And there were two wills found, both made in her favor. The testator's leaving assets in both kingdoms makes this a very particular case. But I must observe to Your Lordship that this will was made in Ireland and witnessed there, and, in that kingdom, they might give sentence on the credit of the witnesses, where they were best known and their characters could be easiest found out. And this, indeed, appears to be the fact from the complaint of the petitioners, that five of the witnesses, whose testimony was allowed in this kingdom, were rejected there, and it may be so here on a commission of review, as in the Case of Drake and Prime, 6th of February 1705/[06], Abington was allowed a good witness by the Prerogative [Court] and the Court of Delegates, and yet his evidence was refused on a review.

Here have been three sentences against one, indeed, in favor of the will, but not on the same evidence, but only sentence against sentence.

As to the errors in the proceedings, it is common not to have due entries from Ireland, and it is answered by the practice of the Court of Delegates here. The judges meet, adjourn, and, at the day, perhaps no judge comes; yet the proceedings do not fall for that reason, but new warrants are granted to attend, and no entries are made of such warrants. Proceedings of courts are first taken down in minutes, and are drawn up at large from thence, so that it is not strange that several errors should appear in them.

As to the prayer of their proctor, that the sentence might be stayed until the other judges came, who heard the cause, this might have delayed the sentence forever, for, according to my instructions, they two were dead when the sentence was given. Though the sentences in England were very solemn and in conformity, yet there is sufficient cause for a review, because we have new matter to prove and [that] by new evidence. And, as the law has set no time in which such a petition is to be brought, it lies wholly in the breast of the crown. And no case can happen in which it can be more properly asked than in this, where a daughter is left poor and destitute of any provision from her father, and [there is] a suit depending at the same time in Ireland to set aside the will, wherefore it was advisable to wait until the same was determined in that kingdom, and, if the judges there gave sentence in favor of the will, then to acquiesce, but, if they gave sentence for the daughter, this then would be a
good reason for us to pray a review of the sentence given in England. And it is very necessary to prevent the clashing of jurisdictions in case the sentence of the Commissioners in Ireland should be confirmed on the commission of review granted to the petitioners for them in the same kingdom; it would be allowed in one court to be a good will and disallowed in another.

And there is no other method for one uniform determination than to have both sentences reviewed by a new commission. So that, here, the length of time can be no objection, because it was proper for Mrs. White to wait the event of the suit in Ireland. By the rules of this court, a month is the time limited for a rehearing. Suppose then a decree made in favor of the plaintiff and, in another cause, a decree is given for the defendant on the same equity and a petition is preferred to rehear the last cause. The court will likewise suffer the first cause to be reheard at the same time, though the petition is preferred at a greater distance of time than is limited by the course of the court to the end that there may be one uniform decree in both causes. And reviews in ecclesiastical courts are of the same nature with rehearings.

Lord Chancellor [LORD KING]: Though the cross-petitioners suggest that they have new matter to offer, yet, as they have produced no affidavits to prove the same, I can take no notice of the allegations of their petition. My opinion, however, is not final, but I am only humbly to lay my thoughts before His Majesty. I cannot advise the king to grant a commission of review after five years’ acquiescence under the sentence, for that would render property unsettled and precarious, and no commission without proof of new matter was ever granted at such a distance of time if the case stood single. But, here, in one kingdom, is a sentence for the will; in the other against it. Five Delegates in Ireland heard the cause, and, four years after, three gave sentence.

As to the entries, they are but matter of form, and may be rectified. In this case, there have been two sentences in England for the will, and one in Ireland, so that a commission of review of the sentence of the Delegates in Ireland is plainly reasonable. But, to prevent contradictory decrees, this seems to me at present the best method, to lay before His Majesty that the petitioners are well entitled to a commission and that it would be proper to suspend the consideration whether a commission should be granted to the cross-petitioners until those commissioners of review have given sentence. If they reverse the sentence of the Delegates in Ireland, then, there will be no occasion for another commission, because the sentences in England will
agree; if they affirm it, that it will be proper to grant a review of the sentence in England to the same Commissioners, that two different sentences on the same will may not be on record in the same kingdom. But [it is] not to be allowed to give new evidence as to facts and matters before examined to.

The acts of the Court of Delegates in Ireland were produced in this cause signed by the Register. And it was adjudged that there needed no affidavit to prove his hand, he being a public and known officer, as, on an appeal to the Lords, the party is never put to prove the Register's hand to a decree.

[Other reports of this case: Lincoln's Inn MS. Misc. 147, pp. 23, 163.]

78

**Dent v. Prudence and Bond**

(Del. 1729)

*Churchwardens cannot sue in their official capacity after their terms of office have expired.*

2 Strange 852, 93 E.R. 893

In 1725, during the time Prudence and Bond were churchwardens of St. Matthew's, Ipswich, a rate was made for the repairs of the church and the appellant Dent not paying his share, the churchwardens, after their year was out cite Dent to compel a payment. And he appearing insisted to be dismissed, for that the suit was not begun within their time.

But the judge decreeing him to answer, he appealed to the Arches, where the judge pronounced against the decree to answer before there was a contestation of suit, but he retained the cause.

From thence, Dent appealed to the Delegates. And, upon a hearing 17 December 1729, before the bishops of Norwich [Baker] and Carlisle [Waugh], Chief Justice Raymond, Baron Carter, Sir Henry Penrice, and other doctors, it was determined that Dent should be dismissed and that Prudence and Bond, who can sue only in a politic capacity, could not institute any suit after that capacity was gone.
It was agreed that, if the suit had been begun within their year, they might have proceeded in it after their year was out, it being *ex necessitate* to prevent people from delays in order to wear out the year. So is 1 Danvers, Abr., 788; Cro. Eliz. 145, 179, 1 Leon. 177; and Dr. Prideaux’s *Directions to Churchwardens*, 60, 61.¹ But, in regard this was not commenced until the year was out and no precedent was shown to warrant this suit, the appellant was dismissed.

*Strange pro Dent.*

W. H. Cockburn, *Clerk’s Assistant* (1800), p. 31

Michaelmas term 1729. Sepe against Prudence and Bond.

Churchwardens out of their office sue for a rate made by them in the year of their wardenship.

The defendants say they, being out of their office, could not sue.

And sentence was given in the inferior and Arches courts for the churchwardens.

But the Judges Delegates were unanimously of opinion that they could not sue when out of office. So they reversed the former sentence and condemned the churchwardens in costs.

79

**Warren v. Cusack**

(Del. 1729)

*Upon an appeal as to the making of a will, court costs are not given where the parties are in equal degree of relationship, but where there are allegations of bad faith, such as the forgery of or the suppression of a will, court costs will be awarded.*

British Library MS. Stowe 403, f. 40

8 November 1729; Serjeants’ Inn Hall.

[This was an] appeal from the Prerogative Court of Ireland by John [?] and Mary Warren, nieces to Oliver Talent, who made the will, against Ann Cusack, a niece also in equal degree, who was made executrix by that will. The will was proved and pronounced for in the court below. And costs were given but not taxed.

They proved for the appellants a great many declarations of the testator that the Warrens should have his estate, and, likewise, gave some proof of a subsequent will, but could not prove any contents.

The court did not lay any weight on these declarations of affection or disaffection and was of opinion that a subsequent will where the contents was not known could not be a revocation of the former.

Dr. Henchman quoted Jennings and Whitehead on Sir Antony Keck’s will.1 There was a former will and an executor, and also a second will was made, but it was lost. There, he said, if they could prove the bequests, it would be a revocation. Nor could they prove a different executor. Ergo, there could be no revocation. And, where they cannot, bequests would be rather a codicil than a revocation or a new will.

And per totam curiae, Pengelly, Chief Baron, at the head of the commission, the sentence was affirmed for the will, and the cause was remitted, and costs were taxed at £80.

The rule in the spiritual court is not to give costs on an appeal where the appellant is in equal degree with the executor and devisees, as here, and only contests the factum and condidit of the will. But here are contradictory allegations, as that the first will was forged and then that there was a subsequent will, but it was suppressed, and there was a codicil. Ergo, costs were given.

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1 Whitehead v. Jennings (Del. 1714), see above, Case No. 52.
Where a person receives property as a legatee, rather than as an executor, he cannot plead plene administravit, and he takes cum onere of claims against the property.

One person has received property as a legatee, he cannot renounce the legacy and take it as an executor.

Boden v. Wise
(Del. 1730)

19 February 1729/[30]; Serjeants' Inn Chancery Lane.

It was a suit for a legacy by the will of Adam Boden's father, who, having a term for years, devises to the plaintiff this term, paying out of it £20 per annum to his sister, Elizabeth Moor, for life, and, then, after her death, he bequeaths to his two daughters £100 each and the survivor to have the whole.

So, the defendant, marrying the survivor, claims the £200. And the appellant pleads plene administravit below. And there is a sentence for the legacy. And this sentence was affirmed.

And per curiam, this is no good plea, because it appeared the appellant entered on this estate and lease and enjoyed it for many years as legatee and not as executor, for he did not put this lease or the value of it in the inventory, but left it quite out. Ergo, taking as legatee, he must take it cum onere and not as executor, he being made so by the will and residuary legatee. And, if he take once as legatee, he cannot go back.

They quoted 10 Co., Lampet's Case; Doctor and Student, ca. 33, lib. 2; Salk. 308.1 Nota the appellant lived in the house and paid the £20 per annum for several years.

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Thorpe v. Plaxton
(Del. 1731)

Where there is a private prosecutor and an appeal is made before the issue is joined, if the private prosecutor dies pending the appeal, the appeal abates.

British Library MS. Stowe 403, f. 40v, pl. 2

May 1731; at Serjeants' Inn Hall Fleet Street.

This was an appeal from a gravamen from the Consistory Court of York, and it was in a criminal cause upon articles exhibited against Plaxton, a parson, for drunkenness and other crimes. This was at the promotion of Jacob Thorpe, who was promotor voluntarius. This promoter entered into a bond to prosecute. The cause proceeds so as to examine witnesses on both sides, after which there is another allegation put in, which is refused by the judge, upon which this appeal is.

[On] 19 November, a commission of appeal and an inhibition is decreed. And Thorp [was] served with the citation and inhibition. And [it was] returned 3rd December. But, on the 2nd December, the promoter died. And the question was whether the Court of Delegates could by their commission appoint a new promoter, for Sir Thomas Clarges was ready and offered himself to be a promoter.

The great objection was here no contestation of suit or issue was joined before the promoter died.

[It was] agreed, this being a cause of office, the judge below might have appointed a new promoter, and it is a summary cause.

Strange said it was like a relator or common informer on the Stat. 4 & 5 Will. & Mar., ca. 8,¹ and that this will not abate the suit, for that the judge really was the party plaintiff, though, nominally, it was Thorp and that it was ex officio judicis.

But the court decreed that the cause was abated and that they had nothing to do with it, because it was to relieve in and to determine in a cause

¹ Stat. 4 Will. & Mar., c. 8 (SR, VI, 390-391).
between Thorp, plaintiff agentem, and Plaxton, defendant. And, in truth, there was no such cause, for that Thorp was dead. And to make a new promoter would be to make a new party. Nor is there any cause before the court until an issue is joined, for, after issue is joined or the suit contested, the proctor might carry on the cause. But the court decreed that the inhibition below should be relaxed.

It seems there is a promotor necessarius, where they proceed per inquisitionem, and he gives no security and is only the proctor of the judge. Second, there is a proceeding per denunciationem, i.e. by a churchwarden, and it is from a presentment of theirs. Third is per accusationem, which is this case. And that is voluntary, and it is ad instantiam et petitionem of Thorp, who is the party plaintiff.

7 Moore P.C., N.S. 24, 17 E.R. 9

A suit was brought in the Consistory Court of York for the correction of a clerk for drunkenness and neglect of duty. It appears that, after an appeal to the Court of Delegates, the promoter died, and, upon objection being taken, that court assigned the cause for a hearing ad informandum in jure on the legal question ‘whether, by law, the office of ordinary has not such a concern in all prosecutions of a spiritual nature that a proper promoter may be permitted on any emergency to carry on the cause, either in the first instance or on appeal’.

But it does not appear to have been solemnly determined, for the inhibition on appeal was relaxed on the ground, as it is stated, that the promoter had died before the inhibition and the citation were returned. The opinion of the Court of Delegates is, however, sufficiently apparent from the course taken by them.

7 Moore P.C., N.S. 33, 17 E.R. 12

On an appeal from the Consistory of York before the Delegates, the promoter having died pending the appeal, the Delegates assigned the cause for a hearing ad informandum in jure on the legal question ‘whether, by law, the office of the ordinary has not such a concern in all prosecutions of a spiritual nature that a proper promoter may be permitted on any emergency to carry on the cause, either in the first instance or the appeal.’
Eventually, they dismissed the appeal, but on the special ground that the promoter had died before the inhibition and the citation were returned. In other words, the jurisdiction of the court appealed from remained, and the jurisdiction of the appellate court was never founded.

82

**da Rosa v. de Pinna**

(Del. 1732)

The grant of administration of a decedent’s estate to a married woman vests rights in her husband which she cannot defeat by afterwards renouncing the administration.

2 Lee 390, 161 E.R. 380

22 May 1732. Lopes da Rosa and others against Lusitano de Pinna and others. Judges, doctors Pinfold, Strahan, Audley, and Isham.

Mary Agnes de Pinna, in the Prerogative [Court], prayed administration to her mother and brother. She was opposed by Lopes da Rosa and another sister, both which lived at Bahia in the Brazils. Administration was decreed to Mary de Pinna, who was a married woman. She was sworn administratrix, and the administration was decreed under seal.

Mr. Lanes, proctor for Lopez da Rosa etc., appealed

And, now, in the Delegates, Mr. Holnar appeared for De Pinna, the husband, and would have appeared for Mary de Pinna, the wife, also, but she, having altered her mind, gave a special proxy to Mr. Cheslyn to renounce her right to the said administration, and give an affirmative issue to the libel of appeal. The question was whether this proxy could now be admitted.

It was insisted that it could not, for the administration having been decreed, there was a *jus acquisitum* to the husband, and the wife could not now renounce in prejudice to her husband. And to show that a wife, who has the interest immediately in her, shall not by her act prejudice her husband, Dr. Andrew cited the cases of Jacobs v. Flutter in the Arches, 1719; of Lilley v.
Miscellaneous Reports of Cases in the Court of Delegates from 1670 to 1750

Bevoir, Prerogative, 1719, and also of Gibbs v. Davis, and of Silvester v. Gee, both in the Prerogative [Court].

De Pinna prayed administration to her mother and sister. She was opposed by da Rosa, another sister, who lived at the Brazils.

The judge of the Prerogative [Court] decreed administration to pass under seal to de Pinna, who was sworn administratrix.

Da Rosâ’s proctor appealed, and, in the Delegates, Mrs. de Pinna gave a proxy to renounce her right to the administration in order to prejudice her husband.

The husband intervened and prayed that her proxy might be rejected.

The Court was of opinion that, on decreeing the administration to the wife, an interest was vested in her husband, which she could not by any subsequent act deprive him of, and, therefore, rejected her proxy of renunciation.

83

Lewis v. Bulkeley
(Del. 1733)

Where a specific legatee has received his legacy, he can be a witness to prove the will.

Where an unmarried woman makes a will, then marries, and then her husband dies, her will has become invalid unless she republishes it after her husband’s death.

British Library MS. Stowe 403, f. 41v, pl. 1

6 February 1732[33].

In the case of Mary Williams, alias Hampton, she made a will *dum sola* and then married this Hampton. He died, and she did not republish this will during her life.

[It was] urged [that], if she had the power of making and the power when she died, it is enough by the civil law.

But the main question was, as below, if this legatee of a specific legacy was a good witness. [It was] so agreed and decreed on appeal to the Dean of
Arches. And the Delegates were divided. Then, there was a Commission of Adjuncts.

The question in a case of the probate of a will [is] if a legatee who had a legacy by that will and such legacy was paid him and received by him but [there was] no release, could he be a witness.

[It was] objected if the will be set aside, the administrator had an action against this legatee for so much money.

By Page and Fortescue against Probyn etc. and by a great majority of the doctors, [he was] held to be a good witness.

1 Lee 190, 161 E.R. 71

13 February 1732-33. Lewis et Lewis contra Bulkeley, per curatorem, Serjeants’ Inn, Fleet Street, coram judges Page, Probyn, Fortescue, Thompson, Lee; doctors Tindall, Pinfold, Strahan, Audley, Kinaston, Isham, Bramston, Cottrell.

This cause began originally in the Consistory Court of Bangor upon the will of one Mary Williams, alias Hampton, and was appealed from thence to the Arches, where the first sentence was affirmed, and from thence to the Delegates.

In the first instance, William Lewis, Esq., was examined as a witness, who, in an interrogatory put to him, deposed that he was a legatee in the said will in a piece of plate which he had since received and was worth about £8. And he added that, if the will should be set aside, he would be entitled to an equal share of the deceased’s effects with Ann Lewis, the opponent in this cause.

The deposition of this witness was read in the court at Bangor. But, in the Arches, it was objected that he had a specific legacy, which, if the will should be set aside, might be recovered again from him by the administrator, and, therefore, he, having an interest under the will, could not be a witness to support it.

Dr. Bettesworth, dean of the Arches, was of opinion the objection was good, and would not suffer his deposition to be read, and this rejection of him was not appealed from.

But, afterwards, when the cause was heard in the Delegates, on the 5th December 1732, the rejection of this witness not having been entered in the minute book of the Arches Court, the counsel for the will offered to
read his deposition there, upon which the counsel for the other side made
the same objection to him that had been before made in the Arches. And,
after much debate, the court was divided in opinion; to wit, Judge Page,
Judge Fortescue, Dr. Tindall, and Dr. Pinfold were of opinion that he
was a good witness; Judge Lee (afterwards Lord Chief Justice Lee, brother
to Sir George Lee), Dr. Audley, Dr. Bramston, and Dr. Cottrell, were of
the contrary opinion. Whereupon, a commission of adjuncts was obtained,
and, on 13th February 1732/[33], this point was solemnly argued before the
whole commission, as above named, the majority of whom were of opinion
he was a good witness and that his deposition ought to be read.

It was agreed by all the judges of the common law that, if the will
should be set aside, the administrator might recover the legacy by an action
of trover. And they seemed to agree that there was no difference between this
and a pecuniary legacy, for, in that case also, if the will wherein such legacy
was devised was set aside, the legacy might be recovered from a legatee who
had received it by an [action of] indebitatus assumpsit; so that they seemed to
agree that the objection would lie with regard to their being interested against
all witnesses that were legatees of any sort, unless they renounced their lega-
cies in proper form.

But those of the commissioners who were of opinion that he was a good
witness seemed to found their judgment on his answer to the interrogatory,
in which Lewis swore he was entitled to share in the distribution under an
intestacy, and, from thence, argued that he could be under no bias, because
he must have a better interest to set this will aside than he could have under
an £8 legacy to support it.

The judges who were of the contrary opinion argued that the rule of
law that no person could be a witness where he had an interest was clear
and determined and that the smallness of the interest did not alter the gen-
eral rule, that the interest under the will was clear and certain, whereas that
under an intestacy was uncertain, there being no constat of the quantum of
the estate, nor of the degree he stood in as to distribution, and, therefore, an
uncertain interest could not be set in competition with one that was certain.

The judges who were of opinion that the deposition of Lewis ought to
be read were Judge Page, Judge Fortescue, Tindall, Pinfold, Strahan,
Kinaston, Isham, Bramston, doctors. The judges of the contrary opin-
In this case, I [Sir George Lee] was of counsel; vide my notes.

1 Haggard Ecclesiastical 652, 162 E.R. 708


This was an appeal from two concurrent sentences of the Court at Bangor and of the Court of Arches, both which courts had pronounced for the validity of the will of a married woman made previous to a second marriage.

The original citation at Bangor issued at the instance of Rowland Williams and Dorothy, his wife, and also of William Lewis and Anne, his wife, the next of kin of the deceased, calling upon William Bulkeley, tutor or guardian of his daughter, Maria Bulkeley, during her minority, executrix in the will of Maria Williams alias Hampton, to appear and prove the said will per testes and further to do and receive what may be just.

There was no citation against the legatees, either personally or viis et modis, nor a citation against all persons in general to see proceedings.

On 17th February 1732-33, the Delegates reversed both sentences.

On 19th April 1733, before the Condelegates, Hill exhibited for Dorothy Williams, sister and next of kin of Mary Hampton, otherwise Williams, and prayed administration to pass the seal.

Sayer exhibited a special proxy under the hand and seal of Owen Lewis, and alleged him to be a legatee in the will of the deceased in this cause and now remaining in the Registry of this court.

Upon the petition of each proctor, the act [was] to be delivered three days before and to show precedents on the last court [day] of this term.

On 7th May, the cause was assigned for informations and sentence at Serjeants’ Inn whensoever.

On 1st June, before the whole commission at Serjeants’ Inn, Hill prayed that administration of the goods of Mary Hampton, otherwise Williams, as dying intestate, be granted and ordered to pass under the seal of this court to his client, the sister and next of kin of the deceased.

Sayer prayed liberty to propound the will in the name of his client and to prove the same by sufficient witnesses.
The judges, by their interlocutory decree, rejected the petition of Sayer, and ordered the administration to pass the seal in the name of Dorothy Williams, the sister and next of kin of the deceased.

R. Burn, *Ecclesiastical Law*, vol. 4, p. 51

Mrs. Lewis, a widow, made a will; soon after, she married again. In some time, her second husband died, and she again became a widow, without any children by either husband. The will which she made in her first widowhood remained. And, being found after her death, the question was whether it was a good will or not.

The counsel for the will cited many authorities from the civil law and showed that, among the Romans, if a man had made his will and was afterwards taken captive, such will revived and became again in force by the testator’s repossessing his liberty.

But it was observed on the other hand that marriage is a voluntary act, but captivity is the effect of compulsion.

And the will was adjudged not to be good.

84

**Blunt v. Crook**

(Del. 1733)

*Where an interlocutory order has been made, there can be a rehearing, regardless of how many judges of the court made the order.*

2 Comyns 446, 92 E.R. 1153

Dame Dorothy Blunt *versus* Japhet Crook and Thomas Hawkins.

On an appeal to the Delegates, the case was that John Hawkins made his will in favor of the appellant, his niece, and, afterwards, he made another will, as pretended, in favor of Japhet Crook and Thomas Hawkins.

And a libel was exhibited to discover the fraudulent contrivances of Crook to obtain the last and to set it aside and establish the first will.
Crook made an evasive and insufficient answer, to which exceptions were taken, but overruled by the judge of the Prerogative Court. And, thereupon, an appeal [was taken] to the Delegates.

The Delegates reverse the former decree, and retain the cause, and order Crook to answer de novo, who puts in another evasive answer, upon which the appellant, before sight of any depositions, gives in further allegations to explain facts which Crook had not clearly answered and containing facts discovered pending the suit.

In Trinity term, these allegations were rejected by two of the Delegates at Doctors’ Commons, on which the appellant applied that the matter might be reheard before all the Delegates.

But it was objected that no such rehearing was ever allowed, that the Delegates are all in equal authority, and their meeting at Doctors’ Commons makes as much a session as at Serjeants’ Inn, and the other Delegates might have been present if they had pleased, that, by the commission, the Delegates are authorized so that, in actis ordinariis duo, in sententia definitiva quinque, concurrant, so that the determination by two in this matter, which is an ordinary act, is final and conclusive.

On the other side, it was insisted, and so determined by the Delegates, that, admitting generally two of the Delegates may settle the allegations, upon which the proofs in the cause may be taken and this may be well if all the parties acquiesce in what they think proper. But, if the parties are dissatisfied with it, it will be hard to bind them down to what two shall determine, which would in its consequences be to make them entire judges of the cause, for, if they rejected all the allegations which one side thought most material, the other Delegates could have no other evidence before them on which they could form a judgment but such as the two Delegates admitted.

It seems fitting, therefore, that, where the parties are dissatisfied with what the two Delegates have done, that the matter may be brought under the consideration of the Condelegates, which is not to bring an appeal or writ of error on their judgment, as is insinuated, before others that are but co-ordinate in authority with them. But it may be better compared to a court’s reviewing or re-considering the act of one of themselves or their own act, as, where matters of order or regularity are settled by a judge at his chamber, or in court, when but one or two are there, it is frequent to draw it into examina-
tion again when the court is full. And this may be more proper where allega-
tions are admitted than when rejected improperly.

85

**Davis v. Mace**
(Del. 1734)

*Court costs accrue from the time that the party knew or should have known of the opposing party’s right.*

British Library MS. Stowe 403, f. 41v, pl. 2

17 June 1734; Davis *et al.* v. Ann Mace *et al.*

A suit was commenced for an administration by two nieces as next of kin. The aunt comes in and propounds and gives in an allegation that she was aunt and next of kin, which was denied. But it was proved she was an aunt and next of kin. And they had a copy of the allegation the 4th of May. And they had until the 15th of June to consider whether the aunt was next of kin or not.

And the question was what the costs should be if any.

And *per curiam*, though, at the commencement of the suit, they might not know but they were next of kin, yet, having notice from the 4th of May, they [the court] gave costs from that time. And so, they reduced the bill from £98 to £80 and ordered a further inventory, though the former inventory was £3900.

86

**Hucks v. Williams**
(Del. 1734)

*In this case, the will of a blind testator was properly executed, and the administration of the decedent’s estate was given to the residuary legatee.*
This was a suit for an administration. And an appeal was brought by a granddaughter and next of kin against Sarah Wheeler, residuary legatee in a will or an appointment in the nature of a will.

An estate of a widow was with the consent of the husband before the marriage conveyed to trustees for her separate use with a power by any writing or by her last will and testament or any writing purporting to be her last will in the presence of three witnesses to dispose of the same. This was proved by three witnesses.

But the objections were, first, that this married woman was about ninety and was blind. *Ergo*, it ought to be read to her, and [he] ought to tell the witness what the contents were and should prove that there were instructions.

The answer was that it was read to her, though [it was] not necessary, about two months after, and [she was] asked whether it was according to her mind, and she said 'yes'. And all three subscribing witnesses proved the execution. And she signed, sealed, and delivered it as her act.

The second objection was that this instrument was a deed of trust only, but [there was] no testamentary schedule. And they ought to apply to [the Court of] Chancery to compel a performance of the trust, and the rather because it began thus etc. ‘to all Christian people . . . .’

But *per curiam*, Lord Strafford, the bishop of Bangor [Sherlock], Justice Fortescue, and two doctors, the appeal was rejected, and it was held to be well executed and a good testamentary schedule, though it was objected that there could not be an administration until the trustees had renounced. So, they affirmed the decree below that the administration should be committed to Sarah Wheeler, the residuary legatee in this instrument of appointment.

14 February 1733[/34]. *Vide Codex*, lib. 6, tit. 28, law 21; Swinburne, part 2, par. 11, p. 87, new edition.1

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1 H. Swinburne, *Brief Treatise of Testaments and Last Wills*. 

238
Rushworth v. Mason
(Del. 1734)

A written complaint that has no prayer for relief is a nullity, and such nullity cannot be cured in an appellate court.

British Library MS. Stowe 403, f. 43

John Rushworth, in a cause of appeal on a gravamen, who was elected usher of the free school in Coventry, a caveat was entered against a licence.

They insisted upon a nullity below in the articles. The articles given in are in the name of the judge to the civil cause turned into a criminal [cause]. This cause was founded on the 77th Canon.¹ Nothing makes a cause civil or criminal but the prayer. These articles were given in with an intent to hinder his license. And there was no prayer to the additional articles.

And this nullity was rejected where it is the cause of appeal. Without a prayer, it is no libel. And they should have pronounced it void below. And, if there was no prayer, they cannot add one, but they must condemn it. [Henry] Conset, [Practice of the . . . Ecclesiastical Courts], part 3, p. 77.

There can be no such thing as an acquiescence in a nullity, like an original in a court of law. Gaill, 1st obs., 127, no. 3, 6. One cannot reform a nullity and this. It was said that, in the Case of Lomax and Lomax,² a nullity was pronounced for, but in no other case. Mynsinger's Observations, cent. 1, obs. 27; vide Calvin's Lexicon, for nullitas; Xanthius, De Nullitate, no. 127, 129; Clerk's Praxis, tit. 302.

This is turning an indictment into an action. The head of the articles cannot be reformed, and a libel without a prayer or conclusion is nothing, so that the judge below rejected the nullity and ordered the prayer to be extended and the articles to be reformed after the suit was contested or the issue was joined.

² Lomax v. Lomax (1726), Lincoln's Inn MS. Misc. 147, f. 139, pl. 3.
Ergo, the court determined against the judge below and that there was good [cause] of appeal, and they reversed what the court below of Litchfield and Coventry had done.

2 Comyns 448, 92 E.R. 1154

Rushworth versus Mason and others, inhabitants of Coventry.

On an appeal to the Delegates, the case appeared to be that, on the 16th day of July 1733, John Rushworth was elected by the Mayor and Common Council of Coventry to be usher of the grammar school at Coventry. But, it being required by Canon 77, made anno 1603, that none teach school without licence from the bishop of his diocese, on the 3d of October 1733, a caveat was entered with the Register of the bishop against his obtaining such licence.

On the 23d of October, the caveator, he that entered the caveat, was called to know what he had to object against the granting of such licence. And the proctors on each side exhibited their proxies in the Consistory Court of the bishop of Litchfield and Coventry, Hand for Rushworth, the appellant, and Fletcher for George Mason, Nathaniel Alsop, and W. Grove, three inhabitants of Coventry, who prayed time to exhibit articles. And a day is assigned for that purpose.

On the 26th of October, articles are exhibited, but [there was] no title or head to them and no prayer annexed.

On the 6th of November, Hand prays the articles to be dismissed. And a day is given to consider them.

On the 20th of November, four of the sixteen articles are admitted, viz. the third for soliciting the chastity of a woman, the tenth that he was passionate and pulled his mother out of bed, the eleventh that he beat his wife inhumanly after the sacrament etc., the twelfth that, being vicar of Filongly, he beat his servant etc., and the thirteenth article which was for exacting subscriptions and abusing his parishioners by ill language, threats, striking, etc. ordered to be reformed.

On the 4th of December, nineteen additional articles were given in, which were admitted on the 11th of December.

Upon this, Rushworth appeals to the Court of the Arches in querela nullitatis for the four articles admitted, and he prays that the thirteenth, which was ordered to be reformed, should be rejected.
On the 29th of April 1734, the appeal was considered and adjourned.

On the 7th of May, Dr. Bettesworth, Dean of the Arches, rejects the *querela nullitatis*, orders the head or title of the articles to be reformed, and the prayer to be extended, and the thirteenth to be farther reformed.

From this sentence of the Dean of the Arches, the appeal is now to the Delegates.

It was insisted for the appellant by Serjeant Birch, Doctor Andrew, and Doctor Cottrell:

First, that Mason, Alsop, and Grove, being inhabitants of Coventry, are no proper persons to complain of acts done by the corporate body, for they are concluded by their determination; otherwise, a minority may defeat an act of the majority;

Second, that it was improper to proceed in this manner, for, upon the caveator's being summoned to show what objection he had against the bishop's giving a licence, they should have proceeded in a summary way, not by way of libel and article;

Third, that, on the appeal, the court could not reform the head of the articles, which is to make a new cause, nor extend the prayer, which is to vary entirely the nature of the proceeding; the proceeding was in a criminal way; it is now altered to a civil cause;

Fourth, that, if this could be done, it could not be after a sentence for the admission of the articles;

Fifth, that the articles are foreign to the matter complained of, which charge him with misdemeanors in his spiritual function of vicar, when the matter was only whether he should have a licence to teach school;

Sixth, it is not too late to insist on this matter, for we say there was a nullity in the proceeding, which may be objected at any time after an appeal allowed and after thirty years etc.

And all the articles and proceedings from the beginning were declared to be null, and the parties, it was declared, might object below originally if they had anything to object against the party's being licensed to teach school as an usher.
Where a testator bequeaths his entire estate to his wife, the will will not be set aside in favor of a pretermitted child, because it will be presumed that the testator intended that the bequest would enable the mother to adequately support their child.

1 Phillimore Ecclesiastical 482, 161 E.R. 1051

4 November 1734. The Judges Delegate present at the sentence were Mr. Justice Denton, Mr. Baron Carter, Mr. Baron Thompson, Dr. Strahan, Dr. Audley, Dr. Isham, and Dr. Cottrell.

Captain Rowland Phillips died in September 1731, leaving a widow and three children at the time of his death. No will was found. The widow had renounced the administration, which was granted to the grandmother of the children. The widow, afterwards, married Ward, the plaintiff. A will was subsequently found in a portmanteau among a parcel of papers. It was made twelve days after the marriage, and it gave everything to the wife. Evidence was gone into to show that the testator had afterwards a bad opinion of his wife, that they lived upon very bad terms, that she had been confined in a madhouse for a very considerable time, and that, in the latter part of his life, he lived separate.

The Prerogative Court appears to have pronounced against this will, not upon any question of revocation, but upon failure of the proof of the factum. I [Sir John Nicholl] have looked into the pleadings and evidence. And, as far as can be collected, it appears that the opposition was directed against the factum. It was offered to prove that it was a forgery, that the testator was abroad at the time the will was made, that he lived on ill terms with his wife etc. Thus, the original grounds intended to show that he had made no will, and not to raise the question of presumed revocation.

The Delegates reversed that decision, and they were of opinion that the factum was fully proved. They were also of opinion it was not revoked, for,
from the notes of counsel, it appears that this point was raised and discussed, namely, whether the will was revoked or not.

And I find in some subsequent cases it has been quoted, both in argument and decision, as an authority that the birth of children alone will not revoke. But suppose the direct point to have been raised, solemnly raised, instead of occurring accidentally in argument, I think that there were grounds upon which the Delegates could not decide otherwise than for the validity of that will. The will is made twelve days after the marriage; why, certainly, at that time, the testator must be presumed to have contemplated the birth of children; he must have made his will in contemplation of that event; he thought it proper at the time to give the whole to his wife; it is by no means an uncommon thing both for a husband expecting children and a husband having children to give everything to the wife under the idea that his death will devolve upon her the duty of providing for those children and that he enables her to discharge that duty and provide for them by leaving her the bulk of his property. In the case of a will made in that way twelve days after the marriage, when the event of children must be presumed to be contemplated, it would have been exceedingly dangerous to have held such a will to be void, besides it was proved that the will remained in the deceased's own possession in a trunk with his own letters. There was no inception of any new will, so that the revocation must have arisen, if at all, upon the state in which the deceased afterwards lived with his wife.

But the two great circumstances of difference between that case and the present are those already referred to, first, that the property being given to the wife, the duty of providing for the children devolved upon her, and, therefore, they could not be considered as unprovided for, and, secondly, that the will was made at a time when he contemplated the fact of his having children. That case then, though of very considerable weight, yet does not appear to me to go the whole length of establishing that the birth of subsequent children accompanied by a different combination of circumstances may not, without a subsequent marriage, raise a presumption of revocation.

5 Term Reports 54, 101 E.R. 31

A will was found whereby everything was given to the widow. A posthumous child being born, a suit was instituted in this court [the Prerogative
Court] to set aside the will. And the court agreed that the will should not stand on the principle that the testator must have intended to provide for his child.

But, on an appeal to the Delegates, this decree was reversed.

89

**Limbery v. Mason**

(Del. 1734)

*A will is not cancelled or revoked by the testator without a specific intent to do so.*

2 Comyns 451, 92 E.R. 1155

William Limbery *versus* Samuel Mason and Henry Hyde.

Upon a commission of review after an appeal to the Delegates, where the sentence below\(^1\) was affirmed, the case appeared to be this. Samuel Mason made his will dated the 23rd of June 1729 marked letter ‘A’ whereby he devised his real and personal estate, and he made Mason and Limbery his executors. And he made a duplicate of it marked ‘B’, which he left with Limbery, one of his executors. And he left likewise a letter with him, showing where his personal estate was.

In July 1730, Mr. Mason told Hyde that he had made his will, but not to his mind, but he would make a new one and his son executor if he would accept of it. In August 1730, Mr. Hyde telling him that he had spoken to his son, who would accept to be executor, he said he would then go about it as soon as he could.

The part of his former will in his own custody marked A he obliterates in many places and many lines together, and he makes interlineations with his own hand, but he did not tear off his seal or otherwise cancel it, but soon wrote over the paper ‘C D E’ with his own hand, which was in the main agreeable to the paper A so blotted and interlined, but not exactly agreeable,

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\(^1\) *Calmady and Limbery v. Hyde and Mason* (Prerog. 1731), 1 Lee 423, 161 E.R. 156.
there being some additions and alterations to what he had there interlined. And, on the 25th of September 1730, he told Hyde that he had written his will with his own hand and, when he had finished it, he would show it to him. But he never did show it to him, dying on the 2nd of October 1730, and leaving the paper C D E in loose sheets without being signed or sealed by him, and, also leaving a paper ‘F G’, which he had begun and which seems as if he had intended to be a duplicate of C D E. Under the paper C D E was written by him ‘in witness whereof I have hereto and a duplicate thereof set my hand and seal’, though no hand or seal was put, nor duplicate written.

On this case, two points were made: first, whether the paper C D E was a good will, at least as to the personal estate; secondly, if not a will sufficient to pass the personal estate, if it amounted to a good revocation of the first will; so that he died intestate.

And it was insisted that it was a good will of the personal estate, which needs not the same solemnities that are requisite to a will of land. It need not be sealed; it needs no witnesses; if the testator write it for his will, it is sufficient.

In the Case of Worlich and Pollet, anno 1711, Mary Pollet sent for a person to make her will [and] gave him instructions to do so. When he had written it, he read it to her; she approved of it, declared it to be her last will, sent for witnesses to see her execute it, signed and sealed as written, but she died before any other execution; yet it was held a good will, for, though the first sentence for it was reversed upon an appeal, yet it was afterwards affirmed before the Delegates.

So in the Case of Wright and Walthoe, there were three testamentary schedules, whereof one was without a date, the second was written ‘in witness’, but [there were] no witness, the third concluded abruptly, yet, being written by Richard Helman, they were declared to be his will, March 1710.

So in the Case of Loveday and Claridge, 1730, Loveday intending to make his will, pulled a paper out of his pocket, wrote down some things with ink, some with a pencil, and, though it had no conclusion, but appeared to be a draught which he intended afterwards to finish, for it was not signed, but had at the end a calculation of his effects, an account of his testable, and an order to pay to Sir [blank] Hankey a dividend of stocks, yet it was held a will.

So, in a case where the testator gave instructions to make his will of his real and personal estate and, when it was brought to him, he made several
alterations, and then wrote the whole over as altered with his own hand. This, found in his study, though not signed or sealed, was held a good will. It is true, the first sentence was that he died intestate. But that was reversed by the Delegates on the 18th of July 1704.

So in the Case of Brown and Heath and Pocklington, 1721, a will of real and personal estate was prepared in order to be executed, though [there were] several blanks in it, and the testator died before execution, yet it was held a good will for the personal estate.

And, though more was intended to be done, yet it shall stand good for what is done, as in Butler and Baker's Case, 3 Co. 25, if a will be partly written in the testator's life, though more was intended to be written, it shall be good as far as was written.

Then, as to the second point, it was insisted, that this paper C D E, whether a subsisting will or not, was a revocation of the former will A. If it was a good will, there could be no doubt but it was a revocation, but, if not sufficient to substantiate the devise, yet it might be sufficient to revoke the former. A testamentary will is sufficient to revoke a will solemnly executed, though it has not the like solemnities. Vinnius, l. 2, tit. 17, s. 7, fo. 379, 380.

By the Statute 29 Car. II, a former will may be revoked by an obliteration made by the testator himself. And this is so. The testator obliterated that part of A and the cancelling of one part is a cancelling of the duplicate. So it was held in Sir Edward Seymour's Case, who died on the 18th of February 1708. A little before his death, he sent for his will out of his scrutoire [and], in the presence of several persons, cancelled it, and said 'I cancel my will', and desired them to bear witness of it. And, on the next day, he told his physician that he was hot in his body, but easy at his heart. And this was looked upon as a sufficient cancelling of the other duplicate that he had not by him.

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1 Brown v. Heath (Del. 1721), see above, Case No. 65.
3 Stat. 29 Car. II, c. 3, s. 6 (SR, V, 840).
But, on the other side, it was argued that the paper C D E, in this case, did not amount to a will sufficient to give the personal estate, nor did it amount to a revocation of the former will.

It was agreed that, in case the will marked A had been completely cancelled, the duplicate had been thereby likewise revoked.

It was agreed by most that the paper C D E might have amounted to a good will of the personal estate if there had been no former will, although Judge Page, one of the Delegates, doubted of that.

But the matter now to be considered was whether this paper, not being a complete will to pass his estate, as it was intended to be, should amount to a revocation of his former will, which was completely executed.

And it was said that, upon all the circumstances of the case, it did not appear to be the intention of the testator to die intestate. But, being willing to make some alterations of his former will, he was preparing the draught of another. But it ought not to be presumed that the first was designed by him totally to cease until his other was finished. There is no doubt but the testator, by any writing, directly designed for that purpose and executed as the Statute 29 Car. II directs or by any cancelling, obliteration, etc. designed merely to disannul the former will, might have revoked it without more, but he designs to do it by a new will. And, unless such writing be effectual to operate as a will, it shall not amount to a revocation.

And this was agreeable to the rules of the civil law, as well as to the resolutions at common law made since the Statute of Frauds.1

In the civil law, the rule is laid down, tunc prius testamentum rumpitur cum posterius perfectum est etc. Digestum, lib. 28, tit. 3, s. 2. So Mantuan; so Vinnius; so Swinburne; and Domat, 2 part, lib. 3, tit. 1, s. 5, art. 3. A first testament made in due form cannot be annulled by a second, unless the same be likewise made in due form.

It is true that a will may be revoked by a military will, which requires not the same solemnities in the execution which other wills have, but is executed in such due form as such a kind of will requires.

So, at common law, in the Case of Edleston and Speak, 2 W. & M., it was resolved that Anne Speak having made a second will and signed it in the presence of three witnesses, yet they not having attested it in her presence,
whereby it was not a will sufficient to dispose of her real estate as intended by her, it was not a sufficient writing to revoke her former will, although it had all that was required by the Statute 29 Car. II to a writing of the revocation of a will. 1 Show. 89, Carth. 79.1

So, in the case of Hyde and Hyde, 6 Annae, 1 Equi. Ca. 409,2 where, a man, having made and duly executed a will of his real and personal estate, had a mind to change a trustee and make some alterations, and, for that intent, sent for a scrivener, gave him instructions for a new will, who drew up another will pursuant to them, read it over to the testator, by whom it was approved and signed, and who then took the old will out of his pocket, tore the seal from off eight sheets of it, but, before he had torn off the seal from the ninth and last sheet, the scrivener asked what he did, the second was not yet perfected, and he died before it was so. And it was held that the last not being executed according to the Statute 29 Car. II and, consequently, not sufficient to pass his real estate, was no revocation of the former will, and, though the seals were torn off from eight of the sheets of the first will in order to cancel it, yet that not being done with the intent of cancelling, unless the second will was good, should not amount to a cancelling.

It is true the ecclesiastical court allowed the second will to be good for the personal estate, which the Chancellor could not control.

So in the case of Onyon and Tryers, Hilary 1716, 1 Eq. Ca. 408, 2 Vern. 741,3 the testator, having a mind to alter the trustees to his former will, ordered it to be written over, signs it in the presence of three witnesses, then tears the seal from the former will, but the second not being attested in his

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presence, it was held no revocation. The Case of Burkit and Burkitt, 2 Vern. 498,1 is to the same effect.

And all the Delegates but one concurred in that opinion, whereby the sentence of the former Delegates was affirmed.


A., 23 June 1729, made his will and executed two duplicates thereof before three witnesses. And he made B. and C., since deceased, executors. And one of the duplicates was delivered to B.; A. died 2 October 1730. And, about three weeks before his death, he made several alterations and obliterations with his own hand in the duplicate remaining in his own custody, making a new devise of his real estate and a new residuary legatee and a new executor, entirely striking out the names of the first devisees, residuary legatee, and executors, and he altered several of the former legacies, and inserted or interlined new legacies. And, soon after, he wrote another will with his own hand, agreeable in a great measure, but not altogether to the will or duplicate so altered, with a conclusion in these words:

In witness whereof I [the said testator] have to each sheet set my hand, and to the top, where the sheets are fixed together, my hand and seal, and to the last thereof my hand and seal, and to a duplicate of the same tenor and date, this [blank] day of [blank] 1730.

But there was no signing or fixing together. The testator, soon after, began to write another will, word for word with the last, so far as it goes, but he went no farther than devising his lands. The testator lived six days after, and was in good health, and might have finished and executed both or either of the latter wills if he had thought fit. The testator never sent or called upon B. for the duplicate of the first will in his hands, though B. lived in town.

After the death of the testator, all the testamentary papers or schedules were found lying all in loose and separate papers upon a table in his closet,

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not signed or executed, and the duplicate of the first will was found on the same table altered and obliterated, *ut supra*, with his name and seal thereto whole and uncancelled.

A sentence was given in the Prerogative Court for the duplicate of the first will in B.’s hands. And it was confirmed upon an appeal to the Delegates, *viz.* Lord Raymond, Chief Justice, and Probyn, Justice, Dr. Tindall, and Dr. Bramston, who were all the Delegates present, after four days solemn hearing.

And, upon a commission of review, granted by Lord Chancellor King upon the petition of Hyde, the executor named in the new will, it was again affirmed by the opinion of all the Delegates, except Dr. Pinfold, *viz.* of the judges, Reynolds, Chief Baron, Page, Justice, and Comyns, Baron, and two doctors of the civil law, chiefly on the reason (as the reporter says he heard) that the testator did not intend an intestacy, and, by the alterations and obliterations in his own duplicate of his first will, he appeared only to design a new will, which as he never perfected, the first ought to stand. And the testator’s not calling for the duplicate of the first will in B.’s hands strengthens the presumption of his intent not absolutely to destroy his first will until he had perfected another, which he never did.

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**Blunt v. Henchman**  
(Del. 1737)

*An appeal lies to the Court of Delegates only from a final judgment in a lower court.*

West *tempore* Hardwicke 25, 25 E.R. 801

25 March 1736-37.

This was a suit instituted in the Court of Chivalry against Sir Henry Blunt, baronet, [1696-1759] for assuming and usurping without right certain ensigns of arms and a crest contrary to the laws of arms, at the promotion of His Majesty’s advocate of this court [Henchman].
In the progress of that cause, an allegation was exhibited on the part of Sir Henry Blunt, setting forth that all pedigrees must be signed by the proper hands of the parties requesting such entries to be made in the books belonging to the College of Arms and objecting to the validity of some of the entries in the said books, as not being so signed, and insisting that, therefore, no credit ought to be given to them.

This allegation, the court thought fit to reject, whereupon Sir Henry Blunt preferred his petition to the Lord Chancellor, appealing from this act of the court as erroneous and a grievance and praying a Commission of Delegates.

On the other side, a cross-petition was presented by Dr. Henchman, as His Majesty’s advocate in the Court of Chivalry, insisting that no appeal lies from that court for any grievance done therein, but only from a definitive sentence or final interlocutory decree having the force and effect of a definitive sentence.

On behalf of the appellant, doctors Paul and Cottrell contended that an appeal to the king in Chancery lies from all determinations in the court of honor; that, if an appeal lies from a definitive sentence, it follows that it lies for a gravamen, and that the act complained of amounts to a definitive sentence. And they cited Gregory King’s Case in 1702. He was articled against for an irregular practice as a herald. The prosecutor exhibited a libel. He gave a general negative answer. The court decreed that he should put in a special answer in writing on oath. From this order, he appealed and the result was that a Commission of Delegates issued, and they reversed the order.

In Gowne v. Grandall, the appeal was for a grievance in the rejection of a plea by the Court of Admiralty.

Dr. Henchman, advocate for the Court of Chivalry, Dr. Strahan, Mr. Fazakerley, and Mr. Murray, contra: The Court of Chivalry is very ancient. The Statute of Rich. II gives a power to the Privy Council to prohibit in certain cases. This court is governed by the rules of the civil law, 4 Co. Inst.

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1 Earl of Coventry v. King.
125,1 and, by the civil law, an appeal does not lie from any grievance, unless it conclude the party. The rule of the ecclesiastical courts is *a quolibet gravamine licet appellare*. But that rule does not extend to courts proceeding by the civil law. Perezius calls them *appellationes moratoriae*. Gaill’s *Praxis*, lib. 1, obs. 129, the same doctrine is laid down. Lanfranc, tit. *Interlocutoriae Appellationes, In quibus casibus quis potest appellare? In qualibet causa fallit in sententia interlocutoria.* So much for foreign practice. The rules of the Court of Admiralty are applicable to the Court Military. And, in Clarke’s *Praxis Curiae Admiralitatis*, it is said *appellare licet a qualibet sententia definitiva et interlocutoria habente vim sententiae definitivae; non licet appellare* for rejecting an allegation, denying a commission to examine witnesses, because these grievances may be set right on an appeal from the definitive sentence.

The question, then, is whether this interlocutory order will conclude the parties or whether it will be examinable upon an appeal from the definitive sentence. Now, this allegation may be offered upon such appeal. The books must be laid before the court, and the objections will then appear. The Case of Gregory King was of a criminal matter. The Delegates determined that he was not obliged to accuse himself; if he had done so, it would have been irreparable, and he could not have been relieved upon an appeal. In Arthur v. Arthur,2 a commission of appeal was prayed for and denied for a grievance.

Lord Chancellor [Lord Hardwicke] states the case (9th June 1737):

This matter has been argued by counsel on both sides, and two questions have properly arisen:

First, whether an appeal will lie from any sentence or decree of the Court of Chivalry but a definitive sentence or from such a grievance as is described in the civil law by the term *gravamen irreparabile, i.e.* such an one as if submitted to at first can never be set right after a final sentence in the principal cause;

Secondly, supposing it will not, whether the order or act of the court now appealed from be either a definitive sentence or a *gravamen irreparabile*.

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2 *Arthur v. Arthur* (Del. 1720), see above, Case No. 60.
First, as to the first question, it has been admitted on all hands that this court proceeds according to the rules of the civil law, except in cases where any special course or practice of the court breaks in upon it.

Lord Coke, in his 4th Inst. 125, is express upon this point. They proceed according to the customs and usages of that court, and, in cases omitted, according to the civil law, secundum legem armorum. Fortescue, De Laudibus Legum Angliae, in his 32nd chapter, is to the same effect. And, in this respect, he puts it on the same footing with the Court of Admiralty. As to the custom or course of this Court of Chivalry, no precedents have been cited, nor is it pretended that there is any particular course or practice on this head to distinguish it from the general rule of the civil law.

This brings the question then to the rule of the civil law concerning appeals. But that must be understood of the civil law as used and practiced in England.

It appeared by all the authorities cited, and was fully admitted by the learned doctors on both sides, that, in this, the civil and canon law totally differ, that, by the civil law, no appeal lies but from a definitive sentence or a gravamen irreparabile, but that, by the canon law, the party may appeal either from a definitive sentence or any grievance whatsoever.

The authorities upon this subject are numerous and clear, and it is unnecessary for me to repeat them.

To show this general rule of the civil law to have been received and allowed in England, the course of the Court of Admiralty was referred to and Clarke’s Praxis Curiae Admiralitatis, a book of very good authority on that head, was cited. De appellatione a sententia definitiva.

Tit. 53. Appellare licet a quacunque sententia definitiva sive decreto interlocutorio habente vim definitivae sententiae sive viva voce apud acta coram judice tempore latae sententiae vel interpositi decreti hujusmodi sive coram notario publico.

Tit. 54. Quod non licet appellare a gravaminibus seu decreto interlocutorio non habente vim sententiae definitivae. Licet dederis materiam concludentem defenseiis tuae vel concludentes exceptiones contra testes adversarii; vel infra terminum probatorium petieris commissionem ad partes pro testibus examinandis vel similias, et judex ea omnia admittere reclusaverit, semper practicatum fuit quod non
licet ab istis gravaminibus nec a quocunque decreto interlocutorio non habente vim sententiae definitivae appellare; quia haec omnia possunt reparari in appellacione a sententia definitiva, et licet non allegata allegare et non probata probare.

This is clearly the rule of the civil law as received and practiced in England in the Court of Admiralty, and it is founded on the wisest reason, as it prevents that unnecessary delay, which a power of appealing from every imaginary grievance would occasion.

I directed precedents to be searched for in the Court of Admiralty, and I am informed by the proctors on both sides that no instance is to be found of an appeal from grievances of this nature.

One case, however, in the Court of Admiralty, that of Grandall and others against Gowne and others, has been mentioned on the part of the appellants. And, of the particulars of that case, I have, therefore, thought it right to obtain the fullest information. This suit was commenced in the High Court of Admiralty on the 17th of January 1705[/06], and it was heard on appeal before the Delegates on the 7th of March 1706[/07]. It was brought by Grandall and others against Gowne and Company, late owners or part owners of a ship called Speedwell, for wages due to them as mariners on board the said ship. They gave in a summary petition or libel, wherein they set forth that the ship was bound on a voyage from the port of London to the East Indies, that they were hired on the part of the owners of the said ship to proceed on the said voyage, and did their duties on board the said ship accordingly, and set forth that Gowne and Company were owners or part owners of the ship at the time they were hired and shipped for the said voyage. This libel or summary petition was admitted. Gowne and Company put in their answer upon oath to the said libel, and, therein, amongst other things, insisted that, as to so much of the summary petition as seeks discovery of their property or interest in the said ship or lading, they were not obliged by law to answer, for that, by the Act of Parliament 9 & 10 Will. III,¹ it is enacted that all persons who shall trade to the East Indies without being authorized are subjected to the forfeiture of the ship, cargo, and proceeds, and double the value, one-fourth to the informer and three-fourths to the Company, and, further, that, in that

they were not qualified to trade there, the discovery tended to subject them to the forfeitures and penalties of that Act, in case they had any interest in the ship or lading, and to render them liable to prosecutions in respect of that voyage, which Statute they, therefore, pleaded in bar to the discovery sought for by the summary petition. To these answers, exceptions were taken as not being full and plain. On the 16th April 1706, the judge decreed the answers not to be full and that the defendants should answer as to their respective interests in the ship and whether they were or were not owners at the time of the summary petition. From this act, Gowne and Company appealed to the Delegates. And the cause was heard before Lord Chief Justice Trevor, Mr. Justice Tracy, Mr. Baron Smith, and others, who pronounced against the appeal and remitted the cause and condemned Gowne and Company in costs.

This sentence itself is not to be found; so that it does not appear whether the cause was remitted by reason that no appeal lay from a grievance or on the merits. And it must be observed that the case differs widely from the present, for the order or decree there complained of, if it had been a grievance at all, would have been fatal and irreparable if once submitted to.

Of the like kind, is the Case of Gregory King on an appeal from an interlocutory decree of this court in 1702. That was in the nature of a criminal cause against a herald for misbehavior in his office, in having, contrary to his oath and duty, set up a false inscription with a fictitious pedigree of a family, forging, and giving out false arms, and endeavoring to procure false certificates to support all this. His proctor put in a general negative answer. The prosecutor insisted that he should answer on oath. The Court of Chivalry determined that he should answer on oath. From this decision, he appealed to the queen in Chancery, and the appeal was allowed.

But that case is very different from the present. That was a gravamen irreparabile, for, if he had once answered, it would have been too late and the grievance could never have been redressed upon appeal.

The next question then is, admitting that an appeal will not be from any sentence but a definitive sentence or such a grievance as is a gravamen irreparabile, whether the order or decree appealed from in this case be either the one or the other. I am of opinion that it is not. It is from an act of the judge rejecting an allegation upon a point of evidence. The substance of the allegation is this, that, by the laws of the College of Arms, all pedigrees must
be signed by the proper hands of the parties requesting such entries to be made in their books, that some of the entries produced are not so signed, and, therefore, not entitled to any credit.

Consider the nature of this allegation. It is rather of a matter of law than of fact, and, if so, it must necessarily be open on an appeal from a definitive sentence. The law of the College of Arms is strictly so. The usage and practice of the College of Arms is enquirable of from the officers, both in the inferior and in the superior court on appeal. On trials at common law, the question of admitting or rejecting heralds’ books as evidence is always treated as a point of law, and is determined on reasons of law and authorities without any examination of fact. So in 1 Salk. 281, the Case of Stainer and the Burgesses of Droitwich, on a trial at bar, Michaelmas 7 Will. III, King’s Bench.¹

But it may be said that this question of law may possibly be mixed with fact; it may be necessary before you can come at the law to enquire into usage, and usage is fact. If that should be so, then, this may be set right on an appeal from the definitive sentence, and the Judges Delegates, on that appeal, may admit this allegation, or an allegation of the like import, and give the party leave to examine upon it.

This case is not near so strong as some of the cases put by Mr. Clarke in his 54th title, which I have cited.

It is objected that the Lord Chancellor is not to try the merits of the cause in order to determine whether an appeal lies. True, but he must determine whether an appeal lies or not. It is not proper for me to determine whether the judge below has done right or wrong in rejecting this allegation on the merits of it, neither do I. But it is proper for me to determine whether, supposing he has erred, an appeal will lie at present or not. These are two distinct questions.

It is no doubt proper in doubtful cases to let a commission go, and, possibly, it will be said that no great mischief will ensue from so doing in the present case. It may be so, but what weighs greatly with me as to that part of the case is the precedent which I should thereby establish. It would be of ill consequence to allow these dilatory appeals. The same rule must hold for the

¹ Stainer v. Burgesses of Droitwich (1695), 1 Salkeld 281, 91 E.R. 247, also 12 Modern 85, 88 E.R. 1181.
Court of Admiralty, where cases of great value and in which dispatch is most necessary sometimes come.

For these reasons, I am of opinion that no commission ought to issue and that the petition of Sir Henry Blunt must be dismissed.

(The whole of this case is taken from a manuscript report in Lord Hardwicke’s handwriting, except the arguments of counsel, which are taken from his Lordship’s Notebook.)

1 Atkyns 295, 26 E.R. 189

9 June 1737.

A suit was instituted in the Court of Chivalry against Sir Henry Blount, baronet, for assuming and usurping arms etc. as his own proper arms, which neither he nor any of his family ought to bear. In the progress of this cause, an allegation was exhibited by the defendant, setting forth that all pedigrees whatsoever must be signed by the proper hands of the parties requesting such entries to be made in the books belonging to the College of Arms. And then, he objects to the validity of some of the entries in the said books as not being signed and, therefore, no credit to be given to them. But this allegation was rejected by the judge of the Court of Chivalry.

And the defendant petitioned the Court of Chancery in order to obtain a commission of Delegates to determine the said appeal.

On the other side, there is a cross-petition, insisting that no appeal lies but only from a definitive or final interlocutory decree having the force of a definitive sentence.

Lord Chancellor [LORD HARDWICKE]: I observe no objection has been made to the jurisdiction of the Court of Chivalry, but only an appeal from an act of that court in their ordinary jurisdiction. And, therefore, as it is not insisted on in Sir Henry Blount’s petition, it must be thrown out of the case.

There are two questions arising upon the present case:

First, whether an appeal will lie from any sentence of the Court of Chivalry except a definitive one or from such a sentence as is termed in the civil law a gravamen irreparabile;

Secondly, whether this particular sentence of the Court of Chivalry is a gravamen irreparabile.

It has been admitted on all sides that the Court of Chivalry proceeds according to the rules of the civil law, except in cases omitted, and, there, they
are governed by the course and custom of chivalry and arms. And it is so laid down in 4 Co. 425.¹

There has been no precedent cited in the arguing of this case as to the custom or course of the Court of Chivalry in this particular respect. Therefore, it must be brought under these rules of the civil law with regard to appeals, that is so far as the civil law has been admitted in England.

By the canon law, you are admitted to appeal from all grievances in general, but in the civil law only where the gravamen est irreparabile.

The authors upon this head are very numerous. But to show that this has been allowed in England, I shall mention only Clark’s Praxis Curiae Admiralitatis Angliae, who is an author of undoubted credit and very full upon this head. His Lordship then cited several instances out of the 50th and 51st chapters.

These rules are extremely clear and very applicable to the present purpose, for, says the author, although the party propounds exceptions to witnesses and the Court of Admiralty reject them, yet there can be no appeal, for, in the appeal from the definitive sentence, you may equally propound the same exceptions, nor are you precluded from it.

This is the rule then of the civil law in the proceedings of the Court of Admiralty, and it is founded upon very good reason, for, else, it would make causes there unnecessarily tedious if appeals should be allowed upon every trifling or supposed grievance. This had great weight with me in the argument. And, upon search made in the Court of Admiralty by both sides, there is no precedent to be found of an appeal of this kind.

Doctor Paul cited a case of Grundel and others against Gawne and Company. This suit commenced in the Court of Admiralty in January 1705/[06], and was heard at the Delegates in March 1706/[07]. It was brought for wages due to the plaintiffs as mariners, and they prayed that the defendants might set forth whether they were owners of the ship Speedwell bound on a voyage from the port of London to the East Indies. This libel or summary petition was admitted, and the defendants gave in an answer upon oath, but they insisted they were not obliged to discover upon what voyage the ship was bound, because it would subject them to the penalties of the Statute of the 10 Will. made in favor of the East India Company.

But, notwithstanding, the judge of the Court of Admiralty decreed that they should make further answer as to their respective interests in the said ship and whether they were or were not owners at the time in the summary petition mentioned. From this act, the defendant appealed to the Delegates, who pronounced against the appeal, remitted the cause, and condemned Gawne and Company in costs.

But this differs widely from the present case, for the judge of the Court of Admiralty there had committed an error, which was a *gravamen irreparabile*, for, if the defendant had answered, the cause would have been at an end, for, by the confession they must necessarily have made, their own answer would have destroyed them.

In the Case of the Earl of Coventry in 1701 against Gregory King, which was in the nature of a criminal prosecution for having, contrary to his oath and the duty of his office as Lancaster Herald, caused the arms of his father to be impaled with false arms etc., King gave a negative answer to the libel. But it being insisted on behalf of Lord Coventry King's answer should be on oath so far as he was obliged by law to answer, it was alleged by the defendant that the said libel contained criminal matter and, therefore, Lord Coventry's petition ought not by law to be admitted, and he prayed the same to be rejected. But the judge decreed he should give his answer on oath to such of the articles, as he was obliged by law to answer. Upon an appeal to the Court of Delegates in 1702, they allowed the appeal from the interlocutory order.

This too is very wide from the present case, for, if King had made a confession upon oath, the cause would have been over, and, therefore, it was a *gravamen irreparabile*, and it cannot be used as an authority for Sir Henry Blount, for his case depends upon different circumstances.

Then the question will be whether this decretal order be a *gravamen irreparabile*.

By the laws of the College of Arms, all pedigrees entered in their books must be signed by the parties requesting such entries to be made, and all the ancient books are so. And it has been held that no pedigree in law is good without it. And then Sir Henry Blount goes on and applies this to books produced in his case.

This is rather an allegation of a matter of law, and must necessarily be open, even after a definitive sentence, nor will Sir Henry Blount be precluded
from any advantage he may make of it before the Court of Delegates. All courts have a right to enquire of their officers what is the usual practice of their courts. This is the constant method in the King’s Bench, and at trials at nisi prius. In 1 Salk. 281,¹ it is laid down that, upon an appeal from a definitive sentence, the Judges Delegates will certainly admit of this very allegation or allegations to the like effect.

The present case is not near so strong as the instances put by Mr. Clark in his Praxis etc., who is clear of opinion that, in the instances he mentions, no appeal would lie.

An objection was taken in the arguing of this case that the Lord Chancellor, upon a petition for an appeal, is not to try the merits of the cause. This is undoubtedly true, but, then, the Lord Chancellor must determine whether an appeal will lie or not, though he will not enter into the merits or decide whether the judge of the Court of Chivalry has properly rejected the allegation.

It has been said there can no great mischief ensue if such a commission should issue out of the court. But what weighs with me is the making a precedent for future applications to Chancery of this kind, for it would be of mischievous consequences to allow of such dilatory appeals, because, as the Court of Admiralty proceeds by the same law, it would be an authority for such sort of appeals from the interlocutory orders of that court, and it would create great expense and delay, and the suitors there are too necessitous for the most part to allow of any affected delays.

For these reasons, I am clearly of opinion that there is no foundation for Sir Henry Blount’s petition, and, therefore, it must be dismissed.

Jones v. Bourget
(Del. 1739)

A person who is aggrieved by or who has an interest in a sentence in an ecclesiastical court can have an appeal in the Court of Delegates.

¹ Stainer v. Burgess of Droitwich (1695), ut supra.
West tempore Hardwicke 632, 25 E.R. 1121

30 March 1739.

Mr. Bourget instituted a suit in the ecclesiastical court upon a contract of marriage against Mrs. Ann Jubert, who, pending that suit, intermarried with the appellant. A sentence was pronounced in favor of the contract. A child of that marriage was born, and the wife was dead.

Mr. Jones, who, with the child, was very much interested in this sentence, though not a party to the original suit, petitioned for a commission of delegates to review the sentence on the Statute of the 25th Hen. VIII.¹

Upon citing several authorities from the canon and ecclesiastical law, where persons aggrieved by and interested in a sentence may have a commission of delegates to review, though not parties to the original suit, a commission was directed.

[Other copies of this report: 1 Atkyns 298, 26 E.R. 191.]

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Turst v. Turst
(Del. 1741)

Upon a judicial separation of a married couple, neither alimony nor court costs will be given to the wife where her separate income is greater than her husband’s.

2 Lee 92, 161 E.R. 275

27 January 1740[141]. The Judges Delegate present at the sentence were Mr. Justice Page, Mr. Baron Carter, Dr. Kinaston, Dr. Walker, Dr. Pinfold, Jr., Dr. Chapman, and Dr. Collier.

The sentence, as recorded in the Assignation Book of the court, is as follows.

Holman prayed the judges to pronounce for the force and validity of the appeal and complaint interposed in this cause on behalf of his client, the said

Thomas Sebastian Turst, Esq., and that the same was made and interposed for good and sufficient reasons and for their own jurisdiction and that the pretended definitive sentence in writing made and promulgated by the Dean of the Arches, the judge from whom and everything therein pronounced, decreed, and declared, be entirely and absolutely revoked and declared null and void to all intents and purposes in law whatsoever, and that the interlocutory order or decree heretofore made and interposed by the surrogate to the Chancellor of London, the judge in the first instance of this cause and from which the appeal to the Court of Arches was brought by Cheslyn's said client be ratified and confirmed in all things.

Cheslyn, prayed Holman's petition to be rejected and that the money, bank notes, lottery tickets, clothes, jewels, and other things forcibly taken away from his client and mentioned and set forth in the schedule annexed to an affidavit dated 3rd May 1739 made by his party in this cause be restored, that Holman's client be condemned in the costs of suit and alimony.

The judges, having heard the advocates, counsel, and proctors on both sides, by their final interlocutory decree, having the force and validity of a sentence, did pronounce, decree, and declare for the appeal in this behalf interposed and their jurisdiction or, rather, for that of our sovereign lord the king, and reversed the sentence of the judge of the Arches Court of Canterbury, from whom this cause is appealed, and confirmed the decree of the judge of the Consistory Court of London, and retained the principal cause, and decreed a compulsory, at the petition of Cheslyn.

Mr. Turst was one of the King's Band of Gentlemen Pensioners, and he had a salary of £100 a year. But it appearing that the wife had a separate income of much greater value, the Delegates would not allow her either alimony or costs and reversed Dr. Bettesworth’s decree, by which he allowed her costs.

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**Bailey v. Wilson**  
(Del. 1745)

*A witness whose interest in the case is de minimis or contingent is competent to testify.*

262
At the seals before Hilary term, in Chancery, 1744[45], 18 Geo. II.

On a petition for a commission of review upon a sentence of the Court of Delegates here, confirming a will made in Ireland, which was contested for divers reasons, an objection was made for reading the evidence of Mr. Magill in favor of the will, as to which the case stood thus.

The testator had given several specific legacies of a watch, plate, etc. to different persons, and appointed the defendant Wilson executor. It appeared in proof in the cause that Wilson, immediately after the testator's death, sent for Magill and several others to whom these specific legacies were given, that Magill, in Wilson's presence, took the things so bequeathed and gave them to the legatees without Wilson's hindering it, though Wilson did say there was time enough to do it and that it was too early, but Magill declared that the testator had devised it and that he should see them distributed.

The objection to Magill's evidence was that, by this act, he had made himself executor de son tort, and was, therefore, interested in the event of the cause, because, if this was not a good will, the persons to whom administration should be granted would have an action against him as a trespasser, and, in [an action of] trover, they would recover damages against him.

To which it was answered for the defendant that Magill was interested on both sides, for he was liable to have an action brought against him by Wilson, the executor, and, though a man should be finally interested in the event of a cause, if he be not principally interested, his being consequently so will not go to his competency, though it may to his credit. Thus, if an estate be left to A. for life and, after[ward], to the parishioners of B., the parishioners shall be competent witnesses, because every man who so gives evidence may die before this remainder comes into possession. So the heir at law may give evidence for his ancestor, because his ancestor may dispose of his estate otherwise than to him. And he cited East India Company v. Goslin [1742], in the King's Bench, about two or three years ago, where, at the trial, the sailors who had forsaken the ship, as well as the captain, were refused, upon a presumption that, if they had not done their duty, they were chargeable, but, upon motion for a new trial, it was granted, because they not being principally, but only consequently and without certainty, interested in the cause, were not incompetent witnesses, but their credit must be left to the jury. There was also cited The King v. Bray, before this Chancellor when Chief
Justice,¹ which was upon an information relating to the borough of Tentageu, where it was held that the mayor of the corporation was no incompetent witness to give evidence of a custom as to what he did when he was mayor.

Mr. Attorney General [Ryder] replied, first, that the executor of this will could not maintain an action for these goods against Magill. Secondly, supposing he could, yet he could not recover such damages against him as the administrator would in case this will was made void. As to the first, where there is a lawful executor, he only has a right to bring [an action of] trover against an executor de son tort, but it is under the consideration of the jury how far the action is maintainable and what damages shall be given. And, therefore, in the case of debts paid by an executor de son tort, he cannot plead that he has paid the debts, but shall give it in evidence and shall be recoupled in damages in an assize brought against him by the disseisee. 5 Co. 30; Carth. 104, Skin. 274.² And this, not because the payment was originally a good one, but that justice may be finally done to both parties and, at the same time, he is punished for meddling with what did not belong to him. He may not be obliged to pay twice the same sum. But, in the present case, no such action can lie, for a man cannot bring an action for an act done by his consent. The legacies were paid with the executor’s privity. And his not hindering it must be taken for a consent. Suppose the lawful executor had brought an action against the legatees (for he has right if the property remains in him to bring an action for the goods wherever they are), could there have been a verdict for the executor? No, certainly. The legacies are given, and ought to be paid, and, though the executor’s assent be necessary, yet it is not from that assent the legatee derives his right, but from the will. The assent of the executor only completes the right. And, therefore, the least thing will serve to prove it, where the executor cannot be injured by it, and even where he can, if it be shown, it is sufficient. And here is no want of assets. Now, if he cannot recover against the legatees, neither can he against the executor de son

¹ Rex v. Bray (1737), Cases tempore Hardwicke 358, 95 E.R. 232.
tort, for he can recover against him only upon the foundation of the property remaining in him, which is the foundation of the action against the legatee.

But, secondly, suppose the action did lie, there is no ground for putting the two interests upon a level, there being such a difference of what one and the other should recover. In the one case, the whole would be recovered; in the other, but an inconsiderable trifle. And it is this difference of interest that will prevent him from being impartial.

Now, what would the lawful executor recover against the executor de son tort? It was said that the court cannot consider what a jury would do, but only what the law gives. But what are damages? Are they not what a jury must enquire into and contain the prejudice which the plaintiff on demand has suffered? In an action of trover, nothing is recovered but damages, and the court must direct the jury that what they think the plaintiff has suffered is the question. And what damages has he suffered here? None. It is to prevent circuity, which a court of law always does where there is not a necessity, as where the action is not brought for a special thing, that he shall recover next to nothing.

Suppose the rightful executor should bring a bill here against the executor de son tort, would the court oblige him to pay over again what he had once paid? No. An executor de son tort shall be allowed a payments which the rightful executor ought to have made, Chan. Ca. 33, 126, and so justice is done on both sides. How then can he be said a disinterested witness, since the reason for rejecting evidence is the bias of mind arising from the interest the witness has in the event? In the case of The East India Company v. Goslin, the sailors were admitted from a necessity of the thing. And, besides, the duty of the captain and the men were different; it was their duty to obey him. And, while they did so, their bonds to him could not be forfeited. So, where a goldsmith's servant is admitted to swear to all account, it is for the sake of necessity.

Hardwicke, Lord Chancellor: The question is whether the objection to Mr. Magill's evidence goes to his own competency or only to his credit? And I am of opinion it goes only to his credit, and not his competency. In order to determine the question, I shall consider this fact in two lights: first,

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how the point stands, supposing Mr. Magill to have acted as executor of his own wrong; secondly, as acting with the privity of the executor named in the will. As to the first, before probate of the will, he delivers part of the testator’s goods to persons named legatees in the will. It is said that, if the will be not valid, he is liable to make satisfaction to the administrator for the conversion of these goods. To which it is answered, he is liable either way. And the possibility of an action against him by the executor being weighed against the other sets off the matter at large. There are many cases where, if a witness is liable to account either way, he shall be examined, which answers the objection in respect of his competence. And this objection of a man’s being liable to an action differs from his immediately being interested. There has been some change in the doctrine on these points, their being cases in the old books where a man’s being liable to an action went to his competency. But there is a great difference to be made between having an immediate interest and a possibility, as in the case of a tenant in tail, with a remainder over. In an action brought against the tenant in tail, the remainderman cannot be a witness, though an heir at law might, as having nothing vested in him. But the remainderman has a vested interest, which the law considers as part of the same fee. And, therefore, the supporting the tenant in tail’s interest is the supporting his own.

Now, these vested interests are very different from a possibility of action, for, suppose an action of trespass brought for a nuisance and the question is whether the defendant worked upon the plaintiffs soil. The action may be brought against the principal alone, or the workmen may be joined as defendants with him. But, if they are not joined, they may be brought as witnesses. And yet they are liable to have an action of trespass brought against them, and their confession may be evidence against themselves. But the court says that may go to their credit, not to their competency. And the reason of allowing them is that the truth may the better come out.

There was a case mentioned of The King v. Bray, before me when Chief Justice of the King’s Bench, which was upon an information relating to the borough of Tentageu upon the nomination of elisors who are to return the jury. At the trial, the mayor was called to prove the custom. And [it was] objected that he was the mayor that acted and was now brought to establish his own act, in which, if he had done wrong, he was liable to be punished. And Baron Thompson, who tried the cause, allowed the objection. But, upon
a motion for a new trial, the Court of King’s Bench was of opinion that the objection went only to his credit, not to his competency. A new trial was granted. In the argument of that case, several others were put, particularly The King v. Clark,¹ where, upon an information for a nuisance in the river of Thames, a person who had received a particular injury and damage by it was produced as an evidence and objected to, because he might bring his action on the case and recover damages and so would swear under a bias. But the court held this went only to his credit, not to his competency.

This being the general rule as to points of this nature, let us now consider the answer, that Magill is liable to an action either way. It is admitted this would be sufficient if the damages to be recovered against him were equal, which is not the case here, for the lawful executor can recover no damages without deducting what has been rightfully paid according to the will. I never knew, in any case where this answer was given, the court enter into the consideration what might be the quantum of the damage. There is always a difference in the damages. Perhaps, no action may be brought or the witnesses may be favored by the party he supports. Still, if there be an equality by an action on each side, the court will not enter into the consideration of the damages. And it would be going too far now to enter into it in order to determine whether this objection goes to a man’s competency who is in the nature of an executor of his own wrong. As to the abatement in damages, nothing is said of it in Read’s Case, 5 Co. 33b.² He is liable to an action by the creditors and to an action of trover by the executor as a wrongdoer. Indeed, in Carth. 104,³ it is mentioned by Lord Holt, that in [an action of] trover brought by a rightful executor after probate against a man acting as executor of his wrong, he cannot plead payment of his debts, but he shall give it in evidence that the plaintiff may not recover the whole against him. This amounts to no more but that he may give it in evidence in mitigation of damages. And he can plead nothing but not guilty, and he cannot set himself up as executor, because he will be answered that the plaintiff is executor and has a probate.


³ *Whitehall v. Squire* (1690), *ut supra.*
But nothing is said in that case touching this point by the other judges, and the judgment was given against Holt's opinion.

It is laid down somewhat differently in [T. Wentworth,] *The Office of Executors,* which is a book of good authority. If an executor *de son tort* pays debts, this payment is good, and, if the payment be out of his own goods, he may retain, yet that must be understood with this difference, that the payment shall stand as against creditors, but not against a rightful executor, for, then, any stranger might usurp and take from him the liberty which the law gives him of preferring one creditor to another, nay, of preferring himself to other creditors in equal degree with himself. And, therefore, upon an action brought by a rightful executor against an executor *de son tort,* if the value of the estate appears clearly and that the debts were good debts, the court would direct the jury to deduct this in damages. But, if there be a doubt about it, the rightful executor should not in this action be put to account for the value of the assets. And it would be wrong to suffer a man who is a trespasser to enter into it, but leave him to recover as he can. There cannot, therefore, be any certain rule, and it cannot be said what damages shall be recovered.

Now, what appears in the present case? What was the quantum of the assets? What were the debts? Whether the legatees ought to have their legacies? How, then, can it be ascertained that he is liable to more loss one way than another? It is, therefore, a good answer to say there is an equality of action, which way soever this be determined. There is a great difference between an exception to a witness and a challenge to a juror. A juror must stand indifferent before he is sworn, and, therefore, an objection to a juryman need not be so strong as that to a witness, for an exception to his credit goes to his competency, both being blended together. But it is otherwise in witnesses, who, though their credit be weak, are still admitted, that all the light possible may be had.

This was the fact in The East India Company v. Goslin, the question being whether sailors who had given bonds to the master and had deserted the ship could be examined to prove the ship was not forsaken without cause. And, as they had no interest in that particular action, the court thought the objection went to their credit, not to their competency. And, of late, courts have borne towards allowing such objections only to the credit of witnesses.

Secondly, if Magill be considered as acting with the privity of Wilson, this makes his evidence receivable here without dispute. Now, Wilson's
account amounts to this, that, after the testator’s death, he sent for Magill, that there came several friends and, particularly, the legatees, whom Magill proposed delivering their legacies to, saying the testator had desired him to see their’s delivered, that, upon Wilson’s saying he thought it too early to deliver out effects, Magill replied ‘the testator desired it’, and he did accordingly deliver them in Wilson’s presence, who does not say that he objected to it. Is not this sufficient to make it Wilson’s own act? For an executor may before probate dispose of the estate, and, if a disposition in consequence of the will be made by another with the privity of the executor, it is done by his consent, and that person is no more than his agent. Will it, therefore, be an objection to a witness that an executor has employed him as his agent? And yet, in such case, the man is liable if the will is set aside. But it never was thought that, because a witness to a will was employed in the management of the estate and distributor of the effects, that should take away his competency. And the consideration of actions to be brought against him hereafter is too remote. Taking the case in this light, which is the right one, the objection will not go to Magill’s competency, for any man who has meddled even for a moment will be liable as a trespasser to be sued by the administrator. But this is too remote a consideration. I am, therefore, of opinion, Mr. Magill’s evidence should be read.

[Other copies of this report: 2 Vesey Jr. Supp. 2, 34 E.R. 971.]

4 Burrow 2254, 98 E.R. 175

There was also a case of Bailie v. Wilson about the proof of a will, before the [Court of] Delegates, who were equally divided, whether the objection should go to the competence or credit of the only witness who proved a codicil subsequent to a second will, setting up again the first will. And, therefore, no sentence was given.

Thereupon, a commission of adjuncts issued, a majority of whom, Mr. Justice Denison being one, held that it went only to the credit, and a sentence was given for the first will. Upon a petition for a commission to review, it was fully argued.

And Lord Hardwicke, on 15 January 1744[/45], gave a solemn opinion with the majority of the adjuncts that the witness having administered
under the first will as agent to the executor or as executor *de son tort* and being liable to actions, the objection went only to the credit, not to the competency.

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**Woodley v. Milles**
(Del. 1745)

*Parol evidence can be considered to explain a will, but not to vary it.*

Lincoln's Inn MS. Misc. 176, p. 125,
Jodrell 513

November 1745. At the Delegates.

This was a suit by Mr. Milles to have administration granted to him with the will annexed of Tobias Wall, Esq., deceased, as residuary legatee against his next of kin, who insisted that Tobias Wall made no disposition of the residue of his personal estate at all and, therefore, this administration appertained to them as next of kin. The case was Tobias Wall, being seised of a messuage and sugar house etc. at Southampton and of a very great personal estate and of several estates in the plantations and being a bachelor and having several nephews and nieces and sisters and, among the rest, John Milles and Matthew Milles, the plaintiff in this suit, for whom he had always shown a great regard and had left off his business as a sugar merchant in London to him, made his will *in haece verba*, which was written all with his own hand.

2 January 1743. God's will be done, and mine is as follows. First, I give to my sister, Ann Newth, £5000 sterling and, in case she does not live to come over, I then give the said £5000 to her daughter Lorietia Newth forever.

Second, I give my nephew, John Milles, who now lives by or in Exeter, £2000 sterling to be paid him in two years after my death in lieu of what he may claim from my estate.

I give to my nephew, William Woodley, £2000 sterling to be paid him in three years after my death, and it is the said John Woodley that is now married to Mrs. Paine.
I give to my nephew, John Woodley, £2000 sterling to be paid in four years after my death, and it is the said John Woodley that is brother to the aforesaid William Woodley.

I give to my sister, William Woodley, £1000 sterling a year and to be paid her every year she shall live.

I give to Mrs. Elizabeth Weeks, who now lives at my house, £500 with the house I now live in, excluding the other part and the still house, which I design to go with my estate and the £500 must be paid to her directly.

I give to her sister Weeks that is now married to Captain John Wise, £100 to be paid to her directly.

I give to Ann Galloway, the widow of Nicholas Galloway, £500 sterling to be paid her in four years after my death.

I give and bequeath all the rest and residue of my estates of what nature and quality so ever, both here and in Nevis and St. Kitts, my estate's debts here and there with my sugar house and everything that is mine of what nature and property forever.

In witness whereof I do here set my hand and seal the second day of July 1743.

I give to Mr. John Brissault £50 sterling over and above his wages that will be due at my death. I would advise Mr. Milles to keep him on pay for the use of the sugar house.

/l/s/ Tobias Wall, L.S.

The will is written and contained in one sheet of paper, which is folded up as a letter and superscribed on the same paper is ‘To Matthew Milles, Esq., in Abchurch Lane, Esq., London’.

The testator, on or about the day of the date thereof, executed the said will in the presence of John Brissault and William Dawson, the subscribed witnesses thereto, and immediately afterwards sealed the same and delivered it to Mr. Brissault, telling him it was his will and, in case he heard of his death, he would have him deliver it to Mr. Matthew Milles, but, if he could not come to Southampton, to keep it until he could deliver it into his own hands, for it was a thing of great importance to the said Matthew Milles, for, by that will, he had given him the bulk of his estate. And he, at several times afterwards, declared he had left his estate to his nephew, Matthew Milles.
In support of his title as residuary legatee, Mr. Matthew Milles pro-
pounded several allegations to examine witnesses upon, which allegations
consisted of declarations of the testator of kindness to Mr. Matthew Milles,
the circumstances of the execution of the will and delivery to Brissault, and
various other circumstances to show the intent of Mr. Wall to make Mr.
Milles his heir.

The other parties objected [in the court] below to the admissibility of
these allegations because the evidence to be given in support of them could
not be read, it being parol evidence to add to and explain a will.

The judge below admitted these allegations. And Mrs. Woodley and the
other next of kin thereupon appealed to the Delegates.

Doctor Paul, the Solicitor General [Murray], etc., for the appellants,
argued that this was exhibiting an allegation to make a residuary legatee
where there is none in the will. The case must depend on the will alone, and
that was the law before the Statute of Frauds.¹ That Statute requires a will
in writing and no parol declaration of an intent will make it. Mr. Matthew
Milles was not named through the whole will.

They cited Rolleston’s Case, 1735, before the [Court of] Delegates.
Rolleston had two wives, both named Elizabeth. He had lived separate from
his first wife and many years with the second at Port Mahon, where he died.
But, before his death, he delivered his will to his second wife and told her it
was made for her benefit. This appeared in evidence; the will was a gift to his
‘lawful wife’, and the evidence was refused to be read. Selwyn v. Brown, Cases
in Lord Talbot’s Time and House of Lords; Nicholas v. Osbourne, 2 Williams
419.²

If Mr. Matthew Milles is the residuary legatee, that must be made out
either by express words or implication and can be made out no other way.
And this question must be determined here as in a court of common law or
equity.

¹ Stat. 29 Car. II, c. 3 (SR, V, 839-842).
607, 1 E.R. 1527, also 2 Eq. Cas. Abr. 464, 22 E.R. 396; Nicholls v. Osborn
(1727), 2 Peere Williams 419, 24 E.R. 795, also 2 Eq. Cas. Abr. 209, 321, 566,
It is a general rule that a man’s will in writing is not to be construed by circumstances *dehors* or any collateral evidence, which is a rule established to prevent perjury and uncertainty.

But two cases in law were allowed where there were two of the same name to ascertain which is the person described or to ascertain the thing given or to rebut an equity otherwise arising from the will. Thyne’s Case; 5 Coke, Cheyney’s Case.¹

In all these cases, the parol evidence is not brought to alter or enlarge, and the uncertainty cannot be ascertained by the will itself, but must depend on collateral evidence. It may be said that this will be a very hard case, but that will not alter the law. Cogshill v. Cogshill, Lord Lincoln’s Case.

The Statute of Frauds has put the next of kin in the place of an heir at law; therefore, he is not to be disinherited without a plain intent appearing on the will. He may have omitted conditions as well as the person of the legatee in this case, and, then, what a field is open for perjury in admitting such evidence.

If he had remembered the person and forgot the thing called, parol evidence might be given to ascertain the thing. If not, why the person? Not one authority [was cited] where parol evidence was admitted in that case. Ulrich v. Ditchfield, in Chancery, 3 July 1742; Bellasis v. Uthwaite, 1737, in Chancery.² Express words of the will there could not be controlled, *quod voluit non dixit*.

Courts in these cases always tend to the refusal of parol evidence from the danger of it. Moore 221; Swinburne 480; Cary’s Reports 27; 2 Vernon 621, to explain a settlement refused.³ And it is stronger against a will because many circumstances where a person is living may be brought to contradict it.

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The Statute of Frauds, sect. 26, is express against such evidence. The only cases where it is admitted fall under particular heads, as fraud, Thyne v. Thyne; Griffith v. Tapwell, 1733, to show an ademption or satisfaction; Shudal v. Jekyll, by Lord Hardwicke; to ascertain a person or a thing; Harris v. Bishop of Lincoln, 2 Williams; Hodgson v. Hodgson, 2 Vernon, Eq. Ca. Ab. 230.1 These cases neither alter nor add; they only explain a text. Here, it is to make the text itself. Cases where parol evidence was refused show this. Lord Inchequin v. O’Brien, Lord Hardwicke; Adlington v. Cann, 4 July 1744; and Castleton v. Turner, in Chancery, 27 July 1745.2

If administration is granted as residuary legatee, we shall be concluded forever, but if it is rejected and administration is granted to the next of kin, he may bring his bill the next day for an account as residuary legatee, and, then, these questions may be tried in equity after. If it is doubtful, therefore, these allegations ought to be rejected.

It was argued for Mr. Matthew Milles by Mr. Bootle, Noel, etc. And they insisted that parol evidence was not rejected from any inconvenience in such evidence itself, for then it would not be admitted at all in any case, but only in particular cases and upon principles drawn from the Statute of Frauds only, and not upon any general rules, either of the civil or the common law, that, by the civil law, the wills themselves were made with great solemnity and required a certain number of witnesses, yet parol evidence was on all cases admitted to explain them and the utmost latitude was given to such kind of proof and explanation. They cited Voet, In Pandectas, lib. 34, tit. 5; Mantica,

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2 *Lord Inchequin v. O’Brien* (Ch. 1745), Ambler 33, 27 E.R. 18, 1 Wilson K.B. 82, 95 E.R. 505, 1 Cox 1, 29 E.R. 1034; *Addlington v. Cann* (Ch. 1744), Barnardiston Chan. 130, 27 E.R. 583, 3 Atkyns 141, 26 E.R. 885; *Castledon v. Turner* (Ch. 1745), 3 Atkyns 257, 26 E.R. 950.
De Conjecturis, lib. 5, tit. 15, sect. 9, and lib. 3, tit. 1, nos 2, 3, 4; Swinburne, part 7, section 7.1

In the common law, it was still stronger, for, there, no ceremonies were necessary to a will but what were necessary de jure gentium. The whole will might be constituted and totally revoked by parol. It was, therefore, never brought in question whether it might be explained, added to, or altered by such evidence, since such a question would be an absurdity. Parol evidence, therefore, was allowed in opposition to a will, which was not allowed by the civil law.

Before the Statute of Wills,2 this was the case even of devises of lands by custom. They might be by parol. Fitzherbert, Natura Brevium, 460, writ de ex gravi quae, and Coke upon Littleton 111a. A will in writing might be controlled by parol evidence; Jenkins, Centuries, 115.3

Then came the Statute of Wills, which required a writing. Here grew the question of parol evidence, And, in Cheyney’s Case, 5 Coke,4 it appears that parol evidence could not be given to add to a will because that would be so far making a will by parol, nor in opposition to it because that would be to say a will in writing shall not pass that lands, but [. . . ] is all matter. The first refusal of parol evidence, therefore, was upon an inference drawn from the nature of that Statute, and not from any general principle of law against it, for, though by reason of the Statute, you could not aver the testator intended to give his estate contrary to what he declared in his written will, yet you might aver that, the next minute after he had written his will, he had revoked it by parol, and, there, parol evidence was allowed. Croke Eliz. 497; Dyer 310b, 1 Rolle, Abridgment, 614.5 So it continued until the

1 J. Voet, Commentarius ad Pandectas; F. M. Mantica, De Conjecturis Ultimarum Volentatum; H. Swinburne, Brief Treatise of Testaments and Last Wills.


4 Lord Cheyney’s Case (1591), ut supra.

Statute of Frauds. And, as to the personal estates, there was never any question about the admission of parol evidence at all, nor a single case wherein it was denied.

This shows the general principle of law to admit it. And, where it was refused, it has been only in cases where the nature of particular statutes have required such refusal. Consider the Statute of Frauds. But there are two uses of averments in cases of wills, either to explain imperfect ones or to correct the sense of perfect ones, and these are distinct in their natures and are not to be confounded in the Statute of Frauds. As to lands, a will is required in writing, and there can be no revocation by parol. Accordingly, we shall find averments of either sort equally restrained in cases of lands.

But in personals there is no positive clause through the Statute relating to wills of personals as to their being in writing.

But there is a stronger clause against alterations of a will in writing of personals, s. 22, than even of real estates.

Accordingly, we shall find courts of justice have admitted parol evidence to explain them in cases where they would not allow it of lands. But in corrective averments, they have been equally strict in one case as the other.

This shows two things: first, that in explanatory averments, the rules and principles of law before the Statute of Frauds stand in their utmost force twice, except that you cannot add to a will because that will be to make a will nuncupative without ceremonies; secondly, that explanatory and corrective averments stand upon entire distinct foundations and, consequently, the cases cited which fall under one head cannot be applied to the other. This will answer many of the cases contrary, which are every one cases of corrective averments upon wills perfect in themselves. Brown v. Selwyn; Ulrich v. Ditchford; Lord Inchequin v. O’Brien; Rolleston’s Case; Harris v. Bishop of Lincoln; and Cogshall v. Cogshall at the Council. In every one of which cases, the parol evidence was introduced to contradict the meaning of the written will.

Here, the question is how far the court can assist a written will which cannot be understood without such an explanation. And, here, as I observed before, a greater latitude is used in personal than real estate because courts are not equally bound by the word of the Statute.

He cited cases where it was admitted in personals where it would be refused in reals. Beaumont v. Fell, 2 Williams 141; Hodgson v. Hodgson,
Wherever there is a degree of certainty in the written will as to the person or thing by the rules of construction allowed in wills, parol evidence may be admitted to strengthen, but not to create a constructive intent.

Consider what is wanted in the present case, that the person of a legatee may be made out by construction or implication as well as a thing or interest in a thing. It was said by Lord Hardwicke in the case of Castleton v. Turner, and the rule of the civil law is very express. Mantica, *De Conjecturis*, lib. 4, t. 1, no. 8. *Laicta heredis institutio valet quae ex verborum consequentia colligitur et institutio quae per errorem scribentis scripta non est proscripta habetur*, that, in order to show this construction of the intent, every part of the whole will is to be considered. Unintelligible words are to be transposed so that they may take effect. That whatever appears in writing and to have been written *animo testandi* must be taken in and considered to make out such a construction cannot be denied. Cole v. Rawlinson, admitted by all the judges. Mantica, lib. 3, tit. 3, no. 10; lib. 6, tit. 13.

What appears from this will, unassisted with evidence, is this, that the residue of the personal estate and the sugar house were intended to one and the same person, that Mr. Milles was to have such an authority in the latter as he could not have without an interest in it and, then, by the rules of law, the postscript will amount to a gift in a will, that, from the superscription, it is plain Mr. Matthew Milles was to be some way concerned in the testament, that, without this parol evidence and in the order the several clauses stand, they are unintelligible and three parts in four of the will are absolutely void, that, if the words, ‘to Mr. Matthew Milles’ are testamentary words and written *animo testandi*, they make a part of this will and ought to be inserted in

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2. *Castledon v. Turner* (Ch. 1745), *ut supra*.

the probate, and, then, by the rules of law, the words and clauses must be so transposed as to answer the intent and make them intelligible.

The parol evidence, therefore, is made use of for three purposes only; first, to show what Mr. Milles is meant in the postscript, there being two Mr. Milles named in the will, and this is within Cheyney’s Case; secondly, to prove that the direction was written and published *animo testandi*, which can only be proved by matter *dehors* the will; thirdly, that the order in which the sentences in this will may be connected is the right order and agreeable to the intent.

These things ascertained, we stand in no need of further words. The implication on the face of the will becomes necessary. It already appears from the will that they may be understood in some order. These circumstances ascertained show in what order.

If the person intended is described in the right place, if described in any other, it will do by the rules of construction.

The principles of the civil and common law are with us. This is not a case within the equity of the Statute of Frauds, for it goes to ascertain matter of construction only, not to add.

And if the Statute of Frauds is construed so as to prevent men’s wills of the proper and ordinary helps of interpretation by evidence of the circumstances of the testator and his estate at the time of making it, it were better those statutes were never made. No sort of writings are more liable to imperfection and stand more on need of all possible helps from construction, and yet they will deprive them of the only means by which in this and many other cases they can be rightly understood.

The Court of Delegates affirmed the sentence of the judge of the Prerogative [Court].

N.B. I [Paul Jodrell] was counsel for Mr. Milles.

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**Morrison v. Stewart**

(Del. 1746)

*An ecclesiastical court has the power and discretion to examine a lunatic under oath during periods of sanity.*
Morrison, a lunatic, by his committees and guardians, against Stewart, calling herself Morrison. At the Delegates. 4th and 9th June 1746.

This was a suit brought by the lunatic, who was admitted to sue by his committees as guardians in the Consistory Court of the bishop of Winchester for jactitation of marriage, to which libel loco resposi Mrs. Stewart, alias Morrison, gave in an allegation wherein she alleged a marriage solemnized with Mr. Morrison at his chambers in the Temple, to which allegation she prayed that Mr. Morrison as well as his guardians might be brought before the judge and put in his answer.

It appeared by the return of the commission of lunacy and by two affidavits that Mr. Morrison was a lunatic with lucid intervals. But the physician swore he was then incapable of giving a rational answer. And, therefore, it was prayed on his behalf that his guardians only should answer and not the lunatic. The judge, upon hearing the advocates and proctors on both sides, decreed that George Morrison be brought before him in order to give in his answers in case the judge should think to take the same. From this act and a decree of citation founded on it, Morrison, by his guardians, appealed to the Arches Court of Canterbury, where the judge pronounced against the appeal, upon which they appealed to the Court of Delegates.

Mr. Noel etc., for the appellants: The inquisition finds that Mr. Morrison was a lunatic with lucid intervals, but not so as to manage his affairs. And it finds him to have been so for twelve months before, which carries his lunacy back beyond the time of the marriage alleged.

Upon a petition for custody of his person and estate, this suit was recommended by the Lord Chancellor to be brought here, as Mrs. Stewart, who is a common prostitute, claimed a marriage with him at his chambers in the Temple. And, upon this, he is admitted to sue as lunatic by his guardians, the committees, appointed by the Lord Chancellor.

The general question will be whether, in a suit so founded and instituted in pursuance of an order of Chancery, it is in arbitratio judicis to do that which is contrary to the nature of the suit so instituted and founded, viz. examine a lunatic upon oath.

There is no person in any court concerning the care of lunatics, but in Chancery, when a commission is granted, he is protected by that care from
acts of his own in every suit by or against him. And in Chancery, though
the court requires the evidence of parties upon oath, yet, a lunatic is never
required to answer upon oath there. Nor was it ever known that an applica-
tion was made to that court alleging the lunatic to be in a lucid interval and
praying that he might answer upon oath.

So here, in a suit instituted by him qua lunatic, it cannot be consistently
done. And, if such order had been proper, it should have been before he was
admitted to sue by his guardian. But after he is once so admitted, it is repug-
nant to the nature of the suit to oblige him to answer.

I do not say the commission of lunacy is conclusive as to the merits of
the case, but, as to the method of proceeding, it certainly is. And, therefore,
the court has received the suit in this light; they must, as to the manner
of proceeding, proceed in it accordingly. All subsequent proceedings to this
admission must go upon a supposition that he is a lunatic. And, in this very
allegation, she prays the answer of his guardians as well as his. She, therefore,
desires the suit may be carried on against him as a lunatic, yet she prays an
answer from him not as a lunatic.

Suppose his and his guardian’s answer should prove contradictory. What
could the court do upon them? There is more impropriety in demanding an
answer upon oath in a lucid interval [than] any other thing, as it necessar-
ily requires much memory and reflection to make one. This is our time to
appeal, for, if the answer was admitted, we could never appeal from the taking
of the answer, so he would be on a view the sole judge.

The only case where such answers are ever taken in these courts is in
case of minor proximus pubertati, but if not so, then refused in the case of
infants, [as it] was the other day on the will of Lord Leicester, where an infant
of eleven years old was refused to be examined.

By the civil law, furiosis is considered as absent [blank] or [ . . . ]
Digestum 41, title 2nd, l. 1, part 3.

The marriage pleaded is clandestine. He is, therefore, not obliged
to answer because, if he admits it, it will be a crime, for, by the canons of
the Council of Lateran, received here, he is ipso facto excommunicate, and,
therefore, he shall not answer to charge himself. He ought, therefore, to be
defended in that from answering by his committees.

For the appellant, it was said that many of the arguments contrary
would be answered by truly stating the matter in dispute, for the question on
this appeal is not whether a lunatic or furiosus shall be examined upon oath. Neither is it the question whether this lunatic shall or shall not be absolutely obliged to answer, for neither of these questions being determined by the judge below, he having neither obliged him to answer nor refused his answering, neither can it be determined upon this appeal.

All the judge has done is to require him to be brought before him to judge by inspection and examination of the party whether he is fit to answer upon oath or not. And the single question is whether the judge has or has not done right in requiring this evidence, which question will depend upon this, whether the judge, on a suit by a guardian of a lunatic and in a matrimonial cause and where it appears he has lucid intervals, has or has not a discretionary power by the rules and practice of the ecclesiastical court to oblige or not oblige the lunatic to answer as he finds him capable, for, if he has such power by law, then, this order must be right because he must exercise that discretion upon full proof. And no appeal can lie nor can there be any grievance until that discretion is rightly or wrongly exercised.

But if he has no such power and cannot by law, after admitting him to sue by guardian as a lunatic, compel him to answer, though in a lucid interval, then, I admit this order is nugatory and ought to be reversed.

And so far as the gentlemen have argued from the practice of the Court of Chancery and the inconsistency of the thing with the nature of the suit, they have argued rightly upon the true question. But though this is a new case in our courts of common law and chancery, yet we contend that both from the authorities of the civil law and from the reason of the thing, the judge has such a power and that where the suit is by guardian as well as by the party himself, and that this discretionary power must be governed not by the general ability of the party to manage his affairs or to conduct the suit itself by his capacity to understand what he is doing at the time when the answer is to be given in.

As to the authorities in this matter, the practice of our ecclesiastical courts to oblige the party to answer upon oath is not new but is taken from the ancient civil law and is governed by their rules. In that law, there were two kinds of these oaths: jus jurandum litus decisorium, which was put by one party to the other and like our wager at law; jus jurandum suppletorium, which is the answer given at the discretion of the judge and to inform himself.
In our courts, this is done before proof by way of answer to allegations. In those, it was done *post litem contestatam* and where there was but a *semiplena probatio* before. [J.] Ferrarius, *Praxis*, f. 252, tit. 4, glos. 21.

Our oath, with more reason, is taken first but is derived from thence and governed by the same principles and subject to the same rules. And it is just the same question now before the court as it would be after a *semiplena probatio* in those courts, whether the lunatic should be brought before the judge and examined upon oath if in a lucid interval or whether the judge should desist from the suit and give no judgment at all.

It remains to show that, in such case, the judge could and ought to admit such oath. This power of the judge to require an answer upon oath in what cases he could and in what cases he could not is no new question, but it is treated at large in the *Digestum* and in other authors of the civil and common law. And, in all of them, it is expressly laid down that this power is discretionary in the judge in all instances.

*Digestum*, lib. 11, tit. 1st, l. 21, *De interrogatoribus in jure faciendis*, and in l. *Quibus casibus interrogari oportet*, *Digestum*, lib. 12, tit. 4, *De in litem jurando*.

This discretionary power extended as well where the suit was by guardian as where by the party himself, which is a full answer to the arguments drawn from the inconsistency of the thing with the nature of the suit itself.

That this is so in the case of a *pubertati proximus* was admitted *e contra* and was rightly admitted, for it appears by an author who has written a tract professedly upon the subject that both *adultus* and *prodigus* were put to answer upon oath, though both must sue by guardian. Phanucciis, *De Iurejurando in Litem*, part 2nd, cap. 2nd, *Tractat.*, *Tractat.*, tom. 3rd, part 2nd, last tract but one in that volume.¹

And the reason of this is given, because, though neither of them are civilly bound, as by contracts, nor are of ability to manage their temporal concerns, yet both being equally intelligent of the nature and obligation of an oath, both shall be sworn.

These authorities show that the admission to sue by guardian does not take away the power of the judge to examine on oath if he thinks fit and that this right of requiring an oath is not commensurate with the party’s power of

¹ Ph. de Phanucciis, *De Iurejurando in Litem*, in *Tractatus Universi Juris* (1584).
managing his suits or affairs, but with his being at the time when his answer is required in a capacity to understand what he swears and the nature and obligation of an oath. Now, that a lunatic in a lucid interval is capable of both cannot be denied.

We admit that he cannot be sworn if he is mad, but we insist he ought to be sworn if, at the time when he appears before the judge, he is in a lucid interval.

It is objected that this is a most dangerous power to reside in a single judge without an appeal. But this is a mistake of the law, for, if he uses the discretionary power wrong, an appeal does lie. Phanucciis, part 2, cap. 2, *Judex si injuste se habet in deferendo vel negando juramentum in litem remedium est ut ad superiorem appelletur*.

From these authorities, it appears that the judge has in this instance a discretionary power and that, if he exercises that power wrongly, an appeal lies. But, if so, no appeal can lie from this order because this power has not yet been exercised wrongly and this order is only preparatory to the exercise of it rightly.

I have hitherto confined myself to the authorities to prove that the judge has such a power. I shall likewise endeavor to prove he must have such power in this case from the reason and nature of the thing.

This is a cause of marriage in which, if there either appeared a marriage or a contract of marriage, the suit must be dismissed. This suit is to rectify the conscience of the parties. And, therefore, these suits are most favored at law in the means to come at the truth and that even against the general principles and practices of courts in other causes.

Mynsinger, *De Testibus*, 187, and cap. 26, *In quaestione conjugii etiam post apertas testificationes recipr., sunt alii testes cum versatur in eo peccatum per partes non remissibile*.

The judge, therefore, in such suits must be armed with all possible powers to come at truth, yet, without this power he could not in many instances, for, suppose the question was whether there was or was not any contract of marriage ever entered into and the contract pleaded was *solus cum sole*, no other evidence could be had but this. Or suppose the contract was admitted and the question was whether it was made in a lucid interval. His answer in another lucid interval would be the best evidence one way or the other that could be had.
The court would, therefore, have a very infirm jurisdiction in a matter of conscience if bound by its positive rules to reject the only evidence in some cases of this and the best cases in all.

If guardians make an unjust defense and against the conscience of the party, does not the court run the hazard of obliging the parties *ad poenatum non remissibile*?

The court, therefore, as it acts in this case upon the conscience of the party could not have a complete jurisdiction of the cause without such a power. This would serve as an answer to the arguments drawn from the practice of the Court of Chancery, but that objection is capable of other answers.

In the first place, let the practice of that court be what it will, it is no rule in this court. This court must judge according to the practice of the ecclesiastical courts. Now, it is admitted that *adolesens pubertati proximus* is obliged to answer, which is as directly repugnant to the practice in Chancery as this. Every argument of this kind holds just as strong in that case as in this. Yet, if that was the question before the court, must not the court go according to the practice of the ecclesiastical court, not of Chancery?

Besides, that court requires an answer only as it is a defense of some temporal concern. But, if, by the commission, he is found incapable to manage them, he must be presumed incapable to defend himself in a matter relating to them.

Lastly, the commission is conclusive evidence while it stands in Chancery of the lunacy. It is not so here in any court of law whatever, but is traversable. And, whereas the question is whether lunatic or not (as here), the lunatic is constantly examined *in propria persona*, that being the best evidence of the matter by the principles of law.

If then, the judge has a power in this suit to examine this question on the merits finally, he must have a jurisdiction to do as to any incident necessary to a right determination of those merits, which whether he shall or shall not answer upon oath is.

Slight evidence is sufficient to admit him to sue by a curator, because it is no *gravamen* one way or other, but rather an advantage to the opposite party.
But, when the judge is discretionarily to determine a matter which is *gravamen irreparabile* one way or the other and absolutely necessary to the right determination of the merits, he ought to have the fullest proof the case will allow, the very same proof he would require at the hearing of the cause.

As to the objection of its being a clandestine marriage, though most of these causes relate to such marriages, no case was cited where such a defense was allowed, and he must answer to the fact of the marriage, though not to its being or not being clandestine.

Upon the whole, the question hereafter may be whether this lunatic shall or shall not answer. But the question now before the court only is whether a power to put him to answer if he appears to be capable to answer does or does not reside in the judge in this cause, for, if it does, this order being a necessary step to the right exercise of such a power must be right.

N.B. The judges dismissed the appeal with £60 costs and, *consensu partium*, retained the cause. And Morrison was afterwards examined by the Delegates who adjudged him capable to answer and took his answer accordingly, wherein he, in a great measure, confessed the marriage and consummation.

I [Paul Jodrell] was counsel for Mrs. Stewart, alias Morrison.

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**Kindleside v. Cleaver**  
(Del. 1748)

*An administration de bonis non* must be granted to the next of kin.

1 Lee 178, 161 E.R. 66

1 July 1748. Mr. Justice Wright, Mr. Justice Birch, doctors Walker, Simpson, Pinfold, Jr., Chapman, and Collier.
This appeal was from a decision of Dr. Bettesworth, Prerogative [Court], 1745.¹

The judges held that an administration de bonis non is within the Statute of 31 Edw. III, ch. 11,² and must be granted to the next of kin, as well as a simple administration.

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ADDENDA

97

James v. Roe

(Del. 1628)

The administration of a married woman's estate should be committed to her widower.

W. Jones 175, 82 E.R. 93

In an appeal upon a commission delegatory awarded to Jones, Whitelock, Croke, and Yelverton, justices, and Doctor Steward, Doctor Pope, and others, the case was thus, where the administration of the goods of a wife must be awarded and committed to the husband de mens jure or not.

And JONES, WHITELOCK, and YELVERTON were of opinion that it must (absente Croke); the two doctors were to the contrary. And the reasons of the justices were as follows. Before the Statute of 31 Edw. III, the ordinary had power solely to meddle with the goods in the possession of an intestate man, and he did not have anything to do with the debts or choses in action, nor could he release any debt nor have a suit for it. But, if the debtor would voluntarily pay to the ordinary, then he could receive it and distribute it as well as the other goods of the testator in pious uses, quod vide in Greshold's Case, Plowden, Commentaries, and 12 Hen. VII, 22, and all the books.

Second, before the said Statute, it seems that the ordinary had nothing to do with the goods or debts of a married woman, unless where she was the executrix to another and the goods or debts were not administered, because the goods in the possession of the wife were the husband's by the intermarriage and the wife had nothing in them, but of the choses in action, the husband, during the marriage could release them if he wished. But, if the wife, before a recovery, died, the husband could not sue for them nor the ordinary [have anything] to do with them, but the debtor will have the profit of it. But the course in such a case, to prevent it, was to make an executor which the wife could do with the assent of her husband but not without consent. And she could make her husband executor. And, by this means, as executor, the wife could recover the debts. 39 Hen. VI, 27 and 51; 22 Hen. VII, 22; 26 Edw. III, 71; 6 Edw. II, Fitz., Executor, 109; 4 Hen. VI, 31, 32; 5 Edw. II, Fitz., Devise, 24; and 28 Hen. VIII, cap. 9, Statute Hiberniae.

1 Stat. 31 Edw. III, stat. 1, c. 11 (3R, I, 351).


3 YB Mich. 39 Hen. VI, f. 27, pl. 38 (1460); YB Hil. 6 Edw. II, Executors, pl. 109 (1313); YB Trin. 4 Hen. VI, f. 31, pl. 11 (1426); YB Mich. 5 Edw. II, Fitzherbert, Abr., Devises, pl. 24 (1311).
Third, the Statute of 31 Edw. III gives power to the ordinary to commit an administration to the next and most loyal friend of the intestate, who had the power to dispose of the goods pro salute animae and no one [is] more near and more loyal a friend to the wife than the husband. And he, when his wife dies, is here, who takes care for the funeral and other things pertinent to her. And ideo, to him, the administration should be committed. And this power given to the ordinary must be strictly followed and not to be awarded by his discretion. And the Statute of 22 Hen. VIII does not extend to this case because it is, where the husband dies intestate, the widow or the next of kin will be joined in an [administration]. But, if the wife was an executrix and died intestate, there, the ordinary could commit it to the most next friends of the first testator. And, for the main point, it is so resolved in the Case of Ognell, reports of Coke, part 4.2

And, upon all the said reasons, they were of the opinion as aforesaid.

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Marshall v. Yokely
(Del. 1690)

In this case, the court found that the clandestine marriage in issue was valid and that the widow was entitled to have the administration of her deceased husband's estate.

Harvard Law School MS. 1052, f. 18v, pl. 64
(James Wright's reports)

Before the Delegates at Serjeants' Inn, Chancery Lane, 5 December.

Richard Marshall, an apprentice to Wiseman, the surgeon,3 died intestate at sea. His father claims administration as next of kin, supposing him unmarried. Mary Yokeley, by the name of Mary Marshall, counterclaims the administration as widow, and makes proof of a clandestine marriage two years before by producing a certificate of their marriage at Marylebone (the parson being dead since) and several letters of Richard Marshall subscribed 'your ever loving husband'.

The judge of the Prerogative [Court of Canterbury] decreed the administration to the father. The widow appeals to the [Court of] Delegates, being Judge POWELL, Judge GREGORY, and Baron TURTON, with four civilians, who, upon hearing the evidence of the marriage and counsel on both sides, both common lawyers and civilians, the court decreed for the widow, one judge and three civilians being for the validity of the marriage and two judges and one civilian against it.


In re Will of Turner
(Del. 1694)

In this case, the holographic will in issue was found to be valid.

Where a will does not dispose of the entirety of the testator's estate, the undispensed assets go to the decedent's next of kin.

Harvard Law School MS. 1052, f. 41, pl. 115
(James Wright's reports)

December 1694. Before the Delegates at Serjeants' Inn in Fleet Street.

Sir William Turner, alderman of London, dying anno 1692, a search was made after his will, but none [was] found except two [ . . . ] draughts in a drawer in his study, both written with his own hand, one dated 1690, the other without a date, whereby Charles Turner, his kinsman and next heir, was made his executor. Against the proof of which will, several of Sir William's kindred put in a caveat, pretending that he died intestate, and, therefore, desired administration and distribution, according to the Statute.¹

At the hearing, it appeared by the depositions of several persons that Sir William Turner required them (severally) to witness a will which he signed and published before them in the year 1691. But this will could not since his death be found and produced. The kinsmen affirmed that this latter will was a revocation of all former [wills], which being once revoked could not revive again, though the latter were lost or destroyed, without a new publication. And they called those two papers found in his study mere escrows of no value.

The counsel for the executors answered that a paper found in the study of a person deceased written all with his own hand is virtually a will, though not formerly published, that this paper draught of 1690 was his will, and the other without a date a codicil to it, that, admitting there was a subsequent will, yet that not being to be found, it shall be presumed the testator burned or destroyed it, and, therefore, the former will revives of course, as, where there is an act of Parliament which is afterwards repealed by another act, if, after that, the act of repeal be repealed, the first act revives of itself without any new enacting. To this, the added the inconvenience that would follow in case this will of 1690 should not be allowed, for then, several charities thereby given would be defeated, in particular a considerable augmentation to the hospital of his foundation in Yorkshire, for which he had always showed a very great concern, as appeared by several letters produced.

In the arguing of this cause, the Case of Seymour and Noseworthy, printed in Serjeant Hardres' Reports, p. 374,² was cited on both sides, though most to the advantage of the executor.

After all the arguments (which lasted two days), the Delegates gave their judgment for the executor and that the will was valid. But, in regard the devises in the will did not amount to the whole estate, they decreed further that a dividend should be made of the overplus among the kindred.


Lister v. Earl of Banbury (Del. 1697)

In this case, the court held a contested clandestine marriage to be valid, but ordered the husband to pay his second wife a sum of money.

Harvard Law School MS. 1052, f. 46, pl. 130
(James Wright's reports)

30 November. The case of the earl of Banbury's marriage.

This cause was pleaded before the dean of the Arches by Dr. Newton and Dr. Waller on behalf of Mrs. Price, who sued the said earl [of Banbury] by the name of Elizabeth, countess of Banbury, having been married to Charles Knowles, commonly called the earl of Banbury, in the year 1692, at such a church in Verona by the archpriest of the same in the presence of four witnesses, the said earl first making oath that he was free and unmarried and unengaged to any other woman, all which was in due form attested by the bishop of Verona. After this, as appeared by the depositions, they lived together as husband and wife at Mantua, at Paris, etc. and, after being returned into England, when he fought and killed Mr. Lawson, as was alleged, on her account. And he being imprisoned in the King's Bench, she then accompanied with him there, and was reputed his countess, and solicited his business. And divers letters since the said marriage were produced written by him to her in the tender terms of a husband and superscribed 'to the countess of Banbury'.

On the other side, a marriage was affirmed to be had between the said earl and Mrs. Elizabeth Lister at the Nag's Head Inn in James Street in Covent Garden 1689 by Dr. Clewer in the presence of one person only, viz. Mr. Charles Sherard. This was said to be, at best, but a clandestine marriage, and, Dr. Clewer being of ill fame, his certificate was to be esteemed of small or no regard in comparison of that from Verona. Besides, there was no manner of proof of cohabitation with Mrs. Lister until the year 1693, and, therefore, and upon some other circumstances, it was to be presumed (as Mrs. Price's counsel urged) that, if there was really any marriage with Mrs. Lister, it was not until 1693, which was after that of Mrs. Price.

On another day, Dr. Pinfold, Dr. Oldish, and Dr. Lane pleaded two hours and a half for Mrs. Lister's marriage, answering objections against the credit of the witnesses produced for her and objecting against those of Mrs. Price. But when they read scandalous matter relating to Mrs. Price, as having been a player and kept by Sir Thomas Armstrong, Sir George Etheridge, and the like near twenty years ago, she, being then in court, said aloud 'whatsoever was

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before, I defy the malice of my greatest adversaries to charge me with any irregular action since my marriage.

After this, an another day, Dr. Littleton argued for Mrs. Lister's marriage, and insisted chiefly on these particulars, viz., that, if Mrs. Lister's marriage should be annulled, it would carry with it this consequence, that a gentlewoman of unblemished reputation should be thereby made a whore and her children bastardized, that Mrs. Price's marriage ought not to be allowed because [it was] not according to the prescript form of the [Book of Common Prayer], that Dr. Clewer, the infamous, ought to be believed concerning with what an honest man does swear, rather than an honest man should have no credit because he concurs with what a knave swears.

At the same time, five common lawyers argued for Mrs. Price, viz. Sir William Williams, Serjeant Darnall, Sir Francis Winnington, Mr. Jones, and another. The arguments lasted three hours.

*Inter alia, Sir William Williams* said that the foreign marriage being with all the solemnities used in that country where the parties were was good, that, when we are at Rome, we must do as they do there, that, if this were not allowed, all our litigations might be questioned, for all our forefathers were married in this manner, that, of late years, one Coddington, an Englishman, married at Turin, in Savoy, had his marriage questioned here, and adjudged good in this court etc.

*Sir Francis Winnington* added that Dr. Clewer's certificate has the highest suspicion of being forged as to the time, another person married by him having made oath that, his wife being forward with child, he procured him to antedate his certificate three or four months before the marriage to save the woman's reputation and this he did for 10s.

A certificate of marriage is no evidence at Westminster Hall. The copy of the Registry Book, if sworn to be a true copy, has been allowed as evidence, but a certificate without oath is no more than the party's bare word. And, what Dr. Clewer's word signifies, let all the world judge.

A clandestine marriage, as this is at best, set up to avoid another which is formal and apparent ought to be indubitably and directly proved, which this is not, both Clewer's and Sherard's depositions being, in diverse places, to the best of their remembrance.

All the counsel agreed that the sole point on which this cause depends is the priority of the two marriages, for, if Mrs. Lister's marriage were not first in time, Mrs. Price's marriage was clearly valid and good.

After this, the doctors for Mrs. Lister moved for a suppletory oath and that Mrs. Lister herself might be sworn to prove her own marriage, which being overruled by the judge as unreasonable, they appealed, on this preliminary point, to the [Court of Delegates]. See Raymond's reports, p. 1.

On the fourteenth of December 1696, a Court of Delegates sat at Serjeants' Inn in Fleet Street to hear and determine the whole cause.

Here, the counsel for the appellant, Mrs. Lister, urged hard that the earl of Banbury's answer might be read, which the court refused to allow, he being a party to the suit.

At last, after several meetings, the Court of Delegates, on the thirteenth of January 1696/[97], came to a determination of this long-depending cause, and gave a sentence for Mrs. Lister's marriage. But withal, they decreed that the earl of Banbury should pay Mrs. Price 100 pounds.