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Alexander Forrester's Chancery Reports

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ALEXANDER FORRESTER'S

CHANCERY REPORTS

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(1732-1755)

A New Edition

by

W. H. BRYSON

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INTRODUCTION

This is a new edition of Alexander Forrester's Chancery reports. It is based upon the best manuscript copy that has survived, Lincoln's Inn MSS. Misc. 52 and Misc. 54, and the first printed edition. The edition that was first published in 1741 included only the cases from 1732 to 1739. Compared to the copy in Lincoln's Inn, they are not much different in quality from each other. The cases in the 1741 edition are the basis for this edition as far as they go. The learned apparatus of the third edition by John Griffith Williams (d. 1799) has not been reprinted here, as it is easily accessible elsewhere.

Alexander Forrester (d. 1787) was one of the leaders of the Chancery bar in the middle third of the eighteenth century. We know that Forrester continued to make notes (or reports) of cases after 1739. The reporter Paul Jodrell (1714-1751) copied six of Forrester's reports into his own collection of Chancery reports. John Eykyn Hovenden (1781-1867) added seventeen cases 'extracted' from Forrester's reports to Vesey Junior's reports in his *Supplement*, 34 E.R. 666-1248. Comparing Hovenden's version and the Lincoln's Inn manuscript of the Case of James v. Owen (Ch. 1733), 2 Vesey Junior Supplement 275, 34 E.R. 1092, and Case No. 16, it can be seen that Hovenden was not strictly faithful to Forrestser's original report. However, it is close enough, and Hovenden's versions have been included here as Forrester's reports, except for James v. Owen. If Forrester's complete manuscript still exists, its whereabouts is presently unknown.

The first edition of a part of Forrester's reports was printed in *Chancery Cases tempore Talbot* in 1741. For a bibliographical discussion of the manuscripts and the earlier editions, see W. H. Bryson, comp., *Some English Law Reporters of Seventeenth Century Cases* (2020), pp. 59-63. The first edition, by a Mr. Ridge, has an appendix of other Chancery reports from the same time period, and John Griffith Williams (d. 1799), in his edition of 1792, added three more reports to it. These cases are not included herein.

Charles Talbot, baron Talbot, (1685-1737) was an excellent equity jurist, serving as Lord Chancellor from 29 November 1733 to 14 February 1737. The only systematic reporter of Talbot's opinions, other than Forrester, was William Peere Williams (1664-1736); see 3 Peere Williams 229-418, 24 E.R. 1040-1126.

We thank the William S. Hein & Co., Inc., for their kind permission to reprint an earlier version of part of this collection of cases.

TABLE OF CASES REPORTED

[These references are to case numbers, not page numbers.]

ALEXANDER FORRESTER'S CHANCERY REPORTS

1

Papillon v. Voyce

(Ch. 1732)

An estate to one for life with a remainder to the heirs of his body is an estate tail.

However, the intention of the testator in this case was to create an estate for life with a remainder in the life tenant's son.

Hilary 5 Geo. II, in Chancery, 1731[/32].

Samuel Papillon, citizen [of London], by will, gives a moiety of his personal estate to his only son John in full [satisfaction] of his orphanage [share]. And as to the other moiety, which, by the custom of London, he might dispose of, after some legacies, he gives the residue of it to trustees to be laid out in the purchase of lands and to be conveyed to the use of his son John for life without impeachment of waste and, after that estate, to the use of trustees to be for that purpose named to preserve contingent remainders and, after his son's decease, then to the use of the heirs of his body lawfully to be begotten and, in default of such issue, to the use of the children of his three sisters with a remainder to his own right heirs. He also devises his manor of Great Bentley to the use of his son John for life without impeachment of waste, then to the trustees in the will named to preserve contingent remainders, and after his said son's decease, then to the use of the heirs of his body and, for default, to the use of the children of his three sisters, remainder to his own right heirs. And farther he says that his said son shall have a power to make a jointure out of his said manor of Great Bentley or out of the lands to be purchased as before, proportional to the portion he shall receive.

John Papillon, the son, brings his bill against the trustees and remaindermen to have the writings of the manor of Great Bentley delivered to him and to enforce the trustees to purchase lands according to the intent of his father's will, upon which the question was whether John Papillon should have an estate for life or in tail in lands to be purchased and whether in tail or for life in the manor of Bentley.

The cause was first heard at the Rolls, where His Honor [JEKYLL] decreed an estate for life only to John Papillon in the lands to be purchased and also an estate for life in the manor of Bentley and that the writings should be brought into court and all parties to have copies.

It was now reheard before the Lord Chancellor King.

And the plaintiff brought a supplemental bill, setting forth that, upon his father's marriage, he covenanted to settle the manor of Great Bentley to the use of himself for life with a remainder to his first son in tail. Upon this, the defendants' counsel gave up the point as to the estate of Great Bentley. And the only question now was what estate the plaintiff was to have in the lands purchased with his father's personal estate.

Mr. Solicitor General [*Talbot*] and Mr. *Lutwyche* insisted for the plaintiff that, if words have a known legal construction, they are in no case to be altered and that it was well known that to one for life, remainder to the heirs of his body, carried an estate tail, though a limitation to one for a lesser estate than for life with a remainder to the heirs of his body did not. As to the trustees to preserve contingent remainders, they were words of surplusage and made no difference in the tenure, for the consequence then must be to the plaintiff for life with a remainder to him in tail, which is the same as an estate in tail. And he cited Bale v. Coleman,

2 Vernon 670; Legat v. Sewel, 2 Vernon 551, which was in point; Goodwright v. Pullen, at a trial at bar, Mich. 13 Geo. I; Morris v. Wood, an appeal from Barbados and just determined in the Council, in both which cases an estate to one for life, remainder to the heirs of his body and, for default of such issue, then to another was held an estate tail; Westal v. Easy, in the House of Lords; King v. Melling, 1 Ventris 214, 225; Backhouse v. Wells, Abr. Eq. Ca. 184.[1]

Mr. Attorney General [*Yorke*], Mr. *Lutwyche*,[2] and Mr. *Ryder* argued on the other side that it was plain that the intent of Samuel Papillon, the father, was that his son should have an estate for life only from his appointing trustees to preserve contingent remainders, from his giving him a power to make a jointure, and from the power he intended the tenant for life, *viz*. without impeachment of waste. And in most cases, the intent of the party is to prevail against a rule of law, to which purpose was cited Boraston's Case, 3 Coke 20.[3]

The Lord Chancellor [LORD KING] said that, had this devise been a limitation of a real estate, there had been no doubt of its being an estate tail in the devisee.

The Attorney General [*Yorke*] said he apprehended it would not, for it differs from King and Melling's case, 1 Ventris, which had not the words ' without impeachment of waste'. And no case has been cited on the other side wherein there were trustees to preserve contingent remainders. As to Baile and Coleman's case, in 2 Vernon, there were two different opinions of two different chancellors, one with us and the other against us. And as to Legat v. Sewall, 2 Vernon, there was a case made for the opinion of the judges of the Common Bench, in which Lord Trevor and two other judges certified it to be an estate tail. But Justice Tracy was of a different opinion and gave his reasons on his certificate, which the Lord Chancellor Harcourt said were very strong, but, as he had sent for the opinion of the judges, he must abide by the majority.

And the Attorney General [*Yorke*] added that, to his knowledge, that case had been carried into the House of Lords had it not been agreed by the parties. And he cited Lisle v. Grey, 2 Jones 114, Pollexfen 532, Raymond 218, or 280, and he said it was afterwards affirmed in the Lords' House,[4] though one of the books says otherwise. But supposing the point

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[1] *Baile v. Coleman* (1711), 2 Vernon 670, 23 E.R. 1036, also 1 Peere Williams 142, 24 E.R. 330, 2 Eq. Cas. Abr. 309, 472, 717, 22 E.R. 261, 402, 603, Hardwicke 17, Chan. Cases *tempore* Anne 141; *Legatt v. Sewell* (1706), 2 Vernon 551, 23 E.R. 957, also 1 Peere Williams 87, 24 E.R. 306, 1 Eq. Cas. Abr. 394, 21 E.R. 1127, Gilbert Rep. 141, 25 E.R. 99, 2 Eq. Cas. Abr. 530, 22 E.R. 447, Chan. Cases *tempore* Anne 62; *Goodright v. Pullen* (1726), 1 Barnardston K.B. 6, 94 E.R. 4, 2 Strange 729, 93 E.R. 812, 2 Lord Raymond 1437, 92 E.R. 435, 2 Eq. Cas. Abr. 315, 22 E.R. 268; *West v. Erisey* (1726-1727), 2 Peere Williams 349, 24 E.R. 760, 1 Comyns 412, 92 E.R. 1135, 1 Brown P.C. 225, 1 E.R. 530, 2 Eq. Cas. Abr. 39, 22 E.R. 33, Exch. Cases *tempore* Geo. I, vol. 2, p. 931; *King v. Melling* (1672), 1 Ventris 214, 225, 86 E.R. 144, 151, also 2 Levinz 58, 83 E.R. 448, 3 Keble 42, 52, 95, 84 E.R. 584, 589, 614, Pollexfen 101, 86 E.R. 526, 3 Salkeld 296, 91 E.R. 835, 1 Eq. Cas. Abr. 181, 21 E.R. 973; *Backhouse v. Wells* (1712), 1 Eq. Cas. Abr. 184, 21 E.R. 976, also 10 Modern 181, 88 E.R. 683, Fortescue 133, 92 E.R. 791, Gilbert Cas. 20, 129, 93 E.R. 247, 282.

[2] Sic in MS.

[3] *Hynde v. Ambrye* (1587), 3 Coke Rep. 16, 76 E.R. 664, also 1 Eq. Cas. Abr. 190, 194, 21 E.R. 980, 984.

[4] *Lisle v. Grey* (1670), T. Jones 114, 84 E.R. 1174, Pollexfen 582, 86 E.R. 653, T. Raymond 278, 302, 315, 83 E.R. 143, 156, 163, also 2 Levinz 223, 83 E.R. 529, 1 Freeman 462, 89 E.R. 345, 2 Shower K.B. 6, 89 E.R. 758, Dodd 34.

to be doubtful, yet, when they come to the court for a favor (for, without the assistance of this court, they cannot compel the trustees to lay out the money), this court will tie them down to the intent of the parties. And to this, he cited Leonard v. Earl of Sussex, 2 Vernon 526, which was stronger than this case and affirmed in the Lords' House; Humberstone v. Humberstone, 2 Vernon 737, and Sir John Hobart v. Lord Stamford,[1] about Serjeant Maynard's estate devised by his will, where this court ordered that trustees to preserve contingent remainders should be added, otherwise Lord Stamford, the surviving trustee, might by a fine have barred all the remainders and kept the estate himself.

Lord Chancellor [LORD KING]: An estate to one for life with a remainder to the heirs of his body is an estate tail in the law. And if a man has made a will, we cannot control him by saying he ought to have made it otherwise. I am inclined to think this an estate tail, but, if you will, you shall have a case made for the judges' opinions.

But that the defendants' counsel objected to.

And so, it stood over until the next day, when the Lord Chancellor continued of the same opinion as to the letter of the will. But he said that, as the intent of Samuel Papillon was plainly that it should be an estate for life in his son and, as they now come for aid in this court, we ought to tie them down to what was intended by the donor. And so he decreed the trustees to find out a purchase as soon as they could and that they should convey to the plaintiff for life with remainder to his first son etc.

[Other reports of this case: Lincoln's Inn MS. Misc. 384, pp. 343, 346, 362, 2 Peere Williams 471, 24 E.R. 819, W. Kelynge 27, 25 E.R. 478, Fitz-Gibbons 38, 94 E.R. 643, 1 Eq. Cas. Abr. 185, 21 E.R. 977.]

2

Mortimer v. Mortimer

(Ch. 1732)

Where contingencies are to arise within a space of a lifetime, they are good.

The words 'seised and possessed' will convey both freehold and leasehold lands.

28 April 1732.

This was a devise of a term to A. and B. in trust to permit his son and his issue to take the profits, but, if he die leaving no issue extant or enceinte, then to his daughter. The question was whether this limitation to the daughter was a good limitation.

The Solicitor General [*Talbot*] and Mr. *Lutwyche* argued that it was good, it not being a limitation of an estate tail with a remainder over, but a contingency to arise within the compass of a life, which no doubt is good and has been often so held and these words are tantamount to a limitation to one and his issue and, if he dies without issue living at the time of his death, then over to another which has been often held to be good. And he cited the Case

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[1] *Leonard v. Earl of Sussex* (1705), 2 Vernon 526, 23 E.R. 940, also 1 Eq. Cas. Abr. 12, 184, 21 E.R. 836, 975; *Humberston v. Humberston* (1716), 2 Vernon 737, 23 E.R. 1081, Precedents in Chancery 455, 24 E.R. 203, also Gilbert Rep. 128, 25 E.R. 89, 1 Peere Williams 332, 24 E.R. 412, 1 Eq. Cas. Abr. 207, 21 E.R. 993, 2 Eq. Cas. Abr. 457, 22 E.R. 389; *Hobart v. Countess of Suffolk* (1709), 2 Vernon 644, 23 E.R. 1020, 1 Eq. Cas. Abr. 272, 21 E.R. 1040, *sub nom. Earl of Stamford v. Hobart* (1710), 3 Brown P.C. 31, 1 E.R. 1157, Hardwicke 22, note also *In re Maynard's Will* (1691), Dodd 101.

of Pinbury v. Elkin, 2 Vernon.[1] The words 'extant or enceinte' are operational words and widely differ from the common cases of settlements to one and his issue, which take in all the issue which he may have *in infinitum*.

Mr. Attorney General [*Yorke*] and Mr. *Mead* argued the limitation to be void, saying that, wherever a term is limited to one and his issue, the whole is vested in him, and, though, of late, these words have been stretched, yet that has always been where there was a first devise of a freehold only. The Case of Pinbury v. Elkin, 2 Vernon, is founded on the words, 'remain after her decease', and it is very different from this case. That of Brook v. Taylor differs also, there being the words 'then living', which were a description of the time. Limitations of terms after an estate tail have never been favored. Love v. Windham, 1 Ventris and 1 Siderfin; Leigh's Case, 1 Leonard, both which prove that words such as these create an absolute entail. Neither will the words 'extant or enceinte' after the Case of Paine v. Shalford, before the Lords Commissioners and afterwards affirmed in the House of Lords; there, it was said the law would not bear a limitation of a personalty after a former limitation in tail, though, in that case, there was a time limited within which the contingency must have happened. And he cited the Case of Attorney General, *ex rel*. Goldsmith's Company v. Hall, where a devise to one and the heirs of his body was held to be so strong as to allow of no limitation over.[2]

Note: There was another point in this case, which was what would pass by a general devise of his lands, tenements, and hereditaments whereof he was seised and possessed of, whether both freehold and leasehold or whether freehold only. And to that was cited the Case of Rose v. Bartlet, Croke Car. 292.[3]

The Lord Chancellor [LORD KING], to this last point, held it to be a devise of both freehold and leasehold by reason of the words 'seised and possessed', which include both. To the first question, he said that, though the first devisee had an absolute property, yet it was subject to a proviso. If it was a remainder, it would be void. But it is a contingency to arise by way of an executory devise. And, where contingencies are to arise within the compass of a life, they are good. The words 'extant or enceinte' make it equal to the case of a limitation to one and his issue, and, if he dies with issue living at his death, then to another, which is good, the words 'extant or enceinte' being synonymous. It had been otherwise indeed had the contingency been to have arisen on a general failure of issue; that had been void, it being too remote a contingency to arise after an estate tail spent.

[Other reports of this case: Lincoln's Inn MS. Misc. 384, p. 364, Lincoln's Inn MS. Coxe 40, p. 47, W. Kelynge 26, 25 E.R. 478.]

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

[2] *Brooks v. Taylor* (1729), Mosely 188, 25 E.R. 341, 2 Eq. Cas. Abr. 368, 22 E.R. 312, also cited in *Clare v. Clare* (1734), Cases *tempore* Talbot 21, 25 E.R. 638; *Love v. Wyndham* (1670), 1 Ventris 79, 86 E.R. 55, 1 Siderfin 450, 82 E.R. 1211, also 1 Modern 50, 86 E.R. 724, 1 Levinz 290, 83 E.R. 412, 2 Keble 637, 84 E.R. 401, 2 Chancery Reports 14, 21 E.R. 602, 1 Eq. Cas. Abr. 191, 21 E.R. 982; *Lee's Case* (1584), 1 Leonard 285, 74 E.R. 260; *Attorney General, ex rel. Goldsmiths Company v. Hall* (1731), W. Kelynge 13, 25 E.R. 470, Fitz-Gibbons 314, 94 E.R. 772, 2 Eq. Cas. Abr. 293, 348, 22 E.R. 246, 297.

[3] *Rose v. Bartlett* (1633), Croke Car. 292, 79 E.R. 856.

3

Earl of Warrington v. Leigh

(Ch. 1732)

A testator who orders that his debts be paid out of his worldly estate charges his real estate with the payment of his debts after his personal estate is depleted for that purpose.

17 May 1732.

The duchess of Somerset devised £1500 in trust to her executor to be laid out in land and to be settled on Mr. Henry Booth in tail, remainder to Mr. Langham Booth in tail, remainder to the earl of Warrington in fee. Upon the executor's death, Langham Booth took out administration with the will annexed to the duchess. And, before any purchase was made, he makes his will in these words, '*Imprimis*, I will that my debts be paid out of my worldly estate' and, then, he devises his manor of Thornton with several remainders, all chargeable with an annuity of £100 *per annum* to Mrs. S., and he dies without issue. Henry Booth being likewise dead without issue, my Lord Warrington brought his bill to have the £1500 laid out in land and settled or to have the money paid him according to the will and also to charge Langham Booth's real estate with this £1500, there being a deficiency of his personal assets.

The cause was first heard at the Rolls. And it was there decreed against the earl as to charging the land.

And having obtained a rehearing, Mr. *Lutwyche*, Mr. *Wills*, and Mr. *Mead* argued for the plaintiff and said that the words, 'worldly estate' were as much as if he had said, 'all the estate he had in the world', which would clearly have charged all the real estate. And they cited 2 Vernon 708 and the Case of Cloudesly v. Pelham, 1 Vernon 411, which is the same as this, for, there, he devised his estate to his executor, willing him to pay his debts and, here, he willed his debts to be paid, and so there was no difference; 1 Vernon 45, is also much the same; 2 Vernon 228, Alcock v. Sparrow; 690, Beachcroft v. Beachcroft.[1] The plain meaning of the word *imprimis* is that, before all things, his debts shall be discharged, and, as to the other words, it is so clear they charge both real and personal estate that it can bear no dispute. These words are not like words of course in a will, where one says, '*imprimis*, I will my debts be paid', for that is saying no more than the law says without them as to the personal estate, which is chargeable of itself towards the payment of all debts. But it is otherwise of a real estate, which is no way chargeable unless made so by the party's act in his lifetime by deed or will. And so these words 'worldly estate' must by charging both have a proper operation. And in Harris and Ingledew's case, heard at the Rolls in 1730,[2] where the words were 'and as touching the worldly estate wherewith it has pleased God to bless me, my debts and funeral charges being first paid, I bequeath' etc., the court was of opinion that both freehold and

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[1] *Trott v. Vernon* (1716), 2 Vernon 708, 23 E.R. 1065, also Gilbert Rep. 111, 25 E.R. 77, Precedents in Chancery 430, 24 E.R. 192, 1 Eq. Cas. Abr. 199, 21 E.R. 987, 2 Eq. Cas. Abr. 291, 22 E.R. 244; *Clowdsley v. Pelham* (1686), 1 Vernon 411, 23 E.R. 552, also 1 Eq. Cas. Abr. 197, 21 E.R. 986; *Newman v. Johnson* (1682), 1 Vernon 45, 23 E.R. 298, also 1 Eq. Cas. Abr. 197, 21 E.R. 986; *Alcock v. Sparhawk* (1691), 2 Vernon 228, 23 E.R. 748, also 1 Eq. Cas. Abr. 198, 21 E.R. 987; *Beachcroft v. Beachcroft* (1715), 2 Vernon 690, 23 E.R. 1047, also 1 Eq. Cas. Abr. 198, 21 E.R. 987.

[2] *Harris v. Ingledew* (1730), 3 Peere Williams 91, 24 E.R. 981, 2 Eq. Cas. Abr. 74, 169, 233, 255, 422, 462, 768, 22 E.R. 64, 144, 198, 216, 358, 393, 652.

copyhold were chargeable with the payment of a simple contract debt by virtue of the words 'worldly estate', which take in all the estate, both real and personal, whereof the testator was seised or possessed.

Mr. Attorney General [*Yorke*], Mr. Solicitor General [*Talbot*], and Mr. *Ryder* held on the other side that, notwithstanding what had been said, such clauses were often thrown in as words of course, which, if they should be taken to affect real estate, would be very inconvenient to purchasers etc. in laying open the real estate to debts barred by the Statute of Limitations.[1] After this clause, which has been insisted on, is a devise of the manor of Thornton, which is now sought to be charged with several remainders over, all liable to the payment of an annuity of £100 *per annum* to Mrs. S. It is not at all said out of what fund he would have his debts paid, but it is left to the construction of the law to be discharged according to the nature of the securities and, consequently falling within the maxim *expressio eorum quae tacite insunt* etc., cannot alter the method which the law lays down for the payment of debts. Although much has been said on the other side on the word *imprimis* to make it tantamount to the case where one wills that such a thing be done in the first place, yet they are very different, for, in this last case, the words imply a priority in the doing of the act. But the word *imprimis* is only that whereby the testator first sets down his intent. And, in that sense, it is to be found in every will and almost in every deed of articles. Besides, here is a sufficient demonstration of his intent that this manor should be liable only to the annuity, for, in the limitation of remainders, he only says 'chargeable with this annuity' without saying anything of his debts, which he would have done had he intended it to be chargeable. The Case of Cloudesly v. Pelham, 1 Vernon 411, is very different from this, for, there, the testator had devised his real estate to the same person he had made his executor, but, when he gives him his personal estate, that was with a recital that he was indebted to him, and so it came to him as a payment. Alcock v. Sparrow, 2 Vernon 228, also differs, for there was a devise to his heir at law 'subject to the trusts mentioned', which the court would, no doubt, construe to pay his debts, since the whole trust must be taken together. The Case of Trott v. Vernon, 2 Vernon 708, is also different, for there was a direction that his 'debts should be paid in the first place', which bars any devise of his real estate from taking place until his debts be paid. But besides the difference between these words and the word *imprimis*, had there been in that case any particular charge on the real estate, as there is here, and that particular charge taken notice of singly and by itself in every limitation of the real estate as the testator has here done, the general words made use of in that case, though stronger than those made use of here, would never have charged the real estate. And the laying of a particular charge on the real estate distinguishes it from all the cases cited on the other side.

Lord Chancellor [LORD KING]: I think the personal assets must first be applied as far as they will go. But to see how far the real estate is chargeable, we must consider the words of the will. He wills that his 'debts be paid out of his worldly estate.' And the words 'worldly estate' certainly take in as well the real as the personal estate. Now, though there be a devise of several parts of the real estate chargeable with the annuity, yet that does not defeat the charge which was laid on it by the words 'worldly estate', which take in everything, as well real as personal. The personal assets must first be applied as far as they will go, then, in case of a deficiency, to come upon the real.

This case was afterwards affirmed in Parliament.[2]

Note that my Lord Warrington had been decreed at the Rolls to produce papers and writings upon oath, which he refused to do otherwise than upon his honor, insisting on his

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[1] Stat. 21 Jac. I, c. 16 (*SR*, IV, 1222-1223).

[2] *Lords' Journal*, vol. 24, p. 231.

peerage. To that was cited the Earl of Lincoln's Case in the Star Chamber, 2 Car. I,[1] and there were produced two orders of the House of Lords, one in 1628 and the other in 1640, the former of which seemed to have been made upon that resolution in the Star Chamber in the Earl of Lincoln's Case, which is in Sir William Jones's reports at large. There was also cited the Case of Gaines v. Gaines, in 1712, where my Lord Falconbridge was examined as a witness both for the plaintiff and defendant upon his honor, and, there, it was insisted by Mr. Vernon that his depositions could not be read, though they were equal on both sides, being examined as well for the one as for the other, and he said it had been so adjudged in the House of Lords. And so it was held by Lord Harcourt, and his depositions were accordingly rejected, for, in all these cases where peers are examined upon interrogatories or as witnesses, it is always upon oath, no such thing ever having been heard of as an affidavit upon honor, upon which Mr. Attorney General put a case of a peer's waging his law, which he said must assuredly be done upon oath and not upon his honor. W. Jones, Earl of Lincoln's Case; 2 Modern 98, Earl of Shaftsbury v. Lord Digby.[2]

Lord Chancellor [LORD KING] inclined to think these orders did not reach the present case and that they extended only to answers. But he would search into precedents before anything be determined.

Note: This very session of Parliament, an order was made in the House of Lords relating to this matter. Query the orders.

See J. Selden, *Privileges of the Baronage*, part 2nd, ch. 1, and Precedents in Chancery 92, Duke of Hamilton v. Lord Gerrard.[3]

[Other reports of this case: Lincoln's Inn MS. Misc. 384, p. 365, W. Kelynge 39, 25 E.R. 485, 2 Eq. Cas. Abr. 372, 22 E.R. 316.]

4

Mansell v. Mansell
(Part 1)

(Ch. 1732)

It is a breach of trust for trustees to preserve contingent remainders to destroy them.

Donees who benefit from a breach of trust cannot retain any benefit therefrom.

20 June 1732.

Upon a rehearing, the case was thus. Mr. Vaughan's estate being charged with £1200, he devises it, subject to this charge, to trustees in trust to permit Dorothy Loyd to enjoy the profits during her life, remainder to trustees to preserve contingent remainders, remainder to her first and other sons in tail male, remainder to Sir Edward Mansell in fee. The tenant for life and the remainderman in fee intermarry, and, before the plaintiff's birth, who was their

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[1] *Earl of Lincoln's Case* (1627), W. Jones 152, 82 E.R. 81, Croke Car. 64, 79 E.R. 659, Hutton 87, 123 E.R. 1119.

[2] *Earl of Shaftsbury v. Lord Digby* (1676), 2 Modern 98, 86 E.R. 963, also 3 Keble 631, 641, 642, 647, 661, 84 E.R. 920, 927, 931, 938, 1 Freeman 422, 425, 429, 89 E.R. 314, 317, 320, T. Jones 49, 84 E.R. 1141.

[3] *Duke of Hamilton v. Lady Gerrard* (1699), Precedents in Chancery 92, 24 E.R. 44, also 2 Eq. Cas. Abr. 13, 22 E.R. 11.

son, the husband and wife join in a feoffment to the use of the husband in fee and levy a fine to the same uses. The trustees released. The husband devises his estate to his wife and, afterwards, in trust for the plaintiff, his eldest son, who was born after the release, for his life, remainder to his first and other sons in tail, remainder to Rawley Mansell, the defendant, his second son, for life and to his first and other sons in tail. And he subjects his estate to pay several legacies to his daughters. The plaintiff, in his bill, insisted on the breach of trust and that the parties who claim under the fine and feoffment, being parties to the breach of trust, ought not to take advantage of it. And, therefore, he prayed a recompense according to the original will of Mr. Vaughan.

The defendant, in his answer, insisted on the fine and feoffment.

The Master of the Rolls [Jekyll] decreed for the plaintiff for so much as was not aliened *bona fide*.

And it was argued by Mr. Attorney General [*Yorke*], for the plaintiff, that the estate ought to be preserved by the trustees according to the intent of the deed of trust, that their joining with the tenant for life in alienation was a high breach of trust and that, had they aliened to one who had no notice of the trust, the remedy should be against them, but where with notice, the parties claiming under the trust should make good the estate, and it was so held by the Lord Harcourt in Pye and George's case, in Salkeld's Reports,[1] which is stronger than our case, for those we claim against are all volunteers under Sir Edward Mansell's will. Mr. Vaughan's estate being subject to a charge of £1200, it cannot be supposed that Sir Edward Mansell and the trustees should bar the remainders to prevent them coming to the first and other sons of Dorothy, who was his wife, but merely to discharge that debt, which a court of equity would upon a bill brought have decreed to be done by sale wherever a conveyance has been made for a particular purpose; though no particular limitation of the estate after that purpose performed, that has been always looked on as a resulting trust for the heir or for such to whom the inheritance belongs. And there are many cases where it has been so held. 2 Vernon 52, Baden v. Earl of Pembroke.[2]

It was also insisted that old Sir Edward Mansell had in an answer formerly put in to another suit in this court allowed that the plaintiff would be entitled in equity to an estate tail under Vaughan's will.

Mr. Solicitor General [*Talbot*], Mr. *Verney*, and Mr. *Ryder*, after the proofs [were] read, added that their claiming only against devisees under Sir Edward Mansell's will and not against any purchaser, either with or without notice of the trust, obviated all objections that could be made on that head and that, where a volunteer claims under a breach of trust without any consideration paid and with notice of the trust, it would be unreasonable he should take advantage of it, but he shall hold the estate liable to the trust. Pye and George's case, though not a case directly adjudged, yet was a very strong declaration by the court. Trustees to preserve contingent remainders were found out to help the defect in the law of the first son's not being able to take advantage of the forfeiture of the tenant for life by making a feoffment because he was not *in rerum natura* at the time of the forfeiture committed. And at law, before the Statute of Uses,[3] if a feoffee to uses had enfeoffed another with notice of the use, the second feoffee would have held the estate subject to and for the use of the *cestui que use*. Here,

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[1] *Pye v. George* (1710), 2 Salkeld 680, 91 E.R. 578, also 1 Peere Williams 128, 24 E.R. 323, Precedents in Chancery 308, 24 E.R. 146, 1 Eq. Cas. Abr. 384, 21 E.R. 1120, 7 Brown P.C. 221, 3 E.R. 144, Chan. Cases *tempore* Anne 178.

[2] *Baden v. Earl of Pembroke* (1688), 2 Vernon 52, 213, 23 E.R. 644, 739, also 3 Chancery Reports 217, 21 E.R. 771, 1 Eq. Cas. Abr. 241, 265, 21 E.R. 1018, 1035.

[3] Stat. 27 Hen. VIII, c. 10 (*SR*, III, 539-542).

the first son is a *cestui que trust*, and trustees are appointed to preserve, and not to destroy, the contingent remainders. Then, taking it on the other side, this does not seem so much a breach of trust as a just and legal act to take off that charge which lay on the estate and to secure that very entail which they were trustees for and would have been destroyed by a sale, for the acts done by the husband and wife are recited in the deed to be done only in order to be settled on the husband to and for the raising such sums as the estate is chargeable with. And it is the greatest equity they should be taken to this particular purpose only, it being a lawful one, for, where a deed may be taken in a double sense, the just and equitable one shall be preferred. Neither is it to be supposed the wife should have joined in the disherison of her children, but only to make Sir Edward Mansell, her husband, a trustee for this special purpose of discharging the estate. In all cases of raising terms for one purpose, after that purpose is served, the term should attend the inheritance, though no trust is appointed after the serving of the purpose. Lowther v. Lowther, heard at the Rolls the last term. And so, whether it is considered as a rightful act, as it must be, or whether it is taken to be a breach of trust, and so a wrongful one, the plaintiff ought to be relieved, and, *quacumque via data*, the decree ought to be affirmed.

Mr. *Lutwyche*, Mr. *Wills*, and Mr. *Mead* argued on the other side for the defendant. And they said that it was not pretended but that the legal estate was well vested in Sir Edward Mansell by his father's will. But they object that here has been a contrivance to defeat the plaintiff, not then born, of that estate which he would otherwise have had. It was not the feoffment that destroyed the contingent remainders, for therein the trustees were not concerned, but it was the release. And it is observable that here is no purchaser, but only volunteers claiming under a settlement made by Vaughan's will. And, in many instances, where, in cases of volunteers, contingent remainders have been destroyed, they neither being favored in law or equity, Pollexfen 250,[1] where a tenant for life with a remainder to himself destroys the contingent remainders, it has always been held good. And it is here admitted that had there been a purchaser, there would have been no relief, which appears by this very decree, for it gives no relief against such who have purchased part of this estate *bona fide*. As this case is circumstanced, there can be no reason for a court of equity to interpose, for they seek relief as to one part of the father's will, which they do not like, but would have the other part, which makes for them, to stand. 2 Vernon 582, Noys v. Mordaunt.[2] Here is a very fair settlement made by the father, and he has gone farther towards serving Mr. Vaughan's intent, which was to have the estate remain in the family, than would have been otherwise if he had been tenant in tail. The defeating of this will will be disappointing the provision made by the father for his younger children, which could the father have apprehended, he would have provided otherwise for his children.

Their saying the conveyance to Sir Edward Mansell was only a trust for the payment of debts, for that was not Dorothy's intent to disinherit the child she was then enceinte of, is setting up an intent to defeat the express act of the parties, which was a conveyance for and in consideration of natural love only to Sir Edward Mansell, and to no other use or purpose whatsoever and the word trust is not so much as mentioned in any part of the deed, and there being in the end of the deed an express provision that all conveyances shall be to the use of Sir Edward Mansell in fee, and to no other use whatsoever.

In all the cases cited in the Case of Lowther v. Lowther there was an express conveyance to strangers in trust, none of which is in this case. But here, the conveyance is to his own heir

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[1] *Howard v. Duke of Norfolk* (1681), Pollexfen 223, 250, 86 E.R. 568, 578.

[2] *Noys v. Mordaunt* (1706), 2 Vernon 581, 23 E.R. 978, also Gilbert Rep. 2, 25 E.R. 2, Precedents in Chancery 265, 24 E.R. 128, 1 Eq. Cas. Abr. 273, 21 E.R. 1041, Chan. Cases *tempore* Anne 44.

without mentioning a word of any trust, neither will their other method of taking it as a breach of trust do much better, since a remedy has often been denied against the trustees for preserving contingent remainders in case of a tenant in tail. Pratt v. Spring, 2 Vernon 303; Bowater v. Elly, 344; Ely v. Osborne, 754.[1] Neither do they pray their remedy against the trustees, but against the tenant for life, who has been guilty of no breach of trust. If there be no trustees and the tenant for life by a fine bars the contingent remainders, there can be no remedy against him, and yet that is a stronger case than this, since, there, he would have a kind of trust reposed in him but, here, he has none at all.

Then were cited the cases of Stapleton v. Sherrard, 1 Vernon 212; Sherborne v. Clerk, 273; Smith v. Dean and Chapter of St. Paul's and Rogle, 367, and in Shower Parl. Ca. 67,[2] to prove that equity would not assist to defeat these advantages a man has at law by taking fetters off another person's estate. Upon the whole, as no precedent has been shown where, in the like case, any remedy has been given and that the Case of Pye v. Gorge was but an extra-judicial opinion of the court and so imperfectly reported that no stress can be laid on it, they said it would be hard to begin in this case, which must be by taking away a legal title and defeating the provisions made for younger children, who are always favored in equity, besides we should be left without any provision for the debts which have been paid by old Sir Edward Mansell and to which this estate was liable. And, therefore, they prayed the decree might be reversed.

Lord Chancellor [LORD KING]: Can you show any precedents of a legal title having been set aside by reason of the trustee's joining in the destroying the contingent remainders? I was told a great while ago, though I cannot remember by whom, that this was in question in my Lord North's time [1682-1685], who declared he would not relieve because it was *damnum sine injuria*, there being nobody in use at the time of the release. The Case of Pye v. Gorge was an *obiter* opinion. All that I collect from it is that I must be wary what I do. I have a doubt as to the debts which have been paid by old Sir Edward Mansell and for which no provision is made by this decree. I must be attended with Mr. Vaughan's will and all the deeds relating to this business. And I will take time to consider it.

Post, fo. 15.[3]

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[1] *Platt v. Sprigg* (1693), 2 Vernon 303, 23 E.R. 796, also 1 Eq. Cas. Abr. 386, 21 E.R. 1122; *Bowater v. Elly* (1696), 2 Vernon 344, 23 E.R. 819, also Precedents in Chancery 81, 24 E.R. 39; *Elie v. Osborne* (1717), 2 Vernon 754, 23 E.R. 1093, 1 Peere Williams 387, 24 E.R. 437, 1 Eq. Cas. Abr. 385, 21 E.R. 1121, 2 Eq. Cas. Abr. 702, 22 E.R. 590, Chan. Cases *tempore* Geo. I, 269.

[2] *Stapleton v. Sherrard* (1683), 1 Vernon 212, 305, 314, 432, 465, 23 E.R. 421, 485, 491, 567, 590, also 2 Chancery Reports 255, 21 E.R. 672, 1 Eq. Cas. Abr. 76, 161, 21 E.R. 890, 958; *Sherborne v. Clerk* (1684), 1 Vernon 273, 23 E.R. 466, also 1 Eq. Cas. Abr. 76, 21 E.R. 890; *Ash v. Rogle* (1686), 1 Vernon 367, 23 E.R. 526, Shower P.C. 67, 1 E.R. 46, also 2 Chancery Reports 387, 21 E.R. 695, 1 Eq. Cas. Abr. 119, 21 E.R. 925.

[3] For later proceedings in this case, see below, Case Nos. 9, 11.

5

Morgan v. Dean

(Ch. 1732)

In this case, the devise in issue created an entail.

23 June.

There was a devise to Morgan Dean 'during his natural life and for want of issue male by Morgan Dean, remainder to Anthony Dean and his heirs'.

Mr. Attorney General [*Yorke*] and Mr. *Floyer* argued that this was but an estate for life in Morgan Dean. The latter words do not enlarge the first devise. The rule of construction of wills has not yet gone so far. Sonday's Case, 9th Report, differs from this, for, there, there was an express devise to the son and so, plainly, it was an estate tail. But there is no such thing here. And where an express devise for life is devised, it has been often held that it could be enlarged. Bampfield v. Popham, 2 Vernon 427, 449; there was an express estate for life given as here, and it was held it was not to be enlarged. Indeed, in the case of a devise to the testator's heir at law, it has been sometimes held that an estate for life should be enlarged. But the Case of Gardner v. Sheldon, Vaughan 259, is express that, where an estate for life is given to a stranger, there shall arise no estate by implication.[1]

Mr. *Lutwyche* insisted, on the other side, that what had been urged was contrary to the determination of many cases. Suppose in this case there be issue male of Morgan. Who can the estate go to? It cannot go to Anthony Dean, and it cannot be a contingent remainder in Anthony, for, then, it must wait until failure of issue male, which may not be these hundred years and so a perpetuity, which is the reason why these kind of limitations have been held to give an estate tail. In Bampfield v. Popham, the reason was because it was limited by way of contingent remainders, there being a limitation to the first and every other son of the testator in tail. The Case of Langley v. Baldwyn is express that the words 'for default of issue male' give an estate tail, and it was so held in that case by the judges of the Common Bench, to whom it was referred for their opinions. King v. Melling, 1 Ventris 214, 225.[2]

Lord Chancellor [LORD KING] said he had no doubt but this was an estate tail. But, at the Attorney General's request, he made a case of it for the opinions of the judges of the Common Bench.

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[1] *Sonday's Case* (1611), 9 Coke Rep. 127, 77 E.R. 915; *Bampfield v. Popham* (1701-1703), 2 Vernon 427, 449, 23 E.R. 873, 888, also 2 Freeman 266, 22 E.R. 1201, 1 Peere Williams 54, 24 E.R. 290, Holt K.B. 233, 90 E.R. 1028, 1 Eq. Cas. Abr. 183, 21 E.R. 975, *sub nom. Popham v. Bamfield*, 1 Vernon 79, 167, 344, 23 E.R. 325, 391, 510, 1 Salkeld 236, 91 E.R. 209, 2 Freeman 269, 22 E.R. 1203, 1 Eq. Cas. Abr. 108, 21 E.R. 916, 2 Eq. Cas. Abr. 308, 22 E.R. 260, Chan. Cases *tempore* Anne 26; *Gardner v. Sheldon* (1671), Vaughan 259, 124 E.R. 1064, also 2 Keble 781, 84 E.R. 494, 1 Freeman 11, 89 E.R. 9, 1 Eq. Cas. Abr. 197, 21 E.R. 986.

[2] *Langley v. Baldwin* (1707), 1 Eq. Cas. Abr. 185, 21 E.R. 976, Chan. Cases *tempore* Anne 84; *King v. Melling* (1672), 1 Ventris 214, 225, 86 E.R. 144, 151, also 2 Levinz 58, 83 E.R. 448, 3 Keble 42, 52, 95, 84 E.R. 584, 589, 614, Pollexfen 101, 86 E.R. 526, 3 Salkeld 296, 91 E.R. 835, 1 Eq. Cas. Abr. 181, 21 E.R. 973.

6

Griffith v. Trapwell

(Ch. 1732)

A decree that was obtained by fraud can be avoided by an original bill or by a bill of revivor.

26 June 1732.

A bill of review was brought by one of the daughters and co-heirs of Greenhouse against the other to reverse a decree made in a cause by consent to establish articles of agreement. The bill suggested that the former decree had been obtained by misrepresenting the quantum of the testator's estate, by which much less fell to the plaintiff than her share came to.

Mr. Attorney General [*Yorke*], for the defendant, said that the bills of review were in the nature of writs of error *coram nobis residet* and were founded either on some errors appearing on the face of the decree or on some new matter of equity arising since the decree was made. But no instance can be shown of a plaintiff on a bill filed praying a decree and a decree had thereon to bring a bill of review to reverse that decree, which he himself has obtained. And he cited the Case of Can v. Can,[1] decreed the 22nd of August 1721, where a bill was brought to establish a will and disinheriting the eldest son of Sir Robert Can, a second will having been burnt. An agreement was afterwards made allowing the eldest son a small estate. A bill was afterwards brought suggesting new evidence and that the former agreement was obtained by fraud. Yet the Lord Macclesfield said that, for ascertaining property and to prevent the defeating of agreements in this case, he could not relieve in this case, though he declared he would go as far as he could to assist the plaintiff, who was heir at law and disinherited.

Mr. Solicitor General [*Talbot*] replied for the plaintiff that, wherever an advantage is taken of the ignorance of another, whether that ignorance proceeds from a natural defect or from any other cause, this court would relieve. To the plaintiff's being bound up in point of form as to the bringing a bill of review, he answered that this bill was not merely to be looked on as a bill of review, but also as an original bill to many purposes, for therein are many prayers, as to come to an account, to pray relief against the articles etc., and the last prayer is that the decree may be reversed and it prays process *ad revivendum respondendum* etc. Neither is a bill of review to be compared to a writ of error *coram nobis* since no bill of review can be brought on any matter before the decree. And so no argument can be drawn from thence. If fraud and circumvention be a sufficient cause to bring either an original bill or a bill of review for an infant when he comes to age, so will it be in the case of a plaintiff who has been circumvented. In the Case of Can v. Can, there had been a very long acquiescence under the decree ever since Lord Somers's time [1693-1700], which was a main reason why no relief was given. But here is plain fraud, and, therefore, the plaintiff should have relief, having applied as soon as it was found out.

Lord Chancellor [LORD KING]: An erroneous decree of this court may be avoided either by original bill, if the decree was obtained by fraud, or by a bill of review or by a mixture of both. Now, the question is if here is not a fraud apparent. Here, the sister, having nothing to do with the administration, but wholly ignorant of the quantum of the testator's estate, comes to an agreement to take £3000 in lieu of her distributive share. Can it be supposed anybody in their senses will accept of £3000 in lieu of a moiety of an estate of £16,000? Her intent was

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[1] *Cann v. Cann* (1687-1721), 1 Vernon 480, 23 E.R. 605, 1 Peere Williams 567, 723, 24 E.R. 520, 586, 2 Eq. Cas. Abr. 417, 22 E.R. 354, Chan. Cases *tempore* Geo. I, 754.

to have an equal share. And to establish this agreement by a decree of this court would be carrying on a plain fraud. The decree must be reversed and the articles set aside.

7

Higden v. Watkinson

(Ch. 1732)

The creditors of a bankrupt can seize a possible bequest to him.

6 November.

The testator, Knight, devised his estate to be sold, and the money arising by the sale he directed the trustees to dispose of thus: 'I give and bequeath unto all and every the child and children of my daughter Elizabeth Watkinson that shall be living at her decease' etc. William Watkinson became a bankrupt and had his certificate allowed before the death of his mother, Elizabeth Watkinson.

The question was whether there was not by the will such a right vested in the trustees immediately upon the testator's death for the benefit of Elizabeth's children to be divided and paid after her death as would entitle the assignees for the benefit of William Watkinson's creditors to his share of the estate to be sold and divided pursuant to the will.

The cause was at first heard at the Rolls, and there, it was decreed for the assignees.[1]

And now, upon a rehearing, was cited the Case of Crane v. Crockett, heard at the Rolls, 9th June 1729, where a legacy was devised to a wife at her age of 22. The husband became a bankrupt and had his certificate allowed before her attaining that age. It was decreed the assignees were not entitled to this legacy.

It was answered on the other side that the decree was founded on this reason, that, even supposing it had been a vested legacy and the husband had come to have it decreed to him, the court would not have decreed it to him without compelling him to make a proportional settlement, and, therefore, the assignee would not be in a better condition than the bankrupt himself was.

The Lord Chancellor [LORD KING] affirmed the decree saying that it was such an interest as William Watkinson himself might have assigned or released and that the statutes did never intend any benefit to the bankrupt, but meant to make all liable which he had in him, which appears by the words of one of the statutes of bankruptcy (I think he said the last statute but one, which must be 5 Geo. I[2] and is now expired) that mentions the very word possibilities.

N.B. In this case, Mr. Pigot had given his opinion under his hand that there was no right in the assignees by reason of the words, 'living at her death', which vested nothing in her children during the life of Elizabeth, but the whole rested in contingency and was nothing but a possibility or what the civil law calls *spes habendi*, which, by the rules of the common law, is not assignable, but, had it been generally to the children of Elizabeth, then, it had been an interest vested and so been assignable.

[Other reports of this case: Lincoln's Inn MS. Misc. 384, p. 366, *sub nom.* Higden v. Williamson (1731), 3 Peere Williams 132, 24 E.R. 1000, 2 Eq. Cas. Abr. 89, 114, 22 E.R. 77, 79.]

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[1] *Sub nom. Higden v. Williamson* (1731), 3 Peere Williams 132, 24 E.R. 1000, 2 Eq. Cas. Abr. 89, 114, 22 E.R. 77, 79.

[2] Stat. 5 Geo. I, c. 24.

8

Hale v. Hale

(Ch. 1732)

A devise takes effect at the moment of the testator's death.

10 November.

Robert Waldron, having agreed to settle £2000 to the use of himself for life, remainder to his wife for life, remainder to the issue of the marriage, remainder to himself in fee. And, afterwards, having no issue, by his will in the year 1703, he devised that the settlement should be made good and, after his wife's life, to be sold and divided into moieties subject to £500 to be disposed of by his wife at her death, half to the children of Jane Hale, his niece, then living, and the other half to the children of Jane Terrard, then living, and the residue of all his real and personal estate, half to the children of Jane Hale, equally to be divided at their several ages of 21 or marriage and interest in the meantime for their maintenance, the other half to Jane Terrard, her heirs, executors, and administrators. Jane Hale had two children born after the testator's death. And the question was whether they should come in with the other children living at the testator's death and to have a share of the moiety of the residue.

Mr. *Mead* cited the Case of Musgrave v. Perry, 2 Vernon 710,[1] where there was a devise to his grandchildren living at the time of his decease; two grandchildren were born, one within nine months, the other within six months after the testator's death. It was decreed they should not take. He likewise insisted that, if they must wait until Jane Hale's death, no division could be to the other children in the meantime.

Mr. *Floyer*, on the other side, cited the Case of Jamison v. Pocklington, heard at the Rolls, 12th March 10 Anne [1711], where Robert Bradford, by will dated 10th October 1699, amongst other legacies, gave to his son Richard's younger children £800 equally amongst them. It was decreed that a child born after the testator's death should have a share of the legacy with the other younger children who were living at his death.

Lord Chancellor [LORD KING]: It must be taken as it stood at the testator's death and to be divided amongst the children of Jane Hale that were living at the testator's death only.

[Other reports of this case: Lincoln's Inn MS. Misc. 384, p. 62.]

9

Mansell v. Mansell
(Part 2)

(Ch. 1732)

11 and 13 November. *Ante* fo. 10.[2]

This cause came now to be argued before the Lord Chancellor assisted by the Lord Chief Justice Raymond and the Lord Chief Baron Reynolds.

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[1] *Musgrave v. Parry* (1715), 2 Vernon 710, 23 E.R. 1067, also 1 Eq. Cas. Abr. 71, 203, 21 E.R. 884, 990, Chan. Cases *tempore* Geo. I, 175.

[2] For other proceedings in this case, see Case Nos. 4, 11.

Mr. Attorney General [*Yorke*] argued that either there was a resulting trust after the purpose served or, if not, then there was an equity in Sir Edward Mansel to entitle him to have the estate re-settled according to the uses limited in Mr. Vaughan's will. And he cited the Case of Lowther v. Lowther, heard at the Rolls the first of June 1730, where a devise was to his son Charles Lowther for 99 years if he should so long live, remainder to trustees to preserve contingent remainders, remainder to his first and other sons in tail male, remainder to his second son Francis in like manner, remainder to his kinsman Robert Lowther in fee upon trust to raise legacies of £5000 for the provision of the daughters of his sons, Charles and Francis, and no farther trust was declared. It was held in that case that notwithstanding the word 'kinsman', it should be a resulting trust for the heir after the £5000 raised. And though it will be said that this case differs from that of Lowther v. Lowther because the word trust is not mentioned, yet will not that make the defendant's case the better, the word 'trust' not being a technical word nor absolutely necessary. But where, from the nature of the thing, it appears a trust is created, that will avail as strong as if the word 'trust' had been inserted, as appears by the Case of the Countess of Bristol v. Hungerford, 2 Vernon 645. The case likewise of Baden v. Earl of Pembroke, 2 Vernon 52, proves that the general words of conveyances have been restrained to serve only the purpose intended by the parties.[1]

To the second point, that Sir Edward Mansel has an equity to set up the trust again, it is plain that, when trustees join in barring contingent remainders, it is a breach of trust in them. And a trust binding the conscience of the trustees and also of all coming under them with notice, it follows that, in this case, the parties claiming under the breach of trust are in conscience bound to make good the estate. It was said in the last argument that in Pollexfen 250 there was an opinion that trustees might lawfully join in barring contingent remainders, but that was said *arguendo* only by Pollexfen when but a counsel at the bar. On the other hand, Pye and Gorge's case, which was the opinion of a very great chancellor, who held that those coming in under a breach of trust as volunteers should make good the trust, is strong enough to overrule the opinion of another great man, delivered only as counsel, though no decree was ever made.[2]

Mr. Solicitor General [*Talbot*] argued to the same purpose as formerly and took notice that the words in the conveyance 'that it should be to the use of Sir Edward Mansel and to no other use whatsoever', which had been insisted on by the defendant's counsel to prove that there was no intention of the parties to have the conveyance to work to any other purpose whatsoever than to convey an absolute fee simple to Sir Edward Mansel did import no more than that the legal estate should remain in Sir Edward Mansel, but the equitable title was to remain as it was before. And he cited the cases of Sir John Hobart v. the Countess of Suffolk, 2 Vernon 644,[3] and of Lord and Lady Hertford v. Lord Weymouth.

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[1] *Countess of Bristol v. Hungerford* (1709), 2 Vernon 645, 23 E.R. 1021, also Precedents in Chancery 81, 24 E.R. 39; *Baden v. Earl of Pembroke* (1688), 2 Vernon 52, 213, 23 E.R. 644, 739, also 3 Chancery Reports 217, 21 E.R. 771, 1 Eq. Cas. Abr. 241, 265, 21 E.R. 1018, 1035.

[2] *Howard v. Duke of Norfolk* (1681), Pollexfen 223, 250, 86 E.R. 568, 578; *Pye v. George* (1710), 2 Salkeld 680, 91 E.R. 578, also 1 Peere Williams 128, 24 E.R. 323, Precedents in Chancery 308, 24 E.R. 146, 1 Eq. Cas. Abr. 384, 21 E.R. 1120, 7 Brown P.C. 221, 3 E.R. 144, Chan. Cases *tempore* Anne 178.

[3] *Hobart v. Countess of Suffolk* (1709), 2 Vernon 644, 23 E.R. 1020, 1 Eq. Cas. Abr. 272, 21 E.R. 1040, *sub nom. Earl of Stamford v. Hobart* (1710), 3 Brown P.C. 31, 1 E.R. 1157, Hardwicke 22, note also *In re Maynard's Will* (1691), Dodd 101.

To the second point, he said that, though the defendant's counsel had in their former argument insisted on the plaintiff's producing precedents where relief had been given in such a case, yet he apprehended it lay upon them (and he believed he could defy them) to produce a single precedent where trustees breaking their trust in the most unconscionable manner and yet relief had been denied in a court of equity, the reason and justice of the thing being entirely with the plaintiff.

Mr. *Ryder* insisted that the courts of equity always keep such a hand over trustees that they will not lay anything open to them which might induce them to break their trust, which was the reason that a trustee is never suffered to purchase an estate he is trustee for. He took notice of the Case of Inglefield v. Inglefield, 1 Vernon 443, 446,[1] cited on the former argument for the defendant, which he said widely differed from this, there being no trustees to preserve contingent remainders, but a bare contingent estate tail depending on an estate for life. And he added that the objection of Mr. Vaughan's intent being better served by this devise than otherwise, it would have been amounted only to saying that old Sir Edward Mansel was a better judge of what estate his son should take from Mr. Vaughan than Mr. Vaughan himself was. Besides, how is it possible that Sir Edward Mansel's will made many years after the breach of trust should make that a good act which at the time of the committing of it was evil? The act of the trustees must stand upon its own bottom and cannot receive sanction from any subsequent matter.

Mr. *Lutwyche*, Mr. *Wills*, and Mr. *Mead* insisted on the same points they had done in their former argument, saying it was very foreign to the purpose to presume a trust when no such thing is mentioned in any of the conveyances, but only a conveyance to the use of Sir Edward Mansel and his heirs. They said that all the cases where terms had been raised to serve a particular purpose and a resulting trust decreed for the heir did all differ from the present case, for that, in them all, there were conveyances to strangers and, no farther disposal being made, it was fit there should be a resulting trust for the heir upon the common and well-known maxim that an heir shall never be disinherited but by a necessary implication. But here is no conveyance to a stranger, but to himself and his heirs, and the whole trust was expressed and, consequently, nothing was left to result, as in the other cases. Besides, in the feoffment and in the covenant to levy the fine, it is expressly said that the conveyances shall be ' to no other use whatsoever', which ousts all notion of any implied trust. There was also somewhat remaining undisposed of in all the cases which have been cited, and then it is very reasonable it should go to the heir. So was the Case of the Lord and Lady Hertford v. Lord Weymouth, there being a conveyance for the payment of debts and then to the now Lord Weymouth when he should come to his full age, and no provision was made in case the debts should be paid after he attained his full age; consequently, there was an interest undisposed of which must go to the heir at law. The Case of Lowther v. Lowther was not decreed on the point of the resulting trust, for, there, in the end of the devise was a bequeathing of all his real and personal estate undisposed of to Charles Lowther, and so it could plainly operate but as a trust in Robert Lowther after the £5000 was raised.

To the second point, they argued as formerly and cited the cases of Tipping v. Pigot and of Frewin v. Charleton, Abr. of Equity Ca. 385, 386,[2] which they said took off from the authority of Pye and Gorge's case.

They concluded by saying that here were equitable circumstances for the defendant as well as the plaintiff and, then, where there is equity on both sides, the law will take place. And this

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[1] *Englefield v. Englefield* (1686-1687), 1 Vernon 443, 446, 23 E.R. 575, 576.

[2] *Tipping v. Piggot* (1713), 1 Eq. Cas. Abr. 385, 21 E.R. 1121, also Gilbert Rep. 34, 25 E.R. 25, Chan. Cases *tempore* Anne 649; *Frewin v. Charleton* (1712), 1 Eq. Cas. Abr. 386, 21 E.R. 1121.

will is the only provision made for Mr. Rawley Mansel. And, by the Case of Noyce v. Mordaunt, 2 Vernon 582,[1] it cannot stand in part and fall in part, but it must stand and fall as to the whole.

Lord Chief Justice [RAYMOND]: We give no present opinion. But I think it very hard to say there shall be a breach of trust, which is a creature of this court, and that this court shall not relieve. Indeed, of a bare tenancy for life without trustees, it is otherwise, for there is a power in the tenant for life at law, which this court will not take from him, so that plainly stands upon another reason, to all of which the Lord Chief Baron [REYNOLDS] agreed. They would take time to advise.[2]

10

Acherley v. Vernon

(Ch. 1732)

The origin of the equity jurisdiction of the Court of Chancery is the delegation of the king's jurisdiction to hear petitions.

23 November.

Upon a motion, it was declared by the Lord Chancellor [LORD KING] that, at the making of Magna Charta and afterwards until King Edward III's time, the way to be relieved in equitable matters was by petition to the king, who, thereupon, referred it to the chancellor, but that, afterwards, petitions growing numerous, in Edward III's time, it was ordered they should go before the chancellor. And that was the rise of the court of equity, as it now stands.

N.B. This arose upon an answer of Mr. Acherley, a barrister at law, who, by it, insisted that all matters of freehold were by Magna Charta determinable by a jury only, and not triable in equity.

[Other reports of this case: 9 Modern 68, 88 E.R. 321, 10 Modern 518, 88 E.R. 834, 2 Barnardiston K.B. 212, 426, 94 E.R. 456, 596, Willes 153, 125 E.R. 1106, Fortescue 188, 92 E.R. 812, 1 Comyns 381, 92 E.R. 1121, 2 Comyns 513, 92 E.R. 1184, 1 Peere Williams 783, 24 E.R. 614, 2 Eq. Cas. Abr. 302, 328, 565, 587, 768, 22 E.R. 254, 280, 476, 494, 653.]

[Affirmed: Lords' Journal, vol. 22, p. 588, 3 Brown P.C. 85, 1 E.R. 1194.]

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[1] *Noys v. Mordaunt* (1706), 2 Vernon 581, 23 E.R. 978, also Gilbert Rep. 2, 25 E.R. 2, Precedents in Chancery 265, 24 E.R. 128, 1 Eq. Cas. Abr. 273, 21 E.R. 1041, Chan. Cases *tempore* Anne 44.

[2] For other proceedings in this case, see Case Nos. 4, 11.

11

Mansell v. Mansell
(Part 3)

(Ch. 1732)

12 December.[1]

The court now delivered their opinions in this case.

The Lord Chief Baron [REYNOLDS] was of opinion against the plaintiff as to the first point. And he said that the trustees never having executed the feoffment, their estate could not be impeached. It must be then the release which was an absolute conveyance and intended to destroy the remainders. All the cases that have been cited for the plaintiff are founded on this reason, that, where an estate is conveyed to trustees for a particular purpose, after that purpose is served, it shall be a resulting trust for the heir. But there can be no such thing here, for here was no trust declared in the feoffment and fine, and all the conveyances cannot be taken together as one and the same act since they were plainly designed for different purposes, the feoffment and fine to discharge the debts and the release to defeat the contingent remainders.

But the second point is clearly with the plaintiff, the release being a fraud in the trustees and a high breach of trust in them. And this court will relieve against all volunteers claiming under a breach of trust. But against a purchaser without notice, the remedy shall be against the trustees themselves. And as it is allowed in this case, that the plaintiff might have a remedy against his trustees, so must he have one against those claiming under them.

The opinion of my Lord Pollexfen delivered *arguendo* as counsel at the bar is of no weight. But the Case of Pye v. Gorge is an express declaration of the court. Inglefield and Inglefield's case differs widely from this, it being solely decreed upon the point of fraud, and, besides, there being in that case no trustees, there could not consequently be any breach of trust. The Case of Ely v. Osborne can be of no greater authority than the reason on which it was founded, which was that the first son had an estate tail, in equity at least, and, there, the remainders were already vested.[2]

The case of [*blank*] in the Abridgment of Equity Cases, fo. [*blank*],[3] which book I should not have cited but that it was declared at the bar to agree with the notes taken, was also of an entail. It is true that courts of equity have sometimes compelled trustees to join in conveying, as in Plat and Sprig's case,[4] but that has always been upon some special reason. And no such reason appears here where none are parties but those claiming under the breach

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[1] For earlier proceedings in this case, see above, Case Nos. 4, 9.

[2] *Pye v. George* (1710), 2 Salkeld 680, 91 E.R. 578, also 1 Peere Williams 128, 24 E.R. 323, Precedents in Chancery 308, 24 E.R. 146, 1 Eq. Cas. Abr. 384, 21 E.R. 1120, 7 Brown P.C. 221, 3 E.R. 144, Chan. Cases *tempore* Anne 178; *Englefield v. Englefield* (1686-1687), 1 Vernon 443, 446, 23 E.R. 575, 576; *Elie v. Osborne* (1717), 2 Vernon 754, 23 E.R. 1093, 1 Peere Williams 387, 24 E.R. 437, 1 Eq. Cas. Abr. 385, 21 E.R. 1121, 2 Eq. Cas. Abr. 702, 22 E.R. 590.

[3] *Tipping v. Piggot* (1713), 1 Eq. Cas. Abr. 385, 21 E.R. 1121, also Gilbert Rep. 34, 25 E.R. 25, Chan. Cases *tempore* Anne 649.

[4] *Platt v. Sprigg* (1693), 2 Vernon 303, 23 E.R. 796, also 1 Eq. Cas. Abr. 386, 21 E.R. 1122.

of trust. But whatever courts of equity would do upon a proper application, they would never suffer trustees to defeat remainders when they pleased and so make them judges.

It has been objected that here is an equivalent to Sir Edward Mansel by this will and that, if he will take advantage of this will, he must let it stand as to the whole, and to prove that was cited the Case of Noyce v. Mordaunt.[1] But I answer that the plaintiff has no equivalent, he being made but a bare tenant for life without power of raising one shilling. And in Noyce and Mordaunt's case, there was an implied condition, but no such thing is in our case. Besides, all we have to do here is with Mr. Vaughan's estate and how the plaintiff shall hold it without meddling any farther. The not relieving would go a great way toward defeating every settlement by laying it in the trustees' power to join with the tenant for life when they pleased. So that I cannot but advise my Lord Chancellor to affirm the decree.

Lord Chief Justice [RAYMOND]: I entirely agree with my Lord Chief Baron upon the first point, that here can be no resulting trust, as the plaintiff's counsel would have it.

But upon the second, I think the plaintiff well relievable here, there being no remedy for him at common law. I cannot tell on what reason was founded that law which lays it in the power of a tenant for life to bar the contingent remainders *ad libitum*, and surely the creating of trustees was a wise provision to remedy that mischief. And trustees, being the creatures of this court, are entirely under the direction of it and punishable here. An alienation will not affect a purchaser without notice, but, in that case, I think the remedy will be against the trustees. Precedents in this case are not to be expected and perhaps not to be found. But if right reason is to sway and govern, it can never be said that trustees shall have it in their power to defeat *ad libitum* that very estate for the preservation of which they were created. And here, the parties coming in under the breach of trust must be affected by it, the breach of trust being, as I may say, an equitable encumbrance on the land wherever it comes. Not one of the cases cited will go near warranting the denial of relief, since it was never known that a court of equity would encourage trustees to undo all. The Case of Elie v. Osborne was adjudged upon the point of the remainders' being vested, and that it was for the benefit of the entail to have the trustees to join. That of Platt v. Sprig was founded upon there being a mortgage term. Though I have a great regard for my Lord Pollexfen's memory, yet cannot I lay any stress on what he said *arguendo* as counsel. I think the objection that this would lay it in the trustees' power to defeat every settlement is strong and unanswerable. Indeed, it has been insisted that here is an equivalent. But we must consider the nature of these estates as quite different, neither have we anything to do here, but with Mr. Vaughan's estate. Upon the whole, I think the plaintiff ought to be relieved upon the second point, namely the breach of trust.

Lord Chancellor [LORD KING]: I shall lay the first point out of the question. But on the second, it is clear that, in point of law, the remainders had been destroyed by the deed of release. But, in equity, it is plainly a breach of trust and relievable here, this court being the only judge of trusts and being only able to lay hands on trustees, who are its creatures. So it was before the Statute of Uses,[2] as appears in Rolle's *Abridgment*,[3] where it is said that, if a feoffee to uses had enfeoffed another with notice, the uses had run with the land, why then, since the Statute, the construction of trusts must be the same, and every volunteer coming into land subject to a trust must be affected with it, for this court will never sit still while trustees are by their own arbitrary act defeating the parties' intent. Indeed were it the case of a mere

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[1] *Noys v. Mordaunt* (1706), 2 Vernon 581, 23 E.R. 978, also Gilbert Rep. 2, 25 E.R. 2, Precedents in Chancery 265, 24 E.R. 128, 1 Eq. Cas. Abr. 273, 21 E.R. 1041, Chan. Cases *tempore* Anne, 44.

[2] Stat. 27 Hen. VIII, c. 10 (*SR*, III, 539-542).

[3] H. Rolle, *Abridgment*, 'Uses', vol. 2, pp. 796-797.

tenancy for life without trustees, it would be otherwise, since that, being a legal conveyance only without any trust at all, this court would have no jurisdiction. But in this case, it must affect everyone who comes in voluntarily under the trust. And, therefore, I think the decree must be affirmed.

Note the Earl of Ormond's Case, Hobart 348, which seems to be in point, and the opinions of the Lord Chancellor and all the judges in the Duke of Norfolk's Case, 3 Chancery Ca. 15, 20, 27, 37.[1]

[Other reports of this case: Lincoln's Inn MS. Misc. 384, pp. 365, 367, 370, 2 Peere Williams 678, 24 E.R. 913, 2 Eq. Cas. Abr. 685, 747, 748, 22 E.R. 575, 633, 635, Wilmot 36, 97 E.R. 14.]

12

Wilson v. Spencer

(Ch. 1733)

A devise that vests upon the testator's death, though payable in the future, is an asset of the devisee so that, if the devisee dies after the testator but before payment, it is a part of the devisee's estate and does not lapse.

31 January.

John Spencer, in March 1729, made his will in the following words:

> My will is that all my debts and funeral charges be duly paid out of such part of my personal estate as is not hereafter specifically devised as far as that will extend and, in default thereof, out of my real estate. And I will that my executor, within twelve months after my decease, shall raise out of that part of my personal estate not herein specifically devised, and in default of such fund, then in aid thereof out of my real estate by mortgage or sale of such part as shall be sufficient the sum of £1000, which said sum I give to my younger son, Edward Spencer, to be paid him by my executor immediately after the same shall be so raised.

Then, he charges the same with another sum not exceeding £1000 to be disposed of in any manner as he should afterwards by any deed appoint, of which no appointment was made. And afterwards, he goes on in the following words:

> And I charge my real estate with the said sum of £1000 and with the further sum not exceeding £1000 for the purposes aforesaid to answer the same at all events in case my personal estate not herein specifically devised should prove deficient and fall short to answer the same. And whereas I have assigned to my eldest son, William Spencer, one-third part of my stock in trade in my iron works and have assigned one other third part to my younger son, Edward Spencer, which said assignments I do ratify and confirm to my said sons, and whereas, since the said assignments, I have had only one-third part to dispose of, now, I do hereby will the

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[1] *Earl of Ormond's Case*, Hobart 348, 80 E.R. 488; *Duke of Norfolk v. Howard* (1681), 3 Chancery Cases 1, 22 E.R. 931, also 1 Vernon 163, 23 E.R. 388, 2 Swanston 454, 36 E.R. 690, Pollexfen 223, 86 E.R. 568, 2 Chancery Reports 229, 21 E.R. 665, 2 Freeman 72, 80, 22 E.R. 1066, 1070, 79 Selden Soc. 904, 922, 999, Dodd 42.

> said remaining part to be equally divided between my said sons, so as they may be equally concerned in the whole and take as tenants in common, not as joint tenants.

And he makes his eldest son executor. In April 1729, John Spencer dies. And in December following, Edward, the younger son, dies, leaving a will wherein he makes the plaintiff residuary legatee and executor, who now brought his bill against William Spencer, who was heir at law and likewise executor to John Spencer, the father, for the £1000 given to Edward by his father's will and also that the plaintiff might take his share in the iron works according to the will.

The first question was whether this legacy of £1000 was to be considered as a legacy immediately vested in Edward Spencer so as that he should have a power to dispose of it before it became payable. The other was whether the share in the iron works confirmed to Edward Spencer by the will of John Spencer would pass to him, there being no such assignment made to him by the said John Spencer in his lifetime.

Mr. *Lutwyche*, Mr. *Wills*, and Mr. *Verney* argued for the plaintiff that this was to be considered as an immediate legacy though payable at a future time and that it differed from a legacy payable out of land at a certain time, there being in this case no certain time mentioned for the payment, but only so soon as it shall be raised by his executor and the executor is not to raise it after a year, but within the year, and might have raised it immediately after the testator's death. And he cited the Case of Egerton v. Egerton, decreed at the Rolls the last term, where a term was created and the trust of it declared to be for raising portions for daughters within seven years. It was decreed to be an immediate gift, and the portions were ordered to be paid as soon as they could. Indeed, where a legacy arising out of land is given at a future day, if the legatee dies before that time, it sinks for the benefit of the heir. But here, the personal estate is in the first place liable, and, if that fund is sufficient, it is to be considered as a legacy arising out of the personalty in all respects.

Besides, supposing the personal estate sufficient to raise half the legacy, in that case, according to the construction put upon it on the other side, half the legacy must be vested and half not, or let them put the case how they will, it must be seen first what the personal estate is and when the executor will please to raise it before we can tell what kind of legacy it is. But even if this should be looked on as a legacy charged altogether upon the lands, yet there is a difference made in all the cases between a will and a deed. And in the Case of Lady Poulet v. Lord Poulet, 1 Vernon 204, 321, and 2 Ventris 366,[1] upon which all the other cases were founded, it is said that a portion in these cases should sink, but that a general legacy should not. The same distinction is likewise in the Case of Brathwaite v. Brathwaite, 1 Vernon 334. They also cited the cases of Cave v. Cave, 2 Vernon 508,[2] and Higden v. Graves.

Mr. Attorney General [*Yorke*] and Mr. Solicitor General [*Talbot*] argued for the defendant and admitted that, if a legacy affects a personal estate only and is payable at a future time and the legatee dies before that time, it will go to his representative. But, if given at a future time, it shall not, but shall be a lapsed legacy. But it must be admitted on the other side that, where a legacy is given out of a real estate, whether it be given at a future time or only made payable at a future time and the legatee dies before that time, it shall sink for the benefit of the heir.

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[1] *Lady Poulet v. Lord Poulet* (1683), 1 Vernon 204, 321, 23 E.R. 415, 496, 2 Ventris 366, 86 E.R. 489, also 2 Freeman 93, 22 E.R. 1079, 2 Chancery Reports 286, 21 E.R. 680, 1 Eq. Cas. Abr. 267, 21 E.R. 1036, Lords' Journal, vol. 14, p. 87.

[2] *Brathwaite v. Brathwaite* (1685), 1 Vernon 334, 23 E.R. 503, also 1 Eq. Cas. Abr. 114, 336, 21 E.R. 921, 1085; *Cave v. Cave* (1705), 2 Vernon 508, 23 E.R. 925, also 1 Eq. Cas. Abr. 275, 21 E.R. 1042.

Now, as to their first objection, that there is no certain time fixed for the raising of this legacy, but that it is left to the discretion of the executor to raise it at what time he pleases within the year, it will make no difference if it is to be paid within or at the end of the year. However, it is plain the testator has directed it to be raised at the end of the year. It being like the case of a bond for payment of money within a year, there, the money is not payable until the end of the year. And had Edward Spencer applied to this court, it would not have decreed him the payment of it until the year's end. And had not the residuary legatee been the executor in that case, the executor would not be compelled to pay it until the year's end. In the Case of Egerton v. Egerton, the portions were to be raised within seven years after Sir William Egerton's death and to be paid at 21 or marriage. Sir William Egerton lived to a great age, and his daughters had attained their ages of 21 long before his death so that to reconcile both parts of the will, it was ordered the trustees should raise the portions immediately.

As to the legacy's affecting the personal estate only and that the real estate is but to come in aid of it, it has been frequently adjudged that, where a legacy may affect a real estate, it is to be looked on as a charge on the real estate. It was so held in the Case of Yates v. Phetiplace, 2 Vernon 416; Duke of Chandois v. Talbot, before the present Lord Chancellor and founded on the authority of the Case of Yates v. Phettyplace; Jennings v. Lukes, lately heard at the Rolls;[1] and likewise the case of [*blank*] at the Rolls, at the end of last term.

A distinction has been made between a legacy and a portion. But if there be any difference, it is more reasonable that a legacy should sink than a portion. But, however, the two before mentioned cases of Yates v. Phetiplace and the Duke of Chandois v. Talbot were both of them legacies. And the distinction in the Case of Poulett v. Poulett was no part of the resolution of the case, nor, indeed, could there be any reason for it.

It was insisted for the plaintiff that, as the legatee was of age when he died, it would differ this from the other cases and that the legatee lived until part of the money might have been raised. But that can make no difference, the money not being yet become payable. And as to the words ' at all events', they can by a necessary construction imply no more than that, if the personal estate was not sufficient, the real estate should at all events be made liable.

The Lord Chancellor being called away to the House of Lords, the further hearing of this cause was put off.

[3 February.]

The court now gave judgment in this case. And he said that the Case of Poulett v. Poulett was of a portion, which, arising out of a real estate payable at a future day and the child dying before that time, the Lord Keeper's opinion was that it should sink. But since that, this doctrine has been carried much farther. However, the present case is plainly an absolute bequest by the express words of the will, which does no more than give the executor twelve months to pay it in. And he cited the Case of Johnson v. Farrand, 2 Vernon 424,[2] which my LORD CHANCELLOR said was a stronger case than the present case, the portion being there charged

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[1] *Yates v. Phettiplace* (1700), 2 Vernon 416, 23 E.R. 868, also 12 Modern 276, 88 E.R. 1319, Precedents in Chancery 140, 24 E.R. 67, 2 Freeman 243, 22 E.R. 1185, 1 Lord Raymond 508, 91 E.R. 1239, 2 Eq. Cas. Abr. 541, 559, 653, 654, 22 E.R. 456, 471, 548, 550; *Duke of Chandos v. Talbot* (1726-1731), 2 Peere Williams 371, 601, 24 E.R. 771, 877, Select Cases *tempore* King 24, 25 E.R. 202, W. Kelynge 25, 25 E.R. 477, 2 Eq. Cas. Abr. 89, 145, 253, 449, 473, 545, 587, 730, 22 E.R. 77, 124, 215, 383, 403, 459, 494, 616; *Jennings v. Looks* (1725), 2 Peere Williams 276, 24 E.R. 728.

[2] *Jackson v. Farrand* (1701), 2 Vernon 424, 23 E.R. 871, also Precedents in Chancery 109, 24 E.R. 53, 1 Eq. Cas. Abr. 268, 21 E.R. 1037.

upon the personal estate, but, in case that proved defective, then, the real estate was to be liable.

To the second point, he was clear that, though there had been no assignment by John Spencer in his lifetime, yet was it fully conveyed to Edward Spencer by this will.

And so he decreed an account to be taken of the personal estate and, if that should prove deficient, then the £1000 to be raised by a sale or mortgage and that the defendant should admit the plaintiff into one moiety of the iron works.

[Other reports of this case: 1 Vesey Sen. 48, 27 E.R. 882, Lincoln's Inn MS. Misc. 384, p. 372, pl. 1, 3 Peere Williams 172, 24 E.R. 1017, 2 Eq. Cas. Abr. 547, 22 E.R. 461.]

13

Arthington v. Calverly

(Ch. 1733)

An infant can present a person to be a rector of a church and can require him to give a bond to resign upon request.

Eodem die [3 February 1733].

Upon a rehearing, the case was thus. Cyril Arthington, by deed of the 21st November 1723, conveyed the advowson of the living of Addle to Sir Walter Calverly and Sir Walter Hawksworth and their heirs. And, by another deed of 22nd of November, the trust of the former deed was declared to be that they should present such son of Robert Jackson to the said living as should at the first or any future vacancy be fit to receive the same and, if no such son should be fit, then to present such person as the said Cyril Arthington or his heirs should by any writing under hand and seal nominate or appoint, provided that such clerk so presented should upon his receiving his letters of presentation give a bond or other sufficient security to resign the same as soon as such son of the said Robert Jackson should be fit to receive it, he being requested thereunto, and, in default of such nomination, then, the trustees to present such person as they should think proper with the same proviso.

The plaintiff's bill did set forth that he was the heir of the said Cyril and an infant of six months old, that he had nominated one Robert Hitch to the trustees, but they refused to present him. And, therefore, he prayed that they might be obliged to present him and that the archbishop of York, who was likewise made a defendant, should be obliged to institute him and be inhibited from instituting any other.

Two points were made in this case, first, whether this nomination of the infant was a good nomination within the deed of 22nd November or if there was such a default as would entitle the trustees to nominate and present. The second was whether the defendants, the trustees, were in this case entitled to their costs of suit.

It was argued for the defendant that this was no regular nomination by reason of the infant's incapacity. For though it is said in the books that an infant, or a guardian in the infant's name, may present, yet this is different from the common cases, it being a power under a deed of trust. And in other cases of powers, as to make leases etc., it cannot be said that an infant can execute such a power. Besides as the plaintiff has no legal estate nor interest in him, but only a bare power to nominate, such a power must be taken strictly, and it is impossible that an infant of but six months old can strictly perform a power that requires signing and sealing. To this purpose is the Duke of Norfolk's Case, cited in Sir Francis Inglefield's Case,

7 Coke,[1] and the Case of Roberts v. [*blank*], Pasch. 8 Will. III, in an ejectment in the Common Bench, where Roberts had a power to make a jointure and had the deed ready which he had sealed, but, having the gout in his hands, he could not sign it. Now, by law a sealing is a signing, but in the case of a power, it must be strictly taken, wherefore the deed in that case was held to be not well executed.

The reason why the law allows an infant to present to a living is through necessity to avoid a lapse, which was frequently the case before the Statute of *Quare Impedit*.[2] But that reason does not hold here, for if the infant does not present, the trustees without doubt may. Besides, this is such a case as requires particular discretion, *viz*. to present such a one as will give sufficient security to resign. And the infant cannot tell who is proper to give such security.

To the second point, it is a constant rule in this court that, if trustees come here and have no interest in the thing disputed, they shall have their costs at all events. But, if they claim an interest, it is otherwise. Now, in the present case, no one can say they have an interest. They have indeed the estate in them. But that is nothing more than a legal power, stripped of all manner of interest.

On the other side, it was insisted for the plaintiff that an infant may perform the condition of a deed, may declare the uses of a fine, or, which is in point to the present case, suppose an estate be mortgaged and the legal estate is in the mortgagee, he shall present to the living, but upon a bill brought by the mortgagor, whether he be an infant or not, this court will oblige the mortgagee to present such a one as the mortgagor shall nominate.

As to what has been said of this being a power in the infant, it must be admitted there are many cases where powers are to be taken strictly. But all the later cases in this court are for a favorable construction of them. And, where the power is over one's own estate, it is said, even in the old books, see Kibbet v. Lee, Hobart's reports,[3] that they are to be taken liberally. However, this is not a power, but an equitable interest in the heirs of the grantor.

As to the costs, if trustees claim nothing and have not misbehaved, they are by the practice of the court to have their costs. And though the law does not look upon this to be such a beneficial interest so as to make money of it, yet they claim an honorary interest, which is a benefit. However, here has been a misbehavior in them, and as great a one as could be, they having set up an interest against their *cestui que trust*.

Lord Chancellor [LORD KING]: I can see no reason for altering my former decree, which is that the trustees do present Robert Hitch, nominated by the plaintiff, and that the archbishop shall admit him, upon giving such security as the Master shall direct to resign according to the direction of the deed. The plaintiff is to pay the bishop his costs. All other parties are to sit down with their own costs.

[Other reports of this case: Lincoln's Inn MS. Misc. 107, f. 157, Lincoln's Inn MS. Coxe 40, p. 49, 2 Eq. Cas. Abr. 518, 675, 22 E.R. 437, 567.]

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[1] *Duke of Norfolk's Case*, 7 Coke Rep. 13, 77 E.R. 431.

[2] Stat. 13 Edw. I, Westminster II, c. 5 (*SR*, I, 75-77).

[3] *Kibbet v. Lee* (1619), Hobart 312, 80 E.R. 455.

14

Warner v. Conduit

(Ch. 1733)

In this case, the Statute of Limitations barred the plaintiff's claim on a debt, the court finding that there was not sufficient evidence to prove a trust (which would not have been barred).

The plaintiff, being related to the late Sir Isaac Newton and putting great confidence in him, applied to him for his advice in what manner he should place out a sum of £1400, which he had then by him. Sir Isaac said, if he would send it to him, he would take care of it, upon which the plaintiff ordered his banker to pay it to Sir Isaac, but to take no note or receipt for it. However, Sir Isaac gave him a note, by which he acknowledged the receipt of the sum and promised to pay upon demand. Sir Isaac died intestate about the year 1729, and administration was granted to the defendants. The plaintiff had brought an action at law, to which the administrators pleaded the Statute of Limitations[1] in bar, upon which he brought his bill in this court to have the £1400 repaid, to which the defendants pleaded the Statute of Limitations and further answered that the money delivered to Sir Isaac had been put into the funds and there lost and that Sir Isaac had often declared he owed nothing to the plaintiff and, farther, that the defendants being administrators to Sir Isaac, appointed the plaintiff to look over the papers and that he put several of Sir Isaac's papers into his pocket and burnt others, saying they were of no use, and that the plaintiff never mentioned anything of his demand until he had been entrusted with these affairs.

For the plaintiff, it was said that the Statute of Limitations could not prevail in this case, this money being delivered to Sir Isaac Newton only upon trust to be managed by him to the best advantage for the plaintiff. And to prove that, the banker deposed he had direction to take no receipt for it. And the defendants admit they believe the money was laid out in the funds. And there is no evidence that the stock was ever transferred to the plaintiff.

Lord Chancellor [LORD KING]: No doubt, if money is delivered to anyone upon trust, the Statute of Limitations shall in no case bar the demand. But here is no trust mentioned in the note nor any evidence that it was a trust of any sort, except of what appears from one of the defendants' answers and that is only that he heard Sir Isaac Newton had said so. It is certain Sir Isaac had the money, but what he did with it does not appear.

He dismissed the bill.

N.B. It was said in this case that, at law, the plaintiff cannot reply to the Statute of Limitations, but must either take issue upon it or drop the proceeding unless a fresh promise be made within the six years to revive the debt.

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[1] Stat. 21 Jac. I, c. 16 (*SR*, IV, 1222-1223).

15

Brown v. Elton

(Ch. 1733)

If a husband sues for his wife's legacy, he will be required to make a settlement upon his wife if he has not already done so.

It was decreed at the Rolls that, if a *feme* legatee marries before the legacy is become payable and the husband brings his bill for it, this court will oblige him to make a settlement proportionable to the legacy if he had made none before.

And the Lord Chancellor [LORD KING] now affirmed the decree.

[Other reports of this case: 3 Peere Williams 202, 24 E.R. 1030, 2 Eq. Cas. Abr. 241, 22 E.R. 205.]

16

James v. Owen

(Ch. 1733)

Specific performance of a contract will not be ordered where the defendant's contractual expectations were destroyed by third parties.

The bill was for a performance of articles of agreement for the sale of the printer's place of London, wherein the plaintiff covenanted to present the defendant to the court of aldermen and to surrender the place to him and the defendant was to pay £500 for the place and all fines and expenses upon that occasion. The defendant deposited the £500 with the City Crier and was accordingly presented and paid a fine to the court but was there told by the court that they would no longer pay the usual exorbitant price for printing the City business and that he would be paid no more than the common prices which others were paid. Notwithstanding this, the defendant promised to stand to the agreement. But not performing it, the plaintiff brought his bill against Owen and the Crier of London, in whose hands the money was.

For the defendant, it was said that, if articles are made for the sale of an estate at a future day and, in the meantime, the estate is damaged by fire or by the sea's overwhelming part of it and the party comes here to carry the articles into execution, the court will not in that case decree an execution.

Lord Chancellor [LORD KING]: You apply to carry an agreement into execution, and the first thing to be done is a surrender on your part. Besides, it is plain upon the merits that this agreement was in consideration of the profits as they then stood.

He dismissed the bill, but with no costs unless the plaintiff proceeded at law, and then he is to pay the defendant the costs of this suit.

17

Carter v. Carter

(Ch. 1733)

A contract that is mutual will be ordered to be specifically performed after the death of one of the parties to it.

21 April.

John Carter, by his will, gives £8000 to trustees to be laid out in land and to be settled to the use of A. for life, remainder to his first and every other sons and in default of such issue, then, to trustees for the term of fifteen years to raise the sum of [*blank*] as a portion for Elizabeth Carter, and, after the determination of that estate, then to Thomas Carter in tail, remainder to the right heirs of the testator. A decree was had at the Rolls to have the money laid out accordingly. Soon after this decree, A. died without issue, upon which Elizabeth became entitled to her term of fifteen years and likewise to a remainder in fee expectant upon the determination of the estate tail in Thomas as right heir to the testator.

Elizabeth and Thomas, being the only persons interested in this £8000 so to be laid out in land, came to the following agreement, which was reduced into writing, *viz.*, that Thomas should have £4200 and that Elizabeth should have £3800 for their respective interests in this estate and that both parties should apply to the court for direction for the payment of the money in the proportion agreed upon and that, upon such payment, all parties were to give such releases, receipts, and do all other things requisite as counsel should advise. About three weeks after this agreement, Thomas died, upon which a bill of revivor was brought. And the Master of the Rolls [Jekyll] decreed this agreement should be carried into execution and that the £4200 should be paid to the administrator of Thomas and the £3800 to Elizabeth.

And now, upon a rehearing before the Lord Chancellor [King], it was argued for the plaintiff, who was administrator of Thomas Carter, that Thomas had under this will and decree an estate tail and, had it been in lands, he might have barred his issue and the remainders and, as money given to trustees to particular uses comes under the direction of this court, it will save them the expense of purchasing lands and then suffering a recovery of them and, upon application of the parties, the court will decree them the money in a proper proportion, so, where money is to be laid out in land to the use of one in tail with a remainder to the same person in fee, it is the court's constant practice, upon application, to decree the money to be paid to him. And the reason is because he may at any time, even in vacation, levy a fine to bar the issue. And this has been the continued practice since the authority of Colwell v. Shadwell, in the Lord Cowper's time [1705-1708, 1714-1718]. But, when money is given to be laid out to the use of one in tail with a remainder to another in fee, it must be admitted that, as nothing but a recovery can bar the remainder in fee and that can be suffered in term time only, this court has sometimes refused to decree the money to the tenant in tail and given the remainderman his chance, though in the Case of Handaside v. Sir J. Thornicroft,[1] where money was given to Sir J. Thornicroft in tail with a remainder to his sisters in fee, the Master of the Rolls decreed the money to Sir J. Thornicroft, though counsel attended for his sisters to oppose it. So, where money is given to one in tail with a remainder to another in fee and the tenant in tail brings a bill to have the money and the remainderman consents, which is the present case, it comes within the first part of the distinction and is the same as if the remainder in fee simple had been to the same person, and this court will decree him the money.

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[1] *Thornicraft v. Hanasyde* (1727), Lincoln's Inn MS. Misc. 384, p. 267.

It was argued on the other hand for the defendant that it was the business of this court to carry agreements into execution, but, then, they must be such only as are mutual and reciprocal at all events, and not hard upon either party. And they must likewise be such as might have been performed at the time they were agreed to be performed. It has been said that, if a bill is brought by a tenant in tail for money and the remainderman consents, the court will decree the money to him but that, if the remainderman does not consent, this court will not take his chance from him, but will put the tenant in tail to the suffering of a recovery. But no reason of this distinction can be assigned, for why should not the issue in tail have his chance as well as the remainderman? And whatever this court might have done in case Thomas had brought his bill to have the money paid to him and Elizabeth had consented, yet, had Elizabeth brought her bill and Thomas consented, this court would never have carried this agreement into execution to the prejudice of Thomas's issue. But, whatever this court might have done in case of a proper application, yet as this agreement now stands, it is by no means proper to be carried into execution, for it is a conditional agreement and part of the things to be performed are to be done according to the advice of counsel, and for others they were to have the direction of the court. And until both parties have put themselves into a condition of performing this agreement, it cannot be a complete one, nor such as this court will enforce the execution of. And as to Handaside and Sir J. Thornicroft's case, that will not be of any great authority at this time. And, if there be a tenant in tail of money with a remainder over to another in fee and the remainderman consents, the money should be paid to the tenant in tail and he dies before this consent has been carried into execution, this court has afterwards refused to do it. So, in the Case of Wheedon v. Oxenden, 8th July 1731,[1] a legacy was given to the wife to be paid in six months after his decease upon condition that she released her right to dower. She died within the six months without giving any release. And it was held by the Master of the Rolls, that, as she had not performed the condition, though it was not her fault that she did not do it, yet her executor should not have the £3000 legacy. It was also said there was no consideration, no *quid pro quo* on the part of the administrator to entitle him to this £4200.

To that, it was replied for the plaintiff, that the consideration was not material in this case, for the covenant of a tenant in tail will at any time bind his issue and this court will, in the case of a covenant, decree a tenant in tail to suffer a recovery. As to the Case of Wheedon v. Oxenden, it was there left to the wife's option to take her £3000 or her dower, and she chose her dower.

Lord Chancellor [LORD KING]: In this agreement are mutual covenants. Both undertake to carry them into execution, and both are for that purpose to apply to the court. There were no parties interested in this money at the time of the agreement but these two, and they agree to divide it. One of them happens to die before all the covenants are performed. But shall that avoid the agreement when all the things may as well be done after his death as during his life?

He affirmed the decree.

[Other reports of this case: Cases *tempore* Talbot 271, 25 E.R. 773, Mosely 365, 25 E.R. 442, 2 Eq. Cas. Abr. 30, 22 E.R. 27.]

[1] *Wheddon v. Oxenham* (1731), 2 Eq. Cas. Abr. 546, 22 E.R. 460.

18

Lord Carteret v. Paschall
(Part 1)

(Ch. 1733)

A husband has the power to dispose of his wife's income that is receivable during the marriage and after her death.

24 and 25 April.

Sir Thomas Bromsall in 1704 covenanted by articles before marriage to settle a rent charge of £500 *per annum* upon his intended lady as a jointure. But he died before he made any settlement pursuant to such agreement. His widow, the Lady Bromsall, brought her bill to have the articles carried into execution. And by a decree made the 14th May 1708, it was *inter alia* directed that the Master should see what was due for the arrears of the said rent charge and what lands of Sir Thomas Bromsall were subject to such covenant. In 1712, the Lady Bromsall married Dr. Herbert, upon which the proceedings were revived. And, in 1713, the Master's report came in, by which it appeared there was then due for the arrears of the rent charge the sum of £4500. And it was then decreed that the Lady Bromsall should hold all the lands of the late Sir Thomas Bromsall not otherwise subjected until the arrears and growing interest of the said rent charge were satisfied. And it was soon after by an order directed that a receiver, who had been appointed by the court, should be discharged and that the tenants should attorn to the Lady Bromsall and Dr. Herbert. Afterwards, Dr. Herbert, without his lady's privity, assigned over the arrears that were then due and likewise the growing interest of the said rent charge during the joint lives of him and his wife to the Lord Carteret and Sir Clement Cotterel, who, by another deed, declared the trust of such assignment to be for the payment of particular debts of the doctor and, as to the overplus, to be to such uses as he should by deed or will appoint. In 1731, Dr. Herbert died intestate, and, soon after, the Lady Bromsall also died.

The bill was brought by the Lord Carteret and Sir Clement Cotterel, who were the trustees, and by the creditors, who were the *cestui que trusts* of the assignment, against the administrator of Dr. Herbert, the administrator and heirs of the Lady Bromsall, and also against another, who claimed as mortgagee of some of the lands, to have the benefit of the assignment made by Dr. Herbert.

And now, the question was whether Dr. Herbert had such an interest in the arrears so decreed to be due and likewise in the growing produce of the said rent charge as to entitle the party to take under such assignment or whether the interest arising by the decree would, notwithstanding the said assignment, survive to the Lady Bromsall and her administrator.

For the plaintiff, it was argued that the interest in the arrears and growing rent charge was not barely a chose in action in the wife, but was under a decree to hold *quousque* etc., which is the same as if it had been a decree for a certain liquidated sum and that by the decree, it became a vested interest in the husband, and such a one as, without doubt, might be released by him and, *a fortiori*, be assigned for a valuable consideration. They cited the Case of Theobald v. Dewfay,[1] heard before the Lord Macclesfield, where one Rusly devised a term to his wife for life and then to his two heirs for the remainder of the term, one of which married the defendant, who assigned his interest in the said term to Theobald, and this was held a good assignment, though the wife of the testator was living, so that they had only a possibility to

[1] *Theobalds v. Duffoy* (1724-1730), 9 Modern 102, 88 E.R. 342, 2 Eq. Cas. Abr. 88, 340, 22 E.R. 76, 290, Chan. Cases *tempore* Geo. I, p. 1063.

enjoy it. And this decree was afterwards affirmed in the House of Lords. So in the Case of the Lady Pratt and her children, where a share of stock was given to the survivor of them, and an assignment in that case by one of the children, though a bare possibility, was held good. Crowch and Martin's case, 2 Vernon 595, where a seaman assigned his wages before they became due, and such assignment was held good even against a creditor. Gibson v. Holt, decreed by the present Chancellor, where, the Lady Jane Holt having a rent charge, Mr. Holt, her husband, assigned the same though it was an unliquidated sum, an uncertain interest, yet it was held good. And though, in this case, the wife joined, yet that could make no difference, as she was a married woman. Moore 7, pl. 25; it was adjudicated that the arrears of a rent charge belonging to the wife, if the husband made no assignment of them, should go to the executor of the husband and not to survive to her. So, in the case of a bond given to the wife, the husband may release it without any consideration and may bring an action for it in his own name, if given during the coverture. The husband may avow alone for rent due to the wife before marriage. Croke Jac. 442. And, if the husband grants the rent due *jure uxoris*, it has been held the grantee shall recover all that became due before the husband's death.[1]

But then, they say this is an equitable interest only, and not in possession, to which we answer that an assignment of an equitable estate, especially if made upon a good and valuable consideration, is good in a court of equity. 3 Chancery Rep. 90.[2] But there are many precedents where assignments of equitable choses in action have been held good, though without a valuable consideration. Atkins v. Dawbeny, Abr. Eq. Ca. 45;[3] where a legacy was given to the wife during coverture and the husband's assignment of it was held good. Packer v. Wyndham, decreed 1715,[4] where money belonging to the wife was in this court and so continued until the husband died, yet his assignment of it was held good, the possession of this court being held by Lord Cowper to best the possession of the husband. So, in the several cases of trust terms *jure uxoris*, 1 Vernon 7, 18, 2 Vernon 270,[5] the husband's assignment of them has always been

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[1] *Pratt v. Pratt* (1731), 2 Strange 935, 93 E.R. 952, W. Kelynge 35, 25 E.R. 483, Fitz-Gibbon 284, 94 E.R. 758; *Crouch v. Martin* (1707), 2 Vernon 595, 23 E.R. 987, also 1 Eq. Cas. Abr. 45, 21 E.R. 862; *Holt v. Holt* (1731), 2 Peere Williams 648, 24 E.R. 899, 2 Eq. Cas. Abr. 140, 664, 22 E.R. 119, 558; *Anonymous* (1549), Moore K.B. 7, 72 E.R. 402; *Wise v. Bellent* (1617), Croke Jac. 442, 79 E.R. 378.

[2] *Earl of Suffolk v. Greenvile* (1641), 3 Chancery Reports 89, 21 E.R. 738, also 2 Freeman 146, 22 E.R. 1119, Nelson 15, 21 E.R. 778, 118 Selden Soc. 620.

[3] *Atkins v. Dawbeny* (1714), 1 Eq. Cas. Abr. 45, 21 E.R. 862, also Gilbert Rep. 88, 25 E.R. 61.

[4] *Packer v. Wyndham* (1715), Precedents in Chancery 412, 24 E.R. 184, Gilbert Rep. 98, 25 E.R. 68, 2 Eq. Cas. Abr. 138, 583, 22 E.R. 118, 491, Chan. Cases *tempore* Geo. I, p. 141.

[5] *Turner's Case* (1678-1681), 1 Vernon 7, 23 E.R. 265, also 1 Eq. Cas. Abr. 58, 21 E.R. 871, *sub nom. Turner v. Turner*, Dodd 38, 79 Selden Soc. 711, *sub nom. Turner v. Bromfield*, 1 Chancery Cases 307, 22 E.R. 814, Lords' Journal, vol. 13, p. 681; *Pitt v. Hunt* (1681), 1 Vernon 18, 23 E.R. 273, also 2 Chancery Cases 73, 22 E.R. 852, 2 Freeman 78, 22 E.R. 1070, 79 Selden Soc. 896, 1 Eq. Cas. Abr. 58, 21 E.R. 871; *Tudor v. Samyne* (1692), 2 Vernon 270, 23 E.R. 774, also 1 Eq. Cas. Abr. 58, 21 E.R. 871.

held good. And in the Case of Twysden v. Wise, 1 Vernon 161,[1] where money was left in trustees' hands for the benefit of the wife, it was held that the husband might dispose of it.

But this case goes still farther, for it is not altogether like the arrears of a rent charge or an inheritance *jure uxoris*, but the decree is that she shall hold until she has received the arrears and growing interest, so that it is absolutely vested in her and is in the nature of a lease to her or an execution at law or an estate by *elegit* or statute, in which cases, the law gives the husband an absolute power of disposal. And it was so held in Shelly's Case, 1 Coke. And, in 2 Inst. 396, it is said that, notwithstanding it is called *liberum tenementum*, it shall go to the executor, and not to the heir. Hobart 253.[2]

It was further argued upon the circumstances of this case that this rent charge was all the fortune the wife had and that the husband had maintained her for many years very handsomely and it would be very hard that he should not have a power over the produce of her estate so as to assign it for the payment of those debts he had contracted in maintaining her.

It was argued on the other hand for the defendant, the executor of the Lady Bromsall, that this was such an estate as in equity would be looked on as a rent charge to the Lady Bromsall and, as such, the law says that the arrears due both before and after marriage shall survive to her. They have picked out a case in Moore, where it is said that such arrears as became due after marriage shall go to the executor of the husband, but that is the only case in the books to that purpose.

The Lord Chancellor [LORD KING] said they need not take much pains to lessen the authority of that case and all the other authorities are against it. 1 Inst. 351a; Rolle's Abr. 351, pl. 1, 5; Moore 806; Rutland v. Molyneux, 2 Vernon 64; Lister v. Lister, 2 Vernon 68; Cleland v. Cleland, Abr. Eq. Ca. 70,[3] where it is fully laid down that neither arrears of rent nor any other choses in action *jure uxoris* shall go to the executors of the husband, but shall survive to the wife.

Terms and all chattels real shall survive to her if he does not dispose of them. But arrears of rent due before marriage are so far from going to his executor that, if the wife dies, the husband can have no pretension to them but as administrator to his wife.

Then, what difference will this assignment make? No case has been cited where the husband's assignment of a bond or any other chose in action that belonged to the wife before marriage has been held good. And though he has a power over them so as to receive or release them, yet they cannot pretend he has any property vested in him so as to assign them.

The Case of Theobald v. Deufay has been mentioned, which was an assignment of a possibility of a term, and we admit that is somewhat like a chose in action, but, in that case, the wife joined in the assignment and in the receipt of the consideration money, which makes a great difference in a court of equity, though she was a married woman. Besides, there were

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[1] *Twisden v. Wise* (1683), 1 Vernon 161, 23 E.R. 387, also 1 Eq. Cas. Abr. 68, 21 E.R. 881.

[2] *Wolfe v. Shelley* (1579-1581), 1 Coke Rep. 88, 76 E.R. 199, also Moore K.B. 136, 72 E.R. 490, 1 Anderson 69, 123 E.R. 358, Jenkins 249, 145 E.R. 176, 3 Dyer 373, 73 E.R. 838; E. Coke, *Second Institute* (1642), p. 396; *Breadman v. Coales*, Hobart 253, 80 E.R. 399.

[3] E. Coke, *First Institute* (1628), f. 351a; YB Mich. 10 Hen. VI, f. 11, pl. 38 (1431), H. Rolle, *Abridgement*, ' Baron & Feme', pl. G, 1, vol. 1, p. 351; *Anonymous* (1625), *id*., pl. G, 5, vol. 1, p. 351; *Cole v. Moore* (1607), Moore K.B. 806, 72 E.R. 917; *Rutland v. Molyneux* (1688), 2 Vernon 64, 23 E.R. 651, also 1 Eq. Cas. Abr. 63, 21 E.R. 877; *Lister v. Lister* (1688), 2 Vernon 68, 23 E.R. 654, also 2 Freeman 102, 22 E.R. 1085, 1 Eq. Cas. Abr. 68, 21 E.R. 881; *Cleland v. Cleland* (1697), 1 Eq. Cas. Abr. 70, 21 E.R. 883, also Precedents in Chancery 63, 24 E.R. 31, 2 Eq. Cas. Abr. 170, 22 E.R. 145.

other extraordinary circumstances attending that case, for all the positive authorities are against it. Leonard 185; 1 Rolle's Report 393, Hutt, show that a possibility cannot be assigned. As to the cases of trust terms, they are no way like choses in action, they are estates vested, and the husband has a right to the perception of the profits. And for the Case of Twysden v. Wise, 1 Vernon 161, that is no positive decree. The reporter, it is true, has said it should survive to the wife, the husband having made no disposal of it. But in answer to that, there is the Case of Burnet v. Kinaston, 2 Vernon 401,[1] which positively says that the wife's mortgage, though assigned by the husband, yet, as it is a chose in action, it shall survive to the wife and to her administrator. And in Packer and Wyndham's case, the reason why the court decreed the money to the husband's assignee was because they had laid their hands on it, and the husband could not come at it. He brought his bill and did all he could to get possession of it. So the court thought it unreasonable to deprive the party of his right by law through any act of theirs.

Besides, there was another reason for that decree, and the same upon which the court founded itself in the Case of Gibson v. Holt, that the assignees had paid a valuable consideration for such assignment. A portion of £8000 was paid, and it was very reasonable they should have the £800 *per annum*. But in both these cases, it was not properly an assignment, but, there being a valuable consideration paid, the court looked upon the assignee as no more than a trustee, which construction cannot be made in the present case.

Then, they have urged and much relied on that the decree has altered the nature of this debt and made it like a judgment at law or a tenancy by *elegit*. But the decree has by no means altered the nature of the demand; it has only confirmed it to be an equitable rent charge, it being nothing more than a decree *quod computet*. Indeed, had it been a decree for a certain liquidated sum, it might have come nearer to a judgment at common law. However, allowing it to be in the nature of a judgment, if an action is brought for the debt of the wife and judgment had and the husband dies before execution, the wife shall have the benefit of the execution. And though sometimes a decree for a certain sum may be equal to a judgment at law, yet a decree was never held preferable to a judgment. 1 Chancery Cases 27;[2] 1 Rolle's Abr. 189. So, though the husband may avow the taking in his own right, yet, if he dies before it is levied, it shall survive to the wife. 15 Edw. IV, pl. 14.[3] And there is a necessity for the husband to avow in that manner, for he must either avow in his own right or as attorney to somebody, and he cannot be attorney to his wife. As to what has been said of the husband's bringing an action for a debt due to his wife, if it was due before the marriage, the action must be brought jointly, which the court at first doubted, and the husband may join with his wife in an action on a bond given to her after marriage.

Now, as to the circumstances of this case, Dr. Herbert had made no settlement on his lady, so that, if he had applied to the court during his wife's lifetime, it would never have given him the money unless he had made a reasonable settlement upon her, and it can hardly be thought his representative stands in better circumstances than he himself would have done.

The Lord Chancellor [LORD KING] inclined to think the assignment good, but would deliver no opinion until he had considered the matter more fully. *Post*, fo. 42.[4]

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[1] *Burnett v. Kinnaston* (1700), 2 Vernon 401, 23 E.R. 860, also Precedents in Chancery 118, 24 E.R. 57, 2 Freeman 239, 22 E.R. 1183, 1 Eq. Cas. Abr. 69, 21 E.R. 882.

[2] *Nanney v. Martin* (1663), 1 Chancery Cases 27, 22 E.R. 676, also 1 Chancery Reports 233, 21 E.R. 559, 2 Freeman 172, 22 E.R. 1138, 1 Eq. Cas. Abr. 68, 21 E.R. 881.

[3] YB Mich. 15 Edw. IV, f. 9, pl. 14 (1475).

[4] For further proceedings in this case, see below, Case No. 20.

N.B: It seemed to be insisted by the party's counsel that the husband had so far a vested interest in the arrears of the wife's freehold and inheritance, that, if the rent became due after the marriage upon a lease made by the husband, that such arrears should go to the executor of the husband and not survive to the wife. *Sed quaere*.

19

Lord Glenorchy v. Bosville
(Part 1)

(Ch. 1733)

The question in this case was whether the devise in issue created a life estate or an entail.

Post, fo. 49.[1]

Sir Thomas Pershall devises all his real estate to his sister, Anne Pershall, and Robert Bosville and their heirs and assigns upon trust that, until his granddaughter, Arabella Pershall, marry or die to receive the rents and profits thereof and out of it to pay her the sum of £100 *per annum* for her maintenance and, as to the residue, to pay his debts and legacies, etc., after payment thereof, then in trust for his said granddaughter, and, upon further trust, that, if she live to marry a Protestant of the Church of England and if such marriage be of the age of 21 or upwards or, if under the age of 21 years and such marriage be with the consent of her aunt, the said Anne Pershall, then to convey the said estate with all convenient speed after such marriage to the use of the said Arabella for her life without impeachment of waste, voluntary waste in houses excepted, with remainder after her death to her husband for life, remainder to the issue of her body, and, for want of such issue, then, from and after the determination of the said estates, to the use of [*blank*], with several remainders over, and upon further trust that, if the said Arabella Pershall dies unmarried, then, to the use of the said Anne Pershall for life with a remainder to the son of his granddaughter, Frances Ireland, in tail, remainder to the defendant, Mr. Bosville, for life with a remainder to his first and other sons, remainder to the testator's right heirs, and upon further trust that, if his granddaughter marries not according to the direction of his will, then, upon such marriage, to convey the said estate to trustees, and, as to one moiety thereof, to the use of the said Arabella for life, then to trustees to preserve contingent remainders, remainder to her first and every other sons, being a Protestant, with several remainders over, and, as to the other moiety, to his daughter Ireland's son in like manner.

In 1712, Sir Thomas Pershall dies, and, in 1723, Mrs. Arabella Pershall comes to age. And upon a treaty of marriage in 1729, she applies to the trustees for a conveyance of the estate to herself for life, then to her husband for life, with a remainder to the issue of her body. And such conveyance was executed by one of the trustees. But Mr. Bosville, the other trustee, who was also a remainderman, refused. However, having by this conveyance a legal estate tail in one moiety and an equitable estate tail in the other moiety, she suffers a recovery to the use of herself in fee. And in 1730, she marries the plaintiff, the Lord Glenorchy, who made a very considerable settlement upon her. And, as to her own estate, she covenanted to settle it upon the Lord Glenorchy and herself for life with a remainder to the first and every other son of the marriage, and upon failure of such to the survivor of them two.

The bill was now brought to have a conveyance of the moiety of the said trust estate from Mr. Bosville to such uses as are limited in the said covenant. The general question was whether, under this will, the Lady Glenorchy was tenant for life or in tail, upon which two

[1] See below, Case No. 26.

questions arose: first, if these words in an immediate devise of a legal estate would carry an estate tail; secondly, if so, whether this court will make any difference between a legal title and a trust estate executory.

Lord Chancellor [LORD KING]: I should upon the first question make no difficulty of determining it an estate tail had this been an immediate devise. But, when you apply to this court for the carrying a trust estate to execution, whether we shall not vary from the rules of law to follow the testator's intent, which will bring on another question, what is the testator's intent in the present case.

For the plaintiff, upon the second question, it was argued that the Lady Glenorchy was, under this will, entitled to an estate tail in equity, for this court puts the same construction upon limitations of trusts in equity as the law does upon legal estates, and that to prevent confusion. This doctrine is laid down with the strongest reasons by the Earl of Nottingham in the Duke of Norfolk's Case, and the great authority of Baile v. Coleman, 2 Vernon 670,[1] where a trust estate to one for life, remainder to the heirs male of his body is held an estate tail, [which] has never yet been questioned. So it is held in Legat and Sewell's case, 2 Vernon 551 (but more fully reported in Abr. Eq. Ca. 394),[2] where money was given to be laid out in land to one for life and, after his decease, to his heirs male and the heirs male of the body of every such heir male, severally and successively, one after another, and a case being made for the judge's opinion as of a legal estate, which they certified to be an estate tail.

(N.B. In Abr. Eq. Ca. 395, it is said they certified it to be an estate for life only; ' only' is a mistake in the print, see *errata ad* page 395.)

So, in the Case of Bagshaw v. Downes or Bagshaw v. Spencer, at the Rolls, Hilary 6 Geo. II [1733],[3] an executory trust was directed to the judges for their opinion as a legal estate, upon the same reason, do *cestui que trusts* levy fines and suffer recoveries, which are held good in this court. Indeed, in marriage articles, if they covenant to settle to the husband for life, remainder to the wife for life, then to the heirs of their two bodies, this court will decree a conveyance in strict settlement if any of the parties apply here because the children are looked upon as purchasers. But in a will, it is otherwise. They take through the bounty of the testator and in such words as he gives it.

It was further insisted that the words ' issue of her body' would make a difference from all other cases, for in the Statute *De donis*,[4] which created entails, it is said to be a proper word for that purpose, and it is used no less than ten times in that Statute. For this, the

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[1] *Duke of Norfolk v. Howard* (1681), 3 Chancery Cases 1, 22 E.R. 931, also 1 Vernon 163, 23 E.R. 388, 2 Swanston 454, 36 E.R. 690, Pollexfen 223, 86 E.R. 568, 2 Chancery Reports 229, 21 E.R. 665, 2 Freeman 72, 80, 22 E.R. 1066, 1070, 79 Selden Soc. 904, 922, 999, Dodd 42; *Baile v. Coleman* (1711), 2 Vernon 670, 23 E.R. 1036, also 1 Peere Williams 142, 24 E.R. 330, 2 Eq. Cas. Abr. 309, 472, 717, 22 E.R. 261, 402, 603, Hardwicke 17, Chan. Cases *tempore* Anne 141.

[2] *Legatt v. Sewell* (1706), 2 Vernon 551, 23 E.R. 957, 1 Eq. Cas. Abr. 394, 21 E.R. 1127, also 1 Peere Williams 87, 24 E.R. 306, Gilbert Rep. 141, 25 E.R. 99, 2 Eq. Cas. Abr. 530, 22 E.R. 447, Chan. Cases *tempore* Anne 62.

[3] See *Bagshaw v. Spencer* (1741-1748), 2 Atkyns 246, 570, 26 E.R. 552, 741, 1 Vesey Sen. 142, 27 E.R. 944, Vesey Sen. Supp. 82, 28 E.R. 463, 1 Wilson K.B. 238, 95 E.R. 594, Jodrell 669, Harvard Law Sch. MS. 1134, pp. 102, 209.

[4] Stat. 13 Edw. I, c. 1 (*SR*, I, 71-72).

authority of King v. Melling, 1 Ventris 214, 225,[1] and the reasons there given cannot be contested, which is also an authority in the present case, for, there, it is held that to one for life with a power to make a jointure, remainder to his issue, is an estate tail. And the power to make a jointure is much stronger to show the intent of the testator than the words ' without impeachment of waste'. To A. for life, remainder to the issue of her body, and, for want of such issue, remainder over was held an estate tail in the Exchequer, in the Case of Williams v. Tompion, about three or four years ago; Anderson 86, to one for life, remainder to the children of his body is an entail. And so, in Wild's Case, 6 Coke 16, and in Sweetapple v. Bindon, 2 Vernon 536.[2]

It was further urged that, if the remainder in this case to the issue be construed to be words of purchase, they must be attended with the greatest absurdity, for in what manner can the issue take? All the son's daughters and grandchildren are issue, and, if they take as purchasers, they must be joint tenants or tenants in common, and that for life only, 2 Vernon 545,[3] which construction can never be agreeable to the testator's intent. And whatever estate was given in the first part of the will, yet the words ' and for want of such issue, then' etc. will give the plaintiff an estate tail according to the cases of Langley v. Baldwin and Shaw v. Weigh, Abr. Eq. Ca. 184, 185.[4]

It was also farther urged that, from the face of the whole will and by comparing this clause with the other, it appears the testator intended the plaintiff should take an estate tail and that the several clauses in a will are to be taken together and make but one conveyance, and that it was a proper argument to prove the intention of the parties from the different penning of the several clauses. The person who drew this will knew how to convey either by words of limitation or purchase when there was occasion for it, for, where he limits the estate to Mrs. [*blank*] Ireland, it is in strict settlement by proper words of purchase, and so, when he limits it to the Lady Glenorchy in case she had married a papist. But farther to show he understood the doctrine of conveyances, when he limits by words of purchase to sons not *in esse*, he has put in trustees to preserve contingent remainders, which he would certainly have done in this case had he intended the plaintiff, the Lady Glenorchy, an estate for life only.

For the defendant, it was argued that, though in the construction of wills in this court, uses and trusts are to be governed by the same rules as legal estates and that there is but little difference between uses and trusts executed and legal estates. Yet trusts executory are by no means under the same consideration. In the cases of Legat v. Sewell and Baile v. Coleman, the judges were divided in their opinions. And since that time, there is an express authority for the

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[1] *King v. Melling* (1672), 1 Ventris 214, 225, 86 E.R. 144, 151, also 2 Levinz 58, 83 E.R. 448, 3 Keble 42, 52, 95, 84 E.R. 584, 589, 614, Pollexfen 101, 86 E.R. 526, 3 Salkeld 296, 91 E.R. 835, 1 Eq. Cas. Abr. 181, 21 E.R. 973.

[2] *Wild's Case* (1599), 6 Coke Rep. 16, 77 E.R. 277, 1 Eq. Cas. Abr. 181, 21 E.R. 973, Gouldsborough 139, 75 E.R. 1050, *sub nom. Richardson v. Yardley*, Moore K.B. 397, 72 E.R. 652; *Sweetapple v. Bindon* (1705), 2 Vernon 536, 23 E.R. 947, also 1 Eq. Cas. Abr. 394, 21 E.R. 1127.

[3] *Cook v. Cook* (1706), 2 Vernon 545, 23 E.R. 952.

[4] *Langley v. Baldwin* (1707), 1 Eq. Cas. Abr. 185, 21 E.R. 976, Chan. Cases *tempore* Anne 84; *Shaw v. Weigh* (1729), 1 Eq. Cas. Abr. 184, 21 E.R. 976, also 8 Modern 253, 382, 88 E.R. 180, 272, Fortescue 58, 92 E.R. 760, 2 Strange 798, 93 E.R. 856, Fitz-Gibbons 7, 94 E.R. 628, 1 Barnardiston K.B. 54, 94 E.R. 38, 2 Eq. Cas. Abr. 315, 359, 22 E.R. 267, 305.

defendant in the Case of Papillon v. Voyce (*ante* fo. [*blank*]);[1] so likewise in the Case of the Attorney General v. Younge, in the Exchequer, and the Case of Leonard v. Earl of Sussex, 2 Vernon 526, as also in the Case of Bramston v. Kynaston, heard at the Rolls in June 1728,[2] where an estate was given to be settled upon his grandchild for her life, with a remainder to the issue of her body, and, when she applied to have an estate tail conveyed to her, she was decreed an estate for life only.

And to show that this court is tied up to the rules of law in cases of executory trusts was cited the Case of the Earl of Stamford v. Sir John Hobart, about Serjeant Maynard's will,[3] where an estate was given to trustees to convey one moiety to Sir John Hobart for 99 years in case he so long lived, with several remainders over, and this court decreed the Master should settle the conveyance according to the letter of the will. But upon exceptions to the Master's report, 19th December 1709, it was ordered that proper estates should be made to support the remainders, that the testator's intent might not be frustrated. And this resolution was affirmed in the House of Lords. So, in all matters executory, this court seeks out for the intent of the parties and lets it prevail against the rules of law. In marriage settlements, it was never doubted but this court would carry any words into strict settlement if the intent of the parties was such. And it was so held in the Case of West v. Easy, in the House of Lords, and in that of Trevor v. Trevor, Abr. Eq. Ca. 387.[4] And the same rules will prevail in all things executory, whether wills or articles. Besides, the present case is very much like that of marriage articles. The testator had all along the marriage of his granddaughter in view and intended this will as no more than heads or directions for the trustees in what manner he would have it settled. And so it remains to be carried into execution by the aid of this court.

Then as to the word ' issue', it is sometimes a word of limitation, sometimes of purchase. There is a case mentioned in Wild's Case, 6 Coke 16, where to one and his children is held to be an estate tail. Yet, had it been to one for life, remainder to his children, there can be no doubt but that it had been a bare estate for life. And as to the objection that the issue, if purchasers, are to take jointly and for life only, why shall it not be as in cases where the limitation is to the first and every other son? And wherever ' heirs of the body' are held to be words of purchase, they are construed to the first and every other son.

To make an estate tail arise by implication upon the words ' and for want of such issue' has been cited the Case of Langley v. Baldwyn, Ab. Eq. Ca. 185. But there is the Case of Bampfield v. Popham, 2 Vernon 427, 449, for the defendant; so the Case of Lodington v.

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[1] *Papillon v. Voyce* (1732), above, Case No. 1.

[2] *Attorney General v. Young* (1733), 2 Comyns 423, 92 E.R. 1142; *Leonard v. Earl of Sussex* (1705), 2 Vernon 526, 23 E.R. 940, also 1 Eq. Cas. Abr. 12, 184, 21 E.R. 836, 975; *Bramston v. Kynaston* (1729), Lincoln's Inn MS. Misc. 384, p. 281.

[3] *Hobart v. Countess of Suffolk* (1709), 2 Vernon 644, 23 E.R. 1020, 1 Eq. Cas. Abr. 272, 21 E.R. 1040, *sub nom. Earl of Stamford v. Hobart* (1710), 3 Brown P.C. 31, 1 E.R. 1157, Hardwicke 22, note also *In re Maynard's Will* (1691), Dodd 101.

[4] *West v. Erisey* (1726-1727), 2 Peere Williams 349, 24 E.R. 760, 1 Comyns 412, 92 E.R. 1135, 1 Brown P.C. 225, 1 E.R. 530, 2 Eq. Cas. Abr. 39, 22 E.R. 33, Exch. Cases *tempore* Geo. I, vol. 2, p. 931; *Trevor v. Trevor* (1719), 1 Eq. Cas. Abr. 387, 21 E.R. 1122, also 9 Modern 161, 88 E.R. 377, 10 Modern 436, 88 E.R. 798, 1 Peere Williams 622, 24 E.R. 543, 2 Eq. Cas. Abr. 475, 505, 22 E.R. 404, 427, 5 Brown P.C. 122, 2 E.R. 574, Chan. Cases *tempore* Geo. I, 612.

Kyme, 3 Levinz 431, and that of Backhouse v. Wells, Abr. Eq. Ca. 184.[1] Besides, it is a general rule that, where an estate is to be raised by implication, it must be a necessary and inevitable implication and such as that the words can have no other construction whatsoever. And, in the present case, there is the word 'issue' mentioned before so that these last words must relate to the issue before mentioned, whereas, in the Case of Langley v. Baldwyn, the limitation is to six sons only, then come the words 'and for want of issue', which words could not have relation to anything before mentioned.

The Lord Chancellor [LORD KING] would take time to advise and to have the judge's opinions. *Post*, 49.[2]

20

Lord Carteret v. Paschall
(Part 2)

(Ch. 1733)

Ante, fo. 31.[3]

The court now gave judgment in this case.

Lord Chancellor [LORD KING]: I cannot see but that this assignment is a sufficient disposition to bar this interest from surviving to the wife, for the like proceedings in equity will bar equitable interests in the same manner as proceedings at law will bar legal estates. And upon that reason, it is that the assignment of a trust term prevents its surviving. It is agreed that the Lady Herbert was in possession under this decree and, after the marriage, a bill of revivor was brought, and the husband had possession, and to holding in the nature of a distress until satisfied. Besides, a decree of this court for the performance of a thing is altogether like a tenancy by *elegit, transiit in rem judicatam*. And in the present case, he did all that was possible for an absolute possession, so that his representatives are well entitled to the estate he assigned them.

He decreed that the plaintiffs should hold the estate of the late Sir Thomas Bromsall until the arrears of the rent charge due before Dr. Herbert's marriage and the growing interest during his life were satisfied and that they should apply the produce towards the discharge of the particular debts as they stood in the deed to declare the uses of the assignment according to the trust in them reposed.

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[1] *Langley v. Baldwin* (1707), 1 Eq. Cas. Abr. 185, 21 E.R. 976, Chan. Cases *tempore* Anne 84; *Bampfield v. Popham* (1701-1703), 2 Vernon 427, 449, 23 E.R. 873, 888, also 2 Freeman 266, 22 E.R. 1201, 1 Peere Williams 54, 24 E.R. 290, Holt K.B. 233, 90 E.R. 1028, 1 Eq. Cas. Abr. 183, 21 E.R. 975, *sub nom. Popham v. Bamfield*, 1 Vernon 79, 167, 344, 23 E.R. 325, 391, 510, 1 Salkeld 236, 91 E.R. 209, 2 Freeman 269, 22 E.R. 1203, 1 Eq. Cas. Abr. 108, 21 E.R. 916, 2 Eq. Cas. Abr. 308, 22 E.R. 260, Chan. Cases *tempore* Anne 26; *Loddington v. Kime* (1695), 3 Levinz 431, 83 E.R. 766, also 1 Lord Raymond 203, 91 E.R. 1031, 1 Salkeld 224, 91 E.R. 198, 2 Eq. Cas. Abr. 331, 22 E.R. 282; *Backhouse v. Wells* (1712), 1 Eq. Cas. Abr. 184, 21 E.R. 976, also 10 Modern 181, 88 E.R. 683, Fortescue 133, 92 E.R. 791, Gilbert Cas. 20, 129, 93 E.R. 247, 282.

[2] See below, Case No. 26.

[3] For earlier proceedings in this case, see above, Case No. 18.

Memorandum: On Thursday 27th February 1734, this decree was affirmed in the House of Lords.[1]

[Other reports of this case: 3 Peere Williams 197, 24 E.R. 1028, 2 Eq. Cas. Abr. 89, 90, 140, 22 E.R. 77, 120, 2 Brown P.C. 10, 1 E.R. 759, Lincoln's Inn MS. Misc. 123, f. 12, Lords' Journal, vol. 24, p. 471.]

21

Rogers v. Rogers

(Ch. 1733)

In this case, the devise in issue created an estate in fee in the widow and not a trust with a resulting trust to the heir.

William Rogers gives a legacy of £5 to his brother, Henry Rogers, and, after some other legacies are given, he devises in manner following:

> Item, I constitute my wife, Ann Rogers, whole and sole heiress and executrix of all my lands, tenements, goods, and chattels whatsoever, real and personal, and the same to dispose of or sell as she shall think proper to pay my debts and legacies of this my last will and testament.

The bill was now brought by Henry Rogers, the brother and heir of the testator, against the widow to have a discovery of the writings and to have an account of the real and personal estate of his brother that came to her hands. And now, the question was whether this should be construed a devise to the wife for her own benefit or whether, after the particular purpose, the payment of debts and legacies, was satisfied, it should not be a resulting trust for the heir.

For the plaintiff, it was argued that the heir is not to be disinherited at law or in this court unless by express words and that, when an estate is given without saying to what uses or when an estate is given for any particular purpose, the person to whom it is given is only a trustee and, after the particular purpose is satisfied, there shall be a resulting trust for the benefit of the heir at law. And he cited the authorities of Culpeper v. Aston, 2 Chancery Cases 115, 223; Sir John Hobart v. Countess of Suffolk, 2 Vernon 644; Randal v. Bookey, 2 Vernon 425; Countess of Bristol v. Hungerford, 2 Vernon 645; and the Case of Sir Cyril Wich v. Packington, mentioned in that case.[2] There was also cited the Case of Loder v. Loder,[3] heard

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[1] *Paschall v. Thurston* (1735), 2 Brown P.C. 10, 1 E.R. 759, Lincoln's Inn MS. Misc. 123, f. 12, Lords' Journal, vol. 24, p. 471.

[2] *Culpeper v. Aston* (1676-1682), 2 Chancery Cases 115, 221, 22 E.R. 873, 919, also 1 Eq. Cas. Abr. 272, 21 E.R. 1040, 73 Selden Soc. 443; *Hobart v. Countess of Suffolk* (1709), 2 Vernon 644, 23 E.R. 1020, also 1 Eq. Cas. Abr. 272, 21 E.R. 1040, Hardwicke 22, *sub nom. Earl of Stamford v. Hobart* (1710), 3 Brown P.C. 31, 1 E.R. 1157, note also *In re Maynard's Will* (1691), Dodd 101; *Randall v. Bookey* (1701), 2 Vernon 425, 23 E.R. 872, also Precedents in Chancery 162, 24 E.R. 78, 1 Eq. Cas. Abr. 272, 21 E.R. 1040; *Countess of Bristol v. Hungerford* (1709), 2 Vernon 645, 23 E.R. 1021, also Precedents in Chancery 81, 24 E.R. 39; *Wych v. Packington* (1712), Indiana Univ. Lilly MS. Parker, 'Cases in the Exchequer, vol. 4', p. 144 (Price's Reports), Harvard Law Sch. MS. 1169, part 2, pp. 97, 111, 125 (Eden's Reports), order of 9 December 1707: Public Record Office E.126/18, f. 681; order

at the Rolls, 1st June 1730, where John Loder devised all his real estate to his eldest son for 99 years if he so long lived, and so in strict settlement with a remainder to his second son in the same manner and, in default of such issue, then, to his kinsman Robert Loder and his heirs upon trust to raise and pay to his daughters the sum of £5000 as an addition to their portions. And though, in this case, several estates were to take place before this last remainder, yet it was decreed that, after the legacies of £5000 were raised, it should be a resulting trust for the benefit of the heir of the testator. So likewise in the Case of Heron v. Elford, heard at the Rolls last term, where an estate was devised to the plaintiff and his wife upon trust that, if his personal estate was not sufficient, then to sell towards the payment of his debts and legacies, unless they raised money for that purpose by any other ways and means and, upon a question, what estate or interest the plaintiffs took under this devise, it was held to be a resulting trust for the benefit of the heir, after payment of the debts and legacies, notwithstanding the words ' raising the money by other means' seemed to give the plaintiffs an absolute estate, and make it much stronger than the present case.

It was argued on the other hand for the defendant that it had been admitted on the other side that the legal estate passed to the wife, according to Collier's Case, 6 Coke 16,[1] and that the cases of resulting trusts are to be considered with a great deal of caution because they are against the letter of the will which is as strong a circumstance in the defendant's favor as the not disinheriting the heir can be in the plaintiff's. Besides, the present case, taking the whole will together, is widely without the rules of resulting trusts and very different from the authorities that have been mentioned. In the first place, he makes his wife his heiress, which words have been held to put the party in the place of the heir, and entitles her to everything which in the course of law would come to the heir in all respects. Hobart 29, 75.[2] And if so, what is there in the present case to result and to whom, but to her, who, in all events, represents the heir? It is not disputed but that the wife is entitled absolutely to the personal estate under this will. And what difference is there between the disposition of that and of the real estate? To imagine the testator intended her a beneficial devise of the personal estate and not of the real is absurd. Besides, the real estate is by the will become assets in her hands and will be under the same construction as the personal estate. Another circumstance here is that the devise is to the wife. Had it been to a stranger, it might have made the case stronger in the plaintiff's favor. Then, here is a distinct legacy of the £5 to the heir, which shows he did not intend him to have the overplus. And had it been 1s. only, no doubt but it would be construed a disinheriting of him. As to the cases mentioned on the other side, that of Culpeper v. Aston was a devise to a stranger. Besides, there must be a mistake in the report of that case, for there are not such words in the case as would carry the estate, where he has reported it to be decreed. And all the other cases are of devises to trustees, and there are express trusts mentioned, either to pay such and such debts or for other particular purposes. And, in such

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of 30 May 1709: Public Record Office E.126/19, f. 153, 3 Brown P.C. 44, 1 E.R. 1166, 2 Eq. Cas. Abr. 507, 744, 22 E.R. 429, 632, Lords' Journal, vol. 19, p. 448, Lincoln's Inn MS. Misc. 503, p. 281, Equity Cases Exch. 619.

[3] *Loder v. Loder* (1730), Mosely 356, 25 E.R. 437, 2 Vesey Sen. 530, 28 E.R. 339, Lincoln's Inn MS. Coxe 40, pp. 13, 41, Lincoln's Inn MS. Misc. 384, pp. 294, 341.

[1] *Collier v. Walker* (1595), 6 Coke Rep. 16, 77 E.R. 276, also Croke Eliz. 379, 78 E.R. 625.

[2] *Counden v. Clerke* (1614), Hobart 29, 80 E.R. 180, also Moore K.B. 860, 72 E.R. 955, 1 Eq. Cas. Abr. 213, 21 E.R. 998; *Spark v. Purnell* (1614), Hobart 75, 80 E.R. 224, also Moore K.B. 864, 72 E.R. 958.

cases, if part of the estate is left in the trustees undisposed of, this court will very properly construe it a resulting trust for the benefit of the heir. The Case of North v. Crompton, 1 Chancery Cases 196, is an express authority with us, where it was insisted on that, as the heir at law had a legacy, there could be no resulting trust for his benefit. And he cited the Case of Collingham v. Mellish, 2 Vernon 247, Abr. Eq. Ca. 273;[1] Phillips v. Herne, 1 Chancery Cases.

The Lord Chancellor [LORD KING] was of opinion this could not be a resulting trust, but was intended to be a beneficial devise to the wife in fee. He took notice of the £5 legacy given to the heir at law and that there was no trust mentioned in the will. He relied upon the Case of North v. Crompton, 1 Chancery Cases 196, which he said was in point, and likewise the Case of Collingham v. Mellish, 2 Vernon 247, and likewise in a late learned and accurate treatise, as His Lordship was pleased to call it, entitled Cases in Equity Abridged 273.

[Other reports of this case: Cases *tempore* Talbot 268, 25 E.R. 771, Select Cases *tempore* King 81, 25 E.R. 234, 3 Peere Williams 193, 24 E.R. 1026, 2 Eq. Cas. Abr. 304, 22 E.R. 256.]

22

Tanner v. Morse

(Ch. 1734)

In this case, the devise in issue created an estate in tail.

29 June 1734.

Thomas Carter, 10 March 1725, made his will, whereby he devised in the following manner. 'As to my temporal estate, I bequeath to my nephew Tanner [the testator's heir at law] the sum of £50.' Then he gives several legacies. 'And all the rest and residue of my estate, goods, and chattels whatsoever, both real and personal, I give and bequeath to my beloved wife Mary Carter, whom I make my full and sole executrix.'

The heir at law brought this bill against the devisee and executrix, who married the defendant Morse, to have an account of what deeds belonging to the testator she had got in her custody and to set forth what right she claimed to the real estate of Thomas Carter and whether he made any will and, if so, to set it forth. And the plaintiff, to make himself proper in a court of equity, had charged in his bill that the defendants refused to let him have a sight of the deeds and that they threatened, if he brought an [action of] ejectment, to set up some old encumbrances to bar it. The question was whether any and what estate in the testator's lands passed to the defendant by this will.

For the plaintiff, it was said that there were no words in the will that could be construed to extend to the inheritance or, if any, it must be the words 'as to my temporal estate', which, in the strictest sense, relate only to the estates of a certain duration that are to continue for a time only and have never been held to pass an estate of inheritance. As to the words 'all the rest and residue of my estate', they must have relation to somewhat that went before. And there is nothing disposed of in the will before this clause, but only some legacies charged upon the

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[1] *North v. Crompton* (1671), 1 Chancery Cases 196, 22 E.R. 759, also 1 Eq. Cas. Abr. 272, 21 E.R. 1040; *Cunningham v. Mellish* (1691), 2 Vernon 247, 23 E.R. 759, 1 Abr. Eq. Cas. 273, 21 E.R. 1040, also Precedents in Chancery 31, 24 E.R. 16, *sub nom. Gillingham v. Melvish*, Dodd 108.

personal estate. And so [it was] held in the Case of Markant and Twisden, Abr. Eq. Ca. 212,[1] where, notwithstanding there was the word 'devise', yet it was decreed not to pass the inheritance; whereas, in the present case, there is no such word as 'devise', nor even the words 'heir', 'land', or 'tenement'. It was farther urged that the words of the will were not certain or positive enough to disinherit the heir. And he cited the Case of Bowman *versus* Milbank, 1 Lev. 130; a devise of all to his mother was held to be uncertain words and not sufficient to disinherit the son.[2]

It was said, on the other hand, for the defendant, that, even if the case would admit of any doubt, yet the plaintiff was not proper to come into this court; that here were no mortgages, leases, or trusts that could have been set up by the defendant, which he has told the plaintiff in his answer, so that, whatever the plaintiff had done at first, yet, upon the coming in of the answer, he might safely have proceeded by [an action of] ejectment.

Then, as to the merits, it was said that the words 'temporal estate' have been constantly and very properly construed to extend to all the estates, both real and personal, and that, in opposition to the word 'eternal', the word 'temporal' is the same as 'worldly', and, as such, it comes within the reason of the Lord Warrington's Case, where the words were 'as to my worldly estate, I will that all my debts be paid', etc.[3] And, by virtue of these words, 'worldly estate', it was held that his real estate was liable to his debts. But the latter clause itself would be sufficient to pass a real estate of inheritance. And so were the opinions of the court in the old reports. There is a case in Styles, where the words 'all my estate' were held to pass an inheritance, and another in Skinner's reports, where 'all my estate' passed everything the testator had. Hyley *versus* Hyley, 3 Mod. 228; 'all the remaining part of my estate'. So, in 1 Chan. Cases, Tyrrel *versus* Page, 262, and in 4 Mod. 89, Carter *versus* Horner; Salk. 236, Bridgwater *versus* Bolton; 2 Vern. 564, Murry *versus* Wise; 687, Ackland *versus* Ackland; 690, Beacroft *versus* Beacroft. And, likewise, the Case of Awdrey *versus* Middleton, in 1716, where the words were 'as to all my worldly estate, I give [some legacies] and all the rest of my goods and chattels and estate, I give to Middleton'; and the question was whether the real estate passed by that will; the Lord Cowper held that, from the frame of the whole will, the testator intended it, and, accordingly, he decreed the real estate should pass.[4] And this case does not vary in any particular from the present, except the word 'worldly' instead of 'temporal'. 'All

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[1] *Markant v. Twisden* (1711), 1 Eq. Cas Abr. 212, 21 E.R. 997, also Gilbert Rep. 30, 25 E.R. 22, Chan. Repts. *tempore* Anne 543.

[2] *Bowman v. Millbank* (1664), 1 Levinz 130, 83 E.R. 333, also 1 Siderfin 191, 82 E.R. 1050, T. Raymond 97, 83 E.R. 52, 1 Keble 719, 83 E.R. 1205, 1 Eq. Cas. Abr. 208, 21 E.R. 994.

[3] *Earl of Warrington v. Leigh* (1732), see above, Case No. 3.

[4] *Hyley v. Hyley* (1688), 3 Modern 228, 87 E.R. 147, also Comberbach 93, 90 E.R. 364, 1 Eq. Cas. Abr. 210, 21 E.R. 996, 2 Eq. Cas. Abr. 302, 22 E.R. 254; *Terrel v. Page* (1675), 1 Chancery Cases 262, 22 E.R. 791, also 73 Selden Soc. 185; *Carter v. Horner* (1692), 4 Modern 89, 87 E.R. 279, also 1 Shower K.B. 348, 89 E.R. 279, 1 Eq. Cas. Abr. 177, 21 E.R. 870; *Countess of Bridgewater v. Duke of Bolton* (1704), 1 Salkeld 236, 91 E.R. 209, also 6 Modern 106, 87 E.R. 866, Holt K.B. 281, 90 E.R. 1054, 1 Eq. Cas. Abr. 177, 21 E.R. 970, 2 Eq. Cas. Abr. 299, 22 E.R. 252; *Murry v. Wyse* (1706), 2 Vernon 564, 23 E.R. 968, also Precedents in Chancery 264, 24 E.R. 127, 1 Eq. Cas. Abr. 177, 21 E.R. 970; *Ackland v. Ackland* (1712), 2 Vernon 687, 23 E.R. 1045, also 1 Eq. Cas. Abr. 177, 21 E.R. 970; *Beachcroft v. Beachcroft* (1714), 2 Vernon 690, 23 E.R. 1047, also 1 Eq. Ca. Abr. 198, 21 E.R. 987; *Awbery v. Middleton* (Ch. 1716), Chan. Cases *tempore* Geo. I, p. 210.

my concerns' has been held to pass a real estate and that upon a point reserved upon a trial at an assize. So ' and whatever else I have in the world' has passed an estate of inheritance.

Lord Chancellor KING, before whom this cause was first heard: You have cited no case where the word ' temporal' has been used. But, to me, it seems clearly to relate to every estate of this world, for, there is nothing here but what is temporal; everything must have an end, and the testator certainly intended all the remaining part of his estate to go to his wife, as well real as personal. But, then, whether she will take an estate for life or in fee, I do not determine. That point is not before me. If they have a mind to try it, they must stay until this woman is dead. At present, I am very doubtful of it.

The plaintiff, being heir at law, insisted upon his privilege of trying the validity of this will at law and, likewise, what would pass by it. And, accordingly, the Lord Chancellor retained the bill until they had a trial.

On the 29 June 1734, Trinity [term] 8 Geo. II, this cause was reheard by the LORD TALBOT, who affirmed the Lord King's decree, and he decreed an estate in fee simple to pass by the words of the will.

See the Case of Reeves *versus* Winnington, 3 Mod. 45, where a devise of ' all his estate' was held to pass a fee, by the whole court.[1]

23

Tyte v. Willis

(Ch. 1733)

In this case, the devise in issue created an estate in tail.

5 December [1733].

George Tyte, by his will, devised his real estate to his wife Jane for life, remainder to his son Henry for life, remainder to his son George and his heirs forever, and, if he died without heirs, then, to his two daughters, Katherine and Jane. The question was what estate George took, whether a fee simple or only an estate tail.

And the Case of Webb and Herring, Croke Jac. 415,[2] was cited to prove that, where a devise is to one and his heirs and, if he die without heirs, remainder over to another, who is or may be the devisee's heir at law, such limitation shall be good, and the first limitation [was] construed an entail, and not a fee, in order to let in the remainderman. But, where the second limitation is to a stranger, it is merely void, and the first limitation is a fee simple.

Lord Chancellor [LORD TALBOT]: In this case, George took only an estate tail. The difference which has been taken is right. And the reason of it is that, in the latter case, there is no intent appearing to make the words carry any other sense than what they import at law. But, in the former, it is impossible that the devisee should die without an heir while the remainderman or his issue continue. And, therefore, the generality of the word ' heirs' shall

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[1] *Reeves v. Winnington* (1684), 3 Modern 45, 87 E.R. 28, also 2 Shower K.B. 249, 89 E.R. 920, 2 Eq. Cas. Abr. 299, 22 E.R. 251, Dodd 51.

[2] *Webb v. Hearing* (1617), Croke Jac. 415, 79 E.R. 355, also Bulstrode 192, 81 E.R. 162, 1 Rolle Rep. 398, 436, 81 E.R. 563, 590, J. Bridgman 84, 123 E.R. 1217, 1 Eq. Cas. Abr. 180, 21 E.R. 972.

be restrained to heirs of the body, since the testator could not but know that the devisee could not die without an heir while the remainderman or any of his issue continued. 3 Mod. 123.[1]

24

Countess of Ferrers v. Earl of Ferrers

(Ch. 1733)

The arrears of an annuity or of a rent charge are never decreed to be paid with interest except where the sum is certain and fixed.

One of the points in this case was to this effect. The countess dowager of Ferrers was by a settlement and the will of her late husband, Earl Robert [1650-1717], entitled to a jointure estate of £1000 *per annum* but was kept out of possession by Earl Washington [1677-1729], the son of Earl Robert by a former marriage. And she now insisted upon the arrears and interest from the time of her husband's death, comparing it to the case of arrears of an annuity or a rent charge, which are decreed to be paid with interest.

Lord Chancellor [LORD TALBOT]: The arrears of an annuity or rent charge are never decreed to be paid with interest but where the sum is certain and fixed and also where there is either a clause of entry or a *nomine poenae* or some penalty upon the grantor which he must undergo if the grantee sued at law and which would oblige him to come into this court for relief, which the court will not grant but upon equal terms. And those can be no other but decreeing the grantor to pay the arrears with interest for the time during which the payment was withheld. But interest for the rents and profits of an estate was never decreed. Yet, the sum being entirely uncertain and though it may be said that the lady is entitled to an estate of £1000 *per annum*, yet that is not sufficiently certain, being only the perception of the profits of an estate, which are not to be paid at any one certain time, but only as the tenants of the land bring them in, some at one time, some at another.

25

Micklethwaite v. Calverly and Baker

(Ch. 1733)

Where a defendant dies before his plea is argued, his personal representative must file his own separate plea.

14 December 1733.

The plaintiff filed his bill in this cause, to which the defendant Baker pleaded. And, before the plea came on to be argued, the defendant died; the plaintiff revived. And, now, the same plea came to be argued.

But the Lord Chancellor [LORD TALBOT] was of opinion that it could not be argued but that the defendant's representative must plead *de novo*.

N.B. The reason seems to be because the representative may have a plea to defend him without denying the merits, for, if an executor or administrator can truly plead *plene administravit* upon a *scire facias* at law (which must always issue in such case), the execution

[1] *Blaxton v. Stone* (1687), 3 Modern 123, 87 E.R. 79, also Skinner 269, 90 E.R. 122.

can only be *de bonis testatoris quando acciderint*. But the answer of the testator in a court of equity will bind the executor who has assets.

[Other reports of this case: 2 Eq. Cas. Abr. 75, 22 E.R. 65.]

26

Lord Glenorchy v. Bosville
(Part 2)

(Ch. 1733)

Sir Thomas Pershall devises all his real estate to his sister Anne Pershall and Robert Bosville and their heirs, and he assigns upon trust that, until his grand-daughter Arabella Pershall marry or die, to receive the rents and profits thereof and, out of it, to pay her £100 a year for her maintenance, and, as to the residue, to pay his debts and legacies and, after the payment thereof, then, in trust for his said grand-daughter and, upon further trust, that, if she lived to marry a Protestant of the Church of England and, at the time of such marriage, be of the age of twenty-one or upwards, or, if, under the age of twenty-one and such marriage be with the consent of her aunt, the said Anne Pershall, then, to convey the said estate with all convenient speed after such marriage to the use of the said Arabella for life without impeachment of waste, voluntary waste in houses excepted, remainder after her death to her husband for life, remainder to the issue of her body, with several remainders over and, upon further trust, that, if the said Arabella Pershall die unmarried, then, to the use, of the said Anne Pershall for life, remainder to the son of his other grand-daughter, Francis Ireland, in tail, remainder to Mr. Bosville, the defendant, for life, remainder to his first and other sons, remainder to the testator's right heirs, and, upon further trust, that, if his grand-daughter marry not according to the directions of his will, then, upon such marriage, to convey the said estate to trustees, as to one moiety thereof, to the use of the said Arabella for life, remainder to trustees to preserve contingent remainders, remainder to her first and every other son, being a Protestant, with several remainders over and, as to the other moiety, to his daughter Ireland's son in like manner.

Sir Thomas Pershall died in the year 1722, and Mrs. Arabella Pershall, in 1723, attained her full age. And, upon a treaty of marriage in 1729, she applies to the trustees for a conveyance of the estate to herself for life, remainder to her intended husband for life, remainder to the issue of her body. And such conveyance was executed by one of the trustees. But Mr. Bosville, the other trustee, who was also a remainderman, refused to convey. However, she, having by this conveyance a legal estate tail in one moiety and an equitable estate tail in the other moiety, suffered a recovery to the use of herself in fee. And, in 1730, she married the plaintiff, the Lord Glenorchy, who made a considerable settlement upon her. And, as to her own estate, she covenanted to settle it upon the Lord Glenorchy and herself for life, remainder to the first and every other son of the marriage in tail male, and, upon failure of such issue, to the survivor of the said husband and wife in fee.

The bill was to have a conveyance of the moiety of the said trust estate from Mr. Bosville to such uses as are limited by her in the said covenant. And the principal question was whether, under the said will, the Lady Glenorchy was a tenant for life or in tail, upon which, two other questions arose: *viz*. first, whether the words in the will in an immediate devise of a legal estate would have carried an estate tail; secondly, if so, whether the court will make any difference between a legal title and a trust estate executory.

Lord Chancellor [LORD TALBOT]: I should upon the first question make no difficulty of determining it an estate tail had this been an immediate devise, but, when you apply to this court for the carrying a trust estate into execution, the doubt is whether we shall not vary from

the rules of law to follow the testator's intent, which will also bring on another question, what is the testator's intent in the present case.

Upon the second question, it was argued for the plaintiffs that the Lady Glenorchy was under this will entitled to an estate tail in equity, for this court puts the same construction upon limitations of trusts in equity as the law does upon legal estates, and that to prevent confusion. This doctrine is laid down with the strongest reasons by the earl of Nottingham in the Duke of Norfolk's Case and the authority of Baile *versus* Coleman, 2 Vern. 670, where a trust to one for life, remainder to the heirs male of his body, is held an estate tail has never yet been questioned. So it is held in Legat and Sewell's Case, 2 Vern. 551 (but more fully reported in Abr. Ca. Eq. 394, pl. 7), where money was given to be laid out in land to one for life, and, after his decease, to his heirs male, and the heirs male of the body of every such heir male, severally and successively, one after another, and a case being made for the opinion of the judges as of a legal estate, they certified it to be an estate tail. So, in the Case of Bagshaw v. Downes or Bagshaw v. Spencer, at the Rolls, Hilary 6 Geo. II, an executory trust was directed to the judges for their opinion as a legal estate.[1] Upon the same reason, do *cestui que trust*s levy fines and suffer recoveries, which are held good in this court. Indeed, in marriage articles, if they covenant to settle to the husband for life, remainder to the heirs of their two bodies, this court will decree a conveyance in strict settlement if any of the parties apply here, because the children are looked upon as purchasers. But, in a will, it is otherwise; they take through the bounty of the testator and in such words as he gives it.

It was farther insisted for the plaintiffs, that the words ' issue of her body', would make a difference from all other cases; for, in the Statute *de Donis*, which created entails, it is said to be a proper word for that purpose, and is used no less than ten times in that Statute, for this the authority of King and Melling, 1 Vent. 214, 225, and the reason there given cannot be contested, which is also an authority in the principal case, for, there, it is held that to one for life, with a power to make a jointure, is much stronger to show the intent of the testator than the words ' without impeachment of waste, to [A.] for life, remainder to the issue of her body, and, for want of such issue, remainder over,' was held an estate tail in the Court of Exchequer in the Case of Williams *versus* Thompson, about three or four years ago; Anders. 86; to one for life, remainder to the children of his body, is an entail; so, in Wyld's Case, 6 Co. 16, and Sweetapple *versus* Bindon, 2 Vern. 536.[2]

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[1] *Duke of Norfolk v. Howard* (1681), 3 Chancery Cases 1, 22 E.R. 931, 1 Vernon 163, 23 E.R. 388, 2 Swanston 454, 36 E.R. 690, Pollexfen 223, 86 E.R. 568, 2 Chancery Reports 229, 21 E.R. 665, 2 Freeman 72, 80, 22 E.R. 1066, 1070, 79 Selden Soc. 904, 922, 999, Dodd 42; *Baile v. Coleman* (1711), 2 Vernon 670, 23 E.R. 1036, also 1 Peere Williams 142, 24 E.R. 330, 2 Eq. Cas. Abr. 309, 472, 717, 22 E.R. 261, 402, 603, Hardwicke 17, Chan. Cases *tempore* Anne 141; *Legatt v. Sewell* (1706), 2 Vernon 551, 23 E.R. 957, 1 Eq. Cas. Abr. 394, 21 E.R. 1127, also 1 Peere Williams 87, 24 E.R. 306, Gilbert Rep. 141, 25 E.R. 99, 2 Eq. Cas. Abr. 530, 22 E.R. 447, Chan. Cases *tempore* Anne 62; *Bagshaw v. Spencer* (1741-1748), 2 Atkyns 246, 570, 26 E.R. 552, 741, 1 Vesey Sen. 142, 27 E.R. 944, Vesey Sen. Supp. 82, 28 E.R. 463, 1 Wilson K.B. 238, 95 E.R. 594, Jodrell 669, Harvard Law Sch. MS. 1134, pp. 102, 209.

[2] Stat. 13 Edw. I, c. 1 (*SR*, I, 71-72); *King v. Melling* (1672), 1 Ventris 214, 225, 86 E.R. 144, 151, also 2 Levinz 58, 83 E.R. 448, 3 Keble 42, 52, 95, 84 E.R. 584, 589, 614, Pollexfen 101, 86 E.R. 526, 3 Salkeld 296, 91 E.R. 835, 1 Eq. Cas. Abr. 181, 21 E.R. 973; *Wild's Case* (1599), 6 Coke Rep. 16, 77 E.R. 277, 1 Eq. Cas. Abr. 181, 21 E.R. 973, Gouldsborough 139, 75 E.R. 1050, *sub nom. Richardson v. Yardley*, Moore K.B. 397, 72 E.R. 652; *Sweetapple v. Bindon* (1705), 2 Vernon 536, 23 E.R. 947, also 1 Eq. Cas. Abr. 394, 21 E.R. 1127.

It was farther argued that, if the remainder in this case to the issue be construed to be words of purchase, they must be attended with the greatest absurdity, for, in what manner can the issue take? All the sons, daughters, and grandchildren are issue, and, if they take as purchasers, they must be joint tenants or tenants in common, and that for life only. 2 Vern. 545 (Cook v. Cook). Which construction can never be agreeable to the testator's intent. And whatever estate was given in the first part of the will, yet the words, ' and for want of such issue, then', etc. will give the plaintiff an estate tail, according to the cases of Langley *versus* Baldwyn, and Shaw and Weigh, Eq. Cas. Abr. 184, pl. 28, 29.[1]

It was also farther urged that, from the face of the whole will and by comparing this clause with the other, it appears that the testator intended the plaintiff, the Lady Glenorchy, should take an estate tail and that the several clauses in a will are to be taken together and make but one conveyance and that it was a proper argument to prove the intention of the party from the different penning of the several clauses. The person who drew the will knew how to convey, either by words of limitation or purchase, where there was occasion for it, for, where he limits the estate to Mrs. Ireland, it is in strict settlement by proper words of purchase, and, so, where he limits it to the Lady Glenorchy, in case she had married a Papist. But farther to show he well understood the doctrine of conveyances, when he limits by words of purchase to sons not *in esse*, he has put in trustees to preserve contingent remainders, which he would certainly have done in this case, had he intended the Lady Glenorchy an estate for life only.

For the defendant, it was argued that, though, in the construction of wills in this court, uses and trusts are to be governed by the same rules, as legal estates, and that there is but little difference between uses and trusts executed and legal estates, yet trusts executory are by no means under the same consideration. In the cases of Legat *versus* Sewell, and Baile *versus* Coleman, the judges were divided in their opinions. And, since that time, there is an express authority for the defendant. In the Case of Papillon *versus* Voyce, Hilary 5 Geo. II. So, likewise, in the Case of the Attorney General *versus* Young, in the Court of Exchequer; and the Case of Leonard v. Earl of Sussex, 2 Vern. 526, as also in the Case of Brampston *versus* Kinaston, heard at the Rolls in June 1728, where an estate was given to be settled upon his grandchild for her life, remainder to the issue of her body, and, when she applied to have an estate tail conveyed to her, she was decreed an estate for life only.[2]

And to show that this court is not tied up to the rules of law in cases of executory trusts, the Case of the Earl of Stamford *versus* Sir John Hobart, concerning Serjeant Maynard's will was cited, where an estate was given to trustees to convey one moiety to Sir John Hobart for 99 years, in case he should so long live, with several remainders over, and this court decreed the Master should settle the conveyance according to the letter of the will, but, upon exceptions to the Master's report, 19 November 1709, it was ordered that proper estates should be made to support the remainders, that the testator's intent might not be frustrated, and this resolution

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[1] *Cook v. Cook* (1706), 2 Vernon 545, 23 E.R. 952; *Langley v. Baldwin* (1707), 1 Eq. Cas. Abr. 185, 21 E.R. 976, Chan. Cases *tempore* Anne 84; *Shaw v. Weigh* (1729), 1 Eq. Cas. Abr. 184, 21 E.R. 976, also 8 Modern 253, 382, 88 E.R. 180, 272, Fortescue 58, 92 E.R. 760, 2 Strange 798, 93 E.R. 856, Fitz-Gibbons 7, 94 E.R. 628, 1 Barnardiston K.B. 54, 94 E.R. 38, 2 Eq. Cas. Abr. 315, 359, 22 E.R. 267, 305.

[2] *Papillon v. Voyce* (Ch. 1732), see above, Case No. 1; *Attorney General v. Young* (1733), 2 Comyns 423, 92 E.R. 1142; *Leonard v. Earl of Sussex* (1705), 2 Vernon 526, 23 E.R. 940, also 1 Eq. Cas. Abr. 12, 184, 21 E.R. 836, 975; *Bramston v. Kynaston* (1729), Lincoln's Inn MS. Misc. 384, p. 281.

was affirmed in the House of Lords.[1] So, in all matters executory, this court endeavors to find the intent of the parties, and lets it prevail against the rules of law. In marriage settlements, it was never doubted but that this court would carry any words into strict settlement if the intent of the parties was such. And so they held in the Case of West *versus* Erisey, in the House of Lords; and in that of Trevor *versus* Trevor, Abr. Eq. Ca. 387. And the same rules will prevail in all cases executory, whether wills or articles.[2] Besides, the present case is very much like that of marriage articles; the testator had all along the marriage of his grand-daughter in view, and intended this will as no more than heads or directions for the trustees in what manner he would have it settled. And so it remains to be carried into execution by the aid of this court.

Then, as to the word 'issue', it is sometimes a word of limitation, sometimes of purchase. There is a case mentioned in Wyld's Case, 6 Co. 16, where 'to one and his children' is held to be an estate tail. Yet, had it been one for life, remainder to his children, there can be no doubt but that it had been a bare estate for life. And as to the objection, that the issue, if purchasers, are to take jointly and for life only, why shall it not be as in cases where the limitation is to the first and every other son? And wherever heirs of the body are held to be words of purchase, they are construed to the first and every other son.

To make an estate tail arise by implication upon the words, 'and for want of such issue', has been cited the Case of Langley and Baldwyn, 1 Eq. Cas. Abr. 185. But there is the Case of Bamfield *versus* Popham, 2 Vern. 427, 449, for the defendant; so the Case of Loddington and Kyme, 3 Lev. 431; and that of Backhouse and Wells, 1 Eq. Cas. Abr. 184.[3] Besides, it is a general rule that, where an estate is to be raised by implication, it must be a necessary and inevitable implication and such as that the words can have no other construction whatsoever. And, in the present case, there is the word 'issue' mentioned before; so that these last words must relate to the issue before mentioned. Whereas, in the Case of Langley and Baldwyn, the limitation is to six sons only; then come the words, 'and for want of issue', which words could not have relation to anything before mentioned.

The Lord Chancellor [LORD TALBOT] had taken time to advise and to have the opinion of the judges upon this case.

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[1] *Hobart v. Countess of Suffolk* (1709), 2 Vernon 644, 23 E.R. 1020, 1 Eq. Cas. Abr. 272, 21 E.R. 1040, *sub nom. Earl of Stamford v. Hobart* (1710), 3 Brown P.C. 31, 1 E.R. 1157, Chancery Repts. *tempore* Anne 207, Hardwicke 22, note also *In re Maynard's Will* (1691), Dodd 101.

[2] *West v. Erisey* (1726-1727), 2 Peere Williams 349, 24 E.R. 760, 1 Comyns 412, 92 E.R. 1135, 1 Brown P.C. 225, 1 E.R. 530, 2 Eq. Cas. Abr. 39, 22 E.R. 33, Exch. Cases *tempore* Geo. I, vol. 2, p. 931; *Trevor v. Trevor* (1719), 1 Eq. Cas. Abr. 387, 21 E.R. 1122, also 9 Modern 161, 88 E.R. 377, 10 Modern 436, 88 E.R. 798, 1 Peere Williams 622, 24 E.R. 543, 2 Eq. Cas. Abr. 475, 505, 22 E.R. 404, 427, 5 Brown P.C. 122, 2 E.R. 574, Chan. Cases *tempore* Geo. I, 612.

[3] *Langley v. Baldwin* (1707), 1 Eq. Cas. Abr. 185, 21 E.R. 976, Chan. Cases *tempore* Anne 84; *Bampfield v. Popham* (1701-1703), 2 Vernon 427, 449, 23 E.R. 873, 888, also 2 Freeman 266, 22 E.R. 1201, 1 Peere Williams 54, 24 E.R. 290, Holt K.B. 233, 90 E.R. 1028, 1 Eq. Cas. Abr. 183, 21 E.R. 975, *sub nom. Popham v. Bamfield*, 1 Vernon 79, 167, 344, 23 E.R. 325, 391, 510, 1 Salkeld 236, 91 E.R. 209, 2 Freeman 269, 22 E.R. 1203, 1 Eq. Cas. Abr. 108, 21 E.R. 916, 2 Eq. Cas. Abr. 308, 22 E.R. 260, Chan. Cases *tempore* Anne 26; *Loddington v. Kime* (1695), 3 Levinz 431, 83 E.R. 766, also 1 Lord Raymond 203, 91 E.R. 1031, 1 Salkeld 224, 91 E.R. 198, 2 Eq. Cas. Abr. 331, 22 E.R. 282; *Backhouse v. Wells* (1712), 1 Eq. Cas. Abr. 184, 21 E.R. 976, also 10 Modern 181, 88 E.R. 683, Fortescue 133, 92 E.R. 791, Gilbert Cas. 20, 129, 93 E.R. 247, 282.

And the same coming now again to be argued upon the same points that had been before the late Lord Chancellor, it was insisted by the plaintiff's counsel that the Lady Glenorchy's marrying a Protestant of the Church of England at or after the age of twenty-one or, if under that age, marrying such a one with her aunt's or, in case she was dead, with the other trustees' consent, was a condition precedent, which, when performed, would give her an estate tail.This intent appeared from the different penning of the several clauses in this will, for it provides, in case she should not marry such a person as is before described, that she should have but a moiety for life, and trustees are appointed to preserve contingent remainders, none of which are enjoined in case she should marry a Protestant of the Church of England, which shows a difference was intended in case of performance and non-performance of the condition. Then, considering it as a legal devise, [there is] no doubt but that a devise to one and the issue of his body will make an estate tail. And so it was held in the Case of King *versus* Melling, 1 Vent. 214, 225, notwithstanding the proviso there, empowering the devisee to make a jointure. So, if, in this case, the land itself had been devised to the Lady Glenorchy, it would have made an entail at law. And there is no difference between an entail of a legal estate and of an equitable one. Wyld's Case, 6 Co. 16; a devise to a man and his children, who had then two children alive, the devisee took but for life. But, in King *versus* Melling, 1 Vent. 214, 225, Lord Hale said that, had there been no children living, in that Case of Wyld, it would have been an estate tail, though ' children' be not so strong a word as ' issue', which, in many statutes, particularly the Statute *de Donis* takes in all the children. In Shelley's Case, 1 Co., it is said that, if there be a gift to one for life, be it by deed or will, and, afterwards, comes a gift to the heirs of his body, it is an entail. [It is] otherwise, indeed, if the limitation be to the heirs male of such heir male, as in Archer's Case, 1 Co.; there, it would make but an estate for life, because the limitation there is grafted upon the word ' heirs'.[1] So, in the Case of Backhouse and Wells, in the King's Bench 1712, 1 Eq. Cas. Abr. 184; the devisee took but for life, the limitation being there grafted upon the word ' issue', which, for that reason, was taken to be only a description of the person in that case. But, in Cozen's Case, Owen 29, and in Langley *versus* Baldwin, 1 Eq. Cas. Abr. 185, the estate tail was raised by implication, which shows that an estate tail may pass not only by express words, but by implication also. In King and Melling, the Lord Hale said upon Wyld's Case that, had it been to the children of the body, it would have passed an entail. And yet none of those cases seem so strong as the present. So in the Case of Cook *versus* Cook, 2 Vern. 545, it is said, that a devise to one and his children, if there be no children living, will be an estate tail.

The exception of waste is next to be considered. And, had it not been for that, this would clearly have passed an entail. But this exception varies not the case, for, here, the estates must disjoin (according to Bowles's Case, 11 Co.[2]) to let in the husband's estate, which must intervene between her estate and that of her issue. And the power of committing waste, voluntary waste in houses excepted, was given only to make her dispunishable of waste during the time she should be tenant for life only, which she must be until her husband's death by reason of the remainder to him, but not at all to restrain the estate which the words of the will give her, which is plainly an estate tail. The adding the words, ' without impeachment of waste', can alter nothing, for, if she was tenant in tail, she had already in her that power which these words would give her, and the expressing the power which was already in her could not

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[1] *Wolfe v. Shelley* (1579-1581), 1 Coke Rep. 88, 76 E.R. 199, also Moore K.B. 136, 72 E.R. 490, 1 Anderson 69, 123 E.R. 358, Jenkins 249, 145 E.R. 176, 3 Dyer 373, 73 E.R. 838; *Baldwin v. Smith* (1597), 1 Coke Rep. 63, 76 E.R. 139, also Croke Eliz. 453, 78 E.R. 692, 2 Anderson 37, 123 E.R. 533.

[2] *Bowles v. Bury* (1615), 11 Coke Rep. 79, 77 E.R. 1253, also 1 Rolle Rep. 177, 81 E.R. 413.

more abridge her estate (according to the maxim of *expressio eorum etc*.) than the power of making the jointure did in King and Melling's Case. In Langley and Baldwyn's Case, there were the same words as here, and, in that of Shaw and Weigh or Sparrow *versus* Shaw, Abr. Eq. Ca. 184, which went up to the House of Lords, the prohibition went not only to voluntary, but to all manner of waste, and yet, there, it was decreed to be an estate tail, which was as much stronger implication to make the sister to be but tenant for life than any in the present case. And, in Baile and Coleman's Case, 2 Vern. 670, an estate tail was decreed by the Lord Harcourt, notwithstanding the power of leasing given to Christopher Baile. Nor can the other words, ' voluntary waste in houses excepted', carry the implication farther than the former, since this court will often restrain a tenant for life without impeachment of waste from committing waste, notwithstanding his power, as was declared by the earl of Nottingham in Williams and Day's Case, 2 Ch. Ca. 32, who, there, said that he would stop the pulling down of houses or defacing a seat by a tenant in tail after possibility of issue extinct or by a tenant for life, though dispunishable of waste by an express grant or by a trust. And the like has been since done in the Case of Vane *versus* Lord Barnard, 2 Vern. 733.[1]

By comparing this with the other clauses of this will, it appears plainly that the testator did not intend the Lady Glenorchy a less estate than to the other devisees, but that his design was to prefer her and her issue to that of Mrs. Frances Ireland, though Frances was dead at the time of the will, and that her son, who could expect no more favor than his mother could, had she been living, should not have an immediate estate tail, and so a greater estate than she who was intended to be most preferred.

It is plain the testator well knew the difference between giving an estate for life and an estate tail by the different wording of the clauses of this will in that, whereby he devises the remainder to Mr. Bosville, these words are purposely omitted, and, in others, he gives the Lady Glenorchy several estates, according to the marrying such or such persons, Protestants or Papists. And, consequently, he must be thought to have intended her a greater estate upon her performing than upon her not performing the condition. If, therefore, these words would create an estate tail at law, the construction will be the same here, since a court of equity ought to go farther than the courts of law, as was held by Lord Cooper in the Case of Legat and Sewell, 2 Vern. 551, 1 Eq. Cas. Abr. 395, and was also held by Lord Harcourt in the Case of Baile and Coleman, 2 Vern. 670, where he takes a difference between cases arising upon wills and cases arising upon marriage articles. Where the persons being all purchasers, the agreement is to be carried into stricter execution than in the case of a will, where the parties being but volunteers, the words must be taken as you find them. The same is held *totidem verbis* in the Case of Sweetapple *versus* Bindon, 2 Vern. 536, where it is said that, in a devise, all being volunteers, the devisee's estate is not to be restrained. Nor is there any argument to be drawn from this being an executory trust, since the Case of Baile *versus* Coleman was such and looked upon as such by the Lords Cowper and Harcourt. And the Case of Leonard *versus* Earl of Sussex, 2 Vern. 526, is widely different from ours, for there was an express injunction that it should be settled in such manner as that the sons should never have it in their power to bar the issue.

It was argued for the defendant by Mr. Attorney General [*Willes*], Mr. *Verney*, and Mr. *Fazakerley* that the Lady Glenorchy could take but an estate for life. And they took a difference between the present case, being of an executory trust, and those of Cozens, and of Cook *versus* Cook, which were legal estates and executed. The resolution in Sonday's Case, 9 Co. 127b, which was likewise of a legal estate, was chiefly founded upon the proviso restraining the son

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[1] *Williams v. Day* (1680), 2 Chancery Cases 32, 22 E.R. 832, also 79 Selden Soc. 821; *Vane v. Lord Barnard* (1715-1716), 2 Vernon 738, 23 E.R. 1082, also Precedents in Chancery 454, 24 E.R. 203, Gilbert Rep. 127, 25 E.R. 89, 1 Salkeld 161, 91 E.R. 150, 1 Eq. Cas. Abr. 399, 21 E.R. 1131, 2 Eq. Cas. Abr. 244, 22 E.R. 208, Chan. Cases *tempore* Geo. I, 87.

or his issue from aliening, which made the argument that he was intended by the testator to be tenant in tail, since, if he had been but tenant for life, the restraint had been vain and needless.[1] In the Case of Langley *versus* Baldwyn, an estate tail was raised by implication upon the words, 'if he die without issue male', because the devise extending no farther than the sixth son, no son born after could have taken, but the heir at law must have been preferred, whereas his intent was to provide equally for all his sons, and, therefore, the raising an estate tail by implication (besides that it was in the case of a legal estate) was carrying the testator's intent into execution. The Case of King *versus* Melling has indeed gone very far, but it has always been looked upon as the *ne plus ultra*, beyond which no court would ever go. This appears from the resolution in the Case of Backhouse *versus* Wells, where the party's intent prevailed against the doctrine now insisted on. But it is said the word 'issue' is always a word of limitation. In that of Sweetapple *versus* Bindon, the words did of themselves carry an estate tail, and there was no intent appearing to the contrary. And in Legat *versus* Sewel, one judge was of opinion it was but an estate for life, and that case was afterwards agreed.

The difference which was insisted on in the former argument, and is still strongly relied on for the defendant, between legal estates and trusts executed and trusts executory is evident, and it appears plainly from the Case of Leonard *versus* Earl of Sussex, where the words were much stronger to create an estate tail than they are here. But, yet, in that case, the court declared that, it being a trust executory, the provision should be looked upon as strong for the benefit of the issue as if it had been in marriage articles and that the testator's intent (appearing by the subsequent words, that none should have power to dock the entail) should be observed; therefore, [it was] decreed but an estate for life. This difference appears likewise from the cases of White *versus* Thornborough, 2 Vern. 702,[2] and Trevor *versus* Trevor, Eq. Ca. Abr. 387, and from that of Papillon *versus* Voyce, Hilary 5 Geo. II, which is not distinguishable from our case, except that there were trustees appointed in that case to preserve contingent remainders, which are not in this. But, notwithstanding that provision, the late Lord Chancellor declared in that case that the limitation, had it been by an act executed, would have created an estate tail, but that, the trust being executory and to be carried into execution by the assistance of this court, he would keep the parties to the observance of the testator's intent, which plainly governs the present case. And, by all those, it appears that the testator's intent is as much to be observed in cases of executory, as of marriage, articles.

If, therefore, the testator's intent is to be observed and that no words which may have any operation are to be rejected, it plainly appears from this and the other clauses of this will that Sir Thomas Pershall intended this lady only an estate for life. It is true, indeed, that the word 'issue' in a will is generally a word of limitation, and creates an estate tail, but that is only where no intent appears to control it. And, in every clause of this will, where he intends only an estate for life, he mentions the words 'for life', and, where he intends an estate tail, there is not a word mentioned of impeachment of waste, which shows he knew what he was doing when he inserted this exception, and was not ignorant of the operation these words would have on the several estates. And these words were in the Case of Loddington *versus* Kyme, 3 Lev. 431, taken to be a strong implication of the testator's meaning to give but an estate for life, notwithstanding the other words, which seemed to carry an entail. Nor is there any color for what has been insisted on for the plaintiff, that the power of committing waste with the restraint of voluntary waste in houses was designed only to attend on her estate for life until, by her husband's death, she should come to be tenant in tail, since no more could be meant by it than

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[1] *Sonday's Case* (1611), 9 Coke Rep. 127, 77 E.R. 915.

[2] *White v. Thornborough* (Ch. 1714), 2 Vernon 702, 23 E.R. 1056, also Gilbert Rep. 107, 25 E.R. 75, Precedents in Chancery 425, 24 E.R. 190, 2 Eq. Cas. Abr. 231, 714, 22 E.R. 196, 601, Chan. Cases *tempore* Anne 706.

to restrain her from defacing or pulling down houses while she was in her husband's power, the testator not knowing who her husband might be. This power of committing waste has been compared to the power of leasing in the Case of Baile *versus* Coleman, though they are widely different, nor can it be compared to that of making a jointure in King and Melling's Case, for, since a tenant in tail cannot make a jointure without a recovery, the power was as proper to be annexed to an estate tail as to an estate for life, which was one of the reasons of Lord Hale's opinion in that case. In our case, to serve the intent of restraint of waste in houses, she must be decreed but an estate for life. If it be an estate tail, she will be enabled to commit waste in houses as well as in all the other parts of the estate, notwithstanding any restraint to the contrary, nor will the answer that has been given to this, that she might be restrained in this court, avail, since no instance can be shown where a tenant in tail has been restrained from committing waste by an injunction of this court.

[Lord Chancellor [LORD TALBOT]: That was refused in Mr. Saville's Case of Yorkshire, who, being an infant and tenant in tail in possession, in a very bad state of health and not likely to live to full age, cut down by his guardian a great quantity of timber just before his death to a very great value; the remainderman applied here for an injunction to restrain him, but could not prevail.]

The other objection, that Sir Thomas Pershall could never intend the Lady Glenorchy a less estate than the children of his other grand-daughter, Frances Ireland, turns rather against the plaintiff, for the testator's intent was to provide for the Lady Glenorchy's children, preferably to those of Frances Ireland, and, therefore, he makes the lady herself but a tenant for life and her children tenants in tail. Nor is anything more common than to limit an estate for life only to the first taker, by which the intent of providing for children is better answered than if the first taker was made tenant in tail. Nor will there in this case follow the inconvenience that has been mentioned, by making the issue to be purchasers, *viz*. that the issue must take jointly and take estates for life only, for, if issue be *nomen collectivum*, as has been insisted for the plaintiff, why may it not be so as well where they take by purchase, as where they take by limitation; especially where the testator's intent that they should take successively and by seniority of birth is as well served by their taking one way as the other? And, if the word 'issue' be tantamount to the word 'heirs', as it has been agreed to be, they have answered themselves.

In the Case of Burchet *versus* Durdant, 2 Vent. 31, and in 2 Lev. 232, by the name of James *versus* Richardson, the words 'heirs of the body' were held to be words of purchase by reason of the words 'now living', which came just after, and, yet, were at the same time determined to carry an estate tail, the word heirs being *nomen collectivum*.[1] And, if so in the case of a legal estate executed, much more ought this construction to hold here, this will being meant by the testator only as heads of a settlement to be made. And so it may well be thought not to have been so accurate in the wording as if the conveyance were then to have been drawn up with advice of counsel and all other assistances to make it formal.

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[1] *James v. Richardson* (H.L. 1685), *Durdant v. Burchett* (H.L. 1690), 2 Ventris 311, 86 E.R. 458, 2 Levinz 232, 83 E.R. 533, also T. Raymond 330, 83 E.R. 172, Pollexfen 457, 86 E.R. 610, 3 Keble 832, 84 E.R. 1039, T. Jones 99, 84 E.R. 1166, 1 Ventris 334, 86 E.R. 216, 1 Freeman 458, 472, 89 E.R. 343, 353, 1 Eq. Cas. Abr. 214, 21 E.R. 998, Lincoln's Inn MS. Misc. 557, f. 94, pl. 2, Skinner 205, 90 E.R. 95, Comberbach 153, 90 E.R. 400, Carthew 154, 90 E.R. 694, Holt K.B. 223, 224, 90 E.R. 1022, 1023, 1 Eq. Cas. Abr. 214, 21 E.R. 999, Dodd 60; *Darbison, ex dem. Long v. Beaumont* (1713-1714), 1 Peere Williams 229, 24 E.R. 366, also Fortescue 18, 92 E.R. 743, 1 Eq. Cas. Abr. 214, 21 E.R. 999, Dodd 366, 3 Brown P.C. 60, 1 E.R. 1177, Lords' Journal, vol. 19, p. 696, *sub nom. Lay v. Beamont* (Ex. 1709), Eq. Cases Exch. 604.

Lord Chancellor TALBOT: Several observations have been made on the different penning of the several clauses of this will, from which I think no inference can be drawn, the testator having expressed himself variously in many, if not in all, of them. It is plain that, by the first part of this will, he intended her but an estate for life until marriage; then comes the clause upon which the question depends. But, before I give any opinion of that, I must observe that the trustee has not done right, for nothing was to vest until after her marrying a Protestant; the trustee, therefore, by conveying and enabling her to suffer a recovery before marriage, which has been done accordingly, has done wrong.

But the great question is what estate she shall take. And, first, considering it as a legal devise executed, it is plain that the first limitation, with the power and restriction, carries an estate for life only; so, likewise, of the remainder to the husband. But then come the words, 'remainder to the issue of her body', upon which the question arises. The word 'issue' does, *ex vi termini*, comprehend all the issue. But, sometimes, a testator may not intend it in so large a sense, as, where there are children alive, etc. That it may be a word of purchase is clear from the Case of Backhouse *versus* Wells and of limitation by that of King *versus* Melling. But that it may be both in the same will, has not, nor can be, proved. The word 'heirs' is naturally a word of limitation. And, when some other words expressing the testator's intent are added, it may be looked on as a word both of limitation and purchase in the same will. But should the word 'issue' be looked upon as both in the same will? What a confusion would it breed, for the moment any issue was born, or any issue of that issue, they would all take. The question then will be whether Sir Thomas Pershall intended the Lady Glenorchy's issue to take by descent or by purchase. If by purchase, they can take but for life, and so every issue of that issue will take for life, which will make a succession *ad infinitum*, a perpetuity of estate for life. This inconvenience was the reason of Lord Hale's opinion in King and Melling's Case, that the limitation there created an estate tail. It may be the testator's intent is by this construction rendered a little precarious. But that is from the power of the law over men's estates and to prevent confusion. Restraint from waste has been annexed to estates for life, which have been afterwards construed to be estates tail. I do not say that, where an express estate tail is devised, that the annexing a power inconsistent with it will defeat the estate. No, the power shall be void. But, there, the power is annexed to the estate for life, which she took first. And, therefore, I am rather inclined to think it stronger than King and Melling's Case, where there was no mediate estate, as there is here, to the husband. There, there was an immediate devise; here, a mediate one. So the applying this power to the estate for life carries no incongruity with it. As the Case of King and Melling has never been shaken and that of Shaw and Weigh or Sparrow and Shaw, which went up to the House of Lords, was stronger, I do not think that courts of equity ought to go otherwise than the courts of law. And, therefore, I am inclinable to think it an estate tail, as it would be at law.

But there is another question, *viz*. how far, in cases of trusts executory, as this is, the testator's intent is to prevail over the strength and legal signification of the words. I repeat it, I think, in cases of trusts executed or immediate devises, the construction of the courts of law and equity ought to be the same, for, there, the testator does not suppose any other conveyance will be made. But, in executory trusts, he leaves somewhat to be done, the trusts to be executed in a more careful and more accurate manner. The Case of Leonard and the Earl of Sussex, had it been by an act executed, would have been an estate tail, and the restraint had been void, but, being an executory trust, the court decreed according to the intent, as it was found expressed in the will, which must now govern our construction. And, though all parties claiming under this will are volunteers, yet are they entitled to the aid of this court to direct their trustees. I have already said what I should incline to if this was an immediate devise, but, as it is executory and that such construction may be made as that the issue may take without any of the inconveniences which were the foundation of the resolution in King and Melling's Case and that, as the testator's intent is plain, that the issue should take, the conveyance, by being in the common form, *viz*. to the Lady Glenorchy for life, remainder to her husband the Lord

Glenorchy for life, remainder to their first and every other son, with a remainder to the daughters, will best serve the testator's intent. In the Case of Earl of Stamford and Sir John Hobart, 19 December 1700, it appeared that, for want of trustees to preserve the contingent remainders, all the uses intended in the will and in the Act of Parliament to take effect might have been avoided, and, therefore, the Lord Cowper did, notwithstanding the words of the Act, upon great deliberation, insert trustees. In the Case of Legat and Sewell, the words if in a settlement would have made an estate tail, and, in that of Baile and Coleman, the execution was to be of the same estate he had in the trusts, which, in construction of law, was an estate tail. Nor is the rule generally true that, in articles and executory trusts, different constructions are to be admitted. The late Case of Papillon and Voyce is directly against this. And it seems to me a very strong authority for executing the intent in the one case as well as the other.

And, so, he decreed the Lady Glenorchy but an estate for life, with remainder etc.

[Other reports of this case: See above, Case No. 19, Jodrell 687, 693, 1 Vesey Sen. 150, 27 E.R. 949, 2 Eq. Cas. Abr. 718, 743, 747, 758, 22 E.R. 604, 630, 634, 643.]

27

Legg v. Goldwire

(Ch. 1736)

A marriage contract cannot be varied by a marriage settlement that was made after the marriage has taken place.

10 November 1736.

Lord Chancellor [LORD TALBOT]: Where articles are entered into before marriage and a settlement is made after marriage different from those articles (as if, by articles, the estate was to be in strict settlement and, by the settlement, the husband is made a tenant in tail, whereby he has it in is power to bar the issue), this court will set up the articles against the settlement. But, where both articles and settlement are previous to the marriage, at a time when all parties are at liberty, the settlement differing from the articles will be taken as a new agreement between them, and shall control the articles. And, although, in the Case of West and Erisey, Michaelmas term 1726, in the Court of Exchequer and, afterwards, in the House of Lords, in 1727,[1] the articles were made to control the settlement made before marriage, yet that resolution no ways contradicts the general rule, for, in that case, the settlement was expressly mentioned to be made in pursuance and performance of the said marriage articles, whereby the intent appeared to be still the same as it was at the making the articles.

[Other reports of this case: 2 Eq. Cas. Abr. 719, 22 E.R. 606.]

[1] *West v. Erisey* (1726-1727), 2 Peere Williams 349, 24 E.R. 760, 1 Comyns 412, 92 E.R. 1135, 1 Brown P.C. 225, 1 E.R. 530, 2 Eq. Cas. Abr. 39, 22 E.R. 33, Exch. Cases *tempore* Geo. I, vol. 2, p. 931.

28

Clare v. Clare

(Ch. 1734)

The word 'issue' in a deed can never be a word of limitation, but it is made so in wills in order to serve the testator's intent.

A leasehold, without a particular provision, cannot descend, but must be distributed in a course of administration.

In this case, the devise in issue created an estate for life.

Deeds and wills stand or fall as they were at the time of the making of them, and they cannot be made good by any later act.

A succession of estates for life to persons not in esse *is a perpetuity.*

8 May [1734].

William Clare, possessed of a term of one thousand years, by a will dated 13 April 1706, devises it to trustees in trust for his son Thomas Clare for so many years of the term as he should live and, after his death, in trust for the issue male of his son Thomas lawfully begotten, for so many years of the said unexpired term as such issue male should live and, when the issue male of his said son Thomas should happen to be extinct, then, in trust for his second son William for life, remainder in trust for the issue male of his said son William for so many years as they should happen to live, the eldest of such issue male to be preferred before the youngest and, after the death of the said William Clare and from the time his issue male should happen to be extinct, then, that the premises should come, descend, and continue in the issue male of the name and family of the Clares which should be the next of kin for all the residue of the term. And he made his son Thomas sole executor and residuary legatee. The testator died. And, in the year 1718, Thomas died without having had any issue male. The question was whether the whole term did not vest absolutely in Thomas and whether the limitation over to William, the second son, after failure of issue male of Thomas, was not void.

Mr. Attorney General [*Willes*] and Mr. *Fazakerley* argued that the limitation was good, for that, the whole being vested in the trustees, Thomas, the first son, had but a contingent interest in so many years only as should happen to be expired at his death, and no absolute estate tail in the whole, as it must have been to prevent the limitation over to William taking place. Then, it must be the remainder in the trust for the issue male of Thomas, which must avoid the limitation over. Indeed, the word 'issue' is in a will sometimes taken to be a word of limitation (though, in a deed, it can carry but an estate for life) in order to fulfil the testator's intent. But that intent must be plain and manifest, and the words not controlled by any other.

This appears from Wyld's Case, 6 Co. 16, where the words, 'after their decease', made the other words to be words not of limitation, but of purchase, and from the cases of Papillon *versus* Voyce and Lord Glenorchy and Bosville. And the reason why, in many cases, these words are determined to carry an estate tail is because, otherwise, the testator's intent could never take place, which was the reason of the resolution in King and Melling's Case, 1 Vent. 214, 225. But no inference can be drawn from the case of freehold to that of leasehold estates, which have been often differenced in this court. In the Case of Peacock and Spooner, 2 Vent.

195, the words were stronger than they are here, and yet the generality of them was restrained, and they were construed to be words of purchase.[1]

If, then, Thomas took but an estate for life, the remainder to his issue never taking place must be looked upon as out of the question, which will let in the limitation to William. And this is an eligible construction in order to let in a provision for his family and to follow his intent, which was that his son William should take. Nor is this intent controlled by any rule of law, the contingency happening within the compass of a life, *viz*. that of Thomas, the elder son. And that such construction may well be made appears from the Case of Higgins *versus* Dowler, 2 Vern. 600, and from that of Brook and Taylor, Trinity term 2 Geo. II, in the King's Bench, where there was a bequest of a personal estate to his wife, upon condition to give his three sisters £5 yearly for their lives, and, after his wife's death, he gave the same to his daughter, Mary Taylor, upon the same obligation to his sisters, and, after his daughter's death, to the fruit of her body, and, for want of such fruit, to his brothers and sisters and their children then living; the opinion of the court was that the limitation to the brothers and sisters was good, and yet, had there been any fruit of the body, they must have taken an estate tail, but, they never coming *in esse*, the second limitation was allowed to take place. So in the Case of Stanley and Leigh or Mead, at the Rolls, about three terms ago, where there was a bequest to one for life and to his first and every other son and there never was any son; upon the words 'if he died without issue', it was insisted that the limitation over should take place and that these words should be understood to be issue at the time of his death, and [it was] so allowed by the court, for that the limitation to the sons and the heirs of their bodies never taking place, the second limitation was good, there being no danger of a perpetuity.[2] So, in our case, had Thomas had any issue, they would have taken an estate tail, but there being no issue of him, the limitation over to William, the second son, is good.

Mr. Solicitor General [*Ryder*] and Mr. *Lutwyche* argued for the plaintiff, who was executor to Thomas, the residuary legatee, that the limitation to William was void, for that it was plainly the testator's meaning that the issue male and the issue of that issue should take *in infinitum*. And, then, he says that, when the issue shall be extinct, it shall go to William. The extinguishment here meant is not of any one issue, but of the whole. The words 'lawfully begotten' are likewise considerable, being held by the Lord Hale, in King and Melling's Case, to be words naturally belonging to the creation of an estate tail. Only, suppose he had made as many limitations for lives as there had been possibility of people's taking, would not this, in a court of equity, be looked upon to be the same as if he had limited it to him and the issue of

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[1] *Wild's Case* (1599), 6 Coke Rep. 16, 77 E.R. 277, 1 Eq. Cas. Abr. 181, 21 E.R. 973, Gouldsborough 139, 75 E.R. 1050, *sub nom. Richardson v. Yardley*, Moore K.B. 397, 72 E.R. 652; *Papillon v. Voyce* (Ch. 1732), see above, Case No. 1; *Lord Glenorchy v. Bosville* (1733), see, Case Nos. 19, 26; *King v. Melling* (1672), 1 Ventris 214, 225, 86 E.R. 144, 151, also 2 Levinz 58, 83 E.R. 448, 3 Keble 42, 52, 95, 84 E.R. 584, 589, 614, Pollexfen 101, 86 E.R. 526, 3 Salkeld 296, 91 E.R. 835, 1 Eq. Cas. Abr. 181, 21 E.R. 973; *Peacock v. Spooner* (1688-1690), 2 Vernon 43, 195, 23 E.R. 638, 727, 2 Freeman 114, 22 E.R. 1094, 1 Eq. Cas. Abr. 362, 21 E.R. 1104, Chan. Cases *tempore* Jac. II, 429, Dodd 95.

[2] *Higgins v. Dowler* (1707), 2 Vernon 600, 23 E.R. 992, also *sub nom. Higgins v. Derby*, 1 Salkeld 156, 91 E.R. 145, 1 Peere Williams 98, 24 E.R. 311, Chan. Cases *tempore* Anne 110; *Brooks v. Taylor* (1729), Mosely 188, 25 E.R. 341, 2 Eq. Cas. Abr. 368, 22 E.R. 312; *Stanley v. Leigh* (1732), 2 Peere Williams 686, 24 E.R. 917, 2 Eq. Cas. Abr. 293, 22 E.R. 246.

his body, and has he not done it? Here, he has limited it to as many as should be of the name and family of the Clares, according to Judge Rickhill's invention in 1 Inst. 377b.[1]

But such practices have always been discountenanced, nothing being so contrary to our laws as the admission of a perpetuity. Nor will the other method which has been attempted to support this limitation do better, which is that of construing Thomas to take an estate for life and then striking out the remainder to his issue male, as if it had never been, because there never was any issue male of him, for it is admitted that, if Thomas had had any issue male, this limitation over had been void and the making it good by failure of issue male would be making the validity of the limitation to depend upon a subsequent accident, whereas it must stand upon its own bottom and cannot be decreed to be good or had upon any unforeseen accident.

The opinion of the Master of the Rolls in the Case of Stanley *versus* Leigh was founded upon the Case of Higgins *versus* Dowler. And there are now thoughts of appealing from that decree at the Rolls. If the Case of Brooks *versus* Taylor had depended singly on the words 'to her and, after her decease, to the fruit of her body', it had clearly been an estate tail. But the reason was that there were those other words, 'to my brothers and sisters then living', which brought it within the compass of a life. And these words, 'then living', make the case to be the same as the Duke of Norfolk's, 3 Chan. Cases. In the Case of the Lady Lanesborough *versus* Fox, the sessions before last, in the House of Peers, the judgment was (by the advice of all the judges present) that there was no implied estate, and, consequently, the recovery [was] void, which shows that the court has never laid any stress on the accident of the death happening or not happening. And, in the Case of Scattergood *versus* Hedge, the Lord Treby and the other judges held that the accident of no son being born was not to influence the case one way or other, which is another strong authority that subsequent accidents are not to be regarded.[2]

Lord Chancellor [LORD TALBOT]: Two questions have been made in this case: the first is what estate Thomas, the eldest son, took by this will, whether an estate tail or an estate for life only; and, secondly, whether, if he took but an estate for life, the subsequent accident of his dying without issue male or rather never having had any issue male, will let in the limitation to William, the second son. As to the first, I am of opinion that Thomas took but an estate for life, nor will the subsequent words, 'that from and immediately after his death the trustees should suffer', etc. enlarge his estate for life. The word 'issue' in a deed can never be a word of limitation, but it is made so in wills to serve the testator's intent, which was the reason of the resolution in the Case of King and Melling. And, if the present case was like that, I should think myself bound to observe that resolution. But that was of a freehold, which may and must descend to the issue, and this is of a leasehold, which, without a particular provision, can never descend, but must go in course of administration. And, therefore, as here is an express estate for life limited to Thomas, it shall not be enlarged by any of the subsequent words, especially when, in the limitation to William, the second son, he has explained what he meant by the gift to the issue in the first part, for, there, he gives it to the first and every other son and the heirs male of their bodies; so it is plain he intended every issue that was born of Thomas should

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[1] E. Coke, *First Institute* (1628), f. 377.

[2] *Duke of Norfolk v. Howard* (1681), 3 Chancery Cases 1, 22 E.R. 931, 1 Vernon 163, 23 E.R. 388, 2 Swanston 454, 36 E.R. 690, Pollexfen 223, 86 E.R. 568, 2 Chancery Reports 229, 21 E.R. 665, 2 Freeman 72, 80, 22 E.R. 1066, 1070, 79 Selden Soc. 904, 922, 999, Dodd 42; *Lady Lanesborough v. Fox* (1733), 2 Eq. Cas. Abr. 341, 22 E.R. 291, 3 Brown P.C. 130, 1 E.R. 1223; *Scatterwood v. Edge* (1697-1700), 1 Salkeld 229, 91 E.R. 203, 12 Modern 278, 88 E.R. 1320, 1 Eq. Cas. Abr. 189, 21 E.R. 980, 2 Eq. Cas. Abr. 337, 22 E.R. 287, King's Inn Dublin MS. 92, p. 1.

take. And, then, the limitation to William, being at so great a distance, is too remote, and cannot take effect.

The next question is whether the subsequent accident of Thomas's dying without issue will better the case for William. And, as to that, I think all deeds and wills are to stand as they did at the time of the making them, and cannot be made good by any after act, especially where such act is collateral and is, upon its happening, such a contingency upon which no estate can commence by law. Was it ever said in case of a limitation to one and, if he die without issue living at the time of his death, that you must wait until his death to determine whether the limitation be good or not? If so, that limitation would be no better than a general limitation upon a general failure of issue.

The Case of Higgins *versus* Dowler is very imperfectly reported, and it was upon a demurrer, where things are not argued with that nicety which they are upon arguing the merits of a cause. That of Stanley and Lee has not been particularly mentioned so that what we have of it is only upon memory. And I think it much better to stick to the known general rules than to follow any one particular precedent which may be founded on reasons unknown to us. Such a proceeding would confound all property. That of Brooks and Taylor (whatever reason the judges might go upon) was certainly very different by reason of the words 'then living'. But there is a plain affection of a perpetuity as strongly declared by the testator himself as can be. And a succession of estates for life to persons not *in esse* is as much a perpetuity and as little to be endured as would be that of an estate tail, of which no recovery could be suffered. The Case of Lady Lanesborough *versus* Fox is the strongest authority that can be, and even, had it not been in the House of Lords, I should have thought myself bound to go according to the general and known rules of law.

And so he decreed the term to Thomas, as being the residuary legatee of his father, and from him to the plaintiff, who was the executor of Thomas.

N.B., as to this last point, Burges and Burges, 1 Mod. 114, 1 Chan. Ca. 229, and Duke of Norfolk's Case, 3 Chan. Ca. 19, 29.[1]

[Other reports of this case: Lincoln's Inn MS. Misc. 384, p. 374, pl. 31, p. 388, pl. 6, 2 Eq. Cas. Abr. 703, 22 E.R. 590.]

29

Stephens v. Hide

(Ch. 1734)

In construing a will, the testator's intent is to be gathered from the words of the will without either adding or rejecting any which can possibly have any meaning.

Upon a rehearing, the case was thus. Humphrey Hide, the testator, did by his will in the year 1718 devise three-fourths of his personal estate to his three sons, equally to be divided between them. And, as to the other fourth, he devised it to his three sons, but in trust only for his two daughters, and, by their approbation, to be put out at interest in the name of his three sons and the interest to be paid to his two daughters respectively during their natural lives and, afterwards, to their or either of their child or children, and, for default of such issue, he devised it to his three sons, equally to be divided between them. One of his daughters leaves

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[1] *Burges v. Burges* (1673-1674), 1 Modern 114, 86 E.R. 773, 1 Chancery Cases 229, 22 E.R. 775, also Pollexfen 40, 86 E.R. 505, Reports *tempore* Finch 91, 23 E.R. 49, 73 Selden Soc. 43; *Duke of Norfolk v. Howard* (1681), *ut supra*.

a son, under whom the plaintiff claimed, and the other dies without issue. The question was whether the son should take the moiety belonging to his aunt, who died without issue, or whether it should go to the three sons. The Master of the Rolls [JEKYLL] decreed the son to take only the moiety belonging to his mother and the other moiety to go to the three sons of Humphry Hide.

Mr. Attorney General [*Willes*] and Mr. *Fazakerley* argued for the plaintiff that the children of the daughters must take by purchase and that the devise, being to the child or children of either of them, any issue of them or either of them was entitled to the whole that was devised that, had the estate, instead of being limited to his two daughters, been limited to two strangers, there could be no doubt but that the surviving child must take the whole and, the two daughters taking only an estate for life, their child or children do not claim through or under them, and, consequently, it is the same as if the devise had been to two strangers and then to the child or children of his two daughters. The testator does not say that they shall take the motives respectively, but he devises it to the child or children of either of them so that, by the plain and necessary construction of the words, nothing could go to the sons if there was a child or children of either of the testator's daughters.

Mr. Solicitor General [*Ryder*], Mr. *Lutwyche*, Mr. *Verney*, and Mr. *Floyer* argued on the other hand for the defendant that the moiety of the daughter who died without issue must go to the three sons, for that there was no doubt but that, by the word 'respectively', the daughters were tenants in common. And the subsequent limitation, being founded on the first devise, must receive the same construction as to the children taking by purchase. This being a personal estate, the testator's intent could not otherwise be fulfilled than by making them take by immediate devise. But that intent was only to provide for his two daughters and their respective issues in the natural order, *viz*. the child or children of one to take what belonged to his or their mother and not what belonged to the other sister, so that this case must be considered as if the testator had devised one moiety to one daughter and her issue and the other to the other and her issue and, for want of such issue, to the sons, where there can be no doubt but that, upon failure of issue of one daughter, her share must have gone over to the sons. But, if the subsequent words should be explained according to the construction insisted on for the plaintiff and that one daughter had died first, both having issue, the moiety of the deceased (whose child or children were never to take during the other's life) must go either to the surviving daughter, which is contrary to the nature of a tenancy in common, or else it must have expected, and been in abeyance until the death of the surviving sister, which is absurd. But, according to our construction, it will go to the issue of the person first dying and, upon failure of such issue, go over to the sons, in which there is no inconvenience. And, if it had happened that one daughter had had but one child and the other several, then either the issue of each daughter must have taken their mother's share respectively according to our construction or all the children must have taken equally *per capita*, which is contrary to the testator's intent.

Lord Chancellor [LORD TALBOT]: The question here is to how much of the testator's estate the plaintiff, claiming under the son of one of the daughters, is entitled. And, in this will, as well as in every other, the testator's intent is to be gathered from the words of the will without either adding or rejecting any which can possibly have any meaning. The testator has here devised his estate to be divided into four parts, three whereof he gives to his three sons and, of those three, the sons are plainly tenants in common. The fourth he has given to his two daughters, but with this difference, that, whereas the sons have the property of their respective shares given them, the daughters have not the absolute property in that share which comes to them, but only the interest, which is to be paid to them respectively during their lives, and by this word 'respectively', they are tenants in common.

The next limitation to the children vests the whole property in them, and they take as purchasers according to Wyld's Case, 6 Co. 16a.[1] But, then, it is contended that they must take respectively as well as their mothers. This I see no reason for, there being no words of division in the devise to them, but the whole is to go over to either of their child or children. And, when a testator has used such plain words to show his intent that, whether there was one or more children, that, in either case, the child or children should take the whole, I cannot add words to make the moiety only to go to his child or children, against the testator's plain intent, which appears from this, that, wherever he intended a tenancy in common, he has expressed it, as by the word ' respectively' in case of the daughters and the words ' equally to be divided' in case of the sons. Nor is there any absurdity in supposing that, if there had been many children of one sister and none of the other, that the children should take the share of her, who left no issue in the mother's lifetime, since his intent was equal and as rational in case there had been many children as but one, as in the present case. But if, on the other hand, after the death of one without issue, the whole was not to go over to the children of the other until their mother's death, the surviving daughter would have an estate for life by implication. And so the absurdity of an abeyance or expectancy will be avoided. Nor does it seem contrary to the testator's intent that his grand-children should take *per capita*, they all being equally related to him. But, as these are only cases that might have happened, I think it not necessary for me to determine how the estate would then have gone. That which has happened is only now in judgment. And, upon the whole, I am of opinion that the testator's intent was that any child of either of his daughters should (in all events) take the whole of this fourth part and no part to go over to his sons until a failure of such issue.

And so he decreed for the plaintiff.

[Other reports of this case: Lincoln's Inn MS. Misc. 384, p. 391, pl. 10, 2 Eq. Ca. Abr. 537, 22 E.R. 453, Cases *tempore* Talbot 30, 25 E.R. 642.]

[Reg. Lib. 1733 A, f. 321.]

30

Hebblethwaite v. Cartwright

(Ch. 1734)

In this case, the marriage settlement in issue created an estate in tail.

21 May [1734].

James Hebblethwaite, upon his marriage with Bridget Cobb, settled his estate to the use of himself for life, remainder to his first and other sons in tail male, remainder to trustees for one thousand years (the trust whereof is afterwards declared), remainder to his brother Charles Hebblethwaite for life, and, after his decease, to the heirs male of his body hereafter to be begotten, and, then, he declares the trust of the term to be that, in case there should be no issue male of the bodies of the said James and Bridget begotten that should live to the age of twenty-one years or be married and have issue and that there should be one or more daughter or daughters of the bodies of the said James and Bridget, that, then, the said daughter or daughters should have, if but one, the sum of £4000 for her portion and, if two or more, the

[1] *Wild's Case* (1599), 6 Coke Rep. 16, 77 E.R. 277, 1 Eq. Cas. Abr. 181, 21 E.R. 973, Gouldsborough 139, 75 E.R. 1050, *sub nom. Richardson v. Yardley*, Moore K.B. 397, 72 E.R. 652.

sum of £5000 equally to be divided between them at their ages of twenty-one or days of marriage, which should first happen, and that, if there should be but one daughter, that, then, she should have the yearly sum of £100 to be paid her half-yearly by equal portions for her maintenance, and, if there should be two or more, then, the sum of £100 to be paid them half-yearly in equal shares until their respective portions should be raised and paid, and, in case the portions were not paid, that, then, the trustees, their executors, etc. should, out of the rents or profits or by mortgage or sale of the premises or any part thereof, during the term, raise and pay the several portions before limited, provided that, if the father should in his lifetime prefer them in marriage with portions equivalent to those herein limited or that, after his death, the remainderman should upon their marriage pay them portions equivalent or that there should be no daughter or daughters who should live to attain the age of twenty-one or be married, that, then, the term should cease and be void. Bridget, the wife, died in her husband's lifetime, leaving no issue male, but only three daughters, who are all unmarried.[1]

Two questions were made: first, what estate Charles Hebblethwaite had; secondly, whether, upon this trust, the daughter's portions were raised in their father's lifetime.

As to the first question, the Lord Chancellor [LORD TALBOT] was clearly of opinion that Charles took an estate tail and that the words ' hereafter to be begotten' do not confine it to the issue born after, but will likewise take in that born before; the words '*procreatis et procreandis*' being of the same import, according to 1 Inst. 20; and 24 Edw. III, pl. 15, where the limitation was *et haeredibus quos ille de corpore procreaverit*, held it should take in the issue born before.[2] And this, he said, was to prevent the great confusion which would otherwise be in descents by setting in the younger before the elder etc.

The precedents in raising daughters' portions have gone both ways, sometimes they have been decreed to be raised in the parents lifetime and, at other times, not, which shows that the raising or not raising must depend upon the particular penning of the trust. In the Case of Brome *versus* Berkeley, Abr. Eq. Ca. 340, 7, the raising of the portion in the mother's lifetime was refused, because the provision of maintenance was not to commence until the death of the jointress, and, consequently, the portion could not be raised until then, for the maintenance must precede the portion, and, if that which was to precede the portion must have waited the jointress's death, it follows clearly that the portion, which was to come after, must do so likewise. And, in that of Corbett *versus* Maidwell, 2 Vern. 640, and Eq. Ca. Abr. 337, 5, it was requisite that the daughter should be unmarried and unprovided for at his decease.[3]

But, here, not only the term is not contingent, but absolutely vested in the trustees, and all the contingencies in the declaration of the trust of the term precedent to the raising the portions have happened, as that of not having issue male, the daughters' marrying or attaining the age of twenty-one, etc. Indeed, during the life of the father and mother, it was contingent by reason of the uncertainty whether there would be any issue male between them, but, immediately upon the mother's death, it became no longer contingent, but absolutely vested by reason of one of the parties death without issue male, which, in this court, is deemed a total failure of issue male between them. The Case of Greaves *versus* Maddison, Ch. Jus. Jo. 201,

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[1] Williams' Note: In Reg. Lib. 1733 A, f. 391, the daughters are stated to be married.

[2] E. Coke, *First Institute* (1628), f. 20; *Bray v. Hastings* (1350), YB Trin. 24 Edw. III, f. 28, pl. 15.

[3] *Brome v. Berkeley* (Ch. 1727-1728), 2 Eq. Cas. Abr. 649, 22 E.R. 545, also 2 Peere Williams 484, 24 E.R. 826, 6 Brown P.C. 108, 2 E.R. 965, 1 Eq. Cas. Abr. 340, 21 E.R. 1088, Chancery Cases *tempore* Geo. I, p. 1238; *Corbet v. Maidwell* (1709-1711), 2 Vernon 640, 655, 23 E.R. 1019, 1027, 1 Eq. Cas. Abr. 337, 21 E.R. 1086, also 3 Chancery Reports 190, 21 E.R. 764, 1 Salkeld 159, 91 E.R. 147, Chan. Cases *tempore* Anne, p. 220.

was a stronger case than this, and was at law;[1] yet, there, the portions were adjudged to be raised in the father's lifetime, though, by the express words of the condition, he was to be dead before the portions were to be raised. But, in our case, the father's death is not at all made part of the condition; it is only said that, if there be no issue male between them, then, the trustees are to raise [it] out of the rents and profits or by sale or mortgage of the premises, etc., without any mention made of the father's death. Nor will the option given to the trustees of raising, either by rents and profits or sale or mortgage of the premises, warrant the conclusion that has been inferred, that James Hebblethwaite's death must necessarily precede, since it is impossible for the trustees to raise the portions out of the rents and profits during his life, for, in deeds, it is usual to put in every way which may be made use of. But it does not from thence follow that the daughters are to wait until the trustees can make their choice which way they will raise their portions. That might be making them wait until their fortunes could be of no service to them. And, though the mortgage or sale is to be during the term which is not to commence in possession until the father's death, yet the portions may well be raised in his lifetime, it being nowhere said that the portions shall not be raised until after such time as the term shall take effect in possession. Indeed, had there been no express authority given to the trustees to sell or mortgage, there might be some difficulty. But, since they have the power of both, they may use that which best suits the interest of the daughters.

The next thing to be considered is the proviso where the term is made void in case the father should in his lifetime prefer the daughters in marriage with portions equivalent with those provided for them by the settlement. The proviso has been objected to prove that the party's design was that the portions might not be raised during the father's lifetime by reason of the power reserved to him of providing for them in his lifetime by portions equivalent. And to prove this has been cited the Case of Corbet *versus* Maidwell. But that case widely differs from the present one, for, there, it was part of the description of the daughter that she should be unmarried and unprovided for at the time of the father's death, which description gave the father time to perform it during his life, for the reasons before mentioned. But we have no such description here, nor can it be thought from the nature of the thing that a second marriage might be intended. A portion upon a second marriage, being not a portion equivalent to that provided by the settlement, it could only be a first marriage that was intended, and, upon that and no other, were the portions to arise, not upon the distant and remote consideration of the second marriage.

And so he decreed the portions to be raised with interest from the mother's death, at which time they first vested.

[Other reports of this case: 2 Eq. Cas. Abr. 395, 22 E.R. 337.]

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[1] *Greaves v. Mattison* (1682), T. Jones 201, 84 E.R. 1216, also Skinner 38, 90 E.R. 19, 1 Eq. Cas. Abr. 336, 21 E.R. 1085.

31

Cooke v. Arnham

(Ch. 1734)

A court will correct a defect in a surrender of land in favor of creditors and younger children who are unprovided for.

Courts will not re-consider unequal shares or divisions of property among siblings that was made by donors.

Upon a rehearing, the case was thus. Robert Cooke, seised in fee of copyhold lands in Lakenham in the County of Norfolk and of several freehold lands, by a will dated 28 April 1710, devised all his messuages and lands, whether freehold or copyhold, to his grandson, Richard Cooke, who was his heir at law, for life, remainder to his first and other sons in tail, remainder to his daughters in tail, remainder to his younger son, the plaintiff, in fee. And he died without making any surrender to the use of his will. Richard, the grandson, died without issue. But, before his death, he surrendered the copyhold lands in Lakenham to the use of his will, whereby he devised them to his mother and her heirs.

The questions were, first, whether the defect of the surrender should be supplied in favor of the plaintiff, not being a child unprovided for but already provided for another way, secondly, whether equity would supply the defect, it being in case of so remote a devise as a remainder upon an estate tail, which is of no (or at least very little) value in the eye of the law, and defects being never supplied where the heir is disinherited. And, here, the heir at law has only an estate for life with a remainder in tail.

It had been decreed at the Rolls against the plaintiff that, this being no present provision intended for him, the defect should not be supplied.

Lord Chancellor [LORD TALBOT]: There never having been any surrender to the use of the will, the legal estate descended to the grandson as heir at law. And, therefore, the single question now is whether this court will supply that defect. The rule is that creditors are entitled to have a defect of a surrender supplied, as are likewise younger children unprovided for, and that from the circumstances of the persons who appear in a favorable light before the court. But the objection here is that the plaintiff does not appear in that favorable light, he being otherwise provided for. As to that, it has been often held here that the father is the sole and only judge of the quantum of the provision and the defect of surrenders has been supplied, even where the copyhold estate intended to pass has made but part of the provision, and so not liable to the objection of leaving the child entirely unprovided for in case the defect was not supplied, for the court has never yet entered into the consideration of the quantum that was proper for each child. And I do not find it insisted on by the counsel that, had the provision been in the same will, and not by any other act in the testator's lifetime, that that would have taken away any equity he might have to get the defect supplied. And, if it would not in that case, why should it in this?

The objection is that this could not be intended as a present provision, being a remainder after several estates tail, which, being so remote, is of little or no value in the eye of the law. But this objection is of no weight, for, suppose the father had but a remainder upon an estate for life, might not he have made a provision out of it for his children? It is true he could not make so good a provision as where he is in actual possession. But it would be a provision still. And, if after one life, why not after three or four? And what difference is there between the cases where the court will supply a defect of a surrender upon a remainder depending on an estate for life and where the whole is devised away or is only a remainder after an estate tail, that is why should it be supplied where the whole is devised away from the heir at law and not

where but part? Here is no intermediate disposal of the estate but to such persons as would have all been entitled to take as heir at law before the plaintiff. So, his intent was that, for so long as his heirs at law continued such as would be so before the plaintiff, that this should be a provision for him, and, when they fail, there is no heir at law to be disinherited, but he becomes heir at law himself. Nor can it be said that there is an heir at law unprovided for, for, though he is made but tenant for life, yet there are limitations to all his issue, who are all to take before the plaintiff.

And so he reversed the decree, and ordered the defect of the surrender to be supplied.

[See] the Case of Burton *versus* Lloyd, in Lord Harcourt's time, said to be in point.[1]

[Other reports of this case: 3 Peere Williams 283, 24 E.R. 1066, 2 Eq. Cas. Abr. 236, 22 E.R. 201, Cases *tempore* Talbot 37, 25 E.R. 647.]

32

Bosanquett v. Dashwood

(Ch. 1734)

A debtor cannot be estopped to plead usury on the grounds of being particeps criminis.

11 November [1734].

The plaintiffs, being assignees under a commission of bankruptcy against the two Cottons, brought their bill against Dashwood, the defendant, as executor of Sir Francis Dashwood, who had in his lifetime lent several sums to the Cottons, the bankrupts, upon bonds bearing £6 *per centum* interest, being the then legal interest, and had taken advantage of their necessitous circumstances, and compelled them to pay at the rate of £10 *per centum*, to which they submitted and entered into other agreements for that purpose and so continued paying £10 *per centum* from the year 1710 to the year 1724.

It was decreed at the Rolls that the defendant should account and that for what had been really lent. Legal interest should be computed and allowed. And what had been paid over and above legal interest should be deducted out of the principal at the time paid. And the plaintiffs [were] to pay what should be due on the account. And, if the testator had received more than was due with legal interest, that was to be refunded by the defendant and the bonds to be delivered up.

Mr. Solicitor General [*Ryder*] and Mr. *Fazakerley* insisted for the defendant that it was hard to inquire into a transaction of so long standing, the parties having on all sides submitted to the agreement, and that *volenti non fit injuria*, which was the reason of the Lord Holt's opinion in the Case of Tomkins *versus* Barnet, 1 Salk. 22, why an action would not lie for recovery of money paid upon an usurious contract, and that the bankrupts, being *particeps criminis*, should have no more advantage here than at law. Nothing was more common than to admit the party, after he had paid the money, to be an evidence in an information upon the Statute of Usury, which shows he is in the eye of the law, after payment, an indifferent person.[2] And [they] compared it to the case of gaming, where, if the loser pays the money and

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[1] *Burton v. Lloyd* (1713), Chan. Cases *tempore* Anne 632.

[2] *Tompkins v. Bernet* (1694), 1 Salkeld 22, 91 E.R. 21, also Skinner 411, 90 E.R. 182; Stat. 7 Geo. I, stat. 1, c. 31.

does not sue for the recovery within the time prescribed by the Act, he is barred. And they cited the Case of Walker *versus* Penry, 2 Vern. 78, 146.[1]

Lord Chancellor [LORD TALBOT]: There is no doubt of the bonds and contracts therein being good. But it is the subsequent agreement upon which the question arises. It is clear that more has been paid than legal interest. That appears from the several letters, which have been read, and which prove an agreement to pay £10 *per centum* and that from Sir Francis Dashwood's receipts. But whether the plaintiffs be entitled to any relief in equity, the money being paid, and those payments agreed to be continued by several letters from the Cottons to Sir Francis Dashwood, wherein are promises to pay off the residue, is now the question.

The only case that has been cited that seems to come up to this is that of Tomkins *versus* Barnet, which proves only that, where the party has paid a sum upon an illegal contract, he shall not recover it upon an action brought by him. And, though a court of equity will not differ from the course of law in the exposition of statutes, yet does it often vary in the remedies given and in the manner of applying them.

The penalties, for instance, given by this Act, are not to be sued for here. Nor could this court decree them. And, though no [action of] *indebitatus assumpsit* will lie in strictness of law for the recovering of money paid upon an usurious contract, yet that is no rule to this court, which will never see a creditor running away with an exorbitant interest beyond what the law allows, though the money has been paid, without relieving the party injured. The Case of Sir Thomas Meers, heard by the Lord Harcourt,[2] is an authority in point, that this court will relieve in cases, which, though perhaps strictly legal, bear hard upon one party. The case was this. Sir Thomas Meers had in some mortgages inserted a covenant that, if the interest was not paid punctually at the day, it should from that time and so from time to time be turned into principal and bear interest; upon a bill filed, the Lord Chancellor relieved the mortgagors against this covenant as unjust and oppressive. So, likewise, is the Case of Broadway,[3] which was first heard at the Rolls and then affirmed by the Lord King, an express authority that, in matters within the jurisdiction of this court, it will relieve, though nothing appears which, strictly speaking, may be called illegal. The reason is because all those cases carry somewhat of fraud with them. I do not mean such a fraud as is properly deceit, but such proceedings as lay a particular burden or hardship upon any man, it being the business of this court to relieve against all offenses against the law of nature and reason. And, if it be so in cases which, strictly speaking, may be called legal, how much more shall it be so, where the covenant or agreement is against an express law, (as in this case) against the Statute of Usury, though the party may have submitted for a time to the terms imposed on him? The payment of the money will not alter the case in a court of equity, for it ought not to have been paid. And the maxim of *volenti non fit injuria* will hold as well in all cases of hard bargains, against which the court relieves, as in this. It is only the corruption of the person making such bargains that is to be considered. It is that only which the Statute has in view. And it is that only which entitles the party oppressed to relief. This answers the objection that was made by the defendant's counsel of the bankrupts' being *particeps criminis*, for, they are oppressed, and their necessities obliged them to submit to those terms. Nor can it be said in any case of oppression that the party oppressed is *particeps criminis*, since it is that very hardship which he labors under and which is imposed on him by another that makes the crime. The case of gamesters, to which this has

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[1] *Walker v. Penry* (1688-1690), 2 Vernon 42, 78, 145, 23 E.R. 537, 660, 700, also Precedents in Chancery 50, 24 E.R. 25, 1 Eq. Cas. Abr. 288, 21 E.R. 1051.

[2] *Meers v. Lord Stourton* (1711), Chan. Repts. *tempore* Anne 364, 1 Peere Williams 146, 24 E.R. 332.

[3] *Broadway v. Morecraft* (1729), Mosely 247, 25 E.R. 377.

been compared, is no way parallel, for, there, both parties are criminal. And, if two persons will sit down and endeavour to ruin one another and one pays the money if, after payment, he cannot recover it at law, I do not see that a court of equity has anything to do but to stand neuter, there being in that case no oppression upon one party, as there is in this.

Another difficulty was made as to the refunding. But is not that a common direction in all cases where securities are sought to be redeemed, that, if the party has been overpaid, he shall refund? Must he keep money that he has no right to merely because he got it into his hands? I do not determine how it would be if all the securities were delivered up; this is not now before me. I only determine what is now before the court. And it is the common direction in all cases where securities are sought to be redeemed.

And so he affirmed the decree etc.

[Other reports of this case: 2 Eq. Cas. Abr. 7, 58, 246, 534, 22 E.R. 6, 51, 209, 450, Cases *tempore* Talbot 41, 25 E.R. 650.]

[Later proceedings in this litigation: Bosanquet v. Earl of Westmoreland (1738), West *tempore* Hardwicke 598, 25 E.R. 1104.]

33

Penne v. Peacock

(Ch. 1734)

Allegations of fraud must be proved by some evidence.

The operations of fines and recoveries is the same upon trust estates as upon legal estates.

12 November [1734].

The defendant, Jane Peacock, before her marriage, conveyed (with her now husband's privity) the premises to trustees in trust to pay the rents and profits to her sole and separate use for her life and, after her decease, in trust for such uses as she, whether unmarried or married, should by her last will limit and appoint and, for want of such appointment, then, to her own right heirs forever. She, afterwards, marries the defendant, who mortgages part of the lands to the plaintiff for £1000 for a term of five hundred years. And, then, a fine is levied by the husband and wife, who both declared the uses of the fine as to the mortgaged premises to be to the plaintiff for securing the principal and interest.

The wife, by order of the court, answered separately, and insisted in her answer that she had been forced to join in the fine by duress, insinuating the mortgage to be fictitious and in trust for the husband in order to defraud her. She further insisted that there was no power reserved to her in the indenture of bargain and sale to dispose of her real estate or any part thereof but by her last will [and] that she had no estate in the premises, but that the fine and mortgage were both void.

It was insisted for the defendant that, the legal estate being in the trustees, the parties to the fine had not such an estate in them whereof a fine could be levied to bar the wife's right and that this, being a mere naked power without any interest, could not be barred by the fine, but remained still in the wife by force of the first conveyance.

Lord Chancellor [LORD TALBOT]: The suggestions of duress and fraud in the defendant's answer do not appear upon the proofs, although it must be confessed that the reserving the equity of redemption to the husband and his heirs, without any mention made of the wife, looks a little suspicious. But, as the fraud is not made out to the satisfaction of the court, it is needless to determine how far so solemn an act as a fine might be affected by it.

The next objection is that the legal estate being in the trustees, the husband and wife had not such an estate in the land whereof a fine could be levied to bar the wife's right. But, as to that, it is very well known that the operations of fines and recoveries is the same upon trust estates as upon legal estates. And, if so, it must inevitably follow that an estate for life limited to the wife and the remainder limited to her own right heirs in default of any appointment made by her last will are both disposed of by the fine. And, if no such remainder had been limited by it, as the estate was the wife's own and moved originally from her, whatever was not conveyed would have remained in her, and, consequently, been barred. This answers the objection of its being a naked power or a power in gross, and so not barred by the fine, for, how can that be called a naked power, which is to operate and take effect on the party's own estate? It is certainly a power coupled with an interest and annexed to her inheritance and so destroyed by the fine, since that a lease and release or any other conveyance will carry with them all powers that are joined to the estate. So, a feoffment to the use of her last will or the surrender of a copyhold to the use of one's last will do still leave a power in the feoffor or surrenderor to dispose of their estate by a new feoffment or surrender.

And so he decreed the trustees to convey to the plaintiffs, the mortgagees, but without prejudice to any future bill that might be brought for discovery of the fraud or force.

For the defendant, was cited the Case of Blackwood *versus* Norris, heard some time ago at the Rolls, where the Lady Shovell had devised £4000 in trust for the separate use of a married woman, and, upon a bill brought by the husband and wife against the trustees, though the wife was herself in court and consented that the money should be paid to her husband, yet the Master of the Rolls would not decree it, but dismissed the bill.[1]

N.B. This was the case only of a personalty.

[Other reports of this case: 2 Eq. Cas. Abr. 136, 22 E.R. 116.]

[Reg. Lib. 1734 A, f. 42.]

34

Hopkins v. Hopkins
(Part 1)

(Ch. 1734)

In this case, the legal estate devised to the trustees was sufficient to support some of the contingent remainders in issue.

Where there are demands made against an estate, if the trustee and the first person who has a vested estate of inheritance are brought before the court, the decree will be binding on all persons.

No equitable estate can be acquired by disseisin, abatement, intrusion, or bare pernancy of the profits.

10 November [1734].

The testator, Mr. Hopkins, by his will, devises his real estate to trustees and their heirs to the use of them and their heirs in trust for Samuel Hopkins, the plaintiff's only son, which plaintiff is heir at law to the testator, for life and, from and after his decease, in trust for the first and every other son of the body of the said Samuel, lawfully to be begotten, and the heirs male of the body of every such son, and, for want of such issue, in case the said John Hopkins,

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[1] *Blackwood v. Norris*, 2 Eq. Cas. Abr. 147, 22 E.R. 126.

the plaintiff, should have any other son or sons of his body lawfully begotten, then, in trust for all and every such son and sons respectively and successively for their respective lives with the like remainders to their several sons with the like, remainders to the heirs male of the body of every such son, as before limited to the issue male of the said Samuel Hopkins, and, for want of such issue, in trust for the first and every other son of the body of Sarah, the said John Hopkins's eldest daughter, lawfully to be begotten, with like remainders to the sons of John Hopkins's other daughters, and, for want of such issue, then, in trust for the first and every other son of his cousin Anne Dare (wife of Francis Dare) lawfully to be begotten with like remainders to the heirs male of the body of every such son of the said Anne Dare and, for default of such issue, then, in trust for his own right heirs forever. Then come two provisoes, the one, whereby every person that should come into possession of his estate was to take his name and hear his arms, the other is in these words:

> provided also, and it is my will, that none of the persons to whom the said estates are hereby limited for life shall be in the actual possession thereof, and in the enjoyment of the rents and profits or of any greater or other part thereof than as hereinafter is mentioned until he or they shall have respectively attained his or their ages of twenty-one years and, in the meantime and until his or their attaining to such age, my trustees and their heirs and executors shall make such allowances thereout for the handsome and liberal maintenance and education of such person and persons respectively as they shall think suitable and agreeable to his estate and fortune, and it is my will that the overplus of the said rents and profits, over and above the annual allowances or such part thereof as shall remain after all my debts, legacies, and funeral expenses shall be first paid (with the payment whereof I have charged my real estate, in case my personal estate shall not be sufficient for those purposes), do go to such persons as shall first be entitled unto or come into the actual possession of my said real estate according to this my will.

Samuel Hopkins died in the testator's lifetime without issue. And sometime after, the testator died without any alteration made of his will, nor had John Hopkins any other son, nor were any of the other remaindermen *in esse* at the testator's death, except [*blank*] Dare, son of Ann Dare.

The first question was whether, by Samuel's death in the testator's lifetime, the several limitations between him and Dare were not become void, there being no particular estate to support them as remainders, by reason of Samuel's death in the testator's lifetime, who was to take the first estate, nor nobody capable of taking at the testator's death but the son of Anne Dare, who, thereby, claimed the whole interest presently, or whether these intermediate limitations should not enure by way of executory devise to any other son he might hereafter have.

The second question was, in case the limitation to the other sons of John Hopkins was to be looked upon as an executory devise, what should become of the rents and profits in the meantime.

The cause was first heard at the Rolls, and there [it was] decreed to be an executory devise.

Mr. Serjeant *Earle* and Mr. *Peere Williams* argued that, the consideration of trust and legal estates being the same, this limitation to the other sons of John Hopkins was to be taken to be a remainder, and could not enure, the rule of law being never to construe that an executory devise which may enure as a contingent remainder. They agreed to the difference between deeds and wills, that, in the former, the first estate must be good, otherwise, all the remainders depending thereon are void and can never arise, but, in the latter, the first estate may be void, and yet the remainders take place, as in 2 Ro. Ab. 415, pl. 6, 7; Plow. 414a;

Croke El. 423; 2 Vern. 722.[1] But they insisted that devises of real estates were to relate to the time of the making the will, as if one devises all the land he has or shall have at his decease, yet no after-purchased land shall pass, but such only as he had at the time of the will made and that what was a limitation by way of remainder at the time of the will made could not by any subsequent accident become an executory devise, 1 Salk. 237; 1 Sid. 3; 2 Ro. Abr. 418; 2 Saund. 380, 388; 1 Salk. 226; and that this, being to arise after an estate tail, was too remote, the law not allowing of executory devises to arise after an estate tail.[2]

Mr. Attorney General [*Willes*], Mr. Solicitor General [*Ryder*], Mr. *Verney*, Mr. *Fazakerley*, Mr. *Bootle*, and Mr. *Strange* argued, on the other hand, that, Samuel being dead without issue in the testator's lifetime, this limitation to the other sons of John Hopkins should enure by way of executory devise. They observed that executory devises were not of a very long standing, yet that they are of the same nature with another thing which is very ancient, which is springing uses, which are as old as uses themselves. And, if at common law such things were allowed, it was very well done of the judges to admit of executory devises to carry into execution as far as possible the intent of the testator. The testator's intent is clear in this case, that the first and every other son of John Hopkins should take, and that this intent may be carried into execution is likewise clear. Indeed, as a contingent remainder, it can never take effect, because remainders must take place *eo instanti* the particular estates determine. But, in order to prevent that inconvenience, other ways have been found out to support wills. And the Lord Hobart commends the judges for being *astuti* to serve the party's intent.

The rule laid down on the other side, that a limitation which may enure as a remainder shall never be construed to be an executory devise, is true. But that is only a supposal that the party's intent was that things should go according to the ordinary forms. But, where they cannot, there, extraordinary methods are used to serve the intent. And it is impossible to find out any set of words more proper to make an executory devise than those used here. Nothing but the intervening estate to Samuel can make any difficulty. And that is answered by the cases put on the other side, 2 Ro. Abr. 415, of a devise to A. for life, remainder to B. and of a devise to a monk, remainder over; A. dies in the testator's lifetime; B. shall take by way of executory devise, and, in the latter case, immediately upon the testator's death, the remainderman shall take; and yet, if either A. had outlived the testator or the monk been

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[1] *Farington v. Darl*[*ington*] (1431), YB Trin. 9 Hen. VI, f. 23, pl. 19, 2 Rolle, Abr., *Remainder*, pl. C, 6, 7, p. 415; *Newis v. Lark* (1571), 2 Plowden 403, 75 E.R. 609; *Fuller v. Fuller* (1595), Croke Eliz. 422, 78 E.R. 664, also Moore K.B. 353, 72 E.R. 624, 1 Eq. Cas. Abr. 216, 407, 21 E.R. 1000, 1137, 139 Selden Soc. 827; *Hutton v. Simpson* (1716), 2 Vernon 722, 23 E.R. 1074, also 1 Eq. Cas. Abr. 7, 196, 216, 407, 21 E.R. 832, 985, 1000, 1137, *sub nom. Sympson v. Hornsby*, Precedents in Chancery 439, 452, 24 E.R. 196, 202, 2 Eq. Cas. Abr. 439, 496, 660, 22 E.R. 374, 420, 554, Gilbert Rep. 115, 120, 25 E.R. 80, 84, Chan. Cases *tempore* Geo. I, p. 211.

[2] *Bunter v. Coke* (1707), 1 Salkeld 237, 91 E.R. 210, also Holt K.B. 248, 746, 90 E.R. 1036, 1310, 3 Brown P.C. 19, 1 E.R. 1149, Fitz-Gibbons 225, 94 E.R. 730, 11 Modern 106, 121, 88 E.R. 929, 940, 1 Eq. Cas. Abr. 174, 21 E.R. 968, 2 Eq. Cas. Abr. 295, 22 E.R. 248; *Anonymous* (1660), 1 Siderfin 3, 82 E.R. 935; 2 Rolle, Abr., *Remainder*, p. 418; *Purefoy v. Rogers* (1671), 2 Williams Saunders 380, 85 E.R. 1181, also 2 Levinz 39, 83 E.R. 443, 3 Keble 11, 84 E.R. 566 , 1 Eq. Cas. Abr. 189, 21 E.R. 980, Lincoln's Inn MS. Misc. 500, ff. 192, 194b; *Goodright v. Cornish* (1694), 1 Salkeld 226, 91 E.R. 200, also 4 Modern 255, 87 E.R. 380, 12 Modern 52, 88 E.R. 1159, Skinner 408, 90 E.R. 181, Holt K.B. 227, 90 E.R. 1024, 1 Lord Raymond 3, 91 E.R. 898, Comberbach 254, 90 E.R. 461, 1 Eq. Cas. Abr. 189, 21 E.R. 980, 2 Eq. Cas. Abr. 337, 22 E.R. 287.

deraigned in the testator's lifetime, in both cases, the second limitation must have been a remainder.[1]

So, in this case, the estate to Samuel never having taken effect, it must enure by way of executory devise to the first and every other son of John Hopkins; whereas, had Samuel outlived the testator, the limitation had been a remainder. The case in 1 Sid. 3, widely differs from this, for that was upon a settlement, which is complete upon the execution of it, whereas a will is ambulatory until death. Nor can any better comparison be drawn between this and the other cases that have been put, which are of contingent remainders, and so quite foreign to executory devises. And, in that of Purefoy *versus* Rogers, 2 Saund. 380, 388, the particular estate was existing after the testator's death, which, consequently, supported the remainder.[2] And so it plainly differs from this case, where there is no particular estate in being. But Croke Eliz. 878 is a strong authority for the construction now desired, for, there, the devise was of lands to J. from Michaelmas following, remainder over in fee; the testator died before Michaelmas; it was held by the court to be a good executory devise, for a remainder it could not be, because it could not begin until the particular estate did, which was not to commence until Michaelmas after and a freehold cannot be in expectancy; it was therefore held that the freehold should in the meantime descend to the heir at law, and vest in him, but, if, in that case, the testator had lived to Michaelmas, then, it had been a good remainder.[3]

And, if an executory devise may by a subsequent accident become good as such, especially where the testator's intent is clear that it should (which was the reason of the resolution in the Case of Higgins *versus* Dowler, 2 Vern. 600, where the limitation to the daughter was allowed to be good, there being no son to take; so, a devise to two and their heirs, one dies in the life of the testator, the survivor shall take the whole, 1 Salk. 238).[4] And, if courts of law do, much more will courts of equity mould the words so as to let in those whom the testator intended to take.

Nor will the objection hold that has been made on the other side, *viz*. that this, being to take effect after an estate tail, is too remote, and can never arise, for, here, can never be any estate tail before this executory devise is to arise, Samuel being dead without issue. Nor is there any danger of a perpetuity; the longest time that this can subsist as an executory devise being only until the birth of a son to a person *in esse*, which is but nine months, whereas, in the Case of Floyd *versus* Carey, in the House of Lords, twelve months were allowed to be a reasonable time, and, in that of Massenburgh *versus* Ash, 1 Vern. 234, 257, 304, twenty-one years were held to be good. And, where there is no danger of a perpetuity, it is just that executory devises should be carried as far as may be to serve the intent of the party. This court went a great way in that Case of Massenburgh *versus* Ash. And, though the courts at law would not at first allow any executory devise to arise after the compass of a life or lives wearing out together, as appears by the Case of Scattergood *versus* Edge (1 Eq. Cas. Abr. 189, pl. 14, 15), 1 Salk. 229, yet that of Floyd *versus* Carey, being subsequent to that and in the House of Lords, has led the courts of law into carrying them as far as this court does. The Case of Lord Glenorchy *versus* Bosville is another strong authority, where the words were determined to carry an estate tail, but the trusts being executory and the intent of the parties clearly otherwise, they were

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[1] *Farington v. Darl*[*ington*] (1431), *ut supra*.

[2] *Purefoy v. Rogers* (1671), *ut supra*

[3] *Payne v. Ferrall* (1602), Croke Eliz. 878, 78 E.R. 1103, also Noy 43, 74 E.R. 1012.

[4] *Higgins v. Dowler* (1707), 2 Vernon 600, 23 E.R. 992, also 1 Peere Williams 98, 24 E.R. 311, sub nom. *Higgins v. Derby*, 1 Salkeld 156, 91 E.R. 145, Chan. Cases *tempore* Anne 110.

restrained, and decreed to carry but an estate for life with a remainder to the first and other sons etc.[1]

Lord Chancellor [LORD TALBOT]: Two questions have been made upon this will; the first is whether this limitation to the first and every other son of John Hopkins can now take effect as an executory devise or whether it shall be taken as a contingent remainder and, consequently, void for want of a particular estate to support it by reason of Samuel's death in the testator's lifetime and that John Hopkins had no son *in esse* at the testator's death, in whom the remainder might vest; the next question is, in case the limitation be taken as an executory devise, what is to become of the rents and profits of this estate until John Hopkins has a son.

As to the first, I think it impossible to cite any authorities in point. None have been cited. It seems to be allowed that, if things had stood at the testator's death as they did at the time of the making of the will, the limitation in question would have been a remainder by reason of Samuel's estate, which would have supported it. So is the Case of Purefoy *versus* Rogers, 2 Saund. 380, 388. And limitations of this kind are never construed to be executory devises but where they cannot take effect as remainders. So, on the other hand, it is likewise clear that, had there been no such limitation to Samuel and his sons, the limitation must have been a good executory devise, there being no antecedent estate to support it, and, consequently, not able to enure as a remainder, so that it must be the intervening accident of Samuel's death in the testator's lifetime, upon which this point must depend. And, as to that, I am of opinion that the time of making the will is principally to be regarded in respect to the testator's intent. If an infant or married woman make a will and do not act either at full age or after the coverture determined to revoke this will, yet the will is void, because the time of making is principally to be considered and the law judges them incapable of disposing by will at those times. The same reason holds in the case of a devise of all the lands which a man has or shall have at the time of his death; no after-purchased lands shall pass without a re-publication, which was the Case of Bunter *versus* Cook, 1 Salk. 237, because the time of the will made is chiefly to be regarded. Indeed, it is possible that subsequent things may happen to alter the testator's intent, but, unless that alteration be declared, no court can take notice of his private intent not manifested by any revocation of the former, though these subsequent accidents may and must in many cases have an operation upon the will, as in the Case of Fuller *versus* Fuller, Croke Eliz. 422; and Hutton and Simpson, 2 Vern. 722. And, in the Lord Lansdown's Case, the first limitation did not expire by effluxion of time, but by the intervening alteration of things between the time of the will was made and the testator's death and the words there, for want of such were not construed to create another estate tail to postpone the limitation, but only to convert the second estate to the precedent limitation.[2] So we see that, in these cases, the method of the courts is not to set aside the intent, because it cannot take effect so fully as the testator desired, but to let it work as far as it can.

And, if, in this case, we consider it as an executory devise, the intent will be served in case John Hopkins has a second son. But, if it is taken as a remainder, the intent, plainly

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[1] *Floyd v. Cary* (1697), 2 Freeman 218, 22 E.R. 1170, also Shower P.C. 137, 1 E.R. 93, Precedents in Chancery 72, 106, 24 E.R. 35, 51, 1 Comyns 20, 92 E.R. 938, 1 Eq. Cas. Abr. 260, 21 E.R. 1032; *Massenburgh v. Ash* (1684), 1 Vernon 234, 257, 304, 23 E.R. 437, 453, 485, 2 Chancery Reports 275, 21 E.R. 677; *Scatterwood v. Edge* (1697-1700), 1 Salkeld 229, 91 E.R. 203, also 12 Modern 278, 88 E.R. 1320, 1 Eq. Cas. Abr. 189, 21 E.R. 980, 2 Eq. Cas. Abr. 337, 22 E.R. 287, King's Inn Dublin MS. 92, p. 1; *Lord Glenorchy v. Bosville* (1733), see above, Case Nos. 19, 26.

[2] *Bunter v. Coke* (1707), *ut supra*; *Fuller v. Fuller* (1595), *ut supra*; *Hutton v. Simpson* (1716), *ut supra*; *Penphrase v. Lord Lansdown* (1712), 10 Modern 96, 88 E.R. 642, 1 Comyns 384, 92 E.R. 1122, 2 Eq. Cas. Abr. 769, 22 E.R. 653.

appearing that a second son of John Hopkins should take, is quite destroyed, there being no precedent estate to support it as a remainder. The very being of executory devises shows a strong inclination, both in the courts of law and equity, to support the testator's intent as far as possible. And, though they be not of ancient date, yet they are of the same nature with springing uses, which are as old as uses themselves. I can see no difference between this case and the others of like nature that have been adjudged. And if such a construction may be made consistently with the rules of law and agreeable to the testator's intent, it would be very hard not to suffer it to prevail. In Pay's Case, Croke Eliz. 878,[1] had the testator lived to Michaelmas, the limitation had been a remainder, and, if a remainder in its first creation does by any subsequent accident become an executory devise, why should it not be good here upon the authority of that case, where, by the testator's death before Michaelmas, what would otherwise have been a remainder was held to be good by way of executory devise? I think that, in this case, the limitation would operate as an executory devise if it was of a legal estate, and, therefore, shall do so as a trust, the rules being the same.

The next question is what is to become of the rents and profits in case this be taken to be an executory devise until the birth of a son to John Hopkins. And this must depend upon the wording of the proviso. The words are that none of the persons to whom the estates are limited shall be in the actual possession and enjoyment of the rents and profits until they shall respectively attain the age of twenty-one and that, in the meantime, the trustees shall make such allowance thereout as they shall think suitable. And, then, he wills that the overplus of such rents and profits do go to such persons as shall be entitled unto and come to the actual possession of his estate etc. By which words, none are affected but such as are to come to the estate under the limitations. It restrains them from having anything to do with the estate until they attain the age of twenty-one, and provides the surplus (beyond their allowance) to be laid up for them.

But, here, is no provision made what shall become of those rents and profits until a son be born. The words ' in the meantime' have been differently construed. And it was said that there was no certain *terminus a quo* from whence they should begin. Had Samuel lived, the *terminus* must have been from the time of the limitation taking place. And so it must be *toties quoties* any come to be entitled to this estate under the several limitation. But, until somebody is *in esse* to take under this executory devise, the rents and profits must be looked upon as a residue undisposed of, and, consequently, must descend upon the heir at law, the case being the same where the whole legal estate is given to the trustees and but part of the trust disposed of, as in this case, and where but part of the legal estate is given away. And, so, the residue undisposed of, the legal estate descends upon the heir at law. So it was held by the Lord King in the Case of Lord and Lady Hertford *versus* Lord Weymouth [Michaelmas term 1734], which shows that equity follows the law.

One objection, indeed, has been made, which is that the testator, having in this case devised another estate to John Hopkins, his heir at law, can never be supposed to have intended him this surplus. And to warrant that objection, the Case of North and Crompton, 1 Chan. Ca. 196, has been cited.[2]

I answer that, in these cases, the heir does not take by reason of the testator's intent being one way or the other, but the law throws it upon him. And, wherever the testator has not disposed (be his intent that the heir should take or not take), yet still he shall take, for somebody must take, and, none being appointed by the testator, the law throws it upon the heir.

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[1] *Payne v. Ferrall* (1602), *ut supra*.

[2] *North v. Crompton* (1671), 1 Chancery Cases 196, 22 E.R. 759, also 1 Eq. Cas. Abr. 272, 21 E.R. 1040, Chan. Repts. (1660-1673), p. 569.

And so he affirmed the decree, and ordered the personal estate, which was of very great value, to be laid out in land and settled to the same uses as the real estate, according to the direction of the will.[1]

35

Lutkins v. Leigh

(Ch. 1734)

Where a testator leaves his real estate charged with his legacies and debts, the legatees and simple contract creditors have a right to stand in the place of bond creditors where the personal estate is insufficient.

Benjamin Knight, having mortgaged his freehold lands to Mr. Ainscomb for securing the sum of £2500 in 1729, made his will in these words:

> As touching my worldly estate, after payment of my debts and funeral charges, which I will to be first paid, I give my freehold estate in Kent to my wife for life, chargeable with an annuity of £30 for life to Elizabeth Knight.

And, after his wife's death, he devises his said freehold estate, so charged, to the children of his three sisters, and he directs the residue of his personal estate to be placed out at interest, his wife to have the interest during her life and, after her death, to be divided among the children of his three sisters, and he gave his wife £1500 with a proviso that the devises and bequests in the will should be accepted by the wife in lieu of her dower and in full satisfaction of her share of the personal estate.

The question was whether the personal estate should be applied in exoneration of the real so as to defeat the pecuniary legatees, there not being sufficient [assets] to pay the £1500 in case the personal estate should be applied in exoneration of the real.

Mr. Attorney General [*Willes*] insisted for the widow that this legacy was to be looked upon as a charge upon the real estate, according to the Lord Warrington's Case. And he said it was a great while before this court would favor the devisee of land, being but *haeres factus*, so far as to entitle him to have the personal estate applied in exoneration of the real. 1 Chan. Ca. 271 and 2 Vern. 477, where it is said that an express devise shall not be defeated, even for an heir, much less for a devisee of land, who is but *haeres factus*.[2]

Lord Chancellor [LORD TALBOT]: This point has been so far determined that it seems quite settled and clear. Where a man leaves his real estate charged, the legatees and simple contract creditors have a right to stand in the room of bond creditors if these latter run away with the personal estate, and this is in order to do justice both to the testator's intent and, likewise, to the creditors. Indeed, where the contest is between the heir and executor and there is either a mortgage or bond wherein the heir is bound, the heir shall always prevail to have the personal estate applied. But that is only where no prejudice is done either to a simple contract creditor or a legatee. And, had there been no devise of the land in this case, the widow

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[1] For later proceedings in this case, see below, Case No. 96.

[2] *Earl of Warrington v. Leigh* (1732), see above, Case No. 3; *Cornish v. Mew* (1676), 1 Chancery Cases 271, 22 E.R. 796, also Reports *tempore* Finch 220, 23 E.R. 121, 1 Eq. Cas. Abr. 117, 21 E.R. 923; *Hawes v. Warner* (1704), 2 Vernon 477, 23 E.R. 906, also 3 Chancery Reports 206, 21 E.R. 768, 2 Freeman 27, 22 E.R. 1208, 1 Eq. Cas. Abr. 106, 21 E.R. 914.

and the other legatees would have had a right to apply to this court and to stand in the room of the mortgagee if he fell upon the personal estate, that being the proper fund for their legacies, and to have so much of the real estate as he had out of the personal. But, here, the real estate is devised away, which gives the legatees rather a stronger claim than when they have to do with an heir at law, since it was a long time before a devisee could prevail with this court to have the personal estate applied in exoneration of the real, as appears from many ancient cases, which distinguish in that case between a devisee and an heir at law, though, at last, he has prevailed where there is no damage done to a third person. But it has been endeavored here to put him in a better condition than the heir. And to that end has been cited 1 Salk. 416. There is a great difference between that case and this, for a bond affects not the real estate in the testator's hands, nor did it the devisee until the Statute of Fraudulent Devises,[1] nor, before the Statute, did it affect the heir if he had aliened before the writ was brought. But, in the case of a mortgage, that is a lien upon the land, both in the hands of the testator and the devisees, and in whose hand soever the land comes. Thus, the court has gone as far as is reasonable, *viz*. to put the *haeres factus* in as good a plight as the *haeres natus*, but not in a better. So, the legatees must have the legacies out of the personal estate in case the mortgagee keeps to the real. And, if he falls upon the personal, they have a right to stand in his room for so much out of the real estate as he shall take out of the personal, that being a proper fund for their payment.

36

Sabbarton v. Sabbarton

(Ch. 1734)

A limitation over of a personalty after an estate tail is void.

22 November [1734].

Joseph Sabbarton, being seised of a real estate and possessed of a personal estate in Bank stock and Orphans stock, by a will dated 21 April 1710, devised his real estate and stock to trustees and their heirs, executors, etc. in trust to pay the rents and profits to Catherine Corr for life, and, if she married Benjamin Sabbarton, then, in trust, after her decease to pay the rents and profits to him for life, and, after both their deaths, in trust to the first and every other son of them two in tail male and, for want of such issue, to their daughters, equally to be divided between them, and, for want of such issue, then, in trust for the issue male or female of the survivor of them, equally to be divided between them, and, in default of issue of the said marriage, then, in trust for the issue of the survivor of them and, if neither of them leave issue, then, in trust for his sister, Sarah Kidwell, for life, and, after her decease, to the use of all and every the child and children of his brother, John Sabbarton, who shall be living at his death or his wife shall be *enceinte* of and shall attain the age of twenty-one, and to the heirs, executors, administrators, and assigns of such child or children, share and share alike, as they shall respectively attain their ages of twenty-one and, in default of such children etc., then to his own right heirs.

Benjamin and Catherine intermarried, but had no issue between them. Catherine survived, but had no issue, and she devised to the defendant. The question was between the plaintiff, who was a child to John Sabbarton, and the defendant, who claimed under the devise of Catherine,

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[1] *Herne v. Meyrick* (1712), 2 Salkeld 416, 91 E.R. 362, also 1 Peere Williams 201, 24 E.R. 355, 1 Eq. Cas. Abr. 143, 21 E.R. 944, Chan. Cases *tempore* Anne 507; Stat. 3 Will. & Mar., c. 14 (*SR*, VI, 320-321).

whether the limitation of the personal estate to Benjamin and Catherine and the issue of the survivor of them did not create an estate tail in Catherine, who survived, and, consequently, the limitation over of a personalty after an estate tail void.

Mr. Solicitor General [*Ryder*], for the plaintiff, cited the Case of Atkinson and Hutchinson,[1] heard the second of May last, where the devise was to trustees in trust for his wife so long as she should remain unmarried, then, in trust for such child and children as he should leave at his death, equally to be divided between them, and, if either of them die without issue, then, his share to go to the survivor and, if both die without issue, then, in trust for the defendant Hutchinson. He left two daughters, who both died without issue under age. And, there, the words 'dying without issue' were held to be issue living at the death, and so the limitation to Hutchinson was allowed to be good. So, in the Case of Donne *versus* Merrefield, heard at the Rolls the 22d of October 1730, where the devise was to his brother John for life, then, to such person as he should marry for her jointure and, after her death, to the heirs of the body of his brother John and the executors, administrators, and assigns of such heirs during the residue of the term and, for default of such issue of his brother John, then, to Henry Donne. This limitation to Henry was held good, the words being taken to be heirs living at his death. Forth *versus* Chapman, heard by the Lord Macclesfield; Higgins *versus* Dowler, 2 Vern. 600.[2]

Lord Chancellor [LORD TALBOT]: I do not see how it is possible to maintain this limitation to the children of John Sabbarton. Executory devises are favored in order to support the parties' intent, but, still, they must not exceed the rules. The compass of a life is held to be a reasonable time for a contingency to happen in. So, in the Case of Massenburgh *versus* Ash, 1 Vern. 234, 257, 304, twenty-one years after a life were held to be a reasonable time. But a contingency to arise after the determination of an estate tail is too remote, so that the question must be here whether the words mean a general failure of issue or such a failure as is to happen within the compass of a life. The real and personal estates are both devised to the same trustees, and the limitations are the same. The estates are first limited to Benjamin and Catherine for their lives, remainder to their first and other sons, remainder to the daughters and, for want of such issue, then, in trust for the issue male or female of the survivor, which latter words do clearly make an estate tail, according to King and Melling's Case, 1 Vent. 214, 225, they taking in both sons and daughters and grandchildren *in infinitum*.[3]

It has been endeavored to confine this limitation to the issue living at the death of the survivor, but it can never be imagined that these limitations to John Sabbarton's children were intended to take effect before the determination of the former, and they plainly carry an estate tail; these latter must be void. It has been also objected that the words 'leave issue' must be construed issue living at the death. But, still, we must remember that this is a complicated devise, both of the real and personal estate, and, in the case of the real, this limitation to the

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[1] *Atkinson v. Hutchinson* (1734), 3 Peere Williams 258, 24 E.R. 1053, 2 Eq. Cas. Abr. 294, 317, 22 E.R. 247, 270.

[2] *Donne v. Merrifield* (1730), 4 Viner, Abr. 222; *Forth v. Chapman* (1720), 1 Peere Williams 663, 24 E.R. 559, 2 Eq. Cas. Abr. 292, 359, 22 E.R. 245, 306, Chan. Cases *tempore* Geo. I, p. 660; *Higgins v. Dowler* (1707), 2 Vernon 600, 23 E.R. 992, also *sub nom. Higgins v. Derby*, 1 Salkeld 156, 91 E.R. 145, 1 Peere Williams 98, 24 E.R. 311, Chan. Cases *tempore* Anne 110.

[3] *Massenburgh v. Ash* (1684), 1 Vernon 234, 257, 304, 23 E.R. 437, 453, 485, 2 Chancery Reports 275, 21 E.R. 677; *King v. Melling* (1672), 1 Ventris 214, 225, 86 E.R. 144, 151, also 2 Levinz 58, 83 E.R. 448, 3 Keble 42, 52, 95, 84 E.R. 584, 589, 614, Pollexfen 101, 86 E.R. 526, 3 Salkeld 296, 91 E.R. 835, 1 Eq. Cas. Abr. 181, 21 E.R. 973.

issue of the survivor makes Benjamin and Catherine tenants in tail. And the personal estate, being intended to go and be limited in the same manner as the real, must likewise be an estate tail. And, so, the limitations of it after that void, the word 'leave' being only to connect the clauses and show what is to become of the estate after the determination of the former limitation. The words in the Case of Forth and Chapman were different, and carried an intent in the testator different from the intent in this case. In that of Atkinson *versus* Hutchinson, there was no precedent limitation in tail, as there is here. And, in the other of Donne *versus* Merrefield, the contingency of the brother's having issue was to arise within the compass of a life, and there were no words carrying a general failure of issue by reason of the words 'executors, administrators, and assigns', which restrained the word 'heirs' to immediate heirs, and, that contingency never happening, the limitation over was allowed to be good.

And so he dismissed the plaintiff's bill etc.

[Other reports of this case: Cases *tempore* Talbot 245, 25 E.R. 759, Andrews 333, 95 E.R. 422, Cases *tempore* Hardwicke 413, 95 E.R. 265, 2 Eq. Cas. Abr. 349, 22 E.R. 297, Lincoln's Inn MS. Misc. 384, p. 511.]

[Reg. Lib. 1734 B, f. 45.]

37

Lord Raymond's Case

(Ch. 1734)

It is contempt of court to marry a ward of the court without the court's direction.

Upon a petition to the Lord Chancellor [LORD TALBOT], the defendants set forth that the late Lord Raymond had by his will appointed them guardians to the present lord, his only child, and trustees of his estate until he should come to age, that the plaintiff was but seventeen years old, and was seduced by Mr. Chetwynd in order to marry his daughter, Mrs. Mary Chetwynd, who was much inferior to him in family and fortune, that it would be a great disadvantage to the plaintiff to marry at this time by reason of his tender age and want of education, that the plaintiff had contracted such an acquaintance with the lady, that the defendants had been forced to keep him close in their custody for some time to prevent their marrying, wherefore they (in general terms) prayed the assistance of this court and that His Lordship would give such directions as to him should seem proper.

The petition was supported by an affidavit, setting forth Mr. Chetwynd's proceedings. And there was also an affidavit of Mr. Chetwynd, showing that he did not give the plaintiff any encouragement, but that, upon solicitation and after he had been twice with the defendants about it, he had consented to the intended marriage.

Lord Chancellor [LORD TALBOT]: It appears that the Lord Raymond is but seventeen years old and is about contracting matrimony at an age when he is not capable of judging for himself, and, unfortunate for him it is that he is of age to contract matrimony. It being most reasonable to have the guardian's counsel in all such cases, especially where they are appointed by the will of the father and have the same power over the infant as the father would have had. But, here, has been an application in time. And I am glad it has before the marriage was actually consummated, since it is most proper for the court to prevent it if it be in its power so to do. There are many cases where an application has been made to this court after the marriage was had, and such have always been attended with a censure upon the parties privy to and promoting such marriage without the consent of the court. In the Earl of Shaftsbury's

Case, Eq. Ca. 172,[1] there was an order of the court before the marriage was had, and, so, the infant lord was more immediately under the care of the court, and, upon his mother's consenting to his marrying and promoting it without the consent of the court or the guardian, a [writ of] sequestration went against her, although the marriage was with the Lady Susanna Noel, a lady of equal family, and every way proper for My Lord Shaftsbury. In the Case of Mr. Hand,[2] daughter to Dr. Hand, all the parties were committed, it being held a contempt of the court to marry a ward of the court without its direction. Indeed, this is not the present case, but I infer from hence that we are to take all the care we can to prevent this marriage. As to the inequality of fortune, it is not shown what estate the plaintiff, the Lord Raymond, has, so that I cannot tell whether this be a Smithfield bargain or not. And, as to the family, it is admitted that Mr. Chetwynd is of a very good family. But the age of the Lord Raymond is improper. And that is the consideration which weighs most with me and upon which I think myself bound in duty to prevent the marriage if I can.

In order, therefore, to strengthen the guardians hands, I order that the Lord Raymond shall continue in their care and custody and that they do not permit him to marry without the consent of the court. As to Mr. Chetwynd, the match not having taken effect, there is no necessity of looking so minutely into the affair in order to censure him. He would have done well not to have consented to this marriage unless the guardians had done so too. But it has been said that it would be unnatural in a father not to suffer his daughter to marry to her advantage, and she would have reason to blame him for it ever after. Now, to prevent that charge upon Mr. Chetwynd, I order him not to suffer his daughter to marry the Lord Raymond without the consent of the court, which prevents any imputation or charge upon Mr. Chetwynd from the lady or anybody else, since, if there be any fault in it, it will fall upon the court. And I shall be very willing to bear it.

N.B. In this case, there was no cause in court at the time the facts set forth in the petition were transacted. The bill was filed but the day before the petition was presented. And, in the cases cited, there were causes in court at the time of the marriages.

38

Cotterell v. Purchase

(Ch. 1734)

In this case, the deed in issue was an absolute conveyance and not a mortgage.

The plaintiff and her sister being seised of an estate in Yorkshire as joint tenants, the plaintiff, by lease and release, in consideration of £104, conveys the moiety to the defendant and his heirs. But it was admitted that the conveyance (though absolute in law) was intended by the parties as a mortgage to be redeemable on payment of the money with interest. Sometime after, in the year 1708, those deeds were cancelled. And, in consideration of a farther sum, which made up the whole £184, she conveys the estate in manner as before, but with this farther covenant, that she would not agree to any division or partition of the estate or make or cause to be made any division or partition thereof without the licence, consent, advice, and appointment of him, the said Benjamin Purchase. At the time of this conveyance, the plaintiff's sister was in possession of the whole estate, and so continued until the year 1710,

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[1] *Eyre v. Countess of Shaftesbury* (1722), 2 Peere Williams 103, 242 E.R. 659, also 2 Eq. Cas. Abr. 87, 486, 489, 710, 755, 22 E.R. 75, 412, 415, 597, 640, 641.

[2] *Willis's and Hanne's Case* (1710 x 1714), 2 Peere Williams 112, 24 E.R. 662.

when the defendant turned her out of possession of the moiety by [an action of] ejectment, and, from that time, he enjoyed it quietly until 1726, at which time, the plaintiff filed her bill to be let into a redemption, to which the defendant pleaded himself an absolute purchaser for a valuable consideration.

And, in 1732, the cause coming to be heard upon the merits, the Master of the Rolls [JEKYLL] was of opinion that the deeds of 1708 amounted to an absolute conveyance. And he dismissed the bill.

For the defendant, were given in evidence several particulars to show that, by the deeds of 1708, the parties intended an absolute conveyance of this estate. And it was insisted that, as the deeds were an absolute conveyance in law, by the Statute of Frauds,[1] no trust or mortgage could be implied without an agreement in writing. And they insisted likewise that, as the defendant had been in possession ever since the year 1710, the plaintiff was barred of the redemption by the Statute of Limitations.[2]

It was said, on the other hand, for the plaintiff, that the defendant's plea admitted the first conveyance made in consideration of the £104 to be intended but as a mortgage and that the second conveyance was in the same form, excepting the covenant and that it was, therefore, probably intended in the same manner. As to the covenant, it made strongly for the plaintiff, since to suppose a person would absolutely sell away his estate and, then, covenant not to make a division of it is absurd. The Statute of Frauds makes nothing against the plaintiff, this being in nature of a resulting trust and so within the proviso in that Statute. Nor can the Statute of Limitations affect the plaintiff, since, in cases of redemptions, the court always gives what it thinks a reasonable time. And, though the general rule be not to exceed twenty years, unless it be upon extraordinary circumstances, yet that rule cannot affect the plaintiff, who did not lose possession until 1710 and brought her bill in 1726.

Lord Chancellor [LORD TALBOT]: The case is something dark. The first deed is admitted to be a mortgage, and the second is made in the same manner, excepting an odd sort of covenant, which is the darkest part of the case, for, to suppose that it is an absolute conveyance and to take a covenant from one who had nothing to do with the estate makes both the parties and covenants vain and ridiculous. But, then, it will be equally vain and ridiculous if you suppose the deed not an absolute conveyance, so that it is of no great weight, and must be laid out of the question. Then, as to the circumstances, on one side, has been showed an account stated of money received. And it is there said so much received on account of purchase money, and, in another general account, the sum of £184 is called purchase money. Then, as to the agreement in this that, if the plaintiff had a desire for it, she should have her estate again upon payment of the money with interest and the costs he had been at, this shows it was not redeemable at first. There have been strong proofs on both sides as to the value. One has shown the rent to be but £27 *per annum* and then deducting one-third out of it for the dower of the plaintiff's mother, a moiety of what remains is near the value of the money paid. The other side has shown the rent to be £40 *per annum*.

But I rather give credit to the first, because it is certain the dower was but £9 *per annum*; do that, upon the whole, I am inclined to think this was at first an absolute conveyance. Had the plaintiff continued in possession anytime after the execution of the deeds, I should have been clear that it was a mortgage. But she was not. And her long acquiescence under the defendant's possession is, to me, a strong evidence that it was to be an absolute conveyance. Otherwise, the length of time would not have signified, for they who take a conveyance of an estate as a mortgage without any defeasance are guilty of a fraud, and no length of time will bar a fraud. Besides, here, the bill was filed in 1726. And, though the cause has lain dormant,

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[1] Stat. 29 Car. II, c. 3 (*SR*, V, 838-842).

[2] Stat. 21 Jac. I, c. 16 (*SR*, IV, 1222-1223).

yet it is not like making an entry and then lying still, for, in the present case, the defendant might have dismissed the bill for want of prosecution, or they themselves might have set down the plea to be argued.

In the Northern parts, it is the custom in drawing mortgages to make an absolute deed with a defeasance separate from it. But I think it a wrong way and, to me, it will always appear with a face of fraud, for, the defeasance may be lost, and, then, an absolute conveyance is set up. I would discourage the practice as much as possible.

Upon the circumstances of the case, he affirmed the decree etc.

39

Jones v. Marsh

(Ch. 1734)

In this case, the family settlement in issue was not a fraudulent conveyance.

The defendant's father, sometime after marriage, in consideration of an additional portion of £100 paid by his wife's mother (a receipt whereof was endorsed on the deed), settles an estate of £100 *per annum* upon himself for life, remainder to his first and other sons etc. And the mother of the defendant's father, having an interest in this estate, joins with him in the conveyance. The father, thirteen years after, mortgages this estate with the usual covenants to the plaintiff, and he dies. The plaintiff brings his bill to foreclose. The question was whether the settlement should be looked upon as a volunteer and fraudulent against a creditor, who lent his money so many years after.

The Case of Parslow *versus* Weedon, Eq. Ca. Abr. 149, was cited.[1] But the Lord Chancellor [LORD TALBOT] said that Mr. Vernon had always grumbled at the determination of that case, and never forgave it the Lord Macclesfield, saying it was contrary to the constant practice of the court. There were also cited the cases of Osbourne *versus* Strode; and Duranda *versus* Cooke, in the late Lord Chancellor's time.[2]

Lord Chancellor [LORD TALBOT]: The question is whether this be a voluntary conveyance or not. Here is plain proof that £100 was paid, the receipt being endorsed upon the back of the deed, for a consideration for £100 *per annum*. Yet, in marriage settlements, things are not to be considered so strictly, there being room for bounty, and every man ought to provide for his wife and family. Besides, in this case, there was an estate that moved from the defendant's father's mother. And she may in some respect be considered as a purchaser of the limitations made to her grandchildren, so that it would be very hard to call this a fraudulent settlement, since it is in consideration of a marriage had and of an additional provision of £100 paid by the wife's relations, which cannot be called voluntary against a creditor who lent his money thirteen years after.

How far this court will set aside a family settlement without any consideration as fraudulent against a creditor who lends his money thirteen years after the settlement, I do not say. I need not at present determine that point.

[Other reports of this case: 2 Eq. Ca. Abr. 715, 22 E.R. 602.]

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[1] *Parslow v. Weedon* (Ch. 1718), 1 Eq. Cas. Abr. 149, 21 E.R. 950, also Chan. Cases *tempore* Geo. I, 374.

[2] *Osgood v. Strode* (1724), 2 Peere Williams 245, 24 E.R. 716, 10 Modern 533, 88 E.R. 839, 2 Eq. Cas. Abr. 25, 22 E.R. 21, Chan. Repts. *tempore* Geo. I, 1049.

40

Collet v. De Gols and Ward

(Ch. 1734)

The statutes concerning bankruptcy bind equitable as well as legal rights and courts of equity as well as courts of law.

After a debtor's bankruptcy, his creditors are in the nature of purchasers, and have a prior equity to any other person's.

Purchasers for a valuable consideration without notice of an act of bankruptcy cannot be compelled to discover anything, such as encumbrances, that may result in a forfeiture.

14 February.

The plaintiff, as assignee under a commission of bankruptcy against Tyssen, filed his bill against Ward and others to set aside several conveyances, which Ward and the other defendants in trust for him had obtained of Tyssen after his bankruptcy and also without any consideration. The defendant Ward pleaded himself a purchaser for a valuable consideration of all the estates in question and also that he had no notice of Tyssen's being a trader or of his having committed any act of bankruptcy. Whereupon, an issue was directed. And the jury found Tyssen a bankrupt, and fixed the day of the bankruptcy to 25 December 1732. Tyssen being seised of a considerable real and personal estate, some part of which real estate was in mortgage to Bradley for £1000 and another part to Harkshaw for £500, which latter mortgage and some others were by assignments vested in the defendant Ward and a great part of Tyssen's personal estate being conveyed in trust for Ward subsequent to Tyssen's bankruptcy, Ward got several mortgages and also releases of equity of redemption of all the aforesaid estates, which he, now, insisted upon against the plaintiffs and the creditors under the commission.

It was argued for the plaintiff that all things done by Tyssen subsequent to his bankruptcy were as so many void acts and that Ward could have no advantage from them. The act of bankruptcy was in itself of such force as to put Tyssen, from that very time, under an incapacity of disposing of or affecting any of his real or personal estate to the prejudice of his creditors under the commission. The legal effect of the assignment avoided all intermediate acts between the bankruptcy and the assignment so as to give the whole to the assignees, according to the Case of Kidwell *versus* Player, 1 Salk. 111, and the Case of Phillips *versus* Thomson, 3 Lev. 191, where an act of bankruptcy was committed after a [writ of] *fieri facias* delivered to the sheriff and before seizure of the goods by him, and [it was] held that the execution was of no effect against the assignees.[1] And the law is the same with regard to the bankrupt's disability over his real estate by the Statute 13 Eliz., cap. 7, and 21 Jac. I, cap. 19.[2] The plaintiff there would be entitled to avoid an execution by [a writ of] *elegit* if the act of bankruptcy was committed before the [writ of] *liberate*, and the plaintiff would in such a case be accountable for the profits intermediate to the bankruptcy and the assignment.

It was further argued that, by the Statute 13 Eliz., a purchaser would be defeated although there should be forty years after an act of bankruptcy and before a commission and although the purchaser had no notice, for the words of the Statute are general 'after bankruptcy' and the proviso in the end of the Statute makes it still plainer, *viz*. that assurances,

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[1] *Kiggil v. Player* (1708), 1 Salkeld 111, 91 E.R. 102; *Philips v. Thompson* (1684), 3 Levinz 69, 191, 83 E.R. 645, 581.

[2] Stat. 13 Eliz. I, c. 7 (*SR*, IV, 539-541); Stat. 1 Jac. I, c. 15 (*SR*, IV, 1031-1034).

made by a bankrupt before bankruptcy and *bona fide*, shall not be defeated. This was a hard doctrine against fair purchasers without notice, but so the law was. And there is, therefore, a proviso in the end of 21 Jac. I, that no purchaser for a good and valuable consideration shall be impeached unless the commission be sued out within five years after the bankruptcy. And, here, the commission was sued out within three years. Wherefore, they insisted that the encumbrance should be redeemed and that the plaintiff should have the residue of the real and personal estate and that Ward should not come in as a creditor for any money lent after the bankruptcy.

It was also further urged that the equity of the redemption of the mortgaged premises was an interest transferred by the Statute to the plaintiff and that the defendant's having no notice of the bankruptcy when he lent his money would, therefore, make no alteration. Besides, all the conveyances after the 25th of December 1722 are fraudulent for want of a consideration. And, therefore, Ward had not the usual equity of a purchaser for a valuable consideration without notice. And, then, as he had not paid a consideration, his not knowing of the bankruptcy will not avail him. It appears, likewise, that he had notice of Tyssen's absconding and being often denied to his creditors. And, though Ward might be ignorant of the legal consequence, yet *ignorantia juris non excusat*, according to the Case of Hitchcock *versus* Sedgwick, 2 Vern. 156.[1]

On the other hand, it was insisted for the defendant that, as he had the law on his side and equal equity at least with the plaintiff, if not a superior one, in regard he paid a valuable consideration for all the deeds after Tyssen's bankruptcy, and, besides, had no notice of it, that the court would not interpose to his prejudice. And the Case of Hitchcock and Sedgwick, 2 Vern. 156, was cited, to show how far purchasers without notice were favored in courts of equity, as also 2 Chan. Cas. 72, 135, 136, 156; 1 Vern. 27; 2 Vern. 599.[2]

N.B. There was no proof of a valuable consideration, but only some few scattering sums which Ward let Tyssen have at different times.

Lord Chancellor [LORD TALBOT]: The first consideration will be as to that part of the estate which is in mortgage to Bradley. And the question is as to that whether the plaintiffs, the assignees of Tyssen, are to redeem it or the defendant Ward.

The release of the equity of redemption, which Ward has obtained, appears to be a gross imposition, for the consideration is mentioned to be £2000, yet not a farthing appears to be paid. The statutes that have been mentioned concerning bankruptcy bind equitable as well as legal rights and courts of equity as well as law. These statutes were founded on supposed frauds of the bankrupts. And, therefore, they were intended to put them under disabilities to prejudice and defraud their creditors. In the present case, the equity of redemption of this estate was made over by Tyssen after his bankruptcy, though before the assignment. Nothing, therefore, passed by this conveyance. And, if Bradley's mortgage had been out of the case and the plaintiff would then have purchased of him after an act of bankruptcy and then a commission had issued within five years, the assignees under that commission must have prevailed. Creditors, after bankruptcy, are in the nature of purchasers, and have a prior equity to any other person's. And, here, Ward's is a prior conveyance, but from a person who had nothing to convey. Ward could not come in at law as a creditor for this sum of £2000. Besides, it is an imposition, the money never having been advanced; yet, if it had been actually paid,

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[1] *Hitchcock v. Sedgwick* (1690), 2 Vernon 156, 23 E.R. 707, also 1 Eq. Cas. Abr. 54, 323, 332, 21 E.R. 868, 869, 1076, 1083.

[2] *Perrat v. Ballard* (1681), 2 Chancery Cases 72, 22 E.R. 852; *Brown v. Williams* (1682), 2 Chancery Cases 135, 22 E.R. 883; *Wagstaff v. Read* (1683), 2 Chancery Cases 156, 22 E.R. 892; *Abery v. Williams* (1681), 1 Vernon 27, 23 E.R. 282; *Wilkes v. Bodington* (1707), 2 Vernon 599, 23 E.R. 991.

as the legal estate was in Bradley, it would not have been any benefit to Ward, but he must have lost the money.

He decreed, therefore, as to this estate, that Bradley should re-convey to the plaintiff upon payment of principal and interest.

The next question is, as to those estates which being incumbered by Tyssen before his bankruptcy, those encumbrances are since by mesne assignments vested in Ward. And, here, it appears that Ward has after the bankruptcy and before the plaintiff's assignment got a release of the equity of redemption of those estates from Tyssen for £3600.

Here, the legal estate is in Ward. And the question is whether, in a court of equity, it shall be taken away without Ward's being paid all the money he advanced. Though the rule be the same here as at law upon construction of statutes, yet, where an act is to be carried into execution, here, there are certain rules to be observed which will bind equally in a case of an act of Parliament as of the common law. One of those rules is that a purchaser for a valuable consideration without notice, having as good a title to equity as any other person, this court will never take any advantage from him. And, consequently, this court will not grant a discovery against him of the only equity he has to defend himself by, which, if he should be obliged to discover, the other party would immediately take advantage of. And there certainly may be cases where a purchaser for a valuable consideration without notice of an act of bankruptcy shall not be obliged in this court to discover anything, whether encumbrances that he has got in or any other thing, but all advantages shall be left him to defend himself. Suppose two purchasers without notice and the second, by chance, gets hold of an old term; he shall defend himself thereby against the first, who still is as much a purchaser for a valuable consideration as himself. I do not, therefore, think a purchaser for a valuable consideration without notice of the bankruptcy [is] to be relieved against in this court within [the Statute] 21 Jac. I.

The Case of Hitchcock *versus* Sedgwick, 2 Vern. 156, is very different from this, for, a commission is a public act, of which all are bound to take notice. But an act of bankruptcy may be so secret as to be impossible to be known. And, therefore, I think that Ward, having the legal estate in him, shall by that be protected for so much as he really and *bona fide* paid Tyssen before notice of Tyssen's bankruptcy.

And, therefore, he directed an issue upon the point of notice to try whether Ward had notice of Tyssen's bankruptcy and when. And, as to the other part of the estate, which, though not in Ward himself, was in others, who were trustees for Ward, that must be considered as one and the same thing.

[Other reports of this case: 2 Eq. Cas. Abr. 119, 682, 22 E.R. 101, 573.]

[Related cases: De Gols v. Ward (Ch. 1734), Cases *tempore* Talbot 243, 25 E.R. 758, 2 Eq. Cas. Abr. 97, 119, 22 E.R. 83, 101.]

41

Upton v. Prince

(Ch. 1735)

In this case, the devise in issue was held to have been paid by an advancement given inter vivos.

25 and 26 April 1735.

The testator, William Prince, a freeman of London, had issue two sons, William and Peter, and four daughters. And, in his lifetime he gave his two sons, in order to settle them

in the world, £1500 apiece, for which, he took two several receipts, each in the following words:

> Received of my father, William Prince, the sum of £1500, which I do hereby acknowledge to be on account and in part of what he has given or shall in or by his last will give unto me, his son.

Sometime afterwards, the testator makes his will in the following words:

> And, whereas, I have heretofore paid to, given, or advanced with my children William, Elizabeth, and Sarah, the sum of £1500 apiece, now, I do hereby, in like manner, give and bequeath unto my three other children, Peter, Mary, and Anne, the several sums of £1500 apiece.

And, then, he gives the residue equally amongst all his children.

The custom of London being waived on all sides, the question was whether Peter should have a new sum of £1500 upon the latter words of the will or whether he should not be in the same case with William, they both being equally advanced by the father and this seeming only a mistake in the testator.

Mr. *Fazakerley* insisted that the receipt given to his father could not control the express gift of the father subsequent, and the father's omitting Peter in the mention of the advancement should be plainly intended a difference between them, the receipts given by both and the case of both being the same.

But the Lord Chancellor [LORD TALBOT] decreed the £1500 received by Peter in his father's lifetime to be a satisfaction for what the father gave him by his will and that he should not have another £1500 upon the latter words.

[Other reports of this case: Cases *tempore* Talbot 72, 25 E.R. 668, 2 Eq. Cas. Abr. 272, 22 E.R. 230.]

42

Menzey v. Walker

(Ch. 1735)

Where a power of appointment for the benefit of all children is exercised for the benefit of only one, the execution of the power is void and of no effect.

26 April [1735].

Mr. Walker, upon his marriage, settled his estate upon himself for life, remainder to his wife, remainder to trustees for a term of three hundred years, remainder to his first and other sons, and the trust of the term was declared to be for the raising such sum and sums of money for the portion and portions and maintenance of all and every child and children of that marriage, other than an eldest son, in such manner and at such time and under such limitations as he, the said Mr. Walker, should appoint by his last will or by deed under hand and seal attested by three credible witnesses, so as such sum or sums do not in the whole amount to above £2000 if but one younger child or £3000 if more than one and so as all the sums for such maintenance do not in the whole amount to above £120 *per annum*, and, for want of such appointment, then, in trust to raise such portion or portions equally to be divided amongst all his younger children, share and share alike, to be paid to them respectively at the age of twenty-one or day of marriage.

The testator had three younger children. And, by his will duly executed, reciting that his two daughters were amply provided for by their grandfather, he appoints the whole sum of £2000 to his second son, Thomas Walker. And the question was whether this appointment of the whole to one was a good appointment and made pursuant to his power.

This cause was heard at the Rolls, where it was decreed to be not a good appointment. And, now, coming on to be heard before the Lord Chancellor [LORD TALBOT], Mr. Attorney General [*Willes*] etc. argued this appointment to be good. And he said that a difference was to be made where such powers are to be executed by a stranger and where by the father himself, who is a proper judge of the merit of each child, and, consequently, that the court will not interpose to set aside this distribution, considering the particular circumstances of this case, where, by the words of the power, he was not bound to raise the whole sum of £2000, but might, if he had pleased, not have raised the tenth part of that sum.

The father, in this case, had a latitude or, else, the providing how this sum should be divided in case no appointment was made by him would have been vain and idle, and, if it was not necessary for him by the words to divide it equally, this appointment made by him must be good. It is in proof here that the other children were provided for by their grandfather and took good estates from him. Indeed, where certain directions are given that such and such sums shall be given to each child, there, nothing is left either to the discretion of the party or of the court. But, where this court has relieved against the execution of powers merely discretionary in their creation, it has not been for inequality only, but for some other piece of injustice or hardship.

In the Case of Wall *versus* Thorborn, 1 Vern. 355, 414, relief was given, because there was no reason that one daughter should be looked upon in a different light from the others, she having no particular provision, but, even in that case, the court said that the circumstances must be very strong to take away the power which the wife had by the express words. And, in that case, another is cited of Sweetnam *versus* Wolaston, where relief was denied. In that of Thomas and Thomas, 2 Vern. 513, it is said that this court will relieve against an unreasonable, but not an unequal distribution, upon a special or particular power, which was the Case of Lister *versus* Robinson, Mich. 1732, where a man gave a power to his wife to devise such a sum to and amongst his child and children and in such manner and proportion to each child as she should think fit; there were two children, and, the elder being provided for, the mother appointed the whole to the younger, upon which appointment, a bill was brought here for an equal distribution, but it was dismissed.[1] So, in that of Austin *versus* Austin, heard by the present Lord Chancellor [LORD TALBOT], 2 March 1733[/34], where the words of the trust were that, if Robert Austin, the father, dies, leaving by Jane, his wife, a son, and other issue then living, then and in such case, to raise a sum not exceeding £1500 as soon as may be to and for the sole benefit and advantage of such child or children, other than the eldest son of that marriage, in such proportion, manner, and form, in all respects, as the said Robert should, for such purpose by his last will and writing, direct and appoint, and, in default of such appointment, then, to and for the sole benefit of such child, if but one, and, if more, other than the eldest, equally and in equal parts and manner to all intents and purposes. Robert, by his will, directs the £1500 to be raised, and he gives £450 to his son Robert, £1050 to Jane, and nothing to Edward, who had an estate of £400 or £500 *per annum* given him by another, and he, coming into this court for a share of the £1500, his bill was dismissed, the power being discretionary and nothing hard in the execution of it.

The cases before mentioned will govern this, for, here, the manner, the time, the limitation are all reserved to him by the power, whereby he might have given it to one sooner,

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[1] *Wall v. Thurborne* (1686), 1 Vernon 355, 414, 23 E.R. 519, 555, Chancery Cases *tempore* Jac. II, 203; *Thomas v. Thomas* (1705), 2 Vernon 513, 23 E.R. 928, also 1 Eq. Cas. Abr. 344, 21 E.R. 1091; *Lister v. Robinson* (1732), 2 Eq. Cas. Abr. 668, 22 E.R. 560.

to the other later, to the one absolutely, to the other under a limitation, in which cases, there would have been an inequality as well as in the present one. Indeed in Austin's Case, there are not the words in such proportion, but there are words tantamount. And these powers, being reserved to parents in order to keep their children in due obedience, are highly reasonable that parents may have a power of distribution, according to the merit or circumstance of each particular child.

Mr. Solicitor General [*Ryder*], Mr. *Pauncefort*, and Mr. *Fazakerley* argued on the other side against the validity of this appointment. And, though they admitted that, perhaps, where powers were general or discretionary, this court would not intermeddle, yet they insisted that, here, the power was particular, and, consequently, must be strictly pursued. The argument of this power's being executed by the father himself will not alter the case, for, by the words, it is clear that a provision was intended for every child and all the children are become purchasers of some provision under this power, the words being 'for all and every of them'. And consequently, though the father be a better judge than a stranger, yet being disabled by the words from excluding any of them, this court will take care that he, as well as any other, shall follow the rules of reason and justice.

The discretionary power lodged in the father by this power is first to be considered with relation to the eldest son, whose circumstances perhaps might not be able to bear so great a charge as £2000 or £3000, and, therefore, the father has a power to charge the estate with such a sum as he should think his son's estate could bear, provided it did not exceed £2000 if but one younger child or £3000 if more. It must next be considered with relation to the younger children. And, there, three things are left to his discretion: *viz*. first, the time, manner, and the limitation, the time, whether it should be payable at the day of marriage or at any other time; second, the manner, which must be understood the manner of raising, and not of distributing, the sum, this construction agreeing with the wording of the power in every clause and the subsequent provisions making it clear, especially, that which relates to advancement by the father in his lifetime; third, the limitations which he had power of making, but still for the children's benefit, for, one might marry imprudently or be guilty of some other piece of folly, which might make it necessary for the father to limit the share of such child in such a manner as might be effectual and advantageous to that child. And, his having a discretion in these cases cannot give it to him in the other respect of giving the whole to one and nothing to the two others, such discretion being neither given nor intended to be given to him by the words of this power, nor will the two children's being provided for by the grandfather alter the case, the intent of the party's being to raise a portion for each by the trust. And it would be very unreasonable that a child becoming, by accident, able to do for himself by the bounty of some of his friends, should thereby lose the right he has of being provided for by his father. The Case of Wall *versus* Thorborn, 1 Vern. 355, 414, is an express authority.

And, in the cases of Thomas *versus* Thomas, 2 Vern. 513, and Lister and Robinson, there was an express power of giving it to one of the children. And so it is not like this. So, in that of Austin and Austin, the power was much more general and entirely discretionary. But, here, is an unreasonable exclusion of two of the children, who have but a small provision, no way adequate to what their brother takes under this will.

Lord Chancellor [LORD TALBOT]: There are two questions; the first is whether the power be pursued; the second whether it be executed in a reasonable manner. As to the first, I think the words are as plain as they can be, that the execution of this power should be for the benefit of all the children. Indeed, it was discretionary in the father how much should be raised. But he had no such discretion as to exclude one or the other. The words 'in such manner' do clearly extend only to the manner of raising, there being several methods mentioned in the power, which was to make it as convenient as might be for the eldest son. The time also was under his discretion, whether it should be paid at marriage or any other time. And so was the limitation. But, still, that is to be understood of the manner in which the portions should be settled upon them, whether it should be upon their respective marriage or in what other manner

he thought proper. And, if he makes no appointment, then, he fixes it upon the express words, 'to be equally divided between the children' and the time that it shall be paid. Now, after a this, how can this partial appointment be called an execution of his power? And is not that the present case? If, then, it be clear that he has not pursued his power, it is needless to enquire whether the provision made by him be reasonable or not. A void appointment being as no appointment, and, consequently, a failure of the appointment he was enabled to make by his power. Where there is a defective execution of a power, creditors or younger children are entitled to have that defect supplied. But, where the execution is merely void, as in the present case, and, when the court has interposed in such cases as this before us, it has always been where the execution, though perhaps within the words, was attended with some hardship or unreasonableness; so that, if this depended upon the reasonableness or unreasonableness of the execution, I should not determine the point without some farther enquiry into the circumstances of these two daughters. But, as a power to all and every can never be restrained to one only, I think the execution void, and so the second point is quite out of the question. In the cases of Lister and Robinson and Thomas and Thomas, 2 Vern. 513, the words gave a general power, which, being so, the court had nothing to do to restrain them. So, in that of Austin and Austin, the father had a power with regard to the nomination of the child or children who should take and, there, the execution was highly reasonable, the person excluded being provided for five times as greatly as the other children. And, so, it would have been unreasonable in the court to rescind what he had done upon so just a ground.

So he affirmed the decree.

Note Mildmay's Case, 1 Co. 175a, 177a.[1]

[Other reports of this case: 2 Eq. Cas. Abr. 668, 22 E.R. 560.]

[Reg. Lib. 1734 A, f. 327.]

43

Mallabar v. Mallabar

(Ch. 1735)

Parol evidence can be considered in order to understand a testator's intent.

In this case, the court ruled that there was no resulting trust for the heir and that the executrix should have the whole residue after the sale of the estate.

6 May [1735].

The testator, Thomas Mallabar, by his last will devised as follows:

> Imprimis, I devise, give, and bequeath all and singular my messuages, lands, and hereditaments whatsoever and wheresoever in the counties of Norfolk, Suffolk, and Cambridge, unto my sister Esther Mallabar and to her heirs and assigns forever upon trust that the same shall be sold by her or them for the best price that can be gotten for the same as soon as conveniently can be after my decease and that, out of the monies arising therefrom, all my just debts, of what kind soever, be paid, and, after payment of my debts, I devise out of the remainder of the money the sum of £500 to my sister, Mary Bainbrigg, and also £500 to my sister Girt's children

[1] *Mildmay v. Standish* (1582-1584), 1 Coke Rep. 175, 76 E.R. 379, also Croke Eliz. 34, 78 E.R. 300, Jenkins 247, 145 E.R. 174, Moore K.B. 144, 72 E.R. 495.

that shall be living at the time of my decease, to be divided equally between them, and also £500 to my nephew, Nicholas Mallabar, and also £500 to be divided amongst the children of my late brother, James Mallabar, which shall be living at the time of my decease;

Item, after my debts and legacies paid as aforesaid and subject to the same, I give and bequeath all the rest and residue of my personal estate unto my said sister, Esther Mallabar, whom I do hereby constitute and appoint sole executrix of this my last will and testament.

The executrix brought her bill against Nicholas Mallabar, the heir at law of the testator, to prove the will and to have the estate sold and the debts and legacies paid according to the will, and she charged that the testator had not surrendered all his copyholds estate to the use of the will, but some part of it only. And she suggested that the testator's whole estate, real and personal, included such parts of the copyhold as were not surrendered, and, therefore, she insisted that the defect of the surrender should be supplied.

The defendant, in his cross-bill, insisted that there was more than sufficient, excluding the copyhold which was not surrendered, to pay all the debts, and, therefore, he insisted that the surrender should not be supplied.

Both causes came to an hearing together. And the plaintiff, in the original bill having in her second answer to the cross-bill, confessed that the testator's estate, exclusive of the copyhold not surrendered, was more than sufficient, the Lord Chancellor [LORD TALBOT] refused to supply that defect against the heir. And he dismissed the original bill with costs as to that point. The reason whereof was because she confessed the matter in her second answer to the cross-bill, though she had charged the contrary in her original bill and not disclosed the truth in her first answer to the cross-bill, and, therefore, she should be punished with costs.

Another point arose at the hearing, though not insisted on in the pleading, which was whether, upon the will, there was not a resulting trust for the heir. The plaintiff's counsel insisted that here could be no resulting trust for the heir, first, because the testator had given a legacy of £500 to the heir, secondly, because the testator had directed his real estate to be sold for the payment of his debts and legacies, and had, therefore, considered it as a personal estate, and, after payment of his debts and legacies and subject to the same, he had given all the rest and residue of his personal estate to his executrix, the plaintiff, but, if it should be construed to be a resulting trust or the heir, the testator's intent would be utterly defeated, for, then, the personal estate must be first applied in ease of the real, and, so, the executrix would have but a troublesome affair without any benefit or consideration, which could never be the testator's intent. And, in order to show clearly that was the testator's intent, they insisted upon giving parol evidence.

Lord Chancellor [LORD TALBOT]: If this was *res integra* and I was at liberty to follow my own opinion, I should be very unwilling to admit such evidence. But, as it has been done and, particularly, in the cases of Doxey *versus* Doxey and Littlebury *versus* Buckley, 2 Vern. 677, I now admit it to be done.[1]

Then, was read a deposition of a witness, who gave full evidence of the testator's declarations that the plaintiff, after payment of his debts and legacies, should have all the rest of his estate.

But the Lord Chancellor [LORD TALBOT] decreed upon the will itself, independently of the parol evidence, that here was no resulting trust for the heir and that the executrix should

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[1] *Docksey v. Docksey*, 2 Eq. Cas. Abr. 506, 22 E.R. 429, Chancery Cases *tempore* Anne 114 (Ch. 1708), 3 Brown P.C. 39, 1 E.R. 1163 (H.L. 1710); *Littlebury v. Buckley*, 1 Eq. Cas. Abr. 245, 21 E.R. 1021.

have the whole residue after the sale of the estate, both of the money arising by such sale and of the personal estate.

[Other reports of this case: 1 Eq. Cas. Abr. 124, 21 E.R. 929, 2 Eq. Cas. Abr. 432, 508, 22 E.R. 367, 430.]

[Reg. Lib. 1734 A, f. 349.]

44

Lechmere v. Lady Lechmere

(Ch. 1735)

A court of equity will aid an heir against the personal representative of his ancestor even though he is a volunteer in regard to his ancestor.

Where securities are appropriated to a decedent's estate, they are considered as land, not only to the issue of the marriage but also to a collateral general remainderman.

If a person contracts to buy or sell land, this binds himself, his heirs, executors, and administrators, and the heir may compel a personal representative to complete the transaction.

An heir is not a creditor, but he only stands in his ancestor's place.

A court will compel a person to be just before generous.

13 May [1735].

The late lord Lechmere,[1] upon his marriage with the Lady Elizabeth Howard, daughter to the earl of Carlisle, and in consideration of £6000 portion, covenanted with the earl of Carlisle and the Lord Morpeth, his son, to lay out within one year after the marriage the said sum of £6000 and, likewise, the farther sum of £24,000, amounting in the whole to £30,000, in the purchase of freehold lands in possession, which were to be settled upon the lord Lechmere himself for life, without impeachment of waste, remainder to trustees and their heirs during the life of the lord Lechmere, to preserve contingent remainders, remainder for so much as would amount to £800 *per annum* to the lady Lechmere, for her jointure, remainder of the whole to the first and other sons of the marriage in tail male, remainder to the trustees for five hundred years, for the raising a portion or portions for the daughter or daughters of the marriage, remainder to the lord Lechmere, his heirs, and assigns forever, but, if there should be no daughters, that the said term was to cease for the benefit of the lord Lechmere, his heirs, and assigns forever. And the said lord Lechmere farther covenanted that, until the said £30,000 should be laid out in lands as aforesaid, there should be paid interest for the same after the rate of £5 *per centum* unto the persons entitled to the rents and profits of the lands when purchased.

The lord Lechmere, after his marriage, purchased several estates in fee simple in possession, but which were never settled according to the covenant, as also several terms and reversions, etc. And, in the year 1727, he died intestate and without issue, leaving a considerable real estate to the value of about £1800 *per annum* to descend upon the plaintiff, his nephew and heir at law. The lady Lechmere took out administration. And the plaintiff brought his bill against her for an account of the lord Lechmere's personal estate and to have this covenant carried into execution, his remainder by the death of lord Lechmere without issue now taking effect, as also to have some purchases completed, which were left incomplete by the lord Lechmere's death.

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[1] A. A. Hanham, 'Lechmere, Nicholas, Baron Lechmere', *Oxford Dictionary of National Biography*, vol. 33, p. 27.

The lady Lechmere insisted by her answer that the plaintiff, being no way privy to any of the considerations within this covenant, could not compel her to lay out the £30,000 in the purchase of lands for his benefit, but that, if he could, the lands which lord Lechmere had permitted to descend on him, being to the value of £1800 *per annum*, ought to be taken in full satisfaction for all the benefit the plaintiff could be entitled to as heir at law to the lord Lechmere, who designed these several purchases to be settled according to the uses specified in the covenant.

The cause was first heard at the Rolls, and, there, decreed for the heir at law, Mr. Lechmere, upon both points, *viz*. that he was entitled to have a specific performance of this covenant, and, secondly, that the several estates which descended upon him were not a satisfaction for this covenant or any part of it.

And, now, coming on to be heard before the Lord Chancellor [LORD TALBOT], Mr. *Pauncefort*, Mr. *Strange*, Mr. *Browne*, and others, argued for the plaintiff, that he could not in this case be considered as a mere volunteer, but was in some sort a purchaser, according to Jenkins and Kemish's Case, Hardr. 395, Lev. 150, 237.[1] But, though he should be taken for a volunteer, yet, he must prevail against an administratrix. And this is to serve the intent of the lord Lechmere, who, by his covenant, has said that his heirs at law should have an interest in the land and in the money until the land be purchased. That the heir was in contemplation at the time of the lord Lechmere's entering into this covenant appears from the provision that, in case there should be no daughters, the term of five hundred years should cease for the benefit of him and his heirs. Wherever a man enters into a lawful engagement and is prevented by death or any other accident from carrying his agreement into execution, the court will look upon it as performed.

The strength of this rule appeared from the Case of Sweetapple *versus* Bindon, 2 Vern. 536, where the husband was decreed to stand in the same condition as if the money had been actually laid out in land, although no rule of law be clearer than that the husband shall never be tenant by the curtesy but where he has reduced his wife's estate into possession during her life. Though every tenant in fee has his heir in his power, yet, if the ancestor does nothing to divest the natural right which his heir has to succeed him and to have a specific execution of his covenant, he shall always prevail against the executor or administrator, even when the covenant was merely voluntary, as appears by the Case of Holt *versus* Holt, 2 Vern. 322.[2]

The trustees' neglecting to compel the lord Lechmere, in his lifetime, to perform his covenant, cannot prejudice either party who is entitled to have it carried into execution, for, if so, the doctrine of this court would be entirely overturned and trustees would become judges whether and how far men should be bound by their covenants. But, by the known rules of this court, trustees are bound to execute the trust in the manner the persons that made the conveyance have directed. And they have no latitude of judgment left to them to distinguish whether the conveyance be made upon a valuable consideration or not, or whether the persons claiming under the trust be volunteers or purchasers. If, then, the neglect of the trustees will not affect the case one way or the other, the whole must depend upon the equity of the heir and administratrix. And, taking the heir even but as a volunteer, yet, he is such a volunteer as is greatly favored both at law and in this court, and will always appear in a more favorable light than an executor or administrator, as appears from the several cases of Kettleby *versus* Atwood, 1 Vern. 298, 471; Knight *versus* Atkins, 2 Vern. 20; Baden *versus* Earl of Pembroke, 2 Vern.

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[1] *Jenkins v. Keymish* (Ex. 1664-1666), Hardres 395, 145 E.R. 515, 1 Levinz 150, 237, 83 E.R. 343, 386, Exch. Cases *tempore* Car. II, 26.

[2] *Sweetapple v. Bindon* (1705), 2 Vernon 536, 23 E.R. 947, also 1 Eq. Cas. Abr. 394, 21 E.R. 1127; *Holt v. Holt* (1694), 2 Vernon 322, 23 E.R. 808, also 1 Chancery Cases 190, 22 E.R. 756, 1 Eq. Cas. Abr. 85, 274, 21 E.R. 897, 1042.

52; Lancey and Fairchild, 2 Vern. 101; Lingen and Sowray, Eq. Ca. Abr. 175, pl. 5; and Vernon *versus* Vernon, in the House of Lords in 1732; and Kentish *versus* Newman, July 1713, where a wife being possessed of £200, the husband, before marriage, covenanted to join so much to her £200 as would purchase £30 *per annum* to be settled on them two and the heirs of their bodies, remainder to the husband in fee, and, until the settlement made, the £200 to be taken as part of her separate estate and, if no settlement made during the husband's life and she survived, then, to remain to her, but, if he survived, then, to go to her brothers and sisters; the marriage took effect in 1688, and they had issue, a daughter; the wife died in 1711, before the husband, no purchase having been made, upon a bill brought by the daughter, she had a decree against the brother and sister of her mother, though the money had not been laid out within the time provided by the articles, the court looking upon the purchase as completed.[1] This case not only fully proves the right of the heir, but, likewise, that he shall not lose that right through any accidents preventing the execution of agreements within the time prefixed.

Here are no creditors, no want of assets, and, consequently, no equity, to prevail against the heir. They farther insisted that, if this covenant was to be carried into execution, it could not be done partially, but, being equally binding as to all parties, all are equally entitled to the benefit of the execution, that, therefore, it could not be confined singly to the purchase of lands of £800 *per annum* for the lady Lechmere's jointure, but the whole must be carried through and limited to the heir in the manner it would have been limited to the lord Lechmere himself, had he been alive. The lady Lechmere cannot vary the execution of the articles. And the covenant, being to lay out the whole sum of £30,000, which is an entire covenant, cannot be restrained to a covenant for purchase of lands of £800 *per annum* only for the lady Lechmere's jointure. This method would be admitting the representative to contradict what the lord Lechmere himself has said should be land, and land for the benefit of his heir, which appears from the provision that, until the lands purchased, interest at £5 *per centum* should be paid to such persons as should be entitled to the rents of these estates. Many of the cases cited were not so strong as the present one, being founded upon voluntary agreements, which, nevertheless, have been carried into execution for the benefit of the heir against the executor. And they insisted upon that of Vernon *versus* Vernon, as a case in point and no way distinguishable from the present, the matter resting upon the covenant in that case as well as in this and the execution of that covenant decreed in favor of the heir against the wife, both in this court and in the House of Lords, notwithstanding all the same objections made there in her behalf that can be made here for the defendant.

To the second point, they argued that the lord Lechmere having not done anything in his lifetime to show his intent that these late purchases should go in satisfaction of his covenant, in part or in the whole, no supposed intent could prevail against the heir for the administratrix, she not having so good an equity as he, especially seeing that suppositions may be as well one way as the other. That the cases of satisfaction depend upon the particular circumstances of

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[1] *Kettleby v. Atwood* (Ch. 1685-1687), 1 Vernon 298, 471, 23 E.R. 481, 596, 2 Chancery Reports 404, 21 E.R. 700, 1 Eq. Cas. Abr. 273, 21 E.R. 1041; *Knight v. Atkyns* (Ch. 1686-1687), 2 Vernon 20, 23 E.R. 624, also 2 Chancery Reports 400, 21 E.R. 699, 1 Eq. Cas. Abr. 274, 21 E.R. 1041, Chancery Cases *tempore* Jac. II, 274; *Baden v. Earl of Pembroke* (1688-1690), 2 Vernon 52, 213, 23 E.R. 644, 739, 3 Chancery Reports 217, 21 E.R. 771, 1 Eq. Cas. Abr. 241, 265, 21 E.R. 1019, 1035; *Lancy v. Fairechild* (1689), 2 Vernon 101, 23 E.r. 675; *Lingen v. Souray* (1711-1715), Precedents in Chancery 400, 24 E.R. 179, also 1 Peere Williams 172, 24 E.R. 343, Gilbert Rep. 91, 25 E.R. 63, 10 Modern 38, 88 E.R. 615, 1 Eq. Cas. Abr. 175, 21 E.R. 968, 2 Eq. Cas. Abr. 553, 22 E.R. 465, Chan. Cases *tempore* Geo. I, 99; *Vernon v. Vernon* (1731-1740), 1 Brown P.C. 267, 440, 1 E.R. 559, 676, also 2 Peere Williams 595, 24 E.R. 875, W. Kelynge 9, 25 E.R. 468, 2 Eq. Cas. Abr. 28, 22 E.R. 24; *Kentish v. Newman* (1713), 1 Peere Williams 234, 24 E.R. 368.

each case appears from the cases of Duffield *versus* Smith and Goodfellow *versus* Burkett, 2 Vern. 258, 298, and also from the intent of the parties, as is most manifest from that of Saville *versus* Saville, where the only difference was between a descent of lands in fee, which, by the settlement, were to be a satisfaction and that which happened, of a descent of lands in tail of equal value, of which the daughters might, by levying a fine, have made themselves tenants in fee, and, yet, held there not to be a satisfaction, because the intent was that the fee simple lands should descend.[1]

In the present case, it does not appear that the intent was that those fee simple lands should go in satisfaction, for, if he had so intended, he would have acquainted the trustees with his design of performing so much of his contract by these purchases. And, as no intent appears, it is no more than if the lord Lechmere had given a bond to his heir, and had then permitted these lands to descend upon him, in which case, it cannot be pretended that the descent would have been a satisfaction for the bond or that the administratrix could have defended herself against this demand by such an argument. So, if he had owed £1000 to his next of kin, the distributive share would never have been taken as a satisfaction for the debt. A less thing cannot go in satisfaction for a greater, as in Atkinson's and Webb's Case, 2 Vern. 418. But an equivalent must be given, which must appear to have been intended as a satisfaction. And, in that of Eastwood *versus* Vink, April 1732, it was held that a devise, which was to go in satisfaction, must be of the same nature as the thing for which it was to be an equivalent. And, therefore, it was held there that money could not go in satisfaction for land, nor copyhold for freehold, etc.[2]

How, then, according to these rules, can several of these purchases be called a satisfaction? There are terms, reversions, etc. which are not only less in value, but, from their nature, cannot be limited according to the uses intended by the covenant, which was to purchase freehold lands and lands in possession. And it is, therefore, very strange to think that the lord Lechmere should take purchases, and intend them to go in satisfaction of his covenant, which he very well knew could not from their nature or their value answer any description of those he had agreed to purchase. Such a construction, besides its absurdity, would go in direct contradiction to the well known maxim that an heir is not to be disinherited by a constructive, but a necessary implication only.

Mr. Attorney General [*Willes*], Mr. Solicitor General [*Ryder*], Mr. *Verney*, and Mr. *Fazakerley* argued for the defendant that the consideration, upon which this covenant was made, extended no farther than to the lady Lechmere and the children of the marriage, but not at all to the heir, who, therefore, could be looked upon but as a mere volunteer, and, as such, had no claim to any equity. The naming the heirs in the covenant was only to show what should become of the land when the other limitations should be spent. And the provision that the interest should be paid to such as should be entitled to the rents and profits of the estate, was no more than what must have been if it had not been inserted; and so fall within the rules of *expressio eorum etc*., that it was necessary to explain for what purpose the five hundred years term was raised and to provide that, in case of failure of daughters, it should sink in the inheritance in order to prevent its becoming legal assets, which it must otherwise have done.

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[1] *Duffield v. Smith* (1691), 2 Vernon 177, 258, 23 E.R. 717, 767, also 2 Freeman 185, 22 E.R. 1150, 1 Eq. Cas. Abr. 204, 21 E.R. 991; *Goodfellow v. Burchett* (1693), 2 Vernon 298, 23 E.R. 792, also 1 Eq. Cas. Abr. 204, 239, 21 E.R. 992, 1017; *Savile v. Savile* (1720-1725), 2 Atkyns 458, 26 E.R. 677, 11 Modern 327, 88 E.R. 1059, Select Cases *tempore* King, 32, 25 E.R. 206, 2 Eq. Cas. Abr. 646, 22 E.R. 542.

[2] *Atkinson v. Webb* (1704), 2 Vernon 478, 23 E.R. 907, also Precedents in Chancery 236, 24 E.R. 115, 1 Eq. Cas. Abr. 203, 21 E.R. 991; *Eastwood v. Vinke* (1731), 2 Peere Williams 613, 24 E.R. 883, W. Kelynge 36, 25 E.R. 483, 2 Eq. Cas. Abr. 355, 22 E.R. 301.

Here was a great difference between a limitation to the heirs of the body and a general remainder to one and his heirs, the heir being, in the former case, under the immediate contemplation of the parties, but not so in the latter. And this court considers even a covenant but as *nudum pactum* in the case of volunteers, for, though it be a court of conscience, yet, that is only to aid such as are in conscience entitled to a performance of the covenant, which cannot be said of a volunteer, unless he, by some particular circumstances, takes himself out of the general rule. Then, as to the nature of the obligation, here are no trustees appointed, but the whole rests singly upon the lord Lechmere's covenant, which is but a personal lien, and must fail whenever he himself becomes entitled to the benefit of what was to be performed by that obligation. The rule that what is covenanted to be done is looked upon as done holds only in cases where somewhat is vested either in trustees or some other manner, whereupon the covenant may be a lien, but not where it is a mere personal obligation, as in this case, the whole remaining in the person's own hands.

This difference appears from the Case of Lingen *versus* Sowray, Eq. Cas. Abr. 175, where there was, as appears by the decretal order, an assignment of securities to trustees to be laid out in land and to be settled; the trustees did not actually receive the securities, but, sometime after the marriage, the husband called in part of the money himself, and settled it upon the same persons as it was to have been settled upon by the marriage settlement; he, afterwards, made his will, and devised his personal estate to his wife, against whom a bill was brought by the nephew as heir at law, and, it appearing that £700 remained upon the same securities at his death as at the time of settlement, it was decreed that the £700 should be looked upon as land, but that the other part that was actually taken out by him should not be bound. And the court would not, in that case, admit the representative of the covenantor to say that his ancestor had broken his covenant. The like distinction in the Case of Chaplin *versus* Horner, 18 March 1718, at the Rolls, and, in that of Chichester *versus* Bickerstaff, 2 Vern. 295, it is held that, though money shall in many cases be considered as land when bound by articles in order to a purchase made, yet, whilst it remains still money, it shall be deemed part of the personal estate of such person who might have aliened the land in case a purchase had been made.[1]

And, in the cases of the Countess of Warwick and Edwards;[2] Knight *versus* Atkins; Lancey *versus* Fairchild; and Sweetapple *versus* Bindon, 2 Vern. 20, 101, 536, the sums were appropriated and standing out in trustees' hands. And, so, [they are] not like this case. And, in that of Knight *versus* Atkins, the plaintiff was both heir and executor, as appears in 2 Chan. Rep. 400. Indeed, the Case of Vernon and Vernon, in the House of Lords, 1732, rested upon a bare covenant, but there was an express provision that the brother should have the benefit of the covenant, there being an express estate limited to him, upon which he might have had remedy against Mr. Vernon himself in his lifetime. But it cannot be pretended that the plaintiff could in this case have had any remedy against the lord Lechmere in his lifetime; Lord Lechmere could have limited the remainder to any other of his relations in bar of his heir at law. In the Case of Cann and Cann, 1 Vern. 480, the court refused compelling the executrix to lay out the money in a purchase of lands whereof the husband would, by the articles, have been tenant in tail.

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[1] *Chaplin v. Horner* (Ch. 1718), 1 Peere Williams 483, 24 E.R. 483, 2 Eq. Cas. Abr. 721, 22 E.R. 607, Chan. Cases *tempore* Geo. I, 474; *Chichester v. Bickerstaff* (1693), 2 Vernon 295, 23 E.R. 791.

[2] *Edwards v. Countess Dowager of Warwick* (Ch. 1723), 2 Peere Williams 171, 24 E.R. 687, Dickens 51, 21 E.R. 186, 1 Brown P.C. 207, 1 E.R. 518, 1 Eq. Cas. Abr. 140, 21 E.R. 942, 2 Eq. Cas. Abr. 42, 52, 83, 22 E.R. 36, 46, 72, Chan. Cases *tempore* Geo. I, 955.

The objection that the covenant was entire, and, consequently, could not be partially executed was endeavored to be answered by saying that the lady Lechmere did not come here to have the covenant carried into execution, but was ready to waive all the pretensions she had under this covenant, unless the court should think the heir entitled to have it carried into execution. And they concluded this point by saying the heir was as much a stranger to this covenant as the natural daughter was held to be to the covenant for farther assurance in Foresaker's and Robinson's Case, Eq. Cas. Abr. 123,[1] and that the lord Lechmere having lived several years after his entering into this covenant and having never carried it into execution, this long surceasing was to be taken as a change in his intention, and, consequently, the heir is not entitled to a performance.

As to the second point, they argued that, if the heir was entitled to have a specific performance of this covenant, the descent of lands to the value of above £30,000, which he took from the Lord Lechmere, must be looked upon as a satisfaction. Wherever a thing is to be done, either upon a condition or within a time certain, yet, if a recompense can be made which agrees in substance, though, perhaps, not in every formal circumstance, such a recompense shall be good, and shall go in satisfaction of the thing covenanted to be done. In the Case of Wilcox and Wilcox, 2 Vern. 558, the descent of lands of the same value was held a satisfaction, though, in that case, the son was a purchaser, which the heir is not in the present case. And, in that of Blandy *versus* Widmore, 2 Vern. 709, the husband having covenanted to leave his wife £620 at his death and dying intestate, whereupon, her distributive share came to £1000, this was held to be a satisfaction. And, in the case of portions, they are held to be satisfied, either by a devise or where given by a will; they are likewise held to be satisfied by a gift in the party's lifetime, though the will does not take effect until his death.[2]

Lord Chancellor [LORD TALBOT]: The first question is whether the plaintiff, the heir at law to the lord Lechmere, be entitled to a specific performance of this covenant. It has been considered by the plaintiff's counsel as an argument of the lord Lechmere and an intent in him to lay out this whole sum of £30,000 in lands at all events. On the other hand, the defendant's counsel have insisted that the design went no farther than the providing for the lady Lechmere and the issue of the marriage. The intent seems to me to be that the £3000 should, at all events, be laid out in land, the produce whereof was to be secured to the issue of the marriage, who, in this case, must have taken as purchasers. But, as to the remainder in fee, I do not think that the looking upon the lord Lechmere, either as a purchaser of it or not, will vary the case, since, had the covenant been silent, the remainder must have returned to the person from whom the estate moved. And I think it quite the same whether he is considered as a purchaser or as a volunteer, the dispute not being between the heir and a third person, but between the two representatives of the lord Lechmere, the one of his real, the other of his personal estate. The heir's being but a volunteer in regard to his ancestor will not exclude him from the aid of this court. But, though the question is between two volunteers, the court will determine which way the right is, and decree accordingly. We must, therefore, see whether the £30,000 is upon this covenant to be looked upon as real or personal estate.

It seems to be allowed on both sides that, had the money been deposited in trustees' hands, it must have been looked upon as a real estate and the heir entitled to the benefit of it. This, I say, seems to be granted, and [there is] no authority against it but what has been

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[1] *Fursaker v. Robinson* (1717), 1 Eq. Cas. Abr. 123, 21 E.R. 929, also Precedents in Chancery 475, 24 E.R. 213, Gilbert Rep. 139, 25 E.R. 97.

[2] *Wilcocks v. Wilcocks* (1706), 2 Vernon 558, 23 E.R. 961, also 1 Eq. Cas. Abr. 26, 156, 21 E.R. 847, 955, Chan. Cases *tempore* Anne, 75; *Blandy v. Widmore* (1716), 2 Vernon 709, 23 E.R. 1066, also 1 Peere Williams 324, 24 E.R. 408, also 2 Eq. Cas. Abr. 352, 22 E.R. 300.

collected from the Case of Chichester *versus* Bickerstaff, 2 Vern. 295. It is probable that, in that case, the court went upon some reason which induced it to think that Sir John Chichester looked upon that money as personal estate, for, otherwise, the authority of that case is not to be maintained, being contrary to all the former resolutions and to a late one in the House of Lords, by which I am bound, *viz*. that of the Countess of Warwick *versus* Edwards, where the money was decreed to go as land, though to a collateral heir who was not within the consideration of the settlement, so that it is now a settled point, that, where the securities are appropriated, they shall go as land, not only to the issue of the marriage but, likewise, to a collateral general remainderman, unless there appears some variation in the parties intent. And, indeed, it is very reasonable that it should be so, for, otherwise, the neglect of trustees or any other accident might overthrow all men's agreements and contracts entered into upon the best and most valuable considerations.

But it has been objected that this case differs from all those, for that the money was never deposited, but remained in the lord Lechmere's own hands and that he, only, was the debtor. So, now, the question is whether this will make any difference. An heir can no more be looked upon as a creditor against his ancestor than he can be looked upon as a purchaser under him. He takes with the several burdens that his ancestor lays upon him. And as, on the one hand, the lord Lechmere bound himself by his covenant to lay out this sum of £30,000 in land, he, on the other, acquired a right to an estate for life and to a remainder in fee, which, by his death, are now severed, and the remainder only descends upon the heir.

If a man articles for a purchase, and binds himself, his heirs, executors, and administrators, may as well be called, in that case, both covenantor and covenantee, as in the present one. But yet the heir is entitled to have the purchase completed, and may compel the executor to do it, because their rights are different, as appears from the Case of Holt *versus* Holt, 2 Vern. 322. And, wherever a man's design appears to turn his personal estate into land, this gives his heir an advantage, which this court will never take from him. None of the cases cited warrant this present distinction that is endeavored at. And, in reason, I am sure there is nothing to warrant it, the intent and agreement of the parties being the same in both cases, which, if effectual in one case, I cannot see why it should not be so in the other. The only case, from which anything like this distinction can be collected, is that of Kingston and Sowray. But I am no ways satisfied that that case was resolved upon that reason, for, in that case, the husband had altered the trust and the limitations of it. Besides, in that case, nobody had any interest in it but he and his wife, and the court, as appears by the decree, laid great stress upon the change of his intent's appearing by changing the trust. But, here, no change appearing, the intent remains as it was at the time of the covenant entered into. And, consequently, [there is] a very wide difference between the two cases. In the case Chaplin *versus* Horner, the husband alone was to have the benefit of the articles. And, therefore, [it is] not at all like the present case.

I, therefore, think that this case falls within the common known rule that money articled to be laid out in land is to be looked upon as land. The lord Lechmere was bound at the time of his death to lay out this money in land, by which he gained a right to an estate for life with a remainder in fee. And the estate for life, being determined by the death, the right which he had to the remainder descends upon his heir. And, as it comes by his death, nothing that has been done by the lady Lechmere, either as to the waiver of her jointure or anything else, can alter or defeat that right. Indeed, to suppose it would be absurd.

The cases upon satisfaction are generally between a debtor and a creditor, and the heir is no creditor, but he only stands in his ancestor's place. One rule of satisfaction is that it depends upon the intent of the party and, that, which way soever the intent is, that way it must be taken. But this is to be understood with some restrictions, as that the thing intended for a satisfaction be of the same kind or a greater thing in satisfaction of a lesser, for, if otherwise, this court will compel a man to be just before he is generous. And so it will decree both. But these questions are no way material in this case, which turns entirely upon My Lord

Lechmere's intent at the time of these purchases made. Those made before the covenant can never have been designed to go in performance of the subsequent covenant, his intent being clear that the whole sum of £30,000 should be laid out from the time of the covenant. Then, there are terms with covenants to purchase the fee. But terms are not descendible to the heir, and so no satisfaction. The like of reversions, especially seeing the lives did not fall in during the lord Lechmere's own life. But, as to the purchases of lands in fee simple in possession, it is to be considered that there was no obligation upon the lord Lechmere to lay out the whole sum at one time. Now, here, are lands in possession, lands of inheritance purchased, which, though not purchased with the privity of trustees, yet it was natural for the lord Lechmere to suppose that the trustees would not dissent from those purchases, being entirely reasonable. The design of inserting trustees being not to prevent proper, but improper, purchases. And, though they were not purchased within the year, yet nobody suffered by it. And, so, this circumstance cannot vary the intent of the party in a court of equity. The intent was that, as soon as the whole was laid out, it should be settled together, and not to make half a score of settlements. In the Case of Wilcox and Wilcox, 2 Vern. 558, the covenant was not perfected; nothing was done towards it strictly, but some steps taken by the ancestor, which seemed to be intended that way. And it is as reasonable to suppose these purchases to have been intended to satisfy this covenant in the present case, as it was to suppose it so in that.

And, so, he varied the decree as to this point only, *viz*. as to the fee simple lands in possession purchased since the covenant.

[Other reports of this case: Lincoln's Inn MS. Misc. 384, p. 399, pl. 23, 3 Peere Williams 211, 24 E.R. 1033, 2 Eq. Cas. Abr. 32, 182, 258, 298, 355, 462, 501, 22 E.R. 27, 156, 219, 250, 302, 393, 425.]

45

Jermyn v. Fellows

(Ch. 1735)

In this case, the provision for younger children was held to be a good appointment for the only surviving child who had not been previously provided for.

16 and 17 May [1735].

By a private act of Parliament, 13 Will. III, entitled, An Act for Enabling Stephen Jermyn To Make Provision for his Younger Children and for the Advancement of his Eldest Son,[1] it was enacted that the sum of £3750 remaining in the Chamber of London, and the interest thereof should be vested in trustees named in the Act, upon trust that they should by and with the consent of the said Stephen Jermyn, the father, in his lifetime, by any writing under his hand testified in the presence of two or more witnesses, dispose of the said sum unto and among Stephen Jermyn, the son, Martha and Catherine Jermyn, daughters of Stephen Jermyn, the father, and the survivors and survivor of them, and such other child and children as the said Stephen Jermyn, the father, should hereafter have, in such manner, proportion, and proportions, and at such time and times as the said Stephen Jermyn, the father, by his last will in writing or other deed under his hand and seal, testified by two or more witnesses, should limit and appoint, and, in default of such appointment or for so much of the said £3750 whereof no appointment should be made, then, unto and amongst such and so many of the said Stephen Jermyn, the son, Martha, and Catherine, and the survivors and survivor of them and such other

[1] Stat. 12 & 13 Will. III (*SR*, VII, 729) [not printed].

child and children as the said Stephen Jermyn, the father, should hereafter have and should not be provided for out of any part of the £3750, share and share alike, and, in case any of them died before twenty-one or marriage, then, his or their share to go to the survivor or survivors.

At the time of this Act made, Stephen Jermyn had five children, John, his eldest son, Stephen, his second son, Mary, Martha, and Catherine. Mary was provided for before the Act passed, upon her marriage, and [it was] so recited in the Act. John died soon after the Act passed under age and without issue in his father's lifetime, whereupon, Stephen, the second son, became entitled to the provision made for the eldest son. Martha, upon her marriage, had £1050 appointed to be paid her by the father in full [satisfaction] of her share of the said £3750. And Catherine married the defendant Fellows, and died afterwards, having attained her age of twenty-one, no part of the £3750 having been appointed to her, and she left several children. After her death, upon the 23d of June 1720, Stephen Jermyn, the father, by deed duly executed, directed the trustees to pay the remaining £2700 to his son, Stephen Jermyn, his executors, and administrators. And he died soon after. Then, died Stephen, the son, leaving issue, the plaintiff, who claimed under this appointment made to his father.

The defendant insisted that Stephen, becoming eldest son by his brother John's death, became entitled to the provision made for the eldest son and, ceasing to be a younger child, became thereby incapable of taking by force of the appointment. And, so, he being disabled and Martha having been fully provided for out of the £3750, the remaining £2700 belonged to him, as administrator of his late wife, it being a part not appointed according to the direction of the Act. The question was whether this appointment to Stephen Jermyn, the son, being eldest son at the time of the appointment made, was a good appointment within the meaning of this Act.

Lord Chancellor [LORD TALBOT]: It is clear from the words of this Act that the legislature intended to provide for Stephen, Martha, and Catherine, and for any other younger children which Stephen Jermyn, the father, should have, and, without doubt, Stephen was at that time considered as a younger child. The father, pursuant to his power, made an appointment to Martha and her husband of £1050, which was accepted by them in full [satisfaction] of Martha's share, so that she is quite out of the case. And the only question is whether the appointment to Stephen, the son, of the remaining £2700 be a good appointment.

And the intent of the Act has been much relied on. And it has been compared to marriage settlements when younger children are so called, in opposition to him who takes the estates, although that, in the strictly grammatical sense, the second born can never be called the eldest. The Case of Chadwick *versus* Doleman, 2 Vern. 528, was much stronger.[1] For, there, he was the younger son at the time of the appointment made, and, yet, it was brought back again seven years after. That case arose upon a settlement; this arises upon an Act of Parliament, in which the intent shall prevail against the very words. But, then, that intent must be plain and clear. Now, Stephen is, indeed, called a younger child in the preamble, but, when the power of appointment is given, it is not to appoint amongst the younger children generally, but to Stephen, Martha, and Catherine. And it is observable that the power might have been executed, part at one time and part at another, by one or more deeds or by his last will, nor was there anything vested until an appointment made, but all was uncertain until he appointed. And the legislature had in view that there might be a death in the father's lifetime by reason of the words ' survivor and survivors'. Martha being out of the question, nobody is to be considered but Catherine and Stephen. Catherine died long before the appointment, and, consequently, none [were] in being at that time but Stephen. And I think it would be very hard to take it from him in favor of an administrator, who has no other right than she had and that is none at all, she dying before the execution of the power, which was ambulatory until the father's death. So,

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[1] *Chadwick v. Doleman* (1705), 2 Vernon 528, 23 E.R. 941, also 1 Eq. Cas. Abr. 344, 21 E.R. 1091, Chan. Cases *tempore* Anne 74.

this case differs greatly from that of Chadwick *versus* Doleman, where the question was between the eldest son, become so by his brother's death, and the other younger children, all which had as good a right as Sir Thomas Doleman himself. Beside, the power in the present case is to appoint it to the survivor or survivors, and, if Stephen be incapable of taking, there is nobody left to take, for Mary was fully provided for before the Act; Martha had accepted of £1050 in full for her share, and Catherine died before the execution of the power, so that, unless Stephen can take, the appointment must be merely void. And, then, it will come to this, that Stephen is the only person left who can take. Indeed, he was a younger child at the time of the Act made, but circumstances are since altered, there being nobody left but he, whereas, in Chadwick *versus* Doleman, there were younger children capable of taking at the time, as well as Sir Thomas Doleman himself.

And so he decreed the appointment to be good.

[Other reports of this case: 2 Eq. Cas. Abr. 668, 22 E.R. 561.]

[Reg. Lib. 1734, f. 621.]

46

Bellamy v. Burrow

(Ch. 1735)

The offices of King's Coroner and Attorney in the King's Bench can be held in trust for the benefit of another person.

14 June [1735].

The late Mr. Bellamy, the plaintiff's father, was by letters patent 4 Geo. I [1717-1718] entitled to the office of King's Coroner and Attorney in the King's Bench to hold by himself or his sufficient deputy during his life after the death of Simon Harcourt and William Bordrigge. Mr. Harcourt died in the year 1724, and, on the 9th of May in the same year, Bordrigge surrendered to the crown, whereupon, Mr. Bellamy entered upon and enjoyed the office. About this time, Mr. Bellamy, being desirous to have another life in the office, obtained new letters patent, 14 May 1724, granting the office to Mr. Burrow, who was his near relation, to hold by himself or deputy during his life after Mr. Bellamy's death. Mr. Bellamy, acquainting the defendant that he had inserted his name in a warrant from the king for a grant of the office, wrote a note in the following words *viz.*:

> 8 May 1724 [which was the day before the surrender by Bordrigge and some days before the date of the letters patent] whereas Mr. Bellamy has caused my name to be inserted in a warrant from the king for a grant of His Majesty's Coroner and Attorney in the King's Bench in order for the passing of a grant thereof, I do promise, at his request, to execute in due form any declaration of trust with proper and usual covenants that shall be reasonable, declaring my name is used in trust for the said Mr. Bellamy, his executors, and assigns.

This note was then signed by Mr. Burrow, the defendant, and delivered by him to Mr. Bellamy. No other declaration of trust was ever executed by the defendant. But, in February 1732, Mr. Strutt, being employed in Mr. Bellamy's affairs, received orders from him to draw his will. And, having received instructions from him for that purpose (but none particularly concerning the Crown Office) and apprehending from his general instructions that Mr. Bellamy intended to devise his Patent Office and the profits thereof in the same manner as he had

directed all his other estate real and personal to be devised, inserted in the draught which he prepared the following clause, *viz*.:

> And as to the office commonly called the Crown Office, whereof I am patentee, determinable upon my life and the life of [*blank*] Burrow, Esq., I give the said patent and all benefit arising therefrom to my executors, their executors, and administrators in trust to apply and dispose of the profits arising therefrom in the purchase of lands to be settled to the uses last above mentioned, and it is my will that my executors do not give up my right to appoint clerks generally to act in the said office nor to the benefit of filing and copying affidavits, but to have recourse to all lawful means in the confirming my right in the said office and to the profits arising therefrom etc. And it is my will that the said Burrow do act in the said office as master thereof for the benefit of my son or appoint a deputy, as he shall think proper.

Mr. Strutt attending Mr. Bellamy soon after with the draught of the will, at the reading of this clause, Mr. Bellamy was greatly surprised, saying he had given no such instructions, and directed the clause to be left out of the engrossment of his will, it being no part of his intention. Some days after, Mr. Bellamy being desirous to see the state of his affairs as drawn up by Mr. Strutt, directed him to make an alteration in relation to the Crown Office in the following words, *viz*. that Mr. Burrow might insure the Crown Office for the first year or until he should obtain a farther grant and act in the same office himself or appoint a deputy as he should think proper. And a day or two after, he ordered this clause to be left out of his will, which accordingly was done. And his will was duly executed by him, whereby he, after payment of his debts and legacies, devised his personal estate to his executors in trust to invest the same together with other monies arising from the sale of some lands in the purchase of land to the use of the plaintiff, his only child, and the heirs male of his body, remainder to his two sisters for life, remainder to the defendant Burrow in tail male. And he made the defendant one of his executors. The testator soon after died, leaving a great load of debts, far exceeding his real and personal estate. The question was whether Mr. Burrow was, upon this whole case, to be looked upon but as a trustee or whether he should hold the office in his own right.

The case was first heard at the Rolls, where the plaintiff's bill was dismissed, and the office decreed to Mr. Burrow in his own right upon the following reasons.

Master of the Rolls [JEKYLL]: The ability of any person to whom a patent is granted for the execution of an office relating to the administration of justice is the foundation upon which the patent passes, as appears from Winter's Case, Dy. 150b, which was a grant of this very office, and from the Lord Hobart's opinion in the Case of Glover *versus* Bishop of Litchfield, Hob. 143.[1] And, if it afterwards appears that the person to whom such grant is made is unskillful and unable to execute it, such grant is void, as it was held by all the judges in Winter's Case. The reason is that an office relating to the administration of justice highly concerns the public, and is not considered as the private property of the person enjoying it, independently of his skill and integrity in the discharge of his duty. And, therefore, grants of this kind being made upon this foundation, if there is any trust to be declared by the person to whom such office is granted, the crown ought to be privy to it and the ability and integrity of the person for whose benefit it is should be known and approved. Nor do I think that a private dealing between two persons concerning a public office, especially the Crown Office, the due

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[1] *Prothonotary's Case* (1557), 2 Dyer 150, 73 E.R. 328; *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. Lib. MS. Dd.3.86, part 5, Oxford Bodl. Lib. MS. Eng. hist.c.494, Lincoln's Inn MS. Hale 80(g).

execution of which so greatly concerns the public, ought for the reasons before mentioned to receive any countenance in a court of equity. And there cannot, in this case, be the least pretense to determine it as a trust between the crown and the nominee, since the crown is no way privy to any trust declared or intended between the parties. Perhaps indeed, it might be too hard to say that all trusts of offices of this kind, which are held by patent, are void, and, therefore, the nature of this office, the circumstance under which the trust is declared and the ability of the person for whose benefit it is declared to execute it himself or appoint a proper deputy, are to be taken into consideration, and will, in some measure, govern the opinion of the court. But still, whatever may be the circumstances of any case relating to an office that concerns the administration of justice, I shall always be very careful how I sever the profits from the duty of it, the reason of which is founded in the relation of things, since, without the observance of this, the dignity cannot be supported nor the attendance recompensed, which are necessary for the due execution of it, by which means, the public will suffer the more in order to increase the gain of a private person.

The objections to Mr. Burrow's enjoying the office in his own right are, first, that he has given a memorandum, which, in a court of equity, will amount to a declaration of trust. Secondly, subsequent to this, and even shortly after the testator's death, he declared that his name was used in the patent only in trust for Mr. Bellamy or to that effect. Thirdly, that the testator died insolvent, and, therefore, the grant to Mr. Burrow ought to be declared a trust for the benefit of his creditors.

To support the first objection, it has been said that, although the declaration was but imperfect and executory and imported, in strictness, a farther act, which was never demanded by Mr. Bellamy and, consequently, never done by Mr. Burrow, yet that part of it relating to the execution of a farther deed makes it unnecessary, since the words are 'I do promise, at his request, in due form to execute any declaration of trust with proper and usual covenants, declaring my name is used in trust for him', from whence it was collected that the words 'is used in trust' were an immediate declaration, and, in strictness, took place when the paper was signed. But I do not think that any stress can be laid on this part of the memorandum, since the words 'is used in trust' do manifestly refer to a future, and cannot be, therefore, construed into a present declaration. Nor will any court strain or torture words to make them import what is evidently contrary to their plain meaning. Besides, the limitation in Mr. Bellamy's will in favor of Mr. Burrow does, *prima facie*, prove that he intended to provide for him. And, from Mr. Strutt's evidence, it is plain that he declined at two several times ascertaining the trust or explaining himself concerning the Crown Office. From all which, it seems plain to me that the memorandum signed by Mr. Burrow was only taken to make such use of it as, from the future behavior of Mr. Burrow, Mr. Bellamy might think proper with regard to this office, and not as an actual declaration of trust. And Mr. Bellamy's conduct at last does pretty clearly explain what his meaning was at the first.

As to the second objection, Mr. Burrow might possibly declare that he looked upon himself as a trustee for Mr. Bellamy, knowing that he had executed that memorandum. But this only shows what Mr. Burrow's sentiments were, not Mr. Bellamy's, by which the present case must be governed.

As to the last objection, *viz*. the insolvency of Mr. Bellamy, it cannot affect a matter of this consequence relating to the execution of an office of so great a trust, in which the confidence of the crown and the good of the public must be considered before the case of creditors.

And, so, he dismissed the bill, expressing in a particular manner his approbation of Mr. Burrow, with regard to his skill and probity in the discharge of his duty. And he declared that he did not doubt that, if the Lord Chancellor [LORD TALBOT] should, upon an appeal, be of opinion that Mr. Burrow was but a trustee for Mr. Bellamy's creditors, yet he would think, as His Honor should have done had he been of that opinion, that Mr. Burrow was entitled to a

very liberal allowance. This case was now re-heard by the Lord Chancellor [LORD TALBOT] upon the sole point of the trust.

Mr. Attorney General [*Willes*], Mr. Solicitor General [*Ryder*], Mr. *Chute*, and Mr. *Duval* argued for the defendant that there was a plain intention of kindness appearing by the will from Mr. Bellamy to the defendant and that such intentions have always, in construction of trusts of this kind, had a great weight with the court. Mr. Bellamy's intent at the time of the grant obtained seems uncertain and to be ascertained afterwards by his future choice. The wording of the note given by the defendant showed clearly that it was not intended as a present declaration of trust, but only to secure a future declaration upon Mr. Bellamy's request, in case the defendant, who was then very young, should not behave to his satisfaction. Here was no demand ever made, nor the least pretence of misbehavior in the defendant. And, had Mr. Bellamy intended the profits of this office as an additional estate, he would surely have said somewhat of it in his will, wherein he is very particular in the disposition of all his estate, both real and personal. Nor can he be said to have forgot Mr. Burrow, having limited several estates to him in remainder and made him executor of his will. When the person who drew his will had officiously inserted a clause, whereby this was declared to be a trust, he blamed him, and ordered that, before the will was engrossed, this clause should be left out and nothing of it to be mentioned, which was a strong presumption that he intended it solely for the defendant's benefit, it being very strange to suppose that, had he intended him to be but a bare trustee, he should make no provision for him, but make him execute the office without any consideration at all. Though the intent seemed so strongly with the defendant, it was also worthy of the consideration of the court whether such an office, so highly concerning the administration of justice, could be granted in trust, the public being very much concerned in the execution of it. And, as it must, by law, be granted to a person who is fit and expert, otherwise, the grant is void, whether it was not proper and reasonable that the officer should have the profits to his own use. The office of Marshal was held in Sir George Reynold's Case, 9 Co. 95,[1] not to be grantable for years, for many reasons which will weigh as strong against dealings of this nature, particularly, that which says that, in offices concerning the administration of justice, the trust which the law reposes in the officer is individual and personal, and the law will not repose confidence in matters relating to the administration of justice in persons unknown. And this being the case of creditors, who were likely to remain unsatisfied, could not vary the nature of this office, which was no more liable to become legal assets than an office in fee or a stewardship of a manor granted for life could be deemed so upon a judgment obtained against the ancestor, either in the hands of the heir in the first case or against the grantee himself in the second case.

Dyer 7b, is an express authority that offices of trust are not assets, for, here, the question was whether the profits of the Philazer's Office could be taken in execution. And [it was] held they could not, for, execution can only be of such things as are grantable or assignable, which an office of Philazer is not, it being a personal trust that cannot be assigned. This resolution, likewise, shows how careful the law is in not severing the profits of an office from the duty of it. And, in this great Case of the Earl of Oxford, Sir William Jones 127, it is held by Justice Dodderidge that no use can be of an office at common law.[2]

There never was an instance of a trust of such an office being carried into execution in this court. That of a Master of this court was never yet attempted to be granted upon a trust, nor, if it had, is it likely that such a trust would be countenanced here. And yet, the office now in question is of as great confidence in the Court of King's Bench as that of a Master is in this

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[1] *Rex v. Reynolds* (Ch. 1612), 9 Coke Rep. 95, 77 E.R. 871.

[2] *Anonymous* (1536), 1 Dyer 7b, 73 E.R. 19; *Earl of Oxford's Case* (1625), W. Jones 97, 101, 82 E.R. 51, 53.

court. Nor can the Court of King's Bench, in case this should be construed to be a trust, get at the *cestui que trust* to make him answerable in case of any misdemeanor, the person executing the office being the only one that they can take notice of. In Sir George Reynold's Case, 9 Co. 97b, it is said that this very office of Clerk of the Crown and other offices of other courts relating to the administration of justice are to be granted in the same manner as they always have been granted, for that, otherwise, good clerks will be deterred from applying themselves to knowledge if such offices should become saleable or transferrable from one to the other for lucre. And, upon that also, would arise corruption in the office and extortion from the subject. If, therefore, this office is neither legal assets nor liable to be taken in execution, because not assignable, according to Dyer 7b, nor saleable nor grantable for money by Statute 5 & 6 Edw. VI, cap. 16,[1] then, the profits of it cannot be accounted for upon a trust, the latter being as much within the Statute as the former, for there is but little difference whether I convey my office for a present sum of money or upon condition that the grantee shall pay the profits of it to me. And all corrupt bargains relating to the sale of offices being void by the Statute, if such a proceeding as this was to meet with any countenance, that good and wholesome law might be entirely eluded, so that taking the memorandum to be even a present declaration of trust, it is void by the Statute of 5 & 6 Edw. VI, and, consequently, the office must be decreed to the defendant to hold and enjoy it in his own right, discharged from any trust.

Mr. *Verney*, Mr. *Fazakerley*, and Mr. *Strange*, argued on the other hand, that Mr. Burrow was a mere trustee and that the memorandum he had signed was a clear and plain declaration of a trust. And a trust might well be annexed to a thing which is neither grantable nor extendible. But, if this should be construed to come within the Statute 5 & 6 Edw. VI, cap. 16, then, not only the declaration of trust would be void, but, likewise, the grant itself to the defendant. But this office might well be granted in trust, notwithstanding the Statute, for, that only avoids corrupt agreements between the grantor and grantee of an office and cannot be construed to extend to such as come in nomination only to execute the office without having anything to do with the profits of it, but only to such as are themselves the beneficial officers. Here is no corrupt agreement between the grantor and grantee, but a grant of this office obtained at the sole charge of Mr. Bellamy, and no consideration at all moving from the defendant. Though an office was not, strictly speaking, legal assets, yet, if an officer conveys the profits of an office to trustees for the payment of his debts, this court will carry such a trust into execution, as appears from the Case of Thynn *versus* Jacob, 16 June 1656, where the lord Goring, having a grant of the offices of Clerk of the Council and Clerk of the Signet of the Court of the President and Council of the Marches of Wales, conveyed the profits to two trustees for the payment of his debts. Mr. Thynn, a subsequent creditor, brought his bill against the trustees for an execution of the trust and to have his debt paid. And [it was] so decreed by the then Commissioners of the Great Seal, and, upon a re-hearing in 1661 before the lord Clarendon, the decree was affirmed, the validity of the trust being never questioned. The like determination was in the Case of Powell *versus* Drake, 10 May 1731, in this court, where Mr. Drake having a grant of the office of Chirographer in the Court of Common Bench in the names of Bennett and Champion, who had declared the trust to be for the benefit of Mr. Drake, he devised it for the payment of his debts and legacies, and [it was] decreed upon the Master's report that the office should be sold for the satisfaction of his creditors. And so, it was afterwards for £3500. The arguments that the profits of the office are not to be severed from the execution of it are not warranted by any of the cases cited. Sir George Reynold's Case was adjudged upon the great inconvenience that might ensue upon a grant for years, as, if the grantee should die intestate, there would be none to execute it until administration was granted, which, perhaps, might not be for a long time. And, indeed, if that doctrine was to prevail, it

[1] Stat. 5 & 6 Edw. VI, c. 16 (*SR*, IV, 151-152).

would overthrow all the benefit which the law gives to the grantee of an office, whose grant is to hold it by himself or a sufficient deputy, which words are so beneficial and strong that in Young and Fowler's Case, Croke Car. 555, a grant of the office of Register to an infant of eleven years of age to be executed by him or his deputy was held good, for that he might appoint a sufficient deputy, which, if he did not or if the deputy misbehaved, it is a forfeiture of the office.[1]

And, there, a difference is taken between such a grant and where the grant is to the infant alone. Nor can anything be inferred from the cases cited in Dyer 7, 150, but that the public is concerned that the offices that relate to the administration of justice be executed by proper persons, which does not at all preclude the grantee from making a deputy, for the office being executed by a sufficient person, the public weal is satisfied. In the Case of Culliford and Cardonell, Salk. 466, a difference was taken between a bond for the payment of a sum in gross for an office and a bond for accounting for part of the profits as his deputy, which comes pretty near our case.[2] And that the law will, in some cases, allow the profits of an office to be severed from the execution of it, appears from the common case of a sequestration of the profits of a benefice for the payment of debts, where the benefice, *viz*. the cure of souls, is as much an office as that now in question.

Lord Chancellor [LORD TALBOT]: The first question is whether Mr. Burrow is to be looked upon but as a trustee for Mr. Bellamy's creditors or whether he is to hold this office in his own right, discharged from any trust. It must be considered that, at the time of this grant, Mr. Bellamy was himself in the office for his own life and also for the life of another who surrendered, in whose stead a grant was obtained to Mr. Burrow for his life, upon which he gives such a paper as I think amounts to a declaration of trust. It has been said that this related to a future act and was not intended as a present declaration. But I cannot think so. It seems to be quite proper for a declaration *in praesenti*. There is an express promise, which would not perhaps have been so strong, if, at that time, the grant had been actually passed and perfected. But it was not so at this time. And, therefore, the transaction was sufficient as things stood. Nor can I think it right to admit of Mr. Strutt's evidence to oust a construction which appears from the nature of the transaction itself. The intent must be collected from the words of the note and from the circumstances appearing at the time of the note given. The not mentioning anything of it in his will might be to leave the defendant at liberty to execute this office either by himself or deputy or for many other reasons, as well as those that are insisted on. And, by the instructions given to Strutt, he had ordered his executors to insure this office for £2000, so that, if these instructions were admitted to weigh anything, they would rather weigh against the defendant than in his favor.

The next question is whether, by law, there can be a trust of this office if this case be within the Statute of 5 & 6 Edw. VI, 7. I should do Mr. Burrow but little service in decreeing for him if it be within the Statute. In that case, the whole is void, and the office vacant, the Statute disabling the party buying, as well as selling, so that it would lead us farther, perhaps, than the defendant desires. The design of the Statute was to restrain corrupt agreements between the grantor and grantee. But, here, is no such thing, this being a gratuitous grant from the crown of this office without any consideration at all, either from Mr. Bellamy or Mr. Burrow. Here is a bare nomination of Mr. Burrow to act, but nothing at all to bring it within the Statute, for want of a corrupt agreement between the trustee and the *cestui que trust*. Indeed,

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[1] *Rex v. Reynolds* (Ch. 1612), *ut supra*; *Young v. Fowler* (1639), Croke Car. 555, 79 E.R. 1078, also March 38, 82 E.R. 401.

[2] *Culliford v. Cardonel* (1696), 2 Salkeld 466, 91 E.R. 402, also Comberbach 356, 90 E.R. 525, 1 Comyns 1, 92 E.R. 927, Holt K.B. 506, 90 E.R. 1178, 12 Modern 90, 88 E.R. 1184.

the reason of the thing speaks itself, for, where the officer is to have no part of the profits to his own use, but barely his name made use of, what inducement can he have to give a sum of money for an office, the profits of which he is to be no way benefited by? The cases that have been cited for the defendant do not come up to the present case, for, here, can be no want of an office nor of a proper officer, he being officer still, though not to his own use, so that this differs widely from the reasons in Sir George Reynold's Case and the other cases. As I am, therefore, persuaded that here was a trust intended, I think it ought to be carried into execution. It has been objected by the defendant's counsel that it was merely executory. But I do not think it more so than any other trust. Every trust is, in some sort, executory, for, they all relate to some future act to be done. And this does no more. And whatever may hereafter happen in case a deputy be made and that he misbehave, the loss must be borne by the trust estate. And, consequently, [there is] no damage to Mr. Burrow, who is but a nominal officer only.

And so he reversed the decree, but ordered that, after the account be settled, the Master should make a very liberal allowance to Mr. Burrow for the time he had actually executed the office and also for the time to come.

[Other reports of this case: Lincoln's Inn MS. Misc. 384, p. 403, pl. 26, 2 Eq. Cas. Abr. 743, 22 E.R. 631.]

47

Gifford v. Manley

(Ch. 1735)

An acknowledgement under hand and seal of the receipt of trust assets creates a specialty debt.

21 June [1735].

By articles previous to the marriage of Anthony Gifford, dated the 20th of September 1717, the sum of £400 was vested in two trustees, Buckingham and Jones, to be put out at interest, the interest to be paid to the husband and wife during their lives and the life of the survivor of them, and, after their deaths, then, to such children of the marriage as should be appointed by the survivor and in such share and proportion as should be appointed. And it was further agreed that neither of the trustees should be answerable for the act of the other. The £400 was paid to Buckingham only, who gave a receipt for it, and, by a writing under his hand and seal, dated 1 October 1717, he declared, that Jones, the other trustee, had received no part of the £400, but that he had received the whole. Buckingham dies intestate, having never placed out the £400 according to the trust, but having kept it in his hands until his death. The question was whether this was to be looked upon as a simple contract debt only or whether as a specialty debt, being under hand and seal.

The Master of the Rolls [JEKYLL] had decreed it a specialty debt to affect the executor only, but not the heir, he not being bound, nor the declaration under hand and seal extending to him and that the plaintiffs should stand in the room of such other creditors as had been satisfied out of the personal estate in case of a deficiency.

It was now insisted on that an acknowledgement, though without the words *teneri et firmiter obligari*, if under hand and seal, will create a specialty debt, because under hand and seal. And to prove it were cited Dy. 20a; Ro. Ab. 597; Bro., *Dette*, 187; Croke Eliz. 644.[1]

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[1] *Core's Case* (1536), 1 Dyer 19, 73 E.R. 42; 1 Rolle, Abr., *Dett*, p. 597; YB Trin. 11 Hen. VI, f. 48, pl. 5, 1 Brooke, Abr., *Dett*, pl. 187 (1433); *Chambers v. Leversage* (1598), Croke Eliz. 644, 78 E.R. 883.

Lord Chancellor [LORD TALBOT]: This, without doubt, is to be considered as a specialty debt, there being no other definition of such a debt but that it is under seal. The cases which have been cited prove it. There was one tried at York before the Lord Macclesfield, where a man had given a note to a woman upon a consideration not proper to be mentioned in the following manner, *viz*. 'borrowed and received from £100, which I promise never to pay', and he directed the jury to find for the plaintiff.

Here is a contract that the trustees shall lay out this £400 and that one shall not be answerable for the other. And, as Buckingham has by a paper under hand and seal, acknowledged that he received that estate, he is become answerable for the whole. And not having laid it out as he was bound to do, he has broken his covenant. I have no doubt but that this is a specialty debt, for, though breaches of trust are indeed in some cases considered but as simple contract debts, yet, here, it must be otherwise by reason of the express acknowledgment under hand and seal, that he alone has received the whole money, and had received it as trustee for the particular purposes mentioned.

And, so, he affirmed the decree.

[Other reports of this case: Lincoln's Inn MS. Misc. 384, p. 405, pl. 29, 2 Eq. Cas. Abr. 502, 22 E.R. 425.]

[Reg. Lib. 1734, f. 383.]

48

Hatton v. Nichol

(Ch. 1735)

In this case, the testator's debts were well charged upon his real estate in the case of a deficiency of his personal estate to pay them.

2 July [1735].

Mr. Nichol made his will in the following words:

> And, as to the worldly estate, with which it has pleased God in His abundant goodness to bless me, I give, devise, and dispose thereof as follows: *Imprimis*, I will that the charges of my funeral and all debts which shall be owing by me at the time of my death be justly paid and satisfied, especially that due to my poor carriers, which I will shall be discharged out of the first money of mine that shall be received, of which I desire particular care may be taken, and I will that all my debts be discharged within one year after my decease or so soon after as can possibly be performed.

And, then, he devises his real estate to trustees in trust for his wife for the term of 99 years if she so long live, and, after her death, in trust for his brother for 99 years, remainder to his first and other sons in tail male, and he gives away several specific and pecuniary legacies. The question was whether his real estate was, by these words, chargeable with the payment of his debts in the case of a deficiency of the personal estate.

Mr. Solicitor General [*Ryder*] argued it to be a plain charge upon the real as well as the personal estate, which appeared from the provision that they should be paid within one year.

And he cited the Case of the Earl of Warrington *versus* Leigh, where the real estate was held to be chargeable, though the words were not so strong as in the present case.[1]

Lord Chancellor [LORD TALBOT]: The debts are well charged upon the real estate in case of a deficiency of the personal estate. Let an account be taken of the testator's debts and also of his personal estate, not specifically devised, which is first to be applied as far as it will go.

[Other reports of this case: 2 Eq. Cas. Abr. 502, 22 E.R. 425.]

[Reg. Lib. 1734 A, f. 574.]

49

Proof v. Hines

(Ch. 1735)

A court of equity will grant relief against a contract that was entered into through force and necessity.

3 July [1735].

The plaintiff being entitled in right of his wife to some part the late Sir Thomas Coleby's estate and being a very mean illiterate person and in very poor circumstances, he applied to the defendant, a brazier by trade, and his wife to assist him in making out his pedigree and getting such proofs as were necessary to the making out his title to this estate. The defendant telling him that such things could not be done without money and he answering that he had none nor did not know where to raise any without the defendant's assistance, he desired him to advance it, and he would repay him. The defendant, accordingly, laid out several sums. And the defendant's wife employed several persons to search registers etc. for the plaintiff. Pending the suit, the defendant's wife often declared that she thought herself and her husband entitled to a good gratuity for their trouble and assistance of the plaintiff, but she was resolved not to trust to the plaintiff's generosity, but to bind him as fast as pen and ink could bind him. The plaintiff, coming sometime after to the defendant's wife, desired her to continue her and her husband's care for his affairs, she, thereupon, pressed him very much for the payment of what money had been laid out by them, whereupon, he offered to give a bond for £1000, payable to the defendant in a year, for what services they had already done and for such care as they would hereafter take of his affairs, to which the defendant's wife replied, he might take what time he pleased for the payment of the bond. But she pressed him very hard for the repayment of what had been laid out by her husband and her. The plaintiff gave her his bond for £1000 for the use of the defendant, her husband, after the recovery of some part of the estate by the plaintiff. This bond was put in suit. And, now, the plaintiff brought his bill to have it set aside as unduly and unconscionably obtained, by taking advantage of the distress he was then under.

It was in proof in the cause that, at the time he gave this bond, he was in the meanest circumstances, being reduced so low as to live upon what broken scraps of meat he could get from taverns and such places.

Mr. *Verney*, Mr. *Fazakerley*, and Mr. *Mills* argued for the plaintiff that he, appearing to be illiterate and in such mean indigent circumstances, must naturally be supposed [to be] in the defendant's power and that the necessity of his circumstances was the cause of his giving the defendant a bond for such an exorbitant sum. It can never be imagined that, being *sui juris*, he

[1] *Earl of Warrington v. Leigh* (1732), see above, Case No. 3.

would have entered a bond by which the defendant had it in his power to throw him into jail and keep him there all his life whether he had the good fortune to recover what he was then suing for or not. And it can as little be thought that this bond was designed as a mere gratuity to the defendant, the plaintiff being at that time not worth £5 in the world, and it being very uncertain whether he should ever be in better circumstances than he then was. Bonds taken from young heirs, marriage brokage bonds, though given quite voluntarily and, often, too cheerfully, are set aside in this court upon the reason that the party is not a free agent and that the free operation of the mind, which is necessary to give validity to every act, is wanting. This appears from the Case of Curwen *versus* Millner, 19 June 1731, and from 2 Vern. 14, 27, 121, and the Case of Twisleton and Griffith, heard before the Lord Cowper, 1716.[1] These cases, indeed, were upon contracts, where it may be said nothing was intended by way of a gratuity. But there are cases where bonds merely voluntary and not founded upon contracts have been set aside as being unconscionable. 1 Vern. 413; 1 Salk. 158; 2 Vern. 652, 764.[2] In most of these cases, there was a hazard run by the defendant, the whole money must have been lost upon a contingency.

But, here, the defendant runs no hazard, nor can he have any other loss than that of his advice. The Case of Bosanquett *versus* Dashwood, 11 November 1733,[3] is another very strong authority that, where an advantage is taken of either party's circumstances and necessities, this court will relieve. Nor will the consideration's moving partly from the wife vary the case, for, her declaring that she would not trust the plaintiff's generosity, but would bind him as fast as pen and ink could bind him and the husband's afterwards accepting the bond makes it to be his own act *ab initio*.

Mr. Attorney General [*Willes*] and Mr. Solicitor General [*Ryder*] argued for the defendant that there were many cases where the court perhaps would not decree a performance of the condition of a bond, but, yet, upon application made by the obligor, would not set it aside. This case was very different from the cases of bonds given by young heirs or for marriage brokage, where the whole rests upon contracts, but nothing is intended by the way of gratuity, as it is in the present case. The illegality of the consideration, fraud, accident will entitle to relieve here. But it was never yet said that a man's poverty, barely and merely without any other ingredient, would be a sufficient cause for setting aside any voluntary contract he may have entered into through his own carelessness and which the other party may through want of Christianity, perhaps, enforce a performance of.

Here, the past services done to the plaintiff by the defendant and the expectation of future services were the motives upon which the plaintiff gave this bond. And none of the cases cited

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[1] *Berney v. Pitt* (1686), 2 Vernon 14, 23 E.R. 620, 2 Chancery Reports 395, 21 E.R. 697; *Nott v. Johnson* (1687), 2 Vernon 27, 23 E.R. 627; *Wiseman v. Beake* (1690), 2 Vernon 121, 23 E.R. 688, also 2 Freeman 111, 22 E.R. 1092, 1 Eq. Cas. Abr. 91, 21 E.R. 202; *Twisleton v. Griffith* (Ch. 1716-1721), 1 Peere Williams 310, 24 E.R. 403, 2 Eq. Cas. Abr. 510, 22 E.R. 431, Chan. Cases *tempore* Geo. I, 165.

[2] *Traiton v. Traiton* (1686), 1 Vernon 413, 23 E.R. 544, also 1 Eq. Cas. Abr. 88, 21 E.R. 899; *Duke of Hamilton v. Lord Mohun* (1710), 1 Salkeld 158, 91 E.R. 147, 2 Vernon 652, 23 E.R. 1025, also 1 Peere Williams 118, 24 E.R. 319, 1 Eq. Cas. Abr. 90, 21 E.R. 901, 2 Eq. Cas. Abr. 386, 22 E.R. 330, Chan. Cases *tempore* Anne 18; *Turton v. Benson* (Ch. 1718-1719), 2 Vernon 764, 23 E.R. 1099, also 10 Modern 445, 88 E.R. 803, 1 Peere Williams 496, 24 E.R. 488, 1 Strange 240, 93 E.R. 498, Precedents in Chancery 522, 24 E.R. 234, 1 Eq. Cas. Abr. 45, 88, 21 E.R. 862, 900, 2 Eq. Cas. Abr. 87, 22 E.R. 75, Chan. Cases *tempore* Geo. I, 490.

[3] *Bosanquett v. Dashwood* (1734), see above, Case No. 32.

will warrant the setting aside a bond merely voluntary as this is. The plaintiff cannot be said to be other than a free agent. Only because he had a great mind to recover the part of the estate which he apprehended to be his due, which was the only influence he was under at the time he entered into this bond. The Case of Bosanquet *versus* Dashwood, though one of the reasons for the decree was the unfair advantage that one party had taken of the other's necessity, was very different from this, for, though the Statute[1] does not go so far as to make the party receiving the usurious interest liable to refund, yet, having prohibited the taking beyond such a sum and avoided the contract, the taking it is a breach of the Statute, and the actual receipt of the money will, in a court of equity, make him liable to refund, the wrong being the same, whether the usurious interest has been actually paid or not. In the present case, it is observable that the bond was never put in suit nor payment of it demanded until after the plaintiff's recovery of what he was suing for, which takes off the objection that he might have lain in prison all his life, whether he had prevailed in his suit or not.

Lord Chancellor [LORD TALBOT]: I have been a good deal doubtful in this case, for, as, on the one hand, it is entirely reasonable to leave people at liberty to dispose of their property as they think fit, so, on the other hand, it is reasonable to prevent any imposition in such disposal. And, if, here, has been no imposition on the plaintiff and that all his defence be his poverty or the inconvenience it may be to him to pay this sum, that will not be a ground for relief. But, as this case is circumstanced, the plaintiff's poverty is not to be omitted in the consideration of the transaction. His circumstances were as mean as can be imagined, and [there was] no certainty that he should be ever able to discharge any part of this bond, and, yet, he gives an obligation for £1000 to be paid at all events within the year. A poor illiterate man who applies to the defendant and his wife for aid in pursuing his claim; they answer that registers could not be searched, nor other things done without money; he, thereupon, replies that he has none, but desires the defendant to lay it down for him. The cause goes on, and, pending this suit, the defendant's wife presses for the money laid out, whereupon, the plaintiff declares that, for the services they have done and he hoped they would continue, he would give a bond, upon which the wife replies he might take what time he pleased for the payment of the bond, but, at the same time, again presses for repayment of the money laid out by her husband and her and, then, the bond is given, so that, here, is a plain contract between them. And how can I consider it as a gratuity or otherwise than as a contract?

Now, though a mere voluntary contract is not to be set aside purely and simply because it is voluntary, yet that differs widely from the present case, which was not intended as a bounty, but as an execution of an original contract for the services already done. Had an attorney, pending the suit, taken such a bond as this upon the same transaction, would not the court set it aside or would it suffer it to stand any farther than as a security for what was justly and legally due? The rule that a mischief is rather to be suffered than a general inconvenience does not at all affect this case, for, it would be a much greater inconvenience to leave men under difficulties and distresses open to all the oppression that other people may please to make them undergo. This is the reason upon which the court relieves against bonds given by young heirs and marriage brokage bonds, and will not suffer any advantage to be taken of the extravagance and want of judgment in the one case and of the strong bias to obtain what is desired in the other.

The only difficulty that arose with me was whether the defendant had any share himself in the transaction and that, where fraud is pretended, it must be fully proved. Here, indeed, the husband was not present when the bond was executed. But, still, I think there is sufficient ground for relief, for, here, the wife was party to all the transactions in searching registers etc. The contract for the bond was for their joint service, and, though she did not press for the bond, yet, she pressed for what worried more strongly, *viz*. the repayment of the money which

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[1] Stat. 13 Ann., c. 15 (*SR*, IX, 928).

she and her husband had lain out at the time that he was not worth a shilling and in the midst of the pursuit of his cause, and, when this comes to be coupled with that other saying of hers, that she would not trust to his generosity, but bind him as fast as pen, ink, and paper could bind him, it makes it plain that it was obtained of the plaintiff when under force and necessity, the pressing for the repayment being almost as strong as if she had actually required the bond.

And, so, he decreed the bond to stand as a security only for so much as had been actually laid out with interest. And left the defendant at liberty to bring his [action of] *quantum meruit* at law for what he deserved for his pain and trouble.

[Other reports of this case: 2 Eq. Cas. Abr. 186, 22 E.R. 160.]

[Reg. Lib. 1734, f. 289.]

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King v. Withers

(Ch. 1735)

A contingent interest is transmissible to a personal representative.

Charles Withers, the testator, being possessed of a considerable real and personal estate, disposed of it in the following words, *viz.*:

> I give and bequeath unto my daughter, Mary, at her age of twenty-one or day of marriage, which shall first happen, the sum of £2500. And my will and meaning is that, if my son, Charles, should die without issue male of his body then living or which may afterwards be born that, then, my said daughter should have and receive at her age of twenty-one or day of marriage, which shall first happen, the farther sum of £3500 over and above the said sum of £2500, but, in case the contingency of my said son's dying may not happen before the said age of my daughter or her day of marriage that, then, she shall receive and be paid the sum of £3500 whenever it might after happen.

Then, he devises his real estate to his son in tail, and, for want of such issue, remainder to his brother in fee. Then he goes on thus:

> And my will and meaning is that the lands and premises hereby devised shall be liable to and chargeable with the payment of the said sum of £3500 whenever it shall become due and payable.

And he directs that, in case of failure of issue of his son, his daughter, her heirs, or assigns should join in a surrender of some copyhold lands to the use of his brother; otherwise, the legacy of £3500 to be void.

The daughter marries, having attained her age of twenty-one, and dies in her brother's lifetime, leaving the plaintiff, her husband, who took out administration to her, and, then, her brother dies without issue male.

The question was whether the legacy of £3500 should be raised out of the land, the personal estate being deficient and whether it was such an interest in her as would go to the plaintiff, her administrator.

Mr. Solicitor General [*Ryder*], Mr. *Verney*, and Mr. *Fazakerley* argued for the defendant that the case was become quite different by the daughter's death from what it would have been

had she lived, in which case, it might have been a consideration of marriage and an advancement to her, that the husband was a mere stranger, and the same arguments that might be used for him could, with as much reason, be used for the most remote collateral relation she might have left behind her. Had this sum of £3500 been intended to vest absolutely, there would have been no necessity for providing for the contingency of her marriage or attaining her age of twenty-one before her brother's death. But, if it did not vest absolutely, then, this provision shows that the testator thought it necessary to provide for that only. And, when another contingency happens, no way provided for by him, it must follow that the plaintiff is not entitled to have this legacy raised. This was not to be compared to cases where a present interest subsisting is given to one for life, remainder to another upon a contingency; there, the interest is subsisting in the donor himself, but not so here, for it was never a subsisting interest even in the donor himself. And there was a great difference where, at the time of the legatee's death, it is absolutely uncertain whether the contingency will ever happen, as in the present case, and where the thing is certain, but only the manner or time of payment uncertain. In the last case, the legatee's death will not alter the case, but the representative shall be entitled to it.

But [it is] otherwise in the former, according to Domat, lib. 4, tit. 2, s. 9, p. 10, 11. This case differed from that of Cave *versus* Cave, 2 Vern. 508, for, there, the son, being by his father's will entitled to the interest, was decreed the principal. In the Case of the Earl of Rivers *versus* Earl of Darby, 2 Vern. 72, the contingency had actually happened by the lord Colchester's having a daughter at his death, and, consequently, the portion was to be raised for the benefit of her representative. The Case of Pinbury *versus* Elkin, 2 Vern. 758, 766, was a demand out of a personal estate only, and, so, not to be compared to the present case, where the real estate is chargeable as well as the personal. Nor can it be resembled to that of Buckley *versus* Stanlake, Easter term 1720, where a man, seised of a rectory for lives, devised it to his wife for life and, after her decease, to his daughter, her heirs, and assigns, and, if his daughter should happen to die unmarried, then, to his wife and her heirs and assigns, subject to and chargeable with two legacies of £100 each to two strangers, who died before the daughter; then, the daughter died an infant and unmarried; the wife devised it to trustees for the performance of her husband's will, and, upon a bill brought, [it was] decreed the legacies of £100 each to the representatives of the two legatees, although they both died before the daughter, upon whose death without marriage, the estate was devised to the wife, chargeable with their legacies, for, there was a second will, *viz*. that of the wife, to entitle the legatees and their representatives to the several legacies bequeathed by the husband's will, and, upon that circumstance, it is most probable the court went in decreeing the legacies. In the Case of Wilson *versus* Spenser, 31 January 1732, it was a present bequest and no contingency, the twelve months being given to the executor to get in the testator's estate and to pay this legacy, but not at all to create a contingency to arise within the year.[1]

There is nothing to warrant the distinction that, where the child marries and dies, the legacy or portion shall be raised for the benefit of her husband, but not where she dies an infant and before marriage. The Case of Carter v. Bletsoe, 2 Vern. 617, is directly against it. Nor is it warranted from that of Jackson *versus* Ferrand, 2 Vern. 424, for, there, the £500 was

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[1] J. Domat, *Civil Law* (1722); *Cave v. Cave* (1705), 2 Vernon 508, 23 E.R. 925, also 1 Eq. Cas. Abr. 275, 21 E.R. 1024; *Earl Rivers v. Earl of Derby* (1688), 2 Vernon 72, 23 E.R. 656, also 1 Eq. Cas. Abr. 268, 21 E.R. 1037; *Pinbury v. Elkin* (1717-1719), 2 Vernon 758, 766, 23 E.R. 1095, 1099, also Precedents in Chancery 483, 24 E.R. 217, 1 Peere Williams 563, 24 E.R. 518, Chancery Cases *tempore* Geo. I, 636; *Buckly v. Stanlake* (1720), Chan. Cases *tempore* Geo. I, 650; *Wilson v. Spencer* (1733), see above, Case No. 12, 3 Peere Williams 172, 24 E.R. 1017, 2 Eq. Cas. Abr. 547, 22 E.R. 461, 1 Vesey Sen. 48, 27 E.R. 882, Lincoln's Inn MS. Misc. 384, p. 372, pl. 1.

to be raised out of the rents and profits as soon as might be; so that whatever was raised before the daughter came to twenty-one was then to be separated from the land, and remain as money in the executors' hands, and, consequently, could never merge for the benefit of the heir, when once separated from the land. And, though, as it appears from the decretal order, which was produced in court, debts came in so fast that the £500 could not be raised so soon as expected, yet the intent was the same, that it should be raised for her, and [it was] decreed probably upon that or some other circumstance not mentioned in the book. But, besides the authority of Carter *versus* Bletsoe, 2 Vern. 617, the cases of Smith and Smith, 2 Vern. 92, and Tournay and Tournay, Precedents in Chan. 290, are express that the child must live until the time the legacy or portion becomes payable; otherwise, it shall sink for the benefit of the heir. Snell *versus* Dee, 2 Salk. 415. It was also said that the words, ' which may afterwards be born', make this to be a legacy to take effect after a general failure of issue, and, consequently, too remote.[1]

Mr. Attorney General [*Willes*] replied for the plaintiff that, had this legacy been given to her, her executors, and administrators, it would not have made the case anything better for the representative, for, if, by her death, the contingency be defeated, then, the representative can never have it. But a contingency before it has happened may well vest in the party, and, consequently, be transmissible to the representative, as if there be a devise of a lottery ticket to one in case it comes up a prize; the devisee dies before the ticket drawn; then, the ticket comes up a prize. Shall not the representative have it? Many other cases which might be put prove it likewise. If this interest be compared to a grant of a rent *de novo* to commence at a future day, then, it may be released or extinguished. And, if so, it is immaterial whether it be assignable or not. And he relied upon 2 Vern. 348.[2]

Lord Chancellor [LORD TALBOT]: It has been made a question by the defendant's counsel whether the words, ' which may afterwards be born', do not make this a void bequest, as being too remote. Had it been after a general failure of issue, it would not have been good, because it would then have kept in suspense too long. But, now, the nature of the thing confines the testator's intent, for, though we should take it in the most general sense, yet, the contingency must arise within nine months after the brother's death; so that the objection of its being too long in suspense is, by this plain and natural sense, entirely removed.

The next and great question is whether this sum of £3500 be now a subsisting charge upon the real estate, for, the personal estate being deficient, I shall consider it principally as a charge upon the land. Three things were, by the will, necessary to happen to entitle the plaintiff's wife to this legacy, death of her brother without issue male, marriage, or attaining her age of twenty-one. All three have happened, and, now, the question is whether another implied contingency be necessary to entitle her to this additional portion. The words whereby the particular contingency of her marriage or attaining her age of twenty-one is provided for have been construed both ways. But I do not think that any great stress can be laid upon them either one way or the other. The testator might throw it in naturally enough to manifest his intent that his daughter should have the £3500, although she married or attained her full age before her brother's death. Nor will the operation of the words whereby the real estate is made

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[1] *Carter v. Bletsoe* (1708), 2 Vernon 617, 23 E.R. 1005, also Precedents in Chancery 267, 24 E.R. 129, Gilbert Rep. 11, 25 E.R. 9, 2 Eq. Cas. Abr. 540, 22 E.R. 455; *Jackson v. Farrand* (1701), 2 Vernon 424, 23 E.R. 871, also Precedents in Chancery 109, 24 E.R. 53, 1 Eq. Cas. Abr. 268, 21 E.R. 1037; *Smith v. Smith* (1688), 2 Vernon 92, 23 E.R. 669; *Tournay v. Tournay* (1709), Precedents in Chancery 290, 24 E.R. 139, also 2 Eq. Cas. Abr. 654, 22 E.R. 550, Chan. Cases *tempore* Anne 211; *Smell v. Dee* (1707), 2 Salkeld 415, 91 E.R. 360, Chan. Cases *tempore* Anne 99.

[2] *Thomas v. Kemeys* (1696), 2 Vernon 348, 23 E.R. 821, also 2 Freeman 207, 22 E.R. 1163, Colles 112, 1 E.R. 206, 1 Eq. Cas. Abr. 269, 21 E.R. 1037.

chargeable any way affect the present question. The other clause whereby she or her heirs are to join in a surrender of the copyhold lands has also been considered as influencing this question. But it does not follow from thence that what has since happened was then in the testator's view, for she might have died before she had actually received the money, although the son had died without issue in her lifetime. And, therefore, it was reasonable enough to secure the remainderman the better by compelling her heirs and assigns to join upon pain of forfeiture of this sum.

The only thing, therefore, to be considered is her death, upon which the whole must turn. It has been said that, where portions in cases of this nature are chargeable upon land, they shall sink for the benefit of the heir. The leading case is that of Lady Paulet *versus* Lord Paulet, 1 Vern. 204, 321.[1] This and the like cases have gone, not upon any provision of the party, but on the construction of this court. Nor has the difference between the age being annexed to the body of the devise itself or to the time of payment ever held in these cases. The reason is that, if portions are given to be paid at eighteen or marriage and the party dies before that time, the occasion of raising it, *viz*. the advancement, ceases. And, therefore, the reason of giving it shall qualify the grant itself, as an annuity *pro consilio impenso et impendendo*, the counsel is the foundation of the grant. And, so, in these cases, the provision for advancement being the reason of the portion; when that fails, the portion shall cease likewise. It may be compared to what is called in Scotland *causa data et non secuta*, when the cause ceases, it shall never be raised for one purpose when designed for another. Indeed, in the Case of Jackson *versus* Farrand, 2 Vern. 424, the court went somewhat farther. But the marriage of the child might be the cause of that decree, £500 being intended as a portion, although no express provision made that it should be paid upon the daughter's marriage. The Case of Carter versus Bletsoe seems to be contrary. And, in both these cases, there was the same circumstance, *viz*. the death of the daughter after marriage but before the only time that was limited for the payment happened.

In cases where the portion is to be raised out of the reversionary term after the tenant for life's death and to be paid at twenty-one or marriage, the child marries, and, then, dies, it would be very hard to decree it to merge. In Butler and Duncomb's Case, 2 Vern. 760, a sum was borrowed by the direction of the court to assist the husband in his trade, the term being not yet come into possession. In the Case of Broome *versus* Berkley, Abr. Eq. Ca. 340, the Lord Trevor delivered his opinion in the House of Lords that, in all such cases as this, where the portion is contingent and the child marries and then dies, the representative shall have it. Indeed, in cases where the child dies so young that the portion could never be wanted, the court will not decree it to be raised, because there is no occasion for it, as in Bruen and Bruen's Case, 2 Vern. 439, and in that of Tournay *versus* Tournay.[2] But there is no precedent where the court has dealt so hardly with a child who dies after marriage, as to take that away which was intended for its provision.

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[1] *Lady Poulet v. Lord Poulet* (1683), 1 Vernon 204, 321, 23 E.R. 415, 496, also 2 Ventris 366, 86 E.R. 489, 2 Freeman 93, 22 E.R. 1079, 2 Chancery Reports 286, 21 E.R. 680, 1 Eq. Cas. Abr. 267, 21 E.R. 1036, Lords' Journal, vol. 14, p. 87.

[2] *Butler v. Duncomb* (Ch. 1718-1719), 2 Vernon 760, 23 E.R. 1096, also 1 Peere Williams 448, 24 E.R. 466, 10 Modern 433, 88 E.R. 797, 1 Eq. Cas. Abr. 339, 21 E.R. 1088, 2 Eq. Cas. Abr. 674, 22 E.R. 566, Chan. Cases *tempore* Geo. I, 400; *Brome v. Berkeley* (Ch. 1727-1728), 1 Eq. Cas. Abr. 340, 21 E.R. 1088, also 2 Eq. Cas. Abr. 649, 22 E.R. 545, 2 Peere Williams 484, 24 E.R. 826, 6 Brown P.C. 108, 2 E.R. 965, 1 Eq. Cas. Abr. 340, 21 E.R. 1088, Chan. Cases *tempore* Geo. I, 1238; *Bruen v. Bruen* (1702), 2 Vernon 439, 23 E.R. 881, Precedents in Chancery 195, 24 E.R. 94, also 1 Eq. Cas. Abr. 267, 21 E.R. 1036; *Tournay v. Tournay* (1709), Precedents in Chancery 290, 24 E.R. 139, also 2 Eq. Cas. Abr. 654, 22 E.R. 550, Chan. Cases *tempore* Anne, 211.

It has been said that this, being future, could not be intended as a provision for her. But is not a future interest an interest still, though not so good as an interest in possession? It is and may be a consideration of marriage. It does not, indeed, absolutely vest, because the contingency may never arise. But it is carrying it too far to say that it does not vest at all. Why may it not vest in such manner as to be transmissible? There is no doubt but, after twenty-one, she might have released it, though not have assigned it at law, because but a mere possibility in the eye of the law. A condition may descend upon the heir, although no estate does actually descend from the ancestor. And, when the condition is performed, he shall be in by descent, because of the condition descending. And, as this might have been released, I do not see why it should not be transmissible to the representative.

But, if I had any doubt about that, the several authorities that have been cited for the plaintiff would bind me; and, particularly, 2 Vent. 347, where the interest was as contingent as it is here, is an express authority that a contingent interest is transmissible to the representative.[1] The Case of Bulkley *versus* Stanlake is the same. It has been said, indeed, that, in this case, the contingency was annexed, not to the legacy itself, but to the fund only out of which it was to arise. Thus, I apprehend that the contingency went to the whole. Nor can I help considering that case as another authority that a contingent interest is transmissible to the representative. That of Pinbury *versus* Elkin was a devise of £80 to his brother if his wife should die without issue by the testator then living; the devisee died in the lifetime of the wife; then, the contingency happened, and the legacy was decreed to be paid to the representative. The Case of Snell *versus* Dee, 2 Salk. 415, weighs but little with me, for, first, I do not think it well reported, secondly, the reason seems idle, for, why may not an uncertainty be transmissible as well as a certainty, though perhaps not so beneficial. This, although to be raised out of land, cannot receive a different construction from the other cases, for, though it is to be raised out of land, it remains money still. And can anyone say that the contingently upon which this was left to her has not happened? Has not she married? And, although she has not lived to receive it, yet the contingency having happened, it must go to her husband, who is her representative and who may well be thought to have married her in contemplation of this additional fortune of £3500, though depending upon a contingency.

And so he decreed it to the plaintiff, the husband and administrator of Mary.

N.B. Upon the 16th of March 1735, this decree was affirmed in the House of Peers.

[Other reports of this case: Lincoln's Inn MS. Misc. 384, p. 408, pl. 34, Precedents in Chancery 348, 24 E.R. 163, 1 Eq. Cas. Abr. 112, 21 E.R. 920, 2 Eq. Cas. Abr. 656, 22 E.R. 551, Gilbert Rep. 26, 25 E.R. 19, 3 Peere Williams 414, 24 E.R. 1125, 3 Brown P.C. 135, 1 E.R. 1226, note also Chancery Repts. *tempore* Anne, p. 538.]

51

Rudge v. Barker

(Ch. 1735)

In this case, a share in a devise went to the survivor's next of kin and not to the survivor's survivor.

18 July [1735].

Thomas Cole made his will as follows, *viz.*:

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[1] *Anonymous* (1680), 2 Ventris 347, 86 E.R. 478.

> I give unto my granddaughters, Elizabeth and Anne, and to my grandson, Thomas, £1000 of my capital stock in the East India Company and the interest thereof to them for their use. And, if any dies, to the survivors or survivor, share and share alike. And my meaning is that the interest shall be paid to their father, my son Howard, to be improved to their use.

The grandson died an infant, by which, his share survived amongst his two sisters. Then, one of the sisters dies. And the question was whether the share she had taken by survivorship upon her brother's death should survive to the other sister, as well as her original legacy of £1000 or whether that share taken by survivorship should go to the father, who was her administrator.

Master of the Rolls [JEKYLL]: The first question is whether the interest shall receive a different construction from the principal. But I think it will not, for, being both coupled together, they must receive the same determination.

The next question is whether the share arising by survivorship, which the deceased sister took upon her brother's death, will survive to the next sister or whether it will go to her father who is her administrator. And I am of opinion that it does not survive, but goes to her administrator. Indeed, it may be the testator intended the whole to go amongst his grandchildren and nobody else to have any benefit. But, whatever his intent might be, I must judge upon the words of the will, and, according to those, the limitation over relates to the legacy only. Had they not been distinct legatees, it might have been another question. But, being entirely distinct and not even so much as tenants in common, the case is the same as that of Barnes *versus* Ballard, before the Lord King, 1 June 1727, where it was decreed for the administrator. And it agrees with the Lord Holt's opinion, cited in Woodward and Glasbrook's Case, 2 Vern. 388; the devise is several, and the question is not upon the original share, but upon the share that accrued by the survivorship, which goes to the administrator by reason of the words ' share and share alike', which are tantamount to the words ' equally to be divided'.[1]

And, so, he decreed the share accruing by survivorship to the father, who was the administrator of the deceased.

[Other reports of this case: 2 Eq. Cas. Abr. 548, 22 E.R. 462.]

[Reg. Lib. 1734 A, f. 537.]

52

Moor v. Black

(Ch. 1735)

A court of equity will order discovery of title deeds where the plaintiff needs them to prove her dower rights.

A court of equity will take jurisdiction of a case in order to prevent multiplicity of litigation.

26 July [1735].

The plaintiff, by her bill, charged that Mr. Rawlinson died upon the 8th of July 1732, seised of several estates, which, upon his death, descended, as to one moiety, upon the plaintiff's husband in fee, who died the 11th of March after, before any partition made and that the defendants had got possession of all the title deeds, whereby she was disabled from suing

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[1] *Woodward v. Glasbrook* (1700), 2 Vernon 388, 23 E.R. 849.

for dower at law. And, therefore, she came into this court to have her dower assigned of what lands descended to her husband.

The defendants demurred, for that the plaintiff's right of dower was a right merely at law and triable by a jury and that no impediment was suggested why she could not recover at law.

Mr. Attorney General [*Willes*] and Mr. *Forrester* insisted for the plaintiff that she was proper to come into this court, both by reason of the deed's being in the defendant's hands, without which she could not prove her title at law, and, also, for that the estate being in coparcenary and no partition made, the sheriff could, upon recovery in a writ of dower, put her into possession but of a third of an undivided moiety and that, still, recourse must be had to this court for a certainty, and not to set out a part to her, the judgment in dower not reducing it to more certainty than it was before, according to 1 Inst., sec. 45,[1] and that, by bringing this bill, the plaintiff had only done at first what she must have done at last.

Mr. *Fazakerley* insisted, on the other hand, for the defendant, that, though the plaintiff might be entitled to a discovery, she could not be so to have dower assigned her, that being a title merely at law and for a detainer, of which, damages were to be assessed by a jury and that she was not entitled to the possession of the deeds, but that they belonged to the defendant.

The Lord Chancellor [LORD TALBOT] overruled the demurrer upon both points, saying that there was no possibility for the plaintiff (as appeared to him) to recover without the assistance of the deeds, for the estate descending upon her husband in July and he dying upon the 11th of March after, before any receipt of rent or partition made, she could not prove a seisin at law to entitle herself to dower.

Secondly, she lay under another difficulty, as her husband's estate was complicated, and she must come here for a partition; otherwise, the consequence would be that, after judgment and execution, she must, at the end of every six months, be driven to her action against such as held jointly with her and who received the profits for her share and, also, for her damages for the detainer, which would be absurd and unreasonable.

[Other reports of this case: 2 Eq. Cas. Abr. 389, 22 E.R. 332.]

53

Hudson v. Hudson
(Part 1)

(Ch. 1735)

When one co-administrator of a decedent's estate dies, the administration survives to the other.

30 July [1735].

The plaintiff brought his bill, as administrator, against the defendant, who pleaded that administration had been granted to the plaintiff and to another who died before the bill [was] brought. And, upon that plea, the question was whether, when an administration is granted to two and one dies, the administration shall cease and be void or whether it shall survive to the other who is still living.

The court doubted at first, and would hear civilians. And, accordingly, it was now argued by Dr. *Strahan*, for the plaintiff, and by Dr. *Lee*, for the defendant. And he quoted the Case of Bowden *versus* Bowden, the 30th or 31st of April 1734, where it was adjudged in the Court

[1] E. Coke, *First Institute* (1628), f. 37.

of Arches that an administration does in such case determine and cease and does not survive, being but an authority, and no interest.

Lord Chancellor [LORD TALBOT]: There are authorities both ways in the present case, *viz*. that of Adams and Buckland, 2 Vern. 514, where it was held by the Lord Cowper that an administration would survive,[1] and that of Bowden *versus* Bowden, where the contrary was determined in the ecclesiastical court. As, therefore, the precedents are not uniform, we must consider this case according to the general rules of survivorship, which seem to be pretty much the same, both by the common and civil law. If an estate for 99 years be granted to two if they shall so long live, when one dies, the estate is determined. But, if a grant be made to two for their lives, when one dies the survivor shall take the whole, according to Brudenell's Case, 5 Co. 9. But, in Auditor Curle's Case, 11 Co. 1, it is held that, if an office be granted to two, there shall be no survivorship of it without special words.[2]

We must now consider which of these cases resembles the present one most. It cannot properly be said that there was any such thing as an administrator before the Statute 31 Edw. III, cap. 11. Before the Statute, where one died intestate, the king, as *pater patriae*, was to take care of his estate. And this did, in process of time, devolve from the king to the ordinary. And the Statute of Westminster II, cap. 19, which was made to compel the ordinary to pay the intestate's debts, looks as if they had not been very forward in it before. But by the [Statute] 31 Edw. III, the ordinary is to grant administration. And, therefore, the administrator is the creature of that Statute, and is to be considered accordingly. The express words of the Statute enable him to sue and be sued as an executor: And, since that time, it has never been doubted but that the property of the goods was well vested in him, since he now represents the intestate in everything. By the wording of the [Statute] 21 Hen. VIII, cap. 5, one would imagine that somewhat beneficial if intended to the administrator, by reason of the persons there mentioned, to whom administration is to be granted, *viz*. the most lawful friend, for, had no benefit been intended to him, why might not the administration be granted to any other as well as to the nearest of kin? The spiritual courts did indeed take bonds of the administrators to oblige them to distribute the estate, but, as often as they did so, they were prohibited by the temporal courts. Nor does the Statute of Distributions alter the nature of the office. It makes him only to be, as it were, a trustee for the persons entitled to a distribution, and, usually, for himself as one of them.[3]

And then, if a joint estate at law will survive, why shall not an administration, when they both have a joint estate in it? A trust will survive though no way beneficial to the trustee. And the administrators being appointed by the Statute to come in lieu of executors, the Statute has, therefore, made a will for him who is dead intestate. And the office of administrator is every way to be compared to that of an executor. It has been said, indeed, that one executor may do many acts which one administrator cannot do without the other administrator. But that is nothing to the survivorship, either for or against it. I have all due regard for the determinations in the ecclesiastical court. But I have, likewise, a great deal for those of a noble person who sat with as much honor as any man ever did and he having determined this point in Adams and Buckland's Case, I think it safer for me to follow that authority than any other which may have

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[1] *Adams v. Buckland* (1705), 2 Vernon 514, 23 E.R. 929, also 1 Eq. Cas. Abr. 249, 21 E.R. 1025.

[2] *Brudnel v. Skidmore* (1592), 5 Coke Rep. 9, 77 E.R. 61; *Auditor Curle's Case* (1610), 11 Coke Rep. 2, 77 E.R. 1147.

[3] Stat. 31 Edw. III, stat. 1, c. 11 (*SR*, I, 351); Stat. 13 Edw. I (Westminster II), c. 19 (*SR*, I, 82); Stat. 21 Hen. VIII, c. 5 (*SR*, III, 285-288); Stat. 22 & 23 Car. II, c. 10 (*SR*, V, 719-720).

passed in the ecclesiastical court *sub silentio*; especially, when the question arises upon the construction of several acts of Parliament, the construction of which belongs to the temporal courts.

And so he overruled the plea.

[Other reports of this case: See below, Case No. 86, West *tempore* Hardwicke 155, 25 E.R. 870, 1 Atkyns 460, 26 E.R. 292, 2 Eq. Cas. Abr. 425, 22 E.R. 362.]

[Reg. Lib. 1735 A, f. 468.]

54

Hervey v. Desbouverie

(Ch. 1735)

An underage City of London orphan cannot devise his orphanage part, but that will be distributed amongst the rest of the surviving orphans.

A child who has been advanced, as well as one not advanced, is entitled to a share of a London citizen's estate upon the death of a brother or sister.

A London citizen can give a legacy contingent upon a child's waiving his or her orphanage share.

8 August [1735].

This cause came on by consent, and was thus. Sir Christopher Desbouverie [1671-1733], a freeman of London, being seised of a very considerable real estate and possessed of a personal estate of the value of £60,000, by his will dated 21 January 1730, gave to Anne [d. 1757], his eldest daughter, now the wife of Mr. [John] Hervey, one of the plaintiffs, the sum of £12,000 and to his daughter Elizabeth [d. 1798], another of the plaintiffs, the sum of £7000 and to the defendant John Desbouverie [1721-1750], his younger son, £14,000, and he devised all the rest and residue of his personal estate to his executors in trust for his eldest son, Freeman Desbouverie [d. 1734], until he should attain his age of twenty-one, and, in case his eldest son should die before that age, he gave all the residue to the defendant John.

By a codicil dated 17 July 1732, he gave his daughter Elizabeth £3000 more, which made her fortune £10,000, and thereby taking notice that his daughter Anne had been sometime married to Mr. Hervey, instead of £12,000, he gave her but £10,000, and desired that Mr. Hervey should immediately, upon his decease, give the rest of his executors, Mr. Hervey himself being one, a bond, renouncing all farther claims and demands of and from his estate. The testator died soon after, leaving no wife and only the four children above named. About two years after, Mr. Freeman Desbouverie died at the age of eighteen, having made his will, whereby, after some pecuniary legacies given, he made his brother John residuary legatee.

The plaintiff's bill was to be let into a share of Freeman's orphanage part, as distributable amongst the surviving children by the custom, Freeman dying before twenty-one, who could neither devise his orphanage share before that age, nor could his father devise it upon the contingency of his dying before twenty-one to one child in bar of the rest, the custom being paramount to the will and not to be controlled by it.

Mr. Attorney General [*Willes*], Mr. *Fazakerley*, Mr. *Moreton*, and Mr. *Forrester*, argued for the plaintiffs, that, according to the custom, nothing stood in the way of the plaintiff's claim, for, that the orphan himself could not devise his share nor could the father devise it over upon the contingency of his son's dying before twenty-one, according to Pate and Hatton's

Case, 1 Chan. Cases 199, and that of Wilcox *versus* Wilcox, 2 Vern. 558,[1] and according to the constant course of the City, which appeared from the following precedents taken out of the City books, *viz*.:

> Saturday, April 1570. This day it was put in question whether William Offley, merchant, who married Anne, the daughter of William Beswick of London, draper, and was advanced in the life of the said William, her father, should or justly ought to have any part or portion of the orphanage share of Arthur Beswick, one of the orphans of the said William Beswick, which Arthur is deceased, amongst other the orphans of the said William, after the decease of the said Arthur or not. Whereupon, the ancient and old records were seen and considered, and, for that it appeared by the ancient custom of this City that the said William Offley, in the right of the said Anne, his wife, ought to have, amongst other the orphans and children of the said William Beswick, his part of the orphanage and portion of the said Arthur after his decease, it was ordered that the surety's bond for the said orphan shall be sent to for the payment of the same to the said William Offley.

Note: The custom was that, if the orphanage shares were not brought into the Chamber of London, securities were given for the payment.

Another to the same purpose:

> Friday, 20 June 1572. *Curia Specialis tenta die* 24 May 1625. According to the order of this honorable court of the 10th of this instant May, we have sundry times met together and considered of the matters thereby referred to us, and, upon examination, perusal, and consideration had of ancient and later books and records of this City, we find that the custom is and so has been taken, declared, and adjudged by the court that the orphanage part and portion of an orphan of this City, dying in his or her minority, within the age of twenty-one years, whether son or daughter, if such orphan daughter so deceasing be unmarried at the time of his or her decease, by the custom of this City, ought to come and be to and amongst his or her brethren or sisters by the father surviving, as well advanced as not advanced in the life of the father, although the father of such orphan, by his last will, should otherwise dispose of the same or should die without a will. This 24th day of May 1625. Heneage Finch, recorder, Thomas Middleton, Edward Barkham, etc. And upon the certificate a judgment given.

Another judgment of the same nature: 28 February 1672, 25 Car. II, and the same certificate to the Court of Chancery, 18 February 1702, 1 Ann., in Jesson and Essington's Case, Precedents in Chancery 207.[2]

> *Martis 8 Octobris* 1639. Whereas in the cause at the suit of George Combe and Anne, his wife, one of the daughters of Walter Burton, deceased, late citizen and freeman of London, complainant against John Burton and others, depending in the Court of Requests, the said court finding the question to depend upon the custom

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[1] *Pate v. Hatton* (1671), 1 Chancery Cases 199, 22 E.R. 760, Chancery Cases (1660-1673), 573; *Wilcocks v. Wilcocks* (1706), 2 Vernon 558, 23 E.R. 961, also 1 Eq. Cas. Abr. 26, 156, 160, 21 E.R. 847, 955, 958, Chan. Cases *tempore* Anne 75.

[2] *Jesson v. Essington* (1702), Precedents in Chancery 207, 24 E.R. 101, also 2 Eq. Cas. Abr. 263, 321, 22 E.R. 222, 274.

> of this City, whether thereby any orphan of this City, under age, may by will devise his orphanage part or not or whether the same ought not to be distributed among the rest of the orphans, notwithstanding the devise, by will, did think fit that the plaintiff's counsel make their case concerning the said point and that Mr. Recorder and Mr. Common Serjeant shall be attended therewith and that, after consideration had, to certify the aforesaid court the custom of this City in the said point; now, this day, the case was presented unto this court under the hand of counsel on both sides, and, upon advice and counsel taken thereupon by this court, it was agreed and ordered by this court that Mr. Recorder certify, according to the truth and custom of this City, that an orphan, before his full age of twenty-one years, cannot by will devise his orphanage part, but that the same ought to be distributed amongst the rest of the surviving orphans, according to the laudable custom always approved of.

A certificate of the same purport to the Court of Chancery, 17 January 1655.

The plaintiff's counsel insisted that, by these precedents, it plainly appeared that neither the father nor the orphan (during the minority) could make any disposition of the orphanage share in bar of the right of the surviving orphans and, that being established, nothing could bar the plaintiffs in the present case but the pretended satisfaction given by the father's will for their several orphanage shares, which, although, indeed, not so considerable as the legacies left by the will, yet these legacies could never be taken as a satisfaction for this contingency, but, as for the £2500 devised to each above their orphanage share, it must be taken as a mere bounty from the testator. This case differed from that of Kitson *versus* Kitson, Michaelmas 1712, Precedents in Chan. 351, and Eq. Cases 28,[1] where the wife was obliged to take either by the will or the custom, for that, upon the husband's death, there was a present right vested immediately in the wife, which the will (if she chose standing to that) should be a satisfaction for.

But, here, was no right in the plaintiffs upon the father's death to anything but their own orphanage shares. This was a mere contingency to arise, not out of their father's, but out of their brother's, estate. And it is to be considered only in that light. The cases upon satisfaction are generally between debtor and creditor, as is held in Lechmere and Lady Lechmere's Case.[2] But, here, was neither debtor nor creditor, but a mere chance which the custom gives to every child of a freeman to take his brother's or his sister's share if dying under age, and, consequently, the rules of satisfaction did not reach this case. Had Sir Christopher Desbouverie advanced the plaintiffs in his lifetime, it would never have barred them from this right of survivorship, as was clear from the above precedents. And, if so, it was hard to take it from them, because the advancement was by a will, and not by an act executed in the father's lifetime.

Mr. Solicitor General [*Ryder*] insisted for the defendants that the testator's intent was manifest that the plaintiffs should have no more than £10,000 each and that he had this very contingency in view which has happened, so that the question is whether the will shall be complied with or whether the plaintiffs shall be at liberty to drop that which makes against them and take up that which makes for them, relying upon the operation of the custom. The defendants do not pretend that the father had a power to devise the orphanage share, that is the share of any of the children that should die before twenty-one in bar of the custom, but what they insist upon is that, if the plaintiffs will take advantage of the additional bequest

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[1] *Kitson v. Kitson* (Ch. 1712), Precedents in Chancery 351, 24 E.R. 164, Gilbert Rep. 28, 25 E.R. 20, also 2 Eq. Cas. Abr. 275, 22 E.R. 232, Chan. Cases *tempore* Anne 536.

[2] *Lechmere v. Lady Lechmere* (Ch. 1735), see above, Case No. 44.

beyond the orphanage share, they must comply in the whole with the will, and not comply with one part and waive the other. The objection that this was a future contingent right and, therefore, not within the will cannot alter the case, for, although it was but a contingency at the time of the testator's death, yet the release of that contingency might as well be the consideration of this additional bequest, as if it had been a present right immediately upon Sir Christopher's death.

Lord Chancellor [LORD TALBOT]: The question here arises upon the will compared with the custom. It is clear that the testator intended by his will to make a disposition of his personal estate. He has given his daughter Elizabeth £3000 in case his son Freeman should die before twenty-one, and, by the codicil, he gives some additional legacies to his children. But he makes no alteration as to the devise over to his son John, the eldest son dying before twenty-one. Had this stood upon the custom alone, there must have been a distribution of his orphanage share. But, now, it is to be considered whether the custom shall prevail against the express limitations of the will. The custom is clear that children advanced, as well as those who are not advanced, are entitled to a distribution. And the reason is that, when the father advances his child in his lifetime, it is supposed to be done with regard to his present circumstances. And, if it do not appear how much he was advanced with it, it is a bar. It is otherwise if the *quantum* appear, for, the father shall not have it in his power to advance one more than the other upon a presumption that the other may be more fully provided for by the death of a third. And, therefore, it is very reasonable that a child advanced, as well as one not advanced, shall be entitled to a share upon the death of a brother or sister. It is clear, therefore, that neither the freeman nor the orphan can devise against the custom, nor can they anymore devise what accrued by survivorship than the original share. But, still, the father may make a disposition by his will, and leave it to his children's option, either to take by the will or stand by the custom. If they choose the former, that will be a waiver of the custom, for it would be unreasonable to admit a latitude of taking by the will as far as that makes for the party and, likewise, by the custom, as far as that will go, and waive the other part of the will which makes against him.

The Case of Noys *versus* Mordaunt, 2 Vern. 581,[1] goes upon that reason, and the City precedents prove only that the father cannot by will dispose of the orphanage share in bar of the custom, but do not prove that, where a will is made and legacies given by that will which the child accepts of, that he shall notwithstanding have recourse to the custom for his share and so, by taking both under the will and the custom, defeat that provision intended by his father for others. The bond that the plaintiff was to give is, to me, a strong proof that the testator had the custom in view, and intended notwithstanding to make this provision for his children, for it does not appear that either the plaintiff, Mr. Hervey or his wife, had any other claim or right to any part of the testator's estate but what the custom of London gave them. Nor can I ever think that this contingency will give them a right to take both by the will and the custom, for, even supposing it to be the orphan's estate, it is clear that the testator considered it as his own. And, in that view and upon that consideration, he gave the plaintiffs the additional sum of £3500 beyond what was due to them by the custom. And, indeed, in propriety of speech, the orphanage shares are so many demands upon his estate, so that his expression is not so improper as may be thought.

But however, his intent is clear. And that must take place, although his expressions be not so correct as might be. And £10,000 being better than £7500, which was the amount of the shares of each of the plaintiffs, with contingencies of increases by the death of the other children, this bequest of £10,000 must be taken as a bar to what may happen by the

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[1] *Noyes v. Mordaunt* (1706), 2 Vernon 581, 23 E.R. 978, also Gilbert Rep. 2, 25 E.R. 2, Precedents in Chancery 265, 24 E.R. 128, 1 Eq. Cas. Abr. 273, 21 E.R. 1041, Chan. Cases *tempore* Anne 44.

contingency. I am, therefore, of opinion that his intent was to dispose of his personal estate in such a manner as that, if the plaintiffs choose to take by the will, they should be barred of what was due by the custom.

And so he decreed an election, and, if they took by the will, then, to take nothing by the custom, reserving to the plaintiff Elizabeth her election until twenty-one or marriage and that Mr. Hervey and his wife should make theirs before the first day of Hilary Term next.

[Other reports of this case: 2 Eq. Cas. Abr. 272, 22 E.R. 230.]

[Reg. Lib. 1735 A, f. 592.]

55

Attorney General v. Scott

(Ch. 1735)

Courts of equity follow the same rules as to trusts that prevailed before the Statute of Uses.

Women are not be endowed of trusts.

12 November [1735].

Anne Ratford being seised in fee of lands in London and in Essex, she and her husband levied a fine, and, by a lease and release, 18 February 1711, conveyed the premises in London to Thomas Barker and his heirs to the use of him and his heirs in trust to permit the said Anne and her husband to receive the profits during their lives and the life of the survivor of them with a power to Anne to charge the premises with £400, and, subject to such power, Barker to stand seised to the use of the heirs of the survivor of John and Anne. And, by another deed, 2 April 1712, the Essex estate was conveyed in the same manner. Anne died in 1713; John the husband died in 1723, having, by his will, devised this trust estate to Locklay and his heirs, who was married to his now wife in 1713, and, afterwards, in 1724 and in 1727, mortgaged several parts of the premises to the defendant Scott. The estate being now to be sold, the question was whether Locklay's wife had any title of dower to this trust estate, which might hereafter affect the purchasers, she having insisted upon it in her answer.

For the wife were cited Fletcher *versus* Robinson, Precedents in Chan., and Banks *versus* Sutton, at the Rolls, March 1733, where dower was decreed of the trust estate, because there was a direction that the trustees should convey, and, therefore, looked upon as an actual conveyance.[1]

Lord Chancellor [LORD TALBOT]: The question is very considerable and very proper to be settled. Dower is properly a legal demand. And, here, the estate is limited to the trustees and their heirs to the use of them and their heirs, so that it is actually executed in the trustees. And whatever comes after can be looked upon only as an equitable interest, for there cannot be a use upon a use.

The question, therefore, is whether the wife of the devisee shall be entitled to dower at law. No dower was of a use before the Statute, it being entirely a legal demand, as appears

[1] *Robinson v. Fletcher* (1653), Precedents in Chancery 250, 24 E.R. 121, also 2 Peere Williams 710, 24 E.R. 925, 3 Chancery Reports 94, 21 E.R. 739; *Banks v. Sutton* (1732), 2 Peere Williams 700, 24 E.R. 922, also 2 Eq. Cas. Abr. 388, 22 E.R. 331.

from Vernon's Case, 4 Co. 1.[1] And, then, how can she be dowable of a trust after the Statute, since no difference can be assigned between a trust now and a use before the statute? And courts of equity must follow the same rules now as to trusts as prevailed before the Statute as to uses. How the difference now received between a tenant by the curtesy and a tenant in dower ever came to be established, I cannot tell. But that it is established is certain. Nor have I heard any case cited to the contrary, but that of Fletcher *versus* Robinson, which was determined upon another reason that does not affect the present case. That of Bottomly *versus* Lord Fairfax, Easter term 1712, Precedents in Chan. 336, is an exact authority that a woman shall not be endowed of a trust.[2] And the received practice of inserting trustees to bar dower would otherwise be of no signification.

For me, therefore, to do a thing merely upon the authority of an obscure case,[3] which does not seem to have been determined upon that point either and that might perhaps shake the settlements of five hundred families is what I cannot answer to my conscience. I do not think it necessary to say anything as to the cases where terms are standing out, as Lady Dudley *versus* Lord Dudley, Precedents in Chan. 241, and that of Countess of Radnor *versus* Vandebendy, 1 Vern. 356, and Show. Parliament Cases 69, for they are different and are to be considered in another light.[4]

Nor is there any greater necessity, at this time, of determining the question where the legal estate is first in the husband and, consequently, the wife entitled to the dower, and then is conveyed to trustees by the husband, for, in the present case, it was originally a trust estate and could not be any inducement to her in her marriage, for, she married in 1713 and the trust estate was not devised to her husband until 1723, ten years after her marriage.

[Other reports of this case: 2 Eq. Cas. Abr. 385, 22 E.R. 329.]

[Reg. Lib. 1735 A, f. 84.]

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[1] Stat. 27 Hen. VIII, c. 10 (*SR*, III, 539-542); *Vernon v. Vernon* (1572), 4 Coke Rep. 1, 76 E.R. 845, also Dyer 317, 73 E.R. 718, 3 Leonard 28, 74 E.R. 519, Benloe 210, 123 E.R. 147, 136 Selden Soc. 75, 98, 130, 157, 160.

[2] *Bottomley v. Lord Fairfax* (Ch. 1712), Precedents in Chancery 336, 24 E.R. 158, also 1 Peere Williams 334, 24 E.R. 413, 2 Vernon 750, 23 E.R. 1090, 1 Eq. Cas. Abr. 144, 217, 21 E.R. 945, 1001, Chan. Cases *tempore* Anne 470.

[3] *Viz. Fletcher v. Robinson*.

[4] *Lord Dudley v. Lady Dudley* (1705), Precedents in Chancery 241, 24 E.R. 118; *Countess of Radnor v. Vandebendy* (1683-1697), Shower P.C. 69, 1 E.R. 48, *sub nom. Lady Bodmin v. Vandenbendy*, 1 Vernon 179, 356, 23 E.R. 399, 520, also 2 Chancery Cases 172, 22 E.R. 899, *sub nom. Lady Radnor v. Rotheram*, 2 Freeman 211, 22 E.R. 1165, Precedents in Chancery 65, 24 E.R. 32, 1 Eq. Cas. Abr. 219, 21 E.R. 1002, 2 Eq. Cas. Abr. 383, 22 E.R. 326, Lincoln's Inn MS. Misc. 559, f. 111, Chancery Cases *tempore* Jac. II, 156.

56

Law v. Law

(Ch. 1735)

A court of equity will interpose when it sees private contracts made to elude laws enacted for the public good.

A bond to influence and effectuate the purchasing of a public office is void and unenforceable.

14 November [1735].

Edmund Law, the plaintiff's late husband, gave his elder brother a bond, reciting that, whereas the said Edmund Law had been for many years an officer and supervisor of the excise by the procurement of his brother, Richard Law, the defendant, and that the said Richard Law had promised to use his utmost endeavor and interest to procure him to be advanced to the office of collector of the excise, upon condition that the said Edmund Law shall pay to the said Richard Law £10 *per annum* so long as he shall continue supervisor. his then office, and £20 *per annum* as long as he should be collector, the condition, therefore, was that if Edmund should pay the said £10 and £20 *per annum*. etc. Edmund Law paid one sum of £10, and died intestate. And the defendant, Richard Law, brought an action upon the bond against the plaintiff, the widow and administratrix of Edmund. And she, thereupon, brought her bill to set aside this bond and to have the £10 refunded.

Lord Chancellor [LORD TALBOT]: It is agreed on all hands that this bond is good at law, wherefore the representative of the obligor is obliged to come hither for relief. The general head of relief goes upon fraud and imposition, of which there is nothing suggested in the present case, but the whole consideration appears in the condition. The question is whether this be such a bond as a court of equity ought to relieve against.

This is but one agreement, although respecting two periods, *viz*. that of having obtained the office of supervisor and that of procuring the collectorship, and, then, the condition is to pay two several sums. It relates to an office which is certainly within the Statute 5 & 6 Edw. VI,[1] for it concerns the king's revenue, and cannot be executed by deputy, and nobody can say but that the sale of offices within that Statute is a public mischief. The legislature has adjudged it to be so. And, although this be not directly a sale within the Statute, yet it is in effect the same, there being little or no difference between a commissioner's taking a sum of money and another person's taking it to influence the commissioner.

The inconveniences are the same, since, thereby, the persons appointing are deceived and so is the public. And there is a very strong presumption that the person so giving is not duly qualified for the execution of the office. And, in this very case, it appears that the obligor was suspended. The objection that, this being a penal law, it is not to be extended in equity is easily answered, for, though penal laws are not to be extended as to penalties and punishments, yet, if there be a public mischief, and a court of equity sees private contracts made to elude laws enacted for the public good, it ought to interpose. Here is a bond given for future acts, as well as for such as are passed and which is the same as if given to a commissioner for a direct sale. And, indeed, had there been no precedent of the same nature, I should have had courage enough to have made one in the present case. But I shall be abundantly warranted by what the court has done in cases within the same reason. Bonds of resignation are not entirely parallel, for the relieving or not relieving against them depends upon the use made of them *ex post facto*,

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[1] Stat. 5 & 6 Edw. VI, c. 16 (*SR*, IV, 151-152).

and bonds given in fraud of marriage are relieved against by reason of the extortion and imposition which attends them, as in the Duke of Hamilton's Case, 2 Vern. 652.[1]

But marriage brokage bonds fall directly within the reason of this case, being entirely a voluntary act, Nor does the court interpose therein for the particular damage to the party only, but, likewise, from a public consideration, marriage greatly concerning the public. And it is no objection that the point of relieving against them has been settled but lately, for it was settled upon very great consideration and there are now many precedents of it. If, therefore, in this and the like cases, this court does interpose and regulate things of a public nature, as in the case of a young heir's entering into unreasonable contracts during the life of the parent, why shall it not do the like in the case before us, the inconveniences of winking at such practices being plain and obvious to every man's understanding? Some cases have been cited for the defendant, none of which come up to our present case, as Lawrence *versus* Brazier, 1 Chan. Ca. 72, where it does not at all appear what the office was and the only question there is whether the party should pay for the time he was dispossessed; that of Beresford *versus* Done, 1 Vern. 98, related to a commission in the Army, and no law prohibits the sale of such, no more than it does that of a purser of a ship, which was Symmonds *versus* Gibbons, 2 Vern. 308; that of Lockner *versus* Strode, 2 Chan. Ca. 48, had nothing illegal in it, for the payment was not to be absolute, but only in case the profits amounted to £400 or more, besides the whole profits belonging to the sheriff himself, that was but a reservation of what was his right, *viz*. the profits of the office. And, in that of Bellamy *versus* Burrow, the sole question was whether that office was capable of a trust.[2] So that none of those cases come near to the present one, which is clearly within the mischief of 5 & 6 Edw. VI, and, therefore, not to be endured.

And, therefore, he decreed the bond to be cancelled and a perpetual injunction.

[Other reports of this case: 3 Peere Williams 391, 24 E.R. 1114, W. Kelynge 181, 25 E.R. 557, 2 Barnardiston K.B. 390, 401, 94 E.R. 572, 580, 2 Strange 960, 93 E.R. 968, 2 Eq. Cas. Abr. 187, 22 E.R. 160, Jodrell 643, Lincoln's Inn MS. Misc. 384, p. 407, pl. 33, Lincoln's Inn MS. Coxe 40, p. 71.]

[Reg. Lib. 1735 A, f. 86.]

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[1] *Duke of Hamilton v. Lord Mohun* (Ch. 1703-1710), 2 Vernon 652, 23 E.R. 1025, also 1 Peere Williams 118, 24 E.R. 319, 1 Eq. Cas. Abr. 90, 21 E.R. 901, 2 Brown P.C. 239, 1 E.R. 916, 2 Eq. Cas. Abr. 387, 652, 22 E.R. 330, 1025, Chan. Cases *tempore* Anne, 18.

[2] *Lawrence v. Brasier* (Ch. 1666), 1 Chancery Cases 72, 22 E.R. 701, also 1 Eq. Cas. Abr. 85, 21 E.R. 897, Chancery Cases (1660-1673), p. 263; *Berrisford v. Done* (1682), 1 Vernon 98, 23 E.R. 340, 1 Eq. Cas. Abr. 85, 21 E.R. 897; *Symonds v. Gibson* (1693), 2 Vernon 308, 23 E.R. 800, also 1 Eq. Cas. Abr. 85, 21 E.R. 897; *Lockner v. Strode* (1680), 2 Chancery Cases 48, 22 E.R. 840, also 73 Selden Soc. 280; *Bellamy v. Burrow* (Ch. 1735), see above, Case No. 46.

57

Ex parte Lyne, a lunatic

(Ch. 1735)

A joint grant of the estate of a lunatic ends when one of the grantees dies.

14 November [1735].

The custody of the lunatic's estate was granted to a husband and wife, the wife being next of kin to the lunatic. The wife died.

And the Lord Chancellor [LORD TALBOT] held that the husband's right to the custody of the lunatic's estate was determined, it being a joint grant and a mere authority without any interest. And he said it had been so determined in the Lord King's time.

[Other reports of this case: 2 Eq. Cas. Abr. 583, 22 E.R. 491.]

58

Kensey v. Langham

(Ch. 1735)

In this case, the advowson in issue did not pass to the trustees by the will.

The word 'tenements', in a will does not pass an inheritance of an advowson.

In the case of a mortgage of an advowson, the mortgagor presents upon an avoidance before a foreclosure.

18 November [1735].

Sir Edward Nichols, being seised in fee of several lands in Northamptonshire and elsewhere, August 12, 1708, made his will, whereby he devised his manor of Faxton and lands lying there and other lands in the will mentioned to trustees and their heirs in trust for the plaintiff, Jane Kensey, and the Lady Susanna Danvers, her sister, and all other his messuages, cottages, closes, woodlands, and tenements whatsoever in Faxton, Haslebitch, Subby, and Hardwicke in Northamptonshire and all other his lands and tenements not therein after devised upon trust that his said trustees and the survivor of them should, out of the rents, issues, and profits, yearly forever, pay the sum of £30 apiece without any deduction to the several vicars for the time being of eight several vicarages in his will named for the augmentation of their vicarages and that, whenever the profits of those lands amounted to more than the yearly payment and his trustees' expenses, that, then, the surplus should be disposed of in such charitable uses as his trustees should think fit. The testator died, leaving the plaintiff and the Lady Susanna Danvers, his heirs at law, which latter died soon after without issue. And, now, the church of Hardwicke becoming void, which was full at the time of the testator's death, the plaintiff brought her bill to have the presentation for, the advowson not passing by the devise to the trustees, did belong to her as heir at law.

The trustees and vicars insisted in their answer that, by the general devise, the advowson passed and that the testator intended it to pass to make up what deficiency might be in the estate.

Lord Chancellor [LORD TALBOT]: The question is whether the advowson passed to the trustees by the will. And I rather incline to think that, by the first words, it does not pass, there being lands lying and being at Hardwicke to satisfy these words. And an advowson, being but

a right of presenting, cannot be said to be situate. Nor am I clear that the word 'tenements', which has been said to carry the advowson, does extend to incorporeal inheritances. But I do not think it necessary to enter into that question at this time. And I shall consider it a devise to the trustees, so far as it may be beneficial to the charity, but not where it cannot be any way beneficial to it, as, in the present case, the church being actually void and consequently cannot be beneficial, for no money must or can be taken for the filling it. And, if so, the rule that whatever is not disposed of remains in himself must take place and the heir at law, consequently, be entitled to this presentation, there being no provision that either the trustees or the charity should have it. It has been said, indeed, that this might be a beneficial devise by the trustees' selling the next avoidance. But, as he has made no such provision, I do not think it proper by such a construction to advance a thing which would be much better if entirely prohibited, especially, in the present case, where it cannot be proved that he intended any such thing.

In cases of mortgages, the mortgagor presents to every avoidance before foreclosure, for, the lands being but a pledge in the mortgagee's hands for the payment of his debt, he can receive nothing but what may be accounted for in its nature, which a presentation cannot be, and, therefore, he shall not have it. So in Atherton *versus* Sir Walter Calverley, the trustees having no interest, only a bare power of nomination, the right of presentation was decreed to be in the infant.[1] As, therefore, this particular turn is not to be given away by the will and since nothing is intended for the trustees but a reimbursement of their charges and this cannot be applicable to the charity, I think this turn belongs to the heir at law and that her presentee must be admitted.

A case was made for the opinion of the judges of the King's Bench whether the word 'tenements', in the will would pass the inheritance of the advowson to the trustees.

Note the judges, afterwards, certified that the advowson did not pass by the devise in question, from a manuscript note of the late Mr. Cox of Lincoln's Inn, contained in the library of that Society.

59

Chapman v. Blissett

(Ch. 1735)

A legal estate in trustees will support contingent remainders, even of a trust declared by a will where no conveyance is directed.

In this case, the devise in issue was held to be an executory devise.

22 November [1735].

Joseph Blissett devised all his freehold, copyhold, and leasehold and all his real and personal estate not therein before devised to three trustees, their heirs, executors, and assigns in trust to pay his son, Isaac Blissett, £37 quarterly, and, if he married with consent, then, double the sum, and, if he should have any child or children, he gives the rest and residue of the yearly rents and profits of his said trust estate, over and above the said yearly payment, to be applied during the life of the said son for the education and benefit of such child or children, and, then, he goes on in these words, *viz.*:

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[1] *Arthington v. Calverly* (Ch. 1733), see above, Case No. 13, also Lincoln's Inn MS. Misc. 107, f. 157, 2 Eq. Cas. Abr. 518, 675, 22 E.R. 437, 567.

> After my son's decease, I give one moiety of the said trust estate to such child and children of my said son as he shall leave, their respective heirs, executors, and assigns and to the survivor, and, the other moiety, I give to the child and children of my grandson, Joseph Dickenson, and every other child and children of my daughter, their heirs, and assigns and the survivor of them. Then, in case Isaac die without issue, the first moiety to Joseph Dickenson and other child and children of Sarah and their heirs etc.

Then, by another clause, he appoints £100 *per annum* as a jointure to any wife his son Isaac should marry, in case he married with consent, and he gives to his said grandson, Joseph Dickenson, £30 *per annum* for his maintenance until his age of fifteen and, then, £200 to put him out apprentice. Soon after, the testator died.

In the year 1712, Isaac Blissett, the testator's son, brought his bill for a discovery, and it was decreed, *inter alia*, by Lord Harcourt that the surplus of the profits of the testator's real estate, over and above the several payments directed by the will, and the produce of the personal estate should be improved for the benefit of such child or children as the said Isaac should have and that, after Isaac's death and upon his having a child, all parties interested should apply to the court. Soon after, Isaac married with consent, and, having issue, a son and a daughter, he applied to the court for farther directions, whereupon, it was decreed by the Lord Cowper that the produce of the surplus of the testator's estate to the time that Isaac had a child should go in augmentation of the said surplus, but that the produce of such surplus, from the birth of Isaac's first child, should be paid to him for the maintenance of his children during his life and that, at his death, the estate should go according to the limitations in the testator's will. Isaac Blissett continued accordingly to receive the surplus profits until his death, which was upon the 10th of October 1728, leaving a son and two daughters, the now defendants. About two years after Isaac's death, Joseph Dickenson married, and had issue, the plaintiff, his only daughter, and he died soon after.

This cause was first heard at the Rolls, where it was decreed for the plaintiff and that the produce of the surplus of the testator's real and personal estate incurred after his death, and, therefore, Isaac had a child born, should not go to such child, but should go in augmentation of the residuum of the testator's estate.

And now coming on to be reheard, two questions were made, first, whether the children of Joseph Dickenson took by way of executory devise or contingent remainder, for, if they took by the latter, then, the plaintiff could never take, she being born three years after Isaac's, the particular tenant's, death. The second question was what should become of the surplus of the real and personal estate of the testator from his death until the birth of Isaac's first child, whether it should go to the children of Isaac or whether it should go to the augmenting of the residuum.

Mr. Attorney General [*Willes*], Mr. *Verney*, and Mr. *Fazakerley* argued for the defendants that the rules of trusts vested were the same as those of estates limited to uses at law and that no rule was better known than that the remainder must vest *eo instante* the particular estate determines, that the danger of perpetuities was equal in trusts and legal estates, and that executory devises were no more to be favored here than at law. Where nothing goes to the heir at law as undisposed of until the contingency happens, upon which the devisee's interest is to arise, then, it is a contingent remainder. Here was no descent to the heir in the meantime, the whole being disposed of during the life of Isaac. And, though part of the profits were to be laid out during his life for the benefit and education of his children and there were children born before his death, that did only vest their interest in them in their father's lifetime. And there being a complete disposition of the profits during the life of Isaac makes it a freehold of the trust in being as to the whole trust, *viz*. part to himself and part to his children. Besides, no more is executed here in the trustees than is sufficient to serve the purposes specified during the life of Isaac. And both the trust estate and interest determine with his life, for the trustees

cannot have a greater estate by implication than what the express words give them, unless the purposes directed necessarily require it, the court never extending the construction against the vesting of uses. Now, after Isaac's death, the legal estate is devised, part to his children and part to the children of Joseph Dickenson, and it is devised by *verba de praesenti*, which are only proper for a remainder and to make a use executed, for, whenever the devise is *in verbis de praesenti* and the testator intends a present devise, no fact can alter it. And, if it cannot take effect as such, it shall rather be void than be construed a future devise, the consequences being no ingredient in the construction.

This appears from the Case of Scattergood *versus* Edge, 1 Salk. 229, where it was agreed that, if the words had been to a child to be born, it would have been good by way of executory devise, but, being to trustees for eleven years and then to the first son of A. in tail, who had no son at that time, it was void, there being no person *in esse* capable of taking at that time. The same determination was in Goodright and Cornishe's Case, 1 Salk. 226, in both which cases, it was impossible to support the devise, but as a future one.[1]

Yet the testator having devised by *verba de praesenti*, the court would not make a construction in favor of the party not born. What has been said for the plaintiffs, that this was not too remote a contingency because confined to arise within the compass of a life, is agreed. But the question is whether it was the testator's intent to pass it in that manner. And, if it was not, then, it must be a contingent remainder, and, as such, by its not taking effect in due time upon the determination of the estate of freehold in Isaac, it is void, and can never arise.

Mr. Solicitor General [*Ryder*] replied for the plaintiff that, although the devise was *in verbis de praesenti*, yet considering the whole frame of the will, it was evident that the testator's intent was to extend it to the children born thereafter, the words being used promiscuously and making no difference between the children already born and those to be born. And, in Scattergood and Edge's Case, there was nothing to show the intent to be to take in the children unborn, whereas the clause in the will, whereby, upon the death of Joseph and his daughter without children, he gives their moiety to Isaac's children shows plainly that he must mean children to be born, since he knew that Joseph had no children at that time and that he, by another clause, provided a particular maintenance for him until his age of fifteen. Nor was it more reasonable to construe this to be a use executed in the trustees only during Isaac's life and then to determine, for there are many other purposes in the will to be served by them, which do not any way depend upon Isaac's life, as the annuity given to his wife, the direction about putting out boys to apprenticeship, and others which are quite distinct from and have no dependency upon Isaac's life, but can arise no way but from the trust estate. And, surely, it could never be his intent to make such a disposition as would be liable so soon to be defeated by the determination of the trustee's estate, but rather to continue the uses for the benefit of all that were named, which could only be done by the continuance of the trustee's interest. And the words being well able to bear that construction, it is the most reasonable way of taking his intent.

Lord Chancellor [LORD TALBOT]: The first question is whether this limitation to the plaintiff be good or void. It has been said that, the trust estate determining upon Isaac's death, the limitation to Joseph's children was of a legal estate. And, being by *verba de praesenti*, could enure only as a contingent remainder, and, consequently, the plaintiff could never take, because not *in esse* at the determination of the particular estate by the death of Isaac. The whole

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[1] *Scatterwood v. Edge* (1697-1700), 1 Salkeld 229, 91 E.R. 203, also 12 Modern 278, 88 E.R. 1320, 1 Eq. Cas. Abr. 189, 21 E.R. 980, 2 Eq. Cas. Abr. 337, 22 E.R. 287, King's Inn Dublin MS. 92, p. 1; *Goodright v. Cornish* (1694), 1 Salkeld 226, 91 E.R. 200, also 4 Modern 255, 87 E.R. 380, 12 Modern 52, 88 E.R. 1159, Skinner 408, 90 E.R. 181, Holt K.B. 227, 90 E.R. 1024, 1 Lord Raymond 3, 91 E.R. 898, Comberbach 254, 90 E.R. 461, 1 Eq. Cas. Abr. 189, 21 E.R. 980, 2 Eq. Cas. Abr. 337, 22 E.R. 287.

depends upon the testator's intent as to the continuance of the estate devised to the trustees, whether he intended the whole legal estate to continue in them or whether only for a particular time or purpose. If an estate be limited to A. and his heirs in trust for B. and his heirs, then, it is executed in B. and his heirs. But, where particular things are to be done by the trustees, as in this case, the several payments that are to be made to the several persons, it is necessary that the estate should remain in them so long, at least, as those particular purposes require it. No authority has been cited to warrant the doctrine that, in case of such a general limitation to trustees, as the present case is, that they should have but a particular interest and, then, that interest to determine. Such a case might indeed be framed, but it was never intended here, there being many purposes to take effect, which might endure longer than the life of Isaac and the taking it in so confined a sense would be making a second construction to disappoint the testator's intent, which was to make an entire disposition of the legal estate to the trustees.

Considering it, therefore, as a trust estate, the question is whether this limitation to the plaintiff shall enure by way of executory devise or contingent remainder. And I think [there is] no objection against its taking place as an executory devise, that it is limited by *verba de praesenti*, for it appears that Joseph was very young at the time of the devise and the testator's providing a maintenance for him until he should attain to the age of fifteen, it is a proof of his knowing that Joseph had no children at that time, it being entirely improbable that he should have any in being, when he was himself of so tender an age at the time of the devise. So, although the words be *in praesenti*, they must be taken in a future sense in order to serve his intent, which appears manifestly to be that the children of Joseph should take in its creation. Therefore, it was executory.

But, then, it has been said that, when Isaac had a son born, the remainder vested in him and, consequently, the limitations to the other became vested remainders likewise. And the remainderman not being *in rerum natura* at the time of Isaac's death, this remainder can never arise. But, in regard to trusts, the rules are not so strict as at law, for the whole legal estate being in the trustees, the inconvenience of the freehold's being in abeyance, if the particular estate determines before the contingency (upon which the remainder depends) does happen, is, thereby, prevented, there being always a sufficient tenant to the *praecipe*, the defect of which was the sole mischief the law provided against. And, even the reason is not now so strong as when real actions, which can be brought against the tenant of the freehold only, were more in use. The whole, therefore, being in the trustees supports the several uses that are to arise out of their interest, which continuing in them until the birth of the plaintiff, whether it be taken as a future limitation or as a contingent remainder of a trust, is good either way.

The next question is what shall become of the intermediate profits from the time of the testator's death until the birth of Isaac's son. Upon this head and in this very case, there have been two different decrees, the first by the Lord Harcourt, who thought those profits should belong to the children of Isaac when born, the other by the Lord Cowper, who was of opinion that the children had no right to them, but that they should go in augmentation of the trust estate. I am at a loss how to determine between two as great men as ever sat here. But the whole being open before me, I must give my judgment in the manner which seems to me most reasonable. He gives, in case Isaac should have any children, the rest and residue of the yearly rents and profits for the education and benefit of such children. Now, the words 'rest and residue' are words of relation and part of somewhat that went before. The preceding disposition being of yearly rents and profits, the words 'rest and residue' must be applied to them, and not to the capital, which was not given away before. Indeed, had those children never been born, then, they could never take. But, when they are born, how can I determine that they shall not take what is expressly given them without any distinction between profits before and after their birth? The words 'benefit and education' make it plain that they are entitled to them all absolutely and entirely.

And so he varied the decree at the Rolls as to this last only.

[Other reports of this case: 1 Atkyns 594, 26 E.R. 374, West *tempore* Hardwicke 328, 25 E.R. 964, 2 Eq. Cas. Abr. 341, 703, 22 E.R. 291, 591.]

[Reg. Lib. 1735 A, f. 298.]

60

Ashton v. Ashton

(Ch. 1735)

A specific devise passes only that item or that value therein that the testator had at his death.

24 November [1735].

Joseph Ashton, by will, gave to his nephew Henry Ashton and two other persons the sum of £6000 South Sea annuities upon trust as soon as conveniently might be after his death to sell and lay out the same in a purchase of lands to be settled on the plaintiff for life, remainder to his issue, and, afterwards, by a codicil dated three days after, taking notice that he had given his trustees such a sum, he gives £1200 to be laid out in land to the same uses, and he made his nephew executor. The testator died, leaving a very considerable personal estate, but he had only £5360 in annuities at the time of the will made. The question was whether it should be made up £6000 or whether only the testator's specific fund passed by the will. It had been decreed at the Rolls to pass nothing but what the testator had in South Sea annuities.

Lord Chancellor [LORD TALBOT]: This is a specific legacy. The testator has given £6000 South Sea annuities stock, having at that time but £5360. And, if a man devise a thing which he has not, it is not such an estate as a court of equity can relieve against. If, in this case, he had actually had as much as he devised, but, before his death, had sold a part, it had been an ademption for so much. But, here, is no ademption, for, he having no more than £5360, no more can pass. Specific legacies are different in their nature from all others, for, if there be a deficiency of assets, there shall be no abatement of the specific legacy. And, on the other hand, if the testator alien any part of it or the whole, the legatee has no claim on any other part of the estate. And, in this case, this being a specific legacy and the testator not having so much at that time, no relief can be given to the legatee. It is a mistake in the testator, but such as cannot be helped here. If a man, through a mistake, devises the inheritance of an estate which he really has not, this court cannot put the devisee in a better condition than the will has left him. Nor is this to be compared with the case in 2 Leon., where it is held that, if one devises his land in such a place and has no land, but only a tithe in that place, the tithe shall pass, for, otherwise, there would be nothing to satisfy the devise. But, if one devises his lands, expressing them to be of the value of £600 and they prove to be worth but £500, this court can make no addition, for, being a specific devise of the estate, the devisee must take it as he finds it.

And so he affirmed the decree.

[Other reports of this case: Jodrell 685, 1 Vesey Sen. 149, 27 E.R. 948, West *tempore* Hardwicke 488, 25 E.R. 1046, 3 Peere Williams 384, 24 E.R. 1111, 2 Eq. Cas. Abr. 558, 22 E.R. 470.]

61

Cray v. Rooke

(Ch. 1735)

In the settling of a decedent's estate, voluntary bonds, which are mere gifts, are payable after all creditors but before legatees.

If a decedent's personal estate is not sufficient to pay voluntary bonds, they are payable out of the real estate.

11 December [1735].

A bill was brought by the son and heir and his two sisters to have a distribution of their father Jeremiah Cray's estate and to set aside a bond given by his said father to the defendant, Katherine Rooke, in the penalty of £2000 to pay her, whom he had formerly kept as his mistress, the yearly sum of £80.

The defendant insisted by her answer that the bond was good, that she, being a woman of virtue and entitled to some fortune, was prevailed upon by larger promises to live with the said Jeremiah Cray, whereby she greatly disobliged all her friends, and that she and Jeremiah Cray cohabited from January 1728 to April 1731, when the said Cray, for making some provision for her child, then about two years old, executed this bond without any fraud or imposition, whereby he bound himself and his heirs in the penalty of £2000 for the payment of a yearly annuity of £80 *per annum* for her maintenance and that of her child, the said Jeremiah Cray being then about marrying (which he afterwards did) the plaintiff's mother.

The Master of the Rolls [JEKYLL] had decreed the annuity, secured by the bond, to be paid after all other creditors, whether by bond or simple contract, this being a voluntary bond, and that, in that course of payment, a fund should be set apart out of the personal estate. But he had given no direction whether the real estate should be chargeable with this annuity in case of a defect of the personal assets.

Wherefore the defendant Rooke appealed. And it was insisted for her, first, that this bond was not to be considered as a mere voluntary bond, that the defendant Rooke appeared to be a virtuous young gentlewoman before unhappily seduced by Mr. Cray, that this was a *premium pudoris etc*. and considerations may arise as well by suffering loss and damage at the instance of another, as by giving money etc., and that, in Harris and Marchioness of Annandale, decreed 25 June 1727 and affirmed in the House of Lords, 19 March 1728,[1] a like bond was to be paid in a course of administration, and not postponed, etc. And, in Ord and Blackett, decreed by Lord Macclesfield, it appearing that Sir William Blackett had seduced the plaintiff, a young lady of £10,000 fortune, and settled upon her £300 *per annum* annuity, by a deed, which was not an effectual conveyance, so that she could not recover in law, this court interposed, and decreed against the heirs at law of Sir William Blackett. So, in the case in the Exchequer, cited in Harris and Lady Annandale, in Eq. Abr. 87, where a man granted an annuity to a woman of £30 *per annum* out of lands he had no title to, the court decreed him to

[1] *Marchioness of Annandale v. Harris* (1727), 2 Peere Williams 432, 24 E.R. 801, 1 Eq. Cas. Abr. 87, 21 E.R. 898, 1 Brown P.C. 250, 1 E.R. 547.

make a good grant etc. and, therefore, the court would not consider the grantees as mere volunteers.[1]

It was also insisted that, if the bond was to be considered as voluntary and to be postponed to creditors by simple contract, yet, as it affected the real estate and no pretence to set it aside for fraud, the bill, so far as it sought on behalf of the plaintiff, the heir at law, to set the bond aside, ought to have been dismissed, and the plaintiff left to her remedy at law against the real estate or some provision made by the decree for the defendant Rooke to have satisfaction out of the real estate etc.

Mr. Attorney General [*Willes*], for the plaintiffs: This at best is to be considered as a voluntary bond. There is a difference where such bonds etc. are given before seducing and where after, and this appears to be long after. And it would be strange to put such bonds etc. upon a better foot than bonds and securities given after marriage, which are always deemed voluntary etc.

As to the Case of Ord and Blackett and the other cases in the Court of Exchequer, they are founded upon this, that, though a bond of conveyance be at first voluntary, yet, if the party, who gives it does afterwards by fraud, destroy or endeavor to defeat it, equity will relieve against the act of the party himself. And so was the Case of Pitt and Pitt, at the Rolls, where it appearing that the late Governor Pitt, had granted the younger son, the plaintiff, an annuity of £300 *per annum* in order to qualify him for a member of Parliament and, afterwards, got the deed and burnt it, it was decreed against the eldest son, the heir at law, to make it good.

Lord Chancellor [LORD TALBOT]: No relief in equity can he had against this bond. Here is no pretence of fraud, and, therefore, no reason to relieve against it. It is indeed a voluntary bond, being given after actual cohabitation, and cannot be in a more favorable condition than a settlement made after marriage, which is looked upon as voluntary, although the obligation of nature is as strong upon a man to provide for his children after marriage as before it.

If, then, it be once settled to be good, the next question is in what degree it shall be paid. And, as to that, I think that, according to the Lord Harcourt's opinion, the resolution in Jones and Powell's Case, 23 February 1712, all creditors, whether by bond or simple contract, shall be preferred, but that this bond shall be paid before legacies, for the bond, although it be voluntary, transfers a right in the lifetime of the obligor, but legacies arise only from the will, which takes effect only from the testator's death, and, therefore, ought to be postponed to a right created in the testator's lifetime. The Case of Fairbeard and Powers, 2 Vern. 202, proves this expressly and that the Lord Harcourt's opinion in Wood and Powell's Case or in Jones and Powell's Case was grounded upon precedent authorities.[2]

The next consideration is how far it shall affect the real estate in case of a deficiency of the personal assets. Now, although it be a voluntary bond and postponed in point of payment, even to simple contract creditors, yet it must not be in a worse condition than they are, its being voluntary, giving the heir no right to set it aside, for, as the ancestor might have granted away the estate entirely from his heir, so, when he thinks proper to charge himself and his heirs, the heir shall be bound in respect of the assets descended upon him from his ancestor. And, as the whole is now before me, I must give my opinion upon it, since the leaving the defendant to sue the bond at law, where she can recover but the penalty and where the parol

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[1] *Ord v. Blackett* (1724), 2 Peere Williams 433, 24 E.R. 801, note also *Ord v. Blackett*, 9 Modern 116, 88 E.R. 351, 2 Eq. Cas. Abr. 487, 22 E.R. 414; *Cary v. Stafford* (Ex. 1725), 3 Swanston 427, 36 E.R. 935, Ambler 520, 831, 27 E.R. 336, 522, Exch. Cases *tempore* Geo. I, vol. 2, p. 893.

[2] *Jones v. Powell* (1712), 1 Eq. Cas. Abr. 84, 21 E.R. 896; *Fairbeard v. Bowers* (1690), 2 Vernon 202,23 E.R. 731, also Precedents in Chancery 17, 24 E.R. 9, 1 Eq. Cas. Abr. 143, 152, 21 E.R. 945, 952.

must demur until the heir, who is now but three years old, comes to his full age, would be delaying her much too long, and, since even after advantage taken of the infancy at law and the penalty recovered against the heir, he might resort again to this court to have the whole thing reconsidered, which is now as proper for the judgment of the court as it would be then.

And so he decreed that, if the personal estate fall short upon payment of the arrears and growing payments by the plaintiff and upon his securing the annuity out of a sufficient part when he comes of age, the defendant Rooke be restrained from proceeding upon this bond at law.

[Other reports of this case: 2 Eq. Cas. Abr. 182, 22 E.R. 156.]

62

Ibbetson v. Beckwith

(Ch. 1735)

In this case, the devise in issue of the testator's worldly estate passed a fee simple.

Thomas Beckwith made his will in the words following, *viz.*:

> As touching my worldly estate, wherewith it has pleased God to bless me, I give, devise, and dispose of the same in the manner following; *imprimis*, I give my estate, which I lately purchased of John Adamson, to pay and discharge all my debts. Item, I give and bequeath unto my loving sister, Mary Beckwith, all my estate at Helmehouse in Hither Dale Leasing at Crew, and all my estate at Cubeck, paying and discharging all legacies before charged by my father's will. Item, I give unto my loving mother all my estate at Northwith Close, North Closes, and my farm held at Roomer, with all my goods and chattels as they now stand, for her natural life, and to my nephew, Thomas Dodson, after her death if he will but change his name to Beckwith; if he does not, I him give only £20, to be paid him for his life out of Northwith Close, North Close, and the farm held at Roomer, which I give her upon my nephew's refusing to change his name, to her and her heirs forever.

Mr. Solicitor General [*Ryder*] and Mr. *Fazakerley* argued that this was a fee simple in Thomas Dodson, the testator's intent being to dispose of his whole estate, and, there, such a construction should prevail as should make the whole to pass. As this was his intent, so had he used words sufficient to carry the whole. Three things only being necessary in wills to make the devise good, *viz.* the person described who is to take, the thing which is to be taken, and the interest which the party is to have in it, all which concur here, the words being sufficient to describe the person, the thing, and the interest which the party is to have in that thing.

In wills, the word 'estate' carries the whole interest the party has, as was held in Wilson and Robinson's Case, 2 Lev. 91, where the opinion of the whole court was that the words 'tenant right estate' were sufficient to pass the fee, although, as that case is reported, 1 Mod. 100, it seems to be the opinion but of two judges. So, in Norton and Ladd's Case, 1 Lutw. 755, the words 'whole remainder' were held to carry a fee, although one would think they

would carry but an estate for life. But, because the intent was manifest that a fee should pass by these words, it was held so accordingly.[1]

The objection of a precedent estate being given, *viz*. to the mother, by the word ' estate' was idle, for that, as it was restrained to be but for life and had the word ' inheritance' been used instead of the word ' estate', with such a restriction, it would have passed but an estate for life. The other parts of the will made his intent to pass a fee simple quite plain, as the provision that he should take the testator's name and the limitation over to another and her heirs forever upon his refusal to take the name is a plain proof that he intended him a fee simple not to be divested out of him but upon his refusing to take the testator's name. And it might well be compared to Beachcroft and Beachcroft's Case, 2 Vern. 690, where the words ' worldly estate' were held to pass a fee. Barry *versus* Edgworth, Abr. Eq. Ca. 178, and Holden and Barker, 11 June 1706, a devise of all his estate in Mount Street was adjudged to pass an estate in fee.[2]

Mr. Attorney General [*Willes*] and Mr. *Verney* insisted on the other side that Thomas Dodson took but an estate for life, it being a known rule that an heir was never to be disinherited but by express words or by necessary implication. And there could be no necessary implication where the words were capable of being taken in two senses, as they are in the present case, where it is natural to take the words in that sense, which is used by people in common parlance, rather than in the strict legal sense. This will was drawn by the testator himself, who appears not to have been very knowing in the legal signification of the words. Now, the word ' estate' does, in common speech, imply only the personal possession, as when it is said that a man has an estate, by that is meant land, houses, etc.

The clause of his changing his name is rather a proof that he intended him but an estate for life, for it is usual in all such clauses to provide that not only the first taker, but, likewise, every heir shall take the testator's name and that, upon any of their defaults, the estate shall go over. But here is no provision for the heir of Thomas taking the testator's name, which looks as if he intended Thomas's estate to determine with his life. A gift of one's inheritance for life will give to the devisee but an estate for life, because the word ' inheritance' being restrained to the term of a life, can mean only a description, and not the continuance of the thing given. And, where, after such a limitation, the remainder is given over to another, the remainderman takes a fee, because the word ' inheritance', where not restrained by others, can mean only a fee, which the word ' estate' does not. And, therefore, it is very different from the present case.

His intent appears farther from the difference of his expression in this clause and in that whereby, upon failure of taking his name, he limits it by express words to her and her heirs, which diversity of expression proves a difference of intention in him. Indeed, in some cases, the devisee may have a fee simple, not from the words, but from the purposes for which he takes, which require a continuance of the estate, as in this very will, the clause whereby he devises several lands to his sister, paying his legacies, gives her a fee. But, in the devise to Thomas, there is no particular purpose to make that construction requisite, nor is there any other clause in all the will which has a devise over but this one.

Wilson *versus* Robinson's Case, 2 Lev. 91, is securely intelligible, as the case is there stated. The misfortune of most of the modern books being that they run to the argument and resolution before they have well stated the case, leaving us often to judge of the case by the

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[1] *Wilson v. Robinson* (1673), 2 Levinz 91, 83 E.R. 464, also 1 Modern 100, 86 E.R. 763, 1 Freeman 112, 89 E.R. 83, 3 Keble 180, 245, 84 E.R. 663, 701; *Norton v. Ladd* (1704), 1 Lutwyche 755, 125 E.R. 395.

[2] *Beachcroft v. Beachcroft* (1715), 2 Vernon 690, 23 E.R. 1047, also 1 Eq. Cas. Abr. 198, 21 E.R. 987; *Barry v. Edgeworth* (1729), 1 Eq. Cas. Abr. 178, 21 E.R. 971, also 2 Peere Williams 523, 24 E.R. 845, Mosely 172, 25 E.R. 333; *Holder v. Barker* (Ch. 1708), Chan. Cases *tempore* Anne, 129.

arguments. Besides, the words 'tenant right', which were used in that case, are of a particular signification. Burdet *versus* Burdet, in 1732, is within the rule of passing a fee, because of the devise for payment of debts. In Norton and Ladd's Case, 1 Lutw. 755, the words 'whole remainder', which were there used, ousted any notion of an estate for life only. And in Beachcroft and Beachcroft's Case, there being a precedent charge upon the inheritance for the payment of his debts, the devise of the moiety of what was left must necessarily carry the inheritance. The distinction taken in Barry and Edgworth's Case, Abr. Eq. Ca. 178, between a devise of all his estate in such a place and at such a place, which latter (says the book) will carry but an estate for life, is an express authority for the defendant, that but an estate for life passes by this will, the words here being the same as if he had put in the word 'at'. (*Sed per* Lord Chancellor [LORD TALBOT], I remember that case very well, and no such distinction was made in it as is pretended by the book.) Another strong authority for the defendant is Wilkinson and Merryland's Case, Croke Car. 447, 449, and 1 Ro. Abr. 834, held but an estate for life.[1]

Lord Chancellor [LORD TALBOT]: The question turns entirely upon the construction of the words of the will, what interest was intended to Thomas Dodson, whether an estate for life or in fee. In order to come at the testator's intent, the whole complexion of the will has been very properly taken into consideration on both sides. And it has been said that the first words, 'worldly estate', were used only to show that what he was then doing was *animo testandi*, but not intended by him to reach to the whole of his estate. As to that, I am of opinion that these words prove him to have had his whole estate in his view at that time. Indeed, he might have made but a partial disposition. But, if the will be general and that taking his words in one sense will make the will to be a complete disposition of the whole, whereas the taking them in another will create a chasm, they shall be taken in that sense which is most likely to be agreeable to his intent of disposing of his whole estate. If, therefore, Thomas takes an estate in fee, the will will be perfect, and take in the whole, whereas, if he takes but an estate for life, one moiety will after his death descend upon him as heir at law and the other moiety to the other co-heirs.

The clause whereby the estates are devised over to his mother and her heirs in case Thomas should refuse to take his name has been argued as a proof of his intending him but an estate for life. But that depends upon the construction of the word 'estate', which will be clear from the sense he had taken it in through all the other parts of this will; whensoever he has used it, he has meant thereby to pass the inheritance.

It has been said, indeed, that, in those clauses, the fee does not pass from the force of the words, but from the nature of the purposes, *viz*. that of paying debts, etc. But, still, the words are an argument that he intended to pass the inheritance, though not the whole argument. It has been said, likewise, that the word 'paying' does not of itself import a fee. But, still, in what sense has he used the words 'my estate' to pass the inheritance, as, for example, the word is left out in the clause now in question, which is a very material and a very operative word. But yet, none will pretend that this clause should be expunged by reason of the omission of that single word. Then, the next words are 'all my estate' Northwith Close, North Close, etc. without either 'in' or 'and', which is likewise very imperfect, so that it must return to the words 'all my estate to my mother for life, and to my nephew Thomas Dodson after her death'. Now, although the word 'estate' may, in common speech, not mean an inheritance, yet it is clear he has meant it so here. And, then, taking it in that proper legal sense, it will be a complete disposition of the whole, whereas, taking it to carry but an estate for life, there will be a chasm, an incomplete disposition, since half must descend to this very Thomas and the other half to the other coheirs, as has been before observed.

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[1] *Wilkinson v. Merryland* (1636), Croke Car. 447, 449, 79 E.R. 989, 991, also *sub nom. Wilkinson v. Meream*, 1 Rolle, Abr., *Estate*, pl. N, 14-16, p. 834, W. Jones 380, 82 E.R. 199, 1 Eq. Cas. Abr. 178, 21 E.R. 971

In the Countess of Bridgwater and Duke of Bolton's Case, 1 Salk. 236, Abr. Eq. Ca. 178, the devise of all his real estate ' in' or ' at' (I do not rightly remember which) such a place was held to pass a fee.[1] And I do not think there is any difference between the words ' at' or ' in'. They, in my opinion, mean the same thing. The Case of Wilson *versus* Robinson, 2 Lev. 91, and of Burdet *versus* Burdet, in 1732, are very strong authorities for the plaintiff, in the first of which, the fee was held to pass by the words ' tenant right estate', and the latter was a devise of his particular estates at such and such a place, which was held likewise to pass the inheritance. Nor did the provision in the end of that case, for the payment of his debts, influence the construction. But it was decreed upon the force of the first words. The same resolution was in that of Barry and Edgworth, Abr. Eq. Ca. 178. All which are so many express authorities that the word ' estate' carries a fee. Nor has any case been cited to warrant the altering the known legal signification of it.

An objection, indeed, has been made from the nature of the limitation. And it has been said that, although the word ' estate' might in other cases carry a fee, yet it could not do so here, because applied in the first instance to an estate for life only. And, therefore, it was intended but as a description of the thing intended to pass. But that objection has no weight in it, for, although he gave it particularly to his mother in the first place, yet the devise to his nephew is in general words. And I cannot see that the limitation for life, in the first instance, where the second limitation is general, can make any difference.

Another objection has been made that, had he intended him an estate of inheritance, he would have given it to him in the same words as he has limited it over upon his default of his taking his name. But this wording is so incorrect that I think no great stress can be laid upon it. What weighs with me is the intent plainly appearing to pass the inheritance, as is manifest from the other clauses of the will. Indeed, as to the other lands, wherein the testator had not a fee, the words ' my estate' pass only such an interest as the testator had. If a fee, then a fee; if but a chattel, then that only, the operation of the words being according to the estate the testator has in what he devises.

And so he decreed an estate in fee to Thomas, the nephew.

[Other reports of this case: 2 Eq. Cas. Abr. 302, 22 E.R. 255.]

63

Robinson v. Comyns

(Ch. 1736)

In this case, the remainder in issue was held to be an equitable remainder of a trust estate.

7 February [1736].

Robert Sheffield, being seised of a real estate and possessed, likewise, of a considerable personal estate, by a will, devised all his lands unto the defendant and his heirs to the use of the defendant and his heirs in trust for the payment of his debts and, afterwards, in trust for his granddaughter, Mary, the plaintiff's late wife, and the heirs of her body, remainder to the defendant Comyns and his right heirs, upon condition that he should marry the testator's granddaughter. And he gave him, likewise, his personal estate in trust for Mary until she should attain her age of twenty-one, and he made the defendant his executor, and he died soon after.

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[1] *Countess of Bridgewater v. Duke of Bolton* (1704), 1 Salkeld 236, 91 E.R. 209, 1 Eq. Cas. Abr. 177, 21 E.R. 970, also 6 Modern 106, 87 E.R. 866, also Holt K.B. 281, 90 E.R. 1054, 2 Eq. Cas. Abr. 299, 22 E.R. 252.

The defendant brought a bill for the perpetuating of testimony of the witnesses to the will. And, in his bill, reciting the clause in Robert Sheffield's will, declared himself ready and willing to marry the young lady, but she, by her answer, set forth her absolute aversion to the match and utterly refused to have him, and soon after marrying the plaintiff [Sir John Robinson], she and her husband, after she had attained her age of twenty-one, made a bargain and sale to J.S. in order to the suffering a common recovery, wherein her husband and she were vouched and the uses thereof were to the issue of the marriage, remainder to her own right heirs. The lady died, leaving issue by the plaintiff, two children, who set forth their right under the deed and marriage settlement, and insisted upon the defendant's remainder being barred by the recovery.

This bill was brought against the defendant to have a conveyance according to the uses declared in the recovery.

Lord Chancellor [LORD TALBOT]: The first question is what sort of estate the remainder in John Comyns is, whether it be a trust or a legal estate. It is observable that the whole estate is given to the defendant and his heirs to the use of him and his heirs, which is a complete disposition of the whole legal estate, and, being in the case of a will, would be so of the equitable interest likewise, unless the testator's intent appears to the contrary, as in this case it manifestly does, for it is given in trust for the payment of his debts etc. and, so far, is a limitation of an equitable estate, the remainder of which, had the testator gone no farther, would, after the purposes served, return to the heir at law, as was determined upon Serjeant Maynard's will.[1] But, then, there comes a remainder to the defendant and his right heirs etc.

It is true that the word ' remainder', properly speaking, signifies only a continuance of the same kind of estate as is before limited, which here was only a trust estate, for, when the whole legal estate is disposed of and part of the equitable interest likewise, there, the remainder must be an equitable remainder. In this case, indeed, it is not an absolute one, but conditional, which, when the condition is performed, will vest the estate in him. And, if the condition be not performed, it will then descend to the heir. The testator, therefore, has considered it as an equitable interest. And, yet, it is likewise true that this equitable interest, when vested in the same person with the legal one, must, as to some purposes, be considered as a legal interest.

The next question is whether the condition annexed to the defendant's remainder be a condition precedent or subsequent. And, as to this, I am inclined to think it is a condition subsequent. There are no technical words to distinguish conditions precedent and subsequent. But the same words may indifferently make either according to the intent of the person who creates it. In this case, the precedent limitation was an estate tail in possession. And, therefore, why shall we not say that as to this remainder likewise, it was the testator's intent to have it vest immediately in the defendant? The limitation is immediate, although the condition upon which it depends is subsequent. Whether the defendant has broken the condition or not has not been proved. But, from his answer and some other things that have appeared in the cause, I am inclined to think it now dispensed with, partly by the Lady Robinson's death and partly by her declaration in her answer to the former bill that she would not marry him. And, therefore, the defendant's interest is now become absolute.

Another question has been made, whether the interest of the Lady Robinson and her husband was barrable by a recovery. And, if it was, whether it was well barred by this recovery without a fine. It has been said that a legal and an equitable interest cannot be incorporated together. But that objection cannot affect this case, for, though the legal and equitable estates cannot be incorporated, yet the testator has not limited an equitable estate and

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[1] *Hobart v. Countess of Suffolk* (1709), 2 Vernon 644, 23 E.R. 1020, 1 Eq. Cas. Abr. 272, 21 E.R. 1040, *sub nom. Earl of Stamford v. Hobart* (1710), 3 Brown P.C. 31, 1 E.R. 1157, Chan. Cases *tempore* Anne 207, Hardwicke 22, note also *In re Maynard's Will* (1691), Dodd 101.

then the legal estate, but he has at first given the whole fee. It happens, indeed, that the last part of the equitable interest may be considered as merged by coming to one and the same person who had the whole legal estate in him. But it would be hard that, by coming to the defendant, although not absolutely, for the heir might, upon the condition broken, have taken the equitable interest out of him. It would be hard, I say, that this should prevent their incorporation. I, therefore, think it an equitable estate in the defendant, as well as that which was in the Lady Robinson, and, consequently, that she and her husband had a power to bar it. Whether it has been done in this case is next to be considered.

It has been said, that a wife tenant in tail and her husband cannot make a tenant to the *praecipe* without a fine. But whatever may be the case where a husband is merely seised in right of his wife is not necessary for me to determine, because, in this case, Sir John Robinson did by his intermarriage become entitled to an estate by curtesy. And, therefore, he alone, without his wife's joining, might have made a good tenant to the *praecipe*.

It has been also objected that the bargain and sale, whereby the tenant to the *praecipe* was made, was not enrolled until the recovery was completed. As to that, if the Lord Hobart's opinion, as cited [in] Goldbolt's reports, had been law, [some] judicial authority would certainly have followed it. If there be no enrollment, then the bargain and sale are void. But, if there be an enrollment within six months, then, it is good by relation.

And so he decreed for the plaintiffs.

See, as to this point of relation, Hynde's Case, 4 Co. 70b.[1]

[Other reports of this case: Cases *tempore* Talbot 167, 25 E.R. 720, 1 Atkyns 473, 26 E.R. 302, West *tempore* Hardwicke 635, 25 E.R. 1123, 2 Eq. Cas. Abr. 215, 393, 394, 22 E.R. 184, 335, 583, Jodrell 22.]

64

Adams v. Cole

(Ch. 1736)

In this case, a wife's portion vested in her husband, and it survived to his personal representative.

8 March [1736].

John Lockyer, upon his marriage with Elizabeth Hody, gave a bond to two trustees, reciting that:

> whereas, by the said marriage, he, the said Lockyer, should be greatly preferred in riches and substance to the value of about £500, and had agreed to pay her the yearly sum of £10 to her sole and separate use, as well during the coverture as being sole, without any control from her intended husband, and, likewise, that, if she should die in his lifetime, that it should be lawful for her to dispose, by will, of the sum of £100, and all her wearing apparel, watch, rings, and jewels, and that, in case she survived him, then, he was to leave her the sum of £200 and all her wearing apparel, plate, jewels, household goods, furniture, linen, and woollen of all sorts, which she shall at her marriage be possessed of, to be at her sole disposal, and, for the better securing the premises, the said John Lockyer was upon request

[1] *Libb v. Hynde* (1591), 4 Coke Rep. 68, 76 E.R. 1037, also 138 Selden Soc. 602, 1 Anderson 285, 123 E.R. 475.

to settle lands of the yearly value of £12. Now, the condition of this obligation is that, if the said John Lockyer should pay the said sum and should (in case of his surviving her) permit her to make such will and if she survived him, would leave her the sum of £200 and all her wearing apparel etc. that she should be possessed of at the time of her marriage, that, then, this obligation to be void.

Part of the said Elizabeth's fortune consisted in a bond debt of £200 given to her while unmarried. Then, the marriage takes effect, and John Lockyer, the husband, makes his will and the plaintiff the residuary legatee thereof, and he dies, without ever recovering this bond debt of £200. Then, his wife dies.

And the question was whether this bond debt, being a chose in action and never reduced into possession by him, should go to his representative or to the representative of the wife, who survived her husband.

Mr. Solicitor General [*Ryder*] and Mr. *Clive* argued for the plaintiff that, although the husband has by law no right to a chose in action belonging to the wife unless reduced into possession by him during the marriage, according to 1 Inst. 351b, yet that would not affect the present case, the husband here being a purchaser for a valuable consideration of all his wife's fortune, whether in action or possession, by force of the condition of his bond. And they cited the Case of Meredith *versus* Wynne, Abr. Eq. Ca. 70, pl. 15, although, as the court observed, that case is quite different from this, for, there, the husband survived the wife, and Packer and Wyndham's Case, Precedents in Chanc. 412.[1]

Mr. *Fazakerley* insisted on the other hand for the defendant that the husband could not be considered as a purchaser, the article reciting that he should be greatly advanced to the value of £500 and that, if she survived, he should leave her £200 for her wearing apparel. And, should the plaintiff's construction prevail, then, she should not have even so much as was her own, and the husband would be a purchaser, not with his own, but with her money, so that, here, is no consideration moving from the husband to the wife. And wherever the court takes an advantage from the wife, which the law gives her, it must be upon some advantage redounding to her from her husband's estate, of which there was nothing here. Had there been any dowable estate, she must have been endowed notwithstanding this bond. And, therefore, there is no reason to bar her of this legal advantage, according to the resolution in Lister and Lister's Case, 2 Vern. 68.[2]

Lord Chancellor [LORD TALBOT]: Most of the cases where choses in action have been decreed to the husband's representative, he dying in the lifetime of the wife, have gone upon the reason of equality, there being a settlement made by the husband on his life, whereby he became a purchaser of her fortune, and, therefore, on the one hand, as she was to have the provision made by the settlement, so, on the other, he should have her whole portion. In this case, indeed, there is no settlement of any estate by the husband upon his wife, only a provision that, in case she should survive him, then, he should leave her £200 and her wearing apparel, jewels, etc., so that it has been truly said that here is nothing moving from the husband, since the whole that she is to have will not amount to £500. But still is not this the agreement of the parties? Had he reduced it into possession during the marriage, it had been his absolutely; nay,

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[1] E. Coke, *First Institute* (1628), f. 351; *Meredith v. Wynne* (Ch. 1711), 1 Eq. Cas. Abr. 70, 21 E.R. 883, also Gilbert Rep. 70, 25 E.R. 49, Precedents in Chancery 312, 24 E.R. 147, 2 Eq. Cas. Abr. 352, 22 E.R. 299, Chan. Cases *tempore* Anne 281; *Packer v. Wyndham* (Ch. 1715), Precedents in Chancery 412, 24 E.R. 184, also Gilbert Rep. 98, 25 E.R. 68, 2 Eq. Cas. Abr. 138, 583, 22 E.R. 118, 491.

[2] *Lister v. Lister* (1688), 2 Vernon 68, 23 E.R. 654, also 2 Freeman 102, 22 E.R. 1085, 1 Eq. Cas. Abr. 68, 21 E.R. 881.

he might have released it during the marriage. Indeed, had there been no agreement, the law which gives her the chance of survivorship must have taken place. But she has waived that chance by her express agreement of having so much at all events. And his departure from that absolute right, which the law gave him over the whole, either by reducing into possession this debt or by releasing it, is of itself a sufficient consideration. The consequence of his not having this £200 would be that he should be bound on the one side to leave her so much if she survived him and she is not bound at all. I think, therefore, that the husband's representative is entitled to this £200.

And so he decreed for the plaintiffs.

[Other reports of this case: 2 Eq. Cas. Abr. 143, 22 E.R. 122.]

65

Fort v. Fort and Blomfield

(Ch. 1736)

In this case, the transaction in issue created a trust for the wife in her own right.

Frances Witherley, being possessed of South Sea stock and other stock to the value of £2000, by will dated the 14th of December 1732, devised some annuities, and, subject to those annuities, she devised all the residue of her personal estate to Bridget Fort, the plaintiff, by the name of Bridget Witherley, her maiden name, and made her executrix of her will, and she died. The plaintiff, being sometime before the testatrix's death (but unknown to her), married to Mr. Fort, who, thereupon, agreed with the defendant Blomfield to settle this £2000 and put it into the hands of two trustees, one whereof to be nominated by him and the other by his wife, in trust for the husband and wife and the survivor, the husband and wife make a transfer of stock to the two defendants as trustees nominated by them both. Blomfield, the wife's trustee, draws a declaration of trust, and sends it into Scotland to Fort and his wife to be executed by them, whereby this stock was to be settled upon the husband and wife for their lives and for the life of the longest liver of them, then, for the issue of the marriage, and, if no issue, then, for the wife, her executors, and administrators. The husband refused to execute this declaration, apprehending that his wife would thereby be empowered to dispose of the stock during his life, in case they had no issue, and that she died before him. But, by a letter directed to the defendant Blomfield, he desired that the trust should be declared jointly for himself and his wife for their lives and, after their decease, then, to their children, then, to the survivor to take the whole. A declaration was accordingly drawn, but, before it could be transmitted to the husband, he died intestate without issue.

And now the question was whether the defendants should be looked upon as trustees for the wife as administratrix to the husband, in which case, the defendant Fort would be entitled to a moiety under the Statute of Distributions,[1] he being father to her husband, or whether they should be trustees for her in her own right.

Lord Chancellor [LORD TALBOT]: The testatrix has made the plaintiff executrix of her will and residuary legatee thereof by her maiden name, not knowing her to be married at that time. And it would be hard, therefore, to say this £2000 did vest absolutely in the husband, notwithstanding the case, 3 Lev. 403, that has been cited;[2] especially, in the present case,

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

[2] *Howell v. Maine* (1694), 3 Levinz 403, 83 E.R. 751.

where she is made executrix and consequently chargeable with debts. But, without entering minutely into the kind of right which the husband had to this stock, whatever it was, he had it singly through his wife, subject to the several agreements made for settling this stock. And it was very reasonable that it should be settled, the husband having made no settlement upon her. The first agreement between the husband and Blomfield was that it should be settled so, as if they had no issue, the survivor of the husband and wife should take the whole, and that it should be put into the hands of two trustees to be nominated by the husband and wife, who, accordingly, make a transfer of the stock to the two defendants as their trustees. Then, comes the declaration of trust drawn by Blomfield, and, therein, a new scheme of turning this money into land, which was never thought of before, and the proviso about the survivorship not at all observed, but, instead thereof, it is expressly said that, in case there be no issue of the marriage, it shall be to such uses as the wife shall direct. This declaration, the husband positively refuses to execute, but, by a letter to Blomfield, proposes to have it settled according to the agreement, that is that neither he nor his wife shall have power to dispose of it, but that it should go to the survivor, upon which, another declaration of trust is drawn. But the husband is prevented by death from executing it, having before declared that which of the two survived should have the whole, which shows his intention of continuing in his former resolution. And nothing appears to show any alteration of it.

Taking it, therefore, in that light, I must consider the defendants as trustees, not only for the husband but for him and his wife. Otherwise, what necessity was there for their being nominated on both sides, it being antecedently agreed upon what terms this stock should be settled. The agreement was complete on both sides, and the subsequent transfer of the stock to the trustees must be taken in pursuance of that agreement and not to convey away all the wife's right, which was settled by the precedent agreement, to which this transfer relates and is a completion of. I am, therefore, of opinion, that, upon her surviving her husband, this stock is become her sole and absolute property.

And so he decreed the defendants to be trustees for the wife in her own right.

[Other reports of this case: 2 Eq. Cas. Abr. 144, 22 E.R. 123.]

66

Heard v. Stanford

(Ch. 1736)

At common law, a husband is chargeable personally with his wife's debts only during the marriage and no longer, and so also in equity.

The alteration of the settled law is the proper work of the legislature only, and not the courts.

The defendant's wife, before marriage, gave a promissory note for £50 to the plaintiff in consideration of five years service at the rate of £10 *per annum*, and, afterwards, she married the defendant, who had a fortune with her to the amount of £700, part whereof consisted of things in action, some of which the defendant received as husband and, the rest, he took as administrator to his late wife.

The bill was for the payment of this note upon a suggestion of his having received a great fortune with her and never having made any settlement upon her.

The defendant insisted that that part of his wife's fortune, which was not reduced into possession by him during the marriage and which he received after her death as administrator, was not near sufficient to pay her debts and that he had already paid more than that part amounted to.

The question was whether the husband should be liable in equity to the payment of his deceased wife's debts and the fortune he had received with her should be looked upon as equitable assets. It being clear that, at law, he is chargeable only during the marriage and no longer.

For the plaintiff, was cited the Case of Freeman *versus* Goodham, 1 Chan. Ca. 295, where, upon a bill brought against the husband for discovery of goods bought by the wife before the marriage, which, after her death, came to his hands, the Lord Nottingham said he would change the law in that point, and also that of Powell *versus* Bell, Abr. Eq. Ca. 60, pl.7.[1]

Lord Chancellor [LORD TALBOT]: The question is whether the husband, as such, be chargeable for a debt of his wife after her death in a court of equity, as, on the one hand, the husband is by law liable to all his wife's debts during the marriage, although he did not get one shilling portion with her and that her debts should amount to £2000 or any other sum whatever, so, on the other hand, it is as certain that, if the debt be not recovered during the marriage, the husband is no longer chargeable as such, let the fortune he received with his wife be never so great. The case perhaps may be hard, but the law has made it so, that it may be equal on both sides, as well where the husband is sued during the marriage for a debt of his wife with whom he had no fortune, as where he, by her death, is discharged from all her debts, notwithstanding any fortune he may have received in marriage with her. So is the law, and the alteration of it is the proper work of the legislature only.

There are instances, indeed, in which a court of equity gives a remedy where the law gives none. But, where a particular remedy is given by law and that remedy is bounded and circumscribed by particular rules, it would be very improper for this court to take it up where the law leaves it and extend it farther than the law allows. Besides, if relief was to be given in this case, it would be very unreasonable not to extend it to the former case, where the hardship lies on the husband, which was never yet done.

There is a case which may and probably does happen very often that comes very near to this. Suppose goods are sold for a certain price to a person, who, just after the delivery and before the price paid, becomes a bankrupt and these very goods are vested in the assignees. The vendor can come in but as a creditor for his share, and can neither pretend to have the price agreed nor pursue the goods in the hands of the assignees. And, yet, this is a hardship upon him, but not such as is relievable here.

In the Case of Freeman *versus* Goodham, the goods never came to the husband's hands until after the wife's death, which made it a very hard case upon the creditor and probably occasioned the saying of My Lord Nottingham. But, even there, he only overruled a demurrer put in to a bill for a discovery of the goods, and it does not appear what became afterwards of the cause. And, in that of Powell *versus* Bell, the wife was administratrix of her first husband and it did not appear what she had in her own right and what as administratrix of her husband, in which case, the marriage is no gift in law of the goods which she has *in auter droit*. And, upon this reason only, are founded all the cases where a surviving husband has been charged with his wife's debts after her death.

And so he decreed an account of what the husband had received since his wife's death as her administrator and that he should be liable for so much only, but, as to any further demand against her, he dismissed the bill.

[Other reports of this case: 3 Peere Williams 409, 24 E.R. 1123, 2 Eq. Cas. Abr. 135, 246, 22 E.R. 115, 209.]

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[1] *Freeman v. Goodham* (1676), 1 Chancery Cases 295, 22 E.R. 808, also 1 Eq. Cas. Abr. 60, 21 E.R. 874; *Powell v. Bell* (1706), 1 Eq. Cas. Abr. 61, 21 E.R. 874, also Precedents in Chancery 255, 24 E.R. 124, Chan. Cases *tempore* Anne 55.

67

Streatfield v. Streatfield

(Ch. 1736)

When a testator devises what he had no power over, a court of equity will compel the devisee, if he will take under the will, to take entirely, but not partially.

In this case, the party was required to elect to take under the will in question or under the marriage settlement in question.

Thomas Streatfield, the plaintiff's grandfather, by articles previous to his marriage, 31 May 1677, agreed to settle lands in Sevenoake to the use of himself and Martha, his intended wife, for their lives and the life of the survivor, and, after the survivor's decease, to the use of the heirs of the body of him, the said Thomas, on his wife begotten, with other remainders over. The marriage soon after took effect. And, by a deed dated 5 April 1698, reciting the aforesaid articles, he settled his lands at Sevenoake to the use of himself and his wife for their lives and the life of the longest liver of them, without impeachment of waste during the life of Thomas, and, after their decease, to the use of the heirs of the body of the said Thomas on the said Martha to be begotten and, for want of such issue, remainder to the right heirs of Thomas. They had issue Thomas, their only son, and two daughters, Margaret and Martha. In the year 1716, upon the marriage of Thomas, the son, the father settled other lands, of which he was seised in fee, of the yearly value of £355 to the use of his son for life, remainder to the daughters of the marriage, remainder in fee to the son, with a power to raise £2000 for younger children. After the son's death, Thomas, the father, in the year 1723, levied a fine of the lands comprised in the deed of 1698 to the use of himself in fee. And, in the year 1725, he made his will, and, thereby, devised part of those lands to his two daughters Margaret and Martha:

> And also all other his manors, messuages, lands, tenements, and hereditaments whatsoever, either in possession, reversioner, or remainder, not therein before given or disposed of, situate in the counties of Kent, Surrey, or elsewhere, to trustees in trust for the plaintiff Thomas, his grandson, for life, remainder to his first and other sons in tail male, remainder to his daughters in tail, remainder to Margaret and Martha, with several remainders over. [Then comes this clause.] And my will and meaning farther is, and I do hereby authorize and appoint the trustees and the survivor of them to receive the rents and profits of the said estates to them devised, and, out of the same, to allow and expend for the education of my grandson, Thomas, so much as they shall think fit during his minority and that the trustees shall place out at interest such monies arising out of the rents and profits of the said estates, which said monies with the interest arising therefrom, my will is, be paid to my grandson Thomas at his age of twenty-one years, if he so long live, or, in case he dies before that age, then that the same shall be paid to my two daughters Margaret and Martha, their executors, etc.

The testator died in the year 1730.

The question was whether the settlement in 1698 was a proper execution of the articles of 1677 and, if not, whether the general devise to the plaintiff should be taken as a satisfaction for what he was entitled to under the articles of 1677.

Mr. Solicitor General [*Ryder*], Mr. *Browne*, Mr. *Fazakerley*, and Mr. *Noel* argued for the plaintiff that, although, in a will or articles executed, Thomas, the grandfather, would have been tenant in tail, yet the articles of 1677, being but executory, this court would interpose by

carrying them into execution in the strictest manner and not leaving it in his power to destroy the uses as soon as raised. According to that rule, the deed of 1698 was certainly no execution of the articles in equity, for, though it was in the very words, yet did it not at all answer the intent of the articles, and came, therefore, within the rules of Trevor and Trevor's Case, Abr. Eq. Ca. 387.[1]

The settlement in 1716 upon Thomas, the son's, marriage, although it was of lands of greater value than those contained in the articles, could never be thought a satisfaction for them, there being no reference at all in it to the articles and it being made only in consideration of the son's marriage and for settling a jointure upon his wife and making a competent provision for the issue, all which are new considerations no way relative to the articles. And, where there is an express consideration mentioned in a deed, there can be no averment of another not contained therein.

That nothing could be taken for a satisfaction but what was in its nature agreeable to the thing which was to be done was held in Lechmere and Lady Lechmere's Case.[2] But, in this case, Thomas, the son, was by the articles to have been tenant in tail, but, by the settlement of 1716, he was to be but a tenant for life, which was giving him a less estate for a greater, and, consequently, not to be deemed a satisfaction without a special acceptance of it as such, according to the rule in Pinnel's Case, 5 Co. 117, where it is held that payment of a lesser sum can never be a satisfaction for a greater, unless upon a special circumstance showing the intent, as payment at an earlier day etc.[3] The will could no more be taken for a satisfaction than the settlement and upon the same reasons, for, by it, the plaintiff is no more than a tenant for life and even that not absolutely, the profits being directed by the testator to be accumulated until the plaintiff attains his age of twenty-one and then to be paid to him, but, if he dies before that age, they are given away to the testator's daughters, and, when he does arrive to that age, he is to be but barely a tenant for life and even not that without impeachment of waste. Besides, if the will be construed a satisfaction as against the plaintiff, so it must likewise be as to all the others claiming under the articles, whereas the plaintiff's sisters, who were entitled under the articles, can never take anything under this will, but are wholly excluded.

The general devise of ' all his manors, lands, etc. in possession, reversion, or remainder,' will not alter the case, for, where the testator has an estate sufficient to satisfy such general words, he shall never be construed to have intended to pass that which he had no right to dispose of and the giving of which would work a wrong. That he had no right to dispose of the lands contained in the articles is evident from what has been already said. And had not this been upon his own marriage, but in any other settlement, he had been a trustee for his son, and, then, had made his will in the same words that he has done here. Surely, that trust estate would never have passed. And there is no difference whether the trust be expressed or whether it arises by implication of equity. It would be an absurdity to construe these words to pass away a third person's estate. A grant of all one's goods will not pass those which he has *in auter droit*. So, if he had had a mortgage in fee, such general words would not have passed it from the devisee of the personal estate to the devisee of the land. In Rose and Bartlett's Case, Croke Car. 292, a general devise of all his lands and tenements, having both freehold and leasehold,

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[1] *Trevor v. Trevor* (1719), 1 Eq. Cas. Abr. 387, 21 E.R. 1122, also 9 Modern 161, 88 E.R. 377, 10 Modern 436, 88 E.R. 798, 1 Peere Williams 622, 24 E.R. 543, 2 Eq. Cas. Abr. 475, 505, 22 E.R. 404, 427, 5 Brown P.C. 122, 2 E.R. 574, Chan. Cases *tempore* Geo. I, 612.

[2] *Lechmere v. Lady Lechmere* (Ch. 1735), see Case No. 44.

[3] *Pinnel v. Cole* (1602), 5 Coke Rep. 117, 77 E.R. 237, also Moore K.B. 677, 72 E.R. 833.

was held to pass the freehold lands only. And, in Harwood and Child's Case, heard by the present Lord Chancellor [Lord Talbot] 18 March 1734, a devise of all his lands for payment of debts, having both freehold and copyhold, but no surrender made of the copyhold to the use of his will, was held not to pass the copyhold. Nor can the cases of Duffield *versus* Smith, 2 Vern. 250; Noys *versus* Mordaunt, 581, be objected, for, in the former, the decree was reversed upon account of the sister's being heir at law and disinherited, which is the present case, for, here, they would take a beneficial interest from the plaintiff, who was heir at law to his grandfather, and give him but a very small one in its room, and, in the latter case, the father, being tenant in tail of part, had a power to bar it by fine, in which respect, he might well be looked upon as a proprietor of the whole.[1] But, if he be decreed to make his election, it must be done presently, for, then, it is that he is to take, whereas he cannot by law make his election, being but an infant. And, if so, the court must compel him to that which the law disables him from doing.

Mr. Attorney General [*Willes*], Mr. *Strange*, and Mr. *Peere Williams* argued for the defendant, that this court will not in all cases whatever decree a specific performance. But would in some particular cases leave the party to his remedy at law upon the covenant. These articles were made so long ago as in 1677, and Thomas, the son, who was the person entitled to have them carried into execution, lived until 1722. Forty-five years after, without ever desiring to have them executed. And the intent of those articles did not seem to go any farther than the settling the jointure on the wife and the making Thomas, the grandfather, tenant in tail, the words being to provide for the wife, but no mention [was] made of the issue. But whoever comes into equity must do equity. And, therefore, if the plaintiff would take advantage of those articles, he must make a compensation for it out of the will, which gives him an estate upon a plain supposal that he shall take nothing by the articles. But he shall never be at liberty to take a great benefit under the will and waive that part which makes against him to the prejudice of a third person. The whole will must be acquiesced under or no part of it at all, according to the resolution in Noy's and Mordaunt's Case, which went upon the reason of an entire compliance with the testator's intent in taking entirely under the will, and not upon the supposed reason of his being proprietor by having it in his power to levy a fine.

The like resolution was in the Case of Hearne *versus* Hearne, 2 Vern. 555, in that of Cowper *versus* Cotton, 16 February 1731, at the Rolls, where a freeman of London devised his estate to trustees for the raising of £6000 for his four daughters and he made a disposition of the surplus and [it was] held that they should stand either by the will or by the custom, and, if by the former, that they should not defeat the devise over.[2] In cases where general words in a will had been restrained from passing all which the testator had, it has been upon the testator's intention manifestly appearing in the will itself not to pass so much as the generality of his words would comprehend.

But, in the present case, his intent plainly appears to pass all. Nor will that intent be satisfied by saying that he had a reversion of the lands comprised in the articles, since he would have been tenant in tail under the articles and only for life under the will.

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[1] *Rose v. Bartlett* (1633), Croke Car. 292, 79 E.R. 856; *Harewood v. Child* (1734), Cases *tempore* Talbot 204, 25 E.R. 738, 1 Cox Chancery Cases 7, 29 E.R. 1037, Jodrell 460, Ridgeway *tempore* Hardwicke 243, 27 E.R. 817; *Duffield v. Smith* (1691), 2 Vernon 177, 258, 23 E.R. 717, 767, also 2 Freeman 185, 22 E.R. 1150, 1 Eq. Cas. Abr. 204, 21 E.R. 991; *Noyes v. Mordaunt* (Ch. 1706-1707), 2 Vernon 581, 23 E.R. 978, also Gilbert Rep. 2, 25 E.R. 2, Precedents in Chancery 265, 24 E.R. 128, 1 Eq. Cas. Abr. 273, 21 E.R. 1041, Chan. Cases *tempore* Anne 44.

[2] *Herne v. Herne* (1706), 2 Vernon 555, 23 E.R. 959, also 1 Eq. Cas. Abr. 203, 21 E.R. 991.

Lord Chancellor [LORD TALBOT]: It cannot be doubted but that, upon application to this court for the carrying into execution the articles of 1677, the court would have decreed it to be done in the strictest manner, and would never leave it in the husband's power to defeat and annul everything he had been doing. And the nature of the provision is strong enough for this purpose without any express words. And I must, therefore, consider what was the operation of the deed of 1698, which is declared to be performance of the true intent and meaning of the articles. If it be so, all is well. But, if it be not, it only shows that the parties intended it so, but were mistaken. So was the Case of West v. Erissey, where the articles were by the House of Lords decreed to be made good. And the same must be done in this case if nothing intervenes to prevent it.[1] The settlement in 1716, whereby the grandfather settled other lands upon his son's marriage, has been called a satisfaction for those articles. But, to me, it appears neither an actual satisfaction, nor to have been intended as such. The grandfather had done that in 1698 which he apprehended to be a satisfaction for the articles, But, this deed proceeds upon considerations quite different from those of the articles, the persons claiming under this being purchasers for a consideration entirely new, the limitations being entirely different. And, therefore, it would be absurd to call this a satisfaction for another thing it has nothing to do with and to which it is no way relative.

The next thing to be considered is the fine levied of the lands in question in the year 1723 by the grandfather. The intent whereof was to have the absolute ownership of those lands in him. And one reason why no application has been made until now to have those articles carried into execution might be that, during the grandfather's life, nobody was entitled to anything in possession under them. Then, comes the will in 1725, whereby he gives part of those lands settled in 1698 to his daughter, thereby showing his apprehension to be that, by a fine, he had given himself a power of disposing of them. And it would be a very strained construction to say that he intended this, not as a present devise to his daughters, but to take effect out of the reversion of the lands comprised in the articles.

The next thing is the devise to the trustees for his grandson, the plaintiff, upon his attaining the age of twenty-one. And the question here is whether the general words shall ever pass lands not capable of the limitation in the will. And, to that, have been cited Rose and Bartlett's Case, Croke Car. 292, and other cases. But they cannot influence the present case, for the testator had legally a power to dispose of those lands and, though they might be affected with a trust in equity, yet that cannot be supposed to lie in his cognizance, he having done an act to enable himself to dispose of these lands. And it differs from the case that was put of an express trust and the trustee devises all his lands, for, there, the trustee cannot be ignorant that the lands which he holds in trust are not his own. But what makes his intent clear is that he has devised part of these lands to his daughters and he must have looked upon himself as master of the one part as well as the other. I, therefore, think his intent was clear to pass these lands by the will.

And, if so, we must now consider what will be the effect of this will. If the plaintiff has been upon the lands of the articles, then he may stand to them if he pleases. But, when a man takes upon himself to devise what he had no power over upon a supposition that his will will be acquiesced under, this court compels the devisee, if he will take advantage of the will, to take entirely, but not partially under it, as was done in Noyes and Mordaunt's Case, there being a tacit condition annexed to all devises of this nature that the devisee do not disturb the disposition which the devisor has made. So are the several cases that have been decreed upon the custom of London.

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[1] *West v. Erisey* (1726-1727), 2 Peere Williams 349, 24 E.R. 760, 1 Comyns 412, 92 E.R. 1135, 1 Brown P.C. 225, 1 E.R. 530, 2 Eq. Cas. Abr. 39, 22 E.R. 33, Exch. Cases *tempore* Geo. I, vol. 2, p. 931.

The only difficulty in the present case is that what is given to the plaintiff is precarious, nothing being given to him if he dies before twenty-one and, if after, then, but an estate for life, and he appears before the court in the favorable light of being heir at law. But this will not alter the case. The estates which the testator has given him were undoubtedly in his power. He has given them to trustees until his grandson attain twenty-one, and has disposed of them in such a manner as that there can never be any undisposed residue to go to the plaintiff as heir at law. And, surely, it is as much in the power of the court to make this bequest, thus limited, to be a satisfaction if the party will stand to the will, as in the other cases. Indeed, if he takes by the will, there is nothing to make satisfaction to his sisters for their general chance under the articles. But that is because nothing is left them by the will, and they cannot be said to be quite destitute of provision, since it is just and reasonable that they should be maintained by their mother, who is entitled to a large and ample provision by her marriage settlement. Nor can what is devised to the plaintiff be looked upon as intended by the testator to go towards the maintenance of younger children, for, if the plaintiff dies before twenty-one, then, all the profits already received are to go to his aunts. And so by that construction, I must take the maintenance out of their estate, and oblige them to contribute to the maintenance of distant relations, *viz*. nieces at the same time that the mother, who has an ample provision, would be left at large and under no tie of maintaining her own children.

And so he decreed the plaintiff to have six months after he comes of age to make his election whether he will stand to the will or the articles. And, if he makes his election to stand to the latter, then, so much of the other lands devised to him as will amount to the value of the lands comprised in the articles and which were devised to Margaret and Martha to be conveyed to them in fee.

[Other reports of this case: 1 Swanston 447, 36 E.R. 459, 2 Eq. Cas. Abr. 36, 22 E.R. 31.]

68

Warrington v. Norton

(Ch. 1736)

A commission of bankruptcy cannot be taken out against a person after his death.

Whatever is done in pursuance of commission of bankruptcy is a dealing in it for the purposes of the statute of bankruptcy.

A commission of bankruptcy was taken out against one Hughes, and, upon the 9th of February 1730, at eleven o'clock in the morning, the commissioners met, and proceeded to declare him a bankrupt. And the declaration was signed by them between three and four o'clock in the afternoon, and the assignment of the bankrupt's goods was executed at six, at which instant, the commissioners had notice that the bankrupt died that day at one in the afternoon, which was the first notice they had of his death.

The bankrupt having before his death devised all his real and personal estate for the payment of his debts, the plaintiff, who was a creditor, brought his bill against the defendant as assignee under the commission for an account of such goods of the bankrupt as had come to his hands, to which, the defendant pleaded the commission and the proceedings under it. The question was whether this was such a dealing under the commission as was within 1 Jac. I, cap. 15, sect. 17,[1] the words whereof are:

[1] Stat. 1 Jac. I, c. 15, s. 12 (*SR*, IV, 1034).

That where after any commission of bankruptcy is dealt in by the commissioners, the offender happen to die before distribution, that, nevertheless, they may in that case proceed in the execution of the commission in such sort as they might have done if the offender was living.

Mr. Attorney General [*Willes*], Mr. *Fazakerley*, and Mr. *Forrester* argued for the defendant that the meeting in order to declare him a bankrupt was a sufficient dealing within the Statute and that the assignment has a relation to the bankruptcy, that, when the commissioners assign, it is from the act of Parliament, and not from themselves, for they have no interest vested in them, but it is the operation of the act which gives them right in the thing, but none at all in the person of the bankrupt, so that his death cannot be material. And the law giving no right over the person, but only a power of calling him a bankrupt, it must be in pursuance of the commission, and, therefore, that examination was a dealing within the Statute, that, by law, there can be no splitting a day, as a lease made to commence from henceforth takes in the day of the date, although executed at the very last moment. And, in Shelley's Case, 1 Co. 93, the recovery was held good, although the party died the same day, because it was a legal proceeding. The laws against bankrupts were not at all to be considered as penal, but as remedial laws, and, as such, were entitled to the most favorable construction, according to the rule laid down in Heyden's Case, 3 Co. 7. And, therefore, if any construction could be made more beneficial for the creditors than another, that one was to be admitted as founded upon natural justice and upon that best of rules, *jus suum cuique tribuere*,[1] that, in these cases, the law itself both provided how it shall be construed, for, by 21 Jac. I, cap. 19, sect. 1,[2] it is enacted that all the statutes which were theretofore made against bankrupts and for the relief of creditors shall be in all things beneficially construed for the relief of the creditors of the bankrupts, so that the law itself directs a beneficial construction to be made for the creditors. And, when a law does by express provision enact how construction shall be made, the clause so directive of construction is of the same force and authority as any other part of that law.

Mr. Solicitor General [*Ryder*] and Mr. *Browne* argued on the other hand that these laws were rather penal than remedial, the party being therein called an offender etc., which he does not appear to be until he is declared a bankrupt and that declaration is the dealing meant by the Statute, for, until then, there can be no proceeding upon the commission properly so called. Shelley's Case is quite different, for, recoveries being common assurances, the law favors them and does not enter into any inquiries about the particular minute of the day the party died upon. Had this law not been made, the commissioners could not have proceeded after the bankrupt's death. And the words of the Statute seem to mean that he should be declared a bankrupt first.

Lord Chancellor [LORD TALBOT]: The plaintiff, if contented to come in under the commission, will be entitled to the benefit of it. But his intent seems to be to set aside all the words of this Statute of 1 Jac. I. It looks as if some doubt had been conceived whether the party's death determined the commission. The former statutes being that they should seize his body, which they could not do when the party was dead. But it was always clear that no commission could be taken out against a man after his death; then, whatever might occasion the doubt, comes this Statute, which says that, when the commission had been dealt in etc., what is a dealing in it is the question.

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[1] *Wolfe v. Shelley* (1579-1581), 1 Coke Rep. 88, 76 E.R. 199, also Moore K.B. 136, 72 E.R. 490, 1 Anderson 69, 123 E.R. 358, Jenkins 249, 145 E.R. 176, 3 Dyer 373, 73 E.R. 838 *Attorney General v. Heydon* (Ex. 1584), 3 Coke Rep. 7, 76 E.R. 637, also Moore K.B. 128, 72 E.R. 485, Savile 66, 123 E.R. 1016, 1 Leonard 4, 74 E.R. 4, 4 Leonard 117, 74 E.R. 767, 137 Selden Soc. 253; *Institutes of Justinian*, 1, 1, 3-4.

[2] Stat. 1 Jac. I, c. 15 (*SR*, IV, 1031-1034).

Indeed, I know no particular act, as distinct from another, which can be called a dealing. It has been said that the declaring him a bankrupt was the act meant. But that declaration of the commissioners being only discretionary and for caution and not at all binding to anybody, it is not probable that the Act should intend that only to be a dealing, which it has not anywhere given the commissioners power to do. Whatever is done in pursuance of the commission is a dealing in it, if never so minute. And, thereafter, for that these, being remedial laws, are to be beneficially construed in favor of the creditors, I cannot, therefore, put a narrow constrained construction upon the words 'dealt in' in order to overthrow this commission and all the just right of the creditors claiming under it.

The plea was allowed.

[Other reports of this case: 2 Eq. Cas. Abr. 97, 22 E.R. 83.]

[Reg. Lib. 1735 A, f. 188.]

69

Lowther v. Carleton

(Ch. 1736)

Where a bona fide *purchaser for value without notice of a defect in his seller's title sells to a person who had notice, the latter takes free and clear of the defect.*

7 April [1736].

A church lease of twenty-one years obtained by the plaintiff's grandmother was, upon the marriage of his father and mother, surrendered to the dean and chapter of Carlisle, and a new one for the same term granted to the plaintiff's father and mother, which, by articles, was agreed to be settled on them for their lives and the life of the survivor and, then, upon the issue of the marriage. The father and mother, afterwards, surrendered this new lease, and a new one was granted to a stranger, to whom the father had mortgaged the second. The last lease was, afterwards, purchased by the late marquess of Wharton, who did not appear to have any notice of the marriage articles. The defendant purchased the marquess of Wharton's title of his executors, who, upon the purchase, gave him a collateral security for the better assuring his title. But, previous to this purchase, the defendant had notice of the marriage articles, which were shown to him by his own father. And, now, the plaintiff brought his bill to be let into possession of this leasehold estate, and prayed that the defendant might be considered as a trustee for him.

The defendant pleaded his purchase, and confessed the notice. But, principally, he insisted upon the marquess of Wharton's purchase without notice, whose title was now in him.

Lord Chancellor [LORD TALBOT]: Had this bill been brought against Lord Wharton himself and he had pleaded that he was a purchaser without notice of the articles, the plea would have been good, he having the law on his side, and, having both law and equity, the court would not take it from him. And, as the court would not have given any relief against him, so neither would it against his executor, for, if the plaintiff's title had not been good against the Lord Wharton himself, it would not be so against his executors. And, therefore, his death is not material. Had the defendant paid nothing at all for his purchase, yet the plaintiff could not prevail against him, because, though he were but a volunteer, yet he claims under a purchaser without notice, who has barred the plaintiff's right and all the purchaser's right is now devolved upon him.

Indeed, it has been objected that the defendant is a purchaser without notice under the Lord Wharton. But, because he is so, shall he be in worse condition than a volunteer or

executors claiming under Lord Wharton would have been? A volunteer claiming under a purchaser for a good and valuable consideration without notice would have a clear and absolute right. And shall not the defendant have it also, because he is a purchaser with notice of the plaintiff's title? As the Lord Wharton had a right of enjoying it, so he had of aliening it. And, when he had so done, his alienee has the same right that he himself had. Nor can the defendant's taking a collateral security make his case the worse, for, though he might be relieved against the Lord Wharton's executors upon that security, yet what relief can they have where the testator was a fair and honest purchaser?

The executors, upon some doubts arising in the purchaser as to the title, gave him a collateral security. But why should they be liable to make satisfaction out of this security, when, if they had kept the term in their own hands, it would never have been taken from them by the plaintiff? The security being given only to satisfy the purchasers' doubts shall never return to their disadvantage. If the Lord Wharton can be affected with notice, then, all will be overturned; but, if he cannot, the defendant's plea will be good.

I remember a case where a purchaser with notice aliened to one who had no notice, and, there, although the court would not affect the purchaser without notice, yet it being a fraud, the vendor, who was the purchaser with notice, was decreed to make satisfaction to the plaintiff.

And so he allowed the plea.

[Other reports of this case: 2 Atkyns 139, 242, 26 E.R. 487, 549, Barnardiston Ch. 358, 27 E.R. 678, 2 Eq. Cas. Abr. 632, 685, 22 E.R. 531, 575, Jodrell 174.]

70

Rolt v. Rolt

(Ch. 1735)

A will must be construed so as to make the entire will consistent.
Contingent interest is not payable until the contingency vests.

10 April [1735].

Mr. Baynton, being seised in fee of a considerable estate and having no children, by indenture 19 January 1715, covenanted to suffer a recovery of all his lands to the use of himself for life, then, to his wife for life, then, to the issue of their bodies, and, for want of such issue, in trust for his sister Anne Rolt for her sole and separate use during life, and, after her death, if Edward Rolt, her husband, should survive her, to permit him to receive the clear yearly sum of £1000 during life, and, afterwards, to Edward Rolt, eldest son of Edward and Anne, for life, with a remainder to his first and other sons, with a like remainder to Thomas, and all the other sons of Edward and Anne. Then, comes this proviso:

> Provided also that it shall and may be lawful to and for the said Anne Rolt, with the consent of the said Edward Rolt, her husband, and for the said Edward Rolt, her surviving, from time to time, by sale, mortgage, or otherwise, charging the premises, to raise and secure such sums of money not exceeding in the whole the sum of £12,000 as the said Anne, notwithstanding her coverture, shall, with the consent in writing of her husband, think fit, and for the said Edward Rolt, her surviving, as he shall think fit, for the maintenance and portion of any of the children of them, the said Edward and Anne, born or to be born, and, if the said Edward and Anne, his wife, or the survivor of them, shall not appoint in what proportion such their children shall be provided for, then, all the parties to these presents are agreed that £2000 apiece shall be raised and payable to each such

> younger sons and £3000 apiece for the daughters of the said Edward and Anne, and, if there shall be but one daughter, then £6000 for such only daughter, at their ages of twenty-one years, with interest for the said several sum after the rate of £5 *per centum* for their several respective maintenances until their respective portions shall become payable, and such maintenance to begin from the time that shall be appointed by the said Edward and Anne, his wife, or the survivor of them, and, in case no such appointment, then, from the death of the survivor of them, the said Edward and Anne, his wife.

Then, comes a provision that, if any of the younger children die before, their respective shares become payable, then, the share of such child so dying shall be equally divided amongst the surviving children.

Mr. Baynton died soon after without issue. And, then, in the year 1722, Mr. Rolt died, leaving issue by his wife, four younger sons and two daughters, Elizabeth and Anna Maria, which last died an infant soon after her father's death. And, in the year 1734, the mother died, having never charged the lands with the £1200 or any other sum for the younger children's provision nor given any direction in what manner or proportion they should be provided for, some of the children having attained their age of twenty-one in her lifetime.

The questions were, first, whether, there having been no appointment made by the father or mother, the sum of £2000 only should be raised pursuant to the power given to them or whether the whole sum of £14,000 should be raised pursuant to the clause, which, in default of appointment, gives £2000 to each younger son and £3000 to each and every daughter, there being four younger sons and two daughters, one of whom died an infant in her mother's lifetime. The second question was whether such of the children as attained their ages of twenty-one in their mother's lifetime should have interest for their portions from that time or only from the time of their mother's death.

Lord Chancellor [LORD TALBOT]: The first question is how much shall be raised for the younger children, whether the whole sum of £14,000 or only £12,000.

By the first clause, it is clear that no more than £12,000 was to be raised. But the doubt arises upon the second clause, whereby particular sums are provided for each younger child in case no appointment be made by the father or mother, which has not been done. And, by the number of younger children, the particular sums provided by this clause amount to £14,000. This second clause, indeed, is not an independent clause, but subsidiary to the first. In case the first does not take effect, then, this second is to prevail, whereby he has made a certain direct charge of £3000 for each daughter and £2000 for each younger son, without any provision, as there is in the first clause, that the whole shall not amount to more than £12,000.

In the first clause, where he delegates the power of charging, he thought it proper to confine that discretionary power given. But, where he was to charge the estate himself, as, by this second clause, he does, there was no reason for him to confine his own discretion. And, if so, can a court of equity (where there are six younger children and the estate well able to bear the charge) seek for a foreign intention to take away their bread? The question whether Anna Maria, who died in her mother's lifetime, be such a daughter as can be said to have any interest in this sum of £3000 depends upon the construction of the deed, whether it was a certain charge before or not until the mother's death.

The power of appointment is not given to the husband and wife jointly, but to her to be executed with her husband's consent, which shows that he intended that she might execute it during her marriage, and, in case the husband should survive her, then, there is an express provision that he might execute it, but, in case she survived her husband, as she did, it is not so clear by this clause whether, by the first gift of the power to her, he intended to enable her to execute it during the marriage only, but under the control of her husband or whether she might execute it after her husband's death. This, I say, is not clear by this clause. But the other clause of maintenance makes it so, and proves his intent to be that it might be done either way,

for it says 'appointed by the survivor', and, therefore, the taking it in the first sense would be taking away the effect of the words, whereas, in all cases, the construction must prevail which makes the whole consistent. And, where there are plain and ambiguous words, those that are ambiguous and doubtful must give way to such as are plain and obvious. By the first clause, such children only can be considered as entitled to any share under the power of appointment as were living at the survivor's death. But no appointment having been made, it stands upon the second clause, which is a direct charge upon the land of £2000 and £3000 for each daughter.

The next question is about the interest, from what time it shall be payable. And I am of opinion that, although the payments were to be at twenty-one, yet no certain interest vested in any of the children until the survivor's death, and, although some of them attained their ages of twenty-one in their mother's lifetime, yet all being contingent until the survivor's death, no interest can be due but from the time of the happening of the contingency.

And so he decreed the whole £14,000 to be raised and interest from the mother's death only.

[Other reports of this case: 2 Eq. Cas. Abr. 656, 22 E.R. 550.]

[Reg. Lib. 1735 A, f. 212.]

71

Bradley v. Powell

(Ch. 1736)

In this case, the settlement in issue created a contingent portion for a younger son, but, the contingency never happening, it lapsed.

24 May 1736.

John Powell being tenant for life with a remainder to Henry, his eldest son, in tail, they two agreed to resettle the estate. And a recovery was accordingly suffered to the use of John, the father, for life as to part, then, to trustees for two hundred years, upon trust to raise £1100 to be paid to Richard Powell, the second son of John Powell, within six years after the death of John or as soon after as the same could be raised, and, in the meantime, interest from the death of John, the father, after the rate of £5 *per centum* for and towards his maintenance until the portion be paid to him, remainder to Henry, the eldest son, for life, and to his first and other sons in tail, etc. Richard, the second son, died considerably indebted, leaving no assets, after having attained the age of forty-five years. And, two years after, John, the father, died, by whose death an estate of £700 *per annum* came to Henry and, from him, to his son, the now defendant.

The bill was brought by the creditors of Richard against the defendant and the trustees to have the £1100 raised and applied towards the payment of his debts. The defendant Powell insisted that, Richard dying in his father's lifetime, the portion could not be raised, not being transmissible to his representative, but shall merge in the land for the benefit of the defendant, who was heir at law.

Lord Chancellor [LORD TALBOT]: It has been doubted whether this settlement was to be considered as voluntary. But I think it was made upon a good and valuable consideration and that the parties are purchasers under the recovery suffered by the father and son, and, therefore, Richard is to be considered as a purchaser for the £1100 in question.

But the main point is whether this £1100 is to be looked upon as a portion. And I think it must be considered in that light, it moving from the father and being intended by him as a

provision for his child. The rule of portions sinking in the land where the party dies before the term, out of which they are to arise, comes into possession has not always held without exception, as appears from Butler and Duncomb's Case, 2 Vern. 760, where the words were ' from and after the commencement of the term'. And, therefore, the portion was not payable during the life of the father and mother, the term not being yet commenced. But yet the court enabled the husband and wife to raise money upon the interest by way of mortgage, which was to consider it in some sort as already vested. So in that of Broome *versus* Berkley, Abr. Eq. Ca. 340, notwithstanding the portions were decreed not to be raised immediately, yet they were considered as transmissible interests. The same in King and Withers's Case, in the House of Peers.[1] In all these cases, the limitation was that the portions should be paid them at such a time, as upon marriage or at such an age. And the intent of the parties was plain that, upon either of these contingencies happening, the child should be entitled to the portion, although it was contingent, since a contingent interest is transmissible and a future provision may well be looked upon as a consideration for marriage.

In the present case, the term and the trust are not to arise until the father's death, but no particular time is limited for the payment of the £1100, but barely within six years after his father's death, and not made payable to him, his executors, and administrators, etc., but, barely, to him with a provision that, from the father's death, £5 *per centum* shall be raised for and towards his maintenance, which looks as if the intent was to postpone the vesting until the death of the father, since the £5 *per centum* for and towards his maintenance can never be raised by them to that purpose when he died in his father's lifetime.

This first act which the trustees are to do, *viz*. that of providing for his maintenance, necessarily supposes him living at his father's death. And, where the interest is contingent, as it is in the present case, it is most conformable to reason to consider the principal as contingent likewise.

But, if the construction should be otherwise, the term, by the express words of the trust, can never cease, it being to endure for and towards his maintenance until the portion be paid unto him, which it can never be, since he died in his father's lifetime.

I, therefore, think the whole was contingent, principal as well as interest, and that it differs from the Case of Broome *versus* Berkley and of King *versus* Withers, for that, in those cases, a marriage ensued, which was one of the times appointed for payment. But, here, the £1100 is limited to be paid to him within six years after his father's death without any other limitation. And, he dying in his father's lifetime, the contingency has never happened. And the portion must, therefore, sink for the benefit of the owner of the real estate.

And so he dismissed the bill.

[Other reports of this case: 2 Eq. Cas. Abr. 253, 657, 22 E.R. 215, 552.]

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[1] *Butler v. Duncomb* (Ch. 1718-1719), 2 Vernon 760, 23 E.R. 1096, also 1 Peere Williams 448, 24 E.R. 466, 10 Modern 433, 88 E.R. 797, 1 Eq. Cas. Abr. 339, 21 E.R. 1088, 2 Eq. Cas. Abr. 674, 22 E.R. 566, Chan. Cases *tempore* Geo. I, 400; *Brome v. Berkeley* (Ch. 1727-1728), 1 Eq. Cas. Abr. 340, 21 E.R. 1088, also 2 Eq. Cas. Abr. 649, 22 E.R. 545, 2 Peere Williams 484, 24 E.R. 826, 6 Brown P.C. 108, 2 E.R. 965, 1 Eq. Cas. Abr. 340, 21 E.R. 1088, Chan. Cases *tempore* Geo. I, 1238; *King v. Withers* (Ch. 1735), see above, Case No. 50.

72

Hunter v. MacCray

(Ch. 1736)

The question in this case was whether a writ of ne exeat *can forbid a trustee for going to Scotland, a foreign jurisdiction within the king's dominion.*

27 May [1736].

A motion was made before the Lord Chancellor [LORD TALBOT] that a [writ of] *ne exeat regno* might be so framed as to prevent the defendant from going into Scotland upon an affidavit made that he was soon going to reside there and that he had confessed that, as trustee for the plaintiffs under their father's will, he had received the sum of £10,000. The common order had been made at the Rolls for a *ne exeat* to issue, upon a petition there preferred, and marked for £10,000 bail. And this motion was now made upon an apprehension that, as the writ was only to restrain him from going out of the realm, it could not restrain him going into Scotland, which, by the Union, is now the same kingdom, and yet, as effectually out of the reach of process of the court, as any other foreign part which is of the king's allegiance.

His Lordship [LORD TALBOT] asked how they would have it altered and what authority he had to alter an original writ, especially, as this writ was not originally intended to aid the process of the court, but was a mandatory writ to prevent the king's subjects from going into foreign countries to practice treason with the king's enemies. And he seemed to think that this case must have happened since the Union and yet he had never known nor heard that any attempt had been made to alter the writ. And he said that, perhaps, there was no foundation for the doubt, whether the common writ would not prevent the defendant from going into Scotland as well as any of the king's other dominions out of the reach of the process of the court.

Mr. *Hamilton* informed the court that something of this kind had been moved in one Mitchel's Case, in the Lord Cowper's time, who seemed to think that the writ extended to Scotland, notwithstanding the Union, and did nothing in it. The Registers likewise said they never knew any other than the common order made.

His Lordship [LORD TALBOT] considered whether he might not direct that the sheriff should take security that the defendant should not go out of that part of Great Britain called England, but, as such an order might be liable to objections as whether the defendant might go into Wales, whether it would be necessary to give the same direction in every other case as well as in the present and whether it would not be countenancing an objection, which, otherwise, perhaps, would not be of any force. He said that it was dangerous to alter old established forms, and, therefore, he would make no order in it, but left the parties to proceed in the old beaten path.

[Other reports of this case: 2 Eq. Cas. Abr. 674, 778, 22 E.R. 566, 662.]

[Reg. Lib. 1735, f. 407.]

73

Scarth v. Cotton

(Ch. 1736)

Where an infant is concerned, the administration of a decedent's estate will be stayed until the infancy ends, except an account will be taken of the estate before then.

5 July [1736].

A bill was brought by the plaintiff, as a bond creditor, against the defendant, as trustees of the estate of one John White, who had in his lifetime conveyed it to the defendant in trust to sell all or so much of the same as would be sufficient to pay his debts and the encumbrances charged upon it and, then, in trust for his own right heirs, in order to have the estate sold, the prior encumbrances paid off, and, then, to be paid his debt out of the residue.

The daughter and heir, who was an infant, was also a defendant. And she, by her answer, insisted that, being an infant, the parol ought to demur, because that, although it was a trust for paying off encumbrances which then affected the same, yet, as to the residue, it was only assets.

The Lord Chancellor [LORD TALBOT] thought it was so and that there was no difference between legal and equitable assets. And, although, in this case, it would be to the infant's prejudice to take advantage of the law, because the interest would out run the rents and profits of the estate, yet, it being mentioned in the pleadings, he said he could not avoid ordering it, although the counsel would have waived the objection.

And so an order was made to take an account of what was due to the plaintiff. But all proceedings were to stay until the defendant came to age and the plaintiff to pay all parties their costs, except the infant, and to have them again out of the estate.

74

Wheeler v. Trotter

(Ch. 1736)

A general allegation in the pleadings of malfeasance in office is sufficient to allow evidence to be given of specific acts of malfeasance.

5 July.

The defendant, being Register of the Consistory Court of Durham for life to be exercised by himself or his sufficient deputy, by deed dated 30 August 1731 appointed the plaintiff his lawful deputy in the said office for the term of three years from the 6th of September 1731. And by articles executed between them upon the said 6th of September, it was agreed that the plaintiff should account monthly for all fees etc. except one third part which the plaintiff was to retain to his own use. And the plaintiff entered into a bond of £1000 penalty to surrender up the office to the defendant at the end of the three years. Afterwards, there was a second agreement in writing between them, whereby the defendant promised to grant unto the plaintiff a farther deputation for four years from the end of the three years. At the end of the three years, the defendant refused to grant to the plaintiff a second deputation, whereupon the plaintiff brought this bill for a specific performance and for an injunction against the defendant's suing at law upon the penal bond.

The defendant, by his answer, insisted that he could not be obliged to grant a second deputation, the agreement being in its nature revocable and that he was determined to execute the office himself. And he charged the plaintiff with several misdemeanors in taking exorbitant fees, embezzling records, granting administrations without oath, without specifying any particular act relating to any of these misdemeanors, but only a general charge.

And the defendant offering to read a piece of evidence relating to one particular fact in taking exorbitant fees, the question was whether the defendant should be let in to read to any particular fact not set forth in the answer, but only involved in the general charge, to which the party could not possibly give any answer.

Lord Chancellor [LORD TALBOT]: The question is whether this matter be sufficiently put in issue so as that it may be read in evidence against the plaintiff. The bill is brought for a specific performance of an agreement whereby the defendant was to grant the plaintiff a farther deputation for four years, which he now refused to do upon account of the party's receiving and taking larger fees than those allowed by the table [of fees]. The argument for the plaintiff is this, *viz*. a court of equity ought not to compel one to disclose anything not particularly put in issue, as this fact is not.

But I am of opinion that, although it might have been more particularly put in issue, yet that, as to this purpose, it is sufficiently specified. In the Lady Donnerail's Case,[1] which has been cited for the plaintiff, the allegation of ' general misbehavior' could never be tried because consisting of such a complication of facts which could never fix the particular act of adultery that was then in question. But in the present case, this evidence is not read to fix any particular fact specially and singly by itself, as was in that case, but only to evince his general conduct. And if there be any things which are doubtful and require a more particular answer, these things may be put into a further way of proof, where the party will have an opportunity of giving proper answers to each fact, which takes off all objection of surprise upon the plaintiff.

And so the plaintiff, finding the opinion of the court to be against him upon this point, came to an agreement with the defendant. And the matter was compromised in court between them.

[Other reports of this case: 3 Swanston 174, 36 E.R. 819, 1 Vesey Junior Supplement 281, 34 E.R. 789.]

75

Galley v. Baker

(Ch. 1736)

In this case, a former decree of the court was not properly performed, and the court ordered it to be remedied and the money invested for the benefit of the rector of the parish church that was in issue.

3 July [1736].

The duchess of Dudley, being seised in fee of a house and gardens in St. Giles's in the Fields called Whitehouse, upon the 7th of April 1662, made a lease of the premises to the then archbishop of Canterbury and other trustees, for the benefit of the rector of the parish and his successors, for the term of ninety-nine years. And, afterwards, by her will, dated 2 November 1668, reciting the lease, she directed her heirs to convey from time to time, as the rector of St.

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[1] *Viscountess Doneraile v. Viscount Doneraile* (1735), 1 Cooper *tempore* Cottenham 534, 47 E.R. 987, 125 Selden Soc. 283.

Giles's and his successors should direct, declaring her intent to be that the said house should remain as a dwelling house for the said rector and his successors forever, as a free gift by her. There was at her death a lease for lives subsisting, which determined in 1681, when the late Archbishop [John] Sharp [1645-1714] was rector, who, finding that the house was so old and ruinous that it could not conveniently be made an habitation for the rector and thinking it would be more for the advantage of him and his successors to let out the ground on a building lease at a reserved rent, came to an agreement with one Boswell to let him a lease for forty-one years at £11 *per annum* to build houses on.

And a bill being brought by Boswell to have this agreement carried into execution, it was decreed by the earl of Nottingham that a lease should be made with covenants to build, and a lease was accordingly made the 27th of February 1682 by Dr. Sharp and the heir of the duchess and the surviving trustee of the term.

Boswell laid out a considerable sum, and built sixteen good houses, and, his lease expiring at Michaelmas 1720, when the late Bishop Barker was commendatory rector of St. Giles's, the bishop, in the year 1724, brought this bill, setting forth all the former proceedings and suggesting that the houses were so ruinous that it was necessary to rebuild them, which nobody would undertake unless a building lease could be obtained for a long term. And he prayed it might be enquired under what rents and covenants it was proper to have such a lease granted.

The court, thereupon, sent it to a Master, who reported that the parties proposed to let a lease for sixty-one years and to improve the rent from £16 to £20, and made it appear that the houses were ruinous and that it would be for the benefit of the rector to have such a lease made with proper covenants, which the court accordingly ordered, and a lease was made 22 June 1725. But, in it, there was no covenant to rebuild, only in case where any was necessary to be pulled down. And it appeared by the evidence that the bishop had taken £600 for a fine of the lessee. But nothing of it appeared upon the lease. In fact, the houses wanted a great deal of repair, but not to be rebuilt, nor was any one of them rebuilt, but about £700 laid out in repairs, the rents being now £167 *per annum*.

This bill, therefore, was brought by the plaintiff, the present rector and immediate successor to the bishop, against the bishop's executor and against the lessee, either to avoid the lease, as obtained by fraud upon the court and on a contract injurious to the successor, or to have the £600 with interest from the bishop's death, for the benefit of the successor, the present rector.

Lord Chancellor [LORD TALBOT]: There was not the least suggestion to the court that the bishop intended to take a fine or make any private advantage, but only a desire of having it inquired how the end of the trust might be best answered.

In his proposal to the Master, he says that, notwithstanding the inconvenience he has been at for want of a rectory house, yet, provided he may have leave to make a lease, he is willing to do it, which is said to be a suggestion that he intended to take a fine. It might be a dark intention, and shows skill in imposing upon the court, but it cannot make the case the better. Affidavits were laid before the Master that the houses would fall of themselves if not speedily taken down, which was the inducement to the court to make a final decree, and, thereby, give leave to lease. And the present bill is not to set aside the former decree, nor can it be done by an original bill, except in case of apparent fraud, nor is the decree wrong in itself, but it has not been rightly pursued, and a wrong use has been made of it in the carrying it into execution.

According to the decree, there should have been no fine and there should have been proper covenants. If there had been no fine, the bishop would never have agreed to this lease at the rent of £20 *per annum*. And, if the facts had been known to the court, it would never have ratified the lease. This, therefore, is what the present bill is brought to rectify.

The questions are, first, as to the lessee who does not appear until 1725, being no party to the former cause, when he was told that the bishop had power to make such a lease, he

looked no farther back than the decree. He saw the power that the bishop had, and it does not appear that he had a great bargain, so that it seems too hard to set aside his lease, and the rather, because part is sold and the repairs have been great. But, secondly, as to the bishop, I have no doubt but the £600 ought to be considered as a part of the trust from which it flowed, and it ought to be repaid with interest at £4 *per centum* to the present rector from the death of the bishop.

And so he decreed the £600 to be laid out in a purchase for the rector and his successors and, until such a purchase made, to be laid out on security in trustees' names, and the bishop's executors to pay costs out of his assets. But, as against the lessee, he dismissed the bill without costs.

[*Sub nom*. Galley v. Sharplesse, Reg. Lib. 1735 A, f. 342.]

[Other reports of this case: 2 Eq. Cas. Abr. 696, 22 E.R. 585.]

76

Stapleton v. Colville

(Ch. 1736)

In this case, the devise in issue created a charge that was entirely upon the testator's real estate, and the widow had the personal estate to her own use.

Mr. Colvile, by a will, devised his lands to his wife for life, chargeable with the payment of two annuities for the lives of the annuitants and, likewise, with a legacy of £1000, and he gave her a power to raise by mortgage or sale of any part of the inheritance such a sum as would be sufficient to discharge the debts he should owe at the time of his death. And, then, reciting the great satisfaction he had of his estate's having continued so long in his name and family and the great desire he had to perpetuate as far as he could his name and estate, he devises all his real estate, after his wife's death, to his nephew Robert Lupkin for life, remainder to his first and other sons in tail, etc., upon condition of their taking and using the name and arms of Colvile forever. And, then, in the close of his will, he gives all his goods, chattels, and personal estate to his wife, and he makes her sole executrix.

The question was whether the wife should take the personal estate exempt and discharged from the payment of debts or whether the personal estate should not according to the general rule be first applied.

It had been decreed at the Rolls that the charge should be entirely upon the real estate and the wife to have the personal estate to her own use.

Mr. Attorney General [*Willes*], Mr. Solicitor General [*Ryder*], Mr. *Verney*, and Mr. *Hamilton* argued that, by the known and general rule, the personal estate was the proper fund for the payment of debts and that it has been always held that, where there are no words in a will to exempt it, either particularly or by necessary implication, it shall be applied first. And, whenever it has been held otherwise, that has only been to satisfy the testator's intent, who, being master of the whole, may give and dispose of it in what manner he pleases, as in the case of a devise to trustees to sell for payment of debts etc. But where the debts are only charged

upon the estate, the personal estate must be first applied according to the distinction in Wainwright and Bendlow's Case, 2 Vern. 718.[1]

In this case, the clause whereby he has disposed of his real estate was to be considered but as auxiliary to that whereby he has disposed of his personal estate. And whether the devisee of his personal estate takes as executor or in any other manner, both law and equity make him but as a trustee for the creditors, who have the best right to it. And, although the testator makes both real and personal estate the fund for payment of his debts, yet there shall be no average, but the real estate shall be chargeable only in case of deficiency of the personal. So, where the personal estate is devised to one who is made executor, unless there be particular words to exempt the personal estate, it shall pass to the devisee but as executor and, consequently, applicable in the first place, according to Cuttler and Coxeter's Case, 2 Vern. 302, and French and Chichester's Case, 2 Vern. 568, the last of which is a very great authority, being warranted by the opinion of the Lord Keeper Wright and the Lord Cowper, who both decreed the personal estate to be first applied, notwithstanding that the trust estate was expressly and directly charged with payment of debts. So, in Harewood and Child's Case, heard by the present Lord Chancellor [LORD TALBOT], 13 August 1734,[2] where the words were:

> I devise all my manors to A. and B. and their heirs, in trust that they and their heirs, out of the rents and profits or by lease or mortgage or sale thereof or any part thereof, shall raise so much money as I shall owe at my death, and, after payment of my debts and reimbursing themselves, upon farther trust that they and their heirs shall stand seised of such part of the premises as shall remain unsold to and for such persons and uses as the manor of C. is already settled, and, if any money remains after payment of my debts, it shall be paid to my daughter and such as are entitled to the said manor by the limitation aforesaid.

He had already given the manor of C. to his daughter in tail, with remainder to his nephew, and, then, he gave all his personal estate, of what nature or quality soever, to his daughter, whom he made executrix. And it was held that, notwithstanding this express devise to the trustees, the personal estate should be first applied in discharge of the real. The like was decreed in Bromhale and Wilbraham's Case, at the Rolls about four or five years ago,[3] where the testator devised in the following words, *viz*.:

> All my personal estate of what nature, kind, or quality soever, I give to my sister A., whom I make my executrix, and, all my real estate of what kind, nature, or quality soever, I give unto my two sons B. and C., chargeable with my debts.

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[1] *Wainwright v. Bendlowes* (1716), 2 Vernon 718, 23 E.R. 1071, also Precedents in Chancery 451, 24 E.R. 201, Gilbert Rep. 125, 25 E.R. 87, 1 Eq. Cas. Abr. 271, 21 E.R. 1039, Chan. Cases *tempore* Geo. I, 273.

[2] *Cutler v. Coxeter* (1693), 2 Vernon 302, 23 E.R. 794, also Lincoln's Inn MS. Misc. 10, p. 198; *French v. Chichester* (1707), 2 Vernon 568, 23 E.R. 970, also 3 Brown P.C. 16, 1 E.R. 1147, 2 Eq. Cas. Abr. 493, 22 E.R. 419, Chan. Cases *tempore* Anne 77; *Harewood v. Child* (1734), Cases *tempore* Talbot 204, 25 E.R. 738, 1 Cox Chancery Cases 7, 29 E.R. 1037, Jodrell 460, Ridgeway *tempore* Hardwicke 243, 27 E.R. 817, 2 Eq. Cas. Abr. 372, 22 E.R. 318.

[3] *Bromhall v. Wilbraham* (Ch. 1733), Cases *tempore* Talbot 274, 25 E.R. 774, Ridgeway *tempore* Hardwicke 242, 27 E.R. 817, 2 Eq. Ca. Abr. 372, 22 E.R. 316, 317, Lincoln's Inn MS. Misc. 384, p. 373, pl. 27.

It was held at the Rolls, and, afterwards, by Lord Chancellor King that the personal estate should be first liable. And the same had been before decreed in the Case of Lord Gray *versus* Lady Gray, 1 Chan. Ca. 297, and that of Mead *versus* Hide, 2 Vern. 120.[1]

In the present case, there is no devise to trustees for payment of debts, but a beneficial interest is given to the wife for life with a power to raise by sale or mortgage of the inheritance such a sum as will be sufficient for the payment of his debts, which was intended only to enable her to dispose of the inheritance in case of necessity, but not at all to take it out of the common rule, being no more in effect than charging the real estate, which could be charged only by one of the two means chalked out by the testator. Indeed, without this particular power, the wife, being but a tenant for life, could neither sell nor mortgage the inheritance. But that can be no objection, since, in case of a deficiency of the personal estate, the inheritance would still be liable, although she had no power of charging it. Besides, the devise to his nephew after his wife's death evinces the testator's intent to be that the real estate should not be chargeable but upon a deficiency of the personal, it being upon a condition that his nephew shall take his arms, which always implies the testator's intent to give the devisee as large, beneficial, and great estate as possible to perpetuate his name and family. And it was one of the reasons for decreeing a fee simple to the devisee in Ibbetson and Beckwith's Case.[2]

Mr. *Browne*, Mr. *Fazakerley*, and Mr. *Earle* insisted on the other hand that, upon the whole frame of this will, the testator's intent clearly appeared to give his personal estate to his wife, exempt from the payment of his debts, and that all the cases cited on the other side did but evince the general rule, without governing the present case, which was quite different from every one of them all. The directions given in respect of his debts are contained in the clause whereby he disposes of his real estate, and, with that clause, he has closed everything in regard to his debts, the devise of the personal estate standing sole and single, without anything therein relating to the payment of his debts. And, when an express devise is to be controlled by implication, it must be such an implication as is absolute and necessary, whereas, in this case, the testator's intent plainly appears to give his personal estate to his wife absolutely without any charge, having used no words which, either by themselves or by any implication, can denote an intent in him that the personal estate given should be charged with his debts. And, since he has not, neither this nor any other court can narrow his expressions so as to make the disposition different from what he intended it to be. Had he intended the charge to lie upon the personal estate, he needed only to have charged the real estate in aid of it, but he would never have been so exact in describing the particular manner in which the real estate should be made chargeable with his debts, as he has been in his creating this power, which, if it is not considered as a beneficial power given to the wife in order to ease her own estate, can never have any effect.

And it is not at all to be compared with an authority given to trustees to sell, there being a very great difference between such bare general powers to a third person to sell or do some other act and such a particular beneficial power as the present one, which, when given to a person to do a thing that is and will be advantageous to him, is to be considered in the same light as if the giver himself had done that thing, particularly in the case of a wife, as it is here. The devise of the personal estate is all his goods, chattels, etc., by which words, unless a part can be taken for all, she must take the whole personal estate discharged from any out-goings,

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[1] *Lord Grey v. Lady Grey* (1677-1678), 1 Chancery Cases 296, 22 E.R. 809, also 2 Freeman 6, 22 E.R. 1020, Repts. *tempore* Finch 338, 23 E.R. 185, 2 Swanston 594, 36 E.R. 742, 73 Selden Soc. 393, 79 Selden Soc. 481, 657; *Mead v. Hide* (1690), 2 Vernon 120, 23 E.R. 687.

[2] *Ibbetson v. Beckwith* (1735), see above, Case No. 62.

for, the word 'all' implies it, since, though, as to the creditors, the personal estate cannot be looked upon as his after his death, yet, between legatees and devisees, it is as much his and to be looked upon as such after his death as during his life. And, in all the cases where the intent has clearly appeared to discharge the personal estate, it has made no difference whether the devise was to charge the real estate only or to sell it.

According to Bamfield and Wyndham's Case, Precedents in Chan. 101, where the devise of the personal estate was almost in the same words as here and which, though decreed upon the reason that, if the personal estate should not be exempted, nothing would be left for the wife, yet seems, likewise, to have gone upon the words of the devise themselves. So, in the Case of the Attorney General and Barkham, decreed in this court about two years since,[1] where the testator devised in the following words, *viz*.:

> For the just and true performance of this my last will and for the payment of all my debts, I give and devise all my real estate, and, as to the personal estate, which at the time of my death, I shall be possessed of and entitled unto, I give the same unto my executor and executrix herein named to defray my funeral charges and expenses, and, if my personal estate shall fall short to discharge the same, then, the remainder to be paid to my executors out of the first rents and profits of my real estate, as they shall become due after my decease until payment be made of all my legacies, debts, and funeral expenses as aforesaid. And, if there be any surplus of my personal estate, that then, my executors pay the same to my dear and loving wife.

And he held in this case that the personal estate should go to the wife discharged from the payment of debts. The cases of Harewood *versus* Child and of Broomhall *versus* Wilbraham are very different from the present case, for, in the first the daughter was to take the whole either way, whether as real or personal estate, and, therefore, the doubt there could only be with regard to the representatives. And, in that of Broomhall *versus* Wilbraham, had the real estate which was devised to the sons been charged with the debts, the sons would have had nothing at all and the testator's sisters, who were the devisees of the personal estate, would have run away with the whole, so that the question being between the testator's own children and his sisters, it was natural and just to construe the intent in favor of his children and to lay the load on the personal estate.[2]

But what clearly evinces the testator's intent in the present case is that the annuities, legacies, and debts are all in one and the same clause and, the personal estate being as much the proper fund for the payment of legacies, as debts and the legacies being particularly charged upon the land and coupled and joined with the power given for sale of part of the inheritance for payment of his debts shows he intended no difference between them. The annuities, likewise, are given in the same clause. And it can never be pretended that the annuities were designed by him to issue out of the personal estate. Then, comes a separate distinct clause, whereby he disposes of all his goods, chattels, etc., without any reference to the former or anything that looks like an intent of burdening the personal estate with the debts. But those, being particularly provided for by a former clause with the legacies and annuities, must be considered as designed by him to issue out of the same fund and his intent, as to all three, to be one and the same.

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[1] *Bamfield v. Wyndham* (1699), Precedents in Chancery 101, 24 E.R. 49, also 2 Eq. Cas. Abr. 370, 22 E.R. 315; *Attorney General v. Barkham* (1734), 2 Eq. Cas. Abr. 372, 22 E.R. 316.

[2] *Harewood v. Child* (1734), *ut supra*; *Bromhall v. Wilbraham* (Ch. 1733), *ut supra*.

Lord Chancellor [LORD TALBOT]: The single question for the judgment of the court is whether the personal estate shall or shall not be liable to the payment of the testator's debts. What the quantum of the debts or the amount of the personal estate was at the testator's death does not appear. If it did, it would give a great light into this matter. Indeed, it is not absolutely in the testator's power to take the personal estate from the creditors. But he may substitute another fund in the room of it. And, if so, this court will take care that right will be done to all parties, as well the devisees of the personal as of the real estate. The testator's intent must govern the construction of his will, and that intent must be collected from the will itself. In case where the real estate is charged with payment of debt and an executor appointed, as in Wainwright and Bendlow's Case,[1] there is no room to doubt of the testator's intent, for, it is no more than charging his real estate for the better security of his creditors in case of a deficiency of the personal. But it can never be intended an exemption of the personal estate for the benefit of the executor.

A difference has been taken between the bare charging of the real estate and a devise to sell. But I think that, in equity, a charging of the real estate is almost equal to a devise to sell, since the court will, upon the necessity of a sale, order it so. And, in Wainwright and Bendlow's Case, the testator's intent appeared to have the whole converted into money. And, therefore, that case does not seem to me to weigh much either way.

It has also been said that, where the executor is named in the same clause, the nature of the personal estate is not altered. But it still remains liable to the debts. And some cases have been so decreed. But, although that reason may have some weight, yet do I not think it sufficient for the exoneration of the real estate. And, unless it was acquainted with the particular circumstances of French and Chichester's Case, wherein the book seems deficient, I can never form any judgment from it, since, if the reason given in the book for it be the only one, I cannot say that it gives me entire satisfaction, nor can I lay any great stress upon it. And, the rather, because there is a plain difference at law between the bare making an executor and the making him likewise legatee of the personal estate, as it is in the present case, for, in the first instance, if the executor dies intestate before probate, the representative of the testator is entitled to the administration, whereas, in the latter, there being an express gift to him, he takes as legatee, and, consequently, upon his death, his representative would be entitled to it, an interest being vested in him in his own right in the one case, but nothing at all in the other, until he has converted it. In the Case of Harewood *versus* Child, the opinion of the court was founded upon the completion of the will, which, being taken together, manifested the intent to be that the daughter should take the personal estate liable to the payment of his debts, she herself being devisee of the whole. And it would have been absurd to imagine the testator to have intended his personal estate to be exempt from the payment of his debts, when he had expressly provided that the surplus of the produce of what should be raised out of the real estate should go to the very same person, who was devisee in tail of the real estate. In that of Broomhall *versus* Wilbraham, the real and personal estates were pretty much of the same value and the debts must have exhausted the one or the other fund, so that, had the judgment of the court been otherwise, the man's children would have been left without any provision. And, in that of Mead *versus* Hide, there was an executor, but without any express gift made to him. But, in Bamfield and Wyndham's Case, the determination was in favor of the wife, that she should take the personal estate exempt from the debts, and, there, she was made executrix in the same clause, although, indeed, there be another reason given in the book, of the debts amounting to more than the personal estate. In that of the Attorney General *versus* Barkham, the testator had laid the charge upon the real estate and, then, taking

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[1] *Wainwright v. Bendlowes* (1716), 2 Vernon 718, 23 E.R. 1071, Precedents in Chancery 451, 24 E.R. 201, Gilbert Rep. 125, 25 E.R. 87, 1 Eq. Cas. Abr. 271, 21 E.R. 1039, Chan. Cases *tempore* Geo. I, 273.

up his personal estate, he mentions particular things which he charges it with, so that the surplus there meant must be the surplus after the particular charge which he had there specified. And, therefore, this case, being very particular, must stand upon its own bottom and reason, and cannot be compared to the present one. All those cases depended upon the intent plainly appearing, as this must do likewise, after the gift of the annuity and legacies wherewith he has charged his real estate, wherein I do not think that the using the words ' charging or chargeable' will make any difference, since they are used *** indifferently. He gives his real estate to his wife for her life. And, although it does not necessarily follow that the coupling both together shows he intended both to be payable out of one and the same fund, the personal estate being the proper fund for debts, though no provision had been made by the testator. But the annuities having none but what is particularly provided for them, yet that must have some weight.

Then comes the power given to the wife, which seems to me very clearly to manifest the intent that she should take what he has given to her by his will to her own use, for his intent being to carry down and perpetuate his estate in his name and family, can it be supposed that, having given his wife the whole power over his personal estate by making her executrix, he would likewise give her a power of disposing of so much of the inheritance (and consequently of defeating the devise to his nephew, not of so much as the personal estate should prove deficient, but of what should be necessary for the payment of his debts), unless he had intended her the personal estate absolutely to her own use, clear and discharged from the payment of his debts? His intent seems clear to give her this power of disposing of so much of the inheritance as would satisfy his debts in order to secure her the full enjoyment of her estate for life and of the personal estate free from all charges whatsoever.

And so he affirmed the decree in behalf of the wife.

[Other reports of this case: 2 Eq. Cas. Abr. 372, 425, 22 E.R. 316, 361.]

77

Hervey v. Aston
(Part 1)

(Ch. 1736)

The question in this case was whether provisions for marriage with consent are enforceable or not.

Sir Thomas Aston, by settlement after marriage, creates a trust term of one thousand years, the trust whereof he declares to be by mortgage or sale of the premises to raise the sum of £2000 for the portion of each of his daughters, provided they married with the consent of the defendant their mother. Then he directs a yearly sum to be paid them out of the rents and profits until they marry, and, if any of his daughters should happen to die before marriage with such consent, that her portion should cease and the premises be exonerated thereof, and, if such portion should be raised in whole or in part, that the same should be paid to such person to whom the premises should belong. By his will in 1722, he creates another trust term to raise by sale or mortgage the sum of £4500, whereout £2000 to be paid to each of his daughters in augmentation of their fortunes, but subject to such conditions as are declared in the settlement. And, by a codicil, in pursuance of a power of revocation, he creates another trust term for the better raising of his daughters' portions.

Sir Thomas died in 1724, leaving eight daughters, one of whom, Mr. Hervey married after the age of twenty-one but without the consent of her mother. And another married Mr. Clutton at her age of nineteen and without consent likewise. And they and their husbands brought their bill against their mother and brother to have their portions and additional fortunes

and to have the real estate applied towards payment of their respective portions, alleging that, upon their respective marriages, their portions became payable. Mr. Clutton, the husband of one of the daughters, died, whereupon they brought a bill of revivor. And a decree was made by consent with liberty to apply farther to the court. And, now, Mr. Hervey and his wife and Mrs. Clutton preferred their petition for payment of their portions, Mr. Hervey offering therein to settle his wife's fortune and they insisting that the lands were sufficient to answer the daughter's additional portions.

The Master of the Rolls [JEKYLL], having taken time to consider of this case, now delivered his opinion. The question is whether the plaintiffs be entitled to those original and additional portions, both the marriages being had without the consent of the Lady Aston, the mother. And, first, it is to be observed that these portions are provisions for children, secondly, that the loss of these provisions is a penalty, and, thirdly, that this court can impose terms upon the husbands as to the settling the fortunes. Nor are provisions for children merely voluntary, since nature obliges parents to take care of their children. F.N.B. 284, of the new edition, and that the court did very early impose terms upon husbands applying for their wives' fortunes, appears from the Case of Shipton, in a book called Reports of Cases in the time of Sir Heneage Finch 145.[1]

Now, for the clearing up of this question, it is to be considered that, by the canon law, all conditions against the liberty of marriage are unlawful. Swinbourne 150. And, in the same chapter it is said 'that, although the legacy be given over, yet it is void, as being in restraint of marriage and, consequently, against the good of the commonwealth'. Thus, it stood by the ecclesiastical law. And, in Moore 857, Pigot's Case, cited by J. Winch, comes up to the present case; it was a condition annexed to a legacy that the daughter should marry with the consent of the mother; she married without her mother's consent, and yet sentence was given that she should have her legacy, which shows that the common law courts had adopted the notions of the ecclesiastical lawyers. This court, indeed, has not gone so far, wherever there is a devise over, that devise over having always been held to be good. But, where there is no devise over, such conditions have been only considered as *in terrorem*. 1 Mod. 308, Abr. Eq. Ca. 110.[2]

And there is a reasonable foundation for construing such devises to be *in terrorem* only, for, though a daughter marries without her father's consent, yet it is not to be supposed that this severity (was he living) would carry him so far as to leave her quite destitute. Besides, whatever is injurious to the commonwealth is unreasonable. And, therefore, it was that restraints of marriages were discouraged by the Roman laws. For these reasons, this court has construed such limitations to be only *in terrorem*, unless there be a devise over. Indeed, it has been insisted that, in the present case, there was a devise over, for that, by that clause of the will whereby the testator provides the additional sum of £2000 to each of his daughters, he gives the residue, over and above the £2000 apiece, to his wife. But the legacy is not by that given over, only the residue over and above the £2000.

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[1] A. Fitzherbert, *Natura Brevium*; *Shipton v. Hampson* (1674), Repts. *tempore* Finch 145, 23 E.R. E.R. 79.

[2] H. Swinburne, *Brief Treatise of Testaments and Last Wills*; *Gresley v. Luther* (1614), Moore K.B. 857, 72 E.R. 953; *Piggot v. Morris* (1725), Select Cases *tempore* King 26, 25 E.R, 203, also 2 Eq. Cas. Abr. 214, 543, 22 E.R. 182, 457; *Fry v. Porter* (1670), 1 Modern 86, 300, 86 E.R. 752, 898, 1 Eq. Cas. Abr. 111, 282, 333, 21 E.R. 918, 1047, 1083, 2 Chancery Reports 26, 21 E.R. 606, 1 Chancery Cases 138, 22 E.R. 731, 1 Freeman 31, 89 E.R. 26, 2 Levinz 21, 83 E.R. 434, 1 Ventris 199, 86 E.R. 135, T. Raymond 236, 83 E.R. 122, 2 Keble 756, 787, 814, 867, 84 E.R. 478, 498, 515, 548, 3 Keble 19, 84 E.R. 570, Chan. Repts. (1660-1673), p. 413

It has been likewise insisted that, by the clause in the settlement declaring that, if any should die before marriage with such consent, that her portion should cease, there was a sufficient disposition of it. But, surely, this is not a good disposition within the meaning of those cases that allow a limitation over to be good, for this is not to take place upon marrying without consent but upon dying before marriage with such consent. And it is no more than providing for daughters dying unmarried, he taking it all along that, if they married, they would do it with consent. Here, does not appear to be any person in the testator's view to whom these fortunes should go over, as there does in all the cases where these limitations over are allowed, the intent being as clear in those cases to give it over upon a breach of the condition, as that, upon performance of it, the first taker should retain it.

As to authorities, I shall cite first those that relate to personal estates: the Case of Escot *versus* Escot, 6 February 1663, and mentioned in 1 Chan. Ca. 144, was a devise to his nephews and nieces, to his nephews at twenty-one, to his nieces at twenty-one or marriage, but, if they married without their mother's consent, then, he devised it over, and the court went so far in this case as to decree the legacy notwithstanding the devise over. The next is that of Sir Henry Bellasys *versus* Sir William Ermine, 1 Chan. Ca. 22, and it agrees with the Register Book; the condition was that she should marry with the consent of A. and, if not, that she should have but £100 *per annum*. The court held this proviso to be only *in terrorem*. So Garrett and Pretty's Case, 2 Vern. 293, where, for want of a devise over, the condition was held to be but *in terrorem*.[1]

The true reason of this distinction is given in Stratton and Grymes's Case, 2 Vern. 357, that a devisee over being named, he must be looked on as a person whom the testator considered and had in his thoughts as to what provision and benefit he was to have by the will. Indeed, that of Amos *versus* Horner, Abr. Eq. Ca. 112, is contrary to the former determinations, but no resolution was there taken, but it went off for want of parties, and never came on again.[2] And, in that of Creagh *versus* Wilson, 2 Vern. 572, the intent of the condition was to provide against his daughters marrying a Papist, which, since the Protestant religion has been settled here, is a very good condition.[3]

And, if the testator's intent be defeated in that respect, the legacy shall not be paid. Nor will these fortunes being chargeable upon land, vary the case, for, although they are to issue out of land and are secured by deed, yet this being upon a direction of trust money, though by deed, the court will adjudge this limitation to be only *in terrorem*, the intent of the parties being as much to govern in construction of trusts, as in construction of wills, as is said by Lord Somers in Sheldon and Dormer's Case, 2 Vern. 311. Nor is the Case of Fry *versus* Porter applicable to the present case, that being a condition annexed to a legal estate and this being an equitable interest only. In Farmer and Compton's Case, 1 Chan. Rep. 121, although the marriage was against consent, yet the daughter was held to take by the opinion of two judges, to whom it was referred. And, in that of Fleming *versus* Waldgrave, 1 Chan. Ca. 58, the benefit of the lease was decreed to the administrator, notwithstanding the devise over. Indeed, in that of Aston *versus* Aston, 2 Vern. 452, the court would not relieve, because of the express words of the devise over. The Lord Falkland's Case, 2 Vern. 333, is not at all applicable to

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[1] *Bellasis v. Ermine* (1663), 1 Chancery Cases 22, 22 E.R. 674, also 2 Freeman 171, 22 E.R. 1137, 1 Eq. Cas. Abr. 110, 21 E.R. 918, Chan. Repts. (1660-1673), p. 152; *Garret v. Pritty* (1693), 2 Vernon 293, 23 E.R. 790.

[2] *Amos v. Horner* (1699), 1 Eq. Cas. Abr. 112, 21 E.R. 920.

[3] *Stratton v. Grymes* (1698), 2 Vernon 357, 23 E.R. 825; *Amos v. Horner* (1699), 1 Eq. Cas. Abr. 112, 21 E.R. 920; *Creagh v. Wilson* (1707), 2 Vernon 572, 23 E.R. 972, also 1 Eq. Cas. Abr. 111, 21 E.R. 919.

this case, nor will it be an authority almost in any case from the peculiarity of its circumstances. That of King *versus* Withers, reported in a book composed by the late, Lord Chief Baron Gilbert, called Reports in Equity 26, is an express authority for the plaintiffs, although I cannot agree with what is there said, that trust money to arise out of land must have the same construction that the lands themselves would. So, likewise, is the determination in Semphill *versus* Baily, Preced. in Chan. 562. By all these various judgments, it appears that such clauses in restraint of marriage are never taken favorably, but generally restrained, as intended only *in terrorem*.[1] In the present case, it is a sum of money charged upon land.

But, there being no distinction between conditions annexed to money charged upon land and conditions annexed to portions arising out of the personal estate and portions by will being due by ecclesiastical law notwithstanding such conditions as this annexed to them, portions by settlement, although under the like conditions, are likewise due by the law and rules of this court. And, therefore, I think the plaintiffs well entitled to their several portions.

And so he ordered that Mr. Hervey should make his proposals before the Master as to the settling his wife's fortune and that Mrs. Clutton's fortune should be paid to her, her husband being dead.

[Williams's Note: The Master of the Rolls [JEKYLL] seems to have determined this case upon a principle that a condition annexed to money or portions charged upon lands were entitled to the same equitable construction to avoid a forfeiture as conditions annexed to portions arising from personalty, and, that, notwithstanding the condition was a precedent one. But, afterwards, in Trinity term 1738, this decree was reversed by LORD HARDWICKE, Chancellor, assisted by Lord Chief Justice LEE of the King's Bench, Lord Chief Justice WILLES of the Common Pleas, and Mr. Justice COMYNS of the same court. They seem to have considered that portions or interests directed to be raised out of lands had nothing testamentary in them, and, therefore, were not to be governed by the rules of the civil or canon but by those of the common law, that no rule was more fixed than that portions charged upon lands did not vest until the time of payment arrived, that the present condition to marry with consent was a lawful one and a condition precedent, and, that being such, nothing vested in the plaintiffs until that condition was performed. *Vide* Comyns's Rep. 726; 1 Atk. 361, where the reader will find the arguments of the judges, with the reasons which induced a reversal of the decree at the Rolls stated much at large. It seems, therefore, by this decision to be settled that conditions in restraint of marriage, so far as the same respect interests arising out of lands, are to be governed by the rules of the common law, and, therefore, whether the condition be precedent or subsequent or whether there be a devise over or not, the interest shall never vest until the condition be performed.]

[Other reports of this case: See below, Case No. 91, Harvard Law School MS. 1134, p. 13, Lincoln's Inn MS. Misc. 384, pp. 446, 456, 459, 1 Atkyns 361, 26 E.R. 230, 2 Comyns 726,

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[1] *Sheldon v. Dormer* (1693), 2 Vernon 310, 23 E.R. 802; *Fry v. Porter* (1670), *ut supra*; *Farmer v. Compton* (1625-1626), 1 Chancery Reports 1, 21 E.R. 490; *Fleming v. Walgrave* (1664), 1 Chancery Cases 58, 22 E.R. 693, 1 Eq. Cas. Abr. 110, 21 E.R. 918; *Aston v. Aston* (1703), 2 Vernon 452, 23 E.R. 890, also Precedents in Chancery 226, 24 E.R. 110, 1 Eq. Cas. Abr. 111, 336, 21 E.R. 919, 1085, Chan Cases *tempore* Anne 23; *Bertie v. Viscount Falkland* (Ch. 1697), 2 Vernon 333, 23 E.R. 814, also 1 Salkeld 231, 91 E.R. 205, 3 Chancery Cases 129, 22 E.R. 1008, 2 Freeman 220, 22 E.R. 1171, 12 Modern 182, 88 E.R. 1248, Holt K.B. 230, 90 E.R. 1026, Colles 10, 1 E.R. 155, Dickens 25, 21 E.R. 176, 1 Eq. Cas. Abr. 110, 21 E.R. 917, Chancery Cases *tempore* Harcourt, p. 17; *King v. Withers* (Ch. 1735), see above, Case No. 50; *Semphill v. Bayly* (1721), Precedents in Chancery 562, 24 E.R. 252, also 2 Eq. Cas. Abr. 213, 22 E.R. 181.

92 E.R. 1287, West *tempore* Hardwicke 350, 25 E.R. 975, Willes 83, 125 E.R. 1067, 2 Eq. Cas. Abr. 147, 216, 432, 504, 539, 650, 22 E.R. 126, 184, 367, 427, 454, 546, Jodrell 10.]

[Reg. Lib. 1736 A, f. 60.]

78

Morrice v. Bank of England

(Ch. 1736)

Decrees in equity and judgments at law must in the administration of legal assets stand upon the same foot; that which is prior in time, be it a judgment or be it a decree, must be first satisfied.

6 November.

One Mr. Brown, in the plaintiff's husband's lifetime, *viz.* in October 1720, made his will and thereby devised to Mr. Morrice the sum of £16,500 in trust for his daughters to be paid to them and the survivors of them at twenty-one or marriage, which should first happen, share and share alike, together with such interest as should be made of the same. And, after some other legacies and subject to the payment of his debts, he gave all the residue of his estate, real and personal, to Mr. Morrice and made him sole executor. Mr. Morrice, being a great trader, contracted a great many debts and died the 16th November 1731, having made his will and the plaintiff, his wife, sole executrix thereof, leaving his affairs very much embarrassed, being indebted to several persons in specialties and otherwise in large sums and particularly to the Bank in £35,000. Soon after his death and before any action was commenced against the plaintiff by any of her husband's creditors, the defendants Ann and Judith and Elizabeth, daughters to the testator Morrice (with some few other creditors) brought their bill upon 15 December 1731 against the plaintiff as executrix of her husband, setting forth the several sums in which the testator stood indebted to them respectively and with which he was entrusted for their benefit, which remained unpaid together with a great arrear of interest and prayed a decree for the payment thereof. Mrs. Morrice put in her answer immediately, confessing the demands in the bill. And upon 25 January 1731, the cause was heard upon bill and answer only, and the now defendants, the daughters, obtained a decree by consent, that the plaintiff should out of her husband's assets pay the said several sums of money so demanded in a course of administration, in obedience to which decree, the plaintiff on the 4th February following paid out of her husband's assets to two of her daughters the sum of £10,111 in satisfaction of part of their demands under that decree. Upon 16 December 1731, some few other creditors for smaller sums of money had filed their bill for payment of several quantities of South Sea stock and annuities and East India stock that had been transferred to the testator in trust for them, praying that such quantity thereof as remained in the testator's name might be transferred to proper trustees, and, as to such part as he had disposed of to his own proper use, that the plaintiff might be decreed out of her husband's assets to make good the same. Mrs. Morrice confessed this bill likewise and, on 2 February 1731, a like decree was made, that the plaintiff should pay what should be reported due by the Master out of the assets in a course of administration. All the defendants had notice of these decrees from the plaintiff or her agents as soon as they were made and also that the assets come to her hands were not sufficient to discharge their respective debts upon specialties and the sums of money decreed by the two decrees and that all the debts (except the said sum of £10,111 were yet unpaid) and the other parts of the decree wholly unperformed.

During these transactions, several other creditors brought their actions against the plaintiff for their respective debts, as executrix to her husband, and, amongst others, the Bank, who

were creditors to the value of £35,000, sued out a *latitat* against the plaintiff 28 December 1731, tested the last day of Michaelmas Term before, and returnable 24 January. And the plaintiff, on 6 February 1731 (having upon the 1st of February obtained a week's time to plead to the actions which the Bank and some others had brought against her, upon condition of not confessing judgment in that or any other court to any other creditors) by way of special *plene administravit*, pleaded one judgment and several other specialties and that she had not assets *ultra* etc.[1] There were several other specialty debts which came out after and which she would also have pleaded to if she had had information of them, and she would also have pleaded the two decrees of the 25 January and 2 February had she been able by the rules of law so to have done, they being obtained before any plea put in. And upon the 7 February 1731, several of the creditors took judgment of assets *quando acciderint*, and signed their judgments as of that same term. But the Bank having replied that she had assets *ultra*, a trial was had and a special verdict was found upon which, in Hilary 1735, the Bank had judgment for £14,659 against her as the assets of the said Humphrey Morrice.

The plaintiff now brought her bill setting forth the above particulars and that, by the rules of law, she could not plead the said decrees to the several actions although she was liable to executions upon the judgments, nor by the same rules retain assets of the testator to satisfy the said decrees and protect her from executions, though, at the same time, she was bound at her peril to retain assets to pay the said debt by the said decrees directed and, therefore, prayed that what should appear due to any of the defendants might out of the assets of the deceased be paid them respectively as far as such assets would go in a course of administration, having regard to the nature and superiority of their debts, and that she might be protected and indemnified in paying a due obedience to the decrees of this court and that the defendants might be restrained from proceeding at law. And, by a bill of revivor and supplemental bill, she prayed the directions of the court in what manner she should administer the testator's assets in respect to the several demands.

The Bank and other judgment creditors insisted that the decrees were fraudulent and obtained by collusion between the plaintiff and the parties to those suits in order to gain an undue preference to the parties concerned therein and that their debts being due by judgments, they were to be paid before the decree creditors.

The cause was first heard at the Rolls, where the decree creditors were ordered to be paid first; and, after they were satisfied, then the surplus of the assets (if any there should be) to be applied to the payment of the several judgments according to priority, and if anything then remained, to be paid in a course of administration, from which decree, the Bank and other judgment creditors appealed. And, after some days arguments, the court now gave judgment.

Lord Chancellor [LORD TALBOT]: In questions of this kind, where the assets are equitable, this court endeavors to put all the creditors upon an equal foot, it being more agreeable to natural equity and justice that the testator's assets should be distributed *pro rata* amongst all the creditors, one debt being in conscience as much a debt as another. And I should have been glad that all the creditors in the present case had had temper enough to consent to so equitable a rule. But this not being consented to by some of the creditors who think they have got an advantage, I cannot help declaring it a defect in our laws that neither courts of law or equity have it in their power to enforce a distribution of assets *pro rata* amongst the creditors although such distribution be not consented to by them. But, as there is no such power, this court does in the distribution of legal assets follow the rules of law, which allows a preference to such creditors as have used legal diligence in the getting in their debts. In cases of debt or account against executors, this court has a concurrent jurisdiction with courts of law, since a

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[1] *Bank of England v. Morice* (1734), W. Kelynge 165, 25 E.R. 549, 2 Strange 1002, 1028, 93 E.R. 996, 1012, 2 Barnardiston K.B. 183, 374, 94 E.R. 436, 562, Cases *tempore* Hardwicke 219, 95 E.R. 141.

legal creditor may bring his bill here for a discovery, and, although the more ancient way might be to bring bills for a discovery only, yet now, it is the course to bring bills both for discovery and satisfaction. And, by suing in equity, there is this advantage that the plaintiff may have the oath of the executor with respect to the distribution of assets, which he cannot have at law and an account may be more conveniently taken in this court. This concurrence of jurisdiction is the cause why, in the distribution of legal assets, this court swerves from its own rule of equality amongst the creditors to follow those of law, which give a preference to some, since, otherwise, things would be in the utmost confusion, and executors could not possibly know how to act.

In the present case, therefore, the assets not being equitable but legal, the first question will be whether any of the creditors, who stood upon an equal foot at Mr. Morrice's death, have gained any preference by what has happened since, some having obtained judgments, others decrees, and others remaining creditors upon a simple contract. The great point that has been so much spoken to at the bar is whether decrees of this court be equal to judgments at law, in the course of which several gentlemen have gone into the antiquity and extent of jurisdiction of the several courts of law and equity. But, as the present question does not depend upon the jurisdiction or antiquity of the several courts, I think all inquiries of this kind are to be avoided with great care where they give no light to the matter in dispute, such questions having heretofore occasioned contentions which are happily now laid asleep, and which I have no desire to renew, especially, when I consider that in all such variances between this and other courts, the poor subject, who has been the unhappy occasion of them, has been ground between the several powers of both. As courts of law do not review decrees made by this court, so neither does this court review judgments given at law, what it does is to interpose and restrain a person who has obtained such a judgment from making a bad and unconscionable use of it. But as to judgments, so long as they remain in force, they are equal in their natures in what courts soever they are obtained, whether in a court of record by grant or a court of record by prescription, in a court of general jurisdiction or in a court of a confined one, in a court of pie powders, or in any other superior court.

There is an evident demonstration that, in courts of law, it is neither the antiquity or extent of jurisdiction of any court that determines the rank wherein judgment creditors must stand, but rather the obligation which the party lies under of paying obedience to the awards of the several courts having jurisdiction, which obligation is as strong in a case of a decree as in a case of a judgment, since both must be performed. A judgment is executed against the person by a *capias ad satisfaciendum*, and a decree is executed by an attachment for a contempt in non-performance of it. So a judgment is executed as against land and goods by a *fieri facias* and *elegit* given by the Statute[1] and a decree is so by sequestration; only in this respect, the remedy given by this court is more effectual that though the party be in prison upon an attachment for non-performance of a decree, yet his lands and goods may be sequestered at the same time, whereas, at law, the party, having once made his election to take the body in execution, could not have recourse to another execution. Now that decrees to hold and enjoy are in the nature of a tenancy by *elegit* and do equally bind the land appears from Lord Carteret v. Pashells (*ante* [*blank*]),[2] decreed by the Lord King, and that decree afterwards affirmed in the House of Lords,[3] where, after a decree to hold and enjoy the land and possession given until payment of an annuity, the assignment of this interest by the annuitant's husband was held good

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[1] Stat. 13 Edw. I, Westminster II, c. 18 (*SR*, I, 82).

[2] *Lord Carteret v. Paschall* (Ch. 1733), above Case Nos. 18, 20.

[3] *Lord Carteret v. Paschal* (1733), 3 Peere Williams 197, 24 E.R. 1028, 2 Eq. Cas. Abr. 89, 90, 140, 22 E.R. 77, 120, 2 Brown P.C. 10, 1 E.R. 759.

because the decree created an equitable interest in the land similar to a tenancy by *elegit*; and whereon a *scire facias* might be brought against the executor as well upon a judgment obtained against the testator, both being equally *res judicata*.

If, therefore, decrees and judgments are equally conclusive upon the parties, both being the decisions of courts having jurisdiction *in rem et personam*, I can see no reason why, in the administration of legal assets, decrees and judgments should not stand upon the same foot, although I am apprised that the uniform judgment of courts of law has been that, upon an action brought upon a bond, a decree of this court is not pleadable nor can be given in evidence. But, although this may have obtained for law, this court has notwithstanding been of another opinion with regard to its own decrees, as appears from the Case of Searle v. Lane, 2 Vernon 37, 88,[1] where this court differed in opinion from the courts of law, although the administrator appeared in a very favorable light before the court, and, there, the Lord Jeffreys declared decrees of this court to be equal to judgments at law, and the filing a bill here to be equal to the filing of an original at law to prevent the alienation of assets. And this difference of opinion seems to be a right one, since otherwise the decrees of this court would be nugatory and vain. The same was held in Shaftoe and Powell's Case, 3 Levinz 355, in the Exchequer,[2] (which was said at the bar to be an impartial court, as being a mixed court both of law and equity), where the court declared that a decree in equity obliges an executor in equal degree with a judgment at law, as likewise in those of Sims v. Murray and Bishop v. Godfrey, Precedents in Chancery 179, and that of Harding v. Edge, 1 Vernon 143,[3] is the only one where decrees are said to be inferior to judgments; in all the rest, they are said to be equal. It is, therefore, no wonder that, if they be equal, this court should find means to support its own authority, which means are pointed out in that Case of Harding v. Edge, *viz*. the bringing a bill here. It was never yet controverted but that this court has jurisdiction where the demand is equitable, and, if so, a decree must be a lien upon the assets as well as a judgment, and an executor being bound to apply the assets to the amount of the judgment, he must likewise be bound to apply them to the amount of a decree; otherwise, the executor must either be ruined or a subsequent judgment render a decree ineffectual, which, in effect, would be a reversal of it. Where judgment is had against the testator himself, he is bound from the delivery of the writ to the sheriff, but, in a case of an executor, he who gets judgment first has the preference, as is Brooke, Abr., tit. *Exec*. 172.[4] And why shall it not be so in the case of a decree, since it is not only against the executor to pay, but to pay out of the assets? And although the court follows the rule of giving precedence to a judgment confessed before a decree obtained, yet, if a decree does not bind as forcibly as a judgment and that a judgment obtained after a decree shall sweep away the assets, this court must give up its jurisdiction and all things will be in the utmost confusion. I do not in the present case rest upon my own reason only, the Case of Joseph v. Mott, Precedents in

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[1] *Searle v. Lane* (1688), 2 Vernon 37, 88, 23 E.R. 634, 667, also 2 Freeman 103, 22 E.R. 1086, 1 Eq. Cas. Abr. 144, 332, 21 E.R. 946, 1082.

[2] *Shafto v. Powell* (1693), 3 Levinz 355, 83 E.R. 727, also 1 Freeman 332, 22 E.R. 1237, 89 E.R. 248, Dodd 134, 331.

[3] *Bishop v. Godfrey* (1701), Precedents in Chancery 179, 24 E.R. 87, also 2 Eq. Cas. Abr. 459, 22 E.R. 391; *Harding v. Edge* (1682), 1 Vernon 143, 23 E.R. 375, also 2 Chancery Cases 94, 22 E.R. 863, 1 Eq. Cas. Abr. 144, 21 E.R. 946, 73 Selden Soc. 234, 79 Selden Soc. 593.

[4] C. St. German, *Doctor and Student* (T. F. T. Plucknett and J. L. Barton, edd., 1974), Selden Soc., vol. 91, p. 198, 1 Brooke, Abr., *Executors*, pl. 172, f. 317.

Chancery 79,[1] being an express authority that a decree prior in time shall be preferred to a subsequent judgment, and, although in Darston and Earl of Oxford's Case, Precedents in Chancery 188,[2] that resolution is said to have been disapproved by Lord Keeper Wright and his own decree in conformity to it to have been afterwards reversed, yet does it not appear upon what reason the Lords went in the reversal which might be particular to that case, there being a real security besides the covenant, whereas the resolution in Joseph and Mott's Case stands unreversed to this hour and it is further supported by a later authority, *viz*. the Case of Saville v. Saville, 16 December 1732,[3] where an exception taken to the Master's report for having allowed the executor a payment of £1000 to a bond creditor after a bill filed in this court was allowed by Lord King, which is directly contrary to the Lord Keeper Wright's opinion in Darston and Earl of Oxford's Case. In Abbess v. Winter and Moore v. Winter,[4] 2 May 1733, the defendant's testator, being a supercargo of the South Sea Company, had borrowed several sums of money on bottomry and died in the voyage, and, upon a bill brought by some of the creditors, they obtained a decree for an account of assets and payment in a course of administration; upon 16 July 1731, Moor and other creditors had brought the like bill and obtained the like decree the 30 July 1731 fourteen days after the first; and it was referred to the same Master, who made his report in each cause upon one and the same day and reported the assets not sufficient to pay the creditors in the first suit and said the moneys mentioned in both reports were the same. Upon exceptions taken to both reports by the executor, for that the Master had appropriated the assets in both causes, which would subject him to a double payment, and both exceptions being opened together, it was held by the Lord King that the executor was chargeable but once and that no farther than the assets extended, and he so ordered the assets to be applied to the payment of the creditors under the first decree, resembling the proceedings here to the proceedings at law, the filing a bill and serving a subpoena to the filing of a declaration. This case confirms me in the notion I always had, that a decree binds the assets from the time of its being pronounced so that no other creditor can have a satisfaction but out of the residue after the decree fulfilled; as does likewise that of Jones v. Bradshaw, 4 May 1661, at the Rolls, 3 Chancery Rep. [*blank*],[5] where an executor had paid a sum of money pursuant to a decree of this court and, upon a plea of *plene administravit*, they would not allow him to give this payment in evidence at law, but this court decreed it should be allowed upon the account. Decrees and judgments, therefore, must in the administration of legal assets stand upon the same foot, that which is prior in time, be it a judgment or be it a decree, must be first satisfied.

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[1] *Joseph v. Mott* (1697), Precedents in Chancery 79, 24 E.R. 38, also 2 Eq. Cas. Abr. 459, 22 E.R. 391.

[2] *Darston v. Earl of Oxford* (1701), Precedents in Chancery 188, 24 E.R. 91, also 1 Eq. Cas. Abr. 10, 21 E.R. 834, 2 Eq. Cas. Abr. 460, 22 E.R. 391, Colles 229, 1 E.R. 262.

[3] Earlier proceedings in *Saville v. Saville* are reported at 1 Peere Williams 745, 24 E.R. 596, Select Cases *tempore* King 32, 25 E.R. 206, 2 Atkyns 458, 26 E.R. 677, 11 Modern 327, 88 E.R. 1069, 2 Eq. Cas. Abr. 646, 679, 704, 22 E.R. 542, 570, 591, Fortescue 351, 92 E.R. 886.

[4] *Abbis v. Winter* (1733), 3 Swanston 578, n., 36 E.R. 983.

[5] *Jones v. Bradshaw* (1661), 3 Chancery Reports 2, 21 E.R. 710, also Nelson 74, 21 E.R. 793, 2 Freeman 153, 22 E.R. 1124, 2 Eq. Cas. Abr. 464, 22 E.R. 396, Chan. Cases (1660-1673) 49.

The next thing to be considered is what has been alleged by the judgment creditors upon the point of relation, which is that, though, in fact, the decrees be prior in time to the judgments, yet the judgments, having relation to the first day of the term, must in the eye of the law be considered as signed that day, and, then, they will be prior to the decrees. But certainly a court of equity must attend to the truth of the fact. And the rule of relation is not conclusive even to courts of law, as appears from 1 Siderfin 432,[1] where the court interposed to prevent the doctrine of relations from doing an injury, it being a maxim that *in fictione juris semper subsistit aequitas*, as is said in 1 Inst. 150a,[2] courts of law do indeed admit relations to substantiate their own judgments, but never admit them when they become injurious. And why may not a court of equity do the same thing and inquire into the real time of signing the judgment in order to prevent a fiction from defeating its acts? And shall a judgment by relation take away those very assets which were before bound by a decree? No, surely. And, since a decree is not pleadable at law, this court, which says that assets are bound by a decree, will take care to put creditors claiming under it in the same plight as if they would plead it. And, if this doctrine of relations was admitted in the present case, the maxim *in fictione juris semper subsistit aequitas* would be entirely reversed.

It has been indeed objected that those decrees were obtained by fraud and collusion between the parties in order to gain an undue preference to such creditors as the plaintiff Mrs. Morrice chose to favor. Whatever is done by fraud is considered as a nullity, and nobody ought to be injured by it. But I wish I was as clear in this as I am in the other points of this case, for it must be owned that Mrs. Morrice put in her answer before she was obliged to do it by the rules of the court, that her answer is an admission of the bill, and that she appeared *gratis* without a subpoena to hear judgment. I could have wished that these decrees had been obtained in a more adversary manner. But suppose them to have been obtained by confession. What will be the consequence thereof? Will it be that therefore there has been fraud used in the obtaining them? Will the confessing a judgment for a just debt be admitted upon a replication *per fraudem* as an evidence that it was fraudulently obtained? And, if not, why should it be so in the Case of a decree, especially when the defendant's answer here is upon oath, which it is not at law? The second decree was obtained upon the 2nd of February 1731 and she having obtained time to plead upon the first of February in the action depending between the Bank and her upon condition of not confessing judgment to any other creditors, it is from thence inferred that she shall take no advantage of her having confessed this decree, it being as much a breach of the rule made in the King's Bench as the confessing a judgment at law would have been, which is certainly true, but the answer, which was the confession of the debt, was put in the 29 January and nothing remained but the hearing of the cause, which was done without any subpoena to hear judgment, which might be a reason if the Bank was postponed by it, not to protect the executrix, but cannot be so to take away the benefit of the decree from the creditors. But even that is not the case here, the Bank not having obtained judgment until two or three years after. The consequence therefore of all this is that the demands of the decree creditors must be established and that they have a right to pursue their decrees and to compel Mrs. Morrice to apply the assets to the performance of them and as she will be bound to obey the decrees, which will be no defense to her at law. But unless this court protects her, she will likewise be liable to the demands of all such creditors as have obtained judgments at law.

The next question will be whether she can have any and what relief in this court. It has been said that bills of conformity for rateable distribution amongst the creditors, though anciently allowed, are now discountenanced and that this is worse because intended to give a preference. The reason why such bills are discountenanced is because this court has no right

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[1] *Prodger's Case* (1669), 1 Siderfin 432, 82 E.R. 1200.

[2] E. Coke, *First Institute* (1628), f. 150.

to take away the preference which one creditor gains over another by his legal diligence, as may be collected from the Case of Buckle v. Atleo, 2 Vernon 37,[1] and that such bills might be brought by executors for delay, a considerable time being requisite for the settling of all the demands, but this bill of the plaintiff is no way like this, being only for her necessary defense and not seeking to give preference to any, but only to have it determined who has gained the preference according to the rules both of law and equity. She comes here for protection, being liable to make a double satisfaction, first to pay away the assets to the decree creditors and then to pay them to the judgment creditors. And, when an executor finds himself so embarrassed by yielding obedience to the decrees of this court and has not misbehaved himself, he may very properly come here for protection, according to Jones and Bradshaw's Case, which is an authority in point.

It has been objected indeed that she, having brought herself into this dilemma by her confession of the decrees, is not entitled to any relief, the difficulty she lies under being her own voluntary act. But if what she has done be neither contrary to the rules of law or equity, it would be hard to make her forfeit her right of protection. To the rules of law, it is not, since an executor may by confessing judgment to one pay him and plead that judgment in bar to another's demand, the original of which liberty might be to prevent the executor's being liable to two demands when he had assets sufficient only to pay one. Why may not an executor by parity of reason confess decrees? Since this court has never controlled the rules of law, either in the liberty it gives the executor of retaining for his own debt or in the other liberties it gives of restraints and puts upon him as to payment of others by confessing of judgments or making of voluntary payments to save in that one Case of Darston v. Earl of Oxford, which, as I have already said, is different from all other resolutions and very little to be depended on. As nothing, therefore, that she has done is contrary to the rules of equity, although her case had been clearer if these decrees had been obtained in a more adversary manner, yet, being for a just debt, they must be paid according to priority.

Another objection has been made, that the judgment creditors have both law and equity on their side, this court will not take the benefit of the law from them. But that rule takes place only where the equities are equal and of the same nature. In such case, this court stands neuter. In the present one, all the creditors stood upon an equal foot at Mr. Morrice's death, but, as soon as the decrees were made, the assets were bound, according to Taylor and Wheeler's Case, 2 Vernon 564,[2] where a man had lent his money upon a mortgage of a copyhold estate, and the surrender being void at law for want of a presentment within due time was held to be an equitable lien upon the land against the assignees of the mortgagor, who was become a bankrupt, although they had both law and equity of their side, because the mortgagee's equity was of a superior nature, having contracted for the particular estate itself. Here, the equity of the judgment creditors is to be paid, not by Mrs. Morrice, but out of the assets, and her equity is to pay no more than the assets amount to, and as those were bound by the decrees, her equity is in that respect superior to, and must prevail against, that of the judgment creditors. As to retainer of the Bank stock prayed by the Bank, I think they have no right to it. Indeed, where there is a mutual credit, there may be a retainer, but there can be no account and balance

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[1] *Buccle v. Atleo* (1687), 2 Vernon 37, 23 E.R. 634, also 1 Eq. Cas. Abr. 75, 236, 21 E.R. 887, 1015.

[2] *Taylor v. Wheeler* (1706), 2 Vernon 564, 23 E.R. 968, also 2 Salkeld 449, 91 E.R. 388, 1 Eq. Cas. Abr. 122, 312, 21 E.R. 928, 1068, Chan. Cases *tempore* Anne 72.

between the stock and money. And the case which has been mentioned of Megliorucei v. Royal Exchange Assurance[1] is an authority in point.

Upon the whole, I think this a very proper case for the judgment of the supreme court. But I am of opinion that the decree is right in the manner in which it orders the several creditors to be satisfied.

And so he affirmed the decree and an injunction against all parties.

Upon the [*blank*] day of May 1737, this decree was affirmed in the House of Lords.[2]

[Other reports of this case: Lincoln's Inn MS. Misc. 109, f. 105, W. Kelynge 43, 25 E.R. 487, 2 Eq. Cas. Abr. 164, 22 E.R. 140, 3 Swanston 573, 36 E.R. 980.]

79

Jenkins v. Jenkins

(Ch. 1736)

Although parents have a duty to support their children, if their children have an income of their own, the parents can apply that to their children's support.

A legatee must accept all of the terms of a will or none of them.

20 November.

David Lewis, by will dated 22 November 1699, gave to his granddaughter, Anne Jenkins, £300 to be paid her within five years after his decease. And to the other four children of his daughter, Eleanor, being his four grandsons, he gave £200 apiece to be paid them within five years after his decease, and he declared that no interest should be charged for either of the said last mentioned sums to the appointed time of payment, and, then, the said last sums to be put out to interest for the said children by their father and mother and the survivor. And he also declared his intent to be that, in case any of the said children died before such legacy became due, that, then, the legacy of such so dying should go amongst the brothers and sisters of the whole blood of such child, share and share alike, and he made his son-in-law, Thomas Jenkins, husband to his daughter Eleanor, executor. And he died the 29th of the same month. Eleanor, the testator's daughter, had then five children besides the said Anne, *viz*. David Jenkins, the eldest, the plaintiff, the second, John, George, and William. Anne died on 10th June 1700. And Eleanor had another child, *viz*. the defendant, since the death of Anne, but before Anne's legacy became payable, Thomas Jenkins, the executor, expended £110 in placing out the plaintiff to apprenticeship and paid several debts of his and maintained him after he came to age. And, by his will in writing in 1731, he devised as follows:

> Whereas I am executor to my late father-in-law, David Lewis, who, by his will, gave my son Thomas Jenkins £200 to be paid him as by the said will is mentioned and, there being also due on the death of his sister Anne £50, which I am by the said will obliged to pay, I do, therefore, in discharge of my said executorship, and out of affection to my said son Thomas, give the said £250, notwithstanding I paid

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[1] *Meliorucchi v. Royal Exchange Assurance Co*. (1728), 1 Eq. Cas. Abr. 8, 21 E.R. 833, Lincoln's Inn MS. Misc. 384, p. 267, pl. 2, and p. 270, Lincoln's Inn MS. Hill 19, p. 118, Lincoln's Inn MS. Misc. 13, p. 17.

[2] *Bank of England v. Morice* (1737), 2 Brown P.C. 465, 1 E.R. 1068, Lords' Journal, vol. 25, p. 129.

> thereof £110 to place him out apprentice and have maintained him with all manner of necessaries, and have paid for him at his request upwards of £200 in discharge of his debts, and have maintained him these twenty years, for which payments, charges, and expenses, I insist upon no more than the interest of the £250 and do give him the said £250 notwithstanding the charge I have been at and the payments and disbursements which I have made as aforesaid, to be paid him by my executor within six months after my death, and I give the interest of the said £250 to my executor in satisfaction of the money by me paid, laid out, and expended for my said son Thomas Jenkins and do enjoin my said executor to take the said sum and no more in satisfaction thereof.

He then gives the plaintiff all sums that were due to him from one Price, who afterwards became insolvent, and farther devised to him a close in fee, and he made the defendant executor and residuary legatee.

The plaintiff brought his bill for the £250 and interest for five years after the death of David Lewis. And the defendant in his answer insisted that the plaintiff ought to submit to the whole will of his father and not take advantage of it in part and avoid it in the other part.

The cause was first heard at the Rolls, where it was decreed that the child which was born after the testator Lewis's death and before the legacy of £300 became payable to Anne was entitled to a share with the other children and likewise that the plaintiff was entitled to interest as well for the £50, which came to him upon Anne's death, as for the £200 devised to him by Lewis and likewise to the land and money left him by his father, Thomas Jenkins.

And the question now was whether the plaintiff was entitled both to the interest of the legacy of £250 and also to what was devised to him by his father or whether his father's will should not be taken as a satisfaction for it.

Lord Chancellor [LORD TALBOT]: As to the general demand, the plaintiff is entitled to the principal, but the question is whether he has not received a satisfaction for it by the money expended upon him by his father in his lifetime, as, on the one hand, parents are bound to maintain their children where the children have no subsistence of their own, so on the other, where the child has an annual income, the parent is not bound to let that accumulate and maintain the child out of his own pocket, but may apply that income to the child's maintenance. In the present case, the child had but £250 in the whole, whereas the father had a good real and personal estate and, if what is sworn by one witness be true, the father had in the year 1730 promised to pay both principal and interest and to assign an estate by way of security for the growing interest, which shows no intent to set up so hard a demand against his child, whose fortune was so small in comparison of his own. And though he was persuaded afterwards to alter his opinion and to revive his demand, yet, having before waived by the transaction in 1730, he should not be at liberty now to revive it, so that, if the case stood upon that point alone, I should make no difficulty of relieving the plaintiff. But then comes the will whereby the father might impose what terms he pleased upon his own disposition according to the rule in Noys and Mordaunt's Case, 2 Vernon 581,[1] which is applicable to the present one, it being unreasonable to take a will by halves and not to be supposed that the testator would have made the bequest had he known that the terms upon which he makes it would not be complied with. In the present case, the testator never intended that the plaintiff should have this interest and likewise take advantage of the devise of the close and of the sum given him. And I do not think there is any difference where the devise is of money only and where it is partly of money and partly of land. In Noys and Mordaunt's Case, although land was by the will given in

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[1] *Noys v. Mordaunt* (1706), 2 Vernon 581, 23 E.R. 978, also Precedents in Chancery 265, 24 E.R. 128, Gilbert Rep. 2, 25 E.R. 2, 1 Eq. Cas. Abr. 273, 21 E.R. 1041, Chan. Cases *tempore* Anne 44.

satisfaction of land, which might be said to differ it from this case, yet the land was of a different nature which brings it to the same thing as is here.

And so he reversed the decree and decreed the plaintiff to make his election, whether to take under the will and to waive the interest of the £250 or to have the interest and waive all advantage of the devise.

[Other copies of this report: Vesey Senior Supplement 250, 28 E.R. 517.]

[Other reports of this case: Lincoln's Inn MS. Misc. 384, p. 66.]

80

Stavely v. Parsons

(Ch. 1736)

In this case, the pre-nuptial contract protected the wife's portion from the creditors of her bankrupt husband, it not being a fraudulent transaction.

4 December 1736.

In the year 1709, a treaty of marriage was carried on between the plaintiff's father on her behalf and Joseph Stavely, her husband, as he became afterwards, upon which the father agreeing to give her a £1000 portion, the husband did on his part agree that the said £1000 should remain and be to the father, his executors, and administrators in trust for the plaintiff in case he the said Joseph Stavely should fail, become insolvent in trade, or die in the plaintiff's lifetime, whereupon and previous to the marriage, Stavely gave a bond for £2000 conditioned for payment of £1000 and a judgment was acknowledged defeasanced upon payment of the £1000 upon any of the said contingencies. The £1000 were paid to the husband, and the marriage took effect some days after. In 1734, the husband became a bankrupt.

And now, the question was whether this agreement should protect the £1000 from the commission and whether the wife should take advantage of it.

For the plaintiff was cited a Case of Lockyer v. Sawyer, 27 November in the Exchequer (in the Lord Chief Baron Pengelly's time),[1] where, upon a marriage, the sum of £3000, being the wife's portion, was vested in trustees in trust for the husband for life, then for the wife for life, and then for the issue of the marriage, and, if no issue, for the survivor of them and the executors and administrators of such survivor with a proviso that, if the husband, who was a trader, should happen to fail in trade, that, from thenceforth, the trust should be for the wife to her sole and separate use. The husband became a bankrupt, and the trust was decreed to be good and that the wife was well entitled to it, even during the coverture.

Lord Chancellor [LORD TALBOT]: The question is whether this be such a contract as creates a debt to be recovered by the assignees. The agreement was made previous to the marriage. The parties contracting were the father and wife, and, the money moving from the father, he might give it in what manner he pleased. Nay, the very instrument which recites the payment of the money to the husband recites also the two contingencies upon which it is to be brought back again. What is there unreasonable in this? There may indeed be cases so circumstanced as to make such an agreement fraudulent, as prejudicial to trade in general, but there is nothing of that in the present case. The time likewise when this agreement was made is considerable, *viz*. in the year 1709, and the bankruptcy did not happen until the year 1734.

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[1] *Lockyer v. Savage* (1733), 2 Strange 947, 93 E.R. 959, 2 Eq. Cas. Abr. 260, 272, 22 E.R. 221, 230.

And can it be thought that any collusion was intended against creditors when the husband was in such circumstances as to carry on the trade for twenty-five years? Indeed, there was a possibility that he might fail, but it is not probable that any fraud was intended by this agreement. I admit that, in Lockyer and Savage's Case, the money remained all along in the trustee's hands. But was it not for the husband's benefit? And does not a commission of bankruptcy affect as well equitable as legal rights that a man has in him? If so, the money remaining in the trustee's hands and never being paid to the husband will make no difference, for, if the agreement in that case had not been good, the commission would have affected the money as well in the trustee's hands as if it had been actually paid to the husband.

And so he decreed for the plaintiff.

[Other copies of this report: 2 Vesey Junior Supplement 114, 34 E.R. 1018.]

[Other reports of this case *sub nom*. Stawley v. Parsons, Lincoln's Inn MS. Misc. 384, p. 449.]

81

Stephens v. Stephens

(Ch. 1736)

An executory devise of a freehold that suspends the vesting of an estate until an unborn child attains the age of twenty-one years is good.

18 December.

Sir William Steavens, the testator, made his will in the following words.

> *Item*, I give, devise, and bequeath unto my grandson, William Steavens, all my messuages, lands, etc. situate, lying, and being at Deptford in Kent, and all my freehold messuages, lands, tenements, hereditaments, and premises to my said grandson, William Steavens, his heirs, and assigns forever. But in case my said grandson, William Steavens, shall happen to die and depart this life before he attains his age of twenty-one years, then I give and bequeath to my grandson, Thomas Steavens, all etc. as before mentioned to hold the same unto my said grandson, Thomas Steavens, his heirs, and assigns forever. But in case my said grandson, Thomas Steavens, shall happen to die and depart this life before he attains his age of twenty-one, then I give and bequeath all etc. whatever before mentioned to such other son of the body of my daughter, Mary Steavens, by my son-in-law, Thomas Steavens, as shall happen to attain his age of twenty-one, his heirs, and assigns forever, the elder of such sons to take place before the younger, one after another as they shall be in seniority of age and priority of birth and of the several and respective heirs male of the several and respective body and bodies of all and every such son and sons, the elder of such son and the heirs male of his body lawfully issuing to take place and be preferred before the younger of such sons and the heirs male of his and their bodies issuing. And, for default of such issue male, then I give, devise, and bequeath my aforesaid etc. to all and every the daughter and daughters of my said son, Thomas Steavens, of the body of my said daughter to be begotten and the heirs of the bodies of all and every the said daughters as tenants in common and not joint tenants, and, for want of such issue, then I give, devise, and bequeath all my aforesaid etc. to my brother, Richard Steavens, his heirs, and assigns forever.

And all the residue of his real and personal estate not before bequeathed, he gave to his son, (Sir) Thomas Steavens, his heirs, and assigns, and he made him executor.

William and Thomas Steavens, the grandchildren in the will named, were living at the testator's death. Both died without issue and before they had attained their ages of twenty-one. Then was born another son, Thomas. And the question was whether, upon his attaining his age of twenty-one, being still an infant, he should take by way of executory devise or whether the contingency was not too remote and, consequently, the devise as to him and such other sons as should be born after was void.

This case had been sent by the Lord King to the judges of the King's Bench for their opinions, who now certified the same in the following words.

> We have heard counsel for all the parties and maturely considered the case upon which the question is stated and referred to us. And the principal point appears to be whether the devise made by the will in these words, *viz*. 'In case my said grandson, Thomas Steavens, shall happen to die before he attains his age of twenty-one years, then, I give all my freehold estate to such other son of the body of my daughter, Mary Steavens, by my son-in-law, Thomas Steavens, as shall happen to attain his age of twenty-one years, his heirs, and assigns forever', be good by way of executory devise, as to which we do not find any case wherein an executory devise of a freehold has been held good, which has suspended the vesting of the estate until a son unborn should attain his age of twenty-one years except that of Taylor v. Biddall, adjudicated upon a special verdict in the court of Common Bench, Hilary 29 & 30 Car. II, 2 Modern 289,[1] which resolution appeared in every view of it to be so considerable in the present case that we have caused the record to be searched and find it to agree with the printed report in the material parts thereof. And, therefore, how unwilling soever we may be to extend executory devises beyond the rules generally laid down by our predecessors, yet, upon the authority of that judgment and its conformity to several late determinations in cases of terms for years and considering that the power of alienation will not be restrained longer than the law would restrain it, *viz*. during the infancy of the first taker, which cannot reasonably be said to extend to a perpetuity and that this construction will make the testator's whole disposition to take effect, which otherwise would be defeated, we are, therefore, of opinion that this devise before mentioned may be good by way of executory devise, the consequence whereof is that all the subsequent limitations will be good. The estate will vest in Thomas, the son now living, when he shall attain the age of twenty-one years in tail male according to the clause directing the order of succession between the sons to be born, and if Thomas, the son now living, shall happen to die before his age of twenty-one years and the testator's daughter, Dame Mary Steavens, shall have any other sons by Sir Thomas Steavens, then, the estate will go over to him when he shall attain his age of twenty-one years in like manner as it would have vested in Thomas, and, if Thomas, the son, shall happen to die before his age of twenty-one and Dame Mary Steavens shall have no other son by Sir Thomas Steavens who shall attain his age of twenty-one years, then, his estate will go over to Sarah, the daughter, and any other the daughters of the said Dame Mary [Steavens] by Sir Thomas Steavens as tenants in common in tail with the remainder over to Richard Steavens, the testator's brother, in fee. But, in case Thomas should die before

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[1] *Taylor v. Biddall* (1677), 2 Modern 289, 86 E.R. 1078, also 1 Freeman 243, 89 E.R. 173, Carter 182, 124 E.R. 904, 1 Eq. Cas. Abr. 188, 21 E.R. 979, 2 Eq. Cas. Abr. 290, 335, 22 E.R. 243, 286.

twenty-one and Sarah, the daughter, should then be dead without issue and there should be no other son of Dame Mary who should attain the age of twenty-one or any other daughter hereafter born of their two bodies, then, the estate will go over to the said Richard Steavens by virtue of the last remainder limited to him in fee. As to the profits of the estate received since the death of William, the grandson, or to be received until it vests in any person by force of the executory devise or shall go over to the remainderman, we conceive that they belong to Sir Thomas Steavens by virtue of the residuary devise in the will as an interest in the testator's real estate not before bequeathed or disposed of by his will.

Signed *Hardwicke, Edmund Probyn, Francis Page, William Lee*

The Lord Chancellor [LORD TALBOT] was pleased to declare himself very much satisfied with this opinion of the judges as agreeing perfectly with his own sentiments. And he said he hoped it would be for the future a leading case in the determination of all questions of this kind.

[Other reports of this case: Cases *tempore* Talbot 228, 25 E.R. 751, Lincoln's Inn MS. Misc. 359, p. 556, W. Kelynge 168, 25 E.R. 550, 2 Barnardiston K.B. 375, 94 E.R. 563, 2 Eq. Cas. Abr. 294, 342, 22 E.R. 247, 291, Cambridge Univ. Libr. MS. Add. 110, f. 8.]

[Reg. Lib. 1736 B, f. 120.]

82

Beuvot v. Barbut

(Ch. 1737)

A commercial consul is not entitled to diplomatic immunity.

3 February.

The plaintiff's father, being employed to dispose of 100,000 tickets in the Groningen Lottery of the year 1722, procured a power from the managers of that Lottery to the defendant and one West to dispose of 10,000 each, part of the 100,000 which had been entrusted to him. And articles were executed between the plaintiff's father, of the one part, the defendant and West, on the other, whereby they were to allow him one-third of the profits which should be made by the sale of those tickets. And, the defendant not performing his agreement, the plaintiff's father, in the year 1727, brought his bill and, in 1731, obtained a decree against the defendant for an amount of the third of the profits made by the sale of the tickets. In June 1734, the Master reported the sum of £932 due from the defendant to the plaintiff's father, and, upon exceptions taken to the report and argued in July 1735, the debt was reduced to £582, upon which, the plaintiff, being his father's executor, served the defendant with a writ of execution. And, the money not being paid, the defendant was taken up by an attachment.

The defendant first came into England in the year 1718 having obtained letters from the king of Prussia of the 5th of June 1717, whereby he was appointed:

His Prussian Majesty's Agent of Commerce in Great Britain and by him authorized to do what His Majesty should think proper to order him from time to time touching the commerce which his subjects carry on in England and to present letters, memorials, and instruments necessary thereto, his said Majesty requiring all whom it might concern to acknowledge the said Barbut for his agent to receive

> writings from his hands, to confer with him upon all such matters as might relate to the affairs above mentioned, and to give him all manner of help and assistance in the function of his charge.

This commission was approved by the lords justices, the late king being then abroad, the 20th September 1720 and entered in the Secretary of State's office. His late Majesty died in 1727, and the defendant obtained no renewal of his commission until 20th September 1735 (after arguing the exceptions the July before and when he found that he should have a large sum of money to pay) and had it approved the 20th November following. It was proved by affidavit that the defendant had, since 1721, dealt in divers sorts of goods, that, in that year, he failed and compounded with his creditors, and that, for four years last past, he traded and dealt in buying beeswax and tallow and in making and selling wax and tallow candles by retail. On the other hand, there were affidavits of a jeweler, a fan maker, and a felt maker, who swore that they had for several years dealt with the defendant and all that time took him for a public minister and agent of the king of Prussia and, as such, took him to be free from all arrests and imprisonments.

And the defendant having now moved the court to be discharged from his imprisonment as contrary to the law of nations and to the Statute 7 Ann., ch. 12,[1] the question was whether such an agent of commerce as the defendant be entitled to the privilege of a public minister by the law of nations or by the Statute or whether such only are to be considered as ministers who are appointed to manage and take care of the affairs and interest of the prince and state by whom they are sent and have credentials from the prince or state that sends them to the prince or state to whom they are sent, and not such as are really no more than correspondents to particular persons in the mercantile way and assistants to the subjects of the state who appoints them by their supposed knowledge of the custom and usage of traffic and commerce here, and likewise, whether, by the two bills which were brought by the defendant against the plaintiff's father pending this suit for a general account of the profits of the whole 100,000 tickets and which were dismissed with costs, the defendant had not entirely submitted to the jurisdiction of this court and waived his privilege if he had any.

Mr. *Gambier* argued very learnedly for the plaintiff that the words 'public minister' are a modern expression, not known either in our common or statute law until the making of the Stat. 7 Ann., ch. 12, but that what is said in our books of ambassadors or legates (as there were then no other words used to denote a public minister nor so many different species or names of them, as envoys ordinary and extraordinary, plenipotentiaries residents, etc.) may show what are the characteristics of a public minister or legate. Lord Coke, 4 Inst. 152, 153,[2] tells us that '*omnis legatus est agens, sed omnis agens non est legatus*', for if he be sent from one sovereign to another to treat between them, although he be in his letters of credence termed agent, yet he is an ambassador or legate. By his using the word legate as synonymous with ambassador, it is evident that what he says must be understood to mean public ministers (though a term not then known, the word *legatus* being the proper Latin word used by the civil law for public ministers in general) and there he tells us that it was resolved by the Chief Justice of England, the Master of the Rolls, and the judge of the Admiralty on a reference to them from the Privy Council in the Case of Samuel Palache,[3] ambassador from the king of Morocco to the States of Holland, that there can be no ambassador without letters of credence *de sua legatione*. If, therefore, what is said by him of an ambassador or legate must be understood to

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[1] Stat. 7 Ann., c. 12 (*SR*, IX, 81-82).

[2] E. Coke, *Fourth Institute* (1644), p. 153.

[3] E. Coke, *Fourth Institute* (1644), pp. 152-153.

relate to public ministers, there are three several characteristics or requisites to constitute such a public minister:

First, that he be sent from one prince or state to another prince or state;

Secondly, that he be sent to treat between them and that must be understood of state affairs; and

Thirdly, that he have letters of credence *de legatione suae*, and here again is the distinction to be taken that every legate or public minister is an agent, but not every agent a legate or public minister, and that is not the name given to a person, but the matters he is sent about which must decide whether he be a *legatus* or public minister or not, since, though he be termed 'agent', yet, if he have the requisites or characteristics of a public minister, he is such; if not, he is an agent and not a public minister. And, therefore, an agent of commerce not having these requisites, nor indeed any of them, cannot, according to Lord Coke, be a legate or public minister, but an agent only.

As to the civil law, there is a great deal said therein of the *sanctimonia legatorum* and of the right to be protected from all violence, as well by the *lex Julia de vi publia*, *Digesta*, lib. 48, tit. 6, l. 7, and others as by the *jus gentium*, *Digesta*, lib. 50, tit. 7, and *Codex*, lib. 10, tit. 63, *de legationibus*,[1] mention their rights and privileges. But as what is there said relates to *legatus* (the Roman law word) which not only denotes ambassadors or public ministers in general without specifying who are or are not to be deemed such but also included deputies from Roman cities or provinces to the Senate or emperor and also his to them, all which were not ambassadors or public ministers, this law cannot be of use to elucidate who are to be deemed public ministers and who not, so that recourse must be had to authors of the *jus gentium*, that being the only law which extends to nations in general.

The two most approved authors upon this science, H. Grotius, *De Jure Belli ac Pacis*, and S. Pufendorf, *De Jure Naturae et Gentium*, wrote only of the *legati* without defining their different names and species. Grotius indeed makes the representing quality of a legate to be the source of his immunity as to the jurisdiction of the state where he resides, but does not define who is to be deemed a legate, nor is the word 'public minister' to be found in him, as in truth it would not be mentioned by him, being a late invented expression, and the species or [branches] of them but a modern invention. It is, therefore, necessary to resort to more modern books of the *jus gentium* to know who is to be considered as a public minister and who not. The most complete system as generally allowed of the *jus gentium* as to this point is first Wicquefort's *Ambassadors*.[2] The author was a privy councilor to the duke of Brunswick-Lunenburg, and a great part of his life was a public minister at several courts. The second is Bynkershoek, *De Foro Legatorum*, translated into French by Mr. Barbeyrac[3] at the author's request, with notes and additions. He was an eminent Dutch lawyer and a judge in the High Council of Holland. The former in lib. 1, fo. 126, and the latter in the 13th, chapters 1, 2, and 3, do expressly say that agents are not now considered as public ministers, and examples are given by them both to prove their position, which, evincing the usage amongst princes to be so, must govern the present question, as from usage is found the *jus gentium*. If, therefore, an agent is not a public minister, *a fortiori*, an agent of commerce cannot be so, since *additio denotat minoritatem*, and that an agent of commerce must be less than a general agent and has not the four characteristics which prove what these authors say appear to be necessary to make a public minister, *viz*. first, to be sent by one sovereign prince or state to another and so to

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[1] *Digesta*, 48, 6, 7; *Digesta*, 50, 7; *Codex*, 10, 65.

[2] J. Wicquefort, *The Embassador and His Functions* (J. Digby, trans., 1716).

[3] C. van Bijnkershoek, *Traité du Juge Competent des Ambassadeurs* (J. Barbeyrac, trans., 1723).

represent the prince; secondly, to treat of or manage state affairs; thirdly, to have letters of credence; fourthly, to reside with the prince, all which requisites agree with the Lord Coke's opinion, since, in his first, that he be sent from one sovereign to another, is necessarily included the representation and, in his second, by 'treating between them', must be understood about state affairs, and also it implies a residence, since, otherwise, he could not treat between them.

Now, an agent of commerce has not any one of these characteristics. And it is observable that he is not so much as named in any of these authors, for Wicquefort, ch. 1, treats expressly of the different names of public ministers and who are to be deemed so and who not, and Bynkershoek, ch. 10, s. 6, and ch. 13, does the same, and both take notice of consuls and commissaries as not entitled to the character or privileges of public ministers, but neither of them once have this name, from whence it is plain that it is a new title, which, according to Wicquefort, no prince has a right to introduce without the consent of the other potentates and imports no more (if even it does so much) than a consul, who is by the *jus gentium* entitled to no privilege or exemption of jurisdiction, as both Bynkershoek and Wicquefort do prove. This will appear still more plain from comparing the commissions of consuls and of agents of commerce, who, neither of them, have letters of credence, one of the requisites of a public minister, but, first, by the inspection of the letters of credence of an ambassador and the constitution of a consul, it is manifest how widely one differs from the other, the letter of credence being written by the king himself to another king, the commission of a consul being only in the nature of a deed poll, *viz*. 'to all to whom' etc., the letter mentioning the character of *legatus*, the commission only appointing him consul, the letter desiring the prince to whom he is sent to give entire faith to all he shall say, the commission desiring he may be accepted as consul in such a place, and, lastly, the letter being signed by the king, the commission only by the Secretary of State, all which show the vast difference there is between letters of credence of a public minister and commissions of consuls not public ministers.

Now, by comparing the constitution of a consul with that of an agent of commerce, it will be as evident that this latter is not near so extensive or important as that of a consul. The defendant's commission is 'to do the functions of agent of commerce to the king of Prussia in the kingdom of Great Britain touching the commerce of the Prussian subjects', but no desiring the king of Great Britain to receive him as such, as there is in that of our consul's from the king to the duke of Tuscany, nor a power to judge of affairs of commerce as consuls have, although they may be much the same to aiding and assisting merchants and enjoying all privileges unto their office belonging. It is, therefore, evident that the office of agent of commerce is not so extensive or important as that of consul, as it wants the highest part of the office, that of judging between merchants, and, consequently, he can no more be a public minister than a consul, who is denied by the aforesaid authors to be a public minister. But he is equivalent in all respects to the office of commissary mentioned both by Wicquefort and Bynkershoek, which they deny to be a public minister, but, says Wicquefort, lib. 1, fo. 132, he is the same as those merchants of Amsterdam and Hamburg who beg this title from the northern courts in order to facilitate their little traffic. That this was the Case of the defendant and this commission of his obtained with a view only of making his traffic easy to him appears from the following considerations that his first commission is dated 15th June 1717 and allowed September 1720, the second dated 22 September 1735 and allowed November 1735, so that there were above three years between the date of the first commission and the allowance of it, which great interval shows this new office to be of no great use or importance to the public, nor, indeed, to himself all that time, since it could wait so long for its allowance, which, by the express words of the Stat. 7 Ann., ch. 12, is that which gives the commission force and operation. It is sworn that the defendant failed in 1720 and compounded with his creditors, which, if true, makes it evident why the defendant did at that time think the commission of use to him at least (whatever it might be to the public) and is the reason why, after three years and more of obscurity, it came to light, and it was tried at least by way of protestation. That the

farther use of this new agency was not to the public, but to the defendant himself, appears from the renewal of it in 1735, for if it was to be used by him as a public ministership, it must have expired at the late king's death, since, by the death of the prince to whom a public minister is sent, the power of the minister is determined. Wicquefort, lib. 1, ch. 30, fo. 929. The late king's death happened in 1727 and yet this commission was not renewed until eight years after, which interval shows his agency to be of no great use to the Prussian merchants, nor, indeed, to himself during that time. But, after all his delays in this cause by bills and cross-bills dismissed with costs, exceptions to reports, etc., finding by the order of court on hearing the exceptions in July 1735 that he should soon have a large sum of money to pay, he thinks (which indeed must be allowed to be a strong motive to him, though not to the Prussian merchants) of reviving the expired commission, which, accordingly, after an eight year's death, is revived inasmuch as possible, since, from the making of the order in July, he was not above two months in obtaining the reviver of it, as little time as could well be to apply from hence to Berlin for a commission, and to have it executed and sent here. So great a dispatch shows the defendant to have been distressed in point of time and that he thought it way material to be again an agent of commerce as against the plaintiff. And, therefore, he did not let it sleep for three years, as he had done the former, but he had it allowed immediately, thereby to protect himself from the jurisdiction of this court, if such a titulary agency could do it.

But to make it still clearer that this agency is merely titular and the defendant is no way to be considered as a public minister, it is to be observed that, by his own affidavit, he does not specify any particular negotiation or show any instance of his exercising his pretended ministerial function, but he only swears, ' that, ever since he was invested with the said powers, he has acted in conformity thereto and has at times as occasion required exercised his function, not only in matters of commerce, but in affairs of state, by letters under the sign manual of the king of Prussia, and that he has been publicly known or received as an agent or minister.' What is acting in conformity to his powers? Is it not a studied expression to seem to mean something and yet mean nothing? Had it been a real agency not calculated for a particular purpose, it had been easy to have studied numberless instances (in so many years) of his negotiations and transactions with merchants, if not with secretaries of state or at least some memorials or representations by him delivered. Besides, as to state affairs, he has sworn, ' that he was charged with them by letters under the king of Prussia's sign manual', which, if true, shows that it was by virtue of special letters in the absence of the king of Prussia's minister, and not under his agency, and so rather invalidate his pretence to be a public minister under that, by showing that he would not be charged with affairs of state without letters under a sign manual. And even this is under the vague expression of being ' charged with affairs of state', which facileness of expression well suits so faint an agency, so that, even upon his own affidavit, there is not the least proof of his being a public minister, but rather proof to the contrary from the tenderness and vagueness of it.

The five other affidavits on his behalf are remarkable from the persons that make them, *viz*. one gentlemen, one jeweler, two fan makers, one felt maker, who swear they have known him for about fifteen years, and have all along known him to be a public minister of the king of Prussia, and have dealt with him for large sums in course of trade, so that they certainly prove him a public trader, but not a public minister. And whether he dealt for jewels, fans, or felts, they certainly could judge, but not whether he was a minister. The attempt to prove his privilege by such as these speaks the utmost barrenness of proof. And had he been a real minister, it might well have been expected that he would have produced the testimony of some or at least one public minister, or some of the secretaries of state's officers, or lastly of some merchants that had known his acts of agency, which last it is plain he thought to be fit persons to vouch for these acts, since the jeweler etc. does swear, ' that he was known on the Exchange for a public minister by those that he dealt with', and yet not one was produced to verify his pretension, but he is reduced so low as to prove his public character by fan makers and such others, who are as unfit judges of the matter as they are to vouch for the Exchange of London

or the Court of St. James's, so that, from the defendant's own proofs, there being no one application specified to the king or his ministers, no one act instanced of public ministracy, nor any intercourse even with merchants or act of agency, there is nothing to induce a belief of his being a public minister, anything more than a titular agent of commerce.

But from the plaintiff's proofs, the truth is made still clearer by showing him not to be a public minister, but a public dealer, and that in so low a way as making and selling candles by retail, which is positively sworn by three people, and this very fact of his exercising so low a trade is a convincing proof of his not being nor of even his own considering himself as a public minister of so great a prince. The proceedings in the cause are another argument or confession of his own that he was not, nor is not, a public minister in any shape, or are at least a waiver of any privilege he might pretend to as such. A long, obstinate defense to a cause began in 1727 and ended in 1736, above nine years, wherein he was sued by the name of 'J. Barbut, Merchant' (and so far from insisting on any privilege that he himself in several petitions to the court and in his two bills against the plaintiff styled himself 'merchant' and not 'agent' or 'public minister') his filing two cross-bills, which have both been dismissed with costs, since paid by him, must be construed as an acquiescence under the jurisdiction of this court and a waiver of his privilege, if he had any, according to the maxim *quilibet renunciare potest est juri pro se introducto* and the present claim of privilege to come too late after such repeated acts of acquiescence for so many years, since, otherwise, the plaintiff must have been every way a loser and the defendant every way a gainer, for, had he prevailed, he had been still a private man, but, when he loses, he is then a public person, which is too unfair an advantage to be taken by any public minister.

The defendant's attempt is still more glaring as he offers to make a most manifest abuse of a law made for the protection of public ministers and their servants for, by the 5th section of 7 Ann., ch. 12, it is provided 'that no trader within the description of any the statutes of bankruptcy shall have benefit of this act as a servant to a public minister'. And he manifestly appears to be a trader himself by his making and selling candles by retail, and, by his own affidavit, he shows that he has traded in jewels, fans, and felts, so that he is proved such a trader as by that proviso could have no benefit of this Act as a servant to a public minister, but claims the benefit of it as a master. And such an attempt to elude a law ought not to be countenanced anywhere, much less in a court of equity, against fair and honest creditors, whose case would be very hard if a dealer in retail in so low a way as of tallow candles would after the end of a long and expensive suit wipe off all their demands with a pretence of privilege under a titular agency of commerce, a commission evidently intended not to relate to state affairs, but to trade, and as evidently by the defendant not as an agency, but as a protestation against and elusion of a law intended to exclude all such unfair traders from any privilege. And no such abuse of this Act having been attempted in twenty-eight years, it ought not to be suffered, nor the defendant under all these circumstances deemed a public minister from so great a king, who cannot be supposed to countenance him in the abuse of his commission, which being much lower than that of consul, he must be subject to the law of this land and the justice of this court.

Lord Chancellor [LORD TALBOT]: Although ten years be elapsed since the commencement of this suit and the defendant has never made any claim of privilege until he was taken upon an attachment for non performance of the decree, yet still he may well insist on his privilege, if he has any, the privilege not being his but his master's, the reason of which is the necessity of intercourse between princes and states as well as private men, and if public ministers were not privileged from arrests, there would be no possibility of such an intercourse, and the master's business might remain neglected and undone through such a disturbance. The question, therefore, is whether the defendant be by his commission to be considered as a public minister or not. And here, it may be proper to observe that the Stat. 7 Ann. is not a new law, but only a declaration of the *jus gentium*, which is and before that Statute was part of the law of the land. In the Statute, there is an exception of such servants as shall come within the description

of the statutes of bankrupts. But that reaches not to the persons of ministers themselves, and perhaps, were it not for that proviso, the retinue of public ministers would be much greater than it is. The word '*legatus*' did formerly include every minister without any subdivision of orders of such, that being but a modern institution, the reason of which subdivision was perhaps the difference of their appointments. But whatever was the reason, those of the second class are entitled to all privileges as well as those of the first and are, therefore, taken notice of in their distinct classes in the Statute 7 Ann., ch. 12. The consideration whether the defendant be such an one depends upon the words of the Statute, 'authorized and received as such by' etc. Now, the authority under which the defendant claims his privilege is 'to be agent of commerce here and to execute such commands as he shall receive from time to time touching commerce and to present memorials in relation thereto' etc., which was accepted and received by the lords justices in 1720 and again renewed in 1735 in the same manner.

It has been truly said that, in order to constitute a public minister, there must be letters of credence from one prince or state to another. The general practice is so, but here is no such thing in the present case, only a commission which is directed to nobody in particular. It has been also said that he should be employed about state affairs, and this in contradistinction to commerce, which distinction if just, the defendant's commission is not a right one, but if commerce be included within the words 'state affairs', his commission may be right in this instance.

As to that, it is well known that there are sometimes treaties of commerce only. And will anybody say that a plenipotentiary sent to negotiate such a treaty is not a public minister or not entitled to the privileges of a public minister? Surely not. I mention this to show that part of the argument is not much to be depended upon. The question, therefore, must turn upon this point, *viz*. whether the defendant be such an agent as is authorized to transact matters of commerce between the courts of England and Prussia, for, if he be, I think him entitled to the privileges of a public minister. The acceptance of him by the lords justices in 1720 and by the king in 1735 seems to have followed his authority which is 'to assist the king of Prussia's subjects in matters of commerce', and agrees in everything with the notion of a consul, save the power of judicature, which consuls are generally empowered to exercise over the subjects of the prince who sends them. The latter part is a request from the king of Prussia to all whom it may concern to acknowledge him as agent of commerce, which cannot be thought to be intended as an application to the crown of England, but only to his own subjects residing here, whereas in consuls' commissions, there is an application to the prince or state into whose territories they are sent to acknowledge the persons as such, and the acceptance takes notice of them as such and in the same manner. This it is which makes the difference, for, as to the name, it is immaterial as to the present question what name he is called by if the business about which he is to be employed be the same. That the power of judicature which consuls have does not make them public ministers is a sentiment adopted by Bynkershoek, ch. 10, s. 6, but it seems not fully agreed to by Mr. Barbeyrac in his note upon that passage. The received practice is the best evidence of what is the law of nations. It appears in the present case as to consuls from Wicquefort, lib. 1, ch. 5, fo. 132, 133, who blames the States of Holland for insisting on the privileges of a public minister in behalf of their consul. And he also mentions a demand of theirs to the Senate of Genoa for allowance of privilege to their consul, but it was refused by the Genoese. The release of the English consul in Holland in Oliver Cromwell's time is said by Bynkershoek, ch. 13, s. 6, to have been by *raisons de politique*. And Wicquefort says expressly they did wrong in releasing him. I cannot, therefore, think myself authorized to release the defendant, who is but a sort of a consul, unless I could be satisfied, which I am not at present, that consuls are entitled to the privileges given to public ministers by the *jus gentium*.

And so he denied the motion.

[Other reports of this case: Cases *tempore* Talbot 281, 25 E.R. 777.]

83

Metcalf v. Ives

(Ch. 1737)

In this case, the pre-nuptial contract in issue was enforced.
Arbitral awards can be set aside for fraud or mistake.

18 June.

Upon the plaintiff's marriage, her father, William Russell, a freeman of London, settled some houses in London of the value of £1000 upon her and her husband and the issue of the marriage, which was all the advancement she had from her father during his life. And, upon the marriage of the two defendants, the other daughters of William Russell, he gave them each £2000, but, before the defendant Johnson's marriage and his intended wife being then an infant, he, in consideration of the £2000, entered into articles with Russell whereby he agreed to take the £2000 in full [satisfaction] of all other part of the said Russell's estate which he might be entitled to by the custom of the City. And he covenanted with Russell that he and his wife would at anytime after Russell's death seal such deeds as counsel should advise for the releasing of all their rights to Russell's personal estate. Russell, by the sale of his real estate, increased the personal estate to near £30,000. And he died leaving the plaintiff and the two defendants his only children, having first made his will whereby he left the plaintiff £2000 and an annuity of £40 *per annum* to the defendant Johnson's wife for life. And, after some other legacies, he made the defendant Ives and his wife residuary legatees.

The plaintiff being willing to waive her legacy and to take her orphanage share and some difference arising thereon between her and the defendant Ives and his wife, [they] were referred to two arbitrators, who, by the award, taking notice that Ives had made oath that the testator's estate amounted to £26,000 whereout he owed £1200 and considering that Mrs. Ives was not advanced at all and Mrs. Johnson advanced only by the £2000 given to her upon her marriage and, consequently, entitled to a farther orphanage share of the estate, her marriage articles never having been laid before them, but remaining in the custody of Ives, who had bought out the claim of Johnson and his wife, awarded the plaintiff the sum of £4450 in full satisfaction of her orphanage share and mutual releases to be given, which was accordingly done.

The plaintiff was [not] informed at the time of the award, nor for some year after, of the contents of Johnson's marriage articles, but, as soon as he had notice thereof, she brought her bill to be relieved and to set aside the award and release, to be let into her full orphanage share, regard being had to Ives' advancement and to Johnson's being barred from any farther share by her marriage articles. A cross-bill was exhibited by Ives and his wife against the plaintiff and against Johnson and his wife, praying relief against the award, for that no allowance was made thereby of the £1000 which the plaintiff had received upon her marriage and which was concealed by the plaintiff from the arbitrators and that she might be decreed to give up her security for the £4450 awarded to her, and account for the interest received and praying against Johnson that he should be decreed to return the money he received for the purchase of his claim, he being barred by the articles.

Both causes were heard at the Rolls. And both bills were dismissed notwithstanding the deposition of the arbitrator chosen by the plaintiff, who swore that, had he known of the contents of Johnson's marriage articles, he would not have made such an award. The questions now were whether these articles were a bar, being but a bare agreement not carried into execution, and, if so, whether the benefit arising from the composition with Johnson should accrue to the estate of the freeman or only to his legatory share, and lastly, whether the court would relieve against the award.

Lord Chancellor [LORD HARDWICKE]: I cannot enter into the hardships which may fall upon any of the parties, but must decree according to the merits of the case. The first question is whether these articles, being but a bare agreement not carried into execution, shall bar the defendant Johnson and his wife from claiming any farther share of her father's personal estate. And as to that, I am of opinion that the articles are a bar, they being entered into as a consideration for the marriage and portion long before the defendant Johnson was entitled to anything from her father. And no hardship was imposed by him either upon the husband or wife. And there is no difference in a court of equity whether it be but a bare agreement or whether it be actually executed, but both must operate as well against customary as other rights, there being no difference between common law and customary rights, nor between vested and contingent ones, as appears from the case of dower, which is both a common law and a contingent right, and yet of which a woman may bar herself so that contingent and vested rights stand as to the present purpose upon the same foot, it being in a person's power to bar him or herself of both. It has been objected that the wife was an infant at the time of these articles, but the husband was of full age and has thereby contracted to accept of this sum as a full bar and to give a release to the father's executors, and this same husband, being living at the father's death, must execute his agreement. Besides, this was such an interest as he might have released and his release would have been good against the wife. It is plain that had she been of age, these articles would have bound her. But, in the present case, though she was not of age, it is not her, but her husband that is before this court and he can take no advantage of his wife's infancy. And if agreements of this kind were not held good and binding, it might occasion great prejudice to the citizens of London, who may desire to marry their children in their own lifetime and to settle the rates of such child's portion.

The next question is whether the surplus arising from this composition shall go to the freeman's whole estate or whether only to his legatory share. And this, I think, must come within the constant rule that, in cases of composition, what accrues thereby goes to and is considered as part of the freeman's estate and as if the person compounded with had been entirely out of the question. Agreements, therefore, to do a thing, whether relating to customary or common law rights, being considered in equity as if the thing was actually done, so must this agreement, which being to release to the executors of the father proves it was intended that the benefit should accrue to the whole estate, the executors being the freeman's representatives as to the whole estate, and, therefore, the release must be according to the agreement.

The last point is whether there ought to be any relief against the award. And I think the plaintiffs well entitled to relief upon account of the concealment of the articles from one, at least, of the arbitrators, who deposes that, had he known of them, he would not have made such an award. Now though awards are not to be set aside for an error in judgment in point of law, yet if any art or industry be used by either of the parties to prevent their coming at the knowledge of the fact, it will be a good ground to relieve against and set aside such an award, as was done by the Lord Cowper, who set aside an award for the arbitrators' having proceeded upon a mistake.

And so he decreed the articles to be a bar and the award to be set aside.

[Other reports of this case: Lincoln's Inn MS. Misc. 384, pp. 309, 485, West *tempore* Hardwicke 82, 25 E.R. 832, 1 Atkyns 63, 26 E.R. 42, Cases *tempore* Hardwicke 382, 95 E.R. 248.]

84

Atkins v. Hiccocks

(Ch. 1737)

A contingent legacy lapses when the legatee dies before the contingency happens.

19 July.

The testator, William Hiccocks, by will, charges a leasehold estate with a legacy of £200 for his daughter Elizabeth to be paid her at the time of her marriage or within three months after, provided she married with the consent and approbation of William and Samuel Hiccocks, his two sons, or the survivor of them, and that she should receive yearly the sum of £12 until her marriage to arise out of the said leasehold estate, which he wills to stand and be charged with the payment of the said yearly sum of £12 as aforesaid and also with the said sum of £200 when the same shall become due, as therein before appointed and declared. The daughter dying unmarried, the question was whether this legacy was lapsed or whether it should go to the daughter's representative.

Lord Chancellor [LORD HARDWICKE]: The question is whether this legacy was so vested in the daughter as to be transmissible to her representative, the time of payment being not such as must absolutely have happened by computation of time (for so it would clearly have been a vested right) but being uncertain whether it would ever happen and, consequently, contingent, since, upon the legatee's dying, the marriage can never take effect. And I am of opinion that it never vested in the daughter. Where a legacy is given to be paid at a time certain or at such as might happen by effluxion, though the legatee dies before that time, yet shall the bequest go to the representative according to Cloberrie's Case, 2 Ventris 342,[1] because the time being certain and of necessity to happen, it is reasonable to consider it as *debitum in praesenti solvendum in futuro*. But there is a great difference where the time is certain and where eventual, for, in the last case, the testator seems not so much to have had the time as the event of the contingency in his view. Now, the present case is of the last sort wherein the testator seems not so much to have considered the time as the accident of marriage, which by her death being absolutely impossible to happen, she can have no right to this legacy, whereas, when a legacy is given to be paid at twenty-one, nothing can be supposed to have been in the testator's meaning but that the legacy should not be paid to the legatee until the age of discretion and when he may be supposed capable of governing his estate.

This difference appears from *Digesta*, lib. 35, tit. 1, *De conditionibus*, l. 75, where it is said that *dies incertus conditionem in testamento facit*. But the civil law being of no farther authority here than as it has been received, it is proper to consider how the point stands by our law, which by Swinburne, 267, 268 (old edition),[2] agrees to this distinction, and in 272 at the latter end, this very case is put, and there it is declared that, if the legatee dies, the legacy dies also, and it is not recoverable by the representative.

It has been objected that the gift of the £12 money being at six percent at the time of this will is a gift of interest in the meantime and that, therefore, the principal must be considered as vested, but still we must remember that the time here is eventual, and, in cases where the

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[1] *Cloberry v. Lamden* (1678), 2 Ventris 342, 86 E.R. 476, also 2 Freeman 24, 22 E.R. 1035, 2 Chancery Cases 155, 22 E.R. 892, 1 Eq. Cas. Abr. 294, 21 E.R. 1055, 2 Eq. Cas. Abr. 539, 22 E.R. 454, 79 Selden Soc. 509, 529.

[2] H. Swinburne, *A Brief Treatise of Testaments and Last Wills*.

gift of interest makes the principal to vest, the time is always certain and such as must happen by effluxion. But I consider the gift of the £12 rather as an annuity until the event should happen, the words being ' until the same shall become due', than as a gift of interest, although, at the time of this will, money bore six percent. Nor will Thomas and Howell's Case, 1 Salkeld 170,[1] govern the present one, that being a devise of a real estate and not upon a precedent condition, but a subsequent one. The condition of marriage with consent is also a strong proof that the legacy never vested until marriage, for, though there be no devise over upon such marriage without consent and, consequently, no forfeiture, yet a marriage there must be (whether with or without consent) before the condition can be said to be performed according to the book, Swinburne, already quoted.

And so he decreed the legacy to such for the benefit of the son.

[Other reports of this case: Lincoln's Inn MS. Misc. 384, p. 491, 1 Atkyns 500, 26 E.R. 316, West *tempore* Hardwicke 114, 25 E.R. 849.]

85

Stanley v. Stanley

(Ch. 1737)

Portions will not be raised in the lifetime of the father or mother unless the words of the gift are express to that purpose.

In this case, the contingency upon which the trust was to take effect had not yet happened.

Having the enjoyment of an inheritance means having it in possession.

27 October. Hans Stanley v. Sarah Stanley *et al*.

Mr. Stanley, upon his marriage, articled to lay out the sum of £20,000 in lands to be vested in trustees to the use of himself for life, then, as to so much thereof as should amount to £800 *per annum*, to the use of his wife for her jointure, remainder to trustees for 500 years, remainder to the first and every other son of the marriage in tail male, with a power to the husband of disposing by will or deed of the surplus of the said lands above the £800 *per annum* amongst his younger children as he should think fit, and the trust of the 500 years term was declared to be for raising portions for younger children and that, in case there should be issue male of the marriage who should enjoy the inheritance of the premises so to be purchased and settled and one or more son or sons, daughter or daughters of the said marriage, that the sum of £8000 should be raised for the portions and maintenance of such younger children equally to be divided amongst them at their respective ages of twenty-one or days of marriage, and the interest of each such younger child's share until the principal should become payable, to be for their respective maintenance. Afterwards, by will dated 9th December 1731, Mr. Stanley devised several parts of his real estate to trustees for the term of 500 years in trust that they, out of the rents, issues, and profits thereof or by demise, mortgage, or sale of any part of the premises, should raise the sum of £4000 as an additional fortune for his three daughters at their respective ages of twenty-one or days of marriage, and, until they should be entitled to the said sum, they should respectively have the sum of £50 *per annum* each for their maintenance and education, and, after the said £4000 raised, the term to cease. And he devised the inheritance of the premises so charged to his son and his heirs forever.

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[1] *Thomas v. Howell* (1692), 1 Salkeld 170, 91 E.R. 157, also 4 Modern 66, 87 E.R. 266, Skinner 301, 319, 90 E.R. 135, 143, Holt K.B. 225, 90 E.R. 1023, 2 Eq. Cas. Abr. 361, 22 E.R. 307.

Mr. Stanley died in 1733 leaving his wife, who is still living, the plaintiff, his only son, and the defendants, his three daughters, all infants. And now, the question was whether the £8000 provided as a portion for the younger children should be raised presently in the mother's lifetime or whether they should not be raised until the trust term of 500 years should be actually come into possession both by the death of Mr. Stanley and his lady.

Lord Chancellor [LORD HARDWICKE]: The question is whether the daughters are entitled to have their portions raised immediately out of the term and are to have maintenance until the money can be raised or whether they are to wait until the mother's death, which is *vexata quaestio*, it being difficult to reconcile the various resolutions upon this head without entering into minute circumstances. But, however, the latter authorities have generally borne against raising portions in the life of the father or mother unless the words were so express as not to admit of any other construction, and that because such raising of portions in the lifetime of the parent tends to an absolute destruction of the inheritance. Here, the doubt is whether the contingency upon which the trust of the term is to take effect has yet happened, for, as to the term itself, that is not contingent, but vested in the trustees by the father's leaving younger children. And I am of opinion that the contingency upon which the trust is to take effect has not yet happened, for it is not sufficient that there should be issue male and likewise other children, but that issue male must enjoy the inheritance, which must be understood enjoying it in possession, for, otherwise, the effect of the words 'enjoy the inheritance', if taken to mean an enjoyment in reversion would be absolutely annulled, the issue male being the very moment after his birth entitled to the inheritance in remainder after the particular estate spent.

The portions are to be paid at twenty-one or marriage, and the interest is to be for their maintenance and education. But that must be understood from the time only that their portions became payable, since, otherwise, the younger children might as soon as they were born and in their father's lifetime have brought a bill for maintenance, which is absurd to suppose ever to have been meant by the parties. It must, therefore, be understood an actual possession, it being a very metaphysical notion of an enjoyment that a man enjoys an estate because he has a reversion or remainder after the estate for life spent, during whose continuance he does not receive one shilling of the profits. The parties' intent is farther manifested from the additional portion of £4000 given to his daughters by his will, which is expressly given after his wife's death. And, though these words would not take away the daughters' right, if any they had, yet being ambiguous and doubtful, they evince by this latter act of his what his intent was in the former. In the present case, there are certain words sufficient to postpone the raising of portions until the mother's death.

And, in that of Broome v. Berkley, Abr. Eq. Ca. 340,[1] the term was for raising portions for daughters to be paid at twenty-one or marriage which should first happen by and out of the rents and profits or by mortgage or sale as the trustees should think fit and, in the meantime and until the portions should become payable, the trustees were to raise £100 *per annum* for their maintenance. The father died, and the daughter married, having attained her age of twenty-one, but yet, because the maintenance was to precede the portion and the first payment of that maintenance was to commence only upon the first feast after the term was come into the trustees' possession, which would not be until the mother's death, for that reason, hard as the young lady's case might appear to be, it was held here and, afterwards, in the House of Lords that the portions should not be raised until the mother's death. So, in Butler and Duncomb's

[1] *Brome v. Berkley* (1728), 1 Eq. Cas. Abr. 340, 21 E.R. 1088, also 2 Peere Williams 484, 24 E.R. 826, 6 Brown P.C. 108, 2 E.R. 965, 2 Eq. Cas. Abr. 649, 22 E.R. 545, Chan. Cases *tempore* Geo. I, 1238.

Case, 2 Vernon 760,[1] though, by consent of all parties, a medium was found out to satisfy the husband and wife's demands. Now, the present case seems to bear a great likeness to that of Broome v. Berkley and to that of Corbet v. Maidwell, Abr. Eq. Ca. 337;[2] the Lord Cowper said that he would not go a step farther than does the resolution in Greaves v. Mattison, T. Jones 201,[3] and that, had it been *res integra* before him, he would not have gone so far as does the judgment in that case. Beside, the widow is by the articles to have £800 *per annum* clear of all taxes. But, if these portions are to be raised in the mother's lifetime, there will be nothing left for the issue male and the intent of the parties as to him, that he shall have and enjoy the estate after the mother's death, would be entirely frustrated.

And so he decreed the daughters to wait until the mother's death.

[Other reports of this case: Lincoln's Inn MS. Misc. 384, pp. 459, 493, West *tempore* Hardwicke 135, 146, 643, 25 E.R. 859, 865, 1127, 1 Atkyns 455, 549, 26 E.R. 289, 345, Lincoln's Inn MS. Misc. 54, loose sheet, see also below, Case No. 97.]

86

Hudson v. Hudson
(Part 2)

(Ch. 1737)

A release by one administrator is not a bar to other administrators of the same decedent's estate; however, a release by one executor is a bar in the case of co-executors.

4 November.

Lord Chancellor [LORD HARDWICKE]: A release by one administrator shall not bar the other, as it does in the case of executors, they differing in many respects.

First, an executor before a probate may release a debt or assign a term, but not so of an administrator, for, upon an account brought by an administrator after letters of administration granted to him, such release or assignment will not bar him.

Secondly, if an executor dies and makes an executor, such second executor shall be so to the first testator, for the first executor communicates his interest to him. But it is otherwise of an administrator, for, if he dies, letters of administration *de bonis non* must be granted to another.

Thirdly, if a creditor makes his debtor executor, this is an extinguishment of the debt. But it is otherwise if administration of the creditor's estate be committed to the debtor, for, there, he comes in not under the party's own authority, but under the ordinary, according to Wankford v. Wankford, 1 Salkeld 299, and that is founded upon Sir John Needham's Case, 8 Coke 135, where it is so resolved. But what is said in that case of an administrator's having

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[1] *Butler v. Duncomb* (1718), 2 Vernon 760, 23 E.R. 1096, also 1 Peere Williams 448, 24 E.R. 466, 10 Modern 433, 88 E.R. 797, 1 Eq. Cas. Abr. 339, 21 E.R. 1088, 2 Eq. Cas. Abr. 674, 22 E.R. 566, Chan. Cases *tempore* Geo. I, 400.

[2] *Corbet v. Maidwell* (1709-1711), 1 Eq. Cas. Abr. 337, 21 E.R. 1086, also 1 Salkeld 159, 91 E.R. 147, 2 Vernon 640, 655, 23 E.R. 1019, 1027, 3 Chancery Reports 190, 21 E.R. 764, Chan. Cases *tempore* Anne 220.

[3] *Greaves v. Mattison* (1682), T. Jones 201, 84 E.R. 1216, also Skinner 38, 90 E.R. 19, 1 Eq. Cas. Abr. 336, 21 E.R. 1085.

but a bare authority seems not satisfactory, but rather what Lord Vaughan calls it in Bedell and Constable's Case, 182, 'a private office of trust', in which light it was considered by Lord Cowper in his decree of Adams and Buckland's Case, 2 Vernon 514, that an administration shall not determine by the death of one, but it survives to the other administrator.[1] Indeed, I can find but one authority in the present case, and that is in a little book, but that little book is the work of a very great man, F. Bacon, *Elements of the Common Laws*, 4 vol., 93, where it is expressly said that a release by one administrator shall not bar the other.

And so he determined the release [not] to be a bar.

N.B. The administrator who gave the release was dead. Query: If he had been living and an action had been brought by both the administrators, whether the defendant would have pleaded this release in bar.

[Other reports of this case: See above, Case No. 53, Lincoln's Inn MS. Misc. 384, p. 125, Cases *tempore* Talbot 127, 25 E.R. 700, West *tempore* Hardwicke 155, 25 E.R. 870, 1 Atkyns 460, 26 E.R. 292, 2 Eq. Cas. Abr. 425, 22 E.R. 362.]

87

Morris v. Burrow

(Ch. 1738)

A contract that was founded upon a mistake is void ab initio.

The custom of London is that, where a wife is compounded with as to her widow's share, her share accrues to the whole estate and the orphanage share is a moiety of the whole.

Only such sums as are given intentionally as a portion are considered to be advancements.

3 February.

John Burrow, a tradesman at Thame in Oxfordshire, having six children by his first wife, who was dead, and intending to remove to and become a freeman of London, but being desirous of reserving to himself a power of disposing of his personal estate, four of his children, being all that were then of age, in September 1718, entered into the following agreement with him:

> Whereas John Burrow of Thame is of opinion that he may greatly improve his estate by following some trade of buying and selling in the City of London and, for performing the same, apprehends it necessary to purchase a freedom of the said City and whereas, in case he becomes a freeman, he shall thereby absolutely disable himself from giving or disposing of his personal estate or otherwise amongst his children, as he can now do, and whereas we whose names are here subscribed, children of the said John Burrow, are desirous he should become a freeman of the said City in order to increase his estate and are contented that our said father should retain to himself full power and authority to give and dispose of his personal estate in such manner as if he was not a freeman of the said City, now we, George,

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[1] *Wankford v. Wankford* (1703), 1 Salkeld 299, 91 E.R. 265, also 3 Salkeld 162, 91 E.R. 753, Holt K.B. 311, 90 E.R. 1072, 11 Modern 38, 88 E.R. 869, 1 Freeman 520, 89 E.R. 390; *Post v. Nedham* (1610), 8 Coke Rep. 135, 77 E.R. 678; *Bedell v. Constable* (1668), Vaughan 177, 182, 124 E.R. 1026, 1028; *Adams v. Buckland* (1705), 2 Vernon 514, 23 E.R. 929, also 1 Eq. Cas. Abr. 249, 21 E.R. 1024.

> John, Elizabeth, and Phyllis Burrow, children of the said John, do severally and respectively discharge, release, and disclaim any right and demand whatever to all and every part of the personal estate which our said father shall die possessed of, other than such part as he shall by his last will or otherwise legally give unto us or, in case he shall die intestate, we then shall be entitled to by the laws of the land and custom of London. And we do severally covenant, promise, and agree that, in case our said father shall make and leave a will behind him at the time of his death, we will not sue for or claim any part of his estate other than such as shall be respectively given to us by such last will and will at the request of the executor of such will duly execute good and sufficient releases of all claims and demands etc.

Soon after this agreement, John Burrow became a freeman and married a second wife, upon whom he settled part of his personal estate in bar of what she might claim by the custom.

But two of his children, being infants at the time of the agreement, did not nor could not execute it or be parties to it.

John Burrow, from time to time, advanced several sums to his children on their marriage and otherwise. And besides what he had given his daughter, Mary Wollaston, one of the defendants, he laid out the sum of £630 in the purchase of an estate to trustees to the intent that John Burrow might receive out of it an annuity of £31 during his life, then to the use of Mary for her life, remainder to such of her children as she should appoint, and, for want of appointment, to her children and their heirs. And he gave her and her children some small sums, upon which the husband gave John Burrow a note acknowledging to have received £778 as so much advanced of his wife's fortune.

In October 1732, John Burrow made his will and left a considerable sum to his children, but not in equal shares, and he made his two sons Giles and John, the defendants, executors, and he gave the residue amongst them and his other children. And he died leaving a widow and five children by his first wife, Elizabeth, the plaintiff, and the four defendants, all which, except two of the defendants that were then under age, had executed the agreement.

The plaintiff and his wife brought their bill in order to set aside the agreement as being without consideration and not binding, and to be let in to their customary share and that the sums advanced to the other children might be brought into hotchpot.

The defendants insisted on the agreement, but, if that should be set aside, they insisted that only one-third of the testator's estate was subject to the custom, he having left a widow who was barred and, consequently, he had a right to dispose of her third. And it was insisted for the defendant Mary that the £630 having been laid out in land and the small sums advanced to her and her children ought not to be considered as an advancement out of the testator's personal estate and, consequently, not brought into hotchpot.

Lord Chancellor [LORD HARDWICKE]: I do not recollect any instance of such an agreement before so that this point must be determined from the reasons of the thing and from the resolutions of cases which bear some resemblance to it. But before I come to that, it is necessary to remove an objection that has been made, which is that, though this should be deemed a voluntary agreement, yet will not the plaintiff be entitled to relief against it, there being no fraud in the case, and that, though the court would not decree the performance of such an agreement, yet will it not interpose to set it aside, but leave it to law. Now, this is certainly true where a bill is brought merely to set aside an agreement and that agreement is the only matter before the court. But that is not the present case, the plaintiff being entitled to a decree for her share of the testator's estate, either upon the foot of the custom or that of the will, which necessarily brings into question the validity of the agreement. And in this respect, it may well be resembled to the cases of redemptions and trusts, upon which, though there are questions merely legal, yet all is determined here because the directions necessary to the redemption or for execution of the trust can be given here and nowhere else. Here, though the

sons are executors and also residuary legatees, yet are they not the sole residuary legatees and, consequently, are in the nature of trustees for the rest. And, before any account can be decreed against them, the validity of the agreement itself must be considered.

As a release, it certainly cannot be good, since it has been often determined that a release of his customary share from a child to his father, then actually a freeman, is void because the whole is in the father during his life and the child [has] neither *jus in re* nor *ad rem*, which is a much stronger case than the present, for, there, though no right be actually vested, yet there is something of a right commenced, but, here, there is not so much as a right inchoate. Neither do I think it to be supported as an agreement, there being nothing moving from the father as a consideration, no covenant on his part to take up his freedom (and, consequently, what has been said of that being the consideration fails) but remaining still in the father's power whether he would or would not become a freeman. It is only said, that ' it might be advantageous to him to become one', and, if he did, the increase of the estate would still be in his power, either to spend or lay out in land, either of which would have taken it out of the custom, so that the children might or might not be benefited by it just as he pleased.

But I do not lay so much stress on this as I do on the agreement itself being nugatory, the end of which was to reserve to the father a power of disposing as if he had been no freeman, being impossible ever to be attained, for there were two of the children not parties to the agreement because they were infants and those others who were parties to, and bound by, it must mean it as an advantage to themselves that the father should have the power of disposing in a liberal manner amongst them.

But what was all this to those two who were no parties and who, if this agreement was binding upon the others, must run away with the whole orphanage part and the others left entirely destitute for the consequence of making the agreement to be binding on such as executed it and void as to the others must be that those who executed it would be deprived of their whole orphanage share, which would not be in the power of the father to dispose of, but would go also to the two children that were no parties to it, which would be absurd. This agreement, therefore, has proceeded upon a plain mistake on both sides, on the father, who intended, notwithstanding his becoming a freeman, to reserve a power of disposing of his estate, which, for the same reason that stood in the way of the children who were parties to it, he could not have done. And mistake being a head of equity entitling to relief, the party is relievable here. And as to the subsequent agreement of the two children that were no parties to it, that will signify nothing, for it was void at the time of the making. No matter *ex post facto* can make it good. Besides, such agreements are discountenanced as being derogatory from the custom, which allows nothing to bar the child but an actual advancement from the father. And wherever such agreements have been held good, there has been a just and valuable consideration moving from the parent to the child, as a sum of money upon a preferment in marriage or in trade, which tend to the child's present advantage, as was done in the cases of Blunden v. Barker,[1] before the Lord Macclesfield (but never finally determined), and Medcalfe v. Ives (*ante* 35)[2] lately determined. The only end of those agreements is to exclude the child from having any farther share in the father's estate, but not to give the father a power to dispose of all, as it is here, and even which end is not nor cannot be attained by the present agreement. And, as the father did not consider his becoming a freeman as an advantage to his children only, but likewise to himself, and that this court always aims at equality, I think it proper to let it in here. But at the same time, I do declare that I give no opinion how far such

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[1] *Blunden v. Barker* (1720), 1 Peere Williams 634, 24 E.R. 548, 10 Modern 451, 88 E.R. 806, 2 Eq. Cas. Abr. 258, 268, 22 E.R. 219, 226, Chan. Cases *tempore* Geo. I, 576.

[2] *Metcalf v. Ives* (1737), see above, Case No. 28.

an agreement as the present one would have been good or void had all the children been of full age and parties to it.

As to the point of the widow's share, it has been several times certified that, where she is compounded with, her part shall accrue to the whole estate, and the orphanage share be a moiety of the whole. Townsend v. Townsend, heard by the late illustrious Lord Chancellor [Lord Talbot], 3rd May 1736.

For the defendant Wollaston, he has concluded himself by the note acknowledging that the several sums advanced by the testator be in part of his wife's fortune. Indeed the Case of Whitcombe v. Whitcombe,[1] at the Rolls, 3 May 1718, is an express authority that only such a sum as is given by way of a portion (and not petty small sums) shall be considered as an advancement. But, here, the defendant himself has acknowledged the sums mentioned in his note to be in part of advancement, and, therefore, they must all be brought into hotchpot. Nor do I think the investing of the £632 in land will make any difference. Had it been a real estate moving originally from the husband, that might have given it another consideration, but being given in money originally and to be settled in such a manner as his daughter should think fit, I do not think it will make any alteration.

It has been objected that there being an annuity for the testator's life reserved out of the estate purchased, the whole purchase money ought not to be brought into hotchpot. But as the *collatio bonorum* is not to be until the testator's death, when the annuity determined, that objection is not material, but the whole must come into hotchpot.

And so he decreed for the plaintiff.

[This report is printed at West *tempore* Hardwicke 242, 25 E.R. 917.]

[Other reports of this case: 1 Atkyns 399, 26 E.R. 253, 2 Atkyns 627, 26 E.R. 774, 2 Eq. Cas. Abr. 272, 22 E.R. 230.]

88

Bellasis v. Uthwatt

(Ch. 1738)

Wills should be construed so as to avoid disinheriting an heir, unless the intent to do so is clear.

The age to dispose of personalty is seventeen; the age to dispose of realty is twenty-one.

11 February.

The testatrix, by will 22 July 1727, after several legacies to several persons, gave and devised the residue of her estate both real and personal to her daughter, Bridget, her heirs, and assigns forever, but, in case she died before ' she should be of age to dispose thereof', then she gave and devised the same to trustees in trust to lay out £6000 to build a hospital for seamen's widows and that the residue of her estate above the £6000 should be divided amongst her own sisters and their representatives. The daughter married the plaintiff, by whom she had a child now living, and died at the age of twenty.

The question was between the husband, as her representative, and the child, as her heir at law, on the one side, and the devisees of the mother, as well the sisters as the trustees for the charity, on the other, who should be entitled to her real and personal estate.

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[1] *Whitcome v. Whitcome* (1718), Lincoln's Inn MS. Misc. 384, p. 24.

Mr. *Browne* and Mr. *Fazakerley* argued for the plaintiff that, though the real and personal estates were given by one and the same clause, yet, being of a different nature, they might well receive different constructions, as was done in Forth and Chapman's Case,[1] by the Lord Macclesfield, and the word 'dispose' may as well be understood to dispose of it to her own as to another's use. The devise is to the daughter in fee, qualified only with a restraint from disposing until she should come to a proper age, and it cannot be supposed that, by these subsequent words, the mother should intend to exclude the children which her daughter might have. No precise age of twenty-one or seventeen is meant by the words 'of age to dispose', but any time when she might be capable of disposing, and her marriage is to be considered as an actual disposition, it being no way necessary that the disposition should be by an act executed under hand and seal, but by any act in general whereby she might show her capacity and intent of disposing was sufficient. That marriage is such an act appears from this, that portions are always made payable upon marriage as being the time when children want the power of disposing of their fortunes, which having happened in the present case, must be taken for the time when the testatrix intended her daughter the power of disposing, as was done in Jackson and Farrand's Case, 2 Vernon 424,[2] where the portion was payable only at twenty-one, yet the daughter marrying before that age and leaving a child, the portion was decreed to be raised. It seems also to have been the testatrix's intent that, upon the daughter's coming to the age of disposing of the one or the other, that should prevent the bequest of the £6000 taking effect, for, if after her arrival at an age sufficient to dispose of the personal estate, the £6000 should still be liable to be raised upon her dying before she was of the age to dispose of the real estate and she (as has actually happened) should die before twenty-one, then must the £6000 have come entirely out of the real estate, which is scarcely sufficient for it, and so nothing would be left for the sisters, which shows that the words must be taken *reddendo singula singulis* as the most reasonable construction to prevent the disinheritance of the grandchild. The cases of Love v. Love, 1 Salkeld, and Winkfield v. Combe, 2 Chancery Cases 16,[3] show how far the court will go in favor of children descended from the testator and the *Digesta*, lib. 35, s. 102, and Domat, preface to the second part, cc. 4, 8,[4] show how favorable by all laws is the condition of the heir in blood.

Mr. Attorney General [*Ryder*] insisted for the defendants that our law takes notice of seven different [ages] to several purposes, which are set down in 1 Inst. 78b,[5] and the last, which is twenty-one, is there said to be that which the law takes notice of for disposing of lands, goods, and chattels, that there was no absurdity in supposing that the testatrix might not have grandchildren in view, as thinking her daughter would not marry before twenty-one, that marriage considered as an act of the party was no disposition of the estate. It is but by the operation of law that it is so in particular cases. And the power of disposing given here must

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[1] *Forth v. Chapman* (1720), 1 Peere Williams 663, 24 E.R. 559, 2 Eq. Cas. Abr. 292, 359, 22 E.R. 245, 306, Chan. Cases *tempore* Geo. I, 660.

[2] *Jackson v. Farrand* (1701), 2 Vernon 424, 23 E.R. 871, also Precedents in Chancery 109, 24 E.R. 53, 1 Eq. Cas. Abr. 268, 21 E.R. 1037.

[3] Perhaps *Loddington v. Kime* (1695), 1 Salkeld 224, 91 E.R. 198, also 3 Levinz 431, 83 E.R. 766, 1 Lord Raymond 203, 91 E.R. 1031, 2 Eq. Cas. Abr. 331, 22 E.R. 282, or *Loder v. Loder* (1690), 3 Salkeld 211, 91 E.R. 782; *Winkfield v. Combe* (1680), 2 Chancery Cases 16, 22 E.R. 824, 79 Selden Soc. 803.

[4] *Digestum*, 35, 1, 102; J. Domat, *Civil Law in Its Natural Order*.

[5] E Coke, *First Institute* (1628), f. 78.

be understood a power of disposing by the express act of the party, and not by a legal implication. The age is what must give the power, and that age is twenty-one. In Chapman and Forth's Case, the reason of the difference of construction was by reason of the party's intent, which plainly differed in the one from what it was in the other, whereas, in this case, the intent appeared to be the same in both, that, as to the personal estate, the consideration of the daughter's leaving a child was immaterial since, even if the plaintiffs should prevail, the child would have no share of it, but it would go to and is claimed by the husband, as representative to his wife, so that the dispute lay only between the representatives of the testatrix and of the wife.

And as to the objection that, should the times be taken to be different, the £6000 might be left to arise entirely out of the real estate, and so the sisters be frustrated of what was intended to them, it would be removed by considering the age of twenty-one as the only one whereat she would dispose of both, and that because both estates being given by one and the same clause, the intent must be taken for one and the same in both, that, until twenty-one, she should not have the power of disposing of any part.

Lord Chancellor [LORD HARDWICKE]: The question, both as to the real and personal estate, depends upon the clause whereby the residue is disposed of. And it appears the will was made in haste, probably by reason of the testatrix's approaching death. That construction of it tending to the disinheritance of the grandchild ought not to prevail, unless the words be very plain to that purpose, no more than that taking the personal estate from the daughter, as to which I am very clear in my opinion that the contingency upon which the devise over was to take effect has not happened. The daughter was between eleven and twelve years old at the time of the will was made, and the word ' dispose' must be taken *reddendo singula singulis* as if the testatrix had repeated the contingency twice, and, then, those several ages which the law prescribes for the disposal of each will govern the construction in both, as was done in Forth and Chapman's Case, where the same words creating an estate tail in the real estate were restrained as to the personal estate. So here, the personal estate shall go to the daughter's representatives, and this is the fairest construction to make between a mother and a daughter.

As to the real estate, the word ' dispose' must be understood when she shall be able ' to dispose by reason of her age', which the law has fixed to that of twenty-one, and cannot be taken to mean such a general disposition as marriage, which was certainly never in the testatrix's intent, according to Thomlinson and Dighton's Case, 1 Salkeld 239,[1] since, though an infant, she would in some cases have a general power of disposing, as, for example, by forfeiture for treason etc., which cannot be thought the sense of the will but only such a disposition as should be made by her by reason of her full age, the consequence whereof is that the £6000 must be decreed thereout to the charity.

N.B. The next day, His Lordship quoted Whitmore and Weld's Case, 2 Ventris 367,[2] as an authority in point, that the age to dispose of personal estate shall be understood the age of seventeen.

[Other reports of this case: 1 Atkyns 426, 26 E.R. 271, West *tempore* Hardwicke 273, 25 E.R. 934.]

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[1] *Thomlinson v. Dighton* (1711), 1 Salkeld 239, 91 E.R. 212, also 1 Comyns 194, 92 E.R. 1030, 1 Peere Williams 149, 24 E.R. 335, 10 Modern 31, 71, 88 E.R. 612, 631, 2 Eq. Cas. Abr. 309, 659, 22 E.R. 261, 553.

[2] *Whitmore v. Weld* (1685), 2 Ventris 367, 86 E.R. 490, also 1 Vernon 326, 347, 23 E.R. 499, 513, 2 Chancery Reports 383, 21 E.R. 694.

89

Cashburne v. Inglis

(Ch. 1738)

In equity, an equity of redemption is always considered as an estate in the land.
The widower of a mortgagor can be a tenant by the curtesy.

25 March 1738.

Upon an appeal from the Rolls, the case was thus. Thomas Cashburne devised the lands in question to his daughter Ann in fee, who, sometime after, mortgaged the premises to the defendant Scarfe in fee, and then she intermarried with the defendant Inglis, by whom she had issue, one child, and she died, as did soon after the child, the mortgagor having been all along in possession.

The question was whether the husband, under the present circumstances of the case, was entitled to be a tenant by the curtesy of the premises, which it had been decreed at the Rolls he should not, for that tenancy by the curtesy being a legal title only, the husband would not be so of this, which was but an equity of redemption.

Mr. Attorney General [*Ryder*] and Mr. *Browne* insisted for the plaintiff that, a tenancy by the curtesy being a mere legal title, it is absolutely necessary that the ceremonies which the law requires should be observed in order to give the husband a right, one of which is a seisin indeed according to 1 Inst. 29a, whereas a right of redemption is nothing else but a right of action, and the law dispenses nowhere with this rule except in the cases of advowsons or rents, where it may in some instances be impossible for the husband to reduce them into possession during the coverture. 1 Inst. 29a; 8 Coke 34,[1] that if the wife, while unmarried, had made a conveyance with a condition of reentry upon payment of a sum of money at a day certain and, then, had married and died before the day, the husband should never have been a tenant by the curtesy, which was the case here, for, though the husband might during the coverture have brought a bill to redeem and so have saved his right, yet not having done it, his right was gone forever, that, before the Statute, there would be no tenancy by the curtesy in the husband of a wife *cestui que use*, though the wife was actually in possession, which excluded any advantage that might be claimed in the present case from the mortgagor's being in possession. And they cited the Case of Penvill v. Luscombe,[2] 4th February 1728, wherein the Master of the Rolls inclined that there should be no *possessio fratris* of an equity of redemption, which could only be upon account of its being but a right of action, and no remedy for the recovery of the possession but by a suit in equity, and that upon terms of payment of the principal and interest, and those of Robinson v. Tongue, before the Lord King, in 1730,[3] and Reynolds v.

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[1] E. Coke. *First Institute* (1628), f. 29; *Paine v. Sammes* (1587), 8 Coke Rep. 34, 77 E.R. 524, also 1 Leonard 167, 74 E.R. 154, 1 Anderson 184, 123 E.R. 420, Gouldsborough 81, 75 E.R. 1009.

[2] *Penvill v. Luscombe* (1728), Mosely 72, 122, 25 E.R. 278, 306, 2 Jacob & Walker 201, 37 E.R. 603.

[3] *Robinson v. Tonge* (1735), 2 Strange 879, 93 E.R. 913, 3 Peere Williams 398, 24 E.R. 1117, 1 Brown P.C. 114, 1 E.R. 453, 2 Eq. Cas. Abr. 259, 454, 469, 509, 22 E.R. 219, 387, 399, 431.

Missen, at the Rolls, in 1732, in both which a man having made a mortgage in fee and then married, it was held that the wife was not dowable.

Mr. *Fazakerley* insisted on the other hand, for the defendant, that this case was like that of advowsons and rents, of which a seisin in law will make a tenant by the curtesy, that there was no sort of doubt but that a man might be a tenant by the curtesy of a trust estate, according to the cases of Sweetapple v. Binden and Williams v. Wray, 2 Vernon 535, 680,[1] upon the maxim *aequitas sequitur legem*, there being the same rule for determining equitable as legal rights. The mortgagee in the present case was never in possession. And if the mortgagee be considered in this court but as a trustee for such as are entitled to the equity of redemption, why should not the husband have the benefit of that trust? Here, the wife had a seisin of an equitable estate which was descendible to the issue and, consequently, as near the rule of law as an equitable estate can be. And, therefore, there can be no reason for excluding the husband, when nothing is clearer than that a man may be a tenant by the curtesy of a trust, nor is it any objection to say that he might have brought a bill to redeem, for that is saying no more than that he might have made a legal estate of it, whereas the question is whether a man may be a tenant by the curtesy of an equitable estate. 1 Inst. 30b; lands held of the king *in capite* descended to a wife, who after an office found intrudes and marries and then dies, yet shall the husband be a tenant by the curtesy, although, by the office found, all was in the crown and she was nothing but an intruder until the record entitling the king be removed by petition or *monstrans de droit*. And this is in favor of a tenancy by the curtesy. And so why shall not the husband be a tenant by the curtesy in the present case, even supposing the wife's possession to be nothing but a tenancy at will? Hardres 467, 469.[2]

Lord Chancellor [LORD HARDWICKE]: This question depends upon two considerations: first, what is an equity of redemption in the eye of this court; secondly, what is necessary to make a tenant by the curtesy. As to the first, an equity of redemption is always considered here as an estate in the land. It is descendible; it may be barred; and, therefore, it is not to be looked upon as a mere right, but as such whereof there may be a seisin in equity, for, otherwise, it would not be devised. A mortgage in fee is considered here but as a chattel interest in the mortgagee, and there shall be no tenancy by the curtesy of it to the husband until foreclosure, as was resolved in the Case of Litton v. Russel, 2 Vernon 625, by Lord Cowper and the Master of the Rolls, which shows that the mortgage is looked upon here but as a chattel. The same in Burnet and Kynaston's Case, 2 Vernon 401.[3] And where there is a devise and then a mortgage of the lands, the mortgage is a revocation of the devise but *pro tanto* because the equity of redemption remains in the testator and shall pass by the devise, though precedent to the mortgage.

It has been objected that an equity of redemption is but a right of action, but it is no more so than every other trust of land, for which the party must have a subpoena, as the old books calls it. And, if it was no more, where would the ownership of the land in equity be, for

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[1] *Sweetapple v. Binden* (1705), 2 Vernon 536, 23 E.R. 947, also 1 Eq. Cas. Abr. 394, 21 E.R. 1127; *Williams v. Wray* (1711), 2 Vernon 680, 23 E.R. 1042, also 1 Peere Williams 137, 24 E.R. 327, 2 Vernon 378, 23 E.R. 838, Precedents in Chancery 151, 24 E.R. 73, 1 Eq. Cas. Abr. 219, 21 E.R. 1002.

[2] *Pawlett v. Attorney General* (1667), Hardres 465, 145 E.R. 550, Equity Cases Exch. 23.

[3] *Strode v. Lady Falkland* (1708), 2 Vernon 621, 23 E.R. 1008, also 3 Chancery Reports 169, 21 E.R. 758, 1 Eq. Cas. Abr. 210, 21 E.R. 996; *Burnett v. Kinnaston* (1700), 2 Vernon 401, 23 E.R. 860, also Precedents in Chancery 118, 24 E.R. 57, 2 Freeman 239, 22 E.R. 1183, 1 Eq. Cas. Abr. 69, 21 E.R. 882.

mortgages have, as I have said already, been often determined to be nothing else but chattels in the mortgagee.

As to the second consideration, what is necessary to make a tenancy by the curtesy of an equitable estate, the eight first requisites of a legal tenancy by the curtesy meet in the present case. 1 Inst. 30a. But it is said that the husband shall not be a tenant by the curtesy in this case because the fourth is wanting, there being no actual seisin. Now, that objection proceeds upon a supposition that there can be no tenancy by the curtesy of an equitable estate, whereas the present question is whether here was a sufficient seisin to make a tenancy by the curtesy of an equitable estate, as an actual seisin is at law, and, by what I have said upon the first head, it appears there was the ownership of the land remaining in the wife so long as she lived and the mortgagee's interest being but a chattel or pledge for securing the money. And it has been determined that there may be a tenancy by the curtesy of an equitable estate, that it is now the settled law of this court, upon the maxim of *aequitas sequitur legem*, and so clearly taken in Williams and Wray's Case, 2 Vernon 680. That of Sweetapple v. Bindon, 2 Vernon 535, goes much farther than the present one, for, in that, there was neither seisin nor land, but only money to be laid out, which was merely equitable. The comparison between the husband's laches in not paying the money and in not entering upon the land at law is no way parallel, it being much easier to make an entry than to pay money. And besides, the mortgagee is by the rules of this court entitled to six months notice. Nor are the laches greater here than in any other trust of land in the wife, where the husband does not make an actual entry upon the land.

The next objection is that, as a woman shall not be endowed, so neither shall a man hold an equity of redemption by the curtesy. But that will not do better than the former, for, if it proves anything, it will prove too much, there being no dower of a trust estate at all. Indeed, it is not easy to find out the reason of that distinction between a tenancy by the curtesy and in dower. And, were things to begin over again, it would probably be settled otherwise, the complaint being not that there should be a tenancy by the curtesy of a trust estate, but that there should not be dower allowed of such an estate. In the Case of Penvill v. Luscombe, the question was whether there could be a *possessio fratris* of an equity of redemption, but the point was never determined and so it makes nothing to the present question. Of conditions of powers of revocation, it is certain there shall be no tenancy by the curtesy, which is all that the cases put by way of illustration by the party's counsel do prove. But what is that to the present case, which is quite of another nature and no way to be compared to those?

And, therefore, I am of opinion that the husband is well entitled to be a tenant by the curtesy of these lands.

[Other reports of this case: Lincoln's Inn MS. Misc. 384, p. 418, pl. 52, 53, Lincoln's Inn MS. Misc. 109, f. 53, 1 Atkyns 603, 26 E.R. 377, West *tempore* Hardwicke 221, 25 E.R. 905, Cases *tempore* Hardwicke 399, 95 E.R. 258, 2 Jacob & Walker 194, 37 E.R. 600, 2 Eq. Cas. Abr. 728, 22 E.R. 613.]

90

Prowse v. Abington

(Ch. 1738)

A general devise in fee to an executor to sell does not create a personal asset.

Where a legacy is charged upon both real and personal estate, it shall by the party's death before the time of payment be looked upon as extinct with regard to the real estate, though it would not had it been a charge upon the personal estate only.

A contingent legacy lapses when the legatee dies before the contingency happens.

28 April.

Thomas Compton, brother of the plaintiff's mother, by will dated the 13th of August 1718, devised his real estate to trustees in trust to sell part of his lands, and, with the moneys arising thereby, to pay so much of his debts as the same would amount unto and to receive the rents and profits of his other lands and thereby and by granting leases for three lives or 99 years determinable upon three lives, to pay all his debts and legacies, and after payment thereof to stand seised to the use of his sister, Isabella Abington, for life, and to the heirs male and female of her body, remainder to the use of the plaintiff by the name of his nephew George Prowse in fee. And by the same will, he gave to his goddaughter Anne Prowse, the plaintiff's sister, £500 and to his godson Thomas Prowse, the plaintiff's brother, £500 to be paid to them respectively at twenty-one or marriage which should first happen. And he thereby also gave some other pecuniary legacies, and the rest of his goods and chattels to his trustees, whom he made executors in trust for the uses aforesaid.

Thomas Prowse died unmarried before twenty-one. And now the question was whether this legacy should go to his representative or sink for the benefit of the devisee. Another question was also made, which was whether, if the legacy should sink for the devisee's benefit, if the trustees should not still be liable to account for such rents and profits of the lands and moneys arising from the leases as they had received and those which the personal estate were to be applied towards discharging the legacy.

For the plaintiff, were quoted Dethick v. Caravan, 1 Levinz 224; Dyer 264; and Smith v. Avery, Abr. Eq. Ca. 269.[1]

For the defendant, [was cited] Smith v. Smith, 2 Vernon 92.[2]

Lord Chancellor [LORD HARDWICKE]: There is not the least ground for considering the rents and profits of the lands already received by the trustees, nor the moneys arising from the leases which the testator has directed to be made, as personal assets. That would be overturning the constant doctrine of this court, for, where there is a general devise in fee to executors to sell, it has never yet been determined that such an interest should be taken as personal assets. And. if, in such case, the executor dies before a sale, the land must in the meantime descend to his heir. Suppose, upon such a devise, a legacy was given. Was it ever known that the legatee could in the meantime go into the ecclesiastical court and compel the executors or trustees to account for the rents and profits? Now, that is plainly the present case, for here is not a bare power only to the trustees to sell, but a general and express devise to them and their

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[1] *Dethicke v. Caravan* (1667), 1 Levinz 224, 83 E.R. 380; *Horneby v. Clifton* (1567), 3 Dyer 264, 73 E.R. 586, also 1 Anderson 52, 123 E.R. 349; *Smith v. Avery* (1702), 1 Eq. Cas. Abr. 269, 21 E.R. 1037.

[2] *Smith v. Smith* (1688), 2 Vernon 92, 23 E.R. 669.

heirs, whereby he has given them the whole interest in the estate, and the dispositions he afterwards makes are but declarations of the trust.

As to the main question, I own I always have had some doubt about the general rule which has been laid down, that, where a legacy is charged upon both real and personal estate, it shall by the party's death before the time of payment be looked upon as extinct with regard to the real estate, though it would not had it been a charge upon the personal estate only, and that because it seems to me that the real estate, which is the security for payment of the legacy, should be as extensive as the principal fund. But notwithstanding this doubt of mine, the point has been determined in so many instances that I am bound by them, particularly in that of Lady Poulet v. Lord Poulet, 1 Vernon 204, 321,[1] from which, though some later cases have been distinguished that has only been upon account of the parties' having married before the time of payment, and there is no difference between a legacy and a portion, as appears from the Case of the Duke of Chandois v. Talbot.[2] It was said that the court might marshal the assets so as to throw such debts as would affect the real estate upon that and leave the personal estate open to this legacy. But the present case falls not within that rule, that being only where the legacy does originally charge both funds, whereas it is but by accident, *viz*. by the parties' death before twenty-one that it is in the present case become chargeable upon both.

The Case of Jackson v. Farrand, 2 Vernon 424,[3] was indeed decreed upon account of its being a portion and that the child was actually married before its death, and it has been inferred from thence that, had it not been considered as a portion, it would have been otherwise. But in other cases, where the legacy has been charged upon a mixed fund, the determinations have been the same and particularly that of the Duke of Chandois v. Talbot, which is a very strong authority, the Lord King, who made that decree having for a good while leaned to the other side, but he was at last overpowered by the resolution of Yates v. Phettiplace, 2 Vernon 416, and of other cases such as Smith, 2 Vernon 92, etc.[4] As to the Case of King v. Withers (*ante*) and that of Broom v. Berkeley, in the House of Lords,[5] the Lords Talbot and Trevor's opinion were grounded upon a supposal that, by the parties' marriage and having children, the time of payment was come, and, therefore, every way fit that the portions should be raised.

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[1] *Lady Poulet v. Lord Poulet* (1683), 1 Vernon 204, 321, 23 E.R. 415, 496, also 2 Freeman 93, 22 E.R. 1079, 2 Ventris 366, 86 E.R. 489, 2 Chancery Reports 286, 21 E.R. 680, 1 Eq. Cas. Abr. 267, 21 E.R. 1036, Lords' Journal, vol. 14, p. 87.

[2] *Duke of Chandos v. Talbot* (1726-1731), 2 Peere Williams 371, 601, 24 E.R. 771, 877, Select Cases *tempore* King 24, 25 E.R. 202, W. Kelynge 25, 25 E.R. 477, 2 Eq. Cas. Abr. 89, 145, 253, 449, 473, 545, 587, 730, 22 E.R. 77, 124, 215, 383, 403, 459, 494, 616.

[3] *Jackson v. Farrand* (1701), 2 Vernon 424, 23 E.R. 871, also Precedents in Chancery 109, 24 E.R. 53, 1 Eq. Cas. Abr. 268, 21 E.R. 1037.

[4] *Yates v. Phettiplace* (1700), 2 Vernon 416, 23 E.R. 868, also 12 Modern 276, 88 E.R. 1319, Precedents in Chancery 140, 24 E.R. 67, 2 Freeman 243, 22 E.R. 1185, 1 Lord Raymond 508, 91 E.R. 1239, 2 Eq. Cas. Abr. 541, 559, 653, 654, 22 E.R. 456, 471, 548, 550; *Smith v. Smith* (1688), 2 Vernon 92, 23 E.R. 669.

[5] *King v. Withers* (1735), see above, Case No. 50, Gilbert Rep. 26, 25 E.R. 19, 3 Peere Williams 414, 24 E.R. 1125, Precedents in Chancery 348, 24 E.R. 163, 1 Eq. Cas. Abr. 112, 21 E.R. 920, 2 Eq. Cas. Abr. 656, 22 E.R. 551; *Brome v. Berkley* (1728), 6 Brown P.C. 108, 2 E.R. 965, also 2 Peere Williams 484, 24 E.R. 826, 1 Eq. Cas. Abr. 340, 21 E.R. 1088, 2 Eq. Cas. Abr. 649, 22 E.R. 545, Chan. Cases *tempore* Geo. I, 1238.

The reason of the distinction between cases where a legacy is charged upon the real estate and where upon the personal estate and is payable at a particular time before which the legatee dies, I take to be that, by the civil law, which is the rule whereby legacies are determined in the ecclesiastical courts, a contingency is transmissible and is not lost by the party's death before the happening of the contingency, whereas, by the common law, which is the only rule whereby real estates or charges upon them are determinable, if one promises to pay a sum of money to another when he shall attain the age of twenty-one, no action lies before that time. And, by the party dying before twenty-one, the money is lost forever.

And so he dismissed the bill.

[Other reports of this case: 1 Atkyns 482, 26 E.R. 306, West *tempore* Hardwicke 312, 25 E.R. 955, 2 Eq. Cas. Abr. 464, 22 E.R. 395.]

91

Hervey v. Aston
(Part 2)

(Ch. 1738)

In this case, a condition precedent to receiving a legacy, marriage with consent, did not happen, and the plaintiffs were denied their portions.

Roman law is of no authority in England, unless it can be proved that it was received in England.

5 June. Hervey v. Sir Thomas and Lady Aston, *ante*, fo. 20.[1]

Sir Thomas Aston, the father, by a settlement after marriage bearing date in May 1712, conveyed all his lands to trustees and their heirs to the use of himself for life, remainder as to part to the defendant, the Lady Aston, his wife, during her widowhood, and, as to the rest of the premises and also those limited to his wife after the determination of her interest therein, to the use of his son, the defendant, Sir Thomas Aston for life, remainder to trustees to preserve contingent remainder, remainder to his first and other sons in tail male, remainder to the second and other sons of Sir Thomas, the father, in tail male, and, as to some part of his lands, to trustees for the term of 1000 years, and, as to the rest and also this part after the determination of the 1000 years term, to the use of the first and other sons of Sir Thomas, the father, by any other woman in tail male, remainder to the first and other daughters of the said Sir Thomas, the son, in tail, remainder to the first and other daughters of Sir Thomas, the father, by the defendant, the Lady Aston, in tail with other remainders over.

The trust of the 1000 years term was declared to be:

> That in case Sir Thomas Aston should have one or more son or sons by his wife living at his death or born in due time afterwards, and should also have more daughters than one living at his death or born in due time afterwards, or who in his lifetime has or have been married with his consent, then, and in such case and not sooner or before, the trustees should by the rents and profits or by mortgage or sale of the premises or by such ways and means as to them should seem meet, raise for the portion of every such daughter the sum of £2000 and pay the same unto every such daughter or daughters when and as soon as she or they shall be married with the consent of the Lady Aston [the defendant], if then living and not married again,

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[1] *Hervey v. Aston* (1736), see above, Case No. 77.

and if she should be dead or married again, then with the consent of the trustees or the survivor of them, or the executors and administrators of such survivor, and should, out of the rents and profits of the premises yearly after the death of the said Sir Thomas Aston, pay to his daughters the respective yearly sum of £50 apiece until their respective ages of 18 years, and afterwards and until their respective marriage with such consent and during the life of the Lady Aston and until her second marriage, the respective yearly sum of £70, and after the respective marriage of such daughters with such consent or after the death or second marriage of the Lady Aston, then the respective yearly sum of £100 until their respective marriages or death, which should first happen, provided that, if any of his said daughters should die before she or they should be married, that, then, the sum or sums intended for the portion or portions of her or them so dying should cease and the premises be exonerated thereof, and, if raised or so far as the same should be raised should remain and be payable unto such person or persons to whom the remainder or reversion of the premises expectant upon the said term should for the time being belong or appertain, provided also, that it should be lawful for Sir Thomas Aston by deed or writing by him signed and sealed, or by his last will in writing signed and published in the presence of three witnesses, to revoke, alter, or make void all or any of the uses or estates created by this settlement.

Sir Thomas Aston being afterwards desirous of making some farther provision for his daughters, by a will dated in February 1722, reciting that several lands had then lately been devised to him, subject to several debts and legacies amounting to £3100, which he had paid, whereby his personal estate designed for the benefit of his daughters was much diminished, devised those lands to trustees for 500 years upon trust by sale or mortgage within six months after his death to raise the sum of £3100, and pay the same to his executrix in his will named to come in lieu of such part of his personal estate as he had so applied. And he farther devised unto the same trustees some new purchased lands for 500 years upon trust that they within six months after his death should by sale or mortgage raise the sum of £1000 and pay the same to his executrix to be accounted as part of his personal estate. And, subject to these two terms, he devised these lands to such persons and for such estates as his other lands were conveyed by the settlement. And he directed that, out of these sums to be paid to his executrix and all other moneys which he should be entitled to at his death, there should be paid to each of his daughters as should be unmarried and unprovided for by him at his death, the sum of £2000 if the same would extend so far, if not, then, so much as they would extend to pay equally amongst them and to be for the augmentation of the portions provided for them by the settlement and to be paid them at such times and subject to such conditions, provisos, and limitations as their original portions were by the settlement made liable to, and, in case any of his daughters should happen to die before their original portions were become payable, then, that the £2000 should not be paid to the executors or administrators of such daughter. And, if the moneys out of which the £2000 apiece were to be raised should be more than sufficient, then, he gave the residue thereof to his wife, the Lady Aston, whom he made sole executrix and guardian of his children.

By a codicil dated in July 1723, Sir Thomas Aston taking notice of his will and settlement with the power of revocation therein contained and that the 1000 years term therein mentioned was not to commence until after other estates of inheritance, so that his daughters would have no benefit thereof until after his son's death without issue male, therefore, in pursuance of his power, he declared that the 1000 years term should commence after his death, before the estate limited to his son, the defendant, Sir Thomas Aston, should take place, or before any other estate in the settlement contained (except such part as should be in jointure to his wife) and that all the rest and residue of his estate settled by the deed should be to the use of the trustees for the better raising his daughters' portions.

Sir Thomas Aston died in 1724, leaving the defendant, his only son, and several daughters and also leaving a considerable personal estate, which, with the two several sums to be paid to the Lady Aston, his executrix, was charged by the bill to be sufficient for raising the several sums of £2000 bequeathed to each of his daughters.

Mr. Hervey and Mr. Clutton, having married two of the daughters, Catherine and Anne, but without the Lady Aston's consent, brought their bill to have the several sums of £4000 as belonging to their wives under their father's will and settlement paid to them.

The defendant, the Lady Aston, insisted by her answer that she had acquainted her daughter, Mrs. Hervey, with the conditions upon which she would be entitled to her portion and that, if she married without her consent, she would not be entitled to any part thereof, but that, if she married with consent, she would be ready to pay her the portion, that, upon her finding that Mr. Hervey made his address to her daughter, she acquainted him with the conditions, and that she never would give her consent to a marriage between them, that the trustees had likewise acquainted the earl of Bristol, Mr. Hervey's father, therewith and that they would never consent thereto, but that, notwithstanding this caution and notice, her daughter, having first attained her age of twenty-one, married the plaintiff, Mr. Hervey, against her mother's consent.

As to the other plaintiff, Mrs. Clutton, the Lady Aston insisted that she, being but of the age of nineteen, married Mr. Clutton, though she had been often acquainted with the terms upon which her portion was given to her, not only without her consent, but without her privity, and that no application had ever been made to her in that respect. And she submitted whether, under these circumstances, her daughters were entitled to any portion.

Mr. Clutton died pending the cause leaving one child by his wife. And Mr. Hervey had several children by his wife now living.

The question was whether, upon this case, the ladies were entitled to any portions, either under the deed or will of their father, or whether, by the marriage without consent of their mother, they had not forfeited both. The cause was first heard at the Rolls, where, after time taken to consider the point, the Master of the Rolls [Jekyll] decreed for the plaintiffs. (See his argument *ante*, page 20.)

And having been reheard by the Lord Chancellor [LORD HARDWICKE], assisted by the two Chief Justices [LEE and WILLES] and Mr. Justice COMYNS, they now delivered their opinions.

Mr. Justice COMYNS: The question is whether the plaintiffs be entitled either to the portions provided for them by Sir Thomas Aston's settlement or by his will. And I am of opinion that they are entitled to neither, his intent being plain that they should have neither without a marriage with the consent of their mother and of the trustees. He has provided a maintenance for them from the time of their attaining their age of eighteen until their marriage 'with consent', and that of maintenance being to continue until marriage with consent, no portion can arise until such marriage, that not arising until the maintenance ceases, which it does not, until such time as is already mentioned. It has been said, indeed, that the consent required in this case is but a circumstance, and, consequently, it may be dispensed with. But it is well known that, where several things are previous to the arising of an interest, each of them must happen before that interest can arise. Many cases might be quoted to prove this. But I think it sufficient to mention one, which is that of Sir Caesar Cranmer v. Duke of Southampton, Shower Parl. Cas. 83, where it is expressly held that, in conditions copulative consisting of many parts, all must be performed before the interest can arise, and it was so decreed in that case, and in the next, fo. 87, of the same book.[1] Now, it is clear in the present case that, where Sir Thomas Aston had used the word 'marriage', he meant such a marriage

[1] *Wood v. Duke of Southampton* (1692), Shower P.C. 83, 87, 1 E.R. 58, also 2 Freeman 186, 22 E.R. 1151, 1 Vernon 338, 23 E.R. 506.

as he had before described, that is a marriage ' with consent'. It has been objected, that, in that clause of the deed whereby the term is made to cease upon the death of his daughters, he has only mentioned their dying before marriage generally without saying anything of consent. But that, I think, will not avail the plaintiffs, it being necessary to word the clause so as the term was a security not only for the portions but also for the maintenance, which the daughters must have, although married without consent.

The strong objection for the plaintiffs is that, by the civil law, such clauses as the present one, which go in restraint of marriage are discountenanced and made void and that this maxim of the civil law has been adopted here. But we must remember what Mr. Selden in his *Dissertatio ad Fletam*, ch. 3, s. 5, says of the use of that law here:

> *Non quidem omnino quasi regnum hoc seu rempublicam Anglicanam caesaribus jurive caesareo subjici, aut regimen hinc inde pendere omnino, aut jus Anglicanam ante sive scripto sive moribus constitutum inde mutationem recipere . . . sed ut tum ubi deeset nostri juris praescriptum expressius ad rationem juris etiam caesarei ratione suffultam recurreretur, tum ubi jus utrumque consonam, eti caesarei quasi firmaretur explicateturve res verbis*.

Now, by the Roman law, none could dispose of his estate without leaving such a part to his heir, *Digesta*, lib. 35, tit. 2, l. 1,[1] and, if that was not done, the will was set aside, and this was called the *legitima portio*. There were attempts made to elude that law by making the party to forfeit his *legitime* upon marriage without consent, but such clauses were held to be void as being infringements upon the law before mentioned, though a restraint from marrying a particular person they held to be good. But the common practice of this court is to allow of such general clauses where there is a bequest over upon the breach of it, and this even in the case of a pecuniary legacy.

As for the cases that were quoted from Moore 587, Pigot's Case, and 1 Chancery Cases 58, Fleming v. Walgrave, and that of Aston v. Aston, 2 Vernon 452,[2] they do not come up to the present point, there being in none of them a marriage necessary to precede the portion, as there is in this case. And I take the practice of this court in cases where there is no bequest over upon a marriage without consent to have been established in order to avoid contradiction of judgments in one and the same case between it and the ecclesiastical courts, which govern themselves by the civil law, as we see in Pigot's Case. But having never taken up that rule where a legal interest was given to a third person upon a marriage without consent, it must govern itself by the same rule in cases of trusts, the determinations being the same in both. And, therefore, as in cases of conditions precedent, every part must be performed before a legal estate can arise, so must it be in trusts likewise. And marriage with consent being a necessary ingredient in the present case to the payment of the portion, that must happen before any portion can be due. By the civil law, which has been much relied on for the plaintiffs, a child's marrying without his parent's consent thereby forfeited his right. And, at this day by the custom of London, a child's marrying without his father's consent is a forfeiture of his orphanage share unless the father be reconciled to it during his lifetime. And indeed, it is the duty of every child to have the consent of his parents in the taking of a step of such consequence, which not being

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[1] *Digestum*, 35, 2, 1.

[2] *Davenant v. Hurdis* (1599), Moore K.B. 576, 589, 72 E.R. 769, 776, or *Gresley v. Luther* (1614), Moore K.B. 857, 72 E.R. 953; *Fleming v. Walgrave* (1664), 1 Chancery Cases 58, 22 E.R. 693, 1 Eq. Cas. Abr. 110, 21 E.R. 918; *Aston v. Aston* (1703), 2 Vernon 452, 23 E.R. 890, also Precedents in Chancery 226, 24 E.R. 110, 1 Eq. Cas. Abr. 111, 336, 21 E.R. 919, 1085, Chan. Cases *tempore* Anne 23.

done in the present case and both Sir Thomas Aston's settlement and his will having made the Lady Aston's consent to be a condition precedent to the payment both of the original and additional portions by him intended for his daughters, I am of opinion that the plaintiffs are not entitled to any relief in this court.

Lord Chief Justice WILLES: I consider what has been said upon penalties and forfeitures as quite out of the present question, for, though the plaintiffs be not entitled to their portions upon their present marriage, yet they may in case of a future one with their mother's consent, upon the death of their present husbands, one of whom is dead since the commencement of this suit. Nor do I think the arguments that have been drawn from parental authority to weigh much in the present case, which is strong enough without them, and particularly as I do not find the distinction between a gift from a parent and from another person to be taken in any other case.

The question depends singly upon the nature of the gift itself. And, if any set of words can be strong enough, they are so in the present case to prevent the arising of the portions. Sir Thomas Aston's intent appears to me the same, both upon the deed and the will. And I cannot help repeating upon this occasion what was said by a very great man upon a great occasion too, ' that were this propounded to a man of a plain and clear understanding unprejudiced from the notions of law, the only question with him would be how it came to be a question at all'. It is a known rule, that no words are to be rejected in the construction of deeds or wills that can have any sensible signification, and, therefore, the words ' with consent', though omitted in the clause whereby the term is made to cease upon the death of the daughters are not to be taken as signifying nothing because, as my brother Comyns has already observed, it was necessary to word that clause so, from the term's being a security as well for the yearly sums as for the portions themselves. And the intent is as clear upon the will as upon the settlement that the portions arising by the one, as well as the other, should not be due until a marriage with the consent of the Lady Aston if then living.

Sir Thomas Aston's intent, therefore, being plain and clear, we are now to see whether that intent of his be contrary to the rules either of law or equity, wherein I must take notice of the Lord Chief Justice Holt's saying in the Case of Bertie v. Lord Falkland, 2 Vernon 333,[1] that men's deeds are the laws which they are allowed to make for the regulation and management of their estates, and that of the Lord Nottingham in Jervois and Duke's Case, 1 Vernon 19,[2] that, here, the father has been his own chancellor. And I cannot see in the present case that this intent of Sir Thomas Aston is contradictory to the rules either of law or equity. The distinctions that have been taken at the bar between the cases where the legacy or portion is to arise out of the real estate and where out of the personal estate are indeed laid down in the Case of Lady Poulet v. Lord Poulet, 1 Vernon 204, 321, and in that of Tournay v. Tournay, Precedents in Chancery 290,[3] so that, if, in the case in question, we consider the marriage with consent as a limitation precedent upon which the portions are to arise out of the

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

[2] *Jarvis v. Duke* (1681), 1 Vernon 19, 23 E.R. 274, also 1 Eq. Cas. Abr. 110, 21 E.R. 918.

[3] *Lady Poulet v. Lord Poulet* (1683), 1 Vernon 204, 321, 23 E.R. 415, 496, also 2 Freeman 93, 22 E.R. 1079, 2 Ventris 366, 86 E.R. 489, 2 Chancery Reports 286, 21 E.R. 680, 1 Eq. Cas. Abr. 267, 21 E.R. 1036, Lords' Journal, vol. 14, p. 87; *Tournay v. Tournay* (1709), Precedents in Chancery 290, 24 E.R. 139, also 2 Eq. Cas. Abr. 654, 22 E.R. 550, Chan. Cases *tempore* Anne 211.

real estate, then Bertie and Lord Falkland's Case is an express authority that this court can neither relieve the plaintiffs nor decree the portions until there be a marriage with such consent, and that of Fry v. Porter[1] goes farther still, for, there, it is held that there shall be no relief even against a condition subsequent unless there can be a compensation, which can no more be in this case than it would in that. And, if, on the other hand, we consider this as a personalty, then, those two cases before mentioned of Lady v. Lord Poulet and Tournay v. Tournay do govern the point, the time of payment of the portions being not yet come. That of King v. Withers, Precedents in Chancery 348,[2] was urged as an authority for the plaintiffs, but, there, the daughter had actually attained her age of twenty-one, which was one of the times when the portion was payable at and vested, and, therefore, the court had nothing to do with any subsequent act of the daughter in marrying or not marrying with her mother's consent.

It was likewise objected that children being considered sometimes as creditors in this court, it will dispense with conditions in their favor. But how can that be in the present case? Indeed, where the will of a parent is defective, this court will endeavor to help out the intent in favor of his children. But what is that to our case, where the words are as plain as they can be to manifest a clear intent? Or was it ever known that, where a parent gives his child a legacy upon one condition, this court will give it to him upon another?

The next objection, and which has been much relied upon by the plaintiffs' counsel is that such clauses as this, which go in restraint of marriage are void by the civil law and consequently that the rules of that law are to prevail against the defendant's, the Lady Aston's, power of assent or dissent given to her by her husband. But the civil law is of no farther authority here, than as it has been received in particular instances. And it does not appear very plain that, even by that law, for herein I do not include the commentators whose reasoning are sometimes very extraordinary, this clause in question would be void, for though we do not find the words ' conditions precedent', and ' subsequent' in the civil law, yet, certainly, such things are known there as well as with us, it having been allowed by the arguments of the doctors at the bar on both sides of the question that a marriage here must be before any portion is due. And, therefore, call it what you please, a condition precedent or a limitation of time when the interest shall arise, still, it is somewhat that must happen before the interest can arise.

The distinction between the cases where there is a devise over upon a marriage without consent and where not, though I do not rightly understand the reason of it, has been settled so long that it would perhaps be introducing too great an uncertainty to shake it now. The only way to reconcile it to reason in my opinion is to make it a circumstance whereby the court judges of the testator's intent whether he meant the clause to be *in terrorem* only or really meant a forfeiture. Upon the foot, therefore, of this distinction, the judgment in Hayward and Paget's Case, at the Rolls,[3] seems to stand single and contradicts that of Amos v. Horner, Abr. Eq. Ca. 112,[4] in which, though no decree can be found in the Register's Book, it appears

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[1] *Fry v. Porter* (1670), 2 Chancery Reports 26, 21 E.R. 606, 1 Chancery Cases 138, 22 E.R. 731, 1 Modern 300, 86 E.R. 898, 1 Eq. Cas. Abr. 111, 282, 333, 21 E.R. 918, 1047, 1083, *sub nom. Williams, ex dem. Porter v. Fry*, 1 Modern 86, 86 E.R. 752, 1 Freeman 31, 89 E.R. 26, 2 Levinz 21, 83 E.R. 434, 1 Ventris 199, 86 E.R. 135, T. Raymond 236, 83 E.R. 122, 2 Keble 756, 787, 814, 867, 84 E.R. 478, 498, 515, 548, 3 Keble 19, 84 E.R. 570.

[2] *King v. Withers* (1735), see above, Case No. ___, Precedents in Chancery 348, 24 E.R. 163, Gilbert Rep. 26, 25 E.R. 19, 3 Peere Williams 414, 24 E.R. 1125, 1 Eq. Cas. Abr. 112, 21 E.R. 920, 2 Eq. Cas. Abr. 656, 22 E.R. 551, 3 Brown P.C. 135, 1 E.R. 1226.

[3] *Haward v. Pagett* (1733), Lincoln's Inn MS. Misc. 384, p. 69.

[4] *Amos v. Horner* (1699), 1 Eq. Cas. Abr. 112, 21 E.R. 920.

plainly by the calendar that a decree there was of some sort or other, and that this decree was against the plaintiff appears from its never having been drawn up, a thing which often happens, when a man gets a decree he does not care for, he does not put himself to the trouble of drawing it up, and, therefore, I cannot help looking upon this case as an authority.

Another objection has been made from the hardship of the present case. But that can have no weight either in law or equity. When one finds a hard case, it is natural to wish it was otherwise, but it can no way influence the judgment of courts of justice, and indeed, in the present case, I can find no difference between the will and the settlement except from what was quoted out of the civil law, of a legacy depending upon the will of the heir, who, being to take advantage of it himself, would never consent to the legatee's receiving it. Now, if, in the present case, the Lady Aston's refusal (she herself being to take advantage of the forfeiture) be unreasonable, there may be room for an enquiry, so far as it relates to the additional portions arising by the will. Had the daughters before marriage brought a bill suggesting an offer of suitable matches and an unreasonable refusal on the mother's part, perhaps the court would then have directed an enquiry into the matter. But this being a thought entirely new, if My Lord Chancellor thinks there is no weight in it (which I entirely submit to His Lordship's much better judgment), then, I am of opinion that the plaintiffs have no right to these portions.

Lord Chief Justice LEE: In M. Hale, *Pleas of the Crown*, 16, it is said that, though the civil law was framed by wise and great men, yet it is of no farther authority here than as it has been adopted in particular points, which it has never been in the determination of conditions, those being determined by the rules of the common law only. Parental authority is, I think, to have its weight in the present case, the law of nature requiring a compliance from the child to the parent in a step of such consequence as marriage, as we read in H. Grotius, *De Jure Belli ac Pacis*, who, treating of marriage, says that, although, by the law of nature, the want of the parent's consent will not annul a marriage, yet filial piety requires it from the child. Indeed, where the compensation can be made, this court will relieve against conditions subsequent, but not in such cases as the present one, which are no way capable of compensation. And so he concluded against the plaintiffs.

Lord Chancellor [LORD HARDWICKE]: I am much obliged to my Lords Chief Justices and Mr. Justice Comyns for their assistance and the great pains they have taken in the consideration of the present case.

The first question is upon the original portion due by the settlement. And that depends upon the words of the declaration of the trust of the term, what was the maker's intent and is the genuine meaning of them, and whether there be any rules either of law or equity that will excuse these ladies, the plaintiffs, from performing all the words. Now as to that, I think it a difficult matter to use more plain and express words than are used here. Where a gift is made or a sum directed to be paid upon a condition, that condition is a collateral quality, which must be performed before the sum or gift can go to the party. This, therefore, is to be taken, as my Lord Chief Justice of the Common Bench called it, to be a limitation of time when these portions shall become due. And nothing is clearer since the Case of Lady Poulet v. Lord Poulet than that portions arising out of land are not due to the party until the point of time upon which they are made payable happens, which happens beyond all doubt to have been Sir Thomas Aston's intent, for as he provides for the distant state of his daughters in case they shall come to the actual possession of his estate by obliging their husbands to take the name and arms of Aston, so he provides for their nearer state by portions, which he does mean to be due to them until their marriage with consent and until that time they are to remain content with their annuities. It has been objected indeed that the words, being general without any mention of consent in the clause whereby the term is made to cease, do prove him not so very mindful of the consent, but to have his eye chiefly to the marriage of his daughters, but this was fully answered by my Lord Chief Justice of the Common Bench and Mr. Justice Comyns and, besides, it would be a very strange construction to make that which is an unnecessary and

superfluous clause to overthrow an intent plainly and manifestly appearing from all the other clauses of this settlement.

Another objection was made of its becoming impossible for the Lady Aston to signify her consent, as if she should become a lunatic etc. But such an accident would either be a dispensation of the condition by the act of God, or else the power created by the owner would, through the incapacity of the trustee, devolve upon this court.

It was also said that this arising upon a trust was cognizable only in equity, which construes such clauses *in terrorem* only, where there is no bequest over. But, in the present case, I think there is an effectual devise over by the provision that the portion shall sink and, if raised in part, that so much as is raised shall be repaid. And, in what light soever it is considered, there is still a disposition made upon non performance of the condition, the grantor's intent being as plainly where he disposes of it to the person who would otherwise have had it, as where he gives it to a stranger. But this is made clearer still from the provision that, if, at the death of any of his daughters, part of her portion be then raised, it shall go to such as should be entitled to the inheritance, who might perhaps be but a tenant for life. And this might well happen to be the case upon the marriage of one daughter with consent, when it would prove difficult to raise exactly such a precise part as her portion would amount to, and, therefore, the surplus must in such case be laid up for the benefit of the daughter who shall marry next.

As to the commentators of the Roman law that have been quoted in this case, they are certainly of no authority in England, unless it can be proved that they have been received here. And, even by that law, it is not clear whether the mother's consent be not necessary to the child's marriage. *Codex*, lib. 5, tit. 4, l. 1,[1] which, though not an express authority, yet shows the matter to be doubtful. But this court has certainly let in the civil law upon no other account than to preserve a conformity between its determinations and those of the ecclesiastical courts upon one and the same point and that the party should not have it in his power to vary the right by applying here or there as he might think proper. Besides, in cases of personal legacies, this court holds plea of them only as incident to the account of assets according to Davis and Gardner's Case, at the Rolls, Trinity 1721.[2] But portions arising out of land are no way to be considered in the same light, for, though they be equitable, yet like contingent limitations of trusts, springing uses, etc., they are determinable by the same rules that legal estates are, according to which such conditions as this are certainly good, as an estate limited to a woman *durante viduitate*, and the custom of London, whereby it is held by the Lord Jeffreys, 1 Vernon 354,[3] an infant marrying against consent loses his orphanage share unless there be a reconciliation in the father's lifetime. Such conditions, therefore, being good at law, we must remember the Lord Hale's saying in Fry and Porter's Case that 'estates governable by the law of this kingdom without relation to another form ought not to be influenced by another law', and the Lord Harcourt's opinion in King v. Withers that a legacy arising out of land must be considered as a devise of the land itself would be. The cases of Fleming v. Walgrave, Aston

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[1] *Codex*, 5, 4, 1.

[2] *Davis v. Gardiner* (1723), 2 Peere Williams 187, 24 E.R. 693, 2 Eq. Cas. Abr. 499, 22 E.R. 423, Chan. Cases *tempore* Geo. I, 968.

[3] *Foden v. Howlett* (1685), 1 Vernon 354, 23 E.R. 519, also 1 Eq. Cas. Abr. 156, 21 E.R. 955.

v. Aston, and Needham v. Vernon[1] (which last is out the Lord Nottingham's manuscript reports [and] seems rather an award than a decree) do none of them resemble the present one and have been fully answered already.

The next question is upon the additional portions arising by the will. Now, these are expressly made payable under the same restrictions and qualifications as the others, and, if so, then the limitation of time in the one must be the same as in the other, and, being so incorporated and united to each other, it is impossible to construe them indifferently without doing violence to both. Nor is it possible for the plaintiffs to have the augmentation unless they likewise have the thing augmented. One difference indeed there may be, and that is a very material one between these latter portions arising by the will and the former with regard to the use that the Lady Aston may have made of the power of consenting given to her by her husband, which was taken notice of by my Lord Chief Justice of the Common Bench and was mentioned at the bar by Dr. Strahan from *Digestum*, lib. 23, tit. 2, l. 19,[2] and D. Godofredus' comment thereon. But as I am doubtful how far I would go in such a case, I shall be glad to have the judges' advice in my directions upon that point and, therefore, leave it to their consideration.

But before I conclude, I must take notice of something that was said by the counsel of the policy of the Roman law in discouraging such restraints of marriage, which policy was said to be general in its reason and to extend to all countries. But whatever might happen in after times, it was certainly not so in those of the commonwealth. The *Lex Julia et Papia Poppaea*[3] was made in the time of Augustus after the miseries ensuing from the civil wars between Caesar and Pompey and the Proscription after Caesar's death of many of the best citizens of Rome had so discouraged marriage that, at the election of consuls, none could be found to fill that high office who had a wife and children, a consideration always of great weight with that people, so that they were at last forced to choose two unmarried persons, the history whereof may be seen in G. Gravina, *Origines Juris*, lib. 3, cha. 36.

So that upon the whole, I am of opinion that the plaintiffs are not entitled to any relief.

Note: Upon reading the Lady Aston's answer, it appeared that no measurable use had been made by her of the power of consent given her by her husband, and the answer not being replied to, nor any proof on the plaintiffs' behalf, and she having sworn that she had told her daughters that she would consent to any proper match, the Rolls' decree was reversed.

[Other reports of this case: See above, Case No. 91, Harvard Law School MS. 1105, p. 13, Lincoln's Inn MS. Misc. 384, pp. 446, 456, 459, 1 Atkyns 361, 26 E.R. 230, 2 Comyns 726, 92 E.R. 1287, Cases *tempore* Talbot 212, 25 E.R. 741, West *tempore* Hardwicke 350, 25 E.R. 975, Willes 83, 125 E.R. 1067, 2 Eq. Cas. Abr. 147, 216, 432, 504, 539, 650, 22 E.R. 126, 184, 367, 427, 454, 546.]

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[1] *Fleming v. Walgrave* (1664), *ut supra*; *Aston v. Aston* (1703), *ut supra*; *Needham v. Vernon* (1673), Reports *tempore* Finch 62, 23 E.R. 33, also 1 Eq. Cas. Abr. 111, 21 E.R. 919, 73 Selden Soc. 37.

[2] *Digestum*, 23, 2, 19.

[3] *Codex*, 8, 57.

92

Purse v. Snablin

(Ch. 1738)

In this case, the legacy of a quantity of stock in a company was found to be a pecuniary legacy, not a specific legacy, and the executor was ordered to buy with the assets of the estate sufficient stock to pay to the legatees.

28 October 1738.

The testator, Robert Rowland, made his will in the following words:

> I give to my nephew Robert Snablin and his heirs all my freehold and copyhold estates situated in Ely, London, Surry, or anywhere else, and I give unto my said nephew Robert £2500 in Bank stock and £1500 in East India stock. Item, I give to my niece Ann Snablin £5000 in the old annuity stock of the South Sea Company. Item, I give to my niece Susanna Swinburne £3000 in the new annuity stock of the South Sea Company. Item, I give to my cousin Robert Purse £5000 in the old annuity stock of the South Sea Company.

And he made his nephew, Robert Snablin, the residuary legatee.

The testator left but one £5000 old South Sea annuity stock, whereupon the question was whether the two several legatees, Ann Snablin and Robert Purse, should each of them have £5000 old South Sea annuities and consequently the residuary legatee be obliged to make the will good by laying out part of the residuum in purchasing £5000 old South Sea annuities or whether Robert Purse, who was likewise executor, and Ann Snablin should have but that one £5000, which the testator left, between them.

The cause was first heard at the Rolls, where the late Master [Jekyll] decreed them but the one £5000 between them.

Mr. Attorney General [*Ryder*], Mr. *Fazakerley*, and Mr. *Clarke* argued now for the plaintiffs that the testator certainly did not intend the two legatees to be either joint tenants or tenants in common of these £5000, but intended them a separate provision and that each should have £5000, the words of the will being not 'my South Sea annuities' but '£5000 in the old South Sea annuities', the former would have made it a specific bequest, but the latter words are as well answered by one £5000 in that stock as by another, that this construction was perfectly agreeable to the rules observed in cases where a quantity of a thing is devised, as in Swinburne, part 3, s. 5,[1] if the testator devise a certain quantity of grain and wills that the same be paid out of the corn growing in such a field, though no corn grow there, yet is the executor compellable to pay the whole legacy, and part 7, s. 10, if the testator bequeath a horse, the bequest is good, whether he have any or none. So in Domat, lib. 4, tit. 2, sect. 3, n. 19, 21,[2] where it is said, that, if the testator leaves a certain quantity of corn, or leave a ring or watch, where there is no such thing existing in him, that still the legacy is good, and, there, the difference is taken between a devise of 'my ring' and a devise of 'a ring', that, in such case, the former is void, being specific, but the latter good, and, at n. 22, it is said that as there are rings etc. of different prices, the value shall be determined by the circumstances of the testator,

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[1] H. Swinburne, *Brief Treatise of Testaments and Last Wills*.

[2] J. Domat, *Civil Law in Its Natural Order*.

that these cases were very strong authorities to the present purpose, the bequest there being held notwithstanding the difference in value between things of the same sort whereas, in ours, there is no uncertainty in the value, but a plain and certain devise of £5000, which does not admit of any doubt in the valuation. And this is no way like a devise of land to A. and then of the same land to B., where some books say that they shall be joint tenants, and others that they shall be tenants in common, for that is a specific devise. But this is nothing but a bequest of a sum of money. And, where one gives £5000 to A. and £5000 to B., it is clear he intends them £5000, and not £2500 each, or where he leaves a ring to A. and one to B., it would be very strange to imagine that the several devisees should have but one ring between them and wear it by turns. But plainly in such cases, the testator's assets must be sold to satisfy the legacies. It was argued that specific legacies were never favored, the court generally inclining against them for fear a loss should thereby fall upon the other legatees, and does, therefore, as far as it can, consider them as general ones, according to Pawlett's Case, Raymond 335,[1] that it could not be presumed that the testator was ignorant of his own circumstances, or having computed his stock so exactly as he has done should mean to give the same thing to two different people, and this in a very short will, which he could scarce forget himself between one line and the other, that in Partridge and Partridge's Case,[2] it was held by the late excellent Lord Chancellor that, if one leaves £500 in stock to another and has no stock at the time of his death, the executor must lay £500 out of the assets in stock for the legatee's benefit.

Mr. *Browne* and Mr. *Hamilton* argued on the other hand for the defendant that, should the plaintiff's construction prevail, nothing at all would be left for the residuary legatee's benefit and that words making a specific legacy in one clause of the will must do the same in another. That this was a specific legacy appeared from his disposing in every other clause of his will of the exact quantity of stock and land which he had. And, if all these bequests be specific, why should not the present one, which comes in company with them, be considered as such, it being very strange to imagine his meaning to be that another £5000 should be bought, which he has nowhere declared, and it is quite uncertain for which of the two it should be bought. And had he meant two different things, he would have expressed himself two different ways. They argued that no authority has been cited to prove that, where a specific legacy is given and the fund out of which it is to arise proves deficient, the legatee shall have the benefit of the general estate to supply that defect, and, though the rule laid down in Swinburne be certainly true, that, in a bequest of a mere quantity of a thing, it must be made up by the executor in order to satisfy the legacy, yet that goes no farther than to a bequest of a quantity without any reference to a particular fund, as there is in the present case to stock, for wherever the legacy is not complete without a reference to a particular thing, there, the quantity can be no more than what the testator leaves at his death, as a sum of £100 in his scrutoire, when he has but £50 etc. Godolphin, fo. 411, n. 17.[3] And so was the resolution in Ashton and Ashton's Case, in this court, 24th November 1735 (*ante* [*blank*]), and *Digesta*, lib. 33, tit. 6, l. 5,[4] whereby it is plain that the legacy will be restrained to the quantity found in the granary upon the difference between the cases where the testator leaves some quantity and where none at all.

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[1] *Pawlett's Case* (1679), T. Raymond 335, 83 E.R. 174.

[2] *Partridge v. Partridge* (1736), Cases *tempore* Talbot 226, 25 E.R. 749, 9 Modern 269, 88 E.R. 444, 2 Eq. Cas. Abr. 552, 570, 22 E.R. 464, 480.

[3] J. Godolphin, *Orphans' Legacy* (1701), p. 411, ¶ 17.

[4] *Ashton v. Ashton* (1735), see above, Case No. 60, 3 Peere Williams 384, 24 E.R. 1111, 2 Eq. Cas. Abr. 558, 22 E.R. 470; *Digestum*, 33, 6, 5.

This case had been argued last term, when the court would take time to consider it, and, now, the Lord Chancellor delivered his opinion.

Lord Chancellor [LORD HARDWICKE]: The question is whether the two legacies of £5000 are to be considered as gifts of the same or of two different sums. If the former, the decree at the Rolls is right, if otherwise, not. The first thing to be considered is the testator's intent, which does not seem any way doubtful. He has given two legacies to two several people. And, after writing the first, he must be intended to mean the same thing to the second, having used the same words in both. And, where a man explains himself in his will, no mistake of his estate shall be presumed. Indeed, where a man devises particular lands, which he has not, it may be considered an insanity, or rather as the civilians call it, *magis derisorium quam utile legatum*. But no instance can be shown where it has been held so in legacies consisting in quantity only. And a man appearing to be sane at the making his will cannot be presumed when he wrote the last line to have so soon forgot what he had but just written in the former. Would any man who had just given £5000 to one and then changed his mind and intended that bequest equally between the first and a second legatee have used the same words to the second that he did to the first? No, certainly. But he would have mentioned it as a gift of the moiety only of that sum. Nor does this construction in the least contradict any of the rules of law, the power of disposition of one's personal estate being larger and more extensive than that over the real estate. And, here, the testator has no way described these annuities as ' his', but only so much in the one and so much in the other, which is a very material difference in the present case, as appears from *Digesta*, lib. 32, tit. *De Legatis et Fideicommissis*, l. 71, and 2 Domat 159. It was said indeed that the words here are as strict as if he had said ' my annuities', the will beginning with these words ' my estate'. But certainly it is not so, there being many authorities in the civil law that such words as are used here do amount to a direction to the executor to buy so much for the legatee as is wanting at the testator's death, as Swinburne, p. 7, s. 24; Domat, lib. 4, tit. 2, s. 3, n. 18, 19, 20, 21, 22, and Mynsingerus upon Justinian's *Institutiones*, lib. 2, tit. 20, S.S. *Generaliter*,[1] which last is almost in terms the same as the present case. For why should not the same rules hold in cases of stocks as do by the civil law in cases of money since they are every way as changeable as money? Indeed, a defect of assets to make good and satisfy all the legacies might give the case another consideration. But it plainly appears that there are assets to satisfy them all. And had he given £5000 South Sea stock to A., having none at the time, by the authorities before cited, the rest of his personal estate must have been laid out in the purchase of such. And why shall it not be so here? It was endeavored to make a specific legacy of this, which cannot be, a specific legacy being a thing distinct from any other, as one's gray horse etc. And, if such be given doubly to A. and to B., it must go between them (unless the latter words appear to be a revocation of the former) because it is such a thing as is not capable of being purchased, being an individual.

But to say this of the present case is to beg the question, which by what I have said appears not to be confined by the testator to the particular £5000 he then had, but may as well be satisfied by any other £5000 stock, and consequently no specific legacy in this sense. There is indeed another sort of specific legacy (though not properly so called) consisting as the present case does only in quantity or measure and which may be made up by another quantity or measure of the same thing. And that stocks having been considered in this last light is plain from Partridge and Partridge's Case heard by the Lord Talbot, which is an express authority that, had the testator had no stock at all, then, the executor must have purchased it for the legatee's benefit. It was objected that, having given the other legacies in exactly the same quantity as he was actually possessed of, he must have intended this bequest equally between

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[1] H. Swinburne, *Brief Treatise of Testaments and Last Wills*; J. Domat, *Civil Law in Its Natural Order*; J. Mynsinger von Frundeck, *Apotelesma*.

the two legatees. But that objection turns the other way, for he who was so well apprised of every part of his estate could never mistake so widely as this construction would make him do.

It was also said that this was like giving such a sum in such a chest, which confines it to the particular place, being annexed to the body of the devise itself, and that, therefore, the legatee must take what he finds there. But that is not the case here, stock being a particular thing, which cannot be anywhere else but where it is, whereas a sum of money may be anywhere else as well, as in a scrutoire or chest. The objection of the surplus for the residuary legatee being but small is not material in our law, which chiefly considers the particular legatees and looks upon the devise of the residuum only as a sweeping clause. It is indeed otherwise by the Roman law, but that is because the *haeres institutus* is considered thereby in the same light as we do an heir at law, sitting in the place of his ancestor.

But before I conclude, I must observe that, notwithstanding all I have said, there are cases where a devise of stock is not to be considered merely as a pecuniary legacy, as I am doing the present devise, but it is to be taken for a specific one, as was very rightly done by the Lord Talbot, in Ashton and Ashton's Case, with which resolution I perfectly agree. And this I say to prevent too large inferences which might be made. But, as this case is circumstanced, I am of opinion that each of the two legatees is entitled to have a several sum of £5000 in South Sea stock.

And so he reversed the decree and directed that the £5000 stock should be equally divided between the two legatees with the dividends accrued thereon since the testator's death, and then another £5000 stock to be purchased and be divided equally between them.

[Other reports of this case: Lincoln's Inn MS. Misc. 107, f. 190, Lincoln's Inn MS. Misc. 53, p. 2, Lincoln's Inn MS. Misc. 384, pp. 306, 462, 1 Atkyns 414, 26 E.R. 262, West *tempore* Hardwicke 470, 25 E.R. 1037, 2 Eq. Cas. Abr. 552, 22 E.R. 464.]

93

Hall v. Terry

(Ch. 1738)

Where a sum of money is charged in a will upon land and the legatee dies before the time at which it is payable, the legacy lapses.

8 November.

The testator, Michael Terry, by will, gave his moiety of certain lands in Hampshire subject to his wife's jointure, to his nephew, Stephen Terry, and his heirs, so as he should within twelve months after the lands came to him pay several sums of money to several persons in his will named.

And then the will goes on thus, ' And I do hereby will and devise the said premises shall be chargeable with the said several sums accordingly'. Then, in the close of his will, he gives all the rest and residue of his personal estate (his debts and legacies first being paid) to the said Stephen and to Thomas Terry. And he makes them executors. One of the persons to whom a legacy of £100 was bequeathed died after the testator, but before the wife. And the plaintiff, as her representative, brought her bill against Stephen and Thomas Terry for the payment of this legacy.

The question was whether this legacy was to sink for the benefit of the devisee or whether it should go to the representative of the legatee, she dying in the wife's lifetime. And assets of the testator were admitted on all sides.

Mr. *Chute*, Mr. *Fazakerley*, and Mr. *Henley* argued for the plaintiffs. And they cited the cases of King v. Withers (*ante* [*blank*]), heard by the late excellent Lord Chancellor, and

which was afterwards affirmed in the House of Lords, and that of Wilson v. Spencer (*ante* [*blank*]), before the Lord King, and that of Whalley v. Cox, at the Rolls,[1] in all which, the legatees or persons to whom the money was payable died before the time of payment came and yet the money was decreed to be raised. They also insisted in the present case that the condition was annexed only to the time of payment and not to the legacy itself and that, the personal estate being charged with the payment of these legacies, there were two funds out of which they might arise and, therefore, though it should not be a good charge on the real estate, yet it might well be raised out of the personal estate, the defendant having admitted assets, according to a Case of Innocent v. Taylor, in a book called Finch's Reports.[2] And they urged the Case of Buckley v. Stanlake, heard by the Lord Macclesfield, in 1720 (*ante* [*blank*]),[3] where a man seised of a rectory devised it to his wife for life and, after her death, to his daughter and her heirs and, if his daughter should die unmarried, then, to his daughter and her heirs chargeable with two legacies of £100 each to two strangers, who both died before the daughter, then died the daughter, an infant and unmarried; the wife devised it to trustees for performance of her husband's will and, upon a bill brought, it was held that the representatives of the two legatees were well entitled to the legacies, though both the legatees died before the daughter upon whose death without marriage the rectory was devised to the wife chargeable with their legacies.

Mr. Attorney General [*Ryder*] and Mr. *Browne* argued on the other hand for the defendants that here was no legacy, but only a charge upon the real estate in the nature of a condition, that in the Case of King v. Withers, the person to be provided for was married and had attained the age of twenty-one and so the interest vested before the contingency happened. And they cited the Case of Bright v. Lawton or Norton, heard by Lord Talbot, and those of Yates v. Phettiplace and Carter v. Bletsoe, 2 Vernon 416, 617,[4] as authorities in point that this sum should not be raised out of the real estate, but should sink for the devisee's benefit.

Lord Chancellor [LORD HARDWICKE]: There have been various determinations in cases of this nature which are not easily reconcilable to each other, being grounded upon very minute circumstances laid hold on to warrant them, which, if thoroughly considered, would not perhaps appear sufficient reasons for those judgments. But the general rule of the court seems now to be that, where a sum of money is charged upon land and the legatee dies before the time at which it is payable, it shall sink in the estate for the benefit of the heir or devisee. This was

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[1] *King v. Withers* (1735), see above, Case No. 50, Gilbert Rep. 26, 25 E.R. 19, 3 Peere Williams 414, 24 E.R. 1125, Precedents in Chancery 348, 24 E.R. 163, 1 Eq. Cas. Abr. 112, 21 E.R. 920, 2 Eq. Cas. Abr. 656, 22 E.R. 551, 3 Brown P.C. 135, 1 E.R. 1226; *Wilson v. Spencer* (1733), above, Case No. 12; *Whalley v. Cox* (1737), 2 Eq. Cas. Abr. 549, 22 E.R. 462.

[2] *Innocent v. Tayler* (1673), Reports *tempore* Finch 112, 23 E.R. 61.

[3] *Buckley v. Stanlake* (1720), Chan. Cases *tempore* Geo. I, 650.

[4] *Yates v. Phettiplace* (1700), 2 Vernon 416, 23 E.R. 868, also 12 Modern 276, 88 E.R. 1319, Precedents in Chancery 140, 24 E.R. 67, 2 Freeman 243, 22 E.R. 1185, 1 Lord Raymond 508, 91 E.R. 1239, 2 Eq. Cas. Abr. 541, 559, 653, 654, 22 E.R. 456, 471, 548, 550; *Carter v. Bletsoe* (1708), 2 Vernon 617, 23 E.R. 1005, also Precedents in Chancery 267, 24 E.R. 129, Gilbert Rep. 11, 25 E.R. 9, 2 Eq. Cas. Abr. 540, 22 E.R. 455.

first settled in the Case of Lady Poulet v. Lord Poulet, 2 Ventris 366, and 1 Vernon 204, 321.[1] Several distinctions, indeed, have been made to bring the present case out of that general rule.

The first is that this sum is charged as well on the personal estate as the real estate. But I do not think that this payment affects the personal estate, for the residue of that is given to Stephen and Thomas, debts and legacies being first paid. Now, this is no legacy, nor is there any bequest of it as such, but there are several others in the will that may properly answer that description and are payable out of the personal estate, whereas the sum in question is wholly charged on the real estate. And I should have been of that opinion in case the question had been between Stephen and Thomas, whether Thomas's share of the personal estate should bear part of the burden or not. But even supposing this a charge upon both estates, it shall so far partake of the realty as to sink in the land upon the death of the party according to the authorities of Yates v. Phettiplace and the Duke of Chandois v. Talbot.[2]

The next thing that was urged for taking this case out of the general rules was that, here, it is only a postponing the time of payment and no way annexing it to the substance of the legacy. But this distinction does not hold in the case of charges upon land, and even if it did, I do not think it would affect the present question, for here is no gift, but, by the words 'so as he pay' etc. and by the subsequent words 'and I will the premises shall be chargeable accordingly', which plainly refer to the former clause, so that here is no original gift, and a time afterwards appointed for payment, but the whole is no more than a direction that it shall be paid. And had it been to arise wholly out of the personal estate, I think that, even in that case, it had not been transmissible, the time being annexed to the substance of the gift.

The third objection was that the reason of appointing the time of payment arises only from the nature of the estate chargeable with such payment and not from the nature of the bequest itself, which was intended to vest immediately upon the testator's death. But should I lay any stress on this objection, I should overthrow many cases that have been settled, since, by all the late resolutions, it is determined that, wherever a sum of money is charged on lands payable at a future day and the person dies before the time of payment, that shall sink in the land and not go to the representative of the person so dying.

Now, I come to the authorities cited for the plaintiff. In the Case of King v. Withers, according to any memory, the ground of the judgment was that there were only two things requisite to vest the right, *viz*. the attaining of twenty-one and marriage, both which had actually happened, and, though the payment was subject to a contingency, yet it was expressly provided that the sum charged should be paid whenever that contingency should happen. In that of Wilson v. Spencer, the legacy was absolutely vested, only the testator gave a year for the payment of it. And the circumstances of that of Whalley v. Cox are not sufficiently agreed upon for me to ground any determination upon it. As to that of Buckley v. Stanlake, there was an express devise of the wife to the use of the husband's will, which induced the court to make a more equitable construction in favor of his bequests. And that of Innocent v. Taylor is of no authority, the book from whence it is cited not containing the Lord Nottingham's own reports. I agree, indeed, that there are several cases about the time that this of Innocent v. Taylor is said to have been decreed, which go in favor of the doctrine laid down for the plaintiff, but being antecedent to the resolution in that of Lady v. Lord Poulet, which first settled this matter,

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[1] *Lady Poulet v. Lord Poulet* (1683), 2 Ventris 366, 86 E.R. 489, 1 Vernon 204, 321, 23 E.R. 415, 496, also 2 Freeman 93, 22 E.R. 1079, 2 Chancery Reports 286, 21 E.R. 680, 1 Eq. Cas. Abr. 267, 21 E.R. 1036, Lords' Journal, vol. 14, p. 87.

[2] *Duke of Chandos v. Talbot* (1726-1731), 2 Peere Williams 371, 601, 24 E.R. 771, 877, Select Cases *tempore* King 24, 25 E.R. 202, W. Kelynge 25, 25 E.R. 477, 2 Eq. Cas. Abr. 89, 145, 253, 449, 473, 545, 587, 730, 22 E.R. 77, 124, 215, 383, 403, 459, 494, 616.

they are of no weight with me, whereas on the other hand, that of Bright v. Norton is an authority which comes up to the present point.

Upon the whole, therefore, I am of opinion that neither the distribution endeavored to be established nor the authorities cited for the plaintiff are sufficient to take the present case out of the general rule and that, as this sum is given to the person in whose right the plaintiff claims, not otherwise than by the direction for payment, and as she died before the time of such payment came, it never vested in her.

And so, he dismissed the bill with costs.

[Other reports of this case: 1 Atkyns 502, 26 E.R. 317, West *tempore* Hardwicke 500, 25 E.R. 1053, 2 Eq. Cas. Abr. 550, 22 E.R. 463, C. Viner, *General Abridgment*, vol. 8, p. 383.]

94

Nugent v. Lady Gifford

(Ch. 1738)

Creditors of a decedent's estate cannot go against assets that have been alienated by the executor to a bona fide purchaser for value.

In this case, the executor was ordered to pay a bona fide debt of the testator.

13 November.

Sir Richard Bolling lent in the year 1711 the sum of £3000 upon a mortgage which he took in the names of Knight and Longueville. And, dying in 1716 possessed of a personal estate of £40,000 and upwards, he, by his will, made his son Mr. Arundell Bolling, sole executor and residuary legatee, who, having in his father's lifetime borrowed upon two bonds the sum of £1600 of Knight, after his father's death in the year 1718, assigned the trust of this mortgage to Knight as a farther security for the money due on those bonds. Mr. Arundell Bolling afterward died insolvent, having wasted the whole personal estate which came to him from his father. The bill was brought by the representative of Knight for satisfaction of the debt out of this mortgage against the Lady Gifford and Mrs. Arundell, the daughters and co-heirs of Mr. Arundell, and against the mortgagor's heir at law and also against the executor of the surviving trustee of the legal estate.

The defendants, the Lady Gifford and Mrs. Arundell insisted that, on their mother's marriage with Mr. Arundell, articles were executed whereby Sir Richard Bolling covenanted to settle £10,000 with £5,000 more, their mother's fortune, on Mr. Arundell and his wife with several remainders to the issue of that marriage and that covenant having never been performed, that Sir Richard Bolling's personal estate, which came to the hands of Mr. Arundell, was bound by it and that, there being no legal assignment of the mortgage to Knight, it still continued part of the specific assets of Sir Richard and, consequently, subject to their encumbrance, which was prior to the plaintiff's, that this covenant was a lien on Sir Richard Bolling's personal estate and that Knight, having lent his money upon a security, which he knew to be part thereof, must be considered as having notice of whatever was a charge on the security.

The plaintiff insisted that Knight had lent his money fairly without notice of such articles and that Mr. Arundell, as sole executor and residuary legatee of Sir Richard Bolling, had an absolute power over his personal estate and might dispose thereof as he thought fit and that the assignment to Knight being for a *bona fide* consideration, it ought to be looked upon here in the same light as an assignment of a legal estate would be at law.

Lord Chancellor [LORD HARDWICKE]: The defendants, the Lady Gifford and Mrs. Arundell, insist that they are creditors of Sir Richard Bolling, that the trust of the mortgage in question is part of his specific assets, and, being such, must be applied to pay his debts before

it can be applied to the payment of any debt of Mr. Arundell, who was only an executor to him, and that this assignment by the executor is not such a disposition as can take place against them, but that they may still follow the assets. Their claim arises upon their father's marriage articles, whereby Sir Richard Bolling covenanted to settle the two several sums of £10,000 and £5,000 upon Mr. Arundell and his wife with remainders to the issue of the marriage. There was no son but only two daughters, the defendants, of that marriage, who now say that they are entitled to have this money raised, although the case that has happened of their being no sons and but daughters of the marriage, be nowhere mentioned in the articles. But I am of opinion (was it necessary for me to determine it) that the defendants are well entitled to have this money raised, although this particular case be not expressly provided for, because this court will construe articles in the most liberal sense for the benefit of the issue of the marriage. But at the same time, I think the disposition that has been made by the executor a good one and that they cannot disturb it. I must take notice that there is no power of revocation in Sir Richard Bolling and his Lady and the survivor of them to revoke all the uses of these articles and limit such new ones as they thought fit, so that, although the defendants be creditors, they are so under the circumstances of being liable to a power of revocation, though that, indeed, does not appear to have been executed.

Taking them, therefore, to be creditors, the question is whether they can follow this sum of £3000 in the hands of the plaintiff so as to have the benefit of it as specific assets. And I am of opinion that they are not entitled to follow it as specific assets, but that the plaintiff has a good right to retain it as a security for his debt. There is no doubt but that, in point of law, the executor has the power of disposing of and aliening the assets and that, when he has so done, no creditor can follow them because his debt is in law no lien upon the assets, but only a demand on the executor. This court, indeed, goes farther and will follow them into the hands of others besides the executor. And, therefore, if an executor pay a legacy and leave debts unpaid, this court will not suffer the legatee to run away the assets and disappoint the payment of debts, and so in other cases of the like nature. But this does not hold in any case where the executor aliens or disposes of them for a valuable consideration, for, unless there be some fraud, this court will not control the powers of executors exercised in that manner no more than the law does. And it would be of very bad consequences if it did, for, then, no man would care to deal with executors. And this is on the highest reasons, since a purchaser cannot come here to have an account of the debt, nor has he any way to know what debts are standing out, which would put such difficulties upon purchasers as to render assets unalienable.

It was objected that, in the present case, the assets are not legal but equitable because the legal estate was in the trustees, of which Longueville being the survivor, Knight did not acquire any legal, but only an equitable, estate, and that, by the rules of this court, he took it subject to all the equity it was burdened with in the hands of the person who made the assignment. That, indeed, is the general rule of this court, but it holds only where nothing itself is charged with that equity, not where there is but a bare demand against the person of the executor. Nor does this court make any difference between the executor's power over legal and over equitable assets. And it would be very mischievous was there any, for, suppose an executor takes a trust term, he would never sell it since it would be liable in the purchaser's hands to any debts of the testator, notwithstanding any money had been paid for it, there being no difference where there is money paid and where not.

The next question was that Knight took the assignment of this trust with notice of its being part of Sir Richard Bolling's assets and, therefore, knew it was liable to his debts. But this objection will hold equally in all other cases of purchases from executors where the purchaser derives his title from him.

The next thing that was objected was that here was no consideration of money paid by Knight, but only of debts due before, which were contracted in the life of Sir Richard Bolling, and that, therefore, this was a *devastavit*, to which Knight was party and which he knew to be so. But I do not find that this court has laid it down for a rule that, if an executor sells for

money or debts due from himself that this shall affect the security in the hands of the assignee, for, suppose, here, there had been money paid down. Might not that money have been misapplied? Nay, he might have paid these very debts with it. But, if the transaction be a fair one, I do not see where is the difference, since money that is *bona fide* due is as good a consideration as money actually paid down. The two authorities that were cited to support the defendants' pretensions are, first, that of Crane v. Drake, 2 Vernon 616,[1] for which I have looked into the Register's book and thereby the ground of that case appears to have been the notice which the purchaser had of the plaintiff's debt and was admitted by him in his answer. Now, apply that to the words of the Lord Cowper's resolution, where he puts it on the contrivance to defeat the plaintiff of his debt, and it makes a strong case that, where debts are standing out and a person has notice of such debt and, then, discounts his own debt due by the executor, such a transaction is a fraud. But that differs greatly from our case, where there is not even a suggestion that Knight knew of Sir Richard Bolling's having any debts whatsoever, and the clause read out of the Lady Gifford's answer goes a great way to show the contrary, for she says that Sir Richard Bolling left a personal estate of £40,000 value, which her father wasted. And, if so much was left, it rather argues that there were no debts, than it does notice of this debt, which arose by a marriage settlement amongst themselves in private, so that this Case of Crane v. Drake does no way come up to the present one, being singly founded on the notice from which the Lord Cowper inferred a collusion and grounded his decree thereupon.

The next authority that was relied on was that of Paget v. Hoskins, Precedents in Chancery 431,[2] which was a very clear case, for there was no alienation of any particular chattel to a purchaser for a valuable consideration, but only the wife's fortune computed at £6,000, and taken with the plainest notice of its being subject to an account, which no way resembles the case of a purchaser of a term or other distinct thing for the use of the purchaser, so that there was the plainest and highest equity in the world.

I, therefore, do not think these cases come up to the present one. And I am of opinion, upon the whole, that this is a good assignment and that the plaintiff is entitled to the benefit of it. But here being three bonds, the last of which was entered into in the year 1724 for the sum of £400, which was long after the assignment and not appearing to be taken in exchange of either of the old ones, I cannot decree satisfaction for more than the other two, and, as to that one, he must come in as a creditor on Mr. Arundell's assets.

And so he decreed the two bonds to be paid out of the mortgage money.

[Other report of this case: 1 Atkyns 463, 26 E.R. 294, West *tempore* Hardwicke 494, 25 E.R. 1050.]

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[1] *Crane v. Drake* (1708), 2 Vernon 616, 23 E.R. 1004, also 1 Eq. Cas. Abr. 240, 21 E.R. 1018, Chan. Cases *tempore* Anne 148.

[2] *Paget v. Hoskins* (1715), Precedents in Chancery 431, 24 E.R. 193, also Gilbert Rep. 111, 25 E.R. 78, 2 Eq. Cas. Abr. 684, 22 E.R. 574, Chan. Cases *tempore* Geo. I, 170.

95

Boycot v. Cotton

(Ch. 1738)

An estate can be charged with interest payments for portions before the time that the portions become payable.

A contingent legacy lapses when the legatee dies before the contingency happens.

24 November.

Sir Robert Cotton, in the year 1687, covenanted to levy a fine to the use of himself for life, then to his wife for life, remainder to Thomas, his second son, for life, remainder to trustees to preserve contingent remainders, remainder to the first and other sons of Thomas in tail, remainder to the other sons of Sir Robert in like manner with a proviso that it should be lawful for Thomas Cotton and the other tenants in possession after the death of Sir Robert Cotton and his wife, by deed or will, to limit any part thereof not exceeding £500 *per annum* for a jointure, and another proviso for Thomas Cotton and other tenants in possession to charge any part of the lands not exceeding £500 *per annum* with portions for younger children, with a power of revocation to Sir Robert.

Thomas, who afterwards became the eldest son, married in 1690, and, in 1714, he made a jointure of £500 *per annum* to his wife and executed the second power by charging all the lands not in jointure and the reversion of those in jointure (with an exemption restraining the whole to £500 *per annum*) with £675 to each of his younger children to be paid to such of them as should have attained the age of twenty-one at his death or within one year after and, if he had not attained such age, to the sons at twenty-one and to the daughters at 18 or marriage ' with interest at five percent to commence after [his] decease'.

Sir Thomas died leaving his wife and several younger children. Mrs. Vere Cotton, one of the daughters, died at 16, unmarried, and Mr. John Cotton, one of the younger sons, died at the age of 27.

The bill was brought by the younger children against their elder brother for their several portions and likewise for their distributive share of their deceased brother and sister's portions. The main question was whether Vere's portion should be raised or whether it should sink for the benefit of the heir.

Lord Chancellor [LORD HARDWICKE]: Three points have been made in this case. The first is whether by the power contained in the deed of 1687, Sir Thomas Cotton could charge the estate with interest for these portions before the time they became payable. The second is whether he has charged it so as that it shall become annually due or whether it shall accumulate and be paid at the same time as the principal. The last is whether the portion of Mrs. Vere Cotton, the daughter, be transmissible to her representatives.

As to the first, I am of opinion that Sir Thomas Cotton could well charge the estate with interest for these portions upon the authority of Lord Kilmurry and Gery's Case, Abr. Eq. Ca. 341,[1] which was not of a portion but only of a charge on land by way of security, and where there is a general power for raising portions. It seems in the nature of it to include that of giving interest, as where a father gives a legacy to a child, though he makes it not payable until twenty-one, or perhaps he gives it not until then, yet, where the child has no other provision, this court has gone so far as to give interest, even before the vesting, and, in the present case,

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[1] *Lord Kilmurry v. Geery* (1713), 1 Eq. Cas. Abr. 341, 21 E.R. 1088, also 2 Salkeld 538, 91 E.R. 456, 2 Eq. Cas. Abr. 665, 22 E.R. 559, Chan. Cases *tempore* Anne 584.

there was no other provision of maintenance. It was objected that this was but a power to charge the portions on a reversion, which this court has always avoided doing. As to that, it is true that this is a charge on the reversion because, the estate being but £600 *per annum*, there is a jointure of £500 upon it, but it does not appear to be so much the parties' intent to preserve the estate as to provide for the children, there being in this power no time of payment appointed nor no particular sum limited.

As to the second point, I think the interest becomes due annually. The words import it, being expressly 'to pay *per annum*'. Interest is given as a satisfaction for postponing the payment. And no precedent has been shown where interest was accumulated in the like case, nor is there any reason for such a construction here, for Sir Thomas having a power to charge with interest, he must be intended to give it in lieu of maintenance.

Upon the third point, I am of opinion that the portion of Vere, by her dying before 18 or marriage, must sink into the estate. The general rule in all such cases has been that portions charged upon land shall in the case of the party's death sink into the land, whether they be given with or without maintenance, by deed or by will, except in that of Jackson v. Farrand, 2 Vernon 424,[1] which is an anomalous case. It was said that these portions being payable with interest from the father's death, it must be considered as *debitum in praesenti*, and there was cited the Case of Cave v. Cave, 2 Vernon 508,[2] which, as taken from the Register's book, is of no authority at all, the defendant having in his answer admitted that the £4000 ought to be raised and they being expressly devised over upon the death of Charles under age. But that of Bruen v. Bruen, 2 Vernon 439, and pretty near the same as in the Register's book, but exactly so in Precedents in Chancery 195,[3] is contrary to the *obiter* opinion in Cave v. Cave and resembles very much the present one, for, there, the portion was in strictness payable upon the father's death, but the child dying at five years old before she could want it, it was decreed to sink in the land. That of Tournay v. Tournay, Precedents in Chancery 290,[4] is exactly the same as the present one. It is true the decree is not entered, but the minute book warrants the report of it as a case in point and falling within the reason of that of Bruen v. Bruen.

As to the interest of this lady's portion, it is the same as giving maintenance. And, therefore, the interest grown due in her lifetime must be raised, but the principal must sink for the benefit of the heir.

[Other reports of this case: 1 Atkyns 552, 26 E.R. 347, West *tempore* Hardwicke 520, 25 E.R. 1064.]

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[1] *Jackson v. Farrand* (1701), 2 Vernon 424, 23 E.R. 871, also Precedents in Chancery 109, 24 E.R. 53, 1 Eq. Cas. Abr. 268, 21 E.R. 1037.

[2] *Cave v. Cave* (1705), 2 Vernon 508, 23 E.R. 925, also 1 Eq. Cas. Abr. 275, 21 E.R. 1042.

[3] *Bruen v. Bruen* (1702), 2 Vernon 439, 23 E.R. 881, Precedents in Chancery 195, 24 E.R. 94, also 1 Eq. Cas. Abr. 267, 21 E.R. 1036, Chan. Cases *tempore* Anne 2.

[4] *Tournay v. Tournay* (1709), Precedents in Chancery 290, 24 E.R. 139, also 2 Eq. Cas. Abr. 654, 22 E.R. 550, Chan. Cases *tempore* Anne 211.

96

Hopkins v. Hopkins
(Part 2)

(Ch. 1738)

12 March. (*Ante* 76 in first volume.[1])

Since the former decree in this cause, John Hopkins, the testator's heir at law, had another son born the 18th June 1736, who died the 29 December following, and, upon his death, John Dare, the eldest son of Anne Dare, having taken the name and arms of Hopkins and attained the age of twenty-one, pursuant to the will, brought his bill against John Hopkins, the heir at law, and his five daughters and against James Hopkins, the surviving executor and trustee, and also against the other remainderman, praying a conveyance to himself of the real estate and that the personal one might be invested in a purchase of lands and conveyed in the same manner.

It was argued for him that, upon the birth of William, the son of John Hopkins, the estate vested in him and all the subsequent limitations thereby became remainders, that the first vested remainder was to the plaintiff, who, upon William's death, became thereby entitled to an immediate conveyance, the intermediate contingent remainders being void for want of an estate of freehold to support them, and that, by the birth of William, the case was the same as if Samuel had survived the testator and then died.

Lord Chancellor [LORD HARDWICKE]: It seems to have been agreed on all hands at the time of the former hearings, that, if Samuel, the son of the now defendant, John Hopkins, had survived the testator, he had taken an estate in possession and that the subsequent limitations must have been construed to be contingent remainders. But it was then insisted that, by Samuel's death in the testator's lifetime, the case was to be considered as if he had never been *in esse*, and the several limitations might take effect as executory devises, of which opinion was the late Master of the Rolls [Jekyll] and was also the Lord Talbot when it was reheard by him, there being no material variation in the decree nor any direction concerning any conveyance of the estate, but only a general liberty given to resort to the court for farther direction, as there should be occasion. It is upon this reservation that the plaintiff found himself by reason of the contingency of the birth and death of William, the second son of John Hopkins, praying by his bill to have a settlement made by the trustees pursuant to the will and that the first limitation of the estate may be to him in possession and also an account of the profits since William's death. What the quality of that estate shall be is a consideration which may be postponed until it be seen whether or no he be entitled to an immediate conveyance, as to which, it has been insisted that an estate of freehold being once vested in William, all the subsequent estates must take effect as remainders, either contingent or vested, and that all such remainders as are still in contingency and did not vest on the determination of the estate which came to William are void, and the first remainder actually vested being limited to the plaintiff, he is entitled to an immediate estate in possession.

It has been insisted, on the other hand, first, that there is no necessity to consider the limitations to the sons of the daughters of John Hopkins as contingent remainders, but that they may all subsist as separate and distinct executory devises; secondly, admitting these subsequent limitations to be remainders, that the legal estate devised by the trustees is sufficient to support these contingent remainders; thirdly, that the determinable freehold, which descends to the heir at law until the contingency happens, is sufficient to support them, as to which, I am of opinion

[1] See above, Case No. 34.

that had these been remainders of a legal estate or, if no use or trust executed by the Statute,[1] they had been void and could not have been supported. I likewise think that these contingent limitations cannot be supported as separate and distinct executory devises, which was the first thing insisted on for the defendants, nor does the Case of Higgins v. Derby, 1 Salkeld 156,[2] where the trust of a term was declared to a man for life, remainder to his wife for life, remainder to the first son of their bodies and the heirs male of his body, and so on to the other sons, remainder to the daughters, the husband and wife died leaving only a daughter, and it was said to have been held by the Lord Cowper that, there being no son, the remainder to the daughter was good, comes not up to the present question, for, there, the estate never vested as there was no son, whereas, in our case, it vested in William, the subsequent limitations must, according to Purefoy and Rogers' Case, 2 Saunders 380,[3] and several others, take effect as contingent remainders, and, although the first estate in William, who was not born at the testator's death, be construed an executory devise, yet are not the subsequent limitations to be taken as separate and distinct executory devises, but are parts of the same devise.

The case, therefore, chiefly subsists on the second point insisted upon for the defendant, *viz*. that the estate in the trustees is sufficient to support the contingent remainders, whereas it is not necessary that all the intermediate limitations between the estate vested in William and that limited to the plaintiff be good, but it will be sufficient to exclude the plaintiff if some of them only are so. And as to this point, I am of opinion that the legal estate devised to the trustees is sufficient to support some of those contingent remainders (for as to others of them, such as the limitations to the sons of the unborn daughters of John Hopkins, they are certainly not good) and I am induced to think so because this opinion is agreeable to the testator's plain intention, and that intention is no way contrary to the rules of law or principles of a court of equity. The plaintiff comes into this court in a very unfavorable light, claiming under a will and endeavoring to set aside a great part of it. This has been endeavored to be retorted upon the defendant, the heir at law, by saying that he takes the profits until the contingency happens, though the testator's intent appears plainly to the contrary. But the heir stands in a very different light from the devisee, for he claims not the profits undisposed of by the will, but paramount to it, and by the disposition of law. I confess I believe that, could the testator have framed his will so as that no person should take the intermediate profits, he would have done it, but, since they are not disposed of, the heir takes them, not by virtue of the will, but of his legal right. The words of the devise to the trustees have been properly relied upon by the defendants' counsel to show the testator's intent of giving them such an estate as should be sufficient to support all the particular estates devised by the will, and the legal estate executed in them is a trust, which a court of equity will support, if it can, for the serving all the particular purposes mentioned in the will, provided these purposes be not contrary to the rules of law or equity.

Those that have been insisted on for the plaintiff are that every contingent remainder must either vest during the continuance of the particular estate which is to support it or *eo instante* that it determines, according to Archer's Case, 1 Coke 66b, and that, ever since the

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[1] Stat. 27 Hen. VIII, c. 10 (*SR*, III, 539-542).

[2] *Higgins v. Derby* (1707), 1 Salkeld 156, 91 E.R. 145, also *sub nom. Higgins v. Dowler*, 2 Vernon 600, 23 E.R. 992, 1 Peere Williams 98, 24 E.R. 311, Chan. Cases *tempore* Anne 110.

[3] *Purefoy v. Rogers* (1670), 2 Williams Saunders 380, 85 E.R. 1181, also 2 Levinz 39, 83 E.R. 443, 3 Keble 11, 84 E.R. 566, 1 Eq. Cas. Abr. 189, 21 E.R. 980.

determination of Chudleigh's Case,[1] the only method of preserving contingent remainders has been to limit a particular estate to trustees for that purpose. But I think, first, that the rule of law does not hold in the present case, where the whole legal estate is executed in the trustees and the *cestui que trust* has nothing but a mere equitable estate. Secondly, the supporting of such of these remainders as are not too remote will not affect any legal power of alienations or tend to a perpetuity. Thirdly, it would have been vain and nugatory to have limited a particular estate to the trustees for the supporting of these remainders. As to the first, the reason of the rule of law is to prevent the freehold's being in abeyance and that there may be one to perform services to the lord and against whom a *praecipe* may be bought.

But this will not hold in the present case, where the legal estate is in the trustee who may perform the services and against whom a *praecipe* may be brought. And, as there is a sufficient person to answer legal demands, so is there likewise as to equitable ones, it being the settled rule of this court that, where there are any demands made against the estate, if the trustee and the first person who has a vested estate of inheritance are brought before the court, the decree will be binding on all persons. And even at law before the Statute of Uses,[2] it was not necessary that there should be an estate of freehold in the *cestui que trust* to support the contingent uses, for we are told by Justice Gawdy in Chudleigh's Case, 1 Coke 135a, that, if, before the Statute, a feoffment had been made to the use of one for years and afterwards to the use of the right heirs of J.S., this limitation had been good because the feoffees remained tenants of the freehold.

Secondly, the supporting of these remainders will not affect any rightful power of alienation in the *cestui que trust*. After the Statute of Uses, the necessity of making provisions for families induced even the courts of law to admit of such limitations by way of springing uses (to which executory devises succeeded) as were not originally good of a common law fee. But they still adhered to the old rule that there could be no limitation of a use or trust upon a use. And, therefore, if A. conveyed lands to B. to the use of B. in trust for or to the use of C., they held that C. had nothing in the land, the use being once executed in B., but courts of equity interposed and said that B. was obliged in conscience as a trustee for C. to render him an account and, therefore, gave him a remedy by subpoena, which they could not have done, and supported equitable uses and trusts, if they had not (to avoid a perpetuity) given the *cestui que trust* the same power of alienation as persons seised of the like legal estates would have had. And, therefore, the fine of a *cestui que trust* of an equitable estate tail shall bar his issue, and his recovery shall bar the remainders, those being now deemed legal alienations and common assurances. Nay, some have held that a bargain and sale by a tenant in tail in equity shall have the same effect as a fine and, therefore, no perpetuity can ensue or legal right of alienation be taken away by supporting these estates in equity. But this is applicable only to rightful alienations, not to vicious ones, and, therefore, no equitable estate can be gained by disseisin, abatement, intrusion, or bare pernancy of the profits. Nor have courts of equity ever supported the destruction of contingent remainders, but they have endeavored to support them where there has been no remedy at law. And so, in the case of mergers, they have revived terms for raising younger children's portions for the sake of creditors or other equitable

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[1] *Baldwin v. Smith* (1597), 1 Coke Rep. 63, 76 E.R. 139, also Croke Eliz. 453, 78 E.R. 692, 2 Anderson 37, 123 E.R. 533; *Dillon v. Freine* (1589-1595), 1 Coke Rep. 113, 135, 76 E.R. 261, 305, also 1 Anderson 309, 123 E.R. 489, Popham 70, 79 E.R. 1184.

[2] Stat. 27 Hen. VIII, c. 10 (*SR*, III, 539-542).

purposes, notwithstanding the terms were merged in law, as in Powell and Morgan's Case, 2 Vernon 90.[1]

Thirdly, it would have been vain and nugatory to have limited an estate to the trustees to preserve these contingent remainders, for they could by such a limitation have taken nothing, either in law or equity. In law, the use being executed in the trustees, this farther limitation would have been a use upon a use, which the rules of law do not admit of, and, in equity, they could have taken no more than they had before, they being by the first devise seised of an estate in fee simple. Indeed, it has been objected that the legal estate in the trustees and the equitable estate in the person to take under the contingent limitations are of different natures, and the one cannot support the other. But I think this legal estate in the trustees is sufficient in a court of equity to support all the equitable trusts afterwards limited. It would have been otherwise indeed if these contingent remainders had been uses executed by the Statute, for, there, the legal estate being executed in the *cestui que use*, it must either have vested immediately or gone over immediately as a common law fee, according to Chudleigh's Case. And, if it once goes over, it can never come back. But these being equitable trusts only, there is no reasoning from the one to the other. The testator might have made these limitations good by using proper words for that purpose. And, where such words are wanting and the testator's intent is clear, this court will supply that defect, as was done in Sir John Hobart and Countess of Suffolk's Case, upon Serjeant Maynard's will, heard by Lord Cowper, 19th December 1709, when he declared that, in matters executory, where a future conveyance was required and the words of the will were improper or informal, this court would order a conveyance to be made in a proper and formal manner to answer the testator's intent, and, therefore, in that case, he interposed between the estate for life and the remainders an estate to trustees to preserve contingent remainders, though there was no such direction in the will, which order was affirmed upon an appeal to the House of Lords.[2] So in that of Humerston v. Humerston, 2 Vernon 737, Precedents in Chancery 454,[3] heard by him 25 January 1716 and entered in the Register's book of that year, lib. A, p. 529, he declared that, though an attempt of making a succession of estates for life was vain, yet a strict settlement ought to be made on all persons living at the time, and, if any of them had issue living, that their names should be inserted and they made tenants for life, which necessarily implies that there must be trustees to preserve the contingent remainders of such as were not in being at the time. And in that of Sandys v. Sir Basil Dixwell,[4] heard before me the 8th December last, where an estate was given to trustees in trust to convey the same for the separate use of a married woman during life, so as her husband should not intermeddle therewith, and, after her decease, in trust for the heirs of her body, I was of opinion that no estate tail ought to be conveyed to the woman, but only an estate

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[1] *Powell v. Morgan* (1688), 2 Vernon 90, 23 E.R. 668, also 1 Eq. Cas. Abr. 269, 21 E.R. 1038.

[2] *Hobart v. Countess of Suffolk* (1709), 2 Vernon 644, 23 E.R. 1020, 1 Eq. Cas. Abr. 272, 21 E.R. 1040, Chan. Cases *tempore* Anne 207, *sub nom. Earl of Stamford v. Hobart* (1710), 3 Brown P.C. 31, 1 E.R. 1157, Hardwicke 22, note also *In re Maynard's Will* (1691), Dodd 101.

[3] *Humberston v. Humberston* (1716), 2 Vernon 737, 23 E.R. 1081, Precedents in Chancery 455, 24 E.R. 203, also Gilbert Rep. 128, 25 E.R. 89, 1 Peere Williams 332, 24 E.R. 412, 1 Eq. Cas. Abr. 207, 21 E.R. 993, 2 Eq. Cas. Abr. 457, 22 E.R. 389.

[4] *Roberts v. Dixwell* (1738), West *tempore* Hardwicke 536, 25 E.R. 1072, 1 Atkyns 607, 26 E.R. 381, 2 Eq. Cas. Abr. 668, 22 E.R. 561.

for life with a remainder to the children by way of purchase. But this being a determination of my own, it has less weight with me than the other cases.

A distinction was taken by the plaintiff's counsel that all these resolutions were in cases of executory trusts, whereas, in the present case, the trusts are executed by the will. But I believe that this distinction will, in the greatest part of the cases that come before the court, appear to be almost without any difference, for it seems to me that all trusts not executed by the Statute are executory and that this court must, at some time or other, devise a conveyance to be made. However, I do not say that there are no cases where this distinction holds. But taking it for granted that it does, I think the present case plainly is executory and that there must be a conveyance at some time or other, for, by the proviso for allowing maintenance and laying up the surplus profits until a person capable of taking shall attain the age of twenty-one years, it appears that the trustees are to be in possession until that time, but, then, such person is by the express words of the will to be in possession and will then be in possession and will then be entitled to a conveyance. So in the devise of £300 *per annum* to James Hopkins, it is said 'until some such person shall attain twenty-one and be in possession'. And the devise of the personal estate to the trustees is upon an express trust to be laid out in land and 'to be conveyed' to the same uses as the real estate.

As to the general point, whether the estate in the trustees be sufficient to support these contingent remainders, I think the Case of Chapman v. Blisset, heard by the Lord Talbot, 22 November 1735 (*ante* [*blank*])[1] and afterwards reheard by me, an express authority that it is, we being both of the opinion in that case that the limitation to the children of Joseph was only of a trust and was well supported by the precedent devise to the trustees, the Lord Talbot, when it was before him, saying that, though the devise was in words *de praesenti*, yet should it be taken in a future sense to preserve the testator's intent, who designed a benefit to such children of Joseph as should be thereafter born, he knowing Joseph himself to be very young at the time and, consequently, very improbable he should have any, and, it being objected to the limitations operating as an executory devise that, by Isaac's having a son born, the estate vested, and the subsequent limitation became a remainder and was void because no child of Joseph was in being at the death of Isaac. He answered that, in cases of trusts, the rule was not so strict here as at law, for the whole estate being in the trustees, the inconvenience of the freehold's being in abeyance and of the want of a tenant to the *praecipe* was thereby prevented and that, therefore, the continuance of the estate in the trustees was sufficient to support the contingent remainders of the trust and the limitation was good, either as an executory devise or as a contingent remainder, of which opinion I also was when it came before me.

As I am of this opinion upon this point of the trust, it is not necessary for me to give any opinion as to the point made for the defendants, *viz*. whether the freehold descended to the heir at law is not sufficient to preserve the contingent remainders in this case. But as, during the argument, I seemed to think it would not, perhaps it may not be improper just to mention the principal objection and what may be said to obviate it. The objection is this, that, wherever an estate of freehold is to support a remainder, it must be created at the same time, whereas, here, the freehold comes to the heir by operation of law, and the remainder is limited by the will, so they cannot unite in such a manner as to make the one support the other. To this, it may be answered that an estate to a man for life has been construed to unite to a remainder to the heirs of his body so as to make it but one estate tail, according to the rule in Shelley's Case,[2] though

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[1] *Chapman v. Blisset* (1735), see above, Case No. 59, also West *tempore* Hardwicke 328, 25 E.R. 964, 2 Eq. Cas. Abr. 341, 703, 22 E.R. 291, 591.

[2] See *Wolfe v. Shelley* (1579-1581), 1 Coke Rep. 88, 76 E.R. 199, Moore K.B. 136, 72 E.R. 490, 1 Anderson 69, 123 E.R. 358, Jenkins 249, 145 E.R. 176, 3 Dyer 373, 73 E.R. 838.

not limited by the same conveyance, and that in Pybus and Mitford's Case, 1 Ventris 372,[1] where it was held by three judges that there was a good estate tail in the father within the rule of Shelley's Case, and fo. 378, the Lord Hale says that the estate for life arising by the operation of law is as strong as if it had been limited to him for his life and afterwards to the heirs male of his body. Now, if the estates might unite in that case, why may not the resulting trust of the freehold do so in the present one with the trust of contingent remainders so as to support it, especially if, as Lord Hale there says, 'We ought, as good expositors, to serve the party's intent where we can by any means do it, for, according to Lord Hobart, judges in the construction of deeds do no harm if they are strict in serving the party's intent without violating any law.' But as to this point of the freehold in the heir supporting the remainder, I give no opinion, as I said before, but have only mentioned these things to obviate any consequence from what I said during the argument.

It was objected against the supporting of these contingent remainders that it would have been impossible to have framed an express limitation so as to make them good. This is true as to some of them, but not as to all, for undoubtedly as to the limitations to the sons to be born of John Hopkins, or to those of his daughters born at the making of the will, they might have been good by limiting an estate to trustees to support them, and though it is farther insisted that this would be a new invented limitation and go beyond the common cases, yet it suffices that the contingencies are confined to arise during the life of a person in being.

The last objection is that, if these future limitations are to be supported and the trust of the estate is in the meantime to result to the heir at law, this would be making a new resulting trust contrary to the words and the intent of the will. But I think this no more than the common case of an implied resulting trust, which is as strong as an express one. And the Case of Carrick v. Errington,[2] heard by the Lord King in November 1726, is an authority in point to this purpose. In that case, Edward Errington, being seised in fee, by a fine and a lease and release, conveyed to Richard Ridley and Nicholas Fenwick and their heirs to the use of the grantor for life, the remainder to his first and other sons in tail, remainder to Ridley and Fenwick in fee subject to particular charges. By a separate deed, the trustees declared that the reversion in fee was conveyed to them in trust for Thomas Errington for life, remainder to Richard Soulby to preserve contingent remainders, remainder to the first and other sons of Thomas Errington in tail, remainder to William Errington for life, remainder to Soulby to preserve contingent remainders, remainder to the first and other sons of William Errington in tail, remainder to Edward Errington in fee. Edward Errington died without issue, and Thomas Errington was living, but was a papist incapable of taking by 11 & 12 Will. III.[3] The plaintiff Carrick and others were co-heirs of Edward Errington, the grantor, and William Errington, the next remainderman after Thomas and his issue, and the trustees were defendants. And upon hearing the cause, it was declared by the Lord King that, the trust for Thomas Errington being void by the Statute, the plaintiffs, the co-heirs of Edward, were entitled to the profits of the estate from his death, and he decreed an account of them and likewise that possession of the estate should be delivered to the plaintiff. The remainderman, William, appealed to the House

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[1] *Pibus v. Mitford* (1673-1674), 1 Ventris 372, 86 E.R. 239, also 3 Keble 239, 316, 338, 84 E.R. 697, 741, 754, 3 Salkeld 337, 91 E.R. 859, T. Raymond 228, 83 E.R. 119, 2 Levinz 75, 83 E.R. 456, 1 Modern 98, 121, 159, 86 E.R. 761, 780, 800, 1 Freeman 351, 369, 89 E.R. 262, 275.

[2] *Carrick v. Errington* (1726), 2 Peere Williams 361, 24 E.R. 766, 9 Modern 33, 88 E.R. 297, Mosely 9, 25 E.R. 239, 2 Eq. Cas. Abr. 161, 623, 624, 625, 22 E.R. 137, 523, 524, 525, 5 Brown P.C. 390, 2 E.R. 751.

[3] Stat. 11 Will. III, c. 4, s. 4 (*SR*, VII, 587).

of Lords, when upon hearing the cause in May 1728, it was urged in his behalf that, Edward having conveyed away his whole estate, no resulting trust could be raised by implication in favor of his heirs, especially as they were postponed by Edward, the grantor, to the particular uses and that, where an estate was limited to a person incapable of taking, the next remainder ought to take place immediately. But, notwithstanding as there might come one *in esse* capable of taking and that in the meantime the profits might descend to the heir at law, the Lord King's decree was affirmed.

If, then, what I have said be right as to the real estate, it will hold more strongly as to the personal one, that being more immediately under the direction of this court, according to the Lord King's opinion in Papillon and Voyce's Case (*ante* [*blank*])[1] that a settlement of a personal estate to be laid out in land pursuant to a will might be carried more strictly into execution in this court than in case of an immediate devise of a real estate in the same words. The consequence of all this is that the plaintiff is not entitled to any conveyance, nor to the rents which became due during the life of William Hopkins and that no conveyance can yet be made of the legal estate, but it must first be seen whether John Hopkins, or any of his daughters who were living at the time of the will shall have a son who will attain to his age of twenty-one. As, therefore, the plaintiff is not yet to take any estate, the question what quantity of estate should be conveyed to him is become immaterial at present.

And so he dismissed the bill, but without prejudice to any farther application, according to the reservation of the former decree.

[Other reports of this case: See above, Case No. 34, Harvard Law Sch. MS. 1105, p. 33, Cases *tempore* Talbot 44, 25 E.R. 653, West *tempore* Hardwicke 606, 25 E.R. 1108, 1 Atkyns 581, 26 E.R. 365, 1 Vesey Sen. 268, 27 E.R. 1024, Vesey Sen. Supp. 137, 28 E.R. 480, 2 Vesey Jun. 719, 30 E.R. 859, 2 Eq. Cas. Abr. 341, 431, 501, 22 E.R. 291, 367, 425, Jodrell 6.]

97

Stanley v. Stanley

(Ch. 1739)

Where a man dies intestate without children, his father and siblings being dead, his widow takes one half of his estate, his mother takes one fourth, and his nieces and nephews share in one fourth under the Statute of Distributions.

15 May.

Hoby Stanley, the plaintiff's uncle, died intestate and without issue, leaving a widow, the defendant Philippa Stanley, and Ann Stanley, his mother, another defendant, but no brother or sister living. The plaintiffs were children of his brother, William Stanley, deceased.

The question was whether the plaintiffs were entitled to any, and what part of the intestate's personal estate by 1 Jac. II, ch. 17,[2] the defendant Ann, the mother, insisting that the intestate's widow was entitled to one moiety and she, herself, to the other.

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[1] *Papillon v. Voyce* (1732), above, Case No. 1, also 2 Peere Williams 471, 24 E.R. 819, W. Kelyng 27, 25 E.R. 478, Fitz-Gibbons 38, 94 E.R. 643, 1 Eq. Cas. Abr. 185, 21 E.R. 977.

[2] Stat. 1 Jac. II, c. 17, s. 5 (*SR*, VI, 19).

Lord Chancellor [LORD HARDWICKE]: There are two questions in the present case. The first is whether the plaintiffs be entitled to a share with the intestate's mother, he having left a widow, and the second is whether they can come in, there being no brother or sister living to bring them within the Statute 22 & 23 Car. II, ch. 10.[1]

As to the first, it is plainly within the determination of Keilway and Keilway's Case, in 1726, by the Lord King, Eq. Ca. 189,[2] which authority has stood unimpeached, nor has there been any appeal against it since. And I am very well satisfied with the reason of that decree. That case was upon the Statute of 1 Jac. II, ch. 17, in which the clause relating to distributions says 'that, after the death of a father, if any of his children shall die intestate without wife or children in the lifetime of the mother' etc, which, as well as the Statute of Distributions, is very incorrectly penned, for according to the first description 'if any child dies intestate in the lifetime of the mother', the word 'child' means daughters as well as sons, and by the second, 'without wife or children', it can only mean sons since they alone could leave a wife. But the intention of the Statute was to take in all the children, and that is chiefly to be considered.

As the law stood upon the Statute 22 & 23 Car. II, the descending line excluded both the ascending and the collateral, but, as between these two last, when there was a father, no other could take a share with him because they must claim through him to make out their kindred and he, being the first, takes alone. So it was where there was only a mother, she being in the same degree. But the legislature saw the bad consequences of this, for a mother carrying all from her husband's children did, by a second marriage, give all her first husband's personal estate (as in the case of citizens), frequently very large, to a strange family, and this certainly would be against her first husband's intention. And, therefore, it meant to remedy it, but at the same time not to deprive the mother of everything, and, therefore, it suffered her still to come in, as a brother or sister of the intestate would do.

It has been objected that the words of the Statute 'die without wife or children' must be understood in the conjunctive 'without both'. But I think that is against the general intention which I have mentioned and I am of opinion that the meaning of the Statute is to let in the mother and collaterals for their shares as well where the intestate dies leaving a wife, as where he dies without a wife or children, according to Keilway and Keilway's Case, which was very rightly determined and ought to stand.

The second question is not within the judgment of that case, the intestate here leaving no brother nor sister, and, therefore, it is said that, here, there being no person for the mother to share with equally, there is no ground to let in a representative of a brother because none is ever admitted but where there is a person to whom those claiming in right of representation are to be made equal by claiming in the whole right. It is true that this construction has prevailed on the Statute 22 & 23 Car. II, ever since Lord Somers' time, in many cases, particularly Lord Chief Baron Bury's. That Statute, s. 5, considers that there should be some to take in their own right corresponding to those who claim by representation because, otherwise, the first provision of the Statute, that they shall come in according to the proximity of kindred, must take place. But that of Jac. II is of a different nature and lets in a different person, for it lets in every brother and sister and the representatives of them to an equal share with the mother in her lifetime, the effect of which is that, as by the Statute Car. II, if one died without a child or brothers or sisters, leaving nephews and nieces only, there being none living to take a brother's share in his own right, all stand in equal degree and take *per capita*, so by that of Jac. II, a person is introduced who takes a share originally in her own right, as a brother or sister would

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

[2] *Keilway v. Keilway* (1726), Gilbert Rep. 189, 25 E.R. 133, also 2 Strange 710, 93 E.R. 800, 2 Peere Williams 344, 24 E.R. 758, 2 Eq. Cas. Abr. 441, 442, 22 E.R. 376, Chan. Cases *tempore* Geo. I, 1157.

do, and in case a brother or sister had been living, they must all have taken *per stirpes*, as they shall do here, the mother being brought into a share in their stead. And whether the person entitled to such a share in the whole right be a mother or a brother is just the same thing. Nor is there any resorting to the s. 3, of the Statute of Car. II, because brothers and sisters cannot be in the same degree of kindred with the mother.

It is objected that, if this be true, the right of representation will go on *in infinitum*. But as the words ' their representatives' in the Statute Jac. II are general, I am of opinion that the consequence upon which the objection is founded will not follow. I think the proviso in this Statute, which is a statute of continuance of that of Car. II with enlarging clauses very common in other such acts, is to be taken as if it was incorporated or inserted in the very Statute of Car. II itself. This is the reasonable construction of such statutes and agreeable to Lord Hale's rule in 1 Ventris,[1] that, in the case of statutes *in pari materia*, they are to be construed as in one another and this of Jac. II is certainly *in pari materia*, the proviso being super-added to carry on the intention of that of Car. II. And I think that the inconvenience objected will not follow from this construction, the Statute Car. II allowing no representation beyond brothers' and sisters' children, and, by that of Jac. II, none other ought to be admitted.

I am, therefore, of opinion that this case, so far as it is governed by that of Keilway v. Keilway, ought to have the same determination. And I also think that the plaintiffs are to take *per stirpes* an equal share with the mother in right of representation.

And so he decreed the personal estate to be divided into four equal shares, two of which to go to the widow and the other two to the mother and the plaintiffs.

[Other reports of this case: See above, Case No. 85, Lincoln's Inn MS. Misc. 54, loose sheet, Lincoln's Inn MS. Misc. 384, pp. 459, 493, West *tempore* Hardwicke 135, 146, 643, 25 E.R. 859, 865, 1127, 1 Atkyns 455, 549, 26 E.R. 289, 345, Jodrell 23.]

98

Pierson v. Shore

(Ch. 1739)

Where trustees intentionally commit a forfeiture for the advancement of the beneficiary, it is not a breach of trust.

30 July.

A lease was made by a dean and chapter for three lives to the mother of A. and her heirs. The mother dies leaving A., an infant, her heir at law, and makes B. and C. her guardians and trustees, whom she empowers to lay out her personal estate in purchases of lands for the infant's benefit. During the infancy of A., one of the lives drops, whereupon the trustees, in order to the getting a new lease, commit a voluntary forfeiture, and the dean and chapter grant a new lease for three lives. The infant dies, and the heir *ex parte materna* brought his bill to be let into possession and for the rents and profits of this estate, insisting that, as this was the mother's estate, it ought to descend to the heir on the part of the mother.

Lord Chancellor [LORD HARDWICKE]: The single question is whether this lease shall go to the heir on the part of the mother or to the heir on the part of the father. And I am of opinion that it shall go to the heir on the part of the father. Suppose all the lives had dropped during the infancy of A. and then the trustees had renewed. How would it have gone in that

[1] *Bayly v. Murin* (1673), 1 Ventris 244, 86 E.R. 164, also 3 Keble 46, 107, 193, 84 E.R. 586, 620, 671, 2 Levinz 61, 83 E.R. 450.

case? Undoubtedly, to the heir on the part of the father. Or if the trustees had taken the lease for three lives to the infant and her heirs, it must have gone to the heir on the part of the father. Indeed, if a lease for years or lives be subject to a trust and the representative or executor of the owner renews it, the lease shall still be subject to the old trust. But the present case differs from that and is also distinguishable from the other of turning the infant's personal estate into real estate, which the court will still preserve as personal estate to give the infant a power of disposing it, which, according to some opinions, he may do at fourteen, but, by all, at seventeen years of age.

It is objected that no act of guardians or trustees during the infant's minority shall prejudice those who are to take in [re]presentation. Now, I admit that, had the trustees taken this new lease wantonly or collusively, the construction would have been otherwise. But here, there was a just reason for what they did, one of the lives was dropped, and, had they let it go on until another had done so, the fine would have been considerably raised. And, therefore, it was very proper to renew upon the dropping of the first life. Besides, the trustees were empowered by the will to lay out the infant's personal estate in purchases for her benefit, and this act was both reasonable and for the infant's benefit. And it must, I think, have the same consequence as if done by the infant herself, in which case, it would certainly have gone to the heir on the part of the father. What reason is there that the infant's representative should pay the charges of renewal for the benefit of the heir on the part of the mother? The Case of Mason v. Day, Precedents in Chancery 319,[1] is an express authority for the heir on the part of the father.

And so he dismissed the bill, but without costs.

[Other reports of this case: West *tempore* Hardwicke 711, 25 E.R. 1162, 1 Atkyns 480, 26 E.R. 305, Jodrell 41.]

99

Stapleton v. Stapleton

(Ch. 1739)

A contract to settle an inheritance which might be disputed later is enforceable, the avoidance of future possible litigation being a sufficient consideration.

A contract can be amended only with consent of all of the parties thereto.

A former secret conveyance is void against a subsequent bona fide purchaser for a valuable consideration.

Courts of equity grant relief against accidents.

2 August.

Sir Miles Stapilton, by deed of the 20 and 21 August 1661, conveyed his estate in Yorkshire and Durham to trustees for the term of 99 years if he should so long live, remainder to trustees during his life to preserve contingent remainders, remainder to his first and other sons in tail male, with several remainders over, remainder to Philip Stapilton, the plaintiff's grandfather and the defendant's father, for 99 years, remainder to trustees to preserve contingent remainders, remainder to the first and every other son of Philip in tail male, remainder to the right heirs of Sir Miles Stapilton in fee.

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[1] *Mason v. Day* (1711), Precedents in Chancery 319, 24 E.R. 150, also Gilbert Rep. 77 25 E.R. 54, 2 Eq. Cas. Abr. 494, 22 E.R. 419, Chan. Cases *tempore* Anne 382.

Sir Miles died without issue. And, the other intermediate remainders being spent, the premises came to Philip Stapilton, who, having two sons, Henry, the plaintiff's father, and the defendant Philip, by lease and release of the 9th and 10th September 1724, between Philip, the father, of the first part, Henry and Philip, the two sons, of the second part, and Thompson and Fairfax of the third part, it was witnessed:

> that for settling and perpetuating the premises in the name, blood, and family of Philip Stapilton, the father, and for making a complete provision for his said sons, and for preventing all disputes and controversies whatsoever between them or any other claiming of the premises and for barring the estate tail, reversion, and remainders, and for answering the several intents and purposes of the several parties thereto,

the said Philip, the father, and his sons conveyed to Thompson and Fairfax and their heirs in trust as to part of the premises to Philip, the father, in fee, and, as to the residue, to him for life, then, as to part, to his son Henry for life, remainder to trustees to preserve contingent remainders, remainder to Henry's first and other sons in tail male, remainder to Philip in like manner, remainder to the daughters of Henry as tenants in common, with like remainder to the daughters of Philip, remainder to the right heirs of Philip, the father, and, as to the other part of the said premises, to Philip, the defendant, for life, remainder to his first and every other son in tail male, remainder to Henry for life, with the same remainders as in the former premises were limited. And the said father and sons covenanted with the trustees and the survivor of them and the heirs of such survivor within twelve months to procure some person to bring a writ of entry against the said Thompson and Fairfax whereby a recovery might be suffered and such recovery or recoveries should inure and be to the uses in the said deed and to and for no other use whatever.

By another deed of the 28 and 29 September of the same year between the father of the first part, Henry and Philip, the sons, of the second part, and William Lorrain and Thomas Worsley of the third, the said Thompson and Fairfax of the fourth part, and the two Halls of the fifth part, reciting the former covenant to suffer a recovery and that Lorrain and Worsley were the heirs to the surviving trustee of the deed of 1661, they, for the suffering of the said recovery, released all the premises to Thompson and Fairfax and their heirs to make them tenants to the *praecipe*. And it was agreed by all the parties that immediately after such recovery suffered, it should inure to the uses declared in the former deed.

In April 1725, Henry died, leaving the plaintiff, his eldest son, an infant. And soon after his death, by another deed of the 12 and 13 April 1725, between all the same parties, except Henry, as the former, reciting that Philip, the father, and the defendant, his son, were willing to bar all such estates tail as the premises were subject to, it was agreed that a recovery should be suffered as to the one part to the use of Philip, the father, in fee, and as to the residue to the use of the father for life, remainder to the defendant in fee.

In Trinity term after, two recoveries were accordingly suffered, all being parties to them who were to be so by the deeds of 1724, except Henry who was dead, and Philip, the father, dying in 1729, the defendant possessed himself of all the premises.

The plaintiff brought his bill for the establishing of his title to such part of the premises as he had a right to and to be let into possession thereof and for an account of the rents. And, it being at the former hearing insisted for him that, as the recovery was not suffered in Henry's, his father's, lifetime, he, as issue in tail, was not bound by the agreement of 1724, but he had a right to the whole as heir of his father's body under the deed of 1661, an issue was directed to try the legitimacy of Henry, his father, the defendant by his answer insisting that Henry was born long before his father and mother's marriage and was consequently a bastard, whereupon a trial being had and a verdict finding Henry, the plaintiff's father, to be born before his father and mother's marriage, it now came before the court upon the foot of

the agreement, the plaintiff insisting to have the benefit thereof, and that the recoveries should inure to the uses of the deed of 1724, and the defendant, on the other hand, alleging that, by the subsequent deed in 1725, his father and he had come to a new agreement, which was executed by suffering two recoveries to the uses thereby limited and that no recovery being ever suffered pursuant to the deeds of 1724, no use could arise to the plaintiff out of the recoveries already suffered nor this agreement be carried into execution in the plaintiff's favor, who claimed under a voluntary deed without any valuable consideration.

It was argued for the plaintiff that, at the time of the execution of the deeds of 1724, the defendant's title was disputable at best and this agreement was a beneficial one to all the parties concerned in it, as it gave each of them a consideration, that the agreement was express for making all recoveries thereafter to be suffered to inure to the uses mentioned in those deeds and, there being no power to revoke those uses, they could not be changed but by the concurrent agreement of all parties therein concerned (which was not to the deed of 1725), nor had Philip, the defendant, at the time of the second declaration of the uses any estate left in him, all being gone by the former conveyance and, consequently, not being owner, was incapable of declaring any new use, according to Beckwith's Case, 2 Coke 56.[1] That of Machil v. Clarke, Farresley 18,[2] is express that a tenant in tail may charge everything he has in himself, though not in the hands of the issue, and, if he may do so, when once that estate is gone and annihilated (whereby the issue is barred), all antecedent charges and effects must affect the estate when the remainder comes into possession in him, nor is it in his power to defeat them by any mediate act of his. So, in that case, it is held that, if a tenant in tail grants *totum statum suum*, a base fee passes to the grantee determinable upon the death of the tenant in tail, and, when, afterwards, a fine is levied or a recovery suffered, they, having no other effect than to remove the impediment to the validity of the charge or grant by barring the issue in tail, must of necessity inure to let in the precedent charge or lease, as was resolved in Symonds and Cudmore's Case, 1 Salkeld 338 and 1 Shower 370,[3] which is an authority in point. That this was farther manifested from the case of exchanges, where, though by 1 Inst. 51,[4] an equality in the quantity of the estate given and taken be requisite, yet both there and by the Lord Holt in Machil v. Clarke, it is held that an exchange between a tenant in fee and a tenant in tail is good, for, thereby, a fee passes from the tenant in tail, which shall continue good until avoided by the issue. And in Croker v. Kelsey, Croke Jac. 688,[5] the leases (though

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[1] *Colgate v. Blithe* (1589), 2 Coke Rep. 56, 76 E.R. 541, also 4 Leonard 88, 74 E.R. 749, Moore K.B. 196, 72 E.R. 528, 1 Anderson 164, 123 E.R. 409, Gouldsborough 12, 67, 75 E.R. 963, 999.

[2] *Machil v. Clerk* (1702), 7 Modern 18, 87 E.R. 1068, also 11 Modern 19, 88 E.R. 856, 2 Lord Raymond 778, 92 E.R. 19, 1 Comyns 119, 92 E.R. 992, 2 Salkeld 619, 91 E.R. 524, Holt K.B. 615, 90 E.R. 1240.

[3] *Symons v. Cudmore* (1691-1693), 1 Salkeld 338, 91 E.R. 296, 1 Shower K.B. 370, 89 E.R. 646, also 3 Salkeld 335, 91 E.R. 857, 12 Modern 32, 88 E.R. 1145, 1 Freeman 503, 89 E.R. 379, Skinner 284, 317, 328, 90 E.R. 128, 142, 146, 4 Modern 1, 87 E.R. 226, Carthew 257, 90 E.R. 753, Holt K.B. 666, 90 E.R. 1268, Dodd 100, 127.

[4] E. Coke, *First Institute* (1628), f. 51.

[5] *Croker v. Kelsey* (1624), Croke Jac. 689, 79 E.R. 598, also W. Jones 60, 82 E.R. 32, Hutton 84, 123 E.R. 1117, J. Bridgman 27, 123 E.R. 1175, 2 Rolle Rep. 490, 498, 81 E.R. 935, 941, Benloe 139, 143, 73 E.R. 1009, 1013.

not warranted by the Statute 32 Hen. VIII[1]) could not be avoided after the fine is levied, the reason whereof is that such leases are good against all but those aided by Westminster II,[2] which the tenant in tail himself is not. So in that of Goddard v. Complin, 1 Chancery 119,[3] it is held that a mortgage or judgment by a tenant in tail, who afterwards suffers a recovery for the settling of a jointure or any other collateral purpose, shall be made good by such recovery and that no subsequent act of his should defeat the precedent one. It was said that, upon these authorities, it was clear that the recovery must in the present case be to the uses of the first deeds unless there had been a power of revocation reserved or that all the parties had by the deed of 1725 agreed to alter them, the estate being by those deeds of 1724 entirely out of the defendant and none but the issue in tail being able to defeat the charge, who is now barred by the recovery, such charge and agreement must remain good and indefeasible. And, then, this was clearer still from considering that the recovery agrees in most circumstances with the agreement of 1724, being suffered within the twelve months, and all made parties who were agreed to be so and from the covenant that all recoveries to be suffered should inure to the uses in that deed and to and for no other uses whatsoever.

It was farther argued that, allowing the first point to carry a greater difficulty than it did, yet this agreement was such as a court of equity would decree a performance of, since it will do so by all agreements founded upon a valuable consideration and that other considerations than mere pecuniary ones are considered as valuable here. Now, at the time of this agreement, it was but dubious at best whether Henry, the plaintiff's father, was illegitimate or not, and, if so, each party was purchasing peace by this deed, which is surely a very valuable consideration. The estate is thereby so modeled as to let in four daughters, who could take nothing under the deed of 1661, which is a valuable consideration to Philip by making a more ample provision for his children. And that agreements not so well founded as this have been carried into execution appears from Frank and Frank's Case, 1 Chancery Cases 84.[4] Besides, here is no fraud in the trustees who could not without the concurrent consent of all parties join in any recovery but that which was agreed to be suffered by the deeds of 1724, they being trustees for every use to be built upon that agreement and it would be strange that their joining with some of the parties only in these recoveries should defeat the uses of 1724 and that, therefore, the present agreement being no way voluntary, but built upon the strongest and most valuable consideration could not but be carried into execution in this court.

On the other hand, the defendant's counsel insisted that the general view of the parties was only to bar the estates tail and that, as the recovery would have inured to the recoveree and his heirs had there been no express declaration of the use, it was necessary to declare those to which the parties intended it to inure, but that, under the circumstances of this case, the parties had it in their power, both in law and equity, to vary the agreement which was made in favor of a bastard, appearing merely as a volunteer before the court, and, though no parol averment of uses contrary to those in the written agreement would be valid, yet where the parties think proper to change their minds and reduce such second declaration into writing, it will, in the

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[1] Stat. 32 Hen. VIII, c. 28 (*SR*, III, 784-786).

[2] Stat. 13 Edw. I, Westminster II, c. 1 (*SR*, I, 71-72).

[3] *Goddard v. Complin* (1669), 1 Chancery Cases 119, 22 E.R. 722.

[4] *Frank v. Frank* (1667), 1 Chancery Cases 84, 22 E.R. 706, also 1 Eq. Cas. Abr. 23, 21 E.R. 845.

case of a volunteer, stand good, as in the Countess of Rutland's Case, 5 Coke 25a,[1] where the second declaration was held sufficient to control the former. It was argued that, if the barring of estates tail and reversions and remainders thereon was the first view of the parties and, if, by any subsequent accident, that purpose should not be fully answered, no reference could then be had to the agreement, and the Statute 27 Hen. VIII,[2] exempting no uses but such as are expressly declared by the parties and appear manifestly to be their intent to raise, none can arise in the present case, but such as the recovery was suffered to, Stephens' Case, 1 Leonard 138,[3] that in Seymour's Case, 10 Coke 95b,[4] there was no express declaration of the use of the fine and, consequently, when levied, it was highly reasonable for it to inure to the precedent bargain and sale, no intent appearing to the contrary, and, in that of Machil v. Clarke, there was, besides this reason, a valuable consideration also, whereas, in this case, Henry being illegitimate, stipulated for what he had nothing in, and the defendant, who would otherwise have been tenant in tail, was thereby reduced to an estate for life. And, if the fine of one who has no right shall not bind, no reason could be given why the declaration of a use by such a one should.

To the second point, they argued that, here, there being no pecuniary consideration paid to the defendant, this court would not carry such an agreement into execution in favor of a volunteer, as the plaintiff was, according to 2 Ventris 365, where it is held that a defective voluntary conveyance will not be decreed here, unless where intended as a provision for younger children and that, although a bastard eigne had particular privileges beyond other bastards, yet had he no more, either in the case of hereditary descent of lands or distribution of personal estate, in neither of which was he considered as of the blood or kindred of the ancestor. And that was the direct reason of the decree in Furasher and Robinson's Case, Precedents in Chancery 475.[5] They argued that the father's proceeding in this case was like the insuring of goods where the party knows them to be lost, a thing never allowed in this court. So here, he drew the defendant into this agreement, who was then utterly ignorant of his pretended brother's illegitimacy, thereby to take advantage of his ignorance.

Lord Chancellor [LORD HARDWICKE]: I am of opinion that the plaintiff is entitled to relief, it being very reasonable for this family to make such an agreement within itself. And what was endeavored at thereby is so just that, if it can by any means be carried into execution, this court will decree it. And I think the defendant very hard in seeking to abrogate what was done upon so just and solid a ground. At the time of this agreement, both the sons were acknowledged for legitimate by their father, notwithstanding some rumors spread of the elder's illegitimacy. A prudent foresight that the thing might one day or other come to be canvassed induced the father to take this step in order thereby to secure a provision for and keep the defendant from starving if, upon a trial, the eldest son should be found legitimate by a jury and,

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[1] *Countess of Rutland v. Earl of Rutland* (1604), 5 Coke Rep. 25, 77 E.R. 89, also Moore K.B. 723, 72 E.R. 864, Croke Jac. 29, 79 E.R. 23.

[2] Stat. 27 Hen. VIII, c. 10 (*SR*, III, 539-542).

[3] *Stephens' Case* (1588), 1 Leonard 138, 74 E.R. 128.

[4] *Heywood v. Smith* (1612), 10 Coke Rep. 95, 77 E.R. 1070, also 1 Bulstrode 162, 80 E.R. 853.

[5] *Bonham v. Newcomb* (1684), 2 Ventris 364, 365, 86 E.R. 488, also 1 Vernon 7, 214, 232, 23 E.R. 266, 422, 435, 2 Chancery Cases 58, 159, 22 E.R. 845, 893, 1 Eq. Cas. Abr. 24, 312, 21 E.R. 845, 1068; *Fursaker v. Robinson* (1717), Precedents in Chancery 475, 24 E.R. 213, also Gilbert Rep. 139, 25 E.R. 97, 1 Eq. Cas. Abr. 123, 21 E.R. 929.

on the other hand, to secure something for the eldest should he be found otherwise. In this view, therefore, the father (probably keeping both his sons in the dark) brings them into this agreement and, not having the freehold in himself, they all join in the deed of 9th and 10th September 1724, reciting in the most decent terms, the consideration thereof to be 'for preventing all disputes and controversies whatsoever between them' etc. Then comes the covenant for suffering a common recovery, by which it is plain that the parties were at a loss to know who were the heirs of the surviving trustee in the deed of 1661, and they, therefore, take twelve months (a very unusual time) for suffering the recovery, not knowing as yet where the freehold was. But having afterwards found them out, they execute the second deeds of 28 and 29 September for fulfilling the covenants of the former. Henry, the eldest son, dying soon after, the recovery is suffered within the twelve months wherein the trustees vouch the father, who vouches the son, and he over the common vouchee. And now, this bill is brought by the plaintiff, an infant, who, as he prays general relief, shall have everything decreed which he has a right to *secundum allegata and probata*.

The first general question is whether, as this case is circumstanced, the plaintiff has any estate in the premises vested in him, which question will subdivide itself into two, the first, whether the deeds of 1724, taking them as a mere declaration of uses, be a good declaration of the uses upon the subsequent recovery notwithstanding the intervening deed of 12th and 13th April 1725, and, secondly, if they be not a good declaration, whether the recovery afterwards suffered will make good and indefeasible the estates that passed thereby. Now, I am strongly inclined to think these deeds a sufficient declaration notwithstanding the intervening one of 1725 where there is a covenant precedent for the suffering a recovery and uses are therein declared that the recovery, though differing in some circumstances, as of time, person, etc., will inure to the former uses. Indeed, before the Statute of Frauds,[1] in case of such a variance between the recovery and the covenant, a parol averment might be taken that the recovery was to another use than what was contained in the deed precedent. But, since that Statute, the parol averment is gone, and, therefore, the recovery must now inure to the precedent declaration, though they happen to differ or vary in some circumstances. It is true that a new agreement reduced into writing before the recovery was suffered will vary the uses. But there must be the agreement of all parties who were to take under the former declaration, as is said in the Countess of Rutland's Case, that it may be changed by mutual agreement of all parties. And otherwise, it would be monstrous that the tenant in tail should have it in his power to change the use of it himself without the consent of the other parties. So, in that of Jones v. Morley, 2 Salkeld 677,[2] where there was a variance in the time, the fine being levied of the current Hilary Term, which was to have been by the agreement levied the Hilary Term next after, but the declaration of the new use was by consent of all parties. I, therefore, think that the second agreement in this case, being not between all the parties who were to have been benefited by the first, is not obligatory, nor can it annul the former, especially as the recovery is suffered within the time and between the same parties that are appointed by the first, And it would be going much too far even for a court of law to say that such an agreement upon a good and valuable consideration should be annulled by the tenant in tail alone, without the consent of all parties.

Secondly, I am of opinion that, admitting these deeds not to be a sufficient declaration of the uses (considering them merely as such), the recovery afterwards suffered will make good

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[1] Stat. 29 Car. II, c. 3 (*SR*, V, 839-842).

[2] *Jones v. Morley* (1698), 2 Salkeld 677, 91 E.R. 575, also 1 Lord Raymond 287, 91 E.R. 1089, 4 Modern 261, 87 E.R. 383, 12 Modern 159, 88 E.R. 1234, Comberbach 429, 90 E.R. 571, Carthew 410, 90 E.R. 837, Holt K.B. 321, 90 E.R. 1077, 1 Comyns 29, 47, 92 E.R. 943, 953, 1 Shower P.C. 140, 1 E.R. 96.

and indefeasible the estates thereby raised. A use passed by the deeds of 1724, and, in all cases both at law and in equity, the final intent of the parties is considered in the raising of uses, and wherever that is found, the law will suffer the conveyance to operate as it may, *ut res magis valeat*. But here, the intent was to pass the legal estate itself by the deed as far as they could, which makes the covenant so particular and so unusual, as it is, *viz*. 'to suffer either by themselves or jointly with the heirs of the trustees [whom they knew not] and to do it within twelve months'. Now, this shows their intent was at all hazards to pass the legal estate and the use thereon. And, if so, the question is what estate passed in point of law to the several parties by the deeds of 1724. And, by the doctrine laid down in Machil and Clarke's Case, there passed a base fee which was afterwards made good by the recovery.

It has been objected that, should this estate be made good by the recovery, every tenant in tail might by a deed, which he would keep by him, convey away his estate to particular uses and, then, by some other deed and recovery, convey it to a purchaser, whereupon, the former secret conveyance might be brought to light. But first, I think such former secret deed would be void against a purchaser for a valuable consideration. Secondly, here, it is limited to Philip himself and his heirs, and, therefore, none but he and his heirs are concerned to make good the use declared before. If a tenant in tail contract debts by a specialty or makes a lease not warranted by the Statute and, afterwards, suffers a recovery, such debts will, after the recovery suffered, affect the estate, and the lease will then be good, notwithstanding there be a declaration of uses upon the recovery. The reason is that the prior charge is defeasible only by the issue in tail, who comes in under the Statute *De donis*. And, when the issue is barred by the recovery, the protection of the Statute is gone, and, consequently, the estate tail being changed into a fee, there is no longer reason to keep out the encumbrances, according to Symonds and Cudmore's Case and that of Croker v. Kelsey, W. Jones 60, where it is said that the tenant in tail himself shall never avoid his own lease or charge. And the Statute of Westminster II aiding none but the issue in tail, when the privity of the estate tail is gone, the charge is unavoidable. Agreeable to this was the resolution of the four judges in the Lord Derwentwater's Case,[1] where, upon an appeal from the commissioners of forfeited estates, the question was whether a tenant in tail after a recovery by him suffered was in of his old, or of a new, estate, and they held him to be in of the old, the recovery only taking off the fetters laid on him by the Statute *de Donis*. I, therefore, think that the estates which passed by the deeds of 1724 are good and indefeasible even at law.

But was the point of law more doubtful than it is, I think the plaintiff is entitled to have these deeds of 1724 carried into execution as an agreement, here being a valuable and a sufficient consideration arising from the circumstances of this family. Nor does the father appear guilty of the least fraud upon the defendant. He knew it to be a dark case which might be attended with much litigation, ruinous to both. And, by this agreement, he hoped to settle the matter so as to prevent all disputes after his death.

Now, though the ecclesiastical law legitimatizing the issue born before marriage does not take place here, yet a bastard eigne has by the law of England many privileges beyond other bastards, nor will the doubtfulness of his title at the time of the agreement entered into be any argument against the decreeing of a performance thereof since, in the Case of Can v. Can,[2] it was held very strongly by the Lord Macclesfield that agreements entered into at a time when rights are dubious shall not be afterwards set aside upon the right coming out to be clear in one or other of the parties. To this it has been observed that, in such case, the consideration must

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[1] *Lord Derwentwater's Case* (1719), 9 Modern 172, 88 E.R. 382, 2 Eq. Cas. Abr. 621, 22 E.R. 520, *sub nom. Radcliffe's Case*, Misc. Delegates Cases 136.

[2] *Cann v. Cann* (1687-1721), 1 Vernon 480, 23 E.R. 605, 1 Peere Williams 567, 723, 24 E.R. 520, 586, 2 Eq. Cas. Abr. 417, 22 E.R. 354, Chan. Cases *tempore* Geo. I, 754.

be mutual, which, as it comes out here, is not so, for, had the plaintiff's father been found legitimate, he, as issue in tail, could not have been compelled by the defendant to carry this agreement into execution.

But first, Henry never refused to execute it, and his death, which is the act of God, making it impossible for him to do his part, this court, which in so many other instances relieves against accidents, will not in the present one suffer it to defeat and rescind this agreement.

Secondly, the consideration was mutual, for, had Henry been found legitimate and Philip, the defendant, had died leaving issue in Henry's lifetime, such son of Philip might, in my opinion, have compelled Henry to an execution of this agreement. And, if so, we are not to consider what has since happened, but must take the agreement as it stood when first made, and then it was mutual.

The next objection has been drawn from the supposed compulsion used by the father. But there is not the least proof of it, nor does the nature of the act show any such thing. Besides, the compulsion, if any, was equal on the one son as well as the other.

And so he decreed for the plaintiff.

[Other reports of this case: Lincoln's Inn MS. Misc. 384, pp. 414, 501, 1 Atkyns 2, 26 E.R. 1, Cases *tempore* Hardwicke 277, 95 E.R. 178, West *tempore* Hardwicke 12, 25 E.R. 794, Jodrell 96.]

100

Marriott v. St. John

(Ch. 1743)

A contract cannot be enforced against a woman who was married and who was an infant at the time the contract was made.

1 Vesey Junior Supplement 75, 34 E.R. 698

Hilary term 16 Geo. II.

A woman, entitled as residuary legatee to a bond, the legal interest in which remained in the executor of the will under which she claimed, joined with her husband, she being still under age and no settlement having been made on her by her said husband, in an assignment of the bond to one of his creditors. The husband died before the money due on the bond was received.

And it was held that the wife, surviving, was entitled to the bond, and not the assignee.

101

Langley v. Earl of Oxford

(Ch. 1743)

Executors have the power of settling their testator's accounts, and the legatees are bound thereby.

2 Vesey Junior Supplement 98, 34 E.R. 1012

Langley sold an estate to Mr. Harley, father to the earl of Oxford,[1] and £10,000, part of the purchase money, were left in the hands of Mr. Harley. Langley made his will, and, thereby, gave two legacies, one of £3000 another of £1000 out of these £10,000. Mr. Harley, afterwards, paid the £10,000 to Langley's executor. And, now, the legatees brought their bill against the earl of Oxford, as executor to his father, Mr. Harley, to have their legacies paid out of the £10,000 and to open the account which had been settled between Langley's executor and Mr. Harley.

LORD HARDWICKE, Chancellor, said the general question is whether the plaintiffs, who are legatees out of these £10,000, are entitled to be relieved against this transaction between Langley's executor and Mr. Harley, as having a specific lien upon these £10,000. It has been insisted that these legacies are a specific lien and that the executor could not release, assign, or discharge this debt without the concurrence of the specific legatees. And it has been compared to the case of an equity upon a specific thing. But this distinction must be attended to; in the case of legacies, there must be an account of all the assets and of the debts of the testator in order to see whether, after due administration, the specific legatee will be entitled to the thing devised to him. If this were not so, whenever a term specifically devised is sold by an executor for the payment of the testator's debts, the devisee of the term might overturn the sale.

The Case of Humble v. Bill, 2 Vern. 444,[2] is something to this purpose; the decree made in the Court of Chancery was, indeed, reversed in the House of Lords, though, upon what grounds, it is difficult to find out. The reasons for the decree given by Lord Keeper Wright are very strong, and the laying down a rule that assets should be so affected by a specific legatee as not to be alienable without his consent would be attended with many inconveniences. I have found somewhere that a distinction was taken in that case, to the effect that, as Humble came in only as a mortgagee, he might take the term subject to the legacy there in question, though he could not have been held to do so if he had purchased and paid the full value for the term.

An executor is not bound in all cases to assent to a legacy. And, though this court can compel him; yet, upon a bill brought for that purpose by a legatee, if the executor insist that there are debts and not sufficient assets to pay them, the court will not decree him to assent until an account has been taken. Indeed, as it was said by the Master of the Rolls in Ewer v.

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[1] G. Goodwin and D. Whitehead, 'Harley, Sir Edward (1624-1700)', *Oxford Dictionary of National Biography*, vol. 25, pp. 303-305; W. A. Speck, 'Harley, Robert, first earl of Oxford and Mortimer', *Oxford Dictionary of National Biography*, vol. 25, pp. 317-326.

[2] *Humble v. Bill* (1703), 2 Vernon 444, 23 E.R. 884, also 1 Eq. Cas. Abr. 358, 21 E.R. 1101.

Corbett, 2 P.W. 148,[1] if an executor should sell a part of the personal estate of his testator at an undervalue, this would be evidence of fraud, or, if a purchaser from an executor of a devised term knew that all the devisor's debts were paid, it would be a hardiness in him to proceed in his purchase without the devisee's concurrence. But, where the case is one of a devisee of legacies out of a debt, subject, perhaps, to a litigation upon a long account, and the whole debt is not given, who has the right of stating the account with the debtor? Certainly, the executor. Debtors would be greatly entangled if, by the debtor's laying a charge upon the debt, they should be disabled from stating their account with the executor. Suppose two partners and one of them gives a legacy out of his share, could not the other partner and the executor settle the account? I am of opinion they might. And there never was an instance where, in taking an account of a partnership, it was not thought sufficient to have the executor only a party. The law vests the power of settling the testator's accounts in the executor and concludes the legatees by what he does. And that rule must not be broken in upon without some particular reason.

[Other reports of this case: Ambler 17, 795, 27 E.R. 9, 505.]

[Reg. Lib. 1747 A, f. 300, Reg. Lib. 1742 B, f. 528; Reg. Lib. 1747 B, f. 300.]

102

Tomkins v. Tomkins

(Ch. 1744)

An inaccurate description in a will of a legatee will not render the legacy void if it can be shown who was the intended legatee.

Where both the name and the description used by a testator to designate the object of his bounty belong equally to two individuals, raising a latent ambiguity, parol evidence may be resorted to.

2 Vesey Junior Supplement 455, 34 E.R. 1176

27 January 1743[/44], Hilary term 17 Geo. II.

William Tomkins, by a will, gave £200 to his brother, Joseph, and, afterwards, gave him his leasehold brew house and utensils and all the rent that should happen due thereon in trust for the benefit of his eldest son Benjamin, until he should attain twenty-one, but, if he died before twenty-one, then he gave it to his second son, Joseph. Then, he gave £50 apiece to each of his other children, and made his brother Joseph executor, giving legacies to all his next of kin, particularly £26 to his 'sister Benjamin' and to her three children £50 each. But he died without making any disposition of the surplus. The testator had no sister Benjamin but the wife of his brother Benjamin, and she had four children. Upon this will, very inaccurately drawn, several questions arose: namely, as to what interest Benjamin took in the brew house, whether Joseph, the second son, came within the description of other children, [and] whether the wife of the testator's brother Benjamin could take, as being sufficiently described, and, also, what should become of the surplus, here being legacies given to all the next of kin as well as to the executor.

LORD HARDWICKE pronounced his judgment as follows. This is a very inaccurate will. But, as to the legacies given by the testator to his 'sister Benjamin' and her children, I think

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[1] *Ewer v. Corbet* (1723), 2 Peere Williams 148, 24 E.R. 676, also 2 Eq. Cas. Abr. 449, 22 E.R. 382.

the description sufficient, brothers' wives being often called by their husbands' Christian names for the sake of distinction, and, as it has been agreed that the legacies shall extend to the fourth child, it is not necessary for me to give any opinion upon it. But I should have thought it a favorable case for all the children. Had the testator expressed his gift to be to all her three children, this would certainly have let in the whole actual number and the word 'three' must have been rejected as repugnant. In the present case, indeed, the word 'all' is not used, but 'her children' are indefinite words, and to be construed universally. Were they not to extend to all, the legacy would be void for want of knowing which three should take, and what one should be excluded.

The next and principal question is upon Benjamin's interest in the brew house, whether the words 'until he shall attain twenty-one' are to enure as a limitation of his interest or only of the continuance of the trust in the trustees, the will not fully explaining the testator's intent, which must, therefore, be supplied by construction. Now, I think these words are to be considered only as a limitation of the continuance of the trust. The rent devised must mean the arrears of rent due at the testator's death, not any fractional arrear which might happen to be due when Benjamin came of age. And the giving the brew house over upon one contingency shows that, if the specified contingency did not happen, the testator intended Benjamin should retain it. Something is given to every one of the testator's family. But, if Benjamin is not to hold this lease after his age of twenty-one, nothing will be given to the person whom the testator seems to have principally regarded, and this lease must fall into the residue of the personal estate, and go to persons for whom it was certainly not intended. Besides, a very small transposition makes the matter clear for if this lease had been given to the use and benefit of his eldest son, Benjamin, in trust until he came to twenty-one, there could not have been the least doubt of the testator's intent. I, therefore, think the dying before twenty-one is the only contingency upon which this interest is to be taken out of Benjamin.

As to the question whether the devise to the 'other' children of his brother Joseph shall exclude Joseph, the contingent legatee, I think it shall not, as meaning only other than the eldest son, Benjamin, for nothing is given to Joseph, the second son, in possession, and he ought, therefore, to be considered as one of those 'other' children.

Next, I think the legacy devised to the executor, Joseph, excludes him from the surplus of the personal estate, the late cases having gone further than the former did on this head. That of Foster v. Munt, 1 Vern. 473,[1] has been sometimes said to have been determined upon the foot of fraud, but it does not appear from the proofs in the cause that any fraud was made out, and there it was first established that a legacy to an executor 'for his care and pains' excludes him from any further benefit, it being plain, in such a case, that he is intended only as a trustee. It was afterwards held that a legacy given generally to an executor would have the same effect, because the testator could not intend to give him all and some, though, were that point to be settled *de novo*, there might be some reason for a different determination, as a legacy to the executor might be intended only to put him on a par with the other legatees, that, in case of a deficiency, he might still be sure of something in proportion with the others. But the law is now settled. Nor has the giving a legacy to the next of kin been suffered to preclude them from the residue, where the executor has had a legacy given to him likewise. In some of the cases, legacies have been given to some of the next of kin; in others, to all. But, in neither case, have they been excluded from the surplus, their right being founded upon an equity arising from the Statute of Distributions[2] and they taking by way of succession *ab intestate*, as

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

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

the heir at law takes all such parts of the real estate as are undisposed of. I am, therefore, of opinion, that the surplus in the present case must be divided amongst the next of kin.

1 Vesey Junior Supplement 113, 34 E.R. 714

Hilary term 1743[/44].

Should both the name and the description used by a testator to designate the object of his bounty belong equally to two individuals, these are facts *dehors* the will, raising a latent ambiguity, to resolve which, parol evidence must be had recourse to. And, if one of the parties was very intimate with and the other but little known by the testator, the presumption in favor of the former will be very strong.

103

Gwynne v. Hooke

(Ch. 1744)

A granddaughter, and not a brother, is a person's right heir.

1 Vesey Junior Supplement 441, 34 E.R. 865

The judges certified in the following words:

> Upon hearing counsel on both sides and consideration of this case, we are of opinion that the plaintiffs are not entitled to the estate in question by virtue of the will of the said Griffith Dawes, dated 14 November 1693, for we conceive that Francis, the brother of the testator, under whom the plaintiffs claim, could not take by the description of ' right heir male of the testator'. /signed/ *W. Lee* etc.

LORD HARDWICKE declared himself satisfied with this opinion, and, on the 17 July 1744, dismissed the plaintiff's bill.

The testator, upon whose will the case cited arose, left a granddaughter, who, at his death, was his right heir.

[Other reports of this case: 1 Wilson K.B. 30, 95 E.R. 475.]

104

Meadbury v. Eisdale

(Ch. 1744)

A co-defendant cannot be used as a witness against another defendant.

Jodrell 423

The plaintiff brought his bill against the two defendants charging them jointly with a fraud. Friend, by his answer, denied the whole fraud and charged it on Eisdale, upon which the plaintiff did not reply to Friend's answer, but examined him as a witness to prove the fraud in Eisdale.

At the hearing, it was objected to his being a competent witness, being charged by the bill as *particeps criminis* and liable to make satisfaction to the plaintiff as well as the other defendant.

It was answered that, as his answer was not replied to, there could be no decree against him, for his answer was to be taken as true and, if he could not be examined as a witness, it would be impossible for any plaintiff ever to prove a fraud when he was at first in the dark as to the transaction and had by the answer discovered the guilty defendants if he could not afterwards examine the innocent defendant to prove the fraud in the others.

Lord Chancellor [LORD HARDWICKE]: The rules of law and of this court are different. At law, a plaintiff cannot examine anyone as a witness when he has been made a defendant. And this was determined even in the case of the crown upon an information for a misdemeanor in the [Court of] King's Bench brought by Lord Trevor when Attorney General, who, when he had gone through his whole evidence for the crown and one of the defendants happened not to be affected by it, would have examined him as a witness for the crown, but the court were all of the opinion that he could not, upon which, to make him a good witness, he, immediately at the bar, entered a *nolle prosequi* against him and he was then allowed to be examined. So, at law, a defendant against whom there is no evidence may be examined for a co-defendant, but never for a plaintiff. In this court, indeed, a plaintiff may examine one defendant against another. But the suggestion in the order for examining him is always that he is not interested in the event of the cause. And, if it appears he is interested, he cannot be read, though examined. In this case, I am of opinion that Friend is not a competent witness, for, though, by the plaintiff's not replying to his answer, that must be taken as true between the plaintiff and him and, consequently, the plaintiff can have no decree against him, yet, as between the plaintiff and the other defendant Eisdale, the plaintiff's bill must be taken as true against the plaintiff, and, by the bill, it appears that Friend is equally guilty with Eisdale. And, if the whole sum decreed or more than his proportion should be levied on Eisdale, Friend would be liable to contribute to Eisdale, so that it was plainly his interest to throw the whole on Eisdale at the time he was examined. And, though the plaintiff had not then replied to Friend's answer, yet he might have replied to it at any time before publication, and so he was at the time of his examination under a bias.

The method the plaintiff should have taken was, on seeing by Friend's answer that Eisdale was the only person against whom he could get a decree, to have amended his bill by striking out Friend from being a defendant. Then, he would have been a good witness.

[Other copies of this report: British Library MS. Hargrave 383, f. 111v, Georgetown Univ. Law Libr. Eldon MS., p. 222.]

[Other reports of this case: 9 Modern 438, 88 E.R. 559, Lincoln's Inn MS. Misc. 560, p. 317, pl. 2.]

105

Davids v. Pipon

(Ch. 1744)

A personal estate follows the owner's person wherever he may be.
A court cannot order a partial accounting of a decedent's estate.

Jodrell 424

6 June.

A native and inhabitant of Jersey died intestate in Jersey leaving brothers and likewise brothers' and sisters' children and leaving part of the estate in Jersey and another part in England, which last consisted of a debt of £600 due to the intestate from a person living in England presently after the intestate's death. The plaintiffs, the nephews and nieces, sent a letter of attorney to the other plaintiff, Davids, to take out administration in their names as next of kin as to the estate in England and, administration being granted to him accordingly, he received the £600 debt. Upon notice of this, the defendants, the brothers, sent a letter of attorney to the other defendant, LeHardi, to get Davids' administration repealed and to take out a new administration in their names as the real next of kin to the intestate. All which being done and a new administration granted to the defendant, LeHardi, as attorney for the other defendants, brought an action against Davids for what he had received of the intestate's estate. And Davids and the other plaintiffs, the nephews and nieces, brought this bill for an injunction and insisted that such part of the intestate's personal estate as was in England at his death was distributable by the Statute of Distributions,[1] which admits brothers' and sisters' children with brothers and sisters, and not according to the laws of Jersey, which exclude them.

Note: All the parties to the suit, as well LeHardi, the administrator, as the other plaintiffs and defendants except the plaintiff Davids were inhabitants of Jersey.

For the plaintiffs were cited Dyer 305; Swinburne 406, 407, 408.[2] And it was said that no notice could be taken here of the laws of Jersey, which, being as different from ours as those of any foreign kingdom, the saving of any particular customs in the Statute of Distributions cannot be thought to have them at all in view, that this debt was recoverable only by virtue of letters of administration granted in England and consequently governable by the rules of the law of England and, upon all administrations, bonds are entered into to distribute according to our law, that the locality of the effects gave jurisdiction to the several courts, as where there are goods in the province of Canterbury and also of that of York, two administrations must be taken out, one for each province, and, though the custom of London has been determined to follow the person, yet others are merely local and the effects must be in the place to be affected by them, as in Cholmley v. Cholmley, 2 Vernon 47, 82, and 1

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

[2] *Daniel v. Luker* (1571), 3 Dyer 305, 73 E.R. 687; H. Swinburne, *Brief Treatise of Testaments and Last Wills*.

Vernon 200,[1] the custom is pleaded not only that the person died in York but that his effects were there likewise.

It was insisted by the defendants that personal estates are not local, as real estates are, that they are not considered so in our law, but it is the quality of the person they are determined by, that, wherever a freeman of London dies, his estate is distributable by the custom of London, so of a freeman of York dying in York. The personal effects in any part of the world are considered as assets, and the executor or administrator must account for them, which proves that this court does not regard the locality of the effects else only the assets in England should be accounted for, that, should the plaintiffs' pretense be admitted, no inhabitant of Holland or any foreign country would invest any of his fortune in English stocks if what he should so invest must be considered as divided from the rest of his estate and be distributable not according to the laws of Holland or the other country he inhabits, which govern the remainder of his estate, but by the laws of England. And they cited Burrows v. Jamineau, before Lord King, as to the custom of Leghorn, and Feawbert v. Twist, Precedents in Chancery 207,[2] but by the Lord Chancellor, there, the custom of Paris was by the parties made the rule of their contract.

Lord Chancellor [LORD HARDWICKE]: I am unwilling to determine the general question that is made between the parties, it being of very great extent. And, as the case comes before the court, it is not necessary to give any opinion upon it. However, this much may be said that every man's personal estate is supposed to follow his person, the different administrations that the law appoints to be taken out being only qualifications to entitle the party to recover the estate but do not influence the rule or measure of distribution. This case put of suing two administrations, one in each province, proves it, for, if the intestate was an inhabitant of the province of York, his whole estate, as well in the province of Canterbury as of York, must be distributed according to the custom of York. Now, consider the question as between foreign countries, for the king being seised of Jersey in the right of his Duchy of Normandy, it must be looked upon as a foreign country with regard to the present question. If, therefore, a foreigner, inhabitant of a foreign country, has a debt due to him in England, shall the suing out of administration here separate this debt from the rest of his estate and transmit it according to the rules of the law of England? I do not give any positive opinion upon this point. But were it to come before me, I should think it would not, from the great inconveniences that might ensure to the trade and commerce of this nation. As to the Statute of Distributions, that directs the surplusage to be distributed so that, when an account is decreed, it must be of the whole not of a part, and it directs the distribution to be amongst 'the next of kin and their representatives'. But here, the nephews and nieces are no representatives by the laws of Jersey, to which the intestate was subject, so that, upon the Statute, it is not at all clear which way it should go. But I give no opinion on the general question, there being sufficient ground to dismiss this bill without entering into that, for the plaintiff Davids has nothing to do to come into this court. He is a debtor to the estate by having received the debt due to the intestate under the administration granted to him as attorney for the nephews and nieces, which administration is now repealed and another granted to the defendant LeHardi, as attorney for

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[1] *Chomley v. Chomley* (1688), 2 Vernon 47, 82, 23 E.R. 642, 663, Chancery Cases *tempore* Jac. II, 440, also 1 Eq. Cas. Abr. 66, 160, 21 E.R. 880, 958; *Goodwin v. Ramsden* (1683), 1 Vernon 200, 23 E.R. 412, also 1 Eq. Cas. Abr. 161, 21 E.R. 958.

[2] *Burroughs v. Gemineau* (Ch. 1726), Select Cases *tempore* King 69, 25 E.R. 228, Mosely 1, 25 E.R. 235, 2 Strange 733, 93 E.R. 815, Dickens 48, 21 E.R. 185, 2 Eq. Cas. Abr. 476, 524, 22 E.R. 405, 443, Chancery Cases *tempore* Geo. I, 1205; *Feaubert v. Turst* (1702), Precedents in Chancery 207, 24 E.R. 101, also 1 Brown P.C. 129, 1 E.R. 464, 2 Eq. Cas. Abr. 475, 22 E.R. 404.

the brothers, nor can the other plaintiffs go on, not having the administration and whole estate before the court. And I cannot decree a partial account. If I did, what confusion might it occasion. An account would be taken of one part of the estate in England one way and the court of Jersey would decree an account of the estate in Jersey another.

The bill was dismissed.

[Other copies of this report: British Library MS. Hargrave 383, f. 112v, Georgetown Univ. Law Libr. Eldon MS., p. 224.]

[Other reports of this case: 9 Modern 431, 88 E.R. 554, Ridgeway *tempore* Hardwicke 165, 27 E.R. 791, Ambler 25, 799, 27 E.R. 14, 507.]

106

Brooksbank v. Wentworth

(Ch. 1744)

A farm can include a malt house, and, therefore, a bequest of a farm can include a malt business thereon.

Jodrell 428

Eodem die [22 June].

The testator, being a farmer and also a maltster and possessed of a farm and of a malt house held by lease under the defendant at the yearly rent of £40, made his will in the following words.

> I give unto Phoebe Brooksbank all my household goods, chattels, and corn, hay, implements of the husbandry, and stock belonging to my messuage and dwelling house, farm, premises which I hold by lease from Sir William Wentworth, for a certain term of years. And I do hereby also give the said messuage, farm, and premises for and during the remainder of the said term to the said Phoebe Brooksbank if she shall so long live.

And he gave the farm after the plaintiff's decease to the defendant, to whom he likewise gave all his chattels, real and personal, and made him executor.

The testator died possessed of a considerable stock of malt and some barley in the granaries belonging to the malt house and of a malt mill and other implements used in the making of malt. The question was whether these particulars passed to the plaintiff by this bequest, it being insisted for the defendant that the business of a maltster was a distinct and separate trade from that of a farmer, that the malt, barley, and implements used in the malting business were consequently also a distinct and separate stock in trade and did not pass to the plaintiff under the above mentioned bequest, but belonged to the defendant as executor and residuary legatee. And some proof was read on the defendant's side as to what was understood in that country to be the meaning of the word ' stock'.

Lord Chancellor [LORD HARDWICKE]: The question upon the extent of the words of the will was whether the malt and barley remaining upon the premises are included within them, and I think they are. The testator held a farm consisting of a malt house as well as other things of the defendant at a rent of £40, so that the rent was paid was well for the malt house as for the other parts of the farm. A malt house being upon a farm increases as well the rent as the repairs. And it is most unreasonable to imagine the testator intended the devisee for life to pay

the rent, part of which was for the malt house, and yet that she should be excluded from the stock of materials for carrying on the trade. But be that which way it will, the question is whether the words be sufficient to carry them. And I think the words ' stock belonging to my messuage, farm, and premises which I hold from Sir William Wentworth'. The malt being part of that stock upon the premises so held do put it out of all doubt that he meant to pass the whole which was upon the premises, nor has any evidence been read to show that he meant to distinguish his real stock in husbandry from his stock in trade or the barley he had bought from that which grew upon the farm. The defendant indeed has (which is not usual) examined witnesses to the meaning of the word ' stock', who say that stock means the farm [and] means only stock in husbandry. But they take no notice of this being extended to the stock in the messuage, dwelling house, and premises, which take in more, the word ' premises' putting it out of all doubt. I am, therefore, of opinion that the malt, barley, and other particulars in question pass to the plaintiff by this bequest.

Ex notis Magistri Forrester.

[Other copies of this report: British Library MS. Hargrave 383, f. 115v, Georgetown Univ. Law Libr. Eldon MS., p. 230.]

[Other reports of this case: 3 Atkyns 64, 26 E.R. 839.]

107

Galton v. Hancock

(Ch. 1744)

Where a testator devises a life estate and subsequently purchases the remainder, this is a revocation of the devise of the life estate.

Jodrell 430

This cause had been reheard on the same point which had been debated at the former hearing, whether the lands descended to the heir by the testator's purchasing the reversion after the will was made were assets in his hands liable to satisfy the mortgage upon the wife's, the devisee's estate, to whom the testator intended to give his whole estate, but the will for want of publication could not operate as to one part.

For the defendant was quoted Herne v. Meryrick, 1 Williams 201; Chiffon v. Birt, 678; Coleman v. Winch, 775.[1]

For the heir was cited King v. King, 21 June 1735,[2] where a man devised his copyhold to A. and, after all his just debts and legacies be paid, gave all the rest and residue of his real and personal estate to his son in fee, whom he made executor. The copyhold was subject to a

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[1] *Herne v. Meyrick* (1712), 1 Peere Williams 201, 24 E.R. 355, also 2 Salkeld 416, 91 E.R. 362, 1 Eq. Cas. Abr. 143, 21 E.R. 944, Chancery Cases *tempore* Anne 507; *Clifton v. Burt* (1720), 1 Peere Williams 678, 24 E.R. 566, also Precedents in Chancery 540, 24 E.R. 242, 2 Eq. Cas. Abr. 555, 22 E.R. 467, Chancery Cases *tempore* Geo. I, 732; *Coleman v. Winch* (1721), 1 Peere Williams 775, 24 E.R. 609, also Precedents in Chancery 511, 24 E.R. 229, 2 Eq. Cas. Abr. 498, 509, 589, 599, 22 E.R. 423, 431, 503.

[2] *King v. King* (1735), 1 Peere Williams 358, 24 E.R. 1100, 2 Eq. Cas. Abr. 255, 22 E.R. 216.

mortgage, and, then, the testator mortgaged both freehold and copyhold. The devisee of the copyhold brought a bill against the residuary devisee, who was likewise heir and executor, to have the copyhold estate exonerated out of the personal and, if that was not sufficient, out of the real estate. And it was so decreed by Lord Talbot. But why? Merely because the devise was after debts were paid, and not from any right the devisee of the copyhold had against the heir.

The question being now of great consequence, the court took time to consider of it until this day and now gave judgment.

Lord Chancellor [LORD HARDWICKE]: The general question in this case is whether the devisee be entitled to have the mortgage discharged out of the lands descended to the heir. And this may be divided into two questions; first, whether, from the words of the will, any intent can be collected to throw this burden particularly on the heir or devisee; second, whether, upon the rules of this court for marshalling assets, the devisee has a right to have this debt discharged out of the lands descended to the heir.

As to the first, it was insisted for the defendant that the words of the introduction clause in the will, whereby he directs that all his just debts be paid, are sufficient to charge the whole estate, which would certainly hold in the case of creditors if necessary to bind a fund for their payment, as has often been determined in cases less strong than the present, but are not sufficient to change the rule of marshalling assets by transferring the burden as to the several persons claiming the testator's estate by devise or descent. On the other hand, it was said these introductory words show the testator did not mean to give his wife his whole estate, real and personal, free from his debts. But it would be strange to collect from such general words an intention to charge a devise, especially in this case, where the whole was given to him, and that is by accident only, that he takes less than was intended him by the testator.

The second question is, as, therefore, no particular intent can be collected from the words of the will, the next question is whether, according to the rules of this court for marshalling assets, the defendant be entitled to have the lands descended upon the heir applied in exoneration of her mortgage, which is a new point that has never been yet determined. I shall consider it in two lights: first, how it would have stood between the heir and devisee had this been a debt by a bond or covenant wherein the heir was bound without any mortgage and, secondly, whether the mortgage makes any difference in the case. At common law, before the Statute of Fraudulent Devises,[1] the devisee was not liable to pay debts because the descent was broken, nor did equity differ from the rules of law in making that assets here, which was not so at law, though it had been often attempted here, but could never be obtained. And, therefore, if, where the descent was broken in part, the heir was sued on the ancestor's bond before that Statute, he had no remedy against the devisee, not so much as by contribution. Now, what is the consequence of the Statute 3 & 4 Will. & Mar., ch. 14, as to specialty debts considering the question still abstractedly from the mortgage? The words of it are that such creditors shall have their actions of debt against the heirs at law and such devisees jointly so that the devisee is now made liable at law and the action must be brought jointly against him and the heir. But what kind of judgment shall be given upon such action? This is a new point not settled, which I shall endeavor to clear, though not quite material to the determination of the present case. It was contended for the defendant that there must be two judgments, one against the heir and another against the devisee, where the heir has not assets sufficient. But this seems to me to be otherwise, for the action must be brought jointly even where the whole estate is devised. And I think the intent of the Statute was only to provide relief for the creditors at all events by preventing any collusion or contrivance between the heir and the devisee so that, if there be assets, whether descended or devised, the creditor must by this joint action necessarily succeed against one or the other.

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[1] Stat. 3 Will. & Mar., c. 14 (*SR*, VI, 320-321).

I ordered precedents of judgment on this Statute to be searched, but none can be found because few actions have been brought at law upon this Statute, as the parties may have a more complete remedy here. I can find but three in point, in none of which is there any judgment, one in Clift's *Entries* 243 and the others in Lilly's *Entries* 145, 529, in all which, the court charges the heir and devisee in the debt and *detinet*, just as where an action was before this Statute brought against two heirs. Now, by the rules of law, the judgment must follow the writ and count and, consequently, against both jointly, as in case of coparceners, where but one judgment is given and, if one be overcharged, he shall have contribution against the other, as is laid down in Sir William Herbert's Case, 5 Coke 3a.[1] In Dacre v. Pepys, Plowden 438b,[2] there is a precedent at large of a judgment against an heir, by which the lands are to be delivered to the creditors to hold until he has levied the debt. Now, if this be so, the judgment cannot be such as is contended for on the defendant's behalf for, if one judgment be given against the heir for the creditor to hold the lands until satisfied, the debt how great soever may be satisfied by a long perception of profits and there can be no reason for a second judgment against the devisee, as there is no time from whence such judgment shall commence, the creditor being to hold the lands recovered against the heir *in infinitum* until satisfaction.

If, therefore, the judgment at law must be joint against both, how does it stand in equity? There is no printed authority to determine this, only something similar started by the counsel, but not determined by the court, in Gaull v. Wade, 1 Williams 99, as to contribution.[3] But two cases not in print were cited to prove that the lands descended are first liable, Savil v. Savil, before Lord King, and Lord Conway's Case, before me,[4] to which I will add a third, that of Tyat or Pyat v. Raymond, heard by Lord Talbot, 27 January 1734, all which decrees I take to be right and that the notion of contribution started by the counsel in 1 Williams is not well founded. My reason for thinking these decrees right is that, as before the Statute, the devisee was not liable that it was made in favor of the creditor only in whose sole behalf it avoids the devise, but not in that of the heir or anyone else; so, where the descent is not totally broken but lands descend to the heir sufficient for payment of the debts and no person is defrauded, it would be hard in a court of equity to make a devisee liable whom the testator never intended to charge or to make him contribute to the heir for lands which were not meant by the testator to be subject to any part of his debts. My opinion, therefore, is that, were this only a specialty debt by a bond or covenant, the lands descended must have been first charged.

The remaining point, which indeed makes the difficulty of the case, is, that there being a mortgage on the devised lands, whether that mortgage shall be satisfied out of the assets descended. It is to this it is to be considered that a debt by mortgage where there is a covenant and bond is a debt by specialty which all the assets are liable to pay. It is true the creditor may pursue his remedy against which he please, but this is only for his benefit and no way concerns the question between the heir and devisee. By the old cases, the heir has a clear right to have

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[1] *Harbert's Case* (1584), 3 Coke Rep. 11, 76 E.R. 647, also 137 Selden Soc. 276, Moore K.B. 169, 72 E.R. 510.

[2] *Davy v. Pepys* (1573), 2 Plowden 438, 75 E.R. 658.

[3] *Gawler v. Wade* (1707), 1 Peere Williams 99, 24 E.R. 312, also 2 Eq. Cas. Abr. 165, 22 E.R. 141, Chancery Cases *tempore* Anne, 105.

[4] *Savile v. Savile* (Ch. 1719-1721), 2 Atkyns 458, 26 E.R. 677, 11 Modern 327, 88 E.R. 1069, Select Cases *tempore* King 32, 25 E.R. 206, 2 Eq. Cas. Abr. 646, 679, 704, 22 E.R. 542, 570, 591, 1 Peere Williams 745, 24 E.R. 596, Fortescue 351, 92 E.R. 886, Philadelphia Free Library MS. LC 14.81, f. 96, Chancery Cases *tempore* Geo. I, 600; *Walpole v. Lord Conway* (1740), Barnardiston Chan. 153, 27 E.R. 593, 2 Eq. Cas. Abr. 651, 22 E.R. 546.

the personal estate applied to the discharge of a mortgage on his estate. And this is in conformity to the law, which gave many privileges to the heir, as sitting in his ancestor's place and bound to do his services to the public and gave some of these privileges, even in the king's case, as by Magna Charta, c. 8,[1] where the king grants that he will not seize the debtor's land so long as he has chattels sufficient. 2 Inst. 18, 19.[2] Nor were lands originally liable to a private person's debt nor any execution but by *fieri* [*facias*] or *levari facias*, which last, though the it mentions *de terris*, yet means no more than the corn and other present profits of the land. Sir William Herbert's Case, 3 Coke 12a; 2 Inst. 394.[3] And when lands were made liable by the Statute of Westminster II, c. 18, this could only mean lands descended, as lands were not devisable at law. From this, it was that courts of equity stepped in in favor of the heir and, as before Westminster II, the ancestor's personal estate was only liable in his hands, so did they give the heir the privilege of laying the load upon the personal estate as the most proper fund for discharging the ancestor's debt. But this was at first personal to the heir. And it was long before it was extended to the devisee or *haeres factus*, for, in Cornish v. Mew, 27 Car. II, 1 Chan. Cas. 271,[4] it was refused to a devisee, but by whom, whether the Master of the Rolls or some judge, is uncertain, for though this was in Lord Nottingham's time, yet do I think it was not done by him because I find by a manuscript of his before that time, in Michaelmas 25 Car. II, he had determined otherwise in a Case of Mason v. Cheney.[5] Then, it was confined to a general devisee or *haeres factus* upon the same ground as in the case of the heir, such devisee standing in the heir's place. But it was afterwards further extended by the same chancellor to a particular devisee in Popley v. Popley, 2 Chan. Cas. 84 and 1 Vernon 36,[6] where I understand the words ' ordinary devisee' as meaning a devisee of particular lands. The opinion of a great man has been followed ever since and that on another reason besides those drawn from the old law which is the testator's intent to give the estate to the devisee free from any charge which might in its consequences frustrate that gift. Now, suppose there be simple contract creditors and the personal estate is employed towards payment of specialties. They shall stand in the place of specialty creditors for so much as is drawn out of the personal estate and receive satisfaction out of the lands descended, which is no more than the original creditors could have done. The lands descended are therefore, if the personal assets be insufficient, the primary fund for the payment of debts. And this I say on the authority of those cases of Savill v. Savill and Lord Conway.

It was objected that the testator's intent was declared by an act of his own in his lifetime that of the mortgage whereby he has created a specific lien on the lands devised and declared that they shall bear this burden and that this was the party's own contract. But this contract was only between him as debtor and his creditor and not between him and his heir or devisee, for, with them, he never contracted. And it has never been admitted in a court of equity that a man,

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[1] Stat. 25 Edw. I, Magna Carta, c. 8 (*SR*, I, 115).

[2] E. Coke, *Second Institute* (1642), pp. 18-19.

[3] *Harbert's Case* (1584), 3 Coke Rep. 11, 76 E.R. 647, also 137 Selden Soc. 276, Moore K.B. 169, 72 E.R. 510; E. Coke, *Second Institute* (1642), p. 394.

[4] *Cornish v. Mew* (1676), 1 Chancery Cases 271, 22 E.R. 796, also Reports *tempore* Finch 220, 23 E.R. 121, 1 Eq. Cas. Abr. 117, 270, 21 E.R. 923, 1038.

[5] *Mason v. Cheyney* (1673), Reports *tempore* Finch 42, 23 E.R. 23, 73 Selden Soc. 1.

[6] *Popley v. Popley* (1681), 2 Chancery Cases 84, 22 E.R. 858, 1 Vernon 36, 23 E.R. 290, also 1 Eq. Cas. Abr. 270, 21 E.R. 1038.

by making a mortgage, intends the mortgaged lands to be the primary fund for payment of the mortgage money. If it had, the court would never have decreed payment out of the personal estate in the first place. It was said indeed that the case is different with respect to the real estate, but no authority was cited for this. And though his mortgage be a pledge and security for the creditor, yet it leaves the representatives of the mortgagor where they were without determining the question between the heir and the devisee. If a simple contract creditor shall go first against the lands descended before he affects those devised, which is done not for the benefit of the creditor, but of the devisee of the land, why shall not the devisee have the same benefit directly to exonerate his own lands, as he has in the other case by circuity? That is why shall he not have the same relief directly against the heir by throwing the charge upon him as where he throws the simple contract creditors upon him for so much of the personal estate as is exhausted by the specialty creditors? In the case of a deficiency of personal assets, legatees are entitled to stand in the place of specialty creditors, but this is only as to lands descended, as was determined by Lord Macclesfield in Clifton v. Birt, 1 Williams 678,[1] where he says that a devisee of land is a specific legatee and shall not be broken in upon or made to contribute towards a pecuniary legacy. Now, by this circuity of throwing the legatees upon the real assets, they are preferred to the heir. Why shall not the devisee of the land be so too, especially when it is to comply with the testator's intent?

There is another reason for preferring the devisee in this case grounded upon the reason of the common law, which considers every devisee as a purchaser and coming in by purchase and an heir shall have no contribution against a purchaser, whether for a valuable consideration or otherwise. Sir William Herbert's Case, 3 Coke. In the Case of Searle v. St. Eloy, heard at the Rolls, 25 January 1727 and, afterwards, before Lord King 25 and 28 May 1728 (see it stated at 2 Williams 386),[2] as to another point, there was a devise of lands subject to the encumbrances thereon at the time of the testator's decease, and it was held first at the Rolls and, afterwards, by Lord King that the encumbrances should be first charged on the other lands descended to the heir before the devised lands.

I have now done with the reasons and authorities that determine me to think that the mortgage shall be discharged out of his lands descended, and I shall proceed to take notice of some objections made on both sides. The first is what was said for the plaintiff that this would tend to the leveling of all devises and that, if a man had two estates, one mortgaged for a greater, the other for a less sum, and devised one to one person, the other to another, one of the devisees would be entitled to contribution against the other, for which was quoted Carter v. Barnardiston, 1 Williams 505.[3] But I think there would be no reason for contribution in that case, the intent being equal that as one devisee should have one part of the land, the other should have the other part. Nor is this Case of Carter v. Barnardiston any authority to what it is urged, for the several devises were not until after an express general charge for the payment of debts.

The only other objection I shall take notice of was on the part of the defendant, which was this, that, if the devisee was not to have the lands descended applied in discharge [and] his mortgagee chose to take his remedy against the heir, he might have his remedy over against the devisee, which would be absurd and against the testator's intent. And I think this was

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[1] *Clifton v. Burt* (1720), *ut supra*.

[2] *Serle v. St. Eloy* (1726), 2 Peere Williams 386, 24 E.R. 778, also 2 Eq. Cas. Abr. 375, 517, 22 E.R. 319, 436.

[3] *Carter v. Barnardiston* (1718), 1 Peere Williams 505, 24 E.R. 492, also 2 Eq. Cas. Abr. 224, 375, 430, 475, 692, 703, 22 E.R. 190, 319, 366, 404, 582, 591, Chancery Repts. *tempore* Geo. I, 407.

rightly argued, for whatever remedy his creditor pursues does not alter the right of the parties and the burden must rest in its proper place and this strange consequence would follow, that the heir would draw from a devisee what was plainly and manifestly intended him by the testator.

I have after most mature deliberation altered my opinion in this case, which I am not ashamed to own since not to confess an error is much worse than to err. The appearance of hardship against the heir struck me at first. But this hardship in a particular instance must not prevail upon the court to break into its rules for marshalling assets. And though this may be called a new case not strictly within any rule nor warranted by any former precedent, yet must we remember that neither law nor equity consist merely of cases and precedents but of general rules and principles, by the reason of which the several cases coming before the courts of justice are to be governed without distinction or exception of any particular case from hardships peculiar to it. But there is one circumstance in the present case which frees my mind from any uneasiness on account of hardship upon the heir, which is that the charging the lands descended to him will bring things nearer to the testator's intent, the whole being intended to go to the devisee and what is come to the heir is the mere effect of a chance, the accidental revocation of the will by an act in law, the purchase of the reversion of one estate after the will was made and the testator's dying without any republication of it.

I declare, therefore, that the former decree must be reversed and that the devisee has a right to have the lands descended upon the heir applied towards satisfaction of his mortgage.

[Other copies of this report: British Library MS. Hargrave 383, f. 117, Georgetown Univ. Law Libr. Eldon MS., p. 233.]

[Other reports of this case: 2 Atkyns 424, 427, 26 E.R. 656, 658, Jodrell 258, 321, Harvard Law School MS. 1105, p. 47, Lincoln's Inn MS. Misc. 560, p. 119.]

108

Bailey v. Wilson

(Ch. 1745)

A witness who has a direct interest in the outcome of a lawsuit is incompetent to testify as a witness therein, but, if his interest in the case is indirect, he amy testify subject to being impeached.

An exception to the credit of a juror goes to his competence. But witnesses may be admitted to testify, though their credit be weak so that all possible light may be had.

2 Vesey Junior Supplement 1, 34 E.R. 971

Hilary term 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, and, amongst others, the testator's sanity was disputed. An objection was taken to reading the evidence of a 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 for several of those to whom the specific legacies were given. Magill, in Wilson's presence, took the specific articles so bequeathed, and gave them to the legatees, without being hindered from so doing by Wilson, though the latter did indeed say there was time enough and it was then too early to do it. But Magill replied the testator had

desired it, and therefore he should see the articles distributed. The objection made to Magill's evidence by the plaintiff 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 person to whom administration should be granted would have an action against him as a trespasser, and, in [an action of] trover could recover damages against him. To this, it was answered by the defendant that Magill was interested on both sides, for he was liable to have an action brought against him by Wilson, the executor.

LORD HARDWICKE said the question is whether the objection to Mr. Magill's evidence goes to his competency or only to his credit. I am of opinion it goes only to his credit, not his competence. In order to determine the question, I shall consider this matter in two lights: first, how the point stands, supposing Mr. Magill to have acted as executor of his own wrong; and, 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 that he is liable either way and that the possibility of an action against him by the executor, being weighed against the other, sets the matter at rest. There are many cases where, if a witness is liable to account either way, he shall be examined, which disposes of the objection to Magill's competence. And this objection of a man's being liable to an action differs from his being immediately interested. There has been some change in the doctrine on these points, there being cases in the old books where a man's liability to an action went to his competence. 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, in an action brought against his ancestor, as having nothing vested in him during such ancestor's life. 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 supporting his own. Now, these vested interests are very different from a possibility of an action, for, suppose an action of trespass brought for a nuisance and the question to be whether the Defendant worked upon the plaintiff's 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 competence, and they are admitted that the truth may better come out.

A Case of The King v. Bray was before me, when Chief Justice of the King's Bench,[1] which was upon an information relating to the Borough of Tentagen, as to the nomination of elisors, whose duty it is to return a jury of freemen, by whom a new mayor is to be elected. Objections were taken to witnesses who were brought to prove the custom, as having been themselves actors in that for which, if it were a wrongful act, they were liable to be punished. And Baron Thompson, who tried the cause at the assizes, allowed the objection. But, upon a motion for a new trial, the whole Court of King's Bench was of opinion that the objection went only to credit, not to competence, and a new trial was granted. In the argument of the case, several others were put, particularly The King v. Clark,[2] where, upon an information for a nuisance in the River Thames, a person who had received a particular injury and damage thereby 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 competence.

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[1] *Rex v. Bray* (1737), Cases *tempore* Hardwicke 358, 95 E.R. 232.

[2] *Rex v. Clark* (1702), 12 Modern 615, 88 E.R. 1558.

This being the general rule as to points of this nature, let us now consider the observation 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 in both cases. But it is said, if one is to be balanced against the other, the scales ought to be equal, which is not the case here, for the lawful executor can recover no damages without deducting what has been lawfully paid according to the will. I never knew any case of this kind, however, in which the court entered into a nice consideration of the quantum of damages. There will always be a possible difference in the damages. Perhaps, no action may be brought or the witness whose conduct is impeached may be favored by the party he supports. But still, where a witness is equally liable to an action by the plaintiff or the defendant in the cause in which he offers his testimony, the court will not go into a consideration on which side the greater damages might be recovered against him in order to ground an objection to his competence. But how does it appear in the present case? What was the quantum of the assets? What were the debts or whether the legatees ought to have their legacies? How, then, can it be ascertained whether this witness is liable to more loss one way than another? It is, therefore, a good answer to say there will be an equal ground of action against him, however the present question may be determined. There is a great difference between an exception to a witness and a challenge to a juror. An exception to the credit of a juror goes to his competence, both being blended together. But witnesses may be admitted, though their credit be weak [so] that all possible light may be had.

Secondly, if Magill be considered as acting with the privity of Wilson, this, makes his evidence receivable here without dispute, Now, upon Magill's proposing to deliver the specific legacies, though Wilson said he thought it too early to deliver out effects, yet, when Magill replied the testator had desired it and he did accordingly deliver the articles in Wilson's presence, the latter 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 his testator's estate and, if the disposition be made by another with the privity of the executor, and not against his consent, that person is no more than his agent. Will it, therefore, be an objection to a witness that the executor has employed him as his agent? Surely not. And yet, in such a case, the man is liable if the will be set aside. But it never was thought that, because a witness to a will has been employed in the management of the estate and distribution of the effects, that should take away his competence. The consideration of actions which may possibly be brought against a witness hereafter is too remote. I am, therefore, of opinion Mr. Magill's evidence should be read.

[Other copies of this report: 9 Modern 473, 88 E.R. 583.]

[Other reports of this case: 3 Brown P.C. 195, 1 E.R. 1265.]

109

Channel v. Beeby

(Ch. 1745)

In this case, the intent of the testator was to set up a new entail and not to describe any particular devisee.

1 Vesey Junior Supplement 441, 34 E.R. 865

25 November 1745.

A testator, by a will dated 27 January 1731, devised all his real estate to A., B., and C. and their heirs to the use of them and their heirs upon trust to suffer his cousin Richard Beeby and his assigns to take the profits for his life and, after his decease, to permit his next heir

male of the name of Beeby and the heirs male of his body forever to take the profits of the said estate, it being his intent that his estate should not be sold or go out of his name, but that it should descend from heir male to heir male of the family and name of Beeby so long as there should be heirs male of the name of Beeby of his family, and, in default of issue male of his family and name of Beeby, to his own right heirs. Richard Beeby, the tenant for life, died without issue male. And the bill was brought against the trustees by the plaintiff as heir at law and, likewise, against the defendant, Joseph Beeby, for a conveyance of the estate and an account of the profits, charging the devise to be void. The defendant insisted on his title as the next heir male related to the testator of the name of Beeby, the plaintiff, though heir at law, as descended from the testator's eldest brother, being a female, whereas the defendant was descended through males from a brother of the testator's father. For the defendant, it was argued that the testator having taken notice of his heirs general in contradistinction to his heirs male and having postponed the former, here was a sufficient description of the person intended to take, under which description, Joseph Beeby was entitled, though he was not heir in the strict legal sense.

But LORD HARDWICKE said this is a plain case, and the defendant is contending to overturn a multitude of authorities in which the point has been settled. In Newcomen v. Barkham, 2 Vern. 729, it is true the rule laid down in Shelley's Case as to this matter was disputed, but, when it came before me, I chiefly relied on their being a sufficient description of a person certain to take, and, therefore, distinguished it from what is laid down in Shelley's Case. But, then, a person who takes as heir male by description, must be heir male of the body of some one pointed out or, else, the description is void. The present case is exactly like that of Ford v. Lord Ossulston, which went through almost every court in Westminster Hall, and was tried at bar in the King's Bench 13 November 1708.[1] In that case, the testator, after taking notice of his daughter, devised his estates to his own heir male; the plaintiff in the suit was nephew to the devisor. And Chief Justice Holt said the words 'heirs male of the body' are sufficient to vest a remainder, but, where the words 'of the body' are wanting, they must be supplied or the devise is void, and the words 'heirs male' cannot let in a collateral heir. This I take from a manuscript note of that case, and Dawes v. Ferrers, 2 P.W. 1, as well as Sterling v. Ettricke, Prec. in Cha. 54, are to the same purpose.[2] It being clear that such a succession of heirs male cannot be established, the defendant contends here is a sufficient *descriptio personae*. But I am of opinion these words cannot be so applied. I admit that, where the devise is to a presumptive heir or to an heir in borough English, the devise is good, because some one certain person is pointed out. But what certain description have we here? Did the testator mean his heir male at his death or when the estate for life determined or when he made his will? In whom then can it vest? His intent plainly was to set up a new entail, and not to describe any particular devisee.

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[1] *Newcomen v. Barkham* (1717), 2 Vernon 729, 23 E.R. 1078, also *sub nom. Brown v. Barkham*, Precedents in Chancery 442, 461, 24 E.R. 197, 207, 1 Strange 35, 93 E.R. 368, Lincoln's Inn MS. Misc. 506, p. 1, Gilbert Rep. 116, 131, 25 E.R. 81, 92, 2 Eq. Cas. Abr. 717, 22 E.R. 603, 1 Eq. Cas. Abr. 215, 21 E.R. 999, see also *Newcomen v. Bedlam Hospital* (Ch. 1741), Jodrell 178; *Wolfe v. Shelley* (1581), 1 Coke Rep. 88, 76 E.R. 199, 3 Dyer 373, 73 E.R. 838, 1 Anderson 69, 123 E.R. 358, Moore K.B. 136, 72 E.R. 490, Jenkins 249, 145 E.R. 176; *Ford v. Lord Ossulston* (1708), 3 Salkeld 336, 91 E.R. 858, 11 Modern 189, 88 E.R. 980, 2 Eq. Cas. Abr. 357, 22 E.R. 304.

[2] *Daws v. Ferrers* (1722), 2 Peere Williams 1, 24 E.R. 617, also Precedents in Chancery 589, 24 E.R. 264, 2 Eq. Cas. Abr. 331, 505, 22 E.R. 282, 427; *Starling v. Ettrick* (1695), Precedents in Chancery 54, 24 E.R. 27.

As to the objection that he has postponed his right heirs, there is no weight in it, because that does not show that the persons to take before should not be his right heirs likewise. It is only a general devise of the reversion, and, therefore, affords no inference excluding them. And this objection was more strong both in Ford v. Lord Ossulston and Daws v. Ferrers. The case which appears most in favor of the defendant is that said in 1 Ventr. 381 to have been decided in Hilary 16 or 26 Eliz.[1] But it is doubtfully stated, and Lord Hale takes notice there of the testator's having before particularly mentioned his brother's son in such a way as went to show he was meant when the testator spoke of his heir male, and it was plain that the person so described was someone then in being, who was intended to take. That comes, therefore, to the cases which I allow, namely, where the question is whether a particular person be sufficiently described or not by what is technically an improper description. But, here, no certain person is described or intended, and it is only an attempt to create a particular entail in heirs male, which the law does not allow.

[Other reports of this case: Jodrell 501.]

110

Meredith v. Tooke

(Ch. 1746)

Where a legatee dies before the legacy vests, it lapses, as, where a legacy is given at a certain time, it is not vested before that time, but, if it is given absolutely to be paid at a certain time, it is vested.

1 Vesey Junior Supplement 325, 34 E.R. 810

10 February 1745[/46], Hilary term 19 Geo. II.

Mary Lethieullier, by a will, devised in these words:

> I do hereby order my executrixes hereinafter named to lay out the sum of £2400 in the purchase of government securities within one month after my decease in their own names and that they do pay the interest or dividends thereof to my grandson, William Lethieullier, during the term of his natural life and, from and after his decease, then I will and direct my executrixes to deliver and transfer the said securities which shall be so purchased with the said sum of £2400 to the children of my said grandson, William Lethieullier, to be divided amongst them, share and share alike, as they shall respectively attain his or their age of twenty-one years if sons or, if daughters, at their ages of twenty-one years or marriage or, if there shall be but one child of my grandson, then, I give the whole security to such one child at his or her age of twenty-one or marriage. And I direct that the dividends or interest of the said £2400 shall from the death of my said grandson be from time to time as soon as it amounts to £100, laid out in the purchase of good government securities, all which I direct shall be also delivered to the child or children of my said grandson in the like manner as the securities to be purchased with the said sum of £2400 are hereby directed to be and, in case of the death of any of the said children before the age or marriage before mentioned, I will that their respective shares shall go to the survivor of them.

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[1] *Anonymous* (temp. Eliz.), 1 Ventris 382, 86 E.R. 245.

The testatrix died in the life of her grandson, William, who died leaving issue one son, John. John died when about five years old, and his mother, the plaintiff in the suit, took out administration to him. The question was whether the said bequest of the £2400 vested in John, and his mother, consequently, as his administratrix, was entitled to it or whether it was a lapsed legacy by his dying under age.

LORD HARDWICKE said I shall premise that the whole clause on which this question depends consists of a direction to the executrixes. The common distinction has been made that, where a legacy is given *at* twenty-one, it is not vested, but, if given absolutely to be *paid* at twenty-one, it is vested. I shall first consider the latter part of the clause, where the testatrix puts the case of an only child, not merely because it is that which has happened, but because it may afford some light in explanation of the other part of the clause. Now, in the latter part, the gift is to such one child at his or her age of twenty-one. Here, therefore, the time is plainly annexed to the gift itself. But it is insisted on by the plaintiff, and I think rightly, that the case will not necessarily be dependent on this passage of the will singly, but that, if there be words in the general disposition, which show the intent of the testatrix that this legacy should vest in any case or in that of there being several children, those words shall control the strictness of the latter, even in the case, which has happened, of there being only one child. As to this, however, the whole, as I said before, consists of a direction to the executrixes. And, therefore, the argument used for the plaintiff, that this is a severance of the £2400 from the rest of the estate of the testatrix fails, for this is not like a bequest to trustees, but the property during the life of William Lethieullier continued in the executrixes. It was further insisted for the plaintiff that the gift to the children of William was immediate, that the direction to deliver and transfer is absolute and immediate, and the division only is to be postponed until twenty-one. But I am of opinion that the reference of the words ' as they shall attain their age of twenty-one years' must go to the delivery and transfer, as well as to the division. It appears to be so from the nature of the thing itself, for how are these securities to have been delivered and transferred to these children before they were divided? To all the children jointly? No, certainly. The testatrix has directed an accumulation of the interest until the children attained twenty-one, such interest to be received and laid out in the meantime by the executrixes, which is inconsistent with a transfer before that time. The new securities to be purchased with the dividends are directed to be transferred in like manner as the securities to be purchased with the £2400. These words ' in like manner' must relate to the time, for there is no other mode or circumstance to which they can refer.

Now, these securities could not be transferred until the children were twenty-one, because the fund out of which they were to arise was not to close until then. And the whole being to go in like manner, the securities purchased with the principal sum of £2400 must not be transferred until the same time. In the latter part of the clause, the testatrix has given the legacy expressly at twenty-one. But, in the former part of the clause, her meaning is expressed to be the same. And I think it plainly appears to have been her intent that the whole should be suspended until some of the children attained twenty-one. As to her intent what should become of this legacy in the case that has happened, it in no way appears. But there is not the least probability that it was her intent to give it to the child's administratrix. The cases cited from 2 Vern. 508 and 673, do not come up to this, for, in both of them, interest was to commence immediately, and, as to that of Acherley v. Vernon, 1 P. Wms. 783, the question there was only about the commencement of the interest and the legacy was severed from the bulk of the

estate and could not go to the residuary legatee from the terms of the will.[1] Upon the whole, therefore, the bill, as to this demand, must be dismissed.

It appears that the report of Cave v. Cave, referred to by Lord Hardwicke as from 2 Vern. 508, would have been no sound authority for the plaintiff, even had it been more closely in point in his favor, for the inaccuracy of that report has been ascertained by an examination of the Register; see Boycott v. Cotton, 1 Atk. 556.[2]

111

Bland v. Bland

(Ch. 1746)

A wife's paraphernalia cannot be disposed of by her husband's will.
In this case the testator's words were merely precatory and not dispositive.

Jodrell 528

24 February 1745[/46].

Lady Bland, mother of the late Sir John Bland [1691-1743], by will in 1721, devised her manor of Withington and other lands in Lancashire subject to a charge of £6000 for her daughter's fortune and to the payment of her own and her husband's debts to her son, the late Sir John, his heirs, executors, administrators, and assignees forever and did thereby earnestly request her said son that, in case of a failure of issue of his body, he would sometime in his lifetime, either by will or any other writing, convey and settle the said real estate so devised by her to him ' or so much thereof as she should stand seised of at the time of his death' so and in such manner as that, after a failure of issue of his body, the same might come to be enjoyed by her daughter and the heirs of her body with several remainders over. And she died.

Upon Sir John Bland's marriage with Lady Frances, one of the defendants, several other lands had been settled on him for life, remainder to his first and other sons in tail male, with a proviso that, if, after the birth of any son or sons by Sir John by his wife, he should be minded to alter the use or estate thereinbefore limited to any son who should then be his eldest or only son and to limit the same so as to reduce such son to be tenant for life with remainder to trustees and their heirs during his life to support contingent remainders, and, after his decease, to the use of the first and other sons of such only or eldest son successively in tail male and should declare such intention by any deed or deeds or by his last will in writing attested by three or more credible witnesses, then and in such case, the parents should ensure as to such premises whereof the use should be so intended to be altered to the use of such only

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[1] *Cave v. Cave* (1705), 2 Vernon 508, 23 E.R. 925, also 1 Eq. Cas. Abr. 275, 21 E.R. 1042; *Stapleton v. Cheele* (1711), 2 Vernon 673, 23 E.R. 1038, also Precedents in Chancery 317, 24 E.R. 150, Gilbert Rep. 76, 25 E.R. 53, 1 Eq. Cas. Abr. 295, 21 E.R. 1056; *Acherley v. Vernon* (1732), 1 Peere Williams 783, 24 E.R. 614, also 9 Modern 68, 88 E.R. 321, 10 Modern 518, 88 E.R. 834, 2 Barnardiston K.B. 212, 426, 94 E.R. 456, 596, Willes 153, 125 E.R. 1106, Fortescue 188, 92 E.R. 812, 1 Comyns 381, 92 E.R. 1121, 2 Comyns 513, 92 E.R. 1184, 2 Eq. Cas. Abr. 302, 328, 565, 587, 768, 22 E.R. 254, 280, 476, 494, 653, see above, Case No. 10.

[2] *Cave v. Cave* (1705), *ut supra*; *Registrum Brevium*; *Boycot v. Cotton* (Ch. 1738), 1 Atkyns 552, 26 E.R. 347, also West *tempore* Hardwicke 520, 25 E.R. 1064, above, Case No. 95.

or eldest son for the term of his life, and, after the determination of that estate, to the use of two persons to be in such deed or will for that purpose named and their heirs during the life of such only or eldest son in trust to preserve the contingent remainders to be limited as aforesaid. And it was recited that it was not intended any other estate thereby limited, except such estate tail limited to such eldest son as should from time to time be intended to be reduced to a tenancy for life should by any deed or will be any way charged or attested.

Sir John, by will in April 1743, devised all his real estate ' which were unsettled' at his marriage and were then absolutely in his power to Lady Frances, his wife, for the term of fourteen years in trust for raising portions for and thereout. He also directed some annuities to his younger children and for payment of his debts, legacies, and funeral charges and gave her all his personal estate, but, as to his jewels, he directed that his wife should have the use of them for her life with a power of disposing of such as she should think proper to the wife of his eldest son or, if he died unmarried, to the wife of his next son. He also devised that, as soon as his debts, legacies, and funeral charges should be discharged, the term of fourteen years granted to his wife should cease as to all of the estates comprised in that term, which should then be vested in the Lord Guernsey and five others therein named until such time as his son John, the defendant, should have a son of the age of twenty-one years to whom they should then deliver up the possession of all his real estate comprised in their trust with all arrears and profits that should have accrued before that time with this proviso, however, that he should entail all the said real estates on such son of one of his brothers, if he should have no son who should arrive to the age of twenty-one, who should come next to the title of baronet. And he appointed the Lord Guernsey and the others to be trustees of his will. He further directed the punctual payment of all his debts and legacies and that neither his real not his personal estates should be put in the power of his son John, but preserved for the use of his eldest and other sons in tail male and, after them, to the use of his own second son with remainders over. Then, he devised to Lady Frances, his wife, an annuity of £100 to be raised by her during the continuance of the fourteen years term and afterwards, reciting his hope that his son John, now Sir John, the defendant, would not think he had put any hardship upon him by his will since he had only restrained him from prejudicing those who might happen to succeed him, he did, therefore, according to the power reserved to himself by his settlement at his marriage make and appoint him ' tenant only for life' of all the lands therein settled upon him with a remainder to his heirs male with a power, however, of exchanging any parcel of land with the consent of his trustees. And he gave his wife and the before named trustees a power to lay out any sum in the purchase of lands for the benefit of the next heir male after his son John.

Soon after this will, died Sir John Bland, the testator. And the younger children having now brought their bill for raising their portions out of the trust estate and for a performance of the several trusts in their father's will, several questions arose.

First, what estate the late Sir John Bland took in the manor of Withington and the other Lancashire lands under his mother's will;

Secondly, whether if she had the absolute fee in them, they were sufficiently comprised in his own will so as to pass thereby;

Thirdly, whether the power reserved to him by his marriage settlement was good in point of law and, if good, whether well and properly executed by him;

Fourthly, whether the intermediate profits between the expiration of the fourteen years term and the present, Sir John Bland having a son who should attain to twenty-one, were sufficiently disposed of;

And lastly, whether, notwithstanding the devise of the jewels to Lady Frances for life, she had not an absolute right to such of them as were her paraphernalia and worn by her as the ornaments of her person in her husband's lifetime.

For the plaintiffs, it was argued that here was an absolute devise of Withington and the Lancashire lands to the late Sir John Bland under his mother's will, the legal fee being given

him and the request or recommendation that, in a failure of issue of his own body, the lands should come to her daughter, leaving in him a discretionary power and only taking place in case he should have no children of his own and was no restraint of the precedent absolute devise in fee to him. Besides having himself several children at the time of his death, he was no way bound to take notice of this request, that the word 'request' imports no kind of trust or confidence, as, in the case cited by Lord Nottingham, was decreed by Lord Ellesmere in Civil v. Rich, 1 Ch. Ca. 310,[1] where a man devised a term to his wife and hoped she would leave it to his son; her second husband granted it away, and it was held this was no trust for the son. Now, here was much less reason for varying the construction, this being meant only if he should find it convenient to the situation of his family, that, had Lady Bland intended to give Sir John Bland an estate over, which he should have no power, she would have used other words than she had done, for even supposing it an estate tail by implication, still, he might have docked it by a recovery and even the pretended restraint did not go to the whole but only to so much as he should die seised of, which was the strongest proof of her intending him an absolute estate in the whole, that here was, therefore, no pretense of his being a trustee for himself of an estate tail only, and even supposing there was, he, having the legal fee and a trust in tail in himself, had fully disposed of it by his will, which was a good disposition according to Brown v. Brown, 25 October 1739, which was a father, upon his son's marriage, articled to lay out a sum of money in land to be settled upon the son for life, remainder to his first and other sons in tail male, remainder to the father in fee, and no settlement pursuant to the articles, but the father who had the fee in him, his son and also the first son of the marriage (who was to have been the first remainderman in tail) joined in a conveyance and it was held good against the second remainderman because all had joined who had any sort of interest, legal and equitable, and, here, there could be no doubt of Sir John Bland's intending to dispose of these lands, for he had no other estate in Lancashire. And the words, 'which are absolutely in my power' must necessarily extend to them.

As to the power contained in Sir John Bland's marriage settlement, it was argued to be good as being intended to be exercised in one single instance only, that of an eldest son, and it was said these kinds of powers are contained in many noble family settlements, that if it was good in its original creation, it was also well executed by the will, which recites the settlement in making the defendant tenant for life, and that Sir John Bland's having sufficiently declared his intent to revoke the use in tail the new use to the defendant for life with remainders to his first and other sons in tail, then took place and arose out of the settlement, that having directed the new use whenever the old should be revoked, since it would be nonsense to imagine that, by the words, 'remainder to his heirs male' in the will, he should still mean to leave his son tenant in tail, as he was under the settlement before the power was executed. And lastly, that even supposing the execution was defective in some points, the general declaration of his intent in the will would be sufficient according to Harvey v. Harvey, 12 November 1739.[2]

As to the point of the intermediate profits of the lands devised by Sir John Bland for the payment of his debts and legacies, it was insisted that they were well and sufficiently disposed of, the devise being first to his wife for fourteen years for payment of debts or, if paid within that time or upon a determination of the term, then to trustees until the defendant should have a son who attained to the age of twenty-one and then they were to deliver not only the

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[1] *Civil v. Rich* (1679), 1 Chancery Cases 309, 22 E.R. 815, also 2 Chancery Reports 141, 21 E.R. 640, 1 Vernon 216, 23 E.R. 423, 1 Eq. Cas. Abr. 153, 21 E.R. 952, 79 Selden Soc. 632, 722.

[2] *Harvey v. Harvey* (1739), Barnardiston Chan. 103, 27 E.R. 572, 1 Atkyns 561, 26 E.R. 352, 2 Eq. Cas. Abr. 669, 670, 22 E.R. 562, 563.

possession, but also all the accumulated profits to such son when he became twenty-one so that here being a competent disposition of the whole, it distinguished the present case from that of Hopkins v. Hopkins, 18 November 1734.[1]

For the defendant, the present Sir John Bland, it was argued that Lady Bland's intent was clear to keep her estate in her own family, having limited no remainder but to those of her blood and to entail all such parts as Sir John Bland should stand seised of as strictly as the law permits, that the words, 'earnest request' amounted to a direction, a will being nothing but a direction how a man's estate shall go after his death and no particular set of words [is] requisite, but every hope, every inclination of what the party would have done with his estate, either by a devisee or executor, is imperative, as in Mason v. Limbrey, before Lord Talbot in 1735,[2] where there was a devise of £2000 to A. with a devise to give it among his children and the children of a deceased daughter 'as he should think fit'. A. died in the testator's lifetime, yet it was held that the children should have it, A. having under the will but a life interest. So in Massey v. Sherman,[3] in this court, Michaelmas 1739, where a copyhold estate was devised to the wife and her heirs, not doubting, but being well satisfied and putting his trust and confidence in her that she would dispose of the same to and among all or such of his children as she should think fit, the court inclined that this was a trust for the children, not in equal proportion but to one or more as she should please, and, the wife having devised the greatest part to the daughter without a surrender subject to the payment of debts and the rest to her son, it was held by the Lord Chancellor that, if this was a trust only in the mother, it was good as a devise of a trust of a copyhold without a surrender, and it was decreed for the daughter. So in Eacles v. England, 2 Vernon 466,[4] admitted that the words, 'I desire' amount unto an express devise, that the words, 'earnest request' were no less strong. The reason for giving him a fee being only for the payment of debts and cleared the encumbrances, which answered the doubt arising from the words 'so much', as those purposes might require a sale of some part. She might also intend Sir John Bland a power of selling part for a valuable consideration, but still her mind was that what he should leave unsold should go to the remainderman, that the words 'so that after failure of issue, the same should come to my daughter' proved her intent.

Sir John Bland was tenant for life only with remainders over as in Sandys v. Dixwell,[5] about three years ago, where, though the words gave an estate tail to the wife and consequently would let in her husband to be tenant by the curtesy, yet, because the intent was plain that the husband should never have anything to do with it, the words were restrained to give the wife but an estate for life. And this being originally a trust estate in the trustees would be sufficient to preserve the contingent remainders though no trustees were actually appointed for that

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[1] *Hopkins v. Hopkins* (1734), Harvard Law Sch. MS. 1105, p. 33, Lincoln's Inn MS. Misc. 384, p. 393, Cases *tempore* Talbot 44, 25 E.R. 653, West *tempore* Hardwicke 606, 25 E.R. 1108, 1 Atkyns 581, 26 E.R. 365, 1 Vesey Sen. 268, 27 E.R. 1024, Vesey Sen. Supp. 137, 28 E.R. 480, 2 Vesey Jun. 719, 30 E.R. 859, 2 Eq. Cas. Abr. 341, 431, 501, 22 E.R. 291, 367, 425, see above, Case Nos. 34, 96.

[2] *Limbery v. Mason* (1734), 2 Comyns 451, 92 E.R. 1155, Lincoln's Inn MS. Misc. 384, p. 405, pl. 30.

[3] *Massey v. Sherman* (1739), Ambler 520, 27 E.R. 335.

[4] *Eeles v. England* (1704), 2 Vernon 466, 23 E.R. 901, also Precedents in Chancery 200, 24 E.R. 96, 1 Eq. Cas. Abr. 297, 21 E.R. 1057.

[5] *Roberts v. Dixwell* (1738), West *tempore* Hardwicke 536, 25 E.R. 1072, 1 Atkyns 607, 26 E.R. 381, 2 Eq. Cas. Abr. 668, 22 E.R. 561.

purpose, as in Hopkins v. Hopkins, 12 March 1738, that the case quoted of Civil v. Rich, if it were to be determined at this day, it would be construed imperatively and it was answered by Hill v. Smith, 14 August 1739, and Lombe v. Lombe, December 1744,[1] where thirds were given to the wife, ' hoping' she would continue a widow, that, as to Sir John Bland's power of disposing, if he should be construed to be a tenant in tail in equity, still he could not dispose by will since a tenant in tail in equity can pass his interest only by a fine and that it was a mistake to say that, because he had both interests in him, legal and equitable, it was unnecessary to levy a fine because that would work only by estoppel, for, as to the equitable estate, the fine must work by way of a bar. And the case cited of Brown v. Brown was not applicable for many reasons, there being not only an acquiescence by the remainderman under the will, but the coming afterwards to set aside a part of it and to set up a title under the articles and that against a superior equity, a claim of a portion for a daughter. It was argued that, where money was to be laid out in land and settled upon the party in tail, remainder to him in fee, the court would decree the money to him, but never where the remainder was limited to a third person.

As to the power, it was insisted that the validity of these powers had never yet received any judicial determination nor were they grown into common practice, that they tended to a perpetuity, the legal notion of which is not to make estates always unalienable, but to make them so for a longer time than the law allows.

But it was said by the Lord Chancellor [LORD HARDWICKE] I shall not determine this question should the case turn on that without the assistance of judges, so apply to the point of the execution of it.

It was argued that this was a mere legal power, and the execution of it must be so, nor could a court of equity put it upon a different foot from the law, that such powers must be strictly pursued, as, where there is a power given to limit an estate for life, an execution of it by limiting an estate for 99 years if the party shall so long live has been held not good, though it is substantially the same, that, here, the power required Sir John Bland to declare his intention of limiting the new use to his eldest son for life with a remainder to his first and other sons in tail, whereas, here, he had declared no such intent of limiting it to him for life with remainder to his first and other sons, but had done it by limiting the use to him and his heirs male, that he was also to name trustees for preserving contingent remainders, which he had not done, the six trustees appointed by his will being for another purpose, that of the fourteen years term, and so the power was not legally nor properly executed, that this power being to charge a third person's estate by changing his estate tail into an estate for life was to be taken strictly according to Evelyn v. Evelyn, 2 Williams 598,[2] that, though he had a power to alter his eldest son's estate, yet he could not alter the other estates which were fixed by the settlement, whereas, though he had an authority to do it under the power, yet he had, by his will, which was intended for an execution of the power, authorized the defendant to make exchanges of lands whereby the whole would be in the defendant's power to alter. And, if he was wrong in this instance, the case could not be taken by parcels, but the whole power and execution thereof must be taken together.

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[1] *Hopkins v. Hopkins* (1734), *ut supra*; *Civil v. Rich* (1679), *ut supra*; *Hill v. Smith* (Ch. 1739), Jodrell 48, Lincoln's Inn MS. Misc. 384, pp. 497, 542; *Lady Lombe v. Clifton* (Ch. 1744), Jodrell 455.

[2] *Evelyn v. Evelyn* (1731), 2 Peere Williams 659, 24 E.R. 904, also W. Kelynge 18, 25 E.R. 473, 2 Barnardiston K.B. 118, 94 E.R. 393, Fitz-Gibbons 131, 94 E.R. 686, Select Cases *tempore* King 80, 25 E.R. 233, 6 Brown P.C. 114, 2 E.R. 969, 2 Eq. Cas. Abr. 500, 22 E.R. 424.

Upon the last point, it was argued that a difference was to be made between the surplus profits arising during the continuance of the fourteen years term and such as should arise between the determination of the term and the defendant's having a son who should attain to twenty-one, the latter only being given to the trustees to be accumulated and, if any surplus of the former beyond what would satisfy the debts, legacies, and annuities, such surplus must result and go to the heir as undisposed of, that, as to the latter, there was no express gift of them to such son when he should attain twenty-one, but only a direction that the trustees should after the end of the term take possession and then deliver it up with all arrears of profits to such son when twenty-one. Next comes the direction for entailing, but still, there is no gift to the son at twenty-one nor to any son of the brothers who should come to the title of baronet, and, lastly, that, as to the intermediate profits between the expiration of the term and the birth of a son to the defendant, they were all undisposed of and must consequently go to him as heir at law.

Lord Chancellor [LORD HARDWICKE]: Many questions have arisen in this case. The first relating to the manor of Withington and other lands contained in Lady Bland's will and subject to her devise, the next to be settled estates comprised in the late Sir John Bland's marriage settlement, and the third relating to lands devised by his will and, upon this last, besides the question upon the inheritance and freehold itself, another has been made upon the intermediate profits until the present Sir John Bland shall have a son who shall attain his age of twenty-one.

As to the first, there are three points to be considered: one, whether these lands are comprised in Sir John Bland's will so as to pass thereby; secondly, whether he took such an estate in them under his mother's will as enabled him to dispose thereof; and, thirdly, whether the present Sir John Bland has any equitable estate therein under his grandmother's will. Upon the first of these, I am of opinion that these lands do pass by Sir John Bland's will, being unsettled at the time of his marriage, and the words 'which were unsettled at my marriage' sufficiently extends to them. Many questions have arisen in this court upon the words 'settled' and 'unsettled', particularly in Strode v. Russel, 2 Vernon 621, and afterwards in Chester v. Chester, Ab. Eq. Cases 211,[1] in both of which it was determined that lands comprised in a deed, but whereof no use was limited or declared, would pass by the words, 'out of settlement'.

The next point is Sir John Bland's power of disposing, which depends upon his mother's, Lady Bland's, will now in law. Sir John clearly had that power, the devise being to him and heirs not subject to any trust, but the charge only. But whether he had such an estate in equity is the doubt, which depends upon the request in Lady Bland's will, whether imperative or not, for, if it be the former, Sir John Bland must then be considered as a trustee for the use in the will. In order to make such a construction, the party must declare his will and not leave it purely to the option of the devisee whether he will or will not give the estate. Indeed, there have been many cases in this court where clauses, which have been directory have been taken for a disposition, as in those of Mason v. Linbery and Massey v. Sherman, where there were the words 'trust and confidence'. But as it is so in some instances, it may be otherwise in others and the request to be complied with barely at the devisor's direction. In the present case, I think Lady Bland did not mean her request to her son as imperative, but discretionary, for he is not desired to settle any part of the lands, but he might sell the whole if he pleased. And this is a bare request, not obligatory, but subject to his judgment. As to such parts as he should die seised of, he might have sold them for a valuable consideration. He might have advanced a son

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[1] *Strode v. Lady Russell* (1708), 2 Vernon 621, 23 E.R. 1008, also 3 Chancery Reports 169, 21 E.R. 758, 1 Eq. Cas. Abr. 210, 21 E.R 996; *Chester v. Chester* (1739), 1 Eq. Cas. Abr. 211, 21 E.R. 996, also 3 Peere Williams 56, 24 E.R. 967, Mosely 313, 337, 25 E.R. 413, 426, Fitz-Gibbons 150, 94 E.R. 695, 2 Eq. Cas. Abr. 330, 22 E.R. 281.

or a daughter in marriage with them or put them to any other use he should think fit. It was said that the debts and charges to which these lands were liable answered the doubt arising from the words ' so much'. But the payment of debts and legacies has no sort of connection with and bears no relation to the time of his death, which is the only point of time to which the request relates and this brings it very near the Case of Attorney General v. Hall, before Lord King,[1] where it was held that the absolute property vested in the son and that he might dispose of it. Here, it is not a bare power, but the fee itself, that is given, and his power of disposing was not collateral but flowed from the nature of the estate given him. I am, therefore, of this opinion upon the penning of the will, by which I do not mean to contradict former cases wherein there was a desire to settle a particular thing, here being no such desire, either as to any particular part or the whole, but all was absolutely left in Sir John Bland's power to dispose of or not, as he should think fit. This being, therefore, my opinion upon this head, it is needless to consider whether, if a settlement had been made of these lands by the late Sir John Bland, he must have been a tenant for life or in tail or whether leaving the legal estate in fee and also an equitable estate tail in himself, he could dispose thereof by a bargain and sale or by a will without a fine, that being now immaterial and not fully determined in Brown v. Brown, which had many peculiar circumstances that have been mentioned at the bar.

The next question arises upon Sir John Bland's marriage settlement, *i.e.* as to the power therein, which whether good in point of law, I shall not determine.

It was an invention of the last earl of Nottingham, and it has never yet received the sanction of a judicial determination and, though it does not go so far as that in the Duchess of Marlborough's Case, yet it is still an attempt to carry limitations for life one step farther than the law has hitherto allowed. Had the case turned upon this question, I should not have heard it without the assistance of the judges, but I am very clearly of opinion that this power is not well executed. The power required Sir John Bland to declare his intent of altering the estate and, though it was said to be sufficient for him to declare his intent of revoking and that the new uses would upon such revocation arise out of the settlement, yet that is not so, for he must not only declare his intent of revoking the legal use, but must expressly limit a new one to the son for life with remainders to his first and other sons, whereas he has done it by limiting an estate for life with a remainder to the heirs of his body, which makes him a tenant in tail. And upon an [action of] ejectment, it would be held not a good execution of the power from the diversity of estates he had power to limit and those he has limited. But, if there could be any stretch of these words upon the authority of Lisle v. Gray, Sir T. Jones 114,[2] which yet I think there cannot, still the want of trustees for preserving contingent remainders, which, by the power he was required to insert, makes it bad, for, as it now stands, all the contingent remainders might be destroyed; besides, the power given of exchanging is going farther than he had authority to do. It was objected that this power was not to be taken strictly, but favorably, for which was cited Kibbet v. Lee, Hobart 312.[3] But what is there said relates to powers of revocation in the owner to revest the estate in himself, not to abridge or alter the estate of a stranger, as in this case, where the power goes to change the estate of Sir John Bland, the son, from an estate tail to an estate for life.

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[1] *Attorney General v. Hall* (1731), W. Kelynge 13, 25 E.R. 470, Fitz-Gibbons 314, 94 E.R. 772, 2 Eq. Cas. Abr. 293, 348, 22 E.R. 246, 297.

[2] *Lisle v. Gray* (1680), T. Jones 114, 84 E.R. 1174, also 2 Levinz 223, 83 E.R. 529, Pollexfen 582, 86 E.R. 653, 1 Freeman 462, 89 E.R. 345, 2 Shower K.B. 6, 89 E.R. 758, T. Raymond 278, 302, 315, 83 E.R. 143, 156, 163, Dodd 34.

[3] *Kibbet v. Lee* (1619), Hobart 312, 80 E.R. 455.

The third question relates to the intermediate profits of the lands devised by Sir John Bland's will. The devise after the expiration of the fourteen years term is to six trustees and, though not expressly said 'to their heirs', yet the nature of their trust must carry a fee even at law without the word 'heirs', as in Shaw v. Weigh, Abr. Cas. Eq. 184,[1] and several other cases. The doubt as to the profits is the most difficult part of the case, here there being no estate in the land either in law or equity given to the first son of the present Sir John Bland. But, however, though there be not the clause directing the trustees to preserve the profits for such eldest son, it amounts to a direction to the trustees to settle the estate on him. And there is no occasion at present to determine whether, upon such son's attaining twenty-one, he must entail the estate upon a failure of issue of his own upon a brother's son, passing by the brother himself.

As to the profits, was it not for the annuities, there could be no surplus of them during the continuance of the fourteen years term since the whole annual profits must be applied to the payment of debts and legacies, which, as soon as paid, he has expressly declared the term should cease. But as it must continue for the payment of the annuities, what surplus profits there shall be after the debts, legacies, and other charges paid must go to the defendant Sir John Bland as an undisposed residue. As to the profits between the determination of the term and the birth of a son, they likewise must go, nor are the plaintiffs anyway interested to dispute it, since, whatever becomes of them, the plaintiff can claim no right thereto. But, if they do not go to the defendant, they must go to his eldest son. This resembles Hopkins v. Hopkins, where the intent was as strong as it is here to lock up the profits until there was a son who should attain twenty-one. But there being no *terminus a quo*, the arrears should commence, though there was a *terminus ad quem*, the arrears were held undisposed of until the birth of a son. So here, the words 'from and after the time' can relate only to the birth of a son to whom the arrears shall be due, but not before his birth where he is not in being and can have no right to arrears. It was said this was like Smith v. Smith, 14 June 1743,[2] but what turned that case was not so much of the proviso being much the same as in Hopkins v. Hopkins, but that, by an antecedent clause of the will, the profits were expressly devised from the time of his death to the trustees and so there was no room to decree them to the heirs at law. But here, how can the arrears go to a person not *in esse*? A man cannot say 'My heirs shall not have my estate unless he dispose of it to someone else', for, if he makes no disposition to another, still, the heir will take, bare negative words not being sufficient to exclude him. This resembles the case of executory devises at law, as in Scatterwood v. Edge, 1 Salkeld 229,[3] where it is debated how far future devises are good, and the reason given for supporting them is that the estate descends in the meantime upon the heir, not only because there must be one to do service to the lord, but also that there must be someone to take the profits which the law will not lay up for a person not *in esse*. But herein is a great difference between a direction of profits to be laid up for the benefit of a son to be born and ordering them to be laid out in land, because money ordered as land and, therefore, it amounts in this last instance to a devise of so much land to a son to be born, which is good by way of an executory devise, as being to arise within the compass of a life or twenty-one years after.

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[1] *Shaw v. Way* (1728), 1 Eq. Cas. Abr. 182, 185, 21 E.R. 975, 976, also 8 Modern 253, 382, 88 E.R. 180, 272, Fortescue 58, 92 E.R. 760, 2 Strange 798, 93 E.R. 856, Fitz-Gibbons 7, 94 E.R. 628, 1 Barnardiston K.B. 54, 94 E.R. 38, 21 E.R. 974, 976, 2 Eq. Cas. Abr. 315, 359, 22 E.R. 267, 305.

[2] *Smith v. Smith* (Ch. 1743), Jodrell 323.

[3] *Scatterwood v. Edge* (1697), 1 Salkeld 229, 91 E.R. 203, also 12 Modern 278, 88 E.R. 1320, 1 Eq. Cas. Abr. 189, 21 E.R. 980, 2 Eq. Cas. Abr. 337, 22 E.R. 287.

As to my Lady Francis Bland's claim of her paraphernalia, if they were meant to be included in the will, she can have no right to them but under the will, because she claims other interests by the will and must, therefore, abide by the whole. The wife's claim of paraphernalia against her husband's testamentary disposition was not formerly so strong as now, as we see in Lord Hastings v. Sir A. Douglas, Croke Car. 343, where the [Court of] King's Bench was divided in opinion. But, since Tipping v. Tipping, 1 Williams 729, she is held to have a right to them as against her husband's executors and legatees.[1] The question, therefore, is how far the words of the will extend. In Lord Hastings v. Sir A. Douglas, it seems not doubted by any of the judges that the words, 'all my jewels' would extend to paraphernalia, but, since Tipping v. Tipping, I think that, if the husband had other jewels besides his wife's paraphernalia to answer the words, 'all my jewels', they would not be included. And, therefore, I shall refer it to a master to see how that matter stands here.

[Other reports of this case: 9 Modern 478, 88 E.R. 586, 2 Cox 349, 30 E.R. 161.]

112

Howell v. Hayler

(Ch. 1748)

Legacies will not be paid out of a testator's real estate even though the heir at law is the residuary legatee.

1 Vesey Junior Supplement 342, 34 E.R. 818

8 February 1747[/48].

Thomas Hayler bequeathed several pecuniary legacies, and, then, he gave all the rest and residue of his real and personal estate to his brother and his heirs. The brother was the testator's heir at law. And the question was whether the legacy was a charge on the real estate.

LORD HARDWICKE said the terms of the will are not sufficient to charge the legacies on the real estate. It would be dangerous to carry implied intents so far where nothing more appears to warrant the presumption of such intent. No case has been cited to warrant such a decree, founded only on the circumstance of the devise being to the testator's heir at law.

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[1] *Lord Hastings v. Douglas* (1634), Croke Car. 343, 79 E.R. 901, also W. Jones 332, 82 E.R. 175; *Tipping v. Tipping* (1721), 1 Peere Williams 729, 24 E.R. 589, also 2 Eq. Cas. Abr. 467, 499, 573, 627, 22 E.R. 398, 423, 483, 526, 527, Chancery Cases *tempore* Geo. I, 469.

113

Reynolds v. Lowe

(Ch. 1748)

An equity of redemption cannot be divided by a descent where it would be to the prejudice of a mortgagee.

1 Vesey Junior Supplement 280, 34 E.R. 789

14 May 1748, Easter term 21 Geo. II.

A. had mortgaged in fee and died, leaving two daughters, B. and C., his co-heiresses. C. mortgaged her moiety of the equity of redemption to D., who got in the original mortgage, and he brought a bill against B. and C. to compel them to redeem or be foreclosed. C. made default. And it was decreed at the Rolls that B. should redeem both of the mortgages or be foreclosed.

LORD HARDWICKE reversed that decree, and determined that B. and C. or either of them might redeem the original mortgage and that, if B. paid the whole money, the plaintiff should redeem her as to a moiety, she by paying the whole, becoming a mortgagee for a moiety, but neither B. not C. to be at liberty to redeem the first mortgage in moieties, for, that being one entire mortgage, the Lord Chancellor [LORD HARDWICKE] held that the equity of redemption could not be split by the descent to the prejudice of the mortgagee.

114

Arnold v. Chapman

(Ch. 1748)

A trust of land for a charity is void under the Statute of Mortmain.

Executors of decedent's estates are only trustees, and not legatees.

Jodrell 644, 649

12 July 1748.

Thomas Emerson, by will dated 14th January 1745, bequeathed as follows. He gave and devised all his moiety or half part of all his customary or copyhold premises in the tenure of the defendant Chapman in Battersea to Chapman and his heirs, 'the said Chapman paying or causing to be paid to his executors £1000'. The testator gave several small legacies, which he directed to be paid by his executors after named. And he also gave some annuities, which he directed to be paid by the Governors and Guardians of the Foundling Hospital out of the estate bequeathed to them. He gave to the plaintiff Arnold in memory of his friendship all his printed books, being about 1000 volumes, and to the plaintiff Truman £100. All the rest, residue, and remainder of his estate, consisting in many freehold, copyhold, or leasehold estates or in ready money etc. or in any other thing whatsoever or wheresoever, he gave, devised, and bequeathed to the Governors and Guardians of the Hospital for the maintenance of exposed and deserted young children and to their successors and assigns forever subject and chargeable with the payment of the two annuities before given during the lives of A. and B. and such other legacies as he should give by any codicil. And he appointed the plaintiffs, Arnold and Truman, executors.

This bill was brought by the executors to have the opinion of the court upon the legacy of £1000 given by the will out of the estate bequeathed to Chapman, which was claimed by the plaintiffs in their own right as a specific legacy to them [and] by the defendants, the Governors of the Hospital, by the defendant Cooper as heir at law or next of kin, and by Chapman as a void legacy being for the benefit of a charity and, therefore, void by the late Statute of Mortmain, 9 Geo. II.[1]

It was admitted on all sides that there were assets much more than sufficient to pay all the debts and legacies.

Mr. *Clarke*, for the plaintiff, said there was nothing on the face of the will that implied a trust in the executors and, their having other legacies, there was no ground why they should not take this too, for there was no inference from one that they should not have the other. The court will not intend a trust if it be not expressed. Adlington v. Cann.[2]

The Attorney General [*Ryder*], for the charity, not being able to contend that it could directly enure for their benefit as a trust, argued that it ought to do so by circuity, that the testator has turned this portion of his real estate into personalty and given it to his executors as assets. This ought, therefore, to be applied by the court in payment of debts and legacies and so leave the personal estate clear to the charity. If he had given it expressly to pay debts and legacies, that would certainly be the case and his personal estate would have gone to the charity exempt. Here, the court will so apply it to answer his general intent, which appears to be to enlarge his personal estate. I must admit that, if the debts and legacies do not exhaust the whole £1000, the remainder will not go to the charity nor enure for their benefit.

He cited Dalton v. James.[3] There were several legacies, one of £1000, to a charity and legacies charged on real estate as well as personal. The personal estate not being sufficient to pay all, it was held that the court would marshal the legacies so as all might be paid by paying the charity legacy out of the personal and the others out of the real estate.

And he contended that it was not a legacy to the plaintiffs in their own right because they took as executors and it was intended as assets.

Mr. *Jodrell* for Chapman: The questions are, first, whether it is given to the executors as legatees or as executors and trustees. If the latter, what are the consequence as to the first? Through this whole will, the executorship is taken as an office of trust only and, wherever the executors are spoken of, it is as trustees. Where he considers them as legatees, he speaks of them by name and gives particular legacies in token of friendship.

Wherever a personal legacy is given to executors, whatever they take as executors is a trust. Why should not this rule hold to exclude them from what they take by a particular gift as executors as well as from what they take by a general gift to them in that capacity by operation of law? To make a contrary construction is to say that what is expressly given to them as executors is given to them as legatees, which seems a very forced construction and not agreeable to the intent of the testator, which seems clearly to be that they should take this as assets.

If, then, this is a trust in the executors, it is a trust for the benefit of the charity and void. And it seems clearly within the words and intent of the Statute, which are that all devises are void in trust for the benefit of any charitable use.

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[1] Stat. 9 Geo. II, c. 36.

[2] *Adlington v. Cann* (1740), Barnardiston Chan. 130, 27 E.R. 583, see also *Addlington v. Cann* (Ch. 1744), Jodrell 377.

[3] *Attorney General, ex rel. v. Lord Weymouth* (1743-1746), Ambler 20, 27 E.R. 11.

But it is contended that it ought to be made good by circuity. That it cannot be so with regard to the quantum of the debts and legacies seems not much contended, for, if, indeed, it was, a clear method would be invented by this means to evade the Statute.

But I apprehend it ought not to be made good by circuity as far as there are debts and legacies, for will not that be for the benefit of the charity just as much as if it had been expressly given to them? Will they not take it in effect by this kind of construction as much as by an express bequest?

Indeed, if the personal estate was insufficient to pay debts and legacies so far as that deficiency went, I admit that the bequest would be good, but no further. The Act has directly prohibited bequests out of lands for the benefit of any charity. But, if the charity is to stand in the creditor's place as far as they are paid out of the personal estate, is not a court of equity doing that by circuity, which this wise law has in direct terms prohibited?

No application ought to be made of this money for the benefit of a charity one way more than another, for the trust itself, so far as they can devise any benefit from it in any shape, is void by the Statute. The Case of Roper v. Ratcliffe, Modern Cases in Law and Equity 167,[1] seems in point against making such a circuity in favor of a void devise. There, the devise might have been made good by such a circuity, for the bequest to the Papist was not specific, but a general bequest of all the residue of his real and personal estate by charging the debts all on the real estate and giving him the entire personal. But no such argument was made use of in that case, nor any enquiry about the debts directed, as there must have been if such a circuity would have been made.

If it was not done in that case, why here in favor of a residuary legatee equally incapable to take the benefit of this £1000, as the Papist in that case was, the surplus money's arising by sale of the estate?

But if this is to be considered as a trust for the charity or a devise for their benefit, it cannot be raised at all. The payment is a void condition or a condition become impossible. And, therefore, the devise to Mr. Chapman is pure, and he takes the estate exonerated, just as if he had been to have paid it to a person who died before the testator or before the day of payment.

Lord Chancellor [LORD HARDWICKE]: As to the first question, the £1000 must, if the law permits it, go where intended, the executors taking only as executors, and the contrary would be attended with many inconveniences, that a bare gift of an estate to executors should enure to their own use. Indeed, such a legacy of the personal estate might do so because, having the whole in them as executors, the bequest of a part of it to them would be redundant if they did not take such part in their own right. But there is no case where it is held so of a gift of land or a sum of money to arise out of land, as is proved by that case cited from Wentworth, *Office of Executors*, 104, of land acquired by a villein devised for years to his executor, that such land purchased by the villein after the testator's death shall be assets for the payment of his debts. Now, here are no express words of the gift of the £1000, but only a devise of the copyhold to Chapman 'paying his executors £1000', which makes it less strong. And in such parts of the will whereby he means to give them something in their private capacity, he does not name them 'executors', but by their names, as in the bequest of the books to Arnold and of £100 to Truman.

As to the second question, as to the trust of £1000 for the Foundling Hospital, the charity is no doubt a very good one, but I cannot break the law for it. Had this been a direct charge upon the land, it had undoubtedly come within the Statute of Mortmain. But here, it is made

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[1] *Roper v. Radcliffe* (1712-1714), 9 Modern 167, 181, 88 E.R. 380, 387, also 10 Modern 89, 230, 88 E.R. 639, 706, 1 Strange 267, 93 E.R. 514, 5 Brown P.C. 360, 2 E.R. 731, 2 Eq. Cas. Abr. 508, 620, 621, 622, 625, 771, 22 E.R. 430, 520, 521, 525, 655, 2 Peere Williams 3, 24 E.R. 618, Chancery Cases *tempore* Anne, 473.

part of the personal estate by the gift thereof to his executors, from whence it is contended that it shall be good.

Indeed, men may, by their wills, change and metamorphose their real into personal estate, but, then, it must be for lawful purposes, and, by this construction, the Act would be totally avoided, trusts being equally within the Statute as devises of or charges upon the land, as was held in Dalton v. James, before me.

Then, it was said that the court would marshal assets so as to throw all the legacies upon the £1000 and let the personal estate go whole and free to the charity. And I would do it the rather in this case because of the Statute, which disables the charity from having any benefit of these £1000 as a charge upon land. But I must take the rule now just as before the Statute and, therefore, suppose a personal estate of £1000 value and debts charged both on the real and personal estate. The court would marshal the assets there so as to let in a particular legatee and did so in that Case of Dalton v. James. But this was never done where a residue is given charged with debts (as it is here with legacies to the charity) as it would be turning the debts on what was not intended to be charged therewith and the doing it in this case would in its reasons tend to evade the ground of the resolution in Roper v. Ratcliffe, 2 Williams 3, by turning all the debts upon the real estate for the Papist's benefit, besides it would be establishing a new rule. And to do what? To overreach the Act of Parliament.[1]

As to the third question, what, then, shall become of the devise of the copyhold to Chapman? This is not like a devise upon an illegal condition, which the law avoids and makes the devise absolute. Here, it is not so, being only a devise to Chapman 'paying to his executors', which is a lawful act. And until the account was taken, it did not appear but this sum might be necessary for the payment of the testator's debts. I am, therefore, of opinion that Chapman cannot hold the estate absolutely, but he must perform the condition of paying the £1000. And, in this case, the devise being to a stranger and the condition descending to the heir, if the heir should enter for the condition broken, this court would make him a trustee for those entitled to the benefit of the performance of the condition.

As to the fourth question, who, then, shall have the £1000 and whom shall the executors pay it to and be trustees for? Not to the next of kin, but it shall be a resulting trust for the heir at law, the money arising out of land and the Act prohibiting all charges upon lands for charities in favor of the heir at law, who having the legal title in him by his having the right to enter, for the condition, when broken, shall also have the benefit of the trust.

He decreed accordingly.

[Other reports of this case: 1 Vesey Sen. 108, 27 E.R. 922, Vesey Sen. Supp. 72, 28 E.R. 460.]

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[1] Stat. 9 Geo. II, c. 36; *Attorney General, ex rel. v. Lord Weymouth* (1743-1746), Ambler 20, 27 E.R. 11; *Roper v. Radcliffe* (1712-1714), *ut supra*.

115

Gilbert v. Chudleigh

(Ch. 1748)

A contract that is against public policy will not be enforced regardless of the good faith of the parties thereto.

2 Vesey Junior Supplement 169, 34 E.R. 1043

18 July 1748.

LORD HARDWICKE: It was urged for the defendant, that this is a bill brought by one of the parties to this corrupt contract against a representative of the other, who is a stranger to it, and that, although an executor might have a claim to relief for the sake of providing assets, yet the court will show no favor to either of the parties themselves. But the truth is that, in these cases of violations of public policy, it is indifferent who stands before the court if the intention of the contract be evident, because the court does not regard the state and condition of the parties so much as the nature of the contract and the public good.

The contract there in question was a security given as a consideration for procuring the obligor a public office.

116

Meredith v. Jenkins

(Ch. 1751)

A plaintiff who sues to prevent waste must allege his title to the land in question with specificity.

1 Vesey Junior Supplement 443, 34 E.R. 866

16 December 1751.

A testator devised his real estate to his daughter for life and, after her decease, that his present heir male and his heirs should enjoy the inheritance. The plaintiff in the suit was the testator's brother, who brought his bill to stay waste. The defendant demurred for that the plaintiff could not take under the words of the will, and so had no title.

The Lord Chancellor [LORD HARDWICKE] said the plaintiff is not heir at law to the testator who has left a daughter. The question, therefore, is whether he be sufficiently described by these words so as to take. In all the cases, the person claiming successfully under such words has been described as the heir male of the body of someone. But the present case endeavors to let in a collateral heir under the words ' heir male', without saying of whose body he is to be heir, to allow which, I think, would be going against first principles. But supposing the question not so clear as it is, the plaintiff has made no title by his bill, it not appearing even that he is heir male, since the testator may have had some brother older than the plaintiff, who left a son, and, thus, the plaintiff have no sort of right.

The demurrer was accordingly allowed.

117

Lady Howe v. Count Kilmanseg

(Ch. 1752)

Where a foreigner makes a will in a foreign nation giving general devises, the executor may have the assistance of the English courts to have the testator's assets, but, as to specific legacies, the English courts will apply English law.

1 Vesey Junior Supplement 361, 34 E.R. 827

Easter term 25 Geo. II, 1752.

Upon a question arising as to a codicil of the countess of Darlington's will made at Hanover, whereby she disposed of £5000 South Sea annuities, it was laid down as a general distinction by LORD HARDWICKE that, if a foreigner, living abroad and having a personal estate in England, makes a universal heir or residuary legatee, giving either the whole or the residue of such estate to be settled according to a foreign law, the Court of Chancery here will not prevent the executor from getting the estate which may be in England, in order to transmit it abroad. But, if he gives a specific thing, as a leasehold estate or South Sea annuities, to a particular legatee for life or years, making further limitations of the estate so bequeathed, which limitations are void by the law of England, though good by the law of the country in which the will is made, the English Court of Chancery will lend no assistance to carry such limitations into effect.

118

Banks v. Farquharson

(Ch. 1752)

The provisions of the bankruptcy acts do not apply to transactions made before the bankrupt person became a trader.

2 Vesey Junior Supplement 178, 34 E.R. 1047

8 June 1752, Trinity term 26 Geo. II.

William Watts was in 1726 chosen a manager of the Sun Fire Office, and, in 1729, a by-law was made that every manager of that office should be possessed of fifty shares of the stock of the said office in his own name and no one to be capable of acting or of being elected unless so qualified. At this time, Mr. William Watts had but forty shares in his name, ten of which were the property of Nathaniel Hill and six the property of his own brother, Thomas Watts, the defendant's first husband. In order to continue himself in the management, William Watts applied to Thomas Watts to transfer to him ten more shares, which Thomas accordingly did without receiving any consideration for the same. On the 21 June 1729, William Watts signed a note, whereby he declared that sixteen shares then in his name in the Sun Fire Office books were the property of Thomas Watts. And, on the 4 May 1732, William Watts signed another paper, whereby he declared that ten of the shares in his name in the said books were in trust for Nathaniel Hill, and did oblige himself to transfer them to Hill on demand. William Watts, becoming afterwards indebted to Thomas Watts in the sum of £800, by deed bearing date 24 July 1735, agreed that the fifty shares then standing in his name should remain charged

with and liable to the payment of the £800 to Thomas Watts within three months and, in failure thereof, that he would transfer the said shares to Thomas to be by him sold and the produce thereof applied to discharging his debt and interest, returning the overplus to William, and, if William should not transfer them as agreed, that then it should be lawful for the said Thomas, his executors, etc., who were thereby constituted the attorneys of the said William Watts irrevocably, in the name of the said William to transfer the said shares to Thomas, his executors, etc. upon the above-mentioned trust.

The £800 being unpaid and Mrs. Pulteney being willing to advance the money upon the security of the said shares, Thomas Watts delivered the aforesaid mortgage to her with an endorsement by him, declaring the same to be in trust for her. William Watts, in 1739, entered into a partnership for buying and selling butter and cheese for supplying the Navy, and, being concerned in some contract with the Commissioners and having received his share of one year's profit, he was, as a trader, found a bankrupt in 1742. Thomas Watts died in 1741, having made the defendant, his wife, his executrix, who, by paying off Mrs. Pulteney, got back the assignment of the fifty shares executed by William to Thomas, and, by virtue of the power of attorney therein, transferred to Hill his ten shares, and, as to the remaining forty, insisted that sixteen of them always were the property of her husband and that she had a specific lien upon the other twenty-four until satisfaction of the £800 and interest for which they were mortgaged to her husband.

The plaintiff brought his bill, as assignee under the commission [of bankruptcy] issued against William Watts, to have the benefit of the fifty shares, insisting that, as they had constantly stood in the books of the Sun Fire Office in the name of William Watts and were his qualification as a manager, he had by consent and permission of Thomas Watts the order and disposition thereof, and was the reputed owner, so as to bring the case within the very words of the Statute of 21 Jac. I, c. 19, and the resolution in Ryall v. Rolles.[1]

For the defendant it was argued, that these shares in the Sun Fire Office were not ' goods and chattels' within 21 Jac. I, nor could they be taken in execution. If a man has stock in the public funds in his name as a trustee, such stock will not be liable to his bankruptcy, and, as none of the public companies admit of a declaration of trust being entered in their books, it would be of the most mischievous consequence that such a trustee should be considered as ' owner' within 21 Jac. I, though the objection that the stock procures credit to the person in whose name it stands would hold as strongly in that case as in the present. The preamble or introductory passage of the 11th section of the said Statute restrained the generality of the enacting clause, as had been determined in L'Apostre v. Plaistrier, cited in Copeman v. Gallant, 1 P.W. 318. The Case of *Ex parte* Chion was in point for the defendant. And, upon the authority of Sir Thomas Littleton's Case, it was doubtful whether William Watts was liable to the bankrupt laws merely in consequence of having in one instance contracted with the Navy Board to furnish a supply of butter and cheese.[2] But, at all events, it was scarcely possible that Thomas Watts should know anything of William's being a trader, and, consequently, he was not blameable for letting the shares remain in William's name.

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[1] Stat. 21 Jac. I, c. 19, s. 11 (*SR*, IV, 1229); *Ryall v. Rolle* (1749), 1 Atkyns 165, 26 E.R. 107, also 1 Vesey Senior 348, 27 E.R. 348, Vesey Senior Supplement 165, 28 E.R. 490, 1 Vesey Junior 348, 27 E.R. 1074, 1 Wilson K.B. 260, 95 E.R. 607, 9 Bligh N.S. 377, 5 E.R. 1131.

[2] *L'Apostre v. Plaistrier* (1708), 1 Peere Williams 318, 24 E.R. 406, also 2 Eq. Cas. Abr. 113, 22 E.R. 96; *Copeman v. Gallant* (1716), 1 Peere Williams 314, 24 E.R. 404, also 2 Eq. Cas. Abr. 113, 22 E.R. 96; *Ex parte Chion* (Ch. 1721), Chancery Cases *tempore* Geo. I, 814, 3 Peere Williams 187, n., 24 E.R. 1022; *Littleton's Case* (1675), 1 Ventris 270, 86 E.R. 180, 1 Freeman 391, 89 E.R. 290, 2 Vesey Junior Supplement 180, 34 E.R. 1048.

LORD HARDWICKE, in delivering judgment, said, though distinctions have been made between part of these shares and the rest, I shall take them together upon the assignment of the 24 July 1735, and consider whether that assignment be or be not good. It was contended on the part of the plaintiff that taking the shares to have been originally William's, this assignment is void by 21 Jac. I, and that all the shares left standing in William's name were 'goods and chattels' within that Act. I should be very loathe to determine whether stocks in the public companies come within that Act. And there is some difference between those and the present subjects in dispute, which are shares only in a private society or partnership. To say that trusts of stocks shall in no case be within this Statute might be attended with great frauds upon trade, and, on the other hand, to include all such trusts within it might be mischievous to the public, as was observed by Lord Macclesfield in *Ex parte* Chion. But something that has not been mentioned at the bar governs my judgment in the case now before me, which is that this assignment was made long before William Watts became a trader, for it was not contended that, as a member of the Sun Fire Office, he was a trader, that not being a partnership of trade.

Now, the words of 21 Jac. I, plainly show that the persons who are the object of that Act are traders in a capacity of becoming bankrupts, and it is not contended that William Watts became a trader until August 1739, when he began dealing in butter and cheese for supplying the Victualling Office, so that four years passed between the assignment in question and his becoming a trader. The question, therefore, is whether such security by way of assignment of a *chose en action* for money really advanced to a man not then in trade, but becoming a trader four or five years afterwards, shall be brought within this Act? I think it ought not. I compare this to the determinations upon 1 Jac. I, c. 15, sec. 5, relating to conveyances made by bankrupts, where the question has been whether such a conveyance by one not then a trader, but becoming so afterwards, would come within the clause adverted to, and it was held it would not in Crispe v. Pratt, Cro. Car. 548, where the conveyance was made but two years before the man became a trader, whereas, in the present case, five years passed the two acts. The resolution in Crispe v. Pratt was followed by Sir Joseph Jekyll in Lilly v. Osborne.[1]

Let us then consider the effect hereof upon the present question. The words of the 1st and of the 21st Jac. I, are much alike, and the reason of the thing the same in both, the 21st Jac. I, being a rigorous law and yet necessary for preventing frauds in trade by gaining false credit. A man who deals with another that is a trader knows he shall be relieved against any private assignments by this Statute. But a person dealing with another who is no trader can have no such expectation, and it might be mischievous to extend these acts to persons becoming traders long after. This distinguishes the present case from that of Ryall v. Rolles, where the person was actually a trader at the time of the assignment, and from all the cases determined on that ground. And, consequently, here, the assignees will be entitled to nothing but what really was the bankrupt's after the £800 paid.

With respect to the question whether the enacting part of the 11th section of 21 Jac. I, c. 19, should be restrained by the preamble, or introductory clause of that section, His Lordship [LORD HARDWICKE] repeated what he and Chief Baron Parker had said in Ryall v. Rolles, namely that, if that clause was not confined to such goods only as were originally the bankrupt's own, it would be impossible to account for many determinations on the subject.

As to the fact whether, in point of law, William Watts had ever been a trader and subject to the bankrupt laws, LORD HARDWICKE seems to have thought the case distinguishable from that of Sir Thomas Littleton, and that the dealings of Watts made him a trader. But, afterwards, issues were directed to try from what time William Watts became a trader and from what time a bankrupt.

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[1] *Crisp v. Pratt* (1639), Croke Car. 549, 79 E.R. 1072, also W. Jones 437, 82 E.R. 230, March 34, 82 E.R. 399; *Lilly v. Osborne* (1723), 3 Peere Williams 298, 24 E.R. 1073, 2 Eq. Cas. Abr. 115, 22 E.R. 98.

[Other reports of this case: Ambler 145, 27 E.R. 94, 1 Dickens 167, 21 E.R 233, Jacob 343, 37 E.R. 881.]

[Reg. Lib. 1752 A, f. 337.]

119

Lynch v. Milner

(Ch. 1753)

A bequest of money to be invested in land is a legacy out of the decedent's personal estate, and it is considered as a pecuniary legacy.

1 Vesey Junior Supplement 273, 34 E.R. 786

1 February 1752[/53].

A testatrix bequeathed £8000 to be laid out in land and settled on A. and the heirs of his body and, for want of such issue, £2000 thereof to B. and the remaining £6000 to a charity. By a codicil, the testatrix said that B. should take nothing unless A. died before twenty-one and that the charity should have but £5000; B. died before A.; then, A. died under twenty-one and without issue.

LORD HARDWICKE decreed the £2000 to the [personal] representative of B., considering it as a legacy out of the personal estate, it appearing, upon the whole of the will and codicil taken together, that the entire bequest was to continue as money until A. should have attained his age of twenty-one. But, even if the £8000 were to be considered as land, His Lordship seems to have thought that, under the circumstances of the case, the £2000 would have been transmissible to the representative of B., the charity, which, he said, would otherwise take the benefit of the lapse, being excluded by the terms of the codicil.

The previous decree made at the Rolls, reported in 3 Atk. 112,[1] whereby the £2000 in question were decreed to the heir *ex parte paterna* of A., who was also his personal representative, was reversed. The decree reversed was made by FORTESCUE, Master of the Rolls, but his predecessor, SIR JOSEPH JEKYLL, at the first hearing of the cause, on the 30 March 1734, directed an account and that the charity and the legatee B. should be taken as legatees for £7000 if A. should die without issue before twenty-one.

This, LORD HARDWICKE said, sufficiently showed that Sir Joseph Jekyll considered the whole as money. Otherwise, his decree must have been to invest the money in land and in the meantime to place it out at interest upon government securities.

[Other reports of this case: 3 Atkyns 112, 26 E.R. 868.]

[1] *Attorney General v. Milner* (Ch. 1744), 3 Atkyns 112, 26 E.R. 868.

120

Ellis v. Smith

(Ch. 1754)

In general, where there is a devise for the payment of debts or for any particular purpose, the surplus is a resulting trust for the heir at law.

However, in this case, the words of the will indicated that there was to be no resulting trust.

1 Vesey Junior Supplement 4, 34 E.R. 667

11 May 1754.

It appears that it was found impracticable to send the parties in this suit to the trial of an issue to have it determined in the regular manner whether the will in question was sufficiently executed within the Statute,[1] and, therefore, a good revocation of a former will made by the testator. The ground of this difficulty was that the will was made and attested at New York and the attesting witnesses were all out of reach.

LORD HARDWICKE, therefore, proposed that a case should be stated for the opinion of the Court of King's Bench, and a case was accordingly prepared from the depositions. But, being signed by the defendant's counsel only, and not by the plaintiff's, who refused their signature, the King's Bench declined going into the question, saying the case should be signed by the counsel on both sides and the facts admitted, as in a special verdict.

Upon these difficulties, the Lord Chancellor [LORD HARDWICKE] resolved on hearing the cause with the assistance of the two Chief Justices, the Master of the Rolls, and the Chief Baron. The will being established in point of law, a question arose upon the construction of the clause whereby the testator, after giving several legacies and, amongst others, one of £300 to his natural son, William Bromley, devised as follows:

> all my just debts to be paid by my cousin, William Ellis, whom I make my whole and sole executor, and leave him all my real and personal estates to pay them. But, in case William Ellis, my executor to this will, should be dead, then, I make his brother Francis my executor for performing all that is specified herein, and, in case he should be dead, then, I make his nephew William my executor for performing all the covenants hereinafter mentioned, and, in case he should be dead, then, I make William Bromley, my natural son, my executor, he performing all the covenants in this my last will, but, in case my natural son should die before twenty-one, the £300 to go to him that is my executor.

The question was whether William Ellis and the others were intended to take any beneficial interest to themselves or whether there was not a resulting trust for the heirs at law after the debts and legacies paid.

As to this point, LORD HARDWICKE said there are various determinations upon resulting trusts, which it would be pretty difficult to reconcile. Every case must turn upon the penning and upon its particular circumstances. I shall, therefore, consider the present, first, upon the words of the will and, next, upon the collateral circumstances that accompany it, first, then, upon the intention appearing on the face of the will, not only from the words of the devise to

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[1] Stat. 29 Car. II, c. 3, ss. 5, 6 (*SR*, V, 840).

William Ellis but as attended with the particular substitutions. In general, where there is a devise for payment of debts or for any particular purpose, the surplus is a resulting trust for the heir at law, the ground whereof is that the testator intended the devisee to take as a trustee. But, sometimes, particular circumstances or an intent appearing from the words of the trust have got the better of the rule, as in Conyngham v. Mellish, 1 Eq. Ca. Ab. 273,[1] where the word 'trust' is not used, yet, if the gift be 'for the payment of debts', though not said 'in trust', it has been held that the surplus shall result to the heir. But, if an estate be given to one, he paying debts, by way of condition, the estate will not be taken away from the devisee.

There is another set of cases where estates have been given subject to a charge, which have been determined not to import any resulting trust, but only a burden and incumbrance in the hands of the devisee. Take this, therefore, upon the first devise to William Ellis, abstracted from the others, and, in point of law, the inheritance passes by the word 'real estate'. I do not, indeed, know any instance where a devise has been in these very words, but there are many cases upon the same head. If, then, the question rested there, it would be difficult to make this a resulting trust, especially, the devise being to William Ellis by the name of 'his cousin' and no other legacy given him by the will. But consider it, next, with the substitutions. It was insisted that, from these three substitutions, it appeared the devisees were intended as bare executors, and yet there are not words to carry the real estate to these substitutes, though they were plainly intended to perform and do all that William Ellis himself was to perform. But, as the testator has given the real estate to William Ellis and intended to put the substitutes in his place, there is clearly no reason to abate from the first devise, on account of a failure of expression in the substitution. To what purpose were the substitutes to take and what could the testator mean by the words 'he performing all the covenants'? Why, that they should do everything that William Ellis was to do, and, if he was directing the substitutes to do all that William Ellis was to do, they must take all that he was to take; otherwise, they could not sell or mortgage for payment of his debts.

Without giving a direct opinion upon this, I incline to think it an implied devise of the real estate to the substitutes and that more arises from the substitutions in favor of the first devisee than to the contrary. One of the substitutes was an infant of twelve years of age and the testator's natural son. Can it be imagined he intended to make an infant and his son an executor in trust only? That circumstance affords a strong implication that he intended a beneficial devise of the whole, and I am, therefore, of opinion, that more arises from the substitutions against the resulting trust than for it. Taking it, therefore, barely upon the words of the will, here is no resulting trust.

The describing William Ellis in the testator's will by the name of 'his cousin' is a subsidiary reason, and one particularly relied on in Conyngham v. Mellish. But it is said the testator knew very well how to devise a beneficial interest subject to debts, having by his former will devised it correctly so. That, however, only shows that the drawer of the first will, made when he was in England, knew how to do it, but that the testator did not when he made his own will in New York.

Let us now consider the collateral circumstances, and these satisfy me [that] here is no resulting trust. Facts or circumstances or parol proof may rebut a resulting trust, though this doctrine was weakened by the judgment of the House of Lords in Browne v. Selwyn,[2] in which, however, the reason relied on was that, as there was an express gift of all the personal estate, it would have been contradicting the words of the will to admit foreign proof. In the present

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[1] *Coningham v. Mellish* (1691), 1 Eq. Cas. Abr. 273, 21 E.R. 1040, also Precedents in Chancery 31, 24 E.R. 16, 2 Vernon 247, 23 E.R. 759, Dodd 108.

[2] *Brown v. Selwin* (1734), Cases *tempore* Talbot 240, 25 E.R. 756, 3 Brown P.C. 607, 1 E.R. 1527, 2 Eq. Cas. Abr. 464, 22 E.R. 396, Lincoln's Inn MS. Misc. 384, p. 393, pl. 15.

case, the testator, by his first will, which was made in England, had given all his real and personal estate to William Ellis to his own use subject to payment of debts. Then, he went to New York, and, merely in order to let in a few legacies, made this new will. But not knowing at that distance whether William Ellis might not be dead before his will could reach him, he, therefore, proceeds cautiously, and provides anxiously for that event by substitutions. And, though he inserted these in an inaccurate manner, he had plainly no intent of revoking or altering his will as to the beneficial interest given to William Ellis.

[Other reports of this case: 1 Vesey Junior 11, 30 E.R. 205, 1 Dickens 225, 21 E.R. 254.]

121

Lloyd v. Abrahall

(Ch. 1754)

A married woman can exercise post mortem *a power of attorney reserved over a trust estate where the trust is by construction.*

1 Vesey Junior Supplement 378, 34 E.R. 835

18 June 1754, Trinity term 28 Geo. II.

Lands having descended upon Mary Abrahall, wife of Gilbert Abrahall, and her sister, also a married woman, as co-heiresses, partly from their father and partly from their brother, they and their husbands levied a fine to trustees and their heirs to the use of them and their heirs, limiting the several moieties to the use of each of the husbands and wives for their lives, then, for such persons and to such uses as each of the sisters should by will or other instrument duly attested appoint of her separate moiety, and for want of such appointment to the right heirs of each. Mary Abrahall, by a will dated two years after the deed leading the uses of the fine, being then enceinte and applying her will to her power, not, indeed, by a particular recital, but by using the words 'all my real or personal estate which I may or can dispose of', devised her moiety to the same trustees named in the deed and their heirs, to the use of her husband for life and, from and after the determination of that estate, for want of lawful issue on the body of her to be begotten, to the use of the same trustees to preserve contingent remainders during the life of her husband and, from and after his decease, to the use of her sister, Benedicta Andrews, for life, remainder to her first and other sons in tail male, remainder, in like manner, to her cousin John Hoskins, the defendant to the suit, and all the rest and residue of her estate, real and personal, to her husband. Mary Abrahall was delivered of a daughter, and she died in October 1718, and her husband, Gilbert Abrahall, died in the November following, leaving their said infant daughter, who subsequently died at about the age of seven years. Benedicta Andrews, upon the death of her said niece, entered on Mary Abrahall's moiety. And, being advised that the limitations in Mary's will were void and that, consequently, the whole vested in herself as heir at law to both her sister and niece, by will, dated 5 September 1741, devised both her own and her sister's moiety to the plaintiff, and she died without issue.

The bill was brought to establish the plaintiff's title to Mary Abrahall's moiety under the will of Benedicta Andrews on the ground that the limitation to Benedicta in Mary's will was a contingent remainder, *viz.* in case of failure of lawful issue of the body of Mary living at the death of Gilbert Abrahall, which event had not happened at the determination of the particular estate limited to Gilbert, the daughter Benedicta being then living. And it was also urged that the limitation could not enure as an executory devise or future use, for, then, it must be understood as intended after a general failure of issue, which would be too remote.

LORD HARDWICKE said this case had at first such an appearance of difficulty, that I thought I should be obliged to send it to a court of law, but, now, I deem that unnecessary. There can be no doubt of the intent of the testatrix Mary Abrahall, which certainly was that her own issue should in the first place take her estate and that, afterwards, her collateral relations should have it, as mentioned in the appointment. The consideration is whether that intent can or cannot take effect. The object of the fine levied of the estate which descended upon the two sisters as co-heiresses (as appears by the deed leading the uses thereof) was to give them such a power of making appointments of the inheritance as might answer any exigency of their respective families. This goes a good way towards furnishing light for the construction of the appointment afterwards made by Mary Abrahall; for her will was certainly only an appointment by a married woman by virtue of a power over a trust estate. It was said, indeed, that, if this was a trust estate, it became so by accident, by the limitation of a use upon a use in the deed leading the uses of the fine. It may be so. But the law is settled that such a limitation is a trust by construction, whether it was originally intended to be so or not. In either case, it must be directed by the rules of equity, and executed by a subpoena. I shall, however, consider this question under two heads: first, as if it had been a devise of a legal estate, which it is not; and, secondly, as what it is, not a devise, but an appointment by virtue of a power reserved over a trust estate. As to the first head, if this had been a devise of a legal estate, what would have been the operation? This question was put in three different ways: first, whether any estate tail could arise by implication to Mary's daughter by force of the words 'for want of issue on the body of Mary to be begotten'; secondly, whether the devise to Benedicta Andrews was a contingent remainder depending upon Mary's dying without leaving issue; thirdly, whether it was a vested remainder or could be good by way of an executory devise. But the second and third queries may be laid out of the case, for, as a contingent remainder, it could never take effect, the specified contingency not having happened when the particular estate determined, the daughter of Mary being alive at the time when Gilbert, the tenant for life, died. And, as an executory devise, it could not take place, for, according to that construction, it would be too remote. This brings it, therefore, to the first question, whether any estate tail could arise by implication to the issue of the testatrix Mary Abrahall. I think there is no absolute necessity to determine this question, but, if there was, the defendant's right stands on a strong foundation. That estates may arise by implication in a will is very certain. In Robinson's Case, it was decided that, under a devise to A. for life, and, if A. died without issue, remainder over, A. took an estate tail. The determination in Langley v. Baldwin, 1 Eq. Ca. Ab. 185, went still further. It is said, however, that implications which go to exclude or postpone the title of an heir at law must not only be constructive and possible, but necessary, as laid down in Gardner v. Sheldon, Vaugh. 262.[1] But I do not understand that, where the intent is plain, there must be an absolute natural necessity to authorize a legal implication. There are various ways by which a man may restrict the interests of his heir at law. He may devise to his heir at law after the death of another person, which will give that other person an estate for life by implication. Or a testator may say that, after the death of A., who is his heir at law, though not so described, without issue, B. shall have his estate, thus modifying the fee. It is clear indeed that a man may devise his estate to his heir at law by way of restriction, which restriction may apply either to the time at which the heir shall take or to the interest which he is to take. Walter v. Drew, Com. 372, which case, though not very fully or correctly reported, yet shows that a devise to the second son of the testator if the eldest son died without issue was considered as a restriction and reduction of the eldest son's interest. That, by implication from such words

[1] *Robinson's Case* (1606-1607), 1 Ventris 230, 86 E.R. 154; *Langley v. Baldwin* (1707), 1 Eq. Cas. Abr. 185, 21 E.R. 976, also Chancery Cases *tempore* Anne 72; *Gardner v. Sheldon* (1671), Vaughan 259, 124 E.R. 1064, also 1 Freeman 11, 89 E.R. 9, 2 Keble 781, 84 E.R. 494, 1 Eq. Cas. Abr. 197, 21 E.R. 986.

an estate tail may arise, appears also from the cases of Newton v. Bernardine, Moor 127, and Cosen's Case, Owen 29.[1] There would be a good deal, therefore, to support a determination in the defendant's favor from the strict rules of law, were this a plain devise of a legal estate, since if a man may by implication lay such a restriction upon his heir at law as to turn a fee simple into an estate tail. Why should not the present case come within the reason of that rule? But it was said that, here, is no estate given to Mary's daughter, the first taker. True; none is given in direct terms, but there is what amounts to the same thing. The testatrix considered her issue as the persons to take, and has laid this restriction upon them, that, upon their dying without issue, the estate should go over. And, thus, it stands upon the first question.

But I do not think the case is to be determined upon that question, the true point arising under the second head, this being an appointment under a power reserved to a married woman over a trust estate. And, really, the plaintiff undertakes a pretty hard task when he contends that this is not an executory trust, when, at the same time, he brings his bill for a conveyance, which must be executed by this court, and cannot rest upon the trust executed by the devise. There is, indeed, a case when Sir John Trevor, Master of the Rolls, seemed to think it discretionary in the Court of Chancery whether it would or would not decree a conveyance. But I know of no such rule, and it would be very dangerous. Here, is a married woman executing a power. All the estates must arise out of that power, for, though she was owner of the fee, she could dispose of it in no other way except under her power. When such power is executed, it is the same as if the limitations in the instrument executing the power were contained in the deed which created it. Consider, then, what would be the effect if all these limitations had been inserted in the deed of trust and a son or daughter of Mary Abrahall had brought a bill for an execution of the trust and for a conveyance, what kind of conveyance, must the Court have directed? It must have considered the construction of the deed of trust, and would never have directed such a conveyance as would have destroyed all the limitations over contrary to the intent of the person executing the power, but would have directed a conveyance to the husband for life, then to the son or daughter, not in fee, but some way in tail, either as taking from Mary Abrahall or in strict settlement. Mary Abrahall's will declares a plain intention, that, upon failure of issue of her body, the subsequent limitations should take effect. And would not the court have modelled them in such sort as that they might all take effect? But it was said the word 'issue' is a word of purchase. And, then, it is asked how shall the limitations go on; shall the issue all take for life or shall the eldest son only take? I answer that, in the execution of a trust, it shall be taken according to the party's intent, the court having in many cases construed the word 'issue' so as to adapt it to the common course of settlements with the proper limitations. I am, therefore, of opinion that the plaintiff has no title.

The bill was accordingly dismissed but without costs.

1 Vesey Junior Supplement 342, 34 E.R. 818

18 June 1754.

LORD HARDWICKE: It has been argued that, according to Gardner v. Sheldon, Vaugh. 262, although estates are often given in a will by implication, this distinction is to be taken, namely, that an estate given by implication of a will, if it be to the disinherison of the heir at law, is not good, when such an implication is only constructive and possible, but not a necessary implication. This is undoubtedly the doctrine laid down in that case, but I do not see

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[1] *Walter v. Drew* (1723), 1 Comyns 372, 92 E.R. 1117, also 2 Eq. Cas. Abr. 315, 344, 22 E.R. 267, 293; *Newton v. Barnardine* (1583), Moore K.B. 127, 72 E.R. 484; *Cosen's Case* (1586-1587), Owen 29, 74 E.R. 877.

that it is said there must be an absolute natural necessity where the intent is plain and the implication of law thereon.

122

Hurst v. Morgan

(Ch. 1755)

A married woman may not make a will, but she can execute a power of attorney.

1 Vesey Junior Supplement 20, 34 E.R. 674

2 May 1755.

A married woman, under a power duly reserved to her to limit the uses of an estate by deed or will or writing in the nature of a will, during her coverture, devised the said estate to her son and heir in fee charged with her debts, and she died. Shortly after, the son died, a minor. An important question arose whether the son took by appointment only under the power and as a purchaser or whether he took by descent, which it was held he must have done if the instrument were taken to be a will, as the devise, being to the heir at law of the testatrix, would have been void or at least operate only so far as to let the heir in to take by his preferable title. Upon this point, depended the question whether the estate should devolve upon his heirs *ex parte paterna* or his heirs *ex parte materna*.

LORD HARDWICKE said it was clear that the testatrix, as a married woman, could not make a will and that the instrument could only take effect as an appointment under her power. It had been insisted on by counsel that, if not a will, the instrument must have all the qualities of a will. But His Lordship said it was very true it must have all such qualities as arise from the testamentary form of the instrument, such as being liable to revocation or lapse, but it could take effect only as an appointment, more especially as relating to real estate, raising a question triable at law, where the instrument must have been pleaded, not as a will, but as an appointment and the limitation therein contained considered as if it had been inserted in the original deed which created the power, as that deed operated by transmutation of possession, being a conveyance by lease and release. LORD HARDWICKE was of opinion that the estate of the appointee proceeded out of the estate of the releasees and vested in the son as a purchaser, consequently, that it must go to his heir *ex parte paterna*.

INDEX OF NAMES

[These references are to case numbers, not page numbers.]

SUBJECT INDEX

[These references are to case numbers, not page numbers.]