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Reports of Cases in the Court of Chancery From 1683 to 1688

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**REPORTS OF CASES
IN THE COURT OF CHANCERY
FROM 1683 TO 1688**

Center for Law Reporting

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**REPORTS OF CASES
IN THE COURT OF CHANCERY
FROM 1683 TO 1688**

Volume 1

Edited by
W. H. BRYSON

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INTRODUCTION

This collection of law reports brings together in one place the reports of cases in the Court of Chancery from the short tenure of Sir Francis North, lord Guilford, and that of Sir George Jeffreys, Lord Jeffreys, who was the Lord Chancellor during the reign of King James II. These reports have been scattered heretofore, but it is hoped that, by reprinting them in one place, they can be more easily comprehended individually and the jurisprudence of this court can be better understood. They come from the reigns of King Charles II and King James II, and date from 1683 to 1688.

Francis North was born on 22 October 1637, in Cambridgeshire, the second son of Dudley North, Lord North, (1602-1677) and Anne Montagu North, daughter of Sir Charles Montagu. He was a student at St. John's College, Cambridge, from 1653 to 1655, when he entered the Middle Temple. He was called to the bar in June 1661. He was a protégé of Sir Geoffrey Palmer, the Attorney General, and quickly gained a good reputation and practice. In 1671, North was made Solicitor General and knighted. He was elected to Parliament in 1673, and, in the same year, was made Attorney General. In 1675, he was made Chief Justice of the Court of Common Pleas, and, on 20 December 1682, North was made Lord Keeper in succession to Lord Nottingham. He was made baron Guilford on 27 September 1683. He died suddenly at his seat at Wroxton, Oxfordshire, on 5 September 1685.¹

George Jeffreys was born in 1648. He was called to the bar at the Middle Temple in 1669, made the Recorder of London in 1678, and created a king's serjeant in 1680. In 1683, he was made the Chief Justice of the Court of King's Bench, and, two years later he was raised to the peerage as a baron. On 23 October 1685, he was made the Lord Chancellor. He was a brutal man and much despised as a person, but he was a good equity judge. He resigned from the Court of Chancery on 8 December 1688, two days before James II abdicated. Jeffreys died in prison on 8 April 1889.²

The collections of Chancery reports before the tenure of Lord Nottingham are poor.³ The appointment of Sir Heneage Finch, Lord Nottingham, to the Chancery bench in 1673 marked a new era in law reporting in the Court of Chancery. Lord Nottingham, a first rate lawyer, began making reports of the cases that he heard as judge, and these reports were full and learned. They cover the period 1673 to 1682, and, while they were generally known, they were not easily accessible until they were published by David Yale in 1957 and 1961, Selden Society, volumes 73 and 79. Fortunately, Thomas Vernon began his extensive collection of Chancery reports in 1681; they continue up to 1720. Vernon's reports are not particularly good, even the much expanded later editions, but they are fairly comparable to the contemporary common law reports. Thus, there has been systematic reporting of Chancery cases since 1673. There are also a few Chancery reports from this period in other printed books.

By putting all of the reports of this court for this time period into one book and arranging them chronologically, we can see that, in fact, the systematic contemporaneous reporting of Chancery cases begun by Lord Nottingham continued unabated after his untimely death in 1682.

This collection of reports has the expected cases involving procedure and jurisdiction.

¹ P. D. Halliday, 'North, Francis, first Baron Guilford', *Oxford Dictionary of National Biography*, vol. 41, pp. 85-88; E. Foss, *Judges of England* (1864), vol. 7, pp. 260-270.

² G. W. Keeton, *Lord Chancellor Jeffreys* (1965).

³ W. H. Bryson, *Cases Concerning Equity*, vol. 1, Selden Society, vol. 117, pp. xiv-xvi; M. Macnair, 'The Nature and Function of the Early Chancery Reports', in C. Stebbings, *Law Reporting in England* (1995), pp. 123-132.

However, the vast majority deal with issues of property law. These arose out of family settlements which generated disputes over settlements not performed, the interpretation of conditional gifts and devises, intestate succession, breaches of trust, the rights of mortgagees and other secured creditors, jointures, charges on land, etc. In most of these cases, the issues to be decided were common law rights, but they had to be determined in a court of equity before an equitable remedy could be granted. They illustrate that the rules of common law and equity were not in opposition, as a general principle, but equity fulfilled and fine-tuned the common law by giving more modern and sophisticated remedies to enforce basic common law rights. Note that there are no Case Nos. 286, 289, 294, 323, 329, 379, 399, 408, or 458.

Most of the text of the law reports herein has been in print for several centuries. However, this new edition and new arrangement of some few of our books, though small and modest, is a part of the international, ongoing effort to keep the tools of the common law sharp and in good repair.

We thank the Masters of the Bench of Lincoln's Inn, London, the Council of the King's Inns, Dublin, and the Trustees of the British Library for preserving the manuscript reports of the common law. Additionally, many thanks are due to them for their permission to publish some of them here.

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**REPORTS OF CASES
IN THE COURT OF CHANCERY
FROM 1683 TO 1688**

1

Anonymous
(Ch. 1683)

The general Statute of Distributions of intestate decedents' estates does not apply to citizens of London.

Where an executor is devised the residuum of a decedent's estate and dies before the testator, the devise lapses, and goes to the decedent's next of kin.

Where a mother of a deceased child takes administration, the decedent's siblings take nothing.

2 Freeman 85, 22 E.R. 1074

Hilary term 1682[/83].

Upon the Act of Distribution for Intestates' Estates,⁴ these points have been resolved, as it was affirmed to me [Richard Freeman] by Mr. Keck and Mr. Moseley etc.:

First, that the customary part, belonging to the administrator of a citizen of London dying intestate, is not within the Act, because the custom of London, being saved by the Act, the customary part shall go wholly to the administrator as it did before, and so it has been resolved at common law and in Chancery;

Second, that, where a man makes an executor to whom he devises all the rest and residue etc., and this executor dies before the testator, he that takes administration *cum testamento annexo* shall be liable to make distribution of this surplus within the Act of Parliament;

Third, that, if a child dies and the mother administers, she shall not be compellable to make distribution to any of the brothers and sisters of the intestate.

2

Anonymous
(Ch. 1683)

Where a plaintiff moves to have his suit dismissed, the defendant is entitled to receive full court costs.

1 Vernon 116, 23 E.R. 354

11 January 1682[/83].

Upon a motion made to dismiss a bill [wherein plaintiff had proceeded to an answer only] with 20s. costs, [it was said] *per* Lord Keeper [NORTH] that was a rule made at least fifty years since. And he saw no reason, if a defendant had been put to greater charge, why he should not have his full costs and that, for the future, it should be referred to a Master to tax the defendant his costs in such case.

[Other reports of this case: 1 Eq. Cas. Abr. 126, 21 E.R. 931.]

⁴ Stat. 22 & 23 Car. II, c. 10 (SR, V, 719-720).

Anonymous
(Ch. 1683)

The officers of the City of London do not have their own ameracements; they have no royal ameracements.

1 Vernon 116, 23 E.R. 354

Eodem die [11 January 1683].

Upon a motion for a messenger upon a *cepi corpus*, the defendant living in London, Lord Keeper [NORTH] said this had been looked upon as a motion of course, but, in truth, it was grounded upon a mistake, for, to His Lordship's knowledge, the officers of the City have not their own ameracements. They have no royal ameracements.

Williams v. Mellish
(Ch. 1683)

A bill of review does not lie before the decree has been performed.

A bill of review lies only for error of the face of the record or for newly discovered evidence.

1 Vernon 117, 23 E.R. 354

15 January 1682[/83].

Upon a motion made by Mr. *Williams*, on behalf of the plaintiff, his brother, that proceedings might be stayed on the decree until the plaintiff was heard on a bill of review, Mr. *Williams* insisted that a bill of review was like a writ of error at law or an appeal in the ecclesiastical court. And a writ of error at law, until the Statute for special bail,¹ was in itself a *supersedeas*. And, as to the precedents in court, he had looked into them, and found there was no constant rule, for, sometimes, a bill of review had been allowed before the decree had been performed and at other times not.

Lord Keeper [NORTH]: Even before the Statute for special bail on a writ of error, the writ was not such a suspension of the judgment but that a man might nevertheless have had an action of debt on it. But I do not think there is any sound argument to be drawn from such comparisons. In this case, the decree shall be performed to a tittle before any bill of review be allowed, unless the plaintiff *Williams* will swear himself not able to perform the decree, and will surrender himself to the Fleet [Prison] to lie in prison until the matter be determined on the bill of review.

1 Vernon 166, 23 E.R. 390

Eodem die [15 May 1683]. *Mellish v. Williams*.

Williams, in his bill of review, assigned for error the subject matter of fourteen exceptions to the Master's report, which had been formerly overruled.

And the defendant demurred, for that there was no error appearing in the body of the decree.

The plaintiff's counsel insisted that these matters being contrary to the proofs in the cause, though they were matters of fact, they might be examined in a bill of review upon the proofs already taken, for the rule of the court is that there must be error appearing in the body of the decree without

¹ Stat. 16 & 17 Car. II, c. 8, s. 3 (*SR*, V, 557).

further examination of matters of fact, which implies that, if it can be done without farther proof, a decree may be reversed for errors which may be made out by proofs already taken in the cause.

But that was utterly denied by the defendant's counsel and the court, for that only errors in law could be assigned or new matter discovered since the decree made and that with leave of the court.

[Other reports of this case: 1 Eq. Cas. Abr. 82, 21 E.R. 894.]

[Earlier proceedings in this case: 79 Selden Soc. 740.]

5

Anonymous
(Ch. 1683)

A corporate defendant does not put in an answer under its corporate seal, but it must answer by one of its officers under oath.

1 Vernon 117, 23 E.R. 355

Eodem die [15 January 1683].

[There was] a bill against a corporation to discover writings. The defendants answer under their common seal, and so, being not sworn, will answer nothing in their own prejudice.

[It was] ordered that the clerk of the company and such principal members as the plaintiff shall think fit answer on oath and that a Master settle the oath.

6

Eastwick v. Conningsby
(Ch. 1683)

Where one co-partner dies, a court of equity can appoint a commissioner to wind up the business of the partnership.

1 Vernon 118, 23 E.R. 355

Eodem die [15 January 1683].

The plaintiff's late husband [to whom she is administratrix] and the defendant being co-partners for many years in the trade of a druggist, the plaintiff's bill was to have a discovery of the estate and her proportion and dividend thereof according to the articles of co-partnership.

The defendant answered.

And it appearing that many debts owing to the joint trade stood out, it was now moved on the behalf of the plaintiff that an able attorney might be appointed to sue for and recover these debts, it being alleged in the bill that the defendant, carrying on a distinct trade for himself with the persons that were debtors to the joint trade, to oblige them, he forbore to call in their debts.

And it was ordered accordingly unless the defendant, within a week, would give security to the plaintiff to answer her moiety of the debts that were standing out.

[Raithby's note: Reg. Lib. 1682 A, ff. 253, 384. The order was that 'Ralph Grange therein named should be appointed to sue for and get in the several debts owing to the partnership and that the defendant should deliver to him all bills, bonds, and notes for such debts, and also produce the books of account concerning the said trade unless the defendant would within a week next give security to answer one moiety of such debts to the plaintiff.' And it appears also to have been referred to the

Master ‘to direct an appraisement of the estate and goods belonging to the said co-partnership and payment of the debts due from the partnership thereout and, if any overplus, then a moiety thereof to be paid to the plaintiff by the defendant or otherwise to assign such debts standing out to the plaintiff as the Master should direct, and the Master was to have all books, papers, etc. produced on oath, and to accommodate all matters in dispute between the parties if he could.’]

[Other reports of this case: 1 Eq. Cas. Abr. 370, 21 E.R. 1109.]

7

Burdett v. Rockley
(Ch. 1683)

Dower rights attach to land in the custody of sequestrators.

1 Vernon 118, 23 E.R. 356

16 January 1682[/83].

The plaintiff’s bill was to revive a sequestration obtained against the defendant’s husband for a personal duty before his intermarriage with the defendant and to avoid the defendant’s estate in dower in the lands that were sequestered before the marriage, it being insisted that these lands were so bound by the sequestration and covered therewith, that the defendant’s right of dower could never attach to them.

To this bill, the defendant demurred.

And the demurrer was allowed by the Lord Keeper [NORTH] [and an injunction that had been obtained was dissolved].

And the counsel at the bar desired to know His Lordship’s opinion, whether the heir in fee simple should in such case have the estate bound and subject to such a sequestration or not.

But the Lord Keeper [NORTH] refused to declare his opinion therein, saying that the case was not now before him.

1 Vesey Sen. 182, 27 E.R. 970

The bill set forth a suit against the late husband of the defendant and a decree in his life[time] and that, for not obeying, contempt issued against him and sequestration against the real and personal estate until satisfaction. And, he dying, the said commission was renewed by order of the court, and an injunction was ordered. The bill was in aid of the sequestration.

[There was a] demurrer thereto, for that, by the plaintiff’s own showing, the defendant being dead, the sequestration abated, it not being for the lands in question or for any rent or encumbrance thereout, but for a personal duty in disobeying the decree and the rather for that, after his death, no subpoena in the nature of a *scire facias* yet issued against the defendant and heir, whereby they might come in and make a defence.

The demurrer was allowed, and the injunction for staying the defendant’s proceedings at law was dissolved, so that a revivor was held necessary.

[Other reports of this case: 1 Eq. Cas. Abr. 218, 352, 21 E.R. 1001, 1096.]

[Earlier proceedings in this case: 1 Vernon 58, 23 E.R. 308.]

Archbishop of York v. Anonymous
(Ch. 1683)

A court of equity will not grant a writ de cautione admittenda to a bishop before the petitioner has performed the sentence of the ecclesiastical court.

1 Vernon 119, 23 E.R. 356

18 January 1682[/83].

Upon a motion made by Mr. *Bellwood* for a *supersedeas* to a writ *de cautione admittenda*, for that they had taken a writ to the sheriff without any affidavit filed, that the bishop refused to admit of the caution, and for that reason a *supersedeas* was awarded.

And the Lord Keeper [NORTH] declared that, finding this court often troubled for writs *de cautione admittenda*, he thought the right of it was that, if there was a sentence for a man to pay money or to do any other thing in the spiritual court, a man ought first to perform that before he is admitted to his writ *de cautione admittenda*, for it is in vain to take security *parere mandatis ecclesiae* whilst a man refuses to obey the sentence.

Sed quaere, for, suppose a man be excommunicated for not coming to church or not receiving the sacrament. How can he do that until his caution is admitted and he absolved?

[Other reports of this case: 1 Eq. Cas. Abr. 415, 21 E.R. 1144.]

Anonymous
(Ch. 1683)

Where a person has a complete defense at common law to a claim, a court of equity will not enjoin the common law proceedings.

1 Vernon 119, 23 E.R. 356

Eodem die [18 January 1682[/83].

Upon a motion made by Mr. *Stedman*, where three several actions at one time were brought against an executor and he, to each action, pleaded *riens entre mains ultra* £100 and so, upon each action, there was a judgment for £100. And, therefore, he prayed an injunction.

But it was denied by the Lord Keeper [NORTH]. In cases proper for law, a man must defend himself by legal pleadings, and every executor ought to be careful in the first place to cover all his assets with a judgment.

[Other reports of this case: 1 Eq. Cas. Abr. 236, 21 E.R. 1015.]

The Stationers' Company v. Lee
(Ch. 1683)

A patent which restricts the selling of foreign books is valid and enforceable.

2 Shower K.B. 258, 89 E.R. 927

In Chancery, it was moved for an injunction to stay the selling of some books imported from Holland etc.

And it was urged that they had quietly enjoyed the sole printing of these books from the first [year] of King James until very lately and that all particular members of the company have distinct shares and benefit in the printing of them, according to the stock they put in by virtue of a by-law of the company so the trade or gain is not restrained to a few. By the same by-law, above £200 a year is always applied for the supporting of poor widows and orphans of the same company. And they are at £200 or £300 a year charge in looking after the press for the service of the government; besides, it would be of dangerous consequence that the Hollanders and other foreigners should print our primers, psalters, almanacs, and singing psalms, for they may and actually do abuse them, for, being at no charge for correcting and printing in a worse character and paper, they will undersell the English, and destroy our manufacture.

Then, they moved against a trial of the validity of their patent for these reasons.

It appears by the recital of King James set forth in the bill that the sole printing of primers and psalters was in grant before that time by a patent to John and William May, for their lives, then, by Queen Elizabeth, to Benjamin Alley in reversion for thirty years, which was purchased by the plaintiffs. Then, the said patent of the first [year] of King James was granted to the plaintiff. Afterwards, his patent was surrendered, and the patent was renewed in the thirteenth year of James I. The king has always had and exercised his prerogative in the printing of these and some other books. In the first year of Queen Mary, there was granted to Cowood the printing of statutes and proclamations, wherein was recited a former grant. We have here a copy thereof. In the first year of Queen Elizabeth, [there was] the like patent to Jugg and Cowood for the sole printing of them and likewise Bibles. The sole printing of law books was granted by Henry VIII to Tottel, and enjoyed. All these patents have been renewed and continued down ever since, and multitudes of men have purchased under them. The king is head of the Church, and has a particular prerogative in ecclesiastical affairs. And, therefore, in the printing of primers etc., he has a particular prerogative in restraining and licensing prognostications of all sorts. And, were it otherwise, it would be of dangerous consequence to the government. In the Statute 21 Jac. I, c. [*blank*], against illegal and mischievous monopolies,¹ it is particularly declared, that this Statute should not extend 'to patents for sole printing'. In the case of *Darcy v. Allen*, about monopolies,² the patents for printing, which were the same as now, were admitted good. By the 14 Car. II, c. 33,³ it is enacted 'that no person shall imprint or import any book or books, which any other person by force or virtue of any letters patents or entry in the stationers' book had right and privilege solely to print'. Although this Statute

¹ Stat. 21 Jac. I, c. 3 (SR, IV, 1212-1214).

² *Darcy v. Allen* (1602), 11 Coke Rep. 84, 77 E.R. 1260, Noy 173, 74 E.R. 1131, Moore K.B. 671, 72 E.R. 830, British Library MS. Add. 25203, f. 678, J. I. Corré, 'The Argument, Decision, and Reports of *Darcy v. Allen*,' 45 Emory Law Journal 1261 (1996).

³ Stat. 14 Car. II, c. 33, s. 5 (SR, V, 430).

be expired, yet it seems to amount to a judgment that some persons by letters patent had a right and privilege solely to imprint some books.

Since this Statute, there was a contest between Mr. Titon and divers other booksellers and Colonel Streater, patentee of the law books,¹ about the printing of Croke's reports. And, in an action brought, there was a sudden judgment against Colonel Streater in the Court of King's Bench, but, upon a writ of error in Parliament and hearing of counsel, this judgment was reversed, and the patent adjudged good. In Hilary term 23 & 24 of Charles II [1672], in the case of Mayo v. Hill, an action *tam quam* was brought for the penalties of the Act of 14 Car. II, c. 33, setting forth that the now plaintiff, by virtue of the new letters patents, was proprietor of the copyright of the English Bibles and psalms and that the defendant had etc. And, upon trial before the Lord Hale, it was found for the plaintiff by the direction of the Lord Hale, who, thereupon, declared the patent had been always held legal. In Michaelmas term, in 27 Car. II, the Company of Stationers brought an information in the Court of Common Pleas against one Seymour,² for the penalties of the Act of 14 Car. II, c. 33, for the printing and vending of almanacs, setting forth that, by virtue of the letters patents in 13 Jac. I, they were entitled to the sole printing of almanacs, and a special verdict was found thereupon and judgment [was given] for the plaintiff.

Now, by all these judgments so affirmed, it appears that the respective letters patents gave a right to the patentees; else no judgment could have been given for them; so, upon the Statute 14 Car. II, c. 33, which gives the penalties to those who have a right by force and virtue of letters patents. In Easter term 32 Car. II, the Company brought an action on the case against Marlow,³ setting forth their patent of 13 Jac. I, and that Marlow had printed and sold almanacs, which action was tried before the Lord Keeper, then Chief Justice of the Common Pleas, and [there was] a verdict for the plaintiff. There, it is objected the Statute 35 Hen. VIII, c. 15,⁴ reciting that, by an Act of Richard III,⁵ all strangers might import and sell books and that, by the said Act of 35 Hen. VIII, c. 15, it is enacted, 'that none shall buy to sell again any imported books ready bound, otherwise than in gross, and not by retail', whence they infer that it is lawful to import any books in sheets. The answer is that that Statute of Richard III is not in print; *quaere* if it be perpetual. But, however, it extends only to strangers, and it will not take away the king's prerogative, the king being not named in the Act. And, as for that of 35 Hen. VIII, c. 15, it cannot be of greater force for that very reason; besides the Statute is only prohibitory, and does not enlarge, but restrains the liberty of the subject. The judgments in the House of Lords and other courts where these statutes were objected prove that they do not take away the king's prerogative. If the words of the Statute imported a general liberty for all sorts of books, the defendants might insist to import any seditious or heretical books, which, by law, they cannot do, so that the liberty of importing books must be restrained to such as are not contrary to the king's prerogative and the public weal.

And an injunction was granted.

¹ *Roper v. Streater* (C.P. 1670).

² *Stationers' Company v. Seymour* (1677), 1 Modern 257, 86 E.R. 865, 3 Keble 792, 84 E.R. 1015.

³ *Stationers' Company v. Marlow* (1680), J. Lilly, *Entries* (1741), p. 63.

⁴ Stat. 25 Hen. VIII, c. 15 (*SR*, III, 456).

⁵ Stat. 1 Ric. III, c. 9 (*SR*, II, 489-493).

1 Vernon 120, 23 E.R. 357

Eodem die [18 January 1682[/83].

Upon a motion for an injunction to stop the sale of English Bibles printed beyond the sea, it was urged that the Chancery was a court of state and, therefore, for the great mischief that might arise from these Bibles if they should be suffered to be publicly sold, the sale ought to be prohibited by this court upon that politic account as well as to quiet the king's patentees in their possession.

Lord Keeper [NORTH]: I do not apprehend the Chancery to be in the least a court of state, neither can I grant an injunction in any case but where a man has a plain right to be quieted in it. And, though the patent for law books has been adjudged good in the House of Lords, yet that is not exactly the same case with this, though near it. Let there be a trial at law, and let the king's patentees be plaintiffs, and the defendants admit they have sold twelve Bibles. And when the trial is over, come back again.

[Earlier proceedings in this case: 2 Chancery Cases 66, 76, 93, 22 E.R. 849, 854, 862.]

11

Anonymous
(Ch. 1683)

Where a husband sues to enforce his wife's legacy, a court of equity will require him to settle it to his wife's separate estate and for their children.

2 Shower K.B. 282, 89 E.R. 941

If a husband come to sue in Chancery for his wife's portion, the court, upon the prayer of the wife's friends and relations, will force him to secure the same, part for the wife and part for the children, for, say they, 'if you will have equity you must do equity', and they may qualify their own decrees. But they will never force him if he come not there as a complainant, as if he sues at law etc.

12

Anonymous
(Ch. 1683)

The Court of Chancery does not have the general jurisdiction to enforce the payment of alimony.

2 Shower K.B. 282, 89 E.R. 941

In the late times, they sued for alimony in [the Court of] Chancery. And the judges were then of opinion that, there being no spiritual courts nor civil law [courts], the Chancery had the jurisdiction in those days. But now that we have courts Christian, the Chancery will allow of demurrers to such bills for alimony.

13

Anonymous
(Ch. 1683)

A court of equity will enjoin an action at common law on a bond where the debtor enters into a consent decree to pay the debt.

1 Vernon 120, 23 E.R. 357

23 January 1682[/83].

[There was] a motion for an injunction to stay proceedings on a bond upon an offer made to give [a confessed] judgment with a release of errors.

But the Lord Keeper [NORTH] answered that he did not think that so beneficial an offer as might be looked upon, for that, notwithstanding the release of errors, the plaintiff might bring his writ of error and put the defendant to plead his release and so delay time as long as if no release of errors had been given.

But, upon the plaintiff's offering to be bound by an order to bring no writ of error, an injunction was awarded.

14

Gerrard v. Vaux
(Ch. 1683)

A contract for the common law conveyance of land will be specifically enforced where that is the agreement of the parties.

1 Vernon 121, 23 E.R. 357

Eodem die [23 January 1683].

The bill was to have an execution of an agreement. But, upon the proof, it appearing the agreement was only that the defendant would quit the possession of the lands and not that he would convey all his estate in those lands, the bill was dismissed.

But the Lord Keeper [NORTH] said, if the agreement had been to have conveyed those lands, although he was not apprised what estate he had in them, yet he should have decreed the agreement.

[Other reports of this case: 1 Eq. Cas. Abr. 24, 25, 21 E.R. 845, 847.]

15

Curzon v. The African Company
(Ch. 1683)

A question in this case was whether a new company that had bought the assets of an existing insolvent company could be sued for the debts of the old company.

The writ of process against a corporation is a distringas, not a subpoena.

In this case, the suit was settled out of court by a compromise.

Skinner 84, 90 E.R. 40

Hilary term 35 Car. II.

Carson brought a bill against the African Company, and set forth that he, in the name of Sir R. Foch, who declared it a trust, lent the African Company £3000, which they obliged themselves to pay under their common seal, that, after[wards], £1800 was paid and that obligation cancelled and a new one with a penalty for £1800 residue entered into under their common seal to Sir R. Foch and a new declaration of trust sealed by him to Carson the same day and written by the clerk of the company and how that, afterwards, by agreement between that company and the new African Company, the old one conveyed all their forts and effects to the value of £34,000 to the new company for the payment of the debts due by the old company, that they had paid to the value of £29,000. And, out of the residue still remaining in their hands, the complainant desired to be satisfied.

Part of the counsel for Curson would have it a trust and so this company is bound to pay the complainant, and the making the old company parties to the bill is not necessary.

Others would have it no trust, but that the new company owing the old company £5000 upon the agreement that it should be liable to the creditors of the old company by way of attachment, which, in equity, may be against a company.

But it was objected by the counsel for the company that then the old company ought to be parties to the bill and the court to decree that the old company should discharge this upon payment of it to Curson.

The others would have it that the equity ought to be against them that have the effects and that this company, having the effects, should be liable.

Lord Keeper [NORTH] said, if an executor conveys over all the estate and go to the Indies or elsewhere, not to be found, that the estate shall be liable to satisfy the creditors. But this shall be after he has stood out all process.

But the decree was by consent that the company should pay out of the £5000 £40 percent, the proportion paid to the other creditors, and interest from the time of the former dividend, and the costs were to be allowed out of the interest, the old company not being made parties to the bill. And [it was] said in this case that process against a company is by [a writ of] *distringas*, not subpoena, and, if they have no effects, there is no way to compel them to appear.

1 Vernon 121, 23 E.R. 358

Eodem die [23 January 1683].

It was objected against the plaintiff that he had not brought proper parties to hearing, the bill being to be relieved for a debt owing from the Old African Company, and they had brought to hearing the New African Company only.

The Lord Keeper [NORTH] objected that the old company were in a manner *in nubibus*, though their charter was not surrendered, as was objected at the bar, for he knew how that matter was. The old company were almost £200,000 in debt, so that their credit was lost and they could not carry on their trade. And, therefore, that the trade might not be lost to the nation, it was necessary that a new company should be erected, which was so done. And the king accepted no surrender from the old company of their charter, but they are a company still in being. The new company [which in truth are almost all the same men as were of the old company] bought the old company's stock and effects at the true value, and the money was to be applied for the payment of the debts of the old company. But that which stuck with him in this case was he did not see how a company that had no estate could be compelled to appear.

Upon which it was urged the plaintiff might take out a *distringas* against the company, and have it returned *nihil*, and so got a sequestration against them, and, then, by the course of the court, the plaintiff need not to bring them to hearing.

But then, for the plaintiff, it was said that the plaintiff had an order made in this cause that the defendants should take no advantage at the hearing for want of proper parties.

To which it was replied such an order was in itself void, and could not take away the

defendant's just exceptions unless it had been by consent.

Lord Keeper [NORTH] ordered the plaintiff's counsel to go on and open the cause. And, after debate, the plaintiff agreeing to take as other creditors had done £40 *per centum* with interest for his money, he was ordered so to do. And he was likewise ordered to allow a £100 debt that was owing by him to the company, for that it is the custom of companies that, if they owe a man £100, they will give him credit for so much, and, therefore, in respect of a company, stoppage is to be allowed as a good payment.

[Reg. Lib. 1682 A, f. 291.]

16

Harvey v. Montagu
(Ch. 1683)

Where a person willfully pays money into to a wrong or a doubtful person, he is bound by the consequences.

A court of equity requires everyone to take notice of its decrees as much as of common law judgments.

1 Vernon 122, 23 E.R. 359

26 January 1682[/83]. Sir Thomas Harvey v. Ralph Montagu.

The case was Mr. Harvey, being possessed of a great personal estate, died, and he made the plaintiff, Sir Thomas Harvey, and Mrs. Elizabeth Harvey, his widow, executors, and directed by his will that £20,000 of his personal estate should be invested in lands and that Mrs. Harvey should receive the profits thereof for her life. And he made Sir Thomas Harvey residuary legatee.

Sir Thomas Harvey exhibited a bill against Mrs. Harvey, setting forth that he was residuary legatee and yet Mrs. Harvey had got the whole estate of the testator into her hands and converted it to her own use.¹

Mrs. Harvey insisted on a deed made during coverture, whereby the greatest part of her husband's estate was settled in trust for her.

But Sir John Coell deposed that this settlement, being made in the late times, was contrived only to prevent sequestration and, that cause coming on to be heard, she was decreed to account to Sir Thomas Harvey for the personal estate and that the deed of trust should be set aside and she should receive no more of the testator's estate, upon which, she goes into France, and refuses to perform the decree, and was under a sequestration.

Afterwards, Sir Thomas Harvey exhibits a bill against the now defendant Mr. Montagu, setting forth that he, owing £10,000 and interest on a mortgage to Mr. Harvey, the testator, and that Mr. Montagu knowing of the former decree and having been present at the hearing of that cause and, at the time when the said decree was pronounced, had since, with an intent to elude and avoid the decree, paid this money to Mrs. Harvey, as he pretended, whereas, if he had paid the money, it was with notice and after the former decree. And, therefore, it was prayed that Mr. Montagu might pay this £10,000 with interest.

The defendant insisted that he had paid and fully satisfied all the mortgage money on such a day in July, which was in time subsequent to the decree, and that he having paid it to a person that in law was well entitled to receive it and having a legal discharge for the same and being no party to the former decree nor bound by it nor ever served with any order upon it, he ought not in a court of equity to be compelled to pay it over again.

¹ *Harvey v. Harvey* (Ch. 1680-1686), see below, Case No. 347.

This cause came on to be heard before the Lord Chancellor Nottingham in Michaelmas Term last, and the proof on behalf of the plaintiff being that the defendant Mr. Montagu was an intimate acquaintance of Mrs. Harvey and one with whom she advised in the management of her affairs and that he was present in court at the time of the decree pronounced, it was, therefore, held by the court that this was no good payment, though, for the defendant, it was insisted that this was no legal notice to Mr. Montagu, that he was no party to the former decree, nor bound by it, nor was ever served with any order upon it, and that he now having really paid his money [as the same was fully in proof] and having a good and legal discharge for it, it was a very hard and strange demand in equity to compel him to pay it again. And, in truth, that clause in the order, that Mrs. Harvey should receive no more of the testator's estate, was inserted in the decretal order by the clerk who drew up the decree and was not in the minutes nor directed by the court. And the decree is not that no person shall pay any money to Mrs. Harvey [for that in itself would be a void clause to all that were not parties to the decree] but only that she should receive no more. And, if Mr. Montagu be decreed to pay this money to the plaintiff, he will not only be decreed to pay his money twice, but, in truth, the plaintiff will have a double satisfaction decreed him, for, by the former decree, Mrs. Harvey is to account to him for all moneys by her received, and is now under a sequestration for it. And, in truth, the plaintiff has received satisfaction for it by the sequestration, having under it not only received the profits of the £20,000 which she was to receive for her life, but also the profits of £1500 *per annum*, which is her own land of inheritance and that, therefore, these decrees were repugnant and did fight with one another.

But, notwithstanding all that could be said, the payment to Mrs. Harvey was decreed to be an ill payment. And it was referred to a Master to take the account.

After this, the plaintiff got a report *ex parte*, and Mr. Montagu, having petitioned and moved by his counsel for a re-hearing, was denied it. And, then, he moved to go back to the Master [this being but a report *ex parte*], which, at last, was obtained. And it being alleged that Mr. Montagu had paid Mrs. Harvey some money for her necessities before the first decree, it was directed that what he had really paid before the decree of the principal or interest should be allowed him on account and his own oath to be taken as to the interest.

When he came before the Master, he proved that he had actually paid £7500 of the principal money, even before the first decree was pronounced. And the Master made his report to that effect.

And, now, the matter coming before the Lord Keeper [NORTH] upon exceptions to the Master's report, the proofs for the defendant were made by one Mr. Phalizo that the defendant, just before he was recalled from his embassy in France, had returned thither £5000 in money, which was left in Phalizo's hands, and had raised by the sale of the furniture of his house there the sum of £2500 more, which was likewise left in Phalizo's hands, and that the defendant Mr. Montagu had bills from Phalizo for payment of this money and that Mr. Montagu, before the first decree was pronounced, gave orders to Mrs. Harvey to receive this money of Phalizo, who swore that, thereupon, he became her pay-master and that, afterwards, in time subsequent to the first decree,¹ Mr. Montagu gave new orders or bills to Mrs. Harvey to receive this money and that, thereupon, she having occasion for it, he did actually pay it to her, and she, with her own hand, endorsed on the counterpart of the mortgage the receipt of this money.

Hereunto, for the plaintiff, it was objected that the defendant could not be admitted to this proof, it being contrary to his own oath, who, in his answer, had sworn the money was paid on such a day in July.

Secondly, that Phalizo's deposition ought not to be read in this case, for that he, before the hearing, was examined in chief upon an interrogatory that led him to discover the several times of the now pretended payments and that, therefore, he ought not to be examined to the same matter again after the hearing, for, now, publication being passed and the defendant, seeing where the matter

¹ Raithby's note: The first decree was made 23 November 1680, and the bills delivered in April 1681.

pinched, would supply it by the straining of Phalizo's evidence. If such a proceeding should be allowed, it would occasion perjury and especially in this case, where Phalizo has sworn the money was paid in July.

Thirdly, admitting the case to be according to this new proof, yet, in truth, this is no payment, for Mr. Montagu might have revoked his orders given to Phalizo for payment of this money to Mrs. Harvey and the money was not actually received until after the first decree and that bills of exchange are not assignable but by endorsement only. And it carries a suspicion with it that there is no witness, either to the orders given to Mrs. Harvey or to the endorsement on the mortgage deed. And the endorsement is not upon the original deed, but on the counterpart remaining in Mr. Montagu's possession.

To this, it was answered, that Mr. Montagu's answer and Phalizo's former depositions were very consistent with what was now proved before the Master, for, though they swore the mortgage was fully satisfied and paid on such a day in July, yet a great part of the money might have been paid before, as, in truth, it was, though the completing payment was not made until July and that the plaintiff's counsel could not be in earnest when they objected against Phalizo's being examined after the hearing, for that was never denied in a matter of account and was so settled in the Case of Sandys and Davison in the Lord Hyde's time upon long debate and that Mrs. Harvey accepting of these bills and Phalizo swearing he then became her pay-master and her receiving the money upon them afterwards makes this a good payment *ab initio*. Mr. Montagu could not have so revoked his orders, but Mrs. Harvey might have required payment thereof afterwards, and Phalizo might have justified his payment thereof. And, as to the endorsement's being made on the counterpart of the mortgage, the defendant's counsel conceived that was most proper, it being fit Mr. Montagu should have the evidence for the payment of his money in his own hands. And, though there was no witness to it, yet it was fully proved to have been all written with Mrs. Harvey's own hand. And it is an evidence of the sincerity of this payment and that it was not done with a design to have served a turn, for, if so, Mr. Montagu might have easily removed all these doubts.

But the Lord Keeper [NORTH] allowed the exceptions to the Master's report, and ordered Mr. Montagu to repay the whole money.

[Raithby's note: 'Whereupon etc. it appearing that the said bills were not delivered to Mrs. Harvey until April 1681, His Lordship declared that he could not allow the £7500 to be really and *bona fide* paid the 4th of October 1680, but conceived the payment not to be until April 1681 aforesaid and after the decree, and does think fit and so order that the said exceptions do stand and be allowed and that the defendant do pay unto the plaintiff the whole £10,500 mentioned in the decree on the 2d of May next.' Reg. Lib. 1682 A, f. 240. The reasons upon which the decree in this case is founded do not appear, but it is apprehended they do not arise out of the doctrine respecting the rights of parties, as being subject to a decree, for the decree here could not, it is conceived, in any sense be said to bind any rights that were in the defendant, Mr. Montagu. By the payment of this money, he did not become amenable to the process of the court, as in the case of contempt, nor was he clothed with any character which rendered him the subject of the service of an order founded upon the decree, it not appearing that he had even come in before the Master. But the decree appears to be founded on the circumstances and upon this broad general principle, which must govern the decision upon every other case under circumstances of a similar nature, namely, that, where a man willfully pays money into a wrong hand or a doubtful hand, he must abide the consequences and that a court of equity will oblige all persons to take notice of its decrees as much as of judgments.]

[Other reports of this case: 1 Eq. Cas. Abr. 146, 163, 331, 21 E.R. 947, 960, 1082.]

[Earlier proceedings in this case: 1 Vernon 57, 23 E.R. 307, 2 Chancery Cases 82, 22 E.R. 857, 79 Selden Soc. 922.]

The East India Company v. Sandys
(Ch. 1683-1685)

The question in this case was whether a court of equity can enjoin commercial trading that infringes upon a charter granting exclusive trading privileges.

1 Vernon 127, 23 E.R. 362

27 January 1682[/83].

The East India Company exhibited a bill against the defendant Sandys, an interloper, setting forth their patent for the sole trade to the East Indies and the great power that was thereby given them and, particularly, the clause in the patent that whosoever should trade thither, not being of the company, should forfeit the value of such goods and commodities wherein they should so trade, one moiety thereof to the company and the other moiety to the king but they were willing to waive their forfeiture and setting forth what places and towns they had in the East Indies and that they had there above 150,000 men under their government and that they had been at above £50,000 charge in securing their trade in those countries and that they had purchased divers privileges of the princes there and that the defendant, though he was not of the company, had traded thither with the plaintiff's money and under their colors and that, by reason of his trading thither and bringing goods and merchandises from thence, they had suffered great damage and were forced to sell their goods at lower rates and that the defendant ought to answer damages for the same and that, now, to their further prejudice, the defendant continued on his trade in the Indies and had laded a ship called [*blank*] with commodities to be transported thither. And they prayed a full discovery etc.

To this bill, the defendant answered, and demurred. By answer, he denied he traded with the plaintiff's money or under their colors and that he did not know what had been done in the Indies, for that he was never there etc. And for demurrer, [he said] that the bill tended to make the defendant liable to a forfeiture, as appeared by a clause in the company's patent set forth in their bill, and that, of their own showing, their patent was a monopoly and, in itself, void etc. and that he was not bound to discover whether he was sending any goods to the Indies or what goods he had brought from thence etc.

This demurrer coming on to be argued before the Lord Keeper [NORTH], for the plaintiffs, it was insisted that this was only an auxiliary bill for a discovery in order to a legal trial and that an answer could not hurt the defendant, for that the plaintiffs, by their bill, had waived the forfeiture, that the company had been of an ancient standing and long continuance, and their patents from time to time renewed and confirmed by several succeeding kings, and that the antiquity of their possession, which had not been until now of late interrupted by these interlopers, entitled them to the protection of this court, and that, therefore, it was but reasonable they should have an injunction for the quieting of their possession, and that it was no monopoly, as was pretended, for that they always licensed people to trade to the East Indies, though they were not of their company, on payment of a reasonable proportion of the necessary charge and expense which the company had been at for the support of their trade thither, and it was but natural justice they should so do, as in the Case of Sewers,¹ all are made to contribute that receive a benefit by what is done by the commissioners. And, for precedents, they insisted on the Case of the East India Company and Foscue, and the Bookseller's Case,² and that it was lately ruled in the Exchequer in the Case of the Sixty Chancery Clerks on a bill to discover whether they had paid the king's duty, and, there, though

¹ *Case of Sewers* (1609), 13 Coke Rep. 35, 77 E.R. 1447.

² *Stationers' Company v. Lee* (Ch. 1683), see above, Case No. 10.

the defendants demurred, as here, because it would subject them to a forfeiture, yet they were made to answer. And there has never any advantage been taken of such forfeitures; it is but like a *subpoena centum librarum*.

But it was answered there was a great difference between mandatory writs and patents that create rights. And the plaintiffs' saying in their bill that they will take no advantage of the forfeiture will not protect the defendant in an action at law. But, if it would, the plaintiffs can waive but a moiety of the forfeiture, and cannot waive the king's moiety. And their patent must as against them be taken to be good, even in that clause of the forfeiture, though maybe it is the weakest clause of it. And it was further insisted that this patent was a monopoly and the plaintiffs had very boldly inserted it in their bill, and suggested that, by reason of the defendant's trading to the East Indies, they had been forced to sell their goods for little more than half what they were really worth, which showed the oppression of this patent upon the people.

Lord Keeper [NORTH]: I must in this case be governed by [the common] law, and the validity of the patent is properly triable there. And, until it is determined there, I do not see how I can grant an injunction, though I am far from thinking the patent void, which has been confirmed by so many succeeding kings, and since there have been divers Parliaments that have taken notice of other matters but never reflected on this patent as void or against law.

The reasons given why this bill should not be answered are chiefly three:

First, that what the plaintiffs complain of is but in the nature of a trespass, and, for that, they may have a remedy at law, but, to that, it may be answered, in some cases even for a trespass, a bill is proper enough in this court, as where, by the secret contrivance of it, a man cannot easily prove it, as for instance, if a man in his own ground digs a way under ground to my mineral and the like, and so in this case there is a difficulty as to the proof, the matters for the greatest part having been transacted in the East Indies;

The second objection is that it tends to subject the defendant to a forfeiture. I do not think there is much in that, for I take it the clause as to a forfeiture is the weakest clause in the patent, and I believe many of the able counsel that argue for the company never perused the bill; otherwise, they would not have inserted some matters that had been better left out;

Thirdly, it is objected that this patent is a monopoly. Certainly, in its creation, it was only a patent of regulation, for, at first, all people were at liberty to come in and patents for regulation of trade are exempted out of the statute. And, if it be now reduced into fewer hands and so become a monopoly, it is hard to say when it became such. It is like the vastness of the buildings in London becoming a nuisance; no one can say when first they became so or which particular house first made it such. And it is to be observed the words of the Statute of Monopolies¹ are that there shall be no monopoly within this kingdom. What influence that may have on this case is worthy of consideration. I would, therefore, have this matter first tried at law, and, for that purpose, let the defendant admit that he has bought and sold East India goods, that he brought from thence to some certain value and, when the trial is over, come back again. And, if the trial go against the defendant, he shall perfect his answer on interrogatories. But, in the meantime, let the defendant put in an answer without oath that thereby the complainants may be entitled to the benefit of a commission to the Indies to examine their witnesses there.

2 Chancery Cases 165, 22 E.R. 896

29 June 1685.

The East India Company had a verdict against interlopers,² who, in breach of the charter, traded. But the Company, not being otherwise able to discover the particulars of the commodities

¹ Stat. 21 Jac. I, c. 3 (SR, IV, 1212-1214).

² *East India Company v. Sandys* (1683-1685), see above, Case No. 17.

etc. and damages, exhibited a bill of discovery, to which the defendants gave insufficient answers. And [it was] so reported by the Master. And the plaintiffs' title being found good at law and that their patents were good in law to exclude others from trading into those parts, they now prayed an injunction against the defendants to stop certain ships which the defendants were setting forth to those parts to trade in further breach of the patents. And so the like was done formerly in Case of the Printers for importing Bibles.¹

Lord Keeper [NORTH]: The case is of a great consequence if it be to stop actions on insufficient answers. But to forbid plowing or trading or the like, I cannot, but I will advise.

[Related cases: *Sandys v. East India Company* (K.B. 1683-1684), 2 Shower K.B. 366, 89 E.R. 988, Skinner 91, 132, 165, 197, 223, 90 E.R. 43, 62, 76, 91, 103, 7 State Trials 493 (F. Hargrave, ed., 1778); *East India Company v. Evans* (Ch. 1685), see below, Case No. 249.]

18

Grahme v. Grahme
(Ch. 1683)

The question in this case was whether a bond given to resign from a rectory was simoniacal or not.

1 Vernon 131, 23 E.R. 364

29 January 1682[/83].

Upon a motion to dissolve an injunction granted to stay proceedings in an action on a bond given by an incumbent to his patron that he [the incumbent] should resign on request, Lord Keeper [NORTH] said he was not satisfied that such a bond was good in law. The precedents that were in the case were not directly to the point, whether such bonds are simoniacal or not. He, therefore, directed that the plaintiff should declare on this bond and the defendant plead simony, and, after that and judgment at law, come back to the court.

19

Rex v. Cary
(Ch. 1683)

A writ of error does not lie from the Latin side of the Court of Chancery to the Court of King's Bench.

1 Vernon 131, 23 E.R. 364

In a cause on the Latin side, on a motion that the defendant Cary might stand committed for not vacating his letters patent of reprisals, it was moved by Mr. *Wallop* that they might be at liberty to bring a writ of error in the King's Bench. And he cited *Dyer* etc.²

But the Lord Keeper [NORTH] said all those books were founded only on the single opinion of my Lord *Dyer* and that he thought the jurisdiction of Chancery, even of the Latin side, is not subjected unto nor to be controlled by the King's Bench and that he would enjoin all such writs of error.

¹ *Stationers' Company v. Lee* (Ch. 1683), see above, Case No. 10.

² *Anonymous* (1572), 3 *Dyer* 315, 73 E.R. 714.

[Other reports of this case: 1 Eq. Cas. Abr. 129, 21 E.R. 934.]

[Earlier proceedings in this case: 1 Vernon 54, 23 E.R. 306.]

20

Anonymous
(Ch. 1683)

The question in this case was whether a court of equity can rehear a case after the decree has been enrolled.

1 Vernon 131, 23 E.R. 365

Upon a motion for a rehearing of a cause where the decree was signed and enrolled by the late Lord Chancellor [Lord Nottingham], the Lord Keeper [NORTH] asked Serjeant Maynard if he knew any law whereby he could justify the rehearing of a cause signed and enrolled by his predecessor, for that was to vacate a record. The Lord Chancellor himself was master of his own enrollments, and might upon his memory know some reason for a rehearing of it. But he could not do it without there was some surprise or other irregularity in the enrolling of it. But he said he had a privy seal that enabled him to sign and enroll the decrees pronounced by his predecessors.

21

Franklin v. Thornebury
(Ch. 1683)

An infant's contract is confirmed and enforceable where the obligor revived a benefit under the contract after coming of age.

1 Vernon 132, 23 E.R. 365

29 January 1682[/83]. In Court, Lord Keeper.

A voluntary deed was cancelled. And the lands being devised for the payment of debts and debts paid under the will, query whether equity will relieve in such a case, since the testator himself could not avoid such a voluntary deed.

In the same case, an agreement, being void as against an infant, yet was decreed, the infant having received interest under it after he became of full age.

[Other reports of this case: 1 Eq. Cas. Abr. 282, 21 E.R. 1047.]

Welden v. Duke of York
(Ch. 1683)

A fine with proclamations and non-claim cannot foreclose an equity of redemption.

1 Vernon 132, 23 E.R. 366

Eodem die [29 January 1683].

To a bill to redeem a mortgage, Welden had pleaded a fine with proclamations and non-claim for five years.

The plea was overruled, the mortgagee having a right to retain the land until his money was paid. And this was a new way of foreclosing a man of his equity of redemption.

[Other reports of this case: 1 Eq. Cas. Abr. 257, 21 E.R. 1030.]

Hardham v. Roberts
(Ch. 1683)

A court of equity can correct a defective surrender of a copyhold for the benefit of younger children.

1 Vernon 132, 23 E.R. 366

Eodem die [29 January 1683].

One point in this case was that a man, having, by his will, made provision for his younger children out of some copyhold lands but the surrender having been made into the hands of one customary tenant only, the question was whether this defect should in equity be supplied against the heir.

And it was decreed for the plaintiffs, the younger children, there being many precedents in court of the like nature.

[Other reports of this case: 1 Eq. Cas. Abr. 122, 21 E.R. 928.]

Tilsly v. Throckmorton
(Ch. 1683)

Where a trustee of a trust for several beneficiaries pays one his full share and, afterwards, the fund loses value, the first payment abates proportionally, and, if the first does not refund, the trustee is liable unless he took a security to cover that contingency.

2 Chancery Cases 132, 22 E.R. 881

February 1682[/83].

Upon a trust to pay several portions to several children at their respective ages, the trustee pays one. The estate decays so that there is not sufficient to pay the others. In that case, the person trusted paid in his own wrong, for he shall make it good to the rest, abating proportionably out of each

party's share, according to the loss. And he should have taken security in case of loss happening and so also, though the trust or legacy were to be paid to the eldest in the first place or first, for that denotes not preference in the quantity.

And it was affirmed by Mr. *Keck* and others at the bar that, many times, it had been so decreed.

But the Lord Keeper NORTH seemed of another opinion as to the last point. But he agreed further at the bar, that, if the portion of any one lay on or out of Blackacre or other particular fund by itself and the others out of another fund, each must bear his own loss.

25

Hulbert v. Hart

(Ch. 1683)

The benefit of a decedent's contract passes to his executor and not to his heir.

1 Vernon 133, 23 E.R. 367

5 February 1682[/83].

Coparceners make a partition by consent. And the lands of the one being of greater value than the lands allotted to the other until an estate for life fell in, it was agreed that that coparcener who had the least share should have a rent of £20 *per annum* issuing out of the lands allotted to the other to make his share equal. And a bond was given for securing the payment of it. But this bond for equality of partition being made payable to him, his executors, or administrators, the question was whether the heir or the executor should have the benefit of this bond.

It was admitted, if he had taken a sum in gross in consideration of the inequality of the partition, that had been like selling so much of his part. But, here, the bond being to secure a growing payment, the heir that has the land ought to have the benefit of it.

Lord Keeper [NORTH] decreed it for the executor and barely upon this difference, that, here, was no grant of a rent, but a bare agreement, and so he had his election either to pay it or forfeit his bond.

[Raithby's note: There is an entry of dismissal with costs to be taxed, Reg. Lib. 1682 A, f. 229.]

26

Matthews v. Newby

(Ch. 1683)

A court of equity has jurisdiction over the distribution of an intestate's personal estate.

1 Vernon 133, 23 E.R. 368

6 February 1682[/83].

The bill being to have distribution of the legatory part of the personal estate of a citizen of London who died intestate, the defendant, the widow and administratrix, pleaded that, by the custom of the City of London, if a freeman dies intestate and without issue, his widow ought to have her widow's chamber and a moiety of the rest of the personal estate and the administrator the other moiety. And she set forth the proviso in the Act of Distributions¹ that it should not prejudice the custom of London and that administration of her husband's personal estate was granted to her.

¹ Stat. 22 & 23 Car. II, c. 10, s. 2 (*SR*, V, 719).

It was affirmed by the counsel at the bar that it had been lately resolved in the King's Bench that the whole estate of a citizen of London was exempted out of the Act of Distributions.

And, thereupon, the plea was allowed.

But, whereas the defendant had demurred, for that distribution ought to be made in the spiritual court, the Lord Keeper [NORTH] overruled the demurrer, for that the spiritual court in that case had but a lame jurisdiction and, there being no negative words in the Act of Parliament, he thought a bill for distribution very proper in this court.

[Other reports of this case: 1 Eq. Cas. Abr. 156, 21 E.R. 955.]

27

Howard v. Howard
(Ch. 1683)

A court of equity has jurisdiction over the distribution of an intestate's personal estate.

1 Vernon 134, 23 E.R. 368

Eodem die [6 February 1683].

Upon a bill for a distribution of an intestate's personal estate, the defendant demurred, for that distribution of an intestate's personal estate is proper in the spiritual court, and not here.

The demurrer was overruled for the reasons in the last case.¹

28

Denny v. Filmer
(Ch. 1683)

A second bill of review does not lie after a first bill of review has been dismissed.

2 Chancery Cases 133, 22 E.R. 881

A decree passed where the bill was never answered, but the bill was taken *pro confesso*, though the party defendant never answered, but only appeared by his clerk, and the bill was never read in court as it ought to have been.

A bill of review was brought. And, on demurrer, it was dismissed.

Now, the heir brought another bill of review. And, though there was manifest error, not only in the form of the court, but in the right, *viz.* two heirs having title as heirs, one of them plaintiff had a decree for the whole, who had title but to a moiety.

Yet My Lord NORTH dismissed the bill, and said there was no remedy but in Parliament. And he cited Mordant or Morgan's Case, where a bill was grounded on a deed, whereto two witnesses were examined, but the deed was not produced, and, the witnesses not agreeing, the bill was dismissed, and a bill of review was brought and dismissed, and after[wards] the deed was found, and [there was] an affidavit of it etc., and then a bill of review was exhibited, but dismissed *quia* of the former bill, which, said the Lord Keeper [NORTH], was a hard case.

To which it was answered that it differs from the present case, for, there, the cause was heard on the merits, but, here, there is not so much as an answer.

Lord Keeper [NORTH] dismissed the bill.

¹ *Matthews v. Newby* (Ch. 1683), see above, Case No. 26.

1 Vernon 135, 23 E.R. 369

Eodem die [6 February 1683]. *Dunny v. Filmore*.

A bill having been taken *pro confesso*, a bill of review was brought. And a demurrer, having been put in to it, was allowed. And, now, a new bill of review being brought, the defendant demurred and, for cause, showed that a bill of review lies not after a bill of review.

And the demurrer was allowed.

[Earlier proceedings in this case: 2 Freeman 172, 22 E.R. 1138, Nelson 64, 21 E.R. 790, 1 Eq. Cas. Abr. 81, 21 E.R. 894.]

29

Anonymous
(Ch. 1683)

Equity will not aid a volunteer, but will leave the parties to their common law remedies if any.

2 Chancery Cases 133, 22 E.R. 882

The bill was to discover and have the use of a deed, which was to lead the use of a fine levied by the defendant's mother and concealed and suppressed by her.

The defendant's mother being seised in fee, she and her husband levied a fine, which, by deed, was declared to be to the use of the husband and wife with other uses, under which the plaintiff makes title, *viz.* by the husband's will, the fee being limited to the husband.

The complaint is that the defendant suppresses the deed.

The defendant is heir to her mother, and insists that the fine was gained unduly, and denies the having the deed, which was voluntary without consideration.

And, because the conveyance by the fine, etc., was voluntary and without consideration, no money being paid, etc., the Court would give no relief, but left the plaintiff wholly to [the common] law to help himself there as he could.

30

Earl of Ardglass v. Muschamp
(Ch. 1683-1684)

A harsh loan contract that was the result of overreaching will be set aside upon the debtor's repayment of the loan and reasonable interest.

1 Vernon 135, 23 E.R. 369

Eodem die [6 February 1683].

The defendant Muschamp had petitioned the Lord Keeper for a re-hearing of his plea to the jurisdiction of the court. And Mr. *Wallop*, in arguing, insisted much on the Case of the Company of Horners in London, 2 Roll's Rep. 471, where this court would not meddle with the trust of lands in Chester, though the party was out of the jurisdiction of the county palatine, and cited the Lord Derby's Case,¹ and, therefore, much less ought it to anticipate the jurisdiction of the Chancery of

¹ *Case of the Company of Horners of London* (1624), 2 Rolle Rep. 471, 81 E.R. 923; *Egerton v. Earl of Derby* (1614), 12 Coke Rep. 114, 77 E.R. 1390, 1 Eq. Cas. Abr. 137, 21 E.R. 940, E. Coke,

Ireland.

Sed non allocatur. And the plea was overruled again, the Lord Keeper [NORTH] citing only Preston and Archer's Case.¹

And, as to the objection that this court was deficient in power in this case to compel a performance of its decree because it could not sequester the lands in question, he looked upon that as an objection of no weight. And it did not appear to him but the defendant might have other lands in England and, then, those would be subject to a sequestration.

And, therefore, he overruled the plea.

[Raithby's note: And a commission for taking the defendant's answer beyond the sea was granted. Reg. Lib. 1682 A, f. 307.]

1 Vernon 237, 23 E.R. 438

22 April 1684.

Thomas, earl of Ardglass [1653-1682], for £300, in the year 1675, did grant to the defendant [Henry Muschamp] a rent charge of £300 *per annum* out of lands in Ireland of £1000 a year to hold to the defendant and his heirs and to commence from the first Michaelmas [29 September] or Lady Day [25 March] after the earl's death without issue male, with a proviso that, if the earl had any issue male who should attain the age of twenty-one years, the grant should be void. Afterwards, the earl settled his estate for £300 consideration to the use of himself for life, remainder in tail to all his issue male, the remainder in tail to the plaintiff, his uncle, which was according to a former settlement made by the ancestors of his family and which Earl Thomas, upon his marriage, had barred. And, then, the plaintiff [Vere Essex Cromwell, earl of Ardglass (1625-1687)] and Earl Thomas both brought their bill to be relieved against the grant of the rent charge, alleging that it was obtained by fraud and practice, by debauching Earl Thomas with drink and women and that the grant was pretended to be only a security for repayment of the money and interest. After which bill was brought, the defendant obtained a release of that suit from Earl Thomas. And the now earl's bill was (Earl Thomas being dead) to set aside the grant and release upon payment of £300 with interest. And, upon the first hearing of this cause before the Lord Keeper [NORTH], though he declared there was a foul practice, yet he doubted it might be too great a violation upon contracts to set it aside. He, therefore, advised the plaintiff to amend the bill.

The plaintiff afterwards obtained a re-hearing. And many precedents in the Lord Ellesmere's, Lord Bacon's, and Lord Coventry's times, and since were produced, whereby it appeared that unconscionable bargains which had been made with young heirs had been set aside by a decree of this court. And it appeared in this case that, at the time of the bargain, the earl was very young and had forsaken his wife and her friends in Ireland and lived here in London in riot and debauchery and, for supply of his expenses, had made this bargain without the advice of any friends or counsel of his own, but he relied wholly on the defendant. And the consideration was but one year's purchase for a rent charge in fee, now fallen into possession, and the contingency of the earl's dying without issue male (upon which the defendant did insist chiefly for his defense) was an artifice of the defendant, the earl, as appeared in proof, being disabled to get children.

And however that contingency might be used as an argument to persuade the earl that he had the best of the bargain, yet the Lord Keeper [NORTH] did not think it likely the defendant would have made it but in expectation of an unreasonable advantage and that the earl would in a short time by his vicious debauched course of life destroy himself, as he did. And it appeared also that the defendant was informed by the earl's surgeon that the earl was not able to get a child, and, therefore,

Fourth Institute (1644), p. 213.

¹ *Archer v. Preston*, 1 Eq. Cas. Abr. 133, 21 E.R. 938.

the contingency was not to be looked upon as if the earl had been in ordinary circumstances, but, as it was in the eye of the defendant, who was his companion in those debaucheries. And it appeared also that the defendant was solicitous to draw the earl into the like bargains with other people and that the release was obtained without any consideration after the settlement on the plaintiff.

Whereupon (though, for the defendant, it was insisted that it was a just bargain in regard of the contingency, nor had the defendant any means to recover his money again, and that the bargain was made when the earl was in good health, and was acknowledged three months after in order to be enrolled, and that there was no fraud in obtaining the grant or release), the Lord Keeper [NORTH] declared that the more he heard of the cause, the worse he liked it, and that the earl of Ardglass being easy, dissolute, and necessitous, the defendant, in conjunction with his cousin Deny Muschamp, who had got another unreasonable bargain from the earl, which had been set aside by this court, had beset the earl, and having got a copy of the settlement from Muschamp, who had the original, concealed both from the earl and that the precedents produced came up to the case, as he thought, and, therefore, after some days' consideration had, he decreed a re-conveyance or release of the rent charge and that the same should be set aside and a perpetual injunction awarded upon the plaintiff's paying the defendant £300 and interest.

And the defendant obtaining a re-hearing afterwards, the Lord Keeper [NORTH] upon the re-hearing declared he was fully satisfied in the decree and that, if he were to die presently, he would make it. And so he confirmed it.

About a year afterwards, a bill was brought by the plaintiff against George Pitt, Esq., who, by the agency of the defendant Muschamp, had obtained for £300 consideration the like grant from the earl of a rent charge of £300 *per annum* drawn exactly *mutatis mutandis* by Muschamp's grant, to be relieved against that grant to Pitt, though Mr. Pitt insisted he did not transact that affair with the earl himself, but, being told by Muschamp that such a bargain might be had, left it to them to deal therein between them. And he pretended utter ignorance of the earl's state of life or condition of health when the bargain was made, so that he was innocent and a fair purchaser, which pretense being foreseen, it was charged by the bill particularly that Pitt's method in carrying on the contract by Muschamp was a further instance of the fraud, that so, if he were questioned, he might deny his knowledge of the condition of the earl. And, though, indeed, the matter of the defendant's ignorance of the earl's condition was all he had to insist on for his defense more than what Muschamp had in his case, yet the Lord Chancellor Jeffreys, upon the hearing of this cause, inasmuch as it appeared that Muschamp had seen Mr. Pitt's broker in other unreasonable bargains, declared that it was not to be believed that Mr. Pitt would make this bargain without enquiry and knowledge of the condition of the man he dealt withal and that, therefore, Mr. Pitt's pretense of not personally knowing the earl or not treating with him was not only a further evidence of the fraud, but that he was conscious he should be questioned, and he pretended that ignorance the better to excuse it. And he declared *fraus est celare fraudem*. And he decreed Pitt to release and reconvey upon payment of his £300 and interest and a perpetual injunction.¹

[Raithby's note: Reg. Lib. 1683 A, f. 633, 7 July 1684. But the decree was altered in this respect, *viz.* 'That, whereas, by the decree, it was ordered that, on payment of £300 and interest at £6 percent to the defendant, he, the defendant, should convey the said rent charge of £300 *per annum* to the plaintiff, it is now upon this re-hearing decreed that, on such payment of £300, the said defendant was not only forthwith to deliver up to the plaintiff the deed whereby the rent charge was granted to be cancelled, but also to surrender and release all his estate and interest to the plaintiff, by such instrument as the Master should direct and that the plaintiff should hold the lands and premises in question discharged of the said rent charge against the defendant, his heirs, and assigns, and all other persons claiming' etc. Note, in this case, Lord Keeper [NORTH] said that the overvalue, be it never so great, is not of itself a sufficient ground to set aside a bargain or whereupon this court can

¹ *Pitt v. Earl of Ardglass* (Ch. 1687), see below, Case No. 386.

presume a fraud.]

2 Chancery Reports 266, 21 E.R. 675

Thomas, first earl of Arglas, the now plaintiff's father, and William, earl of Arglas, the plaintiff's brother, were seised in fee of the premises in question, and made divers settlements thereof, by which, in case of failure of issue male of the said William, the said estate should come to the plaintiff and the heirs male of his body. Thomas, the plaintiff's father, died, leaving issue male only Earl William and the plaintiff. And Earl William is dead, leaving issue male only the last Earl Thomas, the plaintiff's nephew. The said last Earl Thomas, upon his marriage with his now wife, levied a fine, and suffered a recovery, but not with the intent to defeat the remainder to the plaintiff, but only to settle a jointure. And several deeds were executed, leading the uses, by which there was a remainder in fee reserved for the plaintiff, for want of issue male of the last Earl Thomas. And the said last Earl Thomas, to the intent the reversion of the premises should come to the plaintiff and the heirs male of his body, did for £300 convey the said premises to the use of the last Earl Thomas for life, and, in case of failure of issue male of his body, to the plaintiff and the heirs male of his body, with remainders over. Earl Thomas, the plaintiff's nephew, coming over into England and getting an acquaintance with the defendant Muschampe and being in want of money, the said Muschampe lent him £100, and, for security, he pressed the said earl to make it out of his estate in Ireland. The said defendant, having drawn the security, brought the said earl some writings ready to be executed, of which the said earl had no copies or counterparts, neither did he give time to peruse the same. The said earl, relying on the defendant's integrity, sealed the same, believing the said security to be void on payment of the said £1100, as the defendant affirmed it should. But the said deeds being made to settle on the defendant a rent charge of £300 *per annum* to his own use, which being done by fraud, there ought to arise a trust which ought to go and be enjoyed by the plaintiff according to the aforesaid settlement made on the plaintiff. And the plaintiff is willing to pay the defendant whatever sum of money he has really lent or paid to the said last Earl Thomas with interest.

The defendant insists that the said last Earl Thomas, by deed in 1675 for £300 and other considerations, granted to the defendant a rent charge of £300 *per annum*, without any deduction, to be issuing out of the estate in Ireland to be held by the defendant and his heirs and to commence at such of the feasts as should first happen after the death of the said last earl of Arglas without issue male, with a power to distrain and a proviso that, if the said last earl should during his lifetime have or at his death leave issue male which do attain to the age of twenty-one, then the said grant to be void. And, of the said £300, there was at one entire payment £180 paid to the said last Earl. The defendant has a receipt for the said £300, and says the deed was fairly executed and made without any fraud or practice. And he insists that the said grant of a rent charge was on a contingency so uncertain that £300 was a sufficient consideration for the said grant, which £300 was paid thus, *viz.* £100 after the agreement and before the conveyance of the said rent charge and £184 to the said earl the same day the conveyance was executed. The said money was paid as purchase money, and not as money lent. The said earl approved of the said conveyance, though he had no copy and after the said defendant's purchase of the rent charge. And since the exhibiting of this bill, the said Earl Thomas has given the defendant a general release under hand and seal, where it is declared that the bill is exhibited against the defendant contrary to the said Earl's direction, and disallowed all further proceedings thereon against the defendant.

This court upon reading the said deeds and several precedents in this court, as well in the reigns of Queen Elizabeth, King James, King Charles I, as in his now Majesty's reign, where relief has been given against overreaching bargains and contracts made by young heirs and taking into consideration the circumstances of this case, it appeared that Thomas, earl of Arglas, at the time of this bargain, was very young and of an easy nature, and had forsaken his wife and friends and came to London, where he lived in riot and debauchery, and, for the supply of his expenses therein, was this bargain made, in which it does not appear he took the advice of any friends or counsel, but relied wholly on the defendant. The consideration of this grant is very small, being but one year's purchase

for a rent charge in fee simple, which is now happened in possession. And the overvalue, be it never so great, is not of itself a sufficient ground to set aside a bargain or whereupon this court can presume fraud, yet it is a great evidence of fraud, where there are other circumstances concurring, as there is in this case.

And, whereas the defendant insisted that the contingency of the death of a young man without issue male was so great that it cannot be esteemed an overvalue, such a reversion not being worth one year's purchase, His Lordship declared he looked upon it as an artifice of the defendant, for it was easy to persuade the Earl Thomas, who could not judge of his own defects, that the defendant had the worst of the bargain, whereas it is not likely the defendant would have made it, but that he thought Earl Thomas would in a short time destroy himself by his vicious and debauched course of life. And His Lordship was of opinion the defendant had circumvented the said Earl Thomas in his bargain, and concluded on the whole matter that the plaintiff ought to be relieved in this court, and the release made by Earl Thomas without any consent after the settlement made upon the plaintiff ought to be no bar thereunto. But inasmuch as His Lordship found by the precedents that, in such cases, this court does not turn any loss upon the defendant, but only correct the excess and extravagance of such bargain, therefore, His Lordship thought fit the £300 should be restored to the defendant, with consideration for the same at £6 percent and, on payment thereof, the defendant to convey the said rent charge of £300 *per annum* and all his title, interest, and demand in the premises to the plaintiff. And he granted a perpetual injunction, not only to stay all proceedings at law, but for quieting the plaintiff, his heirs, etc. in the possession of the premises.

[Reg. Lib. 35 Car. II, f. 524.]

[Other reports of this case: 1 Eq. Cas. Abr. 169, 21 E.R. 964.]

[Earlier proceedings in this case: 1 Vernon 75, 23 E.R. 322, 1 Eq. Cas. Abr. 133, 21 E.R. 937.]

31

Price v. Keyte
(Ch. 1683)

There can be a supplemental bill to a bill of review.

1 Vernon 135, 23 E.R. 369

Eodem die [6 February 1683].

In a bill of review, you may add a new supplemental bill.

[Other reports of this case: 1 Eq. Cas. Abr. 80, 21 E.R. 893.]

Anonymous
(Ch. 1683)

Where an agent is sued for money received on behalf of and paid to his principal, the agent must plead the payment by way of an answer even though he has already made an account in a prior bankruptcy proceeding.

2 Ventris 358, 86 E.R. 484

A bill was exhibited by the assignees of commissioners of bankrupts to have an account against the defendant of the bankrupt's estate.

The defendant pleaded that he was but a servant to the bankrupt and had given an account of all to his master and likewise had been examined before the commissioners upon the whole matter.

Upon hearing this plea, my Lord Chancellor [NORTH] overruled it, and ordered that he should answer.

1 Vernon 136, 23 E.R. 369

If a man, by answer, swears that what he received he received as a menial servant and has paid it over to his master, he shall not be put to account again. But he ought to disclose this matter in his answer.

Hobbs v. Norton
(Ch. 1683)

Estoppel in pais will bind a defendant.

1 Vernon 136, 23 E.R. 370

9 February 1682[/83].

Sir George Norton's younger brother, having an annuity of £100 *per annum* charged on lands by his father's will, contracts with Mr. Hobbs for selling him this annuity. Mr. Hobbs goes to Sir George Norton, and tells him he was about to buy this annuity of his younger brother, and desired to know of him if his younger brother had a good title to it and whether his father was seised in fee at the time of the making the will and whether the will was ever revoked. Sir George Norton told him he believed his brother had a good title to it and that he had paid him this annuity these twenty years, but withal told him that he heard there was a settlement made of his father's lands before the will and that the said settlement was in Sir Timothy Baldwin's hands and that he had never seen it and, therefore, could not tell him what the contents of it were. But he encouraged him to proceed in his purchase, telling him he had not only paid his brother his annuity to that time, but had paid to his sisters £3000 under the same will. Afterwards, Sir George Norton gets this settlement into his hands, and would avoid this annuity, the lands being thereby entailed.

Hobbs's bill was to have this annuity decreed or repayment of his purchase money.

The cause coming on to be heard, there was no proof that Sir George Norton, at the time he encouraged Hobbs to proceed in this purchase, had any notice of this settlement. But one witness swore that Sir George promised to confirm the annuity to Hobbs. But that, being but by one witness and contrary to Sir George Norton's answer, was looked upon as no evidence, it not being probable

that Sir George should agree to confirm this annuity, for then he would have been made a party to the deed.

Lord Keeper [NORTH] decreed the payment of the annuity purely on the encouragement Sir George gave Hobbs to proceed in his purchase and that it was a negligent thing in him not to inform himself of his own title, that thereby he might have informed the purchaser of it when he came to enquire of him. And, therefore, he decreed Sir George to confirm the annuity to Hobbs.

But, as to the case between Sir George and his younger brother, that might admit of another consideration, being it was in proof in the cause that the younger brother, all along, was knowing of this settlement and, therefore, possibly he should not have an advantage of drawing in a stranger to purchase his title. But the cause between them, not being ready for hearing, was left to come on as it could by the course of the court.

[Other reports of this case: 1 Eq. Cas. Abr. 356, 21 E.R. 1099.]

[Earlier proceedings in this case: 2 Chancery Cases 128, 22 E.R. 879.]

34

Prodgers v. Frazier
(Ch. 1683-1684)

The king may grant the custody of an idiot, his lands, and goods to another person without security to account, but, in the case of a lunatic, the grantee must account.

1 Vernon 137, 23 E.R. 370

Eodem die [9 February 1683].

This day, upon debating the matter before the Lord Keeper [NORTH], he refused to change the possession or to do anything in it until the validity of the patent was determined in a legal trial. And, therefore, he directed the plaintiff to bring his ejectment *custodiae* to be tried in the King's Bench next term and the defendant to admit the plaintiff was once in possession.

[Raithby's note: It appears in this case that, after the order for overruling the plea, the plaintiff, having waived the proceedings on the bill, had obtained an order for a new commission *de idiota inquirendo*, and obtained an inquisition thereon to be taken, and the said Bridget again to be found an idiot, and obtained a new grant from His Majesty of her person and estate, and an order out of this court for an injunction to the defendant and other the tenants of the estate to deliver the idiot and her estate to the plaintiff, and also a writ of assistance to the sheriff for the purpose, and an order for an attachment against the defendant and the other tenants for not obeying the last mentioned order. The Lord Keeper [NORTH], this being on a rehearing, ordered that all the before mentioned orders for overruling the plea etc. should be discharged, and he directed a trial at bar of the King's Bench and, in the meantime, respited the judgment on the plea. Reg. Lib. 1682 B, f. 264. The Court of King's Bench, upon the issue, adjudged the grant to be good, holding it to be a trust coupled with an interest, of which an infant is capable. In the debate of this case, it was, *inter alia*, objected whether the grant of the custody of an idiot will pass any interest to the executor of the grantee, because such a grant carries a trust with it, and that the king may have some knowledge and consideration of the grantee, but not of his executor. To which it was answered here was an interest coupled with a trust, as in the case of wardship formerly, which always went to the executor of the grantee and which was of greater consideration in the law, than the feeding or clothing of an idiot. And of that opinion was the court, and that the king had a good title to dispose of both the ward and the idiot, one until he was of age, and the other during his idiocy. And it being objected in this case that the finding an idiot *per spatium octo annorum* was bad for that the finding of an idiot ought to be *a nativitate*, it was

answered and agreed to by the court that the finding an idiot is sufficient without the addition of any other words, and, therefore, *per spatium octo annorum* shall be surplusage, for, in this case, words are not so much to be regarded as the reason of the law, which does not allow of idiocy, otherwise than *a nativitate*. Judgment was for the defendant.]

Skinner 138, 90 E.R. 64

1683. Frasier v. Progers.

[An action of] trespass was brought against the defendant for entering into the land of one Bridget Denny, wherein the plaintiff sets forth an inquisition, wherein in it was found that Bridget Denny then was and for eight years last past had been an idiot *per visitationem Dei non gaudenda lucidis intervallis etc.* and further set forth that the king, such a year etc., granted to Sir Alexander Frasier and his executors *custodiam, dispositionem, etc.* during the idiocy and that Sir Alexander Frasier made the plaintiff, his wife, executrix, and died, etc.

The defendant comes and shows that after, *scil.* such a year, an office was found, which did find Bridget Denny was an idiot *a nativitate per visitationem etc.* and that, after this office, the king granted *custodiam, dispositionem, etc.* to the defendant at will, by virtue whereof etc.

To which the plaintiff demurred. *Pollexfen*, for the plaintiff, did grant that, where a man becomes a lunatic, that the king has not an interest, but can only commit the lands of such person to the care of another and that such committee is accountable to the lunatic if ever he recovers and to his executors if he dies and that, by the death of such committee, the grant is determined.

And, on the other side, he said, it might be granted to him that, where one is a lunatic *a nativitate*, that the king has an interest and shall receive the profits of his lands to his own use or grant them to another and that such grantee shall receive them and is not liable to an account, but only to maintain the idiot and his family out of them and that this difference is warranted by these books, Moor 4, 1 And. 23, Dyer 25; 4 Rep. 127; Stamford, *Prerogative*, 34.¹ As to the king's having the profits of an idiot's lands to his own use and so it becomes an interest in the king, he thinks they agree it on both sides so that the question between them is whether or not a grant of such an interest or a commitment of it to one and his executors during the idiocy be good or not or that it ought to be at will only. They on the other side would compare it to an office, which goes not to executors according to Sir George Reynell's Case, 9 Rep. 97.² And he said that he could compare it to nothing better than a guardianship in chivalry, which does go to executors. Where a man is outlawed, the king may lease his lands during the outlawry, and this shall go to the executors of the lessee. The king has the lands of an idiot, as he has those things the property whereof is in no man, for, here, the idiot though he breathes, yet as to the using and possessing etc., he is incapable. And such things the king may grant, as waifs, strays, etc. He says that idiots by the Statute of Hen. VIII,³ are within the government of the Court of Wards, as wards that had lands in chivalry were, and that, after the death of such idiot, his heir ought to have his lands out of the king's hands by livery, as a ward at his full age ought, and that the idiot himself sues not livery, because he will never be at age. Here he cited Stamford, *Praerogative*, 35, and prayed judgment for the plaintiff.

Holt, for the defendant, said that he should not so much insist whether the king could grant the custody etc. of an idiot during his idiocy, so that it should go to his executors, but he said that the office which was found for the king in the year etc. upon which the grant was made to Sir

¹ *In re Frances* (1537), Moore K.B. 4, 72 E.R. 399, 1 Anderson 23, 123 E.R. 333, *sub nom. Holmes's Case*, 1 Dyer 25, 73 E.R. 57, also Benloe 17, 123 E.R. 14; *Snow v. Beverley* (1603), 4 Coke Rep. 123, 76 E.R. 1118; W. Staunford, *Exposition of the King's Prerogative*.

² *Reynel's Case* (Ch. 1612), 9 Coke Rep. 97, 77 E.R. 871.

³ Stat. 32 Hen. VIII, c. 46, s. 1 (SR, III, 802).

Alexander Frasier was void and no title was found for the king. And so the grant to Sir Alexander was void, or, if a title was found, it was but that Bridget Denny was a lunatic, and so determined by Sir Alexander's death. He said that the writ was to inquire whether Bridget Denny was *ideota a nativitate vel non, si non, tunc, a quo tempore*. Now, they find in the first office that she was then an idiot and had been for eight years, which is no more than that she is a lunatic, which was not their commission to inquire of. And, so, the office is void, not being according to the writ. But, admit the office good, yet it finds the king's title but to a lunatic, and then the king is deceived in his grant, for he grants an idiot, when his title is but to a lunatic. And so the grant was void. And so he concluded for the defendant.

Pollexfen said he expected not that he would insist upon this. However, he thought the king was well entitled to an idiot by the first office, for finding her an idiot *non gaudens lucidis intervallis* would have been good, though *per spatium octo annorum* had been omitted. And that shall not vitiate it, for, perhaps, she was but eight years old. He said the office was but the finding of the lay gentlemen and ought to be taken favorably, not strictly, as in pleading, especially in the case of the king, it being such an office as this, which was merely for information, for the interest was vested in the king before. And he cited 5 Rep. 56, that an office having matter and substance, though it be mistaken, is good.¹

The court inclined to *Pollexfen*. *Adjornatur*.

Skinner 177, 90 E.R. 82

1684. *Frasier v. Progers*.

Sir Edward Herbert argued this term for the plaintiff, and he endeavoured to make out three things:

First, that the king was well entitled to the office;

Secondly, that such an interest will go to the executors;

Thirdly, if the two first points should be against him, yet that the defendant has no title, for that his letters patent are void. It is objected, that finding her *ideota naturalis et sic continuaverat per spatium octo annorum* is ill, because this does not prove her an idiot *a nativitate*.

In answering which, he considers what the law would be, if the office had found her an idiot from such a time only, and he takes it the law would be the same, and he says that the three differences taken in *Beverley's Case*² are of an idiot or natural fool, of a *non compos [mentis]* by the act and visitation of God, and of a lunatic, which he says are not warranted by the Statute *de Praerogativa Regis*,³ and that there is in law no ground of difference between an idiot and one *non compos*. But the sole difference is between an idiot and a lunatic. And the reason of it is for that the lunatic enjoying *lucida intervalla*, which is a temporary cure, the law sees a possibility that as he is cured and then relapses; so he may be cured and not relapse, which is a ground of difference in this case, but none in the other.

But this *JEFFREYS*, Chief Justice, did not seem much to approve.

And *Herbert* said that this point might be left out of the case, for that the office is well enough, and that the words *a nativitate* are not necessary. If the office had found her *fatua naturalis*, it had been enough.

If the office be uncertain, yet it will not be void, but the best shall be taken for the king. But,

¹ *Knight v. Breech* (1588), 5 Coke Rep. 54, 77 E.R. 137, also *Gouldsbrough* 15, 75 E.R. 965, *Moore K.B.* 199, 72 E.R. 530, 3 *Leonard* 124, 74 E.R. 582, 1 *Anderson* 173, 123 E.R. 414, 137 *Selden Soc.* 269, 139 *Selden Soc.* 870.

² *Snow v. Beverley* (1603), 4 Coke Rep. 123, 76 E.R. 1118.

³ *SR*, I, 226-227.

where the office is so uncertain that no title appears, there a [writ of] *melius inquirendum* [lies]. But, where a title appears for the king, but it is not found in what degree, there, the best shall be taken for the king. And yet, before the Statute of Edw. VI,¹ if an office had found *de quo vel de quibus tenementa praedicta tenentur*, yet it should have been for the king and be intended to be held of him. He cited Dyer 155, 162, 306.²

The second question is, if the interest passes to the executors; this he said was not much insisted on, nay rather yielded by *Holt*, for it is not a bare trust, but a trust coupled with an interest, or, rather, an interest with a trust incident to it. And the objection that the king knows the committee, but knows not who may be his executor, is the same in the case of an executor of an executor and that an executor of an executor has the disposal and ordering of the estate of the first testator, for, as he reposed a confidence in the first executor for the management of his estate, so did he in him for choosing a fit person to order it after his death.

But thirdly, he said that the defendant's letters patents are void, for that between the return of the office and the grant of the letters patents are but fifteen days. And 18 Hen. VI³ enacts that there should be a month, for that, in the meantime, the parties might come and tender a traverse. And, in this case, two traverses might have been taken, one by the idiot, that she was not an idiot, and the other by any person having a title to the land. Wherefore etc.

3 Modern 43, 87 E.R. 27

1684. Prodgers v. Frazier.

[To a writ of] trespass, the defendant pleaded that, before the time of the trespass supposed to be committed, Bridget Dennis was seised in fee of the lands in question, who, by a writ *de idiota inquirendo*, was found to be an idiot, not having any lucid intervals *per spatium octo annorum etc.*, by virtue whereof the king was entitled, who granted the custody to Sir Alexander Frazier, who died, and that the defendant, Mary Frazier, was his executrix. The plaintiff replied, and confessed the idiocy, but [said] that the king granted the custody of the idiot to the plaintiff. And, upon this replication, the defendant demurred.

In this case, it was agreed by the counsel on both sides that the king, by his prerogative, has the sole interest in him of granting the estate of an idiot to whom he pleases without any account. But it is otherwise in the case of a lunatic, for, there, the grantee shall have nothing to his own use, but must put in security to account to the lunatic, if ever he come to be capable, or else to his executors or administrators.

But the questions that did arise in this case were, first, that there was not sufficient title found for the king, for, by the inquisition, the idiot was found to be so *per spatium octo annorum etc.*, which is uncertain, because, before that time, she might have *lucida intervalla*, and then she cannot be an idiot without being naturally so; therefore, the jury ought to have found her an idiot *a nativitate*, for that is the only matter which vests an interest in the king.

But it was answered and agreed by the court that the finding her to be an idiot was sufficient without the addition of any other words, and, therefore, *per spatium octo annorum* shall be surplusage, for, in this case, words are not so much to be regarded as the reason of the law, which does not allow of idiocy otherwise than *a nativitate*. But supposing a seeming uncertainty in this office found, yet it being said generally that she was an idiot, the subsequent words shall not hurt, because the general finding shall be taken in that sense which is most for the advantage of the king,

¹ Stat. 2 & 3 Edw. VI, c. 8 (SR, IV, 47-48).

² *Anonymous* (1557), 2 Dyer 155, 73 E.R. 338; *Anonymous* (1558), 2 Dyer 161, 73 E.R. 352; *Anonymous* (1571), 3 Dyer 306, 73 E.R. 691.

³ Stat. 18 Hen. VI, c. 6 (SR, II, 306-307).

as, for example, it was found by an office that a person died seised of two manors and that he held one of the queen by knight's service generally and the other of a mesne lord in chivalry, which is the same tenure; now, it was held that the first general finding shall be intended knight's service *in capite*, because it was most for the king's benefit, that he might thereby be entitled to the wardship of the heir, who was found to be under age.

Secondly, whether the grant of the custody of an idiot will pass any interest to the executor of the grantee, because such a grant carries a trust with it, and the king may have some knowledge and consideration of the grantee, but not of his executor.

To which it was answered that here was an interest coupled with a trust, as in the case of wardship formerly, which always went to the executor of the grantee and which was of greater consideration in the law than the feeding or clothing of an idiot.

And of that opinion was the court that the king had a good title to dispose of both the ward and the idiot; one until he was of age and the other during his idiocy.

Judgment [was given] for the defendant.

[Other reports of this case: 1 Eq. Cas. Abr. 276, 21 E.R. 1043.]

[Earlier proceedings in this case: 1 Vernon 9, 23 E.R. 268, Skinner 4, 90 E.R. 2, 2 Shower K.B. 171, 89 E.R. 868, 2 Chancery Cases 70, 22 E.R. 851, Dodd 43, 79 Selden Soc. 894.]

35

Exton v. Greaves
(Ch. 1683)

The foreclosure of a mortgage does not affect the rights of other creditors of the same debtor.

A mortgagee in possession is entitled to reimbursement for necessary repairs and permanent improvements.

1 Vernon 138, 23 E.R. 371

Eodem die [9 February 1683].

J.D. having made a mortgage to J.S. and the mortgaged premises or the equity of redemption thereof being subjected to the payment of divers debts, the mortgagee exhibits his bill against the mortgagor and all the creditors that they should redeem or be foreclosed. The cause was heard, and, at the time, the creditors and mortgagor were to pay the mortgage money or be foreclosed, the defendant Greaves, by consent of the creditors, being a creditor himself, pays the money, and agrees with the creditors that, if they would pay his money at a further day, they should redeem him, otherwise, that he should have the lands absolutely. The creditors fail to pay the money at the time agreed on. Greaves, for twenty years together, enjoys the lands, and lays out £800 in building.

And now the creditors exhibit their bill to redeem him.

For the plaintiff, it was insisted that this was but a mortgage in Greaves and that it did not stand upon the same foot as in the former decree but that, upon the later agreement, there arose a new equity of redemption to the creditors.

For the defendant, it was insisted that he came in and stood in the place of the mortgagee and, if the mortgagee had not assigned to him, all these creditors had been foreclosed by the decree and insisted on the length of time and, principally, that this was in no sort like the case between a mortgagor and a mortgagee, for, there, the mortgagee had a covenant for payment of his money and a bond most commonly for performance of covenants, but, here, the defendant Greaves had no way to compel the creditors to pay him his money and a mortgage ought to be mutual, as one may compel to receive, so the other may compel to pay, and it would have been looked on as superfluous and fantastical for the defendant to have exhibited a bill to have foreclosed these creditors.

But the Lord Keeper [NORTH] decreed a redemption because these lands, by the new agreement, became a mortgage in respect of the other creditors in the hands of the defendant and, in regard of the trust and confidence which they had in the defendant, being all creditors alike, and, principally, because the mortgagee had assigned to Greaves his mortgage only and not the benefit of the decree for the foreclosing of the redemption. And he directed an account to be taken and the defendant to be allowed only necessary repairs and lasting improvements.

[Raithby's note: It appears that, pending or soon after the reference to the Master, several of the plaintiffs, the creditors, offered to redeem the premises, and the defendant Greaves, being a creditor in his own name for £200, voluntarily offered to the plaintiffs and the rest of the creditors that, if he might be paid his whole debt, he would redeem the mortgaged premises for the benefit of the plaintiffs, the rest of the creditors, after satisfaction of his own debt and the money he should really pay for the redemption thereof. And he desired that he might alone treat with the heir of the mortgagor and his trustees for the same, promising and agreeing that, if he might be permitted to redeem and buy in the mortgage, that the residue of the said mortgaged premises after his own debt and what he should pay were satisfied should go for the benefit of the rest of the creditors. A plea and answer were put in of twenty years possession and, denying that, Greaves promised to come to any account respecting the premises unless his money was paid him by a day therein mentioned. Reg. Lib. 1682 A, f. 452.]

[Other reports of this case: 1 Eq. Cas. Abr. 317, 21 E.R. 1072.]

36

North v. Wyld
(Ch. 1683)

Where a bill of discovery is filed by a creditor-mortgagee to discover the rights of the debtor in the land, the defendants must show that the mortgagor is dead and show the particulars of any relevant marriage settlements.

1 Vernon 139, 23 E.R. 372

9 February 1682[/83]. At the Rolls, Master of the Rolls [GRIMSTON] and Lord Chief Justice PEMBERTON.

The plaintiffs being mortgagees, the bill was to discover settlements and what estate the mortgagor had in him.

To this bill, the defendants pleaded two several settlements, whereby the mortgagor was only tenant for life.

The plea was overruled because the defendants did not offer by way of answer to admit the tenant for life to be dead so that the plaintiffs might try the validity of these settlements at law, for, if they should expect until the tenant for life was dead, their witnesses that could prove the fraud might be likewise dead. Besides, the defendants pleaded these settlements to be made after marriage in pursuance of promises and agreements made before marriage, and did not set forth what those promises and agreements were.

[Other reports of this case: 1 Eq. Cas. Abr. 38, 21 E.R. 857.]

37

Barker v. Wyld
(Ch. 1683)

A suit for an account due from joint factors can be brought against any single one of them for the entire amount due.

1 Vernon 140, 23 E.R. 373

Eodem die [9 February 1682[/83]. At the Rolls, Master of the Rolls [GRIMSTON].

The plaintiff's bill was to have an account of goods delivered to the three defendants' respective testators, who were factors.

In this case, there being three defendants, one whereof had by answer sworn he believed and hoped to prove the plaintiff was satisfied his demands, the plaintiff replied to the other two only, and brought the cause on by bill and answer as against the other defendant.

It was insisted that the plaintiff in this case could have no decree for, having brought on his cause as against the third defendant on bill and answer only, his answer must be taken to be true. And, though he does not directly swear the money paid, yet he says he believes and hopes to prove it paid. But the plaintiff not replying to him, he is excluded of the benefit of his proof. And this was a cunning practice of the plaintiff to proceed against those defendants only who were ignorant of the matter and to exclude the defendant who, perhaps, could have proved the debt paid.

The plaintiff was ordered to pay costs, and left at liberty to reply to the other defendant.

In this case, it was admitted that, if there are three joint factors and a man has a demand against them jointly, a bill against any one of them for the whole duty shall be good and that there are divers precedents of it.

Sed quaere if it be not only where the other factors are beyond the sea.

[Other reports of this case: 1 Eq. Cas. Abr. 35, 21 E.R. 854.]

38

Thorne v. Thorne
(Ch. 1683)

A conveyance is valid though never delivered.

A mortgage made to one of several remaindermen can be a revocation pro tanto of that donee's remainder.

1 Vernon 141, 23 E.R. 373

23 February 1682[/83].

A man had by indenture mentioned to grant, enfeoff, and confirm his land unto trustees to stand seised to the use of his three brothers in consideration of blood, natural love, and affection. But it happened this deed was never executed with livery. The question was whether it should work as a covenant to stand seised.

And it was decreed by the Lord Keeper [NORTH] without any difficulty. The like judgment was

cited in the Case of Crossing and Scudamore,¹ and, in the present case, though it was not taken notice of, there was an express covenant that the *cestui que trust* should enjoy according to and for and during the estates thereby respectively limited.

In this case, the settlement was with a power of revocation, and, subsequent to the deed, the grantor had made a mortgage in fee to the defendant, who was one of the brothers.

The court [NORTH] held this to be a revocation *pro tanto* only.

[Reg. Lib. 1682 B, f. 411.]

1 Vernon 182, 23 E.R. 402

4 July 1683.

Thorne, being seised in fee by a voluntary conveyance, settles his lands to the use of himself for life, remainder to his daughter and heir apparent in tail, remainder to his three brothers in tail, remainder to himself in fee, with a power of revocation. And, seven years after, he mortgages those lands in fee, and the condition of the redemption was that, if the mortgagor or his heirs paid the money at the day, he should have the lands in his former estate. The mortgage was made to one of the three brothers that were the remaindermen. The mortgage became forfeited, and the mortgagee afterwards purchased of his eldest brother, who was the heir at law.

The third brother brought his bill for a third part, by virtue of the remainder in tail limited to him and his two brothers. And the question was whether the mortgage was a total revocation or but *pro tanto*.

The Lord Keeper [NORTH] declared it was a revocation *pro tanto* only, the mortgagor being to have the lands on payment as in his former estate. And he decreed it accordingly.

39

Batty v. Lloyd
(Ch. 1683)

A contract that was freely and fairly entered into by both parties will not be set aside by a court of equity because it turned out to be a good bargain for one of them.

1 Vernon 141, 23 E.R. 374

Eodem die [23 February 1683].

The defendant had agreed with the plaintiff, who was to have an estate fall to her after the death of two old women, to give her £350 in consideration of being paid £700 at the death of the two women, and the plaintiff was to secure this £700 on a mortgage of her reversionary estate. It happened that both the women died within two years afterwards.

And, now, the bill was to be relieved against this bargain.

Sed non allocatur, though the Case of Nott and Hill² was cited, where relief was given in such a case as this, the plaintiff in that case being prevailed upon through his necessities.

Lord Keeper [NORTH]: I do not see anything ill in this bargain. I think the price was the full value, though it happened to prove well. Suppose these women had lived twenty years afterwards.

¹ *Crossing v. Scudamore* (1671), 1 Modern 175, 86 E.R. 810, 1 Ventris 137, 86 E.R. 94, 1 Freeman 368, 89 E.R. 274, 2 Levinz 9, 83 E.R. 428, 2 Keble 754, 784, 84 E.R. 476, 495, Lincoln's Inn MS. Misc. 500, ff. 149, 155.

² *Nott v. Hill* (Ch. 1683), see below, Case No. 76.

Could Lloyd have been relieved by any bill here? I do not believe you can show me any such precedent. What is mentioned of the plaintiff's necessities is as in all other cases. One who is necessitous must sell cheaper than those who are not. If I had a mind to buy of a rich man a piece of ground that lay near mine for my convenience, he would ask me almost twice the value. So, where people are constrained to sell, they must not look to have the fullest price, as in some cases that I have known, where a young lady that has had a £10,000 portion payable after the death of an old man or the like and she, in the meantime, becomes marriageable, this portion has been sold for £6000 present money, and thought a good bargain too. It is the common case, pay me double interest during my life, and you shall have the principal after my decease.

[Other reports of this case: 1 Eq. Cas. Abr. 275, 21 E.R. 1042.]

40

Norden v. Norden
(Ch. 1683)

A devise of land to pay debts does not include debts that the testator denied, but such a creditor can be paid after all of the other creditors have been first paid.

1 Vernon 142, 23 E.R. 375

Eodem die [23 February 1683].

One Hollis, who had a demand of £500 against Norden and had run it up to £2700, obtained a decree for it in this court. Norden appealed to the House of Lords, where the decree was affirmed. It was observed that Norden, at the pronouncing of this decree in the House of Lords, fell down in a swoon, and, within a week afterwards, died, as supposed of grief. But he first got a petition answered for a rehearing. And, in his sickness, he devised all his lands for the payment of his debts. And now Hollis would come within this trust to have satisfaction of his debt.

Lord Keeper [NORTH]: It cannot be supposed that a man who denied your debt upon his oath and died your martyr in his cause should ever intend you should have the benefit of this trust. Suppose a verdict had passed against a man and he should bring [a writ of] attaind and, pending this suit, he should make such a settlement for the payment of his debts. Would any man say that he ever intended the debt recovered by the verdict should be satisfied out of it? However, at length, he decreed that, after all debts upon simple contract were paid, Hollis should come in and be paid his debt if he could find assets.

[Other reports of this case: 1 Eq. Cas. Abr. 138, 21 E.R. 941.]

Coventry v. Hall
(Ch. 1683)

Where a former decree should have provided for mesne profits, but did not, a later decree can grant them nunc pro tunc.

2 Chancery Cases 134, 22 E.R. 882

24 February 1682[/83].

Sir Thomas Thinn had issue, Sir James, by one wife, Sir Henry Frederick, by another. And he made a conveyance of several manors on Henry, which, being designed by way of a covenant to stand seised, was defective. And, afterward, it was decreed in Chancery to be relieved, and [it was] likewise settled by an Act of Parliament.¹

Afterwards in 1650, Sir Henry Thinn exhibits a new bill against Sir James for the mesne profits, which was decreed that Sir James should account for the mesne profits from the year 1646, when Sir James got the possession. The suit, divers times, abated by death, so the decree was not completed. Sir James was dead, and made Thomas, his brother, executor. Thomas died, and made the defendant his executor. Sir Henry likewise died, and made the defendant his executor.

The cause came now to be reheard touching the mesne profits between the executors *ab integro*. Two points were debated.

First, whether Sir James, or especially his executors, should be accountable for the mesne profits, for he had a title at law, the conveyance being defective and being under no obligation of trust or covenant or articles, as heir unto his father, and the defective conveyance itself is not mentioned to be in consideration of marriage or valuable consideration, and, therefore, Sir James was not guilty.

But *curia e contra*.

Second, the second and main question was whether a decree being first had for the land and no decree for the mesne profits, a new bill shall be exhibited for the profits, especially, because, in the first bill, Sir James was charged for taking the profits, and relief was prayed on the whole matter, so that Sir Henry, if he had asked it, might have had relief for the mesne profits. And it is not denied but that he might have had a decree if he had prayed it.

My LORD NORTH confirmed the former decree made by the late Lord Nottingham for the mesne profits and that the executor of Sir Thomas Thinn, executor of Sir James, should account for them so far as the estate of Sir James etc.

2 Chancery Reports 259, 21 E.R. 673

Sir Thomas Thynn, father both of Sir Henry Frederick Thynn and Sir James Thynn, conveyed to Sir Henry Frederick and the heirs male of his body, expectant after the decease of him, the said Sir Thomas, the manor of Hemsford and other lands. And he soon after died. The said Sir Henry Frederick possessed the said premises. But Sir James Thynn pretending the said conveyance was defective, Sir Henry Frederick, in October 1650, obtained a decree that the said Sir Henry Frederick and the heirs of his body should enjoy the said premises against the said Sir James Thynn and his heirs, according to the intent of the said settlement. Sir James Thynn insisted that Sir Thomas was but tenant for life, and not seised in fee of the premises, having suffered recoveries so that the

¹ *Thynne v. Thynne* (Ch. 1664) 1 Ventris 51, 86 E.R. 37; *Nott v. Thinn* (Ch. 1673), Reports *tempore* Finch 70, 23 E.R. 37; Private Act, 14 Car. II, c. 21 (*SR*, V, 434) (text not printed).

freehold was in the said Sir James or some other for his use, by virtue of which he received the profits which Sir Henry Frederick ought to have received, Sir Henry not being able to recover the said mesne profits at law by reason of the defect in the said conveyance, which is now supplied and settled by the said decree and Act of Parliament so that the said Sir Henry has the right to the said profits and writings, so the bill is to be relieved for the same and to have an account thereof.

The defendant insisted that there ought to be no account of the mesne profits, the demand thereof being very old and is grounded on a decree in a former cause whereby a defect in a conveyance under which the plaintiff's claim was supplied, and there is no provision in the said decree for mesne profits, though the bill originally was such as this court might have decreed mesne profits. When the decree was made, it was not granted nor any farther relief than only possession, and the possession has been so inconstantly in any one person that it is very difficult, especially after so long time, against an executor that is no way privy to the account of the testator.

The plaintiff insisted that, though the demand on the decree is ancient and a prosecution has been for the same ever since the right being determined, the plaintiff ought to have an account of the mesne profits as the consequences of that right, though the original bill might pray an account and the decree be silent as to that point.

This court declared that, considering this case as if there were no Act of Parliament, the plaintiff has a right to demand an account upon an equity that arises on the marriage agreement and the settlement made in pursuance thereof, notwithstanding the length of time, for that the plaintiffs or their testator could not come sooner than when the title was cleared. The objection raised from the shortness of the former decree is not material to prejudice the plaintiff's demand, for that there could not then be any decree for profits, the said Sir James pretending title as tenant in tail, and that Sir Thomas was but tenant for life. So, now, the right being cleared, the plaintiff ought to have an account of the mesne profits from the time the right accrued. And [the court] decreed accordingly.

The defendant appealing from the said decree made by the Lord Chancellor Finch to the Lord Keeper NORTH, the case was heard *ab integro*, and the Lord Keeper, on hearing the decree in 1650 and the decree of the Lord Finch read, declared that there was nothing in the case but the loss of time, and, though the decree in 1650 was silent as to the mesne profits, yet the same ought to be no objection to the right. And though it was omitted by the decree in 1650, yet it ought in justice to have been decreed for the mesne profits, as well as for the right of the title, it being an accessory to the decree. And it ought to be judged *nunc pro tunc*, there being no bar against it. And [the court] confirmed the decree made by the Lord Finch.

[Reg. Lib. 34 Car. II, f. 330.]

Brown v. Williams
(Ch. 1683)

A bona fide purchaser for value from a bankrupt who had no knowledge of the bankruptcy need not answer to a bill of discovery as to the goods purchased.

2 Chancery Cases 135, 22 E.R. 883

28 February 1682[/83].

The assignee of a bankrupt exhibits his bill against the defendant to discover goods of the bankrupt that came to his hands after the bankruptcy.

The defendant, by way of plea, sets forth that he had no goods of the bankrupt or that ever were his but what he bought for full and valuable consideration and *bona fide* and that, at the time of the sale and payment of his money, he had no notice either of the commission or of any act of bankruptcy committed by the bankrupt.

On long debate, the plea was allowed by the LORD NORTH, and [the plaintiffs] to take what remedy they could before the commissioners or at law.

Hutchins, counsel for the defendant, cited a former precedent, but it was not produced.

43

Ex parte Portman

(Ch. 1683)

A bona fide purchaser for value from a bankrupt who had no knowledge of the bankruptcy need not answer to a bill of discovery as to the lands purchased.

2 Chancery Cases 136, 22 E.R. 883

[28 February 1683.]

The assignee of the commissioners of a bankrupt, Portman, exhibited his bill against the defendant to discover lands etc. which were the bankrupt's at the time of his breaking.

Hutchins, for the defendant, pleaded, that he was a purchaser for full and valuable consideration, and, at the time of his purchase, he had no notice of any act of bankruptcy, nor that Portman was a bankrupt, nor of any commission, and refused to make discovery.

And the plea was allowed by My LORD NORTH, Lord Keeper.

[Related cases: *Wagstaff v. Read* (Ch. 1683), see below, Case No. 128.]

44

Anonymous

(Ch. 1683)

In any money remains unpaid after a lease or devise to pay debts, it goes to the heir and not to the executor.

2 Ventris 359, 86 E.R. 485

If a man makes a lease or devises an estate for years, he being seised of an estate of an inheritance, for payment of debts, if the profits of the land surmount the debt, all that remains shall go to the heir, though [it be] not so expressed and albeit it be in the case of an executor.

45

Leak v. Morrice

(Ch. 1683)

An oral contract to reduce a contract to writing is not barred by the Statute of Frauds.

2 Chancery Cases 135, 22 E.R. 883

[28 February 1683.]

The bill is to have an agreement performed by the defendant, which was in effect that the defendant should assign a term of years in his house and plate and certain vessels of beer for 200 guineas, whereof he paid one in hand as earnest of the bargain and, three days after, 19 guineas more. And part of the bargain was that it should be executed by writings by a certain time.

The defendant pleaded the Statute for Prevention of Frauds and Perjuries,¹ and that it was a parol agreement and none of the goods were delivered by the defendant, so there ought to be no relief in law or equity. But he confessed the receipt of the 20 guineas, and offered to repay them.

Keck, for the defendant at the bar, enforced the plea, because it was to take away the defendant's trade, and he alleged the money was only paid for the lease.

Lord Keeper [NORTH]: It is clear the defendant ought to repay the money. It is charged that the agreement was to be put in writing.

It was answered, yea.

Whereupon the Lord Keeper [NORTH] overruled the plea.

Dickens 14, 21 E.R. 171

28 February 1682[/83].

The matter upon the plaintiff's bill and the defendant's plea and demurrer put in thereto coming on this present day [28 February 1683] to be heard and debated before the Lord Keeper, LORD NORTH, of the Great Seal of England in the presence of counsel learned on both sides, the scope of the plaintiff's bill being, among other things, to be relieved upon an agreement touching an assignment of a lease and goods, where the defendant pleaded the Statute of Frauds and Perjuries, for that, if any such agreement was made, it was by parol.

But the plaintiff's counsel insisting that the plaintiff does by his bill set forth that it was agreed that the agreement should be put into writing, upon opening [of the case] and debate of the matter and hearing of what could be alleged, His Lordship [NORTH] does order that the defendant do answer so much of the plaintiff's bill only as does charge that the said agreement was to be put into writing, and, after such answer put in, the plaintiff may reply and proceed in his cause as he shall be advised. But the benefit of the said plea and demurrer is hereby saved to the defendant to the hearing of the cause, when, if the plaintiff shall be relieved, this court will give such directions touching the defendant's being examined upon interrogatories, as to this court shall seem meet.

[Other reports of this case: 1 Eq. Cas. Abr. 23, 21 E.R. 844.]

46

Barney v. Beak
(Ch. 1683)

A court of equity will give relief against a penalty in a bond.

2 Chancery Cases 136, 22 E.R. 883

February 1682[/83].

The bill, that the plaintiff's father being aged and infirm, and allowing the plaintiff, a young gentleman, but small allowance, that, he being in want, one Stysted got acquainted with him, and told him that he had found out a parcel of wines, which, if he would buy, he should not be enforced to pay for them until after his father's death. They went to Beak, the defendant, who sold him several hogsheads of wines to the value of £1280, and affirmed them to be of that value, and sound, good, and merchantable, and took of the plaintiff a statute of £2880, 17 November 1678, defeasanced to pay £1440 within twenty days after the death of his father. The wines were flat and dead, and were delivered to Stysted, who could sell them for no more than £360. [It was alleged] that the plaintiff's father was but tenant for life, the remainder to the plaintiff, that this was done by contrivance

¹ Stat. 29 Car. II, c. 3 (SR, V, 839-842).

between the defendant Beak and Stysted by their fraud, and Stysted had £20 of the plaintiff and other gratification of Beak, and the plaintiff's father being dead, the defendant Beak proceeded on the statute.

The defendant Beak, by answer, [said] that he knew not Stysted, but he and the plaintiff came to him to buy of him wines, and he sold the plaintiff twenty tuns of claret at £36 the tun, in all £740, and, after much treaty, agreed that, if the plaintiff died before his father, then nothing [was] to be paid, but, if he survived his father, to pay double the value, *viz.* £1480, that the wines were good and sound, and the plaintiff sent Ady, a known cooper, to taste and try the wines, who did so, and the plaintiff, to encourage the defendant to sell, did inform the defendant that his father was sickly and kept to his chamber. And he denied the fraud and that he sold the wines which were left at the same price.

At a former hearing, 9 February 1680, the Lord Chancellor [Lord Nottingham] relieved the plaintiff.

But now the bill [was] dismissed, saving as to the penalty of the statute, for there was no proof of any fraud, but it was a hazardous bargain.

LORD NORTH: It may be Stysted put in other wines, or took out of these and filled them again with bad.

Note that the same day, *viz.* 9 February 1680, when the Lord Chancellor relieved Barny, he did not in another case relieve, though very like it, *viz.* between the now plaintiff Barny and Pit.¹ Pit lent Barny £1000 to have £2500 if Barny survived his father, and to lose the £1000 if Barny died in his father's lifetime, secured by a [confessed] judgment; Pit sued; Barny sought to be relieved in equity, and was dismissed.

[Related cases: *Barney v. Tyson* (Ch. 1683), see below, Case No. 53.]

47

Lord Paget v. Read
(Ch. 1683)

A husband is liable for the conversion and waste committed by his estranged wife.

1 Vernon 143, 23 E.R. 375

1 March 1682[/83].

Several goods were devised to Mr. Read's wife for life and, after her decease, to the Lord Paget. In this case, although Mr. Read and his wife were parted and there had been great suits for alimony² and she, during the separation, had wasted these goods, yet the Lord Keeper [NORTH] thought it reasonable that the husband should be charged for this conversion of the wife, the Lord Paget's title being paramount to the wife's, and not under her.

[Raithby's note: A trial at law was directed as to the goods and the value thereof come to the hands of the defendant's wife. But the suit was afterwards compromised. Reg. Lib. 1682 A, f. 698.]

[Other reports of this case: 1 Eq. Cas. Abr. 61, 21 E.R. 874.]

¹ *Berney v. Pitt* (Ch. 1686-1687), see below, Case No. 356.

² *Read v. Read* (1671), 2 Keble 853, 84 E.R. 540; *Rex v. Reade* (1671), 2 Keble 736, 84 E.R. 465; note also *Attorney General v. Read* (Ex. 1671), Exch. Repts. *tempore* Car. II, 229; *Attorney General v. Read* (Ex. 1676), 1 Freeman 327, 89 E.R. 242, 2 Modern 299, 86 E.R. 1083, Dodd 256.

Harding v. Edge
(Ch. 1683)

Debts based on decrees in equity and judgments at law have priority over contract debts.

1 Vernon 143, 23 E.R. 375

Eodem die [1 March 1683].

Upon a special report, the sole question was how a duty decreed should take place in relation to other debts in point or priority of satisfaction.

And it was ordered that a decree should precede debts on simple contract and bonds, and take place next to judgments. And the case of Parker and [*blank*] was cited,¹ where it had been so resolved.

And, as to the objection that, in [actions of] debt upon a bond, at law, an executor could not defend himself by pleading he had no assets *ultra* what would amount to satisfy the decree, it was answered he might defend himself by a bill in this court, which would take care to protect him therein.

[Raithby's note: The words of the decree are 'His Lordship declaring that debts by decree are in the nature of judgments at law, and ought to be paid before debts by bond or simple contract'. Reg. Lib. 1682 A, f. 369.]

[Other reports of this case: 1 Eq. Cas. Abr. 144, 21 E.R. 946.]

[Earlier proceedings in this case: 2 Chancery Cases 94, 22 E.R. 863.]

Palmer v. Jones
(Ch. 1683)

The liability of a trustee for a breach of trust is as if he were a bailiff.

1 Vernon 144, 23 E.R. 376

Eodem die [1 March 1683].

This cause coming to be reheard, the Lord Keeper [NORTH] thought the former decree too severe upon Doctor Jones, the trustee. And he declared he would never charge a trustee with imaginary values, but that he should be charged as a bailiff only. He thought it a great hardship that a trustee was allowed nothing for his own labor and pains.

It was answered that it had often been complained of in court as too hard a rule to charge a trustee with what he had made, or might have made, without his willful default, but the court could never yet find where else to fix a measure.

The Lord Keeper [NORTH] said that very supine negligence might indeed in some cases charge a trustee with more than he had received, as he remembered in the Case of Hollis and Montagu, but, then, the proof must be very strong.

¹ *Parker v. Dee* (1674), 2 Chancery Cases 200, 22 E.R. 910, Reports *tempore* Finch 123, 23 E.R. 67, 3 Swanston 529, 36 E.R. 968, 73 Selden Soc. 83.

For the plaintiff, it was urged that this case had one unusual circumstance, for, here, the trustee had expressly covenanted to set and let the land and, upon other terms, would not have been admitted into the trust, yet, for eight years together, he had kept the land in his own hands etc.

After debate, the plaintiff was glad to remit a good part of what he had by the former decree. And so the matter ended by compromise.

[Other reports of this case: 1 Eq. Cas. Abr. 397, 21 E.R. 1130.]

[Earlier proceedings in this case: 79 Selden Soc. 649.]

50

Bovey v. Smith
(Ch. 1683)

Where a plaintiff has delayed for a long time to enforce a right and the defendant has changed positions, a court of equity will not give the plaintiff a remedy.

1 Vernon 144, 23 E.R. 377

2 March 1682[/83].

The case was Mrs. Bovey, the plaintiff's mother, living in Holland and though a married woman, yet traded as a *feme sole* and having acquired to herself a separate estate, about forty years since, made her will in Dutch. And she thereby devised her houses in Chelsea, which she had purchased with her capital, to William Bovey, her husband's son by a former wife, and two other trustees and their heirs, in trust for her four daughters and their children and such of their children as should be alive at the last. And, afterwards, by her said will, she declares the trust of all her estate thereby undisposed of to be for her and her heirs. The plaintiff claims as heir to his mother, his elder brother not being of the whole blood, but by a former wife.

Before the making of this will, Mrs. Bovey had settled these houses by a deed executed in her lifetime on the same trustees in trust for such persons and such estate as she, by any writing under her hand and seal, should direct and appoint.

William Bovey and the other trustees, apprehending that this devise carried the inheritance of these houses to the daughters, in 1652, sell the inheritance thereof for a full and valuable consideration. And the money is proportionally distributed amongst the daughters, the plaintiff being privy to the conveyance and making no claim or pretending any right to these houses, and a fine is levied of them, and five years pass. Afterwards, differences arising between the plaintiff and William Bovey, the trustee, there is an award made, and £200 awarded to be paid the plaintiff, and the plaintiff to give a general release of all actions, real and personal. But no notice is taken in the award of the breach of trust. The £200 is paid the plaintiff, and a general release is given accordingly.

About ten years afterwards, William Bovey, the trustee, for a full consideration, purchases back these houses to himself and his heirs. And the defendant Smith, standing in the place of Bovey, the trustee, and the plaintiff having now taken advice upon this will and conceiving the daughters took only an estate for life, exhibits his bill to have an execution of this trust and these lands decreed to him.

The late Lord Chancellor [Lord Nottingham] had twice heard this cause, and decreed it both times for the plaintiff.¹ But the decree not being signed and enrolled, the cause came this day to be reheard before the Lord Keeper [NORTH].

¹ *Bovey v. Smith* (1677-1682), 79 Selden Soc. 470, 930, 934, 1 Vernon 60, 84, 23 E.R. 310, 328, 2 Chancery Cases 124, 22 E.R. 877.

For the defendant, it was insisted that this was not only a very old and stale demand, the pretended breach of trust having been committed above thirty years since, but a very hard demand in equity, to charge a trustee, who, according to the best of his skill, had in this case acted honestly and to evict the land from him who was now become a real and innocent purchaser thereof.

And first, as to the will itself, it was observed that the same was made in Dutch and the original was lost and a small mistake in the translation might make a great variance in it, for, if it had been 'issue' instead of 'children', it would have carried an estate tail. And the custom in Holland may be that those words carry an inheritance there. And the will being in truth incoherent and almost insensible in itself, if the matter had been called in question within any reasonable time, the intent of the testator might have been made out by proof, which might have given light to the doubtful and ambiguous wording of the will, and, by which, the intent of the testatrix might have better prepared. But, here, has been an acquiescence in the plaintiff for above thirty years, whereas, had he soon laid claim to this estate, the defendant might in equity have compelled the daughters to have refunded the money received by them out of this estate.

Secondly, it was insisted that the fine with proclamations and non-claim for five years was a flat bar to the plaintiff in this case. And he cited cases, wherein it had been resolved that no other claim than the exhibiting of a bill and taking out a subpoena was a sufficient claim in equity, as a man at law must file an original where he cannot enter.

Thirdly, that the release being general of all actions, real and personal, it released the breach of trust if any were. And it being full within the words of the release, after so many years, it ought not now to be enquired into whether this breach of trust was intended to have been released thereby.

Fourthly, if there was any notice of the trust in this case, it was at most but a notional notice, for both the plaintiff and the trustee apprehended that this will carried the inheritance to the daughters.

Fifthly, it was observed that this was a declaration of a trust only, and not the limitation of an estate and that, therefore, there was a greater latitude left to the court in judging upon this case and that, in many respects, it ought to have an equitable and favorable construction.

For the plaintiff, it was answered that, though the will was in Dutch and though it might be such as, by the law of the Low Countries, would carry an inheritance, though what the custom of the Low Countries is does not appear, yet that is nothing to the purpose, for a will to pass the inheritance of lands in England, wheresoever it is made, must be such as will carry an inheritance according to the laws of this realm, as has been resolved in the case of Latin wills and the like. And the devise being concerning lands, the whole will must be in writing, and the intent of the testator cannot be supplied by proof. And, as to the plaintiff's acquiescence under this breach of trust, it is easily answered, for the last of the daughters died not above two years before the bill was exhibited. And, though the remainderman may, if he will, take advantage of the forfeiture of the tenant for life presently, yet he is not bound to do it, but he shall have five years after the death of the tenant for life to make his entry or claim. And the plaintiff's bill in this case is very proper to have the land itself decreed, for, though the plaintiff may have satisfaction in damages, yet the land being now come to the trustee again, the best and equalest measure is to decree him to convey the land itself. And they cited the Lord Canmore's Case, where a trust was broken and then a full bar to the *cestui que trust*, and yet the land coming afterwards into the trustee's hands, he was decreed to convey the land itself, as the best measure that could be taken in that case. And the plaintiff's counsel did insist that there was not any bar at all to the trust, as this case was, for, first, as to the release, a release shall never bar a man who is ignorant of the right and interest he is to release and where such right is suppressed and concealed from him. And, in this case, the plaintiff was not apprised that anything passed to him by this will.

Secondly, though the release be general of all actions, real and personal, yet it was made in pursuance of an award which concerned matters in account between the *cestui que trust* and the trustee only. And it is not, nor can be pretended in this case, that the plaintiff has received any satisfaction for his interest in these houses.

Thirdly, all the three trustees joined in the conveyance, and so were all guilty of a breach of

trust, and yet this release is made to one of them only, whereas, if it had been designed to have released the breach of trust, it would have been made to them all.

Then, as to the fine, it is true a fine will bar an equitable right, as well as an estate at law. But, then, the estate must be displaced, which here it is not, the fine being by and between the parties to the trust only, who having notice of the trust, the fine operates so as to strengthen the trust, and not to extinguish it. The trust being all along incumbent on the land and passing with it and so this case is in truth stronger than that Case of the Lord Canmore, for here was never any real bar, and, in this case, it was impossible anyone should come at the land but they must have notice of the trust, for they purchase under the will, and all their title is by the will, by which the trust is created. And a man that has notice of the will must at his peril take notice of the operation and construction of the law upon it. And, though this be called a notional notice, yet it is such a notice as has always been allowed to be good, for every man is presumed to be cognizant of the law of the realm, and he shall not take advantage of his own ignorance, but *caveat emptor*.

For the defendant, it was only replied that here was no answer given as to the plaintiff's acquiescence and coming so late, for there was no survivorship in the case, for the jointure was severed by the fine and all but one of the four daughters were dead almost ten years before the bill.

The Lord Keeper [NORTH], in the debate, put this case to Serjeant Maynard. A., seised in fee in trust for B., for full consideration, conveys to C., the purchaser having notice of the trust, and, afterwards, C., to strengthen his own estate, levies a fine; whether B., the *cestui que trust*, be not in that case bound to enter within five years.

And the counsel were all of opinion that he was not, for, here, C., having purchased with notice, notwithstanding any consideration paid by him, is but a trustee for B., and so, the estate not being displaced, the fine cannot bar.

Lord Keeper [NORTH]: In this case, you come here in equity after one and thirty years possession to affect an estate with a trust, notwithstanding a release and fine, and that upon a supposal that Mrs. Bovey made no other appointment (as she had power to do by the deed and, after so long a possession, it ought rather to be presumed she did) and also upon a supposal that this is a true copy of the will. This is only a translation, and the original is lost, and the difference in point of translation between 'children' and 'issue' is nice. And the question is who shall suffer, for the defendant is a purchaser and has paid a full consideration, and, here, he must be affected with a notional notice only. And the plaintiff, all the while, stood by, and was silent, and, at best, was passive in the breach of trust. And this case is rather stronger than Sir George Norton's Case,¹ where the heir stands by and encourages a purchaser and, afterwards, trumps up a deed of entail. Though it be hard to dismiss the bill after two decrees for the plaintiff, yet I am not satisfied I can decree it for him.

The bill must stand dismissed.

[Reg. Lib. 1682 A, f. 273.]

[Other reports of this case: 1 Eq. Cas. Abr. 256, 384, 21 E.R. 1029, 1120.]

[Earlier proceedings in this case: 1 Vernon 60, 84, 23 E.R. 310, 328, 2 Chancery Cases 124, 22 E.R. 877, 79 Selden Soc. 470, 930, 934.]

[This decree was reversed in the House of Lords 4 March 1692, *Lords' Journal*, vol. 15, p. 275.]

¹ *Hobbs v. Norton* (Ch. 1683), see above, Case No. 33.

51

Roberts v. Matthews
(Ch. 1683)

Payment to an agent is not a valid payment to the principal creditor.

1 Vernon 150, 23 E.R. 379

Eodem die [2 March 1683]. In Court, Lord Keeper.

The case was the defendant Matthews employed one Smith, a scrivener, to place out £50 for him at interest, which the scrivener did to the plaintiff, and took the plaintiff's bond for it in the defendant's name. And, about three months afterwards, he delivered the bond to the defendant. The plaintiff Roberts, all along, paid his interest to the scrivener, and, about five years after the entering into this bond, the scrivener calling upon him for the principal, he paid £30 of it. And the scrivener, not having the bond in his custody, gave the plaintiff a receipt for £30 received in part for the use of the defendant Matthews.

[It was] adjudged this was a void payment, for the bond being in the custody of the defendant Matthews, and not in the scrivener's, the plaintiff ought to have seen his money endorsed on the bond. And, though this alone were enough to make it an ill payment, yet this case was the stronger for that the plaintiff was not ignorant whose money it was, the receipt he took for the payment of the £30 being for the use of the defendant. And many precedents were cited to the same purpose.

[Raithby's note: This was decreed on a rehearing before Lord Keeper [NORTH] together with costs at law and in this court. 'The defendant having sworn the bond to be in his custody at the time of payment of the £30, it lay on the plaintiff to prove the same to be in Smith's hands or, otherwise, that he had authority to receive the £30, which had not been done'. Reg. Lib. 1682 B, f. 685.]

52

Hollis v. Whiting
(Ch. 1683)

An oral contract to reduce a contract to writing is not barred by the Statute of Frauds.

1 Vernon 151, 23 E.R. 380

Eodem die [2 March 1683].

The bill was to have the execution of a parol agreement for a lease of a house, setting forth that, in confidence of this agreement, the plaintiff had laid out and expended very considerable sums of money etc.

The defendant pleaded the Statute of Frauds and Perjuries.¹

And the plea was allowed. But the Lord Keeper [NORTH] was of opinion that, if the plaintiff had laid in his bill that it was part of the agreement that the agreement should be put into writing, it would alter the case, and possibly require an answer.

[Other reports of this case: 1 Eq. Cas. Abr. 19, 21 E.R. 841.]

¹ Stat. 29 Car. II, c. 3 (SR, V, 839-842).

Barney v. Tyson
(Ch. 1683)

A contract that was the result of overreaching will be set aside in a court of equity.

2 Ventris 359, 86 E.R. 485

The case was thus. The plaintiff, in the life[time] of his father, being about twenty-six years of age and having occasion for money, prevails with the defendant to let him have in wares to the value of £400, and gives him a bond for £800 to be paid if he survived his father, at which time an estate would befall him of £5000 *per annum*. And he having survived his father, he preferred his bill against the defendant to compel him to take his principal money and interest.

And it was proved in the case that the defendant was informed at the time of this bargain that the father was ill and not like to live (and he did live but a year and half after) and that one Stisted, a man very infamous, was employed in the transaction of this bargain.

And the plaintiff obtained a decree in the time of the Lord Chancellor Finch.

And now, upon a petition to the Lord Keeper NORTH, the defendant obtained a re-hearing.

And in maintenance of the decree, it was alleged that the hazard which was run was very little and such bargains with heirs were much to be discountenanced.

The Lord Keeper [NORTH] affirmed the decree. But he said that he would not have it used as a precedent for this court to set aside men's bargains. But this case having received a determination and the defendant having accepted his principal money and interest thereupon and there being only a slight omission in the enrollment of the decree, which, if it had been done, had prevented a re-hearing, and the defendant having delayed his application to him by petition, he would not now set the decree aside.

Skinner 107, 90 E.R. 50

Easter term 35 Car. II. Stisestead v. Barney.

Barney's father being sick, one Tison sold Barney as many goods as were worth £400, for which Barney entered into a judgment of £1600 defeasanced for the payment of £800 within forty days after his father's death. Barney's father dies within a year after this judgment was entered into.

And a bill in Chancery is brought to relieve Barney against this judgment. It was brought before Finch, Lord Chancellor, and he decreed that Barney should pay £400 and the interest from the time of the sale.

And afterwards, upon a rehearing before NORTH, Lord Keeper, this decree was confirmed, for Barney's father being then sick, it was looked upon to be a cheat. And, if it should be allowed, it would be like the case of lending £30 to receive £33 if the son of the obligee be living June 1 etc. and 5 Rep. 70.¹ And then they may tie it upon the life of one condemned to be hanged, and so evade the Statute.² So, here, the father being likely to die, it was looked on as little better than a cheat. But, if the father had been in perfect health, though he had died quickly after, yet they would not have relieved him, for, by the same reason, that, if the father had lived thirty years, he should have continued without his money or interest, by the same reason he shall have it if he die sooner. And [there is] no reason to relieve on one side and not to relieve on the other. But, here, the father being

¹ *Reynolds v. Clayton* (1595), 5 Coke Rep. 70, 77 E.R. 160, also 2 Anderson 15, 123 E.R. 521, Moore K.B. 397, 72 E.R. 652.

² Stat. 13 Eliz. I, c. 8 (SR, IV, 542-543).

sick and likely to die, it was the main reason of the decree.

[Related cases: *Barney v. Beak* (Ch. 1683), see above, Case No. 46; *Berney v. Pitt* (Ch. 1686-1687), see below, Case No. 356.]

54

Amand v. Bradbourne
(Ch. 1683)

The necessary expenses of administering a trust are payable from the trust assets and not by the trustee personally.

2 Chancery Cases 138, 22 E.R. 884

The trustee sued concerning the trust in Chancery, obtained a dismissal, and had costs paid him as in course. But the costs allowed him and taxed were short of his real costs. After a bill by the *cestui que trust* to have an account of the trust, on account of his disbursements, he shall be allowed his true and necessary costs in the former suit, and not be concluded etc. And [it was] so ordered.

[Other reports of this case: 1 Eq. Cas. Abr. 397, 21 E.R. 1130.]

55

Ex parte Backwell
(Ch. 1683-1687)

A judge cannot grant a commission of bankruptcy on his own motion.
A commission of bankruptcy cannot be superseded if any creditor opposes it.
A commission of bankruptcy continues where the bankrupt dies.

2 Chancery Cases 143, 22 E.R. 886

A commission, at the complaint of fifteen creditors on the Statute of Bankrupts,¹ issued out against Alderman Backwell,² who died shortly after. These creditors having judgment and finding that, on their judgment, they might have a better remedy than their proportion was likely to be on the commissions, the heir of the bankrupt paid their debts. And none other creditors appearing then to prosecute, by their consent, the commission was superseded.

And, after[wards], thirty other creditors sued for a discharge of the *supersedeas*:

First, because, when a commission is granted, not only the first prosecutors are interested therein, but all that will come in within four months, and, therefore, they having tendered contribution within the four months, the commission ought not to have been superseded by consent of the fifteen;

Secondly, they alleged that the commission had been dealt in by the commissioners, and an assignment of lands made, and, the alderman being dead, they should be remediless, for no new commission can be now granted.

¹ Stat. 13 Eliz. I, c. 7, s. 2 (*SR*, IV, 539).

² G. E. Aylmer, 'Backwell, Edward (c. 1619-1683)', *Oxford Dictionary of National Biography*, vol. 3, pp. 112-116.

Therefore, they prayed a discharge of the *supersedeas*.

On the other side, it was objected that the assignment was void, being made after Backwell's death.

The Lord Keeper NORTH: If I erred in granting the *supersedeas*, I can discharge it. Secondly, but, if some creditors obtain a commission and receive satisfaction, I can at their request supersede the commission, if none other creditors appear. I am not bound to call them in; else it were mischievous. Therefore, he ordered the commission to be brought in and the assignment. If the assignment be well, I can, etc., try that at law.

1 Vernon 152, 23 E.R. 381

16 April 1683.

Several of the creditors of Alderman Backwell having this vacation petitioned for a commission of bankruptcy against him, the Lord Keeper [NORTH] ordered that a commission should issue unless cause were this day shown to the contrary. And it was now moved that the granting of the commission might for some time be suspended, for that much the major part of the alderman's creditors had compounded with him, which would be all set aside and avoided if a commission should go, and it was sought for only by some few and unreasonable people, the alderman having already made very fair proposals, *viz.* that the creditors should be paid their whole debts, one-fifth in ready money and the other four-fifths in assignments on the Exchequer, and that near 250 of his creditors had accepted of this composition, and actually received their moneys, which now would be all overreached by this commission. And they did not doubt but, in a month's time, if the commission might be so long suspended, they should agree with the rest of the creditors.

But, by the counsel for the creditors, it was answered that, by the alderman's petitioning for time and other studied delays and by reason of privilege coming in, he had already for near seven years prevented the creditors of the benefit of this commission already and that their danger was very great in these delays, for, by the Statute, a purchaser was not to be overreached unless the commission was sued out within five years after his purchase, and they did not know but that this might be a critical time for the granting of the commission in that respect. And, by the very words of the Statute, no commission of bankruptcy can issue after a man's death. And, though it was granted in a man's lifetime, yet, if nothing was done upon it before he dies, all is avoided.

Lord Keeper [NORTH] declared that, though the words in the Act of Parliament were that the Chancellor may grant a commission of bankrupt, yet that 'may' was in effect 'must', and it had been so resolved by all the judges. And the granting of a commission was not a matter discretionary in him, but that he was bound to do it and that he had done the alderman already what kindness he could, in that he refused to grant a private seal for the passing of this commission, but that, now, he could deny it no longer, by reason of the prejudice and hazard that the creditors might in this case sustain by delays. And, as for what was said, that much the greater part of the creditors had already submitted to a composition and had delivered up their specialties and now this commission would overreach them and they would be in danger to lose their debts, he said he could not help that if it should so fall out, but, as for bills of conformity, they had been long since exploded, and there was no such equity now in this court. But he would take care that there should be able persons nominated commissioners. And, therefore, first, to prevent all danger, he directed the commission should be this day sealed and that the commissioners should meet and proceed to prove the alderman a bankrupt so that the execution of the commission might not be prevented by his death and that, then, they should surcease all further prosecution. And he directed Alderman Backwell's counsel to bring him the names of such sufficient and honest persons as might be fit to be commissioners in this case and such as might treat with the creditors and see if they could come to any agreement, and he would renew the commission to such persons. And he said it was a mischief that the Act of Parliament had subjected the commissioners to an action so that no sufficient persons and such as might be fit to manage such a concern as this would undertake the trouble of it. And, as for a debt of £60,000 that Mr. Attorney [General] said the alderman owed the king, the Lord Keeper [NORTH] said, if such a

debt was owing, it was fit that an application should be made to the Lords of the Treasury that His Majesty should be satisfied out of the assignments of the Exchequer debt. But he said there was a patent now laid before him which he was much importuned to pass whereby this debt of the king's was to be fixed upon the land and the king to grant this to the alderman's son.

1 Vernon 208, 23 E.R. 418

Some of Alderman Backwell's creditors having, upon a petition to the Lord Keeper [NORTH], obtained a commission of bankruptcy against him, the commissioners sat and found him a bankrupt, and made an assignment. And, then, Alderman Backwell dies in Holland. His son and heir agrees with all the creditors who had petitioned for this commission, and, thereupon, he obtains a *supersedeas*. Afterwards, the other creditors hearing of it, they petition the Lord Keeper to grant a *procedendo*, because a commission being once granted and an assignment made, that was a trust for all the creditors of Alderman Backwell that should come in within the four months, which they intended to do. And they insisted that the commission could not be regularly discharged until after the four months were past, and, though it had been sometimes done in other cases, yet that was where the creditors might have the same benefit by a new commission. But, in this case, the bankrupt being dead, if this commission should stand superseded, the creditors were without a remedy. And they insisted this was a fraud and contrivance between the heir and the other creditors to defeat them of their just debts, and ought not to be countenanced in equity and that they relied upon it, that they might at any time within the four months have come in, and they have had the benefit of this commission. Otherwise, they themselves would have petitioned for a commission against him.

But the Lord Keeper [NORTH] declared that, in any case, where all the creditors that petitioned for a commission would afterwards agree to have it discharged, he would never scruple to discharge the commission. And, in this case, he mentioned how inconvenient it would be to revive the commission, for Alderman Backwell had traded considerably since such time as the commissioners had found him a bankrupt and that all the composition money that his son had paid to his father's creditors must be refunded, and that many other inconveniences would ensue, and that he had all along determined with himself not to revoke this *supersedeas*, but had deliberated upon it, that the other creditors might make the best terms they could with the heir, and when they have been fairly offered, if they stood in their own light, they must blame themselves for it. And he declared he would not revoke the *supersedeas*, nor grant a *procedendo*.

2 Chancery Cases 190, 22 E.R. 906

8 November 1687.

A commission of bankrupt issued against Alderman Backwell, and the creditors who sued out the commission were compounded and agreed with. And, thereupon, a [writ of] *supersedeas* to the commission was granted. The earl of Exeter and a hundred other creditors petitioned that the commission may be revived and the *supersedeas quia improvide emanavit* set aside.

And *Pemberton*, serjeant, and others insisted:

First, that they were the greatest number of the creditors who desired it;

Second, the commission is *de jure* granted and could not at first have been denied;

Third, and when it is once granted, then all the creditors, every one of them, are interested in the benefit and proceeding of the commission equally with the rest of the creditors at whose petition the commission was granted; so as they come in and pray to be admitted within the four months and tender their contribution;

Fourth, and the non-petitioners now pray to be admitted, and, though now the four months be past, it is not their fault because the *supersedeas* being granted within the four months, they could not be blamed, for they had time until after four months;

Fifth, and seeing they were interested in the commission as well as the petitioners for the commission, the other creditors cannot hinder them from coming now into it, without which they

should lose their debts.

The former debates on this matter did produce some propositions of accord from Mr. Backwell, son and heir of the alderman, which now not being acquiesced in, etc.

Lord Keeper [NORTH]: I hold that the commission is *de jure* and the Statute,¹ which says the Chancellor may grant etc., is as if it had been ‘shall grant or ought to grant’. But he cannot grant *ex officio*, but on request of persons interested. If twenty men swear before me, that J.S. is a bankrupt, yet without a petition of a creditor, I may not award a commission. But, when it is once granted, if the persons that petition were well satisfied, I do think a *supersedeas* may be granted as well within the four months as after. Possibly, they who petition find that it is best for them so to have it, for, if their debts be by judgment, they will be preferred before others. Whereas, on the commission, they must come in but in proportion with others, and it is a *quaestio juris*. I will hear it assisted by judges.

Note: When once a commission is granted, it is folly for the other creditors to sue for their debts at common law or Chancery, for, if they should recover, yet it will not avail them, but they must be liable to the commission. So if they had judgments not executed, it were vain to sue execution, and, therefore, time is given to all creditors, *viz.* four months to come in. And, if they might be hindered to come in before the four months, it might be made a trick to cozen them, *viz.* A. has a judgment, B. sues out a commission, compounds, etc., and takes satisfaction, gets a *supersedeas*, A. could not have execution.

Afterwards, other creditors petitioned the Lord Chancellor, SIR GEORGE JEFFREYS, BARON OF WEM, to take off the *supersedeas*, and to renew the commission, which was much opposed by Mr. Backwell, heir to the alderman, who had after the *supersedeas* granted, and granted at the suit of all the creditors, who petitioned at first for the commission, compounded and agreed with the said first petitioners.

And now, the 8th of November 1687, the Attorney General [*Sawyer*], *Pemberton*, *Holt*, serjeants, Mr. *Finch*, and others argued very earnestly against the granting of the commission:

First, because Alderman Backwell, against whom the commission was first granted, was dead and was not in his life declared a bankrupt;

Second, because, by the death of the king, the commission is determined, as all other commissions are, and, if the Statute *Jacobi*² had not provided otherwise, the commissioners could not have proceeded after the death of the bankrupt, though they had acted or dealt in the commission before the death of the bankrupt, but the Statute provides for that case, but does not provide in case of abatement of the commission by the king’s death, with whom all commissions died also. And they argued much that, by the words in the Statute, *viz.* ‘dealt in’ is meant a proceeding by the commissioners, as *Holt* said, until distribution, as others said, until the party were declared bankrupt.

Lord Chancellor [JEFFREYS]: I am no friend to the commission of bankrupt. It has occasioned much hurt. And he instanced in a case lately before him, wherein the charge and expenses of the commissioners and their attendance came to £400, and the distribution to the creditors [came to] 7s. in the pound; each commissioner claimed 20s. *per diem*, 16s. half a day, etc. But, as to this case, I do renew the commission, for the agreement of the persons who first petitioned for the commission cannot prejudice any other creditor that did or might come in and contribute, yea though there should be but one such creditor for the petition, for the commission is expressly in behalf of themselves and all other creditors, and the commission is so granted and cannot be otherwise, so as the petitioners for the commission are no more concerned than others, or any others that shall come in. And the Statute that gives continuance to the commission when the bankrupt dies makes it all one as if the bankrupt died not, for though he be dead, yet, as to this purpose, he is still living.

Lord Chancellor [JEFFREYS] to *Pemberton*: Suppose Backwell were living and the king dead, might not the commissioners proceed or grant a new commission?

¹ Stat. 13 Eliz. I, c. 7, s. 2 (SR, IV, 539).

² Stat. 1 Jac. I, c. 15, s. 12 (SR, IV, 1034).

Pemberton: Yea, a new commission.

Chancellor [JEFFREYS]: Yes, and proceed where the other left, and their proceedings as effectual as the former or any acting of commissioners. If it be but receiving money for contribution, as they did of some of the new petitioners, [it] is a dealing within the words of the Statute. And *in fine*, he granted the commission.

Note: The *supersedeas* was granted within the time the Statute gives to creditors who did not petition to contribute. And they being now by act of court disabled, may not they after renew?

[Other reports of this case: 1 Eq. Cas. Abr. 52, 21 E.R. 868.]

56

Hodges v. Waddington
(Ch. 1683)

Where a decedent's estate is insolvent, a legatee of an executor who committed waste against the first decedent's estate must refund.

If an executor pays a debt upon a simple contract and the decedent's estate is insolvent, there shall be no refunding to a creditor of a higher nature.

2 Ventris 360, 86 E.R. 485

Easter term 35 Car. II.

The case was thus. An executor wasted the testator's estate. And he made his will, wherein he devised divers of his own goods, and he made his son executor.

Afterwards, a suit was commenced against the son, to bring him to an account for the estate of the first testator, which was wasted. And, depending that suit, the son, after the bill was brought against him by the legatee of his own goods, delivered them to the legatee, and he assented to the legacy. After which, upon the account against the son, it appeared that the first executor had wasted the goods of the first testator to such a value.

And then, the party, at whose suit the said account was and who was to have the benefit thereof, together with the son and executor of the first executor, preferred a bill against a legatee of the goods to make him refund. And he obtained no relief, especially for that he had made the executor plaintiff, who should not be admitted to undo his own assent.

But liberty being given to bring a new bill against the legatee and the said executor, the cause came to hearing.

And it was decreed that the legatee should refund so that one legatee that is paid shall not only refund against another but a legatee shall refund against a creditor of the testator that can charge an executor only in equity, *viz.* upon a wasting by the first executor. But, if an executor pays a debt upon a simple contract, there shall be no refunding to a creditor of a higher nature.

Note also the principal case went upon the insolvency of the executor.

1 Vernon 162, 23 E.R. 388

A., being indebted unto B., makes C. his executor; C. wastes the estate, and dies. And he makes D. his executor, and, by his will, devises several legacies; D. pays the legacies; B. exhibits a bill against D., the executor of C., for his debt due from the first testator and against the legatees in the will of C. to compel them to refund their legacies, there not being now sufficient assets of the first testator.

[It was] decreed that the legatees should refund.

[Other reports of this case: 1 Eq. Cas. Abr. 236, 21 E.R. 1015.]

[Earlier proceedings in this case: 2 Chancery Cases 9, 22 E.R. 821, 79 Selden Soc. 708, 777.]

57

Anonymous
(Ch. 1683)

An answer that merely acknowledges the existence of a document does not admit the contents of that document.

2 Ventris 361, 86 E.R. 486

A bill was brought, setting forth a deed of settlement of lands in trust and to compel the defendant, who was a trustee therein nominated, to execute an estate.

The defendant by answer says that he believed that there was such a deed as in the said bill is set forth etc.

And, upon the hearing, they would have read a deed for the plaintiff, though not proved (but upon a commission taken out only against another defendant to the bill), supposing it to be confessed by the answer.

But the court would not permit the reading of it, for the confessing goes no further than what is set forth in the bill and will not warrant the reading of a deed produced, although it has such clauses in it.

58

Gibbs v. Cotton
(Ch. 1683)

A messenger to arrest a defendant who has not appeared cannot be awarded until after the negligent sheriff has been amerced.

1 Vernon 154, 23 E.R. 382

Eodem die [16 April 1683].

Upon a motion for a messenger upon a *cepi corpus* returned in London, the Lord Keeper [NORTH] said that, now, the granting of a messenger in such a case was become the ordinary process of the court, and it might be necessary for expedition. But he must take care that the king might not lose his amercements, and, therefore, for the future, no messenger should go until the sheriff was amerced.

But it was answered that would occasion great delay, for that the sheriff could not be amerced

but in term time.

59

Ex parte Wright
(Ch. 1683)

The Court of Chancery cannot determine that a lunatic has become sane, but a court of common law and a common law jury, upon an issue and evidence, can do so.

1 Vernon 155, 23 E.R. 382

Eodem die [16 April 1683].

A motion was made that a man [Sir Benjamin Wright] who was found to be a lunatic, being now by his confinement become of sound mind, might be inspected, and might make a settlement of his estate.

But the Lord Keeper [NORTH] refused to make any order in it. But he directed them that, if he made any settlement of his estate, the same should be done before the Justices of the Common Pleas by a fine that so they might examine him and inspect him. And he directed that, forasmuch as now he was found a lunatic on record, they should reply to it that he was now restored to his understanding so that an issue might be taken upon it and tried in the Common Pleas.

60

Town of Nottingham's Case
(Ch. 1683)

A scire facias cannot be brought in order to defeat a pending action of quo warranto.

1 Vernon 155, 23 E.R. 383

27 April 1683.

The corporation being divided into parties, one party surrendered the old charter, and took a new one. The other party would stand and fall by their old charter, and brought a *scire facias* to repeal this new charter, upon which the old sheriffs returned *scire feci*, and the return was filed.

And, now, it was moved by Mr. Attorney General [*Sawyer*] that this return might not be received, for that were to admit that the old charter was in being, contrary to the surrender and new charter, which were both remaining on record in this court.

But it was answered that the objection of prejudice was equal on both sides, but with this that it was impossible this return should be made by the new sheriffs, for they are defendants, and they cannot return they had served themselves. And Mr. Attorney [General] has admitted that the old sheriffs are the sheriffs in possession by his bringing a *quo warranto* against them. And this being purely a question of right and the return that is to be made being only whether they had notice or not, they cannot be injured by it. If they have not legal notice, they may plead it, and it will that way avail them. And, now, they move too late, this return being already regularly filed in court, and to damn it now were to determine the merits of the cause upon this motion.

The Lord Keeper [NORTH] was of opinion that the court, in such a case as this, ought not to interpose. But he gave Mr. Attorney General [*Sawyer*] a fortnight's time to speak to it. But he said, whereas the king has a *quo warranto* depending against them, if the parties who were against the new charter meant to outrun the king's action, he thought that ought not to be suffered. And it was a strange proceeding and without precedent that was used in the Duke of Buckingham's Case, *viz.*, pending the king's suit, to convict his witnesses of conspiracy.

Lady Poines's Case
(Ch. 1683)

A suit in equity does not lie to quiet the possession of a defendant.

1 Vernon 156, 23 E.R. 383

Eodem die [27 April 1683].

The Lady Poines's trustee having contracted to sell her estate to one person and she herself having actually sold it to another, this trustee disturbed the purchaser in his possession. And it was now moved for an injunction to quiet the possession of the purchaser.

But it was answered that such a motion never was made to have an injunction to quiet the possession for a defendant who had no bill in court and that, before the cause was heard, an injunction for quieting the possession is only grantable where the plaintiff has been in possession for the space of three years before the bill was exhibited upon a title yet undetermined or in case the cause has been heard and judgment passed upon the merits of the cause by the court.

And, therefore, the Lord Keeper [NORTH] denied the motion.

[Other reports of this case: 1 Eq. Cas. Abr. 284, 21 E.R. 1048.]

Earl Craven v. Widdows
(Ch. 1683)

Contracts between partners cannot bind any of their creditors, but only the partners themselves are bound.

Where two partners both become bankrupt, the creditors of the partnership have priority over the separate creditors of each partner.

2 Chancery Cases 139, 22 E.R. 884

27 April [1683].

Two partners in trade put in each an equal stock, and agreed by covenant that the stock should pay the debts of the stock and neither of their separate debts should charge the stock, but only his own estate, or to that effect. They both became bankrupts. And a commission went against them both. One of them owed separately more than the other.

The question was between separate creditors of each bankrupt and the creditors on account of the joint stock, for these would exclude the separate creditors to charge the joint stock, but that it should satisfy the stock debts.

But the opinion of the LORD NORTH was *e contra*, for the covenant of the partners cannot bind any of their creditors, but only themselves.

Quaere how the separate creditors could have other title than those under whom they claim.

Dicitur that, if one defendant cannot be found to serve process on him, if process be against him until sequestration and he shall not appear, you proceed against the rest, as when one is outlawed at common law.

2 Chancery Reports 226, 21 E.R. 664

Earl Craven v. Knight.

The bill is that the defendant, George Widdows, being indebted to the plaintiffs, became bound to them in several bonds. And the said Widdows and the defendant Berman, for several years past were co-partners. And Widdows, by articles of co-partnership, was entitled to two-thirds of the whole stock, and the defendant Berman to one-third. The said Widdows and Berman, the 25th of August last, became bankrupts, and a commission of bankruptcy being awarded against them, the commissioners assigned all the estate of the said bankrupts to the defendant Wright and others. And they refuse to let the plaintiffs, creditors of the bankrupts, to come in, and intend to divide the said estate amongst the joint creditors of the bankrupts, by reason whereof, the plaintiffs' debts will be utterly lost.

The defendants insist it was agreed by indenture of co-partnership that all such debts as should be owing on the joint account should be paid out of the joint stocks and, at the end of the partnership, each co-partner should take and receive to his own use his share of joint stock and the joint stock and trade should not be charged with the private or particular debts of either of the said partners, but that each should pay their private debts out of their particular estate, not included in the said joint stock. If both the said partners should be living at the end of the first three years of the six years, the said Berman should come in as a joint partner accordingly. And, during the joint trade, the said co-partners became jointly indebted to the other defendants, Wright etc., in £6000, and Widdows became indebted to the plaintiff as aforesaid, without the consent of Berman. And the monies due on the said bonds were not brought into the account of that joint stock. And the said Widdows was only a surety, and received none of the money.

And the defendants insist that the joint creditors ought to be first paid out of the estate in partnership and that the commissioners have no power to grant the joint estate to pay the plaintiffs, they being separate creditors of Widdows. And, if a surplus of the joint estate after the joint creditors be paid, then the plaintiffs can have but a joint moiety of such surplus towards their satisfaction, the said Berman's moiety being not liable to pay the said Widdows' separate debts. And the debts then claimed were the proper debts of the said Widdows. And, after all the joint debts are paid, there will be an overplus, so that thereby the said Berman will be discharged, and have money paid to him. But, if the plaintiffs and other separate creditors of Widdows be admitted to the joint estate, there will not be sufficient [assets] to pay the joint creditors; so, thereby, not only Berman's estate will be applied to pay Widdows' debts, but it will be liable to the joint creditors. There can be no division of the joint estate whereby to charge any part thereof with the private debts of either party. And, until the joint debts are paid and until a division be made of the surplus, both parties are alike interested and every part of the said joint estate. The commissioners have no power by the commission to administer an oath to the plaintiffs for proof of their debts, they claiming debts from the said Widdows only. And the commission is against Widdows and Berman jointly, and not severally, and, therefore, cannot admit of the plaintiffs' creditors.

This court declared that the estate, belonging to the joint trade as also the debts due from the same, ought to be divided into moieties and that each moiety of the estate ought to be charged in the first place with a moiety of the said joint debts, and, if there be enough to pay all the debts belonging to the joint trade with an overplus, then such overplus ought to be applied to pay the particular debts of each partner. But, if sufficient [assets] shall not appear to pay all the joint debts and if either of the partners shall pay more than a moiety of the joint debts, then such partner is to come in before the said commissioners, and be admitted as a creditor for what he shall so pay over and above his moiety. And he decreed accordingly.

[Other reports of this case: 1 Eq. Cas. Abr. 55, 21 E.R. 870.]

[Reg. Lib. 34 Car. II, f. 732.]

Brown v. Brown
(Ch. 1683)

In the absence of fraud or excessive damages, an arbitral award will not be set aside.

2 Chancery Cases 140, 22 E.R. 885

30 April 1683.

The plaintiff was tenant for life, the remainder in tail to his first, second, etc., sons, the remainder to the defendant in tail. The plaintiff, having no son, committed waste. The defendant brought his action for the waste, and, at the *nisi prius*, by consent of the parties and rule of court, the matter was referred to two of the jury to make their award by Michaelmas, on defect of an award, then to Ballard, an umpire. No arbitrament being made, the umpire made his award and awarded £348 damages.

The plaintiff exhibited his bill to be relieved against the award. And for equity, he alleged:

First, excessiveness in the damages;

Secondly, the misdemeanor in the umpire, that he had declared before the umpirage made that he would not meddle in the matter, and, after the umpirage was made, declared that he made his umpirage for fear he should be arrested, whence his counsel inferred that he had been menaced;

Lastly, that, after the submission, the plaintiff had repaired the premises, and proved the repairs were made, and that 40s. would perfect the repairs.

And, therefore, he prayed a new trial.

The defendant insisted that the umpirage ought not to be set aside without fraud or partiality proved, that his saying he would not meddle in the business was in August before the time he was to make his umpirage, as the truth was, and the defendant had notice given him by the umpire to attend, which he did not, so that the umpire had no notice of the reparations, and, if he had, it was not material to avoid the award.

The Lord Keeper [NORTH] dismissed the bill.

1 Vernon 157, 23 E.R. 384

30 April 1683.

Sir Anthony Brown, being tenant for life, remainder to his first and other sons in tail, remainder in tail to the defendant of some mills and houses of about £70 *per annum* and having no issue, suffered the mills and houses to go greatly out of repair. And it was computed that the reparations would amount unto £380 or thereabouts. Hereupon Brown, the remainderman, brings an action of waste at law. When the cause came to be tried at the assizes, there was a proposition made for a reference to arbitrators and umpire, and it was accepted by the parties. And, by consent, it was made a rule of court. Afterwards and before the award was made, Sir Anthony Brown repairs all the waste within 40s.,¹ and forbids the arbitrators to make any award, who thereupon forbore, and he likewise forbids the umpire, but he, notwithstanding, made his award that Sir Anthony Brown should pay the defendant £380.

The plaintiff's bill was to be relieved against this award.

And, for the plaintiff, it was insisted that it was a bold thing of an arbitrator or umpire to make an award after he had been forbidden by the party. And they said it was a rule here that no award

¹ Raithby's note: This does not appear in the Register's Book; all that appears is a statement in the bill 'that, before the said award was made, the plaintiff put the premises into very good and tenantable repair and better than they were when the plaintiff entered'.

should stand where the arbitrator or umpire refused to hear the party. And they endeavored to make it out that the umpire had so done in this case.

But their proof amounted to no more than that the umpire had said he was so well satisfied as to the value of the repairs that the plaintiff might bring what witnesses he would he should not believe them, he having viewed the repairs himself.

Then, they insisted that the damages in this case were very outrageous, the repairs being made good within 40s. before the award made. And the umpire being a carpenter, they compared it to the Butcher of Croydon's Case,¹ who had awarded a man that had been called a bankrupt knave £300 to repair his honor, as he expressed it in his award. And it was said that, in this case, the defendant had but a remote remainder after an estate tail, and yet he had as much damages given him as if he were to come immediately into the estate.

For the defendant, it was insisted that this was an award made in pursuance of a rule of court and the whole matter had been examined in the Common Pleas and, when they were at the wall there and under an attachment for not performing of the award, then they come with a bill here, and get an injunction, whereas it is not usual to stay proceedings on an attachment in another court, and that here was no fraud or collusion in the making of this award and that is necessary to the avoiding of it in equity. And they conceived the damages were not outrageous, for the umpire might have given the treble value.

And, as to the objection that the defendant had only a remote remainder after an estate tail, it was answered by Serjeant *Maynard* that the damages were not to be considered in proportion to the man's estate who is to have them but proportional to the damage done the inheritance. And he said, if awards must be set aside on such slight pretenses, they had as good strike that title out of the books. And he cited the Case of Robins and Grantham, where there was a plain mistake of £250 and yet the party could not get any relief against the award, and the Case of Crab and Fenton.

After long debate, the Lord Keeper [NORTH] dismissed the bill, saying he saw no fraud or collusion in the matter and the damages were not outrageous. He might have awarded the treble value, although it is true, as was objected by the plaintiff's counsel, £380 is near the value of an estate for life of £70 *per annum*. He said, where there appears a manifest error in the body of an award, there, in some cases, there may be relief against it in Chancery. But where the error does not appear without the unravelling of it and examination to matters of account, he thought it was not relievable here.

Note, in this case, the umpire himself, though excepted to, was read as a witness.

[Raithby's note: He was made a defendant. Reg. Lib. 1682 A, f. 702. But he might nevertheless be a witness.]

[Other reports of this case: 1 Eq. Cas. Abr. 50, 225, 21 E.R. 866, 1007.]

¹ *Cooper v. Anonymous* (c. 1671), 3 Chancery Reports 76, 21 E.R. 733, 1 Eq. Cas. Abr. 50, 21 E.R. 866.

Hollis v. Edwards
Deane v. Izard
(Ch. 1683)

A court of equity cannot specifically enforce an oral contract for the conveyance of land, but it can grant damages for the non-performance of an oral contract.

1 Vernon 159, 23 E.R. 385

1 May 1683.

In these cases, bills were exhibited to have an execution of parol agreements touching leases of houses. And they set forth that, in confidence of these agreements, the plaintiffs had expended great sums of money in and about the premises, and had laid the agreement to be that it was agreed the agreements should be reduced into writing.

The defendants pleaded the Statute of Frauds and Perjuries.¹

For the plaintiffs, it was insisted on the saving in the Act of Parliament, *viz.* unless the agreement were to be performed within the space of a year.

But it was answered that clause did not extend to any agreement concerning lands or tenements.

Then it was insisted for the plaintiffs that, undoubtedly, they had a clear equity to be restored to the consideration they had paid and to the money which they, in confidence of the agreement, had expended on the premises.

As touching that matter, it was said by the Lord Keeper [NORTH] that there was a difference to be taken where the money was laid out for necessary repairs or lasting improvements and where it was laid out for fancy or humor. And he thought clearly the bill would hold so far as to be restored to the consideration. But he said the difficulty that arose upon the Act of Parliament in this case was that the Act makes void the estate, but does not say the agreement itself shall be void. And, therefore, though the estate itself is void, yet possibly the agreement may subsist so that a man may recover damages at law for the non-performance of it. And, if so, he should not doubt to decree it in equity. And, therefore, he directed that the plaintiffs should declare at law upon the agreement and the defendants were to admit it so as to bring that point for judgment at law, and, then, he would consider what was further to be done in this case.

[Raithby's note: The defendants were to put in their answer as to the agreement and the circumstances thereof before the 9th of May. Reg. Lib. 1682 A, f. 497. Such answer was accordingly put in and decreed, and, then, the plaintiff was ordered to establish the agreement at law, where he afterwards became nonsuit. Reg. Lib. 1682 A, f. 669. The bill was afterwards, 17th June, dismissed without costs, but the defendants to be at liberty to pursue their costs at law, as they should be advised. Reg. Lib. 1683 A, f. 603.]

[Other reports of this case: 1 Eq. Cas. Abr. 19, 21 E.R. 841.]

¹ Stat. 29 Car. II, c. 3 (SR, V, 839-842).

Lady Dacres v. Chute
(Ch. 1683)

When enforcing an account, a court of equity can find as a question of fact whether interest is due on the account or not.

Court costs are recoverable along with and in addition to the amount of the decree.

Court costs when taxed are recoverable out of the assets of a decedent's estate.

Interest accrues on unpaid court costs after they have been taxed.

1 Vernon 160, 23 E.R. 387

Eodem die [1 May 1683].

The Lady Dacres, by an agreement made on her marriage with the defendant's grandfather, was to have a jointure of £500 *per annum* or £5000 in money. She elected the £5000 in money, and had a decree for it and the sequestration of the defendant's lands and a writ of assistance to put her in possession. And a decree was made against the defendant, then an infant, for maintenance to be allowed his younger brothers and sisters. And this was to be paid out of the sequestered estate.

Upon an appeal, the House of Lords reversed this decree as to the maintenance, which had been paid to the Lady Dacres and which she had applied to the maintenance of the children. And, now, the cause came back to the court to have the account taken of what the lady, her agents, or any under her had received out of this estate.

The Lord Keeper [NORTH], upon the account, allowed the principal sums paid for maintenance towards the sinking of the Lady Dacres's debt, but would not let them be applied at the time they were paid, but in one entire sum at the end of the account. And so he struck off all the interest for above sixteen years, which came to more than the principal, saying that this was a hard case and damages were in the power of the court.

In this case, the sequestrators had power by order of the court to fell timber. And it appeared by proof in the cause that the real value of the timber taken by them off this estate amounted unto £7000 and but £2000 had been brought to account. And forasmuch as it did not appear that the Lady Dacres had received more than £2000 on account of the timber, the Lord Keeper [NORTH] would not charge her further, saying the sequestrators were the officers and agents of the court and men must take care to pay their debts at their peril, though the defendant was all this time an infant.

[Raithby's note: Reg. Lib. 1682 A, f. 861. But this point as to sequestrators does not appear. It came on upon exceptions to the Master's report, for that, in taking the account, the Master ought to have charged the plaintiff with a sum of £5570 for timber cut from the estate in question, over and above the sum of £1680 allowed upon the said account, as paid the plaintiff by one Owen, his agent. But, it appearing to the court that the proofs of the defendant were extravagant, representing values and estimates made long after the wood was disposed of and upon the memory and opinion of witnesses, as well as their credit, and, therefore, could not be set in the balance with accounts taken at the time and it not appearing that there was any fraud or underselling nor any more money received than was placed to account, neither was Owen the plaintiff's agent in the management of the woods, but the guardian of the infant defendant might have allowed his account, whether the plaintiff would or no, and in case there had been any overvalue or mismanagement which had not appeared, Owen ought to be therefore chargeable, and not the plaintiff, the exception was overruled.]

2 Chancery Reports 245, 21 E.R. 669

The matter controverted is touching costs. The plaintiff had a decree 15 Car. II [1663-64]

against the defendant's father, deceased, and the plaintiff should have her costs of that suit. And, the said costs being taxed, they became part of that decree, as much as if they had been named in the decree in certainty.

The defendant insisted that, upon the first hearing, costs were only reserved until after the report and, upon hearing exceptions to that report, nothing was said touching costs. But, in the order confirming the last report in that cause, costs are directed to be taxed, but the defendant's father by name was to pay them, and, by the decree, as it is enrolled, the reversion of the lands in question was directed to stand charged with the debts and damages, but not with the costs. And the costs were given as a personal thing, and died with the defendant's said father, and cannot affect the said estate which was the grandfather's. And the plaintiff could not have revived her suit for the costs alone.

This court declared that, though it may be true that a suit cannot be revived for costs alone, where there is no duty decreed because it is the laches of the party not to get them taxed where there is nothing else in demand. Yet, when there is a duty decreed and costs awarded by the same decree which is signed and enrolled in the life[time] of the party, it would be unreasonable that, by the defendant's delaying the account, the costs should be lost, which could not properly be taxed until the final decree and when the charge of suit is at an end.

And this court further declared that the costs when taxed may be recovered out of the assets, as in the case of heirs and executors at the common law. And this court looks upon the wording of the decree in that manner to proceed from the difference between the debt and costs, the debt not being chargeable upon the person at all and the costs chargeable upon the person as well as the assets. And it were unjust to expound the decree by charging the person to discharge the assets from payment of costs to which they are naturally chargeable unless they have been paid by the defendant's father.

This court, therefore, thought fit that the costs from the time that they were taxed should carry interest and charge the assets by descent. And the court ordered the account to be taken by the Master accordingly.

[Other reports of this case: 1 Eq. Cas. Abr. 352, 21 E.R. 1097.]

[Reg. Lib. 34 Car. II, f. 861.]

[Earlier proceedings in this case: 3 Chancery Reports 6, 21 E.R. 711, 2 Chancery Cases 21, 29, 104, 22 E.R. 673, 677, 867, 1 Eq. Cas. Abr. 29, 21 E.R. 850.]

66

Twisden v. Wise
(Ch. 1683)

Where a trustee holds money for a married woman's use and her husband dies, not having made any disposition of this fund, the money goes to the widow and not to the husband's executor.

1 Vernon 161, 23 E.R. 387

4 May 1683. In Court, Lord Keeper.

Moneys were left in trustees' hands for the benefit of a married woman, and the husband dies. The question was whether the wife or the executor of the husband should have it.

And it was decreed for the wife, the husband having made no particular disposition of it.

[Other reports of this case: 1 Eq. Cas. Abr. 68, 21 E.R. 881.]

67

Alam v. Jourdan
(Ch. 1683)

Where a defendant puts in an answer under oath, this is testimony that cannot be contradicted by the plaintiff except by the evidence of two witnesses.

1 Vernon 161, 23 E.R. 387

There being but one witness against the defendant's answer, the plaintiff could have no decree.

[Other reports of this case: 1 Eq. Cas. Abr. 229, 21 E.R. 1010.]

68

The Pewterers' Company v. The Governors of Christ's Hospital
(Ch. 1683)

A court of equity will grant relief against a perpetuity, even where there is a gift over to a charity.

1 Vernon 161, 23 E.R. 388

Eodem die [4 May 1683].

A man devises land to one and the heirs of his body, but, if he should go about to alien, that, then, his estate should cease, and, from and after the determination of his estate, then he devised the lands to Christ's Hospital.

The question was if the limitation to Christ's Hospital was good.

It was admitted that this restraint of alienation tended to a perpetuity, and was, therefore, void. But the fact being that the estate tail was spent by effluxion and the donee being now dead without issue, the charity ought to take place and the limitation was good.

But the Lord Keeper [NORTH] decreed against the charity, and said that this was an invention taken up about the time that this will was made to create a perpetuity, thinking that, by limiting an estate over to a charity, the law would be so careful to preserve the charity that it would allow of such a limitation and admit that advantage might be taken of a forfeiture in the case of a charity, which it would not do in the case of a private person. And the intention of the testator plainly appearing to be to create a perpetuity, the limitation was adjudged void.

69

Baily v. Cotton
(Ch. 1683)

A devise of a rent out of a parcel of land precludes a resulting trust of that same land.

2 Chancery Cases 140, 22 E.R. 885

13 May 1683.

Bemble, seised in fee, conveyed the lands to the defendant for 1000 years, in trust, that, whereas divers suits and controversies were touching the lands, that the defendant should defend the suits (note, he was tenant of the land then and before to the plaintiff) and title with the profits and yield yearly accounts to Bemble of all the profits, and pay to him, his executors, and administrators the surplus of what he should not expend, and should pay an annual sum after his death to the plaintiff and another annual sum to another. And he died.

The plaintiff was his cousin and heir, and sued for an account and for the lands in regard that a trust resulted to the heir after the expressed trusts were performed.

The Lord Keeper [NORTH] dismissed the bill.

And yet, from the state of the case *supra*, it appears that Bemble's executors and administrators were entitled to have an account of the surplus in the defendant's hands, and, consequently, a bill might well be brought by the executor or administrator for such surplus. But the bill here is brought by Bemble's heir and legatee, and the testator having devised to him an annual sum etc., seems plainly to exclude him from all title to the real estate, and the heir is only to be preferred where the testator's intent is doubtful, as 1 Chan. C. 7, etc. *Sed vide ante* 1, 4, 59, 69.¹

70

Duke of Norfolk v. Howard
(Ch. 1683)

A contingent interest in land that does not vest within a reasonably short time period of time is void ab initio.

1 Vernon 163, 23 E.R. 388

15 May 1683.

The matter now coming on to be argued on a bill of review to reverse the decree made in this cause by the late Lord Chancellor [Lord Nottingham], errors assigned upon a demurrer were:

First, that it does not appear there was an attornment to him that made the settlement;

Secondly, that the now plaintiff ought not to be accountable for the profits longer than he received the same;

Thirdly, that, at the pronouncing of the said decree, the Chancellor was assisted with three judges, who were of opinion against the decree;

Fourthly, that the limitation of the term over unto the defendant Charles Howard was void.

But the only error insisted on was the fourth, *viz.* that the limitation of the term over was void.

The Lord Keeper [NORTH] said that, at the time of the pronouncing of the former decree, his opinion was against the decree and that he had considered of it since, and could not find any reason to alter his opinion, and, therefore, he told them plainly that this cause came before him with some prejudice, unless they could by new matter or new reasons convince him. And, therefore, he did propose that the plaintiff should admit the trust of the term to be an estate at law executed to the same uses and that they should try their title in an [action of] ejectment at law. But the defendant's counsel declined it, and insisted their case was much stronger in equity than it was at law and they relied much upon the trust of a term to be different from the limitation of a term at law.

The plaintiff's counsel argued much to the same effect as formerly. And he relied upon the Case of Child and Bailey and Burges and Burges.²

The Lord Keeper [NORTH] declared he saw no reason to change his former opinion. He said

¹ *Goring v. Bickerstaff* (1662), 1 Chancery Cases 4, 22 E.R. 665, also 2 Freeman 163, 22 E.R. 1132, Pollexfen 31, 86 E.R. 502; *Copleston v. Boxwell* (1660), 1 Chancery Cases 1, 22 E.R. 664; *Rand v. Cartwright* (1664), 1 Chancery Cases 59, 22 E.R. 694, also Nelson 101, 21 E.R. 800; *Sherly v. Fagg* (1665), 1 Chancery Cases 68, 22 E.R. 699.

² *Child v. Bayley* (1623), Palmer 48, 333, 81 E.R. 972, 1109, W. Jones 15, 82 E.R. 9, Croke Jac. 459, 79 E.R. 393, 1 Eq. Cas. Abr. 192, 21 E.R. 982, 2 Rolle Rep. 129, 81 E.R. 704, 1 Rolle, Abr., *Devise*, pl. L, 5, p. 612; *Burges v. Burges* (1673-1674), Pollexfen 40, 86 E.R. 505, Reports *tempore* Finch 91, 23 E.R. 49, 1 Chancery Cases 229, 22 E.R. 775, 73 Selden Soc. 43.

the late Lord Chancellor [Lord Nottingham] declared upon the hearing of this cause that the trust of a term was to be governed by the same rules as the limitation or devise of a term at law was. And, therefore, he thought he was unreasonably pressed by the defendant's counsel, who insisted on the equity of the case and would make a difference between the limitation of the trust of a term and a devise of a term or limitation of a term itself. A perpetuity is a thing odious in law and destructive to the commonwealth. It would put a stop to commerce, and prevent the circulation of the riches of the kingdom. And, therefore, it is not to be countenanced in equity. If, in equity, you should come nearer to a perpetuity than the rules of common law would admit, all men, being desirous to continue their estates in their families, would settle their estates by way of trust, which might indeed make well for the jurisdiction of the court, but would be destructive to the commonwealth. And the intention of a man is not always to be pursued in equity, as in the case put by Mr. Serjeant Maynard. If a man settles a term in trust for one and his heirs, it shall go to the executor. And he remembered at the last hearing it was said that My Lord Bridgeman directed this conveyance, and his name was urged [in order] to give an authority to the case. But he said this conveyance, whoever drew it, was certainly a very inartificial conveyance, for, first, if the words 'heirs male' had been left out, it would have been good. Secondly, if there had been a new term created, it would have been good. Thirdly, as this term is limited, if the honor of Graystock had not descended to the present duke himself, but to his issue, then this provision for the defendant had been out of doors. Fourthly, the limitation to all the several sons in tail, the one after the other, was certainly inartificial. And he said it was an hard case, but the rules of law must be observed. And he ordered the former decree to be reversed.

Note this decree was reversed in the House of Lords, the 19th June 1685, and the former decree of the Lord Nottingham was affirmed.

[Raithby's note: Afterwards, May 18, this matter came on again, the defendants insisting that they ought to have been heard by answer before the former decree was reversed. But the court considered it as mere delay and to continue in the possession of the said barony by the rents and profits of which they had received large sums of money, which ought to be repaid to the plaintiffs, and ordered that the plaintiffs be at liberty to proceed as they should be advised, and, in the meantime, awarded a writ or writs of restitution to be directed to the sheriff for the putting and keeping the plaintiffs in the quiet possession of the barony of Graystock and other the lands and premises in question. Reg. Lib. 1682 A, f. 517.]

2 Chancery Reports 229, 21 E.R. 665

Howard v. Duke of Norfolk.

The plaintiff, by his bill, seeks to have execution of a trust of a term of 200 years of the Barony of Grostock. The case was this. The earl of Arundel, the duke of Norfolk's father, by lease and release *anno* 1647, settled the Barony of Grostock and other lands to himself for life, then to the Countess Elizabeth, his wife, for life, and, after her decease, there is a term limited to the Lord Dorchester and other trustees for 200 years under a trust to be declared in a deed of the same date with the release. And the limitation of the inheritance after the term of 200 years is, first, to Henry Howard, now duke of Norfolk, and the heirs of his body, then to Mr. Charles Howard, the now plaintiff, brother of the said Henry, and so to all his brothers successively in tail male, remainder over. Then, by the said other deed, the earl declares the trust of the term of 200 years, and that deed, in the reciting part, declares that it was intended the said term should attend the inheritance and the profits should go to such persons and in such manner as was therein after limited, *viz.* to Henry Howard, now duke of Norfolk, and the heirs male of his body, so long as Lord Thomas, Lord Maltrevers, eldest son of the said earl of Arundel or any issue male of his body should be living. But, in case he should die without issue male in the lifetime of Henry Howard, not leaving his wife enceinte with a son or, in case, after the death of Thomas without issue male, the honor of the earldom of Arundel should descend to Henry Howard, then Henry Howard and his heirs to be excluded of the trust, and then it should be to Charles, the plaintiff, and the heirs male of his body,

remainder in like manner to other brothers. After this, the contingency does happen, for Thomas, duke of Norfolk dies without issue, and the earldom of Arundel, as well as the dukedom of Norfolk, descended to Henry, now duke of Norfolk, by Thomas's death without issue. Presently, upon this, the marquess of Dorchester, the surviving trustee, assigns the term to one Marriott; he assigns it to the now duke of Norfolk, and the duke suffers a recovery to the use of him and his heirs. And the plaintiff's bill is to have execution of the trust of this term to the use of himself and his heirs male of his body.

The defendants' insist that, by the assignment by Marriott to My Lord Duke Henry, the term was surrendered, and quite gone. The common recovery which barred the remainders which the other brothers had would also be a bar to the trust of this term and that the trust of a term to Henry and the heirs male of his body until by the death of Thomas without issue the earldom should descend upon him, and, after that, to Charles and the heirs male of his body was a void limitation of the remainder to Charles.

The plaintiff insists, though the term by the survivor is gone and merged in the inheritance, yet the trust of that term remains in equity, that this is not a term that attends the inheritance, but it is a term in gross and so not barred by the recovery, and that the limitation of the remainder in contingency is good in law, and relief ought to be had in this court.

The Lord Chancellor Nottingham, the case being of great consequence, calls the judges to his assistance, *viz.* the Lord Chief Justice Pemberton, the Lord Chief Justice North, and the Lord Chief Baron Montagu. And they made one single point in the case, whether this contingent trust of a term limited to the plaintiff Charles and the heirs of his body upon the dying of Thomas without issue male, whereby the honor did descend to Henry be good in point of creation and limitation, for, as for the recovery, if this be not a good limitation in point of creation, the recovery will do nothing, so that supposes it to go along with the inheritance. And, if this take effect, then it will suffer no prejudice by the recovery. And, as for the assignment by Marriott to the duke, if this court decree it for the plaintiff, then it is a breach of trust, and then he must answer for it, and so must the duke, for it is a surrender to a person who had notice of the trust. If, for the defendant, then it is of no weight. So the whole rests upon the first single point, *viz.* whether it be a good limitation upon the contingency to Charles or, as they call it, a springing trust. And the said three judges were all of opinion that it was a void limitation and that it ought to be decreed for the defendant.

They said there is great difference as to the limitation of terms that are in gross and terms that attend the inheritance. As to terms in gross, they are not capable of limitation to one after the death of another without issue. But, in terms attendant upon an inheritance, there may be such a limitation if the inheritance be so limited, and not else. Now, the term is capable of a limitation to Henry and the heirs male of his body and, for want of such issue, to Charles and the heirs male of his body, because it has an inheritance to support it. But, now, to put another limitation upon it, that, upon the dying of Thomas without issue, whereby the earldom shall descend, this shall go over to Charles, that cannot be, for it has no freehold to support it, and so it is a term in gross. Further, there cannot, by the rules of law or equity, be a remainder for years of a term limited after an estate tail, neither directly nor upon a contingency, as in Burges's Case. But the law will allow a remainder directly upon an estate for life; so likewise upon a contingency if that were to happen during the continuance of the particular estate. But this case is a step further and not to be allowed.

They relied chiefly upon Child and Baylies's Case, which was put thus by Chief Baron Montagu. [It was] a devise by A. of a term to William, his eldest son, and he assigns and, if he die without issue, then to Thomas, his youngest son. It was judged in the Exchequer Chamber to be a void remainder because, thereby, a perpetuity would ensue, though it was argued in that case that it was given upon a contingency to the younger son, which would soon be determined and end in a short time. Chief Baron Montagu put this for law, a term may be limited to one and the heirs male of his body upon a contingency to happen first with a limitation over; if that contingency do not happen, it is a good limitation, as if a term be limited to the wife for life and then to the eldest son if he overlive his mother and the heirs male of his body, the remainder over to a younger son; if the eldest son die in the life of the mother, the limitation to the second son may be good. But, if there

be an instant estate tail created of a term, though there be a contingency as to the expectation of him in remainder, yet this is such a total disposition of a term, as, after which, no limitation of a term can be. And so the judges were of opinion that the plaintiff had no right to the term, but the decree ought to be for the defendant.

The Lord Chancellor Nottingham differed from the judges and decreed for the plaintiff. He put some steps or preliminaries, which he agreed with them and which were clear:

First, that the term in question, though it were attendant on the inheritance at first, yet, upon the happening of the contingency, it is become a term in gross;

Second, that the trust of a term in gross can be limited no otherwise in equity than the estate of a term in gross can be limited in law;

Third, the legal estate of a term for years, whether it be a long or a short term, cannot be limited to any man in tail, with the remainder over to another after his death without issue; this is a direct perpetuity;

Fourth, if a term be limited to a man and his issue and, if that issue die without issue, the remainder over, the issue of that issue takes no estate; and yet, because the remainder over cannot take place until the issue of that issue fail, that remainder is void too; *Reeve's Case*;

Fifth, if a term be limited to a man for his life and, after, to his first, second, and third son in tail successively and, for default of such issue, the remainder over, though the contingency never happen, yet the remainder is void, though there were never a son born to him; that looks like a perpetuity; *Sir William Buckhurst's Case*;¹

Sixth, one case more and that is *Burges's Case*, a term is limited to one for life, with contingent remainders to his sons in tail, with a remainder over to his daughter; though he had no son, yet, because it was foreign and distant to expect a remainder after the death of a son to be born without issue, that, having a prospect of a perpetuity, was adjudged void;

Seventh, if a term be devised or a trust of a term limited to one for life, with twenty remainders for life successively, and all the persons *in esse* at the time of such limitation, these are all good remainders.

Eighth, a term is devised to one for eighteen years, after, to C., his eldest son, for life, and then to the eldest issue male of C. for life, though C. had not any issue male at the time of the devise or the death of the devisor, but, before the death of C., it is good, being a contingency that would speedily be worn out, *Cotton and Heath's Case*,² for there may be a possibility upon a possibility and a contingency upon a contingency, and, in truth, every executory devise is so, and, therefore, the contrary rule given by Lord Popham in the *Rector of Chedington's Case*³ is not reason.

These things were agreed by all.

But the point is the trust of a term for 200 years is limited to Henry in tail, provided, if Thomas die without issue in the life of Henry, so that the earldom shall descend upon Henry, then, to go to Charles in tail, and whether this be a limitation to Charles in tail is the question.

My Lord Chancellor [Lord Nottingham] conceived it a good limitation as a springing trust to arise upon a contingency and which is not of a remote or long consideration.

As for the legal reasons of this opinion, they were these.

First, many men have no estates but what consist in leases for years. Now, it would be absurd to say that he who has no other estate than what consists in leases for years should be incapable to

¹ *Lord Buckhurst v. Fenner* (1598), 1 Coke Rep. 1, 76 E.R. 1, Moore K.B. 488, 72 E.R. 713, 2 Anderson 118, 123 E.R. 576, Tothill 141, 21 E.R. 148, 117 Selden Soc. 155, 221.

² *Cotton v. Heath* (1638), Pollexfen 26, 86 E.R. 500, 1 Eq. Cas. Abr. 191, 21 E.R. 982, Chancery Repts. *tempore* Coventry 287.

³ *Lloyd, ex dem. Roberts v. Wilkinson* (1598), 1 Coke Rep. 153, 76 E.R. 343, 140 Selden Soc. 951, Moore K.B. 478, 72 E.R. 707.

provide for the contingencies of his own family, though they are directly in his immediate prospect, he shall not make provisions for a wife and children upon marriage.

Second, it was the opinion of the Lord Chief Justice Pemberton that, had it been thus penned, it had been good. If Thomas die without issue male living, Henry, so that the earldom descend upon Henry, then the 200 years limited to him and his issue shall cease, but, then, a new term of 200 years shall arise and be limited to the same trustees for the benefit of Charles in tail. Now, what difference is there why a man may not raise a new springing trust upon the same term as well as a new springing term upon the same trust? It is true, in 6 Edw. VI in the time of Lord Chancellor Rich, all the judges delivered their opinion, if a term of years be devised to one, provided if the devisee die, living J.S., then to go to J.S. is absolutely void. But, in 19 Eliz. Dyer fo. 277, 328,¹ it was held by the judges to be a good remainder, and that was the first time that an executory remainder of a term was held to be good. As for Child and Bayles's Case, the case is truly reported by Crook, a term of seventy years is devised to Dorothy for life, then to William and his assigns all the rest of the term, provided that, if William die without issue living at the time of his death, then to Thomas, which is in effect the present case. But there was more in it. William had the whole term to him and his assigns. Dorothy was executrix, and she granted the lease to William. And the record goes further, after the death of Thomas without issue, it was to go to the daughter, which was a plain affectation of a perpetuity. But, however, this case is contradicted by other resolutions, Cotton and Heath, before cited, and Wood and Sanders, in this court, which was this, a long lease is limited and declared thus, to the father for sixty years, if he lived so long, then to the mother for sixty years, if she lived so long, then to John and his executors if he survived his father and mother, and, if he died in their lifetime, having issue, then to his issue, but, if he die without issue, living the father or mother, then the remainder to Edward in tail; John died without issue in the lifetime of the father and mother. It was resolved by Lord Keeper Bridgman, assisted by two judges, that the remainder to Edward was good. The whole term had vested in John if he had survived, yet, the contingency never happening and so wearing out in the compass of two lives in being, the remainder over to Edward might well be limited upon it.

Objection: Where will you stop if not at Child and Bayles's Case?

Response: Everywhere where there is an apparent danger of a perpetuity, but so is not this case.

The equitable reasons were:

First, it was prudence in the earl to take care that, when the honor descended upon Henry, a little better support should be given to Charles, who was the next man and trod upon the heels of the inheritance;

Second, it was very probable and almost morally certain that Thomas would die without issue, he being not of a good state of body or mind and, while such, they were circumspect that he should not marry;

Third, it is a hard thing for a son to tell his father that the provision he has made for his younger brothers is void in law. But it is much harder for him to tell him so in Chancery for, there, no conveyance is ever to be set aside where it can be sorted by a reasonable construction. The law does in many cases allow of a future contingent estate to be limited where it will not allow a present remainder to be limited. A man has an estate limited to him, his heirs, and assigns (this is a fee simple) but, if he die without issue, living J.S. or, in such a short time, to J.D., this is good. Though it be impossible to limit a remainder of a fee upon a fee, yet it is not impossible to limit a contingent fee upon a fee. Pell and Browne's Case.² If a lease comes to be limited in tail, the law allows not a

¹ Perhaps *Anonymous* (1568), 3 Dyer 277, 73 E.R. 620; *Welcden v. Elkington* (1575), 3 Dyer 358, 73 E.R. 804, also 2 Plowden 516, 523, 75 E.R. 763, 772, Benloe 308, 123 E.R. 216.

² *Pell v. Brown* (1620), Croke Jac. 590, 79 E.R. 504, Palmer 131, 81 E.R. 1012, 2 Rolle Rep. 196, 216, 81 E.R. 746, 760, Godbolt 282, 78 E.R. 165, J. Bridgman 1, 123 E.R. 1157.

present remainder to be limited thereupon, yet it will allow a future estate arising upon a contingency only and that to wear out in a short time. The limitation in Wood and Sander's Case is after an express entail, and yet it was adjudged good, because it was a remainder upon a contingency that was to happen during two lives, which was but a short contingency, and the law might very well expect the happening of it. But our case is stronger because it is only during one life.

It was decreed the plaintiff should enjoy this barony for the residue of the term and the defendants to make him a conveyance accordingly and to account with the plaintiff for the profits received since the death of Duke Thomas and which they or any of them might have received without willful default.

The duke of Norfolk exhibited a bill of review in Chancery, to which Charles Howard put in a plea and demurrer, which was argued before Lord Keeper NORTH. And he overruled the said plea and demurrer, and reversed the Lord Chancellor's decree.

But, afterwards, this decree was reversed in Parliament, and the first decree was affirmed on behalf of Charles Howard.

[Reg Lib. 34 Car. II, f. 722.]

[Earlier proceedings in this case: 3 Chancery Cases 1, 22 E.R. 931, 2 Swanston 454, 36 E.R. 690, Pollexfen 223, 86 E.R. 568, 2 Freeman 72, 80, 22 E.R. 1066, 1070, 79 Selden Soc. 904, 922, 999, Dodd 42, Oxford Bodleian Library MS. Rawlinson C.347, British Library MS. Hargrave 161, f. 13, British Library MS. Lansdowne 1064, ff. 224v, 240, 247v, 1 Eq. Cas. Abr. 192, 21 E.R. 982.]

71

Treackle v. Coke
(Ch. 1683)

The assignee of a lease is liable for the rent payable by his assignor to the original lessor for the time that he was in possession.

1 Vernon 165, 23 E.R. 389

Eodem die [15 May 1683].

The assignee of a lease rendering rent, having enjoyed the land six years, assigns over. The bill was to call him to an account for the rent for such time as he enjoyed the land.

The defendant pleaded a judgment upon a demurrer at law.

And the plea was overruled, for, though, in strictness of law, there is no privity of contract to charge the assignee, yet, in equity, he is most certainly chargeable for such time as he received the profits.

The counsel alleged there were twenty precedents in the case.

And the Lord Keeper [NORTH] said, if there had not been one, he should not have doubted to have made a precedent in this case.

[Raithby's note: There is an entry of a plea overruled, 15 June 1683, in a case of the name of Trattle v. Cooke. Reg. Lib. 1682 B, f. 763.]

[Other reports of this case: 1 Eq. Cas. Abr. 47, 21 E.R. 863.]

72

Ashton v. Ashton
(Ch. 1683)

A witness cannot make an objection to the materiality of a question put to him.

1 Vernon 165, 23 E.R. 390

Eodem die [15 May 1683].

A bill being exhibited to prove a will and perpetuate the testimony of the witnesses, the defendant, upon cross-examination of one of the witnesses, exhibited an interrogatory to him to discover what deeds or settlements he knew the testator had made, to which the witness demurred as not pertinent to the matter in issue.

The Lord Keeper [NORTH] overruled the demurrer, because he would not introduce such a precedent, as for a witness to demur. It did not concern the witness to examine what was the point in issue.

[Other reports of this case: 1 Eq. Cas. Abr. 41, 21 E.R. 859.]

73

University College, Oxford v. Foxcroft
(Ch. 1683)

An order for a personal duty and a sequestration thereon do not survive the death of the party who had the duty.

1 Vernon 166, 23 E.R. 390

Eodem die [15 May 1683].

Upon a demurrer, the Lord Keeper [NORTH] inclined that a sequestration for a personal duty determined with the death of the party, and could not be revived against the heir. But he took time to consider of it, and would be attended with precedents. And the Case of Rockley and Burdett¹ was cited, where it was ruled that such a sequestration should not bind the wife who came in for her jointure or dower.

[Raithby's note: This was the case of a charity. The demurrer was afterwards allowed. Reg. Lib. 1682 B, ff. 522, 666.]

2 Chancery Reports 244, 21 E.R. 669

The bill is to revive a former decree made against the defendant's father, whereby the said defendant's father was decreed to pay the plaintiff £2000 and interest.

To which the defendant demurs, for that the said defendant's father, against whom the said decree and a sequestration is had, is dead, whereupon the sequestration being granted purely for his contempt of a decree, which was for a personal duty only and determined by his death and, therefore, ought not to be revived against the defendant, his heir, nor is his real estate in the hands of his heir chargeable with the personal duty or decree for a personal duty.

The plaintiff insisted this is a case of extremity, being on the behalf of a charity, and the defendant endeavors to deprive the plaintiff of £2000 given for the purchasing of £100 *per annum* for the maintenance of two fellows of a College.

His Lordship [NORTH] declared that the decree, being for a personal duty, ought not to be revived against the defendant as heir. And he allowed the demurrer, and dismissed the bill.

¹ *Burdett v. Rockley* (Ch. 1683), see above, Case No. 7.

[Reg. Lib. 34 Car. II, f. 522.]

74

Popham v. Bampffield
(Ch. 1683-1685)

Where an appeal is pending in the House of Lords and Parliament has been prorogued, the case may proceed in the Court of Chancery.

1 Vernon 167, 23 E.R. 391

18 May 1683.

This cause came on to be reheard. But Lord Keeper [NORTH] did not vary the former decree. He said the difference was whether this case lay in compensation or not, for, where there can be a recompense made, this court will relieve against such a condition. And, therefore, he directed a Master to look into it and see what recompense Mr. Popham had made his son by his will. And he declared, if a compensation was made, he would relieve against the breach of the condition. But, in case a sufficient compensation was not made, he would then consider farther of it.

[Reg. Lib. 1682 B, f. 515.]

1 Vernon 344, 23 E.R. 510

The Parliament being prorogued, you may proceed in the account in this court, notwithstanding the appeal.

[Reg. Lib. 1685 B, f. 91.]

[Other proceedings in this case: 1 Vernon 79, 23 E.R. 325, 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, 73 Selden Soc. 158, 374, 79 Selden Soc. 932, Bampffield v. Popham (1701-1703), 2 Vernon 427, 449, 23 E.R. 873, 888, 2 Freeman 266, 22 E.R. 1201, 1 Peere Williams 54, 24 E.R. 290, Holt K.B. 233, 90 E.R. 1028, 1 Eq. Cas. Abr. 183, 21 E.R. 975.]

Vermuden v. Read
(Ch. 1683)

In this case, the court of equity enforced the express terms of a marriage settlement.

1 Vernon 167, 23 E.R. 391

Eodem die [18 May 1683].

This case being likewise reheard, the Lord Keeper [NORTH] thought not fit to aid the complainant or to make a better case for him in equity than he had at law upon the articles, but thus far only, that, whereas Sir Compton Read, by the articles, had a power to retain the £4000 at £3 percent interest, His Lordship [NORTH] decreed that Sir Compton should either pay the money or that the complainant should hold the land absolutely for his life.

[Raithby's note: The decree on the rehearing was that the plaintiff was well entitled to an estate for life in a moiety of the manor of Denford and the lands and premises thereto belonging and to an account of the profits thereof since the death of his wife and that possession thereof be delivered to him accordingly and the defendant, Sir Edward Read, was to make good to the plaintiff interest on the said £4000 at the rate of £5 *per centum per annum* up to the time of the death of his said wife. Reg. Lib. 1682 B, f. 510.]

[Earlier proceedings in this case: 1 Vernon 68, 23 E.R. 316, 79 Selden Soc. 931.]

Nott v. Hill
(Ch. 1683-1687)

A court of equity will grant relief against contracts and securities given as the result of bad faith, dishonesty, and overreaching.

1 Vernon 167, 23 E.R. 391

Eodem die [18 May 1683].

The plaintiff, being entitled to an estate tail after the death of Sir Thomas Nott, his father, in a house at Richmond, in Surrey, which, if in possession was worth to be sold for about £800 and being cast off by his father and destitute of all means of livelihood, did in 1671 for £30 paid him in money and £20 *per annum* secured to be paid him during the joint lives of him and his father, absolutely convey his remainder in tail to the defendant Hill's father and his heirs.

The plaintiff's father lived ten years after this conveyance. And, after his father's death, the plaintiff brought his bill to be relieved against this conveyance, charging that it was intended to be only as a security. And, though there was no proof to that purpose and the deed was absolute and though Hill had lost all his money if the plaintiff had died in his father's lifetime, yet, upon the first hearing of this cause, 20 June, 34 Car. II [1682], the Lord Nottingham decreed a redemption.

And this cause being now reheard before the Lord Keeper [NORTH], he reversed the Lord Nottingham's decree, and declared he did not see how he could relieve the plaintiff. If it be to be declared a law in Chancery that no man must deal with an heir in his father's lifetime, that were something. But, as it now stood, he saw no reason to relieve the plaintiff. But he dismissed the bill.

Note this decree not being signed and enrolled, the cause was reheard before the Lord

Chancellor Jeffreys 27 May 1687, who reversed the Lord Guilford's decree, and confirmed the decree made by the Lord Nottingham, declaring he took Hill's purchase to be an unrighteous bargain in the beginning and that nothing which happened afterwards could help it.

[Raithby's note: It appears upon the pleadings that the plaintiff received no more than the £30 and the £20 *per annum* for five years and no longer. Reg. Lib. 1686 B, f. 656. Note also Reg. Lib. 1682 B, f. 482.]

1 Vernon 271, 23 E.R. 464

Eodem die [19 November 1684]. Johnson v. Nott.

Hill bought of the defendant Nott in the lifetime of Sir Thomas Nott, his father, the reversion of a house at Richmond at an undervalue by reason of the contingency that, if the defendant Nott had died in the lifetime of Sir Thomas, his father, Hill had lost all his purchase money.

And, after the death of Sir Thomas Nott, who died about ten years after this contract was made, Nott brought his bill to be relieved against the bargain, and was relieved by Lord Nottingham, but, upon a re-hearing before the Lord Keeper [NORTH], that decree was reversed.

Now, this bill was brought by Johnson, the executor of Hill, setting forth that Nott, the defendant, was only tenant in tail and had covenanted to make further assurance, and he prayed he might be compelled to perform his covenant in specie and be decreed to levy a fine.

Upon the hearing, the Lord Keeper [NORTH] denied the plaintiff any relief, and said upon the first hearing on Nott's bill he thought it a hard case, though he did not see sufficient reason to set aside the contract. But, as to the plaintiff's bill, he said a contract which carries an equity to have it decreed in specie ought to be without all objection. And he said the practice of purchasing from heirs was grown too common, and, therefore, he would not in any sort countenance it. And he dismissed the bill, and left the plaintiff to bring his action of covenant at law.

2 Vernon 27, 23 E.R. 627

June 1687. Thomas Nott, son and heir of Sir Thomas Nott, plaintiff; Johnson and Graham, executors of George Hill, defendants.

The plaintiff, being entitled to an estate tail after the death of his father in lands, which, if in possession, were worth to be sold about £800 and being cast off by his father and destitute of all means of livelihood, did, in 1671, for £30 paid and £20 *per annum* secured to be paid to him during the joint lives of him and his father, absolutely convey his remainder in tail to the defendant Hill's father and his heirs. The plaintiff's father lived ten years after this conveyance.

And, then, the plaintiff brought his bill to be relieved against this conveyance, charging that it was intended only as a security and, though there was no proof to that purpose and the was deed absolute and though Hill would have lost all if the plaintiff had died in his father's lifetime, yet, upon the first hearing of this cause, 24 June 34 Car. II [1682], the Lord Nottingham agreed a redemption.

The 18th May 35 Car. II [1683], the Lord North, upon a re-hearing, dismissed the bill.

And that dismissal not being signed and enrolled, the 27th May 1687, the Lord Chancellor [JEFFREYS] ordered a re-hearing. And, now, upon the re-hearing, he declared he took it to be an unrighteous bargain in the beginning and that nothing happening afterwards would help it. And so, he discharged the Lord North's order and confirmed the Lord Chancellor Nottingham's decree.

[Raithby's note: The defendants accounting for the profits received and to have their costs at law and in this court to be taxed and to have the bond for the payment of the annuity delivered up. Reg. Lib. 1686 B, f. 655.]

[Earlier reports of this case *sub nom.* Nott v. Hill, 2 Chancery Cases 120, 22 E.R. 875, 1 Vernon 167, 23 E.R. 391, 1 Eq. Cas. Abr. 275, 21 E.R. 1042.]

Earl of Macclesfield v. Fitton
(Ch. 1683-1685)

The question in this case was whether, under the circumstances of this case, compound interest was payable.

A bill of review lies where a decree was unjust as a matter of law appearing in the decree or where the court lacked or exceeded its jurisdiction.

There are no time limits for bringing a bill of review; however, the defense of laches applies to a bill of review.

A court of equity has jurisdiction to grant discovery in a case of a forgery.

Where a court of equity has taken jurisdiction, it can retain jurisdiction and grant a remedy in order to prevent a multiplicity of actions.

1 Vernon 168, 23 E.R. 392

19 May 1683.

The bill was to have the redemption of a mortgage of the manor of Bosley and Siddington, in the County of Chester that was formerly the estate of Sir Edward Fitton, which mortgage had been assigned to the defendant Fitton. The bill was exhibited so long since as February 1662. But being then put off for want of proper parties, the plaintiff claiming the estate by the will of Sir Edward Fitton and had not brought the co-heirs to a hearing, and so the cause slept until now, the Lord Macclesfield¹ being all the while in possession, the points now insisted on were two.

First, upon the assignment to the defendant Fitton, the debt was stated between him and the mortgagee and some of the co-heirs that were then looked upon to have a right to the redemption, and the defendant's counsel insisted that this ought to conclude the plaintiff as a stated account.

But, the plaintiff being no party thereunto, that was overruled by the court.

Secondly, there being great arrears of interest due at the time of the assignment, which were paid by Mr. Fitton, the original mortgage money being but £1500, and he paid upon the assignment £2300, the question was whether the £800 paid for interest then in arrear should be reckoned principal as to the defendant Fitton, and carry interest with it.

For the plaintiff, it was insisted interest was never made principal in such a case unless the mortgagor had joined in the assignment. And they cited the Case of Porter and Hubbart,² where, in a like case, it was decreed that interest should be reckoned principal. But, for that reason, the decree was reversed in the House of Lords.

But the Lord Keeper [NORTH] said that precedent would not weigh much with him. He was of counsel in the case, and it was hard in all its circumstances, for, there, the mortgage being in the late times, although the mortgagor received all the profits without interruption when things were dearer than ordinary by reason of the troubles in other parts of the kingdom, yet, in that case, the Lords would not allow of £6 percent interest, but reduced the interest to £4 percent. But, although he thought it reasonable that the interest paid upon the assignment should be reckoned principal, yet he would not now make a new precedent. But he directed the defendant's counsel to search for precedents, and, if they could find any one, he would follow it in this case.

But the plaintiff's counsel affirmed there was no such precedent.

¹ R. Hutton, 'Gerard, Charles, first earl of Macclesfield (c. 1618-1694)', *Oxford Dictionary of National Biography*, vol. 21, pp. 932-936.

² *Porter v. Hubbart* (1672), 2 Chancery Reports 85, 21 E.R. 623, 3 Chancery Reports 78, 21 E.R. 734, Nelson 150, 21 E.R. 813, 2 Freeman 30, 22 E.R. 1039.

[Raithby's note: Afterwards, 7 July, this cause came on before the Lord Keeper [NORTH], 'and His Lordship, after declaring the plaintiff entitled to redeem, declared his opinion in this case and also as a rule in all other cases of this nature for the future, that, where a mortgagee and assignee do *bona fide* make up an account of principal and interest without any design to charge the mortgaged estate and fairly pays his money, principal and interest, and takes an assignment, all such money as was paid upon the assignment ought to carry interest from the time of such assignment, but, if there was not so much money due for principal and interest at the time of such assignment as is mentioned in the assignment, the mortgagor ought to have liberty to contest the same and the account ought so far to be open. And he does order and decree the same accordingly and that the Master, to whom by the said former order the account stands referred, is to proceed in the reference accordingly, with this further direction, that the said defendant Fitton shall be charged by way of discount on the said mortgage for what profits the father of the defendant, the defendant himself, or his trustee, or any other person on his behalf has received out of any other part of Sir Edward Fitton's estate not within the mortgage'. Reg. Lib. 1682 A, f. 669. N.B. This cause is entered in the Register's Book in the name of Earl of Macclesfield v. Jolliffe.]

1 Vernon 264, 23 E.R. 459

Fitton v. Earl of Macclesfield.

Upon a motion that a bill of review might be admitted without payment of the costs of the former suit, amounting to £150, for which the now plaintiff, as was pretended, had been in execution almost twenty years, and was not able to pay them.

Per curiam: Upon his making an oath that he is not worth £40 besides the matter in question and besides a suit depending between the same parties to foreclose a mortgage, the debt being pretended to be overpaid, he shall be admitted to bring his bill of review without payment of these costs.

[Reg. Lib. 1684 A, f. 15.]

2 Freeman 88, 22 E.R. 1076

Fitton v. Lord Maxfield.

Per curiam [NORTH], in a bill of review, all things are to be performed according to the former decree that do not extinguish the right; otherwise, the non-performance is a good plea in bar, as if writings are to be brought into court or costs paid, but not to release the right or make a conveyance, because that would destroy the right.

Not bringing in writings according to the decree sought to be reversed nor giving security for the costs in the bill of review was pleaded in the cause between Okeover and Poole.

1 Vernon 287, 23 E.R. 474

26 January [1685]. In Court, Lord Keeper [NORTH].

The plaintiff Fitton having brought a bill of review to reverse a decree made by the Lord Chancellor Clarendon about twenty-two years since, the defendant the Lord Macclesfield demurred and also pleaded to the bill of review.

Upon the pleadings in the cause, it appeared that the Lord Macclesfield, in Easter Term 1661, exhibited his bill, thereby setting forth that Sir Edward Fitton, being seised in fee of the estate in question, settled this estate upon himself for life, remainder to all his sons successively in tail male in case he should happen to have any, with a remainder to the Lord Macclesfield, who was his nephew, and the heirs male of his body, but subject to a power of revocation by deed or will. Afterwards, Sir Edward Fitton made his will and thereby devised the lands to the Lord Macclesfield in fee, who, therefore, prayed by his bill to have the trust of a term that was to attend the inheritance

assigned to him. And he complained that Fitton and the other defendants pretended to set up several titles to the premises.

In answer to this bill, the now plaintiff, Mr. Fitton, set forth that, subsequent to the settlement in the bill, Sir Edward Fitton made another settlement, and thereby limited the estate to himself for life, remainder to all the sons he should after happen to have in tail male, with remainder to the now plaintiff and his heirs, but with a power of revocation by deed or will, and that he did not know that Sir Edward Fitton made any such will, as was pretended, neither was it material, for that the said Sir Edward Fitton, in his lifetime by deed poll, bearing date the third day of April 18 Car. I [1642], released the power of revocation in the last settlement.

The cause was heard the 13th January 1662, and a trial was directed to be tried at the King's Bench bar touching the reality of this deed poll, which, upon a long and full evidence, was there found to be forged. And, thereupon, they came back into this court. And the will being fully proved here by witnesses, a decree was made for the plaintiff, the Lord Macclesfield, and an account of profits was directed, and the deed poll was ordered to be brought into court. But a twelvemonths time was given to Mr. Fitton to try his title, and, in case he should think fit to try the same, an officer of the court was directed to attend at such trial with the deed.

Afterwards, Mr. Fitton, within the twelve months, brought his ejectment in the County of Chester, and, upon full evidence, a verdict passed for the Lord Macclesfield, who thereupon came back into this court, and the decretal order was made absolute.

In the bill of review, the principal errors assigned were:

First, that this was a title proper at law and that a man ought not to be concluded in a title which concerns the inheritance upon a single verdict and especially in a feigned issue where the whole title could not come in evidence;

Second, that the Lord Macclesfield's title was under a will, and there had never been any trial touching the reality of this will;

Third, the plaintiff Fitton was sent to trial under a great prejudice, the deed poll being called in the order a pretended deed, by reason of which reflection, the trial could not be a fair or equal trial;

Fourth, that here was an account of profits directed and a decree made before any trial had, which was preposterous;

Fifth, that here the deed poll was damned, whereas some of the remaindermen that claimed by this deed were no parties to the suit.

To this bill of review, the Lord Macclesfield pleaded and demurred.

The plea was that Mr. Fitton, though he had taken no notice of it in his bill, having by the decretal order twelve months' time given him to try his title, he afterwards brought his ejectment in the County of Chester where the whole title on both sides came in issue and that, upon a full and long evidence, a verdict passed for the Lord Macclesfield by a jury of the best gentlemen in the county.

The demurrer was, because there was no error in the decree, it being grounded upon two verdicts. and that the court had a proper jurisdiction of the cause, there being a long term out in trustees to attend the inheritance and that, now after twenty-two years acquiescence under the decree and when all the witnesses to the will were dead, the plaintiff ought not to be admitted to his bill of review and, especially, for that he had not paid the costs of the former suit.

For the plaintiff, it was said that a bill of review is not barred by length of time (but by some at the bar, it was said that a fine and non-claim would have been a bar to the bill of review if Fitton had not been in prison), and that the title was properly a title to be tried at law, and yet had never been tried, for, as to the trial in the King's Bench, that was only in a feigned action where the validity of the will could not come in question. And they were also sent to a trial under a prejudice, the deed poll being called a pretended deed. And, as to the other trial, there was an ejectment indeed brought. But there, Mr. Fitton was under the same prejudice as to the deed, and he could not make use of the depositions of some witnesses that were dead, the bill and answer not being brought down, so that, in truth, the validity of the will was never fairly tried. But supposing there had been one trial and a verdict upon evidence against Mr. Fitton, yet a title at law ought not upon that to be perpetually

bound up by a decree of this court, for that were to make a verdict in ejectment as peremptory as a recovery in a writ of right. But all that the court ought to have done in such a case had been to have set the trust term aside and have left the parties to law. And suppose a bill was now brought in this court suggesting that a title was disputed at law and should pray that, for peace sake, a trial in ejectment might be made as peremptory, as a recovery in a writ of right, without doubt a demurrer would lie to such a bill;

Second, this decree was unjust to damn the deed poll, because that the remaindermen were not parties, and, though Mr. Fitton could not fully prove his title, yet the remaindermen might, and, by that means, the court might be engaged to make repugnant decrees;

Third, that, here, an account of profits was decreed before any recovery at law and yet, at the same time, Mr. Fitton had a year's time given him to try his title, which was preposterous. And an account of profits was not so much as prayed by the bill. And a decree ought to be but *secundum formam petitionis*, and, had the bill been as general as the decree, a demurrer would have lain as to any relief for an account.

For the defendant, it was answered that, as to what was objected, that the remaindermen were no parties, that was no error to be assigned by this bill because those that were not parties to the decree could not be barred by it, neither could they have any bill of review of that decree;

Second, as to the objection, that it was a title purely at law, that was a mistake for, there being a trust of a term to attend the inheritance, this court had undoubtedly a proper jurisdiction;

Third, that, whereas it was objected that the validity of the will had never come in question, that was also a mistake for, in the ejectment brought by Mr. Fitton, where the defendant, as well as the plaintiff, was to make a title, the validity of the will came properly in question, for the Lord Macclesfield could make no title but by the will, the prior settlement with a remainder to him being with a power of revocation, the subsequent settlement to Mr. Fitton revoked that so that, upon the ejectment, not only the validity of the will but the reality of the deed poll came again in question, for, had either the deed poll been found real or the will not well proved, in either case the Lord Macclesfield could have had no title. And, where the court has a jurisdiction by reason of a trust, it has not been unusual to make a decree upon one trial, as in the Case of the Lord Howard. And this case is much stronger, the will having been fully proved in this court, for so the decretal order is, and also attempts made to set up a forged deed. And, for that reason in Sir Thomas Williams's Case, a decree was made upon one trial to damn a forged deed.

And as to what was objected, that the decree was larger than the bill, it was answered the bill was upon the whole case and relief prayed in the premises. And they also insisted on the length of time and that their witnesses were dead as also that the plaintiff had not paid his costs for, though the Lord Keeper had made an order to dispense with it, yet that ought to have been set forth in the bill of review, which, in this case, was not done.

Per curiam [NORTH]: When a decree comes to be reversed on a bill of review, it ought to be either because it was unjust in matter of law arising within the body of the decree or for that the court wanted, or exceeded, its jurisdiction, neither of which objections were made out in this case; for the court had a plain jurisdiction by reason of the trust of the lease. And without doubt this court has a natural jurisdiction in the case of forgery, this being the proper court to detect it in, where you may have time to inspect the deed and to sift the witnesses, which the proceedings at a trial at law do not admit of. And then the court having a natural jurisdiction, it is only matter of discretion, whether to send it to a trial at law or not. And in case the deed poll had been damned without any trial, yet it had not been error. And it being made out that there was a forgery in the case, the Lord Keeper [NORTH] said he did not wonder the court inserted some reflections in the order in odium to the forgery. And as to what was objected, that the court ought only to have set the term of years aside and to have left the parties to law, which is the only material objection, he said he did not think the court was bound so to do. No question but a bill of peace to prevent multiplicity of trials is a proper bill, though, had the matter been *res integra*, he should not have made altogether such a decree to have bound the inheritance after the lease expired upon one trial. But he observed there was the greater reason for it in this case because Mr. Fitton declined controverting the will and rested upon the deed poll for

releasing the power of revocation. And though there was but one trial wherein the will could properly come in question, yet he well remembered that, upon the trial of the forgery in the King's Bench, Doctor Smallwood was produced and he there proved the will. And, though there be no limitation of time to the bringing a bill of review, yet, after two and twenty years, he should not reverse a decree but upon very apparent and flat errors, especially this decree having been made by the Lord Clarendon, who well understood the rules of justice and equity (and, by Mr. *Keck*, no decree of his was ever yet reversed), and there having been since his time several other keepers and chancellors and no bill of review brought. He did not see cause after this length of time, when the witnesses to the will were dead (which whether made or not is only matter of fact), to reverse this decree.

And, therefore, he dismissed the bill of review.

[Raithby's note: Reg. Lib. 1684 A, f. 318. It appears by the Register's Book that an order was afterwards obtained for a rehearing of the above mentioned plea and demurrer, and, on motion, it was ordered that the plaintiff should procure the same to be set down for such rehearing the first day of causes and exceptions after the term or, in default thereof, such order for rehearing is discharged. Reg. Lib. 1684 A, f. 253. N.B. It does not appear again.]

[Other reports of this case: 1 Eq. Cas. Abr. 82, 21 E.R. 895, 2 Eq. Cas. Abr. 175, 22 E.R. 149.]

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Crawle v. Crawle
(Ch. 1683)

A writ of error will not be issued in a criminal case without the allowance of the attorney general or the king.

1 Vernon 170, 23 E.R. 393

21 May 1683.

A man being indicted for not coming to church and found guilty, application was made to Mr. Attorney General that they might bring a writ of error. But he refused to allow thereof.

And, thereupon, Mr. *Wallop* this day moved the Lord Keeper [NORTH] for a writ of error.

But the Lord Keeper [NORTH] told him that, though he had the custody of the great seal, yet he could make no use thereof but according to the course of the court, and, therefore, he could not put the seal to a writ of error until it had been first signed and allowed by Mr. Attorney [General]. And he took it that a writ of error in a criminal matter was *ex gratia regis* in all cases, but, where provision is made for the same by the statute and is not due *ex debito justitiae* or *de cursu*, as Mr. *Wallop* would have it. But, if there were real error in the case and a writ of error was not sought for delay, their way was to petition the king, and he would give directions for inspecting the proceedings to see if there were real error or whether a writ of error was sought purely for delay.

And Mr. Attorney [General *Sawyer*] said that *Crawle* being indicted upon the Stat. 3 Jac.,¹ no error could avail him and the indictment could not be quashed nor the proceedings avoided otherwise than by conformity.

[Other reports of this case: 1 Eq. Cas. Abr. 414, 21 E.R. 1143.]

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¹ Stat. 3 Jac. I, c. 4, s. 18 (SR, IV, 1075-1076).

Turner v. Crane
(Ch. 1683)

Upon the death of a mortgagee, the decedent's rights in the mortgage pass to his or her heirs, not to an administrator of his or her estate.

1 Vernon 170, 23 E.R. 394

26 May 1683.

A *feme sole*, having a mortgage in fee of a copyhold, marries, and dies leaving issue, which issue is admitted and dies. And then, the husband, as administrator to his wife, claims title to this copyhold as being a mortgage and so part of his wife's personal estate.

The question being now between the husband and the heir at law, the Lord Keeper [NORTH] declared he would be attended with precedents. But he said he did not much regard what had been objected, that the issue of the wife had been admitted by the husband. But all he scrupled was that, in this case, there was no covenant for the payment of the mortgage money, which alone gives the executor title to the mortgage money. And, although it was urged that there could be no such covenant in the surrender of a copyhold and that it would be unreasonable and inconvenient to have one law as to freehold mortgages and another as to copyhold, yet he would make no decree in it until he should be attended with precedents.

[Raithby's note: It was stated in the bill that this mortgage was taken into consideration as part of the wife's fortune on the making the settlement on their marriage by the plaintiff, and it appears that, the mortgage money not being paid, the wife was admitted, and received the rents several years before the marriage, and that, upon her death, her daughter and heir was admitted, being an infant, by her guardian, and received the rents until her death, leaving her aunt, the wife of the defendant, her heir, who was thereupon admitted, and received the rents. Reg. Lib. 1682 B, f. 550. It was afterwards decreed that the mortgaged premises should go to the heir. Reg. Lib. 1682 B, f. 660.]

2 Chancery Reports 242, 21 E.R. 668

Robert Newell and his wife, for £220 paid by the plaintiff's wife, Susan, then a widow, did surrender the copyhold premises to the use of the said Susan and her heirs on condition that, on the said Robert Newell and his wife's paying to the said Susan, her executors, and assigns £230 in March next after, then the mortgage to be void. And the money not being paid, the said Susan was admitted to the premises. And, afterwards, she married the plaintiff, and they received the profits of the said premises. Afterwards, Susan died intestate, no ways indebted, leaving Susan, her daughter by the plaintiff, her heir, an infant. And the said Susan, the infant, was admitted by the plaintiff, her guardian, as heir to Susan, the mother, who received the profits. And she died, leaving the defendant Jane Crane, her aunt, as heir, and she was admitted. And the plaintiff, on Susan, the daughter's, death, took administration of Susan, the mother's, estate, and claims the mortgaged lands, insisting that, though the defendant Jane was heir to Susan, the daughter, who was heir to Susan, the mother, yet the premises, being a mortgage belonged to him as administrator to Susan, the mother.

This court would consider of this case and of cases of mortgages in fee where no covenant is made for the payment of the mortgage money to the executor or administrator and no debts are owing by the mortgagee, whether the heir or administrator of the mortgagee shall have the lands.

This court, upon reading precedents, declared that it was fully satisfied that the plaintiff, as administrator to the said Susan, ought not to have the mortgaged premises from the defendant Jane Crane, the heir of the heir of the said mortgagee, but the said Jane ought to enjoy the same. And the court dismissed the plaintiff's bill.

Lincoln's Inn MS. Misc. 498, p. 22, pl. 2

A mortgage was made of a copyhold in fee. The mortgagee died, having made A. his executor. A., as guardian to the heir of the mortgagee, is admitted to the copyhold. And, receiving the profits, he accounts to the heir of the mortgagee for them for about twelve years and then the heir dies, and A., as executor to the mortgagee, pretended that the mortgage belonged to him.

But that My Lord Keeper [NORTH] would not allow of it after he had so long submitted to the title of the heir.

[Other copies of this report: Lincoln's Inn MS. Misc. 503, p. 89, pl. 2, Lincoln's Inn MS. Misc. 504, p. 85, pl. 2.]

[Reg. Lib. 34 Car. II, f. 668.]

80

Benson v. Bellasis
(Ch. 1683-1686)

*In this case, the terms of a marriage settlement were enforced.
A deed is presumed to be an integration of all of the precedent negotiations.*

2 Chancery Reports 252, 21 E.R. 671

This cause having received a hearing before the Lord Chancellor Nottingham, 11 July 33 Car. II [1681-82], who made a decree for excluding the defendant Dame Dorothy, administratrix of Robert Benson, the plaintiff's father, from having any part of his personal estate and the said cause being heard 10 July, 35 Car. II [1683], before the Lord Keeper NORTH, who decreed the said defendant Dame Dorothy to retain to her own use one-third part of the said personal estate of the said Robert Benson and the said cause being again reheard this day by the Lord Chancellor Jeffreys, the case being that the said Robert Benson, on his marriage with the defendant Dame Dorothy, for the settling of a jointure on the said Dorothy in full of all jointures, dowers, and thirds, which she might claim out of his real and personal estate, conveyed lands to the use of himself for life and, after, to the said Dorothy for life in full of all jointures etc., as is aforesaid, with this proviso that, if the said Dorothy should after the death of the said Robert Benson have or claim to have or should recover any other part of the lands or tenements or any part of the personal estate of the said Robert by the custom of the Province of York or by any other means whatever, other than what the said Robert Benson should give, bequeath, or settle upon or to her, that, then, the feoffees therein named should be seised of all the premises settled in use upon the said Dorothy to the use of Sir Henry Thompson and Mr. Grayham, their executors, administrators, and assigns for sixty years to commence from the death of the said Robert if the said Dorothy should so long live, upon special trust that the said Thompson and Graham should receive the profits of the premises limited in the jointure, and they should dispose thereof to such persons and their uses, as should be damnified by the said Dorothy's perception of the profits of any other lands of the said Robert or the taking or recovery of any part of the personal estate, other than what should be given or bequeathed, until the respective values of the profits or values of such personal estate should be fully satisfied and the residue of the said profits to remain to the said Dorothy.

The said Robert dying intestate and the said Dorothy, administering at York and in the Prerogative Court of Canterbury, as guardian to the plaintiff Robert, possessed the real and personal estate, [and] pretends a right to some part of the personal estate by the said administration, notwithstanding the said marriage settlement.

The Lord Chancellor Nottingham declared the said Dorothy was bound by the said marriage

agreement and the administration ought to have been granted to her and that, however, the same ought not anyways to avail her, for that it would be contrary to the said settlement and agreement, and that the said Dorothy ought not to claim any part of the real estate, other than what was settled on her by the said deed or any of the personal estate. And he decreed accordingly.

But the defendant Dorothy insisted that the Lord Keeper North had adjudged one-third of the personal estate to belong to the defendant by virtue of the said administration, and was an accruing right, not barred by the marriage agreement.

The Lord Chancellor JEFFREYS, on reading the said marriage settlement and the said two former orders, declared that the said order for the excluding of the said defendant Dorothy from having any part of the personal estate was a just order and ought to stand and be pursued and that the said order of the Lord Keeper North before mentioned ought to be set aside. And he decreed accordingly.

[Reg. Lib. 34 Car. II, f. 848.]

1 Vernon 369, 23 E.R. 527

27 February [1686]. *Bellasis v. Benson*.

The bill was to be relieved touching the plaintiff's jointure, which the bill charges was by parol agreement made on the marriage agreed to be £400 *per annum*.

The defendants plead that, after all treaties and agreements touching the marriage settlement, a jointure was actually settled and accepted and the marriage thereupon had eighteen years since.

Lord Chancellor [JEFFREYS]: The jointure deed is an evidence that all the precedent treaties and agreements were resolved into that. But he ordered the defendants to answer and save the benefit of the plea to the hearing.

[Raithby's note: The plea was overruled without costs on either side. Reg. Lib. 1685 A, f. 347.]

[Other reports of this case: 1 Eq. Cas. Abr. 229, 21 E.R. 1009.]

[Earlier proceedings in this case: 1 Vernon 15, 23 E.R. 271, 1 Eq. Cas. Abr. 17, 21 E.R. 839, 79 Selden Soc. 891.]

81

Foot v. Salway
(Ch. 1683)

A court of equity will not enforce an implied contract as there is an adequate remedy at common law.

2 Chancery Cases 142, 22 E.R. 885

6 June 1683.

Foot let to freight to the defendants, being of the Turkey Company, 200 tuns of a ship, wherein he was interested, for a voyage to the Straights. The price of the freight per tun was not expressed in the charter party. The ship brought home no silk or other commodities used to be brought from Turkey, the freight whereof of some in such voyages was £5 per tun and of some £6 per tun, usually and constantly paid, but brought home only boxwood, the freight whereof usually was only 40s. per tun. The defendants would pay but 40s. per tun.

The plaintiff's bill is to have £5, because, though it be not so expressed in the charter party, yet it was expressly agreed that the ship should be loaded with silks or other the goods that paid the

greater freight, and enforced their equity, for that boxwood never in such voyages was brought home alone, but only to fill up empty places, but cottons or other goods, and no man will ever let out his ship, nor take ship to freight for boxwood only, for the freight at 40s. per tun will not pay the charge to the owner of the ship. And although the defendants pretend that they could not freight the ship with other goods, because the locusts in that year had eaten and spoiled the cottons in those parts, yet that might not excuse them from their agreement, which the plaintiff's counsel very earnestly pressed to have read and proved, especially Mr. Solicitor [General] *Finch*, who finding the Court against relieving the plaintiff upon the parol agreement said, that most part of the causes in court were of that nature.

Yet the court would not agree with him. But you may take a remedy at law upon your parol agreement.

Solicitor [General *Finch*]: No, My Lord, because the deed is the agreement in law.

Lord Keeper [NORTH]: Why, when it stands with and not contradicts the deed, you may sue at law. And, on conclusion, he did not relieve the plaintiff.

82

Anonymous
(Ch. 1683)

Where a suit has lain dormant for a year or more, it can be revived only by service of a subpoena.

1 Vernon 172, 23 E.R. 394

Lord Keeper [NORTH]: If a cause has slept twelve months in court, there shall be no proceedings had upon it without first serving a *subpoena ad faciendum attornatum*.

[Other reports of this case: 1 Eq. Cas. Abr. 4, 350, 21 E.R. 831, 1095.]

83

Anonymous
(Ch. 1683)

An affidavit of a contempt of court can be filed after the arrest if it be filed before the return date.

1 Vernon 172, 23 E.R. 395

Where a man is arrested upon an attachment, the contempt shall hold good, though no affidavit be filed at the time of taking forth of the attachment if it be filed before the return of it.

[Other reports of this case: 1 Eq. Cas. Abr. 350, 21 E.R. 1095.]

Creed v. Colville
(Ch. 1683)

The question in this case was whether a trust of an estate in fee that descended upon the heir be liable in equity to the satisfaction of a bond debt wherein the heir is expressly bound.

Whatever money comes to the hands of an executor, whether by the sale of land or by a decree of a court, is assets of the decedent's estate.

1 Vernon 172, 23 E.R. 395

15 June 1683.

The single point of this case was whether the trust of an estate in fee descended upon the heir is liable in equity to the satisfaction of a debt by bond wherein the heir is expressly bound.

The late Lord Chancellor [Lord Nottingham] had decreed it assets. But, upon a rehearing before the Lord Keeper [NORTH], he seemed doubtful.

For the heir against the decree, it was said that this point had formerly been settled upon great advice in the Case of Box and Bennett,¹ which was heard by the Lord Chancellor with the assistance of the Lord Chief Justice Hale and Mr. Justice Wadham Windham. And this decree was unreasonable in that an account of the profits was decreed during the infancy, whereas, at law, if the heir is bound in the bond of the ancestor and, after the death of his ancestor, is sued during his infancy, the parol must demur, and the plaintiff cannot have judgment against the infant, neither are the profits liable during his minority.

But, for the decree, it was argued that the precedent of Box and Bennett was looked upon as a hard case, and had never carried any great authority with it, it being a precedent of the judges' making, who look upon the Court of Chancery as precarious in its jurisdiction, and, therefore, as much as may be, are for restraining it to the rules of law. But a trust, being a creature of this court, ought to be governed solely by the rules of equity, and equity ought to be conformable throughout. And, therefore, why should not the trust of an inheritance be assets, as well as the trust of a term? An equity of redemption is every day made assets in equity. And what reason can be given why, in equity, a trust of an inheritance should not be assets where the inheritance itself, had it not been in trust, would have been assets at law?

As to the profits during minority, they said that was not insisted on by them, though they had no precedent in equity that the parol should demur. But infants were there suable.

Lord Keeper [NORTH]: I know the Case of Box and Bennett has had hard words given it and been much railed at. But the decree in that cause was made upon great advice. And he did not know how he could be better advised now. And he said there was a difference between the case of an heir and the case of an executor, and, therefore, the trust of a term and the trust of an inheritance are not the same thing as to this point, for whatever money comes to the hands of the executor, either by sale of the term, or if money be decreed to him in this court, will be assets. But, if an heir, before an action brought, sells and aliens the assets, the money is not at law liable in his hands unless the sale were with fraud or collusion, as, if an heir sell and buy again, there, the new purchased lands will be assets. And, as to an equity of redemption, he said that, if a man had a mortgage and a bond, before the mortgage should be redeemed by the heir, the bond ought to be satisfied. But he did not know that an equity of redemption should be assets in equity to all creditors.

And he mentioned Mr. Baron Weston's case against Mrs. Danby, which was thus. Baron Weston had a debt due to him by bond, wherein the heir was bound, but it happened that, for three

¹ *Bennet v. Box* (1662), 1 Chancery Cases 12, 22 E.R. 669, 2 Freeman 184, 22 E.R. 1149, 2 Eq. Cas. Abr. 465, 22 E.R. 396.

descents, the heir was still an infant, and so the parol demurred at law, until the interest much exceeded the penalty of the bond. And Mrs. Danby having been all along guardian to these infants and received the profits of the estate without paying any debts and converted them to her own use, the baron, therefore, brought an action against her, and called her administrator to these children. But the baron's policy did not prevail.

As to the case in question, His Lordship [NORTH] said he would not throw such a cause out of court without good consideration first had and that he should be much governed by the precedent of Box and Bennett unless they could show that the latter precedents had been otherwise. And he directed them to attend him with precedents towards the latter end of the term.

[Raithby's note: Reg. Lib. 1682 A, f. 818. This cause came on again the 14th of December, when an order was made for the parties to attend the two Lords Chief Justices and Lord Chief Baron, who were thereby desired to certify their opinion on the question. Reg. Lib. 1683 A, f. 166. Afterwards, in Michaelmas Term 1684 upon a motion of the defendants, it was ordered that, unless the plaintiffs, the creditors, procured the certificate of the Lord Chief Justices' and the Lord Chief Baron's opinion by the first day of the next term, the bill should be dismissed without further motion. Reg. Lib. 1684 A, f. 210. No further proceedings appear.]

[Other reports of this case: 1 Eq. Cas. Abr. 281, 21 E.R. 1046.]

[Earlier proceedings in this case: *sub nom.* Lady Grey v. Colville, 2 Chancery Reports 143, 21 E.R. 641, 79 Selden Soc. 744.]

Rex v. Lord Gray
(Ch. 1683)

The Court of Chancery cannot order the Court of King's Bench to allow a bill of exceptions.

1 Vernon 175, 23 E.R. 396

Eodem die [15 June 1683]. The Rioters' Cases.

This day, a motion was made, that the Lord Keeper would grant a mandatory writ to the Chief Justice of the King's Bench to command him to sign a bill of exceptions in the Case of the Lord Gray *et al.*, who were convicted for a riot in London. And they produced a precedent where, in a like case, such a writ had issued out of Chancery to the Judge of the Sheriff's Court in London.

But the Lord Keeper [NORTH] denied the motion, for that the precedent they produced was to an inferior court and he would not presume but the Chief Justice of England would do what should be just in the case, for, possibly, you may tender a bill of exceptions that has false allegations in it and the like, and then he is not bound to sign it, for that might be to draw him into a snare. And he said, if they had wrong done them, they might right themselves by an action on the case. And, if this court had a power to grant such a writ, the same was discretionary only, as writs of error are in criminal cases, which are discretionary and not *de cursu*. And he said he had a collection of several cases out of the old books of the law that were given unto him by My Lord Chief Justice Hale, which show that writs of error in criminal cases are not grantable *ex debito justitiae*, but *ex gratia regis*. And, in such a case, a man ought to make application to the king, and he will then refer it to his counsel, and, if they certify there is error, the king will not deny a writ of error.

[Other reports of this case: 1 Eq. Cas. Abr. 414, 21 E.R. 1143.]

Barbone v. Brent
(Ch. 1683)

A person cannot sue in equity for an account after a verdict at common law for the same matter.

1 Vernon 176, 23 E.R. 397

19 June 1683.

The bill was to have an account, setting forth that the plaintiff had bought several goods of the defendant and had paid him several sums of money in part of satisfaction but the plaintiff having lost the receipts and acquittances, the defendant had recovered the whole value of the goods at law.

The defendant demurred to this bill because it appeared of the plaintiff's own showing that the defendant had recovered at law.

For the plaintiff, it was insisted that, if this case upon the bill was true, which, by the demurrer, is admitted so to be, the plaintiff ought to be relieved in equity as to the money overpaid.

Lord Keeper [NORTH]: If a man pays money in part of satisfaction and, afterwards, the whole value of the goods is recovered against him at law, the money so paid upon that account becomes money received for the use of him that paid it, and he may recover it in an action at law.

But it was answered by the plaintiff's counsel that, though that may be true, where the whole debt is recovered, yet it would not be so in this case, because, here, the jury had allowed some payments and made some abatement of the full value, but had not allowed all the payments, because the now plaintiff could not produce his receipts, and, now, if they should bring an action at law for the money so overpaid, they could not make out what payments the jury allowed and what not.

Sed non allocatur.

It was then insisted by the plaintiff's counsel that they were entitled to have a discovery in this court in order to enable them to proceed at law, they having lost their receipts and acquittances.

Lord Keeper [NORTH]: After a verdict at law, you come too late for that, and I see no reason why the defendant should be put to answer. I allow the demurrer.

[Reg. Lib. 1682 A, f. 619.]

Portington v. Tarbock
(Ch. 1683)

An appeal does not lie from the Court of Exchequer in the County Palatine of Chester to the Court of Chancery.

1 Vernon 177, 23 E.R. 398

Eodem die [19 June 1683].

The bill was a bill of review and appeal to set aside a decree in the Court of Exchequer in the County Palatine of Chester made in a cause wherein the now defendant was plaintiff and the now plaintiff was defendant. And it was charged in the present bill that there was no sufficient ground for making the said decree.

The defendant put in a plea, and set forth that the parties to the said decree were, and long had been, inhabitants in the said County Palatine and that the lands mentioned in the decree lay within the said County Palatine and matters in question arose there and that, by the ancient privileges and usages in the said County Palatine, such parties and matters were and ought to be sued and

impleaded there, and not elsewhere, and that the decree in itself was just and not questionable in this court.

For the plaintiff, it was insisted that the Court of Chancery was the supreme and high court of equity, and it was, therefore, but just and natural that an appeal should lie to it to correct the mistakes and abuses of the inferior courts. And it was said by the counsel that, although such bills had not been frequent here, yet they were not without precedents of the like nature. And they cited the precedent of Edwish and Davis, where such a plea was overruled and the defendant put to answer, and the Case of Humphreys and Griffith,¹ where, in the equity courts of North Wales, they had decreed an infant to convey and the decree was for that reason reversed in this court, and they cited a case in the Lord Nottingham's time, where an appeal from the Mayor's Court in London was allowed, but they were not relieved in that case because they had first brought a *certiorari* bill and, afterwards, consented to a *procedendo* and, by that, had disclaimed the jurisdiction of this court and, therefore, the court would not entertain them upon their appeal.

The counsel for the defendant chiefly insisted on the practice of this court that such bills had not been usual and that most of the cases cited were *certiorari* bills and that all courts of equity were by prescription, and, therefore, were all equal, and no appeal would lie.

The Lord Keeper [NORTH] declared he thought it reasonable that an appeal should lie. There is no doubt but a *certiorari* bill might have been brought to remove this cause. But no bill of review can be brought, for that is only to re-inspect what the same court had before done. As to an appeal, it seemed to him reasonable, first, because this court is the high and supreme court of equity, and the others are but inferior courts, secondly, even from this court, there formerly lay an appeal to the king and that was the course until the House of Lords, which is the highest court, had frequent meetings, and there determined all matters upon appeal. And, if, from this court, there lies an appeal to the king himself, why should there not lie an appeal from inferior courts to this court, where the Chancellor or Keeper sits by the king's commission. There is no doubt but this court may hold a plea for matters within the County Palatine, because the parties may live out of the jurisdiction.

The Lord Keeper [NORTH] would do nothing in the case at this time, but directed them to attend him with precedents.

1 Vernon 184, 23 E.R. 403

Eodem die [14 July 1683].

This bill being of the same nature with the last case,² the Lord Keeper [NORTH] gave the same rule in it, and allowed the plea.

[Reg. Lib. 1682 B, f. 674.]

¹ *Humfreis v. Griffith* (1663), 2 Freeman 169, 22 E.R. 1136.

² *Jennet v. Bishopp* (Ch. 1683), see below, Case No. 101.

Lady Bodmin v. Vandebendy
(Ch. 1683-1696)

A lease for a term of years that was made before an estate of inheritance was created must expire before any right of dower can accrue.

1 Vernon 179, 23 E.R. 399

Eodem die [19 June 1683]. In Court, Lord Keeper.

The bill was that the plaintiff might by the aid of this court be let in to try her title at law for dower of the lands in question, there being a term for years standing out that had been raised for particular purposes. And she offered, by her bill, to discharge the trust of the term, and prayed that the term might be made attendant on her dower.

To this, the defendant pleaded himself a purchaser [but did not plead himself a purchaser without notice], and insisted on the benefit of the term to protect his purchase.

The defendant was ordered to answer.

[Raithby's note: Reg. Lib. 1682 A, f. 723. The words of the order are 'That the defendants do fully answer the plaintiff's bill and that the defendant's plea and demurrer be set aside only in order that the complainant may prefer her exceptions to so much thereof as tends to answer in case the defendant has not thereby fully answered so much of the plaintiff's bill as he therein answers unto, but the benefit of the defendant's plea and demurrer is to be saved to him at the hearing'.]

2 Chancery Cases 172, 22 E.R. 899

The cause came again to be heard before the Lord Chancellor. And, after long debate, he decreed for the plaintiff against the lease for years and an old statute which Vandebenden had bought in, for the Lord Chancellor [JEFFREYS] said he could not imagine why a jointress should be relieved against such a lease and not the widow, who has dower. The jointress comes in by contract and act of the party. The dower is by act of law grounded on marriage, the act of both parties. The wife in that case is by law more favored than the heir, and the heir should be relieved, as if a lease be made in trust to pay debts, the lessor dies, the heir, paying the debts, shall be relieved against the lease, and set it aside. And why not the wife? I can see no reason for it. And Vandebenden could not but have notice that the Lord Bodmin was married when also Vandebenden had a statute of £10,000 from the Lord Bodmin. But the defeasance thereof appeared not.

Some of the counsel insisted on it as a strong proof that Vandebenden had an abatement in respect of the plaintiff's possibility of title. Others insisted that a lease being created by the same settlement, by which the inheritance was settled only on a particular purpose and then to wait on the inheritance, shall be never applied to another purpose in equity, but is as a *non ens*. Others pressed that the wife for her dower is in law in the *per* by her husband and shall be entitled to clear all encumbrances as well and more than the husband.

Note: The wife had not dower executed, for the judgment in dower was with a *cesset executio* during the term.

1 Vernon 356, 23 E.R. 520

27 January [1686]. In Court.

The defendant, for £4400, purchased of the Lord Bodmin the reversion after the death of the Lord Warwick of lands of near £1000 *per annum* and for protection of the estate and to prevent the plaintiff's dower, the defendant, upon his purchase, took an assignment of a term for years, which

was vested in trustees to secure the payment of certain annuities and, afterwards, in trust to attend the inheritance and likewise took an assignment of an ancient statute that had been kept on foot for the protection of the estate.

The plaintiff had recovered dower at law, but she was prevented from taking out execution by reason of this term and statute. To be relieved against which and to be let into possession of her thirds was the end of the plaintiff's bill.

The defendant insisted he was a purchaser and that he ought to have the benefit of this term and statute for the protection of his purchase.

For the plaintiff, it was insisted that *aequitas sequitur legem* and that dower in the eye of the law was as much favored as a purchaser and, therefore, where a tenant in tail dies without issue whereby the estate, which was in the husband, is determined, yet the dower continues and that a woman, for her dower, comes not in the *post*, as has been objected, but it is a continuance of the husband's estate and, though a difference has obtained and been allowed between a jointress that comes in by the act of the party and a woman that, by operation of law, becomes entitled to dower and that the former shall have the benefit of a term limited to attend the inheritance, and not the latter, yet, in truth, there was no ground in reason for such a difference, for, though a jointure may be made in respect of a portion, yet marriage itself is a sufficient consideration and so [it is] esteemed in law *et fortior et aequior est dispositio legis quam hominis*.

Secondly, the original intent in creating this term was only to secure the payment of annuities and, that particular intent being satisfied, this term ought not to be longer kept on foot. And this reason was enforced from the judgment given in the cause between Hall and Dench,¹ where a man having by his will devised his lands in fee to I.S., and, afterwards, having occasion for moneys, mortgages the same lands in fee to I.N., it was decreed that this mortgage was not an absolute revocation but that the devisee should have the benefit of redemption, the mortgage being only for that particular purpose to supply the mortgagor's present occasions with moneys. And so, in this case, the particular ends in raising this term being answered, it ought not to be made use of to keep the plaintiff out of her dower. And they cited the Case of the Attorney General and Thruxton,² where it was adjudged that the inheritance escheating, though the king, by escheat, comes in the *post*, yet he should have the benefit of a term limited to attend the inheritance. And [it was] urged that, in case there was a term raised of lands in gavelkind to attend the inheritance, that equity would distribute this term amongst all the heirs in gavelkind *pro rata*. And it was further urged that the circumstances of this case were of great weight in equity; the defendant was a purchaser with notice of the plaintiff's title to dower and that he took advantage of the Lord Bodmin's extravagance and that the value in respect of the consideration paid was in itself very exorbitant, *viz.* the reversion of £1000 *per annum* after the death of the Lord Warwick, who died within a year after the purchase for £4400 so that it might be reasonably presumed that the defendant had an allowance made him in his purchase in respect of the plaintiff's title to dower. And it is a common case in equity that, where a purchaser has an allowance in respect of an encumbrance, this shall make the encumbrance good, though it was before defective. And the Lady Bodmin here brought a great portion, at least £30,000, and these circumstances make this case much different from that of Pheasant and Pheasant,³ for, there, the plaintiff had by the decree of this court her whole portion restored to her, it having been lodged in the Chamber of London, and the property not altered by her husband, and there was, therefore, the less reason to incline a court of equity to relieve her against the term that prevented her dower. And, in that case, she had not actually recovered dower, as the plaintiff here has done.

¹ *Hall v. Dench* (Ch. 1685), see below, Case No. 276.

² *Thruxton v. Attorney General* (Ch. 1685), see below, Case No. 285.

³ *Pheasant v. Pheasant* (1670), 2 Ventris 340, 86 E.R. 475, 1 Chancery Cases 181, 22 E.R. 752, 3 Chancery Reports 69, 21 E.R. 731, Lord Nottingham, *Prolegomena*, pp. 218, 233, 321.

For the defendant, it was insisted that this was a case that must frequently happen, and yet there was no precedent where a plaintiff had been relieved in such a case, but, on the contrary, the Case of Pheasant and Pheasant was express in point and adjudged that the plaintiff should not be relieved. And, as to the circumstances of a great portion brought by the plaintiff and that the defendant had purchased at an undervalue, by which they would difference this case from that, it was answered that those were bare suggestions and not a word proved of it in the cause, and, therefore, not to be regarded. But what was chiefly relied on by the defendant's counsel was the inconvenience that might ensue should relief be given in this case, that it would alter the course of conveyancing and overthrow many purchases, it having always been looked upon as a good security to a purchaser and a sufficient protection to his estate where there was an ancient term kept on foot, and, frequently, in such cases to avoid charges, they never insist on a fine or common recovery, and, if such a term shall be set aside for a doweress, why not for any other encumbrance?

The Court [JEFFREYS] inclined to relieve the plaintiff, and, therefore, in regard the equitable circumstances of a great portion and the purchase at an undervalue were not in proof, the Lord Chancellor [JEFFREYS] referred it to a Master to examine and to state the case to the court.

Precedents in Chancery 65, 24 E.R. 32

13 November [1696]. Lady Radnor v. Rotheram.

This case had been argued by counsel on both sides. And this day was appointed to give judgment.

The case was Lady Radnor's husband was seised in tail of the lands in question, but there was a term for ninety-nine years prior to his estate, which was created for the performance of several trusts in the earl of Warwick's will, which were all performed, and, after, to attend the inheritance. He levied the fine and suffered a recovery and sold the estate to the defendant. But his wife not joining, she, after his death, recovered dower. And she brought this bill to have the benefit of the term.

It was said the husband should have had the benefit of this term and dower is the continuance of the husband's estate and the vendee of the husband shall have it as to the inheritance, and, therefore, so ought the doweress too. And, if she had been a jointress, there is no doubt but she should have had it. And the purchaser had notice of the marriage. And several cases were cited, *Rockby versus Burdett*; *Attorney General and Farmer*; *Cloud and Drake*; *Fletcher and Robinson*, etc.¹

My Lord Chancellor [SOMERS] said he could not help the plaintiff, for, though a jointress shall have the aid of a court of equity in the like case, that is because she has a fixed interest by the agreement of the party. But a doweress has an interest by law under particular circumstances. And, if it went upon the true reason of the thing, a woman should be as well endowed of a trust of an inheritance as of the inheritance itself, which yet all agree she shall not be. And, where an inheritance upon which a term is attendant is recovered, there, the term shall go along with it, for it must either do so or be extinct, for the trustee cannot have it. This case has frequently happened, and yet it was never helped, which is a strong argument it cannot be. In the case of *Snell versus Clay*,² the term did go to the tenant by the curtesy, but this point was not stirred there. However, that was against an heir at law, and that is another case. But here is a purchaser. If there had been any agreement to have had the benefit of it, as there was in the Case of *Barker and Fouke*, it would have done it. But, in this case, I cannot assist the doweress against a purchaser, nor, perhaps, could I against the heir.

The Lady Radnor brought an appeal, and, the 14th of April 1697, the decree was affirmed in

¹ *Burdett v. Rockley* (Ch. 1683), see above, Case No. 7; *Farmer v. Attorney General* (1681), 79 Selden Soc. 880; *Robinson v. Fletcher* (1653), 3 Chancery Reports 94, 21 E.R. 739, Precedents in Chancery 250, 24 E.R. 121.

² *Snell v. Clay* (1695), 2 Vernon 324, 23 E.R. 809.

the House of Peers.¹

2 Freeman 211, 22 E.R. 1165

1696.

The Lord Radnor, in his settlement, limited a term to trustees for ninety-nine years for such uses and purposes as he should appoint and, for default of appointment, to attend the remainders, which were to the use of him and the heirs of his body, remainder to his own right heirs. Afterwards, he makes several appointments in pursuance of the trust, and he dies. The appointments are all satisfied.

The plaintiff brought a writ of dower and recovered at law, but she could have no fruit of it by reason of this term, which was taken in by the defendant, who purchased part of the estate, and it was kept on foot to protect his purchase. Whereupon she preferred her bill to be let into the estate, notwithstanding the term, the appointments being all satisfied.

It was insisted for her that the trusts being satisfied and the term, being to attend the remainder, ought likewise to attend her dower, which was reserved out of the remainder.

It was agreed in this case:

First, that a jointress should have had this term to have attended her estate and it should not have stood in her way;

Second, in case there had been any agreement that she should have had her dower, that then this term should not have stood in her way;

Third, in case there had been a mortgage upon the estate, she should have been let into a redemption, for that, when the mortgage is satisfied, the mortgagee has no more to do with the estate; (Beverley and Hayes.)

Fourth, in the case of an extent of a satisfied statute, a dowager has been relieved against it because it ought to be vacated.

But the Lord Keeper [SOMERS] was of opinion that the plaintiff could have no relief in this case. He said there was no precedent where the dowager was ever yet relieved against an heir at law where there was a term to attend the inheritance, and much less in this case where the defendant is a purchaser.

And for that which was alleged, that the defendant, at the time of the purchase, had notice of the plaintiff's right of dower, so he had also notice of the lease which was to protect it, and so that was nothing.

For the Case of Fesont and Fesont, where the dowager brought a bill to be relieved against a term to attend the inheritance, it was not resolved, but the case was agreed.

The Case of Fletcher and Robinson, where Colonel Robinson, being in danger of a forfeiture, made a lease to his younger son, and, after the elder son marrying and dying, his widow brought a writ of dower, and, this lease being insisted upon, it was decreed that it should not be given in evidence, but, there, the reason was because it was perfectly a fraudulent lease.

And for the Case of Clay and Sell,² where it was held that the tenant by the curtesy should have the benefit of a term attending the inheritance, which decree was made at the Rolls and affirmed before him, he said he had looked upon his notes and never found that that point was stirred in the case.

And, though, in this case here, there is great reason to assist the plaintiff, she having brought a great fortune into the family, he said that could make no alteration, for it might be said to be reasonable that there should be dower of the trust of an inheritance or of a long term for 1000 years, and yet it was never done. And he said, if the defendant here had been only heir at law, he could have

¹ *Countess of Radnor v. Vandebende* (1697), Shower P.C. 69, 1 E.R. 48.

² *Snell v. Clay* (1695), *ut supra*.

given no relief, there having been no precedents, especially in a case which must needs happen often.

British Library MS. Hargrave 80, f. 25v

Vanderbendy purchased the inheritance of him [Lord Radnor] and took an assignment of a term in trust that had been created for payment of debts and legacies not then satisfied, knowing at the same time that the vendor was married. The vendor dies, and then his widow prefers her bill to be relieved against the term, she contributing to the discharge of the trusts.

The bill was dismissed. And this dismissal was confirmed on appeal. Afterwards, the debts and legacies being satisfied, she brought another bill for relief, but [it was] dismissed again in both places.

[Other reports of this case: 1 Eq. Cas. Abr. 219, 21 E.R. 1002, 2 Eq. Cas. Abr. 383, 22 E.R. 326.]

[Affirmed on appeal: Shower P.C. 69, 1 E.R. 48, Lincoln's Inn MS. Misc. 559, f. 111.]

89

Knight v. Bampffield
(Ch. 1683)

*A bankrupt's assignees have the same rights as the bankrupt.
Fraud must be pleaded with particularity.*

1 Vernon 179, 23 E.R. 399

Eodem die [19 June 1683].

A man makes a mortgage, and, after forfeiture for non-payment of the mortgage money, he marries, and conveys the equity of redemption to trustees to the use of himself for life, remainder to his wife for her jointure. And, afterwards, he becomes a bankrupt. The commissioners assign this equity of redemption in trust for the creditors, and the assignees state an account with the mortgagee.

The jointress brings her bill to be relieved against this account, alleging it was not fairly stated, but that the assignees, by combination with the mortgagee, had allowed more money than was really due on the mortgage.

The defendant pleaded this stated account.

Lord Keeper [NORTH]: The assignees stand in the place of the husband, and the account by them stated ought to be as conclusive as if it had been stated with the husband. And the bill is not right in charging a general fraud in the stating of this account, but the plaintiff ought to have assigned particular errors in the account. However, he gave the plaintiff leave to amend her bill.

[Reg. Lib. 1682 A, f. 635.]

[Other reports of this case: 1 Eq. Cas. Abr. 12, 21 E.R. 836.]

Crossing v. Honor
(Ch. 1683)

Where creditors sue the heir of their debtor, they must allege specifically that the heir is bound to pay the debt.

1 Vernon 180, 23 E.R. 400

Eodem die [19 June 1683]. In Court, Lord Keeper.

A bill was brought by the obligee in a bond against the heir of the obligor, alleging that he, having assets by descent, ought to satisfy this bond.

The defendant demurred because the plaintiff had not expressly alleged in the bill that the heir was bound in the bond. And, though it was alleged that the heir ought to pay the debt, yet that was held insufficient.

And the demurrer was allowed.

[Raithby's note: In this case, a plea and demurrer were put in, and both were allowed, but without costs. Reg. Lib. 1682 A, f. 622.]

[Other reports of this case: 1 Eq. Cas. Abr. 41, 21 E.R. 859.]

Rutter v. Rutter
(Ch. 1683)

A freeman of a city, though residing outside of the city, is nevertheless bound by the inheritance customs of the city as to his estate.

1 Vernon 180, 23 E.R. 400

Eodem die [19 June 1683]. In Court, Lord Keeper.

A man that was a freeman of London leaves the town, and lives in the country twenty years together. And he marries, and makes his wife a jointure, and dies. She exhibits her bill to have her share of her husband's personal estate according to the custom of the City of London.

The defendant pleaded the husband's leaving the town and living twenty years in the country and the jointure.

But the plea was disallowed.

[Reg. Lib. 1682 B, f. 609.]

Anonymous
(Ch. 1683)

A bill for discovery only of a bond need not be made under an oath that the plaintiff has lost the bond.

1 Vernon 180, 23 E.R. 400

Eodem die [19 June 1683]. In Court, Lord Keeper.

Where a man brings bill for discovery of a bond, he need not make oath he has lost the bond, as he must do if the bill was to be relieved for the duty.

93

Cevill v. Rich
(Ch. 1683-1684)

The question in this case was whether an advancement of a daughter of a London freeman on her marriage by land of inheritance should exclude her from her customary part of the personal estate of her father.

1 Vernon 181, 23 E.R. 401

20 June 1683.

Upon a rehearing, the question was whether an advancement of a daughter on a marriage by land of inheritance was such an advancement as should exclude her from her customary part of the personal estate of her father, who was a freeman of London. In the case of the son and heir at law, it was admitted it would not exclude him. But, in this case, there being two daughters and coheirs and one being advanced by land of inheritance on her marriage, the case is more doubtful.

And the Lord Keeper [NORTH] ordered that the Recorder [of London] should certify the custom of the City of London in that point.

2 Chancery Cases 160, 22 E.R. 894

Rich v. Rich.

In debate, [it was] agreed by the counsel, and not denied by the court, that a lease for years waiting on the inheritance of a citizen shall not be reckoned as a chattel to be divided among children by the custom.

Secondly, it was certified by the Recorder that, if a citizen convey to a child an inheritance, though it be expressed for an advancement, it bars no child's part, but such child may come in for a share etc. with the rest.

Thirdly, it was debated whether, if a citizen marry [off] a daughter, and give money with her and she desire to come in for a share, whether she shall be admitted if the father do not in writing declare her advanced and the sum, as *Inds Law tempore* Edw. VI, or whether she shall not come in.

Lord Keeper [NORTH]: I regard no by law in the case.

Churchill: The precedents are many that, unless the father do declare her advanced, she shall come in. We ground not on any by-law, but the custom, which presumes in such case a full advancement, unless the contrary appear.

1 Vernon 216, 23 E.R. 423

29 January 1683[/84]. *Civil v. Rich.* In Court, Lord Keeper.

The custom of the City of London touching orphans was certified to be that, where an heir or co-heir had a real estate settled on him by the father, that the same was out of the custom of the City of London, and, though the father should afterwards declare the same to be a full advancement for such child, yet that was no bar to his orphanage part, neither was it to be brought into hotchpot, but it was clearly out of the custom.

And it was said that, by the custom of the City of London, where a child is married with the father's consent and there is a portion given in marriage, such child is debarred from claiming any benefit of the orphanage part unless the father shall by writing under his hand and seal not only

declare that such child was not fully advanced, but likewise mention in certain how much the portion given in marriage did amount unto that so it may appear what sum is to be brought into hotchpot.

[Raithby's note: The certificate in this case is not stated in the Register's Book; several proceedings were had, and certificates were made, but the decree was at last made upon a compromise, which took place between the parties. Reg. Lib. 1683 A, f. 596.]

[Other reports of this case: 1 Eq. Cas. Abr. 153, 21 E.R. 952.]

[Earlier proceedings in this case: 1 Chancery Cases 309, 22 E.R. 815, 2 Chancery Reports 141, 21 E.R. 640, 79 Selden Soc. 632, 722.]

94

Davis v. Weld
(Ch. 1683)

The question in this was whether the corpus of a trust could be sold to pay the debts of the beneficiaries who had only an interest for their lives in the trust.

2 Chancery Cases 144, 22 E.R. 886

22 June 1683.

There was a marriage settlement on the plaintiff and wife for life, the remainder to trustees for the life of Davis in trust to preserve contingent remainders to the first, second, etc., sons, etc., in tail. They were married eleven years, had no children, and Davis had not the portion of £1000 paid, and was in debt £4000 by that and other occasions. The estate settled was alleged to be £600 *per annum*.

And the bill was against the remainderman for life to join in a sale of some part, which also could not be done, and also the father and mother, eaten out with the debts, driven to great want. And precedents were cited where it had been done.

LORD NORTH: I cannot justify to decree a breach of trust. If it has been done, it was it may be when recompense was made. And, at last, he ordered precedents to be looked into.

1 Vernon 181, 23 E.R. 401

The defendant Weld was the surviving trustee in a settlement made on the marriage of the plaintiff Davies and his wife, whereby land was settled upon the husband and wife for their lives, remainder to trustees to preserve contingent remainders, remainder to their first and every other son in tail male. The plaintiff and his wife had been married twelve years, and never had any issue. And, having contracted debts, the bill was that they might be enabled to sell part of their estate for the payment of debts.

The defendant, the trustee, by answer, set forth the settlement, and confessed the plaintiffs had been married so many years and had had no issue and believed they never would have any and that they had contracted such debts. And he submitted to do as the court should direct, so as he might be indemnified.

For the plaintiff, it was insisted that the court, in such cases, had decreed the land to be sold for the payment of debts. And, for precedents, they cited the Case of Digby and Cornwallis and Sir John Tufton's Case.¹ And they said that necessity does create a natural equity.

¹ *Digby v. Cornwallis* (1671), 3 Chancery Reports 72, 21 E.R. 732; *Tufton v. Hawtry* (1678), Reports *tempore* Finch 415, 23 E.R. 226, 79 Selden Soc. 480.

But the Lord Keeper [NORTH] declared he did not see how he could make such a decree, for he had known where people had been married near twenty years without issue and after had children. But, at the plaintiff's importunity, he gave time until Michaelmas to attend him with precedents.

[Other reports of this case: 1 Eq. Cas. Abr. 386, 21 E.R. 1121.]

95

Lomax v. Bird
(Ch. 1683)

A creditor can defeat a suit for the redemption of a mortgage by showing that someone other than the plaintiff has the right of redemption.

1 Vernon 182, 23 E.R. 402

The plaintiff, claiming under the heir general, came to redeem a mortgage.

The defendant, by answer, set forth a deed of entail, entitling another person to the equity of redemption.

The plaintiff prayed he might redeem at his peril.

But the Lord Keeper [NORTH] would not admit him to do it unless he could make out that the estate tail was docked.

[Raithby's note: A trial at law was ordered. Reg. Lib. 1682 B, f. 718. Entered *sub nom.* Lomax v. Shalcrosse and Lomax v. Leigh.]

[Other reports of this case: 1 Eq. Cas. Abr. 315, 21 E.R. 1070.]

96

Talbot v. Braddill
(Ch. 1683-1686)

A debtor can redeem mortgaged lands before the creditor's right to foreclose accrues.

1 Vernon 183, 23 E.R. 402

The plaintiff [George Talbot], being seised in possession of lands of £15 *per annum* and in reversion after the death of his mother of other lands of about £17 *per annum* and of other lands after a term of twenty-six years to come of £8 *per annum*, which estate was subject to encumbrances, did by deed and fine [and recovery] in March 1657, in consideration of £320, demise those lands to the defendant [Edward Braddill] for 99 years at 5s. *per annum* rent, upon condition that, if the plaintiff or his heirs should pay the defendant £380 the 25th of March which should be in the year 1688, then the conusees should stand seised to the use of the plaintiff and his heirs. And the plaintiff covenanted for the defendant's enjoyment accordingly.

And now in 1682, twenty-five years after the conveyance, the plaintiff brings his bill to be admitted to redeem the premises and to have an account of profits from the date of the deed, alleging that, though the deed was in that form, yet it was nevertheless agreed between him and the defendant that it should be a mortgage and redeemable at any time upon payment of £320 and interest.

And, though there was no proof of any other agreement than the deed and that there was a bond to perform the covenants of the deed and although it appeared that the estate consisted much in old buildings and a mill and that the defendant had laid out above £100 in repairs, yet, in regard

the plaintiff's mother died within three years after the deed, whereby the revenue exceeded the interest of the money, the Lord Keeper [NORTH], notwithstanding there was a contingency at the time of the deed, thought this an unreasonable bargain, and did decree an account of the profits *ab origine* and a redemption on payment of what the profits fell short of the £320 and interest, and appointed the same to be paid at a day certain, and not to expect until 1688, according to the condition of the deed.

[Raithby's note: And the defendant to be allowed for all lasting improvements. Reg. Lib. 1683 B, f. 282.]

1 Vernon 394, 23 E.R. 539

26 April [1686].

Those, under whom the plaintiff claims, in the year 1657, conveyed the estate in question, being part in possession and the other part leased out for lives, unto the defendant and her heirs, and this was in consideration of £320 paid and a reservation of 5s. *per annum*. Possession is delivered immediately, but there is a proviso in the deed that, on payment of £380 in the year 1688, the estate should be redeemed or reconveyed. It appeared in the cause that the estate in possession at the time of the conveyance was but £15 *per annum* that the 5s. rent had been always paid, but two old lives happening to die within some few years after the conveyance, the estate became £45 *per annum*. And the plaintiff's bill was now to redeem.

This cause had been heard by the Lord Keeper NORTH, and a redemption was decreed with an account of profits. And the Master had reported the defendant overpaid, and the cause came now to be reheard.

It was insisted for the plaintiff that this was a special bargain and agreement of the parties that ought to be binding and that the estate was not redeemable until 1688 and that then there ought to be no account of profits, but £380 ought to be paid for the redemption.

First, the lien in a mortgage ought to be equal; where one side cannot foreclose, the other ought not to redeem. And, in this case, the plaintiff could not have foreclosed the defendant until 1688.

Secondly, an account of profits was not reasonable in this case: first, because there was a contingency in the case; as the lives happened to die soon, so they might have lived long and then the defendant had lost a good part of his interest; and, secondly, it is usual and common in Welsh mortgages to deliver the possession immediately and to agree to set the profits against the interest, and such agreements have always been allowed good in this court.

For the defendant, it was insisted that this court had always favored redemptions. And, if the court should suffer redemptions to be fettered by such clauses, scriveners would be inserting them in every mortgage, and, by that means, worm young heirs out of their estates. And it was said that the rule, where one side cannot redeem, the other cannot foreclose does not hold in all cases, for if I lend £100 upon a mortgage with a proviso to redeem on payment of £112 at the end of two years, there, one side cannot foreclose until the end of two years, but, if the mortgagor comes at the end of the first year and offers to pay the £112, he shall be admitted to the redemption.

The court [JEFFREYS] inclined that the plaintiff should redeem. But he proposed that, whereas the Master had reported the defendant to be £60 overpaid and the defendant had since that received two years profits, the plaintiff should waive the benefit of the account and the defendant forthwith deliver possession. And he gave the defendant a week's time to consider of this proposition.

[Raithby's note: And in case the defendant consented on such terms to deliver possession to the plaintiff, then to have the 40s. which he had deposited with the Register on his filing exceptions to the Master's report, by which the £60 was reported overpaid, returned to him, otherwise, the former decree to stand. Reg. Lib. 1685 B, f. 474.]

Prideux v. Gibben
(Ch. 1683)

A purchaser of land is the equitable owner from the time of the contract to purchase and before the common law conveyance is executed.

2 Chancery Cases 144, 22 E.R. 887

23 June 1683.

Amery on a treaty of purchase for lands with Pollard, articles were made, and Pollard was to convey to Amery lands called Rawson in fee. Amery makes his will in writing, and devises in general words all his lands to be sold for the payment of his debts and legacies. After[wards] Rawson is conveyed to him, and he after[wards] levies a fine.

And the Lord Chancellor [NORTH] pronounced a decree that the lands were well sold, though the devise was general and the devisor was not seised at the time of the will made, nor no new publication of the will being for the payment of debts. And he said that, if a man devise all his lands for the payment of debts and after[wards] purchase lands, that he would decree a sale although there be no precedent articles.

10 Modern 529, 88 E.R. 838

A man, having contracted for an estate, devises all his land to be sold for the payment of his debts. And, after the making of the will, the land was actually conveyed to him in pursuance of the antecedent contract.

The court decreed the land to be sold for the payment of his debts. And, if the testator had a power to devise an estate contracted for, before the conveyance, for the payment of his debts, he might certainly have devised it in any other manner. [It was] said in that case by the Lord Chancellor [NORTH] that, where a man devises his land to be sold for the payment of his debts and he, afterwards, purchases lands, equity will decree a sale, though there were no articles entered into precedent to the will.

[Other reports of this case: 1 Eq. Cas. Abr. 174, 21 E.R. 967.]

[Earlier proceedings in this case: *sub nom.* Prideaux v. Gibson, 79 Selden Soc. 893.]

Robinson v. Noel
(Ch. 1683-1687)

An executor cannot act so as to prejudice a creditor of the decedent, but where an executor pays a legacy, he will be estopped thereby as to his own claim.

2 Chancery Cases 145, 22 E.R. 887

The case was that Martin Noel, being seised in fee of the moiety of a plantation in Barbados, by his will in writing, devised the same to Robinson and Theodore Noel, who died an infant. And he made Robinson and Theodore and James Noel, two of his sons, executors, and appointed Robinson to manage the plantation. And he died. The executors proved the will.

The bill charges that Robinson was to supply the said plantation during the plaintiff's minority

and to answer the profits to them, it being for their maintenance. And it charges that, by the will, the plantation was devised to the plaintiffs and the said Theodore is since dead. And the bill prays an account against Robinson, although he had assigned to Fawknor, and leased to one Warsam for years at a certain rent, and yet had assented to the legacy, for he made a lease of the said half of the plantation, reserving the rent to himself in trust for the plaintiffs. And they pray an assignment of the term and account, Theodore and James being dead and the plaintiffs being their administrators.

The defendant Robinson confessed the seisin of Martin Noel, the father, and that, by his will, he devised the same to him and to Theodore and to James. But he denies himself chargeable to the plaintiffs, first, because, by the law and custom of Barbados plantations, though in fee are not to go to the heir nor the legatee until debts paid, and that the testator was indebted to others and to himself in great sums *ultra* the value of the plantation, and he mentions the sums, and that he, not being apprised at the time of the lease of such law or custom of Barbados, made such a lease and reservation of the rent, but that he made the lease as guardian and trustee for the plaintiffs, the children, and not as executor, and, therefore, it cannot be taken as a disposition as executor or assent to a legacy.

The Lord Keeper [NORTH] decreed for the plaintiff.

2 Ventris 358, 86 E.R. 484

The plaintiff's father, being seised in fee of a foreign plantation, devised it to the plaintiff, and he made the defendant executor.

The executor lets it for years, reserving rent in trust for the plaintiff, who now exhibited his bill to have his rent.

The defendant confessed the devise of the testator and the lease made by himself, but he said that great losses had fallen upon the testator's estate and that he paid and secured, which is payment in law, for the debts of the testator to a great value and that he hoped he should be permitted to reimburse himself by the receipt of this rent, notwithstanding the mentioning of the trust, as aforesaid.

The cause came to hearing.

And the court decreed for the plaintiff, for, although a legatee shall refund against creditors if there be not assets and against legatees, all which are to have their proportion where the assets fall short, yet the executor himself, after his assent, shall never bring the legacy back. But, if he had been sued and paid it by the decree of this court, the legatee must have refunded; as a debtor to a bankrupt pays him voluntarily, he must pay him over again. It is otherwise of payment by compulsion of law.

Note My Lord Chancellor [NORTH] said that, if they give sentence for a legacy in the ecclesiastical court, a [writ of] prohibition lies, unless they take security to refund. Note also in this case that, though it be an inheritance, yet, being in a foreign country, it is looked upon as a chattel to pay debts and a testamentary thing.

It was objected that this could not be taken for an assent, for, if so, how could the testator let it?

But the court said that it did tantamount to an assent, and, being a lawful act, a little matter will be taken for an assent.

2 Chancery Reports 248, 21 E.R. 670

Noell v. Robinson.

The case being *viz.* that Sir Martin Noell, deceased, father of the plaintiff, being seised in fee of a moiety of a plantation in the Barbados called Horn Hall with the appurtenances and being legally entitled by the laws and customs of the said island to dispose thereof by his will in writing, devised the same to the plaintiffs Nathaniel, Grace, Elizabeth, and one Theodorus Noell. And Sir Martin, by his will, appointed the defendant Robinson to supply the said plantation with all necessaries during the minorities of the plaintiffs and to receive the profits in trust for the plaintiffs. And, for his care

therein, he gives him an allowance, and made his son Martin Noell and Theodorus Noell, deceased, and the defendant Robinson his executors. And the defendant Robinson proved the will, and took on him the execution thereof and the management of the plantation, and assented to the legacy and bequests of the plaintiffs. And, in performance of such trust and assent, they leased the premises to one John Worsam for twenty years at 20,000 pound weight of sugars rent *per annum* in the trust for the plaintiffs, the devisees, and, since, have conveyed away the same to one Falkner and others to defeat the plaintiffs. So the bill is to call the defendant Robinson and Falkner to account for the profits of the premises and to convey their interest to the plaintiffs.

The defendants insist that, by the custom of the said island of Barbados, where the said premises are, the said Sir Martin had not power to make such a devise of the premises to the plaintiffs, he being then much indebted to several persons, and the said defendant Robinson had paid several debts for him, and insist that the said lease made to Worsam was done without due consideration, and not with any intent thereby to assent to the lease to the plaintiffs and deprive the creditors of their just debts or, in any sort, to exempt the estate therefrom, nor had no reason so to do, he being bound with the testator in several securities to several persons in several sums of money, and employed all the profits he received, as also £500 and odd pounds for Worsam's lease, for the payment of Sir Martin's debts, amounting to £30,000. And so the testator's estate ought to pay the debts, and not to be subject to his will. And the said defendant, believing the premises to be as lands of inheritance, made the said lease to Worsam, a creditor of Sir Martin, but is since advised it is a chattel and liable to the payment of his debts.

But the plaintiffs insisted that, by the said lease to Worsam and a reservation of the rent thereon to himself in trust for the plaintiffs, he had placed the estate in such a manner that the same could never by any subsequent act come into the administration of the estate of Sir Martin. And every act of the defendant Robinson was a plain assent to the legacy to the plaintiffs. And it is plain the premises were devisable, and so the plaintiffs' title was plain and undoubted, and the plaintiffs ought to have a decree against the defendant to account to them for the said estate, and ought to have the benefit of the said lease.

The defendant further insisted that, by such imprudent act, as aforesaid, he ought not to be divested of the estate, but it ought to go to pay Sir Martin's debts.

This court declared that, by the said clause in the lease to Worsam, the defendant had assented to the plaintiffs' legacies given them by the will of their father. And the devise by the will was a good devise, and the premises did well pass thereby and, the said act of the defendant Robinson, being voluntary, had put the estate out of the power of the creditors of Sir Martin or out of the power of any administrator *de bonis non* of him. And [the court] decreed the plaintiffs to have the benefit of the premises and of the lease to Worsam and the defendants to assign their interests to the plaintiffs accordingly.

But the said defendant desiring a rehearing of the cause, which was on the 20th of November 1682, when the defendant insisted that the said lease could not be an assent, for that the defendant Robinson then claimed the premises, not as executor or otherwise than only as trustee for the devisees, whose inheritance he then took the same to be, and not as personal estate, upon which and other grounds the defendant insists, the said rent and reversion of the premises expectant on the determination of the lease was and ought to be of the testator's personal estate and to go in the ordinary course of administration and to an administrator *de bonis non* and be liable to debts.

His Lordship [Lord Nottingham] notwithstanding what was now urged by the defendant declared he saw no cause to alter the former decree, but confirmed the same.

This decree was reversed by the Lord Keeper NORTH, and, in 1683, he heard this cause upon the whole merits, and ordered an account.

And, in 1686, The Lord Chancellor JEFFREYS reheard this cause upon the merits, and confirmed My Lord Chancellor Finch's decree, and discharged My Lord North's decree.

30 April [1687]. Lord Chancellor. Noel v. Robinson.

By the defendant's counsel, it was insisted that, by the custom of the island of Barbados, a plantation there, though it be a fee simple estate, is in the first place liable to the payment of debts, so that the owner cannot by his will so devise his plantation, but that the same will be liable to the payment of his debts. But these debts must be either debts contracted on the place or debts contracted in England or elsewhere for matters relating to the plantation etc.

And Mr. Serjeant Maynard's Case was cited, who recovered a debt contracted here against the executor of an owner of a plantation in Barbados, and, by his advice, an action of trover was brought and judgment obtained for the fourth part of a Negro. But the principal point intended was whether the defendant Robinson, who was the executor of Sir Martin Noel, who had devised this plantation to his children, having made a lease of this plantation reserving the rent to himself, but had therein declared that the same was in trust for the children of Sir Martin Noel, who were the legatees, was such an assent to a legacy as should be binding to the executor so as that he should not have relief against the same as to debts by him afterwards paid.

And it was insisted for the defendant that such an assent to a legacy is no ways binding as to a creditor, the thing itself remaining in specie. But, in case the plantation had been afterwards sold, it might have been otherwise. And then as it would not bind the creditors, so it would not in equity be binding to the executor himself as to such debts as were by him afterwards paid, for, as to those debts, he stood in the place of the creditors and had their equity. And the Case of Huttoft Grove *versus* Banson and his wife and Thomas Grove,¹ decreed the fourteenth of December 1669, was cited, where one Huttoft, by his will, devised £5000 to the plaintiff and £500 to the plaintiff's sister, who afterwards married Banson, and made the defendant Thomas Grove his executor, and, upon the treaty of that marriage, the executor agrees that there was £500 and interest due for the legacy and that he would make that up £1000 and he enters into a statute for payment and also assigns the equity of redemption of a mortgage for further security and dies, having much wasted the testator's estate, and without assets sufficient to make compensations. And the plaintiff's bill was that Banson might have his £500 legacy only in proportion with him, and it was so decreed accordingly, and the plaintiff was preferred as to the redemption of the mortgage, he having a £5000 legacy and the defendant but £500. And a like case of Nelthorpe and Biscoe [was cited],² where a legatee had actually received her legacy at the time it became payable, and the estate afterwards, by casualty, proving deficient to answer the other legacies, which were not then payable, was made to refund. And the Case of Chamberlain and Chamberlain,³ decreed the 26th of July 1664 [was cited], that an assent to a legacy shall not bar a creditor where the thing itself is remaining in specie. And in the Case of Catchmay and Nicholls,⁴ where a woman, who had the use of a personal estate devised to her for life with a remainder over to another, had changed the securities and taken new bonds in her own name, it was determined that that should not be construed to be a *devastavit*, or make her estate any way liable and that the executor in that case was but in the nature of a trustee and was not to be punished where the devisee had acted fairly and done nothing against good conscience. And, besides, in the principal case, the assent insisted upon is not properly speaking an assent to a legacy, for the devise is of no less than the whole inheritance.

¹ *Grove v. Banson* (1669), 1 Chancery Cases 148, 22 E.R. 736.

² *Nelthrop v. Hill* (1669), 1 Chancery Cases 135, 22 E.R. 730.

³ *Chamberlain v. Chamberlain* (1674-1675), 1 Chancery Cases 256, 22 E.R. 788, 2 Freeman 141, 22 E.R. 1115, 73 Selden Soc. 68.

⁴ *Catchmay v. Nicholas* (1674), 73 Selden Soc. 79, Reports *tempore* Finch 116, 23 E.R. 63.

Lord Chancellor [JEFFREYS]: It is a case of consequence, and it will be fit, therefore, it should be well enquired into how far a plantation in Barbados is liable to the payment of debts. But, as to the actual assent to a legacy by an executor, that would not bind a creditor. If an executor should release a debt of £100 for 1s., that would not bind a creditor. But, in case there is no other creditor, save only the executor himself, there, his assent will be binding to him, as if an executor will voluntarily release a debt, he shall not be relieved against it, though a creditor should.

1 Vernon 460, 23 E.R. 585

Eodem die [26 May 1687]. Lord Chancellor.

This cause coming on this day again for His Lordship's opinion, he [JEFFREYS] inclined to decree it for the plaintiff. And he declared that, where an executor has assented to a legacy, he shall never afterwards avoid it, though a creditor, in such case, may make the legatee refund. And, as touching the making a plantation in Barbados liable to a debt contracted here, it was said the method was by a procuration from hence under the seal of the Mayor of London and getting that recorded there or an acknowledgment of the debt by the owner of the plantation upon the place will do it.

1 Vernon 469, 23 E.R. 594

25 June [1687]. Lord Chancellor.

Per curiam [JEFFREYS]: A plantation in Barbados is not a testamentary estate by the laws now in force. And, therefore, he confirmed the Lord Nottingham's decree, which was for the plaintiff Sir Martin Noel's children.

[Reg. Lib. 1682 B, f. 679.]

[Other reports of this case: 1 Eq. Cas. Abr. 299, 21 E.R. 1059.]

[Earlier proceedings in this case: 1 Vernon 90, 23 E.R. 334, 79 Selden Soc. 929.]

99

Dowse v. Percivall
(Ch. 1683)

Where a person owns a fee and a leasehold in the same land, he owns a freehold of inheritance.

2 Chancery Reports 243, 21 E.R. 668

The plaintiff's father, John Dowse, took a lease of the City, and, afterwards, purchased the inheritance in trustees' names for him and his heirs. And the said Dowse died intestate. The defendant, his wife, as administratrix, claims his lease to belong to his personal estate.

This court decreed it to attend the inheritance.

2 Vernon 57, 23 E.R. 646

The Case of Douse and Persivall [was] first heard by the Lord Nottingham, and reheard by Lord Guildford, where a man purchased an estate of inheritance, on which there was a term for years in being, and he took the assignment thereof in his own name.

In that case, the court decreed that this term, though in himself, should not be looked upon as part of his personal estate so as to be subject or liable to the custom of the City of London.

[Reg. Lib. 34 Car. II, f. 186.]

[Earlier proceedings in this case: 1 Vernon 104, 23 E.R. 345, 1 Eq. Cas. Abr. 151, 21 E.R. 951.]

100

Windham v. Jennings
(Ch. 1683)

A mortgage can secure several loans, in which case, the debtor or his heir must repay all of the loans in order to redeem the mortgage.

He that will have equity must do equity.

2 Chancery Reports 247, 21 E.R. 669

Sir George Crooke mortgaged lands in 28 Car. II [1676-77] to the defendant for £2000 and died. And the plaintiff, being his heir, prays a redemption.

But the defendant insists that the said Sir George Crooke, before the mortgage, borrowed of the defendant £300 on bond, *viz.* in 1672, and the defendant insists it was agreed to be secured also by the said mortgage, but the plaintiff is not willing to pay that, and will redeem the mortgage only.

This court decreed the plaintiff to pay to the defendant both the £2000 and the £300, and, then, the plaintiff to redeem, for he that will have equity must do equity.

[Reg. Lib. 34 Car. II, f. 776.]

101

Jennet v. Bishop
(Ch. 1683)

An appeal does not lie from the Court of Exchequer in the County Palatine of Chester to the Court of Chancery.

1 Vernon 184, 23 E.R. 403

14 July 1683.

The bill was a bill of appeal and review, the cause having been heard and decreed in the County Palatine of Chester.

To this bill, the defendants demurred.

And after long debate, the Lord Keeper [NORTH] allowed the demurrer, and declared his opinion to be that such a bill would not lie. But, if any appeal lies, it must be to the king himself.

102

Killigrew v. Killigrew
(Ch. 1683)

The outlawry of a plaintiff does not prevent his litigation in a representative capacity.

1 Vernon 184, 23 E.R. 403

Eodem die [14 July 1683].

The bill being to be relieved touching a debt due to the plaintiff as executor, the defendant pleaded an outlawry of the plaintiff in bar.

But the plea was overruled, the plaintiff suing *in autre droit* as executor.

[Reg. Lib. 1682 A, f. 644.]

[Other reports of this case: 1 Eq. Cas. Abr. 37, 21 E.R. 856.]

103

Somerset v. Fotherby
(Ch. 1683)

A bill in equity to preserve testimony lies to prove a modus decimandi.

1 Vernon 185, 23 E.R. 403

Eodem die [14 July 1683].

The bill being to examine witnesses *in perpetuam rei memoriam* to prove a *modus decimandi*, the defendant demurred for that the bill was to establish a custom against the church and in prejudice of tithes that are due *communi jure*. And several precedents were cited, where bills to have a *modus* decreed were upon a demurrer dismissed.

But this bill being only to preserve testimony, the Lord Keeper [NORTH] thought it reasonable the defendant should answer, and he overruled the demurrer.

[Other copies of this report: 1 Rayner 65, 2 Gwillim 534, 1 Eagle & Younge 541.]

[Reg. Lib. 1682 B, f. 690.]

[Other reports of this case: 1 Eq. Cas. Abr. 234, 367, 21 E.R. 1014, 1107.]

104

Price v. Price
(Ch. 1683)

An allegation of fraud in a bill of complaint must be responded to by way of an answer and not by a plea.

1 Vernon 185, 23 E.R. 404

Eodem die [14 July 1683].

To the plaintiff's bill, the defendant pleaded he was a purchaser *bona fide* for a valuable consideration.

But there being several badges of fraud alleged in the bill, though the defendant in his plea had denied them, yet, because he had not denied them by way of answer that so the plaintiff might be at liberty to except, the plea was overruled.

105

Anonymous
(Ch. 1683)

A person can be examined as to a contempt of court by a commissioner in the country.

1 Vernon 187, 23 E.R. 404

Michaelmas term 35 Car. II, 1683.

Where a man is to perfect his answer upon interrogatories or to be examined for a contempt, although the rule of court be that he shall be examined in four days or stand committed, yet, if the party be in the country, he shall have a commission to take his examination.

[Other copies of this report: 1 Eq. Cas. Abr. 101, 21 E.R. 911.]

106

Edmunds v. Povey
(Ch. 1683)

A second mortgage will be subordinated to a third mortgage where the holder of the third mortgage without notice of the second purchases the first encumbrance.

1 Vernon 187, 23 E.R. 404

15 October 1683.

The principal question in this case was touching the buying in of encumbrances, *viz.* where there are first, second, and third mortgagees, who had all lent their money without notice. The third mortgagee, hearing of the two former securities, buys in the first encumbrance, to wit a judgment that was satisfied. And it was strongly insisted at the bar that, though this trade of buying in encumbrances had been formerly countenanced here, yet that it was in truth a thing against conscience and contradictory to many established rules of law and equity.

But, after long debate, the Lord Keeper [NORTH] told them he wondered the counsel laid their

shoulders to a point that had been so long since settled and received as the constant course of Chancery. It is true there have been strong arguments used against the unreasonableness of this practice, and there might be likewise strong reasons brought for the maintaining of it, and so it was at first a case very disputable. But, being once solemnly settled, as it was in the Case of Marsh and Lee,¹ he would not now suffer that point to be stirred.

The counsel, in their own justification, replied that His Lordship, when this cause came first before him, had referred it to Sir Adam Ottley to state the case specially. And it now came before him on the Master's report, and there was no other point in the case but this. And, therefore, they supposed His Lordship intended they should be at liberty to speak to that matter.

But His Lordship [NORTH] declared he would not change the rule that had so long prevailed in this case. But it may be he might do so where he found a man designing a fraud and thought to make a trade of cozening by the rules of the court.

Serjeant *Pemberton* moved that, as to the point of notice, he supposed His Lordship meant that a man that buys in a prior encumbrance must do it without notice of the middle encumbrance, not only when he lent his money, but also at the time when he bought in the prior encumbrance.

Sed non allocatur.

[Reg. Lib. 1683 A, f. 185.]

107

Chapman v. Bond
(Ch. 1683)

If a purchaser take a term in his own name and the inheritance in the name of a trustee, it is assets for the payment of the decedent-purchaser's debts and goes to the heir, though it be not mentioned to attend the inheritance.

1 Vernon 188, 23 E.R. 405

29 October 1683. In Court, Lord Keeper.

Where a man takes an assignment of a term in a trustee's name and the inheritance in his own name so that, by construction in equity, the term is attendant upon the inheritance, this term in equity shall be assets for the payment of debts as well as a term taken in his own name is assets at law, but, with this difference, that the heir shall have the benefit of the surplus of the trust of a term, and not the executor after debts paid. But, if a term be expressly declared by deed to be attendant on the inheritance, there, such a term shall not be made assets in equity.

Note, this point was not directly in the case, but came in by way of argument only, and so the difference that had been formerly taken in this case between legal and equitable assets was exploded.

Lincoln's Inn MS. Misc. 498, p. 1, pl. 1

Lord Keeper [NORTH]: If a man purchased an estate which is mortgaged for years and takes an assignment of a mortgage lease in friends' names in trust for himself, his executors, and assigns and takes a conveyance of the fee to himself and his heirs, this term, being only by construction in equity to attend the inheritance, shall be assets in equity to pay all debts as it would have been at law if the assignment of the term had been taken in his own name and the inheritance in trustees.

But [it was said] by Mr. *Phillips*, counsellor, if a term be assigned to friends upon an express

¹ *March v. Lee* (1670), 1 Chancery Cases 162, 22 E.R. 743, 3 Chancery Reports 62, 21 E.R. 729, 2 Ventris 337, 86 E.R. 473, 1 Eq. Cas. Abr. 323, 21 E.R. 1076.

trust to attend the inheritance, then it shall be only assets in equity to such debts as would have charged the inheritance at law, *viz.* bonds etc.

[Other copies of this report: Lincoln's Inn MS. Misc. 503, p. 72, pl. 1, Lincoln's Inn MS. Misc. 504, p. 69, pl. 2.]

[Reg. Lib. 1683 A, f. 170, entered *sub nom.* Chapman v. Condon.]

[Other reports of this case: 1 Eq. Cas. Abr. 241, 21 E.R. 1018.]

108

Tremaine v. Tremaine
(Ch. 1683)

Where a lawsuit is settled out of court, the court, with the consent of all of the parties, can allow the case to be withdrawn and take it off the file.

1 Vernon 189, 23 E.R. 405

This cause was between a father and son. And there having been great heat and indecent reflections on both sides in the bill and the answer and the matter being ended this vacation by compromise, upon a motion this day made in court by Mr. *Porter*, the bill and answer were taken off the file by consent.

109

Earl of Ranelagh v. Hayes
(Ch. 1683)

A surety can require the principal debtor to pay the debt that is owing, and a surety can require a creditor to sue on a bond against the principal debtor.

2 Chancery Cases 146, 22 E.R. 888

Michaelmas term 1683.

Hayes covenants to save the Lord Ranelagh harmless touching three parts of a farm assigned to Hayes by the Lord Ranelagh, *et sua quia* damnify.

It was decreed by the LORD NORTH to save harmless and a Master to tax damages.

But it was much opposed by Mr. *Keck*, because a covenant is not to perform anything in specie, and a Master in Chancery is to tax damages instead of a jury, and the plaintiff has a remedy at law, and not here.

And note the breach assigned was that the plaintiff was sued in the Exchequer by the king for rent, but it was not charged in the bill here or proved that the rent was behind, but only that he was sued etc. And [it was] objected that this would for every petty breach subject the defendant to commitment.

1 Vernon 189, 23 E.R. 405

30 October 1683.

The earl of Ranelagh assigns several shares of the excise in Ireland to Sir James Hayes, and Sir James covenants to save the earl harmless in respect of that assignment and to stand in his place touching the payments to the king and other matters that were to have been performed by him. The plaintiff, the earl of Ranelagh, suggests in his bill that he is sued by the king for £20,000 and that the defendant Sir James Hayes, by the agreement, ought to have paid it. And, therefore, he prays the defendant may be decreed to perform the agreement in specie.

It was insisted for the defendant that here was no proper subject for equity, nor anything that the court could decree, for here was no specific covenant, but only a general and personal covenant for indemnity and that was not decreeable in equity, for it sounds only in damages, which cannot be ascertained in this court, especially as this case is, there being no breach of the covenant assigned in the bill, for a suit being brought by the king, that is not in itself any breach, for the defendant cannot prevent that. He will defend the suit, and, if nothing is recovered, there is no breach.

But the Lord Keeper [NORTH], in this case, thought fit to decree that Sir James should perform his covenants, and he directed it to a Master and that *toties quoties* any breach should happen, he should report the same specially to the court. And the court then might, if there should be occasion, direct a trial at law in a *quantum damnificatus*. And he conceived it reasonable that Sir James Hayes should be decreed to clear the earl of Ranelagh from all these suits and encumbrances within some reasonable time. [One year is the time specified in the decree.] And he compared it to the case of a counter-bond, where, although the surety is not troubled or molested for the debt, yet, at any time after the money becomes payable on the original bond, this court will decree the principal to discharge the debt, it being unreasonable that a man should always have such a cloud hang over him.

[Raithby's note: The covenant on the part of the defendant appears to have been that he would indemnify the plaintiff and his estate from all debts, accounts, covenants, breaches of covenants, rents, and demands, whatsoever, and from all costs which should come to the plaintiff or his estate by His Majesty, his heirs, or successors, and from any creditors or other person to whom any debt should be due or payable for or by reason of the said three parts or any of the covenants or agreements entered into by the said letters patent or articles of agreement in the said indenture mentioned by the plaintiff, and should, likewise, indemnify the plaintiff and his estate, and procure a discharge according to the usual form to the plaintiff for £300 due to the partners, and that he, the defendant, should indemnify the plaintiff from all accounts, payments, charges, and actions whatsoever, which the partners might have for or on account of any moneys, due by the plaintiff, the then late farmer of His Majesty's revenue in Ireland, for rent or otherwise. The breaches assigned in the bill are as follow, 'that the defendant wholly refused to perform the covenants on his part, but, in absolute breach thereof, permits the plaintiff to be prosecuted by His Majesty for his arrears of rents due to His Majesty, reserved by the said letters patent, and also for a large sum of money borrowed of His Majesty and applied to the uses of the undertaking', and the bill also charges that the plaintiff is prosecuted by one of the partners for the arrears of certain payments from which the defendant is also obliged by covenant to indemnify the plaintiff. The Lord Keeper [NORTH] gave as one reason for his decree 'that the computation of damages in such a cause must depend upon examination of long and intricate accounts of the revenue of Ireland, which cannot be made upon a trial at law, and a jury cannot foretell what damages will after happen, but must give their verdict upon uncertainties, which will afterwards occasion suits in this court'. And it was also ordered that, upon any suit or demand against the plaintiff upon any matter relating to the said farm, he should give timely notice to the defendant or his clerk in court to the intent the defendant may take all necessary care in defense thereof to prevent any damage that may come to him thereby. Reg. Lib. 1683 A, f. 105.]

If A. is bound for B. and has a counter-bond from B. and the money is become payable on the original bond, equity will compel B. to pay the debt, though A. is not sued, for it is unreasonable that a man should always have such a cloud hang over him.

[Other reports of this case: 1 Eq. Cas. Abr. 17, 79, 21 E.R. 839, 892.]

Howard v. Harris

(Ch. 1683)

Compound interest can be contracted for.

The question in this case was whether an equity of redemption can be defeated by a contract to that effect.

2 Chancery Cases 147, 22 E.R. 888

6 November 1683.

The bill was against Harris and Robert to redeem two mortgages made to Harris by Henry Howard, late husband of the plaintiff, and brother of H., heir to Harry. The bill charges the mortgages made and that there were some agreements for redemption, if not expressed in the deeds, yet it was to be redeemed, and charged that she was jointressed on articles made before marriage, executed after[wards] by reason Howard, the intended husband, was then an infant, but, at full age, made a jointure to the plaintiff. And [she] offers to pay the money, so she may be admitted to redeem.

Robert consents to her demand.

Harris denies the articles, and sets forth that, as to nine tenements, he was a purchaser for valuable consideration, £1600, from Sir Robert Howard. And after two mortgages made to him, the last mortgage including the first, and redeemable on payment of £1000, the nine tenements in lease for three lives are yet in being.

The case came now to be heard. And, on the pleadings and proof, [it] was, *viz.* Sir Robert Howard, in 1651, by fine and deed produced and proved, conveyed the nine tenements in reversion after three lives yet in being, and whereon £7 10s. was reserved to Harris and his heirs. [In] *anno* 1665, she, Sir Robert [being] then dead, married Henry. [In] 1671, Henry, in consideration of £1000 mentioned in the deed to be paid, conveyed Lurkin and other lands (the nine tenements are no part of these lands) to the plaintiff for her life for her jointure (*quaere* if not for part of her jointure). And, after[wards], in June 1671, [he] conveyed the nine tenements in reversion to him in fee, but not to be redeemed but by Henry and the heirs males of his body, and by no other, which, by his answer, he says was done so, because of the injury Sir Robert had done him, for now one Berry, then husband to the plaintiff, had set on foot a fraudulent conveyance made by Sir Robert and his brothers, whereby Berry pretended that Sir Robert was but tenant for life, and so the conveyance of the nine tenements was void, which induced Harris to consent, for thereby, *viz.* by this mortgage and his conveyance, he still kept possession, and received the rents £7 10s.

Afterwards, having his money, £564 secured by this mortgage, Henry Howard had need of more money, and Harris supplied Henry Howard with £436 more, which made the debt £1000. And he took a mortgage *anno* 1672 of the same lands (the nine tenements in reversion as aforesaid) and of divers other lands to him and his heirs, redeemable only by Henry Howard and the heirs males of his body. But, in this conveyance (*quaere*, if not in the former mortgage also), Henry Howard covenants to pay the interest duly every half year, and the £1000 in *anno* 1686. Afterwards, in 1673, Henry Howard conveys Hopsel and Aston, which are the nine tenements, and divers other lands, to the plaintiff for life for a jointure, the remainder to himself and the heirs males of his body, or to that

effect, the remainder over, under which Robert, the other defendant, claims. But, as before is said, the plaintiff, until this conveyance, had no title to the land in Hopsel etc., the nine tenements.

For the plaintiff, Mr. Solicitor [General *Finch*], Mr. *Keck*, and others insisted that both conveyances being with power of redemption by Henry Howard and the heirs male of his body ought in equity to be not so restrained. A mortgage can by no art or clauses be so restrained, but the mortgagor and his assigns of the equity of redemption or his own heirs, though not of his body, may redeem, else it would lie in the power of a scrivener to make all mortgages absolute in effect, and to put a bar to the power and jurisdiction of this court to relieve in cases of mortgage, by inserting such a clause.

Mr. *Keck* cited a precedent of 1678 between Killington and Green. The condition of a mortgage was to redeem during the life of the mortgagor. It was decreed that the heir might redeem.

Secondly, the covenant on Henry Howard's part to pay the money and interest makes it a mortgage on Harris's part, and he might sue for the money, and it cannot be a mortgage, but it must be a mutual mortgage equal to both.

On the other side, it was said that, generally, it is true, that no restraints could be put on a redemption where the business is only lending of money by the one, and securing the money lent by the other, and, therefore, if the case were only that Harris had lent etc. and Howard had made a mortgage redeemable by him or his heirs male etc., his heir general or assignee might redeem, for securing the money is the main [object] of the business. But this is not the case as to the nine tenements, for it is alleged and proved Sir Robert Howard had long before the jointure, *viz.* 1651, absolutely and for a full consideration by fine and deed sold those lands to the defendant, *viz.* the reversion and rents £7 10s., and Harris [was] in possession of the rents before and until the jointure made. And the consideration of the mortgage 1672 to him by Henry Howard was the precedent title from the father of Henry. If it had been so plainly said that, for that reason and because he would only redeem, and so his heirs males, it would have been a good restraint, that he and his heirs males might have liberty to set on foot his pretense, but no other. If A., in breach of trust vested in him for J.S., should convey the lands to B. and B., being entitled under a breach of trust, conveyed to J.S. on condition that he and the heirs of his body may redeem, B. died without issue, shall his collateral heirs redeem, and so as that J.S. should be forced to convey not only the interest he has by the mortgage, but extinguish his ancient title? For so it is desired here, that Harris should convey to the plaintiff, and so lose his former title, for which he paid so much, and has no consideration for it, for his lending of money to Howard is no consideration to Harris to lose his purchase and his money which he paid for it.

Again, Harris did really purchase from Sir Robert. It is not alleged or proved how Henry Howard comes to be interested or what title Henry Howard had. It is not said so much as in the bill that Henry Howard was seised of any estate, in fee or otherwise, but *abrupte* that he made such jointure and mortgage, and prays the conveyance, paying the mortgage money.

The defendant sets forth a purchase from the father by fine for valuable consideration. Now, if you will have a re-conveyance and redeem, you must show why the conveyance to the defendant is not good, by showing a former title to the title of Sir Robert, the conusor of the fine, or invalidate his conveyance by some matter, and not only, by replication, aver your jointure; else, if a man take a mortgage of his own lands and lend money, he shall lose his land for his own money, *viz.* for nothing.

The objection on the covenant can press no further than as to the other lands, where the defendant's title is only the mortgage.

The portion the plaintiff brought is but £1000. Both her jointures are near £1000 *per annum*.

The LORD NORTH, Lord Keeper, decreed the redemption, but on payment of the money and interest on interest. And he took a difference where the covenant is to pay the interest and where not, for [an action of] debt lies on the covenant.

Michaelmas term 1683.

Sir Robert Howard, by a settlement in the family, being tenant for life, with remainder to Henry, his first son, sold the lands in question to the defendant. Afterwards, he dying, his son Henry defeated the said purchase by virtue of the said settlement, and, in the year 1670, he mortgages the same to the defendant for £500, and then settles the same upon his wife, the plaintiff, for an addition to her jointure voluntarily. Afterwards, the said Henry Howard takes up £500 more of the defendant, and, in the deed, the proviso is that, if he or the heirs male of his body should pay etc., then to be void. And a covenant is that no person should redeem but he and the heirs male of his body. And he covenanted likewise that the money should be paid *prout*.

Henry Howard dies without issue male, and the plaintiff, being his widow and entitling herself by virtue of the said deed of settlement, preferred her bill to redeem. And a redemption being decreed by the Lord Chancellor FINCH,¹ the cause was now reheard.

On the defendant's part, it was insisted that, here being exclusive words, no person excluded by them should redeem, for the mortgagor, being master of his own estate, might part with it upon what terms he pleased. And, here, it did plainly appear that his intent was that no person but himself and the heirs male of his body should redeem.

But the Lord Keeper [NORTH] confirmed the decree, for it being a security for money once and there being a covenant to pay the money, by which covenant the mortgagor and his executors were perpetually obliged, and, besides, there being no consideration paid for this exclusive covenant, he decreed a redemption according to the former decree. But he seemed to be of opinion that, if there had been any particular agreement and a consideration paid, those exclusive words might have been effectual.

But others were of opinion to the contrary, for once a mortgage and always redeemable, no negative words shall exclude the mortgagor. And it was compared to a distress for rent that, although there be a covenant in the deed, that, if the rent be behind, the party may distrain and hold the distress irrepleviabie, that, notwithstanding, the party may replevy.

But a case was cited by Mr. Solicitor [General, *Finch*], in the House of Lords, that where a man made a purchase and an agreement was made between the vendor and vendee that, in case the purchase money were repaid within seven years, that he would re-convey, there, if the money be not repaid in the seven years, the party is not bound afterwards to re-convey, there being no interest to be paid nor any covenant to pay the money.

Lincoln's Inn MS. Misc. 498, p. 1, pl. 2

It was held in this case by My Lord Keeper [NORTH] that a mortgagee shall have interest not only for the principal mortgage money but also for so much of the interest as is in the mortgage expressly covenanted to be paid from such time as the same becomes due, because the mortgagee might upon the covenant have had an action of debt for that interest as well as the principal.

[Other copies of this report: Lincoln's Inn MS. Misc. 503, p. 72, pl. 2, Lincoln's Inn MS. Misc. 504, p. 69, pl. 3.]

1 Vernon 190, 23 E.R. 406

6 November 1683.

Mr. Howard settles a jointure on the plaintiff, his lady, before marriage, which proving defective and not of the value according to the marriage agreement, he, therefore, afterwards, makes

¹ *Howard v. Harris* (1678), 79 Selden Soc. 617, British Library MS. Stowe 406, f. 114.

her an additional jointure of other lands. And, afterwards, Mr. Howard, in 1673, makes a mortgage to the defendant Harris for securing £1000 with interest, in which, amongst others, part of the lands belonging to the additional jointure was comprised. And, in the mortgage, there is a special clause of redemption, *viz.* that, if Mr. Howard or the heirs male of his body should in June 1686 pay the principal sum of £1000 and £60 *per annum* interest in the meantime, then, Mr. Howard or the heirs male of his body might reenter. And Mr. Howard covenants that no one but he or the heirs male of his body should be admitted to redeem this mortgage, and he likewise covenants to pay the £1000 on the [*blank*] day of [*blank*] in the year 1686 and £60 *per annum* interest in the meantime by half-yearly payments from the date of the mortgage.

Mr. Howard dies without issue. The plaintiff, being a jointress of part of the mortgaged lands and so entitled to redeem the whole, in 1677, exhibits her bill to redeem this mortgage.

The defendant, by answer, insists the lands are now become irredeemable.

This cause was heard before the Lord Chancellor Nottingham. And now, upon the defendant's petition, it came to be reheard before the Lord Keeper [NORTH], and was by them both decreed for the plaintiff.

For the plaintiff it was insisted:

First, that restrictions of redemption in mortgages have been always discountenanced in this court, and it would be a thing of mischievous consequence should they prevail, for then it would become a common practice and a trade amongst the scriveners and go to fetter the mortgagors as to make it impracticable for them to redeem according to the precise letter of the agreement, and the plaintiff's counsel insisted that there was no more in this case against a redemption than there was in every mortgage; it is true here is an express covenant that none but Mr. Howard or the heirs male of his body should redeem, and, in every mortgage, there is a proviso that, in case the money be not paid by such a day, the mortgagee shall hold the land discharged and, not only so, but there is likewise an express covenant for further assurance, so that, in every mortgage, the agreement of the parties, upon the face of the deed, seems to be that a mortgage shall not be redeemable after forfeiture;

Secondly, it was argued that it was a maxim here that an estate cannot at one time be a mortgage and at another time cease to be so by one and the same deed, and a mortgage can no more be irredeemable than a distress for a rent charge can be irrepleviable; the law itself will control that express agreement of the party, and, by the same reason, equity will let a man loose from his agreement, and will against his agreement admit him to redeem a mortgage;

Thirdly, it is another standing rule that a mortgage cannot be a mortgage of one side only. And here it is plain Mr. Harris may make it a mortgage, for he has a covenant for the repayment of his mortgage money. And, for precedents, was cited the Case of Kilvington v. Gardiner, who was to redeem at any time in his lifetime, and Sir Robert Jason's Case.¹

For the defendant, it was insisted that this express agreement of the parties ought to be pursued. And they pretended the same was made upon good consideration, *viz.* that the defendant Harris had formerly purchased these very lands from Sir Robert Howard, father of the plaintiff's husband, who pretended himself to be seised in fee. But this land was afterwards evicted upon a pretense that Sir Robert was only tenant for life. And the reason of this special clause of redemption was that, in case Mr. Howard should have issue male, the estate might remain in the family, but, if he had none, it should be left to the defendant, as something towards a compensation for the loss in his purchase, and Mr. Harris was to submit to the loss, and not to question Mr. Howard's title. But, as to this, they had not a word of it in proof, saying only that the defendant had made such a purchase, but not that this was the consideration of the agreement. And it likewise appeared that Mr. Howard claimed by an ancient settlement from the Lord Suffolk, and not by any settlement made by his father, Sir Robert.

¹ *Jason v. Eyres* (1680-1681), 2 Freeman 69, 22 E.R. 1064, 2 Chancery Cases 33, 22 E.R. 833, note also *Jason v. Jervis* (Ch. 1685), see below, Case No. 233.

Then, it was insisted that this additional jointure was voluntary and the plaintiffs ought not to take the estate out of the hands of a purchaser.

But it was answered he was a purchaser for no more than his mortgage money. And one that comes in by a voluntary conveyance may redeem a mortgage. And, if the additional jointure was voluntary, so likewise was the agreement that none but Mr. Howard or the heirs male of his body should redeem. And that was subsequent to the additional jointure.

And it was further urged that the mortgaged estate is a reversion after lives only, and is at present but £7 *per annum* and that Mr. Harris did actually borrow the mortgage money to lend on this reversion, and it could not be presumed he would have so done unless it had been in consideration that this mortgage had been made in a special manner redeemable.

But it was answered that, possibly, the defendant might design such a catching bargain of this mortgage. But that was a sort of circumvention, and the worst part of the case.

After long debate, the Lord Keeper [NORTH] decreed the mortgage should be redeemed, the rather for that the defendant had a covenant for repayment of his mortgage moneys. But he said, if the case had been that a man had borrowed money of his brother and had agreed to make him a mortgage and that, if he had no issue male, his brother should have the land, such an agreement made out by proof might well be decreed in equity.

But, then, for the defendant, the mortgagee, it was insisted that this mortgage having been made ten years since and of a reversion where £7 *per annum* rent was only reserved, that, in this case, the defendant ought to have interest upon interest; otherwise, he would be a great loser in this case.

But as to that, it was answered that the plaintiff's bill to redeem was filed so long since as 1677 and that the defendant had by answer opposed the redemption and, therefore, from that time, he had no pretense to an allowance of interest for his damages and it was never known in this court that interest upon interest was at any time allowed in any case.

But the Lord Keeper [NORTH] was clear of opinion that, as to so much interest as was reserved in the body of the deed, that should be reckoned principal, for, it being ascertained by the deed, an action of debt would lie for it. And, therefore, it was reasonable that there should be damages given for the non-payment of that money. And, whereas it was urged that this had never been practiced and that there was not any such precedent in the court and that, if this were to be established for a rule, every scrivener would reserve all his interest half-yearly, from time to time, as long as the money should be continued out upon the security, which would be to change the law and practice in this court and make all mortgagors pay interest upon interest.

But the Lord Keeper [NORTH] said he was clear in that distinction between debt and damages, and he saw no inconvenience that could ensue. It would serve only to quicken men to pay their just debts. And, accordingly, he decreed that, after a deduction of the yearly rent of the mortgaged premises out of the £60 a year payable for the interest, the defendant should be allowed interest for the residue of the said £60 a year, for which the defendant might have sued at law and recovered damages.

[Reg. Lib. 1683 A, f. 855.]

[Earlier proceedings in this case: 1 Vernon 33, 23 E.R. 288, 79 Selden Soc. 617.]

Lyford v. Coward
(Ch. 1683)

After forty years' possession and enjoyment of a copyhold estate, the defect of the surrender will be supplied by a court of equity.

2 Chancery Cases 150, 22 E.R. 890

6 November 1683.

The bill was for a decree of certain copyhold lands, parcel of the manor of Buckeridge in the County of Berks. And his title is by a surrender made long since by Richard Lyford, father of the defendant Mary, to the use of his will, under which will he claims, because all the rolls are lost or detained by Blagrove, lord of the manor, and enforces that the surrender is to be presumed, because that he had been in possession forty years and done suit and service to the court as a copyholder.

Blagrove, the lord, denies having any rolls.

The defendant Mary denies both the surrender and the will and that she was but three years old at her father's death, whose heir she is, and, since, a married woman, and, therefore, no laches can be imputed to her, neither in law nor equity. And, being an infant, she did not discover her title but lately, being heir to her grandfather, who made the will. And for trial of her title, she has brought a plaint in the nature of a writ of *aiel*, as heir to her grandfather, *viz.* daughter and heir to Richard, son and heir to Richard, who, as is pretended, made the will and surrender.

At the hearing, the plaintiffs made no proof of the surrender and admittance, but proved that he had served several times as a copyholder at the court, and he produced a note under Sir Edward Powell's hand of a receipt of money for his admittance. But to what estate he was admitted does not appear. It was also insisted on that the plaintiff had paid several legacies given by the will. But this was but lightly insisted on at this hearing (but mainly on the long possession), because there was assets enough to pay the legacies and the legacies were personal, nothing at all relating to the lands.

The defendant's counsel answered: The possession against an infant and married woman was not concluding evidence, especially against an heir, to support a voluntary conveyance against an heir at law, who had but this land left her, being but £4 *per annum*, whereas the plaintiff had a great estate from the grandfather. And [it was] insisted that the bill was founded on matter merely triable at law, whether will or no will, surrender or no surrender.

But the Lord Keeper [NORTH] insisting much on the possession as ground to make a decree for the surrender, the defendant's counsel replied that, by the Statute of 32 Hen. VIII,¹ a writ of *aiel* is allowed to be brought upon a seisin within fifty years, and, though, in some cases, the court has decreed settlements without a trial, yet that was always where the bill was founded on some matter of equity properly and peculiarly finally to judge, as where a trust is built upon a conveyance or the like. And the last judgment is in this court, which here is not so and, if the plaintiff thought an inferior court not capable enough to try the point if the defendant did consent to try it in an [action of] *ejectione firmæ* or otherwise as the court should direct, which is all the equity the plaintiffs could have here.

But the Lord Keeper [NORTH], though much pressed to the contrary, decreed the surrender, and left the defendant to try [the issue of] will or no will.

¹ Stat. 32 Hen. VIII, c. 2 (SR, III, 747-748).

1 Vernon 195, 23 E.R. 409

Eodem die [6 November 1683].

The plaintiff, having enjoyed a copyhold for forty years under a will and having been admitted at the next court after the will made, came here to be relieved and to have the defect of a surrender to the use of the will supplied, such surrender not being now to be found, as also the defendant having brought a writ of *aiel* in the court baron. It was suggested in the bill that a court baron was not proper by reason of the difficulty for the trial of such an action.

For the plaintiff, it was said it was a plain equity that, after forty years' enjoyment, the defect of the surrender should be supplied. And he cited the Case of Griffith and Lloyd.

The Lord Keeper [NORTH] was clear that the want of a surrender should be supplied, surrenders being kept by the lord and his stewards, who are oftentimes changed and not so careful as they should be. And, therefore, a surrender might be lost without the default or negligence of the party.

And he was about to have decreed the land to the plaintiff. But it [was] urged by the defendant's counsel that, in this case, they contested even the will itself as well as the surrender and, as to the enjoyment, the defendant was an infant eighteen years of the forty and they conceived the length of time ought not to be any bar to the defendant's right in this case for that, by the Statute of Limitations,¹ in a writ of *aiel*, the plaintiff may declare of seisin in his ancestor at any time within fifty years.

Whereupon Lord Keeper [NORTH] decreed the defendant should admit a surrender. And he directed an issue, will or no will.

But the defendant's counsel insisting that the pretended testator was also *non compos* [*mentis*] (which, as was said, ought to be pleaded specially), they desired *compos vel non* might be the second issue. At last, it was agreed, it should be tried in an [action of] ejectment, where the whole matter might come in evidence, and the plaintiff was not to insist on his long possession.

In this case, were cited the following cases, *viz.* Biden v. Loveday, 14 June, 11 Car. I,² where a lessee had been twenty-five years in possession and the lessor would have avoided the lease for want of livery, this court presumed livery, and decreed the lessee should hold out during the continuance of his lease, though, after long possession, courts at law will presume livery; Penrose v. Trelawney, 2 July, 35 Car. II [1662], where, in regard the plaintiff had forty years possession of a piscary, the court decreed the defendants to surrender and release their title to the same, though the surrender made by the defendant's ancestors was defective, and that the plaintiffs should hold and enjoy against the defendants.

[Raithby's note: Reg. Lib. 1683 B, f. 150. It appears that an order was afterwards obtained by the plaintiff that, if the trial was not had at or by the time therein mentioned, it should be taken as tried and adjudged against the defendants, unless cause [be shown]; no cause was shown, and no trial was had, and, the cause coming on again on the equity reserved, no counsel appeared for the defendants, and a decree was made for the plaintiffs, and a perpetual injunction was awarded. Reg. Lib. 1683 B, f. 642.]

[Other reports of this case: 1 Eq. Cas. Abr. 306, 21 E.R. 1064.]

¹ Stat. 32 Hen. VIII, c. 2 (*SR*, III, 747-748).

² *Byden v. Loveden* (1613), Tothill 54, 21 E.R. 121.

112

Anonymous
(Ch. 1683)

A power to raise a sum of money out of the profits of land is a sufficient ground to decree a sale of the land, but not if it were out of the annual profits.

Lincoln's Inn MS. Misc. 498, p. 1, pl. 3

If a man has an authority to raise a sum of money out of the rents, issues, and profits of an estate, this is a good power to ground a decree for the sale of the estate etc., but not if it had been out of the rents, issues, and annual profits.

[Other copies of this report: Lincoln's Inn MS. Misc. 503, p. 72, pl. 3, Lincoln's Inn MS. Misc. 504, p. 70, pl. 1.]

113

Anonymous
(Ch. 1683)

A forfeiture of copyhold lands which protects the rights of the lord of the manor to receive legal payments upon surrenders is valid and will not be prevented by a court of equity.

Skinner 142, 90 E.R. 66

Michaelmas term 35 Car. II.

There has been generally practiced in most copyhold manors that, upon the mortgage of a copyhold, the mortgagor surrenders into the hands of two customary tenants to the use of the mortgagee upon condition to be void if the money be paid at such a day. Now, to avoid the fine to the lord, the usual way is not to present the surrender at the next court, but, after the court is over, to make a new surrender into the hands of two customary tenants, *ut supra*, and so, from time to time, as often as any court shall be held, which non-presentation is at law a forfeiture.

And to be relieved against this forfeiture was a bill exhibited, which NORTH, Lord Keeper, denied to help. But he left them to the common law.

114

Anonymous
(Ch. 1683)

Where a bond is transferred by the creditor's executor for value paid and received, the courts of equity will consider this as a valid and enforceable transaction.

Skinner 143, 90 E.R. 67

One acknowledges a recognizance. The conusee makes his executor, and dies. The executor, before a [writ of] extent, assigns the recognizance to J.S., who pays the money to the executor. The executor dies. And administration *de bonis non* is committed to the next of kin to the first testator, who sues for this recognizance.

But Lord Keeper [NORTH] said it was like the case where the testator is indebted to A. and B. was indebted by bond to the testator and then the executor assigns B.'s bond in satisfaction of the debt owing to A., that, here, the administrator *de bonis non* shall never recover upon this bond; no more shall he in the principal case upon the recognizance.

2 Ventris 362, 86 E.R. 486

An administrator *de bonis non* of the conusee of a statute had agreed with the conusor to assign it in consideration of a sum of money which, upon the said agreement, the conusors had covenanted to pay to him, his executors, or administrators, and, then, the administrator died.

The court decreed the money to be paid to the executor of the administrator and not to the new administrator *de bonis non*, although, before the [writ of] extent, it could not be assigned at law.

Sed nota that there were not debts of the first intestate appearing.

115

Anonymous
(Ch. 1683)

A release of an account balance can be withdrawn so that the accuracy of the account can be litigated in court.

Skinner 148, 90 E.R. 69

The party gives in an account of debtor and creditor, and sets down so much received and so much paid, which, being taken as true, a release is given.

NORTH, Lord Keeper, thought it reasonable to relieve against such a release, and let them in to disprove the articles of the account. And NORTH said in this case that a release obtained as soon as ever the heir came of age by the guardian should never by him be thought a trick, but that it was the proper time.

But *Finch* said it had been otherwise held.

116

Anonymous
(Ch. 1683)

The question in this case was whether a factor who smuggles goods must account for them to his principal.

Skinner 149, 90 E.R. 70

Where a factor smuggles foreign customs and yet sets them down to his master as paid upon account, the Chancery would not relieve for that the factor ventured his life. And so it was ruled by Hyde, Lord Chancellor, in the Case of Vandervaldy and Barry.

But NORTH, Lord Keeper, said he was not satisfied of it, for that he ventured his master's goods as well as his own life.

117

Thexton v. Betts
(Ch. 1683)

A grant of the next presentation to a rectory cannot be transferred after the vacancy has occurred.

2 Freeman 87, 22 E.R. 1075

The plaintiff's testator, being incumbent of a parsonage and having a grant of the next avoidance, mortgaged the next avoidance for £25. He being dead, the plaintiff is his executor.

And he brought his bill to redeem.

And the defendant demurred.

Per curiam [NORTH], he shall not redeem, for, now the advowson is become in that plight that it cannot be transferred in law, the party shall never be decreed here to transfer it. And the plaintiff's bill was to be dismissed. But, if the defendant takes the benefit of presenting, he shall not also sue for his money.

It was proposed that, though the defendant could not by law assign the next avoidance now it is fallen and so could not be decreed to do an act against law, yet this court might compel the mortgagee, upon receipt of his money, to present the nominee of the mortgagor.

But that the Lord Keeper [NORTH] said he would never do, for that would be for this court to do the same thing in substance which the law allows not to be done, and might tend to encourage simony. And, therefore, he would never do it. And he said the grant of the next avoidance comes as near simony as may be.

118

Ratcliffe v. Graves
(Ch. 1683)

The administrator of a decedent's estate must account for the profits received for the use of the assets of the estate while they were in his hands.

2 Chancery Cases 152, 22 E.R. 890

7 November 1683.

An executor, liable to debts and legacies payable *in futuro* and having money of the testator in his hands, lends it at profit, and receives it and the profit or interest thereof.

The debate was whether he shall answer for the interest he received as assets. Lynch's Case and other cases, *ante*, and the Case of Mr. Cartwright, in this court (where it was decreed that the executors should not be charged and affirmed in an appeal in Parliament), were cited.¹ And the reason given then, and now given, was because the executor not being bound to lend etc., if he do lend, it is at his peril, and, if it be by that occasion lost, he shall answer the same out of his own estate, and, therefore, as he shall bear the loss, he shall have the gain.

The Lord Keeper [NORTH] remembered Cartwright's Case, for he said he did not like that case, for saying also that, when the executor lent it on security, he might secure himself for a small matter.

¹ *Grosvenor v. Cartwright* (1679), 2 Chancery Cases 21, 22 E.R. 827, 1 Eq. Cas. Abr. 43, 239, 21 E.R. 861, 1017, 79 Selden Soc. 733, 757, 764.

Finch, Solicitor [General]: My Lord, the security so taken may fail.

Keck: It has been taken here as a rule that the executor shall not be charged.

Yet now the Lord Keeper [NORTH] decreed the executor should be charged.

Note also that this term he declared that, where a lease for years is to wait on the inheritance, that it shall be assets as to debts as well where the interest of the lease is in the hands of a stranger, and not in the owner of the inheritance, as when it is in the *cestui que trust* of the inheritance, and the interest of the inheritance is in a strange trustee.

Note [it was] contrary to former resolutions.

1 Vernon 196, 23 E.R. 409

7 November 1683.

Walter Ratcliffe, the plaintiff's father, having made his will and the plaintiff and his brother John executors and residuary legatees and they being infants at their father's death, administration with the will annexed during their minority was granted to Elizabeth Ratcliffe, their mother. And the Prerogative Court, upon granting the said administration, took the usual bond from the administratrix, in which the two defendants, the Heathers, were bound as her sureties.

The plaintiff's brother being dead and having made his will and the plaintiff executor, he now brought his bill for an account of the testator's personal estate. And, as to the defendants, the sureties, it was suggested, that, by fraud and covin, they had got up their said bond, and had procured insufficient security to be accepted by the Prerogative Court in the room thereof.

But the Lord Keeper [NORTH], upon the first opening of the matter, declared he would not charge the sureties further than they were answerable at law. And he dismissed the bill as to that part.

Another part of the case was that the said administratrix having had the intestate's estate long in her hands and employed the same in trade and received interest for some part thereof, it was prayed that she might answer interest for it.

The Lord Keeper [NORTH] was clear of opinion that she ought to answer interest for it, for he thought it reasonable that executors in all cases should answer interest if they had used the money in trade or received any interest for it and not turn the same to their own private advantage. The only objection against it was that, if the money should miscarry or be lost, the executor must stand to the loss of it. But, now, everyone knows a man may insure his money for one percent. And, therefore, he decreed the administratrix should account for interest unless she made oath that she had kept the money by her although it was urged that the constant practice of the court had been otherwise for twenty years past and more and that there were above forty precedents in the case and the cases of Haselwood and Baldwin and Gardener and Cartwright were cited, in which last case, it was fully in proof that the executor had received interest and, therefore, it was decreed that he should account for such interest as he had received. But this decree was afterwards reversed upon an appeal to the House of Lords.

But, notwithstanding these precedents, it was decreed *prout supra*.

[Other reports of this case: 1 Eq. Cas. Abr. 93, 21 E.R. 904.]

West v. Lord Delaware
(Ch. 1683)

In this case of a marriage settlement, the court of equity, thinking that the settlement was unfair, recommended that the dispute be settled out of court by mediation.

1 Vernon 198, 23 E.R. 411

10 November 1683. Charles West, Esq. v. Lord Delaware and Sir John Cutler.

The plaintiff, being the son and heir of the defendant, the Lord Delaware, there were articles made on the marriage of the plaintiff with one Mrs. Huddleston, whereby the Lord Delaware, in consideration of a £10,000 portion to be paid or secured unto him by Mr. Huddleston, covenants with Mr. Huddleston to settle on his daughter £800 *per annum* for her present maintenance and jointure and £400 *per annum* more after the death of his lordship's mother, remainder to her issue, and that, after his decease, he would make up the £1200 *per annum* £3000 *per annum*, and that was to be settled on her issue. And there was a clause in the articles that Mr. West should have power to sell £100 *per annum* of the premises.

Mrs. Huddleston dies after marriage without issue before the portion was paid or any settlement was made. Afterwards, the Lord Delaware has a decree for the £10,000 portion, but, by compromise accepts of £6000, which his lordship receives, but refuses to make any settlement on his son.

The bill was to be relieved touching these articles and to have an execution of them according to the meaning of the parties and an equitable construction.

For the plaintiff, it was insisted that, although, by the letter of the articles, there is no agreement for settling any estate upon the son, yet it is strongly implied. And the intent of the parties cannot be presumed to be otherwise. And, if these articles had been carried to any lawyer to have drawn a settlement in pursuance of them, no one will say but they would have limited an estate for life to Mr. West.

First, it was urged that the word '*junctura*', jointure, *ex vi termini*, implies an estate for life to the husband;

Secondly, that the portion was a consideration moving from Mr. West and such consideration as would make him a purchaser;

Thirdly, that it would be a most unnatural exposition of the articles to say the whole estate should be limited to the wife and nothing to the son and thereby to make his son beholden to his wife for maintenance out of his own estate;

Fourthly, that it is impossible to draw a conveyance exactly pursuant to the letter of the articles, for, in case the Lord Delaware had died in the lifetime of Mr. West, his son, the contingent remainders to the issue had been destroyed.

But, for the Lord Delaware, it was insisted, and so he had sworn in his answer, that the articles were made according to the agreement and that they were so penned on purpose that, if his son's wife should die without issue, the estate might revert to him again, and he might have his son in his power as to a second match.

After long debate, the Lord Keeper [NORTH] told them that each of them were unreasonable and held too fast, that, on one side, it was too much to ask all the estate for that the Lord Delaware had but £6000 of the portion and, on the other hand, it was too hard for the Lord Delaware to refuse to make any settlement at all. But he advised them to end the matter by compromise, and proposed it should stand referred to the Attorney General and Sir Francis Pemberton.

[Earlier proceedings in this case: 2 Ventris 357, 86 E.R. 483, 1 Vernon 74, 23 E.R. 321, 1 Eq. Cas. Abr. 35, 21 E.R. 855.]

Goodwin v. Ramsden
(Ch. 1683-1692)

The issue in this case was the distribution of the estate of a decedent who died in the ecclesiastical province of York.

1 Vernon 200, 23 E.R. 412

13 November 1683. In Court, Lord Keeper.

The plaintiff's bill was to have an account and her share of her father's personal estate, who died intestate.

The defendant pleaded that the estate in question lay within the province of York and that the intestate died there and that the plaintiff, being one of his daughters, was advanced by him in his lifetime and that, by the custom of the province of York, a daughter, being once advanced by her father in his lifetime, was excluded from all further benefit of her father's personal estate.

But, in this case, it appearing that all the children of the intestate were advanced by him in his lifetime and so the estate was wholly exempted out of the custom of the province of York, it ought to go now in a course of administration, and be distributed according to the Act for Settling Intestates' Estates.¹

And, thereupon, the plea was overruled.

[Raithby's note: But the benefit of the plea was saved to the hearing, and, in case the plaintiff did not prevail, he was to pay the defendant his costs. Reg. Lib. 1683 A, f. 41.]

2 Vernon 274, 23 E.R. 777

29 June 1692. Gudgeon v. Ramsden.

The intestate, being an inhabitant in the Province of York, left issue a son and daughter only and no widow. The daughter had a portion given her in marriage in lieu and full satisfaction of what she might claim by the custom of the Province of York. The son was also advanced by a settlement of lands. The question was how this estate should be distributed.

For the heir, it was insisted that now the custom of the Province of York is to be quite laid out of the case and the same distribution made of the estate as of any other intestate's estate and, by consequence, the daughter to bring her portion into hotchpot but the heir to have a full share without regard to what lands had been settled upon him.

Per curiam: The daughter must not bring back her portion into hotchpot, for that came in lieu of the customary part, and it was as the price the father thought fit to give her for the same.

[Raithby's note: The plaintiffs were the representatives of the daughter; the son does not appear to have been advanced by the intestate in his lifetime, but he entered on the real estate as heir at law, and took out letters of administration of the personal estate, and the decree declared 'that both the said son and daughter of the intestate were excluded by the custom of the Province of York, and that the portion given to the daughter ought not to be brought back into the account of the intestate's personal estate or esteemed or taken as any part thereof'. And then [the court] ordered an account of the personal estate, and decreed the clear residue thereof, after payment of debts etc., to be equally divided, one moiety thereof to the representatives of the daughter, without allowing anything for her said portion, and the other moiety thereof to the representatives of the son, according to the Statute

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

of Distributions. Reg. Lib. 1691 A, f. 1036, entered *sub nom.* Goodgeon v. Rigby. Afterwards 22 February 1693[/94], the cause came on for re-hearing on a petition of the heir, but it went off on a compromise, the heir consenting to pay the plaintiff £600 and £150 for costs in lieu of their claim, which was ordered accordingly. Reg. Lib. 1693 A, f. 359, entered for the re-hearing *sub nom.* Gudgeon v. Gudgeon.]

[Other reports of this case: 1 Eq. Cas. Abr. 161, 21 E.R. 958.]

121

Day v. Chatfield
(Ch. 1683)

The administration of a decedent's estate will be granted to the residuary legatee or to the next of kin, rather than to the executor of the executor.

1 Vernon 200, 23 E.R. 412

Eodem die [13 November 1683]. In Court, Lord Keeper.

Where an executor dies before the probate of a will, his executor cannot take upon him[self] to prove that will, but administration ought to be granted with the will annexed to the residuary legatee, if there be any, or else to the next of kin, according to the resolution in Isted's Case, in Dyer, fol. 372.¹

122

Moore v. Hart
(Ch. 1683-1684)

In this case, the court found that there was a valid and enforceable marriage settlement agreed upon by both parties.

1 Vernon 201, 23 E.R. 412

14 November 1683. In court, Lord Keeper.

The bill was to have an execution of a marriage agreement, setting forth that the defendant had made great application to the plaintiff's friends and relations that the plaintiff might become a suitor to his daughter and, at first, promised to give his daughter £3000, but the defendant, afterwards, finding the plaintiff's affection settled upon his daughter, receded from his promise, and then pretended he could not give her so much. And, thereupon, on the 6th of January 1680, a letter was written by one Mr. Reeve, a relation of the plaintiff, to the defendant Hart, desiring him to be plain what he would give down with his daughter. In answer to which letter, the defendant, on the 10th of the same month, wrote to Mr. Reeve, acknowledging the deserts of the plaintiff beyond the defendant's ability, and adds further:

you desire me to be clear, and say what I will lay down upon the nail, to which, if you mean in ready money, my estate lying in land, I can say but little, but, if it be to say what I will give my daughter at the present, I say with all plainness £1500 in land, either at Creton or Wapnam, but, if our difference in the value of the land will make money

¹ *Isted v. Stanley* (1580), 3 Dyer 372, 73 E.R. 834.

more acceptable, I will give the same sum in money out of the moneys to be raised by sale of Creaton etc.

And [the bill] further [set] forth that, in confidence of this promise and agreement, the plaintiff married the defendant's daughter, whereby she would be entitled to dower, the plaintiff's estate being £500 *per annum* in possession and as much more in reversion. And, therefore, to have the said promise made good and the land stand charged with the £1500 portion according to the agreement was the bill.

The defendant Hart had formerly pleaded the Statute of Frauds and Perjuries,¹ but that was overruled by Mr. Justice CHARLTON.²

And the defendant, now, by answer, insisted on the benefit of that Act of Parliament, and further set forth that, after his letter of the 10th of January, Mr. Reeve wrote another letter to him to this effect, *viz.* that since the defendant resolved not to be obliged to give £500 more at his death, he left the defendant and the affair as he found it, etc. [The defendant said in his letter he would give the plaintiff's wife £500 at the time of his death if she had issue. Reg. Lib.] And the defendant said further that he looked upon this letter to be an absolute waiver of the treaty, and did not answer it or, after that time, treat further with Mr. Reeve or any other touching the marriage. But he renewed a former treaty concerning his daughter's marriage with one Mr. Hart, who had £600 or £700 *per annum* and offered to settle £200 *per annum* on her, but that, before his daughter returned home from Mr. Reeve's house, where she had been, the marriage with the plaintiff was had without the defendant's consent or privity. And he insisted that all former proposals were absolutely waived by Mr. Reeve's last letter and that, if the plaintiff had any demands against the defendant, he ought to take his remedy at law. And he denied he ever treated about the said marriage or made any promise concerning the marriage portion after that last letter of Mr. Reeve. And he insisted he ought not to be charged.

But it being fully in proof that the defendant Hart, upon the receipt of Mr. Reeve's last letter, came up to town purposely about this match, and declared before several witnesses not above two days before this marriage that he would make his promise good upon the word of a priest and under bitter imprecations that, if he did not do it, he and his posterity might perish etc.

And Mr. Reeve likewise deposing that he never communicated his last letter to the plaintiff but that the same was written without his privity or knowledge, the court decreed the defendant to pay the plaintiff the £1500 portion [together with interest, which it was referred to the Master to compute from the time of the marriage. Reg. Lib.] and that the lands at Creaton and Wapnam should stand charged with the payment of it [and, if the estates should not be of that value, then the defendant to make good the deficiency. Reg. Lib.] and that the plaintiff should settle a £300 [£200. Reg. Lib.] *per annum* jointure on his wife, though, for the defendant, it was urged that this promise in writing being discharged by a subsequent letter in writing, it could not now be revived by parol discourses.

It was also objected that the plaintiff had a good remedy at law.

But it was answered he was proper in equity to charge the lands with the money by virtue of the agreement.

¹ Stat. 29 Car. II, c. 3 (SR, V, 839-842).

² *Moore v. Hart* (1682), 1 Vernon 110, 23 E.R. 352.

Skinner 142, 90 E.R. 67

Letters did pass between A. and B. concerning the marriage of A.'s son to B.'s daughter. In one of the letters, B. did promise, if A. would marry his son to B.'s daughter, to give with her to A.'s son £1500 worth of land, which A. utterly refused, and he wrote that he would no further trouble him about that affair until he was in a condition to give £1500 in ready money. Afterwards, B., by letter, offers to make his daughter worth £1500 in present money and to give her £500 more at his death if she please him, and he promises by word of mouth that he will do it, and wishes that the blessing of God may never light upon him or his if he does not give £1500 down, etc. A.'s son marries the daughter.

And he brings a bill against B. for the money.

And the question was whether this was within the Statute of Frauds and Perjuries, for it was objected that the letters were by way of a proposal and that the treaty was at an end by A.'s saying he would trouble himself no more etc.

But My Lord Keeper NORTH decreed it a good promise within the Statute.

And in My Lord Chancellor Finch's time, there was a feoffment made, and the feoffee promised to make a defeasance, which promise was by parol, and not in writing, yet it was decreed a good promise within that Statute.¹

2 Chancery Reports 284, 21 E.R. 680

A treaty of marriage was had between the plaintiff and Anne, his wife, the defendant's daughter, who promised to give with her £4000. But, when the defendant perceived them to be mutually engaged, he began to recede from his promise, which the plaintiff finding, a letter was written to the defendant by a friend of the plaintiff, desiring him to be plain and ascertain what portion he would give the plaintiff with his daughter. Then, the defendant agreed to give £1500 down and £500 more at his death if she should have issue and both sums to be charged on his estate at Creaton and Wapingham, which agreement was in writing and signed by the defendant. And he did in answer to the said former letter express and declare as much under his hand. And, thereupon, the marriage took effect.

But the defendant pretended he never made any such agreement and that the plaintiff married his daughter without his consent. But he confesses he received a letter from one Reeve, a friend of the plaintiff, wherein he desired the defendant to be clear and say what he would lay down upon the nail in marriage with his daughter to the plaintiff and what he would secure to be paid at his death. And he sent a letter to Reeve in answer, wherein he acknowledged the plaintiff's deserts exceeded his ability, and, with all plainness, acquainted him he would give her £1500 in present out of his estate at Creaton and £500 more at his death if she should have issue then living. But, afterwards, Mr. Reeve sent a letter in answer to that, whereby the treaty and proposals were absolutely waived. And the defendant never further treated, but the marriage was had without his consent and without any agreement in writing or settlement. And, therefore, he insists upon the Act for Prevention of Frauds and Perjuries.

To which, the plaintiff insists the last letter sent by Reeve was no manner of the treaty or proposal in the former letters in January 1680.

This court, on reading the several letters sent by Reeve to the defendant in the behalf of the plaintiff and the defendant's answer thereunto, is fully satisfied. The plaintiff, upon his marriage, became well entitled to £1500 agreed by the defendant under his own hand to be paid to the plaintiff as his wife's portion out of his estate at Creaton, and [it was] decreed accordingly.

[Reg. Lib. 35 Car. II, f. 60.]

¹ *Potts v. Turvin* (Ch. 1681), 79 Selden Soc. 856.

2 Ventris 361, 86 E.R. 486

Bird v. Blossie.

The case was thus. One wrote a letter, signifying his assent to the marriage of his daughter with J.S. and that he would give her £1500. And, afterwards, by another letter, upon a further treaty concerning the marriage, he went back from the proposals of his letter. And at some time after[wards], he declared that he would agree to what was proposed in his first letter.

This letter was held a sufficient promise in writing, within the Statute of 29 Car. II, called the Statute against Frauds and Perjuries, and that the last declaration had set the terms in the first letter up again.

[Reg. Lib. 1683 B, f. 66.]

[Earlier proceedings in this case: 1 Vernon 110, 23 E.R. 352, 1 Eq. Cas. Abr. 22, 21 E.R. 844.]

123

Earl of Ranelagh v. Thornhill
(Ch. 1683)

A account balance stated by a Master in Chancery cannot include compound interest.

2 Chancery Cases 153, 22 E.R. 891

17 November 1683.

A bill of review [was filed] to reverse a decree for money on account by the Master, whose report was decreed.

The error alleged was that the Master had allowed interest upon interest for, having made a total of divers sums paid by Thornhill and interest for them, the Master then added other sums after paid, and then cast up the former total, which was compounded of interest and principal, and, in the latter, he allows interest for the first total etc.

And the Lord Ranelagh, being summoned to attend, refused or neglected, and moved to be heard. But, because it is not proper to be moved after a decree, it was not allowed by motion. But now, [it was] directed to be examined and rectified as to that point, but the rest of the decree was to stand.

1 Vernon 203, 23 E.R. 414

17 November 1683. In Court, Lord Keeper.

In a bill of review, it was assigned for error that the defendant, who was a solicitor, had a decree for his fees, for which he ought to sue at law.

Sed non allocatur. A man may have a bill for solicitor's fees only if for business done in this court, and so he may where the business is done in another court if it relates to another demand the plaintiff makes in this court.

[Other reports of this case: 1 Eq. Cas. Abr. 75, 21 E.R. 887.]

124

Carpenter v. Bennet
(Ch. 1683)

In the enforcement of a marriage settlement, after debts are paid, the husband must have some part of the estate, because it is not reasonable that his wife and children have all of the rest to his total exclusion.

1 Vernon 203, 23 E.R. 414

Eodem die [17 November 1683].

A man upon his marriage having agreed to settle his lands, being £100 *per annum*, upon himself for life, remainder on his wife for her jointure, the remainder in tail upon their issue, and it appearing in the cause that the husband had then contracted a debt of £700, it was decreed the land should be sold, the husband's debt be first paid, and the residue of the money laid out in a purchase of lands to be settled on the wife and her children.

And a bill of review being brought to reverse this decree, it was assigned for error that the husband had not a sufficient allowance made him for his interest in the premises and that, this being all his estate, he ought in equity to have had some provision made him out of the estate which was decreed to be purchased for his maintenance.

And, for these reasons, the Lord Keeper [NORTH] reversed the decree, saying it was hard to compel a man to sell his estate for life for seven years purchase, and it was likewise hard the wife should not allow her husband maintenance.

[Raithby's note: In this case, there was a demurrer, which was overruled, but without costs. Reg. Lib. 1683 A, f. 48.]

125

Hincks v. Nelthorpe
(Ch. 1683)

A court of equity does not have jurisdiction to enforce a contract for a wife's separate maintenance.

1 Vernon 204, 23 E.R. 414

The bill was to establish an agreement [made before the marriage, Reg. Lib.] for a separate maintenance for the defendant's wife. And (amongst other things) it prayed a discovery of several unkindnesses and hardships which the defendant, as it was pretended, had used towards his wife to make her recede from this agreement.

To which discovery, the defendant demurred, for that it was not a matter properly examinable or relievable in this court.

And the demurrer was allowed.

[Raithby's note: There was also a plea of the Statute of Frauds¹ to that part of the bill that related to the agreement, which was overruled, but the benefit thereof was saved to the hearing. No further account of the cause appears. Reg. Lib. 1683 A, f. 38.]

¹ Stat. 29 Car. II, c. 3 (SR, V, 839-842).

[Other reports of this case: 1 Eq. Cas. Abr. 40, 77, 21 E.R. 859, 890.]

126

Harding v. Marsh
(Ch. 1683)

A court of equity does not have jurisdiction over the issue of bankruptcy or not.

The question in this case was the extent and amount of the administrative expenses of the bankruptcy proceedings.

2 Chancery Cases 153, 22 E.R. 891

19 November 1683.

On a commission against Peacock, a bankrupt, sued out by the plaintiffs, a distribution was made of £370 to the plaintiffs. After[wards], the plaintiffs, in two suits at law prosecuted by them, were nonsuited in one, and there was a verdict against them, which suits were to have recovered £600, part of the bankrupt's estate. And then they exhibited a bill in Chancery, and, there, [they] were dismissed, because [the issue of] bankrupt or not was only triable at law.

Then they sued at law, and had judgment, and also execution for £600. Then Langley, a creditor, prays to be admitted in, and he tenders the charges of the commission, and that he may be admitted to partake in so much of the £600 and other estate *ultra* and beyond what was already distributed. The commissioners admit him, and call the plaintiffs to account, which they refusing to do, the commissioners sue the plaintiffs on a covenant which the plaintiffs had given the commissioners, as is usual.

The plaintiffs now sued to be relieved against the covenant on two reasons: first, that, after the four months elapsed and distribution, no creditor can come in; secondly, they had spent in the suits £900. The cause was now heard.

The defendant's counsel argues that it was true that Langley could not come in to disturb the first distribution, but he might come in for the residue of which no distribution was made, for, in that the first creditors had no more interest than the defendant and there are no negative words in 21 Jac.,¹ which makes the restraint. But, as to what is distributed by the precedent law, 13 Eliz.,² all creditors, whether they sue out the commission or no, might at any time come into the commission, for, by that Statute, each creditor is to have his proportion *pro rata* out of the bankrupt's estate, which made the execution of the Statute, in point of distribution, uneasy and difficult, because it was hard to find out all the creditors. And, on the other hand, it was too great a power in the commissioners by that law, because the commissioners might the next day after the commission or as soon as they pleased sell and dispose of the whole estate, to obviate which, 21 Jac. gives a remedy. And the words in that statute 'before distribution', must not be understood of the estate that is not distributed.

As I was about to argue that point further, it having been alleged at the bar that Langley's demand was vain, for nothing could come to him if he contributed to the charge the plaintiffs had been at, for the estate to come in, *viz.* the residue, would not be beneficial to him, £600 only is recovered, out of which £300 and £170 being deducted, £130 remained, and, if their charges in recovery were allowed, nothing would remain.

But Mr. *Keck*, of counsel with the plaintiffs, acknowledged the defendant was to come into the commission paying the charge.

The Lord Keeper [NORTH] referred the account of the charges to be specially reported by the

¹ Stat. 21 Jac. I, c. 19 (SR, IV, 1227-1229).

² Stat. 13 Eliz. I, c. 7 (SR, IV, 539-541).

Master, for Langley insisted that he had borne £200 in charge with the plaintiffs, and is to be but at the charge of the commission, not of the suit, for the recovery is to their own use, *viz.* the £470, not of unnecessary suits, where also they failed.

127

Lampen v. Clowbery
(Ch. 1683)

In this case, the devise in issue created a vested interest in the legatee.

2 Chancery Cases 155, 22 E.R. 892

19 November 1683.

William Clowbery, by his will, gave £2000 to the defendant: ‘item to the daughter of the said O. Clowbery when she shall attain her age of twenty-one years or be married, which shall first happen, the sum of £500 to be paid her, with interest’. The testator died, the daughter legatee died under age, unmarried. O. Clowbery, her father, her administrator, sued, and had a decree for the £500 and interest thereof, to be accounted from the death of the testator.

And Lampen, against whom the decree was, being executor etc., brings a bill of review, where, on debate, the difference was allowed by the Lord Keeper [NORTH], between a devise of £500 to one to be paid at her age of twenty-one or married, there, it is due, though she died before twenty-one, and, where £500 is devised if or when she comes to twenty-one.

The point, being a mere point in law, was long debated.

Mr. Solicitor [General *Finch*] argued that, because interest is to be paid, therefore, the principal must be due. And he said that the words transposed are £500 with interest to be paid at twenty-one had made it plain, and the interest must be intended for the maintenance of the child in the interim.

E contra, it was said that this is contrary to the words, which cannot bear that sense without violence. And £500 and the interest are by the will to be paid at twenty-one or marriage, not before twenty-one etc. And he meant it that the interest computed, *viz.* from his death, should be paid for her portion. And this is best suitable, and stands with the words, and is rational. Mantica, etc., l. 6, c. 14. *In testamentis, ratio tacita non debet considerari, sed verba solum spectari debent. Multa possunt movere mentem testatoris quae nos latent. Ideo, per divinationem mentis, durum est a verbis recedere.*¹

The Lord Keeper [NORTH] once pronounced a reversal of the decree. But, being much pressed that the intention of the testator would be clear in the proofs, he declared he would suspend the decree, and hear their proofs.

Skinner 147, 90 E.R. 69

One did devise to his niece £500 when she attains to the age of twenty-one years or shall marry, which shall first happen, to be paid her with interest. The niece dies before twenty-one or marriage.

And her administrator, before such time as the twenty-one years was expired, sued for the interest.

And, upon a bill of review, this came before NORTH, Lord Keeper. And the question was whether this was a present interest vested in the legatee or only a conditional devise.

Maynard argued that it was a conditional devise, and takes the old difference, where one

¹ F. M. Mantica, *De Conjecturis Ultimarum Voluntatem*.

devises £500 when the devisee attains twenty-one years or marries and where it is a devise to A.B. to be paid when he attains twenty-one or marries. Upon the first case, it is a conditional devise, and no interest vests, but it goes back to the executor etc. if the legatee dies before twenty-one or marriage. But, in the second case, there is a present interest, only *solvendo in futuro*. He would have this case to be the same with the first of these cases and that the words 'to be paid with interest' alter it not, for his intent is that, if she live until such a time etc., then the £500 shall be paid with interest. And it shall not be intended that the interest shall go to her present maintenance, for, in the will, there was £2000 given the father, and the father was to maintain the daughter. And this was only as an addition to her fortune, if she should live to such age or marry.

And to this opinion NORTH, Lord Keeper, inclined.

Finch, Solicitor [General], on the other side, insisted that 'to be paid with interest' must be intended interest for her present maintenance, for that, otherwise, the testator might have computed what it would have come to all that time and given her as much as the principal and interest would have amounted to, but he intended it otherwise. And they put the case, that one should give so much when A.B. came to twenty-one for payment of the debts of the deviser, it should be taken as if the words had been when A.B. should have come to twenty-one. They said, in this case, that, if the words had been £500 to be paid with interest when she comes to twenty-one, there it had been a present interest and that there is no difference where it is to be paid with interest when she comes to twenty-one and where it is when she comes to twenty-one to be paid with interest.

And, therefore, he [*Finch*] and *Pemberton* and *Keck* did insist it was a present interest, according as My Lord Chancellor *Finch* decreed it.

But My Lord Keeper [NORTH], by consent, went to a new hearing of the cause upon proofs without prejudice to the matter in law, that thereby he might see better the intent of the party etc.

Afterwards, he decreed that it was an interest vested and that the party should have interest.

[Earlier proceedings in this case: 2 Ventris 342, 86 E.R. 476, 2 Freeman 24, 22 E.R. 1035, 1 Eq. Cas. Abr. 294, 21 E.R. 1055, 2 Eq. Cas. Abr. 539, 22 E.R. 454, 79 Selden Soc. 509, 529.]

128

Wagstaff v. Read
(Ch. 1683)

A bona fide purchaser of goods from a bankrupt can be compelled to give discovery of what goods he bought, their value, and their price if the plaintiff agrees not to use this answer in any action at common law.

2 Chancery Cases 156, 22 E.R. 892

20 November 1683.

Portman became bankrupt. The commissioners assign his estate, whereof the plaintiff made title to some goods, and exhibits his bill against the defendant to discover the goods and their value and what and how much he paid for them, because, as the plaintiff charges, they came to the defendant's possession after the bankrupt broke.

The defendant sets forth, for what goods did ever come to his hands, he bought of Portman *bona fide* for a full and valuable consideration, nor did not know, nor had any notice, that, at the time of buying until the now bill, he was a bankrupt, or of any account of his bankruptcy. And he pleads this matter against any discovery.

After long debate, the Lord Keeper [NORTH] seemed to incline that the defendant, being a purchaser without notice, should not be prejudiced by this court. But, on the other hand, if the sale were at an extreme undervalue, as for 5s. or the like, then such a general plea shall not stand, for then the plaintiff should be disabled to disprove and any man in the like case should be protected.

Therefore, let the defendant set forth what the goods were or what he paid for them.

But the defendant's counsel objected that would destroy and prejudice the purchaser, though he paid the full value, for, if he discovers what he paid, the commissioners will assign the money or, if he discover the goods, the commissioners will assign them, and so the court shall be instrumental to wound the purchaser. If the plaintiff can help himself at law by the aid of the Statute, he may, and the court will not hinder him, but not aid him here.

The difficulty to avoid this mischief on either side held long discourse, and, at last, ended that the defendant should answer what and how much he paid so as the plaintiff did consent to take no advantage of the discovery but here in this court, and not at law, which the plaintiff consented unto by his counsel and he to subscribe his consent with the Register, and then the defendant was to answer.

[Related cases: *Ex parte* Portman (Ch. 1683), see above, Case No. 43.]

129

Anonymous
(Ch. 1683)

A bona fide purchaser of goods from a bankrupt can be compelled to give discovery of the price paid for them, but not of when the purchase was made.

Skinner 149, 90 E.R. 69

A bill was brought against a man who had bought goods of a person, really a bankrupt, who, in his answer, sets forth that he bought them for a full and valuable consideration, not knowing that he was a bankrupt. But he sets not out what the consideration was, nor the time when, and refuses to do it.

The court ordered that he should set out what the consideration was or, otherwise, he would make himself the judge. But they would not compel him to show the time when for fear it should overreach and be within the time after an act of bankruptcy committed, though NORTH seemed to hold that, upon a contract where there is *quid pro quo*, an act of bankruptcy shall not overreach. And he cited Fowl's Case at Temple Bar, which was in the Common Bench upon a special verdict.

130

Girling v. Lord Lowther
(Ch. 1683)

A voluntary conveyance cannot defeat the payment of a subsequent confessed judgment for value.

2 Chancery Reports 262, 21 E.R. 673

Sir Thomas Leigh, deceased, late father of the defendants, John, Thomas, and Woolley Leigh, became indebted to Edmond Girling, deceased, in several sums of money by bonds. And the said Girling became bound for the said Sir Thomas for several great sums of money, against which securities, Sir Thomas gave the said Girling counterbonds. In Hilary term 28 Car. II [1677], Sir Thomas gave a [confessed] judgment of £1000 to the said Girling for the payment of £530, and, in August 1669, Sir Thomas made his last will in writing, and, thereby, devised to the defendants, Sir John Lowther, John Currence, and Edward Badby, executors of his said will, several lands and tenements for the payment of his debts to be by them sold for that purpose. The Swan Inn in St. Martin's Lane being sold, there arose a question touching the money raised by such sale, whether

it were well applied or not.

The case being *viz.* that Sir Thomas Leigh, upon his marriage with Hannah Relfe, daughter of Anthony Relfe, while he was underage, by articles, previous to the said marriage with the said Hannah, agreed to settle on himself and the said Hannah, his intended wife, and such [issue] as they should have between them lands of £700. In consideration thereof, the said Anthony Relfe was to settle, and did settle, upon the said Thomas and his heirs, lands of £200 *per annum*, whereupon, Sir Thomas Leigh, July 1661, makes a settlement upon himself and the said Hannah, his intended wife, and their first, second, and other sons in tail his manor of Addington and other lands in Addington and several lands in the counties of Surrey and Kent. Afterwards, in May 1665, Sir Thomas Leigh mortgaged to Mr. Peck for £2000 several lands in Middlesex and Norfolk, and, afterwards, in December 1665, those lands and the moiety of the Swan Inn in St. Martin's and the reversion thereof were granted to trustees upon several trusts, which, by deed of 15 June 1668, appears to be performed and satisfied. And, thereupon, on the same 15 June 1668, the said premises were mortgaged to Sir John Lowther for £2500, which £2500 was raised and paid to Sir John Lowther out of the profits and by sale of the said Swan Inn, which was formerly by voluntary conveyance drawn and settled by the said Sir Thomas Leigh upon the two defendants, Thomas and Woolley Leigh, for natural love and affection. Sir John Lowther, in April 1679, assigned the said mortgage by conveying to one Burton and others the manor of Thorpe in Surrey and Shoelands and other premises in trust for the payment of such of the debts of Sir Thomas Leigh as should any ways encumber or disturb the purchaser of the Swan Inn, which said lands are sufficient to pay the plaintiff's debts and the testator's engagement, being £1331, which debt is to be paid the plaintiff by a decree of this court.

The defendants, the Leighs, insist that the money raised by the sale of the Swan Inn, although paid to redeem the other estate in mortgage to Sir John Lowther, ought not to be applied so, that the land ought to be discharged of the mortgage money or of what was paid to redeem the same, but the said lands ought still to be a security for the said money to the use of the younger children, for whose benefit the said Swan Inn was settled. And, although the said settlement was voluntary, yet the same, being a provision for younger children, ought not to be adjudged fraudulent as to a subsequent judgment, which the plaintiff's is, or however not as to a subsequent voluntary devise of their father, under which only the creditors by bond come in. And, therefore, as to them, the said mortgaged lands ought to be charged with the said money raised by the sale of the said Swan Inn with interest since it was paid to redeem the said estate, precedent to any benefit any creditor by bond can have out of the said lands.

This court declared that the said voluntary conveyance ought not to stand in the way to prevent satisfaction of a subsequent judgment for good considerations and that the monies due on the plaintiff's judgment and the monies raised by sale of the Swan Inn were well applied to discharge the mortgage on the other estate whereby the money due on the judgment with interest may be the more speedily raised by the sale thereof and the money raised by sale of the said Inn, after the judgment satisfied with interest, ought to stand secured for the benefit of the younger children and be raised by the sale of the said estate and by the rents and profits in the meantime precedent to the other creditors not on judgment. And after the said judgment and provision for the younger children are satisfied, the residue is to be applied to the other creditors. And [it was] decreed accordingly.

[Reg. Lib. 34 Car. II, f. 148.]

Langton v. North
(Ch. 1683-1684)

If a purchaser take a mortgage term in his own name and the inheritance in the name of a trustee, it goes to the heir, though it be not mentioned to attend the inheritance.

2 Chancery Cases 156, 22 E.R. 892

24 November 1683.

Mary [*blank*] lent £700 and took a mortgage of land called Sison for a thousand years in the name of her brother, and, afterwards, did purchase the inheritance in the name of a third person, and the lease was assigned to her. She died intestate. And her mother took administration. The question was touching the benefit of this lease.

The heirs to her, her sisters, claimed as heirs against the administratrix.

A difference was taken at the bar, *viz.* that, if Mary had been first purchaser of the fee and after[wards] purchased a lease, it should wait on the inheritance, and the administrator or executor should not have or keep it against the heir. But, here, the lease was first in her.

Lord Keeper [NORTH]: There is no difference in reason. And, therefore, he dismissed the plaintiff as to this point. And [he held] that the heirs were to have the lease to attend the inheritance.

2 Chancery Reports 271, 21 E.R. 676

Sir Robert Gouning, deceased, being seised of lands and a great personal estate, upon a marriage to be had between him and the defendant, Dame Anne, daughter of Sir Robert Cann, articles of agreement were executed. In pursuance of the articles, a settlement of part of the premises was made upon the defendant, Dame Anne, for her jointure. And, in the said settlement, there was a covenant on the said Sir Robert Gouning's part to lay out as much money in the purchase of lands as would amount to £110 *per annum* to be settled on the said Dame Anne for her life, remainder to the heirs of the said Sir Robert Gouning, which was intended to be an enlargement of his real estate and to be for the benefit of his heir. But the said defendant Dame Anne refused since the death of Sir Robert Gouning, her husband, to whom she is administratrix, to execute the said covenant in specie, by the purchasing of lands of £110 *per annum* to be settled according to the covenant as aforesaid and which ought to come to the plaintiffs as coheirs of the said Sir Robert Gouning.

The defendants insist that the said covenant was made in favor of the said Dame Anne only, and not for the plaintiffs', the heirs', benefit. And the defendant, also as administratrix, claims title to the mortgaged lands at Siston, insisting that the same are a chattel lease for a long term of years, which, by assignment, came to Mary Gouning, sister of the said Sir Robert, and that she afterwards procured a release of the equity of redemption for £950, including therein the money due upon the said mortgage, and that she purchased the reversion in fee thereof in the name of her brother, Sir Robert, which she did on purpose to keep the lease distinct and separate, and that it ought not to go to the heir, but to the administratrix.

But the plaintiffs insist that the said lease ought to attend the inheritance, which Mary Gouning, to whom the plaintiffs are heirs, bought in for that purpose in the name of the said Sir Robert, her brother, and that the same ought to come to the plaintiffs, as the other real estate of the said Sir Robert.

This court declared, as to the lands at Siston, it was an inheritance, and ought to go to the heirs at law, and decreed accordingly. And, as touching the covenant for the purchasing of lands of £110 *per annum*, this court dismissed the bill.

1 Eq. Cas. Abr. 274, 21 E.R. 1042

Michaelmas [term] 35 Car. II [1683].

So, if a purchaser takes the mortgage term in his own name and the inheritance in the name of a trustee, yet it shall go to the heir, though not mentioned to attend the inheritance.

[Reg. Lib. 35 Car. II, f. 95.]

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Lady Pawlett v. Lord Pawlett

(Ch. 1683-1685)

A trust is administered according to the intent of the settlor, but a legacy is governed by the rules of the common law.

In the case of a trust raised in land to raise money, if the beneficiary die before it be payable, the money does not go to the executor or administrator.

1 Vernon 204, 23 E.R. 415

24 November 1683.

The Lord Poulet, the defendant's father, by a settlement, limited a term to trustees for the raising of £4000 apiece for his younger children for their portions to be paid them at their respective marriages or ages of one and twenty years, which should first happen, and for paying unto them £100 *per annum* maintenance in the meantime, and, after these portions and maintenance raised, then, the residue of the term was to be in trust for his heir, the defendant.

The said Lord Poulet, having two daughters by the plaintiff, his second wife, *viz.* Vere and Susanna, makes his will, and thereby he gives to his said daughters £4000 apiece for their respective portions to be raised and paid them in such manner as by the said settlement is directed. But he declares they should have but one £4000 apiece, and not two by the settlement and will unless the defendant, his son, should die without issue, in which case, he devised that they should have £2000 apiece more to be paid in the same manner as the £4000.

Vere, one of the daughters, died, being about eight years of age. The Lady Poulet, the mother, takes letters of administration to her daughter Vere, and exhibits a bill against the trustees and the Lord Poulet, the heir at law, to have her said daughter's portion of £4000 raised and paid.

In this case, the question was whether the £4000 portion of Mrs. Vere Poulet, the daughter, did cease by her death or should be raised for the benefit of her administratrix.

Lord Keeper [NORTH] said this was a very hard demand in equity, for a jointress, who had already the provision intended her on her marriage and was before a stranger in the family, to go away with this £4000, and neither the heir nor younger children benefited by it, she being not to make any distribution.

If the £4000 had been to have been raised out of the personal estate, it had been clear the plaintiff must have had it. But, being here a charge upon the estate of the heir, he would consider of the case, and advise him with the judges about it.

Note this bill was dismissed 13 May 1685. And, afterwards, upon an appeal to the House of Lords, the decree of dismissal was affirmed.

Lincoln's Inn MS. Misc. 498, p. 14

Easter 1 Jac. II [1685].

Lord Pawlet [d. 1679], by deed, raises a term for 500 years upon trust that the lessees should out of the profits allow a certain yearly sum for the maintenance of his younger children and pay his debts and, afterwards, should raise £4000 apiece for each of his daughters to be paid at their days of marriage or age of twenty-one, which should first happen, with a proviso, nevertheless, to be subject to the direction of his last will but, for want of such direction, then to go according to the limitations in the deed. Then, by his will dated the day after the deed, he, reciting the deed, devises to each of his daughters £4000 apiece to be paid at such times and in such manner as is directed by the deed. One of the daughters died before twenty-one or marriage. And her mother, the complainant, took administration to her.

And the question was whether she were entitled to this portion or not. This case was argued by several common [law] and Chancery lawyers.

And, after all, My Lord Keeper [NORTH] was of the opinion that the portion of the deceased daughter should not go to her administrator, the plaintiff, but in favor of the heir. The term should be discharged of it. If it had been a devise of a portion out of a personal estate, it should have gone to the executor or administrator for the reason in Bond and Brown's Case, page 12.¹ So it has obtained that, if a portion be devised to one out of lands payable at marriage or age of twenty-one, though the party dies before twenty-one and unmarried, yet it shall go to her executor or administrator. But, in the case of a trust raised in land to raise money to be so paid, if the party dies before it be payable, it shall not go to the executor or administrator but the heir shall have the benefit of it. And this case rests wholly upon the deed, the will having neither charged the personal estate nor his lands at large but left the matter just as it was before. So the bill was dismissed.

This decree was afterwards affirmed upon an appeal in the House of Lords.

Note a like case to this was decreed by the Master of the Rolls [Trevor], between Tiddlerly and Tiddlerly and affirmed by Lord Keeper Somers, Monday, 13 November 1693, there being no time limited for the payment of the portion.

[Other copies of this report: Lincoln's Inn MS. Misc. 503, p. 83, pl. 2, Lincoln's Inn MS. Misc. 504, p. 80.]

British Library MS. Lansdowne 1064, f. 338v

The case was upon a settlement of My Lord Pawlett whereby a term was carved out to certain trustees upon trust to raise portions for daughters £7000 apiece for such daughters as My Lord Pawlett should by his will appoint, which portions were to be paid to them at the respective ages of one and twenty or day of marriage which should first happen. My Lord Pawlett, by his will, referring to this settlement, does declare which daughters the portions should be paid to and appoints them to be paid in such manner as is declared by the deed. And he dies.

One of the daughters dies unmarried. And, before she comes to the age of twenty-one, her mother takes out administration to her, and she exhibits her bill against My Lord Pawlett, the heir at law and the trustees for to have this portion paid.

And the question was whether the £4000 was an interest vested in the daughter presently and only payable *in futuro* or no interest vested until the day of payment.

Keck argued that there was an interested vested, which ought to go in the course of administration. First, if you take it upon the deed singly, it is not the question whether such a settlement were reasonable or no, but what the settlement is. If My Lord Pawlet had intended to have

¹ *Bond v. Brown* (1684), see below, Case No. 187.

these portions cease in case of death, he would [have] inserted such a clause which is usual in most settlements. Suppose it had been payable only at one and twenty and the daughter had married, had a child, and died before one and twenty, should this portion fall, that would be very inconvenient.

Then, this portion does not stand solely upon the deed, but upon the deed and will, and, if this had been by will originally, then an interest would be vested certainly, as is agreed by the other side.

If a man, by will, give a personal legacy or, by his will, charges land, the payment of a sum of money to be paid at such a day, it is *debitum in praesenti*. And, though the legatee die before the day, his executor or administrator shall have the money. Now, here, the deed is not complete without the will. The will names the persons.

B., on the other side: This is a portion, and, as it stands upon the deed, it cannot go to the administrator, for, being a bare trust to raise so much out of the profits of the lands and as a portion only which is designed only in case the daughter come to marry or to such an age, and there is maintenance provided for her in the meantime. And it never could be the meaning of My Lord that it should be in the power of his daughter to dispose of this portion before marriage or before her full age when he does not think fit to have it paid to her before. Now, if there be an interest vested in her, then she may dispose of it by will at the age of seventeen years.

And this point was so decreed in the case of Bond and Browne in this court but lately.

Then, the will makes no alteration for that is wholly relative and appoints the money to be paid as by the deed.

And if the portion would cease had there been no will, so it must now, though there be a will.

Suppose there had been an express proviso in the deed, as there is in many deeds, that the portion should cease in case of death, the will had not altered it, neither does the will control what the law of this court says, that it shall cease.

Objection: Suppose the daughter had contracted debts for her maintenance, should not this portion have been liable to the payment of those debts?

Answer: That is not the case here neither could it have been the case upon this settlement because there is maintenance provided, the arrears of which must go to the administrator of the daughter.

My Lord Keeper [NORTH] said that he had been attended with precedents and he had not seen any case adjudged upon a trust where a portion was by deed to be raised out of the profits for lands. But all the cases are of legacies, either personal or charged upon lands, and that it has always been taken that it shall go in the course of administration though the legatee dies before the day of payment. But, when a portion is intended to be raised by deed, there, it is otherwise. And the will in this case makes no difference, for it is only declaratory of the deed.

And so the plaintiff's bill was dismissal.

1 Vernon 321, 23 E.R. 496

13 May 1685.

John, lord Pawlett, by indentures of lease and release 7 and 8 May 1679, conveys several manors and lands to trustees and their heirs to the use of himself for life without impeachment of waste and, after his death, to other trustees for the term of 500 years upon the trusts thereafter declared, and then limits several remainders over. The trust of the term for 500 years was declared to be for raising moneys by rents and profits or by leases to be derived out of the term for 500 years, in the first place to pay the Lord Pawlett's debts as also such yearly maintenance for every younger son and daughter as was thereafter expressed, and, after payment of his debts and such maintenance, as aforesaid, then to pay all such sums for all and every younger son and daughter as the said lord Pawlett had or should have and at such time and times and in such manner as he should by writing or by his last will appoint. And, in default of such appointment, the trustees should, in convenient time after such debts as aforesaid should be satisfied and not before, raise and levy out of the premises £1000 apiece for each and every younger son and £4000 apiece for each and every daughter of the said Lord Pawlett on the Lady Susanna, his second wife, begotten, payable at one and

twenty or marriage, which should first happen, with this further, that, in case the said Lord Pawlett should not otherwise direct by will, every younger son and daughter should be allowed such competent yearly maintenance and education as should be thought requisite until the portions should be respectively paid so as such maintenance did not exceed £150 *per annum* for a son, and £100 *per annum* for a daughter, and, after the performance of these trusts and some other trusts therein mentioned, the trustees were to surrender so much of the 500 years term as should remain to whom the immediate reversion should belong.

The lord Pawlett, by his will the 29th May 1679, devises to his two daughters by the said Susanna, his wife, £4000 apiece for their respective portions to be raised and paid to them respectively in such manner as in the said indenture is directed and further wills that they should have the same yearly maintenance until their respective portions should be raised as by the said indenture was appointed, provided that, by virtue of his will or of the said indenture or otherwise all put together, his daughters should not have more than £4000 apiece for their portions unless his son and heir apparent should happen to die without issue and, then, they should have £2000 apiece more.

The lord Pawlett dies, leaving issue by the Lady Susanna one son, *viz.* the defendant the lord Pawlett, and two daughters, Susanna and Vere. Before any part of the portion of Vere could be raised, she (12th December 1681), dies underage and unmarried. And administration of her estate is granted to the plaintiff, her mother, who brings her bill against the heir and the trustees to have the said legacy of £1000 and interest for the same from the death of Vere raised out of the trust estate.

This matter coming on this day to be argued upon a case stated specially by a Master, the sole question was whether, as this case is, the Lady Susanna is entitled to have the £4000 and interest raised out of the said estate.

For the plaintiff, it was insisted, first, that the £4000 was *debitum in praesenti* but payable *in futuro*, and, therefore, being an interest vested, it ought to go to the administratrix.

Secondly, this £4000 is a duty arising by the will and is in the nature of a legacy, for the deed was to take place only in case the lord Pawlett had made no appointment by his will. And, in all cases of construction, equity ought to favor the right that goes in a course of administration. And, though now the case falls out to be between the mother and the heir at law, which of them shall have the benefit of this £4000 and the plaintiff's counsel would draw an equity from thence in favor of the heir, whereas it might have so happened that the son might have died in the lifetime of his sister and then the controversy would have been between the mother and the half-sister and there ought to be the same rule in both cases and suppose this portion had been made payable at twenty-one only and the daughter had married and died under twenty-one leaving children, it would be hard by a construction in equity to deprive the daughter's children of this £4000. And it was urged that the deed being penned that, after all portions paid, the lord Pawlett should have the estate, it was not thereby meant that he should have it before all the portions were raised and paid.

For the defendant, it was insisted that the case depends upon the deed and not upon the will, which only confirms the deed, and it is a case purely in construction and a matter of trust, and, therefore, equity ought to favor the heir in such a case. And the Case of Bond and Brown was cited as a case in point, which was decreed last term by the Lord Keeper [NORTH] in favor of the heir. And what was principally relied upon was that this was not a legacy, nor did it arise by the will, for then it was admitted it must have gone in a course of administration. But the duty arose upon the deed and was given under the notion of a portion, and not as a legacy, and a maintenance is appointed in the meantime. And it was not intended that the daughter should dispose or have any interest in the £4000 until marriage or twenty-one.

Lord Keeper [NORTH]: This is a case both great in value and in its consequence, and I find no precedent on either side. The Case of Bond and Brown, being a new case and decreed but last term, is not to be urged as a precedent. As to a legacy devised by a will, I take the law to be settled that, where it is *debitum in praesenti*, though not payable until a future day, it shall go in a course of administration. And the reason is that it takes place on the personal estate and depends purely on a will, which is to be construed and expounded in the spiritual court. And, in such case, it is but just that the legacy should go in a course of administration in regard it comes out of the personal estate.

And it is indifferent whether the executor of the first or the last takes it. And so it is where a sum of money is by will only devised payable out of land because it has been looked on as a legacy. But, where it stands upon a deed only, as I take it it does in this case, the will being only a confirmation of the deed (and so it would have been if the Lord Pawlett by deed had only raised a trust for payment of such portions as he by will should appoint), the case is quite of another consideration. And here the plaintiff has no title at law, neither is there any demand according to the letter of the deed. But the plaintiff would have the trustees decreed to raise a portion, which, according to the letter of the deed, never became payable and would have me force a construction in favor of the plaintiff, the lady Pawlett, in prejudice to the heir at law. But I see no reason to decree for the plaintiff, and the rather, for that the £4000 is to come wholly out of the lands and the personal estate is no way subjected or made liable to the payment of it by the will. And, therefore, the bill must be dismissed.

[Raithby's note: The words of the trust are 'That the said trustees should, after the commencement of the 500 years, either out of the clear yearly rents or profits, or out of so much of the premises, or by the granting leases, or any other lawful way allow to the defendant lord Pawlett a yearly maintenance and should levy so much more money as should be sufficient for payment of his debts.' Reg. Lib. And although there be a will in the case, yet it refers to the deed, and was made at the same time, so that it does not at all alter the consideration of the case, per Lord Keeper [NORTH]. Reg. Lib. And Lord Keeper [NORTH] said 'He conceived there was a great difference between a legacy and a trust, for that a trust is expounded according to the intent of the party, but a legacy is governed by the rules of common law, and an executor who is to have the residue in one case, is not of so great regard as the heir, who is to have the residue in the other.' Reg. Lib. 1684 A, f. 516. This decree was affirmed upon an appeal to the House of Lords, 19 November 1685. *Lords' Journal*, vol. 14, p. 87.]

2 Freeman 93, 22 E.R. 1079

The Lord Paulett, in a marriage settlement, raises a term of 500 years in trust that, out of profits, leases, sales, or otherwise, the trustees should raise £4000 apiece to younger sons and daughters to be paid them at the age of twenty-one years or their marriage or as he should direct in his last will and testament and, after the sums raised, the term to merge in the reversion. At the time of executing the deed, his will was drawn with the bequests as aforesaid relating to the trust. One of the children died before one-and-twenty years unmarried; her administrator demands the same, as the chattels of the party deceased.

The court decreed that it should accrue to the benefit of the heir, out of whose estate the term was to be raised, giving reasons and making the difference as follows:

First, that, perusing all precedents offered, he found none that came up to this case, making a great difference between a legacy and a trust, that, if it had been a legacy by will, legacies are governed by the rules of the law, but, where sums are to grow out of a trust of a term, the will of him that created the trust is to be observed, and, although this was by will, yet the will and the trust relating to one another and executed at the same time, it shall be construed upon the trust, and the trust for such purposes, being of a term carved out of the inheritance, it shall accrue to the heir, [it] being more reasonable an inheritance of an heir should be respected, than if it had been originally goods and chattels, [and] so the estate of an executor, farther alleging that these sort of settlements, concerning most of the great families of England being made upon a sort of a condition and the consideration of advancing the younger children of such families, the condition and the reason of the advancement being prevented by death, it was more reason that it should be for the benefit of the heir of the family, out of whose estate the trust was created, than that an executor should go away with such sums, that often is a stranger to a family; besides, it could not be intended that the trustees should be charged with such sums presently, when the time of payment is not effluxed, and only maintenance assigned in the meantime. In this case, the money was not actually raised, and the executors would [have] compelled them to raise it.

2 Ventris 366, 86 E.R. 489

The Lord Pawlet had made a settlement of his estate and had by the deed charged his lands with the payment of £4000 apiece to be paid to his two daughters at their respective ages of twenty-one years or days of marriage. And he reserved to himself a power of otherwise ordering it by his will. And by his will in writing made at the same time, or within a day after, he devised by these words, *viz.*:

I give and bequeath to my two daughters [by name] £4000 apiece to be respectively paid unto them for their portions in such manner as I have provided by the said settlement.

And he mentioned that he would be understood to mean only one £4000 to each of his said daughters and appointed to each of the daughters £100 *per annum* for maintenance.

It happened one of the daughters died before marriage or the age of twenty-one years. And My Lady Pawlet, the mother of the daughters, took out letters of administration to the daughter that died and preferred a bill against the trustees for the £4000 and the heir, to whom the benefit of the lands after the money raised was appointed.

The question solely was whether this money should go to the administratrix or the land be discharged thereof and accrue to the benefit of the heir.

It was agreed on all hands that, if this had been a legacy or a sum of money bequeathed by the will, although the party had died before the age of twenty-one or marriage, the administrator should have had it, and that is the practice in the ecclesiastical court in case of legacies. The legatee in such case is taken to have a present interest, though the time of payment be future.

My Lord Keeper [NORTH] mentioned the reason to be because it charges the personal estate which is in being at the time of the testator's death and, if the legacy should by such an accident be discharged, it would turn to the benefit of the executors, whereas the testator did not probably so intend it. And further it has been ruled that, although a sum of money be devised out of lands to be so paid at a future day, the death of the legatee does not lose it. Though My Lord Keeper [NORTH] did not seem satisfied with the reason of that case, but, it having been so decreed, it was not good to vary to avoid arbitrariness and uncertainties.

But here, this sum of money is appointed to be paid by the deed, and is a trust charged upon lands, and trusts are governed by the intention of the party, and that the personal estate is not charged, and this sum of money does not lie in demand by a suit, as where a legacy is devised, but only a bill may be preferred to have the trusts performed.

And though it was much insisted on for the plaintiff that, here, the will bequeaths this money, yet that refers to the deed and orders it to be paid in such manner as was thereby appointed.

And it was said to be the same with the case of Bond and Richardson,¹ which was lately by My Lord Keeper thus decreed, being a sum of money charged to be paid out of land at such an age. If a settlement were made and lands charged with such sums of money as a will should declare, there, the will would be but declarative, and not operative.

2 Chancery Reports 286, 21 E.R. 680

This is upon a case stated, *viz.* that John, late lord Pawlet, on his marriage with the plaintiff, the Lady Susanna, his second wife, in consideration of her portion, settled a jointure of £1000 *per annum* on her. And, afterwards, having three children, *viz.*, the defendant, the now lord Pawlet, and Susanna, and Vere Pawlet, by deed, he conveyed lands to trustees and their heirs *viz.* to the use of the said lord Pawlet for life, charged with portions for his daughters by the Lady Essex Pawlet, his

¹ *Bond v. Brown* (1684), see below, Case No. 187.

former wife, and, after the death of the said lord Pawlet, to the use of Francis Pawlet and others for 500 years on trust that they should after the commencement of the 500 years, out of the profits or by leases or other lawful ways out of the premises, allow the now defendant maintenance and also sufficient [assets] to pay all the late lord Pawlet's debts and maintenance for the younger children and, after that, to raise money to pay the younger children's portions in such manner and time as the said lord Pawlet should by any writing or last will appoint, and, in default of such limitation or appointment, the trustees to raise £4000 apiece for every younger son and £4000 apiece for every daughter of the said lord Pawlet by the Lady Susanna to be paid at their ages or day of marriages if such portions could conveniently be raised and, if not, then, so soon after as the same could be with this further that every younger son and daughter should have a maintenance until the portions be paid and, after all the said sums be raised, the remainder of the 500 years to be surrendered to whom the immediate reversion belonged, which is now the defendant.

The late lord Pawlet, by will, in 1677, published at the same time when the said deed was executed, gave to his said daughters, Susanna and Vere Pawlet, £4000 for their respective portions to be paid them as the said deed directed, and he made the said Francis Pawlet and the other trustees executors.

Vere Pawlet, one of the said daughters died. And the plaintiff, her mother, took administration to her estate and, thereby, entitles herself to the said portions of £4000 appointed to be paid to the said Vere at her age or day of marriage.

And the question now being whether the plaintiff, by virtue of such administration, is entitled to the portion of her said daughter Vere, who died before her age or day of marriage, and the trustees should be compelled to raise the same out of the trust of the term of 500 years, which was granted out of the defendant's, the now lord Pawlet, the infant's, inheritance.

This court [NORTH], upon perusal of precedents, declared, they did not find that any of the precedents came up to this case and conceived there was a great difference between a legacy and a trust, for that a trust is expounded according to the intent of the party, but a legacy is governed by the rules of common law, and an executor, who is to have the residue in one case, is not of so great regard as the heir, who is to have the residue in the other, that this case is of general concern to all families, for it was grown a thing of course to charge the younger children's portions upon the heir's estate, which would not have been charged but for these occasions of providing for children. And, in this case, the time of payment never happening but becoming impossible by the death of the child before the portion was payable, the plaintiff has no right to demand it. And it were hard for this court to make a strain against the heir, where the consideration fails for which the portion was given, *viz.* the advancement of the children. And although there was a will in the case, yet it refers to the deed, and it was made at the same time, so that it does not at all alter the consideration of the case. And it would be hard to decree the payment presently, for that were to wrong the heir, who is to have the proceed of the money beyond the maintenance until the time of payment. This court saw no ground to take it from the heir at law to give it to an administrator, who might have been a stranger. And so he dismissed the plaintiff's bill.

The precedents used in this cause for the administrators were *Rowley contra Lancaster*; *Brown contra Bruen*; *Clobery contra Lampen*.¹

The precedent for the heir was *Gold contra Emery*.²

This cause was heard in Parliament, and the dismissal was confirmed.

[Reg. Lib. 36 Car. II, f. 516.]

¹ *Rowley v. Lancaster* (1670), 2 Chancery Reports 25, 21 E.R. 606; *Lampen v. Clowbery* (Ch. 1683), see above, Case No. 127.

² *Every v. Gold* (1668-1669), 2 Chancery Reports 1, 21 E.R. 599.

[Other reports of this case: 1 Eq. Cas. Abr. 267, 21 E.R. 1036.]

133

Coleby v. Smith
(Ch. 1683)

A conveyance made by a person's ancestor can be set aside on the ground of fraud in the inducement.

1 Vernon 205, 23 E.R. 416

6 December 1683.

The bill was brought by Coleby, the plaintiff, to be relieved against a purchase made by the defendant Smith *et al.* from the plaintiff's father, suggesting that he had been circumvented and imposed upon by the defendants. [The purchase as stated in the bill was of an estate worth £400 *per annum* for £4300, payable by installments in seven years. Reg. Lib.]

The defendants insisted on their purchase.

And, in this case, it appeared that there were at first articles for the purchase under hand and seal and, sometime after that, a conveyance was actually made and executed in pursuance of these articles, and the purchase money was all paid or secured. And, after all this, a fine was levied by Coleby, the father, to the purchaser. And Coleby writes a letter to his tenants to attorn. And, because Coleby, the son, the now plaintiff, showed himself discontented at this purchase, and would have obstructed it, Coleby, the father, takes a release from his son of all his right to these lands, which release was proved to be so taken with an intent to establish this purchase.

Upon the hearing of this cause, the Lord Keeper [NORTH] set this purchase aside, because there appeared to be some art used to persuade Coleby, the father, to sell these lands, *viz.* they persuaded him, he being almost in his dotage, that they could help him to a great match, and told him that, to qualify himself for the lady, it was necessary he should convert all his land into money, which showed the man was purely imposed upon, for, here, he sells his land when he does not want money and sells it to those who had no money to buy, but were to borrow. And he is to receive his money by installments, and, when the whole is received, it is much less than the real value, and the defendants, in a very little time, might have paid the purchase money out of the profits. And besides, the defendants never own to him that they were to be the purchasers, but drive on the bargain in one Mr. Ewre's name. And a letter is written by one of the confederates as from Mr. Ewre that he must resolve quickly what he would do and that Mr. Ewre would admit of no longer delay in the matter etc. And, for these reasons, the Lord Keeper [NORTH] set aside this purchase.

Though note it was proved that Coleby, the father, was a sensible man and capable of managing his own business and had not any apparent weakness upon him and that he was absolute owner of this estate and might have given it away. And it was likewise proved that, after he had conveyed away the land, he declared, if it were then to do, he would do it again.

[Raithby's note: It likewise appeared that Coleby, the father, received several of the installments and two bonds for the remainder, and, three years after the purchase, levied a fine of the premises to the defendants. The defendants, by their answer, expressly denied all the circumstances of imposition and restraint charged by the bill. By the decree, the plaintiff was to repay the defendants all moneys paid by them on account of the purchase together with interest thereon from the respective times of payment, they accounting to the plaintiff for the profits they had received of the estate. Reg. Lib. 1683 A, f. 161. The decree in the principal case was affirmed in the House of Lords on appeal, 18 December 1685, *Lords' Journal*, vol. 14, p. 86.]

Childrens v. Saxby
(Ch. 1683)

Parties who execute a judgment in violation and contempt of an injunction from a court of equity must repay the money and pay for any damages done during the execution.

1 Vernon 207, 23 E.R. 417

6 December 1683.

The defendants having taken out execution in breach of an injunction of this court and some of the bailiffs who served the execution having, as was alleged, found out a place in a wall in the plaintiff's house that was made up again with bricks, wherein was hid £150, and having taken away the money and done great spoil to the plaintiff's goods, an order was made by the late Lord Chancellor [Lord Nottingham] that the defendants should make good this money to the plaintiff, and should satisfy all other damage which the plaintiff would swear he had sustained.

And, now, this matter came before the Lord Keeper [NORTH], and the defendants complained of this order as unjust and without precedent. The most that has been ever done in this court in any such case was only to put the parties accused to purge themselves on oath. But, here, by this order, the plaintiff was to be the judge of his own damage and that the defendants came into possession by course of law, and the bailiffs were legal officers. If they did anything amiss, the party ought to take his remedy at law against them, and the plaintiff ought not to be answerable for their misdemeanors.

But the Lord Keeper [NORTH] held the order to be just. And he thought it an idle practice in the court to put a thief to his oath to accuse himself, for he that has stolen will not stick to forswear it. And, therefore, in *odium spoliatoris*, the oath of the party injured should be a good charge upon him that has done the wrong. And he confirmed the former order.

[Raithby's note: And the Master was to compute the amount of the loss sustained together with interest thereon, which was to be paid with costs. Reg. Lib. 1683 A, f. 78.]

[Other reports of this case: 1 Eq. Cas. Abr. 15, 229, 21 E.R. 838, 1010.]

Potts v. Potts
(Ch. 1683)

It is a sufficient answer to an account for a servant or apprentice to say in general that whatever he received was received and paid out again by his principal's order.

1 Vernon 207, 23 E.R. 418

Eodem die [6 December 1683].

On exceptions to a Master's report, which had reported the defendant's answer insufficient, the Lord Keeper [NORTH] declared that it was sufficient for a servant or apprentice in answer to a bill for an account to say in general that whatever he received was by him received and laid out again by his master's order.

[Raithby's note: The exceptions were allowed. Reg. Lib. 1683 B, f. 154.]

[Other copies of this report: 1 Eq. Cas. Abr. 6, 21 E.R. 832.]

Osborne v. Chapman
(Ch. 1683)

A husband can sue for an account for money due from the former guardian of his wife during her minority.

2 Chancery Cases 157, 22 E.R. 893

The defendant, as guardian to the plaintiff's wife, an infant, had managed her estate. And, on the treaty of the plaintiff for the marriage with the wife, he desired an account, which was given him, whereon he and his counsel advised three or four days, and then £800 was found due to the wife, which the defendant, by three several bonds, secured to the plaintiff. And the plaintiff gave a bond in £1400 to the defendant to release all accounts to him after the marriage, which was had.

And the defendant paid the £800 according to the bonds. But the plaintiff gave no release, but now sued to have an account and relief against the bond.

But the defendant insisted that his agreement to make a release, proved by the bond given by him and by his acceptance of the money secured by three bonds after the marriage, was had; he now ought not to have account.

Lord Keeper [NORTH]: He accepted of no money but of what was due to him. And the account was made before the marriage when he had no title. And there is no release made as there was in the like case by Basset, which bound Basset, and the plaintiff was greatly favored in the accounts, and the marriage was but one year since, and the plaintiff's pursuit is fresh. Therefore, answer the bill.

Anonymous
(Ch. 1683)

The Statute of Frauds does not extend to trusts raised by operation of the law.

2 Ventris 361, 86 E.R. 486

Where a man buys land in another's name and pays money, it will be in trust for him that pays the money, though [there be] no deed declaring the trust, for the Statute of 29 Car. II, called the Statute of Frauds,¹ does not extend to trusts raised by operation of the law.

¹ Stat. 29 Car. II, c. 3 (SR, V, 839-842).

Carnesew v. Arscott
(Ch. 1683)

Where an annuity with clauses of distress, penalties, and redemption is not paid, a court of equity can foreclose the redemption of the annuity but not the ownership of the land itself.

1 Vernon 209, 23 E.R. 419

15 December 1683.

On a demurrer to a bill of review, the case was the plaintiff had granted an annuity out of certain lands in Cornwall to the defendant with a clause of distress and *nomine poenae* and a power to enter and detain until he was satisfied all the rent in arrear and the *nomine poenae*. The annuitant exhibits a bill, suggesting that there was no distress to be found upon the land, but that it lay waste and that, if he should enter, he could make no profit thereof by reason the land was covered with some old encumbrances and his stock would be swept away. And the annuity being redeemable on payment of a sum of money, he prayed the defendant might be absolutely foreclosed, even of the land itself. And it was so decreed *ex parte* by the Lord Chancellor Nottingham.

And, now, it was assigned for error by the plaintiff in the bill of review that he ought not to be foreclosed of the land itself, but, at most, could be only foreclosed from redeeming the annuity and that the *nomine poenae*s should run upon him.

And, of that opinion, was the Lord Keeper [NORTH], and he, therefore, reversed the decree.

Heighter v. Sturman
(Ch. 1683)

Part performance of an oral contract to convey land will take the case out of the Statute of Frauds.

1 Vernon 210, 23 E.R. 419

15 December 1683.

An administratrix and her two children being entitled to a lease of a house, they all three agree to make the plaintiff a lease for ten years at a certain rent. The administratrix, with the privity of the other two, having executed such a lease, the bill was to compel the other two to execute the same likewise.

The defendants pleaded the Statute of Frauds and Perjuries,¹ the agreement made with them not being reduced into writing.

But the Lord Keeper [NORTH] overruled the plea, and held that the administratrix having executed the lease, this case was out of the Statute.

[Other reports of this case: 1 Eq. Cas. Abr. 21, 21 E.R. 843.]

¹ Stat. 29 Car. II, c. 3 (SR, V, 839-842).

140

Sewell v. Musson
(Ch. 1683)

A contract that makes time of the essence will be strictly enforced in a court of equity.

1 Vernon 210, 23 E.R. 420

A creditor having agreed with his debtor to take a sum of money less than his debt, so as it was paid precisely by such a day, he fails of payment. And, now, he brings his bill, suggesting some equitable excuses why he did not pay precisely at the day and that he tendered the money within a day or two afterwards and that the defendant refused to accept it and sued for the whole at law.

To this, the defendant demurred, for that the bill contained no equity. And he insisted that, when he made an agreement in favor of the plaintiff, he might restrain and qualify it as he thought fit and that the plaintiff having failed of payment at the day, the defendant was not now bound by the agreement or obliged to take less than his just debt.

Lord Keeper [NORTH] allowed the demurrer, and said *cujus est dare ejus est disponere*.

[Reg. Lib. 1683 B, f. 173.]

[Other reports of this case: 1 Eq. Cas. Abr. 28, 147, 21 E.R. 849, 948.]

141

Stapleton v. Sherrard
(Ch. 1683-1687)

The administration of a decedent's estate can be given either to the widow or to the next of kin.

By the custom of York, where a man dies intestate and without children, the widow has a moiety of the personal estate of her husband by the custom and another moiety of a moiety by the Statute for the Distribution of Intestates' Estates.

2 Chancery Reports 255, 21 E.R. 672

Stapleton v. Lord Sherwood.

Sir Philip Stapleton, the plaintiff's father, on his marriage with his first wife, settled the manor of Warter in the County of York, whereby he made himself but tenant for life, the inheritance vesting in the plaintiff, his eldest son. And Sir Philip had issue by his first wife, the plaintiff, his eldest son, Robert, his second son, and Mary, who married the other plaintiff, the Lord Merrion. Sir Philip, in 1647, by will, devised to his said son Robert a rent charge of £40 *per annum* to be issuing out of the said manor. And, afterwards, the said Robert died, and the defendant Dorothy, his relict, administered to the said Robert's personal estate. So, the plaintiff's bill is to have distribution of his personal estate.

The defendant Dorothy insisted that she, as widow of her said late husband Robert, by the custom of York, is entitled to a moiety of the said personal estate. and by the late Act for Settling Intestates' Estates,¹ the said defendant is entitled to the other moiety. And she insisted that Sir Philip having issue by several wives, which are yet alive, or their representatives, they are equally entitled

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

with the plaintiff Stapleton.

This court declared a distribution of the said personal estate according to law to be made amongst the plaintiff Stapleton and the child of the Lord Merrion as also the brothers and sisters of the said Robert, as well those of the half blood, as those of the whole blood, and their respective lineal representatives, who are to be called into the account.

And, as to the point whether the Lord Merrion and his child have the right to his wife's share of the estate, a case is to be made. The Master, to whom the account of the intestate's personal estate was referred, has allowed to the defendant Dorothy, the administratrix, a moiety of the said estate of the said intestate's dying without issue, and has distributed the other moiety amongst the intestate's kindred, brothers and sisters, whereas, by the custom of the province of York, she is not only to have a clear moiety of the personal estate of her said husband so dying without issue after debts etc., but, by the late Statute for Settling Intestates' Estates, she is to have a moiety of the other moiety.

The plaintiff insists that there was no color for the defendant to have a moiety of the remaining moiety, the said Statute leaving the custom as it was, without addition, diminution, or enlargement. But the widow was to have only a moiety, and the other moiety [was] to be distributed amongst the next of kin.

This court, for the further satisfaction, ordered the Lord Archbishop of the province of York to certify when a man dies intestate within that province without issue, after his debts, etc. paid, how the residue is to be distributed by the custom of the province.

The bishop certified that, in such cases as aforesaid, the widow of the intestate, by the custom of the province, had usually allotted to her one moiety of the clear personal estate and the other moiety has been distributed amongst the next of kin to the intestate and that had been the constant practice of the Ecclesiastical Court at York.

The plaintiff insisted that the custom of that province is excepted out of the Act of Parliament and, if it were within the Act, it ought to have the more favorable construction on their part, because it was made in favor of them, and not of the widow and administratrix, who, before the said act, usually went away with the whole estate, unless more particular instances prevented.

This court declared they could not expound the Act to give the defendant more than a moiety, that being the proportion allotted to her by the custom and also by the Act if it had not been a case within the custom, which custom is confirmed, because it appoints the same kind of distribution with the Act, and it would be a strain to give her more than a moiety, part by the custom and part by the Act. And [the court] refers to the Master's report made in this cause.

[Reg. Lib. 34 Car. II, f. 732.]

1 Vernon 212, 23 E.R. 421

Eodem die [15 January 1684].

The bill sets forth that the plaintiff was entitled to certain lands as remainderman in tail, and it prays a discovery who was the tenant of the freehold that he might know against whom to bring his [writ of] *formedon*.

To this, the defendant pleaded a fine and non-claim in bar, and likewise he demurred.

The Lord Keeper [NORTH] inclined that the demurrer was good, for that one shall not have a bill here in any case to discover a tenant to the *praecipe*, for there are ways to know it without, though the Case of Bickerton and Bickerton¹ was cited, where such a demurrer was disallowed. But the matter in the principal case went off upon the plea, which was allowed to be good, for, though, after the fine was levied, the plaintiff had made his entry, yet that would not do, the fine being levied by the tenant in tail, which made a discontinuance of the estate, and therefore the plaintiff must make

¹ *Bickerton v. Bickerton* (Ex. 1678), Equity Cases Exch. 94.

his claim by action.

Afterwards, the matter of this demurrer coming on to be argued again on the 5th of February following, the demurrer was allowed to be good.

1 Vernon 305, 23 E.R. 485

24 February [1685].

The question in this case was upon the custom of the province of York, the husband dying intestate without issue in the lifetime of the wife, whether the wife should have any benefit of the other moiety, as administratrix, by virtue of the Statute of Distributions.¹ And the Case of Crisp and Hayes in the King's Bench was cited, wherein it was said to have been adjudged that the legatory part was out of the custom and was to be governed by the Statute of Distributions.

But for the plaintiff, it was said that, in the case of Ramsden and Gudgeon² in this court, it was adjudged otherwise and that, by the custom of the province of York, where the husband dies without issue, the children's part ought to go over to the next of kin.

But that was denied by the counsel for the defendant, who said the custom of the province of York was the same with the custom of the City of London, unless in the case where the eldest son has lands by descent, he shall have no part of the personal estate.

As to the matter in question, the Lord Keeper [NORTH] would deliver no opinion, but ordered, that the Lord Archbishop of York should be attended and desired to certify how the custom of the province of York was in that particular.

1 Vernon 314, 23 E.R. 491

7 May 1685.

This cause came before the court upon exceptions taken to the certificate of the Lord Archbishop of York, to whom, upon the hearing of the cause, the Lord Keeper [NORTH] had referred it to certify how the personal estate of an inhabitant of the province of York, who dies without issue intestate, leaving a widow, ought, by the custom of the province of York, to be distributed. The certificate was that, after debts and funerals paid, one moiety of the personal estate belonged to the widow and that the other moiety had been usually distributed amongst the next of kin.

For the defendant, the widow of the intestate, it was argued that the custom of the province of York, where a man dies without issue intestate leaving a widow, extends only to one moiety of the personal estate, which the wife is to take by the custom, and the other moiety is clearly out of the custom and left to go in a course of administration and is to be governed by the Statute for the Distribution of Intestates' Estates, and the widow, the administratrix, will be entitled to have her share of the other moiety according to the Statute. And it is unreasonable to believe that there is any such custom as is pretended, for the custom does *privare communem legem*. As to so much of the personal estate as the custom reaches, that is bound by it, and no devise of the party can prevent it. And if the custom is as it is here certified, it will follow that, where a man has children, there he may by will dispose of one-third part of his personal estate, but, when he has none, he cannot devise one penny, for, by the custom, one moiety is to go to the wife and the other moiety to the next of kin, so that the whole is bound. And, if this be so, the custom has a greater respect to remote relations than it has to a man's own children, for the children can claim but a third part by the custom, but the next of kin shall have a moiety.

For the plaintiff, it was said that an inhabitant of the province of York may dispose of his estate as he will in his lifetime and that this custom is only where a man dies intestate and, therefore,

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

² *Goodwin v. Ramsden* (1683-1692), see above, Case No. 120.

it cannot be said to be unreasonable that, when a man is surprised and has not time to make a will, that one moiety of his estate should be distributed amongst the next of kin. And he cited Crispe's Case, in the King's Bench, that, where a citizen of London dies intestate, his whole estate, as well the legatory part as the residue, is governed by the custom and that no part of it is touched by the Statute of Distributions of Intestates' Estates.

Lord Keeper [NORTH]: I take it that the whole is governed by the custom. And the usage of the spiritual court, which is here certified by the archbishop, is great evidence of such a custom. And I do not believe that the Act for Distribution of Intestates' Estates intended that the wife should have more than a moiety. And he said he took it that the Statute of Hen. VIII¹ leaves the ordinary at liberty to grant administration either to the wife or the next of kin.

But it was said by Mr. Solicitor [General, *Finch*] that the courts at law would prohibit the spiritual court from granting administration to the next of kin where there was a wife. And he cited the cases of Thompson and Butler and Sir George Sands's Case in the King's Bench,² where prohibitions were granted in such cases.

But the Lord Keeper [NORTH] was of opinion that, if such prohibitions had been granted, it was against the Act of Parliament, which expressly leaves it to the ordinary's discretion to grant administration either to the wife or the next of kin.

[Raithby's note: The exceptions to the certificate appear in effect to be 'That His Grace had certified more than was referred to or desired of him by this court, which tends to the defendant's damage, for that he has certified not only the custom which was all that was desired of him, but likewise the practice of the ecclesiastical courts at York concerning the distribution of the residue of intestates' estates, which, notwithstanding, ought to be distributed according to the Act for Distribution of Intestates' Effects, and not otherwise, whereby it is expressly provided that the custom of the province of York might be observed as formerly.' Reg. Lib. The exceptions to the Archbishop's certificate were overruled, but without costs, if the defendant should divide the intestate's property according to the certificate and pay the same to the persons entitled within two months from the date of the order. Reg. Lib. 1684 B, f. 375. Note, in this case the Lord Keeper [NORTH] said 'I cannot expound the Act to give the defendant more than a moiety, that being the proportion allotted to her by the custom and also by the Act, if it had not been a case within the custom, which custom is confirmed, because it appoints the same kind of distribution with the Act, and it would be a strain to give her more than a moiety, part by the custom, and part by the Act.' This cause appears by the Register's Book to have obtained a rehearing before Lord Chancellor Jeffreys, Trinity Term 1687, when, the Lord Keeper's decree was affirmed. Reg. Lib. 1686 B, f. 610.]

1 Vernon 432, 23 E.R. 567

Eodem die [5 February 1687]. In Court, Lord Chancellor.

The matter in question concerned the right and distribution of the personal estate of an inhabitant of the province of York, who died intestate.

Per curiam [JEFFREYS]: The saving in the Statute for Distribution of Intestates' Estates goes only to the customary part, and the testamentary part is out of the custom and must go in a course of administration and be distributed according to the Statute.

1 Vernon 465, 23 E.R. 590

¹ Stat. 21 Hen. VIII, c. 4 (*SR*, III, 285).

² *Thompson v. Butler* (1672), 2 Levinz 55, 83 E.R. 447; *Sands' Case* (1664), 1 Siderfin 179, 82 E.R. 1042.

Eodem die [8 June 1687].

Per curiam: The wife has a moiety of the personal estate of her husband by the custom and another moiety of a moiety, there being no children, by the Statute for the Distribution of Intestates' Estates.

[Reg. Lib. 1684 B, f. 256.]

[Other reports of this case: 1 Eq. Cas. Abr. 76, 161, 21 E.R. 890, 958.]

142

Stephens v. Berry
(Ch. 1684)

The courts of the universities do not have jurisdiction over freehold land.

1 Vernon 212, 23 E.R. 420

15 January 1683[/84]. In Court, Lord Keeper.

The plaintiff exhibits his bill to be relieved touching some lands in Cornwall, and the defendant [Arthur Bury], being head of Exeter College in Oxford, pleads the privilege of the University of Oxford and that he ought to be sued in the Vice Chancellor's Court in Oxford only.

But his plea was overruled for that matters of freehold are excepted out of the patent to the University and their court can at best have but a lame jurisdiction as to lands in Cornwall.

[Raithby's note: The plaintiff had leave to amend his bill without costs. Reg. Lib. 1683 B, f. 269.]

[Other reports of this case: 1 Eq. Cas. Abr. 136, 21 E.R. 940.]

143

Brend v. Brend
(Ch. 1684)

Where jointure lands are mortgaged and the husband dies, his widow has the right of redemption, not his heir.

Final decrees should recite the particular facts relevant to the issues that were found by the judge.

1 Vernon 213, 23 E.R. 421

Eodem die [15 January 1684].

Upon a demurrer to a bill of review, the case was thus. The defendant had a jointure in some houses in London before the Fire [of 1666], of £100 *per annum*. The houses are burnt down, and, then, the wife and husband borrow £1500 to build upon the ground, and levy a fine *sur concessit* for ninety-nine years if the wife lived so long. And a deed is made between the conusee and the husband, wherein the husband covenants to repay the mortgage money with interest. And the equity of redemption is limited to the husband and his heirs, but the wife is no party to this deed. The husband expends £3000 or £4000 in building upon this ground, and dies. The question was whether the jointress or the heir of the husband should redeem.

The Lord Chancellor Nottingham had decreed it to the wife, and, now, upon arguing the demurrer, the Lord Keeper [NORTH] was of the same opinion, for that the wife was no party to the

deed of re-demise, by which the redemption was limited to the husband and, the wife being a jointress and having granted a term for years only out of her estate for life, there rests a reversion in her, which naturally attracts the redemption. And he said, if the cause had come originally before him and there had been assets sufficient, the husband having covenanted to pay this money, he would have decreed it clear to the wife. It was as little as a husband could reasonably do to rebuild the houses and put his wife's jointure in as good a plight as it was before. And, therefore, he allowed the demurrer to the bill of review.

In this case, a debate arose touching the stating of the matters of fact in a decree. And it was complained that the registers now drew up decrees in such a manner as that no bill of review could be brought, for they only recite the bill and answer, and then add that, upon the reading of the proofs and hearing what was alleged on either side, it was decreed so and so. And they never mention what particular facts were allowed by the court to be sufficiently proved and what not that so, upon a bill of review, it might appear to the court upon what facts the decree was grounded.

The Lord Keeper [NORTH] declared he would not allow of that way of drawing up decrees in general but that the facts that were proved and allowed by the court as proved should be particularly so mentioned in the decree; otherwise, if a bill of review was brought, those facts would be taken as not proved, for, else, a decree could never be reversed by a bill of review, but all erroneous decrees must be reversed upon appeals. And, on appeal, as on a bill of review, the cause must be on the same evidence as in the original cause; there can be no examination *de novo*.

2 Chancery Cases 161, 22 E.R. 894

Broad v. Broad.

A bill of review on the decree was brought to hearing the 22d of February 1683[/84]. And the decree was read. And objections were made against it:

First, that the decree was founded on a trust, arising on an agreement by the husband, but the decree mentioned no such agreement, but recites it in the recital of the plaintiff's bill, and then proceeds to recite the answer, and then proceeds to the decree on this manner, 'whereupon and reading the proofs, the court decreed' the trust and redemption, but does not say that such agreement was proved.

Therefore, the plaintiff's counsel insisted that the decree was made on the bill and answer.

Mr. Solicitor [General *Finch*] and others said that it was the course and a hundred decrees were so. And, when it is said, on reading the proofs, it is decreed, it is intended that the matters put in issue are proved.

But *e contra*, it was said that a decree ought to be grounded on fact, *ex facto jus oritur*, and else, by the clerk's course, the defendants should be barred of a review in all cases, for the plaintiff in a bill of review cannot allege matter of fact contrary to what is stated in the decree to be proved. And it may be many issues are joined in the bill and answer. If this course should hold, all must be admitted, and no man can truly know on what fact or case the decree was made, nor any appeal brought.

The LORD NORTH declared accordingly, and was clear of opinion, that it was not enough to say 'on reading the proofs, it is decreed', but, on reading the proofs, it appeared thus and thus, and, therefore, decreed etc. And, on this reason, he said that he took no notice of the agreement, but yet affirmed the decree, because, when the wife joined in the fine, *sur concessit*, of her jointure, in order to a mortgage or security, it was not an absolute departing with her interest, but there resulted a trust for her, when the security or mortgage is paid, to have her estate again, as if it had been a mortgage on condition and the money paid at the day.

[Reg. Lib. 1683 A, f. 260.]

[Other reports of this case: 1 Eq. Cas. Abr. 62, 162, 316, 21 E.R. 876, 959, 1071.]

[Earlier proceedings in this case: 79 Selden Soc. 920.]

144

Jones v. Luin
(Ch. 1684)

Where land is purchased by a father in his son's name, it is prima facie a gift to the son, but, where the equities are otherwise, it is a trust for the father.

Lincoln's Inn MS. Misc. 498, p. 4, pl. 1

Lord Keeper [NORTH]: If a father purchases lands in his son's name, this, *prima facie*, shall be intended an advancement and not a trust. But yet, the acts of the father may overrule the intendment, and make it a trust. And, therefore, if the father, in such a case, do anything which implies him to be the owner of the land, it shall be adjudged a trust for him.

And, accordingly, whereas the plaintiff Jones had taken a lease of a copyhold from the defendant's father, which he had purchased in the defendant's name, it was decreed to be a trust for the father and that the plaintiff should enjoy it accordingly. And an injunction was granted to continue during the term, notwithstanding the defendant had never had any other advancement from his father.

[Other copies of this report: Lincoln's Inn MS. Misc. 503, p. 75, pl. 1, Lincoln's Inn MS. Misc. 504, p. 72, pl. 1.]

145

Draper v. Crowther
(Ch. 1684)

The courts of the universities cannot grant equitable remedies or sequestrations of land.

2 Ventris 362, 86 E.R. 487

Hilary term 35 & 36 Car. II.

The bill sets forth a contract under seal with the defendant for the making of a lease of certain lands in Middlesex and to have an execution of the agreement.

The defendant pleaded that he was head of a college in Oxford. And he sets forth the charters of 14 Ric. II and 14 Hen. VIII, empowering the University to enquire and proceed in all pleas and quarrels in law and equity except concerning freehold, where a scholar, their servants, and ministers *sunt una partium etc. et quod Justiciarii de Banco Regis sive de Communi Banco vel Justiciarii ad Assisas non se intromittant etc.* and the confirmation by an Act of Parliament of the 13th [year] of Elizabeth.¹ And he concluded his plea to the jurisdiction of the court.

And it came to be argued before the Lord Keeper GUILFORD, 22 February 1683[/84]. And the plea was overruled, because the charter ought properly to be extended to matters at common law only or to proceedings in equity that might arise in such cases, and not to mere matters of equity, which are originally such as to execute agreements in specie.

Again, cognisance of pleas is never to be allowed unless the inferior jurisdiction can give a remedy. Here, they can only excommunicate or imprison, but cannot proceed to a sequestration of

¹ Stat. 13 Eliz. I, c. 29 (SR, IV, 585-586).

lands in Middlesex.

If the matter lay only in damages, it might be allowed to them, because the jurisdiction is given over all England. But this is not to be intended where the suit is for the thing itself and when it is out of their reach.

A precedent was cited in the year 1663, before my Lord Clarendon, Chancellor, assisted with Hale, then Chief Baron, and Justice Wyndham, where the plea was overruled.

Vide in the 3 Cro. 73, Wilcocks and Bradell's Case, and Hallie's Case 87.¹

[Other reports of this case: 1 Eq. Cas. Abr. 136, 21 E.R. 940.]

146

Anonymous
(Ch. 1684)

In this case, the devise over that was in issue was enforced.

2 Ventris 363, 86 E.R. 487

One devised his lands to J.S. in fee in trust for Katharine [*blank*] and the heirs of her body and, if Katharine died without issue, to Jane [*blank*] for life. And, in another clause in the will, he devised that, if Katharine died without issue and Jane be then deceased, then, and not otherwise, he gave the land to J.N. and his heirs. Katharine died without issue, and Jane survived her, and died.

A bill was brought by J.N. against J.S. and the heir at law of the testator to have this trust executed.

My Lord Keeper [NORTH] decreed it for J.N. although Jane survived Katharine, because the words 'if Jane be then deceased' seemed to be put in to express his meaning that Jane should be sure to have it for her life and that J.N. should not have it until she were dead and also to show when J.N. should have it in possession.

147

Bonham v. Newcomb
(Ch. 1684)

Parties to a mortgage can contract for a limited time to redeem or else the conveyance to be absolute, unless the mortgage is intended only to be a security for a loan.

1 Vernon 214, 23 E.R. 422

25 January 1683[/84].

This case came now before the court upon a demurrer to a bill of review to reverse a decree made in this cause by the Lord Chancellor Nottingham. And the error assigned was that the defendant Newcomb ought not to be admitted to a redemption against his express agreement in the mortgage deed to redeem within a certain time or otherwise that the estate should be irredeemable.

It was argued for the demurrer:

First, that an estate could not be a mortgage at one time, and, afterwards, become an absolute purchase by one and the same deed;

¹ *Wilcocks v. Bradell* (1627), Croke Car. 73, 79 E.R. 664; *Halley's Case* (1627), Croke Car. 87, 79 E.R. 677.

Secondly, that the mortgagee in this case had a proper remedy, and might have made his estate absolute in a legal course, *viz.* by exhibiting a bill to foreclose the mortgagor of the equity of redemption. And they cited the case of Yieldmington and Gardiner, where the mortgagor was to redeem during life only, and yet his heir was admitted to the redemption, and Sir Robert Jason's Case, where an estate was to go to his wife and her heirs unless a sufficient jointure were settled within such a time limited in the deed, and the Case of Howard and Harris.¹

But, as to that case, it was answered, though there was a qualified redemption, yet there was an express covenant for the repayment of the mortgage money, and so it was in the power of the mortgagee to make it a mortgage at any time.

But the Lord Keeper [NORTH] inclined to reverse the decree, for that *modus et conventio vincunt legem*, and all conditional purchases or bargains must not be turned into mortgages. And he said that, where there is a condition or covenant that is good and binding in law, equity will not take it away.

It was objected against the bill of review that they had assigned errors collected from the proofs in the cause that did not appear in the body of the decree.

But the Lord Keeper [NORTH] observed that was occasioned by the ill way they had got of late in drawing up decrees in general, without particularly stating the matters of fact. And he said the plaintiff in a bill of review should not be concluded by it unless the matter of fact were particularly stated in the decree.

At last, it was agreed by the counsel to waive the signing and enrolling the decree by consent and to hear the cause again *de integro*.

[Raithby's note: The order in this case was 'that the demurrer should be overruled but without costs and that the plaintiffs should be at liberty to set down the former cause to be heard *ab origine*, the enrollment notwithstanding, and that, in the meantime, all proceedings on the former decree and enrollment be thereby suspended'. Reg. Lib. 1683 A, f. 236.]

2 Chancery Cases 159, 22 E.R. 893

25 January 1683[/84].

The former decree, *ut supra*, [was] pronounced to be reversed by the Lord Keeper NORTH on precedents cited and long debated but ordered to suspend etc., and he would hear the cause *ab origine*.

He disliked also the entry of the decree, *viz.* reciting the bill and answer. And reading the proofs and hearing counsel, he decreed it [to be] a mortgage, and, therefore, not stating the point of fact, *viz.* that it appeared thus or thus etc. And so he did lately in the Case of the Countess of Anglesey.

2 Ventris 364, 86 E.R. 488

One being seised in fee, in consideration of £1000 paid to him by a person that married his kinswoman, conveys to him and his heirs, and takes a re-demise for 99 years, if he should live so long. And [there is] a covenant therein that, if he should pay £1000, with the interest that should be due for the same, at any time during his life, that the grantee should re-convey to him and his heirs and that, if he did not pay the money, then that his heirs etc. should have no power to redeem. He died, the money not being paid. And his heir preferred a bill to redeem it.

And it was urged for him that, in a conveyance, which was a security for money, whatever

¹ *Jason v. Eyres* (1680-1681), 2 Freeman 69, 22 E.R. 1064, 2 Chancery Cases 33, 22 E.R. 833, note also *Jason v. Jervis* (Ch. 1685), see below, Case No. 233; *Howard v. Harris* (Ch. 1683), see above, Case No. 110.

covenant there was therein to exclude from redemption, such covenant would not be regarded in this court and that the person to whom the conveyance was made might have had a bill in the lifetime of him that conveyed to have a time set for the payment of the money or otherwise to be foreclosed.

But My Lord Keeper [NORTH] dismissed the bill, for, he said, in a common mortgage, such a covenant to restrain redemption should not be regarded. But this was made with an intention of a settlement of his estate besides the consideration of the money paid. And he denied that he could have been, by the decree of this court, limited to any time for payment of the money, for this court cannot shorten the time that is given by an express covenant and agreement of the parties, but, when that time is past, then the practice is to foreclose.

Note this dismissal was afterwards in the Parliament held 1 & 2 Will. & Mar. affirmed.

Note, if a man makes a voluntary conveyance, and there be a defect in it, so as it cannot operate at law, this court will not decree an execution thereof. But, sometimes, it has been decreed where it is intended a provision for younger children.

1 Vernon 232, 23 E.R. 435

Easter term, 36 Car. II, 1684.

This cause coming on to be heard *de integro* before the Lord Keeper [NORTH], he adhered to his former opinion that there ought to be no redemption in this case and, principally, because it was proved in the cause that the intent and design of the mortgagor was to make a settlement by this mortgage and that he intended a kindness and benefit to the mortgagee in case he should not think fit to redeem this estate in his lifetime and that, there being an express covenant that the mortgagor might redeem at any time during his life, he thought he could not in equity have been debarred of that privilege, for, by a bill to foreclose a man, you shall only bar him of his equitable title when the estate in law is become forfeited, but, where he has a continuing title at law, as in this case, an express proviso that he might redeem at any time during life, he thought equity could not debar him of that privilege. And, therefore, being [that] the mortgagee in the present case could not have compelled the mortgagor to redeem and he might have lived so long as to have made it an ill bargain and, now, when, by a contingency, it happens to be a good bargain, there is no reason to raise an equity from thence to take the estate from the mortgagee, especially in this case, there being a kindness and benefit intended him by the mortgagor. And, therefore, he reversed the Lord Nottingham's decree, and dismissed the original bill for a redemption.

Lincoln's Inn MS. Misc. 498, p. 4, pl. 2

A takes £1000 of another who had married his kinswoman. And, in consideration thereof, by lease and release, he conveys all his estate, which was part in possession and part in reversion, to his kinswoman and her husband and the heirs of the husband. And they, the next day, re-demise to him for 99 years if he should so long live. And, by the same deed, they covenant that, if he, at any time, during his lifetime should repay the £1000 and interest, that then the husband and wife will reconvey to him and his heirs. And he covenants that, if he does not pay the £1000 and interest during his life, that then they shall have the estate absolutely and his heirs etc. shall have no power to redeem. He dies without paying the money.

And now, the plaintiff, who was his heir at law, exhibits his bill to redeem.

And it was decreed by My Lord Keeper [NORTH] that he should not redeem.

It was strongly urged by the Solicitor General [*Finch*] and Mr. *Keck*, for the plaintiff, that the conveyances, being originally but a mortgage, could not by any covenant, either in the same or any other deed, be made irredeemable and that, if it were otherwise, several improvident young men, who take up money upon their estates, would be forced to put in the like clauses into their conveyances and so be cozened out of their estates.

My Lord Keeper [NORTH] agreed that, where the original conveyance is intended barely for a security, it shall remain redeemable notwithstanding any such clause or covenant. But, where, as

it did in this case, it appears that there was an intention of a settlement as well as security, there, the intention of the party, which, in a court of equity, is principally to be regarded, shall be observed.

It was argued by the defendant's counsel that, if a redemption should be admitted in this case, it would have been a hardship upon the defendant, for that, if he had a mind to have his money again, he had no means to compel the payment of it, and the person who made the conveyance might have lived so long that the principal and interest might have amounted to much more than the value of the land and so the defendant have had a hard bargain. And, therefore, if he happens to have a good one by the party's dying soon and not redeemable to take it out of his hands by letting in the heir would be hard.

To answer this, Mr. Solicitor [*Finch*] said that the conveyance being but a mortgage, though there was a power left in the party to redeem at any time during his life by the covenant, yet, as he might at any time pay the money and have a reconveyance, so the other party might at any time exhibit his bill and foreclose the redemption if the money were not paid by a time to be prefixed by the court and that so it had often been decreed.

But this My Lord Keeper [NORTH] denied. And he said that, though, where the party has only a redemption in equity, there, upon such a bill exhibited, he shall be foreclosed of his equity of redemption if he does not pay the money by the time prefixed by the court. But, where the party has a remedy at law to have his estate again by a condition or covenant upon the payment of money at any time during life or during a certain number of years etc., there, a court of equity can never take that title which the party has at law from him by foreclosing him before the time.

Note, afterwards, an appeal was brought against this decree in Parliament, and the appeal was dismissed May 1st, 1689.

[Other copies of this report: Lincoln's Inn MS. Misc. 503, p. 75, pl. 2, Lincoln's Inn MS. Misc. 504, p. 72, pl. 2.]

[Reg. Lib. 1683 A, f. 482. And this dismissal was afterwards, 1 May 1689, affirmed in Parliament. *Lords' Journal*, vol. 14, p. 198.]

[Earlier proceedings in this case: 1 Vernon 7, 23 E.R. 266, 2 Chancery Cases 58, 22 E.R. 845, 2 Freeman 67, 22 E.R. 1063, 1 Eq. Cas. Abr. 312, 21 E.R. 1068, 2 Eq. Cas. Abr. 67, 22 E.R. 1063, 79 Selden Soc. 925.]

148

Hobert v. Hobert
(Ch. 1684)

A conveyance can be set aside for fraud, but not for inadequate consideration.

2 Chancery Cases 159, 22 E.R. 893

26 January 1683[/84].

The suit was to avoid a conveyance by fine and deed to lead the uses of the fine twenty-three years since, on a supposition of fraud, purchasing the fee of the land for £11 worth £60 *per annum*, the plaintiff ignorant of the value, but the defendant well apprised thereof and the plaintiff ignorant also of his title, which he came to the notice of after the fine. The bill was dismissed.

The Lord Keeper [NORTH] declared that, if one will seal a release or other assurance to one in possession, for never so unequal consideration, it shall not be relieved, because of a new title discovered, unless there be some special fraud, as if A. having title, and B. in possession, B. conveys the land to A. in trust for B. and then gets A. to convey the land to him as in execution of the trust, whereby A. extinguishes his title etc.

Jefferys v. Small
(Ch. 1684)

Partners in an agricultural or a business enterprise do not succeed to their deceased partner's interests by the law of survivorship.

1 Vernon 217, 23 E.R. 424

Eodem die [29 January 1684].

Two persons having jointly stocked a farm and occupied it as joint tenants, the bill was to be relieved against survivorship, one of them being dead.

And, though it was proved in the cause that the deceased was informed what the consequence of law was in case he should die and that he thereupon replied, he was content the stock should survive, yet the Lord Keeper [NORTH] was clear of opinion that the plaintiff ought to be relieved. And he said, if the farm had been taken jointly by them and proved a good bargain, there, the survivor should have had the benefit of it. But, as to a stock employed in a way of trade, that should in no case survive. The custom of merchants as to bills of exchange is now extended to inland bills, and the custom of merchants is extended to all traders to exclude survivorship. And, though it is common for traders in articles of co-partnership to provide against survivorship, yet that is more than is necessary. And he said he took the distinction to be, where two become joint tenants or jointly interested in a thing by way of gift or the like, there, the same shall be subject to all the consequences of law.

[Other reports of this case: 1 Eq. Cas. Abr. 290, 370, 21 E.R. 1052, 1109.]

Lady Speake v. Lady Speake
(Ch. 1684)

A contract to make a jointure of a certain specific value must be performed by the personal representative of the deceased husband.

Where the personal estate of a decedent is insufficient to pay the debts of the decedent's estate, the deficiency will be paid out of his real estate before specific legacies will be abated.

1 Vernon 217, 23 E.R. 425

Eodem die [29 January 1684]. In Court, Lord Keeper.

The bill was to have a jointure, defective in value, made good, the husband having covenanted that the lands settled for the plaintiff's jointure were £700 *per annum*, whereas they were but £500.

The defendant was decreed to perform the covenant in specie, but the value of the lands were to be estimated as they were at the time of the jointure settled, and not according to the present value, rents being now much fallen everywhere. But, if the covenant had been that they were of £700 *per annum* and should so continue, then, they should have been made up full £700 *per annum* at this time.

It was objected for the defendant that this covenant for the value was only in the first articles, and not in the jointure deed, and that, therefore, the articles being executed and this settlement of a jointure wherein there is no covenant as to the value accepted as a performance of the articles, the plaintiff ought not now to resort back to the covenant. And, though this settlement was made when the plaintiff was an infant and a married woman and so no acceptance of hers could conclude her,

yet it was accepted by her father, with whom the articles were made, and he transacted this whole affair on her behalf.

Sed non allocatur.

[Raithby's note: The defendant was ordered to pay the arrears since the death of the plaintiff's husband. No costs were given. Reg. Lib. 1683 A, f. 239.]

Skinner 158, 90 E.R. 73

Hilary term 35 & 36 Car. II. Speak v. Pedley.

Speak being an infant, a treaty of marriage was had for him by his mother and the father of [*blank*] Windham, an infant. And articles of marriage were sealed wherein it was agreed that Speak, at full age, should settle lands of the value of £700 *per annum* upon the daughter of Windham. The marriage takes effect; the portion is paid, and Speak, at full age, the daughter being still within age, takes a survey of his estate, and gives in to the father Blackacre at £500 *per annum*, Whiteacre at £100 *per annum*, and Swanacre at £100 *per annum*, which is accepted by the father. And the settlement is made and accepted by the father, the daughter still a minor. And, in the settlement, it is said to be in pursuance and performance of the articles. Speak dies. The lands settled prove to be of the value but of £500 *per annum*.

And the wife brings her bill against the heir to make it up to £700 *per annum*.

And My Lord Keeper NORTH decreed that it should be so, being upon articles in writing sealed. But, if it had been only a parol agreement, then [there would be] no relief or, if, at the time of the settlement, the lands had been of £700 *per annum* value and by accident had gone less, then no relief. But, here, being a solemn agreement and settlement made in the minority of the wife, this is a fraud, and it shall not prejudice her. But, if it had been a parol agreement for £700 *per annum* and but £500 *per annum* was settled, they could not have relieved her.

And, further, in this case, Speak was indebted to his mother for arrearages of an annuity of £500 *per annum* £3000, and he makes her his executrix, and, by his will, he devises as much land as is worth £20,000 and devises his jewels to his wife.

The question before NORTH, Lord Keeper, was whether the mother, being executrix, may retain the jewels towards payment of the debt or else whether the debt shall be included in the £20,000 worth of land, the personal estate not being sufficient to pay the debt.

And My Lord Keeper [NORTH] held that, inasmuch as the personal estate was not sufficient, that the land shall go in discharge of the debt and the specific legacy shall not be lost. But, if there were not enough besides the legacy to pay the debt, then that she might retain.

[Other reports of this case: 1 Eq. Cas. Abr. 221, 21 E.R. 1004.]

Hoby v. Hoby
(Ch. 1684)

A court of equity can order a new assignment of dower where the first assignment is grossly out of proportion to the parties' rights.

1 Vernon 218, 23 E.R. 425

Eodem die [29 January 1684].

The bill was to be relieved against an assignment of dower by the sheriff, which, in the bill, was charged to be fraudulently done, there being assigned to the defendant for her dower one full third part of the lands, which amounted to £300 *per annum* and, in this third part, there was a coal work, which, one year with another, was worth £300 *per annum* beyond all charges, and yet no consideration was had of it in the assignment of this dower. And it likewise appeared that the defendant's own father was the only person that, on the behalf of the infants, the children, defended the writ of dower. And he appeared to see the same set out, which looked like a collusion.

And the plaintiff's counsel offering that the defendant should have one entire third, both of the land and the coal works, and that by way of a rent charge on the whole, the court [NORTH] ordered she should accept thereof or that, otherwise, a new assignment of dower should be made.

And she took time to consider of it.

[Raithby's note: The court proposed to the parties that the defendant should either take £300 *per annum*, the sum originally proposed to be settled on her by articles before the marriage, or that she should work all the coal pits and dig coals, as well on the plaintiff's land as the land assigned the defendant in dower, and to take a third penny thereof, or else a new writ of seisin on the said judgment should be issued to the sheriff to divide the lands into three parts and to choose by lot. The defendant, thereupon, consented to accept a third penny of the clear profits of the said estate, provided she might have it allotted to her out of the lands and coal works already allotted her in dower, which, not being opposed on the part of the plaintiff, was so decreed. And the defendant was to be at liberty to break or make any new mouths to the said coal pits in any part of the plaintiff's lands not assigned or any part of the lands assigned her in dower and to work the same as she should think fit, and should at any time sink pits, work, dig, sell, and carry away coals in and from any part of the plaintiff's lands not assigned in dower as well as in what lands are assigned the defendant in dower, allowing and accounting to the plaintiff for two-thirds parts of the clear profits, and the defendant was to have an allowance of £40 *per annum* out of plaintiff's two-thirds of the profits to repair the mansion house.]

2 Chancery Cases 160, 22 E.R. 894

Holby v. Holby.

The defendant recovered dower against the plaintiff an infant. One appeared for the plaintiff, then tenant, as her guardian, being her grandfather, but father to the defendant, then demandant in the writ of dower, and suffered judgment, for he could do no other. But the dower was unequally set out by the sheriff, but the sheriff was not culpable of any fraud.

But a great inequality appearing, the Lord Keeper [NORTH] declared that the plaintiff ought to be therein relieved.

Whereupon a proposition was made by the plaintiff's counsel that either the plaintiff should set out the whole in three several parts and the defendant choose one part for her third or, if the defendant would set them out, and they choose two.

[Reg. Lib. 1683 A, f. 256.]

[Other reports of this case: 1 Eq. Cas. Abr. 220, 21 E.R. 1003.]

152

Reeve v. Reeve
(Ch. 1684)

A later jointure will defeat an earlier gift of a charge on the jointure land.

A wife's jointure has priority over a daughter's jointure.

A defeated gift of a charge on specific land is payable out of other lands owned by the donor.

1 Vernon 219, 23 E.R. 426

5 February 1683[/84].

The case was, Sir Richard Reeve, having issue by a former wife, by deed, charges his lands at Bickerton for the payment of a £3000 portion to his daughter. And, afterwards, he marries a second wife, and he makes her a jointure of a moiety of these lands at Bickerton without taking notice of this charge of £3000. He, afterwards, by his will, thinking that this £3000 charged as aforesaid would be good against the jointure, takes notice thereof, and devises to his wife other lands in Yorkshire in lieu of her jointure in Bickerton, and dies.

The wife and the son and heir agree together to defeat the daughter of her £3000 portion. And, therefore, the wife finding that the settlement, which was made on her marriage, though subsequent in time, would yet prevail against this charge of £3000, which was voluntary and fraudulent as to her, she adheres to her jointure, and refuses to accept of the devise.

The daughter's bill is to be relieved.

The Lord Keeper [NORTH] decreed the plaintiff should hold such part of the lands in Yorkshire as should be equal in value to such of the lands in Bickerton as were comprised within the jointure until her portion was raised.

Lincoln's Inn MS. Misc. 498, p. 2, pl. 1

Sir George Reve voluntarily charged an estate of his in Suffolk with £3000 for his daughter's portion. And, afterwards, he settled that estate upon a second wife for her jointure, she knowing nothing of the charge, which yet being voluntary, would not have affected her being a purchaser. Afterwards, Sir George, by his will, taking notice of the charge and that his wife's jointure might be encumbered by it, devises that his wife should have an election to refuse her jointure and take another estate of his in Yorkshire instead of it. The wife refuses the Yorkshire estate, whereupon, the daughter exhibited her bill, and had the Yorkshire estate made liable to her portion by a decree.

[Other copies of this report: Lincoln's Inn MS. Misc. 503, p. 73, pl. 1, Lincoln's Inn MS. Misc. 504, p. 70, pl. 2.]

2 Ventris 363, 86 E.R. 487

Sir Robert Reeve, upon his marriage with his second wife, settled a jointure of divers of his lands in Suffolk, which he had before charged with his daughter's portion, viz. £3000, which daughter he had by a former wife. And, by his last will, he mentioned that the said jointure lands were so incumbered, and, therefore, he devised certain lands he had in Bickerton in Yorkshire to his wife in lieu of such part of the Suffolk lands as were charged with the portion in case she would accept thereof.

But, after his decease, it appeared that the lands in Bickerton were not equivalent in value to the Suffolk lands. And, therefore, she held to the latter, and was not prejudiced by the charge of the portion, because it appeared to be a voluntary settlement.

Note, in this case, the Lord Keeper [NORTH] decreed that the portion should be charged upon the Bickerton lands for so much as it was defeated by the settlement in jointure of the Suffolk lands.

[Other reports of this case: 1 Eq. Cas. Abr. 221, 335, 21 E.R. 1004, 1084.]

153

Anonymous

(Ch. 1684)

A bona fide purchaser for value can put in a plea as to the consideration, but he must answer as to the lack of notice.

2 Chancery Cases 161, 22 E.R. 894

February 1683[/84].

A bill was exhibited for discovery. The defendant pleaded that he was a purchaser for valuable consideration, *viz.* so much etc. and that he had no notice of the plaintiff's title etc.

It was ruled by LORD NORTH that the plea as to not having notice by way of plea was not good. But it ought to have been, as to the notice, by way of answer, and not by way of plea, on debate, but yet that the defendant, being a purchaser, should not lose by the formality of pleading the benefit of his plea if he should answer the whole plea, for, if he should answer to the time of his purchase, which possibly was *in facto* after the plaintiff's purchase (they were indeed both of them mortgagees), then the plaintiff might wound him at law. He should put in a new plea, and put in the point of notice by way of answer, or to that effect, was the order.

2 Ventris 361, 86 E.R. 486

A bill was preferred against one to discover his title that A.B. might be let in to have execution of a judgment.

The defendant pleaded that he was a purchaser for a valuable consideration. But he did not set forth that he had no notice of the judgment.

And it was overruled, for it is a fatal fault in the plea.

154

Cresset v. Kettleby

(Ch. 1684)

Where a bill of complaint is in the disjunctive, a plea to either is a sufficient response.

1 Vernon 219, 23 E.R. 426

Eodem die [5 February 1684].

The bill was that the plaintiff's father, by a settlement, on his first marriage, was only tenant for life or else tenant in special tail and the plaintiff was the eldest son of that marriage and that the defendant claimed by a subsequent settlement, having notice of the first.

The defendant pleaded a fine levied by the father, and set forth her title under the second settlement, and insisted she was a purchaser, but did not plead she had no notice of the first

settlement.

Lord Keeper [NORTH]: The bill being in the disjunctive, the defendant might take it either way. And, having pleaded a fine, which is a bar, supposing the father to be tenant in tail, he allowed the plea.

[Raithby's note: The plaintiff was at liberty to amend his bill. Entered by the name of Cressett v. Cressett. Reg. Lib. 1683 A, f. 389.]

[Other reports of this case: 1 Eq. Cas. Abr. 37, 21 E.R. 857.]

155

Earl of Newburgh v. Wren
(Ch. 1684)

Priority of suit in the Court of Exchequer cannot preclude a suit in the Court of Chancery for the same matter.

1 Vernon 220, 23 E.R. 427

Eodem die [5 February 1684].

The plaintiff's bill was to foreclose the defendant. And the defendant pleaded that he had already exhibited a bill against the now plaintiff in the [Court of] Exchequer to redeem,¹ to which bill the defendant there (the now plaintiff) had answered. And the subject matter of that suit being the same with the plaintiff's bill in this court, the defendant pleaded the pendency and priority of the former suit in the Exchequer in bar to the plaintiff's bill here.

And, for the plea, it was argued by the Solicitor General [*Finch*] and others that this bill here was but in the nature of a cross-bill to that in the Exchequer, which the now plaintiff might have exhibited there, and, then, one account of the profits would have served for all, and it was vexatious in the plaintiff to bring the same matter in issue in another court at the same time. And, if the Deputy [King's] Remembrancer in the Exchequer should take the account one way and a Master here should take it another, it would breed confusion. And, if this court should be of an opinion that there ought to be no redemption and the Exchequer should decree a redemption, the jurisdictions would clash. And, therefore, to avoid these inconveniences, priority of suit ought to give jurisdiction to the Exchequer.

But the Lord Keeper [NORTH] overruled the plea, and said this court must deny justice to none. And a plaintiff has a liberty to commence his suit in what court he thinks fit. And the Chancery was the highest court of equity. And, though the Exchequer was an ancient court of equity, yet the same was but a private court, and its jurisdiction properly was only for getting in the king's revenue and for the king's officers. And they ought to keep within their proper bounds. And, if there should happen any of the inconveniences mentioned by Mr. Solicitor [General], there are several precedents that injunctions have gone to the Exchequer in such cases.

And the plaintiff's counsel urged the case was much stronger, for the defendant Wren had bought one Doily's title and Doily's title was from one Ball, who had formerly exhibited his bill to redeem in this court, and, upon a hearing, his bill was dismissed, so that, in truth, this court was first possessed of the cause. And this dismissal was afterwards pleaded in the Exchequer, and Doily was privy to it, but the Court of Exchequer disallowed the plea.

Lord Keeper [NORTH] declared his opinion to be that, in any case, if the mortgagor exhibited a bill to redeem in the Exchequer that the defendant there should be at liberty to exhibit a bill to

¹ *Wren v. Earl of Newburgh* (Ex. 1683), Equity Cases Exch. 193.

foreclose in this court. And he overruled the plea, and ordered the defendant to pay costs.

[Reg. Lib. 1683 A, f 225.]

[Other reports of this case: 1 Eq. Cas. Abr. 80, 134, 21 E.R. 893, 938.]

Lowther v. Carill
(Ch. 1684)

The question in this case was whether a party to an oral contract for the sale of land can be required to execute a written contract.

1 Vernon 221, 23 E.R. 428

Eodem die [5 February 1684].

The defendant having agreed to purchase a lease of the plaintiff, the lease was drawn and some alterations made in it by the defendant's counsel. And it was afterwards engrossed and sent down into the country to the plaintiff to be executed, who accordingly executed the same. But the lease not being returned within the time agreed on, but kept in the country three months longer than it ought to have been, and the defendant, upon enquiry, finding she was to pay too much for this lease, when the deed was returned, she refused to accept it, or to execute a counterpart. The plaintiff's bill was to compel her to it.

The defendant pleaded in bar the Act of Frauds and Perjuries¹ and that she had not signed any agreement in writing.

And, for the defendant, it was strongly insisted that, by the letter and meaning of the Act of Parliament, the defendant ought not to be bound by this agreement, she or her agent having not signed the same, and, though Sir Jo. Lowther had executed the lease on his part, yet the defendant ought not to be bound, the words of the Act being that the agreement must be signed by the party that is to be bound by it.

Lord Keeper [NORTH] ordered the defendant to answer and to save the benefit of the plea to the hearing.

[Without costs. Reg. Lib. 1683 B, f. 216.]

[Other reports of this case: 1 Eq. Cas. Abr. 21, 21 E.R. 843.]

¹ Stat. 29 Car. II, c. 3 (SR, V, 839-842).

157

Hayward v. Angell
(Ch. 1684)

A court of equity can set aside a condition on the ground of non-performance through an accident, such as a death.

1 Vernon 222, 23 E.R. 428

6 February 1683[/84].

Upon a demurrer to a bill of review upon a decree made by the Lord Chancellor Nottingham, the error assigned was that, the defendant's wife's father having given portions to his daughters in case they should release to his heir their right to certain lands, one of the daughters happened to die before she had given any such release, and, therefore, the heir refused to pay the portions. And, thereupon, the other daughters having exhibited their bill to be relieved, they were dismissed, whereas the portion was £2000 to each daughter and the land to be released was not worth £500, and the performance of the condition was prevented by the act of God.

For the demurrer, it was argued that this was a condition precedent and, being not performed, there could be no relief. And they cited Fry and Porter's Case¹ and that this case was much stronger than that, for the words are, 'if his daughters should release, then he appointed them [such and such portions] upon condition they should release' etc., so that the condition was double. And it is as full as can possibly be penned to exclude the daughters from all benefit of their portions unless they should release.

And Serjeant *Maynard* would have it to be stronger than an ordinary condition precedent, it being, if they should release, then he gave etc. And he said there was a difference between a condition in the giving a portion and a portion given upon condition, for, in the former case, the portion does never arise unless the condition is performed.

But the Lord Keeper [NORTH] inclined to overrule the demurrer. And he said, in all cases where the matter lies in compensation, be the condition precedent or subsequent, he thought there ought to be relief.

And, by agreement, the signing and enrolling of the decree was set aside, and the cause to be heard *de integro*.

[The demurrer was overruled. Reg. Lib. 1683 A, f. 408.]

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.

Johnson v. Desmineere
(Ch. 1684)

A case cannot be adjudicated upon a defendant's default before an appearance by the defendant and without any proof of damages.

1 Vernon 223, 23 E.R. 429

9 February 1683[/84].

The plaintiff's bill was an appeal from a decree of the Court of Policies and Assurances in London, whereby, the defendant below not appearing upon the first summons, the bill was ordered to be taken *pro confesso* against him.

And, for the plaintiff [Sir James Johnson], it was insisted that, though, by the Statute 43 Eliz., c. 12, and the Statute 14 Car. II, c. 23,¹ the commissioners may proceed in a summary course without formalities of pleadings, yet it was very extraordinary to take a bill *pro confesso* upon the first summons. And they ought at least to have had the allegations in the bill proved before they proceeded to make such order. And it was said, though the course in this court now is to take a bill *pro confesso* after the party has once appeared and stands out in contempt until the plaintiff is got to the end of the line and has run through all the process of the court against him, yet, formerly, this court did not do it, even in that case, without putting the plaintiff to prove the substance of his bill.

Whereupon the Lord Keeper [NORTH] reversed the decree. And, though, in this case, the appeal was not brought within two months after the decree, according to the said Act of the 43d Eliz., yet, in regard the defendant could not make out that the now plaintiff had been fairly summoned, the Lord Keeper [NORTH] admitted the appeal.

And, thereupon, the parties agreed to try the matter in an action on the case, the plaintiff by order being not to insist upon the Statute of Limitations.²

[Raithby's note: The plaintiff was not allowed costs, the suit being to reverse the commissioners' decree. Reg. Lib. 1683 A, f. 706. The costs in the Court of Policies were not taxed, nor execution signed by the Commissioners until so late as that the two months allowed by the Act did not intervene between the completion of the decree (without which taxation and signing, Lord Keeper [NORTH] said the decree was not complete) and the appeal. And the court declared that the two months ought to be reckoned from the first service with or other regular notice of the decree and also that the Act had provided a power to punish defaulters by contempt by commitment, which course the Commissioners ought to have taken for an answer.]

[Other reports of this case: 1 Eq. Cas. Abr. 83, 21 E.R. 896.]

¹ Stat. 43 Eliz. I, c. 12 (SR, IV, 978-979); Stat. 14 Car. II, c. 23 (SR, V, 418-419).

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

Attorney General, *ex rel.* Christ's Hospital v. Siderfin
(Ch. 1684)

Where a general devise is made to charitable uses, the king can direct it to an appropriate charity.

1 Vernon 224, 23 E.R. 430

11 February 1683[/84].

Mr. Syderfen, the defendant's brother, having by his will (amongst other things) charged a manor in the west of England with the raising of £1000 out of the profits to be applied to such charitable uses as he had by writing under his hand formerly directed and no such writing being to be found and the defendant, his brother and heir at law, being in possession of the estate, the bill was brought in the name of the Attorney General at the relation of the Governors of Christ's Hospital, setting forth the will and that no such writing as was mentioned therein was now to be found and that, therefore, the application of this charity was in the king and charging that the testator in his lifetime had frequently expressed his good intentions towards this hospital and that the king, being informed that there was no such writing to be found as aforesaid, had been graciously pleased to declare his will and pleasure to be that this money should be laid out for the benefit of the mathematical boys, which were of his own foundation in Christ's Hospital, it was therefore prayed that the same might be so applied.

The defendant, by answer, confessed the will, but that the writing therein referred unto was not to be found and that he believed, if any such writing was at any time made by the testator, it was afterwards by him revoked and cancelled, for that, subsequent to the making of this will, he had charged several great sums of money upon his land and that the whole estate would scarce amount to answer all the charges thereon and the heir would be disinherited and left without any provision.

Lord Keeper [NORTH]: It is no question but the charity being now general and indefinite, this writing not being to be found, the application of this money is now in the king. And His Majesty having declared his pleasure to have it disposed for the benefit of the mathematical boys of his foundation in Christ's Hospital, he thought it could not be better laid out. And, though, by the will, it was directed to be raised out of the profits, yet, it being a gross sum, he thought it would carry interest to the time it should be paid and raised out of the profits. And, forasmuch as, by the will, it was intended to be a permanent charity, he referred it to a Master, who, by the approbation of Mr. Attorney General, should see it laid out in land for the benefit of the said mathematical boys. And he decreed the same accordingly. And he cited the Case of Frier v. Peacock, in this court,¹ where Frier, the testator, had given several particular charities by his will and devised the surplus 'for the good of poor people forever', and a bill being brought that the surplus which was devised indefinitely might be applied for the benefit of Christ's Hospital by the king's direction, it was so decreed, although there were poor kindred of the testator's who insisted they were within the equity of that general devise to a charity.

Note, in this case, the defendant, by the decree, was to be indemnified against the writing referred unto in the bill in case it should be afterwards found.

Lincoln's Inn MS. Misc. 498, p. 2, pl. 2

Mr. Siderfin, of the Middle Temple, by his last will, devised £1000 to such charitable uses as he had appointed. After his death, no appointment could be found, wherefore a petition was made

¹ *Jones v. Peacock* (1675), Reports *tempore* Finch 245, 23 E.R. 135, 73 Selden Soc. 209, 304, *sub nom. Attorney General v. Matthews* (1676), 2 Levinz 167, 83 E.R. 501.

to the king to appoint how it should be disposed of.

The king appointed it to a hospital which he had founded for instructing boys in the mathematics in order to make them navigators.

And now a bill was exhibited here by the Attorney General to continue to the king's appointment.

[Other copies of this report: Lincoln's Inn MS. Misc. 503, p. 73, pl. 2, Lincoln's Inn MS. Misc. 504, p. 70, pl. 3.]

[Reg. Lib. 1683 A, f. 340.]

[Other reports of this case: 1 Eq. Cas. Abr. 96, 21 E.R. 906.]

160

Basket v. Pierce
(Ch. 1684)

The questions in this case were whether a fine by a beneficiary of a trust in tail and non-claim will bar the rights of a remainderman in tail and whether a beneficiary of a trust can be barred by a non-claim by the laches of his trustee.

1 Vernon 226, 23 E.R. 431

Eodem die [11 February 1684].

A man, by his will, devises his lands to trustees for 99 years for the payment of his debts and legacies, and, afterwards, in case they should not act and take upon them the trust within six months after his death, then he devised the said lands to another and his heirs in trust to pay his debts and legacies, and, afterwards, to A. in tail, remainder in tail to B. A. levies a fine, and dies without issue. Five years pass and non-claim. The question was whether this fine by the *cestui que trust* in tail and non-claim should bar the remainderman in tail.

And the Lord Keeper [NORTH] was of opinion that it should, for equitable rights are as well to be bound by fines as actions and titles at law. And he cited the Case of Freeman and Barnes,¹ where a fine by a *cestui que trust* was adjudged a good fine and bar. And he was of opinion that it would bind at law.

But it being urged for the plaintiff that, in the Case of Freeman and Barnes, there, the fine was levied by the *cestui que trust* that had the whole entire estate in him and so was to work upon his own equity only but, here, the *cestui que trust* had but an estate tail only, which was spent, and there were other remainders over. And they did insist in this case that the remainderman was not barred by a non-claim, for that all the debts and legacies were not paid and so his title was not commenced and the term for 99 years did subsist and was not expired. And it was insisted that, the entire estate at law being in the trustee, he ought to have entered, and it was against equity to suffer the *cestui que trust* to be barred by non-claim for the laches of his trustee.

Whereupon the Lord Keeper [NORTH] decreed the trustee should give leave to the plaintiff to bring an action in his name to try his title. And he said, it being a title at law, he would not determine it himself, though his opinion was that the plaintiff was barred.

¹ *Freeman v. Barnes* (1670), 1 Levinz 270, 83 E.R. 401, 1 Ventris 55, 80, 86 E.R. 39, 56, also 1 Siderfin 458, 82 E.R. 1215, 2 Keble 597, 650, 84 E.R. 375, 409, *Barnes v. Freeman* (1667), Carter 161, 195, 124 E.R. 890, 912.

[Raithby's note: The costs of this suit were ordered to the defendant, and the plaintiff was to enter into a recognizance to pay the mesne profits. Reg. Lib. 1683 A, f. 394.]

[Other reports of this case: 1 Eq. Cas. Abr. 256, 21 E.R. 1029, 2 Eq. Cas. Abr. 473, 22 E.R. 402.]

161

Phillips v. Duke of Buckingham
(Ch. 1684)

The question in this case was whether a conveyance can be set aside on the ground of fraud in the inducement.

1 Vernon 227, 23 E.R. 432

Eodem die [11 February 1684].

The case was that Mr. Phillips having formerly treated with the duke of Buckingham for the purchase of the manor of Sheapeshead and Garrowden in the County of Leicester and not agreeing upon the price, the treaty was broken off. But to compass this purchase, Mr. Phillips procured Mr. Niccoll, the Lord Chancellor Nottingham's Secretary, to negotiate this matter for him. And it being pretended to the duke, as was proved in this cause, that this purchase was for the Lord Chancellor or for the Solicitor General, his son, the duke declared himself willing to oblige any of that family. And he said, if the Lord Chancellor would please any way to satisfy himself of the value of the estate, he should set his own price. Afterwards, Mr. Niccoll agreed with Hemmings, a land jobber, whom the duke had employed in this affair, to buy this estate for £28,000. And, thereupon, the duke and Mr. Niccoll entered into articles, whereby the duke did mention to grant, bargain, and sell this estate to Niccoll and his heirs in the present tense. And Niccoll covenants to pay £28,000 for this purchase at such times as were therein mentioned, and, both of them sealing each part of the indenture, they were both originals. And Niccoll goes immediately, and acknowledges before a Master in Chancery the deed in his custody, and gets it enrolled.

The duke, afterwards, discovering this purchase was in trust for Mr. Phillips, looks on himself as ill used in this matter, and refuses to perform the articles or to execute conveyances. But one article being that it should be lawful for the purchaser to sue in the duke's name to compel his trustees to convey and his mortgagees to assign to Mr. Niccoll, Phillips and Niccoll exhibit a bill and make the duke a party plaintiff against the trustees and mortgagees, setting forth the articles and that the purchase was in trust for Phillips and praying the defendants might convey and assign to the plaintiff Phillips.

Afterwards, the duke, upon a motion, affirming that the bill was exhibited in his name without his privity or consent, gets his name struck out of the bill. Then, Mr. Phillips amends his bill, and makes the duke a defendant, and, as against him, prays an execution of the articles in specie. The trustees and mortgagees answer. But the duke stands out to a sequestration. And, then, the plaintiffs go on against the trustees and mortgagees without the duke, and obtain a decree against them to convey and assign, which the mortgagees, afterwards, on payment of their money, did accordingly. Afterwards, the duke comes in and answers, and examines his witnesses.

And the cause coming on this day regularly to be heard as against him and the matters aforesaid being made out by proof and, likewise, though but slenderly proved, that the lands were of greater value and were worth between £35,000 and £36,000, the Lord Keeper [NORTH] declared his opinion that there had not been fair and open dealing in the managing of this affair but that the duke appeared to him to have been misinformed and drawn in and that the duke, having a great value for the Lord Chancellor or Mr. Solicitor [General], declared himself willing to part with the estate to either of them for less than he would have done to another and that being the intention of the agreement, Lord Keeper [NORTH] said, he would not, in equity, carry it into execution for the benefit

of a stranger.

And he said articles, out of which an equity could be raised for a decree in specie, ought to be obtained with all imaginable fairness and without any mixture tending to surprise or circumvention. And, therefore, he declared he could not in justice decree these articles to be performed in specie. But he proposed that, if the parties would agree to go before a Master and if a better purchaser did not come in within six months, Mr. Phillips might retain his purchase.

But that proposition was disliked on each side. The duke desired the opinion of the court, and Mr. Phillips thought he had a good cause at law on his deed enrolled. But he offered to submit the matter to the Lord Keeper [NORTH] as an arbitrator.

But that was declined by the duke, he understanding the court was of opinion for him.

And, thereupon, the Lord Keeper [NORTH] pronounced his decree for dismissing the plaintiff's bill. And he put this case, that of a man, being about to sell an estate, should be informed by J.S. that the vendor's brother desired to be the purchaser, and, thereupon, the vendor should declare his brother should have a better pennyworth than another person and he should article with J.S. for the sale of it at an undervalue and this purchase should be in truth for a stranger. Lord Keeper [NORTH] thought that equity ought not to decree this purchase. And he said that Mr. Phillips had here a person of great honor to deal with, and ought to have carried the matter fair and open with him. But he declared, if the bill had been brought in Mr. Solicitor [General]'s name and he would have patronized the purchase, the articles must have been decreed, and no one can doubt but he might have sold it to Mr. Phillips the next day. But it was another case [than] was now before him.

Note, in this case, Mr. Niccoll was Mr. Phillips's principal witness to have proved the fairness of the contract and proceeding touching this purchase but, he being a party plaintiff, though Mr. Phillips had an order to examine him *de bene esse*, could not be read, but must have been dismissed before he could have become a witness.

Note Mr. Phillips had not proved the value of the land, as he ought to have done, but would have examined witnesses *viva voce* to it, but that would not be received.

Note, though the articles were enrolled and imported a present grant, the legal estate did not thereby pass to Niccoll, it being in the mortgagees.

[Raithby's note: The statement in this report is not correct. It appears from the Register's Book that, at the hearing on the 11th of February, the court respited the judgment, and recommended a compromise to the parties. This not being effected, the cause came on for judgment as to the duke of Buckingham the 3d of March following, when it was stated on the part of the plaintiff Phillips that the plaintiffs had obtained a decree against the other defendants, the mortgagees and trustees, and that, pursuant to such decree, the plaintiff Phillips had paid on the 23 December 1682 £15,957 14s. 4d. to said mortgagees, according to a report of the Master who was ordered to state and settle the said mortgage debts, and had also, at the same time, paid the sum of £5000 to the said trustees and that the plaintiff Phillips was now in possession of the said estate and that the said Master had, by his report of the 27 February 1683, directed how the remainder of the said purchase money with interest at the rate of £5 percent ought to be paid and applied. The decree is then stated in the Register's Book in these words: 'Whereupon etc., the court does think fit and so order and decree that the plaintiff Phillips do pay unto the said defendant the duke of Buckingham and his wife the £1500 mentioned in the Master's report of the 27 February 1682-83, as thereby is directed, and that the defendant the duke of Buckingham do make and perfect a good assurance to the plaintiff Phillips of the said manors and premises by fine and common recovery and by deeds leading the uses of the same to the plaintiff Phillips and his heirs, and the said defendant is to procure his wife, the duchess of Buckingham, to join in the levying and executing such deeds and fine. And, upon the defendant and his wife's making such further assurance by deed, fine, and common recovery, the plaintiff Phillips is forthwith to pay the residue of his said purchase money remaining unpaid with interest at £5 percent as the Master should direct to defendants Clayton and Wildmeers, the acting trustees of the said duke, for the use of the said trust, and it is hereby referred to the Master to tax the plaintiff's costs of this suit, which are to be allowed and deducted out of the plaintiff's said purchase

money accordingly'. Reg. Lib. 1683 B, f. 258.]

[Other reports of this case: 1 Eq. Cas. Abr. 18, 21 E.R. 840.]

162

Fielding v. Bound
(Ch. 1684)

The ecclesiastical courts have jurisdiction over the administration of decedent's estates.

Legacies to charities have priority over other legacies, and they do not abate where the decedent's estate is not sufficient to pay all of the legacies.

1 Vernon 230, 23 E.R. 434

1 March 1683[/84].

A man, by his will having devised several legacies and, amongst others, £40 to a charity and the Spiritual Court being of opinion that, though the estate fell short and would not satisfy all the legacies, yet that the entire £40 ought to be paid to the charity in the first place and not in average or proportion with the other legacies, the plaintiff exhibited his bill, setting forth that the estate was deficient and would not satisfy all the legacies and that the Spiritual Court, notwithstanding, would compel the plaintiff to pay this £40 for the charity, without having any security to refund.

And the plaintiff, for that reason, now moved for an injunction to the Spiritual Court.

But it was now denied by the Lord Keeper [NORTH], who said the civil law was the law by which legatory matters were to be determined and that the Spiritual Court had unquestionably the proper jurisdiction thereof. And, if, by their law, there was a preference given to charitable legacies, he had no power to alter the law in that point. And, therefore, he refused to grant any injunction or to direct security to be given for refunding in case of deficiency of assets.

[Reg. Lib. 1683 A, f. 311.]

163

Anonymous
(Ch. 1684)

Where a written contract differs from the mutual intent of an oral agreement, the parties are bound by the contract as written.

Skinner 159, 90 E.R. 74

One that could read made an agreement for a lease for twenty-one years. The lessor himself drew the lease but for one year, and read it for twenty-one years. And, after the expiration of a year, he ejected the lessee.

And he brought a bill in Chancery to be relieved upon all this matter, which was in proof.

But it was dismissed with costs, for it was within the Statute of Frauds and Perjuries etc.¹ And, being able to read, it was his own folly. [It would have been] otherwise if he had been unlettered.

¹ Stat. 29 Car. II, c. 3 (SR, V, 839-842).

Bricker v. Pottle
(Ch. 1684)

In this case, the court found the intent of the testator to be that only one share of the devise in issue was to go to the plaintiffs, who were husband and wife.

Lincoln's Inn MS. Misc. 498, p. 7

A man devises the residue of his personal estate in this manner: 'To my cousin A.B., her sister, and my cousin C. and D., his wife, equally to be divided amongst them'. The question was whether the husband and wife should have two fourth parts or one third part betwixt them.

And it was decreed that they shall only have a third part betwixt them, for the apparent intention of the devisor and because the words 'equally to be divided betwixt them' must be intended where a division may be, which cannot be betwixt a husband and wife of a personal chattel, but all which belong to the husband, and, therefore, if he and his wife should have two fourth parts, the division would not be equal.

[Other copies of this report: Lincoln's Inn MS. Misc. 503, p. 77, Lincoln's Inn MS. Misc. 504, p. 74.]

Skinner 182, 90 E.R. 84

A.B. has three nieces. One of them takes as husband, A.; B. devises a legacy to the husband and wife and the other nieces equally.

The question in Chancery was whether here should be three parts or four.

It was urged that, being tenants in common, there should be four parts, as likewise that so it should be adjudged by the civil law and that, in Chancery, they govern legacies by the rule of the civil law unless where it directly contradicts the common law.

But it was ruled by NORTH, Lord Keeper, that there should be but three parts and that the husband and wife should take but as one person according to the rule of the common law, and the rather for that the legacy here was given in respect of the wife, and not of the husband also.

1 Vernon 233, 23 E.R. 435

30 April 1684. Bricker v. Whatley.

A man, by his will, after debts and legacies paid, gives all the residue and surplus of his estate to A., B., and C. and the wife of C. equally to be divided amongst them, share and share alike.

The only question was whether C. and his wife should be taken as one person and so have only a one-third part of the surplus or should be taken as two persons and so be entitled to a moiety.

It was urged that, by the words 'equally to be divided betwixt them', they took as tenants in common, and not as joint tenants, and, therefore, must take as two persons and that, in this case, there should be no survivorship. But, if the husband died, his share should go to his executor, and not to his wife.

And [it was said] by Mr. Solicitor General [*Finch*], if lands had been devised in like manner, the husband and wife should take by moieties and as distinct persons.

But it being proved in the cause that the wife only was of kin to the testator, and not the husband, the Lord Keeper [NORTH] was of opinion that the husband and wife should have but a one-third part.

[Reg. Lib. 1683 A, f. 497. The words of the will, as stated in the Register's Book, are as follow: 'He gave and bequeathed the rest and residue etc. his debts and funeral expenses being first paid, in equal shares between his kinsman, the plaintiff Richard Bricker, the plaintiff Christian Bricker, his sister, and the defendants his cousin Stephen Whatley, and Hester, his wife, equally to be divided amongst them.']

165

Ragget v. Clarke
(Ch. 1684)

A debtor can make his creditor an occupant of his land so that the debt can be paid off by the occupant's perception of the profits of the land.

2 Ventris 364, 86 E.R. 488

Easter term 36 Car. II. William Ragget and his wife *versus* William Clarke.

The case was thus. Nicholas Wheeler was seised of a parcel of land for his own life and the lives of two others. And he prevailed with the defendant to be bound with him for a sum of money. And, that the defendant might raise money for the discharge of the said debt, he permitted the defendant to enter into the said lands and to take the profits for two years, the said lands being about £12 yearly value. And the said land being so in the possession of the defendant, the said Wheeler died. And he made Isabel, wife of the now plaintiff, his executrix.

And this bill was brought by the said husband and wife to have an account of the profits and that the possession of the land should be delivered up to them.

The defendant, by a plea, sets forth his title as occupant.

And it was allowed. And the bill was dismissed.

1 Vernon 234, 23 E.R. 436

Eodem die [30 April 1684]. In Court, Lord Keeper.

The bill was brought by an executrix to be relieved against an occupancy and to subject the estate to the payment of debts, pretending a deficiency of assets.

It was said for the defendant that it was not proved in the cause that there was any deficiency of assets, but, if it had, yet this occupancy happening before the Statute of Frauds and Perjuries,¹ the estate was no wise subjected to the payment of debts.

And of that opinion was the Lord Keeper [NORTH]. And, therefore, he dismissed the bill. And he cited a case in the Common Bench in the time of the Lord Keeper Bridgman, where the question was between an under lessee for years and a tenant at will, which of them should be the occupant, and it was adjudged for the tenant at will, against the opinion of the Lord Keeper Bridgman.

[Reg. Lib. 1683 B, f. 508.]

¹ Stat. 29 Car. II, c. 3 (SR, V, 839-842).

Massenburgh v. Ash
(Ch. 1684-1685)

A trust of a lease is governed by the same rule against perpetuities as an executory devise of a lease.

1 Vernon 234, 23 E.R. 437

6 April 1684.

The case arose upon a deed, touching the contingent remainder of a term for years, and, though there was a will in the case, wherein there was a disposition of the same term, yet it was agreed the will could not alter the deed, but that the case must depend on the deed alone. And, as to that, the case was thus. A term for years was assigned to trustees in trust for a husband and wife during their lives and the life of the longer liver of them, and, if there should happen to be issue male of their bodies living at the time of the decease of the survivor of them, then, in trust, that the eldest son of that marriage should be maintained out of the rents and profits until he attained his age of twenty-one years and, then, the whole term to be assigned unto him, and, in case he should die before the age of twenty-one years, then, in like manner for the maintenance of the second, third, fourth, and every other son of that marriage, one after another, until one of them should attain the age of twenty-one years, and, then, the whole term to be assigned to him, but, in case there should be no such issue living at the time of the decease of the survivor of the said husband and wife or in case there should be such issue and they should all die before any one of them attained their age of twenty-one years, then, he limited the term to the plaintiff, Sir William Massenburgh, who was his eldest son and heir by a former wife. The husband and wife die, and leave a son only, who dies whilst an infant of about five years old.

The question was whether the remainder over to Sir William Massenburgh was good.

In the arguing of this case, it was agreed by the counsel and so declared by the court that, as to the limitation of the trust of a term, it was to be governed and guided by the same rules in equity that the devise of a term is at law, and not to be carried further, and that such limitations or contingent remainders as were good in one case would be so in the other *et e converso*.

Secondly, the general rule that has hitherto obtained was that you might limit a term to as many persons as you would, one after another, that were *in esse* at the time of the limitation and one step further to a person not *in esse*, but there could be but one contingent remainder of a term for years.

But the counsel for the plaintiff argued that, where there is a contingent remainder limited upon a contingent remainder, if the first contingency never happens, then, the second contingency is good, and shall take place in law. And they insisted much on the inconveniences people lie under, whose estates consist in church leases, by reason they have no latitude left by some hard resolutions to make a settlement of their estates or reasonable provision for their families. These inconveniences were formerly so far considered in this court that, in such cases, they would admit limitations over, which the common law would not then allow, but, seeing it done in Chancery, the common law courts soon followed the example of this court and enlarged much upon the inconveniences that might often happen should this remainder be adjudged void. And they observed that here was no danger of a perpetuity, being the contingency must of necessity happen within the space of twenty-one years at most after the decease of either the husband or wife. And this cannot be said to come nearer a perpetuity than almost every settlement of a real estate, for, here, if the issue once attains his full age, then, the whole term is to be assigned unto him and he may dispose of it at his pleasure or, otherwise, it shall go in a course of administration. And they relied strongly on Wood and

Sander's Case,¹ as a case adjudged in point. And they cited the cases of Colton and Heath, and Oakes and Chalfont, etc.²

On the other side, the defendant's counsel insisted much on that rule in cases of executory devises, that one contingent remainder was good, but a contingency upon a contingency is not to be allowed. And, to the Case of Wood and Sanders, they opposed the Case of Child and Bailey, and cited the cases of Goring and Bickertaffe and of Gibbons and Summers in the Common Pleas, and the case of Warman and Seaman in this court.³ And they urged that, in case that rule were to be broken, which allows only one contingent remainder, there are no bounds set, and no man knows where it will end, for, as they may appoint the contingency to happen within the space of twenty-one years, so they may enlarge it to thirty years, and from thence to forty, and so on without end.

Lord Keeper [NORTH] thought it a case of great consequence. And, for as much as he took the rules in Chancery touching the limitations of trusts of terms for years to be the same with executory devises of terms for years at law, he would have the opinion of the judges before he would determine anything in this matter. And he directed a case should be drawn, as the case stood upon the deed, and that it should be tried in a feigned issue in the Common Pleas.

2 Chancery Reports 275, 21 E.R. 677

This court ordered a case to be stated in this cause upon the deed (only) by way of executory devise to bring the question arising into determination, as if in a will and in such a method as if the trust and limitations in the deed had been limited and created by the will, upon which case the judges of the Common Pleas were to certify their opinions whether the remainder of a residuary estate of the two leases or terms in question limited to the plaintiff were a good devise or limitation or not. The said judges were also to be attended with another case made upon both deed and will, and they are to certify what the law is in the case of an executory devise as also what is fit to be decreed in equity.

The case on the deed only by way of executory devise is *viz.* two several terms, one for 500 and the other for ninety-nine years by will dated the 1st of November 1679 and devised in these words *viz.* that Sir Henry Massingberd and his assigns shall take the rents, issues, and profits for and during the term of his life, and, after his decease, Elizabeth, his wife, should receive the rents, issues, and profits during her life, and, after the decease of the said Sir Henry and Elizabeth, the eldest son of the said Sir Henry begotten upon the body of the said Elizabeth shall take the profits of the said lands until age and then to have the whole term to him, his executors, and administrators, and, if such eldest son happen to die before he comes of age, then the second son of their two bodies shall take the profits of the said premises until he come of age, and then to have the whole term, and, if such second son die before he comes of age, then the third son to have and receive as aforesaid, and, if such son die before he likewise comes of age, then the fourth son to have and receive as aforesaid,

¹ *Wood v. Saunders* (1669), Pollexfen 35, 86 E.R. 503, 1 Chancery Cases 131, 22 E.R. 728.

² *Cotton v. Heath* (1638), Pollexfen 26, 86 E.R. 500, 1 Eq. Cas. Abr. 191, 21 E.R. 981, Chancery Repts. *tempore* Coventry 287; *Oaks v. Chalfont* (1674), 73 Selden Soc. 104, Pollexfen 38, 86 E.R. 504, 1 Chancery Cases 239, 22 E.R. 779.

³ *Child v. Bayley* (1623), Palmer 48, 333, 81 E.R. 972, 1109, W. Jones 15, 82 E.R. 9, Croke Jac. 459, 79 E.R. 393, 1 Eq. Cas. Abr. 192, 21 E.R. 982, 2 Rolle Rep. 129, 81 E.R. 704, 1 Rolle, Abr., *Devise*, pl. L, 5, p. 612; *Goring v. Bickerstaff* (1662), 1 Chancery Cases 4, 22 E.R. 665, 2 Freeman 163, 22 E.R. 1132, Pollexfen 31, 86 E.R. 502; *Gibbons v. Summers* (1681), 3 Levinz 22, 83 E.R. 557, 1 Eq. Cas. Abr. 192, 21 E.R. 982; *Warman v. Seaman* (1675), Pollexfen 112, 86 E.R. 530, 2 Chancery Cases 209, 22 E.R. 914, 1 Freeman 306, 22 E.R. 1227, Reports *tempore* Finch 279, 23 E.R. 153, 3 Keble 544, 84 E.R. 870, 73 Selden Soc. 197, 217, 248.

and, in the case of no issue male between Sir Henry and Elizabeth living at the time of the death of the survivor of them who shall live to their age and that there shall be one or more daughter or daughters of the said Sir Henry and Elizabeth, that, then, the said daughter or daughters, their executors, and administrators to have and take their several equal shares and proportion of the said rents, issues, and profits, for and during the said terms unless William Massingberd, the now plaintiff, should within six months after the death of the survivor of them, the said Sir Henry and Elizabeth, pay such daughter or daughters or secure the several sums following *viz.*, if but one daughter £1000, and, if more, then to every one of the rest £1500 apiece, and, after the same paid or secured, in case there shall be no such son or daughter living at the time of the death of the survivor of the said Sir Henry and Elizabeth or which should live to attain his or her age, then the residue of the said terms to go and be for Sir William Massingberd, the now plaintiff, his executor, and administrators.

Sir Henry Massingberd died in September 1680, leaving his wife Elizabeth *enceinte* of a son after born and named Henry, who died within six weeks after. Sir Henry and Elizabeth had no other issue, which Elizabeth is now the defendant. *Quaere* whether the said devise to William Massingberd the now plaintiff be good.

The case, upon both the deed and the will [was] that Sir Henry Massingberd, being possessed of two several terms, one for 500 and the other for ninety-nine years, by the indenture 2 November 1679, made an assignment thereof to trustees, upon trust to permit and suffer him the said Sir Henry and his assigns to receive the rents and profits during his life, and, after his death, to permit the defendant Elizabeth, then Elizabeth Rayner, his intended wife, to receive the rents and profits during her life, then upon trust to assign the residue of the said terms to such person or persons and for such estates and terms and in such manner as the said Sir Henry should by will in writing nominate, limit, and appoint, give, devise, or dispose thereof, or any part thereof. and in case the said Sir Henry should die intestate or should not by his will nominate, limit, appoint, give, devise, or dispose of the same and every part thereof, that then the trustees should permit the eldest son of the body of the said Sir Henry on the body of the said Elizabeth to receive the rents, issues, and profits of the premises undisposed of by the will of the said Sir Henry until he should attain his age, and should then assign to him, his executors, and administrators the residue of the said terms. And in case the eldest son should die before age, then the trustees should permit the second son to receive the rents and profits with the like trust to assign to him at his age, and so to the third and fourth son in like manner. And, in the case of no issue male between them at the time of the death of the survivor of them, the said Sir Henry and Elizabeth, which should live to attain their respective ages, and that there should be one or more daughter or daughters between them, that then the trustees should permit the said daughter and daughters, her and their executor, and administrators to take their several equal shares and proportions of the said rents, issues, and profits, not devised or disposed of by the will of the said Sir Henry, for and during the said terms, unless William Massingberd, the now plaintiff, the eldest son and heir of the said Sir Henry by a former wife, should within six months after the death of the survivor of them, the said Sir Henry and Elizabeth, pay to such daughter or daughters or secure to the good liking of the trustees the several portions therein mentioned for the said daughter or daughters. After the said portions paid or secured or, in case there should be neither son nor daughter living at the time of the death of the survivor of them, the said Sir Henry and Elizabeth, or that should live to their respective ages, that then the trustees should assign the residue of the said terms to the said William Massingberd, his executors, and administrators. Then there is a power of revocation in the said Sir Henry by deed or will to revoke and make void this present deed, and the estate and estates, trust and trusts of the premises, or any part thereof.

After this, Sir Henry made his will in writing and the defendant Elizabeth, his Lady, executrix and residuary legatee. And he devised in these words, *viz.*:

I do hereby give unto her all my estate, which I have by deed settled upon her, according to the true meaning and intent of the said settlement. And also I give her all those other lands hereby hereafter settled upon her, according to my true intent of my settlement

thereof for her life, or on my issue by her. And I do also give her all my estate concerning my interest in the college leases from John Rutter of Canterbury and also all my goods and chattels not hereby otherwise disposed of. I will that all the copyholds any ways appertaining to Paston be taken to the use of my executrix and also the bishop's lease when need is that it be renewed also to her use and also the lease for 500 years of Paston, all at her charge, according to the true intent of my settlements upon her, which I hope my son William will endeavor as before the Almighty to make good unto her and hers, and, if either I have no issue by her or that they or their issue all die, so that the succession be expired, then, after my wife's decease, I hereby give (upon my son's willful neglect or refusal of his duty herein, and not otherwise) all my said lands not settled on him by his marriage to all the daughters of my daughters Sanderson and Stoughton to be divided among them. Yet always provided that, if my said son neither neglect nor refuse any reasonable duty herein, then my will is that, after my wife's decease and that all her issue by me be either dead or have their portions paid them as is provided, that then all my said lands settled on her for life, whether copyhold, leasehold, or freehold with all the rest unsettled, shall descend and be to him and his heirs forever.

Sir Henry Massingberd left no issue living by that wife, but left his said wife *enceinte* of a son born alive and named Henry. But he died about six weeks after, to whom the lady is administratrix. The judges' opinion upon both these cases [was]:

We have heard the case of Massingberd and Ash referred to us argued by counsel on both sides, both upon the deed of trust and upon the will, and are all of opinion that the whole weight of the case rests upon the deed of trust and that the will, though it have some clauses in it which, if they were substantive of themselves, would alter the case, yet, as it is penned and the clauses all bound up with relation to the deed of trust, it does not. And we are likewise of opinion that all the remainders and contingencies in the deed of trust, being limited and confined to fall within the compass of twenty-one years, are good, and that, therefore, the remainder of the term ought to be decreed to the plaintiff, Sir William Massingberd. *Thomas Jones, Creswell Levinz, J. Charlton, T. Street.* February 17, 1684.

The Lord Keeper [NORTH] declared himself of the same opinion with the judges that the remainder of the said terms after the death of the said Dame Elizabeth were good remainders in law and that the plaintiff, Sir William, ought to enjoy the premises for the remainder of the said term accordingly. And he decreed the same.

[Reg. Lib. 35 Car. II, f. 466.]

1 Vernon 257, 23 E.R. 453

Eodem die [28 October 1684].

It having been ordered at the hearing of this cause that a case should be drawn up as it stood upon the deed for the judges of the Common Pleas to give their opinion upon, it was now moved that the Lord Keeper would rehear the cause and be attended with judges or that it might be presented to the judges for their opinions as a case in equity as well as a point in law.

The Lord Keeper [NORTH] declared his opinion was that he could go no farther in equity than the law went in the case of an executory devise. But, however, he directed the case to be drawn up at large for the judges' opinions, as well in point of equity as of law. And, in case they were of an opinion that equity ought to go farther than the law, he would consider further of it.

24 February [1685].

This cause upon the former hearing having been directed to be tried in a feigned issue in the [Court of] Common Pleas that so the validity of the contingent limitation over of the trust of the term to the plaintiff might come in issue, Lord Keeper [NORTH] declaring that the trust of a term in equity ought to be governed by the same rule as an executory devise of a term at law, afterwards, upon a motion, it was ordered that a case should be drawn up for the Judges of the Common Pleas to give their opinion upon and the judges having unanimously given their opinion that the contingent limitation over to the plaintiff was good, for this reason, because the contingent limitation was circumscribed and must happen within the space of twenty-one years, the cause came now to be heard upon the equity reserved.

And the Lord Keeper [NORTH] declared himself fully satisfied with the opinion of the judges and decreed for the plaintiff. And he said he took this case to be the same with the Case of Wood and Saunders, where the trust of a term was limited to the husband for life, remainder to the wife for life, with a remainder to their eldest son, and, if he died leaving issue, then to that issue, but, in case he should happen to die in the lifetime of the husband or wife without issue, then the remainder over was limited to another son of the husband and wife, and this remainder, by the advice of the judges, was held to be good, the remainder to the eldest son being but a contingency.

[Reg. Lib. 1684 B, ff. 250, 251.]

Earl of Salisbury v. Bennet
(Ch. 1684-1691)

The question in this case was whether, where a devise is conditional upon two conditions, a waiver of one condition waives the other condition.

Where a gift upon marriage is conditioned upon consent, the condition is only in terrorem unless there is a gift over to a particular person.

My Lord Salisbury married the daughter of one Bennet, who had two daughters. And he bequeathed by his will to each of them £20,000 provided that, if they or either of them married before the age of sixteen or if that the marriage were without the consent of such persons, that they should lose £10,000 of the portion and that the £10,000 should go to his other children.

The case was thus. The Lord Salisbury married with one of the daughters under the age of sixteen but with the consent of all the parties. It was urged that, it being with consent, it might be at any age.

But My Lord Keeper [NORTH] was of opinion that both parts must be observed.

This day [Hilary term 2 Will. & Mar., 1691], the court gave judgment in the case between the Lord Salisbury and Bennet. And the case was Simon Bennet, having two daughters, Grace and Frances, by his will, devises to Grace and Frances, his daughters, £20,000 apiece to be paid them at their respective ages of twenty-five years or days of marriage, so as such marriage be not before sixteen and so as such marriage be with the consent of the Lady Clifton, Mrs. Bennet, his wife, and one Lea, or one of them, and, 'if either of my daughters shall marry otherwise, then such daughter shall only have £10,000' without saying what shall become of the other £10,000. And, then, he

devises the surplus of his estate to his two daughters after his debts and legacies paid. And, afterwards, he devises that the surplus of his estate shall be laid out in the purchase of lands and those lands settled in such manner as he had or should settle his real estate. And, then, within two days, he settles his real estate to himself in tail male, and then in aid of his personal estate, and then in trust for his two daughters etc. Grace marries the defendant in her father's lifetime, and there was a proposal for a treaty in marriage for Frances to the now earl of Salisbury, which had no effect. But, after the death of the then earl of Salisbury and Mr. Bennet, the treaty of marriage was renewed and took effect, and the marriage was had with the consent of the mother and Mr. Lea, the Lady Clifton being dead. But this was before Frances had attained the age of sixteen. Upon this marriage, the Lord Salisbury is paid £10,000, but the other £10,000 is (as was contended) forfeited by reason of the marriage being had before sixteen. And if it be forfeited or not so as no relief can be in the case was the question.

And the court unanimously decreed that the earl of Salisbury was to be relieved in this case and that the £10,000 was not forfeit.

Rawlinson said that conditions wholly to restrain marriage are odious, as that a woman shall not marry or shall not marry before sixteen, and, therefore, as in the civil law, are void but that prudent restraints imposed by parents did bind and that children that neglect the observance of them, as in case of consent etc., did it at their own peril and ought not to expect relief here. And, therefore, he took it to be very plain that, where a devise of a portion was upon condition that, if the devisee marry with the consent of A.B., he gives her £10,000 and, if she marry without the consent of A.B. etc., then the portion to go over to J.S., that, if she marry without consent, J.S. shall have it and there would be no relief. And so he thinks it would be if it were to cease and [there be] no devise over. But, here, in this case, there is a positive devise of £20,000 to be paid at the age of twenty-five or marriage, so as it is an interest immediately vested and to be defeated by a condition subsequent, which ought to be taken strictly. Now, how far this condition shall be extended to defeat this interest is the question. So as such marriage be not before sixteen and so as such marriage be with the consent of etc., this is the restraint. Now the defeating part is 'and if either of my said daughters marry otherwise, then such daughter', etc. Now, this part being 'otherwise' and not 'sooner and otherwise', 'otherwise' shall be taken to refer to the last part of the clause and to be intended otherwise than without consent. And so the defeating part is to be tied up to the consent, which was had. And the time [is] but a circumstance, which, if he would have had material, he would have expressed it in another manner, and have said 'sooner or otherwise'. He observed further in this case that the personal estate was sufficient to discharge debts and legacies. And he put *Lady Pawlett's Case*,¹ where a sum is devised to be raised out of lands for a daughter's portion and the daughter dies, that, there, her executors or administrators shall not have it, for, it being given as a portion and to prefer her in marriage and she dying so as there can be no need of it, it shall not be raised. And he said that, in this case, it being a testamentary matter, they ought to observe the rules of the civil law and that, if My Lord had sued in the Ecclesiastical Court (as he might if they had not granted an injunction, because the rest of Mr. Bennet's estate was in question here before them), he would have recovered the whole £20,000.

Hutchins seemed to think that, if sooner had been in, that it would not have made an alteration, for that it was but a circumstance of time, but that the consent was the material care of Mr. Bennet, and, further, that Mr. Bennet, after this will was made, entered upon the treaty for the marrying of his daughter, which was a sort of dispensation to that part of his will. And he instanced the *Case of Lord Feversham*,² who, upon the marriage of a daughter of Sir George Sands, late earl of Feversham, was by agreement to have £3000 *per annum*, when the present Lord Feversham settled £2000 *per*

¹ *Lady Pawlett v. Lord Pawlett* (Ch. 1683-1685), see above, Case No. 132.

² *Earl of Feversham v. Watson* (1677), 2 Freeman 35, 22 E.R. 1042, Reports *tempore* Finch 445, 23 E.R. 242, 2 Eq. Cas. Abr. 210, 22 E.R. 178, 79 Selden Soc. 588, 637.

annum for a jointure, the estate in possession of the Lord Feversham was nothing but Holdenby, which is about £800 *per annum* but he had pensions in Ireland to commence *in futuro*, which, being sold, would amount to what would purchase £2000 *per annum*, the marriage took effect, and, afterwards, the Lord Feversham was upon a treaty to sell his pensions in order to the purchasing and settling the £2000 *per annum*, the then Lord Feversham, hearing of it, told him that these pensions not being in possession, they would not sell for so much as when they came into possession and so advised him not to part with them yet, and he, accordingly, forbore, and then his wife dies, and the then Lord Feversham dies, and the present Lord Feversham prefers his bill against Mr. Watson, who married the other sister and was the daughter and heir of Sir George Sands, and it was decreed in this court, and afterwards affirmed in the House of Lords that the Lord Feversham should have an execution of the first agreement and that this was a dispensation in Sir George Sands of the agreement for the present which should not prejudice the Lord Feversham.

So he [*Hutchins*] said in the present case this treaty of Mr. Bennet for his daughters' marriage before sixteen was in effect a dispensation with the restraint of his will. And he said it would be the hardest case imaginable to make this a forfeiture, for that she married before the age of sixteen, for the time was but a circumstance. The main care and provision of Mr. Bennet was the consent, which was had, so that she paid a true observance and obedience to her father's will. The only fault is she did it too soon, which he thought, in this case, should not hurt her. And he instanced in the Duke of Southampton's Case,¹ where it was likewise provided that the lady should not marry before fifteen and, yet, there was a marriage at nine, and [it was] after confirmed at the age of consent. And he likewise cited the Lord Derby's Case in this court,² to the point to which Rawlinson cited Lady Pawlet's Case, and said it differed from Lady Pawlet's case. But he concluded that the Lord Salisbury, being plaintiff and seeking equity, ought to do equity. And, therefore, he desired that My Lord would be pleased to consider of a fitting settlement, suitable to what he had and should receive and that, when the Master had considered of it, they would then make their decree.

But from what time My Lord should have interest, whether from his lady's age of sixteen or from her marriage or not, was not spoken to by the court, for that it had not been debated at the bar and had not been considered as part of the case. And he gave time to speak to that part.

2 Vernon 223, 23 E.R. 744

1 May [1691]. Rawlinson, Hutchinson, Lords Commissioners.

Mr. Simon Bennet devised to his two daughters £20,000 apiece to be paid them at their respective age of twenty-five years or marriage, which should first happen, so as such marriage was with the consent of the mother and other trustees and after such time as they respectively had attained the age of sixteen years. If either of them married before sixteen or without consent, then such daughter to have only a £10,000 portion. And he directed that the surplus of his personal estate should be invested in lands and settled on his daughters and their issue, with cross-remainders, etc.

In the lifetime of Mr. Bennet, a marriage was treated of to be had between the plaintiff and his lady. But, before any agreement was made, old Mr. Bennet died and the plaintiff, the earl, married his now wife before she attained her age of sixteen but with the consent of her mother and the trustees.

Whether he should have only a £10,000 or a £20,000 portion was the question.

For the plaintiff, it was insisted that here was no express devise over and that it was a clause inserted and intended only *in terrorem* and old Bennet himself, after the making of this will, though his daughter was under sixteen, treated to have married her to the plaintiff, so, as it stood on the will, if there had been any condition precedent or forfeiture, he had afterwards dispensed with it. Here the

¹ *Duke of Southampton v. Cranmer* (Ch. 1685-1692), see below, Case No. 284.

² *Earl of Rivers v. Earl of Derby* (Ch. 1688), see below, Case No. 510.

whole portion comes out of the personal estate, and is a legacy, and, therefore, regard ought to be had to the law and usage in the spiritual court, where conditions of this nature are odious. And the Case of the Duke of Southampton was cited, where relief was given in the like case.

The court decreed the £20,000 to the plaintiffs.

Nelson 170, 21 E.R. 818

Lords Commissioners, Michaelmas term 1691.

Simon Bennet, by will, devised £20,000 to his daughter, so as she married after the age of sixteen and with the consent of the trustees named in the said will, but, if she married before she was sixteen or without the consent of the trustees, then he devised to her £10,000 and no more and that the other £10,000 should go into the bulk of his personal estate, and be laid out in the purchase of lands, and settled as he had directed.

The earl of Salisbury married the daughter before she was sixteen years old but with the consent of the trustees. And it was proved in this cause that Mr. Bennet, the testator, had in his lifetime made some overtures of marrying this daughter to the said earl.

And, thereupon, the court decreed that the earl should have the portion, *viz.* £20,000.

There was an appeal brought from this decree to the House of Peers, and, there, it was confirmed.

Note that, in arguing this case, this difference was taken and allowed, both at the bench and at the bar, *viz.* that, where there is a devise of £1000 to a daughter if she married with the consent of trustees named in the will and, if she did not marry with their consent, then she should have but £500, this is only *in terrorem*. And though she should afterwards marry without such consent, yet she shall have the whole £1000. But, where the devise is of £1000 if she marry with consent as aforesaid and, if she does not, then the £1000 is devised over to another person, in such case, if she marry without the consent, the devise over is good, and she can never be relieved. And this was Fry and Porter's Case.¹

Note the difference, for there was no devise over of the £10,000 to any particular person in the principal case, but only that it should sink into the bulk of his personal estate.

[Reg. Lib. 1690 A, f. 609.]

[Affirmed on appeal: 2 Freeman 118, 22 E.R. 1097.]

[Other reports of this case: 1 Eq. Cas. Abr. 109, 21 E.R. 917.]

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.

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Gorman v. Salisbury
(Ch. 1684)

A written contract can be cancelled by an oral agreement.

1 Vernon 240, 23 E.R. 440

7 May 1684.

The single point of this case was whether an agreement in writing made since the Statute of Frauds and Perjuries¹ might be discharged by parol.

And Lord Keeper [NORTH] held it might. And, therefore, he dismissed the bill which was brought to have the agreement executed in specie.

[Other reports of this case: 1 Eq. Cas. Abr. 22, 21 E.R. 844.]

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Anonymous
(Ch. 1684)

*A grant of land 'equally to be divided' creates a tenancy in common.
Survivorship that will defeat an heir is not favored in the law.*

2 Ventris 365, 86 E.R. 489

In a covenant to stand seised to the use of A. for life and, after[wards], to two equally to be divided and to their heirs and assigns forever, My Lord Keeper [NORTH] declared his opinion that the inheritance was in common, as well as the estate for life. He said that it had been held that, where the words were 'to two equally divided', that should be in common; otherwise, if the words were 'equally to be divided'. But, [it has been] since taken to be all one. Nay, a devise to two equally will be in common. Here, there shall not be such a construction as to make one kind of estate for life and another of the inheritance, and survivorship is not favored in prejudice of an heir.

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Anonymous
(Ch. 1684)

A bill to perpetuate testimony cannot also pray for relief.

2 Ventris 365, 86 E.R. 489

Note that, if a bill be exhibited for the examining of witnesses *in perpetuam rei memoriam*, if the plaintiff therein prays relief, the bill shall be dismissed.

¹ Stat. 29 Car. II, c. 3 (SR, V, 839-842).

Peyton v. Bladwell
(Ch. 1684)

An agreement that would diminish the value of a marriage settlement is fraudulent and will be set aside.

1 Vernon 240, 23 E.R. 440

9 May 1684. Yelverton Peyton and his wife, Sir John Roberts, and Nathaniel Denham, plaintiffs; William Bladwell, heir and executor of Sir John Bladwell, and others, defendants.

Sir John Bladwell being executor of the plaintiff Peyton's mother and having purchased an estate which belonged to the plaintiff's mother, he promised that he would not only settle the said estate on the plaintiff but also other land of £300 a year if a convenient match could be found for the plaintiff. Accordingly, in 1676, Sir John treated a marriage for him with the niece of the plaintiffs, Sir John Roberts and Denham. And it was agreed between him and Sir John Roberts that Sir John should give his niece a £2500 portion to be laid out in lands after his death and that Bladwell should settle lands of the value of £300 a year, whereof £200 *per annum* should be settled for the jointure, and that he would also settle other lands of the value of £100 *per annum* on himself for life, remainder to plaintiff Yelverton Peyton and his heirs.

Accordingly, by lease and release, 14th and 15th July 1676, Sir John Bladwell, in consideration of a bond entered into by Sir John Roberts to pay £2500 after his and his wife's death for the marriage portion, conveyed lands in the County of Norfolk, which, in the conveyance, were said to be £300 a year. And, as to £200 a year thereof, the same were limited for the jointure of the wife of the plaintiff Peyton, remainder to the heirs male of their two bodies, remainder to Peyton in tail, remainder to him in fee and, as to the residue, to the plaintiff Peyton in tail, remainder to him in fee. And Sir John Bladwell thereby covenanted that the jointure lands were £200 a year and that, within two years then next, he would settle other lands in Norfolk of £100 a year and worth £1700 to be sold to the use of himself for life, remainder to the plaintiff Peyton and his heirs.

After the marriage, Sir John Bladwell prevailed on the plaintiff Peyton, who was very young, on promises of leaving him a greater estate by his will than he had agreed to settle upon him and by other insinuations, to execute a writing whereby Sir John Bladwell was to receive the profits of the whole estate, allowing the plaintiff Peyton only £120 a year, and to assign over to him the plaintiff Robert's bond and also to release or discharge the agreement for the settling of the £100 *per annum* on him and his heirs after the death of Bladwell.

The plaintiff's bill was to be relieved against these agreements, which had been extorted from the plaintiff Peyton, and to have the jointure made good, the lands settled for the jointure not being of the value of £200 a year.

After long debate, the Lord Keeper [NORTH] decreed that the defendant Bladwell, notwithstanding the agreement with the plaintiff Peyton, should account for all the profits of the estate which Sir John Bladwell had been in possession of under that agreement over and above the £120 *per annum*. And the Master was to see what was the value of the jointure lands at the time of the settlement. And the defendant Bladwell was decreed to make good so much as the jointure lands fell short of £200 *per annum* at the time of the settlement made. And Sir John Bladwell having devised some lands by his will to the plaintiff Peyton, the defendant was decreed to make up those lands £100 a year and to settle them on the plaintiff Yelverton Peyton and his heirs, according to the marriage agreement.

And, although it had been strongly insisted by the defendant's counsel that the agreement being to settle £100 *per annum* on Yelverton Peyton and his heirs, he had the power to release and discharge that agreement, and there was no benefit thereby intended to the wife or issue of that

marriage, and, in case the settlement had been actually made, it had been in the plaintiff Yelverton's power to have sold or given away those lands, the settlement being to be made to him and his heirs after the death of Sir John Bladwell, and, therefore, he might well release the agreement as to that £100 *per annum*, and no one could be said to be injured by it, no more than if he had devised away or sold those lands.

Yet the court [NORTH] declared its detestation of such underhand agreements and that it was a deceit and fraud as to Sir John Roberts, who was drawn in to give a great portion with his niece, in expectation of a settlement adequate to it, which, by this means, is to be frustrated, for, though the plaintiff Peyton could have disposed of the lands which were to have been settled on him and his heirs, yet that is frequently done in many settlements, the father by that means being left at liberty to provide for his younger children and to reward them most that behave themselves best. But, still, there is a benefit intended to the issue of the marriage. And it is part of the consideration, for which the portion was given. And, therefore, he declared this underhand agreement and release to be fraudulent, and he set the same aside, and decreed the agreement to be performed as to the £100 *per annum*.

[Raithby's note: Reg. Lib. 1683 B, f. 495. And that the bond given by Sir John Roberts for payment of the marriage portion and also a bond in the penalty of £4000 given by Sir John Bladwell for performance of the covenant of the deed 14th and 15th July 1676, which Sir John Bladwell had also gotten from the plaintiff, together with the assignment to him from the plaintiff, and all other papers and writings relating to the matters in question should be delivered up by the defendant Bladwell.]

172

Churchill v. Lady Speake
(Ch. 1684)

Where the beneficiary of a trust has not received any payments therefrom, when the payments are made, they are to be paid with interest, even though no demand for the payment was made.

1 Vernon 251, 23 E.R. 448

The case was that one Prideaux, the plaintiff's grandfather and the father of Sir John Churchill's wife, being (amongst other things) possessed of and entitled to a mortgage for £1000, gave this mortgage (amongst other things) to his wife, willing her to give £500 of it to the plaintiff, his granddaughter, Sir John Churchill's eldest daughter. But, as to the time when and the manner of giving it, he left it to his wife's discretion, as she should think fit and best for his said granddaughter. And, having thus made his will, he died about 1664, the plaintiff, his granddaughter, being then an infant of about nine years old.

Mrs. Prideaux, the plaintiff's grandmother, lived until 1683, and then died, making the defendant, the Lady Speake, her executrix, having paid no part of this £500, neither was the same in all that time so much as demanded of her.

And the plaintiff's bill was to have this legacy of £500 given unto her by her grandfather paid with interest.

And the Lord Keeper [NORTH], notwithstanding there was not any demand proved and though Mr. Prideaux left the time and manner of paying this £500 to his wife, decreed the £500 with interest from the death of Prideaux, the grandfather, being near twenty years.

[Raithby's note: The court was fully satisfied that the nature of this case was a trust in Margaret, the grandmother, for the benefit of the plaintiff. Reg. Lib. 1683 A, f. 572.]

[Other reports of this case: 1 Eq. Cas. Abr. 286, 21 E.R. 1049.]

Anonymous
(Ch. 1684)

The question in this case was whether an infant peer can be brought into a court of equity to appear and answer by a guardian appointed by the court.

Execution of a judgment for debt against the ancestor cannot be awarded against an infant heir.

2 Chancery Cases 163, 22 E.R. 895

Trinity term 1684.

Sir John Churchill showed that a sequestration for non-appearance was issued against the Lord Mohun, an infant of seven years. Several ill and beggarly fellows, as sequestrators, by color thereof, received the rents of the Lord Anglesey, and certified the demand of payment of others, A., B., C. etc., tenants who refused to pay their rents, whereupon an injunction issued against A., B., C. etc., to pay their rents to the sequestrators. And some tenants were imprisoned, of which he complained.

And, said the Lord Anglesey, present in court, the tenants dwelt in Cornwall and it were hard they should be forced to come to London. At last, the Lord Anglesey offered to appear for them, and, if so and the contempt in the tenants did not appear, costs to be awarded.

Note the process of injunction was not against tenants of the Lord Mohun, but A., B., C. etc. by name.

Sir John Churchill said a Messenger of the court should be sent to bring in the infant, and, when he comes in, the court shall or may assign one of the Six Clerks as a guardian to appear and answer etc.

Lord Keeper [NORTH]: How will that look in the Lords' House, that an infant peer shall put the defense of all his estate in a Six Clerk, who knows nothing and cannot be informed by the infant of his estate etc.? At common law, the parol was to demur, and the infant is not bound to answer until full age. And execution of a judgment for debt against the ancestor cannot be against the infant heir. And, by act of Parliament,¹ the execution of a statute is not against an infant, for the Register, Parliament, and common law gave no execution against an infant heir, although the debt were clear and indisputable, viz. judgment or by statute.

Yet *e contra*, it is done in Chancery. Query.

Baxter v. Manning
(Ch. 1684)

A mortgage can be agreed to be security for a later bond debt in addition to the original debt.

Lincoln's Inn MS. Misc. 498, p. 9, pl. 1

Trinity [term] 36 Car. II.

The plaintiff exhibited his bill to redeem several mortgages.

The defendant confesses the mortgages, but prays that the defendant may not redeem unless he will also pay him certain moneys due to him upon a bond which he would not have lent but upon the account of the mortgages and the plaintiff's promising that he should have the purchasing of the

¹ Stat. 16 & 17 Car. II, c. 5, s. 2 (SR, V, 555).

mortgaged lands.

And it was decreed accordingly that he should pay as well the moneys lent upon any bonds since the mortgage as the moneys due upon the mortgages themselves and, thereupon, the defendant to reconvey.

[Other copies of this report: Lincoln's Inn MS. Misc. 503, p. 79, p. 1, Lincoln's Inn MS. Misc. 504, p. 75, pl. 2.]

1 Vernon 244, 23 E.R. 441

3 June 1684.

The plaintiff makes a mortgage of his estate to the defendant. And, afterwards, the mortgagee advances and lends more money unto the plaintiff, the mortgagor, on his bond. The plaintiff brings his bill to redeem. The defendant insists to have his bond debt as well as the mortgage money paid him.

Per curiam [NORTH]: Although there is no special agreement proved in this case that the land should stand as a security for the bond debt, yet the mortgagor shall not redeem without paying both.

[Raithby's note: Reg. Lib. 1683 A, f. 730. It was referred to the Master to enquire whether the debts secured in this case by bond were separate or included in the mortgage, and, in case they should prove distinct debts, then the decree to be as above, and it was so made 31st January subsequent. Reg. Lib. 1684 A, f. 252.]

175

Bletsow v. Sawyer
(Ch. 1684)

A marriage settlement can give to a married woman a power of appointment.

1 Vernon 244, 23 E.R. 442

4 June 1684.

The case was [that] a man settles lands to the value of £6 *per annum* and more to the use of himself for life, and after to his wife for life, and he further agrees that she shall hold and enjoy the same until £100 shall be paid by his heir to her executors, administrators, or assigns. The wife makes a writing, purporting to be her last will, and, thereby, disposes of this £100, and she dies in the lifetime of her husband. The question was whether this £100 were well disposed of or appointed by her.

And the plaintiff's counsel insisted that it was not intended she should have any benefit of this £100 unless she should happen to survive her husband, and, then, she might be capable of disposing of it by will. But dying a married woman, her will was void, and her husband was entitled to the administration.

Per curiam [NORTH]: This will is good, the wife being as to this purpose *quasi a feme sole*. And, without doubt, it is a good appointment in equity.

Secondly, this was but a chattel interest in her, and she might well dispose of it in her husband's lifetime. And it was said in this case that, where a married woman saves money out of a separate maintenance, she might dispose of it as a *feme sole* and that there had been several decrees in this court ratifying such dispositions.

[Raithby's note: The will, though not good at law as a will, yet it is good in equity as an assignment thereof, and it ought to be paid to the defendant, though he had not proved the will. And he decreed

the £100 to be paid with interest from the death of the husband, it being the intent of the deed of settlement that she should have the disposition thereof. It was decreed 6th July preceding. The cause was reheard, and the plaintiff was ordered to elect within a week whether he would proceed at law or in equity, and, in case he elected to proceed at law, then his bill was to be dismissed with costs, but, in default of such election, then the former decree was to stand confirmed and the plaintiff to pay the defendant 40s. costs for the day. Reg. Lib. 1683 A, f. 731.]

[Related cases: Sawyer v. Bletsoe (Ch. 1694), 2 Vernon 328, 23 E.R. 812.]

176

Shuttleworth v. Laycock
(Ch. 1684)

A mortgage can be agreed to be security for a later bond debt in addition to the original debt.

1 Vernon 245, 23 E.R. 443

7 June 1684. In Court, Lord Keeper.

Where there is a debt secured by a mortgage and also a bond debt, when the heir of the mortgagor comes to redeem, he shall not redeem the mortgage without paying the bond debt too in case the heir be bound; so, if there are two mortgages and one is defective, if he will redeem, he must take both.

[Raithby's note: This was a bill to redeem on the payment of the mortgage money. In this case, the mortgagee received the rents and profits, and it being understood between him and the mortgagor that the money due upon the mortgage together with that lent to the mortgagor on a bond amounted to the full value of the premises, the mortgagee had built thereon, and, then, he made his will and devised all his estates etc. in Leeds and all his estate, interest, and demands therein, and the money arising or growing due upon the redemption of such part as was mortgaged and should be redeemed to the defendants and their heirs. The decree was made on the offer of the plaintiff to release his equity of redemption. Reg. Lib. 1683 B, f. 553.]

2 Chancery Cases 164, 22 E.R. 896

[If the] mortgagor borrows more money of the mortgagee, and gives a bond for it, the heir of the mortgagor shall not redeem without also paying the debt by bond if that the mortgagor bound himself and his heirs in the bond.

Beachinall v. Beachinall
(Ch. 1684)

Upon a jury trial upon an issue out of Chancery, the parties have the right to present to the jury all of their evidence.

1 Vernon 246, 23 E.R. 443

5 June 1684.

The bill was to be relieved touching a marriage agreement. Upon the marriage, there was a deed executed, which imported to be a settlement made in pursuance of the marriage agreement. But, at the hearing, there was strong proof by three or four witnesses that this deed was not drawn according to the agreement, but that the agreement was for settling more lands of far greater value and to other uses.

The cause was heard by the Lord Chancellor Nottingham, who directed the agreement to be tried at law, and the deed to be left out of the case, and not given in evidence.

In a bill of review, the error assigned was because, by this decree, they were not permitted to give the deed in evidence.

And, for that reason, the Lord Keeper [NORTH] reversed the decree, saying it was a strange order to take away a man's evidence and then send him to law.

[Raithby's note: The plea and demurrer to the bill of review were overruled, and the cause was ordered to be reheard, notwithstanding the enrollment of the decree and dismissal, and the five marks deposited with the Register before the bill of review by the plaintiff were to be repaid to him. Reg. Lib. 1683 A, f. 731. An order was afterwards obtained for re-hearing the cause the first day of causes and exceptions after term. Reg. Lib., f. 590. But no entry appears afterwards. There are several entries in a cause between the same parties where the plaintiffs appear to sue *in forma pauperis* and which end in the bill's being dismissed. Reg. Lib. 1686 A, f. 8. Entered in the name of Beachinall v. Arnold.]

Trevanian v. Mosse
(Ch. 1684)

A plea of purchase must allege that the defendant's seller had seisin and possession.

1 Vernon 246, 23 E.R. 444

Eodem die [5 June 1684]. In Court, Lord Keeper.

A plea of a purchase for a valuable consideration was overruled because the defendant did not allege seisin and possession in the person from whom he bought.

[Other reports of this case: 1 Eq. Cas. Abr. 38, 21 E.R. 857.]

179

Fanshawe v. Fanshawe
(Ch. 1684)

Where privilege to be sued only in a particular court is alleged, the privilege must apply to all of the defendants or it will be overruled.

1 Vernon 246, 23 E.R. 444

Eodem die [5 June 1684]. In Court, Lord Keeper.

Two of the defendants, being the officers of the Exchequer, plead the privilege of the Exchequer. The plea was overruled because there was a third defendant who had no right of privilege.

[With costs of 5 marks. Reg. Lib. 1683 A, f. 589.]

[Other reports of this case: 1 Eq. Cas. Abr. 37, 349, 21 E.R. 857, 1094.]

180

Bonsey v. Lee
(Ch. 1684)

Where a vicarage has no endowment, the lay impropiator of the small tithes must maintain a priest.

1 Vernon 247, 23 E.R. 445

Eodem die [5 June 1684].

Where there is no vicarage endowed, the impropiator of the small tithes is bound to maintain a priest. And, upon an information by the Attorney General for that purpose, the king may assign to the curate such an allowance or proportion of the small tithes as he shall think fit. But, otherwise it is, where the vicar is endowed, though but of never so small a matter. The Case of the King and Sutton in the King's Bench was cited.

[Raithby's note: The bill in this case was by a plaintiff claiming a rectory formerly belonging to the dissolved Priory of Newark and to which the chapel vicarage house and small tithes in question were annexed and that the same might be settled and established upon a minister in Holy Orders. To this bill, the defendant pleaded a purchase for a valuable consideration and divers proceedings in this court and the Court of Exchequer, whereby the right is vested and confirmed in him, and that he and those under whom he claimed had been in possession above thirty years. This plea was overruled, and the defendant was ordered to answer. But he offered to settle the small tithes on a licensed minister appointed by the bishop and his successors forever and also the vicarage house, taking back a lease of the house for sixty years at the yearly rent of 1s., and the plaintiffs were to give their answer within a week. Reg. Lib. 1683 A, f. 623. It does not appear again.]

[Other copies of this report: 2 Gwillim 534, 1 Eagle & Younge 548.]

[Related cases: Bonsey v. Lee (K.B. 1681), 3 Levinz 72, 83 E.R. 583, 1 Eagle & Younge 539.]

181

Godfrey v. Turner
(Ch. 1684)

A bill of discovery for a lost deed need not be made under oath of the loss.

1 Vernon 247, 23 E.R. 445

5 June 1684.

[There was a] demurrer because the plaintiff has not made an oath of the loss of his deed.

Per curiam [NORTH]: Where you come only for discovery of the deed, you need not make an oath of the loss of it, as you must do when you come for relief, for you shall not translate the jurisdiction without an oath made of the loss of the deed.

[Other reports of this case: 1 Eq. Cas. Abr. 13, 21 E.R. 837.]

182

Gibson v. Scevengton
(Ch. 1684)

A wife's appearance in court does not constitute an appearance by her husband, even though they be co-defendants.

1 Vernon 247, 23 E.R. 445

7 June [1684].

The defendant having appeared and, afterwards, stood in contempt until a [writ of] sequestration was returned, it was insisted by the plaintiff's counsel that the bill ought to be taken against the defendant *pro confesso*. And he cited two precedents where it had been so done, and he said it was no more than a judgment by default at law.

But the Lord Keeper [NORTH] would consider of it until the next term.

And, it being alleged that husband and wife were defendants and that it was the wife only who had appeared and that without the husband's privity, the Lord Keeper [NORTH] referred it to a Master to examine that fact. And he said, if it should fall out to be so, he could not decree against the husband, but they must proceed, and lay on the sequestration to bring him in.

Which the plaintiff's counsel said was but a sorry remedy in regard that sequestrators upon mesne process were accountable for all the profits and could retain only so far as to satisfy for the contempts.

183

Eyre v. Hastings
(Ch. 1684)

In this case, the administratrix was not required to pay off a debt by the decedent that was secured by a mortgage.

2 Chancery Reports 273, 21 E.R. 677

Henry Eyre, deceased, the plaintiff's brother, being seised of lands, 22 Car. II [1670-71], mortgaged the same for £200 to Giles Eyre, the plaintiff's son. The said Henry Eyre covenanted to pay the mortgage money, and gave a bond for performance of the covenants. The said Henry dying without issue and intestate, the premises descended on the plaintiff, as brother and heir. And administration was granted to Dorothy, his relict, who paid the mortgage money and interest then due to the said Giles Eyre, the mortgagee, in relief of the plaintiff, who ought to enjoy the premises discharged of the mortgage money. The said Dorothy made her will. And the defendant Ralph Hastings, senior, her executor, has got the mortgaged premises assigned to him, and insists he ought to hold the same until the £200 and interest be paid him by the plaintiff.

The defendant Ralph, junior, an infant, claims the premises by the will of the said Dorothy, who devised the same to him.

To be relieved against them and the plaintiff to have the inheritance of the premises discharged from the payment of the mortgage money and interest and the bond delivered up is the bill.

The defendant Hastings, senior, insists that the said Dorothy paid the said mortgage money and interest, but not in relief of or for the benefit of the plaintiff, and, thereupon, the premises were assigned to the said Hastings, senior, in trust for the said Dorothy, who had an equitable right to all her husband's estate. Dorothy devised the said premises to Hastings, junior, her godson.

The Master of the Rolls [GRIMSTON] decreed the plaintiff to enjoy the premises against the defendant. This cause was reheard by the Lord Keeper [NORTH].

And this defendant, the infant, insists that he is much prejudiced by the decree for that, thereby, he is stripped of the estate in question, devised to him by the said Dorothy's will without payment of the money and interest, there being no covenant in the said mortgage deed for the payment of the money and interest or any bond.

But the plaintiff's counsel insisted that Dorothy paid the mortgage money and interest for the plaintiff's benefit.

The defendant insisted that Dorothy declared the mortgage money and interest was paid in relief of the heir at law.

This court declared that, in case there was not any covenant in the deed for the payment of the mortgage money and interest, the said Dorothy, the administratrix, was not obliged to discharge the same.

[Reg. Lib. 35 Car. II, f. 590.]

Nodes v. Battle
(Ch. 1684)

Where a defendant has been served with process but has not appeared, a court of equity cannot take the suit for confessed, but it can issue a writ of sequestration.

2 Chancery Reports 283, 21 E.R. 679

The bill is that the defendant may redeem or be foreclosed. And the defendant, being served with a subpoena, refuses to appear, and sits out all process of contempt to a serjeant-at-arms returned, and cannot be apprehended.

The plaintiff prays the bill may be taken *pro confesso*.

This court declared, in regard the defendant has not appeared, this court could not decree the bill *pro confesso*, but ordered a [writ of] sequestration against his real and personal estate until he cleared his contempt.

[Reg. Lib. 35 Car. II, f. 106.]

Attorney General v. Baxter
(Ch. 1684-1689)

A charitable devise to an illegal purpose will be re-directed by a court of equity to a proper purpose that is as close to the testator's intent as possible.

Lincoln's Inn MS. Misc. 498, p. 9, pl. 2

A. had devised £600 to Mr. [Richard] Baxter¹ to be disposed of to sixty ejected non-conformist ministers that were very poor at the nomination of the devisee. And by his will, he declares that he did not devise it to them upon the account of their non-conformity, but that he thought several of them to be objects of charity. This devise being looked upon as void as to the persons to whom it was appointed to be distributed because of their opposition to the government, application was made to the king to appoint the money to some other charity. And the king appointed it to Chelsea College, which was then building.

And this information was exhibited to perform that appointment.

After much was said, My Lord Keeper [NORTH] was of the opinion that the devise of the money was good but that it ought not go to such persons as it was by the will directed to be distributed amongst because of the encouragement it would be to non-conformity, many non-conformists being capable of a share. But he said, in cases of this nature, the money ought to be applied to a good use *eiusdem generis* and that an appointment of that good use to which it shall be applied is a judicial act. And it ought to be according to the rules of this court. And, therefore, if the king makes such an appointment as is consistent with the rules of the court, the chancellor will be governed by it; else, he will take the liberty to inform the king of the matter and that it ought to go according to such rules. And according[ly], My Lord Keeper [NORTH] was of the opinion that, if this

¹ H. N. Keeble, 'Baxter, Richard (1615-1691)', *Oxford Dictionary of National Biography*, vol. 4, pp. 418-433,

money were applied to Chelsea College, it ought to be for the maintenance of a chaplain there.

[Other copies of this report: Lincoln's Inn MS. Misc. 503, p. 79, pl. 2, Lincoln's Inn MS. Misc. 504, p. 76.]

1 Vernon 248, 23 E.R. 446

Eodem die [7 June 1684].

Robert Mayot, who was a beneficed clergyman of the Church of England, by his last will, 12 October 1676, bequeathed £600 to Mr. Baxter to be distributed by him, amongst sixty pious ejected ministers, and he adds 'I would not have my charity misunderstood; I do not give it to them for the sake of their non-conformity, but because I know many of them to be pious and good men and in great want'. He also gave Mr. Baxter £20 and £20 more to be laid out in a book of his entitled *Baxter's Call to the Unconverted*.

Upon this will, Mr. Attorney General exhibited an information, wherein he alleges this charity to be against law and that, therefore, the right of applying this money was in the king and that His Majesty had declared his pleasure to be that this £600 should go towards the building of Chelsea College.

Mr. Baxter, in his answer, stated the controversy between the conformists and dissenters, and showed upon how small a matter some that conformed in all other points were kept out of the pale of the church and ejected from their livings. And, then, he swore himself a conformist and that he knew many poor pious and ejected ministers that were in great want and forced to undertake servile employments for their livelihood and that he accepted of the trust reposed in him by his testator and intended, as soon as he could get this money of the executors, to distribute it according to his testator's intention amongst poor ejected ministers, whom he supposed were not disabled by law from the taking of a legacy. And he said he did not believe the testator had any design against the government, being very conformable to the church, and one whom he never saw and that the testator was very charitable. And he sets out many excellent charities of his in his lifetime that were legal and allowed. And, as for the book mentioned in the testator's will, it was, he hoped, not condemnable nor ever condemned, but had been printed two and twenty times and licensed etc. And he hoped the doctrine and disposition of the dissenters, merely as ejected ministers, was not so bad as to forfeit all charities, His Majesty having in his Declaration declared in these words, *viz.*:

We must for the honor of all of either persuasion with whom we have conferred declare that the desires of all for the advancement of piety were the same, their zeal for the church the same, they all approve the episcopacy and a liturgy in a set form, and, if, on such excellent foundations, any such structure should be for lessening the gift of charity, a vital part of the Christian religion, we shall think ourselves unfortunate and defective in the administration of government God has entrusted us with etc.

And Mr. Baxter said further he thought His Majesty was not mistaken and that, not only religion, but humanity binds men to pity those who spent their lives in studying to know God's will, and yet, by mistake in some opinions, are fallen into want. And, therefore, he owned his dissent against resigning other men's sustenance, and hoped the court would not misconstrue that act of charity.

The Attorney [General *Sawyer*] and the Solicitor General [*Finch*] etc. argued that this was a devise to the sixty ejected ministers, *eo nomine*, as they were dissenters and to suffer them to take by such a devise was almost to make a corporation of them, and it would certainly encourage and keep up a perpetual schism in the church, which the law would not endure.

For the defendant, it was argued that this was a good bequest and that dissenters were not disabled from taking a legacy. Any devise, though to a superstitious use, was good at common law.

And it would not be pretended that this devise was within any of the statutes of superstitious uses.¹ The devise was made by a conformist, who had he or a dissenter given £10 apiece to sixty dissenters by name, there would not be the least pretense to make that legacy void. And what has the testator done here? He has deputed Mr. Baxter to name the sixty persons for whom the charity was designed. And what law has disabled him from executing this power of nomination, though he had been a dissenter? But he, by his answer, has approved himself one of the Church of England. And it was said there could be nothing of weight in the objection that such bequests would keep up a schism in the church in regard here was nothing durable, no land, no rent, no annuity given, only one gross sum of £10 to a man, which would only buy bread for his family for a very little while. But, if that was a real mischief, yet to damn this charity would be no remedy to the evil, for it would but teach the dissenters for the future to name the parties or to dispose of their charities in their lifetimes. And, in that case, the dissenters will only have a better opportunity of drawing out and extending their donors' charities. And it was observed that the bequest was to 'poor ejected ministers'; now, there are many ejected for want of titles, and are fit objects of charity.

The Lord Keeper [NORTH] told Mr. Attorney [General] that causes of this moment ought not to be brought before him but in term time, when he might have the assistance of the judges. But, however, being he had now heard the matter and was not doubtful in the case, he would not defer making his decree. And he adjudged the charity, that is the use, to be void and that the money should be applied for the building of Chelsea College.

Then, it was urged that, if the charity was void, the money ought to remain with the executor.

But the court said there was a difference between the charity and the use and that the use was void, and not the charity.

Then, it was observed to the court that the practice had always been to apply charities *in eodem genere* and this, being intended for ejected ministers, ought to go amongst the clergy.

And, thereupon, the Lord Keeper [NORTH] decreed it for the maintenance of a chaplain for Chelsea College.

[Raithby's note: This decree was reversed by the Lords Commissioners in Trinity Term, 1689, and the £600, which had been brought into court, was ordered to be paid out and distributed according to the will.]

2 Vernon 105, 23 E.R. 677

8 June [1689]; Attorney General v. Hughes.

This cause concerning the devise to Mr. Baxter of monies to be by him distributed amongst poor ejected nonconformist ministers coming to be reheard, the former decree was discharged, and the information dismissed, and the money then remaining in court ordered to be paid out to Mr. Baxter to be by him distributed according to the will.

[Reg. Lib. 1688 A, f. 433.]

[Other reports of this case: 1 Eq. Cas. Abr. 96, 21 E.R. 907.]

¹ Stat. 1 Edw. VI, c. 14 (SR, IV, 24-33).

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Hatton v. Gray
(Ch. 1684)

The signing requirement of the Statute of Frauds is not mutual in respect to the enforcement of that Statute.

2 Chancery Cases 164, 22 E.R. 895

14 June 1684.

Hatton sold houses to Gray for £2000. A note was made by Hatton of the agreement, signed by Gray but not by Hatton.

Mr. Solicitor [General *Finch*]: The note binds not him who signed it not, for the Statute of Frauds and Perjuries etc.¹ And, therefore, in equity, it cannot bind the other party, for both must be bound or neither of them in equity.

But it was decreed contrary.

1 Eq. Cas. Abr. 21, 21 E.R. 843

A. sold houses to B. for £2000. A note was made by A. of the agreement, and [it was] signed by B. only. And it was objected that this was within the Statute and that the note binds not him who did not sign it and that they must be both or neither bound in equity.

But it was decreed that they were both bound.

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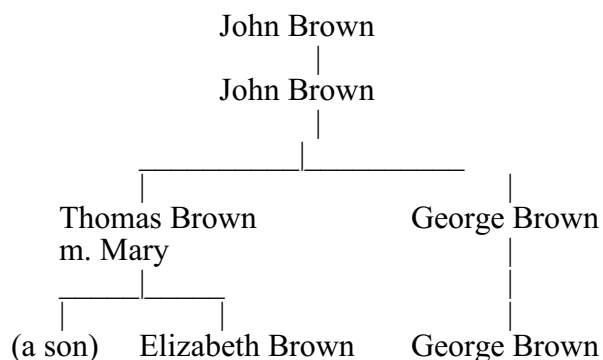
Bond v. Brown
(Ch. 1684)

A trust to raise a portion for a woman who dies unmarried will not be enforced.

2 Chancery Cases 165, 22 E.R. 896

John Brown [was] the great-grandfather of Elizabeth, John [was] her grandfather, and Thomas [was] her father. Thomas was seised of the lands etc. in question. And they all by fine and recovery settled the lands in question to the use of Thomas for life, the remainder to Mary for life for her jointure, remainder to Stulford and other defendants for 99 years, the remainder to the issue male of Thomas in tail, remainder to George Brown in tail, etc. The settlement was in consideration of the marriage of Thomas with Mary, the plaintiff, and a £2000 portion. George Brown, on whom the remainder was settled, was a remote kinsman, viz. son of George, the son of John, father of Thomas. The marriage took effect, and the portion was paid.

¹ Stat. 29 Car. II, c. 3 (SR, V, 839-842).



The term was by the same deed which declared the uses declared to be to raise out of the premises £2000 for the daughter and daughters of Thomas by Mary and maintenances yearly not exceeding £20 *per annum*, if one daughter, £2000 and, if any daughter died, the survivors, or survivor, if more daughters than one, to have the part of the daughters dying, *viz.*, if Thomas die without issue male or having such issue male by Mary, if such issue should die in minority or unmarried, the trustees should out of the premises raise and levy £2000 for the portion and portions of such daughter and daughters, together with a competent yearly maintenance for every such daughter and daughters, not exceeding £20 *per annum* and the £2000 to be paid at twenty-one years or marriage, which should first happen, proviso, if the said Thomas Brown in his lifetime or any to whom the immediate remainder etc. should appertain should within twelve months next after the death of the said Thomas Brown, without issue male by the said Mary, either pay or secure the same and the said maintenance to the liking of the said trustees, then the said term to cease. Thomas died, having a son, who died without issue, Elizabeth, his sister, then living, and many years after, until she was nineteen years old. And then she died. Mary, the mother, took administration to Elizabeth.

And the bill was to have the £2000 and the £20 for so many years as Elizabeth lived, for George in remainder had entered and received the profits, but not paid the £20 nor maintained Elizabeth.

The Lord Keeper [NORTH] decreed for the plaintiff as to the maintenance, notwithstanding that her grandfather John had by his will given the said Elizabeth £2000, so as she needed not maintenance. But, as to the £2000, he dismissed the bill.

Lincoln's Inn MS. Misc. 498, f. 12, pl. 1

Lord Keeper [NORTH]: If a portion be devised to a woman to be paid at her marriage or at the age of twenty-one, though she dies without marrying and before twenty-one, yet this shall go to her executor or administrator because, it being a personal legacy, this court is guided by the practice of the spiritual court, which has original jurisdiction of legacies. And, by their law, everything is construed strictly against executors, who are looked upon as persons that ought to take nothing as to their own use, the surplus of the estate being to be disposed of in pious uses. But, if a term be raised out of the inheritance in trust to raise portions to be paid at marriage or age of twenty-one, if the party dies unmarried and before twenty-one, this court will not raise the portions for the executor or administrator of the party so dying in prejudice of the heir, who is much favored. [It was] decreed.

Query how it will be if a man raises a term in trust to perform his will and then devises a portion, as before. *Vide* in page 17, *Pawlett and Pawlett*, and 56, *Earl of Rivers and Earl of Derby*.¹

¹ *Lady Pawlett v. Lord Pawlett* (Ch. 1683-1685), see above, Case No. 132; *Earl of Rivers v. Earl of Derby* (Ch. 1688), see below, Case No. 510.

[Other copies of this report: Lincoln's Inn MS. Misc. 503, p. 81, pl. 2, Lincoln's Inn MS. Misc. 504, p. 78.]

188

Anonymous
(Ch. 1684)

Upon a motion for leave to examine witnesses after publication of the depositions upon making the usual oath of not having seen the depositions, the non-moving party may examine at large as well as cross-examine the witnesses produced by the movant.

1 Vernon 253, 23 E.R. 449

16 October 1684.

Upon a motion for leave to examine after publication upon making the usual oath of not having seen the depositions, the Lord Keeper [NORTH] declared that, in such a case, the other side should be at liberty to examine at large, as well as to cross-examine the witnesses produced by the party that made the motion, which was all he might do formerly. And his reason was that a crafty solicitor may lie in the lurch, and examine nothing until after publication is passed and the other party may think himself secure, and so not examine to those points, which he could otherwise have proved, in regard he finds his adversary has not examined to those matters and, when once publication is passed and the party that examined has seen his own depositions, then, the side that lay still, having tied up his adversary, so that he can only cross-examine the other's witnesses, applies for an order upon the usual affidavit to enlarge publication, and, when he has got that order, then, he comes in with a whole cloud of witnesses.

And, though it may be thought hard that anyone should have liberty to examine after he has seen the depositions, yet His Lordship thought it a reasonable penalty on such as would not examine in time or that should lie upon the catch to take advantage of the other party. And he ordered the Register to take notice of it as a fixed rule for the future.

[Other copies of this report: 1 Eq. Cas. Abr. 233, 21 E.R. 1013.]

189

Corporation of Sutton Coldfield v. Wilson
(Ch. 1684)

As a general rule, a freeman of a city cannot be a witness for the city, being interested in the outcome of the suit. However, if a freeman is cross-examined, this waives the objection.

1 Vernon 254, 23 E.R. 450

24 October 1684.

The question being whether a bond of £400 penalty was intended for the benefit of the corporation or of the defendant and the witnesses for the plaintiff being all members of the corporation, it was objected that they could not be read, they swearing for their own benefit. Which exception was allowed as good.

And the Lord Keeper [NORTH] said a corporation ought to have a town clerk and under clerks that are not freemen that they may be competent witnesses upon occasion. And he said he thought

it very hard in the Case of the Waterbailage of London¹ that no one freeman of the City, though it was not sixpence concern to him, could be admitted as a witness. But there indeed, the fee was in question. And here being only a bare sum of £200 in dispute, he thought that not considerable enough to take off a man's testimony. And he said it was usual, where a man was a legatee, if it was an inconsiderable legacy, as 5s. (or £5 to a man of quality), that he should nevertheless be a witness to prove the will.

At length, it appearing that the defendant had cross-examined some of the plaintiff's witnesses not only to questions barely whether they were of the corporation or not but to other questions which tended to the merits of the cause, the Lord Keeper [NORTH] declared that made them good witnesses, though they were members of the corporation. And, upon their evidence, it was decreed for the plaintiff.

[Other reports of this case: 1 Eq. Cas. Abr. 225, 21 E.R. 1007.]

190

Barlow v. Grant
(Ch. 1684)

Where a legacy is given to a child to pay for his apprenticeship but he dies before he is bound out, the legacy is vested and goes to his personal representative.

Where a small sum of money is bequeathed to a child for his education, his guardian can use the principal as well as the interest of the bequest to pay for an appropriate education.

1 Vernon 255, 23 E.R. 451

27 October 1684.

Upon a bill for a £100 legacy given to a child, the defendant insisted upon an allowance of £16 a year for keeping the legatee at school.

It was objected that only the bare interest of the money ought to have been expended in his education, and not to have sunk the principal, as, in this case, the defendant had done.

But the Lord Keeper [NORTH] thought it fit and reasonable to be allowed. And he said the money laid out in the child's education was most advantageous and beneficial for the infant, and, therefore, he should make no scruple of breaking into the principal, where so small a sum was devised that the interest thereof would not suffice to give the legatee a competent maintenance and education. But, in the case of a legacy of £1000 or the like, there, it might be reasonable to restrain the maintenance to the interest of the money.

In this case, there being £30 also given to the infant to bind him an apprentice, the infant died before he attained a competent age to be placed out an apprentice. And the question was whether this £30 should go to the executor of the infant.

Lord Keeper [NORTH]: I think this £30 ought to go to the executor or administrator of the infant. And, in this case, the infant being seventeen years old and having made a will and named an executor, it was allowed to be a good disposition of the £30.

[Raithby's note: Reg. Lib. 1684 A, f. 149. These points do not appear by the Register's Book. In this case, Robert Grant made his will, and thereof appointed his wife and the defendant, his eldest son, executors. The wife died. And, on a bill for an account, the defendant claimed to be allowed (amongst other things) certain sums of money that he had disbursed for the maintenance and livelihood of three others of the children claiming under the will. And the decree as to that is 'That

¹ *Rex v. City of London* (1678-1680), 1 Ventris 51, 86 E.R. 226, 2 Levinz 231, 83 E.R. 533.

the Master on taking the account is to allow the defendant for the maintenance and education of the said children to the time they were able to go to service and no further.’]

Lincoln’s Inn MS. Misc. 498, p. 11, pl. 1

Michaelmas [term] 36 Car. II

£20 is devised to A. to bind him an apprentice. He dies before he is bound.

Yet [it was said] by the Lord Keeper [NORTH] his administrator shall have the money.

[Other copies of this report: Lincoln’s Inn MS. Misc. 503, p. 80, Lincoln’s Inn MS. Misc. 504, p. 77, pl. 1.]

2 Freeman 89, 22 E.R. 1076

Michaelmas term 1684.

A. devised to B. £20 to put him out apprentice when he should come to the age of seventeen years. And he died before that age. And the question was whether his administrator should have it or not.

And [it was] resolved that he should.

191

Heycock v. Heycock
(Ch. 1684)

Where there is a pecuniary devise to be paid out of the profits of lands, if the profits will not be sufficient to raise the sum in a convenient time, the court can decree a sale of the lands.

1 Vernon 256, 23 E.R. 452

Eodem die [27 October 1684].

In this case, the Lord Keeper [NORTH] declared he took it to be the law of this court that, where there is a devise of a sum certain to be raised out of profits of lands, if the profits will not amount to raise the sum in a convenient time, the court will decree a sale.

[Earlier proceedings in this case: 2 Chancery Cases 124, 22 E.R. 877, 1 Eq. Cas. Abr. 72, 199, 21 E.R. 885, 987.]

192

Parker v. Ash
(Ch. 1684)

Where a will with erasures has been admitted to probate, the question of the erasures is res judicata.

The Statute of Limitations does not apply to a claim for a legacy.

The executor of an executor who committed waste against a decedent’s estate is liable therefor only so far as the latter has received assets from the former.

1 Vernon 256, 23 E.R. 452

28 October 1684.

The bill was for payment of a legacy given to the plaintiff by the will of A.B., in which will,

many legacies and, amongst others, the plaintiff's legacy were erased, and such erasures were supposed to have been done by the testator in his lifetime. But, when the will came to be proved and this matter contested in the Spiritual Court, the executrix submitted that the will should be proved as if no such erasures had been made, and an instrument purporting her consent to this matter was annexed to the will.

Lord Keeper [NORTH]: I take the executrix to be concluded by this consent, which prevented the examination of the matter when it was fresh. And it may be that she knew that the erasures could have been proved to have been made after the death of the testator. But he said the usual course in such cases is to have a sentence against the erasure and then a probate granted with the words erased out inserted therein.

Then, the length of time since the death of the testator and the staleness of the demand were insisted upon.

But, to this, it was answered that a legacy is not within the Statute of Limitations¹ and length of time is only a presumption of payment. But, in this case, the defendant does not pretend a satisfaction, but only contests the duty. And there is this difference between debts and legacies as to their antiquity. Legacies always appear upon the face of the will, and so an executor knows what he ought to pay without being asked or told. But, for debts and other dormant demands, against which he cannot provide without notice, there the Statute had reason to limit the time.

The Lord Keeper [NORTH] decreed the legacy against the defendant, who was executor of the executrix. And the first executrix having delivered over a great part of the assets to the defendant in her lifetime, an account had been afterwards stated between them and a release given. However, it was directed that an account should be taken of the whole assets and that what the defendant had received he was to answer out of his own estate and that, what was wasted by the first executrix, the defendant was to answer as far as he had received assets.

[Raithby' note: With interest from the exhibiting of the bill. Reg. Lib. 1684 B, f. 28. This instrument was a declaration by the executrix registered in the ecclesiastical court before she was admitted to prove the will that she accepted of the said will and executorship chargeable with the legacies demanded by the plaintiff and that she would perform and discharge the said will as by law she ought to have done in case the said words and legacies had not been there erased out, and it was declared by the decree that this declaration affixed to the probate of the will ought to be accepted and taken as part of the will of the testator and that the legacies claimed by the plaintiff ought to be paid accordingly. Reg. Lib. 1683 B, f. 479.]

193

Duke of Buckingham v. Gayer
(Ch. 1684)

Where a mortgagee in possession refuses to receive the profits of the land and credit them to the mortgagor's debt, he will be answerable for them.

1 Vernon 258, 23 E.R. 453

30 October 1684. In Court, Lord Keeper.

Sir Robert Gayer, who was a mortgagee under the duke, had brought an [action of] ejectment, and recovered judgment against the duke of his Berkshire estate, of which one Goodchild, who had a lease for three years, was in possession, but paid no rent, and was in truth insolvent. And Sir Robert Gayer, in combination with this Goodchild, who was accountable to the duke for £18,000, refused

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

to take out execution. And the duke could not eject Goodchild by reason of Gayer's judgment.

It was, therefore, moved that Sir Robert Gayer might be compelled to take out execution, and receive the profits in discharge of his debt.

But it was said by the counsel for the defendant that no order was ever yet made to compel a mortgagee to take out execution, whether he would or not, and to order the defendant to take out execution might involve him in a suit with Goodchild. And it was to make him, *nolens volens*, the duke's bailiff. And a mortgagee, who desires to act discreetly, would not enter before he had foreclosed the equity of redemption.

The duke's counsel said they would not compel Sir Robert Gayer to be the duke's bailiff, but, in case he did not think fit to receive the profits, they desired the rent might be brought into court.

Which the court [NORTH] held reasonable, and ordered that, unless Sir Robert Gayer take out execution before the end of the term, he should be answerable for the profits, as in a case of willful default.

194

Carter v. Carter
(Ch. 1684)

In this case, the arbitral award in issue was not ultra vires and was valid and enforceable.

1 Vernon 259, 23 E.R. 454

31 October 1684. In Court, Lord Keeper and Justice Levinz.

The case was Ralph Carter and John Dawson, executor of Richard Carter, of the one part, and Anne Carter, the widow of the said Richard Carter, of the other part, having submitted themselves to an award and entered into a recognizance for the performance of it, an award was made, wherein reciting that the said Richard Carter had acknowledged a judgment of £100 to the said Ralph Carter and that the said Anne Carter, as being terre tenant, was by reason of that judgment disturbed in her jointure, it was (amongst other things) awarded that the said Ralph Carter should acknowledge satisfaction upon this judgment.

In a *scire facias* upon this recognizance, the breach assigned was that satisfaction was not acknowledged upon the judgment.

And the exception taken by Mr. *Holt* was that the award was larger than the submission, for when A. and B., of the one part, and C., of the other, submit to an award, that is a submission of the differences that C. had with A. and B. jointly or with either of them severally, but this does not submit any differences that might be between A. and B. Now, in this case, Ralph Carter, the conusee of the judgment, had two remedies, one against Anne Carter, as terre tenant, to bind the lands and another remedy against the said John Dawson, as executor of the said Richard Carter, to follow the personal estate. And, therefore, the award ought not to have been that satisfaction should be acknowledged on the judgment, which destroyed both remedies, but only that the land should be freed and discharged from this judgment.

But upon hearing of Mr. *Pollexfen* on the other side, the Lord Keeper [NORTH] and Mr. Justice LEVINZ were both of opinion that the award was well made and the breach well assigned, for that all parties concerned in the judgment were before the arbitrators and Ralph Carter, who made the submission, had the whole power of the judgment in him. And, therefore, he ordered judgment to be entered upon the *scire facias* unless better cause was shown to the contrary etc.

[Other reports of this case: 1 Eq. Cas. Abr. 49, 21 E.R. 865.]

Dunch v. Kent
(Ch. 1684-1685)

Purchasers who take in violation of a trust contained in letters patent take with notice of the breach of trust.

1 Vernon 260, 23 E.R. 455

Eodem die [31 October 1684].

The king being indebted to Colville, a banker, in £85,832 17s. 8d. and Lindsey, a bankrupt, having married Colville's widow and executrix, the king, by his letters patent, in consideration of the said debt, grants to Lindsey an annual sum issuable out of the hereditary excise upon special trust in the patent declared that all such of Colville's creditors as would come in within a twelvemonth and accept a share of this annual sum proportional to their debts should have the same assigned to them. The year was long since passed. And the plaintiff, being a creditor of Colville's, brings his bill to have the benefit of this trust. And he complains that Lindsey had made several assignments to the defendants who were none of Colville's creditors and that Lindsey had out of Colville's estate paid off several bonds and kept the same on foot and made assignments of them to the defendants in satisfaction of his own proper debts, under color whereof, they had come in under this trust and had the benefit of these letters patent.

In this case, for the plaintiff, it was insisted that, although Colville's creditors came not within the year, that yet this was a continuing trust for them. And Mr. Solicitor [General, *Finch*] did admit that a trustee, for payment of debts in general, may sell upon good consideration, and the purchaser, though he had notice of the trust, shall not be affected with any misapplication of the money, for the land being sold for a good consideration, that is discharged. And it is the money that is to be applied for the payment of the debts, unless the debts be particularly mentioned in a schedule or in the deed of trust. And, in such case, the purchaser must at his peril see the money rightly employed and the debts discharged. And it was admitted that, if Lindsey had administered Colville's estate and was in disburse more than the assets which he had received amounted to, that, for so much, Lindsey was a creditor to Colville, and should have the benefit of this trust.

But, in this cause, there being many defendants and their cases different and distinct, the Lord Keeper [NORTH] would not enter into the debate of any of them, but he referred it to a Master to state all the particular cases to the court. And he directed the Master to certify when the assignments were made and whether for Lindsey's proper debts and whether Lindsey was a creditor to Colville at the time of the assignments made. And, in that respect, he was to see if Lindsey compounded any of Colville's debts, for he being executor in the right of his wife, he could not have the benefit of those compositions.

1 Vernon 319, 23 E.R. 494

11 May 1685.

This cause came now before the court upon the Master's special report, who had reported that the assignments made by Lindsey to the defendants purported to be in consideration of debts due and owing by Colvile, yet, in truth, they were not Colvile's debts, but Lindsey's debts.

Per curiam [NORTH]: Though the creditors of Colvile did not come in within the year, yet this patent was a trust for them and was special assets and not convertible to other purposes by Lindsey, who married his executrix. But Lindsey, after the year, ought to have preferred his bill to have compelled his creditors to have come in or otherwise to renounce the trust. And Lindsey having not so done, but assigned to creditors of his own that were not creditors of Colvile, that was a breach of

trust and void as against Colvile's creditors. And though it was objected that Lindsey's creditors had made over their assignments to other persons, who came in as purchasers without notice for full and valuable considerations, yet, *per curiam*, such purchasers came in under the letters patent in which the trust is mentioned and they ought to have taken notice of it at their peril.

[Other reports of this case: 1 Eq. Cas. Abr. 147, 21 E.R. 948.]

196

Anonymous
(Ch. 1684)

In a suit against the executors of a decedent's estate for a lease or a personal duty, the trust beneficiaries and the residuary legatees are not necessary parties.

1 Vernon 261, 23 E.R. 456

In a bill to be relieved touching a lease for years or other personal duty against executors, though the executors be but executors in trust, yet it is not necessary to make the *cestui que trusts* or residuary legatees parties.

[Other copies of this report: 1 Eq. Cas. Abr. 73, 21 E.R. 885.]

197

Palmer v. Trevor
(Ch. 1684)

A legacy to a married woman is payable to her husband, even though they be living separate and apart.

Where a legacy is payable at a certain date, interest on the unpaid money accrues on that date.

Lincoln's Inn MS. Misc. 498, f. 11, pl. 2

If a legacy be devised to a married woman for her sole and separate use, she is to receive it, and the payment to herself is good. But, where a legacy is devised to a married woman who lives separately from her husband and was not maintained by him, My Lord Keeper [NORTH] would not take this to be a legacy for her separate use unless it had been so expressed in the will. And, therefore, payment to the wife was held to be ill, and the party was forced to pay it over again.

My Lord Keeper [NORTH] declared in this case that, where a legacy is devised to be paid at a certain time, the party shall have interest from the time limited for the payment. But, where no certain time of payment is limited, no interest shall be paid for it.

[Other copies of this report: Lincoln's Inn MS. Misc. 503, p. 81, pl. 1, Lincoln's Inn MS. Misc. 504, p. 77, pl. 2.]

1 Vernon 261, 23 E.R. 456

4 November 1684.

A.B. devised £100 to the plaintiff's wife to be paid within six months after the testator's death. And a bill being brought for this legacy, the defense, which the defendant, the executor, made, was that he had paid the legacy to the plaintiff's wife and had her receipt for it.

And the defendant's counsel insisted that this was a good payment, for that, without doubt, a man might so devise a legacy to a married woman for her separate maintenance, as that the husband should not intermeddle with it and that the wife's receipt should be a sufficient discharge for it. And they further insisted that such was the intent of the testator in this case and that the will ought to be so construed in equity, for, at the time of making this will, the plaintiff and his wife were parted, which was then well known to the testator, and that the wife was much straightened for want of maintenance. And it was said that the civil law, whereby legatory matters were properly determinable, was that such a legacy ought to be paid to the wife.

But the defendant's counsel not being prepared to maintain that point, the Lord Keeper [NORTH] held it no good payment, and decreed the legacy to be paid to the plaintiff with interest, it being to be paid by the will at a certain time, *viz.* within six months after the testator's death.

[Other reports of this case: 1 Eq. Cas. Abr. 58, 301, 21 E.R. 872, 1061.]

198

Clarke v. Jevon
(Ch. 1684)

Where a purchaser without notice of an equity of redemption gets in an estate at law, no redemption can be had against him.

However, no one can be prevented from redeeming his own mortgage.

2 Freeman 89, 22 E.R. 1076

Da. Grant, possessed of a term for years of houses in the Strand, mortgages them to Hynde, and he then sells the equity of redemption to the defendant. Afterwards, the said Da. Grant sells the equity of redemption to George Dewy, the plaintiff's testator, who mortgaged the same to Sandford. The defendant Jevon buys in Sandford's mortgage, paying him his principal and interest. George Dewy dies, and the plaintiff, being his executor, prefers his bill against the defendant to redeem.

The defendant pleaded that, before Da. Grant sold the equity of redemption to Dewy, he sold it to her for £150, which she had *bona fide* paid, and that she had since purchased in the estate in law of Sandford, and so demanded judgment whether she should answer.

And, by the Lord Keeper [NORTH], she must answer, for, though it be true generally, where a purchaser of an equity without notice gets in an estate at law, no redemption shall be against him, yet, here, Dewy having taken in the old mortgage and this mortgage to Sandford being made by him, there is no case where a man shall be hindered from redeeming his own mortgage.

Lincoln's Inn MS. Misc. 498, f. 12, pl. 2

Jevon v. Clarke.

A. makes a mortgage to B., and then he sells the equity of redemption to J.S., and, afterwards, he sells the same equity of redemption to J.N., who has no notice of J.S.'s purchase. J.N. redeems B. and takes an assignment of his interest and then mortgages to C.; J.S. redeems C. and, thereby, he gets the estate in law, yet J.N., upon the payment of the mortgage money, shall have it from him

again, for, when J.N. had purchased the equity of redemption without notice and, afterwards, bought in the mortgage, he had an absolute estate, and none could redeem his mortgage but himself.

This was reported to me by Mr. Freeman of the Middle Temple, who was counsel in this case.

[Other copies of this report: Lincoln's Inn MS. Misc. 503, p. 82, pl. 1, Lincoln's Inn MS. Misc. 504, p. 79, pl. 1.]

199

Williamson v. Hemmingsworth
(Ch. 1684)

In this case, the devise in issue was enforced according to the terms of the will.

Lincoln's Inn MS. Misc. 498, p. 3, pl. 1

Land was devised to J.S. and his heirs in trust for A. and the heirs male of her body and, for the want of such issue, in trust for B. for life and, after the death of A. without issue male, if B. shall be then dead and not otherwise, to C. and his heirs.

A. dies without issue, leaving B. Then B. dies.

And C. exhibited his bill to have the trustees convey to him, which was decreed accordingly, for that B. being dead when A. should die without heirs male was not a contingent without which the estate to C. was not to take place, but only the designation when C.'s remainder should come into possession.

[Other copies of this report: Lincoln's Inn MS. Misc. 503, p. 74, pl. 1, Lincoln's Inn MS. Misc. 504, p. 71, pl. 1.]

200

Sessions v. Joy
(Ch. 1684)

The Statute of Frauds does not apply to equities of redemption.

Lincoln's Inn MS. Misc. 498, p. 3, pl. 2

The plaintiff, being a lessee for a long term of years in consideration of a sum of money, conveyed his term to the defendant. And now, he exhibited a bill in this court to redeem, alleging that, though the deed imported an absolute conveyance, yet it was agreed at the time of the execution therefore that the same should be but as a mortgage.

To this bill, the defendant pleaded the new Statute of Frauds and Perjuries¹ because there is no such agreement in the writing.

But My Lord Keeper [NORTH] said he did not take that Statute to extend to equities of redemption. And he overrule the plea.

Note, the 14th March 1698, there was a like cause to this heard at the Rolls betwixt Cornet *contra* Bampfield, and the Master of the Rolls [Trevor] decreed a redemption.

[Other copies of this report: Lincoln's Inn MS. Misc. 503, p. 74, pl. 2, Lincoln's Inn MS. Misc. 504,

¹ Stat. 29 Car. II, c. 3 (SR, V, 839-842).

p. 71, pl. 2.]

201

Drakes v. St. John
(Ch. 1684)

Where a rent is charged upon a chattel interest in land and the rent charge is acquired by the owner of the chattel interest, the rent is not merged and extinguished.

Lincoln's Inn MS. Misc. 498, p. 8

Drax v. St. John.

The case was this. Sir J.D. devised two several rent charges of £100 to A. and B. during their lives out of his plantation (I think in Barbados) with a clause of distress. And, by the same will, he devises his plantation to his sons jointly. The elder son purchases the two rent charges. And he makes his will and devises a legacy to the plaintiff. And he makes his brother the executor.

The only point that the court took notice of was whether these rents being purchased by one of the joint tenants of the plantation should be quite extinct and gone or whether, the estate being eased by it, the value of the rents should be assets in the hands of the surviving brother to pay the legacy.

My Lord Keeper [NORTH] was of the opinion that this case is not like the case where one joint tenant of lands purchases the rents that issue out of the land, but, a plantation being in the nature of a chattel, it is all one as if a man had charged his goods with a rent, in which case, the rent will not be extinguished, though one joint tenant of the goods should purchase the rent. And this case, as he said, being all one with that, the value of the rent shall be assets to pay the legacy.

[Other copies of this report: Lincoln's Inn MS. Misc. 503, p. 78, Lincoln's Inn MS. Misc. 504, p. 75, pl. 1.]

202

Radnor v. Turnor
(Ch. 1684)

A devise of a specific tract of land 'or the value' thereof passes the freehold and, if the estate has sufficient assets, the executor must pay off any encumbrances upon it.

Lincoln's Inn MS. Misc. 498, f. 13, pl. 1

A man devises to J.S. Blackacre or the value of it.

This was held by Lord Keeper [NORTH] to be a devise of the land in fee. And, whereas Blackacre was at that time mortgaged, he held that, if the executor had sufficient assets to pay off that mortgage and all other debts, it should come to the devisee clear.

[Other copies of this report: Lincoln's Inn MS. Misc. 503, p. 82, pl. 2, Lincoln's Inn MS. Misc. 504, p. 79, pl. 2.]

Foster v. Marchant
(Ch. 1684)

The committee of a lunatic has an estate during pleasure.

A committee of a lunatic cannot make leases nor encumber the lunatic's estate without a special order of the Court of Chancery.

1 Vernon 262, 23 E.R. 457

Eodem die [4 November 1684].

The bill was by a second committee of a lunatic against the first committee *et alios* to call him to an account for the profits of the lunatic's estate.

Lord Keeper [NORTH]: The committee of a lunatic has an estate but during pleasure, and, therefore, he cannot make leases, nor anyways encumber the lunatic's estate without a special order of this court where the profits are not sufficient to maintain the lunatic.

In this case, the lunatic, before he became such, having made a mortgage of a good part of his estate for £50, the committee had transferred this mortgage, and taken up £300 or £400 more upon it.

The Lord Keeper [NORTH] declared the mortgage should stand as a security for £50 only. And, as to improvements and buildings made by the first committee on the lunatic's estate, for which he craved an allowance, the Lord Keeper [NORTH] declared the heir, upon the lunatic's death, must be let into the estate without making any allowance for such improvements. And as to an allowance demanded for the lunatic's son's maintenance, the Lord Keeper [NORTH] referred it to a Master to examine and report what maintenance was reasonable to be allowed.

[Raithby's note: But, in this case, the decree is that the plaintiff in the original bill, the lessee of the first committee of the lunatic, should enjoy the several leases of the lunatic's estate made to him by the said committee and the lunatic's son in case the same were *bona fide* made for a valuable consideration and no fraud was used by the plaintiff or his agents in the obtaining thereof whereby to burden the estate, upon which the Master to whom it was referred to examine the same was to report. And the Master was to look into the value of the fine the plaintiff paid for the same and what rent is reserved thereon and, if it appeared the same was of sufficient value, the leases to stand, and the plaintiff to hold the same against the defendants and all claiming by them during the continuance of the respective terms thereby granted, freed and discharged of all encumbrances done by the said lunatic or his son or said other the defendants and the plaintiff to execute counterparts thereof and to account for the rent thereof. And the Master was also directed to examine what moneys from time to time since the defendant Marchant, the lunatic, was found a lunatic, the plaintiff or any for him or by his order had paid, the court declaring that such sum or sums of money as had since the lunacy been really and *bona fide* paid by the plaintiff for the debts of the said lunatic, contracted before the lunacy, or for the maintenance of him or his son or for his or their use or benefit or for the defense or recovering of his estate, such moneys as shall so really appear to have been disbursed and paid shall be allowed and paid to the said plaintiff. In case it shall appear to the said Master that the son was not sufficiently maintained and provided for out of some other part of the estate or by some other person or persons which the Master was also to examine and make such allowance for the son as he should reasonably think fit, which allowance so to be made was to be paid and allowed to the said plaintiff. And the said Master was to make all just allowances on both sides. And the said mortgage was to stand as a security for what should appear due to the said plaintiff on the account to be taken as aforesaid. And, as touching the account so mentioned to be made up between the said plaintiff and Ferrars, the first committee, the Master was to look into and examine if the same was

made up without fraud or contrivance on purpose to charge the lunatic's estate and before the custody was taken from the said Ferrars. And, if it appeared that the said Master did find and certify that the same were fairly and *bona fide* made and stated without any fraud or collusion in the plaintiff, in such case, such accounts were to stand, and not to be raveled into unless the defendant could disprove the same, and the plaintiff to be allowed and paid what on such account shall appear due. Note the plaintiff had taken an assignment of the said mortgages and paid great sums in defending the lunatic's title, and advanced sums of money for care and maintenance of the lunatic's son, and an account had been stated between Ferrars and the plaintiff. It also appears that the premises leased to the plaintiff by the lunatic before lunacy falling old and ruinous, the plaintiff would not repair without a further lease of eleven years. The committee and the son of the lunatic joined in a lease for such further term to the plaintiff, and granted him a lease of other messuages, etc., for twenty-one years at a rent, and the plaintiff agreed to lay out £700 in repairs. And the plaintiff Foster was to receive the rents, to keep down the principal and interest of his mortgage, and to account from time to time with Ferrars, which he did up to June 1681. Reg. Lib. 1684 A, f. 796.]

[Other reports of this case: 1 Eq. Cas. Abr. 277, 326, 21 E.R. 1043, 1078.]

204

Deguilder v. Depeister
(Ch. 1684)

Where a vessel is insured for a voyage that never occurred, the insured party is only liable to pay the premium of the bond.

1 Vernon 263, 23 E.R. 458

Eodem die [4 November 1684].

The case was upon a bottomry bond, whereby the plaintiff was bound in consideration of £400 as well to perform the voyage within six months as at the six months' end to pay the £400 and £40 premium in case the vessel arrived safe and was not lost in the voyage. It fell out that the plaintiff never went the voyage, whereby his bond became forfeited.

And he now preferred his bill to be relieved.

And, upon a former hearing, in regard the ship lay all along in the port of London and so the defendant ran no hazard of losing the principal, the Lord Keeper [NORTH] thought fit to decree that the defendant should lose the premium of £40, and be contented with his principal and ordinary interest

And, now, upon a re-hearing, he confirmed his former decree.

[Raithby's note: Reg. Lib. 1684 A, f. 721. The bond was by one Naphthali Ball to the plaintiff; the ship appears to have been sold, and the interest to be paid was from the date of the bond to the sale of the ship. The plaintiff then petitioned for another re-hearing, whereon the decree was confirmed, as above, and the plaintiff was to pay 40s. costs for the day.]

[Other reports of this case: 1 Eq. Cas. Abr. 372, 21 E.R. 1111.]

[Earlier proceedings in this case: 73 Selden Soc. 155, 233, Reports *tempore* Finch 206, 23 E.R. 113.]

205

Anonymous
(Ch. 1684)*A Jew takes an oath upon the Torah.*

1 Vernon 263, 23 E.R. 459

A Jew being to put in an answer, upon a motion, it was ordered that he should be sworn upon the Pentateuch and that the plaintiff's clerk should be present to see him sworn.

206

Merreitt v. Eastwick
(Ch. 1684)*Where a bond is given for the payment of a specific order of a third party, it is held in trust and is not assets of his estate.*

1 Vernon 264, 23 E.R. 459

7 November 1684. William Merreitt versus John Eastwicke and Ann, his wife, administratrix of Hugh Pearce.

This day the Lord Keeper [North] being sent for to the trial of the money in the pix, Mr. Baron ATKYNS sat, and went on with the causes.

And this cause then coming on to be heard, the case was that the king of Denmark sent over the said Hugh Pearce, his huntsman, into England, and remitted to him a bill of exchange for £843 13s. 6d. drawn upon one Jacobson, a merchant in London, to buy horses and dogs. He receives all the money except £200, and lays it out accordingly, and delivers up the bill of exchange. And for the other £200, he takes a note from Jacobson, payable to himself or bearer on demand, and then falls ill. And shortly afterwards, he died. But, in his sickness, he delivers to the plaintiff, in whose house he lodged, this note for £200, and orders him to lay out the money in horses and dogs for the king of Denmark's use, which he accordingly does. And, afterwards, he goes to Denmark, and carries over the horses and dogs which had been bought, and accounts with the king for the money, and receives a gratuity for his trouble.

After the death of Hugh Pearce, the defendant Anne, his wife, takes out administration. And she and her now husband bring an action of trover against the plaintiff for this £200, and recover a verdict.

The bill was to be relieved.

Upon the hearing of the cause, Mr. Baron ATKYNS was of opinion the plaintiff came too late after a recovery at law, and would have dismissed the bill. But Sir Samuel Clarke, Sir Miles Cooke, and Sir William Beversham, the Masters in Chancery, stood up and opposed it, being of opinion that there ought to be relief and a decree for the trust. And, thereupon, the court being divided, no order was made.

And the cause, standing in the paper the next day, came on to be heard before the Lord Keeper [NORTH], who declared that he was satisfied that the £200 received by the plaintiff was part of the £843 13s. 6d. remitted by the king of Denmark. And, although Pearce had altered the property by taking a bill for it payable to himself or bearer, yet Pearce was to apply it for the king of Denmark's use. And the plaintiff, having made such provision as Pearce should have done, ought not to be charged therewith as so much of the estate of Pearce, he having accounted for the same. And it was

ordered that all proceedings at law should be stayed until further order. And there being an account decreed touching some other moneys, which the plaintiff had received, the judgment was ordered to stand as a security for what should be found due from the plaintiff on the account. But, if nothing should appear to be due, satisfaction was to be acknowledged on the judgment.

Note, upon searching the record of this case, it appears that this cause was heard before the Lord Keeper [NORTH] on the 8th of November and such decree was made as above, but it does not appear by the record that this cause had come on before Mr. Baron Atkyns the day before.

[Reg. Lib. 1684 B, f. 153.]

Ewelme Hospital v. Town of Andover
(Ch. 1684)

A bill of peace lies to prevent a multiplicity of suits.

1 Vernon 266, 23 E.R. 460

10 November 1684.

There having been time out of mind a fair held at Weyhill near Andover, which was within the hundred and manor, whereof the corporation of Andover were the lords, but the pickage and stallage and other profits of this fair being enjoyed by particular tenants, who claimed several acres of the land on Weyhill, on which the fair was held, as belonging to their respective estates within the manor and another part of the soil and profits being claimed by the Hospital of Ewelme and another part by the parson of Wey, so that the corporation had but little or none of the profits of the fair, the corporation, upon the surrendering of their old charter, got a clause inserted in the new one that they might hold the fair in what place they pleased, which Mr. Attorney [General *Sawyer*] said was only an explanation of what the law implied upon the old charter, the fair being granted to them. And now for their own profit, they would remove it to another place, the soil whereof belonged to the corporation. And, hereupon, several actions being brought on both sides, the bill was brought against the town of Andover by the tenants of the hospital and the parson to quiet them in their possession.

It was objected by the defendants that the bill was not proper, the right not having been settled by law, for, though the plaintiffs had recovered in two several actions, yet these verdicts were both set aside as having been gained by a practice upon and undue solicitation of the jury. And the judges had certified the verdicts to have passed contrary to their direction.

Lord Keeper [NORTH]: I take such a bill to be very proper in this court, being a bill of peace, and, in such case, this court ought to interpose and prevent a multiplicity of suits. But, in this case, the bill praying only special relief, *viz.* that they might be quieted in possession until the right was tried at law and not having prayed relief in the premises or a perpetual injunction, the Lord Keeper [NORTH] thought the bill was not proper for a decree. And he directed the plaintiffs to amend the bill in that particular.

And the town of Andover, having a bill to change the venue, complaining that they could not have a fair trial in the county where the action was laid, that bill was dismissed.

208

Chapman v. Tanner
(Ch. 1684)

A mortgagee in possession who allows the bankrupt mortgagor to receive the profits of the land must account for the profits to the assignees of the commissioners of the bankrupt mortgagor.

Where a bankrupt purchaser of land has not paid the purchase price, the land is charged with the price, the seller not being required to come into the bankruptcy proceedings as a creditor.

1 Vernon 267, 23 E.R. 461

Eodem die [10 November 1684].

A bankrupt, before he became such, having made a mortgage of his estate, the assignees of the statute bring an [action of] ejectment for the recovery of the lands comprised in the mortgage. The mortgagee refuses to enter, but suffers the bankrupt to take the profits, and to fence against the assignees with this mortgage.

Lord Keeper [NORTH]: The mortgagee shall be charged with the profits from the time of the ejectment delivered.

Another point in this case was that, the bankrupt having bought land and all the purchase money not being paid, the assignees would have had the vendor come in as a creditor under the Statute for the remainder of his purchase money.

Per curiam [NORTH]: In this case, there is a natural equity that the land should stand charged with so much of the purchase money as was not paid and that without any special agreement for that purpose.

[Raithby's note: The vendor had in a schedule to his answer set forth a list of several writings in his hands belonging to the title of the said estate and which he, by his answer, swore were by the agreement between him and the bankrupt to remain in his hands until he was paid the sum of £100 remaining due of the purchase money and for which he had also a bond from the bankrupt. N.B. The plaintiffs had replied to the answer, stating the aforesaid agreement, and the defendant, the vendor, had not made any proof of the agreement. Reg. Lib. 1684 A, f. 176.]

[Other reports of this case: 1 Eq. Cas. Abr. 56, 329, 21 E.R. 870, 1080.]

[Earlier proceedings in this case: *sub nom.* Tanner v. Chapman, Reports *tempore* Finch 466, 23 E.R. 252.]

Barrell v. Sabine
(Ch. 1684)

A clause of the right to repurchase in a sale of land does not create a mortgage.

1 Vernon 268, 23 E.R. 462

11 November 1684.

Upon the hearing of this cause, the single question was mortgage or no mortgage. And it being before the Statute of Frauds and Perjuries,¹ for proof of its being a mortgage, it was urged for the plaintiffs:

First, the overvalue, *viz.* that it was a church lease of £180 *per annum* over and above the rent reserved and all reprises and renewed at the time of the pretended purchase and made up a complete term for twenty-one years. And Mr. Serjeant Barrell's² purchase money was but £950, of which not one penny came to the vendor's hands, but all went for discharging encumbrances and in repairs and renewing the lease and that the defendant was offered much about the same time for this lease £1400;

Secondly, that Sabine was at the charge of the conveyance;

Thirdly, that Serjeant Barrell should declare, if Sabine would repay his money within a year and half and give the Serjeant £100 for his pains, Sabine should have his estate again.

And to prove that such a declaration was sufficient to make it a mortgage, they cited the cases of Cole and Martin, and Beale and Collins.

On the other side, it was answered [that] the overvalue was not so great as was pretended and that this had all the forms and steps of an absolute purchase, there being first express articles for an absolute purchase and then a conveyance made in pursuance of those articles and possession was delivered immediately upon the execution of the conveyances.

The Lord Keeper [NORTH] said he was fully satisfied that it was not originally a mortgage, but an absolute purchase. But he believed Sabine might complain he had sold his estate too cheap and that, thereupon, Mr. Serjeant Barrell might declare, if he would repay him his money within one year and give him £100 for his pains, that he should repurchase his estate, which Lord Keeper [NORTH] believed was the true state of the case. And he cited Sir Anthony Cage's Case, of a clause to repurchase, which made so much stir in Westminster Hall. And he said he thought that, where there was a clause or provision to repurchase, the time limited ought to be precisely observed. And he said that, as to the Serjeant's agreement that Sabine might repurchase for £100 more, that seemed reasonable in respect of his trouble and for that the estate was the more valuable, as having gone through a lawyer's hands, who understood the title, and that might be a means to encourage purchasers. And he dismissed the bill.

¹ Stat. 29 Car. II, c. 3 (SR, V, 839-842).

² Sir Paul Barrett (d. 1685); Serjeant Francis Barrell died in 1679. J. H. Baker, *Serjeants at Law* (1984), p. 498.

210

Bailey v. Devereux
(Ch. 1684)

A suit for an injunction lies to determine the legality of a commission of rebellion issued out of the court.

1 Vernon 269, 23 E.R. 463

13 November 1684.

Upon a motion for an injunction, the case was that an action of assault, battery, and false imprisonment was brought at law against the plaintiff for arresting the defendant on a commission of rebellion, which issued irregularly.

Per curiam [NORTH]: The plaintiff must have an injunction, for the irregularity ought to be punished in this court and can only be examined and determined here, whether regular or not, for, at law, supposing the commission of rebellion issued regularly, they will not allow that as a justification. And, therefore, the injunction was granted. And it was referred to a Master to examine whether the commission of rebellion issued regularly or not, and, in case he found it irregular, to tax the defendant his costs.

[Raithby's note: 6 November. A motion on the part of the defendant was made to dissolve an injunction which had been obtained by the plaintiff. And the order from the Register's Book appears to be 'That the irregularity of the proceeding be referred to be examined by the Master, who is to certify the same'. And it was further ordered 'That the defendant should be at liberty to proceed to trial unless cause shown on a given short day, and the defendant in the meantime is at liberty to prepare for trial'. Reg. Lib. 1684 A, f. 36. No further entry appears.]

[Other reports of this case: 1 Eq. Cas. Abr. 284, 21 E.R. 1049.]

211

Coppring v. Cooke
Cooke v. Knight
(Ch. 1684)

Upon a bill to redeem, the mortgagee in possession must account for all of the profits received or receivable.

1 Vernon 270, 23 E.R. 463

14 November 1684. In Court, Lord Keeper.

Upon a bill to redeem a mortgage, the case was that the mortgagee had obtained a judgment in [an action of] ejectment and entered on the mortgaged premises and thereby prevented other creditors that had subsequent securities from entering, and yet he permitted the mortgagor to take the profits.

And, now, the other creditors coming to redeem him, the court ordered the mortgagee should be charged with all the profits he had or might have received since his entry.

[Other reports of this case: 1 Eq. Cas. Abr. 329, 21 E.R. 1080.]

Tyte v. Tyte
(Ch. 1684)

Where a devise is given of a certain parcel of land, but, if the devisee be evicted, then the devisee is to have another certain parcel and there is an eviction from the first, the devisee is entitled only to receive the value of the first parcel out of the second.

1 Vernon 270, 23 E.R. 463

17 November 1684.

A man, by will, devises lands called Styles to his younger son, and, thereby, declares that, in case his son should be any way hindered or prevented from enjoying the lands called Styles, then, in lieu thereof, he gave him all those his lands called Darrow Barne.

The plaintiff, by his bill, sets forth that he was the heir of the devisor, but that neither he nor, in truth, the devisor was entitled to more than to one moiety of the lands called Styles and that the defendant, J.N., a stranger, was entitled to the other moiety and had evicted the devisee. And he sets forth that Darrow Barne was of much greater value than Styles and that it was not through his default that the devisee did not enjoy Styles. And he charged a combination between the devisee and the other defendant, J.N., and prayed relief as to the overvalue of Darrow Barne.

The Lord Keeper [NORTH] was clear of opinion that, this being a condition that lay in compensation, the plaintiff ought to be relieved. And he decreed that the defendant, the devisee, should have a compensation [either in land or money] for the land evicted, set out in Darrow Barne, and that the plaintiff should be relieved as to the overvalue. But the defendant, J.N., that had the other moiety of Styles, having all along fomented suits on both sides and the court threatening to saddle him with costs, he submitted that the defendant, the devisee, should have his [J.N.'s] moiety of Styles, and he to take a compensation out of Darrow Barne. And it was decreed accordingly.

[Raithby's note: Reg. Lib. 1684 B, f. 170. The bill was filed by the devisee of Darrow Barne and other lands, who claimed to be entitled to Styles or to a moiety thereof and who, it appears by the answer of one of the defendants, the devisee of Styles, had entered thereon for an account and to be relieved against the proviso in the will, he offering to make satisfaction for the moiety of Styles, from which he had evicted the defendant, either in land or money out of Darrow Barne, and the other lands included in the proviso.]

[Other reports of this case: 1 Eq. Cas. Abr. 106, 21 E.R. 914.]

213

Cotton v. Iles
(Ch. 1684)

Where a purchaser of land subject to a mortgage that has been forfeited dies, the land will be considered as a real estate and not a personal estate.

1 Vernon 271, 23 E.R. 464

19 November 1684.

A mortgagee in fee enters for a forfeiture, and, after seven years' enjoyment, absolutely sells the land to J.S. and his heirs.

Per curiam [NORTH]: The estate shall not be looked on to be a mortgage in the hands of J.S. so as to make it part of his personal estate, but it shall be for the benefit of the heir.

[Other reports of this case: 1 Eq. Cas. Abr. 273, 328, 21 E.R. 1041, 1080.]

214

Plampin v. Betts
(Ch. 1684)

A party's own oath is not sufficient evidence to prove his own case.

1 Vernon 272, 23 E.R. 465

20 November 1684.

On a demurrer to a bill of review, the plaintiff, by his original bill, suggests that all receipts touching the dealings in question were lost, and he prays an account and discovery from the defendant. The defendant, in his answer, sets forth his books of account and his receipts and payments. And he swears he received no other money of the complainant. After this, the plaintiff produces his receipts, which differ as to the dates from the entries in the books of account set out by the defendant in his answer. And, after many wrangles in taking the account, an order was made by the Lord Chancellor Nottingham that, in case the plaintiff would make oath that he believed the sums in question to be distinct sums, they should be taken as such. And this, as also that the plaintiff's oath in some other cases should conclude, was the error assigned.

And, for that reason, the decree was reversed, the Lord Keeper [NORTH] saying there was no color to make such an order, but, if there had been sufficient evidence without and the oath had been *ex abundanti* [*cautela*] only, it had been otherwise.

[Raithby's note: Reg. Lib. 1684 B, f. 134. The original bill appears to have been filed by the defendant in the bill of review against the now plaintiff, who was administrator *de bonis non* of Thomas Plampin, deceased, for an account of moneys left by him, the original plaintiff, in the hands of the intestate at several times and for which he never took any note and which appear to have been allowed to the plaintiff in the original cause on his own oath. They are as stated in the Register's Book, £67 15s., £57 15s., £150 15s., and £90 and 24 guineas and also the sum of £500.]

Pusey v. Pusey
(Ch. 1684)

In a suit in equity, a demurrer will be overruled where the defendant has not answered to all of the charges in the bill of complaint.

Where land is held by the tenure of a horn, cornage, the heir is entitled at law to the possession of the horn.

1 Vernon 273, 23 E.R. 465

Eodem die [20 November 1684].

The bill was that a horn, which, time out of mind, had gone along with the plaintiff's estate and was delivered to his ancestors in ancient time to hold their land by, might be delivered to him, upon which horn was this inscription, *viz.* 'pecote this horn to hold huy thy land'.

The defendant answered as to part, and demurred as to other part. And the demurrer was that the plaintiff did not by his bill pretend to be entitled to this horn, either as executor or devisee, nor had he in his bill charged it to be an heirloom.

The demurrer was overruled because the defendant had not fully answered all the particular charges in the bill. And he was ordered to pay costs. And the Lord Keeper [NORTH] was of opinion that, if the land was held by the tenure of a horn, or cornage, the heir would be well entitled to the horn at law.

[Reg. Lib. 1684 B, f. 310.]

Sherborne v. Clerk
(Ch. 1684)

A bill of discovery does not lie to require the defendant to disclose the tenant to the praecipe on a voluntary conveyance.

1 Vernon 273, 23 E.R. 466

Eodem die [20 November 1684]. In Court, Lord Keeper.

A demurrer to a bill brought to discover the tenant to the *praecipe* on a voluntary conveyance was allowed.

[Raithby's note: The defendant pleaded a good title in his father to the lands in question and quiet possession thereof by himself as heir to his said father for twenty-two years. The plea then states that the plaintiff had brought a writ of formedon in remainder against the defendant for the premises in question, and declared on a certain settlement in the bill mentioned; to this writ, the defendant had pleaded a fine and recovery suffered by his father, to which plea the plaintiff replied and traversed that the defendant's father was tenant of the freehold and that, on the trial, the plaintiff was nonsuited and judgment thereupon was duly entered for the defendant. And this plea was allowed. Reg. Lib. 1684 B, f. 112.]

[Other reports of this case: 1 Eq. Cas. Abr. 76, 21 E.R. 890.]

Smith v. Turner
(Ch. 1684)

A party is not bound by a decree that was entered by the consent of his counsel without his own agreement.

The Master of the Rolls, acting alone, cannot make a decree of the Court of Chancery.

1 Vernon 273, 23 E.R. 466

Eodem die [20 November 1684].

Upon a bill of review, the error assigned was that there was no ground for making this decree more than that it is mentioned in the decree that it was made by the consent of the plaintiff's counsel and he ought not to be concluded by the consent of his counsel. And that was allowed to be a good error as also that the decree was made by the Master of the Rolls alone, and he cannot, by his commission, make a decree without the assistance of two Masters.

Note this case not being warranted by the record, it is thought fit to insert the words of the record itself, which are as follow, viz.:

Jovis Vicesimo Die Novembris, Anno Regni Caroli Secundi Regis Tricesimo Sexto, inter Edwardum Smith, Baronum, Querentem, [et] Anna Turner, Viduam Defendentem. Lord Keeper [NORTH]. The matter upon the plea and demurrer put in by the said defendant to the plaintiff's bill of review coming this day to be heard and debated before the Right Honorable the Lord Keeper of the Great Seal of England in the presence of counsel learned on both sides, upon opening the matter of the said defendant's plea, which is grounded on a submission or consent of the now plaintiff Smith's counsel to a decree made in a former cause, wherein the defendant Turner was plaintiff and the now plaintiff Smith defendant and, therefore, the decree in the former cause, against which the plaintiff's bill of review seeks relief, being grounded on a consent, ought not to be impeached or prejudiced by the now plaintiff's bill. Upon debate of the matter of the bill, plea, and demurrer, this court held the said plea and demurrer to be good and sufficient, and does order that the same do stand and be allowed.

[Reg. Lib. 1684 B, f. 101.]

Lloyd v. Gunter
(Ch. 1684)

Upon a commission to take an answer, the defendant cannot file a plea of res judicata.

1 Vernon 275, 23 E.R. 467

Eodem die [20 November 1684].

The defendant had pleaded a former decree in bar to the plaintiff's bill. But the plea was not suffered to be opened for that it came in after a proclamation returned and also came in by a general commission which was to take the answer only, and not to plead, answer, or demur.

[Raithby's note: This plea appears to have been referred to one of the Six Clerks not towards the cause to examine and certify as to its being regularly taken and returned. Reg. Lib. 1684 B, f. 77.]

[Other reports of this case: 1 Eq. Cas. Abr. 41, 21 E.R. 860.]

219

Hills v. Oxford University
(Ch. 1684)

*A court of equity can order an action at law to be filed to determine the validity of a royal patent.
A preliminary injunction will not be granted where it might result in an unremediable
prejudice to the defendant.*

1 Vernon 275, 23 E.R. 467

24 November 1684.

In the eighth year of King Charles I, there was a patent granted to the University of Oxford to print Bibles and other books not prohibited. [On] 30 March, 8 Car. [1633], that patent is confirmed. And it limits that there shall be but two presses and three printers. The plaintiffs claim as the king's printers under several patents continued down by mesne assignments, and they bring their bill to restrain the defendants from printing Bibles etc. And it was observed that the Bible was translated at the king's own charge, so that the copy was his, and that printing was brought in by Henry VI at his own charge.

The Lord Keeper [NORTH] was of opinion that it was never meant by the patent to the University that they should print more than for their own use or at least but some small number more to compensate their charge. But, as they now manage it, they would engross the whole profit of printing to themselves and prevent the king's farmers of the benefit of their patent. However, he said the validity of the several patents was a matter proper to be determined at law and the plaintiffs were now proper only for a discovery. And, therefore, he ordered that the plaintiffs should bring an action at law in the King's Bench against the University or the defendants Parker and Guy, who claimed under the patent to the University, and that it should be tried at the bar. And the defendants were to admit they had printed a competent number of Bibles at the trial [and the plaintiffs' patent as king's printer and the plaintiffs to admit the defendants Parker and Guy to be well and truly constituted the University printers].

And, though the plaintiffs pressed much for an injunction to stay the University printers from going on with the printing of Bibles until the trial had settled the right, yet the Lord Keeper [NORTH] refused to grant it in regard that, in case the right should be found with them, they would by such prohibition receive a prejudice that he could not compensate nor make good to them.

[Reg. Lib. 1684 A, f. 766.]

220

Newhouse v. Milbank
(Ch. 1684)

A writ of prohibition lies to prevent a lower court from exceeding its jurisdiction.

1 Vernon 276, 23 E.R. 467

Eodem die [24 November 1684].

A [writ of] prohibition was granted to an inferior court upon a suggestion that they held a plea of a matter out of their jurisdiction.

Bartholomew v. Meredith, a/k/a Moorehead
(Ch. 1684)

Where a portion becomes payable, it is a vested interest, and it passes to the administrator of the deceased devisee.

1 Vernon 276, 23 E.R. 468

27 November 1684.

J.S., by will, devises land to be sold for the payment of portions to his younger children. One of the children dies after the portion becomes payable but before the land was sold.

Per curiam [NORTH]: The administrator of the child that is dead is entitled to the money.

[Raithby's note: The devise was to trustees and their heirs upon trust to sell and to divide the moneys arising by the sale amongst his four daughters if then living and, if any of them should be dead and should leave any child or children, that the respective share of such daughter or daughters so dying should be equally divided amongst the children of her or them so dying. Two of the daughters died leaving issue, and, of the issue of one of the daughters so dying, two children died before the sale took place. This was a bill by the purchaser of the lands, and the sale was decreed, and the representatives of the two children who died before the sale were declared entitled to their respective proportions of the purchase money. Reg. Lib. 1684 A, f. 155.]

[Other reports of this case: 1 Eq. Cas. Abr. 268, 21 E.R. 1037.]

Palmer v. Young
(Ch. 1684)

Where a joint tenant surrenders a lease and takes a new lease in his own name only, the new lease will be deemed to be held in trust for all of the original joint tenants.

1 Vernon 276, 23 E.R. 468

Eodem die [27 November 1684].

One of the three that held a lease under a dean and chapter surrenders the old lease and takes a new one to himself.

Per curiam: It shall be a trust for all.

[Reg. Lib. 1684 B, f. 124.]

[Other reports of this case: 1 Eq. Cas. Abr. 380, 21 E.R. 1117.]

Attorney General v. Vernon
(Ch. 1684-1686)

*A court of equity, upon an English bill, may decree letters patent to be delivered up and cancelled.
A grant of land from the crown can be vacated for procedural defects and for surprise.
In a patent from the crown, the words ex mero motu are merely words of course.*

1 Vernon 277, 23 E.R. 468

The bill was that His Majesty, in the right of his Duchy of Lancaster, was seised of the honor of Tudbury, the forest of Needwood, and of many other particular lands in the bill specified, and that the defendants had intruded and committed waste, sometimes, alleging the lands descended to them or some of them from their ancestors, at other times, pretending a grant thereof from His Majesty, whereas, if there was any such grant, it was obtained by surprise and by false particulars, many things being omitted or not valued and those that were valued were much undervalued, and that it did not pass in the usual form of grants of inheritance under the Duchy seal, and that endeavors were used to stop the grant, but without effect.

To this bill or information, the defendants pleaded that they had paid to His Majesty £7000 in money and had conveyed to him the lands, whereon the fort of Sheerness was built, and that, in consideration thereof and of the king's special grace and favor, by letters patent under the Duchy seal, executed by livery, in pursuance of a warrant under the king's signet or sign manual, His Majesty did grant to the defendants Brown and Boheme in the words following. [And, then, they set out the letters patent]. And the defendant Vernon averred that, though the patent passed in the name of the other defendants, yet that was done to prevent a merger of several leases he had in part of the premises, and that, as he believed, the grant was intended in favor of him, who had served His Majesty and the late king with the hazard of his life, and had suffered much for them, both in his person and his estate, and that, therefore, and for that letters patent could not be avoided by an English bill, but the matter in question was properly at law and ought to be determined in the Duchy and that the defendants were purchasers, equity ought not to avoid their grant or to put them to discover matters in avoidance of it.

And, by the defendants' counsel, it was insisted:

First, that there never had been any precedent of this nature to repeal letters patent by an English bill in Chancery, but, as to that, it was *causa primae impressionis*.

Secondly, that a title under letters patent is a title purely at law and determinable there and that, likewise, there is a proper remedy by *scire facias*.

Thirdly, as there was no precedent of any such bill, so it was impracticable to proceed here, for that the letters patent pleaded and all other letters patent are matter of record, and cannot be disannulled but by a matter of as high a nature. And the English side of the Court of Chancery is no court of record. And, therefore, letters patent cannot, neither can a fine, be vacated or cancelled by a decree on an English bill. But, if anything could be done on such a bill, at most, it could be but to decree a reconveyance. And that was not prayed by the bill.

Fourthly, it was observed that the word 'fraud', which, if anything, must give jurisdiction to the court in this case, was not in the whole bill, for that the whole charge of the bill goes but to two things only, *viz.*, first, that the patent passed over-hastily and had not its due progression through all the offices, as in the case of a grant of an inheritance under the Duchy seal, according to the usage of that court, it ought to have had, and, secondly, that this grant was obtained by misinformation and false particulars or at least that His Majesty was not duly and fully apprised of the value of the lands when this grant passed.

As to the first of these objections, it was said that the grant passed duly or not; if not, that

would avoid the grant at law and the usage of the Duchy court is most properly determinable there. But, if it passed regularly and according to law, then could be no objection upon that account against it in equity. And it was urged further that, though it might be reasonable where there is a general warrant for a grant that it should pass through all the proper officers hands to the intent they might examine and take care that the grant be not larger or more comprehensive than His Majesty intended it, yet, where there is a warrant to pass a patent *in haec verba*, as in this case there was, there, the particulars and manner of the grant is fixed and ascertained by the warrant, and there needs no such care or scrutiny of the officers about it.

As to the second objection, it was said it had never yet been thought a reason sufficient to avoid the king's grant, because he did not receive a consideration adequate to the value of the land, for kings are supposed to be bountiful, and not to make a bare Smithfield bargain. And, though it should appear upon an examination in this court that there was an overvalue, yet that would be no reason to avoid this grant, for that the grant is not only in consideration of the £7000 in money paid and of the conveyance of the lands at Sheerness, but also of the king's special grace and favor. And the defendant, Vernon, has by his plea shown himself to be a person who had some title to the king's favor, he having served His Majesty and the late king with the hazard of his life, and suffered for their service both in his person and in his estate. And he expressly avers that the patent was intended in favor of him, though not taken in his name, to prevent a merger of his leases. And, then, when the value shall appear, how much shall be said to pass in respect of the king's bounty and how much in respect of the consideration paid? Certainly, whatever the overvalue shall be, it ought to be imputed to the king's bounty, unless the law had prescribed limits, which it has not, to the king's grace and favor.

And it was further observed that the defendant Vernon had several long leases of part of the premises, and, in those leases, the rents reserved were thought a good consideration. And those leases were not yet impeached. And not only the same rents were continued, but an increase of rent was reserved on the grant of the inheritance. And so the same consideration goes to that too.

Fifthly, that there was a particular *non obstante* in the patent, that it should not be impeached for mistaking or not mentioning the values and a covenant for further assurance in case the grant was any way defective and that the force of such a *non obstante* was properly determinable at law.

Sixthly, if letters patent shall be impeached by an English bill in Chancery upon such suggestions and pretenses as these, no patentee can be safe, nor shall the king's seal be of any force. And, unless the utmost consideration was paid, the grant shall be open to the best bidder. And, after never so long an enjoyment, the patentee shall be called in here, and entangled in proofs of the values of the lands granted. And, since *nullum tempus occurrit regi*, nothing hinders but they may go back and repeal letters patent made by King James or as much farther back as they please.

Lastly, the defendants were purchasers, and had pleaded themselves so to be. And £7000 was actually paid, and their lands at Sheerness were conveyed to the king. And, therefore, as purchasers, they were entitled to the protection of the court. And, in case their grant was defective, they might possibly have an equity to have it supplied here. But there was no equity to destroy a purchaser's grant. Neither was it the practice of this court to compel a purchaser to answer matters whereby to impeach his grant. And, if the defendants should be forced so to do, the consequence thereof might be to strip them of their purchase and yet be left without a remedy for the consideration paid and the lands conveyed.

For the king, it was insisted by the counsel, first, that, in this case, a bare purchase was intended and not a gratuity and that the letters patent were obtained in respect of the consideration paid, and not as of the king's bounty, for that would have much altered the case.

Secondly, as it was intended a purchase only, so it was unduly obtained by false particulars. And it was no small evidence of the fraud that it was carried on in such haste and by such unusual methods.

Thirdly, that the king, in this case, was properly relievable in this court by an English bill, first, for that the king may sue in what court he pleases, secondly, the bill charges a surprise and false particulars, and a fraud is properly relievable here, thirdly, that the king ought not to be in a worse

condition than a subject, and a nobleman shall be relieved for such a fraud put upon him by his servant. And, in case the king shall not be relieved in this case by an English bill, he will be without a remedy, first, for that there is no remedy to be had in the Duchy court, for that is only a court of revenue, and not a court of law, and for that they cited Owen and Holt's Case in my Lord Hobart, fo. 77, and the Case of Dowty and Fisher, in the King's Bench;¹ and, besides, the complaint of the bill was that the Chancellor of the Duchy had not done well in this matter. Secondly, as this case was, the king could have no remedy by *scire facias*, for that these patents were no record of this court and for that, in a *scire facias*, the deceit ought to appear within the body of the patent, but the matters upon which the bill seeks relief are frauds in obtaining the grant and matters *dehors* the patent.

Fourthly, they said there could be no such danger as was pretended to ancient patents, for that the equity will not be the same against the ancient patent, where there has been a long enjoyment under it, as against a patent newly passed and fresh in agitation. And, as to ancient patents, it shall be presumed the king intended a bounty, which will alter the case. As to what has been urged that there was no precedent for such an English bill, it was said there is no precedent of any grant of such value passed on such consideration.

Lord Keeper [NORTH]: The question is short, whether there be a fraud or not. If a fraud, it is properly relievable here. It is not fit such a matter as this should be stifled upon a plea. And, therefore, Lord Keeper [NORTH] overruled the plea, and denied to save the benefit of it until the hearing, because he would not give any countenance to such a case.

[Reg. Lib. 1684 A, f. 109.]

2 Chancery Reports 353, 21 E.R. 685

Sir Robert Sawyer, Knight, His Majesty's Attorney General, on behalf of His Majesty, plaintiff; and Edward Vernon, Esq., Rupert Brown, and Samuel Boheme, defendants.

The scope of the information in this cause being to set aside letters patent obtained by the defendant Vernon in the names of the defendants Browne and Boheme in nature of a grant or contract under the seal of the Duchy of Lancaster, of the Honor of Tudbury, and the Forest of Needwood at a great undervalue, wherein his late Majesty was surprised, His Majesty's Attorney General by information setting forth that his late Majesty being seised in fee in right of his crown as parcel of his Duchy of Lancaster of the said Honor of Tudbury of the value of £2000 *per annum* and also of the benefit of timber trees, woods, etc. of the value of £30,000, whereon the defendants commit waste, pretending title to the premises by grant of the crown from his late Majesty, whereas such grant was unusually obtained, and by surprise, for that about September 1683, for some small sum and getting some interest in ground at Sheerness to the value of about £500, and endeavouring to value the lands at Sheerness at £3000, in October following, they did prefer a petition for the said grant and obtained a reference thereof to Sir Thomas Chichley, Chancellor of the Duchy, and hastily obtained a report in November and, within two days after the report, a warrant was signed for passing the grant, though endeavors were used to stop it by command from his late Majesty and the Lords of the Treasury the 19th of the same November, and, particular application made to the Chancellor of the Duchy, he then denying he knew thereof, and it was not known that any grant was thereof until the particular thereof was found in a scrivener's shop about a month after the passing thereof, contrary to the course of the Duchy, there being no such grant yet registered or enrolled, to the prejudice of His Majesty and the nobility and others having dependency there, the said defendant having given untrue particulars of the most profitable matters thereof to the value of some thousand pounds wherefore the said grant ought to be delivered up to be cancelled.

¹ *Owen v. Holt*, Hobart 77, 80 E.R. 227; perhaps *Fisher v. Patten* (1671), 1 Ventris 155, 86 E.R. 105, 2 Levinz 24, 83 E.R. 435, 2 Keble 826, 84 E.R. 522, *sub nom. Duchy of Lancaster Case* (1671), 2 Keble 780, 84 E.R. 493.

The defendant Vernon insisted that the defendants having long leases of the said premises unexpired of a great yearly rent and also offices within the premises, upon which has been expended great sums of money in buildings and repairs, whereby His Majesty's ancient rent has been much increased, and the defendant Vernon being informed of some endeavors used to obtain the reversion in fee of the said premises, he petitioned His Majesty in September 1683 in the name of the other defendant Browne to prevent a merger of the said leases and, on the 29th of the said September, obtained a reference to the Chancellor of the Duchy of Lancaster, and 19th of November 1683, the said Chancellor made a report, and thereupon, 20 November 1683, His Majesty signed a warrant dated the 19th of the same month, authorizing the Chancellor to make a grant of the premises, that thereupon the defendant Vernon by deed 20 November 1683 between his late Majesty of the one part and himself on the other did sell unto His Majesty all those forty acres in the Isle of Sheppey, whereon His Majesty's Fort of Sheerness is built, that, in consideration thereof, and £7000 paid by the defendant for His Majesty's use, his said Majesty, 21 November granted unto the defendants Browne and Boheme in trust for the defendant Vernon all the said premises.

And the said defendant Vernon insists that the said patent passed regularly and is effectual in law and ought not to be impeached, the impeachment whereof being in derogation of other His Majesty's grant and the considerations are equivalent to the grant, His Majesty's favor being an ingredient thereunto, and the premises mightily over-valued by the surveyor, and the said patent was left with a scrivener, whereon to raise £10,000, but the same was not thought a sufficient security for such a sum, that the defendant Browne for £10,300 has purchased the said premises of Vernon and insists on the said grant as good in law and is advised that this court will be tender in examining the methods of the passing the said grant, when it has received the allowance of the proper officer by having the seal affixed to it.

His Majesty's counsel insisted that this suit is properly brought in this court by English bill to be relieved against the said grant or patent and that no *scire facias* can be brought in the Duchy or in this court for the reversal thereof, and, if a bill or information (as this case is) should not be admitted, His Majesty would be in a worse condition than any of his subjects, considering the great overvalue and the quick, hasty, and unusual manner of passing the patent, contrary to all patents of that nature, it passing neither by privy seal, privy signet, or any immediate warrant, but the Chancellor of the Duchy acted therein in all capacities, and passed the grant after notice and fresh pursuit by his late Majesty for recalling the same and express prohibition that no money should be received.

This court, assisted with several judges, were all clear of opinion that this suit was proper by English bill and that the patent could not be annulled or made void by *scire facias* or otherwise at the common law and the bill being to have remedy for His Majesty against fraud, surprise, and deceit, which their lordships declared was made out, and that the king was most grossly deceived and abused as to the value and that, therefore, His Majesty ought to be relieved in this court or otherwise he would be remediless and so in a worse condition than any of his subjects in a case of this nature and this court, with the said judges, taking into consideration the excessive over-value, which was offered to be made good by the surveyor, the surprise and deceit and the speedy and unusual passing the said grant and that no money was paid until the grant was ordered to be stopped and directions for this prosecution, which was before livery and seisin.

This court declared and was fully satisfied that, in this case, His Majesty ought to be relieved and the said grant set aside and made void and decreed the same accordingly and the enrollment thereof in the Duchy Court vacated and the defendants to procure those, in whom the estate in law is, to reconvey unto His Majesty and the defendants at liberty to apply to His Majesty for to have the money paid back, which was paid to Sir Thomas Chichley and Cuxton, as aforesaid.

Lincoln's Inn MS. Misc. 557, f. 114

24 and 26 February 1685[/86].

The defendants, for £7000 and more paid and the soil of Sheerness was conveyed to the king in fee at the value of £3000 with the words '*de gratia nostra speciali et ex certa scientia et mero motu nostris*', have obtained a grant under the Duchy seal to Rupert Browne and one Boheme in fee of the honor of Tutbury in the County of Stafford, being Duchy lands, which grant was made upon a reference and a report of Sir Thomas Chichele, Chancellor of the Duchy and by the warrant of King Charles II *in haec verba*.

And now, there was a bill exhibited in Chancery in the name of the Attorney General of the king and not in the name of the Attorney General of the Duchy against the grantees and *cestui que trusts*, suggesting that the king was deceived in the grant and he was not fully and truly informed of the value and quantity and nature of the estate. And the effect of this bill was to set aside this Duchy grant in the Chancery in equity for those reasons aforesaid.

The defendants, at first, pleaded the letters patent and the consideration and the methods of procuring them. And they denied any fraud or concealment.

But this plea was overruled by Lord Keeper NORTH.

And this day [24 February 1686], the Lord Chancellor [JEFFREYS], being assisted with SIR THOMAS JONES, Chief Justice of the Common Bench, and MONTAGU, Chief Baron of the Exchequer, set aside the said grant and decreed it to be void, and [he decreed] a re-conveyance and an account without any remedy or allowance for the purchase money paid or charge in obtaining the grant, it not being before him by any bill or demand, upon the reason that the king was deceived and did not have full and true information of the nature and value of the estate.

Note a grant of Duchy lands under the Duchy seal was set aside and examined in Chancery. And, in the debate of this case, it was admitted that no *scire facias* to reverse this patent could be brought either in the Duchy or in this Court of Chancery and, if relief will not be [given] upon this bill, the king will be remediless against so great a surprise, false suggestions, and deceit. And, in the decree, there are some reflections against the method used in passing the grant and the hastiness of it. And the proposals, petition, reference, report, warrant, and patent passing were all examined, inspected, and considered by the court. And the defendants were left at liberty to make an application to His Majesty for his direction and order for receiving back the money, being £7100 paid to the use of the king beyond the value of the estate of Sheerness, [which was] thought to be worth £3000 more.

[Other copies of this report: Georgetown Univ. Law Library MS. B88-7, p. 631.]

1 Vernon 370, 23 E.R. 528

26 February [1686]. Lord Chancellor JEFFREYS; Lord Chief Justice JONES; Lord Chief Baron MONTAGU.

The information set forth that His Majesty was seised in fee as parcel of the Duchy of Lancaster of the honor of Tudbury in the counties of Derby, Stafford, Leicester, Nottingham, and Warwick and of the manor of Tudbury, the forest of Needwood, the offices of High Steward of the honor of Tudbury, Constable of the castle and Lieutenant of the forest of Needwood, and Bailiff of the new liberty, and Bailiff of the castle and manor of Tudbury, and High Steward of the lordship and manor of the High Peake and Mirkersworth, the office of Steward of Newcastle-under-Lyme, lately granted to William Levison Gower, Esq., and of all those lands, tenements, and hereditaments, parcel of the demesne lands of the said castle and manor of Tudbury demised by his late Majesty to Michael Andrews, and since by his now Majesty to Mary Blagg, and divers other lands, privileges, etc., all which premises are parcel of the Duchy of Lancaster and are one year with another £2000 *per annum* and His Majesty ought accordingly to enjoy the same without interruption and to receive

the rents and profits after the expiration of the lease granted of some part thereof. And he is also entitled and ought to have the benefit of all the timber and wood on the premises, which amounts to above £30,000, and no waste or other prejudice to the disinherison of His Majesty ought to be done.

The defendants, by combination to deprive and prejudice His Majesty in his right in the premises and to commit waste therein, have lately entered on the premises and begun to cut down the timber, and they give out they will cut down all or the greatest part thereof, as also the hollywood and underwood, to the apparent wrong of His Majesty, pretending some title by descent or conveyance from some of the king's ancestors or that the same or greatest part thereof is duly granted unto them out of the crown by his now Majesty. Whereas, if they have any such grant, the same was obtained by unusual means and by surprise and ought not to be binding to His Majesty, he being not duly apprized thereof. About September 1683, the defendants proceeded in a clandestine manner to deceive His Majesty by making a colorable proposal for paying some inconsiderable sum, far short of the real value, and the getting in the interest of some grounds at Sheerness for His Majesty and discharging the arrears due from His Majesty for the same, which would amount to above £400 or £500, and yet no money has been paid to His Majesty. And the defendants endeavored to have the ground at Sheerness estimated at £300.

In October following, the defendants petitioned His Majesty for the said grant and a reference to Sir Thomas Chichley, Chancellor of the Duchy, and a report was hastily obtained from him in the same month. And, about the 19th of November following, a warrant was signed for passing a grant of the premises, and, about two days after, a grant was obtained under the Duchy seal, albeit all endeavors were used to stop the grant by His Majesty's express commands and by the order of the Lords of the Treasury on the 19th of November, and particular application was made to the Chancellor of the Duchy, but in vain, he denying he knew of any such grant. Nor could it be known until a particular was found at a scrivener's shop about a month after, which proceedings are contrary to the course that has always been, and ought to be, observed in passing grants of inheritance under the Duchy seal, for there ought to have been first a warrant of the Auditor to make a true particular to the Surveyors, who return an estimate, and, thereupon and not before, a warrant is granted by His Majesty, and then the Clerk draws up a grant for the King's Attorney of the Duchy's perusal, who, upon his approving thereof, signs the bill with a docket, which, afterwards being signed by His Majesty, passes the seal of the office. But, by the defendants' hasty and unusual proceedings, there is no such grant yet registered with the Clerk, nor enrolled with the Auditor, nor any footsteps of the proceedings to be seen in the said office. His Majesty is deceived, not only to his disinherison, but to the apparent prejudice of the crown. And the said honors, manors, and forests being of so great extents and large privileges and royalties, and multitudes of the nobility, gentry, and freeholders, copyholders, and others having dependence there and being thereby furnished with all necessaries for profit and pleasure, they are most proper to be preserved in the crown.

The defendants obtained the said grant by untrue particulars, the estates in such particulars being set down of less value by some £1000 by the year than the same are really worth, and the wood and timber not valued, though worth above £30,000, and the quantity of acres represented less by some thousands than they are, and several great privileges and profitable matters having no value at all set on them, as appears by a particular lately returned to His Majesty by his Surveyor General, whereby the premises are estimated at above £60,000, nor is there any considerable rent reserved, for all which causes and other imperfections the said grant ought not to deprive His Majesty of the possession and right thereto, nor ought any of the timber to be cut down by virtue thereof, but such grant ought to be delivered up and cancelled.

And, therefore, it was prayed by the said information that the defendants may set forth what proposals were made to His Majesty for obtaining the said grant, by whose interest procured, what reference was made thereupon, and whether any report was made, by whom, and how long after the reference, when the warrant was signed by His Majesty and the grant passed the seal, and whether any enquiry was made after it from His Majesty before it was sealed, and what answer was given him, whether any report was made by the Auditor or Surveyor General, or why omitted, and where

were the particulars signed, whether it is not the usage of the Duchy to have all grants of inheritance pass as before is suggested, and why the said grant passed without observing that course, for whose benefit the said grant was made, and for what considerations, and the value of the premises when the said grant was passed, and of the timber and wood on the same that the defendants' proceedings in committing waste might be stayed and that the said grant might be decreed to be delivered up and cancelled, and such further relief had as should be meet.

The defendant Vernon pleaded his patent and that he was a purchaser, which being overruled, he answered and insisted on his title. And by his answer, he set forth that he believed the late king was seised in fee in the right of his Duchy of Lancaster, *inter alia* of the honor of Tudbury and forest of Needwood and other the particulars hereafter mentioned to be granted to Mr. Brown and Boheme, though not of such great value as in the bill, that the defendant having several leases of parcel thereof for long terms at a considerable yearly rent, as also offices and commands within the forest and honor, and having expended great sums in building and repairs and otherwise and the king's rents having been increased on taking some of the leases and the reversions of some of the lands therein having been granted to others and being informed endeavors were used to obtain the reversion in fee of the lands in lease and all the rest in the information with the rents thereon, the defendant was induced to draw up a petition for the king's granting the premises to such as the defendant should nominate, that he having acquainted the duke of Ormond with his intentions and the duke, as he believes and doubts not to prove, advised with the Attorney General therein and obtained the favor to make the king acquainted therewith, the duke being privy to what the defendant had done and suffered for the service of the late king's royal father and himself, as also for that the duke had an interest in the premises, of which the grant was sought, being steward of the honor and constable of the castle of Tudbury and lieutenant of the forest, *inter alia*, which are held for the lives of the duke and the earls of Arran and Ossory, and a lease of the site of the castle for about ninety years yet in being.

He attended the earl of Sunderland, one of the Secretaries of State, with a petition to the king in the name of Rupert Brown, the defendant's nephew, whose name he made use of to prevent a merger of his lease, with the proposal annexed, *viz.* that the king would be pleased to grant to the defendant the inheritance of the honor of Tudbury and forest of Needwood with the lands thereto belonging, parcel of the Duchy, pursuant to the proposal annexed, *viz.* to pay to the king £7000 in money to reserve the old rents and to pay to the king as much as would amount by increase of rent and deduction of fees to £70 *per annum* to convey to the king the lands whereon the fort of Sheerness was built, with a release of all demands by reason thereof and to keep for His Majesty's service 1000 deer forever clear of all charges *prout* the petition and proposal 29th of September.

The earl of Sunderland signed an order of reference to the Chancellor of the Duchy, *viz.* that His Majesty was graciously pleased to refer the petition and proposal to Mr. Chancellor of the Duchy to consider of it and report what might be fit to be done therein for the king's service and the petitioner's gratification, which His Majesty was disposed to *prout* order.

The Chancellor having informed himself by surveys and otherwise, though what his methods therein were the defendant knows not, and reported a satisfactory account thereof, the king signed a warrant authorizing the Chancellor to pass a grant of the premises in the same words with the grant hereafter mentioned.

By an indenture dated the twentieth of November 1683, duly executed and enrolled between His Majesty of the one part and the defendant on the other part, reciting that Godfrey Meynell for £400 had granted to the defendant and his heirs all those twenty-three acres of fresh and seventeen acres of salt marsh in the island of Sheppey, whereon the fort of Sheerness was erected, and all his estate and interest therein, the defendant granted and released the same and all his interest to the king, his heirs, and successors and all moneys whatsoever which were due or owing to or could anywise be demanded by the said Meynell and the defendant or either of them, the defendant having power from Meynell in that behalf, *prout* the deed.

In consideration thereof and of £7000 *bona fide* paid by the defendants or some of them into the receipt of the Duchy and for other considerations, the king, by his warrant under his sign manual

in the words in the patent hereafter mentioned and in pursuance thereof by his letters patent under the Duchy seal, executed by livery and seisin, did give and grant *prout* the letters patent.

He knows not whether, by the usage of the Duchy Court, grants of inheritance ought to pass in such manner and form as by the bill is set forth, but he believes the grant was duly passed and is effectual in law. And whether or no the grant was enrolled is not material. He insists that the grant ought not to be impeached on a pretence of an overvalue or the defendant was drawn under an examination in this court touching the same, for he avers that, in the lifetime of the late King Charles I, he did faithfully and with the hazard of his life serve him in the late war in arms and was by the Usurper [Oliver Cromwell (1599-1658)] long imprisoned in the Tower [of London] and thereby and otherwise suffered much, both in his estate and person. Although the patent was taken in the name of Brown to prevent a merger of the defendant's leases and also in the name of Boheme to prevent Brown's wife from claiming dower, yet their names were purely made use of at the defendant's nomination and in trust for him and his heirs and was granted in favor of this defendant at the instance of his friends and with respect to his sufferings, as well as for the consideration of the conveyance of the lands in the Isle of Sheppey and the £7000, which the defendant avers was really paid for the king's use to Nathaniel Curson, Deputy Recorder of the Duchy *prout* his receipt.

Inasmuch as the grant is of his late Majesty's special grace, as also for the considerations before mentioned and in the grant expressed, the defendant insisted the patent ought not to be impeached under pretence of surprise or want of consideration or any of the suggestions in the bill, for which there is no ground in the patent, especially since it is a grant of the honor, lands, etc. in the bill, which ought not to be impeached by an English bill in this court, being no court of record. And he is advised it would be in derogation of His Majesty's grants and of dangerous consequences to all his subjects, such especially as claim any estate of inheritance by letters patent if they should be drawn under question on such pretenses as are in the information, especially since the suit wants a precedent. And if these be grounds to avoid the king's grant, they are such as may lie against all that are of the king's favor and other considerations, nor can any averment lie against such grant where His Majesty's grace and favor is an ingredient in it.

The patent is a matter of record and good in law, and the common law ought to determine the validity thereof, nor ought, nor can, a patent if a matter of record be vacated or cancelled by a decree on an English bill and the rather for that such considerations as aforesaid have been paid and satisfied, besides the great charges in passing it. And the defendant is entitled to the protection of the court as a purchaser, and the validity of the patent ought not to be impeached here, whereby the defendant may lose the £7000 and the Sheerness lands.

As to the particular mentioned to have been returned to the king by his Surveyor General, the defendant insists that the same being *ex post facto*, no use ought to be made thereof to impeach the grant, nor is the same true, but set on foot, not for the king's advantage, but by some who would impeach the defendant's grant in expectation of a grant thereof to themselves, most of the particulars thereof being valued at excessive rates and many thereof being in jointure to the Queen Dowager with a power of filling up leases for thirty-one years at anytime during her life. And, as appears by the particular, the Surveyor has taken many things by hearsay and by the relation of others, who would impeach the grant, and great values are there put upon reversions after long leases on inconsiderable offices, such as were never valued in a purchase, as the offices of steward, bailiff, and the like, the profits whereof will scarce answer the trouble of any that are capable to be trusted therewith. And the Surveyor has computed the soil of the forest at £27,200 upon a supposition that the forest may be inclosed, whereas there are several persons of quality and worth that have charters and claim estovers and rights of common throughout the forest. And, whereas, in the late wars, there was an ordinance for inclosing it,¹ yet the same could not be effected without an armed force, much less is it probable that this defendant should compass it. Neither is the Surveyor's valuation of the

¹ Ordinance of 22 November 1653, C. H. Firth and R. S. Rait, edd., *Acts and Ordinances of the Interregnum* (1911), vol. 2, pp. 783-812.

timber less extravagant, being computed at £30,000, and he is mistaken in quantity and value, as may appear by two surveys taken in the late times with more exactness, the one in 1650, which values the wood and timber at £13,591 18s., the other in 1658, where they are valued at £12,284, 18s. 2d., out of which estovers were to be allowed *prout* surveys. And, afterwards, timber to the value of £3098 9s., was cut down and sold by the usurpers, and the wood in the forest was certified in 1662 and 1663 by the late Lord Seymour and the officers of the forest to be worth about £12,000, and he believes they really thought it worth no more. And much of the timber has been since cut down and carried away by several grants from the king, and many of the best trees have been picked and culled out for such as claim the estovers, the earl of Devonshire claiming, *inter alia*, three cart loads of wood from the Exaltation [14 September] until the Invention of the Holy Cross [3 May] once a year and as much timber as was necessary for building and repairing old houses and tenements formerly belonging to the prior and convent and the tenth penny and part of all timber sold within the chase and other tithes and perquisites *prout* the earl's answer in the Duchy.

Considering the matters before, as also that the country there abounds with timber and no navigable is river near, much of the timber is to be preserved for estovers, and hollies and underwoods and other woods are to be preserved for the deer, which the defendants are obliged to keep, the Surveyor's report will appear to be grounded on mistakes and made up of extravagant computations and imaginary values.

The honor of Tudbury was formerly of a great extent and dependencies, yet it is not now of such consideration to the crown as the bill surmises, being dismembered and reduced to a narrow compass, the most considerable manors and lands formerly held of it being transferred and held of others of the king's manors. And, particularly, in 6 Car. I, *inter alia*, the inheritance of the manor of Braseington, Bouteshall, Sherrald Park, and lands in Tudbury were granted to Charles Harbord, Esq., *et al.*, in consideration of £2207 in money and a debt of £2350 and of the king's grace, which are of the value of £3000 *per annum*, as he is informed, and are held of the honor of Enfield.

He denies the late king was surprised or deceived in the passing of the grant or that any false particulars were delivered to the king by the defendant or any other to his knowledge or that the king was misinformed, unless by the particulars of the Surveyor General in the bill, of the quantity or value of the premises, but he believes the contrary.

He denies he knows or believes that there was any order or direction by the late king or Lords of the Treasury for the hindering or stopping of the grant or that any order or message for that purpose was sent or delivered to the Chancellor of the Duchy on the 19th of November 1683 or before the passing thereof. But, if such had been, the Chancellor of the Duchy, as he believes, would have obeyed it. And he believes it altogether untrue and without ground, for that, as he is informed, the king, for a considerable time after the grant was passed, expressed himself to be well satisfied therewith and declared he designed the £7000 consideration for a particular use, as he is informed and believes, and has heard that, a month after the grant passed, there was a paper left with the Chancellor's secretary, *viz.* 'Let no grant pass of Castlehay, Agardsley, Little Park, and Hanbury Park, the Castle of Tudbury, and the rangership of Needwood Forest, until notice to my Lord Dartmouth, his lady, or Mr. Richard Grahme'.

He denies any endeavors were used by him or any to his knowledge to have the Sheerness lands valued at £3,000 or a greater sum than the real value, the consideration paid by the defendant for the same appearing in the grant, though he believes he bought the same at a great undervalue.

He believes, after the grant passed, a particular of the things thereby granted, as well as of the defendant's leases and estates therein, might be left by the defendant Brown at a scrivener's in London to procure £10,000 thereon for the defendant, but the same was not thought a sufficient security, and, the defendant being thereby disappointed and the defendant Brown having advanced and become bound with the defendant for several sums, it was agreed between them that Brown should become a purchaser of a full moiety of the premises for £7000, which was the £7000 paid to the late king, and should discharge the defendant from all engagements that he stood bound in for raising thereof and that Brown should lend the defendant £3300 on a mortgage of the other moiety, and, thereupon, this defendant and the defendants Brown and Boheme, by good assurance well

executed by way of lease and release, conveyed the premises to Mr. Serjeant Birch and his heirs, as to one moiety thereof, to the use of Brown and his heirs, and, as to the other moiety, to the use of Birch and his heirs in trust, first, by sale or profits, to raise and pay the £3300 with interest to Brown, afterwards, for payment of the defendant's debts, and, afterwards, in trust for the defendant and his heirs.

He denies he has committed any waste or felled any wood since the grant, though he says by several leases to him made of part of the premises, there are botes granted to him and timber for new buildings and repairs.

The answer of the defendants Brown and Boheme:

Rupert Brown believes the late king was seised in the right of the Duchy of the honors, manors, etc. in the bill. And the defendant Vernon informed him he had a promise from the king of a grant thereof in consideration of a conveyance of the Sheerness lands and of £7000. The grant being agreed to be taken in the name of the defendant Brown and the defendant Boheme, his servant, the defendant Brown, at the defendant Vernon's request, advanced and paid the moneys. The king, in consideration thereof and for other considerations in the patent mentioned, by letters patent under the Duchy seal, whereon livery was executed, under the rents and covenants therein, granted to the defendants Brown and Boheme and their heirs the premises in the words therein *prout*. Afterwards, at the desire of the defendant Vernon, the defendant Brown lent at interest to him the sum of £3000, which, with £300 before due to Brown together with interest for the same, was agreed to be secured on part of the premises, which part was for that purpose conveyed to Edward Birch, Esq., named by the defendants Brown and Vernon, the estate in law of the rest of the premises being then settled to the use of Brown and his heirs, in consideration of the £7000, which was paid with the defendant's proper moneys to Mr. Curson, Receiver or Deputy Receiver of the Duchy *prout* receipt.

For the £7000 and £3300, the defendant is a real purchaser of the premises; besides, the defendant has been put to great charges for the drawing of writings, advice of counsel, and other matters relating to the premises.

They both say that, as to the ways or means of obtaining or passing of the grant, other than the paying the £7000 and conveying the Sheerness lands, they are ignorant, being transacted by the defendant Vernon, to whom the king intended a considerable reward. Brown insists that the grant is good in law and ought not to be impeached on the suggestions in the bill in a court of equity, and he cannot give any account of the proposals or proceedings in obtaining or passing the grant, being managed by the defendant Vernon and the defendant concerning himself no further than the paying of the £7000 and seeing the conveyance of Sheerness executed. He conceives the court will be very tender to examine any of the methods or means, how such grant came to be passed when it has received the allowance of the proper officer. The defendant has paid in part of the rent reserved on the patent to Curson for the king's use £6 11s. 9d.

And the defendant Boheme says that he, being a servant to the defendant Brown, is a stranger to the premises, further than that his name was made use of in the patent, and he disclaims any interest in the premises.

The proofs as to the values were very various. And the Surveyor General's survey, which made it amount to £60,000, was reduced to one-half, even by the Attorney General's own proofs. Vernon proved the surveys and all the matters in his answer fully, so that, upon weighing the proofs on both sides, the extremity of the full value did not amount to £20,000. Vernon proved His Majesty's order of reference 29th September 1683 from the Lord Sunderland, principal Secretary of State, to the Chancellor of the Duchy and the 19th November 1683 warrant signed 'Charles Rex' and countersigned by the Chancellor of the Duchy, and the 20th November 1683 Vernon's conveyance of the land at Sheerness to the king enrolled and, the 21st November 1683, the patent passed the Duchy Seal.

The Attorney of the Duchy proved the methods of passing grants, but that when, by the king's immediate command, the lands are ascertained, the estate limited, and rent fixed, as it was here, grants have passed by privy seal or signet.

The duke of Ormond proved a letter written by himself and sent by Vernon 29th August 1683

to the Attorney General signifying that he had left Vernon's proposals with the Lord Rochester, the first Commissioner of the Treasury, and that the attorney's answer was such grant might be legally passed and that the king declared to the duke he intended a kindness to Vernon by the grant and was well satisfied with it and did not express his displeasure until the country gentlemen petitioned against it. And he and the earl of Ardglass and others fully proved Vernon's service and sufferings for the crown, his being a Colonel in the time of the rebellion, his supplying the king with £2000 in his exile, and other signal services, which the king often owned, and his being many years imprisoned under Cromwell in the Tower, and in danger of being put to death in endeavouring the king's restoration.

For the king, it was argued that an English bill was the proper remedy in this case, for that no *scire facias* would lie, it not being a record of this court, and, if it would, yet a *scire facias* would not reach this fraud, it not appearing within the body of the grant. And equity here did but follow the law; many things even at the common law being such surprises as should avoid letters patent in a *scire facias*. And, if a man had been so cunning as to avoid those particular badges of fraud and surprise that came within the reach of the common law and there was a fraud and surprise in the present case, though compassed in another method, it was fitting the king should not be left without relief in such a case. If he was, he would be in a worse condition than a subject, who should avoid a conveyance, nay a fine, when obtained *mala fide*. And it was not fitting that it should be left in the power of the king's officers by their connivance to put His Majesty without relief in the case of a fraud and surprise. And, though there was no precedent of any such suit, yet all precedents had a beginning, and there was scarce any precedent of such a fraud and surprise.

And as the remedy was proper, so, in this case, there was sufficient ground for a decree, there being all the badges of fraud and surprise imaginable. First, in the passing of the grant, there was no warrant to the Auditor to make out particulars, no warrant to the Surveyor to return an estimate, no bill with a docket signed by the attorney, none of the usual methods observed, but only a warrant under the sign manual for passing the grant in question to the Chancellor and countersigned by him, which is to make a warrant to himself, a thing never before heard of, and, though a patent may pass by immediate warrant under the privy seal or signet, yet this is in effect no warrant, being only under the sign manual and no seal to it, neither privy seal nor signet. And then, the hasty proceeding is remarkable. This warrant was signed but the 29th of November, and the patent passed the Duchy seal the 31st of November, though it would take a week's time to engross it. And here, the petition, proposal, the Chancellor's report, and warrant for the grant are all of the handwriting of Woolley, the defendant Vernon's man. And the overvalue in this case was excessive, and the consideration of the defendant's services and sufferings were not to be regarded in the case, the patent being but in common form and no particular notice taken of any services or sufferings, no gratuity or bounty being intended by the king, but it was a bare purchase, and the patent recites the consideration and that the dependencies were great and not fitting to be severed from the crown. Many noblemen hold of this honor, and the precedent will not be of such dangerous consequence as is pretended, for there must be a recent prosecution in the case of a surprise. And here, it was immediately, but an acquiescence for any considerable time would have amounted to a confirmation.

For the defendant, it was said that there are two questions, first, whether the grant be avoidable by an English bill, secondly, if avoidable, whether there be sufficient ground to avoid the patent in question.

First, there is no precedent of any such suit ever brought into this court, and it is Littleton's rule what never was never ought to be.¹ And it is in itself repugnant that letters patent being matter of record should be destroyed by an English bill, the English side of the Court of Chancery being no court of record. And, besides, the law having set the bounds what matters shall be reckoned sufficient to avoid the king's grant and what not and provided remedies for such cases, equity ought not to go beyond the law in this case, and the rather, for that relief in equity ought to be mutual. Now,

¹ T. Littleton, *Tenures*, s. 108.

if the patent had been defective or had not passed so much land as was intended, yet this court would never have relieved the subject, as in *Doddington's Case*,¹ where, even in the body of the patent, it appeared more land was intended to have passed, yet there being a defective description of it, judgment was given for the second patentee against the first, who was a purchaser. And it was never heard that the patentee came into this court for relief, though the lawyers in My Lord Cook's time were men of great learning and abilities and knew well how to advise their clients had they looked upon it as a case proper for this court to have intermeddled with. But, in former ages, it was not thought that letters patent, being matter of record, could be altered or set aside by an English bill. But acts of resumption were then thought necessary, but this indeed is a more easy and expeditious way if it is to be admitted.

An overvalue was never yet thought a sufficient ground to repeal a patent in a *scire facias*, for kings are presumed to be bountiful. And, though all that a subject can do is but what his duty obliges him to, yet there are in this as strong motives to incline His Majesty to be bountiful to the defendant as can be in any case, for, here, the defendant sold £400 *per annum* and spent it in raising and maintaining a regiment for His Majesty's service and was all along in arms from the first setting up the standard at Nottingham and was instrumental in his late Majesty's escape from Bristol; he suffered two years imprisonment in the Tower, presented His Majesty with £2000 in his exile, etc. And the duke of Ormond proves that the king designed him a gratuity and reward by the grant in question. It is a matter much in derogation of His Majesty's grants that they should be impeached on the pretenses in the information and of dangerous consequence to all patentees, especially if the succeeding king shall avoid his predecessor's grant on pretence of an overvalue. Nor is that mischief answered in saying there must be a recent prosecution, for the law says *nullum tempus occurrit regi*. And the law has no more ascertained what shall be called a recent prosecution and what not than it has what shall be reckoned an overvalue to avoid a grant and what not.

As to the objection that this patent did not pass in the ordinary and regular method and had not its due progression, it was answered that this must be taken to be well passed and to be a good grant at law; otherwise, there would be no need of an English bill, but it might be avoided by *scire facias*, for the patent may be removed by a [writ of] *certiorari* into this court, and then a *scire facias* will lie. And the methods of passing grants in the Duchy are various. And the Attorney of the Duchy, in his deposition, says many grants have passed by immediate warrant under the privy seal or signet, and they took it that a warrant under the sign manual was as valid as if it had been under the signet or privy seal. And, in this case, expedition and secrecy, which are objected to as an evidence of a surprise, were but necessary, it appearing in the cause that the defendant had a powerful competitor, the Lord Dartmouth, endeavouring to obtain a grant of the things in question. And the objection that the warrant for the patent and other papers were written by the defendant's servant is of no great weight, it being common for patentees to make use of their own counsel. And patents are many times drawn by them and engrossed by their clerks, and, if the proper officers are answered their fees, there is no great hurt in that, since that is not a reason sufficient to avoid the patent.

As to the overvalue, the proof is various. There have been no less than three former surveys, which, in all other cases, have been the foundation from which they have taken their measures in the Duchy. And, if our witnesses are to be credited, there is not really any considerable overvalue in the case. And the Surveyor's certificate here is *ex post facto*, and that is not by the Surveyor of the Duchy, who is the proper officer in this case. And had there been a particular certified by the proper officer precedent to the grant, yet that should not now stand in competition or jostle with the patent.

Lord Chief Baron MONTAGU said he took it that the allegations in the information were fully proved and that the king's evidence was much stronger than the defendant's, that the proposal mentioned nothing of services, but seemed to imply an adequate consideration. And the overvalue being proved, he took that to be a false suggestion. And the overvalue in some measure appeared

¹ *Hall, ex dem. Doddington v. Peart* (1594), 2 Coke Rep. 32, 76 E.R. 484, also 138 Selden Soc. 609, Popham 60, 79 E.R. 1176, *sub nom. Hall v. Combes*, Croke Eliz. 368, 78 E.R. 615.

from the defendant's tenaciousness. The warrant was of an unusual and unheard of nature, being directed to the Chancellor of the Duchy and countersigned by himself, no privy seal or signet put to it. Here were no particulars from the Auditor, no certificate from the Surveyor, and the patent passed not gradually but *per saltum*. And he looked upon the overvalue to have been the occasion of the secrecy, huddle, and haste that had been used in passing this grant. And, as to the objection that there was no precedent of any such suit brought into this court, he said this court creates precedents. It is not long since bills to foreclose redemptions were first brought in use, and the court must find out new ways to obviate the mischiefs of the age, for *crescit in orbe dolus*. And he took it that no *scire facias* would lie in this case, the deceit not appearing in the body of the grant. And, therefore, he thought His Lordship might justly decree a re-conveyance and that the patent should be delivered up and cancelled. And he supposed care would be taken that the consideration should be restored.

Lord Chief Justice JONES said the pleadings in the cause are very long, and the proofs voluminous. He would not, therefore, having but an old decayed memory and, at this time, wanting the use of hands which might in some measure supply that defect, take upon him to repeat all the circumstances of the case, but he would in a few words deliver his opinion.

It is objected that the subject matter of this suit is not proper by an English bill; that is not the proper method, they say, for avoiding letters patent. I take it that a *scire facias* will not lie in this case or, if it would, yet the deceit appears not in the body of the patent. And, therefore, a *scire facias* will not reach it. The value is not mentioned in the patent. And shall there be no way then, where the king is deceived, for His Majesty to be relieved? That would be to put him in a worse condition than a subject. But there is no precedent they say. He was sorry that Colonel Vernon, an honest gentleman and of known loyalty, should be the occasion of making a precedent of this nature. But there was a time when all precedents began. Had the patent been intended a gift or gratuity only to the defendant Vernon for his services, there, no fraud or surprise would have been collected from the overvalue. But there being money to be paid for the grant and that being the consideration which was regarded, as well as the defendant's services and sufferings, he, therefore, thought the excessive overvalue in this case argued a plain surprise, if not a fraud. But it is objected what shall be said to be such an overvalue as will avoid a patent and what not? My brother Pemberton, in arguing for the defendant, admitted that an excessive and outrageous value might do it, and the court is to judge what is excessive and outrageous and what not. He thought the plaintiff's proofs as to the values were much stronger and more full and exact than the defendant's, but yet, had there been no unfair practice or artifice in the case, he should have moved My Lord Chancellor that an issue at law might have been directed for ascertaining the value. But, as this case was a patent huddled up in haste by an unusual sort of warrant, all offices passed by, no money at the time paid, but only a note given to the Chancellor of the Duchy, who was not the proper officer to receive the moneys, and here before the grant was perfected, that is to say before livery, there was a kind of a prohibition, and Mr. Curson was desired not to receive the moneys. Therefore, upon the whole matter, he thought His Lordship might very well decree the patent to be delivered up and cancelled and order a reconveyance to be made.

Lord Chancellor [JEFFREYS] thanked their lordships for their assistance in this cause, which was a cause of very great consequence. And he was glad to find their lordships concurred so entirely in opinion with him, for, besides the apprehension he had of his own inability, he had formerly heard this matter at the Council Board and knew many things of his own knowledge that might have had some influence on his judgment. But, now, he was fully convinced that he ought to decree the patent to be delivered up. That Colonel Vernon has been very loyal and that his services and sufferings for the crown have been considerable must be admitted. It is proved by persons of great quality that were concerned with him, but, after all, that is but every subject's duty. And, by the way, he said he must take notice that Colonel Vernon had before this time tasted of the king's bounty both in England and in Ireland. This patent was not designed or intended to be a bounty or reward to Colonel Vernon, but it was intended a purchase and nothing else, for, here, as soon as ever the late king was informed of the overvalue, he gave directions for setting aside this patent, which answered the objection of a succeeding king's avoiding his predecessor's grants, for, here, the prosecution was begun in the time

of his late Majesty. There is nothing of services suggested in the petition, nor anything of it mentioned in the patent, and the words *ex mero motu* are only words of course etc.

The first question then is whether this court upon an English bill may in any case decree letters patent to be delivered up and cancelled. And he was clear of opinion that, had the patent passed ever so regularly, that yet this court might have decreed it to be delivered up. Fraudulent contracts and bargains are properly relievable here; the precedents are common. In the Case of Coleby and Smith,¹ a fine, conveyance, release, articles, and several other deeds made at a considerable distance of time one after another were all set aside. But it is asked how can a matter of record be vacated by an English bill? Does not this court every day decree satisfaction to be acknowledged on judgments and the like? And he said that the patent in question was not a matter of record, for the estate passed by livery, and, therefore, he thought a *scire facias* would not lie in this case, because it is no record, for, had the patent been removed by a *scire facias* into this court, that would not have made the patent a record which was no record before. But, in case a *scire facias* would have lain, he thought there was sufficient ground to avoid these letters patent upon a *scire facias*, because there was no sufficient warrant for the passing of the grant, there being neither privy seal nor signet to it. (*Vide* Stat. 27 Hen. VIII, cap. 11.²) And to say no worse, the Chancellor of the Duchy was at least surprised in the passing of this grant, and it had gone beyond all manner of method. A report ought to have come back to the secretary's office, from which the warrant was made. Here, the warrant for passing the grant is countersigned by the Chancellor himself, who is to pass it. The report and the warrant for the grant are both written by Vernon's man. And here is a warrant to Tench to make out particulars on the same day that the report bears date. And the warrant is but the 19th of November, and the patent is engrossed and passed the 21st of November, in so short a time that it was not possible to be done after the warrant passed, but all things were prepared and in a readiness for a surprise. And, here, before livery and before the money came to Curson's hands, there is a countermand and a *caveat* entered. And, though from the Lord Dartmouth, yet that is not material, and the king, had he known how the matter stood, but that was kept secret, might have countermanded the livery, and then the patent had been invalid. And here, the Chancellor is secretary, is treasurer, countersigns a warrant to himself, is everything. What authority had he to receive the money? They might as well have paid it to anybody they had met. And, before it came to Curson's hands, he is told the king was displeased with the grant and desired to forbear receiving of it; so that, in truth, here is no money paid at all.

And then, the overvalue is excessive in this case. It is fully proved (and he said, he knew it), that Mr. Harbord offered to give as much as the particular comes to and so did other gentlemen of the country. And anyone that knows Mr. Harbord will easily believe that he would not knowingly buy an ill bargain or sacrifice so many thousand pounds out of any pique to Colonel Vernon. And the greatness of extent and dependencies must be made an ingredient in this case. He said he could wish the crown had not parted with so many flowers as it has already done, and then he was persuaded there would not have been so many rebellions as there have been. And, though Colonel Vernon was an honest gentleman and of good quality, the honor of Tutbury is of that vast extent, and so many noblemen hold of it that it is not fitting for a person of his degree.

And, therefore, he decreed the patent to be delivered up and cancelled and that Colonel Vernon should procure his trustees to reconvey. And he said care would be taken that the money should be repaid, but that matter would be most proper upon a petition to the king.

But note here was no direction for the conveying back of Sheerness to Vernon nor any satisfaction to be made for it. And, afterwards, by a bill exhibited by Brown against Vernon and Curson for the £7,000, Vernon, who refused to give any obedience to the decree, dying before he answered that bill, Brown set up an administrator to him, who put in an answer, and Brown obtained

¹ *Coleby v. Smith* (1683), see above, Case No. 133.

² Stat. 27 Hen. VIII, c. 11 (*SR*, III, 542-544).

the decree against Curson for the £7000.

[Reg. Lib. 1 Jac. II, f. 388.]

[Other reports of this case: 1 Eq. Cas. Abr. 75, 133, 21 E.R. 887, 937.]

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Elme v. Shaw
(Ch. 1684)

Where a demurrer is sustained without more, court costs are not taxable.

1 Vernon 282, 23 E.R. 470

8 December 1684. In Court, Lord Keeper.

A demurrer was allowed, but without costs, because it was a demurrer only, without any answer, and it came in by commission.

[Other reports of this case: 1 Eq. Cas. Abr. 125, 21 E.R. 931.]

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Goffe v. Whalley
(Ch. 1684)

An heir must make discovery of what assets he has by descent and what trusts exist for his benefit.

1 Vernon 282, 23 E.R. 471

Eodem die [8 December 1684].

A bill was brought against an heir to discover what assets he had by descent and to subject money raised by sale upon alienation before any original filed and to discover the trust of lands descended before the Statute of Frauds and Perjuries,¹ which makes the trust of an estate descended assets.

The defendant pleaded alienation before the original bill was filed and that the trust of an estate descended was not assets in his hands.

But the Lord Keeper [NORTH] ordered he should answer, saving the benefit of his plea to the hearing.

[Raithby's note: It appears that the defendant, having been taken on a proclamation for want of an answer, put in a demurrer to the bill, which, being set down to be heard, it was prayed by the plaintiff's counsel it might be set aside, but the defendant's counsel insisted the plaintiff had accepted the costs and thereby waived the contempt and ought not to take advantage of the coming in of the plea. And he did then offer to admit assets to satisfy the plaintiff's demand and to give his consent to the court in a week then next. But the defendant's counsel, afterwards, refusing to stand to such offer and admit assets, it was ordered that the demurrer be set down to be heard again, which, coming on to be heard accordingly, was overruled. Reg. Lib. 1684 A, ff. 75, 104.]

¹ Stat. 29 Car. II, c. 3 (SR, V, 839-842).

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Anonymous
(Ch. 1684)

A court of equity can grant damages for very small sums proved only by the oath of the plaintiff, giving the particulars thereof.

1 Vernon 283, 23 E.R. 471

Sums under 40s. are to be allowed the party on his oath, but, then, he must in his affidavit mention unto whom paid, for what, and when.

227

Dunn v. Allen
(Ch. 1684-1687)

An assignee cannot have a scire facias to revive a decree that is not signed and enrolled. Contracts and judgments can run with the land and bind subsequent owners.

1 Vernon 283, 23 E.R. 471

1 December 1684.

Per curiam [NORTH]: An assignee shall not have a *scire facias* to revive a decree that is not signed and enrolled. But, after the decree is enrolled, an assignee may bring a *scire facias* to revive it in like manner as at law. If there be a judgment for an annuity and the annuitant afterwards sells the annuity, the vendee shall have a *scire facias* upon this judgment.

But though the Lord Keeper [NORTH] disallowed the *scire facias*, yet it was without costs, because the defendant might have demurred but did not.

[Raithby's note: The defendants had appeared on the *scire facias*, and put in several examinations by way of answers, wherein issue was joined, and witnesses were examined, and the defendants were at first ordered to pay the costs thereof to be taxed, but, afterwards, on agreement, the plaintiff was admitted to file his original bill, and the defendants were to pay 20 marks costs for their irregularity, and, by consent, the depositions which had been taken on the *scire facias* between the parties were to be read on the original bill so to be filed. Reg. Lib. 1684 A, f. 82.]

1 Vernon 426, 23 E.R. 563

28 January [1687]. In Court.

The plaintiff purchased the manor of Lenthall, in the County of Hereford, of Sir Sampson Eure, who, upon articles of agreement made between him and his tenants for the settling of heriots and stinting the common, obtained a decree for confirmation thereof. The plaintiff first brought a *scire facias* to revive this decree, which was discharged by the late Lord Keeper NORTH, in regard that the plaintiff, who claimed as a purchaser or assignee and comes not in in privity, is not entitled to bring a *scire facias* to revive the decreed, but the same was discharged without costs, for that the defendant did not demur to the *scire facias*, as the Lord Keeper said he might have done.

And now, the plaintiff brought his bill to revive the decree, and he prayed no other relief, to which the same objection was made as had been before to the *scire facias*, the plaintiff being no more entitled to bring a bill of revivor than a *scire facias*, there being no other difference between them save only that a *scire facias* lies when a decree is signed and enrolled and a bill of revivor upon

an abatement before such time as the decree is signed and enrolled. But an assignee or a purchaser who come not in in privity can in no case revive but ought to bring an original bill to have a parallel decree made, in which it may be used as a good argument or inducement to the court that there was such former decree to make a like decree if no sufficient reasons are showed to the contrary. But the former decree can no ways be revived nor carried into execution save only by the making a parallel decree. And the plaintiff has now no such bill. And this was the objection as to the form.

And, as to the matter, it appeared of the plaintiff's own showing that this agreement was made only between persons that were bare tenants for life, for, on the one hand, Sir Sampson Eure, the lord of the manor, was but tenant for life and, on the other hand, the tenants were but likewise tenants for life by settlements made precedent to these articles on which the decree was founded; so their agreement could in no sort bind on the one hand or the other the persons who, upon the respective deaths of the tenants for life, became tenants in tail.

But the Master of the Rolls [TREVOR] was of opinion that these articles tending to settle the customs of the manor, which were immemorial and before the Statute *de Donis*¹ and for stinting the common and preventing suits, ought to bind the issue in tail, though made only by the tenant for life. And he would not presume that the tenant in possession would do anything in prejudice of the tenant's right. And he decreed that the former decree should be confirmed and revived and executed. *Quaere.*

[Raithby's note: 'And for that the said articles were naturally binding to the premises as well as to the persons and that, therefore, no act being reciprocally done between the lord or tenant since the making of the said articles and decree, they remain in full force and virtue and that Mr. Dunn's title to the said manor and premises being for good and valuable consideration, he is well entitled to have an execution and performance of the said articles and decree, and the said decree is and does hereby stand revived and confirmed.' And the plaintiff having brought several actions at law against the defendants, the same were stayed by injunction. Reg. Lib. 1686 A, f. 1100.]

[Other reports of this case: 1 Eq. Cas. Abr. 2, 21 E.R. 829.]

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Bradbury v. Duke of Buckingham
(Ch. 1684-1685)

A court of equity can allow compound interest.

2 Chancery Reports 286, 21 E.R. 680

This court did declare that the plaintiffs ought to have interest for their interest money from time to time, when it is a stated sum.

[Reg. Lib. 36 Car. II, f. 401.]

¹ Stat. 13 Edw. I, Westminster II, c. 1 (SR, I, 71).

Woodhall v. Benson
(Ch. 1684-1685)

A lease in gross cannot be entailed.

2 Chancery Reports 290, 21 E.R. 681

John Wirley, deceased, being possessed of divers manors and lands for 320 years, the said term came to the defendants Adams and Shagburgh in trust for the payment of monies and, after, in trust for Edward Colley, grandson of John Wirley, for his life and, after his decease, to the plaintiff Anne, late wife of the said Edward Colley, and the said plaintiff Anne was to have £130 *per annum* for her life, which settlement was made in consideration of marriage. After the death of Edward Colley, the trustees were directed to permit the heirs male of Edward on the plaintiff Anne to be begotten to receive the residue of the profits, and, in the case of no issue male of her, there is a provision for daughters and limitations over to the said Edward Colley's heirs male. It was also declared that, in case the plaintiff Anne should survive the said Edward, then she to have the moiety of the manor house for her life. The trust limited to the heirs male of Edward and the remainders thereupon depending are void, and the benefit of the whole trust was in Edward, for that the trust would not be entailed.

By another deed, it was declared by the said Edward Colley and his said trustees that, in case the plaintiff Anne should have no issue, she should have the whole manor house above the £130 *per annum*. And, by another deed, the said Edward Colley, by the consent of his said trustees, declared, in case the said Edward should die, leaving the plaintiff Anne no issue and should not otherwise dispose of the residue of the profits of the premises over and above the rents and charges payable as aforesaid, then his said trustees, after his death, should by sale or leases of the premises, pay all debts and, after all debts paid, to permit the plaintiff to receive the residue of the profits for her life and, after her death, to permit the right heirs of Edward to receive the same. The trust for the right heirs of Edward was void, and reverted. And the said Edward did afterwards declare that, in case he had no issue, he intended to leave his whole estate to the plaintiff Anne.

The said Edward, 22 January 26 Car. II [1675], made his will in writing reciting the agreement in the last deed touching payment of his debts, and, after some small legacies, devised to his said trustees all the rest of his personal estate in trust that they should pay his debts as aforesaid and, declaring his meaning to be that his executors, after his debts paid, should deliver the surplus to the plaintiff Anne, deducting £5 apiece for their pains and all charges. Edward soon after dying, the surplus belonged to the plaintiff. And the said trustees possessed the premises and the personal estate, and the plaintiff Anne having since intermarried with the plaintiff Woodhall, whereby the whole belongs and remains to him in the right of his wife, the said trustees ought to assign to the said plaintiff. But the said trustees pretend the trust and term aforesaid does after the plaintiff Anne's death belong to the defendant Gabriel Ciber and Jane, his wife, she being the only sister and heir at law of the said Edward Colley. The defendant Benson, knowing of the will and settlement aforesaid, purchased the premises of the defendant Ciber and his wife. And the trustees assigned to him.

The defendants, the trustees, insisted that their names were used in the marriage settlement of Edward Colley upon his marriage with the plaintiff Anne, in which settlement was recited a conveyance made by John Wirley, whereby he did demise the trusts mentioned, and the premises in trust as to Clark's Farm, for such persons as he or his executors should by will or otherwise direct and several other persons upon several other trusts and, as to several parcels of the said premises, which the said defendant conceived was the estate lately enjoyed by Edward Colley in trust for such persons as the said John Wirley should direct and, for want of such appointment, to Jane, his daughter, for her life and, after, to John Colley, her son and heir, and his issue male and, for want

of such issue, in trust for the daughters of the said Jane. And, after the death of Jane and John, Edward was entitled, and he, together with Sir John Wirley, the surviving trustees, upon Edward's marrying with the plaintiff, did devise to the said defendants, the trustees, the manor house etc. for the term of twenty years in trust to pay certain annuities mentioned and to permit Edward Colley for his life to receive the profits of the residue and, in case the marriage took effect and the plaintiff Anne survived him, then, to pay her £130 *per annum* for her life and, after Edward's death, to permit the heirs male of their two bodies to receive the residue of the profits and, for default of such issue male, there is a provision for daughters, and supposes the residue of the profits may be limited to any issue male of Edward and, for want of such issue, to permit the defendant Jane and Anne, since deceased, sister of the said Edward, to receive the profits of the estate as the deed expresses. And he remembered no other agreement than what is mentioned in the said deed. And he sets forth the deed of 21 January 26 Car. II [1675], whereby the said defendants, the trustees, were entitled by sale of leases to pay debts and, after payment thereof, if the plaintiff Anne should be then living, should permit her to receive the residue of the profits for her life and, after her decease, the right heirs of Edward to receive the same. After the time of executing the last mentioned deed, the said Edward made his will, and, after some legacies, he took notice of the said deed bearing date the day before. And it was declared thereby that the defendants, the trustees, should out of the profits pay all his debts. And, being fearful those profits should not do, he did devise to them all the rest of his personal estate, and made them executors, and, after debts paid, the residue to the plaintiff Anne. November 1676, Edward Colley died, after which, the said defendant proved the will, and entered on the estate.

But the defendants, Ciber and Jane, his wife, insisted that the said defendant Jane, being the only sister and heir to Edward Colley, are after his debts entitled to the premises for a long term to commence after the death of the plaintiff Anne. And they have sold their interest to the defendant Benson.

Upon reading the said deed and will, the Lord Keeper NORTH was of opinion that the said term so as aforesaid created was a term in gross and so not capable of being entailed, and, therefore, it could not descend to the heir of Edward Colley, but that the same should be liable to the payment of his debts. And the plaintiff Anne should hold the £130 *per annum* for her life, and, after the said debts paid, the plaintiff Anne should receive the profits of the whole estate for her life, charged with the said annuity. And the said plaintiffs were to redeem the mortgage to the defendant Woodward. But, as to the residue of the said term, after the death of the plaintiff Anne and debts paid, how the same should be disposed of, a case was ordered to be made.

A case being stated, this cause came to be heard thereon before the Lord Chancellor JEFFREYS, and all the former pleadings being opened, as also the defendant Ciber's cross-bill, which was to this effect, *viz.* to have the said term of 820 years to attend the inheritance. And the case stated appearing to be not otherwise than before is set forth.

His Lordship [JEFFREYS], on reading the said deed and will, with the question being who shall have the remainder of the term in the said lease, whether the plaintiff Anne as residuary legatee or whether she shall have only an estate for life, His Lordship [JEFFREYS] declared that the deed and will do make but one will, and, by them, there was no more intended to the plaintiff Anne than an estate for her life and that she ought to enjoy the whole mansion house *cum pertinentiis* during her life and also the surplus of the profits of the residue of the said estate after debts and legacies paid and the defendant Benson, who purchased the inheritance of Ciber, to enjoy the same, discharging all things as aforesaid.

[Reg. Lib. 36 Car. II, f. 314.]

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Keale v. Sutton
(Ch. 1684-1685)

A writ of prohibition lies to prevent a lower court from exceeding its jurisdiction.

2 Chancery Reports 301, 21 E.R. 684

The defendant being arrested in the Marshall's Court for matters arising in Berkshire out of the jurisdiction of that court, this court granted a [writ of] prohibition, which being disobeyed, an attachment was ordered against the persons disobeying the same, and the defendant [was] to proceed upon the same.

[Reg. Lib. 36 Car. II, f. 773.]

231

Carvill v. Carvill
(Ch. 1684-1685)

A court of equity can order an issue to a common law jury to determine the validity of a purported will.

2 Chancery Reports 301, 21 E.R. 685

The testator Robert Carvill made his will the 5th of June 1675. And he thereby gave the plaintiffs several legacies and also legacies to the defendants, which he appointed to be paid by sale of lands after the death of his sister Rosamund, whom, with the defendants, he made executors. And he gave his said executors *residuum bonorum*, and, in 1678, he died. And the said Rosamund is dead.

The defendant Robert Carvill, being the eldest son of Henry, the testator's brother, is his heir at law, who insists that the testator made no such will and that he claims the said lands by descent or, if any such will was made, the testator was *non compos [mentis]* at the making thereof and that no person was named in the said will to sell said lands. And he insists on the Act against Frauds and Perjuries.¹ And he avers that the testator died not until 1680 and that he did not make and sign that will according to the said Act, there being no witnesses that have attested it according to that Act. And he does, therefore, insist that the same is void in law as to the devise of lands and that the same are come to him as heir and he has since recovered the same at law. And he insists also that the said will is void in law, because no person is appointed to make a sale and, being but a voluntary disposition for the payment of legacies, and not debts, the plaintiff ought to have no relief to make the same good in equity to the disinherison of the defendant, the heir at law.

But the plaintiffs insisted, though the testator died after the said Act, *viz.* December 1678, yet the will was made long before the 24th of June 1677 and so is not within the intention of the said Act and, though no person be in express words named to sell the lands, yet the sale ought to be made by his executors, and the heir ought to be compelled to join in the sale.

The defendant, the heir, insisted that, though the will might be out of the provision of the Act, being made before the making of the Act, yet there is no good proof that any such will was made or published by the testator.

¹ Stat. 29 Car. II, c. 3 (SR, V, 839-842).

This court directed it to law on this issue, *devisavit vel non devisavit*. And a verdict passed for the plaintiff.

This cause coming to be heard on the equity reserved and this court being satisfied with the verdict, which was *viz.* that the said Robert Carvill, the testator, did make and publish such a will and thereby devised the said lands to be sold as aforesaid, this court, upon reading the will, decreed the said lands to be sold by the said executors and the said legacies to be paid thereout according to the said will.

[Reg. Lib. 36 Car. II, f. 142.]

Norton v. Mascall
(Ch. 1684-1687)

A court of equity will specifically enforce a contract for arbitration after the award has been made even though the proceedings were not strictly proper at common law.

2 Chancery Reports 304, 21 E.R. 685

The suit is to have a voluntary award performed. The defendant insisted it being a voluntary submission of the parties and the reference not directed by this court, the award was void and ought not to be performed. And he demurred to the plaintiff's bill.

The Master of the Rolls [GRIMSTON] ordered precedents [be searched for]. And, upon the reading of the award, he declared he saw no cause to relieve the plaintiff, but he dismissed the bill.

This cause was reheard by the Lord Chancellor JEFFREYS, who declared he saw no cause why the said award should be impeached, but it was fit that the same should be performed, being in part executed and assented unto. And he decreed the same to stand confirmed and the defendant to perform the same.

[Reg. Lib. 36 Car. II, f. 544.]

2 Vernon 24, 23 E.R. 626

May 1687.

The plaintiff and defendant had submitted to an arbitrament by a bond, and an award was made, not binding by form of law, by which the plaintiff was to pay the defendant £900 and to seal a release to the defendant and the defendant was to assign several securities he had from the plaintiff. The plaintiff sold some lands to raise the £900, expecting the defendant would receive it, as he gave him intimation he would, and he tendered him the £900 and a release executed by the plaintiff.

And, though there was no other execution on the plaintiff's part of the award and though the award was extra-judicial and not good in strictness of law, yet the Lord Chancellor [JEFFREYS] decrees it should be performed in specie.

[Other copies of this report: 1 Eq. Cas. Abr. 51, 21 E.R. 867.]

Jason v. Jervis
(Ch. 1685)

A marriage settlement can be valid as to a jointure, and, at the same time, it may be a fraudulent conveyance as to other provisions.

1 Vernon 284, 23 E.R. 472

24 January [1685]. In Court, Lord Keeper [NORTH]. Sir Robert Jason *versus* Elizabeth Jervis, widow, *et al.*

Nathaniel Bacon [1647-1676], the defendant Elizabeth's former husband, who headed the rebellion in Virginia,¹ was owner of the lands in question, and he contracts with the plaintiff Jason to sell him the lands for £1200. Jason has not money to pay for the purchase, but confesses a judgment of £4000 penalty, defeasanced for payment of the consideration money to Bacon. And thereupon Bacon conveys the lands to him and one Pheasant, his trustee. Thomas Jervis contracts with Jason, Pheasant, and one Bucknam for the lands for £1200, and Jason, Pheasant, and Bucknam enter into a statute that, in consideration of £1200, they and all claiming by, from, or under them, or any, or either of them, would convey the said lands unto Jervis and his heirs free from all encumbrances done or suffered by them, any, or either of them, and that Bucknam, who was in possession, should deliver possession unto Jervis or, in default thereof, the £1200 was to be repaid.

Bacon dies in Virginia. And, after his death, his wife and children set up a settlement by which Bacon was only tenant in tail, and, by virtue of this settlement, they evict the estate from Jervis, who afterwards dies and makes the defendant Elizabeth his executrix.

For the plaintiff, it was insisted that, although there was a general covenant to convey, yet it was restrained by the special words that come afterwards, *viz.* 'free from all encumbrances done by them, any, or either of them', and a covenant by the word '*concessi*' may be restrained by a subsequent special covenant. And it appears by the whole context of the agreement that the intent of the parties was only that Jervis should take Bacon's title *talis qualis* and he, by a recovery, might have cut off the remainders and have made a good title. And this is a case of very great extremity, for the wife of Bacon and her children run away with the land by virtue of this settlement and she likewise will have the £1200 consideration money, as executrix to Jervis.

Lord Keeper [NORTH]: I take the covenant to convey to be a general covenant, and it cannot be supposed that, when a man buys the inheritance of an estate, he intended that those he bought of should convey an estate for life only. And as to the other objection, that it would be a strange case for Bacon's wife to have both the money and the land too, there is no weight in that objection, for she has an estate for life in the land by the settlement and she has the money as executrix to Jervis. *Et quando duo jura in uno conveniunt, aequum est, ac si essent in diversis.*

But then, the plaintiff's counsel pressed they might be admitted to try again the reality of this settlement, whether it was not fraudulent, the former trials having been in Bucknam's name, who was a known cheat, and his name cast an odium on the cause.

Whereupon it was ordered they should try it next assizes in an [action of] ejectment, first, against the wife as to her estate for life and, then, as to the remainders to the children for, if the bond before marriage was only for a jointure and the settlement goes further and entails the land upon the children of the marriage, the settlement might be good as to the jointure and fraudulent as to the

¹ B. Tarter, 'Bacon, Nathaniel', *Dictionary of Virginia Biography*, vol. 1, pp. 271-274; W. M. Billings, 'Bacon, Nathaniel (1647-1676)', *Oxford Dictionary of National Biography*, vol. 3, pp. 164-165.

remainders in respect to a purchaser.

[Raithby's note: The bill in this case stated that Bacon applied to the plaintiff, being a young heir and necessitous, and proposed to sell him the lands in question, being of the yearly value of £150, and to take security for the payment of the purchase money after the death of the plaintiff's father and that, thereupon, the plaintiff gave a judgment for £8000 defeasanced for payment of £4000 at his father's death and, thereupon, a conveyance ready engrossed wherein the name of Pheasant was used as purchaser, being an utter stranger to the plaintiff, was executed by Bacon and taken by one Bockenham into his custody for the plaintiff's use, and no trust was mentioned in the deed. Bockenham then applied to the plaintiff and offered to purchase the said lands of him, and, upon his paying the plaintiff £50 and promising to pay the full value, plaintiff executed a conveyance thereof to him. Bockenham gave some security for the payment of the remainder of the purchase money, and several encumbrances were set on foot. Afterwards, Bacon agreed to discharge the aforesaid judgment and to accept a re-conveyance if the plaintiff would undertake to procure one or else that the plaintiff would pay £1250, with £60 *per annum* in lieu of rents in the meantime, which the plaintiff undertook to do. But before the said agreement was executed, Bacon went beyond the seas and died. And the defendant Jervis claimed the benefit of the said agreement, the plaintiff not having taken in Bockenham's interest nor obtained any re-conveyance from Pheasant. The plaintiff thereupon gave the defendant Jervis a judgment for £2000, the former judgment being released, defeasanced for the plaintiff's putting the defendant Jervis within a time therein mentioned in quiet possession of the lands in question, and, in the meantime, to pay £60 *per annum* half yearly and make satisfaction for such damages as should come upon the premises and, in default thereof, within three months after the time at which it was agreed possession should be delivered to pay £1250 to defendant Jervis, his heirs, or assigns. The plaintiff got in Bockenham's interest and took a re-conveyance from Pheasant, but did not convey to Jervis at the time appointed, but he afterwards offered to convey and pay the rent and deliver possession with reasonable damages, which the bill prayed he might accept. Jervis, by his answer, stated a purchase by him from Bacon of the premises in question without any knowledge of the transaction between the plaintiff and Bacon and payment to Bacon of £1500, the purchase money for the same, and that Bacon covenanted that he and his wife would further assure as defendant's counsel should advise; that defendant, afterwards being informed of the transaction between the plaintiff and Bacon, agreed to accept a conveyance from the plaintiff and the other parties on the terms mentioned above, and that such agreement was not performed on the part of the plaintiff, and that Bockenham made great waste on the premises, and claimed £1250 and damages. The defendant Elizabeth Jervis claimed her jointure out of the lands in question under a settlement made by Nathaniel Bacon thereof on his marriage in consideration of her portion. And the court, at the hearing, declared Jervis to be a *bona fide* purchaser and decreed the judgment to stand for performance of the agreement between him and the plaintiff and that, on payment of the said £1250 and interest from the time at which the defendant Jervis was to be let into possession by the terms of the agreement, together with the defendant Jervis's costs to be taxed both at law and in equity, the defendant should reconvey the premises to the plaintiff, and, on default of payment, the plaintiff's bill to be dismissed with costs to be taxed. And the Master was ordered to enquire and report whether any and what part of the £1500 the defendant Jervis's purchase money was retained by him and for the amount of so much, if any, thereof as should appear to be so retained, the plaintiff was to have an allowance and deduction on the said account. 22d November. Reg. Lib. 1684 A, f. 100. But nothing was said in the decree respecting the jointure claimed by the defendant Elizabeth Jervis. On this decree, the plaintiff petitioned for a rehearing, principally on the point of the validity of the settlement, when a trial at law was ordered as stated, and, at that trial, the defendants were to admit the plaintiff to be a purchaser for a full consideration of the lands in question from Nathaniel Bacon. Reg. Lib. 1684 A, f. 354.]

234

Preston v. Tubbin
(Ch. 1685)

The question in this case was when a person is bound by a lis pendens.

1 Vernon 286, 23 E.R. 474

Eodem die [24 January 1685].

Where a man is to be affected with a *lis pendens*, there ought to be a close and continued prosecution. In this case, the bill was to compel the father to perform articles made on his son's marriage; the father mortgages the land that was to be settled pending the suit, and the mortgagees are thereupon made parties, and then the father dies.

Lord Keeper [NORTH]: Here the *lis pendens* is well enough, for the plaintiff being heir, he cannot revive the suit against himself.

It was said by Mr. Solicitor [General, *Finch*,] that, where there is a *lis pendens*, as if a man has exhibited his bill to have articles performed, there he may by an original bill affect a third person with notice of the first suit that shall come in and purchase the estate pending that suit and that there are forty precedents of it in this court, for, otherwise, though a man has proceeded never so cautiously and immediately exhibited a bill to have articles performed, yet a stranger may come in in the meantime and prevent him of the estate.

But that was denied by Mr. *Keck* and by the court, who said that, with actual notice, you may affect anyone by an original bill. But, as to notice purely by a *lis pendens*, you shall not affect anyone who is no party to the suit by an original bill unless the former cause has proceeded to a decree. And there is not that danger in the case, as Mr. Solicitor apprehends, for, if the first suit be proceeded in with effect, all persons that come in *pendente lite*, though they be no parties to the suit, their interest shall be bound and avoided by the decree in that cause.

And the Lord Keeper [NORTH] said, though notice to a man's counsel be notice to the party, yet, where the counsel comes to have notice of the title in another affair, which it may be he has forgot, when his client comes to advise with him in a case with other circumstances, that shall not be such a notice as to bind the party.

[Raithby's note: In this case, the parties agreed that the mortgagee who was charged with notice of the suit should be paid his principal and interest, he not insisting on his costs, and it was decreed accordingly. Reg. Lib. 1684 B, f. 297. N.B. The cause is entered in the Register's Book under the name of Preston v. Preston.]

235

Anonymous
(Ch. 1685)

A judgment creditor has priority over a bond creditor.

An equity of redemption is an asset in equity, but not by the common law.

2 Freeman 90, 22 E.R. 1077

Hilary term 1684[/85].

A., lessee for sixty years, mortgages his term to B. and then acknowledges a statute to C., and then confesses a judgment to D., and dies; C., the conusee of the statute, pays off the mortgagee, and

takes an assignment of the mortgage; D. prefers his bill against C. to redeem the mortgage. And the question was whether D. should pay only the money due upon the mortgage or that and what was due upon the statute before C. should be compellable to assign.

And *per curiam* [NORTH], C. must assign upon payment of the mortgage money only, for, when A., the mortgagor, died, the equity of redemption of this term was assets in equity, and, as the judgment shall be satisfied by assets in law before a statute, so it shall in equity, and, though the conusee of a statute has got the assignment of the mortgage, yet that shall not take away the right of priority, which the judgment has by the law.

Note: The reason of this decree seems to be because the term was personal assets.

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Morgan v. Lord Sherrard
(Ch. 1685-1686)

The question in this case was whether a judgment creditor has priority over a secured creditor as to a leasehold.

Lincoln's Inn MS. Misc. 498, f. 13, pl. 2

Hilary [term] 36 & 37 Car. II. Morgan and Lord Sherwood.

J.S. acknowledged a statute to the defendant. And, afterwards, the plaintiff had a judgment, the same J.S., who dies having before mortgaged a term which he had in certain land. The defendant redeemed the mortgage, and would have held over to satisfy his statute.

But it was held he should not, for the equity of redemption of the term, being assets in this court, shall be administered in the same course and order as assets at law. And, there, the judgment, though subsequent in time, must have been paid before the statute.

Ex relatione Mr. Phillips.

Note Mr. Trevor told me that My Lord Keeper Guilford did not make any decree in this matter, but caused a case to be made of it in order to consider and give his opinion. But he died before he gave any.

[Other copies of this report: Lincoln's Inn MS. Misc. 503, p. 83, pl. 1, Lincoln's Inn MS. Misc. 504, p. 79, pl. 3.]

1 Vernon 293, 23 E.R. 477

26 January [1685].

A man, possessed of a term for years, makes a mortgage of this term to J.S. and, afterwards, acknowledges a statute to the Lord Sherrard and, then, confesses a judgment to the plaintiff Morgan.

The bill was to have the equity of redemption of this term, which was vested in the executor, and so become assets to be administered in a course of administration and subjected to the judgment, a judgment in course of administration at law being to be preferred to a statute.

For the defendant, the Lord Sherrard, it was insisted that he had the statute and that, having got the term extended in the hands of the executor, a subsequent judgment could not avoid that extent. And his counsel alleged there was a case in Anderson to that purpose. But the counsel on the other side denied there was any such case.

And the Lord Keeper [NORTH] was of opinions that a term for years was not extendable by the conusee of a statute in the hands of an executor and, though it be extendable in the lifetime of the conuser in his hands, yet the extent is but *quousque*, and, if the conuser alien the term before an extent, the statute binds not the term. And then, if it be not extendable in the hands of the executor, it is but a chattel, like a jewel or a horse, and, there, a judgment must be preferred in the course of

law to a statute.

The Case of Fuller and Guilmore was admitted, that a prior statute extended shall not be avoided by a subsequent judgment. But that is in case of a freehold, and not as to goods or chattels.

British Library MS. Lansdowne 1064, f. 355v

Trinity [term] 2 Jac. II [1686].

The case was Francis Sherard, brother to My Lord Sherard, in 1673, enters into a statute of £4000 to My Lord Sherard for the payment of £2000. Afterwards, in 1675, he borrows £700 more of My Lord Sherard, and, for securing this £700, he makes a bill of sale to My Lord of his goods and household stuff, enumerating the particulars, and of all his personal estate whatsoever. In 1676, Francis Sherard acknowledges a judgment to Jane Morgan for £400.

Afterwards, Francis Sherard mortgages a term for years which he had in certain houses to the Lady Carey and Sir John Pelham for £500. Francis Sherard dies, leaving his widow his executrix.

My Lord Sherard borrows a sum of money of the Lady Mary Heveningham to pay off the mortgage and accordingly does pay it off, and the assignment is taken in My Lady Heveningham's name to secure her money and afterwards in trust for My Lord. And My Lord covenanted in the deed of assignment to pay her the money.

Jane Morgan dies, and the plaintiffs, her executors, exhibit their bill in this court against My Lord Sherard to be let into a redemption of their mortgage upon payment of the mortgage money and so to have preference before the statute. And whether he should or no was the question.

First, whether, by the sale of all the personal estate, those general words, coming after such particular things as were before enumerated, should pass the [. . .] or not.

And My Lord Chancellor [JEFFREYS] was clear of opinion it should not.

Second, whether My Lord Sherard should be redeemed by the plaintiffs without having a satisfaction. And the plaintiffs' counsel objected that, in point of law and the course of administration, a judgment, though junior to a statute, may be satisfied before the statute, and this is not like the case of a third mortgagee purchasing in the first mortgage, for, there, he has the legal estate by the assignment. But, here, it is otherwise, for, here, the legal estate is in My Lady Heveningham and the assignment is taken to secure her money, for it is her money [that] paid off the mortgage and not My Lord Sherard's so that the plaintiffs come to redeem not against My Lord Sherard, but against My Lord Heveningham and the trust declared for My Lord Sherard after her money paid cannot alter the case, for it is not in the power of a mortgagee or an assignee of a mortgagee to charge the land with any further trust or charge than only for the mortgage money.

On the other side, it was insisted that My Lord Sherard having obtained the legal estate in the term and having as much right in conscience to have a satisfaction for his debt as well as the conusee upon the judgment, and, at common law, if a conusee of a statute do extend his statute, the executor may plead that in bar to a *scire facias* upon the judgement. So in *Whitlock and Meade's Case* in [. . .].¹

And, though the assignment be taken in the Lady Heveningham's name, that will make no difference, for the money was Lord Sherard's money which he borrowed of her and secures it to her by this assignment and, in the deed, covenants to pay the money.

And My Lord Chancellor [JEFFREYS] was of opinion that the plaintiffs should not be let in to redeem without paying the statute off because the conusee of the statute has as much right to his debt in conscience as a judgment creditor and, having a legal estate, a court of equity shall never divest him of the estate to make him lose his debt.²

¹ *Whitlock v. Mead* (1674), Reports *tempore* Finch 132, 23 E.R. 72.

² *Ex relatione* Dr. Ian Williams, University College, London.

Lincoln's Inn MS. Misc. 498, p. 25

Morgan v. Lord Sherwood.

This cause came to be heard before My Lord Chancellor JEFFREYS between the seals after Trinity term *anno* 2 Jac. II [1686]. And My Lord was of the opinion that the defendant having the title in law by virtue of the mortgage and also a just and honest debt due to him upon the statute, a court of equity ought not to take it out of his hands to give it to him that had the judgment. And, although there was a bill likewise brought by the executor that he might redeem the mortgage and so administer the term according to the course of law and pay the judgment before the statute, My Lord would not make any such decree.

And so the defendant held over to satisfy his statute.

Ex relatione Mr. Trevor.

[Other copies of this report: Lincoln's Inn MS. Misc. 503, p. 92, pl. 2, Lincoln's Inn MS. Misc. 504, p. 87, pl. 2.]

[Other reports of this case: 2 Eq. Cas. Abr. 462, 22 E.R. 394.]

237

Weston v. Duke of Norfolk
(Ch. 1685)

A suit to perpetuate testimony does not lie where the plaintiff can sue at common law to vindicate his rights.

Lincoln's Inn MS. Misc. 559, f. 24

Thursday 29 January 36 Car. II [1685], between Weston and others, plaintiffs, and Henry, duke of Norfolk, and others, defendants.

The plaintiffs set forth their right and title to common in Horsham Heath, claimed by the defendants, and prayed leave to examine witnesses *in perpetuam rei memoriam*.

The defendants put in a plea to the plaintiffs' bill, and insisted upon their title to the place called Horsham Heath exclusive to any common therein for the plaintiffs and set forth their title, and insisted that the plaintiffs ought not to examine their witnesses until their pretenses were asserted by a trial at law, to which they might, if they would, proceed, not being hindered therein by the defendants.

In this case, a trial was directed to be had and a stay of any examination until after the trial.

[Other copies of this report: Georgetown Univ. Law Lib. MS. B88-8, p. 297.]

[Public Record Office, C.33/264, ff. 183v, 202v.]

238

Dolin v. Coltman
(Ch. 1685)

Where a conveyance that bars dower is voidable as a fraudulent conveyance, a court of equity will establish the right of dower.

1 Vernon 294, 23 E.R. 478

3 February [1685]. In Court.

The wife joins with her husband in a mortgage and levies a fine to the intent to bar her dower. And, in consideration thereof, the husband agrees the wife shall have the redemption of the mortgage, and the husband afterwards mortgages this estate twice more.

The court took this agreement to be fraudulent as against the subsequent mortgagees so far as to entitle the wife to the whole equity of redemption. But, in regard the wife, in confidence of this agreement, had levied the fine and thereby barred her dower and the husband and wife being both living, the court decreed that, after the husband's decease, the wife, in case she should happen to survive him, should enjoy her dower. And whereas the mortgagees pressed that the decree might only be that she should enjoy her dower, notwithstanding the fine, the court thought it unreasonable in this case to put the wife to her writ of dower because they might convey away the estate and she not know against whom to bring her writ of dower. And, therefore, he decreed the dower to her.

[Other reports of this case: 1 Eq. Cas. Abr. 148, 219, 21 E.R. 948, 1003.]

239

Booth v. Rich
(Ch. 1685)

A decree for lands to be sold to pay debts will bind infants.

1 Vernon 295, 23 E.R. 478

Eodem die [3 February 1685].

Per curiam [NORTH]: There being an infant in the case, we cannot foreclose him without a day to show cause after he comes of age. But the proper way in such a case is to decree the lands to be sold to pay the debts, and that will bind the infant.

[Reg. Lib. 1684 A, f. 413.]

[Other reports of this case: 1 Eq. Cas. Abr. 280, 21 E.R. 1046.]

Earl of Newburgh v. Bickerstaffe
(Ch. 1685)

An infant's laches will not bar his right to have an account for the profits of land.

1 Vernon 295, 23 E.R. 478

4 February [1685].

This cause came this day to hearing. And, upon the pleadings, it appeared to be a pure title at law and rested upon this single point, whether the marshlands in question were Duchy lands or not, the Lord Newburgh claiming by a patent under the Duchy seal in King James's time and the defendant Sir Charles Bickerstaffe claiming under a patent in King Charles I's time granted unto the duke of Richmond under the great seal, so that, if they were Duchy lands, they were well passed to the Lord Newburgh, but, if not Duchy lands, but derelict lands, then they were well passed to the duke of Richmond. And, as to the jurisdiction of this court in the case, it was insisted that, the plaintiff being an infant, no laches should prejudice his right and, therefore, the plaintiff's bill, though he was an infant, was proper for an account of profits in this court.

The Lord Keeper [NORTH] observed, that Littleton¹ says, if a man intrudes upon an infant, he shall receive the profits but as guardian and the infant shall have an account against him in this court, as against a guardian.

But to that, it was answered that, in this case, a verdict had passed against the infant and that binds his right as to an account of profits and that the possession was recovered in the lifetime of the infant's father. And, in such case, laches would run upon an infant. And, besides, the plaintiff was not proper for an account here until he had first recovered at law.

But the court retained the bill and directed there should be a trial in [an action of] ejectment at the King's Bench bar next term.

[Reg. Lib. 1684 A, f. 408.]

[Other reports of this case: 1 Eq. Cas. Abr. 280, 21 E.R. 1045.]

¹ T. Littleton, *Tenures*, s. 108.

241

Thynn v. Thynn
(Ch. 1685)

Where a testator was defrauded into making a will, the person who committed the fraud will be held to be a trustee for the beneficiaries originally intended by the testator.

1 Vernon 296, 23 E.R. 479

9 February [1684/85].

The case was that Mr. Thynn of Egham,¹ deceased, having made a will and, thereby, made his wife sole executrix, the defendant Mr. Thynn, the son, hearing of this will, came to his mother in the lifetime of his father and persuaded her that, there being many debts, the executorship would be troublesome to her and desired that he might be named executor for that he, by reason of his privilege of Parliament, could struggle the better with the creditors. And he persuaded his mother to move his father in it, declaring that he would be only an executor in trust for her. And the mother accordingly prevails on the father that it might be so. And thereupon, Mr. Thynn, the son, gets a new will drawn, whereby a legacy of £50 only is given to his mother, and therein he makes himself sole executor and cancels the former will, though the father opposed the doing thereof. And the last will was read over so low that the testator could not hear it. And when he called to have it read louder, the scrivener cried he was afraid of disturbing His Worship. The defendant, having thus made himself sole executor and procured this will to be executed, where only a legacy of £50 was given to his mother, set up for himself and denied the trust for his mother. And, in his two first answers, he denied the will was drawn by his directions and that the £50 therein given to his mother was without the testator's privity, but, in his third answer, he confessed it.

Upon the whole matter, it appearing to be as well a fraud as also a trust, the Lord Keeper [NORTH], notwithstanding the Statute of Frauds and Perjuries,² though no trust was declared in writing, decreed it for the plaintiff and ordered that the defendant should be examined on interrogatories for discovery of the estate.

British Library MS. Hargrave 83, p. 3

Thynn had made his son executor and residuary legatee. But, afterwards, he altered his mind and determined to make his wife executrix and residuary legatee and would have made a new will for that purpose. But his son said 'Sir, you are weak and in pain; do not give yourself the trouble of making a new will. I faithfully promise it shall be as you intend and your wife shall have the residue of your personal estate as duly as if she had been declared in the will the residuary legatee.'

The court decreed the son to be only a trustee of the residuum for the wife.

Lincoln's Inn MS. Misc. 10, p. 147

Mr. Thinne of Egham was decreed to be an executor in trust upon parol proof, but there was fraud. Mr. Thinne's father, being about to make his will and his wife executrix, his son desired him to make him executor, which he said would be a credit to him and that it should be all one, for he

¹ J. P. Ferris, 'Thynne, John (c. 1640-1699)', B. D. Henning, *History of Parliament: House of Commons 1660-1690* (1983), vol. 3, pp. 564-565.

² Stat. 29 Car. II, c. 3 (SR, V, 839-842).

would be a trustee for his mother and would account to her. After this, he sets up for himself and denied the trust.

But, it being fully proved, the court decreed the trust, as [it] being a manifest fraud.

British Library MS. Hargrave 80, f. 137v, pl. 1

Mr. Thyne intended to make his wife executrix. But his son desired him to let him have the credit of being his executor and promised to account to the wife, upon which Mr. Thyne named his son executor in the will. And, though there was nothing in writing to build a trust on for the wife, the son was nevertheless decreed to be barely a trustee for her.

Lincoln's Inn MS. Misc. 506, p. 81

The father having made his wife executrix and residuary legatee, the son prevailed with his mother to desire the father to put him in her room, telling him that there would be a great many debts which would occasion a great deal of trouble, that it was not fit for her to manage it, that he was a Member of Parliament and could manage it much better. Accordingly, another will ready drawn in which his mother was left out and he put in was brought to the father, who executed it. The father died, and the son kept all to his own use.

Upon a bill brought by the mother, this was declared a trust in the son for her.

[Other reports of this case: 1 Eq. Cas. Abr. 380, 21 E.R. 1116.]

242

Strelly v. Winson
(Ch. 1685)

A majority of the partners in a joint venture can overrule the minority and proceed in a common undertaking of the business.

1 Vernon 297, 23 E.R. 480

Eodem die [9 February 1685].

There being three part owners of a ship, one of them refuses to fit out the ship to sea and the others do it without his consent, and the ship is lost in the voyage.

Per curiam [NORTH]: In this case, the loss of the ship shall be equally borne by all three, for, though one of the partners did not consent to the fitting out of the ship, yet he would have been entitled to one-third part of the freight and, in this court, should have had an account of the third part of the profits of that voyage. And so, where one tenant in common receives all the profits, he shall account in this court as bailiff to the other two for two-thirds. But in case the other two part owners had applied to the Court of Admiralty, as regularly they ought to have done, that court would have made an order that, upon one part owner's refusing to navigate the ship, the other two should have liberty to do it alone and should not have been accountable to the part owner that refused to join for any part of the profits. And there, in case the ship had been lost, the whole loss must have rested on those two that set out the ship. But, in the present case, in regard the third person, who refused to join with the other two, would have been entitled to a share of the profits of the voyage, if any had been made by the ship, he ought to bear his proportion of the loss. *Qui sentit commodum sentire debet et onus.*

[Raithby's note: But the court upon this point did not think fit to direct any account touching the same, there being no sufficient countermand, and, as to that matter, the bill was dismissed. Reg. Lib.

1681 B, f. 303. The ground of the refusal as stated in the Register's Book by the bill was that defendants, the other part owners, had not come to any account with the plaintiff for former voyages. This was denied by the answer.]

[Other reports of this case: 1 Eq. Cas. Abr. 7, 372, 21 E.R. 832, 1111.]

Skinner 230, 90 E.R. 106

Hilary term 36 & 37 Car. II.

[Where there are] four joint owners in a ship [and] three will navigate the ship [and] the fourth will not, the course is to go into the Admiralty and there give security to answer for the ship if she be lost. And then they shall be discharged against the other.

If one dislike the voyage, and does not expressly prohibit navigating the ship and the ship go on the voyage and is lost, in such case, he shall not be answered his part. But, if the ship return, he shall have an account for what is earned, and it shall be intended a voyage with his consent, without an express prohibition proved. As if four tenants in common of land, one or more stock the land and manage it, the rest shall have an account of the profits. But, if a loss come, as if the sheep etc. die, they shall bear a part, according to NORTH, Lord Keeper.

243

Hall v. Dowthwaite
(Ch. 1685)

Where a court of equity has taken jurisdiction over a case, it will retain jurisdiction to do justice where it later appears that there was an original lack of jurisdiction.

1 Vernon 298, 23 E.R. 480

11 February [1685].

This case concerned lands within the County Palatine of Durham. And, in order to entitle this court to jurisdiction of the cause, the bill suggests prior encumbrances to parties that lived out of the jurisdiction. But, when the cause came to hearing, no such matter was made out by proof.

But it appearing that the proceedings in the county palatine had been unjust, the Lord Keeper [NORTH] said he would retain the cause and consider of it.

[Raithby's note: An order was made, it being matter of title, that a trial should be had in pursuance of two former orders for that purpose. Reg. Lib. 1684 A, f. 301. No further order appears.]

244

Kettleby v. Atwood
(Ch. 1685-1687)

In this case, a right of election never accrued and the money in issue was ordered to be invested in land for the ultimate benefit of the remainderman.

1 Vernon 298, 23 E.R. 481

Eodem die [11 February 1685]. In Court, Lord Keeper [NORTH].

By articles made upon marriage, it was agreed that, the wife having a £1500 portion, the husband should add £500 more to it and that the same should be deposited in trustees' hands until

a convenient purchase could be found out for investing the same in land, which land, when purchased, was to be settled to the use of the husband and wife for their lives, remainder to the first and other sons of their two bodies in tail, remainder to their daughters in tail, with a remainder over to the right heirs of the husband. And, in the articles, there was a proviso that, in case the husband died without issue, the wife might make her election, whether she would have the land or money, and had six months time to make her election.

The husband died before any purchase was made, leaving the wife enceinte of a daughter born soon after his death, who died at a month old. The wife was administratrix both to her husband and child, and she made her election within the six months to have the money and gave notice thereof to the plaintiff, who was her husband's brother and heir.

The bill was brought by the plaintiff to have the £2000 invested in lands and settled according to the articles.

Lord Keeper [NORTH]: Had a bill been brought in the lifetime of the infant (it being better and safer for the infant to have had land than money), I would have decreed the money to be laid out for the benefit of the infant. But I do not see what equity the heir has against the administratrix.

The bill was dismissed, but without costs.

[Raithby's note: The money, by the articles in the meantime until the purchase of land, was to be put out at interest for the benefit of such persons to whom the rents and profits of the lands should belong in case the same were settled, and the proviso was that, if Richard Kettleby, the husband, died before a purchase was made leaving no issue and Anne, his intended wife, should survive him, that then the £2000 should be laid out in the purchase of land to be settled upon Anne for life, remainder to the right heirs of Richard, or else three parts thereof should be paid to Anne, her executors, etc. at her election to be made within six months after the death of Richard. Then the marriage took effect.]

2 Chancery Reports 404, 21 E.R. 700

1686. *Kettleby v. Lamb*.

On a treaty of marriage between Richard Kettleby, the plaintiff's younger brother, and the defendant Anne, now wife of the defendant Atwood, articles were entered into and made between Thomas Lamb, father of the defendant Anne, of the first part, and the said Richard Kettleby of the second part, and the plaintiff and others, trustees of the third part, whereby the said Lamb covenanted to pay £1500 to the said trustees as a marriage portion with the defendant Anne, his daughter, and the said Richard Kettleby covenanted to pay £500 more, which being £2000, was agreed to be laid out in the purchase of lands to be settled upon the said Richard for life and, after, on the said trustees and their heirs during the life of Richard to preserve the contingent remainders and, after, to the use of the said Anne, his wife, during his life for her jointure and, after, to their first and so to the seventh son of their two bodies and their heirs successively and, for want of such issue, to the daughters and, for want of such issue, to the right heirs of the said Richard Kettleby forever. And by the said articles, it was agreed that, before such purchase could be made, the said trustees should place out at interest the said £2000 and, from time to time, to pay over the interest to such person to whom the lands intended to be purchased are limited, as if the same had been purchased and settled accordingly. And there was a proviso in the articles that, if the said Richard died before a purchase should be made, leaving no issue of his body on the body of the said Anne, his intended wife, and Anne survived him, that, in that case, the £2000 or so much thereof as was not laid out in lands should either be laid out in the purchase of lands to be settled upon the said Anne for life with remainder to the right heirs of Richard or else three parts thereof, the whole to be divided into four parts of such monies as should be paid to the said Anne, her executors, etc. at her election, so as she made such election within six months after the said Richard's death, otherwise at the election of Richard's right heir. Afterwards, the marriage took effect, and £1500 of the £2000 was placed with the said Lamb by the trustees, who paid the interest thereof to the said Richard Kettleby during his

life. And, before the money was laid out in a purchase, Richard died intestate, leaving issue one daughter named Anne, who likewise died in a month after the said Richard; whereupon the right of the £2000 or lands to be purchased therewith after the death of Anne, the wife, accrued to the plaintiff, Edward Kettleby, as right heir of the said Richard Kettleby. So, to have the £2000 invested in lands and settled according to the said articles for the benefit of the plaintiff is the plaintiff's suit.

The defendant Atwood, who has married the said Anne, the relict of the said Richard Kettleby, insists that the said Anne, his wife, is administratrix to Richard, her first husband, and the said Anne, her daughter, and is thereby well entitled to the personal estate. And according to the proviso in the said articles, the said Anne had made her election to have £1500 of the £2000 to be at her own disposing, and she was well entitled to the other £500 as administratrix to Richard and Anne, her said daughter. And the marriage articles being merely for the benefit of the said defendant, Anne Atwood, and her issue and the plaintiff no way entitled under the consideration thereof, there was no ground in equity to compel a performance so as to give the plaintiff the defendant's portion.

This case being heard by the Lord Keeper NORTH, he declared that the £2000 did belong to the administratrix of the said Richard Kettleby and ought not to be settled upon his heir, and he dismissed the plaintiff's bill. Which dismission being signed and enrolled, the plaintiff brought his bill of review against the said defendants. And, for error, he assigned that, whereas it was declared by the said LORD NORTH that the £2000 did belong to the administratrix of Richard Kettleby and not to be settled upon his heir, that the same ought to be decreed to be laid out in land to be settled upon the said Anne only for life, remainder to the plaintiff, as right heir of Richard, and his right heirs forever according to the uses of the articles.

To which the defendant pleaded and demurred, insisting the same was obtained on good grounds and reasons and farther insisted that, since the said dismission and before the bill of review, the said Lamb had paid the said £1500 with other money unto the defendant Atwood in right of the said Anne, his wife, who was administratrix to Richard Kettleby and Anne, the daughter and that, in consideration thereof, the said defendant Atwood had made a settlement equivalent thereto for a jointure for his said wife and the issue male of their two bodies with a provision for daughters and that they had a son then living and prayed the judgment of this court therein.

Which plea and demurrer was argued before the Lord Chancellor JEFFREYS, which His Lordship overruled. And he ordered the defendant to answer and he would hear the cause *ab origine*.

At which hearing, the defendant Atwood and his wife insisted that the plaintiff's demand, being only a remote remainder in fee as right heir of the husband, was not so valuable in interest as for a court of equity to decree a purchase to be made for the sale thereof and to take the money from the wife and administratrix to make that purchase, when she ought to return the same as assets or, however, £1500 of the money was her own portion and belongs to her by her election within six months. And, though, according to the strict letter of the articles, her husband, Richard Kettleby, could not be said to die leaving no issue because he had a daughter living at the time of his death, yet the daughter dying within the six months allotted for the wife's election in case he had died leaving no issue, there was great equity to extend the construction of that clause of the articles so far as to give her back her own £1500 portion.

The plaintiff insisted that such remainders in fee have been considered by this court and purchases decreed to be made and limited to such right heirs and that the £2000 in this case cannot be assets and, in like cases, had been so adjudged at common law. And, in this case, the articles have expressly provided that the money shall go as the land ought to have gone, as if a purchase had been made therewith. And, as for the pretence of the said defendant Anne's electing £1500, her power of electing did never arise, nor can her power be enlarged by this court beyond the express words of the articles, nor is there reason for it in this, in regard the articles provided that she shall have a dower besides. And the said Anne, by virtue of her two administrations, has a great personal estate besides the £2000 in question.

This court declared that the £2000 must go as the lands ought to have gone in case a purchase had been made and yet the wife had no power to elect £1500, part thereof, because her husband died leaving issue, and so her power of election never arose, nor did any circumstances appear to His

Lordship in this cause to induce him to enlarge the construction of the articles touching such power of electing beyond the express words thereof. And he decreed the said dismissal to be reversed and that the defendant Atwood and Anne, his wife, do lay out the £2000 for purchasing lands in possession in fee simple to be settled according to the intent of the articles.

And, as for the defendants, the trustees, in regard they relied upon the said dismissal signed and enrolled for their indemnity in paying the said £2000 to the said Atwood or his wife, they are indemnified thereby.

1 Vernon 471, 23 E.R. 596

19 October [1687].

This cause came on to be reheard. And the question now was between the wife and the heir on the part of the husband, who should have the money after the death of the wife, the wife being administratrix both to her husband and her child.

And the court [JEFFREYS] decreed for the heir that the money was bound by the articles and should be for the benefit of the heir, as the land should have gone in case the money had been laid out according to the articles. And the Case of Whittick and Jermin¹ was cited, which had been lately decreed by this Chancellor and was a case in point. And the Chancellor [JEFFREYS] said he remembered the Case of Lawrence and Beverley² upon a special verdict before the Lord Chief Justice Hale, in which he himself was of counsel, and it was there ruled that the money was not assets to satisfy a creditor, but was bound by the articles.

In the arguing of this case, it was insisted for the defendant that the wife, by the articles, had an election in case her husband died without issue whether she would have the land or the money and had six months time to make this election after the death of the husband, and, although the husband had issue at his death, yet that issue died within the six months, and, therefore, the wife might elect.

Sed non allocatur, for the husband having issue at his death, he could not be said to die without issue; so no election could arise to the wife. And the Case of Goodier and Clark was cited in Siderfin, part 1, fo. 102.³

[Raithby's note: The decree as stated in the Register's Book is 'Whereupon, etc. His Lordship did declare that the £2000 did belong to the administratrix of Richard Kettleby and ought not to be settled upon his heir', and dismissed the bill, but without costs. Reg. Lib. 1684 A, f. 242.]

[Reg. Lib. 2 Jac. II, f. 1064.]

[Other reports of this case: 1 Eq. Cas. Abr. 273, 21 E.R. 1041.]

[Related cases: Kettleby v. Adamson (Ch. 1687), Dodd 68.]

¹ *Whitwick v. Jermy* (Ch. 1685), see below, Case No. 300.

² *Lawrence v. Beverleigh* (1671), 2 Keble 841, 84 E.R. 532.

³ *Goodier v. Clarke* (1661-1663), 1 Siderfin 102, 82 E.R. 996, also 1 Keble 73, 78, 169, 246, 462, 83 E.R. 819, 822, 880, 926, 1054.

245

Dominick v. Langley
(Ch. 1685)

In this case, the gift in the marriage settlement in issue never vested in the donee.

1 Vernon 299, 23 E.R. 482

Eodem die [11 February 1685]. In Court, Lord Keeper [NORTH].

The case arose upon a marriage settlement, wherein there was a proviso that, in case the husband should have no issue male of the marriage, but should leave issue female, then the heirs of his body or he that should have the estate by virtue of the limitations in the settlement should pay to such issue female £1000 at eighteen years of age or marriage, which should first happen. The husband died, leaving issue male and issue female by his wife, and the issue male died before the portion to the issue female became payable.

Mr. Solicitor [General, *Finch*]: The intent of this settlement is that, in case the husband died and there should be no issue male of the marriage living when the portion became payable, then the £1000 were to be paid.

Sed non allocatur per curiam [NORTH], and the bill was dismissed.

246

Anonymous
(Ch. 1685)

Any process for contempt of court that has not been executed ceases upon the death of the king in whose name it was issued.

1 Vernon 300, 23 E.R. 482

Upon a motion for a serjeant at arms on a commission of rebellion returned, [it was held] *per curiam*, by the king's demise, all process of contempt not executed is determined so that you must begin again at an attachment. But, where any process is executed and a *cepi corpus* is returned, there, the process stands good.

[Other reports of this case: 1 Eq. Cas. Abr. 351, 21 E.R. 1096.]

247

Anonymous
(Ch. 1685)

A party cannot object to the jurisdiction of a court after having pleaded to the merits of the case.

1 Vernon 301, 23 E.R. 482

On a motion for a [writ of] *supersedeas* to a [writ of] prohibition to an inferior court, for that the prohibition was prayed at the suit of the party after he had pleaded to issue and by that submitted for the jurisdiction of the inferior court, Lord Keeper [NORTH] [held] that is a good reason why a prohibition should not go at the suit of the party. But, where an inferior court meddles with matters

out of its jurisdiction, I will grant a prohibition for the king in such a case. But, if you bring an affidavit that the cause of action arose within the jurisdiction, upon that, I will award a *supersedeas*.

248

Spalding v. Shalmer
(Ch. 1685)

In the case of a breach of trust, each trustee will be charged for no more than he actually received, but, where several join in receipts, they shall be all charged.

1 Vernon 301, 23 E.R. 483

18 February [1685].

The case was that Augustine Spalding, the plaintiff's father, did in April 1666 convey several manors and lands lying in Hutton, Blagdon, Congresbury, and Kingston Seymour in the County of Somerset to Alexander Dyer, Thomas White, deceased, and the defendant Shalmer, and their heirs, to the use of them and their heirs until they had raised by sales or profits sufficient to pay the debts in a schedule to the deed of trust annexed amounting to £1061 and also to pay £1500 to one Codrington in case he should convey an estate in Hutton according to articles made between him and Spalding dated 21st March 1653. And, after payment of the debts and the £1500 and all charges relating to the said trust, the trustees were to stand seised of the remainder of the lands unsold to the use of the plaintiff, the son of the said Spalding, in tail male, with remainder to the right heirs of the said Augustine Spalding.

The trustees enter and undertake the trust and, in 1668, sell unto Robert and Richard Viccaris the lands at Congresbury for £1500, and sell other lands at Hutton to several other persons for £772 more and so raised by sales in all £2275. And, after this, the trustees, in 1670, convey the lands at Kingston Seymour to Nixon and Newcourt, which is mentioned to be in consideration of £840. But no money was actually paid, and the conveyance to Nixon and Newcourt was only in trust for Alexander Dyer. And, as touching the £1500 to be paid to Codrington, he could not make a good title, and so the purchase was broken off. And, instead of paying the £1500 to him, there was a decree made in 1672 that Codrington should pay to the trustees £800, being part of the purchase money that Spalding had advanced in his lifetime, which £800 was accordingly paid, so that near the trustees had received £3275, whereas the schedule debts amounted but to £1061 and the receipts and payments were all indorsed on the deed of trust.

After this, *viz.* in 1679, Dyer the trustee owing £200 by bond to the defendant St. Amond, St. Amond lends him £200 more, and, thereupon, the said Alexander Dyer and Nixon and Newcourt, his trustees, make a mortgage to the defendant, St. Amond, of the lands at Kingston Seymour for securing the £400 and interest and deliver to him the deed of trust, by which he had notice that the trust was only for payment of the schedule debts, which amounted but to £1061, and the £1500 to Codrington, and he had also notice by the indorsements that the trustees had raised by sales before the conveyance to Nixon and Newcourt £2275, but it did not thereby appear whether Codrington's £1500 were to be paid or not.

Upon the hearing this cause, the questions were how far the trustees should be charged with this breach of trust and whether St. Amond's mortgage, he coming in with notice of the trust, should stand good against the heir.

For the plaintiff, it was insisted that all the trustees were answerable to the plaintiff for the breach of trust in regard the deed of trust was particular, that they should sell for payment of the debts in the schedule only, and, when they had raised by the sale made to Robert and Richard Viccaris £1500, that was sufficient to pay the debts in the schedule with an overplus, and all the subsequent sales, wherein they all joined, were breaches of trust.

But, as to that, it was answered by the defendants' counsel that, when the lands at Hutton were

sold and the lands at Kingston Seymour conveyed to Nixon and Newcourt, the contract with Codrington was not broken off, for the decree was subsequent to those sales and it did not then appear but £1500 was necessary to be raised for the carrying on that purchase.

Whereunto, for the plaintiff, it was replied that St. Amond's mortgage was subsequent to the decree and he ought to have enquired whether Codrington had conveyed the lands at Hutton, for, by the deed of trust, the £1500 was not to be raised until he had conveyed.

Lord Keeper [NORTH]. Each trustee shall be charged for no more than he actually received, but, where they join in receipts, there they shall be all charged. And as to St. Amond's mortgage, that was held to be good. Where lands are to be sold for payment of particular debts, the purchaser must take care to see his money rightly applied, and, if the debts be not paid, that is such, a breach of trust as shall affect the purchaser. But, if more be sold than is sufficient to pay the debts, that shall not turn to the prejudice of the purchaser, for he is not obliged to enter into the account and the trustees cannot sell just so much as is sufficient to pay the debts. And he observed the deed of trust was not only for the payment of debts in the schedule, but also to pay the trustees their costs and charges.

It was then said for the plaintiff that £200 of the money on St. Amond's mortgage was not advanced upon account of the trust, but was a debt owing by Dyer, and, therefore, it ought not to be charged on the trust estate.

Sed non allocatur.

The Court also directed that the moneys disbursed by the trustees for the maintenance of August Spalding's children, though not within the trust, should be allowed.

[Raithby's note: It appears that there was an account stated and settled between the plaintiff and Dyer on the 10th April 1682. And though the plaintiff, by his answer to the cross-bill of the defendant Shalmer charging that fact, stated that, at the settling such account, it was agreed between him and Dyer that, if the balance due thereon was not well secured within a week from that time and, if, in that space of time, the like security was not given by Dyer, that he would convey to the plaintiff and his heirs the lands in Kingston Seymour and deliver to the plaintiff all the writings relating to the trust estate, that the said account should be of none effect, and that none of those matters were performed by the said Alexander Dyer, yet the account was decreed to stand, but the defendant Lovell, the executor of Dyer, was ordered after having all proper allowances to apply the residue of Dyer's estate in payment of what should be found due to the plaintiff from Dyer on the said account, but the same was to be without prejudice to any equity the other creditors of Dyer might have against the plaintiff or any other person to whom the estate of Dyer should go by virtue of that decree for satisfaction of any debts due to them from Dyer at the time of his death, and who had a bill depending against Lovell and others for that purpose. Reg. Lib. 1684 B, f. 377. Entered *sub nom.* Spalding v. Lovell. The defendant Shalmer, in the principal case by his answer, admitted that he had joined not only in the several sales made of the trust estate but also in the conveyance of the lands at Kingston Seymour to Nixon and Newcourt, but he denied that any of the money arising by the sales came to his hands, but that the same was received, paid, and disposed of by Dyer and White. And he said he did not remember on what trusts or to what intents and purposes the conveyance to Nixon and Newcourt was made.]

The East India Company v. Evans
(Ch. 1685)

A defendant can be ordered to make discovery of matters that might result in tort damages against him.

1 Vernon 305, 23 E.R. 486

25 February [1685].

The bill was brought by the company, setting forth their letters patent and the great charges they were at in making leagues with princes and building forts and maintaining forces in India, and it prayed a discovery what the defendants had traded for there and that they might be compelled to bear a proportionable part of the said charges.

To which bill, the defendants pleaded, answered, and demurred. They pleaded they were free merchants and set forth the Statute 21 Jac., against restraining of trade,¹ and the Statute 9 Edw. III, that all merchants might trade anywhere,² and the Statute 19 Edw. III, that merchants might trade anywhere not in enmity with the king,³ and averred the Indians were not in enmity and demurred as to the discovery because it was to subject them to a penalty and also to that part of the bill that would enforce them to contribute to the Company's charge because it appeared by the plaintiff's bill that they denied the defendants' liberty to trade to India or to have the advantage of the plaintiff's privileges. And, by answer, the defendants denied they traded under the Company's colors etc.

For the defendants, it was insisted that, as to what the plaintiffs prayed a discovery of, it was to enable them to go on in an action which sounded only in tort, and therefore they ought not to have a discovery in equity. And the discovery would likewise subject the defendants to great penalties, for, though the Company, by their bill, waived the forfeiture, yet they might dismiss their bill and would not be bound by that offer. And, besides, that offer could in no sort bind the king, who was entitled to one moiety of the forfeiture and had already brought informations against the defendants.

For the plaintiffs, it was insisted that Sandys, one other of the interlopers, was ordered to admit he had traded to the value of £1000 and the Company had already recovered against him,⁴ by which they had affirmed their right at law and, therefore, ought to have a discovery against these defendants. And as to what was objected from the Statute of King James, that related to home trade only and not to foreign trade. And, as to the other statutes of Edw. III, they would not reach this case, for here was no league of amity, but only a league of commerce and the defendants have by their plea said the Indians are not enemies, but do not say they are at amity. And as to the objection that the actions brought by the Company sounded in tort only, it was a common case that a man shall have a discovery in this court in order to enable him to bring an action of trover, and he cited the Printers' Case, in this court. And as to the clauses of forfeitures, they were void in law, and it had been oftentimes adjudged that any restriction of trade under pain of forfeiture was absolutely void. And as to the informations brought against the defendants, they are not brought for the forfeitures, but for a contempt to the king. And the defendants' demurrer is improper, for we hope to have relief here

¹ Stat. 21 Jac. I, c. 3 (SR, IV, 1212-1214).

² Stat. 9 Edw. III, stat. 1, c. 1 (SR, I, 270-271).

³ Stat. 18 Edw. III, stat. 2, c. 3 (SR, I, 301).

⁴ *East India Company v. Sandys* (Ch. 1683-1685), see above, Case No. 17.

by a commission to examine our witnesses who live beyond the sea and to have our possession quieted.

Serjeant *Pemberton*, for the defendants: There is no precedent in this court that a bill might be brought for a discovery to enable the plaintiff to bring an action that sounds in tort only. And supposing the plaintiff's patent is a patent for regulation of trade only, yet it is but like a patent for a new invention. The case in trover is founded upon a right. And though the plaintiffs now say the clauses of forfeitures in their patent are void, yet I know that lately in Mr. Boome's Case, in the Common Pleas, they made use of those clauses in this patent to justify a seizure of goods.

Lord Keeper [NORTH]: Clauses to restrain trade under forfeiture have been adjudged void about twenty times, so that matter is out of the case. And it is a mistake to say a man shall not have a discovery in this court for matters that sound in tort. And he cited the case where a man carried his mine under his neighbor's ground and the case; where a man ran away with a casket of jewels, he was ordered to answer, and the injured party's oath [was] allowed as evidence *in odium spoliatoris*. And it seemed to him a strange demurrer to say they are not to contribute to the charge of the Company because they were wrongdoers. And this was but a charter for regulating of trade, and there had been many patents for that purpose soon after the making of the Statute of 21 Jac., which had never been thought illegal, nor complained of in any subsequent Parliament. And therefore, His Lordship overruled the plea and demurrer and ordered the defendants to answer the bill.

250

Oxburgh v. Fincham
(Ch. 1685)

A bill of revivor need not be filed against a defendant who is in default.

1 Vernon 308, 23 E.R. 487

25 February [1685].

[There was a] demurrer to a bill of revivor because the plaintiff had not revived against all the defendants.

Per curiam [NORTH]. It is not necessary to revive against a defendant that has not answered.

[Raithby's note: In this case, there appears to have been a cross-bill, a demurrer to which was overruled and, therefore, no costs. Reg. Lib. 1684 B, f. 235.]

[Other reports of this case: 1 Eq. Cas. Abr. 3, 21 E.R. 830.]

251

Pawlet v. Ingres
(Ch. 1685)

A bill in equity to perpetuate testimony does not lie where the petitioner has a judgment against him at common law for the matter in dispute.

1 Vernon 308, 23 E.R. 487

Eodem die [25 February 1685].

One commoner had brought an action on the case against another commoner for oppressing the common and had recovered £10 damages. The bill was brought by the defendant at law to examine his witnesses to prove his right of common *in perpetuam rei memoriam*.

Per curiam [NORTH]: Such a bill is not to be admitted in this court. A commoner ought not to come here to prove his right of common until he has recovered at law in affirmance of his right. But, if the bill had been that one commoner had recovered 1s. or other small sum for damages against the plaintiff for oppressing the common or for using the common where he ought not and, therefore, that the other commoner might accept of like damages for what was past, to prevent charges at law, that had been in the nature of a bill of peace and had been a proper bill in this court.

[Raithby's note: Reg. Lib. 1684 B, f. 264, by which it appears this was on a plea and also on a demurrer for want of parties, which were allowed.]

[Other reports of this case: 1 Eq. Cas. Abr. 103, 21 E.R. 912.]

252

Norton v. Sprig
(Ch. 1685)

A second husband is not personally liable for waste or breach of trust committed by his wife and her deceased first husband unless he has given a bond.

1 Vernon 309, 23 E.R. 488

27 February [1685].

Upon arguing exceptions to the Master's report, the question was how far the second husband should be charged of his own estate for a *devastavit* and breach of trust committed by the wife and her first husband.

Per curiam [NORTH]: Where there is a bond, there is a lien by a deed, and so the second husband [is] bound. But, where there is barely a breach of trust or debt by simple contract, there, in equity, the plaintiff ought to follow the estate of the wife in the hands of the executor of the first husband.

[Other reports of this case: 1 Eq. Cas. Abr. 60, 21 E.R. 873.]

253

Grice v. Banke
(Ch. 1685)

The final judgment of a court merges into itself all claims that were or could have been adjudicated in that lawsuit.

1 Vernon 309, 23 E.R. 488

Eodem die [27 February 1685].

The court of judicature for rebuilding houses burnt down by the Great Fire in London having settled the rent, which the tenant was to pay for the house in question, *viz.* £5 *per annum*, and there being an ancient rent of £1 5s. *per annum* issuing out of the same house to a charitable use and which was now twenty years in arrear, the question was whether the landlord or tenant should pay this rent.

Upon reading the Act of Parliament,¹ the Lord Keeper [NORTH] was satisfied the tenant was

¹ Stat. 18 & 19 Car. II, cc. 7, 8 (*SR*, V, 601-612).

in no case to be charged with more than the rent of £5 *per annum* in the whole. And he directed the plaintiff to bring the Lady Dorset, who had the reversion expectant on the lease, before the court. And he ordered the tenant not to pay any more of his rent in the meantime and declared that the growing payments and the arrears of the £1 4s. a year ought to be deducted out of the rent.

254

Prettyman v. Prettyman
(Ch. 1685)

A former suit for the same matter as the present suit results in either an abatement of or a bar of the present suit.

1 Vernon 310, 23 E.R. 488

28 February [1685].

A former decree of dismissal being pleaded in bar, it was objected that the dismissal and decree could not be pleaded in bar because the decree was not signed and enrolled. And, if the defendant would have it that it was a suit still in being, then the plea was a plea in abatement only.

Per curiam [NORTH]: Either that suit was for the same matter as the present or not. If not, you ought to have moved to have had the plea referred. But if it is, then that suit is either depending or determined and either way is pleadable.

[Raithby's note: The plea was of a suit and dismissal in the [Court of] Exchequer for the same matters and allowed with 5 marks costs, and the order runs 'That, after payment of the costs, it should be referred to the Master to examine and certify whether the plaintiff's bill, which was dismissed in the Exchequer, and his bill in this court be for one and the same matter in substance or not.' Reg. Lib. 1684 B, f. 282.]

[Other reports of this case: 1 Eq. Cas. Abr. 162, 21 E.R. 959.]

255

Nicholson v. Pattison
(Ch. 1685)

A court of equity will compel a defendant to produce a written contract that is in dispute between the parties.

1 Vernon 310, 23 E.R. 489

Eodem die [28 February 1685].

The bill suggested the defendant had got into his custody a writing purporting an agreement between the plaintiff and defendant and prayed he might set it forth and suggested further that the plaintiff had paid the defendant the money due and yet he threatened to take out execution.

As to the first part of the bill, the defendant demurred because the plaintiff had not made oath of the loss of the writing. And, by his counsel, it was insisted that the plaintiff himself had this writing, but had erased it since the executing of it and so, by his own act, has destroyed his own remedy at law and, therefore, ought not to be aided in equity.

Sed non allocatur per curiam [NORTH].

256

Naylor v. Cornish
(Ch. 1685)

A debt payable by the City of London can be sued against the commissioners of the City.

1 Vernon 311, 23 E.R. 489

Eodem die [28 February 1685].

The bill was to be relieved touching a debt due from the Chamber of London under the common seal of the City, and it was brought against the old mayor and aldermen and the now commissioners. And the bill charges that, though the king had obtained judgment against the City in a *quo warranto*,¹ yet he had been graciously pleased to declare that he would take no advantage of the forfeiture of their lands, but had granted the lands to the defendants as commissioners to receive the profits in trust to pay the City debts and that there was a chamberlain appointed (named in the bill) and the plaintiff had likewise made Mr. Attorney General a party, charging that he did not oppose the payment of the plaintiff's debt.

The defendants demurred for that they were not liable in their private capacities nor did they receive any of the rents or profits of the City lands as citizens of London nor upon trust to pay the debts of the City.

For the defendants, it was insisted they acted by commission and were only in the nature of managers and accountable to the king only and acted only during his pleasure.

The Lord Keeper [NORTH] ordered the defendants to answer. But he said the plaintiff had but a melancholy reckoning, there being a debt of above £150,000 due to the orphans, which was to be preferred in payment.

[Raithby's note: The demurrer was overruled without costs; the bill charged that the money had been lent by the plaintiff to supply the necessities of the Chamber of London to pay to orphans. Reg. Lib. 1684 B, f. 256, entered *sub nom.* Naylor v. Smith.]

257

Gell v. Hayward
(Ch. 1685)

A bill of complaint in reference to a right of way must allege the right of way with specificity.

1 Vernon 312, 23 E.R. 490

Eodem die [28 February 1685].

[Upon a] bill to examine witnesses to perpetuate the testimony of witnesses touching a right to a way, The defendant demurred because the plaintiffs had not set forth by their bill the way they claimed with sufficient certainty.

Lord Keeper [NORTH]: If you have not laid the way in your bill exactly *per et trans*, as you ought to do in a declaration at law, I will allow the demurrer for uncertainty.

But upon reading the bill, it appeared to be laid certain enough.

Then, the Lord Keeper [NORTH] said he would not allow examination *in perpetuum rei memoriam* for such trivial things as rights of common or for ways or watercourses or, at least, not until after a recovery at law for that the examination costs more than the value of the thing. And, in the present case, the plaintiff is either disturbed in his way or he is not. And, if he be, he has his

¹ *Rex v. City of London* (1683), 3 State Trials 545-630 (F. Hargrave, ed., 1776).

remedy at law. And, if he be not, he has no reason to complain.

But, for the plaintiff, it was said that the bill charged the plaintiff's tenant was in combination with the defendant and would not suffer the plaintiff to bring an action in his name.

[Raithby's note: It appears that the bill in this case charged that the defendant and several of the plaintiff's tenants, holding land to which the way led, combined together so that the plaintiff could not try his right at law, and yet that the plaintiff had not served the said tenants with process. The order was in the following words, 'Inasmuch as the defendant [query plaintiff] has brought no action at law and the tenants had not answered, the court orders that the plaintiff do prosecute the other defendants, the tenants, to answer, and, after they have answered and that the plaintiff shall have brought his action, the said plaintiff might then procure the said demurrer to be set down to be further heard as he shall be advised.' Reg. Lib. 1684 A, f. 340.]

258

Norris v. Bacon
(Ch. 1685)

When a solicitor sues in court for his fees, he must sign his written account that is attached to the bill of complaint.

1 Vernon 312, 23 E.R. 490

Eodem die [28 February 1685].

A solicitor brought a bill in this court for his fees. The defendant pleaded the Statute 3 Jac., ch. 7,¹ that the plaintiff had not signed his bill. And the plea was allowed.

[Raithby's note: The words of the order are as follow: 'His Lordship orders that the said defendant's plea be overruled without costs, but the plaintiff is to subscribe his name to his bill of charges annexed to his bill in this court.' Reg. Lib. 1684 B, f. 288.]

¹ Stat. 3 Jac. I, c. 7 (SR, IV, 1083-1084).

Grant v. Stone
(Ch. 1685)

A recognizance entered into by an order of a court can be enforced only in that court which ordered it.

1 Vernon 313, 23 E.R. 491

It was moved on behalf of the plaintiff that, he having entered into a recognizance by order of the court, that the defendant endeavoured to arrest him upon it at law, whereas, by the course of the court, he ought to bring a *scire facias* only.

For the defendant, it was said that a recognizance is suable, as well at law, as in this court, and the defendant had chosen to bring an action upon the recognizance to the intent he might hold the plaintiff to bail.

Lord Keeper [NORTH]: A recognizance is suable in the courts at law either by an action to be brought on it or, more properly, by an original in the [Court of] Common Pleas. But this being a recognizance entered into by order of this court, I will not allow it to be sued otherwise than by a *scire facias* in this court.

[Reg. Lib. 1684 A, f. 358.]

Bonithon v. Hockmore
(Ch. 1685)

A fiduciary can be reimbursed out of the estate any reasonable management expenses paid to third parties, but he cannot charge the estate for his own personal services.

1 Vernon 316, 23 E.R. 492

8 May 1685.

In an account before the Master, the plaintiff, who had married the defendant's mother and had a debt upon the estate, was allowed by the Master great annual sums of money for his care and pains in managing of the estate.

Per curiam [NORTH]: Where a mortgagee or trustee manage the estate themselves, there is no allowance to be made them for their care and pains. But, if they employ a skillful bailiff and give him £20 *per annum*, that must be allowed, for a man is not bound to be his own bailiff.

[Other reports of this case: 1 Eq. Cas. Abr. 7, 328, 21 E.R. 833, 1080.]

261

Barker v. Holder
(Ch. 1685)

A court of equity will not grant relief against a common law verdict on the ground of excessiveness.

1 Vernon 316, 23 E.R. 493

Eodem die [8 May 1685].

The plaintiff, being a lessee at £40 a year, covenants to lay out and expend on the premises £200 within ten years. He fails to do it. And, when thirty years of the lease are expired, the defendant brings an action on the covenants and, about £30 being proved to have been laid out, recovers £150 damages.

The bill was to be relieved against this verdict in regard the damage's were excessive, or, at least, that the £150 might be decreed to be laid out on the houses, for the plaintiff ought to have the benefit of it during his lease.

Lord Keeper [NORTH]: I think that the jury dealt very hard with Mr. Barker to give such great damages and to put him upon making a precise proof that the whole £200 was laid out when it ought rather to have been presumed it was, the defendant having brought no action in twenty years time after the money ought to have been laid out. But the jury having thought fit to give such damages, there is no ground for me to mitigate them nor to decree the moneys to be laid out on the premises, for, if it had been laid out when there was thirty or forty years to come in the lease, the lessee would have taken care to have laid it out in lasting improvements, which it may be, now his lease is near out, he would not do. And, therefore, he dismissed the bill.

[Other reports of this case: 1 Eq. Cas. Abr. 28, 21 E.R. 849.]

262

Tunstall v. Oxenbridge
(Ch. 1685)

A plaintiff cannot argue or prove matters that were not alleged in the bill of complaint.
A plaintiff's laches can be a bar to his claims.

1 Vernon 317, 23 E.R. 493

9 May 1685.

The plaintiff, by his bill, demanded an account of the personal estate of Sir John Tunstall, his grandfather, and of the personal estate of his grandmother, who both died intestate. And several administrations had been granted of their estates. And now, Oxenbridge, the plaintiff's uncle, had obtained an administration *de bonis non*. But all these administrations, as the plaintiff by his bill alleged, were a trust for the children of the plaintiff's father's eldest brother, who had assigned their interest to him. And the plaintiff, thereupon, had now procured an administration *de bonis non* to himself.

And the plaintiff, by his bill, sought also to be let into a tenant right of a church lease that was enjoyed by his grandfather, but had been twice renewed by the defendant.

And, whereas the plaintiff's counsel would have it that this lease was a lease for years determinable on three lives and so went in a course of administration, it was answered that it was an absolute lease for three lives and not for years determinable on three lives, as they would fancy,

for, being held of the Dean and Chapter of Westminster, they had power only to demise for three lives or twenty-one years and could not make a lease for ninety-nine years determinable on three lives, and so the plaintiff's administration gave him no title to a tenant right, if any there was.

And then, for the plaintiff, it was insisted that he had an assignment of the interest of the heir at law.

Lord Keeper [NORTH]: If you would be relieved in that respect, you ought to have set forth the assignment and grounded your bill upon it, which you have not done, so that your bill is defective in that point. And besides, the last life died so long since as in 1649, and the defendant has renewed the lease twice since that time.

Adjournatur.

[Raithby's note: The bill was dismissed. Reg. Lib. 1684 B, f. 368. Entered *sub nom.* Tunstall v. Piggott, and the decree was affirmed in the House of Lords, 22 March 1693, *Lords' Journal*, vol. 15, p. 400.]

Durbaine v. Knight
(Ch. 1685)

Where an unmarried woman files a suit, then marries, then revives the suit, and gets a decree in her favor, the losing defendant pays all of her court costs from the initial filing.

1 Vernon 318, 23 E.R. 494

Eodem die [9 May 1685].

A *feme sole* exhibits her bill and, pending the suit, intermarries. The husband and wife bring a bill of revivor and obtain a decree with costs. The question was whether they should have costs of the whole suit or only from the bill of revivor.

Lord Keeper [NORTH]: This is not like a revivor against an heir or executor, where the suit is abated by death. In that case, they shall answer only for their own time. But here, all proceedings stand *in statu quo*, and it is unreasonable there should be such an abatement. And in case the defendant had been a *feme sole* and intermarried, that should not have abated the plaintiff's suit and, in this case, the abatement was by the party's own act.

The Court ordered the costs of the whole suit, deducting only the charge of the bill of revivor, which was thought hard in these two respects: first, that the abatement was by the party's own act; secondly, that, had the defendant been in the right and so ought to have had costs, yet he could not have compelled the plaintiffs to revive.

[Reg. Lib. 1684 A, f. 564.]

[Other reports of this case: 1 Eq. Cas. Abr. 126, 21 E.R. 931.]

264

Anonymous
(Ch. 1685)

Lis pendens does not attach to property until a bill of complaint has been filed and process has been served.

1 Vernon 318, 23 E.R. 494

A subpoena served and bill filed is a *lis pendens* against all persons. But the service of a subpoena without a bill's being actually filed makes no *lis pendens*. But the bill being filed, the *lis pendens* comes from the service of the subpoena, though it be not returnable until the next term and though the party lives never so remote, for, otherwise, a man upon the service of a subpoena might alien his lands and prevent the justice of this court.

But that being by the counsel observed to be a hard fiction in equity to bind purchasers, it was proposed that some course might be taken by having some public record or calendar kept whereunto purchasers might have resort and see what lands are in demand in this court, as they may at law in case of fines.

Curia advisare vult.

265

Zouch v. Swaine
(Ch. 1685)

A sale of land that was the result of overreaching by the purchaser will be set aside with the purchase money to be refunded with interest.

1 Vernon 320, 23 E.R. 495

Eodem die [11 May 1685].

The defendant had drawn in the plaintiff, a young man, and purchased an estate of him at a great undervalue. And it happened that the title was defective and the defendant had been evicted. And there being covenants for quiet enjoyment and other securities entered into by the plaintiff, he now came to be relieved against an action brought on these covenants.

And for the defendant Swaine, it was insisted that he ought to have the value of the estate evicted.

Lord Keeper [NORTH]: The defendant, who was a lawyer, and ought to have understood a title, purchased this estate at a great undervalue. And the title now proving defective and the land evicted, it is unreasonable he should make an advantage of this catching bargain. And, therefore, he decreed him his purchase money with interest only, discounting mesne profits.

[Raithby's note: Reg. Lib. 1684 B, f. 403. The interest to be computed from the date of a deed which was considered as a settlement of the account. In this case, it appears that the plaintiff's father had in his lifetime mortgaged the premises in question to one Summers and then made his will and appointed the plaintiff's mother and others executors and died leaving the plaintiff his heir at law, who filed this bill against the mortgagee for an account and redemption. This was decreed. The plaintiff and his mother then applied to Wergg and Swaine for a loan of the money to pay off the said mortgage, and they or one of them accordingly lent the same. And the premises were then conveyed in mortgage to Wergg, who entered and received the profits to an amount more than sufficient to pay

the said mortgage money and interest. The plaintiff's mother then died, leaving the plaintiff, who became entitled to the equity of redemption. And, thereupon, Wergg, by deed 16 December 30 Car. II [1664], reconveyed the premises to him. and the defendant, who then or soon after, got the plaintiff, who was then just come of age, to execute an absolute conveyance of the premises to him, in pretending that it was only a counterpart of the conveyance from Wergg, and then entered and received the profits, for an account of which and to have a re-conveyance from Wergg and Swaine, the bill was filed. Swaine put in a plea to the plaintiff's title and an answer, submitting to account on payment by plaintiff of what was due on the mortgage. And an account was so decreed, and, as against Swaine and Wergg, of all the rents and profits of the said estate from the time of the conveyance to Wergg by the mortgages of the plaintiff's father. Reg. Lib. 1680 B, f. 555.]

266

Seymour v. Fotherly
(Ch. 1685)

In this case, the court of equity refused to reform the marriage settlement in issue.

1 Vernon 320, 23 E.R. 496

The father, on the marriage of his son with the plaintiff's daughter, in consideration of a £4000 portion, which the father was to receive, articles to settle lands to the use of the son for life, remainder to the wife for a jointure, remainder to the first and other sons of the marriage in tail male, remainder to the right heirs of the son.

The bill was to discover the value of the estate and what encumbrances might be upon it and to have the articles performed. The defendant, having another son, insisted, he was surprised in the articles and intended that, in default of issue male of his eldest son, his estate should have come to the second son, charged with portions for daughters, and would have had the court interpose that the settlement might have been so made.

Sed non allocatur.

[Raithby's note: And [the court] decreed a specific execution of the articles. Reg. Lib. 1684 B, f. 422.]

267

Blithe's Case
(Ch. 1685)

Where a wife has a power coupled with an interest, that interest vests in the husband and passes to his administrator upon his death.

2 Freeman 91, 22 E.R. 1077

Master of the Rolls, SIR JOHN CHURCHILL.

A widow, having one child and being possessed of a term for years, just before her marriage with the second husband, assigns this lease to two trustees without the privity of her husband in trust that she should receive the profits during life and, afterwards, in trust for her child for life and, afterwards, upon such trusts as she should by any writing signed in the presence of two witnesses declare and appoint. And then she marries.

The husband enjoyed the lease for several years during the life of his wife, and, after the death of the wife, the child received the profits during his life.

The wife, during her coverture by the second husband, by deed under hand and seal in the presence of two witnesses, appoints the trustees after the death of the child to permit the defendant to receive the profits during the residue of the term after the death of the child.

The plaintiff, being administrator to the husband, prefers his bill against the trustees to compel them to assign to him. Whereupon it was held:

First, that this lease being a thing of small value, about £3 *per annum* and there appearing no treaty of marriage nor any contemplation of this lease nor any agreement concerning it with the husband, that the assignment made to the trustees was not fraudulent against the husband but that he should be bound by it so as that the child, after the death of the wife, should hold it, and, if she had then limited it over, the husband had been bound by it;

Second, it was held that the execution of this power by the wife after marriage was void and so the plaintiff, who was the administrator of the husband, had the decree; not but that a married woman may in many cases execute a naked power; but here this power was coupled with an interest, which interest by the marriage did vest in the husband for the residue of the term, being not disposed of in the first settlement, was a trust for the wife and, by consequence, was by marriage a trust for the husband, which the wife could not dispose of without him.

268

Baker v. Olibeare
(Ch. 1685)

Where a lease is forfeited and then renewed, the lessee can compel his sub-lessees to renew their unexpired sub-leases.

2 Freeman 92, 22 E.R. 1078

Mr. Baron ATKYNS.

The plaintiff, being lessee of a house from the Company of Carpenters, in which there was a clause of forfeiture for non-payment of rent, also for not repairing within three months after notice, makes an under-lease to the defendant [Olibeare, a barrister of the Middle Temple]. The plaintiff's lease being avoided by the said Company for non-payment of rent, he took a new lease and then did request the defendant to take a new lease from him, which the defendant refusing, the plaintiff preferred his bill to compel him to take a new lease, which was strongly opposed by the defendant's counsel for that, although it was frequent that, where a lessor took advantage of a forfeiture, the lessee might compel him to grant a new estate, yet it was never known that, in that case, the lessor could compel the tenant to take a new lease.

But it was answered that case is not like this, for, there, it was the act of the lessor to avoid the estate, but, in this case, it is not the act of the lessor, the plaintiff, but of the Company, who are the head landlords. And, although it may be occasioned by the default of the plaintiff, *viz.* in not paying his rent, yet there is a great difference between an act and a default, for it would be very hard, where the head landlord takes an advantage of a forfeiture by the default of the mesne landlord, that all the under-tenants should be thereby discharged.

And so it was decreed that the defendant should take a new lease for so much of the term as was unexpired with the same covenants as were in the old lease.

269

Anonymous
(Ch. 1685)

An executor cannot pay a creditor of the estate while litigation is proceeding against the estate.

2 Freeman 93, 22 E.R. 1079

Mr. Solicitor [General *Finch*] cited a Case of Patrick and Dee,¹ where an executor pleaded *plene administravit* to an action brought against him, whereupon the plaintiff preferred his bill in this court for discovery of assets, and, whilst the suit was depending in this court, the executor confessed judgment to another person; this court caused him to pay the whole debt, for that the party should not suffer by an act that was done to defraud him whilst he was proceeding to this court.

270

Pullen v. Serjeant
(Ch. 1685)

The descendants of the half blood have an equal share with those of the whole blood by virtue of the Statute for the Distribution of Intestates' Estates.

Lincoln's Inn MS. Misc. 498, p. 16, pl. 2

The only question in the case was whether the half blood should have an equal share with the whole blood by virtue of the Statute for Distributing Intestates' Estates² or only have a half share.

And it was decreed by Justice CHARLTON, who sat this day in court in the absence of My Lord Keeper [North] in Parliament, that they should have an equal share with the whole blood.

Note the House of Lords, by the advice of the two chief justices and some other judges, made the like decree in an appeal brought in the Parliament began the 20th of March *anno* 2 Will. & Mary 29.

[Other copies of this report: Lincoln's Inn MS. Misc. 503, p. 85, pl. 2, Lincoln's Inn MS. Misc. 504, p. 81, pl. 2.]

British Library MS. Hargrave 369, f. 10

Trinity [term] 1 Jac. II.

Upon a bill for distribution upon the [Statute of] 22 & 23 Car. II, a question was, *viz.* whether the children of the half blood would have an equal share with those of the whole.

And Justice CHARLTON being here in the absence of the Lord Keeper said that it had been settled that the half blood should have an equal share and so was the Case of Smith and Tracy, lately

¹ *Parker v. Dee* (1674), Reports *tempore* Finch 123, 23 E.R. 67, 2 Chancery Cases 200, 22 E.R. 910, 3 Swanston 529, 36 E.R. 968, 73 Selden Soc. 83.

² Stat. 22 & 23 Car. II, c. 10 (*SR*, V, 719-720).

adjudged in the King's Bench, and Allen 36.¹

2 Chancery Reports 300, 21 E.R. 684

The bill is to have a discovery of the estate of Anne Nurse, deceased, and a distribution to be made and the plaintiffs to have their proportions thereof, they being the next of kin to the said Anne Nurse, *viz.* the plaintiff Anne, wife of the plaintiff Pullen, sister by the mother's side of the said testatrix, Anne Nurse. And the other plaintiffs are of the same degrees of consanguinity and so are entitled to their equal shares of their personal estate. And the said Anne Nurse made Anne, the wife of William Hodges, executrix, who died before the said Anne Nurse, and the said Anne Nurse died without [any] altering of her will. After her death, the defendant Serjeant, a relation to the said Anne Nurse, took administration of the said Anne Nurse's personal estate.

The defendant insists that he, being the only brother and one of the nearest relations to Anne Nurse, the testatrix, and her said executrix dying before she administered *cum testamento annexo* and paid debts and legacies, is willing to distribute as the court shall direct. And he craves the direction of the court whether the plaintiffs, being of the half blood, shall have an equal proportion with the defendant and others of the whole blood.

This court declared that the plaintiffs, who are of the half blood to the said Anne Nurse, were equally entitled to a distribution of the said estate and to an equal share with the defendant Serjeant and the others who are of the whole blood and decreed the same accordingly.

[Reg. Lib. 36 Car. II, f. 570.]

271

Preston v. Jervis
(Ch. 1685)

Where the true owner of land has acquiesced for a long period of time in the sale of it and the buyer has relied on the acquiescence to his or her detriment, the true owner will be ordered to execute a conveyance to the purchaser.

1 Vernon 325, 23 E.R. 498

19 May 1685.

The case was that the defendant's elder brother, in 1665, sold lands of the nature of borough English to the plaintiff's mother, which belonged to the defendant, the elder brother apprehending then, as is pretended, that the defendant was dead. The plaintiff's mother took a bond from the elder brother to indemnify her against the defendant's title, for the lands lying in Kent are presumed *prima facie* to be gavelkind. And, in truth as it appeared and was proved in the cause, the younger brother having notice that his elder brother had thus sold his lands, they came to an agreement in 1676 or 1677, by which the elder brother was to pay the defendant an annuity, which was equal to the annual value of the lands and to leave him lands of the elder brother in Kent, and so he suffered the plaintiff's mother to enjoy her purchase whilst the elder brother lived.

But he being dead, the defendant brought an [action of] ejectment to evict the plaintiff, who

¹ *Smith v. Tracy* (1677), T. Jones 93, 84 E.R. 1163, 1 Ventris 307, 316, 323, 86 E.R. 198, 204, 209, 2 Ventris 317, 86 E.R. 462, 2 Levinz 173, 83 E.R. 504, 1 Modern 209, 86 E.R. 833, 2 Modern 204, 86 E.R. 1027, 1 Freeman 288, 294, 89 E.R. 208, 212, 3 Keble 601, 620, 669, 730, 776, 806, 831, 84 E.R. 902, 914, 943, 978, 1006, 1023, 1038, 1 Eq. Cas. Abr. 249, 21 E.R. 1025; *Brown v. Wood* (1647), Aley 36, 82 E.R. 902.

claimed as heir to his mother, and, thereupon, he brought his bill to be relieved.

And in regard the land was sold in 1665 and the younger brother, in 1674, came over into England, and, after he had notice of the sale had accepted an annuity of his elder brother and suffered the plaintiff's mother to enjoy without calling her title in question during all the lifetime of his elder brother, whereas, if he had so done, the plaintiff's mother might have taken advantage of her collateral security, which was now of no value, the elder brother having left no assets, and it being also proved that the elder brother suffered some other lands to descend upon, and come to the defendant, which he might have prevented, it was decreed that the defendant should make good the plaintiff's title and surrender and release the lands to the plaintiff and his heirs.

[Reg. Lib. 1684 B, f. 434.]

272

Kenge v. Delavall
(Ch. 1685)

The jointure of a married woman who lives separately from her husband is not liable to the creditors of her husband after his death.

1 Vernon 326, 23 E.R. 499

20 May 1685.

Sir Ralph Delavall and his lady, by reason of some discontents in the family, agreed to live apart. And there was a separate maintenance settled on the lady, but determinable on either of their deaths. The lady contracts several debts to the plaintiff and others during the separation. Sir Ralph dies. And the bill is to subject the defendant's jointure to the payment of the plaintiff's debt.

Lord Keeper [NORTH]: Had the separate maintenance continued, there might be some reason for the creditors to follow that and make it liable to their satisfaction. But that being determined by the death of the husband, I do not see which way the jointure can be charged with it, and the rather for that the executor of the husband, who may have paid the debt, is no party to the suit. I overruled the demurrer indeed because I would have the case before me with all its circumstances. But now I see no equity, and, therefore, the bill must be dismissed.

[Raithby's note: It was stated in the bill that the defendant had agreed to pay the debts out of her separate maintenance and had entered into a bond with sureties for the payment thereof. Reg. Lib. 1684 A, f. 586.]

[Other reports of this case: 1 Eq. Cas. Abr. 68, 21 E.R. 881.]

273

Mason v. Good
(Ch. 1685)

Interests in chattels pass by an assignment of letters of administration.

Skinner 232, 90 E.R. 107

The case was this, Dr. Good had taken securities in his own name in trust for Thomas Cook for divers sums of money, and he makes Good his executor and dies. Thomas Cook assigns the said money and all bonds taken in Good's name in trust for him to Mason and then dies intestate. Richard Cook, administrator to Thomas, assigns his letters of administration to Mason, and then Richard dies intestate. Anne, daughter of Richard and wife to Good, the defendant, takes letters of administration of the goods of Thomas Cook unadministered by Richard, her father. Mason prefers a bill against Good as executor to Good, the trustee. Good, the executor, claims in the right of his wife.

[It was] held upon a plea and demurrer in Chancery by Lord Keeper NORTH that the interest of Richard well passed by the assignment of his letters of administration to Mason. And so likewise [it was] held at the hearing before the Master of the Rolls [CHURCHILL] and so decreed.

[Other reports of this case: 2 Eq. Cas. Abr. 422, 22 E.R. 359.]

274

Whitmore v. Weld
(Ch. 1685-1686)

*An executorship durante minore aetate ceases when the infant becomes seventeen.
A devise over of vested personalty is void.*

1 Vernon 326, 23 E.R. 499

26 May 1685.

The case arose upon the will of Mr. Whitmore, who, by will dated 18th January 1675, devised the surplus of his personal estate, being of the value of £30,000, to the lord Craven¹ during the minority of William Whitmore, the testator's only son, for the use of him and his heirs lawfully descended from his body and to the use of the issue, male and female, descended from the bodies of his sisters, Elizabeth Weld, deceased, Margaret Flemish, and Anne Robinson, in case his son died during his minority without issue. And he made his son executor and the lord Craven executor during the son's minority. The testator died in 1678, his son being about the age of thirteen. And the lord Craven proved the will during the minority of the son. And, afterwards, the son died without issue, being at his death of the age of eighteen and having never taken upon him the executorship of his father. And before his death, he made his will and thereby devised to his wife, the plaintiff, all his estate, real and personal, and what else he could give her and made her sole executrix. And the question was whether she, as executrix to her husband, or the children of the testator's sisters should have this personal estate.

¹ R. M. Smuts, 'Craven, William, earl of Craven (bap. 1608, d. 1697)', *Oxford Dictionary of National Biography*, vol. 14, pp. 63-67.

For the plaintiff, it was insisted that here was an estate by this devise absolutely vested in the son and that no words in the will could afterwards divest it and that it is against the nature of a personal estate to be thus limited over. And the son had by this devise an absolute right in the personal estate and might spend it or forfeit it. And the Case of Clent and Ridges¹ was cited, where a man devised £6000 apiece to his sisters, but, if they should happen to die before twenty-one, he devised it over, and the lord Shaftesbury, in that case, decreed for the remaindermen, but that decree was afterwards reversed upon an appeal to the House of Lords. And it was much insisted on that the devise to the lord Craven being during the minority of the son, that ought, in this case, to be intended until he should attain the age of seventeen years. And the lord Craven being also made executor during the minority of the son, it shows the testator intended that the lord Craven's interest in the personal estate should determine when the son attained the age of seventeen years and, the personal estate being then absolutely vested in him, it cannot afterwards be divested.

For the defendants, it was insisted that the intent of the testator and the letter of the will carried this estate to them. And that devise did well enough consist with the rules of law, here being no estate actually vested in the son, it being a trust in the lord Craven, and that, during minority, was always taken in our law to be until the party attained the age of twenty-one years.

Lord Keeper [NORTH] said he was troubled to see the intent of the party in any case disappointed, but more especially in the case of a will, which is many times made in haste, when there is not time for that advice and deliberation which may be used in other cases, and, therefore, as far as the rules of law will permit, the intent of the party ought to be supported. And he said this will might certainly have been so penned that it should have gone over to his sister's children. And he took the question touching the minority to be a considerable point. And he observed that, though an infant at seventeen might administer, yet he could not, until he was of full age, commit a *devastavit*. And he said, if it be a trust vested, the limitation over must not be endured. But, if it be not vested, it will come near the Case of Massenburgh and Ash.² But he said he would consider of it and have the opinion of the judges.

Lincoln's Inn MS. Misc. 498, p. 17

Michaelmas 1 Jac. II, 7 December 1685.

The case was this. William Whitmore, the elder, taking notice that he had settled the greatest part of his lands by deed and being possessed of a very great personal estate in mortgages, jewels, plate, bonds, and other goods and chattels, amounting in the whole to £36,802, by his will in writing, devises several legacies, and, afterwards, he devises in this manner, *viz.*:

The surplusage of my personal estate, my debts, legacies, and funeral charges being paid and satisfied, I give unto the Right Honorable William earl of Craven for the use of my only son William Whitmore and his heirs lawfully descended from his body and for the use of the issue male and issue female descended from the bodies of my sisters, Elizabeth Weld, deceased, Mary Kemeys, Anne Robinson, in case that my only son William Whitmore should decease in his minority without issue lawfully descended from his body. I nominate and appoint my only son, William Whitmore, executor of my last will and testament. I nominate and appoint William earl of Craven, during the minority of my son William Whitmore, executor of my last will and testament. I commit the education and tuition of my only son William Whitmore unto the care of the Right Honorable the earl of Craven.

¹ *Clent v. Bridges* (1673), Reports *tempore* Finch, 23 E.R, 14, 73 Selden Soc. 15.

² *Massenburgh v. Ash* (Ch. 1685), see above, Case No. 166.

The testator died, his son being about the age of thirteen years. And the earl of Craven proved the will. William Whitmore, the son, made his will in writing, and, thereby, he devises to Frances, his wife, all his real and personal estate, and he makes her executrix. And he died without issue, being then above the age of eighteen years and under the age of twenty-one, not having proved his father's will. Frances proved her husband's will and brought this bill to have an account of the personal estate of William Whitmore, the father, and to have it decreed to her.

And, after many arguments on both sides, My Lord Chancellor [JEFFREYS] expressed himself to be clear of the opinion that William Whitmore, the son, being made executor of his father's will and the earl of Craven executor during his minority, My Lord Craven's executorship ceased when William, the son, came to the age of seventeen and, then, the property of the whole personal estate vested in him. And it being once vested in him, the devise over is void. And, therefore, he decreed for the plaintiff.

In this case were cited the cases of Broadhurst and Richardson, 23 Car. II; and Warner and Posley, 32 Car. II; and Sir Theodore Maine's Case in 1661; and the Case of Clent v. Bridges, 9 November 25 Car. II.¹

[Other copies of this report: Lincoln's Inn MS. Misc. 503, p. 85, pl. 3, Lincoln's Inn MS. Misc. 504, p. 82.]

British Library MS. Add. 35978, f. 48

This case was referred by the Lord Keeper [North] to the justices of the Common Pleas for their opinion. [On] 18 January 1675[/76], William Whitmore, by his will in writing devised several legacies etc.; then follow these words:

The surplusage [?] of my personal estate I give to William, earl of Craven, for the use of my only son, William Whitmore, and the heirs of his body and for the use of the issue male and female of my son, Welde, Keymis, and Robinson in case my son die during his minority without issue. I make my son, William Whitmore, my executor. I appoint the earl of Craven my executor during the minority of my son. I commit the care and education of my son to the said earl of Craven.

In August 1678, the testator died, the son being thirteen years old. The earl of Craven proved the will. William, the son, made his will 31 July 1684, being then above eighteen years of age. And he died. And he devised all his personal estate to his wife, and made her his executrix, who has proved his will. And if she shall have the personal estate of old William by the devise of or as executrix to her husband, he being dead without issue is the question.

And two points [were] made:

First, if the contingent whereby the issue of the sisters should claim ever happened, William, the son, being above seventeen, though under twenty-one, at his death;

Second, supposing the contingent happened, if this devise of his personal estate in general [. . .] a dying without issue before twenty-one be good.

And, after the hearing of counsel, *Levinz* and *Street* held that the contingent never happened and that the condition [?] during the minority of the son, being in a will concerning a personal estate shall be taken *secundum subjectam materiam* to be the age of seventeen, when an infant is of age to make a will and dispose of a personal estate and when the executorship of the Lord Craven is to

¹ *Broadhurst v. Richardson* (1680), 2 Ventris 349, 86 E.R. 479, 2 Chancery Reports 153, 21 E.R. 644; *Clent v. Bridges* (1673), *ut supra*.

cease, like the case of Co. Litt. 89a, the Statute of Marlbridge¹ gives the [. . .] an account [. . .] *ad legitimum aetatem pervenerit* [?] and the writ thereupon is *ad plenam aetatem*, that is taken to be at the age of fourteen years *secundum subjectam materiam* when he shall be out of wardship, and not twenty-one.

And, for the second, they held that this devise of a [. . .] in general in trust for one and the heirs of his body and, if he die before his age without [. . .] is void as to all in the remainder etc. shall go to him and his heirs and to make such a remainder is to cross a general and certain maxim of the law that, where a property in a personal thing is once vested, it cannot be disposed over to another and here the trust of the property was vested in William, the son, and the same rules as to property are to be observed in Chancery as at common law, as has been often ruled in Chancery.

Second, this personal estate must be conceived to consist of many things perishable, as corn, sheep, and other such like as cannot be preserved in specie etc. He that is a trustee is not to alter or change the thing without the consent of him for whom he is trustee, which, in this case are, first, an infant, second, those in remainder, who can give no consent until the contingent happened. And this is not like the case of the [. . .], where one may have a bare use or occupation of a book or a ring or a picture or the like, whereof there may be a use, and yet the thing remains in specie to another. But of a whole personal estate, there can be no use supposed without a consumption or alteration of the thing in specie. Suppose it were money, there can be no use of it without exchanging it. Suppose it were in mortgages, though the title should appear dangerous, yet the trustees must not alter it if William, the son, have only a use etc., not a property in it.

But JONES, Chief Justice, and CHARLTON held the contrary. And, to the first, they held that the [. . .] of the goods being to the Lord Craven during the minority of William, the son, that shall not determine until William's age of twenty-one, though perhaps the executorship of the Lord Craven may determine at William's age of seventeen, because then young William was capable of being executor himself. And so the words 'during the minority' of his son shall in the first part signify until he come to twenty-one and in the last part until he come to seventeen.

And, as to the other part, they held this a good devise to the issue of the sister upon the contingent, this being a matter of trust and the estate put into the trustee in point of management for all the persons concerned and he is entrusted to change and alter it for the benefit of all persons in such sort as he shall see fit.

So, the Court of Common Pleas being divided, they made no certificate of their opinions.

And afterwards, in Trinity vacation, the Lord Keeper North dying and the Lord Jeffreys being made Lord Chancellor, he upon hearing the cause in Michaelmas term, without difficulty, as I heard, decreed the remainder of the personal estate over to the sister's children to be void and that the whole trust was vested in William, the son, and went to his executors.

1 Vernon 347, 23 E.R. 513

Eodem die [8 December 1685].

Upon the Lord Chancellor's coming to the seal, the plaintiff obtained an order to have this cause heard before His Lordship and not to stay for the judges' certificate. And, this day coming on to be heard accordingly, the Lord Chancellor [JEFFREYS] was of opinion that the devise to the Lord Craven during the minority of the testator's son upon the whole complexion of the will should determine when the son attained seventeen years of age and, secondly, had that been otherwise, yet it was a trust vested in the son, and the remainder over was void. And, therefore, he decreed for the plaintiff and said, if the matter in question had been but for £100, it would not have held an hour's debate.

¹ E. Coke, *First Institute* (1628), f. 89; Stat. 52 Hen. III, c. 17 (SR, I, 24).

2 Chancery Cases 167, 22 E.R. 897

December 1685. Whitmore *contra* Lord Craven *et al.*

William Whitmore, having issue only one son, made his will in writing. And, thereby, he devises several legacies, and, after, he wills in this manner, *viz.*:

The surplusage of my personal estate, my debts, legacies, and funeral charges being paid and satisfied, I give unto the Right Honorable William, earl of Craven, for the use of my only son William Whitmore and his heirs lawfully descended from his body and for the use of the issue male and issue female descended from the bodies of my sisters Elizabeth Weld, deceased, Margaret Kymish, and Anne Robinson in case that my only son William Whitmore should decease in his minority without having issue lawfully descended from his body. I nominate and appoint my only son William Whitmore executor of my last will and testament. I nominate and appoint the Right Honorable William, earl of Craven, during the minority of my only son William Whitmore, executor of my last will and testament.

And he commends and commits the education and tuition of his son to the care of the said earl.

In the year 1678, the testator died, his son being then about the age of thirteen years. The earl of Craven proved the will and paid the legacies. And the residue of his personal estate consisted for the most part in cattle, household goods, plate, jewels, arrears of rent, and debts upon bond, the mortgages being not considerable.

William Whitmore, the son, is lately dead without issue, being about the age of eighteen years and under the age of nineteen, and he had never taken upon him the executorship to his father. William Whitmore, the son, a little before his death, made his will in writing, and, thereby, he devised to his wife all his estate, real and personal, and what else he could give her, and he makes her executrix.

The widow sues for the estate and the surplusage. The sister's children exhibit a cross-bill for it. In December 1685, both were heard.

The questions were two:

First, whether the devise of the surplus to the use of the children in case that William, the son, did take effect is good in law, because it is to them in case William die without heirs of his body during his minority, for the defendant pretended that, though a term or a chattel given to one and the heirs of his body and if he die without heirs of his body, yet, when it is so given on a contingency to happen in a short time and which is to happen, at farthest, on the death of one person, it is good that the intention of the will may be performed. And Maslingbord's Case and that of the Duke of Norfolk were cited.¹

But *e contra*, it was said that, though that may be true in the case of a chattel real, it cannot be in the case of money or personal chattels, which, once vested (as here in William, the son), can never be divested. Never any such precedent was or can be. The inconvenience would be great, and, in the case of a term or chattel real, it was long ere it was allowed, and the use of money is the money itself.

Secondly, for the plaintiff, that, if it be a good devise, yet the contingency never happened, for William must die during his minority or else the defendant can have nothing. And minority is not twenty-one, but seventeen in the case of an executorship. And 'minority' in the first part of the will is of the same sense as the word 'minority' is in the latter part. The same word in the same will is of the same sense and the rather because the executorship of the Lord Craven being but during the

¹ *Massenburgh v. Ash* (Ch. 1685), see above, Case No. 166; *Howard v. Duke of Norfolk* (1681), see above, Case No. 70.

minority of William, the executor ceases when William comes out of his minority as executor. William is first named executor, and then the Lord Craven is made executor during the minority of William, that is while he comes to be of seventeen years of age, and, then, the Lord Craven has no more to do. William can sell, alien (yea), and devise his own estate by will. The Lord Craven's interest of executorship ceases.

The Lord Chancellor [JEFFREYS] decreed accordingly, and he put the case as if the clause of executorship had been in the first place and Lord Craven named executor during the minority of William and, then, if William die during his minority, the residue to the children, it were without question, and the property at seventeen vested in William and cannot be divested. And he said that, if the case had been of small value, it had endured no debate, but now six counsel of each side have spoken.

2 Chancery Reports 383, 21 E.R. 694

William Whitmore, deceased, in 1675, by his will, devised to the earl of Craven for the use of William Whitmore, his son, the plaintiff Frances Whitmore's late husband, all the surplusage of his personal estate, and he made his son, William Whitmore, executor, and the said earl of Craven his executor during the minority of his said son. And the said William, the father, died and left a personal estate of £40,000. William, the son, at his father's death, being but of the age of thirteen years, the said earl proved his father's will and possessed all the personal estate. And the said William, the son, having attained the age of eighteen years, not having proved the said will and being entitled to the surplus of the said personal estate, in 1684, made his will and thereby devised to the plaintiff Frances all his personal estate and whatsoever lay in his power to give and made her his executrix, and he died in 1684. And the plaintiff Frances being of the age of eighteen years proved his will and is thereby entitled to the personal estate of William, the father.

But the defendants, one of them being sister of William, the father, and the others the children and grandchildren of the sisters of the said William Whitmore, the father, pretend the surplus of the personal estate of William, the father, belongs to them.

The said William Whitmore the father's will is in these words, *viz.*:

the surplus of my personal estate, my debts, legacies, and funeral paid and satisfied, I give to the Right Honorable William, earl of Craven, for the use of my only son William Whitmore and his heirs lawfully descended from his body and for the use of the issue male and issue female descended from the bodies of my sisters, Elizabeth Weld, deceased, Margaret Kemesh, and Anne Robinson, in case that my only son William Whitmore should decease in his minority without having issue lawfully descended from his body. I nominate and appoint my only son, William Whitmore, executor of my last will and testament. I nominate and appoint the earl of Craven, during the minority of my only son, William Whitmore, executor of my last will and testament.

The defendant Dame Anne Robinson insists she is the surviving sister of William Whitmore, the elder, and so is entitled to the administration of William, the elder, unadministered by William, the younger. And the defendant, Sir John Robinson, and others, the younger children of the said Dame Anne Robinson, insist that they are entitled by William the father's will to an equal share of the surplus of the personal estate of William, the elder, the rather for that William, the elder, made a settlement of his real estate on trustees and thereby made a provision for the maintenance of William, the younger, during his minority. And, therefore, they opposed the plaintiff Frances' getting administration of William, the elder.

The said plaintiff Frances Whitmore insisted that, by the will of William, the elder, there was no joint devise made to the said William, the son, and the issue male and female of the sisters of William, the father, but a several devise to William, the son, with remainder to the sisters' issue and

that the said William, the son, having an interest vested in him by the will of his father and being eighteen years old when he died and he having then a power to have proved his father's will, the earl's executorship during his minority being determined, might have spent or given away the said estate in his lifetime, he might surely give away the same by his will, which he having done to the plaintiff Frances, she is thereby well entitled to the same and that the remainder over to issue male and female of the sisters, the estate being purely personal, is absolutely void.

This court, hearing several precedents quoted, declared that, by the will of the father, there was an interest vested in William, the son, and the remainder over to the issue male and female of the sisters of William, the elder, was void and that William, the son, living to eighteen years and making his will, as aforesaid, and the plaintiff Frances his executrix, she is thereby well entitled to the surplus of the personal estate. And he decreed the same accordingly.

2 Ventris 367, 86 E.R. 490

The case, as it was drawn up upon reference thereof by My Lord Keeper [NORTH] to the judges of the Common Pleas for their opinion, was thus, *viz.*, on the 18th of January 1675, William Whitmore, the elder, taking notice that he had settled the major part of his lands by deed and being possessed of a very great personal estate in mortgages, jewels, plate, bonds, and other goods and chattels, amounting in the whole to a very great sum, by will in writing devised several legacies. And, after[wards], he wills in this manner, *viz.*:

the surplusage of my personal estate, my debts, legacies, and funeral charges being paid and satisfied, I give unto the Right Honorable William earl of Craven for the use of my only son William Whitmore and his heirs lawfully descended from his body and for the use of the issue male and issue female descended from the body of my sister Elizabeth Weld, deceased, Margaret Kemes, and Anne Robinson in case that my only son, William Whitmore, should decease in his minority without issue lawfully descended from his body. I nominate and appoint my only son, William Whitmore, executor of my last will and testament. I nominate and appoint the Right Honorable William earl of Craven, during the minority of my only son, William Whitmore, executor of my last will and testament. I commit the education and tuition of my only son, William Whitmore, unto the care of the Right Honorable the earl of Craven.

On the 5th of August 1678, the testator died, his son being then about the age of thirteen years. The earl of Craven proved the will.

William Whitmore, the son, made his will in writing, and thereby devised to Frances, his wife, all his estate real and personal and makes her sole executrix. And about the second of August, he died without issue, being above the age of eighteen years and under the age of twenty-one years, not having proved his father's will.

The will of William Whitmore, the elder, is duly proved by Frances.

The question was whether Frances Whitmore, the executrix of William Whitmore, the son, be well entitled to the surplusage of the personal estate of William Whitmore, the father, or the descendants of the sisters.

Upon the hearing of this cause, a case was made *ut antea* and referred by the late Lord Keeper NORTH to the judges of the Common Pleas, who were divided in opinion, but made no certificate thereof, the reference being determined by his death.

And afterwards, by order, it came to be heard before the Lord Chancellor JEFFREYS, who, upon hearing of the counsel of both sides, decreed it for Frances Whitmore, the complainant, for that the executorship of My Lord Craven determined at the age of seventeen years of William Whitmore, the son, and then the surplusage became an interest vested in him and could not be devised over. And His Lordship seemed to be of opinion the minority in the clause, wherein the devise over was, should be understood to determine at the same time, as in the clause of executorship.

West *tempore* Hardwicke 283, 25 E.R. 938

William Whitmore, the father, made his will in these words, *viz.*

The surplus of my personal estate, my debts, legacies, and funerals being paid, I give to the earl of Craven, for the use of my only son, William Whitmore, and the heirs lawfully descended of his body and for the use of the issue male and issue female descended from the bodies of my sisters Elizabeth Weld, Margaret Kemish, and Ann Robinson, in case my only son William Whitmore should decease in his minority, without having issue lawfully descended from his body. I nominate and appoint my only son, William Whitmore, executor of my last will and testament. I nominate and appoint the earl of Craven, during the minority of my son William, executor of my said will.

The testator died, William Whitmore, the son, being then of the age of thirteen years. The earl of Craven proved the will. The son married, and died without issue, being above the age of eighteen years and under twenty-one, not having proved his father's will, but the son had made a will and his wife executrix.

A bill was brought by the son's widow and executrix to have the benefit of the surplus of the father's personal estate. And the question at the hearing was whether she or the children of the father's sisters, who claimed by the devise over, were entitled.

The cause was first heard by Lord Keeper NORTH, who made a case of it for the opinion of the judges of the Common Pleas. But, after his death and before any certificate, the cause came to be reheard by LORD JEFFREYS, who was clear in his opinion for the executrix of the son, and decreed accordingly. And he held, first, that the words, 'if the son should decease in his minority', being applied to personal estate, should be understood under the age of seventeen, when the minority as to disposing of personal estate determined, and the rather because the son was made executor, and then the executorship vested in him. And he held the minority in the devise over and the minority to suspend the executorship should be understood in the same sense.

Mr. Vernon makes him go further and say that the trust was vested in the son and the remainder over was void. But though that is loosely expressed, it must be understood of the case as the fact had happened, for it cannot be doubted, but the devise over on the contingency of the son's dying without issue in his minority was good in its creation.

Mr. Vernon reports Lord North (though he made a case) to have said that the question touching the minority was a considerable point.

[Reg. Lib. 1684 B, f. 455; Reg. Lib. 1685 B, f. 106.]

275

Anonymous
(Ch. 1685)

A court of equity can enjoin a person who has the privilege of Parliament from suing at common law.

1 Vernon 329, 23 E.R. 501

Per curiam [NORTH]: Though the court will not proceed against a member that has the privilege of Parliament, yet, if a Parliament man sues at law and a bill is brought here to be relieved against that action, the court will make an order to stay proceedings at law until an answer or further order.

[Other reports of this case: 1 Eq. Cas. Abr. 349, 21 E.R. 1094.]

276

Hall v. Dench
(Ch. 1685)

Where a testator devises lands and then mortgages them, the mortgage does not revoke the devise.

1 Vernon 329, 23 E.R. 501

1 July 1685. At the Rolls, SIR JOHN CHURCHILL, Master of the Rolls.

The case was J.S., in 1663, by his will in writing, devises the lands in question to A. in tail male, remainder to the plaintiff in fee. And having afterwards occasion for money, he mortgages these lands in fee and, in 1683, dies. A. being dead without issue, the plaintiff, who had the remainder, brings his bill to be let into the benefit of this devise.

It was objected by the counsel for the defendant, who was the heir at law, that this mortgage, being a mortgage in fee, was an absolute revocation of the devise. If it had been but a mortgage for years, then they did admit the reversion would have passed and that would have carried with it the equity of redemption, and so the revocation should have been *pro tanto* only. But here being an estate in fee mortgaged, that goes to the whole and is a full and absolute revocation in law, and, being an absolute revocation in law, there was no reason for equity to aid the plaintiff against the heir at law, first, because it is a will made above twenty years before the death of the party; secondly, the testator intended not an immediate estate to the plaintiff, and he was but very remotely considered in the making this will, the testator having put the whole estate in the power of A., who, having an estate tail, might have barred the remainder which was devised to the plaintiff.

For the plaintiff, it was insisted that this mortgage should be a revocation only as to the mortgage moneys and, though, in law, it was an implicit revocation of the whole estate, yet equity will consider the intent of the party, which was only to supply his occasions with the money and not done with a design to revoke the devise in the will. And the Case of Thorne and Thorne¹ was insisted on as a case express in point, that a mortgage, though in fee, shall be a revocation *pro tanto* only, and the case of one Haggott, in the time of the Lord Keeper Coventry, was likewise cited, as also the case of Mountague and Jeffereys in Rolle.²

The Master of the Rolls [CHURCHILL] was of opinion that a mortgage should be a revocation *pro tanto* only. And in regard there were four or five witnesses, who swore that, after this mortgage, the testator declared his former will should stand, the Master of the Rolls [CHURCHILL] thought that was a new publication of the will and, then certainly, the equity of redemption well passed, though it was objected that such parol declarations since the Statute of Frauds and Perjuries³ would not amount to a new publication. And he said there were four things which equity favored, *viz.* livery, attornment, assent to a legacy, and the new publication of a will. And, in either of those cases, a slender evidence would serve the turn.

And whereas the defendant's counsel pressed for a trial at law, whether there was a new publication or not, the Master of the Rolls [CHURCHILL] said the cause must properly end here, and, where the court has a jurisdiction as to the end, it must have likewise as to the means. And since he was fully satisfied in the evidence, he said he would not send it to a trial at law. And he decreed for

¹ *Thorne v. Thorne* (1683), 1 Vernon 141, 182, 23 E.R. 373, 402.

² *Mountague v. Jeffereys* (1596), 1 Rolle, Abr., *Devises*, pl. U, 2, p. 616.

³ Stat. 29 Car. II, c. 3 (SR, V, 839-842).

the plaintiff.

1 Vernon 342, 23 E.R. 508

27 November [1685]. Lord Chancellor [JEFFREYS].

This cause coming this day to be heard before the Lord Chancellor [JEFFREYS], upon an appeal from the decree of the Master of the Rolls, he confirmed the decree and declared, though the mortgage in fee was a revocation at law, yet, in equity, it should not be taken for a total revocation, but the devisee should be admitted to the redemption, for the intent of the mortgagor making the mortgage could be no other than only to serve his special purpose of borrowing money to supply his present occasions.

2 Chancery Reports 297, 21 E.R. 683

The plaintiff Grace Hall, being daughter of William Knight, deceased, who was the son of Susanna, one of the sisters and co-heirs of Thomas Bridger, deceased, which said Thomas Bridger, being seised in fee of lands in Binstead and Middleton and having no children, made his will in 1663, by which he gave all his lands in Binstead to the said Thomas Knight, son of the said William Knight, and the heirs of his body, and, for want of such issue, then to the plaintiff Grace and the heirs of her body, with remainders over. And, by the same will, he devised one moiety of the lands in Middleton to the said Thomas Knight and the heirs of his body with the like remainders over. And sometime after the said will, the said Thomas Bridger mortgaged the said lands in Binstead to John Comber and his heirs for £500, and the said Bridger repaid the £500. And he had the mortgage delivered up and cancelled, but no reconveyance of the lands. And the said Comber, after that, was but a trustee for Bridger. The mortgagee, who, in 1682, declared that the will he made in 1663 should stand and be his last will, and then he died. But the defendant Dench, having got the cancelled deed in his custody and the plaintiff bringing an [action of] ejectment under the title of the will, got a verdict for the lands in Middleton. But the defendant, at the trial, setting up a title in the defendant Comber upon the cancelled mortgage for the lands in Binstead, a verdict passed for the defendant. So, to have the said mortgage deed delivered up and the plaintiff to enjoy the premises according to the said will is the bill.

The defendants, as co-heirs at law to Bridger, insist that the testator Bridger never intended that the estate should go as that will directed, in regard he, soon after the said will, mortgaged the same to Comber. And, besides, the legatees and executors in the said will were most of them dead before the said Bridger, and the mortgage money was not paid until after the estate was forfeited, and the mortgage to Comber was an absolute revocation of the said will. And, upon an [action of] ejectment brought by the plaintiff under the said will, the defendants obtained a verdict for the lands in Binstead, wherein the validity of the said will was in issue.

The plaintiffs insisted that the verdict obtained by the defendants, as aforesaid, was by reason the title in law was in Comber, the mortgagee, and not upon the validity of the will. And a verdict had been had in affirmation of the said will for other lands therein mentioned, and the testator was in possession of the premises at the time of his death.

This court, the defendants insisting to have it tried at law whether there was a revocation of the said will or not, declared there was no color to direct any trial at law in this case, for that, on reading the proofs, it plainly appeared that the testator expressly declared the said will should be his last will and that, upon such an express proof, it would be vain to direct a trial at law. And he declared that, when the mortgage money was paid, the mortgagee and his heirs immediately from that time became trustees for the mortgagor and his heirs. And the court having considered of several precedents, as well ancient as modern, which were full in the point that, notwithstanding such revocation, yet there was a republication of the will and that the same was a republication of such a nature that made the said will a good will. And he decreed the defendant Grace to enjoy the premises according to the said will.

This cause came to be reheard before the Lord Chancellor JEFFREYS, who was well satisfied with the republication, and he declared that, notwithstanding the said mortgage, the will was a good will and was not revoked. And he confirmed the former decree.

[Reg. Lib. 1685 A, ff. 117, 799.]

277

Marsden v. Bound
(Ch. 1685)

Where the parties have acted in good faith, depositions de bene esse can be admitted into evidence even though the strict time limits be not observed.

1 Vernon 331, 23 E.R. 502

2 July [1685].

The plaintiff examined his witnesses *de bene esse* in Michaelmas vacation, and, in Hilary term following, the defendant puts in an answer, and, about five weeks afterwards, before any replication filed or examination in chief, the witness dies.

And now, it was moved by Mr. Serjeant *Maynard* that the plaintiff might be at liberty to read this deposition at law. And, inasmuch as, by the strict rules of the common law, no depositions of witnesses taken *de bene esse* or before issue joined can be read or given in evidence, it was also prayed that the defendant might be ordered not to oppose the reading of this deposition at a trial at law, which the Lord Keeper [NORTH] held reasonable, for that, otherwise, an examination *de bene esse* would be to no purpose.

Mr. *Porter*, this day, moved the Master of the Rolls [CHURCHILL] to discharge this order because the plaintiff had been negligent or, otherwise, he might have examined his witness in chief, the answer having been put in above five weeks before the witness died, or he might have tried the matter at law in Hilary term, before the death of the witness.

But it was answered the plaintiff could not go to law before he had the defendant's answer to see if he would confess the matter of fact and that he stood out two months in contempt before he would answer. And though the plaintiff might have replied within the five weeks, yet could he not well have examined in chief, the witness and the plaintiff both living in Cheshire, and this was not such a lapse of time as ought to deprive him of the benefit of the evidence, and the rather for that, though it is not regular by the course of the court, the defendant's commissioners joined in the execution of this commission, so that here could be no foul practice.

And, therefore, the last order was confirmed.

[Reg. Lib. 1684 B, f. 489.]

[Other reports of this case: 1 Eq. Cas. Abr. 234, 21 E.R. 1014.]

278

Urlin v. Hudson
(Ch. 1685)

A plea in abatement of auter action pendant is examinable by a Master in Chancery. Such a plea is not to be put in upon oath.

1 Vernon 332, 23 E.R. 502

The defendant pleads that the plaintiff brought a former suit for the same matters, which suit is still depending for aught he knows to the contrary

For the plaintiff, it was insisted that this plea was not good because he does not positively aver that the former suit is still depending and no issue can be taken upon his knowledge to the contrary.

But the Master of the Rolls [CHURCHILL] allowed the plea because the plaintiff ought not to have set it down to be argued, for, by that, he admits that the former suit for the same matter is depending, but the plea ought to have been referred to a Master to examine whether there was a former suit depending for the same matter or not. And he said there needs no positive averment that the former suit is still depending, for that is examinable by the Master and the defendant never swears a plea of a former suit depending, but it is always put in without oath.

[Reg. Lib. 1684 B, f. 523.]

[Other reports of this case: 1 Eq. Cas. Abr. 14, 39, 21 E.R. 838, 858.]

279

Rous v. White
(Ch. 1685)

The question in this case was whether a court of equity will uphold a joint tenancy of a lease with the right of survivorship.

2 Shower K.B. 452, 89 E.R. 1036

The case was A. and B. take a lease from Christ Church Hospital to them two for a long term of years. And, by articles between them, it was agreed that there should be no advantage taken of survivorship, but that whosoever died first, his executor, administrator, or assignee should have and enjoy the interest of the party so dying. Then B., by will, devised her moiety to C. and D., her two daughters, paying £25 a year to J.S. out of the profits, each £12 10s.

Upon a demurrer before Lord Keeper NORTH, I argued, that a joint tenancy may be of a chattel and that this creates one, for they come to it by one and the same joint means and title and, therefore, C. dying, D. ought to have the whole moiety by survivorship. The devise here is the original of both their interests; the estate of both is the same. If it was in a deed, it would be no great question. And, in a devise, it must be so too, unless there be words of severalty or the testator had some way or other declared his intention that they should take and hold by moieties, of which here is none, no words 'divided, or to be divided' or the like. And the words 'paying £25 yearly out of it', alters not the case, for that is an encumbrance on the whole, and the subsequent words, 'each £12 10s.', are only explanatory of the former and will make no difference, for it is no more than declarative of what is implied in the former words, on which the law would have directed the same thing, viz. that each

should bear her portion or share. It is no declaration of the testator's intention how they should take, but barely directs how that annual sum should be paid. And the party to whom the same is payable should have the whole out of the houses, though one had released or assigned to her companion. And the houses would stand chargeable with the whole £25 as an encumbrance on them into whose hands soever they come, whether assignee or survivor, it not being a personal charge, condition, or penalty on the devisees, but laid upon the houses and to be and issue out of the rents, issues, and profits of the term. And supposing it only an equitable interest in Elizabeth White, the mother and testatrix, and she devises it thus, that will not alter the case, but survivorship shall take place there as well as in a case at law. Survivorship is not so unconscionable a thing as to be excluded out of all equitable estates, for the benefit thereof is equal to both and the contingency is alike, and she might have survived my client, as well as my client might have and has survived her, so that there is no hardship in the case on any pretence of inequality. Survivorship is a title allowed even in debts and contracts and obligations and recognizances. If they had been joint purchasers for a valuable consideration paid by them, share and share alike, there had been more color of equity because, by the casualty, the executor would have lost both the interest of the term and the money too, which otherwise would have come to the personal estate and have been assets to have paid debts. But here are no debts pretended, and all is *gratis* given to them by the free good will of the testatrix, and they must take it in such manner as the law directs upon such a will. And it cannot be thought that she designed any otherwise, for, if the intention had been to have given several moieties, it would have been so expressed, for she knew the difference between a joint tenancy and a tenancy in common. She was cognizant of the right of survivorship, as is apparent by the wording of the will, for she there recites her power to dispose of her interest, although but a joint tenant, which was by an original agreement at the time of the purchase of the lease from the Hospital. And if she had intended her legatees should have had the same power, she would have said so.

On the other side, it was insisted that, in equitable estates, survivorship ought not to be allowed, it being against all equity that one should go away with the whole.

To which LORD NORTH replied that he knew no inequality in the thing nor any reason against it. But, however, he would not declare any opinion therein of a sudden and, therefore, would reserve the benefit thereof to the hearing.

But the case was afterwards compounded.

280

Anonymous
(Ch. 1685)

A defendant is entitled to recover reasonable costs upon the plaintiff's suffering a nonsuit.

Upon a petition to take depositions abroad, the names of the witnesses and their testimony must be specifically stated.

1 Vernon 334, 23 E.R. 503

The Lord Chancellor [JEFFREYS] declared that he would not allow of the rule of dismissing a bill with 20s. costs, but that, for the future, the defendant should have the costs he should swear he was out of purse. But, in such affidavit, he must specify the particulars that the court may judge of the reasonableness of them if there should be occasion.

He also declared that the general affidavit of having material witnesses beyond sea should not be sufficient for a new commission, but the witnesses must be named in the affidavit and the point mentioned to which they can materially depose.

[Other reports of this case: 1 Eq. Cas. Abr. 15, 102, 21 E.R. 838, 911.]

Brathwaite v. Brathwaite
(Ch. 1685)

Payments out of a trust that are payable to the settlor's children upon his death are payable to all of his children who are living at the time of his death though born after the creation of the trust, but nothing is payable to the administrators of any child who died before.

Even though trust payments are payable according to the 'seniority' of the beneficiaries, yet, in the case of a deficiency in the trust funds, they will all be paid pro rata.

1 Vernon 334, 23 E.R. 503

24 October 1685. In Court, Lord Chancellor.

A tenant in tail with the remainder in fee to himself levies a fine and settles his estate on trustees, in the first place to pay his son and heir £100 *per annum* and then to make a provision of £100 apiece for his younger children, sons and daughters, to be raised and paid according to their seniority, and a maintenance in the meantime.

In this case, the Lord Chancellor [JEFFREYS] decreed, first, that, whereas, at the time of the settlement, the party that made it was a widower and had eight children by his first wife and declared he intended not to marry again, yet, in regard he afterwards married a second wife and had many children by her, that the children by this second wife were equally entitled with the children of the first to have the benefit of this provision for younger children.

Secondly, that, whereas the deed directs the provision for his younger children should be raised and paid according to their seniority, that yet, in case there should happen a deficiency, the eldest should not have more and the younger less, but they should be all paid in average.

Thirdly, that, whereas many of the younger children by the first wife died in the lifetime of their father, that the administrators of the children so dead should have no benefit of this provision, but the same should cease. But in case any of the daughters had been married in the lifetime of the father and died, the husbands, as their administrators, should have had their portions and, no certain time being appointed for payment, but the same being left indefinitely, it does not naturally attach until the death of the father. And His Lordship took a difference between a portion or provision and a legacy payable at the age of twenty-one years etc.

Fourthly, that, whereas Thomas, the son and heir, who was to have £100 *per annum* in the first place, had purchased in a statute which was an encumbrance on the estate, that he should be allowed no more than what he really paid for it, and that the whole estate must in the first place be looked on as liable to satisfy this encumbrance and then to raise the £100 *per annum* and arrears and the surplus for raising the provisions for younger children, but that their maintenance should go on in the meantime.

[Raithby's note: Reg. Lib. 1685 A, f. 37. The state of the case is somewhat different, Sir Thomas Brathwaite, being tenant in tail expectant of the premises in question, joined with his father, the tenant for life in possession, in a deed bearing date 17th March 1665, by which they covenanted to levy a fine to trustees therein named before the end of Trinity Term then next of the premises in question to the uses and upon the trusts *inter alia* above mentioned after the death of Sir Thomas and his father. It does not appear that any fine was levied at that time, but it is stated that, after the birth of several of the plaintiffs, the children of the said marriage, and about six years after the date of the deed of settlement, a fine was levied to Sir Thomas Brathwaite alone pursuant to the said covenant. Reg. Lib. This part of the decree relating to the death of the married daughters in the lifetime of the father does not appear in the Register's Book. The words of the decree are 'But with this that the younger children, which died in the lifetime of Sir Thomas Brathwaite, the father, before their portions became payable, the provision or portion of such children so dying shall not be a charge on

the said estate or any allowance thereof made to the defendant Thomas, the eldest son, as their administrator, to prejudice the plaintiffs, there being no interest vested in them to give the defendant Thomas a title thereunto'. Reg. Lib.]

[Other reports of this case: 1 Eq. Cas. Abr. 114, 366, 21 E.R. 921, 1085.]

282

Phillips v. Vaughan
(Ch. 1685)

Where a debtor redeems land held by an assignee in possession of the mortgagee, the debtor must pay the full amount of the debt minus the profits of the land received by the mortgagee and his assignee.

1 Vernon 336, 23 E.R. 504

27 October [1685]. In Court, Lord Chancellor [JEFFREYS].

A. mortgages his land to B.; C., a stranger, buys the interest of B. for less than was really due on the mortgage, and the heir of the mortgagor brings his bill to redeem. And the question was whether C. shall be allowed more than he really paid.

For the plaintiff, it was insisted that a stranger, purchasing an encumbrance that had no interest before in the estate so that it was not to protect his purchase or anything of that nature, ought to be allowed no more than he really paid.

Lord Chancellor [JEFFREYS]: This case has neither point nor edge, for there is no color why, when the heir of the mortgagor comes to redeem the mortgage, he should not pay the whole that is due on the mortgage. If another man has met with a good bargain, there is no equity for the heir of the mortgagor to deprive him of the benefit of it and make an advantage thereof unto himself. But, if a man had purchased without notice of this encumbrance, he might possibly have had an equity to have redeemed the encumbrance for what was really paid for it.

[Raithby's note: The bill was brought by the assignee of a mortgagee against the heir, and the plaintiff, having been some time in possession, was decreed to account for and allow the defendant the amount of the rents and profits received by him during such possession. Reg. Lib. 1685 B, f. 38.]

[Other reports of this case: 1 Eq. Cas. Abr. 329, 21 E.R. 1081.]

283

Oldfield v. Oldfield
(Ch. 1685)

Where legacies are paid with bonds that are later discharged in bankruptcy, the legatees cannot then go against other assets of the decedent's estate.

1 Vernon 336, 23 E.R. 505

27 October 1685. In Court.

Sir John Oldfield by his will, amongst other things, devises as follows, viz. 'Item, I give £3000 to be equally divided amongst A., B., and C., my three young children, which said sum is in the hands of Sir John Tufton', and, in his said will, he adds this clause, viz. 'And for the more sure payment of the said sum', in case his son and heir, whom he thereby appointed his executor, should

not pay the same according to his will, then he devised his lands to his younger children for the raising and payment thereof and appoints the same to be paid unto them at twenty-one or marriage, which should first happen, and a maintenance out of his lands in the meantime.

Sir John Tufton, being minded to pay in this £3000, exhibits his bill against the executor and the infants, who appeared by their mother as their guardian, and obtains a decree for redemption of his mortgage. And a Master is appointed to see the moneys put out on security for the benefit of the infants. The Master makes his report and thereby approves of securities for placing out the money, *viz.* Sir Robert Viner's bond for £1000, Alderman Backwell's bond for another £1000, and Meynell's bond for the third £1000, and the money is put out accordingly.

These persons proving insolvent, the infants by their now bill would resort to the lands and charge the estate of the heir with this £3000.

The counsel for the plaintiffs urged that, where there were two funds for securing the payment of infants' portions, if one failed, they might resort to the other. And they put this case, that, if a man by his will had charged the lands of his heir for payment of portions to his younger children at twenty-one or marriage and the heir, in the minority of the younger children, should exhibit his bill to pay in the moneys and have his lands discharged, the Court of Chancery, in such case, would not discharge his lands nor, in any case where infants were concerned, change a real into a personal security.

But the Lord Chancellor [JEFFREYS], upon the first opening of the cause, took the case to be clear against the plaintiffs for that the intention of the testator appeared to be that there should be an effectual payment of the £3000, for Sir John Tufton's security might have failed or his heir and executor might have received it of him and have refused or neglected to have paid it over to the infants and, in either of those cases, the lands should have been charged, but they were only supplementally chargeable in case of such a defect or deficiency. But here, when there has been a real and effectual payment and the moneys put out upon securities, which could not then be objected against, but were approved of by the mother of the infants, who, by will, was made their guardian, and allowed of by the court, there could be no reason after all this that the heir should be charged with these moneys. Nor can it be an objection that the moneys were paid in before the time appointed by the will, *viz.* before the infants were either married or had attained twenty-one years of age, for it was not in the power of the heir and executor to compel Sir John Tufton to keep the moneys in his hands when he was minded to pay it in. And he said the case put by the plaintiffs' counsel was not like this, but he admitted that the lands of the heir, when charged for payment of portions to infants at twenty-one or marriage, shall not be discharged before that time, nor that a real security for infants' portions shall be changed into a personal one where the lands are originally charged. But here, the lands were only supplementally charged in case the £3000 had not been effectually paid; and the payment made in this case he adjudged to be effectual and according to the intent of the testator.

And, therefore, he dismissed the bill.

[Raithby's note: But as to the maintenance allowed out of the lands, the decree is 'That the same be paid by the defendant after the rate of £30 *per annum* each according to the directions of the will during the life of the plaintiffs' mother, she having been entitled under the former decree to the interest of the £3000 for her life, the plaintiffs' discounting what they have already received, and the testator's lands to stand charged with the payment of the said maintenance.' Reg. Lib. 1685 B, f. 152.]

[Other reports of this case: 1 Eq. Cas. Abr. 266, 335, 21 E.R. 1035, 1085.]

Duke of Southampton v. Cranmer
(Ch. 1685-1692)

A conditional devise cannot create a life estate where the condition fails.

1 Vernon 338, 23 E.R. 506

Eodem die [27 October 1685]. In Court. Duke of Southampton, as administrator of his late wife, plaintiff; and Cranmer *et al.*, executors of Sir Henry Wood, defendants.

The bill was brought by the duke of Southampton,¹ who married the daughter and heir of Sir Henry Wood, as administrator to his late wife, for an account of the personal estate of his said wife, *viz.* the profits of her real estate received by trustees in her lifetime. The case arose upon the construction of a deed of settlement and will made by Sir Henry Wood, wherein, amongst other things, it was recited that a marriage was intended between the duke of Southampton and the daughter of Sir Henry Wood, and then comes a clause, that, in case the daughter should live to attain the age of sixteen years and should refuse to marry the said duke of Southampton, then the said duke should have £20,000 out of his personal estate. And, afterwards, there is another clause to this effect, *viz.* and if it shall happen that the said intended marriage shall not be had until after his daughter attained her age of sixteen years, then he, upon such marriage had, settles his real and personal estate upon the duke and his intended wife for their lives etc.

The marriage takes effect, the lady being under the age of sixteen years. She lives to attain sixteen years and, before seventeen, dies without issue.

The defendant's counsel would have it that, by this settlement, to which the will refers, the personal estate was not vested so as to entitle the administrator of the wife by reason the marriage was had before she attained the age of sixteen and that it was Sir Henry Wood's intent to restrain his daughter from marrying before she attained that age.

Lord Chancellor [JEFFREYS]: I take the intent to be quite otherwise. The thing chiefly aimed at was that there might be a marriage had between the duke and Sir Henry Wood's daughter and for that intent is the clause of £20,000 penalty, in case at sixteen years of age she should refuse to marry him. And this latter clause is only to bring in that £20,000 again into the personal estate and to be settled to the same uses with the rest in case the marriage should be had after her age of sixteen years. And, to me, it does in no sort imply that they might not marry before that time.

And, therefore, he decreed an account etc.

[Raithby's note: Reg. Lib. 1685 A, f. 128. The deed was by lease and release and is very shortly stated in the Register's Book. After reciting that the said treaty for the marriage was with the approbation of His Majesty and a declaration that, on the marriage taking effect, His Majesty would settle lands in England on the plaintiff of £2000 *per annum*, the clause alluded to is as follows. The lands therein mentioned were conveyed by Sir Harry Wood to trustees therein named 'Upon trust for the plaintiff and his duchess and their children, if any, and, if she should refuse to marry the plaintiff or die before the age of sixteen, then that the trustees should raise out of the said manors etc. the sum of £20,000, to be paid to the plaintiff.' The deed is dated the 22d and 23d of May 1671, and, on the 24th of the same month of May, Sir Henry Wood made and executed his will, reciting and confirming the said deed and declaring that, if the plaintiff or his brother George, lord Palmer, should not marry the said Mary or should die without issue by her or, if either of them should have issue by

¹ J. M. Rigg and M. Kilburn, 'FitzRoy, Charles (1662-1730)', *Oxford Dictionary of National Biography*, vol. 19, pp. 929-930.

her, after the death of such issue, without issue, then as to those premises and all other his lands etc. upon trust for the said Mary, as therein mentioned. Entered *sub nom.* Duke of Southampton v. Bishop of Litchfield. The decree in this case was [reversed] in the House of Lords, 14th April 1690, *Journal House of Lords*, vol. 14, p. 464; Shower P.C. 83.]

2 Freeman 186, 22 E.R. 1151

1692. Duke of Southampton v. Sir Caesar Cramborne.

Sir Henry Wood, having one daughter and having a desire to advance his daughter in marriage to the said duke, makes a settlement of his estate, reciting the intended marriage etc. And he limits it to the use of himself for life, remainder to the use of J.S. and the defendant and their heirs to the intent that, in case the plaintiff should be married to his said daughter after the age of sixteen and that they should have issue male between them, that then the said trustees and their heirs should stand seised of the premises in trust for the plaintiff during his life and, after his decease, in trust for his said daughter for her life and, after, in trust for such issue in tail etc. The said plaintiff was married to the said daughter before her age of fourteen, but she lived until she was above the age of sixteen, and then she died without issue.

And the plaintiff preferred his bill to have this trust executed to him for his life. And the only question was whether he was entitled to this estate for life.

And it was held that, although she was married before the age of sixteen, yet, inasmuch as she lived until after the age of sixteen, she might properly enough be said to be married after the age of sixteen. And so it was held in the Lord Salisbury's Case,¹ and it was affirmed in the House of Lords. They all held that, although there was no issue of that marriage, yet the plaintiff was entitled for his life, for that it should be taken *reddendo singula singulis* and the having of issue should be no condition precedent to his trust for life but should refer to that limitation of the trust to the issue, for that a trust should be expounded by the same rules as a will or as articles of agreement, which need not that precise form of words as a limitation of an estate at law, as an agreement to convey an estate to J.S. forever will carry the fee simple.

And TREVOR said that, if it were the limitation of a use at law, it would be sufficient to create an estate for life, the intent of the party so plainly appearing as it does in this case.

This cause being afterwards heard in the House of Lords, the decree was reversed.

British Library MS. Hargrave 80, f. 54, pl. 2

In the Case of Sir Harry Wood's Will, it was decreed and the decree was affirmed in the House of Lords on these words, *viz.* 'if the duke of Southampton should die without issue by my daughter, then I devise it to' [*blank*]. The daughter died without issue. And, though it was then certain that the duke must die without issue by her, [it was decreed] that the devise could not, however, take place until after the duke's death, that, until the Statute of Hen. VIII,² no heir could be disinherited by a will, nor since but by a will in writing, and that the words for that purpose ought to be direct, not uncertain, and the implication necessary.

[Reversed on appeal: Shower P.C. 83, 1 E.R. 58, *Lords' Journal*, vol. 14, p. 464.]

[Related cases: Wood v. Webb (Ch. 1712), British Library MS. Hargrave 80, f. 81.]

¹ *Bennett v. Lord Salisbury* (1691), 2 Freeman 118, 22 E.R. 1097, 2 Vernon 223, 23 E.R. 744, Nelson 170, 21 E.R. 818, Ventris 365, 86 E.R. 489, Skinner 285, 90 E.R. 129, 1 Eq. Cas. Abr. 109, 21 E.R. 917.

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

Thrupton v. Attorney General
(Ch. 1685)

A term attendant on an inheritance can escheat.

The word 'all' in a will is sufficient to pass a lease for years.

1 Vernon 340, 23 E.R. 507

4 November 1685. In Court.

A man, seised of lands in fee, by a settlement, limits a term for a hundred years to trustees in trust for such uses, intents, and purposes as he, by deed or will in writing, should declare, direct, limit, or appoint, and, for want of such will or deed, to attend the inheritance. This man, being a bastard, dies without heir, having first made a nuncupative will and, thereby, devised as follows, *viz.* 'I give all, all to I.S.', who had now administration *cum testamento annexo*. And the question was whether this term should escheat with the inheritance.

It was insisted by the counsel for the plaintiff, first, that this was not a prerogative case and there was no difference in the case of an escheat whether the lands were to come to the king or to the mesne lord.

Secondly, a term limited to attend the inheritance does not at common law attend the inheritance, for there, in the eye of the law, it is a term for years and must go in a course of administration if equity did not interpose. And where the case does not carry an equity along with it, the Chancery ought not to interpose, but let the law take place. And an escheat, which is properly only where there is no other person to take, is not to be favored in equity, especially where it turns to the wrong of a third person. And, even in equity, a term limited to attend the inheritance shall in many cases be severed from it, as, if a man dies indebted, a term limited to attend the inheritance shall be assets and made liable to his debts.

Thirdly, where a man comes in paramount to him who limited a term to attend the inheritance, as the lord by escheat does, he comes in the *post* and shall have no benefit of the term. And for that reason, it was ruled in the case of Pheasant and Pheasant¹ that a widow, who claimed dower, coming in paramount, should have no benefit of the term that was limited to attend the inheritance.

Fourthly, that this nuncupative will was long before the Statute of Frauds and Perjuries,² and then a man might dispose of a trust by parol and that the word 'all' in this nuncupative will would certainly carry the term. And, therefore, it was insisted that it was well appointed to the administrator *cum testamento annexo*.

Lord Chancellor [JEFFREYS]: I do not take it, that what Mr. Serjeant Pemberton laid down as an established rule is so, for, if a man seised in fee raises a term and lodges it in trustees to attend the inheritance and afterwards dies indebted, I never heard that that term should be made assets, but have heard it often denied. But, indeed, where the inheritance is in trustees and a man has a term in his own name which is limited to attend the inheritance and dies indebted, the term in that case shall be liable to his debts, for it is assets at law. But as to the principal case, I take the question to be no more than whether a term attendant on the inheritance may escheat or not, for, if it will in any case, it must escheat here. I agree that, generally speaking, a man, before the Statute of Frauds and Perjuries, might dispose of a trust by parol, and I also agree that the words 'all, all', would be sufficient to pass a lease for years. But, in this case, the term being settled by deed expressly upon

¹ *Pheasant v. Pheasant* (1670), 2 Ventris 340, 86 E.R. 475, 1 Chancery Cases 181, 22 E.R. 752, 3 Chancery Reports 69, 21 E.R. 731.

² Stat. 29 Car. II, c. 3 (SR, V, 839-842).

these trusts, *viz.* for such uses, intents, and purposes as he by deed or his last will in writing should appoint, and in default of such appointment then to attend the inheritance, this restrains and ties up his hands from making any parol disposition. And I take his intent by the words ‘all, all’, to be all that he could dispose of by parol. And so the king in this case is not in barely in the *post*, but in the *per* also, for the term for years goes with the inheritance by the express limitation of the party.

[Raithby’s note: The bill was dismissed. Reg. Lib. 1685 B, f. 52. *Sed quaere* whether, where the lord has the principal thing in the *post*, he can have the accessory in the *per*, and the inheritance is the principal thing, and the term is only the accessory.]

[Other reports of this case: British Library MS. Lansdowne 1064, f. 346v.]

287

Jevon v. Bush
(Ch. 1685)

An infant can be a trustee.

A trustee accused of a breach of trust has the burden to prove that he did not breach his trust.

1 Vernon 342, 23 E.R. 508

Eodem die [27 November 1685].

Henry Beard, lord Bellamount,¹ in 1647, being about to leave England and having been in arms for King Charles I and under great oppressions from the then usurped powers, lent £600 to one Gardiner of Croyden on a recognizance of £1000, which he took in the name of the defendant Bush, and intended it as a provision for the plaintiff, his infant daughter, then but two years old. And Bush, at the same time, executed a declaration of the trust and covenants that the plaintiff might receive and enjoy the full fruit and benefit of this security without any hindrance or disturbance from him or any claiming under him. Soon afterwards, the lord Bellamount goes beyond sea and dies in Persia in 1654. Gardiner being about to sell his estate and the purchaser having notice of the recognizance, Bush is prevailed upon to acknowledge satisfaction. And, in 1657, and not before, the plaintiff had notice of this declaration of trust and, understanding that Bush had acknowledged satisfaction on this recognizance, brings her bill to be relieved against this breach of trust.

The defendant, by answer, insisted, and it was so proved in the cause, that he was but eighteen years old when he made this declaration of trust. And he insisted likewise that, though the trust was declared to be for the benefit of the infant, yet it was only to protect the father’s estate, who was obnoxious to those times, and that he never had one penny, directly or indirectly, for his acknowledging satisfaction on that recognizance, nor ever had the recognizance in his custody. But the lord Bellamount’s widow delivered up the same and, as he believes, received the moneys due thereon. And he, at her request or by her order or by the order of the lord Bellamount, acknowledged satisfaction on the recognizance and believes he had some warrant or order in writing from them or one of them for acknowledging satisfaction thereon, but the same was burnt or lost in the Fire of London. And he insisted that, after all this length of time, satisfaction being acknowledged in 1654, above thirty years since, he ought not now to be charged with a pretended breach of trust.

The counsel for the defendant insisted that the plaintiff ought to prove some fraud in the trustee or that he received to his own use part of the money.

Lord Chancellor [JEFFREYS]: The proof lies on the defendant’s side. He ought to discharge

¹ B. Morgan, ‘Bard, Henry, first Viscount Bellomont (1615/16-1656)’, *Oxford Dictionary of National Biography*, vol. 3, pp. 787-788.

himself, and it is not sufficient for him to say he never received any of this money for his own use. There is no doubt but an infant may be a trustee, and the breach of trust was committed in 1654, after he was of full age.

And, therefore, he decreed him to pay the principal money with damages not exceeding £1000 being the penalty of the recognizance.¹ And he cited My Lord Hobart, who says that a *cestui que trust* in an action of the case against his trustee shall recover for a breach of trust in damages.

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Darnell v. Reyny
(Ch. 1685)

A defendant's pleas must be argued or deferred before exceptions to the answer can be filed.

1 Vernon 344, 23 E.R. 509

Where the defendant answers to part and pleads to all other matters not answered unto, the plaintiff cannot put in exceptions to the answer until he has first argued the plea or obtained an order that the plea shall stand for an answer with liberty to except to the matters not pleaded unto.

[Raithby's note: In this case it appears that, before the arguing of the plea, the plaintiff had filed exceptions to the answer, and had got them referred, and the motion was 'that the exceptions might be set aside', and the order was 'that all proceedings upon the exceptions be stayed until the said plea be argued'. Reg. Lib. 1685 A, f. 85.]

[Other reports of this case: 1 Eq. Cas. Abr. 41, 21 E.R. 860.]

290

Frederick v. David
(Ch. 1685)

Where a defendant absconds after being served with an attachment, a serjeant at arms and then a sequestration can be issued against him.

Lincoln's Inn MS. Misc. 506, p. 34

After a decree, the party not appearing nor complying with the decree, there issued a [writ of] attachment to the sheriff, who took up the defendant, but discharged him on taking a bond for his appearance. The sheriff returned a *cepi*. And the next process was to send a messenger to bring him into court. But, if he should return *non est inventus*, as he must, for there was an affidavit that he was seen in Holland, the question was how the court should come at a [writ of] sequestration, for that, on a return of *non est inventus* by the messenger, no sequestration could go and the amercing the sheriff would be of no service to the plaintiff, who had been at great expense in obtaining a decree.

Upon great debate, it was ordered by the court that the warrant should be directed to the serjeant at arms and then, on his returning *non est inventus*, there might go a sequestration.

¹ Raithby's note: The interest on the £600 was to be computed from the time of Gardiner's entering into the recognizance. Reg. Lib. 1685 A, f. 133.

1 Vernon 344, 23 E.R. 510

Upon an affidavit that the defendant David was gone into Holland to avoid the plaintiff's demand against him and he having been arrested on a [writ of] attachment and a *cepi corpus* returned by the sheriff, the court, upon a motion, granted a [writ of] serjeant at arms against him and, upon the return thereof, granted a [writ of] sequestration.

[Raithby's note: When a *cepi corpus* is once returned, there is an end of all manner of process, for no proclamation or commission of rebellion goes after that, and, though a messenger of late years has been usually granted in such cases, yet he is but a new officer and subordinate to the Serjeant at Arms. But regularly in such a case, you ought to move that the defendant may enter his appearance and be examined within four days or stand committed.

The order in this case recites a former order, whereby it had been ordered that the defendants should in ten days then next give security to the approbation of the Master in the sum of £7000 to pay what should be due unto the plaintiffs upon the extent of the account of the estate in question or, in default thereof, that the said defendants should pay the plaintiffs the sum of £2486 according to former orders and that the plaintiffs should be at liberty to prosecute the defendants for the same and enforce payment. The defendant refusing to give security, the plaintiffs, thereupon, had served the defendant with a writ of execution to pay the money, which he likewise refusing, the plaintiffs had thereupon taken out an attachment against the defendants, whereon they were in the long vacation arrested, and the Sheriffs of London had taken the defendant David's own bond of £40 only for their appearance, whereupon the Sheriffs having returned a *cepi corpus*, the plaintiffs had waited ever since to see if the defendants would appear, and that it was further alleged that this court did usually upon *cepi corpus* returned grant a messenger to bring in the body or cause the Sheriff to be amerced, neither of which would be of any avail to the plaintiff for satisfaction of the said money, the said defendants, as the said plaintiffs were informed, not having been at their house or at the Exchange for a great while, and being seen in Holland, as by affidavit appeared, so that, unless such course might be taken as that a sequestration might be awarded, the plaintiff was in danger of losing the effect of his suit, which had lasted six or seven years and been very chargeable, and that it was conceived that, in such extraordinary cases as this is, this court might as well grant a serjeant at arms, whereupon to ground a sequestration, as well as a messenger, or else there would be a failure of justice thereon. The order then proceeds as follows 'And this court being informed that, by the practice of this court, a sequestration might be awarded upon a return of a serjeant at arms, but that it is not known that any was ever granted upon the return of a messenger, and that a messenger is but a new officer, but that the serjeant may as well go as a messenger, it is ordered that the serjeant at arms attending this court do apprehend the said defendants and bring them into this court to answer the said contempt.' Reg. Lib. 1685 A, f. 583.]

[Other reports of this case: 1 Eq. Cas. Abr. 352, 21 E.R. 1096.]

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Newdigate v. Johnson
(Ch. 1685)

An account taken in a court of a city can be re-opened in a high court of equity.

2 Chancery Cases 170, 22 E.R. 898

The plea of an account of an orphan's estate before the aldermen of London was disallowed. And a surcharge [was] allowed to be made thereon by the Lord Chancellor [JEFFREYS], who said,

when he was Recorder of London, he observed well the manner of their taking such accounts. He also decreed that the executor pay interest at £6 percent for the money he had not paid into the Chamber until he paid it in, though the Chamber usually takes but £5 percent.

292

Greswold v. Marsham
(Ch. 1685)

Where a mortgagee with notice of a subsequent judgment by confession purchases the land subject to his mortgage, he takes the land subject to the judgment.

2 Chancery Cases 170, 22 E.R. 898

There was due to Marsham £4000 upon a mortgage made to him of lands. The mortgagor, after the mortgage, acknowledged three judgments to other persons for other monies due. Two of those persons to whom the judgments were given gave notice to Mr. Marsham of their judgments and desired him to accept of his money that was due upon the mortgage, which they said they were ready to pay him, and desired him to appoint a time when, and they would pay him his money within a fortnight, to the intent that his mortgage being set aside they might take execution on their judgments. But [they] proved not any money actually tendered. But afterwards, Marsham exhibited a bill against the mortgagor and had a decree to foreclose him of redemption. And afterwards, [he] took a further absolute conveyance from the mortgagor for a considerable sum of money. And now the two creditors had a decree against Marsham to pay them their money. But Powel, the third creditor, had no relief because he gave no notice in time of his judgment.

293

Comyns v. Comyns
(Ch. 1685)

The question in this case was whether, where a decedent's estate is insufficient to pay all the legacies, the specific legacies will abate proportionably with the pecuniary legacies.

2 Chancery Cases 171, 22 E.R. 898

The case was [there were] several legatees by will of sums of money *in numero*, others *in specie*; the estate would not pay all. The question was whether the loss should fall only on the legatees *in numero* or whether the specific legatees should contribute proportionably.

The Lord Chancellor [JEFFREYS] was strongly of opinion they ought to contribute, for he said that the intention of the testator was as much that one should have all the money as the other should have the whole specific legacy. And [he] put the case, suppose three specific legacies be one horse etc. and there is not sufficient [assets] to discharge them all by reason of debts, what shall be done there?

E contra, it was objected that the practice of the civil law and of this court had been otherwise. Chancellor [JEFFREYS]: [I will] see precedents.

Quaere: In case there be three legatees, each to have a horse, but particularly A. the black horse etc. and so to the rest and the debts so diminish the estate that the horses cannot be delivered.

Quaere: If there be not a difference in such case if the legacies were particular, *viz.* the black horse to A., the white to B., etc.

Beckford v. Beckford
(Ch. 1685-1692)

In settling the estate of a deceased London freeman, an advancement to a child is to brought into hotchpot for the benefit of the orphanage third only.

2 Chancery Reports 359, 21 E.R. 687

Richard Beckford, citizen and freeman of London, had several children, and, by his will in writing, after debts and funeral charges paid, he appointed one full third part of his personal estate to the plaintiff, Frances Beckford, his relict, according to the custom of the City of London, and declared that Frances and Elizabeth, two of his daughters, had been fully advanced in his lifetime and Mary and Jane, two other daughters, had not, and [it was] directed they should bring their portions they had received into the third part of his personal estate belonging unto his unpreferred children, and they should have equal shares with his unpreferred children.

Now the question between the plaintiff Frances and the unpreferred children was how the said estate should be divided by the custom of London, the plaintiff Frances insisting that the children not fully advanced ought to bring what they had received into the whole estate and then she ought to have one full third part of the whole personal estate, insisting that every widow of a freeman ought, by the custom of London, to be endowed with one full third part of the whole personal estate.

This court declared the custom to be that the testator's two children, Mary and Jane, who were not fully advanced, were to bring what they had received into hotchpot with the orphanage third after the estate is divided into thirds, and not into hotchpot with the whole estate; and [it was] decreed accordingly.

And what has been received by anyone, more than their share and legacies, is to be repaid as the Master shall appoint.

1 Vernon 345, 23 E.R. 511

7 December 1685. In Court, Lord Chancellor [JEFFREYS].

The only point was upon the custom of the City of London, where a child that had a portion, but was not fully advanced, was to bring her portion into hotchpot, whether the portion should be brought into the personal estate in general that so the widow might come in for part of it or whether it should be brought into the orphanage part only.

Lord Chancellor [JEFFREYS]: It is beyond all doubt that it must be brought into the orphanage part only.

Lincoln's Inn MS. Misc. 498, p. 26, pl. 2

Becsfford v. Oakes.

It was in this case held by the Master of the Rolls [TREVOR] that, where a citizen marries [off] a daughter in his lifetime and gives her a portion and afterwards dies intestate, leaving a wife and no other child, that, in such case, the daughter shall not be obliged to put her portion in hotchpot for the benefit of the wife, as she should have been if there had been other children, but that, as against the wife, the portion shall be looked upon as a mere gift. And it was also held, where an intestate leaves a wife and but one child, that that one child should have two-thirds of the estate and the wife the other third in the same manner as if there had been more children.

2 Vernon 281, 23 E.R. 782

7 December [1692].

Where a freeman of London dies, leaving a wife and children, some whereof were only in part advanced and others full advanced, the children who were in part advanced must bring in what they have respectively received into hotchpot. But it shall be brought into the children's third only and not to increase the widow's or executor's third, *viz.* the estate left by the testator at his death shall be first divided into three parts, *viz.* the widow's third part, the orphanage part, and the legatory or testamentary part, and, then, what the children in part advanced had received shall be brought into the orphanage part only and not to increase the whole estate.

[Reg. Lib. 1685 A, f. 196. Entered *sub nom.* Beckford v. Kendall.]

[Earlier proceedings in this case: 2 Chancery Cases 119, 22 E.R. 875.]

[Other reports of this case: 1 Eq. Cas. Abr. 155, 21 E.R. 954.]

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Annand v. Honeywood
(Ch. 1685)

Money intended to be invested in land is not considered to be personal property.

1 Vernon 345, 23 E.R. 511

Eodem die [7 December 1685]. In Court, Lord Chancellor [JEFFREYS].

The point here also arising on the custom of the City of London, the question was whether money given by the father to be laid out in land to be settled on his eldest son for life, remainder to his first, second, third, etc. sons in tail, should be reckoned to be an advancement by part of the personal estate of the father so as that the son ought to bring the same into hotchpot to entitle him to a share of the personal estate.

Lord Chancellor [JEFFREYS]: There is no color to reckon this any part of the personal estate.

[Earlier proceedings in this case: 2 Chancery Cases 117, 129, 21 E.R. 874, 880, 2 Chancery Reports 179, 21 E.R. 651, 2 Freeman 56, 22 E.R. 1056, 79 Selden Soc. 824, 879.]

[Other reports of this case: 1 Eq. Cas. Abr. 152, 21 E.R. 952.]

Tunbridge v. Teather
(Ch. 1685)

In this case, the court held that the defendant had duly performed his contract even though he might have performed it better.

1 Vernon 345, 23 E.R. 512

8 December 1685. In Court, Lord Chancellor [JEFFREYS].

A man upon his marriage, in consideration of a £500 portion, by articles precedent to the marriage, covenants with trustees to add £500 more to his wife's portion, and that it should be laid out in land, and settled to the use of the husband for life, remainder to the wife and the issue of her body by him, remainder to the right heirs of the husband. The husband, without the consent of the trustees, purchases a farm, on which there was a great house and gardens, and pays £1000 for it, though, in truth, it was worth no more than £25 *per annum* and takes the conveyance to him and his heirs and, afterwards, settles it to the uses in the articles.

The bill was to have the defective value supplied.

And, for the plaintiff, it was insisted, first, that this was not a settlement according to the articles, because the purchase was made to the husband and his heirs and he, afterwards, settles it to the uses in the articles, whereas, if it had been bought with the wife's money and the conveyance had been made to the uses in the articles, then the estate had not moved from the husband and, consequently, it would not have been a jointure within the statute of the 11 Hen. VII, cap. 20,¹ and then the wife being tenant in tail might have aliened it. Secondly, £1000 being to be laid out as a provision for the wife, it must be intended a reasonable provision, and it could not be expected that £1000 should produce less than £50 *per annum* and it was not intended to be in the power of the husband to defeat such provision by laying out the £1000 in a fine house and garden, which would not serve to buy bread for the widow. And this appears more plainly from another clause in the articles, by which, in case a purchase was not made according to the articles, the wife was to have £700 in money or £50 *per annum* at her election.

But the Lord Chancellor [JEFFREYS] was of opinion that, the husband having really laid out £1000 in the purchase and the father of the plaintiff having viewed the estate before the purchase was made, though it was not of so good a value as might have been purchased with £1000, it must be taken as a performance of the articles. And, therefore, he dismissed the bill.

¹ Stat. 11 Hen. VII, c. 20 (SR, II, 583).

298

Knight v. Calthorpe
(Ch. 1685)

The grantee of a rent charge can distrain in all or any part of the lands for the rent.

1 Vernon 347, 23 E.R. 513

Eodem die [8 December 1685]. In Court.

A man, upon his marriage, charges his lands with a rent charge for the jointure of his wife, and, afterwards, by his will, he devises part of these lands to his wife. The plaintiff's bill was that the lands devised to the wife might bear their proportion of the rent charge; otherwise, the rest of the lands, that were not sufficient to pay the rent, would be clogged with the arrears, which, in time, would swallow up the inheritance.

Lord Chancellor [JEFFREYS]: The grantee of the rent charge may distrain in all or any part of the lands for her rent, and there is no reason to abridge her remedy in equity. And the husband certainly intended her some benefit by this devise, and he has not declared it should be accepted in part of the rent charge. And, therefore, he dismissed the bill.

[Reg. Lib. 1685 A, f. 201.]

[Other reports of this case: 1 Eq. Cas. Abr. 33, 21 E.R. 853.]

299

Redman v. Redman
(Ch. 1685)

In this case, the court granted relief against a fraudulent bond, even though the plaintiff was a party to the fraud, because it was a fraud against creditors.

1 Vernon 348, 23 E.R. 514

9 December 1685. In Court.

The case was that, upon a treaty for a marriage between Charles Redman and the now plaintiff, the plaintiff's father would not consent to the match by reason that Charles Redman was indebted in the sum of £200 to one Byran, for which he and Joice, his mother, stood bound in a bond. To remove this obstruction, Henry Redman, younger brother of Charles, and Joice, the mother, give a new bond to Byran for the payment of this debt. And, thereupon, the bond wherein Charles was bound was delivered up to be cancelled. But Charles gives his brother Henry a counterbond to indemnify him against this debt, and he paid the interest of the £200 to Byran during his life. And it was in proof in this cause that the now plaintiff, the widow of Charles, was privy to all this matter and that she being in love with Charles contrived this way to satisfy her father that the marriage might take effect. But now being sued by Henry on the counterbond, as administratrix to her husband, she brought her bill to be relieved.

The defendant's counsel insisted that Henry became bound in this bond voluntarily, having no manner of obligation on him to pay this debt for his elder brother, but it was done at the instance and request of his brother and the now plaintiff, who contrived this means to bring the match about. And [it was] insisted that, if Charles himself had been plaintiff, he should not have been relieved against this counterbond and his administratrix, who was privy to this transaction, could have no

better right than Charles had.

Lord Chancellor [JEFFREYS]: This is a plain fraud, and, by this contrivance, the father of the plaintiff was drawn in to give the greater portion, and he absolutely refused to marry his daughter until Charles was made a clear man and particularly discharged of this very debt and, though Henry had no obligation on him to become bound for his elder brother's debt, yet it was all one to the plaintiff's father which way that debt became discharged, but that was to be first done, let it be one way or other. And he declared that, in case Charles himself had been the plaintiff, he should have been relieved. But the case was stronger, because, if this bond should be suffered to lie on Charles's estate, it might swallow the assets and defraud his creditors, as it also injured the plaintiff in the right she had by the custom of London to the personal estate of her husband. And, therefore, he decreed the bond to be delivered up.

[Reg. Lib. 1685 B, f. 90.]

300

Whitwick v. Jermy
(Ch. 1685)

A court of equity can order specific performance of a contract to make a marriage settlement.

Lincoln's Inn MS. Misc. 498, p. 19

11 December 1685. Charles Whitwick and Elizabeth, *uxor*, and John Jermy and Jana, *exor*, Albion Chair, *et al.*

The case was this. The defendant Jane, being sister to Mr. Albion Chair, had £1000, which was her portion, in his hands, which was secured by a mortgage of part of his estate. And, upon a treaty of marriage between the said Jane and Oliver Beverly, Mr. Chair, by articles indented between him and the said Oliver Beverly, covenants to pay the said £1000 and interest to the said Oliver Beverly within a year to the intent the same might be laid out in lands etc. And the said Oliver Beverly, by the same articles, covenants with Mr. Chair to lay out the said £1000 in land, which should be settled on himself and his wife and the heirs of their two bodies, with a remainder to his own right heirs. The marriage takes effect. Oliver Beverly makes his will in writing and his wife Jane sole executrix. And he dies leaving issue, a daughter by the said Jane, which died about four years after. Twelve or thirteen years after the death of the daughter, the plaintiff Whitwick, having married Elizabeth, niece and heir of the said Oliver Beverly, exhibited her bill to have the £1000 to be laid out in land and to be settled according to the said articles.

My Lord Chancellor [JEFFREYS] did not deliver any positive opinion whether, if the lands had been purchased and settled according to the articles, Jane had been a jointress within the Statute of 11 Hen. VII,¹ for, if he had not, as My Lord Chancellor seemed to think she was not, then, she, having issue by her husband, Oliver Beverly, at the time of his death, might have barred the remainder in fee. But, notwithstanding, My Lord Chancellor [JEFFREYS] decreed that, though the issue being now dead, she could not bar the remainder, yet the money should be invested in land and settled according to the articles.

[Other copies of this report: Lincoln's Inn MS. Misc. 503, p. 86, Lincoln's Inn MS. Misc. 504, p. 83.]

[Related cases: Lawrence v. Beverleigh (1671), 2 Keble 841, 84 E.R. 532.]

¹ Stat. 11 Hen. VII, c. 20 (SR, II, 583).

Hale v. Thomas
(Ch. 1685-1686)

Where a plaintiff has received a final judgment in a court of common law, he cannot thereafter sue in a court of equity for the same matter.

1 Vernon 349, 23 E.R. 515

18 December 1685.

In 1638, those, under whom the defendant now claims a debt of £1300 principal money then lent, acknowledged a judgment for £2000 penalty, defeasanced for the payment of the principal moneys with interest. The defendant for ten or twelve years together had kept the plaintiff out of his debt by fencing with prior encumbrances, which were in truth satisfied, and, by setting up a pretended entail, which on a trial at law was found against him. The plaintiff had exhibited a former bill and, thereby, only prayed that the defendant might come to an account and accept what, if anything, should be found due to him on those prior encumbrances and that the plaintiff might be let into a satisfaction of his debt. But he did not pray further, as he might have done, that, if the defendant should be found to have raised or received more than was due to him, that he might pay over the surplus to the plaintiff. And, upon the account taken in the said cause, it was found that the defendant was overpaid with a surplus of £4000.

The plaintiff's now bill was that he might have those moneys towards his debt and be satisfied his principal moneys with interest and costs. And the matter came on now to be argued on the defendant's plea, who had pleaded the former bill brought by the plaintiff, and the proceedings thereon and that, after the account taken in the former cause, the plaintiff had proceeded at law and revived his judgment by *scire facias* and taken execution by [a writ of] *elegit*, and that, thereupon, the defendant had brought the whole penalty of the bond into the Court of Common Pleas and insisted that a court of equity ought not to charge him beyond the penalty of the judgment. And this plea was allowed by the court, not but that equity may, and in many cases does, carry on the debt beyond the penalty of the security, as where the party has been delayed by injunction of this court and the like. But it was observed that, where it has been so done, it has been always against a plaintiff when he has come for relief. But there is no precedent where a plaintiff in this court shall charge a defendant beyond the penalty and further than he could charge him at law.

But, in this case, the court allowed the plea, principally because the plaintiff after the account taken in the former cause had surceased his prosecution in this court and proceeded at law, having sued forth a *scire facias* on his judgment and taken forth execution and, therefore, having elected to proceed at law, he should not now resort back to equity, especially as this case is, where he has taken execution by *elegit*, which charged a moiety of the lands only, and now would come for a decree in equity for the same debt, which would charge the person and the whole estate. And, therefore, the court allowed the plea.

Note: In this case, the plaintiff thought it most for his advantage to prosecute at law, expecting to have held the lands at the extended value, and, if the defendant had come for relief in equity, he should not have redeemed or charged the plaintiff with the real value unless the defendant would have offered to pay the whole principal moneys with interest and costs. But as soon as the plaintiff had extended at law, Mr. Serjeant Maynard, the defendant's counsel, advised him to bring a *scire facias* against the plaintiff to show cause why the extent should not be taken off on payment of the penalty of the judgment, which he, at the same time, offered to pay, and he brought it into the Court of Common Pleas.

2 Chancery Cases 182, 186, 22 E.R. 902, 904

November [1686].

Sir Anthony Thomas and Samuel, his son and heir apparent, were bound to Rose Hale, *anno* 1637, each of them and their heirs in £2000 to pay Rose Hale £1300 at days shortly afterwards, which was not paid; whereupon Hale, the plaintiff, as executor of Rose Hale, obtained judgment on the bond for £2000 and £12 damages and costs against Samuel and, by bill in Chancery, against Anthony, the defendant, brother and heir of Samuel, setting forth that Samuel had died seised in fee simple, but that Anthony, the defendant, had purchased in trust for himself a precedent statute made to one Dagnall, which was satisfied in equity by perception of profits. Anthony sets forth by his answer an entail made by his grandfather and descended to him, and he denied that Dagnall's statute was satisfied. As touching the entail, a trial at bar was directed and that the defendant should not give in evidence the statute. And a verdict was for the plaintiff against the entail.

And as touching the statute, the plaintiff moved that the defendant might either purchase and satisfy the plaintiff's judgment or to account before a Master whether satisfied or not on penalty to pay costs of the suit in case that the statute were satisfied. The Master reports the statute satisfied and £4000 more, *viz.* £1400 by sale of lands and the rest by perception of profits. And he decreed that the plaintiff should proceed at law.

The costs were paid, and liberty was given him to enter judgment on the verdict.

The plaintiff took out a *scire facias* in the Common Pleas and had there judgment to take execution, which he, accordingly, did on the first judgment by [a writ of] *elegit*, and extends lands and houses of the true yearly value of £350 *per annum* by the extent of £40 *per annum*.

The defendant, on affidavit of this, moves in the Common Pleas to stay the filing of this unreasonable extent, which the plaintiff opposed, because that now his debt and damages amounted to £5000 or £6000 and could not be satisfied by an ordinary extent for £2012.

Thereupon, the defendant brought into court money in bags, *viz.* the £2012, and prayed a stay of the extent, according to the book 16 Hen. VII¹ and other authorities, for the law provides for the plaintiff that the extent at too low value shall not be obtruded on him, for, in that case, he may pray that the extenders shall pay him his money and hold the lands extended at the extended value, which they must do, and shall, and, on the other hand, if the extents be too low, the defendant has his remedy by tender of the money to stay the extent, which, by the laws and authorities of the books, he may do before the extent filed and so stay the extent, or, after the extent at any time, he may tender so much as remains to be levied by or according to the extent and compel the plaintiff to receive it, and the extent shall thereon cease and be discharged. And a *scire facias* lies in that case. And, for that reason, the defendant has no remedy against the extent when once filed, but by that course. And, therefore, the defendant, now, when the money lay in court, prayed that the extent might be stayed and the plaintiff receive the £2012.

The court was satisfied that the extent ought to be stayed, but would not adjudge the plaintiff to receive it, but left that for the plaintiff to do what he would.

Thereupon, the defendant took out a *scire facias* against the plaintiff to show cause why he should not receive the £2012 and the extent be stayed, to which (the writ being served) the plaintiff appeared not, and judgment thereupon [was] given *in Communi Banco* that the land be discharged of any extent.

But then the plaintiff petitioned the Lord Chancellor that the cause might be reheard in Chancery on the original bill, setting forth in his petition the Master's report and the stop of his extent upon this judgment. And now the cause came to be heard accordingly.

Michaelmas Term, 2 Jac. II [1686]. Serjeants *Rawlinson* and *Hutchins*, and Mr. *Finch*, Mr. *North*, Mr. *Keck*, and others [were] of counsel for Hale, the plaintiff. The bill was opened and the other proceedings in Chancery. The equity they pretended to arise to them because that the defendant having, as the Master reported, been overpaid above Bagnal's statute £4000, he, immediately after that statute [was] satisfied, received the profits in wrong of the plaintiff and, as some of the counsel

¹ YB Pas. 16 Hen. VII, f. 6, pl. 4 (1501).

expressed it, became a trustee, or in nature of a trustee, for the plaintiff, which, had not the plaintiff been hindered from extending at that time by the false plea of the defendant by setting forth an entail and extent falsely, the plaintiff, by his extent, would have had.

In answer to which the defendant insisted:

First, that, when the creditor lent the money and chose his own security by taking a penal bond for it, he made himself judge what recompense he should have in case the obligor performed not his agreement, so as, if a man agree to do or not to do such or such a thing and take security to do it or not to do it, this court shall never enlarge his security and better it for him. And to that purpose, Curtis and Dawe's Case was put and Elliot and Hale's Case.¹

And in the debate of this case, the Lord Chancellor [JEFFREYS], by way of question, asked the plaintiff's counsel, if a man for money takes a mortgage and lets the interest surmount the value of the mortgage, shall this court mend it?

As to the falsehood of the answer, the answer was not a contrived known falsehood, for £1900 was satisfied not by profits, but sale. And as to the entail, it was not false, but true, for the land was entailed. But the plaintiff Hale, at the trial, produced a fine levied by Samuel Thomas, our brother, which fine was not of a third part of the houses entailed and, consequently, not of that third part until election of the cognizee and *cestui que use*, which never was done, as if a tenant in tall of three hundred houses or acres of land levy a fine of one hundred, it is no bar of all or any part until an election be made, and, until an election, the lands remain entailed, upon which grounds, we first inferred that our allegation that the land was entailed and descended so was not false; at least, it was a probable and disputable point, and not culpable to be alleged to draw upon us a penalty beyond the penalty of a bond, as was endeavored.

Secondly, the report of the Master that charges us with the profits of the whole land, when part was only barred, is a wrong to us, which now we may allege at the hearing of the cause at large, for, in truth, the plaintiff was not apprised of this before the Master.

Lastly, the plaintiff's bill being to set aside encumbrances to the end he may have a remedy at law and had a decree that he might go to law accordingly and, in 1684, pursued that decree and had an order to take execution on the judgment and, after, took out, in pursuance of the decree, a *scire facias* to have execution, as he did the 33d of Car. II and judgment thereupon to take out execution without damages, for, in a *scire facias*, no damages are ever given, and, after that judgment, took out an *elegit*, which forced us to bring in our money or lie under that unreasonable suit, where it still remains, and it is too late now since he has made his election to go from it, and it was a strange case, where a man has obtained a decree to proceed at law and, having proceeded at law, has got as much as the law will give him, then to fly off from his first decree and proceeding at law to have a new and another kind of decree and more than ever he asked in his bill. By the first decree and judgment and proceedings, our person is not charged, but, by this new proceeding, he would charge our person and turn a real charge upon our lands into a personal charge upon our person.

In the debate, the Chancellor [JEFFREYS] asked what remedy we had at law for our money, which we had paid into the Common Pleas Court?

And after long debate, the court discharged the order on the petition, November 1686. The Lord Chancellor [JEFFREYS], in the debate, insisted that the plaintiff had made his own election by taking execution by *elegit*.

The report of the Master, which charges Dagnall's statute, which was precedent to the plaintiff's judgment, to be satisfied and upon which report the plaintiff was let in, and now the plaintiff being stayed *ut supra* from further execution, yet he now prayed a new hearing of the original cause, insisting that, by the Master's report, it did appear that the defendant, after Dagnall's statute [was] satisfied, had received of the profits £500 *per annum* and so, on the whole matter, had

¹ *Davis v. Curtis* (1674), 1 Chancery Cases 226, 22 E.R. 773; *Elliot v. Hele* (Ch. 1686), see below, Case No. 351.

received £4000, and, as soon as he had satisfaction of Dagnall's statute, he became in the nature of a trustee, and responsible to the plaintiff for the profits received.

But in regard of his taking execution by *elegit*, the Lord Chancellor [JEFFREYS] would not relieve the plaintiff in that point, but inclined against the plaintiff on that point also.

But if it had come into debate, the Master's report must have been re-examined and would have failed: (1) because there was a grand mistake therein, for he computed £500 *per annum* for two years to amount to £1500 which cannot be; (2) but a greater was the entail of the houses is of £300 and more, and the fine levied to bar the entail was not of £300 but of £80, or thereabouts, which in truth barred no part until the election of the cognizee, etc. but clearly could be no bar of more houses than are comprehended in the fine. But yet the Master has charged the yearly profit, being £500, on the whole houses in satisfaction thereof; (3) another error in the report is that £1900 was raised by sale of part of the inheritance, which is not wholly to be so charged, for the inheritance is not to be sold to satisfy the profits, but only the annual profits.

[Raithby's note: There is simply an entry of a demurrer allowed in a case of the above name. 18th December. Reg. Lib. 1685 A, f. 121.]

[Earlier proceedings in this case: 79 Selden Soc. 882.]

302

Nosworthy v. Basset
(Ch. 1685)

The question in this case was whether, after a demurrer has been sustained to a special replication, the plaintiff can plead a general replication.

1 Vernon 351, 23 E.R. 516

Eodem die [18 December 1685]. In Court, Lord Chancellor [JEFFREYS].

The plaintiff having filed a special replication, the defendant put in a plea and demurrer to the replication. His plea was that, since his answer put in, he had recovered the estate in question in an [action of] ejectment upon full evidence at a trial at the bar.¹ And he demurred to other special parts of the replication.

The plaintiff's counsel admitted the plea and demurrer to be good, which were, therefore, allowed by the court; but the court refused to declare any opinion whether the plaintiff might not, notwithstanding the plea and demurrer were allowed, afterwards put in a general replication. And the plaintiff's counsel conceived they might, because the plea and demurrer were tied up to that replication only; but he seemed to admit that it might have been so pleaded, as that the matter settled by the trial at law should not have been drawn into issue or examined into.

[Reg. Lib. 1685 B, f. 175.]

[Earlier proceedings in this case: Reports *tempore* Finch 102, 23 E.R. 55, Nelson 135, 21 E.R. 809, 1 Eq. Cas. Abr. 80, 21 E.R. 893, 73 Selden Soc. 37, 62.]

[Other reports of this case: 1 Eq. Cas. Abr. 43, 21 E.R. 861.]

¹ Note *Nosworthy v. Basset* (1688-1693), Comberbach 90, 209, 90 E.R. 362, 433, *sub nom. Hitchins, ex dem. Nosworthy v. Basset*, 1 Shower K.B. 537, 89 E.R. 738, 3 Modern 203, 87 E.R. 131, 2 Salkeld 592, 91 E.R. 495.

303

Anonymous
(Ch. 1685)

A suit upon a bill of interpleader does not abate upon the death of the plaintiff.

1 Vernon 351, 23 E.R. 516

Upon a motion, it was declared by the court that a cause having been heard upon a bill of interpleader and a trial at law directed to settle the right between the defendants, there is an end of the suit as to the plaintiff so that, if he afterwards dies, the cause shall still proceed and there needs no revivor, each defendant being in the nature of a plaintiff.

[Other reports of this case: 1 Eq. Cas. Abr. 2, 80, 21 E.R. 828, 893.]

304

Oddy v. Torlesse
(Ch. 1685)

A court of equity will grant relief against a harsh bargain to the extent of future payments but not as to past payments.

1 Vernon 352, 23 E.R. 516

Lord Chancellor [JEFFREYS].

The plaintiff, having agreed with the defendant for the office of Clerk of the Bridge House for £950, deposited £500 in money, and a bond of £900 penalty was entered into by himself with a sufficient surety for £450 more, which was to be delivered to the defendant upon his surrender of his office to the plaintiff. The plaintiff was admitted, and the defendant received the £500 and the bond and, afterwards, came to an agreement with the plaintiff that the plaintiff should pay him £80 yearly until the £450 was paid off. The plaintiff had paid him on that account so much as exceeded the £450 and interest by £300.

The plaintiff's bill was, therefore, to have the articles for payment of the £450 and £80 *per annum* in the meantime and a judgment on a bond for performance of covenants delivered up and the surplus of the money repaid with interest.

The defendant insisted that it having been tried in the [Court of] Common Pleas whether the contract was usurious by the rule of that court and there found not to be usurious and there being still a great deal of money due to him on that account, the plaintiff ought not to be relieved without payment of it.

But it appearing to the court that the first agreement which was made with the plaintiff's friend's privity was for £950, and that they were not privy to the second agreement, but the plaintiff's necessity was worked upon therein, for that, as it was penned, the plaintiff was to pay £80 *per annum* until the £450 and every part of it was paid, so that, if there were but £5 of it unpaid, yet the plaintiff must pay £80 *per annum* until it was paid, the Lord Chancellor [JEFFREYS] declared that, if the plaintiff had paid beyond £950 and interest, he should pay no more. But, for what was actually overpaid, he would not relieve him. But he decreed that what money had been brought into court by the plaintiff to continue the injunction should be delivered out of court to him and that the defendant should acknowledge satisfaction on the judgment and deliver up the articles and bonds.

[Reg. Lib. 1685 B, f. 27.]

Halliley v. Kirtland
(Ch. 1685)

Where a bond creditor buys a mortgage from the mortgagee of the same debtor, the debtor cannot redeem without paying off both debts.

2 Chancery Reports 360, 21 E.R. 687

John Park mortgaged lands to the defendant Kirtland for £60, and he was also indebted to the defendant Sanderson £50 on bond. And the said Kirtland, wanting his money, assigned the said mortgage to the said Sanderson so that Sanderson, on payment to him of the money paid to Kirtland on the said mortgage and his £50 on bond and interest, is willing to re-convey to the plaintiff, which he refuses to do.

This court, inasmuch as the estate so vested in the defendant, as aforesaid, is a chattel lease and so liable to debts and the defendant having an assignment of the mortgage and his debt on bond being a just debt, declared that the plaintiff ought not to be let in to a redemption of the said mortgage but upon payment of the said £50 and interest due on the said bond as well as the mortgage money and decreed accordingly.

[Reg. Lib. 1 Jac. II, f. 566.]

Coltman v. Warr
(Ch. 1685)

A court of equity will not allow a rehearing after the enrollment of the final decree.

2 Chancery Reports 361, 21 E.R. 688

This court would not rehear a cause after the decree [was] signed and enrolled notwithstanding the said cause had been opened since the enrollment in order to rehearing and discharged the order for rehearing.

[Reg. Lib. 1 Jac. II, f. 566.]

Jones v. Henley
(Ch. 1685)

A legacy 'to all my servants' is payable only to those who were such when the will was made and continued so until the testator's death.

2 Chancery Reports 361, 21 E.R. 688

Sir Robert Henley by will gives £100 apiece to all his servants, which will is dated the 10th of November 1680. And Sir Robert lived afterwards until the 7th of August 1681 but made no republication of the said will. And the plaintiffs, as servants to Sir Robert, demand £100 apiece legacy. These servants, viz. Jones, Clerke, Meeke, Searle, and Hanbury, were all menial servants

before the 10th of November 1680, and so continued until the 7th of August 1681. These servants, *viz.* Litchfield, Davies, Deacon, Booth, Noon, etc., were all servants at the time of his death, but were not in his service at the time of making the will. Cook and Hawkes were both servants at the 10th of November 1680, but, before the 7th of August 1681, were discharged from his service. William Harrison was a menial servant the 10th of November 1680, but died before the 7th of August 1681. Castilian, Goddard, etc. were servants at large, but not menial, *viz.* as steward and bailiff, before the 10th of November 1680, and so continued until the said 1681, but did not inhabit in the house. Stranger and Long were chairmen and agreed with after the said 1680 at 20s. per week. So the plaintiffs insist that such that were his servants at the time of his death ought to have the benefit of the said devise.

But the defendant insisted that none of the plaintiffs can be anyways entitled to that benefit, but only such as were menial servants before the publishing of the said will and did so continue all along to be menial servants and live in the house with him to the time of his death.

This court declared that none of the said plaintiffs but such as were servants to the said Sir Robert before the making the said will and did so continue to be servants to him until the time of his death could have any pretence to the said legacy and such only as were his menial servants and lived all along in the house with him from before the 10th of November 1680 until the 7th of August 1681 and no others and ordered that Jones, Clerke, etc. only, and no other of the plaintiffs, be paid their legacy of £100 apiece by the said defendant and ordered the bill, as to all the other plaintiffs, to be dismissed.

[Reg. Lib. 1 Jac. II, f. 995.]

308

Fenwick v. Woodroffe
(Ch. 1685)

After a condition is once performed, it ceases to bind in the future.

2 Chancery Reports 363, 21 E.R. 688

Doctor Smalwood, deceased, by deed in 1672, conveys the land and premises to trustees and their heirs to the use of himself for life, remainder to Theophania, his wife, for life, remainder to Mary, their sole daughter, and the heirs of her body, remainder to his own right heirs, with a proviso that, if his said daughter Mary should thereafter marry in his lifetime without his privity and consent first had, then all and every the uses and limitations therein mentioned and made should cease and be utterly void. The said Mary did intermarry with Sir John Lloyd in the doctor's lifetime with his consent, who, upon a settlement made on the said Mary, was to have £2000 portion, £1500 whereof was to be laid out in lands for increase of Mary's jointure. And she had issue by him, the plaintiff Anne. Sir John Lloyd died, and the said Dame Mary intermarried with one Hutchinson without the consent, good liking, or privity of the said Doctor Smalwood, her father. In 1683, the said Doctor Smalwood died, having by his will in 1683 made the defendant, James Smalwood, and others executors. And he thereby devised and settled his estate real and personal, *viz.* according to his settlement formerly made. He gave his said daughter Dame Mary all his lands during her life if his executors should so think fit, and, in case they should not, to his grandchild Anne Love, and, in case of failure, to his grandchild, Theophania Hutchinson during her life, and, in case of failure, to his nephew, the defendant James Smalwood, forever, and his personal estate, as money, books, plate, etc., to be divided amongst his said daughters, grandchildren, and nephew James Smalwood, at the discretion of his executors, so to have the said £1500 which rested in Dr. Smalwood's hands, being part of the £2000 portion, covenanted by Dr. Smalwood to be laid out in lands by the said doctor for the increase of Mary's jointure aforesaid, to be laid out according to the doctor's covenants. And to

have the benefit of the said settlement in 1672 is the plaintiff's bill.

The Defendant, James Smalwood, pleads and claims a right to the estate of Doctor Smalwood by his will and by the said deed of 1672, the said Dame Mary having by her marriage with the said Hutchinson in the doctor's lifetime without his privity or consent broken the condition by which she was to have enjoyed the lands in that settlement. And he prays the judgment of this court, the estate being limited to him as aforesaid. And he further pleads and insists that Dame Mary ought not to have any discovery of the writings of the doctor's estate because he, the said James Smalwood, and the other defendant, Woodroffe, have not yet consented that she should have any part of the doctor's estate, which power was given them by the doctor's will, as aforesaid. And whether he and the other defendant ought to consent as aforesaid, he submits to this court.

But the plaintiffs insist that they admit such proviso in the deed of 1672 that, in case the said Dame Mary should marry in the lifetime of the doctor without his privity, consent, and liking, then all and every the limitations therein should cease and be void, but they insist that the marriage between Sir John Lloyd and Dame Mary was concluded by the doctor himself, as appears by the said articles, and that they married with the doctor's good liking, privity, and consent, according to the said condition, and they insist that Dame Mary's second marriage with Hutchinson was not without the consent, privity, and good liking of the said doctor, and insist also that the said proviso by Dame Mary's first marriage was fully performed and the estates in and by the said settlement granted, absolutely vested according to the limitation declared and contained, so as the said second marriage of Dame Mary with the said Hutchinson, if it had been without such consent, could not have divested the same, and therein they crave the judgment of this court.

This court declared that the first marriage of Dame Mary being by her father's consent, her second marriage, though it had been without his consent, could be no breach of the proviso or condition in the first settlement and decreed the defendants, the executors of Dr. Smalwood, to account for all the personal estate of the said doctor and the rents and profits of the real estate and, if the personal estate [be] sufficient after debts, to pay the £1500, then they are to pay the same to the trustees, which they are to lay out in a purchase of lands, according to the deed of the 18 August 1683.

[Reg. Lib. 1 Jac. II, f. 400.]

Earl of Winchelsea v. Norcliffe
(Ch. 1685-1687)

Where a person dies intestate, his personal property vests immediately in his distributees even before an actual distribution be had and does not lapse when the distributee dies.

Upon the distribution of an intestate's estate, those of the half blood have an equal share with those of the whole blood.

2 Chancery Reports 367, 21 E.R. 689

Katherine, late countess of Winchelsea, the plaintiff the earl's late wife, had three husbands successively, viz. Lister, her first husband, by whom she had issue, the defendant, Christopher Lister, Sir John Wentworth, her second husband, by whom she had issue, Thomas Wentworth, since deceased, and the defendant, John Wentworth, and the plaintiff, the earl, her third husband, by whom she had issue, the said Lady Katherine, and the plaintiff, the Lady Elizabeth. The said Wentworth had a real estate by descent from his father, out of which, after his father's death, there was payable to or to the use of the said Thomas several sums of money for rents, fines, and profits. In 1684, the said Thomas died intestate, leaving no wife or child, but leaving the defendant, Christopher Lister, John Wentworth, the Lady Katherine, and the plaintiff, the Lady Elizabeth, his brothers and sisters,

who being the next of kin in equal degree, his mother, the said countess, dying in his lifetime, they, by virtue of the late Act of Parliament for Settling Intestates' Estates,¹ became entitled to the surplus of the said Thomas's personal estate, to be equally distributed and divided amongst them, *viz.* to each of them a fourth part thereof. Before any distribution was made, the Lady Katherine died intestate, and administration of her estate was granted to the plaintiff, the earl, her father, who, by virtue thereof and of the said Act of Parliament, ought to have the said Lady Katherine's fourth part of the said personal estate of the said Thomas Wentworth, her brother. And the plaintiff, the Lady Elizabeth, ought to have another fourth part. But the defendants pretend that part of the said Thomas's personal estate was in his lifetime invested in the purchase of lands, which were conveyed to him and his heirs, and ought to descend to the said John Wentworth, as his brother and heir, and the said money ought to be accounted as part of his personal estate; whereas, if any such purchase were made, the same were without his consent and during his minority, when he had no power to direct the laying out thereof, and the lands in equity ought to be accounted part of his personal estate, of which the plaintiffs seek to have their shares.

The defendants insist that the defendant John Wentworth only was of the whole blood, the rest being but of the half blood to him only and leaving the defendant, Dame Dorothy, his grandmother by the mother's side, *viz.* mother of the said countess, who conceives herself to be entitled as grandmother to an equal share with any of his brothers and sisters. And she insists that the said Lady Katherine dying within less than a year after the intestate, Thomas Wentworth, she was not by the said Statute entitled to any share of the said personal estate, her supposed right being merely a thing in possibility and expectation, which vanished by her death within the year. And the defendants insist that the countess, before her marriage with the plaintiff, the earl, *viz.*, in 1673, granted lands to trustees for twenty-one years if she so long lived in trust out of those lands and other lands late of Sir John Wentworth to pay her £200 *per annum* until the said Thomas was twelve years of age for his maintenance and, after until twenty-one, so much as the said trustees thought fit and the residue for the benefit of the said Thomas, his heirs, and assigns. The said defendants, with the countess's approbation, out of the monies arising by the said trust, made several purchases in their own names and declared the trust thereof for the said Thomas Wentworth and his heirs and the defendant, Dame Dorothy, made other purchases in her own name with the said Thomas's money which she received in trust for him. And she insists that those monies so invested in those purchases in the lifetime of the said Thomas in trust are not nor, at his death, were any part of his personal estate, but the lands descend to the defendant, John Wentworth, as his heir.

Sir John Wentworth died in 1671 and left a great personal estate, which came to the earl and countess on their marriage. And Sir John Wentworth died intestate within the Province of York. The defendant, John Wentworth, being his younger son unpreferred, became entitled to a third part of his estate equally with his widow by the custom of that province. And, by force of the said Act for Settling Intestates' Estates, Thomas and John became entitled with her to the other third part.

The defendants farther insist that the said earl is not nor can be entitled to any share in the said Thomas Wentworth's personal estate for that the Act of Parliament is only authoritative and directive to the ordinary and administrator and there are no vesting words therein, whereby to entitle the Lady Katherine to a share of the estate. And she dying before any distribution and within the twelve months allowed to that purpose, her share fell among her surviving brothers and sisters. And, however, if she was entitled to any part, it could only be to a half share, she being but of the half blood to the deceased, and that so in the course of the civil law.

But the plaintiff insisted that, though the Act of Parliament be only authoritative and directive to the judge and yet such authority and direction in an act of Parliament does by judgment and implication of law vest an interest in the wife, children, and kindred for whose benefit the act was made, as much as if it had been a bequest of *residuum bonorum*, for that the Act appoints all ordinaries whatsoever, on granting any administration, to take the bond prescribed thereby, one

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

clause of the condition whereof is to pay the surplus that shall be found due on such administration account to such person or persons, as the judge by his decree or sentence to that act shall limit and appoint. And then it appoints the ordinaries and judges respectively to order and make just and equal distribution of such surplus amongst the wife, children, or next of kin, according to the rules and limitations therein, and the same to decree and settle (which is the very title of that Act), and that, though there be twelve month's time given for distribution, yet that is only with respect to creditors, and no way hinders the vesting the surplus in such persons as are appointed to have it immediately upon the trustee's death, any more than a legacy to be paid *in futuro*. And it is generally a much longer time before an intestate's estate can be got in and the surplus known. And, if the executors or administrators of persons dying in the meantime shall lose their shares, it will elude the intent of the Act of Parliament, which was made for the benefit of the wife and children and kindred generally. And it will lie much in the power of an administrator, by retarding his account, to prevent another of his share. Nay, it will be mischievous to the administrator and those who shall claim distribution, for that, if no interest be vested in any before an actual distribution by decree or sentence, then no distribution can be by agreement or consent of the parties nor, let the occasions or necessities of any claiming distribution be never so great, can any administrator satisfy the payment of any part of the estate until such sentence or decree be made, which the lawmakers could never intend. And, if no interest be vested by that Act, then has this court no jurisdiction to intermeddle therewith, for that the Act only directs the ecclesiastical judge to make a decree or sentence for distribution. But the same vesting an interest and there being no negative words that a distribution shall be sued for there and elsewhere, several distributions have been made in this court, as well in the Lord Chancellor Finch's time and the Lord Keeper North's time as since. And the same is looked upon as a point settled. And it is the constant course of the ecclesiastical courts to decree the shares of any persons dying before distribution to the executors or administrators of such persons so dying, and not to the surviving persons claiming distribution. And this Act was intended as the will of every intestate and the wife, children, and kindred respectively to be as well entitled, as if the intestate had made a will and so bequeathed the same amongst them. And for the half blood and whole blood, the same has made no difference between them, but appointed the distribution to be equal. And for the monies alleged to be invested in lands, such purchases do not alter the nature of the case, for that Thomas, being a minor, could not give authority or consent for it; and he might have dissented to it when at age. And dying in minority, the same still remains part of his personal estate, and the land is but in the nature of a mortgage or additional security for it.

This court declared they saw no cause or color to decree any share for the defendant, Dame Dorothy, and conceived her no way entitled to any. But, as to the plaintiff, the Lord Winchelsea, this court declared they were fully satisfied that the said Act of Parliament does immediately, upon the death of an intestate, and before any actual distribution made, vest an interest in the respective persons appointed to have distribution of the surplus of his estate, as much as if it had been bequeathed by will and that, if any one of them die before distribution, though within the year, yet the part or share of such person so dying ought to go over to the executors or administrators of such party so dying, and not to the survivor or next of kindred to the first intestate. And the Lady Katherine was at her death well entitled to a share of her brother Thomas Wentworth's estate, as an interest thereby vested in her, notwithstanding she died within a year after the intestate and before any distribution was made. And the Lord Winchelsea, as her administrator, is now well entitled thereto. And the court decreed a distribution and the plaintiff, the Lord Winchelsea, shall have the Lady Katherine's share and proportion of the said Thomas Wentworth's estate accordingly. And the plaintiff, the Lady Elizabeth, shall have a like share thereof with the defendant Lister and John Wentworth.

The question being whether the respective shares of the plaintiff and defendant Lister, the said Lady Katherine and Elizabeth and the defendant Lister being only of the half blood to the intestate, and whether the money be vested in lands or the lands themselves should be accounted part of the personal estate of the said Thomas Wentworth or not, His Lordship ordered a case to be made as to those two points.

The case was *viz.* that the said Thomas Wentworth died an infant and unmarried, leaving such brother of the whole blood and such brother and sisters of the half blood, as aforesaid, who were his next of kindred in equal degree and that, upon his death, a real estate of near £2500 *per annum* descended to the defendant, John Wentworth, his brother and heir, and that above £3000 of the profits of that estate, received in the intestate's lifetime by Dame Dorothy Norcliffe and the said trustees, which belonged to him and his proper monies, were by them during his nonage and without any direction or power in their trust, but of their own heads, laid out in purchases in fee and conveyances in their names, but in trust for the said intestate and his heirs, with this express clause in the said conveyances, *viz.* in case he at his full age would accept the same at the rate purchased, the purchase being made with his money and for his advantage.

This court, as to the said two points, being assisted with judges, declared that the plaintiff and the defendant Lister ought each of them to have an equal share with the defendant, John Wentworth, of the surplus of the personal estate of the said intestate, and the distribution thereof ought to be made among them, share and share alike. And he decreed accordingly.

And, as to the other point, he declared that the monies laid out in the said purchases ought to be taken and accounted for as part of the said personal estate and distributed with the rest. And he decreed a sale of the said purchased premises and distribution thereof to be made as aforesaid. See Max. Eq. 22, c. 4.¹

1 Vernon 402, 23 E.R. 544

16 June [1686]. In Court. Earl of Winchelsea v. Wentworth.

The lands in question were limited to John, the second son, subject to a proviso that, if his elder brother should die without issue, John should pay the Lady Katherine £1500 within six months after the death of the elder brother or, in default thereof, that the land should go to the Lady Katherine and her heirs. The elder brother dies without issue, and, within three months afterwards, being before the time for the payment of the £1500, the Lady Katherine died. And John refused to pay the £1500.

The principal question was between the heir and executor of the Lady Katherine, *viz.* whether this should be taken as a real estate and go to the heir of the Lady Katherine or be looked on as a personal estate and only a security for money, she dying before the time of payment, and go to her executor.

The Lord Chancellor [JEFFREYS] directed a case should be stated by a Master for the judgment of the court.

In the arguing of this case were cited the Case of Pitcarne and [*blank*]² and Wallis and Grimes, where the court had relieved in like cases against the limitation over on payment of the money, though after the day.

But the Lord Chancellor [JEFFREYS] declared his opinion that the court ought not to relieve in such cases, for that is to destroy the known and common difference between a limitation and a condition.

¹ Perhaps E. Wingate, *Maximes of Reason* (1658), p. 53.

² *Pitcairne v. Brase* (1679), Reports *tempore* Finch 403, 23 E.R. 220, 79 Selden Soc. 452.

1 Vernon 403, 23 E.R. 545

Eodem die [16 June 1686]. In Court.

A guardian to an infant, having a considerable sum of money in his hands that was raised out of the infant's estate, lays out £2500 in a purchase taken in the name of I.S. for the benefit of the infant if, when he came of age, he should agree thereto and allow the trustees that money upon account. The infant dies under age.

The question was whether the heir of the infant should have this estate or whether it should be looked on as a security for £2500 and go to the executors and administrators of the infant. As precedents for the heir were cited the cases of Palmer and Allicot and Dennis and Badd,¹ where a guardian buys in a mortgage on the infant's estate and takes an assignment of it in the names of trustees.

The court inclined to the heir but referred this to be stated as a case by the Master. And, in this case, the court held that, where a person entitled to a share of an intestate's estate dies before distribution and within the year, there was an interest vested and that his share should go to his executor or administrator.

In this case also, the court was of opinion that, where there is a brother of the whole blood to the intestate and a sister of the half blood, the sister should have but half a share.

But note the judgment in the cases of Smith and Tracy and Stapleton and Sherrard,² and the constant practice of the court has been otherwise.

2 Freeman 95, 22 E.R. 1080

In this case, these questions did arise upon the Act for Distribution of Intestate Estates:³

First, whether the grandmother should have an equal share with the brother or sister.

And it was said she should because she is two degrees from the intestate, and so is a brother or sister, computing the degrees according to the civil or canon law, *viz.* one degree to the father, another from him to the brother, and so the grandmother is but two degrees, one to the father, another to the grandmother.

But the Lord Chancellor [JEFFREYS] seemed clear, that the grandmother should have no share.

Second, whether a brother of the half blood should have an equal share with a brother of the whole blood.

And by the Chancellor [JEFFREYS], he shall not, but he shall have only half a share, and so, he said, it was held in the King's Bench and, since that, there being a cause in the Exchequer, where this point being in question, the barons consulted with him, and he informed them of the resolution in the King's Bench, and they ruled it accordingly in the Exchequer.

Query, whether it be not since resolved that he shall have a whole share.

Third, the intestate was an infant, and the father of the intestate, leaving a great personal estate

¹ *Palmer v. Allicock* (1685), 3 Modern 58, 87 E.R. 37, 2 Shower K.B. 407, 486, 89 E.R. 1010, 1056, Comberbach 14, 90 E.R. 314, Skinner 212, 218, 90 E.R. 98, 101; *Dennis v. Badd* (1670), 1 Chancery Cases 156, 22 E.R. 740, 1 Eq. Cas. Abr. 261, 21 E.R. 1033.

² *Smith v. Tracy* (1677), T. Jones 93, 84 E.R. 1163, 1 Ventris 307, 316, 323, 86 E.R. 198, 204, 209, 2 Ventris 317, 86 E.R. 462, 2 Levinz 173, 83 E.R. 504, 1 Modern 209, 86 E.R. 833, 2 Modern 204, 86 E.R. 1027, 1 Freeman 288, 294, 89 E.R. 208, 212, 3 Keble 601, 620, 669, 730, 776, 806, 831, 84 E.R. 902, 914, 943, 978, 1006, 1023, 1038, 1 Eq. Cas. Abr. 249, 21 E.R. 1025; *Stapleton v. Sherrard* (Ch. 1685), see above, Case No. 141.

³ Stat. 22 & 23 Car. II, c. 10 (SR, V, 719-720).

to him, made trustees; the trustees purchased lands for the use of the intestate in case he accepted thereof when he came to age, and he dying before he came to age, the question was whether this was personal estate to be distributed or whether the lands should descend to the heir.

And as to this point, the court was doubtful, but seemed to incline that it should go to the heir and should not return to the personal estate, there appearing no fraud in the trustees but that they had well executed their trust.

But of this, the court seemed more doubtful.

Fourth, a devise to the heir, paying £300 to another brother within the space of three years, and, if he did not, that then the other brother should have the land; the money is not paid; and the question was whether the other brother should have the land.

And the Lord Chancellor [JEFFREYS] seemed to think that he should because this is a limitation over and not like a condition to redeem upon a mortgage.

But it was averred by the practicers at the bar that it had been often ruled in the times of Lord Nottingham and Bridgman that this was but in the nature of a penalty to enforce the payment of the money and, though the money was not paid at the day, yet, if the party came afterwards and paid the principal and interest, that he should have the land.

It was ordered that all these points should be stated into cases, and then he would consider of them and give his resolution.

1 Vernon 430, 23 E.R. 566

Eodem die [4 February 1687]. In Court, Lord Chancellor [JEFFREYS]; Lord Chief Justice BEDDINGFIELD; Lord Chief Baron ATKYNS.

The Lady Winchelsea, having issue by her former husband Sir John Wentworth, two sons, *viz.* Thomas, the eldest son, and John, her second son, settles the lands in question to the use of herself for life, remainder to John, her second son, and his heirs, he paying unto Katherine, her daughter, £1200 within six months after the estate should fall in possession, provided, if Thomas, the eldest son, should die without issue so as his estate should come to John, that, then, if John did not within six months afterwards pay £1500 to Katherine, the lands should go to Katherine and her heirs. Thomas dies without issue so that his estate came to John, who was under age and neglected to pay the £1500. And, in truth, the lands were not worth that money. And Katherine being dead without issue, the question was between the earl of Winchelsea, the administrator of Katherine, his daughter, and Dame Elizabeth Finch, sister and heir of Dame Katherine.

The plaintiff insisted that this was only in the nature of a security for money and that, consequently, he became entitled thereunto as administrator. And the defendant insisted that it was not a bare security for money, but rather in the nature of a settlement and a plain limitation of the estate over upon default of payment at the day appointed and that, therefore, she ought to have this estate, as being heir at law to Dame Katherine, and the rather for that John, who had the title of redemption in case the estate was redeemable, desires not to redeem the same.

The Lord Chancellor [JEFFREYS], with the concurrence of the judges, dismissed the plaintiff's bill, declaring it was not in the nature of a security for money, but a settlement with a plain limitation over upon default of payment to Dame Katherine and her heirs. And the plain intention of the party appears to be upon the face of the deed by the different penning of the two provisoes that, in the latter case, the land itself, in default of payment, should go over to the Lady Katherine and her heirs. And to make this a redeemable estate was to destroy the known difference in the law books between a condition and a limitation over.

1 Vernon 435, 23 E.R. 569

19 February [1687]. In Court, Lord Chancellor [JEFFREYS]; Master of the Rolls [TREVOR]; Lord Chief Baron ATKYNS; Mr. Justice LUTWYCHE.

The case was that the trustees of the estate of Thomas Wentworth, an infant, having a sum of £3000 in their hands, which they had raised out of his real estate, invested the same in lands which lay commodious to the infant's estate and took the conveyance thereof in their own names, but they thereby declared the trust to be for the benefit of the infant in case the infant, when he came of age, should accept the same at the rate they had bought the estate and discharge them of the £3000. And this was done with the consent of the grandmother, who was the infant's guardian. The infant died under age, and the question now was whether the heir of the infant should have those lands or whether the purchase should be left upon the hands of the trustees and they to account to the administrator of the infant for the £3000.

Mr. Justice LUTWYCHE: Neither the heir nor the administrator have any title to the lands. Here was only a bare election in the infant in case he had lived to come of age and that election cannot now be made. And, therefore, he held that the trustees were accountable to the executor or administrator for the £3000.

Lord Chief Baron ATKYNS [was] of the same opinion.

The Master of the Rolls [TREVOR] differed from the judges and held that the heir of the infant ought to have the land. And he observed that the £3000 was not taken out of the infant's personal estate, but had been raised and saved by and out of the profits of his real estate and that the trustees had acted honestly and for the benefit of the infant and that it was but reasonable they should have such a power in them, for a purchase of lands that lie commodious to a man's estate may not be always to be had. And here being no creditor in the case, he thought the heir ought to be preferred before the administrator. And he took notice of the Case of Dennis and Badd, cited at the bar, where the committee of an idiot had bought in a mortgage that was upon the idiot's estate, and the estate descended to another idiot, and, though the mortgage was kept on foot by an assignment in trust, yet, in that case, it was decreed on a bill brought by the committee that the lands should go to the heir and that the mortgage should not be taken as personal estate and an heir shall by the course and justice of this court have the personal estate applied in ease of the real and to discharge mortgages though there be no covenant for the payment of the mortgage money. And, in case the trustees had come to this court and shown how it would be for the benefit of the infant to have had this money thus laid out, he did not doubt but that the court would have decreed it accordingly.

Lord Chancellor [JEFFREYS] concurred in opinion with the judges and held that the trustees must account for the £3000 to the executor. And he said there was a plain difference between this case and that of Dennis and Badd, for, in that case, had the money come to the hands of the executor, yet, in his hands, it would have been liable in equity to the debt due by mortgage and the heir should have compelled him so to apply the same so that, there, the trustees did no wrong or prejudice to the executor nor more than what the executor himself might have been compelled to have done. And he did agree that, if the trustees had come to this court and had obtained a decree for the investing this money in a purchase, this court would have maintained its own decree. But not having so done but voluntarily put an election in an infant, who never made any, he thought they remained accountable for the £3000, as being part of the infant's personal estate. And he said the matter that had been pressed at bar by Mr. Serjeant Rawlinson, had not been answered, *viz.* that, if the infant at seventeen years might dispose of his personal estate, though he could not of his real, but, if his trustees, at their pleasure, might turn and convert his personal estate into a real, they thereby would debar the infant of the right and privilege which the law gave him and might at their pleasure advance the heir and prevent an infant from providing for his younger children, which was unreasonable. And, therefore, he decreed the trustees to pay the £3000 to the administrator with interest only according to what they had made by the profits of the purchased lands.

Another matter, which was made a doubt of in this case was whether those of the half blood

should have an equal share of an intestate's estate with those of the whole blood. And the court unanimously agreed that those of the half blood must have an equal share, though the Lord Chancellor [JEFFREYS] said that, until the Case of Smith and Tracy, 27 & 28 Car. II [1675], at Doctors' Commons, they gave but half a share to one of the half blood, and it was so done in the case of one Brown. But, since the Case of Smith and Tracy, that matter has been settled, and those of the half blood have always had an equal share with those of the whole blood. And *Coke upon Littleton* distinguishes between those of the half blood as to descents.¹ But, as to administration and personal estates, they are all one.

[Reg. Lib. 1685 A, f. 1026, Reg. Lib. 2 Jac. II, f. 315.]

[Other reports of this case: 1 Eq. Cas. Abr. 105, 262, 21 E.R. 914, 1033.]

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Middleton v. Middleton
(Ch. 1685)

Even where there is a devise of a trust to pay the decedent's debts, his widow shall first have her paraphernalia and then the decedent's debts will be paid out of his personal estate.

Lincoln's Inn MS. Misc. 498, p. 22, pl. 1

In this case, Sir R.M. had raised a trust in lands for the payment of his debts, yet the personal estate shall be first applied to the payment of them and what that will not reach to pay the real estate shall make up. But the widow, in this case, shall be allowed her paraphernalia out of the personal estate.

Mr. Bellwood reported this case to me.

But 27 May 1692, in a cause between Offley and Offley,² the court were of a contrary opinion as to the paraphernalia.

[Other copies of this report: Lincoln's Inn MS. Misc. 503, p. 89, pl. 1, Lincoln's Inn MS. Misc. 504, p. 85, pl. 1.]

2 Chancery Reports 377, 21 E.R. 692

Sir Thomas Middleton, upon his marriage with the plaintiff, Dame Charlotta Middleton, settled a great part of his estate in the County of Flint and other counties for her jointure, being seised in fee of lands in several counties, *viz.* Flint, Denbigh, and Merioneth, and settled all his estate on his first and other sons on her body in tail male and charged the same with several terms of years for raising portions for daughters, *viz.*, if one daughter and no issue male, £8000, and out of his personal estate. Intending to make an addition to the portion of the plaintiff Charlotta, his only child, and to increase the plaintiff Dame Charlotta's fortune and jointure, he made his will in 1678, and thereby reciting that, whereas, upon his marriage settlement, it was provided that, if he should have a daughter, she was to have £6000 portion, as his will was. And he gave to his only daughter Charlotta, in case she should have no son living at his death, £10,000 more, as an addition to her portion, to

¹ E. Coke, *First Institute* (1628), f. 14.

² *Offley v. Offley* (1691), Precedents in Chancery 26, 24 E.R. 14, 1 Eq. Cas. Abr. 66, 21 E.R. 879, 2 Eq. Cas. Abr. 465, 483, 626, 658, 22 E.R. 396, 411, 526, 553, Lincoln's Inn MS. Misc. 498, p. 101.

make her up the same £16,000. And for raising of the said portions and payment of his debts and legacies, he devised all his said lands, except his lands limited for his wife's jointure for her life, unto trustees and their heirs in trust to raise out of the rents and profits of the said premises the several sums mentioned for his daughter's portion and the sums of money thereafter mentioned. And he willed that, until one-half of the said daughter's portion should be raised, his daughter Charlotta to have £100 *per annum* for the first four years and, afterwards, £200 *per annum* until her moiety of her portion should be raised. And, after payment of the said portions, maintenance, debts, and legacies, he devised the said trustees to stand seised of all the said premises (except before excepted) to the use of the heirs males of his body, with a remainder to the defendant, Sir Richard Middleton, his brother for life, without impeachment of waste, remainder to his first son and heirs males of his body, with other remainders to the defendants Thomas, Richard, and Charles Middleton, remainder to the right heirs of the said Thomas. And he bequeathed to his said daughter Charlotta, the plaintiff, his diamond pendants which his wife wore. And he bequeathed to his wife, Dame Charlotta, after his death, one annuity of £200 *per annum* for her life, to be raised out of the profits of the said premises. And he bequeathed the great silver candlesticks to go according to his grandmother's will, to the heirs of his family with his estate as an heirloom. And he bequeathed the use of all his goods, stock, and household stuff to his wife, the plaintiff Dame Charlotta, for so long as she should live at Chirke Castle, and, from thence, he left the same to his eldest son and heirs or such as should be heir male of his family, according to the limitations aforesaid. And his further will was that his said wife should have such proportion of the goods, household stuff, and stock, for stocking and furnishing of Cardigan House and demesne, being part of her jointure, as should be judged fit by her trustees, that she might be supplied with goods and stock requisite for her house. And he left to whomsoever should be his heir all his stable of horses, and he made the plaintiff, Dame Charlotta, executrix, and he died in 1683, leaving the plaintiff, Charlotta, his daughter and heir.

The defendant, Sir Richard Middleton, insisted that Sir Thomas Middleton, his brother, had, in consideration of £184 to him paid in 1680, conveyed to the said defendant and his heirs two messuages, being £11 10s. *per annum* in the County of Denbigh, and, taking notice that the same was comprised in his wife's jointure, he declared he would leave or give his wife by will or otherwise a sufficient compensation for the same, so that he should not be troubled. And the defendant insists that the £200 *per annum* given her by the will was intended to be as a compensation. And he insists that Sir Thomas intended his daughter more than £16,000 and that such part of his personal estate, as was not specifically devised to his executrix, which was all he intended her, ought to be applied towards satisfaction of the testator's debts and legacies and the plaintiff's portion, and the rather for that, by the true construction of the will, the real estate is subjected only supplementarily and that part of the personal estate intended to the executrix is specifically devised to her; the devise of the goods and stock were only intended, in case the plaintiff, Dame Charlotta, should live on her jointure. But she not residing on her jointure, he insists she is not entitled to the said stock and goods. And as to all other the goods and stock and furniture, the defendant was well entitled by the will, as heir male of the family, according to the limitation of the will.

The plaintiff insists that the personal estate, not being devised for payment of debts and provision being made for payment thereof out of the real estate, and does submit to the court whether the personal estate ought to be applied for debts and legacies, the real estate being sufficient to do the same and whether, if she be compelled to pay the debts and legacies therewith, she shall not be reimbursed out of the real estate.

The questions arising upon the said will and now debated are *viz.*:

First, whether the personal estate not specifically devised ought to come in aid of the real estate and be subject to the debts and legacies chargeable thereon?

Secondly, whether the plaintiff Charlotta ought to have any greater portion by the settlement and will than £16,000, and whether she ought to have the several yearly maintenances given by the said deed and will and to what time and times and whether the stable of horses did not belong unto her, as being given to whomsoever shall be the testator's heir, she being the testator's heir.

Thirdly, whether the plaintiff, the Lady Charlotta Middleton, ought not, besides her jointure,

to have her annuity of £200 *per annum* and to have furniture and stock for her jointure, house and lands, and to have the jewels and chamber plate and furniture of her chamber as her paraphernalia.

This court declared it was intended the daughter should have only £16,000 portion and that such of the goods and stock and household stuff at Chirke Castle, which were devised to the defendant Sir Richard Middleton, did belong and ought to be enjoyed by the said Sir Richard and that the personal estate not specifically devised away and which is not to be set out to the plaintiff, the Lady Middleton, pursuant to the said will ought to be applied and paid towards payment of the debts and legacies and the portion of the daughter and that the plaintiff, the Lady Middleton, (besides her jointure which she ought to enjoy free from encumbrances) ought to have and enjoy the said annuity of £200 *per annum* and arrears given and devised to her by the said testator and that she ought to have her paraphernalia and proportion of the goods, household stuff, and stock for furnishing and stocking her jointure house and demesnes to be set out by the trustees according to the will and the daughter to have both the maintenances by will and deed of settlement and the stable of horses and all things specifically devised to her by the will and decreed accordingly.

[Reg. Lib. 1 Jac. II, f. 793.]

311

Whitlock v. Marriot
(Ch. 1685-1686)

*A defendant can be ordered to pay damages and court costs for filing a scandalous pleading.
A solicitor who forges counsel's signature to a pleading can be fined and imprisoned.*

2 Chancery Reports 386, 21 E.R. 695

This case being upon a scandalous answer, His Lordship [JEFFREYS] declared the said answer to be very scandalous and impertinent and that the exceptions taken by the defendant to the Master's report were not only more scandalous but also malicious and that, it appearing that Ryley, the defendant's solicitor, had put Mr. Lynn's, a counsellor's, hand to the exceptions without his knowledge, this court ordered the said Ryley to be taken into custody of the Messenger. And he declared the answer and exceptions were not pertinent to the cause but merely to defame the plaintiff. His Lordship ordered the defendant Marriot to pay to the plaintiff £100 for his reparation and costs for the abuse and scandal aforesaid and the said Ryley to pay £20 and to stand committed to the Prison of the Fleet until payment thereof be made.

Dickens 16, 21 E.R. 172

3 May 1686.

An answer [was] reported scandalous. [There were] exceptions to the report. Upon arguing the exceptions, the defendant was fined £100, and his solicitor, who had forged the counsel's name, £20, and committed until payment.

[Reg. Lib. 1 Jac. II, f. 700.]

Ash v. Rogle
(Ch. 1685-1686)

A court of equity will aid a common recovery but not defeat one.

2 Chancery Reports 387, 21 E.R. 695

Ash v. Rogle and the Dean and Chapter of St Paul's.

This case is upon a demurrer. The plaintiff's bill is to enforce the defendant, the lord of the manor of Barnes in Surrey, to receive the plaintiff's petition or bill in the nature of a writ of false judgment to reverse a common recovery suffered of some copyhold lands in the manor by Susan Rogle, widow, which the defendant Rogle holds under the said recovery. The bill set forth that Katherine Ferrers, by the will of her husband or by some other good conveyance, was seised in fee of free and copyhold lands in Barnes, formerly her said husband's, in trust to convey £200 a year thereof upon William Ferrers, her eldest son, and the said Susan, his then wife, and heirs males of the body of William, remainder in tail to Thomas Ferrers, the plaintiff's father, second son of Katherine, and the heirs of his body. Edward being obliged by articles, upon Susan's marriage with his son William, to settle lands of that value on Susan for her jointure, Katherine, on that trust in 1642, surrendered the premises to the value of £100 *per annum* to the use of the said William and Susan and the heirs of their two bodies begotten, remainder to the right heirs of William, which was a breach of the trust in Katherine, in limiting an estate tail to Susan, when it should have been an estate for life. William died before the admittance, leaving issue only his son William, and, in 1652, Susan surrendered to one Mitchell, against whom the common recovery in question was then obtained, wherein one Walter was demandant, the said Mitchell tenant, and Susan vouchee, to the use of herself the said Susan for life, the remainder to William Ferrers and the heirs of his body, the remainder to the right heirs of the survivor of them, the said Susan and William, her son. William, the son, died soon after, and Susan died in 1684. And the plaintiff's father, Thomas, being dead without issue male, in case the common recovery had not been suffered, the premises would have come to the plaintiff, being the youngest daughter to her father, as cousin and heir both of William Ferrers, the father, and William, the son, the premises being borough English, and so the plaintiff was well entitled to prosecute the lord of the manor in the nature of a writ of false judgment to reverse the said recovery, wherein there are manifest errors and defaults. But the said lord refuses to receive the said petition and combines with the defendant Rogle, who is son and heir of the said Susan by a second husband, who pretends that his mother, Susan, surviving her son William Ferrers, the premises are descended to him by virtue of the use of the said recovery, limited to the right heirs of the survivor of Susan and her son, William. So, the plaintiff's bill is to examine the defects of the said recovery.

The defendants demur for that the relief sought by the bill is of a strange and unprecedented nature, being to avoid and reverse a common recovery had in the said manor thirty years ago and that upon a bare suggestion generally that the recovery is erroneous, without instancing wherein, which may be said in any case.

The MASTER OF THE ROLLS declared that, as to that part of the bill which seeks to impeach or reverse the said recovery for any errors or defects therein or compel the said lord to receive any petition for reversal thereof or anyways to impeach the same, this court being the proper court to supply the defects in common assurances and rather to support than to assist the avoiding or defeating of them and there being no precedents of such a bill as this is, he thought not fit to admit of this nor to introduce so dangerous a precedent, whereby a multitude of settlements and estates depending on common recoveries suffered in copyhold courts for valuable considerations would be avoided and defeated through the negligence or unskillfulness of clerks and, therefore, conceived

the said common recovery ought not to be shaken. Yet nevertheless, the case being new and great, he referred it to the opinion and determination of the Lord Chancellor.

His Lordship [JEFFREYS] held the demurrer good and ordered it to stand.

1 Vernon 367, 23 E.R. 526

Eodem die [19 February 1686].

The bill was brought by a remainderman after an estate tail spent to be relieved against an erroneous recovery of a copyhold estate in a court baron suffered above thirty years ago. And the relief sought was that the Dean and Chapter, who were lords of the manor, might be decreed to suffer the plaintiff to bring a plaint in the nature of a writ of error or false judgment in their Court Baron or else that he might be relieved upon the merits of the cause by the decree of this court.

The estate had been enjoyed under the recovery ever since, though the estate tail was spent many years ago. The defendant Rogle, who claimed the estate under the recovery, demurred, for that it would be of dangerous consequence to all persons who claimed under recoveries of copyhold estates to draw the same in question in this manner, for that, through the ignorance of stewards of copyhold courts, it frequently happens that all the legal requisites to a common recovery of freehold lands were not observed in recoveries of copyhold estates and yet, the barring of copyhold estates by recoveries in such courts having obtained in many manors, it would shake many of them if, upon niceties in form, they should be impeached. And [it was] insisted there was no precedent that any relief in such case was ever given in this court and that it was better to suffer a particular mischief in this case than, by relieving it, to make a precedent of general inconvenience to owners of such estates.

The Dean and Chapter answered the bill and submitted to do as the court should direct.

This demurrer was first argued by learned serjeants at law and counsel on both sides solemnly before the Master of the Rolls, who allowed the demurrer.

And, afterwards, being reargued before the Lord Chancellor [JEFFREYS], he was of the same opinion and confirmed the Master of the Rolls' order, both of them severally declaring it would be of dangerous consequence and contrary to equity to give any relief in such a case. And yet the errors assigned by the bill in the recovery were such as would have been gross errors in a recovery in a freehold estate. And the Lord Chancellor [JEFFREYS] said, if there had been an error in any adversary proceedings in the lord's court, this court would have ordered the lord to proceed and examine it. You may try the common law courts, whether they will grant you a [writ of] *mandamus*. You shall have no aid from this court.

Note, from this decree of dismissal, there was an appeal to the House of Lords, and, there, the decree was affirmed, for that common recoveries not being adversary suits, but common assurances, equity ought rather to supply defects than to assist in the annulling them.

[Reg. Lib. 1 Jac. II, f. 154.]

[Other reports of this case: 1 Eq. Cas. Abr. 119, 21 E.R. 925, British Library MS. Lansdowne 1064, f. 348.]

[Affirmed on appeal: Shower P.C. 67, 1 E.R. 46.]

313

Kew v. Rouse
(Ch. 1686)

Where two tenants of land are each to pay a sum of money out of the income from the land, they are tenants in common and not joint tenants.

1 Vernon 353, 23 E.R. 517

January 1685[/86].

The plaintiff's wife, whose administrator he is, and the defendant's wife were the two daughters of Elizabeth Wise, who, being possessed of a term for years, in April 1679, devised that term and all her interest therein unto her two daughters, they paying yearly to her son £25 by quarterly payments, viz. each of them £12 10s. yearly out of the rents of the premises during his life, if the term so long continued. The plaintiff's wife being dead, the defendant claims the whole by survivorship. And whether it was a joint tenancy or a tenancy in common was the question.

The Lord Chancellor [JEFFREYS] conceived it clearly to be a tenancy in common, for that £25 *per annum* was to be paid by the two daughters equally in moieties. And he decreed an account of the moiety of the profits to the plaintiff, as administrator to his wife.

[Reg. Lib. 1685 A, f. 435.]

[Other reports of this case: 1 Eq. Cas. Abr. 292, 21 E.R. 1054.]

314

Bechinall v. Arnold
(Ch. 1686)

A suit to perpetuate testimony cannot be brought where the plaintiff can bring an action and have a remedy.

1 Vernon 354, 23 E.R. 519

16 January [1686]. In Court, Lord Chancellor [JEFFREYS].

A bill [was filed] to prove a will and perpetuate the testimony of the witnesses.

The defendant pleaded himself a purchaser without notice of any such will. And he insisted that, unless there had been a verdict in affirmance of such will, nothing hindering the plaintiff, but that, if he had a title, he might recover at law, the plaintiff ought not to be admitted to examine his witnesses, thereby to hang a cloud over a purchaser's estate.

And, upon debate, the court allowed the plea.

[Other reports of this case: 1 Eq. Cas. Abr. 234, 333, 21 E.R. 1014, 1083.]

315

Foden v. Howlett
(Ch. 1686)

If the daughter of a London freeman marries against his wishes, she will lose her orphanage share of his estate.

1 Vernon 354, 23 E.R. 519

Eodem die [16 January 1686]. In Court.

Lord Chancellor [JEFFREYS]: If the daughter of a citizen of London marries in his lifetime against his consent, unless the father be reconciled to her before his death, she shall not have her orphanage share of his personal estate, and it would be unreasonable to take the custom to be otherwise.

[Other reports of this case: 1 Eq. Cas. Abr. 156, 21 E.R. 955.]

316

Wall v. Thurborne
(Ch. 1686)

A power of appointment once fully executed cannot be later modified.

A question in this case was whether a court of equity can supervise the appointment where a power of appointment is not exercised equally among the beneficiaries.

1 Vernon 355, 23 E.R. 519

Eodem die [16 January 1686]. In Court, Lord Chancellor [JEFFREYS]. Wall *et uxor versus* Thurborne *et uxorem* and Isabella Crooke.

Sir George Croke, having three daughters only, by his will, directs, that his lands shall descend and come amongst his daughters in such shares and proportions as his wife, by deed in writing, should direct and appoint. The wife makes an unequal distribution. And having given little to the plaintiff, she brought her bill and insisted that the giving the wife such power by the will was intended only to keep her children in obedience and, the plaintiff having behaved herself dutifully, she ought to have an equal share.

To this the defendant pleaded the will and that the wife, in pursuance of such power, had by deed executed appointed so much to one daughter and so much to the other and, though the deed was with a power of revocation, yet it was never actually revoked.

As to the power of revocation, the case may be eased of that, for it was only an authority in the wife, and, that being once executed, she could not reserve such power to herself. And as to the main point, whether the wife might make such an unequal distribution or not, the court would not now determine upon the plea, but ordered it should stand for an answer with liberty to except. But [the court] declared the circumstances must be very strong, as something of bribery or corruption, that would take away this power that was given to the wife by the express words of the will.

For the plaintiff was cited the Case of Cragrave and Perrost,¹ where a man, having two

¹ *Craker v. Parrott* (1677 x 1678), 2 Chancery Cases 228, 22 E.R. 921, 2 Freeman 18, 22 E.R. 1029, 79 Selden Soc. 492, Reports *tempore* Finch, 354, 23 E.R. 194, 1 Eq. Cas. Abr. 345, 21 E.R.

daughters, one by a former wife and another by his second wife, devised his estate to his wife to be distributed between his daughters as his wife should think fit. And she gave £1000 to her own daughter, and but £100 to the other. And the court there decreed an equal distribution.

On the other side was cited the Case of Swetnam and Woolaston,¹ where an estate was devised to a man to distribute the same amongst his nephews and nieces as he should think fit, and one of the nieces, to whom nothing had been appointed, brought a bill that she might have an equal share of the estate, and it was dismissed.

1 Vernon 414, 23 E.R. 555

6 December [1686]. Lord Chancellor.

Sir George Crooke, by his will, devised that his real estate should descend to his three daughters and heirs, provided that his wife should distribute it in such proportions as she should think fit. The mother, by deed executed in her lifetime, appoints a very small proportion for the plaintiff's wife, who was one of the three daughters, and had appointed the rest for the other two daughters. And the bill was to be relieved against this unequal distribution.

Upon long debate, the court [JEFFREYS] declared the case was proper and relievable in equity, for, as the mother here had appointed this daughter a less proportion than the other, so she might for some (it may be) causeless displeasure have allotted her but one barren acre only, and it would be hard if equity, in such a case, should not interpose. And, if the court might interpose in that case, it cannot then be objected that the court ought not to intermeddle or wants jurisdiction in the case in question. And it is discretionary in the court whether it shall relieve in this case or not. And the court took time to consider of it and to be attended with precedents.

In the argument of this case were cited the cases of Craker and Perrot and Gibson and Kinven,² where a man, by will, left his personal estate to his wife to be distributed amongst his children at her discretion, and she gave all to one child and none to another, and the court controlled that disposition, such clauses being generally intended to preserve obedience only.

But note one main reason in the case last cited was that the wife had married a second husband and, being under coverture, her distribution might be influenced by her husband's authority.

[Raithby's note: Reg. Lib. 1686 B, ff. 79, 142. The bill appears afterwards to have been dismissed on a compromise. Reg. Lib. 1686 B, f. 648.]

1091.

¹ *Woolstenholm v. Swetnam* (1677 x 1678), 2 Chancery Reports 129, 21 E.R. 636.

² *Craker v. Parrott* (1677-1678), *ut supra*; *Gibson v. Kenvin* (1682), 1 Vernon 66, 23 E.R. 315, 79 Selden Soc. 931.

317

Cocks v. Foley
(Ch. 1686)

A court of equity will order a prescriptive rent to be paid where a court of common law will require details which cannot be proved.

1 Vernon 359, 23 E.R. 522

3 February [1686]. At the Rolls.

The bill was to be relieved touching two several rents purchased by the plaintiff of 3s. and 2s. *per annum*, issuing out of lands, the bill suggesting the rents had been constantly paid time out of mind, but that they could not recover at law, not knowing the nature of the rent, whether rent charge, service, or rent sec, and the boundaries of the land being uncertain so that they could not at law declare with that preciseness as was required in an avowry.

And several precedents being produced, where the court had relieved in these cases, and, amongst others, Sir William Beversham's Case,¹ who had a decree for a rent of 1s. 3d. *per annum*, the court [TREVOR] declared they would decree the rent, if it had been constantly paid.

But the defendant desiring the matter might be tried at law, an issue was directed to try whether any and what rent was issuing out of all or any of the lands in the bill mentioned.

[Reg. Lib. 1685 A, f. 295.]

[Other reports of this case: 1 Eq. Cas. Abr. 32, 75, 364, 21 E.R. 852, 887, 1105.]

318

Usher v. Ayleward
(Ch. 1686)

The defense of laches will defeat a purchaser's claim in a suit in equity.

1 Vernon 360, 23 E.R. 522

February 1685[/86]. Usher and Prime *versus* Ayleward, Edmonds, *et al.*

In 1669, Bromwell and Webb took two building leases of tofts of ground in London, one from the trustees of St. Bartholomew's Hospital, which was taken in Kemson's name, and the other from the trustees of the parish of St. Michael, Cornhill, in Parsons's name, upon which Webb and Bromwell built several houses, and, therein, Bromwell disbursed considerably more than Webb. In 1675, by indenture between Kemson, Webb, and Bromwell, wherein reciting that Kemson's name was used in the lease from St. Bartholomew's Hospital in trust for Webb and Bromwell, their executors, etc. and that the tofts were the proper purchase of Webb and Bromwell and the houses thereon were built at their charges, Kemson, for 5s., assigns that lease to Webb and Bromwell, *habendum* to them, their executors, etc., and they covenant to save Kemson harmless from the rent therein reserved. The 23d June 1669, Parsons assigns his lease to them likewise.

Webb and Bromwell received the rents and profits during their joint lives. And, in June 1678, Bromwell died, and he made his wife executrix, who proved the will. One Hyban, upon a *testatum*

¹ *Tyler v. Beversham* (1673), Reports *tempore* Finch 80, 23 E.R. 42.

feri facias to the Sheriff of Middlesex, seized the houses in question, which, 19 February 1679, were sold by the Sheriff to Hyban, and Hyban and Bromwell's executrix, for £240 paid by the plaintiff Usher, assigned all their interest in law or equity to the plaintiff Prime in trust for Usher.

Ten days after Bromwell's death, Webb assigned St. Bartholomew's lease to Francis Edmonds for a £800 debt, which Webb owed him. Afterwards, Edmonds died, and the defendant Edmonds took administration to him. Webb became a bankrupt in July 1679, and the commissioners, the 3d of December 1679, reciting Kemson's lease and Bromwell's death and that the right survived to Webb, assigned that lease to the defendant Edmonds for his share of his intestate's debt of £800 owing by Webb. And Edmonds enjoyed until Midsummer 1684.

The defendant Ayleward swore by his answer that he went with one Waile, who deposed so also, to Bromwell's executrix to know if she or any other claimed title to the premises and whether there was any deed to prevent survivorship, who said she claimed nothing therein and that he might safely proceed in the purchase. And, thereupon, 24 June 1684, Edmonds, for £410 really paid by the defendant Ayleward, assigned Kemson's lease to Ayleward. And Ayleward denied that he knew or heard of the plaintiff's title before his purchase. And Ayleward, by his answer, confessed the having of Kemson's assignment and the declaration of trust put therein and confessed that the lease to Parsons was not assigned to him by the commissioners nor by Edmonds by any express words yet conceived it did pass, for that the buildings were intermixed upon both tofts of ground and that one could not be enjoyed without the other.

The plaintiff and defendant, both of them, proved their money paid.

And the question in this case was whether the plaintiff should be relieved against the title by survivorship.

For the plaintiff, it was insisted that survivorship was against equity and that, by the justice of this court, if two joint purchasers pay, share and share alike, for a purchase and one dies, his representative shall be relieved against the survivor for a moiety of the purchase and that, in the present case, there would be no doubt but that, if Bromwell's executor had sued Webb for a moiety, she must have been relieved against him and so must the plaintiff also as her assignee and that, if there was an equity fixed upon the deeds by the assignment and declaration of Kemson between the joint tenants to prevent survivorship, as most certainly there was, the defendant's pretence of ignorance of the plaintiff's title would not justify his purchase against it, for that he, purchasing under Kemson's assignment, must be subject to that equity which did thereby arise against survivorship and that he did apprehend there was such a title lying out appears by his discourse with Bromwell's executrix and, therefore, he should not have proceeded therein upon her saying she claimed no right or that he might safely proceed, for that such discourse was after her assignment to the plaintiff and so would not turn to his prejudice.

Yet, nevertheless, the defendant being a purchaser, though under these circumstances, the Master of the Rolls [TREVOR] dismissed the bill without costs and the rather for that the plaintiff did not bring the bill until after the defendant's purchase, though the plaintiff's purchase was made two years before.

[Reg. Lib. 1685 B, f. 200.]

Huckstep v. Mathews
(Ch. 1686)

The defense of laches will defeat a legatee's claim in a suit in equity.

1 Vernon 362, 23 E.R. 523

February 1685[/86]. John Huckstep *versus* Dorothy Mathews and John Court.

John Huckstep, whose father and the plaintiff were brothers, in December 1685, made John Mathews and Benjamin Court executors of his will, and he gave them thereby the revenues of his lands until his debts and legacies were paid. And, after payment thereof, he gave the lands to them and their heirs upon condition that, if any of the name of Huckstep would purchase them for his own use, then his will was that Mathews and Court should sell the same to him for £200 less than the reasonable value thereof.

The executors proved the will and enjoyed jointly for ten years, and then Court died, and Mathews received the whole rents, which, with the personal estate, were more than enough to pay the debts and legacies. And the plaintiff, being of the name of Huckstep, brought his bill and prayed a conveyance of the lands for £200 less than they were worth to be sold.

The defendants demurred, for that the will was made above twenty-five years ago and it was uncertain to whom the sale ought to be made, and Mathews and Court, who, if the same were to be sold, were to sell the same, are both dead, which demurrer being heard before the Lord Keeper NORTH, he ordered the defendants should answer the bill and saved the benefit of the demurrer to the hearing.

And now, the cause came on before the Lord Chancellor [JEFFREYS]. And the defendants, by answer, insisted that, Court being dead, Mathews, after his death, had levied a fine of the premises and made a settlement thereof, under which the defendants now claimed and that there were above five years passed since that fine was levied before the plaintiff brought his bill, though the plaintiff lived always within a mile of the place where the testator died.

And the Lord Chancellor [JEFFREYS] conceived that, the plaintiff's bill being brought twenty-five years after the testator's death, what was prayed thereby was unreasonable. And, therefore, he dismissed the bill.

Suppose two persons named Huckstep had at the same time claimed the benefit of this devise. Which should have it?

[Reg. Lib. 1685 B, f. 601.]

[Other reports of this case: 1 Eq. Cas. Abr. 213, 21 E.R. 998.]

Butcher v. Stapely
(Ch. 1686)

A change of possession will give a third party notice of a contract to sell land so as to prevent the third party from being a purchaser in good faith.

1 Vernon 363, 23 E.R. 524

10 February [1686]. Lord Chancellor.

The defendant [Richard] Butcher being seised of the lands in question, which he had mortgaged to one Colstock for £400, agreed with the plaintiff to sell the same to him for £700. A short note was drawn up of the agreement (but not signed by either party) as follows.

December 9th, 1682, Richard Butcher, for £740, does bargain and sell unto Thomas Butcher all those lands etc. the plaintiff to have them from Lady Day next, and then the moneys to be paid, the plaintiff to have the hog pound and dung and the defendant to pay all taxes etc. and is not to cut any trees nor to put any cattle on the premises and is to have the corn in the barn etc. and to avoid it so soon as he can. The lands are in mortgage to Colstock for £400, and the plaintiff is to pay for the writings.

Soon after this agreement, the plaintiff [Thomas Butcher] puts in his cattle and makes encroachment on the defendant Butcher's other lands. Thereupon, the defendant, to prevent differences, desires the plaintiff to repeal the bargain, which he refusing, the defendant told him he should not have the bargain and advised him not to procure any moneys to pay for it and drove the plaintiff's cattle off the ground and soon after sold the lands to the defendant Stapely for £740. And the 3d February 1682, he sealed articles for that purpose and a bond of £1000 to perform the same. The 26th March 1683, the plaintiff tendered his purchase money and writings to seal, which the defendant refused. And, the 28th of the same month, Stapely paid Butcher £240 and took a conveyance of the estate free from encumbrances, except a mortgage. And, in June after, he paid off the mortgage and took an assignment of it to a friend of his own.

The bill was to have the bargain and agreement between the plaintiff and defendant Butcher decreed. And it charged Stapely with notice of that agreement before his purchase, which Stapely and Butcher denied by answer, nor was there any direct proof of notice, save that some neighbors in discourse did say they had heard the defendant Butcher had sold the estate to the plaintiff.

For the defendant Stapely, it was insisted that there was no sufficient proof of notice of the plaintiff's agreement and that, if there was notice, yet the agreement was not perfect nor binding by the Act against Frauds and Perjuries,¹ it not being signed.

The Lord Chancellor [JEFFREYS] declared that, inasmuch as possession was delivered according to the agreement, he took the bargain to be executed and that Stapely had notice of it and that it was a contrivance between the defendants to avoid the bargain. And, therefore, he decreed the defendant Stapely's bargain to be set aside and that Stapely should execute a conveyance to the plaintiff upon payment of £700 and interest and the defendant Stapely to procure a conveyance from his trustee, the assignee of the mortgage.

¹ Stat. 29 Car. II, c. 3 (SR, V, 839-842).

Lincoln's Inn MS. Coxe 40, p. 282

There was a parol agreement for the sale of lands. And the purchaser, thinking the agreement good, put his cattle upon the land, and entered. And, afterwards, the defendant contracted with another person for the sale of the same estate for more money, and, on that agreement, articles under hand and seal were entered into. And the plaintiff, being the first purchaser, brought his bill to have the agreement performed.

And [it was] so decreed, as an agreement executed in part and that the second purchaser should deliver up the writings.

And, in this case, the Statute of Frauds and Perjuries was pleaded, and disallowed.

[Reg. Lib. 1685 A, f. 418.]

[Other reports of this case: 1 Eq. Cas. Abr. 21, 21 E.R. 843.]

321

Allen v. Arme
(Ch. 1686)

In this case, a gift was upheld, there being no evidence of surprise, fraud, or trust.

1 Vernon 365, 23 E.R. 525

February 1685[/86].

The plaintiff Allen, being a servant to the defendant's grandmother, married one of her daughters, who brought him a portion of £600, with part of which he purchased the copyhold lands in question, which were surrendered to the use of the plaintiff and his wife and the heirs of their two bodies, the remainder to himself in fee. The wife, soon after, died without issue. And the plaintiff, with respect to her memory and in kindness to the defendant, her nephew, did voluntarily surrender the lands to the use of himself for life, with remainder to the defendant in fee, and the defendant was admitted to the remainder in fee and paid a £5 fine. The plaintiff, afterwards, married again. And his bill was to be relieved against this surrender, as obtained by surprise and without consideration.

The cause was at issue, but no surprise was proved. The bill abated by the death of the plaintiff and defendant both. And the plaintiff's wife, in behalf of herself and her son by him, brought her bill in the nature of a bill of revivor, suggesting a settlement on her marriage of the copyhold lands upon her and her issue, against the defendant's widow, who claimed by surrender from her husband.

And upon the hearing, no surprise being proved, it was insisted for the plaintiff that the surrender was made, as indeed it was, by the plaintiff's husband in the time of his sickness and, therefore, it must be intended by him not to bind in case he recovered of that sickness, it being merely voluntary, and that his intentions appeared so by his having after his recovery settled the same before his marriage on the plaintiff, his second wife and their issue, who were to be taken to be purchasers, and ought, therefore, to be relieved against that voluntary surrender.

But the Lord Chancellor [JEFFREYS] declared he saw no equity in the case nor could he infer any intention by any circumstances in it contrary to the surrender. And, therefore, he dismissed the bill, there not appearing any fraud or trust in the case.

Gascoigne v. Thwing
(Ch. 1686)

In this case, there was not sufficient evidence to prove the plaintiff's allegations, and the suit was dismissed.

1 Vernon 366, 23 E.R. 526

19 February [1686].

The bill was that Sir Thomas Gascoigne, in October 1678, purchased a great manor house and above four acres of land in the County of York and took the conveyance in the name of one Vavasor, who had assigned to the defendant Thwing. And it was suggested that the estate was bought with the plaintiff's money and was upon trust that one Elizabeth Thwing, deceased, should enjoy it for her life and then in trust for the plaintiff and his heirs, who, by the bill, prayed the estate might be conveyed to him.

The defendant, by answer, denied he knew it was bought with the plaintiff's money, but he believed it was bought with the proper money of the said Elizabeth Thwing and that the conveyance was in trust for her and her heirs. And he claimed it as heir to her, and he insisted on the Statute of Frauds and Perjuries,¹ there being no declaration in writing of any trust for the plaintiff.

The chief point was whether, when a man purchases land with his own money and takes the conveyance in another man's name, this is such a resulting trust by implication of law as is saved by the Statute and it needs no declaration of trust.

And after long debate whether the plaintiff should be admitted to read to prove the money was his, the proofs were read. And they amounting only to what had passed in discourses and been owned by the defendant and the proofs being doubtful, the Master of the Rolls [TREVOR] dismissed the plaintiff's bill,² because the proofs were not sufficient whereon to ground a decree. And he said, there was some secret in the cause, which he did not fully apprehend and was not made clear upon the proofs.

Now, the truth of the fact was that this great house was bought with a design to make a nunnery of it and the said Elizabeth Thwing was to be the Lady Abbess, and, that project failing, the defendant set up for himself.

[Other reports of this case: 1 Eq. Cas. Abr. 232, 21 E.R. 1012.]

¹ Stat. 29 Car. II, c. 3 (SR, V, 839-842).

² but without costs, Reg. Lib. 1685 A, f. 263. Raithby's note.

324

Anonymous v. Chapman
(Ch. 1686)

The question in this case was whether an annuity payable out of a leasehold for the lessee's life should continue after the lessee's death to be payable out of the profits that the deceased lessee had received out of the land during his life.

Lincoln's Inn MS. Misc. 498, p. 20

Hilary 1 & 2 Jac. II.

A., seised in fee of an estate of small value and possessed of a term for years determinable upon the death of J.S., devises the lands which he has in fee and the term to J.S. provided that he shall pay £40 *per annum* to J.D. during the life of the said J.D. The £40 is duly paid by J.S. during his life. Then he dies, whereby the term for years is determined. The question was whether the £40 *per annum* devised to J.D. should cease thereby or whether the executors of J.S. should not be accountable to J.D. for so much as their testator had received out of the term above £40 *per annum* to answer that to J.D. yearly as long as he should live and the profits would extend.

[Other copies of this report: Lincoln's Inn MS. Misc. 503, p. 87, Lincoln's Inn MS. Misc. 504, p. 84, pl. 1.]

325

Bright v. Woodward
(Ch. 1686)

After a suit has been brought against an executor, he ought not to make any payments out of the decedent's estate without an order of a court.

Lincoln's Inn MS. Misc. 498, p. 21, pl. 1

It was held by My Lord Chancellor [JEFFREYS] in this cause that a bill in this court is equal to an action at law and that, therefore, a voluntary payment of a bond without a suit after a bill here should not be allowed to Woodward, who was an executor.

Mr. Bowes reported this case to me.

[Other copies of this report: Lincoln's Inn MS. Misc. 503, p. 88, pl. 1, Lincoln's Inn MS. Misc. 504, p. 84, pl. 2.]

1 Vernon 369, 23 E.R. 528

Eodem die [27 February 1686].

On exceptions to a Master's report, Lord Chancellor [JEFFREYS] was of opinion that, after a suit commenced here, an executor shall not be allowed any payments made voluntarily without a suit.

A commissioner may be a witness, but, then, he ought to be examined before any other witness be examined.

[Other reports of this case: 1 Eq. Cas. Abr. 240, 21 E.R. 1018.]

Lord Ward v. Lord Meath
(Ch. 1686)

A bill in equity concerning a married woman's estate can be taken pro confesso against the husband for his profits of the land, but, where the husband does not appear, there can be no decree for the inheritance of the wife.

2 Chancery Cases 173, 22 E.R. 899

1 March 1685[/86].

A bill was exhibited in Chancery against the husband and wife for lands in Ireland. The husband appeared for himself, but departed without making answer, upon which process continued against him to a serjeant at arms. And now, the first of March 1685[/86], the plaintiff pressed for a decree against the husband and wife *pro confesso*. In the interim pending the process against the husband, the wife got an order to appear and answer and did answer, setting forth a title to herself of the inheritance, and therefore no decree could be against her.

The Court decreed the bill *pro confesso* against the husband only, that he account for all the profits of the land received since the coverture and the profits which shall be received during the coverture, etc.

Hutchins, for the defendant: What if it appear upon hearing of the wife that she has a title?

Keck: We cannot proceed against the wife, for her answer is no answer, being made without the husband's answer.

Note, by the proceedings in this cause, no decree can ever be had against a married woman for her inheritance if the husband will not appear.

Mr. Solicitor [General *Finch*], who was a counsel for the defendant, upon reading of this report to him, told me that the defendant never did appear, but, a commission being taken out for the husband and wife to appear, it was taken by the court as if he had appeared, though it was never executed for him.

Responsio quaere, for an essoin or an original writ cast or taken out in the name of a party is no error etc.

[Other reports of this case: 1 Eq. Cas. Abr. 65, 21 E.R. 878.]

Dancer v. Evett
(Ch. 1686)

Where a copyholder purchases the fee and conveys it to a third person, the copyhold is destroyed.

1 Vernon 392, 23 E.R. 538

March 1685[/86].

The case upon a bill of review was this. A copyholder in fee agreed with the lord to enfranchise his copyhold, and he took the conveyance from the lord in the name of a trustee, and, then, he devised the same lands to a younger son, from whom the now defendant purchased them. The now plaintiff, who was heir at law of the copyholder, recovered the lands in [an action of] ejectment, as he might do upon his ancestor's admittance. And, thereupon, the now defendant brought his bill against the heir to be relieved in equity.

And he insisted that the estate purchased of the lord was purely an estate in equity according

to the Case of Smith and Murrin, reported amongst the Lord Coke's copyhold cases,¹ and that the disposition of the fee to the purchaser was a disposition of the whole estate that the copyholder had either in law or equity. And the Lord Chancellor Nottingham, who heard the cause, was of that opinion and decreed that the purchaser should hold and enjoy against the heir of the copyholder, who now brought his bill of review to reverse the decree. And he insisted that his ancestor did not alien the copyhold.

The defendant, who was plaintiff in the original cause, pleaded the decree, and he insisted by way of demurrer there was no error in it.

And the Lord Chancellor [JEFFREYS] was of that opinion and allowed the demurrer.

[Other reports of this case: 1 Eq. Cas. Abr. 119, 21 E.R. 926.]

328

Parker v. Turner
(Ch. 1686-1687)

Where a copyholder in tail purchases the fee and conveys it to a third party, the entail in the copyhold is destroyed.

Lincoln's Inn MS. Misc. 498, p. 26, pl. 1

The case was this. A copyholder in tail accepts a feoffment in fee of the same land from the lord of the manor, and, then, he levies a fine of the land and mortgages it to J.S. The issue in tail gets the deeds declaring the use of the fine and also the possession of the land by marrying with one who was a tenant in possession.

And the mortgagee exhibited his bill here to have the deeds and the possession of the land, which was decreed accordingly, My Lord Chancellor [JEFFREYS] being clear of the opinion that, by the feoffment, the estate tail in the copyhold was destroyed, but this was not to prejudice the issue's title at law if he had any.

1 Vernon 393, 23 E.R. 538

March 1685[/86].

A person, being tenant in tail male of a copyhold estate, remainder to himself in fee, purchased the freehold of the copyhold from the lord. And then, for a full value, he bargains and sells the whole estate, which was quietly enjoyed under the purchase thirty years. The tenant to the purchaser, being a woman and the copyholder being dead, married his son, who, being thus got into possession, set up his title as issue in tail. The plaintiff, who claimed under the purchaser, brought an [action of] ejectment, and a special verdict was found at law.

But, before that was argued, he brought his bill here for a decree to hold against the issue in tail. And the defendant pleaded his title.

The Lord Chancellor [JEFFREYS] declared he was of opinion that the purchaser of the freehold should attract the other estate, which was but at will. However, he took time to consider of it. And, afterwards, he did decree it so accordingly and that the purchaser should enjoy against the issue in tail.

¹ *Murrel v. Smith* (1591), 4 Coke Rep. 24, 76 E.R. 928, also 138 Selden Soc. 412, Croke Eliz. 252, 78 E.R. 507.

2 Chancery Cases 174, 22 E.R. 899

5 March 1685[/86]. *Barker v. Turner*.

A copyholder, to him, and the heirs male of his body, purchased the fee simple to him and his heirs. And, afterwards, for a valuable consideration, *viz.* £300, he sold the land and conveyed it to the defendant, who was in possession divers years. The copyholder died, leaving issue a son. A special verdict was found at common law, the question being whether the son has right or no.

Now, the Lord Chancellor [JEFFREYS] was of opinion for the purchaser and that the conveyance was good against the heir, for the copyhold being severed from the manor, there is no means to bar it but by conveyance at common law; the entail is not within the Statute of Westminster II.¹ But the Lord Chancellor [JEFFREYS] took time to advise.

1 Vernon 458, 23 E.R. 584

7 May [1687].

The question was whether, a tenant in tail of a copyhold having taken a conveyance in his own name of the freehold in fee, the copyhold estate was thereby merged.

The Lord Chancellor [JEFFREYS] seemed to make little doubt but that the copyhold was merged, though it was said this point was depending upon a special verdict at law.

[Raithby's note: In this case, it appears that the grandfather of one of the defendants, being tenant in tail general with divers remainders over of the copyhold premises in question, 9 February 12 Car. I (1634), took a feoffment in fee thereof, and, afterwards, he and his wife levied a fine of the premises in question to the father of the defendant Turner and another, who, by deed dated 10th June 12 Car. I (1634), declared the use thereof to be to such uses as the grandfather should by will appoint and, in default of such appointment to his right heirs, the grandfather and the trustees named in the above deed, afterwards, by deed dated 18th June 23 Car. I (1647), convey the said premises in mortgage, and, the money not being paid, the mortgagee made her will, bearing date 25th April 1662, and devised the premises for twenty-one years. The plaintiff Parker continued in receipt of the rent until 1678, when the defendant Walker, having married one who was tenant at will to the plaintiffs of the premises in question under rent and being in possession, claimed as heir of the body of the grandfather, and the defendant Turner claimed to redeem, having purchased the equity of redemption under the will of the grandfather. And it was objected the copyhold was mortgaged by the feoffment and that, a fine having been levied, the supposed entail was barred and extinguished. And the decree was that, inasmuch as the defendant Turner had no bill to redeem and the title being in the plaintiffs under and by virtue of the fine and assurance aforesaid, the said defendants should deliver up possession of the lands in question to the plaintiffs to be by them enjoyed according to their several estates and interests therein and the defendants to account for the profits of the premises by them respectively received from the time of their entry thereupon. Reg. Lib. 1686 B, f. 521. Note the lands in question were copyhold of a manor wherein, by a custom, entails might be cut off by a common recovery.]

[Other reports of this case: 1 Eq. Cas. Abr. 119, 21 E.R. 926, 2 Eq. Cas. Abr. 228, 22 E.R. 194.]

¹ Stat. 13 Edw. I, Westminster II, c. 1 (SR, I, 71).

330

Oglander v. Baston
(Ch. 1686)

An arbitral award merges into itself all claims that were arbitrated.

A husband may sue alone for a bond debt due to his wife without joining his wife in the action.

1 Vernon 396, 23 E.R. 540

27 April [1686]. In Court.

The plaintiff being entitled to the surplus of the personal estate of I.S. as residuary legatee and a difference arising between the plaintiff's husband and the executor touching the quantum of this residuum, it was referred to arbitration. And an award is made that the executor of I.S. should pay £1500 to the plaintiff's husband. But before anything further was done, the husband dies.

And this bill was now brought by the wife against the executor of her husband and also against the executor of I.S., and the sole question was who had the right to this £1500, whether the executor of the husband or whether it should survive to the wife.

Lord Chancellor [JEFFREYS]: The award is a sort of judgment, and the arbitrator having awarded that the £1500 should be paid to the husband, that has changed the property and vested it in the husband.

The case of Norden and Levit¹ was cited, where the husband had a term in the right of his wife and only took a covenant for further assurance, and it was adjudged that altered the property.

On the other side, it was said that, if the husband grants a rent charge out of a lease which he has in the right of his wife, that does not change the property. But, if the husband makes a demise of the term itself, though but for a fortnight, that will alter the property.

Per curiam [JEFFREYS]: If there be a bond debt due to the wife, the husband may sue alone without joining his wife. But, in case the wife was joined in the action and judgment is recovered, the judgment will survive to the wife. But, not being joined, the interest does vest by the judgment in the husband, and it will go to his executor.

[Other reports of this case: 1 Eq. Cas. Abr. 69, 21 E.R. 882.]

331

Jauncy v. Sealey
(Ch. 1686)

Where a person dies in a foreign country, having made a will there and devising property located there, the law of that country governs the probate of the will.

1 Vernon 397, 23 E.R. 541

29 April [1686]. In Court, Lord Chancellor.

The plaintiff, as administrator to J.S., who died at Naples, brought his bill to have a discovery of the intestate's personal estate.

¹ *Norden v. Levit* (1677), T. Jones 88, 84 E.R. 1160, 2 Levinz 189, 83 E.R. 512, 1 Freeman 442, 89 E.R. 331, 3 Keble 597, 615, 691, 706, 742, 778, 84 E.R. 900, 911, 964, 985, 1006, 79 Selden Soc. 617.

The defendant pleaded that the supposed intestate had made a nuncupative will in the presence of nine or more credible witnesses, and he, thereby, made the defendant executor, and that he, the defendant, had proved the will according to the custom of the country where the testator died. And he denied he had left any estate but what was at Naples.

The court [JEFFREYS] allowed the plea and said, the testator having left no estate in England, it was not necessary that the will should be proved here, no more than if a man died and left an estate in Scotland.

[Reg. Lib. 1695 A, f. 564.]

Fowke v. Hunt
(Ch. 1686)

Grandchildren are not entitled to the orphanage share of a deceased London freeman's estate.

1 Vernon 397, 23 E.R. 541

A citizen of London dies leaving a widow and no children, but he has several grandchildren living at the time of his death.

And the question was whether they were within the custom of the City of London or not.

The Lord Chancellor [JEFFREYS] took time to consider of the case. And, having consulted the Recorder and several of the Aldermen, this day, he delivered his opinion that the grandchildren were not within the custom of the City of London.

2 Shower K.B. 467, 89 E.R. 1045

In Chancery, it was held and declared by LORD JEFFREYS that, if a freeman of London die, leaving a wife and grandchildren, the grandchildren, in such case, shall not have the benefit of the custom of an orphanage part, but the wife shall have a moiety, as if [there were] no child at all. And this [was] upon the report of the Recorder [of London].

[Other reports of this case: 1 Eq. Cas. Abr. 154, 21 E.R. 953.]

Clobery v. Symonds
(Ch. 1686)

Lands in execution by a writ of extent can be redeemed at any time regardless of a great length of time since the debt.

2 Chancery Reports 392, 21 E.R. 696

Lands were extended in 1 Car. I [1625 x 1626] and held in extent, and a bill was exhibited to redeem, and, being not redeemed, the bill was dismissed in 16 Car. I [1640 x 1641]. And afterwards, he who had the extent by virtue of the said dismissal sold the said premises to the defendant. But the plaintiff, having since bought the equity of redemption, seeks a redemption.

This court, notwithstanding the dismissal and length of time, ordered an account from the time of the purchase, but no account from any time before, but the profits to go against the interest to that time.

1 Vernon 397, 23 E.R. 542

Eodem die [29 April 1686]. Lord Chancellor.

The plaintiff's bill was to redeem lands, which, in the first year of King Charles I, were extended upon a judgment for £400, the plaintiff deriving his title under one who purchased these lands from the conuser of this judgment without notice.

The defendant claimed part of the lands by assignment under the conusee of the judgment and pleaded that, so long ago as in the year [*blank*], J.S., under whom the plaintiff claims, brought his bill in this court to redeem, that the cause was heard, and an account directed to be taken by one of the Masters of this court, and it was ordered that the plaintiff should within six months after the report made pay the money reported due or, in default thereof, the bill was to stand absolutely dismissed, that the Master made his report accordingly, and that J.S. did not pay the money reported due within the time limited by the decretal order, and, thereupon, the bill was dismissed, and that J.S. lived above twenty years afterwards and never sought any redemption. And he averred that the profits of the lands were not sufficient to pay the interest of the money reported due and that, since this dismissal, he had purchased part of the land for a valuable consideration. And he demanded the judgment of the court whether, after this length of time and proceedings aforesaid, the plaintiff should be admitted to a redemption.

The court [JEFFREYS] overruled the plea, because, under the [writ of] extent, the defendant has at law an interest only *quousque* he is satisfied. And the dismissal here will not give him a greater estate. And it would be absurd to deny a redemption, for the interest under the [writ of] extent was but a chattel interest and the consequence of denying a redemption would be that lands of inheritance should not descend but, to the world's end, go in a course of administration.

[Reg. Lib. 1685 A, ff. 899, 1069.]

334

Smithier v. Lewis
(Ch. 1686)

A creditor can file a bill of discovery to discover fraudulent conveyances made by the debtor.

1 Vernon 398, 23 E.R. 542

Eodem die [29 April 1686]. In Court, Lord Chancellor.

The plaintiff, having obtained a judgment against the defendant on a bond of £1400 penalty for the payment of £700 and interest, brought his bill. And, setting forth this judgment, he complained that the defendant, to defraud him of the benefit of it, had assigned his estate to trustees, that he had lent £1200 to Rowe and Green, who were since become bankrupts, in the name of one Elton, but that it was in trust for the defendant Lewis. And, therefore, he prayed a discovery of this matter and that the plaintiff might come in under the Statute of Bankruptcy¹ for this £1200 debt and that the commissioners might not make any distribution until this matter was determined.

The defendant demurred, for that he, in his lifetime, was not bound to discover his personal estate and for that this bill was in the nature of a foreign attachment, which the practice of this court did not admit or countenance.

Per curiam [JEFFREYS]: I overrule the demurrer.

[Raithby's note: On the 23d April, an order was made that, unless an answer [be filed] in a week,

¹ Stat. 1 Jac. I, c. 15 (SR, IV, 1031-1034).

the defendant having been brought to the bar of the court three times by [a writ of] *habeas corpus* to show cause why he should not answer, he should be turned over to the common side of the Fleet Prison, the defendant then put in a frivolous plea and demurrer, which was overruled. Reg. Lib. 1685 B, f. 449. And now, an order was made that, unless an answer [be filed] in four days, the bill should be taken *pro confesso*. Reg. Lib. 1685 B, f. 435.]

[Other reports of this case: 1 Eq. Cas. Abr. 77, 21 E.R. 890.]

Angell v. Draper

(Ch. 1686)

A judgment debtor's goods are not subject to the judgment nor to any account nor discovery before a writ of execution has been issued.

1 Vernon 399, 23 E.R. 543

Eodem die [29 April 1686]. In Court, Lord Chancellor.

The bill was that the plaintiff had obtained a judgment against J.S. for £100 and that the defendant, upon pretence of a debt due to himself and to prevent the plaintiff's having the benefit of his judgment, had got goods of J.S. of great value into his hands, sufficient to satisfy his debt with a great overplus. And he prayed an account and discovery of these goods.

The defendant demurred, because the plaintiff had not alleged that he had sued out execution and had actually taken out a [writ of] *feri facias*, for, until he had so done, the goods were not bound by the judgment nor the plaintiff entitled to a discovery or account thereof.

Per curiam [JEFFREYS]: I allow the demurrer. The plaintiff ought actually to have sued out execution before he had brought his bill.

[Reg. Lib. 1685 A, f. 479.]

[Other reports of this case: 1 Eq. Cas. Abr. 77, 21 E.R. 890.]

Burch v. Maypowder

(Ch. 1686)

A writ issued in the lifetime of a king who then died before its execution was well executed and is binding.

1 Vernon 400, 23 E.R. 543

30 April [1686]. In Court, Lord Chancellor.

The question upon the Master's special report was whether an attachment that was sued out in the time of the late king and was executed at Exeter three days after the king's demise [6 February 1685] but before any notice of the king's demise was well executed or not.

The objection taken to it was that, though the execution of the attachment before notice of the king's demise was good and would excuse the officer that did it, yet the return of the *cepi corpus*, which was made after notice of the king's demise, was nought and the plaintiff having upon the *cepi corpus* returned gotten a messenger and proceeded for the contempt, that was irregular.

But the court [JEFFREYS], on reading the case of Crew and Vernon, in Cro. Car. 97, and a

precedent in the Lord Keeper North's time, between Vaughan and Bampfield,¹ was of opinion that the attachment was well executed and also well returned and that the proceeding upon it since was good.

2 Shower K.B. 467, 89 E.R. 1045

On a special report coming to be heard before My Lord Chancellor [JEFFREYS], it was held by him that a [writ of] attachment issuing in the late king's time for not answering and executed in this king's time was regular, being as a civil process for not answering.

Tamen quaere, for I, being of counsel for the defendant, was doubtful thereof, it being a process of contempt.

[Reg. Lib. 1685 A, f. 536.]

[Other reports of this case: 1 Eq. Cas. Abr. 352, 21 E.R. 1096.]

337

Englefield v. Englefield
(Ch. 1686-1691)

A conveyance can be set aside on the ground of fraud committed against the grantor.

1 Vernon 443, 23 E.R. 575

1 May [1686]. In Court, Lord Chancellor.

Sir Thomas Englefeild, the plaintiff's father, was seised of an estate for his life in the reversion of two estates, the one in Leicestershire and the other in Wiltshire, each of about the value of £1800 *per annum*, expectant upon the death of two jointresses, remainder to his first and other sons in tail, remainder in like manner to his next brother, the now defendant. And, though he was thus entitled to the reversion of these great estates expectant on the death of the jointresses, Sir Robert Howard's lady having all the Wiltshire estate in jointure and Dame [*blank*] Englefeild all the Leicestershire estate in jointure to her, yet he had little or nothing *in praesenti* and had been some time in prison for debt. And having formerly been married, but never had any issue, and being sixty years old and not intending to marry again, the Wiltshire estate was sold to Sir Robert Howard. And, out of the purchase money, £2500 was paid to the defendant for his interest therein. And the now defendant agreed with Sir Thomas Englefeild, his elder brother, to pay him down in hand £600 and to pay him £500 *per annum* during his life to commence from the death of the Lady Englefeild, the jointress, whose estate the defendant also bought in, for, without her, the plaintiff's father having barely an estate for life expectant on her death, he could not make a good tenant to the *praecipe*, and, after several treaties had, at last, a final agreement is made (wherein Sir Jeffery Palmer was consulted) between the two brothers upon the terms aforesaid, and Lady Englefeild's estate being bought in, a common recovery was suffered and fines levied. And the defendant was in actual possession of the estate. After this, Sir Thomas marries a young wife, and, by her, in his old age, has issue, the now plaintiff. And he then brought a bill in the Lord Keeper Bridgeman's time to be relieved against this agreement and the conveyance made pursuant thereunto, thereby suggesting that he was defrauded and circumvented, which bill was to the same effect with the plaintiff's now bill. And, upon a solemn hearing, that bill was dismissed.

¹ *Crew v. Vernon* (1627), Croke Car. 97, 79 E.R. 686; note *Bampfield v. Vaughan* (1673), Reports *tempore* Finch 104, 23 E.R. 56, 73 Selden Soc. 183.

And, for the defendant, it was now strongly insisted that, although the plaintiff comes in as remainderman, so that, in strictness, a dismissal of the plaintiff's father's bill is not pleadable in bar to the now plaintiff's bill, yet, certainly, if there were not ground to relieve the father, the now plaintiff cannot be relieved upon any pretence of fraud, which was personal. And, if any fraud was done to anyone, it was to the father, and not to the plaintiff, who was not then in being. Nor was his estate of any consideration in the law, but it was purely contingent and well and sufficiently destroyed by the common recovery before the plaintiff was born. The contract and agreement was made by the consent of all the friends and relations and with great deliberation, Sir Jeffery Palmer having been all along consulted in it, and it was done by his advice and was reasonable and natural, Sir Thomas being then sixty years of age, never having had any child, though formerly married, and then a widower, and wanted a present subsistence. The badges of fraud assigned by the plaintiff received, as they thought, a clear answer, and they were in issue in the former cause. And now, after twenty years enjoyment under this agreement and purchase, it was insisted there was little ground for the plaintiff to destroy it upon pretence of fraud, when the fraud, if any, was in relation to the plaintiff's father only, whose bill was dismissed. And the plaintiff's contingent estate was well and sufficiently destroyed by a legal conveyance, and his father might, if he had pleased, have given this estate to his brother, and the plaintiff could never have avoided it.

The court [JEFFREYS] was of opinion, upon the reading of the articles, that this conveyance was obtained by fraud. And, as to the objection that the plaintiff's estate was contingent and absolutely destroyed by a legal conveyance, that would not be material, for, if the conveyance was obtained by fraud, it was the same in equity as if no conveyance had ever been made. And, therefore, the court declared they would decree it for the plaintiff unless better cause was shown.

Lincoln's Inn MS. Misc. 557, f. 149

5 March 1686/87. Sir Charles Englefield, plaintiff v. Anthony Englefield, defendant.

The case was thus. Sir Thomas Englefield, the father of the plaintiff, was tenant in tail of Wootton Bassett estate and other lands in the County of Wiltshire *circa* £2000 *per annum* and also tenant for life with remainders to the first and other sons of his body of a Leicestershire estate at Shouldby Ashby etc. *circa* £1800 *per annum*, but there was not any estate in trustees to support this contingent remainder to the first and other sons. Also, Honora, the wife of Sir Robert Howard, who was the relict of the older brother of Sir Thomas, was a jointress for her life of the Wiltshire estate and Winifred, the relict of the older son of the said Sir Thomas's older brother, was a jointress for life of the Leicestershire estate. The said brother and nephew died without issue. Both of those estates came to Sir Thomas, as above, charged with those two jointures for life, and the jointresses were in possession. Sir Thomas being an aged person and not of great understanding and being also in necessity and, without the consent of the jointresses, disabled to dispose of the premises, not being at this time married, he was prevailed upon by his necessity and practice between one Smith, not of a good reputation, and the defendant Anthony, the brother of Sir Thomas, to whom, after the death of Sir Thomas without issue, both the estates will come, i.e. the Wiltshire estate in tail and the Leicestershire estate for life with contingent remainders to his first and other sons, as to Sir Thomas, to part with the Wiltshire estate to Sir Robert Howard, who gave more because it was at first agreed to be given by Smith and Anthony, though all that was given was not near the value. And that which was given consisted principally in an annuity for life to Sir Thomas. And Sir Robert Howard, when the treaty was with him, declared that he expected that Anthony, the defendant, would join. And, afterwards, Sir Thomas, with Anthony, joined in a fine and recovery to Sir Robert Howard and conveyed the Wiltshire estate to him in fee. And for this joining, Anthony, the defendant, had £2500 from Sir Robert Howard, part of the consideration for the purchase. After which, Sir Thomas was prevailed upon to grant his estate in the Leicestershire lands to Anthony, the defendant, his brother, by divers and several sorts of conveyances, one of which was a fine with proclamation, but no consideration for these conveyances was given to Sir Thomas, but the sole consideration expressed in the conveyances was that Anthony had joined with him in conveying the Wiltshire estate, not

taking any notice of the £2500 received for it.

Sir Thomas married, and his wife was pregnant with the now plaintiff. And the defendant treated with Winifred to surrender her estate for life for a small time to be void upon a subsequent condition so as to make a tenant to the *praecipe* for a common recovery and Winifred to have her estate for life again. (This is a common practice to make a tenant to the *praecipe*, and [it has been] held good.) And Winifred refusing to make such a surrender without a consideration and the wife of Sir Thomas being pregnant with the plaintiff and expecting to be delivered within three months that if he had been born before the destruction of the estate for life, upon which the said contingent remainder depended, the remainder had been vested in the now plaintiff and the conveyances to the defendant ineffectual, the defendant agreed to give to Winifred divers thousands of pounds for this courtesy. And, afterwards, the Leicestershire estate was settled in the defendant and his heirs, charged with the estate for life of Winifred and also charged with the money agreed to be given to Winifred for her surrender, as above. Anthony married and made a settlement upon it. The plaintiff was born.

And *circa* 1671, Sir Thomas exhibited a bill in Chancery to be relieved against these conveyances to Anthony. But, upon the hearing by Lord Keeper BRIDGEMAN, the bill was dismissed.

After that, Sir Thomas died, and the mother of the now plaintiff exhibited a bill in Chancery in the name of the now plaintiff *tunc et adhuc* an infant to be relieved, to which bill, the defendant pleaded the fine of Sir Thomas and his conveyances and the dismissal. But this plea was not allowed by FINCH, then Lord Chancellor, upon which a treaty was [made] between the plaintiff's mother and the defendant, who agreed to give to the mother £300 to cease prosecution three years, which was ceased, and the money was paid accordingly. The writings of this agreement were produced and read at this hearing.

And the now plaintiff, being married, exhibited his bill to be relieved against the defendant for the Leicestershire estate. And the now Lord Chancellor JEFFREYS decreed for the plaintiff *nisi causa* the Friday next, and he set aside the operation of all the fines and conveyances by Sir Thomas upon the reason that the defendant obtained them by fraud and without any consideration, because, though it was admitted that one brother can give his estate to another brother and disinherit his heir if he would and it is for natural love and affection, yet, here, the conveyances by Sir Thomas were not made for such reason or consideration but only in consideration that Anthony had joined with Sir Thomas in conveying the Wiltshire estate, which was not any consideration inasmuch as Sir Thomas, without Anthony, could have conveyed it, he being the first tenant in tail and Anthony tenant in tail after him. And, thus, his estate was neither valuable nor importing any consideration, but it was merely a deceit upon Sir Thomas. *Vide* Bedell's Case, 7 Rep. 40b,¹ where an express consideration *facit cessare tacitum*, where the father, for £100 paid by the son to him, covenanted to stand seised to the use of the son, this did not raise any use as it would if it had not been mentioned for consideration of £100.

And, in this case, the agreement by the defendant to give £300 and paying it accordingly for the cesser of the suit and other circumstances inclined the court to the relief. If fraud appears there, no fine bars, nor the dismissal of the father's bill upon hearing, it being agreed that the case upon the father's bill was not as strong as here, there being now all the matters of fact and circumstances made open.

And, afterwards, in April 1687, the decree was made for the plaintiff absolutely and for an account for the mesne rates to be computed both ways, *viz.*, first, at the time of the now plaintiff's bill, the other, at the death of the plaintiff's father, it being objected that no laches will be imputed to the infant for not suing before or for the miscarriage of his mother. And, upon the return of the Master's report, the court will determine which to stand.

And, afterwards, in the year 1692, there was an appeal in Parliament from this decree, and it seemed to be reversed, but an accord was made. And Mr. *Heneage Finch*, who was of counsel with

¹ *Bedell v. Bedell* (1607), 7 Coke Rep. 40, 77 E.R. 470, also Jenkins 289, 145 E.R. 209.

myself [*Edward Ward*] in Parliament for Sir Charles Englefield, purchased the estate, all parties joining in the sale.

[Other copies of this report: Georgetown Univ. Law Library MS. B88-8, p. 17.]

1 Vernon 446, 23 E.R. 576

6 April [1687]. In Court, Lord Chancellor.

This cause standing this day again in the paper, the defendant's counsel applied themselves principally to answer the objections made in relation to the pretended badges of fraud. And they observed that, whether Sir Thomas, the now plaintiff's father, was barely tenant for life without any remainder to his issue or whether there was a remainder to his first and other sons in tail depended only on the republication of a will, which was in the power of Sir Robert Howard to make it a will or no will. And the title was thought so doubtful that the point upon the republication was afterwards tried at the bar. But Sir Thomas was fully informed and apprized of his estate by the will, such as it was, and it is fully proved in the cause that the first agreement, which was 18th December, was for £600 and £200 *per annum* and it was then so far from being apprehended that the defendant had any extraordinary bargain of it, the plaintiff's father being then above sixty years of age and not like to have issue, that he reserved a latitude to go off. And then, Smith, finding the defendant so indifferent in this matter, comes in, first, for a third and, then, for a moiety. After all this, they come to a new agreement. The £200 is paid, and there are covenants for further assurance and new deeds executed, and, after all this, a release is given.

And, as to the objection that the consideration of the subsequent articles of the twenty-first of September was mentioned to be, amongst other things, that the defendant released his pretensions to the Wiltshire estate, it appeared that they were in time subsequent to the articles of the twenty-first of September.

As to that, it was answered that the articles of the twenty-first of September were antedated [and] that they might overreach Smith and cut him out of his moiety. But they were not in fact executed, as fully appeared in the cause, until after, that the defendant had released his pretensions to the Wiltshire estate, and that the dismissal of the plaintiff's father's bill, was there nothing else in the cause, answers all those matters. And it was observed that the plaintiff had very little ground to stand upon and a very slender, if any, foundation to raise an equity upon, for, as to an estate in law, he had none, no not so much as a right. There was never anything more than a contingency limited to him, and that was fully destroyed by a legal conveyance before he was born. And yet, in respect of that alone, it is that he would be now relieved upon a supposed fraud done in the obtaining a conveyance in prejudice of this imaginary estate of his, when his father that had a real estate could not be relieved.

And it was insisted that a dismissal upon hearing of the merits of a cause was as pleadable as a decree, and the plea in this case was disallowed barely upon the account that the plaintiff did not come in under his father's title, but as a remainderman. In the Case of Roscarrocke and Barton,¹ a tenant for life with a remainder to another in tail was foreclosed, and, after sixteen years time, the remainderman came to redeem, but was dismissed, for, otherwise, there would be no end of suits, as, in this case, if Sir Thomas had seven sons, they would have all had several new springing equities.

But the court [JEFFREYS] varied not in opinion and, therefore, decreed a reconveyance and an account of profits.

2 Vernon 236, 23 E.R. 753

¹ *Roscarrick v. Barton* (1672), 1 Chancery Cases 217, 22 E.R. 769.

1691.

There having been a decree made for a very liberal allowance for the maintenance of the infant out of a trust estate and not according to the trust, upon a rehearing, it was endeavoured to set aside the decree.

Per curiam: Where an infant recovers by a decree of the court, the court may with the approbation of the infant's relations allot him a maintenance, though there was no provision in the trust for that purpose. And this is founded on natural equity. And, though, in this case, the decree went beyond the rules of regular equity, yet a decree being made in it, we will not reverse it, though possibly we would not have made the decree.

[Reg. Lib. 1686 A, f. 1084.]

[Earlier proceedings in this case: 79 Selden Soc. 901.]

[Other reports of this case: 1 Eq. Cas. Abr. 165, 281, 21 E.R. 961, 1046.]

338

Holley v. Weedon
(Ch. 1686)

A court of equity will not relieve against the accident of a debtor's dying during the pendency of an action at common law.

Lincoln's Inn MS. Misc. 498, p. 21, pl. 2

Easter 2 Jac. II.

J.S. binds himself and his heirs in a bond and dies leaving lands in fee to descend to his son A. An action is brought upon this bond against A., who pleads *reins per descent*, and a verdict [went] for the plaintiff. But, before the day *in banco*, A. dies, having devised away the land.

And now a bill was exhibited in this court to subject the land to the payment of the bond.

But the bill was dismissed.

[Other copies of this report: Lincoln's Inn MS. Misc. 503, p. 88, pl. 2, Lincoln's Inn MS. Misc. 504, p. 84, pl. 3.]

1 Vernon 400, 23 E.R. 544

4 May [1686]. In Court.

One Thomas Castle became bound to the plaintiff for the payment of £100 and interest, and he dies. And some land, of which he was seised in fee, descended to Jane, his daughter and heir. Jane died, and the land descended to Robert, her uncle and heir. The plaintiff sues out an original against Robert, who pleaded a false plea, and the plaintiff had a verdict at law for recovery of his debt. But Robert died before the day *in banco*, having devised his lands to the defendant, his son.

The end of this bill was to affect the lands in the hands of the defendant with this debt recovered at law, but rendered fruitless by the hand of God. And the Case of Parker and Dee¹ was cited as a precedent near this case.

Lord Chancellor [JEFFREYS]: I dismiss the bill. There is no color of equity in the case, unless

¹ *Parker v. Dee* (1674), Reports *tempore* Finch 123, 23 E.R. 67, 2 Chancery Cases 200, 22 E.R. 910, 3 Swanston 529, 36 E.R. 968, 73 Selden Soc. 83.

you will have it that Robert died maliciously before the day *in banco*, on purpose to defeat the plaintiff of his debt.

2 Chancery Cases 175, 22 E.R. 900

Thomas Castle, *anno* 1657, borrowed of the plaintiff several sums, *viz.* £200, and bound him and his heirs by bond for payment. And he died seised of the lands in fee, which descended to his daughter and, on her death without issue, to the defendant Robert, and he entered, the money being unpaid. The plaintiff, Michaelmas [term] the 16th of Car. II [1664], filed a bill against Robert, as heir, who pleaded *riens per descent*. And [there was a] verdict against him at the Norfolk Assizes. But, before the day in bank, Robert died; so as the plaintiff could not have judgment. Robert left Robert, an infant, his son and heir.

Then, Trinity 31 Car. II [1679], the plaintiff filed an original against the infant in the Common Bank; and Michaelmas last, Robert, the infant, coming of age, the plaintiff declares against him on the two bonds, who pleaded *riens per descensum die brevis*. And issue was joined.

The defendant pretends that Robert, the father, by his will, devised the lands to the defendant Weeden etc. a little before his death.

The plaintiff exhibits the bill to be relieved against the will and pressed that he ought to be relieved, for the lands were liable in law to his debt and the plaintiff, while they were so liable, did do all the law required in suing Robert while he was seised of the lands by descent and renewing the suit against the infant and must have had judgment against Robert if the act of God, *viz.* the death of Robert, had not prevented it. And it is not reason that a false plea should advantage and profit himself. Parker and Dee's Case. And if the suit had abated by another occasion, yet in a writ by journeys account, though Robert had aliened the land on valuable considerations, yet the land had been liable, and, by the suit, attached, Robert is disabled by act executed, feoffment, fine, or otherwise, to discharge the land any more by his will.

The Lord Chancellor [JEFFREYS] dismissed the bill.

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Meynell v. Massey
(Ch. 1686)

A court of equity can order lands settled to pay a woman's portion to be sold to pay it where the income from the lands is not sufficient for that purpose.

2 Vernon 1, 23 E.R. 614

18 June 1686. Lord Chancellor JEFFREYS. George Meynell, junior, and Mary *ux.*, and George Meynell, senior, plaintiffs; Richard Massey, Blunden *et ux.*, *et al.*, defendants.

The 29th of August 1662, after the marriage of Hamlet Massey with the plaintiff Mary's mother, with whom he had received a £2000 portion, he and his father, by deed, fine, and recovery, settled their lands, part of them for three respective jointures and the remainder of them to Hamlet for life, the remainder to his first and other sons by his wife in tail, the remainder in tail to the defendant Massey, under a condition and agreement that, if Hamlet, at his death, should leave one only daughter by his wife and no son, then, if the persons in remainder of the premises (except the jointure lands) should not pay unto such daughter £2000 at one payment at Midsummer after she should be sixteen years of age, the recovery of all other than the jointure lands should be during the jointures and the recoverors should stand seised to the intent that it might be lawful for such daughter or her assigns, after default of payment so long and until she should receive £2000, to enter and distrain for the same £2000 and damages for the forbearance thereof and the distress to impound and keep until the £2000 with damages were satisfied.

The plaintiff Mary was the only daughter of that marriage, whose father died without issue male, and, at Midsummer 1679, she became entitled to the £2000, she being sixteen in 1678. And, in 1682, she and the plaintiff George, the younger, married.

The defendant, by his guardian, had received the rents of the estate for about fourteen years. And the plaintiffs had demanded the portion of him and the guardian, which they had refused to pay or sell the lands to raise it. And [it was] insisted she ought to take her portion out of the rents and profits, as it would raise it, and that the lands subject to the portion beyond the jointures were but £120 *per annum*.

And, though, in this case, there was no power given to the trustees to sell by the settlement nor to the daughter to enter and hold until she was satisfied, but barely a power of distress, yet, inasmuch as it was to be paid with damages and the portion was to be paid at sixteen and was no more than her mother's portion and the plaintiff was twenty years old when she married and was now twenty-four, the Lord Chancellor [JEFFREYS] declared, though there was no manner of proof to that purpose, that he would take it that it was intended that, in case the remainderman failed to pay it at the day, the trustees were to sell to raise it. And he decreed the trustees accordingly to sell and raise the portion.

[Raithby's note: The decree declared that the £2000 and damages were due to the plaintiff and that the premises ought to stand charged therewith and, then, that, in order to the raising so much of the £2000 and damages, from the 24th day of June 1679, as should appear on the Master's report to remain unpaid, the surviving trustee in the settlement named should make and execute such leases, mortgages, or other estates of the said premises or any part thereof as should be necessary and sufficient to raise and pay the same on the present or future tenants of the said premises whose leases or estates are in part or in the whole expired and should be at liberty to renew and fill up the same with any life or lives not exceeding three lives, paying a valuable consideration therefor, and, in the case of the refusal of any or all of such tenant or tenants to renew, then forthwith to make and execute any grant or grants, lease, mortgage, or conveyance of such parts thereof whereof such tenants refused to renew as he could. Reg. Lib. 1685 B, f. 790.]

340

Wharton v. Wharton
(Ch. 1686)

A title per formam doni will not to be decreed against in equity.

2 Vernon 3, 23 E.R. 615

1686. Angelica Magdalena Wharton, widow of Philip Wharton, plaintiff; Mary Wharton, daughter and heir of Philip Wharton by a former wife, by her guardian, *et al.*, defendants.

In 1684, in consideration of a £6000 portion paid by the plaintiff and her friends to Philip Wharton and his father and of the marriage intended between her and Philip, they, by lease and release, convey the manor of Hutton Pannell etc., the manor of Edlington, and part of Ravensworth to the trustees of the plaintiff's nomination in trust that, after Philip's death, they should during the plaintiff's life receive and take out of the profits £600 yearly to be paid half yearly as the plaintiff should appoint with power to the trustees to distrain and to enter and receive the profits until the same and the arrears thereof and damages for non-payment were paid and, after other remainders spent, to the right heirs of Philip and his father, which the defendant is. And Philip and his father did covenant to make further assurance and to levy a fine of Edlington to those uses and that they or one of them were seised in fee of all the premises and that the same should continue to those uses free of all encumbrances.

The marriage was had, and the portion was paid. Sir Thomas, the father of Philip, died. And Philip, surviving his father, 20th February 1684[/85], made his will, and he did confirm the

plaintiff's jointure and devised all his lands to the defendant Mary [1671/72-1727] in tail, subject to the plaintiff's jointure. And he appointed that all persons any way concerned should make further assurance and that all his and his father's and father-in-law's debts and legacies should be paid out of his real estate. And he died without leaving any issue but the defendant.

And the bill complained that the defendant set up entails against her jointure and the lands were liable to pay the debts and legacies. And it set forth that Philip had acknowledged a fine for perfecting the jointure, and, though he died before the same was perfected, yet it ought to be made good in equity and the plaintiff's jointure decreed to her and the debts and legacies paid out of the real estate.

The defendant set up several entails in settlements, whereby she was entitled to all the lands but Ravensworth, notwithstanding the marriage settlement, being about £1300 *per annum*, and that her title was not barred in regard the fine was not perfected and that, in the plaintiff's marriage deed, Sir Thomas covenanted that her £6000 portion should be laid out in a purchase for the better securing her £600 *per annum* and then Edlington was to be discharged of it and that, the £6000 being paid to Sir Thomas and Philip, they deposited it in the East India Company. And she insisted that none of the lands were liable to the plaintiff's rent charge but those in Ravensworth. And she set forth several settlements for that purpose and insisted that the plaintiff ought not to be aided in equity by the fine, it having proceeded no further than barely a caption from Philip, and that she ought not to have both the £6000 and her jointure but that the £6000 ought first to be applied to make up her jointure of £600 *per annum* and the surplus of it to the payment of debts and legacies in ease of the real estate.

For the plaintiff, it was insisted that, she being a purchaser, the defect of the fine, not being perfected, ought to be supplied in equity as much as a defect in livery.

But, as to that, it was insisted that the defendant's title was *per formam doni* and so not to be decreed against in equity.

And in that point, the Master of the Rolls [TREVOR] did not think fit to relieve the plaintiff. But, as to the £6000, though Sir Thomas had covenanted to lay it out in a purchase for the better securing the jointure, which, if he had done, the remainder would have descended upon Philip and Philip was his heir and executor, it was conceived by the Master of the Rolls [TREVOR] that, therefore and inasmuch as, by the marriage settlement, Ravensworth, being £300 *per annum*, was settled towards the jointure, and which the plaintiff's counsel insisted the trustees might hold over after her death to answer all arrears of her £600 *per annum* in her lifetime with damages and the plaintiff's counsel seeming willing to take the £6000 and £300 *per annum* for her life out of Ravensworth, the Master of the Rolls [TREVOR] did so decree it and that the plaintiff should have the £6000 discharged of debts and legacies and the £300 *per annum* for her life.

[Reg. Lib. 1685 B, f. 763.]

[Other reports of this case: 1 Eq. Cas. Abr. 258, 21 E.R. 1030.]

Cotterel v. Hampson
(Ch. 1686)

Where lands are vested in trustees by an act of Parliament to be mortgaged for a particular purpose, the mortgagee must make sure that the money is applied to that purpose.

2 Vernon 5, 23 E.R. 616

June 1686. Lord Chancellor. Sir John Cotterel, and John Holt, Esq., plaintiffs; Serjeant Hampson, Charles Bill, *et al.*, defendants.

Major Bill, the defendant Bill's father, and his trustees, Crump and Johnson, in May 1677, mortgaged a tenement called Dovers in Surrey to the earl of Leicester in fee. In 1680, Major Bill made his will. And he made Garrett his executor in trust for the defendant Charles during his minority, who having married the defendant Hampson's daughter, he and his mother and Garrett, by articles, transferred the executorship to [Robert] Hampson [d. 1689] in July 1682. And Major Bill's trustees, by the appointment of Garrett, transferred the equity of redemption of the mortgage to Hampson and Hodges. And they and the earl of Leicester, for £1800 paid by the plaintiff Cotterel, assigned the mortgage to him. In December 1682, the plaintiff Holt lent Serjeant Hampson £260, which Hampson agreed should be secured by the said mortgage. And Cotterel, by writing under hand and seal by Hampson's directions, acknowledged himself a trustee for Holt in the mortgage as to the £260 after his own £1800 and interest was paid. And Hampson and Hodges assigned the equity of redemption to Holt for that purpose. And that the defendants might redeem or be foreclosed was the bill.

The defendant Bill insisted by answer upon a settlement in 1658, upon his father and mother's marriage, of the tenement called Dovers and the Printing House on the defendant's father for life and his mother for life and, afterwards, on the defendant in tail and that, in the Fire in 1666, the Printing House being burnt and the defendant's father, but tenant for life, could not raise money to rebuild, whereupon, 22 Car. II, an Act of Parliament¹ passed, reciting that marriage settlement and the father's incapacity to rebuild, which did enable the defendant's father to sell his lands in Kent and Surrey to rebuild and stock the Printing House for the benefit of the defendant's mother and children. And the tenement called Dovers and the land in Kent were vested in Crump and Johnson to sell to raise money for the building and stocking the Printing House and the surplus to purchase land to be settled to the uses of the said marriage settlement of the defendant's said father and mother. And [it was] insisted that he was abused in his minority by Hampson in transferring the executorship and that no more money ought to be charged on the mortgage than what was taken up and employed according to the trust of the Act of Parliament.

And the Lord Chancellor [JEFFREYS] did so decree it and that an account should be taken of what monies had been employed in building or stocking the Printing House according to the trust of the Act of Parliament and that the defendant Bill, paying so much with interest and costs, discounting the profits received by the mortgagees, should be let in to redeem, though, for the plaintiffs, it was insisted that it could not reasonably be intended that they could be privy to and could prove the laying out of the money according to the Act of Parliament and that no man would lend money upon the trusts of an act of Parliament if it was incumbent upon him to see the money laid out and employed according to the Act. And such a construction of the Act could not consist with the intention of the Act, but utterly prevent the same.

¹ Stat. 22 Car. II, c. 11 (SR, V, 665-682).

[Reg. Lib. 1685 A, f. 1031.]

[Other reports of this case: 1 Eq. Cas. Abr. 358, 21 E.R. 1101.]

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Warwick v. Gerrard
(Ch. 1686)

A general power of appointment in a covenant to stand seised is void.

2 Vernon 7, 23 E.R. 617

30 June 1686. Lord Chancellor.

The defendant's wife, being seised in fee, before her marriage, covenanted to stand seised to the use of herself for life and, after, to the heirs of her own body to be begotten, remainder to such uses as she by will or writing under hand and seal should appoint, and, for want of such appointment, to the use of the plaintiff and his heirs. Then, she married the defendant and had issue, one daughter. The mother died, and, afterwards, the daughter died without issue. The plaintiff was of the blood and kindred of the mother. The mother, after the execution of the deed of covenant, made her will, and, thereby, reciting that deed, she gave to the child she then went with and its heirs all her lands and, for lack of such issue, to the defendant and his heirs, charged with the payment of several legacies, of which one was £100 to the plaintiff, part of which legacies the defendant has paid and offered to pay the rest. The plaintiff's bill was for the writings.

And, for the plaintiff, it was insisted that the power in the covenant to stand seised being general was void and that, by consequence, the devise was void.

But, for the defendant, it was insisted that, though the power was general, yet it ought to be supported so far as to make good any disposition which she might have made by a covenant to stand seised, for the covenant was made before her marriage and, at the same time, the defendant made a settlement upon her in consideration of the intended marriage. And, if she had covenanted for that consideration to stand to the use of her husband, it would have been good. And, so by consequence, her disposition to the husband by virtue of that power, though the same was general, being such as the law would bear upon a covenant to stand seised, ought to be taken to be good.

Upon the hearing, the court [JEFFREYS] left the parties to try it at law.

And, at law, a verdict was given for the plaintiff, though the defendant stood upon a special verdict that so the same might have been argued.

And, afterwards, the cause being heard, it was decreed according to the verdict.

Quaere tamen.

[Reg. Lib. 1685 B, f. 840.]

343

Archer v. Mosse
(Ch. 1686)

A court of equity cannot disregard the probate of a will made in an ecclesiastical court.

2 Vernon 8, 23 E.R. 618

About June 1686.

John Archer, the plaintiff's uncle, who died in January 1682, had before, when in perfect health, made his will. And, thereby, he had given the plaintiff the greatest part of his personal estate to the value of £5000, as was proved in the case. But one Bridget Sandyman, his maid servant, had in sickness prevailed upon him, as was alleged, to make another will and to marry her a week before his death, when he lay in his sick bed, at six of the clock at night, though it was really proved by two ministers that she was a year before actually married to the defendant Mosse and was then his wife and that Mosse procured the license for the marriage of Archer to Bridget and that, though they had set up a will dated a week before Archer's death, whereby Bridget was made executor and all given to her, and that she had suppressed the former will, by which the plaintiff claimed, yet that will, so by her set up being proved in the Prerogative Court and she having made her will and Mosse her executor, though, in this case, there was as gross a practice proved as could possibly be in gaining that will by Bridget from Archer and that he was not *compos [mentis]*, neither when he made it nor when his pretended marriage was to Bridget and that he knew in his health that she was married to Mosse.

And the matter in question being purely relating to the personal estate, the Lord Chancellor [JEFFREYS] was of opinion that, whilst that probate stood, this matter was not examinable in Chancery, and, though the fraud was fully proved, as aforesaid, and was opened to him, he would not hear any proofs read. But he dismissed the bill.

[Other reports of this case: 1 Eq. Cas. Abr. 136, 405, 21 E.R. 940, 1136.]

344

Clyat v. Batteson
(Ch. 1686)

Where a life tenant redeems a mortgage and then dies, the remainderman can redeem his interest but must pay off the full debt with an offset only for the profits from the land received by the life tenant.

1 Vernon 404, 23 E.R. 546

30 June [1686]. In Court.

Lands in mortgage are devised to A. for life, remainder to B. and his heirs. A. enters and buys in the mortgage, taking an assignment in trustees' names, and dies.

B., the remainderman, now prefers his bill against the defendant, the representative of A., to redeem the mortgage. And his counsel insisted that he ought to pay but two-thirds of what was due on the mortgage and the other third ought to be allowed by the defendant, by reason that the tenant for life enjoyed the profits during his life.

Per curiam: Had you come to redeem in the lifetime of the tenant for life, then he should have allowed a proportion of the money with respect to the value of the respective estates of the tenant

for life and remainderman. But he being now dead and having enjoyed the estate but one year only, the defendant must make an allowance only for the time that A. enjoyed the estate.

[Reg. Lib. 1685 A, f. 759.]

[Other reports of this case: 1 Eq. Cas. Abr. 117, 21 E.R. 924.]

Attorney General v. Ryder
(Ch. 1686)

Whether a will has been revoked is a matter for an ecclesiastical court not a court of equity to decide.

2 Chancery Cases 178, 22 E.R. 901

12 October 1686.

£600 were devised for ejected ministers. It was urged [as follows].

First, the king had disposal of the money.

Secondly, a legatee, where there were many legatees, sued for his legacy. The executor sets forth that there were divers other legatees and that there was not sufficient assets to pay all, and, therefore, he insisted that the other legatees might be parties, that they might come into the account and abate equally, else the executor should be put to divers accounts, and the account with one will not bind the rest.

But to that the Lord Chancellor [JEFFREYS] regarded not.

Thirdly, the executor sets forth a revocation of the will, by which the legacy was given.

Lord Chancellor [JEFFREYS]: The bill is under probate ecclesiastical, and I will not try it here. Go to the ecclesiastical court and prove it, i.e. the revocation, there.

Burton v. Anonymous
(Ch. 1686)

A Master in Chancery should not extend the deadline for making his report without leave of court.

2 Chancery Cases 179, 22 E.R. 901

29 October [1686].

[It was] ordered that a report made in the cause be referred back, but the defendant to pay costs if he changed not the report considerably. But no time being prefixed in that order for the Master to report. By a subsequent order, the report was to be made by the third of November. The Master was attended several times, and a few days before the third of November, he gave a certificate that he was ready to report, but, by reason of its length and schedules of particulars, he could not finish it within the time. And without further order for further time, he did finish his report, which was done four or five days after the third of November, the draught of which report the plaintiff perused, and the report was filed. The first report and the second differed £3700, so that the report was to the advantage of the defendant £3700, etc. But the plaintiff proceeded to the hearing of the cause. And the second report being made out of time, viz. after the time elapsed for the making thereof, the same was disallowed, and the first report [was] decreed. But if the defendant would bring into court the money first reported, the second report should be considered. And the plaintiff got costs taxed to

£140 or thereabouts.

And now the defendant moved that he, being also but a trustee, might be discharged of the costs, which were not settled by the decree, but imposed only as a penalty in case he caused the plaintiff to travel in the report without just cause, which he had not done, as appeared by the report.

The Lord Chancellor [JEFFREYS] disallowed the motion and ordered the costs, unless the defendant would bring the money first reported into court. And he showed much displeasure against the Master for making and filing the report without warrant expressing as if it had not been gained *gratis*.

347

Harvey v. Harvey
(Ch. 1686)

In this case, a voluntary settlement which was made in order to prevent a seizure for loyalty to the crown and which was never acted upon in the lifetime of the parties was not enforced.

2 Chancery Cases 180, 22 E.R. 901

The case was, *viz.* there was a marriage agreed to be between them. She brought him a great personal estate valued £30,000, and she was seised of lands of the yearly value of £1200 or more, and his land [were] about £800 *per annum*. And both were agreed to be settled for their lives on them, remainder in tail male to their sons, and the fee simple of her lands in default of the issue male, as she should appoint, etc. and, in default of such appointment, to him and his heirs, for that there had been long love etc. between them. Sir John Coel was indifferent counsel to draw up the conveyances. And when John Harvey¹ came to Sir John Coel, he then took notice that, if the lady's land should be settled as aforesaid, then the same would be obnoxious to sequestration, for John Harvey had been in arms for King Charles, and, at that very time, was secretly engaged in a plot for the king. Thereupon, he consulted with Sir John Coel how to avoid that mischief, who thereupon advised and drew up the settlement with a precedent interest and estate for years to be in trustees in trust that the trustees, their executors, etc. should dispose of all the rents and profits of the lady's said land from time to time, as she alone should without her husband dispose and to such persons as she alone should direct and with a covenant by John Harvey, his executors, etc. for performance.

Accordingly, it was done; the marriage took effect; and they lived about twenty years. John Harvey, in the presence of his wife, made his will and acquainted her therewith, whereby he gave her all his jewels and £20,000 to be laid out in land and his wife to be estated therein for life, and he gave her other legacies. But he made the plaintiff Thomas his executor and gave to him the residue of all his personal estate and died.

Sometime after his death, differences arose between the lady and Thomas, the executor. The matter was, *viz.* John, the husband, and his wife living so long together, he, notwithstanding the said trust excluding him from the profits and his covenant, did constantly take all the profits and disposed of them in housekeeping and otherwise as he pleased. And they both made leases to tenants without the trustees. But now the lady, upon the covenant, would have an account and satisfaction for the profits received by her husband from the plaintiff, who exhibits this bill to be relieved against the covenant, for that the lease for years was made only to protect the wife's estate against the violence of those times and not to exclude the husband, but the sequestrators.

And in proof hereof, Sir John Coel, who was a Master in Chancery many years and of a very clear reputation, did fully depose thereto. And the change of the first intended settlement was by the

¹ R. O. Bucholz, 'Hervey, John (1616-1680)', *Oxford Dictionary of National Biography*, vol. 26, pp. 860-861.

appointment only of John Harvey. And though his testimony was single, the nature of the case required secrecy, and the subsequent perception of the profits without complaint or interruption by her or the trustees and leases aforesaid and the testimony of a woman that the lady had expressly affirmed she had not made any such. But this testimony of the woman was not much insisted on by the plaintiff's counsel or the court. But there were some other settlements of personal estate to the like purpose to have been made, which were never made nor insisted on to be made because, [Oliver] Cromwell [1599-1658] shortly after dying, then John Harvey thought himself out of danger.

But on the contrary, it was very full and at large insisted on that, against conveyances by fine and deed on consideration of marriage and so great a portion and settled by advice of counsel, the court might not relieve against a trust expressed in a deed indented and how dangerous such a precedent would be and the silence of the lady not interrupting or complaining of the taking of the profits during her husband's life was not considerable, for it may be that she was not willing to displease him and she knew her husband had a great estate to leave and has left sufficiently to satisfy her of the covenant, on which she desired nothing in this court, but would take her remedy at law, which she hoped that the court would not hinder and not let it be in the power of any single person of what credit or reputation soever he be of against a settlement by deed, fine, consideration.

But on this point chiefly the court decreed for the plaintiff against the widow, and so did SIR HARBOTTLE GRIMSTONE do before, and, on rehearing of that decree, it was affirmed by the LORD FINCH; and now, on a third hearing, confirmed by the Lord Chancellor JEFFREYS.

There was another matter moved and insisted on, *viz.*, if, in such case of separate maintenance, the wife permit the husband still to receive and spend, possibly in her maintenance, that the executor of the husband, after his death, should be put to account.

But I [*Keck*] observed not that the Lord Chancellor now grounded his decree on that.

[Earlier proceedings in this case: 1 Vernon 57, 122, 23 E.R. 307, 359, 2 Chancery Cases 82, 22 E.R. 857, 3 Chancery Reports 87, 21 E.R. 737, Reports *tempore* Finch 363, 23 E.R. 198, 1 Eq. Cas. Abr. 146, 163, 331, 21 E.R. 947, 960, 1082, 79 Selden Soc. 850.]

Seabourne v. Powel
(Ch. 1686)

Where a mortgage is invalid because of the lack of title in the mortgagor and then the mortgagor later gets a good title, the mortgagee is entitled to have a new mortgage.

2 Vernon 11, 23 E.R. 619

8 November 1686. John Seabourne and Thomas Seabourne, plaintiffs; George Powel, Thomas Seabourne, senior, Alice Austin, the wife of Joseph Austin, William Mackley, and Judith, his wife, defendants.

Thomas Cows demises houses and grounds in Chick Lane in 1674 for a long term to build upon, which term came by assignment to the defendant Austin and her husband, which they believed to be a good title. And they borrowed £100 of the defendant Mackley's wife upon a mortgage of it, for which the plaintiffs became bound. The defendant Austin's husband, nine years since, ran away for debt, and they, thinking their title good, had borrowed and build upon the ground with it and but £15 of Kerrington's money was that way employed. Seven years after her husband's going away, the defendant Austin found her title not good, the real title being in one Haynes. And he compassionating her case, for a ten guineas fine, leased the premises for a long term at £4 yearly rent in trust for her to the defendant Powell *et al.* And he had instigated Mackley to sue the plaintiff upon the bond for the mortgage money.

The plaintiff's bill was that, though the mortgage might not in strictness of law be good, yet

the estate granted by Haynes was in regard of the monies laid out in building upon the other title and that the estate mortgaged was of better value than the mortgage, besides what was reserved to be paid to Haynes, and that the mortgagee had, therefore, a plain equity to have the benefit of that title, which was but a graft into that stock from which he derived and that the defendant Alice had since the taking of that estate (and so it appeared on proof) paid the interest to the mortgagee and that, therefore, the plaintiffs, being but sureties in the bond, had an equity to have the benefit of the mortgage and of that new acquired title to save them harmless against the bond or else the trustees ought to be decreed to make a new mortgage to the mortgagee and he to forbear suing upon the bond.

The Master of the Rolls [TREVOR], in this case, did look upon the estate made by Haynes to be as a graft into the old stock and the benefit of it above £4 *per annum* reserved to Haynes did arise in consideration of the former title. And, therefore, he did decree the trustees to make a new mortgage to the mortgagee.

[Reg. Lib. 1686 B, f. 83.]

349

Griffith v. Buckle
(Ch. 1686)

In this case, the court ordered the defendant to specifically perform a contract for a marriage settlement but to do it according to the defendant's understanding of the agreement.

2 Vernon 13, 23 E.R. 620

November 1686. Thomas Griffith, William Buckle, *et ux.*, plaintiffs; William Buckle, senior, defendant.

The bill was to have a marriage agreement in 1683 between the plaintiffs and defendant executed, whereby the defendant, in consideration of a marriage to be and, afterwards, had between the plaintiff Buckle and his wife, the plaintiff Griffith's daughter, and in consideration of £1500 that was her portion, £1200 of which was paid to the defendant and the other £300 secured, did article to convey the lands in question to the use of himself until the marriage had with remainder to the heirs of the plaintiff Buckle upon the body of Elizabeth, remainder to the plaintiff William Buckle in fee.

The defendant insisted that he was surprised in the wording of the articles and that he intended only an estate for life to the plaintiff with remainder to his sons in tail and that, in the case of his sons dying without issue, it should come to the defendant's own children and that it was plain, however the articles were worded, that it was so meant, for that there was a clause in the articles, as indeed there was, that his son should do no waste, which would have been repugnant in case he had been to have had the estate of inheritance.

And, though there was no surprise proved in the gaining of the articles, the Master of the Rolls [TREVOR] decreed the father to execute a conveyance, whereby the plaintiff was to be but tenant for life, with remainder in tail to his issue successively, and that, thereupon, the articles should be delivered up.

[Reg. Lib. 1686 A, f. 237.]

Earl of Kildare v. Eustace
(Ch. 1686-1687)

A court of equity that has personal jurisdiction over the parties can grant equitable relief that affects foreign land.

1 Vernon 405, 23 E.R. 546

8 November [1686]. In Court.

The plaintiff's bill was to be relieved touching the trust of certain lands in Ireland. The defendants had appeared and answered the bill and had not any way objected to the jurisdiction of this court. But the cause coming now to be heard, the Lord Chancellor [JEFFREYS] objected this court could not hold pleas of land in Ireland.

For the plaintiff, it was urged that he was proper for relief in this court by reason that both plaintiff and defendant were here in England and that a court of equity does only *agere in personam*. Its proceedings are to reform the conscience of the party and, if, at any time, a court of equity may be said to *agere in rem*, it is only in the case of a sequestration, which is for the contempt of the party, and that, therefore, the defendant, being served with a subpoena here and living in England, this court had proper jurisdiction of the cause, though the land lies in Ireland, and the rather, for that it was never yet pretended that there was any local action in equity. And they instanced for precedents the late cases of the Lord Arglasse and Muschamp, and Lord Arglasse and Pitt, and Archer's Case.¹ And they insisted that, otherwise, there would be a failure of justice, for the defendant, living here, could not be served with process issuing out of the Chancery in Ireland.

But the Lord Chancellor [JEFFREYS] overruled the plaintiff's counsel and said, as to the cases of the Lord Arglasse, the fraudulent contracts were made here in England, and, as to the present case, there would be no failure of justice, for they might have a subpoena out of this court returnable in the Chancery of Ireland, as in his own experience, in cases between master and apprentice in the City of London, he had known subpoenas to have issued out of this court returnable in the Mayor's Court in London for persons that lived out of the jurisdiction. And, therefore, he pronounced the rule for the dismissing the bill. But, at the importunity of the plaintiff's counsel, he gave them a week's time to search for precedents.

1 Vernon 419, 23 E.R. 559

3 December [1686]. Lord Chancellor [JEFFREYS]; Lord Chief Justice BEDDINGFIELD; Lord Chief Baron ATKYNS.

The Lord Chancellor and the Judges having been attended with precedents, *Sir John Holt* argued for the plaintiff as to the preliminary point only, to wit whether this court had jurisdiction and might hold a plea of the lands in question which lay in Ireland:

First, that a trust was purely personal and that a court of equity here might as well hold a plea of a trust that concerned lands in Ireland as the other courts of law might of other personal contracts, though the same might concern lands in Ireland, as, if a man being here in England enters into a bond for granting a rent charge out of lands in Ireland, there is no question but it may be sued in any of the courts of law here; so a covenant entered into in Ireland or a contract made there may be sued here and so *e converso*; and it has been held, it is My Lord Hobart's opinion, that an action of the

¹ *Earl of Arglasse v. Muschamp* (1682), 1 Vernon 75, 135, 237, 23 E.R. 322, 369, 438, 2 Chancery Reports 266, 21 E.R. 675, 1 Eq. Cas. Abr. 133, 21 E.R. 937; *Pitt v. Earl of Arglasse* (Ch. 1687), see below, Case No. 386; *Archer v. Preston*, 1 Eq. Cas. Abr. 133, 21 E.R. 938.

case will lie for a breach of trust;

Secondly, that Ireland has its courts of its own by a grant from the king, but not exclusive of the king's courts here, for Ireland is a conquered kingdom and a decree of this court may as well bind land in Ireland, as by every day's practice it does lands that lie in foreign plantations, and, for precedents, he cited the case of a *scire facias*¹ brought in the Chancery here to repeal a patent of lands in Ireland. If a man that is beneficed here is made a bishop in Ireland, that comes within the Statute of Hen. VIII, against pluralities, and shall make void his living here in England. And it was resolved in *Evans and Ascough's Case*, Latch, f. 234, and *Dowdale's Case*, in Co. 6th Report,² that lands in Ireland shall be assets to satisfy a bond debt here, but it is otherwise of lands in Scotland. And the necessity of the case is considerable, for should not this court relieve in such a case as this? Where the land lies in Ireland and the trustee lives in England, the *cestui que trust* would be without a remedy, for, though it is true we may serve him with a subpoena out of this court returnable in the Chancery in Ireland, yet, if he will not appear upon that subpoena, we can proceed no further; we cannot take out any attachment upon it.

And for precedents in this court of decrees made concerning lands in Ireland were cited the cases of *Leake and Lord Ranelagh*, 8 Car. I, in the Lord Keeper Coventry's time; *Archer and Preston*, soon after the king's restoration;³ and the *Case of the Lord Thomond and Spencer*.

The defendant's counsel, in a manner, waived the preliminary point and would not enter into the debate whether this court might not decree the trust of lands in Ireland, the trustee living here, but that it was certainly a matter discretionary in the court whether they would do it or not. And as this case was circumstanced, they apprehended the court would not interpose:

First, that, in this case, there had been no less than two judgments in the courts of law in Ireland and no less than three bills in equity;

Secondly, that *Sir Morrice Eustace*,⁴ the trustee, did not live in England, but came here occasionally upon other business and that it would be unreasonable to keep him from his own country and from all his other concerns to attend this suit;

Thirdly, that the case arises upon facts properly triable in Ireland, to wit whether *Fitzgerald*,⁵ for whom this trust was created, was the same *Fitzgerald* that was in the rebellion, and this fact had been twice tried in Ireland and found against the plaintiff;

Fourthly, that this case depends upon construction of the Act of Settlement in Ireland,⁶ for, if not only the trust, but the land itself was actually vested in the king by that Act, then it was a pure title at law and no ground for a suit in equity and that the lands were so actually vested was the opinion of the Chancellor and Judges in Ireland, who were the proper expositors of that law.

And it was further insisted that trusts which concern lands are not purely personal, but in some

¹ *Pilkinton's Case* (1441), YB Mich. 20 Hen. VI, f. 8, pl. 17.

² Stat. 21 Hen. VIII, c. 13 (SR, III, 292-296); *Evans v. Askwith* (1626), Latch 31, 233, 82 E.R. 259, 362, also Benloe 187, 73 E.R. 1045, W. Jones 158, 82 E.R. 84, Noy 93, 74 E.R. 1060, Palmer 457, 81 E.R. 1169, Paynell K.B. 127, 168, 264, 292; *Richardson v. Dowdale* (1605), 6 Coke Rep. 46, 77 E.R. 323, also Croke Jac. 55, 79 E.R. 47.

³ *Archer v. Preston*, 1 Eq. Cas. Abr. 133, 21 E.R. 938.

⁴ R. M. Armstrong, 'Eustace, Sir Maurice (d. 1665)', *Oxford Dictionary of National Biography*, vol. 18, pp. 655-657.

⁵ J. Ohlmeyer, 'Fitzgerald, George, sixteenth earl of Kildare (d. 1660)', *Oxford Dictionary of National Biography*, vol. 19, pp. 793-794.

⁶ Stat. 14 & 15 Car. II, c. 2, s. 174, *Irish Statutes* (rev. ed. 1885), p. 159.

sort local, as particularly in the remedy by injunction for the possession and that now [writs of] sequestration are become a common process, though at first introduced in the Lord Bacon's time and then but sparingly used in process, and, after a decree, to sequester the thing in demand only. And now likewise, bills are common here for a partition, which seem to concern nothing but the land itself, but that was grounded upon the Statute¹ which makes one tenant in common accountable to the other; so that now, since the Statute, they are become, as it were, trustees, the one for the other. Nor is the plaintiff remediless, his trustees living in England if that were so, for a decree made in Ireland may be carried into an execution by an English bill in this court against his trustee here.

And for precedents where this court refused to hold a plea of lands in Ireland, they cited Sir William Pettit's Case,² where the bill, being to have a partition of lands in Ireland, was dismissed.

But note, in that case, as to the matter of account, it was retained.

And, in the Case of the Countess of Lancharle against O'Bryan, 24 Car. II [1672], upon articles of marriage, all the transactions having been in Ireland, the bill was dismissed.

The plaintiff's counsel having before spoken only to the preliminary point touching the jurisdiction of the court in the case of a trust of land in Ireland, which was now waived by the defendant's counsel and the court satisfied as to that matter and the Lord Chancellor inclining to dismiss the bill because the case turned upon a construction of the Act of Settlement and upon a fact which was proper to be tried in Ireland and not here, our law differing from the law in Ireland, it was replied by the plaintiff's counsel that the courts of law in England were proper expositors of the Irish laws. Nay, their judgment is to control the opinion of the judges in Ireland, as upon all writs of error. And *a fortiori* may they take upon them to judge of a matter or expound a law that comes before them in the first instance. And there is no difficulty in trying here whether this be the same Fitzgerald or not; it may be done here as well as in Ireland.

And, as touching the Act of Settlement, though the same be copiously penned and has the words, 'trusts, equities', etc., and that all shall be actually vested in the king, yet the construction of that Act is natural and plain and must be taken *reddendo singula singulis*, that is to say lands in possession vest absolutely in possession, a trust vests in a trust, and the like, and it amounts to no more than that they shall be as much in the king's actual possession, as if an office was actually found. And so has it been resolved here upon other statutes of attainders, that have as liberal clauses as this Act of Settlement has. The Case of Smith and Wheeler, in the King's Bench³ concerning Simon Maine's estate, being the first case there settled by the Lord Chief Justice Hale; Lord Holland's Case on the Statute of Hen. VIII; and Powly's Case.

After long debate, the judges concurring with His Lordship [JEFFREYS] that the court had a proper jurisdiction in this case and that the judges in England were proper expositors of the Irish laws and that, by the true construction of this Statute, the trust was vested in the king, and not the land itself. And, the proof being full as to the identity of the person, he decreed for the plaintiff as to one moiety, the trust as to the other moiety being for Sir Morrice Eustace himself and not for Fitzgerald.

¹ Stat. 31 Hen. VIII, c. 1 (*SR*, III, 718).

² *Carteret v. Petty* (1676), 73 Selden Soc. 293, 2 Swanston 323, 36 E.R. 639, Reports *tempore* Finch 242, 23 E.R. 133, 2 Chancery Cases 214, 22 E.R. 916, 1 Eq. Cas. Abr. 133, 21 E.R. 937.

³ *Smith v. Walker* (1669-1671), 1 Modern 16, 38, 86 E.R. 696, 714, 1 Freeman 9, 89 E.R. 8, 1 Ventris 128, 86 E.R. 88, 1 Levinz 279, 83 E.R. 406, 2 Keble 564, 608, 644, 763, 772, 84 E.R. 355, 383, 405, 482, 488.

1 Vernon 423, 23 E.R. 561

25 January [1687]. Lord Chancellor [JEFFREYS]; Lord Chief Justice BEDDINGFIELD; Lord Chief Baron ATKYNS.

The defendant having obtained an order for the rehearing of this cause, Mr. *Pollexfen* argued, for the defendant, singly as to that point, that, by the Act of Settlement, not only the trust, but the lands themselves, as this case was, were actually vested in the king, and, consequently, what title the plaintiff had was purely a title at law, and not a trust or equitable title. And he put the case shortly thus, *viz.* that Sir Morrice Eustace, being an innocent Protestant, was possessed of the lands in question for the remainder of a term for years in trust for Fitzgerald, being an innocent Papist, and that the lands in question were actually seized by the late pretended Commonwealth, and the *custodiam* of them was granted. And the fact was admitted so to be, and it was so stated in the plaintiff's bill.

And, first, he observed that, if the words of the Act would bear it, it was but reasonable that the estate in law should vest and go along with the trust, it being no prejudice to anyone, the trust being the substance and the estate in law but, as it were, the shadow. Secondly, the design of the Act was the establishing the possessions of these forfeited lands and to make the title unquestionable, which intent is best answered by vesting, not only the trust, but the lands themselves. And the Act is fully and liberally penned for that purpose. These lands are actually vested by the enacting clause, *viz.* all land whereof any soldier or adventurer was in possession or whereof the king was in possession or whereof the *custodiam* was granted or that was seized or sequestered by the pretended Commonwealth or that any person by or under their title or, by reason of the late war, received the rents or was in possession on the seventh of May 1659.¹ Now, the description of having the *custodiam* granted, of having been seized and sequestered, etc. comprehended the lands in question. As to the objection that the vesting words must be taken *reddendo singula singulis*, that is that lands in possession shall be vested as lands in possession, a trust of land vested as a trust, etc., that may hold of lands not included within those particular descriptions. But to apply such construction to such lands so described were to render all those particular descriptions and the main body of the Act fruitless and nugatory. The particular exception in the proviso, as to Protestants' estates, strengthens the vesting clause as to the lands and trusts of innocent Papists. And the particular penning of this Act distinguishes this case from all the cases upon other English acts for forfeitures.

Sir John Holt argued, for the plaintiff, that this Act of Parliament was made for these special purposes: first, to supply the defect of attainders; secondly, the want of inquisition and default of office; thirdly, that trusts in Ireland were not forfeited before this Act, nor were the trusts of inheritances in England forfeited before the Stat. 33 Hen. VIII, as is resolved Co. 7 Rep., f. 34.² And he insisted on the case of *Smith and Wheeler* and that a trust shall vest as a trust only and that, where a traitor was to have an estate on the performance of a condition, there, notwithstanding the vesting clause, the king must perform the condition. And, as to the exception, a cautionary proviso cannot enlarge the enacting part.

The Lord Chancellor [JEFFREYS] inclined that the estate in law as well as the trust was actually vested. But he recommended the case to the judges for their further consideration.

¹ Stat. 14 & 15 Car. II, c. 2, preamble, *Irish Statutes* (rev. ed. 1885), p. 87.

² Stat. 26 Hen. VIII, c. 13, s. 4 (*SR*, III, 509); *Nevil's Case* (1604), 7 Coke Rep. 33, 77 E.R. 460.

1 Vernon 428, 23 E.R. 565

4 February [1687]. Lord Chancellor [JEFFREYS]; Lord Chief Justice BEDDINGFIELD; Lord Chief Baron ATKYNS.

This cause coming on this day to be reargued, there were two points made by the plaintiff's counsel: first, whether the estate in law was executed by the Act of Settlement; secondly, admitting it was so, yet whether the defendant having no right to one moiety, as appears by his own answer, either in law or equity, the plaintiff ought not to have a decree for that moiety.

As to the first point, the Lord Chief Baron [ATKYNS] seemed still to doubt whether the estate in law was executed by this Statute. But the Lord Chief Justice [BEDDINGFIELD] and the Lord Chancellor [JEFFREYS] were clear of opinion that, by the particular penning of this Statute, not only the trust, but the estate in law was actually vested in the king and well granted to the plaintiff's trustees.

As to the second point, it was insisted on by the counsel for the plaintiff that he ought to have a decree for the moiety, for that it appearing by the defendant's own answer that he had no title thereunto, taking Fitzgerald, who was the owner of this estate, to be one and the same person with Fitzgerald, who was the nocent and forfeiting person, as was clear by the proofs in the cause he was the same person, it was then against conscience to suffer the defendant, who had the good fortune at law to obtain a verdict for the whole, to take out execution thereupon and to put the plaintiff about to try his fortune at law again, and the rather for that it had been a doubt and there were different opinions amongst the judges in Ireland whether the estate in law was vested in the king or not and, though it is objected that, where a man has a title at law, he ought to pursue his legal remedy and shall not have a decree in equity, yet that is not always so. And the daily practice of this court in many cases is otherwise, as where a creditor by bond or the like brings his bill for a discovery of assets and, having proved assets here, he shall have a decree for his debt and not be put to prosecute at law for the same. And, in many such like cases, the court never sends the plaintiff to law where a title appears for him. And, besides, in this case, there was a necessity of a decree for the plaintiff against his trustees, who were only patentees in trust for the plaintiff, and it appearing to the court that he had a title against all the other defendants, the decree ought to be uniform and made against them all.

And this the court thought reasonable. But, in regard this matter was new and had not been before under consideration, the court took time to consider further of it and to hear what the defendant's counsel had to say to it.

1 Vernon 437, 23 E.R. 571

Eodem die [19 February 1687]. In Court, Lord Chancellor [JEFFREYS]; Master of the Rolls [TREVOR]; Chief Baron ATKYNS.

This cause standing this day again in the paper to be heard, it was insisted for the plaintiff that, let the vesting point be one way or other, the plaintiff had a proper case for a decree, for that he had apparently a right, at least to one moiety. And, though, in case the estate in law vested in the king, so that his patentee had a proper remedy at law to recover the right, yet there being a just occasion to come into this court, as there was in regard that the Lord Clare was the patentee in trust for the plaintiff, when the court, by that means, is possessed of the cause and the right fully examined to here, the court will not after that send the plaintiff to law. This court never decreed a suit when it might decree a remedy, as in the case of a devise of land or where a bond is taken in trust and the trustee refuses to let his name be made use of, the court will decree the duty, and not an action to be brought in the trustee's name. And the defendant Eustace cannot in reason oppose a decree, for, if the estate in law be in him, he confesses it to be only a trust, and, if it be not in him, he cannot be prejudiced, for he disclaims to have any interest. And the judges in Ireland having held that the plaintiff could not recover at law because the estate in law was not in the king's patentee and the

court of equity in Ireland having refused to decree for the plaintiff because they were of another opinion and thought the plaintiff had a proper remedy at law, it would be hard for this court, when they were satisfied the plaintiff had a plain right, to send him to law.

And, as to the objection that it could not properly be tried here, whether the Fitzgerald that is the *cestui que trust* was the same person with the Fitzgerald that forfeited, there was little reason in that objection. In the Case of Barnewell and Rochford, Roll's Abridgment, f. 597,¹ a trial was directed touching a feoffment of lands in Ireland, which certainly was much more local than the point in question.

Lord Chief Baron ATKYNS, upon reading the second Act of Settlement, was of the opinion that the estate in law absolutely vested in the king and not that the trust only vested, but yet, notwithstanding, he thought the plaintiff might have a proper case in equity in case a plain right appeared for him. But he now doubted whether this court would direct a trial whether the Fitzgerald that was the innocent or forfeiting person and the Fitzgerald that was the *cestui que trust* was one and the same person.

The Master of the Rolls [TREVOR], as to the vesting point, thought the acts of Settlement were not like the Statute of Henry VIII etc. and that this case differed from the Lord Sheffield's Case and Dowdale's Case,² for, there, the vesting is for the king's use, but, by the Act of Settlement, the king was to take nothing to his own use, but was in the nature of a trustee, though contrary to the general received opinion that the king cannot be a trustee. But, in the main, he was of opinion that the trust only vested. And, as to the question whether the person that forfeited and the *cestui que trust* was one and the same person, he thought the evidence was full and plain that it was the same person. In 1642, he was outlawed by the name of Fitzgerald of Christiantown; the lease in trust was made by Fitzgerald of Ladytown, and the inquisition found that Fitzgerald of Christiantown was afterwards of Ladytown. But, in case the court doubted of that matter, he thought this court might well direct a trial at law.

Lord Chancellor [JEFFREYS] was satisfied upon perusal of the Act that the estate in law vested in the king but that the plaintiff might notwithstanding be proper for a decree. And he took it that this court might very well direct a trial, whether the person that forfeited and the *cestui que trust* was one and the same person. And he cited Sir William Tyrningham's Case, who, being so powerful that right could not be had against him in the County of Buckinghamshire, the venue was changed upon a bill brought here purely for that purpose. And he took the point in this case rather to be whether there was ground for him to doubt whether it was the same person. And, therefore, he declared, in case the defendant would not consent to try that matter here, he would decree it without upon more ado.

And, thereupon, a trial was directed by consent to be had in the County of Salop. But with this at the instance of the Chief Baron [ATKYNS] that, in case the verdict went for the plaintiff, it should be without costs, but, if against him, he should pay costs.

2 Chancery Cases 188, 22 E.R. 905

A lease for fifty years was made by Sir Morrice Eustace, deceased, in trust for George Fitz-Garret. George Fitz-Garret was attainted of treason in Ireland, and an office [was] found whereby the trust was forfeited to the king and derives title to the trust by grant from the king. And [he] prays that the defendant, who is executor to the lessee, may execute the trust and assign the lease.

The defendant, by answer, confesses the lease and trust, but [says] that George Fitz-Garret, who was attainted, was not the *cestui que trust*, but another person, who, in truth, was a rebel in Ireland and attainted of treason, so as the king had no title, and that, if the king had any title, yet the

¹ *Barnewell v. Rochford* (1545), 2 Rolle, Abr., *Triall*, pl. I, 8, p. 597.

² *Richardson v. Dowdale* (1605), *ut supra*.

bill in equity did not lie because, if all were true, yet, by the Act of the Settlement, which gives all lands of the rebels in Ireland which they or any in trust for them should be to the king thereby, the estate of the lands is in the king, and not only a trust. And he sets forth further that those matters had been questioned in several suits, *viz.* whether that Sir Morrice Eustace, the lessee, were the same person who was attainted or no or whether the estate or a trust only vested in the king. And the now plaintiff had had three suits by bill in equity and also a bill in Chancery in Ireland, which he waived, (I think) dismissed. And the defendant had two verdicts at the bar in Ireland for his title, *viz.* that Sir Morrice Eustace, the lessee, was not the person attainted, but another of that name. And, thereupon, the said Mr. Eustace coming into England to defend himself, the plaintiff did dismiss his bill in equity in Ireland and exhibited this bill here.

The cause being heard here, the Lord Chancellor [JEFFREYS] doubted whether, as this case is circumstanced, *viz.* after two verdicts and judgment in matters triable in Ireland, *viz.* which of the two was the person who was attainted, and the point in law upon the Act of Settlement, he could not determine it. And precedents [were] directed to be searched and the Chief Justice of the Common Pleas and Chief Baron of the Exchequer to be attended with them, which was done.

And now the cause, the said judges assisting, came to a hearing and the plaintiff's counsel, Serjeant *Holt*, Mr. *Finch*, and others, argued for the plaintiff, making the question to be whether, a trust of lands in Ireland and the trustee being here in England, this court has jurisdiction, for, though this court cannot execute their decree by [a writ of] sequestration or giving possession of lands in Ireland, yet they can compel the party. And, in the case of partition, the court here decreed an account of the profits, although they dismissed the bill as to the partition of the lands. And though, here, the court will not grant sequestration as in the case of partition, nor name commissioners in Ireland to make the partition, yet they can compel the party to convey by imprisonment, and, otherwise, there would be a failer of justice, for they in Ireland cannot relieve because the party is here, and we here because the land is not here, and so no justice could be done. And the bill [was] dismissed.

Sed quaere, for in 1 Vern. 439, it is said that the Lord Chancellor was satisfied on perusal of the Act, that the estate in law vested in the king but that the plaintiff might notwithstanding be proper for a decree. And he held that this court might well direct a trial, whether the person that forfeited and the *cestui que trust* was one and the same, citing Sir William Tyrringham's Case, who, being so powerful that right could not be had against him in Buckinghamshire, the venue was changed on a bill brought here for that purpose. And he declared that, except the defendant would consent to try the identity here, he would decree it without more. Whereupon a trial was directed to he had by consent in Shropshire, but, at the instance of Chief Baron Turnor, it was with this direction, that, if the verdict went for the plaintiff, it should be without costs, but, if against him, he should pay costs.

And note in the Case of Barnwell and Rochford, Rolle Abr. 597, a trial was directed touching a feoffment of lands in Ireland. *Vide* 1 Vern. 438.

[Reg. Lib. 1686 A, f. 30.]

[Other reports of this case: 1 Eq. Cas. Abr. 133, 21 E.R. 938.]

351

Elliot v. Hele
(Ch. 1686)

A contract to make a jointure that does not specify any particular land does not create a lien on any land.

1 Vernon 406, 23 E.R. 547

10 November [1686].

A tenant in tail with a power to make a jointure of lands in the counties of A., B., and C., remainder in tail to J.S., marries and receives £3000 portion with his wife. And, by articles before his marriage, he covenants to settle a jointure, but he dies before any settlement was made. The wife dies, and her executrix brings the bill to have an account of the profits of the lands, which, by the articles, were covenanted to be settled in jointure, against the remainderman, who had upon his marriage settled those lands upon his wife and her issue, but with notice of the power in the first tenant in tail to make a jointure.

The Lord Chancellor [JEFFREYS] dismissed the bill, there being no equity for the administratrix of the first jointress against the second and her issue, who was equally a purchaser with the first. And this power, being a general power to make a jointure, and it was not said of what lands in particular, was not such a lien upon the lands as should affect a purchaser, though the power had been afterwards executed, much less where it was not executed at all, for, as a man, by such general power, might make a jointure of £500 *per annum*, so he might make a jointure of £50 or £5 *per annum*. And he said there was a great difference between a defective execution of a power and where the power was not executed at all.

But then, for the plaintiff, it was insisted that there were some fee simple lands, which were devised over, and those lands in the hands of a voluntary devisee were as much bound by those articles as if they had remained in the hands of the heir, as, where a trustee makes a voluntary conveyance, the feoffee, according to the resolution in Chudleigh's Case before the Statute of Uses,¹ stood seised to the same uses. And the law is the same of a trust, which is not executed by the Statute at this day.

[Reg. Lib. 1686 A, f. 57.]

[Earlier proceedings in this case: 2 Chancery Cases 29, 87, 22 E.R. 831, 859, 79 Selden Soc. 816.]

[Other reports of this case: 1 Eq. Cas. Abr. 345, 21 E.R. 1092.]

¹ *Dillon v. Freine* (1589-1595), 1 Coke Rep. 113, 135, 76 E.R. 261, 305, Popham 70, 79 E.R. 1184, 1 Anderson 309, 123 E.R. 489; Stat. 27 Hen. VIII, c. 10 (SR, III, 539-542).

352

Skinner v. Kilby
(Ch. 1686)

A legatee can renounce a bequest; such a renunciation is binding on the heirs.

2 Chancery Reports 391, 21 E.R. 696

The bill is to have the benefit of a bequest by the will of Robert Kilby, the will being, *viz.*, ‘if my son Richard Kilby should behave himself towardly and undertake the payment of my debts and legacies, then he [is] to have all my lands in Tredington; if he behave himself otherwise or to neglect to pay my debts and legacies as aforesaid, then he [is] to have but 5s.’ and he left it to the direction of his executrix, Jane Kilby, the defendant’s mother and also mother of the said Richard Kilby, the plaintiff’s father.

The said Richard waiving the said devise made to him and neglecting the payment of his said father’s debts and legacies, the said Jane undertook and paid the same, being entitled by the said will. And, by her will, she bequeathed to the said defendant the premises.

This court, upon reading the said will of Robert Kilby, the testator, which being as is aforesaid, declared that, according to the said will, the said Jane was well entitled to the premises and that the defendant ought to enjoy the same and could not relieve the plaintiff, but dismissed the bill.

[Reg. Lib. 2 Jac. II, f. 72.]

353

Nayler v. Strode
(Ch. 1686)

An infant can surrender a copyhold estate.

2 Chancery Reports 392, 21 E.R. 696

The surrender of a copyhold estate by an infant of four or five years of age was allowed of by this court; yet the lord of the manor insisted he never heard of any admittance in that manor at such an age.

[Reg. Lib. 2 Jac. II, f. 473.]

354

Newte v. Foote
(Ch. 1686)

Neither a solicitor nor any of his clerks can be present at the taking of a deposition in a case concerning his client.

2 Chancery Reports 393, 21 E.R. 697

The defendant insists that the depositions in this cause are irregularly taken and ought to be suppressed for that Mr. Samuel Underwood, who was clerk to Mr. Edward Gibbon, solicitor for the

plaintiff in this cause, did write as clerk in execution of the said commission under the said commissioners. And the said Underwood confessed the same and solicited the matter, for which reasons the defendant's commissioners refused to join in the execution of the said commission, it being of great mischief for solicitors or their clerks to be privy to the taking of depositions in such causes as they solicit.

This court was well satisfied that the said depositions were for the reasons aforesaid irregularly taken and does order that the same be hereby suppressed and that the Six Clerk's certificate for the regular taking of the depositions be discharged.

[Reg. Lib. 2 Jac. II, f. 695.]

355

Griffith v. Jones
(Ch. 1686)

A devise to 'poor kindred' is governed by the Statute of Distributions.

2 Chancery Reports 394, 21 E.R. 697

Peter Griffith being seised in fee of lands and possessed of a personal estate of £20,000, in 1681, by his will, devised to his brother, the plaintiff, £200, to the plaintiff, Shonnet Price, and Dorothy Parry, the daughter of his sister Shonnet, £150 apiece, etc. and to the sons and daughters of his brother and sisters (not mentioned by name in his will) £10,000 equally between them, which said legacy does belong to the plaintiffs John Lloyd and Alice Williams, being the only nephew and niece not named in the will, and the overplus of his estate he obliged the executors should pay and distribute amongst his brother's and sisters' children and grandchildren and the rest of his poor kindred, according to his executors' discretions. And the plaintiffs claim the overplus of the said estate, as being all the brother's and sisters' children and grandchildren of the testator and poor kindred that can take by the will.

The defendants, the executors, insisted that they conceive the distributing and apportioning the said surplus is left to them by the express words of the will and that they ought to distinguish the grandchildren of the testator's brothers and sisters, whose fathers and mothers were dead before the testator and had no particular legacies by the will and consider the condition and number of children of the said kindred and give most to those that most want. And they conceived that such of the plaintiffs as have particular legacies ought to have but a small one if any part of the said surplus. And the defendants crave the directions of this court how far the words 'poor kindred' shall extend to what degree of relation.

This court decreed that the surplus of the said estate be distributed to and amongst the testator's brother's and sisters' children and grandchildren and, as to the rest of the poor kindred, according to the Act of Parliament for Distributing Intestates' Estates,¹ and no further and to be distributed in such shares and proportions as the executors in their discretions should think fit.

And whereas there are debts owing to the testator's estate and the debtors are poor, but propose to pay as far as they are able, this court decreed that the executors be at liberty to compound any debt owing to the said estate if they should think fit.

Creditors on judgments and bonds were decreed to redeem mortgages towards satisfaction of their debts, fo. 843.

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

2 Freeman 96, 22 E.R. 1082

Master of the Rolls, TREVOR.

A man made his will and gave several legacies to several of his relations, and, after his debts and legacies paid, he gave the surplus to his brother's and sisters' children and grandchildren and the rest of his poor kindred at the discretion of his executors.

[There were] two questions, how far the words 'poor kindred' should extend and, for that, [it was] resolved that it should carry one degree farther than he had expressed and no farther. It was said that, of late, it has been held that, if a man gives his personal estate amongst his kindred, that the devise should be governed by the Act of Distribution of Intestates' Estates. But this being a will, he said he would extend it one degree farther than the testator had expressed.

He held that the children and grandchildren and the rest of the poor children should have equal shares and that the executors should have no power to give more to one than another, notwithstanding the words 'at the discretion of my executors'.

[Reg. Lib. 2 Jac. II, f. 353.]

356

Berney v. Pitt
(Ch. 1686-1687)

A court of equity will grant relief against contracts and securities given as the result of bad faith, dishonesty, and overreaching.

2 Chancery Reports 396, 21 E.R. 697

The bill is that the plaintiff's father being only tenant for life of a real estate, which, after his death, would come to the plaintiff, and the plaintiff's father allowing the plaintiff but a small subsistence, the plaintiff borrowed of the defendant £1000 in 1675 and entered into a judgment of £5000 defeasanced for the payment of £2500 after the plaintiff's father's death, which happened in 1679.

The defendant insists that he lent the plaintiff £1000, for which the plaintiff gave a bond and warrant of attorney to confess judgment to the defendant of £5000, which was defeasanced, that, in case the plaintiff should out-live his father and in one month after his father's death pay the defendant £2500 and if the plaintiff should marry in his father's lifetime, then he should from such marriage, during his father's life, pay the defendant interest for the £2500. And the defendant insists that, if the said plaintiff died before his father, the defendant had lost all his money.

This cause being first heard by My Lord Finch, 9 February 33 Car. II [1681], who then, upon reading the said defeasance, declared that, as this cause was, he could not relieve the plaintiff otherwise than against the penalty and decreed the plaintiff to pay to the defendant £2500 with interest.

This cause was re-heard by My Lord Chancellor JEFFREYS. The plaintiff insisted that he had by order of this court paid £2300 upon the said judgment and that the late Lord Chancellor and Lord Keeper had frequently relieved against such fraudulent and corrupt bargains made by heirs in their fathers' lifetime and that there was not any real difference where the contract is for money and where it is for goods.

This court, on reading the defeasance, declared it fully appeared that these bargains were corrupt and fraudulent and tended to the destruction of heirs sent hither for education and to the utter ruin of families. And as there were new frauds and subtle contrivances for the carrying them on, so the relief of this court ought to be extended to meet with and correct such corrupt bargains and

unconscionable practices and decreed the former order to be discharged and the plaintiff to be restored to what he has paid over and besides the principal money and interest.

2 Vern 14, 23 E.R. 620

January 1686[/87].

The plaintiff being a young man, as he alleged, and his father tenant for life only of a great estate, which, by his death, was to come to the plaintiff in tail, and, during his life allowing the plaintiff but a narrow allowance, he became indebted and borrowed £2000 of the defendant in 1675. And he entered into two judgments of £5000 apiece, defeasanced each of them that, if the plaintiff outlived his father and, within a month after his father's death, paid the defendant £5000 and if the plaintiff should marry in the lifetime of his father, then, if he should, from such marriage during his father's life, pay the defendant interest for his £5000, the defendant should vacate the judgment with this farther clause in the defeasance, that it was the intent of the parties, if the plaintiff did not outlive his father, that the money should not be repaid. In January 1679, the plaintiff's father died.

And to be relieved against the said judgments upon payment of the £2000 lent with interest was the bill, which complained of a fraud and a working upon the plaintiff's necessity when in straits.

This cause came first to be heard in Hilary term 27 Car. II [1676] before the Lord Nottingham, who, in regard the judgments were for money lent and not for wares taken up to sell again at an undervalue, as improvident heirs used to do, and, in regard of the express clause in the defeasance of the defendant's losing all if the plaintiff died before the father, did not think fit to relieve the plaintiff against the bargain itself without paying the £5000 with interest from a month after the plaintiff's father's death. And he did decree, upon the payment of the £5000 with interest, the defendant should acknowledge satisfaction upon the judgments. And the money was paid, being £5390, and the judgments were vacated accordingly.

And now, the cause coming to be reheard at the plaintiff's instance before the Lord Chancellor JEFFREYS, it was insisted that there was no true difference in the case of an unconscionable bargain whether it be for money or for wares and that the inserting the clause in the defeasance that the defendant should lose his money if the plaintiff died before his father did not differ the case in reason at all from any other bargain made by the plaintiff or other tenant in tail to be paid for at their father's death, for, in these cases, if the tenant in tail died, living the father, the debt would be lost of course, and, therefore, the expressing of it particularly in the defeasance made the bargain the worse as being done to color a bargain that appeared to the defendant himself unconscionable.

And, though there was not in this case any proof of any practice used by the defendant or any on his behalf to draw the plaintiff into this security, yet, in respect merely to the unconscionableness of the bargain, the Lord Chancellor [JEFFREYS] discharged the Lord Nottingham's decree and did decree the defendant Pitt to refund to the plaintiff all the money he had received of him except the £2000 originally lent and the interest for the same.

British Library MS. Hargrave 83, p. 31

The defendant lent the plaintiff £1000 in the lifetime of his father and the plaintiff gave the defendant a recognizance to repay £2500 in case he survived his father, if not, the £1000 was to be lost.

The bill was brought by Berney after the death of his father.

Lord Nottingham would not relieve, but LORD JEFFREYS, upon a rehearing, did.

[Reg. Lib. 1686 A, ff. 273, 373.]

357

Cooke v. Anonymous
(Ch. 1686)

Additional sureties who agree to pay if the original sureties do not pay are liable for contribution.

2 Freeman 97, 22 E.R. 1082

Three [were] bound in a bond, one being principal [debtor] and the other two sureties. Afterwards, a fourth man becomes bound to the obligee, that, if the other three did not pay according to the condition of the bonds, that he would pay. A month after[wards], one of the two sureties pays the money and prefers his bill against the fourth, now, for contribution. And the question was whether he should be bound to contribute, his being but a supplemental security.

And the Master of the Rolls [TREVOR] seemed to think that he should.

[Other reports of this case: 2 Eq. Cas. Abr. 223, 22 E.R. 189.]

358

Knight v. Atkyns
(Ch. 1686-1687)

In this case, under the terms of the settlement in issue, the heir and not the widower was entitled to the estate.

2 Chancery Reports 400, 21 E.R. 699

The plaintiff is brother and heir as well of John as Benjamin Knight and also executor of the said Benjamin. And the said John Knight, being seised of a plantation in Barbados of £1000 *per annum*, by his will, declared his debts to be paid and gave several legacies and made his brother Benjamin sole executor and gave him the residue of all his real and personal estate. And the said Benjamin proved the will. And, afterwards, a treaty of marriage was between the said Benjamin and Sir Jonathan Atkyns on behalf of Frances, the daughter of Sir Jonathan, upon which treaty, it was agreed that Sir Jonathan should give the said Benjamin £1500 as a portion with the said Frances and, for a jointure in case Frances survived, Benjamin was to add £1500, and the said sums to be laid out in a purchase of lands to be settled upon Benjamin and Frances for life and for a jointure for Frances in lieu of her dower, and, after their decease, to the issue between them, and, for want of such issue, to the right heirs of the said Benjamin and, until such purchase, the said respective sums of £1500 to be paid into the hands of the feoffees and the increase thereof to the uses aforesaid. But, in regard such a purchase could not be speedily found out, Sir Jonathan and Benjamin became mutually bound to each other by bonds of £3000 penalty with condition reciting that there being suddenly a marriage to be had between the said Benjamin and Frances and for settling a future maintenance upon Frances in case she survived and upon the issue between them, if, therefore, Sir Jonathan, his heirs, executors, etc. should pay as a marriage portion with the said Frances into the hands of two feoffees to be jointly appointed between them £1500, which, with the like sum to be paid by Benjamin, was to be laid out upon good security, real or personal, and the increase thereof for the uses aforesaid and, in case the whole was not provided within a short time, then so much as either party should deposit and the remainder with all convenient speed, then the said bonds to be void. Such provision was sufficient and in full of any dower the said Frances might have to Benjamin's estate.

No feoffees being appointed, the £1500 still remains at interest in Sir Jonathan's hands. And

the said Benjamin, for payment as well of his own as his brother John's debts and legacies and to oblige his real and personal estate for performance of the marriage agreement, did by deed in 1681 convey unto trustees all his plantations, houses, etc. upon trust to himself for life and after his death to satisfy the said bond of £3000 for payment of £1500 to Sir Jonathan for the future maintenance of the said Frances according to the said marriage agreement and in full of dower and to do all things according as he by his last will should direct. The said Benjamin, by will 10 December 1681, therein reciting the condition of the said bond, gave his wife £1000 unpaid of Sir Jonathan's bond and his trustees to pay £1500 with £500 he had received of Sir Jonathan in part of his wife's portion, which sums made in all £3000, and was to be laid out in a purchase of lands to be settled to the uses aforesaid. And he made Hulkot and Fowler executors in trust to manage for the plaintiff, whom he made his sole executor, who, afterwards, took upon him the execution of the said will. And he claims the said £3000 to be laid out in lands to be settled according to the said marriage agreement, which was in case Benjamin died without issue, the said lands so to be settled were to come to Benjamin's right heirs. And the plaintiff is instituted as heir and executor of Benjamin.

The defendant Pierce confesses the marriage agreement and bonds, as in the bill, and that the marriage between the said Henry and Frances took effect and the said Benjamin is since dead and that, since his death, the said defendant Pierce has married the said Frances and is thereby entitled to the benefit of the bond entered the into by the said Benjamin to Sir Jonathan and the monies due thereon and to the third part of Benjamin's lands.

The plaintiff insists that, the said Frances dying without issue, the money in Sir John Atkyns's hands ought now to be paid to the plaintiff.

This court, upon reading the said bond and condition and the deed and will of Benjamin, declared that, by the marriage agreement and condition of the bond, it was very clear that the said Frances, having no issue by the said Benjamin, could only have an estate for life or the interest of the money for her maintenance and that the plaintiff is well entitled to have the said £3000, paying the defendant Pierce interest for the £1500, which the said Benjamin, the plaintiff's testator, was bound to layout. And he decreed accordingly.

2 Vernon 20, 23 E.R. 624

20 April 1687. Richard Knights, plaintiff; Sir Jonathan Atkyns, John Pierce, and Frances, his wife, *et al.*, defendants.

It was agreed upon the marriage of Benjamin Knights and the defendant Frances, daughter of Sir Jonathan Atkyns, that Sir Jonathan should give her a portion of £1500 and that Benjamin should put £1500 more to it and this £3000 to be laid out in the purchase of lands to be settled on Benjamin and Frances for her jointure and on the heirs of their two bodies.

Benjamin dying without issue, Frances intermarried the defendant Pierce. The plaintiff, being heir of Benjamin, brought his bill to have the money owing by Sir Jonathan Atkyns together with £1500 more, which he offered to lay down, laid out in a purchase according to the marriage agreement. Frances, Pierce's wife, died before answer.

For the defendant Pierce, it was insisted at the hearing, though no mention of it in his answer, that he, as administrator to his wife, who survived Benjamin, was entitled to the money and not the heir of Benjamin, all the uses for which the purchase was agreed to be made being spent by the death of Benjamin and Frances without issue, and that there was no mention in the marriage agreement how the remainder in fee should go and that, the wife's portion being equal to the money laid down by the husband, it would have been reasonable if a question had been made in this court how the remainder should have been limited in the life of the parties to have decreed it for the right heirs of the survivor and that, therefore, the purchase being never made and the wife surviving, she was entitled in equity to the whole money, and the defendant, her husband, as her administrator, had the same right if not to the whole, at least to a moiety, which was her own proper portion.

But, for the plaintiff, it was insisted that, if a bill had been brought in the lifetime of the husband and wife to have had the purchase made, it would have been decreed to have been to the

use of the husband and wife and the heirs of their two bodies with a remainder to the right heirs of the husband.

The Lord Chancellor [JEFFREYS] decreed it for the heir upon the presumption that it was so intended and that Sir Jonathan Atkyns should pay what remained in his hands of the £1500 to the plaintiff, the heir, the plaintiff paying the defendant Pierce interest for the £1500 which Benjamin Knights, Benjamin and the defendant Sir Jonathan Atkyns having mutually entered into bonds for that purpose, was bound to lay out, and also interest for £500, which Benjamin had received of Sir Jonathan in part of his wife's portion from the death of Benjamin to the death of Frances.

[Reg. Lib. 1686 A, f. 604.]

[Other reports of this case: 1 Eq. Cas. Abr. 274, 21 E.R. 1041.]

359

Marsden v. Panshall
(Ch. 1686)

A bill of discovery lies to determine what specific goods are in a pawnee's hands in order to be able to bring an action for them in a court of common law.

1 Vernon 407, 23 E.R. 548

11 November [1686]. Lord Chancellor.

The plaintiff was a clothier in Yorkshire, and he entrusted one Bumpas to sell his cloths here in London. Bumpas, after he received the cloths from the plaintiff, pawns them to the defendant, who was a pawnbroker in town.

The plaintiff's bill was to discover whether those cloths came to the hands of the defendant, who, by answer, confessed that some cloths were pawned to him by Bumpas, but he did not admit that they were the plaintiff's cloths whereby to enable him to bring an action at law.

Serjeant *Maynard* this day moved for the plaintiff that the defendant might be ordered to let the plaintiff with two or more persons present have a sight of the cloths pawned by Bumpas, which was ordered accordingly, the meaning of which was and so it was taken by the court that the plaintiff should thereby be enabled to bring an action at law.

[Reg. Lib. 1686 B, f. 32.]

360

Cole v. Warden
(Ch. 1686)

An equity of redemption is an asset of a decedent's estate.

1 Vernon 410, 23 E.R. 550

15 November [1686]. In Court.

The plaintiff, having a subsequent mortgage and having also bought in the title of the heir at law to one Le Wright, brought his bill against the defendant and one Richardson and others. And Richardson, by answer, set forth that he had a prior mortgage from Le Wright and also moneys due to him by bond and, on payment, should be ready to reconvey.

For the defendant, it was insisted that, as against the heir, the mortgage being but a mortgage

for years, the reversion, which attracts the redemption, was assets at law and, for that reason, the equity of redemption was adjudged assets in this court in the Case of Davie and Dabinett,¹ which was first heard at the Rolls and settled upon an appeal to the Lord Chancellor. But it was admitted there was a difference between a mortgage in fee and a mortgage for years, for, in the Case of Bennett and Box,² which was resolved with the advice of judges, they would not allow that the equity of redemption of a mortgage in fee should be assets in equity to pay a bond creditor. But, in this case, the plaintiff has not only the title of the heir at law, but also subsequent mortgages, which his counsel alleged were to the value of the estate.

The Lord Chancellor [JEFFREYS] directed the Master should certify that matter specially and, when he saw the value of the estate, he would decree according as the nature of the case required, his present opinion being that, if there was a surplus beyond the mortgages, it should be assets to answer bond debts.

361

Plucknet v. Kirk
(Ch. 1686)

An equity of redemption is a property right that can be reached by creditors.

1 Vernon 411, 23 E.R. 551

Eodem die [15 November 1686]. In Court.

Amongst other matters in this case, the point chiefly disputed was whether the equity of redemption of a mortgage in fee since the Statute of Frauds and Perjuries³ should be assets in equity to satisfy a debt by bond.

And the Lord Chancellor [JEFFREYS] inclined that it was, but he respited his decree until the Master had reported a state of the case.

[Raithby's note: The decree was reserved both as to judgment and bond debts, Reg. Lib. 1686 B, f. 181, and so afterwards decreed. Reg. Lib. 1686 B, f. 844.]

¹ *Davis v. Dabinett* (1674-1676), 73 Selden Soc. 55, 338.

² *Bennet v. Box* (1662), 1 Chancery Cases 12, 22 E.R. 669, 2 Freeman 184, 22 E.R. 1149, 2 Eq. Cas. Abr. 465, 22 E.R. 396.

³ Stat. 29 Car. II, c. 3 (SR, V, 839-842).

362

Clowdsley v. Pelham
(Ch. 1686)

In this case, a decedent's real and personal property was held liable to pay his debts.

1 Vernon 411, 23 E.R. 552

19 November [1686]. Lord Chancellor.

The plaintiff's bill was to have satisfaction for a debt owing to him by Anthony Deane, deceased, who, by his will, had devised all his lands to the defendant Pelham and the heirs of his body, with remainder over to another. And, in another part of his will, reciting that he owed the defendant Pelham money upon account, he, therefore, devised to him all his personal estate, and he made him executor, willing him to pay his debts.

Upon the reading of the will, though the clause as to payment of debts seemed to relate to the personal estate only and though the lands were devised to the defendant in tail with a remainder over to another and that it was objected that a tenant in tail could not be a trustee, yet the court [JEFFREYS] decreed both real and personal estate to be sold for the payment of the testator's debts.

[Reg. Lib. 1686 B, f. 88.]

[Other reports of this case: 1 Eq. Cas. Abr. 197, 21 E.R. 986.]

363

Hunt v. Matthews
(Ch. 1686)

A widow, with the consent of her fiancé, can settle her estate in trust for the benefit of her children by her first husband.

1 Vernon 408, 23 E.R. 549

20 November [1686]. Master of the Rolls. In Court.

The case was a widow, before she married the defendant, her second husband, assigned over the greatest part of her estate, to the value of £800, to trustees as a provision for her children by her first husband. The defendant, after his marriage, having got this deed into his possession, suppressed it.

Upon the hearing, it was insisted for the defendant that this deed, made by the widow a little before her marriage with the defendant, was fraudulent, and it was done with a design to cheat her husband, and it ought not, therefore, to be countenanced in equity. And they cited the Case of Sir Philip Howard and Baker, where an assignment made by the widow before her marrying a second husband was by a decree set aside.

But the court [TREVOR] thought that a widow might with a good conscience before she put herself under the power of a second husband provide for the children she had by the first. And the deed being suppressed by the defendant, by which the particulars and value of the estate might appear, he decreed him to pay the £800 without directing any account.

[Raithby's note: This decree stands entered 12th November, and interest was decreed from the time of the marriage of the defendant with the plaintiff's mother to be computed by the Master, it fully

appearing that there was a deed made and executed by the said Sarah Hunt, the widow, before her marriage with the defendant for settling the value of £800 on or in trust for her daughter, the plaintiff, Ann Hunt, but that the defendant confessed that he was consenting thereto and that, after his marriage, he got the same deed into his custody and burnt or destroyed it, so that it should never rise against him, nor ever do the plaintiff Ann Hunt any good. And the defendant was to be allowed for the maintenance of the plaintiff for such time as she lived with him and his wife, the plaintiff's mother. And the decree, on a re-hearing, was confirmed. Reg. Lib. 1686 A, ff. 152, 303.]

[Other reports of this case: 1 Eq. Cas. Abr. 59, 21 E.R. 872.]

364

Fursor v. Penton
(Ch. 1686)

A trust will not be implied in favor of a married woman.

1 Vernon 408, 23 E.R. 550

Eodem die [20 November 1686]. Master of the Rolls. In Court.

The case was a man, before marriage, covenants with his intended wife that she should have a power to dispose of £300 of her estate notwithstanding the intermarriage. The husband now brings his bill against the defendant, in whose hands the £300 was, setting forth that, if there was any such agreement with his wife, the same was discharged by the intermarriage.

For the defendant, it was insisted that he was concerned only as a trustee. But he offered it to the court that, though the covenant was improvidently taken in the name of the wife, whereas it ought to have been in the name of trustees and, though it should be admitted that the marriage, in strictness of law, had discharged the covenant, yet a court of equity would never suffer a trust to be so defeated.

And the court [TREVOR] inclined to dismiss the bill.

But then, the plaintiff's counsel alleging that the wife was consenting that the money should be paid to the husband, the court adjourned the cause until next term, when the plaintiff might bring his wife into court to be examined.

In the arguing of this case, the Case of Smith *et ux.* v. Stafford, in Hob. fo. 216,¹ was cited, where, according to the book, a promise by the husband to the wife before marriage to leave her £500 at his death was discharged by the intermarriage.

But note the case of Clarke and Thompson² is directly contrary, and, there, the Case of Smith and Stafford is cited, and three judges were of opinion that the promise was not discharged by the intermarriage, and only My Lord Hobart [was] of the contrary opinion. But neither of those cases come up to this case, for here, it is that the wife, though married, may dispose of £300. There, it is that the husband, at his death, would leave his wife worth £500, and the reason of the case in Cr. Jac.³ is that it was not a duty during the coverture.

¹ *Smith v. Stafford* (1618), Hobart 216, 80 E.R. 363, also Noy 26, 74 E.R. 996, Hutton 17, 123 E.R. 1069, 1 Brownlow & Goldesborough 18, 123 E.R. 638.

² *Clark v. Thomson* (1620), Croke Jac. 571, 79 E.R. 489.

³ *Clark v. Thomson* (1620), *ut supra*.

365

Knightly v. Burdett
(Ch. 1686)

An insurer is not liable under a policy where the insured has not suffered any loss covered by the policy even where the policy does not require the insured to prove any loss.

2 Vernon 10, 23 E.R. 619

23 November [1686]. Lord Chancellor JEFFREYS. Knightly, Robinson, *et al.*, plaintiffs; Burdett, Hutchinson, *et al.*, defendants.

The king having granted a duty upon sea coal for the king's life to the Lord Townsend, the defendants were farmers of that duty. And the plaintiffs insured the defendants that the duty should not determine before Michaelmas 1685 and that, if it did, they would pay the defendants the several sums of money subscribed on the policy without abatement and without questioning what the defendants might lose thereby and without any farther dispute, plea, or pretence whatsoever. The duty determined by the king's death in February 1684[/85]. And the premium paid to the plaintiffs was three guineas percent for insurance. The defendant Burdett had recovered at law of the plaintiff Knightly the sum of £50, being the sum subscribed by him.

The bill suggested that, though the duty did expire by the demise of the king, yet there was no interruption or stop of payment of the duty. But his present Majesty did declare by proclamation that tonnage and poundage should be collected as in his brother's time and that, thereby, the patentee and the defendants under him did enjoy the duty until Michaelmas 1685 or made some composition touching the same and so were not damnified. And, therefore, they prayed to be relieved against the policy and verdict, which the defendants insisted upon by plea.

And, though it was so express that, in case the duty expired before Michaelmas 1685, the plaintiffs would pay the subscription without abatement etc., as aforesaid, yet the Lord Chancellor [JEFFREYS] overruled the plea and ordered the defendants to answer.

[Reg. Lib. 1685 A, f. 213.]

366

Durston v. Sandys
(Ch. 1686)

An agreement and a bond to resign from a rectory is unenforceable where it is for an improper purpose, such as not to demand the payment of tithes.

1 Vernon 411, 23 E.R. 552

24 November [1686]. Lord Chancellor.

The defendant, upon his presenting the plaintiff to a parsonage, took a bond of him to resign, which, though in itself lawful, yet the patron making an ill use of it, *viz.* to prevent the incumbent from demanding tithes in kind, the court [JEFFREYS] awarded a perpetual injunction against the bond.

[Raithby's note: The defendant had a large estate in the parish, and, upon the plaintiff's demanding tithe of the defendant for the same, the defendant gave him notice to resign. The plaintiff, accordingly, attempted to resign to the bishop of Gloucester, who, on learning the cause of the resignation, refused to receive it and ordered the plaintiff to continue to do duty in the parish in

question. The defendant then put the bond in suit, and the plaintiff filed his bill. The defendant put in a plea, which was overruled.]

2 Chancery Cases 186, 22 E.R. 904

The defendant, patron of the church of Messenden in Gloucestershire, took a bond from the plaintiff to resign upon request.

Upon hearing the cause, a perpetual injunction was decreed against the bond, for the court and all sides agreed that the bond was good, yet, if the patron made use of it to his own advantage, by detaining tithes or the like, the court would relieve against the bond. And, in this case, the patron did detain his tithes from the plaintiff, whom he had presented. He pretended in his answer a *modus decimandi* but made no proof of it and, being patron of several other churches, had taken a bond from those he had presented and made ill use of it.

2 Chancery Reports 398, 21 E.R. 698

The defendant being patron of the rectory of Messenden in the County of Gloucester and the former incumbent having resigned the same, the defendant told the plaintiff he would present him to the said rectory worth about £100 *per annum* and the plaintiff coming to the defendant for the said presentation, the defendant drew a bond of £300 penalty with condition that the plaintiff should resign the said rectory at any time within six months notice, which the plaintiff sealed. And, thereupon, the plaintiff was instituted and inducted and was ever since a constant resident on the place and has been at charge of repairs. And the plaintiff demanded tithes of the defendant, who refuses to pay the same, but gave the plaintiff notice to resign, who resigned the said rectory into the hands of the bishop of Gloucester. But the bishop refused to accept the said resignation and ordered the plaintiff to continue to serve the cure, declaring that he would never countenance such unjust practices of the defendant, but ordered his register to enter it as an act of court that the plaintiff had tendered his resignation and that the said bishop had rejected it. The defendant arrested the plaintiff on the said bond for not resigning. So, to be relieved against the said bond is the plaintiff's suit.

The defendant insisted that the plaintiff demanded more than his just due for tithes; whereupon the defendant refused payment and that, the defendant requesting the plaintiff to resign according to the condition of the said bond, the defendant arrested him, which he hopes is just for him to do, and that this court will not hinder the prosecution and that the plaintiff has no color of relief in this court against the said bond. And he insists that the reason of his arresting the plaintiff on the said bond was his non-residence and litigious carriage to the parishioners.

This court declared that such bonds taken by patrons from their clerks to resign at pleasure may be good in law yet ought to be enjoined and damned in equity whensoever they are used to any ill purposes. And the defendant making ill use of the said bond, His Lordship [JEFFREYS] decreed that a perpetual injunction be awarded against the defendant to stay proceeding at law upon the said bond.

[Reg. Lib. 1686 A, f. 80. The cause was then heard 24th December, according to the Register's Book, and decreed as above stated. Reg. Lib. 1686 A, f. 108.]

[Other reports of this case: 1 Eq. Cas. Abr. 86, 21 E.R. 897.]

Drury v. Hooke
(Ch. 1686)

Marriage brokage bonds are void and unenforceable.

1 Vernon 412, 23 E.R. 553

Eodem die [24 November 1686]. In Court, Lord Chancellor.

The bill was to be relieved against a marriage brokage bond. And, it appearing that the marriage was brought about without the consent of the young woman's parents, who were then living, the Lord Chancellor [JEFFREYS], for that reason alone, decreed the bond to be delivered up, terming it a sort of kidnapping. And he said there was a material difference where the parties were at their own disposal and where their parents were living, though such a bond was in no case to be countenanced.

2 Chancery Cases 176, 22 E.R. 900

The plaintiff gave a bond to the defendant conditioned in effect that, if the plaintiff married A.S., then the plaintiff to pay a certain sum of money.

A.S. was a young gentlewoman and had a £2000 portion. And the plaintiff, being about sixty years of age and having seven children, made use of the defendant to procure the marriage. And he did it and put the bond in suit. The bill was to be relieved against the bond.

Mr. *Finch* and others, for the plaintiff, pressed the great inconvenience of such brokage, especially in the case of young persons, and it were prejudicial to the young woman.

Serjeant *Rawlinson* and others *e contra*: We are defendants not plaintiffs, and the bond is good at law. And in the Case between *Cressey* and *Crooke*,¹ the court gave no relief in the same case, which was that the Lady *Shipdain*, being a rich widow, lodged in *Crooke*'s house, and *Cressey* agreed with *Crooke* that, if he could get him access to the lady, he would give him a sum of money if he married her and gave a bond to pay it. The marriage proceeded. *Crooke* put the bond in suit. *Cressey* sued in Chancery to be relieved and was dismissed.

Lord Chancellor [JEFFREYS]: [There is a] great difference of a widow forty-five years of age and a young maiden that has no friends to advise her. And, therefore, he decreed for the plaintiff.

Such bonds are of very ill consequence.

[Other reports of this case: 1 Eq. Cas. Abr. 89, 21 E.R. 900.]

¹ *Cressy v. Croke* (1677), 79 Selden Soc. 490.

368

Canning v. Hicks
(Ch. 1686)

A mortgage is personal property of a decedent's estate.

A mortgage that is undisposed of by a will goes to the decedent's executor and not to his next of kin.

Lincoln's Inn MS. Misc. 498, p. 22, pl. 2

Trinity 2 Jac. II. Cannon v. Hicks.

J.S., whose heir the plaintiff is, having a mortgage in fee, having made the defendant executor and, by his will, devised £20 to his executor and a lease to the plaintiff. And he dies. And now, the plaintiff pretending that the mortgage being in fee did belong to him, therefore, he exhibited his bill against the executor to have the writings.

The plaintiff's counsel insisted that there being a personal estate more than sufficient to pay all the debts and a legacy of £20 being devised to the executor, it was a plain declaration of the intention of the devisor that he should not have any other benefit and, therefore, this mortgage ought to belong to the heir.

The counsel on the other side relied upon the common cases that a mortgage, though in fee, is but a security for money and so part of the personal estate and ought to go to the executor. And many cases were cited to that purpose.

And of that opinion was the Master of the Rolls [TREVOR] notwithstanding the devise to the executor. And so the bill was dismissed.

In the arguing of this case, a case was cited to have been decreed that by My Lord Guilford to this effect, a mortgage was made of a copyhold in fee, the mortgagee died having made A. his executor. A., as guardian to the heir of the mortgagee, is admitted to the copyhold, and, receiving the profits, he accounts to the heir of the mortgagee for them for about twelve years and then the heir dies, and A., as executor to the mortgagee, pretended that the mortgage belonged to him, but that My Lord Keeper would not allow of it after he had so long submitted to the title of the heir.

But, notwithstanding this, the plaintiff's bill in the principal case was dismissed.

[Other copies of this report: Lincoln's Inn MS. Misc. 503, p. 89, pl. 2, Lincoln's Inn MS. Misc. 504, p. 85, pl. 2.]

1 Vernon 412, 23 E.R. 553

26 November [1686]. Lord Chancellor.

Upon a rehearing of this cause, the sole point insisted on was, where a man had by his will devised particular legacies to his executors, as he had likewise done to his heir, whether the heir or executor, there being no defect of assets, should have some mortgages in fee made to the testator that had been forfeited in his lifetime.

And the court [JEFFREYS] confirmed their former decree in favor of the executor. But he did admit, as this case was circumstanced, there was much to be said in behalf of the heir. But, since it had been often very solemnly settled that all mortgages should be looked on as part of the personal estate and that it was now grown the established rule of the court, it was not fit to alter it in order to accommodate one particular case.

In the argument of this case was cited the Case of Turner and Crane, on the one side, where an old forfeited mortgage of a copyhold was decreed to the heir, and, on the other hand, the case of

Baker and Thornbury,¹ settled in the Lord Nottingham's time, where, in the case of an old forfeited mortgage in fee, though the money, by the proviso, was made payable to the heir, yet it was decreed to be part of the personal estate, and the Case of Noy and Ellis,² though the mortgagors would not redeem, yet the land was decreed to the executors against the heir.

2 Chancery Cases 187, 22 E.R. 905

26 December [1686].

The mortgagee, where the mortgage was of the fee simple to him, devises £100 and other legacies and then adds a devise of £100 to the defendant, whom he makes executor, and dies.

Two points were decreed:

First, that the executor shall have the benefit of such a mortgage, viz. the land, and not the heir, though the land be descended to him;

Secondly, that the legacy does not bar the executor of the mortgagee, though it was much pressed by Mr. *Finch* and others to the contrary, and that it was an implication that the executor should have no more than the £100 because the testator expressly willed that the executor should not be paid his legacy until after his debts and other legacies paid so that the £100 is as much in this case as if he had expressly devised the £100 out of the residue of his estate after his debts and legacies [be] paid, which does strongly infer he meant no more than the £100, not the whole residue.

[Reg. Lib. 1686 A, f. 1106.]

369

Dunch v. Golding
(Ch. 1686)

A person who has a rent charge on a leasehold can be compelled to co-operate in a renewal of the lease, and he can compel the lessee to renew.

Lincoln's Inn MS. Misc. 498, p. 24, pl. 1

The plaintiff had a bishop's lease for three lives, and the defendant had a rent charge for his life secured out of that lease by demise and re-demise. But there was no covenant on the defendant's part that he should surrender to enable the plaintiff to renew, but yet he submitted by his answer to do it so he might have some money paid him, which he had before expended upon the like account.

And it was decreed accordingly by the Master of the Rolls [TREVOR]. And he was of opinion that, though the defendant had not submitted to it, yet he should have been decreed to do it without any covenant to that purpose so that his security be not thereby weakened and that the grantee of such a rent charge should have had a remedy against the grantor to compel him to renew in the case of a failure of lives or effluence of years.

Query how such a case can happen.

[Other copies of this report: Lincoln's Inn MS. Misc. 503, p. 91, Lincoln's Inn MS. Misc. 504, p.

¹ *Turner v. Crane* (1683), 1 Vernon 170, 23 E.R. 394, 2 Chancery Reports 242, 21 E.R. 668; *Thornborough v. Baker* (1675), 73 Selden Soc. 201, 3 Swanston 628, 36 E.R. 1000, 1 Chancery Cases 283, 22 E.R. 802, 2 Freeman 143, 22 E.R. 1117, 1 Eq. Cas. Abr. 327, 21 E.R. 1079, 2 Eq. Cas. Abr. 428, 22 E.R. 364.

² *Noy v. Ellis* (1676), 2 Chancery Cases 220, 22 E.R. 918.

86.]

370

Floyd v. Hughes
(Ch. 1686)

A condition in a devise for marrying with the consent of a third person lapses when the devisee attains the age of majority.

Lincoln's Inn MS. Misc. 498, p. 24, pl. 2

£1000 was devised to a girl for her portion without limiting any time of payment, and, afterwards, there was a proviso in the will that, if she should marry without the consent of the executors, that then she should have but £5 and the £1000 devised to her should go to J.S. The devisee attains her age of twenty-one.

And she exhibited her bill to have the £1000 paid her.

And it was decreed accordingly by the Master of the Rolls [TREVOR], who said the proviso is now determined, for it cannot be intended to extend any farther then if she should marry with the executors' consent before she attained the age of twenty-one, at which time the law adjudges her capable to dispose of herself; else, if she should live unmarried until four score, she could not have any portion so long as any of the executors should live.

[Other copies of this report: Lincoln's Inn MS. Misc. 503, p. 92, pl. 1, Lincoln's Inn MS. Misc. 504, p. 87, pl. 1.]

371

Coke v. Fountain
(Ch. 1686-1689)

Depositions in a former lawsuit can be used as evidence where the issues were the same and the parties were the same or in privity.

1 Vernon 413, 23 E.R. 554

Eodem die [26 November 1686]. In Court, Master of the Rolls [TREVOR].

Upon a motion, the defendant Fountain's counsel moved that they might be at liberty to read depositions in this cause, which were taken in a cause where the plaintiff's father was a party, the suit being in all matters the same.

But, on the other side, it was objected that the now plaintiff, not claiming as heir and his father being only tenant for life, those depositions could not be read against him.

And, after long debate, the defendant had only the common order for leave to read those depositions at the hearing, saving just exceptions.

It was said by Mr. Serjeant *Phillipps* that it is a common case, where one legatee has brought his bill against an executor and proved assets and, afterwards, another legatee brings his bill, that he should have the benefit of the depositions in the former suit, though he was not party to it.

Lincoln's Inn MS. Misc. 498, p. 75, pl. 1

Hilary vacation 1687/88.

The plaintiff's grandfather granted a rent charge out of his estate to the defendant, and, afterwards, he settled the estate upon himself for life, remainder to his son for life, remainder to the first son of his son in tail. And he dies.

The son exhibits a bill against the defendant to be relieved against this rent charge, in which cause several witnesses were examined. And, at the hearing, there was a decree, and then the son dies.

The plaintiff, his son, exhibits a new bill against the defendant upon the same equity. And now he prays that the depositions taken in the former cause might be made use of in this.

But, upon long debate, it was denied for that the now plaintiff, coming in by virtue of his remainder, did not come in in privity to his father, who was the plaintiff in the former cause.

[Other copies of this report: Lincoln's Inn MS. Misc. 503, p. 99, Lincoln's Inn MS. Misc. 504, p. 92.]

Lincoln's Inn MS. Misc. 498, p. 34

Michaelmas 1 Will. & Mar., Wednesday 20 November. In court, all the Commissioners of the Great Seal present.

John Cook, the plaintiff's father, made several leases of several parts of his lands to the defendant. And, likewise, he granted a rent charge of £1000 *per annum* to the defendant and her husband. Afterwards, he settled his estate upon his marriage to the use of himself for 99 years if he should so long live, with limitations to preserve contingent remainders, and then to his first and other sons in tail, etc. And, afterwards, he exhibited his bill against the now defendant to have an assignment of those leases and rent charge, acknowledging them to be made and granted in trust for himself. The defendants answered, and witnesses were examined, and the cause was heard. And the leases were decreed to be a trust for the plaintiff but not the rent charge. Before the enrolling of this decree, John Cook, the plaintiff, dies, leaving the now plaintiff, his only son, who exhibited this bill against the same Mr. Fountain to examine the former decree and to have the rent charge as well as the leases set aside.

The defendant answered. And, all his witnesses being dead, the question was whether the depositions taken in the former cause might be read for the now plaintiff against Mr. Fountain, who was the defendant in the former cause as well as this.

It was largely debated by counsel learned on both sides.

Mr. Attorney [General *Treby*] and others, for the defendant, urged that, in all cases, the benefit must be mutual and, where the defendant cannot make use of evidence against the plaintiff, the plaintiff shall not make use of it against the defendant. And it is agreed by all that the defendant, in this case, cannot make use of these depositions against the plaintiff because they were taken in a cause to which he was not a party or anyone under whom he claims, he claiming by way of a remainder. And the Case of Sir Ralph Bovey, in the King's Bench,¹ was cited, where a special verdict found a deed *in haec verba* in a case to which a tenant for life was a party, and, the deed afterwards being lost, it was held that the verdict could not be given in evidence against the

¹ Perhaps *Jennet v. Cooles* (1666 x 1667), 1 Siderfin 223, 262, 344, 82 E.R. 1070, 1094, 1147, *sub nom. Sir Ralph Bovy's Case*, 1 Ventris 193, 211, 217, 86 E.R. 131, 142 146, *sub nom. Jemot v. Cooly*, T. Raymond 135, 158, 83 E.R. 73, 84, 1 Levinz 170, 83 E.R. 353, 1 Keble 784, 915, 83 E.R. 1241, 1318, 2 Keble 20, 184, 270, 295, 84 E.R. 13, 115, 168, 184, *sub nom. Jemott v. Cowley*, 1 Williams Saunders 112, 85 E.R. 122.

remainderman and that it was a known rule that he who has a particular estate may benefit the remainder but cannot prejudice it.

On the other side, it was urged by Serjeant *Hutchins* and others that the reason why the depositions could not be read in this cause against the plaintiff was because he was no party in the cause wherein they were taken nor claimed under any that was, and, therefore, it would be very unreasonable he should be bound by proofs where he had no opportunity of cross-examining the witnesses and where there might be a collusion between the parties.

But that reason failed on the defendant's part for he was likewise defendant in the cause wherein the depositions were taken, had an opportunity of cross-examining, and was equally concerned to sift and contest the proofs then as now, the former bill being to the same effect as this. If a bill be brought by a remainderman to execute a decree to which the tenant for life was a party, he shall read the former proofs, for the court will not execute a decree blindfold[ed]. If one creditor brings a bill to discover assets, all the other creditors, though no parties, shall have the benefit of those examinations.

And a difference was taken between a bill to lay a charge upon an estate and a bill to discharge an estate.

Several cases were cited where depositions which were taken in one cause or in one court might be read in another if concerning the same matter. 16 Jac. I, Dunch against the Lady Norris; depositions taken in the [Court of] Star Chamber were read in the [Court of] Exchequer, though not between the same parties. 3 and 12 December 25 Car. II [1673], Morris and Cleyton against Breddale; depositions taken between the mother and the son were read in the cause between Morris and Clayton and the son. 22 Car. II, Sir Robert Britton and others against Sir Edward Bainton and others; depositions read in another cause between the same parties, and the defendant in this cause might use these depositions upon a bill to reverse that decree. And so it was done in the cause between Sir Robert Carr and Hetley.

But all the three Commissioners [to Hold the Great Seal] delivered their opinions that the advantage ought to be in all cases reciprocal. And, therefore, these depositions could not be read against the defendant. So the bill was dismissed for want of evidence. And an appeal was brought immediately in Parliament, *ubi pendet*.

[Other copies of this report: Lincoln's Inn MS. Misc. 503, p. 117, Lincoln's Inn MS. Misc. 504, p. 107.]

[Reg. Lib. 1686 A, f. 169.]

[Earlier proceedings in this case: 73 Selden Soc. 185, 362, 3 Swanston 585, 36 E.R. 984, 1 Eq. Cas. Abr. 227, 21 E.R. 1008.]

[Related cases: *Guavas v. Fountain* (Ex. 1687), 2 Freeman 99, 22 E.R. 1083, Eq. Cases Exch. 262, Dodd 327, 2 Eq. Cas. Abr. 281, 710, 22 E.R. 237, 597; *Gwevers v. Earl of Danby* (Ch. 1688), 3 Chancery Reports 216, 21 E.R. 771; *Fountain v. Guavas* (Ex. 1676), Eq. Cases Exch. 82; *Coke and Gwavas v. Fountain* (Ex. 1682), Eq. Cases Exch. 160; *Cooke v. Fountain* (K.B. 1680), Ventris 346, 86 E.R. 224.]

372

Traiton v. Traiton
(Ch. 1686)

A bond that is contra bonos mores such as to prevent a parent-child relationship is unenforceable.

1 Vernon 413, 23 E.R. 554

27 November [1686]. Lord Chancellor.

The heir having had some difference with his mother, the jointress, relating to the repairs of the mansion house, he settles the estate upon his brother, but, first, he takes a penal bond from him of £500 penalty in the name of the defendant, his sister, that he should never suffer his mother to come into the house. The bill was to be relieved against this bond.

The court [JEFFREYS], though the defendant insisted on the breach of the bond and that, thereby, a provision was intended her, decreed the bond to be delivered up and cancelled, it being against the law of nature to prohibit a son to cherish his mother.

[Reg. Lib. 1686 B, f. 100.]

[Other reports of this case: 1 Eq. Cas. Abr. 88, 21 E.R. 899.]

373

Nevil v. Saunders
(Ch. 1686)

In this case, the devise was held to be a trust for the devisee's separate use not executed by the Statute of Uses even though the devisee be an unmarried woman.

1 Vernon 415, 23 E.R. 555

Eodem die [6 December 1686]. Lord Chancellor.

Lands were given by will to trustees and their heirs in trust for Anne, the defendant's wife, and her heirs ('and assigns') and that the trustees should from time to time pay and dispose of the rents and profits to the said Anne or to such person or persons as she, by any writing under her hand as well during coverture as being unmarried, should order or appoint the same without the intermeddling of her husband, whom he willed should have no benefit or disposal thereof. And, as to the inheritance of the premises in trust for such person or persons and for such estate and estates as the said Anne, by any writing purporting her will or other writing under her hand, should appoint ('and seal in the presence of two or more credible witnesses, as well during coverture, as being unmarried, should give, limit, and appoint'), and, for want of such appointment, in trust for her and her heirs ('and assigns').

The question was whether this was an use executed by the Statute¹ or a bare trust for the wife. And the court [JEFFREYS] held it to be a trust only, and not an use executed by the Statute.

[Reg. Lib. 1686 B, f. 160.]

¹ Stat. 27 Hen. VIII, c. 10 (SR, III, 539-542).

[Other reports of this case: 1 Eq. Cas. Abr. 382, 21 E.R. 1118.]

374

Howe v. Howe
(Ch. 1686)

In this case, the court held that the copyhold estate in issue, which was for the life of the purchaser and his two brothers, was held in trust by the brothers for the purchaser's heir.

1 Vernon 415, 23 E.R. 556

7 December [1686]. Lord Chancellor.

J.S., who had taken a copyhold estate for the lives of himself and his two brothers, dies, leaving a son. The uncles, during the life of their nephew, suffer him quietly to enjoy. But, now, he being dead, they disturbed the administratrix of their nephew.

And the bill was brought by her to be relieved, as having the title of the first taker, who paid the fine, the other two lives being but in the nature of trustees for him.

Upon long debate, the court [JEFFREYS] decreed for the plaintiff, the administratrix, against the uncle, though it was taken notice of and pressed in arguing for the defendant that there was not any custom in the manor of which the estate was held that the first taker might surrender, nor is there any such custom where the copies run successively.

In the arguing of this case were cited as precedents of like decrees the cases of Powell and Theallwell; Clarke and Danvers;¹ Thynne and Bampfield.

375

Powell v. Arderne
(Ch. 1686)

Where a bill in equity charges the defendants with conspiracy, the defendants must deny any conspiracy in order to plead multifariousness.

1 Vernon 416, 23 E.R. 557

8 December [1686]. Lord Chancellor.

The defendant demurred because the plaintiff's bill was brought against several defendants for several distinct matters.

The demurrer was overruled because the plaintiff, by his bill, had charged the defendants with combination, which the defendant had not denied by answer.

[Other reports of this case: 1 Eq. Cas. Abr. 39, 21 E.R. 858.]

¹ *Clark v. Danvers* (1680), 1 Chancery Cases 310, 22 E.R. 815.

Barbon v. Searle
(Ch. 1686)

The question in this case was how to proceed in the Court of Chancery when there is an appeal pending in the House of Lords, but Parliament is not in session and new relevant matter is discovered pendente lite.

1 Vernon 416, 23 E.R. 557

11 December [1686]. Lord Chancellor.

The plaintiff, by his bill, which was partly original and partly a bill of review, set forth the order made by the Peers in Parliament, whereby Clerke, the plaintiff in the original cause, whose interest the now plaintiff has, was relieved as to a moiety of the personal estate and dismissed as to the real, and that such order had not been made, but that the defendant suppressed the evidences and had, pending the appeal, as the plaintiff has since discovered, burnt the deed that made out the plaintiff's title. And, therefore, he prayed the defendant might answer and discover the matters aforesaid, the plaintiff alleging in his bill that he did not thereby design to impeach the order of the House of Lords, but that, by this discovery, he might be capacitated to apply to the Lords in Parliament, when there should be a sessions, for such relief as the nature of the whole case, when discovered, should require.

To this bill, the defendant demurred. And, in arguing the demurrer, Serjeant *Maynard*, for the defendant, insisted that, after a judgment given, upon an appeal in the House of Lords, this court could not intermeddle further than to settle so much of the cause as the Lords had transmitted to this court, which concerned only the personal estate, and that matter this court had already, pursuant to the direction of the House of Lords, determined, and that no bill of review would lie in this case, that bills of review are not favored and are tied up to strict rules. And, for that purpose, he cited the Case of Dunny and Filmore,¹ where, upon a bill of review, the court had decreed the whole estate to the plaintiff, and, though it appeared even upon the face of the decree that the plaintiff had a title but to one moiety only, yet it was there resolved that no bill of review would lie upon a bill of review, and the defendant was left without a remedy. And he likewise cited Morgan's Case, where, upon a bill of review, the plaintiff could not produce the deed and so failed at the hearing of making out his equity, and, though the deed came afterwards to his hands, which plainly made out his title, yet it was adjudged to be a right without a remedy and the defendant to be without relief. And he likewise observed that the plaintiff's title of his own showing was only as assignee of Clerke, and an assignee can in no case have a bill of review, much less an assignee that comes in, as the plaintiff did, *pendente lite*.

For the plaintiff, it was answered that the stress of the serjeant's argument was levelled as supposing this to be a bill of review, whereas it was as well an original bill, as a bill of review, and that a difference had been commonly taken and allowed in this court, though it was not necessary to maintain the bill in question between a decree and a dismissal, to wit, where there is a decree, that is not to be altered but by bill of review, but, where there was only a dismissal, an original bill might be brought upon a new equity. And he said they did not pretend to say that this court could reverse or alter the order of the House of Lords. But, as there is little doubt to be made but that the Parliament, if it had been sitting, upon a petition would have directed this matter to have been examined in this court, in regard that it is not the course there to take answers upon oath, so, in the

¹ *Dunny v. Filmore* (1663-1682), 2 Chancery Cases 133, 22 E.R. 881, 2 Freeman 172, 22 E.R. 1138, Nelson 64, 21 E.R. 790, 1 Vernon 135, 23 E.R. 369, 1 Eq. Cas. Abr. 81, 21 E.R. 894.

interval of Parliament, when we cannot obtain such direction, this court may well proceed to have a discovery of this matter or, else, by death or otherwise, the plaintiff, peradventure, may lose the benefit of it, so that this bill is not to change or alter the Lords' order, but, in effect, is auxiliary to the proceedings before them.

The court [JEFFREYS], hereupon, ordered the defendant to answer the bill, and, when he had so done, the plaintiff was not to proceed any further without the special leave of the court.

[Reg. Lib. 1686 B, f. 1125.]

377

Orde v. Heming
(Ch. 1686)

Where a mortgagee has the power to enter into the mortgaged premises and to receive the profits therefrom until the debt is paid, there is no time limit on the mortgagor's right of redemption.

1 Vernon 418, 23 E.R. 559

Eodem die [11 December 1686]. Lord Chancellor [JEFFREYS].

The bill was to redeem a mortgage. And the defendant demurred by reason that, of the plaintiff's own showing, it appeared the mortgage was sixty years old.

The demurrer, upon argument, was overruled, because it was charged in the bill that the mortgagor agreed the mortgagee should enter and hold until he was satisfied, which is in the nature of a Welsh mortgage, and, in such case, the length of time is no objection.

[Other reports of this case: 1 Eq. Cas. Abr. 314, 21 E.R. 1069.]

378

Cock v. Burrish
(Ch. 1687)

In this case, the testator intended the residuary estate to be a joint tenancy, and he intended his executors to be trustees only.

1 Vernon 425, 23 E.R. 562

26 January [1687]. Lord Chancellor.

J.S. makes his will and the defendant Burrish and another executors, and he devises to them legacies of £20 apiece and likewise devises to them £800 in trust for the payment of several annuities to A., B., and C. for life, far exceeding the interest of the £800, and he devises the surplus of his estate to his nephews, Charles Cock and John Cock, equally to be divided between them, and he appoints the same to be paid to his executors in trust to be laid out for the benefit of the residuary legatees. One of the residuary legatees dies in the lifetime of the testator, and the other happens likewise to die within two years after the testator's death.

The first point was whether, in regard, by the devise of the surplus, Charles and John Cock were tenants in common and not joint tenants, the survivor should have the whole surplus.

And the court [JEFFREYS] decreed him the whole, the design of the will showing the testator chiefly intended their benefit, and not any advantage to his executors, who were in a manner strangers and but remotely related, and the rather for that, though the devise is not wholly joint, but several by the words 'equally to be divided', yet, in the latter clause, where he appoints the executors

to lay out the money for their benefit, there, it is joint again.

A second question was whether, the annuities being determined by the death of the annuitants, what remains of the £800 should go to the executors or to the surviving residuary legatee.

[JEFFREYS] decreed also with the plaintiff, it not being a conditional devise to them of £800, paying such and such annuities, but it was only deposited in their hands in trust for the payment thereof. And, as they were no way obliged to pay more than the £800, so there is no reason that they should have the benefit of what remained unexhausted of the £800 in payment of the annuities.

[Reg. Lib. 1686 A, f. 280.]

380

Beard v. Nutthall
(Ch. 1687)

Where a jointure fails, the widow must first claim her dower and then she may recover from her husband's estate any deficiency in the value of her jointure.

An administrator can retain any debts owed to him or her out of the decedent's estate.

1 Vernon 427, 23 E.R. 564

29 January, [1687]. In Court, Master of the Rolls.

The plaintiff's husband, after marriage, enters into a voluntary bond to settle a jointure of the value of [*blank*] on his wife, and, afterwards, he settles lands of that value upon his wife in jointure. And, thereupon, the bond was delivered up to be cancelled. The husband dies, and the jointress is evicted.

The bill was that the wife, being administratrix of her husband, might retain of her husband's personal estate against the defendants, who claimed a share of the personal estate upon the Statute of Distributions,¹ to the value of her jointure, there being no creditors in the case.

The court [TREVOR] ordered that, in regard the plaintiff was now become entitled to dower, that she should proceed at law for the recovery thereof and what the same should fall short in value of the jointure should be retained by her out of the personal estate, notwithstanding the bond was after the marriage and voluntary and delivered up to be cancelled, for an agreement, though voluntary, under hand and seal, ought to be decreed by this court and the delivery up of the bond by a married woman could no way bind her interest.

[Other reports of this case: 1 Eq. Cas. Abr. 221, 21 E.R. 1004.]

381

March v. Bennett
(Ch. 1687)

Where a debtor dies leaving an infant heir, a court can order the debt to be paid out of the profits of his land.

1 Vernon 428, 23 E.R. 565

1 February [1687]. In Court.

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

The bill was to be relieved against an old bond entered into by the plaintiff's father, on which the plaintiff was now sued as heir to his father.

And it appearing that the plaintiff's father left no personal estate, but left an estate in fee simple of £300 *per annum*, which descended to his son, who was then but two years old, the Master of the Rolls [TREVOR] took it to be a strong objection that, in almost twenty years time, this debt was never demanded of the heir.¹

To which it was answered that, during the plaintiff's minority, they had no remedy, nor could they compel the infant's guardian to pay the debt out of the profits of the infant's estate, nor was ever any such decree made in this court.

But the Master of the Rolls [TREVOR] declared he thought such decree to be just and equitable and, if such case came before him, he would decree satisfaction out of the profits of the infant's estate. *Sed dubitatur*.

382

Lord Hollis v. Lady Carr
(Ch. 1687)

A judgment debt is a just debt whether the debtor agrees with it or not.

1 Vernon 431, 23 E.R. 567

5 February [1687]. In Court.

This cause coming on this day to be heard again and the plaintiff by his now bill seeking relief upon the will of Sir Robert Carr, who had devised his lands for the payment of his just debts, it was insisted for the defendants that the plaintiff's debt was not within the intent and meaning of this provision for payment of debts, that Sir Robert Carr always obstinately opposed the payment of it and looked upon it that he was surprised and circumvented in the covenant obtained from him when he was but just come of age and a student at Cambridge for the payment of his sister's portion, to which he was no way liable and that, therefore, he always refused to levy a fine whereby to subject his lands for the payment of it although he was decreed so to do.²

And they cited the Case of Hollis and Norden,³ where a debt that the party had always contested to the last was by the Lord Keeper North adjudged not to be within the intent of a provision made by a person for the payment of all his just debts. And such provisions have not been extended to all sorts of debts, as debts that arise by a misfeasance, as an escape, or breach of trust, which were contracted *mala fide*, have never been taken to be within a general provision made for the payment of debts.

Lord Chancellor [JEFFREYS]: Sir Robert Carr has devised his estate for the payment of all his just debts, and the plaintiff's debt must now be taken to be such; the law has said it is a just debt. And had not Sir Robert Carr devised his lands for the payment of his debts, they would have descended on his heir and been assets in her hands and liable to have satisfied the plaintiff's demand on Sir Robert Carr's covenant. And, therefore, he decreed the debt with interest.

[Other reports of this case: 1 Eq. Cas. Abr. 139, 21 E.R. 941.]

¹ Raithby's note: The date of the bond was 8th June 1659. Reg. Lib.

² *Hollis v. Carr* (1676), Reports *tempore* Finch 261, 23 E.R. 143, 2 Freeman 3, 22 E.R. 1017, 2 Modern 86, 86 E.R. 956, 73 Selden Soc. 282, 334, 378, 3 Swanston 638, 36 E.R. 1004.

³ *Norden v. Norden* (1682), 1 Vernon 142, 23 E.R. 375, 1 Eq. Cas. Abr. 138, 21 E.R. 941.

383

Hamond v. Hicks
(Ch. 1687)

*Where one fiancé dies before the marriage, any marriage settlement can be rescinded.
Where a contract has been rescinded, a court of equity will order restitution to be made.*

1 Vernon 432, 23 E.R. 568

Eodem die [5 February 1687]. In Court.

Upon a treaty of marriage, the man and woman having each of them copyholds of inheritance, they mutually surrender the same to the use of them two and the survivor of them, and, before any marriage was had, the man happens to die. Upon his death, which was about thirty years since, the woman, by virtue of the man's surrender, enters on his copyhold estate and enjoyed the same ever since.

The heir of the man now brought his bill to have the estate re-surrendered and for an account of the profits, insisting that the marriage never took effect and that it was a trust for the husband and his heirs until the marriage took effect.

The Lord Chancellor [JEFFREYS] decreed a re-surrender and an account of the profits from the death of the man.

384

Aspinwall v. Case
(Ch. 1687)

A person can dispose of his property in any way he pleases, however capricious.

1 Vernon 433, 23 E.R. 568

8 February [1687]. In Court.

Sir Gilbert Ireland, by deed executed in his lifetime, makes a lease for 500 years to six trustees therein named with a power to make leases for twenty-one years or three lives at any time within one and thirty years after the death of Sir Gilbert and his lady and the survivor of them. And this is thereby declared to be in trust for the payment of his debts and that the surplus should be to and for such purposes as he should by his will direct and appoint. And he gives to two of the trustees that were intended to be the acting persons £20 *per annum* for their pains. And there is a proviso that, if such person to whom the inheritance should belong should confirm such leases as should be made by the trustees and undertake the payment of such debts as should be then unpaid, the term for 500 years should cease etc. And, by will of the same date, reciting the deed and power to dispose by will, he appoints that the trustees should have the surplus to be received by profits and raised by leasing within the thirty-one years after the decease of Sir Gilbert and his lady and the survivor of them, without account, and he devises the reversion to the plaintiff for life and to his first and other sons in tail.

The plaintiff, by his bill, offered to pay all the debts and sought to be relieved against this power in the trustees for making leases during the thirty-one years. And, for the plaintiff, it was insisted that this was a very strange and unusual sort of settlement and, upon the face of it, it appeared to have been a surprise upon Sir Gilbert by the contrivance of Mr. Entwisle, who drew the conveyance. And the principal matter intended by the deed appeared to be only a provision for the payment of Sir Gilbert's debts and settling the reversion upon his kindred and relations and that the

trustees should have no other benefit save only the £20 *per annum* provided by the deed itself, there being no mention in the deed that Sir Gilbert intended to do anything for the benefit and advantage of the trustees. And, should the trustees be suffered to make leases for twenty-one years or three lives according to the power of the deed, it will be a vain and idle provision that is made for the plaintiff for life, with remainder to his first and other sons in tail, for the trustees, in the last year of the thirty-one, may fill up estates for twenty-one years or three lives, so that, in probability, neither the plaintiff nor any son of his will have any benefit by it. And the court might with justice, when the plaintiff offered to pay the debts, restrain the trustees in their power to lease. And some proof was offered tending to an ill practice in Mr. Entwisle in the making and contriving of this settlement.

Lord Chancellor [JEFFREYS]: Sir Gilbert has expressly given the surplus of the profits to the trustees, and I cannot take it from them. He might have given his estate to a fiddler for a song. And I know Sir Gilbert was in doubt which way to dispose of his estate and that he had a personal kindness and friendship for some of the trustees and no good opinion of the plaintiff. And, therefore, he pronounced a dismissal of the plaintiff's bill.

But, afterwards, a proposition was made by the plaintiff's counsel and accepted of by the defendant, who was then in court, that the plaintiff should take upon him the payment of the debts resting unpaid and should pay the trustees for their own benefit £600 and they not to account for any profits already received and that, thereupon, the plaintiff should have the estate and interest of the trustees assigned unto him.

385

Carpenter v. Carpenter
Wasborne v. Downes
(Ch. 1687)

A beneficiary of a trust in tail can bar the remainders.

Where a marriage settlement is diminished by a prior encumbrance, the jointress and the remaindermen bear the loss proportionably.

1 Vernon 440, 23 E.R. 572

23 February [1687]. In Court.

In these cases, it was resolved that, where a common recovery is suffered or a fine levied by a *cestui que trust* in tail, it shall have the same effect and avail as much in this court and bind the trust in the same manner as the same would the estate in law in case he had the legal estate in him. And, as to a fine, it had never been doubted since the case in Lord Bridgeman's time.¹ And it has been held by some that, even a bargain and sale enrolled by a *cestui que trust* of an estate tail should bind the issue in regard that such a trust is not within the Statute *de Donis*.²

And, in the Case of Carpenter and Carpenter, the husband, upon his marriage, had agreed and given a bond to settle particular lands to the use of himself for life, remainder to his wife for life, remainder to the issue of that marriage in tail, and, the husband having afterwards aliened and sold part of these lands, the wife had obtained a decree in the Lord Nottingham's time to have the full value of the estate she was to have for her life supplied and made good to her out of the lands remaining unsold and that the inheritance of those lands should be subjected thereunto.

Now, upon a rehearing, the Lord Chancellor [JEFFREYS] reversed that part of the decree, for

¹ *North v. Way* (1681), 1 Vernon 13, 23 E.R. 270, *sub nom. North v. Williams*, 2 Chancery Cases 63, 78, 22 E.R. 848, 855, 79 Selden Soc. 888, 1 Eq. Cas. Abr. 256, 21 E.R. 1029.

² Stat. 13 Edw. I, Westminster II, c. 1 (SR, I, 71).

the jointress and the children are equally purchasers and the wife must not have all and leave nothing for the children, but they must bear the loss in proportion. And so, in any case where the issue and jointress claim by the same settlement, if there be a prior encumbrance, the jointress shall contribute and bear her proportion and not hold over and lay the whole burden upon the heir.

[Other reports of these cases: Carpenter and Carpenter, 1 Eq. Cas. Abr. 114, 21 E.R. 921; Washborn v. Downes (1671), 1 Chancery Cases 213, 22 E.R. 767.]

386

Pitt v. Earl of Arglasse

(Ch. 1687)

When a demurrer to a bill of review is sustained, the court will dismiss the bill of review on the merits of the case.

1 Vernon 441, 23 E.R. 572

24 February [1687]. In Court, Lord Chancellor.

The plaintiff having brought a bill of review to reverse the decree obtained by the defendant, the defendant demurred thereunto. And the plaintiff, being satisfied that the opinion of the court would be against him, moved that he might dismiss his bill, and he obtained leave to make the motion when the demurrer came to be argued. And now, he moved accordingly.

But the court [JEFFREYS] denied the motion and allowed the demurrer. And so the plaintiff was caught, who designed only delay but was now barred from bringing any new bill of review. At law, after errors assigned, the court will not give leave to discontinue a writ of error.

[Reg. Lib. 1686 B, f. 342.]

387

Trinity College, Cambridge v. Browne

(Ch. 1687)

Heriots are payable by common law tenants but not by beneficiaries of trusts of land.

1 Vernon 441, 23 E.R. 573

Eodem die [24 February 1687]. In Court, Lord Chancellor.

The bill was to discover the best beast of the *cestui que trust* of a college lease. The defendant demurred, for that the best beast of the *cestui que trust* could not be taken for a heriot. And it also appeared of the plaintiffs' own showing that the tenants, who had the estate in law in them, were yet living. The demurrer was allowed.

[Raithby's note: The case, as made by the bill, was that the plaintiffs were seised of the manor and rectory of Shitlington in Bedfordshire with a court baron to the parsonage, that there were several tenants who held their copyhold lands by fine uncertain at the will of the lord on death or alienation, and that paid heriots on the deaths of the tenants, whose lands were heriotable. It stated a surrender of a heriotable copyhold estate, 26th February 1657, to the defendants Burgoyne and Gray, of Lincoln's Inn, their heirs, and assigns, and their admission, that Sir Samuel Browne, [d. 1668] one of the Justices of the Common Bench, was the real purchaser of the estate, and he paid the purchase money and received the rents, and, since his death, the defendant Thomas Browne, his son and heir,

enjoyed the estate and also held freehold estates, for which he paid the plaintiffs quit rents, that Burgoyne and Gray were unknown to the plaintiffs and lived remote, and, if they should die in remote parts, the homage could not present their deaths, and the plaintiffs would lose a fine and heriots, as they had done by Sir Samuel Browne not dying seised and their copyhold estate would by unity of possession be swallowed up in the defendant Browne's freehold. And the bill asked what was the best chattel Sir Samuel Browne died possessed of and prayed a commission to examine witnesses and to perpetuate their testimony, that the defendants Burgoyne and Gray might surrender the copyhold estate to the defendant Browne, and, on his admission, the plaintiffs might be paid their fine due on the death of his father and the heriot. To this bill, the defendant Browne put in an answer and demurrer. The answer was general, namely, as to so much as etc. and admitted his father's purchase and answered some other parts of the bill and then followed the demurrer as to so much of the bill as sought a discovery of Sir Samuel Browne's best chattel and prayed that Burgoyne, the surviving trustee, might surrender etc., for that it appeared by the plaintiffs' showing they had always a tenant of the copyhold of their own admittance and all fines, fees, and quit rents had been duly paid and neither Sir Samuel Browne nor the defendant had ever been admitted tenant and that, by their own showing, the custom of the plaintiffs' manor was that heriots (if any due) were only payable after the deaths of the copyhold tenants. The demurrer was overruled. Reg. Lib. 1686 B, f. 271. N.B. The above state of the case is taken from the bill and answer.]

388

Parry v. Rogers
(Ch. 1687)

A bill to perpetuate testimony does not lie where the plaintiff can bring a action to try the matter in dispute.

1 Vernon 441, 23 E.R. 574

Eodem die [24 February 1687]. In Court, Lord Chancellor.

The bill was to examine witnesses to preserve their testimony touching the title of certain lands in the bill mentioned. The defendant demurred because there was no impediment that hindered the plaintiff from trying his right at law and that he had not obtained any verdict in affirmation of his pretended title.

The demurrer was allowed.

389

Lecone v. Sheires
(Ch. 1687)

A debtor can make his creditor the guardian of his child and allow him to recoup the debt out of the income of the child's estate.

1 Vernon 442, 23 E.R. 574

Eodem die [24 February 1687]. In Court, Lord Chancellor.

The father of the plaintiff, the infant, being indebted to the defendant by deed, granted him the guardianship of his children, with a covenant not to revoke the deed, and he gave a bond of £500 penalty to perform covenants.

The bill was to bring the guardian to an account and to remove him. And, though the guardian, being present in court, produced the deed and was ready to deliver up the same in case the court

should so order or direct, yet, in regard there was a just debt owing to the defendant from the father of the infant, the court [JEFFREYS] declared they would not restrain the guardian from receiving the rents and profits of the infant's estate, but only from abusing his person.

Note the Statute is that the father may by deed grant the guardianship of his children from time to time. *Vide* Stat. 12 Car. II, cap. 24, sect. 8.¹

[Other reports of this case: 1 Eq. Cas. Abr. 260, 21 E.R. 1032.]

Addison v. Hindmarsh

(Ch. 1687)

A bill of appeal lies from an inferior court to the Court of Chancery.

Upon a bill of appeal in equity from an inferior court, the plaintiff therein must assert the injustice done him by the inferior court, but he is not obliged to assign any particular errors of law.

A bill of appeal in equity is heard upon the same evidence as in the lower court, and there can be no examination of witnesses de novo.

1 Vernon 442, 23 E.R. 574

Eodem die [24 February 1687]. In Court.

The bill was to be relieved touching certain lands which the plaintiff claimed title to as heir on the part of his father. The defendant pleaded that the mother was the purchaser of those lands and that the defendant was heir on the part of the mother. But it not being pleaded that the defendant was heir of the whole blood to the mother (and in fact he was only of the half blood to the mother), for that reason, the plea was overruled.

Note in a bill by way of appeal from an inferior court, the plaintiff therein must complain of the injustice done him by the inferior court. But he is not obliged to assign any particular errors, which is the difference between a bill of appeal and a bill of review. But, in this, they agree, *viz.* that both must be upon the same evidence and you cannot examine *de novo*, though, in the spiritual courts, they examine over and over again and proceed upon new allegations.

And the Lord Chancellor [JEFFREYS] seemed to incline that a bill of appeal would lie from an inferior court to the Court of Chancery, as, at common law, the King's Bench corrects all inferior courts.

Note that, from the Court of Equity at Lancaster, an appeal by Act of Parliament lies to the Duchy Court.

[Other reports of this case: 1 Eq. Cas. Abr. 38, 21 E.R. 857.]

¹ Stat. 12 Car. II, c. 24, s. 8 (*SR*, V, 260).

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Spindlar v. Wilford
(Ch. 1687)

A court of equity will specifically enforce a contract to pay an annuity out of copyhold lands even though the transfer is unenforceable by the law of surrenders.

2 Vernon 16, 23 E.R. 621

February 1686[/87]. Nathaniel Spindlar, plaintiff; Edward Wilford and Priscilla, executrix of George Adams, defendants.

Mercy Thorn, in 1614, surrendered a copyhold tenement to the use of Adam Johnson and his heirs on condition that Johnson and his heirs should pay Abel Peterson and his heirs £5 *per annum* forever and, in default of payment, the use to Johnson and his heirs to be void and to be to the use of Peterson and his heirs. Johnson was admitted, and there were several alienations of the copyhold tenement by surrender and admittance. And there were also alienations of the £5 *per annum* rent, which had always been done too by surrender and admittance on assigning the rent. The plaintiff was the last surrenderee of the rent, and the defendants Wilford and his wife were tenants in possession of the copyhold, and they denied to pay the rent. And the bill was to force them to pay it.

The defendants demurred and insisted that the plaintiff's title being by several mesne surrenders of the £5 *per annum* and the admittance thereupon was not good so that the £5 *per annum* being a rent created *de novo* and no copyhold or customary interest could not pass in that manner and the plaintiff had no title in equity.

But, for the plaintiff, it was insisted that, though, in strictness, the rent would not pass in law of surrender, yet the surrender and admittances were evidences of the agreement for the sale and the plaintiff was a purchaser and ought, therefore, to be helped in equity.

And the Lord Chancellor [JEFFREYS] was of that opinion, and he overruled the demurrer.

And, 27th October 1687, it was decreed for the plaintiff that the defendant should pay the £5 *per annum* and the arrears.

[Reg. Lib. 1687 B, f. 8.]

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Carleton v. Earl of Dorset
(Ch. 1687)

Where a woman conveys away her estate without the consent of her then fiancé, the conveyance will be set aside in favor of her husband.

2 Vernon 17, 23 E.R. 622

February 1686[/87]. Robert Carleton, esq., and Lady Dayrill, his wife, plaintiffs; the Earl of Dorset, Millington, *et al.*, defendants.

The Lady Dayrill, before her marriage, without Mr. Carleton's privity, had conveyed her estate of good value to the defendants and their heirs in trust that they should permit such person and persons to receive the rents and profits and dispose thereof as she, whether *covert* or *sole*, should appoint.

The bill was to avoid that conveyance, being in derogation of right of marriage and without the husband's privity. And the lady, being crazed in her understanding, endeavoured to run away

from her husband, and she stirred up her creditors to sue him.¹

For the husband, it was insisted that the deed, being made without his privity, was in derogation of the rights of marriage and, therefore, ought to be set aside. And they cited the Case of Sir William Howard for that purpose and the Case of Edmonds against Dennington,² about four years since, where a woman, on an agreement before marriage with her husband, being to have the power to act as a *feme sole*, notwithstanding that marriage, and the husband dying, and she, marrying again, the second husband not being privy to the settlement on the first marriage, it was decreed that the second husband should not be bound by that settlement on the former marriage.

The Lord Chancellor [JEFFREYS], in this case, did decree the plaintiff Carleton should have the possession of the estate against the defendants and that the defendants should make a conveyance of the lands to the Six Clerks that it might be subject to the order of the court.

[Raithby's note: And an account of the rents and profits and that the plaintiff should make such allowance and provision for the Lady Dayrill and her son as should be reasonable. Reg. Lib. 1686 A, f. 422.]

[Other reports of this case: 1 Eq. Cas. Abr. 59, 21 E.R. 872.]

393

Kettleby v. Adamson
(Ch. 1687)

Where a sum of money is contracted upon a marriage to be invested in land with certain remainders but is not so spent, a court of equity will order the money to go to whom such land would have gone had the contract been properly performed.

Dodd 68

[It was] resolved:

First, that where money upon a marriage was to be by articles to be laid out upon a purchase to be settled to the husband and wife and the heirs of their body, remainder to the right heirs, etc., this money is not assets;

Second, the money not being invested in land shall go according to the land as if it had been purchased;

Third, that the remainderman should have it notwithstanding it is after an estate tail because notwithstanding that the tenant in tail could bar the remainder, yet if he not do [it], the remainderman will have the land; thus here;

Fourth, but the remainderman [can]not maintain a bill to execute it during the life of the tenant in tail, because if it had been in land, the tenant could dock [it], thus here.

Note the principal case³ was resolved *contra* by NORTH, and, upon a bill of review afterwards, the Chancellor JEFFREYS reversed the decree, and [it was] resolved as above.

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¹ Raithby's note: The charge in the bill was that the Lady Dayrill has got into debt and that the defendants stirred up her creditors to sue the plaintiff, her husband. Reg. Lib.

² *Edmonds v. Dennington* (1677), 79 Selden Soc. 569, 1 Eq. Cas. Abr. 59, 21 E.R. 872.

³ *Kettleby v. Atwood* (Ch. 1686), see above, Case No. 224.

Anonymous
(Ch. 1687)

In a suit in equity, where a peer appears as a defendant but does not answer, a writ of sequestration lies against him.

Comberbach 62, 90 E.R. 344

29 October 1687.

[Where] a peer of the realm appears and does not answer, formerly, a [writ of] attachment lay. But now, by order of Parliament, no process lies, but a [writ of] sequestration.

395

Saunders v. Browne
(Ch. 1687-1688)

Where land is held jointly, there is a right of survivorship, but there is no right of survivorship where money is held jointly.

Carthew 15, 90 E.R. 614

The mother having two daughters, A. and B., made her will and thereby devised £200 to her daughter B. to be laid out by her trustees in the will named in lands and to be settled to the use of the said B. and the heirs of her body, and, if she died without issue, then to the use of the children of A., who then had issue, the plaintiff, and the mother of the defendant. But before the money was laid out in a purchase, B. died without issue. And then the trustees laid out the £200 in a purchase of lands and settled the same on the plaintiff and on the mother of the defendant jointly in fee according to the will, they being the children of A. And they jointly enjoyed the same for some time. And then, the mother of the defendant died before any severance was made of this joint estate.

And now, the question was whether the defendant should have her mother's moiety or whether the plaintiff should have the whole by survivorship.

And it was decreed that the plaintiff should have the whole.

And here, the following case was put, *viz.* £500 apiece is devised to two legatees, and, afterwards, they took a mortgage jointly to both of them for securing the payment of their legacies with interest. And there, one of them died. It was held that the other shall have nothing by survivorship because, in this case, the mortgagees were trustees for each other and the mortgage, which is only as a security, makes no alteration in the case.

And in the principal case, it was held that, if the money had not been actually laid out in a purchase, the defendant would have been entitled to a moiety thereof, for, in such case, there should be no survivorship. *Quod nota.*

2 Vernon 46, 23 E.R. 640

16 May [1688]. In Court, Lord Chancellor.

The case was that J.S., by his will, directed £240 to be laid out in the purchase of lands to be settled on Mary and the heirs of her body and, if she died without issue, then on the children of Elizabeth, which she should leave behind her. Mary died without issue before any purchase had. Afterwards, the trustees lay out the money in a purchase and convey the lands to the two children of Elizabeth and their heirs, who so held for several years. And, then, one of them dies. The single question was whether the moiety of the dead child should survive.

Per curiam, [JEFFREYS] decreed that it should not survive.

1688. Saunders *contra* Charles Ballard.

A. devised £200 to be laid out in a purchase of lands and settled upon M. and the heirs of her body and, if M. die without issue, that then the children of J.S. shall have it (or words to that effect), so that it did not appear by the will whether the testator intended that the children should have the land as joint tenants or tenants in common. M. died without issue. The trustees, afterwards, purchase land with the £200 and settle it on C. and D., the two then living children of J.S., and their heirs. C. has issue and dies.

The court [JEFFREYS] would not help the issue of C. against D., who had claimed all by survivorship, for My Lord [JEFFREYS] said he would not make it a breach of trust in the trustees that they did make this a joint purchase, there being nothing in the will to direct them otherwise. But, if the money had remained in their hands, he seemed to be of opinion that the children of C. should have had a moiety, for, where money is given to two, being personal estate, it shall be several to them.

[Other reports of this case: 1 Eq. Cas. Abr. 292, 21 E.R. 1054.]

396

Heywood v. Maunder
(Ch. 1687)

Where a trust of a term is given to a person and his issue, there can be no gift over because it would create a perpetuity, but, where there is a contingency that must end in a lifetime, it is good.

2 Freeman 98, 22 E.R. 1083

A term for years was assigned to trustees in trust for the husband for so many years of the said term as he should live and, afterwards, for the wife for so many years as she should live and, after the decease of the wife, in trust for such of their children as should be then living and their issues and, for default of such issue, in trust for the plaintiff for the residue of the said term, who brought his bill to have the trust executed, the husband and wife being dead without issue, wherein the sole question was whether this limitation of the trust of a term after dying without issue were good or not.

Per curiam [JEFFREYS]: In this case, it is good enough, for although, where the trust of a term is limited to a man and his issue, it cannot be limited over because issue may continue forever and the whole term is sunk in that limitation; nay, where the trust of a term is limited after the death of anyone without issue, it is not good because it would make a perpetuity and issue may continue forever; yet, in this case, it being upon a contingent, which must determine in a life, it is good enough, the contingent happening that no issue was living. And that was the reason they went upon in the Duke of Norfolk's Case.¹ And he decreed for the plaintiff accordingly.

And, in this case, it was said that trusts of terms for years ought to be carried as far as the rules of law will possibly permit, being now become common settlements upon marriage, many estates being held only by terms for years.

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

Anonymous
(Ch. 1687)

If a debt be due to an intestate and the administrator takes a security in his own name for its payment, this is a waste of the assets of the estate.

Where a lessee makes an express promise to pay rent or gives a note for it, an action will lie upon the note or the promise.

2 Freeman 100, 22 E.R. 1084

Lord Chancellor [JEFFREYS].

Rent of £60 being due to A., he died intestate, leaving B. his administrator. B. and the tenant come to an account, and the tenant pays B. £29 and gives him a note for £31, and [B.] then died intestate. And the sole question was whether the administrator of B. or the administrator *de bonis non* of A. should have this rent.

And it was ruled that the administrator of B. should have it, for, by taking a note for it, he had altered the property so as to make it due to him in his own right, unless there had been any debts of the first intestate unpaid and, then, this court would have made it liable to satisfy those debts. And they seemed to be of opinion that, if a debt be due to the intestate and the administrator takes a security in his own name, although the first security be not delivered up, yet, in case the debt be not paid, this will be reckoned as assets come to his own hands and will make a *devastavit*.

And *Finch* cited a case, adjudged in the House of Lords,¹ where an executor bringing trover for goods of the testator, upon an agreement, the executor took a bond for the value of the goods; afterwards, the obligor became insolvent; and this was adjudged a *devastavit*. But he said that the case differed from this because, there, the executor had made as it were an absolute disposal and sale of the goods and, therefore, took a security at his peril, but that differed from this case, for, notwithstanding this note, an action might be brought upon the lease, but yet it was adjudged as aforesaid.

And it was held likewise that, where a lessee makes an express promise to pay rent or gives a note for it, that an action on the case will lie upon the note or the promise. (1 Rolle 8.)

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Gay v. Wendow
(Ch. 1687)

A court of equity will grant relief against a fraudulent bond even though the plaintiff was a party to the fraud.

2 Freeman 101, 22 E.R. 1084

Lord Chancellor [JEFFREYS].

The plaintiff, a woman, who had £150 given by her brother, the defendant, upon her marriage, gives a bond privately to her brother to repay the said money. The husband being dead without issue, the defendant sued the bond at law upon the plaintiff, whereupon she preferred her bill here to be relieved against it, being a fraud by reason it was done without the privity of her husband.

It was urged for the defendant that it was good reason for the husband or any of his issue to

¹ *Norden v. Levit* (1677), T. Jones 88, 84 E.R. 1160, 2 Levinz 189, 83 E.R. 512, 1 Freeman 442, 89 E.R. 331, 3 Keble 597, 615, 691, 706, 742, 778, 84 E.R. 900, 911, 964, 985, 1006, 79 Selden Soc. 617.

be relieved in case they had been concerned but that there was no reason that the woman herself, who gave the bond, should be relieved.

But [it was] ordered that the bond should be delivered up, for, being once a fraud, no accident of death or course of time should alter the case. And the plaintiff was relieved notwithstanding it was her own agreement, being done in fraud of the husband.

[Other reports of this case: 2 Eq. Cas. Abr. 478, 22 E.R. 406.]

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Paget v. Paget
(Ch. 1687)

In this case, the court held that the deed in issue was good and enforceable even though blank spaces in the deed were filled in after it was executed and there was not further assent given.

2 Chancery Reports 410, 21 E.R. 701

There was a deed of revocation and a new settlement made by that deed. Though after the sealing and execution of the said deed, blanks were filled up in the said deed, and the said deed was not read again to the party, nor released and executed, yet it was held a good deed.

[Reg. Lib. 3 Jac. II, f. 2.]

401

Smith v. Clever
(Ch. 1687-1688)

A use of or interest from a sum of money can be devised over.

2 Chancery Reports 410, 21 E.R. 702

Smith v. Fisher.

Susan Beale, by her will in writing, after several legacies thereby given, gave all the rest and residue of her estate unbequeathed, which consisted mostly in ready money, to be put forth to interest by her executors, and one half of the interest to be paid to the plaintiff Anne Cole, her sister, during her life and the other half of the interest unto the plaintiff Anne Smith, daughter of the said Anne Cole, and, after her mother's decease, to have all the interest during her life, and, if the said Anne Smith died without issue of her body, then the principal of the residue should be equally divided between the defendants, Mary Clever and Elizabeth Farmer.

The question is whether the devise over to the defendants, Clever and Farmer, as aforesaid, was a good devise.

This court declared that the said will was a good will as to the limitations over to the defendants, Clever and Farmer, and decreed the executors to account accordingly.

2 Vernon 38, 23 E.R. 635

At the Rolls. Smith *et ux.*, plaintiffs; William Clever *et ux.*, and William Farmer *et ux.*, defendants.

The case was that one Susan Beale, being possessed of a considerable personal estate, made her will, and, thereby, she appointed Robert Franklyn and Joseph Fisher executors in trust to receive and pay, act, and do all things according to the intent and meaning of her will. And, having thereby

devised several particular legacies, she devised further in the words following, *viz.*:

and the rest and residue of my estate unbequeathed shall be put forth to interest by my executors, and one half of the interest shall be paid to my sister Anne Cole during her life, and the other half of the interest unto her daughter Anne Smith, and she to have one half of my household goods, and, after her mother's decease, to have all the interest during her life. And my will is that, if the said Anne Smith die without issue of her body, the principal of the residue shall be divided equally between Mary Clever and Elizabeth Farmer and such children as are or shall be born of their bodies then living.

The bill was brought by the plaintiff Smith and his wife setting forth that the remainder over to Clever and Farmer, expectant on the plaintiff Anne's dying without issue, was void in law, being of a personalty, and that the whole interest of this personal estate was well vested in the plaintiff Anne, and, therefore, it prayed that the trustees might be directed to deliver the securities and to pay the money unto the plaintiffs.

The defendants, by answer, confess the will, and they insisted on their title by virtue of the limitation over.

The case was several times argued before His Honor the Master of the Rolls [TREVOR], who took time to consider of it.

2 Vernon 59, 23 E.R. 647

21 May 1688.

The Master of the Rolls [TREVOR], having heard several arguments in this case, took time to consider thereof. And, this day [21 May 1688], he delivered his opinion therein that he took the question to be not so much how far a personal chattel might be devised over as how far the use of money may be limited and devised over. The first authority I meet with in this case is in Henry VIII's time, in Brook's Cases 388, where the occupation of goods is devised to one, the remainder over; the remainder is accounted good, and the Case of the Lord Hastings *versus* Douglass, Cro. Car., and in the case 37 Hen. VI,¹ there cited, by which it appears the law is clear that the devise of the use and occupation of goods vests not an absolute property thereof in the first devisee, but that a limitation of them over is good. Now, by the devise in question, I take it that the money itself is not devised but only the interest of it.

As to the objection that the devise of a personal estate in tail, remainder over, is a perpetuity and void, and so was adjudged in the Case of Boucher and Antram, 14 November 23 Car. II,² that is not anything like the principal case, for, here, money is not devised but only the use of it. But the case I most principally depend on is Rachel's Case, where chattels were devised to the wife for life etc. and, if she were with child, then to that child, if that child died without issue, the remainder over to the grandson. The wife had no child. And it was in that case resolved that the remainder over was good, as likewise it would if there had been a child and that child had died without issue. And he cited the Case of Wood and Saunders, 21 Car. II.³

And, as to the objection that had been made by the plaintiff's counsel, that the interest being given to Anne Smith for life and, if she died without issue, then the remainder over etc. implies an estate tail, both in the principal and the interest, he said an implication cannot be against the plain

¹ *Lord Hastings v. Douglas* (1634), Croke Car. 343, 79 E.R. 901, W. Jones 332, 82 E.R. 175, 1 Rolle, Abr., *Executors*, pl. 9, p. 911; YB Trin. 37 Hen. VI, f. 30, pl. 11 (1459).

² *Boucher v. Antram* (1671), 2 Chancery Reports 65, 21 E.R. 617, Pollexfen 37, 86 E.R. 504.

³ *Wood v. Saunders* (1669), Pollexfen 35, 86 E.R. 503, 1 Chancery Cases 131, 22 E.R. 728.

intent of the party expressed in his will. And, in this case, the testatrix had carefully distinguished between principal and interest, and nothing passed but barely the use until she comes to the remainder over, and, then, she devises the principal.

And he mentioned the rule taken in *Matthew Manning's Case*,¹ that the intention of the party in his will ought to be observed as far as may consist with the rules of law. And he cited the *Case of Oakes and Chaffon*² as an authority in point. And he declared, as this will was penned, the remainder was good. And, therefore, he decreed the money should go according to the will, but with this, that, in case there should be issue of Anne Smith, the issue should have the absolute and entire interest in the money.

Note it was objected that the devise of the use or interest of money passes the money itself, as a devise of the profits of a term carries the term. And, as to the main point, the *Case of Love and Windham*³ was cited as an authority with the plaintiffs.

[Reg. Lib. 3 Jac. II, f. 641.]

[Other reports of this case: 1 Eq. Cas. Abr. 362, 21 E.R. 1104.]

402

Earl of Dorset v. Powle
(Ch. 1687)

In this case, the court allowed the defendant to receive various rents and profits pursuant to the marriage settlement in issue.

2 Chancery Reports 411, 21 E.R. 702

This case is, where, by the deeds and agreement before marriage, the countess of Dorset had an absolute power to dispose of all the personal estate she had at the time of her marriage with the defendant and the proceed thereof. And she had by her will and otherwise well disposed of and appointed the same to the plaintiff. And this court ordered the defendant to confirm the same. But as to the rents and profits of the real estate, upon consideration of the several clauses of the deed relating to the said estate and different penning of the same from the other deeds that concerned the aforesaid personal estate, His Lordship [JEFFREYS] declared that the said countess had no power to dispose of the same.

By indenture tripartite, dated 28th of June, 31 Car. II [1679], made between the defendant Mr. Powle of the first part, Sir Thomas Littleton and Charles Brett, Esquire, of the second part, and the countess of Dorset on the third part, reciting that the said countess was seised in fee of several manor lands, tenements, and hereditaments in England and reciting there was a marriage intended between Mr. Powle and the countess, it was agreed that, if the marriage took effect, the countess should during the coverture receive and dispose to her own use and at her own will and pleasure of all the right and title she had or claimed in the said manor lands and premises or in any other manors or

¹ *Clark v. Manning* (1609), 8 Coke Rep. 94, 77 E.R. 618.

² *Oaks v. Chalfont* (1674), 73 Selden Soc. 104, Pollexfen 38, 86 E.R. 504, 1 Chancery Cases 239, 22 E.R. 779.

³ *Love v. Windham* (1670), 1 Siderfin 450, 82 E.R. 1211, 2 Chancery Reports 14, 21 E.R. 602, 1 Levinz 290, 83 E.R. 412, 2 Keble 637, 84 E.R. 401, 1 Ventris 79, 86 E.R. 55, 1 Modern 50, 86 E.R. 724, 1 Eq. Cas. Abr. 191, 21 E.R. 982.

lands of the countess's in England and of all the rents and profits thereof so as Mr. Powle, his executors, administrators, and assigns were not to intermeddle nor have any benefit or advantage thereby in law or equity, but should join with the countess from time to time in the disposing thereof as she should appoint. And the defendant Mr. Powle thereby covenanted that, if the marriage took effect, Mr. Powle, his executors, or administrators, without the consent of the countess in writing, would not incumber the premises or receive the rents and profits to their own use, but from time to time would upon request authorize such persons, after receiving the same for the countess's separate use, as she should think fit, so as she might have nothing to do therewith, either in law or equity, and that, upon request, he would make reasonable leases of the premises for such considerations and terms and under such covenants as the countess should think fit, and gave such acquittances for the rents as should be requisite and convenient and at the charges of the countess, and her said trustees should commence and prosecute any suit necessary for the recovery of any part of her estates and in defence of her right thereto, and that the said countess might dispose of the premises and receive the profits according to the true intent and meaning of the said indenture tripartite without the interruption of Mr. Powle, his executors, or any claiming under him or them.

And by another indenture tripartite, 28 June, 31 Car. II [1679], between the countess of the first part, Sir Thomas Littleton and Mr. Brett, of the second part, and Mr. Powle of the third part, reciting that, whereas there was a marriage to be had between Mr. Powle and the countess, and that, by agreement she was to have and dispose to her own use and at her pleasure all her jewels, plate, goods, and chattels, both real and personal, and the benefit thereof, so as Mr. Powle, his executors, or administrators were not to intermeddle therewith, the countess, by Mr. Powle's consent, did make a bargain and sale to the said Littleton and Brett of all her jewels, plate, household stuff, money, goods, and chattels real and personal, upon trust that they should dispose of the same and the proceed thereof to such persons and such uses as the countess by any writing or by her will should appoint, so as Mr. Powle might not have any power or interest in law or equity to sell, charge, or dispose of the same or any part thereof, and, for want of such appointment upon trust, to deliver the same, or such part thereof as should be undisposed of by the said countess to her executors or administrators. And Mr. Powle, by the last deed, covenanted not to hinder the same and also that they should be free from all debts and engagements of the said Powle.

Mr. Powle and the countess intermarried, and, afterwards, the said countess, according to the said agreement and power, as long as she lived, disposed of all the rents and profits of her real estate and without Powle's intermeddling. Afterwards, the said trustees dying, Mr. Powle, by deed with the said countess, transferred the said trust to other trustees and also covenanted not to intermeddle, but the said premises to be solely in the power of the said countess. And it was agreed that the receipts of the countess should be sufficient for the premises or the proceed thereof, notwithstanding the coverture. The countess, by herself and the trustees, received the rents and profits of the premises and disposed thereof without Mr. Powle. The said countess by deed of appointment in 1682 and by her will in 1684 whereof she made the plaintiff, the earl of Dorset [1638-1706], her son, executor, to whom she, after some bequests and appointments to other persons, bequeathed and appointed all the rest of her personal estate and also gave to him all her monies and rents and all arrears of rents in her stewards' and tenants' hands, to all which the plaintiff the earl, the said countess being dead, is entitled.

The defendant Powle insists that, as to the rents and profits of the real estate, he claims the same and that he was so far from not intermeddling therewith, that he would not permit the stewards to receive the rents without warrant from himself and that he passed all the accounts thereof and rectified them after the countess had signed them.

This court declared there was an absolute power in the said countess of disposing all her personal estate that she was possessed of at the time of her marriage and the proceed thereof and that she had, pursuant to such power, well disposed of the same and decreed the defendant Powle to confirm the said will and appointment. But, as touching the rents and profits of the real estate, upon consideration of several clauses of the deed relating to the said estate and the different penning of the same from the other deeds that concerned the personal estate, this court declared the said

countess had no power to dispose of the same and all the arrears thereof to be accounted for to the said Mr. Powle.

[Reg. Lib. 3 Jac. II, ff. 148, 599.]

Holford v. Burnell
(Ch. 1687)

Where a defendant, in his answer to a bill for foreclosure, offers to redeem, he cannot later withdraw his offer.

1 Vernon 448, 23 E.R. 577

18 April [1687]. In Court.

The plaintiff's bill was that the defendant might redeem or be foreclosed. The defendant, by answer, confessed the plaintiff's mortgage and that he, the defendant, having the equity of redemption assigned to him the better to secure a debt owing to him by the mortgagor, offered to pay the plaintiff what was due on his mortgage. This cause rested thus for some time. And, afterwards, the mortgagor being absconded, a bill was brought by several of his creditors against the plaintiff Mr. Holford and others.¹ And, in that case, it appeared that the lands mortgaged to Mr. Holford were subject to a mortgage prior to his and that the mortgagor had made a deed of trust of those lands, amongst others, for the payment of his debts. And, upon hearing of that cause, it was decreed that the now plaintiff should be only paid in proportion with the other creditors. And, not liking that decree, he brought this cause to a hearing on the bill and answer. And, in regard the lands by the deed of trust were subjected to the payment of more debts than the same were worth to be sold, the defendant would now go back from the offer in his answer and be contented to be foreclosed.

And it was strongly insisted for the defendant that he ought not to be so bound by this offer in his answer but that he might notwithstanding waive it, he being content to be foreclosed, and the rather for that, since the answer was put in, the original cause was heard, and it was decreed that the now plaintiff should be paid but in proportion with the other creditors and, now, by bringing on the cross-cause upon the bill and answer, the plaintiff would vary the decree made in the original cause and that the circumstances of the case were now much altered and varied from what they appeared to be in the cross-bill and from what was known at the time of the answer put in. And the plaintiff could not have a decree beyond his own bill, which was only that the defendant might redeem or be foreclosed.

But, notwithstanding this, the Master of the Rolls [TREVOR] held the defendant to the offer in his answer, and he decreed him to pay the money due to the plaintiff.

[Reg. Lib. 1686 A, f. 562.]

[Other reports of this case: 1 Eq. Cas. Abr. 36, 21 E.R. 855.]

¹ Perhaps *St. John v. Holford* (1668), 1 Chancery Cases 97, 22 E.R. 712, 1 Eq. Cas. Abr. 325, 21 E.R. 1077.

Dorrington v. Jackson
(Ch. 1687)

A court of equity will not grant relief to a plaintiff who is in a position of inequity and bad faith.

1 Vernon 449, 23 E.R. 578

Eodem die [18 April 1687]. In Court, Lord Chancellor.

Hind and his wife, who was the widow and administratrix of Colvile, being possessed for years of a messuage called The Three Tuns in Lombard Street [London], the fore part by lease from Sir Christopher Buckle under a ground rent of £10 *per annum* and the back part by lease from the defendant Jackson at a ground rent of £5 *per annum*, the plaintiff Dorrington brings an action against them at law for a debt owing by the intestate Colvile, whereunto they appeared. And Hind becoming a bankrupt and he and his wife absconding, the plaintiff obtains judgment against them at law by default. And, upon a [writ of] *venditioni exponas*, he has these terms for years sold unto him by the sheriff. But pending that proceeding at law, Buckle and Jackson, the head landlords, entered for non-payment of the ground rent and obtained several judgments in [actions of] ejection. Dorrington agrees with Buckle and pays him his rent in arrear with his costs and charges at law and accepts a new lease of him for the residue of the term then to come. And, by a writ of possession upon the judgment recovered by Buckle, he is put into possession of the fore part of the messuage. And, having thus Buckle's interest, he apprehended that Jackson could not dispose or make any benefit of his back part of the messuage, and, therefore, he refused to agree with him on the same terms as he had with Buckle. And he insisted to have abatements of the ground rent in arrear etc. And he pretended that the back house would be of little use to him and that he was very indifferent whether he had it at the ground rent or not.

Jackson, hereupon, agrees with the other defendant Watson, who was tenant to Jackson of a messuage in Cornhill, which adjoined to the back part of The Three Tuns, the ground on which that back part was built having formerly belonged to this messuage, to lay this back part of The Three Tuns to the messuage in Cornhill. And, for that purpose, they beat down a wall and make a door into the back part of this messuage, and, by nailing up the doors, divide it from the fore house. Dorrington, being thus disappointed of bringing Jackson to his own terms, indicts him and Watson for a forcible entry. But they were acquitted. And, having tried, but without success, other means at law to get the possession of this back house, at last, he tenders the ground rent in arrear and the costs and charges at law. And, upon the refusal of that, he brings his bill to be relieved against the re-entry and forfeiture at law.

Upon the hearing of the cause, the case appearing to be *ut supra* and it being fully proved in the case that Jackson had offered the plaintiff to accept of the same terms as Sir Christopher Buckle had agreed to and that the plaintiff refused to comply with that offer and would not pay all the ground rent in arrear with the defendant's costs and charges at law and that, before the bill was brought, Jackson had actually let this back part to Watson, who had been at a considerable charge in the fitting this back house for his convenience, the court [JEFFREYS] would not, therefore, now relieve the plaintiff but dismissed his bill with costs to be ascertained by the defendant's own oath.

This cause was afterwards reheard, and the former decree confirmed *in omnibus*.

[Reg. Lib. 1686 A, ff. 524, 698.]

405

Tooke v. Atkyns
(Ch. 1687)

A marriage portion will be ordered to be paid as agreed.

1 Vernon 451, 23 E.R. 579

19 April [1687]. In Court.

The plaintiff's mother being very intimate with the defendant Sir Robert Atkyns and designing to make an advantage by the marriage of the plaintiff, her son, who was heir to a good estate, an agreement was made between the plaintiff's mother and Sir Richard Atkyns, whose daughter the plaintiff married, that Sir Richard should pay £2000 for the use and benefit of the plaintiff's mother. And nothing of a portion was paid or intended for the plaintiff. And £1800 of this money having come to the hands of the defendant Sir Robert Atkyns, a trustee for Mrs. Tooke, unto whom or for whose use the defendant Sir Robert had long since paid the same, the plaintiff's bill was to have this money answered and made good to him, he having no other portion with his wife.

The defendants by answer insisted that this money was intended for the use and benefit of the mother and not for the plaintiff. And the writings seemed to import as much. And the defendant's counsel insisted on the Case of Greysly and Lothar, in Hob., fo. 10,¹ where it is adjudged to be a sufficient consideration to maintain an action that the mother would give her consent to the marriage of her child.

But Sir Richard Atkyns being examined in the cause and, in effect, deposing that this money was intended as a portion with his daughter, the Lord Chancellor [JEFFREYS] decreed for the plaintiff and that, in the first place, the mother should pay as far as she was responsible and Sir Robert Atkyns the residue. But both were to be liable to satisfy the moneys to the plaintiff.

406

Glover v. Faulkner
(Ch. 1687)

A defendant in a court of equity can be examined as a witness where he has been released and the testimony goes only to accounts.

1 Vernon 452, 23 E.R. 579

25 April [1687]. In Court, Lord Chancellor.

This cause having been heard and referred to an account, the plaintiff afterwards moved to examine two of the defendants *de bene esse*, which was ordered unless cause [be shown to the contrary].

The defendant's counsel, coming this day to show cause, took this difference that, although it was an order of course to examine a defendant *de bene esse*, saving just exceptions, yet, when the cause was open and it appeared that the defendants were parties interested, it was proper to show cause against such an order before the witnesses were examined, which difference was allowed to be well taken.

¹ *Grisley v. Lothar* (1614), Hobart 10, 80 E.R. 161, also Moore K.B. 857, 72 E.R. 953, 1 Brownlow & Goldesborough 18, 123 E.R. 638.

But it appearing that releases were given to the defendants and the matter to be examined to being only matter of account, the cause was disallowed.

[Reg. Lib. 1686 A, f. 648.]

[Other reports of this case: 1 Eq. Cas. Abr. 233, 21 E.R. 1013.]

407

Wardour v. Berisford
(Ch. 1687)

In this case, the defendant had suppressed some matters of accounts, and his claim was therefore denied.

1 Vernon 452, 23 E.R. 579

26 April [1687]. In Court, Lord Chancellor.

The plaintiff and defendant having married two daughters of I.S., upon his decease, there were some loose papers that concerned the account between the plaintiff and his father-in-law put up together in a bundle and covered with a paper tied up with a tape and sealed by two persons then present and delivered to the defendant Berisford to be safely kept, being then told they were matters of concern. And there being now an account directed of the estate of I.S., which was to be equally distributed between the plaintiff and defendant, the defendant demanded as due from the plaintiff to his father-in-law for diet etc. £2300.

But, upon proof made that the defendant had altered the bundle of papers so sealed up and displaced them and that it could not be known what papers might have been taken out and the Master having reported that the defendant had suppressed the evidences, the court [JEFFREYS] for that reason disallowed the defendant's whole demand against the plaintiff, though the defendant swore he had produced all the papers and though the papers produced appeared to be half-yearly accounts and related one to the other and not one missing, but the account was thereby carried down within a little time before the testator's decease. And, though the Lord Chancellor [JEFFREYS] declared himself satisfied that all the papers were produced, yet, for the reason aforesaid, he wholly disallowed the said demand.

[Raithby's note: This came on upon exceptions to the Master's report, the Master having reported that he was satisfied there had been a suppression and embezzlement of some pages or accounts called Wynne's account, the bundle of papers before mentioned, either by the defendant Berisford or with his privity and that, therefore, he had forborne making the defendant any allowance ordered by the decree and, by the decree Lord Chancellor [JEFFREYS] declared the account, called Wynne's account, was through the carelessness of the defendant embezzled, and, therefore, in respect thereof, the exceptions were overruled.]

[Reg. Lib. 1686 B, f. 491.]

[Other reports of this case: 1 Eq. Cas. Abr. 11, 21 E.R. 835.]

Sagitary v. Hyde
(Ch. 1687-1688)

A voluntary settlement made before a debt was contracted is not such a fraudulent conveyance that will be set aside at the suit of the creditor.

1 Vernon 455, 23 E.R. 581

2 May [1687]. In Court, Lord Chancellor.

A man makes a settlement on one of his coheirs with a power of revocation. The heir, before either an original filed or a bill brought, aliens. But, before all the purchase money is paid, an original is filed and a bill is brought, and notice thereof is given to the purchaser.

Per curiam [JEFFREYS]: There is a difference between a conveyance with a power of revocation and a conveyance to such uses as a man shall appoint and he, afterwards, by will appoints the uses.

In the principal case, there being a debt owing to the king, it was ordered that the king's debt should be satisfied out of the real estate, that the other creditors might be let in to have satisfaction of their debts out of the personal assets.

Lincoln's Inn MS. Misc. 498, p. 79, pl. 2

Eodem die [9 May 1688]. Sagittary v. Mr. Edward Hide *et al.*

Mr. Edward Hide, in the year 1658, made a voluntary settlement of his estate upon himself for life and, afterwards, upon his wife for life, with divers remainders over with a power to revoke all the estates except the wife's estate for life. In the year 1668, he became indebted to the plaintiff by bond, and he gave him also a real security for his money by a lease for lives. Afterwards, Mr. Hyde revokes the settlement and settles the estate upon himself for life and, after, upon his wife for life, remainder to himself in tail, remainder to Mr. Middleton, his nephew, who was likewise a defendant, etc. with a power of revocation. And he dies having issue, a daughter. The daughter dies without issue, whereby Mr. Middleton became heir to Mr. Edward Hide. And he had the estate by virtue of the remainder limited to him. All the lives expire, whereby the plaintiff's real security became of no avail.

And, now, he exhibited his bill against Mr. Hide, who had purchased the estate from Middleton, pretending that the settlement was void against him, being a creditor, and that Mr. Hide had enough of the purchase money in his hands to pay him and he had notice of this bond debt before the purchase.

But it appeared in the cause that Mr. Hide had bought the land before any notice and paid the greatest part of the purchase money and was under covenants to pay the rest.

And My Lord Chancellor [JEFFREYS] was of opinion that, upon the circumstances of this case, the settlement made in 1668 was not fraudulent against the plaintiff, though it were both voluntary and with a power of revocation, and, therefore, could not be affected with this debt, either in law or equity, in the hands of Mr. Hyde, the purchaser of Mr. Middleton himself, for that, at the time of entering into the bond to the plaintiff, the estate was under a settlement made ten years before and so not subject to the plaintiff's debt, and, besides, the plaintiff had a real security, the failure of which could not be foreseen by Mr. Edward Hyde when he made the settlement and Mr. Middleton was not heir to Mr. Hyde at the time of his death, though, by accident, he came to be so afterwards. And, therefore, as to Mr. Hide, the bill was dismissed.

[Other copies of this report: Lincoln's Inn MS. Misc. 503, p. 103, pl. 2, Lincoln's Inn MS. Misc. 504, p. 96, pl. 2.]

2 Vernon 44, 23 E.R. 639

9 May [1688]. Lord Chancellor.

The plaintiff is a creditor by bond to J.S., who settled his real estate on his wife for life, remainder to one Middleton in tail, who happened afterwards to be heir at law, with the power of revocation. And Middleton sold to the defendant Hide, who had part of his purchase money in his hands, out of which the plaintiff ought to be satisfied his debt.

For the plaintiff, it was insisted that the settlement was fraudulent and that the estate ought to be assets and made liable to the plaintiff's debt. And they cited Lenthal's Case, in the King's Bench, in [an action of] debt upon a recognizance forfeited by reason of an escape; a voluntary settlement made thirty years before the escape was judged to be fraudulent.

Per curiam [JEFFREYS]: Every voluntary conveyance is not, therefore, fraudulent, but a voluntary conveyance, if there was a reasonable cause for the making of it, may be good and valid, even against a creditor. And here, the defendant Hide, before his purchase, had notice that there was a bond. But there was no original filed, and, before the commencement of the suit, he had covenanted to pay the residue of his purchase money. And the court, thereupon, inclined to dismiss the plaintiff's bill.

[Other reports of this case: 1 Eq. Cas. Abr. 142, 21 E.R. 944.]

410

Scudemore v. White
(Ch. 1687)

A suit based upon an open account is not barred by the Statute of Limitations.

1 Vernon 456, 23 E.R. 582

3 May [1687]. Lord Chancellor.

The Statute of Limitations¹ is no plea in bar to an open account.

[Other copies of this report: 1 Eq. Cas. Abr. 304, 21 E.R. 1063.]

411

Layr v. Nelson
(Ch. 1687)

A surety has a right of contribution against his co-sureties.

1 Vernon 456, 23 E.R. 582

Eodem die [3 May 1687]. In Court, Lord Chancellor.

Where one obligee that is a surety is sued alone, by the custom of the City of London, he shall make his co-sureties contribute. So, where a surety pays a debt and has no counterbond, by the custom of the City of London, he shall maintain an action against the principal.

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

Rothwell v. Widdrington
(Ch. 1687)

Where a married woman's land was made more valuable by her husband's consent to an enclosure, she cannot many years later set it aside to make an unreasonable gain.

1 Vernon 456, 23 E.R. 582

4 May [1687]. Lord Chancellor.

A decree was made for an inclosure twenty years since, to which the defendant, the Lady Widdrington's husband, had agreed in his lifetime, and she, having an estate of about £25 *per annum* within the manor, would now disturb the inclosure. And, though, in strictness, her husband's consent could not bind her interest, yet, it being proved in the cause that her estate was much improved by the inclosure and that she designed only to make an unreasonable advantage to herself, the court [JEFFREYS] decreed the inclosure should stand.

[Other reports of this case: 1 Eq. Cas. Abr. 104, 21 E.R. 913.]

[Reg. Lib. 1686 B, ff. 270, 462.]

Longdale v. Longdale
(Ch. 1687)

Conditions of gifts will be strictly enforced.

1 Vernon 456, 23 E.R. 583

Eodem die [4 May 1687]. In Court, Lord Chancellor.

The father makes a voluntary settlement upon his eldest son in tail male, remainder to a second son, etc., in which is a proviso that, if his eldest son did not pay the second son £600 at his age of twenty-one years, that then the estate of the eldest son both in law and equity should cease.¹ The father, having afterwards married a second wife, by deed taking notice of the former settlement and that his son had not paid the money according to the proviso, conveys the same lands to the use of his children by his last wife.

The plaintiff's bill was to be relieved against the forfeiture for non-payment at the precise day.

But, in regard the conveyance was purely voluntary and the father might have put what conditions or restrictions upon his son he thought fit and the proviso being special, that, for non-payment at the day, the son's estate both in law and equity should cease, the court [JEFFREYS] refused to relieve the plaintiff and dismissed the bill,² and the rather for that the plaintiff had set up

¹ Raithby's note: The proviso was 'that the eldest son should within two years after attaining his age of twenty-one years, pay the sum of £600 to his father, the settlor'. Reg. Lib.

² Raithby's note: Without costs, in case the plaintiff delivered possession of the lands in question, in pursuance of the decree, otherwise with costs to be taxed. Reg. Lib. 1686 B, f. 425. Entered *sub nom.* Langdale v. Langdale.

a release against his father, which was obtained by surprise and the deed in law was defective and amounted only to a declaration of trust.

[Other reports of this case: 1 Eq. Cas. Abr. 109, 21 E.R. 917.]

414

Eyles v. Cary
(Ch. 1687)

A testator's debts must be paid out of his personal estate as far as it will go.

1 Vernon 457, 23 E.R. 583

6 May [1687]. Lord Chancellor.

The case arose on a will, wherein was this clause, *viz.* 'I will all my debts shall be paid before any of my legacies or gifts hereinafter mentioned.' And, then, he devises several pecuniary legacies. And, after, in the same will, he devises lands to J.S. on condition to pay a certain rent to J.N. and other lands to J.S. on condition to pay £5 *per annum* to J.D. The question was whether these lands were by the will subjected to the payment of the testator's debts or only to the payment of the particular rents thereout devised.

Per curiam [JEFFREYS]: The lands are not subjected to the payment of the testator's debts; the general clause in the beginning of the will shall be intended only of the personal estate and the pecuniary legacies thereout devised.

[Other reports of this case: 1 Eq. Cas. Abr. 198, 21 E.R. 986.]

415

Surrey v. Smalley
(Ch. 1687)

An executor of a decedent's estate cannot pay any of the decedent's debts where a suit is pending against the estate.

1 Vernon 457, 23 E.R. 584

Eodem die [6 May 1687]. Lord Chancellor.

A judgment confessed by an executor pending a bill here shall not be allowed upon an account of assets.

[Raithby's note: In this case, six several judgments had been confessed by the executor to creditors of the testator and, afterwards, assigned by them to three persons, defendants in the cause, for 10s. in the pound and the charges in recovering of them, and, on a bill filed by creditors for discovery of the testator's estate and to have the aforesaid judgments set aside as obtained by fraud, all that appeared was that one of the defendants, who was an uncle to the widow of the testator, another of the defendants, wrote one or two of the assignees of the judgments word to purchase the same. And the decree was that the assignees of the said judgment ought not to be allowed any more for the said judgments than what was really paid for the assignments in case the said judgments were obtained in an adversary way of proceeding before the plaintiff's suit in this court. And the Master was to enquire and report how the said judgments had been obtained, and then the court would consider of the costs. Reg. Lib. 1686 B, f. 501.]

[Other reports of this case: 1 Eq. Cas. Abr. 240, 21 E.R. 1018.]

416

Self v. Madox
(Ch. 1687)

A bona fide purchaser for value of lands conveyed pending litigation takes subject to the outcome of the suit.

1 Vernon 459, 23 E.R. 585

26 May [1687]. In Court, Lord Chancellor.

The defendant Madox was decreed to pay the plaintiff a sum of money or deliver up possession of a house and lands in Edmonton. And, upon the defendant's examination on interrogatories touching a contempt in not performing the decree, it came out that the defendant had made an assignment to a real creditor by bond of this house and lands for satisfaction of his debt and that this assignment was made by Madox of his own free will, without the privity or knowledge of the creditor, not only pending the suit, but even after the time first set for payment of the money or delivering of the possession was expired, which time Madox had got enlarged on a motion with the design in the meantime to make this conveyance.

The question was whether this assignment made by Madox should defeat the plaintiff of the benefit of the decree.

The Court [JEFFREYS] decreed the possession of the house and lands to be delivered to the plaintiff without any regard had to this conveyance. And the Case of Goldson and Gardiner, in 1680, was cited, where the court had made the like decree in the case of a conveyance made from the father to the son prior to the decree but pending the suit.

417

Newton v. Rowse
(Ch. 1687)

Where the performance of a contract is totally defeated by the accident of the death of one party, the other party can rescind and have a total refund of all moneys paid even though the contract provided for only a partial refund.

1 Vernon 460, 23 E.R. 586

30 May [1687]. Lord Chancellor.

The defendant was executor of one Child, an attorney, with whom, when he lay ill of the sickness whereof he afterwards died, the plaintiff placed his son and gave £120¹ with him. And articles were made and executed, by which it was provided that, in case Child died within one year, that then £60 of the money should be returned. It happened that Child never recovered, but he died within three weeks after the sealing of the articles and the payment of the money. And the bill now was to have a greater sum than £60 paid back.

The court [JEFFREYS], notwithstanding the parties themselves had provided against accidents and agreed for a certain sum, to wit £60, to be returned in case Child died within a twelvemonth and that *modus et conventio vincunt legem*, yet decreed 100 guineas to be paid back to the plaintiff, the

¹ Raithby's note: 120 guineas.

father.

[Other reports of this case: 1 Eq. Cas. Abr. 308, 21 E.R. 1065.]

418

Mackworth's Case
(Ch. 1687)

The king, as parens patriae, can allow an infant married woman to settle her inheritance by means of a common recovery.

1 Vernon 461, 23 E.R. 587

2 June [1687].

Sir Humphry Mackworth,¹ having married an heiress, petitioned the king that His Majesty would be pleased by privy seal to direct his justices of England and Wales to take a fine or common recovery, as there should be occasion, from his wife, notwithstanding her minority, she being now eighteen years of age, in order to the settling of her estate to the uses therein mentioned so that the petitioner might be sure, though his wife should die, who was now big with child, of an estate for life in the premises.

The king, in answer to a petition, signified that he was satisfied with Sir Humphry's merit and was graciously disposed to gratify him in this matter. But, however, he referred it to the Lord Chancellor to report what was fitting to be done therein.

And now, upon hearing counsel on both sides, one Mr. Evans, who had married the young lady's mother, opposed the petition.

But the Lord Chancellor [JEFFREYS] declared he thought the petition reasonable and that he would report the same to the king accordingly.

Note, though the petition prayed that the justices might be directed to take a fine or common recovery, Mr. Serjeant *Maynard* observed that the petition was unartfully drawn in that matter, for that a fine could not be taken from an infant, nor was it ever done, but that a common recovery might be had, as desired, by the king's special direction.

[Other reports of this case: 1 Eq. Cas. Abr. 283, 21 E.R. 1048.]

419

Heyward v. Rogers
(Ch. 1687)

The question in this case was whether the settlement in issue was void as being a perpetuity.

1 Vernon 461, 23 E.R. 588

4 June [1687]. In Court, Lord Chancellor.

One Prudence Goodwin, being possessed of a term for years, settled the same in trust for herself for life, remainder to one Rebecca Hurst for life, and from and after the death of Rebecca, to permit and suffer such child or children as Rebecca should have at her death to receive and take

¹ W. P. Griffith, 'Mackworth, Sir Humphry (1657-1727)', *Oxford Dictionary of National Biography*, vol. 35, pp. 699-701.

the profits thereof, and, for want of such child or children, then in trust for the plaintiff. Rebecca had issue a son, who died in her lifetime without issue.

The question now was between the plaintiff, the remainderman, and the defendant, who was administrator, as well to Rebecca as to the child.

It was objected that the remainder to the plaintiff of the term in question was void, being to take place after two lives then in being and the death of such child or children as Rebecca should have, who were not then in being. To which it was answered that all this was to happen and was circumscribed to the life of Rebecca, to wit, in case she died leaving no issue. And the Case of Oakes and Chafford¹ was cited, and it was said that, if this child had lived to contract debts or wanted a maintenance, it would be hard that his administrator should not have the benefit of this term or, suppose the son of Rebecca, though he died in the lifetime of Rebecca, had left a son, it would be hard to carry this term from the child to the remainderman.

[Reg. Lib. 1686 A, f. 689.]

420

Collins v. Metcalfe
(Ch. 1687)

Where a devisee dies before the devise is payable, it goes to the devisee's administrator.

1 Vernon 462, 23 E.R. 588

Eodem die [4 June 1687]. In Court, Lord Chancellor.

A portion was devised to a child with interest, but not to be paid or payable until the child attain twenty-one years or was married. The child dies under twenty-one and unmarried.

[The court] decreed the portion to the administrator.

[Other reports of this case: 1 Eq. Cas. Abr. 295, 21 E.R. 1056.]

421

Spencer v. Wray
(Ch. 1687)

After a suit has abated, the plaintiff has an election either to bring an original bill or a bill of revivor.

1 Vernon 463, 23 E.R. 588

7 June [1687]. In Court, Lord Chancellor.

[JEFFREYS] adjudged that, where the suit abates, the plaintiff may either bring an original bill or a bill of revivor at his election.

[Reg. Lib. 1686 B, f. 813.]

[Other reports of this case: 1 Eq. Cas. Abr. 4, 21 E.R. 830.]

¹ *Oaks v. Chalfont* (1674), 73 Selden Soc. 104, Pollexfen 38, 86 E.R. 504, 1 Chancery Cases 239, 22 E.R. 779.

422

Hester v. Weston
(Ch. 1687)

A defendant cannot at the same time demur for multifariousness and answer to the merits; to do so will result in the overruling of the demurrer.

1 Vernon 463, 23 E.R. 588

Eodem die [7 June 1687].

Where a man demurs for that the bill contains several matters not relating one to the other and in some whereof the defendant is not concerned, if, by answer, the defendant does more than barely deny combination and confederacy, he overrules his demurrer.

[Reg. Lib. 1686 A, f. 696.]

[Other reports of this case: 1 Eq. Cas. Abr. 40, 21 E.R. 858.]

423

Meredeth v. Jones
(Ch. 1687)

Where, upon a marriage contract, a portion is to be paid by the father of the woman and a settlement is to be made by the husband and the husband dies after the marriage but before the contract is performed, the widow becomes entitled to the portion but not to the jointure as executrix.

1 Vernon 463, 23 E.R. 589

8 June [1687]. In Court, Lord Chancellor.

By articles on the marriage of the plaintiff, the plaintiff's father was to pay £50 as a portion with his daughter, and the intended husband, in consideration thereof, was to make a settlement. The marriage was had, but, before the money was paid or the settlement made, the plaintiff's husband died intestate. And she takes out administration and, thereby, becomes entitled to the £50. And now, she brings her bill against the heir of her husband for to have her jointure according to the marriage articles.

Per curiam [JEFFREYS]: The plaintiff shall not have the money as administratrix and also the jointure too, which was agreed to be made in consideration of the money and in expectation that the husband should have received it. And, therefore, he dismissed the bill with costs.

[Reg. Lib. 1686 A, f. 574.]

[Other reports of this case: 1 Eq. Cas. Abr. 221, 21 E.R. 1004.]

424

Bale v. Newton
(Ch. 1687)

Marriage settlements are absolute conveyances and are not revokable.

1 Vernon 464, 23 E.R. 589

Eodem die [8 June 1687].

A joint purchaser of lands conveys his part to the use of himself for life, remainder as to a third part to his wife for a jointure, remainder of the whole to his infant heir in tail. And two days afterwards, he makes his will, and he devises the same estate with other things to his infant heir in tail, but subject to the payment of his debts in case his personal estate should not be sufficient to pay his debts, as also a legacy of £250.

The personal estate proving deficient to pay both debts and legacies, the end of the bill was to have the debts paid out of the land, that so the legacy might be paid out of the personal estate.

Per curiam: The settlement, though voluntary, is not revocable. And, therefore, having settled the lands, the testator had thereby disabled himself to charge the premises by his will.

[Other reports of this case: 1 Eq. Cas. Abr. 23, 21 E.R. 845.]

425

Long v. Clopton
(Ch. 1687)

Where a mortgagor or his successor in interest settles an encumbrance for less than the debt due on it, he is entitled to reduce his debt to the creditor-mortgagee only in the amount he paid for the settlement, but, where the creditor settles, he is entitled to the entire bargain he made.

1 Vernon 464, 23 E.R. 590

Eodem die [8 June 1687].

On a Master's special report, to whom the account in question was referred to be taken, it was determined by the court that an heir or any other shall not, as against a real purchaser, be allowed more on any encumbrance bought in than what he actually paid for the same without regard to what was really due on such encumbrance and that, where a prior encumbrancer buys in a subsequent encumbrance with notice of an intervening security, he shall not be allowed the same. And the Case of Borough and Frances¹ was cited.

[Raithby's note: The case by the Register's Book appears to have been that a bill was exhibited against the defendant, as heir of his father, against whom a judgment had been obtained to discover the real and personal estate of his said father liable thereto and for an account of profits of the said estate and that, at the hearing, an account was directed of what had been received and paid for preceding encumbrances for principal and interest and for charges in defense of the title. And the defendant having compounded several encumbrances, the court reserved the matter whether the

¹ *Burgh v. Francis* (1673), Reports *tempore* Finch 28, 23 E.R. 16, 73 Selden Soc. 14, 3 Swanston 551, 36 E.R. 971, 1 Eq. Cas. Abr. 320, 21 E.R. 1074.

defendant should have the benefit. And it was agreed that the encumbrances being particular and charged on several parts of the estate, some of which estates were of far greater value than the money lent thereon, over and besides all general securities that effected the same, the plaintiff ought to be admitted to a redemption to such particular estates as he should think fit and not be bound to redeem the whole. And the decree was that the defendant, though he be an heir, yet ought not to be allowed the benefit of the composition to the prejudice of plaintiff's debt, but ought to be allowed what he had really paid for principal, interest, and charges, as well on account of encumbrances precedent to the plaintiff's judgment as subsequent, until he had notice of the said plaintiff's judgment and that the plaintiff ought not to be admitted to a redemption of any part of the estate without redeeming the whole and paying what should appear to be due to the defendant upon the account. And, as to the account, Lord Chancellor [JEFFREYS] declared that the defendant, being charged with the rent of the lands for the time he held it, ought to be allowed taxes, repairs, and all incidental charges annually and the costs and charges he had been put unto in relation to the title of the premises and that defendant ought not to be charged with any rents or profits while any of the encumbrancers were in possession of the premises or with any more than he raised or received out of said estate. Reg. Lib. 1686 B, f. 652.]

426

Robinson v. Thompson
(Ch. 1687)

A majority of the partners in a venture can bind the minority.

1 Vernon 465, 23 E.R. 591

10 June [1687]. In Court, Lord Chancellor.

Per curiam [JEFFREYS]: Where the major part of the part owners of a ship settle and agree an account of the profits of a voyage, it shall conclude the rest. And the plaintiff was ordered to pay costs.

[Other reports of this case: 1 Eq. Cas. Abr. 373, 21 E.R. 1111.]

427

Herne v. Meeres
(Ch. 1687)

In this case, a fraudulent conveyance for a very small purchase price was set aside for the benefit of creditors, and the purchase money was ordered to be repaid.

1 Vernon 465, 23 E.R. 591

11 June [1687]. In Court, Lord Chancellor.

The plaintiffs were creditors of Mr. Cox, son of Dr. Richard Cox, the physician, by bond, upon whom a considerable estate was settled for his life. He was outlawed, and he absconded. And, pending the prosecution at law against him, the defendant, Sir Thomas Meeres, having notice thereof, purchased his estate for life and gave between three and four years purchase for the same.

The bill was to be relieved against this purchase, as being a trust or else it was fraudulent, it being bought at a great undervalue.

For the plaintiffs, it was insisted, the purchase was made with full notice of their debts and prosecution at law, that Cox absconded, and was not to be met with at that very time when the

purchase was made, that the purchase was at a great undervalue, to wit between three and four years purchase, whereas the defendant might have insured his life at £5 percent.

For the defendant, it was said, as to the overvalue, that young Cox, at the time of the purchase, was very sickly, and his estate was not then worth more to be sold. And they read some proof to that purpose, that there was no trust, but the purchase was absolute. And the plaintiffs had no lien on the land; the defendant had notice, it was true, but it was of things immaterial, of debts that did not affect the land, and, if notice of a bond debt shall be sufficient to set aside a purchase, it would obstruct all sales of the estates of the persons that died indebted.

Per curiam [JEFFREYS]: The purchase is at a great undervalue and huddled up in haste and at a time when young Cox concealed himself from his creditors. And it carries another ill circumstance along with it, which is that the defendant is a trustee in the marriage settlement. And for him to buy the estate for life of the husband was to take away the maintenance and support thereby intended and provided for the wife and children, on whose behalf he was entrusted. And all this was with notice of the plaintiff's debts and proceedings at law, which ought to bear some weight in this case. And, though the plaintiff's securities were not such as did immediately affect the land, yet the notice was such. And Cox's absconding, had he been a trader, would have made him a bankrupt, and, then, the defendant would have lost all his money. And so at law, where a conveyance is found to be fraudulent, the creditor comes in and avoids all without repayment of any consideration money, and, in equity, therefore, where the court can decree back the principal and interest, there is no hurt done and a lesser matter in such a case will serve to set a conveyance aside.

The court [JEFFREYS], therefore, decreed the defendant to reconvey upon payment of his principal and interest and that all creditors that were in equal degree should be let in *pro rata*, paying their contribution, and that the defendant might not any longer stand any hazard in case young Cox should happen to die, the plaintiffs and such creditors as should come in were ordered by the court to give security within three days to redeem the defendant.

2 Brown's Chancery Cases 176, 29 E.R. 102

Cox, father and son, being indebted to Herne by bond dated the 27th December 31 Car. II (1679), Herne sued them thereupon. And, they being abroad, about Trinity term 1684, he filed his original writ for the purpose of proceeding to outlawry. But, in Michaelmas term, they appeared and pleaded. And, in the term following, he obtained separate verdicts, sued out [writs of] *elegit* in London, and got possession of several houses in London. In the meanwhile, Cox, the younger, having an estate for life in several houses in London, some of them comprised within the plaintiff's writs of *elegit*, and in lands in Yorkshire, the inheritance of his mother, and having also, by his marriage settlement, in which the defendant Sir Thomas Meeres was a trustee, an estate for life in lands in Lincolnshire, the inheritance of his wife, the value of the whole being about £800 *per annum*, sold the same to Sir Thomas Meeres at the price of £1480 for the lands in Lincolnshire and Yorkshire and £1500 for the houses in London. The conveyance bore date the 31st of October 1684.

The bill was for a discovery of all estates of the Coxes and what money was due on the securities.

The defendant, by his answer, insisted that he was a purchaser for a valuable consideration, Cox being a sickly life, without notice of the plaintiff's claim.

At the hearing, the plaintiff's counsel relied upon the inadequacy of the price paid.

And, by the decree, the Lord Chancellor [JEFFREYS] declared that the bargain made by Sir Thomas Meeres with Cox, junior, was not fairly obtained in respect of the circumstances young Cox was in, but it ought in conscience to be made void, the premises purchased by him being more than double the value of the money paid by him. Therefore, the defendant Meeres ought to be looked upon as a mortgagee. And he gave directions accordingly.

428

Bill v. Price
(Ch. 1687)

A court of equity will grant relief against contracts and securities given as the result of bad faith, dishonesty, and overreaching.

1 Vernon 467, 23 E.R. 592

Eodem die [11 June 1687].

The defendant, being an exchangeman, had for many years past practiced upon young heirs by selling them goods at extravagant values and to be paid five for one and more upon the death of their fathers and had in that manner obtained from the plaintiff and two other young gentlemen that were heirs to good estates several securities wherein they were bound severally and jointly in £4000 for the payment of great sums of money.

Per curiam: [It was] decreed the plaintiff's security to be delivered up on payment of what the defendant really and *bona fide* paid to him alone and for his own proper use.

[Raithby's note: Reg. Lib. 1686 A, f. 1046. The defendant agreed to deliver to a certain person goods to the amount of £1200, and to lend him £300 on having good security for the payment to the defendant of £1500. Whereupon the plaintiff, being under age, gave a warrant of attorney for confessing judgment to that amount, which judgment was entered up by the defendant after the plaintiff had obtained his age. And, it appeared that the defendant, by indenture of defeasance did covenant with the plaintiff that, if he should pay Price, his executors, administrators, etc. on or about etc., then the said defendant should give a warrant of attorney to acknowledge satisfaction on the record of the said judgment, and, in the meantime to sue out no execution. And the bill prayed to be relieved on the payment to the defendant by the plaintiff of what he had really received in money or goods. And the decree was 'that it should be referred to the Master to examine what money or goods the plaintiff actually received at the time of the plaintiff's giving the warrant of attorney for confessing judgment or at any time since from the defendant or his servants and also to ascertain the real value of such goods, the plaintiff to be examined on interrogatories, and that what the said Master shall find and certify due, the plaintiff to pay same, and, thereupon, the defendant to give a warrant of attorney to acknowledge satisfaction.']

[Other copies of this report: 1 Eq. Cas. Abr. 91, 21 E.R. 902.]

429

Jennings v. Selleck
(Ch. 1687)

In this case, the lease in issue was held to be an advancement for the lessee and not a trust for the lessor.

1 Vernon 467, 23 E.R. 593

21 June [1687]. In Court.

The plaintiff's father being lord of a west country manor and the tenant in possession of a tenement refusing to renew, the lord thereof makes a lease for ninety-nine years to the plaintiff, his daughter, and, afterwards, he sells this estate to the defendant, who, having notice of this lease, takes

a collateral security that the plaintiff should release within four years after she attained her age of twenty-one years.

The plaintiff's bill was for an account of the profits of the lands comprised in the lease and that she might hold this estate during the lease, which the defendant had got into his possession and had suppressed.

For the defendant, it was insisted that this lease made by the lord to the plaintiff, his daughter, was but a trust for himself, and it was the usual method that lords of west country manors took when the tenant in possession refused to renew, that they might have the estate in their own power.

Lord Chancellor [JEFFREYS]: This lease does not appear to be a trust for the father. But I take it to be an advancement for his child. And the plaintiff having purchased with notice of it and taken a collateral security, he must make the best of his security. And, therefore, he decreed the possession and an account of profits.¹

[Reg. Lib. 1686 A, f. 1100.]

[Other reports of this case: 1 Eq. Cas. Abr. 381, 21 E.R. 1117.]

430

Poole v. Guise
(Ch. 1687)

Land seized upon a writ of extent can be redeemed regardless of the length of time since the seizure.

Upon a redemption of lands seized under a writ of extent, the person in possession will be allowed whatever he has paid for the land minus what profits and interest he has received during his possession.

1 Vernon 468, 23 E.R. 593

Eodem die [21 June 1687].

The bill was to redeem an estate, which had been actually extended on a judgment, so long since as in the 45th Eliz. [1602 x 1603].

For the defendant, it was said that, though, under an extent, a man has but an estate *quousque* the debt is satisfied and so the same is always in its own nature redeemable, yet, after this length of time and after the estate had gone through five or six hands, it was in the discretion of the court to direct after what method the account should be taken and that the defendant ought not to account for more than the extended value.

But this cause went off upon a proposition that the defendant should be allowed what he paid and account only for what he received during his own time.

[Raithby's note: The defendant, Sir John Guise [d. 1695], had purchased part of the extended premises in question and had expended in purchasing in and defending the encumbrances large sums of money. And the decree was 'On the plaintiff's offer to pay to the defendant, Sir John Guise, what he has laid out in buying in of the extents and encumbrances, together with his interest and costs, discounting what the said defendant had made and received out of the said extended premises that the plaintiff do produce before the Master all deeds etc. relating to the premises in question and make out his title thereto and that, then, the Master do take the account between the parties and see what is due to the defendant, Sir John Guise, on the said extended premises and what he has laid out and expended in buying in of encumbrances and compute interest for the same and allow him all such

¹ Raithby's note: From the time of the defendant's entry thereon together with costs to be taxed.

costs as he has been any ways put unto in defending of suits touching his title to the said premises since his purchase thereof and also tax said Sir John Guise's costs of this suit and all other just allowances, discounting and deducting all such moneys as the said Sir John Guise has any ways made or received out of the extended premises, as well by the casual as by the annual profits thereof, since his purchasing the same, and, on the payment thereof, the plaintiff to be let into possession.' Reg. Lib. 1686 B, f. 851.]

431

Brett v. Marsh
(Ch. 1687)

The parties to a sale of land can agree that the seller will discharge a particular encumbrance out of the purchase money.

1 Vernon 468, 23 E.R. 594

23 June [1687]. In Court, Lord Chancellor.

On exceptions to a Master's report, to whom the account in question was referred, it appeared the defendant was an encumbrancer by a judgment and had also a debt by a bond and received £200 of the purchaser of the estate in part, but gave no notice to the purchaser that it was to be applied towards the payment of the bond debt.

Per curiam [JEFFREYS]: It shall, therefore, be applied towards satisfaction of the judgment, the £200 being part of the purchase money.

[Raithby's note: The lands were purchased by the plaintiff of one Sharpe, the original debtor in the judgment and bond in question, and, at the time of the purchase, it was agreed that £200, part of the purchase money, should be paid to the defendant in discharge of his demands on the premises. And the same was accordingly paid. And it also appears that the defendant had written a letter, which was stated in the Master's report, which the court considered so worded as to imply the intention of the defendant that the £200 should be taken to be paid towards satisfaction of the judgment debt. By the articles of purchase, it appears that Sharpe had agreed that certain lands therein mentioned should be settled as a collateral security for securing the purchased premises from all preceding encumbrances. It was also decreed that the plaintiff should assign over such collateral security to the defendant free from all encumbrances by the plaintiff as a further security for the moneys remaining due to the defendant. Reg. Lib. 1686 A, f. 787.]

[Other reports of this case: 1 Eq. Cas. Abr. 147, 21 E.R. 948.]

Capell v. Brewer
(Ch. 1687)

Where a writ of extent in aid by a solvent creditor is used to defeat other creditors of their common debtor, a court of equity will order the creditor who executed the writ of extent to refund what he has received thereby.

1 Vernon 469, 23 E.R. 595

5 July [1687]. Lord Chancellor.

The bill was to be relieved against a [writ of] extent out of the Exchequer taken out by the contrivance of a farmer of the excise, who, having a debt owing him by a man that failed, procured the king to take that debt in aid and, by that means, to defeat all the other creditors.

Per curiam [JEFFREYS]: It is become a common practice and a great oppression in the City that any accountant to the king shall sell wines upon credit at an extravagant price and, when the man fails, an execution comes, as the first process, out of the Exchequer at the king's suit, and it sweeps away all so that all other just creditors are defeated and a commission of bankrupt rendered ineffectual. And he, therefore, declared that, where a farmer of the excise, as the principal case was, or other accountant to the king had sufficient estate of his own to satisfy the king's debt and should use this trick to defeat other creditors by getting the debt owing to him to be taken in aid of the debt to the king, such person should refund with costs. And he decreed it accordingly.

[Reg. Lib. 1686 A, f. 794.]

Cresly v. Carrington
(Ch. 1687-1688)

In order to object to an arbitral award, the plaintiff must move the court to affirm it and then either party can except to it.

1 Vernon 469, 23 E.R. 595

Eodem die [5 July 1687]. Lord Chancellor.

The matter in difference having upon the hearing been referred by the court to gentlemen in the country, who had made an award therein, the cause was set down to be heard upon the matter of the award.

But it was thrown out as coming on irregularly for that the plaintiff ought first to have moved to confirm the award, as is done upon a Master's report, and either side may except to it if they find occasion, and, then, the matter will properly come before the court on those exceptions.

2 Vernon 79, 23 E.R. 661

Eodem die [25 July 1688]. Lord Chancellor. *Cressey v. Carrington*.

Upon the hearing of this cause, it was referred by order of court to gentlemen in the country to certify the matters controverted, who made a certificate accordingly. The defendant, conceiving himself aggrieved by the certificate, put in exceptions thereunto.

But the court [JEFFREYS] rejected the exceptions and would not enter into the debate thereof.

But he ordered the certificate to be binding, though it was insisted that the certificate was not, in the form of the court, more binding or peremptory than a Master's report, to which the parties have a right to except if they find themselves aggrieved. *Mes non allocatur; tamen quaere.*

[Reg. Lib. 1686 A, f. 1005; Reg. Lib. 1687 A, f. 1189.]

[Other reports of this case: 1 Eq. Cas. Abr. 51, 21 E.R. 867.]

434

Hall v. Bodily
(Ch. 1687)

An answer based upon the defendant's remembrance is a sufficient pleading.

1 Vernon 470, 23 E.R. 596

7 July [1687]. Lord Chancellor.

On exceptions to an answer, the defendant having sworn he received no more than the sum of [*blank*] to his remembrance, it was allowed to be a good answer.

[Reg. Lib. 1686 A, f. 998.]

[Other reports of this case: 1 Eq. Cas. Abr. 35, 21 E.R. 854.]

435

Whicherley v. Whicherley
(Ch. 1687)

An accountant cannot prove a debt owing to him by his own oath.

1 Vernon 470, 23 E.R. 596

Eodem die [7 July 1687].

The court, being informed that the course of the court was that an accountant was to be allowed on his own oath, all sums not exceeding 40s. each, so as the whole was not above £100, declared that rule seemed very unreasonable, and they would consider how to rectify it.

[Other reports of this case: 1 Eq. Cas. Abr. 11, 21 E.R. 835.]

436

Awbry v. Keen
(Ch. 1687)

Where a contract to convey land is not executed, the seller must repay any part payment of the purchase price.

1 Vernon 472, 23 E.R. 597

Eodem die [19 October 1687]. Lord Chancellor.

The plaintiff was tenant to Mr. Thynne, and he contracted with his steward or bailiff for a copyhold estate for two lives. He pays £200 down and was to pay the residue on the taking up of his copy, which he was to do in three months, and then to name his two lives. A court was held accordingly; the three months expire, and the plaintiff neglects to name his two lives and take up his copy. And, before anything further was done, Mr. Thynne died suddenly, being murdered, upon whose death, the manor came to the Lord Weymouth by virtue of a remainder limited in a settlement so that he was not bound by this agreement.

The plaintiff's bill was to compel the defendant, Mr. Thynne's executor, to refund, which was decreed accordingly, although it was insisted that it was the plaintiff's own laches that he had not the estate.

[Other reports of this case: 1 Eq. Cas. Abr. 28, 21 E.R. 849.]

437

Alsopp v. Patten
(Ch. 1687)

Part performance will take a contract out of the Statute of Frauds.

1 Vernon 472, 23 E.R. 598

Eodem die [19 October 1687]. Lord Chancellor.

There are two joint lessees of a building lease. The one agrees to sell his moiety to the other by parol for four guineas, and he accepts a pair of compasses in hand to bind the bargain. The bill is to have a specific performance of the agreement.

The defendant pleads the Statute of Frauds and Perjuries.¹

The agreement being in some part executed, the court [JEFFREYS] ordered the defendant to answer and saved the benefit of the plea to the hearing.

[Other reports of this case: 1 Eq. Cas. Abr. 22, 21 E.R. 843.]

¹ Stat. 29 Car. II, c. 3 (SR, V, 839-842).

438

Winn v. Fletcher
(Ch. 1687)

A defendant's denial that the plaintiff is an administrator is a good plea in abatement.

1 Vernon 473, 23 E.R. 598

Eodem die [19 October 1687]. Lord Chancellor.

The plaintiff entitles himself as administrator; the defendant pleads the plaintiff is not an administrator. It was objected this is a negative plea.

Per curiam [JEFFREYS]: I allow the plea. It is a good plea in abatement at law.

[Other reports of this case: 1 Eq. Cas. Abr. 37, 21 E.R. 857.]

439

Foster v. Munt
(Ch. 1687-1689)

Where executors of a will are given legacies as compensation for acting, they hold any residual assets in trust for the next of kin.

Lincoln's Inn MS. Misc. 498, p. 27

Michaelmas 3 Jac. II.

The case was but this. J.S., by his will, devised legacies to his children and grandchildren to the value of about £1300, and, likewise, he devises £10 to his executor for his care. And he dies possessed of a personal estate consisting for the greatest part in leases for years of houses to the value of between £6000 and £7000.

The plaintiffs' bill was to have Munt, who was the executor, account for the surplus of the estate to them, for that the testator, having given the executor £10 for his care, intended him no other benefit by the executorship and, therefore, the residuum of the estate ought to go according to the Act for Distributing Intestates' Estates.¹

The proofs, I think, made not much to alter the case, for, on the plaintiffs' part, it was proved by several witnesses that, after the will was made, the testator had several times said he had given Munt but £10 and that Munt himself had said so too, from whence the plaintiffs' counsel inferred that he was but a trustee for the surplus.

So it was proved by the defendant's witnesses that the testator, being informed that, as his will was, his executor would have all the surplus, said he would not alter it. And being pressed several times to give more to his children and grandchildren, he had refused to do it. They, likewise, proved that the testator had been parted from his wife many years and had no kindness for his children and grandchildren and that, when the testator and the executor himself had said that he had but £10 by the will, it was because the testator had ordered him to do so to conceal how he had disposed of the estate and to keep him from being importuned by his friends.

Serjeant *Rawlinson* and Mr. *Keck*, for the defendant, insisted that, as this case is, the Statute

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

of Frauds and Perjuries¹ would bar the plaintiffs of relief, there being no resulting trust nor any declaration of a trust in writing and the estate consisting in the most part in leases for years. But putting the Act out of the case, they conceived the plaintiffs not relievable by the devise, for the devise of particular legacies to the plaintiffs was as strong an implication the testator intended them no farther benefit as the devise of £10 could be to the executor that the testator intended him no farther benefit.

And they cited the Case of Cunningham and Hicks,² decreed by the Master of the Rolls and affirmed by My Lord Chancellor upon a rehearing, which was this. J.S. devised a legacy to Cunningham, the plaintiff, who was his next of kin and heir, and also he devised a particular legacy to Hicks, the defendant, whom he made executor. Cunningham exhibited his bill to have an account of the surplus, upon the same pretense as in this case, and he was dismissed, nay, though part of the testator's estate was a forfeited mortgage in fee which was descended to the plaintiff Cunningham, yet the executor went away with that too. And they relied upon that as much stronger than the present case.

My Lord Chancellor [JEFFREYS] said the Act of Frauds and Perjuries did not affect this case here, it being in effect a declaration of the trust in writing, for the implied trust, which the law would have cast upon the executor, is by the particular legacy to him prevented.

He talked a good deal which I did not very well apprehend.

And he decreed that the plaintiffs should have an account of the surplus and the executor only his £10. Cordell and Noden.³

Note, on Thursday the 5th of December 1689, this decree was reversed by the Commissioners of the Great Seal at Warwick House. But, an appeal being brought in the House of Peers from that decree, the Lords, the 23rd of October 1690, reversed the Commissioners' decree and confirmed My Lord Chancellor.

[Other copies of this report: Lincoln's Inn MS. Misc. 503, p. 93, Lincoln's Inn MS. Misc. 504, p. 88.]

1 Vernon 473, 23 E.R. 598

25 October [1687]. In Court, Lord Chancellor.

John Markham, by will, devised particular legacies to his children and grandchildren and £10 apiece to Munt and one Symonds, whom he made executors, for their care. The surplus being £5000 and upwards, the question was whether the surplus should be a trust for the children or go to the executors.

[JEFFREYS] decreed a trust for the children.

[Raithby's note: The statement of the will in the Register's Book is not particular, but it seems to agree with the above, and the decree is as follows, 'Whereupon, etc. His Lordship declared that the words in the will did amount to a declaration of a trust by excluding the executors from any property which the law might cast upon them, it being plain the testator never designed the surplus of his estate should go to his executors, for he gave them £10 apiece for their care, and does, therefore, order and decree etc.', and he gave the plaintiffs their costs. Reg. Lib. 1687 A, f. 25.]

¹ Stat. 29 Car. II, c. 3 (SR, V, 839-842).

² *Canning v. Hicks* (Ch. 1686), see above, Case No. 368.

³ *Cordell v. Noden* (1690), 2 Vernon 148, 23 E.R. 702, Precedents in Chancery 12, 24 E.R. 6, 1 Eq. Cas. Abr. 244, 21 E.R. 1021, Lincoln's Inn MS. Misc. 498, p. 57, Lincoln's Inn MS. Misc. 503, p. 132, Lincoln's Inn MS. Misc. 504, p. 121.

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Upon a bill of review, the point was thus. A. made his will and gave several legacies, and among others, to his two daughters, and gave £10 apiece to B. and C., whom he made executors, for their pains and care and did not dispose of the residue.

And the LORD JEFFREYS decreed that B. and C. were executors in trust for the daughters and that they did not have anything beyond the particular legacies.

But the court now reversed the decree and said that it will not be a trust for the daughters or for any other, but the executors will have the residuum, because it was not disposed of. And the court asked why [it be] a trust for the daughters, for they are not entitled more than any others.

The ecclesiastical court had the proper determination of the will and had decreed it upon a controversy.

The executor has the residuum not that this is given to him by the law, but because it is not given to any other, and, because no one can demand it, he retains. But if he die intestate, administration *de bonis non* will be granted to the next of blood of the testator.

Maynard declared that, if the testator had died, that they are executors in trust, yet, if he had not declared for whom, it had been the same case. And it is not similar to the cases where a trust can result, as to the heir or to the executor upon assignment of a term or similar. Also the argument of the particular legacy to the executors is retorted that the daughters also had particular legacies and it will be as well intended as he intended that they will not have any more than in the case of executors upon their legacies. And in this case, the case of Canon and Hicks¹ was cited, which was almost the same case, and there [it was] decreed by the Master of the Rolls, Trevor, and upon an appeal affirmed by Jeffreys. (I was informed that, in this case, there was a legacy to the executor but [it was] not expressed to be for his care and pains.) But it seems it is not any difference. In the first case, the decree was reversed, and the cause was ordered to be heard.

[In] Michaelmas [term] 1690, this case was brought in the House of Lords upon an appeal, and the Lords, upon argument, reversed the reversal and affirmed Lord Jeffreys' decree and [held] that the executors were only trustees for the daughters.²

Note a case was afterwards decreed in Chancery upon the same point in effect in 1691 between Cordel and Noden, but, there, the court held that the executor will be a trustee to the children, not equally, but in proportion with their legacies, and others held that the surplus will go in the course of the administration. Query.

Lincoln's Inn MS. Coxe 40, p. 79

John Markham, by a will dated in 1681, devised particular legacies to his children and grandchildren and £10 apiece to Munt and one Symonds, whom he made executors, for their cares. Symonds died in the lifetime of the testator. And, 18 July 1686, the testator died, leaving a personal estate undisposed of about £5000 value. And the question was whether this surplus should be a trust for the children or go to the executors. It was proved that the testator, in his lifetime, being advised to alter his will [and] also that Munt would have the surplus, declared that it was his intent that Munt should have it. Soon after the testator's death, Munt proved the will. And the children of the testator brought their bill against him, alleging that he was only a trustee. And they obtained a decree in the late Chancellor Jeffreys' time, whereby Munt was decreed to assign his interest in the surplus to them as their trustee.

After this Munt brought a bill of review before the Lords Commissioners of the Great Seal, before whom the decree of the Lord Chancellor Jeffreys was reversed by the following order bearing

¹ *Canning v. Hicks* (1686), see above, Case No. 368.

² *Lords' Journal*, vol. 14, p. 529, *sub nom. Forster v. Bernard*.

date 5 December 1 Will. and Mar., 1689.

Whereas, by an order of the 9th July last made upon the arguing of the now plaintiffs' plea and demurrer to the defendant's bill of review, it was ordered that the said plea and demurrer should be overruled and the decree obtained against the defendant reversed and either party to be at liberty to petition to have the cause reheard. And the said cause coming this present day to be reheard before the Commissioners of the Great Seal, in the presence of counsel on both sides and on long debate of the matter etc. and reading the testator's will and the said decretal order made by the Lord Chancellor Jeffreys in this cause whereby it is declared by His Lordship that the words in the will amount to a declaration of trust that did exclude the executors from any property the law might cast upon them for that the testator never designed the surplus estate should go to his executors Their Lordships, the Lords Commissioners, were unanimously of opinion that the declaration of the Lord Chancellor was not warranted by any rule of law or equity for the testator's estate was all personal and the probate of the will [was] duly granted to the defendant, the executor, in the ecclesiastical court after the plaintiffs had opposed and contested that matter with him there so that no suggestion of fraud in gaining or contriving the will was examined in this court, the probate being conclusive, and for that it was a very strained construction to make a trust by implication for the surplus estate against the standing rule and judgment of law, though the executor had a legacy of £10 and this was a new opinion against the precedents of the court and would be of dangerous consequences and, if stood, might be a means to strike many wills and an inlet of many suits, nothing being more common in wills than for executors to have particular legacies by the same will whereof they are appointed executors and, if it were an argument that the executors should not have the surplus where the law gives it them, because they had particular legacies, it was a much stranger that the plaintiffs who had such a legacy of £200 should not have it, besides, if it should be taken that the testator did not intend the executors any more than their particular legacies (which Their Lordships are of the opinion ought not to be so adjudged in any court of justice, it being theirs by law yet the plaintiffs have no manner of title to the surplus, for this case is not within the provision of the Act for Settling Intestates' Estates, here being a will and an executor and a probate of the will granted to the executor and the plaintiffs have no title in law or equity to question it nor ought the value [. . .] the rule of justice wherefore Their Lordships do think fit and order that the said plaintiffs bill do stand dismissed out of the court without costs. And it is further ordered in the cause in the bill of review that the plaintiffs, who are defendants in that cause, do two days before the last seal deliver upon oath to the defendant Munt or to whom he shall appoint all deeds, writings, etc., which they or other of them or any other person or persons for them have in their and other of their custody, which the said plaintiffs received out of this court, but, in default of the said plaintiffs' delivering the said writings by the time aforesaid to the defendant or whom he shall appoint, then it is further ordered that the said plaintiffs in the original cause do pay to the defendant his costs of suit to be taxed by the Master. And it is further ordered that the recognizance entered into by the defendant on bringing his bill of review be vacated and discharged.

Note this decree was afterwards reversed in the House of Lords and the Lord Chancellor Jeffreys' decree affirmed upon this reason, that the executors having an express legacy, they ought to be looked on as trustees to the next of kin for the residue.

2 Eq. Cas. Abr. 433, 22 E.R. 368

A., possessed of a personal estate and of leases for years, makes his will, and he, thereby, gives legacies to every one of his grandchildren, and likewise £10 unto Mount. And he made him his executor and died. There being no disposition of the personal estate, the next of kin exhibited their bill to have a distribution. It was insisted that the executor cannot be a trustee for the next of kin for the residue of the estate which is not disposed of since the Statute of Frauds unless there had been a declaration of the trust. And giving a legacy to the executor cannot alter the case because there are legacies also given to the next of kin, which makes them equal.

By the Lord Chancellor [JEFFREYS], the said Statute does not affect this case, and, although the next of kin have legacies given, yet a legacy given to the executor excludes him from having the residue. Therefore, he decreed a distribution.

Note this decree, upon a rehearing before the Lords Commissioners [to Hold the Great Seal], was reversed, and their decree was set aside in the House of Lords, and this decree was affirmed.

9 Modern Reports 243, 88 E.R. 426

It was first sent to the Master to enquire what the surplus amounted to. And I [Lord Hardwicke] have heard that that arose in a great measure from an ill opinion which My Lord Jeffreys had conceived of the executor's behavior in obtaining the will. And, it being reported to amount to £5000, he thought it was absurd to say that the testator would have given the executor so small a legacy as £10 for his care and pains if he had meant at the same time to give him the surplus. But there was no particular evidence of any fraud in that case, but only such a general charge in the bill; so that the decree was founded wholly on that single point.

[Other reports of this case: 1 Eq. Cas. Abr. 243, 21 E.R. 1020, 2 Eq. Cas. Abr. 443, 22 E.R. 378, British Library MS. Stowe 406, ff. 150, 152.]

440

Barker v. Talcot
(Ch. 1687)

A payment of a debt due to a decedent that is made to his administrator is binding on any other administrator even though the creditor's estate was not fully administered.

1 Vernon 473, 23 E.R. 600

27 October [1687]. In Court.

The plaintiff Barker held a farm by lease from one Talcot, who dies intestate, and Talcot, his son, takes administration. And he settles an account with Barker for the rent then in arrear, which amounted to £60. Barker satisfied £29, part thereof, by cheese etc. and gives a note under his hand promising payment of the remaining £31 to Talcot, the son. Before the £31 are paid, Talcot, the son, also dies intestate. And, afterwards, the plaintiff Barker pays the £31 to Mr. Shaw, the administrator of the son. After this, Talcot, the defendant, takes out administration *de bonis non* to Talcot, the father, and, then, he brings an account against the plaintiff for the £31.

Upon the trial, the judge doubting whether the note given to Talcot, the son, was an absolute conversion, a verdict was suffered for the plaintiff, which, by agreement, was to stand as a security. And a case was to be made for the opinion of the judges.

And, pending that matter, Barker brought his bill against the administrator of the son and also against the administrator *de bonis non* of the father setting forth the matter as above and praying relief and that he might not be doubly charged and compelled to pay the same money twice.

The Lord Chancellor [JEFFREYS], on a full hearing, adjudged the note given to Talcot, the son, for the £31 to be *quasi* a payment and a good conversion in him and that the same ought to go to his administrator and not to the administrator *de bonis non* of the father.

In the arguing of this case was cited the Case of Norden and Levett,¹ where an administrator brought [an action of] trover for goods and recovered, and he takes part in hand and accepts a covenant for the satisfaction of the residue, and the debtor, afterwards, failed. It was adjudged in the [Court of] King's Bench to be a *devastavit* in the administrator, and the judgment was afterwards confirmed upon a writ of error in the House of Lords.

And the Lord Chancellor [JEFFREYS] cited a case adjudged by Serjeant Pemberton, when Chief Justice, where an executor of an obligee accepted a note drawn on a goldsmith for the money, the goldsmith accepted the bill, and, before payment, fails; the executor, afterwards, brought an action upon the bond, and this matter, being given in evidence, was adjudged a good payment.²

441

Gale v. Lindo
(Ch. 1687)

A court of equity will grant relief against a fraudulent bond to the executor of the party who committed the fraud.

Lincoln's Inn MS. Misc. 498, p. 30

The defendant had a sister, between whom and J.S. there was a treaty of marriage, she pretending her portion to be more than it was. But to carry on the match, the defendant made it up as much. But, before the marriage was made, his sister privately entered into articles to pay him £100 *per annum* for his life, and, also, she gave him a bond of £100. The marriage takes effect. J.S. dies, and, after, the wife dies without any children.

The plaintiff, who was executor to the wife, exhibited his bill to have the articles and bond delivered up, which was decreed by My Lord Chancellor [JEFFREYS] accordingly.

The counsel on both sides agreed that these articles and bond, being in fraud of the marriage agreement, would have been void against the husband or any issue of that marriage.

But the counsel, for the defendant, insisted that they were good against the wife, she surviving, and against her executors, as a voluntary conveyance is good against the party and his executors, though it may be void as to others and, though this should be looked upon as a fraud, yet the wife had the benefit by it and, being *particeps [fraudis]* in it, she nor her executors could never take any advantage of it.

But My Lord Chancellor [JEFFREYS] said, if the husband and wife together had exhibited a bill to have them delivered up, it must have been so decreed and that which was once a cheat could never after become honest.

[Other copies of this report: Lincoln's Inn MS. Misc. 503, p. 96, Lincoln's Inn MS. Misc. 504, p. 90.]

¹ *Norden v. Levit* (1677), T. Jones 88, 84 E.R. 1160, 2 Levinz 189, 83 E.R. 512, 1 Freeman 442, 89 E.R. 331, 3 Keble 597, 615, 691, 706, 742, 778, 84 E.R. 900, 911, 964, 985, 1006, 79 Selden Soc. 617.

² *Vernon v. Boverie* (1683), 2 Shower K.B. 296, 89 E.R. 949; *Cookesey v. Boverie* (1683), 2 Shower K.B. 296, 89 E.R. 949.

1 Vernon 475, 23 E.R. 601

29 October [1687]. In Court.

The case was that, when a marriage was treating between one Gringer and the sister of William Pitman, the woman not having so great a portion as the man insisted upon, she prevails with her brother Pitman to let her have £160 to make up her portion, and she gave him a bond for the repayment of it. And, thereupon, the marriage was had. And the husband, who knew nothing of the bond, died without issue, and his wife survived him, and, afterwards, she died having made her will and the plaintiff executor. William Pitman, the brother, dies, and he makes the defendant his executor, who put the bond in suit against the plaintiff, as executor of the widow, to recover back the £160. And, thereupon, he brings his bill to be relieved.

For the defendant, it was insisted that, although this might be a fraud as against the husband or any issue of his, who were to have the benefit of the marriage agreement, yet the husband being dead and there being no issue, this bond is good against the woman herself and, by consequence, against her executor, there being no creditors in the case or any deficiency of assets pretended.

Lord Chancellor [JEFFREYS]: You admit the husband might have been relieved on a bill brought by him and his wife. That which was once a fraud will be always so. And the accident of the woman's surviving the husband will not better the case. He decreed the bond to be delivered up and a perpetual injunction against it.

Quaere, if the condition of the bond had been that, in case the woman survived the husband, that she should repay it, whether she could have been relieved?

Note it was opened in this case that, after the death of the husband, the wife agreed to repay the money and actually paid part. *Sed non allocatur*.

[Raithby's note: It appears that judgment had been obtained on the bond at law, on the record of which the defendant was ordered by the decree to cause satisfaction to be entered. Reg. Lib. 1687 A, f. 221.]

442

Williams v. Springfield
(Ch. 1687)

Where a debtor redeems mortgaged land that came to the hands of an assignee of the mortgagee, he must repay the entire amount due.

1 Vernon 476, 23 E.R. 602

4 November [1687]. In Court, Lord Chancellor.

The plaintiff had mortgaged the lands in question to J.S., who finding it was a slender security and not worth the money due thereon, the plaintiff's wife, in case she should happen to survive her husband, having a right of dower in the mortgaged estate. J.S. agreed with the defendant Springfield to assign the mortgage to him for £100, although there was £150 then due to him thereon.

The plaintiff now brought his bill to redeem. And the sole question was whether the defendant should be allowed all the money that was then really due on the mortgage.

Per curiam [JEFFREYS]: Where there are subsequent encumbrances or creditors in the case, there, a man that buys in a prior encumbrance shall be allowed only what he really paid, though there was in truth a greater sum due, but, where the mortgagor himself or his heir comes to redeem, there is no reason that he should have the benefit of a good bargain made by another man, and he ought, therefore, to pay what is really due on the mortgage, whatever it be, without respect to what the assignee paid. And he decreed it accordingly.

[Raithby's note: The bill was by the assignee of the mortgagee. Reg. Lib. 1687 B, f. 84.]

[Other reports of this case: 1 Eq. Cas. Abr. 330, 21 E.R. 1081.]

Fulthrope v. Foster
(Ch. 1687)

A contract to sell land with an option to repurchase will be treated as a mortgage.

1 Vernon 476, 23 E.R. 602

11 November [1687]. In Court.

The mother, who had an estate for life, joins with her son, who had the inheritance, in a conveyance of lands of £4 *per annum* and a profit out of some coal mines, which, *communibus annis*, were worth £9 *per annum* for £90. The deed was absolute, and the vendee was immediately put into possession, but on a proviso that, if the son should pay the money at the end of ten years, the defendant should reconvey to the son.

The bill was brought by the son to redeem. And the sole question was whether the defendant should retain the profits in lieu of the interest or should account for what he had received out of the estate.

It was insisted that the mother, who had parted with her estate for life, had the most reason to complain, and yet she was content the defendant should have the profits in lieu of the interest, that the son had a good bargain of it, for he had got to himself his mother's estate for life, and that this was but like the case of Welsh mortgages, where the mortgagee is put into possession immediately under a proviso to have a reconveyance on payment of the principal money, sometimes at a time prefixed and often at any time whatsoever. And there, the profit always goes against the interest. This case was stronger by reason that the profits here arising out of the coal mines were more uncertain than the profits of lands.

But the Master of the Rolls [TREVOR] thought that, in this case, the profits being £13 *per annum*, it was altogether unjust and unreasonable that the same should go in lieu of the interest of £90. And, as touching Welsh mortgages, he thought, if the value was excessive, the court would decree an account, notwithstanding the agreement for retaining the profits in lieu of interest. And he thought the court would relieve against a Bristol bargain, to wit where A. lends B. £1000 on a good security and, as to one £500, it is agreed between the parties that it should be repaid altogether with interest for it, as it should become due, and, as to the other £500, that B., in consideration thereof, should pay unto A. £100 *per annum* for seven years. And, in the principal case, he decreed a reconveyance on payment of what should appear to be due, discounting the profits received.¹

[Reg. Lib. 1687 A, f. 141.]

¹ Raithby's note: From the time of the mortgagee's entry.

Deering v. Hanbury
(Ch. 1687)

A devise over of chattels after a devise for life is void.

The question in this case was whether an executor should give security to pay a devise over of chattels after a devise for life.

1 Vernon 478, 23 E.R. 603

12 November [1687]. In Court.

J.S., by will, having disposed of a term for years, whereof he was possessed, and [having] bequeathed several legacies, devises all the rest of his estate, being chattels personal only, unto the defendant, his daughter, whom he also makes executrix. But he willed that, in case his said daughter died without issue, that the same should go over to the plaintiffs. And he appoints that she should give security that, in case she died without issue, the estate should go over accordingly.

The bill was to compel the defendant to discover the estate and to give security. The defendant demurred for that the devise over was void and that, therefore, she ought not to be enforced either to discover the estate or to give security.

The counsel for the plaintiff did admit that, had there been nothing more in the case than a devise to the defendant and her issue and, in case she died without issue, it should go over to the plaintiffs, that would have been void, had the devise been of a term for years and much more of chattels merely personal, as the principal case was, for, where chattels personal are devised to one for life, that is, if the things themselves and not the bare use thereof only be devised, a devise over is void. And they cited the Case of Whitmore and Chemish.¹ But they took it that the testator having made his daughter as well executrix as residuary legatee and appointing her to give security for the purpose aforesaid, it made this a different case from those that had been put. And they took it clearly that, if a man, by his will, gave his estate to his executor upon condition, that the executor after his death should have his estate fairly appraised and inventoried and directs that his executor should within six months give a bond to J.S. conditioned to pay to J.S. such sum as the same should be appraised at at the end of ten, twenty, or thirty years after his death, that such conditional devise would be good, as would also the bond. And so they took it it would be in case the condition was to give a bond to pay the value thereof to J.S. in case the executor should die without issue. And so, in the principal case, though the devise over would not be good as to the personal chattels themselves, which were every day wasting and spending, yet the security would be good for the value thereof.

But it was observed by the defendant's counsel that the security in this case by the will appointed to be given was not to pay the value of the estate but that the estate itself should go over upon her dying without issue, which was repugnant and void in law, for this in effect is to entail a bond, and, should this be admitted, in time, as a judge upon the like occasion once expressed himself, we should entail old shoes.

The Master of the Rolls [TREVOR] thought fit to save the benefit of the demurrer to the hearing. And he appointed the defendant to answer as to the will, but not to discover the estate, unless the court should so think fit upon the hearing of the cause.

[Raithby's note: Reg. Lib. 1687 A, f. 212. The defendant submitting to be examined on interrogatories for discovery thereof, as the court should see fit, no further account of the cause appears.]

¹ *Whitmore v. Weld* (Ch. 1685-1686), see above, Case No. 274.

Towers v. Davys
(Ch. 1687)

A jointress who is also administratrix is entitled to have her jointure confirmed by the heir in return for giving him the title deeds, but she must also confirm the heir's rights.

1 Vernon 479, 23 E.R. 605

14 November [1687]. In Court, Lord Chancellor.

The plaintiff, as heir at law, brought a bill for the deeds and writings that concerned his estate, the defendant insisting that she, having a jointure of part, ought not to discover or part with her writings until her jointure was confirmed.

For the plaintiff, it was insisted the jointure was made after marriage and not pursuant to any precedent articles and was purely voluntary.

Per curiam [JEFFREYS]: Confirm the jointure, or you shall not see the deeds. But, whereas the defendant insisted she was entitled to another part of the estate as administratrix by reason of a lease for years, which had been heretofore made thereof, and she having by letter acknowledged that the lease was intended to attend the inheritance, the court [JEFFREYS] compelled her to agree to relinquish all her pretensions to the lease, and, unless she would so do, he declared she should be ordered to produce all the writings without having any confirmation of her jointure.

[Raithby's note: The, decree in this case was as follows, 'Whereupon etc. that the defendant do produce all the deeds, writings, and evidences touching and concerning the premises and estates in question or any part thereof upon oath before the Master and what lands or tenements thereby appear to be intended to be settled by the said defendant's first husband on her for a jointure, the said defendant and her assigns are to hold and enjoy the same accordingly against the said plaintiffs, and all claiming under them, and the plaintiffs are thereby decreed to confirm the same to the defendant for her life, the reversion and remainder to the plaintiffs in fee. And it is further ordered and decreed that the defendants do forthwith convey to the plaintiffs and their heirs all the rest of the estate and premises which are not in and by the said deeds conveyed by the said Humphrey Davys [the defendant's first husband] and settled or intended for the defendant's jointure, such conveyance to be settled by the Master. And it is further ordered and decreed that the said defendant do come to an account for all the rents and profits received by her or for her use of all the lands and premises not mentioned or intended to be settled upon her in jointure, if any such there be, from the time the plaintiffs exhibited their bill, and that the Master do report thereon. And, after the Master's report, the plaintiffs are at liberty to move for the writings belonging to them as they shall be advised.' Reg. Lib. 1687 B, f. 153.]

[Other reports of this case: 1 Eq. Cas. Abr. 167, 222, 21 E.R. 963, 1005.]

Cann v. Cann
(Ch. 1687)

A third-party beneficiary of a marriage settlement does not have a cause of action where his ancestor, the obligee, did not enforce the settlement and, had he done so, he could have defeated the plaintiff's entail by the means of a common recovery.

1 Vernon 480, 23 E.R. 605

15 November [1687]. In Court.

William Cann, the plaintiff's grandfather, on the marriage of Sir Robert Cann, the plaintiff's father, settled the manor of Breane in Gloucestershire and other lands to the use of Sir Robert for life, then to his intended wife for life, remainder to the heirs male of the body of Sir Robert. And he covenanted to purchase other lands of the value of £50 *per annum* and to settle them to the like uses. William, the grandfather, died and left a considerable personal estate. And he made Sir Robert his executor. Sir Robert levied a fine and thereby barred the entail of the settled lands, and, by his will, he gave his estate to his son by the defendant, who was his second wife. And he gave the plaintiff an annuity of £200 *per annum* for life only and that upon condition to release his executrix of all demands, which he refused to do by reason that his father had in his lifetime entered into a bond of the penalty of £12,000 to leave the plaintiff £6000 at his death.

The plaintiff's bill was that he, being the issue in tail, might have satisfaction made him on this covenant or, at least, might have liberty to sue the covenant in the trustees' names. And it was said that it was the more reasonable the plaintiff should take advantage of the covenant in regard he was disinherited.

But, it being insisted for the defendant that this was a covenant of William, the grandfather, and was broken in the lifetime of Sir Robert, the plaintiff's father, who thereby became entitled to the damages on that covenant, and the plaintiff's own bill was that Sir Robert, as executor to his father, had out of his personal estate retained a satisfaction for the non-performance of this covenant and that in case the lands had been purchased and settled according to the covenant, yet it had the next day been in the power of Sir Robert to have barred the entail by the levying of a fine or suffering a common recovery and that, therefore, there was no reason now to carry this covenant into an execution in equity for the benefit of the plaintiff, the issue in tail, and that against the executrix of an executor, the court [JEFFREYS] was clear of an opinion that, in regard Sir Robert had been tenant in tail in case this settlement had been actually made and so might have barred the estate the next day, as he has done all other the entailed lands, that the plaintiff ought not to be relieved as touching that covenant, but he dismissed that part of the bill.

And the bill being also to have satisfaction for a legacy of £50 devised to the plaintiff by Humphrey Hooke, his grandfather, in 1658 and another legacy of £100, which was devised to the plaintiff by Cicely Hooke, his grandmother, in 1660, both which had been received by his father, it was insisted for the defendant that the plaintiff had received ample satisfaction for these legacies from his father in his lifetime and, more particularly, that the bond of £12,000 entered into by Sir Robert to leave the plaintiff £6000 at his death was in time long after he had received these legacies and that all the plaintiff's demands must naturally be intended to be included in this bond and that, besides all this, the plaintiff, in answer to a cross-bill, had insisted on the Statute of Limitations.¹

Lord Chancellor [JEFFREYS]: I will do all I can to help an heir that is disinherited. And you shall be allowed nothing more than what you can prove to have been actually paid towards satisfaction of these legacies and *eo nomine*, as in part of the legacies, and shall pay the residue with

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

interest.

[Reg. Lib. 1687 A, f. 80.]

Gosling v. Dorney
(Ch. 1687)

In this case, the debts and legacies of a decedent's estate were ordered to be all paid proportionally without any preference to the debts.

Lincoln's Inn MS. Misc. 498, p. 31

The case was this. A widow makes her will and, thereby, devises certain lands to trustees to be sold for the payment of her and her late husband's debts. And she makes the same trustees her executors. And she dies indebted to one of them by bond.

And this bill was exhibited in this court to enforce the trustees to sell the land and perform the trust. All the trustees renounced but he only who was the creditor. And he insisted that, the money arising by the sale of the lands would be assets at law and, therefore, he being a bond creditor and the estate now being sufficient to pay all the debts, he ought to be permitted to retain to pay his own debts wholly before any simple contract [debt], according to the course of administration at law.

But My Lord Chancellor [JEFFREYS] was of opinion against him, for, though it be true, if the land had been sold, the money would have been assets and, then, according to the course of administration, his bond should have been paid before any simple contract [debt], yet this being upon a trust and the parties coming into this court for an execution of it, debts of all kinds being equal in equity, the bond shall have no advantage before any simple contract.

Then, it was insisted for the defendant that the woman having devised this land for the payment of her own and her husband's debts, as to her husband's debts, it was but in the nature of a legacy and it had often been resolved in this court that, where a trust is raised for the payment of debts and legacies and the estate is not sufficient to pay both the debts and legacies, the debts must all be paid before the legacies shall be let in. And so it was said to be decreed in the Case of Hoxon and Witham, by Lord Chancellor Nottingham,¹ upon great debate.

But My Lord Chancellor [JEFFREYS] was of another opinion in this point likewise. And he said that, where a person has subjected his lands to pay debts and legacies, whereof themselves they would neither in law nor equity have been subject to the payment of either, there, a court of equity could not subject them in any other manner than the party himself had made them liable.

And all the ancient practicers not in the cause, being asked how the practice of the court was in this matter, acknowledged that the Case of Hoxon and Witham had been decreed accordingly as the same was cited, but that they had not known any other case besides that so decreed.

My Lord Chancellor [JEFFREYS] seemed very clear in his opinion upon both the points. But, for the present, he did only refer it to a Master to state the debts and procure a purchaser. And he reserved his final decree until after the report should be made.

[Other copies of this report: Lincoln's Inn MS. Misc. 503, p. 97, Lincoln's Inn MS. Misc. 504, p. 91.]

¹ *Hickson v. Wytham* (1675), 1 Chancery Cases 248, 22 E.R. 784, 1 Freeman 305, 89 E.R. 222, 22 E.R. 1226, Reports *tempore* Finch 195, 23 E.R. 107, 73 Selden Soc. 136, 152, 2 Eq. Cas. Abr. 369, 22 E.R. 314.

1 Vernon 482, 23 E.R. 607

16 November [1687]. In Court.

Where land is devised to be sold for payment of debts and legacies, the Lord Chancellor [JEFFREYS] was of opinion that the debts and legacies should be paid in equal proportion without any preference to the debts. And so it was resolved in the Case of Sir John Bowles by the Lord Nottingham that debts and legacies should be paid *pari passu*. But the Lord North reversed that decree and gave preference to the debts. And so the Lord North, likewise, in the case of Hixon and Witham, decreed the debts to be first paid.

But the Lord Chancellor [JEFFREYS] declared he was not satisfied with that opinion, but he would consider of it.

[Raithby's note: The words of the will, as stated in the Register's Book, are, 'And the testatrix particularly directs that the charges of her funeral and probate of her will be first paid, then that her trustees be fully indemnified, next that the debts and after that her legacies be paid, and the surplusage (if any) to her two sisters,' etc. The decree is 'That the money to be raised by sale of the lands and profits thereof until sale be applied in discharge of the debts, each creditor and legatee to come in for satisfaction of their debts and legacies, share and share alike, *pro rata*, without any regard to the nature of the securities.' Reg. Lib. 1687 A, f. 49.]

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Lady Shore v. Billingsby
(Ch. 1687)

In this case, the devise in issue created a joint estate with the right of survivorship.

1 Vernon 482, 23 E.R. 607

Eodem die [16 November 1687].

A man having devised the surplus of his estate after his debts paid to A. and B., A. dies. It was adjudged in the [Court of] Delegates and decreed by the Lord North and now confirmed by the Lord Chancellor [JEFFREYS] that this was a joint devise and should survive to B. And the Lord Chancellor's [JEFFREYS] opinion was that, if A. and B. had been made executors and A. had possessed a moiety of the goods and died, it would have been all one. And the Case of Cox and Quaintont¹ was cited, where there were two joint executors and one died; [it was] adjudged his executor or administrator should not have an account against the survivor.

[Other reports of this case: 1 Eq. Cas. Abr. 243, 21 E.R. 1020.]

¹ *Cox v. Quantock* (1674), 1 Chancery Cases 238, 22 E.R. 779, Reports *tempore* Finch 176, 23 E.R. 97, 2 Freeman 140, 22 E.R. 1114, 73 Selden Soc. 102, 1 Eq. Cas. Abr. 242, 21 E.R. 1019.

Whaley v. Norton
(Ch. 1687)

A gift given for immoral purposes will be set aside.

1 Vernon 483, 23 E.R. 608

18 November [1687]. In Court.

The bill was to be relieved against a bond and judgment defeasanced for the payment of £400 to the defendant. And the bill charged that, whereas the security recited £400 to have been lent and paid by the defendant to the plaintiff, that, in truth, the money was never really lent or paid.

The defendant, by answer, confessed that the £400 was not lent or paid by her and that it was never meant or intended so to be and that it was the mistake of the scrivener in making the security after that manner, for that the £400 thereby intended to be secured was the free gift of the plaintiff unto the defendant.

The truth of the case was that the defendant was for some time kept by the plaintiff, and this £400 was given her upon that account. But, of that, no notice was taken in the bill. And the counsel for the defendant insisted that, it being a free gift, no equity could relieve against it. And they cited the Case of Bourman and Uphill, which was this very case in point, and the equity laid in the bill was the same, to wit that it purported to be a security for money lent, whereas no money was really lent or paid. And the court would not relieve in that case, though the gift was upon the like account. And the Case of Peacock and Mainklin was also cited.

The Master of the Rolls [TREVOR] said that there would be a difference in these cases between a contract executed and executory and that this court would extend relief as to things executory, which, if done, it may be might stand. But, as this case was, he saw no ground to relieve the plaintiff, nothing appearing to him, but it was a free and voluntary gift without anything of *turpis contractus*. And, in case it had been so, yet we know that Adam was punished, though tempted by Eve, because he would be tempted.¹ But, if it had been charged in the bill that the defendant was a common strumpet and she commonly dealt and practiced after that sort and used to draw in young gentlemen, in such case, he thought it reasonable the court should relieve.

And the plaintiffs had, in this cause, proved as much. But the defendant's counsel opposed the reading to that matter, by reason it was not charged in the bill nor in issue in the cause. So they prayed liberty to amend their bill and to charge that special matter, paying the costs of that day and of the depositions taken in the cause.

[Other reports of this case: 1 Eq. Cas. Abr. 87, 21 E.R. 898.]

¹ Genesis, chap. 3.

450

Walley v. Walley
(Ch. 1687)

A devisee can redeem his land that was mortgaged by the executor of the devisor, but the mortgagee is to be reimbursed for capital improvements.

1 Vernon 484, 23 E.R. 609

19 November [1687]. In Court, Lord Keeper. John Walley, an infant, *per prochein ami*, plaintiff; Peter Walley, Thomas Gaudy, Robert Warner *et al.*, defendants.

Francis Walley, the plaintiff's grandfather, being, amongst other things, possessed of several messuages and tenements at Mile End in Stepney in the County of Middlesex for a term of forty years, in which there was at his death about thirty-five years to come, which he held by lease from Clare Hall in Cambridge and which messuages were worth about £90 *per annum* over and above the rent reserved on the lease, and, being so possessed and of other personal estate, in November 1671, he made his last will and testament, and, thereby, he devised several legacies amounting unto about £60, and, then, he devises in these words, *viz.*:

Item, all the rest and residue of my lands, houses, tenements, goods, chattels, household stuff, and plate, jewels, and whatsoever else belongs to me in this world, as well that which is unnamed, as that which is named, I give and bequeath unto my loving grandchild John Walley, the younger, [to wit the plaintiff], and I do make my son-in-law John Walley [to wit the plaintiff's father] executor in trust for my said grandchild John Walley.

Afterwards, in 1677, the testator died. And John Walley, the father, proves the will, possesses the personal estate, and, in March 1678, surrenders the old lease, and takes a new lease from Clare Hall in his own name for the same term as was unexpired of the old lease and without payment of any fine or other consideration. And, having so done, he mortgages part of the estate to one Williams for £200, which mortgage by mesne assignments was come down to the defendant Seymour in trust for Gaudy, who had lent a further sum of £350 on a security by way of a mortgage of the premises. After this, John Walley, the plaintiff's father, makes an assignment of his equity of redemption to the defendant Peter Walley upon trust to sell and dispose of the premises for the payment of his debts. And then, he goes beyond the sea as a common soldier to the Indies in the service of the East India Company. The defendant Warner, being a sea captain and having got a sum of money together, employs one Peters, a scrivener, to find him out a purchase, who informs him of the estate in question, and he brings Peter Walley, the trustee, and Warner together, and Warner contracts with Walley to purchase the premises at the price of £870. And he pays off Gaudy and takes an assignment of his mortgage.

The plaintiff's bill set forth the matter, *ut supra*, and charged that Gaudy, before he lent his money, as also Warner, before he had paid any part of his consideration money, had full notice of the plaintiff's title and that his father was only executor in trust for him. And, therefore, he prayed an account of profits and to be let into possession and to have the new lease assigned.

Gaudy, by answer, confessed that he had notice before the lending of the money, but that he was at the same time told that Walley, the grandfather, died greatly indebted and that his executor was in disburse £500 and more for the payment of his debts. And he set forth what profits he had received during the time he was in possession and that he had accepted of what rested due on his mortgage from Warner, the purchaser, and had, thereupon, assigned the same unto him.

Warner set forth his purchase and that he had paid off Gaudy and taken an assignment of his

mortgage and that he had not yet paid the residue of his purchase money but had given a note for it to Peter Walley, the trustee. And he denied he had notice of the plaintiff's title before his purchase.

The cause coming this day [19 November 1687] to be heard and it being fully proved that Warner had notice before any of his purchase money was paid or deeds executed and that the will of Walley was read over both to him and Peters, the scrivener, before his purchase, it was insisted by his counsel that he ought notwithstanding to have the benefit of Gaudy's mortgage, for that it was not proved in the cause that Gaudy had notice before he lent his money and, though Gaudy had by answer confessed notice, yet that could not bind Warner, the purchaser, but that the plaintiff might have examined Gaudy *de bene esse* against Warner to have proved the notice and that, Gaudy being before the court, the plaintiff might take a decree against him for that money.

But it was answered that Warner having purchased with full notice, he stands affected with the trust and cannot defend himself as an innocent purchaser. And, though Gaudy's answer cannot be read against him as evidence, yet, if he would mend his case on the pretence that Gaudy had no notice, he then must stand in Gaudy's place, and Gaudy's confession of notice as to the title he derives from Gaudy will bind him, and Gaudy cannot transfer to Warner a better right than he himself had. And he confesses he came in with notice.

And Warner's counsel then prayed, in regard that Gaudy was a defendant before the court, that the plaintiff might take his decree against Gaudy for the money paid to him by Warner, the purchaser.

The court decreed the plaintiff should be let into possession and have the benefit of the new lease and an assignment thereof from the defendants and an account of the profits for what each defendant had respectively received.¹ But with this, that the Master should also take an account of the personal estate of Walley, the plaintiff's grandfather, and what the plaintiff's father paid for the debts and legacies of Walley more than what the other personal estate of Walley would amount unto should be allowed upon the account. And Warner should be likewise allowed what he had laid out in lasting improvements upon the premises, though they were made pending the suit, and that Peter Walley should deliver up to Warner the note or bill he gave for the payment of the residue of his purchase money. And Warner was left at liberty to bring his bill against Gaudy for the money he had paid to him on the assignment of his mortgage.²

In the arguing of this case was cited the Case of Culpepper and Aston,³ wherein it was settled that, where trustees are appointed to sell lands for the payment of debts, the sales by them made of what was more than sufficient for the payment of debts are not good.

Note, in this case, the plaintiff's father, who was the executor in trust, being gone to the Indies as a common soldier in the service of the East India Company and the plaintiff making affidavit of that matter and that he knew not whether his father was living or dead, nor where to find him to serve him with process, it was upon a motion ordered that the plaintiff might proceed against the other defendants without prejudice for not bringing his father to the hearing. And the plaintiff had the decree *supra* without bringing his father to the hearing.

[Reg. Lib. 1687 B, f. 81.]

[Other reports of this case: 1 Eq. Cas. Abr. 332, 384, 21 E.R. 1083, 1120.]

¹ Raithby's note: during the time the said premises were in their respective possessions. Reg. Lib.

² Raithby's note: And also the sum of £30 and a guinea piece received by him in part of the purchase money, and Peter Walley, the trustee, was likewise to account for so much of the testator's other personal estate as had come to his hands. Reg. Lib.

³ *Culpeper v. Austin* (1676-1682), 2 Chancery Cases 115, 221, 22 E.R. 873, 919, 73 Selden Soc. 443, 1 Eq. Cas. Abr. 272, 21 E.R. 1040.

451

Willett v. Winnell
(Ch. 1687)

In this case, the conveyance in issue was a mortgage and not an absolute purchase, and the court ordered a redemption of the estate.

1 Vernon 488, 23 E.R. 611

Eodem die [19 November 1687]. In Court, Lord Chancellor.

The plaintiff was the youngest son of his father, who was seised, according to the custom of the manor of Wolverly, of a copyhold tenement of the nature of borough English of the value of £15 *per annum*. And, in April 1671, the plaintiff's father, having borrowed £200 of the defendant's father for securing the same, made a conditional surrender into the hands of two customary tenants of the manor to be void on payment of the £200 and interest in April 1672. And, at the same time, the defendant's father entered into a bond conditioned that, if the £200 and interest should not be paid at the day, then, if the defendant's father should pay to the plaintiff's father, his executors, administrators, or assigns, the further sum of £78 in full for the purchase of the premises within ten days afterwards, that the bond should be void or otherwise stand in full force.

The plaintiff's father died in November 1671, before the mortgage was forfeited, leaving the plaintiff an infant of two years old. And the £200 with interest not being paid at the day, the defendant pays the £78 the next day after the mortgage was forfeited to the administrator of the plaintiff's father, according to the condition of the bond.

The plaintiff's bill was to redeem on repayment of the £200 with interest, discounting the profits.

The defendant, by answer, insisted it was an absolute purchase.

The court [JEFFREYS] decreed a redemption, making no doubt but it continued a mortgage and was not an absolute purchase. But, as to the £78, he declared that to be well paid to the administrator. And, therefore, he ordered the whole moneys with interest to be repaid and costs, discounting the mesne profits.

[Reg. Lib. 1687 B, f. 152.]

[Other reports of this case: 1 Eq. Cas. Abr. 313, 21 E.R. 1069.]

452

Edwin v. Thomas
(Ch. 1687-1688)

The custom of a manor is a question of fact that can be decided upon an issue out of Chancery.

1 Vernon 489, 23 E.R. 611

25 November [1687]. In Court.

The bill was to be relieved touching the trust of a copyhold estate. In the debate of this case, it was alleged and so it appeared by an ancient book of survey, that, by the custom of the manor of which the estate was held, copyhold land there should not only go to the youngest son, but also, in case the youngest son died without issue, it should go to his youngest brother and not to the eldest, and, if no sons, that it should go to the youngest daughter, and, likewise, that, if the copyholder had

had several wives, the lands should go to the youngest son by the first wife.

And the principal question in this case being whether, upon the death of the youngest son, it should go to his next youngest brother or to the eldest, the Chancellor [JEFFREYS] directed an issue for trial of the custom.

In speaking to this case, the Chancellor [JEFFREYS] cited a case adjudged by the Lord Chief Justice Hale that a rent charge created *de novo* issuing out of gavelkind land should follow the nature of the land and descend in gavelkind.¹

2 Vernon 75, 23 E.R. 657

20 July [1688]. In Court, Lord Chancellor.

The issue directed to be tried touching the custom of the manor of [*blank*] was found against the plaintiff Edwin. And, the cause being now set down upon the equity reserved, it being alleged to be a cause of value and concerning all the copyholds in the manor, a new trial was directed upon payment of costs.

[Reg. Lib. 1687 A, f. 162.]

[Other reports of this case: 1 Eq. Cas. Abr. 125, 378, 21 E.R. 931, 1115.]

453

Firebrass v. Brett
(Ch. 1687-1688)

Excessive gambling is against public policy.

1 Vernon 489, 23 E.R. 612

26 November [1687]. In Court.

The defendant and Sir William Russell, dining with the plaintiff [Sir Basil Firebrass] at his house, after dinner, fell into play with the plaintiff and won of him in ready money about £900, which Brett brought away with him, though, when they began to play, the defendant and Sir William Russell had not above eight guineas between them. And Sir Basil, being somewhat inflamed with wine, brought down a bag of guineas containing about £1500, and Brett won that money also and had it in his possession. But, as he was going away with it out of the house, Firebrasse and his servants seized upon it and took it from him.

Firebrasse had brought an information against Brett for playing with false dice. But Brett was acquitted. And Brett had brought an action of trespass against Firebrasse for taking from him in a forcible manner this bag of guineas. And, thereupon, Firebrasse exhibited his bill, charging many circumstances of fraud and circumvention, which were denied by the defendant's answer.²

And, upon the plaintiff's motion, the Lord Chancellor [JEFFREYS],³ granted an injunction until

¹ *Randall v. Jenkins* (1673), 1 Modern 96, 86 E.R. 760, 1 Freeman 105, 345, 89 E.R. 78, 257, 2 Levinz 87, 83 E.R. 463, 3 Keble 165, 214, 84 E.R. 655, 683.

² Raithby's note: The answer confessed the money was won at play, but said it was won fairly. Reg. Lib.

³ Raithby's note: considering the circumstances of the case, the greatness of the sum, and that it was confessed to be won at dice. Reg. Lib.

the hearing of the cause. And he said that he thought the sum very exorbitant for a man to lose at play in one night and that, if it was in his power, he would prevent it. And he cited the Case of Sir Cecil Bishop and Sir John Staples, in the Lord Chief Justice Hale's time, about a wager upon a foot race, and that the Chief Justice, in that case, said that those great wagers proceeded from avarice and were founded in corruption.

2 Vernon 70, 23 E.R. 655

18 July [1688]. In Court.

The bill was to be relieved touching 1450 guineas, which the defendant had won of the plaintiff at hazard at his own house and, likewise, against an action of trespass brought by the defendant at law, for that the plaintiff and his servants had forcibly taken from him about 2000 guineas more, which the defendant had won from the plaintiff the same time at play and had once in his possession. The bill charged many circumstances of fraud and that the defendant Brett had laid his design to draw in the plaintiff and had for a considerable time used several arts and contrivances for that purpose to get into his company etc., that the defendant had his wine mixed with water and plied the plaintiff so with wine that he knew not what he did, and that the defendant cheated the plaintiff in play etc., and that the defendant Brett, when he began to play, had not above ten guineas in his pocket, so there was little hazard of his side etc.

The Chancellor [JEFFREYS] declared he thought it a very exorbitant sum to be lost at play at one sitting between persons of their rank and that he would discourage as much as in him lay such extravagant gaming. And he cited the Case of Sir Cecil Bishop and Sir Thomas Staples, that came before the Lord Chief Justice Hale in the King's Bench, upon a wager won at a horse race, where His Lordship declared he would give the defendant leave to imparl from time to time, and, if such discouragement was given to gaming at common law, it ought much more to be done in a court of equity.

The defendant, finding that the court inclined so strongly against him, submitted to a proposition made by the counsel, which was afterwards decreed as by consent.

[Raithby's note: The statement of the pleadings, though long, is to the effect in the printed report, except that the defendant Brett swore that he had taken away with him 816 guineas only. The parties went into evidence. And the decree by consent was 'that all parties do retain the said monies in their hands and that each party do give the other general releases of all actions, suits, and demands'. Reg. Lib. 1687 A, ff. 219, 906.]

454

Willett v. Earle
(Ch. 1687)

The payment of arrears for rent has priority over the payment of bond debts in the course of administration of a decedent's estate.

1 Vernon 490, 23 E.R. 613

At the Rolls, Master of the Rolls.

Upon a special report, the point in question was whether an executor, who had paid the arrears of rent reserved upon a parol lease incurred in the lifetime of the testator, had well paid and administered this money so as to bar the plaintiffs, who were creditors by bond.

The court [TREVOR] was of opinion that this rent, though upon a parol lease, did partake of the realty and, therefore, is to be preferred to debts upon bond and that the executor had well applied and duly administered the assets. And the Case of Phillips v. Creech was cited, where it was so

adjudged in the [Court of] Common Pleas, 32 Car. II.

[Other reports of this case: 1 Eq. Cas. Abr. 144, 21 E.R. 945.]

455

Mumma v. Mumma
(Ch. 1687)

In this case, where a father purchased land in the name of his infant son, the court held that the intent of the father was to make an advancement and not a trust for himself.

2 Vernon 19, 23 E.R. 622

April 1687. Mumma, the widow, and others, the younger children of Jacob Mumma, plaintiffs; Jacob Mumma, the eldest son and heir, defendant.

Jacob Mumma, the father,¹ purchased a copyhold tenement in the name of the defendant, his eldest son, an infant of about eleven years old. The father, afterwards, laid out £400 in improvements, paid the purchase money and all the fines, and enjoyed during his life. And, having surrendered to the use of his will, he devised the same to his wife for life and, afterwards, to the other plaintiffs, his younger children. And he made other provisions for the defendant, who having recovered in [an action of] ejectment, the bill was to be relieved against it, for that the defendant was but a trustee for his father in the purchase.

But the Lord Chancellor [JEFFREYS] conceived that he being but an infant at the time of the purchase, though the father did enjoy during his life, that the purchase was an advancement for the son and not a trust for the father.

[Raithby's note: The decree was 'whereupon etc. His Lordship declared that he was fully satisfied the defendant Jacob (at the time of the premises being purchased) was the very person admitted tenant thereto by the lord and had the legal estate and that Jacob, the father, did pay for the purchase of the premises in question for the defendant Jacob's advancement and not for himself and that Jacob, the father, had no power to make an surrender of or to bequeath the said premises and, therefore, dismissed the plaintiff's bill.' Reg. Lib. 1686 B, f. 478.]

[Other reports of this case: 1 Eq. Cas. Abr. 382, 21 E.R. 1117.]

456

Fotherby v. Hartridge
(Ch. 1687)

After a great length of time has passed, a legacy will be presumed to have been paid.

2 Vernon 21, 23 E.R. 625

4 May 1687. Elizabeth Fotherby, widow, executrix of Elizabeth Brome, who was the executrix of Mr. Serjeant Brome, plaintiff; William Hartridge, William Pyseing, and Alice, *uxor ejus*, Bernard Kendal and Anne, his wife, defendants.

¹ J. Day, 'Momma, Jacob (d. 1679)', *Oxford Dictionary of National Biography*, vol. 38, pp. 568-569.

Lewis Lees, the father of the defendants Alice and Anne, in the year 1641, made his will, and, by it, *inter alia*, he gave to the defendant Alice and to Abraham Lees, one of his sons, £100 apiece. And he made his wife Anne, his executrix, and, shortly after, he died. Anne, the executrix, afterwards, intermarried with the defendant Hartridge. And, above thirty years since, she died. And the defendant Hartridge took administration of her goods and *de bonis non* etc. of Lewis Lees, the testator. In the year 1654, because the defendant Alice and her brother Abraham were then under age, the defendant Hartridge deposited their legacies of £100 apiece or securities for the same in the hands of the defendant Anne, who was then unmarried, to the end she might pay them over, whereupon the defendant Kendal together with Mr. Serjeant [Thomas] Brome [d. 1673] entered into a bond to the defendant Hartridge of £400 penalty with a condition to save him harmless against the said legacies so deposited.

The defendant Anne married the defendant Bernard Kendal. And, thereupon, Bernard Kendal, the better to secure the defendant Alice, gave a bond to her elder brother in trust for her legacy. Afterwards, the defendants Alice and William Pyseing intermarried. And, then, Lewis Lees, their brother, assigned the defendant Kendal's bond to the defendant Pyseing, who, thereupon, altered the security and took bonds from Kendal in his own name and obtained judgment upon the bonds.

About the year 1679, Abraham Lees dying intestate, the defendant Alice Pyseing took administration of his goods, of which, all debts and charges paid, there remained a great overplus, one third part whereof was ordered by the Spiritual Court to be paid to the defendant Anne. But it was never paid, the defendant Alice detaining it still for satisfaction of the legacies given and deposited as aforesaid, so that, by detaining the defendant Anne's part of her brother's estate and by the bonds and judgment which the defendant Kendal gave as aforesaid, Pyseing and his wife are satisfied the two legacies.

Nevertheless, in Michaelmas Term 1685, when Lewis Lees, the testator, had been dead about forty-four years, the now defendant Pyseing and his wife, by combination, exhibited their bill against the defendant Hartridge for both the said legacies. And the defendant Hartridge has brought an action against the plaintiff upon the said bond given by the said Serjeant Brome and the defendant Kendal, *dum sola*, to save him harmless, all which is done by contrivance after the plaintiff has paid in debts and legacies more than the testatrix's estate amounted to.

The Lord Chancellor [JEFFREYS] declared that, in this length of time, he would presume the legacy paid. And he decreed a perpetual injunction against the bond and discharged the former decree against Hartridge (though enrolled) on this bill and though no relief was particularly prayed against that decree.

[Raithby's note: This and the point of enrollment is not mentioned in the Register's Book, but the decree is there considered to have been obtained by collusion, and the bond was decreed to be delivered up to be cancelled. Reg. Lib. 1686 A, f. 607.]

[Other reports of this case: 1 Eq. Cas. Abr. 307, 21 E.R. 1065.]

457

Ward v. Bradley
(Ch. 1687)

Trusts and settlements should be enforced according to the intention of the settlor.

Where there is a particular estate for life during a particular term granted to the father, a grant to the heirs of his body afterwards on his marriage will carry it to all the children equally.

2 Vernon 23, 23 E.R. 626

May 1687.

Cole, being possessed for 2000 years of a tenement, in consideration of a marriage to be and after had and of a £350 portion and for provision and stay of living of the husband and wife and their children, demises to trustees for 1700 years, if he and his wife or any of their issue live so long, remainder to the heirs of the body of Cole on that wife. They had issue, the plaintiff and the two defendants, who had gotten an assignment of the whole term and had administration to the father.

And the question was whether the plaintiff should have a third with the other two sisters, the defendants, for, though it was insisted for the defendants that the trust of the whole term vested in the father and was executed in him and that daughters, though the heirs of his body, could not take by purchase in this case.

Yet the Master of the Rolls [TREVOR] conceived that, inasmuch as there was a particular term of ninety-nine years taken out of the 1700 and that the father had a particular estate limited unto him during ninety-nine years, that the trust of the whole term as to the 1700 years was not executed to the father. And he said that constructions of trusts must be governed by intention. And this being in the case of a marriage settlement and the intention was plain, it ought to be supported.

And he cited the Case of Oakes and Chaford, and Traherne and Crompton, 24 Car. II [1672 x 1673], and the Case of Warman and Seymour,¹ where, by the advice of judges, where alienation of a term was to one for life and then to her issue, that the issue took by purchase and 'issue' was not taken to be a word of limitation so as to vest the whole term in the mother. And yet 'issue', in legal understanding, is a word of limitation and not of purchase. And, therefore, he did conceive in this case that, though the word 'heirs' be not properly a word of purchase, yet, there being a particular estate for life during a particular term limited to the father, that the limitation to the heirs of his body afterwards on that marriage would carry it to all the children equally. And he was the more of that opinion for that it was declared in the deed that, after the death of the father, the trustees should execute estates to the person and persons respectively that should be interested according to their respective shares therein, which showed that the children should all take their several shares.

[Reg. Lib. 1686 B, f. 712.]

Berry v. Askham
(Ch. 1687)

All of a decedent's lands are liable for the payment of his bond debts.

Where a bond creditor sues for payment out of his deceased debtor's estate, all of the devisees must be joined as defendants.

2 Vernon 26, 23 E.R. 627

June 1687. *Berry versus* Askham, widow and executrix, and Askham, the heir.

Askham, the father, being indebted to the plaintiff by bond, devises that his executors shall receive the rents, issues, and profits of his real and personal estate, in the first place to pay £60 *per annum* to one for life and, after that person's death, out of the remainder of his estate, his debts being paid, to raise portions for several children payable at twenty-one and maintenance in the meantime. And he devises all his lands in several parcels to several persons at future times. And those devisees were not parties to the suit.

¹ *Oaks v. Chalfont* (1674), 73 Selden Soc. 104, Pollexfen 38, 86 E.R. 504, 1 Chancery Cases 239, 22 E.R. 779; *Warman v. Seaman* (1675), 73 Selden Soc. 197, 217, 248, Pollexfen 112, 86 E.R. 530, 2 Chancery Cases 209, 22 E.R. 914, 1 Freeman 306, 89 E.R. 224, 22 E.R. 1227, Reports *tempore* Finch 279, 23 E.R. 153, 3 Keble 544, 84 E.R. 870.

And whether the lands were to be sold for the payment of debts was the question.

The Master of the Rolls [TREVOR] conceived they should. But, first, he directed an account of the personal estate and the rents and profits of the lands. And, if, those be not sufficient to pay the debts in a reasonable time, he declared he would decree a sale. And he directed the devisees to be made defendants if they would not come in before the Master, declaring that the sales should be out of all the devisee's lands.

[Raithby's note: The defendants to be examined on interrogatories and to have their costs out of the estate. Reg. Lib. 1686 A, f. 1139.]

[Other reports of this case: 1 Eq. Cas. Abr. 199, 21 E.R. 987.]

460

Nott v. Johnson
(Ch. 1687)

A court of equity will grant relief against contracts and securities given as the result of bad faith, dishonesty, and overreaching.

2 Vernon 27, 23 E.R. 627

June 1687. Thomas Nott, son and heir of Sir Thomas Nott, plaintiff; Johnson and Graham, executors of George Hill, defendants.

The plaintiff, being entitled to an estate tail after the death of his father in lands, which, if in possession, were worth to be sold about £800 and being cast off by his father and destitute of all means of livelihood, did, in 1671, for £30 paid and £20 *per annum* secured to be paid to him during the joint lives of him and his father, absolutely convey his remainder in tail to the defendant Hill's father and his heirs. The plaintiff's father lived ten years after this conveyance.

And, then, the plaintiff brought his bill to be relieved against this conveyance, charging that it was intended only as a security and, though there was no proof to that purpose and the was deed absolute and though Hill would have lost all if the plaintiff had died in his father's lifetime, yet, upon the first hearing of this cause, 24 June 34 Car. II [1682], the Lord Nottingham agreed a redemption.

The 18th May 35 Car. II [1683], the Lord North, upon a re-hearing, dismissed the bill.

And that dismissal not being signed and enrolled, the 27th May 1687, the Lord Chancellor [JEFFREYS] ordered a re-hearing. And, now, upon the re-hearing, he declared he took it to be an unrighteous bargain in the beginning and that nothing happening afterwards would help it. And so, he discharged the Lord North's order and confirmed the Lord Chancellor Nottingham's decree.

[Raithby's note: The defendants accounting for the profits received and to have their costs at law and in this court to be taxed and to have the bond for the payment of the annuity delivered up. Reg. Lib. 1686 B, f. 655.]

[Earlier reports of this case *sub nom.* Nott v. Hill, 2 Chancery Cases 120, 22 E.R. 875, 1 Vernon 167, 23 E.R. 391, 1 Eq. Cas. Abr. 275, 21 E.R. 1042.]

Baylis v. Newton
(Ch. 1687)

The conveyance in issue in this case was held not to be a mere trust, and thus the land conveyed was not liable to pay the transferor's debts.

2 Vernon 28, 23 E.R. 628

June 1687. William Baylis, administrator of Fortune, his wife, plaintiff; Jonathan Newton, son, heir, and executor of Matthew Newton, defendant.

Matthew Newton, being seised in joint tenancy of a third of a village called Caldilcot, by lease and release the 22d and 23d November 1668, conveyed his third part for natural love and affection to the use of himself for life, remainder to his wife for life, remainder to the defendant in fee. The 25th of the same November, he made his will, and, thereby, he devised to the defendant and the heirs of his body his lands in Caldilcot and, amongst other things, to the plaintiff Fortune, his daughter, out of a debt Fenwick owed him, £250, his debts being first paid and, if Fenwick's debt was not sufficient to pay them, over and besides the £250 to his daughter, then he appointed his debts to be paid out of his whole estate. Fenwick's debt and the personal estate were not sufficient to pay the testator's debts.

And the bill was to have the lands in Caldilcot subjected to the debts that so the plaintiff might have the £250 out of Fenwick's debt.

And, for the plaintiff, it was insisted that the estate the defendant had in Caldilcot by the lease and release was a trust for his father and that he ought to take it subject to the will and that the lease and release were made to prevent survivorship and which was proved by two witnesses expressly. And so it also appeared by the dates of the lease and release and the will, they being all at the same time, and, had not the lease and release been made, the father as a joint tenant could not have devised.

This cause was heard 19 February by the Master of the Rolls [TREVOR], who directed an account of the personal estate. And, if that was not sufficient to pay the £250, the Master was to report specially as to Caldilcot.

Which matter coming now to be heard before the Lord Chancellor [JEFFREYS], he declared that, if the entire fee had been passed to the son by the lease and release, he would not have taken it to be a trust in the son. But, inasmuch as it was limited to the father for life and then to the mother for life, with remainder to the son in fee, he could not take it to be a trust in the son.

Hawkins v. Taylor
(Ch. 1687)

A third mortgagee can buy the first mortgage and thus defeat the priority of the second mortgagee.

2 Vernon 29, 23 E.R. 628

June 1687. Hawkins, plaintiff; Taylor *et ux.* and Leigh *et al.*, defendants.

The defendant Leigh having an encumbrance on the lands in question subsequent to the plaintiff's and the bill being against him and other encumbrancers to discover their encumbrances, Wilson, who was a defendant and had the first encumbrance, assigned to Leigh *pendente lite*.

And the question at the hearing was whether the defendant Leigh, who had a mortgage

subsequent to the plaintiff's, should help himself against the plaintiff by buying in Wilson's encumbrance that was prior to both.

The Lord Chancellor [JEFFREYS] conceived he might lawfully do so. And he dismissed the plaintiff's bill without costs.

[Other reports of this case: 1 Eq. Cas. Abr. 323, 21 E.R. 1076.]

463

Stanton v. Sadler
(Ch. 1687)

Where a subsequent mortgagee gets a prior encumbrance by extent that has been paid off but not released, a court of equity will not give relief against the extent until after the mortgage debt has been paid.

2 Vernon 30, 23 E.R. 629

Michaelmas term 1687. Ann Stanton, plaintiff; Sadler and Bush, defendants.

The plaintiff was a jointress, and the defendant was a mortgagee subsequent to the jointure. And he got an assignment of a statute that was precedent to the jointure but was satisfied, and he extended it on the lands mortgaged.

The bill was to set aside the extent, for that the statute was satisfied. And whether the statute being satisfied should protect the mortgage or be set aside without the payment of the mortgage money was the question.

And the Master of the Rolls [TREVOR] decreed that, upon the plaintiff's paying the mortgage money with interest and costs, the defendants should assign all their securities to the plaintiff. But he would not set aside the extent without the payment of the mortgage money.

464

Luke v. Alderne
(Ch. 1687)

The question in this case was whether, where a conditional legacy is paid and the condition never happens, the money should be refunded.

2 Vernon 31, 23 E.R. 629

December 1687.

A legacy of £500 was given to the defendant's testator when he should be twenty-four years old. The plaintiff, being his sister and executrix to the testator that gave the legacy, paid the legatee £250 of it at twenty-one to put him out into the world. And she gave him a bond to pay him the other £250 at a day certain, which was the very day he would attain his age of twenty-four years. He died before that age, and the defendant was his executor.

The bill was to have the bond up and the £250 repaid, for that he died before twenty-four and so no legacy was ever due. And it charged an agreement by the legatee to repay in that case and deliver up the bond. That agreement was denied by answer, and, as to the repayment of the £250 and delivery up of the bond, the defendant pleaded the payment and the bond which was for payment at a certain day and became a duty thereby and not as a legacy. And it did waive the penalty.

Upon debate, the plea was to stand for an answer, the Lord Chancellor [JEFFREYS] declaring it was fit to be heard on the merits.

[Raithby's note: This cause came on the 31st May, when the case appeared to be as follows. John White, a citizen of London, by his will, devised certain lands to his daughter, the plaintiff's wife, in fee. And he, by his said will, did devise and appoint his said daughter to give and allow to his son William White maintenance and education until he should attain the age of twenty-four years and that, then, she should pay and satisfy to the said William White the sum of £500. And he made his said daughter executrix, who proved the same. And, then, she intermarried with the plaintiff Luke, who gave security to the Orphans' Court in London for the payment of the said legacy of £500 to the said William White at his age of twenty-four years. The daughter of the testator then died, and the plaintiff took out administration with the said will annexed. William White was the sole orphan of the testator unadvanced, and the testator having no wife, a moiety of the testator's personal estate belonged to him by the custom of London over and besides the said legacy of £500. An inventory was brought into the Orphans' Court, by which it appeared that the money due to the said William White as orphan amounted to £195 19s. 3d. and that his part as legatee came to £195 18s. 3d., for which the plaintiff gave a bond to the Orphans' Court. And he also gave another bond in that court for the payment of £118 1s. 6d. to the said William White, all payable at his age of twenty-one years, for that the orphanage money is then due by the custom and the interest in the meantime. Before William White had received any of his orphanage [part] and after he had attained the age of twenty-one years, the plaintiff Luke prevailed upon him to discharge the said bond given by the plaintiff in the Orphans' Court and to release Luke and to accept £500 in full, both of orphanage and legacy money, £250 whereof was to be paid down and the remaining £250 secured by the bond in question payable at a day certain. And it was insisted on the part of the defendants that, if any contingency was in the testator's will relating to the £500 legacy, yet the said William White released all his orphanage part in consideration of the bond in question and, the said bond being given for £250 with interest at a day certain without any contingency, that the plaintiff had thereby waived all the contingency in the will. It was stated on the part of the defendant that Luke had paid no part of the £250 which was to be paid down and he set up the general release. And the plaintiff Luke, on a cross-bill, by his answer, swore that it was in the instructions to the person who drew the bond for £250 to William White, that, in case William White died before twenty-four years of age, then the bond should be void. It was decreed that the plaintiff Luke do pay to the defendant Alderne the £250 secured by the bond in question with interest and the costs in both causes to be taxed. Reg. Lib. 1687 B, f. 498.]

[Other reports of this case: 1 Eq. Cas. Abr. 300, 21 E.R. 1060.]

465

Sharpe v. Gamon
(Ch. 1688)

In a suit to discover a bankrupt's assets, the bankrupt must be made a party to the suit.

2 Vernon 32, 23 E.R. 630

10 February 1687[/88]. In Court.

A bill [was brought] for the discovery of a bankrupt's estate. The defendant demurred because the bankrupt was not made a party

And the demurrer was allowed.

[Other reports of this case: 1 Eq. Cas. Abr. 72, 21 E.R. 885.]

466

Countess of Plymouth v. Bladon
(Ch. 1688)

Where a plaintiff elects to sue at common law, this is not a bar to a subsequent suit in equity.

It is a good defense to a suit for an account that the plaintiff has and detains the written accounts.

A debt cannot be collected by self help.

2 Vernon 32, 23 E.R. 630

Eodem die [10 February 1688].

The bill was to call the defendant, who was the plaintiff's steward, to an account. The defendant, by way of plea, insisted that the plaintiff ought not to be relieved in this court nor be compelled to account, first, for that the plaintiff had before exhibited a bill in this court to the same purpose and likewise sued at law for the same matter and, afterwards being put to her election, chose to have her bill dismissed, and, not having met with such success at law, as she expected, she would now resort back again to this court; secondly, that the plaintiff had disabled the defendant from giving any account by reason that she had in a violent and undue manner seized his writings and evidences and even imprisoned his person and, so in effect, has made herself both judge and executioner. And detinue of charters is a good plea at law in bar of an account and ought to be so here. And, although they may now allege that the trunk in which the writings were has been since with the writings that were in it restored, that ought not to excuse the plaintiff in this case, for such violent seizure is an evidence of the plaintiff's design to take from the defendant some material papers and, when she had gotten them into her power, it is to be presumed she did take them. And it is not to be expected from the defendant that he should prove what papers the plaintiff took out of the trunk.

Per curiam: As to the first objection, a dismissal upon an election is not peremptory, no more than a nonsuit at law. And, as to the second objection, although such proceedings are not to be approved of or countenanced, yet they cannot amount to a forfeiture of the right which the plaintiff has to call her steward to an account. And, although detinue of charters is a good plea at law in bar of an account, yet it is not a good plea to say the plaintiff did once seize his writings. But it is the detainer of them that makes the plea good. And, as touching the plaintiff's imprisoning the defendant, he may take his remedy by an action of false imprisonment, but a man may surely justify the detaining of his servant that was taking away his goods.

The court, therefore, ordered that, whereas there was a considerable sum of money in the trunk, that the money, as well as the writings, should be restored, for, although the defendant might be greatly in the plaintiff's debt, yet she must not levy her own debt after that manner. And the court ordered the defendant to answer.

[Raithby's note: The decree was for an account in the usual way, and the trunk was to be deposited with the Master, who was to examine the papers therein in the presence of both parties and to make an inventory thereof and to allow either party, at their own cost, to take copies, but the originals were to remain with the Master until further order, and, as to all such papers and writings as did not relate to the account directed, the Master was also to take an inventory of them and deliver them to the several persons to whom they severally belonged, and, as to any monies, they were to be delivered to the defendant, unless it appeared by any note or notes of the defendant's handwriting in or affixed to any of the bags in which the monies were contained that the same were the plaintiff's monies; then, such monies are to remain with the Master until further order. Reg. Lib. 1687 A, f. 408.]

[Other reports of this case: 1 Eq. Cas. Abr. 11, 21 E.R. 836.]

467

Cokes v. Mascal
(Ch. 1688-1691)

Part performance of a marriage contract will take it out of the Statute of Frauds.

2 Vernon 34, 23 E.R. 631

11 February [1688].

The bill was to compel the defendant, whose daughter the plaintiff had married, to perform an agreement alleged to have been made on the marriage. The defendant, by answer, insisted there was a treaty but never any fixed agreement in writing nor any signed by him. And he relied on the benefit of the Act made for the prevention of Frauds and Perjuries.¹

Upon the proof, the case appeared to be that there were several discourses and treaties had before the marriage, and Sir Thomas Cokes was to have made a settlement on the plaintiff's side but, afterwards, flew back from it. And the defendant wrote a letter importing what he intended to settle on his daughter, and, after this, an agreement is drawn and reduced into writing but not signed by either party. But a witness examined in the cause deposed that both parties heard the agreement in writing read over and agreed to it, and it was proved that the marriage was shortly afterwards had and the wedding dinner kept at the defendant's house.

The plaintiff's counsel chiefly relied on the letter and would have that to be a good agreement in writing and valid according to the Act of Parliament and that the subsequent agreement was the same in effect but drawn in a more formal manner and that a marriage having been had upon it and the agreement thereby in part executed, it ought to be performed.

But, for the defendant, it was insisted that here was no ground for a decree of this court, that there was a manifest difference as to the settlement intended to have been made between the letter and the subsequent agreement in writing. And it was likewise proved on the defendant's behalf that, after the letter and agreement in writing, there were several treaties and proposals made. And, the parties, differing, the agreement broke off. And, besides, an agreement ought to be mutual, and there was nothing done in this case that any way obliged the husband.

So, the court inclined to dismiss the bill but, at the instance of the plaintiff's counsel, gave him a twelvemonth's time to try it at law, whether there was an agreement so fixed as they could maintain an action at law upon it and that, afterwards, either side might resort back to this court.

2 Vernon 200, 23 E.R. 730

19 January [1691].

In 1682, a marriage was treated to be had between the plaintiff Cookes and the defendant Mascall's daughter, it being pretended Sir Thomas Cookes would make a considerable settlement on the plaintiff, his kinsman. And proposals being made in order to mutual settlements, Mascall was to settle £40 *per annum* in the present, and Edward Cookes, the father, to settle the reversion of his estate at Wick after the death of him and his wife and to allow his son £20 *per annum* for maintenance in the meantime and Mascall was to settle reversions of copyholds, part after the death of himself and his wife of the value of £80 *per annum*. In 1684, a meeting was appointed and held at Worcester in order to come to a full agreement. There, the proposals were discoursed on, and all parties seemed to allow and approve thereof. In October 1684, Cookes, the father, with one Baker,

¹ Stat. 29 Car. II, c. 3 (SR, V, 839-842).

an attorney, came over to Mascall's house at Tadebigg in order to make a full agreement touching the settlement to be made on the intended marriage. Mr. Baker, having discoursed with both parties, proceeded to draw the agreement into articles in writing to be mutually signed by the parties. But, before the same were ready for execution, upon discourse between Mascall and Cookes, they disagree. And Mascall, by his answer, swore positively that he then reflecting that Sir Thomas Cookes had refused to make any settlement on his kinsman as it was pretended he would and Cookes, the father, also refusing to settle a further estate upon the plaintiff to answer the reversion that Mascall settled expectant on the death of his mother Wallis, he, therefore, refused to proceed any further in order to perfect the agreement. And he never signed it. But Cookes put up what Baker had written into his pocket, and so they parted. And they had no further meeting nor treaty. But old Cookes swore that, after the articles were drawn, they were read over and agreed to and that Mascall promised to meet at another time to execute them, that young Cookes was afterwards permitted to come to Mascall's house, and, in December 1684, he married his daughter, Mascall being privy to it, helping to set them forward in the morning and entertaining them and he seemed well pleased with the marriage upon their return to his house at night.

Upon this case, Cookes, the father, having by his answer offered to perform the agreement on his part, the court thought fit to decree Mascall also to perform the agreement, according to what was contained in the writing drawn by Baker, though that was not signed by Mascall, as it was intended it should have been, nor any other agreement reduced into writing.

[Reg. Lib. 1690 A, f. 139.]

[Other reports of this case: 1 Eq. Cas. Abr. 22, 21 E.R. 844.]

468

Kelley v. Berry
(Ch. 1688)

A remainderman in tail is not entitled to a discovery of the deed of settlement where the entail has been discontinued.

2 Vernon 35, 23 E.R. 632

20 February [1688]. Lord Chancellor.

The plaintiff was a remainderman in tail in a voluntary settlement, and the bill was for discovery of the deed.

But it appearing to the court that the entail was discontinued, the court [JEFFREYS] would not relieve the plaintiff.

[Reg. Lib. 1687 A, f. 326.]

[Other reports of this case: 1 Eq. Cas. Abr. 167, 21 E.R. 962.]

Gifford v. Goldsey
(Ch. 1688)

A devise of a rent continues after the death of the devisee for the duration of the lease.

Lincoln's Inn MS. Misc. 498, p. 75, pl. 2

27 February 1687/88, at My Lord's House. Colse v. Gilford.

J.S., possessed of a term for 99 years determinable upon the death of A., devises a rent out of it to B. without limiting any estate. The only question was whether, if B. died during the term, the rent should be determined or whether it should continue as long as the term.

Mr. *Finch* argued that it should only continue during the life of B. And he took a difference between a devise of a rent out of lands and a devise of the land itself, for, if a man seised in fee devises all his estate in Blackacre, this is a devise in fee of the land, but, if he devises a rent out of his estate, this is but for the life of the devisee.

The other side insisted that it could not be a rent for the life of B., for the devisor had but a chattel in the land and, therefore, could not create a rent of a freehold out of it. And, therefore, as the interest of the devisee in the rent would have ceased with the term if he outlived it, so it is reasonable his interest should continue as long as the term though he died before. And they cited a case in Rolle's *Abridgment*, first part, title *Estate*,¹ wherein Rolle is of that opinion.

My Lord Chancellor [JEFFREYS] decreed that the rent should continue during the term.

[Other copies of this report: Lincoln's Inn MS. Misc. 503, p. 100, Lincoln's Inn MS. Misc. 504, p. [93].]

2 Vernon 35, 23 E.R. 632

27 February [1688]. Lord Chancellor.

A man, possessed of a term for years determinable on lives, devises £20 *per annum* to J.S. to be paid half yearly out of this estate if the *cestui que vies* should so long live. J.S. dying in the lifetime of the *cestui que vies*, the question was whether this rent should determine by his death or go to the plaintiff, who was his executor, and be paid him during the term.

The court [JEFFREYS] decreed it for the plaintiff, the executor of J.S. And he said, if the rent would have continued as long as the term lasted, if J.S. had so long lived, why will it not last so long, though J.S. happened to die sooner. There is nothing said in the will to determine it. And the case in Roll's *Abridgment*, first part, title *Estate*, f. 831, where it is said that, if a man possessed of a term for years grants a rent generally without limiting any estate, the rent shall continue during the whole term, was looked upon to be an authority in point.

[Raithby's note: It appeared by the answer that the testator was possessed of a messuage or tenement at Quarhill and also of a messuage or tenement called Witham Frary for terms for years, determinable on one life in each, and the devise is in the following words: 'I give unto my granddaughter Elizabeth Smithwick £21 *per annum* to be paid unto her at the two most usual feasts out of the messuage or tenement at Quarhill, the first payment to begin on the 29th day of September 1681 if John Smithwick, the younger, so long live. Item, I give unto my said granddaughter £20

¹ *Anonymous* (1615), 1 Rolle, Abr., *Estate*, pl. H, 5, p. 831.

yearly out of my means in Witham Frary to be paid unto her by my executrix half yearly, the first payment to commence on the 29th September 1683 if my executrix should so long live.’ It appears that the granddaughter, the devisee, having intermarried with the plaintiff, died after the 29th September 1681 but before the 29th September 1683. The plaintiff had taken out letters of administration to his said wife. It was in proof, amongst other things, that the executrix had agreed upon the marriage of the plaintiff with the devisee that the said annuities of £20 each should continue to be paid to the plaintiff during the lives in the said testator’s will mentioned, whether the plaintiff’s said wife lived or died. But the court appears to have determined on the words of the devise and decreed the payment of both the said annuities ‘during the respective terms, out of which they were devised together with the arrears due thereon up to a day therein mentioned and, on default, then with interest to be computed from the respective times at which the same ought to have been paid together with the costs to be taxed.’ Reg. Lib. 1687 A, f. 390.]

470

Sprignall v. Delawne
(Ch. 1688)

An executor can pay any of the decedent’s debts he pleases and is not required to marshal them for the benefit of an unsecured creditor.

2 Vern 36, 23 E.R. 633

1 March [1688]. Lord Chancellor.

The plaintiff’s bill was to have satisfaction of a debt owing him by J.S., to whom the defendant was executor. The case was that the defendant was bound to a third person as surety for J.S. And to indemnify him on that behalf, J.S. assigned to him a term for years. And he dies and makes the defendant his executor, who pays that debt out of the personal assets.

And the plaintiff, being a creditor by simple contract and there being no personal assets left, would have had the benefit of that security for the payment of his debt. And it was urged to be reasonable he should have that benefit, in regard that the personal assets, which would have satisfied his debt, were employed in discharge of the debt, which was chargeable on this security.

Sed non allocatur, for that it was in the power of the executor to apply the personal assets the one way or the other.

[Raithby’s note: There were two plaintiffs, William and Judith Sprignall, who were bond creditors of Sir William Delawne, deceased, the one for £500 and the other for £200. And Sir William being also indebted to many other persons, but who are not stated to be parties to the suit, wherein his brother Michael Delawne stood bound with him, he, by deed dated 12th May 1667, conveyed certain estates in Bedfordshire, whereof he was seised in fee to his said brother for a term of 500 years to raise money to pay his debts, wherein his said brother stood bound with and for him, and to indemnify his said brother against those debts. The bill then states that Sir William was also seised in fee of lands and hereditaments in Lincolnshire and Blackfriars in London, which he, by his will dated 28th June 1667, devised to be sold for the payment of such debts as he should owe at the time of his death, and, of such will, he made the said Michael Delawne and his the said testator’s wife, executors. And the bill was in the usual way for an account. Michael Delawne, by his answer, claimed an estate in tail male in the Bedfordshire lands under the will and that the deed was a mere counter-security and to indemnify him against the debts for which he was a security for his said brother and that it contained a proviso to be void on the payment by Sir William of certain debts mentioned in a schedule thereto annexed. And the decree was that the said plaintiffs should be paid their debts out of the personal estate of Sir William in the first place and, if that fell short, out of the produce of the Lincolnshire estate and, if those together did not prove sufficient, then, so much

money as the debts for which the said Michael Delawne stood bound amounted to was to be raised out of the lands in Bedfordshire. The suit then became abated by the death of Michael Delawne, and it was afterwards revived. And, amongst other proceedings, the plaintiffs moved that the rents of the Bedfordshire lands which were brought into court in the former cause and the rents in the future might be applied in satisfaction of their debts. But the court declared that the Bedfordshire lands could not be made liable to the plaintiff's debts but in default of the personal estate. And it afterwards appearing by the Master's report that there was in hand of the personal estate and the rents of the Bedfordshire lands, not distinguishing how much of each, £1637 9s. 5d. sufficient to pay the plaintiff's demand with a great overplus, the plaintiff's bill was on the 15th June 1677 dismissed as against the Bedfordshire lands and that the rents thereof should be paid to the person entitled thereto. And, now, ten years after the signing and enrolling of the said decree, the plaintiffs brought their bill of review, to which a demurrer was put in, which was allowed without costs. And then, the decree is as follows: 'Whereupon etc. His Lordship declared that the said Bedfordshire lands being originally only a counter-security from Sir William Delawne to the said Michael Delawne for what debts the said Michael Delawne did stand bound with the said Sir William Delawne and what he should afterwards be bound with him for and the same being all paid, there was no misapplication in the executors, but they might pay those debts in the schedule with Sir William's personal estate, and the monies raised by sale of the Lincolnshire lands as well as other debts and the Bedfordshire lands were never originally liable, that deed being but in the nature of a mortgage with a proviso to be void.' Reg. Lib. 1687 B, f. 371.]

[Earlier proceedings in this case: 73 Selden Soc. 398.]

471

Cooke v. Cooke
(Ch. 1688)

In a suit upon a simple contract, either the promisee or the third-party beneficiary can sue as the plaintiff.

2 Vernon 36, 23 E.R. 634

Eodem die [1 March 1688]. Lord Chancellor.

Upon a bill for a specific performance of a covenant under hand and seal with A. for the benefit of B., A. must be a party to the suit. But, if it had been only a promise, either A. or B. might have brought the action, according to the case in Yelverton's Reports.¹

[Other copies of this report: 1 Eq. Cas. Abr. 73, 21 E.R. 885.]

¹ *Rolls v. Yate* (1610), Yelverton 177, 80 E.R. 117, also 1 Bulstrode 25, 80 E.R. 730, 2 Brownlow & Goldesborough 207, 123 E.R. 900.

472

Crossland v. Moate
(Ch. 1688)

A devise for the support and education of the testator's children does not abate when one child dies under age.

Lincoln's Inn MS. Misc. 498, p. 76

5 March 1687/88, at the Lord Chancellor's House.

Daniel Crossland, the plaintiff's father, being seised in fee of several houses and shops in Bury in the County of Suffolk, devised one of them to his son John, the plaintiff, to hold to him and his heirs when he shall attain his age of twenty-four years:

Item, I give unto Daniel, my son, all that messuage wherein J.S. now dwells to hold to him and his heirs when he shall attain his age twenty-one years; item, I give unto William, my son, the house where A.B. dwells to hold to him and his heirs when he shall attain his age of twenty-one years, and, in the meantime, until my said children shall attain their respective ages aforesaid, that Faith, my wife, shall have and receive the rents and profits of the said houses for their boarding, education, and maintenance, to whom I give the same for the term aforesaid for that end etc.

William, one of the sons, died about the age of twelve years. And the only question was whether the house to him devised should come immediately to the plaintiff, as his brother and heir, or whether the defendant, Faith, married to Moate, should hold it until such time as William should have attained his age of twenty-one years in case he had lived.

The plaintiff's counsel urged that the cause of the devise to Faith, *viz.* the boarding, education, and maintenance of William, ceasing by his death, her interest should thereby be determined.

But My Lord Chancellor [JEFFREYS] decreed that she should hold it until William would have attained his age of twenty-one in case he had lived, for that the wife had it as a general trust for the education of the children.

[Other copies of this report: Lincoln's Inn MS. Misc. 503, p. 101, Lincoln's Inn MS. Misc. 504, p. 94.]

473

Searle v. Lane
(Ch. 1688-1689)

A final decree of a court of equity is equal to a final judgment of a court of common law.

The administrator of a deceased debtor must pay his judgment debts before any other debts regardless of notice of the judgments.

2 Vernon 37, 23 E.R. 634

5 March [1688]. Lord Chancellor.

An administrator pays money on specialties without notice of money decreed and had fully administered the assets.

And the court [JEFFREYS] nevertheless decreed that the administrator should pay the money

decreed.

[Raithby's note: It appears that the decree in this case for the sum of £85 10s. was had against one Hayman, who died, before a writ of execution thereof could be served upon him, intestate, and to whom the defendant took out letters of administration on the 12th March, of what year the book does not say. But, before he took out such letters of administration, viz. in the month of February, he paid £120, and, within a week after the obtaining such letters of administration, he voluntarily paid away most of the estate and the rest in April, so that no notice could be given of the decree, and the plaintiff's debt remained unpaid. But the order of the court does not appear to have been made on that circumstance, and it is as follows: 'His Lordship declared that the decree was equal to a judgment at law and that the intestate's estate was bound by the said decree and that the defendant was in contempt for not paying the plaintiff and does, therefore, order and decree that the defendant John Lane do forthwith pay unto the plaintiff the said £85 10s. decreed against Hayman with interest for the same and costs from the time the said defendant was served with the writ of execution of the said decree.' Reg. Lib. 1687 B, f. 320.]

British Library MS. Hargrave 71, f. 86, pl. 4

5 March 4 Jac. II [1688] and affirmed upon a rehearing 24 November past [1688].

There, the point was [that] the administrator had paid away his assets to the bond creditors before notice, and yet it was resolved that he should take notice at his peril and should pay the decree first.

2 Vernon 88, 23 E.R. 667

24 November [1688]. In Court, Lord Chancellor.

On a rehearing, the case was that the defendant, being administrator to one Hayman, as being the principal debtor, had paid debts by bond and simple contract without notice of a decree, which the plaintiff had obtained against the intestate for a sum of money.

Upon the former hearing, the court had decreed the defendant, though he had fully administered the assets, to pay the plaintiff the debt decreed to him against the intestate.

Now, upon the rehearing, it was by Mr. *Pollexfen* and Mr. *Keck*, of counsel with the plaintiff, insisted, amongst other things, that it was the rigor of the law and *summum jus* that charged an administrator for the payment of the debts of an inferior nature, when he had not notice of any debts of a higher degree and that rigor of the law ought not to be carried on against conscience in a court of equity. And what ground was there for a court of conscience to charge a defendant that had been in no default? He had no notice of this decree, and could not divine that there was any debt owing of a superior nature. And, if he should have refused to pay a debt of an inferior nature, expecting to hear of what he knew nothing of, he must have paid costs for such delay and neglect of payment of the monies out of his own purse. And, besides, the defendant here was an administrator only, as being the principal creditor, and so he stands not in the same degree of privity as an executor or other relation might have been. And, therefore, not having notice of the plaintiff's demand, it would be against conscience to charge him with it and contrary to regular equity and the measures which the court takes in other cases, as in the case of a trust; though the court will support it and compel an execution of it as far as may be done with equity, yet the court would never charge a purchaser that had no notice of the trust. And it was considerable also in this case that the decree which the plaintiff obtained against Hayman, the intestate, was by default when Hayman absconded and was gone, so that the plaintiff's debt was never contested and was a matter of account, and there was little if anything really due.

Per curiam [JEFFREYS]: There is nothing more frequent in practice or better known than that a decree of this court is equal to a judgment at law. And the filing of a bill in this court is equal to the filing of an original at law to prevent the alienation of assets. And, therefore, the defendant has

done as much wrong in this case by the payment of a bond debt when there was a decree, as if he had done it where there had been a judgment at law. And the having notice or not notice is not material in either case. And were notice to be an ingredient in the case, it were less requisite in the case of a decree than in the case of a judgment, for that there are but few courts of equity but very many courts of law and yet a judgment, even in a court of pie powder, will be binding in such case, so that it is much easier to discover whether there be a decree against a man than whether there be a judgment against him or not. But, if the decree in this case passed by default, there may be some color to have the reality of the plaintiff's debt examined, as at law in an escape against the marshal, the gaoler shall have the prisoner's equity and may give in evidence the poverty of the prisoner etc. And, therefore, the court inclined to let the administrator in this case contest the reality of the plaintiff's debt.

But, it appearing that the original suit between the defendant and the intestate had long depended and had been contested and did not pass by default, the court, therefore, confirmed the former decree.

2 Freeman 103, 22 E.R. 1086

Lord Chancellor [JEFFREYS].

The plaintiff obtained a decree in Chancery for £80 against the defendant's intestate and, thereupon, brought a *scire facias* to revive the decree against the defendant. The defendant pleaded that he had paid away all the intestate's estate to satisfy debts due upon bonds from the intestate before the *scire facias* [was] brought and before he had notice of this decree. And, thereupon, the question was whether this should be a *devastavit* in the defendant in paying bond debts before this decree.

And this point being argued by *Keck* and *Pollexfen*, for the defendant, and *Finch*, for the plaintiff, it was decreed for the plaintiff that a decree in this court for a sum certain was equal to a judgment at law, and, as an executor shall be bound to take notice of a judgment at law, although in an inferior court of record, so much more of a decree in this court, being a court of a higher authority and jurisdiction. And [it was] thereupon decreed for the plaintiff.

But, if the decree had been only to account and had not ascertained the sum, it would have been no more than a judgment *quod computet* at law, which is no complete judgment until the account [is] stated.

This case was reheard in *termino Paschae* 1689 before the Lords Commissioners, who took time to consider of it. Query how determined.

Lincoln's Inn MS. Misc. 498, p. 93

24 November 1688. In Court.

The case was but this. A decree was obtained against a man in this court for the payment of a sum of money. Afterwards and before payment, he dies intestate. J.S. takes out administration and pays a debt due from his intestate upon bond, not having had any notice of the decree that was against him. And he had no assets left to satisfy that decree.

The only question was whether he should pay the money upon the decree out of his own pocket, as he must have done in case he had paid a bond before a judgment at law.

And upon a former hearing of the cause, My Lord Chancellor [JEFFREYS] decreed he should. And, upon the rehearing of the cause this day [24 November 1688], that decree was confirmed.

Afterwards, on Monday, the 29 April 1689, this cause came to be reheard before the Lord's Commissioners of the Great Seal of England. And it appeared that the defendant had paid several debts before he took out administration and that, within five days after administration, he had paid away all the asset and that this was all done in the vacation and that, at the first seal before the term, a subpoena in the nature of a *scire facias* was taken out and served upon the defendant. And the Lord's Commissioners took time to consider of it. The plaintiff died before they gave any opinion in it. And so I heard no more of the matter.

[Other copies of this report: Lincoln's Inn MS. Misc. 503, p. 115, Lincoln's Inn MS. Misc. 504, p. 105.]

[Reg. Lib. 1688 B, f. 48.]

[Other reports of this case: 1 Eq. Cas. Abr. 332, 21 E.R. 1082.]

474

Buccl v. Atleo
(Ch. 1688)

An executor of a decedent's estate may join all of the decedent's creditors as defendants in a bill of interpleader.

2 Vernon 37, 23 E.R. 634

6 March [1688]. Lord Chancellor.

The plaintiff, being executor and his testator [being] greatly indebted and being desirous to be rid of the assets as far as they would go and that his payments might not be afterwards questioned, brought a bill against all the creditors to the intent they might, if they would, contest each others' debts and dispute who ought to be preferred in payment.

The defendant, being a creditor, demurred, for that the bill contained a multiplicity of matter wherein he was not concerned.

But the court [JEFFREYS] overruled the demurrer and held it a proper bill and a safe way for an executor to take.

[Other copies of this report: 1 Eq. Cas. Abr. 75, 236, 21 E.R. 887, 1015.]

475

Parrot v. Bowden
(Ch. 1688)

A plea in abatement of outlawry must be pleaded under oath.

2 Vernon 37, 23 E.R. 635

Eodem die [6 March 1688].

A plea of outlawry was overruled because it was not put in upon oath.

[Other reports of this case: 1 Eq. Cas. Abr. 14, 21 E.R. 838.]

476

Hungerford v. Goreing
(Ch. 1688)

A bill of discovery does not lie to force a person to disclose the boundaries of his land as shown in his deed of conveyance.

2 Vernon 38, 23 E.R. 635

Eodem die [6 March 1688].

The plaintiff's and the defendant's lands lying contiguous, the bill was to discover the boundaries of the defendant's estate, alleging the same fully appeared by the deeds and writings in his hands. The defendant demurred.

Per curiam: There is no reason to compel the defendant to discover the boundaries in his deeds, for that would be to help a man to evidence to evict my possession.

[Raithby's note: The entry of the order is as follows: 'His Lordship does order that the defendant do answer the plaintiff's bill so far only as to put the matter in issue whereby to enable the plaintiff to examine his witnesses *in perpetuam rei memoriam* but the plaintiff is not to proceed any further thereupon', and the demurrer as to the rest of the bill was allowed. Reg. Lib. 1687 A, f. 482.]

477

Legriell v. Barker
(Ch. 1688)

In this suit to foreclose a mortgage, the court held that various encumbrances were not superior to the plaintiff's mortgage.

2 Vernon 39, 23 E.R. 636

Legriell and Morescoe, plaintiffs; William Barker, Esq., Sir William Barker, Serjeant Killingworth, defendants.

There was £200 of the plaintiff Legriell's money lent in the plaintiff Morescoe's name upon bond from the defendant William Barker, the father, and Sir William Barker, his son, wherein they were jointly bound. And the defendant Sir William being jointly bound in other bonds as well as that for his father, 9 February 30 Car. II [1678], the defendant Barker, the father, entered into a statute of £2000 to the defendant Serjeant [William] Killingworth [d. 1704] in trust for the other defendant, Sir William Barker, defeasanced that, if Barker, the father, should within ten years or before his death pay the said several debts for which the defendant Sir William was bound and interest and indemnify the defendant Sir William from the said bonds and all charges touching the same, the statute to be void.

The defendant Barker, the father, paid some of the said debts, but not the plaintiff's, but desired to have the bond delivered up and to secure the same by a mortgage of some of his lands. And, thereupon, for the same £200, he made a mortgage to the plaintiff Legriell of lands in Suffolk for 500 years without impeachment of waste with a proviso that, if he paid her £212 at a year's end, the lease to be void with covenants that the premises were free from encumbrances and for further assurance.

The £200 and interest was not paid, whereupon, the plaintiff Legriell endeavored to enter upon the lands. But the plaintiff found that the premises were extended on the statute and that the defendant Sir William insisted upon such extent and that, 11 October 1681, there were articles between him and his father for his father's doing several things to him and also that his father should pay all the debts unpaid upon the statute according to the defeasance before mentioned by Christmas then next and, until then, that the statute should not be put in suit and that the statute and any other security the said William, the father, could give should stand as a security for the performance of the articles of 11 October and that the defendant, the son, insisted upon great breaches of the last mentioned articles and that, therefore, he had extended the mortgaged premises with the statute.

Note the plaintiff is a purchaser of the land by the mortgage made to her and that the encumbrance the defendant would set up ought not to disturb her or charge the land to prevent satisfaction of her debts, for the statute was originally given to take place only if the father did not pay the debt, and he did pay it by the mortgage he gave, and not otherwise. And, if the plaintiff enjoy

the mortgage, as she ought, the statute ought not to do her any prejudice. And, by the father's giving the statute to his son to pay the debts and indemnify the son, the statute was a farther security for the debts and ought not to be set up to hinder the satisfaction of the debts. Besides, the son has no wrong, for he was bound with his father in the original bond to Morescoe and so was liable to pay it. And, by the last defeasance of the statute, the debts are to be paid also. And, in truth, many of the debts were the son's own, as he has confessed in his answer to a bill of his father.

The Master of the Rolls [TREVOR] took time to consider of this case. And, afterwards, he decreed that the defendants should redeem or be foreclosed and a perpetual injunction against the statute.

[Raithby's note: 'And, after the plaintiff shall be paid what shall be due to her for principal, interest, and costs, in respect of her aforesaid debt, she is to assign and convey the said mortgaged premises and all her estate therein to the said defendant Sir William Barker or as he shall appoint free from all encumbrances done by the said plaintiff, and the Master is to settle and approve of such conveyance.' Reg. Lib. 1686 B, f. 733. Afterwards, the money not being paid nor possession delivered, a petition was preferred by the plaintiff, praying to stay the rents in the tenant's hands, which was ordered accordingly. Reg. Lib. 1687 B, f. 328.]

478

Walker v. Penry
(Ch. 1688-1692)

A usury statute applies to existing contracts to reduce the rate of the continuing interest, but the penalties are not retroactive.

Where interest is paid above the rate of a new interest statute, that amount will be considered to be a part of the repayment of the principal debt.

2 Vernon 42, 23 E.R. 637

3 May [1688]. In Court, Lord Chancellor.

The bill was to redeem an ancient mortgage. And, forasmuch as the mortgagor had paid interest after the rate of £8 percent until 1675, whereas interest by the Act of Parliament in 1660,¹ was reduced to £6 percent, the question was whether the £2 percent from 1660 should not be allowed to go in discharge of so much of the principal.

Per curiam [JEFFREYS]: The contract being made prior to the Statute for Reducing Interest to £6 percent and the contract having not been changed or varied and £8 percent having been voluntarily paid, they saw no reason to relieve the complainant, for the Statute for Reducing Interest respects only subsequent contracts. And, as in this case no [action of] *indebitatus assumpsit* will lie at law to recover back the £2 percent, so there is not any just ground to decree it in equity. And the £8 percent would have been assets at law in the hands of an executor that had received interest after that rate.

The court [JEFFREYS] decreed that, from the time of the defendant's entry, which was in 1675, he should be allowed interest but after the rate of £6 percent. But he thought not fit to give the plaintiff any relief as touching the £8 percent that had been paid from 1660 until 1675.²

¹ Stat. 12 Car. II, c. 13 (SR, V, 236-237).

² Raithby's note: 'And, if at any time before the defendant's entry, £6 percent only had been paid and received, the Master in computing the interest was to allow no more.'

2 Vernon 78, 23 E.R. 660

25 July [1688]. Lord Chancellor.

This cause came again this day to be reheard. And the single question insisted on was whether a mortgagee, having received interest upon an old mortgage after the rate of £8 percent after such time as the interest was reduced to £6 percent by the Statute, should allow or discount the £2 percent toward satisfaction of the principal.

The court [JEFFREYS] confirmed the former decree, to wit that the £8 percent paid to the mortgagee for interest should be by him retained as such and that the £2 percent should not be discounted nor applied towards satisfaction of the principal.

2 Vernon 145, 23 E.R. 700

1 July [1690]. In Court, Lords Commissioners [to Hold the Great Seal]. Walter *et al.*, plaintiffs; Penry *et al.*, defendants.

Upon a demurrer to a bill of review, the original bill was for the redemption of a mortgage made so long since as in 1650, when money was at £8 percent. In September 1660, interest by the Statute is reduced to £6 percent, but the money is still continued on this security, and interest is paid after the rate of £8 percent. And now, the question was whether 8 percent should be allowed as paid for interest since 1660 or whether the 2 percent over the statutable interest should not go to sink the principal.

The cause was first brought to a hearing before the Lord Chancellor Nottingham on the mortgagee's bill to foreclose.¹ And he being of the opinion that the 2 percent should go towards sinking the principal, the then plaintiff dismissed his bill. And, afterwards, the mortgagor brought a bill to redeem. And, that coming to a hearing before the Lord Chancellor Jeffreys, he was of the opinion that, the 8 percent being paid and received as interest, no part of it ought to be applied to sink the principal and that the Statute had no retrospect beyond 1660, but looked forwards to contracts and agreements then after to be made and not to any contracts and agreements before that time. And he decreed the account to be taken accordingly.

Now, upon the bill of review, Lord TREVOR, being there was a decree already made in it, would not reverse it.

Lord RAWLINSON and HUTCHINS, on reading the Act of Parliament, held the Act had a retrospect and makes it unlawful to take more than 6 percent upon any contract, whether made before or after the Act of Parliament. But that part of the Statute which adds penalties relates only to contracts and agreements then after to be made.

[Raithby's note: And it was ordered that what money the plaintiffs have paid for interest since Michaelmas 1660 over and above £6 percent is be applied to sink the principal and the Master was to take the account accordingly. Reg. Lib. 1689 B, f. 812.]

Precedents in Chancery 50, 24 E.R. 25

1692. Walker v. Penrin.

In this case, it was decreed that a mortgagee, having received £8 percent since the year 1660, should account for the £2 percent overvalue to sink the principal mortgage money. But, if the principal and interest were overpaid, the parties must shake hands, for there shall be no refunding.

[Reg. Lib. 1687 B, f. 488, entered *sub nom.* Walker v. Powell and so decreed on a rehearing, July 25. Reg. Lib. 1687 B, f. 634.]

¹ *Penry v. Walker* (1680), 79 Selden Soc. 817, 842.

[Earlier proceedings in this case: 79 Selden Soc. 817, 842.]

[Other reports of this case: 1 Eq. Cas. Abr. 288, 21 E.R. 1051.]

Peacock v. Spooner
(Ch. 1688-1690)

In a trust of a term for years to a person and the heirs of the body by her husband, the words 'heirs of the body' are descriptive and her administrator will not take.

2 Vernon 43, 23 E.R. 638

8 May [1688]. Lord Chancellor.

A term for years assigned in trust that the husband and wife might receive the profits during their lives and the life of the longer liver of them and, after their death, to the heirs of the body of the wife to be begotten by the husband.

The counsel for the plaintiff, to support the remainder, would have the words 'heirs of the body' to be taken to be words of purchase or description, and not of limitation.

But *per curiam* [JEFFREYS] the whole interest of the term vested in the wife, and it must go to her executors or administrators.

[Raithby's note: The bill in this case was filed by Thomas Peacock, the husband, who, having survived the wife, had taken out letters of administration to her. And he claimed to be entitled to the term. And the decree as to that was 'His Lordship was satisfied that the premises, being a term for years, cannot go to the defendants, who were the daughters and coheirs of the plaintiff's wife by a former husband, but must go to the plaintiff as her administrator, and he decreed an account of the profits from the time of exhibiting the bill.']

Lincoln's Inn MS. Misc. 498, p. 78, pl. 2

Eodem die [18 May 1688].

A man, possessed of a of a long term for years, upon the marriage of his daughter with J.S., conveys the term to A. in consideration of the marriage of his daughter and as a provision for the wife in trust for the husband and wife for their lives and for the heirs of the body of the wife by the husband to be begotten. They have issue, and the husband dies. The wife marries a second husband and dies. The second husband takes out administration to her and brings this bill to have the term conveyed to him.

And it was agreed by My Lord Chancellor [JEFFREYS] accordingly for that the term being limited to the heirs of the body of the wife, the whole interest was in her.

Note this decree was afterwards reversed by the Lord's Commissioners of the Great Seal and their reversal was affirmed upon an appeal to the House of Peers, and a difference was made between a limitation of a term to one and the heirs of his body and a limitation to one for life and after to the heirs of his body.

[Other copies of this report: Lincoln's Inn MS. Misc. 503, p. 102, pl. 2, Lincoln's Inn MS. Misc. 504, p. 95, pl. 2.]

Dodd 95

A., possessed of a long term for years, upon the marriage of B., his son, with C. for the preferment of B. and a competent jointure for C., assigned it to trustees in trust for B. and C. and the longer liver of them for their lives, remainder to the heirs of the body of C. by the said B. to be begotten. B. and C. had issue, D. *et al.*, and then B. died, and C. intermarried with E., and then C. died. E. [was] administrator to C., his wife, and he demanded this trust of the term in chancery against the issue, D., to whom the trustees had conveyed it.

And [it was] resolved by all three Commissioners [to Hold the Great Seal], *viz.* TREVOR, RAWLINSON, AND HUTCHINS, that D., the heir of the body of C., will have this trust and term against E., and [it was said] by them [that] ‘heirs of the body’ in this case are a description of the persons to take and that C. had for life *tantum* etc.

Note: See Lampet’s Case,¹ etc.

Note [that] Jeffreys had decreed it to the contrary and that it is a testamentary estate and goes to the administrator and that the heirs of the body are not capable to take it.

In Hilary [term] 1691[/92], an appeal [was] brought, and upon the hearing, the Lords consulted the Judges.

Note: Upon hearing the appeal, the counsel pretended to difference it from a limitation to one and the heirs of his body, because there he had the entire [estate], but in this case, it was to one for life, remainder etc. Nine judges were for reversing and [held] that the limitation is void; NEVILE and LECHMERE [held] *contra*. But the Lords, without argument, confirmed the decree² and said that the intention of the party was that his heirs take, *quod mirum* etc.

2 Vernon 195, 23 E.R. 727

21 November [1690]. In Court, Lords Commissioners.

A term of 900 years was assigned to trustees in trust to permit and suffer the husband and wife and the survivor of them to receive the profits for so many years of the term as they or the survivor of them should happen to live and, after their deaths, to the use of the heirs of the body of the wife by the husband to be begotten. The question was whether the words ‘heirs of the body’ are words of limitation only, a description of the person, so as the heir of the body shall take by purchase.

Per curiam, [it was] held that the heir of the body took by way of purchase and as a person well described and the limitation of the term to them was good. And, therefore, they dismissed the bill that was brought by the executor of the wife, as supposing the term belonged to him.

[Raithby’s note: Note, in this case, they cited the Case of Wareman and Seaman and relied upon it, as also Bowman and Yates, where the words ‘heirs of the body’ were looked upon to be a good description of the person intended to take in a settlement made on a second marriage, although there was issue by a former wife, and so he was not in strictness heir. Wyld’s Case, in Cook’s Reports,³ is not allowed to be law. This decree and dismissal was affirmed upon an appeal to the House of Lords.]

¹ *Lampet’s Case* (1612), 10 Coke Rep. 46, 77 E.R. 994, *sub nom.* *Lampit v. Starkey*, 2 Brownlow & Goldesborough 172, 123 E.R. 880.

² *Lords’ Journal*, vol. 15, p. 80.

³ *Wild’s Case* (1599), 6 Coke Rep. 16, 77 E.R. 277, 140 Selden Soc. 959, 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.

1690. Lords Commissioners.

The trust of a term for years upon a marriage was limited to A., the husband, for life, then to B., the wife, for life, and then to the heirs of the body of the wife by the husband to be begotten. A. dies leaving issue; B. marries a second husband and dies. The husband takes administration.

And the question was whether the husband should have the term as administrator to the wife or the issue.

And it was resolved that the issue should have it, for, to support the intent of the settlement, they would take the words 'heirs of the body' to be *descriptio personae* and not words of limitation.

Note that this seems to carry the trust of a term farther than an other judgment and contrary to former resolutions, but all the Commissioners were of that opinion.

Note that, after Hilary term, this cause was heard upon an appeal in the House of Lords, and the appeal was dismissed, and the decree was confirmed.

[Reg. Lib. 1690 B, f. 48, on a rehearing.]

[Other reports of this case: 1 Eq. Cas. Abr. 362, 21 E.R. 1104.]

480

White v. White
(Ch. 1688)

A charge upon a specific legacy is to be paid off out of the testator's personal estate.

2 Vernon 43, 23 E.R. 638

Eodem die [8 May 1688]. In Court, Lord Chancellor.

The cause was heard the 25th of January last and came now to be reheard. The case was a man, by his will, devised several particular legacies subject to particular charges thereon, and he gave the surplus of his personal estate to his wife.

The bill was brought by the heir to have the personal estate applied in ease of the real estate.

And the court [JEFFREYS] decreed the personal estate to be so applied.

Per curiam [JEFFREYS]: It is not yet settled whether the heir shall not have the personal estate so applied, even against a legatee of a sum of money.

[Raithby's note: This was a bill by the executor of Elizabeth White, who was the executrix and residuary legatee of James White, the elder, who had mortgaged his real estate for securing the repayment of a sum of money, a great part of which had been discharged, together with the whole of the interest due thereon, either by the said Elizabeth out of the profits of the real estate of James White, the elder, which he had devised to her for life, or by the plaintiff. And the bill was against the heir at law, amongst other things, to subject the real estate to the payment of this mortgage money. And [there was] a cross-bill by the heir to subject the personal estate. And the decree on the hearing was as stated in the printed report. And the decree on the rehearing directed 'that as well the profits of the real estate as the personal estate come to the hands of the said Elizabeth ought as against the heir to be applied in the first place to pay the debts, legacies, and funeral charges of the said testator, James White, the elder, and that what assets remain, if any, after payment thereof ought to be liable and applied in discharge of the said mortgage in question, and with these directions, the order on the former hearing is to stand'. Reg. Lib. 1687 B, ff. 290, 504.]

481

Hilliard v. Broxy
(Ch. 1688)

Marriage brokage bonds are void and unenforceable.

Lincoln's Inn MS. Misc. 498, p. 79, pl. 1

9 May 1688, in court.

The plaintiff exhibited this bill to be relieved against a marriage brokage bond, alleging that it was entered into without any consideration just before the marriage and that nothing was due upon it.

The defendant alleged that it was voluntarily entered into after the marriage, and he insisted to have the benefit of it.

My Lord Chancellor [JEFFREYS] said it was all one whether it were given before or after the marriage. And he decreed it to be delivered up.

[Other copies of this report: Lincoln's Inn MS. Misc. 503, p. 103, pl. 1, Lincoln's Inn MS. Misc. 504, p. 96, pl. 1.]

482

Musgrave v. Dashwood
(Ch. 1688)

A widow's right in a copyhold estate cannot be defeated by her husband's contract to convey his estate in that land.

2 Vernon 45, 23 E.R. 639

11 May [1688]. In Court.

The case was that a copyholder for life, where, by the custom of the manor, there is a widow's estate, agrees that J.S. should hold and enjoy during his life and the widowhood of such woman as he should leave at his death. And he enters into a bond for that purpose and to surrender on request.

The bill was brought against the widow to have this agreement performed.

In the arguing of this case was cited the Case of Twiford and Warcup,¹ where a man covenanted that his estate was free from encumbrances, except an estate for life that was thereon. By the custom of the manor, of which the estate was held, the widow of the tenant for life was to hold during her widowhood. And it so fell out that the tenant for life left a widow, yet this was adjudged to be no breach of the covenant. And the Case of Newberry and Wigorn was cited, where a man was admitted to a copyhold estate in trust for J.S. and the question that arose thereupon was whether the widow of the trustee did not come in paramount to the trust and should enjoy her widow's estate, and the court at law was divided upon it. But, in the principal case, the plaintiff was defective in his title, being he had not taken out letters of administration to J.S.

And so the court delivered not any opinion in the case.

¹ *Twiford v. Warcup* (1677), 2 Chancery Reports 106, 21 E.R. 630, Reports *tempore* Finch 310, 23 E.R. 170, 73 Selden Soc. 256, 1 Eq. Cas. Abr. 28, 21 E.R. 849.

2 Vernon 63, 23 E.R. 650

Eodem die [25 May 1688]. In Court.

The case was that a copyholder for life where there was a widow's estate by the custom agrees to sell his estate. And [he] enters into a bond that the purchaser should enjoy.

The bill was brought by the purchaser against the widow to bind her by this agreement.

But the court dismissed the bill with costs for, if such contracts for copyholds should be decreed, all lords would be defrauded of their fines etc. And [the court] put the case, if a joint tenant agrees to alien and does it not but dies, it would be a strange decree to compel the survivor to perform the agreement.

[Lib. Reg. 1687 B, f. 471.]

[Other reports of this case: 1 Eq. Cas. Abr. 25, 70, 120, 293, 21 E.R. 846, 883, 926, 1055.]

483

Niccol v. Wiseman
(Ch. 1688)

Where a replication is allowed to be filed nunc pro tunc, the witnesses must be re-examined.

Lincoln's Inn MS. Misc. 498, p. 81

11 May. In Court.

The defendant had put in a plea and answer to the bill. The plaintiff filed a replication to the plea but none to the answer, yet witnesses were examined on both sides. And the cause was brought on to be heard last term.

At the hearing, it was then objected by the defendant's counsel that the plaintiff had not made proper parties to his bill and that, no replication being filed to the answer, issue was never joined and so the depositions were irregularly taken and that, therefore, the plaintiff could not proceed to hearing. Thereupon, the plaintiff prayed and had an order to file a replication to the answer *nunc pro tunc* and that he should make proper parties and the cause be heard this term. Accordingly, it was now brought on to be heard.

But the defendant's counsel insisted that the plaintiff could not now go on, for that no examinations having been had since the filing of the replication nor no rules given or order for publication, that the cause could not be heard, no publication being passed, and, if it should, the defendant would lose the benefit of his examination.

The counsel of the plaintiff insisted that all that was cured by the order for filing the replication *nunc pro tunc*, for, now, it was the same as if the replication had been filed in due time and before the examinations.

And Mr. *Keck* said there were forty like precedents in court.

But, notwithstanding, My Lord Chancellor [JEFFREYS] said it was irregular, for that, if any witness should be indicted for perjury in any of those depositions, it would appear by this order that they were taken before issue joined and so he could not be convicted and that an order of this court could not solder are them up so as to make them good. So the cause was again put by for a hearing.

[Other copies of this report: Lincoln's Inn MS. Misc. 503, p. 105, Lincoln's Inn MS. Misc. 504, p. 97.]

2 Vernon 46, 23 E.R. 640

Eodem die [11 May 1688]. In Court.

The cause came on to be heard the last term, and, then, the plaintiff had replied to the plea only, and not to the answer.

And the court, thereupon, made an order that the plaintiff should file a replication to the answer *nunc pro tunc* and that the cause should be heard this term.

And the plaintiff now set down the cause for hearing again, without having given rules for publication. And he had also amended his bill and had not now served the defendants to answer; so the cause was again put off as coming on irregularly.

[Other reports of this case: 1 Eq. Cas. Abr. 43, 21 E.R. 861.]

484

Buxton v. Hutchinson
(Ch. 1688)

Tithes for lead ore are not due of common right, but only by a particular custom.

2 Vernon 46, 23 E.R. 640

12 May [1688]. In Court, Lord Chancellor.

The plaintiff's bill was to be relieved from tithe ore¹ in Brassington, a township within the rectory of Blackborne in the County of Derby.

Per curiam [JEFFREYS]: Tithe ore is not due of common right, but by particular custom only. And the court, therefore, directed a trial to be had at law whether there was any and what custom within the said township for the payment of tithe ore with direction to the judge to endorse the *postea* how the custom was found upon the trial.²

[Reg. Lib. 1687 A, f. 667.]

[Other copies of this report: 1 Rayner 67, 2 Gwillim 535, 1 Eagle & Younge 554.]

[Other reports of this case: 1 Eq. Cas. Abr. 366, 21 E.R. 1107.]

¹ Raithby's note: The tenth part or tenth dish of all lead ore for which any duty is payable to His Majesty gotten out of the lead mines, dressed, washed, and cleansed from the earth. Reg. Lib.

² Raithby's note: And, if any custom, what proportion.

Bissell v. Axtell
(Ch. 1688)

A court of equity can take an account of a decedent's estate and of an infant's estate regardless of any earlier account made in an ecclesiastical court.

2 Vernon 47, 23 E.R. 641

14 May [1688]. In Court, Lord Chancellor.

The widow in the spiritual court set up a procurator for her children, the infants, and she gets her account passed there. And each child's proportion was ascertained, and distribution was decreed. And, on giving new security, she got the old security discharged.

The court [JEFFREYS], without regard had to the proceedings of the spiritual court, decreed an account of the whole estate.

[Raithby's note: And notwithstanding the proceedings in the spiritual court, all the defendants were to be examined on interrogatories. Reg. Lib. 1687 A, f. 674.]

[Other reports of this case: 1 Eq. Cas. Abr. 12, 136, 21 E.R. 836, 940.]

Poltock v. Elfick
(Ch. 1688)

The words of the devise in issue in this case created a charge upon the land for the payment of the testator's debts.

Lincoln's Inn MS. Misc. 498, p. 78, pl. 1

Easter 5 Jac. II, 18 May 1688. In Court.

A man devises all his estate, real and personal, to his wife, 'not doubting but she will pay all my just debts'. The only question was whether this created a charge upon his land for the payment of the debts.

And it was decreed without debate that it did.

[Other copies of this report: Lincoln's Inn MS. Misc. 503, p. 102, pl. 1, Lincoln's Inn MS. Misc. 504, p. 95, pl. 1.]

Chomley v. Chomley
(Ch. 1688)

As to the estate of a London freeman, the custom of London prevails over the custom of York.

A marriage settlement can bar a London freeman's widow from her customary share of his estate and from her paraphernalia.

2 Vernon 47, 23 E.R. 642

18 May [1688]. In Court, Lord Chancellor.

By articles made on the marriage of Mr. Nathaniel Chomley with the daughter and only child of Sir Hugh Chomley, Mr. Chomley covenants to lay out £40,000 in land and to settle £1000 *per annum* thereof in a jointure, which was to be in lieu of dower and all demands out of his personal estate, with a covenant that she would not claim any part thereof and to settle the whole on the first and other sons of that marriage in tail male. Sir Hugh, on his part, covenants to give in marriage with his daughter £5000 down and £5000 at his death and to settle his whole estate on the issue male of this marriage, if there should be any, provided that Sir Hugh, with the consent of Nathaniel, might alter, change, and make void the uses etc. in the articles.

Sir Hugh was greatly indebted to the full value of his estate and unable to perform the articles on his part. But Nathaniel, in his lifetime, purchased land of the value of £1050 *per annum* and settled a jointure according to the articles. And, afterwards, he died within the province of York, being also a freeman of the City of London and possessed of a personal estate of the value of about £20,000. And he left issue two sons and a daughter.

The plaintiff, his brother, being his executor, brought his bill for the direction of the court, how and in what manner the personal estate should be disposed of.

The first question was touching the proviso for changing and altering the articles, whether that should be intended only as to the estate that Sir Hugh was to settle, for, if the proviso did not extend to both estates, but should be taken to relate to Sir Hugh's only, then the covenant of Mr. Nathaniel Chomley for laying out £40,000 in land would swallow up his whole estate and there would be nothing left for the younger children.

Secondly, admitting that the articles were not binding, but were avoided pursuant to the proviso, then, if the custom of the province of York was to take place, there being about £50 *per annum* in possession descended on the heir, he was thereby excluded from having any part or share of the personal estate.

As to this point, the court [JEFFREYS] was clear of opinion that, Nathaniel Chomley being a freeman of the City of London, the custom of the City for the distribution of his personal estate should prevail and control the custom of the province of York.

The third question was whether the widow, who, by the articles, was to have no part of her husband's personal estate, more than what he should leave her by his will (and he had thereby given her £1000), should have the jewels, which her husband had presented her with in his lifetime. And it was urged there was the less reason to allow her them in regard her portion was never paid.

The court [JEFFREYS] referred it to a Master to state the whole matter specially to the court.

[Raithby's note: The words of the proviso, according to the Register's Book, were 'provided that it should be lawful for the said Sir Hugh Chomley, with the assent of the said Nathaniel Chomley in writing first had, to alter and make void all or any of the conditions, settlements, and limitation of estate and estates therein agreed to be made or done as if those articles had not been made and that the same power be reserved in all the deeds, settlements, and covenants therein to be made by virtue of the said articles'; and that Sir Hugh should have power to make a jointure and to charge portions as therein mentioned, and, as to that, the Lords Commissioners came to no determination but

committed the care of the whole of the personal estate of Nathaniel Chomley to his brother, the plaintiff, John Chomley, under the direction of the court to receive and get in the same and to lay it out in lands and subject to such trusts and dispositions for the benefit of the children as the court should from time to time declare and direct, allowing £200 *per annum* over and above the value of the lands descended to the heir, and maintenance also was allowed to the children to be increased from time to time as the court should direct, the heir of Nathaniel Chomley not to be bound by that order in case of the death of the children and the widow to have her jointure free from encumbrances, according to the articles. Reg. Lib. 1687 A, f. 663; Reg. Lib. 1688 A, ff. 705, 706.]

2 Vernon 82, 23 E.R. 663

12 October [1688]. Lord Chancellor.

This cause came before the court again upon a case stated by the Master, by which it appeared that Mr. Cholmely's whole estate was scarcely sufficient to perform the marriage articles.

The court [JEFFREYS] again declared that, if there was any personal estate for the custom to work upon, there was no doubt but that the custom of the City of London should be preferred to that of the province of York and that, notwithstanding the custom of the province of York, the heir should come in for a share of the personal estate, for the custom of the province of York is only local and circumscribed to a certain place but that of London follows the person, though never so remote from the City. And he cited the Case of Harwood, who married Offley's heir.

And as to the jewels and paraphernalia, the court [JEFFREYS] declared that the widow was by the articles to have nothing of the personal estate but what her husband should devise to her by his will and that this not only bars her of any customary part but even of any paraphernalia and from jewels given to her by her husband in his lifetime.¹ But, as to the clause in the articles that Sir Hugh, by the consent of Nathaniel, may alter, change, or make void, etc., the court took further time to consider whether that should extend to the settlement on Sir Hugh's part only or unto Nathaniel's also.

[Other reports of this case: 1 Eq. Cas. Abr. 66, 160, 161, 21 E.R. 880, 958.]

488

Dulwich College v. Johnson
(Ch. 1688)

A court of equity can order a discovery of the assets of a decedent's estate before the probate of a will has been granted.

2 Vernon 49, 23 E.R. 643

17 May [1688]. In Court, Lord Chancellor.

The plaintiff's bill was for a discovery of a personal estate that was devised to charities relating to the College. The defendant pleaded that the will was not yet proved, but was controverted in the spiritual court.

The court [JEFFREYS] overruled the plea, a discovery of the estate being for the benefit of all persons interested therein and necessary for the preservation thereof, and discoveries have often been ordered to be made *pendente lite* in the spiritual court.

¹ Raithby's note: A case was ordered for the Mayor and Aldermen, and they were to certify the custom as to the jewels. Reg. Lib. 1689 A, f. 153. No account appears afterwards.

[Other reports of this case: 1 Eq. Cas. Abr. 77, 21 E.R. 890.]

489

Bunce v. Philips
(Ch. 1688)

A court of equity will not grant relief or discovery to a remainderman in tail where there has been a discontinuance of the estate tail.

2 Vernon 50, 23 E.R. 643

Eodem die [17 May 1688].

The bill was to discover an ancient deed of entail alleged to be in the defendant's hands. The defendant pleaded conveyances made to himself of the estate in question so that, if any such entail there was, the same was discontinued.

The court allowed the plea and said they would not aid the issue in tail against a discontinuance, though by a voluntary conveyance.

[Raithby's note: The plea was ordered to stand for an answer. Reg. Lib. 1687 A, f. 1114.]

[Other reports of this case: 1 Eq. Cas. Abr. 167, 21 E.R. 962.]

490

Crook v. Brooking
(Ch. 1688-1689)

A devise to 'children' does not include grandchildren.

A devise to children goes only to children living at the death of the testator, but, if there were no surviving children, the grandchildren will take.

2 Vernon 50, 23 E.R. 643

18 May [1688]. Lord Chancellor.

The case was that one Mallock had devised £1500 by his will to Simon and Joseph Snow to be by them disposed of on such secret trust as he had privately revealed to Simon. And he directed that the execution of the trust should be left wholly to them, so that, in case they should break their trust, yet they should not be questioned for the same, either in law or equity.

Simon, in a letter written by him to Joseph, reciting that the testator had by his will devised such legacy as aforesaid, declares that the intent of the testator was that they should out of the profits of the £1500 maintain the testator's daughter, who was married to one Crew, and, in case she should survive her husband, she to have the whole money at her own free and absolute disposal, but, in case she died in the lifetime of her husband, then the £1500 to go to the children of his daughter Grace Leach in such shares and proportions as Anne Crew should advise.

Anne Crew died in the lifetime of her husband and made no appointment.

At the death of Anne Crew, many of Leach's children were dead, some with issue and some without issue.

It was agreed that the trust was well and sufficiently declared by the letter, which Simon Snow wrote to Joseph, but the doubt was in what shares and proportions the money should be distributed and who should be let into a share thereof.

Per curiam [JEFFREYS]: The money shall be distributed amongst all the children of Leach and

their representatives *per stirpes* and not *per capita* and that without regard had to the administrator of any dead child.

It was objected by the counsel that, if Anne Crew herself had been living, to have made an appointment, she must have distributed it amongst the children then living and could not have given any part thereof to the child of one that was dead.

Sed non allocatur per curiam [JEFFREYS].

[Raithby's note: The decree was 'that the said £1500 ought to be distributed and divided amongst the children and children's children of the said Grace Leach that were living at the death of the said Anne Crew and that the executors or administrators of those children or children's children that were dead in the lifetime of the said Anne Crew ought to have no part or share thereof.' Reg. Lib. 1687 A, f. 688.]

2 Vernon 106, 23 E.R. 679

1689. Lords Commissioners [to Hold the Great Seal]. Unton Crooke and Gratiou, his wife, plaintiffs; Thomas Brookeing *et al.*, defendants.

Roger Mallock, the plaintiff Grace's grandfather, the 15th of February 1651, made his will. And he, thereby, gave to his brothers, Simon and Joseph Snow, £1500 for such uses as he had declared to them and by them not to be disclosed, charging them that they would perform the same, as they would answer it at God's tribunal. The said Snowes, accordingly, received the said £1500, and, afterwards, Joseph Snow died. Simon survived and received the £1500. Simon, in the lifetime of his brother Joseph, wrote a letter to him dated 17th November (1652) and therein mentioned the trust to be that they, out of the profits, should allow Anne Crewe a maintenance for her livelihood during her husband's lifetime, and, if he died before her, she to have the money at her own disposal, but, if the husband survived, the money was to go amongst her sister's children as she should advise.

Anne died in 1684 in the lifetime of her husband, having only one sister Grace, the mother of the plaintiff Gratiou, without giving any advice or directions touching the disposing of the £1500. Grace had only one child living at the death of Anne Crewe, but she had five other children living at the death of the testator Mallock, who all died intestate. And their administrators were before the court as were also such of the children of the dead children as were living. The questions that were made were:

First, whether the plaintiff Gratiou, being the only child living of Grace Leach at Anne Crewe's death, should have the whole £1500;

Second, if not, whether the administrators of the dead children should come in for an equal share with the plaintiff;

Third, or whether the grandchildren, to wit the children of the dead children should come in for an equal share with the plaintiff.

The cause was heard before the Lord Chancellor Jeffreys in May 1688, who declared the trust was well declared by Simon Snow's letter, and he decreed that the £1500 should be divided between the plaintiff Gratiou, the only child living at the death of Anne Crewe, and the children's children as were living at the death of Anne Crewe, from which decree the plaintiffs appealed.

And now, upon a rehearing, it was decreed by the LORDS COMMISSIONERS that the plaintiff Gratiou, being the only child living at the death of Anne Crewe, should have the whole £1500.¹ And they said the only difficulty in this case was the word 'children' and here was but one child. And yet, notwithstanding, they decreed it for the plaintiff, and they were clear of the opinion, where the devise

¹ Raithby's note: Together with such interest as the trustees, the defendants Brookeing and Pengelly, or either of them had made or received in respect thereof to be ascertained by the said defendants' own oaths, they respectively to make such affidavit as the Master shall direct, and the other defendants, the grandchildren, to have their costs. Reg. Lib. 1688 A, f. 476.

is to children, the grandchildren cannot come in to take with the children, and turn it into Latin and children and grandchildren are expressed by distinct and different words. But all admitted that, if there had been no child, the grandchildren might have taken by the devise to his children.

[Other reports of this case: 1 Eq. Cas. Abr. 202, 379, 21 E.R. 990, 1116.]

491

Baden v. Earl of Pembroke
(Ch. 1688-1691)

The question in this case was whether a leasehold created by a redemise for the purpose of securing a debt is a personal asset of a decedent's estate.

2 Vernon 52, 23 E.R. 644

21 May [1688]. In Court, Lord Chancellor [JEFFREYS]; Master of the Rolls [TREVOR]; Justice LUTWYCHE; and Justice POWELL. Baden *et al.*, creditors of Philip, late earl of Pembroke, plaintiffs; the earl of Pembroke, countess dowager of Pembroke, *domina* Charlotta Herbert, sole daughter and heir of Philip, late earl of Pembroke, *et al.*, defendants.

This cause coming now before the court upon a case stated by Dr. Edisbury for the judgment of the court how far the several terms for years after mentioned should be assets and liable to debts by simple contract, the Master certified that Philip, late earl of Pembroke, being seised in fee of the manors and lands after mentioned in consideration of the marriage then intended to be had between him and the now countess dowager of Pembroke and of £10,000, which he then received as a portion with her and in pursuance and performance of certain articles of agreement made before the marriage, whereby the said earl covenanted and agreed to charge his estate in Glamorganshire with the payment of a rent or annuity of £1300 *per annum* to the said countess for her life. And, for performance of those articles, he became bound to the earl of Sunderland in a statute staple of the penalty of £20,000. And the said late earl having agreed to make up the £1300, £1500 *per annum*, did by indenture dated 1 October (1675) made between the said late earl and the said countess of the one part and the said earl of Sunderland and lord Godolphin of the other part, grant, bargain, sell, and demise to the said earl of Sunderland and lord Godolphin, their executors, and administrators all his honors, manors, etc. in Glamorganshire for ninety-nine years under the rent of a peppercorn, but upon trust that they should redemise the premises in the manner after mentioned. And, accordingly, the said earl of Sunderland and lord Godolphin, by their indenture of redemise bearing date the second day of the said October made between them of the one part and the said earl of Pembroke of the other part, did in pursuance and performance of their said trust and for 5s. in money regrant the said premises so demised to the said Earl Philip to hold to him, his executors, administrators, and assigns for ninety-eight years and eleven months, reserving the rent of a peppercorn only, during the life of the said earl and, after his decease, a rent of £1500 *per annum* by half yearly payments, during the life of the countess, as a jointure for her and, after her death, a peppercorn during the residue of the term with a covenant for payment of the rent and a clause of re-entry in case of any default in payment. And the Master, in like manner, stated several other securities that had been made by way of demise and redemise and certified that the bond debts of the late earl amounted unto £9000 and that the book debts and debts by simple contract amounted unto £18,200 and that the personal estate was not above £6000. And, therefore, he submitted it to the court whether the terms redemised to the said late earl should be liable to those debts, which was the single point that came now before the court in judgment.

Mr. *Pollexfen* and others, of counsel with the plaintiffs, the creditors, argued that the estate and interest which Earl Philip had by the redemise was purely a chattel interest. It would in law have passed by grant, been forfeited as any other chattel term would have been, and might have been taken

in execution upon a [writ of] *feri facias*. And, as to the objection that is made that a term abstracted out of the inheritance for a particular purpose is not to be assets as other terms for years would be, he said there was no such rule in law, nor that a term should be attendant on the inheritance or should cease when a particular purpose was answered. And, if a term be raised for a particular purpose and then to cease, it must be so expressed in the deed itself. And no foreign implication will serve for that purpose. And, to that effect, he cited the case of Co. 1 Rep., f. 87.¹ And to make such construction in this case must be not only by an averment foreign to the deed but, likewise, contrary to express statutes, as the Statute of Westminster II and the Statute of Acton Burnel,² by which terms for years are liable to be taken in execution upon a [writ of] *feri facias*. And he saw no reason why the term after the death of the earl was not as subject to a *feri facias* as it was in his lifetime. And there is no question but that, in his lifetime, the term might have been sold by the sheriff by a *feri facias* subject to the payment of £1500 *per annum*. Was the case here between the heir and executor, there might be some color for equity to interpose. But equity ought to favor creditors and the payment of their debts, and it has, therefore, in many cases enlarged assets and made that assets that would not have been so at law. But it has never abridged the assets in prejudice of creditors.

And he cited Tooke's Case, in the Lord Nottingham's time, where a man had a lease for three lives to him and his heirs from the church, and he mortgaged this lease for ninety-nine years if the three lives should so long live, and he died, the mortgage being forfeited. And, there, the court decreed this mortgaged term, which would not have been assets at law, to be sold for the payment of debts.

If a man purchases an estate and takes an assignment of a term thereon to himself and takes the conveyance of the inheritance in the name of trustees, it was never pretended but that the term should be assets. And so, if a man seised in fee makes a mortgage for ninety-nine years, the equity of redemption has always in this court been adjudged assets. And he saw no reason why the altering the security and making it by way of demise and redemise should vary the case.

And, as to the Case of Lawrence and Beverly, upon a special verdict by the direction of the Lord Chief Justice Hale, Easter [term] 23 Car. II [1671],³ where, upon the marriage of Jane Chaire, the sister of Albion Chaire, with Oliver Beverly, by articles made on the marriage, it was recited that Albion stood bound to his sister Jane for the payment of £1000 at her marriage or twenty-one and reciting that a marriage was then intended, by which the money would become payable to the husband, Oliver Beverly, therefore, covenants with Albion Chaire that he should have a twelvemonth's time for the payment of the money, paying interest in the meantime, and Albion Chaire covenants to pay interest in the meantime and, at the year's end, to pay the principal to the intent it might be laid out in a purchase to be settled upon Oliver and Jane and the heirs of their two bodies, remainder to the right heirs of Oliver, and Oliver covenanted that the money, within one month after payment of it, should be laid out. Accordingly, the marriage was had. Oliver Beverly dies, and Jane survives. They had issue Mary, their daughter, who was also dead without issue. After the death of Oliver, Jane received £300 for interest, and the £1000 remained in the hands of Albion unpaid. In an action brought by Samuel Lawrence, who was a creditor by a bond to Oliver Beverly, against the said Jane Beverly as executrix to her husband, all this matter was found specially by the jury by the direction of the Lord Chief Justice Hale. And whether the £300 received by Jane for interest were assets or no the jury doubted, and *petunt advisamentum curiam etc.* And, after several arguments, judgment was given *quod querens nil capiat per billam*. It was observed, that the original security for the £1000 portion was a bond to the wife and so was a chose in action and survived to

¹ *Corbet v. Corbet* (1599-1600), 1 Coke Rep. 77, 76 E.R. 178, also Moore K.B. 601, 72 E.R. 785, 2 Anderson 134, 123 E.R. 585.

² Stat. 13 Edw. I, Westminster II, c. 18 (SR, I, 82); Stat. 11 Edw. I (SR, I, 53-54).

³ *Lawrence v. Beverleigh* (1671), 2 Keble 841, 84 E.R. 532.

her. And there was only a mutual covenant between the husband and Albion Chaire that the money should be paid and laid out in land to be settled to those uses.

And he insisted that here was no equity against the creditors and that the court had never in any case taken the benefit from the creditors of that which was assets at law. And he concluded with the rule taken by Littleton upon the Statute of Merton, *viz.* that which never was, never ought to be.¹

Mr. *Keck* argued for the defendant, the Lady Charlotta Herbert, the sole daughter and heiress at law to Earl Philip, that the articles in this case showed the intent of the parties was only for securing the £1500 *per annum*. And, suppose the matter had rested upon the articles and a bill had been brought to compel a performance of those articles and the court had decreed a security by way of demise and redemise, which had been made accordingly, and then Earl Philip had died indebted, as in this case; I take it the court would never have suffered the redemised term to have been made assets or any advantage to be taken thereof, save only for securing the £1500 *per annum*. And so it was resolved in the Case of Goodrick and Browne,² where a fine was levied pursuant to a decree of this court for a particular purpose, and the court would not permit any advantage to be taken of that fine for letting in of other debts and encumbrances.

Now, in the principal case, the parties had only done that voluntarily which they might by decree have been compelled to have done. And their intent by these articles as fully appeared to be only for securing the £1500 *per annum* as it could have done had there been a decree to have governed it. And this court has in some cases abridged even creditors of the advantages they had at law and made that not to be assets which was assets at law, as in the case of Holt and Holt,³ where an executor had entered into a recognizance for the payment of debts and legacies, and the testator's estate that consisted in houses in London was afterwards destroyed by the Fire, the court, in that case, by reason of that casual loss, would not suffer that recognizance to run upon the executors nor any advantage to be taken thereof further than the executors had assets in their hands. And the Case of Jones and Bradshaw, Easter [term] 1661,⁴ where an executor had paid money pursuant to a decree of this court and, upon a [plea of] *plene administravit*, they would not permit him to give that payment in evidence at law, the court decreed that it should be allowed and referred the matter to an account in this court. And the Case of Douse and Persivall, first heard by the Lord Nottingham, and reheard by Lord Guildford,⁵ where a man purchased an estate of inheritance, on which there was a term for years in being, and he took the assignment thereof in his own name; in that case, the court decreed that this term, though in himself, should not be looked upon as part of his personal estate so as to be subject or liable to the custom of the City of London.

Which cases show that the court has in all times exercised a jurisdiction and interposed in cases of this nature. And the intent of the parties in the principal case by the demise and redemise, which is now become a common conveyance, was only to secure the £1500 *per annum*, which being done, it was reasonable that the estate should fall again into the inheritance. And the inconvenience would be very great should this term by the redemise be made personal assets.

The judges, Mr. Justice POWELL and Mr. Justice LUTWYCHE, only declared their opinions, to

¹ T. Littleton, *Tenures*, s. 108; Stat. 20 Hen. III (*SR*, I, 1-4).

² *Goodrick v. Brown* (1664), 1 Chancery Cases 49, 22 E.R. 688, 2 Freeman 180, 22 E.R. 1145, 1 Eq. Cas. Abr. 255, 21 E.R. 1029.

³ *Holt v. Holt* (1670-1694), 1 Chancery Cases 190, 22 E.R. 756, 2 Vernon 322, 23 E.R. 808, 1 Eq. Cas. Abr. 85, 274, 21 E.R. 897, 1042.

⁴ *Jones v. Bradshaw* (1661), 2 Freeman 153, 22 E.R. 1124, Nelson 74, 21 E.R. 793, 3 Chancery Reports 2, 21 E.R. 710, 2 Eq. Cas. Abr. 464, 22 E.R. 396.

⁵ *Dowse v. Percivall* (1683), see above, Case No. 99.

wit that the demise and redemise being made purely for the particular purpose of securing the £1500 *per annum* and that end being answered, they thought no further advantage ought to be taken of that conveyance and that the redemised term ought not to be liable to debts, save only to debts by bond, as the inheritance would have been in case there had been no term for years.

The, Master of the Rolls [TREVOR] agreed with the judges in opinion, and he said he thought the Case of Lawrence and Beverly fully governed this case. And the like judgment has been since given in this court in the Case of Whitwick and Jermin,¹ where money by a marriage agreement was to be laid out in land, the court would not let that money as personal assets be liable to other debts. And he said that all deeds were but in the nature of contracts and the intention of the parties reduced into writing, and the intention was to be chiefly regarded. In an act of Parliament, the intention appearing in the preamble shall control the letter of the law. And the articles in this case as much show the intention of the parties as a preamble can that of an act of Parliament. And, from the regard that the law itself gives to the intention of the party, it is that, where there is a fine by way of a render, there shall be no dower. And so a rent or recognizance shall not be extinguished by levying a fine to the party. The court did, and often might, control legal titles. And he instanced the Case of Sir John Fagg in the Exchequer,² who making a title by an old dormant security, the court there directed that, if the jury should find the money thereby secured was satisfied, they should find against his title, though it was a title still in law. He thought, therefore, the intention of the parties ought to govern this case and that there would ensue a great and general inconvenience should terms by redemise be made personal assets.

The Lord Chancellor [JEFFREYS] was clear in it that this term redemised ought not to be made personal assets nor be otherwise liable to any of the debts of Earl Philip than the inheritance was, to wit to bond debts or debts of a superior nature. And, therefore, he agreed entirely with the judges and the Master of the Rolls and was glad to find them concur so unanimously with him in opinion. And he declared that Mr. Justice THOMAS POWELL, who had been likewise attended with a case and was to have delivered his opinion in this matter but was removed from being a judge, had been with His Lordship and had declared his opinion was that the redemised term ought not to be any further assets or liable to debts than the inheritance would have been.

3 Chancery Reports 217, 21 E.R. 771

Earl of Pembroke *contra* Bowden *et al.*, creditors of the late earl of Pembroke, and *e contra*.

The late earl of Pembroke, seised in fee of lands, demised them for 100 years at a peppercorn rent, and he takes back a lease with a proviso to be void if he paid not such an annual sum to J.S. and £1000 to J.D. (or to that effect). And the creditors of the said earl contended to make the surplusage of this term, it being worth more than the £1000, and the annuity payable out of it assets to pay his debts. And the earl, as heir, pretends that it ought to go to him and that it is but as if the deceased earl had mortgaged it and the same had been forfeited, for, then, the court agreed that the heir paying the money should have had it. And it was urged for him that the intent of this conveyance was the same as a mortgage, though it was so contrived by counsel that there is indeed a term in the testator.

And the Lord Chancellor [JEFFREYS] cited a case between Whitticke and [blank], in My Lord Hale's time, in the Court of King's Bench, where J.S., before and in consideration of his marriage with J.D., entered into articles of agreement under hand and seal to lodge £100 in the hands of J.N. to be laid out upon lands for the life of the wife for her jointure with other remainders, which said £100 was so lodged in his hands, and, before any lands were bought, J.S. dies, and a creditor of J.S. sues his wife, who had taken out administration to him, and, upon a special verdict, finding as aforesaid, the £100 was adjudged not to be assets in law.

¹ *Whitwick v. Jermy* (Ch. 1685), see above, Case No. 300.

² *Fagg v. Trevor* (Ex. 1685), Lincoln's Inn MS. Misc. 557, f. 105, pl. 3.

And My Lord [JEFFREYS] said that, in Honywood's Case, here in Chancery,¹ he had decreed either the same or the like point and then brought the record of that case into the court, for the intent being that the £100 should be vested in land, it was to be no longer looked upon to be the personal estate of J.S. And, therefore, he seemed to doubt here whether this term were so much as assets in law, for that it was the plain intent that the inheritance should not be charged for any intent but to secure such monies. And it might have been done by way of a mortgage so that then the creditors could have had no pretence to charge it with debts. And it would be very hard and might prove of dangerous consequence upon this way of settlements by demise and redemise to make any other construction and which was surely never thought of in the contrivance of the counsel at his advising such a manner of conveyance.

But the court advised, being assisted by LUTWYCHE and POWELL, until next term.

Note it seems to me that, in the case of marriage money, by force of the agreement and lodging the money in a third person's hand, *viz.* J.N.'s, the property of the £100 was in J.N. not in J.S. upon such trusts as agreed, and so it could not be assets in law nor yet in equity, because it was for special trusts to be directed by the express agreement.

It was also said and agreed in the debate of the principal case that, where a man purchases an estate, upon which there are mortgages for years, and he takes the terms to himself and the inheritance to others in trust for himself and dies indebted, the terms shall be assets, albeit that it be expressly declared that the terms shall wait upon the inheritance, for this court will not take away that which is assets in law, though it will many times enlarge and make that assets in equity which is not assets in law in favor of creditors. But, where the inheritance is in the purchaser and the terms purchased in trustees' names to attend on the inheritance, those terms shall never be made assets in equity.

Quaere whether, in the first case, where the term is in the purchaser etc., whether the lands shall go to the heir or the executor, there being no debts. And it seems to me the heir shall have it, being to attend on the inheritance, but equity will favor creditors more than executors.

And, if a copyhold of inheritance not surrendered to the use of his will be devised to be sold for payment of his debts, the creditors shall enforce the heir in Chancery to sell it. And, as I understood, Mr. Serjeant *Phillips* said it had been adjudged so. And so it is in the case of charitable uses.

Note it was also said and agreed that, where a man articles for the sale of land under hand and seal and without any farther execution thereof, they, by mutual consent, go off of the bargain by releasing each other or cancelling the articles etc. and then the bargainor dies indebted, this shall not be assets; so, if part of the money was paid and the bargainor repays it and they agree to go off as aforesaid and then the bargainor dies. But, if the bargainor dies, part of the money having been paid him and no conveyance made to the bargainee, as the bargainee has a remedy in equity to compel the heir of the bargainor to make the conveyance upon paying the residue of the money, so the creditors can force the heir to convey and the bargainee to pay the money as the testator's personal estate. And it shall be assets to them in law and in equity when paid. But *quaere* whether, when there be no debts and part of the money paid as aforesaid, the executors shall force the heir to sell and shall have the money or whether he and the bargainee may not agree to go off the bargain, for though the ancestor, having both his executors as well as his heirs in him, might undo the bargain, though executed in part, which may perhaps, as it were, amount to a repurchasing of it, yet there is a distinct interest between the heir and the executors after the testator's decease, so that the testator having done a act whereby he intends to deprive the heir and make it a personal estate, the heir cannot prevent it after.

But note also, in this principal case, the earl having agreed to sell lands for £5000 by articles sealed etc. and a mortgage being given up to the earl by the bargainee for £3000 in part of payment, the court seemed pretty clear that the other £2000 should be assets, albeit that the bargainee did offer

¹ *Annard v. Honeywood* (Ch. 1685), see above, Case No. 296.

in his answer to take the said £3000 and release the bargain if the court pleased or to that effect.

2 Vernon 213, 23 E.R. 739

7 February [1691]. TREVOR, RAWLINSON, HUTCHINS. Baden *et al.*, creditors of Philip, former earl of Pembroke, plaintiffs; Countess of Pembroke, Lord Jeffreys, and Lady Charlotte, *uxor ejus*, daughter and heiress of the said Philip, earl of Pembroke, defendants.

Philip, late earl of Pembroke, upon the marriage of the now countess of Pembroke, in consideration of a £10,000 portion and pursuant to articles by which he had covenanted to charge his estate in Glamorganshire with a rent or annuity of £1300 *per annum* to her for her life and, afterwards, he agreed to make it up £1500 *per annum*, did by indenture, 1 October 1675, demise to the earl of Sunderland and lord Godolphin his manors and lands in Glamorganshire for ninety-nine years at a peppercorn rent, and, by indenture 2 October 1675, the earl of Sunderland and lord Godolphin redemise the premises to Earl Philip for ninety-eight years and eleven months at a peppercorn rent during his life and, after his death, £1500 *per annum* by half yearly payments during the life of the countess for her jointure and, after her death, a peppercorn rent during the residue of the term with a covenant for payment of the rent and a clause of reentry for non-payment.

The said late earl, by way of demise and redemise, had secured the payment of several annuities for life, *viz.*, for securing an annuity of £70 *per annum* to one Uphill for life, the said late earl and his trustees had demised a meadow called Burdinsball Meadow to Richard Uphill for ninety-nine years, and Uphill, by indenture, bearing date the next day after, redemised the premises to the late earl for ninety-eight years and six months, reserving the rent of £70 *per annum* during Uphill's life and a peppercorn during the residue of the term, a clause of reentry, and a covenant from Uphill, if the rent was paid, to surrender the term. And, in like manner, he secured other annuities to Negus and others.

The said earl, also, with his trustees, to secure £4000 to his three sisters and £400 *per annum* to the present earl, demised several manors and lands in Monmouthshire to Villers, Salladine, and Chomley for 500 years in trust, out of rents and profits, to raise the interest of the £4000 and the £400 *per annum* to the present earl for his life, clear of all taxes and deductions, under a proviso that, on the payment of the £4000 and interest and securing the £400 *per annum* to the now earl's content, they should at the request of the late earl surrender the term.

The said earl, in November 1682, demised the manor of Patney in Wiltshire for 1000 years to one Clerke as a collateral security for his enjoyment of the manor of East Overton, which he had bought of the late earl.

And, 18 June 1683, by articles under hand and seal, he did covenant for him and his heirs for £5200 to convey to Pinseint and his heirs the manor of Patney, and Pinseint covenanted, in a week after the conveyance was made, to pay the £5200. Pinseint pays part of the purchase money to pay off an old statute and other encumbrances, and, before any conveyance was made, the earl dies, greatly indebted by bond and otherwise.

Upon the first hearing of this cause by the Lord Chancellor Jeffreys on 11 July 1688, assisted by the Master of the Rolls [Trevor], Mr. Justice Lutwyche, and Baron Powell, it was decreed that the term for ninety-nine years raised for securing the £1500 *per annum* to the countess for life was raised only for a particular purpose and, that being done, then to attend the inheritance and go to the heir and not to be taken as a term in gross to be assets to answer the debts by simple contract and that, Pinseint being willing to go off, he should be repaid and his purchase discharged. And he reserved the consideration of the other points for further debate.

Now, upon debate before the Lords Commissioners [TREVOR, RAWLINSON, HUTCHINS], they were of the opinion that the mortgaged terms derived out of the earl's inheritance were assets and liable to the bond debts only and not to the debts by simple contract. And they decreed Pinseint's purchase should go on and the heir convey and the purchase money be paid to the executors.

[Raithby's note: This is not correctly stated. The decree was 'that the terms raised by way of demise and redemise after satisfaction of the jointure and arrears are terms subsisting and legal assets and that the mortgage terms and the purchase money in the hands of Pinseint are likewise assets and subject to the plaintiff's demands.' And the decree, then, after ordering the Master to report what was due to the bond creditors and what money could be raised by sale of goods etc., goes on to direct that such bond creditors as had filed originals should be paid in the first place before other bonds and, then, such other bonds out of the money remaining in court and Pinseint's purchase money and, when the bond creditors are satisfied, then the money arising by the sale of the goods etc. so far as it would go and, if necessary in aid thereof, the terms mentioned in the said demises and redemises (subject to the jointure and arrears thereof as aforesaid) are to be applied in payment of the debts by simple contract that were not barred by the Statute of Limitations,¹ at the exhibiting of the creditors' bill. And the decree ordered that Pinseint should proceed in his purchase and pay the remainder of his purchase money to Sir Thomas Fowles, the Master, by a day therein mentioned and that, on payment thereof, he should be let into possession. Reg. Lib. 1690 B, f. 533.]

[Reg. Lib. 1687 A, f. 1263.]

[Other reports of this case: 1 Eq. Cas. Abr. 241, 265, 21 E.R. 1018, 1035.]

492

Baker v. Child
(Ch. 1688)

Where a married woman makes a contract to convey land and then her husband dies, a court of equity will compel her to specifically perform her contract.

2 Vernon 61, 23 E.R. 648

22 May [1688]. In Court.

Per curiam: Where a married woman, by agreement made with her husband, is to surrender or levy a fine, though the husband die before it be done, the court will by decree compel the woman to perform the agreement.

[Other reports of this case: 1 Eq. Cas. Abr. 25, 62, 21 E.R. 846, 876.]

493

Bachelor v. Bean
(Ch. 1688)

A decedent's personal estate should be used to pay off his debts, and they are not to go to the second husband of the widow-executrix.

2 Vernon 61, 23 E.R. 649

Eodem die [22 May 1688]. Lord Chancellor.

The bill was brought by the heir for an account of his father's personal estate and to have it applied in ease and exoneration of the real estate. And it was brought against the second husband,

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

who married the plaintiff's father's widow and executrix.

Upon exceptions to a Master's report, the court [JEFFREYS] declared that the husband, who had married the widow and executrix of her former husband, should be answerable for so much of the former husband's personal estate as she had possessed and that, although he took it as a portion with the widow, and this was in favor of the heir, though there were no creditors concerned in this case.

[Raithby's note: The defendant in this case was the assignee of a mortgagee and had married the widow and executrix of the mortgagor. And the exception to the Master's report was that he had not charged the defendant, amongst others, with the sum of £661 16s., being assets of the said testator come to his own hands and more than sufficient to satisfy the mortgage money then due to him together with the interest, it appearing that the said executrix had sold stock and cattle of the mortgagor for £600 and had taken a bond for the same in her own name and that, upon her intermarriage with the defendant, the defendant possessed the bond and, after the intermarriage, received the money due thereon, which it was insisted ought to go in discharge of the said mortgage money. The defendant insisted that he took the bond and received the money due thereon as a portion with his wife. And [it was] decreed it should go in satisfaction of the mortgage and, there being more than sufficient [assets] for that purpose, that the defendant should reconvey the mortgaged premises etc. Reg. Lib. 1687 A, f. 653.]

[Other reports of this case: 1 Eq. Cas. Abr. 60, 21 E.R. 873.]

494

Solley v. Gower
(Ch. 1688)

A court of equity will order an equity of redemption to be used to pay the debts due to a deceased mortgagor's creditors.

2 Vernon 61, 23 E.R. 649

25 May [1688]. Lord Chancellor.

Per curiam [JEFFREYS]: The equity of redemption of an inheritance is not assets at law because the estate is forfeited, but, the heir having a right in equity, that ought in equity to be liable to satisfy a bond debt. And, if the heir has aliened or released his equity of redemption to prevent the creditors of the satisfaction of their debts, this court will follow the money in the hands of the heir or his executor.

Where creditors are plaintiffs, the usual decree is that the debts shall be paid in the course of administration, but that is to be intended of legal assets and not of assets in equity that are not assets at law. And, in the Case of Parker and Dee,¹ where creditors come with a bill and make the executor and all the rest of the creditors parties, the executor shall not have power by the confessing of a judgment or by suffering judgment to pass by default after the bill exhibited to prefer one creditor before another. But, there, all the creditors in equal degree shall be paid in proportion.

Where an heir by bond or judgment is a creditor, *quaere* if he shall not retain, the reason being the same in the case of an heir as it is of an executor, for neither can sue himself.

[Other reports of this case: 1 Eq. Cas. Abr. 275, 21 E.R. 1042.]

¹ *Parker v. Dee* (1674), Reports *tempore* Finch 123, 23 E.R. 67, 2 Chancery Cases 200, 22 E.R. 910, 3 Swanston 529, 36 E.R. 968, 73 Selden Soc. 83.

495

Saunders v. Beale
(Ch. 1688)

Where a husband makes a lease of his wife's land, he has the rent, and she has the residue of the term.

2 Vernon 62, 23 E.R. 650

Eodem die [25 May 1688]. In Court.

An inheritrix carves out a term for one thousand years to trustees, the trust whereof was declared by the woman and her intended husband to be for the husband for life and, after his death, to the wife and her heirs. Afterwards, the husband and wife, by a fine *sur concessit*, grant a term of twenty-one years, reserving the rent to the husband and wife and the heirs of the wife.

And the bill was now brought by the administrator of the wife to have the benefit of the rent reserved.

But the court dismissed the bill.

[Reg. Lib. 1687 B, f. 501.]

[Other reports of this case: 1 Eq. Cas. Abr. 69, 21 E.R. 882.]

496

Gibbs v. Browne
(Ch. 1688)

A court of equity will not allow a common law rule of property to defeat the intention of a testator to provide for his daughter.

Lincoln's Inn MS. Misc. 498, p. 85

2 June. At the Rolls.

A., seised of lands in fee, upon the marriage of his son, settles it in this manner, to the use of himself for life, then to trustees for 99 years, then to the son in tail general, with remainders over. And he declares the trust of the term to raise £200 apiece for the daughters of that marriage. The marriage takes effect. The father dies. The son has issue, two daughters, and he dies. And there was a proviso in the deed that, if any person who was to have the remainder would pay £200 apiece to the daughters, then the term to cease. The daughters now were entitled to the remainder in tail. And the question was whether this term for 99 years should stand in their mother's way to prevent her dower, for that the intent of the settlement could never be that, if the estate came to the daughters, they should have portions to be raised out of their own estates.

But the Master of the Rolls [TREVOR] would not make any decree against the term unless the mother would pay the £200 apiece to the daughters to discharge it.

[Other copies of this report: Lincoln's Inn MS. Misc. 503, p. 109, Lincoln's Inn MS. Misc. 504, p. 100.]

Lister v. Lister
(Ch. 1688)

Where debts due to a married woman are not collected during the marriage, the husband's creditors cannot reach them after the husband's death.

Lincoln's Inn MS. Misc. 498, p. 86, pl. 1

3 June. In Court.

A man marries a woman who had several debts owing to her. The man dies before the recovery of any of the debts. And this bill was exhibited to make these debts due to the wife to be liable to pay the debts of the husband, for that he had married her upon confidence of her being worth so much and had made her a proportionable settlement. But, if these debts were taken away, she would prove worth very little to the husband.

But the bill was dismissed.

[Other copies of this report: Lincoln's Inn MS. Misc. 503, p. 110, pl. 1, Lincoln's Inn MS. Misc. 504, p. 101, pl. 1.]

2 Vernon 68, 23 E.R. 654

3 July. Lord Chancellor.

The bill was brought by the creditors of the husband against his widow and against his sister, who was his executrix and a friend to the creditors, setting forth that, upon the marriage treaty, the defendant's portion was represented to be of the value of £500, and, thereupon, the husband, expecting to receive such portion as aforesaid with his wife, agreed to settle on her a jointure of £45 *per annum*. And he made a settlement thereof accordingly, the defendant's fortune being part in monies owing to herself on bond and the other part in the lands of inheritance. The husband died before the bonds were altered or money received or before any fine levied of the wife's inheritance. And he died greatly indebted and had little or no personal estate besides the monies to which he was entitled in the right of his wife as aforesaid. And, notwithstanding, the defendant, the widow, had a jointure settled adequate to her portion, yet she and the executrix, designing to defraud the creditors, insisted that the securities not being altered and no fine levied of the land, the right remained and survived in her, whereas the same ought in equity to be made liable to the husband's debts.

The defendant, the widow, by answer, set forth that the jointure settled on her fell short in value of what by the marriage agreement it ought to have been. And she insisted on her right to the monies due on the bonds and to the lands that were her own inheritance.

Per curiam [JEFFREYS]: The defendant, the widow, has the title in law to the lands. Those were her own inheritance, and the securities remained unaltered, and, being choses in action, the benefit thereof was survived to her. So the law has cast the right upon her, and equity cannot take it from her. And, therefore, he dismissed the bill.

See the case of *Twisden and Wild*.¹

¹ *Twisden v. Wise* (1683), see above, Case No. 66.

2 Freeman 102, 22 E.R. 1085

The plaintiffs were creditors to the defendant's husband and preferred their bill against the defendant and several persons who were debtors to the defendant upon bonds before her marriage. And the case was that the defendant's estate, being about £500, consisted chiefly of bond debts. And, in consideration of this portion, the husband settled £50 *per annum* [as] jointure and died soon after the marriage, before the said bonds were paid or altered. And the wife enjoyed the jointure. And not leaving assets, his creditors preferred this bill.

Per curiam [JEFFREYS]: The bonds not being altered, the law has vested the right to them in the wife, and [they] are not assets of the husband, neither in law nor equity. And so the bill was dismissed.

[Earlier proceedings in this case: Reports *tempore* Finch 285, 23 E.R. 156, 73 Selden Soc. 173, 275.]

[Other reports of this case: 1 Eq. Cas. Abr. 6, 68, 21 E.R. 832, 881.]

498

Therman v. Abell
(Ch. 1688)

Where a master breaks a contract of apprenticeship, he will be ordered to refund proportionably what money he had received under the contract.

2 Vernon 64, 23 E.R. 650

22 June [1688]. In Court.

The defendant being an apothecary, the plaintiff put his son to him as an apprentice and gave with him a sum of money, And he allowed the youth £10 *per annum* for his clothes.

The defendant having put away his apprentice after he had lived some time with him by reason of negligence and misdemeanors laid to his charge, the court decreed the master to refund £30 of the money to be paid within a fortnight and to deliver up the indenture of apprenticeship at the same time and, in default, to pay the costs.

29 Beavan 58, 54 E.R. 547

22 June 1688. Therman, by his guardian v. William Abell.

Upon hearing and debating of the matter in question between the said parties this present day before the Right Honorable the Lord High Chancellor [JEFFREYS] and in the presence of counsel learned on both sides, the substance of the bill appeared to be that the plaintiff's relations, being willing to put the plaintiff to some good trade, about December or January 1684, treated with the defendant, being an apothecary, touching his taking the plaintiff his apprentice, whereon it was agreed that the said plaintiff should serve the defendant for eight years and then be made a freeman of London and the defendant was to have £45 with him and the plaintiff's friends to find him all clothes and apparel during his apprenticeship and that, accordingly, the plaintiff, by indenture of apprenticeship, dated 8th January 1684[/85], became thereafter the defendant's apprentice for eight years with the usual covenants for apprenticeships and masters in London and that the £45 was paid and the plaintiff entered into the defendant's service and continued with him three years and followed the defendant's business in his trade. But the defendant neither instructed him in his trade nor enrolled him with the Chamberlain, but, about September or October last, charged the plaintiff with embezzling of his money and goods and drew him into a confession of several miscarriages and

embezzlings of about £30 of the defendant's money on his promise of forgiving the plaintiff what was past. And the plaintiff hoping all differences were ended, he carefully followed the defendant's business until about January last, when, happening some difference between the plaintiff and his fellow servant, the defendant, without any other cause, turned the plaintiff out of his service, and refused to receive him again, though the plaintiff tendered himself in a submissive manner, but that the defendant promised to return a great part of the £45, whereon the plaintiff and his friends rested for two months, but finding the defendant to shuffle and pressing a performance of his promise, refused to return any part of the money, and being summoned before the Chamberlain, he refused to appear. And the plaintiff, having worn out clothes of £30 value in the defendant's service and being destitute of an employment, sued out his indenture in the Lord Mayor's Court for not being enrolled in order to be turned over to another master. And both the plaintiff and his friends demanded restitution of the defendant for the £45 and satisfaction for the clothes and to have the indenture of apprenticeship delivered. But the defendant refused to do the same. Therefore, that the defendant may be compelled to return the said £45 or a great part thereof and make satisfaction for the plaintiff's clothes worn out in his service and may deliver up the said indenture of apprenticeship and be relieved is the scope of the plaintiff's bill.

Whereas the counsel for the defendant insisted that he does by answer confess that he took the plaintiff his apprentice by such indenture and upon the terms and agreement in the bill and that the £45 was paid him by the plaintiff's friends and that the plaintiff found all his clothes and the plaintiff continued with him until January last, when the defendant discharged him of his service, and he says, about November last, the plaintiff being idle and disorderly, the defendant, after divers admonishings without any amendment, turned him out of his service, but, on signing three notes of confessing, the defendant took him again, but proving still disorderly, the defendant, in January last, absolutely turned the plaintiff out of his service, and he confessed he did not enroll him with the Chamberlain, nor ever promise to return any part of the money, and he hoped the court would not compel him thereto.

Whereupon and upon long debate of the matter and hearing the proofs taken in the cause read and what could be alleged on either side, His Lordship [JEFFREYS] was fully satisfied that the plaintiff ought to have back £30 of the £45, and he does, therefore, think fit and so order and decree that the defendant should within a fortnight after service of this order on the said defendant pay back to Mr. Thomas Marshall, the plaintiff's guardian in this cause, for the plaintiff's use the said sum of £30 and shall also within the time aforesaid deliver up the said indenture of apprenticeship, but in default of the defendant's payment of the said £30 or delivering up the said indenture of apprenticeship by the time and in the manner aforesaid, the said defendant is to pay the plaintiff the costs of this suit.

[Reg. Lib. 1687 B, f. 568.]

[Other reports of this case: 1 Eq. Cas. Abr. 307, 21 E.R. 1065.]

Hall v. Dedman
(Ch. 1688)

An injunction lies from the Court of Chancery to litigation in an ecclesiastical court.

Harvard Law School MS. 1052, f. 11v, pl. 39

An injunction upon a *dedimus* [was] granted to the archdeacon of Berkshire's court. Note injunctions go as well to spiritual courts as common law courts upon a suit commenced in equity. Yet some year after, *viz.* at the first seal after Trinity term, 4 W. & M. [1692], counsel moving

for an injunction to the bishop of Ely's court to stay proceedings in a suit there for a legacy, it was denied, Hutchins, one of the Lords Commissioners, saying that the bishop's court was their older sister and that the Chancery cannot grant an injunction thither. But he bade the party moving to appeal in case he had not justice.

500

Abell's Case
(Ch. 1688)

A trust for a married woman that has been entered as a final order of a court cannot be later set aside.

Harvard Law School MS. 1052, f. 13v, pl. 46

Trinity [term] 4 Jac. II.

The Master of the Rolls [TREVOR] took occasion from a cause then before him to relate Mr. Abell's case, which happened not long before.

Mr. Abell had married a lady of quality and laid out her portion, which was considerable, on houses, which he settled on certain trustees to the use of his wife for life etc. And a decree was passed accordingly, after which, she came to the Master of the Rolls [TREVOR] and would fain have him reverse that settlement, which he absolutely refused, though she offered to be sworn that she did it freely and without the least constraint and though several of the trustees came with her and consented, yet he declared that he would never destroy a trust passed into a decree for a married woman though the said married woman and all the trustees should consent.

501

Rutland v. Molineux
(Ch. 1688)

A married woman cannot contract to pay her husband's debts out of her own inheritance.

2 Vernon 64, 23 E.R. 651

In Court, Lord Chancellor.

The case was a married woman agrees to sell her inheritance so as she might have £200 of the money secured to her. The land is sold, and the money put out in a trustee's name accordingly.

The bill was brought by a creditor of the husband to subject this money to the payment of his debt and charges that the wife promised and agreed it should be liable thereunto.

Per curiam [JEFFREYS]: This money shall not be liable to the payment of any of the husband's debts, nor shall any promise made by the wife for that purpose subsequent to the first original agreement be obliging on that behalf.

[Raithby's note: There is merely an order of dismissal with costs in the Register's Book, except that it appearing that, by an execution, the money belonging to the defendant had got into the sheriff's hands, the same was ordered to be paid to the defendant. Reg. Lib. 1687 B, f. 592.]

[Other reports of this case: 1 Eq. Cas. Abr. 63, 21 E.R. 877.]

Coates v. Needham
(Ch. 1688)

A devise of profits of lands until a third person shall have attained a certain age is valid and continues until that future date even though the third person and the devisee die before that date. Dower rights are rights in the land itself and not merely the profits from it.

2 Vernon 65, 23 E.R. 651

Eodem die [22 June 1688]. Lord Chancellor.

J.S., being seised in fee, devises all his lands in Sutton to trustees and their heirs in trust that they should apply the profits thereof until his son, who was then but two years old, should attain twenty-one, in the manner therein after directed, *viz.* as to a one-third part thereof to his wife in lieu and satisfaction of dower, the other two-thirds for payment of his debts, and, afterwards, to and for other uses, intents, and purposes in his will mentioned. The trustees, from time to time, receive the profits and pay the widow her thirds. But the proof was various whether she took it as for her dower or as devised unto her by the will. The widow dies, and then the son dies.

The plaintiff, who had married the widow and was her administrator, preferred this bill to have the benefit of this devise of a third of the profits until the son might have attained twenty-one years.

The defendants insisted the widow had never declared her acceptance of the devise nor done anything that would bar her of her dower but, on the contrary, often declared she would bring her writ of dower so that, in case she had lived longer than such time as the son would have attained twenty-one, she might have waived the devise and insisted on her dower.

Per curiam [JEFFREYS]: There is no doubt but it is a good devise of the profits until such time as the son might have attained his age of twenty-one years, according to the resolution in Boraston's Case.¹ And her acceptance of the money from the trustees was a sufficient declaration of her agreement to the will, for it cannot be said she took it as dower, for dower must be of the land itself, into which it is not pretended she ever entered, but accepted of a third of the rents and profits from the trustees. And therefore, he decreed the plaintiff should have a third part of the profits until such time as the son would have attained his age of twenty-one years.

[Raithby's note: The decree took notice that the widow of the testator had received the third part of the rents of certain lands called Christhorpe, which were not subject to the devise, but that that made no difference, and so [it was] decreed as in the printed report, and also an account, amongst other things, of the arrears due to the plaintiff under the said trust. Reg. Lib. 1687 A, f. 1171.]

¹ *Hynde v. Ambrye* (1587), 3 Coke Rep. 16, 76 E.R. 664, 138 Selden Soc. 525, 1 Eq. Cas. Abr. 190, 194, 21 E.R. 980, 984.

503

Ascough v. Johnson
(Ch. 1688)

Where a mortgagee buys in prior encumbrances, when the mortgagor redeems, he must pay the amount paid for them as well as the debt due to the mortgagee.

2 Vernon 66, 23 E.R. 652

Eodem die [22 June 1688]. In Court, Lord Chancellor.

Per curiam [JEFFREYS]: Where a purchaser or mortgagee buys in encumbrances to protect his estate at law on compositions, to wit encumbrances on his purchased lands and other lands, he shall be allowed the full money due on such encumbrances, and the same shall not by the heir or mortgagor be redeemed without full payment of all the money due on such encumbrances without regard to the beneficial bargains and compositions made by such purchaser.

504

Stanley v. Earl of Derby
(Ch. 1688)

A life tenant and the trustee cannot make a conveyance to defeat the rights of an unborn remainderman.

Lincoln's Inn MS. Misc. 498, p. 82

Trinity term 4 Jac. II, 26 June. In Court.

The case in effect was but this. A rent charge in fee of £600 *per annum* was issuing out of the estate of the earl of Derby¹ upon the marriage of the plaintiff's father. This rent charge was granted for 1000 years to the defendant, Sir Thomas Skipwith, and others in trust for the father for his life and, after, for his wife for her life and, after their deaths, in trust for the first son of the father, which first son the plaintiff is, and the heirs male of his body. After the marriage and before the plaintiff was born, the father, trustees, and all parties interested joined in a release and conveyance of £200 *per annum*, part of this rent charge to J.S., who had purchased part of the lands liable to the rent. And, afterwards, £400 *per annum* only was paid to Stanley, the father, for his life and, for some years, to the plaintiff. And acquittances were given by him.

But, now, being better informed of his title, he exhibited his bill against My Lord of Derby and the trustees to have this £200 *per annum* made good to him.

And My Lord Chancellor [JEFFREYS] seemed to be clear of opinion that the plaintiff ought to be relieved. But, because it was a family of great honor and antiquity, before he would pronounce any decree, he proposed an accommodation, *viz.* that the defendant, the earl of Derby, should pay the plaintiff £500 *per annum* for the time past and to come, which was accepted by the other side. And so the matter ended.

Note this admits the point that the joining of the trustee before a son be born was such a breach of trust as this court will relieve against.

¹ J. H. Rains, III, 'Stanley, William George Richard, ninth earl of Derby (1655-1702)', *Oxford Dictionary of National Biography*, vol. 52, pp. 252-253.

[Other copies of this report: Lincoln's Inn MS. Misc. 503, p. 107, Lincoln's Inn MS. Misc. 504, p. 99, pl. 1.]

505

Clerkson v. Bowyer
(Ch. 1688)

After a foreclosure, the equitable interest is terminated, and the mortgagee is the owner of the land and it passes to his heirs upon his death.

Lincoln's Inn MS. Misc. 498, p. 86, pl. 2

A mortgagee of a copyhold who is in possession forecloses the equity of redemption. And he dies. The only question was whether the heir or executor should have the lands.

And it was decreed for the heir of the mortgagee. Having foreclosed the equity of redemption in his lifetime, it is now in the nature of a purchase and no longer a mortgage.

Note it did not appear that the mortgagee died indebted.

Ex relatione Mr. Trevor.

[Other copies of this report: Lincoln's Inn MS. Misc. 503, p. 110, pl. 2, Lincoln's Inn MS. Misc. 504, p. 101, pl. 2.]

2 Vernon 66, 23 E.R. 652

2 July [1688]. Lord Chancellor.

There being a mortgage made of a copyhold in fee for securing an annuity, the heir of the mortgagor is foreclosed, and a release is given to the trustee of the mortgagee.

The bill, after all, was to be admitted to the redemption. And it was insisted that the benefit of the mortgage belonged to the executor or administrator of the mortgagee and not to his heir. And, therefore, this foreclosure could not be binding, the administrator being no party to it. And the Case of Gobe and his wife against the Earl of Carlisle,¹ was cited, where the heir of the mortgagee had foreclosed the mortgagor, the executor of the mortgagee being no party, and, afterwards, upon a bill by the executor against the heir of the mortgagee and against the mortgagor, the land was decreed to the executor.

But it was said *per curiam* [JEFFREYS], if the executor or administrator of the mortgagee should after this foreclosure come against the heir of the mortgagee to have the benefit of the mortgage, the heir might well say, I will pay you the money and take the benefit of the foreclosure to myself in case the land be worth more than the money.

[Raithby's note: The bill in this case was by the heir of the mortgagee against the lord of the manor, the administrator and some other parties claiming title to the premises in question stating to the effect in the printed report and praying a discovery of their claims that the lord might admit him as tenant and that the administrator might deliver up to the plaintiff the deeds and writings belonging to the said premises in his hands, which was decreed accordingly, but there was no reasoning in the decree. Reg. Lib. 1687 A, f. 913.]

¹ *Earl of Carlisle v. Gobe* (Ch. 1660), Nelson 52, 21 E.R. 787, *sub nom.* *Earl of Carlisle v. Goble*, 3 Chancery Reports 94, 21 E.R. 739, *sub nom.* *Earl of Carlisle v. Globe*, 2 Freeman 148, 22 E.R. 1121, 118 Selden Soc. 736, British Library MS. Hargrave 174, f. 19, pl. 2, 2 Eq. Cas. Abr. 173, 22 E.R. 148, Public Record Office C.33/213, f. 220v.

Kingdon v. Bridges
(Ch. 1688)

An additional advancement and provision given to the wife's trustees during the marriage cannot be reached by the creditors of the husband after his death.

Lincoln's Inn MS. Misc. 498, p. 84

Trinity term 4 Jac. II.

Mr. Kingdon had purchased a lodge in a forest for his own life, his wife's life, and the life of the defendant Bridges. And, at the time of the purchase, it was intended that, if the wife survived the husband, it should be for her further advancement, for she was provided for before. Afterwards, Kingdon, the purchaser, died much indebted. The only question was whether the wife, who was the plaintiff, and the defendant Bridges, whose names had been made use of in the purchase should be trustees for the executors of Kingdon, the purchaser, to enable them to pay his debts, the whole purchase money having been paid by him, or whether the defendant Bridges should be a trustee for the wife for her life, it having been designed as an advancement for her.

This cause was heard last term by the Master of the Rolls [TREVOR]. And it was by him decreed that Bridges should be a trustee for the wife during her life and, afterwards, for the executors.

And, upon a rehearing of the case this term [Trinity term 4 Jac. II], My Lord Chancellor [JEFFREYS] confirmed the Master of the Rolls' decree.

Ex relatione Mr. Trevor.

[Other copies of this report: Lincoln's Inn MS. Misc. 503, p. 108, Lincoln's Inn MS. Misc. 504, p. 99, pl. 2.]

2 Vernon 67, 23 E.R. 653

Eodem die [2 July 1688]. In Court.

The case was that the plaintiff's late husband purchased a walk in a chase and took the patent thus, to wit to himself and his wife and one Bridges for their lives and the life of the longest liver of them. Kingdon died, and he made the defendant his executor.

The plaintiff's bill was to have the benefit of this purchase and to have the patent delivered to her.

The defendant, by answer, set forth that Kingdon died greatly indebted and had not left sufficient assets for the payment thereof and submitted it to the court whether this purchase ought not to be liable to the payment of his debts.

Per curiam: It shall be presumed to be intended as an advancement and provision for the wife. The wife cannot be a trustee for the husband. And, therefore, he decreed that the plaintiff should enjoy the benefit of the patent during her life and, after her decease, in case Bridges should survive her, to be a trust for the executor of the husband and applied towards the payment of his debts.

[Raithby's note: The decree, on the rehearing (2d July), was 'that the defendant Bridges was a trustee for the plaintiff for all the said lodge and walks and, therefore, that she ought to hold and enjoy the same with all its rights, members, perquisites, and profits during her life and that the said defendant should deliver up the possession of the said premises to the said plaintiff or her assigns and should account with the plaintiff for the rents, profits, and perquisites thereof received by him or raised or made out of the same or that might have been received or made without his willful default, and, in case the said defendant refused so to do, then the court would consider of costs'. Reg. Lib. 1687 A,

f. 911.]

[Other reports of this case: 1 Eq. Cas. Abr. 70, 242, 21 E.R. 82, 1019.]

507

Heartley v. Bowater
(Ch. 1688)

Where an absolute conveyance is reduced to writing, no evidence is admissible to prove that it was only a mortgage.

Lincoln's Inn MS. Misc. 498, p. 86, pl. 3

12 July, at My Lord [Chancellor's] house.

The plaintiff made an absolute conveyance of lands to the defendant, who was his friend. But it was intended and agreed between them that it should be but a mortgage to secure a certain sum of money. And, now, the plaintiff exhibited this bill to redeem.

The defendant insisted that it was an absolute purchase, and he pleaded the Statute of Frauds and Perjuries¹ because there was no defeasance in writing.

And My Lord [Chancellor JEFFREYS] would not relieve the plaintiff against the Statute.

But, at last, the defendant consented that, if the plaintiff would pay him a certain sum of money, which was £1000 more than was due to him, that he would reconvey to him. And the plaintiff accepted the offer.

The plaintiff's counsel put the case as if the plaintiff had sealed the conveyance absolutely upon the defendant's promise to seal a defeasance.

And, if the case had been so, My Lord [Chancellor JEFFREYS] said he would have relieved the plaintiff, for that is but the common case of an agreement executed on one side and not on the other. But there was really no such agreement in this case, but the plaintiff had entirely trusted to the defendant.

[Other copies of this report: Lincoln's Inn MS. Misc. 503, p. 110, pl. 3, Lincoln's Inn MS. Misc. 504, p. 101, pl. 3.]

508

Arundel v. Phillpot
(Ch. 1688)

In this case, an alleged revocation of a settlement was not proved to have been made.

Lincoln's Inn MS. Misc. 498, p. 87

Mrs. Arundell had made a voluntary settlement of her estate upon the defendant with a power of revocation upon tender of a guinea in the presence of two witnesses. Afterwards, upon great disobligations put upon her by the defendant, she settled the same estate upon the plaintiff. But she had never made any formal revocation according to the power, for there had been, I think, two trials at law with the defendant.

And this bill was exhibited to supply the want of form in the revocation, the intention to

¹ Stat. 29 Car. II, c. 3 (SR, V, 839-842).

revoke being sufficiently notorious.

The defendant's counsel objected that the plaintiff, coming in voluntarily, as well as the defendant, could have no assistance of this court against him but ought to take his fortune at [common] law.

But Mr. *Finch*, for the plaintiff, said that this court had helped a defective execution of a power of revocation, which can never be but in a case of a voluntary conveyance, for every conveyance with a power of revocation is by the Statute¹ void against a purchaser, so that he would not need the aid of this court.

My Lord Chancellor [JEFFREYS] said he would not take the subsequent conveyance to the plaintiff to be a sufficient declaration of her intention to revoke. But he said that, if she had solemnly declared her intention to revoke, though she had tendered half a crown instead of a guinea or had not made any tender it all, nay, though she had declared her intention in the presence of one witness only, where, by the power, it ought to have been before two, he would have helped the plaintiff, but, it resting only upon the plaintiff's inconsistent conveyance, he would not.

[Other copies of this report: Lincoln's Inn MS. Misc. 503, p. 111, Lincoln's Inn MS. Misc. 504, p. 102.]

2 Vernon 69, 23 E.R. 654

The case was that Mrs. Phillpot, in 1676, conveys and settles part of her estate on the defendant with a power of revocation on payment or tender of a guinea. The defendant having afterwards much disobliged her, she changes her intentions. And, by deed and will, she settles her estate on the plaintiff, being the eldest son of the Lord Arundel, for payment of some particular charges and appointments. In some of the subsequent deeds, there was some provision made for the defendant, which he accepted and sealed a counterpart thereof.

And the bill was to discover whether the first deed was not well and sufficiently revoked or, in case the revocation was not precise according to the power or was defective, yet to have it supplied in equity, the plaintiff taking the estate charged with several payments etc. and so was in the nature of a purchaser. And, therefore, they ought to have the first deed delivered up and to have the testimony of the witnesses preserved etc.

Per curiam: This court may supply an informal or defective revocation, but it cannot make a revocation where there is none. And, therefore, either prove a tender of the guinea or that Mrs. Phillpot declared she intended to revoke the former settlement; one or other of them shall be sufficient, though it has not all the formalities and circumstances mentioned in the power of revocation, so it appears to be a sober, solid act and done *animo revocandi*.

But that could not be made out. It was then insisted that the subsequent deed should be taken as a sufficient revocation, being of the same land and made to different uses and purposes.

Sed non allocatur.

[Raithby's note: The plaintiff was directed (24th July) to proceed at law within twelve months and, after trial, either party was to be at liberty to resort back to this court as they should be advised. Reg. Lib. 1687 A, f. 911. The time was afterwards enlarged, and various motions and orders thereon were made respecting the said trial at law and other proceedings in respect of the suit up to the year 1693, but no further entry in the cause appears afterwards.]

¹ Stat. 27 Eliz. I, c. 4 (SR, IV, 709-711).

2 Freeman 102, 22 E.R. 1085

A settlement was made with power of revocation by deed sealed in the presence of two witnesses and tender of a guinea to the defendant. The proof was that the party who had this power being in a passion with the defendant, high words passed between them, and she told him she would undo the settlement, and, in her anger, she threw a guinea upon the ground.

Per curiam [JEFFREYS]: This shall not amount to a revocation in equity. But if it had been proved that a guinea had been deliberately tendered and the party had at the same time declared that she did it with an intent to revoke the settlement, although the deed had never been sealed or, if the deed had been sealed to revoke it and no guinea tendered, this court would have supplied the defect of one particular circumstance, where it appeared that the party did deliberately and advisedly intend the thing, but what was said in a passion the court will not regard.

[Other reports of this case: 2 Eq. Cas. Abr. 673, 22 E.R. 565.]

509

Child v. Danbridge
(Ch. 1688)

A court of equity will dismiss a suit for specific performance of a contract where the plaintiff has acted with bad faith and with unclean hands.

2 Vernon 71, 23 E.R. 655

Eodem die [18 July 1688]. Lord Chancellor.

The plaintiff, failing in his trade, compounded with his creditors at so much in the pound to be paid at the time therein mentioned. And he having failed in payment at the precise time, some of the creditors refused to stand to the agreement, which being under hand and seal, the bill was to compel a performance thereof.

But it appearing in the cause that the plaintiff, to draw in the rest of the creditors, had made an underhand agreement with some of them, who were seemingly to accept of the composition, to pay them their whole debts, which being a fraud and deceit upon the rest of the creditors, the court [JEFFREYS] would not decree the agreement nor relieve the plaintiff. But he dismissed the bill.

[Reg. Lib. 1687 A, f. 891.]

510

Earl Rivers v. Earl of Derby
(Ch. 1688)

A deposition de bene esse is admissible in evidence where the deponent dies before he could be re-examined.

Where no time is directed for the payment of a marriage portion, it vests in the woman whether she marry or not.

Lincoln's Inn MS. Misc. 498, p. 16, pl. 1

A witness being examined *de bene esse* before answer and dying after answer and before he could be examined in the cause again, Mr. Serjeant *Maynard* moved that the other side might not oppose his being read as evidence at a trial at law, which was granted and ordered.

[Other copies of this report: Lincoln's Inn MS. Misc. 503, p. 85, pl. 1, Lincoln's Inn MS. Misc. 504, p. 81, pl. 1.]

Lincoln's Inn MS. Misc. 498, p. 89

Upon the marriage of the earl of Derby's sister with the earl of Rivers' eldest son, certain lands were settled by fine and recovery and indenture upon the husband for life and, afterwards, upon the wife for life for her jointure and, then, upon all the sons of that marriage in tail male, remainder to the earl of Rivers in tail etc. Then, there was a proviso in the deed that, if there were no issue male of that marriage and one or more daughters, then, the trustees and their heirs should have a power to raise out of the rents and profits £10,000 for the portion of such daughter if but one and to be equally divided between them if more and to raise £100 *per annum* maintenance for each daughter. The husband dies without issue male, having only one daughter. She attained her age of seventeen years and then made her will and, thereby, bequeathed several great legacies, particularly £2000 to the earl of Derby, her brother, and she makes him her executor, and she died.

Now, this bill was exhibited to prevent the trustees from proceeding to raise the portion because, it being a trust out of lands to raise a portion, which the plaintiff's counsel said must be intended a marriage portion, and, the young lady dying before marriage or one and twenty years, the portion should not be raised at all. And he relied upon the Case of Pawlett and Pawlett, *quod vide supra placito* 23, 28,¹ as an authority in point.

But notwithstanding, My Lord Chancellor [JEFFREYS] dismissed the bill.

Note, in this case, there was no time limited when the portion should be paid.

[Other copies of this report: Lincoln's Inn MS. Misc. 503, p. 113, Lincoln's Inn MS. Misc. 504, p. 103.]

2 Vernon 72, 23 E.R. 656

Eodem die [18 July 1688]. In Court. Thomas, earl of Rivers, plaintiff; William George, earl of Derby *et al.*, defendants.

The case was that, by an indenture tripartite dated 22 May 1678 and by a fine and recovery thereupon had, several manors and lands were (on the marriage of the late Lord Colchester with

¹ *Lady Pawlett v. Lord Pawlett* (Ch. 1685), see above, Case No. 132.

Charlotte Katherine Stanley, sister of the earl of Derby) settled to the use of the Lord Colchester for life, remainder, as to part, to the said Charlotte, his intended wife, for her jointure, remainder to her first and other sons in tail male, remainder to the heirs of the body of the Lord Colchester, remainder to the plaintiff in tail, remainder to John and Richard Savage, the plaintiff's brothers, in fee, provided that, if the said Lord Colchester and all the issue male he should get on the Lady Charlotte his wife should die and, for want of such issue male, the premises should after the death of the said Lord Colchester or his said lady descend and come to the use of any other heir male of the said Lord Colchester by any other wife or to any other person or persons by virtue of any other the uses or appointments therein mentioned and, if there should be any daughter or daughters of the said Lord Colchester on the body of the said Lady Charlotte living at his death, that then the trustees and their heirs should stand seised of the premises, except the lands limited to the Lady Charlotte in jointure during her life and, after her death, then of them also, to the intent that such daughter and daughters of the body of the said lady by the said Lord Colchester begotten should receive the sum of £10,000 out of the rents, revenues, and profits thereof to the use of such daughter if but one, if more than one, to be equally distributed among them, together with £100 *per annum* apiece for their maintenance from the death of their father, until the payment of the £10,000, which is therein mentioned to be intended for their portion or portions respectively.

The Lord Colchester died about 1679, leaving issue by the Lady Charlotte, his wife, one daughter only, to wit Charlotta Katharina, who lived to the age of seventeen years. And, then, she made a will and thereof the earl of Derby executor. And, thereby taking notice that she was entitled to this £10,000, she devised legacies, in the whole amounting to about £15,000.

The plaintiff's bill was that this £10,000 being intended for a marriage portion and to be raised out of the rents and profits of the lands and the daughter dying unmarried and under age, the portion ought to extinguish in the land for the benefit of the plaintiff, who was the heir at law and next remainderman by virtue of the settlement, and that the said Charlotta Katharina had no power to dispose thereof by will and the will that was set up was unduly gained and when she was not *compos mentis*, and that the plaintiff, therefore, was entitled to an account of the profits of the trust estate.

The defendant insisted that the will was duly made and published and fairly obtained and that she was of a sufficient age to make a will. The will was since proved in the spiritual court, so that matter was not now to be drawn under contest in this court. And, as to the £10,000, although it was intended as a portion, yet no time being limited for the payment thereof, it vested in the said daughter and is become due and payable to her executor and that the profits of the trust estate, from the time of the death of the Lord Colchester, ought to be applied for that purpose.

The single question was whether this £10,000, being declared to be for a portion and to be raised out of the rents and profits of land, should go over to the executor of the daughter, who died under age and unmarried, or extinguish in the land for the benefit of the heir.

And that it should extinguish for the benefit of the heir and not to go over to the executor, the Case of Pawlet and Pawlet, first decreed by the Lord Keeper North, and, afterwards, confirmed upon an appeal to the Lords, where the difference was taken between a legacy out of a personal estate and a portion to be raised out of the rents and profits of land, was strongly insisted upon as a case in point, saving that, in that case, the portion was made payable at marriage or twenty-one years of age, and, in this case, no time is appointed, but the same is to be raised by rents and profits.

Lord Chancellor [JEFFREYS] said he knew not what reasons the Lords might go upon in the Case of Pawlet and Pawlet, but he was to make decrees according to his conscience, and every case was to stand upon its own bottom. He thought the case before him was very plain and without difficulty. It was clearly an interest vested in the daughter and ought, therefore, to go over to her executor and the rather because here was no time appointed for payment. And he observed that the plaintiff's counsel, in speaking to the case, admitted that, if she had lived to twenty-one years of age, she might have disposed of this portion or it should have gone to her executor but that, dying before twenty-one, it should determine and extinguish was a fancy for which there was no ground nor foundation. If they had been to have drawn the deed, they might have worded it so. But the deed being silent in that matter, it may as well go over to the executor upon the daughter's dying at

seventeen or eighteen etc. as if she had been twenty-one at the time of her death. And, therefore, he decreed that the trustees should apply the profits received and to be received towards discharge of the portion until the same was raised and pay the same to the defendant, the earl of Derby, as being executor to the said daughter, to be administered according to law.

[Reg. Lib. 1687 B, f. 637.]

[Other reports of this case: 1 Eq. Cas. Abr. 268, 21 E.R. 1037.]

[Affirmed on appeal 29 April 1689: *Lords' Journal*, vol. 14, p. 195.]

511

Stiddolph v. Leigh
(Ch. 1688)

Where a suit is pending against an executor, he should not pay any of the testator's debts without a court order, and, if he does, the payment will be declared a fraudulent conveyance and set aside if the assets of the estate are made insufficient thereby.

2 Vernon 75, 23 E.R. 658

Eodem die [20 July 1688].

Thomas Bostock, executor of one Thomas Bostock, having voluntarily assigned to the defendant Leigh, as a reward for service done, the stock in the East India Company, which was the testator's, pending a bill in this court by Stiddolph, who was a creditor to Thomas Bostock, the testator, the question was whether this assignment should stand good as against the creditor Stiddolph, there not being (without this stock should be brought into the account) sufficient assets of the first testator.

The court [JEFFREYS] looked upon this suit as a contrivance to defraud the defendant Leigh. And the Chancellor [JEFFREYS] declared, he, of his own personal knowledge, was satisfied that Leigh well deserved this reward and that he had that power and influence on Thomas Bostock that he would have given him his whole estate if Leigh had desired it. And forasmuch therefore as Thomas Bostock, the executor, had subjected his own real estate to the payment of his debts, the court [JEFFREYS] directed an account thereof to be taken, and he declared that, if there were sufficient assets of his estate without bringing this stock into the account, the assignment to the defendant Leigh should stand good, though, for the plaintiff, it was strongly insisted on that he, being a creditor to the first testator, might follow the estate in whose hands soever it came and ought not to be put to the charge and trouble of controverting the account directed. *Mes non allocatur*.

[Raithby's note: The circumstances of the case are shortly these. One Thomas Bostock, a scrivener, as trustee, had received several sums of money belonging to the plaintiff and made his will, whereby he gave his property to trustees for William, his infant son. And then, the present plaintiff, in 1678, exhibited his bill against the executors and the son, who had attained his age, for relief as to those monies. And a decree was accordingly had, which was duly signed and enrolled. William, the son, then died, having first made his will and thereof appointed Thomas Bostock, his cousin, executor, who proved the same and became possessed of the estate of William, subject to the monies due to the plaintiff under the said decree. The plaintiff then exhibited his bill of revivor against the last named Thomas Bostock; the proceedings were thereupon revived, and the Master reported £2176 1s. 8d. which was on a rehearing decreed to be due to the plaintiff. Thomas Bostock, the executor of William, then died, having first made his will, whereby he gave to Penelope, his wife, £200 *per annum* out of his real estate. And, after payment thereof, he devised his real and personal estate for

the payment of his debts, and he made the said Penelope residuary legatee and together with one Raworth executors thereof. And then, the plaintiff revived his decree, declaring a sum of £2416 18s. due to the plaintiff against the present defendants. The defendant Leigh, by his answer, swore that he was concerned in the management and conduct of several involved suits for the said William Bostock and which continued to the death of William, who offered to leave Leigh all his property as a recompense, which Leigh refused and prevailed upon him to make one Thomas Bostock, his cousin, the executor of his will and to entrust him to requite him, Leigh, for his services, that, this being done, Bostock, after William's death, presented the defendant Leigh with a bond for £1000 due from certain persons therein named. That defendant, knowing Bostock was straitened for money, proposed to deliver back the bond and to receive in lieu thereof the said £500 [East] India [Company] stock, late the property of old Thomas Bostock, the scrivener, and then worth about £1500, and Thomas Bostock, the executor of William, agreed thereto and to transfer the same to the defendant upon request. Under these circumstances, the decree declared *inter alia* that Thomas Bostock, the executor of William, had received and wasted the estate of old Thomas Bostock, the scrivener, to an amount greater than the plaintiff's demand and that he, having subjected his real estate to the payment of his debts, had thereby made the plaintiff's debt his own. And the same was decreed to be paid thereout as the Master should report, together with interest and costs. And an account was also directed to be taken of the personal estate of Thomas Bostock, the executor of William, and also of the personal estate of old Thomas Bostock, the scrivener, come to the hands of Hull and his wife unadministered, and particularly of a sum of money therein mentioned, part of such personal estate. And the same was to go so far as it would in satisfaction of the plaintiff's demand, then of the real estate of Thomas Bostock, the executor of William, and of the rents and profits thereof from his death over and above the £200 *per annum* to his wife, the same to be also liable to the satisfaction of the plaintiff's demand. And the decree directed such estates to be sold. Reg. Lib. 1687 B, f. 867, entered in *Stiddolph v. Thicknesse*.]

[Other reports of this case: 1 Eq. Cas. Abr. 237, 21 E.R. 1016.]

512

Nelson v. Oldfield
(Ch. 1688)

A court of equity cannot controvert the probate of a will.

A court of equity will not give a remedy to a plaintiff who comes into court with unclean hands.

Lincoln's Inn MS. Misc. 498, p. 90

23 July 1688.

Mrs. Oldfield, being a young gentlewoman and in France, fell into the acquaintance of the Lady Theophila Nelson, the plaintiff, who, by artifices and skill, had so far insinuated herself into the affections of the young gentlewoman that she prevailed with her to take an oath that she would make her will and give the Lady Theophila all she had in case she died before her. And, pursuant to this oath, Mrs. Oldfield made her will and gave all to the plaintiff, and she made her executrix, and she died. The will was contested in the Christian court, and [there was] a sentence for it, and that sentence was affirmed upon an appeal to the [Court of] Delegates.

And now, the plaintiff exhibits this bill for a discovery of the testatrix's estate and to have the aid of this court for the recovery of some money that was in the trustees.

And it was insisted on for the plaintiff the will, being proved as a good will in the Christian court, which has the proper cognizance of such matters, and affirmed upon an appeal, cannot now be contested here in this court, but it ought to be taken for a good will and the executrix to have the

assistance of this court for the execution of it.

On the defendant's part, it was held, though the civilians did hold a will made as this was and continued barely for fear of breaking the oath she had taken not to revoke it was a good will and though the casuists as were of opinion that such an oath was obligatory and the party who had taken such an oath could not in conscience revoke the will, yet, where the circumstances are as in this case, the court of equity will not give any assistance, as if a robber threatens a passenger to kill him unless he will swear to deliver him such a sum of money at a certain day and place. The casuists hold that this oath is obligatory to the party that takes it, yet, if he fail to perform it and the robber should be pardoned, he could have no remedy, either in law or equity, to enforce the performance of this oath.

My Lord Chancellor [JEFFREYS] was clear of the opinion that no relief ought to be given the plaintiff. And he dismissed the bill, saying he would give no sanction to such a will in a court of equity. And he declared his opinion to be that, upon the circumstances of the case, the will was no will at all and that, if application were made to him, he would grant a commission to review the sentence of the [Court of] Delegates.

Note it was proved in the cause that the young woman, when she lay sick, was much troubled that she had given her fortune from the defendant, who was her mother, and she would fain have altered her will but for the dread of the oath she had taken to the contrary.

2 Vernon 76, 23 E.R. 659

23 July [1688]. Lord Chancellor.

The case was that Mrs. Bettinson travelling into France for her health and there falling into company with the plaintiff, who, having the young lady under her power, prevailed so far upon her as to make Mrs. Bettinson solemnly swear to make her will and thereof to make the plaintiff her executor and to give her all her estate. And, when she had made her will accordingly, the plaintiff made her again swear that she would not revoke or alter that or make any other will.

It appeared by the deposition of Mr. Wade, for whom she had sent to advise withal, and by others examined in the cause that she, in her sickness, often complained how she had been circumvented by the plaintiff and of the injury she had done to her mother and sisters by giving her estate from them, that she heartily repented that she was thus fettered, but she durst not, for fear of damnation, revoke or alter her will. And, shortly afterwards, she died, much troubled and afflicted that she could not alter her will. The will was proved in the spiritual court. And the same, concerning only a personal estate, the validity thereof could not be controverted in this court.

And the bill was brought by the plaintiff, as executrix to Mrs. Bettinson, to have the performance and execution of the trust of a term for years for the raising of monies appointed to be paid unto Mrs. Bettinson and her sisters.

Per curiam [JEFFREYS]: The case where a man, to save his life, is made by a thief to swear that he will give the thief a sum of money, though, by the casuists, such oath is held to be binding, yet it shall never be carried on in a court of equity. And he did not see how this could be allowed and esteemed as a will when it was not ambulatory, as a will ought to be, nor made freely and voluntarily, but gained by restraint and force on the party. But, being proved in the spiritual court, that matter was not to be controverted here. The plaintiff might make the best she could of her probate there, but she should have no aid from this court. And, therefore, he dismissed the bill.

[Raithby's note: The bill was for an account of monies stated to be due to the testatrix Dorothy Bettinson, and the answer stated to the effect in the printed report, and the decree was 'that His Lordship was fully satisfied that no aid or countenance in a court of equity ought to be given to the said pretended will or any of the proceedings thereupon or the plaintiffs relieved in equity touching any of the matters in and by their said bill complained of,' and he dismissed the bill but without costs. Reg. Lib. 1687 B, f. 834.]

[Other reports of this case: 1 Eq. Cas. Abr. 136, 406, 21 E.R. 940, 1136.]

Lamplugh v. Smith
(Ch. 1688)

A court of equity will grant relief against contracts and securities given as the result of bad faith, dishonesty, and overreaching.

2 Vernon 77, 23 E.R. 660

24 July [1688]. Lord Chancellor.

The plaintiff, with other young heirs, being drawn in by Sticstead, with the concurrence of Sir William Smith, to buy stockings and such like goods at an extravagant price and to accept of assignments of bad securities and jointly to enter into securities for the payment of the monies agreed on, the bill was to be relieved against those securities.

The counsel for the defendant pretended not to maintain the bargain, but he would have it that the plaintiff, who had entered into a joint security with others, should be liable to answer the true and real value of all the goods that were sold and the securities that were assigned to him and his companions.

But the court [JEFFREYS] declared that the plaintiff should be liable to so much only as came to his own hands and should not be answerable for his companions. And, therefore, he referred it to a Master to examine and certify what of the goods came to the plaintiff's own hands and what was the real value thereof, and, on payment thereof and on reassigning such of the securities as the plaintiff had, his security was decreed to be delivered up.

Witley v. Price
(Ch. 1688)

A court of equity will grant relief against contracts and securities given as the result of bad faith, dishonesty, and overreaching.

2 Vernon 78, 23 E.R. 660

Eodem die [24 July 1688]. Lord Chancellor.

The plaintiff was likewise a young heir and had been drawn in to buy ribbons and braided wares etc. at an extravagant price etc. And the case, being the same in effect with the case immediately preceding,¹ had the like rule.

[Raithby's note: The plaintiff was to be examined upon interrogatories as to what goods he had and the value thereof. Reg. Lib. 1687 B, f. 745.]

¹ *Lamplugh v. Smith* (Ch. 1688), see above, Case No. 513.

515

Cole v. Gray
(Ch. 1688)

A married woman cannot give evidence against her husband.

2 Vernon 79, 23 E.R. 660

Eodem die [25 July 1688].

The plaintiffs were infants and the children of the defendant's wife by a former husband. Their bill was to have an account of the estate left them by their father and of the produce and proceed thereof. Upon the hearing, it was referred to an account, and the defendant and his wife were to be examined on interrogatories for discovery of the estate. The wife, being at variance with her husband and living apart from him, upon her examination, made the estate of the plaintiffs, who were her children, as great as she could and, thereupon, to fix the charge upon the husband.

The plaintiffs, upon a petition to the Master of the Rolls [TREVOR], obtained an order to examine the wife as a witness against the husband *de bene esse*. And the Master, upon her evidence, had charged her husband with several sums of money as interest and produce of the infant's estate.

But now, upon exceptions to the report, the Lord Chancellor [JEFFREYS] disallowed her evidence and declared the wife could not be a witness against her husband.

[Reg. Lib. 1687 A, ff. 1083, 1124.]

[Other reports of this case: 1 Eq. Cas. Abr. 65, 226, 21 E.R. 879, 1007.]

516

Thwaytes v. Dye
(Ch. 1688-1689)

A person who has a power to convey land can convey a rent out of it.

A court of equity will order the enforcement of the execution of a power where the person intended to act pursuant to it but failed to affix a required seal.

2 Vernon 80, 23 E.R. 661

28 July [1688]. Lord Chancellor.

J.S. having four children, to wit two sons and two daughters, settles his estate on trustees to the use of himself for life, remainder to his wife for life, and, after their decease, to the use and uses of such child and children and in such shares and proportions as he should appoint by any writing to be by him signed in the presence of two witnesses, and, in default of such appointment, to his eldest son in tail. He, by his will by him signed and attested by several witnesses, devises a rent charge out of those lands to his youngest son for life and to the first and other sons of his body successively in tail. And he further wills that, in case his said son die without issue male so as the estate should come to his eldest son, then he to pay £500 apiece to his daughters. The son dies without issue.

The bill was brought by the daughters to have their £500 apiece according to the will.

The defendant, who was the eldest son, by way of plea, set forth the deed of settlement and power *prout*. And he insisted that the power was not well pursued nor executed by the will, to wit that the testator might have distributed the land amongst his younger children in what proportions

he thought fit, but he had not the power to grant or devise a rent charge or sums of money as he had taken upon him by his will to do.

But the court [JEFFREYS] disallowed the plea and ordered the defendant to answer the bill.

[Raithby's note: There were both a plea and demurrer put in. And the order was 'that the word "demurrer" be struck out and that the plea do stand for an answer'. Reg. Lib. 1687 B, f. 769. On the 11th May 1689, the cause came on before the Lords Commissioners. No case is stated, but a case was ordered to be made for Their Lordship's consideration. Reg. Lib. 1688 B, f. 386. The will is thus stated in the Register's book 'William Thwaites, the late father of the plaintiff, and the defendants Thwaites and Dye, being seised in fee of the manor of Berners Roding, *alias* Varnish Hall, and of several lands and tenements in the County of Essex, on or about the 24th August 1679, by his will in writing under his hand and seal, did give and appoint to his son Thomas Thwaites, who appears to have been his youngest son, after the death of Frances, the wife of the said testator, £100 *per annum* to be paid him out of the rents of Varnish Hall and to the heirs of his body and, for the want of such issue, to return to the said James Thwaites, who was the testator's eldest son, and the heirs of his body, the said James Thwaites paying unto the plaintiff and to the defendant Frances, who were the two daughters of the testator, £500 apiece within two years after the death of the said Thomas'. Afterwards, 10th July 1689, the cause came on and, according to the statement in the Register's book, the words of the power are 'to the use of such child and children of the said William and Frances and to and for such estate and estates as the said William, by any writing under his hand and seal duly executed before two credible witnesses at the least, should direct, limit, and appoint and, for want of appointment to the use of Thomas, second son of the said William Thwaites, and the defendant Frances Dye, eldest daughter of the said William Thwaites, and her heirs forever', with a power to the said William and Frances, during their joint lives by any deed under their hands and seals, to revoke the uses in the said settlement. The appointment was by devise as before stated, and the decree, as to this point, was as follows. 'Whereupon etc. Their Lordships declared they were of opinion that the said William Thwaites had well executed the power in and by the said settlement to him reserved and that he, being owner of the land and having power by the said settlement to limit any estate or use of the land, might limit and appoint a rent out of the same and might charge the same rent with the payment of any sum of money for his children's portions and that the said will was a good appointment in writing within the power, though not a good will, there being but two witnesses to it, yet the same is a writing under hand and seal. And Their Lordships also declared, in case the said will or writing had been only under the hand of the said William Thwaites and not sealed, yet it is a good appointment in writing pursuant to the power and, especially in this court, shall be so taken and allowed. And it has been so adjudged here in the like case.' And the decree was accordingly for the payment of the £500 with interest from two years after the death of Thomas Thwaites, the youngest son, who had died without issue. Reg. Lib. 1688 B, f. 390.]

Dodd 80

The father made a voluntary settlement to the use of himself for life, remainder to his wife for life, remainder to such child or children and for such estate and estates as he by any writing under his hand and seal attested by two witnesses should limit and appoint. The father, by a paper in the nature of a will signed by him and attested by two witnesses (note there was a seal to it and probable evidence that [it was] sealed), gave a rent charge in fee out of this estate to a child. And upon a case made and considered, all three Commissioners [to Hold the Great Seal] resolved:

First, that the appointment of the rent is good because it is an estate out of the land and he who has power to appoint the land can in this case appoint a rent out of it. Jenkins and Stomish's case¹

¹ *Jenkins v. Kemishe* (Ex. 1664-1666), Hardres 395, 145 E.R. 515, 1 Levinz 150, 83 E.R. 343, Exch. Repts. *tempore* Car. II, 26, *Jenkins v. Keymes* (Ch. 1668), 1 Levinz 237, 83 E.R. 386, 1

was cited to the contrary, which was a tenant for life, remainder in tail with a power by the tenant for life to charge the land with £2000 and he made a mortgage of it by a lease and release, and [it was] resolved that it was not a good execution of the power. But note it was in [common] law and not in equity.

Second, it was resolved that it will be a good execution in equity of this power notwithstanding it had no seal to it, because the seal is only a circumstance and the plain intention of the party is apparent upon the writing being also upon a voluntary settlement and for a provision for children, and, in such a case, where it is apparent that the party designed to execute his power and he has mistaken in the execution of it, equity will help it. And several cases [were] cited and, among others, the case of Ashton and Smith¹ in Nottingham's time.

This case of Thwaites was further [argued] that this rent was appointed to the son, 'he paying £500, apiece to his two sisters', and one of the sisters brought the bill for her £500, and [it was] decreed that she will have it.

In the argument of this case, Lord [Commissioner] KECK said that Lord Nottingham in Ashton and Smith's Case cited a resolution by Ellesmere in 43 Eliz. where a man had a power upon a covenant to stand seised to make leases which were void according to Mildmay's Case,² yet the Chancery supported and made good such leases.

Note query, it was here held thus again. But note the lessee was a purchaser by a great fine paid, as I [Dodd] heard.

Note, upon an appeal in the House of Lords in Christmas vacation 1689, this decree of Thwaites and Dye [was] confirmed.³ But the Lords, upon the proof, took the will to have a seal to it, as it seems.

[Other reports of this case: 1 Eq. Cas. Abr. 343, 21 E.R. 1090, Brasenose Coll. Oxford MS. 59, p. 81.]

517

Turner v. Richmond
(Ch. 1688)

Where a first mortgagee is paid off and then assigns the mortgage to a judgment creditor of the mortgagee, this is valid as against a subsequent second mortgagee.

2 Vernon 81, 23 E.R. 663

There was a first mortgage which was paid off, but [there was] no reconveyance, and next a judgment creditor, then the plaintiff, a second mortgagee, whose bill was against the first mortgagee,

Chancery Cases 103, 22 E.R. 715, 1 Chancery Reports 275, 21 E.R. 571, British Library MS. Hargrave 65, f. 92.

¹ *Smith v. Ashton* (1675), 73 Selden Soc. 191, 221, Reports *tempore* Finch 273, 23 E.R. 150, 3 Keble 551, 84 E.R. 874, 3 Salkeld 277, 91 E.R. 822, 1 Freeman 308, 22 E.R. 1229, 89 E.R. 226, 1 Chancery Cases 263, 22 E.R. 792, 1 Eq. Cas. Abr. 345, 21 E.R. 1091.

² *Mildmay's Case* (1582-1584), 1 Coke Rep. 175, 76 E.R. 379, *sub nom.* *Mildmay v. Standish*, Moore K.B. 144, 72 E.R. 495, Croke Eliz. 34, 78 E.R. 300, Jenkins 247, 145 E.R. 174.

³ *Lords' Journal*, vol. 14, p. 474. Note *Thwaites v. Deye* (1701), Colles 179, 1 E.R. 238, and *Lords' Journal*, vol. 17, pp. 64-65, for later proceedings in this litigation.

the mortgagor, and judgment creditor to have a reconveyance from the first mortgagee, he being satisfied, which he acknowledged by answer and (pending the suit) did afterwards assign the mortgage to the judgment creditor, which the Lord Chancellor [JEFFREYS] did declare to be justifiable, both in him and the judgment creditor. And, unless the plaintiff would redeem and pay off the debt by judgment, he dismissed the bill. And the like case was between Lee and Warner, about a year since, and so adjudged.

518

Hunt v. Hunt
(Ch. 1688)

The question in this case was whether a license to do business is personal or real property.

2 Vernon 83, 23 E.R. 663

16 October [1688]. Lord Chancellor.

The question was between the heir and the executor of a freeman of London, which of them had the right to a carroome, to wit the benefit of a license from the Lord Mayor and Aldermen for the keeping of a cart.

The defendant pleaded that the license was a term for years and personalty and, therefore, belonged to him as executor.

Per curiam [JEFFREYS]: I overrule the plea, and answer the bill.

519

Gibson v. Whitacre
(Ch. 1688)

A plea in abatement for a privilege to be sued in another court must be pleaded under oath.

2 Vernon 83, 23 E.R. 664

Eodem die [16 October 1688]. Lord Chancellor.

The defendant, being the Foreign Opposer in the Exchequer, pleaded the privilege of that court and that he ought not to be sued or impleaded elsewhere.

But the court [JEFFREYS] overruled the plea because it was not put in upon oath.

[Other reports of this case: 1 Eq. Cas. Abr. 14, 21 E.R. 838.]

520

Manlove v. Bale
(Ch. 1688)

A court can order the redemption of a mortgage even though a long period of time has elapsed.

2 Vernon 84, 23 E.R. 664

29 October [1688]. In Court. Manlove *versus* Bale and Bruton.

One Bruton, having a church lease for three lives in 1664, conveyed and assigned it to the defendant Bale's father in consideration of £550. The conveyance was absolute. But Mr. Bale, the

purchaser, by writing under his hand and seal, agreed that, if Mr. Bruton, the vendor, should at the end of one year then next ensuing pay him £600, that he would reconvey. The £600 was not paid, and two of the lives died, and the lease was twice renewed by the defendant Bale and his father. And now, it was near twenty years after the first conveyance. Bruton, being a prisoner in the Fleet [Prison] and indebted to the Warden for chamber rent, assigns to him all his right, title, interest, equity, and power of redemption.

And, thereupon, the plaintiff Manlove, the Warden of the Fleet, brought his bill to redeem and to have an account of the rents and profits of the premises.

The defendant insisted on his title and that the estate was not now redeemable, nor ought he to account for the profits.

But, notwithstanding, the Master of the Rolls [TREVOR] decreed a redemption on the payment of the £550, which was the first consideration money, as also the fines paid upon the renewal of the leases, which monies were to be paid with interest, and the account of the profits was to commence but from the death of Peter Bale, who was the purchaser and the father of the defendant. And, until that time, the profits were to be set against the interest of the £550 consideration money.

[Raithby's note: The Master was to take an account of the profits of the premises from the death of the defendant Bale's father, but nothing is said in the Register's book of setting the profits against the interest. Reg. Lib. 1688 B, f. 47.]

[Other reports of this case: 1 Eq. Cas. Abr. 313, 21 E.R. 1069.]

521

Harrison v. Cage
(Ch. 1688)

Where a trustee is to raise money out of lands and pay it but he becomes insolvent after raising the money and does not pay it, the lands remain liable to the payee.

Where a husband sues for his wife's portion, a court of equity will require him to make a reasonable settlement of it upon his wife.

2 Vernon 85, 23 E.R. 664

Eodem die [29 October 1688]. In Court.

The case was that land was charged by deed for the raising of £500 for the portion of the sister. The trustee entered and raised the whole £500 and more out of the rents and profits of the lands, and, afterwards, he proves insolvent. But, before he became insolvent, the sister had taken a judgment from the trustee that he should pay the £500 when raised.

It was insisted that the land was discharged. And for that purpose [was] cited the Case of Goddard and Bowman, where, the portion being once raised, the land was held to be discharged.

But, on the other side, it was said that, in the case of Goddard and Bowman and in the other cases cited, by the express provision of the deed, the term was to cease when the money was raised. But, in the principal case, the term is still continuing, and the profits are still to be received and taken by the same trustees for the benefit of the heir. And, as to the judgment, that was only in effect that the trustee should perform the trust, being to pay the £500 when raised unto the sister and to account for and pay the residue of the profits to the heir. But the words in the deed of trust being that the trustee should raise and pay £500 to the sister and, though it was raised, it was not paid.

Therefore, the Master the Rolls [TREVOR] doubted and took time to consider thereof and, in the meantime, would look into the deed of trust and defeasance of the judgment.

[Raithby's note: The plaintiff was Henry Harrison, who claimed in the right of Elizabeth, his wife,

late Elizabeth Cage. And the case in the Register's book is in substance the same with that in the printed report. And the decree on the 11th May following was in effect that the trust ought to stand charged with £373, that being the sum found due to the plaintiff in respect of the said trust money, £73 part whereof was to be paid to the plaintiff Henry Harrison and the remainder settled on the plaintiff Elizabeth for her sole and separate use, and the plaintiffs to release and assign the bond and judgment. Reg. Lib. 1688 A, f. 265.]

522

Pawlet v. Dogget
(Ch. 1688)

A devise over of money upon a person's dying before twenty-one without issue is good.

In this case, the court held that both of the testamentary contingent devises over in issue were valid.

Lincoln's Inn MS. Misc. 498, p. 92

31 October 1688. In Court.

J.S., by his will, devised £1300 to his daughter to be paid at her age of twenty-one years and, if she died before one and twenty without issue, then to go to her sister, Martha. And, afterwards, there was a proviso in the will that, if she should marry before twenty-one without the consent of his executrix, that then the money should go to William and Richard D. She married before twenty-one and without the consent of the executrix to B.D. and got a grant of the interest of William.

And this bill was exhibited, as I think, to have security that, in case she should die without issue before she came to twenty-one, the money might be forthcoming for Martha, according to the first clause in the will.

This was opposed by the other side, for that, as they said, though that clause of the will whereby the money was to go to William and Richard D. in case Elizabeth married before twenty-one without the consent of the executrix, though it were subsequent to the other in point of place in the will, yet it must needs be precedent to it in the intention of the devisor, for that, in case of marriage before twenty-one without consent, the money was to go to William and Richard D. though Elizabeth should afterwards live to twenty-one or though she should die before that age leaving issue. And, therefore, she having so married, the money can never belong Martha, for though Elizabeth should die before twenty-one without issue and, therefore, [there is] no need for any security.

The Master of the Rolls [TREVOR], who heard the cause, said it was now settled that a devise over of money upon a person's dying before twenty-one without issue is good. And he thought the contingencies ought to take place and to be preserved according as they were placed in the will and that, upon Elizabeth's marrying before twenty-one without consent, the money should go to William and Richard, yet so that, if Elizabeth should happen to die without issue before her age of twenty-one, it should go to Martha. And, therefore, he referred it to a Master to settle a security.

[Other copies of this report: Lincoln's Inn MS. Misc. 503, p. 114, Lincoln's Inn MS. Misc. 504, p. 104.]

2 Vernon 86, 23 E.R. 665

31 October [1688]. In Court, Master of the Rolls.

J.S., by his will, devises £1300 to the plaintiff's now wife, his grandchild, provided that, if she died before twenty-one without issue, then he willed that the said legacy of £1300 should go over

to A.,¹ and provided, if she married before twenty-one without the consent of her grandmother, that the said legacy of £1300 should go over to the now plaintiff Pawlet. The now plaintiff married the legatee, his now wife, before she was twenty-one years of age and that not only without the consent but to the express dislike of the grandmother, who endeavoured all she could to prevent their intermarriage.

And the now plaintiffs apprehending that the forfeiture, if any, was to the plaintiff, the husband and wife exhibited their bill, the wife not being yet twenty-one years of age and not having any issue, against the executor and against A., to whom the legacy was limited over in case the wife died before twenty-one without issue, to have the said legacy of £1300 paid unto them.

The defendants, by answer, confessed the will and prayed the judgment of the court whether the plaintiff, his wife not being as yet twenty-one years of age and not having issue, was entitled to the legacy, the same, in case the plaintiff's wife died before twenty-one without issue, being by the will limited to the defendant A.

For the plaintiff, it was insisted that the limitation over to A. in case the plaintiff's wife died without issue before her age of twenty-one years was an implicit estate tail in her, which gave her the entire property in this pecuniary legacy, and that, therefore, the limitation over was void and, also, that the proviso of forfeiture upon her marrying without the consent of her grandmother, though placed in the will after the other proviso, yet was first in point of construction, for that forfeiture in point of time might (as in this case it did) happen before her age of twenty-one years, and, until she attained that age, the other contingency could not happen, and, therefore, if there was any forfeiture, it was to the plaintiff.

For the defendants, it was insisted that both the provisos were consistent and, therefore, both were to have their force, so that, if she died without issue before twenty-one, A. was to have the benefit of the first proviso, and yet that would not wholly enervate the second proviso, for, although she should survive the age of twenty-one and have issue, yet, if she married without the consent of her grandmother, the legacy was forfeited by the second proviso to the now plaintiff's husband, and, therefore, the plaintiffs came too soon for a decree, the plaintiff's wife not having issue nor being twenty-one years of age, and that a contrivance of this nature to defeat the will ought not to be countenanced.

Per curiam [TREVOR]: Both provisos are consistent and ought to be so construed. And, as to the first limitation over, that, if she die without issue before twenty-one years of age, that A. should have the £1300, it was a good limitation over, for, though it was upon dying without issue, yet the time for the happening of that contingency was circumscribed and limited to fall before her age of twenty-one years. And, therefore, he decreed that, if the legatee, the now wife of the plaintiff, should die before twenty-one years of age without issue, that A. should have the benefit of the first proviso. And he declared that the proviso of forfeiture by marriage without the consent of the grandmother could not take place nor have any force until the plaintiff's wife had attained her age of twenty-one years.

[Raithby's note: The words of the decree as to this £1300 are 'that the contingency in the will of the plaintiff's marriage without consent has not destroyed the said first contingency of her dying before twenty-one without issue and that, in such case, it ought to go over to the said Sarah Disney and the same or what shall appear on the account to remain thereof together with the interest is to be brought before the Master and put out at interest to answer the contingencies according to the testator's will, and, after the plaintiff's attaining the age of twenty-one years and before the money paid, the said Master is to certify what provision is fit to be made for the plaintiff, Martha, for the future.' Reg. Lib. 1688 B, f. 132.]

¹ Raithby's note: The words are 'To be paid her with the increase thereof at her age of twenty-one or three months after and, if she died without issue before that time, then to S.D.' Reg. Lib.

Comer v. Hollingshead
(Ch. 1688)

A Master in Chancery is not liable for negligence in the performance of his office, though he is for corruption.

2 Vernon 90, 23 E.R. 668

Eodem die [24 November 1688]. In Court, Lord Chancellor.

By a decree of this court, money was to be put out at interest on a security to be allowed by Sir Samuel Clerke, one of the Masters of this court, for the benefit of the husband and wife and their issue. The Master allowed of a security that, afterwards, proved defective. And the plaintiff, by his bill, amongst other things, endeavored to charge the executor of Sir Samuel Clerke to make good the defect of this security.

Per curiam [JEFFREYS]: The Masters would have uneasy places of it if they were to answer for all defective securities, nor is that so much their business but it concerns each side to have counsel to peruse the title (as it appeared there were in this case). The Master, principally, is to take care that the limitations and uses are drawn according to the direction of the court, and, unless there had been either bribery or corruption, it was not reasonable to charge a Master for allowing a defective security. And, therefore, he dismissed the bill as against him.

[Reg. Lib. 1688 A, f. 153.]

Powell v. Morgan
(Ch. 1688)

A legacy upon a condition of not contesting the will is not forfeited where there was probable cause for litigating the will.

2 Vernon 90, 23 E.R. 668

20 November [1688]. In Court, Master of the Rolls.

By a marriage settlement, lands were settled on the husband and wife and their first and other sons in tail male and, for want of such issue, a term for years was limited to the daughters for raising portions, remainder to the issue male of the father, remainder to his right heirs. The husband dies, leaving issue, one daughter only, who is also heir at law to the father. She dies an infant and indebted. But she made a will and devised away the portion charged on the estate, and she gave the plaintiff, who was her heir at law, a legacy upon condition that he did not disturb or interrupt her will. The plaintiff, afterwards, contested the validity of the will and insisted that the term was merged in the daughter, as being also heir at law.

The court [TREVOR], upon the hearing, relieved against the merger and decreed the portion to go according to the will of the daughter.

The point now before the court was whether the plaintiff had forfeited the legacy by contesting the validity of the will.

Per curiam [TREVOR]: There was *probabilis causa litigandi*, and it was not a forfeiture of the legacy.

[Reg. Lib. 1688 B, f. 44.]

[Earlier proceedings in this case: Reports *tempore* Finch 49, 23 E.R. 26, 79 Selden Soc. 836, 853.]

[Other reports of this case: 1 Eq. Cas. Abr. 85, 269, 21 E.R. 897, 1038.]

525

Roper v. Roper
(Ch. 1688)

A defendant who is in contempt of a final decree cannot contest his alleged contempt until he gives a bond to perform the decree.

2 Vernon 91, 23 E.R. 669

Eodem die [20 November 1688].

The court had decreed that either the defendant should pay a sum of money by a time therein for that purpose limited or, in default thereof, that the plaintiff should hold and enjoy the lands charged therewith. A writ of execution of the decree had issued, and a [writ of] attachment for non-performance thereof. And, now, upon the return of the attachment, the defendant moved he might appear and be examined.

And it was insisted he ought to be admitted thereto, for that he might show that the process issued not regularly or that he had paid the money or had a release, and that it was against common sense that a man should be attached for a supposed contempt and yet should not be heard to make his defence. And the Case of the Duke of Norfolk was cited, where there was a writ of execution, then an attachment, and then an injunction for possession, and, afterwards, when a writ of assistance was moved for, upon debate, he was admitted to appear and be examined.

But, in this case, the Master of the Rolls [TREVOR] ordered the process to go on and would not admit the defendant to appear and be examined unless he would give security to perform the decree.

[Other reports of this case: 1 Eq. Cas. Abr. 166, 21 E.R. 962.]

526

Smith v. Smith
(Ch. 1688)

A devise that is intended as a marriage portion lapses when the devisee dies before marriage.

2 Vernon 92, 23 E.R. 669

1 December [1688]. At the Rolls, Master of the Rolls.

The case was that one Thomas Smith, being seised in fee of several lands in the County of Suffolk and having issue, one son and one daughter, the 10th of July 1683, made his will in writing. And, thereby, amongst other things, he devised part to his wife, the now plaintiff, for her jointure, and devised the rents and profits of all other his lands until his son attained his age of twenty-one years unto his executors therein named to be applied in such manner as he had directed. And he gave the whole to his son when he should attain the age of twenty-one years charged with so much of his daughter's portion as should not before that time be raised by his executors and trustees. And he gave unto his daughter the sum of £1000 to be paid by his executor at her age of twenty-one or marriage, which should first happen, willing the same to be raised out of the rents and profits of the said lands.

And he further willed that, in case his son should die before he accomplished his age of twenty-one years or without heirs of his body lawfully begotten, then, from and after the death of his said son, he gave all and every the said messuages, lands, tenements, and hereditaments to John Smith, his uncle, the now defendant, and his heirs, he making up his daughter's portion £2000. And, of his said will, he made the defendant Smith and one Dey, who renounced, executors. And shortly afterwards, he died, leaving his said son and daughter, both infants, and the eldest not three years old. The daughter died soon after the death of the said testator, an infant unmarried. And, shortly afterwards, the son also died without issue. The plaintiff, the widow, took letters of administration to her daughter.

And the principal question insisted on was whether the plaintiff, as being administratrix to her daughter, was entitled to all or any part of the said portion.

For the defendant, it was insisted that the plaintiff was not entitled to all or any part of this portion but that, the daughter dying before twenty-one and unmarried, it extinguished in the land for the benefit of the heir and that it was so resolved in the Case of My Lord Pawlet and the Lady Pawlet, which was afterwards confirmed upon an appeal to the House of Lords, and likewise in the Case of Brown and Bond.¹ And the difference there taken was between a personal legacy (which was admitted should in such case, being *debitum in praesenti* and payable *in futuro*, go to the executor or administrator) and a sum of money appointed to be raised out of the rents and profits of lands and designed for a particular purpose, to wit a portion for a daughter, for which there was no occasion, she dying unmarried and under age. If any part of the £2000 was payable, it could be only the first £1000, for the portion was not to be made up £2000 but upon the son's dying without issue, which never happened in the lifetime of the daughter, she dying before her brother. And so that last £1000 never vested in her and, consequently, could not go to her administratrix. And, if the plaintiff was entitled as administrator, yet she could not have it until such time as the daughter would have attained her age of twenty-one years, as was resolved in the Case of Earl and Earl, even in a personal legacy. But, though these other matters were mentioned for argument's sake, the defendant's counsel relied upon it, that the plaintiff was not entitled to any part of the £2000.

For the plaintiff, it was insisted that the legacy was an interest vested and attached in the daughter and ought to go to the plaintiff, her administratrix, and that it had been so lately resolved by the Lord Chancellor in the case of the Earl of Rivers and the Earl of Derby,² which was long since the Case of Pawlet and Pawlet, and that the principal case was not exactly the same with the case last mentioned, for, there was a settlement as well as a will. But, here, the case depended purely upon a will but seemed to admit that the plaintiff could not have the portion until such time as the daughter would have attained her age of twenty-one years.

Per curiam [TREVOR]: I take it that the plaintiff is not entitled to any part of the £2000 and that the judgment in My Lord Pawlet's Case governs this case. It appears that the intention of the testator was that it should be for a portion, and it is expressly called a portion in the will. And, then, it is no personal legacy but money to be raised out of the rent and profits of land. And the Case of the Earl of Rivers and the Earl of Derby differs from this; in that case, there was no time limited for the payment of the money. But, here, the payment is expressly to be at twenty-one years or marriage. And, therefore, he dismissed the bill as to so much as concerned the £2000 portion.

[Reg. Lib. 1688 B, f. 379; Reg. Lib. 1689 B, f. 295.]

[Other reports of this case: 1 Eq. Cas. Abr. 268, 21 E.R. 1037.]

¹ *Lady Pawlett v. Lord Pawlett* (Ch. 1685), see above, Case No. 132; *Bond v. Brown* (1684), see above, Case No. 187.

² *Earl Rivers v. Earl of Derby* (Ch. 1688), see above, Case No. 510.

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